THE UNIVERSITY *of* EDINBURGH

This thesis has been submitted in fulfilment of the requirements for a postgraduate degree (e. g. PhD, MPhil, DClinPsychol) at the University of Edinburgh. Please note the following terms and conditions of use:

- This work is protected by copyright and other intellectual property rights, which are retained by the thesis author, unless otherwise stated.
- A copy can be downloaded for personal non-commercial research or study, without prior permission or charge.
- This thesis cannot be reproduced or quoted extensively from without first obtaining permission in writing from the author.
- The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the author.
- When referring to this work, full bibliographic details including the author, title, awarding institution and date of the thesis must be given.

THE UNIVERSITY *of* EDINBURGH

The Mechanical Application of the Law: Reassessing 19th-century Legal Formalism

María I. Besomi

Dissertation in Law (Ph.D.)

The University of Edinburgh

2025

This research was possible thanks to the financial support of the Chilean Government's *Programa de Formación de Capital Humano Avanzado – Becas Chile de Doctorado en el Extranjero* (ANID).

Abstract / Lay Summary

This dissertation revisits and critically examines the widespread historical narrative ('Traditional Account' or 'TA') of legal formalism in 19th-century Continental Europe, specifically the codification process and the 'School of the Exegesis' (*école de l'Exégèse*) in France, and the Jurisprudence of Concepts (*Begriffsjurisprudenz*) in Germany.

The TA portrays 19th-century legal thought as a rationalist illusion, out of touch with legal practice and ultimately refuted by 20th-century realism, as well as critical and sociologicall-inclined approaches to the law. This thesis challenges this narrative by interrogating the historical sources, *i.e.,* the texts attributed to formalist thinkers, to uncover what they actually claimed about law and adjudication. In particular, it challenges the dominant portrayal of 19th-century mechanistic and naïve conception of law and adjudication. Contrary to the TA's view that 19th-century jurists held a rigid, deductivist model of legal reasoning -wherein the judge acted as the mere "mouthpiece of the law"- this work argues that such a depiction is historically flawed. Further, this dissertation explores the intellectual and institutional contexts in which 19th-century legal scholarship operated in France and Germany, and reframe the debates on 'legal formalism' in terms that reveal their enduring significance for contemporary jurisprudence.

Chapter One clarifies the conceptual terrain by disambiguating 'legal formalism' from adjacent but distinct concepts of the same term, and from the related concept of legal positivism. This work focuses on a specific concept of legal formalism: a theory of adjudication that denies or minimizes judicial discretion by asserting the determinacy of legal norms and the mechanical nature of legal reasoning.

Chapter Two reconstructs the TA across national historiographies and illustrates how the narrative about 19th-century legal formalism was shaped by 20th-century critiques. In France, the School of the Exegesis is commonly accused of reducing the law to the literal text of the *Code civil,* assuming a complete and coherent legal order in which interpretation was unnecessary. In Germany, the Jurisprudence of Concepts is said to have developed an abstract, conceptual system of law derived from Roman legal categories, likewise guided by assumptions of systematicity, coherence, and absolute closure. The TA regards these developments as expressions of an overarching 19th-century formalist worldview.

Chapters Three and Four challenge the accuracy of this narrative by returning to the primary texts and intellectual contexts of the French and German legal traditions. In both cases, this work shows that the TA has serious shortcomings and presents a distorted picture about 19th-

century legal science: neither school of thought embraced the mechanical conception of adjudication that the TA attributes to them. A new, more nuanced, picture emerges that needs to be accounted for.

Chapter Five reframes these 19th-century traditions through drawing from the conceptual framework of Patrick Atiyah and Robert Summers. It argues that 19th-century legal thought can be better understood as having a normative commitment to different types of formality in law and legal reasoning -authoritative, interpretive, and mandatory-, rather than the reductive notion of "mechanical" application of the law. By distinguishing between formality and formalism, this scheme gives space for a conception of law and legal reasoning that favours formality in the law without being naïve about its possibilities. What the TA misinterprets as blind faith in deduction was, in fact, a deliberate strategy for preserving legal autonomy and resisting arbitrary adjudication.

Chapter Six identifies three substantive disputes that animate the transition from 19th to 20th-century legal thought: (1) the opacity of legal norms and the tension between certainty and flexibility; (2) the nature of legal orders and the role of legal science in their construction; and (3) the meaning of the state's monopoly over legal sources. These debates reflect broader normative disagreements about the law's autonomy, authority, and function within society. The chapter argues that far from being resolved or rendered obsolete, these disputes remain central to contemporary jurisprudential debates -particularly in light of the potential formalization of legal reasoning through artificial intelligence.

In sum, this dissertation offers both a historical correction and a conceptual reorientation. It argues that the TA's account of legal formalism oversimplifies and distorts the 19th-century juristic landscape, and fails to recognize the enduring relevance of debates about law's formality, determinacy, and autonomy. By recovering the internal coherence and intellectual depth of the traditions it critiques, this work provides a more balanced and insightful account of legal thought during a foundational period in the development of modern European legal systems. In this way, this thesis invites a more nuanced engagement with its historical manifestations and philosophical stakes. Ultimately, it aims to show that 'legal formalism', properly understood, is not a relic of the past but a recurring and resilient feature of legal discourse -one that continues to shape our understanding of law's nature, boundaries, and role in democratic societies.

Acknowledgements

I give thanks to my supervisors, Professor Claudio Michelon and Professor Amalia Amaya. Both guided my journey with wisdom and kindness. They challenged and positively reinforced me in a balanced way, while encouraging me to engage in academic activities beyond my thesis. You are both models of academic virtue and I am lucky to have learnt from you these years.

To the rest of the members of the Edinburgh Legal Theory Reading Group and the Edinburgh Centre for Legal Theory. You are an expression of academic endeavour at its best: engaging, with a sense of fellowship, and with a rigour that is never mistaken for arrogance.

To colleagues and friends who have read and commented on my work, or supported my PhD journey in its different facets: León Carmona, Fernanda Díaz, Yunqing Liu, Ismael Martínez, thank you. To my friend and colleague Tsampika Taralli, who read and discussed my ideas in exchange for nothing: for your intellectual depth but above all for your humility and sincere friendship, I will always be inmensely grateful. To Professor Maks del Mar and Professor David Fox for their support and guidance, thank you.

To Professor Nils Jansen, for inviting me to present an early draft of this thesis to his group of legal theory and legal history in the University of Münster. To Professor Michael Lobban and Professor Maks del Mar, for organising the GW Hart conference 2024 - *Historicising Jurisprudence,* and giving me the opportunity to present a piece of my work there. To the organisers of the *Disputationes* Glasgow-Edinburgh and of the Staff Seminars at the Law School in the University of Edinburgh, for inviting me to present chapters of my thesis. I am especially grateful to professor Neil Walker, who chaired the session at the Staff Seminars and commented on my presentation. To the International Association for Philosophy of Law and Social Philosophy for organising the IVR 2024 in Seoul, where I presented some of the ideas developed here. To the sharp audiences in all these spaces, who gave valuable feedback and suggestions that improved this work, thank you.

To the Law School of the University of Edinburgh, especially Shauna Thomson and Linda Graham. Thanks for all your help, warmth, and kindness.

To Libgen's founders and collaborators. Your work makes the world a better place.

To my professors in the *Universidad de Chile,* Enrique Barros and Fernando Atria, who supported my application to the Ph.D. The former taught me how to practice law with an academic approach, and how to do scholarly work with a look to practice; the latter first showed me the relevance of legal theory, and the political salience of formality in the law. Much of my interests

and ideas in this work are inspired by *La Forma del Derecho* and the readings we did in the group professor Atria led during my years as a law student.

To Professor Alexandra Braun, for encouraging me to pursue an academic career, and for her constant help and companionship along the way. Without knowing it, you have been a role model of academic passion and generosity.

To the friends we made in Oxford and Edinburgh, you have become family. To our family in Bristol and in Chile. To my parents, who built a home filled with love and laughter, and gave me the three greatest gifts: Josefina, Guido and Isidora, lately joined by Amelia and Clara. You mean the world to me.

Finally, to my husband, Pablo Ortúzar. Without your generosity I would not be writing these lines. You believed in me when I did not, and you have supported me every step of the way with conversation, stories, music, food, and inconditional love. With you I have debts of the kind that cannot be repaid.

To my parents, Carmen and Guido,
to whom I owe everything that I am

Contents

Introduction

A Familiar Story about Legal Formalism

> "Those who dismiss formalism as a naive illusion, mistaken in its claims and pernicious in its effect, do not know what they are in for."
>
> Roberto M. Unger, *Knowledge and Politics*

In different times and at different places, often during historical moments of rapid change and great expectations, a single same accusation is levelled against the dominant conceptions of law and legal methodology: the accusation of "formalism". Movements, trends, and even schools of legal thought have emerged time and time again, whose central tenets consist in the absolute rejection of the views and assumptions, the postulates and practices of their predecessors. Fierce anti-formalist reactions have occurred in England and the United States, in France, Germany and the international legal community at large, and targeted jurists and legal thinkers as far apart as Blackstone is from Puchta, or Montesquieu from Kelsen. The assault on formalism, then, looms large in the history of legal thinking.[1]

[1] The literature on the attacks against different sorts of legal formalism is vast. In the U.S., the most comprehensive reviews remain Morton G White, 'Social Thought in America: The Revolt Against Formalism' (1949) 8 Journal of the History of Ideas 131; Morton J Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (OUP 1992); Anthony Sebok, *Legal Positivism in American Jurisprudence* (CUP 1998); David M Rabban, *Law's History: American Legal Thought and the Transatlantic Turn to History* (CUP 2013). For England, see David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (CUP 1989) chs 1, 3, 6, 11. In Germany, a classic and still widely-read account can be found in Franz Wieacker, *A History of Private Law in Europe: With Particular Reference to Germany* (3rd edn, Oxford University Press 1995); see also Karl Larenz, *Methodenlehre Der Rechtswissenschaft* (Springer-Verlag 1991). In France, an early account in Eugène Gaudemet, *L'interprétation Du Code Civil En France Depuis 1804* (Sirey 1935); see also John Dawson, *The Oracles of the Law* (U of Michigan Law School 1968) ch 4; and Guido Fassó, *Historia de La Filosofía Del Derecho 3. Siglos XIX y XX*, vol 3 (Pirámide 1996) 161 ff. In international law, see Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (CUP 2002) chs 5, 6; and Martti Koskenniemi, *The Politics of International Law* (Hart 2011) 254 ff. The transnational character and broader scope of the anti-formalist movement is touched upon in Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000' in Alvaro Santos and David M Trubek (eds) (CUP 2006); and in the articles compiled in Olivier Jouanjan and Élisabeth Zoller (eds), *Le «moment 1900». Critique Sociale et Sociologique Du Droit En Europe et Aux États-Unis* (Éditions Panthéon-Assas 2015).

Yet prosecutors are as heterogeneous as the accused, in conceptual framework as well as in political background, interests, and attitudes. There is no single account of formalism and anti-formalism as a phenomenon of Western legal history, and thus, except for a few comparative studies, it is necessary to explore them separately. On the other hand, theoretical inquiries in the tradition of analytical philosophy have set out to identify legal formalism's main theses and draw the definitive line where formalist legal thinking starts.[2] These analyses provide an immensely useful map for understanding the phenomenon of formalism in the abstract, as a non-idiosyncratic issue, a vitiating influence that any legal order and any jurist, at any time, can fall prey to. But they only manage to rid themselves of historical particularities to a certain extent, as their points of reference necessarily exist in history. As a result, fragmentation, especially among Common law and Civil law jurisdictions but even within these, is part of the landscape of the debates about legal formalism, even when they seek to cut across different traditions and account for all of them.

This research focuses on one of these fragments or moments of anti-formalist uprising: that occurred in continental Europe by the end of the 19th and beginning of the 20th century. In particular, it traces two parallel national movements of legal science whose primary concern was to denounce and overcome what they qualified as "canonical" or "classical" schools of legal methodology at the time, in France and Germany respectively. These were the school of the Exegesis (*école de l'Exégèse*), originated out of the Napoleonic codification at the beginning of the 19th century, and the Jurisprudence of Concepts (*Begriffsjurisprudenz*), corresponding to the second generation of pandectists following in Savigny's footsteps. The account bequeathed to us as a result of this uprising is summarised in what follows.[3]

When referring to adjudication and the role of the judge in Europe during the late 18th and 19th centuries, the books of legal history tell a story that is familiar by now. They tell us that by the mid-18th century the Enlightenment and its legal products, the codification movement and the science of legislation, had gained momentum in their battle against feudal institutions, among them, the judges of the *ancien regime*.[4] The judiciary, constituted as a class in the major European

[2] I present some of these works in the next chapter.

[3] For the most part, the literature corresponding to the jurisdictions studied is, naturally, in languages other than English. Where translations of the originals exist and I have been able to obtain them, I have used these. Otherwise, I have used the original sources and translated them when quoting. Unless otherwise stated, all translations are my own.

[4] See Wieacker (n 1) 249 ff; John Dawson, *The Oracles of the Law* (University of Michigan Law School 1968) 263 ff; Eduardo García de Enterría, 'La Democracia y El Lugar de La Ley', *El Derecho, la Ley y el Juez. Dos Estudios.* (Civitas 1997); and generally Guido Fassó, *Historia de La Filosofía Del Derecho 2. La Edad Moderna*, vol 2 (JF Lorca Navarrete tr, Pirámide 1982).

powers, derived its strength from the obscurity of the law, the multiplicity of sources, and its lack of accountability. Uncertainty dominated the courts, and the traditional *interpretatio* was nothing but arbitrariness. In the Continent, the progressive success of the codification movement was crowned by the French Revolution and the subsequent events that led, not long into the 19th century, to the enactment of the *Code civil,* also known for a short time as *Code Napoleon.*

The legal project of enlightened rationalism, functional to the needs for predictability of an incipient capitalist class,[5] in little more than a century was to replace the obscurity of the law with the clarity and certainty of legislation.[6] Legislation was supposed to be almighty, to provide for all possible cases and to contain no gaps or errors that could give rise to doubts. The confidence in the legislature was as intense as the inherited distrust towards the magistrates. In line with this distrust, legal decisions should bear no trace of the decision-maker: in the well-known terms of Montesquieu, judges were to be but *the mouthpieces that pronounce the words of the law*.[7] Later, this approach to the law and the strict subordination it demanded from the judge came to be known with the name of 'legal formalism'.[8]

At some point, the view that the legal culture of 19th-century Europe had been haunted by the ghost of formalism became a commonplace. 'Legalism', a term often used interchangeably with formalism, was thus explained as a violent reaction against the obscurity of the law, the arbitrariness and conservatism of the *ancien regime*'s judges and the legal particularism of the Middle Ages.[9] The canonical formulation of this story regarding legal formalism (hereinafter Traditional Account or TA) emerged at the beginning of the 20th century and has been consolidated to the present day.

According to the TA, this way of conceiving the law was soon to be proved illusory. The legislator's capacities were limited and legislation was not perfect: it could not foresee all cases, nor

---

[5] It was Max Weber who articulated the association between the 'formal rationality of modern law' with class interests and the rise of capitalism (Max Weber, *Economy and Society* (U of California Press 1978) 636 f, 658.)

[6] García de Enterría (n 4); and Paolo Grossi, *Mitología Jurídica de La Modernidad* (Trotta 2003) 35 ff.

[7] Mario Cattaneo, *Illuminismo e Legislazione* (Edizioni di Communità 1966) 44 ff.

[8] Other terms were also coined to refer to this phenomenon: legalistic positivism, legalism, and conceptualism in the case of Germany. See chapter 2.

[9] Following this account, among others, Dawson (n 1) 263 ff; García de Enterría (n 4); Damiano Canale, 'Many Faces of the Codification of Law in Modern Continental Europe' in Damiano Canale, Paolo Grossi and Hasso Hoffmann (eds), *A History of the Philosophy of Law in the Civil Law World: 1600-1900* (Springer 2009); Maximiliano Hernández Marcos, 'Conceptual Aspects of Legal Enlightenment in Europe' in Enrico Pattaro, Damiano Canale and Hasso Hofmann (eds), *A Treatise of Legal Philosophy and General Jurisprudence: Vol. 9: A History of the Philosophy of Law in the Civil Law World, 1600-1900* (Springer 2009); and Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (OUP 1989) 191 ff.

could it be so clear as not to need interpretation.[10] Realistically, it had to be accepted that adjudication was a creative process, and legislation had a relative weight within a complex legal order which had to be responsive to social transformations and their changing needs.[11] The judge's figure as the "mouthpiece of the law" had turned out to be a fairy tale. It was the turn of new, more grounded conceptions on law and legal decision-making. The formalist period thus came to an end. From the mid-20th century, legal formalism became an oddity within a legal environment that was proud to have matured into a more realistic legal science:[12]

> "[C]ontemporary positivism emerges as a doctrine with distinctive profiles precisely due to the break with the naïve and metaphysical positivism that dominated during the 19th century and that, in the context of continental law, has its most significant doctrines in the French School of the Exegesis and the German Conceptual Jurisprudence."[13]

Henceforth legal formalism has been mostly regarded with hostility or condescension by legal scholars. As Frederick Schauer has expressed, "whatever formalism is, it is not good."[14] Generally speaking, 'legal formalism'[15] is employed derogatorily, entailing the notion of a degraded -because excessive or voluntarist- version of reasoning in law,[16] or as thoughtless obedience to the letter of the law.[17] With very few exceptions, nobody presents themselves as formalist; on the contrary, the label 'formalist' is always an accusation to hurl at others.[18] And yet, "[t]he idea that

---

[10] Hernández Marcos (n 9) 90.

[11] François Gény, *Méthode d'Interprétation et Sources En Droit Privé Positif: Essai Critique* (LGDJ 1919).

[12] See, for instance, Juan A García Amado, 'Sobre Formalismos y Antiformalismos En La Teoría Del Derecho' (2012) 3 Eunomia 13, 14; Carlos Alchourrón and Eugenio Bulygin, *Normative Systems* (Springer Verlag 1971) 175; and Roscoe Pound, *Interpretations of Legal History* (Harvard University Press 2014) 129 *in fine*, 130.

[13] García Amado (n 12) 14. Although the author hints that this narrative has been attacked on several fronts (note 2), this does not modify his main assertion in this paragraph and several others in the same text (16, 17, 18).

[14] Frederick Schauer, 'Formalism' (1988) 97 The Yale Law Journal 509, 510. Similarly, Hans-Peter Haferkamp, 'Legal Formalism and Its Critics' in Markus D Dubber, Heikki Pihlajamäki and Mark Godfrey (eds), *The Oxford Handbook of European Legal History* (OUP 2018) 929: "Formalism is bad". See also Brian Bix, *Jurisprudence: Theory and Context* (Second edition, Sweet & Maxwell 1999) 167, esp. note 8; Patrick Atiyah and Robert Summers, *Form and Substance in Anglo-American Law* (Oxford University Press 1987); and.

[15] I write 'formalism', within single quotation marks, when using it as a term or label.

[16] White (n 1). See HLA Hart, 'Positivism and the Separation of Law and Morals' (OUP 1983) 64.

[17] This specific formulation is mine but, in this sense, Grossi, *Mitología Jurídica de La Modernidad* (n 6) 33.

[18] See Haferkamp, 'Legal Formalism and Its Critics' (n 14) 929; David Lyons, 'Legal Formalism and Instrumentalism. A Pathological Study', *Moral aspects of legal theory* (CUP 1993) 42; Martin Stone, 'Formalism' in Scott Shapiro, Jules Coleman and Kenneth Himma (eds) (OUP 2004); and García Amado (n 12) 13.

'formalism has already been thoroughly discredited' is often cited at the beginning of a fresh attack on it."[19] Formalism seems to never quite die out.[20]

Purpose and relevance of the present inquiry

This work seeks to revisit and challenge the narrative advanced by the TA regarding legal formalism in 19th-century Continental Europe, especially in its two most paradigmatic instances: the *Exégèse* in France and the codification process that brought it into being; and the so-called *Begriffsjurisprudenz* in the German states. Its starting point is the conviction that there is no clear and definite understanding of this chapter of our legal history in general, and of these two "schools" in particular. Many inconsistencies and obscurities surround the concepts of 'formalism' and 'mechanical application of the law' as they appeared and developed from the beginning of the 20th century. In this context, the main questions that served as an initial guide to this investigation are the following:

1) What is generally meant by 'legal formalism' in the context of 19th-century Continental Europe? What specific claims are associated with it and how do they relate to each other?
2) What role was played by the codification process in France, the School of the Exegesis, and Conceptual Jurisprudence in 19th-century 'legal formalism'? What are the main traits and ideas associated with them?
3) To whom do we owe the dominant narrative about 19th-century legal formalism? Who articulated it, and how did it develop to the present day?
4) Is this account truthful to historical reality? If so, to what extent? What can we learn from the sources about 19th-century ideas about the law, legal reasoning and the role of the judiciary?

The answers to these questions will show the shortcomings and distortions of the mainstream narrative about legal formalism. We will see that contrasting the narrative with the reality it purportedly aims to describe will lay bare the narrative's flaws, as well as the lack of historical substance of the concept 'legal formalism' as it is generally used. A plausible conclusion

[19] Stone (n 18) note n. 2, with reference.

[20] Still to be seen are the implications of the development of models of artificial intelligence for this debate and related ones in legal reasoning. An overview in Harry Surden, 'Artificial Intelligence and Law: An Overview' (2018) 35 Ga. St. UL Rev. 1305. See also the contributions in Bart Custers and Eduard Fosch-Villaronga, *Law and Artificial Intelligence: Regulating AI and Applying AI in Legal Practice* (TMC Asser Press 2022); and the commentaries in Giovanni Sartor and others, 'Thirty Years of Artificial Intelligence and Law: The Second Decade' (2022) 30 Artificial Intelligence and Law 521.

to be drawn from this is that 19th-century legal formalism is nothing but a myth. Such a conclusion has been, indeed, suggested by some and defended by others, mostly regarding the U.S.'s version of 'legal formalism', where many reasons have been offered to the question of *why* that myth was created.[21] But that is not where this work is headed. Rather, it aims to understand what is it that makes this narrative so pervasive, and particularly what the anti-formalist currents saw in their predecessors that can justify or at least make sense of the concept of 'formalism' and the dispute it provoked. The key to the "dark legend" of formalism and to understanding that which is important for us now in it, lies in this dispute.

The picture that will emerge from this first part of the thesis is more nuanced and complex than that portrayed by the mainstream narrative. To account for this new picture, the usual slogans and labels used to refer to it will not be of use anymore, which creates the need to look at the phenomenon from a different perspective. The second part of this thesis provides such a perspective and aims to contribute to a better understanding of what we now call 'legal formalism', but also of the opposition and reaction it generated. For the TA not only exaggerates its vices and minimises its advantages. It does so because it misunderstands 19th-century jurists' commitments and aims, giving at best a partial account of their underlying normative project, and thus misplacing the criticisms against the wrong background. In this way, I argue, the problems of 19th-century thinking about the law appear magnified, and its merits diminished. But more importantly, we are left without an explanatory framework of *why* the problems and merits are such in the first place, of what the parameters are in relation to which 19th-century ideas on law and adjudication can be said to fail or succeed. To address these issues the normative project sustaining legal formalism shall be reclaimed from the TA, for only in this way can its merits and demerits be made intelligible.

Drawing from Patrick Atiyah and Robert Summer's insights on formality in law and legal reasoning, I show in what sense the approach of 19th-century legal schools to *formality* in law was distinctive. At the same time, this scheme illuminates what aspects of these schools' understanding of formality in the law were at odds with early-20th-century legal scholarship views, and why. In line with the above, I show that the opposition between 19th and 20th-century conceptions of law is significant not only historically but also at a theoretical level. I further examine this opposition

[21] Sebok (n 1); Bruce A Kimball, 'Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature' (2007) 25 Law and History Review 345; Brian Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton University Press 2010); Katharina Isabel Schmidt, 'Der "Formalismus-Mythos" Im Deutschen Und Amerikanischen Rechtsdenken Des Frühen 20. Jahrhunderts' (2014) 53 Der Staat 445; Michael Lobban, 'Legal Formalism' in Markus D Dubber, Michael Lobban and Christopher Tomlins (eds), *The Oxford Handbook of Legal History* (OUP 2018); The last work testifies to the fact that similar attempts at debunking the "myth" of formalism have been carried out in Germany, although with a more limited impact on wider audiences. See chapter 5.

along three avenues: first, as a dispute over the opacity of norms; second, as a dispute over the nature of legal orders and the role of legal science in their development; and third, as a dispute over the meaning of the monopolisation of legal sources by the state. Together, these three dimensions shed a new light on the historical relationship between form and substance in law.

At this point, the question might be asked: why revisit this 19th-century phenomenon called 'legal formalism' today? A partial answer to this question is that demystifying this period augments our knowledge of the history of law and adjudication, with its challenges and lessons. 19th-century schools of legal thought labelled 'formalists' and the 'anti-formalist' backlash which generated the narrative about it represent a crucial chapter of our recent legal experience. What 20th-century theorists attribute to be the basic assumptions of 19th-century formalism appear to be highly disruptive and also implausible claims about law and its application: *a fictional conception.* By presenting an earlier legal culture as a rationalistic fantasy which is just too confident in the law and the legislator, the traditional account neutralises its political function and, at the same time, hides its own programmatic goals. It promotes a dysfunctional understanding of 19th-century European legal culture, leading to the unintelligibility of a key period of Western legal thinking in the context of the formation of modern European states. This misunderstanding is a great obstacle to overcome, for the TA carries too heavy a weight, and its mistakes -along with its truths- are generally given credit until the present day.

Still, even though the narrative that has been passed on to us was inaccurate, why should we care today? And especially, why should legal philosophers care about getting the "story" right? Now follows the rest of the answer. This research is oriented by the idea that the debates surrounding legal formalism and anti-formalism fall within but exceed the field of legal theory, and particularly that of legal reasoning. And despite appearances, it is not far-fetched to suggest that legal formalism and the debates it sparked are not mere things of the past. As will be shown in what follows, 19th-century conceptions on law and adjudication left their mark on the legal institutions that are central to contemporary democracies: political agencies with representational character in charge of creating (most of) the law, professional judicial institutions in charge of (mostly) applying it, and a legal science whose doctrinal work is aimed at systematising positive legal materials not produced by itself, but of which it must assume a certain degree of rationality. Alienation from these institutions is, for this reason, alienation from the legal structures by which our political constitutions are expressed. In part, this is so because anti-formalists, for all their passionate critique, did not manage to build theoretical or methodological alternatives to those they wanted to ridicule and wipe out -or, arguably, they did not even want to build such alternatives.

In the words of Mark Dubber, "they were trying to break the mould […], not to replace it with another."[22]

At least in this way, historical misconceptions about these issues negatively affect how we experience our own legal predicaments and challenges. A generalised hostility towards formalism still informs a significant part of the discussions within the field of legal theory, especially of legal reasoning.[23] It is true that in current debates 'legal formalism' and its various opposites tend to be addressed in the abstract, that is, with little or no concern for any particular historical context, and therefore are supposed to be defended or attacked by their theoretical merits alone. Yet as they attempt to accurately describe or rationally reconstruct real legal practices, past or present (the identification and application of the law, its interpretation, how legal scholars justify their claims, etc.), these abstract accounts of legal formalism are nevertheless bound to some of its flesh and blood instances, or rather, to their (accurate or inaccurate) representations. This is why a non-trivial number of these debates assumes wholeheartedly the claims inherited from the TA, and rests, explicitly or implicitly, on many of its underlying assumptions. By doing so, the traditional understanding of legal formalism not only remains unchallenged but is also kept alive and well; its status of common sense is preserved. And more importantly, it makes the morale of this account linger in the air of our legal and political imagination: we are not naïve anymore; we have woken up from the dogmatic dream.

The purpose of this work is certainly not to deny the relevance of the theoretical debates and criticisms around legal formalism. It aims, rather, at enabling us to recognise whether and to what extent such debates and criticisms may be underpinned by a general understanding whose yield is tainted by the dominant historiography. Hopefully, this will allow us to see how the questions and challenges, but also the solutions and lessons, of 19th-century jurisprudence are persistent and still have a lot to teach us today.

---

[22] Markus D Dubber, 'Legal History as Legal Scholarship' in Markus D Dubber and Christopher Tomlins (eds), *The Oxford Handbook of Legal History* (Oxford University Press 2018) 101, referring to the realists and their reaction against formalism in the US. The relevance and lasting effects of 19th-century conceptions of the law and methods of interpretation is also felt in Latin America, for which see the observations by Argentinian legal philosopher Roberto J Vernengo in his *La Interpretación Jurídica* (UNAM 1977) 13 *in fine*, f.

[23] Depending on the reader and their background, this might or might not ring true, especially because formality is ubiquitous in the law and 'formalism' is a specially broad term with many uses (see next chapter). However, the generalised hostility I point to here is that which can be observed in legal theoretical debates, especially regarding 19th-century theories of law and adjudication. Even where (limited or shy) defences of formalism are in order, the consensus is that 19th-century excesses and naivety about the law and legal reasoning are something that we have proudly overcome. See n. 12-18 and associated texts.

Methodological considerations

This work concerns the intellectual history of the phenomenon generally known as 'legal formalism', which is historically limited in time and space. In particular, it is a history of the ideas about the law and legal reasoning espoused by prominent jurists of 19th-century Continental Europe: the drafters of the Civil code and the School of the Exegesis in France, and Conceptual Jurisprudence in Germany. It is not, in the first place, a history of how judges, at that time and those places, understood their role and decided the cases that fell on them. This explains why there is no case law analysis here.[24]

Nor is this work a history of the concept of 'legal formalism'. That is, it does not seek to trace the contextual inception and development of a term and its uses over time. As far as I am aware, the conceptual history of 'legal formalism' has not yet been written, and it would undoubtedly be of great value. This work may serve as a contribution to a chapter of that history (of a specific century and in particular places), but it does not intend to write it.

Nor does this work, finally, constitute a theoretical analysis of 'legal formalism'. Contemporary legal theory has extensively engaged with this kind of analysis. This dissertation builds on some of the theoretical efforts made in that field, as it needs to clarify what claims we are dealing with and to demarcate the kind of 'legal formalism' that interests us here from other kinds of formalism and related concepts pointing at similar but different phenomena. In this sense, and also in a more general sense, I opt for doing what Michael Moore described as consciously imposing the author's second-order beliefs about the subjects' practice, that is, bringing in the contemporary *concepts* of the practice.[25] Taking this approach means that the concepts and categories of contemporary legal theory are imposed onto a past legal culture, which did not know them. For instance, a contemporary concept of legal interpretation will leave out many operations

[24] While the available reports and commentaries of case law in 19th-century France (especially in the first half) are somewhat limited in their analysis, and the judicial decisions themselves are known for being tremendously succint, a good source of the *commentaires d'arrêt* and their role during the 19th century can be found in Édouard JM Meynial, 'Les Recueils d'arrêts et Les Arrêtistes' in Société d'Études Législatives (ed), *Le Code Civil, 1804-1904, Le Livre du centenaire*, vol 1 (A Rousseau 1904). See also Jacques Krynen, *L'État de Justice, France, XIIIe-XXe Siècles. t.II: L'emprise Contemporaine Des Juges* (Gallimard 2012) esp. 128 ff, 192 ff.

[25] Michael Moore, 'The Need for a Theory of Legal Theories: Assessing Pragmatic Instrumentalism' (1984) 69 Cornell Law Review 988, at 1001. Moore distinguishes between two ways of doing intellectual history: a "modest" way, which respects the subject's second-order beliefs about the relevant practice, and an "imperial" way, which imposes the historian's concepts of the practice. I think that the name is not a happy one, as it suggests that it somehow does violence to the historical subjects, whereas the goal is precisely the opposite: to make them "alive" and bring them into the conversation in a way that they can be heard today. The point is debatable, however. A good defence of the idea of history as an imperialistic enterprise which does violence to the past in Constantin Fasolt, *The Limits of History* (U of Chicago Press 2004).

of legal reasoning that in 19th century were regarded as interpretative. I take note of this, to not falsify the subjects' ways of organising their debates and not fall into anachronism, but I do not take their concepts as my own organising categories. I make the distinction, for instance, between interpretation and reasoning by analogy, or defeasibility. I do this, even at the risk of organising 19th-century legal thinkers' ideas "in ways they might find alien"[26] because I believe that contemporary concepts and categories, or more broadly, our conceptual schemes about the law today, have more explanatory power for us than those that predominated then. Our concepts about the law and legal reasoning are thus able to speak to contemporary readers in a way they can understand and relate to,[27] while at the same time are able to account for past ways of making sense of the same phenomena.

So, this work neither studies past case law, nor traces the history of a concept, nor is it about analysing that concept in the abstract. It focuses, instead, in two particular instances of legal formalism, as framed by a dispute whose roots and developments can only be explained in the context of the recent history of the Civil law tradition. From this perspective, what emerges from behind the term 'legal formalism' and other such terms consists of a series of claims about the law and its application: a cluster of ideas and visions of law. It is these claims that interests us here. This kind of study poses several methodological challenges.

A first challenge is to accurately distinguish between conceptions and ideas about the law and the operations of concrete legal orders. It is important to note that, in principle, conceptions and ideas on the part of legal scholars tell us little about how legal institutions operated or how judges actually decided cases during 19th century in Europe. The views and claims of legal science -our object of study- are one thing; whether, and if so, to what extent, this way of conceiving the law and its application had institutional correlation, is a different thing. While there is an ongoing debate regarding the status of legal science vis-à-vis legal practice,[28] there is no need for us to dwell on it here. Suffice to say that, to the extent that those who theorise about the law have influence (directly or indirectly) in shaping legal education and legal institutions, the split between these two spheres is not absolute. In what matters here, this means that the *history* of legal thought is

[26] Moore (n 25) 1001.

[27] *Ibid.,* 1001 f.

[28] Particularly whether it can reclaim a purely descriptive function or whether its task is inevitably compromised by the normative elements of the practice or even by normative elements external to the practice. See Veronica Rodriguez-Blanco, 'The Methodological Problem in Legal Theory: Normative and Descriptive Jurisprudence Revisited' (2006) 19 Ratio juris 26; Andrew Halpin, 'Methodology' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell 2010); and Julie Dickson, *Evaluation and Legal Theory* (Hart Publishing 2001).

inextricably bound to the *history* of legal practice, but it does not imply that theory and practice in law are undistinguishable from each other.

The second challenge comes from the kind of sources and arguments object of study. They may make it appear as if the present exercise was not about the history of legal thinking but about legal thinking, full stop. Were it not for the fact that these ideas and conceptions about the law were held about two to one century ago, I would not need to justify my use of contemporary concepts to explain other people's legal ideas, as that would be a completely natural form of argumentation in a context of competing or at least alternative legal theories. But people thinking about the law and adjudication two to one centuries ago lived in a quite different context from us. And context changes everything. In 1969, Quentin Skinner successfully introduced the distinction between what a historical actor said and what the actor meant by what was said. The proper understanding of past ideas, he affirmed, presupposes a grasp that goes beyond the meaning of the text itself, to how this meaning was intended to be taken.[29] And the fact is, what 19th-century jurists were *saying* about the law is only part of the issue; what they were *doing* by saying those things is something that can only be understood by means of appealing to context. It is important to recall that many things about legal institutions such as the judiciary or legal education could not be taken for granted then as they are now. Taking into account the broader 19th-centuty political, institutional and intellectual landscape is necessary to help explain the struggles underlying the opposition between 'formalists' and 'anti-formalists' and thus, to *understand* them. The aim is to bring these questions to the front so that the biases entailed by temporal distance can be, if not eliminated, at least reduced.

The third challenge has to do with the fact that this dissertation only focuses on France and Germany, while, admittedly, 'legal formalism' is a much wider phenomenon with many variations. The justification for this election is threefold: first, my interest is to draw attention to 'formalism' as part of a debate that has taken place in the context of the recent history of the Civil law tradition. Apart from the fact that the Common law has already had a long and intense debate on the topic,[30] my interest in studying the Civil law tradition stems from my hope that it contributes to a more comprehensive understanding of the convergences and contrasts existing within the debates on form and substance in European civil jurisdictions, and, in the near future, to open up a reflection about the challenges this poses for Latin American jurisdictions that partake in their

[29] The distinction between locutionary content (what it is said) and illocutionary act (what it is being done by saying what it is said) in the context of the history of ideas was introduced by Skinner in 'Meaning and Understanding in the History of Ideas', reprinted in Quentin Skinner, *Visions of Politics: Vol. 1, Regarding Method* (CUP 2002) ch 4.

[30] See corresponding references in note n. 1.

legal heritage. Second, in the context of this tradition, both the Napoleonic codification and German Pandectism as well as their respective anti-formalist reactions, are inevitable as a frame of reference in the long history of the theoretical and methodological debates about the law in modernity. Their relevance as models goes well beyond their colonial history and is inscribed in the heterogeneous processes of legal transplants, inspirations, and cross-fertilisations within Europe and beyond.[31] Third, interestingly, French and German modern legal sciences often are presented as being, in fundamental aspects, polar opposites. The ways in which multiple parallels and points of convergence are found is both striking and illuminating. Understanding what they have in common and how that helps explain the similar reactions they suffered is also a contribution this work aims to make.[32]

A further complication is that the legal claims behind the label 'legal formalism' do not amount to a fully articulated legal theory, and cannot, because of that, be treated as such. Legal formalism is presented as a set of claims with certain coherence and unity which may be said to represent a vision of law. However, this vision stems from an external reconstruction made by its critics. Part of this work consists, on the one hand, in examining whether these attributions are historically accurate, by means of contrasting it with what these schools and their main representatives have to say in their works; and second, in proposing an alternative reconstruction of their claims that shows if and to what extent are their legal ideas coherent, and what are the assumptions underlying these ideas that may make into a plausible conception about the law and its application. This is the fourth challenge.

Finally, the fifth difficulty is that what I have been calling "schools of law" or "schools of legal science" are not strictly delimited, nor are they monolithic phenomena. The groups of people "within" the Exegesis and Conceptualism did not necessarily identify themselves as members of any particular organisation, school or movement, and they did exhibit some degree of heterogeneity in their ideas about the law, the judiciary and related issues. Even so, I maintain that these groups do have a significant unity in terms of their conceptions of law given their belonging to a common legal tradition and a shared adherence to certain political-legal values. These elements are translated into shared frameworks in relation to the sources of law, its interpretation and the role of the judge, among others. And, perhaps just as important, they reflect on a shared practice

[31] In this sense, the traditional study of Latin American legal history as anchored to the Spanish (or Portuguese) colonial rule is reductivist and ignores the varied influences that countries such as Chile or Ecuador received from France and Germany, especially in terms of private law dogmatics, as well as elements taken from other places or developed originally.

[32] The differences and commonalities are touched upon and developed in chapter 2.

of doing legal doctrinal scholarship. As will be shown, this common allegiance has a more formal expression (through the control of legal education) in the case of France but is equally strong in the case of Germany.

Plan of Exposition

This work is divided into six chapters and a final section with concluding remarks.

The first chapter maps the different concepts of 'legal formalism' found in the literature which could lead to confusion. It desambiguates the concept of 'legal formalism' we are dealing with in this work and outlines its main features in a way that will be useful in the following chapters. Finally, it clarifies a possible confusion between the concepts 'legal formalism' and 'legal positivism'.

The second chapter presents what I have called 'Traditional Account' on 19th-century legal formalism in Continental Europe, especially regarding the codification process and the School of the Exegesis in France, and Conceptualism in Germany. Against the background of national and regional historiographies, it outlines the content of this account and shows how it originated and developed from the beginning of the 20th century. As I present it, this account is a reconstruction of various narratives that are not always totally consistent. Part of the work of this chapter is thus to convincingly show that an overarching narrative which goes beyond national borders is plausible and illuminating in ways that fragmented national accounts are not.

The third and fourth chapters offer a contrast between the content of the Traditional Account and the works of the main targets of "formalism", that is, codifiers and the Exegesis in France, and Conceptualism in Germany. In particular, it tests the main claims about the law, legal reasoning and the role of the judiciary attributed to them against what they had to say about these topics themselves. This exercise shows that the TA presents a distorted picture of 19th-century conceptions of law and adjudication. In the case of France, the focus is on three tennets generally attributed to the codifiers and exegetical authors. First, the reduction of all the law to the legislative texts – this is generally referred to as the "cult of the text of the law" (or "textualism"); second, the belief that the law is a closed, complete and coherent body of clear norms; and third, the idea that the law could be mechanically applied, by purely deductive means from the written text to the facts of the case. In the case of Germany, the focus is on the authors of Pandectism from Puchta onwards but taking into account the early works of Jhering. The conceptual system that German dogmatics built from Roman Law and other sources deserves special attention here. This system was supposedly taken to be closed, complete, coherent, clear, and give place to a mechanical style

of legal reasoning, where deduction had a major, if not exclusive, role to play. These two chapters aim to show neither the French codifiers or the Exegesis nor Conceptualism were formalists, as this term is generally understood.

The fifth chapter explores what remains of legal formalism after the historical review, and in what sense 'formalism' captures some truth of the historical reality presented in the two previous chapters. It outlines how the debunking of the "myth of formalism" in the U.S. resulted in a dismissal not only of 'legal formalism' as a historically accurate concept, but also in its dismissal as a theoretically valuable category, and even further, in the conclusion that the opposition between 19th and 20th centuries legal thought would be the result of a strawman created by the critics; a dispute based on a false disagreement. This chapter argues that this conclusion is untenable for continental Europe and defends that the disagreement is theoretically and practically significant. In particular, it shows in what sense the new picture of 19th-century legal thinkers and methodological trends can be said to have an intimate connection with *formality* and *formal reasoning* in the law. Following the conceptual model developed by Atiyah and Summers, it finds in the Exegesis and *Begriffsjurisprudenz* a commitment to a specific view of formality in the law along three axes: authoritative formality, interpretative formality, and mandatory formality. This commitment to formality in the law allows us to explain the reaction by jurists and schools emerging from the 20th-century jurisprudential turn to sociology and empirical sciences.

The sixth chapter fleshes out the claim that the opposition between 19th and 20th-century conceptions of law is significant and holds the key to understanding 19th-century legal thought beyond the label of 'formalism'. It shows what underlying fights animated this opposition, what projects and values they were defending, and why they were doing so. The chapter proposes three ways in which this opposition can be meaningfully explained at the level of political-normative projects for the law: first, as a dispute over the opacity of norms; second, as a dispute over the nature of legal orders and the role of legal science in their development; and third, as a dispute over the meaning of the monopolisation of legal sources by the state.

The specific ways in which these disputes occurred is distinctive to the 19th and early 20th centuries. It is, in this sense, idiosyncratic. Yet the core of these disputes appears to be persistent and, if not universal, ubiquitous in the experience of those who study, teach and practice the law. The attacks on "formalism" are recurring because something about the target proves to be extraordinarily resistant or even resilient. This helps make sense of the quote above that "[t]he idea that 'formalism has already been thoroughly discredited' is often cited at the beginning of a fresh

attack on it"[33]; that the opposition between formalism and anti-formalism is one that we have seen repeated time and time again in the history of legal ideas. For our generation, this opposition has come back in hand with the debates over AI, which cast doubt on some of the consensus about legal reasoning and the role of the judiciary in contemporary democracies. Only this time, more than ever before, that which appeared as a dream, an illusion, and certainly a pernicious fiction about the possibilities of adjudication, can be plausibly presented as being a reality at hand. While this thesis is not meant to discuss this and related possibilities, if the challenges to the TA and the underlying disputes to formalist/anti-formalist positions presented here are sound, it would mean that the scenario of the "automaton-judge"[34] as a desirable scenario cannot be traced back, nor attributed, to 19th-century European legal science. If mechanical adjudication was ever a dream, it was not dreamt by these 19th-century jurists.

The epigraph in this chapter expresses both a great insight and the irony of Unger's warning to anti-formalists. He affirmed that formalists believed "that words usually have clear meanings", and "that the legal system will dictate a single, correct solution in every case. It is as if it were possible to deduce correct judgments from the laws by an automatic process."[35] At the same time, he claimed that "the destruction of formalism brings in its wake the ruin of all other liberal doctrines of adjudication".[36] Unger wrote this with the understanding that no coherent theory of adjudication was possible on the premises of liberal thought and that a criticism of formalism would reveal this with dreadful consequences (for liberalism). The irony is that, even though he had bought the worst distortions about 19th-century formalism, he still could see that modern liberal democracies and formalism as a theory of adjudication (and legal orders) were in a close yet fraught relationship. In writing this dissertation, I hope that, stripped of the caricatures and yet retaining its distinctive commitment to formality, the role of 19th-century legal science in building and shaping that relationship can be recognised and better understood.

---

33 See Stone (n 18) n 2, with reference.

34 The concept is from Francesca Ceresa Gastaldo, 'The Automaton-Judge: Some Reflections on the Future of AI in Judicial Systems' (2024) 14 Sortuz: Oñati Journal of Emergent Socio-Legal Studies 399.

35 All two quotes in Roberto M Unger, *Knowledge and Politics* (The Free Press 1984) 92.

36 *Ibid.*

Chapter One

'Legal formalism': Delimiting the Object of Study

This chapter does the preliminary work of delimiting the object of study and distinguishing it from related concepts that could lead to misunderstandings. It starts by singling out the concept of 'legal formalism' that is the object of this work, untangling it from other concepts of the term 'legal formalism' often found in the literature that may lead to confusion (§1). Next, it introduces this specific concept of 'legal formalism' as a theory or conception of adjudication, following the schemes developed by analytical legal theory (§2). It further characterises formalist conceptions of adjudication as a set of claims reaching beyond legal decision-making, touching on the nature of legal norms and the law in general (§3). Finally, the chapter clarifies a potential confusion between the concepts 'legal formalism' and 'legal positivism' (§4). A summary of the chapter's conclusions is presented at the end (§5). This exercise clears the way for us to delve, in the next chapter, into the historical version of 'legal formalism': the Traditional Account of 19th-century legal formalism in France and Germany.

1. Disambiguation

'Legal formalism' is a term with many meanings. It does not correspond to one single concept and thus, it must be first disambiguated to specify to which one exactly this work is devoted. This section briefly introduces some of the most widely used concepts of 'legal formalism' that are *not* relevant to this thesis. This exercise is necessary to avoid confusion and to clarify that various uses of the term are as legitimate and recurrent as the one that demands our attention here. The following section fleshes out in more detail the concept of 'legal formalism' that is the subject of this thesis.

A first concept of 'legal formalism' corresponds to an epistemological and methodological stance whereby legal theory can only know with universal validity (i.e. "scientifically" or

"objectively") the form of law, as opposed to its substance.[1] This form, or rather forms, are rational categories with logical consistency and are permanent, as opposed to the contingency of the content of particular laws at particular times. From this perspective, the project of a general jurisprudence is to provide "a skeleton by means of which the essential characteristics of any conceivable historical manifestation of the legal may be identified."[2] This kind of formalism is broadly linked to the methodological crisis brought about by the transition from natural law theories to legal positivism in the 18th and 19th centuries.[3] In fact, this was a problem shared by many disciplines whose object of study was historicised but were themselves still heirs to a rationalist epistemology. For rationalism, "scientific knowledge" meant knowledge of abstract relations, and "objectivity" meant formal consistency.[4] As the law started to be conceived of merely as a *positum* by historical communities, the question arose of what kind of scientific knowledge could be obtained from it. According to Kant, jurisprudence could not be a science *stricto sensu,* as it was not possible to develop universal (i.e. apodictic) statements from it.[5] In this context, in order for jurisprudence to become a scientific endeavour, the only dimension of law that could be analysed was its formal and permanent structure.[6] This project is compatible with both empirical induction and *a priori* intuition.[7] The different doctrines known as "General Principles of Law" were the first articulate efforts made in Europe to discover and systematically present this structure.[8] It was Hegel who first criticised as "formalist" this kind of positive jurisprudence (especially in its appraisal of concepts such as "will" and "right"), because it could not apprehend

[1] An excellent overview in Felipe González Vicén, 'Sobre Los Orígenes y Supuestos Del Formalismo En El Pensamiento Jurídico Contemporáneo' (1961) 8 Anuario de Filosofía del Derecho 47. See also Giovanni Tarello, 'Formalismo', *Novissimo Digesto Italiano* (UTET 1961) 576 f.

[2] Judith Shklar, *Legalism. Law, Morals, and Political Trials* (HUP 1986) 33, referring to Kelsen's Pure Theory of Law.

[3] González Vicén (n 1) 48 f.

[4] *Ibid.,* 52.

[5] Hans-Peter Haferkamp, 'Legal Formalism and Its Critics' in Markus D Dubber, Heikki Pihlajamäki and Mark Godfrey (eds), *The Oxford Handbook of European Legal History* (OUP 2018) 930.

[6] Instead of adapting the means of study, the very concept of law would have been changed to meet the demands of rationalism. See González Vicén (n 1) 50 ff. The content of particular legal orders was, in turn, considered a practical, not scientific, task in the hands of practical jurists (*ibid.,* 55).

[7] Tarello (n 1) 577.

[8] A good example in Giorgio del Vecchio, *The Formal Bases of Law* (John Lisle tr, The Boston Book Company 1914). According to González Vicén ((n 1) 55 ff.), it was Feuerbach who imported Kant's distinction (meant for natural sciences) between form and matter to legal theory (see Anselm Feuerbach, *Über Philosophie Und Empirie in Ihrem Verhältnisse Zur Positiven Rechtswissenschaft* (Nachdr der Ausg Landshut, 1804, Darmstadt Wiss Buchges 1969) 33, 96 f). In the Common law, the first explicit articulation of such a view is in John Austin, *Lectures on Jurisprudence: Or the Philosophy of Positive Law* (Robert Campbell ed, 3rd edn, J Murray 1869) 60 f.

the true historical rationality of law. Later, he would be followed by many.[9] A contemporary development of this concept can be found in Weinrib's use of 'legal formalism' in private law.[10] Weinrib, trying to vindicate the term from caricatures of "mechanical application of the law", postulates that formalism is a theory of legal justification based on *forms*. These forms are legal relationships as defined by their internal structure.[11] As such, formalism allows to understand private law from within, providing internal coherence to its most distinctive features and making possible an "immanent moral rationality" for this area of law.[12]

A second concept of 'legal formalism' is attributed to some 19th-century doctrines of private law and, within it, especially the law of contracts.[13] 'Formalism' in this context means that the whole system of private law is based on a formal notion of free will, which acts like an axiom from which all other concepts and doctrines derive.[14] Jhering baptised this approach as the "formalism of will",[15] a term that made its way across the Atlantic and retained its currency until a century and a half later.[16] In the case of contract law, the principle of freedom of contract and the very category of contract as agreement of wills are taken to be purely formal, and thus disconnected from particular circumstances, internal motives, or consequences in concrete cases.[17]

---

[9] See William E Conklin, *Hegel's Laws: The Legitimacy of a Modern Legal Order* (Stanford University Press 2008). See also Haferkamp (n 5) 930 f.

[10] Ernest Weinrib, 'Legal Formalism' in Denis Patterson (ed), *A companion to philosophy of law and legal theory* (2nd edn, Blackwell 2010) 327 ff; and Ernest Weinrib, *The Idea of Private Law* (OUP 2012) 24 ff.

[11] See Shawn J Bayern, 'Rational Ignorance, Rational Closed-Mindedness, and Modern Economic Formalism in Contract Law' (2009) 97 California Law Review 943, 945.Weinrib, *The Idea of Private Law* (n 10) 28 ff.

[12] In this, he follows Unger, although with opposite goals. See Weinrib, *The Idea of Private Law* (n 10) ch 2.

[13] There are other related but different notions of formalism in contract law. One of them promotes a formal (i.e. textual) interpretation of contracts by judges and strict application of its terms; another one, called "economic formalism in contract law", promotes "that courts ought to be (rationally) ignorant and (rationally) closed-minded in particular ways" for reasons of economic efficiency (Shawn J Bayern, 'Rational Ignorance, Rational Closed-Mindedness, and Modern Economic Formalism in Contract Law' (2009) 97 California Law Review 943, 945). Both of them concern the limitation of choice to the judge in decision-making and thus relate to formalism in adjudication, as explained below. A defence that combines these two versions of formalism (called now "neoformalism") in Alan Schwartz and Robert Scott, 'Contract Theory and the Limits of Contract Law' (2003) 113 Yale Law Journal 541.

[14] Haferkamp (n 5) 933 ff.

[15] Rudolf von Jhering, *Geist Des Römischen Rechts Auf Den Verschiedenen Stufen Seiner Entwicklung*, vol 3 (Breitkopf & Härtel 1852) 413 n. 442.

[16] Duncan Kennedy, 'From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form"' (2000) 100 Columbia Law Review 94, 116.

[17] A summary in Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon 1979) 181 ff; and Lawrence Friedman, *Contract Law in America: A Social and Economic Case Study* (University of Wisconsin Press 1965) 20. This is associated in the U.S., with Langdell's views on contract law and Holmes' bargain theory of contracts. See Richard Epstein, 'Contracts Small and Contract Large: Contract Law through the Lens of Laissez-Faire' in F. H. Buckley (ed), *The Fall*

Politically, this formalism is associated with classical liberalism, which, after industrialisation and its social challenges, became conservative in defending a *laissez-faire* approach to markets and a reactionary stance against policies seeking progressive social transformation.[18] Thus, formalism in contract law would imply "a deliberate relinquishment of the temptation to restrict untrammelled individual autonomy or the completely free market in the name of social policy."[19] The first accusations of this kind of "formalism" appeared during the heyday of Pandectism in Germany,[20] and early in the 20th century in France[21] and the Common law world.[22] Against it, critics proposed to abandon the model of private law based on "abstract relationships"[23] in favour of a model sensible to substantive notions of purpose, interests and social function.[24]

A third concept of 'legal formalism', also associated with the term 'legalism', is that of a particular ethos according to which morality is "a matter of rule following" and moral relationships "consist of duties and rights determined by rules" among which legal rules are the paradigm.[25] In the extreme, it takes justice to be what the law prescribes (i.e. a legalistic conception of justice). This kind of formalism, used rather loosely both in academic and non-academic contexts, is said to be ubiquitous among those connected to the legal profession: judges, lawyers and all kinds of officials committed to bureaucratic ideals are seen as morally insensible by the public at large.[26] The hard-heartedness that made Javert so famous was precisely this legalistic zealotry of lawyers

---

and Rise of Freedom of Contract (Duke University Press 1999); and Eric Posner, 'The Decline of Formality in Contract Law' in FH Buckley (ed) (Duke University Press 1999) 64.

[18] Linking formalism in contract law to the courts' commitment to *laissez-faire* in the Common Law, Atiyah (n 17); Grant Gilmore, *The Death of Contract* (Ronald Collins ed, Ohio State U Press 1995); and Friedman (n 17). A critique in Epstein (n 17); and Posner (n 17) 66 ff.

[19] Friedman (n 17) 20.

[20] Puchta was early accused by Stahl of this kind of formalism. See Haferkamp (n 5) 933 ff.

[21] Louis Josserand, *De l'abus Des Droits* (A Rousseau 1905). Although some hints of this anti-formalist critique appeared earlier. See Jean Charles Laurent, *Principes de Droit Civile Français*, vol 20 (Durand & Lauriel 1876) 428.

[22] Roscoe Pound, 'Do We Need a Philosophy of Law?' (1905) 5 Columbia Law Review 339, 339. See Mathias Reimann (ed), *The Reception of Continental Ideas in the Common Law World, 1820-1920* (Duncker & Humblot 1993); and Haferkamp (n 5) 936.

[23] Friedman (n 17) 20.

[24] Most notably Rudolf von Jhering, *Der Zweck Im Recht*, vol 1 (6th edn, Breitkopf & Härtel 1923) 50 ff, 346 f; Léon Duguit, *Souveraineté et Liberté: Leçons Faites à l'Université Columbia (New York) 1920-1921* (F Alcan 1922) 142; and Léon Duguit, *Traité de Droit Constitutionnel: La Théorie Générale de l'état*, vol 5 (2nd edn, E de Boccard 1923). An overview of this trend in France in Georges Ripert, *La Règle Morale Dans Les Obligations Civiles* (LGDJ 1927) 151.

[25] Tarello (n 1) 574; and Judith Shklar, *Legalism. Law, Morals, and Political Trials* (HUP 1986) 1. To Shklar, "legalism" involves more than this *ethos* and is connected to formalism as a theory of law and adjudication. Cf., Neil MacCormick, 'The Ethics of Legalism' (1989) 2 Ratio Juris 184.

[26] Tarello (n 1) 574; Shklar (n 25) 5 ff.

and other legal officials who place the observance of rules, and especially legal rules, as the ultimate standard of ethical conduct, as privileged reasons for action that trump any other consideration that may recommend against them.[27]

Apart from these three concepts, there are other, more restricted or lesser-used notions of 'legal formalism'.[28] The notion of "semantic formalism" in the context of theories of statutory interpretation, for instance, presents interpretation as the recovery of an "objective meaning".[29] Another such concept is the preference or even abuse of formalities as a technique of regulation of transactions or in procedural matters, as opposed to, e.g., the intention of the parties, or material truth. In this context, a "formalist" law is that which produces legal effects of different kinds only after the strict verification of certain forms or rituals specified in advance. This kind of formalism is often associated with "archaic" legal orders and used as synonym with 'ritualism'.[30]

This work sets all these concepts to one side. Some of them may intersect and overlap in different ways with the 'legal formalism' that is the object of this thesis, but they are different from it. The 'legal formalism' that concerns us here points to a particular conception of adjudication (and, as will be shown, also a particular conception of the law and legal norms). It is the most widely used concept of 'legal formalism' nowadays and, following Giovanni Tarello, "the most important one, as it is used as a label for a series of legal orientations and movements in the course of that methodological controversy in whose history to a great extent resolves the history of -especially, but not exclusively continental- legal science of the past century and the current one."[31]

2. Legal formalism as a theory of adjudication (and something more)

When explaining that the application of rules[32] at some point involves making "a choice between open alternatives", Hart famously wrote that "[t]he vice known to legal theory as formalism or conceptualism consists in an attitude to verbally formulated rules which both seeks to disguise and to minimize the need for such choice."[33] It is this dual idea of

[27] See Leo Katz, *Ill-Gotten Gains: Evasion, Blackmail, Fraud, and Kindred Puzzles of the Law* (U of Chicago Press 1996); and Leo Katz, 'Form and Substance in Law and Morality' (1999) 66 The University of Chicago Law Review 566.

[28] For still other uses of the term see Tarello (n 1).

[29] Pierluigi Chiassoni, *Interpretation without Truth: A Realistic Enquiry* (Springer 2019) 80 ff. This concept is related to the formalism object of this thesis, as it ends up restricting the space for choice to judges in interpreting the law.

[30] See Tarello (n 1) 573.

[31] *Ibid.,* 577.

[32] In this context I use 'rules' and 'norms' interchangeably.

[33] HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 127, 129.

disguising/minimising the need for choice that Frederick Schauer used by the end of the '80s to develop an analytical mapping of formalism. Schauer distinguishes between three different meanings of 'legal formalism', at the heart of which he finds the idea of deciding according to rule.[34] Following general rules always involves, in his account as in Hart's, the "screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account."[35] Rule-sceptics claim that this pretended screening-off does not bind the decision makers, who are always free to decide according to all relevant factors. In contemporary debates, this idea of the law being able to determine the content of the law in particular cases is deemed most characteristic of a formalist theory of adjudication.[36] This includes general theories as well as theories whose scope is limited to a particular area of law.[37] In the context of the scheme above, presenting a decision as if it were bound by rules (when in fact it is not), is to fall under one of the first two species of 'formalism':

> (i) *Denial of choice within norms.* Paradigmatically, 'formalism' involves the denial of the judge's choice when applying an indeterminate norm. A judge would be formalistic if, in specifying the meaning of an indeterminate term or phrasing (thus making a choice or 'fresh judgment'), such specification was presented as definitionally incorporated into the norm.[38] In this sense, 'formalism' amounts to presenting a decision that involves a choice as if it were mechanically (*i.e.,* without having made such choice) derived from the rule.[39]

---

[34] Frederick Schauer, 'Formalism' (1988) 97 The Yale Law Journal 509.

[35] *Ibid.,* 509; and Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon 1991) 51 ff, 77 ff. Hart emphasises the coexistence of different levels of generalisation in the same legal system. See Hart (n 32) 129, 131 ff.

[36] See Brian Leiter, 'Positivism, Formalism, Realism' (1999) 99 Columbia law review 1138; Brian Leiter, 'Legal Formalism and Legal Realism: What Is the Issue?' (2010) 16 Legal theory 111; Lawrence Solum, 'The Positive Foundations of Formalism: False Necessity and American Legal Realism' (2014) 127 Harvard Law Review 2464; Marcin Matczak, 'Why Judicial Formalism Is Incompatible with the Rule of Law' (2018) 31 Canadian Journal of Law & Jurisprudence 61; and Bojan Spaić, 'Formalism' in M Sellers and S Kirste (eds), *Encyclopedia of the Philosophy of Law and Social Philosophy* (Springer 2023) 987 990.

[37] Two examples are constitutional law and international law. See Mark V Tushnet, 'Anti-Formalism in Recent Constitutional Theory' (1984) 83 Michigan Law Review 1502; and Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (OUP 2013), respectivly. For contract law, see notes 17-24.

[38] Schauer discusses this kind of formalism by referring to the famous case in the U.S., *Lochner*. Although not necessarily linked, this kind of formalism would come easily from certain kinds of naturalism, such as Blackstone's. See Schauer, 'Formalism' (n 33) 511 ff.

[39] Of formalism as a pretended "mechanical" or merely "deductive" form of legal decision-making see, for the U.S., Roscoe Pound, 'Mechanical Jurisprudence' (1908) 8 Columbia Law Review 605; Duncan Kennedy, 'Legal Formality' (1973) 2 The Journal of Legal Studies 351, 351, 359; Michael S Moore, 'The Semantics of Judging' (1980) 54 South California Law Review 151, 157; Morton J Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (OUP 1992) 16, 200; Juan A García Amado, 'Sobre Formalismos y Antiformalismos En La Teoría Del Derecho' (2012) 3 Eunomia 13, 14; Michael H Hoeflich, 'Law & Geometry: Legal Science from Leibniz to Langdell'

Hart's concept of formalism is centred around this kind of disguising or minimising of choice.[40]

(ii) *Denial of choice among norms.* 'Formalism' also means denying the judge's choice in applying a seemingly applicable norm even in its core of meaning, that is, even when the norm is linguistically determined. Since norms cannot specify all the conditions of their own application, the judge would always be free to decide whether to apply the seemingly most directly applicable norm or whether to take an escape route (*i.e.* applying another norm by building an exception or by applying a precedent, for example).[41] What is denied or minimised here is the choice to apply or not to apply the seemingly applicable norm.

As noted, these 'formalisms' are not recognised and defined by those who -allegedly- suffer from it, but are rather conceived of from the point of view of the sceptics, who think that decision according to rule is not possible: either because rules are not determinate or clear enough (i) or because the decision maker can always choose to take an "escape route" from the seemingly applicable rule (ii) From this stance, legal norms cannot bind the judge, so judges not only (or indeed never) apply but also (or always) create the law. Hence, in these cases the label 'formalism' boils down to the accusation that those who make legal decisions deny having had the space to make choices not previously made by the law. Instead, they claim to have decided only that which was already determined by legal rules but not yet specified for the particular case. From this perspective, any attempt by the judge to present legal decisions as if they were previously specified by the law is either a lie or a naivety. It is not relevant whether judges are supposed to lie systematically or to be tremendously ingenuous; the important thing is that they *do* have and make choices. Presenting a choice as already specified in the law, thus ignoring or denying the role of the decision makers in creating the law, that is the vice of formalism.[42]

There is another kind of formalism, which is interesting in a way the two previous are not: it does not rule out the possibility of law actually limiting the decision maker's choices.

(1986) 30 American Journal of Legal History 95, 96; François Gény, *Méthode d'Interprétation et Sources En Droit Privé Positif: Essai Critique*, vol 1 (LGDJ 1919) 68.

[40] Since, for Hart, choice exists only in the penumbra of rules, formalism (and its opposite, rule-scepticism) would also make sense only at the margins of legal adjudication (Hart (n 32) 127, and regarding the rule of recognition, 154.) This position is labelled "formalist" by those who deny the existence of plain cases. See Moore (n 38) 163.

[41] Schauer, 'Formalism' (n 33) 516.

[42] In this sense Shklar (n 25) 12; and Spaić (n 35).

(iii) *Restriction of choice.* Formalism may be conceived of as the denial of choice *to* the judge.[43] The legal order, not the decision maker, limits the choice and available escape routes to the decision makers. The ways in which a legal order can do so are various, such as setting clear-cut demarcation lines of what counts as a source of law, having highly formal and detailed formulation of rules, prohibiting the reasoning by analogy or restricting the admissible means of interpretation.[44]

The legal order can restrict choice in these and many other ways, and it can do so straightforwardly by means of legal regulation, indirectly through the prevalent theories and practices of scholars, judges and other officials, or, most likely, through a combination of both. Naturally, rule-sceptics will claim that given the fact that judges are always free to interpret rules in one way or another, or to follow the rule or disregard it, the supposed restriction of choice to the judge is always an illusion that falls under one of the two versions of formalism identified above.[45] Those who are not rule-sceptics will accept that restriction of choice to the judge is a real possibility, but still point out that there is a need to debate its desirability. Those who consider it both possible and generally desirable (in Hart's terms, those who seek to "minimize the need for choice") would be 'formalists' in this sense.

Now, for many authors, including Schauer, rules are rules because of their entrenched linguistic formulation,[46] and thus applying a rule means or should mean applying its "literal meaning".[47] This notion can be both an expression of formalism of the kinds (i) and (ii), or of a formalism of the kind (iii). This is why 'formalism' may be used as a synonym of 'textualism', and both, in turn, as a synonym of 'rulism'.[48] But this need not be the case. Many consider the literal

---

[43] Schauer, 'Formalism' (n 33) 522.

[44] *Ibid.,* 522 ff.

[45] See, for instance, Riccardo Guastini, 'A Sceptical View on Legal Interpretation' (2005) 2005 Analisi e diritto 139; Riccardo Guastini, 'Rule-Scepticism Restated' in Leslie Green and Brian Leiter (eds), *Oxford studies in philosophy of law* (OUP 2011).

[46] Schauer, *Playing by the Rules* (n 34) 62 ff.

[47] Restriction of choice thus means restriction to the literal meaning (whatever is meant by 'literal meaning', which is not a peaceful matter). Schauer does not understand this restriction as a restriction of the interpretative criteria; as he thinks that the rules *are* their literal meaning (or semantic equivalents), this meaning could obtain without interpretation. See Schauer (n 33) 522 ff, esp at 535. As per Hart, in plain cases judges are supposed to follow the language of rules, or rather, the "linguistic conventions" governing the meaning of rules. See HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard Law Review 593, 610.

[48] Schauer, 'Formalism' (n 33) 522 ff. Cf., Larry Alexander, "'With Me, It's All Er Nuthin'": Formalism in Law and Morality' (1999) 66 The University of Chicago Law Review 530, 531; Katz, 'Form and Substance' (n 27) 566 f; and more recently Richard H Pildes, 'Forms of Formalism' (1999) 66 The University of Chicago Law Review 607, 608.

meaning of a rule as only one (though very important) possible interpretation of it, along with the interpretations resulting from other criteria, such as systemic, historical, teleological, axiological, or a combination thereof.[49] This is the result of distinguishing between the rule's meaning and its meaning derived exclusively from linguistic considerations.[50] From this perspective, 'formalism' may equal 'textualism', but neither can be legitimately used as a synonym with 'rule-following'. 'Formalism' or 'textualism' would rather be a particularly narrow (and mistaken) understanding of what it means to follow (or to interpret) a rule. Indeed, since early on, many have considered a key aspect of 'legal formalism' the refusal to look "beyond" or "through" the letter of the law[51] to its spirit, intention, purpose or function, depending on the theoretical background.[52]

Because this scheme was developed in the context of the Common law, the judiciary has a leading role that in the Civil law context -and therefore in this work- it has not. In the first two cases presented by Schauer, "formalism" is attributed directly to the judges and can be proved by means of exposing the reasoning they develop in justifying a decision. As this thesis concerns certain Civil law jurisdictions in the 19th century, where formalism is said to be fostered by a strict adherence to the principle of separation of powers, the emphases are not placed on how the law is developed and kept autonomous by the judiciary through case law. As noted in the previous section, the judges and their reasoning in reaching decisions are not part of this study. Instead, the emphases are put somewhere else: on the codifiers and jurists who articulated the most influential

---

[49] An excellent theory of the argumentative structure and criteria of legal interpretation in Jerzy Wróblewski, *The Judicial Application of Law* (Zenon Bankowski and Neil MacCormick eds, Springer 1992). A comparative analysis of legal interpretation and its criteria (or "kinds of arguments"), following Wróblewski's scheme, in Neil MacCormick and Robert S Summers, *Interpreting Statutes: A Comparative Study* (Routledge 2016).

[50] In Wróblewski's scheme, for instance, the linguistic is one of the "semantically relevant contexts" of the law's meaning, along with the systemic and functional (Wróblewski (n 48) 91.) This does not suppose endorsement of the notion that every legal rule, even when its sense is clear, ought to be interpreted *stricto sensu* for it to be used in a decision. Indeed, this is not Wróblewski's position (ibid 91 f; also Marcelo Dascal and Jerzy Wróblewski, 'Transparancy and Doubt: Understanding and Interpretation in Pragmatics and in Law' (1988) 7 Law and Philosophy 203, 205 ff.) Cf., Schauer, *Playing by the Rules* (n 34) 62 f. For other authors, in contrast, the treatment of 'literal meaning' as the result of an interpretation according to linguistic directives necessarily depends on the distinction between disposition and norm, where the norm always corresponds to a disposition *as interpreted* and used as a reason for action. See Giovanni Tarello, *L'Interpretazione Della Legge* (A Giuffrè 1980). See also Pierluigi Chiassoni, 'On the Wrong Track: Andrei Marmor on Legal Positivism, Interpretation, and Easy Cases' in Paolo Comanducci and Riccardo Guastini (eds), *Analisi e diritto 2007: Ricerche di giurisprudenza analitica* (Giappichelli 2008) 149 ff.

[51] See Tarello (n 1) 577, under the label 'interpretative formalism'; Cass R Sunstein, 'Must Formalism Be Defended Empirically' (1999) 66 The University of Chicago Law Review 636; and Martin Stone, 'Formalism' in Scott Shapiro, Jules Coleman and Kenneth Himma (eds) (OUP 2004) 173 f, under the concepts 'overly rule-bound decision making' and 'easy case formalism' depending on whether the focus is on judicial practice or on the theory about the practice.

[52] The history of the contraposition letter/spirit of the law runs deep and has both biblical and Roman roots. On the oscillation between the interpretation *ex verbis* and *ex sententia* in classical Roman Jurisprudence see Bernard Vonglis, *La Lettre et l'esprit de La Loi Dans La Jurisprudence Classique et La Rhétorique* (Sirey 1968).

legal conceptions of their time, including those aiming at explaining and justifying what judges do and what they ought to do in deciding cases.

Still, Schauer's distinction is strikingly useful for addressing the Continental law cases of 'formalism'. Perhaps even more striking is the fact that Schauer's treatment of formalism parallels that of a continental legal philosopher, which must be a coincidence as they seem to have developed independently.[53] In 1980, Mario Jori had come up with a distinction between 'practical' and 'interpretative' formalism,[54] where the latter consists in the denial of choice by decision makers (i), (ii), and the former simply in the technique of deciding or reasoning by following rules (or "wholesale"), and thus respecting the restriction of choice made *to* the decision maker in advance (iii).[55] More explicitly than Schauer, Jori linked formalism to the feature of modern and contemporary legal orders as *closed* systems of normative justifications, based on formal sources that categorically determine what reasons are included in and excluded from valid legal argumentation.[56] In Schauer, as in Hart, this notion of closure and self-sufficiency of legal orders is also present but is nuanced, so the "limited domain" which represents the law remains relatively open to external considerations.[57] As will be shown, this idea of the law being a self-sufficient, closed, and complete order of norms is as crucial as the idea of legal rules being determined for understanding the accounts of 'legal formalism' in 19th-century Europe.

Generally speaking, this work takes into account both the ideas and debates of whether and to what extent should the law restrict choices *to* judges (iii), as well as the jurists' understanding of the nature of rule-following and legal reasoning more generally, with a focus on their supposed denial *of* choice when discussing the interpretation and scope of legal norms and institutions (i), (ii). Both kinds of 'formalism', analytically distinguished here between disguising and minimising choice; or between denial of choice by the decision maker and restriction of choice to the decision maker, are part of the same historical phenomenon known as '19th-century legal formalism'. Indeed, it is against the background of legal orders that opted for radically minimising the need for

---

[53] A comparison in Anna Pintore, 'El Formalismo Jurídico: Un Cotejo Entre Jori y Schauer' (2017) 79 Derecho PUCP 47.

[54] Mario Jori, *Il Formalismo Giuridico* (Giuffrè 1980).

[55] *Ibid.,* 25

[56] In this he follows Raz. See Mario Jori, 'Formalismo Giuridico' in Alessio Zaccaria, E Gabrielli and A Iannarelli (eds), *Digesto delle discipline privatistiche, Sezione civile* (UTET 1992) 125. Making this connection already in the '60s see Tarello (n 1) 577.

[57] Because of the rules' open texture, for Hart this openness can be built into the rules themselves. For Schauer, in contrast, this depends on external factors. See Frederick Schauer, 'The Limited Domain of the Law' (2004) 90 Virginia Law Review 1909.

choice (or supposedly did so) that the accusations of disguising or denial can be better explained. As will be shown, the formalism of the kinds (i) and (ii) is regarded as the ideological subproduct of a juristic culture "obsessed" with the formalism of the kind (iii).

The above helps explain why the debates and positions on the nature of legal orders and legal sources play a significant part of this study. As I intend to show, at its core 'legal formalism' is about law's autonomy and about legal reasoning's autonomy from other kinds of practical reasoning. The accusations of formalism that interest us here claim that formalists believe that the "legal" is clearly and completely marked off from the "extra-legal" and that the outcome of every legal decision is already contained or predetermined within the "legal"; that nothing "extra-legal" is added as input for the decision on the part of the decision makers.[58] In contemporary literature, 'legal formalism' is generally presented as the name of a -wrong- theory or conception on adjudication,[59] whereby judges are supposed to be strictly tied to the law and to decide cases according to a model of automated subsumption.[60] Hence the notions of 'automated judge' and 'mechanical jurisprudence'.[61] Thus, the main practical questions addressed by formalist conceptions involve the role of the judge and the nature and means of legal decision-making. And yet indirectly, formalism also supposes a certain understanding of the nature of legal orders and legal norms.[62] For legal reasoning to be completely autonomous, the "legal", the law, must be self-produced and self-sufficient in the areas that it is supposed to be applied to: it must never run out. Likewise, legal norms must be such that they can be applied (or followed) without the help of anything that is not already contained in them: they must be totally determined and clear in their meaning and scope of application, and they must not conflict with other legal norms.[63] All this seems like a lot to ask of the law. Seen in this light, it is not difficult to understand why formalism

[58] See Shklar (n 25) ix–x, 2. Her concept of 'legalism' is broader than legal formalism, but in this separation of law from other social spheres, especially politics, legal formalism would be the "most articulated defence" of legalism.

[59] This approach is ubiquitous, but see for all Leiter, 'Positivism, Formalism, Realism' (n 35); and Schauer, 'Formalism' (n 33).

[60] Antonio Bascuñán, 'El Mito de Montesquieu' in A Schopf and JC Marin (eds), *Lo Público y lo Privado en el Derecho* (Thomson Reuters 2017) 4.

[61] Pound, 'Mechanical Jurisprudence' (n 38) 605.

[62] According to Tarello adjudicative formalism ("interpretative" in his terminology) has never, in history, been divorced from formal conceptions about the law and legal norms, and also of legal science. Tarello (n 1) 580.

[63] Leiter talks about the law being rationally determined when the *class of legal reasons* justifies one and only one outcome (Leiter, 'Positivism, Formalism, Realism' (n 35) 1145.), which is broader than the claim that some legal rule directly determines one outcome. The broadening of the claim makes formalism a more plausible theory of adjudication, and yet that is not how it is usually presented.

is seen by many as a well-closed chapter of the past -a 'rationalist illusion' with no place in a contemporaneous and disingenuous legal science.[64]

3. The claims of legal formalism

Even considering the above as the basic core of what it means in the context of this work, 'legal formalism' remains too abstract a concept. Different emphases and degrees in the assumptions about the nature of law and legal norms, and also different ways of thinking in the autonomy of legal reasoning, mould unique physiognomies and characters which, at the level treated by analytical legal theory, remain undifferentiated. Formalism can be conceptual (legal adjudication means deciding only based on pre-existing law; rule-following implies sticking to the rule's literal meaning, and so on), normative (judges should decide only on the basis of pre-existing law; legal norms should be formulated in such a way that they can decide in this manner, and so on), or both. Likewise, there is great variety in the specific means of ensuring the law's autonomy, as this depends on the theoretical and practical means available at some particular time and place. However, more importantly, it depends on who's power or subjectivity, or what normative order it is that the law is supposed to be kept separate from. Historically, political power, religion, or the subjectivity of the judge are some of the most obvious examples.

Our object of study, hence, is not just any "formalism" in the abstract but that which is said to have concretely existed in some jurisdictions of 19th-century continental Europe, as described since the beginning of the 20th century. This approach brings in some historical particularities to the specific claims meant by the term and how these claims relate to each other. Although they will be identified and explained in detail in the next chapter, it is important to delimit them from the outset as these specific claims, and not the label "legal formalism", are at the centre of this investigation. This section explores these claims.

It is not an easy task to formulate precisely the claims that constitute the phenomenon of 19th-century 'legal formalism', given that beyond the general understanding of it provided by its critics, it remains largely inarticulate. Moreover, its characterisation has been made by critics and then historians with very dissimilar formats and purposes. What is central for some is marginal for others, and claims present here are absent there. Keeping this in mind, the following list is offered as a summary of the main tenets attributed to 19th-century legal formalism in continental Europe.

[64] Among others, see Carlos Alchourrón and Eugenio Bulygin, *Normative Systems* (Springer-Verlag 1971) 175 ff; Roscoe Pound, *Interpretations of Legal History* (Harvard University Press 2014) 129 f. With some caution, García Amado (n 38) 15.

(a) *Role of the judge.* The role of judges is to decide cases by applying pre-existent law. As they are not allowed to create new law, nothing external to the law can be taken into account in legal decision-making.

(b) *Sources of law and the legal order as autonomous.* The legal is clearly separated from the extra-legal by means of formal criteria. The law stems from clearly defined *sources,* which produce and modify the legal order. This means that the law has boundaries, which seals it off from other social norms and standards.

(c) *Law as a complete and coherent order.* The law is complete, thus providing a solution for every possible case brought before the courts (c.1). Also, the legal order is coherent and consistent, so all its parts are inspired by a single set of principles and values, and no contradiction between different rules exists (c.2).[65]

(d) *Legal texts as clear and fully determined.* Legal texts are univocal in their meaning and scope of application and thus need not be interpreted. The texts determine entirely the content of the decision in particular cases.

(e) *Legal reasoning as 'mechanical'.* Applying the law means merely deducing concrete consequences from general legal rules. The expression of this reasoning is the legal syllogism. Interpretation is generally not accepted, but where needed, it is restricted to linguistic criteria (a.k.a. 'textualism'). In accord with claim *(a),* judges cannot defeat legal provisions.

Claim *(e)* is perhaps the single most repeated tenet of formalism. It is sometimes opposed to deciding according to policy, values, or morality. This formulation is, however, misleading, as it presents deductivism (i.e., reasoning from general to particular) as opposed to deciding according to considerations other than legal. It thus confuses a kind of reasoning with the sources upon which reasoning is based, here expressed separately in claims *(e)* and *(b)*, respectively. At other times, this opposition is meant to express a difference in how the (legal) sources are interpreted. In this context, a mechanical way of reasoning would involve using the sources without interpreting them (or rather, interpreting them according to linguistic and/or systematic criteria) as opposed to interpreting them according to teleological or axiological criteria.

There is little agreement as to the precise meaning and scope of these claims, as to which of them are central to a formalistic view of law and which are only marginal, or what are the logical

[65] Some accounts speak of coherence, others of consistency, and still others of both, often without specifying the meaning of these concepts. I make the distinction here for clarity, but it should be borne in mind that there is a degree of ambiguity in the use of these concepts in the literature about the history of legal formalism in the 19th century.

connections between them. While sometimes they are considered to be logically tied to each other, at other times they are presented as incompatible.[66] In the same vein, it is not apparent how these claims fit within a broader theory of law, or how they relate to different methodological approaches to law. [67] It is not clear either whether these claims are meant to be a description of particular legal orders and the argumentative and interpretive practices arising therefrom, or normative claims, or a combination of both. Most importantly (because more difficult to ascertain), it is also doubtful whether these claims apply to the context of justification or to the context of heuresis of legal decisions. These questions will be dealt with in the next chapters. For now, it is enough to make it clear that, in the following, when the term 'legal formalism' appears, it means a conception whereby all or most of these claims are espoused: a 'formalist' school of thought, movement or person is, likewise, one that defends a position that contains all or most of them in a relatively articulate way.

4. Legal formalism and legal positivism: A clarification

Quite a few people have associated and even identified formalism with legal positivism.[68] On the one hand, it is identified with methodological formalism. On the other, and in what matters here, it is often identified with the kind of formalism object of this work, outlined in the previous section.[69] A clarification thus is in point.

Historically, the crisis of natural law theories in the 18th century and the emergence of and transit to legal positivism, roughly coincide with the period of codification, centralisation (and formalisation) of sources by the increasingly powerful nation-states and the professionalisation of

[66] See Leiter, 'Legal Formalism and Legal Realism' (n 35); Stone (n 50).

[67] For instance, analytical jurisprudence was "attacked" under the charge of formalism and defended from this accusation in Hart (n 46) 608 f. Different legal schools, theories and personalities are still associated with formalism. Hart himself accused Blackstone and Montesquieu as canonical formalists: the true "villains" responsible of introducing the idea of automated judges (*ibid.,* 610); other authors associate it more generally with legal scholars and the legal profession, including both analytical positivists and natural lawyers (Shklar (n 25) 12.)

[68] Pound, Frank and Fuller made the link between legal positivism and formalism, but also of both these terms with analytical jurisprudence. See, for instance, Anthony Sebok, *Legal Positivism in American Jurisprudence* (CUP 1998) 39 ff., who also identifies (a restored version of) legal formalism in the 19th-century US with classical English legal positivism (*ibid.,* 48 ff, 108). In Germany, Wieacker used *Begriffsjurisprudenz* as a form of *Positivismus,* but the association is even wider. See Hans-Peter Haferkamp, 'Positivismen Als Ordnungsbegriffe Einer Privatrechtsgeschichte Des 19. Jahrhunderts' in Okko Behrends and Eva Schumann (eds), *Franz Wieacker: Historiker des modernen Privatrechts* (Wallstein 2010); Stone (n 50) 180 ff; Guido Fassó, *Historia de La Filosofía Del Derecho 3. Siglos XIX y XX*, vol 3 (Pirámide 1996) 153; and García Amado (n 38) 14.

[69] See Stone (n 50) 181 f. Stone points out that these terms are confusedly associated. He blames the realists for levelling at the formalists "the vague charge of neglecting history and society in his understanding of law." (*ibid.,* 182)

the judiciary. Although this might help explain the many associations between positivism and formalism, it is far from enough to make them the same thing.

As it is widely understood today, legal positivism is a theory about the nature of law which fundamentally holds "that the existence and content of law depends on social facts and not on its merits"[70] ('social thesis'). On its own, this thesis entails little about legal reasoning and the application of the law, and even less about the completeness and coherence of legal orders or the rational determination of legal norms. It is contested whether this is a comprehensive view about what positivism is and has been, and whether it even captures the many concepts of the term 'legal positivism'.[71] It is also highly debatable whether legal positivists need to commit to any particular theory of adjudication, although many would answer in the negative.[72] Nevertheless, the fact is that there exists a great deal of variety among legal positivists' views on adjudication and legal reasoning. Within this diversity, the autonomy of legal reasoning from other forms of practical reasoning is not something that most positivists would assert. On the contrary, contemporary positivists have made many explicit attempts to rid themselves from the theses ascribed to formalism regarding law and adjudication. A key figure of legal positivism, Kelsen was indeed quite sceptical about the possibility of legal rules completely determining the content of legal decisions or even about a clear-cut distinction between law-creating and law-applying acts.[73] Hart's idea about the "open texture" of rules and the "discretion of judges" in hard cases as a result of such

[70] Leslie Green and Thomas Adams, 'Legal Positivism' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy (Winter 2019 Edition)* (2019) <<https://plato.stanford.edu/archives/win2019/entries/legal-positivism/>>. See also Jules Coleman, 'Negative and Positive Positivism' in M Cohen (ed), *Ronald Dworkin and Contemporary Jurisprudence* (Harvard University Press 1975); and Brian Bix, 'Legal Positivism' in Martin Golding and William Edmundson (eds), *The Blackwell guide to the philosophy of law and legal theory* (Blackwell 2005).

[71] See the distinction between theoretical, ideological and methodological positivism in Norberto Bobbio, *El Problema Del Positivismo Juridico* (Eudeba 1965). A defence of a normative kind of positivism in Jeremy Waldron, 'Normative (or Ethical) Legal Positivism' in Jules Coleman (ed), *Hart's Postcript. Essays on the postcript to The Concept of Law* (Oxford University Press 2001). See also the following note about Fernando Atria, *La Forma Del Derecho* (Marcial Pons 2016).

[72] See, e.g., Coleman (n 69); Leiter, 'Positivism, Formalism, Realism' (n 35) 1150, 1152; Bix (n 69) 31 f; Matthew Kramer, *In Defense of Legal Positivism. Law without Trimmings* (Clarendon Press 1999) 114; García Amado (n 38) 18. Cf., Ronald Dworkin, 'Legal Theory and the Problem of Sense' in Ruth Gavison (ed), *Issues in Contemporary Legal Philosophy* (Clarendon Press 1987). Dworkin refers to legal theories in general, not only to legal positivism. See also Atria (n 70) esp. 77 ff. Through the book, Atria argues how contemporary positivism lost track of its fundamental purpose: the affirmation and defence of a modern idea of law. In this understanding, legal positivism is not fundamentally a conceptual thesis about the nature of the law, and the difference between law-applying and law-creating institutions and practices as they exist is central to any theory of what the law *is*.

[73] Hans Kelsen, *General Theory of Law and State* (Anders Wedberg tr, Cambridge, MA: Harvard University Press [1945], Russell & Russell 1961) 135 ff, esp. 145 f; and Hans Kelsen, *Pure Theory of Law* (Max Knight tr, Second revised and enlarged edition / translated by Max Knight, U of California Press 1970) 236 ff.

open texture is another example of the explicit effort to distance positivism from formalism.[74] Similarly, Raz argued that if positivism's thesis about the autonomy of law (via sources) is correct, then the rejection of a formalist view of adjudication must follow.[75]

There seems to be one reason for the association of both concepts that is worth considering at more length, and that is that both positivism and formalism share a thesis about *legality,* that is, about the criteria for the law's existence and belonging to a certain legal order. Here, the contention that formalism is a theory about adjudication, whereas positivism is a "theory about the nature of the law", will not do.[76] For even if formalism is mainly a theory of the application of the law, to have any plausibility at all it must rely on some assumptions about the nature of law and legal norms (claims *(b), (c), (d)* above). Formalism would thus be parasitic on positivism's claims about the law and legal norms (Dworkin is on point here in saying that jurisprudence "is the general part of adjudication, silent prologue to any decision at law"[77]). One of the claims attributed to formalism is, as formulated in claim *(b),* that it understands the law, the "legal stuff", as clearly marked off from other normative considerations, that is, from the "extra-legal stuff". It is the formality of sources that makes up for the closure of law and, consequently, for law's autonomy. On the other hand, positivism's social thesis has been taken to mean that legal norms are valid not because of their content (or "merits") but because they have been issued or sanctioned by certain persons in certain offices, following specific procedures, etc. That is, legal norms are valid because their creation or recognition conform to certain formal standards, the existence of which can be independently asserted.[78] Some have pointed out that this test of formal validity or *pedigree* is exactly what lies at the core of both legal formalism and positivism.[79] Now, this is only partially true: it may adequately represent so-called "exclusive positivism", specifically through its sources thesis,[80] but not "soft" or "inclusive" versions of positivism, which assert that the rule of recognition can incorporate moral (or other normative) standards into the law and thus into legal reasoning.[81] Moreover, even though the social thesis was interpreted in the sense of the sources thesis, then all

---

[74] Hart (n 32) ch 7.

[75] Joseph Raz, 'On the Autonomy of Legal Reasoning' in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1994).

[76] Leiter, 'Positivism, Formalism, Realism' (n 35) 1150 ff.

[77] Ronald Dworkin, *Law's Empire* (Fontana 1986) 90. However, I do not want to go that far regarding the related implications of this claim for a theory of law.

[78] Joseph Raz, *The Authority of Law. Essays on Law and Morality* (Oxford University Press 1979) 38.

[79] In the U.S., Sebok (n 67). In a similar vein, García Amado (n 38) 29.

[80] Raz (n 77) 46.

[81] A good overview of this difference in Green and Adams (n 69).

we could assert is that formalism relies on this positivistic understanding of sources, but that does not make it the case that positivism entails formalism.

Considering the variety of positions within positivism on matters of adjudication and legal reasoning, the inclusion or not of moral standards in legal sources, and the role of the judge, among others, a conflation of formalism with positivism would be tremendously misleading. The distinction is especially important regarding the subjects of this work: for the most part, the attack against "formalists" led by "anti-formalists" of many kinds from the beginning of the 20th century can be better understood as representing a conflict *within* strands of legal positivism, not between positivism and something else.

In addition, some features of 'formalism' have been attributed to non-positivist scholars, most notably Dworkin. Via interpretative resources, Dworkin makes the kind of legal reasons include a wide array of moral standards so that the law -considering all these standards- is complete and coherent and, from the judge's point of view, never runs out.[82] Aside from Dworkin, formalism has also been associated with natural law and Kantian currents whose model of law is in many respects incompatible with legal positivism.[83] For these reasons, I will not be using 'legal formalism' interchangeably with 'legal positivism'. However, relevant connections will be pointed out where necessary throughout this thesis.

5. Conclusions

At this point we have singled out the concept of 'legal formalism' that will be the object of the rest of the thesis from other concepts of the same term. This chapter presented the concept of 'legal formalism' as a conception on adjudication in the way it is generally understood by analytical legal theory. It further characterised it as a set of claims about the role of the judge, the nature of legal orders, legal rules, and legal reasoning. These claims were spelt out (and labelled *(a), (b), (c), (d)* and *(e)*). Finally, we have also dispelled a potential confusion between the concepts of 'legal formalism' and 'legal positivism'. The next chapter turns to the subject of this thesis, the Traditional Account of 19th-century legal formalism, and in doing so, it makes concrete what until now has been addressed in the abstract.

---

[82] Julie Dickson, 'Interpretation and Coherence in Legal Reasoning' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy (Winter 2016 Edition)* <<https://plato.stanford.edu/archives/win2016/entries/legal-reas-interpret/>>; García Amado (n 38) 16 *in fine*.

[83] Fassó (n 67) 153 ff.

Chapter Two

The Traditional Account on Legal Formalism

This chapter presents what I call the Traditional Account of legal formalism ('TA'). It offers a detailed picture of how the phenomenon known as 'legal formalism' is understood by the literature devoted to the history of European law in modern times. In particular, it maps the TA's assertions about the codification process and the 'School of the Exegesis' in France, on the one hand, and German 'Conceptualism', on the other hand. Following the canonical historiographical accounts in both countries and a wider array of works dedicated to the history of the Western legal tradition, a general pattern emerges. This pattern corresponds to a well-known narrative regarding how 19th-century codifiers and scholars would have thought about the law, the role of the judge and adjudication. This narrative will be revised and challenged in the following chapters.

The chapter is structured as follows. First, it specifies the scope of the TA and how it touches on national and regional dimensions (§1). Second, it reviews the TA as the dominant approach to legal formalism in the relevant literature. (§2). It unpacks the central claims of the TA regarding the notions of legal formalism and mechanical application of the law (§2.A) as well as the historical and theoretical roots of legal formalism (§2.B). I show that, within the general picture presented by the TA, it is possible to distinguish two different kinds of legal formalism, anchored to different notions of legal order (§2.C) and yet underpinned by a common idea of how legal systems and legal rules work and, most importantly, convergent as regards the role of the judge and the nature of legal reasoning and adjudication (§2.D). These similarities made possible the eventual assimilation of one of these types of formalism by the other, which at the beginning of the 20th century provoked homogeneously hostile reactions from anti-formalist movements (§3). Finally, the chapter explains how the TA originated and developed from the beginning of the 20th century in France and Germany as a reaction against 19th-century dominant ways of legal thinking (§4). The main conclusions are summarised at the end (§5).

1. Scope of the Traditional Account: National and regional boundaries

There is a canonical narrative regarding the origins and significance of legal formalism in Europe, which has been a decisive factor in shaping the idea that formalist conceptions about adjudication have an idiosyncratic explanation; that legal formalism is an issue belonging to a well-defined place and epoch that may be best explained by reference to the peculiarities of certain socio-political conditions. I argue that this way of approaching legal formalism has often precluded a comprehensive study of it beyond its outermost layers, favouring either regional accounts that are overly-simplified, or more in-depth but fragmented accounts developed against the background of national historiographies.

Indeed, legal thinking in France, Germany and elsewhere in continental Europe had historically distinctive traits and developments, that makes them worthy of special consideration and study; this fact is not to be denied. However, national frontiers often give the false impression of sharp differences in legal culture where it does not necessarily exist. At the same time, they may give the impression of perfect legal unity within the boundaries of the state in circumstances where internal cultural particularities are strong enough to make this unity weaker than it first appears. There has been a gradual recognition of how the dominant national legal historiographies of the 19th and the first half of the 20th centuries often prevented us from noticing that national frontiers are both more fluid and more porous than was previously acknowledged, hence posing an obstacle to seeing the broader and shared nature of legal values and the common patterns of legal thinking. This explains the revitalisation of regional and particularly European legal history, in which it is acknowledged that legal communities and legal cultures are not perfectly stable nor materially identical to their national states. The study of the shared heritage of European legal thinking has received an increasing interest from the mid-20th century,[1] and has grown stronger and more vital than ever over the last decades.[2]

These considerations suggest that historical and cultural patterns of change affecting how the law is conceived and theorised, transcend, for the most part, national boundaries. French and German legal science and theories of adjudication underwent different, and in some respects

[1] The foundational milestone of this shift has been associated with Paul Koschaker, *Europa Und Das Römische Recht* (4th edn, CH Beck 1966), whose aim was to save Roman law from the crisis in which it was found after WWII. See Thomas Duve, 'European Legal History – Concepts, Methods, Challenges' in Thomas Duve (ed), *Entanglements in Legal History: Conceptual Approaches* (Max Planck Institute for European Legal History 2014) 38.

[2] I follow Lesaffer, who links this tendency with European integration at an institutional level. Randall Lesaffer, 'The Birth of European Legal History' in Markus D Dubber, Heikki Pihlajamäki and Mark Godfrey (eds), *The Oxford Handbook of European Legal History* (OUP 2018) 86.

contrasting, developments during the 18th and 19th centuries.[3] Yet with all their differences, remarkable points of dialogue and convergence may be established between the French version of legal formalism, on the one hand, and so-called 'scientific positivism' in 19th-century Germany, on the other. In the same vein, the anti-formalist reactions that the 20th century brought against legal formalism present similarities as to their aims and influenced each other through their leading proponents.

There is a promising path exploring legal formalism as a regional phenomenon, notwithstanding the particularities that each national experience may present. To outline the narratives about legal formalism against this broader background will require some effort to find a common ground among the somewhat disparate terminologies and sources, showing that they correspond to the same phenomenon across countries and jurisdictions. For the reasons explained in the Introduction, I draw the line in the Civil law jurisdictions of central and western European territories. Although the Common Law was not exempt from judicial formalism, the meaning and extent of this phenomenon are beyond the scope of this inquiry.[4]

This also draws our attention to the fact that historical accounts are not monolithic. They present different narrative explanations for certain phenomena, emphasised from different angles. In this sense, talking about a "Traditional Account" runs the risk of oversimplifying a more complex historiographic landscape. Still, I hope to show that there are some clear shared patterns regarding the narratives built around adjudication in the 18th and 19th centuries in continental Europe. Addressing these patterns without neglecting the particularities of each of these narratives is one of the aims of this chapter. To this effect, I focus on historiographical works that have been influential and, hence, have managed to transcend and affirm their narratives over time.[5]

---

[3] A succinct revision of these differences and how they survive until present days under the 'umbrella' of Romanistic and Germanic legal families in Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (3rd edn, Clarendon Press 1998) 74 ff. Particularly regarding the role of the judge in 19th century, John Dawson, *The Oracles of the Law* (U of Michigan Law School 1968) 374 ff.

[4] The topic of formalism within the Common law tradition has been treated ubiquitously. For references see Introduction, n. 1.

[5] I rely in the following general works: Dawson (n 3); Giovanni Tarello, *Storia Della Cultura Giuridica Moderna* (Il Mulino 1976); Jean Carbonnier, 'La Passion Des Lois Au Siécle Des Lumiéres', *Essais sur les Lois* (Repertoire du Notariat 1979); Franz Wieacker, *A History of Private Law in Europe: With Particular Reference to Germany* (3rd edn, Oxford University Press 1995); JM Kelly, *Short History of Western Legal Theory* (Clarendon Press 1992); Paolo Grossi, *A History of European Law* (John Wiley & Sons 2010); Michel Villey, *La Formation de La Pensée Juridique Moderne* (2nd edn, Presses universitaires de France 2013); Tamar Herzog, *A Short History of European Law: The Last Two and a Half Millennia* (HUP 2018); the contributions in Damiano Canale, Paolo Grossi and Hasso Hofmann (eds), *A Treatise of Legal Philosophy and General Jurisprudence: Vol. 9: A History of the Philosophy of Law in the Civil Law World, 1600-1900* (Springer Netherlands 2009); Randall Lesaffer, *European Legal History: A Cultural and Political Perspective* (Jan Arriens tr, 1st edn, Cambridge University

2. The Traditional Account of 19th-century legal formalism

Within the contemporary literature devoted to the history of law in modern times, it is commonplace that the legal culture of 19th-century Europe was haunted by the ghost of formalism. A conception about the law and the role of judges would have prevailed at the time, whereby the law was deemed a complete, closed and coherent body of rules, and judges were supposed to be strictly subject to the law under a "mechanical" scheme of adjudication.[6] The epitome of this view would have been represented by the Exegetic School (*L'École de l'Exégèse*) in France, originated in the new imperial faculties of law established in France in the 19th century after the Napoleonic codes, and (starting from different premises) the so-called 'Jurisprudence of Concepts' (*Begriffsjurisprudenz*), or 'Legalistic Positivism', in Germany, corresponding to the second generation of pandectists.

A consensus is also in place in politically attributing this formalistic culture to the French revolutionary spirit whereby there was a profound resentment against the *ancien régime*'s judges:

> "Since the Revolution, French legal culture has been dominated by the idea that the judiciary is entirely subordinate to other governmental powers. This view comes from Montesquieu's vision of the separation of powers. […] Montesquieu's theory of the judicial function was famously expanded by Beccaria, who was the first to compare a judgment to a syllogism […] Thus, the judge is left with no discretion, and ideally could be replaced by a robot. This view was almost unanimously accepted at the time of the French Revolution. The reason [is that] in pre-revolutionary France, courts were extremely powerful and posed a great obstacle to reforms."[7]

The Enlightenment's attack on medieval institutions gained traction not only in France. Wherever it went, it brought distrust for the old authorities and replaced it with confidence in universal reason.[8] This optimism was accompanied by the belief that, in those very years,

---

Press 2009); and the contributions in Heikki Pihlajamäki, Markus Dubber and Mark Godfrey (eds), *The Oxford Handbook of European Legal History* (OUP 2018). Where relevant, I complement these accounts with additional sources.

[6] See references in the previous note. Also, Bojan Spaić, 'Formalism' in M Sellers and S Kirste (eds), *Encyclopedia of the Philosophy of Law and Social Philosophy* (Springer 2023) 987.

[7] Michel Troper, 'What Is Interpretation of the Law for the French Judge?' in Yasumoto Morigiwa, Michael Stolleis and Jean Louis Halpérin (eds), *Interpretation of Law in the Age of Enlightenment* (Springer 2011) 140. See also Dawson (n 3) 375: "The leaders of the French Revolution soon undertook the urgent task of subjugating the judiciary."; and Kelly (n 5) 311 f.

[8] An "unbounded faith", in the words of Lesaffer (n 5) 444. Although this process had certainly started earlier. Many would signal to the humanists or, more generally, to the Renaissance. See Constantin Fasolt, *The Limits of History* (U

humankind had become aware of the potential of human reason and had summoned up the courage to use reason without the tutelage of the old authorities. These sentiments permeated all spheres of life, including social governance and the law. Already before the French revolution, codifiers in central Europe had attempted to reduce the law to legislation, and the judges' decisions to a purely deductive exercise.[9] The rationalism of the Law of Reason (*Vernunftrecht*) and Montesquieu's alleged views on the judiciary were signalled as the seeds for legal formalism and the mechanical application of the law.[10] Since Gény made his criticism towards the Exegetic School in France, and Jhering and Kantorowicz towards Conceptual Jurisprudence in Germany, these generalised assumptions only gained credence and popularity, until they became consolidated and part of our legal-historical imaginary: the 19th century was the century of formalism.

It was only at the turn of the 20th century that the pathology of 'formalism' was going to be revealed. After waking from the "dogmatic dream" of their predecessors, the expectations set by legal formalism for the law would be seen by 20th-century legal thinkers for what they really were: a dangerous fiction. The cure, naturally, came from a more "realistic" perspective, centred in the facts of the case, interests, practical utility, or sociological reality, according to the different jurisprudential trends which flourished during the 20th-century.[11] This change is deemed to be a sign of progress.[12]

---

of Chicago Press 2004); and Ernst Cassirer, *The Philosophy of the Enlightenment* (Princeton University Press 1951) 22, 49, respectively.

[9] See Damiano Canale, 'The Many Faces of the Codification of Law in Modern Continental Europe' in Enrico Pattaro, Damiano Canale and Hasso Hofmann (eds), *A Treatise of Legal Philosophy and General Jurisprudence Vol. 9: A History of the Philosophy of Law in the Civil Law World, 1600-1900* (Springer 2009).

[10] See *infra* §4. Allegedly, the "distrust of the judiciary played as large a part as the dictates of Montesquieu's logic in producing this strict separation of governmental powers, which was to remain a basic feature of French judicial organization." (Dawson (n 3) 375.) Similarly, Spaić (n 6). On the other hand, advocates of the new natural law theories, such as Carl Gottlieb Svarez, are said to have been "convinced of the possibility of every circumstance in life to be governed by rules." (Milan Kuhli, 'Power and Law in Enlightened Absolutism – Carl Gottlieb Svarez' Theoretical and Practical Approach' (2013) 21 Rechtsgeschichte - Legal History. Journal of the Max Planck Institute for European Legal History at p. 2.)

[11] See generally Hasso Hofmann, 'From Jhering to Radbruch: On the Logic of Traditional Legal Concepts to the Social Theories of Law to the Renewal of Legal Idealism' in Damiano Canale, Paolo Grossi and Hasso Hofmann (eds), *A Treatise of Legal Philosophy and General Jurisprudence: Vol. 9: A History of the Philosophy of Law in the Civil Law World, 1600-1900; Vol. 10: The Philosophers' Philosophy of Law from the Seventeenth Century to our Days* (Springer Netherlands 2009). See also Karl Larenz, *Methodenlehre Der Rechtswissenschaft* (Springer-Verlag 1991) 43; Eduardo García de Enterría, 'La Democracia y El Lugar de La Ley', *El Derecho, la Ley y el Juez: Dos estudios* (Civitas 1997) 98; and Martin Stone, 'Formalism' in Scott Shapiro, Jules Coleman and Kenneth Himma (eds) (OUP 2004) 227.

[12] See, *e.g.*, Paolo Grossi, *Mitología Jurídica de La Modernidad* (Trotta 2003) 64 ff, 93 ff, and especially 114 ff. Also, Juan A García Amado, 'Sobre Formalismos y Antiformalismos En La Teoría Del Derecho' (2012) 3 Eunomia 13, 14; Carlos Alchourrón and Eugenio Bulygin, *Normative Systems* (Springer-Verlag 1971) 175 ff; Brian Leiter, 'Legal Formalism and

The narrative sketched above (hereinafter referred to as Traditional Account or TA) gives a general picture of how 19th-century conceptions about the law and adjudication are commonly understood by the most influential literature. But this is just a rough picture. In the rest of this section, I provide an account of the meaning and scope of 'legal formalism', and make explicit its underlying assumptions regarding the nature of law and legal reasoning. This provides the model against which to contrast the historical evidence examined in the next chapters and to further assess how far the descriptive and explanatory value of the TA goes.

A. *19th-century legal science and the 'mechanical' application of the law*

A central contention of the TA is the idea that 19th-century formalism involves a strict subordination of the judge to the law (claim identified in the previous chapter as *(a)*), and a mechanical conception of adjudication whereby judges were allegedly expected to mechanically derive from the law the decisions for particular cases -claim *(e)*. Being a conception of adjudication, 'formalism' is not attributed to legal orders as such, nor to judges in deciding cases. Instead, formalism is ascribed to those who put forward views and theories *about* the law and adjudication: mostly legal scholars or what Continental lawyers call 'jurists' and their activity, legal science.[13] 'Formalism' hence amounts to a theoretical way of conceiving the nature of legal orders and adjudication.[14]

In the literature, formalism features in relation to the legal science of particular jurisdictions such as Germany, Austria, France, and Belgium, but also with regards to a more general trend across continental Europe, stemming from the legal strands of the Enlightenment in the 18th century. According to Franz Wieacker, in 19th-century Europe, positive legal science was formalist. Here 'formalist' stands for the belief that the activity of judges is "reduced to the logical process of correct subsumption".[15] The judicial model implied by this conception, Wieacker explains, is called "subsumption machine".[16] Similarly, Eduardo García de Enterría, in discussing

---

Legal Realism: What Is the Issue?' (2010) 16 Legal theory 111, 111, where he speaks of the notion of mechanical application of the law as "vulgar formalism" to say that it is not supported anymore; and Spaić (n 6).

[13] *Rechtswissenschaft* in Germany, *Science Juridique* in France, with their respective products: *die Dogmatik* and *la doctrine*. In France, however, *la doctrine* is also generally used to refer indistinctly to the activity and agents who produce it.

[14] On "legal science" and its possible meanings, Álvaro Núñez Vaquero, 'Five Models of Legal Science' (2013) 19 Revus. Journal for Constitutional Theory and Philosophy of Law/Revija za ustavno teorijo in filozofijo prava 53. See also the contributions in Aleksander Peczenik, Lars Lindahl and GC van Roermund (eds), *Theory of Legal Science* (Springer Science & Business Media 1984); and Aleksander Peczenik, *Scientia Juris* (Springer 2004).

[15] Wieacker (n 5) 345.

[16] *Ibid.*

the key role that the French Revolution played in institutionalising the connection between legislation and democracy, also states that under the guise of "legalistic positivism" in 19th-century Europe, the judge was supposed to be limited to "extract" from the relevant piece of legislation the particularisation required by the specific case.[17] In other terms, there was an attempt to "reduce the judge's function to a simple mechanism of automatic subsumption of pre-established norms";[18] to make the judges "mere mechanical applicators".[19] The same idea is replicated in many works devoted to the history of European law in 19th-century, and even in theoretical or doctrinal works that engage with this subject: under the label of "subjugated judges",[20] or of "judge-machine"[21] the notion of judges as mechanical applicators of the law is ubiquitous in the literature dealing with legal culture and adjudication in 19th-century Europe.

Although not always explicit, at the core of such notions as 'mechanical application of de law' or 'automatic subsumption' lies the gravitational centre of the whole narrative: that judges, when deciding a case, would only need to deduce correctly the normative consequences from a pre-established normative premise. As I will explain, the emphasis on the "only" here aims to contrast with what that the judges are *not* supposed to do: fill gaps, solve contradictions among norms, interpret the legal texts, evaluate the appropriateness of applying a seemingly applicable rule and, above all, create new law.

While this notion is central to formalism as depicted in the TA, it can hardly function alone in a conception of adjudication. For it to be a tenable position, a mechanistic view of adjudication must commit -either explicitly or implicitly- to certain further assumptions. First, it needs to sustain that for every case presented to the judge there will be a legal norm or standard that allows solving the controversy; that the law, in other words, is complete and never runs out. The norm or standard must be legal, naturally, for the judge is supposed to be "the mouthpiece of the law". This, in turn, supposes that the legal order is clearly differentiated from other normative orders, so that judges can draw their decisions only from premises internal to them. There are many ways to understand the completeness and autonomy of legal orders,[22] but in the case of formalism, the idea is that the

[17] García de Enterría (n 11) 87. The author notices that this is the case not only of French judges but of continental judges more generally, in contrast to the judges from the Common law, whose expected role and methods would have underwent a different path.

[18] *Ibid.,* 88.

[19] *Ibid.,* 90.

[20] Dawson (n 3) 379.

[21] Kelly (n 5) 312.

[22] The debates over the autonomy of the legal system and legal reasoning are vast. A survey of the debate from a variety of perspectives in Robert P George, *The Autonomy of Law: Essays on Legal Positivism* (Clarendon Press 1996). The

legal system is completely autonomous from other normative orders -claim *(b)*-, and that it is complete in such a way that there is nothing "outside" the legal order needed to decide a case -claim '*(c.1)*'. A further assumption involved in this picture is that the legal norms based on which the decision is made is simply "there" to follow: they are determined enough and need not be the product of an interpretative or integrative effort. The system is consistent and coherent -claim *(c.2)*, and norms are fully or almost fully determined so that interpretative faculties are not needed -claim '*(d)*'. Should they become necessary, they would be severely restricted, in accordance with claim *(e)*.

The TA affirms that 19th-century 'legal formalists' aligned themselves precisely with this group of assumptions, which, as seen in the previous chapter, are the assumptions that make up a typically formalist view of law and adjudication. While it is not always elaborated, the TA does anchor the formalist view of the role of the judge -claim *(a)*- to formalist claims about the nature of law and legal systems, and also to a formalist theory of rules. The former involves the idea that the law is a closed, coherent and complete system of norms -claims *(b)* and '*(c)*'. The latter, the assumption of legal norms as being always or almost always determined in their meaning and scope of application -claim '*(d)*'. These ideas would warrant the assertion that judges play "a merely mechanical role"[23] and that legal reasoning is "a mathematical-like undertaking"[24] -claim '*(e)*'.

To examine these ideas in detail, however, it must be recognised first that there is a significant disparity between two accounts: the French, derived from the processes of transformation of the system of sources of law and adjudication as a consequence of the Revolution and codification, on the one hand; and the German, on the other, where codification would not be successful until later and the development of law and its system was, instead, carried out by legal scholarship. These divergences are expressed in their respective notions of legal order, its sources and construction, and their respective formulations of the materials upon which legal decision-making would be carried out. To explain this branching off in the TA, some historical context is in point.

---

same happens with the problem of the legal system's completeness and the existence of gaps. See Alchourrón and Bulygin (n 12); Pierluigi Chiassoni, 'Lacune Nel Diritto. Progetto per Un Vademecum Giuridico' in Mario Bessone (ed), *Interpretazione e diritto giudiziale*, vol 1 (Giappichelli 1999); and Riccardo Guastini, *Le Fonti Del Diritto e l'interpretazione* (Giuffrè 1993).

[23] Vivian Grosswald Curran, 'Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law' (2001) 35 Cornell International Law Journal 101, 223.

[24] *Ibid.* See also García Amado (n 12) 16.

B. *Two different paths towards legal formalism*

One may reasonably ask why this generation of brilliant jurists on both sides of the Rhine would have fallen for such implausible fantasies. The TA has developed an all-encompassing explanation for this question, drawing from broader historical accounts to weave its own narrative. These relate to the background European socio-political and intellectual developments in the 17th and 18th centuries, and sometimes earlier. As these broader accounts are not the object of this thesis, they will not be scrutinised further here.[25] What matters is to show how the TA take elements of these historical accounts to build its own narrative. With those caveats, the story goes as follows.

Already in the late 17th century but notably more so by mid-18th century, Enlightened thinkers everywhere denounced what they thought were old-fashioned and arbitrary legal institutions:

> "The plurality of legal systems, sources and institutions, and the complexity of many legal rules, which are often organically grown and not rationally planned, have made the law inaccessible and incomprehensible to most people. It has turned the law into the instrument of the governmental and juridical elites to conserve and strengthen their position. A radical simplification and rationalisation of the legal system will lead to greater legal certainty and equality."[26]

Faith in human reason, a striving for liberties, legal equality and certainty of a new emergent capitalist class,[27] and a generalised hostility towards the institutions inherited from the past, all converged in opposition to legal particularism,[28] a legacy of the Middle Ages and the class that had monopolised the knowledge and application of this complex and fragmented law: the judiciary. Intellectual figures appeared from all over Western and Central Europe condemning the multiplicity and complexity of the legal sources, as well as the total discretion enjoyed by the

[25] Which does not mean that we should take everything they state at face value, even though some of the processes or events they describe are well documented or plausible.

[26] Lesaffer (n 5) 448.

[27] Max Weber, *Economy and Society* (U of California Press 1978) 636–7, 658.

[28] In this context, legal particularism means the existence of many overlapping legal orders with different sources that have neither common rules of competence nor common rules of adjudication. See Alain Wijffels, 'Ancien Régime France: Legal Particularism under the Absolute Monarchy' in Seán Donlan and Dirk Heirbaut (eds), *The Laws' Many Bodies: Studies in Legal Hybridity and Jurisdictional Complexity, c1600–1900* (Duncker & Humblot 2015). A characterisation of legal particularism in the Europe of the 11th-16th centuries, Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press 1983).

judiciary under the guise of *interpretatio*.[29] The opposition to what was seen as a "chaotic and haphazard legal environment in which uncertainty was the rule",[30] was joined by enlightened monarchs who saw in it the opportunity to gain more control over the law and the judges,[31] and favoured the unification and rationalisation of the legal systems within territories that were wholly or relatively unified.[32] Eventually, the opposition's efforts crystallised in two different but related demands: (i) the unification of the law to overcome the complexity and obscurity resulting from legal particularism, and (ii) the reduction of the judiciary's power vis-à-vis the sovereign legislator.[33] Two movements sought to tackle these demands: the codification movement and the science of legislation.[34] The centralisation of legal production by the state and the compilation and systematisation of existing law into *Codes* were the fundamental means of achieving (i). To achieve (ii), the law -as enacted in codes or sanctioned by the corresponding authority- should be applied strictly by the -now subordinate- judiciary.[35]

These are well-documented processes about the period. However, the way in which they are narrated and the uses to which they have been put vary greatly within historical works. We have already seen that the TA places great emphasis on the Enlightened confidence in legislation, which is said to have been as great as the mistrust in judges and their artifices.[36] It further emphasises that interpreting the law was seen as a fundamentally suspicious activity: in the extreme, it was considered that any doubt must be referred back to the legislator, which led to recourse to

[29] Maximiliano Hernández Marcos, 'Conceptual Aspects of Legal Enlightenment in Europe' in Enrico Pattaro, Damiano Canale and Hasso Hofmann (eds), *A Treatise of Legal Philosophy and General Jurisprudence: Vol. 9: A History of the Philosophy of Law in the Civil Law World, 1600-1900* (Springer 2009) 81, 85.

[30] Grossi (n 12) 66.

[31] *Ibid.*

[32] *Ibid,* 66 ff; 80 ff. Seán Patrick Donlan and Dirk Heirbaut, "'A Patchwork of Accommodations": European Legal Hybridity and Jurisdictional Complexity – An Introduction' in Seán P Donlan and Dirk Heirbaut (eds), *The Laws' Many Bodies: Studies in Legal Hybridity and Jurisdictional Complexity, c1600–1900* (Duncker & Humblot 2015) 9 ff.See also an overview of this process in Seán Patrick Donlan and Dirk Heirbaut, "'A Patchwork of Accommodations": European Legal Hybridity and Jurisdictional Complexity – An Introduction' in Seán P Donlan and Dirk Heirbaut (eds), *The Laws' Many Bodies: Studies in Legal Hybridity and Jurisdictional Complexity, c1600–1900* (Duncker & Humblot 2015) 9 ff.

[33] Hernández Marcos (n 29) 89 f.

[34] Grossi (n 5) 66 ff. On the science of legislation see Virgilio Zapatero, 'El Arte de Legislar. Estudio Preliminar' in C Pabón (tr), Jeremy Bentham, *Nomografía o el Arte de Redactar Leyes* (2nd edn, BOE Centro de Estudios Políticos y Constitucionales 2004) xxiii–xxiv.

[35] However, the codification movement and its achievements were not a homogeneous phenomenon. See Canale (n 9).

[36] García de Enterría qualifies this confidence in statutes as 'blind' (García de Enterría (n 11) 84.) See also Carbonnier (n 5).

the institutions of the *Référé Législatif* in France and the *Gesetzkommission* in Prussia.[37] These devices, conceived to prevent judges from creating law and thus usurping the legislator's powers, are not, of course, an invention of the TA. They did exist and did serve the purpose that the TA identifies. But their existence dates from much earlier, their operation was precarious, at best, and they did not survive long into the 19th century.[38] The TA makes it appear as if there was only continuity between these Enlightened ideas, the revolutionary implementation of artifacts such as the *Référé,* and 19th century legal science. In the following chapters I show that this is not the case.

Taking that into account, it is safe to say that the general spirit of the Enlightenment was oriented to make the judge subservient to the law. Where arrangements such as the *Référé* were not implemented or had failed, restrictions to judicial interpretation were proposed and sometimes implemented. In some cases, this meant restricting interpretation to the literal meaning and *interpretatio autentica, i.e.*, according to what the legislator had in mind when the statute was issued.[39] Previous ways of legal reasoning (*v. gr.* analogy, precedent, equity) came to be seen as exceptions or were forbidden.[40] The codification movement was fairly heterogeneous.[41] Nevertheless, it has been strongly associated with a conception of the law as a closed, exhaustive and coherent system of norms. This would be the Enlightenment's answer to the problems previously identified: multiplicity of sources, complexity of the norms, obscurity of legal reasoning, and the unbridled power that this handed over to the judiciary. The creation of systematic normative bodies would allow to replace all legal sources with a single one, while allowing the reduction of inconsistencies, ambiguities and gaps in the law. Some (certainly the TA) describe the codification processes as the replacement of the "old chaos of legal pluralism" with "an extremely rigid legal monism".[42] This description includes codifications whose purpose was fundamentally compilatory, as well as codifications that would have intended to abolish the old law and replace it with a new one. Finally,

---

[37] Zapatero (n 34) lxxix–lxxx.

[38] The *Referée,* for instance, forbade any kind of judicial interpretive engagement, requiring instead that interpretation be made through the legislature, which would clarify or rectify the corresponding provisions. Crucial and generally omitted, however, is that this institution was never able to operate normally and came to an end in 1837. The origins and development of this institution in Paolo Alvazzi del Frate, 'Aux Origines Du Référé Législatif: Interprétation et Jurisprudence Dans Les Cahiers de Doléances de 1789' (2008) 86 Revue historique de droit français et étranger 253.

[39] In this context, both literal and authentical interpretation were opposed to *logical interpretation,* which in some cases included the inquiry into the purposes of the law or *ratio legis*. See Pablo Salvador Coderch, 'El "Casus Dubius" En Los Códigos de La Ilustración Germánica' (1983) 36 Anuario de Derecho Civil 17, 404 ff, 411, 419; and Mario Cattaneo, *Illuminismo e Legislazione* (Edizioni di Communità 1966) 55.

[40] Canale (n 9) 139; François Gény, *Méthode d'Interprétation et Sources En Droit Privé Positif: Essai Critique*, vol 1 (LGDJ 1919) 17 f.

[41] Canale (n 9).

[42] Grossi (n 5) 69. Also in Grossi (n 12) 75.

this would greatly limit the space for judges to interpret and create the law. It would, in other words:

> "make the law more certain and comprehensible. The power of the aristocratic judiciary would be broken. In a system of codified law, the judge would only have to apply the law as it stood on the books. Since the law was clear, certain and internally consistent there was no longer any place for interpretation."[43]

The counterpart of the codification movement was the so-called 'science of legislation'. The belief that the law would be free of inconsistencies and gaps relied on an assumed background of rationality. The science of legislation attempted to substantiate this assumption by providing monarchs and legislatures with formal (clarity, brevity, completeness and precision) and also minimum material standards of rationality.[44] As Jeremy Bentham would do later in England, many enlightened authors devoted themselves to this project from the mid-18th century. Muratori, Beccaria, Verri and Filangieri in Italy, Montesquieu and Constant in France, and Thomasius very early in Germany, all from different standpoints, contributed to developing this "science" of legislation.[45]

This is the point at which this overarching picture branches off and follows different and somewhat contrasting paths in the cases of France and Germany. Political and intellectual landscapes have remarkable parallels and confluences but also significant disparities, which help explain why the French "legalistic positivism" and the German "Jurisprudence of Concepts' are often seen as independent and idiosyncratic phenomena.

i. The passion for legislation: the French road to legal formalism

About the historical causes of the codification process' success in France, the literature tends to converge around three main points: (i) the need for legal unification that would reflect territorial and sovereign unity; (ii) the growing pressure for legal certainty and equality before the law coming from an emergent bourgeois class; and (iii) the enlightened hostility towards the role of the judges of the *ancien régime,* seen as a conservative class, with obscure and unpredictable

[43] Lesaffer (n 5) 453.

[44] According to Hernández-Marcos, the Science of Legislation was the epistemic product of a tension between the primacy of the legislator's will and an inner source of rational moderation in the law. See Hernández Marcos (n 29) 81.

[45] *Ibid.,* 81 ff.

methods. Take, for instance, this canonical summary offered by Jean Carbonnier about the "passion for legislation" at the time of the French Revolution:

> "[t]he growth of the markets, the needs of an emerging industry, demanded a unified, clear and codified law. In previous times there was a confidence that the decisions of the courts would bring about the adaptation of the legal system to social changes. But the *Parlements,* despite their quarrels with the absolute monarchy, were no longer successful in concealing their inherent conservatism. If the legislator was now hoisted to the pinnacle by liberal opinion, it is simply because it appeared as the role that was needed: the only one that could bring to an end the prejudice and abuse, the obscure empire of customs."[46]

After the Revolution, the processes of legal unification and replacement of the old *droit* (*i.e.,* law) by the *loys* (*i.e.,* statutory laws)[47] that had begun as early as the 16th century were to be completed and radicalised: legislation became the only source of law in the whole French territory, entitling the sovereign-legislator with the monopoly of law's production. If the law had since long been conceptualised as a declaration of sovereign will, after Louis XVI's beheading this would no longer be the monarch's but someone else's: the French people as represented in the general assemblies.[48] Against this background, the role of the judge would be certainly redefined. What the European monarchies were trying to achieve since the end of the 16th century, that is, the subordination of the judiciary to their sovereign will in the form of legislation,[49] was finally accomplished by the revolutionaries and Napoléon.

With regards to the intellectual roots about this new role for the judge, the most relevant and direct source generally referred to is Montesquieu's account of the judges in the context of the division of powers within moderate governments. Whereas the TA argues that legal formalism in

---

[46] Carbonnier (n 5) 249.

[47] According to the distinction made by Bodin two centuries before in *Les Six Livres de La République* (J de Puys 1577).

[48] At the end of the 16th century Jean Bodin identified the concept of sovereignty with the power to legislate, and conceptualised the law as the product of a decision whose content was the will of the king (*ie.,* the sovereign). In essence, this notion of law as sovereign will was not changed by Rousseau, even though the person(s) of the sovereign was certainly modified. See Zapatero (n 34) xx; and Luca Mannori and Bernardo Sordi, 'Science of Administration and Administrative Law' in Enrico Pattaro, Damiano Canale and Hasso Hofmann (eds), *A Treatise of Legal Philosophy and General Jurisprudence Vol. 9: A History of the Philosophy of Law in the Civil Law World, 1600-1900* (Springer Netherlands 2009).

[49] Of which the most relevant were Louis XIV's *Ordonnance Civile* of 1667 and *Ordonnance Criminelle* of 1670 (together known as *Code Louis*), because of their role in the struggle between king and courts over the control of the law's creation and application. See Grossi (n 5) 74 ff.

France would derive *politically* from the events that led to the Revolution, it has been *theoretically* attributed to the views of Montesquieu on adjudication.[50] Montesquieu, we are told, would have advocated for a judiciary strictly subordinated to the words of the law, without any power to moderate the rigour of legislation. The source of such understanding derives from the intervention of the tribune J.J. Maillia-Garat when discussing the principle of judicial inexcusability.[51] According to the tribune, Montesquieu had clearly promoted a judiciary with no powers other than to *pronounce the words of the law*; passive beings without faculties to interpret the law, let alone to create new law.[52] From then on, this has been the canonical interpretation of Montesquieu's views regarding the role of the judge. Consequently, his paternity over the ideas of "automaton judge" became firmly established in the historical accounts of the period,[53] and "the myth of Montesquieu" was born.[54]

The more specific formulation of the application of the law as a mechanical logical process, in turn, was attributed to Beccaria,[55] who, in dealing with criminal law, affirmed that the judicial decision should have the form of a logical syllogism.[56] This meant that the judges would be required to take the major premise to be the legal precept, the minor premise the facts of the case, and the conclusion the normative consequence specified in the legal precept. These elements furnish the dominant vision about post-revolutionary France that lies at the foundations of the TA:

> Montesquieu's theory of the judicial function was famously expanded by Beccaria, who was the first to compare a judgment to a syllogism […] Thus, the judge is left with no discretion, and ideally could be replaced by a robot. This view was almost unanimously accepted at the time of the French

[50] Charles de S Baron de Montesquieu, *De l'Esprit Des Lois*, vol 1 (Robert Derathé ed, [1757], Garnier Frères 1973).

[51] See chapter 3, §2.B.

[52] See Pierre-Antoine Fenet, *Recueil Complet Des Travaux Préparatoires Du Code Civil, Suivi d'une Édition de Ce Code...*, vol 6 (Impr De Ducessois 1827) 143 f.

[53] "Since the Revolution, French legal culture has been dominated by the idea that the judiciary is entirely subordinate to other governmental powers. This view comes from Montesquieu's vision of the separation of powers." Troper 2011 140. See also Cattaneo (n 39) 44 ff; Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (OUP 1989); Wieacker (n 5) 376; García de Enterría (n 11) 87; Hernández Marcos (n 29); Canale (n 9) 140. and, coming from a different place, HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard Law Review 593, 610.

[54] This account of Montesquieu's views on the judiciary has been convincingly debunked in Antonio Bascuñán, 'El Mito de Montesquieu' in A Schopf and JC Marin (eds), *Lo Público y lo Privado en el Derecho* (Thomson Reuters 2017).

[55] Canale (n 9) 140; and Hernández Marcos (n 29) 91.

[56] Cesare marchese di Beccaria, *Edizione Nazionale Delle Opere Di Cesare Beccaria: Dei Delitti e Delle Pene* (Luigi Firpo and Rosalba Canetta eds, Mediobanca 1984) ch 4.

> Revolution. The reason [is that] in pre-revolutionary France, courts were extremely powerful and posed a great obstacle to reforms."[57]

ii. A "logically unimpeachable system of concepts":[58] the German road to legal formalism

In contrast to the developments in France, German national consciousness and unification were not enshrined by a revolution. Nor was the Enlightened legal project secured via codification. The codification of private law, for instance, would not succeed until the end of the 19th century, with the result that there were no bodies of positive law replacing the multiple old sources. For these reasons, in Germany legal changes would occur "by the 'inner way'" of developing a historical and scholarly sense of law."[59]

From the early to mid-18th century, the rationalist theories of natural law underwent a process of relativisation and historicisation.[60] Empiricist trends led to a blossoming of scholarship applied to history and constitutional law in Germany, which raised the study of history to an idealistic philosophy of civilisation.[61] Under these schemes, the law could not be seen as the artifact of a rational legislator. The historicity of civilisation meant the historicity of the law, and this realisation laid the foundations for the Historical School of Law ('HSL'): law was now to be seen as a product "quietly blossoming in the collective unconscious of the people."[62] This movement, which represents the transit from early-modern rational natural law to legal historicism,[63] along with the lack of an official authoritative text, yield a kind of legal science with a very particular physiognomy. Private law's development was mainly left to the jurists, who studied and developed by building a scientific system drawing from Roman sources, especially the Pandects (*i.e.,* Digest)

---

[57] Troper (n 7).

[58] The wording is by Larenz (n 11) 43.

[59] Wieacker (n 5) 281.

[60] Montesquieu played a fundamental role in this regard, and in Germany it was Christian Thomasius who adopted a historicist view of the law. See *ibid.,* 283.

[61] As in the philosophy of Herder and Schelling. *Ibid.,* 283 f.

[62] *Ibid,* 285.

[63] Summaries of how this transit occurred in Felipe González Vicén, 'Sobre Los Orígenes y Supuestos Del Formalismo En El Pensamiento Jurídico Contemporáneo' (1961) 8 Anuario de Filosofía del Derecho 47, 64 f; Wieacker (n 5) 344 f; and Lesaffer (n 5) 468.

of Justinian.[64] This is why the heirs of the school's founder, Savigny, are normally labelled 'Pandectists' -and the product of their work, *Pandektenrecht*.[65]

In Savigny's works and later in those of his followers, the rationalisation of the law takes the form of a system with an immanent logic.[66] Wieacker traces back the roots of this development to the movement known as 'Law of Reason' (*Vernunftrecht*) in the early Enlightenment.[67] In Germany, in particular, he points to Christian Wolff, who, inspired by Kant's formal epistemology, had proposed a logically closed system of natural law in which every conclusion could be directly drawn from higher axioms.[68] In this sense, Wolff represented the "idealistic bent" in the natural law tradition of Aristotle and Aquinas, against the voluntarism and nominalism of the revolution going from Ockham to Hobbes.[69]

In particular, the idea of gaplessness in the legal order had been introduced to German legal science at least since the early 19th century. Following Kant, Feuerbach distinguished in every science between substance and form, or body and spirit. In this scheme, the first notion represents an empiric dimension; the second, a system of concepts.[70] In legal science, such a system is formed by general concepts not explicitly formulated in the (empirical) legal materials, but obtained through a process of simplification.[71] A parallel development can be found in the epistemology developed by Descartes and his followers, among which Leibniz is most important to legal science. This epistemology claims that science *is* systematisation: "[s]cience is the creation of an ideal construct embracing all individual phenomena by placing them into larger categories and bringing them under more general laws."[72] In this vein, Grotius thought that the one thing that could be systematised in law were the precepts of natural law, for they were universal and permanent.

---

[64] Ironic given the HSL's assertion that law is the manifestation of each people's cultures, the legal materials object of the German legal science in the 19th-century were fundamentally those of the received Roman Law, which was considered, to a great extent, *ratio scripta*. See Wieacker (n 5) 299 ff, 325 ff; Lesaffer (n 5) 451; and James Gordley, *The Jurists: A Critical History* (OUP 2013) 199 ff.

[65] Wieacker (n 5) 297 ff. See also Hans-Peter Haferkamp, 'The Science of Private Law and the State in Nineteenth Century Germany' (2008) 56 American Journal of Comparative Law 667.

[66] This method will be dealt with in chapter 5.

[67] The difference between these theories and traditional theories of natural law was that the formers, from Grotius onwards, succeeded in getting rid of moral philosophy. See Wieacker (n 5) 199 ff.

[68] *Ibid.,* 254 f; and Lesaffer (n 5) 451. Also attributing formalism in legal thinking to Kant, González Vicén (n 63) 62.

[69] Wieacker (n 5) 264.

[70] See Anselm Feuerbach, *Über Philosophie Und Empirie in Ihrem Verhältnisse Zur Positiven Rechtswissenschaft* (Nachdr der Ausg Landshut, 1804, Darmstadt Wiss Buchges 1969) 33, 96 f.

[71] González Vicén (n 63) 57; Wieacker (n 5) 344 f.

[72] Lesaffer (n 5) 443.

Positive law, in contrast, being contingent and temporal, was not susceptible to scientific systematisation.[73] Following this understanding, the 17th- and 18th-centuries jurists attempted to discover and intellectually reconstruct "a whole and complete system of natural law that would provide a just solution to each and every human problem on the basis of a few axiomatic precepts of natural justice."[74] This genuinely "scientific" legal system would be complete, internally consistent, and intelligible to all.[75]

According to the TA, these notions were not abandoned but taken up by jurists such as Savigny, who developed a system not of universal natural law, but of concrete legal orders.[76] In carrying out this task, the HSL adopted two notions from rationalist natural law theories: (i) the notion of 'concept' as the sum of logical propositions of an object, and (ii) the idea of 'truth' as that which can be deduced necessarily from concepts. In this way, the HSL produced a legal science oriented to conceptually ordering the positive-historical reality of law.[77] The corollary of this outlook would have been the reduction of legal reasoning to a formal syllogism and a severe limitation of interpretative criteria for the judge.[78]

C. *Two conceptions of legal order, one legal formalism*

The paragraphs above traced how a common European narrative about the roots of 19th-century legal formalism bifurcates and yields two similar but not identical accounts: one for France and another for Germany (and, in each case, for the states under their influence). In each case, they would partake of a shared understanding of the role of the judge and the nature of judicial reasoning. In both cases the narrative anchors this conception of adjudication to a notion of a complete, coherent and closed legal order. In other words, a legal order that bears the attributes of a *system*. Yet, and therein lies their most important difference, the legal system in each case is made of different materials.

On the one hand, there is a legal system made of positive rules that are easily identifiable because they have been enacted or sanctioned by the corresponding authorities. This system is conceived of as autonomous from other normative orders, coherent, and exhaustive regarding

---

[73] *Ibid.,* 449 f.

[74] *Ibid,* 450. Emphasis added.

[75] *Ibid.*

[76] González Vicén (n 63) 62.

[77] *Ibid.,* 63, here followed by Wieacker (n 5) 282 ff.

[78] Regina Ogorek, 'Inconsistencies and Consistencies in 19th Century Legal Theory' (2011) 12 German Law Journal 34, 38. Ogorek is here paraphrasing the dominant narrative on the role of the judge in 19th-century Germany.

those spheres of life that it is supposed to apply to. Although it is not necessary for this set of rules to be codified, the idea of a codified body of enacted rules[79] suits especially well with the notion of legal system understood in this way.

This model is often attributed to the Enlightened codifications[80] such as the Prussian *ALR* of 1794 and the Austrian *AGB* of 1811,[81] whose "excessive" confidence in the capacities of the legislator to exhaustively and coherently regulate every aspect of human endeavours has owned them a great deal of criticism:[82] "The advocates of codification shared the conviction of the natural law lawyers […] that man was capable of formulating a legal system that was complete, consistent, clear and comprehensible to all."[83] Such was the case of the Cabinet Order of 1780, by means of which Frederick the Great commended the creation of the *ALR*. There, the King ordered that the law be exhaustive and complete to avoid any possible dispute.[84] In Wieacker's opinion, the belief "that it is possible to find an absolutely correct legal solution […] made him presumptuous enough to try to provide immutable prescriptions for all possible contingencies."[85] Should doubts arise about the law's meaning or application, they would be resolved by a ministerial commission, not by judges. To this end the *ALR* prohibited learned commentaries and judicial interpretations until a later cabinet order was issued in 1798.[86]

In those jurisdictions where codification would not materialise until much later (or would not materialise at all), those who advocated for it were also singled out as excessively confident in its powers. In Germany, Thibaut is generally mentioned among this group.[87] He publicly

[79] A summary of the different meanings of codification and the particularities of 18th and 19th-century codification in Grossi (n 5) 74 f.

[80] See generally Canale (n 9) 137. The author also includes the early Bavarian Civil Code (*Codex Maximilianeus bavaricus civilis*) of 1756 in this trend.

[81] The *Allgemeines Landrechts für die Preußischen Staaten,* of Prussia, has its origins in the Project of the Enlightened monarch Frederick the Great (arguably convinced by his minister of justice, von Carmer -see Kuhli (n 10) 9., with references), and was compiled and redacted by a commission of jurists led by Carl Gottlieb Svarez. The Austrian *Allgemeines burgerliches Gesetzbuch,* in turn, has its roots in the efforts of the Empress Maria Theresia (1840-1870), but it did not see the light until much later. A revision of these codes and their differences in Canale (n 9).

[82] Kelly (n 5) 262 ff.

[83] Lesaffer (n 5) 453. This conviction is particularly attributed to Svarez (Kuhli (n 10) 2.)

[84] Wieacker (n 5) 260. Cf., the more nuanced wording in Kuhli (n 10) 9.

[85] *Ibid.,* 265.

[86] *Ibid.,* 260 f. Until then, only a special *Gesetzkommission* held the authority to interpret the provisions of the code. See Lesaffer (n 5) 455.

[87] Wieacker (n 5) 308 ff; Paolo Becchi, 'German Legal Science: The Crisis of Natural Law Theory, the Historicisms, and "Conceptual Jurisprudence"' in Damiano Canale, Hasso Hofmann and Paolo Grossi (eds), *A Treatise of Legal*

confronted Savigny on the need for a German code following the model of the *Code Napoléon*.[88] Thibaut attributed to codification, in addition to the gains in clarity and unification, the virtue of reducing judicial discretion.[89] Against him, Savigny claimed that the unification and systematisation of existing legal materials in German territories was the task of the legal science, not of codifiers.[90] Codes, "by their completeness", Savigny tells us, were supposed to guarantee "a mechanically precise administration of justice"; and the judge "freed from the exercise of private opinion, […] confined to the mere literal application".[91] Even the *BGB*, albeit born long after, has been charged with formalism. Allegedly, its aim would have been to regulate its matter "completely and exhaustively, in line with the positivist ideal that the judge should be bound to the enacted and gapless text."[92]

Notice how the agents singled out as 'formalist' here are the people in positions of power to officially produce and shape the law.[93] In this context, building a system of law is the task of legislators, codifiers, monarchs. In terms of the distinction made in the first chapter, this would be the kind of formalism (iii), which "minimizes the need for choice" (Hart), or "restricts choice *to* the legal decision-makers" (Schauer). Naturally, this involves a political programme that is meant to have a correlate in legal education, which means that the education received by subsequent generations of jurists is going to be shaped by this "formalism". Legal scholars would then be formalists as a consequence of the activity of monarchs, drafters of codes, and so on.

The Exegesis is a good example on point. Stemming precisely after the proliferation of national codes, the exegetists are generally said to have been trained *only* to explain the codes, their commentaries corresponding basically to the exposition of the legal texts.[94] Furthermore, the Exegesis is said to have been the highest expression of this ideologically-driven formalistic

Philosophy and General Jurisprudence: Vol. 9: a History of the Philosophy of Law in the Civil Law World, 1600-1900; Vol. 10: the Philosophers' Philosophy of Law from the Seventeenth Century to Our Days (Springer Netherlands 2009) 192 ff.

[88] On the dispute between Thibaut and Savigny at the beginning of the 19th century, see Albion W Small, 'Some Contributions to the History of Sociology. Section II. The Thibaut-Savigny Controversy: Continuity as a Phase of Human Experience' (1923) 28 American Journal of Sociology 711; and Becchi (n 87) 192 ff.

[89] Becchi (n 90) 198.

[90] In 1814, Savigny published his 'manifesto', opposing codification in Germany and setting the agenda for legal scholarship (*Vom Beruf unserer Zeit für Gesetzbung und Rechtswissenschaft,* English version: FK von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* (Abraham Hayward tr, Little Wood & Co 1831).

[91] Von Savigny (n 93) 21.

[92] Wieacker (n 5) 376.

[93] Driven by popular demand, in Savigny. See von Savigny (n 93) 21 f.

[94] Guido Fassó, *Historia de La Filosofía Del Derecho 3. Siglos XIX y XX*, vol 3 (Pirámide 1996) 25.

approach to the law, whereby the role of the judge but also of jurists was limited to declaring the conclusions "mechanically derived from the law".[95] The narrative about the French particular style of legal formalism reaches far beyond post-revolutionary France. According to the dominant literature, this type of formalism was going to be adopted, after the defeat of Napoléon, by the absolutist monarchies in Italy, Belgium, and Spain, in an attempt to combine the monarchic and democratic principles within their governments.[96] In addition, the *Code civil* and its built-in notions of the nature of the law, its application and interpretation were to be adopted, imitated or imposed in many jurisdictions in central and eastern Europe and abroad, including Israel, Quebec, Louisiana and several countries in Latin America.[97]

On the other hand, the idea of a system of law may refer to the structure of legal concepts and legal relationships articulated upon the basis of positive legal materials which are, in principle, deemed to be disorganised and incomplete. In this case, the system is superposed and built upon one or more kinds of positive law: a meta-law produced by legal scholars (or judges) to harmonise heterogeneous sources, fill gaps, clarify ambiguities, discover and solve inconsistencies in the law, and deduce new legal consequences from the general norms and abstract categories. Here the leading agents of formalism are the jurists, who work in systematising positive law from within. If the legal system of the formalist legislator can be said to be built 'top-down', this second model is instead built 'bottom-up'. This is a system of scientific law.

19th-century German legal science is widely known (and criticised) for having had as aim and task the construction of precisely this kind of system. From the Historical School to the late Pandectism or 'Conceptualism', at the core of 19th-century German legal science "sprang the conception of a *system",* that is, "a vast structure of mutually and harmoniously interconnected *concepts:* principles, rules, doctrines."[98] In the elaboration of this system, positive legal materials serve "as the quarry from which suitable blocks could be hewn".[99] The most prominent proponent of this method and founder of the Historical School, Savigny, developed this approach with decisive influence by building a rational system in which every concept was logically linked to the others, and in which no external element was necessary to complete it.[100] In this version of system-

[95] Lesaffer (n 5) 462; Fassó (n 94) 24 ff.

[96] García de Enterría (n 11) 86 f.

[97] See Louis Baudouin, 'Influence of the Code Napoleon' (1958) 33 Tulane Law Review 21. Still more far-reaching is the assessment of Robert B Holtman, *The Napoleonic Revolution* (Louisiana State University Press 1978).

[98] Kelly (n 5) 324. Emphasis from the original.

[99] *Ibid.*

[100] Becchi (n 87) 205 f.

building the elaboration of general legal concepts connected to each other would be the mark of law's claim to a logical order. This claim was to be materialised by the jurists. This was, indeed, the position publicly advanced by Savigny when debating Thibaut on the desirability of a codification for Germany. Savigny advocated for an organic development of the law by means of a constructive legal science which would distinguish the leading axioms of law and deduce from them the internal connections between all juridical notions.[101] In this case, what is "integrated" and "insulated"[102] is the *conceptual system* as worked out by scholars, not the legal materials, which, it is acknowledged, may -and most certainly do- have gaps, inconsistencies and ambiguities.

Of course, the rationalisation of the legal materials need not be 'formalist'; yet the TA attributes to 19th-century German legal science precisely the ambition of building a closed, clear, coherent, and complete legal system of private law. In this account, German formalism put "[i]dolatry of a reputedly gapless system of concepts instead of service to justice and common sense."[103] This would make it possible for judges to decide mechanically, merely by deducing the consequences already contained in the system. Savigny was not, however, the target of the critics. The jurists to whom the vice of formalism is most paradigmatically attributed are those belonging to subsequent generations, most notably Puchta, Windscheid, and the early Jhering.[104]

As in the French case, the narrative about German 'formalism' has a much broader outreach than the German law schools. Pandectism has had an influence significant enough to be considered one of the "centralising forces" of European legal history,[105] and directly and indirectly its main theoretical and methodological approaches spread from Germany and took root to a greater or lesser extent in Western Europe and beyond. Indirectly, through the BGB, the reach of German legal science is even greater, but Pandectism in itself has been enormously influential,

[101] von Savigny (n 90) 39.

[102] Wieacker employs these adjectives to mean complete and closed, respectively (Wieacker (n 5) 345.)

[103] After providing some extreme examples of "formalistic" judicial decisions at this time in Germany, Foulkes goes on to state how legalist positivism had deviated grossly from a reasonable, pragmatic approach to law (Albert Foulkes, 'On the German Free Law School (Freirechtsschule)' (1969) 55 ARSP: Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy 367, 374.)

[104] Pandectists and their methods will be dealt with in chapter 4.

[105] Jean-Louis Halpérin, 'The Age of Codification and Legal Modernization in Private Law' in Heikki Pihlajamäki, Markus D Dubber and Mark Godfrey (eds) (Oxford University Press 2018) 55 f.

especially in Switzerland, Austria, Greece, Belgium,[106] Italy,[107] and Central and Eastern Europe, including Russia.[108]

D. *From legal orders to adjudication*

Now, how does the notion of a legal system without gaps or contradictions, either of positive or scientific law, relate to the mechanical application of the law? The answer seems to come naturally: if you have a system of rules which is closed, coherent *and* complete, then it obtains that every particular case that arises must be able to find a solution within it. There is nothing missing from it, and there is nothing outside it that is needed to decide in conformity with its provisions. That would have been how 19th-century legal scholars imagined adjudication. According to García de Enterría, for instance, the revolutionaries and then Napoléon thought that a closed and complete system of codified positive law would be "able to offer an answer, at least in principle, to all the cases that might arise."[109] The process of applying the law would be reduced "to a simple mechanism of *automatic subsumption* of pre-established norms."[110]

In describing the French legal thought after the revolution, García de Enterría makes the association between a state-based exclusivity of law's production with the strict subordination of the judge to the law:

> "The initial idea, to bridle the old freedom of the judge and subject him to his strict function of particularising the Statutory Law (*Ley*) is, thus, that there is no Law (*Derecho*) outside the Statutory Law, that it is in the Statutory Law and nowhere else but in the Statutory Law that the answer to any problem that may arise must be sought."[111]

Where the system is jurist-built, instead, the process takes a different starting point. The normative premises are its legal concepts, principles and the logical relations among them. The

---

[106] Wieacker (n 5) 350.

[107] Influences in Italy are particularly strong. See Halpérin (n 105) 55 f.

[108] E Polay, 'Influence of the School of Pandects on the Jurisprudence of Hungarian Civil Law' (1977) 19 Acta Juridica 175; Roman Schnur, *Einflüsse Des Deutschen Und Des Österreichischen Rechts in Polen: Vortrag Gehalten Vor Der Juristischen Gesellschaft Zu Berlin Am 13. Februar 1985* (W de Gruyter 1985); Olimpiad Solomonovich Ioffe, *Development of Civil Law Thinking in the USSR* (Giuffrè 1989); and Gianmaria Ajani, 'By Chance and Prestige: Legal Transplants in Russia and Eastern Europe' (1995) 43 The American Journal of Comparative Law 93.

[109] García de Enterría (n 11) 84.

[110] *Ibid,* 88. Emphasis added. In the same vein, Zapatero (n 34) lxxix–lxxx.

[111] García de Enterría (n 11) 87.

judge is thus supposed to decide mechanically from these conceptual schemes, and not directly from positive legal materials. Such would have been the scenario of 'legalist formalism'[112] in Germany, where legal scholars allegedly believed

> "that judicial decisions should take the form of logical application of abstract principles and general concepts with a fixed and determinate place in the system. Whereas in the previous *ius commune* the method of proceeding was to analyse an authoritative text and to draw a conclusion from it, now the ultimate basis for decision was a synthetic legal concept which could be traced back to ultimate higher principles in a manner consonant with the system."[113]

As in the French case, the ideal of an impartial judiciary would be facilitated by preventing it from using its discretionary powers. A way to achieve this would be to strictly tie judges to the accepted principles and concepts of law as developed by legal dogmatics.[114] In both cases, the existence of a closed and complete legal system appears to be linked to the opening up of a space -at least a theoretical one- where legal decision-making can be reduced to making a correct subsumption of the facts into a general normative proposition that is already clear and determined. Legal reasoning is, in other words, reduced to the legal syllogism. In this way, both models imply a radical restriction of choice *to* the decision-maker. Considering the above, it is easy to grasp why the TA portrays the figure of the judge as a "subsumption machine".[115]

3. Two kinds of legal formalism?

The above section outlined the contours of two accounts on 19th-century legal formalism. It describes what these accounts have in common, and what makes them distinctive. It also traces the historical paths that help -or at least have helped the TA- to account for these particularities. Whereas the French 'formalist' model is centred around the assertion of the state's monopoly of the production of law, and thus on legislation as the exclusive source of law, the German model places, instead, the construction of the legal system in the hands of legal science. The sources of law, in this case, may be multiple (received Roman law, customary law, enacted law, etc.) and are not directly subjected to state-controlled criteria of legality. Therefore, while in the French model the mechanical activity of the judge depended fundamentally on the work of those who

[112] Wieacker (n 5) 342.

[113] *Ibid,* 255.

[114] *Ibid,* 347.

[115] *Ibid,* 345; and Hernández Marcos (n 29) 95.

authoritatively produced the positive law, *i.e.,* legislators and codifiers, this hinged on the legal scholarship in the German model. This implied, in turn, different power dynamics and strategies for substantiating the rationality of the law. Furthermore, the kind of explanation given to account for these differences also differs. Whereas in France it has focused chiefly on socio-political factors, in Germany it has focused much more on philosophical-theoretical developments. The narrative about a legalistic kind of formalism makes much more sense where direct political antecedents are factored in. These political antecedents are cast as a power struggle over the legitimacy of law's production, which helps explain its focus around enacted texts. In turn, in Germany the narrative about a conceptual legal science revolves around internal methodological struggles inscribed within the frame of intellectual history.

This divergence was outlined by Giovanni Tarello more than half a century ago.[116] In discussing the various meanings of the term "legal formalism", Tarello distinguishes a type of formalism he calls "interpretative". Interpretative formalism, in his terms, is the belief that the meaning of legal norms can be established only appealing to elements internal to the legal system, leaving out elements external to it (*e.g.,* political, moral, economic, etc.) He acknowledges that, historically, this interpretative formalism has had two manifestations: one of a "legalistic" nature and the other of a "conceptualist" nature. Of course, in speaking of legalistic and conceptual formalism, Tarello means the French and German models, respectively.[117] What makes it possible to differentiate between the two types of interpretative formalism, in his opinion, is the criterion used to distinguish what counts as "internal" and what as "external" to the law. While legalistic formalism draws the line at the legal texts, conceptualist formalism draws the line in the conceptual construction of legal science.[118] Because of the aims of Tarello's exercise, he does not delve into the connections between this type of formalism and conceptions of law as an autonomous and closed system, on the one hand, and the nature of legal norms, on the other. Yet he does suggest that these connections exist. Indeed, he anticipates that a formalist conception of interpretation seems to depend on a formalist conception of the law, although not *vice versa*. As he notices, "there are no historical examples of interpretative formalism divorced from a formalist conception of the law".[119]

---

[116] Giovanni Tarello, 'Formalismo', *Novissimo Digesto Italiano* (UTET 1961).

[117] *Ibid.,* 578.

[118] *Ibid.,* 577 f.

[119] *Ibid.*

While helpful, the term "interpretative formalism" may be unnecessarily narrow to refer to the phenomenon outlined in this chapter.[120] It is clear that the term includes but exceeds legal interpretation. It encompasses all aspects of legal reasoning, as well as certain assumptions about the law and legal norms, and even a view of constitutional powers and their scope. Like Tarello, I believe that the theoretical connections between judicial formalism and a formalist conception of the law are more than plausible and have not been sufficiently explored.[121] More importantly, I agree with him that both models of formalism are variations of one and the same phenomenon. Despite the differences, it is important to emphasise that in both cases, the possibility of effectively subordinating the judge to a model of mechanical subsumption derives from the systematic and autonomous nature of the legal order. Both are supposed to rely on the ability of the law to be a unified and autonomous sphere of rationality that can operate without the mediating subjectivity of the judge. And essentially, they rely of a clear-cut distinction between what is internal and what is external to the law; on the possibility that the internal aspects of the law are exhaustive, coherent and without gaps, and finally, on the belief that legal rules are such that they can be mechanically applied. These assumptions are present in both the French and German accounts of legal formalism, and in both accounts these ideas are said to be rooted in the Enlightenment programme and its main values and demands. This common core is often assumed yet not spelt out by historical accounts of the period.

In terms of its intellectual development, the TA overarchingly argues that the Enlightened rationalism of the 17th and 18th centuries gave way to the blossoming of two kinds of legal formalism: one, the formalism of positive law, that never got rid of the Enlightenment passion for the idea of universal reason embodied in legislation; the other, the formalism of scientific law, which started precisely from a radical opposition to universalist rationalism, but that eventually returned to its methods and tools. The TA further argues that both species of formalism affirmed that the fundamental virtue of law was its objectivity, as opposed to the arbitrariness involved in the judge's traditional hermeneutical mediation of the law. However, while in the French case the authority of the legal order is external (it comes from the legitimacy of the political system), in the case of Germany its authority is internal and epistemic: it depends on the constructive and systematic quality of the *scientia iuris*.[122]

---

[120] Admittedly, how narrow this concept is depends on how one understands the concept of interpretation. It is neither uncommon nor illegitimate to refer to the whole set of judicial operations to decide a case as 'interpretation'. Still, my point here is that 'formalism' encompasses claims and assumptions that transcend the domain of legal reasoning.

[121] Tarello (n 116) 580.

[122] González Vicén (n 63) 70.

It is relevant to bear in mind both convergences and divergences in the accounts about 'legal formalism', as both matters in what follows. What makes our task easier is that the TA acknowledges that, eventually, one of these models prevailed over the other.

The early years of Bismarck's empire saw a great deal of legislative enactments which reflected the new political unity of the German states.[123] In parallel, Bismarck's early legislative production was primarily concerned with the administration of justice and procedures (*Justizgesetze*), whose aims were to unify the justice system and to destroy the secret written procedures mastered by judges.[124] It did not take long for the state to dismantle the old Germanic jurisdictions of *Honoratorien* and scholars, and abolish the feudal heritable jurisdictions, replacing them with a centralised and professional judiciary, as had happened in France.[125] As the process of centralisation of the law's production by the state progressed from the mid-18th century, Germany started to shift "from scholarship to legislation"[126] and the "positivism of enactments" began to take the place of the "positivism of legal science".[127] The TA formulates this change as the transit from 'Conceptualism' to 'legalistic' or 'textual' positivism (*Gesetzespositivismus*).[128] According to Wieacker, it represented the triumph "of government over science, of politics over culture".[129] 'Legalistic positivism' shared its basic assumptions with Conceptualism, but added a new dogma: that the law was "completely and exclusively contained in the enacted statutory norms".[130]

This meant that the French "passion for legislation" was ultimately successful and gradually managed to impose itself across the Rhine.[131] The TA claims that, faced with new ways of producing the law, the legislative version of formalism easily fit in among previous formalist assumptions regarding the role of the judge. The new legislators and bureaucrats were still scholars who retained a belief in the idea of an integrated and closed system, and hence the rationality and conceptual "purity" of positive law were to a great extent maintained. The *BGB* (1896) would be

123 *Ibid.,* 369.

124 *Ibid.,* 368.

125 *Ibid.,* 367 f.

126 Wieacker (n 5) 364.

127 *Ibid,* 363.

128 Wieacker (n 5) 363 ff.

129 *Ibid,* 361.

130 Laws that were, in turn, a product of scientific positivism. Foulkes (n 103) 370 f.

131 This movement would have been seen as "thoroughly progressive": it was the success of the French's beliefs in the reasonableness of the people's will (Wieacker (n 5) 364).

the highest expression of this smooth transition.[132] Following the ideal of earlier codes, it would have aimed at regulating its subject matter "completely and exhaustively, in line with the positivist ideal that the judge should be bound to the enacted and gapless text."[133]

Given these transformations, it has been argued that the French model of "legalistic formalism" held virtually absolute sway in continental Europe during the second half of the 19th century. Although this affirmation needs qualification,[134] it helps explain their joint treatment and its considerable success as an overarching narrative of the period. Similarly, it helps making sense of the reactions to formalism both in France and Germany appearing in tandem and having so much in common. These reactions and their emergence are the object of the following section.

4. The origins and consolidation of the Traditional Account

Both in France and Germany, the criticisms towards legal formalism originated at the turn of the 20th century along with the 'Jurisprudence of Interests' or 'Sociological Jurisprudence', which in France developed with the occasion of Gény's criticisms towards the Exegesis,[135] and in Germany, along with the criticisms towards the Jurisprudence of Concepts.[136] Both integrate a cross-cutting movement of reaction against legal formalism that marks the move towards an understanding of the law as anchored in "life" and away from the dogmas and abstractions that had supposedly been the hallmark of the previous period.

A. *The French origins of the TA: Gény and a new method for the 20th century*

François Gény (1861-1959) published his major work, *Méthode d'Interpretation et Sources en Droit Privé Positif,* the last year of the 19th century, both as a denunciation against the formalism of *l'École de l'Exégèse* -called by him *la méthode traditionelle-,* and as a manifesto in advocacy of an alternative methodology, of '*libre recherche scientifique*'.[137] What he sees and criticises in the Exegesis, which was the dominant methodological approach at the time in France, is a fiction with which

[132] Especially with regard to private law, where a high level of sophistication had been achieved, *ibid.,* 364.

[133] *Ibid.,* 376.

[134] As explained, apart from having baseline elements in common, both models influenced each other. The original notion of *system* in the realm of law, the centralising force of Pandectism's methodology regarding the Roman sources, among other elements, remained as part of a common European heritage. It is regarding the formal *sources* of law that the French model, for the reasons explained, ended up dominating over a model that had strongly relied on the scholarly production of law.

[135] KM Schönfeld, 'Rex, Lex et Judex: Montesquieu and "la Bouche de La Loi" Revisited' (2008) 4 European constitutional law review 274.

[136] Ogorek (n 78).

[137] Gény (n 40).

everyone seems to conspire: that all the law derives from written sources (*i.e.,* legislation), and that this law is sufficient to decide every case that arises in legal life.[138] This "reductivist" view would result in a lack of flexibility and innovation, especially in the field of private law.[139]

'School of the Exegesis' was the name given to the predominant approach of legal interpretation and application of the *Code Civil* in the 19th century. It was baptised as such in 1924 by Jean Bonnecase,[140] (that is, more than two decades after Gény's work), in reference to the ancient practice of commenting on the Holy Scriptures. Gény just called it 'the Traditional Method' (*la Méthode Traditionelle* or *Classique*). In general terms, the Exegesis is known for understanding the law as identical with written statutes; and for seeing the legislator as an omnipotent being, and the -mostly codified- law as a closed and complete body of perfectly clear rules, from which every solution could be derived.[141] Under this scheme, the law was to be applied literally,[142] or interpreted merely by reference to the legislator's original intention;[143] it was not for the judge to interpret the law according to its purpose and certainly not to create any new law. The same applied to legal scholarship, which "should adopt a rigorously passive attitude" with regard to legal texts.[144] A strict subordination of the judge to the text of the *lois* (*i.e.,* statutory laws), was a key factor in keeping the judiciary from usurping the powers of the legislator and providing certainty and predictability to its decisions. Hence, the Exegesis could be "fairly described as 'fetishism for written statute'."[145]

The primary purpose of Gény's attack was to demonstrate that this method was a recipe for failure in an increasingly changing world. He claimed that reducing the law to legislation inevitably led to the law's rigidification, which thereby would not be able to respond to new and pressing social needs.[146] This problem was especially felt within private law, as Gény thought that a private law with social value must be dynamic and flexible. In these lines, he aimed at grounding the basis for a full methodological reform of the interpretation and application of the law and,

---

[138] *Ibid., passim* and esp. at 29.

[139] *Ibid.,* 16, 21 ff.

[140] Jean Bonnecase, *L'École de l'Exégèse, Sa Doctrine, Sa Méthode* (2nd edn, De Broccard 1924).

[141] Gény (n 40) 22.

[142] "There is no doubt that the main, if not the exclusive, focus of French legal doctrine has been on the interpretation *stricto sensu* of legal texts." *Ibid.*

[143] *Ibid.,* 24.

[144] Grossi (n 5) 96. In the same sense, Dawson (n 3) 387: "The academic profession thus suddenly called to life could hardly have faced more adverse conditions. They were to be expositors of the new Code". See also Cattaneo (n 39) 44 ff.

[145] RC Van Caenegem, *An Historical Introduction to Private Law* (Cambridge University Press 1992) 150.

[146] Gény (n 40) 45 ff.

more generally, of legal development. Under this new method, legal doctrine and customs would be vindicated and have essential roles to play.[147]

In explaining the problem, he sees with the legal science of his time, Gény first observes that the method of the Exegesis was never really reflected upon by its adherents. The status of legislation, particularly codification, as main source of law was a recent phenomenon in French legal history. In earlier times, the law was loosely interpreted in the light of common sense, the most basic principles of logic or equity, or according to the opinion of doctrinal authorities.[148] When the codification replaced the old sources, the ways of interpreting the law were indirectly affected, and so was the interpreters' role. Indeed, where the only accepted source of law is legislation, every legal decision must come from, and every legal opinion must be founded in, a proposition contained in a legal text. What must be interpreted and applied is now the written statute (*loi*), and no longer the law in general (*droit*), and hence the literal means of interpretation are now fundamental.[149] But in order to link every legal decision to the written statute, one must accept, even if implicitly, a further belief: that the written law does indeed suffice to meet all the challenges posed by the cases brought to the decision-maker. According to Gény, this belief was firmly held by scholars in France at the time, especially considering that judges were bound to decide all the cases brought before them under the principle of inexcusability.[150]

And this is where the fiction originates: legal scholars and judges find themselves needing to justify any legal opinion or decision by means of the legislation, in circumstances that many cases and situations could not have been foreseen by the legislator and, therefore, are not covered by legal texts.[151] This is for Gény a crucial point. He sees that the world around him is developing and getting increasingly more complex, posing new challenges, whereas the legal system is stuck in the year of the enactment of the *Code civil*. To overcome this predicament, judges and scholars resort to all sorts of manoeuvres to find a sound solution to particular cases and pretend that it is a consequence already contained in the legislation. In the most extreme cases, recourse would be

[147] *Ibid.*

[148] *Ibid.,* 23.

[149] *Ibid.,* 31.

[150] And still are: see art. 4 of the French Civil Code.

[151] Gény (n 40) 33 ff.

made to the presumed intention of the legislator or the broader principles implicit in the legal materials. The following opinion of Proudhon, for instance, would exemplify such a view:

> "Judges are forbidden to vilify [*calomnier*] the statutory law [*loi*] by refusing to render a judgment under the pretext that it is silent, obscure or insufficient: if the text appears silent to one who reads it lightly, the principles that it establishes are eloquent to those who carefully ponders them."[152]

For Gény, this is the fiction upon which *la Méthode Traditionelle* is based: making the legislation say much more than it actually says.[153] Presenting the conclusions thus obtained as interpretation of the legislator's will, he affirms, is just "to fool oneself with words".[154]

While Gény describes these mechanisms as the way in which the law is made to mendaciously adapt to social changes, he also claims that the Exegesis has led the legal system to stagnation and lack of innovation: "one quickly perceives what is the system's capital vice, which is that of stagnating the law and to immediately halt the growth of fresh ideas."[155] In his view, this method is essentially flawed when it comes to developing the law in new directions because any innovation must always be framed in terms of existing legislation. In his view, the Exegesis' conception of the law and its application is based upon a misconceived idea of legislation which, in turn, has its roots in "revolutionary illusions".[156] At the core of the Enlightened Project laid the aspiration to break all ties with the past. The codification, particularly the *Code civil,* expressed the dawn of a new era, represented by unified, complete and closed bodies of law able to answer all possible legal problems. To secure the break with the law of the past, these new bodies of law had to claim exclusive and absolute sovereignty.[157] For Gény, the intellectual father of these ideas was Montesquieu, who would have affirmed the priority of legislation by stating that judges were to

[152] JBV Proudhon, *Cours de Droit Français*, vol 1 (2nd edn, Bernard Defay 1810) 60.

[153] Gény (n 40) 33 ff, 40, 52.

[154] "[S]*e jouer soi-même avec des mots". Ibid.,* 43.

[155] Gény (n 40) 65.

[156] "*Illusions révolutionaires*". *Ibid.,* 74.

[157] *Ibid.,* 75.

follow "the letter of the law", and that they were nothing but "inanimate beings that cannot moderate neither [the laws'] strength nor their rigour."[158]

By the turn of the 20th century, this "rationalist illusion" would come to an end.[159] Raymond Saleilles (1855-1912), one of the most prominent French legal thinkers by the end of the 19th century, illustrates that point in his preface to Gény's *Méthode d'Interpretation*. He affirms that French legal scholars had lived under the misapprehension of fiction in believing that "the judges, […] in interpreting the law […] were only drawing the logical solutions that the legislator would have accepted."[160] Not the modern legislator, but the one who enacted the law in the first place; in the case of the Civil Code, that was almost a century before his own time. In Saleilles' view, "there is no fiction in the world that is more evident."[161] His explanation for that gross misrepresentation of law is the same that subsequent literature typically will identify: the particular social context at the time of the Revolution.[162]

B. *The Origins of the TA in Germany: against the Jurisprudence of Concepts*

As in France, in Germany the reaction against formalism was going to appear not long into the 20th century.[163] A pivotal moment in this respect took place when Hermann Kantorowicz (1877-1940) launched an anonymous manifesto against Pandectism, the leading legal methodology at the time, and in favour of a "free law" school (*Freirechtsschule*). This manifesto was tremendously influential at its time.[164] Some have pointed out that the main inspiration for the Free Law School would have come from Gény's criticisms towards the Exegesis.[165] Yet Germany had still earlier proponents of a new jurisprudence centred in interests and social goals, in whom Gény himself found inspiration.[166] Rudolf von Jhering (1818-1892) had satirised late Pandectism because of its

---

[158] Gény quotes *L'Esprit des Lois,* VI 3, and XI 6, respectively. The Constituent Assembly would have followed Montesquieu's ideas -and taken them to the extreme- through two institutions: the *Référé Legislatif,* and the *Cour de Cassation*. See *ibid.,* 76 ff. See next chapter.

[159] Although some authors place this moment earlier (Hernández Marcos (n 29) 90.)

[160] Raymond Saleilles, 'Préface', *Méthode d'Interprétation et Sources en Droit Privé Positif: Essai Critique* (2nd edn, LGDJ 1919) xiv.

[161] *Ibid.,* xiii.

[162] *Ibid.*

[163] Julius Stone, *Legal System and Lawyers Reasoning* (Stanford University Press 1964) 227.

[164] Gnaeus Flavius, *Der Kampf Um Die Rechtswissenschaft* (C Winter 1906).

[165] See, *e.g.*, Albert Foulkes, 'On the German Free Law School (Freirechtsschule)' (1969) 55 Archiv für Rechts und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy 367, 376. Foulkes follows Ernst Fuchs, *Recht Und Wahrheit in Unserer Heutigen Justiz* (C Heymann 1908).

[166] Gény (n 40) 5 and chapter 3.

excessive reliance on abstract concepts and deduction, and its little attention to the law's ends. *Begriffsjurisprudenz* (known in English as Jurisprudence of Concepts or Conceptual Jurisprudence) was the name Jhering coined for the Pandectists of his time.[167] Pandectism, as outlined above, developed out of the Historical School of Law founded by Savigny and was the dominant method for private law in 19th-century German legal science.

As claimed by the critics, the systematic vocation of Pandectism, at its origins closely related to historical sources and positive legal materials, eventually began to become more independent and assert itself as a criterion of law's correction and the basis for legal decision-making.[168] In his early days, for instance, Jhering had proudly declared that jurisprudence could "no longer be embarrassed by history".[169] Yet it is Georg Friedrich Puchta (1798-1846), leading figure of 19th-century legal science, who has been singled out as the main culprit of making conceptual formalism the dominant force within Pandectism.[170] To Puchta is attributed the idea that the law forms a system of rational propositions logically inferable from one another, from the axioms to particular legal decisions -a "pyramid of concepts". Allegedly, for him the scientific knowledge of law would have meant, above all, knowledge about the logical connections among legal propositions.[171] Similarly, for Bernhard Windscheid (1817-1892), the greatest representative of late 19th-century Pandectism, the understanding of the entirety of the law, and the certainty of

[167] Hans-Peter Haferkamp, 'Legal Formalism and Its Critics' in Markus D Dubber, Heikki Pihlajamäki and Mark Godfrey (eds), *The Oxford Handbook of European Legal History* (OUP 2018) 937. The term has also been attributed to Phillip Heck: "It was Philipp Heck, himself a proponent of the *Interessenjurisprudenz*, who introduced the openly pejorative term *Begriffsjurisprudenz* for the German conceptualists." (Raimo Siltala, *Law, Truth, and Reason: A Treatise on Legal Argumentation* (Springer 2011) 187, here following Larenz (n 11) 49.)

[168] González Vicén (n 63) 62 ff; LJ Wintgens, 'From Law without a Science to Legal Science without the Legislator: The German Historical School and the Foundation of Law' (2010) 31 Statute Law Review 85.

[169] Rudolf von Jhering, 'Unsere Aufgabe' (1857) 1 Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts 1, 16.

[170] Wieacker (n 5) 316 f. See also Becchi (n 87) 220 f. Kantorowicz, however, singled out Savigny as the father of conceptualism (Hermann Kantorowicz, 'Was Ist Uns Savingy?' in Helmut Coing and Gerhard Immel (eds), *Rechtshistorische Schriften von Hermann Kantorowicz* (Verlag C F Müller 1970); in English: 'Savigny and the Historical School of Law' (1937) 53 Law Quarterly Review 326.

[171] Becchi (n 87) 220 f; Larenz (n 11) 40 ff.

its application, would depend on a thorough apprehension of the concepts implicit in legal propositions.[172]

Against them Jhering directed all his efforts -and mockery. Indeed, the first criticisms against Pandectism came (anonymously first[173] and under his name afterwards[174]) from one of its former members, and not just anyone. Rudolf von Jhering was one of the most prominent representatives of 'the science of Pandects' at least until 1859.[175] Jhering had followed the programme and methods of the Historical School faithfully and with great skill, most notably in his *Abhandlungen aus dem römischen Recht,* of 1844, and the first two volumes of his *Geist des römischen Rechts,* published between 1852 and 1858.[176] His succesful introduction of the notion of *culpa in contrahendo* in contract law is indeed an especially notable example of Jhering's ability to elaborate new concepts -and thus help in the construction of a private law system- drawing from old Roman law materials.[177] For all we know, during his early years Puchta was for him "a master and model of the right legal method".[178]

Although contemporary literature denies that there was a "Damascus" involved,[179] Jhering did undergo a change of perspective with regard to his own previous works and methods, a change that he recognised on several occasions.[180] After having a low opinion of practising lawyers, he says, his own experience in practice as legal advisor "not infrequently led me to recoil in terror from the application of theories that I had previously defended". Of his previous work, he felt "revulsion".[181] For many authors, this shift was a sign of 'maturity', of turning "from intellectual

---

[172] Larenz (n 11) 48 ff.

[173] Rudolf von Jhering, 'Briefe Über Die Heutige Jurisprudenz von Einem Unbekannten' [1861] *Preussische Gerichtszeitung.* (Berlin 1861–1866), reprinted later in *Scherz Und Ernst in Der Jurisprudenz: Eine Weihnachtsgabe Für Das Juristische Publikum* (Breitkopf & Härtel 1884).

[174] von Jhering, *Scherz Und Ernst* (n 173).

[175] *Ibid.,* 337 ff.

[176] The first volume of which is dedicated to Puchta. Hans-Peter Haferkamp, *Georg Friedrich Puchta Und Die 'Begriffsjurisprudenz'* (Klostermann 2004) 34, with references. A summary of Jhering's early career in Hofmann (n 11) 302 ff.

[177] Mathias Reimann, 'Nineteenth Century German Legal Science' (1990) 31 Boston College Law Review 837, 866, n. 110.

[178] von Jhering, *Scherz Und Ernst* (n 173) 338.

[179] Michael Kunze, *„Lieber in Gießen Als Irgendwo Anders..."Rudolf von Jherings Gießener Jahre* (Nomos 2018). Earlier literature spoke of a 'Damascus' about Jhering's turning "from dream to action" (Wieacker (n 5) 356.), and of 'conversion' (Munroe Smith, 'Four German Jurists' in Munroe Smith, *A General View of European Legal History and Other Papers* (Columbia University Press 1927) 133.)

[180] von Jhering, *Scherz Und Ernst* (n 173) 337 ff.

[181] All the quotes are from ibid 338 f. The translations are by Smith (n 179) 133 f.

fantasy to social realism".[182] As other contemporary jurists, Jhering would have "felt the joy or horror of waking up" to real life.[183] Understanding Jhering's "change of heart"[184] is relavant to better grasp the nature and purpose of his objections against 'conceptual jurisprudence', and also the theoretical and methodological debates that followed and continued well beyond Jhering's life. Jhering's main concern with *Begriffsjurisprudenz* was that it had cut off from reality, putting legal concepts above "real life".[185] In this vein, he criticised the dogmatic construction that consists of determining "a legal institute purely on the sources or the ideas therein without resorting to any real practical meaning."[186] Legal scholarship would have neglected what the law was *for*, what were its purposes, and what were the social needs and interests that justified it in the first place. He referred to this panorama as a "fantasy", and called the science of Pandectism a "heaven of concepts":

> "Here the concepts live for themselves, and if you don't want to cut off your prospects completely, don't ask anyone about the utility of anything you see. Utility! It would be the last straw if the concepts were also useful in our heaven."[187]

For Jhering, the needs of the ever-changing social life had been shamefully forgotten.[188] As he attempted to reclaim the practical value of legal science, he increasingly engaged with the sociological aspects of law and started to think of the law and rights as means of exercising power to achieve a purpose and protect some interest ("*purpose is the creator of the entire law*"[189]), linking in this way purpose in law to the notion of subjective rights as protected interests.[190] As some authors have noted, this does not mean that Jhering denied the value of dogmatics or conceptual construction.[191] Rather, he attacked the notion that the law and its institutes could be understood

---

[182] Wieacker (n 5) 356.

[183] *Ibid.*

[184] Smith (n 179) 133.

[185] Rudolf Von Jhering, 'In the Heaven for Legal Concepts: A Fantasy' (1985) 58 Temple Law Quarterly 799, 799.

[186] *Ibid.,* 804.

[187] *Ibid.,* 807.

[188] *Ibid,* 825.

[189] Isaac Husik, 'Preface' in Rudolf von Jhering, *Law as a Means to an End* (The Boston Book Company 1913) liv f.

[190] Hofmann (n 11) 307.

[191] Nils Jansen and Mathias Reimann, 'Begriff Und Zweck in Der Jurisprudenz: Ein Geburtstagsblatt Für Rudolf von Jhering' (2018) 1 Zeitschrift für europäisches Privatrecht 89, 105.

without resort to practical utility, merely by reference to structure and logical connections within the system.[192]

After Jhering, the various currents encompassed under the umbrella of so-called "Sociological Jurisprudence" took hold and continued to develop views that rejected a "merely mechanical role for the judiciary".[193] Although these movements were heterogeneous, their main shared goal was to denounce Conceptualism, especially its dogma that the legal order had no gaps.[194] The *Freirechtsschule* (Free Law Movement or Free Law School), founded by Kantorowicz, Eugen Ehrlich (1862–1922) and Ernst Fuchs (1859–1929), and the Tübingen-based school of *Interessenjurisprudenz* (Jurisprudence of Interests), associated mainly with Philipp Heck (1858-1943), promoted recourse to the "living law" as opposed to dead conceptual formulas that had no practical use.[195] In his anonymous manifesto, a foundational milestone of the Free Law Movement, Kantorowicz presents the traditional jurist as a being who supposedly can, only with his legal texts and logical operations, deduce the solution predetermined by the legislator for any case.[196] Against this model, the Free Law School, inspired by Gény's own endeavour,[197] promoted the development of law through the creative power of the judges. Regarding legal science, Kantorowicz wanted to make it free from its "childish" belief in the self-sufficiency and coherence of the law and the rationality of its application.[198] They asserted that gaps and contradictions in the enacted law were inevitable, just as judicial discretion was. Consequently, they rejected exegetic methods of interpreting the law as a farce.[199] According to Ehrlich, where "legal technicalism" prevails, with its attached illusion of a gapless legal system, "the decisions are no more certain, even by a hair's

---

[192] *Ibid.,* 107.

[193] The words are from Curran (n 23) 157.

[194] Katharina Isabel Schmidt, 'Der "Formalismus-Mythos" Im Deutschen Und Amerikanischen Rechtsdenken Des Frühen 20. Jahrhunderts' (2014) 53 Der Staat 445, 456.

[195] A good example in Eugen Ehrlich, 'Judicial Freedom of Decision: Its Principles and Objects' in Ernest Bruncken and Layton B Register (eds), *The Science of Legal Method. Select essays by various authors* (A M Kelley 1969) 47.

[196] Gnaeus Flavius (Hermann Kantorowicz), *Der Kampf Um Die Rechtswissenschaft* (C Winter 1906) 7. Kantorowicz refers to the legislator, not to the jurists building the system of concepts at the basis of *Begriffsjurisprudenz*. As seen, Germany underwent a transformation in its conception of doctrine as a source of law vis-à-vis the legislator. At the time of Kantorowicz' criticisms, the situation already had moved towards the 'legalistic' model, and the idea that the task of legal science is to interpret and systematise the statutory law had become widespread.

[197] Foulkes (n 165) 376. He quotes Fuchs, *Recht und Wahreit* (1908). The works of Bulow and Stammler would have been also sources of inspiration. See Schmidt (n 194) 455.

[198] See Nils Jansen, 'Der Gegenstand Der Rechtswissenschaft' (2020) 75 Juristenzeitung 213, 213.

[199] Curran (n 23) 223. This was also the approach of the *Interessenjurisprudenz*. See, *e.g.*, Phillip Heck's speech as rector of the Tübingen University in 1912 in Philipp Heck, *Das Problem Der Rechtsgewinnung* (JCB Mohr 1912) 23.

breadth, and the courts not a whit less arbitrary […]".[200] If anything, the courts become even more arbitrary, because the processes by which they reach a decision are covert.[201] As an alternative, they defended a model of "free determination of the law", which would free the judge from the illusion of "adherence to the law", and would allow, instead, the restoration of justice.[202]

Along with these criticisms, the Jurisprudence of Interests and the Free Law School, among other trends, flourished during the 20th century. The creative role of the judge and the relevance of social needs and interests in adjudication and the criterion of purposiveness in the interpretation of the law would become increasingly central in legal scholarship. In the same vein, the theory of legal sources would grow sceptical of the "totalizing" role of the legislator and enacted law, which half a century earlier had been accepted as dogma.[203]

The narrative thus built by Jhering, Kantorowicz, Ehrlich and others about their predecessors was partly inspired in, and eventually converged with, the narrative that had emerged at the same time in France, reinforcing each other and taking root in the academic common sense of the 20th century.[204] Legal historians have taken a lot of their accounts from this narrative, especially Gény;[205] contemporary authors writing in legal methodology or legal theory, in turn, have either relied on such historical accounts, or have rested on the mere fact that the TA was so successful that its claims no longer need justification.[206] What was at the time a reaction - methodological, philosophical and political- against hegemonic ways of conceiving the law and adjudication became, in turn, a new dogma regarding the vices of the past. At some point, '19th-

[200] Ehrlich (n 195) 63.

[201] *Ibid.,* 64 f.

[202] See generally Hofmann (n 11).

[203] Ogorek (n 78) 39.

[204] Foulkes (n 165); and Becchi (n 87).

[205] Dawson, for instance, follows Gény on the characterisation of the Exegesis, and also Bonnecase, who would baptise and write against it some years after Gény. Dawson (n 3) 393 ff, esp. n. 21, 22. Grossi also follows Gény's account and explanation of legal formalism (Grossi (n 5) 96, 114 ff.) Wieacker also follows Gény with regards to the French experience and draws from González Vicén, who wrote against methodological formalism in Germany (González Vicén (n 63).)

[206] Larenz, *e.g.*, follows Wieacker (Larenz (n 11).) Giving little to no reference, among many others, Lesaffer (n 5) at 461 ff on the Exegesis, and at 470 f on Conceptual Jurisprudence; García de Enterría (n 11); Alchourrón and Bulygin (n 12) 179 f on the Exegesis; García Amado (n 12); and Jean-Sébastien Borghetti, 'French Law' in Julio César Rivera (ed), *The Scope and Structure of Civil Codes* (Springer Netherlands 2013) n 5.

century legal formalism' began to be considered part of the landscape that legal historians and other scholars would later take at face value.

5. Conclusions

This chapter has unpacked the TA and its main tenets, specifying how it understands formalism in law, and in what sense it takes 19th-century legal dominant ways of thought to have been formalist. It has addressed the notion of "mechanical application of the law" and made explicit its underlying assumptions about the nature of legal orders and legal norms. In dealing with these assumptions, the chapter outlined two kinds of 'legal formalism', the French on one side and the German on the other. It showed that both kinds of formalism have clear and distinctive traits, which explains and to some extent justifies the existence of a differentiated treatment. But it also showed that they are connected by a certain shared understanding of the phenomena of law and legal reasoning, which is fundamental to any 'formalist' conception of law and adjudication.

Subsequently, the chapter outlined the historical causes that the TA offers to explain legal formalism. It showed how the TA was originally tailored to the needs of a "reactionary" agenda rather than to historical work. Telling the story of how the TA was forged will be important later to reassess the opposition between 19th and 20th centuries conceptions of law and legal reasoning.

The narrative contained in the TA certainly has structural coherence, but that does not make it correct. The following two chapters put this account to the test. The third chapter contrasts the TA with the relevant historical sources in France, and the fourth chapter follows with the German sources. As will be clear in following chapters, the criticisms and challenges to the TA in both cases are not symmetrical, as they reflect on the diverging emphases and particularities of each jurisdiction. But both show that the central tenets of the TA are fundamentally flawed. The picture that will emerge from them will urge us to challenge the legacy of the TA, both at its descriptive and explanatory levels.

Chapter Three

Challenging the Traditional Account: The French Codification and the 'School of the Exegesis'

This chapter contrasts the claims of the TA regarding 'legal formalism' in 19th-century France as elaborated in the previous chapter. It does so by directly reviewing the materials and authors accused of formalism and contrasting them with the TA's main tenets. This exercise shows that the TA presents a distorted picture of the target's views.

In particular, this chapter seeks to challenge three main overarching claims of the TA regarding the conceptions of the law and adjudication of Napoleonic codifiers, on the one hand, and the Exegesis, on the other. First, the assertion that legislation is the only source of law, and that in this way codifiers and the Exegesis would have reduced all the law to statutory texts. This is generally referred to as legal "monism" and, in the case of the Exegesis, as the "cult of the text of the law" (also "textualism" or "literalism"); second, the claim that the codifiers and the Exegesis believed the law to be a complete, coherent, and closed body of clear and determined rules; and third, the claim that the 'formalists' would have advocated that the law could be mechanically applied, by purely deductive means from the written text to the facts of the case.

Some recent historical works show that there are cracks here and there in the TA. these works do not contest the TA as a whole, nor have they had a pervasive impact (yet) so as to raise a generalised contestation of the TA's main claims, and much less to produce an alternative narrative regarding adjudication in 19th century continental Europe so as to dispute its hegemonical position. They are, nonetheless, of great relevance when it comes to understanding some of the main shortcomings of the TA: where it falls short, where it contradicts itself, where it gets deceptive. This literature is considered where appropriate, but the majority of the chapter rests on a direct contrast with the primary sources.

The chapter starts by identifying the two targets of the TA in 19th-century France (§1), and leads on to the examination of the codification process (§2), and the School of the Exegesis (§3). Regarding the codification, it deals successively with the codifier's understanding of legal sources

and the role of the judge (§2.A); the nature of legal orders and the limits of legislation (§2.B); and a 'mechanical' view of adjudication and legal reasoning (§2.C). Regarding the School of the Exegesis, it examines the following claims attributed to it: the "cult of the text of the law" as a matter of sources and role of the judge (§3.A); the nature of legal orders and the limits of the law (§2.B); and the 'mechanical' application of the law as a conception on adjudication and legal reasoning (§2.C). Finally, the main conclusions of the chapter are summarized (§4).

1. The TA's targets: codification and Exegesis

In France, the TA identifies two main targets of formalism: the Napoleonic codification, and the School of the Exegesis, which originated precisely as a corollary of the former. Judges as such were never directly accused of formalism. Judicial decisions (*arrêts*) were not the subject of serious debate by *la doctrine* until at least the revolution of 1830, and only timidly so from then until the middle of the century.[1] Nor did the judgements in France traditionally include a detailed exposition of the reasoning by which the decisions were reached. Motivation of rulings was made mandatory with the Judicial Reform of 16-24 August 1790. While the style of French judicial reasoning was (and still is) extremely concise, compared with the lack of reasoning that was prevalent in the older courts (*Parlements*) during the 17th and 18th centuries this represented a great improvement. Before 1789, those who commented on the rulings had to infer the reasons that justified it, as well as the argumentations of the parties.[2] The codification process, hence, will be the starting point of this inquiry.

Between 1804 and 1810, during the First Empire, the French people witnessed the birth of five legal codes: the Civil code of 1804 (hereinafter 'Code'),[3] the Code of civil procedure of 1806, the Commercial code of 1807, the Code of criminal instruction of 1808, and the Criminal code of 1810. These codes were all drafted and enacted under Napoléon's rule and are part of the same political project of legal unification. Yet only the drafting process of the Code civil is relevant for our purposes, and particularly its preparatory works. Being the first Code to be drafted and

[1] The *recueils d'arrêts,* which compile summaries and commentaries of the higher courts' decisions, were around since the emergence of the codes -and some even before that- but the number of judgments reported was small, the style was clumsy, and they did not have the authority they have today. It is only in the second half of the century that they start to increase in number and exert some influence. See generally Édouard JM Meynial, 'Les Recueils d'arrêts et Les Arrêtistes' in Société d'Études Législatives (ed), *Le Code Civil, 1804-1904, Le Livre du centenaire*, vol 1 (A Rousseau 1904) esp. 176 f, 182.

[2] This provoked the suspicion or outright indifference of the early scholars of the new *régime* for the reports on case law. *Ibid.,* 182 f.

[3] The French Civil code, officialy '*Code civil des Français'* and sometimes known as *Code Napoléon,* was promulgated on March 21st of 1804.

promulgated, it was in that setting that the most significant theoretical and methodological debates took place regarding the role of the judges, their powers and, in that context, the application and interpretation of the law. These debates, in turn, sparked exchanges about the limits of codification and about the nature of the law and legal rules. The subsequent enactment of the *Preliminary Title* of the Code, of general application, is the expression of the conclusions and decisions adopted in those debates. The pertinence of incorporating these general provisions in the code that would regulate the relationships among private parties was strongly contested, but finally they were approved and remain unchanged to this day.

The next section addresses the "School of the Exegesis" and its main representatives. Although the label "exegetist" has been applied to all those whose vocation is to expose and teach some authoritative text, it is the school devoted to commenting on the French Civil code from 1804 onwards that paradigmatically receives this label in the legal context. Because of the amount of literature belonging to this school, it has been necessary to make choices among its authors and works. One criterion of selection is naturally the TA itself, because it is precisely a matter of contrasting this account's affirmations with the sources. A second criterion of selection is that of relevance. I have picked out the works that, because of the theoretical ambitions of their authors and their lasting influence and authority, have come to be regarded as canonical of the 19th-century French legal science.

2. The Napoleonic codification and the Civil code

The process of drafting the French Civil code is pivotal in the discussions about the role of the judge, and the interpretation and application of the law in the beginnings of 19th-century France. In the context of this process the fundamental legal maxims of enlightened thinking, which were able to survive the first years of the revolution, were to be tested and put to work in a specific institutional design.[4] It is this Code whose drafters, according to the TA, would have conceived as a "closed, complete and coherent" body of rules, susceptible of being applied "mechanically". The relevant parts of this process, for our purposes, are found in two main sources: (i) the debates that took place in the context of the drafting and discussion of the Preliminary Title of the Code, "On

[4] On this matter see Bert van Roermund, 'The "Code Civil" Between Enlightenment and Restoration. The Heritage of Portalis' [2014] *Diametros* 149, 151. According to the author, in relevant aspects the codification would have brought back some ways of legal thinking of the Ancien Régime -hence the reference to restoration.

the publication, effects and application of the laws in general";[5] and (ii) in Portalis' *Discours préliminaire*, whereby he introduced the Code to the National Assembly.[6]

In what follows, three key issues around legal formalism in the codification process will be addressed in this order: the role of the judge and the reduction of sources to legislation (A); the omnipotence of the legislator and the nature and limits of the law (B); and the "mechanical" conception on adjudication (C).

A. *Sources of law and role of the judge*

In the words of Paolo Grossi and others after him, the Napoleonic codification and its ideologues are an example of "legal absolutism".[7] In this context, 'legal absolutism' amounts to a "monistic" conception of law whereby law and legislation are one and the same, insofar as legislation is the only source of the law.[8] This conception of law as legislation is at the basis of French legal formalism (or "legalistic positivism") as generally portrayed, and thus is a key aspect of our inquiry

Before the French Revolution, 'French law' was an amalgam of heterogeneous materials and sources, a mosaic made up of pieces of different origin, function and scope. The provinces had their own customary laws, which often overlapped with the national royal legislation (mostly in the form of *ordonnances*) and the transnational legal orders of Roman law and Canon law, as developed by the Medieval *ius commune* and received in French territory. Different regions had different influences and belonged to different traditions, thus relying more heavily on local customs in some cases, Roman law in others, and yet in others on different combinations of

5 In the original: "De la publication, des effets et de l'application des lois en général". This Title was created by the *Loi 1803-03-05* promulgated on March 15th, 1803 (*14 Ventôse an XI*), so it pre-dates the promulgation of the Code. It was not modified when it became a title of the Code in 1804.

6 This discourse contains the programmatic goals of codification and it is acknowledged as one of the most important pieces of legal writing in 19th-century. A good translation to English can be found in Portalis, Preliminary Address (The International Cooperation Group - Department of Justice of Canada, May 2004) available at: Preliminary Address on the First Draft of the Civil Code - The International Cooperation Group (justice.gc.ca). Since it features no page numbers, henceforth I refer to the original discourse and the numbering it features in Pierre-Antoine Fenet, *Recueil Complet Des Travaux Préparatoires Du Code Civil, Suivi d'une Édition de Ce Code...*, vol 6 (Impr De Ducessois 1827).

7 See Paolo Grossi, 'Assolutismo Giuridico e Diritto Privato. Lungo l'itinerario Scientifico Di Raymond Saleilles' (1993) 39 Rivista di Diritto Civile 345; and Paolo Grossi, *Assolutismo giuridico e diritto privato* (Giuffrè 1998) 7 f, 26, 180 f.

8 Jean-Louis Halpérin, 'Exégèse (École)' in S Rials and D Alland (eds), *Dictionnaire de la culture juridique* (Presses universitaires de France 2003) 681.

sources.[9] Struggles about whose laws were valid and applicable to particular cases and particular individuals were frequent currency. Still by the early stages of the Code's drafting, the French state was seen as no more than "a society of societies".[10]

The processes whereby the French state conquered the exclusivity of law's production starting from the 15th-16th centuries and made legislation into the only (or at least paramount) source of the law, have been documented widely by political and legal historians.[11] The Napoleonic codification would only be the last stage and definitive consecration of this development. As outlined in the previous chapter, in the context of post-revolutionary codification, these processes were driven by three main politico-constitutional ideals: (i) the unification of the law for the whole French territory; (ii) the elimination of the old *privilèges* and social stratification, and unification of the law for every French citizen (equality under the law)[12] and (iii) the materialization of the the principle of separation of powers between legislature and judiciary.[13] Whereas the former two are interwoven with the notion that the legal order is marked off from other social spheres (claim *(b)*), the latter is closely connected with the claim *(a)* identified in chapter 1 regarding the subordinated role of the judge.

Regarding the aims (i) and (ii), that is, the goals of territorial and personal unification, these had been insisted upon in the revolutionary National Assembly, which in august 1790 (little more than a year after the beginning of the Revolution), decreed that "the civil laws shall be revised and reformed by the Legislature, and there shall be a general code of laws, simple, clear, and appropriate

---

[9] On the state of pre-revolutionary French legal sources see generally Philippe Sagnac, *La Legislation Civile de La Revolution Francaise (1789-1804): Essai d'histoire Sociale* (Hachette 1898); and Courtenay Ilbert, 'The Centenary of the French Civil Code' (1905) 6 Journal of the Society of Comparative Legislation 218.

[10] Pierre-Antoine Fenet, *Recueil Complet Des Travaux Préparatoires Du Code Civil, Suivi d'une Édition de Ce Code...*, vol 1 (Impr De Ducessois 1827) xxxv.

[11] See, for general accounts, Jean Gaudemet, *Les Naissances Du Droit: Le Temps, Le Pouvoir et La Science Au Service Du Droit* (Montchrestien 1997); and Serge Dauchy, 'French Law and Its Expansion in the Early Modern Period' in Heikki Pihlajamäki, Markus D Dubber and Mark Godfrey (eds), *The Oxford Handbook of European Legal History* (Oxford University Press 2018). Focusing on the 18th and 19th centuries, Jacques Krynen, *L'État de Justice, France, XIIIe-XXe Siècles.* (Gallimard 2012); and on the significant period of Louis XIV, see Olivier Chaline, *Le Règne de Louis XIV*, vol 2 (Flammarion 2009).

[12] Or, at least, for most male citizens. On the inferior status of married women under the French Civil code see Ute Gherard, 'Civil Law and Gender in Nineteenth-Century Europe' (2016) 43 Clio. Women, Gender, History 250, esp. 253 ff; on the process of overcoming this inferiority see Florence Rochefort, 'Laïcisation Des Mœurs et Équilibres de Genre. Le Débat Sur La Capacité Civile de La Femme Mariée (1918-1938)' (2005) no 87 Vingtième Siècle. Revue d'histoire 129.

[13] These ideals were of long standing, but they gained real strength in the months leading up to and above all following, the Revolution. See Ilbert (n 9) 221 f. These three aims were recognized half a century later in the work of some of the most important jurists of the Exegesis. See Charles Aubry and Charles Rau, *Cours de Droit Civil Français*, vol 1 (F Lagier 1839) 10 f.

to the constitution." "[A] code of civil laws common to the whole kingdom" was also demanded by the Constitution of 1791.[14] The National Convention in 1793 insisted on the need of a uniform legislation.[15] Later, the Commission in charge of drafting the Code started by recognising that French law consisted in a multitude of regulations and privileges coexisting without any coherence, and that *unity* was a primary goal to be attained with codification.[16]

It must be noted that the Civil code was not meant to be, nor did it end up being, a mere compilation of pre-existing laws in France.[17] It is, on the contrary, abrogatory of the many kinds of existing law at the time of the Code's promulgation.[18] In this manner, the Code asserts itself as *the* legitimate source of the law, while denying any alternative claim to legality on the matters it regulates. This self-assertion calls for a separation between what counts as law and what does not, and thus, involves a pretension of -at least a relative- closure of the law as a normative order.

As per (iii), that is, the principle of separation of powers, it had a complex history in French political thought.[19] In what matters here, however, codifiers' understanding was that the principle of separation of powers was more than just keeping powers from intervening in each other: it fundamentally implied a practical distinction between two activities: the creation of the law, on the one hand, and the application of the law, on the other. Accordingly, declared Portalis,

> "[t]here is a science for legislators, as there is one for the judges; and the one does not resemble the other. The legislative science consists in coming up in every matter with the principles most favourable to the common good: the science of the magistrate is that of putting these principles in action".[20]

---

[14] Both in Fenet (n 10) lviii.

[15] *Ibid.*

[16] This idea is repeated well into the drafting process. See, for instance, the presentation by Jacqueminot of the fourth project on december 1799 (*Ibid.,* 327); or Portalis' presentación to the *Corps Législatif* of the *Projet de Code,* on 3 *frimaire, an X* (24 august 1801) (Fenet (n 6) 36.), or the opinion of the tribune Costé in favour of the Project (*Ibid.,* 177).

[17] As was the case of the majority of pre-Napoleonic codification in Europe. See Jean Louis Bergel, *Méthodologie Juridique* (Presses universitaires de France 2001) 322 f.

[18] *Loi No. 3677, sur la réunion des lois civiles en un seul corps, sous le titre de Code civil des Français* 1804 art 7.

[19] See especially Charles Eisenmann, 'L'Esprit Des Lois et La Séparation Des Pouvoirs', *Mélanges en l'honneur de R. Carré de Malberg* (Sirey 1933); MJC Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund 1998); and Michel Troper, *La Séparation Des Pouvoirs et l'histoire Constitutionnelle Française* (Sirey 1973).

[20] JME Portalis, 'Discours de Présentation, 24 Thérmidor VIII' in Pierre-Antoine Fenet, *Recueil complet des travaux préparatoires du Code Civil, suivi d'une édition de ce code...*, vol 1 (Impr De Ducessois 1827) 475 f.

The distinction between these two activities is expressed in an institutional differentiation which is functional in nature. Thus, the legislature's function (or purpose) is to create general rules *ex-ante*, and the judiciary's function is to decide particular cases *ex-post* and in accordance with such general rules. This differentiation is based, in turn, on a principle of political legitimacy.[21] The role of the judge, under this scheme, is defined by this very distinction and consists in deciding cases in accordance with pre-established general rules. What pre-established general rules? Those produced by the persons and bodies responsible for creating the law, i.e., mainly the legislative and executive powers.

These are the basic notions that oriented the codification movement in France at the beginning of the 19th century, and so far, they do not seem to refute but to confirm the TA. However, as will be shown, that would be a hasty conclusion. While the "monistic" vocation of the code's drafters does acknowledge the statutory law as a paradigmatic source of the law, it does not necessarily imply the claim that the law and legislative texts are one and the same. The codifiers recognised that, because of its inherent limitations, the texts would not solve everything.

B. *The limits of legislation*

The *Code civil* aimed at regulating different areas of the social life among individuals with certain sufficiency, clarity and logical unity.[22] These goals aimed to safeguard the separation of powers and, in this way, to protect the freedoms and rights of citizens. And they certainly bring ambitions of comprehensiveness, simplicity and coherence, as was acknowledged by the legislative bodies and members of the drafting commissions.[23]

In this vein, to say that the *Code civil* and other codes were aimed at being "complete, clear and coherent bodies of norms" is an accurate description. The problem arises when one ignores, as the TA often does, that comprehensiveness, clarity and coherence represent regulative ideals aimed at informing the legislator's and codifier's work, and, instead, they are assumed as claims belonging to a theory of the nature of law and legal orders (claims *(c)* and *(d)* as identified in chapter 1), in the first place, and as bearing specific consequences for the theory of adjudication (claim *(e)*), in the second place. The codification's ideal is to move from a state of normative particularism and chaotic legal reasoning to a state of a unified legislation which is clear to the citizen and

[21] Fenet (n 10) 465.

[22] Bergel (n 17) 322 f.

[23] Regarding *l'Assemblée nationale constituante* of 1790, Fenet (n 10) lviii. Also Bergel (n 17) 322 f. Regarding the drafters, Cambacérès' presentation of the third project to the *Coprs Légilatif des 500* expresses the need for legislation to be exhaustive and clear. In Fenet (n 10) 141.

coherent as a whole. But this in no way implies the affirmation that the law -through codification or otherwise- can be ever made complete, or perfectly clear and coherent. Nor does imply affirming that the role of the judge, due to these features, can be reduced to mechanically applying the codified texts. The drafters of the Civil code were perfectly aware of the difference between the two levels of discourse. In this regard its drafters took a good distance from what they called "the revolutionary spirit".[24]

Two articles are of relevance to show how these matters were discussed during the preparation of the Code: the article that consecrates the judicial principle of inexcusability, and the article that enshrines the relative effect of the judgments.

Table 1

	Principle of inexcusability	**Relative effect of judgments**
Formulation and numbering at the beginning of the preparatory works (session of *4 Thérmidor anné XII* [3 July 1801])	**Art. 7**: "*The judge who refuses to judge, under the pretext of silence, obscurity or insufficiency of the [statutory] law, shall be guilty of denial of justice."*	**Art. 6:** "*It is forbidden for judges to interpret the [statutory] laws by means of general or regulatory provisions."*
Definitive formulation and numbering (as enacted)	**Art. 4.** "*The judge who refuses to pass judgment under the pretext of silence, obscurity or insufficiency of the [statutory] law, may be prosecuted as guilty of denial of justice."*	**Art. 5.** *"Judges are forbidden to rule, by means of a general or regulatory provision, on the cases brought before them."*

The debate over these provisions is both extense and intense. It is, in fact, one of the points that created most confrontation in the discussion of the Preliminary Title. On the one hand, the position defended by the drafting commission, crystallised in article 4, holds that judges cannot excuse themselves of passing judgment. According to its authors, this provision was a "remedy" against the abuse produced in the years immediately after the revolution apropos of the *Référé legislatif,* which allowed judges to send back to the legislator the cases where the law was unclear,

[24] In his *Discours de présentation*, Portalis claims that the epoch immediately after the Revolution was not ideal for the creation of a prudent and durable code, for the "revolutionary spirit" wanted to "sacrify it all to the altar of a new political horizon." In Fenet (n 10) 465.

or remained silent.[25] This institution resulted in problematic suspensions and delays in the administration of justice, besides transforming the legislator into an *ad-hoc* judge with retroactive effects.[26] Portalis, the fiercest enemy of the *Référé,* thought that where the law was obscure or indeterminate the judge had to "precise it";[27] where the law was silent, the judge should act as an equitable judge, in the manner of the English Court of Equity ("[t]he civil judge is the ministry of the law, when the law has spoken; it is the arbiter of differences, when she is silent.")[28] In this line, he had defended an article in the Preliminary Title that allowed judges to resort to equity in the silence of the law.[29] But here Portalis is ambiguous. He says obscure laws should be interpreted, but then he claims that one must return to equity (i.e. natural law) in the absence of law, *and* in case of obscurity. It remains unclear if he thought interpretation should be based on natural law or on legislation's internal criteria. If one believes, as Portalis did, that the legislation is a formulation of natural law in the first place, then both alternatives overlap.[30] At any rate, this only applies in private law matters, for in criminal law a strict principle of legality applies: a criminal punishment can only be imposed where there is a previous written law that typifies the specific action or omission as a criminal offence.[31] Thus, where the law is unclear or silent, the judge should always abstain from imposing a punishment.[32] In private law matters, instead, the conflict must be solved in favour of one of the parties and cannot remain open, even if the legislator did not provide for the case or the solution is not clearly determined.[33]

---

[25] *Ibid.,* 474. Portalis is particularly against the *Referé.* He claims that "to force the judge to resort to the legislator would be to accept a fatal principle: to come back to the legislation of *rescrits.*" (*ibid*). The *rescrits* were formal administrative acts deciding a legal matter or giving authoritative interpretation on a legal issue brought before it by some person or organization. The king could in this way clarify legal texts and decide on particular cases.

[26] This is denounced by Maleville (*ibid.,* 14) and Portalis (*ibid.,* 475).

[27] *Ibid.,* 474.

[28] Fenet (n 6) 21.

[29] Art. 14 of the first project presented by Portalis as a "*citoyen*". This article and many others contained in the Preliminary Title were rejected by the *Conseil d'État.* See Bernard Beignier, 'Portalis et Le Droit Naturel Dans Le Code Civil' [1988] Revue d'histoire des facultés de droit 77, 85. For some authors, the rejection of an article in this sense (i.e., that would give the judge an escape route in case of the law's insufficiency) is proof of the belief that the positive law would never run out. See Norberto Bobbio, *Il Positivismo Giuridico* (Giappichelli 1996) 70 f.

[30] Portalis affirms the existence of a system of natural law that corresponds with universal reason. But unlike earlier versions of iusnaturalism, he believes that, because of democratic legitimacy, the authoritative formulation and interpretation of the law corresponds to the legislator in the first place, not to judges or jurists. See Fenet (n 10) 465.

[31] *Ibid.,* 472. In line with enlightened principles of crime and punishment, and specifically with Beccaria's formulation of the principle of legality in criminal law.

[32] In fact, the principle of inexcusability stands: the judge must decide by acquitting the accused.

[33] Fenet (n 10) 472 f.

The contrary position, defended by some tribunes, and most notably by Maillia-Garat (Jacques Joseph Garat, 1767-1837/39), argues that allowing the judges to decide even in absence of law, is granting them legislative faculties that do not correspond to their role; it is granting them the power of creating law for the case, in circumstances that they do not have democratic legitimation for that, and punishing them when they refuse to do so! Maillia-Garat defends a conception of adjudication which involves strict subjection to the letter of the law resorting in his defence to Montesquieu.[34] According to Maillia-Garat, Montesquieu would have defended the idea that judges should be nothing more than the "mouthpiece of the law", as a guarantee of the separation of powers that was at the core of his constitutional ideal. Finally, he advocates for the institution of the *Referé legislatif* or a functional equivalent as the better way to solve the imprecisions and gaps in the law, which he does not ignore.[35]

The answer of the drafters to this objection is that the judge does not become legislator when deciding in the absence of law. The judge is not creating a general rule, but a particular one, so that there is no usurpation of legislative faculties. Only allowing judges to decide against the express wording of the law (such as the *praetor* did through the *bonna fides* actions[36]) or to create general rules would impinge the separation of powers, but that is not what the project establishes.[37] In fact, it is just the opposite: article 5 (former article 6, see Table 1) on the relative effect of judgments, which complements the principle of inexcusability, forbids judges "to rule, by means of a general or regulatory provision, on the cases brought before them" -as did the ancient *Parlements*. As a last resort, if judges decide against the law, the *Cour de Cassation* can annul those judgements.[38] As per Montesquieu, Portalis asserted that this passage was clearly intended for criminal law matters exclusively.[39]

For the opponents this article is no guarantee. They believed that it would be the judges themselves who would ultimately decide in which cases the law is insufficient, unclear or non-existent. That would allow them, without limits, to decide the cases according to their discretion.[40]

---

[34] Session of *12 Frimaire X* (3 December 1801), in Fenet (n 6) 143 ff, esp. 151–8.

[35] *Ibid.,* 153.

[36] *Ibid.,* 168.

[37] *Ibid.,* 168 ff. This has significant consequences with regards to the interpretation of the law. See *infra,* §2.C.

[38] This is noted by Tronchet (*ibid.,* 22).

[39] *Ibid.,* 169.

[40] See for instance Roederer (*ibid.*); Chazal (*ibid.,* 75 ff); and especially Maillia-Garat (*ibid.,* 150 ff).

These provisions were finally approved on 14 *ventose, an* XI (5 March 1803). The institutional design adopted settled two things: (i) the subordination of the judiciary to the law does not entail their stepping aside in cases where the law is taken to be somehow insufficient to solve the case; and (ii) the decisions made by the judges only have legal effects with regards to a particular case, and never count as general law binding in future cases. Adjudicating particular cases was always a judicial task; making general laws was always the legislature's. This, they believed, appropriately secured the separation of powers, and the subordination of the judge to the legislator.

Therefore, the preparatory works of the French Civil code, from their beginning in 1790 to their approval and promulgation in 1803-4, show that nobody among those who were in charge of the drafting commissions, or among the representatives that discussed and approved it, thought that the law in general or this code in particular could be made complete or perfectly clear and coherent. As per completeness, the impossibility of the legislator to foresee everything in advance and to regulate every contingency that might arise is out of doubt, and in fact, is treated as a triviality.[41] The same happens with clarity and coherence: it is acknowledged that the law is often unclear or contradictory due to human limitations. The debate, as may be gathered from above, is precisely about *how* to address the fact that the law will necessarily be insufficient and flawed in many cases. When Cambacérès presents a first project to the *Assemblée* in 1793, he levelled against the belief that the law should "everything foresee, everything regulate" and the belief that the existent laws and costumes should be replaced "by a perfect legislation that left no doubt to solve or difficulty to fear upon".[42] Cambacérès thought that this was not possible nor desirable. Instead, it corresponded to the nation the task of perfecting and strengthening the codes over time.[43] A similar opinion was held by Jacqueminot, in charge of presenting a more advanced project in 1799.[44] But even more eloquent in this regard was Portalis. In his discourse introducing the Code's project on 24 *thérmidor*, year VIII (12 August 1800), Portalis claims that the ambitions of "*tout simplifier*" and "*tout prevoir*" by means of the law are difficult, in the case of the former, and impossible, in the case of the latter. This has multiple causes, from the natural limits of human communication to the changing needs of social life. Moreover, he claims that these are dangerous

[41] Cambacérès (Fenet (n 10) lxxxi f, lxxxvi, 12.); Portalis (*ibid.,* cxvi and Fenet (n 6) 22.); and Tronchet (*ibid.*)

[42] Fenet (n 10) 10 f. By then the Preliminary Title had not yet been formulated.

[43] *Ibid.,* 12

[44] *Ibid.,* 329-30

ambitions that should be abandoned. It is inevitable, he said, that many unexpected issues will appear before the judge.[45]

> "[T]he legislator cannot possibly provide for all eventualities. In any case, how can one fetter the movement of time? [...] How can one know and calculate in advance what only experience can teach? […] A code, however complete it may seem, is hardly finished before a thousand unexpected issues come to face the judge. For laws, once drafted, remain as they were written. Men on the contrary, are never at rest ."[46]

This paragraph summarises the understanding of those who consecutively engaged in the drafting of the many projects for the Code civil, but also of the members of the *Tribunat* and the legislative assembly, who acted as a counterpart to the drafters' commissions. This was accepted even by those who, like Maillia-Garat, were opposed to the proposed solutions.[47] Pervasive as well was the awareness that, although good legislation should aspire to be clear and simple so that the citizens are able to navigate it easily,[48] none of these aspirations is completely achievable. As inevitable as the existence of gaps are ambiguities and contradictions in the law. This contrasts sharply with the idea, expanded by the TA, that the codes' drafters, and especially the French ones of the post-revolutionary age, would have believed in the power of reason to create normative bodies that would regulate everything and would not have gaps nor insufficiencies that needed to be solved through the exercise of further judgment.

It could be objected that this move is not charitable with the TA; that even the most adamant critics of 19th-century legal thinking would have recognised that it did not entail affirming that the law would be *always* and *absolutely* complete and perfect. Those would be just rhetorical figures. The criticism would be, rather, that these people believed that the law could be made *generally* and *significantly* complete and perfect, to an extent that it makes sense to claim that judges can *most of the time* apply the law in a mechanical fashion. The problem is, besides the fact that this would make their objections much weaker than they actually are,[49] that the codifiers did not think

---

[45] *Ibid.*

[46] *Ibid.,* 469.

[47] That is why he proposed a return to the *referées*. See n. 36.

[48] Fenet (n 10) lviii, 141.

[49] As if it were just a matter of degree, whereas in fact the objections were qualitative in nature. Paolo Grossi, just to give an example, claims that art. 4 (principle of inexcusability) is a proof that the codifiers believed the legal system to

it was the case either that *almost everything* could be regulated, or that the law could be in *most cases* perfectly clear and consistent. This was a contested matter. For some of them, like Portalis, in most cases positive texts would not be enough.[50] The problem with the TA seems to be that it attributes to the drafters of the *Code* -and later to the Exegesis- to have completely or to a great extent either ignored or denied these problems of the law because of revolutionary fanaticism or self-indulgence, in circumstances that the debates on these issues show quite the opposite. The limits of the law were generally acknowledged and accepted, and its implicances for adjudication extensively debated.

C. *Adjudication and the mechanical application of the law*

At this point it is possible to see why a strict subordination (in the sense of "mechanical" as specified in claim *(e)*) to the law is not a plausible picture of the Napoleonic codification's objectives. Due to the fact that the legal system is not perfect, the judge just cannot decide mechanically from the legal texts: "[v]ery few cases are susceptible of being decided […] on the basis of a precise text".[51] This makes implausible the ideas, repeated until nowadays, that the French codifier wanted judges to be mere "instruments" of the law,[52] or that they "launched the strongest attack on interpretation".[53] On the contrary, Portalis had warned against the English "formalism", which, by trying to prevent arbitrariness ended up producing inequitable and even absurd results:

> "Let to the judges the right to interpret positive laws […].
> Nothing more puerile than the precautions taken on this point by the

be complete (i.e. gapless), in such a way that the judge could be expected to reason by means of "logical elements". See Grossi, *Assolutismo giuridico e diritto privato* (n 7) 180.

[50] In his *Discours* of *4 ventose an XI* (23 February 1803), when talking of the return to the natural law in case of silence, obscurity or insufficiency of the law, Portalis acknowledges that without equity the office of the judge would become impossible in *most* cases. A similar statement in Fenet (n 6) 22.

[51] Portalis replying to Roederer. *Ibid.,* 26.

[52] John Dawson, *The Oracles of the Law* (U of Michigan Law School 1968) 411.

[53] Adolfo Giuliani, 'What Is Comparative Legal History? Legal Historiography and the Revolt against Formalism, 1930–60' in A Masferrer, KÅ Modéer and O Moréteau (eds), *Comparative Legal History* (Edward Elgar Publishing 2019) 38, 42. As seen, only Maillia-Garat seems to believe that interpretative faculties are "in itself an abuse" of the office of the judge (Fenet (n 6) 168).

English. To avoid arbitrary judgments, they underwent thousands of inequitative and even extravagant judgments..."[54]

If the legal texts are often insufficient, how were the judges expected to reach their decisions? Here we find that the codifiers are ambivalent between resorting to alternative sources, like customs or natural law doctrines, and nuancing the understanding of that positive law via constructive and interpretative means. According to Portalis, the problems created by the positive law's limitations are left to the customs, the legal science and the "*arbitrage des juges*".[55] When these also fail to provide an answer, then the judge will resort to the principles of natural law.[56] Here, the customs, legal science and the discretion of judges would operate as complementary though subordinated to legislation.[57] This is clear in cases for which no (statutory) law is applicable. It is not as clear, though, what is their role in cases where the legal provisions are ambiguous, vague or contradictory with other provisions. Are they conceived of as interpretive criteria of, or alternative sources to, legislation? This is a major issue, for these would not represent a marginal number of cases. In fact, the codifiers thought that it was by means of general principles and legal science "that *the majority* of disputes has always been decided."[58] There is no clear answer to this question. Whereas at times it seems to be the case that these "sources" -except for custom- are thought of as interpretive tools of the legal texts,[59] at other times it seems that they are thought of as alternative sources to positive law.[60] There is no clear differentiation between the cases where the positive law as such runs out (and how to identify its limits), and the cases where the legal texts, considered in themselves or in relation to other legal texts, create problems of interpretation or application that might be solved through interpretative means or by conceptual construction of the legal science. This deficit creates further confusion when it comes to establishing possible solutions.

---

[54] J.E.M. Portalis, *Papiers legislatifs,* quoted in Lydie Schimséwitsch (dite Adolphe), 'Portalis et Son Temps: L'homme, Le Penseur, Le Législateur: Thèse Pour Le Doctorat En Droit' (Thèse pour le doctorat en droit, Université de Paris, Faculté de droit 1936) 257.

[55] Fenet (n 10) 470.

[56] *Ibid.,* 471.

[57] *Ibid.,* 470 f.

[58] This is the case, for instance, of the general principle regarding civil liability in the Civil code (art. 1382).

[59] For instance, Portalis affirms that when unforseen circumstances appear, the judges should decide with help of these other "sources". And right away he says that decisions will be made according to the general spirit of the legislation, which gives the sense that these other sources help understand better this spirit (Fenet (n 10) 470.); later he affirms that most cases are decided in accordance with general principles and legal science, and adds that "[t]he Code civil does not exclude this knowledge; on the contrary, [the Code] supposes it." (Fenet (n 6) 23.)

[60] "But in the absence of a precise wording for every case, these other sources *take the place* of the law." *Ibid.,* 471.

Now, what about the pieces of legislation that are linguistically clear? In principle, the codifiers did believe that the texts with clear wording (*i.e.,* with clear syntactic and semantic meaning), the law should be strictly followed. This appears to be the meaning of the statement: "when the [statutory] law is clear, it must be followed",[61] which seems to fulfil the same function of the traditional maxim *in claris non fit interpretatio*:[62] to foreclose the possibility of the judge making an evaluative judgment with regards to the pertinence of a clear wording in relation to a particular factual situation covered by that wording. In this context, this means that the legal provision must be literally followed, without the need for pragmatic interpretation or any further discernment as to its applicability (*infra, b*).[63]

In what follows I go into more detail into the extent to which judges were supposed to make choices in matters of interpretation and application of the law. This will show how the Napoleonic codifiers understood such issues and the solutions they believed appropriate in each case –or lack thereof.

i. Faculty to interpret an ambiguous or infradetermined legal provision

Judges certainly have the faculty to interpret ambiguous or underdetermined legislation, which, following the dominant terminology at the time, was called "interpretation of the indefinite expression".[64] This kind of interpretation is doctrinary, not authoritative in nature, so it is not binding in future cases for, in conformity with article 5, only the legislator has the faculty to set up general interpretive laws.

> "There are two types of interpretation: doctrinary and authentic.
> Doctrinary interpretation consists in determining the true sense of the

[61] *Ibid.,* 474. This also can be deduced from Portalis' assertion while replying to Maillia-Garat, according to which judges would be usurping legislative faculties if they could decide against the express wording of the law. See *supra* §2.B.

[62] That is, if we follow Wróblewski's terminology, a secondary interpretive rule of exclusion or preference in favour of literal means of interpretation. See Jerzy Wróblewski, *The Judicial Application of Law* (Zenon Bankowski and Neil MacCormick eds, Springer 1992) 87 ff.

[63] Certainly, what counts as a semantically clear expression is controverted, and may require taking into account pragmatic considerations as well. But in this context, if a given linguistic meaning is not challenged it means that the interpretative exercise will end there.

[64] This terminology was originally developed by Savigny in his *System Des Heutigen Römischen Rechts* (Scientia Verlag 1981) as a canon for interpreting written laws. For a translated version, see FK von Savigny, *System of the Modern Roman Law*, vol 1 (Willam Holloway tr, J Higginbotham 1867) bk 1, ch. 4. In particular, the indefinite expression is discussed in the context of interpreting "defective" as opposed to "healthy" laws (*ibid.,* 179 ff), and supposes that the law's expression "guides to no complete thought" (*ibid.,* 179, 181 ff).

> laws […] Without this kind of interpretation, it would be inconceivable that the office of judge could even be carried out."[65]

Interpretive faculties are thus thought as essential to the office of the judge. However, this is pretty much all they had to say regarding law's interpretation. The rules regarding interpretation contained in the preliminary title were abandoned. It was thought that judges should deal with interpretation without fixed rules. In my view, this reveals an understanding of legal interpretation as a rather wide and flexible activity, certainly not regulated through primary or secondary interpretative rules, and which borders with the faculty of deciding according to equity.

ii. Faculty to interpret a legal provision against its express wording

Defeasibility of the statutory law's expression (i.e. wording) in favour of its "spirit", "thought" or "purpose" (under the dominant terminology at the time "interpretation of the erroneous expression"[66]) is not contemplated in the drafting of the Civil code. As seen, a clear wording is the defining criterion for the law's "strict" (i.e. literal) application.[67] When Portalis speaks about interpreting according to the "general spirit of the law",[68] it seems to refer only to semantically obscure/ambiguous legal provisions, not to those whose clear wording could be opposed to their spirit or purpose. The explanation of this exclusion is the same that Savigny identified when dealing with the interpretation of defective written laws: the risk involved in the identification and remedy of this kind of defect is far greater than that posed by the other type of defect -indefinite expression.[69] According to Savigny, identifying this defect is only possible through means with a low degree of institutional differentiation,[70] and involves already putting

[65] Fenet (n 10) 474. The interpretation that is authentic (also *d'autorité*) is given by the legislative or administrative corresponding authority and is, being a law itself, mandatory.

[66] In Savigny's canon for interpreting written laws, the erroneous expression is dealt with in the context of the interpretation of defective laws, and involves that "the thought absolutely denoted by it is different from the actual thought of the law". See von Savigny, *System of the Modern Roman Law* (n 64) 179 ff.

[67] See also Schimséwitsch (dite Adolphe) (n 54) 260 in fine.

[68] Following d'Agusseau. Fenet (n 10) 470.

[69] For Savigny this did not imply that the law's expression should be preferred to its thought. Quite the contrary, he followed here the roman broccard "*Scire leges non est earum verba tenere, sed vim ac potestatem"* (D. 1, 3, 17). However, it did involve taking greater caution in identifying and remedying the defect. See von Savigny, *System of the Modern Roman Law* (n 64) 179, 186.

[70] Neither literal nor logical (here meaning systemic) means of interpretation are useful in these cases, in Savigny's opinion. Only historical and purposive means are appropriate, which are "more unsafe" and "less certain" than other means. *Ibid.,* 187 ff.

forward the actual thought of the law by the interpreter,[71] which would create a significant risk of correcting not the wording but the thought itself, and hence the usurpation of legislative faculties by the judiciary. This risk is explicitly acknowledged by Portalis when replying to Maillia-Garat's objection to article 4: he grants his opponents that allowing judges to pass judgment against the express wording of the law would threaten the usurpation of the legislator's faculty of law creation.[72] Moreover, whereas remedying the latter is necessary because the law's expression does not guide us into a complete thought, and hence is not applicable, remedying the former is, in principle, not necessary, because the law's expression do guide us into a complete -yet erroneous- thought,[73] and hence judges can apply it even if the cost is to betray the actual thought of the law.

Only on one occasion, Portalis appears to acknowledge the possibility of wording and spirit being in contradiction. In this occasion he favours the spirit over the letter, in a rather obscure passage, in affirming that the judge must

> "study the spirit of the (statutory) law *when the letter kills,* and not to expose himself to the risk of being slave and rebel at the same time, and of disobeying because of a spirit of servitude."[74]

This passage, which resonates strongly with 2 Corinthians 3:6,[75] refers to the possibility that the letter of the law kills its actual spirit or intention, with the consequent paradoxical risk of disobedience that would entail being subservient to the letter. Although there are no more hints about the implications of this in the preparatory works of the Code, one of his *plaidoyers* of 31 March 1772 includes a paragraph that may illuminate what he meant:

> "I call principle of the [statutory] law [*loi*] the motifs and the cause which make the law just or necessary. I call principle of the [statutory] law the equity which explains it when it is obscure and which supplements it when it is insufficient. I call legal

[71] "[F]or we recognize the incorrectness of the expression merely by comparing it with the real thought; if this however is known to us, with it the remedy for that fault is likewise found." *Ibid.,* 187.

[72] This conclusion is not warranted, since due to art. 5 judges still cannot create general laws. Portalis seems to understand this and yet he concedes the point by claiming that deciding both against the express wording of the law *or* by means of general provisions would involve granting judges with legislative faculties.

[73] von Savigny, *System of the Modern Roman Law* (n 64) 179, 186.

[74] Fenet (n 10) 476. Some see here a concesion of "wide" interpretative faculties to the judge. See Schimséwitsch (dite Adolphe) (n 54) 257.

[75] **"He has made us competent as ministers of a new covenant –not of the letter but of the Spirit; *for the letter kills, but the Spirit gives life.*"** NIV, emphasis added.

> disposition/provision the particular rule that the [statutory] law prescribes, *and which is always subordinated to the principle that had the law established, on the one hand, and to the circumstances to which it is to be applied."*[76]

The interesting thing about this paragraph is that it affirms the subordination of the legal disposition both to the principle that informs it and to the circumstances to which it applies. Now, with "legal disposition" he refers to the legal text, that on its own does not constitute a legal norm.[77] In this vein, it seems that Portalis would accept an interpretation against the express wording of the law based upon teleological or purposive criteria.[78] This, however, sharply contrasts with the claims, quoted above, according to which (i) "when the law is clear, it must be followed"; and (ii) granting the judges with the faculty of interpreting a provision against its express wording would be granting them with legislative's faculties. Thus, whereas personally Portalis seemed to have favoured means of interpretation with low degrees of formality, this was not transferred to the Civil code's discussion or content.

iii. Faculty to integrate gaps in the law

Gaps in the law are largely discussed in the preparatory works of the Civil code, along with the limitations of the legislator. Here is where article 4 becomes relevant: the judge must decide all the same. The Code would never come to state on what basis the decision should be made in absence of law, but to its drafters this seemed to be a platitude: the judge would act in those cases as a judge of equity.[79] It was upon the basis of "natural equity" that the judge would solve the case. Besides equity, scientific law, ancient principles and customs are mentioned as supplements of legislation. Similarly to the case of the obscure/ambiguous law, it is not clear whether these are sources in which equity is expressed, or whether these are "sources" that allow to supplement the positive legal system from within. For instance, in the case of scientific or doctrinal law, it is

---

[76] J.E.M. Portalis *plaidoyer 31 mars 1772,* in *Recueils des plaidoyers*, t. IV, 129, quoted by Schimséwitsch (dite Adolphe) (n 54) n 2 in 257 f. Here the author notes that Duguit, in believing his "functional jurisprudence" to be opposed to Portalis and 19th-century legal science was rather misguided, as Portlis would have been in fact a precursor of such a jurisprudence. See *ibid.,* n 1 in 258.

[77] Because it needs interpretation to provide reasons for a decision. There does not seem to be other plausible interpretation for this term as he uses it here.

[78] And considering what he understands by "principle", Portalis accepts interpreting the defective law by means of what Savigny would call "general grounds" of the law. For Savigny, this was not an acceptable means of interpretation, and was in fact "interpretation only in name" (von Savigny, *System of the Modern Roman Law* (n 64) 194.), because of the level of uncertainty of such grounds. In this way, Portalis seemed to have accepted wider and less formal means of interpretation than Savigny.

[79] Fenet (n 6) 21, 85, 138 f, 268.

pointed out that it is a superior source, for it knows the *spirit of the* (positive) *laws,* which is better than only knowing its letter.[80] This might refer to the *telos* of legislation in general, whereby general principles may be inferred and, on their basis, solutions for particular cases deduced. This is coherent with the idea that legislation should establish "general principles fertile in practical consequences", but the connection is never made explicit. On the other hand, on some occasions the drafters' discourse conflates the general spirit of legislation with natural law. Since for many of the drafters and members of the Assembly, as was certainly the case of Portalis, positive law was already a formulation of natural law,[81] it is plausible to suggest that for them this would represent a problem in appearance only: in the end, what is primarily a prerogative of the legislative function (*i.e.* interpreting the principles of natural law in order to give them a written formulation for a specific political community), in some cases will be the prerogative of the judge because of legislation's inherent limitations. Portalis acknowledges that this is, although limited, a *creative* faculty[82] and that, despite the fact that judges shall have this prerogative in absence of law, this does not make it into a *jurisdictional* faculty: "If judges can create [law], it is not in virtue of their being judges, it is in virtue of their being men."[83]

iv. Faculty to solve contradictions between legal provisions

This possibility is not explored in the preparatory works of the Civil code. The possibility of two or more legal provisions entering into conflict is touched on in passing,[84] but is not dealt with as a problem in itself. Consequently, there are no hints as to whether judges have (i) the faculty to prioritise one provision over another, nor (ii) the basis upon which such a decision could be made (*v. gr.* second-order rules of preference, either implicit or explicit in the legal system).

v. Faculty to not apply the law when the consequences of its application are deemed unacceptable

The defeasibility of legal provisions is not contemplated in the formation of the Civil code. There are no mentions of extra-legal considerations that might justify the non-application of a

[80] Portalis following d'Agguseau. *Ibid.,* 360.

[81] "A statutory law is not a mere act of will and power, but an act of justice and reason. […] The regulations of the legislator are subordinated to natural law as the decisions of the judge are subordinated to statutory laws." JEM Portalis, *De l'usage et l'abus de l'esprit Philosophique Durant Le 18ème Siècle*, vol 2 (2nd edn, Moutardier 1827) 384 f. The same idea is repeated in his *Discours préliminaire* (Fenet (n 10) 466.) See also Schimséwitsch (dite Adolphe) (n 54) 257.

[82] Because in the case of judges the "interpretation" of natural law principles is circumscribed to particular cases and never has the status of general law.

[83] Schimséwitsch (dite Adolphe) (n 54) 262.

[84] Fenet (n 10) 474.

legal rule. Again, here the statement: "where the law is clear, it must be followed"[85] seem to directly exclude this possibility, for the same reasons discussed above, but this time with even greater strength. Granting the judge with the faculty to defeat the law where non-legal (*i.e.* moral, political, economic, etc) reasons militate against it, would be putting them above the decision made by the legislator, without the democratic legitimation to do so.

3. The School of the Exegesis

As seen in the last chapter, the School of the Exegesis, even more than the codifiers, has been the target of the TA's accusations of formalism. In the words of Gény, the Exegesis believed in two "dogmas": that all the law comes from legislated law, and that, so understood, the law would be sufficient to solve any case that would arise in legal life. A hundred years later, this was still the mainstream account about *la doctrine* born out of the great legal codes.[86] Furthermore, the exegetists would have advocated that the law (as legislation) was complete, clear and coherent,[87] and believed that the law was to be strictly applied, that is, literally and mechanically, to the facts of the case.[88] As per the judges, they were forbidden to interpret the law by any other means, and were certainly forbidden to create new law. A similar passive attitude would have been expected from scholars, whose only task remained that of explaining the legal texts in an orderly fashion. This reductivist view would come at the cost of rigidity and lack of creativity, causing the legal system to be incapable of adapting to new circumstances and facts of life. But is this account of the School of the Exegesis an accurate way of portraying 19th-century French legal science? Was the School of the Exegesis "formalist" as understood by the TA?

The School of the Exegesis was the group of professors -mostly of civil law, but also from other codified areas of law- whose works were devoted to expose and comment upon the codes, and who subscribed to a certain shared conception of what the law was, what were its sources,

---

[85] See n. 62 and associated text.

[86] Meynial (n 1) 176, referring to the first part of 19th-century legal scholarship: "The statutory law, in their eyes [i.e., legal scholars], still contains the whole of the law, systematised into immutable and absolute principles, and whose knowledge and full understanding give the key to all the difficulties that men can raise."

[87] See Helmut Coing, 'Trois Formes Historiques d'Interprétation Du Droit. Glossateurs, Pandectistes, École de l'exégèse' (1970) 48 Revue historique de droit français et étranger 531, 542; Marie-Claire Belleau, 'Le Juristes Inquiets: Legal Classicism and Criticism in Early Twentieth-Century France' (1997) 1997 (2) Utah Law Review 379, 386 f; and Edyta Sokalska and Malgorzata Augustyniak, 'Legal Interpretation from the Perspective of French Jurisprudence: From Positivist Exegesis to Free Scientific Research' (2022) 48 Review of European and Comparative Law 175, esp. 176-9.

[88] See Julien Bonnecase, *L'Ecole de l'Exégèse. Sa Doctrine, Ses Méthodes* (2nd edn, De Broccard 1924). Bonnecasse's study was continued by Eugène Gaudemet in *L'interprétation Du Code Civil En France Depuis 1804* (Sirey 1935), which consolidated this narrative. See also Belleau (n 87) 387 ff; and Sokalska and Augustyniak (n 87) 176.

how it should be interpreted, and what were the roles of judge and jurist as regards to the legal phenomenon. This School was the dominant way of legal thought from the beginning of the 19th century until well advanced the second half of it.

There are several traits of the Exegesis that have been associated with formalism: (i) the "dogma" that identifies the law with positive law, in this case legislation. This is also referred to as "legalism" or "legalistic positivism",[89] and corresponds to the idea that only formal sources issued by the state make up the law which is, thus, a closed normative order (claim *(b)*). Sometimes is equivocally referred to as "cult to the text of the law"[90]; (ii) the ideas that the legal system -consisting only of legislated law- is a complete and coherent body (claim *(c)*) of clear rules (claim *(d)*). This leads to (iii) the belief that judges can, only by reference to the legal texts, mechanically solve any problem brought before them. Thus, legal reasoning would always take the form of a simple deductive syllogism, consisting of the general normative premise as laid out in a text, and the factual premise of the particular case, from which a normative conclusion would be specified. Since legislation is assumed to be complete, coherent and clear, there would have been no need to integrate gaps, solve contradictions, or interpret ambiguous, unclear provisions.[91] Exceptionally, the Exegetists would have acknowledged the need to interpret some ambiguities or obscurities in the legal texts. In those cases, (iv) the interpretation of statutes, understood as the cognitive activity of identifying the legislator's intention, would be severely restricted to literal means (claim *(e)*) As a result -and purpose- of these claims, (v) judges would never create law, but only apply pre-existing law (claim *(a)*). A corollary of this model would have been also a reduced role for legal science. Following the model of the biblical exegetists, scholars would have only one task: to consecrate themselves to the interpretation and explanation of sacred texts -the legal codes.

Traditionally, the School of the Exegesis has been divided into three phases: a formative stage 1804-1830, an apogee (1830-1880), and a decline (1880-1900).[92] Here, the main efforts will be oriented towards the study of the authors belonging to its apogee, for they represent the paradigmatic form of the exegetic method, and also because the greatest names of the School come from this period. These authors are: Duranton, Aubry and Rau, Troplong, and Demolombe. Additionally, a couple of great names from the formative and decline stages will be included when appropriate: Delvincourt, Toullier, and most notably, Proudhon, in the case of the former; Laurent

[89] Eduardo García de Enterría, 'La Democracia y El Lugar de La Ley', *El Derecho, la Ley y el Juez. Dos estudios* (Civitas 1997) 87; Giovanni Tarello, 'Formalismo', *Novissimo Digesto Italiano* (UTET 1961).

[90] E.g., Bonnecase (n 88) 128 ff.

[91] Giuliani (n 53) 37.

[92] First developed by Bonnecase. See *ibid.,* 16 ff.

and Baudry-Lacantinerie, in the latter. It is, lastly, necessary to take into account some minor authors, forgotten today, such as Bugnet and Valette, to whom some of the most famous claims that would support the account on formalism have been attributed. It is also necessary to keep in mind that, throughout these stages, two "rival" methodological branches developed within the Exegesis: the analytic method, on the one hand, and the synthetic method, on the other. The first one, represented most notably by Troplong, is known to have strictly followed the order of the Code, chapter by chapter and article by article;[93] the second, in line with German legal dogmatics and attributed to authors such as Aubry and Rau, to have built on the basis of the Code, its own order, categories and concepts.[94] In the context of this differentiation, the traits attributed to the Exegesis in general can be better understood as a somewhat limited range of diverse opinions and styles, operating on a common basis: the codification as the ultimate legal authority and object of their science.

There are two main ways in which the main representatives of the Exegesis manifested their scientific assumptions and commitments, that is, their ideas and conceptions as regards to their task, the nature of law, its interpretation and application. One of them, of course, can be inferred from the way in which they actually performed their task: the way in which they proceeded in explaining the law, the Civil Code, the means by which they interpreted different dispositions, reasoned in solving legal problems, etc. The other one, which is here to be preferred, is constituted by the claims they directly made about such matters, be it in their academic works or in conferences, discourses, letters and so on. Because they were mostly professors of civil law, one would not expect them to have said much about these questions; moreover, one should not expect them to have thoroughly and deeply reflected on these matters as a legal theorist today would. But nevertheless, they did find a space in their endeavours to express their fundamental understanding of what the law was, where it came from, and how jurists and judges should go about grasping its meaning and applying it to particular cases. They did so for the most part in the prefaces of their works.[95] The claims made in these prefaces are a key source of the Exegetist's agenda regarding the law and legal science. This is why they have been put at the centre of the account on legal formalism in 19th-century France since its very beginnings.

[93] Also called "exegetical". *Ibid.,* 182 ff.

[94] Also called "dogmatic". *Ibid.,* 184 ff.

[95] This was also the approach taken by Bonnecase. *Ibid.*

A. *The "cult to the text of the law" as a matter of sources*

When he first described and baptised the Exegetic School, Jean Bonnecase asserted that one of its fundamental traits was its "cult of the text of the law".[96] This formulation is equivocal because it suggests that the Exegesis would have believed and promoted interpretative literalism. But that is not what Bonnecase meant by this expression. What he meant was that for the Exegesis

> "positive [*i.e.* statutory] law must be the dominant, as well as the exclusive, concern of the jurist and positive [*i.e.* statutory] law is identified, in its entirety, with the law."[97]

Although he uses the generic expression "positive law", he means "legislation". This is clear from a more fortunate expression that he uses in the same paragraph, by stating that the Exegesis substituted *"le culte du droit*" with "*le culte de la loi",*[98] which translates as replacing "the cult of the law" with "the cult of legislated law". Bonnecase's affirmation finds justification in the words of those he considers to be members of this school. Mourlon, for instance, employed a similar formulation as he stated that to the jurist, lawyer and judge "only one law [*droit*] exists, the positive law [*droit positif*]", which he defines immediately after as "the ensemble of statutory laws [*lois*] promulgated by the legislator […]".[99] So by "positive law" Mourlon means legislation.[100] This identification of positive law with legislation that adopts the form of authoritative texts may be the source of the mistake in using the expression "*culte du texte de la loi*" instead of just "*culte de la loi"*. This identification can be further highlighted by a statement made by Demolombe, in which he declared "the texts above all!", not to advocate for literalism, but to explain that the mission of legal scholarship was to explain and interpret the Civil Code as "applicable and binding law".[101] So, a fundamental assumption about the Exegesis is that "law" means "positive law" and "positive

---

[96] *Ibid.,* 128. Also called "*culte littéral*" (Schimséwitsch (dite Adolphe) (n 54) 257.)

[97] Bonnecase (n 88) 128. This is further confirmed in the following paragraphs, where he specifies that the objects of the cult are the legislated texts, and in particular, codification. *Ibid.,* 128 ff.

[98] *Ibid.*

[99] Frédéric Mourlon, *Répétitions Écrites Sur Le Code Civil*, vol 1 (11th edn, Garnier Frères 1880) 3, 6, 59. Here Mourlon is specifically fighting against granting moral norms the status of law, unless they have been sanctioned by legislation.

[100] Admittedly, this includes not only statutory law strictly speaking, but also other sources issued by competent authorities such as old *ordonnances* not abrogated or contrary to new law, the *avis* of the Council of State, and other regulatory decrees and regulations. See, for a list of the main accepted sources of positive law at the time, Aubry and Rau (n 13) 5 ff.

[101] Charles Demolombe, *Cours de Code Napoléon*, vol 1 (Imprimerie générale 1880) vi. I take Giuliani to be wrong in this point (see Giuliani (n 53) 36 f.)

law" means "legislation". Hence the appellatives of "legalism" or "legalistic positivism".[102] This is the same idea that Saleilles and Gény would later repeat: the exegetists would reduce all the law to legislation and, particularly, to codification. As it is clear, this is a claim about the sources of the law, not about a specific form of interpreting it.

Now, the issue of legislation as the fundamental source of the law is certainly a key aspect of the legal paradigm under which the Exegesis operated.[103] To some, as seen above, legislation is considered the *only* source of law, and for others the main source, as customs are accepted insofar as they are sanctioned by the legislature.[104] To this extent the assertion that the Exegesis itself depended and was shaped by a theory of the sources of law with a "*vocation moniste*", is correct.[105] As seen above, a central aim of the codification was that legislation would replace all the other sources of law: customary law, Roman law, judge-made law, canonical law, and so on. Likewise, legal teaching was reorganised by Napoleon precisely to account for this new model in which the law's production rests exclusively in the hands of the legislature.[106] Accordingly, legal science, until then a major source in the elaboration of the law, would now take a new, more humble role: that of explaining and working out the content of the law on the basis of the new codes. In this context, it is possible to understand the famous phrase attributed to Bugnet and often employed as example of the most fanatical formalism: "I know no civil law; I teach the *Code Napoléon*".[107] This did not mean that the *Code Napoléon* was not civil law (after all it was the only civil law). Nor did it mean that the substance of old customs, *ordonnances,* and natural law doctrines did not survive to a great extent in the *Code* -they did. It was rather about overcoming the ancient idea of civil law as an amalgamation of different sources and techniques, with different outcomes depending on the geographical area, personal status, subject matter, and the jurisdiction under which the case in question fell. In other words, it was about moving away from medieval civil law and what was seen

---

[102] See António Manuel Hespanha, 'Tomando La Historia En Serio: Los Exégetas Según Ellos Mismos' (2012) 2 Forum 13, 15; Frédéric Audren and Jean-Louis Halpérin, *La Culture Juridique Française. Entre Mythes et Réalités, XIXè-XXè* (CNRS éditions 2013) 95.

[103] See, *e.g.,* Aubry and Rau (n 13) 5 ff.

[104] *Ibid.,* 37 f.

[105] Nader Hakim, *L'autorité de La Doctrine Civiliste Française Au XIXe Siècle* (LGDJ 2002) 15; also Coing (n 87) 542. Exceptionally, in the absence of law or in controverted cases, other sources may be considered (customs or natural equity). Demolombe even considers that jurisprudence (*i.e.,* a doctrinary body created through judicial decisions of the superior courts) can be a legal source. This is a minoritary position, though. See Bonnecase (n 88) 140 ff.

[106] See *supra* notes 7 and 8. According to Audren and Halpérin, these measures show a policy organised to "secure the reception of the codification and arouse, under the guise of the state, a new national legal culture" (Audren and Halpérin (n 102) 15.)

[107] This attribution might well be mistaken. See Bonnecase (n 88) 29 f.

as its capital vices: multiplicity of sources, the *opinio doctorum* with the obscurity of *interpretatio,* the judges and their arbitrariness.[108] From now on, civil law was one and the same for all the French people, and it was all contained in the Civil Code and other norms formally issued or sanctioned by the state: a clear-cut telling apart of law from non-law was both the aim and the effect of this reorganisation of sources.

Legislation as the fundamental source of law is hence directly related to another trait that Bonnecase also identified in the Exegesis: its *estatisme.* This means, in this context, the belief that the state has the monopoly of law's making.[109] Following Bonnecase, "[t]he doctrine of the School of the Exegesis boils down, as a matter of fact, to declaring the legal omnipotence of the legislator, that is, of the State",[110] for the emergence of modern national states relied on their ability to clearly marking out state-law, and on guaranteeing exclusive control over its production and content.[111] When this principle of legal sovereignty meets the constitutional doctrine of separation of powers, the institutional design of the law's processes calls for upholding a clear-cut distinction between the creation of the law on the one hand, and the interpretation and application of the law, on the other, which entails further differentiation of institutional roles. The Exegesis inscribed itself within this framework:

> "There is no more uncertainty; the law is written in these authentic texts. But for the codes to have this advantage, it is necessary that both authors and judges accept their new position. […] Their only mission is to interpret it. The job of legislating is no longer theirs, it is the legislative's power."[112]

Note the importance of the fact that the law is produced exclusively by the state for the scholars and judges' authority: their new position is subordinated to the law *as* legislation.[113] As Hakim rightly says, "the identity of the doctrine thus depends on a theory of legal sources."[114] The

---

[108] As acknowledged by Aubry and Rau (n 13) 10 f; and Raymond-Théodore Troplong, *Le Droit Civil Expliqué Selon l'ordre Des Articles Du Code. Vol. 9. Des Privilèges et Hypothèques* (Librairie de H Tarlier 1835) x.

[109] And unmaking: "the [statutory] law can only be repealed by the [statutory] law" (*ibid.,* 50).

[110] Bonnecase (n 88) 149. More recently Giuliani (n 53) 35.

[111] See Mátyás Bódig, *Legal Doctrinal Scholarship: Legal Theory and the Inner Workings of a Doctrinal Discipline* (Edward Elgar Publishing 2021) 52. This is the idea that state's law controls its own creation and change put forward by Kelsen in his *General Theory of Law and State* (Russell & Russell 1945) 124 ff.

[112] François Laurent, *Cours Élémentaire de Droit Civil*, vol 1 (Bruylant-Christophe & Ce 1881) 9. Note that here the phrase "there is no more uncertainty" refers to the problem of sources, not to that of interpretation.

[113] On how this institutional design relates to the Exegesis and the jurist's position, see Hespanha (n 102) 15 f. On how this design impacted on the professors' authority, see generally Hakim (n 105).

[114] *Ibid.,* 17.

judge is now a servant of legislation and must "humiliate his reason in front of the reason of the [*loi*]: for he is instituted to judge according to the [*loi*], and not to judge the [*loi*]."[115] But whereas some may call this attitude as "servilism",[116] others -the exegetists themselves- would most likely call it "loyalty" or "commitment" to the codes. Indeed, it strikes as somewhat odd treating this as an ideological trait of a legal school and not as the recognition of a political-constitutional fact, for, indeed, the control of law's production and change were not a mere ideal but got to be institutionally expressed.[117]

With this in mind, the claims according to which the Exegesis *(a)* understood the role of the judge as subordinated to the law (*i.e.,* consisting of applying it); and *(b)* "reduced" the law to -or identified it with- positive law issued or sanctioned by the state, and thus made a clear distinction between law/non-law, can be accepted. However, both claims need to be further examined. As will be shown, the claim *(a),* that is, the subordinated role of the judge, must not be taken to imply claim *(e),* that is, viewing legal reasoning as mechanical or merely deductive. Regarding claim *(b),* there is something else to say of the fact that, as mentioned above, it is often formulated as a cult of the *text* of the law. While sometimes (as in Bonnecase) this is just an unhappy expression to refer to the sources, in others the "obsession" with the literal expression of the law is openly linked to the constitutional separation of powers. In the words of a recent version of the TA: "textualism is one of the leading principles in a constitutional architecture built upon a clean-cut distinction between law-making and its application."[118] Note that this formulation supposes adding to the claim "law = positive law (=legislation)" a second, implicit, one: "legislation = legislative texts". But that the fundamental source of the law is legislation does not imply the claim that the law is identical to the written texts in which legislation is expressed.

With little doubt, this claim is a distortion of 19th-century legal scholars' understanding. One conspicuous example is Raymond-Theodore Troplong (1795-1869), president of the *Cour de Cassation* and considered a leading jurist of the heyday of the Exegesis.[119] Troplong, following

---

[115] Mourlon (n 99) 3, 6, 59.

[116] Hakim (n 105) 7.

[117] See *supra* n. 18 and associated text.

[118] Giuliani (n 53) 37. The author is ambiguous as he presents textualism first as a matter of sources being text-based (36), but inmediately after as a way of identifying the sources with their text ("black letter of the law") (37). He goes on to associate textualism with the need to not interpret the law (referring to the maxim *in claris*), and with the notion that the reason of legal texts "cannot be separated from its written form", which would make the text a "self-standing creature" (37). This shows that he understands textualism as implying the equivalence legislation=legislative texts. The qualification of "obsessive" in *ibid.,* 38.

[119] Bonnecase (n 88) 27.

Savigny, advocated the idea that the law and legislative texts are not to be confounded: written statutes are the expression of the law, whose nature would be the *living whole* of its constituent parts and its successive developments.[120] This rather obscure formulation, in the case of Savigny meant something different than in the case of Troplong. Whereas for the former this living whole was thought of as a historically spontaneous and organic reality (*i.e.* not made by people, as in an artifact), the latter had to show, and in fact showed, loyalty to the authoritativeness of the (man-made) *Code Napoléon.*[121] For Troplong it was without doubt that all the civil law came ultimately from that body of written dispositions, but those texts were only the starting point to reveal the *living whole* of which he spoke about. We find another example in Charles Demolombe (1804-1887), professor at Caen and known as "*prince de l'exégèse"*. Demolombe states that, since the promulgation of the *Code Napoléon* fifty years before*,* a body of doctrine and jurisprudence (in the sense of judicial decisions) has grown out of the legislative dispositions and has become an inseparable part of it, because these texts necessarily must be commented upon and interpreted in order to be applied to particular cases.[122] And yet another example is the case of the professors of civil law at Strasbourg, Charles Aubry (1803-1883) and Charles-Frédéric Rau (1803-1877), also leading scholars of the Exegesis' apogee. Aubry recognises that the text of the law may present ambiguities and vagueness in its expression, and even accept the possibility of the text being semantically clear but not representing the true intention of the legislator.[123] The same idea is held by Proudhon,[124] Demante[125] and Delvincourt.[126] In this vein, they thought that the law, although having its formal source in the legislative texts, was a normative system going beyond those texts. In other words, the law was the *rational system of principles* underlying the legal texts, a system that was precisely the object of a true science of law. As summed up by Aubry:

---

[120] See, e.g., Raymond-Théodore Troplong, *Le Droit Civil Expliqué Selon l'ordre Des Articles Du Code. De La Prescription*, vol 2 (Hingray 1835) vi. The inspiration in Savigny comes from *System of the Modern Roman Law* (n 64) 8, although Savigny here is talking about the visible expression of the law in general. The influence of Savigny on Troplong has been studied in Mikhail Xifaras, 'L'École de l'Exégèse Était-Elle Historique? Le Cas de Raymond-Théodore Troplong (1796-1869), Lecteur de Friedrich Carl von Savigny' in Heinz Mohnhaupt and Jean-François Kervégan (eds), *Influences et réceptions mutuelles du droit et de la philosophie en France et en Allemagne* (Klostermann 2001).

[121] Troplong, *Des Privilèges* (n 108) viii, x.

[122] Demolombe (n 101) iii.

[123] *Rapport du doyen Aubry,* in Bonnecase (1924) 135).

[124] Jean-Baptiste-Victor Proudhon, *Cours de Droit Français. Première Partie : Sur l'état Des Personnes et Sur Le Titre Préliminaire Du Code Napoléon*, vol 1 (Bernard-Defay 1809) ix.

[125] Antoine Marie Demante, *Programme Du Cours de Droit Civil Français*, vol 1 (A Gobelet 1830) 14.

[126] Claude Étienne Delvincourt, *Cours de Code Civil*, vol 1 (P J de Mat 1827) *préface.*

> "All the [statutory] law, in its spirit as in its letter, with a large application of its principles and the most complete development of the consequences that follow thereof, but nothing besides the law, such has been the motto of the professors of the *Code Napoléon*."[127]

As among the codifiers, the exegetists were well aware that the legal texts could not speak for themselves, and that some kind of mediation was needed. This was recognised even by Bonnecase. Although he formulated the issue of sources as a "cult of the text of the law", he also affirms that the Exegetists understood the source of positive law not as the text itself, but rather as the intention that precedes it and justifies it.[128] This point will be touched further upon when addressing the Exegesis' views on the interpretation of the law.

B. *The law as a complete, coherent and closed body of clear rules*

"Legislation was the incarnation of the state which could foresee and produce all possible legal solutions in order to meet all potential needs. In this context, the Code civil constituted the ultimate and most perfect expression of legislative plenitude."[129] "The official adopted text, due to its *completeness, precision, compactness and clarity* would not raise serious interpretation doubts."[130] Such would have been the Exegesis understanding of legislation in general, and the Civil code in particular.

One member of the Exegesis, otherwise mostly forgotten, claimed that the French legislator had "legislated so much […] that it would be quite surprising to find a case that is completely off legal provisions."[131] He believed that the legal system *qua* legislation was if not absolutely, at least almost, complete. And it is quoted to demonstrate that this represents a dominant way of thinking among the Exegetists. That it was a shared "dogma".[132]

This is, however, extremely misleading. As with codifiers, the completeness of legislation was never held as a dogma by 19th-century legal scholars, and not even as a normative horizon.

---

[127] Charles Aubry, 'Séance de Rentrée de Faculté de Strasbourg' (Strasbourg, 1857). Quoted in Bonnecase (n 88) 134.

[128] *Ibid.,* 131 ff.

[129] Belleau (n 87) 387.

[130] Sokalska and Augustyniak (n 87) 176.

[131] Auguste Valette, *Cours de Code Civil Professé à La Faculté de Droit de Paris, Par A. Valette, … T. Ier, 1re Année, Titre Préliminaire et Livre Premier*, vol 1 (G Baillière 1872) 50 f.

[132] This idea can also be found, among others, in Coing (n 87) 542; Belleau (n 87) 386; and Sokalska and Augustyniak (n 87). Belleau, however, is just assuming the position advocated by the *Juristes inquietes* (that is, Gény, Saleilles, *et al*). For the most part, she remains agnostic as to the reliability of such characterization.

There are just too many examples proving this. The same happens with the idea a of a perfectly coherent and perfectly clear body of norms. That is the point of them discussing interpretation of contradictory laws by means of secondary rules of preference,[133] and resorting to other sources in case of gaps.[134] In fact, a key aspect of the exegetic method (even in its analytic version) was finding gaps and contradictions between different dispositions in order to solve them.[135] Furthermore, the dogmatic method of the Exegesis took the legal texts as the starting point to build a rational, coherent system precisely because the raw legal texts were not taken to be such a system yet. Aubry and Rau, for instance, for all their praise of the *Code,* do not assume it to be perfectly rational and coherent, as they are aware that it is a historical object, created by many people with different backgrounds and many limitations.[136] This historical awareness certainly does not lend itself to mythologising the law, and is far from the kind of thinking illustrated by the quotes that open this section. Similarly, while Troplong praised the precision and clarity of the *Code,* he did it to mark the advantage the new legislation posed when "compared to the chaos of the old law".[137] More radical in his approach to this subject, the doyen of Dijon Louis-Romain Morelot, in outlining his agenda regarding legal education and the development of legal science, explicitly stated that legislation was not and could not be taken as a solid foundation, for it consisted in "arbitrary, incomplete and incoherent rules" and in "faulty, equivocal texts, recklessly mutilated or subtly amended and reamended in divergent ways, and not having in common other connection than the one resulting from the same series of numbers!".[138] To be clear, this was far from being the dominant position among the Exegetists, and is only aimed at showing the variety of discourses present within them.

Now, that the legislation was thought to be incomplete, obscure, etc, does not mean that the legal science could not build, starting from these texts, as coherently and clearly as possible, a normative system. The constructive labour of the jurist was a disputed subject in 19th-century France, and the Exegesis was no exception. The analytical and synthetic methods advocated different views on the nature of legal science's labour, and on the legitimate scope that conceptual constructs had within legal reasoning. Confronted with a legislative gap, the judge must decide,

---

[133] *E.g.,* Aubry and Rau (n 13) 81 f.

[134] *E.g.*, Jean Guillaume Locré de Roissy, *L'esprit Du Code Napoleon*, vol 1 (L'Imprimerie Impériale 1805) 44; Aubry and Rau (n 13) 78.

[135] Bonnecase (n 88) 187.

[136] Aubry and Rau (n 13) 80 ff.

[137] Troplong, *Des Privilèges* (n 108) x.

[138] Louis-Romain Morelot, *Dictée d'un Professeur de Droit Français*, vol 1 (V Lagier 1835) 17 f.

for thus ordained the law. Whether judges decided as judges or as legislators in these cases was also a controverted matter.[139] But what was legal science to do when faced to a gap in the law? Simply note it and wait for future reforms? Or try and infer a solution that conforms to the general principles underlying legislation? And those principles, how were they to be identified, and were they themselves also legal sources? The Exegesis does not offer a clear or univocal answer to these questions, because it did not have theoretical tools to address them in a systematic manner, nor did they constitute its direct scientific object. At any rate, to claim that the Exegesis held that legislation "could foresee and produce all possible legal solutions in order to meet all potential needs",[140] or that "the Code civil constituted the ultimate and most perfect expression of legislative plenitude",[141] is surely a gross misunderstanding of the Exegesis' conception of legislation and the legal system. Claim *(c),* therefore, was not part of the Exegesis system of beliefs.

C. *Adjudication and the mechanical application of the law*

We are repeatedly told that 19th-century view of adjudication was that "[t]he functions of judges were reduced to the *mechanical application of the law*."[142] Yet the previous section suggests that the idea of a self-sufficient law that can be mechanically applied is as implausible in the context of the Exegesis as it was in the context of codification. It is generally acknowledged that the texts, when they do provide for a specific case, do not speak for themselves: they need specialised mediation. Sometimes they are unclear, obscure, incomplete. Sometimes they are clear enough, but they yield results that seem to be at odds with the law's intention or purpose or that are plainly absurd. Other times they may be in conflict with other rules in the system. And in other cases, there does not seem to be a legal norm covering the situation that needs to be solved. Constructive and hermeneutical mediation is necessary to deal with these problems and is everything but "mechanical" because it demands judgement.

Although it is said that Napoleon was tempted in following the path of Justinian and Frederick the Great, by prohibiting that his codes were interpreted and commented upon, this option would soon prove itself impractical.[143] This raised the need for a canon of legal

---

[139] Belleau (n 87) 387.

[140] *Ibid.*

[141] *Ibid.* Belleau is here assuming the position of the Exegesis' critics. It is not entirely clear if she remains agnostic as regards this claim, or if she supports it.

[142] Sokalska and Augustyniak (n 87) 176. Emphasis added.

[143] In fact, Napoleon did not ban doctrinaire commentaries or interpretations, although restrictions were issued regarding the methods of legal teaching.

interpretation that was fit for the new model of legal sources and the consequent role of the judge. The exegetical method made use of such a canon drawing from different sources, but it is hard to say that it produced a theory of interpretation or legal reasoning more generally. Nonetheless, it is worth exploring the general conceptions about adjudication and how the main challenges it supposed were understood by the Exegetical School. In the vast majority of their works, the Exegetists clearly defined its interpretative boundaries.[144]

i. Legal interpretation as identification of the legislator's intention

A central trait of the interpretative method followed by the Exegesis has been said to be the subordination of the interpreter to the legislator's will, following, through the Germans, the philological method developed by Spinoza and consolidated by Schleiermacher.[145] Beyond the issue of the sources already discussed, this implies a subjectivist view of statutory interpretation: the law's *meaning* is identified with the (subjective, historical) intention of the legislator. This trait, however, also needs to be further qualified. While it is true that resort to the legislator's intention is pervasive in exegetical works, it is also true that some exegetists thought that the law has an objective meaning, independent of the will of the historical legislator. Troplong, for instance, followed Savigny in this matter: the interpretative activity seeks the sense or thought (*la pensée*) of the law, not of the legislator.[146] The reason why Savigny, and with him Troplong, avoided speaking about "intention" is that this term can refer to two different things: the immediate purpose of the law, or a more distant purpose of the legislator, to which the law concurs indirectly.[147] It is only the first one that is of interest to the interpreter. But even in the cases where resort to the legislator's intention is made, this invocation does not tell us much about how the interpretative goals and limits were conceived by the Exegesis. This has to do with the fact that often the "legislator's intention" is conflated with the law's intention or meaning in an objective sense.[148] A better way to approach this issue is to look at how it was thought appropriate to identify this intention. If it is mostly limited to preparatory works, it is likely that we are in front of a subjectivist view on interpretation; if it is open to systematic and teleological means, then we are facing more objectivist views. In this regard, the Exegesis underwent an evolutionary process. Audren and

[144] Hakim (n 105) 26.

[145] For a detailed account of these developments see Benoît Frydman, *Le Sens Des Lois: Histoire de l'interprétation et de La Raison Juridique* (2nd edn, Bruylant / LGDJ 2007) 343 ff.

[146] Mikhaïl Xifaras, 'Droit Rationnel et Droit Romain Chez Kant. Note Sur Le Conflit Des Facultés' in Mikhaïl Xifaras (ed), *Généalogie des savoirs juridiques* (Bruylant 2006) 208.

[147] von Savigny, *System of the Modern Roman Law* (n 64) 208.

[148] Audren and Halpérin (n 102) 96.

Halpérin have nuanced this common place view about the Exegesis conception of legal interpretation. According to their findings, already by 1830 the notion of the legislator's intention was giving place to a more objective understanding of the law's meaning and to other pre-revolutionary sources of legal knowledge.[149] Even Bonnecase acknowledges that in its last stages the exegetists had an objective understanding of the law's content, which gave them much more leeway in their interpretive means, to which the following section is aimed.

ii. Literalism and interpretative criteria

"Literalism" or "textualism" is generally attributed to the Exegesis as a formalist vice.[150] We saw that, in some cases, this accusation is meant to smuggle an implication of textualism from the theory of sources (*i.e.* that legislation=legal texts).[151] But in other cases, the accusation amounts to attributing the restriction of interpretive means as an autonomous formalist device. In this context, only the literal or grammatical criterion of interpretation would be admissible, implying that the sense of any legal norm could be grasped, and the solution to any case given "simply by literally applying the language of the Code civil to the facts of the case".[152] However, this is far from the ideas that the Exegetists themselves put forward in their works. Although the grammatical criterion of interpretation had a privileged status, other means of interpretation such as the systematic, historical or teleological (all traditionally grouped under the label "logical interpretation") were also admitted and employed by the Exegetists. Jean Guillaume Locré (1758-1840), general secretary of the *Conseil d'État* and member of the drafting of the Civil code, writing shortly after the Code's promulgation advocated for an understanding of the law that went beyond its texts:

> "[I]t is impossible to arrive by means of the text alone to all the notions of which the science of written laws is made. […] *The understanding of the letter is not sufficient; it is also necessary to understand its spirit*."[153]

By "its spirit", Locré means the reasons or motives of the corresponding piece of legislation.[154] This approach to the law's understanding shows a wider interpretive landscape than mere literalism. It is true that Locré thought that these reasons and motives of the law were to be

---

[149] *Ibid.* An inflection occurs with the Monarchy of July, whereby a "formalist" strand of interpretation would have appeared. For these authors, however, "formalist" refers to the problem of the sources.

[150] Describing this narrative, Belleau (n 87) 387 ff.

[151] Raoul Van Caenegem, *European Law in the Past and the Future* (Cambridge University Press 2001) 62.

[152] *Ibid.,* 387.

[153] Locré de Roissy (n 134) 2. Emphasis added.

[154] *Ibid.,* 13.

looked for mostly in the legislative acts and debates which gave place to the corresponding body of legislation,[155] which shows a subjectivist approach to interpretation. For Locré, these debates illuminate the reasons why the legislator preferred one institutional model over others, the detailed motives of each disposition and the scope that was given to them, the "false consequences that were not admitted" and "the remedies indicated to overcome the difficulties in their application".[156] Yet, as Hespanha has noted in his study of the Exegesis, Locré and other exegetists also accepted as a criterion of interpretation the traditional *usus legis,* that is, "the traditions of the application of the law",[157] which may reveal a sense acquired *after* the formation of the legislative intention.[158] This occurs "when the text meets new discursive and extra-discursive contexts",[159] thus forming, in Locré's terms, "[…] an auxiliary and developmental legislation, the strength of which, in time, will be no less great than that of formal legislation."[160] Nor did Aubry et Rau reduce interpretation to literal means.[161] Aubry affirmed that a "healthy" and "sensible" understanding of legal dispositions needs to highlight the legal principles so that "the spirit of the law occupies, in its explanation, the place that legitimately deserves."[162] Troplong follows once more Savigny, claiming that the literal criterion is a relevant means to identify the law's thought, but not the only one. In fact, Troplong had a rather "German"[163] conception of interpretation, whereby the scientific constructions of the *scientia iuris* had a privileged status.[164] These constructions were loyal to the legal texts, but loyalty is understood in a rather flexible way: it uses not only literal means, but also "logical" means, and from philosophical and historical antecedents of legal institutions, for these, as the Code, have a history and are explained by it.[165] Hence Troplong's expression: "the

[155] *Ibid.*

[156] *Ibid.*

[157] Hespanha (n 102) 30. He argues that this positions Locré far away from "formalistic" or "originalistic" positions.

[158] Hespanha uses this as a reason, along with the idea that Locré would have accepted natural law principles as a complementary and even alternative source of positive law -which he does not succeed in demonstrating- to argue that even for the early exegetists the Civil code would have shared its normative authority with other sources in the legal system, and that there was no legalism in the Exegesis. ibid 36, 42 f. I think this conclusion of his is unwarranted.

[159] *Ibid.*

[160] Locré de Roissy (n 134) 6.

[161] See generally Aubry and Rau (n 13) 77 ff.

[162] *Rapport du doyen Aubry. Séance de rentrée de Faculté de Strasbourg*, 1857, in Bonnecase (n 88) 133.

[163] To say "german" here might be considered a provocation. Troplong is here looking not only at Savigny, but also at the 16th century French Historical School, the school of Cujas. See Xifaras (n 146) 184.

[164] *Ibid.,* 182 ff.

[165] This is why the new legislation "does not make superfluous the knowledge of the old law." Xifaras (n 146) 185.

history of institutions is to their present expression what the spirit is to the letter."[166] This does not mean that Troplong does not see in the revolution and its project a genuine discontinuity that impacts on legal institutions. In fact, he not only recognises this discontinuity, but also in many cases is grateful for the true progress that it represents compared to the *Ancien Régime*.[167] Even so, as pointed out by Xifaras, Troplong was aware that the law "does not inscribe itself mechanically in the frame set up by the political history".[168]

iii. Mechanical legal reasoning

The idea of a judge that is the "mouthpiece of the law" is that a of a judge whose only task is to mechanically derive consequences from legal texts. Deducing particular consequences from general provisions would be, thus, the definition of adjudication under a formalist view. The Exegesis would, of course, also have sinned by this belief:[169] "[b]eginning from the idea that a clear and unambiguous text makes interpretation unnecessary (*in claris non fit interpretatio*), the judges are in the position of applying rules to the disputed facts mechanically, connecting them by a simple syllogism."[170]

But there is no evidence that 19th-century legal scholarship ever defended such a view on adjudication and legal reasoning. In fact, this idea is alien to 19th-century commonly held views on legal reasoning by the judge but also by scholars themselves when determining the content of the law for a particular case. Troplong, to begin with, was at the antipodes of mechanical reasoning and his vision was, as has already been pointed out, in favour of the organic development of (positive) law through the creative role of legal science. This development involved much more than applying texts to cases, and included historical and philosophical knowledge.[171] Aubry and Rau, to give another example, take the necessary "art" of interpreting the law to be something different from the deduction of consequences from the law.[172] And in a more general sense, they assume that deducing consequences is something that in many cases will need *argumentation,* that is, mediation.[173] The means that materialise such mediation are, among

[166] *Ibid.,* 186.

[167] For instance, in matters of property. See Raymond Théodore Troplong, *De La Propriété d'après Le Code Civil*, vol 2 (Pagnerre Paulin Firmin Didot Fr 1848) 7.

[168] Xifaras (n 146) 187.

[169] See chapter 3.

[170] Giuliani (n 53) 37, referring to the Exegesis and 19th-century legal science, more generally.

[171] Troplong, *De La Prescription* (n 120) v f.

[172] Aubry and Rau (n 13) 79.

[173] *Ibid.*

others: reasoning by analogy, the argument *a contrario sensu,* and the arguments *a majori* and *a minori.*[174] While using a different language than would be used today, Aubry and Rau present the "deduction of consequences" as only the final part of a more complex operation in which interpretation and other forms of reasoning are crucial to formulate the normative premise of the legal syllogism. This kind of scheme would be generally accepted today as a plausible reconstruction of legal decision-making, and certainly not labelled as a formalist naivety.

The different issues presented in this section show that the Exegesis views on legal reasoning and interpretation cannot be made to correspond to the claim identified as *(e)*.

4. Conclusions

This chapter showed that the claims of the TA with regards to French "legal formalism" are seriously flawed. If the TA has portrayed an image of the codification process and the Exegesis according to which they would support formalist claims (identified in chapter 1 with the letters *(a), (b), (c), (d),* and *(e)*), then such an image is significantly distorted.

While it is true that after the Revolution the idea of legislation as the paradigmatic source of law took hold, it is not true that this involved conflating the law with legal texts. It is also a mischaracterisation to say that the codes' drafters and French legal scholarship claimed that the legal order in general, or the codification in particular, was or could be made into a complete, coherent and closed normative body of rules. Regarding adjudication, the idea of judges as mechanical applicators is also absent from the discourses of codifiers and 19th-century jurists.

Generally speaking, so-called "legal formalists" did not ignore the semantic, pragmatic and systemic limits and deficits of the law, but believed that the space left open by the legislator (and, by different means, by legal science) to decision-makers and interpreters should be treated with caution. In this sense, they did think that restrictions *to* judges could be made by the sources and methodological schemes of interpretation and legal reasoning more generally, and that, to certain extent, it was *desirable* to do so. In particular, it is not the case that judges were denied interpretive faculties, nor that these faculties were limited to literal directives. Nor is it the case that legal conceptions prevailed according to which judges *should* be prevented as much as possible from interpreting the law. On the contrary, both codifiers and exegetists acknowledged the fact that the legal system inevitably would have gaps, inconsistencies and ambiguities; that they would have to be solved by judges; that in order to do so, judges would bear interpretive faculties, including both "grammatical" and "logical" kinds of interpretation; that judges also could, although exceptionally,

[174] *Ibid.*

reason by analogy and by other non-purely-deductive means; that, finally, also recourse to natural equity was expected to be made by judges where the law was silent.

Chapter Four

Challenging the Traditional Account: Germany and the 'Jurisprudence of Concepts'

The last chapter challenged the TA's narrative regarding the Napoleonic codification and the French School of the Exegesis. This chapter contrasts the TA regarding German legal science of the 19th century. The work required in both cases, however, is not symmetrical. A growing amount of literature has paid attention to the accusations of 'formalism' made against Pandectism from Puchta onwards. Therefore, we can rely more on the secondary literature than in the previous chapter. In addition, methodological debates in German private law in 19th century were extensive and in-depth, so the authors have often quite articulated views of the scientific foundations of their task.

This chapter centres around late Pandectism and its main exponents during the 19th century. Among these, two are of special relevance: Georg Friedrich Puchta and Bernhard Windscheid. Some references to Savigny are inevitable. Although he is not generally catalogued as 'formalist' or 'conceptualist',[1] his works and methodological agenda are key to understanding Pandectism. Likewise, the early works of Jhering will also be considered where they adopt that frame of reference. Public law scholars sometimes accused of formalism such as Laband and Gerber, are not as central a target of the TA as private lawyers and are not considered here.

The chapter is structured as follows. First, it briefly presents so-called Jurisprudence of Concepts or *Begriffsjurisprudenz,* its origins and theoretical and methodological backgrounds (§1). Second, it challenges the TA's claims regarding the views and conceptions of 19th-century German legal science (§2) at three different levels: first, the alleged views of 'Conceptual Jurisprudence' regarding legal sources and the autonomy of the legal order (§2.A); second, with the notion of a legal order which is a complete and perfectly coherent system of concepts (§2.B); and third, with

[1] An exception in Adolfo Giuliani, 'What Is Comparative Legal History? Legal Historiography and the Revolt against Formalism, 1930–60' in A Masferrer, KÅ Modéer and O Moréteau (eds), *Comparative Legal History* (Edward Elgar Publishing 2019).

the idea that the law so conceived can be applied mechanically, merely by resort to logical deduction (§2.C). Lastly, the main conclusions reached in the chapter are summarised (§3).

Before starting, one preliminary note is in order. As was already discussed in chapter 2, in terms of the nature of the legal order and the conceptions of adjudication following from it, the background narrative about both French and German 'legal formalism' follows the same overarching argument: the legal order and adjudication as a whole were to be closed-off from other systems of practical reasoning (moral, political) and be made complete, coherent and clear in order to guarantee that the role of the judges would be confined to mechanically apply settled pre-existing law. Thus, at first glance the big difference between the French and German cases of formalism revolves around sources, that is, around where the law's material and content come from. In the French case, formalism is associated with a conception of the sources as coming exclusively from the political authority, in the form of legislation. In the German case, this material would be provided by dogmatics, that is, the system of concepts created by legal scholarship. As we shall see, this difference is real, but it is neither as profound nor as stable as it appears at first sight.

The sources in Germany are predominantly Roman law as received (and sanctioned) by the political authority, provincial statutes, and -in this it does differ from France since the codification- local customs. Customs, however, were of overall secondary importance for the German legal order in the 19th century and decreased to an even more marginal place by the end of it. The differences shrink even more as the state took more and more control of the production of the law from the mid-19th century onwards. The role of legal science in building and developing the law, on the other hand, is admittedly larger in Germany than in France, but what exactly this role is and should be was a matter of great debate.

This movement was described in chapter 2 as the transit from a "scientific formalism" towards a "legalistic formalism", similar in many respects to the French model of formalism. Given that this work tests the TA in general, the question may be asked: Why not just consider the latter kind of formalism? The answer is that the move from the former to the latter must be incorporated to make intelligible the TA's narrative about it, which in various respects presents a distinctive account of German 'formalism', and also some of the flaws we shall uncover in this narrative, which are related precisely to these particularities.

1. Late Pandectism or *Begriffsjurisprudenz*

As mentioned in chapter 2, in Germany the TA originated with the criticisms of Jhering and Kantorowicz to late Pandectism. It was consecrated as the official history of German 19th-century legal scholarship by prominent 20th-century legal historians such as Franz Wieacker or Helmut Coing, as well as legal theorists and legal doctrinal scholars such as Karl Larenz.[2] These authors appropriated the critics' language and discourse levelled against the dominant ways of legal science, calling it *Begriffsjurisprudenz* (Jurisprudence of Concepts). This narrative permeated widely the legal discourse in different legal disciplines. One of the most widely used textbooks in the introduction to comparative law, for instance, holds that for Pandectists

> "the legal system was a closed order of institutions, ideas, and principles […] one only had to apply logical or 'scientific' methods in order to reach the solution of any legal problem. In this way the application of law became a merely 'technical' process, a sort of mathematics obeying only the 'logical necessity' of abstract concepts".[3]

Pandectism developed out of the Historical School of Law ('HSL') founded by F. C. von Savigny (1779-1861), who, inspired by the methodological revolution led by Gustav Hugo (1764-1844) at the beginning of the 19th century,[4] had historicised the object of legal science against the rationalist stamp of early modern natural law theories.[5] This methodological revolution entailed the rejection of the fundamental premises of natural law doctrines: whereas these understood the law as the conscious product of rational activity, the HSL understood it as a historical manifestation of concrete peoples, which could only be grasped against their own cultural

---

[2] Most contemporary authors follow Wieacker and Larenz in their descriptions of 'conceptual jurisprudence'. Haferkamp notes that these authors, in turn, followed Wilhelm. Hans-Peter Haferkamp, *Georg Friedrich Puchta Und Die 'Begriffsjurisprudenz'* (Klostermann 2004) 8 f, with references. Wieacker also follows González Vicén in some key aspects of his account of 'scientific positivism'. See chapter 2.

[3] Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (3rd edn, Clarendon Press 1998) 140. Zweigert and Kotz 2001 140

[4] Paolo Becchi, 'German Legal Science: The Crisis of Natural Law Theory, the Historicisms, and "Conceptual Jurisprudence"' in Damiano Canale, Hasso Hofmann and Paolo Grossi (eds), *A Treatise of Legal Philosophy and General Jurisprudence: Vol. 9: a History of the Philosophy of Law in the Civil Law World, 1600-1900; Vol. 10: the Philosophers' Philosophy of Law from the Seventeenth Century to Our Days* (Springer Netherlands 2009) 187 ff. Also David M Rabban, *Law's History: American Legal Thought and the Transatlantic Turn to History* (CUP 2013) 92 ff.

[5] On the philosophical background of the Historical School of Law and its original stance against Natural Law doctrines, see Felipe González Vicén, 'Sobre Los Orígenes y Supuestos Del Formalismo En El Pensamiento Jurídico Contemporáneo' (1961) 8 Anuario de Filosofía del Derecho 47, 61 ff.

backgrounds. From this point of view, there is no abstract and universal law, but only particular *laws*.[6]

Given the lack of success of the codification movement -a failure which Savigny sought and publicly advocated for[7]-, the states of the German Confederation did not have an official unified corpus of Private Law that could serve as the basis for scholarly study at the time. In fact, the state of the legal sources at the time was highly disorganised, and the debates arising out of this disorder are as much a central aspect of the HSL's agenda as they were of their opponents' agenda.[8] By the end of the 18th century, Prussia had the *ALR* and the French *Code* had currency in the Rhineland, but in other territories the Roman-Canon law developed as *ius commune* was the main form of law. In private law matters, even the *ALR* in Prussia was supplementary to provincial regulations where they were codified.[9] Consequently, private law -the leading discipline of legal scholarship in the 19th century- was a disputed land: Roman law or Germanic law? Statutes or customs? Who determined what counted as valid law in the German states, and by what means? The HSL had answers for these and other related questions. Private law was silently produced by the people's historical consciousness, which had to be recognised, "made visible" and developed by jurists, by means of the construction of a rational, scientific system.[10] In Savigny, this system has an immanent logic unifying all of its elements:

> "I place the essence of the systematic method in the knowledge and exhibition of the innate connexion or of the relationship, by which the single ideas and rules of law are attached to a great unity."[11]

---

[6] *Ibid.,* 62; and Benoît Frydman, *Le Sens Des Lois: Histoire de l'interprétation et de La Raison Juridique* (2nd edn, Bruylant / LGDJ 2007) 353.

[7] On Savigny's debate against Thibaut on codification see Mathias Reimann, 'The Historical School against Codification: Savigny, Carter, and the Defeat of the New York Civil Code' (1989) 37 The American Journal of Comparative Law 95; and Albion W Small, 'Some Contributions to the History of Sociology. Section II. The Thibaut-Savigny Controversy: Continuity as a Phase of Human Experience' (1923) 28 American Journal of Sociology 711.

[8] On this see Olivier Jouanjan, *Une Histoire de La Pensée Juridique En Allemagne, 1800-1918. Idéalisme et Conceptualisme Chez Les Juristes Allemands Du XIXe Siècle* (Presses universitaires de France 2005) 18 ff.

[9] See, in general, Helmut Coing, 'German "Pandektistik" in Its Relationship to the Former "Ius Commune"' (1989) 37 The American Journal of Comparative Law 9, 9 ff.

[10] Jouanjan (n 8) 138.

[11] FK von Savigny, *System of the Modern Roman Law*, vol 1 (Willam Holloway tr, J Higginbotham 1867) xix. On how the HSL turned around the concept of history from external events to *internal necessity,* thus giving it the systematic dimension needed to become a scientific subject in the Kantian sense, see Jouanjan (n 8) 115 ff.

In building this scientific system of Private law, jurists -which in this regard acted as the legal "organ" of the *Volksgeist*[12]- would draw from diverse legal materials, but for the HSL in its Romanist variant one source was considered to be above all the rest: Roman law, as received in Germany since the 15th century, and particularly the Pandects (*i.e.*, Digest) of Justinian.[13] The 'pandectists', amongst which Puchta, Jhering and Windscheid are most notable,[14] sought to unify all the rules and institutions into one single body. This body is not just the sum of rules and institutions as they were found in the ancient texts but involves interpretive work and constructive development, so that, for instance, legal institutions are updated to the reality they will be applied to, and purified of elements which have no practical use anymore.[15] At the same time, the Historical School did not accept the *usus fori* or opinions and interpretations of sources by the courts or old scholarly authorities as valid law. Neither judicial practice nor the *opinio* of the jurists were the object of a science of law.[16] In this they differentiated themselves from the traditional methods used by the jurists of the *ius commune.*[17]

Later generations of jurists followed in Savigny's footsteps, but against a legal background that was rapidly changing throughout the century: state-made law was starting to become increasingly important as a source of law, with the consequent impact on legal teaching and legal science. Where Puchta had spoken of the productive powers of legal science in deriving new

---

[12] It is Puchta who introduces the term *Volksgeist,* but the idea is already in FK von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* (Abraham Hayward tr, Little Wood & Co 1831) 28. Jurists are part of the consciousness of the people, and by studying and systematising its legal dimension the jurist, as the people's legal organ, is "knowing itself". On this notion and the idea of representation involved in it, Jouanjan (n 8) 31.

[13] In this they were opposed by the representatives of the Germanist variant (Jouanjan (n 8) 82 ff.)

[14] Other names are Adolf Merkel (1836-1896), Rudolf Bierling (1841-1919), Karl Bergbohm (1849-1927), Ernst Zitelmann (1852-1923), and Andreas von Tuhr (1864-1925), in private law; and Paul Laband (1838-1918) and K.F. von Gerber (1823-1891) in public law.

[15] See von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* (n 12) 137, 139 f. This, for instance, was one of the aims of Savigny's *The Law of Possession* (a good version in English is *Von Savigny's Treatise on Possession or the Jus Possessionis of the Civil Law* (Erskine Perry tr, S Sweet 1848). By basing the institution on intent, he allowed for legislative transformations of feudal property rights, which earlier theories of possession made impossible. See James Q Whitman, *The Legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change* (Princeton University Press 1990) 183 f. See also Ulrich Falk, 'Der Wahre Jurist Und Der Jurist Als Solcher. Zum Gedenken an Bernhard Windscheid' (1993) 12 Rechtshistorisches Journal 598, 622, on Windscheid's project for "purifying" Roman law from outdated elements.

[16] Nils Jansen, 'Rechtsdogmatik, Rechtswissenschaft und juristische Praxis' (2018) 143 Archiv des öffentlichen Rechts 623, 633. In Savigny the object of legal science as such is the legal consciousness of the people, not the legal texts, which are only an external manifestation of it. See Jouanjan (n 8) 100 ff.

[17] And yet pandectists also thought they were going back to the sources (*zurück zu den Quellen*) and being more faithful to them, doing away with many of the developments brought about by the *ius commune,* such as the *usus fori* and the modifications and additions thereby made to the *Corpus Iuris*. Coing (n 9) 13 ff.

concepts from *existing legal principles,* later pandectists such as Thol spoke of derivation from *existing legal texts.*[18] This change also reflects on how the critics see the situation at the turn of the 20th century:

> "The prevailing ideal of the jurist is this: a senior civil servant with academic education, sitting in his office, armed only with a thinking machine, albeit one of the finest kind. His only furniture is a green table on which the *state's code of laws* [*staatliche Gesetzbuch*] is laid out before him. Any case, real or imaginary, is handed to him, and in accordance with his duty, he is able, with the help of purely logical operations and a secret technique that only he understands, to reach the decision predetermined *by the legislator in the code* with absolute exactitude."[19]

I have emphasised the references to the *state's code of laws* and *by the legislator in the code* because they show that "the dominant preconception of the ideal jurist" at the beginning of the 20th century is (according to Kantorowicz, at least) of a scholar who is ultimately subservient to the state's legislation or otherwise sanctioned law.[20] 'Scientific formalism' had, in this way, given way to 'legalistic formalism'.

At the same time, Savigny's followers started to be seen as focusing increasingly more on the 'systematic' than on the 'historical' aspect of legal science,[21] resembling more the aspirations of a universal jurisprudence of rationalist inspiration than the alternative project of a truly historical legal science concerned with particular laws of particular peoples.[22] It is said about Puchta that he "conceived the law as a rational system of propositions […] and all knowledge about the law as knowledge about the relationship between these propositions"[23]; about Windscheid, that he is

---

[18] See Regina Ogorek, 'Inconsistencies and Consistencies in 19 Th Century Legal Theory' (2011) 12 German law journal 34, 51, with reference.

[19] Gnaeus Flavius (Hermann Kantorowicz), *Der Kampf Um Die Rechtswissenschaft* (C Winter 1906) 7.

[20] Katharina-Isabel Schmidt has noted that this quote refers to the ideal judge, not the jurist (Katharina Isabel Schmidt, 'Der "Formalismus-Mythos" Im Deutschen Und Amerikanischen Rechtsdenken Des Frühen 20. Jahrhunderts' (2014) 53 Der Staat 445, 458 f.) Still, she thinks that this ideal can be extrapolated to the role of dogmatics and legal science more generally. I agree, not only because Kantorowicz is describing, more than anything, a kind of *legal reasoning* as totally autonomous from other kinds of practical reasoning, but also because this kind of reasoning is developed and transmitted mainly in universities through the teachings of legal scholars.

[21] Rabban (n 4) 93.

[22] This has been commented on as one of the great ironies of the HSL. See González Vicén (n 5) 71 in fine, f (he calls it a paradox); and Franz Wieacker, *A History of Private Law in Europe: With Particular Reference to Germany* (Tony Weir tr, OUP 1995) 295.

[23] Becchi (n 4) 220 f.

"known to have argued that legal decisions were the result of a calculation operation, in which the factors were the legal concepts"[24]; a similar accusation of considering legal science a mere "operating with concepts" was made of a later author, Andreas von Tuhr[25]; finally, about Jhering, that he "conceived the task of the jurist as that of the grammarian in relation to language: to identify and to expose the structure of formal elements whose combination produces the totality of the legal order."[26] The latter, indeed, went so far as to state that the jurisprudence resulting from the *Pandektenrecht* could "no longer be embarrassed by history":

> "[T]he concern that the increase in commerce could bring something absolutely new, *i.e.,* something that could not be subsumed under one of our existing concepts, even if it were ever so general- this concern is just as unfounded as the belief that in our day and age, animals might be discovered that could absolutely not be categorized within the zoological system of modern science. A jurisprudence that has existed for thousands of years has discovered the basic forms or basic types of the legal world, and all future movement will be contained within them […], such a jurisprudence can no longer be embarrassed by history."[27]

On this basis, later authors emphasise the connections between late Pandectism, and a certain rationalism born of the Enlightenment. Some claim that Pandectism conceived of scientific knowledge as necessarily founded on a geometrical model of derivation from first truths, or axioms, in the style of Leibniz or Wolff.[28] Systematising law, therefore, as a scientific task of legal science, would mean ordering the legal materials in a way that these deductive connections are found and made explicit. In some versions, this epistemic principle becomes a metaphysical one:

---

[24] González Vicén (n 5) 68.

[25] *Ibid.,* 68, referring to Andreas von Tuhr, *Der Allgemeine Teil Des Deutschen Bürgerlichen Rechts*, vol 1 (Duncker & Humblot 1910) viii.

[26] Eduardo García de Enterría, 'La Democracia y El Lugar de La Ley', *El Derecho, la Ley y el Juez. Dos estudios* (Civitas 1997) 67.

[27] Rudolf von Jhering, 'Unsere Aufgabe' (1857) 1 Jahrbücher für die Dogmatik des heutigen römischen unddeutschen Privatrechts 1, 16. Translation is from Hasso Hofmann, 'From Jhering to Radbruch: On the Logic of Traditional Legal Concepts to the Social Theories of Law to the Renewal of Legal Idealism' in Damiano Canale, Paolo Grossi and Hasso Hofmann (eds), *A Treatise of Legal Philosophy and General Jurisprudence: Vol. 9: A History of the Philosophy of Law in the Civil Law World, 1600-1900; Vol. 10: The Philosophers' Philosophy of Law from the Seventeenth Century to our Days* (Springer Netherlands 2009) 312.

[28] Frydman (n 6) 245. On this model and its relationship with legal reasoning see *ibid.,* 227 ff. It is doubtful, however, that these models served as the basis for Pandectistic legal science. See n. 103, 104 and associated texts.

what cannot be made to fit into the system is irrational, and what is outside rationality simply does not exist.[29] Be it in the manner of geometry or physics,

> "[t]he entire law is submitted to the method of science, which involves the isolation of a unique principle from which all the concepts can be deductively derived. […] From their combination of concepts scientifically elaborated, all legal solutions could be derived from the system thus conceived."[30]

2. Challenging the Traditional Account

By the end of the 20th century, Regina Ogorek presented thorough research on 19th-century conceptions of adjudication and the role of the judge in Germany. Her *Richterkönig oder Subsumtionsautomat*?[31] was a pioneer in questioning the grand narrative regarding these matters outlined in chapter 2. She found that opinions about the nature of the legal system and role of the judge varied greatly among authors and even sometimes within the same author.[32] And yet she convincingly shows that in this heterogeneous context, the "mechanistic view" was a "relatively marginal strand".[33] What perplexes Ogorek about the TA is that it attributes to scholars who had "brought legal dogmatics to now almost unattainable heights" a serious narrow-mindedness and lack of knowledge of method,[34] in circumstances that there was, also in the 19th century, so much evidence "which contradict any assumption of a complete and scientifically precise closed legal system."[35] How this "escaped the notice of earlier scholars" remains an enigma.[36] After Ogorek, other authors such as Ulrich Falk, Joachim Rückert and Hans-Peter Haferkamp, have added to the

---

[29] See LJ Wintgens, 'From Law without a Science to Legal Science without the Legislator: The German Historical School and the Foundation of Law' (2010) 31 Statute Law Review 85, 88 f.

[30] *Ibid.,* 101.

[31] Regina Ogorek, *Richterkönig Oder Subsumtionsautomat? Zur Justiztheorie Im 19. Jahrhundert* (Klostermann 1986). A summary of the main ideas of the book can be found in English in Ogorek (n 18).

[32] Ogorek (n 18) 56.

[33] *Ibid.*

[34] *Ibid.,* 40.

[35] *Ibid.*

[36] Making a similar question in relation to Windscheid, Joachim Rückert, 'Methode Und Zivilrecht Bei Bernhard Windscheid (1817–1892)' in Joachim Rückert and Ralf Seineke (eds), *Methodik des Zivilrechts –von Savigny bis Teubner* (3rd edn, Nomos 2017) 662: "Did a lawyer as recognised and capable as Windscheid simply err? Did he really spend his whole life chasing an 'absurd... conceptual framework'?"

revision of this narrative by focusing on specific Pandectists and accusations.[37] Their findings tend to confirm or even go beyond what Ogorek suspected: that fundamental tenets of this narrative are mistaken. We will rely on those contributions, as well as in the Pandectists' work, to challenge key aspects of the Traditional Account.

Perhaps the most persistent objection raised by Jhering and later critics against Pandectism as it was practiced in the second half of the 19th century, comes down to the accusation that it neglects the practical ends, purposes and conditions of the law's applicability.[38] The remedy, then, was to call for legal scientists to "abandon the delusion" that the law "is a system of legal mathematics, without any higher aim than a correct reckoning with conceptions."[39] Now, this objection has room for many possible interpretations, and it has actually been understood in different ways. In general, the attacks against Pandectism are highly heterogeneous, ambiguous and contradictory and in many cases. The accusations come from different fronts, whose agendas and emphases are of the most varied nature, including attributing to *Begriffsjurisprudenz* and its representatives the erosion of an "ethical content" of law, which would have paved the road to Nazi rule.[40] Hence, identifying exactly what the issue is against it is not without its difficulties, and a lot of literature has been devoted to disentangle and clarify the critics' objections, starting with the very notion of 'Conceptual Jurisprudence'.[41]

Often, accusations that seem to be directed against Pandectism's conceptions of law and adjudication are really targeted at the ways in which some authors did concrete dogmatics and concept-building, or at the substantive theories regarding certain institutions of private law.[42] This is why I will not rely on the many critics' own categories and concepts (for which see chapter 2). Instead, I will address different clusters of claims and methodological choices attributed to *Begriffsjurisprudenz* which would have resulted in this lack of attention to practical ends, as pointed

---

[37] These are quoted throughout the rest of the chapter, but see especially Ulrich Falk, *Ein Gelehrter Wie Windscheid: Erkundungen Auf Den Feldern Der Sogenannten Begriffsjurisprudenz* (2nd, unaltered edn, Klostermann 1999); and Rückert (n 36) 123.

[38] Rudolf von Jhering, *Scherz Und Ernst in Der Jurisprudenz: Eine Weihnachtsgabe Für Das Juristische Publikum* (Breitkopf & Härtel 1884) 347.

[39] *Ibid.*

[40] See, for instance, Karl-Heinz Fezer, 'Wider Eine Neopositivistische Begrifflichkeit Im Recht' [1993] Juristische Schulung 106: "Windscheid's formal, because unethical, legal positivism is not least one of the causes that ushered in a period of weakness of the law, at the end of which little could be held against National Socialist content in the law in the first third of our century".

[41] Haferkamp focuses on this concept and its ambiguity. See Haferkamp, *Puchta Und Die 'Begriffsjurisprudenz'* (n 2).

[42] Especially regarding a formal concept of (contractual) freedom. See Jouanjan (n 8) 174. In denouncing this formalism of the concept of freedom, notes Jouanjan, Jhering was not misguided (*ibid.,* 176 f).

at by the critics, and which are, at the same time, the most recurrent and central to the image of "formalism" that has been built around it. These are, in this order, the beliefs that the law was completely autonomous from other social systems and that legal sources were clearly demarcated from non-legal normative materials (in the nomenclature of chapter 1 identified as claim *(b)*; the law as a system which is complete, coherent and clear (claims *(c)* and *(d)*); the role of the judge (claim *(a)*), and a mechanical conception of adjudication and legal reasoning (claim *(e)*).

A. *Sources of law and the autonomy of the legal system*

One of the most recurrent criticisms against 'Conceptual jurisprudence' is that it removed itself (*i.e.,* legal science) from real life and its practical needs. The image of a "heaven of concepts" far removed from the earth is telling.[43] However, the criticisms target different perceived problems that we shall unravel. On the one hand we have Jhering, whose main concern was the lack of teleological considerations in creating concepts and interpretating the law. Jhering's objection was not directed against a conception of the law as source-based, but rather against how to understand the sources and what considerations include when systematising and interpreting them.[44]

On the other hand, we have a deeper criticism aiming at the conception of the law (and legal reasoning) as closed off from other social entities and other forms of practical reasoning. This criticism, identified in chapter 1 as claim '*(b)*', and that I will call in this context 'formalism of sources', is thus the accusation of believing that there is -and/or should be- a clear-cut distinction between what is law and what is not law; between what belongs to the legal system and what does not. In this scheme, a strict definition of sources allows to clearly identify the elements at either side of the boundary line, and to evaluate the legitimacy of decisions for legal cases accordingly. These criticisms, labelled as "formalism", "rationalistic legal positivism"[45], "positivistic legalism"[46] or even just "positivism"[47], seek to open up the law and legal reasoning to inputs coming from "outside" the law in varying degrees.[48] In some extreme variants of the reaction against 19th-century

[43] See chapter 2 §4.

[44] Jansen (n 16) 637.

[45] *„Rationalistische Gesetzespositivismus",* in Karl Larenz, *Methodenlehre Der Rechtswissenschaft* (Springer-Verlag 1991) 28 ff.

[46] „*Positivrechtliche Rechtlichkeit*". See, for instance, Rückert (n 36) 129.

[47] Because it would recognise as law only the enacted positive law. Such criticism in Erich Molitor and Hans Schlosser, *Grundzüge Der Neueren Privatrechtsgeschichte*, vol 1 (7th edn, C F Müller 1993) 154.

[48] Such as "the deeper, complex foundations of the law and the social order" (*Ibid.,* 154).

'formalist' legal science, the whole distinction between intra and extra-legal considerations crumbles.[49]

At this level of generality, and with some qualifications, the view that 'Conceptual Jurisprudence' conceived of the law as a separate domain from morals or politics, with its own sources, is correct. Not only Pandectism but also its predecessors had understood, in general terms, that the law is (and should be) differentiated from other social orders, and this differentiation critically depends on the formalisation of sources.[50] In this context, this means that the sources are recognised as distinctively legal by the relevant community, and have some form that makes them recognisable -generally a fixed linguistic formulation. Legal reasoning (understood from a wide range of doctrines), is such because it is based on these sources; it is not thus just undifferentiated from general practical reasoning. In Windscheid's understanding, for instance, it is crucial to keep law and politics, applicable law and desirable law, clearly separate.[51] Being "bound by the law" means that "practical tact" or a "sense of justice" can serve as warnings to the judge, but not as the grounds for the decision:

> "I do not disregard practical tact; I consider it to be something very valuable. I just do not want it to be the source of judicial judgement. The source of the decision can only be legal reasoning. But if the result of legal reasoning does not correspond to what the tact indicates, then that should be a warning to the judge. […] But if legal thinking does not want to abandon its result despite all this, then the judge should decide as he has thought, not as he feels. Remedy can then only be expected from legislation -we are all bound by the established law."[52]

As will be shown later, the ideal of "subsumption" in legal reasoning does not depend on a "deductivist" or "mechanistic" understanding, but rather in the simple principle "that lawyers

---

[49] In Esser, for instance, a legal decision is neither possible nor meaningful without a political decision. See Josef Esser, *Vorverständnis Und Methodenwahl in Der Rechtsfindung: Rationalitätsgarantien Der Richterlichen Entscheidungspraxis*, vol 1 (Athenäum-Verlag 1970) 174.

[50] A classical formulation in Georg Friedrich Puchta, *Pandekten* (Adolfus Fridericus Rudorff ed, 9th edn, JA Barth 1863) §20. On the paradigm of sources in 19th century for all the "sciences of the spirit" including law, see Frydman (n 6) 356 f. It must be noted, however, that the distinction between formal and material sources is anachronical. See Alfred Dufour, *Droits de l'homme, Droit Naturel et Histoire* (Presses universitaires de France 1991) 242, 257.

[51] See Rückert (n 36) 130.

[52] Windscheid in Otto Liebmann (ed), *Festgabe Der Deutschen Juristen-Zeitung Zum 500jährigen Jubiläum Der Universität Leipzig*, vol 14 (Deutschen Juristen-Zeitung 1909) 107.

must always claim reference to sources."[53] Thus it can be understood Windscheid's dismissive answer to the objection that he did not take into account the "interests of [commercial] traffic": "The needs of traffic are not a source of law."[54]

A general assumption about the autonomy of law and the relevance of sources in bringing about such autonomy was not, then, a matter of great dispute. The true issues at the time were, instead, (i) what degree of *closure* of the legal system was achievable and desirable; and (ii) what those sources were and who got to make them into legal sources. In some sense, it is the development of the answers to these questions that gave rise to the accusations of 'formalism'. Regarding (i), as it was not the case that in 19th-century Germany the closure of the legal system could come from above (as in France through codification), the the idea is that it was built bottom-up, through doctrines of legal interpretation and legal reasoning more generally, and through the development of the law by legal science. These will be discussed in the following sections. Regarding (ii), seemingly contradictory claims have been made: that Pandectism "reduced" all the law to state law, on the one hand, and that they made legal science's constructs into the ultimate criterion of legal truth, even above valid legislated law, on the other. These claims will be discussed next.

What is the applicable law? The most interesting and heated debates from the beginning of the 19th century took place around this question,[55] and not around whether the law was or not an autonomous system. From the debate Savigny-Thibaut on codification,[56] through the discussions between Romanists and Germanists[57], to the role of legal science and later the judge in the production of law. Given that by the beginning of the century there was a consensus about the jurisprudence of the courts not being a source of law,[58] and that custom was already a subordinated source of law, the debate focused on the two gravitational forces of legal production: the state, fundamentally through legislation, on the one hand, and legal science, through doctrines and conceptual schemes, on the other hand. Which was the ultimate criterion of legality, the propositions logically derived from scientifically-built legal concepts, or normative propositions directly found in the statutes or other state-sanctioned law?

---

[53] Jansen (n 16) 637.

[54] See in Falk (n 37) 35, with reference.

[55] See Frydman (n 6) 355.

[56] A good summary of this debate in Jouanjan (n 8) 18 ff. See also the references in chapter 2 §B.ii., and n. 88.

[57] *Ibid.,* 81 ff.

[58] Georg Friedrich Puchta, *Das Gewohnheitsrecht*, vol 1 (Palm 1828) 166. On this see also Frydman (n 6) 355.

The label 'Jurisprudence of Concepts' suggests which of those is more often seen as the greatest vice of Pandectism. Indeed, since Savigny's manifesto, legal science explicitly took the role of developing the law and "making it visible".[59] But this became more problematic as the legislature reclaimed a privileged status regarding the control of the production of legal sources. While the HSL claimed to be developing the law drawing from its obscure inception in the *Volksgeist*'s womb, legal science was seen by others as outrightly producing the law alongside or even above the legislator. Jhering saw this conflict and accused Pandectists of usurping the legislator's place by creating "eternal concepts", that is, concepts that would be treated as logical truths, above and beyond the positive laws. In particular, *Begriffsjurisprudenz* would put legal science over legislation by taking the legal concepts (and legal principles) it built as if they were irrefutable dogmas, whereas a sound legal science should understand that its concepts stand and fall with the laws from which they had been taken. "Principles," Jhering maintained, "are not written in the stars, nor have they fallen from the skies; man makes them for himself."[60] A well-known example used by Jhering to illustrate this problem was Puchta's refusal of direct representation. Puchta rejected direct representation on the grounds that "the concept of obligation does not allow it".[61] In Jhering's view, the 'concept' of obligation should not be an obstacle to representation; the concept *could* and *should* be changed to include this notion, as concepts are just instruments and not "logical-legal truths".[62] A second example was Puchta's labelling of a provision of Canon Law as 'monstrous' because it did not fit the concept of property.[63] Here Jhering focuses on the instrumental nature of law to fulfil certain purposes, and brings in the standing of the legislator to make use of this instrument: "what would happen if a new legislator wanted to establish precisely the opposite?"[64] he asks.

Although sound, Jhering's criticism is unfair when made against leading pandectists of the time, except for Savigny, who indeed did not consider legislation to have a superior status when it

[59] Jouanjan (n 8) 97 ff.

[60] Jhering (*Besitzwille*) quoted in Munroe Smith, 'Four German Jurists' in Munroe Smith, *A General View of European Legal History and Other Papers* (Columbia University Press 1927) 129 in fine.

[61] Rudolf von Jhering, *Geist Des Römischen Rechts Auf Den Verschiedenen Stufen Seiner Entwicklung*, vol 3 (Breitkopf und Härtel 1865) 301. As Haferkamp sharply notes, Puchta did not speak of the "concept" (*Begriffe*) but of the "essence" (*Wesen*) of obligations (see Haferkamp, *Puchta Und Die 'Begriffsjurisprudenz'* (n 2) 39.)

[62] A similar criticism later in Rudolf Stammler, *Theorie Der Rechtswissenschaft* (Buchhandlung des Waisenhauses 1911) 361.

[63] von Jhering, *Geist Des Römischen Rechts Auf Den Verschiedenen Stufen Seiner Entwicklung* (n 61) 301 with ref 430 at §135 and ref §202 note l of Puchta's Pandekten; and again at von Jhering, *Scherz Und Ernst* (n 38) 302 n 1.

[64] von Jhering, *Geist Des Römischen Rechts Auf Den Verschiedenen Stufen Seiner Entwicklung* (n 61) 301.

came to developing the law.[65] It is true that Puchta is initially ambivalent regarding the status of legal science's concepts vis-à-vis statutory law, but his works show a transition at the end of which he clearly recognises the priority of the legislator over legal science. In Puchta's theory of sources, at least from 1837, "the law of legal science was subordinated to this "legislated law" [*Gesetzesrecht*]."[66] Indeed, if Roman law was binding in Germany, it was because it was received there by means of a legal-political decision, not by the wish of jurists.[67] Jurists lost their status as representatives of the legal consciousness of the people, and "[a]s a result, the validity of the legal propositions they found academically was downgraded compared to other sources of law."[68] Moreover, from 1841 Puchta distinguished between a 'logical' or 'rational' aspect of law and a 'free' or 'historical' aspect.[69] Both dimensions had to be reconciled as much as possible, but priority should be given to the latter in case of conflict. Thus, "[l]egal propositions that arose in accordance with the doctrine of legal sources were valid, even if they contradicted the logical side of law."[70] Indeed, he affirms that although a presumption of validity must be given to a scholarly opinion which is unanimous (*communis opinio*) and has been applied constantly (*usus fori*), it is nonetheless not binding and thus the judge should depart from it when convinced of its incorrectness.[71] This is consistent with what later critics, such as Kantorowicz, saw in 19th-century 'formalism': "[t]he positivism of the 19th century, which developed precisely to overcome natural law, elevated the conviction to a dogma that there is no other law than that recognised by the state."[72] Windscheid had less trouble recognising this priority from the outset: "it is particularly important to me to state that legal science should not overestimate its position in relation to legislation."[73]

---

[65] The law's internal force could only be recognised and carried forward by legal science. The legislator's role was, for Savigny, external and could not touch upon the essence of legal institutions. On this see Jouanjan (n 8) 32, 107 ff.

[66] Haferkamp, *Puchta Und Die 'Begriffsjurisprudenz'* (n 2) 449.

[67] *Ibid.,* 455.

[68] *Ibid.,* 452.

[69] *Ibid.,* 447.

[70] *Ibid.*

[71] Georg Friedrich Puchta, *Vorlesungen Über Das Heutige Römische Recht*, vol 1 (AAF Rudorff ed, Verlag von Bernh Tauchnitz 1847) 44. According to Haferkamp, "Puchta was reacting to the increasing speculative tendencies of his contemporaries" (Haferkamp, *Puchta Und Die 'Begriffsjurisprudenz'* (n 2) 453.), but reconciling the legislator's innovations with the long-established legal principles was not a task devoided of problems (*ibid.,* 457 f).

[72] Flavius (Hermann Kantorowicz) (n 19) 10.

[73] Also, see his final point on "tact" vs "legal reasoning" (*supra* n. 51 and associated text): "Remedy can then only be expected from *legislation* -we are all bound by the established law." Windscheid in Liebmann (n 52) 107. See also Bernhard Windscheid, *Lehrbuch Des Pandektenrecht*, vol 1 (Theodor Kipp ed, 8 Auflage unter vergleichender Darstellung des deutschen bürgerlichen Rechts, Rutten & Loening 1900), §22 n 8: 'What corresponds to the nature of things, to the needs of trade, can be viewed in different ways; it does not depend on what we think about it, but on what the

In the transit to the 20th century, the control of the sources by the state, mainly in the form of legislation,[74] increased, and with it the identification of the law with these formal sources enacted or sanctioned by the state. So much so, that in bringing the different strands of anti-formalist reaction together, Kantorowicz would later affirm that they all put forward propositions "which are intended to evaluate, supplement, develop or overturn state law."[75] In this the *Freirecht* would also have coincided with doctrines of natural law.[76]

This shows that Jhering's idea of Pandectism as prioritising scientific concepts over positive law must, at the very least, be tempered. At the same time, it seems to give credence to the opposite accusation: that Pandectism's notion of sources was "narrow",[77] or that they "reduced" all law to state law,[78] just as their French peers. This has some truth in it: as was already observed, Pandectism did accept that legislation took pre-eminence over legal science as a source of legal decisions and legal reasoning. But one should not be as quick as to make them conclude from this that the law enacted by the state -especially the German states in 19th century- was all that was needed to make legal decisions. As will be seen in the next section, formal sources of law and the legal order have a relationship which is complex and sometimes fraught.

B. *Law as a complete and coherent system of concepts*

Chapter 1 outlined in general (as claims '*(c)*' and '*(d)*'), and chapter 2 explained in concrete for Germany what this accusation amounts to. By way of summary, I offer the following quote:

> "[T]here was really, at least in theory, no room for choice or disagreement. The logic of the [legal] system provided a reliable guide for all situations. [...] '*wissenschaftliches System*' was an idea with various dimensions. It signified the order inherent in the overall pattern of

legislator has thought about it.' On Windscheid's commitment to state-produced sources, see also Guido Fassó, *Historia de La Filosofía Del Derecho 3. Siglos XIX y XX*, vol 3 (Pirámide 1996) 156.

[74] Enacted by the *Reichstag* installed in 1871. See Rückert (n 36) 662.

[75] Including Stammler's '*Richtiges Recht*', Ehrlich's '*Freie Rechtsfindung*', Mayer's '*Kulturnormen*', Wurzei's '*Projektion*', Stampe's '*Interessen wägung*' and Romelin's "*Werturteile*". See Flavius (Hermann Kantorowicz) (n 19) 10.

[76] *Ibid.*

[77] In this sense, Rückert (n 36) 134.

[78] "The positivism of the 19th century, which developed precisely to overcome natural law, elevated the conviction to a dogma that there is no other law than that recognised by the state." Flavius (Hermann Kantorowicz) (n 19) 10.

> private rights, the logical perfection in the complete coherence of its principles […]".[79]

The first thing that needs mentioning is that the notion of a *system* in 'legal system' already points to the idea that the law is something having some kind of unity. The systematic method consists fundamentally in "bringing contemporary diversity back to its inherent unity".[80] This gives the law a *form.*[81] Through systematisation, the reciprocal relationships between different elements are determined. In the context of 19th-century German legal science, it is the idea of *organism* which allows to keep the unity of the system over time.[82] This means that the unity of the system is not only conceived of from a formal or procedural point of view; the system of law is not just the aggregation of positive materials, but it is also substantive, *i.e.,* based on the material content of these rules, and alive. This is what gives the systematic method of legal dogmatics the capacity to "produce" new legal rules and principles through generalisation (induction) and specification (deduction) of the substantive contents found in the legal materials. Even when "formalist" authors such as Laband emphasise that dogmatics works on the basis of purely logical operations,[83] they cannot escape from the fact that the "deduction of consequences"[84] from substantive concepts involves a productive activity.

The second thing is that the trivial fact that no positive legislation can be made complete, coherent and clear -not even classic Roman law- was recognised by all jurists during 19th-century Germany, and by those who preceded them. As in France and elsewhere, acknowledgement of gaps and inconsistencies in legal regulations appeared rather early in Germany.[85] Even the *ALR* in Prussia, apex of the tradition of enlightened absolutism, provided for the case of gaps, allowing the judge to decide the case based on the code's "general principles" or by means of analogy (*Einleitung,* §49). In the lines of Portalis, the drafters understood that regulating everything in advance would be a misguided aim, and that the use of general principles "fertile in consequences" was a better option instead.[86] The same opinion was held by Savigny, who affirmed that regulations

---

[79] Reimann (n 7) 884.

[80] *Ibid.,* 127.

[81] *Ibid.,* 148.

[82] Jouanjan (n 8) 126 ff.

[83] See Paul Laband, *Das Staatsrecht Des Deutschen Reiches*, vol 1 (5th edn, Mohr 1911) ix.

[84] *Ibid.*

[85] Ogorek (n 18) n 28.

[86] Pablo Salvador Coderch, 'El "Casus Dubius" En Los Códigos de La Ilustración Germánica' (1983) 36 Anuario de Derecho Civil 17, 34 f.

which attempt to anticipate correct results in all future cases inevitably fail "because there are positively no limits to the varieties of actual combinations of circumstances" that may arise.[87] The same was the case with the quintessential 'formalists' Puchta[88] and Windscheid.[89]

As stated above, case law was not considered a source of law and custom had a subordinated status -and they would not have made great candidates at ideals such as completeness, coherence or clarity anyway. Legislation being imperfect, the construction of the legal system was, very explicitly, from Savigny onwards, the task of the science of law. In Savigny, in particular, jurists are not separated from their object of study but in a relationship of coproduction with it.[90] Moreover, although the role of the jurist gradually came to be understood, in the course of the century, as subordinate to legislation, it was nevertheless considered a source of law. In Windscheid's words: "[t]he task of legal science is not limited to the recognition of the applicable law. Legal science has a role to play in the creation of new law as well."[91]

The legal system, therefore, is not reduced to official legal texts, but includes the conceptual schemes, principles and doctrines built by legal science.[92] Windscheid's idea of a legal system, for instance, involved an idea of "legal 'completeness' that could only be achieved in this way, with a whole ordered according to principles, not through commentary or casuistry".[93] Hence the idea is that "as a logical system containing all the fundamental principles, legal science could achieve gaplessness and completeness. This would make legal reasoning comfortably predictable and independent of considerations outside the legal system."[94]

This is important because many of the accusations regarding "deductivism", "excess of logic", or "mechanicism" come not from how the (mostly legislated) law is conceived of, but precisely from the *methods used by legal science* to build the system of law that aspired to the ideals of

---

[87] von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* (n 12) 38.

[88] Georg Friedrich Puchta, *Vorlesungen Über Das Heutige Römische Recht*, vol 1 (AAF Rudorff ed, 5th edn, Verlag von Bernh Tauchnitz 1862) 40 f; Georg Friedrich Puchta, *Cursus Der Institutionen*, vol 1 (Breitkopf & Härtel 1841) 44.

[89] Windscheid, *Lehrbuch* (n 73), §46.

[90] On this see Jouanjan (n 8) 152.

[91] Bernhard Windscheid, 'Die Aufgaben Der Rechtswissenschaft. Rede Gehalten Bei Übernahme Des Rectorats an Der Universität Leipzig Am 31. October 1884' in Paul Oertmann (ed), Bernhard Windscheid, *Gesammelte Reden und Abhandlungen* (Duncker & Humblot 1904) 111 f.

[92] See Falk (n 15) 607.

[93] This kind of completeness of the law through the working out of legal principles was already indicated by Savigny. See Rückert (n 36) 130, with reference.

[94] Reimann (n 7) 865 f.

autonomy, completeness, coherence, and clarity.[95] Among other things, it was claimed that Pandectists, especially Puchta, reduced the task of systematisation to mere logical consistency,[96] that "too much emphasis" was placed on the structure of legal institutions vis-à-vis their functions,[97] and that "Puchta and his followers abandoned to a large extent the method of independent induction from purely juristic data, and took their concepts ready-made from the professional philosophers, especially from Hegel."[98] These accusations have been contested by recent literature, both regarding methodology[99] and the relationship between methodology and the alleged neglect of social context and needs.[100] But here something important must be noted. Although it is true that conceptual constructions are, in the sense discussed, part of the legal system, the authors recognise that they do not have the same status as officially enacted legal texts.[101] This was "an indispensable political concession".[102] In this vein, it is necessary to distinguish between two different things in Pandectists' thought: on the one hand, the conceptions on how the law -the object of legal science- is, and on the other, the conceptions on how legal science represents the object it studies. This distinction matters because, as mentioned above, the criticisms against Pandectists such as Puchta or Windscheid are mostly related not to their ideas about the law, but rather with their ways of representing it. And it is not even the case that, in their accounts, the relationship between both things was totally coherent. In Puchta's case, for instance, the relationship between his conception of law, on the one hand, and his understanding of the

[95] A parallel here can be found with the criticisms against formalism in the US. As Michael Lobban has shown, the accusations of formalism usually target the attempt by 19th-century jurists to "put the common law into a rational order and seek underlying principles", but who "did not think of law as a whole as a closed system of reasoning". Michael Lobban, 'Legal Formalism' in Markus D Dubber and Christopher Tomlins (eds), *The Oxford Handbook of Legal History* (Oxford University Press 2018) 422. Furthermore, the same tools used by "formalists" to build their system were used by their critics with exactly the same function (*ibid.,* 427 f).

[96] Walter Wilhelm, *Zur Juristischen Methodenlehre Im 19. Jahrhundert: Die Herkunft Der Methode Paul Labands Aus Der Privatrechtswissenschaft* (Klostermann 1958) 87; Larenz (n 45) 19 ff.

[97] Rudolf von Jhering, *Geist Des Römischen Rechts Auf Den Verschiedenen Stufen Seiner Entwicklung*, vol 1 (Breitkopf und Härtel 1852) 42, n 19.

[98] Smith (n 60) 130.

[99] On Puchta's method, see Haferkamp, *Puchta Und Die 'Begriffsjurisprudenz'* (n 2) 449 ff. With special emphasis in Puchta's doctrine of servitudes, he notes that "[a]t no point did Puchta claim to be able to find a new right through formal-logical deductions", and rather, in building legal pinciples and concepts, "Puchta moved upwards, downwards and horizontally in the legal system." (*ibid.,* 451).

[100] "This emphasis on the rational structure of law does not imply, as often presumed, the separation of legal content from its social context on account of an apolitical approach. It is rather the *contents* which are carried forward in the final phase of deduction to the conclusions and which provide the latter with 'inherent authority'. The legitimation which comes from *Puchta's* process of derivation is thus result-oriented and not formal." Ogorek (n 18) 40 f.

[101] See Haferkamp, *Puchta Und Die 'Begriffsjurisprudenz'* (n 2) 448 with references to Puchta. See also previous section.

[102] *Ibid.*, with reference to Puchta.

construction of a valid scientific system for law, on the other, was fraught. Puchta understood, following Savigny, that the law was as a living organism, developing and without a hierarchy among its elements. Hence, the structure of the law does not fit into the *mos geometricus* (which, at any rate, had been discredited along with modern theories of natural law[103]) but rather resembles more the scientific models of biology:

> "I call it the genealogy of concepts which means that one must not see this hierarchy as a mere arrangement of definitions. Each of these concepts is a living being, not only a dead instrument... Each is an individuality, distinct from the individuality of his progenitor."[104]

This conception of the law's nature clashes with the presuppositions that, for Puchta, any scientifically valid system must accord with: to derive completely from a superior concept or idea (which in Puchta's case is the notion of free will)[105] and that every proposition in it conforms to the system as a whole.[106] Both views, on the law and the science of law, are in conflict. This is why in his early years Puchta "made a distinction between scientific representation on the basis of a principle and the unscientific and impracticable attempt to depict the all-round interconnected organism of law."[107] In this way, Puchta secured the scientific validity of his system without compromising his organic vision of the nature of law. The "pyramid" of concepts, therefore, is only a way of scientifically presenting the otherwise complex organic reality of law. It is not its "true" structure (as found by jurists in legal materials). As he gradually recognised that the law was full of accidents and elements that could not be fitted into the scientific system, he started speaking about a "logical" and a "historical" side of the law. As observed in the last section, it was this latter,

---

[103] See Frydman (n 6) 347 ff.

[104] Puchta, *Cursus Der Institutionen* (n 88) §33. On how the conception of law of the Historical School is not mechanic but organic, Jouanjan (n 8) 28 ff. Moreover, the metaphor of 'organic system' is pervasive in the HSL and Pandectism. The affirmation of Wolff being a source for Puchta has been convincingly discarded (Haferkamp, *Puchta Und Die 'Begriffsjurisprudenz'* (n 2) 445, 448.) Puchta clearly thought his system in organic terms (*ibid.,* 446) and even for the early Jhering, the model for legal science was not geometry but biology (Rudolf von Jhering, *Geist Des Römischen Rechts Auf Den Verschiedenen Stufen Seiner Entwicklung*, vol 1 (9th edn, Breitkopf und Härtel 1907) 26.) This is the case even though he sided with early modern natural lawyers in their universalism, in opposition to the HSL's nationalist *credo* (*ibid.,* 8 f, 11).

[105] On this, see Hans-Peter Haferkamp, 'Legal Formalism and Its Critics' in Markus D Dubber, Heikki Pihlajamäki and Mark Godfrey (eds), *The Oxford Handbook of European Legal History* (OUP 2018) 932 ff.

[106] To this, one must add, at least up to 1828, that the proposition also had to conform with the highly elusive and not transparent-to-reason concept of "spirit of the people". See Haferkamp, *Puchta Und Die 'Begriffsjurisprudenz'* (n 2) 466. Later, this element takes on a secondary role in Puchta (*ibid.,* 450).

[107] *Ibid.,* 446

historical and "freely" established law -that is, not drawn out of conceptual necessity- that took pre-eminence in Puchta's idea of legal reasoning.

Besides perhaps Jhering in his early years, there is no proof that pandectists believed that the science of law and its constructions could be made into a self-sufficient, gapless legal system.[108] Indeed, one suspects Jhering was criticising himself for thinking something like: "the concern that the increase in commerce could bring something absolutely new, *i.e.,* something that could not be subsumed under one of our existing concepts" is "unfounded".[109] In the words of González Vicén, "[p]erhaps nobody has felt with greater *pathos* than Jhering this definitive character of this formal-legal conceptualisation, and perhaps no one has ever given it such a forceful expression either."[110] Indeed, after having changed sides, Jhering admits to Windscheid in a letter that *he* (Jhering) would have overestimated the role of conceptual constructions and, therefore, initiated a path towards Windscheid's "healthier" -and less formal!- outlook. Windscheid would have also missed the mark but because of the opposite vice: he *understated the relevance of the formal-legal element* in justifying his doctrines.[111] Ten years later, however, Jhering reproaches him for having approached the vice of "*formalismus*".[112]

C. *Mechanical conception of adjudication and legal reasoning*

Still following Jhering, he confessed that his biggest earlier mistake was that he had applied the legal sources "unconcerned from their consequences".[113] He does not mean, of course, that he had "applied" the legal sources as judges do to particular cases. Here, the phrase "applying the sources" takes a looser meaning, whereby the legal scholar reasons with the legal sources as a starting point: to explain the sources, to interpret them, to put them in relation with other legal sources, to illustrate how certain practical cases should be solved according to them, and so on. But *Begriffsjurisprudenz* is also associated with the programme of reducing the space of the judge in

---

[108] Although some, like Windscheid, tried to make it as systematically consistent as possible, which, along with his vocation for precision and brevity, made his *Pandekten* highly abstract. See Falk (n 15) 621.

[109] See n. 27 and associated text. In Public law, Laband approaches this level of confidence in the conceptual work of dogmatics. See Laband (n 83) vi.

[110] González Vicén (n 5) 71.

[111] In 'Brief Jherings an Windscheid Vom 29.7.1856' in Helene Ehrenberg (ed), *Rudolf von Jhering in Briefen an seine Freunde* (Breitkopf & Härtel 1913) 176 f.

[112] *Ibid.,* 194 f.

[113] von Jhering, *Scherz Und Ernst* (n 38) 339. Haferkamp notes that this claim is misleading as even in his early years he did not apply 'the sources' but a highly 'creative' interpretation of them. In fact, as early as 1844 Jhering thought that Roman Law should be freed "from the shackles of the letter" and given "the development it had not fully achieved with the Romans". Haferkamp, *Puchta Und Die 'Begriffsjurisprudenz'* (n 2) 34 f, with references.

determining the law "exclusively to the logical act of correct subsumption"[114] (claim *(e)* on mechanical adjudication). Indeed, "[c]onceptual deduction, syllogistic subsumption, formal logic, the method of inversion, and conceptual pyramids became the slogans of what was considered a misguided method."[115] Having clarified that often these accusations correspond not to theories of adjudication or legal reasoning but rather to ways of doing dogmatics and concept-building, this section focuses on the conceptions of legal reasoning and the application of the law, by jurists and judges. In this context, the TA's claim is that pandectists sought "to reduce judicial activity to the linkage of the general premise (statute) and specific premise (case) and views judgment as a mechanical-logical consequence of such formal procedure."[116]

It has already been said that a "mechanical" conception of adjudication and legal reasoning is not the necessary corollary of the claim that the legal system is autonomous from other systems. Closure of the legal system may impinge on what elements are considered legitimate in legal reasoning, but does not determine how legal reasoning is structured, and certainly does not reduce legal argumentation to "deduction". The function of the logical syllogism, which consists of the subsumption of a particular case under the general terms of a legal norm or principle, is that of justifying a legal decision.[117] But finding and formulating the major premise of the syllogism, that is, the legal norm, involves different operations: determining the legal salience of the facts of the case, interpretation, integration of *lacunae*, etc. Although theoretical distinctions between these different operations were not especially sophisticated by the 19th century, they were never treated as "deductive" or "subsumptive" (*i.e.*, "mechanical", as that word is normally used). For pandectists "the source of the judicial decision was not simply the law, but legal thinking as a whole."[118] Crucially relevant in this "whole" are the admitted means of interpretation as well as "the definition of the legal concepts and principles that were to guide the judge's legal thinking."[119] In other words, legal reasoning is defined by its ties to the sources but it is not reduced to correctly

[114] Wieacker (n 22) 345; similarly, Helmut Coing, 'Rechtspolitik Und Rechtsauslegung in 100 Jahren Deutscher Rechts Geschichte', *Verhandlungen des 43. Dt. Juristentages*, vol 1 (JCB Mohr (Paul Siebeck) 1960) 1 ff.

[115] Hans-Peter Haferkamp, 'On the German History of Method in Civil Law in Five Systems' (2016) 17 German Law Journal 543, 545, with reference.

[116] Ogorek frames this within the doctrines of legal interpretation, but she is clearly refering to the style of judicial (and/or juristic) reasoning, and specifically, justification of decisions. Note that she does not support but challenges this claim about 19th century German conceptions about law and adjudication. See Ogorek (n 18) 38.

[117] Not, as in Pufendorf, of demonstrating the analytical implications contained in the axiom of the system. See Frydman (n 6) 249 f.

[118] Falk (n 15) 607.

[119] *Ibid.*

subsuming a case under them; doctrines of interpretation and the constructive quality of legal science were key in everything that precedes subsumption in legal decision-making.

That being said, the question of whether leading Pandectists did endorse a formalist or a mechanical view of legal reasoning will be addressed in particular in relation to the interpretation of the law, and defeasibility, as these were the central *loci* of debate at the time. In addition, it will be shown to what extent these two elements were used as means of closing the legal system to other sources of practical reasoning.

Before, one last preliminary note. Accusations of being detached from life and enclosed in the purely legal are directly linked to the idea that legal reasoning is autonomous from other forms of practical reasoning. This, of course, depends on a theory of the sources of law, and in particular on how those sources define what will and will not be considered part of legal reasoning, that is, what is the resulting normative universe which will justify the decision in particular cases. In this vein, perhaps Windscheid's greatest sin was writing, in 1884, the following paragraph regarding the task of legal science:

> 'Legislation stands on high ground; in numerous cases it is based on ethical, political, economic considerations, or on a combination of these considerations, which are not the concern of the jurist as such'.[120]

Claims about *Begriffsjurisprudenz* being totally removed from the law's context and social bearing usually point to these phrases as proof of the most committed form of formalism, in the sense that any substantive justification or significance of the law shall be indifferent to "the jurist as such". In isolation, this piece certainly seems as if Windscheid were trying to eliminate from legal reasoning "ethical, political, economic considerations". But this is not the case. As will be shown in the next sections, Windscheid did advocate for means of interpretation that would consider relevant material elements, including practical purpose, and also advocated for limiting the consequences of legal norms deemed intolerable on grounds of fairness. These things cannot be done without taking substantive (*i.e.,* extra-legal) issues into account, as it was generally accepted. Admittedly, "[n]ot a single nineteenth century jurist had been of the opinion that a closed system of positive law was feasible."[121] Here Windscheid is pointing in a rather different direction: in reasoning *qua* jurists, the material considerations that justify legislation cannot directly justify legal decisions anymore. If they could, jurists would be able to generally decide disputed matters

[120] Windscheid, 'Die Aufgaben' (n 91) 111 f.

[121] Haferkamp, 'Legal Formalism and Its Critics' (n 105) 937.

of social policy, which they are not legitimised to do.[122] Puchta makes a similar statement regarding judges.[123] Legislation may be based on many political, economic, etc, considerations, but it is legislation the ground for legal decision, and not these considerations which, for the jurist -and the judge-, will become (somewhat) opaque. This is just another way to say that sources, not morality or politics, ground legal reasoning.

i. Interpretation

Besides delimiting sources, another way of closing off legal reasoning to "external" sources is via theories of legal interpretation: limiting interpretive directives to highly formalised criteria (*i.e.,* linguistic or systematic) keeps the "input" of decisions within the boundaries of legality, whereas the admission of less formal directives (*v.gr.,* teleological, axiological) would open up legal reasoning to factors coming from "outside" the legal system. This is why Jhering's more important criticism was against restrictive legal interpretation and for including teleology as a central criterion in interpreting the law. On the other side, restricting interpretation to linguistic criteria gives the impression that the legal norms relevant to particular cases are just "there", ready to be taken and applied without further mediation (*i.e.*, "mechanically").

Ogorek found that restrictive (literalist) theories of interpretation during 19th-century in Private law were quite exceptional and were in place before Pandectism.[124] Jhering's notion of pandectists being unconcerned with the law's purposes and consequences appears unfounded when one confronts these authors and encounters exemplary "formalists" such as Windscheid, claiming that "[t]he law must not be interpreted in such a way as to contradict its purpose" or that the judge should take into account the "value of the result" of his interpretation.[125] Indeed, in terms of doctrines of interpretation, German legal science has an interesting story and a wide range of positions.

---

[122] Such as the morality of divorce or the ways in which to alleviate social hardship, which are the kinds of controversial issues Windscheid is referring to in the previous lines. On this see Rückert (n 36) 136. Ruckert points out that, by limiting lawyers in this way, Winscheid was indeed protecting the constitution, and particularly, the equality of votes in law-making.

[123] In Haferkamp's formulation, for Puchta "[w]hile the legislator was free to develop the law with a view to 'practical needs', the judge was denied such powers". Haferkamp, *Puchta Und Die 'Begriffsjurisprudenz'* (n 2) 453.

[124] One such exception was Schömann. See Ogorek (n 16) 42, with reference to Franz Schömann, *Handbuch Des Civilrechts*, vol 1 (Tasché & Müller 1806) 84, 86. Schoemann.

[125] Windscheid, *Lehrbuch* (n 73) §21. On this see also Falk (n 37) 137 ff.

In the tradition of monarchic absolutism, both the *ALR* (*Einleitung,* §§47-48) in Prussia and the *ABGB* in Austria (xx) severely restricted the interpretation of their provisions.[126] This arrangement was established upon the premise that interpreting the law in a *casus dubius*[127] was not a cognoscitive but a creative activity whereby, if left to the judiciary, the will of the judge would supplant that of the Prince.[128] To some philosophers of the Enlightenment such as Svarez, the "problem" of interpretation could be reduced to a minimum by means of rational legislation.[129] But not even then the restriction was absolute, nor could it be merely based on semantic considerations.[130]

Already early in the 19th century the idea of interpretation being a "problem" to solve had disappeared. Interpretation was, instead, considered a fundamental operation to understand the law in general, not only where it was unclear or led to absurd results. The official model of interpretation, followed irrespective of the different strands within it, was philological as laid out by Spinoza and generalised by Schleiermacher.[131] This method defines itself against the ancient hermeneutics, which admitted a multiplicity of meanings for the same text. This approach was going to be seen, since Hobbes, as an a-scientifc stance.[132] The only possible meaning of a text was a fact to be known, and it consisted in the intention of its author. This "intention" (understood in different ways) was the background against which different theories of interpretation developed in 19th-century German legal science.[133] The main techniques (or criteria) used in the interpretation of the law were two: grammatical and logic.[134] The first studies the words of the law according to the rules of semantics and syntax; the second, its "spirit", that is, the motives that guided its author,

---

[126] Bodin had affirmed that sovereignty's essential attribute was legislation, and interpreting the law was considered a right connected to the act of law-making. See Jean Bodin, *Les Six Livres de La République* (J de Puys 1577) chs 8, 10.

[127] The *casus legis* or *claris* was not supposed to be subject to interpretation in a strict sense. On the scope of the concept of *casus dubius* see Coderch (n 86) 24 ff.

[128] See generally *ibid.,* esp. At 23 f.

[129] *Ibid.,* 24.

[130] *Ibid.,* 24 ff.

[131] On the origins and development of the philological method see Frydman (n 6) 317 ff. On the philological method and the HSL see Alfred Dufour, 'Droit et Langage Dans l'école Historique Du Droit' (1974) 19 Archives de philosophie du droit 151.

[132] See Frydman (n 6) 366, with reference.

[133] *Ibid.,* 367 ff.

[134] This distinction had been introduced in the 18th century by Boehmer (Justus Henning Boehmer, 'Vorrede Zu Barnabas Brissons Dictionarium Juridicum', *Exercitationes ad Pandectas* (1745) vol. 1, p. 22.), and adopted as a general taxonomy by the end of the century.

"the source of the source".[135] The different techniques used to interpret the law were not, in any case, supposed to lead to different results, but to one and the same meaning, at least in most cases.[136]

In these lines, by early 19th century theories of interpretation had started to aim at finding a middleground between "blind mechanical application on the one hand, and unfettered judicial power on the other."[137] Since its beginnings in the formulation of Boehmer, and later in Thibaut, the category of 'logic' interpretation was as indispensable as grammatic interpretation. This category, as it is well known, does not mean "formal" logic but included many different interpetive directives: systematic, historical and teleological.[138] Arguably, "[t]he *interpretatio logica* […] provides a roof of legitimation under which almost all views on interpretation can be housed."[139] This is why Savigny suspected the logical criterion, as he thought it was used to conceal the most diverse factors "going far beyond logical conclusions about the legal text", and ultimately was used to "correct the law" instead of applying it.[140] Others, such as Windscheid adopted the canon of grammatical-logical interpretation in a way that dismissed Savigny's concerns. According to Ruckert, Windscheid's "narrow" conception of sources brings a strict conception of interpretation "which seeks to operate on the basis of the wording, the will of the legislator, and 'logic'."[141] But this must be qualified. First, "logic" must be understood as an open and flexible criterion of interpretation, not meaning "logics" but systematic and historical context, as well as purpose. And second, Windscheid tends to see the "will of the legislator" in a rather objective fashion (as "reasonable will").[142] Although he also gave pre-eminence to the grammatical and systematic criteria of interpretation, Windscheid was more keen on letting morality and practicality enter legal

[135] *Ibid.,* 390.

[136] von Savigny, *System of the Modern Roman Law* (n 11) vol. 1, §33. Savigny rejected the distinction between grammatical and logical interpretation. On this see Antonio Bascuñán, 'El Mito de Domat' in Pablo Grez, *Una vida en la Universidad de Chile: Celebrando al profesor Antonio Bascuñan Valdés* (Legal Publishing 2014) n 22.

[137] Ogorek (n 18) 46.

[138] See on this Jouanjan (n 8) 379 ff.

[139] Ogorek (n 18) 46. This include a range of theories from those which conceive of interpretation as identifying the legislator's intention, to those who seek an objective meaning.

[140] FK von Savigny, *System*, vol 1 (1840) 320.

[141] Rückert (n 36) 134.

[142] And what is reasonable is decided by the users. See Falk (n 15) 614.

reasoning, by letting judges "explore" the will of the legislator,[143] and by granting them flexibility to interpret general legal concepts and principles. Such is the case of *bona fides* in contract law.[144]

ii. Defeasibility and the limits of the law

Another way of closing off the legal system to general practical reasoning is to limit the possibility of defeating the law that, once interpreted, is deemed applicable to the case. In general terms, doctrines of defeasibility (at the time often treated as "exceptions") express the views of legal science on how the particularities of the cases can exceed the generality of legal norms: by bringing unfair or absurd results, for instance. Some of the accusations that Pandectism would follow its concepts and principles "no matter the consequences" are thus a kind of legalistic formalism against substantive notions of justice or reasonableness.

The position of "conceptual jurists" in this matter is not clear. Puchta, for instance, was in favour of giving discretion to the judge in the context of customary case-law, to protect the "requirements of higher justice vis-à-vis the course of ordinary law."[145] On the other hand, the judicial assertion of *aequitas* should not be based on some "dark subjective feeling" but rather on "a judgment of the individual circumstances, conscious of its reasons and corresponding to the spirit of the legal institution in question."[146] According to Haferkamp, this was a way of playing off the 'spirit' against the 'letter', without giving leeway to judicial disobedience of the law.[147]

Here two different things seem to be confused: one is the possibility of interpreting a legal rule by means of the "spirit" of the relevant legal institution, and a different one is the possibility of defeating the rule on the basis of 'higher justice' or 'aequitas' being preferred to 'ordinary law'. In the restricted context of customary law, Puchta seems to favour the position of judges having 'discretion' in both matters. Still, Haferkamp notes that *aequitas* did not mean for Puchta plain postulates of justice to be found beyond positive law (*überpositiven Gerechtigkeitspostulaten*). Indeed, corrections to "ordinary law" are to be found within the system of positive law.[148] This position had nothing to do with later doctrines which gave the judge "corrective access to 'life' and, since

---

[143] *Ibid.,* 613.

[144] *Ibid.,* 608. According to Falk, it was his "narrow" conception of sources which made Windscheid's theory of interpretation so extensive.

[145] Haferkamp, *Puchta Und Die 'Begriffsjurisprudenz'* (n 2) 458., with reference to Puchta, *Vorlesungen Über Das Heutige Römische Recht* (n 71) 235.

[146] *Ibid.*, with reference to Georg Friedrich Puchta, *Pandekten* (Adolfus Fridericus Rudorff ed, 3rd edn, 1845) 31.

[147] *Ibid.,* 459.

[148] *Ibid.,* 459.

Weimar, even sought to mobilise it against parliamentary law."[149] We can, therefore, accept that Puchta was quite strict regarding the application of the law and rather cautious when it came to defeating it.

In occasions, Windscheid seemed to have played with the idea of defeating positive law in favour of a general idea of justice. His doctrine of (tacit) presupposition (*Voraussetzungslehre*) aimed at reintroducing material justice in contract law against those who thought it was "too uncertain" to be tenable[150]:

> "There is no doubt that legal certainty is greatly enhanced if the tacit premise, i.e. the premise inferred from the circumstances, is excluded. But this advantage is bought by a great sacrifice, by the sacrifice that the judge may be prevented from enforcing what he considers to be just. The old struggle between the formalistic and the factual application of the law!"[151]

Commenting on this quote, Ulrich Falk says that, for Windscheid, "[t]he judge must make this decision in the interests of justice even if he finds no basis for it in positive law."[152] He then inmediately asks: "[h]ow can Windscheid be accused of having paid homage to the absurd ideal of the judge as an automaton of subsumption? […] He wanted to provide the judge with a tool 'with which he can satisfy the demands of his sense of justice in numerous cases by means of legal reasoning.'" [153] This last part, taken by Falk from Windscheid, is perplexing: his doctrine would give the judge a tool to "satisfy the demands of his sense of justice" but "by means of *legal* reasoning". Something similar is affirmed by Windscheid regarding the principle of unjustified enrichment ("it allows the judge to satisfy the requirements of the sense of justice with the means of the law itself"[154]). This seems incoherent: if the judge does not find the basis for the decision in positive law but in his "sense of justice", how is the judge reasoning *legally?* This presents

---

[149] *Ibid.,* 461.

[150] Bernhard Windscheid, *Die Lehre Des Römischen Rechts von Der Voraussetzung* (1850); Bernhard Windscheid, 'Die Voraussetzung' in Paul Oertmann (ed), Bernhard Windscheid, *Gesammelte Reden und Abhandlungen* (Duncker & Humblot 1904).

[151] Windscheid, 'Die Voraussetzung' (n 150) 375, 409 f. Falk considers this very telling, as Windscheid was extremely precise with his language. See Falk (n 15) 603.

[152] Falk (n 15) 604.

[153] *Ibid.* The quote inside is taken from Bernhard Windscheid, 'Die Voraussetzung' (1892) 78 Archiv für die civilistische Praxis 161, 405 f.

[154] Bernhard Windscheid, *Zwei Fragen Aus Der Lehre von Der Verpflichtung Wegen Ungerechtfertigter Bereicherung* (Edelmann 1878) 29 f.

Windscheid with two options: either his doctrine must be understood as part of the law because in some sense can be linked back to positive law (because it was induced from legal materials; because it explains or justifies the relevant legal institution; because is a correct derivation of a general legal principle, etc.); or else, the doctrine must be treated as legal because it is *desirable* (*i.e.,* convenient, just) to do so. It is not clear what Windscheid thought, but it seems that he effectively tried to provide judges with doctrinal devices that would give them room to decide according to justice (whatever this means), devices that, because worked out in the context of a Private Law dogmatics densely developed, would thus be more controlled than naked appellation to justice wherever the judge saw fit.[155] Its result is a device that allowed judges to defeat the law in some cases specified by legal doctrinal scholarship, and overseen by that same scholarship. But "he had to concede that it was not possible to draw an unambiguous, subsumable line between a legally irrelevant error of motive and a tacit assumption."[156] He thus acknowledged that this doctrine could, more than any other, "become a dangerous tool in the hands of the unskilful and careless judge".[157] For Falk this shows that Windscheid's doctrine of presupposition "documents a lifelong vote of confidence in the skilful and responsible judge"[158]. In any case, one does not need going that far to reject the claim that Windscheid advocated for a legal reasoning that would apply the law "unconcerned for its consequences", or for a judiciary whose role was defined by "mechanically" applying the law.

3. Conclusions

This chapter aimed at showing that -and in what ways- the TA is mistaken and misleading regarding its narrative about the "formalism" of 19th-century German legal science.

True, most late Pandectists did conceive of the law as autonomous and thus as being "closed off" from other normative orders. To this extent the accusation identified in chapter 1 as '*(b)*' is correct. The law is (*and* should be) differentiated from other social orders, and this differentiation critically depends on the sources. But only to this extent: the degree of closure of

---

[155] Perhaps this is what Ruckert meant when he said that Windscheid "knew how to *carefully* open up for the judge the necessary room for manoeuvre". See Joachim Rückert, 'Bernhard Windscheid Und Seine Jurisprudenz «als Solche» Im Liberalen Rechtsstaat (1817–1892)' (1992) 32 Juristische Schulung 902.

[156] Falk (n 15) 604.

[157] Windscheid, *Die Lehre* (n 150) 8, 119.

[158] Falk (n 15) 605, and again at 609: "In the doctrine of presupposition, only one tendency emerges particularly clearly, which permeated Windscheid's entire dogmatics: the constant endeavour to bring 'the judge's indispensable freedom of action to general recognition'. It was precisely here that Windscheid proved to be a pioneer of subsequent legal developments." Elsewhere, however, he says that Windscheid did not think highly of judicial politics and everyday court life in Bismarck and Puttkamer's Prussia (*Ibid* 606).

the legal order, and the range of sources as well as who controls the sources does not correspond to what has been deemed to be formalists' views in the matter. In this regard, the critics have made seemingly contradictory claims: that Pandectism "reduced" all the law to state law, and, at the same time, that it made legal science's constructs into the ultimate criterion of legal truth, above legislation. As seen, the latter accusation is unfair, and the former needs qualification in account of Pandectism's conception of legal orders. In short, we saw that for Pandectists the law was not reduced to official legal texts, but includes, apart from the minor role of customary law, the conceptual schemes, principles and doctrines built by legal science.

The claim that 'Conceptual Jurisprudence' believed that the legal order was complete, coherent and its rules were perfectly clear and determined (claims '*(c)*' and '*(d)*'), must be dismissed as false. The fact that no positive legislation could achieve absolute completeness, coherence and clarity was acknowledged by all the jurists during 19th-century Germany. The understanding that the law was inevitably prone to gaps, inconsistencies and ambiguities appeared early. Legislation being imperfect, the construction of the legal system was, very explicitly, from Savigny onwards, the task of the jurists -scientific construction, although subordinated to legislation, was still considered a source of law, hence the inaccuracy of affirming that in Pandectism's views the law would be completely "reduced" to statutory law. In this respect, completeness, coherence and clarity were goals that oriented legal science, but in no case did they represent attributes of existing legal systems. Many of the criticisms against Pandectists such as Puchta or Windscheid are mostly related not to their ideas about how the law or legal orders are, but with their ways of representing them.

Finally, it was shown that many of the accusations regarding "deductivism", "excess of logic", or "mechanicism" in their approach to adjudication and legal reasoning (claim '*(e)*') come not from how the (mostly legislated) law is conceived of by 19th-century scholars, but rather from the methods they used to build a system which aspired to the ideals of completeness, coherence, and clarity. The ideal of subsumption in the justification of legal decisions, on the other hand, does not depend on a deductivist or mechanistic understanding of legal reasoning, but rather in the simple principle "that lawyers must always claim reference to sources." (see *supra* n 53). And yet as was shown in the sections regarding legal interpretation and defeasibility of legal rules, for Pandectists there was much more to legal reasoning than subsumption. The idea that Pandectists would have sought to reduce legal reasoning to correct subsumption or "mere deduction" must thus also be dismissed as false.

The next chapter explores what can we make of the conclusions reached in chapters 3 and 4 regarding 19th-century 'legal formalism'. May we safely assume that it is all just a "myth" of one generation about the previous one created to ridicule and diminish their views about law and legal reasoning? If that is the case, what then are the exact views that they wanted to get rid of and why? Insofar as 19th-century conceptions of law and adjudication are not what they are accused of, that is, are not 'formalists' in the sense described in chapters 1 and 2, then surely what exactly is the problem that 20th-century scholars saw in them must be spelled out clearly and in a way that is fair to historical facts. In addition, some explanation must be given as to why, even though it is flawed and its explanatory power about its targets is poor, the TA has been able to take root and survive for so long. These are the issues and questions that chapter 5 shall explore and seek to answer.

Chapter Five

Beyond the Concept of 'Legal Formalism': The Formality of 19th-century Legal Thought

The previous two chapters contrasted what has been said about the "formalists", that is, French codifiers, the 'Exegesis' and the 'Jurisprudence of Concepts', against what their main representatives actually had to say in their works. The core of the argument was that if formalism is understood as the position that defends the claims generally outlined in chapter 1 (claims *(a), (b), (c), (d),* and *(e)*) and more concretely delineated in chapter 2 for the cases of France and Germany, then the historical contrast demonstrates that neither the codifiers, nor representatives of the 'Exegesis' or those of '*Begriffsjurisprudenz'* were formalists.

This chapter elaborates on the relevance of this finding. Its starting point is that the conclusion that none of these schools was formalist is historiographically relevant because they are two of the most paradigmatic historical instances of "legal formalism" in the West. Beyond this historical import, we shall see that this conclusion may also have theoretical offshoots: the category of "formalism", although analytically plausible, would not account for any theoretical position in the history of jurisprudence. Drawing from similar historical insights in the U.S., this reasoning led Brian Tamanaha to conclude that the divide "formalism/realism" would be the result of a strawman created by the critics; a dispute based on a false disagreement.

In this chapter I argue that in the case of Continental Europe, this conclusion is untenable. The opposition between 19th-century schools and those who reacted against them is significant both at theoretical and methodological levels. This opposition needs to be recognised and explained. And yet we know now that they cannot be explained by saying that the former held "formalist" claims, whereas the latter revealed these claims to be naïve (§1). I thus propose a different scheme. I present a conceptual scheme developed by Atiyah and Summers (§2), to characterise the *Exegesis* and *Begriffsjurisprudenz* as committed to a specific view of formality in the law along four axes. I maintain that by reference to these axes of formality, the distinctiveness of 19th-century legal science can be better apprehended (§3). More interestingly, this scheme

acknowledges a difference between formal and formalistic thinking in the law, giving space for a *project* which favours formality in law that need not be naïve or pathological (§4). Finally, the conclusions of the chapter are summarised (§5).

1. "Formalists" and "anti-formalists": A false opposition?

Let us recall the argument so far. Chapter 1 analysed the concept of 'legal formalism' and its main postulates, identified as *(a), (b), (c), (d)* and *(e).*[1] Chapter 2 reconstructed the Traditional Account ("TA") of the 19th-century "legal formalists. Chapters 3 and 4 put to test this account against what the historical subjects had to say in their works. To this effect, I employed these authors directly, along with some specialised secondary literature dealing with specific authors or periods. The main conclusion of such an inquiry was that if the accusation of "formalist" amounts to adhering to the postulates *(a), (b), (c), (d)* and *(e)* about the law and legal reasoning, then the defendants can hardly be found guilty. All things considered, neither codifiers, nor the members of the Exegesis or *Begriffsjurisprudenz* were "formalists".

From a historical point of view, this is a finding worth noting. It shows that the still dominant narrative ('TA') about 19th century "legal formalism" both in France and Germany contains significant misrepresentations and exaggerations. The idea we have today about 19th century legal thought is thus, *to a good extent,* distorted by a critical account which has not been faithful to the historical reality. I say *to a good extent* because, as I also hope to have shown, not all of what it tells us is false or exaggerated. To avoid creating a myth over another myth, that which is right in the received mainstream narrative was also acknowledged. As a result, a different picture of 19th-century legal thought emerges: one that is more nuanced and complex.

This input in the history of legal thought parallels the insights drawn by some literature regarding 19th-century "legal formalism" in the United States. After a close examination of the sources, they show that 19th-century U.S. legal scholars did not maintain the formalist claims attributed to them.[2] Early on, Dworkin famously affirmed that the difficulty of the critics of

[1] Namely: *(a)*, a strict subordination of the judge to the law and only to the law; *(b),* a clear-cut distinction between law and non-law by means of formal criteria (sources), which makes up for law's complete autonomy from other normative orders; *(c),* the completeness and coherence/consistency of the legal order, and thus the inexistence of gaps and contradictions in it; *(d),* the clarity and full determination of legal texts, both in meaning and scope of application, and thus their ability to determine the content of particular decisions; and *(e)* the mechanical nature of legal reasoning, meaning merely deducing concrete consequences from general legal rules, with no mediation from interpreters or judges.

[2] See especially Brian Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton University Press 2010); Katharina Isabel Schmidt, 'Der "Formalismus-Mythos" Im Deutschen Und Amerikanischen

"mechanical jurisprudence" was that they could not find actual "formalists" to ridicule: "[s]o far they have had little luck in caging and exhibiting mechanical jurisprudists (all specimens captured -even Blackstone and Joseph Beale- had to be released after careful reading of their texts.)"[3] This view was affirmed later by Martin Stone, who asserted that formalists are "little more than a scarecrow", and that '*the* formalist' is "to be found only in legal mythology";[4] and also by Duncan Kennedy, who nuanced his previous work and decentred even more deductive formalism as a distinctive feature of 19th-century legal thought.[5] Later on, Brian Tamanaha made a valuable contribution in putting to test the received historiography of 19th-century "formalism" in the United States.[6] Although he warns us that the task is difficult due to the fact that "formalists" never speak for themselves (they speak through their critics -in this case, Pound, Frank, and others-, and through later historiography relying on such critics),[7] he demonstrated that "the age of 'legal formalism' never really existed":[8] the main proponents of "legal formalism" never conceived of the law as a complete and coherent body of norms; nor did they think that law could be mechanically applied, by mere logical subsumption. In his view, the whole narrative of U.S. 19th-century formalism would be a myth.[9] More recently, in his *Law's History* David Rabban has also defended the view that mainstream accounts about 19th-century "deductive formalism" got it fundamentally wrong.[10]

If we accept this conclusion, *i.e.,* that 19th-century U.S. legal scholars were not formalists after all, and consider it along with the conclusion reached here for the cases of France and Germany, the picture we get is that the three most conspicuous historical examples of legal

Rechtsdenken Des Frühen 20. Jahrhunderts' (2014) 53 Der Staat 445; and Karlson Preuß, "Legal Formalism'and Western Legal Thought' (2023) 14 Jurisprudence 22.

3 Ronald Dworkin, 'The Model of Rules I', *Taking rights seriously* (Harvard University Press 1978) 15 f. Similarly, Martin Stone, 'Formalism' in Scott Shapiro, Jules Coleman and Kenneth Himma (eds) (OUP 2004) 167.

4 *Ibid.,* 167 and 172, respectively. The emphasis in the latter citation is in the original and is meant to express that, although some formalist-related claims may be well applied in some instances, the idea of some historical figures or schools being formalists, in general, is false.

5 D Kennedy, 'The Disenchantment of Logically Formal Legal Rationality, or: Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought' (2004) 55 The Hastings law journal 1031, 1033.

6 Tamanaha (n 2).

7 *Ibid.,* 4.

8 *Ibid.*

9 See *ibid.,* 3 ff, 115; also a "patched-together invention" (63); "imagined" (115).

10 David M Rabban, *Law's History: American Legal Thought and the Transatlantic Turn to History* (CUP 2013) 427, 430 ff, 472 ff, and esp. 512 ff. Although he distinguishes between formalism and conceptualism, and agrees with Grey that 19th-century legal scholars were inductive conceptualists (*ibid.,* 512).

formalism in the Western legal tradition would be based on flawed assumptions or, as some authors put it, on a "myth".[11] Historically, "legal formalism" would be an empty label. While for some a historiographical lesson like this one is of no philosophical interest,[12] for others this lack of historical reality has a theoretical import: given that formalist ideas would not have been actually held by any group of scholars, the very concept of "formalism" and the resulting "formalist-realist" opposition, would be of no theoretical value and should, therefore, be abandoned. According to Thomas Grey, "the very persistence and intensity of the polemical assault on classical orthodoxy" (*i.e.,* formalism) indicated that it "was a powerful and appealing legal theory, not the feeble dogma portrayed in the critics' parodies."[13] The majority, however, thought differently. Most authors claimed that the critics would have invented formalism in the U.S., and their criticisms would be "an effortless assault on undefended positions."[14] Formalism, in short, would be a "nontheory".[15]

Brian Tamanaha follows this line of reasoning. After demonstrating that the traditional narrative of 19th century U.S. jurisprudence is a story plagued by falsehoods and errors, he takes a step further and concludes that the very concept of "formalism" would be "a term of abuse with no real theoretical content".[16] Beyond "the derogatory connotation it has traditionally conveyed",[17] there would be "nothing distinctive -nothing unique or unifying" behind the label.[18] This thesis would be strengthened by the fact that there are no 'canonical' texts or manifestos where formalist

[11] Apart from Tamanaha, the notion of "myth of legal formalism" is also present in Schmidt (n 2).

[12] "Some contemporary literature identifies both strands of formalist thought in the nineteenth century as straw-man construed by the critics. The accurate portrayal of the theoretical positions is historically important but of limited philosophical interest." Bojan Spaić, 'Formalism' in M Sellers and S Kirste (eds), *Encyclopedia of the Philosophy of Law and Social Philosophy* (Springer 2023) 987 n 3, with references.

[13] Thomas C Grey, 'Langdell's Orthodoxy' (1983) 45 University of Pittsburgh Law Review 1, 5.

[14] Stone (n 3) 170; in the same vein, Duncan Kennedy, *A Critique of Adjudication : (Fin de Siècle)* (Harvard University Press 1997) 105; Juan A García Amado, 'Sobre Formalismos y Antiformalismos En La Teoría Del Derecho' (2012) 3 Eunomia 13, n 1; and Rabban (n 10) 523 f. Although with some nuances, this claim has also been made for the case of French legal formalism. See Marie-Claire Belleau, 'Le Juristes Inquiets: Legal Classicism and Criticism in Early Twentieth-Century France' (1997) 1997 (2) Utah Law Review 379, 386, 423. Without questioning the *Juristes'* description of the Exegesis (she intentionally takes it for granted as her argument is precisely about the former), she affirms that the whole concept of an *École de l'Exégèse* is a creation of 20th-century criticisms.

[15] David Lyons, 'Legal Formalism and Instrumentalism. A Pathological Study', *Moral aspects of legal theory* (CUP 1993) 63.

[16] Tamanaha (n 2) 161, and more generally, ch. 9. Similarly, AWB Simpson, 'Legal Iconoclasts and Legal Ideals' (1990) 58 University of Cincinnati Law Review 819, 834.

[17] Tamanaha (n 2) 177.

[18] *Ibid.,* 68. He speaks now about legal realism, but he thinks symmetrically in the case of formalism.

ideas are articulated as a coherent whole. Others have also noted this difficulty.[19] Tamanaha further argues that the theoretical formalist-realist divide would be nothing but a sham, which obscures the fact that both 19th and 20th-century legal thought are expressions of "balanced realism", *i.e.,* obedient to the law yet sceptical of its all-encompassing ability to determine every judicial decision.[20] In fact, he claims that "jurists have *generally* viewed judging in terms of balanced realism."[21] The conclusion: "the formalist-realist divide is baseless historically and theoretically".[22] The idea is tempting: although analytically possible, the concept of "formalism" and the resulting opposition "formalism-realism" would have no traction in real life; that is, it would not account for any real position or opposition in the history of jurisprudence.[23]

I do not follow this path here. Although I do consider that getting history right is philosophically constructive, I argue that, at least in the case of Continental Europe, a similar line of reasoning would be untenable.[24] The first reason is that we cannot dismiss everything the TA says as false. As we already pointed out, there is some truth in it that needs to be acknowledged. This ties in with the second reason. The opposition, both at theoretical and methodological levels, between the schools called 'formalist', on the one hand, and those who reacted against them at the beginning of the 20th century, on the other, is real and significant. Even though I do not share the idea of "evolution" or "progress" implicit (and sometimes explicit) in the historical works that have narrated this opposition, it must be recognised that there was a confrontation between different and even incompatible substantive ideas of law, legal norms, legal reasoning and adjudication, and also, as we shall see in the last chapter, with regards to the law as an epistemic object, the role of legal science and its methods.

The labels "formalism"/"anti-formalism" and others such as "mechanical jurisprudence" or "realism" are, for better and for worse, a product of this opposition: even though they distortedly signify the realities to which they are supposed to point, the intellectual and

---

[19] See, for instance, Giovanni Tarello, 'Formalismo', *Novissimo Digesto Italiano* (UTET 1961) 573; Lyons (n 15) 42; D Kennedy, 'Legal Formalism', *The International Encyclopedia of the Social and Behavioral Sciences* (Elsevier Ltd 2001) 8634 8634; and Richard H Pildes, 'Forms of Formalism' (1999) 66 The University of Chicago Law Review 607, 607.

[20] Tamanaha (n 2) 6 f, 125 ff.

[21] *Ibid.,* 7. Emphasis added.

[22] *Ibid.,* 202.

[23] Brian Leiter replied defending the idea that formalism and realism exist as theoretical positions and have advocates, at least in the U.S. See Brian Leiter, 'Legal Formalism and Legal Realism: What Is the Issue?' (2010) 16 Legal theory 111.

[24] I do not not enter the debate about formalism in the U.S. This does not mean an endorsement of Tamanaha's conclusions, but it must be noted that he engages some particularities of the Common law, specifically U.S.'s adjudicatory theories, which have no bearing on our case and that I do not analyse here.

programmatic struggles from which they arose need to be accounted for and explained. While it is tempting to gloss over the whole story as a myth and shift the conversation towards the question of *why* that myth has been produced (*v.gr.,* what, for instance, was its function in the context of struggles of power, or what kinds of misunderstandings led some historian or other to repeat a mistaken claim), I affirm that such a strategy would be unwise. It is not possible to illuminate what was at stake in this dispute if both models are in a continuum of more or less balanced realism, whose differences are reduced, at the most, to their emphases. Following such path, in other words, would leave us with a great deal unexplained. It escapes me, for instance, what exactly would be the point of the traditional "myth" of formalism, and why so many would have -in coordination or spontaneously- sustained such intense criticisms against "undefended positions". In his afterword, Tamanaha offers an explanation: political motives led the critics to oppose 19th-century legal thought. These political agendas would have been "served by attacking aspects of rule-oriented judging".[25] But if this is true, how is it possible that they shared with those who they criticised the same (or fairly similar) conception of adjudication and what it means to be bound by rules?

In this context, an intuition such as Grey's is insightful. Not in the sense that the mere existence of the dispute demonstrates that formalism is "a powerful and appealing legal theory", but in a more modest sense: it shows that the critics saw themselves as fighting against the core of their predecessors' ways of thinking about the law. This self-image is telling, and we should not dismiss it. For some reason, they did not consider their opponents' legal conceptions to be moderate, "balanced" positions that could be negotiated. Of course, in this battle they may have mischaracterised this reason, as well as their rivals and their differences -as they did. But this does not mean that they were wrong in thinking that something relevant was at stake and worth fighting for. Elucidating what was at stake is the subject of the rest of this and the following chapter.

2. A different approach to 'legal formalism': Formality and formal reasoning in law

Our still unexplained assumption is that there is a significant difference between schools such as the *Exegesis* and Gény's *Scientific Method,* in France, or between *Conceptualism* and the

[25] Tamanaha (n 2) 200. Other possible explanations regarding this attack without contenders can be found in Rabban (n 10) 523 ff. He claims that 20th-century critics would have improperly inferred "deductive formalism" from 19th-century legal scholarship's focus on internal legal doctrine. This would be owed to the fact that the former "rejected the internal study of law as a diversion from the real social problems law needed to address" (524), combined with Pound's misguided "generational intellectual rebellion" that would allow them "to highlight the claimed innovations of the younger generation" (*ibid*).

Interessenjurisprudenz or the *Free Law Movement*, in Germany. That difference needs articulation and explanation considering the new picture of the 19th century which resulted from previous chapters.

This picture shows two things: that there is some truth in the traditional account and that 19th-century legal thought in France and Germany has some common features which makes it a unified legal phenomenon very different from its predecessors, but also from those who reacted against them at the beginning of the 20th century. It is true that this phenomenon has been distorted through the label "formalism", which, commonly used as an indicative of beliefs *a, b, c, d* and *e,* is now highly compromised.[26] In this, Tamanaha and others are right.[27] We now know that the difference between 19th- and 20th-centuries legal thought cannot be explained by saying, with the TA, that the Exegesis and Conceptualism naively believed *a, b, c, d* and *e* whereas the critics denounced these beliefs as illusory. Or, as put by Stone in the case of the U.S., "[i]t looks like a mistake, then, to think that, sometime in the twentieth century, a discovered need to resort to 'policy' interrupts a previous ('classical' or 'formalist') fantasy of being able to resolve all legal questions by deduction."[28]

And yet it is not the case that 19th-century legal scholarship can be called "balanced" or "moderate" realists, unless realism is stretched out to lose all its meaning. What cannot be ignored is the fact that codifiers and the Exegesis in France and the Jurisprudence of Concepts in Germany had a distinctive commitment to *formality* in the law. Their vision did privilege, in many ways, formal (in opposition to substantive) reasoning in law. To understand this particular vision of formality in the law I propose, first, to rely on a conceptual scheme developed by Patrick Atiyah and Robert Summers, which will allow us to distinguish between four types of formal thinking in the law and, by reference to these, between four types of degraded, *formalistic thinking*. I argue that it is precisely by reference to these categories of formality in the law -and not by reference to the propositions abbreviated as *a, b, c, d* and *e*- that the differences between 19th and 20th-century legal thought can be better illuminated. More interestingly, this model, by distinguishing between first and second order (formal) reasons, acknowledges that formality in law can only be assessed by reference to value choices that are to be substantively justified, and which, therefore, provide the

[26] I reckon that this is the reason why Tamanaha chose "balanced realists" instead of "balanced formalists" to account for both 19th- and 20th-century legal thought.

[27] In Tamanha's view: even though "[t]heorists working with this term today are in effect trying to turn what was insult into a meaningful concept, […] the negative connotations cling to the word soiling whatever is produced." (Tamanaha (n 2) 8. Also see Paul N Cox, 'An Interpretation and (Partial) Defense of Legal Formalism' (2003) 36 Ind. L. Rev. 57; and Preuß (n 2) 52 f. Preuß joins Tamanaha in advocating for the elimination of the label "legal formalism", but unlike Tamanaha, he acknowledges the differences between 19th and 20th-century legal science.

[28] Stone (n 3) 196.

rationale for its evaluation. In this way, unlike the traditional concept of "formalism", this scheme gives space for a *project* which favours formality in law that needs not be naïve or pathological.

Being a "term of opprobrium",[29] 'formalism' entails an exaggerated or distorted way of conceiving the law. But that by reference to which formalism is a deviation or exaggeration is simply absent from the landscape. In this way, the term has an in-built critique but that what is criticised is never stated to begin with. If 'formalism' is an exaggeration or deviation from something, if it is employed to pejoratively describe legal science or legal theory's conceptions about the law, it is necessary to explain *what is that which is being distorted* and gives place to the problem. Those who first reacted against 19th-century legal thought never gave a solid account of this. Neither did it those who, following that reaction, consolidated the official story about it. So, what is that by reference to which 'formalism' is an exaggeration, a distortion, a vice?

The answer to the question above cannot be other than *formality* or *formal reasoning* in law. If it means something, 'formalism' is a vice by excess or degradation of formality in the law. This distinction between formality or formal reasoning, on the one hand, and formalism, on the other, tends to be ignored. Rather, formal reasoning:

> "is often treated as the same thing as formalistic reasoning as though these were both examples of bad reasoning ranging merely from the bad to the very bad."[30]

Note that this is not a terminological problem. The problem is, rather, that healthy and pathological versions of formality in the law tend to be indistinctly called "formalism" *because* they are collapsed in the first place.[31] The problem, in other words, is that a significant part of the debate around formalism and its historical representatives has been articulated upon the basis of ignoring the difference between reasonable or appropriate levels of formality and formal reasoning in the law, on the one hand, and unreasonable or excessive manifestations of such features, on the other. Without a clear differentiation between the two, it is unsurprising that the concept employed to refer to all things formal in law is, at least, slippery. The distinction has been developed in the

[29] Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press 1995) 22. Weinrib (1995), p. 22.

[30] Atiyah explaining why Joseph Raz called formal reasons "second-order", "preemptive" or "protected" reasons instead of calling them just "formal" reasons. See Patrick S Atiyah, 'Form and Substance in Contract Law' in Patrick S Atiyah, *Essays on Contract* (Clarendon 1986) 94.

[31] I am following here a reasoning similar to the one Stone presents for the confusion he sees between normative and descriptive formalism. See Stone (n 3) 178.

literature, yet its centrality for discussing any historical instance of formalism has been completely ignored.

"Most, if not all, varieties of formalistic reasoning can be represented as degenerate species of one or more of the basic attributes of formal reasoning."[32] This quote is from a study developed almost forty years ago by Patrick Atiyah and Robert Summers, where they discuss form and substance in the Common Law. Here I want to bring up this study, precisely because it makes this distinction central to its analysis. As I deem it necessary, I will introduce concepts or precisions that are not in the authors' scheme, but in the core, I will follow their exposition.

In *Form and Substance,* the authors identify four kinds of formality in the law: authoritative, content, interpretive and mandatory formality.

i. *Authoritative formality*.[33] Authoritativeness concerns the existence of a norm as a *legal* norm (validity formality) and the priority that such a norm has in the legal order vis-à-vis other norms (rank formality). In its first sense, authoritative formality is source-oriented: it poses a standard for ascertaining law's validity exclusively by reference to its *pedigree,* typically, but not exclusively, the procedural rules for the enactment of legislation.[34] Following Raz's terminology, this kind of formality has been generally known in legal theory as giving rise to "authoritative", "exclusionary", "preemptive" or "protected" reasons.[35] In its second sense, authoritative formality is a function of second-order rules of priority, which rank different norms against each other.[36]

   As explained in previous chapters, formality of sources relies in the assumption that the law can produce itself and limit itself. Hence, the law poses its own validity criteria. This allows, at the same time, to speak of an "inside" and an "outside" of the law, and set a clear boundary between legal and extra-legal considerations in legal reasoning.

[32] Patrick Atiyah and Robert Summers, *Form and Substance in Anglo-American Law. A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon 1987) 28. Note that the authors employ *formalistic,* not *formalist.* I come back to this below.

[33] *Ibid.,* 12 ff.

[34] As it is not feasible for a legal order to have purely source-oriented criteria of validity, some content validity will be introduced in the equation, thus making authoritative formality a matter of degree. *Ibid.,* 12.

[35] Joseph Raz, *Practical Reason and Norms* (Hutchinson 1975) 35 ff; Joseph Raz, 'Legitimate Authority', *The Authority of Law. Essays on law and morality* (Oxford University Press 1979) 22 f; and Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 Minnesota Law Review 1003, 1018, 1022.

[36] Atiyah and Summers (n 32) 12 f.

ii. *Content formality*. Content formality is an attribute of the law resulting from the degree of fiat and *arbitrariness* employed in shaping rules. A rule shaped by fiat (*e.g.,* 'Keep right') or whose content is arbitrary, *i.e.,* it is largely under or over-inclusive in relation to its underlying rationale, has thus high content formality. Thus, rules with high content-formality are likely to generate false positives and false negatives from the point of view of the rule's purposes.[37] Content formality can be said to be the degree to which the formulation of a rule has been severed from the substantive reasons which justify it. This means that, in making a decision on the basis of a rule, this rule will be opaque with regards to its own rationale, foreclosing the possibility for the decision-maker to look "behind" the rule's formulation. Because of this severance the rule's rationale is not always easy to identify.[38] This makes criteria of interpretation focusing on purpose or substantive justification less certain than formal criteria, such as literal or systematic. Some degree of content formality is inevitable where rules have a fixed verbal formulation, as in statutes (compared to common law rules, for instance).

iii. *Interpretive formality*. Formality with respect to legal interpretation concerns the degree of institutional differentiation required for interpretive criteria to be accepted or favoured with respect to other criteria. Linguistic and systemic criteria of interpretation present high institutional differentiation and thus, high interpretive formality; whereas some forms of systemic interpretation, and especially purposive or teleological interpretation, tend to be less differentiated and hence less formal.[39] As said, content formality involves a degree of opacity of the rule's substantive reasons, and hence "merely because a rule may incorporate or derive from a substantive reason (or several such reasons) it does not follow that the rule does so plainly or clearly."[40] Low interpretive formality, therefore, may result in uncertain and less predictable decisions.

---

[37] Faced with the action of driving under the influence of alcohol, for instance, it is possible to imagine two different rules: one that prohibits driving "drunk or under the influence of alcohol", and another that prohibits driving with "more than 0.02% blood alcohol level". The former is a rule with low or moderate content-formality (one could imagine a rule with even lower content formality: "it is prohibited to drive in a state which may result in damage for third parties"); the latter has high content formality.

[38] Atiyah and Summers (n 32) 13 f.

[39] The authors reduce formal means of interpretation to the written text, neglecting the systemic criterion of interpretation (*ibid.,* 15, 25). An analytical framework to categorise and compare different directives of interpretation in Jerzy Wróblewski, *The Judicial Application of Law* (Zenon Bankowski and Neil MacCormick eds, Springer 1992). Also, Atiyah and Summers mention a purely axiological criterion of interpretation among the less formal ones, but it is doubtful in what sense a purely axiological criterion can be said to remain interpretative of the law. See Atiyah and Summers (n 32) 15.

[40] *Ibid.*

It can, on the other hand, compensate high content formality where deemed to be under or over-inclusive.[41] Highly formal methods of interpretation generally give priority to linguistic directives of interpretation and tend to disfavour or even exclude purposive and other forms of less institutionally differentiated criteria through some version of the maxim *in claris non fit interpretatio.*[42] It is a mistake, however, to believe that the most relevant differences between methods are to be found in first-order criteria of interpretation (*v.gr.* that the Exegesis, unlike their critics, only admitted the literal or linguistic criterion: this is false). The difference lies, rather, at the level of second-order rules of preference,[43] and especially as to whether (and when) non-linguistic criteria of interpretation can defeat linguistic interpretation.

iv. *Mandatory formality.* It is the attribute of a formal reason of "overriding, or excluding from consideration, or diminishing the weight of, at least some contrary substantive reasons".[44] In other words, it prevents treating legal norms as defeasible against substantive reasons.[45] This kind of formality can be *prima facie* (or rather *in abstracto*), or at the moment of its application to a particular case. Depending on the degree of interpretive formality, this could also include the substantive reasons justifying the norm or system of norms. If interpretive formality is high and purposive interpretation is not admitted or is admitted only to the extent that it does not overstep any of the possible literal senses of the rule, then any overriding of the literal meaning of the rule will be read as defeating the rule itself.[46]

Along these four axes, the law creates reasons of form as opposed to reasons of substance. As the authors explain, "a *purely* substantive reason cannot (…) exist *in the law.* If it is truly incorporated in the law, it must have at least the formal attributes of authoritative and mandatory

[41] *Ibid.,* 15 f.

[42] See Antonio Bascuñán, 'El Mito de Domat' in Pablo Grez, *Una vida en la Universidad de Chile: Celebrando al profesor Antonio Bascuñan Valdés* (Legal Publishing 2014) 282 ff.

[43] "[F]or the second-order rules express the matrix of principles of political justice and more general institutional conceptions that legitimise adjudication." *Ibid.,* 277.

[44] Atiyah and Summers (n 32) 16.

[45] As seen, Raz calls the reasons produced by this attribute "exclusionary reasons" (n. 30), but he thinks of this as a categorical matter, whereas Atiyah and Summers see it as a matter of degree (*ibid.,* 17).

[46] In his analysis of legal formalism Schauer does not distinguish between these things (see chapter 1), but they must be kept separate. In principle, defeasibility of the norm in favour of external reasons is different than defeasibility of the textual formulation of the norm in favour of its purposive interpretation. The former is certainly less acceptable than the latter in a legal order privileging high degrees of formality.

formality to some degree."[47] The existence of specifically legal formal reasons is what makes it plausible to talk about legal reasoning as something different from general practical reasoning. Formal reasoning is what makes it possible to say, even with caveats, that particular cases are decided according to the law.

It is important to note that these kinds of formality can be found both in primary and secondary rules of the legal order, as in the practices of scholars, judges and other officials. Formality so understood may feature in written rules or in practices related to the identification of the law, the content of its norms, the methods of interpretation, and the degree of "shielding" of its norms with regards to reasons of substance. Hence, formality is not necessarily a claim of legal science when conceptualising the law but may be an attribute "embodied in the law";[48] a feature of the legal order itself. This means that sometimes formality may come to judges and scholars as a given. Think, for instance, in content formality: some rules of legislation are created highly formal, whereas others are not. Also, rules for legal interpretation can be themselves formalised and incorporated into codes by the authority.[49] The same is the case for authoritative formality where legislation itself excludes some sources from consideration or reduces their import.[50] In these cases, legal scholarship can identify the degree to which a legal order relies on the different types of formality, and how this impacts on its operations. Certainly, such a feature in a legal order may be evaluated and criticised. But it is one thing to criticise the formality of a legal order and quite another to criticise the theoretical accounts about this legal order.

On other occasions, however, formality in the law is created and shaped by legal science itself. The methods and techniques of legal reasoning and interpretation, including the doctrinal systematisation of legal materials and the creation of legal concepts, is generally carried out by legal scholars. A complication is that it is they themselves who also theorise about these methods and practices. This was the case of 19th-century French and German legal scholarship: formality in the conceptions about the law mirrored formal reasoning in, say, the practice of interpretation (whose means and techniques were not formalised in codes or other formal legal sources). In fact, legal

---

[47] *Ibid.,* 19.

[48] *Ibid.,* 17.

[49] It is the case of the Chilean Civil code (see §4 of the Preliminary Title). It is not, however, the case of the French Civil code, as the drafters decided to dispense with the rules for statutory interpretation and leave it to judges and legal science instead. See chapter 4 and esp. Bernard Beignier, 'Portalis et Le Droit Naturel Dans Le Code Civil' [1988] Revue d'histoire des facultés de droit 77.

[50] Article 7 of the *Loi du 30 Ventôse an XII,* which reunited in the Civil code all its 36 titles: "From the date on which these laws come into force, Roman laws, ordinances, general or local customs, statutes and regulations shall cease to have the force of general or particular law in the matters that are the subject of the laws comprising this code."

doctrinal scholarship and legal theory, as we know it now, were not properly differentiated. The jurists in France and Germany accused of formalism are the ones who, as professors of civil law, developed methodologies of interpretation and conceptual construction of the legal materials and, *at the same time,* roughly conceptualised their own activities, the nature of the law, the legal system, the role of the judiciary, and so on. Despite these entanglements, we need to keep the distinction between the formality of the positive legal order as given by legal materials, formal reasoning as developed by legal science in its operations, and finally, the theoretical claims of legal science about the two formers. Part of the problem with the TA is that it does not acknowledge this distinction.

3. The formality of 19th-century legal thought in Continental Europe

The four axes of formality described above account for some of the main differences between schools of thought, such as the Exegesis and Conceptualism, on the one hand, and the reaction against them by *Interessenjurisprudenz,* the *Freirecht* or Gény's *Méthode Scientifique,* on the other hand. Let us briefly portray the picture.[51]

A. *Authoritative formality.*

In France, especially since the codification, but in a development started earlier, a process of formalisation of the legal sources took place. This process explicitly sought and managed to: a. exclude all forms of law that had not been incorporated into the codes or statutes (validity formality); and b. subordinate the so-called 'material sources', *i.e.,* costume, legal doctrine, to the formal sources (rank formality).[52] In this way, the state turned formal sources, especially legislation, into the law *par excellence*, and with it, the criterion for law-ascertainabilty became highly differentiated. In Germany this process started later, but already by mid-20th century the formalisation and unification of sources in the hands of the state was at a very advanced stage.

The monopolisation and formalisation of the law's production had effects on both legal theory and legal science: the theories of law and adjudication and the methods of legal doctrinal scholarship were accommodated to account for this new scenario. The starting point is that 'law' means 'formal source', which, in turn, means fundamentally 'legislation'. This does not mean,

[51] Note that this portrayal is, as always, a simplified version of a more complex scenario. There were differences between authors, and at different times, even in the works of the same author. I rely on the arguments provided in the previous chapters to claim that there are, despite these differences, sufficient minimum commonalities which are relevant enough to characterise it as a unified phenomenon.

[52] This process was crowned by Article 7 of the *Loi du 30 Ventôse an XII* (see n. 50). Similarly the *ABGB* of 1811 also established that enacted law was the only source of law, excluding natural law (except as last resource), custom and equity from legal decision-making (§§7, 10-12).

though, that other sources will not be considered as means to understanding legislation, especially where the content of the latter has a certain historical depth.[53] As per adjudication, the role of the judiciary must be strictly subordinated to the (formalised) law, and its task is to apply it, not to create it. In France, this conception was institutionally sanctioned: article 5 of the *Code* explicitly prevents judges from creating general norms. Legal reasoning consists of the justification of particular decisions on the basis of pre-existing general legal norms, ascertained by formal criteria. In terms of legal doctrine, methodological changes are a direct result of the subordination of material to formal sources. For the Exegesis, the codification is the condition of the possibility of its *raison d'être* as legal science. It defines its object of study and with it, its theoretical ambitions and methodological choices. Similarly for the Germans, the limits of legal science are given by positive legal texts, which are now its sole object of study. These were plural at the beginning of the 19th century, but increasingly concentrated in the state in the form of legislation by the middle of the century.[54]

B. *Content formality*

The degree of formality of legal rules is given mainly by the legislator. In this regard, both in France and Germany, the degree of formality varies highly among and within different bodies of regulation. Consider articles 65 and 545 of the French Civil code: "Article 65. If the marriage has not been celebrated within one year of the expiry of the publication period, it shall not be celebrated again until new publications have been made in the form prescribed above."; "Article 545. No person shall be compelled to surrender his property except for a reason of public interest and subject to fair and prior compensation." Whereas the former is completely shaped by fiat and thus severed from its substantive purpose or *ratio,* the latter is less formal and more transparent to its direct substantive justification (*i.e.,* protection of the owner's property against the state, whose limit is "public interest") and direct aim (*i.e.,* fair compensation). Legal rules range, therefore, from highly formal to highly informal and may also be a combination of both.

Given that the level of content formality in the legal materials is shaped by legal-making agencies and persons, legal scholars doing doctrinal work did not engage directly with this issue,

---

[53] This was especially the case in the first three decades of the century. See Frédéric Audren and Jean-Louis Halpérin, *La Culture Juridique Française. Entre Mythes et Réalités, XIXè-XXè* (CNRS éditions 2013) 196; and Damiano Canale, 'The Many Faces of the Codification of Law in Modern Continental Europe' in Enrico Pattaro, Damiano Canale and Hasso Hofmann (eds), *A Treatise of Legal Philosophy and General Jurisprudence Vol. 9: A History of the Philosophy of Law in the Civil Law World, 1600-1900* (Springer 2009) 139.

[54] What Wieacker called the transition from "Scientific positivism" to "Legalistic positivism". See Franz Wieacker, *A History of Private Law in Europe: With Particular Reference to Germany* (Tony Weir tr, OUP 1995) 361 ff.

and thus there are no in-depth debates between 19th- and 20th-century legal schools in this regard. Content formality does, however, give place to differences in interpretation theories and techniques, in terms of how far it is possible to look beyond the text of the rule to search for its purpose. These are discussed in the following section.

C. *Interpretive formality*

Neither codifiers or the Exegesis in France, nor *Begriffsjurisprudenz* in Germany conceived of legal reasoning as purely (or mostly) deductive or "mechanic": positive legal texts are not seen as complete or perfectly coherent, and legal norms are not conceived of as fully determined. The judge or interpreter, as mediators between the general norms and particular decisions, must perform interpretive tasks, integrate gaps and solve antinomies to establish the normative premise of their reasoning in the first place. In the 19th century, all these operations were comprised and dealt with within the margins of the methods of interpretation (see chapter 3).

The theories of interpretation dominant in 19th-century France had been taken from the Germans, who in turn followed the philological method.[55] From the few exegetes who present something akin to a theory of interpretation, Troplong and Laurent explicitly follow Savigny,[56] and Aubry and Rau follow Zachariae and Thibaut.[57] The starting point of the philological method is the notion that texts have only one meaning, in opposition to traditional hermeneutics which admitted the possibility of multiple meanings for the same text.[58] Texts are historical pieces whose meaning corresponds to the intention of their (also historical) author,[59] although this purely subjectivist view was combined with -and increasingly replaced by- more objectivist approaches.[60]

---

[55] For a detailed account of these developments, Benoît Frydman, *Le Sens Des Lois: Histoire de l'interprétation et de La Raison Juridique* (2nd edn, Bruylant / LGDJ 2007) 343 ff. As the author points out, there is always a hiatus between "professions of faith and practices".

[56] Raymond-Théodore Troplong, *Le Droit Civil Expliqué Selon l'ordre Des Articles Du Code. Vol. 9. Des Privilèges et Hypothèques* (Librairie de H Tarlier 1835) viii, x; and François Laurent, *Principes de Droit Civil*, vol 1 (Bruylant 1878) §272 f, 341 ff. On this see also Mikhail Xifaras, 'L'École de l'Exégèse Était-Elle Historique? Le Cas de Raymond-Théodore Troplong (1796-1869), Lecteur de Friedrich Carl von Savigny' in Heinz Mohnhaupt and Jean-François Kervégan (eds), *Influences et réceptions mutuelles du droit et de la philosophie en France et en Allemagne* (Klostermann 2001) 177–209; and Frydman (n 55) 347.

[57] Charles Aubry and Charles Rau, *Cours de Droit Civil Français*, vol 1 (F Lagier 1839) §40, 77, n. 1.

[58] Frydman (n 55) 364 f.

[59] In line with article 1156, on the interpretation of conventions which privileges the intention of the parties even over their words. Aubry and Rau proposed to take this rule also as parameter for the interpretation of legislation. See Aubry and Rau (n 57) §40, 77, note 1, and again in 78.

[60] Especially Troplong in France, following also Savigny (see chapter 4, n. 120, 121) and Windscheid in Germany, dismissing Savigny's concerns regarding the potential use of interpretation as a way of correcting the law. See on this

At any rate, this intention or thought can be empirically determined, and to that effect diverse criteria of attribution of meaning are admitted. In conventional terminology, these criteria were divided in linguistic (also called grammatical) and logical (which included systematic and functional directives). Both are complementary and were meant to lead to the same result.[61] It is not the case that clear texts were considered uninterpretable (*in claris non fit interpretatio*), as is commonly said regarding the exegetical method.[62] First, because 'literal meaning' is the meaning obtained by means of a kind of interpretation (that according to the linguistic context of the relevant text).[63] But most importantly, because the method affirms that all texts must be logically interpreted:[64] although the exegetists thought that it was generally the case that a clear text represented faithfully the thought of the legislator, if it was proved that this was not the case, the *thought* or *ratio* of the rule could be favoured against its literal interpretation.[65] What matters, ultimately, is the legislator's intention and the practical purpose ("spirit" "*but*" or "*motif*") for which it was enacted.[66] In the case of Pandectism, the broad category of 'logic' interpretation was as indispensable as grammatic

---

Ulrich Falk, 'Der Wahre Jurist Und Der Jurist Als Solcher. Zum Gedenken an Bernhard Windscheid' (1993) 12 Rechtshistorisches Journal 598, 614.

[61] This is clear in Savigny. In the case of "healthy laws" both kinds of interpretation would lead to the same meaning. See FK von Savigny, *System of the Modern Roman Law*, vol 1 (Willam Holloway tr, J Higginbotham 1867) §33.

[62] Demolombe and Baudry-Lancantinerie are often quoted (Frydman (n 55) 388., although acknowledging nuances later) to prove that the Exegets followed the maxim *In claris* (or *Théorie de l'acte claire,* in French legal doctrine). The former stated: "Where the law is clear and unequivocal, there is no place, of course, for interpretation […] even if it does not appear to accord with the general principles of law or equity. The judge may himself be mistaken in this regard" (Charles Demolombe, *Cours de Code Napoléon*, vol 1 (Imprimerie générale 1880) §116, 137.); and the latter: "There exists a clear and precise provision applicable to the case over which the judge is called upon to rule. The judge must apply this provision even though it appears to him as unjust." (Gabriel Baudry-Lacantinerie, *Précis de Droit Civil: Conforme Au Programme Des Facultés de Droit*, vol 1 (11th edn, Sirey 1911) §88, 51.) In my view, this reading of the authors is wrong. Besides any terminological confusion, the practical effect of these affirmations is not to oppose grammatic interpretation to logical interpretation (let alone interpreting to not interpreting), but rather to contrast interpretation *in general* with the application of equity or considerations of justice beyond the rule (as interpreted). These are, in other words and though the authors would not use this term, statements rejecting the *defeasibility* of the law on the basis of "justice" or "equity", *i.e.*, institutionally undifferentiated practical reasoning.

[63] Even if 'interpretation' here is loosely understood, the linguistic context of a rule (and thus the knowledge of semantic and syntactic rules of the relevant language) is the minimum context needed for a certain text to convey meaning. I follow here Bascuñán (n 42) esp. 279 ff.

[64] A clear formulation of this principle in Jean Guillaume Locré de Roissy, *L'esprit Du Code Napoleon*, vol 1 (L'Imprimerie Impériale 1805) 2; and Charles Aubry, 'Séance de Rentrée de Faculté de Strasbourg' (Strasbourg, 1857).

[65] Jean-Baptiste-Victor Proudhon, *Cours de Droit Français. Première Partie : Sur l'état Des Personnes et Sur Le Titre Préliminaire Du Code Napoléon*, vol 1 (Bernard-Defay 1809) ix; Laurent (n 56) §272, 341 f; §274, 347; and §273, 343, 346 f; Aubry and Rau (n 57) §40, 78; Aubry (n 64); Claude Étienne Delvincourt, *Cours de Code Civil*, vol 1 (P J de Mat 1827) préface; and Baudry-Lacantinerie (n 62) §101, 59., (which reinforces what was said in n. 62). The drafters of the Code abandoned the book featuring the rules of interpretation, among which there was the following second-order rule of exclusion: *"Quand une loi est claire, il ne faut pas en éluder la lettre, sous prétexte d'en pénétrer l'esprit."* On this see chapter 3.

[66] In Frydman's words, the legislator is "the source of the source". Frydman (n 55) 390.

interpretation. The restriction of interpretation to linguistic criteria was not advocated for by pandectists[67] and purposive or teleological interpretation (missed by Jhering) was part of the standard method.[68]

This last point is of great importance. The commitment to formality in the law on the part of exegetes and pandectists can be observed in the fact that the linguistic or systematic criteria of interpretation were generally favoured against less formal criteria such as the teleological or axiological ones.[69] Historical criteria of interpretation (included in the broader category of "logical interpretation") tends to lean towards the analysis of the formalised *travaux préparatoires*.[70] However, while it is true that 19th-century methodology adopts second-order rules of preference which favour more institutionally differentiated criteria, it is not true that it *excludes* less formal criteria of interpretation.[71]

19th-century legal thinkers acknowledged that, not being complete, the positive legal order had "gaps" or *lacunae*.[72] The kinds of arguments and techniques used to integrate these gaps are not properly interpretive (as they do not look for the meaning of a text), but they are generally treated jointly with problems of interpretation. It is the case of logical arguments such as *a pari, a fortiori* or *a contrario* (this last one considered too uncertain[73]).

---

[67] See Regina Ogorek, 'Inconsistencies and Consistencies in 19 Th Century Legal Theory' (2011) 12 German law journal 34, 42, with reference to the single exception of Schoemann.

[68] Bernhard Windscheid, *Lehrbuch Des Pandektenrecht*, vol 1 (Theodor Kipp ed, 8 Auflage unter vergleichender Darstellung des deutschen bürgerlichen Rechts, Rutten & Loening 1900) §21. On this see also Ulrich Falk, *Ein Gelehrter Wie Windscheid: Erkundungen Auf Den Feldern Der Sogenannten Begriffsjurisprudenz* (2nd, unaltered edn, Klostermann 1999) 137 ff.

[69] See, for instance, Aubry and Rau (n 57) §40; Baudry-Lacantinerie (n 62) §101, 59 f. Systematic criteria of interpretation are especially considered where the legislators saw their own work as a coherent whole, as in codifications. Here too the interpretation is ultimately subordinated to the author's intention. See Frydman (n 55) 381 f. In the case of Germany see Falk (n 60) 608 ff.

[70] Laurent (n 56) §272, 342; §274, 347; also Aubry and Rau (n 57) §41, 80 ff, numbers 2 and 3.

[71] Some authors not even exclude the highly substantive consequentialist criterion of interpretation, whereby meaning is attributed in light of the expected effects in a given case. In general discredited, some Exegets admitted it with caution (*e.g.*, Baudry-Lacantinerie (n 62) §101, 60.), or even welcomed it more openly (*e.g.*, Demolombe (n 62) §116, 138.) In Germany, Windscheid welcomed a rather flexible exploration of legislative intention as well as concepts and principles developed by legal science. Cf., Falk (n 60) 608.) See also chapters 3 and 4.

[72] Hans-Peter Haferkamp, 'Legal Formalism and Its Critics' in Markus D Dubber, Heikki Pihlajamäki and Mark Godfrey (eds), *The Oxford Handbook of European Legal History* (OUP 2018) 937.

[73] Pierre-Antoine Fenet, *Recueil Complet Des Travaux Préparatoires Du Code Civil, Suivi d'une Édition de Ce Code...*, vol 6 (Impr De Ducessois 1827) 474.

D. *Mandatory formality*

"[W]hen the [statutory] law is clear, it must be followed", affirmed Portalis during the drafting of the French Civil code.[74] A half-century later, Mourlon formulated the same idea with different words: "A good magistrate humbles [*humilie*] his reason in front of the reason of the law."[75] The function of these assertions is not only to express the subordination of judges to legislators but also to foreclose the possibility of the judge making an evaluative judgment about a rule whose meaning has been settled in relation to a factual situation covered by that wording. "[F]or he is instituted to judge according to the [*loi*], and not to judge the [*loi*]."[76] Once interpreted, that is, once the meaning of the text according to the different criteria of interpretation has been set, the exegetes thought that its application was mandatory, regardless of considerations of equity, justice or convenience.[77] The same happens once the applicable norm has been established, based on the operations of integration of gaps or the solving of antinomies: it must be applied no matter the consequences. Pandectists were also cautious about defeating the law in favour of considerations such as equity or justice. Puchta admitted this solution exceptionally in the context of customary law,[78] and Windscheid was ambivalent about it,[79] but did consider it within the framework of *legal* reasoning.[80] This is a highly formal approach to the mandatoriness of legal rules. The general principle is the same: the law cannot be outweighed by reasons of substance not included in the law itself. In most cases, it was assumed that the legislator had foreclosed fresh judgment even at the cost of injustice or inflexibility.

By relating 19th-century legal scholarship to these four axes of formality/informality in the law, we can understand why, despite being filled with distorted images and false claims, the

---

[74] *Ibid.* This also can be deduced from Portalis' assertion, while replying to Maillia-Garat, that judges would be usurping legislative faculties only if they could decide against the express wording of the law, which they could not. See chapter 3.

[75] François Mourlon, *Répétitions Écrites Sur Le Premier Examen Du Code Napoléon*, vol 1 (A Marescq 1846) §84. Also Alexandre Duranton, *Cours de Droit Français Suivant Le Code Civil*, vol 1 (4th edn, G Thorel - Guilbert 1844) §96, 21; and Laurent (n 56) 37, 58 f, 69 f.

[76] Frédéric Mourlon, *Répétitions Écrites Sur Le Code Civil*, vol 1 (11th edn, Garnier Frères 1880) 3, 6, 59.

[77] See especially Demolombe and Baudry-Lancantinerie quoted in n. 62. Also Duranton, who claims that the unjust law must be obeyed as it enjoys a "presumption of justice", but with the duty of informing its abuses in order for it to be modified (Duranton (n 75) 10.

[78] Georg Friedrich Puchta, *Vorlesungen Über Das Heutige Römische Recht*, vol 1 (AAF Rudorff ed, Verlag von Bernh Tauchnitz 1847) 235; and Georg Friedrich Puchta, *Pandekten* (Adolfus Fridericus Rudorff ed, 3rd edn, 1845) 31.

[79] Bernhard Windscheid, *Die Lehre Des Römischen Rechts von Der Voraussetzung* (1850); and Bernhard Windscheid, 'Die Voraussetzung' in Paul Oertmann (ed), Bernhard Windscheid, *Gesammelte Reden und Abhandlungen* (Duncker & Humblot 1904).

[80] Windscheid, 'Die Voraussetzung' (n 79) 375, 409 f. See the explanation in chapter 4.

narrative about "legal formalism" managed to become so strongly rooted in the historiographical tradition: because it appropriates a term related to the core of the issue, which is formality in the law. These four criteria show *in what specific sense* these schools were committed to formality and how and to what extent they favoured formal reasoning in the law.

4. When formal becomes formalistic

The most interesting thing about Atiyah and Summers' proposed scheme, however, is that unlike the traditional concept of 'formalism' (as beliefs in *a, b, c, d, e*), it provides a conceptual space for assessing theoretical and methodological projects which favour formality in law without this necessarily being a pathology. In this way, it allows us to account for a formal approach to law that that need not be (although it might become) naïve or fanatical. After all, if 'formalism' is intended pejoratively, it cannot mean legal formality, pure and simple. It must mean, instead, an *excessive* favouring of formal attributes in the law. To mark this difference Atiyah and Summers distinguish between formal and *formalistic* reasoning in law. On purpose, the authors do not employ the term 'formalism': because of its ambiguity and because it tends to hide the difference between -and to collapse- formal reasoning, necessary in all legal orders, with its excessive and distorted manifestations.[81]

But when is formality excessive? When does "formal" become "formalistic"? The authors claim that the excess of formality cannot be evaluated in the abstract but by reference to a concrete legal practice and its normative aims. Indeed, the employment of formality in law is justified by further reasons of substance, which they call "substantive second-order reasons". These reasons serve as the basis for justification and criteria of evaluation of the degree and kinds of formality present in a given legal order: "[t]here are, in other words, *reasons* for treating formal reasons as overriding or exclusionary reasons, which shut out other sorts of reasons from consideration."[82] These reasons may be of various kinds: finality in decision-making, certainty and predictability, uniformity, coordination, allocation of decisions to the instances where they are likely to be best made, and democratic self-governance, among others.[83] In the end, the degree of reliance upon

[81] The term 'formalism' is often employed pejoratively to refer to such vices as conceptualism or over-generalisation of case-law, which at some points overlap with what they call *formalistic reasoning*. (Atiyah and Summers (n 32) 29.) They add that although 'formalism' is to some degree identifiable with what they call 'formalistic reasoning', it may also have nothing to do with it. (*ibid.,* 250). Subsequently, they seem to suggest that 'formalism', although falling short of a legal theory, is nonetheless in the realm of conceptions about the law. A formalist conception of the law might -but not necessarily- lead to formalistic legal reasoning (*ibid.*).

[82] Atiyah (n 30) 100. Emphasis in the original.

[83] See, in general, *ibid.,* esp. at 107, 109, 113 ff, 117; and Atiyah and Summers (n 32) 23 ff.

formal reasons depends on moral, political, or economic considerations. Whether the degree of formality in a given legal order is excessive, thus, must consider the value choices of the system and the whole institutional design chosen to serve these value choices.

Reliance on formality in the law (to achieve certainty, for instance) does not mean that substantive issues are not taken into account. In fact, the authors explain that "[t]he widespread use of formal reasons seems […] to *presuppose* that relevant substantive reasons will be, or have been […] more appropriately and more satisfactorily dealt with at some other time, at some other place, before some other body, by some other procedure, or whatever."[84] Atiyah's typical examples are those of contracts or wills, where the legislator relies on the fact that the parties themselves are better suited to make decisions that, once made in the appropriate form, are to be treated as conclusive.[85] But the notion that substantive considerations have been or will be taken into account applies to all kinds of formal reasoning in the law. In this light, to accuse formalistic thinking involves the affirmation that a substantive reason *should have been considered* and was not. If the system also forecloses the possibility of judges taking those reasons into account, we may say that the legislator or, more generally, the legal system, is formalistic. If the system does allow such leeway but the judiciary or doctrine is reluctant to take it, it may be said that you have a formalistic judiciary or formalistic legal scholarship.[86]

In this vein, authoritative formality may degenerate into formalistic reasoning when a gap in the law is ignored or the law is over-extended regarding the matter at hand; content formality when the arbitrariness of the rule is unnecessarily high; interpretive formality when "a conceptualistic interpretation" of the language of the law is adopted (*i.e.,* one that ignores that the language has been incorporated into a statute to achieve a purpose); mandatory formality when substantive reasons are excluded in circumstances that they should be considered to overrule a previous rule or to make an exception to it.[87] All these excesses depend on normative criteria that delimit the conditions under which substantive reasons are to be considered or not. For this reason, in order to differentiate formal from formalistic reasoning is necessary to consider the

---

[84] *Ibid.,* 36.

[85] Atiyah (n 30) 117 ff.

[86] It might be objected that there is no such thing as the legal order -or rule, for that matter- preventing judges from taking those reasons into consideration; that the law and its rules can never bind judges in that way. I think that if this affirmation does not express mere rule-scepticism, it is meant to remind us that rules are never completely binding because they can never completely exhaust the conditions for their own application (*i.e.,* they are defeatable). A legal order would be formalistic precisely when it ignores its own limitations, and owing to this, demands from judges and jurists what it cannot demand.

[87] Atiyah and Summers (n 32) 28 f.

second-order reasons of substance that justify the inclusion of reasons of form in the law, in general, and in the legal order at hand, in particular. "[F]ormalistic reasoning involves a failure to take substantive considerations into account *when they ought to be taken into account.* But […] it is not possible to decide when such reasons *ought* to be considered without reference to other norms of the legal systems".[88] This does not preclude the possibility of criticising the whole style of legal reasoning in a certain legal system. It does, however, require the critics to engage with the configuration of the whole legal order to explain what is wrong with formal reasoning in that specific context.[89]

5. Conclusions

The conceptual framework presented in this chapter makes it possible to distinguish between the formal and the formalistic: between healthy and pathological kinds of formality in the law. Thus, it is now possible to see that the pertinent questions to ask the critics are whether, and if so, in what ways 19th-century legal scholars in France or Germany developed pathological versions of formal reasoning in their respective contexts. Whether, in other words, they reasoned in a way that ignored reasons of substance in the law that *ought to be taken into account.* Once this question is raised, the main problem of the TA comes to light: rarely do these substantive considerations and its whole context appear on the table. Apart from a few passing mentions, the ways in which substantive values are at stake and how they should be incorporated -or not- into legal reasoning are not brought to the forefront of the debate, neither on the part of 19th-century schools, nor in the aims of 20th-century critics. The substantive issue, instead, tends to be reduced to the dispute between "formalism's" faith in the legislator's omnipotence and their distrust of judges arbitrariness, on the one hand, and the critics' advocacy for judges and legal science's creative powers, on the other hand.[90] And because of this, the TA is not able to provide any useful criterion to determine what counts as excessive formality in their respective contexts. And since its criticisms cannot give proper account of what is that the legal science reasonably takes to be formal and what represents an excess, the criticism consists, instead, in attributing to the Exegesis and Conceptualism theoretical conceptions of the law that they did not sustain. This is the great burden that falls on the TA.

---

[88] *Ibid.,* 29.

[89] *Ibid.,* 31.

[90] See chapter 3.

In the next chapter, I attempt to bring precisely these substantive considerations to the fore, articulated as three different but related disputes between different projects for the law.

Chapter Six

Reinterpreting the Opposition between 19th- and 20th-Century Legal Science: Three Substantive Debates

The last chapter sought to understand the phenomenon called 'legal formalism' once the exaggerations and shortcomings of the mainstream narrative have been revealed. To this end, it shifted the perspective, from the attribution of claims *(a), (b), (c), (d)* and *(e)* -which were not defended by 19th-century legal scholarship- towards an account of formality in law that allowed us to show how these 19th-century jurists had a commitment to formality in law and to what extent. Under this scheme the previous chapter aimed at *i.* illuminating the role of formality in law, and *ii.* distinguishing between formal and formalistic, healthy and pathological approaches to formality in the law.

We are now in a better position to see how 'legal formalism' was formal, and what were the specific issues which sparked conflict and rejection by later views about the law and the role of the judge. Hence, we can now offer a deeper understanding of the ways in which the opposition between 19th and 20th-century conceptions of law is significant by linking it with underlying political and legal debates. I propose, in other words, to explain the opposition of 20th century critics to their predecessors in terms of a dispute of normative projects about the law, projects which can only be thoroughly understood -and eventually criticised- by reference to the substantive considerations that inform them. In particular, I formulate three ways in which this opposition can be articulated: first, as a dispute over the opacity of norms (§1); second, as a dispute over the nature of legal orders and the role of legal science in their development (§2); and third, as a dispute over the meaning of the monopolisation of legal sources by the state (§3). Finally, the main conclusions of the chapter are summarised (§4).

1. A dispute over the opacity of norms: between certainty and flexibility

One angle from which the formalism-antiformalism opposition can be understood is as a chapter in the story of a long-standing question: whether and to what extent the law can and should be made opaque with regards to the substantive considerations that justify it. Whether and to what extent legal norms can and should cut off the transitivity of the justification of a decision. The problem posed by this severance in the transitivity of justification (or formalisation of the rule) is one that Aristotle had already noted around 350 BC, in explaining the necessity of *epieikeia* as a corrective of legal justice:

> "all law is universal, but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start."[1]

This shortcoming of the law (although Aristotle attributes it to the cases, it is clear that what he identifies is a problem in our ability to regulate future events) has been treated in legal theory under the problem of over and under-inclusiveness of legal rules: the fixity of the textual formulation of the rule will leave cases out, either because its textual scope is narrower or broader than it should be in relation to its justification.[2] In this way, because they are phrased in universal terms, legal rules "impede access to those facts that would otherwise, under a given theory of justification, be relevant to making the decision, and they interpose facts that would otherwise be irrelevant."[3] This is a deficit that affects all regulation that is general in character. Note that we are not dealing with rules that are defective because they are ambiguous, incomplete or contradictory

[1] Aristotle, *The Nicomachean Ethics* (WD Ross tr, rev by Lesley Brown, Oxford University Press 2009) V $1137^{b}11$-$37^{b}18$. A discussion of Aristotle's idea of equity in Roger A Shiner, 'Aristotle's Theory of Equity' (1994) 27 Loy. LAL Rev. 1245.

[2] Because the relationship between the rule's formulation and its justification rest on predicates that are probabilistic in nature. See Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon 1991) 31 ff. "Justification" here means "the evil sought to be eradicated or the goal sought to be served." (*ibid.,* 26).

[3] *Ibid.,* 87.

with other rules. We are dealing with completely clear, and sound rules whose application, due to the particularities of the case, is inexpedient.

This feature of legal rules, that is, their fixation in general formulations, gives place to the attribute that above was presented as 'content formality'.[4] This formal attribute of law has certainly a cost: by definition, a fixed generalisation is insensitive to individual variations that can arise. Rules with higher degree of content formality are thus more prone to produce false positives and false negatives in their application. Lower content formality, on the other hand, means that the expression of the rule is less 'opaque' with regards to its substantive justification, allowing for less false positives and negatives. This presupposes that the text and the reasons justifying the text may, in certain cases, lead to different results. Aristotle's solution for cases that are not covered by these necessarily "universal statements", is that the judge can deviate from the rule in order to decide according to what the legislator "would have said had he been present".[5] It is not clear whether what the legislator would have decided "had he been present" is here taken as a further specification of the *ratio* of the rule, or rather a decision based upon an external criterion of justice or convenience.[6] In other terms, it is not clear whether further specifications of the *ratio* of the rule are here taken as reformulations of the same rule, and thus as an exercise in interpretation *stricto sensu,* or rather as different rules altogether, whose preference in some cases involves defeating the original rule. This is relevant for the possibility of substantive reasons defeating the valid rule in these cases expresses the limits of what in Atiyah and Summers' terminology was called 'mandatory formality': the attribute of formal reasons to override contrary substantive reasons.[7] This entails the further problem of whether judges having the power to decide if the case at hand is or is not

[4] Atiyah and Summers assert that it is not necessary for rules to have any degree of content formality. Here they take content formality to mean "arbitrariness" (Patrick Atiyah and Robert Summers, *Form and Substance in Anglo-American Law. A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon 1987) 19.) However, in introducing the concept, they assert that arbitrariness (or fiat) is one factor producing content formality, the other being its under or over inclusiveness with regards to the rule's purposes (*ibid.,* 13). It is this factor that makes it necessary for all rules to have some degree of content formality.

[5] Aristotle (n 1) V 1137b22-1137b23.

[6] It has been noted that the concept of *epieikeia* in relation with the law has two possible meanings: "the substance and intrinsic justification of the existing legal norms"; and "an objective ideal at which the law aims, determining the creation of new norms and the modification of those that do not yet conform to the sense of justice felt in the social conscience." See Arnaldo Biscardi, 'On Æquitas and Epieikeia' in Arnaldo Mordechai (ed), *Aequitas and Equity* (Hebrew University 1997) 8.

[7] I am taking here the concept as "ultimate degree mandatory formality", that is, after defences and collateral doctrines have been taken into account (Atiyah and Summers (n 4) 17.) The authors do not discuss whether these excluded substantive reasons are always external to the rule, or could also be the reasons that justify the rule. They tend to speak in general terms of "contrary substantive reasons" (*ibid.,* 16 f, 20) and look at the conflict between text and purpose in the context of interpretation. Yet at some point they also assert that "*underlying* substantive reasons" could "outweigh the formal reasoning involved in literal application" if it led to outrageous results. (*ibid.,* 10).

one of the many covered by the rule's rationale results in legal rules becoming mere "rules of thumb".[8]

Formality in law certainly has a cost: because of our relative ignorance about future events, fixed verbal forms generally entail over or under inclusiveness regarding the underlying reasons that justified the legal form.[9] What is gained in certainty, predictability, efficiency, etc, is lost in flexibility and ability to adaptation to the circumstances.

A third factor at play is the theory of statutory interpretation and the degree of formality it adopts. If legal norms are understood as being more than just their textual formulation, then through interpretation (either according to formal rules of interpretation or according to the settled practice of scholars and judges) the purpose of the rule can be "reintroduced", so that its expression can be extended or reduced, as the case may be, to suit its substantive justification (in Atiyah and Summers' terminology this corresponds to 'low interpretive formality'). In this way, bringing back the rule's *ratio* "through its text" (so to speak) no longer concerns the limits of legal rules (*i.e.* mandatory formality), but merely the limits of the rules' wording. The text of the rule can be "defeated", although no longer in favour of something external to the rule, but in favour of the rule itself, that is, of its meaning according to its *but, ratio,* ground, or *telos*.[10]

In the German legal science in the 19th century, for instance, the possibility of meaning according to text and meaning according to purpose being in opposition was acknowledged as a result of a defect of the law, consisting in "the possibility of the expression embracing more or less than the thought."[11] In these cases, the meaning according to text may be defeated in favour of its

---

[8] This is, in Aristotle's, what *phrónēsis* is about. See Shiner (n 1) 1258. See also Schauer (n 2) 77 f; and John Rawls, 'Two Concepts of Rules' (1955) 64 The philosophical review 3, 17: "as with any set of rules there is understood a background of circumstances under which it is expected to be applied and which need not -indeed which cannot- be fully stated." This raises the question of how well "understood" and agreed upon these conditions of application are. Cf., HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 126: "Particular fact-situations do not await us already marked off from each other, and labelled as instances of the general rule, the application of which is in question; nor can the rule itself step forward to claim its own instances."

[9] Atiyah and Summers (n 4) 97.

[10] The history of the maxim *in claris non fit interpretatio* is precisely the history of the dispute, within the Continental tradition, over the role of linguistic *vs.* teleological criteria of interpretation in determining what counts as a genuine interpretive controversies. A very good summary of this dispute in Antonio Bascuñán, 'El Mito de Domat' in Pablo Grez, *Una vida en la Universidad de Chile: Celebrando al profesor Antonio Bascuñan Valdés* (Legal Publishing 2014) 282 ff. As is there explained, the opposition between the law's "letter" and the law's "sense" (or thought, *ratio*, spirit, etc), does not correspond to the opposition between disposition and norm, and should be reformulated, following Wróblewski's operative theory of interpretation, in terms of the opposition between the meaning of the law according to linguistic criteria of interpretation and meaning according to functional criteria of interpretation (*ibid.,* 279 ff).

[11] FK von Savigny, *System of the Modern Roman Law*, vol 1 (Willam Holloway tr, J Higginbotham 1867) 186.

"actual thought"[12] when the former is deemed to betray the latter in particular cases.[13] This is what Savigny called cases of 'erroneous expression' of the law, in the context of his theory of interpretation of defective written laws.[14] In such cases Savigny, following Suárez,[15] asserted that despite the high risks involved, the thought was to be preferred to the expression, giving the latter an interpretation *extensiva* or *restrictiva* so that it conformed to the former.[16] Still, in identifying this thought highly institutionally differentiated directives should be preferred to those lower in formality: the logical element (*i.e.* systematic directives of interpretation), thus, was to be preferred as a remedy over the specific ground or *ratio* (*i.e.* justification). The general ground, on the other hand, being too remote and uncertain, was to be avoided, and so was the "internal value of the result" (*i.e.* axiological directives), for that would correspond no longer to the identification but to the improvement of the thought of the law, and thus reach the limits of the interpretative domain.[17] This model was generally followed by pandectists, reaching even to its late stage, *Beggrifsjurisprudenz*.[18]

Being the case that one who generalises must make the choices of "in what direction and to what degree" to do so,[19] why not make the rules more transparent, *i.e.* less opaque in relation to their justification? The answer is twofold. A first thing to consider is our relative "ignorance of fact and indetermination of aim": sometimes we don't know in advance *exactly* what we want to achieve. Either because the world changes and is unpredictable in its multiple combinations, or because legislation is the product of processes of debate and compromise of visions and interests, which are, for those reasons, able to accommodate more than just one possible justification in terms of the goals or purposes to be achieved, the legislator is somewhat in the dark with regards

---

[12] Meaning "the intellectual import of the law". *Ibid.,* 171, n. *a.*

[13] Or more precisely, when "the thought absolutely denoted by [the expression] is different from the actual thought of the law." *Ibid.,* 179, 185 f.

[14] In the interpretation of "healthy" laws, that is, laws where "the expression exhibits a thought in itself complete, and no circumstance exists to hinder us from recognising this thought as the real purport of the law" (*ibid.,* 179), the justification of the law (*ratio juris*), understood either as explanation or as aim, is excluded from consideration because of its uncertainty (*ibid.,* 175 f).

[15] Francisco Suárez, s.j., *De Legibus Ac Deo Legislatore* (José Ramón Eguillor Muniozguren, s.j. tr, Anastatic reproduction of the edition Prince of Coimbra 1612, Instituto de Estudios Políticos 1968) bk VI, c. 1, 16.

[16] von Savigny (n 11) 185 ff. Translated to a more precise terminology, the "thought" (*gedanken*) of the law, corresponding to its meaning or content, and being the goal of interpretation, must be established despite of and against its clear *linguistic* meaning or content when it appears, according to other interpretive criteria (systematic, functional), that this linguistic meaning does not coincide with the actual meaning or content of the law.

[17] *Ibid.,* 187 ff.

[18] See chapters 4 and 5.

[19] Schauer (n 2) 21.

to the law's precise *rationale*. But the problem does not end here. There is a second factor that affects even those regulations where the purpose is reasonably clear. Take, for instance, the aim of avoiding accidents on the road. It is clear that a rule such as "do not exceed 120 km/hour" will be inappropriate in more cases than a rule that states: "always drive at a speed that does not cause harm to yourself or others". Adopting the latter would allow us to follow the rule in a larger number of cases without betraying the reasons that justify it. But this is not always possible, indeed sometimes not even desirable, the reason being what Hart identified as a tension between two needs internal to the law:

> "[T]he need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case."[20]

These needs are in tension because they appear not to be simultaneously maximisable: maximising certainty comes at the cost of minimising openness and *vice versa*. When deciding the degree of formality of the rules we will be faced with a trade-off: less formality produces a loss in certainty and predictability (think in the rule above: "always drive at a speed that does not cause harm to yourself or others", and the uncertainty it brings for everyone on the road as to how to behave, and as to what to expect from others, and the potential arbitrariness that it would create in deciding particular cases). On the other hand, higher levels of content formality will produce more cases of "inappropriateness" (where driving under 120 km/hour will produce harm, or where driving above that speed will not), which will confront us with having to reduce the levels of mandatory formality or stick to the rules and accept a solution that brings knowingly inconvenient consequences. An equilibrium among them must be sought. As Hart notices, this equilibrium is not often achieved:

> "[i]n some legal systems at some periods it may be that too much is sacrificed to certainty, and that judicial interpretation […] is too formal […] In other systems or at other periods it may seem that too much is treated by courts as perennially open or revisable in precedents, and too little respect paid to

[20] Hart (n 8) 130.

such limits as legislative language, despite its open texture, does after all provide."[21]

The balancing of these needs, which expresses a compromise between the values of certainty and predictability, on the one hand, and openness and flexibility, on the other, has been the object of a long-standing effort in the Continental legal tradition.[22] This effort can be traced through different doctrines of the nature of legal rules, statutory interpretation, defeasibility, and adjudication more generally, which are especially sophisticated in the second scholasticism and the 18-century German legal science.

This approach may thus be illuminating for understanding the anti-formalist reaction to exegesis and conceptualism against the historical background of the doctrines of legal interpretation and adjudication. Indeed, under the assumption that traditional explanations concerning legal formalism are not satisfactory, some have sought to take an alternative approach to understand legal formalism and anti-formalism by linking them to this internal tension within the law. Such has been Gerald Postema's attempt to articulate Bentham's criticisms to the Common law, under the idea of the paradox of inflexibility.[23] More recently, Fernando Atria made the most of this idea, reframing it in the notion of a 'cycle of adjudication".[24] In the lines of Hart, he understands that formalism and the reaction against it are historically explained because of this cycle, which moves the "pendulum" of adjudication from one extreme to another inasmuch as each of them proves to have its own shortcomings. When "too much is sacrificed to certainty", the pendulum would swing to de-formalisation; when, in contrast, "too much is treated by courts as perennially open or revisable", the arbitrariness of the results would make the pendulum swing back to greater rigidity.[25] Thus, 20th century anti-formalist trends would be explained as the "natural" movement in the opposite direction to the previous period.

19th-century scholars are very much part of this story, as are 20th-century jurists such as Gény and his successors. For Windscheid, for example, the conceptual precision of dogmatic construction was not merely a matter of scientific virtuosity, but fundamental to achieving certainty

[21] *Ibid.*

[22] Certainly not *only* in the Continental legal world. This work, however, concerns itself with this issue in a limited context: that of continental Europe between the beginning 18th and the end of 19th centuries.

[23] Gerald J Postema, *Bentham and the Common Law Tradition* (Oxford University Press 2019) ch 8.

[24] 'El ciclo de la adjudicación', in Fernando Atria, *La Forma Del Derecho* (Marcial Pons 2016) 104 ff.

[25] *Ibid.*

in the law's application.[26] As noted by Joachim Rückert, "Windscheid is therefore working here for practical legal clarity, for certainty and equality in decision-making, and thus for more conscious justice."[27] Saleilles engaged with this topic by noticing that the virtue of the Exegetic School was the certainty it provided, which served as a guarantee against arbitrariness and possessed an objective insight. In contrast, he saw that its greatest weakness was that its formalism precluded the adaptation of the law to the new requirements of social life.[28] He considered that, after some time, only the "inconveniences" of such method were being felt.[29] Likewise, Gény was especially concerned with the fact that the codification and the Exegesis, convinced of the infinite power of human reason to regulate in advance, did not care much to leave open the issues which "can only be properly appreciated and settled when they arise in a concrete case." By doing so they would have sacrificed legal adaptation to new social needs in the altar of rigid forms.[30]

However, what is striking in this matter is the fact that "formalists" and "anti-formalists" are not always where one would expect them to be: the "formalists", that is, the exegetists and pandectists, did not believe that legal norms were identical to their textual formulation. While they took the view that more formal means of interpretation were more certain,[31] they also acknowledged that legal norms served a purpose and that this purpose was an element that could be taken into account for interpreting norms and for "defeating" their text when this was called for by their purpose. They thus sometimes allowed for purposive interpretation. This was recognised by Gény himself, even regarding the "archi-formalist" *doyen* Blondeau.[32] The "anti-formalist" reaction, on the other hand, sometimes conceived of legal norms as narrower entities, identical with their texts and related to a specific kind of situations. This is the case of

[26] Bernhard Windscheid, *Lehrbuch Des Pandektenrecht*, vol 1 (Theodor Kipp ed, 8 Auflage unter vergleichender Darstellung des deutschen bürgerlichen Rechts, Rutten & Loening 1900) 64.

[27] Joachim Rückert, 'Windscheid – Verehrt, Verstoßen, Vergessen, Rätselhaft?' (2017) 13 Juristenzeitung 662, 663.

[28] Raymond Saleilles, 'Préface' in François Gény, *Méthode d'Interprétation et Sources En Droit Privé Positif: Essai Critique*, vol 1 (2nd edn, LGDJ 1919) xiv.

[29] *Ibid,* xi.

[30] François Gény, *Méthode d'Interprétation et Sources En Droit Privé Positif: Essai Critique*, vol 1 (LGDJ 1919) 75 ff. Also, Paolo Grossi, *Mitología Jurídica de La Modernidad* (Trotta 2003) 48. Gény's perspective may be explained by his background as *iusprivatist*. One may sensibly say that private law, besides being very keen on its own tradition, is especially sensitive to the transformations in the practices it seeks to regulate. However, although this problem may have been particularly acute in this field, it seems to have been quite a bit more ubiquitous.

[31] See chapter 5, §3.C.

[32] Blondeau was famous for having said that the only legitimate source of legal decision was *la loi*, that is, legislation. Gény acknowledges that this meant, even for Blondeau, literal but also purposive interpretation. See Gény (n 30) 17.

Kantorowicz,[33] Gény and Saleilles.[34] Any "interpretation" extending or restricting the possible literal meanings of the legal text to make it applicable to new kinds of situations was deemed to be a farce, and a supplantation of the legislator's intention. Beyond -and below- the specific legislative formulation, there is no legislation but doctrinal creation of new law. This difference means that where the exegetists see an interpretive exercise (of lower formality), Gény and those following him understood that the limits of legal reasoning had been reached. There is no extensive interpretation by analogy, for instance, but the creation of a new rule where the law as laid down had left a gap; there is no restrictive interpretation guided by purposes, but defeasibility of the rule against contrary substantive reasons. In the same vein, for "anti-formalists" such as Kantorowicz, there are no principles or standards inferable from the codified legal rules, as he thinks that the codes have as many words as they have gaps.[35] In this sense, 19th-century jurists had a more "substantive" view of what the rules are as compared to some of their "anti-formalist" antagonists, as they did not understood legal rules as being completely opaque with regards to their justification.[36] So, 19th-century scholars had a highly formal approach to the law, but those who reacted against them and accused them of 'formalism' did not seem to have had a necessarily less formal view in this regard.

This does not mean that, all things considered, the reaction was keener on formality in law than their predecessors; they compensated through their theory of sources, making it broad enough to accommodate their own normative creations as direct sources of the law. To this end, they called for the end of the "illusion" and the consequent acceptance of costume and legal doctrine as new, independent, sources of law. It means, though, that the transition from the 19th to the 20th century did not suppose a decrease in the levels of interpretive formality, but rather the opposite. Mandatory formality, on the other hand, could rest in a wide conception of legal rules and their interpretation to operate at high levels during the 19th century; once the idea of legal rules was narrowed down, however mandatory formality gave way to gaps, on the one hand, and greater instances of defeasibility, on the other.

This is one reason why, although illuminating, this internal tension and its balancing does not exhaust the matter. A second reason is that formality in law cannot be reduced to the trade-

[33] Gnaeus Flavius (Hermann Kantorowicz), *Der Kampf Um Die Rechtswissenschaft* (C Winter 1906) 15.

[34] See Saleilles (n 28) xiii: "the will of the legislator has extended only to those solutions literally envisaged by him and their most immediate consequences."

[35] Flavius (Hermann Kantorowicz) (n 33) 15.

[36] This is not, of course, the case of Jhering, whose main concern was to open up the interpretation and application of the law to purposive criteria. See chapters 4 and 5.

off between certainty and openness, for these are not the only values that are involved in the decisions of formalising the law and the degree to which this formalisation takes place. As was explained above, finality, lower costs and efficiency, equality before the law, coordination, and especially autonomy, power allocation and political legitimacy are all elements concerned in these decisions and, consequently, in the models conceived and adopted by legal doctrinal scholarship. The difficulty, especially in the case of the latter elements, is that neither its content nor the *equilibrium* between them is a neutral or merely 'technical' matter. In this sense, there is no middle ground given in advance, just as there are no vices "by defect and by excess" identifiable in advance. They critically depend on broader normative views about political power and its institutional expression. As will be discussed below, the history of legal methodology must consider the political and epistemic presuppositions as the broader context in which theories and conceptions of adjudication and legal reasoning exist.

2. A dispute over the nature of legal orders and the role of legal science in their development

In addition to this tension internal to the law, there is a second conflict that can illuminate the opposition between 19th and 20th century's dominant legal thinking and that is the conceptions regarding the legal order and the role that legal science plays in developing it. "Legal formalists", on the one hand, and the reaction against them, on the other, had radically different visions with regards to the nature of the legal order, and particularly of a legal order configured by the rules laid down by the legislator. Whereas for the former legislative materials, especially the codes, were thought of as a *system*, that is, as a unity whose parts were in harmony with each other and that could reproduce itself, the latter saw it as a set of finite rules that, more often than not, run out when confronted to particular cases.

Faced with the rapid social changes and technological developments, 19th-century schools of legal science had followed, in the domain of private law, the strategy of developing legal solutions by following the guidelines and principles established by the legislator in the codes. This involves many different of operations, of which three are worth mentioning: the deduction of new consequences from the existent provisions, the use of analogy to apply existing provisions to cases not covered by them, and the inference from the existent provisions, groups of them, or the whole code, principles or doctrines, from which then more consequences and provisions could be deduced.[37] These operations are crucial, for they bring in *systemic* directives of interpretation and

[37] See chapters 3 and 4, respectively.

integration of the law, adding yet another layer to the classical opposition between the "letter" and the "thought" of the law, or, in technical language, between literal and purposive (or teleological) directives. This was a central concern in Savigny's work, as seen, and it was explictly articulated by Puchta, who saw in the *Juristenrechts* a mechanism of auto-integration of the law.[38]

In the language of logical positivism, legal science follows certain rules of transformation, which are logical rules whereby new normative propositions can be derived from the existent ones.[39] When a scientific language, by means of these rules of transformation, develop itself making explicit the implications contained in the existent rules, it is a closed language. The methodological model of Conceptualism, but also the Exegesis' understanding, assume that there is a "closure rule" underlying the legal order, which makes a set of normative propositions into a *system.* According to this rule, the legal system is comprised only by those normative propositions laid out in certain ways and through certain procedures, and those which are implicit in these propositions and are, therefore, deducible from them by means of the rules of transformation. Since these new propositions are contained in those that were laid down, juristic work does not consist, *stricto sensu,* in the creation of new law. Rather, the work of the jurist is circumscribed by the limits of a determined language, whose rules of formation and transformation are established in advance.[40] Thus, legal science conceive of its activities as cognoscitive of its object: the law as laid down by the legislator to be further developed by legal science. According to the early Bobbio who also understood legal science in this way, this is "a fundamental canon upon which our legal orders, founded in the complete absorption of the law into legislation, are based."[41] Portalis and later the Exegesis,[42] and especially Pandectism, understood their task in this way, cognoscitive and yet, at the same time, co-productive of the law.[43] Puchta's and the early Jhering's approach to juristic work is a clear example of this model of productive legal science;[44] Windscheid's "fully formed system" of concepts was probably its most outstanding achievement.[45]

---

[38] On this see Felipe González Vicén, 'Sobre Los Orígenes y Supuestos Del Formalismo En El Pensamiento Jurídico Contemporáneo' (1961) 8 Anuario de Filosofía del Derecho 47, 70 f, nn. 69 and associated text.

[39] See for instance the early Bobbio in Norberto Bobbio, 'Scienza Del Diritto e Analisi Del Linguaggio' (1950) 2 Rivista Trimestrale di Diritto e Procedura Civile 342, 360.

[40] *Ibid.,* 361

[41] *Ibid.*

[42] See chapter 3 and also Guido Fassó, *Historia de La Filosofía Del Derecho 3. Siglos XIX y XX*, vol 3 (Pirámide 1996) 156 f.

[43] See especially chapter 4.

[44] See chapter 4 and González Vicén (n 38) 70 f.

[45] On this see Rückert (n 27) 664.

This way of understanding the legal order and the role of legal science was probably what scandalised "anti-formalists" the most.[46] They denounced this strategy and its specific methods as "a fiction"[47] and a "denaturalisation".[48] Following Jhering, Gény asserted that, by "deriving consequences" from normative propositions contained in texts, legal scholars would be assuming the completeness of the positive legal order, that is, the omnipotence of the legislator, and consequently, the complete autonomy of legal reasoning.[49] "In reality", however, they would be doing nothing but simulating a logical exercise while creating new law. As was already shown, legal norms, to these authors, were narrowly conceived as their textual formulation, and referring only to those immediate situations for which they had been enacted. In most cases, beyond the texts they thought that there was no legislative will or intention that could be identified, nor principles or maxims, from which solutions may be derived for cases not directly contemplated. For, how could the legislator have known what to do in situations of which he knew nothing about?[50] Following this view, legislation is full of gaps, and any attempt to infer or deduce consequences from the existing legal texts is "making the legislator say what he did not want to say."[51] The will of the legislator, which the jurists are purporting to follow, is surreptitiously filled with the will of law professors. Any conclusion reached through these means was thus taken to be a doctrinal creation, and creation here must be read as the exercise of discretion in the strong sense. Long gone was Savigny's sophisticated doctrine of interpretation, whereby the risk of supplantation was greater the more institutionally undifferentiated the means employed.[52]

What those who attacked dominant 19th-century legal science aimed at was for the limits of legislation and the legislative intention to be acknowledged, in the first place, and the consequent need for additional sources accepted, in the second place.[53] These additional sources were legal

[46] But not only European. As Michael Lobban argued for the case of the US, criticisms against formalism were often aimed at this role of constructive rationalisation of the law by 19th-century scholars, even though it did not imply the belief that the legal order was a closed and coherent system from which every solution could be deduced. See Michael Lobban, 'Legal Formalism' in Markus D Dubber and Christopher Tomlins (eds), *The Oxford Handbook of Legal History* (Oxford University Press 2018).

[47] Saleilles (n 28) xi, xiii. Saleilles is skeptical of the possibility of developing consequences out of legal rules in general, including abstract legislative formulas or enacted "principles" (*ibid.,* xiii).

[48] Gény (n 30) 4.

[49] *Ibid.,* 5. Also, Saleilles (n 28) xiv.

[50] *Ibid.,* xii.

[51] *Ibid.*

[52] In the case of greater risk, that is, when correcting the erroneous expression of the law, it is crucial the difference between its general and its specific ground as means for correction. Upon this difference -not always clear-cut- is premised Savigny's distinction between interpretation and creation of the law. See von Savigny (n 11) 189 ff, 193.

[53] Saleilles (n 28) xvi.

doctrinal scholarship and the decisions of judges reached through what the Germans called Free Law movement, and Gény termed *libre recherche scientifique,* which involved the interpreters assuming a position equivalent to that of the legislator.[54] *La doctrine*, unlike what the Exegesis was ready to confess, is creative in its own right, and can develop the law where it does not exist or where, existing, it produces inconvenient results. Under this view, legal reasoning is not a reasoning defined and limited by pre-established sources, but quite the opposite: it is open, for it drinks from different sources that permanently create it, unrestricted by strict rules of formation or transformation.[55] This does not mean that doctrinal creation is completely *ex nihilo*. It was already explained how, according to these authors, it is founded upon the "facts of life", that is, circumstances of fact and new practical needs posed by a developing social life (*but sociale du droit*).[56] In any event, it is not founded on the legislator's intention, nor in existent normative propositions which, as mentioned, are not fertile but sterile. *Systemic* directives of interpretation and integration are thus ruled out, and its consequences for legal reasoning neglected or directly rejected. Under the terms of this new methodological programme, legal science was no longer to be circumscribed to knowing the law as laid down, but rather meant to extensively collaborate in the law's production. This opposition was understood in terms of a transition from a "logical jurisprudence" to a "practical jurisprudence".[57] In the late Jhering the terminology employed is even more familiar, as he expresses, a in a letter to Prince Bismarck in 1888, his willing to transform a "formalistic" jurisprudence into a "realistic" one.[58]

For Gény, the main task of legal science consists in "uncovering and applying to the relations arising from the state of society […] rules that are such as, by satisfying our inner sense of justice, to maintain among all interests, with essential security, the desirable harmony, in accordance with the end assigned by God to humanity."[59] These are the rules of an "immanent

---

[54] François Gény, *Méthode d'Interprétation et Sources En Droit Privé Positif: Essai Critique*, vol 2 (LGDJ 1919) 77. On this see also Jean-Pascal Chazal, 'Léon Duguit et François Gény, Controverse Sur La Rénovation de La Science Juridique' (2010) 65 Revue interdisciplinaire d'études juridiques 85, 88 ff.

[55] See Eugen Ehrlich, *Freie Rechtsfindung Und Freie Rechtswissenschaft: Vortrag, Gehalten in Der Juristischen Gesellschaft in Wien Am 4. März 1903* (CL Hirschfeld 1903); and. Albert Foulkes, 'On the German Free Law School (Freirechtsschule)' (1969) 55 Archiv für Rechts und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy 367; and Saleilles (n 28) xiii, in fine, and esp. xv.

[56] This certainly does not answer the question, for the "facts of life" do not come with legal solutions attached to them. Saleilles asserts that the solutions need to be those in harmony with *"l'equité et les besoins de la pratique"* (*ibid.,* xiv), but again, what are the demands of equity and the needs of practical affairs?

[57] Gény (n 30) 6.

[58] Rudolf von Jhering, *Briefen an Seine Freunde* (Helene Ehrenberg ed, Breitkopf & Härtel 1913) 444.

[59] Gény (n 30) 3.

law" (*droit immanent*), of which the law is but an "imperfect revelation".[60] In this context, legislation represents *a limitation* to legal science's methodological aims, a limitation that needs to be generally respected, but a limitation nonetheless.[61] This is a relevant contrast to 19th-century legal science's self-understanding as a cognoscitive enterprise, to which legislation is the very object of knowledge.

The consequence of this view in terms of theories of legal reasoning is the same that the one explained above: interpretation is conceived narrowly, that is, limited to the debate over possible literal meanings of legal texts. This means conceiving all interpretative problems as related to semantic or syntactic indeterminacy. But there is also less space for other operations traditionally understood as part of legal -as opposed to general practical- reasoning, such as the integration of gaps by means of analogical reasoning, or "restrictive" interpretation founded on teleological considerations, earlier addressed as defeasibility of legal texts. All that space would now be covered by doctrinal developments not anchored to positive materials. In this sense, it is not the case that "anti-formalists" did not believe that the legal order could be made complete. The difference was that they thought completeness could not be based on positive law. In the case of Gény, the completeness (or at least comprehensiveness) of the law, was to be achieved by means of rules "uncovered" by jurists such that, "by satisfying our inner sense of justice" maintained among all interests "the desirable harmony in accordance with the end assigned by God to humanity".[62]

This difference prefigures a debate over the nature of legal science that would be relevant later -and is still today. This debate opposed two visions regarding the scientific quality of dogmatic constructions and the objectivity of its conclusions.[63] These views are premised, as we have seen here, upon the conception one has of legal rules and the possibility, as expressed by Portalis, of them being "fertile in consequences". In turn, this creates -or not- the space for a systemic understanding of the law, and the logical connections among different rules and bodies of rules. If we acknowledge that the literal meaning of legal provisions under and over includes many cases that were not supposed to, to what extent this literal meaning can be extended or restricted to fit

[60] *Ibid.,* 4.

[61] *Ibid.* Thus, he states that jurists "are not completely free" to determine the means of their method. The sovereignty of *des Lois* is mentioned as the main constraint in the case of the French law.

[62] *Supra* n. 53.

[63] See Paolo Becchi, 'German Legal Science: The Crisis of Natural Law Theory, the Historicisms, and "Conceptual Jurisprudence"' in Damiano Canale, Hasso Hofmann and Paolo Grossi (eds), *A Treatise of Legal Philosophy and General Jurisprudence: Vol. 9: a History of the Philosophy of Law in the Civil Law World, 1600-1900; Vol. 10: the Philosophers' Philosophy of Law from the Seventeenth Century to Our Days* (Springer Netherlands 2009).

the *ratio* underlying those provisions? How much can these justificatory substances be stretched out by the jurists to new situations and be prioritised over the texts? And then, if we acknowledge that legal provisions do not cover some situation of fact that needs to be addressed, what kinds of operations, if any, are allowed for obtaining new rules out of the existing ones? What kind of legitimacy has legal science to carry out this task? In light of these questions, the role of legal science as a cognoscitive endeavour seems to be in permanent tension with its productive role in the development of the law: "[i]f the task of science is specifically limited to *describing* its object, it is not immediately clear how science can equally contribute to *producing* such an object."[64] Even the most faithful to legislated law cannot avoid, through the systematisation and conceptualisation of legal materials, producing a tension between a "real" and an "ideal" law. It is true that legal science, when, as the Exegesis and *Begriffsjurisprudenz,* committed to positive materials, starts from –and eventually can come back to- a posited legal reality. But it is no less true that the scientific development turns permanently upon itself: not only it derives concepts and new rules that are the basis for further scientific development, but also these juristic constructions and its logical relations may become the ultimate criterion of validity of legal propositions. In other words, that which gives place to the scientific knowledge of the law (that is, legislated law) ends up by being evaluated by reference to the propositions created by that very science. Thus the qualification of certain institutions as "anomalous" figures, and of certain rules as "mistakes" in, or "unfit" for, the system.

It would be reasonable to read the "anti-formalists" as reacting against this tendency of "exegetical" legal science to create, out of posited law, a *non-posited law*, an ideal law, born of the former, but that acquires independence and strength of its own: a meta law that explains and rationalises legislation, but that eventually may compete with it. I say it *would* be reasonable, were it not for the fact that the independence and strength that the "anti-formalists" bestowed on doctrinal construction was far greater than that bestowed on it by the "formalists". As will be shown, the opposition of views around legal science between 19th and 20th century scholars was anchored to a further understanding of how the monopolisation and formalisation of legal sources by the state impacted the nature of legal orders and the role of legal science in it. This is the object of the last section.

[64] *Ibid.,* 205.

3. A dispute about legal sources and political legitimacy

Ultimately, the two tensions above can be seen in light of a subsequent issue. Both are, indeed, closely connected with, and impacted by, the long and complex processes of the state' monopolisation of legal sources.

In the case in point, there was a major break in the late 18th and early 19th centuries which changed the discourses regarding the legitimation of political power, and with it, of law's legitimacy and its means of production. The roles of the legislator and the judge shifted, and the former became the ultimate source of authority in law. In continental Europe, this change took place hand in hand with the monopolisation by the state of the production of law, its identification with written statutes, and the later redirection of the source of law's legitimacy to the general will or popular sovereignty.[65] All these transformations happened in just a little more than a century. The French Revolution represents a particularly intense event of this process, but its scope is broader, extending to most of Western and Central Europe, and later, through colonisation processes, to a large part of the legal systems of the Americas and elsewhere in the world.

This paradigm shift did not solve the tensions presented above, but it certainly reconfigured the terms in which they could be understood and addressed. In fact, different views regarding the role of the judge – mechanical applicator, lawmaker, interpreter of the legislator's will, and so on – are the result of different ways of understanding political power and its institutional realisation through the law. Here I argue that it is *on the basis of this understanding* that the problems related to formality in the law can be thought of in a meaningful way, and not the other way around. A couple of decades ago, Frederick Schauer affirmed that formalism was fundamentally "about power and its allocation."[66] I take this affirmation to be essentially correct. The oppositions presented above had fundamentally to do with political power and its allocation. The relationship between conceptions of power and its materialisation through legal institutions is not simple, nor is it a matter of conceptual necessity. It is a historical reality, and it is in that history that I have been tracing their specific relationships. In particular, the history of legal methodology must account for the change in the political presuppositions that were the result of the Enlightenment, 18th-century revolutions, and their epistemic products: the science of legislation and the codification movement.

[65] See chapter 2.

[66] Frederick Schauer, 'Formalism' (1988) 97 The Yale Law Journal 509, 543.

Regarding the internal tension between certainty and openness, it is perhaps difficult to see how the problem of sources relates to the opacity of rules. The identification of valid sources as belonging to a certain legal order is an operation distinguishable from the operations by which those sources are to be interpreted and related to each other. And yet the problems posed by the law being fixed in general statements, the degree of opacity of these formulations, and the interpretative faculties given to judges and legal scholars is crucial for a legal order based on legislation which involved the rejection of other, previously accepted, sources: precedent, scholarly doctrines, customs, equity, and so on. On the answers to these problems depends the possibility of a legal order -relatively- autonomous from moral and political systems, and, in consequence, the viability of a democratic self-government by means of the law. This dependence was openly acknowledged in both France and Germany during the 19th century.

Regarding the legal order and legal reasoning, critics argue in the following way: *if* (or rather, *because*) 'formalists' believe that norms are fully or generally determined, and the legal order is complete, coherent and closed, hence it is possible and desirable that judges decide mechanically from and only from- these norms. However, now we know that 19th century jurists were not naïve: they knew and thematised the fact that legal provisions are often indetermined and are sometimes under and over inclusive with regards to their justification. In that sense, the positive legal order is not complete, nor perfectly coherent.[67] And we know that *despite* this awareness, they nonetheless expected legal reasoning to be anchored in legislated law. They conceived of legal reasoning as based on pre-existing legal provisions, but this does not mean that legal provisions are immediately sufficient to solve every possible case. Legal materials are to be mediated, that is, interpreted and integrated according to accepted rules of transformation. This leads, in the case of the theory of adjudication, not to a descriptive account of how judges actually reason and decide cases, but to a rational reconstruction of the judicial function and its features in a setting where the legal sources have been monopolised by the state and bestowed with a certain political legitimacy. This rational reconstruction, certainly, involves a normative element: the subordination of the judge and the jurist to the law depends on an attitude of deference toward positive materials and, in this sense, of an attitude of cooperation in the maintenance of a spirit of subjection to the law posited by the legislator. As seen, this was precisely the attitude of 19th-century jurists in France and Germany,

[67] To be sure, neither were they rule-sceptics. The very possibility of subjection to the law implies that the law *can* be known and understood, and thus followed.

but also everywhere else where discussions about what values or policies the law should pursue were left in the hands of the legislator.[68]

The degree of formality in legal rules' formulation and interpretation are, thus, framed within a new paradigm of public powers and law's legitimacy, configured in such a way as it can be produced by the political system and limited in its reproduction as well. In this sense, theories of legal reasoning and adjudication in the 19th century had to deal with the tension internal to legal systems between the needs for certainty and openness, on the one hand, and the problems of a system development by legal science, on the other, in a way that was entirely new. Political, institutional, and epistemic presuppositions deriving from the Enlightenment, the codification, the centralisation of the state and the judiciary, among others, created genuine discontinuities in the way some old jurisprudential and methodological debates were understood. The relationship between form and substance in the law was not the exception.

The opposition between "formalism" and "anti-formalism" may thus be better understood in terms of a historically-situated shift in the way formality in the law was understood. In terms of the tension between certainty and openness, for instance, the intent to seek an equilibrium among these needs cannot be reduced to a 'swing' movement from high flexibility towards utmost rigidity and back again. This is so because a genuine discontinuity, a legal revolution[69] took place regarding the law and the legislation, the judge and adjudication in Continental Europe during the mid-18th and early 19th centuries.[70] That discontinuity changed the very coordinates within which the said tension could be framed, and shaped the approach to formality in the law that lies at the heart of 19th century legal thought. In seeking for this equilibrium under the new framework, legal science asserted itself as subordinated and deferent to written sources but did not understand such sources as mere textual formulation, but rather as *systemic* and *purposive* entities as well. Formalisation in texts was highly important as it formulated the legislator's decisions, but was not definitive. In this way they took a conception about legal norms that was more open and flexible than the one taken

[68] This seems to be the case of 19th-century jurists even in the U.S., where judges never stopped having a significant role in shaping the law on the basis of policy, and constitutional principles and values: so-called formalists "did not see judges (or jurists) as subordinate legislators, who were to be educated in how best to decide cases to make it fit present policy needs". Lobban (n 46) 435, and similarly at 431.

[69] I use this term following Berman's concept of revolutions in law (see Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press 1983).

[70] Although these changes started well in advance, in the mid-17th century, its consolidation and mature effects in legal reasoning might be seen more clearly from the mid-18th century. See, among others, Franz Wieacker, *A History of Private Law in Europe: With Particular Reference to Germany* (Tony Weir tr, OUP 1995); John Dawson, *The Oracles of the Law* (U of Michigan Law School 1968); and Maximiliano Hernández Marcos, 'Conceptual Aspects of Legal Enlightenment in Europe' in Enrico Pattaro, Damiano Canale and Hasso Hofmann (eds), *A Treatise of Legal Philosophy and General Jurisprudence: Vol. 9: A History of the Philosophy of Law in the Civil Law World, 1600-1900* (Springer 2009).

by their critics. Also, they did not see the legal system as a static compound of rules, but rather as an evolving body of rules and principles, "fertile in consequences". Legal science was then, in a sense, creative. But this sense was not the same in which the 20th century reaction understood creativity of legal scholarship, that is, as a genuinely independent source of law.

Those who came after, the reaction, took in consideration the problems of certainty and openness, and in particular, the high price in openness and adaptability they thought the previous generation had paid to maintain certainty:[71] to the willingness to pay this price they called 'formalism'. They also considered the methods of legal science to develop the law within a cognoscitive framework. To these methods they called 'conceptualism' and also 'formalism'. We should not forget that, in Gény's view, the limitation to legislated sources on the part of legal science was *arbitrary,* that is, without justification.[72] A similar view took the *Freirecht* movement in Germany.[73] Now we know that whether the price paid in favour of certainty was excessive or not (and we also know that certainty was not the only value sought by formality) should make reference to the ends aimed at by the legal order at large, including the formalisation of sources. In this sense, criticisms should point out how so-called "formalists" ignored or reduced the space of legal reasoning in interpreting and developing the law according to the reasons of substance that informed it and could be institutionally identified.

What the critics cannot claim, however, is that they paid a price too high over formality for not giving space in their methodology for creating new law, in terms of satisfying needs and interests that the legislated law did not want to consider or considered and protected in a way considered unsatisfactory. Certainly, the line that separates one thing from the other is not always clear, but acknowledging its existence is the *quid* of the matter. And the critics did not acknowledge the difference when it came to attributing excesses, for they understood, mistakenly, that certainty and logical coherence were the fundamental values that informed the monopolisation of the sources. Being that the case, they estimated that such values should, sometimes, yield over other values. This explains, for instance, that Gény affirmed, in the context of the justification of his methodological programme, that the codification, that appeared to be nothing but "an operation of pure form, of simplification and classification"[74] had indeed transformed the methods of legal interpretation among French jurists. This impact, in his view, was *unintended* by the codifiers, who

[71] Saleilles (n 28) xiv; Flavius (Hermann Kantorowicz) (n 33).

[72] Gény (n 30) 4.

[73] Flavius (Hermann Kantorowicz) (n 33).

[74] Gény (n 30) 16.

would have wanted that codification would left intact the essential "freedom of legal interpretation".[75] At the same time, French authors noted how the same change was taking place in Germany after the codification: "The codification has immediately propagated in Germany the narrow and sterile method whose use has paralysed, during the 19th century, the activity of our *school of interpreters of the Civil code.*"[76] This method would have the tendency to limit its horizons to the legislative texts, and to "isolate" the legal system. The codification in both jurisdictions entailed, for Lambert, a "decay" and a "paralysis" of the legal science, in the sense of an abandonment of its creative force and the "observation and guidance of the spontaneous movements of the law."[77]

But this is, again, a mistake. It was not logical coherence what underpinned the whole institutional transformation that led to codification. It was, rather, an idea of the authority of law that was functional to civil liberties and democratic self-government. There lies, in my opinion, the blind spot of the 20th-century reaction against "formalists": they failed to see how this institutional transformation, and the different conception of law's authority, had changed the margins within which long-lasting problems of legal methodology could be debated and why. This point is crucial because what I see in the mainstream narrative about "l9th-century legal formalism", is a criticism that fails to take this paradigm shift seriously and fails to understand how it changed the discussion at hand. In particular, how it changed the content of the need for openness in law and the means by which it could be achieved. Gény seems to insist on seeing this need as linked to the law with capital L: the Law in relation to which the legislation is only an imperfect formulation.[78] It is for this reason that the traditional account proposes a recipe that sounds too familiar: because it seeks to re-establish the terms in which the questions of certainty/openness, and the role of legal science in legal development, were formulated before the schism, when the judge, the jurist and the custom 'discovered' and declared law along with the statutes enacted by the legislative authorities. To a time when the law could be considered as a type of rationality immanent to the *nature of things*,[79] discoverable with proper training. In this sense, it is understandable that Gény proposes something like this: the codification movement, then the revolutionaries, and the Exegesis after them, overdid the need for certainty and stability; that brought new problems, and it is time now to put certainty back in its place, and try and rebalance in favour of adaptation to social needs, through letting legal scholars and costume shape and develop the Law. The problem is that the paradigm change did

[75] *Ibid.*

[76] Édouard Lambert, *La Fonction Du Droit Civil Comparé* (V Giard & E Brière 1903) 94.

[77] *Ibid.,* 94 f.

[78] Gény (n 30) 4, 68, 78 ff.

[79] *Ibid.*

not fundamentally entail a prioritisation of certainty over openness, although it was certainly one of its aspects.[80] It implied rather a whole different understanding of law as a democratically legitimised manifestation of will. This is an obstacle for Gény and his followers, who correctly noted the problems of the lack of adaptation of a code that, by then, had been in force for almost a century, but did not offer a legal methodology that could account for an institutionality which demanded democratic legitimation from its legal norms.

Criticisms towards 19th-century legal science, therefore, must be made considering these elements, that cannot be neglected after the emergence of the modern state was consolidated. Of course, criticisms can be directed against the whole project of modernity and its legal products. Some have taken this path. But this was not the case of the 20th century "anti-formalist" reaction, nor was the case of those who, taking this reaction for granted, produced the historiography which is dominant up to this day.

4. Conclusions

This last chapter sought to reformulate the opposition between 'formalists' and 'anti-formalists' in terms of the substantive projects for the law animating them. To this end, it opened new ways of grasping the relevant legal-political conflicts along three avenues.

First, it showed how this opposition represents a chapter of a jurisprudential long-standing question: the possibility and extent to which the law can and should be made opaque with regards to the substantive considerations that justify it. This was shown to be related to a tension internal to the law between certainty and openness: the formalisation of the law's content presents advantages but also costs: what is gained in certainty, predictability, efficiency, etc, is lost in flexibility and ability to adapt to the circumstances. Admittedly, formalists are willing to pay a higher cost in appropriateness to preserve the values protected by a law with higher formal content. In this regard, however, "formalists" and "anti-formalists" were not in the positions one would expect: while the former did not believe that legal norms were identical to their textual formulation, the later often conceived of legal norms as narrower entities, identical with their texts and related to a specific kind of situations. This apparent paradox, however, is more than compensated by anti-formalists via theories of sources, which shows that, although illuminating, the internal tension between certainty/openness does not exhaust the matter. Moreover, it was further argued that the

[80] And for certain adherents to codification, it was certainly a priority, as was the case of Bentham. A thorough study in Virgilio Zapatero, 'El Arte de Legislar. Estudio Preliminar' in C Pabón (tr), Jeremy Bentham, *Nomografía o el Arte de Redactar Leyes* (2nd edn, BOE Centro de Estudios Políticos y Constitucionales 2004) lxviii.

balancing between these needs is not neutral; what will count as a healthy middle-ground depends on broader normative views about political power and its institutional expression.

Second, the opposition was articulated in terms of a conflict of views regarding the legal order and the role that legal science plays in developing it. Whereas "formalists" saw legislative materials, especially the codes, as a *system*, that is, as a unity whose parts were in harmony with each other and that could reproduce itself, "anti-formalists" saw it as a set of finite rules that, more often than not, run out when confronted to particular cases. Faced to the rapid social changes and technological developments of the late 19th-century, the strategies developed by the former to precisely reproduce the law, to make it "grow", were seen by the latter, again, as smoke and mirrors. They wanted the limits of legislation and legislative intention to be acknowledged and the consequent need for additional sources accepted. Under this view, legal reasoning is not a reasoning defined and limited by pre-established sources, but quite the opposite: it is open and not bound by settled forms. This was understood as a transition from a "logical" to a "practical" legal science, or from a jurisprudence that was "formalistic" into one that was "realistic". This difference prefigures a debate over the nature of legal science that remains relevant to this day.

Third, the chapter tied the first two debates to the processes of the states' monopolisation of legal sources. It argues how these processes reconfigured the terms in which both oppositions could be addressed. Regarding the tension between certainty/openness, it is crucial for a legal order that rejected previously accepted sources to secure the primacy of legislation: on this fact depends the possibility of a legal order -relatively- autonomous from morality and politics and hence the viability of a democratic self-government by means of the law. This was acknowledged in both France and Germany during the 19th century. Regarding the legal order and legal reasoning more generally, 19th century jurists were not naïve. They openly discussed the limits of the law and *despite* these limits, they expected legal reasoning to be anchored in pre-established law. This yields, in the case of adjudication, not a descriptive account of how judges *actually* decide cases, but to a rational reconstruction of the judicial function and its features in a setting where the legal sources have been bestowed with a certain political legitimacy. This reconstruction involves a normative element: the subordination of the judge and the jurist to the law depends on an attitude of deference and cooperation towards state law.

In this sense, theories of legal reasoning and adjudication in the 19th century had to deal with long-standing conflicts in a way that was entirely new. For a genuine discontinuity took place regarding the law and the legislation, the judge and adjudication during the mid-18th and early 19th centuries. The 20th-century reaction against "formalists" failed to see how this institutional

transformation, and the different conception of law's authority, had changed the margins within which long-lasting problems of legal methodology could be debated.

Final Conclusions

Historicising Jurisprudence: Form and Substance in 19th-century European Legal Thought

Legal theory seldom stops to reflect on how its preoccupations, strategies and devices came to be what they are. It seldom stops to ask by what paths and in the context of which limitations and possibilities its concepts and methods took shape and root, or were, instead, discarded and forgotten in the dustbin of history. Now that we have reached the end of our journey, we find ourselves in a privileged position to judge whether there is anything to gain from historicising the conceptions and ideas about the law and legal reasoning; whether, in other words, there is anything to gain by showing that theoretical abstractions about the law are *historically produced*.[1]

I think the answer to that question is yes. Old theoretical and programmatical debates, with their conceptual construction and refinements, are sedimented and survive into our current forms of legal thought and speech. That they are extraordinarily resilient can be seen in the fact that the image of mechanical judges has been around for a long time now, and so have been the debates that this image sparks about the nature of legal decision-making and the limits of legal forms to guide decisions. The needs and challenges faced by 19th-century legal science are not identical to ours but share a great deal with them: e.g., the extent to which written sources can guide decisions, or the status of legal science's conceptual constructions vis-à-vis positive legal materials. These questions remain inscribed into the very foundations of modern jurisprudence, but we are not necessarily aware of the many ways in which they matter and have mattered. Looking attentively at what was at stake then can give us some perspective in this regard: some of the 19th-century's crucial struggles, such as the institutional differentiation of the production and the application of

[1] I am following here the insights developed by Natasha Wheatley in her brilliant book on the historical construction of the notion of 'state'. Natasha Wheatley, *The Life and Death of States : Central Europe and the Transformation of Modern Sovereignty* (Princeton University Press, 2023).

law, the adaptation of theories of interpretation to meet the new paradigm of law's legitimacy, and the new, more limited role, of legal doctrinal scholarship, we now take for granted as could not be taken then. While the temptation to appeal, in the face of the limits of positive law, to the universal truths of natural law or the *opinio doctorum* is not something we must fight against nowadays, we cannot ignore that new forms of substantivistic reasoning[2] still threaten to erode formal reasoning and will inevitably continue to appear in the future. The discourses and actions taken to advance or prevent the different positions adopted in these debates is so vast that this work contains little more than a fraction of them. Still, within the boundaries of its limited reach, this thesis purports to be a contribution to the history of the ideas on the role of the judge and the nature and limits of legal reasoning in the context of the Civil law tradition. In so doing, it further aims to indirectly contribute to give perspective to some of the legal theoretical debates that touch on these topics.

The first part of this thesis (up to chapter 4), aimed at substantially challenging the TA (that is, what has been the hegemonical narrative on 19th-century legal formalism in continental Europe). It did not, however, mean to prove it completely false. As seen, to the question of whether the claims it attributed to 19th-century legal science are accurate, our answer includes many "*no*", and a few "*yes, but*". In general, the main conclusion is that it is not possible to assert, without distorting the facts, that the so-called 'formalists' of the 19th century believed that legal sources were self-sufficient and that, for this reason, interpreters and judges could mechanically (that is, without mediation) determine the content of the law for particular cases. This is the case even in the context of a robust defense of the subordination of the judge to the law, which reflects a sophisticated understanding of what subordination to the law means. For both France and Germany, this conclusion can be broken down into the following statements that test the claims identified in chapter 1 to be those making up the relevant concept of "legal formalism":[3]

France

1. Claim *(a)*. Both codifiers and exegetists affirmed and defended a functional differentiation between law-creating and law-applying institutions. This differentiation was

[2] In the sense described by Atiyah and Summers, this means a pathological way of reasoning. See Patrick Atiyah and Robert Summers, *Form and Substance in Anglo-American Law. A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon 1987) 30 f.

[3] Namely: *(a)*, a strict subordination of the judge to the law and only to the law; *(b),* a clear-cut distinction between law and non-law by means of formal criteria (sources), which makes up for law's complete autonomy from other normative orders; *(c),* the completeness and coherence/consistency of the legal order, and thus the inexistence of gaps and contradictions in it; *(d),* the clarity and full determination of legal texts, both in meaning and scope of application, and thus their ability to determine the content of particular decisions; and *(e)* the mechanical nature of legal reasoning, meaning merely deducing concrete consequences from general legal rules, with no mediation from interpreters or judges.

based, in turn, on a principle of political legitimacy. In this context the role of the judiciary is that of applying pre-established general rules to particular cases. The role of the judge, to this extent, *is subordinated* to pre-existing law, which in this context is produced mainly by the legislator. This is sanctioned in the law itself as the "relative effect of judgments" (art. 6 of the Civil code). This does not mean, however, that this subordination is understood by these actors as "mechanical", nor that judges are limited to being instruments that merely "declare" the law for the case. Indeed, for them neither do interpretation and other operations to assert the law for the case constitute a distortion of the role of the judge, nor does the creation of particular rules where the law is silent.

2. Claim *(b)*. Being controlled by the state more than ever before, the production of all the law takes a recognisable external form which allows to discriminate between the legal and the non-legal; between intra-legal and extra-legal considerations. The differentiation of the law from other normative orders is thus fostered to a great degree. Law's autonomy or closure is sanctioned by codification (art. 7 of the *loi no.* 3.677, *sur la réunion des lois civiles*) and maintained by the jurists who keep extra-legal considerations at bay. This is indeed a formal take on sources and law's closedness. Yet this formal closure is never total (especially for the *Code*'s drafters), as boundaries are porous and the formally enacted legal materials will run out: customs, legal science and even equity as declared by the judge remained in the background as complementary sources when legislation is lacking. In addition, it is not the case that codifiers or scholars conflated the law (based on sources) with the "black letter of the law". A formal approach to sources in no way implied textualism or *culte du texte de la loi*.

3. Claim *(c)*. Neither codifiers nor exegetists declared ever that the law, such as existed in France or elsewhere, was a complete and coherent normative system. Apart from a few figures of speech praising codification, both groups worked under the assumption that the legal order could not be made complete or totally coherent and consistent. The consideration above regarding complementary sources speaks for the existence of gaps. Indeed, comprehensiveness was not even a shared goal within the codification process. The treatment of contradictions and ambiguities, in turn, speaks against the qualities of consistency and coherence. In general, ccomprehensiveness, clarity and coherence represent regulative ideals aimed at informing the legislator's work and are not assumed as claims about the nature of law and legal orders.

4. Claim *(d)*. Similarly, the clarity of law was something to aim for in order to secure understanding and predictability but not affirmed as a conceptual or empirical truth about legislated texts. Human limitations are treated as trivial and so is the need for hermeneutical mediation. The idea that codes' drafters rejected interpretation and aimed at making it unnecessary is, thus, unfounded.

5. Claim *(e)*. Finally, from the conclusions above it can already be inferred that it is not plausible to affirm, as the TA does, that 19th-century actors believed or expected legal reasoning to be "mechanical" or decisions to be "automatic" and merely "deductive". The law being imperfect and limited, it is always in need of scholarly and judicial mediation: to interpret it (not merely when semantically unclear), to work out its consequences for particular cases, to solve inconsistencies, to integrate gaps (by means of different kinds of argument) and to determine, exceptionally, where the application of a law that is clear, must be defeated. Although all these operations (generally called interpretative) are not the subject of fully developed theories of adjudication and legal reasoning, their treatment nevertheless shows that both codifiers and exegetists were charting a way in which judicial mediation would have some room for manoeuvre, while still respecting the boundaries of the role.

Germany

1. Claim *(a)*. Although theories of adjudication varied greatly in 19th-century Germany, generally speaking the role of the judge is to apply pre-established law and not to create new law. What this means in terms of the judge's faculties vis-à-vis the legislature or legal science is not agreed upon. And yet there is no proof that pandectists affirmed that the role of the judge consisted in the logical act of correct subsumption.

2. Claim *(b)*. With some qualifications, the view that 'Conceptual Jurisprudence' conceived of the law as an autonomous domain, is correct. It was also recognised that this autonomy depended to a great extent on the formalisation of sources, although the lack of monopolisation of its creation by the state gave way to heated debates regarding the different sources' status and how was the law to be developed. But for leading pandectists, such as Puchta and Windscheid, positive law (and mainly legislation) was the starting point for legal reasoning, and it is legal reasoning that alone justifies legal decisions. This model of justification does not imply that legal reasoning is reduced to "deductivism" or "pure logics" against the "facts of life". Furthermore, the desirable degree of closure of the legal system was a matter of great dispute.

3. Claim *(c)*. Gaps and inconsistencies in the law are generally acknowledged by pandectists -as was by its predecessors- and its implications are extensively worked out. Legal science builds a legal system that is not just there, in the legal materials. The systematic method of legal dogmatics involves the capacity to produce new legal rules and principles by means of generalising (induction) and specifying (deduction) the substantive contents found in the legal materials. Furthermore, it involves the ordering of different provisions and materials into a single unity, solving contradictions encountered in the materials. It is due to the way in which some of these jurists did concrete dogmatics, and not from their conceptions about the law or adjudication, that the accusations of "formalism" can be better understood. Reconciling the systemic nature of conceptual construction and the complex and organic nature of law was, for Puchta, a daunting task, not free from inconsistencies.

4. Claim *(d)*. Nor was the clarity of legislation taken for granted. The refined theories of legal interpretation produced in 18th and 19th century Germany are proof that the hermeneutical mediation of legal provisions is considered necessary in general, and not only where it is semantically unclear (i.e. defective laws, in Savigny's terminology). This is the case even of Roman law, considered to be *ratio scripta* for its enduring capacity to represent the intrinsic rationality of human relationships.

5. Claim *(e)*. With the help of legal science, the ideal of 19th-century legal scholarship was that legal decisions would become "comfortably predictable", but this does not mean "mechanical". As stated above, the closure of the legal system may impinge on what elements are considered legitimate in legal reasoning, but does not determine the ways in which legal reasoning is structured, and certainly does not reduce legal argumentation to "deduction". The legal decision is the result of legal thinking as a whole, and this in turn depends on the constructive quality of legal science. Both theories on interpretation (stricto sensu) and views on defeasibility show that the finding and formulation of the legal norm that justifies the decision involve operations that in no way can be called "subsumptive" or "deductive".

The second part of this thesis, comprised by chapters 5 and 6, takes as its starting point the picture which emerges out of the previous chapters regarding the TA's targets in France and Germany. While similar debunking works have tried to explain *why* the TA -or its equivalent in the Common law world- got it wrong, this work pursues a different kind of inquiry: why, even in the

face of evidence, the narrative has been so difficult to do away with.[4] In these lines, I engaged with the issue of what can be found to be true about the TA in a way that can explain the fierce opposition it received, and the lasting notion of "formalism" accompanying it. That, I argued, is the commitment of 19th-century legal science to formality in law, and consequently, to formal legal reasoning. Following the scheme developed by Atiyah and Summers, I characterise the *Exegesis* and *Begriffsjurisprudenz* as committed to formality in the law along three axes: authoritative formality, interpretive formality and mandatory formality. It is by reference to these axes that the distinctiveness of 19th-century legal science can be better apprehended. Furthermore, this scheme supposes that formality in law can only be assessed by reference to value choices that are to be substantively justified. In this way, it gives space for a *project* which favours formality in law that need not be naïve or pathological. Finally, I articulated the opposition between "formalists" and "anti-formalists" as disputes between different substantive projects for the law. To this end, it opened new ways of grasping the relevant legal-political conflicts underlying this opposition along three avenues:

1. A dispute in a long-standing issue: the possibility and extent to which the law can and should be made opaque with regards to the substantive considerations that justify it. This relates to a tension internal to the law between certainty and openness, or between predictability and flexibility. Admittedly, formalists are willing to pay a higher cost in appropriateness to preserve the values protected by a law with higher formal content. Nevertheless, the positions defended by "formalists" and "anti-formalists" here are not always consistent: while the former did generally not believe that legal norms were identical to their textual formulation, some of the latter conceived of legal norms as narrower entities, identical to their texts and related to a specific kind of situations. This apparent paradox, however, is more than compensated through theories of sources, which shows that, although illuminating, the internal tension between certainty/openness does not exhaust the matter.

2. A conflict of views regarding the nature of the legal order and the role that legal science plays in developing it. Whereas "formalists" saw legislative materials, especially the codes, as an organic *system*, that is, as a unity whose parts were in harmony with each other and that could reproduce itself, "anti-formalists" saw it as a set of static and finite rules that, more often than not, run out when confronted to particular cases. When faced with the intense changes of the late 19th-

[4] See for instance, the reasoning in Bojan Spaić, 'Formalism' in M Sellers and S Kirste (eds), *Encyclopedia of the Philosophy of Law and Social Philosophy* (Springer 2023) 987 988: "While it might be that both civil law and common law formalism never existed in the exact form its critics portrayed them, it is undoubtedly the case that the positions identified by critics had significant weight in the second half of the nineteenth century" (with references to the critics).

century, the strategies developed by the former to reproduce the law, to make it "grow", were seen by the latter as a (self) deception. They wanted the limits of legislation and legislative intention to be acknowledged and the consequent need for additional sources accepted. Under this view, legal reasoning is not defined and limited by pre-established sources, but quite the opposite: it is open and not bound by settled forms. This was understood as a transition from a "logical" to a "practical" legal science, or from a jurisprudence that was "formalistic" into one that was "realistic". This difference prefigures a debate over the nature of legal science that is relevant up to this day.

3. A dispute over the meaning and implications of the monopolisation of legal sources by the state. It argues how the consolidation of this exclusivity reclaimed by the state reconfigured the terms in which the two previous issues could be addressed. Regarding the tension between certainty/openness, it is crucial for a legal order that rejected previously accepted sources to secure the primacy of legislation: on this fact depends the possibility of a legal order -relatively- autonomous from morality and politics and hence the viability of a democratic self-government by means of the law. This was acknowledged in both France and Germany during the 19th century. Regarding the legal order and legal reasoning more generally, 19th century jurists were not naïve. They openly discussed the limits of the law and *despite* these limits, they expected legal reasoning to be anchored in pre-established law. This yields, in the case of adjudication, not a descriptive account of how judges decided cases, but to a rational reconstruction of the judicial function and its features in a setting where the legal sources have been bestowed with a certain kind of authority. This reconstruction involves a normative element: the subordination of the judge and the jurist to the law depends on an attitude of deference and cooperation towards state law. This third avenue shows that, in their circumstances, 19th-century jurists had to chart new ways to deal with old problems.

If the scheme proposed in this work for understanding 19th-century legal science in Western Europe is compelling, then its (too) common dismissal as being a "naïve", "fanatical", or yet "immature" form of jurisprudence will reveal itself as a form of self-assertion by its opponents which says: they are the past, we are the present and the future. A tear in the fabric of time that renders the rejected position something remote and foreign.[5] When thus revealed, the mechanism

[5] True, this exercise was also carried out by those who, in the 18th and 19th centuries, were declaring their own independence from the *ancien regime* and its ways of doing and thinking the law. Revealing the hidden continuities and distortions in their accounts is not, however, the object of this work.

can be neutralised, we can sew the torn pieces back together and perhaps cease to view those who came before us with detachment.

A few years ago Jan Schröder affirmed that "we search in vain for precise information on how the basic concepts of legal interpretation theory are transformed at the beginning of the 20th century and what legal-theoretical changes lie behind them."[6] I think we search because, although the facts that make up this story are a piece of the past now, the problems they reflected and the debates they originated are far from being over. This is concealed by narratives that tell us a story of straightforward progress: from formalism to realism, from naivety to maturity, and so on. I hope to have contributed to showing that, in the history of legal methodology and legal theory, there is no linear progress, nor is there a simple pattern that can be reduced to the back and forth –and back again– from formalistic to substantivistic reasoning. I hope, ultimately, to have contributed to making this search not entirely in vain.

[6] Jan Schröder, *Theorie Der Gesetzesinterpretation Im Frühen 20. Jahrhundert* (Nomos Verlag 2011) 10.

Bibliography

Ajani G, 'By Chance and Prestige: Legal Transplants in Russia and Eastern Europe' (1995) 43 The American Journal of Comparative Law 93

Alchourrón C and Bulygin E, *Normative Systems* (Springer Verlag 1971)

Alexander L, '"With Me, It's All Er Nuthin"': Formalism in Law and Morality' (1999) 66 The University of Chicago Law Review 530

Alvazzi del Frate P, 'Aux Origines Du Référé Législatif: Interprétation et Jurisprudence Dans Les Cahiers de Doléances de 1789' (2008) 86 Revue historique de droit français et étranger 253

Aristotle, *The Nicomachean Ethics* (WD Ross tr, rev by Lesley Brown, Oxford University Press 2009)

Atiyah P, *The Rise and Fall of Freedom of Contract* (Clarendon 1979)

——, 'Form and Substance in Contract Law' in Patrick S Atiyah, *Essays on Contract* (Clarendon 1986)

Atiyah P and Summers R, *Form and Substance in Anglo-American Law* (Oxford University Press 1987)

Atria F, *La Forma Del Derecho* (Marcial Pons 2016)

Aubry C, 'Séance de Rentrée de Faculté de Strasbourg' (Strasbourg, 1857)

Aubry C and Rau C, *Cours de Droit Civil Français*, vol 1 (F Lagier 1839)

Audren F and Halpérin J-L, *La Culture Juridique Française. Entre Mythes et Réalités, XIXè-XXè* (CNRS éditions 2013)

Austin J, *Lectures on Jurisprudence: Or the Philosophy of Positive Law* (Robert Campbell ed, 3rd edn, J Murray 1869)

Bascuñán A, 'El Mito de Domat' in Pablo Grez, *Una vida en la Universidad de Chile: Celebrando al profesor Antonio Bascuñan Valdés* (Legal Publishing 2014)

——, 'El Mito de Montesquieu' in A Schopf and JC Marin (eds), *Lo Público y lo Privado en el Derecho* (Thomson Reuters 2017)

Baudouin L, 'Influence of the Code Napoleon' (1958) 33 Tulane Law Review 21

Baudry-Lacantinerie G, *Précis de Droit Civil: Conforme Au Programme Des Facultés de Droit*, vol 1 (11th edn, Sirey 1911)

Bayern SJ, 'Rational Ignorance, Rational Closed-Mindedness, and Modern Economic Formalism in Contract Law' (2009) 97 California Law Review 943

Beccaria C marchese di, *Edizione Nazionale Delle Opere Di Cesare Beccaria: Dei Delitti e Delle Pene* (Luigi Firpo and Rosalba Canetta eds, Mediobanca 1984)

Becchi P, 'German Legal Science: The Crisis of Natural Law Theory, the Historicisms, and "Conceptual Jurisprudence"' in Damiano Canale, Hasso Hofmann and Paolo Grossi (eds), *A Treatise of Legal Philosophy and General Jurisprudence: Vol. 9: a History of the Philosophy of Law in the Civil Law World, 1600-1900; Vol. 10: the Philosophers' Philosophy of Law from the Seventeenth Century to Our Days* (Springer Netherlands 2009)

Beignier B, 'Portalis et Le Droit Naturel Dans Le Code Civil' [1988] Revue d'histoire des facultés de droit 77

Belleau M-C, 'Le Juristes Inquiets: Legal Classicism and Criticism in Early Twentieth-Century France' (1997) 1997 (2) Utah Law Review 379

Bergel JL, *Méthodologie Juridique* (Presses universitaires de France 2001)

Berman HJ, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press 1983)

Biscardi A, 'On Æquitas and Epieikeia' in Arnaldo Mordechai (ed), *Aequitas and Equity* (Hebrew University 1997)

Bix B, 'Legal Positivism' in Martin Golding and William Edmundson (eds), *The Blackwell guide to the philosophy of law and legal theory* (Blackwell 2005)

——, *Jurisprudence: Theory and Context* (Second edition, Sweet & Maxwell 1999)

Bobbio N, 'Scienza Del Diritto e Analisi Del Linguaggio' (1950) 2 Rivista Trimestrale di Diritto e Procedura Civile 342

——, *El Problema Del Positivismo Juridico* (Eudeba 1965)

——, *Il Positivismo Giuridico* (Giappichelli 1996)

Bódig M, *Legal Doctrinal Scholarship: Legal Theory and the Inner Workings of a Doctrinal Discipline* (Edward Elgar Publishing 2021)

Bodin J, *Les Six Livres de La République* (J de Puys 1577)

Boehmer JH, 'Vorrede Zu Barnabas Brissons Dictionarium Juridicum', *Exercitationes ad Pandectas* (1745)

Bonnecase J, *L'École de l'Exégèse, Sa Doctrine, Sa Méthode* (2nd edn, De Broccard 1924)

Borghetti J-S, 'French Law' in Julio César Rivera (ed), *The Scope and Structure of Civil Codes* (Springer Netherlands 2013)

Canale D, 'Many Faces of the Codification of Law in Modern Continental Europe' in Damiano Canale, Paolo Grossi and Hasso Hoffmann (eds), *A History of the Philosophy of Law in the Civil Law World: 1600-1900* (Springer 2009)

Canale D, Grossi P and Hofmann H (eds), *A Treatise of Legal Philosophy and General Jurisprudence: Vol. 9: A History of the Philosophy of Law in the Civil Law World, 1600-1900* (Springer Netherlands 2009)

Cappelletti M, *The Judicial Process in Comparative Perspective* (OUP 1989)

Carbonnier J, 'La Passion Des Lois Au Siécle Des Lumiéres', *Essais sur les Lois* (Repertoire du Notariat 1979)

Cassirer E, *The Philosophy of the Enlightenment* (Princeton University Press 1951)

Cattaneo M, *Illuminismo e Legislazione* (Edizioni di Communità 1966)

Chaline O, *Le Règne de Louis XIV*, vol 2 (Flammarion 2009)

Chazal J-P, 'Léon Duguit et François Gény, Controverse Sur La Rénovation de La Science Juridique' (2010) 65 Revue interdisciplinaire d'études juridiques 85

Chiassoni P, 'Lacune Nel Diritto. Progetto per Un Vademecum Giuridico' in Mario Bessone (ed), *Interpretazione e diritto giudiziale*, vol 1 (Giappichelli 1999)

——, 'On the Wrong Track: Andrei Marmor on Legal Positivism, Interpretation, and Easy Cases' in Paolo Comanducci and Riccardo Guastini (eds), *Analisi e diritto 2007: Ricerche di giurisprudenza analitica* (Giappichelli 2008)

——, *Interpretation without Truth: A Realistic Enquiry* (Springer 2019)

Coderch PS, 'El "Casus Dubius" En Los Códigos de La Ilustración Germánica' (1983) 36 Anuario de Derecho Civil 17

Coing H, 'Rechtspolitik Und Rechtsauslegung in 100 Jahren Deutscher Rechts Geschichte', *Verhandlungen des 43. Dt. Juristentages*, vol 1 (JCB Mohr (Paul Siebeck) 1960)

——, 'Trois Formes Historiques d'Interprétation Du Droit. Glossateurs, Pandectistes, École de l'exégèse' (1970) 48 Revue historique de droit français et étranger 531

——, 'German "Pandektistik" in Its Relationship to the Former "Ius Commune"' (1989) 37 The American Journal of Comparative Law 9

Coleman J, 'Negative and Positive Positivism' in M Cohen (ed), *Ronald Dworkin and Contemporary Jurisprudence* (Harvard University Press 1975)

Conklin WE, *Hegel's Laws: The Legitimacy of a Modern Legal Order* (Stanford University Press 2008)

Cox PN, 'An Interpretation and (Partial) Defense of Legal Formalism' (2003) 36 Ind. L. Rev. 57

Curran VG, 'Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law' (2001) 35 Cornell International Law Journal 101

Custers B and Fosch-Villaronga E, *Law and Artificial Intelligence : Regulating AI and Applying AI in Legal Practice* (TMC Asser Press 2022)

d'Aspremont J, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (OUP 2013)

Dascal M and Wróblewski J, 'Transparancy and Doubt: Understanding and Interpretation in Pragmatics and in Law' (1988) 7 Law and Philosophy 203

Dauchy S, 'French Law and Its Expansion in the Early Modern Period' in Heikki Pihlajamäki, Markus D Dubber and Mark Godfrey (eds), *The Oxford Handbook of European Legal History* (Oxford University Press 2018)

Dawson J, *The Oracles of the Law* (U of Michigan Law School 1968)

del Vecchio G, *The Formal Bases of Law* (John Lisle tr, The Boston Book Company 1914)

Delvincourt CÉ, *Cours de Code Civil*, vol 1 (P J de Mat 1827)

Demante AM, *Programme Du Cours de Droit Civil Français*, vol 1 (A Gobelet 1830)

Demolombe C, *Cours de Code Napoléon*, vol 1 (Imprimerie générale 1880)

Dickson J, *Evaluation and Legal Theory* (Hart Publishing 2001)

——, 'Interpretation and Coherence in Legal Reasoning' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy (Winter 2016 Edition)* <<https://plato.stanford.edu/archives/win2016/entries/legal-reas-interpret/>>

Donlan SP and Heirbaut D, '"A Patchwork of Accommodations": European Legal Hybridity and Jurisdictional Complexity – An Introduction' in Seán P Donlan and Dirk Heirbaut (eds), *The Laws' Many Bodies: Studies in Legal Hybridity and Jurisdictional Complexity, c1600–1900* (Duncker & Humblot 2015)

Dubber MD, 'Legal History as Legal Scholarship' in Markus D Dubber and Christopher Tomlins (eds), *The Oxford Handbook of Legal History* (Oxford University Press 2018)

Dufour A, 'Droit et Langage Dans l'école Historique Du Droit' (1974) 19 Archives de philosophie du droit 151

——, *Droits de l'homme, Droit Naturel et Histoire* (Presses universitaires de France 1991)

Duguit L, *Souveraineté et Liberté: Leçons Faites à l'Université Columbia (New York) 1920-1921* (F Alcan 1922)

——, *Traité de Droit Constitutionnel: La Théorie Générale de l'état*, vol 5 (2nd edn, E de Boccard 1923)

Duranton A, *Cours de Droit Français Suivant Le Code Civil*, vol 1 (4th edn, G Thorel - Guilbert 1844)

Duve T, 'European Legal History – Concepts, Methods, Challenges' in Thomas Duve (ed), *Entanglements in Legal History: Conceptual Approaches* (Max Planck Institute for European Legal History 2014)

Dworkin R, 'Legal Theory and the Problem of Sense' in Ruth Gavison (ed), *Issues in Contemporary Legal Philosophy* (Clarendon Press 1987)

——, 'The Model of Rules I', *Taking rights seriously* (Harvard University Press 1978)

——, *Law's Empire* (Fontana 1986)

Ehrlich E, 'Judicial Freedom of Decision: Its Principles and Objects' in Ernest Bruncken and Layton B Register (eds), *The Science of Legal Method. Select essays by various authors* (A M Kelley 1969)

Eisenmann C, 'L'Esprit Des Lois et La Séparation Des Pouvoirs', *Mélanges en l'honneur de R. Carré de Malberg* (Sirey 1933)

Epstein R, 'Contracts Small and Contract Large: Contract Law through the Lens of Laissez-Faire' in F. H. Buckley (ed), *The Fall and Rise of Freedom of Contract* (Duke University Press 1999)

Esser J, *Vorverständnis Und Methodenwahl in Der Rechtsfindung: Rationalitätsgarantien Der Richterlichen Entscheidungspraxis*, vol 1 (Athenäum-Verlag 1970)

Falk U, 'Der Wahre Jurist Und Der Jurist Als Solcher. Zum Gedenken an Bernhard Windscheid' (1993) 12 Rechtshistorisches Journal 598

——, *Ein Gelehrter Wie Windscheid: Erkundungen Auf Den Feldern Der Sogenannten Begriffsjurisprudenz* (2nd, unaltered edn, Klostermann 1999)

Fasolt C, *The Limits of History* (U of Chicago Press 2004)

Fassó G, *Historia de La Filosofía Del Derecho 2. La Edad Moderna*, vol 2 (JF Lorca Navarrete tr, Pirámide 1982)

——, *Historia de La Filosofía Del Derecho 3. Siglos XIX y XX*, vol 3 (Pirámide 1996)

Fenet P-A, *Recueil Complet Des Travaux Préparatoires Du Code Civil, Suivi d'une Édition de Ce Code...*, vol 1 (Impr De Ducessois 1827)

——, *Recueil Complet Des Travaux Préparatoires Du Code Civil, Suivi d'une Édition de Ce Code...*, vol 6 (Impr De Ducessois 1827)

Feuerbach A, *Über Philosophie Und Empirie in Ihrem Verhältnisse Zur Positiven Rechtswissenschaft* (Nachdr der Ausg Landshut, 1804, Darmstadt Wiss Buchges 1969)

Fezer K-H, 'Wider Eine Neopositivistische Begrifflichkeit Im Recht' [1993] Juristische Schulung

Flavius, G (Hermann Kantorowicz), *Der Kampf Um Die Rechtswissenschaft* (C Winter 1906)

Foulkes A, 'On the German Free Law School (Freirechtsschule)' (1969) 55 ARSP: Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy 367

Friedman L, *Contract Law in America: A Social and Economic Case Study* (University of Wisconsin Press 1965)

Frydman B, *Le Sens Des Lois: Histoire de l'interprétation et de La Raison Juridique* (2nd edn, Bruylant / LGDJ 2007)

Fuchs E, *Recht Und Wahrheit in Unserer Heutigen Justiz* (C Heymann 1908)

García Amado JA, 'Sobre Formalismos y Antiformalismos En La Teoría Del Derecho' (2012) 3 Eunomia 13

García de Enterría E, 'La Democracia y El Lugar de La Ley', *El Derecho, la Ley y el Juez. Dos Estudios.* (Civitas 1997)

Gastaldo FC, 'The Automaton-Judge: Some Reflections on the Future of AI in Judicial Systems' (2024) 14 Sortuz: Oñati Journal of Emergent Socio-Legal Studies 399

Gaudemet E, *L'interprétation Du Code Civil En France Depuis 1804* (Sirey 1935)

Gaudemet J, *Les Naissances Du Droit: Le Temps, Le Pouvoir et La Science Au Service Du Droit* (Montchrestien 1997)

Gény F, *Méthode d'Interprétation et Sources En Droit Privé Positif: Essai Critique*, vol 1 (LGDJ 1919)

——, *Méthode d'Interprétation et Sources En Droit Privé Positif: Essai Critique*, vol 2 (LGDJ 1919)

George RP, *The Autonomy of Law: Essays on Legal Positivism* (Clarendon Press 1996)

Gherard U, 'Civil Law and Gender in Nineteenth-Century Europe' (2016) 43 Clio. Women, Gender, History 250

Gilmore Grant, *The Death of Contract* (Ronald Collins ed, Ohio State U Press 1995)

Giuliani A, 'What Is Comparative Legal History? Legal Historiography and the Revolt against Formalism, 1930–60' in A Masferrer, KÅ Modéer and O Moréteau (eds), *Comparative Legal History* (Edward Elgar Publishing 2019)

González Vicén F, 'Sobre Los Orígenes y Supuestos Del Formalismo En El Pensamiento Jurídico Contemporáneo' (1961) 8 Anuario de Filosofía del Derecho 47

Gordley J, *The Jurists: A Critical History* (OUP 2013)

Green L and Adams T, 'Legal Positivism' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy (Winter 2019 Edition)* (2019) <<https://plato.stanford.edu/archives/win2019/entries/legal-positivism/>>

Grey TC, 'Langdell's Orthodoxy' (1983) 45 University of Pittsburgh Law Review 1

Grossi P, 'Assolutismo Giuridico e Diritto Privato. Lungo l'itinerario Scientifico Di Raymond Saleilles' (1993) 39 Rivista di Diritto Civile 345

——, *Assolutismo giuridico e diritto privato* (Giuffrè 1998)

——, *Mitología Jurídica de La Modernidad* (Trotta 2003)

——, *A History of European Law* (John Wiley & Sons 2010)

Guastini R, *Le Fonti Del Diritto e l'interpretazione* (Giuffrè 1993)

——, 'A Sceptical View on Legal Interpretation' (2005) 2005 Analisi e diritto 139

——, 'Rule-Scepticism Restated' in Leslie Green and Brian Leiter (eds), *Oxford studies in philosophy of law* (OUP 2011)

Haferkamp H-P, *Georg Friedrich Puchta Und Die 'Begriffsjurisprudenz'* (Klostermann 2004)

——, 'The Science of Private Law and the State in Nineteenth Century Germany' (2008) 56 American Journal of Comparative Law 667

——, 'Positivismen Als Ordnungsbegriffe Einer Privatrechtsgeschichte Des 19. Jahrhunderts' in Okko Behrends and Eva Schumann (eds), *Franz Wieacker: Historiker des modernen Privatrechts* (Wallstein 2010)

——, 'On the German History of Method in Civil Law in Five Systems' (2016) 17 German Law Journal 543

——, 'Legal Formalism and Its Critics' in Markus D Dubber, Heikki Pihlajamäki and Mark Godfrey (eds), *The Oxford Handbook of European Legal History* (OUP 2018)

Hakim N, *L'autorité de La Doctrine Civiliste Française Au XIXe Siècle* (LGDJ 2002)

Halpérin J-L, 'Exégèse (École)' in S Rials and D Alland (eds), *Dictionnaire de la culture juridique* (Presses universitaires de France 2003) 681

——, 'The Age of Codification and Legal Modernization in Private Law' in Heikki Pihlajamäki, Markus D Dubber and Mark Godfrey (eds) (Oxford University Press 2018)

Halpin A, 'Methodology' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell 2010)

Hart HLA, 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard Law Review 593

——, *The Concept of Law* (3rd edn, OUP 2012)

Heck P, *Das Problem Der Rechtsgewinnung* (JCB Mohr 1912)

Hernández Marcos M, 'Conceptual Aspects of Legal Enlightenment in Europe' in Enrico Pattaro, Damiano Canale and Hasso Hofmann (eds), *A Treatise of Legal Philosophy and General Jurisprudence: Vol. 9: A History of the Philosophy of Law in the Civil Law World, 1600-1900* (Springer 2009)

Herzog T, *A Short History of European Law: The Last Two and a Half Millennia* (HUP 2018)

Hespanha AM, 'Tomando La Historia En Serio: Los Exégetas Según Ellos Mismos' (2012) 2 Forum 13

Hoeflich MH, 'Law & Geometry: Legal Science from Leibniz to Langdell' (1986) 30 American Journal of Legal History 95

Hofmann H, 'From Jhering to Radbruch: On the Logic of Traditional Legal Concepts to the Social Theories of Law to the Renewal of Legal Idealism' in Damiano Canale, Paolo Grossi and Hasso Hofmann (eds), *A Treatise of Legal Philosophy and General Jurisprudence: Vol. 9: A History of the Philosophy of Law in the Civil Law World, 1600-1900; Vol. 10: The Philosophers' Philosophy of Law from the Seventeenth Century to our Days* (Springer Netherlands 2009)

Holtman RB, *The Napoleonic Revolution* (Louisiana State University Press 1978)

Horwitz MJ, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (OUP 1992)

Husik I, 'Preface' in Rudolf von Jhering, *Law as a Means to an End* (The Boston Book Company 1913)

Ilbert C, 'The Centenary of the French Civil Code' (1905) 6 Journal of the Society of Comparative Legislation 218

Ioffe OS, *Development of Civil Law Thinking in the USSR* (Giuffrè 1989)

Jansen N, 'Rechtsdogmatik, Rechtswissenschaft und juristische Praxis' (2018) 143 Archiv des öffentlichen Rechts 623

——, 'Der Gegenstand Der Rechtswissenschaft' (2020) 75 Juristenzeitung 213

Jansen N and Reimann M, 'Begriff Und Zweck in Der Jurisprudenz: Ein Geburtstagsblatt Für Rudolf von Jhering' (2018) 1 Zeitschrift für europäisches Privatrecht 89

Jori M, *Il Formalismo Giuridico* (Giuffrè 1980)

——, 'Formalismo Giuridico' in Alessio Zaccaria, E Gabrielli and A Iannarelli (eds), *Digesto delle discipline privatistiche, Sezione civile* (UTET 1992)

Josserand L, *De l'abus Des Droits* (A Rousseau 1905)

Jouanjan O, *Une Histoire de La Pensée Juridique En Allemagne, 1800-1918. Idéalisme et Conceptualisme Chez Les Juristes Allemands Du XIXe Siècle* (Presses universitaires de France 2005)

Jouanjan O and Zoller É (eds), *Le «moment 1900». Critique Sociale et Sociologique Du Droit En Europe et Aux États-Unis* (Éditions Panthéon-Assas 2015)

Kantorowicz H, 'Savigny and the Historical School of Law' (1937) 53 Law Quarterly Review 326

——, 'Was Ist Uns Savingy?' in Helmut Coing and Gerhard Immel (eds), *Rechtshistorische Schriften von Hermann Kantorowicz* (Verlag C F Müller 1970)

Katz L, *Ill-Gotten Gains: Evasion, Blackmail, Fraud, and Kindred Puzzles of the Law* (U of Chicago Press 1996)

——, 'Form and Substance in Law and Morality' (1999) 66 The University of Chicago Law Review 566

Kelly JM, *Short History of Western Legal Theory* (Clarendon Press 1992)

Kelsen H, *General Theory of Law and State* (Anders Wedberg tr, Cambridge, MA: Harvard University Press [1945], Russell & Russell 1961)

——, *Pure Theory of Law* (Max Knight tr, Second revised and enlarged edition / translated by Max Knight, U of California Press 1970)

Kennedy D, 'Legal Formality' (1973) 2 The Journal of Legal Studies 351

——, *A Critique of Adjudication : (Fin de Siècle)* (Harvard University Press 1997)

——, 'From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form"' (2000) 100 Columbia Law Review 94

——, 'Legal Formalism', *The International Encyclopedia of the Social and Behavioral Sciences* (Elsevier Ltd 2001) 8634

——, 'The Disenchantment of Logically Formal Legal Rationality, or: Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought' (2004) 55 The Hastings law journal 1031

——, 'Three Globalizations of Law and Legal Thought: 1850–2000' in Alvaro Santos and David M Trubek (eds) (CUP 2006)

Kimball BA, 'Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature' (2007) 25 Law and History Review 345

Koschaker P, *Europa Und Das Römische Recht* (4th edn, CH Beck 1966)

Koskenniemi Martti, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (CUP 2002)

——, *The Politics of International Law* (Hart 2011)

Kramer M, *In Defense of Legal Positivism. Law without Trimmings* (Clarendon Press 1999)

Krynen J, *L'État de Justice, France, XIIIe-XXe Siècles.* (Gallimard 2012)

——, *L'État de Justice, France, XIIIe-XXe Siècles. t.II: L'emprise Contemporaine Des Juges* (Gallimard 2012)

Kuhli M, 'Power and Law in Enlightened Absolutism – Carl Gottlieb Svarez' Theoretical and Practical Approach' (2013) 21 Rechtsgeschichte - Legal History. Journal of the Max Planck Institute for European Legal History

Kunze M, *„Lieber in Gießen Als Irgendwo Anders..." Rudolf von Jherings Gießener Jahre* (Nomos 2018)

Laband P, *Das Staatsrecht Des Deutschen Reiches*, vol 1 (5th edn, Mohr 1911)

Lambert É, *La Fonction Du Droit Civil Comparé* (V Giard & E Brière 1903)

Larenz K, *Methodenlehre Der Rechtswissenschaft* (Springer-Verlag 1991)

Laurent F, *Principes de Droit Civil*, vol 1 (Bruylant 1878)

——, *Cours Élémentaire de Droit Civil*, vol 1 (Bruylant-Christophe & Ce 1881)

——, *Principes de Droit Civile Français*, vol 20 (Durand & Lauriel 1876)

Leiter B, 'Positivism, Formalism, Realism' (1999) 99 Columbia law review 1138

——, 'Legal Formalism and Legal Realism: What Is the Issue?' (2010) 16 Legal theory 111

Lesaffer R, *European Legal History: A Cultural and Political Perspective* (Jan Arriens tr, 1st edn, Cambridge University Press 2009)

——, 'The Birth of European Legal History' in Markus D Dubber, Heikki Pihlajamäki and Mark Godfrey (eds), *The Oxford Handbook of European Legal History* (OUP 2018)

Lieberman D, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (CUP 1989)

Liebmann O (ed), *Festgabe Der Deutschen Juristen-Zeitung Zum 500jährigen Jubiläum Der Universität Leipzig*, vol 14 (Deutschen Juristen-Zeitung 1909)

Lobban M, 'Legal Formalism' in Markus D Dubber, Michael Lobban and Christopher Tomlins (eds), *The Oxford Handbook of Legal History* (OUP 2018)

Locré de Roissy JG, *L'esprit Du Code Napoleon*, vol 1 (L'Imprimerie Impériale 1805)

Lyons D, 'Legal Formalism and Instrumentalism. A Pathological Study', *Moral aspects of legal theory* (CUP 1993)

MacCormick N, 'The Ethics of Legalism' (1989) 2 Ratio Juris 184

MacCormick N and Summers RS, *Interpreting Statutes: A Comparative Study* (Routledge 2016)

Mannori L and Sordi B, 'Science of Administration and Administrative Law' in Enrico Pattaro, Damiano Canale and Hasso Hofmann (eds), *A Treatise of Legal Philosophy and General Jurisprudence Vol. 9: A History of the Philosophy of Law in the Civil Law World, 1600-1900* (Springer Netherlands 2009)

Matczak M, 'Why Judicial Formalism Is Incompatible with the Rule of Law' (2018) 31 Canadian Journal of Law & Jurisprudence 61

Meynial ÉJM, 'Les Recueils d'arrêts et Les Arrêtistes' in Société d'Études Législatives (ed), *Le Code Civil, 1804-1904, Le Livre du centenaire*, vol 1 (A Rousseau 1904)

Molitor E and Schlosser H, *Grundzüge Der Neueren Privatrechtsgeschichte*, vol 1 (7th edn, C F Müller 1993)

Moore M, 'The Need for a Theory of Legal Theories: Assessing Pragmatic Instrumentalism' (1984) 69 Cornell Law Review 988

——, 'The Semantics of Judging' (1980) 54 South California Law Review 151

Morelot L-R, *Dictée d'un Professeur de Droit Français*, vol 1 (V Lagier 1835)

Mourlon F, *Répétitions Écrites Sur Le Code Civil*, vol 1 (11th edn, Garnier Frères 1880)

Núñez Vaquero Á, 'Five Models of Legal Science' (2013) 19 Revus. Journal for Constitutional Theory and Philosophy of Law/Revija za ustavno teorijo in filozofijo prava 53

Ogorek R, *Richterkönig Oder Subsumtionsautomat? Zur Justiztheorie Im 19. Jahrhundert* (Klostermann 1986)

——, 'Inconsistencies and Consistencies in 19 Th Century Legal Theory' (2011) 12 German law journal 34

Peczenik A, *Scientia Juris* (Springer 2004)

Peczenik A, Lindahl L and van Roermund G (eds), *Theory of Legal Science* (Springer Science & Business Media 1984)

Pihlajamäki H, Dubber M and Godfrey M (eds), *The Oxford Handbook of European Legal History* (OUP 2018)

Pildes RH, 'Forms of Formalism' (1999) 66 The University of Chicago Law Review 607

Pintore A, 'El Formalismo Jurídico: Un Cotejo Entre Jori y Schauer' (2017) 79 Derecho PUCP 47

Polay E, 'Influence of the School of Pandects on the Jurisprudence of Hungarian Civil Law' (1977) 19 Acta Juridica 175

Portalis JEM, *De l'usage et l'abus de l'esprit Philosophique Durant Le 18ème Siècle*, vol 2 (2nd edn, Moutardier 1827)

——, 'Discours de Présentation, 24 Thérmidor VIII' in Pierre-Antoine Fenet, *Recueil complet des travaux préparatoires du Code Civil, suivi d'une édition de ce code...*, vol 1 (Impr De Ducessois 1827)

Posner E, 'The Decline of Formality in Contract Law' in FH Buckley (ed) (Duke University Press 1999)

Postema GJ, *Bentham and the Common Law Tradition* (Oxford University Press 2019)

Pound R, 'Do We Need a Philosophy of Law?' (1905) 5 Columbia Law Review 339

——, 'Mechanical Jurisprudence' (1908) 8 Columbia Law Review

——, *Interpretations of Legal History* (Harvard University Press 2014)

Preuß K, "Legal Formalism'and Western Legal Thought' (2023) 14 Jurisprudence 22

Proudhon J-B-V, *Cours de Droit Français. Première Partie : Sur l'état Des Personnes et Sur Le Titre Préliminaire Du Code Napoléon*, vol 1 (Bernard-Defay 1809)

Puchta GF, *Das Gewohnheitsrecht*, vol 1 (Palm 1828)

——, *Cursus Der Institutionen*, vol 1 (Breitkopf & Härtel 1841)

——, *Pandekten* (Adolfus Fridericus Rudorff ed, 3rd edn, 1845)

——, *Vorlesungen Über Das Heutige Römische Recht*, vol 1 (AAF Rudorff ed, Verlag von Bernh Tauchnitz 1847)

Rabban DM, *Law's History: American Legal Thought and the Transatlantic Turn to History* (CUP 2013)

Rawls J, 'Two Concepts of Rules' (1955) 64 The philosophical review 3

Raz J, *Practical Reason and Norms* (Hutchinson 1975)

——, *The Authority of Law. Essays on Law and Morality* (Oxford University Press 1979)

——, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1994)

——, 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 Minnesota law review 1003

Reimann M, 'The Historical School against Codification: Savigny, Carter, and the Defeat of the New York Civil Code' (1989) 37 The American Journal of Comparative Law 95

——, 'Nineteenth Century German Legal Science' (1990) 31 Boston College Law Review 837

—— (ed), *The Reception of Continental Ideas in the Common Law World, 1820-1920* (Duncker & Humblot 1993)

Ripert G, *La Règle Morale Dans Les Obligations Civiles* (LGDJ 1927)

Rochefort F, 'Laïcisation Des Mœurs et Équilibres de Genre. Le Débat Sur La Capacité Civile de La Femme Mariée (1918-1938)' (2005) no 87 Vingtième Siècle. Revue d'histoire 129

Rodriguez-Blanco V, 'The Methodological Problem in Legal Theory: Normative and Descriptive Jurisprudence Revisited' (2006) 19 Ratio juris 26

Rückert J, 'Bernhard Windscheid Und Seine Jurisprudenz «als Solche» Im Liberalen Rechtsstaat (1817–1892)' (1992) 32 Juristische Schulung 902

——, 'Methode Und Zivilrecht Bei Bernhard Windscheid (1817–1892)' in Joachim Rückert and Ralf Seineke (eds), *Methodik des Zivilrechts –von Savigny bis Teubner* (3rd edn, Nomos 2017)

Sagnac P, *La Legislation Civile de La Revolution Francaise (1789-1804) : Essai d'histoire Sociale* (Hachette 1898)

Saleilles R, 'Préface', *Méthode d'Interprétation et Sources en Droit Privé Positif: Essai Critique* (2nd edn, LGDJ 1919)

Sartor G and others, 'Thirty Years of Artificial Intelligence and Law: The Second Decade' (2022) 30 Artificial Intelligence and Law 521

Schauer F, 'Formalism' (1988) 97 The Yale Law Journal 509

——, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon 1991)

——, 'The Limited Domain of the Law' (2004) 90 Virginia Law Review 1909

Schimséwitsch (dite Adolphe) L, 'Portalis et Son Temps: L'homme, Le Penseur, Le Législateur: Thèse Pour Le Doctorat En Droit' (Thèse pour le doctorat en droit, Université de Paris, Faculté de droit 1936)

Schmidt KI, 'Der "Formalismus-Mythos" Im Deutschen Und Amerikanischen Rechtsdenken Des Frühen 20. Jahrhunderts' (2014) 53 Der Staat 445

Schnur R, *Einflüsse Des Deutschen Und Des Österreichischen Rechts in Polen: Vortrag Gehalten Vor Der Juristischen Gesellschaft Zu Berlin Am 13. Februar 1985* (W de Gruyter 1985)

Schömann F, *Handbuch Des Civilrechts*, vol 1 (Tasché & Müller 1806)

Schönfeld KM, 'Rex, Lex et Judex: Montesquieu and "la Bouche de La Loi" Revisited' (2008) 4 European constitutional law review 274

Schröder J, *Theorie Der Gesetzesinterpretation Im Frühen 20. Jahrhundert* (Nomos Verlag 2011)

Schwartz A and Scott R, 'Contract Theory and the Limits of Contract Law' (2003) 113 Yale Law Journal 541

Sebok A, *Legal Positivism in American Jurisprudence* (CUP 1998)

Shiner RA, 'Aristotle's Theory of Equity' (1994) 27 Loy. LAL Rev. 1245

Shklar J, *Legalism. Law, Morals, and Political Trials* (HUP 1986)

Siltala R, *Law, Truth, and Reason: A Treatise on Legal Argumentation* (Springer 2011)

Simpson AWB, 'Legal Iconoclasts and Legal Ideals' (1990) 58 University of Cincinnati Law Review 819

Skinner Q, *Visions of Politics: Vol. 1, Regarding Method* (CUP 2002)

Small AW, 'Some Contributions to the History of Sociology. Section II. The Thibaut-Savigny Controversy: Continuity as a Phase of Human Experience' (1923) 28 American Journal of Sociology 711

Smith M, 'Four German Jurists' in Munroe Smith, *A General View of European Legal History and Other Papers* (Columbia University Press 1927)

Sokalska E and Augustyniak M, 'Legal Interpretation from the Perspective of French Jurisprudence: From Positivist Exegesis to Free Scientific Research' (2022) 48 Review of European and Comparative Law 175

Solum L, 'The Positive Foundations of Formalism: False Necessity and American Legal Realism' (2014) 127 Harvard Law Review 2464

Spaić B, 'Formalism' in M Sellers and S Kirste (eds), *Encyclopedia of the Philosophy of Law and Social Philosophy* (Springer 2023) 987

Stammler R, *Theorie Der Rechtswissenschaft* (Buchhandlung des Waisenhauses 1911)

Stone J, *Legal System and Lawyers Reasoning* (Stanford University Press 1964)

Stone M, 'Formalism' in Scott Shapiro, Jules Coleman and Kenneth Himma (eds) (OUP 2004)

Suárez, s.j. F, *De Legibus Ac Deo Legislatore* (José Ramón Eguillor Muniozguren, s.j. tr, Anastatic reproduction of the edition Prince of Coimbra 1612, Instituto de Estudios Políticos 1968)

Sunstein CR, 'Must Formalism Be Defended Empirically' (1999) 66 The University of Chicago Law Review 636

Surden H, 'Artificial Intelligence and Law: An Overview' (2018) 35 Ga. St. UL Rev. 1305

Tamanaha B, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton University Press 2010)

Tarello G, 'Formalismo', *Novissimo Digesto Italiano* (UTET 1961)

——, *Storia Della Cultura Giuridica Moderna* (Il Mulino 1976)

——, *L'Interpretazione Della Legge* (A Giuffrè 1980)

Troper M, *La Séparation des Pouvoirs et l'histoire Constitutionnelle Française* (Sirey 1973)

——, 'What Is Interpretation of the Law for the French Judge?' in Yasumoto Morigiwa, Michael Stolleis and Jean Louis Halpérin (eds), *Interpretation of Law in the Age of Enlightenment* (Springer 2011)

Troplong R-T, *Le Droit Civil Expliqué Selon l'ordre Des Articles Du Code. De La Prescription*, vol 2 (Hingray 1835)

——, *Le Droit Civil Expliqué Selon l'ordre Des Articles Du Code. Vol. 9. Des Privilèges et Hypothèques* (Librairie de H Tarlier 1835)

——, *De La Propriété d'après Le Code Civil*, vol 2 (Pagnerre Paulin Firmin Didot Fr 1848)

Tushnet MV, 'Anti-Formalism in Recent Constitutional Theory' (1984) 83 Michigan Law Review 1502

Unger RM, *Knowledge and Politics* (The Free Press 1984)

Valette A, *Cours de Code Civil Professé à La Faculté de Droit de Paris, Par A. Valette,... T. Ier, 1re Année, Titre Préliminaire et Livre Premier*, vol 1 (G Baillière 1872)

Van Caenegem R, *European Law in the Past and the Future* (Cambridge University Press 2001)

van Roermund B, 'The "Code Civil" Between Enlightenment and Restoration. The Heritage of Portalis' [2014] Diametros 149

Vernengo RJ, *La Interpretación Jurídica* (UNAM 1977)

Vile M, *Constitutionalism and the Separation of Powers* (Liberty Fund 1998)

Villey M, *La Formation de La Pensée Juridique Moderne* (2nd edn, Presses universitaires de France 2013)

von Jhering R, *Geist Des Römischen Rechts Auf Den Verschiedenen Stufen Seiner Entwicklung*, vol 1 (Breitkopf & Härtel 1852)

——, *Geist Des Römischen Rechts Auf Den Verschiedenen Stufen Seiner Entwicklung*, vol 3 (Breitkopf und Härtel 1852)

——, 'Unsere Aufgabe' (1857) 1 Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts 1

——, 'Briefe Über Die Heutige Jurisprudenz von Einem Unbekannten' [1861] *Preussische Gerichtszeitung*

——, *Scherz Und Ernst in Der Jurisprudenz: Eine Weihnachtsgabe Für das Juristische Publikum* (Breitkopf & Härtel 1884)

——, 'Brief Jherings an Windscheid Vom 29.7.1856' in Helene Ehrenberg (ed), *Rudolf von Jhering in Briefen an seine Freunde* (Breitkopf & Härtel 1913)

——, *Briefen an Seine Freunde* (Helene Ehrenberg ed, Breitkopf & Härtel 1913)

——, *Der Zweck im Recht*, vol 1 (6th edn, Breitkopf & Härtel 1923)

——, 'In the Heaven for Legal Concepts: A Fantasy' (1985) 58 Temple Law Quarterly 799

von Savigny FK, *Of the Vocation of Our Age for Legislation and Jurisprudence* (Abraham Hayward tr, Little Wood & Co 1831)

——, *Von Savigny's Treatise on Possession or the Jus Possessionis of the Civil Law* (Erskine Perry tr, S Sweet 1848)

——, *System of the Modern Roman Law*, vol 1 (Willam Holloway tr, J Higginbotham 1867)

——, *System Des Heutigen Römischen Rechts* (Scientia Verlag 1981)

von Tuhr A, *Der Allgemeine Teil des Deutschen Bürgerlichen Rechts*, vol 1 (Duncker & Humblot 1910)

Vonglis B, *La Lettre et l'esprit de La Loi Dans La Jurisprudence Classique et La Rhétorique* (Sirey 1968)

Waldron J, 'Normative (or Ethical) Legal Positivism' in Jules Coleman (ed), *Hart's Postcript. Essays on the postcript to The Concept of Law* (Oxford University Press 2001)

Weber M, *Economy and Society* (U of California Press 1978)

Weinrib E, 'Legal Formalism' in Denis Patterson (ed), *A companion to philosophy of law and legal theory* (2nd edn, Blackwell 2010)

——, *The Idea of Private Law* (OUP 2012)

Wheatley N, *The Life and Death of States: Central Europe and the Transformation of Modern Sovereignty* (Princeton University Press, 2023)

White MG, 'Social Thought in America: The Revolt Against Formalism' (1949) 8 Journal of the History of Ideas 131

Whitman JQ, *The Legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change* (Princeton University Press 1990)

Wieacker F, *A History of Private Law in Europe: With Particular Reference to Germany* (3rd edn, Oxford University Press 1995)

Wijffels A, 'Ancien Régime France: Legal Particularism under the Absolute Monarchy' in Seán Donlan and Dirk Heirbaut (eds), *The Laws' Many Bodies: Studies in Legal Hybridity and Jurisdictional Complexity, c1600–1900* (Duncker & Humblot 2015)

Wilhelm W, *Zur Juristischen Methodenlehre Im 19. Jahrhundert: Die Herkunft Der Methode Paul Labands Aus Der Privatrechtswissenschaft* (Klostermann 1958)

Windscheid B, *Die Lehre des Römischen Rechts von Der Voraussetzung* (1850)

——, *Zwei Fragen Aus Der Lehre von Der Verpflichtung Wegen Ungerechtfertigter Bereicherung* (Edelmann 1878)

——, 'Die Voraussetzung' (1892) 78 Archiv für die civilistische Praxis 161

——, *Lehrbuch Des Pandektenrecht*, vol 1 (Theodor Kipp ed, 8 Auflage unter vergleichender Darstellung des deutschen bürgerlichen Rechts, Rutten & Loening 1900)

——, 'Die Aufgaben Der Rechtswissenschaft. Rede Gehalten Bei Übernahme Des Rectorats an Der Universität Leipzig Am 31. October 1884' in Paul Oertmann (ed), Bernhard Windscheid, *Gesammelte Reden und Abhandlungen* (Duncker & Humblot 1904)

Wintgens LJ, 'From Law without a Science to Legal Science without the Legislator: The German Historical School and the Foundation of Law' (2010) 31 Statute Law Review 85

Wróblewski J, *The Judicial Application of Law* (Zenon Bankowski and Neil MacCormick eds, Springer 1992)

Xifaras M, 'L'École de l'Exégèse Était-Elle Historique? Le Cas de Raymond-Théodore Troplong (1796-1869), Lecteur de Friedrich Carl von Savigny' in Heinz Mohnhaupt and Jean-François Kervégan (eds), *Influences et réceptions mutuelles du droit et de la philosophie en France et en Allemagne* (Klostermann 2001)

Xifaras M, 'Droit Rationnel et Droit Romain Chez Kant. Note Sur Le Conflit des Facultés' in Mikhaïl Xifaras (ed), *Généalogie des savoirs juridiques* (Bruylant 2006)

Zapatero V, 'El Arte de Legislar. Estudio Preliminar' in C Pabón (tr), Jeremy Bentham, *Nomografía o el Arte de Redactar Leyes* (2nd edn, BOE Centro de Estudios Políticos y Constitucionales 2004)

Zweigert K and Kötz H, *Introduction to Comparative Law* (3rd edn, Clarendon Press 1998)