

CHRISTOPH-ERIC MECKE*

RUDOLF VON JHERING'S "STRUGGLE FOR LAW" —
THE REJECTION OF ALTERNATIVE FORMS
OF DISPUTE RESOLUTION?

1. JHERING'S TWO MAIN THESES WITH REGARD
TO THE "STRUGGLE FOR LAW"

When Rudolf von Jhering held his lecture entitled "The Struggle for Law" on 11 March 1872 for the Vienna Society of Jurists, the Wiener Juristische Gesellschaft, he could not have known that it would become the most famous lecture ever given in the history of jurisprudence¹. He was aware, however, of the fact that his statements would break new ground. We even know, from a stenographer's record of his words, that he spoke of experiencing "a certain degree of inhibition" at the beginning of his lecture². After all, his theses did, in fact, constitute what was considered a breach of taboo — at least within the German-speaking juristic circles of the time. The fact that he did not invoke "incredulous smiles"³ or even cold rejection from his listeners, as he had feared, but rather enthusiastic approval and even

* *Dr. jur. Brunswick European Law School (BELS), Institute for European and International Economic Law, Wolfenbüttel (Germany).*

¹ E. Bucher: *Gegen Jherings "Jherings Kampf um's Recht". Was die Privatrechtler aus unsinniger These lernen können* (in: P. Tercier et al. (ed.): "Gauchs Welt". *Festschrift für Peter Gauch zum 65. Geburtstag*, Zürich: Schulthess 2004, p. 46: "The paper, less than one hundred pages long and pocket size, was a much greater public success than any other juristic publication before or since". Nor has any other juristic lecture been translated and continues to be translated to this day into as many languages worldwide (cf. e.g. Seoul 1977, 2nd edition 1991; Tbilisi 2000, Bogotá 2007).

² R. von Jhering: *Der Kampf um das Recht. Vortrag des Hofrates Professor Jhering. Gehalten in der Wiener Juristischen Gesellschaft am 11. März 1872* (in: H. Klenner (ed.): *Der Kampf ums Recht*, Freiburg–Berlin: Rudolf Haufe 1992, p. 113.

³ *Ibidem*, p. 113.

loud bravos during his lecture⁴, may be explained by the specific make-up of his audience. The people who had come together on 11 March 1872 at the Vienna Society of Jurists, an institution where juristic practitioners received further professional training, were not primarily academic tutors of jurisprudence. Apart from certain well-known listeners such as Joseph Unger, one of Jhering's closest faculty friends in Vienna, the audience was made up of legal practitioners including solicitors, judges and officials as well as legal policy makers led by the Austrian Minister of Justice⁵.

More than 20 years have passed now since Herbert Hofmeister pointed out that Jhering had at the time struck a chord with these practitioners by focussing on the enforcement of law, which the solicitors and judges present at the lecture had to deal with every day. The Historical School of Jurisprudence, which had by then become predominant in Austria too, had disparagingly treated the aspect of enforcement as a matter of course that was of no academic interest whatsoever⁶.

Jhering's lecture centred on two main theses: firstly, the thesis that the struggle, or better the many major and minor struggles of plaintiffs in court for the enforcement of their rights, needed to be recognised as more than just a mundane private affair (I will touch upon his own exceptions in due course) but that it in fact constituted "the great and sublime aspect of our ethical world order", the implementation of the "notion of law" and of justice itself⁷. There is hardly a more idealistic height to which Jhering could have elevated the everyday court trial and with it both the plaintiff and the work pursued by the jurists involved. On the other hand, Jhering no longer saw the science of law as playing a fundamental role, despite the fact that it had been viewed as solely responsible for questions of the "notion" of law for centuries, both in the era of natural law and at the time of the Historical School of Jurisprudence. In his view, it was clearly up to the state legislators to immediately eliminate any existing "imperfection[s] of the legal institutions" concerning the judicial enforcement of an individual's own rights. Otherwise, he warned, the "struggle for law" would turn into a state-inflicted "struggle against law"⁸. This was Jhering's *first* thesis which, it appears, for the first time concentrated the minds of legal theorists on what was taking place in the courts every day.

The *second* main thesis of the lecture did not refer to the implementation of law but a step before that, i.e. the creation of law. In a head-on attack against the then prevailing theory, put forth by Friedrich Carl von Savigny and Georg Friedrich Puchta, concerning the creation of law, which set out that the "creation of law [...]"

⁴ *Ibidem*, pp. 127, 130.

⁵ H. Hofmeister: *Jhering in Wien* (in:) *Der Kampf ums Recht. Forschungsband aus Anlaß des 100. Todestages von Rudolf von Jhering*, Berlin: Duncker & Humblot 1995, pp. 21–22.

⁶ *Ibidem*, p. 24.

⁷ R. von Jhering: *Der Kampf um's Recht* (in:) H. Klenner (ed.): *Der Kampf ums Recht*, *op. cit.*, p. 57.

⁸ *Ibidem*, p. 69 (original emphasis).

like that of language or art [...] did not require a struggle, a fight or even a search”⁹, Jhering stated that, much like the implementation of the subjective rights in a trial, the creation of the objective law, i.e. the operative legal norms which formed the basis for any subjective right of the individual, required a “struggle” and more specifically a “struggle” between social antagonistic individual and group interests. He went on to state that, contrary to what the Historical School of Jurisprudence had claimed since Savigny and Puchta, the constant development of law was not an expression of a “quietly operating force of truth” which, significantly, was reflected in non-state customary law rather than in state legislation, but that the exact opposite was true, that it was “the law, i.e. the deliberate [...] acts of state power” which initiated and enforced “all intervening reforms” in the area of law¹⁰. However, since any changes to prevailing law threatened the interests of individuals, the creation of new laws regularly appeared to be the result of a legal policy “struggle”, “where, as with every struggle, it was not the reasoning that tipped the scales but the balance of power between the forces involved”. The result, according to Jhering, was that the content of a new law, much like in a “parallelogram of forces”, was often an expression of a “diversion from the original line to the diagonal”¹¹. This was Jhering’s second thesis.

Both theses presented by Jhering in 1872 tied in with a thesis that he had first published shortly before that, in 1865, in the final volume of his first major work entitled *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* [The spirit of Roman law at the various stages of its development]. It stated that the subjective rights of the individual were “*interests under legal protection*”¹², no more or no less. As we all know, Jhering’s methodological and theoretical views would prevail over the coming decades not just in Germany but also in many other countries, including the USA and in the 20th century led to the jurisprudence of interests. In fact, in view of American legal realism, Jhering was still hailed as one of the “god-fathers”¹³ of American jurisprudence in the mid-20th century.

What is not as well known, however, is that Jhering’s thesis of the interest-based creation of law was not completely new in 1870s Germany. Ten years earlier, the young historian Heinrich von Treitschke had already spoken of the “thousand necessary collisions of rights and interests”¹⁴. Another ten years before that, in 1850, the jurist and early sociologist Lorenz von Stein had identified the “*interest* [...] of *each*

⁹ *Ibidem*, p. 12.

¹⁰ *Ibidem*, pp. 12–13.

¹¹ *Ibidem*, p. 14.

¹² R. von Jhering: *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, Dritter Theil, Erste Abtheilung, Leipzig: Breitkopf und Härtel 1865, § 60, p. 317 (original emphasis).

¹³ W. Seagle: *Rudolf von Jhering: Or Law as a Means to an End*, University of Chicago Law Review 1945–1946, Vol. 13, Iss. 1, p. 87.

¹⁴ H. von Treitschke: *Die Freiheit* (Leipzig 1861) (in:) *Ausgewählte Schriften von Heinrich von Treitschke*. Erster Band, Leipzig 1907, pp. 17–18.

individual in relation to every other” as being the “*principle of society*”¹⁵. Finally, in 1865, the jurist and social historian Wilhelm Arnold went one step further, by seeing “many intersecting, conflicting and opposing interests in economic life”, which the legislative powers would need to “weigh up against each other, examine their greater or lesser justification and then make a decision”¹⁶. This was the same year in which Jhering, in the third volume of his major work *The Spirit of Roman Law*, for the first time combined the concept of subjective rights with the concept of interests. It was just a small step from Arnold’s position to Jhering’s view of the law as an expression of a “parallelogram of forces” and interests, which in the early 20th century would be adopted almost verbatim by the founder of the jurisprudence of interests, Philipp Heck¹⁷.

The actual novelty in Jhering’s lecture on the “struggle for law”, in fact, lay elsewhere: on the one hand, in the first thesis about the moral and, as Jhering termed it, “socio-political”¹⁸ duty of each plaintiff to fight for his subjective rights in court as mentioned in the beginning¹⁹. On the other hand, Jhering’s view on the creation of law, about which he spoke publicly for the first time in 1872, constituted a break with tradition: here was an avowed student of the Historical School of Jurisprudence, who had, in 1852, still dedicated his first major work *The Spirit of Roman Law* to the “great master Georg Friedrich Puchta”²⁰, i.e. to the other forefather besides Friedrich Carl von Savigny of the Historical School of Jurisprudence, and this former student now looked upon the conflicting interests of individuals and individual social groups and saw them as a constructive force behind the contents of legal norms and even as a necessary precondition for legal reforms. This view stood in complete contrast to the Historical School of Jurisprudence, which saw such conflicting individual and group interests as purely destructive forces that would lay waste to law. Of course, the Historical School of Jurisprudence acknowledged the fact that law developed over time, thereby making a legal reform necessary. In its view, however, such legal reform should not be initiated by conflicting interests but by the so-called *Volksgeist*, by the collective spirit and the general “needs” of the people,

¹⁵ L. Stein: *Geschichte der socialen Bewegung in Frankreich von 1789 bis auf unsere Tage*, Erster Band, Leipzig 1850, p. XLI (original emphasis).

¹⁶ W. Arnold: *Cultur und Rechtsleben*, Berlin 1865, pp. 117–118.

¹⁷ Philipp Heck as a young man, in his habilitation treatise, already spoke of the law as a “product of conflicting forces” (P. Heck: *Das Recht der Großen Haverei*, Berlin: Müller 1889, p. 591). Jhering’s equation of diagonal forces with a parallelogram would resurface in the 20th century at the core of Heck’s explanation of the contrast between “conceptual jurisprudence” (*Begriffsjurisprudenz*) that was to be overcome and the “jurisprudence of interests” (*Interessenjurisprudenz*) which should be practised, when he labelled the law as “the resultant, a diagonal of conflicting forces, so to speak, whose impact is only apparent to us as a conflict of interests” (P. Heck: *Begriffsbildung und Interessenjurisprudenz*, Tübingen: J.C.B. Mohr (Paul Siebeck) 1932, p. 46).

¹⁸ R. von Jhering: *Kampf...*, *op. cit.*, p. 56, on the phrase “do not tolerate injustice” and on the “socio-political — and notably not [...] ethical — meaning” of the phrase.

¹⁹ R. von Jhering: *Kampf...*, *op. cit.*, p. 27 (“duty to act against the common good”).

²⁰ R. von Jhering: *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, Erster Theil, Leipzig: Breitkopf und Härtel 1852, p. III.

i.e. of all members of a legal order rather than just certain individuals. Moreover, according to the Historical School of Jurisprudence, the authoritative and specialist expertise to identify such collective "needs" with regard to legal questions in legal orders of advanced civilisations should not have been sought amongst state legislators but amongst the representatives of jurisprudence²¹.

However, Jhering's theses on the "struggle for law" put an end to all of this. In his view, the populace no longer needed any self-appointed representatives who, under sublimation of the conflicting interests, which of course existed in reality, would always identify a single "need" which was purportedly common to all, no matter what question of law was being examined. Jhering envisaged a system in which this task was fulfilled by state legislators²² and the individual stakeholders concerned — today we would use the term lobbyists — who influence legislators in such a way that the resulting laws are in fact a reflection of a parallelogram of societal forces, to stay with Jhering's choice of metaphor. Whilst the advancement of this sociological manner of viewing the creation of laws as based on conflicting social interests is very familiar to us today, in the late 19th century it ultimately spelled the end of the Historical School of Jurisprudence founded by Savigny in 1814. This is — to sum up the first intermediary conclusion of my chapter — where one could see the significance of Jhering's lecture on the "struggle for law" from the point of view of the history of legal theory.

2. ALTERNATIVE MECHANISMS OF DISPUTE RESOLUTION

We can, of course, now ask: do Jhering's theses even allow the dispute resolutions that occur every day when cases are settled out of court, by means of mediation or even by national and international courts of arbitration? Is the "struggle for law" not in fact the exact opposite of the concept of arbitration as a substitute for litigation, in German "Schlichten statt Richten"²³, which underpins the concept of arbitration, i.e. the settlement in private law of a dispute that is not based on conflict but

²¹ On the contrast between "needs" and "interests", not just terminologically, from the point of view of the Historical School of Jurisprudence, which Jhering disagreed with, see C.E. Mecke: *Begriff und System des Rechts bei Georg Friedrich Puchta*, Göttingen: V&R unipress 2009, pp. 181–183, 210–212, 338.

²² R. von Jhering: *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, Zweiter Theil, Zweite Abtheilung, Leipzig: Breitkopf und Härtel 1858, § 38, p. 352, listed the "positive legislative powers" in this order: "law, customary law, autonomy of commerce". However, in his "struggle for law", he very clearly expressed the view that state legislation was the significant source of the law (R. von Jhering: *Kampf...*, *op. cit.*, p. 13). He had already accused the Historical School of Jurisprudence of having turned customary law into the "pet of current jurisprudence" maintaining that "it seems as if one felt obliged to compensate it for its previous neglect by bestowing unconditional love" (R. von Jhering: *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, Zweiter Theil, Erste Abtheilung, Leipzig: Breitkopf und Härtel 1854, § 25, p. 25).

²³ P. Collin: *Judging and Conciliation — Differentiations and Complementarities*, Max Planck Institute for European Legal History No. 2013-04, pp. 5–13.

on cooperation and that leads towards a compromise? And finally: would Jhering, who was a proponent of the legal “struggle”, have even been aware of the concept of arbitration and recognised it as an alternative form of dispute resolution?

Let us start with the last question. Of course, Jhering was aware of the concept of arbitration. After all, this alternative form of dispute resolution which relies on an arbitrator who has been privately hired by both parties in the dispute has existed at least as long as the concept of conflict resolution in a state court. Roman law already made a distinction between a *iudex*, a judge, who ruled in disputes between two parties where one person’s word stood against the other’s, and an *arbiter*, an arbitrator, who, in contrast to the judge, was not bound by the rules of praetorian law and could thus use his discretion to negotiate a compromise between the two parties²⁴. Also the latter is occasionally mentioned in Jhering’s work²⁵. Even his work *The Struggle for Law* mentions church courts of arbitration in the Late Roman Christian period and Jewish courts of arbitration in the Middle Ages as additions to state jurisdiction²⁶. However, in this case Jhering sees arbitration as a consequence of a process of degeneration of the state in the sense that, according to Jhering, arbitration only gains importance in periods where the legal institutions of a state, and first and foremost the judiciary, no longer completely coincide with the “national sense of justice” (the “nationales Rechtsgefühl”²⁷).

Arbitration did, in fact, experience an upswing in the areas of the church, the cities and the city guilds in the Middle Ages, a period where a central state power in the sense of the modern concept of sovereignty was still lacking but where several partial legal systems co-existed in the same territories. Nowadays, a similar pluralism in terms of the sources of law appears to be in the process of forming. The modern model of almost absolute internal and external state sovereignty, which had prevailed elsewhere for several centuries, did not establish itself fully and at national level until the founding of the German Empire in 1871. Having dominated the entire 20th century, it is now increasingly being questioned and challenged by a new legal pluralism²⁸. This legal pluralism is based on privatisation, the decentralisation of public services and on the global communication between private stakeholders in the world economy and the Internet, but also in international sports and non-commercial NGOs²⁹. It is, therefore, no coincidence that international arbitration, outside of tra-

²⁴ A. Schweppe: *Das römische Privatrecht in seiner heutigen Anwendung*, Erster Band, Einleitung und allgemeiner Theil, Göttingen: Vandenhoeck und Ruprecht 1828, § 122, pp. 262–263; K.-H. Ziegler: *Arbiter, arbitrator und amicable compositor*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte 84 (1967), pp. 377–379.

²⁵ R. von Jhering: *Geist*, Erster Theil (1852)..., § 12, pp. 159–161; R. von Jhering: *Geist*, Zweiter Theil, Zweite Abtheilung (1858)..., *op. cit.*, p. XV; R. von Jhering: *Geist*, Dritter Theil, Erste Abtheilung (1865)..., *op. cit.*, § 52, pp. 72–73; § 54, p. 185.

²⁶ R. von Jhering: *Kampf...*, *op. cit.*, pp. 71, 125.

²⁷ *Ibidem*, p. 125.

²⁸ S. Meder: *Doppelte Körper im Recht*, Tübingen: Mohr Siebeck 2015, pp. 248–270.

²⁹ S. Meder: *Ius non scriptum — Traditionen privater Rechtsetzung*, Tübingen: Mohr Siebeck 2008, pp. 103–105.

ditional commercial arbitration, is experiencing an unprecedented rise, chiefly in terms of the settlement of disputes between investors and the state, but also in the area of Internet legislation, including the resolution of transnational trademark disputes arising from the allocation of Internet addresses by the Internet Corporation for Assigned Names and Numbers (ICANN). Following the political decision to phase out the use of nuclear energy, the German government and public are currently waiting with baited breath for the outcome of a claim for compensation, estimated at almost 5 billion euros, filed by the Swedish power company Vattenfall against Germany at the International Centre for the Settlement of Investment Disputes (ICSID) in New York, an international court of arbitration set up by the World Bank Group. It is not just this dispute that raises, in principal, the question as to how a nation state is still able to preserve its political prerogatives against purely economic rationality.

3. HOW JHERING QUALIFIED HIS THESIS ON THE NECESSITY OF A STRUGGLE FOR LAW

So what is the link between the current global reality and Jhering's "struggle for law"? My answer is this: there is none, perhaps, at first glance, but much more than one would expect at a second glance! At first glance, there is hardly a greater contrast than that between the anonymous world of globally linked private legal entities on the one hand, some of which have financial resources that would put any state budget to shame, and the pre-capitalist world conjured up by Jhering's "struggle for law" with a single creditor and an individual debtor made of flesh and blood, whose deliberate non-fulfilment of a contractual agreement under the law of obligations would offend the creditor's honour and morally and ethically stir his blood to such a degree that he would feel not just legally but, indeed, morally bound to pursue the debtor even if, as Jhering states, it meant his ruination.

At second glance, however, the situation presents itself quite differently. A closer inspection of Jhering's lecture clearly shows that he was by no means demanding the unconditional prosecution of debtors in order to maintain the creditors' self-respect in *all* civil-law disputes and against all economic reason, or that he would have styled it as the "great national duty"³⁰ of the creditors concerned — this, incidentally, and I can only touch upon it here, would in fact constitute an anti-liberal aspect in Jhering's legal thinking! It is important to note that Jhering actually demanded the unconditional prosecution of the debtors only in cases where the latter disputed the existence of the debt against their own better judgment³¹. In all *other*

³⁰ R. von Jhering: *Kampf...*, *op. cit.*, p. 57.

³¹ Quite clearly, Jhering had his work-shy maidservant in mind here. See the interesting contribution in this volume by Inge Kroppenber and Nikolaus Linder who have analysed the extant court records pertaining to the peculiar legal dispute between one of the most renowned jurists of his time and his maidservant. The latter was

cases, where the debtors had a valid reason to believe that they were wrongfully pursued, the economic interest of the creditor alone was the decisive aspect, even according to Jhering. Jhering specifically says:

“Towards the bona fide [sic!] possessor of my chattel, I stand in a very different situation. Here the question is what I have to do. It is not a question of my feeling of legal right, of my character, of my personality, but a pure [sic!] question of interest; for I have nothing here at stake but the value of my chattel, and therefore I am entirely warranted in weighing the gain and stake, and the possibility of a doubtful outcome, one against the other and then make my decision: to sue, abstain from suing, or settle. Settlement [scil. in court] [...] with the premises which I propose here, is the best means of resolving the dispute”³².

Unfortunately, these crucial words uttered by Jhering are still being overlooked, even by established exponents of jurisprudence, which results in Jhering’s famous paper in fact being reduced to nothing more than a “misguided thesis”³³.

In Jhering’s view, the basic evil of his time was that no difference was made between two types of cases, i.e. between cases where a debtor denied the debt he owed to his creditor against his own better judgment and “in a shameless fashion”³⁴ and the other cases, where both the creditor and the debtor were convinced of making a rightful claim, and where one or the other had to be disabused of this notion by the final judgement of the court³⁵. Unfortunately, he himself intentionally refrained from pointing out that these *other* cases were not the exception, even in his time, but constituted the vast majority of civil-law disputes. Despite Jhering’s teaching on the struggle for law, this again opened up the possibility for the creditor who was faced with the question of whether or not to sue the debtor to rationally weigh up all the advantages and disadvantages of a trial and potentially even to seek a settlement in or out of court as “the most appropriate solution”³⁶ to the legal dispute. In these cases, Jhering was very clearly *opposed* to a “struggle for law” at all costs, to an “insistence on being right”, a “litigiousness”, a pathological “sense of justice” and even to an “aberration of the sense of ownership” on the part of the creditor³⁷.

represented by a very capable lawyer who made Jhering look rather poor as an advocate acting on his own behalf. Jhering’s feelings of justice not having been served in court may have additionally fuelled his emotions, which are still noticeable in his lecture.

³² R. von Jhering: *Kampf...*, *op. cit.*, pp. 29–30.

³³ A recent example of this being E. Bucher’s paper, the subheading of which uses these very words: E. Bucher: *Gegen Jherings...*, *op. cit.*, pp. 46, 48. Contrary to Jhering’s own words, Bucher in fact accuses him of promoting the struggle simply for the sake of the struggle. This accusation, however, is not justified. See, chapter 4 of this paper for a summary of the elements in Jhering’s paper which were, in fact, of their time and not without flaw.

³⁴ R. von Jhering: *Kampf...*, *op. cit.*, p. 93.

³⁵ *Ibidem*, p. 93.

³⁶ *Ibidem*, p. 30.

³⁷ *Ibidem*, pp. 31–32. After his paper had been published, Jhering felt compelled to add a footnote at this point (*ibidem*, p. 158, no. 49): “The above passage should have guarded me from the accusation that I promoted the struggle for law without taking into account the conflict that prompted it. Only where a person is trampled underfoot

A second point, however, is also worth mentioning. By 1872, the worlds of Berlin and Vienna were no longer as pre-capitalist as Jhering and his audience, whose thundering applause was recorded by the stenographer, would have apparently liked them to be. Jhering's lecture can, in fact, be read as a protest speech against the "sludge of the stock market game and [...] shareholder fraud"³⁸. In the burgeoning heavy and transport industries and on the complementary capital market, even at that early stage, an individual's personality and character, a person's sense of justice and injustice, in short: the man of flesh and blood became expendable. Jhering was not the only member of the educated middle-class to find this abhorrent and to voice his aversion to the "stark, naked materialism in the nether regions of egoism and of scheming", along with a longing for an "idealism", "where all sophistication and calculation" have come to an end³⁹. In this he has found allies in all subsequent critics of unbridled capitalism including, incidentally, those who are currently taking to the streets and protesting against free-trade agreements such as the TTIP (Transatlantic Trade and Investment Partnership) and the international arbitration envisaged as part of it.

Does this mean that Jhering, if he was alive today, would align himself with those law professors who prepare legal opinions on the lack of democracy and transparency in free-trade agreements on behalf of transnational anti-globalisation organisations such as ATTAC? Of course, the question cannot be answered due to its deliberately unhistorical speculativeness. What can be said with certainty, in citation of legal historical sources and later statements on legal policy, however, is that Jhering on the one hand saw the inherent danger in the "omnipotence of the state"⁴⁰ and its destruction of an individual's civil liberties, whilst at the same time being ahead of his time by viewing as dangerous the "excessive accumulation" of capital in the hands of a few, which gives "such a significant predominance to the producer over the ordinary man" in a system where individual "talent and personal earning capacity [...] are completely powerless against such wealth"⁴¹. We also know, from the "conversation in old age" (*Altersgespräch*) with his son Hermann in 1887, that Jhering saw the "latifundial system", as he called it, of the big East-Elbian landowners in the east of the German Empire as posing a major social problem, which in his opinion would even have justified massive infringements of

in his rights have I declared the vindication of one's rights to be a vindication of one's self, and thus a matter of honour and moral duty. When this difference, on which I have laid so much stress, is overlooked, and the absurd view is attributed to me that quarrel and dispute are beautiful, and that litigiousness and dogmatism are virtues, I can find no other explanation than to assume either 'dishonesty' on the part of the reader or 'negligence in reading'". However, this clarification did not help Jhering's cause as far as some fellow experts are concerned (see, footnote 33).

³⁸ R. von Jhering: *Kampf...*, *op. cit.*, p. 40.

³⁹ *Ibidem*, pp. 43, 45.

⁴⁰ R. von Jhering: *Geist*, Zweiter Theil, Erste Abtheilung (1854)..., *op. cit.*, § 30, p. 131.

⁴¹ *Ibidem*, § 31, p. 156; § 34, p. 246 footnote 369; § 34, p. 255.

the freedom of ownership, for instance by [quote] limiting the “maximum sizes [...] of [...] the huge estates owned by individuals”⁴².

Of course, we do not know how Jhering would have judged the *Vattenfall vs. Germany* case that is currently pending before the international court of arbitration in New York. However, presumably Jhering would have come to the same conclusion as the German Federal Constitutional Court did in its ruling on the appeal made by Vattenfall in Germany in parallel to the claim before the New York court of arbitration. The headnotes of the ruling of December 2016 state: “Under certain circumstances” there is “a justified trust” on the part of the foreign investor in the “legal position underpinning the investment in assets and their operability”, in this case the nuclear plants and the fact that their ownership is protected by the constitution, though this ownership protection cannot be seen as absolute vis-à-vis the political prerogatives⁴³. After all, Jhering did not intend to make a case for “the insatiability of egotism” in the name of the “sanctity of ownership”, as Jhering termed it in his second, unfinished major work *Law as a Means to an End*, in German *Der Zweck im Recht*⁴⁴. I am therefore quite sure that he would have expected the international court of arbitration in New York to make a ruling that was as differentiated and legally comprehensible and — in contrast to common courts of arbitration practice⁴⁵ — as transparent for the public as the ruling issued by the German Federal Constitutional Court.

4. ERA-SPECIFIC ISSUES AND WEAKNESSES OF JHERING’S THESES

It is not possible to do justice to Jhering’s lecture and paper “The Struggle for Law” if it is not treated as a product of its time and viewed from Jhering’s personal point of view. He also displayed a lifelong tendency towards a very specific type of rigorousness in the service of justice. As a young man, he was exposed to criticism from his colleagues because he believed that someone who wished to “promote a principle” *must* wish to pursue it ruthlessly and without regard for oneself or others, whilst accepting all consequences of the principle, even if the results in an actual law case were shown to be absurd or unjust⁴⁶. When he realised, as a middle-

⁴² H. von Jhering: *Erinnerungen an Rudolf von Jhering* (1912) (in:) H. Ehrenberg (ed.): *Rudolf von Jhering in Briefen an seine Freunde. Mit zwei Bildnissen*, reprinted Leipzig edition of 1913, Aalen: Scientia 1971, p. 457.

⁴³ Federal Constitutional Court of the German Federal Republic, Judgement of the First Senate of 6 December 2016, paragraph 1 BvR 2821/11, headnote 6 (http://www.bverfg.de/e/rs20161206_1bvr282111.html).

⁴⁴ R. von Jhering: *Der Zweck im Recht*, Erster Band, Leipzig: Breitkopf und Härtel 1877, p. 520 (original emphasis).

⁴⁵ The parallelisation of peoples and individuals can be found as early as the 18th century, for instance in Johann Gottfried Herder’s thinking.

⁴⁶ C.-E. Mecke: *Objektivität in Recht und Rechtswissenschaft bei G.F. Puchta und R. v. Jhering*, Archives for Philosophy of Law and Social Philosophy 94 (2008), p. 165–166.

-aged man, that this had been misguided and went on to denounce it as "conceptual jurisprudence" (*Begriffsjurisprudenz*), he sought and found a new area upon which to exert his rigorousness for the sake of justice, namely the struggle not for insight but for the enforcement of law. As he had been wont to do in his youth, he once again saw his "idealism" as a "question of character". According to Jhering, not all but certain disputes could, in the eyes of certain individuals, turn from being "a mere question of interest to a question of character"⁴⁷, which required a "struggle" using legal means.

Most importantly, however, Jhering was a child of his time and he uttered thoughts and used words that seem slightly strange to our ears today. Even the word "struggle"⁴⁸ had not yet become historically charged but Jhering and his contemporaries would have viewed it as an expression of the modern view of real life in nature⁴⁹ and in society. Another factor is the parallelisation of peoples and individuals⁵⁰, which, while not devised by Jhering⁵¹, was restricted in a pseudo-naturalistic system of thought by himself and some of his contemporaries at the end of the 19th century. From there it was only a short step to issuing a warning against the "exposure of law" by the individual to the "life of a people; all peoples are on their own, no higher power will take on the struggle for a people's rights"⁵². However, such era-specific marginal statements have no impact on the two main theses of Jhering's lecture. The "struggle" in his lecture is a struggle for a person's rights using legal means, or in Jhering's own words: "[...] the struggle for one's rights [always] equates to a struggle for the law [...]"⁵³.

⁴⁷ R. von Jhering: *Kampf...*, *op. cit.*, pp. 26, 74.

⁴⁸ The entire paper contains a rhetoric that appears misguided from today's point of view, but would have been part of the common mindscape and parlance amongst the men of his generation, not only in Germany but all over Europe. See, R. von Jhering: *Kampf...*, *op. cit.*, p. 54 ("flees", "treachery", "defend"), pp. 56–57 ("the battle against the enemy from without", "the battle against the enemy from within", "cowardly flight as a betrayal of the commonwealth"), p. 117 ("flight in battle"), p. 129 ("the duty of cowardice as scientifically expressed"), to name but a few examples.

⁴⁹ C. Darwin: *On the Origin of Species by Means of Natural Selection: or the Preservation of Favoured Races in the Struggle for Life*, London: Murray 1859. At the time of Jhering's lecture, Darwin's "struggle for life" had already become a general topic of discussion. It is quite possible that Jhering was even inspired by Darwin's work when he chose the title of his lecture, a work which, at a time when no categorical distinction was yet made between the natural sciences and the humanities, spelled a sea change in the history of scientific research overall. And yet, we may not view Darwin's work as holding the key to Jhering's legal thinking, which, despite his very obviously held belief in the forces of nature and mechanics, was still, even at the end of his life, rooted in the Christian manifestation of God (R. von Jhering: *Ueber die Entstehung des Rechtsgefühles, revidierte und mit einigen textkritischen Anmerkungen und Verweisungen versehene Wiedergabe des Vortragsprotokolls vom 12.03.1884* (in:) O. Behrends (ed.): *Rudolf von Jhering. Über die Entstehung des Rechtsgefühles mit einer Vorbemerkung und einem anschließenden Interpretations- und Einordnungsversuch von Okko Behrends*, Napoli: Jovene 1986, pp. 12, 54.

⁵⁰ R. von Jhering: *Kampf...*, *op. cit.*, pp. 10, 24–25, 104.

⁵¹ *Ibidem*, p. 62.

⁵² *Ibidem*, p. 43.

⁵³ *Ibidem*, p. 62.

BIBLIOGRAPHY

- Arnold W.: *Cultur und Rechtsleben*, Berlin: Dümmler 1865.
- Bucher E.: *Gegen Jherings "Jherings Kampf um's Recht". Was die Privatrechtler aus unsinniger These lernen können* (in:) P. Tercier et al. (ed.): *"Gauchs Welt". Festschrift für Peter Gauch zum 65. Geburtstag*, Zürich: Schulthess 2004 (http://www.eugenbucher.ch/pdf_files/88.pdf).
- Collin P.: *Judging and Conciliation — Differentiations and Complementarities*, Max Planck Institute for European Legal History No. 2013-04 (<http://ssrn.com/abstract=2256508>).
- Darwin C.: *On the Origin of Species by Means of Natural Selection: or the Preservation of Favoured Races in the Struggle for Life*, London: Murray 1859.
- Heck P.: *Das Recht der Großen Haverei*, Berlin: Müller 1889.
- Heck P.: *Begriffsbildung und Interessenjurisprudenz*, Tübingen: J.C.B. Mohr (Paul Siebeck) 1932.
- Hofmeister H.: *Jhering in Wien* (in:) *Der Kampf ums Recht. Forschungsband aus Anlaß des 100. Todestages von Rudolf von Jhering*, Berlin: Duncker & Humblot 1995.
- Jhering H. von: *Erinnerungen an Rudolf von Jhering* (1912) (in:) H. Ehrenberg (ed.): *Rudolf von Jhering in Briefen an seine Freunde. Mit zwei Bildnissen*, reprint of the Leipzig edition of 1913, Aalen: Scientia 1971.
- Jhering R. von: *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, Erster Theil, Leipzig: Breitkopf und Härtel 1852.
- Jhering R. von: *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, Zweiter Theil, Erste Abtheilung, Leipzig: Breitkopf und Härtel 1854.
- Jhering R. von: *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, Zweiter Theil, Zweite Abtheilung, Leipzig: Breitkopf und Härtel 1858.
- Jhering R. von: *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, Dritter Theil, Erste Abtheilung, Leipzig: Breitkopf und Härtel 1865.
- Jhering R. von: *Der Zweck im Recht*, Erster Band, Leipzig: Breitkopf und Härtel 1877.
- Jhering R. von: *Ueber die Entstehung des Rechtsgefühles, revidierte und mit einigen textkritischen Anmerkungen und Verweisungen versehene Wiedergabe des Vortragsprotokolls vom 12.03.1884* (in:) O. Behrends (ed.): *Rudolf von Jhering. Über die Entstehung des Rechtsgefühles mit einer Vorbemerkung und einem anschließenden Interpretations- und Einordnungsversuch von Okko Behrends*, Napoli: Jovene 1986.
- Jhering R. von: *Der Kampf um das Recht. Vortrag des Hofrates Professor Jhering. Gehalten in der Wiener Juristischen Gesellschaft am 11. März 1872* (in:) H. Klenner (ed.): *Der Kampf ums Recht*, Freiburg–Berlin: Rudolf Haufe 1992.

- Jhering R. von: *Der Kampf um's Recht* (in:) H. Klenner (ed.): *Der Kampf ums Recht*, Freiburg–Berlin: Rudolf Haufe 1992.
- Mecke C.-E.: *Objektivität in Recht und Rechtswissenschaft bei G.F. Puchta und R. v. Jhering*, Archives for Philosophy of Law and Social Philosophy 94 (2008).
- Mecke C.-E.: *Begriff und System des Rechts bei Georg Friedrich Puchta*, Göttingen: V&R unipress 2009.
- Meder S.: *Ius non scriptum — Traditionen privater Rechtsetzung*, Tübingen: Mohr Siebeck 2008.
- Meder S.: *Doppelte Körper im Recht*, Tübingen: Mohr Siebeck 2015.
- Renner M.: *Zwingendes transnationales Recht. Zur Struktur der Wirtschaftsverfassung jenseits des Staates*, Berlin: Nomos 2011.
- Seagle W.: *Rudolf von Jhering: Or Law as a Means to an End*, University of Chicago Law Review 1945–1946, Vol. 13, Iss. 1 (<https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=https://de.search.yahoo.com/&httpsredir=1&article=2396&context=ucilrev>).
- Schweppe A.: *Das römische Privatrecht in seiner heutigen Anwendung*, Erster Band, Einleitung und allgemeiner Theil, Göttingen: Vandenhoeck und Ruprecht 1828.
- Stein L., *Geschichte der sozialen Bewegung in Frankreich von 1789 bis auf unsere Tage*, In drei Bänden, Erster Band, Leipzig: Otto Wigand 1850.
- Treitschke H. von: *Die Freiheit* (Leipzig 1861) (in:) *Ausgewählte Schriften von Heinrich von Treitschke*, Erster Band, Leipzig 1907.
- Ziegler K.-H.: *Arbiter, arbitrator und amicus compositor*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte 84 (1967).

CHRISTOPH-ERIC MECKE

RUDOLF VON JHERING'S "STRUGGLE FOR LAW" —
THE REJECTION OF ALTERNATIVE FORMS
OF DISPUTE RESOLUTION?

S u m m a r y

Rudolf von Jhering's famous lecture entitled "The Struggle for Law" which, since its first publication in 1872, has counted among the most frequently translated papers in jurisprudence ever, contains two main theses. One is devoted to explaining the creation of law. In contrast to Friedrich Carl von Savigny, the founder of the Historical School of Jurisprudence, Jhering ascribed the creation of the legal order of his time to the state legislator when viewed from the perspective of the sources of law and to whichever individual or group interests emerged victorious from power-political struggles when viewed from the perspec-

tive of its content. With this thesis, Jhering drew on a view that was beginning to emerge in the mid-19th century society which, in a manner that pointed to the future, saw the source of law as being rooted in the struggle for power of different interest groups within society. Jhering's second main thesis transferred this view onto the process of the application of law in court. He maintained that since all dictates of justice, as resulting from this struggle for power, were nothing more or less than interests with legal protection and since the law only became real when it was actually applied, a person fighting for their legal right in court was not only fighting for their own right but also for the law in general and thus for justice.

However, according to Jhering, the creditor's duty to society to rigorously enforce their claim against the debtor, albeit not by force but exclusively by legal means, only applied in cases where the rights of the creditor and, therefore, the legal order as a whole were specifically questioned by the debtor because he denied the claim against his own better judgement. By making this important qualification of his second main thesis, Jhering acknowledged that in certain specific cases the creditor could indeed have legitimate reasons, for instance of a moral or economic nature, to decide *not* to insist on enforcing his rightful legal claim against the debtor.

Therefore, modern mechanisms of dispute resolution such as arbitration, which Jhering would have been familiar with based on his knowledge of the Roman *arbiter*, or mediation, are not contradictory to Jhering's theses on the "struggle for law". However, like many of his contemporaries who praised the theses of his lecture, Jhering, in his idealising and moralising the pre-capitalist view of the enforcement of law, was solely focused on the personal relationship between the creditor and the debtor, and not on legal disputes in the anonymous world of publicly traded companies which were already beginning to emerge in Jhering's lifetime in the western European heavy and transport industries.