

## Jurisprudence of Interests

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## THE JURISPRUDENCE OF INTERESTS

HERBERT D. LAUBE

According to Jhering, the real force which moves man to action is interest. To him, action without interest is an absurdity because it is not practical. If law in general is human reason, as Montesquieu has said, quite clearly within the scope of reason is to be found a great diversity of conditions which impinge upon human life. The realm of law and the potential realm of reason cannot be coextensive. Reason and the materials of human existence upon which reason operates are easily distinguishable entities. As a social asset, pure reason would seem to have currency only in such rarified spheres as mathematics. The practical men of law have long since endorsed the position of Jhering who was unable to understand how pure reason, unsupported by some vital force, could be practical in delineating the field of human activity. Only the legally protected interests in any culture define the sphere of existing law.

When sociology awakened men to an awareness of the vital factors which condition life, the formal bounds of legal science were disrupted and legal problems were no longer restricted to the sterile dialectic process. When the concept of interests stirred the imaginations of men to the realities of living, the law passed into its modern phase of development. The conscious goal of human progress became the end of the law. The luring past became only a lingering memory except in so far as the history of its legal development yielded concepts, methods and ideals either as a warning against the dangers of conformity or as a challenge to the creative requirements of cultural growth.

During the past generation there clearly has been a mounting interest in the problem of legal method. The recent publication of *The Jurisprudence of Interests*<sup>1</sup> in the 20th Century Legal Philosophy Series is illustrative of the progress in legal theory since the turn of the century. In his *Survey of Social Interests*, Roscoe Pound has aptly noted the new viewpoint:

“There has been a notable shift throughout the world from thinking of the task of the legal order as one of adjusting the exer-

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<sup>1</sup> This little volume embodies the selected writings of six German scholars: Rümelin, Heck, Oertmann, Stoll, Binder and Isay. These selected writings were translated and edited by M. Magdalena Schoch. The book was published by Harvard University Press.

cise of free wills to one of satisfying wants, of which free exercise of the will is but one. Accordingly, we must start today from a theory of interests, that is, of the claims or demands or desires which human beings, either individually or in groups or associations or relations, seek to satisfy, of which, therefore, the adjustment of relations and ordering of conduct through the force of politically organized society must take account. . . . It is enough to say here that the classification into individual interests, public interests, and social interests was suggested by Jhering."<sup>2</sup>

The Historical School had little to say, according to Rümelin,<sup>3</sup> on how legal precepts have their origin in the needs of practical life or how practical life is affected by them. The student was guided to thinking in those terms only when he turned to the writings of Jhering. The Jurisprudence of Interests not only accentuated the importance of comparative law, but it gave meaning to the constellations of interests which evolved in the life of society. Indeed, it led to a unification of the social sciences. Factual research then became a necessity and Sociological Jurisprudence appeared upon the juristic horizon.

The alleged critical study by Isay of *The Method of the Jurisprudence of Interests* seems to be more amazing than it is illuminating. Fuller briefly characterizes the defects of his performance as follows:

"According to Isay, the Jurisprudence of Interests suffers chiefly from the fact that it accepts the traditional but untenable notion that the decision of cases is derived from rules. In fact, rules are a rationalization after the event. Isay sees the Jurisprudence of Interests as a quixotic attempt to reduce to rational terms ethical values that can only be felt, but not reasoned about."<sup>4</sup>

Let us examine a few excerpts which reveal the character of Isay's critical study. Some of these passages, which epitomize the issues, are apt to impress the reader as a baffling bit of dialectics.

#### *Color vs. Content*

"In the first place, the notion of 'interest' is too colorless and therefore almost devoid of content. It does not become clearer by being defined as man's 'desire for the goods of life.'"<sup>5</sup>

So declares Isay.

To declare that any concept which is colorless is therefore devoid of content is difficult to justify. The rationalism, of either Kant or

<sup>2</sup> Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943).

<sup>3</sup> THE JURISPRUDENCE OF INTERESTS 4 (1948).

<sup>4</sup> *Id.* at xxiv.

<sup>5</sup> *Id.* at 316.

Hegel, clearly had a content, yet the world has probably never discovered that either genius ever endowed rationalism with a particularly colorful quality. The content of a right<sup>6</sup> or a duty, of a power or a liability, or of any concept, is not dependent on the character of its colorfulness. If it were, virtue as a concept would be thrillingly iridescent. Whether an interest has an opalescent appeal depends largely upon the interest. The content of a concept depends upon its substance. Color is only a descriptive incident which might be significant to identify it, if not to appraise it. With conspicuous clarity, Stoll declares that legal concepts are "shorthand expressions for determined interest-situations and for evaluations of these situations."<sup>7</sup> Winfield says that many questions of public policy are uninteresting to the whole community.<sup>8</sup> Yet any specific question may present a vivid conflict of interests.

In the *Mogul Steamship Co.* case,<sup>9</sup> one of England's famous tea cases, the question of cheaper tea was presented, entangled in the issue of restraint of trade. The plaintiff was threatened with the certain ruin of his business by his defendant-competitors, who were cutting freight rates in the China tea carrying trade, if their conduct were not declared tortious by the court. The interest of the plaintiff found concrete embodiment in the controversy as did the interest of his competitors, and incidentally the interest of the British public in cheaper tea. In resolving the conflict of interests in the action, some of the judges refused to recognize that a combination in restraint of trade would give to the plaintiff any right of action against the defendants on the basis of public policy. What is public policy? It is a highly faceted concept. Upon occasion it is as variable in color as the chameleon. Why? Because it is dependent upon the diverse contexts in which a conflict may arise within any constellation of interests. The number of constellations and their complexity is limited only by the range of a given culture in a specific time and place.

The fallacy of Isay's approach was envisioned and clarified by an acute observation of Roscoe Pound. The flexibility of his three-fold classification of interest may require that one's purpose should direct one's viewpoint in weighing the various types of claims or demands. Indeed, the progress of all science is promoted by the expert who knows when and how to ask the proper question.

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<sup>6</sup> As Roscoe Pound says the term "right" is a word of many meanings. Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 3 (1943).

<sup>7</sup> THE JURISPRUDENCE OF INTERESTS 260 (1948).

<sup>8</sup> Winfield, *Public Policy in the English Common Law*, 42 HARV. L. REV. 76, 92 (1928).

<sup>9</sup> *Mogul Steamship Co., Ltd. v. McGregor, Gow & Co.*, [1892] A. C. 25.

"For some purposes and in some connections it is convenient to look at a given claim or demand or desire from one standpoint. For other purposes or in other connections it is convenient to look at the same claim or demand or the same type of claims or demands from one of the other standpoints. When it comes to weighing or valuing claims or demands with respect to other claims or demands, we must be careful to compare them on the same plane. If we put one as an individual interest and the other as a social interest we may decide the question in advance in our very way of putting it. For example . . . one may think of the claim of the employer to make contracts freely as an individual interest of substance. In that event, we must weigh it with the claim of the employee not to be coerced by economic pressure into making contracts to take his pay in orders on a company store, thought of as an individual interest of personality. If we think of either in terms of a policy we must think of the other in the same terms."<sup>10</sup>

According to Pound, the competing interests must be adequately aligned to be properly valued. It was only because of the great emphasis which was placed upon individual interests during the last century that no fruitful development of the content of the concept "public policy" was achieved.

### *The Theory of Value*

Since Heck considers that the Jurisprudence of Interests is "a method of legal science and hence of rational thought," Isay asks: "What is the rational proceeding by which the Jurisprudence of Interests establishes the content of a legal norm sought?" only to learn, quite discontentedly, that the answer, which all the adherents of Heck's school have given, is highly inadequate. The answer is that the jurists and judges should evaluate and balance the interests involved.<sup>11</sup> Isay is skeptical.

"For by telling the legislator or the judge that he must adjust those interests, we have told him nothing whatever about the content of the rule which is to be the legal norm. A method ought to give the legislator or the judge at least some directive as the viewpoints by which he should make the evaluation, and the standards by which he should weigh the interests thus evaluated. . . . Heck stresses the necessity of a 'value-research' and of a 'theory of values'—but he assigns this 'difficult task' to legal philosophy, which he regards as a pre-science in relation to legal science. He considers this function outside the pale of the Jurisprudence of Interests. 'The Jurisprudence of Interests is not a theory of substantive values.'

<sup>10</sup> Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 2 (1943).

<sup>11</sup> THE JURISPRUDENCE OF INTERESTS 315 (1948).

"This shows clearly that the Jurisprudence of Interests today does not yet have a 'method' for establishing the content of legal rules, and that, if it persists in its refusal to inquire into values and—as must be added—to elaborate standards for weighing values, it will never have such a method."<sup>12</sup>

Nothing would seem more clear than that the competing interests and their evaluations do depend upon the end of the law which is dictated by its purpose. The method by which the means to an end is achieved is a rational process. As Oertmann points out, the concept of interest is an expansive one. The ideal interests of morality as well as the utilitarian interests of the market place may be at stake. The death penalty in criminal law and the complex problems of sex in the question of divorce do raise disconcerting, if not baffling, issues of evaluations.<sup>13</sup> Whence comes this necessity of Heck for assigning the difficult task of evaluation to philosophy, the handmaiden of legal science? "Methodolatry" may have been the conditioning factor of Isay's criticism.

If one concedes that a value is a qualitative content of the apprehending process,<sup>14</sup> for any legal scientist to insist upon a formulation of a scale of values to complete the legal system is naive. Certainly, as yet, in the science of axiology no specific scale of values has ever been achieved, if indeed any is possible within the realm of human attainment. In his evasive reply to his critics, Heck says,

"True, we have not produced such a scale of values nor am I going to present one. The reason is simply that we do not aspire to such lofty aims. All we want to accomplish is to aid judges."<sup>15</sup>

Since the supremacy of its value dominates all other attributes of an interest in any given situation, candor seems to have required a more pertinent reply. Since the days of Plato, in the world of ideas, the question of value has been one of the most difficult of all science. It is a basic question.

One may agree with Heck that "The Jurisprudence of Interests is not a theory of substantive values."<sup>16</sup> The theory of value merely conditions the Jurisprudence of Interests. And one may be inclined to agree with Isay that "A 'rational' theory of evaluation is an impossibility," if emotion is eliminated from the law-finding process. Yet, it would seem that his pronouncement grievously lacks insight. Who would

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<sup>12</sup> *Id.* at 317.

<sup>13</sup> *Id.* at 75.

<sup>14</sup> REID, A THEORY OF VALUE 42 (1938).

<sup>15</sup> THE JURISPRUDENCE OF INTERESTS 31 (1948).

<sup>16</sup> *Id.* at 317.

say that psychiatry, which deals with materials of emotional creation, is not a rational science? When Heck stated that the function of a judge was to collaborate in the realization of recognized ideals within a given legal order, he had an objective approach. His declaration merely implied that in any action, a conflict of interests presupposes that, within a given culture, there are recognized ideals. Their pre-existence is assumed in the established legal order. Law may signify the "body of authoritative materials of or grounds of or guides to determination, whether judicial or administrative."<sup>17</sup> The question of the basis of the theory of value of those ideals is quite distinct from the actual existence of conflicting interests. The theory of value of the recognized ideals conditions the interests involved; all interests are not legally protected. Very properly Heck consigned the task of evaluation of those ideals to philosophy.

Kohler says that the Philosophy of Law seeks for the deeper significance of man's activity. To man has been given the task of creating and developing a culture to obtain permanent culture values.<sup>18</sup> The objective reality given to interest values in a specific culture may greatly aid in giving tangibility to this subtle and perplexing problem. If value is conceived as a logically primitive concept, then Isay's desire to have the Jurisprudence of Interests give a specific value content to a legal norm would seem to be mere fantasy. But if value is merely a function of a coherent organization of the experience of men, then how their interests gain recognition is easily exemplified. For value is the object of all our interests and the content of all our ideals,<sup>19</sup> despite the fact that it easily eludes definition and is relative to the specific context in which it plays a dominant role.

#### *The Realistic Theory*

In the same year that Isay's Critical Study appeared, Roscoe Pound was asking these pertinent questions. Are received ideals a part of the law? Shall we say that they are wholly outside the law? Or, are they a part of generally recognized materials of law? The fruitful answers to these questions may be found in *A Comparison of Ideals of Law*.<sup>20</sup> Pound so realistically fortifies his exposition that the dialectic fog seems to vanish. What Isay said was impossible becomes a confirmed reality. What is the relation of morality to the legal order? Let Pound present his perspective of the problem of evolving values in law.

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<sup>17</sup> Pound, *What Is Law?*, 47 W. VA. L. Q. 1, 4 (1940).

<sup>18</sup> HECK, *PHILOSOPHY OF LAW* 4 (1921).

<sup>19</sup> REID, *A THEORY OF VALUE* 295 (1938).

<sup>20</sup> Pound, *A Comparison of Ideals of Law*, 47 HARV. L. REV. 1 (1933).

"We soon find ourselves compelled to take account of certain ideals of what those authoritative materials should be and how they should be understood and applied in order to achieve the ends of the legal order and of the judicial process. . . .

"Such ideals may be held and made the background of their decisions by judges unconsciously or, one might say, half consciously. Often they have a traditional authority from having been received in the thinking and understanding of practitioners and judges—an authority therefore quite as legitimate as that of traditionally received precepts. Often they have been assumed in a long course of teaching and writing so that lawyers and judges, perhaps for generations, have assumed them as a matter of course as the criteria of valuing claims, deciding upon the intrinsic merit of competing interpretations, choosing from among possible starting points of legal reasoning or competing analogies, and determining what is reasonable and just. Sometimes we may find this body of received ideals referred to in the lists of *subsidia* in the codes or in authoritative or semi-authoritative expositions of the codes."<sup>21</sup>

A rational theory of value is found to impregnate law, infected with those irrational factors of emotion which make life vibrant with human interests. When one deserts the realm of life in the abstract and deals with the life of men in the concrete, competing interests strive for recognition. If history supplies the facts and the phases of the evolution of law, its cultural antecedents and their consequences, out of which law has emerged, it would seem that the humanism of our century has sufficiently sensitized our legal philosophy to the well-being of men so that it can evaluate with discrimination which of the competing interests shall be protected by law.

### *The Living Law*

According to Heck,

"It is preeminently through judicial decisions that law affects human affairs. Not until the law has been embodied in judicial decision does it become a living reality."<sup>22</sup>

If so, of necessity, the burden rests upon the lawyer to learn to understand the method employed by the judge in his decision. A generation ago, in the United States, some lawyers became fully aware of the functioning of the judicial process when the courts were considered merely as a formidable obstacle to be overcome in order to free the public from the domination of property interests. The problem was to remove the dead hand of precedent and to inculcate in the judiciary

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<sup>21</sup> *Id.* at 2.

<sup>22</sup> THE JURISPRUDENCE OF INTERESTS 37 (1948).

the spirit of the age. As a bulwark of special privilege, the "technicality-ridden" judges were declared a judicial oligarchy.<sup>23</sup>

Heck's main objection to the orthodox dogma of cognition was that the judge performed an abstract function of reckoning only with concepts and subsuming the pertinent facts under the rules by an objective process of logic. The judge was not concerned with the effect of his decision on human affairs. The judge felt no necessity to justify the result of his decision, having adhered to the conventional technique.

The two insights<sup>24</sup> which, according to Heck, serve as guides to Jurisprudence of Interests are:

1. The judge is bound by law. He shall adjust interests; in case of a conflict of interests, he shall evaluate them in the same way as the legislator.

2. Since the laws are often inadequate, and sometimes contradictory, due to the variety of the problems which arise in actual life, the judge is not expected to obey the law literally. He must evaluate the interests involved when the laws are silent; he must frame new rules and correct the established ones when the rules are deficient.

According to Cardozo, nine-tenths, and perhaps more, of the cases which come before the court are predetermined.<sup>25</sup> There is never complete freedom in the judicial process. The court is encompassed by statutes and their implications, by precedents and by the shadowy traditions of the past and its long established techniques. The limits of judicial freedom, Cardozo regarded as very narrow. The court may neither nullify nor pervert a statute because it does not believe in the values it reflects. It must be guided by objective values rather than by subjective ones. Cardozo endorsed the method proposed by Duguit<sup>26</sup> to resolve this judicial problem. Resort should be had to the aggregate social facts which produced the "juridical norm." What shall be the resort of the distracted judge when authority is silent? In the absence of the fortunate finding of a decision on all fours, the search may yield remote competing analogies. The conscious implications of this process Cardozo revealed to be the function of philosophy.<sup>27</sup> Pertinent to this issue, Heck cites the famous article of the Swiss Civil Code of 1907.<sup>28</sup> It affords a statutory basis for greater judicial freedom, which, in sub-

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<sup>23</sup> ROE, OUR JUDICIAL OLIGARCHY (1912).

<sup>24</sup> THE JURISPRUDENCE OF INTERESTS 40 (1948).

<sup>25</sup> CARDOZO, THE GROWTH OF THE LAW 60 (1924)

<sup>26</sup> *Id.* at 96.

<sup>27</sup> *Id.* at 98-99.

<sup>28</sup> THE JURISPRUDENCE OF INTERESTS 41 n. 18 (1948).

stance, he believes is valid for the German judge as well as the Swiss judge.

"The Law must be applied in all cases which come within the letter or the spirit of any of its provisions.

"Where no provision is applicable, the judge shall decide according to the existing Customary Law and, in default thereof, according to the rule which he would lay down if he had himself to act as legislator.

"Herein he must be guided by approved legal doctrine and case-law."

In referring to the divergent conceptions of the judicial office now taken by the members of our Supreme Court, Fuller says that these differences are not to be found in their economic and political views but rather "in divergent conceptions of the ways in which men should be governed, in opposing views of the judge's office and of his relation to statutes, and even in epistemological differences about the respective roles of reason and intuition in the ordering of human affairs."<sup>29</sup> If one were to epitomize Fuller's analysis of these diversities in the judicial approach, perhaps the simplest resort would lie in Cardozo's classic belief that the most important qualification of a judge is his philosophy. Probably, Cardozo would have accepted Whitehead's view that "Philosophy is an attitude of mind toward doctrines ignorantly entertained."<sup>30</sup>

### *Conceptualistic Quibbling*

Binder laments that the jurisprudence of the nineteenth century failed to keep its eyes on the practical viewpoint which guided Savigny.<sup>31</sup> Had practical appropriateness, instead of formal validity, been its guide, it would not have flung itself into the arms of formal logic and indulged in "fatuous conceptualistic quibblings." "A jurisprudence of concepts which had properly understood itself would certainly not have met with that fate." The vast amount of legal material to be unified and simplified made conceptualism a necessity. But long prior to the turn of the century, legal science complacently pursued its accustomed paths, undisturbed by any suggestion to remedy its apparent defects.<sup>32</sup> Even the uncritical credulity of Jhering's adherents, due to their partisanship, flaunted catchwords like "conceptualistic jurisprudence" with little awareness that they were quite devoid of concrete meaning. To Binder, this was astonishing.

<sup>29</sup> *Id.* at xvii.

<sup>30</sup> WHITEHEAD, *MODES OF THOUGHT* 233 (1938).

<sup>31</sup> *THE JURISPRUDENCE OF INTERESTS* 287 (1948).

<sup>32</sup> *Id.* at 279.

When Jhering emphasized the term "legal construction" as "among the most usual terms of art" in modern jurisprudence, Binder thought that legal science should have inquired into the origin of the term in order to ascertain the legal nature of a concept as *concept* "since all sciences, past and present, form and utilize concepts." The art of formulating concepts seems to consist of construing the simple principles of a statute in order to discover their "hidden riches." Through their interpretation there may be "created the multifariousness of the law." The function of modern legal science obtains its results "by freely developing concepts." To legal theory is assigned the practical function of distilling out of an abundant source material a *practical concept*, as did the Historical School.<sup>33</sup>

What were the revolutionary germs which brought to fine fruition the German Civil Code?<sup>34</sup> The struggle between the old and the new jurisprudence centered about the problem of gaps in the law. How were they to be filled? The dogma of the logical completeness of the law did not supply the answer. The dream of formal logic was to elevate the law to the rank of a science by a process of mathematical thinking. The dream was shattered by the shortcomings of its technique. Due to the aberrations of its conceptual approach, its method of construction was branded a "method of inversion."

### *The Problem of Construction*

Stoll asks: Is it possible for a legislator or a scholar to form concepts and build a system? That aim cannot be achieved arbitrarily; the goal must be determined by teleological considerations.<sup>35</sup> "A statute or a code is more than a sum of legal rules,"<sup>36</sup> since objective unity is a dominant consideration. The task of interpretation is to achieve a systematic development of the basic ideas which it formulated. A Jurisprudence of Interests adopts a method of interpretation in aid of the established system and repudiates the establishing of a "theoretical system" by a logical process of expansion. The avowed split between logic and legal science is unmistakable. The clear cleavage supplies this explicit admonition: "The formal-logical system does not yield legal rules for a teleological order." "The legislator is not a fanatic of logic."<sup>37</sup> The law is to be applied in accordance with facts in the light of its purpose.

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<sup>33</sup> *Id.* at 284.

<sup>34</sup> *Id.* at 290.

<sup>35</sup> *Id.* at 259.

<sup>36</sup> *Id.* at 263.

<sup>37</sup> *Id.* at 264.

The life of a concept depends, not upon the volition of a legislator, but on an evaluating thought. The social condition which dictated the legal relationship determines the content of the notion. The problem of construction is basically one of interest-analysis. The method of logic is convincingly appealed to when the issue of equivocation is presented by a choice between different results. Then arise the resolving considerations of utility. The evaluations of the interests reflect their protective origin, *i.e.*, legal rules and command concepts.<sup>38</sup>

The formulation of concepts, according to Heck, is primarily a process of giving a name to an idea.<sup>39</sup> However closely related a concept and its name may be, the fallacy is apparent; a concept is not merely a word. The dual task of the legislator is to correlate the concepts of the law with the concept of human relations. That is the problem of realism. Herein lies the dual possibility that he may err. Schöfeld's observation is in point.

"A scientific concept which does not rest upon the objectivity of actual facts is a non-concept which has no truth and no reality."<sup>40</sup>

What is the meaning which Stoll assigns to construction? To synthesize he adopts the definition of Rümelin and Heck. Construction is merely that "logical operation with concepts, whose practical aim is to complement the operation of subsumption, and whose theoretical aim is to complete the theoretical system and to prove its unity."<sup>41</sup> To construe a factual situation in order to supplement its subsumption is the immemorial method of judge and lawyers, firmly entrenched in current legal thinking. The function of scholarly research according to Stoll is to translate the rules enacted by the legislature in terms of concepts. "The rules themselves indicate the decisive characteristics of these concepts."<sup>42</sup>

### Conclusion

These collected essays, subsumed under the title of *The Jurisprudence of Interests*, will have a strong appeal to those of the legal profession, who have become conversant with the basic materials through the extensive writings and the stimulating teaching of Roscoe Pound. Their critical approaches frequently provide an inciting zest. Occasionally, the controversial differences may seem to call into play the dogmatic

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<sup>38</sup> *Id.* at 266.

<sup>39</sup> *Id.* at 267.

<sup>40</sup> *Id.* at 271.

<sup>41</sup> *Id.* at 272.

<sup>42</sup> *Id.* at 270.

ego of the essayist. Of necessity the issues involved not infrequently wing their way into the realm of the abstract. Fuller commends this book especially to the student who wishes to understand the civil law, although it offers no systematic statement of German law.<sup>43</sup> His commendation is based on the common conviction that the great need of a student who approaches a foreign system is not a knowledge of its rules but of its methods.

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<sup>43</sup> *Id.* at xxiv-xxv.