TRANSFORMACJE PRAWA PRYWATNEGO
4/2017 ISSN 1641–1609

JOSEFA BIRR*

JHERING'S CONCEPT OF *RECHTSGEFÜHL* AND ITS ROLE IN *THE STRUGGLE FOR LAW*

"It is the energy of our moral nature protesting against the violation of the law; it is the most beautiful and the highest testimony which *Rechtsgefühl* can bear to itself […]"[1]. With these words, Rudolf von Jhering captured the attention of his audience at his Vienna lecture of *The Struggle for Law* in 1872.

The following paper is divided into three parts. I begin with a review of Jhering's concept of *Rechtsgefühl*[2]. I then go on to look at its particular meaning in *The Struggle for Law.* Finally, I show how the function of *Rechtsgefühl* in *The Struggle for Law* fits into Jhering's overall concept of *Rechtsgefühl*.

In the late 19th and early 20th centuries, German jurisprudence was concerned with the phenomenology of *Rechtsgefühl*. This concept is enigmatic. Its range of meaning extends from an inner psychological disposition, or something that is given *a priori*, to an educated feeling for legal right, similar to legal intuition. Related terms and frequently used synonyms such as *Rechtsbewusstsein*, *Rechtsempfinden*, *Gewissen* and *Sittlichkeit* make a clear definition difficult[3].

Rechtsgefühl is widely translated as "the feeling of the legal right" or "sense of justice". The concept of "legal sentiment" comes closest. Still, in my opinion, none of these is quite accurate. Thus, in the following I use the term *Rechtsgefühl*.

---

* *Dipl.-Jur., Göttingen.*

[1] R. von Jhering: *The Struggle for Law* (1872), translated from the fifth German edition by J.J. Lalor, Chicago 1879, p. 75. All (subsequent) quotations from Jhering's lecture *The Struggle for Law* are based on J.J. Lalor's translation of 1879, but I revised most of them. All remaining quotations from Jhering have been translated by myself.

[2] This paper is based on research work conducted as part of my dissertation: *Einzelfall, Rechtswandel und Fortschritt in Rudolf von Jhering's Lehre vom Rechtsgefühl* (working title).

[3] S. Schnädelbach: *The jurist as a manager of emotions, German debates on "Rechtsgefühl" in the late 19th and early 20th century as sites of negotiating the juristic treatment of emotions*, InterDisciplines 2:6 (2015), pp. 47–48.

I. JHERING'S CONCEPT OF *RECHTSGEFÜHL*

For Jhering, *Rechtsgefühl* is a "moral feeling […], the content of the legal and moral truth, a historical product […] of the power of life, the practical requirement which has resulted in these institutions"[4]; finally, *Rechtsgefühl* is "the consciousness of right which grows out of experience with law"[5]. It is to *Rechtsgefühl* that Jhering appeals when he calls upon everyone whose rights have been violated, and on lawyers, in particular, to assert the importance of the legal system and of justice. This is the primary topic of Jhering's lecture *The Struggle for Law* of 1872.

Jhering distinguishes between *Rechtsgefühl* as an ideal, as the critical power of judgement, and *Rechtsgefühl* as the motivation for action in a practical sense, feeling as a subjective impulse to action[6].

In his philosophy, Jhering attributes great power to the idealistic *Rechtsgefühl* to bring about progress in the evolution of law. Furthermore, he establishes a theory of the empirical, historical evolution of *Rechtsgefühl*. In this, he differentiates between the particularization of *Rechtsgefühl* in its application to individual legal cases and its generalization in terms of an evolutionary theory of law.

For Jhering, the idealistic *Rechtsgefühl* constitutes either an inner psychological disposition or something that is given *a priori*, but which also results from an aggregation of individual and cultural experience: "depending on the real facts that have been developed in history"[7].

Jhering rejects the nativist theory "that nature gave human beings innate abilities"[8]. Therefore, there can be no native impulse out of which *Rechtsgefühl* simply grows. Moreover, natural science has proven that instincts are also variable and acquired by experience[9].

The existing legal system, i.e. the reality of the legal institutions, generates the empirical basis for the development of *Rechtsgefühl*. Therefore, for Jhering, *Rechtsgefühl* must be a secondary phenomenon (*Sekundärphänomen*). "It is not *Rechtsgefühl* that created law, but rather, it is law that created *Rechtsgefühl*"[10], he states in 1877

[4] R. von Jhering: *Über die Entstehung des Rechtsgefühles* (1884) (in:) O. Behrends (ed.): *Rudolf von Jhering. Über die Entstehung des Rechtsgefühles mit einer Vorbemerkung und einem anschliessenden Interpretations- und Einordnungsversuch*, Jovene 1986, pp. 18–19.

[5] "das von Erfahrung mit Recht genährte Rechtsgewissen" (in:) O. Behrend: *Das "Rechtsgefühl" in der historisch-kritischen Rechtstheorie des späten Jhering. Ein Versuch zur Interpretation und Einordnung von Jherings zweitem Wiener Vortrag* (in:) O. Behrends (ed.): *Rudolf von Jhering. Über die Entstehung…*, *op. cit.*, p. 97.

[6] R. von Jhering: *Zweck im Recht*, Vol. 2, 1st ed., Leipzig 1883, p. 43: "Gefühl [auch Rechtsgefühl], welcher als allgemeiner Begriff gleichmässig die beiden Functionen […]: die kritische (das Gefühl als Urtheilskraft) und die praktische (das Gefühl als subjectiver Impuls zum Handeln, als Triebkraft), in sich schliesst […]".

[7] R. von Jhering: *Rechtsgefühl…*, *op. cit.*, p. 19.

[8] *Ibidem*, p. 17.

[9] *Ibidem*, p. 28, cf. S. Schnädelbach: *The jurist as a manager of emotions…*, *op. cit.*, p. 55.

[10] R. von Jhering: *Zweck im Recht*, Vol. 1, 1st ed., Leipzig 1877, p. X; R. von Jhering: *Entwicklungsgeschichte des römischen Rechts*, unpublished at the author's death, V. Ehrenberg (ed.), Leipzig 1894, p. 16.

in his work *Zweck im Recht.* For him, "law had to be present, before it could cast its reflection on the human soul"[11].

If *Rechtsgefühl* is to develop, there must be a conscious and unconscious human capacity to abstract experiences. For a legal system to be recognized as general and permanent, an emotional identification of normative feelings with law must be created through continuous experience, comparison and adaption of existing law; this identification must be conceptualized as normative. Like the linguistic development of a child, who learns over the years to abstract appropriate general terms from single concrete objects and to apply them to other objects of the same type, the development of *Rechtsgefühl* depends on the ability to abstract general ideas from existing social and legal norms and to apply these gained cognitions to other cases. For Jhering, the experiences of prevailing social conditions are "mentally inhaled"[12]. He also uses the image of "ethical spores" that "float in the ethical air surrounding us" and which "the child inhales […] with his first breath" to explain the development of *Rechtsgefühl*[13].

This abstraction is both a collective and an individual process. Jhering still differentiates between the *Rechtsgefühl* of specialists in law, particularly lawyers and scientists, and the *Rechtsgefühl* of the general population. He attributes the development of law to the intuition of geniuses, "thinking minds and dynamic personalities" who are involved in the development of new principles of law; "[the struggle] took place on the level of science and literature". At first, the population is entirely uninvolved; only once the change in law has occurred, it becomes gradually implemented in the nation's mind, taking root in its *Rechtsgefühl*. Not until then, the nation's *Rechtsgefühl* becomes progressive[14]. Jhering postulates that *Rechtsgefühl* "[…] is the daughter who follows her mother, reminding her of her own teachings; now she applies the doctrines which the mother has given her to other cases"[15].

Jhering states that *Rechtsgefühl*, as the product of great minds, does not have the power to realize new law in the social context; legal ideals only become realized in law when they are combined with social forces and constellations of interests. This requires practical *social* pressure to enforce new law[16].

Jhering himself was one of these great minds. As a legal consultant and member of various *Spruchfakultäten* (panels of legal scholars), Jhering dealt practically with legal cases all his life, an experience which decisively shaped him as a professor and above all as a scientist. For Jhering, the individual case is effectively the catalyst for his legal thought and the decisive authority for the evolution of law. In

[11] R. von Jhering: *Entwicklungsgeschichte…*, *op. cit.*, p. 21.

[12] *Ibidem*, p. 17.

[13] R. von Jhering: *Rechtsgefühl…*, *op. cit.*, pp. 43–44.

[14] R. von Jhering, *Entwicklungsgeschichte…*, *op. cit.*, pp. 23–24.

[15] R. von Jhering: *Rechtsgefühl…*, *op. cit.*, p. 50.

[16] *Ibidem*; cf. H. Schelsky: *Das Jhering-Modell des sozialen Wandels durch Recht. Ein wissenschaftlicher Beitrag* (in:) M. Rehbinder, H. Schelsky (ed.): *Zur Effektivität des Rechts*, Düsseldorf 1972, p. 41.

the individual case, law addresses reality and becomes reality itself; in Jhering's words: "The realization [of law] is life, and the truth of law is law itself"[17]. For Jhering, jurisprudence is "practical science"[18]. He postulates the primacy of practical life.

Jhering states:

"Life does not exist to serve ideas; rather, ideas exist to serve life. What must happen is dictated not by logic, but by life, commerce, and Rechtsgefühl, regardless of whether it is logically necessary or logically impossible"[19].

Jhering first becomes aware of the essential controlling authority of his *Rechtsgefühl* in a concrete legal case: the famous *Schiffspartenfall*, which he examined at the end of 1858 for the *Spruchfakultät* of the University of Gießen. "We need not conceal the fact that it was the protest raised by a healthy *Rechtsgefühl* against a double demand for the purchase price which gave us the first impulse towards our legal opinion"[20], Jhering wrote in 1859. This case clearly demonstrates the discrepancy between dogmatic deduction and real-life legal practice. Jhering also wrote to Gerber in 1859: "[The case] really tormented me and brought me to despair, until a light arose at the eleventh hour, and I do not believe that this was any tallow candle, but a stearin light […]"[21].

By this time, *Rechtsgefühl* has become objectified in Jhering's legal thought, and assumes "a key function as a methodical corrective"[22]. "By this acceptance of *Rechtsgefühl*, the object of examination, 'law', has effectively been converted into a living thing"[23]. From this moment on, the term *Rechtsgefühl* is part of legal parlance; there is hardly any well-known lawyer who does not have something to say about *Rechtsgefühl*, although Jhering himself usually receives only cursory acknowledgement. Jhering understands *Rechtsgefühl* as a process of applied cultural and ethical empiricism, through which legal concepts are unconsciously abstracted and transferred to new legal cases, allowing new rules to arise, and ultimately, through social validation and consolidation, facilitating the evolution of law. For Jhering,

[17] R. von Jhering: *Geist des römischen Recht auf den verschiedenen Stufen seiner Entwicklung*, Part 2, Section 2, 1st ed., Leipzig 1858, p. 334.

[18] R. von Jhering: *Unsere Aufgabe, Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts*, Vol. 1, 1857, p. 19.

[19] R. von Jhering: *Geist des römischen Recht auf den verschiedenen Stufen seiner Entwicklung*, Part 3, Section 1, 2nd ed., Leipzig 1871, p. 312.

[20] "Wir brauchen es nicht Hehl zu haben, dass der Widerspruch, den das gesunde Rechtsgefühl gegen die doppelte Lucrierung des Kaufpreises erhebt, uns zu unserer Ansicht den ersten Anstoß gegeben hat!" (in:) R. von Jhering: *Beiträge zur Lehre von der Gefahr beim Kaufcontract: Nr. 1, Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts*, Vol. 3, 1859, p. 26.

[21] M.G. Losano: *Der Briefwechsel zwischen Jhering und Gerber, Teil 1, Ebelsbach 1984* (in:) S. Gagner, A. Kaufmann, D. Nörr (eds.): *Münchener Universitätsschriften. Juristische Fakulät. Abhandlungen zur rechtswissenschaftlichen Grundlagenforschung*, Vol. 55/1, Letter to Gerber 01/06/1859, pp. 306–307: "[Der Fall] hat mich wahrhaft gepeinigt und zur Verzweiflung gebracht, bis mir denn noch in der 11ten Stunde ein Licht aufgegangen ist, und wie ich glaube kein Talglicht, sondern ein Stearinlicht […]".

[22] M. Kunze: *Rudolf von Jhering. Ein Forschungsbericht* (in:) G. Kunze, W. Ogris (eds.): *Der Kampf um's Recht. Forschungsband aus Anlaß des 100. Todestages von Rudolf von Jhering*, Berlin 1995, p. 141.

[23] *Ibidem*.

Rechtsgefühl is not only a diagnostic tool for finding the existing positive law, but a creative avant-garde which precedes the applicable law[24].

Therefore, we can see that *Rechtsgefühl* plays an important role as an empirical reservoir of legal innovation. It merely becomes manifest through the irritation it produces when dealing with individual cases. In such individual cases, exemplary problems of today and regulatory concerns of the future are reflected.

II. ROLE OF *RECHTSGEFÜHL* IN *THE STRUGGLE FOR LAW*

"Not the intellect, but the feeling, is able to answer this question; and hence language has rightly designated the psychological source of all law as *Rechtsgefühl.* The consciousness of legal right (*Rechtsbewusstsein*), legal conviction, are scientific abstractions, with which the people are not acquainted"[25], states Jhering in his lecture *The Struggle for Law.*

In the next part of this paper, I will examine the role of *Rechtsgefühl* in *The Struggle for Law*. In his 1872 lecture, Jhering postulates the (practical) *Rechtsgefühl* as the motivation for action, in contrast to the idealistic *Rechtsgefühl* described above. Rather than the critical power of judgement, *Rechtsgefühl* is here a subjective feeling of individual right. Jhering declares: "In the first sense, it is the struggle which accompanies the development, the formation, the progress of abstract law in history; in the second, it is the struggle for the realization of concrete rights"[26]. In *The Struggle for Law*, Jhering is concerned mainly with the second sense, with the struggle for the realization and enforcement of subjective rights.

The purpose of the lecture is "less directed at the scientific data of law than the courageous assertion of *Rechtsgefühl*"[27]. In 1884, in his work *On the Origin of Rechtsgefühl*, Jhering suggests that *The Struggle for Law* appeals to the "practical activity of *Rechtsgefühl*, the moral and practical reaction against the disdainful disregard of *Rechtsgefühl*"[28]. For Jhering, the struggle for law is a moral duty, and its driving force is *Rechtsgefühl*[29].

Jhering sees the evolution of law not as "an organic development from within outward"[30], "the quiet working power of truth"[31], "a process as unnoticed and as

[24] Differently (in:) M. Rehbinder: *Questions of the legal scholar concerning the so-called sense of justice*, J. Social Biol. Struct., London 1982, p. 344.

[25] R. von Jhering: *The Struggle…*, *op. cit.*, pp. 57–58.

[26] R. von Jhering: *Der Kampf um's Recht* (1872) (in:) H. Klenner (ed.): *Der Kampf um's Recht*, Freiburg 1992, p. 11.

[27] R. von Jhering: *Der Kampf um's Recht*, Fourth Edition, Vienna 1874, p. VII.

[28] R. von Jhering: *Rechtsgefühl…*, *op. cit.*, p. 9.

[29] G. Radbruch: *Über das Rechtsgefühl* (in:) A. Kaufmann (ed.): *Gustav Radbruch. Gesamtausgabe Bd. 1, Rechtsphilosophie I*, Heidelberg 1987, pp. 424–425.

[30] R. von Jhering: *The Struggle…*, *op. cit.*, p. 8.

[31] *Ibidem*, p. 7.

painless as is the formation and growth of language"[32], but rather as a "struggle […] living force"[33], "an uninterrupted labor"[34]. In an attack on the historical school, he states: "[…] I allege that the Historical School in law might just as well have been called the romantic. That law or the principles of legal right come into existence or are formed painlessly, without trouble, without action, like the vegetable creation, is a really romantic notion, that is, a notion based on a false idealization of past conditions"[35]. According to Jhering, *Rechtsgefühl* carries with it an imperative to actively form law. Law is only able to grow in society "if it [is] taken seriously as a guide for individual action"[36]. But for Jhering, "the interest of this struggle is not confined, by any means, to private life or private law. Rather does it extend far beyond them. A nation is, after all, only the sum of all the individuals who compose it, and the nation thinks, feels and acts the same way as its individuals think, feel and act"[37].

Hence, while Jhering wishes, above all, to point out that *Rechtsgefühl* is fundamentally essential to the assertion of the legal rights of the individual citizen, he emphasizes that it is no less relevant to the nation: "In the healthy, vigorous *Rechtsgefühl* of the individual, the state possesses the most fruitful source of its own strength, the surest guarantee, from within and from without, of its own existence. *Rechtsgefühl* is the root of the whole tree […]"[38].

In a famous passage, Jhering also asserts: "Irritability, that is the capacity to feel pain at the violation of one's legal rights, and action, that is the courage and the determination to repel the attack, are, in my eyes, the two criteria of a healthy *Rechtsgefühl*"[39].

Jhering continually refers to paradigms from the natural sciences; for example, his metaphor of *Rechtsgefühl* as an organic attribute: *Rechtsgefühl* as "moral pain"[40], a kind of physical acquisition of knowledge, allowing it to act as a surrogate for cognitive ability[41].

"[W]hat do the people know of the right of property, of contract as a moral condition of the existence of the person? Know? They may know nothing about it, but whether they do not feel it is another question; and I hope that I shall be able to show that such is the case. What do people know of kidneys, lungs, liver as conditions of their physical life? But everyone feels the stitch in the lungs, or a pain in the kidneys or liver, and understands the warning which it conveys to him. Physical

[32] *Ibidem*.
[33] *Ibidem*, p. 1.
[34] *Ibidem*, p. 2.
[35] *Ibidem*, p. 15.
[36] S. Schnädelbach: *The jurist as a manager of emotions*…, *op. cit.*, p. 53.
[37] R. von Jhering: *The Struggle*..., *op. cit.*, p. 91.
[38] *Ibidem*, pp. 96–97.
[39] *Ibidem*, p. 59.
[40] *Ibidem*, p. 26.
[41] S. Schnädelbach: *The jurist as a manager of emotions*..., *op. cit.*, p. 54.

pain is the signal of a disturbance in the organism, of the presence of an influence inimical to it. […] The very same is true of the moral pain caused us by intentional injustice, by arbitrariness"[42].

Jhering postulates a "pathology of *Rechtsgefühl*"[43]. He uses such terms as "healthy" and "vigorous" vs. "blunted" and "apathetic" to describe *Rechtsgefühl*[44]. For him, law, legal right, threatens to become blunted, withered and decayed if human action is absent: "What the air is to the flame, freedom of action is to *Rechtsgefühl*. Refuse it this freedom, and the feeling dies"[45].

Jhering also uses the terms "*Rechtsgefühl*", "personality", "person" and "character" as if they were synonyms[46]. Thus, *Rechtsgefühl* can be characterized as highly subjective. Jhering impressively states: "An inner voice tells him that he should not retreat, that it is not the worthless object that is at stake but his *Rechtsgefühl*, his self-respect, his own personality […] [it is] a question of character"[47].

Jhering assumes that people are enraged by different types of violation of rights, every individual defending the basic moral conditions of his own existence. The peasant defends his property, the officer his honour, the merchant his credit[48]. Thus our notion of law is influenced by social and cultural forces; they determine which infringements must be disputed. "If different classes respond to different slights, there must be a consensus on the core values of all the citizens if a coherent body politic is to evolve"[49].

According to Jhering, the power of *Rechtsgefühl* is equally strong in every single individual. Jhering declares:

"The manner in which the wounded feeling of law or of personality reacts, whether under the influence of passion in wild and violent action, or with subdued, persistent resistance, is no measure of the intensity of the strength of *Rechtsgefühl*; and there can be no greater error than to ascribe to the savage or the uncultured man, with whom the former manner is the normal one, a stronger *Rechtsgefühl* than to the educated man who takes the second course. This manner is more or less a matter of education and temperament […]"[50].

The Struggle for Law was inspired, amongst other things, by Kleist's *Michael Kohlhaas*. Jhering cherished Kohlhaas as "a martyr to his *Rechtsgefühl*"[51]. In Kleist's

[42] R. von Jhering: *The Struggle…*, *op. cit.*, pp. 38–39.

[43] *Ibidem*, p. 56.

[44] *Ibidem*, pp. 96, 91.

[45] *Ibidem*, p. 101.

[46] Particularly in R. von Jhering: *The Struggle…*, *op. cit.*, pp. 32, 56, 59.

[47] *Ibidem*, p. 26.

[48] *Ibidem*, p. 42; cf. W. Seagle: *Rudolf von Jhering: or Law as a means to an end*, The University of Chicago Law Review, Vol. 13, No. 1 (Dec., 1945), p. 82.

[49] J.M. McLaughin: *The Unification of Germany: What would Jhering say?*, Fordham International Law Journal, Vol. 17, Issue 2, 1993, p. 281.

[50] R. von Jhering: *The Struggle…*, *op. cit.*, pp. 60–61.

[51] *Ibidem*, p. 87.

novella, Kohlhaas, a decent man who is cheated by a nobleman out of two horses, restores justice by breaking the law. The violation of his right awakens Kohlhaas to his own *Rechtsgefühl*. He takes its defence in his own hands, his *Rechtsgefühl* becoming absolutized; there is no inhibition or self-restraint. It is true that Kohlhaas has indeed been wronged, but the unconditionality of his *Rechtsgefühl* leads to injustice and inhumanity. In the end, Kohlhaas wins justice, but at the price of his own execution which he willingly accepts[52].

The quintessential meaning which Jhering draws from Kleist's novella is that *Rechtsgefühl* and self-interest are not consubstantial; *Rechtsgefühl* can prevail over self-interest[53]. Jhering declares: "It is not a mere money-interest which urges the person whose rights have been infringed to institute legal proceedings, but moral pain provoked by the wrong which has been endured"[54]. For Jhering, in lawsuits "in which the disproportion […] exists between the value of the object in controversy and the prospective cost"[55], the person's assertion of his *Rechtsgefühl* is more important than the insignificant object of dispute[56]. The case of Kohlhaas also shows that when an individual's rights are violated, he has to seek justice[57]. Jhering (following Kleist) liked to say: "Better be a dog, if I am to be trodden under foot, than a man"[58].

Jhering states:

"The struggle for his right is a duty of the person whose rights have been violated to himself. The preservation of existence is the highest law of the whole living creation. It manifests itself in every creature in the instinct of self-preservation. Now man is not concerned only with his physical life but with his whole moral existence. But the condition of this moral existence is right, in the law"[59].

The power of the subjective, highly emotional, passionate feeling becomes particularly clear in Jhering's legal dispute with his maidservant[60]. He shows, based on his own litigation, that rationality often loses out to the emotions. Jhering uses *Rechtsgefühl* "to refer to violations of what one feels to be right, irrespective of whether law agrees with the feeling"[61]. Consequently, Jhering asserts that "the struggle for law, the battle for one's legal rights, is the poetry of character"[62].

---

[52] H. von Kleist: *The Marquise of O and other Stories*, translated by D. Luke, N. Reeves, Harmondsworth 1978, pp. 114–213; cf. N. Duxbury: *Jhering's Philosophy of Authority*, Oxford Journal of Legal Studies, Vol. 27, No. 1 (2007), pp. 44–45.

[53] N. Duxbury: *Jhering's Philosophy…*, *op. cit.*, p. 45.

[54] R. von Jhering: *The Struggle…*, *op. cit.*, p. 26.

[55] *Ibidem*, p. 25.

[56] *Ibidem*, pp. 25–26.

[57] *Ibidem*.

[58] *Ibidem*, p. 29.

[59] *Ibidem*.

[60] "Da habe ich aber, kann ich sagen, gefühlt diesen Stachel des erlittenen Unrechts, wenn man sein gutes Recht hat und die Einrichtungen des Staates derartige sind (‚Bravo!), daß man mit dem besten Willen sein Recht nicht geltend machen, nicht durchsetzen kann" (in:) R. von Jhering: *Der Kampf...* (1872), p. 128–129.

[61] N. Duxbury: *Jhering's Philosophy…*, *op. cit.*, p. 46.

[62] R. von Jhering: *The Struggle…*, *op. cit.*, p. 56.

III. CLASSIFICATION — *THE STRUGGLE FOR LAW* IN JHERING'S CONCEPT OF *RECHTSGEFÜHL*

This leads me to the next point, that is the way in which the *Rechtsgefühl* described by Jhering in *The Struggle for Law* fits into his overall concept of *Rechtsgefühl*.

In *The Struggle for Law*, Jhering chooses very individual and emotionally motivated cases to demonstrate the great significance of the practical function of *Rechtsgefühl* as the motivation to act. Later, particularly in 1884 in *On the Origin of Rechtsgefühl*, Jhering postulates the moral nature of *Rechtsgefühl*. Directly alive, natural and instinctive in the reaction to a violation of right, it ultimately becomes the consciousness that drives the historical evolution of law, adapting it to the moral order of its time and its people. Thus, *Rechtsgefühl* in *The Struggle for Law* ultimately becomes part of the concept of *Rechtsgefühl* described in the first part of this paper.

In the end, Jhering's *Rechtsgefühl*, objectivized and adjusted by personal and emotional evaluation, becomes the "pioneer of progress"[63]. Jhering's study of *Rechtsgefühl* culminates in his *Zweck im Recht* of 1877/1883*,* translated as *Law as a means to an end*, and in his essay *On the Origin of Rechtsgefühl* of 1884. In the context of the developmental philosophy of Roman law which he plans to publish, Jhering pursues the introduction of a pragmatic jurisprudence which practises an evolutionary combination of law and morality. For Jhering, the purpose is the supreme aspect of morality, and thus the basis of meaningful legal principle. In the authority of *Rechtsgefühl*, Jhering recognizes both the guarantee of equilibrium in law (justice) and the guarantee of legal protection. A person is unerringly guided by his growing experience of justice, which is reflected in the critical values of his *Rechtsgefühl*, towards a more appropriate legal structure.

In *Zweck im Recht*, Jhering makes a remarkable return to the primacy of objective morality. Ultimately, the objective moral order is the source of the subjective moral feeling, which is "not the historical Prius, but the Posterius of the real world created by the practical purpose"[64].

For Jhering, *Rechtsgefühl* "has the irreplaceable function of making the law reality"[65].

He writes:

"Not the intellect, but the feeling, is able to answer this question […] but as love frequently does not know itself, and as a single instant suffices to bring it to a full consciousness of itself, so *Rechtsgefühl* uniformly knows not what it is; but

[63] R. von Jhering: *Rechtsgefühl…*, *op. cit.*, p. 50.
[64] R. von Jhering: *Zweck im Recht…*, Vol. 2, p. X.
[65] S. Schnädelbach: *The jurist as a manager of emotions…*, *op. cit.*, p. 55.

the violation of legal right compels it to speak, unveils the truth, and manifests its force"[66].

Thus, Jhering postulates an evolutionary theory of law, expressed with particular clarity in the following citation from his lecture *The Struggle for Law*:

"The Law is the Saturn who is devouring its own children; the law can renew its youth only by breaking with its own past. A concrete legal right or principle of law, which, simply because it has come into existence, claims an unlimited and therefore eternal existence, is the child lifting its arm against its own mother; it despises the idea of the law when it appeals to that idea; for the idea of the law is an eternal Becoming; but that which has become must yield to the new Becoming, since 'Everything which is created must also pass away!' And thus, the historical development of law presents us with a picture of research, struggle, fight, in short of toilsome, wearying endeavor"[67].

BIBLIOGRAPHY

Behrends O.: *Das "Rechtsgefühl" in der historisch-kritischen Rechtstheorie des späten Jhering. Ein Versuch zur Interpretation und Einordnung von Jherings zweitem Wiener Vortrag* (in:) O. Behrends (ed.): *Rudolf von Jhering. Über die Entstehung des Rechtsgefühles mit einer Vorbemerkung und einem anschliessenden Interpretations- und Einordnungsversuch*, Jovene 1986, pp. 55–186.

Duxbury N.: *Jhering's Philosophy of Authority*, Oxford Journal of Legal Studies, Vol. 27, No. 1 (2007), pp. 23–47.

Jhering R. von: *Unsere Aufgabe, Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts*, Vol. 1, 1857, pp. 1–52.

Jhering R. von: *Geist des römischen Recht auf den verschiedenen Stufen seiner Entwicklung*, Part 2, Section 2, 1st ed., Leipzig 1858.

Jhering R. von: *Beiträge zur Lehre von der Gefahr beim Kaufcontract: Nr. 1, Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts*, Vol. 3, 1859, pp. 449–488.

Jhering R. von: *Geist des römischen Recht auf den verschiedenen Stufen seiner Entwicklung*, Part 3, 2nd ed., Leipzig 1871.

[66] R. von Jhering: *The Struggle…*, *op. cit.*, pp. 57–58.

[67] *Ibidem*, pp. 12–13, "Denn 'das Recht ist der Saturn, der seine eigenen Kinder verspeist'; das Recht kann sich nur dadurch verjüngen, dass es mit seiner eigenen Vergangenheit aufräumt. Ein concretes Recht, das, weil es einmal entstanden, unbegränzte, also ewig Fortdauer beansprucht, ist das Kind, das seinen Arm gegen die eigene Mutter erhebt; es verhöhnt die Idee des Rechts, indem es sich auf sie beruht, denn die Idee des Rechts ist ewiges Werden, das Gewordene aber muss dem neuen Werden weichen, denn — Alles, was entsteht, ist wert, dass es zu Grunde geht. — So vergegenwärtigt uns also das Recht in seiner historischen Bewegung ein Bild des Suchens, Ringens, Kämpfens, kurz der gewaltsamen Anstrengung" (in:) R. von Jhering: *Der Kampf…*, *op. cit.*, (1872), p. 15 ff.

Jhering R. von: *Der Kampf um's Recht* (1872) (in:) H. Klenner (ed.): *Der Kampf um's Recht*, Freiburg 1992, pp. 7–100.

Jhering R. von: *The Struggle for Law* (1872), translated from the fifth German edition by J.J. Lalor, Chicago 1879.

Jhering R. von: *Der Kampf um's Recht*, Fourth Edition, Vienna 1874.

Jhering R. von: *Zweck im Recht*, Vol. 1, 1st ed., Leipzig 1877.

Jhering R. von: *Zweck im Recht*, Vol. 2, 1st ed., Leipzig 1883.

Jhering R. von: *Über die Entstehung des Rechtsgefühles* (1884) (in:) O. Behrends (ed.): *Rudolf von Jhering. Über die Entstehung des Rechtsgefühles mit einer Vorbemerkung und einem anschliessenden Interpretations- und Einordnungsversuch*, Jovene 1986, pp. 7–54.

Jhering R. von: *Entwicklungsgeschichte des römischen Rechts*, unpublished at the author's death, V. Ehrenberg (ed.), Leipzig 1894.

Kleist H. von: *The Marquise of O and other Stories*, translated by D. Luke, N. Reeves, Harmondsworth 1978, pp. 114–213.

Kunze M.: *Rudolf von Jhering. Ein Forschungsbericht* (in:) G. Kunze, W. Ogris (eds.): *Der Kampf um's Recht. Forschungsband aus Anlaß des 100. Todestages von Rudolf von Jhering*, Berlin 1995, pp. 125–148.

Losano M.G.: *Der Briefwechsel zwischen Jhering und Gerber, Teil 1, Ebelsbach 1984* (in:) S. Gagner, A. Kaufmann, D. Nörr (eds.): *Münchener Universitätsschriften. Juristische Fakultät. Abhandlungen zur rechtswissenschaftlichen Grundlagenforschung*, Vol. 55/1.

McLaughin J.M.: *The Unification of Germany: What would Jhering say?*, Fordham International Law Journal, Vol. 17, Issue 2, 1993, pp. 277–293.

Radbruch G.: *Über das Rechtsgefühl* (in:) A. Kaufmann (ed.): *Gustav Radbruch. Gesamtausgabe Bd. 1, Rechtsphilosophie I*, Heidelberg 1987, pp. 423–429.

Rehbinder M.: *Questions of the legal scholar concerning the so-called sense of justice*, J. Social Biol. Struct., London 1982, pp. 341–348.

Schelsky H.: *Das Jhering-Modell des sozialen Wandels durch Recht. Ein wissenschaftlicher Beitrag* (in:) M. Rehbinder, H. Schelsky (eds.): *Zur Effektivität des Rechts*, Düsseldorf 1972, pp. 25–46.

Schnädelbach S.: *The jurist as a manager of emotions. German debates on "Rechtsgefühl" in the late 19th and early 20th century as sites of negotiating the juristic treatment of emotions*, InterDisciplines 6:2 (2015), pp. 47–73.

Seagle W.: *Rudolf von Jhering: or Law as a means to an end*, The University of Chicago Law Review, Vol. 13, No. 1 (Dec., 1945), pp. 71–89.

JOSEFA BIRR

JHERING'S CONCEPT OF *RECHTSGEFÜHL* AND ITS ROLE IN *THE STRUGGLE FOR LAW*

S u m m a r y

The paper examines the doctrine of "*Rechtsgefühl*" as developed by the famous Pandectist and legal empiricist Rudolf von Jhering. The iridescent concept of *Rechtsgefühl* is discussed extensively and impressively in the literature, but Jhering's key contribution usually receives only cursory mention. This paper is intended to show the great significance of Jhering's *Rechtsgefühl*, particularly its role in his lecture *The Struggle for Law*. *Rechtsgefühl*, as Jhering conceives it, combines a practical consideration of individual cases, a reflection of the purposes of law and the experience of the observer. It is the essence of what Jhering understands by living legal doctrine and the progress of law.