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French Jurisprudence and the Dispute over the Method: From Positivist Exegesis to Free Scientific Research

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Słowa kluczowe: metodologia, porządek normatywny, wykładnia prawa, prawo natury, szkoła wolnego prawa, egzegeza

Abstrakt

The development of the "natural law" movement during the Enlightenment era has influenced European legal thought and provoked discussions on the law interpretation method. In the 19th century, French and German legal scholarship developed different methodological approaches referring to some historical, social, and multidimensional aspects and foundations of law. The article explores the evolution of the main scientific positions on the method of interpretation of the law which have appeared in French jurisprudence in the 19th and the first half of the 20th century. In France, from the early 19th century, the positivist school of exegesis dominated legal studies. In the half of the century, a new trend of scientific research was developed. The representatives of the current have pondered pluralism of the methods applied in legal research. Then, in France, we observe the rise of the "free scientific research" initiated by François Gény.

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Streszczenie

Francuska jurysprudencja i spór o metodę: od pozytywistycznej egzegezy do szkoły wolnego prawa

Rozwój szkoły prawa natury w dobie Oświecenia wpłynął na europejską myśl prawną i sprowokował dyskusję nad metodami interpretacji prawa. Francuska i niemiecka jurysprudencja w XIX w. rozwinęła różne podejścia w zakresie metodologii, odwołując się do historycznych, społecznych i wielowymiarowych aspektów, podstaw i źródeł prawa. Celem artykułu jest identyfikacja oraz porównanie kluczowych idei, charakterystycznych dla ewolucji głównych stanowisk dotyczących metody wykładni prawa, jakie pojawiły się na gruncie francuskiej jurysprudencji w XIX w. i pierwszej połowie XX w. Pozytywistyczna szkoła egzegezy dominowała we francuskich studiach nad prawem od początku XIX w. W połowie tego wieku pojawił się nowy trend poszukiwań badawczych. Przedstawiciele tego nurtu rozważali pluralizm metod stosowanych w badaniach naukowych nad prawem. Podczas dwóch ostatnich dekad XIX w. i w pierwszej połowie XX w. we Francji obserwuje się rozwój tzw. szkoły wolnego prawa (*libre recherche scientifique*), której inicjatorem był François Gény.

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I. Introductory remarks

In the 19th century, the Napoleonic codes became an "ideal model" for the legislative considerations of the other European countries[3]. In this model, we can find the traces of Montesquieu's postulate of the separation of law-making power and administering justice, as well as the subordination of judicial power to the legislative power. According to these assumptions, the court's authority was to be "invisible", and its representatives should have been considered to be "the lips that proclaim the laws" and inanimate beings which cannot soften their strength or harshness[4]. A significant limita-

[3] K. Sójka-Zielińska, *Idee kodyfikacji napoleońskich. Od utopii do realizmu*, "Czasopismo Prawno-Historyczne" 2005, vol. 57 (2), p. 27.

[4] Ch.L. Montesquieu, *Spirit of Laws*, London 1914, http://www.constituion.org/cm/sol.htm (2.02.2021).

tion of the law-making activity of judges may be noticed here. Their functions are reduced to the mechanical application of law in a specific case[5]. Their actions come down to the passive role. However, this approach encountered some difficulties resulting mainly from the clash of the rigidity and generality of the code regulations with the spontaneity of social life, particularly in the context of some numerous transformations associated with the birth of the capitalist economy.

The phenomena mentioned above caused a lively response of the legal community, which provoked reflection on some issues related to the sources of law and its interpretation. It is worth mentioning here a certain doctrinal paradox. The codifications were based on the ideas and methodology of modern natural law schools, but as soon as they became the binding law, they were cut off from these ideological roots. The creators of codes tried to codify what they thought was an implication of the law of nature or natural entitlements. However, after the Code had been enacted, French lawyers mainly dealt with explaining its provisions[6].

The purpose of the article is to explore and compare the main scientific positions on the method of interpretation of the law, which appeared in French jurisprudence in the 19th and the first half of the 20th century. The main questions the present study strives to answer are: What was the perception of the efficient legal methodology from the perspective of the main representatives of the French scholarship? What were the opinions concerning the interpretation of legal acts? What was the attitude of French jurisprudence towards the sources of patterns for legislation? In this particular study, the historic-descriptive method of theoretical analysis and legal methods (including formal legal method) were applied to address the research questions and then to reach some conclusions. It should be taken into consideration that even within the exegesis schools, some significant discrepancies in the views of its representatives took place. Unfortunately, the modest scope of the article does not allow for an exhaustive treatment of the subject. Therefore, only some issues could

[5] K. Sójka-Zielińska, *Wizerunek sędziego w kulturze prawnej epoki Oświecenia*, [in:] *Prawo i ład społeczny. Księga Jubileuszowa dedykowana Profesor Annie Turskiej*, ed. G. Polkowska, Warsaw 2000, p. 305; M. Kruk, *Francuska szkoła egzegezy i jej teoria interpretacji prawa*, "Zeszyty Naukowe WSEI" 2017, vol. 7 (1), p. 6.

[6] K. Sójka-Zielińska, *Idee kodyfikacji…*, pp. 29–30.

be examined in depth. The views that strayed from the mainstream considerations and the internal ideological disputes have been omitted.

II. French Jurisprudence with Regard to Codification

One of the important consequences of the codification of law in France was the reduction of significant functions previously performed by lawyers. The legal community has experienced a certain identity crisis[7]. In order to overcome it, legal practitioners and scholarship sought the opportunity to rebuild their authority, which was accompanied by the attempts to prepare the theoretical ground for the legal order, which was fundamentally changed in the process of codification.

During the first three decades of the 19th century, there was no uniform canon of the rules of exegesis of law. Moreover, this attitude corresponded to the recommendation of Napoleon, who categorically opposed the interpretation of the text[8]. It was symptomatic that the first French commentators of the Civil Code explained it article by article. The same method was also used in teaching at universities. After 1830, professors Charles-Philippe Aubry (1803–1883) and Charles-Frédéric Rau (1803–1877) left the scholastic methodology, adopting a dogmatic method in their work *Cours de droit civil français*, in which the issues were combined into groups according to their logical relationship[9]. For the exegesists, the best interpretation turned out to be the one that meets the criteria of predictabili-

[7] Jean Louis Halpérin indicated the time of 1789–1804, and then the lawyers were in a deep identity crisis. J.L. Halpérin, *L'impossible Code civil*, Paris 1992, p. 293.

[8] K. Sójka-Zielińska, *Wielkie kodyfikacje cywilne. Historia i współczesność*, Warsaw 2009, p. 243.

[9] In the subject related literature, after Julien Bonnecase (1878–1950), it is accepted the division of the development of the exegesis school into three periods. The first stage of the development is the period of 1804–1830. The second period lasts until 1880, and during this time we can speak of the apogee of the development of the exegesis school. The last twenty years of the 19th century saw a gradual decline in importance of the school of exegesis, and the rise of the school "*libre recherche scientifique*" initiated by François Gény. J. Bonnecase, *La Pensée juridique française de 1804 à l'heure présente: Ses variations et ses traits essentials*, Bordeaux 1933, p. 303; M. Kruk, *Francuska szkoła egzegezy…*, pp. 7–8.

ty based on syllogistic reasoning, fidelity to the text, and the adoption of the principle of objectivity[10].

The purpose of the French Civil Code consolidating several legal orders was to overcome the uncertainty and arbitrariness of the law. Due to its completeness, precision, compactness, and clarity, its creators intended that the officially adopted text would not raise serious interpretation doubts. It would also enhance its prestige. The specificity of this approach presented above is well reflected in the statements of one of the creators of the Civil Code, Jean Étienne Marie Portalis, who negatively assessed the attitude of the leading representatives of the Age of Enlightenment towards jurisprudence and law studies[11]. The legislator turns out to be the institution, which (to realize a specific vision of social order and respect the values associated with it) makes key decisions concerning the shape of the rules that citizens should follow to achieve the desired structure[12].

The assumption that the law is an act of the sovereign's will, which was adopted at the beginning of the 19th century, emphasized the importance of an authentic interpretation, in which the legislator interpreted the previously enacted text. The legislator was also entitled to issue a law to achieve that effect[13]. This practice significantly limited the right of interpretation

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[10] Formal objectivity is the principle adopted in the theories of the interpretation within exegetical hermeneutics. It assumes that there is an objective basis for a legal decision that exists in the text itself. H. Rabault, *Granice wykładni sędziowskiej*, Warsaw 1997, pp. 9, 36. For more about the French school of exegesis and its interpretation of law see: M. Kruk, *Proces wykładni w teorii francuskiej szkoły egzegezy*, "Państwo i Prawo" 2018, vol. 1, pp. 24–39.

[11] W. Wołodkiewicz, *Jean-Étienne-Marie Portalis. Jego wkład w prace legislacyjne Napoleona*, "Palestra" 2012, vol. 5–6, pp. 237–238; B. Beignier, *Portalis et le droit naturel dans le Code Civil*, "Revue d'Histoire des Facultés de Droit et de Science Juridique" 1988, vol. 6, pp. 77–101. For more about the methodological stand of Portalis, see: J.E.M. Portalis, *Discours préliminaire au premier project de Code civil*, http://classiques.uqac.ca/collection_documents/portalis/discours_1er_code_civil/discours_1er_code_civil.pdf (10.01.2021); P.A. Fenet, *Recueil complet des travaux préparatoires du code civil*, vol. 1, Paris 1856, p. 462, quoted after K. Sójka-Zielińska, *Idee kodyfikacji…*, pp. 31, 32.

[12] N. Hakim, *L'autorité de la doctrine civiliste française au XIX-e siècle,* Paris 2002, p. 51; M. Kruk, *Francuska szkoła egzegezy…*, p. 12.

[13] The institution of interpretative laws has been vivid during the whole century. The institution of legislative recourse (*référé législatif*) operated much shorter, until the 1840s. In the case of doubts arising in the course of proceedings, it was introduced the obligation of

of the other entities, granting the privileged position to the will of a sovereign[14]. Such practice allowed not only omitting a historical aspect in the interpretation process, but it also could have jeopardized the legal stability and certainty, making the law dependent on the decision of the current political authorities[15].

III. Evolutionary Perspective of Law

In the second half of the 19th century, there was a clear departure from the vision of perfect legislation, which would be able to create a system that was complete, coherent, and clear enough to eliminate all interpretation problems, and judges would be able to focus only on determining the actual state. The illusory assumption that the Code would diagnose, predict, and regulate all life situations became evident. In this spirit, a hundred years after creating the Code, Raymond Saleilles (1855–1912)[16] postulated the need for the evolutionary perspective in legal science. According to it, the sense and scope of regulations evolve with the changes in customs and ideas[17]. The law is trans-

a judge to ask the legislator for an appropriate explanation of the provisions applicable in the present case. A. Klimaszewska, *Rewolucyjne dywagacje na temat podziału władzy, czyli krótka historia rekursu ustawodawczego we Francji*, "Przegląd Naukowy Disputatio" 2011, vol. 12, p. 12, M. Kruk, *Francuska szkoła egzegezy…*, p. 12.

[14] The model of authentic interpretation of law did not originate in the thought shaped during the revolutionary period. The beginnings of this type of exegesis go back to the 17th century tradition, when Louis XIV in the ordinance on civil procedure forbade judges to interpret royal legislation on the pretext of doubt or difficulty in its application. J.L. Halpérin, *Legal Interpretation in France Under the Reign of Louis XVI*: *A Review of the Gazette des tribunaux*, [in:] *Interpretation of Law in the Age of Enlightenment: From the Rule of the King to the Rule of Law (Law and Philosophy Library)*, eds. Y. Morigiwa, M.M Stolleis, J.L. Halpérin, Dordrecht 2011, pp. 23–24; M. Kruk, *Francuska szkoła egezgezy…*, pp. 7–8.

[15] B. Frydman, *Le sens des lois. Histoire de l'interprétation et de la raison juridique*, Paris 2005, p. 396.

[16] Saleilles' thoughts on the theory of interpretation and application of law are scattered in various places in his numerous publications. R. Beudant et al., *L'oeuvre juridique de Raymond Saleilles*, Paris 1914, passim.

[17] In the words of Saleilles "le sens et la portée des textes changement avec l'évolution des moeurs et des idées". R. Saleilles, *Droit civil et droit compare*, "Revue International de l'Enseignement" 1911, vol. 61, p. 12.

formed under the pressure of diverse social needs, which constantly evoke new combinations of visions and relationships. Therefore, legal science should constantly set and arrange the meaning of the provisions created before with the requirements of social life. However, this does not mean the primacy of the facts over values. The law must be subjected to the moral imperative in order to be universally acceptable. Saleilles affirmed the social need for justice. However, the pursuit of justice should not be based on a priori, absolute assumptions but on the rightness formulated based on objective, rational, and reliable concepts, taking into account the changeability of the social environment. At the same time, it is not enough to say what interests are dominant; we should direct toward harmonizing them[18].

It is significant that in the reception of Saleilles, the idea of justice transforms into the natural law. This natural law is different from the tradition of the 17th and 18th centuries. The French professor settles the law in the current social reality, and he does not question the importance of its evolution. This approach is similar to the concept of the law of nature with variable content created by Rudolf Stammler (1856–1938)[19].

The broad research perspective of comparative law allowed Saleilles to reconstruct the former and determine the specificity of the existing normative order. Thanks to such data, it is possible to determine the direction towards which legislation should aim, apart from a priori and absolute ideas present in the traditional approaches to natural law. The results of comparative studies were an important guide as far as the choice was concerned at the stage of creating the law and its interpretations. Therefore, the text of the act is something like a skeleton or a mechanism at rest. To "revive" it, the effort of various scientific specialists, including the representatives of legal doctrine and legal practice, is needed. They determine the functioning of the law, its effi-

Idem, *École historique et droit naturel, d'après quelques ouvrages rècents,* "Revue Trimestrielle de Droit Civil" 1902, vol. 1, pp. 96–97.

[18] Ibidem, pp. 96–97.

[19] M. Szyszkowska, *Neokantyzm. Filozofia społeczna wraz z filozofią prawa natury o zmiennej treści,* Warsaw 1970, pp. 123–124. It should be taken into account that Rudolf Stammler and Leon Petrażycki had a dispute over who was the first of them who had put forward the idea of the return to natural law. M. Szyszkowska, *Leon Petrażycki jako twórca nowej teorii prawa naturalnego,* "Studia Iuridica" 2018, vol. 74, p. 187.

ciency, and usefulness[20]. The legal act in action is the expression of a community's legal and social awareness, while judges have an active part in mediation between the text of the legal act and this awareness. They should put forward the interpretation which adapts the act to its social function, and at the same time, it shapes (educates) the community in the spirit of the act[21].

IV. François Gény and *libre recherche scientifique*

Significantly, François Gény (1861–1959) supported the greater flexibility in interpreting the legal text[22]. Like Saleilles, he postulated the search for new solutions in jurisprudence. They occurred necessary because formal sources of law were powerless to deal with all problems that have arisen in a complex, diverse, and changing society. In the reception of Gény, subordination to the legal acts provides the interpreter with predictability and certainty, but it also promotes stagnation of law and makes it difficult to adapt the law to changeable ideas and social relations[23]. Therefore, there are some attempts to adjust some new, not intended before, phenomena to the general and abstract framework of the act. In case of doubts, the traditional school of exegesis suggests turning to the legislator, but in Gény's view, this path is not always sufficient. Sometimes, the interpreter cannot recognize the intention of a legislator; therefore, he relies on his own reflection, although he does not always admit it. Gény asks whether it would be better to approve subjective concepts and assign them their rightful place in the interpretation of the law[24].

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[20] R. Saleilles, *Mélanges de droit comparé. Introduction à l'étude du droit civil allemand (à propos de la traduction française du Bürgerliches Gesetzbucg entreprise par le Comité de législation étrangère)*, Paris 1904, p. 3.

[21] Idem, *De la déclaration de volonté. Contribution à l'étude de l'acte juridique dans le Code civil allemand (art.116 à 144)*, Paris 1901, p. 289.

[22] François Gény presents his digressions in his two main works: *Méthode d'interprétation et sources en droit privé positif* (1st edn. in 1899) and *Sciences et techniques en droit privé positif, nouvelle contribution à la critique de la méthode juridique*.

[23] F. Gény, *Méthode d'intrepretation et sources en droit privé positif; essai critique, vol.* I, Paris 1919, pp. 64–65.

[24] Ibidem, p. 67.

As far as formal written law is concerned, the author proposes setting the legal text in a historical and systemic context to reconstruct the will of a legislator. Therefore, the specificity of the time in which the norm originates, the reason for its creation (*occasio legis*), and its hierarchical and contextual relation with other norms[25] should be considered. In order to grasp the practical significance of a legal act, its purpose (*ratio legis*), it is also helpful when some external elements regarding moral, political, social, economic, and technological requirements are taken into closer consideration[26]. These factors determine some general principles, which are considered objectively true by those who create the law.

For Gény, the interpretation of a legal text is a complex process in which psychological and subjective factors and objectively understood facts related to the nature of things and abstract ideals, which are the axiological foundation of law, should be considered. The main purpose of legal interpretation is to identify the will of a legislator involved in the norms. Therefore, linguistic and logical analyses are primarily applied. Gény proposes the "free scientific research" (*libre recherche scientifique*). Considering various categories of data, it is efficient to study the correctness of social facts in their dynamic essence and maintain a methodological discipline appropriate to scientific research. Sociology plays a particularly important part, and the achievements of other disciplines: philosophy, psychology, political science, ethics, economics, history, and comparative law are also essential[27]. They create a multidimensional, comprehensive base that broadens the lawyers' horizons. In the perception of Gény, the benefits of the interdisciplinary approach are also of great importance in the context of discussions on the profile of legal studies. The law requires awareness and competence at both stages: its creation and its application. Scientific research provides some "starting points" that determine the content of law and its expectations[28].

[25] Ibidem, p. 285.

[26] Gény predicts that the meaning and content of a normative act might be modified under the influence of external values, and great caution should be exercised in this matter. The interpretation of law should not lead to the results without conformity to the approved legal norms. Ibidem, p. 288.

[27] Ibidem, pp. 137–138.

[28] F. Gény, *Sciences et techniques en droit privé positif*, vol. II, Paris 1915, pp. 370–371; T.J. O'Toole, *The jurisprudence of Francois Gény*, "Villanova Law Review" 1958, vol. 3, p. 463,

The French scholar does not exclude subjectivity or even intuitionism from the interpretation process[29]. However, he does not treat them as the manifestation of individual freedom. Paradoxically, we can even decide about their objective value in the sense that they appear instinctively, in which they resemble facts. The principles arising from them are unquestionable because of their obviousness and clarity[30].

Gény questioned the idea of the autonomy of legal science, calling for its integration with other disciplines. However, the scholar does not convince that only observation of the facts provides principles that determine the direction of moral conduct. Based on his methodology, he notes that the observed phenomena are usually not directly accessible to human knowledge. In order to be familiar with them, at first, the researcher must develop some hypotheses and concepts. Scientific knowledge is always associated with earlier intellectual constructions, and science is not a direct transcription of reality. All measurement tools are theoretical entities, and a microscope is the extension of the mind rather than an eye[31].

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https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1456&context=vlr (10.02.2021).

[29] François Gény emphasizes the significance of intuition, which allows compensation of the limitations of intellectual abstractions. Therefore, he turns to the philosophy of Henri Bergson (1859–1914), which came in for criticism of Neo-Scholastic and pragmatic schools. T.J. O'Toole, p. 458.

[30] For Gény, honesty and equity are kinds of instinct. F. Gény, *Méthode d'intrepretation…*, pp. 109–110; J. Charmont, *Recent Phase of French Legal Philosophy,* [in:], *Modern French Legal philosophy*, eds. A. Fouillée et al., Boston 1916, pp. 114–124; N. Hakim, *Droit naturel et histoire chez François Gény*, "Clio & Themis" 2015, vol. 9, pp. 1–18. For more about Gény see: A. Pasek, A. Szymańska, R. Wojciechowski, *François Gény (1861–1959)*, "Kwartalnik Prawa Prywatnego" 2016, vol. 25, No. 1, pp. 5–36; J. Mayda, *François Gény and Modern Jurisprudence*, Louisiana and London 1978, pp. 264; S. Herman, *François Gény and Modern Jurisprudence by Mayda Jaro. Baton Rouge, Louisiana and London 1978: Louisiana State University Press, 1978. Pp. xxi, 264*, "The American Journal of Comparative Law" 1979, vol. 27 (4), pp. 730–738; N. Kasirer, *François Gény's libre recherche scientifique as a Guide for Legal Translation*, "Louisiana law Review" 2001, vol. 61 (2), pp. 331–352.

[31] G. Bachelard, *La formation de l'esprit scientifique*, Paris 1938, p. 242, quoted after J.P. Chazal, *Léon Duguit et François Gény, controverse sur la rénovation de la science juridique*, "Revue interdysciplinaire d'études juridiques" 2010, vol. 65 (2), p. 131. It is significant that the example mentioned above reminds a famous illustration concerning the thermometer of

V. Concluding Remarks

The development of the natural law movement during the Enlightenment era has influenced European legal thought in constitutional and international public law, and it provoked discussions in private law. The 19th century has originated a new era of national codes in civil law countries. The French codes were promulgated at the climax of modern history combined with bourgeois and commercial society achievements at the expense of the landowning classes and the Church. In France, from the early 19th century, the positivist school of exegesis dominated legal studies. In the half of the century, a new trend of scientific research was developed. The representatives of the current have pondered pluralism of the methods applied in legal research. During the last two decades of the 19th century, in France, we observe the rise of "free scientific research" initiated by François Gény.

It should be emphasized that François Gény questioned the self-sufficiency of the traditional method of legal exegesis, which was based on resolving all issues using logical conclusions derived from the provisions of a legal act. Due to the insularity of this method, it turned out to be insufficient to take into account the demands of rightness, justice, and social utility. Therefore, the traditional method should be complemented with some more flexible and closer-to-life methods, which would allow the better implementation of the practical objectives of the law. Ultimately, various scientific directions, ideas of natural law, and social transformations meet in law, and they center on its formulas of practical application.

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