

INTERPRETATION OF LAW IN THE AGE OF ENLIGHTENMENT

From the Rule of the King to the Rule of Law

Edited by

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Chapter 6

“Needs” – Pandectists Between Norm and Reality

Hans-Peter HAFERKAMP

Introduction

The history of legal interpretation between 1500 and 1850 has been aptly described by Jan Schröder as a progressive loss of interpretational freedom. He states: “At first, it was possible for an interpreter to go beyond the realm of the legislator’s words as well as his will and purpose. Later on he was merely allowed to exceed the words, and subsequently he was denied even this freedom”.¹ Around 1800, juridical interpretation appears to have gradually lost touch with contemporary concerns. Legal documents were perceived as little more than historical texts dating from another time, and there was a growing awareness of the difficulties associated with placing oneself in the time and position of the author.

During this period, the method of legal interpretation changed from a reasonable, “logical” approach to a method of “reconstruction”. In my field of study, 19th century Pandectism, this transition seems to have increased the authority of antique legal texts. This also corresponds with the view legal historians allotted to Pandectism for a long period of time. Pandectism held a reputation of being entirely concerned with antique sources, and was thus perceived to ignore contemporary social issues and the Industrial Revolution.² This discontinuity resulted in a reduction of the scope of interpretational freedom between the concept of enlightenment hermeneutics and the romantic hermeneutic concepts of Schlegel and Schleiermacher. In the

¹J. Schröder, „Entwicklungen der juristischen Interpretationstheorie von 1500 bis 1850“, ZNR (2002) 56.

²Franz Wieacker, *Privatrechtsgeschichte der Neuzeit*, 1st ed. (1952) 253.

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following discussion I will examine this development from a new perspective, and analyze one particular argument from the Pandectists' 19th century interpretational repertoire. This argument serves as a link between the close commitment to antique texts and the "reality" of the 19th century. With regard to the 18th century, I would like to show that the traditional labels of "practical" law in the 18th century and "theoretical" law in the 19th century are inconsistent. The concepts of "practicability" or "reality" were simply approached in different ways. Thus, I hope that an examination of the 19th century will in turn promote a greater understanding of the 18th century.

I will begin my consideration with a term Georg Friedrich Puchta introduced into the doctrine of the Historical School of Law,³ but which was in fact coined by Savigny in 1814: the *Volksgeist*. When relating to the historical and dynamical moral code of a people as the primary source of just law, the interpretational system of Pandectism found itself in conflict: on the one hand, the intention was to reconstruct a norm of Roman law in its historical meaning; the result, on the other hand, had to correspond to a contemporary set of values. Thus, *Volksgeist* confronted the antique law with reality – but what kind of reality? When approaching the concept of *Volksgeist*, one comes across a term used by Savigny which has so far been mostly neglected in academic studies, but which articulates more precisely Savigny's understanding of *Volksgeist*.⁴ This term, "needs" (*Bedürfnisse*), shall mark the starting point for my considerations.

In 1814, Savigny did not speak of a *Volksgeist* but a "common consciousness of the people".⁵ He explained the origin of such a common conviction as a "recurring need".⁶ The term "need" was not used coincidentally, and 25 years later in 1839, Savigny continued to speak of a "legal consciousness" existing as an "unsatisfied need".⁷ What did he mean by this?

³For the first time in Georg Friedrich Puchta, rec. Eduard Gans: *Das Erbrecht in weltgeschichtlicher Entwicklung*, part 1 (1824), part 2 (1825), in: Friedrich Christoph Karl Schunck (ed.), *Erlanger Jahrbücher der gesamten deutschen juristischen Literatur 1* (1826) 14.

⁴To this Hans-Peter Haferkamp, rec. Horst Heinrich Jakobs, *Georg Friedrich Puchta. Briefe an Gustav Hugo*, in: SZ GA 127, 762 ff.

⁵Friedrich Carl v. Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (1814) 13.

⁶Id., *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (1814) 13.

⁷Savigny, § 52, Bl. 224, 6 (This text is based on the (unprinted) discussion by letter about § 52 of Savigny's System. The text can be found on the following webpage: <http://savigny.ub.uni-marburg.de/>. A debate about this text in: Hans-Peter Haferkamp, *Die Bedeutung der Willensfreiheit für die Historische Rechtsschule*, in: Ernst-Joachim Lampe (ed.), Michael Pauen (ed.), Gerhard Roth (ed.), *Willensfreiheit und rechtliche Ordnung* (2008) 196 ff.

In 1815, Savigny had expressed his ideas more precisely: law originated from "nature, destiny and the people's needs".⁸ The term *Volksgeist*, therefore, combined "nature" – the national character – with "destiny", and a certain legal "reality" or "need". Savigny viewed this "destiny" as the development of a nation, and he increasingly understood it in a religious way. One could also say "reality" was incorporated into the origin of law, and "need" bridged norms and reality. "Need" was a crucial element in legal development and Savigny was convinced that a "practical need would find its own way to satisfaction".⁹

Jhering's famous critique of 1865 was essentially a repetition of Savigny's argument. He accused the Pandectists of believing in an "illusion of juridical logic", and pointed out that legal norms changed "with the needs of life".¹⁰ Thus, instead of describing the well-known change in Jhering's basic assumptions as a development from a "jurisprudence of construction to the needs of real life" (as Regina Ogorek has done),¹¹ should we not speak of a "return to Savigny"? Then again, one could also speak of Jhering's "return to Jhering himself". In 1844, a time in which Jhering – as he himself later described – was imprisoned by the jurisprudence of concepts (*Begriffsjurisprudenz*), he had declared: "Academic interest should not impede a norm which has been a practical need".¹²

Savigny and Jhering were not alone in using the term "need". If one takes into consideration the writings of other Pandectists, it becomes evident that between 1814 and 1880, even supposing *Begriffsjuristen*, several authors constantly emphasized the importance of "needs" in the genesis and knowledge of law. In 1827, Johann Christian Hasse criticized "academic pretentiousness" and demanded an a priori consideration of "practical needs in general".¹³ Also in 1827, Georg Friedrich Puchta defined "a jurist's

⁸Friedrich Carl v. Savigny, *rec. of N. Th. v. Gönner, Über Gesetzgebung und Rechtswissenschaft in unserer Zeit* (1815); here quoted from a reprint in: Savigny, *Vermischte Schriften*, vol. 5 (1850), reprint (1981) 141.

⁹Id., *Geschichte des Römischen Rechts im Mittelalter*, vol. 3, 2nd ed. (1834) 84.

¹⁰Rudolf v. Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, vol. III (1865) § 59, 314.

¹¹Regina Ogorek, *Richterkönig oder Subsumptionsautomat?* (1986) 219 ff.

¹²Rudolf v. Jhering, *Die Lehre von der hereditas jacens: I. Standpunkt der Betrachtung*, in: id., *Abhandlungen aus dem Römischen Recht* (1844) 153 f. note 1.

¹³Johann Christian Hasse, *Von der Bestellung der Servituten durch simple Verträge und Stipulationen*, in: Rheinisches Museum für Jurisprudenz, Philologie, Geschichte und griechische Philosophie, vol. 1 (1827) 92.

business” as the task of “giving a need a certain legal shape”.¹⁴ In the same year, Eduard Gans described juridical customs as a set of rules in which “the particularity of needs itself [. . .] constitutes law”.¹⁵ Concerning the law of succession, Christian Friedrich Mühlenbruch asked in 1833 whether there had been “a practical need”.¹⁶ In 1839, Theodor Marezoll stated that bourgeois “need” would lead to the creation of new law.¹⁷ In the same year, Johann Christian Kierulff announced: “Real law is the satisfied need”.¹⁸ Karl Adolph von Vangerow agreed in 1851, stating that “practical need” leads to corresponding rules of law.¹⁹ As a final example, I refer to Bernhard Windscheid’s 1884 statement, in which he described jurisprudence as being guided by “practical needs”.²⁰

Is this a refutation of my opening thesis? If Pandectism was close to life, would it not be better to speak of a “jurisprudence of needs” instead of a “jurisprudence of constructs”, *Begriffsjurisprudenz*? This would be much too simple. As is generally known, it is difficult to decide whether law is actually close to life, or only claims to be so. One could, in a Kantian view, refuse an answer in order to avoid a naturalistic fallacy. But if one accepts the question, the difficulty still remains of how to “measure” a result and to define how close the law is to “life” – furthermore: which “life”? But if one asks in a specific historical manner, another issue is raised: What did the term “need” mean to the Pandectists? What was the contemporary notion of that term?

When trying to reconstruct the history of the term “need”, it becomes evident that we are dealing with an “Archimedean” term.²¹ Around the year 1780, consistent with Koselleck’s notion of a semantic “saddle period”, “need” or *Bedürfnis* was subjected to a semantic shift. The older

¹⁴Georg Friedrich Puchta, *Über die Negatorienklage*, in: *Rheinisches Museum für Jurisprudenz, Philologie, Geschichte und griechische Philosophie*, vol. 1 (1827) 163 f.

¹⁵Eduard Gans, *System des Römischen Civilrechts* (1827) 182, 184.

¹⁶Christian Friedrich Mühlenbruch, in: Christian Friedrich v. Glück, *Pandecten*, vol. 36 (1833) 179.

¹⁷Theodor Marezoll, *Lehrbuch der Institutionen des Römischen Rechts* (1839) 11.

¹⁸Johann Friedrich Martin Kierulff, *Theorie des Gemeinen Civilrechts* (1839) 1.

¹⁹Karl Adolph v. Vangerow, *Pandekten I I*, 6th ed. (1851) 1018.

²⁰Bernhard Windscheid, *Die Aufgaben der Rechtswissenschaft (Leipziger Rektoratsrede vom 31. Oktober 1884)*, in: Paul Oertmann (ed.), *Bernhard Windscheid. Gesammelte Reden und Abhandlungen* (1904) 109.

²¹Margit Szöllösi-Janze, *Nothdurft – Bedürfnis. Historische Dimension eines Begriffswandels*, in: Michael Prinz (ed.), *Der lange Weg in den Überfluss* (2003); Johann Baptist Müller, *Bedürfnis und Gesellschaft. Bedürfnis als Grundkategorie im Liberalismus, Konservatismus und Sozialismus* (1971) 10 f.

term *Nothdurft* (*indigentia* in Latin) was replaced by “need”.²² Whereas *Nothdurft* emphasized the physical needs of a human being, the term “need” included a spiritual connotation: it denoted ambition and desire, the driving forces behind individuals and society. Needs were viewed as “the foundation of social life and the initiation of bourgeois society”.²³ At the same time, “needs” are subject to historical changes, and they also act as a catalyst of change in human society. In the 19th and 20th centuries, “need” became a central term in economics, sociology and psychology, especially in the works of Karl Marx and Sigmund Freud. Thus “need” also had linguistic connections to two other terms used by jurists in the 19th century: “development” and “spirit”. “Need” represented the natural development of individuals and society; the law and the state could not counteract this development without suffering damage: in the words of Anselm Feuerbach: “With the rise of needs [...] the law itself grows and builds large and complex interwoven webs which can neither be shortened at will nor can their fine strings be interchanged with bigger ones without thus interfering with the conditions of life themselves”.²⁴

The following considerations are intended to show that Pandectists used the term “need” to address fundamental issues of their science. At the same time, this term was closely related to the question of how to merge Roman law and 19th century reality into a modern Pandectism. This was the central question for a jurisprudence concerned with ancient texts. I would like to approach this subject from two different angles. First, I will introduce “needs” as a problem of knowledge. The jurist had to identify “needs” in order to work with them. There was no measure of consensus among Pandectists as to how a jurist was supposed to work with these “needs”. Subsequently, I will distinguish between three approaches discussed by the Pandectists in the 19th century: an “intuitive” approach, a “real” approach, and a “rational” approach. Second, I will address the question: in which part of contemporary theories of law can this argument be located? Is it part

²²Uta Kim-Wawrzinek, Johann Baptist Müller, *Bedürfnis*, in: Otto Brunner, Werner Conze, Reinhart Koselleck (ed.), *Geschichtliche Grundbegriffe – Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, vol. 1 (1972) 440 ff.

²³*Art. Bedürfnisse (politisch)*, in: Deutsche Encyclopädie, Bd. 3, S. 157 f.; see Margit Szöllösi-Janze, *Nothdurft – Bedürfnis. Historische Dimension eines Begriffswandels*, in: Michael Prinz (ed.), *Der lange Weg in den Überfluss* (2003); Johann Baptist Müller, *Bedürfnis und Gesellschaft. Bedürfnis als Grundkategorie im Liberalismus, Konservativismus und Sozialismus* (1971) 10 f.

²⁴Anselm v. Feuerbach, *Betrachtungen über die Öffentlichkeit und Mündlichkeit der Gerechtigkeitspflege* (1821) 153.

of interpretational theory, part of the sources of law, or something entirely different altogether?

“Needs” as a Problem of Knowledge

Let me begin with my first question: How should jurists identify “needs”?

“Intuitive” Need

In Savigny’s circle, a consensus existed that it was necessary for needs to be experienced as an individual’s intuitive participation in a general sense of values. Needs were expressions of legal consciousness. Savigny’s scholar, Georg Friedrich Puchta, spoke of a “natural sense of equity which a jurist [...] must not ignore”.²⁵ In a similar fashion, Johann Friedrich Martin Kierulff called for a “satisfaction of the felt need”.²⁶

Consequently, needs could not be identified using any kind of empiricism; instead, a jurist had to be a part of collective values, the *Volksgeist*. The path to comprehension was through sensitivity and intuition. A jurist had to feel the people’s needs; he had to be their representative. How could this be achieved? To quote Savigny: “The main requirement of this task is a pure, unprejudiced sense of truth”.²⁷ As a protection against untruth “a quiet humble heart” was needed, “faithful love to truth and a heartfelt prayer [...] because in the end it is the simple childlike mind to which alone the truth will be revealed”.²⁸ The truth was revealed, but by whom? Savigny suggested that “God’s will” was “the deeper cause of morality and the law”.²⁹ Savigny’s close friend, Moritz August von Bethmann-Hollweg, agreed, and stated that a jurist could only guard himself against mere “speculation” “if

²⁵Georg Friedrich Puchta, *Über die Negatorienklage*, in: Georg Friedrich Puchta, et al. (ed.), *Rheinisches Museum für Jurisprudenz, Philosophie, Geschichte und griechische Philosophie*, vol. 1 (1827) 163 f.

²⁶Johann Friedrich Martin Kierulff, *Theorie des Gemeinen Civilrechts* (1839) 2.

²⁷Friedrich Carl v. Savigny, *System des heutigen Römischen Rechts*, vol. 1 (1840) 94; for Savignys hermeneutical thoughts regarding this see Stephan Meder, *Missverstehen und Verstehen. Savignys Grundlegung der juristischen Hermeneutik* (2004) 85 ff. and passim.

²⁸Adolf Stoll, *Friedrich Karl v. Savigny – Ein Bild seines Lebens mit einer Sammlung seiner Briefe*, vol. II – *Professorenjahre in Berlin 1810–1842* (1929), no. 338, 239; see also Dieter Nörr, *Savignys philosophische Lehrjahre – Ein Versuch* (1994) 263.

²⁹Savigny, § 52, Bl. 224, 6.

he finds that other humble path, the path of faith, on which he is guided by a superior light, which, by capturing, regenerating and reviving his whole being, gives a new push to every force in himself. What he longs to behold there, he will receive here – the eternal law, the divine law. Not merely as an obscure idea, but as an enlightened innermost force in his soul".³⁰ *Deus in nobis*: law is the work of man, but God is always acting inside of us.

The Pandectists' writing was thus intended to negotiate between legal consciousness, historical sources and the academic demand to understand law as a system. In 1844 (that is, in his supposed phase of *Begriffsjurisprudenz*), Jhering stated: "Academic interest [...] should not impede a norm [...] which has been a practical need, but it should be a legislator's goal to satisfy them both".³¹ Jhering followed the direction of Puchta, who had demanded that jurists "express a need in a certain juridical form [...] and to elevate the demands of equity and of the non-judicial consciousness to genuine legal norms by linking them to the existent legal system".³²

I will now go on to the Pandectists' second approach to identify "needs": the "real" approach.

"Real" Need

In 1879, Bernhard Windscheid praised Savigny for demonstrating the German jurisprudence that "every code [...] is nothing else than an outcome of people's needs and interests which it satisfies and advances. Therefore these needs and interests are the basic principles, if the code is to be recognized in its actual meaning".³³ Even earlier, Windscheid had referred to "needs" in his dogmatic program, and in 1853 he had dealt with the assignment of claims in a well renowned article. He emphasized that the "need

³⁰Moritz August v. Bethmann-Hollweg, *Grundriß zu Vorlesungen über den gemeinen und Preußischen Civilprozeß*, 3rd ed. (1832) XIV; in 1837, with regards to Savigny, he expressed this a little more neutrally. On the one hand he spoke of a "sincerity and love, to which alone the true nature of all things will be revealed" and on the other hand of a complete penetration of the subject "and his relation to the totality of knowledge", see Moritz August v. Bethmann-Hollweg, *rec. Savignys Recht des Besitzes*, 6th ed., in: *Jahrbücher für wissenschaftliche Kritik* 12 (1838) 265 ff., 267.

³¹Rudolf v. Jhering, *Die Lehre von der hereditas jacens: I. Standpunkt der Betrachtung*, in: id., *Abhandlungen aus dem Römischen Recht* (1844) 153 f. note 1.

³²Georg Friedrich Puchta, *Über die Negatorienklage* (1827) 163 f.

³³Bernhard Windscheid, *Festrede zum Gedächtnis an Savigny* (1879) 84, for the consideration of needs by Windscheid see Ulrich Falk, *Ein Gelehrter wie Windscheid*, 2nd ed. (1999) 133 ff., 158 ff., 176 ff., for this citation see 178.

of legal relations” demanded the legitimacy of such an institution and that the “legal consciousness of the people” accepted “this need”. “Needs” were representatives of economical and ethical purposes. Windscheid explained that even if Roman law did not allow an assignment of claims, it was necessary to “accentuate our legal consciousness even against the Roman Law”.³⁴ Although these terms were reminiscent of Savigny, in 1853 Windscheid found himself at a *turning point of jurisprudence*.³⁵ Under this banner, Johannes Emil Kuntze summed up a new literature of reform in 1856. He saw “symptoms of a crisis”³⁶ that unified a new generation of Pandectists everywhere. Kuntze summarized these tendencies as: stronger references to real life, the emancipation of legal history from dogmatics, the pursuit of the refinement of legal dogmatics, and an emphasis on a national perspective. These proposals all had a certain tension in common. Their authors wished to leave the domination of ancient texts behind, but the resulting focus on the present was not intended to result in deficits in rationality. Almost everyone was horrified at the thought of a jurisprudence arguing freely with its sense of justice. Thus, the authors tried to satisfy the present pressure of modernization by continuing to utilise the ancient legal texts. As exemplified by an illustration by Leist, a child will not “let go of its mother’s guiding hand before it feels safe standing on its own feet”.³⁷ The main problem was the search for possible ways in which one could adjust the law beyond the ancient texts in a scientifically controlled way. The term frequently used for this adaptation to reality was again “needs”.

This conceptual continuity was accompanied by a new semantic shift in the idea of “need”. Needs should be – in accordance with the natural sciences – increasingly recognized, and not only felt.

Volksgeist was now more and more perceived as “mysticism”.³⁸ The concept of “people” was no longer understood as a metaphysical-cultural unity but as a network of real interests. In 1865, Wilhelm Arnold began

³⁴Bernhard Windscheid, *Die Singularsuccession in Obligationen*, in: Kritische Übersicht I (1853) 40, 42.

³⁵Id., *Die Singularsuccession in Obligationen*, in: Kritische Übersicht I (1853) 27.

³⁶Johannes Emil Kuntze, *Der Wendepunkt der Rechtswissenschaft* (1856) 4; earlier id., *Das römische Recht in der Gegenwart und die Aufgabe der modernen Rechtswissenschaft in der Zukunft (Besprechung von Jhering, Schmidt, Lenz und Esmarch)*, in: Kritische Übersicht 2 (1855) 173 ff.

³⁷Burkard Wilhelm Leist, *Civilistische Studien auf dem Gebiete dogmatischer Analyse. Erstes Heft: Über die dogmatische Analyse Römischer Rechtsinstitute* (1854) 10.

³⁸Rudolf Stammler, *Über die Methode der geschichtlichen Rechtstheorie* (1888) 6; concerning Ernst Zitelmann, *Gewohnheitsrecht und Irrtum*, in: Archiv für civilistische Praxis, vol. 66 (1883) 323 ff.

to split *Volksgeist* into its real components,³⁹ which he identified as: language, art, science, custom, economy, law, and state. Many authors could not resort to their own sense of justice anymore without a feeling of discomfort. They tried to understand the structure of law which before, as an "organism", had been left to autonomous, uncontrolled development.⁴⁰ Jhering explained in 1865 that: "The science of law does not state organisms, just as organic chemistry does not – it dissolves them".⁴¹ In 1854, Burkhard Wilhelm Leist called for an autonomous "analysis of the existing legal institutions".⁴² In the same year, Reinhold Schmid created a theory of law to "[not] be completely dependent on an uncertain sense of law".⁴³ In 1858, Jhering developed his natural-historical method to "put an end to the dominance of sense".⁴⁴ From this point onwards, references to a sense of law were perceived to be unscientific".

There was now a much stronger demand for empirical evidence in order to identify needs. The "practical needs" or the "needs of life" were increasingly understood as the "needs of legal practice" or the "needs of commerce": a much more realistic understanding. As early as 1843, Georg Beseler proposed to uncover the needs of life by studying them "in a natural scientist's way".⁴⁵ Legal practice, in particular, seemed to be an appropriate subject from which one could gain a detailed view of legal reality and its needs. Then again, deriving arguments from the courts' legal practice had had a bad reputation for some time. In 1846, Savigny repeatedly complained about inconsistent "pretences about the status of recent legal practice".⁴⁶ Savigny himself was dependant on mail correspondence with judges he

³⁹Wilhelm Arnold, *Cultur und Rechtsleben* (1865); later on id., *Cultur und Recht der Römer* (1868).

⁴⁰"We must not try to achieve something by using slogans like 'Volksgeist' and organism. They are empty phrases and by using them we push our problems aside instead of solving them". Wilhelm Arnold, *Cultur und Rechtsleben* (1865) 9; in 1876 Adolf Merkel said, the "perception of all people as an organism" shall "from now on be subject to a special consideration and examination", Adolf Merkel, *Über den Begriff der Entwicklung in seiner Anwendung auf Recht und Gesellschaft*, in: Grünhuts Zeitschrift (1876), reprinted in: Adolf Merkel, *Hinterlassene Fragmente und Gesammelte Abhandlungen* (1898) 59.

⁴¹Rudolf v. Jhering, *Geist des römischen Rechts*, vol. III 2, § 39, 4th ed. (1884) 351.

⁴²Burkard Wilhelm Leist, *Ueber die dogmatische Analyse Römischer Rechtsinstitute* (1854) 5.

⁴³Reinhold Schmid, *Theorie und Methodik des bürgerlichen Rechts* (1848) 251.

⁴⁴Rudolf v. Jhering, *Geist des römischen Rechts*, vol. III 2, § 39, 2nd ed. (1871) 332.

⁴⁵Georg Beseler, *Volksrecht und Juristenrecht* (1843) 58, 109.

⁴⁶Letter to Blume, reproduced in: Dieter Strauch, *Friedrich Carl von Savigny. Briefwechsel mit Friedrich Bluhme 1820–1860* (1962) 311 (*Brief vom 5. 9. 1846*).

was friendly with to be informed about legal practice.⁴⁷ Even Windscheid, who usually argued vehemently for a consideration of legal reality, warned against “this often mentioned, yet frequently untraceable legal practice” in 1862.⁴⁸ Slowly, publications of case collections occurred. Not until 1847 did Seufferts Archiv begin to republish cases systematically.⁴⁹ Collections of court decisions had so far only appeared sporadically.⁵⁰ With Windscheid’s first volume of his pandect textbook in 1862, the persistent consideration of legal practice slowly began.

Court decisions were one way of becoming acquainted with legal practice. By studying cases, one could become acquainted with the legal reality. However, as long as a theory about the raising and changing of needs was missing, one could say little about fundamental “needs”. Without such a theory, one could not distinguish phenomena of legal reality from “real needs”.

This leads us to the third approach of identifying “needs” – the “rational” approach:

Rational Need

To develop a theory of needs, both the sociology of law (which was of little importance before 1900), as well as Freud’s psycho-analysis, were not

⁴⁷See for instance Blume, see also Heinz Mohnhaupt, *Richter und Rechtsprechung im Werk Savignys*, in: Walter Wilhelm (ed.), *Studien zur europäischen Rechtsgeschichte* (1972) 262 f.

⁴⁸Windscheid, *Lehrbuch des Pandektenrechts*, 1st ed. (1862), preface.

⁴⁹Johann Adam Seuffert (ed.), *Archiv für Entscheidungen der obersten Gerichte in den deutschen Staaten* (beginning with vol. 9: *Seufferts Archiv für Entscheidungen*) (1847 ff.).

⁵⁰One of the first collections: Oberhofgericht Mannheim, *Jahrbücher des Großherzoglichen Badischen Ober- Hofgerichts zu Mannheim, I–VII. Gesammelt und mit Genehmigung des Großherzoglichen obersten Justizdepartements herausgegeben vom Staatsrath von Hohnhorst, Kanzler des Oberhofgerichts* (1824–1832); also Oberappellationsgericht Wiesbaden, *Sammlung der merkwürdigeren Entscheidungen des Herzöglich Nassauischen Oberappellations-Gerichts zu Wiesbaden. Herausgegeben von W. von der Nahmer (Advokat und Procurator bei dem Herzöglichen Oberappellations-Gerichte, so wie bei dem Herzöglichen Hof- und Appellations-Gerichte in Wiesbaden), I–II* (1824–1825); Oberappellationsgericht Lübeck, *Juristische Abhandlungen mit Entscheidungen des Oberappellationsgerichts der vier freien Städte Deutschlands. Von A. Heise (Präsidenten) und F. Cropp (Rath bei dem Oberappellationsgerichte) I–II* (1827–1830); Obertribunal in Berlin, *Entscheidungen des Königlich Geheimen Ober-Tribunals, herausgegeben im amtlichen Auftrage von A. H. Simon (geheimer Ober-Justiz- und Revisions-Rathe), und H. L. von Strampff (Kammergerichts-Rathe, I–LXXXIII* (1837–1879).

considered, and Marx's writing was refused for political reasons. A "view behind the scenes" could very well have been inspired by Hegel, as his theory of bourgeois society (which he had developed in his 1821 legal philosophy) was founded on a "system of needs" as a mediation between the satisfaction of individual and collective needs.⁵¹ Hegel thus concluded that protection of property by the judicature was necessary in order to maintain the momentum of the (mediated) needs.⁵²

Eduard Gans designed the idea of a universal legal history, in which he observed the development of the concept of law during the reign of different *Volksgeister* in history. He did not need to resort to needs as an engine of civil society and law because, following Hegel, he focused on legislation, and thus denied an immediate influence of need on the law.⁵³ Lorenz von Stein went even further. In 1841, Stein wrote a long review of Savigny's "System", where he discussed the question of which pieces of Roman law were still applicable. According to Stein, the law in its essence is subordinated to the state-being and its "basic ideas and specifics".⁵⁴ To evaluate this, one had to face "reality and its scientific and practical need".⁵⁵ From this perspective, the next step was obvious: to turn one's sight to society itself; the jurist had to become a social scientist. Parallel to the mentioned critique, Stein worked on a historic analysis of French society from 1789 till 1830. In his famous *Begriff der Gesellschaft* of 1842, he described human society – in line with Hegel – as set in motion by the system of needs.⁵⁶ He deciphered the main

⁵¹For an introduction see Rolf Peter Horstmann, in: Ludwig Siep (ed.), *G.W.F. Hegel, Grundlinien der Philosophie des Rechts* (1997) 193 ff., 200, 206 ff.

⁵²Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts*, in: Johannes Hofmeister (ed.), *Sämtliche Werke Bd. XIII* 4th ed. (1955) § 188.

⁵³See for instance id., *rec. Friedrich von Raumer, Über die Preußische Städteordnung*, in: id., *Vermischte Schriften* (1834) 136; Lawmaking brought about legislators "according to their knowledge and needs". Need as a guideline for good legislation is emphasized for instance in Eduard Gans, *Das Erbrecht in weltgeschichtlicher Entwicklung* vol. 3 (1829) 49, 65, vol. 4 (1835) 19, 68, 107, 251. For a universal history by Gans see Heinz Mohnhaupt, *Universalgeschichte und Vergleichung bei Eduard Gans*, in: Reinhard Blänkner et al., *Eduard Gans (1797–1839). Politischer Professor zwischen Restauration und Vormärz* (2002) 339 ff.; for the system of needs as a motor for civil society see (in close accordance with Hegel) Gans, *Naturrecht und Universalrechtsgeschichte* (1981) 82 ff (introducing the term „Nationalökonomie“ („national economy“)).

⁵⁴Lorenz v. Stein, *Zur Charakteristik der heutigen Rechtswissenschaft*, in: *Deutsche Jahrbücher für Wissenschaft und Kunst* (1841) 365–366, 369–370, 373–374, 377–387, 389–391, 393–399, 377.

⁵⁵Id., *Zur Charakteristik der heutigen Rechtswissenschaft*, in: *Deutsche Jahrbücher für Wissenschaft und Kunst* (1841) 383.

⁵⁶Gottfried Salomon (ed.), *Lorenz von Stein, Der Begriff der Gesellschaft und die soziale Geschichte der französischen Revolution bis zum Jahr 1830* (1921) 29.

needs using history and historical teleology. In doing so, he parted from his Pandectist roots.

Despite a focus on history as a method of gaining insight into the law, and despite the fascination for natural sciences, there were no Pandectists who sought to follow a social theory of this kind. The Historical School of Law opposed Hegel and heavily criticized the evolutionary theory of law presented by Gans in his book on inheritance law.⁵⁷ After 1860, not even Darwin's theory of evolution could convince the jurists of its usefulness.⁵⁸ Consequently, the Pandectists used the term "need" without having a clear theoretical concept. It remained a popular argument for suggesting a closeness to practice. Its persuasive power did not lie in proving an existing "need", but rather in proving an allegation of it to others. Thus, the concept of "needs" remained unsophisticated and obvious to all.

Theoretical Classification of the Argument

This leads us to the question: what does this have to do with juristic interpretation? In considering this question, I move to my second perspective: what did "needs" mean as an argument in the legal theory of the Pandectists? In the 19th century, this question had no unanimous answer.

For Savigny, "needs" were part of the *Volksgeist*. His doctrine concerning legal relationships, *Rechtsverhältnisse*, served as an intersection between legal norms and *Volksgeist*. Savigny used this doctrine to trace the rights back to the condition of the law "the way it surrounds us in real life".⁵⁹ At the same time, these legal conditions, in their system of mutual references, guaranteed the organic coherence of the law. For Savigny, academic-juridical interpretation meant in part a retracing of needs in *Ius Commune* texts, be they antique texts or later interpretations. The Jurist had to purge "the present state of law from all its elements that [...] have been created without a genuinely practical need".⁶⁰ For Savigny, intuition as a part of his hermeneutics was combined with a taxonomist's work. In particular, he displayed a tendency to read contemporary desired results into historical

⁵⁷Georg Friedrich Puchta, rec. Eduard Gans: *Das Erbrecht in weltgeschichtlicher Entwicklung*, part 1 (1824), part 2 (1825), in: Friedrich Christoph Karl Schunck (ed.), *Erlanger Jahrbücher der gesamten deutschen juristischen Literatur* 1 (1826) 14.

⁵⁸Hans-Peter Haferkamp, *Darwinrezeptionen in der Rechtsgeschichtswissenschaft*, will be published in Ludwig Siep (ed.), *Evolution und Kultur*.

⁵⁹Friedrich Carl v. Savigny, *System des heutigen Römischen Rechts*, vol. 1 (1840) 7.

⁶⁰Friedrich Carl v. Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (1814) 119.

sources. For example, he held that the Romans had already known (juridical) representation even though a multitude of antique texts contradicted this.⁶¹ This combination of intuition and scientific knowledge had already been rejected by Puchta.⁶² In interpretation, he demanded a stricter faithfulness to the actual words. If this led to a conclusion in Roman law that was no longer appropriate, the only remaining possibility was to state a negation of this norm by customary law. He held that in the persistent exercise of an aberrant rule by courts or by jurisprudence a practical need could become evident. Need was no argument in interpretational theory but a legal source for customary law.

The development of this kind of customary law made by jurists and especially the courts was, according to Puchta, an intuitive process and, as such, it had to be strictly distinguished from the logical methods of finding the law employed by the legal sciences. The systematic work of jurists could not make use of "needs". Thus, it was not possible to trace the norms back to the *Volksgeist* found with this method. Scientific method and practical needs were separated. Between 1856 and 1858, Jhering developed this argument further. In his natural-historical method, Jhering created a world of "legal bodies" – "needs".⁶³ This realm of legal bodies, which had to be constructed, relied, according to Jhering, "entirely on itself"⁶⁴ without being driven by the demands of reality. A norm thus found existed "because it cannot not exist", even if this norm "could never hope to be of any practical use".⁶⁵ Consequently, Jhering's natural-historic method considered itself as "jurisprudence's emancipation from the coincidence of the immediate need".⁶⁶ Need was no longer a juridical argument. Legal science created the law, but legal reality decided whether there was a practical need for it.

Alas, Jhering's argument remained widely unheard. After 1848, despite the fact that many Pandectists still referred to "needs", most of them no longer regarded them as a source of law. Using the sources of law to create a demanded law, replaced the idea of the *Volksgeist* step by step. It became clearer that law was made and not so much found. "Needs" served as a scientific falsification to verify the practicability of the created law. A debate

⁶¹See Franz Josef Hölzl, *Friedrich Carl von Savigny Lehre von der Stellvertretung* (2003).

⁶²To the following see Hans-Peter Haferkamp, *Georg Friedrich Puchta und die Begriffsjurisprudenz* (2004) p. 371 ff.

⁶³Rudolf v. Jhering, *Geist des römischen Rechts*, vol. III 2, § 41 (1871) 343.

⁶⁴Id., *Unsere Aufgabe*, JhJb 1 (1867) 19.

⁶⁵Id., *Unsere Aufgabe*, JhJb 1 (1867) 18.

⁶⁶Id. *Geist des römischen Rechts*, vol. III 2, § 41 (1871) 369.

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between Windscheid and Justice Otto Bähr in a time before the codification of the German Civil Code (BGB) exemplifies this. In one particular matter, which is of no further interest here, a number of Pandectists referred to practical needs in order to justify their views. Among them was Otto Bähr. Bernhard Windscheid disagreed with him, but in accordance with Bähr, he argued that the law did not exist for its own sake, but much rather to satisfy "human needs". He concluded however: "Practical needs are not a source of law".⁶⁷ Otto Bähr replied that even if "practical needs" may not be an immediate source of law, they still were "a source of our sources of law" and, therefore, "indispensable for understanding and applying the law".⁶⁸ To show said practical need, he used a decision of the Supreme Court of the German Reich, which reflected his own point of view. The decision, he argued, contained the "answer of legal practice" and, therefore, the "rebuttal of Windscheid's argument".⁶⁹ By deducing the practical needs from court decisions, legal science as a matter of fact becomes bound by precedent. For the judge, Otto Bähr, this was much less a problem than for the Professor, Bernhard Windscheid, who countered Bähr in 1887 and stated: what "satisfies the practical needs is disputable. It is not important what we think, it is important what the legislator had in mind".⁷⁰

With the above arguments and views in mind, we can conclude as follows.

Summary

Pandectism in the 19th century was confronted with the old problem of how to obtain or create law from ancient Roman law that was applicable in the present. One label Pandectists used to describe the relationship between law and reality was "needs". Before 1848, the focus lay on "practical needs", but later shifted to the more empirical "needs of legal relations" or "legal practice". The main question was how to discover these said needs as a jurist. In respect of this, Savigny in particular pointed out the intuitive participation of all jurists in the body of values, the *Volksgeist*. After 1848, under the influence of natural sciences, it became surrounded by the atmosphere of not living up to scientific standards. "Needs" had to be identified precisely. How that could be achieved however, remained unclear. One attempt was to give

⁶⁷Bernhard Windscheid, *Wille und Willenserklärung*, in: AcP 63 (1880) 78, 81.

⁶⁸Otto Bähr, *Urteile des Reichsgerichts mit Besprechungen* (1883) 14.

⁶⁹Id., *Urteile des Reichsgerichts mit Besprechungen* (1883) 5, 8.

⁷⁰Bernhard Windscheid, *Lehrbuch des Pandektenrechts I*, 6th ed. (1887) § 22 note 8; generally Ulrich Falk, *Ein Gelehrter wie Windscheid*, 2. ed. (1999) 34.

more weight to court decisions. In numerous other attempts "needs" were simply claimed. Accordingly, a consensus of where to place the argument in legal history could not be found. To Savigny, needs became a part of legal interpretation. Puchta regarded it as a source of customary law, and Jhering as no legal argument at all. To most Pandectists, needs served rather as a control mechanism of those rules which had been crafted quite freely from ancient sources. Which needs actually existed and how they functioned in reality also remained unclear. Thus, it can be seen that the Pandectists most definitely did not develop a complete theory of needs. Jhering's attempt to disenchant the concept of a sense of justice or Stein's attempt to understand the driving powers of society were only the initial stages of this. In the end, to claim that something would satisfy a need remained a hidden judgment, and a mere allegation that a "need" related to reality. The question of whether or not Pandectists were detached from the real world cannot be answered by analyzing the concept of "needs"; however, it can be concluded though, that they did not wish to be.