3 Germany: Sovereign Life and Bare Power?

> "The apolitical does not exist –
> everything is politics."
>
> Thomas Mann, *The Magic Mountain* (1924) 610

3.1 Introduction

A few months after Hermann Hesse, our novelist from the introduction, was born in Württemberg in July 1877, another Hermann saw the light of day in Prussia, in November. His family name was Kantorowicz. Hermann Kantorowicz would – as will be shown – become one of the leading figures of the critically oriented free law movement in the first decades of the 20th century. In a famous little piece published in 1906, titled *The Struggle for Legal Science*, Kantorowicz would satirically paint a picture of the ruling ideal conception of the lawyer. The ideal lawyer was an educated civil servant sitting in his cell in front of a green desk with the official national Code of law on top, armed only with a "thinking machine" (*Denkmaschine*) – a truly Steppenwolfian motive.[72] As Kantorowicz took his first breaths in late 1877, Rudolf von Jhering was sitting at *his* desk (of unknown colour) in Göttingen adding the finishing touches to the first volume of his *Law as a Means to an End*.[73] Here, Jhering launched the motto that "the purpose is the creator of all law". With this slogan and other ideas developed in the later part of his oeuvre, Jhering was in great part the intellectual forerunner

72 Hermann Kantorowicz, *Der Kampf um die Rechtswissenschaft* (first published 1906, reprinted version, Nomos 2002) 5.

73 The preface of the book is dated 6 December 1877, see Rudolf von Jhering, *Der Zweck im Recht. Erster Band* (Breitkopf & Härtel 1877) XIV.

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for the critical movements that bloomed around 1900 – for instance, Kantorowicz' title from 1906 was alluding to Jhering's *The Struggle for Law* (1872).

We will get there, to the turn of the century, and then the bridge will be built from Kantorowicz and his fellow critics to constitutional scholarship. But in line with the methodological framework laid out in the previous chapter, it is important to contextualize and historicize the debates, and in order to do so, we shall begin in the Germany where Hesse and Kantorowicz were born and trace some lines of development up until the first decades of the 20th century. This is done in section 3.2. This section describes an age of transition from the 1870s and until the First World War, where Germany went from a liberally oriented state to an interventionist state and where state and society – "law" and "life" – became more entangled and intertwined (3.2.1). The remainder of section 3.2 is devoted to an analysis of the legal methodological paradigms of this waning liberal era, first within private law (3.2.2), then within the leading constitutional law of the Imperial era (3.2.3), and, as a bridge to the next section where I will move on to the criticism, the legal thinking developed at the beginning of the new century by Hans Kelsen (3.2.4). In brief, the idea is to establish an overarching backdrop against which the criticism – our main topic – can be understood in section 3.3.

In section 3.3, then, I will start by providing the more immediate context of the debates. First, I will have a brief look at some of the criticism that was levelled against mainstream constitutional thinking in the Imperial years (3.3.1), then go on to describe the critical movements that arose within *private* law at the beginning of the 20th century (3.3.2), before I say a few words about the Weimar context (3.3.3). Then follow analyses of the constitutional scholars Erich Kaufmann (3.3.4), Rudolf Smend (3.3.5), Heinrich Triepel (3.3.6), and Carl Schmitt (3.3.7).

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3.2 The backdrop: Germany in an age of transition, 1871–1918

3.2.1 The rise of the interventionist state

Born in 1877, Hesse and Kantorowicz arrived at the dusk of a period of strong national liberalism in Germany, before Bismarck made a conservative turn in 1878 and 1879. Besides the formal foundation of the North German Confederation in 1866/1867 and then the German Empire in 1870/1871, this period saw a parallel process of national foundation and integration through legislative unification of the law in a number of areas.[74] Of particular importance in this regard is the fact that this process of national integration necessitated and legitimated an active role for the legislator.[75] Moreover, important parts of the legal reforms in the late 60's and early 70's aimed at liberalisation, in particular of the professions and the freedom to choose an occupation, with the Act on Vocational Freedom (*Gewerbeordnung*) of 1869 as the crown jewel.[76] A crucial objective of the legislative unifications and the economic liberalisations was to facilitate a private market where free and equal actors could perform transactions. The idea of this classic

74 On this, see Michael Stolleis, '"Innere Reichsgründung" durch Rechtsvereinheitlichung 1866–1880' (printed in Michael Stolleis, *Ausgewählte Aufsätze und Beiträge*, Volume I, Stefan Ruppert and Miloš Vec ed, Vittorio Klostermann 2011) 403–432. See further Hans-Ulrich Wehler, *Deutsche Gesellschaftsgeschichte. 3: Von der "Deutschen Doppelrevolution" bis zum Beginn des Ersten Weltkrieges: 1849–1914* (Beck 1995) 866 f. On 871–872, Wehler speaks of a "bourgeois-liberal national foundation through reform legislation".

75 The legislative competences of the Empire were regulated by Article 4 of the Imperial Constitution of 1871. Pursuant to Article 5, the legislative power was exercised jointly by the Federal Council (*Bundesrat*) and Imperial Diet (*Reichstag*). To illustrate the wide scope, the Empire had competence to regulate technical matters such as metering, currency, and weight (Art. 4 no. 3), decide military and naval matters (Art. 4 no. 14), and, importantly, enact common legislation for the law of obligations, criminal law, trading and bills of exchange, and procedural law (Art. 4 no. 13). The latter was extended in 1873 to give the Empire competence to legislate for the *entire* civil law, in addition to criminal and procedural law, see Stolleis (2011), '"Innere Reichsgründung"' 410 and 413; Wieacker (1973) 468. Important in a unificatory perspective was, moreover, the provision in Article 2 stipulating that Imperial legislation took precedence over state legislation.

76 On this, see Stolleis (2011), 'Innere Reichsgründung' 422 f.

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bourgeois liberalism was that an autonomous private sphere would create wealth and social justice among individuals with very limited intervention from the state.[77] Correspondingly, this liberal tradition considered the classical realm of private law to be the focal point of society. Man was considered a "private law subject" and the order of private law was levied to an order for the entire society consisting of free and autonomous individuals.[78]

The heyday of liberalism came, however, to an end around 1878 when Bismarck switched alliance and joined forces with the conservatives. This "third act of foundation" of the German state, as the historian Hans-Ulrich Wehler has coined it, was inaugurated by the Anti-Socialist Laws from 1878, to be prolonged several times until 1890, and the introduction of protective tariffs on industrial and agricultural products in 1879. The coming decades would also see a number of tightening requirements for occupational licensing through amendments to the above-mentioned Act on Vocational Freedom, with the consequence that the freedom of profession looked profoundly different in 1900 than it had done in 1869.[79]

One of the reasons for this conservative turn was that the classical liberal ideal of a self-regulating free market had proved inadequate; since 1873 and 1876 respectively, the industrial and agrarian sectors had experienced depressions, due to overproduction and economic deflation. The economy would remain unstable until 1895, oscillating between depressions and brief cyclical recoveries, thus strengthening the perception that the invisible hand of the market had to be replaced by a visible, governmental, and strong iron fist.[80]

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77 Dieter Grimm, 'Die sozialgeschichtliche und verfassungsrechtliche Entwicklung zum Sozialstaat' in Dieter Grimm, *Recht und Staat der bürgerlichen Gesellschaft* (Suhrkamp 1987) 138–161, 138. See also Ernst-Wolfgang Böckenförde, 'Die Bedeutung der Unterscheidung von Staat und Gesellschaft im demokratischen Sozialstaat der Gegenwart' in Ernst-Wolfgang Böckenförde, *Recht, Staat, Freiheit* (first published 1991, expanded edn, Suhrkamp 2006) 209, 216.

78 Dan Wielsch, 'Grundrechte als Rechtfertigungsgebote im Privatrecht' (2013) Vol. 213 *Archiv für die civilistische Praxis* 718, 722.

79 Stolleis (2011), 'Innere Reichsgründung' 425.

80 For a thorough overview of the economic developments, see Wehler (1995) 547 f.

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A closely related development that further called into question the ideal of a small-scale economy based on free and equal competitive actors, was the concentration of big business and the cartelization that accelerated in the 1880's and the 1890's. These incorporative processes were, in part, the response by investors and companies to the difficult economic situation.[81] For those in the lower strata of society – the workers – their response was equally one of collectivization of interests, for their part in terms of parties and trade unions. In 1875, the workers' association and the workers' party merged into the Social Democratic Party (SAPD, later SPD) in Gotha. Out of fear for the "read threat", the socialists were suppressed and outlawed, but they would grow immensely after 1890 when the ban was lifted. Eventually, the SPD ended up as the largest party in the 1912 *Reichstag* elections with about 1/3 of the votes. This rise of the proletariat intensified the conflict level and the competition to gain the political upper hand in an Imperial Germany that was characterized by strong aristocratic-feudal elements, monarchism, and militarism.

Another social phenomenon connected to the growing industrialization was the population growth and urbanization. The German population grew from 41.1 million people in 1871 to 64.9 million in 1910. The lion's share of this growth went to the cities, including the rapidly growing large cities (*Großstädte*); in 1871, 4.8 % of the population were living in cities with more than 100.000 inhabitants, of which there were 8, whereas in 1910, the number of these *Großstädte* had grown to 48, and they hosted 21.3 % of the population.[82] The expansion was rapid; Stefan Zweig, the famous novelist, would later write that "[t]he Berlin of 1905 no longer resembled the city that I had known in 1901; the capital

81 The private sector also organized in interest groups that could channel their views into the increasingly important legislative processes, see Michael Stolleis, 'Die Entstehung des Interventionsstaates und das öffentliche Recht', printed in Michael Stolleis, *Ausgewählte Aufsätze und Beiträge*, Volume I (Stefan Ruppert and Miloš Vec ed, Vittorio Klostermann 2011) 433–459, 445.

82 Wehler (1995) 512.

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had grown into a metropolis and, in turn, had been magnificently overtaken by the Berlin of 1910."[83]

In various ways, these political and social developments led to "*the rise of the interventionist state*" (Stolleis). With increased population density, the need for municipal regulation of sanitation, sewage, zoning, energy sources, and transportation became more pressing.[84] Moreover, the tariffs, put in place to protect powerful Prussian agrarian interests against international competition, are already mentioned. Important was also Bismarck's social legislation, with the Act on Health Insurance (1883), the Act on Accident Insurance (1884), and the Act on Old Age and Disability Insurance (1889) among the most prominent ones. These reforms drew on traditional German welfarist traditions but were also the "positive equivalent" to the Anti-Socialist Laws as they were intended to appease the discontented working class.[85]

These new tendencies were, generally speaking, reactions to the deficiencies of the liberal model and its failure to deliver on its promises. As public welfare was not ensured by the market itself and a passive state, there was a demand for a more active state instead. The structure of the interrelationship between state and society changed;[86] to use a formulation by the historian Jan Romein, the state encroached upon society (through more intervention in the private market) and the society encroached upon the state (through mobilization of pressure groups that sought to influence legislative processes, either through lobbyism or through direct political power).[87] In Carl Schmitt's polemical words, the merging of state and society represented a transformation from a neutral to a total state.[88] In our terminology, one could say that "law"

83 Stefan Zweig, *The World of Yesterday* (4th edn, Cassell and Company 1947) 151.
84 For municipal regulation, see Wehler (1995) 523 f.
85 Grimm (1987) 151; Stolleis (2011), 'Die Entstehung' 439 and 442.
86 On this dialectical interrelationship ('*Wechselbeziehung*'), see Böckenförde (1991) 222.
87 Romein (1978) chapter XVIII and XIX.
88 Carl Schmitt, *Der Hüter der Verfassung* (first published 1931, 2nd edn, unrevised reprint, Duncker & Humblot 1969) 79. See also Carl Schmitt, *Der Begriff des Politischen. Text von 1932 mit einem Vorwort und drei Corollarien* (Duncker & Humblot 1963) 24.

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and "life" approached each other. Whereas the classical function of private law had previously been first and foremost to delineate the spheres of individual rights and freedoms – to facilitate the transactions in the "life" of society – it increasingly became a task to penetrate his "life" by governing and steering it in a "social engineering" way.[89]

The developments that appeared in the late 1870's would continue with strengthened force in the decades up until the World War (and, as we will see later, beyond). If one takes a look at the number of enacted laws per year and the number of pages of the official Gazette, one finds a modest, but steady growth in the legislative activity of the *Reichstag*. And from 1900 and onwards, it is a clear tendency that a higher percentage of the enacted laws regulated different aspects of society, such as economic matters, social security, work, communications, health, and so on.[90] Moreover, the number of centralized administrative agencies grew considerably in the years following the unification.[91] In addition, an active interventionist state demands more public law legislation, and correspondingly, there was a growth and development of public law as a scholarly field in the period as well.[92] The increased intervention and regulation contributed to blurred lines between private law and public law, corresponding to the previously noted approximation between state and society.[93] Blurred lines were

89 See Wieacker (1973) 541.

90 Hubert Rottleuthner, 'Aspekte der Rechtsentwicklung in Deutschland – Ein soziologischer Vergleich deutscher Rechtskulturen' (1985) No. 6, Heft 2 *Zeitschrift für Rechtssoziologie* 206. See p. 211 f., with tables on p. 214 and 223–224. Rottleuthner operates with four categories: legislation regulating aspects of society, state regulation of miscellaneous fields (standardization or fiscal matters), internal state regulation, and various other types of regulation. As pointed out on p. 225, the analysis does not contain ministerial regulations, regulations made by the various *Länder* or municipalities, etc. I am grateful to Professor Rottleuthner for the reference. On the growth of federal legislation and its consequences for the relationship between the *Reich* and the *Länder*, see also Heinrich Triepel, *Unitarismus und Föderalismus im Deutschen Reiche. Eine staatsrechtliche und politische Studie* (Verlag von J. C. B. Mohr (Paul Siebeck) 1907) 53–56 and 78–79.

91 Triepel (1907) 60–61.

92 Stolleis (2011), 'Die Entstehung...' 458.

93 *Ibid.* 448.

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also a consequence of the growing tendency to formulate broad general clauses in the legislation. In 1933, Justus Wilhelm Hedemann observed an astounding increase in the use of such provisions over the last decades and a "triumphal procession of good faith [*Treu und Glauben*] throughout almost every field of law".[94] A consequence was that "*all cultural values, all economic interests of the nation and the individuals concerned* should find their way into the legal sphere through general clauses".[95]

Michael Stolleis has precisely described an important legal consequence of these developments:

> The real crucial point of the modification of the entire legal order in the interventionist state is the advancement of the purposive element. Intervention means targeted, purposive exertion of influence through law. In this respect, law is a means, not an end in itself. In this period, the judge turns, as Jan Schröder has put it, from law's 'servant' to its 'guardian', as he determines the intended purpose and, within the frames of the norm, realizes it.[96]

But to what extent was the legal system, or more particularly legal thinking, adjusted to this transformation?

3.2.2 Legal paradigms in "the private law society"

A dominant theme within the German legal system in the 19th century was the strive for achieving high scientific standards.[97] After the fall

94 Justus Wilhelm Hedemann, *Die Flucht in die Generalklauseln. Eine Gefahr für Recht und Staat* (J. C. B. Mohr (Paul Siebeck) 1933) 4 and 56.

95 *Ibid.* 58 (emphasis in original).

96 Stolleis (2011), 'Die Entstehung' 448–449. The reference is to Jan Schröder, *Gesetzesauslegung und Gesetzumgehung. Das Umgehungsgeschäft in der rechtswissenschaftlichen Doktrin von der Spätaufklärung bis zum Nationalsozialismus* (1985) 125. See similarly Wieacker (1973) 541.

97 Hans-Peter Haferkamp, 'Historical Conditions for the Contemporary Understanding of Legal Method in Germany' in Ingvill Helland and Sören Koch (eds), *Nordic and Germanic Legal Methods. Contributions to a Dialogue between Different Legal*

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of the Holy Roman Empire in 1806 and until Germany was unified in 1871, the legal profession tried to work out systems and common concepts that could mediate the fragmentation of law. An influential *Pandektenwissenschaft*, and later what Franz Wieacker in his classical study of the history of private law has described as a legal scientific positivism, evolved out of the historical school in legal science.[98] According to Wieacker, the legal scientific positivists deduced legal propositions and their application from systems, concepts and scientific theorems, without conceding a law-creating or law-changing power to extra-legal – for instance religious, social or scientific – factors. Law was, moreover, seen as a closed and unified system of legal institutions and norms.

The posterity's evaluation of the pandectists has been heavily influenced by Rudolf von Jhering, who in 1884 – after his methodological conversion from Saul to Paul, as he left the camp of pandectists that he had originally adhered to –[99] invented the term "jurisprudence of concepts" (*Begriffsjurisprudenz*), later to become one of the most pejorative terms among legal scholars.[100] Ever since, one of the main accusations against lawyers allegedly dealing with this way of reasoning has been that they are detached from life and its practical needs. But in later years, the accuracy of the ever-repeated vehement criticism of "jurisprudence of concepts" has been questioned.[101] Without going into detail on these debates, two important points should be noted about

Cultures, with a Main Focus on Norway and Germany (Mohr Siebeck 2014) 84–96, 86.

98 On this, see in general Wieacker (1973) § 23. The following is taken from 431 and 433 in particular.

99 For this phrase, see Philipp Heck, *Interessenjurisprudenz* (J. C. B. Mohr Paul Siebeck 1933) 12.

100 Rudolf von Jhering, *Scherz und Ernst in der Jurisprudenz. Eine Weihnachtsgabe für das juristische Publikum* (1884). For an overview, see Seinecke (2017) 148 ff.

101 See e.g. Rückert (2012); Hans-Peter Haferkamp, 'Begriffsjurisprudenz' in *Enzyklopädie zur Rechtsphilosophie*, 2011, available at <http://www.enzyklopaedie-rechtsphilosophie.net/inhaltsverzeichnis/19-beitraege/96-begriffsjurisprudenz> (accessed 7 September 2024).

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legal thinking in light of the transformations in Germany towards the end of the 19th century:

First, the unification in 1871 and the introduction of a common legislator in the German legal system changed the structures and dynamics of the system. This development has already been mentioned, but some important codifications should be mentioned: the German Penal Code was enacted in 1871, the Laws on the Judiciary in 1877, and, as the crown jewel, the German Civil Code (BGB) in 1900. In Wieacker's terminology, there was a shift from legal scientific positivism to statutory positivism. One way of looking at it is that pandectism was particularly well-fitted for this new situation. Its depoliticized methodological programme could go well along with the requirements of a more active and politically ambitious legislator, and, furthermore, the sophisticated and fine-tuned concepts it created could serve as invaluable building blocks for legislation striving to govern a highly complex society with demands for predictability and equality before the law.[102] But that is only one side of the story. The other side is that, as already explained, a strong regulatory ambition introduced a strong element of purposiveness into statutory law. The demand for lawyers' fidelity to statutes became equally well a demand for fidelity to purposes – the judge turned, as previously noted, from 'servant' to 'guardian'. Hedemann saw the general clauses that popped up everywhere as "a piece of legislation left open", and he sensed a tendency towards a blending of legislation, judicial application, and administration.[103] That there were no clear boundaries was implicitly acknowledged by the famous Article 1 (2) of the Swiss Civil Code of 1907, which stipulated that "in the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, *in accordance with the rule that it would make as legislator*" (emphasis added). One year after Hedemann published his study, Carl Schmitt claimed in 1934 that precisely the general clauses exposed that the era of legal positivism had come to

102 See in this direction Rückert (2012) para. 1383.

103 Hedemann (1933) p. 58. The entire quote is italicized in the original. See similarly Friedmann (1972) 45.

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an end.[104] And even if this was a highly politicized statement uttered within the context of Schmitt's position in Nazi Germany, it was a kernel of truth in it. With the open general clauses and the purposive element, a hose was constructed through which "life" could and would seep into law, and a methodology claiming a strict separation of legal and extra-legal factors would easily become too narrow.

The second point is that the *Pandectism* was developed under a social model that started to dissolve with the massive trends of modernization – industrialization, urbanization, and a growing market economy – and, in the late 1870's, the anti-liberal turn. The criticism against the first draft of the Civil Code that was published in 1887 is demonstrative. The draft was modelled on the prevailing conceptual legal thinking – the pandectist Bernhard Windscheid was an influential member of the drafting commission – and was immediately criticized for being detached from life.[105]

In sum, the traditional way of thinking about legal method had come under pressure towards the end of the 19th century due to changes within society at large. The criticism formulated in the early 1900's will be analysed later. What is important at this stage, and to which I will move on, is that the classical private law methodology was adapted by the leading *constitutional* scholars in Imperial Germany.

3.2.3 Carl Friedrich von Gerber and Paul Laband: The separation of "law" and "life (I)

With the North German Constitution from 1866 and then the Imperial Constitution from 1871, a new constitutional epoch was inaugurated in Germany, as the country became unified under a single, federal constitution. A number of factors contributed to the specific path that constitutional legal scholarship would follow during the Imperial era, up until the First World War. First of all, the new constitution gave a

104 Carl Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens* (Hanseatische Verlagsanstalt 1934) 58.

105 On the criticism, see Wieacker (1973) 469–470.

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positive fundament that could replace the previous "common German constitutional law" that scholars had constructed on the basis of the constitutional law of the different states.[106] At this point, there was a parallel to how the increased codification and enactment of statutes changed the preconditions for legal science in other fields, as described above. Secondly, long-term effects of the failed German revolution in 1848 played in. The failure of the revolution had disillusioned the "political professors" who had been active participants, and within constitutional scholarship, the ensuing decades saw an attempt to recast the discipline as a non-political, more strictly scientific field. But one substantial, yet rather neutral and depoliticized objective that both liberals and conservatives alike could join forces around was formal rule of law guarantees.[107] A third factor to be noted is that the Imperial Constitution was a rather technical one. It did not, for instance, contain any constitutional rights nor any judicial dispute resolution, nor did it say anything about the position of the Government.[108] To some extent, this might have contributed to a feeling that from the perspective of constitutional law, not so much was really "at stake", and thereby contributed to a disengaged and non-political constitutional scholarship.[109]

Another important element was the influence on constitutional legal scholarship from the traditional private law discipline. Here, an adaption took place in particular through the writings of Carl Friedrich von Gerber (1823–1891). Gerber was a student of one of the leading pandectists, Georg Friedrich Puchta (1798–1846), and initially a private

106 See Stolleis (2001), *Public Law 1800–1914* 309 and 322.

107 *Ibid*. 254–257.

108 Friedrich (1997) 244 f.; Jacobson and Schlink (2000) 8, who compares it to the Weimar Constitution. Following the organizational part, the 1871 Constitution contained chapters on "Customs and commerce", "Railways", "Posts and telegraphs", "Marine and navigation", "Consular affairs", "Military affairs of the Empire", and "Finances of the Empire". It should be noted, however, that basic rights were guaranteed by ordinary statutes and by most of the State constitutions, see Stolleis (2004) 8.

109 Friedrich (1997) 247.

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law scholar.[110] Gerber published his famous *Basic Features of a System of German Constitutional Law* in 1865, and with this treatise, he brought the mainstream private law methodology into the realm of constitutional scholarship.[111] In the preface to the first edition of the treatise, he wrote that there was a need for "a more precise and correct exposition of the fundamental dogmatic concepts".[112] Gerber claimed that parts of constitutional scholarship had been too infused with by philosophical, political and historical considerations. What he wanted instead was a "scientific system, that is, one governed by a coherent way of thinking". Only through a system like this would "German constitutional law gain its scientific independence and provide a fundament for reliable legal deduction".[113] Gerber did not reject the importance of non-legal elements, but simply demanded a strict separation of these elements from the "legal method" ("*juristische Methode*").[114] With the treatise, Gerber introduced a "scholarly ideal of 'pure construction' from a few coherent fundamental concepts"[115] and it was regarded by a contemporary as "an achievement signalling a new epoch in constitutional law."[116] Some forty years after the treatise was first published, the

110 Carl Friedrich von Gerber, *Grundzüge eines Systems des deutschen Staatsrechts*, 1865. A second edition was published in 1869 and a third one in 1880. In the following references to the preface of the first edition, which was reprinted in the later editions, I quote from a reprint of the third edition from 1969 by Scientia Verlag.

111 In a letter to Gerber of 4 April 1869, Rudolf von Jhering congratulated with the publication of the second edition of *Grundzüge* and wrote: "You have introduced jurisprudence within constitutional law!", see Walter Pauly, *Der Methodenwandel im deutschen Spätkonstitutionalismus. Ein Beitrag zu Entwicklung und Gestalt der Wissenschaft vom Öffentlichen Recht im 19. Jahrhundert* (J. C. B. Mohr (Paul Siebeck) 1993) 140, cfr. also footnote 23 for interesting information about this statement held up against Jhering's own theoretical transformation in this period.

112 Gerber (1969) V (preface).

113 *Ibid.* VI (preface).

114 See Friedrich (1997) 230–231.

115 Stolleis (2001), *Public Law 1800–1914* 320.

116 K.V. Fricker, 'Die juristische Konstruktion im öffentlichen Recht', (1865) *ZStW* 21 465–482, cited from *ibid.* 310. Stolleis himself speaks of a "paradigm shift", see 320.

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constitutional law scholar Philipp Zorn (1850–1928) honoured Gerber as "the father of contemporary constitutional legal science".[117]

The leading figure of constitutional scholarship in the second part of the 19th century was, however, Paul Laband (1838–1918). Laband was an admirer of Gerber and set forth to follow his methodological program.[118] Laband's four-volume treatise *The Constitutional Law of the German Empire* was published gradually from 1876 and onwards, and was reprinted in five editions until 1911. With the publications stretching across almost the entire lifespan of the Imperial constitution, it is possible to view Laband as "a monument of legal-constitutional self-confidence in the Empire".[119] "All subsequent works on German constitutional law", Zorn wrote in 1907, "stand on the shoulders of Laband."[120] And one of his main critics, Heinrich Triepel (cfr. Section 3.3.6), noted that Laband had "completely dominated more than a generation of German scholars".[121]

For Laband, constitutional scholarship deserved a place in the sun, given the recent political developments in Germany. In the preface to the first edition of the first volume of his treatise from 1876, Laband presents the following historical narrative: In the years following the foundation of the North German Confederation in 1867, the public was obsessed with political issues, with antipathies and sympathies towards the new ordering – with feelings (*Gefühls*), in other words. But now, so Laband's story goes, the epoch of political upheavals was over, the constitution was no longer the object for party struggles, and the situation had been stabilised. Now there was a growing need for an understanding (*Verständnis*) of the new constitution, a cognition (*Erkenntnis*) of its fundamental principles and the legal propositions to be derived from

117 Philipp Zorn, 'Die Entwicklung der Staatsrechts-Wissenschaft seit 1866' (1907) Band 1 *Jahrbuch des Öffentliches Rechts* 47, 53.

118 On the relationship between Gerber and Laband, including private letters between them, see Pauly (1993) in particular 205–208, but also 160–161.

119 Stolleis (2001) *Public Law 1800–1914* 324.

120 Zorn (1907) 65.

121 Heinrich Triepel, *Staatsrecht und Politik* (inaugural address as Rector of the Friedrich-Wilhelms-Universität zu Berlin 15 October 1926, Preußischen Druckerei- und Verlags-Aktiengesellschaft 1926) 7.

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these, as well as a scientific mastering (*wissenschaftliche Beherrschung*) of the new legal formations.[122] When reading Laband, one gets the feeling of an intermezzo: one set of actors have just left the scene, and the stage lighting is switched from a dramatical, emotional red light ('*Gefühls*') to a sharp, blue one ('*Erkenntnis*'). Enter the new actors: the legal scholars.[123]

The way to achieve the scientific aims was, for Laband, neither a mere description of the constitutional legal material nor the study of the motives of the legislator. Instead, he advocated "the analysis of the newly formed public law relations, the ascertainment of the legal nature of these, and the discovery of the more general legal concepts they are subordinated to".[124] What interested him, and what he saw as the proper object for legal science, was legal forms, not material purposes.[125] That the Imperial constitution could be subsumed and arranged under general legal concepts was ensured by the fact that the creation of a legal institution that could not be inferred from such concepts was "just as impossible as the invention of a new logical category or the emergence of a new natural force."[126] After his methodological framework had been criticised, in particular by Otto von Gierke in 1883,[127] Laband emphasized in the preface to the second edition from 1887 that he was far from rejecting that there was a place in legal *science* for historical, economic, political or philosophical inquiries.[128] But these fields were to be excluded from legal *dogmatics*, where the

122 Paul Laband, *Das Staatsrecht des Deutschen Reiches*, Volume 1 (1st edn, Laupp 1876) V–VI (preface).

123 According to Laband himself, it would turn out that his call had been successful. In the preface to the second edition of the first volume, Laband noted that "federal constitutional law has become a blossoming and highly developed branch of German legal science." *Das Staatsrecht des Deutschen Reiches*, Volume 1 (5th edn, Mohr 1911) VIII (preface).

124 Laband (1876) VI (preface).

125 Paul Laband, 'Otto Mayer, Theorie des französischen Verwaltungsrechts, 1886' (1887) *Archiv des öffentliches Rechts*, Band 2, 161.

126 Laband (1876) VI (preface).

127 On Gierke's criticism, see text accompanying footnote 160 below.

128 Laband was himself originally a legal historian, as pointed out by Pauly (1993) 189 (footnote 93).

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scientific task lay in "the construction of legal institutions, in tracing individual legal norms back to more general concepts and, inversely, in drawing out the consequences of these concepts." This was a "purely logico-intellectual activity" where there were "no means other than logic" available.[129] A prerequisite for this logico-deductive dogmatic method was the idea that the legal system was a closed system without gaps.[130]

A crucial element of the paradigmatic Gerber/Labandian "*juristische Methode*" was, in other words, the strict separation of legal and non-legal factors. Legal scientists were supposed to stay within the confines of an autonomous legal sphere and stick to conceptualism, systematization and logical deduction. Historical, social, and political perspectives were certainly of great interest, but had no legitimate place in legal analyses. These scientific ideals must be understood in light of the legal and political situation in Germany at the time – but it was also an attempt to carve out an autonomous sphere for constitutional legal science vis-à-vis politics and other scientific disciplines (history, philosophy, economics, etc.). For others, it came to be seen merely as an unacceptable and unsustainable way of detaching "law" from "life". Before we move on to these critics in section 3.3, another important actor to have a look at is Hans Kelsen.

3.2.4 Hans Kelsen: The separation of "law" and "life" (II)

It might seem ill-considered to analyse Hans Kelsen (1881–1973) at this stage of the study, as the majority of his writings date from post 1918.

129 Laband (1911) IX (preface to the 2nd edn of Volume 1 from 1887). At this point, I have used translated extracts from Stanley L. Paulson, 'The Purity Thesis' (2018) 31 *Ratio Juris* 276, 284.

130 See e.g. the following quote from *Das Budgetrecht nach den Bestimmungen der preußischen Verfassungs-Urkunde* (1871): "A gap in the written text of the constitutional document [*Verfassungs-Urkunde*] […] is not to be confused with a gap in the Constitution [*Staatsverfassung*]. The latter is an unthinkable concept; laws can have gaps, but the legal order itself can have gaps no more than the order of the nature can." Cited from Korioth (1992) 215. See the same place for a more general elaboration of this part of constitutional legal thinking in the late 19th century.

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Moreover, Kelsen was not an adherent to Gerber and Laband, even though their theories shared some basic features (I will come back to the relation below). What is crucial here, however, is that Kelsen was criticized in the Weimar period for being a "formalist", sometimes in pair with Gerber and Laband. And that is the reason why Kelsen is considered here, as part of the construction of a backdrop to analyse the criticism against. But as Kelsen took part in the Weimar debates and replied to his critics, he will also be given the floor on later occasions.

Kelsen was the leading figure of the "Vienna school" of legal thinking and one of the most influential legal thinkers throughout the entire 20th century.[131] Kelsen's first main work, his habilitation thesis *Main Problems in the Theory of Public Law* (*Hauptprobleme der Staatsrechtslehre*), was published in 1911. In this general treatise, concerned with fundamental and theoretical problems in constitutional law, one can find the seeds of what was later to become Kelsen's more sophisticated and famous "pure theory of law", which would receive much attention and criticism in the Weimar years.[132] What concerned Kelsen most was to secure "the independence of the law as an object of scientific cognition".[133] One threat to this independence was natural

131 The most comprehensive work on Kelsen is now the voluminous biography by Thomas Olechowski, see *Hans Kelsen. Biographie eines Rechtswissenschaftlers* (Mohr Siebeck 2020). For a concise overview of the historical context that is relevant here, see also Stolleis (2004) 151 f. On Kelsen's later significance, see e.g. Stanley L. Paulson, 'Introduction. On Kelsen's Place in Jurisprudence' in Hans Kelsen, *Introduction to the Problems of Legal Theory. A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law* (Bonnie Litschewski Paulson and Stanley L. Paulson tr, Clarendon 1996) xvii.

132 For an instructive overview and periodization of different phases in Kelsen's thinking, see Stanley L. Paulson, 'Four Phases in Hans Kelsen's Legal Theory? Reflections on a Periodization' (1998) 18 OJLS 153–166.

133 Hans Kelsen, *Hauptprobleme der Staatsrechtslehre* (first published 1911, reprinted version of 2nd edn 1923, Scientia Verlag 1960) V (preface) [tr. 3]. The preface is written in 1923. For the quotes here and in the following from the preface (but not from the main text), I use the translation of the preface by Stanley L. Paulson, Bonnie Litschewski Paulson and Michael Sherberg published in Stanley L. Paulson and Bonnie Litschewski Paulson (eds), *Normativity and Norms. Critical Perspectives on Kelsenian Themes* (Clarendon 1998) 3–22. Paginated references to this translation are included in brackets.

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law theories, which "takes legal theory out of the realm of positive legal norms and into that of ethico-political postulates."[134] But what was even more pressing for Kelsen was to fight against sociological legal theories and their attempt to employ "causal, scientific methods to appropriate the law as part of natural reality."[135] The common ground of this dual defence, which was supposed to furnish legal science with clear borders on both sides,[136] was a fundamental epistemological distinction between the spheres of "is" (*Sein*) and "ought" (*Sollen*). Kelsen's main claims can be summarized as follows: First, that legal science is a science of norms and thus concerned with the *Sollen*-sphere and the question of validity; second, that the objective of legal scholarship is the cognition (*Erkenntnis*) and not the explanation (*Erklärung*) of these norms; third, that formal logic forbids inferences from one sphere to the other; and fourth, that the specific legal cognition consequently has to take the form of normative imputation (*Zurechnung*) between norms in a chain, with a transcendental basic norm (*Grundnorm*) on top of the system. Kelsen, in short, refused to go along with the traditional point of view that positivism and natural law theories are contradictories (*tertium non datur*); he saw them rather as contraries, and this allowed him to introduce a "third way". This "third way" can be called a non-naturalistic legal positivism.[137]

The philosophical basis for Kelsen's theory was neo-Kantian epistemology. Neo-Kantianism had an upswing in general philosophy around 1900, and this trend spread to legal philosophy as well.[138] The neo-Kantians were concerned with the preconditions for objective cognition in the field of the humanities, as they regarded the positivism

134 *Ibid.* V [tr. 4].

135 *Ibid.* V [tr. 3–4].

136 On this, see in particular Hans Kelsen, 'Über Grenzen zwischen juristischer und soziologischer Methode' (speech delivered in the Sociological Society in Vienna in 1911, reprinted version, Scientia Verlag 1970) 1 f.

137 See Paulson (1996) X.

138 For an overview, see Oliver Lepsius, *Die gegensatzaufhebende Begriffsbildung. Methodenentwicklungen in der Weimarer Republik und ihr Verhältnis zur Ideologisierung der Rechtswissenschaft unter dem Nationalsozialismus* (C. H. Beck 1994) 304 f.; Korb (2010) 12 f.

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of natural sciences as insufficient here. Without going into the details of the neo-Kantian aspects of Kelsen's theory,[139] the important point is that the Kantian dimension made Kelsen focus on the forms of law and the building blocks of legal science instead of law's substantial content and its context.[140] For some, this would make the pure theory a truly scientific one, worth of appraisal, but for others, it was more proper to see it as a despicable formalism.[141]

A more general point is that the borders Kelsen constructed around law drastically narrowed the scope of constitutional scholarship. Political realities, historical enquiries, and sociological matters belonged to the *Sein*-sphere and were thus regarded as irrelevant from a legal scientific point of view. Michael Stolleis has rightly pointed out that when Kelsen's theory was silent on fundamental matters such as the question about the connection between state and society, the formation of the political will, and the party system, it seemed to invalidate itself.[142] Kelsen himself was well aware of the limited scope of a strictly normative perspective. He acknowledged the importance of sociological, psychological, and historical studies for a lawyer, but emphasized that the legal scientist "is never allowed to include the results of his explicative considerations in his normative construction of concepts".[143] This was a point of view that very much resembled the position defended by Laband, and it brings us over to say something about the relationship between Kelsen and Gerber/Laband.

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139 On this, see e.g. the critical analysis in Stanley L. Paulson, 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law' (1992) 12 OJLS 311. It is worth noting that according to Kelsen himself, he was not acquainted with Kantian or Neo-Kantian philosophy when he wrote his habilitation thesis, see Korb (2010) 14–15.

140 Compare e.g. Immanuel Kant, *Critique of Pure Reason* (first published 1781, Paul Guyer tr, Cambridge University Press 1998) 149: "I call all cognition transcendental that is occupied *not so much with objects but rather with our mode of cognition of objects* insofar as this is to be possible *a priori*." (emphasis added).

141 For the criticism, cfr. below. For a positive assessment, see Lepsius (1994) 325–326, who regards Kelsen as "the founder of legal science as a science of norms".

142 Stolleis (2004) 158–159.

143 Kelsen (1960), *Hauptprobleme* 42.

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Which is indeed a peculiar one. In the preface to his *General Theory of the State* (*Allgemeine Staatslehre*), published in 1925, Kelsen saw "clearer than before how much my own works rest on the greater predecessors" and he felt "more intimate connected than earlier" with the direction that Gerber, Laband, and Georg Jellinek (1851–1911) represented. The reason was that they, in contrast to "a nebulous metaphysic theory of the state", attempted to make "a *positive theory of the state*, that is, a strictly *juristic* and not *politically* coloured doctrine of the state".[144] Five years later, however, he distanced himself and the Vienna school from the "so-called dominant theory" of the 19th century. The normative theory of the Vienna school "emerged precisely as a critique of this dominant theory", he now claimed.[145] And in a private letter from August 1933, Kelsen strongly objected to being placed in the same category as Laband. Such a claim was "absurd", and Kelsen argued that

> even my early treatise, *Main Problems in the Theory of Public Law*, was most emphatically directed against the political tendencies – albeit cleverly concealed – of Laband's theory of public law, and, therefore, that my *Pure Theory of Law* actually originated in the struggle against 'Labandism'".[146]

How can one reconcile these rather diverging statements from 1925 on the one hand and 1930 and 1933 on the other?

One explanatory factor might be the increased and sharpened critique against both Gerber/Laband and Kelsen that, as we will see,

144 Hans Kelsen, *Allgemeine Staatslehre* (first published 1925, reprinted version, Gehlen 1966) VII (emphasis in original). In 1926, Hermann Heller commented and welcomed that Kelsen now, in contrast to earlier statements, had positioned himself "very correctly" in relation to earlier legal scholarship, see 'Die Krisis der Staatslehre' (1926) Band 55, Heft 2 *Archiv für Sozialwissenschaft und Sozialpolitik* 289, 300 (footnote 27).

145 Hans Kelsen, *Der Staat als Integration. Eine prinzipielle Auseinandersetzung* (first published 1930, reprinted version, Scientia Verlag 1971). Here, he mentioned Georg Jellinek as the most prominent representative of the dominant theory.

146 See Hans Kelsen, 'The Pure Theory of Law, 'Labandism', and Neo-Kantianism. A Letter to Renato Treves' (letter dated 3 August 1933, translated and published in Stanley L. Paulson and Bonnie Litschewski Paulson (eds), *Normativity and Norms. Critical Perspectives on Kelsenian Themes* (Oxford 1998) 169–175.

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had been launched in the methodological debates after 1925, and that Kelsen felt a more pressing need to distance himself from this direction in 1930 and 1933. But his detachment must also be understood in light of the fundamentally different scientific aims of Kelsen and Gerber/Laband. In the letter from 1933, Kelsen wrote:

> The main distinction [...] between the *Pure Theory of Law* and Laband's position is that Laband did not establish a legal theory based on principle at all. Strictly speaking, he confined himself instead to an interpretation of the Constitution [...].[147]

This becomes interesting in light of Kelsen's general views on *interpretation*. In an article from 1929, where he tried to refute claims that the pure theory was "formalistic", Kelsen drew a distinction between legal theories, which seek to cognize law, and legal practice, which creates law.[148] The former category could again be divided into general ("*allgemeine*") and special ("*besondere*") legal theories, depending on whether the theory sought to cognize how law possibly could be or how law actually was in a given legal system. The pure theory of law belonged to the general legal theories. Kelsen does not mention or discuss Gerber or Laband in the article, but what he writes about legal interpretation is of particular interest, not the least because he distances himself in this regard from "traditional jurisprudence".[149] As the 1933 letter showed, he claimed that Laband was dealing with interpretation. The problem of interpretation, Kelsen noted in 1929, was something the pure theory, at least until very recently, had not dealt with.[150] Kelsen treated interpretation as a problem related primarily to the application of law, that is, the concretization of general legal norms into an individual decision.[151] He

147 *Ibid.* 170.

148 Hans Kelsen, 'Juristischer Formalismus und reine Rechtslehre', (1929) Vol. 58 *Juristische Wochenschrift* 1723, 1723.

149 *Ibid.* 1726.

150 Kelsen referred to Fritz Schreier's *Die Interpretation der Gesetze und Rechtsgeschäfte* from 1928 as a recent exception.

151 *Ibid.* 1725. It was a close connection between the theory on interpretation and the idea that the legal system was a hierarchical system with a chain of creation of norms, see Hans Kelsen, *Introduction to the Problems of Legal Theory: A*

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contended – and at this point he even acknowledged a kinship between the pure theory and the free law movement –[152] that the application of law by courts and administrative organs was an act of creation, and that the law was only a frame for this decision. This implied that there were several possible solutions that could be made, and Kelsen claimed that the concrete decision was an act of will, not a process of cognition, and thus relegated from the scope of legal science to the sphere of (legal) politics.[153] This view on legal interpretation indicates the rather narrow scope Kelsen pursued for legal science, and it might also – which is the main point here – help to explain a fundamental difference between him and Gerber/Laband.[154] Even if Carl Schmitt is not the most reliable source for an assessment of Kelsen – in 1936 he would refer to "the Vienna School of the Jew Kelsen" –[155] it is very interesting that he grasped the scope of Kelsen's theory very clearly as early as in 1912. In one of his earliest publications, *Statute and Judgment* (*Gesetz und Urteil*), Schmitt had his first out of many encounters with Kelsen (but the clashes would only come later).[156] Here, he rightly pointed

Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law (Bonnie Litschewski Paulson and Stanley L. Paulson ed, Clarendon 1996) 77. A significant part of the concept of the legal system as a hierarchical system was that almost every legal act – except the basic norm "on top" of the chain and the realization of coercive acts "at the bottom" – was simultaneously application of a higher-level and creation of a lower-level norm, see 70.

152 On the free law movement, see section 3.3.2 below.

153 Kelsen (1929), 'Juristischer Formalismus' 1726.

154 Kelsen would substantially uphold his views in both the first and the second edition of his *Reine Rechtslehre,* see chapter VI (1st edn) and chapter VIII (2nd edn). But some of his distinctions would become slightly more refined. In the first edition, he would for instance substitute the term "legal politics" for "politics", see Kelsen (1996) 82. In the second edition, he would distinguish between "legal scientific interpretation" (*rechtswissenschaftliche Interpretation*) and "interpretation carried out by judicial bodies" (*Interpretation durch Rechtsorgane*), see Hans Kelsen, *Reine Rechtslehre* (2nd completely revised and expanded edn, Verlag Franz Deuticke 1960) 352 f.

155 See Carl Schmitt, 'Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist' (1936) Volume 41 *Deutsche Juristen-Zeitung* column 1193–1199, 1195. See in general Volker Neumann, *Carl Schmitt als Jurist* (Mohr Siebeck 2015) 379 f.

156 Carl Schmitt, *Gesetz und Urteil* (first published 1912, reprinted version, C. H. Beck 1969) 56–57 [tr. 91] (cfr. footnote 368 below for bibliographical information).

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out that it was a fundamental difference between his own work, which was concerned with judicial application, and Kelsen's theory in *Main Problems*, which was a theory about legal science.[157] Similarly, one might also say that Gerber and Laband did not shy away from the issue of legal application, as this was something they considered to be a deduction from legal concepts.

To sum up, there were both similarities and differences between Kelsen and Gerber/Laband. One could say that while both were acutely concerned with the scientific character of law, they had different ideas about what made law scientific. For Kelsen, it was not the construction of legal concepts and systematization of these, but rather the insistence on mere cognition of law in conjunction with the neo-Kantian epistemological foundation of legal science that were the crucial points. As a consequence, Kelsen and Gerber/Laband were to some extent concerned with different issues. But at the same time, a crucial similarity was the separation of law from other social phenomena, or, more precisely, the mantra that non-legal factors should be kept strictly apart from legal reasoning.[158]

This mantra was, in our terminology, a call to separate "law" and "life". For many critics, this separation was intolerable.

Cfr. Neumann (2015) 19 and 21. On the clashes between Schmitt and Kelsen, see section 3.3.7 below.

157 I disagree with Neumann (2015) 21, when he views Schmitt's comments as a critique of Kelsen. Even a claim by Sylvie Delacroix that "[t]he later opposition between the two authors nevertheless begins to take root", is reading too much into the text, see her 'Schmitt's Critique of Kelsenian Normativism' (2005) 18 *Ratio Juris* 30, 32. Schmitt emphasized that because of the scope Kelsen had defined for his work, it would "be wrong to derive an objection against the views propounded in said book from the fact that it does not even intend to explain important (and timely) questions concerning the method of legal practice […]". Moreover, in *The Value of the State* from 1914, Schmitt would refer to Kelsen's *Main Problems* as a "meritorious and significant work", see p. 77 [tr. 212] (cfr. footnote 367 below for bibliographical information). (For the sake of order: Schmitt does not specify which work by Kelsen he has in mind, but if one compares the formulation with the ones in *Gesetz und Urteil*, it seems obvious that he refers to *Main Problems*).

158 The similarity between Kelsen and Laband is also underlined by Paulson (2018) 284.

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3.3 Crisis and criticism, ca. 1900–1933

3.3.1 Counter-voices in the Imperial years and the convulsions around 1900

Even though Gerber and in particular Laband were the leading constitutional scholars in Imperial Germany, their writings were not uncontested, neither in terms of methodological program nor their more specific dogmatic interpretations of the Constitution. Several scholars were, to a lesser or greater extent, critical.[159]

The most thorough and influential criticism was voiced by Otto von Gierke (1841–1921), who published an extensive recension of Laband's treatise in 1883.[160] In his review, Gierke opened by commending that Laband treated constitutional law as a specifically legal phenomenon; as an autonomous sphere apart from politics.[161] The major problem was, however, that Laband overrated formal logics. As a result, his "*juristische Methode*" was formalistic and incapable of grasping the fundamental substantial elements of the law:

> Manifoldness and transition belong to the nature of law, as is the case with all organic and historical formations: only through the creative act of a concrete spiritual power does it receive life and in-

159 For an overview, see Pauly (1993) part E. See also Stolleis (2001), *Public Law 1800–1914* 328 f. See in general 328, where Stolleis agrees that Laband was perhaps the most influential and representative scholar but adds that "[t]he idea that Laband's 'positivism' strangled all other expressions is groundless."

160 Otto von Gierke, *Labands Staatsrecht und die deutsche Rechtswissenschaft* (Schmollers Jahrbuch Band 7) 1883, 1097 f. I quote from a version printed in *Aufsätze und kleinere Monographien*, vol. I (Olms-Weidmann 2001) 271–369. I have used the original pagination that is bracketed in the reprint (starting with p. 1) for my references in the following. For a general overview of Gierke's text, see Stolleis (2001), *Public Law 1800–1914* 337 f.; for a concise summary, see Pauly (1993) 228. It is also worth noting briefly that Gierke, the Germanist, criticized Gerber and his Romanist private law as well. According to Gierke, Gerber had killed "the German soul of German law", see *Deutsches Privatrecht I* (1895) 92, cited from Manfred Friedrich, *Geschichte der deutschen Staatsrechtswissenschaft* (Duncker & Humblot 1997) 227.

161 See in particular Gierke (2001) 4 f. See also a concise summary on p. 76.

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> dividuality. For that reason, science is not capable of understanding the total substance of law merely by the use of logical means.[162]

Gierke saw law as only one of several subsystems of social life, and thus, law had to be understood in its relation to these other social subsystems. Only in this way could the gap between constitutional law (*Staatsrecht*) and the life of the state (*Staatsleben*) be bridged; only in this way could the "inner substance" of law be understood scientifically.[163] The way to achieve this substantial and more holistic understanding was, first and foremost, historical investigations of the law and, as mentioned, its relation to other social processes. In addition, the legal elements had to be analysed philosophically, that is, scholars had to construct a system of "living and valuable" general concepts of constitutional law.[164] Gierke's ideas about law and its close relations to society are even more condensed and graphic in *The Social Mission of Private Law* from 1889. Here, he contrasts socio-political legislation: "living, popular [*volksthümliches*], socially coloured law, full of inner movement", with systems of "pure" private law: "an abstract template; Romanized, individualist, fossilized in dead dogmatics".[165] It was the first draft of the German Civil Code from 1887 he had in mind – but the criticism was obviously also directed against the underlying pandectism that had shaped the draft.

With Gierke's criticism from 1883 – which, as already mentioned, sparked some comments by Laband in the second edition of his

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162 *Ibid.* 15.

163 Gierke pointed out that Laband's analyses *did* contain elements of substantial, as contrasted to formalistic, law, but that he had no scientific methodology to offer for these investigations, see *ibid.* 18. To compensate for this, Laband introduced methods and concepts from civil law, but for Gierke, this only made the matter worse, as Laband thereby ended up with an individualist, technical, and mechanic concept of the state, instead of an organic theory, see 25 f. See also Otto von Gierke, *Die soziale Aufgabe des Privatrechts* (address delivered 5 April 1899, Verlag von Julius Springer 1889) 11 (footnote 4), where he *en passant* refers to German constitutional scholarship as "atomist-mechanic".

164 The need for historical investigations is described in Gierke (2001) 17 f.; the philosophical aspect at 22 f.

165 Gierke (1889) 16.

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treatise – some major themes were introduced that would echo in subsequent debates.[166] Above all, Gierke criticized what he perceived to be the narrowness of a logical method and its inability to grasp law's "inner substance". As a consequence, legal scholarship would, according to Gierke, have to make a turn towards other social phenomena by seeing law as part of broader historical developments – as part of something "living" and "full of inner movement".

The criticism may have stirred up the water, but it was only around the turn of the century that the tectonic plates of constitutional scholarship started to move. Legal historians usually speak of convulsions within the profession in the final decades of the Empire.[167] This will be seen later in the writings of Erich Kaufmann, Rudolf Smend, Heinrich Triepel, and Carl Schmitt. It is impossible to pinpoint an exact point of time when the motions started, as we are dealing with gradual developments without sharp demarcation lines. In 1905, Laband wrote that the "historical-critical" method was "a catchword that has been used to impart mischief in the most recent German constitutional literature as well, although it has *certainly made no great damage so far*."[168] This testimony might indicate that at this point of time, the classical method still stood on relatively firm ground. But precisely at the same time, something was at least brewing. Two years later, in 1907, Philipp Zorn warned against the adaption of the civil law method with its use of "clear-cut concepts" to the realm of public law. The warning, which was addressed as a part of Zorn's discussion of Laband, went as follows:

> The principle "fiat justitita, pereat mundus" could mean the death of constitutional law. For the precondition of all constitutional law is that the state lives and must live; the entire law of the state, the state law, has as its sole meaning to secure, promote, and organize

166 See Pauly (1993) 228, who writes, *inter alia*, that all later criticism would have recourse to Gierke. See also Stolleis (2001), *Public Law 1800–1914* 339.

167 Korioth (1992) in particular 212 and 229. See also Stolleis (2001), *Public Law 1800–1914* 439 f.

168 Paul Laband, 'Alfredo Bartolomei, Diritto pubblico e teoria della conoscenza' (1905) Band 19 *AöR* 615, 618 (emphasis added).

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> this life of the state. Every public law issue must be regarded from this perspective of the *interests* of the State […].[169]

Zorn argued in favour of a freer method within public law, because the ultimate purpose of this field of law was the common good. Public interests, not logical formalism should be the guiding principle – within, he reassured, the boundaries of law and legal methods.

Zorn was not the only one warning against the "clear-cut concepts" of private law. So did private law scholars as well. In fact, the ground was even more shaking under their feet than was the case for their colleagues in the constitutional community. Just like in the field of constitutional law, early signs of a rupture could be traced decades back, to one of the other prominent late 19th century legal scholars besides Gierke: Rudolf von Jhering. Jhering had, as already mentioned, launched an attack on the "jurisprudence of concepts" back in 1884. Here, he had programmatically stated that "the life is not the concepts, but the concepts exist because of life".[170] But – again, just as within constitutional law – there was an intensification of the debates around the turn of the century, with the emergence of directions like the free law movement, the jurisprudence of interests, and sociological legal theories.[171] Before moving on to consider more closely the developments in constitutional scholarship, we shall take a look at these new private law movements. As explained in the chapter on methodology, these more

169 Zorn (1907) 66–68 (emphasis in original).

170 Rudolf von Jhering, *Der Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* Volume 3 (originally published 1865, 4th edn 1884, Breitkopf und Härtel) 320.

171 Hermann Kantorowicz, one of the key actors of these movements, noted 1902 and 1903 as important years for the new *Freirechtslehre*, due to several different publications, see 'Aus der Vorgeschichte der Freirechtslehre' (first published in 1925, reprinted in *Rechtswissenschaft und Soziologie. Ausgewählte Schriften zur Wissenschaftslehre*, Verlag C. F. Müller 1962) 41–67, 43. See similarly Ernst Fuchs, *Was will die Freirechtsschule?* (Greifenverlag 1929) 9. For a later and more extensive overview and perspective, see Joachim Rückert, 'Vom "Freirecht" zur freien "Wertungsjurisprudenz" – eine Geschichte voller Legenden' (2008) 125 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Germanistische Abteilung* 199, 203 f. According to Rückert, it was only around 1909–1911 that the debates had become widespread, cfr. 204 and 207.

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general methodological developments are an important context for the developments within constitutional legal thinking. The reorientations within private law scholarship were, so to say, avantgarde in our context.[172]

3.3.2 A contextualizing detour: free law movement and jurisprudence of interests

As discussed in section 3.2.1, various developments in the late 19th century, connected to the rise of the interventionist state, put the traditional Pandectism under pressure. In the first decades of the 20th century, critical voices started to question the basic premises of mainstream legal thinking, a development that must be understood, at least partly, as a response to the growing tensions that followed in the wake of the transformation of the Germany society. Some of the most prominent scholars include Eugen Ehrlich, Hermann Kantorowicz, Ernst Fuchs, and Philipp Heck, who are usually seen as the key figures of the free law movement, sociological legal theories, and the jurisprudence of interest.[173]

Eugen Ehrlich (1862–1922) is regarded as one of the founders of the discipline of sociology of law, in particular due to his *Foundation of the Sociology of Law* from 1913. In Ehrlich's writings, the relationship between law and life is an important theme through his concept of "living law".[174] Ehrlich's theory was that originally, all legal norms were founded in society through different associations, such as families,

172 The developments in German methodological debates also influenced American discourses, in particular Roscoe Pound, see section 4.3.2.

173 For a classical overview, see Wieacker (1967) 574 f. A more recent analysis with different perspectives is offered by Rückert (2008); see also Rückert (2012) para. 1407 f.

174 For an overview of some aspects, see Hubert Rottleuthner, 'Das lebende Recht bei Eugen Ehrlich und Ernst Hirsch' (2012/13) 33, Heft 2 *Zeitschrift für Rechtssoziologie* 191. At the time of finalizing this manuscript, a comprehensive volume on Ehrlich was just about being published, see Marietta Auer and Ralf Seinecke (eds), *Eugen Ehrlich. Kontexte und Rezeptionen* (Mohr Siebeck 2024).

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clans, churches, guilds, and so on, and their different norms of conduct. Courts – which were originally also a part of society, not the state – decided cases on the basis of norms of decision (*Entscheidungsnormen*). These norms were a different type of legal norms, but originally, they were built directly on the norms of conduct.[175] From these norms of decision, abstract legal propositions (*Rechtssätze*) were drawn.[176] Of legal propositions, Ehrlich had not much positive to say. By transforming norms of decision to ought-propositions, the former lost their flexibility and tended to become "a rule by the dead over the living", Ehrlich claimed, borrowing an expression from Herbert Spencer.[177] Furthermore, legal propositions were "recognized by their fine dialectical composition, by their formally correct demarcation between legal and illegal; it is indeed in advance out of the question that human beings could guide their lives by such juristic subtleties."[178]

Ehrlich's general theory about law, with his preference for the "living law" of society instead of the inflexibility of legal propositions, influenced his legal methodology. One consequence was that he shifted the focus from abstract norms to concrete application and decision-making. Ehrlich wanted judges to have a certain freedom to discover law (*freie Rechtsfindung*). They should be bound by legislation, but as the idea of the legal system as a closed system without any gaps was a

175 Eugen Ehrlich, *Grundlegung der Soziologie des Rechts* (first published 1913, 2nd unrevised reprint, Duncker & Humblot 1929) 98 f. It would thus originally be a fine line between questions about law and questions about fact.

176 See the same point in Eugen Ehrlich, 'Freie Rechtsfindung und freie Rechtswissenschaft' (first published 1903, reprinted version, Scientia Verlag 1973) 11. For the difference between legal norms and legal propositions, see Ehrlich (1929) 29–30: "A legal norm is not to be confused with a legal proposition. A legal proposition is the coincidental and generally binding stipulation of a legal provision [*Rechtsvorschrift*] in a law or a law book. A legal norm is, conversely, the legal command that is transposed into behaviour, as it rules in a particular, perhaps rather small association, also without any verbal formation."

177 Ehrlich (1929) 148 and 323. The same reference is also made in his 'Soziologie und Jurisprudenz' (first published 1906, reprinted version, Scientia Verlag 1973) 12.

178 Ehrlich (1929) 280–281. Even court decisions based directly on the internal organization of an association were something different than "life" itself: "The adaptable and agile is replaced by something rigid and inflexible, the blurred lines are replaced by clear-cut ones", see p. 99.

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fiction, Ehrlich wanted to free them from the "technical jurisprudence" with its abstractions, constructions, and fictions.[179] This paved the way for a radically different view on legal certainty from that widely held in the 19th century. Ehrlich claimed that "[t]here are no other guarantees for the administration of justice than the personality of judges."[180] For legal scholarship, Ehrlich's theory also implied that some fences around the discipline had to be torn down. Law had to be understood dynamically – "not as stiff dogma, but as living forces" – and legal scholarship would need to examine how legal propositions lived and worked in society, how they worked in courts, and how the legal relations, such as family relations and business relations, in themselves operated.[181] This was, in other words, a program for a legal sociology.

Hermann Kantorowicz (1877–1940) followed in the footsteps of Ehrlich and other legal critics.[182] In his little pamphlet *The Struggle for Legal Science* from 1906, Kantorowicz heralded a paradigm shift, where a new movement with new theories about law, legal scholarship, and legal application was moving up front. Kantorowicz operated with a distinction between state law and "free" (but, importantly, positive) law, where the latter was supposed to fill the gaps of the legislation.[183]

179 See e.g. *ibid.* 274: "Free discovery of law is not, as some have believed, a discovery of law that is unbound by statutes, but a discovery that is unbound by the constrictions of meaningless and superfluous abstractions and constructions."

180 Ehrlich (1973), 'Freie Rechtsfindung' 21. On the requirements for judges, who should have a "strong personality", see the elaboration on 31–32. In a comparative-historical perspective, it is interesting to note that Ehrlich admired English and Roman law because these were examples of legal cultures where the "most important men of the nation" had their positions in courts, see p. 31 and Ehrlich (1929) 105.

181 Ehrlich (1973), 'Freie Rechtsfindung' 33 f. According to Ehrlich, legal scholarship was a branch of sociology, and he applauded the "new sociological legal science" in France, developed by Raymond Saleilles (1855–1912), François Gény (1861–1959), and Édouard Lambert (1866–1947), see Ehrlich (1972), 'Soziologie und Jurisprudenz' 21.

182 For an overview of Kantorowicz and his relation to the United States and American legal thought, see Schmidt (2023).

183 Kantorowicz (2002) 8 f. For a later, more elaborated and English overview, see Hermann Kantorowicz and Edwin W. Patterson, 'Legal Science – A Summary of Its Methodology' (1928) 28 COLUM. L. REV. 679. Here, his theory has changed

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This implied that judges were bound by statutory law, but that they were granted discretion to solve the case on the basis of "free" law if the legislation did not offer an "unquestionable" solution or if they were convinced that it was unlikely that the current authorities would have decided according to the wording of the statute.[184] The safeguard against "excessive subjectivity" would be "the balancing plurality of minds in the collegium of judges and the possibilities of appeal", something that was, Kantorowicz claimed, no different than the already existing state of affairs.[185] But the open acknowledgment of more judicial responsibility had consequences for the picture of the ideal judge: "We need judges who are familiar not only with the popular sense of law, but also with the aspects of life and the insights of neighbouring sciences."[186] For legal thinking, the consequence of the new theories was, he wrote in 1910, "the acknowledgment, in contrast to earlier beliefs, that jurisprudence is not to be conducted as a science of words, that its business is not exhausted with an exegesis from fixed words, but that it is rather a science of values, in the service of purposes stemming from social life."[187]

Ernst Fuchs (1859–1929) brought the criticism to a new level. His relentless rhetoric and intense hostility towards classical legal thinking is already hinted at in the title of one of his books, *The Harmfulness of Constructive Jurisprudence* from 1909. Fuchs raged against "pandect-

somewhat, and now he distinguishes between "*formal law, i.e.*, law having undergone and completed a definite process of formation or integration" and "'*free law,' i.e.,* law which has not completed these processes", see 692 (emphasized in original). In an article from 1925, Kantorowicz described his pamphlet from 1906 as "outdated", see Kantorowicz (1962), 'Aus der Vorgeschichte' 43 (footnote 1).

184 Kantorowicz (2002) 34. For the later and modified theory, see Kantorowicz and Patterson (1928) 698 f.

185 Kantorowicz (2002) 34–35.

186 *Ibid.* 38. He was positive towards the English judges with their "great personalities", see p. 35, cfr. footnote 180 above for the similar point made by Ehrlich.

187 Hermann Kantorowicz, 'Rechtswissenschaft und Soziologie' (first published 1910, reprinted in *Rechtswissenschaft und Soziologie. Ausgewählte Schriften zur Wissenschaftslehre*, C.F. Müller 1962) 117–144, 126 (emphasized in original). For a way more nuanced and elaborated theory on legal scholarship, see Kantorowicz and Patterson (1928) 679 f., and the taxonomy on 691.

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ology", "metaphysics", "scholasticism", and so on, and he viewed his adversaries as nothing less than psychopaths and monomaniacs.[188] He argued that law should turn away from philology to sociology, and claimed that "a correct perception of law [*Rechtsempfinden*] depends on a thorough knowledge of life, social relations, and human beings."[189] His aim was a "transformation of legal science to a true knowledge of life and social relations, and thereby its elevation from the metaphysical stage of scholasticism to the level of a science of observation, that is, a natural science."[190] In many regards, Fuchs echoed Ehrlich and Kantorowicz, in particular with his claim that legal certainty depended on judges, not norms. Fuchs had in mind a monarcho-judge, a *Richterkönig*, that was supposed to have a mix of personal capabilities and the right education.[191] This Platonic elitism was in a peculiar and unresolved way combined with a strong emphasis on popular elements, with several references to "*Volkstümlichkeit*" and "laymen".[192] For legal education, this new vision implied that it should be less about legal knowledge ("*Rechtswissen*") and more about legal skills ("*Rechtskönnen*")[193] – less, so to say, about books and more about life.

A final critical voice to be mentioned is *Philipp Heck* (1858–1943), who is generally seen as the main proponent of jurisprudence of in-

188 Ernst Fuchs, *Die Gemeinschädlichkeit der konstruktiven Jurisprudenz* (G. Braunschen Hofbuchdruckerei 1909) 59.

189 *Ibid.* 2.

190 *Ibid.* 26. Here, he drew upon Auguste Comte's theory on the evolutionary development of all sciences, i.e. that they develop from a theological to a metaphysical and then to a scientific stage, see 5. Fuchs's aim was, thus, the elevation of jurisprudence from the second to the third and highest level. See also 16 where he contrasts a "deductive-ideological, dogmatic, sophistic justice of construction by homebodies and bookworms" with an "inductive-realistic, evolutionary, natural justice of balancing interests by observers of human beings and life".

191 *Ibid.* 84 and 21 f.; Ernst Fuchs, *Schreibjustiz und Richterkönigtum* (first published in 1907, reprinted in *Gesammelte Schriften über Freirecht und Rechtsreform*, Volume I, Albert S. Foulkes ed, Scientia Verlag 1970) 96; Fuchs (1929) 46.

192 See characteristically Fuchs (1909) 2–3: "That the good practitioner 'perceives with a confident *Judizium*', means nothing more than that he judges first and foremost like a layman". His ideal seemed to be "a local, German jury court led by a German monarcho-judge", see Fuchs (1970) 101–102.

193 Fuchs (1929) 47.

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terests.[194] For Heck, a fundamental difference between the "old" jurisprudence of concepts and the "new" jurisprudence of interests was that the former "laid strong emphasis on general scientific concepts, which were considered as the foundation of legal norms and the main objective of research", whereas the latter had "a stronger emphasis on effects in real life".[195] Heck regarded Jhering as the founder of the teleological direction in legal thinking, but wanted to go further and to redevelop the new, life-oriented approach to law.[196] According to Heck, law was not only built on purposes – it also contained the decision of a conflict of competing interests. Thus, Jhering's teleological methodology had to be "further developed with the maxim of ordering of interests [*Interessengliederung*], which can also be labelled as a *theory of conflicts*. From every legal norm, the decided conflict of interests has to be worked out."[197] The primary competence and responsibility to decide upon competing interests fell to the legislator, and thus, the judge was bound by statutory law, or, more precisely, the decision of a conflict of interests that the legislation expressed.[198] For that reason, Heck distanced himself from the free law school, which he regarded as a theory that would free the judge from the bonds of legislation.[199] But at the same time, he strongly opposed the "old" tendency to think

194 For a general overview, see Jutta Manegold (b. Oldag), 'Methode und Zivilrecht bei Philipp Heck (1858–1943)' in Joachim Rückert and Ralf Seinecke (eds), *Methodik des Zivilrechts – von Savigny bis Teubner* (3rd edn, Nomos 2017) 177–202.

195 Heck (1933) 9. The book is a printed version of a speech delivered at the University of Frankfurt am Main 15 December 1932, and it gives a concise overview of Heck's theory. For more elaborated works, see the list in Manegold (2017) 200.

196 On the relationship between Heck and Jhering, see in detail Wischmeyer (2015) 169 f.

197 Heck (1933) 13–14 (emphasized in original).

198 That the judges were bound by legislation was something he pointed out with reference to the Constitution, see *ibid.* 19.

199 *Ibid.* 9. Kantorowicz also distinguished between the two, and wrote that "[t]he consideration of interests is related to the free law theory, but has not grown out of the gap problem, and therefore partly arrives at other results", see Kantorowicz and Patterson (1928) 706.

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of the legal system as a system without gaps, and, consequently, the decision-making process as a pure logico-deductive act of cognition:

> The judge is not only supposed to apply ready-made norms, but also to create norms himself. He is also doing an act of legal creation. […] This modern judge is far from a legal automat, but rather to a large extent an assistant of the legislator with greater freedom, but then correspondingly with a larger responsibility as well.[200]

As for legal scholarship, Heck emphasized that it belonged to the practical sciences and that its task was to assist judicial decision-making; first, by proposing which norms that were applicable for different cases, and second, by forming and ordering the normative material in a systematized way. According to Heck, the scientific objective of the classical direction had been "the precise determination of concepts and the ordering of these concepts into a unitary deductive system, a pyramid of concepts", something they had regarded as a problem of cognition and a question having to do with the objective reality.[201] In Heck's alternative vision, "the controversies over construction, the disputes over the correct determination of concepts, and the cult of concepts, will lose their importance. But they will be replaced by *inquires* and *assessments of life*".[202] The principal task of this kind of scholarship would be to propose applicable norms for different cases, an activity that would deal with real life and its needs. Systematization and ordering of the normative material were also part of the scientific task but should be seen as an auxiliary activity, solely for the purpose of the presentation of the material. Moreover, it was designated a secondary position in terms of temporality as well, that is, systematization should

200 Heck (1933) 21. This role as an "assistant" restricted the scope of discretion for the judge. In cases of gap-filling, he would have to apply the value judgments that were contained in the legislation, and if there were contradictions in the legal material, he should do like Article 1 of the Swiss Civil Code prescribed and decide the case as he would have done if he was legislator.

201 *Ibid.* 26.

202 *Ibid.* 29 (emphasized in original).

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come after and build upon the statement of the legal norms. In other words, a deductive approach should be replaced by an inductive.

In spite of internal differences and nuances between the authors, the sociological theories, the free law movement and the jurisprudence of interests brought new perspectives and a radically new spirit. This new spirit sought to understand the "living law" (Ehrlich), saw law as the handmaiden of "purposes stemming from social life" (Kantorowicz), wanted legal scholarship to attain "a true knowledge of life" (Fuchs) and to make "assessments of life" (Heck). Even if one can question the accuracy of their descriptions of their predecessors (something one might suspect already from the fact that they usually did not make any concrete references),[203] the widespread criticism indicates that their programs resonated well with general perceptions and needs within society.[204] And even if their criticism was exaggerated or one thinks that their own positive contributions were inadequate or undesirable, they discussed and reflected upon issues of law that were fundamental both back then and in our own present-day conditions: the relationship between law produced by the state (in particular legislation) and other norms, the factors that create and shape the law, the form and the substance of norms, the factors that influence and should influence legal decision-making, the factors that ensure legal certainty, and the role and function of courts, legal scholarship, and legal education.

These new critical counter-movements focused primarily on private law.[205] But the debates had clear constitutional undertones that in par-

203 See Rückert (2008) 208, with further references in footnote 47; see also Schmidt (2016) 137, who speaks of a "strawman".

204 This is also witnessed by the extensive criticism of judges and courts in this period, often combined with reform proposals. Several of the critical voices, often associated with business interests, complained about judges detached from reality ("*Lebensfremde Richter*"), see Rainer Schröder, 'Die Richterschaft am Ende des zweiten Kaiserreiches unter dem Druck polarer, sozialer und politischer Anforderungen' in Arno Buschmann, Franz-Ludwig Kneemeyer, Gerhard Otte and Werner Schubert (eds), *Festschrift für Rudolf Gmür* (Verlag Ernst und Werner Gieseking 1983) 201–253, see 206 f.

205 Hermann Kantorowicz wrote, however, articles on constitutional law during the Weimar era, but these were to a limited degree connected to the characteristic free law thinking. See his 'Staatsauffassungen' (1925) Vol. I *Jahrbuch für Soziolo-*

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ticular touched upon the relationship between the legislator and the judiciary, something already contemporary scholars remarked.[206] Later it has been claimed that "[t]he full constitutional dimension was perceived in a perfectly clear way at the time, but it was in part relativized, in part defensively scaled down."[207] But what would happen if the new lust for "life" burst out for real in constitutional scholarship, where the connection to fundamental constitutional questions was more immediate?

3.3.3 The Weimar context: Germany in a state of crisis

Returning from the contextualizing private law-detour to constitutional legal scholarship, it was already noted, in section 3.3.1, that something was about to happen within the profession in the final decades before the war broke out. These years have been regarded as a period of transition, where some scholars cautiously started to raise their disquieted voices, but where a programmatical opposition lacked.[208] This still remains to be demonstrated – in the following sections, we will have a look at some scholars whose writings were part of the transition. But their uneasiness would continue into the Weimar era, where a drastically sharpened "quarrel over methods and direction" took place.[209] This

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gie (reprinted in *Rechtswissenschaft und Soziologie. Ausgewählte Schriften zur Wissenschaftslehre*, C.F. Müller 1962 69–81); 'The New German Constitution in Theory and Practice' (1927) No. 19 *Economica* 37; 'The Concept of the State' (1932) No. 35 *Economica* 1. In the latter article, however, he claimed that "the German Classical School of Laband and the present Vienna school of Professor Kelsen have sinned by considering the juristic conception of the State as the only one possible", see 3.

206 See Schmitt (1969), *Der Hüter* 19, also with references to other authors, including an article by Gustav Radbruch from 1906.

207 Rückert (2008) 216 f., quote taken from 218–219. Rottleuthner (2013) 202 has also pointed out that a discussion of constitutional law was absent in Ehrlich's writings.

208 Korioth (1992) in particular 212 and 229. See also Stolleis (2001), *Public Law 1800–1914* 439 f.

209 Cfr. the title of chapter 5 in Stolleis (2004).

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means that another context has to be considered more closely before the analyses of the authors and their ideas: the Weimar context.

The intensification of the debates in the Weimar years was part of a more general political and intellectual entrenchment in a Germany that was tormented by a number of parallel crises running through almost the entire interwar period. On one hand, the crisis in the aftermath of the war was a crisis of the mind, to borrow Paul Valéry's famous title from 1919.[210] The horrors of industrialized warfare had been a shock not only to those who had lived through the storms of steel in the muddy trenches, but also to those back home. The war was perceived as a rupture, not the least because the contrast to "la belle époque" of the pre-war years (and the beautiful, warm summer of 1914) was so manifest. Valéry summarized the essence of this mood with the opening sentence of his essay: "Now we know, we civilized people, that we are mortal". Writing about the last years before the war in his elegy over a lost world, Stefan Zweig commented that "we thought we saw a new dawning. But in reality, it was the glare of the approaching world conflagration."[211] Erich Kaufmann, one of the constitutional scholars that will be analysed in more detail, lamented that "all values that had previously accompanied life now seemed invalided."[212] And in Thomas Mann's *Doctor Faustus*, the narrator, Serenus Zeitblom, writes about the

> feeling that an epoch was coming to an end, an epoch that embraced not just the nineteenth century, but also reached back to the end of the Middle Ages, to the shattering of scholastic ties, to the emancipation of the individual and the birth of freedom, an epoch

210 Paul Valéry, *La Crise de l'esprit*, available at <https://fr.wikisource.org/wiki/La_Crise_de_l%E2%80%99esprit> (accessed 7 September 2024).

211 Zweig (1947) 151.

212 Erich Kaufmann, 'Vorwort zum Bande "Rechtsidee und Recht"' in *Gesammelte Schriften. Band III: Rechtsidee und Recht. Rechtsphilosophische und ideengeschichtliche Bemühungen aus fünf Jahrzehnten* (Otto Schwartz & Co 1960) XIX, XXIII.

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> that I quite rightly had to view as that of my extended intellectual home, in short, the epoch of bourgeois humanism [...].[213]

At the same time, the crises were connected to very specific material and political circumstances in Germany, such as the question of German unity, the threat of putsches and revolution, the humiliating and harsh terms of the peace agreement, the severe economic situation that would lead to hyperinflation in the early 1920's, and, in our context not the least: the new constitution and its legitimacy. The monarchy came to an end with Kaiser Wilhelm II's abdication on 9 November 1918, and a transitionary period of uncertainty ensued. The Council of People's Delegates (*Rat der Volksbeauftragten*) took control over the power, and in January, a National Assembly (*Nationalversammlung*) was elected by the people (including, for the first time, women). The Assembly adopted the Weimar Constitution in July 1919, which was then ratified by Friedrich Ebert, the new President, on 11 August and entered into force from 14 August. The new Constitution, born out of war and revolution, transformed the form of government in several ways. First and foremost, Germany went from a constitutional monarchy to a democratic republic with a parliamentary responsible Government.[214] Article 1 of the Constitution proclaimed that the German state was a republic, and that the authority of the state was derived from the people (including, importantly, women, cfr. Article 22). In addition to the element of a representative democracy through the Parliament (*Reichstag*), the President, who was directly elected for 7 years, was supposed to introduce a "plebiscitary" element.[215] The President was endowed with the compet-

213 Thomas Mann, *Doctor Faustus. The Life of the German Composer Adrian Leverkühn as told by a Friend* (first published 1947, John E. Woods tr, Alfred A. Knopf 1997) 372.

214 For the following, see Ernst Rudolf Huber, *Deutsche Verfassungsgeschichte seit 1789. Band VI: Die Weimarer Reichsverfassung* (W. Kohlhammer 1981) chapter 2; Gertrude Lübbe-Wolff, 'Das Demokratiekonzept der Weimarer Reichsverfassung' in Horst Dreier and Christian Waldhoff (eds), *Das Wagnis der Demokratie. Eine Anatomie der Weimarer Reichsverfassung* (C. H. Beck 2018) 111.

215 Cfr. Art. 41. Friedrich Ebert had already been appointed President by the National Assembly in the transitionary period before the Constitution was adopted, and remained in position pursuant to Art. 180.

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ences to, *inter alia*, appoint the Chancellor and, upon the latter's proposal, the ministers of the Cabinet, to dissolve the Parliament, to use armed force against states in cases of non-fulfilment of duties according to the Constitution or federal laws (*Reichsexekution*), and – famously – to decide on a state of exception and take measures to re-establish public security and order (*Notverordnungsrecht*).[216] The Parliament, on its side, could overthrow the Government or a minister through a motion of no-confidence, and it could also, by a 2/3 majority, call a referendum on the position of the President.[217] In sum, the Weimar Constitution established a complex governing structure whose functionality as a democratic republic depended, like all constitutional states do, to a great extent on the informal political culture. As the Parliament could dismiss the Government without having ready an alternative at hand, the willingness of the political parties to make compromises and act responsibly was crucial.[218] And the wide quasi-dictatorial competences of the President, intended to protect the Republic, could equally well undermine the system if they fell into the wrong hands. Hugo Preuß, the author of the first draft version of the constitution, noted already in 1922 that even "the best constitution is good for nothing when it is applied in a wrong or an amateurish way by its executors".[219]

Another new dimension of the Weimar Constitution was that it, in contrast to the Imperial Constitution, contained a number of fundamental rights. Part II of the Constitution was devoted to fundamental rights (and duties) and numbered no less than 57 articles, divided into five sub-sections on the individual, community relations, religious life, education and school, and the economic life.[220] In addition to

216 Cfr. Art. 53, 25 and 48. All decisions taken by the President had to be countersigned by the Chancellor or responsible minister in order to be valid, cfr. Art. 50.

217 Cfr. Art. 54 and 43 (2).

218 Under the *Grundgesetz* of the Federal Republic, this is different. Pursuant to Article 67 (1), Parliament can only overthrow the Government if it simultaneously elects a new Chancellor.

219 Quoted from Haardt and Clark (2018) 29.

220 Huber (1981) 101 operates with 62 fundamental rights provisions, as he includes some articles from other parts of the Constitution in his counting (Art. 102, 104, 105, 173, and 174).

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the "classical" civil and political rights, the Constitution contained a number of social rights and had a distinct social profile.[221] The German constitutional historian Ernst Rudolf Huber writes that "the fundamental rights of the Weimar Constitution were a manifest against social revolution, but for social reform."[222] Already in the preamble, "social progress" was mentioned along with "freedom" and "justice", and Article 151 proclaimed that "the regulation of economic life must correspond to the principles of justice, with the aim of guaranteeing to all a humane existence". And there were intimate connections between the democratization and the social orientation of the Constitution; the rise of the workers' movement received its material impregnation in the Constitution through the social rights, while, in the opposite direction, basic social security was a prerequisite for political participation.[223]

Yet another important constitutional factor that should be noted is the immense growth of legislation during and following the war. As noted earlier, the legislative activity increased steadily in the pre-war years – but the development accelerated with the war. While there were about 100 published laws in the Gazette from 1913, the numbers rose to more than 200 in 1914, 400 in 1915, and 600 in 1916, and it would remain between approximately 400 and an apex of 900 per year until 1923.[224] A related war phenomenon was the increased transferral of legislative power to the executive, which could manoeuvre faster than the parliament and thereby more easily meet the constant flow of new challenges that a total war created. This trend – which could be observed in other countries as well –[225] was in itself of great constitu-

221 For an overview, see Michael Stolleis, 'Die soziale Programmatik der Weimarer Reichsverfassung' in Horst Dreier and Christian Waldhoff (eds), *Das Wagnis der Demokratie. Eine Anatomie der Weimarer Reichsverfassung* (C. H. Beck 2018) 195.

222 Huber (1981) 95.

223 See similarly Grimm (1987) 153.

224 Rottleuthner (1985) 214.

225 The development was observed as early as in 1926 by the Swedish political scientist Herbert Tingsten, who analysed the developments in Germany, France, Austria, Hungary, and Czechoslovakia in his *Konstitutionella fullmaktslagar i modern parlamentarism* (Fahlbeckska stiftelsen 1926). Tingsten published another book on the same subject in 1930, and in 1934, a translation of his studies

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tional importance, as it changed the division of labour and the balance of power between the legislative and the executive. This trend would continue in the new Republic. The Parliament adopted five enabling acts (*Ermächtigungsgesetze*) between 1920–1923, with broad legislative powers conferred upon the Government.[226]

With these deep-structural constitutional changes, two different outcomes could be expected in constitutional scholarship. First of all, the new constitution had turned libraries of old scholarship into wastepaper, to paraphrase Julius von Kirchmann's expression,[227] and there was a need for interpretation and dogmatic analyses of the new constitutional provisions and system. Scholars set about this new task with great vigour and published a flood of textbooks, commentaries, and articles on a variety of dogmatic issues, in a practically oriented positive-legal fashion.[228] This is worth noting, as I will concentrate on more theoretical and legal philosophical writings in the following. Although these were crucial in terms of shaping legal and political ideologies and narratives, these sorts of writings were by no means the only type of scholarship that the scientific community produced.

The second fairly expectable outcome was that the profoundness of the changes would prompt reflections of a more fundamental character at the crossroad between law, politics, theory, and methods. First, a question arose as to whether the specific theoretical framework that had guided the Imperial constitutional law could be adapted to a new constitutional reality, or whether a new fundament had to be erected.[229] Secondly, confronted with new issues like democracy and parliamentarism, constitutional rights, constitutional adjudication, and

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of France, Switzerland, Belgium, the United States, Great Britain, Italy, Austria, and Germany, was published in French, titled *Les Pleins Pouvoirs. L'Expansion des Pouvoirs Gouvernementaux Pendant et Après la Grande Guerre* (Stock 1934). For the closely related history of the state of exception, see e.g. Giorgio Agamben, *State of Exception* (Kevin Attell tr, The University of Chicago Press 2005) 11–22.

226 See Huber (1981) 439.

227 Julius von Kirchmann, *Die Wertlosigkeit der Jurisprudenz als Wissenschaft* (Julius Springer 1848) 23.

228 See Stolleis (2004) 70 f.; Jacobson and Schlink (2000) 8.

229 See Gusy (2018) 72–73.

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the powers of the President, scholars found themselves in a situation where fundamental legal and political problems had to be addressed. And this took place in the context of a deeply divided country, where even the legitimacy of the Constitution itself was disputed. The general schism threatened to separate the constitutional community. When the Association of German Teachers of State Law was established in 1922, one of the aims was to keep the profession together through a common, relatively de-politicized platform for discussion.[230] Even if the Association did provide a meeting point, it would soon be fairly clear that the division within the profession on questions of fundamental character *was* profound.

3.3.4 Erich Kaufmann: Neo-Kantianism as a dead end

One of the major critics of mainstream constitutional scholarship in Germany was Erich Kaufmann (1880–1972). Kaufmann had strong philosophical interests, and during the course of his lifetime, he was inspired by a number of diverse philosophical directions, including Gierke's organic theory, Dilthey's life philosophy, Hegelian ontology, and natural law.[231] Kaufmann was among those scholars who had signalled a break with traditional thinking through his writings from the final decade of the German Empire.[232] In a trial lecture delivered in 1908,

230 See Stolleis (2004) 178–181. On the establishment of the Association and its role in the Weimar period, see now in detail Christoph Schönberger, 'Ein sonderbares Kind der Revolution. Die Gründung der Vereinigung und die Weimarer Zeit' in Pascale Cancik, Andreas Kley, Helmuth Schulze-Fielitz, Christian Waldhoff and Ewald Wiederin (eds), *Streitsache Staat. Die Vereinigung der Deutschen Staatsrechtslehrer 1922–2022* (Mohr Siebeck 2022), 3.

231 For a self-description of his philosophical position(s), see Erich Kaufmann, 'Vorwort zum Bande "Rechtsidee und Recht"' (1960) XIX f. See more generally Klaus Rennert, *Die "geisteswissenschaftliche Richtung" in der Staatsrechtslehre der Weimarer Republik. Untersuchungen zu Erich Kaufmann, Günther Holstein und Rudolf Smend* (Duncker & Humblot 1987) 97 f.; Lepsius (1994) 344 f. Lepsius comments that in terms of philosophical orientation, there was "barely any jurist as diverse as Erich Kaufmann", see 345.

232 On this, see Korioth (1992) 225 f.

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he claimed that the construction of constitutional concepts should be based on the "many-coloured totality of life" and be guided by organic legal theory. He spoke of a new and deepened idea of law, which saw as its task not only to draw boundaries between the legal spheres of individuals, but, in a more positive and ambitious way, to "*construct* and *coordinate*, and to *constitute* a just condition for social life."[233] In 1917, in the middle of the war, his departure from traditional thinking was more outspoken. Now, he advocated a "functional-physiological" analysis of the state and its organs, and for this purpose, the "usual method of formal jurisprudence" would be insufficient.[234] In Weimar, the seeds Kaufmann had sown would sprout. Looking back after the Second World War, Kaufmann wrote about the aftermath of the First World War that "an until then latent spiritual crisis became apparent", and that all his writings in the period 1921 to 1932 was an attempt to understand and overcome this crisis.[235]

The real assault on classical legal thinking began precisely in 1921, when Kaufmann published a trenchant critique of neo-Kantian legal philosophy and in particular Hans Kelsen.[236] This was a real uppercut,

233 Erich Kaufmann, 'Über den Begriff des Organismus in der Staatslehre des 19. Jahrhunderts' (trial lecture delivered at the Faculty of Law, Christian-Albrechts-Universität zu Kiel 1 August 1908, printed in *Gesammelte Schriften. Band III: Rechtsidee und Recht. Rechtsphilosophische und ideengeschichtliche Bemühungen aus fünf Jahrzehnten*, Verlag Otto Schwartz & Co. 1960) 46, 66 (emphasis in original). The lecture was primarily a historical analysis and critique, followed by some very brief remarks of a more positive character towards the end. This is, according to Lepsius (1994), characteristic for Kaufmann: he did to a very limited degree develop any positive legal philosophy of his own, see 171, 174 and 353. Hans Kelsen had a similar charge against Kaufmann's critique of neo-Kantian legal philosophy (cfr. footnote 236 below), see *Der soziologische und der juristische Staatsbegriff. Kritische Untersuchung des Verhältnisses von Staat und Recht*, (first published 1922, reprinted version of 2nd edn 1928, Scientia Verlag 1962) 103.

234 Erich Kaufmann, 'Bismarcks Erbe in der Reichsverfassung' (first published 1917, printed in *Gesammelte Schriften. Band I: Autorität und Freiheit. Von der konstitutionellen Monarchie bis zur Bonner parlamentarischen Demokratie*, Otto Schwartz & Co 1960) 153, here quoted from Korioth (1992) 225.

235 Kaufmann (1960), 'Vorwort zum Bande "Rechtsidee und Recht"' XXIII.

236 Erich Kaufmann, *Kritik der neukantischen Rechtsphilosophie*, (first published 1921, reprinted version, Scientia Verlag 1964).

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and the book would become an important point of reference for other critics in the years to come. Rudolf Smend, one of his brothers in arms, would later call it a "philosophical pamphlet of high standing".[237] Kaufmann claimed that as an anti-metaphysical legal philosophy, neo-Kantianism could "arguably dominate the catheter philosophy of an era, but not dominate the era itself nor even become a factor that stands in inner connection with its life." Neo-Kantian legal philosophy had avoided to take a positive stance on "the great substantial problems of social and political life" and had become a "science of law without law" ("*Rechtswissenschaft ohne Recht*").[238] Precisely here were the roots of the "critical situation"[239] of German legal philosophy located.

Kaufmann acknowledged that Kelsen had contributed in a positive way by exposing, through his sharp analyses, the "half-truths" of earlier legal thinking.[240] The problem was, however, that after having cleaned the house, Kelsen had let it remain empty. Instead of replacing formalism with positive content, he had put "norm-logical" purity and an empty rationalism in its place.[241] Indeed, Kaufmann saw a close relationship between neo-Kantianism and the classical formalism associated with Gerber and Laband, not only in its genealogy, where he claimed that both could be traced back to Kant (for the latter via Windscheid, Puchta, Savigny and others). It was also a structural similarity, where the Kelsenian normativism had the following implications:

> Legal dogmatics strived accordingly more and more not only to emancipate itself from the "mere" "genetical" and "causal" legal history and to find its own standing, but saw, moreover, its pride

237 Rudolf Smend, 'Die Vereinigung der Deutschen Staatsrechtslehrer und der Richtungsstreit' (first published 1973, printed in *Staatsrechtliche Abhandlungen und andere Aufsätze*, 3rd edn, Duncker & Humblot 1994) 620, 625.

238 Kaufmann (1964) 3 and 52.

239 *Ibid.* 1.

240 On Laband, he would later write that he had "failed to see the true 'legal' in law and the true 'state element' in the state", see Erich Kaufmann, 'Vorwort zu den "Gesammelten Schriften" in *Gesammelte Schriften. Band III: Rechtsidee und Recht. Rechtsphilosophische und ideengeschichtliche Bemühungen aus fünf Jahrzehnten* (Verlag Otto Schwartz & Co. 1960) XIII, XV.

241 Kaufmann (1964) 65 and 79–80, see also 8.

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> in making the legal concepts truly "legal" by the fact that only such elements that were deprived of "social substrates" and other meta-"legal" factors were tolerated, that these were purified from all extra-"legal" components, and that a formal-"legal" purity was placed as the final end and highest mode.[242]

One of Kaufmann's main problems with neo-Kantianism was that it restricted itself to a partial adoption of Kantian philosophy. By leaving Kant's metaphysical moral theory aside and making use only of his formal epistemology, neo-Kantianism had emptied Kant's philosophy.[243] More generally, legal philosophy had lost every positive and material content, had lost its connection to social ideas – had lost even the "idea about law" ("*Rechtsidee*"). Instead, it had turned into something fixed, static, and doctrinaire.[244] But a legal system should not only be concerned with abstract "correctness" and reasonableness – it should also pay attention to the specific collective purposes that the system was supposed to serve. "And a specific collective purpose like that," Kaufmann wrote, "is never formal and empty of content, but rather a living and substantial one, only to be determined by specific substantial world views and value orientations."[245]

While in opposition to "empty" neo-Kantian formalism, Kaufmann rejected the free law movement as well. He had distanced himself from the movement as early as in 1908.[246] In 1921, he observed that in general philosophy, there was an irrational tendency where "the suppressed,

242 Kaufmann (1964) 51.

243 *Ibid.* 53 f. The neo-Kantians' approach amounted to no less than "a murder of the soul of Kantian speculation: they do not let its spirit, but rather an uncanny ghost in its garments, walk around us". Kaufmann would also take up the issue later, see Kaufmann (1960), 'Vorwort zum Bande "Rechtsidee und Recht"' XXV f. On Kelsen's rejection of Kant's ethical-political views, see Kelsen (2006) 225–226 (footnote).

244 See Kaufmann (1921), *inter alia*, 50–52 and 94.

245 *Ibid.* 18.

246 Erich Kaufmann, *Auswärtige Gewalt und Kolonialgewalt in den Vereinigten Staaten von Amerika. Eine Rechtsvergleichende Studie über die Grundlagen des amerikanischen und deutschen Verfassungsrecht* (Duncker & Humblot 1908) VIII (preface).

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but not suppressible 'life' turned against the rationalistic hubris of the epistemology – often in chaotic forms: a bios without logos."[247] As for legal philosophy, it gravitated towards "free law nihilism", and according to Kaufmann, an "unrestricted vitalism and a total dissolution of law into sociology are the great dangers that have grown out of this reaction for the German spirit". The following, one of his closing paragraphs, following immediately the sentence just cited, is rather telling:

> For we need, in order to live, the forms; and we must continuously demolish the forms we have created, if we want to stay alive. That is our destiny. But only the living form makes life possible; and only it shares the destiny of life, that is, the ability to die. The abstract form created solely through rational thinking, however, is stiff and inflexible: within it, life is not possible; and it cannot die, as it is dead.

Kaufmann's critique of legal "nihilism" – something he would also charge his personal antagonist Carl Schmitt with several decades later –[248] was complemented by a positive idea about legal application as an activity guided by norms.[249] Notwithstanding his critique, he did in fact share some of the basic ideas of the free lawyers: that law is to a great extent made by non-state actors, that the process of legal application contains a creative element, that legal certainty is

247 See for this and the following Kaufmann (1964) 101. Commenting on the article in 1960, Kaufmann would reiterate his position that neo-Kantianism overrated what epistemology could offer. "Forms and categories that are epistemologically worked out", he wrote, "can't supply the life with 'support and meaning'." See Kaufmann (1960), 'Vorwort zum Bande "Rechtsidee und Recht"' XXIV.

248 Kaufmann (1960), 'Vorwort zum Bande "Rechtsidee und Recht"' XLV; Erich Kaufmann, 'Carl Schmitt und seine Schule – Offener Brief an Ernst Forsthoff' (letter from 1958, printed in *Gesammelte Schriften. Band III: Rechtsidee und Recht. Rechtsphilosophische und ideengeschichtliche Bemühungen aus fünf Jahrzehnten*, Verlag Otto Schwartz & Co. 1960) 375. The relationship between Kaufmann and Schmitt turned hostile in the late 1920's, and in 1934, Schmitt insisted – successfully – that the "*Volljuden*" Kaufmann should be dismissed from the Faculty of law in Berlin, see Neumann (2015) 171 and 377.

249 Erich Kaufmann, 'Die Gleichheit vor dem Gesetz im Sinne des Art. 109 der Reichsverfassung' in *VVDStRL* (1927) 1, 22.

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ensured not by the formulation of an abstract statute but by court practice, that, consequently, the personality of the judges is crucial, and that this implies the need for a legal education that is concerned with more than "technical" law.[250] He also shared their admiration of common law systems, where the judicial process was less hampered by the "crutches of legislation" than in continental legal thinking.[251] But it was nevertheless a contrast to the free law scholars, and this contrast is perhaps best shown by Kaufmann's insistence that legal education should equip lawyers with ethical values in order for them to be able to realise justice; his focus was *not* – in contrast to the free lawyers – that they should be taught economy, sociology, and so on. Kaufmann's judge Hercules was not supposed to be a utilitarian social engineer, but rather a conscientious person with a "pure heart", striving to realise the "higher objective order".[252]

After the shattering critique of neo-Kantianism in 1921, Kaufmann delivered another significant blow to traditional constitutional legal thinking at the 1926 meeting of The Association of German Teachers of State Law in Münster. The topic of the meeting was the principle of equality before the law as enshrined in Article 109 of the Weimar Constitution – one of the most contested issues among legal scholars in the Weimar years.[253] Kaufmann delivered the first contribution, and here, he rejected legal positivism as a phenomenon that could only fit a stable and satiated society.[254] Instead, he considered natural law to be the most appropriate approach to the principle of equality, but not the rationalist Enlightenment version, which he regarded as purely formal

250 For these views, see *ibid.* in particular 18 f.

251 See Rennert (1987) 278. In Kaufmann (1927) 22, he speaks of the Romans and Anglo-Saxons as "the two greatest people of law" and praised the "great precedents of the outstanding legal personalities", something that very much resembles the position of Eugen Ehrlich, see Ehrlich (1929) 105 and Ehrlich (1973), 'Freie Rechtsfindung' 31; see also Kantorowicz (1973), 'Soziologie und Jurisprudenz' 35.

252 For these terms, see Kaufmann (1927) 11 and 12.

253 On both the Association and the meeting in 1926, including their contexts, see Stolleis (2004) 178 f.

254 Kaufmann (1927) 3. The same point is made in Kaufmann (1964) preface; Kaufmann (1960), 'Vorwort zum Bande "Rechtsidee und Recht"' XXIV.

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(and thus empty) and individual-centred. In his own – according to himself Aristotelian-Christian inspired – natural law theory, the content of the principle of equality was that legislation had to be just in order to count as law. This substantial justice was part of the "material order which it is our task to realise".[255] With this reference to a non-positive order, Kaufmann's concept of justice was obviously a metaphysical one.

Before moving on from Kaufmann, I will say a few words about Kelsen's replies and criticism.[256] Responding in 1922 to the critique of neo-Kantianism, Kelsen would claim that Kaufmann had manifestly misunderstood neo-Kantian philosophy, taken quotes from his own work out of their context without providing the reader with references, and misinterpreted basic ideas, such as the concept of the basic norm.[257] At the meeting of the Association of German Teachers of State Law in 1926, Kelsen commented on Kaufmann's contribution by noting that "the cry for metaphysics is now – after a period of positivism and empiricism, – again to be heard everywhere and in all fields of knowledge."[258] For Kelsen, natural law would lead either to a radical subjectivism, or else, if some common and more objective ground was to be sought, to a positive religion. And to replace positive law with positive religion had obviously political consequences: it gave power to the judges at the expense of the legislator. Kelsen concluded with the following consideration:

255 Kaufmann (1927) 11.

256 There were of course other critics as well, for instance at the meeting of the Association of German Teachers of State Law in 1926. It is illuminating to compare Kaufmann's contribution with the other main contribution, Hans Nawiasky, 'Die Gleichheit vor dem Gesetz im Sinne des Art. 109 der Reichsverfassung' in *VVDStRL* (1927) 25. Nawiasky delivered a literal and systematic interpretation of Article 109 in a more "classical" way. See also the more outspoken criticism by Gerhard Anschütz, 'Aussprache über die vorhergehenden Berichte' in *VVDStRL* (1927) 47. For an overview, see Korb (2010) 117–121; Stolleis (2004) 182–185.

257 Hans Kelsen (1962) 99 f. According to Korb (2010) 116, however, Kaufmann's critique forced Kelsen to clarify his position on the basic norm, and in particular its relation to the actual world (the *Sein*-sphere).

258 For this and the following, see Hans Kelsen, 'Aussprache über die vorhergehenden Berichte' in *VVDStRL* (1927) 53.

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> The question natural law is concerned with is the eternal question about what is located behind the positive law. And he who seeks the answer will find, I am afraid, not the absolute truth of a metaphysic nor the absolute justice of a natural law. He who removes the veil and does not close his eyes, will stare into the Gorgon's head of power.

To sum up, Kaufmann's project was to tear down the wall that in particular Kelsen, but also Gerber and Laband, had meticulously built up around the law and legal science. While Kelsen sought the purity of the method, Kaufmann strived for the opening of the method, as Axel-Johannes Korb neatly puts it.[259] Exactly what the method was supposed to be opened towards, was less clear in Kaufmann's writings. In one of his earliest writings, he had stressed that written constitutional law had to be "open" towards and to "avoid killing" the dynamics of *life* (while, it must be added, it should at the same time ensure stability).[260] But his later writings, and in particular the contribution he delivered in Münster in 1926, clearly shows that it was not so much a horizontal opening towards 'life' as rather a vertical opening towards the "higher objective order" above he had in mind.

3.3.5 Rudolf Smend: Approximation of "law" and "life" through the concept of integration

As with Kaufmann, tendencies of a methodological rupture were present in some of Rudolf Smend's (1882–1975) writings in the final years of the German Empire.[261] In his 'Unwritten Constitutional Law in the Monarchical Federal State', published in 1916, he treated various issues pertaining to the relationship between the Imperial level and the state level.[262] Here, his project can be regarded as an attempt to

259 Korb (2010) 111.
260 Kaufmann (1908), referred to by Rennert (1987) 285.
261 See Korioth (1992) 221 f.
262 Rudolf Smend, 'Ungeschriebenes Verfassungsrecht im monarchischen Bundesstaat' (first published in *Festgabe für Otto Mayer*, 1916, 245, reprinted in

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unite "law in books" and "law in action" – or "law" and "life". In his own words, only the theory that *he* presented about the relationship between the organs would be able to "harmonize the political reality of the *Reich* with the fundamentals of Imperial constitutional law predicated in the theory".[263] This distinction between the written constitutional law and the political reality had been theorized by authors before him as well, but the significance of actual state practice had normally been relegated to the sphere of politics.[264] Smend, by contrast, made it clear already in the introduction of his text that he was dealing with *legal issues*, or more precisely, issues of constitutional law which had in common that they had either not been stated in writing or been formulated in a misleading way.[265] Even though Smend did not formulate a clear opposition to mainstream constitutional scholarship à la Laband, the implication of his theory was radical, because he emphasized that behind a written and purely "organizational" or "formal" constitutional norm, there was a "functional" or "material" one – and the latter was the real norm.[266] Most illustrating is perhaps his interpretation of Article 8 (3) of the Imperial Constitution, which stipulated that the Federal Council (*Bundesrat*) – the organ made up by representatives of the states – should establish a standing committee on foreign affairs consisting of only a few of the states. Smend noted that some of the member states had complained that the committee did not function properly as a supervisory organ. The essential point for Smend, however, was that the real material content of the provision was to establish a functional relationship between the Imperial executive organs and the state level in foreign policy issues, and that

Staatsrechtliche Abhandlungen und andere Aufsätze, 3rd edn, Duncker & Humblot 1994) 39. In the following, I quote from the reprinted version.

263 Smend (1994), 'Ungeschriebenes Verfassungsrecht' 52.

264 For the predominant traditional positions, see Korioth (1992) 221–222, with further references to Laband and Georg Jellinek. See also 224 where it follows that some scholars accepted constitutional customary law as a relevant unwritten source of law. See further Stolleis (2001), *Public Law 1800–1914* 351–352, who also emphasizes the "build up" to the Weimar debates.

265 Smend (1994), 'Ungeschriebenes Verfassungsrecht' 40.

266 *Ibid.* 42–43, 51, and 54.

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this task was fulfilled through other consultative mechanisms.[267] More generally, he interpreted, via historical considerations, the relationship between the states and the Imperial organs, and the states vis-à-vis each other, to be governed by a general, legal principle of "good faith" ("*Bundestreue*").[268] The advantage of this concept as a legal principle was its elasticity and thereby its capacity to govern relations that were difficult to formulate more precisely in clear-cut norms. Thus, it was, in some sense, an adoption of the private law general clauses to the realm of constitutional law.[269] And this opened, as already Smend's own exposition of Article 8 (3) shows, for more political and purposive considerations in constitutional doctrine and a more dynamic understanding of constitutional law.[270] The flip side of the coin was of course that the content of constitutional law became relativized. Another important element that is present in the article, and that would follow in later writings as well, was his emphasis on the constitutional reality – "life" – instead of, or at least as something more important than, written constitutional norms – "law".[271]

Smend developed his theories more closely in the Weimar years, and in 1927, he was the premier spokesperson for the "combat alliance" of anti-positivists at the meeting of The Association of German Teachers of State Law in Munich.[272] The following year, his main treatise, *Constitution and Constitutional Law*, was published, and it contained

267 *Ibid.* 40–43.

268 *Ibid.* 50–51. The "*Bundestreue*"-concept was inspired by Triepel's *Unitarianism and Federalism in the German Reich*, but as a political concept, it had roots back to Bismarck, see on this Korioth (1992) 222. On Triepel and the "*Bundestreue*"-concept, see text accompanying footnote 307 below.

269 Smend (1994) 'Ungeschriebenes Verfassungsrecht' 55–56. See also 51, where he suggests a certain connection with the principle of good faith in the law of obligations.

270 See Korioth (1992) 223.

271 See Rennert (1987) 305–31; Korb (2010) 132.

272 Rudolf Smend, 'Das Recht der freien Meinungsäußerung' in *VVDStRL* (1928) 44. The term "combat alliance" (*Kampfgemeinschaft*) is taken from Smend (1994), 'Die Vereinigung der Deutschen Staatsrechtslehrer' 624.

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theories on the state, the constitution, and constitutional law.[273] He had offered a brief prelude in 1927 of what was to come, when he *en passant* noted that "democracy does not live from relativism (at least not outside of Vienna) [...]"[274]. In 1928, the levees broke. Smend opened his *Constitution and Constitutional Law* by pointing out that state theory, like politics, was marked by collapse and resignation. The crisis had not so much to do with the war or the subsequent turmoil as with intellectual and scholarly developments; in brief, the influence of neo-Kantianism. According to Smend,

> the first tenet of the greatest and most prominent schools of state theory and constitutional law in the German-speaking domain is that the state should be considered not as a part of reality. This position means a crisis not only for state theory, but for constitutional law as well. For without well-founded knowledge about the state, there will in the long run be no fruitful theory of constitutional law – and without this, in the long run no satisfactory life for constitutional law itself.[275]

Smend acknowledged, on the one hand, that the criticism put forward by Kelsen (and Georg Jellinek) against earlier legal thinking was legitimate in the sense that it was directed against an earlier "methodological naivety". But apart from that, it was a "dead end without purpose and aim". Instead of pure legal formalism, what was needed for a legal theory was a "methodological exploration of the material – not to say

273 Rudolf Smend, *Verfassung und Verfassungsrecht* (first published 1928, reprinted in *Staatsrechtliche Abhandlungen und andere Aufsätze*, 3rd edn, Duncker & Humblot 1994) 119. The structure of the book illustrates Smend's project. It is divided into three parts: one on state theory ("*Staatstheoretische Grundlegung*"), one on the theory's consequences for constitutional theory ("*Verfassungstheoretische Folgerungen*"), and one on its consequences for positive constitutional law ("*Positivrechtliche Folgerungen*"). In the preface, he stated that the real thesis of his treatise was that a truly satisfactory doctrine of constitutional law had to build on a general theory on the state and the constitution, while a general theory on the state and the constitution, in turn, had to build on a general method of the humanities ('*geisteswissenschaftliche Methode*'), see 119.

274 Smend (1928) 48.

275 Smend (1994), *Verfassung und Verfassungsrecht* 121.

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sociological and teleological – substance, which is the precondition and object of legal norms. In particular, thus, constitutional law needs a material state theory."[276]

The material theory he tried to offer was, more specifically, a holistic one where form and content were seen as inseparable parts of a greater totality. The theory was built on what he himself called a general "method of the humanities" ("*geisteswissenschaftliche Methode*"), which was inspired by the philosopher Theodor Litt.[277] A fundamental epistemological prerequisite, which he took from Litt, was that the elements of reality could not be understood in isolation but that they had to be seen as a dialectical structure.[278] For that reason, Laband's classical theory fell short, as it failed to regard constitutional law as an "inner totality" ("*geistige Totalität*").[279] Laband's theory was a "system of competence- or power parcels devoid of meaning, without any relation to life itself, but at the same time one that must be detrimental to life, through its non-fulfilment of the tasks incumbent upon the science of constitutional law."[280] The theory had turned out to be "an obstacle to a deeper understanding of its object, and it is, thereby, a symptom and at the same time the cause of the depoliticized education of the generation that grew up in the German Empire."[281]

At the heart of Smend's positive state theory was his concept of *integration*. Smend defined integration as the "fundamental vital process" of all organizations, and the state theory of integration sought to grasp "the full vital reality of the state".[282] The idea of integration

276 *Ibid.* 124.
277 *Ibid.* 119.
278 *Ibid.* 126–127. See also 130: "[…] no elements can be derived conceptually or causally from another, but all of them must be understood as part of the whole."
279 *Ibid.* 234.
280 Rudolf Smend, 'Der Einfluß der deutschen Staats- und Verwaltungsrechtslehre des 19. Jahrhunderts auf das Leben in Verfassung und Verwaltung' (first published 1939, reprinted in *Staatsrechtliche Abhandlungen und andere Aufsätze*, 3rd edn, Duncker & Humblot 1994) 326, 335.
281 Smend (1994), *Verfassung und Verfassungsrecht* 234–235.
282 See Smend (1994), *Verfassung und Verfassungsrecht* 136 f.; see more generally Rudolf Smend, 'Integration' (first published 1966, reprinted in *Staatsrechtliche Abhandlungen und andere Aufsätze*, 3rd edn, Duncker & Humblot 1994) 482, 482.

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was, namely, that the state was a living and continuously developing, reproductive, and coming-into-being entity. The constitution itself was, similarly, not only a legal norm, but an integrating element of reality.[283] The constitution was the form of a substance that was "not a static or a permanent relation, but rather simply flowing, constantly self-renewing life". The real existence of the constitution was precisely this constant actualization of "life".[284] With the strong focus on integration as a process and the constitution as a function of integration, Smend's theory ran along different lines than other critics like for instance Kaufmann. It can be discussed to what extent he actually managed to offer a "material" theory, or whether it remained a more formal and procedural one.[285] Kaufmann himself criticized Smend's concept of integration as a psychological concept that failed to take into account "mental structures" and objective "structures of meaning" that had a trans-subjective objectivity and that were pre-existing prior to any individual act.[286] But it is also possible, as Klaus Rennert convincingly argues, to see the integrative function of the constitution simultaneously as a value, and consequently the realization of this value as a supra-positive normative principle.[287]

Smend's theoretical framework, marked by a turn to "life" and "reality" and an idea of a dynamic and vital state, where elements such as legislation, judgments, and administrative decisions were only dialectically related parts of a higher "totality", had consequences for his methods and doctrine of constitutional law as well. For one thing, it gave a certain aura to different elements of the constitutional system: the constitutional rights provisions of the Weimar constitution were not primarily intended to protect minorities but to replace the integrative function of the monarch that had fallen away with the transition to a republican government; moreover, majority decisions had an elevating catharsis effect as the settlement of a struggle between different groups;

283 Smend (1994), *Verfassung und Verfassungsrecht* 192; Smend (1928) 46.
284 Smend (1928) 46.
285 See the discussion in Lepsius (1994) 99 f.
286 Kaufmann (1960), 'Vorwort zum Bande "Rechtsidee und Recht"' XXXI.
287 Rennert (1987) 302–303.

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and additionally, the determination of the national colours in Article 3 of the Weimar constitution had an important symbolic and integrative function.[288] What is more, these very abstract and quasi-spiritual elements could influence the interpretation of rules. This was already highlighted in relation to Smend's interpretation of Article 8 (3) of the Imperial Constitution in light of the "*Bundestreue*"-principle. Another example, this time from the Weimar Constitution, is the above-mentioned Article 3, which stated: "The *Reich* colours are black-red-gold. The flag of the merchant marine is black-white-red with the *Reich* colours in the upper inside corner". The context of this provision is important. In Weimar, the flag issue was political dynamite, as the black-red-gold flag was a pro-republican symbol that had its origins in 1848, while the right-wing anti-republican forces associated themselves with the black-white-red flag of the German Empire.[289] Smend attacked the reductionist "formal jurisprudence" – he mentioned the standard constitutional commentary by Gerhard Anschütz, a leading classical positivist at the time, specifically – which in its narrowness failed to grasp that this legal proposition was of "heightened legal significance" and "of very high status". A part of this "high status" was that it counted as an interpretative rule.[290]

As with Kaufmann, Kelsen did not let the criticism pass unnoticed, and this section too shall be concluded by having a brief look at the latter's reactions.[291] It was not surprising that it came to a confrontation between the two. As an illustration, Smend's idea about the integrative

288 Smend (1994), *Verfassung und Verfassungsrecht* 151–152 and 260–261; Smend (1928) 47–49.

289 See Marcus Llanque, 'Die Weimarer Reichsverfassung und ihre Staatssymbole' in Horst Dreier and Christian Waldhoff (eds), *Das Wagnis der Demokratie. Eine Anatomie der Weimarer Reichsverfassung* (C. H. Beck 2018) 87, in particular 95 f.

290 Smend (1994), *Verfassung und Verfassungsrecht* 261–262. Smend had presented similar ideas at the meeting in Munich in 1927. There, Anschütz commented in his reply that Smend mixed up law and politics, see Gerhard Anschütz, 'Aussprache über die Berichte zum ersten Beratungsgegenstand' in *VVDStRL* (1928) 74, 74–75.

291 For an overview, see Stefan Korioth, '"…soweit man nicht aus Wien ist" oder aus Berlin: Die Smend/Kelsen-Kontroverse' in Stanley L. Paulson and Michael Stolleis (eds), *Hans Kelsen. Staatsrechtslehrer und Rechtstheoretiker des 20. Jahrhunderts* (Mohr Siebeck 2005) 318.

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function of state symbols found its contrast in Kelsen, who rejected symbols as perceptible surrogates for those unwilling to engage in abstract thinking.[292] For Smend, conversely, Kelsen's idea of the legal personhood of the state as merely "a point of imputation" must have been close to paganism.[293] The differences between the two may in part be explained by different backgrounds and scholarly projects – Smend grew up in a protestant *Bildungsbürgertum* and approached constitutional law and the state from a historical and cultural-philosophical angle, while Kelsen, who came from a Jewish lower middle-class milieu, had a strictly analytical approach.[294]

Kelsen devoted a single, 90 pages long book, titled *The State as Integration* (1930), to refute Smend. He justified the extensive treatment by pointing out that the theory of integration had had a considerable effect on scholars. But in addition, Kelsen explained, there were certain characteristics of Smend's style that necessitated a meticulous analysis: a complete lack of systematic coherence, unclear points of view and an ensuing vagueness, as well as an obscure linguistic style full of foreign words – in short, the theory was no more than "aphoristic remarks", and the focal point, the concept of "integration", was no more than a "non-sensical term".[295] In terms of substance, one of Kelsen's main objections was his well-known favourite charge against other authors: Smend was guilty of methodological syncretism, that is, he failed to keep explicative and normative considerations, *Sein* and *Sollen*, strictly apart from each other.[296] Even though Smend claimed to build on a method of the humanities, his extensive focus on "life" had in reality

292 See Llanque (2018) 88, with reference to Kelsen's *Allgemeine Staatslehre* (1925) 305.

293 See Kelsen (1996) 101.

294 See Korioth (2005) 318.

295 Hans Kelsen, *Der Staat als Integration. Eine prinzipielle Auseinandersetzung* (first published 1930, reprinted version, Scientia Verlag 1971) 2, 3 and 48. For the quotes, I use the original page numbers on the top of the pages. Kelsen is not the only one who has criticized the convoluted style of Smend's writings. Neumann (2015) 82 calls him a "German master of obscurity".

296 See e.g. Kelsen (1971) 21–23 and, concentrated, on 34, where Kelsen states that Smend tries to efface the dualism between spirit and nature.

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led him to treat the state as a natural element, according to Kelsen – he had even made a "true fetishist cult" out of this concept of "life".[297] Smend was, so Kelsen argued, back at the organic state theory that he allegedly dismissed, and his state was a "superhuman nature", a "*Macroanthropos*".[298] Behind all this, Kelsen saw clear political elements: Smend's theory was "an abdication of science in favour of politics", "not cognition of the essence of an object, but value judgments", "political theology", a "battle against parliamentarism" and more specifically the Weimar constitution, and an "apology for dictatorship".[299] For if the decisive criterium for the evaluation of a Constitution was whether it actually had an integrative effect, wouldn't such a theory potentially legitimize unconstitutional actions and even – paradoxically – require that unconstitutional actions were regarded as constitutional?[300]

In conclusion, a recurring and fundamental theme in the constitutional writings of Smend is an attempt to approximate "law" and "life". As such, he had to reject and criticize both Laband and Kelsen, whose theories were based on a separation of these spheres. Smend's objective was guided, first, by the well-known dilemma in constitutional theory that the gap between "law" and "life" has to be somewhat modest, because there is, from a legal perspective, no external "third party" intervener to enforce the law. Second, it was guided by an idea that constitutional law had a certain and specific function, namely, to bring about integrative effects in the real world.[301] As a consequence, his approach to constitutional law was dynamic, set to keep up pace with the constantly "self-renewing life". But the flip side of the coin was,

297 *Ibid.* 24.

298 *Ibid.* 26–33, see also 35.

299 *Ibid.* 33, 55, 77, 82 and 91. According to Kelsen, the normative state theory of the Vienna School was, in contrast, non-political and objective, see 30 and 32 (footnote). Korioth (2005) 328–329 argues that Kelsen's explanation at this point is too simplified, and that one should also see Smend's theory of integration as a search for unity and consensus in a divided and crises-ridden Weimar society. See p. 324 as well.

300 Kelsen (1971) 90–91.

301 See Rennert (1987) 309–310.

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as Kelsen rightly observed, that his theory threatened to relativize the validity of positive constitutional norms.[302]

3.3.6 Heinrich Triepel: Approximation of law and the life of politics

Another significant scholar that belongs to the camp of critical scholars was Heinrich Triepel (1868–1946). In Triepel's works, one finds perhaps the most clear and outspoken example of methodological adaption from private law theory among the critical public law scholars. Triepel worked as a professor in Tübingen from 1900 to 1909, where he got to know Philipp Heck and Max v. Rümelin, two leading proponents of the jurisprudence of interests.[303] Triepel would later claim that his view on legal methods changed while in Tübingen,[304] and he adapted several of the ideas of the jurisprudence of interests in his constitutional works.[305] In other words, there is an analogical, yet in terms of substance completely reversed, situation to Gerber's adaptation of the classical private law method in the 1860's.[306]

One of Triepel's works from the Tübingen years is *Unitarianism and Federalism in the German Reich. A Constitutional and Political Study* from 1907. Overall, this was a fairly conventional study in terms of legal methods, with no clear signs of an attack on mainstream doctrine. For instance, Triepel considered the principle of good faith between the states and the *Reich* organs (*Bundestreue*) to be a political principle, not a legal one.[307] At this point, we have seen that Rudolf Smend went a step further in 1916.[308] However, the principle was not, according to

302 In this direction Friedrich (1997) 358; Rennert (1987) 310–311.
303 On Heck, see section 3.3.2 above.
304 Heinrich Triepel, *Delegation und Mandat im öffentlichen Recht. Eine kritische Studie* (W. Kohlhammer Verlag 1942) III (preface).
305 For the influence from the jurisprudence of interests on Triepel, see Ulrich M. Gassner, *Heinrich Triepel. Leben und Werk* (Duncker & Humblot 1999) 58–59, 236–237, 240, and 247–248. As Gassner shows on 271–272, Philipp Heck would in 1932 describe Triepel as a leading proponent of teleologic jurisprudence.
306 As pointed out *ibid.* 240.
307 Triepel (1907) 24–26.
308 See above around footnote 268. See also Gassner (1999) 232.

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Triepel, completely irrelevant from a legal perspective. He presented a psychologically oriented legal theory, where the validity of law in the final instance went back to "the legal subjects' feeling of subordination".[309] And since we are in general more inclined to accept being subordinated to a legal order we have participated in the establishment of, being reminded of the contractual "good faith" principle could have a useful function in strengthening the states' feeling of adherence to the federation.[310] This perspective indicates that Triepel was willing to leave the confines of conceptualism and classical legal dogmatics, and in general, his perspective was more that of a political scientist than a conceptual legal scholar. In his attempt to describe the structure of the German *Bundesstaat* – with its traits of both centralism and federalism – he drew upon a combination of legal analyses and a description of political developments. For instance, he showed how the federal organs' expansive use of their constitutional competences, such as legislation and establishment of administrative agencies, had developed the country in a more centralist direction.[311] The underlying basic premise of this argument, and indeed the entire study, was that the Constitution was *dynamic*. He noted that "already today, the Constitution is not the same as it originally was."[312] With this conception of the Constitution as a dynamic entity capable of growth – a growth that took place through a dialectic process of formal and informal elements – Triepel displayed a willingness to combine the narrow legal perspective with socio-political and historical considerations. Still, these were not revolutionary ideas; he made a reference to Laband when he presented his theory of the Constitution as dynamic.[313] In sum, Triepel did not dissociate himself openly from the traditional ideas of legal methods in 1907, but

309 Triepel (1907) 26. Triepel clarified that he was speaking of a feeling of subordination among the general population, and, further, not in relation to single rules, but the legal order as a whole ["*die Rechtsordnung im ganzen*"], see 27.

310 *Ibid.* 29.

311 *Ibid.* 53–62, see also 78.

312 *Ibid.* 7. On 44, Triepel referred to the United States as an example of a dynamic constitutional system.

313 *Ibid.* 7. The reference was to Laband's *Die Wandlungen der deutschen Reichsverfassung* (1895). He also referred to Albert Hänel and Hermann Rehm.

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the novelty is rather that he approached the problem of the structure of the *Reich* more in a political scientist than a legal dogmatic way.[314]

In 'The Competences of the Federal State and the Written Constitution', published in 1908, Triepel developed more theoretical and methodological principles that are of interest in our context. The starting point for the inquiry, which was of a comparative nature, was that in both Germany and the United States, the federal authorities possessed competences that were not explicitly enumerated in the written constitutions, but rather created by unwritten law-making.[315] Again, one finds the idea of a dynamic constitution, developed alongside the mere text itself. Yet there was, Triepel pointed out, no general agreement within public law as to the methods for the ascertainment of unwritten constitutional law. He noted that whereas the controversial issues relating to gap-filling had been thoroughly debated within general legal theory and in particular private law theory, the scope of this issue had, within the realm of public law, "barely been considered so far!".[316] This underscores the point that Triepel was keenly aware of methodological developments within private law and that he wanted to adopt these to public law, an aspect he made even more explicit in 1917, when he asserted that state law theory had barely begun the "cleaning process" that private law theory had initiated against the jurisprudence of concepts.[317]

One of the methods he launched for the ascertainment of unwritten rules in German constitutional law was the method of consequential reasoning, where unwritten rules were drawn as a consequence from written rules.[318] He acknowledged that in these cases, the results could

314 Gassner (1999) goes, in my opinion, too far when he, on 232, speaks of a "estrangement from Gerber-Labandian positivism". He makes, however, several nuances in the following.

315 Heinrich Triepel, 'Die Kompetenzen des Bundesstaats und die geschriebene Verfassung' in *Staatrechtliche Abhandlungen. Festgabe für Paul Laband zum fünfzigsten Jahrestage der Doktor-Promotion* (first published 1908, reprinted version, Keip Verlag 1978) 247, 252.

316 *Ibid.* 253.

317 Heinrich Triepel, *Die Reichsaufsicht* (1917) 166 (footnote 3), quoted from Gassner (1999) 252.

318 Triepel (1908) 287.

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be debatable, because "precisely here is the place where the purely logical inference is virtually always combined with a value judgment by the interpreter."[319] Another applicable method was that of analogical reasoning. He did not agree with for instance Gerhard Anschütz, one of the leading positivists within constitutional law at the time, who rejected the possibility of analogical reasoning in public law (by analogy (!) from the prohibition within criminal law).[320] Certainly, Triepel could understand the sceptical attitude, in light of the exaggerations from at least certain members of the free law movement, who wanted to free the judges from statutory law. In addition, he acknowledged that all legal analogies were combined with "assessments of an evaluative character, with *value judgments*", and that they hence could imply a certain risk for abuse.[321] But these possible objections could be refuted owing to two considerations.[322] First of all, Triepel claimed that a subjective element was present in *all* legal application, including mere interpretation; reasoning by analogy was, in other words, not a special case in this regard. Secondly, he argued that the judges were bound to obey and promote the values and balancing of interests that were enshrined in statutory law, something that would move the subjective element to the background. Consequently, analogical reasoning would not be "*arbitrary creation* of law" ("*willkürliche* Rechts*schöpfung*") but rather "*finding* of law" ("Rechts*findung*"). These counter-arguments were accompanied by a number of references to private law scholars and legal philosophers, including Rümelin, Heck, Gustav Radbruch, and Rudolf Stammler, and they were characteristic for the jurisprudence of interests. Once again, one sees how Triepel wanted to adapt private law methodology to the realm of public law, something that is also visible in his assertion that the aforementioned binding to objective

319 *Ibid.* 293.
320 *Ibid.* 311 f.
321 Triepel (1908) 316 and 317 (emphasis in original). See also Heinrich Triepel, *Vom Stil des Rechts. Beiträge zu einer Ästhetik des Rechts* (published posthumously, Verlag Lambert Schneider 1947) 119, where he criticizes the free law movement and distances his own position from the direction.
322 For the following, see *ibid.* 318–319.

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legal values "must apply and is *also* possible to carry out with respect to administrative statutes and *constitutional* provisions".[323] Another testimony to Triepel's private law-orientation is his adoption of the term "jurisprudence of concepts" to the constitutional setting, a term he used to criticize those who derived legal consequences from the concept and the nature of a "*Bundesstaat*".[324]

In these two works from the final years of the Empire, then, there are at least some cautious indications of yet another scholar that seemed to be questioning some basic methodological postulates within the discipline. To speak, though, as his biographer Ulrich Gassner does, about a "critique of Labandian logicism"[325] might give the impression of an explicit methodological confrontation with and dissociation from Laband's methodology, but this is not to be found in these early works. That would only come later. Manfred Friedrich's assertion that Triepel in his pre-war writings "tacitly 'went beyond'" Laband is probably more spot on than Gassner's interpretation.[326] For sure, Triepel *did* explicitly present novel methodological and theoretical ideas; the point is only that he did not expound the relation – or, perhaps better, contrast – between these ideas and the classical paradigms.

If we move on to the Weimar years, Triepel played an important role in keeping the community of public scholars together as the initiator behind The Association of German Teachers of State Law. Triepel was the right man in the right place for this task. He was based in Berlin since 1913 and was generally acknowledged as a respectable scholar, politically conservative, and a "moderate anti-positivist".[327] At the meetings of the Association, he belonged to the camp of the critics.

323 *Ibid*. 319 (the first emphasis added, the second in original). As Gassner (1999) 237 rightly points out, this can be seen in conjunction with the assertion made by Triepel (1926) 39, that there is "only *one* legal method" (emphasis in original), i.e., that the legal method should be the same within private and public law.

324 Triepel (1908) 326–327.

325 Gassner (1999) 235.

326 Manfried Friedrich, 'Der Methoden- und Richtungsstreit. Zur Grundlagendiskussion der Weimarer Staatsrechtslehre' (1977) Vol. 102 *AöR* 161, 167 (footnote 15). See Gassner (1999) 239–240 for a criticism and diverging view.

327 See Stolleis (2004) 179; Gassner (1999) 134.

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In Münster in 1926, when the equality clause of the constitution was under debate, he maintained that "[e]veryone, also in the cases that are apparently straightforward, must in the end have recourse to ideas that are not to be found in the legislation, but that he derives from the supra-positive order of life."[328] In addition, he took the position that the equality clause was binding on the legislator, a doctrine that he had pioneered a couple of years earlier.[329] In Munich in 1927, he commended Rudolf Smend's application of the concept of integration to the fundamental rights of the Weimar Constitution, and he also stated that "in our field, we [...] operate with values and strive for the exposition of the value judgments that are fixed in the legislation or that can be derived from them, to a greater extent than the last generation has done."[330] And in Vienna in 1928, he delivered one of the two keynote speeches, a speech I will come back to in a moment and compare with the other keynote speech, which was delivered by Kelsen.

Triepel's most famous contribution from the Weimar years was perhaps his inaugural address as Rector at the University of Berlin in 1926, titled *Constitutional Law and Politics*. Here, he formulated a fierce critique of classical constitutional methodology that came to be seen as one of most significant contributions to the quarrel over methods in the Weimar era. And now, the criticism became more explicit than it had been in his pre-war writings. He regretted the non-political direction German constitutional scholarship had taken with the "Gerber-Labandian school". With its focus on conceptual analysis, it had elevated the use of logic and excluded the teleological element in law, the result being that there was no place for political considerations.[331] Kelsen and his school had developed these tendencies even further and

328 Heinrich Triepel, 'Aussprache über die vorhergehenden Berichte' in *VVDStRL* (1927) 50, 51.

329 On this, see Gassner (1999) 362 f. Triepel's pupil, Gerhard Leibholz, gave the idea a more thorough fundament in his *Die Gleichheit vor dem Gesetz* from 1925, see Gassner (1999) 367.

330 Heinrich Triepel, 'Aussprache über die vorhergehenden Berichte' in *VVDStRL* (1928) 89, 90. See similarly Heinrich Triepel, 'Wesen und Entwicklung der Staatsgerichtsbarkeit' in *VVDStRL* 5 (1929) 1, 21.

331 Triepel (1926) 6–8.

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reduced law to a "mere form emptied of all content."[332] In a later work, he depicted Kelsen as the one that had most consequently employed a sterile jurisprudence of concepts, without any concern for practical legal issues.[333]

Triepel's main problem with traditional thinking was the strict separation of law and politics, or, more generally, the idea that it was meaningful to keep a pure legal sphere apart from the social and political reality.[334] "After all, constitutional law has as its object nothing else than the political", he wrote.[335] He conceded that legal scholars operated within the normative realm of *Sollen* but stressed that they were not only working with transcendental contents, but with an empirical legal order. And in this concrete legal order, the legal norms were means to achieve certain purposes and promote certain interests. Triepel considered these purposes and interests to be of a political nature, and thus, it was "obvious that a complete understanding of constitutional norms without including political considerations is absolutely impossible."[336]

Triepel's objective of a complete understanding of constitutional law necessitated an alternative legal method, and he hoped for one that would be "confronting life" to a greater extent than what had been common in traditional constitutional law scholarship.[337] The strong influence from the jurisprudence of interests is visible in his many references to purposes, interests, and a teleological perspective.[338] He did not, however, throw the traditional constructive method completely

332 *Ibid.* 17.
333 Triepel (1947) 118. In Triepel (1926) 22 as well, the Kelsenian theory is criticized for not being a practical science.
334 Triepel (1926) 9.
335 *Ibid.* 10.
336 *Ibid.* 19.
337 *Ibid.* 18
338 He referred explicitly to the jurisprudence of interests in *ibid.* 38 and 39, and to Max Rümelin on 20 and Philipp Heck on 22. In Triepel (1947), he explained that he preferred the terms "jurisprudence of purposes" (which he had also used in Triepel (1926) e.g. 24 and 38) or "jurisprudence of values", see 118. The reason was that "jurisprudence of interests" gave the impression that one was only balancing material, and not ideal, interests.

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over board. Instead, he made an interesting distinction between two types of legal construction, namely constructions where the aim is to comprehend (*verstehende Konstruktion*) and constructions where the aim is to fill legal gaps (*lückenfüllende Konstruktion*).[339] The first way of construction confines itself to see individual rules as part of a whole, and to understand the inner relationships and connections within this whole. The gap-filling construction goes further, as it, due to a postulated unity of the legal system, aims to deduce new legal rules in order to fill apparent gaps in the system. Triepel acknowledged the advantages of constructions aimed at a comprehension of the legal material but underlined that it was not the only available method. In cases of gap-filling, on the other hand, there could be no talk of pure construction.[340] Here, a teleological approach was needed:

> We believe […] that, instead of being concealed behind the mask of logics, [teleological considerations] should seek and assert their place in legal doctrine in full transparency. As law is nothing else than a complex of value judgments about conflicts of interests, so is the teleological method the adequate method for the object of legal science. In constitutional law as well, we do not shy away from, but rather *demand* the connection between *political* considerations and formal-logic construction of concepts.[341]

Triepel acknowledged that a political-purposive method in constitutional law ran the risk of degenerating into a "shallow relativism" or a "brute utilitarianism".[342] To such possible objections, he offered a twofold response similar to that he made in defence of analogical reasoning in 1908. First, he asserted that the genuine distinction was not between a political and a non-political method, but between those who transparently presented the standards they applied when they balanced competing interests and those who did not. "[T]he teleological juris-

339 Triepel (1926) 21–22.
340 *Ibid.* 37–38.
341 *Ibid.* 36 (emphasis in original).
342 *Ibid.* 38.

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prudence is forced to lay its cards on the table", he wrote.[343] His second assertion was that mere anarchy was prevented by the fact the jurists were under a duty to apply objective, not subjective standards. These objective standards were enshrined in the legislation or, if that was not the case, "in the legal consciousness of the legal community".[344] And even in those cases where the jurist had to decide in accordance with the rule he or she would make as a legislator, as he put it with a reference to the Swiss Civil Code, subjectivity was not the inevitable result:

> Our conscience is, after all, only a part of a supra-individual spirit. If we search in our hearts, we look, at the same time, to eternal stars. The highest guiding star remains, also for the jurisprudence of interests, the *idea of law*, the eternal *justice*.[345]

Here, Triepel was of course alluding to Kant, with his reference to our inner morality and the eternal stars.[346] As mentioned above, Kaufmann had criticized Kelsen's pure theory of law for only partially adopting Kantian philosophy. And with the reference to a "supra-individual spirit", an "idea of law" and an "eternal justice", Triepel sought precisely to complement the "empty" Neo-Kantian formalistic epistemology with material elements. The metaphysical leanings, moreover, can be seen as a way of transcending the more positively oriented jurisprudence of interests and develop it into a jurisprudence of values.[347] What the supra-positive material elements were supposed to be, remained, however, vague and unspecified.

Once again, Hans Kelsen did not shy away from a confrontation. At the fifth meeting of the Association of German Teachers of State Law

343 *Ibid*. 38.
344 *Ibid*. 39.
345 *Ibid*. 39 (emphasis in original).
346 Cfr. Immanuel Kant, *The Critique of Practical Reason* (first published 1788, Thomas Kingsmill Abbott tr, The Floating Press 2009) 256: "Two things fill the mind with ever new and increasing admiration and awe, the oftener and the more steadily we reflect on them: the starry heavens above and the moral law within".
347 In this direction, Gassner (1999) 279 and 286.

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in Vienna in 1928, Triepel and Kelsen were the two keynote speakers for the discussions on "the nature and development of constitutional review" (*Staatsgerichtsbarkeit*). Their approaches to the topic were – as they also agreed upon when they, at the end of the discussions, were given the floor for final comments –[348] very different.

The starting point for Triepel was an attempt to come up with a material definition of the concept of the constitution, as this was the object of constitutional review. He referred briefly to Smend's concept of integration and added a definition of the constitution as "the law that strives to govern the *essential* aspects of public life."[349] The determination of what was "essential" had to be based on value judgments. He then moved on to discuss the concept of the political and the relation between constitutional law and politics. He came up with a definition of "political" as "only that which is connected to the highest, supreme, decisive aims of the state, to the 'integration' of the state, which relates to the state as a productive power, which, as Hegel puts it, represents the 'position of the highest concrete community'".[350] Then – and here he disagreed with Carl Schmitt – he asserted that there was *not* an antithesis between constitutional law and politics. To the contrary, Triepel claimed that "constitutional law [is] precisely the law *of* the political" and that "constitutional conflicts do not as legal conflicts [constitute] an antithesis [*Gegensatz*] to political conflicts."[351] But at the same time, he pointed to a certain paradox: There was *to a certain degree* a tension (*Widerspruch*) between the nature of the constitution and the nature of constitutional review. The tension was caused by the fact that the political sphere and political conflicts were characterized by a strong element of power and self-assertion, a tendency that worked

348 See Heinrich Triepel, 'Schlusswort' in *VVDStRL* 5 (1929) 115, 117: "I have to confess that Kelsen and I are speaking different languages, because we see the things with different eyes."; Hans Kelsen, 'Schlusswort' in *VVDStRL* 5 (1929) 117, 117: "In the way and manner that we have tried to determine the nature of the Constitution today lies the fundamental, obviously ideological difference".

349 Heinrich Triepel (1929), 'Wesen und Entwicklung' 6 (emphasis in original).

350 *Ibid.* 7.

351 *Ibid.* 8 (emphasis in original).

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against dispute resolution by an impartial third party. "The stronger the 'political instinct' is cultivated, the greater the reluctance towards constitutional review", he claimed.[352]

Kelsen approached the problem from a very different angle.[353] Kelsen offered a theory of constitutional review in line with his *Stufenbau* theory of the legal system as a hierarchy of norms, and went meticulously into numerous details and nuances. When he, following comments and responses from other participants, was given the floor for some final comments, he claimed that the main difference between his contribution and the one by Triepel was that he himself had approached the problem from a legal point of view, whereas it seemed like Triepel had treated the Constitution from a non-legal perspective.[354] Moreover, Kelsen saw the insertion of the concept of the "political" in the line of reasoning as a symptom of a certain hostility towards law. More precisely, he criticized what he saw as a paradox in Triepel's approach. First of all, he accused Triepel of engaging in conceptual jurisprudence, as he tried to derive the tension between the nature of the constitution and the nature of constitutional review from the concept of the political. Secondly, he claimed that Triepel came close to a negation of law itself when he substituted the power of the strongest for law-enforcement through an impartial organ.[355] This was one of Kelsen's most common attacks on his adversaries: If their conclusion was not arrived at through valid legal reasoning, it had to be political-ideological arguments dressed up in legal clothes.[356]

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352 *Ibid.* 8–9.

353 In the ensuing debate at the Association's meeting, Richard Thoma commented that Kelsen hade treated the subject more from a legal theoretical point of view. See Richard Thoma, 'Aussprache über die Berichte zum ersten Beratungsgegenstand' in *VVDStRL* 5 (1929) 104, 104.

354 Kelsen (1929), 'Schlusswort' 118. In his characteristic stinging way, he added that he had tried to grasp the problem "as a jurist, in this Association of constitutional *lawyers* [Verfassungs*juristen*], of state *law teachers* [Staats*rechtslehrern*]".

355 *Ibid.* 119–120.

356 See e.g. around footnote 293 above and 448 below. See also, in this specific context, Hans Kelsen, 'Wesen und Entwicklung der Staatsgerichtsbarkeit' in *VVDStRL* 5 (1929) 30, 33, where he claims that current state law theory in general, and more specifically in relation to the question of ways to ensuring the constitu-

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The following year, in 1929, Kelsen would raise similar charges against Triepel in the second edition of his *The Essence and Value of Democracy*. The background was an address Triepel had delivered at the University of Berlin in 1927 and published in book format in 1928, titled *The Constitution and the Political Parties*. Triepel had discussed whether Germany had become a party state and concluded that legally speaking, it had not, while as a political reality, it had so, at least more or less. According to Triepel, this led to a gap between the legal and the political-social reality.[357] Kelsen was relentless in his critique of Triepel's reasoning, his main objection being that Triepel's analyses of a positive-legal and a factual question were infused with subjective value judgments.[358] Triepel had, so Kelsen claimed, maintained that from a legal perspective, a party state was a contradiction in terms. For Kelsen, this was in reality based purely on value judgments. Then he tried to reduce Triepel's reasoning to absurdity by pointing out that according to Triepel, Germany *had* turned into a party state; did this imply, Kelsen asked rhetorically, that Germany had ceased to be a "state"? At this point, it is possible to question Kelsen's reading of Triepel. Triepel's legal analysis was admittedly a hodgepodge of poorly developed arguments that contained a thinly veiled antipathy towards political parties. But an alternative, and perhaps fairer, reading of Triepel is that he tried to show that there were no constitutional provisions that explicitly recognized political parties as state organs,[359] and moreover, that he did not assert that a party state was a contradiction in terms, legally

tionality of legislation, was politically motivated and went back to the state law doctrine of the constitutional monarchy.

357 Heinrich Triepel, *Die Staatsverfassung und die politischen Parteien* (address delivered at the University of Berlin 3 August 1927, Verlag von Otto Liebmann 1928), see in particular 28–32.

358 For this and the following, see Hans Kelsen, *Vom Wesen und Wert der Demokratie* (2nd edn 1929) in Matthias Jestaedt and Oliver Lepsius (eds), *Hans Kelsen. Verteidigung der Demokratie* (Mohr Siebeck 2006) 167–170 (footnote). For a translation, see Hans Kelsen, *The Essence and Value of Democracy* (Nadia Urbinati and Carlo Invernizzi Accetti ed, Brian Graf tr, Rowman & Littlefield Publishers Inc. 2013) 39–41 (endnote 10).

359 The Weimar Constitution only referred to parties once, in Article 130 (1): "Public officials are servants of the collective, not of a party."

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speaking. Triepel had spoken of a "*schwer auflösbarer Widerspruch*", which Kelsen seemingly interprets as a "contradiction" (Kelsen only quotes "*Widerspruch*"). But an alternative interpretation could be that what Triepel had in mind was a *tension* that was difficult, but not impossible, to reconcile.[360]

Notwithstanding this perhaps inaccurate reading, what is of particular interest is the conclusions Kelsen draw. Now he also took the opportunity to refute Triepel's criticism of the pure theory of law in *State Law and Politics*, where Triepel had also uttered his hope for a new theory that would be more geared towards "confronting life". The argumentation is typical of Kelsen and warrants an extensive quotation:

> I fear that – at least with regard to the problem of the political party – Triepel's constitutional legal theory is mired in abstract formalism much more deeply than the pure theory of law. For the latter wishes to be a theory of positive law only and would certainly recognize that law as valid even if it takes on a content that the theoretician deems harmful. It is precisely for this reason that the theory strives for "purity"; it would rather suffer the – albeit undeserved and by Triepel not substantiated – charge of formalism than be accused of being only true to the "life" it finds politically amenable and of placing the legal norms of the state in an intimate relationship with the "political forces" it subjectively deems valuable.
>
> Yet, this is the typical method employed by traditional constitutional legal theory! That which is deemed politically desirable is deduced from the nature or concept of the state, while that which is politically rejected is proven to contradict the nature or concept of the state. Is this not in fact the actual "conceptual jurisprudence" ["*Begriffsjurisprudenz*"]? Understandably, such a method must oppose the separation of law and politics. Only, [its practitioners] must

360 As I have shown (see around footnote 351 above), Triepel seemed in 'Wesen und Entwicklung' to distinguish between "an antithesis" ("*Gegensatz*") and "a tension" ("*Widerspruch*").

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> not be surprised if their political opponents use the same method to prove the exact opposite."[361]

Kelsen's sensitivity towards political arguments is probably not entirely unwarranted in this case. As just mentioned, Triepel had a distinct antipathy towards political parties. In 1907, back in the days of the stable monarchy, Triepel had self-confidently asserted that "[w]e Germans are a monarchic people, monarchic 'to the bone'. We cannot live without a monarchy."[362] He had also admitted that if he was forced to choose between absolutism and democracy, he would rather have chosen the despotism of one person than that of the mob.[363] Rudolf Smend described him later as a conservative, instilled with a certain "*Etatismus*".[364] But rather than a political interpretation of his works, it is, in my opinion, the impact from private law theory that stands out as the most significant feature of his legal thinking. Smend has aptly pointed out that whereas other participants in the quarrel over methods often drew upon insights from philosophy, sociology and the philosophy of history, Triepel remained within the borders of legal thinking.[365] Pouring from the reservoirs of the jurisprudence of interests, a direction he was well acquainted with since his Tübingen years, he was able to formulate a critique of what he perceived to be the isolationism of classical constitutional methodology, a critique that was overall more moderate than that formulated by some of his co-opponents.

361 At this point, I have quoted from the translated version (see footnote 358 above). The bracket was inserted in the translated version.

362 Triepel (1907) 124.

363 *Ibid.* 119.

364 Rudolf Smend, 'Heinrich Triepel' (printed in *Staatsrechtliche Abhandlungen und andere Aufsätze,* 3rd edn, Duncker & Humblot 1994) 594, 603. On Triepel as a "homo politicus", see Gassner (1999) 170–189. As Gassner shows on 170 with reference to a private letter from 18 April 1933, Triepel described himself as a conservative Christian.

365 Smend (1994), 'Heinrich Triepel' 605.

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3.3.7 Carl Schmitt: Transformation of "law" into "life" through decisions

The final German scholar to have a look at is Carl Schmitt (1888–1985), probably the most controversial figure of German legal thinking in the 20th century. Schmitt is best known for his Weimar and postwar writings, but some of his earliest works, written in the final years of the Empire, deserve attention as well, for two reasons. First, they are yet another example of an early departure from mainstream legal thinking.[366] Second, they do, as I will argue, cast light on later developments in Schmitt's thinking.[367]

In *Statute and Judgment* (*Gesetz und Urteil*) from 1912, Schmitt set forth to answer a basic theoretical question about when a decision taken in legal practise is correct. His short answer was that this is something legal practice itself decides upon.[368] The study was, he underlined, concerned with the normative issue of correctness, and was in other words a juristic, not a social scientific or psychological one.[369] In order to work out a formula to test the correctness of a decision, a decisive criterium was needed. For Schmitt, this criterium could not be drawn from something factual – for instance what the majority of lawyers held to be correct – as it was impossible to derive something normative from something factual ("*Sein*" versus "*Sollen*"). Instead, the criterium had to be drawn from a postulate. This postulate could not, however, be randomly decided, but had to enjoy "actual effectiveness" – it should have a connection to actual judicial practice.

366 On Schmitt's works as a part of the more general embryonic reorientations of the profession, see Korioth (1992) 217 f.

367 In the same direction, see Lars Vinx and Samuel Garrett Zeitlin, 'Introduction. Carl Schmitt and the Problem of the Realization of Law' in Vinx and Zeitlin (eds), *Carl Schmitt's Early Legal-Theoretical Writings. Statute and Judgment and the Value of the State and the Significance of the Individual* (Cambridge University Press 2001) 1, 2–3, and more detailed throughout the text.

368 Carl Schmitt, *Gesetz und Urteil* (1969) VII (preface) [tr. 43]. Here and in the following, I quote from the English translation by Vinx and Zeitlin (cfr. previous footnote). I refer to the pagination of the English version in brackets.

369 For this and the following, see *ibid.* in particular 1–5 [tr. 47–50]. The following quotes are from p. 3 [tr. 48–49].

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An interesting feature to be noted already at this point is the resemblance to Kelsen. Schmitt was, as already mentioned, acquainted with Kelsen's *Main Problems* from 1911.[370] The resemblance lies first and foremost in their basic distinction between *Sein* and *Sollen*, but in addition, the idea about a postulate that enjoyed "actual effectiveness" might be seen as a structural equivalent to the basic norm that Kelsen had not developed yet in 1911, but which later was to become an important part of his pure theory.[371] The status and function of the basic norm is contested, and Kelsen formulated it in different ways himself.[372] But at least in the second edition of his *Pure Theory of Law*, Kelsen refers to it as a norm that is only a product of thought ("*gedachte Norm*"), i.e. more or less a postulate.[373] At the same time, Kelsen pointed out that the basic norm would need a certain relation to real life. It could only be "on top" of an efficacious ("*wirksam*") constitution, that is, a constitution whose norms adopted pursuant to it were applied and complied with by and large.[374] The similarities should not be exaggerated; as the following will show, Schmitt did not have a norm, but rather a general principle of "legal determinacy" in mind. But when I mention the resemblance, it is because it is possible to see the relation between *Sein* and *Sollen* – "life" and "law", we might say – as a fundamental challenge for both of the authors.[375] For Kelsen, it would remain a puzzle and he spent lots of energy trying to soph-

370 *Ibid.* with references to the book on 56–57 [tr. 91], cfr. also footnote 156 above.

371 According to Paulson (1998) 157, Kelsen mentions the basic norm (albeit not as a transcendental concept) for the first time in 1914. An explanation of Kelsen's position in *Main Problems* is offered by Stanley L. Paulson, 'The Great Puzzle: Kelsen's Basic Norm' in Luís Duarte d'Almeida, John Gardner and Leslie Green (eds), *Kelsen Revisited. New Essays on the Pure Theory of Law* (Hart 2013) 43, 44 f.

372 See e.g. Stanley L. Paulson, 'Die Funktion der Grundnorm: begründend oder explizierend?' in Clemens Jabloner, Dieter Kolonovits, Gabriele Kucsko-Stadlmayer, Hans René Laurer, Heinz Mayer and Rudolf Thienel (eds), *Gedenkschrift Robert Walter* (Manzsche Verlags- und Universitätsbuchhandlung 2013) 553.

373 Hans Kelsen, *Reine Rechtslehre* (2nd edition, Verlag Franz Deuticke 1960) 208.

374 Kelsen (1960), *Reine Rechtslehre* 204 and 214.

375 On this problem as a common motif for Kelsen and Schmitt (in the latter's *The Value of the State*, cfr. below), see Paulson (2016) 514–518.

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isticate the basic norm, before he eventually discarded it.[376] Schmitt's authorship would move along very different lines but, as I will try to show, the relation remains, from a certain point of view, a persisting element in his thinking as well.

If we return to Schmitt's *State and Judgment* and the search for a criterium for deciding upon the normative correctness of a decision, he noted that the mainstream criterium was whether the decision was in accordance with the laws – whether it had legality.[377] Schmitt argued that this was certainly a legally valid constitutional principle,[378] but it was useless as a criterium for the correctness of a decision. For the idea "that all decisions exhibit 'conformity to statute'", Schmitt wrote, "can today be regarded as overcome", and to use legality as a criterium was "logically impossible".[379] Schmitt, then, replaced the traditional, norm-oriented criterium with the following decision-oriented formula: "A judicial decision is correct, today, if it is to be assumed that another judge would have decided in the same way. 'Another judge', in this context, refers to the empirical type of a modern, legally trained jurist".[380] This criterium was connected to what he had chosen as the decisive postulate, namely one of "legal determinacy" ("*Rechtsbestimmtheit*"). By choosing legal determinacy as his postulate, Schmitt achieved two things. First, he pointed out that in some "aleatoric" cases – for instance the regulation of give way rules in the traffic – the important issue was not the content of the norm, but *that* a norm was prescribed.[381] In cases like this, where no one would care about the content of the norm, an idea of substantial justice or a similar criterium would be a too narrow postulate. Legal determinacy, by contrast, was a postulate

376 See Hans Kelsen, *Allgemeine Theorie der Normen* (Manz 1979), where he speaks of the basic norm as a fictitious norm.

377 Schmitt (1969), *Gesetz und Urteil* 22 [tr. 64].

378 *Ibid.* 7 [tr. 51] and the reference to Article 1 of the *Gerichtsverfassungsgesetzes*, which stated that the courts were independent and only subjected to statutes.

379 *Ibid.* 11 [tr. 55] and 37–38 [tr. 76–77].

380 *Ibid.* 71 [tr. 103].

381 *Ibid.* 48 [tr. 84–85]. Schmitt also refers to the importance of decisions in ensuring predictability for commercial actors, see p. 52 [tr. 88] and even more outspoken in *Politische Theologie* (first published 1922, 2nd edn, Duncker & Humblot 1934) 41.

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broad enough to encompass these cases as well and could thus cover the entire legal order. The second thing Schmitt achieved was an empirical orientation of the correctness test, which, as already noted, was of particular importance to him.[382]

Schmitt's correctness formula was radical, and it threatened to eradicate the normative orientation of the decision-making process. Admittedly, Schmitt was correct when he claimed that he replaced the objective criterium of legality with another objective criterium, instead of leaving it to the subjectivity of the judge.[383] What is more, he underlined that statutory law would still be a "yardstick" ("*Richtschnur*") for the judge.[384] But still, and more fundamentally, his theory turned the traditionally norm-oriented approach to the decision-making process upside down:

> [The judge] does not subsume under norms as though subsumption were the final end of his activity. The subsumption under a norm (no matter which) is no longer the conclusion and the goal of the reasons of decision, but the means for the achievement of legal determinacy. That by appeal to which the decision legitimates itself is not prior to it (like a positive statute, a cultural norm or a free law norm), but rather to be brought about to begin with (with the aid of positive statute, of cultural norms or of the norm of the free law). The correctness of the decision is not constituted by the fact that the judge acts in accordance with some command, but rather by the fact that it satisfies the postulate of legal determinacy. One is not to assume that the judge is looking backwards towards a will or a command; rather, he is using a norm (that is, its effectiveness) as a means, in order to calculate what would today, given these positive statutes and given this influence of extra-positive norms, as well as such and such precedents, in general be regarded as correct by legal practice.[385]

382 See Schmitt (1969), *Gesetz und Urteil* 62–63 [tr. 96].
383 *Ibid.* 72 [tr. 103–104].
384 *Ibid.* 42 [tr. 80].
385 *Ibid.* 97–98 [tr. 124].

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In 1914, Schmitt turned his attention towards constitutional theory more specifically. In *The Value of the State and the Significance of the Individual* (*Der Wert des Staates und die Bedeutung des Einzelnen*), the objective was to analyse the relationship between law, the state, and the individual. The fundamental thesis of the book was that the exclusive function of the state was to transform law into effect in the real world. The state was the point of transition between the world of ideas to which law belonged and the world of real empirical phenomena.[386] In one way, then, the relation between "law" and "life" is a theme that reappears once again, but in a different guise. Now, the idea of an efficacious postulate is absent, and instead, the focus on the state as a mediator between "law" and "life" has moved up front.

The first step in Schmitt's chain of arguments was to purify law as an ideal phenomenon, something he did in a chapter on "law and power". Law was not defined in terms of power, purpose, or will – elements that belonged to the causal-empirical world – but was rather abstract thought, belonging to a separate normative world.[387] Again, this exercise bore close resemblance to neo-Kantian legal philosophy à la Kelsen, with a clear-cut distinction between *Sein* and *Sollen*.[388] The addressee of the original law was the state, and its function was to transform law into effect in the real world. First of all, this idea introduced a concept of the state as an entity with a calling and a purpose.[389] This purpose belonged to the causal-empirical world. For Schmitt, the state "enters into the world acting" – in order to transform the original law into an effective order, it must use instruments such

386 Carl Schmitt, *Der Wert des Staates und die Bedeutung des Einzelnen* (J. C. B. Mohr (Paul Siebeck) 1914) 2 and 52–53 [tr. 166 and 197]. This text is also included in the English translation of Schmitt's early legal-theoretical works by Vinx and Zeitlin, and I will proceed likewise here in terms of citation (cfr. footnote 368 above).

387 See *ibid.* chapter 1, in particular quotes on 21, 28–29, 31, and 37–38 [178, 182, 184, and 188].

388 See also Stanley L. Paulson, 'Hans Kelsen and Carl Schmitt. Growing Discord, Culminating in the "Guardian" Controversy of 1931' in Jens Meierhenrich and Oliver Simons (eds), *The Oxford Handbook of Carl Schmitt* (Oxford University Press 2016) 510, 512 f.

389 See Schmitt (1914) 52–53 [tr. 197].

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as imperatives, coercion, and power.[390] As these elements are often expressed through the medium of law, a dual system of law emerges: first, there is the original and antecedent law belonging to the world of ideas, and then, there is the positive state-made law in the real world, used as an instrument to realize the original law. This was, of course, a natural law theory. And indeed, Schmitt admitted very briefly that this original law had to be something like "a natural law without naturalism" but chose the easy way out and simply stated that a closer determination of its status was outside the scope of the work.[391]

Is it possible to reconcile this more normatively oriented theory from 1914 with Schmitt's anti-normativity from 1912? In 1914, he refers to *Statute and Judgment* only once and very briefly, and this could indicate that he had departed from his previous points of view.[392] Another possible, and in my opinion more convincing interpretation is that Schmitt is trying to answer different problems in the two books, yet that he is on a deeper level dealing with the same issues.[393] Schmitt himself would later describe *The Value of the State* as a "continuation" of the thoughts presented in *Statute and Judgment*.[394] An illustration of the continuity is that in his work from 1914, he rejects the Montesquieuian and legalistic idea of the judge as the mouthpiece of the statute ("*Gesetz*") by pointing to the fact that extra-statutory factors such as precedents, arguments drawn from the moral value judgments of the time and of the people, the interests of legal intercourse, etc., influence the decision-making process.[395] At this point, he is completely in line with the ideas developed in 1912. But at the same page, he

390 See *ibid.* in particular 55–56, 68–69 and 74 [tr. 199, 207 and 210].
391 *Ibid.* 75–76 [tr. 211].
392 The reference is made at 79 [tr. 213].
393 For a seemingly different view, see Stolleis (2001), *Public Law 1800–1914* 440.
394 Carl Schmitt, *Die Diktatur. Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf* (first published 1921, 3rd edn, Duncker & Humblot 1964). The third edition is an unrevised reprint of the second edition from 1928, where Schmitt included an appendix on the dictatorship of the president pursuant to Article 48 of the Weimar Constitution.
395 Schmitt (1914) 73 [tr. 210]. See similarly 48–49 (footnote 1) [tr. 195] on the free law movement.

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introduces a new element when he underlines that judges are bound by the law ("*Recht*"). In the context of the theory he expounds in 1914, this makes completely sense, because courts – as part of the state – are supposed to transform law into reality. Even though this introduces a new element that was not present in 1912, it doesn't necessarily contradict his earlier theory. And even more so as long as Schmitt kept it completely open in 1914 what the original law was supposed to be. In fact, I think it is possible to view his two early works as complementary, in the way that they are dealing with the same fundamental issue – the act of transforming law into reality.[396] In other words, the element of decisionism that would become more outspoken in his later writings was already present in his early theories, if only in an embryonic form. It is perhaps not by chance that he left the content of the "original law" open; it was nothing to say – this natural law was emptier than any legal formalism could be. The crux of the theory was the *decision*.

After the First World War, Schmitt turned his attention towards new concepts, such as dictatorship, sovereignty, state of exception, and the concept of the political. This was a track change, and the contours of his writings became significantly sharper. But at the same time, there were elements of continuity. In his *Dictatorship* from 1921, for instance, the distinction between norms and their realization is at the heart of his theory of the dictatorship. It is present already in the preliminary remarks, where he comments on the dictator's function in setting aside the positive constitutional norms:

> The intrinsic dialectic of this concept [of dictatorship] is that it is precisely the norm being negated whose authority the dictatorship shall ensure in the historical-political real world. It might, accordingly, be a difference between the authority of the norm that shall be realized and the methods of its realization. In terms of legal philosophy, this is the essence of the dictatorship, namely the

396 See similarly Delacroix (2005) 37: "The general point, in both works, is to underline the necessity for the law (understood in its pure, ideal sense) to be *realised* through sovereign decision-making." See also Neumann (2015) 26.

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> general possibility of a separation of legal norms and norms of realization.[397]

Later in the text, he described this distinction between legal norms ("*Rechtsnorm*") and norms of realization ("*Rechtsverwirklichungsnorm*") as pervading the entire law.[398] What justified the dictatorship from a legal philosophical point of view was precisely that it disregarded law (in the sense of positive legal norms) in order to realize law (through norms of realization).[399] We are, in other words, back at the duality thesis from 1914. At the same time, Schmitt underlined that for the realization, the dictator "cannot, when it is really a matter of extreme cases, take into consideration any general norms". To realize a concrete result means to "intervene in the causal sequence of events with measures whose correctness is based on their expediency […]" – dictatorship was built on technical rationality. It was governed by "concrete circumstances" ("*die 'Lage der Sache'*") and an ultimate purpose ("*Zweck*").[400] Thus, Schmitt's concept of the dictatorship was situated, to borrow from his own terminology, at the threshold between normativity ("law") and facticity ("life") – or, perhaps more precisely, it was a concept of decisionism. His comments on the commissary dictatorship and its relation to the problem of the realization of law are illuminating:

> The dictatorship protects a particular constitution against an attack that threatens to abolish this constitution. Here, the methodological distinctiveness of the problem of realization of law as a legal problem is most evident. The action of the dictator shall create a condition where the law can be transformed into reality, because every legal norm presupposes a normal condition as a homogenous

397 Schmitt (1964) XVI. An English translation by Michael Hoelzl and Graham Ward titled *Dictatorship* was published at Polity in 2014. For some of the quotes I am referring to, the translation is, in my opinion, slightly inaccurate. Therefore, I will use my own translations.
398 Schmitt (1964) 136.
399 *Ibid.* XVII. The parentheses contain my interpretation.
400 *Ibid.* 11 and 18.

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> medium where it is valid. As a result, the dictatorship is a problem of the concrete reality without ceasing to be a legal problem. The constitution can be suspended without ceasing to be valid, because the suspension only implies a concrete exception.[401]

Another interesting point about the book is that Schmitt launches a distinction between two types of natural law: a natural law of justice (*Gerechtigkeitsnaturrecht*) and a natural law of science (*wissenschaftlichem/naturwissenschaftlich-exaktem Naturrecht*).[402] The natural law of justice, which he associated with the Monarchomachs and Grotius, was based on a certain material idea of justice and was concerned with the substantive content of a decision. For the natural law of science, conversely, which he associated with Hobbes (elsewhere described as "a great and truly systematic political thinker"[403]), the crucial point was the fact that a decision was made at all. The latter was an element that had been present in Schmitt's thinking already in *Statute and Judgment*, when he had spoken of "aleatoric" issues. This indicates a line of thought dating back to 1912. What is more, it seems that the natural law theory that was hinted at in 1914 is now, in 1921, openly transformed into a full-blown, Hobbes-inspired decisionist theory.[404]

The following year, in 1922, Schmitt published his *Political Theology*.[405] Now, one year after Kaufmann had published his critique of

401 *Ibid.* 136–137 (emphasis in original). Schmitt uses the term "dictatorship", but judging from the content, he is writing about commissary dictatorship. A commissary dictatorship was supposed to protect and restore an already existing constitution ("the unconditioned commissioner of action for a pouvoir constitué"), while a sovereign dictatorship was supposed to create the condition for the establishment of a new constitution ("the unconditioned commissioner of action for a pouvoir constituant"), see 137 and 146.

402 *Ibid.* 21–22, also for the following.

403 Schmitt (1963) 64.

404 Delacroix (2005) 38 writes that the "disappearance [of the "idea of law"] in Schmitt's later works will mark the beginning of a radicalised 'decisionist' theory of normativity."

405 Carl Schmitt, *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität* (first published 1922, 2nd edn, Duncker & Humblot 1934). In the following, I quote from the English translation: *Political Theology. Four Chapters on the Concept of Sovereignty* (first published 1985, George Schwab tr, 2nd edn, The

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neo-Kantianism, Schmitt turned to a more outspoken criticism of both mainstream constitutional thinking and Kelsen's theory more specifically.[406] A major point for Schmitt was that sovereignty could only be understood in relation to the exception, a point that was concisely formulated in the famous opening line: "Sovereign is he who decides on the exception".[407] Thus, the exception as a phenomenon was of legal significance, and could not be discharged as mere sociology. But so-called rationalistic legal thinking had shied away from issues like these, Schmitt claimed, epitomized by Anschütz, who had written the following on how to proceed in cases of budget conflicts, that is, where the state organs were unable to adopt a budget: "Public law ends at this point."[408] Schmitt was of a radically different view: "Precisely a philosophy of concrete life must not withdraw from the exception and the extreme case, but must be interested in it to the highest degree." Moreover, he favoured the exception over the rule because the latter "proves nothing" while the former "proves everything": "In the exception, the power of real life breaks through the crust of a mechanism that has become torpid by repetition."[409]

Schmitt levelled a separate criticism against Kelsen and his *The Problem of Sovereignty* (1920) and *The Sociological and the Legal Concept of the State* (1922).[410] A starting point for Schmitt was that

University of Chicago Press 2005). Pagination from the translation is kept in brackets.

406 In the original version and in a version printed in an anthology in 1923, Schmitt had referred to and approved of Kaufmann's critique. In the reprint from 1934, with the preface dated November 1933, these references were omitted. As Neumann (2015) 42 (footnote 196) – from where I also take the foregoing information – writes, this can probably be explained both by the hostile relationship between the two since the late 1920's as well as Schmitt's professional ambitions in the Third Reich – Kaufmann had a Jewish family background and was not citable.

407 Schmitt (1934), *Politische Theologie* 11 [tr. 5].

408 *Ibid.* 22 [tr. 15]. Anschütz had claimed this in Georg Meyer and Gerhard Anschütz, *Lehrbuch des deutschen Staatsrechts* (7th edn, Duncker & Humblot 1919) 906.

409 Schmitt (1934), *Politische Theologie* 22 [tr. 15].

410 Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Mohr 1920) and Hans Kelsen, *Der soziologische und der juristische Staatsbegriff* (Scientia Verlag 1922).

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"[t]he connection of actual power with the legally highest power is the fundamental problem of the concept of sovereignty".[411] Kelsen had, so Schmitt claimed, escaped from this fundamental problem by his strict separation of the legal and the sociological sphere; a dualism of methods that resulted in "a monistic metaphysics". According to Schmitt, Kelsen might thereby have succeeded in achieving a unified system, but this was only a sham, made possible by the fact that he had avoided the real problem. And his negation of the problem of the sovereignty was "in fact the old liberal negation of the state vis-à-vis law and the disregard of *the independent problem of the realization of law* [*Rechtsverwirklichung*]."[412] With this reference to the problem of the realization of law, we find, once again, elements of continuity from Schmitt's prewar writings. But now it had become clear that he was opting for a different path than Kelsen.[413] Whereas Kelsen would, as noted earlier, try to solve the "*Sein*/*Sollen*"-problem by inserting the basic norm, Schmitt's solution was still, and now more definitively, the state as the bearer of sovereignty.

In 1927 and 1928, Schmitt published two of his most famous works: the essay on 'The Concept of the Political', and *Constitutional Theory*, his main constitutional treatise.[414] Again, some of the elements are worth reading in light of his earlier writings. The opening line of 'The Concept of the Political' is well known: "The concept of the state presupposes the concept of the political."[415] Further, the concept of the political was to be defined through specifically political categories:

411 Schmitt (1934), *Politische Theologie* 27 [tr. 18].

412 *Ibid*. 29–31 [tr. 19–21] (emphasis added).

413 Paulson (2015) 518 also sees *Political Theology* as a turning point in the relation between Schmitt and Kelsen.

414 'The Concept of the Political' was originally a speech delivered in 1927, published the same year in *Archiv für Sozialwissenschaft und Sozialpolitik*. It was then printed anew in book format in 1932 and 1933 with some adjustments and enlargements and reprinted in 1963. See Neumann (2015) 79–80.

415 Carl Schmitt, *Der Begriff des Politischen. Text von 1932 mit einem Vorwort und drei Corollarien* (Duncker & Humblot 1963) 20 [tr. 19]. Here and in the following, I quote from an English translation: Carl Schmitt, *The Concept of the Political: Expanded Edition* (George Schwab tr, The University of Chicago Press 2007). I refer to the pagination of the English version in brackets.

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"The specific political distinction to which political actions and motives can be reduced is that between friend and enemy."[416] This friend/enemy-distinction – a distinction wherein the *Sein* and *Sollen* dichotomy was replaced by a distinction of *Sein* and *Nicht-Sein*, as one scholar puts it –[417] was, moreover, a matter of decision.[418] If we go back to *The Value of the State* from 1914, Schmitt had written about "law, state, and individual" as a series or a row, and made it clear that the (natural) law was prior to the state.[419] If we compare these approaches, it seems that in 1927, the concept of the political had replaced (natural) law as the presupposition of the state. But this makes sense, as both the natural law concept from 1914 and the concept of the political from 1927/1932 were decisionist in their nature.

In *Constitutional Theory*, Schmitt worked out a conceptual apparatus from which several important facets of his legal thinking can be deciphered. First, he drew a distinction between an absolute and a relative concept of the constitution. The absolute concept "expresses a (real or reflective) whole", while the relative concept "means the individual constitutional law". The absolute concept of the constitution could then either be seen as "the *complete condition* of political *unity* and *order*" or as "a closed *system of norms*".[420] Schmitt rejected both a relative concept of the constitution and the normativist absolute concept. The latter he regarded, as I will come back to soon, as part of bourgeoise heritage. He preferred a positive and absolute concept of the constitution, where the constitution "originates from an *act of the constitution-making power*" which "determines the entirety of the political unity in regard to its peculiar form of existence through a

416 Schmitt (1963) 26 [tr. 26].

417 See Hasso Hofmann, *Legitimität gegen Legalität* (2nd printing with a new preface, Duncker & Humblot 1992) 21, here quoted from Paulson (2016) 510.

418 Schmitt (1963) 27 and 30 [tr. 27 and 29–30].

419 Schmitt (1914) 2 and 46 [tr. 166 and 193], see on the latter page: "The law precedes the state".

420 Carl Schmitt, *Constitutional Theory* (first published 1928, Jeffrey Seitzer tr, Duke University Press 2008) 59 [or. 3] and 67 [or. 11] (emphasis in original). The bracketed pagination, which I take from the translated version, refers to the original publication.

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single instance of decision".[421] The constitution-making power was the political will or the political unity, whose value was drawn purely from its concrete political existence, that is, its ability to distinguish between friend and enemy.[422] The constitution-making act was not constitutive for the political unity but rather the "conscious determination of the particular complete form, for which the political unity decides."[423] While the constitution-making decision "requires no justification via an ethical or juristic norm" and instead "makes sense in terms of political existence", "[t]he validity of any additional constitutional rule is derived from the decisions of [the political] will". Thus, "[t]he decisions as such are qualitatively different from the constitutional norms that are legislated on their basis."[424] Important is also Schmitt's insertion of a dynamic element into his theory, by pointing out that the political will "remains alongside and above the constitution" and that every "genuine constitutional conflict", every "gap in the constitution", and every "unforeseen case, whose decision the foundational political decision effects", could only be decided by the political will.[425] With ideas like these, where the validity of the Constitution was derived from a continuously developing will of the political unity, Schmitt had reached a point where the entire classical constitutionalism was decisively left behind.

Moving on to Schmitt's closely related critique of the normativist absolute concept of the constitution – the constitution as "a closed system of norms" –, he saw this way of thinking as part of a liberal bourgeois *Rechtsstaat* ideology and a rationalist idea of the abstract,

421 *Ibid.* 75 [or. 21] (emphasis in original).
422 The link to the friend/enemy-distinction is pointed out by Neumann (2015) 106.
423 Schmitt (2008) 75 [or. 21], see also 125 [or. 75–76].
424 *Ibid.* 125 [or. 76] and 136 [or. 87].
425 *Ibid.* 125–126 [or. 77]. Elsewhere, Schmitt defined one possible meaning of the constitution (in the type of an absolute, existential concept) as "the principle of the *dynamic emergence* of political unity, of the process of constantly renewed *formation* and *emergence* of this *unity* from a fundamental or ultimately effective *power* and *energy*" – here he also referred to Smend's theory of integration. See p. 61 [or. 5–6] (emphasis in original).

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impersonal law as sovereign.[426] The bourgeois *Rechtsstaat* was a component of modern constitutions, based on a distributional principle of basic rights and an organizational principle of division of powers.[427] But according to Schmitt, it had to be complemented with a political form, for in itself, it was purely negative and empty: "The principles of bourgeois freedom could certainly modify and temper a state. Yet they cannot found a political form on their own."[428] A certain element of emptiness was also inherent in the *Rechtsstaat* concept of law as "a legal (an appropriate, reasonable) rule of a general character", in contrast to the political concept of law as "concrete *will* and *command* and an act of sovereignty". In other words, the *Rechtsstaat* theory was only able to postpone the crucial issue of sovereignty.[429]

Could it, in Schmitt's eyes, be something even emptier than bourgeois *Rechtsstaat* legal thinking? Yes, indeed, and by now perhaps not very surprisingly: the legal thinking of Kelsen. Despite his criticism of the classical bourgeoisie *Rechtsstaat* ideology from previous centuries, Schmitt acknowledged that it at least managed to form a "logically consistent normative order" because it was built on norms that were "*correct* and *reasonable* and can contain a genuine *command* without regard to the actually existing, that is, positive-legal reality." In other words, with their use of abstract concepts, they were able to form systems, order, and unity. Kelsen, by contrast, had expunged the substantial-normative elements and replaced it with a theory of positivity and form, focusing merely on the given, positive legal norms and their validity. For Schmitt, this constituted a degeneration into a "tautology of raw factualness: something is valid when it is valid and because it is valid."[430]

It is no great surprise that it came to a confrontation between Schmitt and Kelsen, two of the sharpest legal thinkers from the Weimar

426 *Ibid.* 62 f. [or. 7 f.].
427 *Ibid.* 170 [or. 126–127].
428 *Ibid.* 235 [or. 200].
429 *Ibid.* 187 [or. 146] (emphasis in original). See also Schmitt (1963) 69 for a similar critique of individualistic liberalism as a "negation of the political".
430 Schmitt (2008) 64 [or. 8–9] (emphasis in original).

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period. Their brilliant minds and sharp pens were perhaps the only things that united them; apart from that, they were so to say inhabiting different legal planets. Much could be said about Kelsen and Schmitt, but I will focus specifically on a few aspects of their controversy over "the guardian of the constitution" from the final years of the republic – "the culmination, in the Weimar period, of the ever greater discord between them."[431] As noted in the previous section on Heinrich Triepel, Kelsen had presented an unwavering defence of constitutional review at the meeting of the Association of German Teachers of State Law in Vienna in 1928. Schmitt, on the other hand, published several writings over the next years where he rejected the desirability of a German constitutional court and argued that it was rather the President who ought to be – and was – the guardian of the constitution. The most famous of these writings is *The Guardian of the Constitution* from 1931.[432]

Schmitt's point of departure in *The Guardian of the Constitution* is interesting in our context, as it contained certain comparative legal reflections. Schmitt started out by warning those who saw the US Supreme Court as a model for constitutional review in Germany, and sought, in his own words, to "prevent unthinking transfers and mythologizations."[433] The Supreme Court had "defended the principles of bourgeois social and economic order, and attempted to protect them against the legislator", and it had done so by reviewing the justice and reasonableness of legislation by using general principles and fundamental considerations. These principles and considerations "can only be called 'norms' if one is willing to abuse the term", Schmitt claimed.[434] He filed a similar charge against the second main part of the

431 Paulson (2016) 512. On the controversy, see also Lars Vinx, *The Guardian of the Constitution. Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge University Press 2015) 1–21.

432 Schmitt also published two articles on the topic in 1929, see Paulson (2016) 525 and 545 for references.

433 Schmitt (1969), *Der Hüter* 14 [tr. 82]. Here and in the following, I use the translation from Vinx (2015) with pagination provided in brackets.

434 *Ibid.* 13–14 [tr. 81–82].

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Weimar Constitution, which contained constitutional rights and duties, where

> we find a most perplexing juxtaposition of a large diversity of basic principles, individual material provisions, programmes, guidelines, and dilatory compromises that defer a decision. The word 'norm' would lose any value and usefulness if one decided to designate all these different propositions as 'norms'.[435]

And this leads us to a crucial point in Schmitt's argument against constitutional review by courts. According to Schmitt, "[a]ll adjudication is bound to norms and the possibility of adjudication ends as soon as the content of the norms themselves starts to get unclear and disputed."[436] In other words, Schmitt introduced a criterion of an undisputed subsumption of facts under general norms in order to count as adjudication. If judges went beyond these "pure legal questions" and into the arena of "political decisions", they would encroach upon the competences of the legislator. This would alter the judges' constitutional position and threaten their independence, so Schmitt argued.[437] Based on these arguments, Schmitt arrived at the conclusion that constitutional review by a court would be something different than "adjudication" (*Justiz*), and that the establishment of a constitutional court was undesirable.

Schmitt's alternative guardian of the Weimar Constitution was the president, who filled the function of a neutral power – a *pouvoir neutre, intermédiaire* and *régulateur*, a concept he took from Benjamin Constant.[438] The demands for a constitutional court, Schmitt argued, was in reality a demand for a neutral and independent authority that could secure a certain permanence and stability.[439] The president was already endowed with these functions, and in addition, he served as a democratically elected representative of the people as a political unity.

435 *Ibid.* 44 [tr. 115].
436 *Ibid.* 19 [tr. 87].
437 *Ibid.* 32, 36–37, 19 f. and 155–156 [tr. 101, 102, 87 f. and 168].
438 On this concept, see *ibid.* 132 f. [tr. 150 f.].
439 *Ibid.* 154 [tr. 166–167].

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The people as a political unity was "capable of expressing its will, and [...] supposed to come together across the pluralistic divisions, in the decisive moment, and make itself prevail." The authority of the president had "the opportunity to connect itself immediately with this unified political will of the German people and to act, on that basis, as the guardian and the preserver of the constitutional unity and wholeness of the German people."[440] This fits well with his idea developed in *Constitutional Theory* of the political will of the unified people as a permanent factor remaining "alongside and above the constitution", awakening in decisive moments to make a true political decision. They could do so, Schmitt seems to argue, through the president whom they had elected.

In his rejoinder, Kelsen attacked Schmitt's arguments on several points. In the following, I will concentrate on two arguments that were closely related: his claim that Schmitt erroneously distinguished between legal and political questions and his claim that Schmitt *failed* to distinguish between, and rather mixed up, legal theoretical and legal-political arguments. To the first point, Kelsen's claim was that Schmitt operated with an inept concept of "adjudication"; it was completely absurd to claim that only cases where the subsumption was undisputed could count as legal adjudication.[441] Along the same lines, he refuted Schmitt's contention that there was a qualitative difference between legal and political questions. "If one conceives of 'the political' as the authoritative resolution of conflicts of interest,", he wrote, "i.e. if one conceives of it, to use C.S.'s terminology, as 'the decision', then one should admit that every court judgment contains, to a higher or lesser degree, an element of decision, an element of an exercise of power."[442]

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440 *Ibid.* 159 [tr. 172–173].

441 Hans Kelsen, 'Wer soll der Hüter der Verfassung sein?' (first published in *Die Justiz* (1930/1931) 576, reprinted in Hans Kelsen, *Wer soll der Hüter der Verfassung sein? Abhandlungen zur Theorie der Verfassungsgerichtsbarkeit in der pluralistischen, parlamentarischen Demokratie*, Robert Chr. Van Ooyen ed, Mohr Siebeck 2008 58), 69 [tr. 186]. Here and in the following, I use the translation from Vinx (2015) with pagination provided in brackets.

442 *Ibid.* 67 [tr. 184]. Kelsen saw an internal contradiction in Schmitt's arguments at this point. Schmitt (1969), *Der Hüter* had namely in fact also asserted that "every

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The basis for this argument was his *Stufenbau* theory, wherein every decision in the legal hierarchy contains both an element of application of law and an element of discretionary creation of law. Consequently, the difference between the legal and the political elements of a decision was of a quantitative, not a qualitative nature.[443] Now, very interestingly, Kelsen was ready to raise a charge against Schmitt that he himself and the Vienna school had been subjected to several times, and which Kelsen had refuted in 1929 when he even flirted with ideas from the free law movement,[444] to wit: With his claim about the "purity" of legal decisions, Schmitt was advancing a theory about the judge as a legal automat, a theory that was a fiction "unmasked long ago".[445] Moreover, Schmitt's way of deducing consequences from an abstract concept, *in concreto* the contention that constitutional review was undesirable because it was not "adjudication", amounted to a jurisprudence of concepts.[446] Schmitt, one can read between the lines, was guilty of legal formalism!

By attacking and refuting the distinction between legal and political questions as arbitrary and unsound, Kelsen had tried to undercut one of Schmitt's main arguments against constitutional review. And now comes the second and closely related point, where Kelsen, after having declared that the Emperor was naked, critically asked *why* he was wearing such "clothes". Or more precisely, he was wondering why Schmitt was dressing up the president with garments originally tailor-made by monarchical legal theorists to strengthen the monarch's

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decision, even that of a trial-deciding court that subsumes a concrete matter of fact, contains a moment of pure decision that cannot be derived from the content of the norm. I refer to this as 'decisionism'", see 45–46 [tr. 117.]. According to Kelsen (2008) 73 [tr. 190], this contradicted Schmitt's earlier argument about qualitative difference between legal and political decision-making.

443 Kelsen underlined that a constitutional court would have a way *more* political character than ordinary courts, see p. 68 [tr. p. 185]. He also stressed that constitutional norms should not be too broad and open-ended, in order to narrow the scope of political discretion, see p. 76 [tr. p. 193], cfr. also, and even more outspoken, Kelsen (1929), 'Wesen und Entwicklung' 70.

444 See at footnote 153.

445 Kelsen (2008), 'Wer soll der Hüter…' 72 [tr. 189].

446 *Ibid.* 65, see also 68 [tr. 182 and 185].

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position by bestowing on him the role of a *pouvoir neutre* between the Parliament and the Government.[447] The answer was a familiar Kelsenian motif: By trying to "infer a desired institutional design from some presupposed legal concept", Schmitt was committing "the typical mistake of failing to distinguish legal theory and legal politics."[448] The entire essay culminated in a forceful defence of the separation between scientific analysis and political argumentation:

> I criticized C.S.'s arguments only insofar as they make use of certain methods, in order to further this political purpose [i.e. to expand the power of the president and reject constitutional adjudication], that make a claim to be sociological analysis and state-theoretical constitutional interpretation, methods that, in short, purport to offer a 'scientific treatment' of the subject. The criticisms offered here aim to show, by focusing on an especially instructive example that is highly symptomatic of the contemporary state of our theory of the state and of public law, how important it is to insist on the strictest separation of scientific inquiry from political value judgement. The careless mixing of science and politics that is so popular nowadays is the typical modern method of forming ideologies. […] The whole value of science, which is the reason why politics tries – again and again, driven by the best ethical motives and in the interest of causes honestly held to be good – to link itself to science, this value, *sui generis* and altogether distinct from ethical-political value, stands and falls with science's willingness to remain strong enough, in this almost tragic conflict, to resist the temptation to mix with politics.[449]

447 On this monarchical theory, see *ibid.* 59–60 [tr. 175–177]. Kelsen found Schmitt's theses particularly remarkable in light of the fact that Schmitt had emphasized several places that one should be very careful with adopting concepts and theories from the 19th century due to the considerably altered political, social, and legal circumstances, see p. 61–62 [tr. 178–189].

448 *Ibid.* 74 [tr. 191].

449 *Ibid.* 105 [tr. 220–221].

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3.4 Brief summary

Towards the end of the 19th century and up until First World War, Germany underwent tremendous social, economic, cultural and political transformations. After the war, the political situation became intensified, and the Weimar republic was ridden by crises. In the field of legal thinking, these developments were paralleled by intense methodological and ideological debates over the concept and nature of law, legal interpretation and reasoning, and the role and function of legal science. More precisely, the legal debates reacted to the social developments. With a more active legislator, both in the sense that more legislation was passed and in the sense that this legislation to a larger extent aimed at socially oriented intervention, it is no wonder that many scholars felt a need to think anew about the fundamental aspects of legal science. And when the political and constitutional order was completely rearranged after the war, the debates were distinctly sharpened.

What brought together the many legal critics in their search for "life" was the view that legal thinking had become too confined and self-reliant. The ideas about what sort of "life" law was supposed to turn towards varied, however, considerably. Just like the private law scholars went in various directions, so did the constitutional scholars. Whereas Erich Kaufmann spoke of a "higher objective order", Rudolf Smend had in mind a societal "integration" that could perhaps be likened to a kind of organic state theory. Heinrich Triepel wanted to approximate law and politics, while Carl Schmitt's writings circled around decisions, unity, and order. Writing on another popular legal trope from the late 19th century and onwards – legal *purposes* –, Thomas Wischmeyer has argued that the concept of a legal "purpose" owed its popularity to the fact that its vagueness and semantic openness offered an arena where a host of ideas, models and ideologies could be discussed under one heading.[450] Something similar could indeed be said about "life" in a legal context.

450 Wischmeyer (2015) 163.

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The turn towards "life" was not uncontested, however. Kelsen's many interventions have illustrated this. For Kelsen, the different approaches to legal thinking had everything to do with political ideology – whether one preferred democracy or autocracy (as was the grand distinction in Kelsen's political theory). The "life"-orientation was, according to Kelsen, part of an autocratic thinking. In one of his many texts on democracy, from 1955, he made this utterly clear, when he "referred" how the autocratic thinkers would reason: "Pulsating life can neither be grasped nor regulated by general rules. Everything depends on the concrete action, on the mystery of the creative *kairos*".[451]

451 Hans Kelsen, 'Foundations of Democracy' (1955) in Matthias Jestaedt and Oliver Lepsius (eds), *Hans Kelsen. Verteidigung der Demokratie* (Mohr Siebeck 2006) 289 (emphasis in original).

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