The “Jurisprudence of Interests” (Interessenjurisprudenz) from Germany: History, Accomplishments, Evaluation

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This paper analyses the jurisprudence of interests (Interessenjurisprudenz) as one of the most important German methodological schools. The first part of the paper evaluates its position in the great methodological debate (Methodenstreit) over the role of ate judge, which emerged in the beginning of the twentieth century in Germany. The ancient conceptual methodology (Begriffsjurisprudenz) came under siege from new methodological orientations like the “free law school” and the “school of objective interpretation.” The most effective challenger and winner in the debate was this Interessenjurisprudenz, which was developed by Von Heck at Tübingen. The second part of the paper articulates the main contributions and the specific vision of the movement as regards the method of the judge. The last part briefly assesses the actual significance of Interessenjurisprudenz in German legal space and in other legal cultures (Anglo-Saxon and French).

Keywords: Interessenjurisprudenz, conflicting considerations, interest, Begriffsjurisprudenz, school of objective interpretation, free law school, Wertungsjurisprudenz

1 Introduction

This paper is addressed to an Anglo-Saxon or French legal audience. As a matter of fact, the German jurisprudence of interests

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(Interessenjurisprudenz) is almost unknown to this public. Interessenjurisprudenz belongs to an approach based on balance or proportionality (rationality of conflicting consideration), which is a dominant mode of legal reasoning of our time.[1]

The major thinkers responsible for creating this approach were Oliver Wendell Holmes in the United States, René Demogue in France, and Philipp von Heck in Germany. There were certain influences on this matter in the Continental Europe and the United States, influences that seem to have been forgotten today.[2] Although the technique of conflicting considerations has a rich European genealogy, it received its most elaborate form in the United States between 1940 and 1970.

In the early fifties, the Constitutional Court of Germany adopted also the technique of proportionality. More recently, the European authorities, such as the European Court of Justice and the European Court of Human Rights, adopted also the technique of proportionality as their usual technique.

The following considerations will try to join the debate about the rationality of conflict considerations in the judge's activity in the historical dimension.

2 The Interessenjurisprudenz in the methodological debate (Methodenstreit) of Germany

2.1 The classical theory: Begriffsjurisprudenz

2.1.1 The coming-out of Begriffsjurisprudenz

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1. Regarding the technique of weighting of interests or balancing, see Alex Aleinikoff, «Constitutional Law in the Age of Balancing », in 96 *Yale L.J.*, 1987, pp 943 et seq; Robert Alexy, «On Balancing and Subsumption: A Structural Comparison », in 16 *Ratio Juris*, 2003, pp 433 et seq; Robert Alexy, «On the Structure of Legal Principles », in 13 *Ratio Juris*, 2000, pp 294 et seq; Francois Ost et Michel van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit*, Bruxelles, Publications des Facultés universitaires Saint-Louis, 2002; Benoît Frydman «L'évolution des critères et des modes de contrôle de la qualité des décisions de justice», Working Papers du Centre Perelman de philosophie du droit, n° 2007/4, on line from October 11, 2007, http://www.philodroit.be.

2. See for an interesting discussion about the subject, Duncan Kennedy et Marie-Claire Belleau,« La place de René Demogue dans la généalogie de la pensée juridique contemporaine», *R.I.E.J.*, 2006, pp. 163 et seq. See also, more recently, Duncan Kennedy, « A Transnational Genealogy of Proportionality in Private Law», in *The Foundations of European Private Law* (ed) Stephen Weatherill et a.., Oxford, Hart Publishing, 2011, pp 185 et seq.

The European legal thinking of the nineteenth century was dominated by two forms of positivism: the French school of exegesis (based on statute law) and the German historical school, which restricted the interpretation to Roman legal sources (mainly *Corpus Juris Civilis* of Justinian). Since the middle of nineteenth century and following the works of G. F. Puchta, the German historical school began to build a deductive system of legal concepts. The new vision replaced Savigny's[3] organic connection of institutions with logical connections between concepts as a source of new rules. It also explicitly added the science (the doctrine) to the other two traditional sources of law (the statute law and the custom).

On this ground would emerge in Germany Begriffsjurisprudenz (the doctrine of concepts) under the leadership of Rudolf von Ihering. In his *Spirit of Roman Law* of 1852–1858, he conceived Begriffsjurisprudenz as achieving the systematic structure previously considered by Puchta.[4] Ihering saw the deconstruction of institutions and legal rules in their "logical elements," followed by a reconstruction, as able to produce new legal rules. This was a "multiplication of law on its own ground," a "growth from inside," since "the concepts were productive ... and may generate new ideas" by a purely inductive approach similar to natural sciences' methodology.[5]

2.1.2 Methodological details of Begriffsjurisprudenz

Ihering identified two levels of doctrine.[6] On the first level, Begriffsjurisprudenz extracted from legal sources, by means of abstract interpretation, the *legal concepts.* On this level, the so called *low doctrine* focuses on the interpretation and clarification of existing law, the clarification of ambiguities and contradictions, and the arrangement (condensation) of legal material with help of classification concepts.

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3. See for a complete presentation Mathias Reimann, "Nineteenth Century German Legal Science," *Boston College Law Review*, Volume 31, Issue 4, Article 2, 7-1-1990, http://lawdigitalcommons.bc.edu/bclr/vol31/iss4/2 .
4. See the French version of Rudolf von Ihering, *L'esprit du droit romain dans les diverses phases de son développement* (4 vol), Fr. trans, Octave de Meulenaere, Paris, Marescq Aîné, 1880.
5. Larenz (Karl), *Storia del metodo nella scienza giuridica*, Milano, Giuffre Editore, 1966, pp. 28.
6. Philipp (von) Heck, "Jurisprudence of Interests," pp. 38, in Magdalena Schoch (tr.ed), *The Jurisprudence of Interests. Selected Writings*, Hardvard University Press, 1948.

The *high doctrine*, on the second level, was the domain of legal science. It did not address the results of the general classification of concepts as mere condensations, but as legal entities with a structure similar to natural bodies. Each concept (obtained by condensation) should be accurately determined as to its inner structure. For example, each right had to be examined in order to determine its object, content, and purpose.[7] The ultimate result must be, according to Ihering, a "formula" or a definition. In this way, the concept was "interpreted" (or constructed). Afterwards, the definition must be strictly respected and used as a basis for new rules and for deciding new cases (not considered when the concept was defined for the first time).

It is exactly this unlimited use of "constructions" that is the main value, according to Ihering. Therefore, all these concepts, their "system" will be seen as an endless source for new legal materials.

Begriffsjurisprudenz has constrained the judge to apply the law (the statute) by a logical insertion (subsumption) of the facts of a case under legal concepts. Any independent evaluation from the judge was prohibited since his activity was modelled on mathematics; he was only supposed to comprehend, to understand the rules through the concepts. The judge may eventually obtain the missing rule from the concept that was the ground for the other, existing rules. This procedure was promoted to the dignity of a general method and was applied not only for normative concepts (found in legal texts) but also for classification concepts (produced by the legal science).[8] Thus legal gaps were solved with classification concepts, which were themselves the basis for new rules.[9]

Apparently, this procedure received the support of the German courts of the time since, in many cases, the Supreme Court of the Reich

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7. We can give a few illustrations of the way Ihering conceived these structural problems: "In a co-ownership is it the ownership, the right, or the value of the property that is divided? Is it the 'obligatio correalis' of Roman law a plurality of obligations with identical contents, or is it an obligation with several subjects?" See Philipp (von) Heck, op. cit., pp. 38.
8. Thus the determination of a protection for the author's works was based on the construction of a classification concept for the property rights in general (based on a normative concept of property law). Then it was obtained by a pure intellectual construction of the protection regime characterizing the copyright (immaterial property).
9. This procedure will be later called the "method of inversion" by Interessenjurisprudenz.

adopted decisions based on the idea that concepts were the origin for legal rules.[10]

2.2 The crisis of Begriffsjurisprudenz and the emergence of competing methodological doctrines

By the end of the nineteenth century and the beginning of the twentieth century, the Begriffsjurisprudenz began its decline in Germany. By then, the law was increasingly seen as a product of political decisions and as a means to regulate social relations based on choices. In other words, the law ceased being seen as an autonomous system and became part of social reality.

During this period, several authors started to reject the system of concepts. Among them was Ihering himself (in his *Anonymous letter on contemporary legal science* from 1861 and in the four volumes of his *Spirit of Roman Law* from the 1864 edition). Ihering believed that not only legal rules but also dogmatic concepts, established through "construction," changed over time. It was no longer possible to identify the practical validity of a rule with its logical consistency. All rules have their origin in practical relations and practical reasons. A concept was invented only for teaching convenience, and not as a logical ground for new rules. Therefore, the system of legal concepts had to be seen only as a teaching system.

On the other side, this time, Ihering praised a new teleological approach, which considered the legal rules as grounded on practical reasons since the "utility and not the will, is the substance of law." To define this notion, the author used the terms "good," "value," "enjoyment," and "interest" and defined the subjective rights as legally protected interests.

These considerations of the late Ihering were a first charge against Begriffsjurisprudenz. However, Ihering was not able to offer an alternative methodology. Thereafter several other doctrines tried to fill this space.

2.2.1 The School of Objective Interpretation

10. Philipp (von) Heck, "Jurisprudence of Interests", pp. 42, op. cit.

The objective hermeneutics theory appeared in the late nineteenth century. It considers, like Begriffsjurisprudenz, that the interpretation of a statute must be cut off from its historical origin. The legal meaning is not what the legislature has thought but whatever is immanent to the objective law.[11] Therefore, the adherents of "objective interpretation" propose a technique of transposition. Under this technique, the terms of a rule are separated from their historical surroundings and placed in the current environment. Thereafter they are interpreted as if they were adopted today.

There are certain differences between Begriffsjurisprudenz and the objective interpretation doctrine. The rationality of the legal system is seen by the latter in a formal sense, as logical connexions of concepts, but also in a substantial way, as a teleological system of rational goals. The system establishes its unity on the authority of general principles seen as normative and evaluative rules, and not as an abstract synthesis of concepts. The result is a method known as teleological and focusing on the "the goal pursued" by the statute.

This method comprises two steps. First of all, there is a search for actual social conditions that the statute should meet. Afterwards, there is a search for a better and more suitable solution according to the ideas of this moment. From several possible literal interpretations must be chosen the one "that is the best response to that purpose."[12] This approach refreshes the interpretation of legal rules by adapting them to the new situations they must answer.[13]

However, the theorists of objective interpretation did not see an opposition between the teleological elucidation of the rule and the rational method of Begriffsjurisprudenz because the goals were not those of historical legislature or original social forces (*intentio*

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11. See Kohler, cited by Larenz, op. cit., pp. 39.
12. Idem. pp. 39 et seq.
13. Teleological technique aims to adapt the legal system through a reasoning by which the purpose or the function of rules is essential in their interpretation. See for a French and Anglo-Saxon context the very interesting developments of Duncan Kennedy, «Two Globalizations of Law and Legal Thought: 1850-1968», in 36 *Suffolk L. Rev.*, 2003, pp 631 et seq; Duncan Kennedy et Marie-Claire Belleau, « François Gény aux Etats-Unis », in Claude Thomasset, Jacques Vanderlinden et Philippe Jestaz (dir.), *François Gény, mythe et réalités : 1899–1999, centenaire de Méthode d'interprétation et sources en droit privé positif, essai critique*, Cowansville, Éditions Y. Blais, 2000.

legislatoris) but the objective goals of the statute revealed through its rational examination (*ratio legis*).

2.2.2 The Free Law School

The ideas of the school of free law silently emerged in the early nineteenth century and became distinguishable in the early twentieth century.

There are several factors that favoured its coming out. The arrival of the German Civil Code (BGB) revealed a number of its flaws. Certain problems were not anticipated, and there was no means to fill the gaps or circumvent the clear provisions from the code. Very soon, the theorists discovered the creative activity of judges, who started to use the general clauses from the code (good faith, morality) to remove its special provisions (while in principle, special rules should prevail over the general ones). They also came to admire the freedom of English higher courts or the U.S. Supreme Court.

In this context, Ehrich asserted in 1903 the ideas of "free research of law" and "free legal science."[14] Then in 1906, Kantorowicz, in his book *The Struggle for the Science of Law*,[15] declared that, in front of legal gaps, the judge must be free to find the law or to create it. This marked the start of the public legal methodological debate known as Methodenstreit (fight between methods) in Germany.

The principle of judicial discretion was the greatest challenge addressed by Freirechtschule for Begriffsjurisprudenz. The basic proposal of Ehrlich and his successors, at least in the beginning, was the idea that the judge may choose the best solution of a case only if he is free to assess its individual characteristics, regardless of the rules from the statute.[16] Therefore, the reasons for a decision can be derived only from the case itself since the case has the law in itself "sua lex."[17]

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14. Reprinted in Ehrlich Eugen *Fundamental Principles of the Sociology of Law.* Transaction Publishers, New Brunswick, [1913] 2001.
15. H. Kantorowicz, *Der Kampf um die Rechtswissenschaft*, Carl Winter, Heidelberg, 1906.
16. Therefore, a decision taken in this way may be called "decision without statute law."
17. This is the reason for rejecting the idea of filling the gaps of a statute based on solutions from the statute itself (through the use of arguments such as "analogia legis" and "argumentum a contrario"—this rejection being shared also by Geny).

From the beginning, the proponents of this movement have attacked with passionate fervour both the practice of the courts and the classical legal theory. This kind of propaganda was effective. If the discussion had been conducted more quietly and only among experts, it would have taken more time for the movement to achieve its purposes. However, this "modus operandi" had also its shortcomings. [18] The arguments were presented in a way that provoked passionate reactions from opponents and prevented a calm evaluation. The ambiguous term "free law"[19] was later abandoned and replaced with the more neutral "sociological jurisprudence," and that helped clarify the controversies and appease the spirits.

Nevertheless, the doctrine of free law has failed to impose its vision about the role and the most opportune practice of the judge. Its critics underlined that, in normal cases, the application of general rules from a statute provides acceptable results. On the other hand, the critics observed the limit of the insight and neutrality of the judge and underlined that, in many situations, the predictability of judicial decisions was much more important than their material justice.

In any case, this doctrine has administered a fatal blow to Begriffsjurisprudenz, which, from now on, would leave the legal scene to become a chapter in history. However, the merit for occupying the methodological space liberated by Freirechtschule returned to the parallel and rival school of Interessenjurisprudenz.

2.3 Interessenjurisprudenz as the main challenger in "Methodenstreit"

Interessenjurisprudenz (doctrine of interests) is much more subtle than the free law doctrine. Its origin may be found in the late Von Ihering (by 1892), who considered that "the rights are legally protected

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18. Max Rumelin, "Legal Theory and Teaching", pp. 21,in Magdalena Schoch, op. cit.
19. The term "free law" has been used to express different ideas. Some lawyers have argued that the binding force of a statute depends on its effectiveness. Others, proceeding from the theory of objective interpretation, argued that the content of a statute must be limited to its "clear and unambiguous terms." Some others came to the conclusion (not accepted by all followers of "free law") that the judge has the right, under certain circumstances, to reject the obedience to the statute law or, as it was sometimes said, to change the statute law. Cf. Max Rümelin, "Legal Theory and Teaching", pp. 23 in Magdalena Schoch, op. cit.

interests," and who understood that statutes are recognitions of interests and have a social purpose.

The fight against the doctrine of concepts (Begriffsjurisprudenz) was likewise the starting point of Interessenjurisprudenz. [20] The opposition was not against the formation of concepts itself and the adoption of judicial decisions on the basis of normative concepts.[21] The opposition was directed against the deduction of new legal rules from classification concepts—in other words, against interpretation through "constructions." The criticism of the formal system of abstract concepts was focused mainly on their inability to produce new rules. Such a system of concepts should have just a descriptive value (being useful only to learn the law).[22]

Interessenjurisprudenz considered its own general concepts relating to interests (e.g., situations of the parties, interest for development, interest for security, etc.) as unable to build a system. These concepts have a decisive role in determining the real interests and then in the interpretation and application of statutes.

We have seen that the fight against the doctrine of concepts (Begriffsjurisprudenz) was the starting point of Interessenjurisprudenz.

However, the second front of Interessenjurisprudenz was directed against the theory of free law.[23]

To the extent that the followers of the free law school sought to liberate the practice of the judge from the chains of conceptualism, they were objective allies for the doctrine of interests. The latter doctrine has benefited from the dynamism of the other school, but—and as these

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20. Philipp (von) Heck, "The Formation of Concepts," pp. 107 in Magdalena Schoch, op. cit.
21. The normative concepts being distinct from dogmatic concepts (of classification) are still considered as useful. Von Heck considers that such concepts, as part of the statutory provisions, must be reintegrated into the rule when the rule is applied. They have as much authority over the judge as other components of the disposition itself. These situations have nothing in common with the method (rejected by Von Heck) that derives new rules from the concepts of classification (construction through concepts). See Philipp von Heck, "The Formation of Concepts," pp.107 in Magdalena Schoch, op. cit.
22. Such abstract concepts are the subjective rights, the wrongful act, etc. See Larenz, op. cit., pp. 65 et seq.
23. Philipp von Heck, "The Formation of Concepts," pp. 108, in Magdalena Schoch, op. cit.

two movements have often been confused—she also suffered from the violent reaction triggered by the free law doctrine.[24]

In fact, the two methodological schools were essentially different. Interessenjurisprudenz is far from a free development of the law envisioned by Freirechtschule. Von Heck believed that the mistake of the free law doctrine, insofar as it aims to produce a positive law, was born from the misconception that the interpretation of statutes is limited to their text.[25] The main safeguard of Interessenjurisprudenz in this respect is the principle of historical interpretation of statutes through the research of interests (see 3.2 below).

The third front of Interessenjurisprudenz is directed against the objective interpretation doctrine.

The doctrine of interests fights the technique of transposition defended by the "objective interpretation" (the legal rules are separated from their historical surroundings, placed in the current environment, and interpreted as if they were adopted today).

Von Heck considers this procedure as contrary to everyday experience and not able to offer any practical guarantee. Its results may be useful only by accident, and in most cases, they would be a pure nonsense. Von Heck believes that the only way to develop the statute law in agreement with practical needs is to separate the historical interpretation of the statute by its later adaptation. An obsolete statute can never be understood as a simple integration into the present, but rather only through a judicial adaptation. If historical interpretation is excluded from the beginning, the result is not just a misreading of adaptation; rather it may also reveal other faults and lead the public to mistrust the loyalty of judges toward the statute.

2.4 The outcome of Methodenstreit

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24. Von Heck had good reasons to stress his opposition to this doctrine since the jurisprudence of interests has often been treated as a variant of the "free law" theory. According to Von Heck, this is a mistake and the chronological order of events would be exactly opposite, Interessenjurisprudenz being the oldest school and the "free law" doctrine being a later occurrence. We can make the same remark for François Gény, who, in his second edition of the treatise *Méthode d'interprétation et sources en droit privé positif*, presented Von Heck as a member of the "free law' school. Therefore the confusion is recurrent.

25. According to Von Heck, this misconception explains also the revival of the theory with Isay in the '20s.

2.4.1 Interessenjurisprudenz as the winner of Methodenstreit

Born in civil law as the main challenger in the methodological fight (Methodenstreit), Interessenjurisprudenz finally won the debate in Germany. Interessenjurisprudenz also conquered the field of public law. Under the name of teleological doctrine, some scholars of public law (municipal and international) from Tübingen (Triepel, Thoma, and others) have occupied the positions previously held by the conceptualist school. Beyond public law and civil law, the controversy has affected the law of the procedure (where the victory of Interessenjurisprudenz would happen later) and criminal law (where the victory was ensured from the beginning).[26] From the '20s onward, these victories in the theoretical battlefield have provided for the doctrine of interests the highest audience from German courts.

But an Interessenjurisprudenz influence has reverberated well beyond the borders of Germany, and especially in Switzerland. The Swiss Parliament adopted in 1907 a famous provision[27] that drew the attention of the legal scholars and was seen by Gény as "the most appropriate summary of his own developments."[28] This provision requires the judge to be responsible for creating law without referring to another source. The precautions taken by its writer, Eugen Huber, were linked to the changing powers of the judge. In fact, the preparation of the article occurred while the victory of the free law school over Begriffsjurisprudenz was ensured.

26. It may be mentioned a decision in German criminal law about a doctor who caused an abortion- followed by the death of the infant (at a time when abortion was still prohibited and punished in Germany) to a woman injured in an accident. In this situation, the method of interests has been called as a backup. The court saw the existence of a gap that could be filled "ad favorem." The judge compared the punishment (penalty) for infanticide with that provided for homicide (the penalty was more severe in the second case). In this way, the conflict of interest between the survival of the mother and the survival of the child was solved on the ground of weighing interests already made by the legislature. Since the doctor has acted to save the mother (the greatest interest considered as such by the legislature to the detriment of the child), he was found not guilty.

27. The judge faced with a shortage of (statute) law and custom may "decide in accordance with the rules that he would establish if he had to act as legislature" while "building on solutions established by the doctrine and jurisprudence" (Civil Code of Obligations of Switzerland, art1, para.1 s. 2 and 3).

28. Gény, *Méthode d'interprétation et sources en droit prive positif*, tome II, pp. 326–327.

Huber recognized a wide discretionary power for the judge but placed boundaries in order to avoid arbitrariness and judicial uncertainty. The judge was not considered a lawmaker but must act *like* a legislature (approximately as a legislature). In fact, when a Swiss judge acted as a legislature, he creatively applied the mechanisms developed by Interessenjurisprudenz. Under this system, corresponding to the practice of the Swiss Federal Court, the interpreter must seek the origins of the statute and the extralegal context in which it arose in order to recognize the value judgments that have guided the legislature and the objectives he intended to achieve.[29]

2.4.2 Reasons for the success of Interessenjurisprudenz

For Freirechtschule, social reality must be considered, and the judge should assume the creation of law based on this social reality. The gaps of the statutes were seen as inevitable. The texts were the ground for interpretation, but out of the texts (in front of legal gaps), the judge was a creator of law. The ideology of separation of powers and the submission of the judge to the statutes were under attack. This might be the main reason (added to the lack of real guidance for the judge) that stopped Freirechtschule from being accepted. Anyway, Freirechtschule was the first methodological doctrine aware of the role played by social reality in shaping the law.

The objective interpretation was equally aware of social reality. But one may also identify here its unhistorical vision (on the pathway of Begriffsjurisprudenz). The texts of statutes are seen and have a meaning in agreement with the purposes resulting from actual social context without any historical perspective. Therefore, the teleology, seen only as actual purpose, is invited in interpretation. However, one cannot see any considerations of legal gaps or the idea of judge as a servant of legislature. Anyhow, if the objective interpretation was less methodologically directive (than Interessenjurisprudenz), it has proposed certain solutions where Freirechtschule has only offered the complete liberty of the judge.

Interessenjurisprudenz was the first movement historically sentient. This historical dimension made Interessenjurisprudenz attentive to the

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29. Cf. Deschenaux (Henry), *The Preliminary Title of the Civil Code*, Ed. University, Freiburg, 1969, pp. 76 et seq.

psychological and social context for the adoption of a given statute in the past. But it made Interessenjurisprudenz equally attentive to the moment of interpretation and the psychological and social context of the present day. This doctrine understands also the inevitability of legal gaps (being aware of the signals exposed mostly by Freirechtschule).

The subtlety and the multidimensionality of this last approach explain its success over the competing schools. In addition, it brings to the judge a detailed guideline for finding solutions by acting as a sentient adjunct of legislature.

3 Interpretation theory in Interessenjurisprudenz

In fact, the doctrine of interests turns toward social reality. As such, most of the doctrine is dedicated to the judicial application of law.

3.1 The use of the concept of "interest" as a causal element of the norm

Von Heck, the leader of the school, makes a distinction between the notion of purpose of a rule and the interests for whose conflict the rule is a solution.[30] His basic idea is that a norm is not the product of a single purpose but the "resultant" (vector) of a conflict of interests (including "ideal interests").

The ultimate goal of judicial decisions is the satisfaction of life's needs, of material or ideal desires existing in a legal community. Von Heck called all these "desires and trends" interests. He designates as "genetic theory of interests" the idea that interests will be "causal" for the legal rule since they are "representations of duties" for the legislature, who transforms them into prescriptions. He considered a causal chain and saw the real interests as essential in the creation of statutes. These interests (including the interest for peace and order in a

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30. Phillipp von Heck, «The Formation of Concepts and the Jurisprudence of Interests», in M. Magdalena Schoch, op. cit., p. 35–36: « The fundamental truth from which we must proceed is that each command of the law determines a conflict of interests; it originates from a struggle between opposing interests, and represents as it were the resultant [vector] of these opposing forces. Protection of interests through law never occurs in a vacuum. It operates in a world full of competing interests, and, therefore, always works at the expense of some interests. This holds true without exception. If we confine ourselves to an examination of the purpose of a law we see only the interest which has prevailed. But the concrete content of the legal rule, the degree in which its purpose is achieved, depends upon the weight of those interests which were vanquished ... Therefore the teleological jurisprudence of Jhering is not sufficient. »

legal community) are not abstractions but facts (akin to the positivist idea of science)[31] and are efficient causes of events. The statute's rules are not only intended to differentiate the interests but are themselves the product of interests. Thus, the statute is a final result of conflicting interests (of material, national, religious, and ethical nature) struggling to be recognized.

Von Heck disapproves the role attached by Begriffsjurisprudenz to syllogism. To him, the judge must carefully verify whether the actual situation, the opposition of interests to be weighed, is identical to the large number of interests already captured by the legislature. In other words, the establishment of the applicable rule (the major of the syllogism) stems from a dialectic between the rules and the facts of the case (the minor of the syllogism).

Interessenjurisprudenz states, as the traditional methodological school (Begriffsjurisprudenz), that the primary role of the judge is to apply the statute. On the other hand, its approach is quite different, since, for Von Heck, the judge must be a thinking associate of the legislature.[32] Unlike the doctrine of concepts, Interessenjurisprudenz asserts that the intellectual activity of the judge is not a formal (or logical) thinking but an emotional thinking. The judicial reasoning is considered in the light of life and interests, and not as conforming to some truth tables. Therefore, the decision of the judge should refer, apart from exceptional cases, to the scale of values reflected by the legal system.

3.2 The Determination of Real Interests

The judge's role is to rank the interests of parties in the case and to make win the party whose interest has greatest value. It must "recognize the real historical interests" that have caused the statute and take into account these interests in deciding the case.[33]

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31. The positivist conception of science that Von Heck placed, unconsciously, at the base of his theory recognises beyond sciences as logic and mathematics, only "causal science." A fact is acknowledged in a scientific way if it is reduced to its causes—physical, biological, historical. Therefore, even the interpretation of statute is, for Von Heck, an explanation through causes. See Larenz, op. cit., pp. 66.
32. Philipp (von) Heck, "The Formation of Concepts," pp. 178, in Magdalena Scoch, op. cit.
33. Larenz, op. cit., pp. 65.

The centre of gravity moves from the personal decision of the legislature and his psychological will to its grounds, and then to the "causal factors" that motivated it.

Thus, the reason to require a method of interpretation defined as "historical research of interests" becomes clear. Under the concept of interpretation are considered several different processes, such as the determination of the dispositions of a statute, its interpretation in the narrow sense, and possibly, its development. And only for the first two processes, Von Heck considers the "historical interpretation" as the most suitable technique of analysis.

As a matter of fact, one can find here a third way between objective interpretation and subjective interpretation, and this doctrine was also qualified as historical objective interpretation.[34] Von Heck is borrowing from the last one the idea that the meaning of a rule is not revealed by what the legislature is saying, while he takes from the first one the need for a historical research.[35]

Therefore, the interpretation must uncover the "normative" will of the legislature.[36] The rule must be understood in order to solve the case in the same way as the legislature would have done. To achieve that, the interpreter must follow two steps:

1. The first step concerns the interpretation itself—the research of interests (Interessenforschung). On this stage, the judge should determine the content of the rule from the perspective of all interests that caused its achievement. To obtain the correct representation of the rule, the interpreter will join a series of representations obtained by various means:
   - The first of these representations comes from the text of the statute, interpreted according to the usual means (grammar, philology, etc.).
   - The second representation relates to circumstances and motives that led to the enactment of the rule. This research is based on a preparatory work, the work of commissions,

34 . Buergisser (Michel) et Perrin (Jean-Francois), « Interessenjurisprudenz. Statut et interprétation de la loi dans l'histoire du mouvement », pp. 327 et seq. in *Droit et intérêt vol 1 Approche interdisciplinaire*, Bruxelles, Facultés universitaires Saint-Louis, 1990.

35. Idem, pp. 327 et seq.

36. Von Heck opposes the "normative will" to the "psychological will" of the legislature, the latter being understood as the will of the legislature as reflected in the preparatory works.

etc., and may determine the interests explicitly incorporated into the lawmaking process. This representation must be further refined to reveal the conflict of interests on the basis of which the rule was enacted.

- The third representation tries to find the silent part of the lawmaking process, the elements that influenced the rule without being stated in preparatory works.

At the end of the process, the judge gets the final representation of the rule. And this allows him to apply the statute by respecting the real will of the legislature.

2. On the second step, the judge will confront the outcome of the first research with the case at hand. He may possibly find that the rule has a gap (lacuna) or need to be corrected.

The judge should refrain from any value judgments as long as the facts of the case are covered by the legislature's will. On the other side, the judge should act creatively when the legislature's will is taken into default. The changes of circumstances request from him to adapt the statute to new situations by supplementing it or, where appropriate, by redesigning and surpassing its dispositions.

3.3 A lower limit for the interpretation process through interests

Stoll, one of the followers of the doctrine of interests, stated that in simple situations, the decision is not obtained by analysing the conflicts of interests but by logical subsumption for the reason of its sheer simplicity. Therefore, the weighing of interests would be useful only for difficult affaires, but not for routine ones.

Von Heck agreed with him but noted the role played in these routine cases by the intuitive weighing of interests. The situations where the procedure of simple logical subsumption can be used are those in which the result of the logical subsumption is consistent with the outcome of interests' analysis and when this outcome seems obvious. In such cases, the analysis of interests is not absent but is made intuitively, in the judge's subconscious. It remains important, however, because if the judge finds that the result does not comply with the interests at stake, it would feel reluctant to apply the logical subsumption.

Here, the analysis of interests has less the role of a conscious motivation, but rather that of a control tool, an alarm device that wakes up the judge whenever the subsumption is not adequate and the conscious and detailed analysis is required.

Hence, Von Heck recognizes that a decision in accordance with the principles outlined can be achieved not just by deliberate and rational weighing of interests but also by intuition, based on the sense of justice (Rechtsgefühl) or "judicium." We are dealing here with a mentally condensed operation, made possible by practice, the constant exercise of previous conscious acts. However, since the intuitive decision can sometimes be distorted by numerous factors, this intuition must to be controlled by the conscious mind.

The doctrine of interests is, according to Von Heck, the method that allows the development of this "judicium" and guarantees the speed of logic subsumption and the perception of its limits.

3.4. An Upper Limit in the Interpretation Process through Interests

According to Von Heck, there are several stages in the application of the doctrine of interests:[37]

1. Sometimes the logical subsumption under a normative concept of a statute matches the statute's aim and is in harmony with the results of interests' evaluation. This is the normal case. The legislature has shaped and expressed the statute in a manner consistent with the value he recognized as decisive. When the judge finds that the concepts of the statute match the legislative intent, it gets the right decision by a logical application of those concepts.

2. Other times, the legislature has not explicitly expressed and defined the layout or the concept and has delegated to the judge the making of the provision or the definition of the concept. The judge should perform the task assigned to him by following the value judgments that emerge from the statute and the guidelines of the legislature.

37. Philipp Heck, "The Formation of Concepts," pp. 180, in Magdalena Scoch, op. cit.

3. Some other times, there is a gap in the statute, an unintentional obscurity or a default of provisions applicable to particular facts. Again, the judge shall proceed by filling the gap through a weighing of interests. *In doing so, the judge must be guided primarily by the value judgments of the legislature and, secondly, by his own assessment*.

The analysis of interests is not preventing the need for the judge to choose between analogy and "argumentum a contrario." It simply provides a good way to examine a case so that the result will be consistent with the legislative intent and the real needs.

4. Finally, sometimes the provision of a statute is in conflict with the practical needs that the statute also recognizes. Here, it is necessary to know if the judge can correct the provisions of the statute, briefly speaking, if the idea of value contained in the statute must prevail over the provision itself. It is precisely here where the doctrine of interests and the theory of free law diverge. Von Heck believes that judges have no right to amend the statutes except in exceptional cases. And in any case, he forbids the judge to have any disagreement with the values from the statute.

4 Final evaluation of Interessenjurisprudenz

4.1 Doctrine of Interests (Interessenjurisprudenz) in the German Space

If in Switzerland this is still the current method of judges, in Germany, after the Second World War, the doctrine of interests was overtaken by the doctrine of values (Wertungsjurisprudenz).[38]

The first reason for this evolution is a practical one. During the Third Reich, the German judges had used in a poor way the weighing of interests, and after the war, it was considered necessary to ensure the pre-eminence of the values hence violated.

The second reason, theoretical this time, is tied to the understanding, by the scholars, of evaluations and the criteria by which interests may be weighed. These scholars discovered a conceptual deficiency in Interessenjurisprudenz.

Already at Von Heck, and after him at Stoll, there are situations leading beyond the genetic "theory of interests." Besides that, while in

38 . Modugno (Franco), "Sistema giuridico," en *Enciclopedia Giuridica*, Instituto della Enciclopedia Italiana, 1988, no 2.1.

some texts the interests appear as "causal factors," there are other texts in which the interests refer to assessments made by the legislature. Hence, the interest is either the subject or the criteria of evaluation or even the "causal" factor of the rule. There is a lack of clarity—not only terminological but essentially methodological.[39]

Therefore, the aim of Von Heck, the statute viewed as a simple product of interests in a struggle for domination in society, is surpassed. The real complete picture is accessible only through the doctrine of values (Wertungsjurisprudenz), which clearly differentiates the concept of interest from the legislative assessment scale.[40]

The discovery of this legislative assessment scale requires a complete analysis of the legal system, considering a set of basic principles that even the legislature, consciously or unconsciously, took into account in his assessments. And here, constitutional law (and the fundamental rights of the new democratic Germany) is called to play a major role. As a matter of fact, Interessenjurisprudenz is nowadays integrated in the broader and deeper methodological current of Wertungsjurisprudenz.

4.2 Interessenjurisprudenz and the Anglo-Saxon or French world

There was no reception of German Interessenjurisprudenz in the Anglo-Saxon or French world. As a matter of fact, Von Heck's work was not translated into English until 1948, and he exercised no discernible influence in the United States. Moreover, Von Heck's work was never translated into French, unlike Ihering's, Gierke's, and Ehrlich's, the German creators of the social approach to law.

Most recently, some important authors start paying (incidental) attention to Von Heck and his Interessenjurisprudenz doctrine from an the Anglo-Saxon or French perspective. Duncan Kennedy and Marie-Claire Belleau[41] wrote two impressive studies about the role of René

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39. Larenz, op. cit., pp. 124.
40. Westermann, cited by Larenz, op. cit, pp. 124.
41. Duncan Kennedy et Marie-Claire Belleau, « La place de René Demogue dans la généalogie de la pensée juridique contemporaine," *R.I.E.J.*, 2006, p. 163 et seq. Some of these considerations are reproduced more recently (in English) in Duncan Kennedy, « A Transnational Genealogy of Proportionality in Private Law» in *The Foundations of European Private Law*, (ed) Stephen Weatherill et al., Oxford, Hart Publishing, 2011, pp 185 et seq.

Demogue, a French jurist, in the genealogy of contemporary conflicting considerations thinking.

Although less concerned with Von Heck, they expressed, from an American viewpoint, interesting considerations about his doctrine. They recognize Von Heck as one of the most important creators of the contemporary mode of conflicting considerations, but they equally express critical opinions about Von Heck's developments. For example, in their vision, Von Heck is a less sophisticated practitioner of the method he helped to invent than Demogue.[42]

They identify also a first flaw in the fact that Von Heck had repeatedly pointed out that "ideal interests" were just as important as "material interests" (wants or needs) in lawmaking and interpretation. In this respect, modern conflicting considerations are sharply different from Heck's version.

Today, conflicting considerations include conflicting moral axioms ("pacta sunt servanda," "res rebus sic stantibus"). They include, most prominently, subjective rights in conflict, without any suggestion that the rights are reducible to interests. "Moreover, in contemporary conflicting considerations, all the considerations have to be universalisable, so that all utilitarian considerations have to be 'social interests'. Whereas Heck prides himself on adding ideal to material interests, the modern approach considers only the ideal."[43]

This criticism seems unmerited if it is seen from the position of the modern American way (mostly formulated in Torts and Constitutional law) of considering conflicting considerations. As a mater of fact Von Heck was answering the problems of a different origin and in a specific context, that of a Continental civil law. Another answer to these critics may be found in the fact that Interessenjurisprudenz was later integrated in Germany (see supra) by Wertungsjurisprudenz, where the ideal considerations (constitutional or extra constitutional) play a major role.

A different fault discovered by the authors is that Von Heck fails to distinguish between interests attached to particular social actors

42. Duncan Kennedy et Marie-Claire Belleau, op. cit., p. 181, 182; Duncan Kennedy, op. cit., p. 197, 198.
43. Duncan Kennedy, op. cit., p. 199.

(debtors and creditors) and interests plausibly attributed, though with different degrees of force, to everyone (e.g., security of transactions).[44]

We consider this opinion as correct, but once again, the later development of German Wertungsjurisprudenz (see supra, 4.1) seemed to have answered it plainly (by eliminating, among others, the recurrent confusion between interests and evaluation's scale of legislature).

The distinguished authors are equally criticising Von Heck because he operates within the framework of interpretation on the ground of a hierarchy of sources. According to Von Heck, when there is a gap or conflict, the task of the judge would be to simply replicate the balance of "interests" from by the statute to be interpreted.[45]

However, the authors answer this criticism themselves and recognise that for Von Heck, it is important "to radically reduce the problem of judicial subjectivism and to subordinate the judge to the legislator and the jurist to the judge, [by] eliminating separation of powers problems." Our own developments about the opposition of Interessenjurisprudenz to the subjectivity of the free law school during Methodenstreit (see supra, 2.3) goes in the same direction.

Finally, the authors underline that Von Heck is reluctant to recognise that if there is a gap in applying a rule to a new situation not considered by the drafters of the original solution, a new evaluation of interests as they play out in the new circumstances is needed. Modern American conflicting considerations technique is ready to do this kind of new evaluation. But Heck objects to that by underlining that "it is only in exceptional cases that the jurist method is called upon to make [a new] evaluation. As a rule, all he has to do is to ascertain the value judgments of the legislator."[46]

We consider that, once again, Von Heck was immersed in a different legal system and was facing very different constrains. He needed to distinguish himself from the rival schools and to be also attentive to the separation of powers.

Generally speaking, Von Heck was historically situated. As the creator of a new direction, he could not answer all the questions. The

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44. Duncan Kennedy, op. cit., p. 199, footnotes 47.
45. Duncan Kennedy et Marie-Claire Belleau, op. cit., p. 184; Duncan Kennedy, op. cit., p. 199.
46. Duncan Kennedy et Marie-Claire Belleau, op. cit., p. 184, 185; Duncan Kennedy, op. cit., p. 200.

later developments from Wertungsjurisprudenz, which included Interessenjurisprudenz, seem to respond to many of these situations.

What is the final judgment about Interessenjurisprudenz? A part of the answer lies in the posterity of legal thinkers who created the trend of conflicting considerations.

Demogue was never accepted in France, his country of origin. He had a certain influence, largely forgotten today, in the development of conflicting considerations in the United States (during the 20's).

Oliver Wendell Holmes, the originator of conflicting considerations in the United States, remains one of the strongest references there even today.

Von Heck succeeded in Germany. His work was translated too late to have any clear influence on American legal thinking (as was the case for Demogue). However his national success shows his genius and the usefulness of the subtle method he developed. The value and the interest of any study about Interessenjurisprudenz are therefore unquestionable.

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