Law and Philosophy Library 97

Raimo Siltala

# Law, Truth, and Reason

## A Treatise on Legal Argumentation

Springer

# Chapter 9
# "*Die Rechtssätze in ihrem systematischen Zusammenhang zu erkennen*" – The Thrust of Legal Formalism

## 9.1 A Genealogy of Legal Concepts by Georg Friedrich Puchta

The *Historical School of Law*, founded by Friedrich Carl von Savigny (1779–1861) at the early nineteenth century, underscored the historical essence and roots of law. It highlighted the role of the *Volksgeist*, i.e. the historically evolving "spirit of the nation" on the evolvement of the law. The *Volksgeist* of a nation found its paramount expression in the *customary law* and, in the more sophisticated legal systems, in the legal conceptions and doctrinal constructions created by the *legal profession* (*Juristenrecht*, *Professorenrecht*). Towards the end of the nineteenth century, the historicist notion of law became transformed into full-fledged *conceptualist jurisprudence* in Germany. A hierarchical system of legal concepts, as created by the legal science so as to deal with the legal issues, was placed at the centre of legal analysis. Among the German conceptualists there were Georg Friedrich Puchta (1798–1846), Bernhard Windscheid (1817–1892), and the young Rudolf von Jhering (1818–1892), who later turned into a vehement opponent and critic of legal formalism under the *Interessenjurisprudence*, or jurisprudence based on the analysis of social interests in law.[1] It was Philipp Heck, himself a proponent of the *Interessenjurisprudenz*, who introduced the openly pejorative term *Begriffsjurisprudenz* for the German conceptualists.[2]

According to the *Begriffsjurisprudenz*, there is an immutable logico-conceptual element in law "frozen' in the *legal concepts* and their mutual *systemic relations*. Even earlier, the historical school of law had found the immutable element of law in the community-centred legal concepts, like the *spirit of the nation* (*Volksgeist*) and the "organically" evolving *legal consciousness* of its people. Concisely: von Savigny underscored the role of historically evolving legal institutes as the subject matter of legal analysis; while Puchta attached legal analysis to the legal concepts (*Rechtsbegriffe*), legal sentences (*Rechtssätze*), and the set of logico-conceptual, or logico-deductive, conclusions derived from the former.[3]

[1] Larenz, *Methodenlehre der Rechtswissenschaft*, p. 49.

[2] Larenz, *Methodenlehre der Rechtswissenschaft*, p. 49.

[3] On conceptualist jurisprudence and Puchta's legal thinking in specific, Larenz, *Methodenlehre der Rechtswissenschaft*, pp. 19–24; Wieacker, *Privatrechtsgeschichte der Neuzeit*, pp. 399–402;

R. Siltala, *Law, Truth, and Reason*, Law and Philosophy Library 97,

DOI 10.1007/978-94-007-1872-2_9, © Springer Science+Business Media B.V. 2011

Puchta introduced the notion of a *genealogy of legal concepts* (*Genealogie der Begriffe*), with reference to the systemic relations that are thought to prevail among legal concepts in a closed, gapless system of such concepts. It was the task of legal science to construct such a systemic totality of law, and then place individual legal problems in it, so as to derive sentences on legal construction and interpretation under highly conceptualist and systemic premises. Before Puchta, von Savigny, too, had underscored the need for a "philosophical", i.e. systematic, method of interpretation on side with a historical, i.e. exegetical-hermeneutical, one.[4] Puchta illustrated the genealogy of legal concepts with a *pyramid of legal concepts* (*Begriffspyramide*): legal concepts were presented as part of a logico-systemic, hierarchical, internally consistent, and gapless whole. In Puchta's pyramid of legal concepts, the field of application of a legal concept is the wider, and its substantive content is the narrower, the higher the legal concept is placed in the systemic hierarchy of legal concepts. In contrast, the field of application of a legal concept is the narrower, and its substantive content is the wider, the lower the legal concept is situated in the pyramid of legal concepts.[5] Puchta's methodology was strictly *logico-deductive*.[6]

On the top of Puchta's *Begriffspyramide*, there are the abstract and general legal concepts with the help of which an overall view can be attained of the legal system concerned. At the same time, their information value and value of use in guiding the judge's legal discretion is rather low. As we proceed towards the lower levels of the *Begriffspyramide*, the substantive elements of law gain more weight, as the concepts become more and more content-bound. At the same time, their field of application becomes narrower, and the idea of gaining an overall view of the legal system is increasingly compromised. At the top of the pyramid of legal concepts in the field of private law, Puchta, like Bernhard Windscheid after him, placed the notion of a *subjective right*.[7]

In Puchta's legal formalism, concepts other than the strictly legal ones were to be purged out of the realm of law and legal science. In that, Puchta to a great extent anticipated the logico-conceptual purity of Hans Kelsen's *Pure Theory of Law* in the twentieth century. According to Puchta's methodological agenda for legal science, the social context of law and legal adjudication could – and, in fact, even ought to – be ignored in the course of enforcing the inherent "logic" of legal concepts and their systemic relations. For instance, a right to establish and use a pathway

---

Bydlinski, *Juristische Methodenlehre und Rechtsbegriff*, pp. 109–113; Ogorek, *Richterkönig oder Subsumtionsautomat?*, pp. 198–211.

[4]Larenz, *Methodenlehre der Rechtswissenschaft*, pp. 17–18, Wieacker, *Privatrechtsgeschichte der Neuzeit*, pp. 397–398.

[5]Larenz, *Methodenlehre der Rechtswissenschaft*, pp. 20–21.

[6]Wieacker, *Privatrechtsgeschichte der Neuzeit*, p. 400: "Da Puchta die 'organischen Rechtsverhältnisse' und 'Institutionen' Savignys in der Sache aufgegeben hat, ist die Hierarchie der Begriffe von den Axiomen aus abwärts lückenlos hergestellt und die Deduktion der einzelnen Rechtssätze und Entscheidungen erst in Strenge möglich geworden."

[7]Larenz, *Methodenlehre der Rechtswissenschaft*, p. 30.

on land owned by someone else (*Wegeservitut*) was defined as the right to use such property,[8] without there being any need to ponder upon the wider social or economic implications of allowing, or not allowing, such third party use of land property.

There is one element in Puchta's model that yet stands in stark contrast to Adolf Julius Merkl's and Hans Kelsen's later notion of formal norm hierarchy, where a legal norm invariably derives its validity from another, higher-level norm and, ultimately, from the presumed, transcendental-logical basic norm. In Puchta's idea of the genealogy of legal concepts, the constitutive elements of law bear impact on the substantive content, and not only as to the formal structure, of law.[9] Thus, the concepts of a (legal) *person*, *responsibility*, and *imputability* in the context of criminal law (*Person*, *Verantwortlichkeit*, *Zurechnungsfähigkeit*) are linked to the questions of social ethics in Puchta's key writings on the issue. The concept of a *legal subject* (*Rechtssubjekt*) was not yet developed into such a formal and relational concept as it was to become in Kelsen's pure theory of law, carefully "purified" of all content-oriented implications.[10]

## 9.2 A Jurisprudence, Based on Legal Concepts and Their Systemic Relations

For the proponents of legal conceptualism, all legal knowledge is *constructive*, *systemic* and *logico-conceptual* in kind. It was no longer historically evolving knowledge of the societal practices that reflect the "organically" developing inner logic of the "spirit of the nation", the *Volksgeist*, as had been argued by Friedrich Carl von Savigny.[11] But nor could it be derived from the allegedly self-evident ideas of a religious or secular justice, as argued by natural law philosophy. At the basis of Puchta's legal formalism, one can see echoes of the rationalistic natural law philosophy from the eighteenth century and, in specific, Christian Wolff's ideas on the systemic structure of law and the deductive model adopted in its analysis. In Puchta's model, however, such systemic elements were to be derived from the

[8] Larenz, *Methodenlehre der Rechtswissenschaft*, p. 21.

[9] Yet, even in Kelsen's pure theory of law, conflict norms such as *lex superior derogat legi inferiori* and *lex posterior derogat legi priori* were allowed to guide legal interpretation.

[10] Larenz, *Methodenlehre der Rechtswissenschaft*, p. 23.

[11] On Savigny's conception of law, Wieacker, *Privatrechtsgeschichte der Neuzeit*, pp. 381–399; Larenz, *Methodenlehre der Rechtswissenschaft*, pp. 11–18. – As to Savigny's doctrine of the sources of law, Larenz points out the following: "Savigny – mostly in his writing 'Beruf unserer Zeit' – regarded not only legislation but also the common legal conviction of the nation, the *Volksgeist*, as the most original source of all law. The method by means of which one can reach such a conviction of the law is obviously not by logical deduction but by direct experience and vision." (Translation by the present author.) Cf.: "Savigny – zuerst in der Schrift über 'Beruf unserer Zeit' – nicht mehr das Gesetz, sondern die gemeinsame Rechtsüberzeugung des Volkes, den 'Volksgeist', als die ursprüngliche Quelle allen Rechtes ansah. Die Form, in der sich eine solche Überzeugung allein bilden kann, ist offenbar nicht die einer logischen Deduktion, sondern die der unmittelbaren Empfindung und Ansschauung." Larenz, *Methodenlehre der Rechtswissenschaft*, pp. 13–14.

German *Pandektenrecht*,[12] not from the general idea of justice and the immutable nature of man as in Wolff's writings.[13]

The path to Puchta's legal formalism was paved by von Savigny's writings on the historically evolving character of law. Notably, Savigny had cherished the idea that in a modern, sophisticated legal system, as the one in Germany, it is the *legal profession* that has privileged access to the true spirit of the *Volksgeist*, making it possible for the legal profession to attain an authentic reconstruction of the law of the nation. Such a scholarly conception of the law, defined as a *Juristenrecht* or a *Professorenrecht* by von Savigny, denotes an obvious shift from customary law to a scientifically constructed, scholarly conception of the law:[14]

> It is the task of legal science *to observe legal sentences in their systemic context*, i.e. as legal sentences that are dependent on and derivable from each others, so as to be able to present the *genealogy* of individual legal sentences from the general principles until their outermost sprouts. In this, even the kind of legal sentences will be brought into consciousness and further cultivated that entail the *spirit of national law* in a concealed manner and, since they have not become part of the common legal conviction of the community in its transactions, nor been the very subject matter of any acts of legislation, are now for the first time presented as *products of scientific deduction*. Thereby the science of law steps forward as a third source of law, on side of the already existing two sources of law. The law so conceived is *scientific law* or, when it is brought into open daylight by the endeavours of the lawyers, the *lawyers' law*.

Puchta's highbrow legal conceptualism enhanced a scientific conception of law as the *lawyers' law* (*Juristenrecht*) or the *law professors' law* (*Professorenrecht*),

[12]The term *Pandektenrecht* refers to the norms of Roman law adopted in the Germany that was split into a mosaic of tiny principalities until its stately unification in 1871. The highly impressive German civil law codification, *Bürgerliches Gesetzbuch* (BGB), did not come into force until 1900.

[13]Larenz, *Methodenlehre der Rechtswissenschaft*, p. 23; Wieacker, *Privatrechtsgeschichte der Neuzeit*, pp. 373–374.

[14]"Es ist nun die Aufgabe der Wissenschaft, *die Rechtssätze in ihrem systematischen Zusammenhang*, als einander bedingende und voneinander abstammende, *zu erkennen*, um die *Genealogie* der einzelnen bis zu ihrem Prinzip hinauf verfolgen und ebenso von den Prinzipien bis zu ihren äussersten Sprossen herabsteigen zu können. Bei diesem Geschäft werden Rechtssätze zum Bewuβtsein gebracht und zutage gefördert werden, die in dem *Geist des nationellen Rechts* verborgen, weder in der unmittelbaren Überzeugung der Volksglieder und ihren Handlungen noch in den Aussprüchen des Gesetzgebers zur Erscheinung gekommen sind, die also erst *als Produkt einer wissenschaftlichen Deduktion* sichtbar entstehen. So tritt die Wissenschaft als dritte Rechtsquelle zu den ersten beiden; das Recht, welches durch sie entsteht, ist *Recht der Wissenschaft*, oder, da es durch die Tätigkeit der Juristen ans Licht gebracht wird, *Juristenrecht*." Puchta, *Cursus der Institutionen, I*, p. 36, as cited in: Larenz, *Methodenlehre der Rechtswissenschaft*, p. 21. (Italics added; translation by the present author.) – Cf. Wieacker, *Privatrechtsgeschichte der Neuzeit*, pp. 400–401; cf. Wieacker, *Privatrechtsgeschichte der Neuzeit*, p. 399: "Puchta's *Gewohnheitsrecht* (I 1828; II 1837) takes the road of the *Pandektenwissenschaft* consequently from the spirit of the nation to the inevitable end of the monopoly of lawyers" (translation by the present author); cf.: "Puchtas *Gewohnheitsrecht* (I 1828; II 1837) geht den für die Pandektenwissenschaft unvermeidlichen Weg von Volksgeist zum Juristenmonopol konsequent zu Ende."

on side with legislation and customary law.[15] From the point of view of legal construction, legal conceptualism entailed a strict commitment to legal *formalism* that banned all openly value-laden considerations from the sphere of law and the judge's legal discretion, no matter whether they be of social, economic, or other kind. Legal phenomena were now to be situated in a systemic grid that consists of legal concepts or legal sentences, and the logical consequences of law were to be drawn from it. As an eminent German scholar in legal history, Franz Wieacker, put it:[16]

> A given legal order is invariably a closed system of institutions and legal sentences and, indeed, independent from the social reality of the conditions of human life that are regulated by the institutions and legal sentences. Under such preconditions, it is yet in principle possible to correctly resolve all the legal cases that may emerge by means of a mere logical operation, by subsuming the case under a hypothetical judgment that is entailed in a general legal dogmatic sentence produced by the legal science (which is also tacitly entailed in the legal concepts produced by the legal science).

Puchta's formalism redefined the judge's act of legal decision-making as subject to a closed, gapless *logico-conceptual calculus* in which axiomatic-deductive logic and the formal modes of reasoning determine the final outcome.

In light of Jerzy Wróblewski's three ideologies of judicial decision-making discerned above,[17] the German conceptualists (mostly) aimed at following the ideology of *bound* legal decision-making,[18] accompanied by the idea of *one right answer* to a legal case and the stern request made by de Montesquieu that the judge be no more than "the mouth that reads the letter of the law", without any powers of genuine legal interpretation.[19] The judge was regarded as a merely passive *subsumtion automaton*, stripped of any rights of legal discretion so as to evaluate the social context of a legal sentence or legal concept.[20] Witty American critics of legal formalism were quick to coin such a notion of judicial decision-making the doctrine of the *slot-machine*

---

[15] Ogorek, *Richterkönig oder Subsumtionsautomat?*, p. 199.

[16] "Eine gegebene Rechtsordnung is stets ein geschlossenes System von Institutionen und Rechtssätzen, und zwar unabhängig von der sozialen Realität der durch die Institutionen und Rechtssätze geregelten Lebensverhältnisse. Unter dieser Voraussätzung ist es aber prinzipiellt möglich, alle anstehenden Rechtssätze allein durch eine logischer Operation richtig zu entscheiden, welche den Fall unter das hypotetische Urteil subsumiert, das in einem allgemeinen dogmatischen Lehrsatz (und implicite auch in der rechtswissenschaftlichen Begriffen) enthalten ist." Wieacker, *Privatrechtsgeschichte der Neuzeit*, p. 433. (Translation by the present author.)

[17] Wróblewski, *The Judicial Application of Law*, pp. 265–314.

[18] Mostly, because, as will be argued below, the German conceptualists did approve of the use of legal analogy under certain conditions, somewhat loosening the requirement of only applying strict logical deduction in law.

[19] "Mais, si les tribunaux ne doivent pas être fixes, les jugements doivent l'être à une telle point, qu'ils ne soient jamais qu'un texte précis de la loi. (. . .) Mais les juges de la nation ne sont, comme nous avont dit, que la bouche qui prononce les paroles de la loi; des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur." Montesquieu, *L'esprit des lois*, pp. 399–404.

[20] Larenz, *Methodenlehre der Rechtswissenschaft*, p. 22.

*judge*. As a consequence, the science of law became more and more alienated from the social, political, and moral context of law and legal adjudication.[21]

Still, even the scholars who advocated the ideas of a conceptualist jurisprudence quite openly acknowledged the possibility of cases for which the legal sentences or legal concepts, as produced by the legal science, could not provide a satisfactory answer and where, as a consequence thereof, the judge or the legal scholar needed to have recourse to legal analogy. In such situations, the methodological requirement of logico-deductive reasoning was relaxed in favour of a significantly less formal approach to the law.[22] On the European continent, the impressive law codifications in France and Austria and the highly systemic undertakings of the German conceptualists had an impact on the development of the general doctrines of law in any branch of law (*die allgemeine Lehren des Rechts*), especially within the German-speaking legal culture. In legislation, such systemic efforts had their heyday, when the German private law codification *Bürgerliches Gesetzbuch* came into force in 1900.

## 9.3 The Langdellian Orthodoxy – A Brief Account of Legal Formalism in America

In the United States, the idea of legal formalism is manifested in the *case method* introduced by Christopher Columbus Langdell (1826–1906), Dean of Harvard Law School since 1870. Langdell's model for legal analysis, later somewhat degradingly coined as "Langdellian orthodoxy",[23] quickly gained the dominant position in legal science and legal education in the United States as introduced by Langdell and then elaborated by Langdell's followers James Barr Ames and Joseph Beale.[24] "Mr. Fox, will you state the facts in the case of *Payne v. Cave?*" was the famous kickoff phrase of Langdell's case method in his lecture on contract law at Harvard in 1870. The lecture then continued with: "Mr Rawle, will you give the plaintiff's argument?" The Socratic method of posing questions to students was Langdell's novelty in legal education.

According to Neil Duxbury's concise analysis, the core of Langdell's case method can be stated as follows[25]:

[21] "... die Entfremdung der Rechtswissenschaft von der gesellschaftlichen, politischen und moralischen Wirklichkeit des Rechts ...", Wieacker, *Privatrechtsgeschichte der Neuzeit*, p. 401.

[22] Bydlinski, *Juristische Methodenlehre und Rechtsbegriff*, p. 112.

[23] Grey, "Langdell's Orthodoxy", passim; de Been, *Legal Realism Regained*, pp. 4–6. – Justice O. W. Holmes once sarcastically called Langdell "the greatest living legal theologian". Cited in Horwitz, "The Place of Justice Holmes in American Legal Thought", p. 54. Cf. also Golding, "Jurisprudence and Legal Philosophy in the Twentieth-Century America – Major Themes and Developments", p. 443, where Langdell's approach to the common law is compared to the ideas put forth by the German conceptualists (*Begriffsjurisprudenz*).

[24] Concisely on the case method by C. C. Langdell, James Barr Ames, and Joseph Beale, cf. Duxbury, *Patterns of American Jurisprudence*, pp. 14–25.

[25] Duxbury, *Patterns of American Jurisprudence*, p. 15.

> Langdellian legal science can be seen to consist of four interrelated elements. First, there is the intense respect for *stare decisis*. For Langdell, to be able to discern the precedential status of any case is to have found the key to the science of law. Secondly, anyone gifted with the ability to discern in this fashion will of necessity realize that most reported cases are in fact unhelpful repetitions of extant principles and precedents. Thirdly, anyone who has realized that only a handful of cases are truly relevant to the science of law must also recognize that the number of fundamental legal doctrines is similarly limited. Fourthly, the task of the legal scientist is to classify these fundamental doctrines so as to demonstrate their logical interconnection, as well as to dispel the myth of their formidable number.

The Langdellian approach placed the emphasis of legal analysis on the doctrine of *stare decisis* and the relatively few general legal principles that were effective behind those court decisions. Langdell had been influenced by John Austin's analytical jurisprudence and the nineteenth century positivist ideal of science, and now the American scene of legal science was to be made more "scientific" by adhering to those ideals.[26] The social consequences of law and the set of value premises at the back of law were ruled out from the scope of legal analysis. Instead, the values of formal legal predictability, in line with the general principles of law underlying individual judicial decisions, were given priority in legal analysis under the Langdellian premises.[27]

Dissenting opinions as to the true formality of Langdell's methodology have been voiced, as well. In his articulate treatise *Beyond the Formalist-Realist Divide: The Role of Politics in Judging*, Brian Z. Tamanaha cites Marcia Speciale who characterizes Langdell's version of legal science as "the beginning of anti-formalism".[28] Tamanaha refers to Holmes' unfair critique of Langdell's agenda, which made him the primary target of anti-formalism in the United States. Still, there is no denial of the fact that Langdell did pursue a highly formalist agenda for the legal science, since that was the means of guaranteeing its status as true science in his mind. In that, similarities to the German conceptualists (*Begriffsjurisprudenz*) are striking.

Langdell's, Ames', and Beale's case method provided an easy target for the antiformalist critique, firstly, by the American school of *sociological jurisprudence* at the end of the nineteenth century and the beginning of the twentieth century, and secondly, by the *American legal realists* in the 1920s and 1930s. For the pragmatism-minded advocates of sociological jurisprudence and legal realism, the effected *law in action* of the actual court decisions, plus the social consequences of law brought into effect, had far more importance than any doctrinal constructions of the *law in the books* of a Langdellian orthodoxy.

Under Langdell's methodology, there was of course no access to Pound's seminal idea of law as a master tool for *social engineering*, nor to Holmes' sarcastic

[26] Mendell, "American Jurists, 1860–1960", p. 33.

[27] Cf. also: ". . . Langdell had argued that law – meaning always private law – should be reduced by legal scientists to a small group of logically categorized founding principles." Duxbury, *Patterns of American Jurisprudence*, p. 21.

[28] Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging*, p. 53.

prediction theory where the *bad man*, only interested in predicting the untoward response of the judges and officials to his conduct, i.e. the sanctions likely to be inflicted upon him, if he decides to break the law.[29] In line with the prediction theory of law, the binding nature of a private law contract was similarly devoid of any moral qualities, i.e. equal to the sanctions that would be inflicted on anyone who failed to satisfy the contractual obligations he had taken to fulfil.[30]

## 9.4 The Constitutive Elements of Legal Formality by Robert S. Summers

Based on a cross-reading of Ronald Dworkin's conception of legal rules and legal principles, the latter in the wide sense of comprising all kinds of value-laden legal standards,[31] on the one hand, and Robert S. Summers' account of the different facets of *legal formality*, on the other, I argue that *legal rules* (à la Dworkin) are legal decision-making arguments with *high legal formality* (à la Summers), and *legal principles* (à la Dworkin) are legal decision-making arguments with *low legal formality* (à la Summers).[32] According to Summers' analysis, the level of formality of a legal norm may be of the following kind:

(a) *Constitutive* formality: *validity* formality and *rank* formality of a legal norm or argument, i.e.:

  (1) *validity* formality, with reference to the either formal or non-formal source of origin of a legal norm or argument; and
  (2) *rank* formality, with reference to the hierarchical or non-hierarchical status of a legal norm or argument, to the effect that legal rules have gained relative independence from the social values and goals at the back of law and, moreover, exert a normative, binding effect upon the legal discretion of the judge by force of their formal source of origin, whereas legal principles enjoy possibly oblique but still adequate institutional support and content-based

---

[29] Vilhelm Lundstedt (1882–1955), a Swedish scholar and key representative of the Scandinavian realistic movement, took up the idea of law as a form of social engineering as major ingredient of his philosophy of law.

[30] "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, – and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference." Holmes, "The Path of the Law", p. 462.

[31] Dworkin, *Taking Rights Seriously*, p. 22: ". . . in those in hard cases . . . [the lawyers] make use of standards that do not function as rules, but operate differently as principles, policies, and other sorts of standards."

[32] Siltala, *A Theory of Precedent*, pp. 41–63; Siltala, *Oikeustieteen tieteenteoria*, pp. 97–102, 756–761.

approval in the community and are, by force of their definition, closely intertwined with social values and/or goals.[33]

(b) *Systemic* formality: static and closed systemic totality of legal rules in the sense of constituting Kelsen's and Merkl's hierarchic norm pyramid, or no more than a loosely defined "system" of legal principles that are, by force of definition, open-ended vis-à-vis certain set of social values and/or goals.
(c) *Mandatory* formality: strong binding force of legal rules vis-à-vis a judge's legal discretion, or the – at least prima facie – weaker, merely persuasive force of legal principles vis-à-vis a judge's legal discretion.[34]
(d) *Structural*, or *norm-logical*, formality: binary logic of the *either/or* kind of applicability in legal rules, or multi-valued logic of the *more-or-less* kind of applicability in legal principles.
(e) *Methodological* formality: semantics-oriented interpretation of legal rules, where recourse to social values and/or goals is at least prima facie ruled out, or the openly value-laden weighing and balancing of legal principles where recourse to social value-laden or goal-oriented elements is required.
(f) *Expressive*, or *logico-linguistic*, formality: semantic characteristics of the legal norm formulation.

= *Deontic formality*: (a) + (b) + (c) + (d) + (e) + (f) above.

The sum total of the various tenets of legal formality (a)–(f) may be called *deontic* formality.

Legal *rules* are legal arguments that are (primarily) based on individual decisions made by institutional decision-making authorities, such as the legislator, courts of justice, and other law-applying officials. Legal rules are or, at the least, may be expressive of *high level of legal formality* in all or most of the categories of legal formality discerned above. Legal *principles* and other value-laden *standards* of law, in turn, are legal arguments that are based on adequate institutional support and sense of approval in the legal community. Legal principles are endowed with *low level of legal formality* in all or most of the categories of legal formality discerned.

A system of legal concepts or institutions defined as a *genealogy* or *pyramid of legal concepts* (*Genealogie der Begriffe*; *Begriffspyramide*), as suggested by

[33] A. J. Merkl's and Hans Kelsen's idea of the *Stufenbau*, or a hierarchical order, of a legal system satisfies the criterion of high rank formality. – It would seem that rank formality, as part of constitutive formality, and systemic formality to some extent overlap in Summers' analysis.

[34] "Only rules dictate results, come what may. When a contrary result has been reached, the rule has been abandoned or changed. Principles do not work that way; they incline a decision one way, though not conclusively, and they survive intact when they do not prevail." Dworkin, *Taking Rights Seriously*, s. 35. – Similarly Dworkin, *Taking Rights Seriously*, p. 26: "A principle like 'No man may profit from his own wrong' does not even purport to set out conditions that make its application necessary. Rather, it states a reason that argues in one direction, but does not necessitate a particular decision."

Georg Friedrich Puchta under the German *Begriffsjurisprudenz*, meets with all the six categories of legal formality discerned, i.e. *constitutive* (i.e. *validity* and *rank*), *systemic*, *mandatory*, *structural*, *methodological*, and *logico-linguistic* formality. The only exception might be methodological formality, since the German conceptualist made room for the use of analogical reasoning in certain cases, as well.

Under high legal formalism, the logical constitution of law is detached from any content-bound tenets of the legal concepts and their systemic totality (= point a). The system of legal concepts is taken as a gapless and internally coherent whole, following the rule-based logic of legal decision-making where individual legal institutions are situated within a logico-conceptual and systemic frame (= point b). Moreover, a systemic totality of such legal concepts is endowed with strong mandatory formality, or normative binding force (= point c). From the point of view of the logic of norms and legal methodology, legal formalism seeks to satisfy the criteria of legal isomorphism (à la Kaarle Makkonen) and the ideology of bound legal decision-making (à la Jerzy Wróblewski) taken to the extreme, since there is no area of free legal discretion left to the judge under such premises (= points d and e). Moreover, the expressive, logico-linguistic qualities of law are deemed to be inherently formal, and not content-bound or intertwined with the prevailing values and goals in society, except in the oblique sense that the basic legal concepts by necessity give effect to certain kinds of social values in an oblique manner (= point f).

Robert S. Summers’ idea of the different categories of legal formality and Ronald Dworkin’s corresponding idea of legal rules and ‘standards that do not function as rules, but operate differently as principles, policies and other sorts of standards’,[35] would seem to quite neatly match to one another. A legal norm or legal argument that ranks *high* in all (or most) of Summers’ categories of legal formality is a legal *rule* in Dworkin’s terminology, valid because of its formal source of origin, or pedigree. A legal norm or legal argument that ranks *low* in all (or most) of Summers’ categories of legal formality, by contrast, is a legal *principle*, if it enjoys adequate institutional support and sense of approval in the community.[36]

## 9.5 “*Der Zweck ist der Schöpfer des ganzen Rechts*” – A Critique of Legal Formalism by Rudolf von Jhering and Lon L. Fuller

From the point of view of legal *methodology* on how to construct and read the law vis-à-vis some actual or merely hypothetical fact-constellation, the borderline between legal formalism and non-formalism is defined by whether *institutional values*, *collective goals*, and *social purposes* of law are allowed to penetrate the judge’s or a legal scholar’s process of legal discretion or legal decision-making. For the legal formalist, law is an autonomous, self-sufficient phenomenon to the effect that there is no need to look for any concealed premises, policy-agenda, social purpose, or

[35] Dworkin, *Taking Rights Seriously*, p. 22.

[36] Cf. Siltala, *A Theory of Precedent*, pp. 41–63.

institutional values beneath the express manifestations of law in legislation and other official sources of law. For the non-formalist, the notion of law as detached from the underlying edifice of institutional values, collective goals, and social purposes simply makes no sense. For the non-formalist, law is an inherently value-laden, interest-oriented phenomenon that cannot be grasped without having recourse to its purpose-laden social premises.

The most ardent critique of the German conceptualists (*Begriffsjurisprudenz*) was issued by *Interessenjurisprudenz*, i.e. a jurisprudence based on the analysis of social interests and purposes in law founded by Rudolf von Jhering (1818–1892) and Philip Heck (1858–1943).[37] As an antithesis to the highbrow German conceptualism, von Jhering's notion of jurisprudence underscored the inherently *interest-laden* and *purpose-oriented* nature of all law. As a consequence, the law could not be captured in a logical, closed, and gapless system of legal concepts, as had been suggested by Puchta in his idea of the genealogy of legal concepts (*Genealogie der Begriffe*). Rather, law is a thoroughly interest-laden social phenomenon. *Der Zweck ist der Schöpfer des ganzen Rechts* – "the [social] purpose is the creator of all law", as Rudolf von Jhering concisely put it in the motto to his treatise *Der Zweck im Recht* in 1877.[38]

In the 1950s debate with H. L. A. Hart on the premises of legal construction and interpretation, Lon L. Fuller voiced similar ideas on the inherently *interest-laden*, *purpose-oriented*, and *value-bound* nature of law. According to Hart, linguistic concepts, and legal rules that incorporate such concepts, have a *core of certainty*, where the semantic meaning-content of the concept or rule is patently clear, and a *penumbra of doubt*, where several readings of the rule are equally possible.[39] In terms of Makkonen's above classification, Hart's legal semantics matches with the *isomorphic* and semantically *ambiguous* situations of legal decision-making, respectively.

According to Hart, legal interpretation is a *semantic* operation whereby the core/penumbra division is affirmed for the legal rule at hand. Within the core, the meaning-content of the rule is patently clear without further ado; within the penumbra, its meaning-content needs to be elucidated and expounded by legal interpretation. Even then, the original purpose of the rule need not be invoked, but the semantic approach will do. If there are no legal rules with a bearing on the issue, the judge is advised to resolve the case as if he were acting in the role of a "small-scale legislator", free of constraints other than those derived from the constitution and international state treaties with effect on domestic law. According to Fuller, on the other hand, legal argumentation is not even possible without first consulting the community-oriented, purpose-laden background premises of law. It is the inherent

[37] On von Jhering's *Interessenjurisprudence*, Wieacker, *Privatrechtsgeschichte der Neuzeit*, pp. 574–578; Larenz, *Methodenlehre der Rechtswissenschaft*, pp. 49–58, 119–125. The key texts of *Interessenjurisprudence* are presented in Ellscheid and Hassemer, eds., *Interessenjurisprudence*.

[38] von Jhering, *Der Zweck im Recht, I*, p. I.

[39] Hart, *The Concept of Law* (1961), pp. 123–124.

purpose of law that defines the semantics of the core and penumbra of a legal rule à la Hart, and not the other way round, as Fuller saw it.[40]

Even earlier in Germany the *Free Law Movement* had attacked the formalist and conceptualist premises of a highly constructivist conception of legal science by the *Begriffsjurisprudenz*. Contrary to Puchta's and other legal formalists' stance on the issue, the legal discretion of the judge could not be captured by deductive syllogisms or logico-conceptual calculi, since the rules of law invariably leave some area of free discretion to the law-applying judge or official. For Hart, that would signify the penumbra of a legal rule. Therefore, the judges not only discover the law in force, but they actively *create* the law in their decisions.[41]

The overt radicalism of the free law movement in underscoring the *sense of social justice* (*Rechtsgefühl*) or *value consciousness* (*Wertfühlen*) prevalent in the community never gained wide ground among the legal profession, even though it in part helped to cut down any excessive formalism in the legal doctrine. The situation with von Jhering's *Interessenjurisprudenz* was rather different. It was far easier for the lawyers to give credit to the idea of the inherently interest-laden nature of law than the excesses of the free law movement.[42] The creative role of the judge under the free law movement bears close similarity to the *sociological jurisprudence* in Europe, and in fact Eugen Ehrlich's writings on the *living law* (*lebendes Recht*) may well be situated under the both intellectual currents.[43] Moreover, according to the French scholar François Gény (1861–1959), the inspired, if somewhat loosely defined idea of the "free scientific research" (*libre recherche scientifique*) was to provide for the basis of legal analysis at the cost of any exercise in legal formalism or system-oriented legal conceptualism.[44]

Parallel to the European schools of legal anti-formalism, such as Rudolf von Jhering's *Interessenjurisprudence*,'s Eugen Ehrlich *Freirechtslehre* and *legal sociology* with the idea of living law (*lebendes Recht*), and François Gény's *libre recherche*

---

[40]Hart, "Positivism and the Separation of Law from Morals"; Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart". – Cf. Tamanaha, *Beyond the Formalist-Realist Divide*, pp. 168–170.

[41]On Rudolf von Jhering's "turn to a pragmatist jurisprudence" (*Jherings Wendung zu einer pragmatischen Jurisprudenz*), i.e. jurisprudence of interests, after his years in the formalist school of law, and on the early jurisprudence of interests by Philipp Heck, Heinrich Stoll, and Rudolf Müller-Erzbach, cf. Larenz, *Methodenlehre der Rechtswissenschaft*, pp. 46–58; Wieacker, *Privatrechtsgeschichte der Neuzeit*, pp. 574–579; on the free law movement by Oscar Bülow, Eugen Erhlich, Hermann Kantorowicz (i.e. the pseudonym Gnaeus Flavius), and Hermann Isay, cf. Larenz, *Methodenlehre der Rechtswissenschaft*, pp. 59–62; Wieacker, *Privatrechtsgeschichte der Neuzeit*, pp. 579–581.

[42]Larenz, *Methodenlehre der Rechtswissenschaft*, p. 62. – The key terms *Rechtsgefühl* (*sense of justice*) and *Wertfühlen* (*legal consciousness*) were first adopted by Hermann Isay. Cf. Larenz, *Methodenlehre der Rechtswissenschaft*, p. 61.

[43]Ehrlich, "Freie Rechtsfindung und freie Rechtswissenschaft"; Ehrlich, "Soziologie und Jurisprudenz".

[44]Bergel, *Méthodologie juridique*, pp. 249–253; Bouckaert, Boudwijn, "Gény, François (1861–1959)".

*scientifique*, the American judges and legal academicians have also showed passion for such legal anti-formalism. What *sociological jurisprudence* and *legal realism* share is a critical stance towards legal formalism in all its manifestations. What all types of legal formalism share is the endeavour to demote the impact of any openly value-laden or purpose-oriented premises on law, unless they can be traced back and locked to the conceptual and systemic edifice of the law. The concession made to analogical reasoning in a situation where no satisfactory legal answer to a legal problem could be derived from the established system of legal concepts patently transgressed the limits of the formalist approach.[45] The intellectual price for such a move was paid in a loss of scientific precision and logical exactitude, if judged in light of the premises acknowledged by the conceptualists themselves.

Like the isomorphic theory of law, legal formalism is aligned with the analysis of semantically clear, routine cases only, leaving the hard cases of legal adjudication quite untouched. In Kaarle Makkonen's terminology, legal conceptualism only covers the situations of legal isomorphism where there exists a picture relation between the two fact-constellations compared. Semantically vague situations of legal decision-making, where recourse to the methodology and canons of legal interpretation is required from the judge, and wholly unregulated situations, where there is no legal norm that could guide the judge's discretion, are out of reach of the formalist approach, strictly defined. It is only in *artificial languages*, like the ones invented in logic and mathematics, that all semantic issues of (legal) interpretation can be avoided, due to the perfection of the logical syntax of language adopted. Yet, it is just because of their fully predetermined character that artificial languages cannot provide a satisfactory ground for legal regulation and judicial decision-making.

There are three unresolved dilemmas in Hart's semantics of the core and the penumbra of legal concepts and legal rules, in Makkonen's isomorphic approach to the law, and in legal formalism in general.

Firstly, the *identification* of an isomorphic situation (à la Makkonen), a bound case of legal decision-making (à la Wróblewski), or the core of settled meanings (à la Hart), and the means of distinguishing them from other legal decision-making situations, is far from self-evident. It seems that the seminal issues of how to construct and read the law logically *precede* the identification of an isomorphic situation (à la Makkonen), the ideology of bound legal decision-making (à la Wróblewski), or the presence of a core of settled meanings (à la Hart), with the effect that interpretation cannot be abolished even under such highly formalist premises.

Secondly, the treatment of *non-isomorphic* situations of legal decision-making or the ones situated on the penumbra of doubt in Hart's legal semantics is left totally uncovered, since the deductive model of logical inference cannot be extended to them. The German formalists suggested having recourse to reasoning by analogy in such cases, but the initial premises of legal formalism are thereby exceedingly compromised.

[45] Bydlinski, *Juristische Methodenlehre und Rechtsbegriff*, p. 112.

Thirdly, the formalist approach to the law fails to give an account of how initially isomorphic fact-situations may be *transformed* into non-isomorphic ones of legal ambiguity or legal gap situations, most often due to the changes effected in the institutional value premises of law. For instance, when the European Convention on Human Rights and Fundamental Freedoms was ratified in Finland in 1995, a huge set of former routine cases were transformed into hard cases of legal adjudication overnight, requiring an act of weighing and balancing among the principles of law and social values entailed.

Contrary to what the advocates of legal formalism would have us believe, the legal system is not merely a systemic collection of static legal concepts or fairly immutable general principles that can be arranged into a closed, hierarchical system. Rather, there is a *dynamic* element inherent in all legal systems. When the value premises at the back of law go through profound enough a change, the borderline between the routine cases and hard cases of legal adjudication, and between the typical and non-typical fact-situations, and between the isomorphic and non-isomorphic situations of legal decision-making is affected, as well. Any overly formalist account of law is poorly equipped to cope with such *structural dynamics of change* in law.

The illusion of having logical syllogisms and a genealogy or hierarchy of legal concepts (à la Puchta) resolve the intricacies of law is broken down so soon as the inherently *interest-laden*, *purpose-oriented*, and *value-bound* characteristics of law is openly acknowledged. Moreover, the blindness of legal formalism to the impact and mutual interplay of the institutional and societal value premises at the back of law, on the one hand, and to the economic, moral, and political effects of law in society, on the other, is hard to reconcile with in the era of modern law. If modern law is deemed, as Thomas Morawetz has suggested, as a *deliberative practice*, the identity of which is constantly subject to be defined, questioned, criticized, and possibly redefined anew by those engaged in the legal discourse,[46] any overly formalist notion of law is likely to invite heavy critique and will not survive for long.

[46]On law as a *deliberative practice*, Morawetz, "Epistemology of Judging: Wittgenstein and Deliberative Practices", pp. 19–23.