

## Judges and Legislators in the Creation of Law

Corresponding Author: XXXX

### SUMMARY

I.- Judges and their apparently contradictory role as guarantors of legal certainty and as promoters of adaptation to social change; II.- The evaluative activity of judges in jurisprudence at the end of the twentieth century; III.- Bibliography.

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**ABSTRACT:** Laws inevitably have lacunas that can only be filled by taking into account many different considerations and assessments, including value judgements. In this essay, I analyse how the creative and interpretive work of judges is not incompatible with the principles of the rule of law and their subjection to it. In legal doctrine, efforts are currently being made to determine the essential aspects of this living law, which intervenes in the resolution of legal issues. And all this in the context of the factual relationship between the performance of judges and that of society.

**KEYWORDS:** jurisprudence, law, assessment.

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### I. JUDGES AND THEIR APPARENTLY CONTRADICTIONARY ROLE AS GUARANTORS OF LEGAL CERTAINTY AND AS PROMOTORS OF ADAPTATION TO SOCIAL CHANGE

Progress is the result of the continual shift of the general moral conscience towards new experiences, owing to the appearance of hitherto unimaginable life situations.<sup>1</sup>

Adapting law to an ever-changing society is one of the major challenges for jurists. Roman law, the basis and foundation of the majority of Western legal systems, was the result of continuous ethical-legal breaks with purely formal and very often fossilised situations, which it was necessary to adapt to new social dynamics. The application of the case law of the Reichsgericht, in the wake of the Second World War, is probably one of the most recent and most drastic examples of that kind of break with a purely formal justice, in favour of its material and absolute content. The aim was to return to the Aristotelian idea of justice, according to which the rendering of services should be compensated in a materially equivalent and socially fair manner. The new organisational model established in modern constitutions, marking the transition from liberal to social welfare states, sought to establish a minimum level of human dignity. And the political powers and governments were expected to take an active part in guaranteeing individual freedoms to this end.

In view of the foregoing, what is the mission of legislators? It is apparently clear that it is not up to them to endorse or encourage such breaks with legal tradition. For if they did, it would imply abandoning the idea of timeless justice, necessary for establishing legal principles, albeit conditioned by the different types of legal relationships. Statutory laws cannot, in any of their final resolutions, be seen as permanently lacking validity. But, nonetheless, legislators should take heed of relative and temporal aspects when drafting them.

There is also the problem of determining to what extent judges are professionally and politically responsible for such breaks with legal tradition. In the strict sense, it could be claimed that they act according to their own conscience, their decisions being legitimate provided that they remain within the scope of action of jurisprudence. Interpretation—especially the legal kind—is a process of creative reasoning whose ultimate purpose is to find grounds for determining the significance of some or other thing.<sup>2</sup> But, when establishing those limits and, for even solid reasons, after overstepping them, legal certainty may be placed in jeopardy. This begs the question of whether or not judges should base their decisions on criteria of equity, even though these may

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<sup>1</sup> Georg Wilhelm Hegel, *Lección sobre la Filosofía de la Historia Universal* (José Gaos tr, 5th rpt, Alianza 1994) 75.

<sup>2</sup> Timothy Endicott, 'Legal Interpretation' in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge 2012) 109.

undermine legal certainty.

Legislators can and should code previous breaks with legal tradition, which tend to be first observed in the courts. Throughout history, the creative activity of judges has had a mixed reception. This activity has usually been accepted when greater faith has been placed in the judiciary—in periods of legal and social spontaneity, one might say—while being restricted or repudiated in periods of legal development and codification.<sup>3</sup>

Since the end of the twentieth century, the controversy between the advocates of strict law and the proponents of the flexible sort has led to a debate on the priority that rules (standards and directives) should be given. The conclusion that has apparently been drawn is that both forms are necessary and should be reconciled: together with the rules, the generic and individual aspects of legal cases should be borne in mind.<sup>4</sup>

To this should be added the different consideration that the activity of judges deserves in the two major systems of legal production that have developed throughout the history of the West and which are still in force: the system of judicial formulation and that of legislative formulation of law.

These systems of legal production—judicial and legislative—form part of the two major legal systems currently prevailing in the West: that which is known as ‘Roman’, ‘Romanised’ or ‘civil law’<sup>5</sup> and Anglo-Saxon or Common Law. In the latter, general or jurisprudential customs have precedence, although statutory law is gradually gaining ground in those countries governed by these systems.

From this it seems clear that in the Roman system laws adopt a predominantly legal and coded form, while in common law customs and legal precedents are particularly important. In turn, legislative and jurisdictional systems can be ordinary or special; in both cases, the equity and flexibility of judges in their rulings play a different role.

If judges were at complete liberty to apply rules in a flexible manner, this would sound the death knell of law, which would be precariously watered down by moral and political considerations. When law loses its qualities of precision, rationality, stability and certainty, it is incapable of achieving its purpose of defining and delimiting the rights and obligations of individuals and social groups. Conversely, an exclusive rule of law, without any type of discretion on the part of judges, would also imply the demise of law, for it would prevent them from resolving cases fairly.

When interpreting the law, therefore, judges should resort to legal reasoning. According to the jurist Timothy Endicott, legal reasoning rationally underpins (general or individual) legal conclusions. In his view, this reasoning does not merely identify the content of laws, but also determines how judges should act according to the law. In the same vein, the general assumptions on interpretation that Endicott considers to be acceptable are as follows:

- It refers to an object (viz. a good interpretation depends on certain assumptions on the object).
- It is creative (i.e. the aim of an interpretation is not merely to confirm what everyone familiar with the object already knows, but also to give it a meaning that may be debatable for others).
- It is rational (there may be reasons that lead to a specific interpretation).

The premises on which Endicott bases himself to consider whether or not an interpretation is legal include, on the one hand, the claim that a legal interpretation establishes a rule for enforcing the law (it is applicative, not a generalisation) and, on the other, the consideration of legal interpretation as a structured or purposive whole. To this he adds some of the aspects of legal reasoning that do not require any interpretation, such as resolving uncertainties in the content of laws, specifying the requirements of abstract legal rules, deciding on what is fair, equitable interferences in legal obligations with powers or rights, and understanding the law.<sup>6</sup>

Neither can law be totally rigid and formal nor purely equitable.<sup>7</sup> The question is: in what terms and to what extent should strict and equitable law be combined? Moreover, what guidelines should laws follow as to the leeway that judges should be given in the use of their own discretion?

It is the socio-political and legal circumstances of each country that determine whether a greater or lesser degree of equity is applied. This is the reason why, in moments of crisis or legal reform, referral to the discretion of equity prevails. This is also the case in those situations involving a recently created field of law that still does not possess a complete set of legal regulations. At any rate, the political-legislative dilemma of the discretion of equity largely depends on the nature and peculiarities of the different elements making up the private law system in question. In short, when what is involved are institutions for which legal certainty is essential, rigid and formal

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<sup>3</sup> KarlLarenz,*LaFilosofíaContemporáneadelDerechoydelEstado*(Eustaquio GalánGutiérrez and Antonio Truyoly Serra trs, Revistade DerechoPrivado1942)129.

<sup>4</sup>LuisLegazyLacambra,*FilosofíadelDerecho* (5th revedn, Bosch1979) 464.

<sup>5</sup> This last term is adopted by English jurists because it derives from the *Corpus Iuris Civilis*, perfected and disseminated by the schools of annotators and commentators all over Europe and then transmitted, mainly through Spain, to the American continent.

<sup>6</sup>Endicott, ‘Legal Interpretation’ (n 2) 9–10.

<sup>7</sup>Theodor Stenberg, *IntroducciónalaCienciadelDerecho* (Labor1930) 23–27.

law should predominate. However, when there is a need to adapt and evolve, flexible and equitable law should prevail.

At the end of the twentieth century, many jurists abandoned the doctrinal stances according to which the law was the one and only source of law. ‘Whoever fails to understand,’ Spota wrote, ‘that law is not only to be found in black letter law, runs the grave risk of inadequately appreciating the living law deriving from legal experience, or better said, from that prolific and notable source of law that is jurisprudence.’<sup>8</sup>

The problem lies in the contradiction that, when applying the law, arises between the criteria of justice and legal certainty; the latter vindicating positivity, generality and pre-established formal law that is valid, regardless of justice or its purpose. On the one hand, ‘Justice and, above all, its purpose call for legal individualisation, adaptation, free and equitable law.’<sup>9</sup> The Greeks, who had already come up against this problem, found a middle-ground solution: neither law without the discretion of equity nor equity without positive law. Neither of these two dimensions of justice can be relegated to second place, for both have contributed to form the legal system. On the other, the lambasted vagueness of equity is, on the whole, avoided if it is not separated from the idea of justice and purpose, the moral and ideal cornerstone of law.<sup>10</sup>

Insofar as whoever interprets the law gives it sense, develops it and completes it, the application of regulations is a creative activity. This does not involve granting judges any arbitrary power to base their decisions on their personal feelings or on their utopian ideals as legislators. Rather, judges are granted the *officium* to cooperate in the creation of law and, complying with it, are subject to laws and guided by the general principles of law. However, when exercising this *officium*, the main difficulty that judges encounter is that there are no general guidelines for categorising legal opinions. This does not mean to say that judges are insufficiently informed to express their views on justice; quite the contrary.<sup>11</sup> However, no debate on practices or convictions would serve as the basis for arriving at conclusions. So, disagreements about justice are not merely differences of opinion. In this sense, it is important to recall the political philosopher Dworkin’s reminder, in *Justice for Hedgehogs* and *Law’s Empire*, that not even the unanimous opinion of the community can determine a legal issue. In short, justice should never depend on opinions or practices.<sup>12</sup>

## II. THE EVALUATIVE ACTIVITY OF JUDGES IN JURISPRUDENCE AT THE END OF THE TWENTIETH CENTURY

In the twentieth century, legal positivism was comprehensively developed by Hans Kelsen,<sup>13</sup> who drew inspiration from the positivist social philosophy of Auguste Comte and the theories of Jeremy Bentham, John Stuart Mill and the social sciences, primarily Charles Darwin’s theory of evolution. But in the final decades of the century, with legal positivism now in sharp decline, there emerged new doctrinal positions, renouncing the logic of subsumption and laying the theoretical foundations for the propensity of court jurisprudence for ‘justice in a specific case’. These new theories resulted from the growing influence of Anglo-Saxon legal thought and from the development of neo-Kantian, phenomenological and ontological theses during the post-war period.

In his ‘pure’ theory of law, Kelsen solely attributed the activities of judges responsible for subsuming facts into rules a scientific character. By claiming that the ‘pure’ theory of law had nothing to do with content, but only with the logical structure of legal rules,<sup>14</sup> he managed to cast a shadow of doubt over their interpretive activity.

The surmounting of this deterministic vision, thanks largely to neo-Kantian authors like Stammler, Rickert and Radbruch, paved the way for a jurisprudence of values rooted in the phenomenology of Edmund Husserl and, especially, in the ontology of Nicolai Hartmann.<sup>15</sup>

With respect to the systematic perspectives that judges should take into consideration when interpreting the law, these are now neither independent methodologies (as in the traditional methodology), nor rigid rules, but

<sup>8</sup> Alberto G Spota, *Tratado de Derecho Civil, tomo I, parte general, vol I* (Depalma 1947) 7–11.

<sup>9</sup> Gustav Radbruch, *Filosofía del Derecho* (4th edn, Revistade Derecho Privado 1959) 98.

<sup>10</sup> José Castán Tobeñas, *La formulación judicial del Derecho: jurisprudencia y arbitrio de equidad* (2nd revedn, Reus 1954) 157.

<sup>11</sup> In relation to the political philosophy on which Ronald Dworkin expounds in his books, *Justice for Hedgehogs* and *Law’s Empire*, see Timothy Endicott, ‘Legal Interpretation’ (n 2) 113–117. Endicott’s example of the accused prisoner is particularly enlightening as regards the objective information that can be leveraged by judges so as to deliver fair judgements.

<sup>12</sup> Ronald Dworkin, *Law’s Empire* (Harvard University Press 1986) 73, 424–5, n 20; Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 157, 162.

<sup>13</sup> Hans Kelsen, *Teoría Puradel Derecho* (9th edn, Porrúa 1997).

<sup>14</sup> Kelsen, *Teoría Puradel Derecho* (n 14) 15–16.

<sup>15</sup> Karl Larenz, *Metodología dela Cienciadel Derecho* (Ariel 1994) 114–117; Karl Larenz, *Derecho Justo. Fundamentos de ética jurídica* (Luis Díez Picazo tr, Cívitas 1993) 21–32.

guiding principles that give them leeway to use their discretion. This does not mean, however, that they can arbitrarily employ systematic principles or omit some or other of them to arrive at the desired conclusion.

In the context of value-orientated thought, many of the traditional interpretation criteria (including those that allow for a development of law inherent to the law) are now being considered under a new light. While the traditional methodology essentially envisages a process of logical argumentation by analogy, the new methodology stresses that the alleged similarity is an identical appraisal. This is the reason why the cases being compared should be identical in aspects that are decisive for evaluating already regulated cases.

Value-orientated thought does not reject the incorporation of the ethical dimension in the findings of law. It contends that, in the case of an unresolvable conflict between fidelity to the law and the justice of the case, the ultimate decision lies in the conscience of the judge, ethical-legal principles thus being of utmost importance in the development of law.

As occurs in the field of ethics, in law the ultimate intention is always to justify the pretension of validity of a particular resolution in a specific legal order.<sup>16</sup>

Yet, jurists do not immediately enforce the ethical principles that ultimately justify a resolution, but only when it is impossible to apply the legal order contained in the laws and legal system or when it is the only way of avoiding a blatant injustice.

Nowadays, there is a general consensus that judicial decisions are not fully pre-programmed in laws. However, judges are subject to the rules of law and law. This implies putting into effect the function of legally and constitutionally envisaged law by means of legal substantiation and arguments, with a view to arriving at a fair resolution, while respecting the legally and judicially inestimable mission and responsibility of the legislator.

We should not lose sight of the fact that legal methodology as a whole, including jurisprudence of values, is conditioned by the political constitution. In this connection, Müller differentiates legal methodology, as the working and argumentation method effectively employed by practical jurists, from that of legal science. He claims that 'the acts of judicial decision-making bodies only have legitimate validity if, according to the methodology's rules, they appear as decision-making rules that can be accredited by legal regulations'.<sup>17</sup>

Furthermore, versus the opinion of some authors that judgement values cannot be substantiated, Alexy<sup>18</sup> holds that an attempt should be made to find rules according to which a rational discourse on the integrity of normative principles can be established. The legal discourse is, by and large, a rational one, subject to more restrictive conditions, such as the connection to the law, the consideration of precedents, the incorporation of law in the dogma elaborated by science and the rules of the procedural regulations in court discourse.<sup>19</sup>

Even so, the importance of these rules should not be overstated. Neither are they capable of answering the question why exactly jurists make use of these rules and forms of interpretation, nor can they establish the extent to which they intervene in value judgements.

The decision on which value judgement has priority in the event of a conflict is not pre-established. The importance of a value judgement in a particular case depends on the facts. Certain rules of reasoning assist in this appraisal. Additionally, criteria like the value judgement's proximity to the facts, the greater or lesser probability of respecting or encroaching on them and how pressing the need is are also important. Equality is one of the factors that clearly limit these rules of preference. Nonetheless, we concur with Westermann that it is necessary to reduce interest to the desire that the parties in a litigation may have to seek more favourable legal consequences for themselves, and to define clearly the concept of interest, in this regard, of the 'legal standards of assessment'.<sup>20</sup>

Standards of assessment (for example, protecting legal transactions, legal appearance, guaranteed property rights, etc.) are not interests, but ultimately consequences of the legislator's idea of justice. Judges are bound by the standards of assessment established by the legislator. Accordingly, court jurisprudence is tantamount to applying legal assessments, versus their independent counterparts.

Notwithstanding the foregoing, jurists like Oscar Adolf Germann<sup>21</sup> acknowledge the merits of jurisprudence of interests and especially the need for an interpretation in accordance with the purpose of the law. But he also stresses that these methods have their limits. For which reason, it would seem more appropriate to use the social values to which the law corresponds as a basis, following a critical-evaluative method. Although this does not only imply the independent assessment of judges, but also their interpretation in keeping with the

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<sup>16</sup> Larenz, *Metodología* (n 16) 141–151.

<sup>17</sup> *ibid* 160.

<sup>18</sup> Robert Alexy, *Theorie der juristischen Argumentation* (Suhrkamp 1978) 24–34; cited in Larenz, *Metodología* (n 16) 508–510.

<sup>19</sup> Larenz, *Metodología* (n 16) 508.

<sup>20</sup> *ibid* 141–142.

<sup>21</sup> Oscar Adolf Germann, *Probleme und Methoden der Rechtsfindung* (Staempfli 1965) 79.

assessments forming the basis of the law and which are implicit in it.<sup>22</sup>

Helmut Coing offers a reasoning for 'jurisprudence of values' that does not derive from jurisprudence of interests,<sup>23</sup> but is based on the critical-evaluative method proposed by Germann. Coing contends that the link between the factual situation and the legal consequences, as developed in a complete legal rule, is based on an assessment. It is therefore a value judgement made by legislators and judges, which can be conditioned by the vested interests of the decision-maker or determined on the grounds of expediency or justice.

What seems clear is that law enforcement is not simply a process of subsumption. For it is also an act of will for achieving purposes, in which the assessments resulting from the law, whether they be of a moral or pragmatic nature, play a decisive role. Thus, for Coing the mission of jurisprudence is 'to elaborate the rational content of the values forming the basis of the law, because only in this way will judges be in a position to check themselves'.<sup>24</sup>

The order of positivised values on which any jurist called upon to make an assessment should focus is envisaged, in all civilised legal systems, in the part pursuant to the fundamental rights established in their respective constitutions. This is where values such as human dignity and constitutional principles, such as the principle of equality in its diverse forms and the principle of free development of personality, are to be found. All of these legal precepts should be interpreted according to the spirit of this order of values.

However, this begs the question of whether or not this order of values is also a hierarchical one. Zippelius poses the question in the following way: do evaluative decisions necessarily lead to a subjectivism or are there objective values and an objective order of values, which form part of a spiritual world that we share? And in what way and to what point can we recognise such an order of values? For Zippelius, the guidelines for evaluative decision-making are to be found in the dominant legal morality.<sup>25</sup> Ethical-legal conceptions would find their highest expression in law, above all in fundamental rights. Additionally, the dominant evaluative conceptions could be expressed in the customs of a place and in certain institutions of social life, like, for example, the traditional form of marriage. Nonetheless, a custom would only serve as a guideline for an evaluative judicial decision if it were an expression of the dominant evaluative conceptions and precisely for being so.<sup>26</sup>

Zippelius encounters a new indication of the dominant legal morality in the legal principles elaborated by court jurisprudence, which, nonetheless, leaves many doubts unresolved. Many pending value conflicts constantly emerge; moreover, the dominant legal morality is variable. Lastly, there are sometimes areas in which decisions do not encounter reliable or immediate guidelines either in black letter law or in existing ethical-legal conceptions. In such an event, judges would only be able to reach resolutions according to their ultimate idea of justice and, in the last circumstance, according to considerations of opportunity.<sup>27</sup>

The crux of the matter is how a new legal idea makes its way into existing law. Joseph Esser provides the following answer:

A real and objective problem requires the development of a specific solution, which primarily still takes place casuistically, without looking for or finding any evidence of the principle; afterwards, this is backed by some or other opportune passage, in relation to which it is conceded—when the contradictions of the system cannot be concealed any longer—that such a passage is only employed to underpin systematically a legal principle transcending it.<sup>28</sup>

Esser addresses the question of how such legal principles are developed and recognised. He rules out the possibility that they may derive inductively from the law or deductively from a system of natural law or a stable hierarchical order of values. He occasionally refers to the nature of things or to a particular institution, as well as to the purposive spheres of ethical-legal principles and general conviction. To his mind, principles are first formed unconsciously until they encounter a convincing formulation differing from the mere interpretation of that which positively already exists. In constant practice, court rulings then become the means for transforming purposive principles into positive legal rules and institutions.<sup>29</sup>

The question concerning the internal connections of the principles and their content still remains open. Legal principles, as Esser understands them, are neither legal (rules) nor logical propositions (axiomatic ones from which specific ought-to-be propositions may be derived from rational conclusions). Legal principles have

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<sup>22</sup> *ibid* 143.

<sup>23</sup> Helmut Coing, *Fundamentos de Filosofía del Derecho* (Juan Manuel Mauri tr, Ariel 1961) 122.

<sup>24</sup> *ibid* 122.

<sup>25</sup> Larenz, *Metodología* (n 16) 144–145.

<sup>26</sup> Reinhold Zippelius, *Teoría general del Estado. Ciencia de la política* (Instituto de Investigaciones Jurídicas de la UNAM 1985) 47–52.

<sup>27</sup> *ibid* 196.

<sup>28</sup> Larenz, *Metodología* (n 16) 149–150.

<sup>29</sup> *ibid* 151.

their roots in specific cases. Subsequently, they become formulas for a series of typically pertinent points of view. This means that, in atypical cases or when there is a change in the guidelines for assessing a principle, the solution can be precisely the opposite. Even after it has been identified, a principle's subsequent development in case law is a continual process.<sup>30</sup>

The interpretation and development of law would be unthinkable without a model, without an idea of the principles that assimilate the disparate nature of a system. Additionally, according to Esser, the normative content of a rule is always determined by principles of all fixed orders and the creation of law. Certainly, a principle is positivised by court jurisprudence, always provided that this has not already occurred by law. Esser understands that, insofar as principles are purposive, they already have an intelligible content that can be enunciated, namely, that they are not only shaped and fleshed out by court jurisprudence, but also initially point in this direction.

It is important to mention the distinction that Esser draws between rules and principles, plus the idea that the majority of principles have not been deductively derived from more general postulates, but are identified in a particular case, based on the examination of a specific problem of groups of cases. So, in a way, they are conscious facts that are included in the development of law.

Besides principles (or guiding concepts), Esser allows for another class of extrajudicial grounds for assessment: standards, models or ideas of value (for instance, secure legal transactions). Laws per se refer to them as general clauses. Rules, as Esser would say, are not found interpretatively, in this case based on the principle, but created by means of legal synthesis; only case law tells us what is law. Notwithstanding this, when the law does not or cannot offer them any indication, judges should not only make do with their legal or subjective assessments. There are core ideas for decision-making and objectifiable and verifiable principles of assessment when judging a specific case. These extrajudicial grounds for the judicial creation of law, described by Esser, would be found, first and foremost, in the express appraisals of the authors of the constitution; then in what he calls 'standards'—i.e. the consensus among legal thinkers at a given time; following this, in the established principles of legal equity; and, finally, in the nature of things, in the logical-objective structures of law and in the accredited doctrine and recognised legal practices.

Indeed, it is in the 'nature of things' that Arthur Kaufmann sees the key concept for understanding the process of creating law, in both the legislative dimension and in that of judicial decisions.<sup>31</sup> This process specifically involves bringing 'ought to be' in line with 'to be'. The nature of the matter is a *toposin* which 'to be' and 'ought to be' coalesce, the systematic point of union between reality and value judgements. Thought based on the nature of things is of the typological kind. Kaufmann's theory of law and the creation of law are grounded in a universal ontology in which reality and value judgements are regarded as one from the start. Equity doubtless forms the point of union par excellence between both, a topic that will be discussed below.

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<sup>30</sup> *ibid* 432.

<sup>31</sup> Arthur Kaufmann, *Rechtsphilosophie im Wandel: Stationen eines Weges* (2nd edn, Heymann 1984) 272ff; cited in Larenz, *Metodología* (n 16) 150.

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