REVIEW

German Jurisprudence in the 21st century: law and its media

Teoria do direito alemã no século XXI: o direito e suas mídias

VESTING, Thomas. Legal theory and the media of law. Translated by James C. Wagner. Cheltenham: Edward Elgar, 2018.

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Abstract

This review critically assesses the book *Legal theory and the media of law*, by Thomas Vesting. The author seeks to present a multidisciplinary conception of jurisprudence, analyzing the coevolution between legal phenomena, their self-descriptions and the dissemination media of communication, from oral cultures to computer networks. The paper posits Vesting's contribution in the modern path of German jurisprudence and philosophy of law.

Keywords: Jurisprudence; Legal theory; Legal media.

Resumo

A resenha avalia criticamente o livro *Legal theory and the media of law*, de Thomas Vesting. O autor visa a apresentar uma concepção multidisciplinar de teoria do direito, analisando a coevolução entre fenômenos jurídicos, suas autodescrições e os meios de disseminação da comunicação, das culturas orais às redes de computadores. O texto posiciona a contribuição de Vesting na trilha moderna da teoria e filosofia do direito alemãs.

Palavras-chave: Filosofia do direito; Teoria do direito; Mídia jurídica.

Thomas Vesting is a Professor at Johann Wolfgang Goethe-Universität, Frankfurt am Main, Germany, leading the chair of public law, law and theory of media. This review aims to analyze and present Thomas Vesting's *Legal theory and the media of law*, pointing out (i) how this book fits in the path of modern German jurisprudence and (ii) how it can contribute for the development of jurisprudential approaches that connect legal theory to pulsing legal and social problems of today. These are the two steps of this text.

1. German Jurisprudence: some historical remarks

The reception of Roman law in Germany led to the historical school of jurisprudence (WIEACKER, 2004 [1952]). It worked to present that law as a system cultivated by erudite commentators but in deep resemblance with the "true" law innate to the customs of the German peoples. The system should be built by logic and abstraction from institutions – the pillars of the abstract system and of the concrete social life.

Savigny (1867 [1840], p. 8-9) says that decisions about individual rights depend on the reference to general rules of objective law, i.e. of state legislation. The "living root and convincing force" of this decision on rights are found in the legal relationship, just as the deepest foundation of law lies in the institutions, whose organic connection gradually constitutes the system. Beyond the surface of decisions governed by rules, we find the legal relationships, which are governed by institutions. That is the "truth and life" of law. The typological and systematic method displays them in their complexity and concreteness. Theory and practice of law are not separated, since the intuition of the institution that dominates a specific legal relationship is a mental operation of the same nature as the construction of the legal system by science. The true sources of law would be the "internal forces" of a people and its history, and not the arbitrary will of the legislator.

By making the science of law a "jurisprudence of concepts," Puchta (1854 [1841]) develops a tension between freedom (law) and necessity (reason). The subject of law is the free individual, capable of wanting and deciding, regardless of his moral value. The right, as a freedom, is structured by equality, by indifference in face of diversity. The legal form abstracts real inequalities, but the latter are immanent to the former: they re-

enter its content. The systematic and rational construction of the law, the conceptual pyramid, brings back the need for freedom, the inequality of relations in the equality of subjects. The law structured in its complexity, available for selections of meaning, is abstraction and inequality, a gradual connection of different equalities. Once positivized, the material source of the legal content (culture, people, history) matters little; law's validity is formal, self-regulated. Paradoxically, legal freedom and rational necessity become, by the science of law, formal freedom and material necessity (DE GIORGI, 1998 [1979], p. 47-60).

Savigny transforms the casuistry of Roman law into a systematic theory of sources and interpretation (VESTING, 2015 [2007], p. 50), founding legal theory as an auxiliary of dogmatics. Despite Savigny's resistance to codification, the anachronistic Romanist law came to be purified as a perfect, enduring and encompassing ensemble, serving as a model to the positive law of the recently unified German State. The Pandectists' work, culminating with the Civil Code of 1900 (*Bürgerliches Gesetzbuch, BGB*), was the apex of that tradition. Its philosophical counterpart, that opened way for legal positivism, is Kant's transcendental formalism: Kant (1991 [1797]) presented as an idea of reason the systematic unity of law, articulated in its doctrines and institutions (see also WEINRIB, 1987, p. 478-508; WALDRON, 1996). For this reason, a person guides her will to transcend nature and realize her freedom. The social contract, as an idea of reason and not a historical fact, has practical reality by obliging the legislator to produce the law according to a unitary will of the nation, as if each citizen had consented to that general will.

In Weber's (1978 [1922], p. 654-658) perception, the formal rationalization of law was paradigmatic in the work of the jurisprudence of concepts. It occurred in several dimensions. Firstly, by the analysis and abstraction of legal generalizations: the relevant reasons for the decision of a concrete case are reduced to some "principles" or legal propositions. Secondly: substantive legal doctrines are synthesized. Finally, the propositions and doctrines are systematized. The highly abstract character of law is the shield of its autonomy. This allows the analytical derivation of legal solutions from a closed system of propositions.

Before Weber, Marx could observe in the historicist school the form of liberal law, a perfect expression of social bonds that characterize bourgeois society: ties of mutual dependence combined with generalized indifference. Indeed, Hegel (1991 [1820])

had analyzed the historical transition from family-based communities to the modern liberal market and its law, praising its upcoming evolution into an ethical order based on the State. Therefore, Marx found a double initial inspiration for his historical materialism: on the one hand, in the critique of Hegel's philosophy of right – in which legal forms are explained "by the so-called general progress of the human mind", and not by "the material conditions of life" (MARX, 1904 [1859], p. 11); on the other hand, in the rejection of the historical school of jurisprudence (represented by Gustav Hugo), with its frivolous and backward celebration of the rational necessity of some positive institutions (such as property, marriage or the state constitution), as they were organized in liberal, bourgeois society (MARX, 1842; see also LEVINE, 1987; KELLEY, 1978).

As Coing (1996 [1989], p. 337-343) observes, Savigny systematized in the concept of subjective law the axis of an objective law system; subjective right would be the zone around the person and innate to her in which she manifests the domination of the world by her will. The domination of the will is expressed in an absolute way in relation to things (real rights), but it is relative in relation to other people: the bonds of obligation deal with specific transactions and activities; otherwise they would mean slavery. This basic concept is maintained by Puchta and Windscheid, who purify the Romanist tradition and lead it to the "jurisprudence of the concepts" that assists the codification of German private law and its interpretation.

Only decades after this codification alternative currents develop, which observe subjective right not as a sphere of innate will, but as a variable configuration from the imperative order of objective law (Thon), or as a legally protected interest (Jhering) and, to this extent, to be considered alongside other competing interests and purposes. At the same time that the scope of the category of subjective rights (*e.g.*, encompassing immaterial assets) was being expanded, its absolutecontours immanent to the individual were being dissipated. The "jurisprudence of interests" (see SCHOCH, 1948) rocked the formalistic scene, turning social, economic and political considerations into a subject matter of legal reasoning.

According to De Giorgi's (1998 [1979], p. 21-22) critical assessment of the evolution of jurisprudence in Germany, Kelsen concludes the formalist and positivist project of 19th century "jurisprudence of concepts", now giving full epistemological basis (through Kantian transcendental philosophy of theoretical reason) for the understanding of law as an autonomous abstract system, whose starting point is the (ideal) identification

of existence and validity. However, although his “pure science” could legitimize law as simply formal validity, it could no more inform law as a concretization of meaning through a distinctively legal reasoning. The indeterminacy that Kelsen concedes in the process of decision-making (by the subject authorized by a norm) undermines the certainty that 19th century doctrinal-formalists assured through their dogmatic assumptions about facts and value.

The following tendencies in the 20th century have been a rebirth of natural law, the merger of jurisprudence and a constitutional theory emphasizing fundamental rights or the reconceptualization of jurisprudence through sociological perspectives, such as those of Habermas and Luhmann. Indeed, the latter way can be considered as the answer to the anxiety expressed in the late 20th century by German legal philosophers: “The legal science and the legal system are not ready to have a scientific theory, to the methodology of social (or, better: democratic) sciences, and don’t have their own direction […]” (WIETHÖLTER, 1991 [1968], p. xviii).

2. Vesting’s contribution

With his *Legal theory and the media of law*, Thomas Vesting (2018) clearly recasts this point about basing jurisprudence on social sciences. Among other references, this jurisprudential approach is conceptually unified through a heterodox adoption of Luhmann’s systems theory. Luhmann’s project was to provide a general theory of society and, within it, a sociology of law that recognizes the positivity of modern law, *i.e.* its variability and evolution. However, this theory is being rephrased to serve a series of other intellectual projects, such as the more philosophical and normative statements of a ‘critical systems theory’ (see FISCHER-LESCANO, 2012; AMATO; BARROS, 2018) and, on the other hand, empirical socio-legal studies (see CAMPILONGO; AMATO; BARROS, 2021). Thomas Vesting is one of the leading proponents of taking that conceptual apparatus in order to build a contemporary theory of law (see VESTING, 2015 [2007]).

The main Luhmannian influence on *Legal theory and the media of law* is Luhmann’s (2012 [1997], cap. 2) conceptualization on “dissemination media”. Alongside “symbolically generalized communication media”, such as power, money, truth and

(legal) validity, Luhmann explains the change in "forms of social differentiation" (LUHMANN, 2013 [1997], cap. 4) through the technological changes in communication.

For instance, in segmentary societies, united and distinguished by kinship, communication works in face-to-face interaction. There is a restricted, slow and low dissemination of information, and mainly among acquaintances (members of the same community). Customary law emerges as the sedimentation of routines and expectations of these interactions; oral cultures work through "pithy, easily memorizable maxims and prohibitions" and "recurring modes of conduct" (VESTING, 2018, p. 27).

The so-called "high cultures" of the Ancient word, such as classic Greece and Rome, are based on geographical differences and center-periphery relations between city and countryside, Empire and province. Writing is the dissemination media of these societies, but distinguishes only its literate elites, such as those in charge of prudently deciding controversies, and thus producing a case-by-case law. Rhetoric becomes important as a way of exerting and practicing *iuris prudentia*.

The rank aristocratic society of the *Ancien Régime* is contrasted by the emergence of the press, which puts side-by-side the pressures for centralization and positivation of law and the revolutionary pressures contesting the old institutions and stratification – this is the birth of mass media, with the press, pamphlets, literary associations and other subversive tools that would foster the liberal revolutions. This was the birth of public opinion, or a "public sphere" opposable to the State apparatus. Codifications, declarations of rights and constitutions were the legal media of that age. They express a partial democratization for a form of legal positivism that emerged within absolutist politics: a hierarchy of valid norms and authorized sources mirrored a social hierarchy in which those below are protected by their superiors, and the latter claim obedience and loyalty (VESTING, 2018, p. 466).

In (post)modern society, we now watch the emergence of digital media of communication, which enable not only mass consumption of information, but a polycentric dynamic of production and consumption of data, with the decline of gatekeepers for selecting and certifying information. Vesting (2018, p. 464) compares traditional mass media such as radio and television to "regulatory agencies" that disseminate information, attest its validity and truth, and assist its consumers (a "mass") to adapt their expectations to the news.

There is decentralized mass dissemination, from acquaintances to strangers. What is the theory able to describe this state of things? What is the profile of the law of a digital society?

Baecker (2006) proposed to link writing to the Aristotelian finalism, to explain Cartesian (or Kantian) individual rationalism as a semantics expressing the advent of printing and to point out Luhmann's social systems theory (with its concepts such as autopoiesis, self-reference, autology, binary coding) as the expression of a society organized through digital media. Vesting (2018) follows an equivalent path to provide a historical balance of legal cultures and to explore their present and future scene.

A legal culture cannot be explained in "monomedial" terms, he insists (VESTING, 2018, p. xi), but the prevalence or specific mix of media is a defining attribute of it. This shouldn't mean to take media as Kant took "reason" or as Hegel took "the spirit". In this new presentation of a history of the "liberal" or "Western" law, the focus on media works as an occasion to build a multidisciplinary approach to jurisprudence, calibrating insights from anthropology and theories of media, culture, language and communication. For example, only the development of printing made possible the idea of a system of symbols (VESTING, 2018, p. 3) – with which rationalists and then historicists recasted the written formulas of Roman Law.

A digital jurisprudence would no more focus on a perceptive and knowing individual subject, mirrored in some unity as in national sovereignty and legal monism. Knowledge and cognition should no more be associated with some individual consciousness, whose integrity and objectivity would provide the certainty asked by analytic philosophy. On the contrary, now jurisprudence should focus on the contextual generation of knowledge from already existing and stored knowledge, in a cybernetic conception of a self-referential dynamics taking place within fluid networks (VESTING, 2018, p. 5-7).

The rationalist model for the formalist positivists of the 19th century was Kant's moral philosophy: a "rigid, deductive, comprehensive rationality [...] ready-made, packaged in an unconditional imperative", while now jurisprudence recovers practical reason, a more pragmatic and situational morality embedding legal reasoning. Instead of a top-down hierarchy of normative patterns, now law is to be represented as a circular network referring endlessly to other normative and cognitive parameters. In this aspect, drawing on Ladeur (1997), Vesting emphasizes that the image of a network serves to

radicalize the idea of “an infinite loop of an unceasing deferral” that was latent in the Luhmannian concept of a system, but not sufficiently “divorced from the tradition of organological thought […] employed by Kant, Hegel, Savigny, Puchta and others to describe and construct a hierarchical body of laws” (VESTING, 2018, p. 20-21).

Vesting’s plan is also to radicalize the “groundlessness” of legal validity that Kelsen tried to contain through the transcendental supposition of a “fundamental norm” – a last attempt to maintain the view of a hierarchical and unified legal order. In Vesting’s (2018, p. 24-25) judgment, that epistemological operation worked to substitute the idea of a God’s directive and took course on the analytical positivism of 1900’s Vienna, serving to escape metaphysics and ontology, but in fact remained “antithetically fixated” to them. Therefore, Vesting (2018) doesn’t present a general theory of law as one could find in Kelsen (1967 [1960]; 1949 [1945]), with his definitions of legal norm and legal order, sanction and validity.

For Vesting (2018, p. 22-23), law’s authority and justification rests ultimately on “a diffuse (center-less) rationality” and “[t]he fluid combinatorial network of law thus inevitably reveals another side of itself that cannot be controlled by law itself” – the distance between legal communications and their structure (expectations, norms) is inevitably marked on the moment of decision-making. Therefore, this pure contingency of legal content, partially expressed in Kelsen and Luhmann, is emphasized as having its last constraint only on “the shared knowledge of a practical culture”. This commitment to particularism takes away the project of “a general theory of law”, and advances the merger of legal theory, jurisprudence and legal history with other disciplines. Juridical modes of thought and concepts such as duty and responsibility, validity and normativity are taken solely as variables to be understood within a given (provincial) legal culture.

After going through spoken language, writing and then printed books, *Legal theory and the media of law* arrives to its fourth and last part, which proposes to focus on the law of a society based on computer networks. In fact, it emphasizes the changes of the modern liberal constitutions coming out of a printing culture, comparing these institutions – like the constitutions – in the setting of a digital order. Vesting (2018, ch. 18) for instance shows how modern constitutions emerged as a charter, a single document representing the unity of the sovereign nation-State, but now their equivalents – such as the transnational orderings of human and digital rights – can only evolve as fragmented and sectoral regulations (see TEUBNER, 2012), with multiple links and mediations among

themselves (see NEVES, 2013), following the trans-territoriality, heterogeneity, and endless self-reference and other-reference provided by communication in the world wide web, with its unlimited hyper-linkage.

In the last chapter of part IV, Vesting (2018) sketches a similar movement in other legal fields, such as marriage and family, schools and universities, communication and media. A noticeable gap is private law in a stricter sense – property, contract, corporations –, which is only referred when linked with international, transnational and proto-constitutional orders of world society.

Dworkin (2006, p. 4) decreed that "[t]he idea of law as a set of discrete standards, which we might in principle individuate and count, seems to me a scholastic fiction". In a balance on the legacy of the critical legal studies – maybe the last noticeable innovation on Anglo-American jurisprudence, besides the tradition of analytical jurisprudence (from Hart to Dworkin) – Unger (2015, ch. 1) pointed out to the result that legal academia no longer remains under the dominance of a single approach. Critical and political, economic and behavioral, analytic, cultural and historical approaches to law coexist. Vesting's (2018) work clearly shows that German jurisprudence is following a similar direction of methodological pluralism, opening way for new and creative mergers of jurisprudence, doctrine and other social disciplines.

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