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"THE STRUGGLE FOR LAW": A LEGAL FIELD OPENING RE-READING

"A LUTA PELO DIREITO": RELEITURA PARA ABRIR O CAMPO JURÍDICO

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ABSTRACT

It is a reinterpretation of the classic work "The struggle for the right" written in 1872 by Rudolf Von Ihering, aiming to identify its main methodological, theoretical and epistemological contributions to the legal field. Through bibliographic research, it was possible to the identification than really matters: the production of legal knowledge anchored in the processes of effective application of the law and in the reach of social justice.

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KEYWORDS: Methods; Legal Epistemology; Rudolf Von Ihering.

RESUMO

Trata-se de uma releitura da obra clássica “A luta pelo direito” escrita em 1872 por Rudolf Von Ihering, com o objetivo de identificar suas principais contribuições metodológicas, teóricas e epistemológicas para o campo jurídico. Através de pesquisa bibliográfica foi possível a identificação do que realmente importa: a produção do conhecimento jurídico ancorada nos processos de aplicação efetiva do direito e no alcance da justiça social.

PALAVRAS-CHAVE: Métodos; Epistemes Jurídicas; Rudolf Von Ihering.

INTRODUCTION

The work chosen for the present analysis is a juridical classic. "The struggle for the right" was the title of a conference pronounce in 1872 at the Vienna Law Society by Rudolf Von Ihering, who in the same year made it a book after some adjustment and enlargement (IHERING, 1993, p. 07).

The epoch time lived by Ihering was marked by great scientific advances, including Darwinism would have influenced his work.

From the scientific and academic point of view, the work was very important for the development of the right, based on the ideals of justice, with the binding of the legal feeling and the struggle to seek its end, social peace. In the struggle for Ihering law, where he expresses in his first sentence that "The purpose of the right is peace, and the way to reach it is to fight" (IHERING, 1993, p.15).

Based on historical data and examples of everyday situations, the author sustains his idea that there is no right without struggle, since the achievements of

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humanity were the result of many conflicts and wars. Even in peaceful moments, it is up to the citizen to fight for the violated rights since it has the duty to maintain the peace and the rights conquered by those that preceded it.

Through a bibliographical review will be analysed the work of Rudolf Von Ihering, with the objective of identifying its main methodological, theoretical and epistemological contributions to the legal field. Therefore, the work was been divided into four parts, besides the biographical considerations are the author's methodological and contributions in the work "The fight for the right". The theoretical and epistemological contributions with the subdivision in the chapters of the book studied; and the lastly, the final considerations.

2 BIOGRAPHICAL CONSIDERATIONS ABOUT RUDOLF VON IHERING

The German jurist and novelist Rudolf Von Ihering was born to a family of lawyers on August 22, 1818, in Aurich, Germany, and died on September 17, 1892.

He studied law at the University of Heidelberg in 1836 and completed his doctorate in 1843. He taught in Kiel, Giessen, and Vienna. Between 1849 and 1872 he received a title of noblesse. He was a teacher and, in parallel, established his legal thinking based on the study of the relations between law and social changes (PERCILIA, 2017).

He was a pioneer in the defence of the conception of law as a social product and founder of the teleological method in the legal field (FERNANDES, 2017).

His work influenced legal culture throughout the Western world; he was married to the writer Auguste Von Littrow, to whom he dedicated the first edition of this book "The Fight for the Right." Written in German, the author's native language, the book was been translated into 26 other languages.

His books had dogmatic nature, his thinking consolidated and consecrated as significantly expressive for the legal science of the nineteenth century. His theses had international influence.

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His postulations are the nucleus of modern theories of subjective law, although this was not his intention. For him, law is an acquisition of purposes; it is something that is wrought in the perennial work of Law (PISCIOTTA, 2012).

3 METHODOLOGICAL CONTRIBUTIONS

To write the work "The struggle for the right", the author used predominantly the inductive method. Starting from the idea that every right in the world was acquired by the struggle, it provides examples to describe what historically means law. He describes the law as a strength, a reason why justice holds in her right hand a balance, in a demonstration of balance and equality for all. Therefore, in the left hand a sword representing the weight of force, which counterbalances the right and its interpretations.

According to Gil (2008, p. 12) “while in the deductive method, one seeks at all costs to confirm the hypothesis, the method, hypothetical-deductive, to the contrary, we seek empirical evidence to knock them down”. Differently, the inductive method comes from particular data for general data, according to English philosopher Francis Bacon:

> There can be only two ways of investigating and discovering of the truth. One, which consists in jumping from sensations and particular things to the more general axioms, and then discovering the intermediate axioms from these principles and their immovable truth. This is what follows. The other, which collects the axioms of the senses and particulars, ascends continuously and gradually, until at last reaches the principles of maximum generality. This is the true path, not yet established (BACON apud VAZ, 2017, s/p).

In this text the author uses a set of ordered data, examples, comparisons and questions to support his idea that the origin of the right comes from the fight, he quotes that "the right is like Saturn devouring its own children"(IHERING, 1993, p. 21).

He uses the doctrine of Savigny and Puchta, on the origin of the right to present his opposition, to sustain the idea that only the law, the volunteer and determined

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action of the public power has force, the power of legal persuasion. For Savigny and Puchta the law arose from popular persuasion, from custom as a means, it is not from the initiative of the legislative power, according Ihering said if it formed after hard work in the struggle against injustice.

In the work analysed, the author compares the struggle of the people for the construction of their right with the birth of a baby. Exposes the intimate bond, like the existent thing between the mother and the new born baby (constructed through "a painful and difficult childbirth") is what happens between peoples and their right, also through painful efforts, work and Continuous struggle (IHERING 1993, p. 23).

In other words, different the that sustains the Savigny's theory, it is not the custom exclusively that gives life to the ties that bind their peoples with their right, but yes the sacrifice, the most difficult and painful ways.

Thus, it is observed that in this work the author part from a private premise to reach a universal truth, building on the basis of its analyzes that all injustice is an arbitrary action, an attack against the idea of right, being this an interest protected by law . Concluding that the struggle for right is at the same time a struggle for the law.

In the subsequent item will also be treated some aspects of the Ihering methodology in the production of his knowledge, since they are indelibly united to the matters that affect those analysed moments.

4 THEORETICAL AND EPISTEMOLOGICAL CONTRIBUTIONS OF THE WORK

Even though the present article deals with the analysis of only one of the works of Rudolf Von Ihering, it is necessary to characterize that his thought has undergone fundamental[1] modification, thereby as it does with scientific thought, and can be divide into two phases.

[1] The author himself, in the work analyzed, and demonstrating academic humility, makes explicit his change of understanding when he refers to the hitoricist thoughts of Savigny and Puchta: "This is the idea I had about the origin of law when I left the University and on whose Influence remained for many years." (IHERING, 1993, p. 19).

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> No thinker of the Law was, along with SAVIGNY, of such great importance for the evolution of the legal methodology as RUDOLF Von JHERING. Open to the most diverse requests, experimented as few the spiritual disconcert of the nineteenth century. It is well known that JHERING's legal work is characterized by a deep dividing line,(15): While in the first period of his creation, about everything in the Geist des remischen Rechts (sic); (Spirit of Roman Law) and the introductory essay Jherings Jahrbücher, he not only supported the Jurisprudence of the formal concepts and construction and the PUCHTA, but also raised it, inclusively, to its summit. In the second period, he pursued it with mordant sarcasm and tried to replace it with a different orientation. At this time, we are interested only in the JHERING of the first period, his contribution to the theory of jurisprudence of concepts formal. However, it should be emphasized that it is precisely in this first period are visible in the thought of HERING certain features that will be decisive in the second period: the abandonment of the ethical categories of idealistic philosophy, to which both SAVIGNY and PUCHTA and the orientation to the kind of thinking of the contemporary nature sciences. With effect, this will only explain the overcoming of logical-formal thinking which then provoked in him JHERING a violent reaction and its course towards a pragmatic Jurisprudence of sociological root. (LARENZ, 1997, p. 29-30).

By what comes out of the work "The struggle for the right", identifies that the author was in the second phase of his thought, because he expresses his criticism to the schools of Puchta and Savigny, opposing the formality[2] and emphasizing the reality of things, observing the struggle as a means to obtain the right.

It is important to draw the definition of legal epistemology, which in Frank's view:

> (...) Is the branch of legal knowledge and philosophical that cares, to a certain form, with himself - with his own legal knowledge. It is concerned with its object, with your method, with its presuppositions, with its nature and with its own validity. In addition, it is concerned with the relationship between the legal knowledge with the other branches of knowledge, with the situation of right in this context of human consciousness (Frank 1989) (FRANK apud SANTOS e SOUZA-LIMA, 2016, p.45).

[2] Regarding Rudolf von Ihering's disagreement in relation formalism, Bruno Bolzon Lauda (2009, p.66) stated that: "Adherence to excessive formalism distort legal science and did not correspond to the true nature of right. In addition, he sinned because he could not respond to society's yearning. Formalism was enclose of formulas disconnected from its time, making the juridical concepts lose their practical meaning. Thus, Ihering had to find him and oppose to him a reply. In that sense, Ihering seems to have been suffer some influence by classical English economists and utilitarian's such as Adam Smith, Jeremy Bentham and James Mill."

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Ihering, coherent with the dogmatism[3] of the nineteenth century, founded the school of teleologism juridical, coherent of the hermeneutics of right, with the idea the if interpretation of the right as a living organism produced by the struggle, differing from the school of Savigny who understood the right as a natural process (ZOVICO, 2008, p. 42).

The teleological interpretation aims at the end sought by the right, less focused on formalism. Ihering was strong expressive in this regard when sarcastically addressing : "We prefer to concretize, pointing out what we cannot call in another way if no than the foolish of our jurisprudence in civil right, so fundamental that they are a true source of injustice"(IHERING, 1993, p. 73).

To Lima (2008), Ihering comprehend the right in the aspect of its purpose, which was very important so that the legal context was related to reality for the reach of value purposes through influences of society in the rise of the content of the right. According to Jacques, it portrays the influences and characteristics of Iheringuian thought:

> Socioteleologism is another existentialist manifestation of right, because it considers this mere social fact with specific purpose of disciplining human conviviality. It lays its roots in Lamarck's organicism, in Darwin's transformism, and in Spencer's evolutionism, suffering also, although indirect and influxes of Comte's sociologism (JACQUES apud LIMA, 2008, p.15).

"The struggle for law" explicity that Ihering was dogmatic, whose theory inspired even Kelsen, positivist enshrined by the work "The Pure Theory of Law," based on norm and rationalism, "without concern the its effects on the concrete world". Unlike, Ihering departs from the purity of the right insofar as it puts a purpose for it, the obtaining of justice, of social peace, and for that purpose appropriates of moral, ethical,

[3] Identifies whether in the following stretches of the work "The struggle for the right" that the author is dogmatic: "However, the power of these two agents. The relations and the science is limited can direct the movement within the limits fixed by the existing right prevent it, but it is not allowed to overturn the levees that prevent the waters from taking a new course. Depositary of this force it is just the law, which by determined and voluntary action of the public power is given, and this not by mere causality but by an intimate need inherent in the law itself "(IHERING, 1993, p. 19)."The struggle for right is therefore at the same time a struggle for the law" (IHERING, 1993, p. 55).

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philosophical, psychological, historical and even biological questions for its validation and birth.

This empiricist tendency checked in "The struggle for the right", to fall again in its analysis of examples, often historical, that denote the need for a means to attend the end (the struggle for the right to produce the just in harmony with the legal feeling). The feeling of right and the disposition for the struggle, conforming as a social product, the positivism, the norm, reaching the social product. The inductive method is characterized by the fact that the author starts from the analysis of specific questions (concrete examples) for the general, in the confirmation of his understanding of the right, as already explained in the specific item of this research, however, if reveal in the stands out that:

> The empiricist epistemic tendencies, although less visible, are fundamental to the field of juridical knowledge. If in the first tendency, the knowledge derived from a retracted or enclosed right is almost lifeless knowledge, in the second tendency, the murmur of reality nourishes and gives life to the juridical knowledge[4]. This means that if in the rationalist tendency, the founding and instituting criterion of the validity of juridical knowledge is formal logic, in the empiricist tendency, besides logic, it is taken into account the bias caused by the application of the norm in the concrete world (SOUZA-LIMA e MACIEL-LIMA, 2014, p. 322).

To Ihering, the right only makes sense if of attend to the legal feeling of the community and its struggle for obtaining justice, therefore, need to use instruments from other disciplines such as philosophy and sociology to interpret this feeling. Justice, an end that must meet the right, is in line with this moral sentiment of a people, which must be in tune with the state performance.

To the author, this feeling of the right is individual, social, as also supports the State, and for being, a feeling can change over time. Without the exercise of this legal feeling, install the despotism. The state power, represented by the Law, that to counter this feeling, which hurts what is just, turns out to be a weak state, subject to foreign

[4] The first tendency addressed by the authors refers to the structuralism episteme and founded by Kelsen, which is integrate with the purity of the right he advocates.

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invasions and attacks, precisely because of the lack of social unity. Because "any arbitrary or unjust disposition, emanating from the public power, is an attack on the legal sense of the nation and, consequently, against its own force." For this reason, Ihering understands that "the most sacred duty of the state is to care for and work for the realization of this idea by itself ", represented by the ideal of justice and feeling the right by society (IHERING, 1993, p. 15).

These earlier ideas highlighted refer to the general questions dealt with in Ihering's work. However, the division into four distinct parts, although maintained by the same guiding principle of knowledge of struggle for the right to obtain justice and consequently of social peace, requires this analysis of the particularities of each theme. After the introduction, the chapters have the following titles: "The interest in the fight for the right", "The fight for the right in the individual sphere", "The fight for the right in the social sphere" and finally, "The German law and the fight by right."

In order for better organize the ideas; other contributions come will be highlighted separately, in the same model as the division of the book.

3.1 THE INTEREST IN THE STRUGGLE FOR THE RIGHT

In this chapter, the German jurist defends his theory of the struggle for the right, with the analysis of the right applied concretely, and uses as a parameter the private law, for understanding that it would be the most fragile form of protection of his work. By understanding that it would be the most fragile form of defence of his work, once the private interest can approach a right that could be confused with egoistical and, therefore, more easily disposed of. With this attitude, the author believes that can proof of his understanding and given more foundation, would make unfounded criticism difficult.

In the face of a concrete case, the individual could to cede or conflict with the adversary. For Ihering (1993, p.25), in both choices there will always be sacrifice "or will sacrifice matter, with the analysis of pros and cons about giving up the peace for a decision to enter in a juridical stalemate. But not, in the author's view, what the litigant

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seeks is the recognition of a right, far superior to any economic value, and therefore must make sacrifices For the ideal of morality.

To make explicit with concrete example that in the defence of private lands, the person who resolves to give up his right and stop fighting, puts at risk with his cowardice every system of right and of achievements already obtained with the past struggles. The author compares defence the individual's in relation to your right of property. Like an invasion of an unproductive area of a State whose unceasing struggle for sovereignty is easily understood and accepted even at the cost of much investment and the death of Its citizens in battles, under penalty of being reduced to nothing, after several assaults not rejected by the foreign enemy. In the same way, that individual owes another for his lands because the feeling of fighting for what is fair is the same.

In this aspect one can identify a limit to its theory, because independent of judicial demands, the right post will continue to exist, to be apply when in case provoke the Judiciary. It is true that if a determinate rule falls into disuse, it will can revoked or replaced itself, but it will not let to exist pure and simply because the Judiciary was not sought to resolve their respective demands.

3.2. THE STRUGGLE FOR RIGHT IN THE INDIVIDUAL SPHERE

Ihering expresses the duty of the individual to himself, to fight in the face of an injury to his right, as a defence of his own morality, equating the abandonment of this exercise with a "moral suicide"

The right is an idea that needs practical application when put in check by injustice, as a arising from of arbitrariness. Even private law issues such as obligations, property rights or situations involving honour, for example, should inspire in the same way the reaction for the moral pain caused, as they affect the personality of the individual. In this aspect, the author to utilize for proof his theory and use the description of the sickness organic that requires prompt attention and medicament, as well as other examples, concrete cases, that make explicit their cohesive argument denoting the inductive method and adopted by it, as already specified.

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The responsibility of the right it consists to both the State and the individual, as well as collectively. In this section of the work, the author reinforces his point of view in the intimate sphere of individuals. That regardless of the sacrifice necessary and its consequences, the defence of a right corresponds to the fulfilment of a duty, the search for a selfless ideal[5], and therefore, "No doing more than obey the particular law of their moral conservation" (IHERING, 1993, p. 34).

The struggle for property rights is the highlighted in this section, since for the author it derives from the strength of the citizen's work, for its usufruct or its descendants, a sort of justification, of moral personification that would validate the law.

At the same time that it justifies the struggle in individual defence, the author explains the duty of the individual to the whole society, since the right would suffer in its structure if there were no individual actions of struggle, encouraging illegality and criminality.

It is through the pain enforced by the moral injury that is formed the legal feeling, originating of all right and irreplaceable by reason. It is through this suffering that the law if revealed for the defence of the moral existence of the individual, and without the struggle, the action, the defence, this feeling, put at risk, and may disappear.

For the author there is a strong concern with the result that been obtained in the application of the right as moral baptism, which will vary as it modifies the feeling of the right within the individual and society.

3.3. THE STRUGGLE FOR RIGHT IN SOCIAL SPHERE

[5] "The right which seems, on the one hand, to lower man to the region of selfishness and interest. Elevates him on the other hand to an ideal height where he forgets all his subtleties, all calculations and this measure of interest which he has accustomed to apply everywhere, and he forgets to sacrifice himself purely and simply for an ideal."(IHERING, 1993, p. 42).

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In the work studied, this section has as main engine the proof that the struggle for the right is a duty of all towards the society, already rehearsed by the author in the previous chapter.

Ihering explicitly states that there would be a relation of dependence between concrete law and abstract right, that is, one needs the other, diverging from the dominant theory of the time by maintaining that the concrete right is fundamental to the maintenance of abstract right, in measure that it restores its strength and life. The lack of this support if likened to "a used wheel that serves no purpose in the mechanism of right, and can be destroyed without altering the general march" (IHERING, 1993, p. 47). The identity of the concrete right give a supports its view that the right must have purpose and not be confined to mere positivist rationality. Here is a great epistemic contribution of Ihering to the legal field.

In retaking the previously discussed issue, that individuals have an obligation to defend their rights in the private sphere. Since in the public and criminal sphere there is a legal imposition of public agents that act, it reinforces its position on the most complex issue of need of private right to have of exercise his action, through their interest and feeling, under penalty of no longer enforce the legal principle.

In order to justify his arguments, the German jurist faces an issue that he himself suggests, and could make his work questionable. How would a single individual fail to seek his right would affect the right in overall? In addition, the answer instigates a reflection. He cites the example of a soldier who leaves the formation, which may even go unnoticed, but if 100 men decide to flee, the others will surely suffer (IHERING, 1993, p. 49).

In this example, the author wants to demonstrate the need for unity in the sense of right, that fed by the means of obtaining it, which is the struggle, even in matters of private law, each individual acting within its limits by a single right, which right Exceeds your personality. The individual responsibility for the collective if highlighted in the following section:

> No, it is not enough for right and justice to flourish in a country. That the judge is always willing to wear his toga, and for the police to be willing to operate

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> with their agents. It is still necessary that each one contribute with his part to this great work, because every man has the duty to crush, when the occasion arrives, this hydra which is called arbitrariness and illegality (IHERING, 1993, p. 51).

In this theoretical contribution of Ihering, it is possible to identify the first contours of the collective right, as well as the necessary social participation in the Public Administration, which has so much relevance nowadays, as individual responsibility towards the society.

Still exhibit that the consequences of contempt for the defence of the right would be extremely noxious in social life, acting as an incentive to evil, with the mockery of those who otherwise decided to fight for justice.

On the other hand, the idea that right essentially consists in action, denotes the author's ideology that the right is something alive, and cannot be protected in the strict scope of positive, because it is directly related to what is moral and just . Ihering gives his value in the right as good or bad, in the sense of whether or not it is in accordance with the feeling of community right. This valuation again denotes impurity, that is, the impregnation of a knowledge that if based beyond on the norm, with philosophical bias in the ideal of justice and morality, again moving away from the Kelsian theory. This bad right, in its conception would not survive, for hurting the essence, the purpose of the right.

This critical analysis of the right in point it out negatively. Based on the lack of justice that it imposes on its recipient, and on reaching the community's own feeling of justice, can be consideration as an epistemological contribution, reflecting in the look the scientific of author.

3.4 THE GERMAN RIGHT AND THE STRUGGLE FOR THE RIGHT

In this last section of the book, the jurist analyses the German law in force at the time, which had the influence from Roman law, identifying that the respective legal feeling suffers from vicissitudes.

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It points out that in private law the merely material penalties do not adequately repair the one who suffered injustice, and that the attack also reaches "the laws of the state, the legal order and the moral law" (IHERING, 1993, p. 67).

In the analysis the balance that counterbalance the right , Ihering argues that the reparation proposed by German law makes the parties unequal, since the offender only needs to return what he has removed without any moral order reparation to the victim, favouring iniquity. Another important contribution to the current law, which provides for reparations and moral damages, and may have their birth in the reflections on justice of this outstanding German jurist.

In this reflection on morality, the objective right of the subjective, a theoretical contribution extremely relevant to contemporary law, and is based on the historical analysis of Roman law that his research pointed to three distinct moments of right. The first is old right, bullwhip used by the brute force of punish all injury to the personal right to the same extent, without considering the degree of guilt and the possibility of innocence of the offender, with subjective evaluation equated from objective. In the second, the intermediate right was characterized by moderation, with the condemnation of who lost the demand in double of that would be injured, with a restorative character. This moderating right differentiated the objective and subjective aspects in the analysis of the unjust, and the law was also object of preservation by the injury, even in relation to questions of private order, solidarizing the reparation to the feeling of the right by the affected one and to all the others that had knowledge. This right that most resembles with the idea of Ihering, which he calls "marvellous" by fully satisfying legitimate demands, within the feeling of justice in all its aspects. And the third period, corresponding to the right of Justinian, which Rudolf regards as a time of injustice, when the debtor was seen with milder eyes, a certain sympathy arising from humanity, to the detriment of justice to the creditor.

In analysis of contemporary German right to the author, the same defined it as something extraneous to reality, very erudite and inaccessible to ordinary people, given only to the knowledge of the wise, and the science and practical application of law in constant conflict. The acid criticism of current right is opposed to what the author

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understands as a just application of the right in line with the legal feeling of the population, and with finality diverse absolutely from mere formalism.

It reinforces, finally, the necessary struggle, no a struggle without motivations, but based on the defence of the right of the personality, even if it demands sacrifices, conducted by morality, which must correspond to the true nature of right.

FINAL CONSIDERATIONS

Not even of far is the attempt to exhaust the analysis of Rudolf Von Ihering's profound work, "The Struggle for Right." Yet, it was possible to verify the many contributions to the legal field, in the theoretical, methodological and epistemological aspects, which can contribute to the opening of the legal field to other fields of knowledge and social reality.

The inductive tendency in the production of knowledge makes of Ihering a thinker focused on interdisciplinarity, with the concern of the right to achieve effectively the ideals of justice and moral arising from the feeling of a people, universalizing their reach. It is about a respectful look at the dynamism of social life, which right and its interpretative application (teleological hermeneutics) must accompany.

Therefore, the right observed under the perspective of morality to the reach of justice, is opposed to the exaggerated positivism that in its formalism deviates from this finality. In this line of reasoning, Rudolf Von Ihering's greatest contribution to "The struggle for law" is his appeal to the jurist and to the social collective for what really matters: the production of legal knowledge anchored in the processes of effective application of right.

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