YOUNG ACADEMICS

European Legal Theory 2

Marius Mikkel Kjølstad

... but Life gives Spirit?

Debating "Law" and "Life" in American and German Constitutional Legal Scholarship ca. 1900–1930

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With a Foreword by Prof. Lorenz Schulz

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Foreword

The Frankfurt Master programme in Legal Theory reflects on the foundations of law in various contexts. The history of this reflection, of legal doctrine and law itself is of particular importance. The academic environment in Frankfurt allows for an almost Hegelian intertwining of theory and history. Besides a strong legal history institute within the university's law faculty there is also and above all the Max Planck Institute for Legal History and Legal Theory which rests on the three pillars of legal history, comparative law and legal theory. Marius Mikkel Kjolstad's master thesis demonstrates this peculiarity of Frankfurt's legal academia. It has been supervised by Michael Stolleis who died in 2022 just before his 80th birthday. He was one of the leading German legal historians and has directed the Max Planck Institute for almost two decades.

He would have been entitled to write this preface. Now it is written by the second supervisor of the thesis who is not a legal historian but has done extended research in American pragmatism in philosophy and law. The preface essentially follows the spirit of Stolleis' assessement.

The thesis deals with the methodological upheavals in jurisprudence between about 1870 and 1930. This period is still of great importance for the contemporary history of German and American law. Some of today's methodological debates can be understood as a resumption of the scholarly reflections at that time. For demonstrating the upheaval Kjolstad takes the example of constitutional law.

He begins with the general, literary and legal situation around 1900, which was strongly influenced by the philosophy of life. This philosophy almost celebrated 'life'. In the methodological debates, this situ-

ation lead into a turning away from the jurisprudence of concepts which was suddenly perceived as unrealistic and condemned as constructivist. What the reference to 'life' implied in a positive sense remained unclear. The historical milestones associated with the names of Ihering in civil law and Franz von Liszt in criminal law are well known. The keywords for the new approaches are jurisprudence of interests and school of free law. In constitutional law, the names of Gierke, Hänel, the young Smend, Erich Kaufmann and Heinrich Triepel are associated with a turning away from legal positivism as practised by Gerber and Laband towards a 'method dispute' (Methodenstreit) in the German public law academy of Weimar between 1925 and 1930.

In the US, the development between 1870 and 1900 is analogous. In this case, the evolution is linked to an accelerating industrialisation accompanied by waves of immigration that had an impact not only on law in the jurisprudence of the Supreme Court but also on legal scholarship (Langdell, Carter, Cooley, Tiedeman). In legal theory and philosophy, this development is represented by American tradition of pragmatism. This specific tradition is connected in law with O.W. Holmes and in philosophy with William James and Charles Peirce. They all gathered at the Metaphysical Club in Cambridge in the early 70s of the 19th century, the nucleus of American pragmatism.

Kjølstad approaches his comparison with the help of preliminary remarks on legal history, comparative law and methodology (part 2). He is aware of the difficulties to identify similarities and differences beyond merely being selective. These preliminary remarks demonstrate at the same time an impressive awareness of the problem and an astonishing command of the literature.

In the third part, Kjolstad adresses Germany and the constitutional changes between 1871 and 1918 which accompanied the transition from an already weakly developed liberal state to an industrial interventionist state. His analysis goes hand in hand with a gradually growing criticism of the positions of Gerber and Laband that we find in Hänel, Gierke, Triepel and Smend. Obviously, there was also a fork in the road between Austria and Germany. In Austria, Kelsen's traditional

legal positivism was theoretically sharpened, while in Germany constitutionalists headed for a connection with 'life'. For this purpose, the above-mentioned 'anti-positivist' authors are used, while the thesis does not deal with Hermann Heller who was not part of the same time frame, at least with his 'Staatslehre' of 1934.

In the fourth part, similar questions are raised about developments in the United States. There, too, rapid industrialisation, the opening up of the West, the Civil War and social problems pushed the science of constitutional law in a new direction. Langdell, J. C. Carter as legal thinkers, Cooley and Tiedeman as constitutional lawyers are consulted. For the period between 1900 and 1937, the names of Oliver Wendell Holmes, Roscoe Pound, Benjamin Cardozo and Felix Frankfurter are particularly well known today. In the US as well, there was a turn towards 'life', albeit as the sociological turn legal realism, of a turn towards the 'living constitution', which overcame the traditional formal strictness in dealing with the US Constitution.

Kjølstad then provides a comparative, highly interesting summary. He mentions the parallel wars (Franco-German and the US Civil War), the economic and social factors, i.e. the growing difference between the constitutional text and the constitutional reality. But the legal cultures are very different. In Germany, 19th century professorial law, system thinking and an unfamiliar approach to a democratically legitimated constitution dominate from 1919 onwards. By contrast, the United States are characterised by the dominance of Supreme Court jurisprudence, case law, and the much weaker position of constitutional doctrine.

The study concludes with some reflections on the importance of 'rationality' in law. This question was much debated in Germany in those decades. Max Weber brought rationalisation to the fore while Carl Schmitt, with his emphasis on 'decision' and the 'saving act', completely abandoned the claim for rational decisions. But the school of free law also propagated strong elements of decision-making alongside or even against the letter of the law, thus relativising the requirement of 'rationality' in the traditional sense. This movement can also be seen in

the US, even as a 'leitmotif', as Kjolstad says, though less pronounced and usually in the sense that social and political reality must be taken into account in jurisprudence. Here, the thesis also reflects on the dichotomy mentioned in the title between the letter and the 'spirit' of the law, between reason and meaning, between detachment from life and proximity to it.

For Stolleis as well, the thesis is an astonishing achievement by a young Norwegian lawyer who has ventured into such a large comparative topic in the German and American legal systems. Stolleis highlights Kjølstad's command of the literature, his familiarity with the underlying historical events and his consistent results. Last not least, the reader will be impressed by the original parallels drawn to literature, be it to Hermann Hesse or Franz Kafka.

Frankfurt on Main, 25 October 2024

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Preface

On this day five years ago, this study was submitted as my Master's thesis within the LLM Programme in Legal Theory at the Goethe University, Frankfurt am Main. For the invitation now to publish the text in the book series "Young Academics: European Legal Theory", I am grateful to Prof. Dr. Lorenz Schulz, Programme Director of the LLM. I would also like to take the opportunity to thank Professor Schulz as well as the LLM teachers and fellow students in 2018/2019, who made my stay in Frankfurt unforgettable and formative. For the writing of this thesis, the opportunity to use the excellent library services at the Max Planck Institute for Legal History (now also Legal Theory) was invaluable.

I extend my deepest thanks to Michael Stolleis (1941–2021), who supervised the work. The opportunity to meet a scholar and person like Stolleis, with his kindness, generosity, and warmth, as well as the attention he paid to my work and his helpful suggestions – one can just imagine the impression this made on a young student.

Given the format of this book series – publication of Master's theses from the LLM Programme – I have chosen to keep the text more or less as I submitted it in 2019. I have only made some minor corrections and adjustments, and included a few additional references.

Oslo, 15 September 2024

Marius Mikkel Kjølstad

Contents

Abbreviations

AM. L. REV.	*American Law Review*
AöR	*Archiv des öffentlichen Rechts*
B. U. L. REV.	*Boston University Law Review*
GER. STUD. REV.	*German Studies Review*
HARV. L. REV	*Harvard Law Review*
ILL. L. R.	*Illinois Law Review*
LAW & HIST. REV.	*Law and History Review*
LQR	*Law Quarterly Review*
MICH. L. REV.	*Michigan Law Review*
Or.	Original
OR. L. REV.	*Oregon Law Review*
Tr.	Translation
U. PA. L. REV.	*University of Pennsylvania Law Review*
VA. L. REV.	*Virginia Law Review*
VT. L. REV.	*Vermont Law Review*
VVDStRL	*Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*
WIS. L. REV.	*Wisconsin Law Review*

1 Introduction

"In him was life, and that life
was the light of all mankind."

John 1:4

1.1 "Life" – a socio-cultural theme at the beginning of the 20th century

In Hermann Hesse's *Steppenwolf* from 1927, we meet Harry Haller, a man driven into a state of crisis by fundamental contradictions both within his own mind and society at large. Harry leads an intellectual-bohemian life, where classical literature and art, usually digested together with alcohol and cigars, form the essential parts of daily – and nightly – life. He despises the direction the cities have been going in, with their storehouses, neon advertising signs, buildings occupied by lawyers, doctors, and barbers, their cinemas, variety shows, and dance halls with loud jazz music and foxtrot-dancing masses. He deplores the shallow and self-righteous bourgeois way of life, marked as it is by a belief in reason, progress, and evolution, but at the same time detached from reality. He is, in short, a stranger; a "stray wolf of the steppes, now part of the herd of city-dwellers".[1]

1 Hermann Hesse, *Steppenwolf* (first published 1927, David Horrocks tr, Penguin Books 2012) 18. Harry's attitude towards the bourgeoisie way of life was, however, ambiguous. He loved the smell of plant pots, floor polish, turpentine, and mahogany, something that reminded him of his childhood, see p. 15 f. This tension between the world of the bourgeoisie home, with its calm atmosphere, and the more adventurous and unpredictable world outside, is also something that Hesse thematised in his

Originally, Harry's way of living was a result of his yearning for independence and preservation of freedom. Yet freedom can be paradoxical and turn into its antithesis, and for Harry, his isolated position has turned out to be a "living death". He has become a "melancholy hermit in his cell crammed full of books" and "an outsider to all social circles, loved by no one, viewed with suspicion by many, in constant, bitter conflict with public opinion and public morality". His desperation has driven him so far that he considers leaving the world.[2]

But then he meets Hermione, a lifebuoy of a muse who leads him away from the lethal razor and turns him towards life instead. "You have strange ideas of what it means to live!", she exclaims when Harry tells her that his life has consisted of studying at the university, making music, reading and writing books, and travelling.[3] She guides him into a new form of life, and the first step of this metamorphosis is, tellingly, that they buy a gramophone and that she teaches him the foxtrot in his attic. At first he is hesitant, for this is a real clash of civilizations: "To expect me to tolerate the sound of American hit-tunes in my room, my refuge, my thinker's den with its volumes of Novalis and Jean Paul, and to dance to them, was simply too much to ask."[4] But he gives in, perhaps because he realizes how Hermione has shattered "the clouded glass cloche that covered my corpse-like existence" and thereby offered "an open door through which life could get in to me".[5]

In the book's fictitious preface, the editor – the nephew of the woman from whom Harry rented his attic, who has decided to publish Harry's notebooks after he has suddenly disappeared – writes that the notebooks "are a document of our times, for today I can see that Haller's sickness of mind is no individual eccentricity, but the sickness of our times themselves, the neurosis of that generation to which Haller belongs." Harry himself had told him that "[n]ow, there are times when

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Demian (first published 1919, Suhrkamp Taschenbuch 1974), where the first chapter is – tellingly enough – titled "two worlds".

2 *Ibid.* 52, 73 and 140.

3 *Ibid.* 95.

4 *Ibid.* 125.

5 *Ibid.* 110.

a whole generation gets caught to such an extent between two eras, two styles of life, that nothing comes naturally to it since it has lost all sense of morality, security and innocence."[6]

And there is perhaps something to it. Harry's turn from the isolated attic full of books towards the pulsating and vibrant *life* of the dance halls can be seen as mirroring a more general socio-cultural critique that dates back to around the turn of the century.[7] In this period, the intellectual sphere was full of "life"; as a concept, a motive, or an idea, "life" permeated the philosophy, literature, fine arts, music, theology, and pedagogy of the days.[8] In the arts, a number of avant-garde movements entered the scene, and they thematized motives like youth, spring, landscape, nakedness, sexuality, dance, experience, and, finally, life.[9] One example was the art nouveau, which was "deliberately revolutionary, anti-historicist, anti-academic" and which used "metaphors of nature, youth, growth and movement so characteristic for the time."[10] Furthermore, the arts became influenced by the machine and turned increasingly into a commercialized mass phenomenon. The uneasiness and insecurity are very much present in for instance Filippo Marinetti's (1876–1944) manifesto of futurism from 1909. The manifesto declared that "the beauty of the world has been enriched by a new form of beauty: the beauty of speed". "Time and Space died yesterday", the pamphlet followed up, and called for the futurist movement to "destroy

6 *Ibid.* 23.

7 Hermann Hesse (1877–1962) wrote *Steppenwolf* in the virulent atmosphere of the 1920's, and interwar topics are present in the book, see e.g. *ibid.* 85 f. But Hesse also points back to the turn from the 19th to the 20th century, for instance with the following on p. 23–24: "A man of Nietzsche's mettle had to endure our present misery more than a generation in advance. Today, thousands are enduring what he had to suffer alone without being understood".

8 Karl Albert, *Lebensphilosophie. Von den Anfängen bei Nietzsche bis zu ihrer Kritik bei Lukács* (new edn, Verlag Karl Alber 2017) 7; Elenor Jain, *Das Prinzip Leben. Lebensphilosophie und Ästhetische Erziehung* (Peter Lang 1993) 51.

9 Albert (2017) 7 with further reference to Dolf Sternberger, *Über Jugendstil* (Insel-Verlag 1977) 108; Modris Eksteins, *Rites of Spring. The Great War and the Birth of the Modern Age* (Doubleday 1989) 31 and 83.

10 E. J. Hobsbawm, *The Age of Empire 1875–1914* (first published 1987, Sphere Books Ltd 1991) 229–230.

museums, libraries, academies of every sort, and to fight against moralism, feminism and every utilitarian or opportunistic cowardice."[11]

In the field of philosophy, a new, critical life philosophy (*Lebensphilosophie*) emerged in Europe around the turn of the century, most notably associated with Friedrich Nietzsche (1844–1900), Wilhelm Dilthey, (1833–1911), and Henri Bergson (1859–1941).[12] Nietzsche, who followed in the footsteps of Arthur Schopenhauer (1788–1860), criticized the abstract philosophy that was taught at the universities, and claimed that the criterium for a true critical philosophy was "whether one can live by it".[13] Mainstream philosophy, he further contended, had gone astray and was valuing knowledge (*Erkennen*) at the expense of life (*Leben*).[14] For Dilthey, it was the adoption of paradigms from the physical science to the humanities that was the main problem; he directed his critique against an atomistic-mechanical worldview, rationalism and positivism, and mainstream logics and epistemology.[15] "Current philosophical thinking thirsts and hungers for life", he wrote, and declared that a comprehension of "the entire and complete reality" was the proper objective of philosophy.[16] Bergson, for his part, introduced in his philosophy a concept of a non-predetermined vital force (*élan vital*) inherent in all things living, in an attempt to challenge the rationalist mechanic or teleological understandings of life.[17] In his epistemology, moreover, Bergson declared that whereas we employ our intellect in matters of natural science, this mode of thought has an "inherent incapability of understanding life".[18] In philosophy, it is rather primarily through intuition, Bergson claimed, that we are able to gain a

11 Filippo Tommaso Marinetti, 'The Founding and Manifesto of Futurism' (*Le Figaro* 20 February 1909, printed in Lawrence Rainey, Christine Poggi, and Laura Wittman (eds), *Futurism: An Anthology*, Yale University Press 2009) 49–53, 51.
12 On the predecessors and roots of life philosophy, see Albert (2017) chapter 1.
13 Quoted from *ibid.* 43.
14 Quoted from *ibid.* 47.
15 Jain (1993) 42–47.
16 Quoted from Albert (2017) 58 and 59, with further references to Wilhelm Dilthey, *Gesammelte Schriften*, Volume 7, 268 and Volume 8, 17.
17 Albert (2017) 79.
18 Quoted from *ibid.* 80.

deep and holistic understanding of life. With this more anti-intellectual intuitivism, Bergson hoped to "free the philosophy from the narrowness of mainstream science, in order to bring it back closer to life".[19] This attempt to approximate "philosophy" and "life" was a grand theme of the life philosophers, who in general were "entranced by movement, word, and life, sometimes to the point of exultation" and who "opposed reason with intuition, theory with practice, the abstract with the concrete, quantity with quality, analysis with synthesis, the part with the whole."[20] They used "life" as "a polemical cultural concept targeting a 'civilization that has become intellectualist and anti-life,' against which it sets the power of 'true experience' in all its irrationality."[21]

If we cross the Atlantic, pragmatism, another critical and anti-intellectualist philosophical direction, was one of the main currents within philosophy around 1900. In the words of its leading spokesperson, William James (1842–1910), pragmatism turned "away from abstraction and insufficiency, from verbal solutions, from bad a priori reasons, from fixed principles, closed systems, and pretended absolutes and origins" and "towards concreteness and adequacy, towards facts, towards action, and towards power."[22] More generally, the period saw a "revolt against formalism", as it is coined in a classical study. The revolters were scholars from different branches of the humanities and social sciences who were "convinced that logic, abstraction, deduction, mathematics, and mechanics were inadequate to social research and incapable of

19 *Ibid.* 79–88, the quote by Bergson from 87. On Bergson and "*le bon sens*", including his criticism of the abstractions of natural science, language and legal thinking, cfr. also Hans-Georg Gadamer, *Truth and Method* (2nd edn, Joel Weinsheimer and Donald G. Marshall tr, Continuum 2004) 23.

20 Jan Romein, *The Watershed of Two Eras. Europe in 1900* (Arnold J. Pomerans tr, Wesleyan University Press 1978) 466.

21 Stefan Korioth, 'Introduction' in Arthur Jacobson and Bernhard Schlink (eds), *Weimar: A Jurisprudence of Crisis* (University of California Press 2000) 41–49, 47 with further reference (endnote 17, p. 346). The idea that life was a "polemical concept" – a *Kampfbegriff* – for the life philosophers is common, see Albert (2017) 9 and Jain (1993) 51. Jain credits the expression to Otto Friedrich Bollnow, *Die Lebensphilosophie* (Springer-Verlag 1958) 4.

22 William James, *Pragmatism: A New Name for Some Old Ways of Thinking* (first published in 1907, The Floating Press 2010) 39.

containing the rich, moving, living current of social life" and who "insist[ed] upon coming to grips with life, experience, process, growth, context, function."[23]

In the field of legal scholarship, corresponding trends can be observed in several countries in the first decades of the 20th century. When the *Steppenwolf* Harry Haller, at this stage obviously well into his metamorphosis, states that "anyone who makes thinking his priority may well go far as a thinker, but when all's said and done he has just mistaken water for dry land, and one of these days he'll drown"[24] – then this is something that could equally well have been written by several legal scholars in this period. And many of them would probably have approved of it when Haller explained that "knowledge and understanding were not what I needed. Instead, what I was desperately longing for was experience, decisive action, the cut and thrust of life".[25] In this period, legal scholarship went through a general reorientation similar to the one that took place in other realms of cultural and intellectual life – one might speak of a legal *Lebensphilosophie*, a legal vitalism. Many scholars criticized a mainstream legal thinking which they considered to be formalistic, abstract, empty, theoretical, mechanical, obsessed with systematization and logics, and/or detached from the practical needs of society. The legal theorist Wolfgang Friedman later commented that "[l]egal logic and techniques came to be seen as elements but by no means the sole, or even the predominant factor, in the unending race between law and new social problems".[26] More recently, the legal historian Katharina Isabel Schmidt has spoken of "a genuine response to the theoretical and practical challenges of modernity advanced by individuals who had one foot each in the legal

23 Morton G. White, *Social Thought in America: The Revolt Against Formalism* (The Viking Press 1949) 11 and 13. See similarly the overview in Laura Kalman, *Legal Realism at Yale 1927–1960* (The University of North Carolina Press 1986) 14–16 of functionalism as a broad intellectual phenomenon in the social sciences.

24 Hesse (2012) 17.

25 *Ibid.* 114.

26 Wolfgang Friedmann, *Law in a Changing Society*, 2nd edn (Steven & Sons 1972) 47.

establishment and the avant-garde antiestablishmentarianism that surrounded them".[27]

As a part of their critique, several of these scholars – who are often referred to in the literature as anti-formalists, critics of jurisprudence of concepts (*Begriffsjurisprudenz*), anti-positivists, sociological lawyers, legal realists, and so on –[28] adapted the widespread "life"-trope into legal language. In one way or another, they wrote about the relationship between "law" and "life". What they wanted was, very broadly speaking, that lawyers should "shatter the clouded glass cloche" (Hesse) that allegedly isolated law from life. This study is devoted to these debates about "law" and "life" as theoretical issues in American and German constitutional legal scholarship from about 1900 until about 1930.

1.2 A living topic

In the next chapter, I will explain *how* this study is conducted, i.e. its methodological framework. At this point, I will say something about *why* the particular "law" and "life"-topic has been chosen for this study. This means providing a brief overview of existing research on the topic and in what sense this work brings something new to the table, as well as explaining why the legal theoretical debates from the early 20th century might be of interest to us today.

Law deals with life. It deals with human beings: their conduct, their relations to other human beings, their properties, their money – their way, in brief, of living together in a society. As such, claiming that law is isolated from life is obviously intended as a fundamental critique. It is a diagnosis, a way of asserting that law doesn't function the way it should, that something is completely wrong. Most often, such claims are then combined with alternative programs, narratives and directions

27 Katharina Isabel Schmidt, 'Law, Modernity, Crisis: German Free Lawyers, American Legal Realists, and the Transatlantic Turn to "Life," 1903–1933' (2016) 39 GER. STUD. REV. 121, 137.

28 I will come back to terminological issues in section 2.2.

for law. This was at least the general pattern at the beginning of the 20th century: diagnoses combined with proposed cures.

The debates concerned what the Danish legal philosopher Alf Ross defined as "jurisprudential problems", i.e. something that "dwells, so to speak, one storey higher than the study of law and 'looks down' upon it".[29] They dealt with a number of fundamental issues at the crossroads of legal theory, legal methodology, legal ideology, ideals of legal science and legal education, and, of course, politics. They were also related – in various and heterogenous ways – to what one could coin certain "legal theoretical antinomies", to borrow an expression from the legal theorist Wolfgang Friedmann.[30] Was law (first and foremost) a normative or a factual phenomenon? Should it be approached by intellect or intuition? Was it bent towards stability or change? Should legal science be concrete or abstract, practical or theoretical? As a scientific field, should it adhere to some sort of positivism or some sort of idealism?

Given this combination of a fundamental critique that touched upon a number of fundamental issues, it is no wonder that there is an extensive literature devoted to legal theoretical developments at the beginning of the 20th century. The widespread use of "life" as a trope in legal scholarship at the beginning of the 20th century has already been noted and analysed by legal historians, most recently by Katharina Isabel Schmidt.[31] As demonstrated in German legal historiography, it even affected the discipline of legal history itself, as a new, "life"-oriented understanding of law shaped the way legal historians in this period looked

29 Alf Ross, *On Law and Justice* (Steven & Sons Limited 1958) 26.

30 Friedmann (1967) lists, in chapter 6, the following principal antinomies in legal theory: individual and universe, voluntarism and objective knowledge, intellect and intuition, stability and change, positivism and idealism, collectivism and individualism, democracy and autocracy, nationalism and internationalism.

31 See in particular Schmidt (2016) and Katharina Isabel Schmidt, 'How Hermann Kantorowicz Changed His Mind About America and Its Law, 1927–1934' (2023) 41 *Law and History Review* 93. See also Hans-Peter Haferkamp, 'Legal Formalism and its Critics' in Heikki Pihlajamäki, Markus D. Dubber, and Mark Godfrey (eds), *The Oxford Handbook of European Legal History* (Oxford University Press 2018) 928, 936 f.; Joachim Rückert, 'Die Schlachtrufe im Methodenkampf – ein historischer Überblick' in Joachim Rückert and Ralf Seinecke (eds), *Methodik des Zivilrechts – von Savigny bis Teubner*, (2nd edn, Nomos 2012) 501–550, for instance para. 1379 f.

upon and approached legal pasts.[32] If one, more generally, gathered the entire literature on anti-formalism, anti-positivism, the critique of jurisprudence of concepts or orthodox legal thought, and so on, it would cover shelf upon shelf.[33] Some studies have also included the comparative aspect between German and American legal thought.[34] To my knowledge, however, it is not written a comparative study on the theoretical developments that focuses more specifically on constitutional scholarship.[35] By combining these two elements – the *comparative* aspect *and* the focus on *constitutional* scholarship – this study aims to contribute with new perspectives to the existing literature.

It should also be mentioned briefly that the choice of topic for this study was initially motivated by methodological debates in Norwegian constitutional scholarship in the period, which contained references to American and German positions and debates. In future research, it could hopefully be possible to expand the geographical scope further – the Scandinavian legal realism definitely belongs to the same picture,

32 See Johannes Liebrecht, *Die junge Rechtsgeschichte. Kategorienwandel in der rechtshistorischen Germanistik der Zwischenkriegszeit* (Mohr Siebeck 2018) 278, 282, 327 f. and 380–381; Joachim Rückert, 'Die Deutsche Rechtsgeschichte in der NS-Zeit. Ihre Vorgeschichte und ihre Nachwirkungen' in Joachim Rückert and Dietmar Willoweit (eds), *Die Deutsche Rechtsgeschichte in der NS-Zeit. Ihre Vorgeschichte und ihre Nachwirkungen* (Mohr Siebeck 1995) 177.

33 Just to mention a few standard accounts, see e.g. Franz Wieacker, *Privatrechtsgeschichte der Neuzeit* (2nd edn, Vandenhoeck & Ruprecht 1967) part 6; Michael Stolleis, *A History of Public Law in Germany 1914–1945* (Oxford University Press 2004), chapter 5; Morton J. Horwitz, *The Transformation of American Law, 1870–1960* (Oxford University Press 1992).

34 See already Hermann Kantorowicz, 'Some Rationalism about Realism' (1934) 34 YALE L.J. 1240, 1240–1241. See further James E. Herget and Stephen Wallace, 'The German Free Law Movement as the Source of American Legal Realism' (1987) 73 VA. L. REV. 399; Schmidt (2016) and Schmidt (2023); David M. Rabban, *Law's History: American Legal Thought and the Transatlantic Turn to History* (Cambridge University Press 2012); David M. Rabban, 'American Responses to German Legal Scholarship: From the Civil War to World War I' (2013) 1 *Comparative Legal History* 13.

35 See, however, to some extent Arthur J. Jacobson and Bernhard Schlink, 'Constitutional Crisis. The German and the American Experience' in Arthur J. Jacobson and Bernhard Schlink (eds), *Weimar: A Jurisprudence of Crisis* (University of California Press 2000) 1–39. This contribution focuses mostly on German developments.

and so does developments in French legal thinking, and most likely other countries too.[36] Further comparative research on these issues would deepen our understanding of constitutional, legal-theoretical and political developments in Western societies (and perhaps beyond) at the beginning of the 20th century.

Although this study offers a new perspective by focusing more specifically on constitutional scholarship, it is a more fundamental question whether these debates, that are now about 100 years old and that took place in very different historical contexts, are worth looking at today. Do they "speak" to us, and if so, should we "listen" to them in hope of learning something from history for our own lives? Or are they rather "a settled chapter of the history of science"?[37]

As I will explain in more detail in the next chapter on methodology, the primary aim with this study is a historicizing, not an actualizing one – the ambition is to learn something about, not from, history. As a consequence, the project does not hinge on the question about actuality and present-day utility. But at any rate, the debates *are*, I think, at some level undeniably relevant today. This can be observed by the simple fact that they are still written about – either the debates in themselves and their historiography,[38] the more general legal-historical contexts they were a part of,[39] or single authors who participated in

36 The most in-depth legal historical analysis of Scandinavian legal realism in English language is now Toni Malminen, *The Intellectual Origins of Legal Realism* (doctoral dissertation, University of Helsinki 2016). On French developments, where the influential writings of François Gény are often mentioned, see e.g. Wolfgang Friedmann, *Legal Theory* (5th edn, Steven & Sons 1967) 328 f. See, moreover, Liebrecht (2018) 381 with reference to literature on France and Italy.

37 I borrow this expression from Michael Stolleis, *Der Methodenstreit der Weimarer Staatsrechtslehre – ein abgeschlossenes Kapitel der Wissenschaftsgeschichte?* (Franz Steiner Verlag 2001), also printed in *Ausgewählte Aufsätze und Beiträge*, Volume I (edited by Stefan Ruppert and Miloš Vec, Vittorio Klostermann 2011) 545–566.

38 See e.g. Brian Z. Tamanaha, *Beyond the Formalist-Realist Divide. The Role of Politics in Judging* (Princeton University Press 2010); Axel-Johannes Korb, *Kelsens Kritiker. Ein Beitrag zur Geschichte der Rechts- und Staatstheorie (1911–1934)* (Mohr Siebeck 2010).

39 See e.g. Laura Kalman, 'In Defense of Progressive Legal Historiography' (2018) 36 LAW & HIST. REV. 1021. And in the run-up to the 100th anniversary of the Weimar Constitution in 2019, several legal historical works were published, see Udo Di

the debates.[40] What is more, the debates were, as already mentioned, connected to a number of legal theoretical "antinomies". Some of the ideas and views that were put forward might be too bound up with their historical context for us to make any "use" of them today – they might be legal theoretical dead ends. But other might be vital, might offer us perspectives on constitutional law and theory that we are still dealing with today (and, presumably, tomorrow too). A hint at this is offered by the fact that the "life"-trope is still alive in legal language; in the United States, the notion of a "living Constitution" has been vividly discussed in constitutional law,[41] whereas in Europe, similarly, one of the most important legal doctrines of the last decades has been that of the European Convention on Human Rights as a "living instrument".[42]

1.3 The life of this study – a brief overview

In the following, I will start out in Chapter 2 with some reflections on the methodology of the study, drawing mainly upon theories of comparative legal history. Then I will proceed with the analyses of constitutional legal scholarship in Germany (Chapter 3) and the United States (Chapter 4), where more detailed overviews will be provided at the beginning of each chapter. These two chapters share, roughly

Fabio, *Die Weimarer Verfassung. Aufbruch und Scheitern* (C. H. Beck 2018); Horst Dreier and Christian Waldhoff (eds), *Das Wagnis der Demokratie. Eine Anatomie der Weimarer Reichsverfassung* (C. H. Beck 2018); Christoph Gusy, *100 Jahre Weimarer Verfassung. Eine gute Verfassung in schlechter Zeit* (Mohr Siebeck 2018).

40 About Carl Schmitt, to take just one example, it has been said that barely a month passes without a new publication on him, see Volker Neumann, *Carl Schmitt als Jurist* (Mohr Siebeck 2015) V (preface).

41 See e.g. David A. Strauss, *The Living Constitution* (Oxford University Press 2010). For an overview of the historical roots of this concept, see G. Edward White, *The Constitution and the New Deal* (Harvard University Press 2000) 205 f. and section 4.3.8 below.

42 This is the well-known doctrine developed by the European Court of Human Rights concerning the dynamic interpretation of the European Convention on Human Rights in the light of present-day conditions, see already *Tyrer v. The United Kingdom* App no. 5856/72 (25 April 1978) para. 31. On the doctrine, see e.g. Francis Jacobs, Robert White, Clare Ovey, Bernadette Rainey and Elizabeth Wicks, *The European Convention on Human Rights* (6th edn, Oxford University Press 2014) 74.

speaking, similar structures, but they are nonetheless separate studies – the comparison is saved for Chapter 5. In this final chapter, I will also conclude by offering some more theoretical perspectives on the historical developments that have been described in the two main chapters of the study.

Two notes on formalities: First, all quotes from non-English works are translated by me, unless otherwise indicated. Second, everything that is kept within brackets inside a quote is added by me – again, as long as I have not positively indicated something else.

2 Some Methodological Reflections

> "Ich selber wirken? Nein, ich will verstehen. Und wenn andere Menschen verstehen, im selben Sinne wie ich verstanden habe, dann gibt mir das eine Befriedigung, wie ein Heimatgefühl."
>
> Hannah Arendt (1964)[43]

2.1 Introduction

This study is concerned with comparative legal history about ways of thinking. But I would like to start by thinking about comparative legal history. This chapter is, accordingly, dedicated to some methodological reflections that are relevant for the analyses.

Comparative legal history is certainly not a new discipline,[44] but it has received increased attention over the last decades. In 2009, the European Society for Comparative Legal History was founded, and

43 Interview with Günter Gaus 28 October 1964, available at <https://www.youtube.com/watch?v=J9SyTEUi6Kw> (see 07:40) (accessed 7 September 2024).

44 Think for instance of Max Weber's comparative sociological-historical analyses in chapter VII of his *Economy and Society* (1921), see section 5.2 for more on Weber's legal sociology. For an introduction to the history of the discipline, see Kjell Å Modéer, 'Abandoning the Nationalist Framework: Comparative Legal History' in Heikki Pihlajamäki, Markus D. Dubber, and Mark Godfrey (eds), *The Oxford Handbook of European Legal History* (Oxford University Press 2018) 100; Aniceto Masferrer, Kjell Å. Modéer and Olivier Moréteau, 'The emergence of comparative legal history' in Olivier Moréteau, Aniceto Masferrer and Kjell Å. Modéer (eds), *Comparative Legal History* (Edward Elgar Publishing 2019) 1.

the Society has been publishing a journal since 2013.[45] In addition, a handbook was launched in 2019.[46] Recently, a Finnish legal scholar has even went as far as proposing that legal history and comparative law ought to merge into one single discipline.[47] Broadly speaking, this historiographical turn can be understood as an attempt to challenge a legal paradigm that is seen by many as too nation state-centred, reflecting methodological trends in the disciplines of both comparative law and legal history.[48] All these trends are connected to various social and legal developments, often described as "globalization", "Europeanisation", "transnationalisation", or the like.

The fact that comparative legal history is a hybrid of three distinct disciplines, and taking into account the extensive methodological debates within the fields of legal theory, comparative law, and legal history respectively, approaching it might feel a bit like moving towards the three-headed Cerberus. But the die is cast, and my tactic for the wrestle with this terrifying animal will be to roll up my sleeves and confront one of the heads at a time. More concretely, I will in the following discuss some historical aspects of the thesis, then move over to some

45 For the background of the Society and the journal, see Seán Patrick Donlan and Aniceto Masferrer, 'Preface' (2013) 1 *Comparative Legal History* iii. See also Masferrer, Modéer, and Moréteau (2019) 3 (footnote 9).

46 Olivier Moréteau, Aniceto Masferrer and Kjell Å. Modéer (eds), *Comparative Legal History* (Edward Elgar Publishing 2019).

47 Heikki Pihlajamäki, 'Merging Comparative Law and Legal History: Towards an Integrated Discipline' (2018) 66 AM. J. COMP. L 733. Pihlajamäki's message was reportedly received with a certain reluctance by Finnish comparativists, see Jaakko Husa, 'Merging Comparative Law and Legal History? Thesis and Scepticism in Finland', IACL-AIDC Blog, 27 March 2019, available at <https://blog-iacl-aidc.org/2019-posts/2019/3/26/merging-comparative-law-and-legal-history-thesis-and-scepticism-in-finland> (accessed 7 September 2024).

48 See e.g. Donlan and Masferrer (2013); Modéer (2018). For trends in comparative law, see e.g. Mark van Hoecke, 'Methodology of Comparative Legal Research' (2015) *Law and Method* 1. For legal history, see Assaf Likhovski, 'The intellectual history of law' in Markus D. Dubber and Christopher Tomlins (eds), *The Oxford Handbook of Legal History* (Oxford University Press 2018) 151–169, 153; Thomas Duve, 'European Legal History – Concepts, Methods, Challenges' in Thomas Duve (ed), *Entanglements in Legal History: Conceptual Approaches* (Global Perspectives on Legal History, Max Planck Institute for European Legal History 2014) 29–66.

comparative aspects, and finally to some legal aspects.[49] Hopefully, then, I will be able to tame the animal and make him into a useful one, to paraphrase Oliver Wendell Holmes.[50]

2.2 The historical aspect: Understanding and interpreting legal pasts

In legal history, it is possible to distinguish between legal historical research where the objective is to use history for present purposes – history as "the handmaiden for contemporary law" –[51] and research that seeks an interpretation of a legal past.[52] A second, and closely related, distinction that I find useful is perhaps best presented by a quote from Hannah Arendt, whom stated the following in an interview, as a reply to a question from the interviewer: "Whether I want to achieve something myself? No, I want to understand."[53] This study aims to *interpret* and to *understand* legal pasts. Both of these aims call for some closer remarks.

To start with the latter, the emphasis on understanding, here in contrast to some sort of acting, is not to be understood in the sense that I claim to be something like an objective, impartial spectator. Quite to the contrary, I would emphasize that writing is a constructive act, as it involves "the selection, arrangement and interpretation of inform-

49 This disposition is to some extent inspired by Seán Patrick Donlan, 'Comparative? Legal? History? Crossing boundaries' in Olivier Moréteau, Aniceto Masferrer, and Kjell Å. Modéer (eds), *Comparative Legal History* (Edward Elgar Publishing 2019) 78. In terms of content, however, I discuss other aspects.

50 Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 HARV. L. REV. 457, 469.

51 Dirk Heirbaut, 'Reading Past Legal Text – A Tale of Two Legal Histories. Some Personal Reflections on the Methodology of Legal History' in Dag Michalsen (ed), *Reading Past Legal Texts* (Oslo 2006) 91–112, 93.

52 Dag Michalsen, 'Methodological perspectives in comparative legal history: an analytical approach' in Olivier Moréteau, Aniceto Masferrer, and Kjell Å. Modéer (eds), *Comparative Legal History* (Edward Elgar Publishing 2019) 96, 100–101; Michael Stolleis, 'Rechtsgeschichte schreiben. Rekonstruktion, Erzählung, Fiktion?' in Michael Stolleis, *Ausgewählte Aufsätze und Beiträge,* Volume 2 (edited by Stefan Ruppert and Miloš Vec, Vittorio Klostermann 2011) 1083–1112, 1107.

53 Cfr. footnote 43 above.

ation", and that it, furthermore, "produces meaning and is not just a mechanical operation."[54] My point is rather that it is not the task, or at least not the primary one, of the legal historian to seek to legitimize or delegitimize historical pasts. This is not to say that historical analyses should completely avoid normative assessments, but the point is that an overly moralizing approach runs the risk of turning the historian into a one-eyed cyclops. And a cautiousness in this regard becomes even more important when analysing, like this study does, pasts that are close to our own times and thereby also our own present-day discussions. Of course, the history one writes may have legitimizing or delegitimizing *effects*, for example relating to the status and the identity of a "school of thought", either historically or in a present-day context. But one has to distinguish between objectives and effects, and, as to the former, a regulative ideal of understanding, not acting, is a guiding principle of this work.

As to the second objective – to interpret a legal past instead of actualizing it for present-day purposes – a question arises pertaining to the relationship between present and past. In an article on the methods of legal history, the legal historian Dag Michalsen has pointed out that we are bound to the past of the present as there is no direct access to the present of the past.[55] Michalsen emphasizes that when we transform "the material of the legal past to a present interpretative account of the past, the use of meta-concepts of different kind is unavoidable". Such meta-concepts are what Michalsen refers to as "legal-historical representations". Together with the "past reality" and "the description of the sources or material of this past reality", these legal-historical representations constitute three different layers of historical references. For instance, a specific past reality is the fact that a certain Hans Kelsen sat down and wrote certain texts; these texts can be described

54 See Günter Frankenberg, *Comparative Constitutional Studies. Between Magic and Deceit* (Edward Elgar Publishing 2018) 86, who makes these points in regard to comparative constitutional law.

55 Dag Michalsen, 'The Nominalistic Argument in Interpreting Past Legal Texts' in Dag Michalsen (ed), *Reading Past Legal Texts* (Dreyers Forlag 2006) 134–157. The following quotes are taken from various places at 135–142.

in various ways, for instance by pointing out that they contain an idea about a certain "*Grundnorm*"; and a legal-historical representation could be that Kelsen was a "leading legal positivist from the Vienna School". Michalsen puts forward a "nominalistic argument" in regard to the formation of representations. This means, first, "that the collective entity" we make is a "linguistic construction [that] only synthesizes individual phenomena" and, second, that one should "question this construction as being the most apt (or interesting) of these descriptions which are carried out on the basis of the historical material." As such, the nominalistic argument is not an ontological position – something that would be impossible for Michalsen as he views conceptualization as an unavoidable part of legal historical research – but instead an epistemological strategy. In accordance with this theoretical position, I will discuss both the main temporal and the main material representations of this thesis with the nominalistic argument as a fundament.[56]

All historical research will necessarily operate with a timeframe – the overarching timeframe of this study is the period between ca. 1900 and 1930, which I also interchangeably refer to as "the first decades of the 20th century" or the like. The historian will explicitly or implicitly cluster certain events into a temporal entity, and this way of ordering and structuring the past will have an impact on the research itself and how it is presented, and thereby also on how we think about and understand the past. The importance of the temporal representation can be illustrated with an example that is relevant to this study. In German constitutional legal scholarship, the theoretical debates in the first half of the 20th century were, as we will see, at their most intense in the Weimar period. But the debates can be seen as a continuation and an intensification of an uneasiness that was already present in the writings of several authors in the decades before the First World War.[57] Whether, then, the debates are seen as a "1918–1933"-phenomenon or, as I try

56 This means that I use different types of representations than Michalsen, who discusses temporal-historical representations, subject representations, and connecting representations.

57 See Stefan Korioth, 'Erschütterungen des staatsrechtlichen Positivismus im ausgehenden Kaiserreich – Anmerkungen zu frühen Arbeiten von Carl Schmitt, Rudolf

to do, as an "early 20th century"-phenomenon (of course giving due consideration to the Weimar context), will influence the conclusions drawn. With the latter approach, socio-economic factors such as industrialization becomes a more important context to take into account.[58] At this stage, I am only interested in the general methodological aspect. In this regard, the nominalistic argument is to stress that the temporal structuring is a historical representation, and moreover, that the writer and the reader alike should critically reflect on whether this representation is the most apt.

Another issue related to the temporal aspect, albeit not directly to temporal representations, is how the historian should deal with the privileged benefit of hindsight. There is a joke about how people in the 1920's and 1930's must have found it frightful and very gloomy indeed when they reflected upon the fact that they were living in an "interwar era". This reminds us of the importance of remembering that our "past of the present" is something different than the "present of the past". Michael Stolleis has, for instance, warned against considering the intellectual debates of the Weimar period as inevitably leading up to the Nazi period, and stressed that the debates "were carried on against an open horizon, where the flames of the holocaust were not (yet) glowing".[59] Implicit in this statement is a warning against what one might refer to as an over-determination of the past, where historical developments are seen as following strictly and by necessity from its past.[60] An under-determination of the past would, on the other hand,

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Smend und Erich Kaufmann' (1992) Vol. 117, No. 2 *AöR* 212 and more in detail in Chapter 3 below.

58 *Ibid.* 230.

59 Michael Stolleis, *A history of public law 1914–1945* (Thomas Dunlap tr, Oxford University Press 2004) 139. In a similar direction, Oliver F. R. Haardt and Christopher M. Clark, 'Die Weimarer Reichsverfassung als Moment in der Geschichte' in Horst Dreier and Christian Waldhoff (eds), *Das Wagnis der Demokratie. Eine Anatomie der Weimarer Reichsverfassung* (C. H. Beck 2018) 9–44, 13.

60 See Maksymilian Del Mar, 'Philosophical Analysis and Historical Inquiry: Theorizing Normativity, Law, and Legal Thought' in Markus D. Dubber and Christopher Tomlins (eds), *The Oxford Handbook of Legal History* (Oxford University Press 2018) 4, 10.

be to look at the past as totally irrelevant to the posterior. The historian should search for a middle-ground here.

The main *material* representation of this study is that different texts and scholars are identified as belonging to different directions, movements, or trends, and that these are given certain labels. The most general representation is the basic frame of the entire work: that in Germany and the United States, a number of legal thinkers had something in common by way of thematising "law" and "life". Important to stress here is that within this broad frame, the divergence and heterogeneity among different writers was considerable, something I will also try to show. Still, with the overarching narrative and the structure, I *do* cluster a number of singular phenomena into broad categories, and this gives rise to the question about what these categories should be labelled. This has been one of the most challenging parts of the work. In the literature, one frequently meets concepts like "anti-positivism", "anti-formalism", and other alternatives.[61] There are a number of problems with terms like these, first and foremost connected to the choice of a strategy for determining the terminology. One strategy could be to employ the concepts the authors used to criticize others and describe themselves. If so, "formalism" and "anti-formalism" seems out of place in the American context, as it was an *ex post* construct, primarily from the 1970's.[62] But if this strategy is chosen, a follow-up question is whether it should be applied when an author or a movement misconstrued their opponents, or, in extreme cases, even when their terminology was blatantly fraudulent (think of the denigration of adversaries by using the terms "*entartete*" or "Jewish" legal thinking). A second strategy could be to follow the accepted terminology of the sci-

61 In the various primary and secondary sources I have used, which includes theoretical writings more connected to private law as well, I have, in addition to the ones mentioned, found at least the following terms: "naturalism", "jurisprudence of interests", "jurisprudence of purposes", "jurisprudence of balancing", "free law", "natural law", "realism", "legal realism", "revolt against classical/orthodox legal thought", "pragmatism", "legal pragmatism", "sociological jurisprudence", "functional jurisprudence", and "(socio)-teleological jurisprudence".

62 See Tamanaha (2010) 59 f.

entific community, if a consensus exists. This would have the advantage that one more easily partakes in an already existing academic discourse, but on the other side, one potentially runs the risk of reproducing questionable interpretations. A third strategy could be to apply clearly defined concepts based on specific criteria, i.e. more of a definitory strategy. No matter which strategy is employed, the concepts one uses are in no way "neutral" – they give certain associations, and they are charged with historiographical layers. The most obvious illustration is that no one wants to be called a formalist.[63]

My strategy can be described as the gazelle's method: I try to run away from the problem. In more practical terms, I will on the whole avoid the most generalizing labels and instead use more neutral words like "critics" and so on, which in the context of this study should be clear enough. When I use terms like "positivism/anti-positivism", "formalism/anti-formalism", and so on, it refers to concepts used by the authors I analyse. The idea behind this choice, which fits well with the nominalism I have advanced, is that I want to get beyond the broad concepts and pay more attention to the underlying and concrete issues. Furthermore, it is also connected to the already mentioned heterogeneity of the authors I am studying, where general categorizations will easily become too crude.

2.3 The comparative aspect: Analogical comparisons and actual influences

In addition to the distinctions made above, it is also possible – when turning to the comparative aspect – to make an analytical distinction between comparative legal history strictly speaking and legal history concerned with legal transfers. By the former category, I refer to the activity of exploring analogous similarities or differences between two or more legal systems. By the latter, I mean the activity of exploring

63 See on this e.g. Haferkamp (2018) 928; Frederick Schauer, 'Formalism' (1988) 97 YALE L.J. 509, 509–510.

actual influences between two or more legal systems.[64] These two different categories of comparative legal historical research are, first, purely analytical. Second, they are not mutually exclusive: it is possible to do both at the same time; but nor are they dependent on each other: it is possible to employ only one of them. Third, they are not exhaustive of possible distinctions that one could make.

As I will explain in more detail below, past legal texts must be understood in constructed contexts. In this perspective, legal transfers and the influence from another legal system is no more than one potential context among others. This transnational aspect of law is well known to legal historians today.[65] When the historian constructs a context, he or she has to select from what is in theory an infinite range of different factors, and there can be no *a priori* determination of whether the transnational context offers an explanatory power that justifies its inclusion in a historical study. To stress the transnational aspect of law should, first and foremost, serve as an eye-opener for the legal historian; a reminder to look for legal transfers and influences from other legal systems. As the legal historian Heikki Pihlajamäki puts it, "[s]ometimes, perhaps, the comparative context will show less in the final research report than in some other cases, but the context should always be there."[66] For the developments in legal thinking I am exploring in this thesis, the transnational context, and more specifically the transfers from and influence of German legal scholarship in the United States, has been pointed out and studied by several authors.[67] At

64 See similarly Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing 2014) 57, who distinguishes between genealogical and analogical comparison. When I prefer the term "actual influences" instead of "genealogy", it is because the idea of a genealogy back to a third "anterior phenomenon" responsible for the appearance of two phenomena (Samuel) might be too crude in some instances.

65 See e.g. Thomas Duve, 'Entanglements in Legal History. Introductory Remarks' in Thomas Duve (ed), *Entanglements in Legal History: Conceptual Approaches* (Global Perspectives on Legal History, Max Planck Institute for European Legal History 2014) 3–25, 4.

66 Heikki Pihlajamäki, 'Comparative Contexts in Legal History: are we all comparatists now?' (2015) No. 70 *Seqüência (Florianópolis)* 57, 70.

67 See footnote 34 above.

this point, I will confine myself to note that I consider this context as a relevant one, and that it will to some extent be part of the analyses in the following chapters.

Moving over, then, to the category of comparative legal history strictly speaking and its focus on structural similarities and differences from an analogical point of view, the principal merit of this aspect is that it opens up a space for deeper reflection. The comparison can be of value in itself, but it can also have instrumental value by making it easier to test hypotheses about historical developments within one legal system. A hypothesis can be, for instance, that in legal system A, the phenomenon a_1 had a strong influence on the emergence of phenomenon a_2. If, then, there is a structurally equivalent b_1 in legal system B, the hypothesis can be tested by asking whether there was also a structurally equivalent b_2. Alternatively, one can start by observing b_2, and then ask whether b_1 was present. The results of exercises like these are, in one sense, modest; the concrete historical situatedness of each legal system means that one cannot establish 'proof' even by a 'falsification', in the terminology of Karl Popper. Moreover, the more complex the phenomena that are investigated becomes, the more cautiousness is called for in terms of claiming that a_1/b_1 and a_2/b_2 are in fact structurally similar. But still, hypotheses might be strengthened or weakened, and, at the very least, this way of thinking makes it easier to question one's own (or others') assumptions.

To illustrate this, I will make use of an example that is relevant in our context. In the United States, the courts had competence to conduct judicial review of the constitutionality of legislation in the period that is analysed. Conversely, this was not the case in Germany, at least not to the same extent.[68] I will not, at this point, go substantially

68 In Imperial Germany, there were no rights provisions at all in the constitution. Moreover, the courts were not competent to conduct substantial constitutional review of legislation ("*materielles Prüfungsrecht*"), see Ernst Rudolf Huber, *Deutsche Verfassungsgeschichte seit 1789. Band III: Bismarck und das Reich* (3rd edn, W. Kohlhammer 1988) 1058–1059. The Weimar Constitution had an extensive part on constitutional rights (see section 3.3.3 below). These provisions had some impact, but an inconsiderable one compared to the situation in the United States

into the discussion about the importance of constitutional review as an explanatory factor. The point here is only that if one presupposes that constitutional review was an important factor that shaped the theoretical debates in American constitutional scholarship, the lack of constitutional review in Germany encourages a second thought and a search for alternative hypotheses. An alternative approach could be to ask: given the fact that it was no such review in Germany, could it be that the structural differences between German theoretical debates and the corresponding debates in the United States are greater than first assumed? Or if not, could it be that there was perhaps a functional equivalent to constitutional review in the German legal system that has been overlooked? Or yet another variant: if one finds structural differences between the American and the German debates, constitutional review might be an explanatory factor for the difference. Once again, my claim is not that exercises like these can establish any 'proof', and they should be employed very carefully and with due regard to the unique contexts of each legal system.

There is one specific circumstance that in particular merits a comparative approach to the present study. The developments I am studying have been the object of intense debates among legal scholars and historians in the respective legal systems. This is not surprising, given that the developments touch upon fundamental issues such as the concept of law, the role of norms in judicial decision-making, the tasks and methods of legal scholarship, and the relationship between constitutional law and politics. But precisely because very fundamental issues are involved, there is a certain risk that the historical interpretations tend to get "politicized" (in lack of a better word and therefore put in quotation marks). The American historiography related to late 19th century legal thinking is illustrative. In a book from 1998, for instance,

(and Germany under the current Basic Law (*Grundgesetz*)). The *Staatsgerichtshof* was set up to decide constitutional disputes, but its jurisdiction was limited to organizational matters. See Horst Dreier, 'Grundrechtsrepublik Weimar' in Horst Dreier and Christian Waldhoff (eds), *Das Wagnis der Demokratie. Eine Anatomie der Weimarer Reichsverfassung* (C. H. Beck 2018) 175–194; Stolleis (2004) 96; Gusy (2018) 70.

the author divided it into "contemporary or progressive interpretations" (1910–1940), "liberal or neo-progressive interpretations" (1940–1970), and "revisionist interpretations" (since 1970).[69] In this situation, it can be particularly useful to employ the comparative perspective in order to get out of nationally entrenched interpretations that might be particularly bound up to certain ideological positions. If we in fact end up as cyclops – even though we tried to avoid precisely that – it might turn out to be a valuable compensation for our reduced sight that we chose to travel and see new places.

2.4 The legal aspect: Selection of texts and construction of contexts

This study centres around a number of legal scholars and their understandings of constitutional theory and methods. These ideas are sought understood against legal, political and social contexts. In both cases, a similar question arises: Which texts to focus on, and which contexts to pay most attention to?

As to the selection of authors and texts, a guiding principle has been to include a variety of scholars, in order to ensure a certain representativeness. At this point, the main strategy has been to consult the already existing research literature. It goes without saying that within the scope of a work of this nature, it has been impossible to give anything even close to a complete account of the theoretical developments. This is particularly the case for Germany.[70] Still, the analyses are intended to be representative of at least broad traits of the intellectual developments in both countries.

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69 William M. Wiecek, *The Lost World of Classical Legal Thought. Law and Ideology in America, 1886–1937* (Oxford University Press 1998) 254 f. (appendix). For other historiographies emphasizing the political aspect, see Tamanaha (2010) 60 f.; Rabban (2012) chapter XIV. For a recent article "in defense of progressive legal historiography", see Kalman (2018).

70 Two important figures that are absent in this study, and only mentioned in passing, are Georg Jellinek (1851–1911) and Hermann Heller (1891–1933). For overviews, see e.g. Stolleis (2001) Chapter 10 IV.2 and Stolleis (2004) 175 f.

The texts one has selected must be understood in their contexts. Etymologically, this means that one tries to weave together (*contextere*) something. This 'something' that one tries to weave together is the text and its surroundings. These surroundings can, symbolically speaking, be represented as in a spatial relation to the text – we want to *under*stand, to '*Ver*stehen', to find out what lies *beneath* or *behind* the text, or even *between* the lines. But since there is practically no end to what surrounds a text, we have once again to make a selection, meaning that we have to construct the context. The selection of relevant contextual factors to study will depend on the research question but also on our more general ideas about what law is and which factors that influence production of norms, adjudication, developments in scholarly thinking, and, more generally, legal change. For the construction of relevant contexts, a distinction between an internal and an external context for the historical study of legal texts might be useful. The internal context consists of other parts of the legal system, while the external context is the more general historical conditions. I will, in the following, give a brief overview of the most important internal and external contextual factors that I will integrate in the coming chapters.

A first internal contextual factor for this study will be the constitutional law of the different legal systems. My focus lies in particular on the theoretical aspects of the texts, but as they relate to the field of constitutional law, the latter is an important context. Thus, it will be necessary to say something about the main structures of constitutional law in the different systems.

A second relevant internal context is theoretical debates taking place in other parts of the legal system, either as general theoretical works or connected to other legal fields. Often, at least historically, private law has been the most fertile ground for theoretical developments. This means that the constitutional scholars who discussed theoretical problems in their fields often relied upon and adapted more general debates. I will devote quite some space to this aspect in the following chapters.

A third internal factor is one that has already been mentioned: the influence from other legal systems. In this study, it is primarily the intellectual influence from other systems that is of significance, and not the reception of specific rules or institutions.

Moving over to external factors, I regard, as I also mentioned in the introduction, the theoretical debates as being connected to broader socio-cultural historical developments. The debates cannot be understood as phenomena isolated from these external developments.[71] Consequently, I will to some extent include these general patterns in the analyses, and they will form the backdrop of the analyses in both Chapter 3 (section 3.2.1) and Chapter 4 (section 4.2.1).

71 See Michael Stolleis (2001), *Public Law 1800–1914* 1; Horwitz (1992), *The Transformation*.

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.

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).

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.

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.

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.

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.

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.

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*

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).

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.

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.

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.

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.

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.

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).

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.

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.

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.

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.

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.

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*

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

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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).

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.

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.

> 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.

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).

> 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.

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).

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.

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

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.

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.

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.

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).

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-*

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).

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.

> 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.

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).

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

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.

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.

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).

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.

> 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).

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.

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.

(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.

> 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

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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).

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-

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

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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."

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*").

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.

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].

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.

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.

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].

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].

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.

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.

> 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.

> 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

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).

"[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.

"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.

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).

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).

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].

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].

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

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].

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].

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.

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).

4 The United States: A Government of Life?

> "Here is action untied from strings
> necessarily blind to particulars and details
> magnificently moving in vast masses."
>
> Walt Whitman, *Leaves of Grass* (1855) 1

4.1 Introduction

1870 was a year marked by several births that would have a significant impact on the American scholarly profession: Roscoe Pound and Benjamin N. Cardozo were born, the same was – more or less – Oliver Wendell Holmes's legal theoretical scholarship,[452] and at Harvard University, Christopher Columbus Langdell gave birth to the so-called "case method" as a way of teaching law. The case method would spread to other universities and become a lasting feature of American legal education, but apart from that, Langdell has by many been portrayed as the chief representative of an orthodox, sterile legal thinking (even though this picture is, as we will see, not wholly uncontested). Holmes and Pound, and to some extent Cardozo, on the other hand, are gener-

452 Holmes's (unsigned) 'Codes, and the Arrangement of the Law', (1870) 5 AM. L. REV. 1 was not his first publication, but it contains his perhaps first famous legal theoretical quote: "It is the merit of the common law that it decides the case first and determines the principle afterwards." It has been considered his "first major essay", cfr. Thomas C. Grey, 'Langdell's Orthodoxy' in Thomas C. Grey, *Formalism and Pragmatism in American Law* (Brill 2014) 46, 46. Around 1870 was also the time when Holmes, according to his biographer, embarked upon his "proving years" and decided to go into "the solitude of the thinker", cfr. Mark DeWolfe Howe, *Justice Oliver Wendell Holmes. The Proving Years, 1870–1882*, vol. II (The Belknap Press 1963), quote taken from 4.

ally seen as the first shepherds that would start the process of leading American legal scholars onto a new path.

If we fast forward to the years around the turn of the century, Langdell passed away, the development of Holmes's legal scholarship came – again more or less – to an end with his famous article 'The Path of the Law', combined with his advancement from State to Federal Supreme Court Justice, while Pound's sociological jurisprudence was being developed through a number of articles. In these 30 years or so, the American society had left the Reconstruction period and the Gilded Age, and entered the Progressive Era. Both the society at large and the legal system had been through considerable changes in various fields: the American population had doubled, the number of law schools tripled, and the number of law students increased almost fivefold.

The idea in the following is basically the same as in the previous chapter: In order to understand the theoretical debates within constitutional scholarship, it is necessary to start with a closer look at important developments within the American society and the legal system in the period leading up to the turn of the century (section 4.2). Then, section 4.3 will continue with an analysis of the critique that followed in the first decades of the 20th century. This section will include overviews of the legal thinking of Oliver Wendell Holmes (4.3.1), Roscoe Pound (4.3.2), Benjamin N. Cardozo (4.3.3), and Felix Frankfurter (4.3.4.), before I will give an overview of the context of legal realism (4.3.5.) and then proceed to an analysis of two of the most famous legal realists, Karl N. Llewellyn (4.3.6) and Jerome Frank (4.3.7). Finally, I will have a brief look at the idea of a "living constitution" and the much-debated issue of the "constitutional revolution" in 1937 (4.3.8).

4.2 The backdrop: The United States in an age of transition, 1870–1900

4.2.1 Industrialisation of society and modernisation of the legal system

"Out of timber so crooked as that from which man is made, nothing entirely straight can be built", Immanuel Kant once famously remarked.[453] This assertion is at least apt for the history of the United States. Felix Frankfurter (cfr. Section 4.3.4) noted in 1933 that "[f]oreigners are fond of calling this the land of paradoxes."[454] He was right. If one looks at the final decades of the nineteenth century, there were a number of contradicting movements, action and reaction, and opposing tendencies in the American society: commitment to the improvement of the freedmen and black peoples' situation in general following the Civil War, yet widespread blatant racism;[455] the ideal of a small-scale economy based on free competition, yet increasing corporative centralization and monopolization; a growing acknowledgment of the need for public regulation, yet a deep hostility towards governmental intervention; a strong emphasis on localism and self-government, yet increased power on the hands of the federal government; and a

453 Immanuel Kant, 'Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht' (1784), here quoted from and translated by Isaiah Berlin, *The Crooked Timber of Humanity. Chapters in the History of Ideas* (Henry Hardy ed, Pimlico 2003) V.

454 Felix Frankfurter, 'Social Issues Before the Supreme Court', (first published in 1933, reprinted in Philip B. Kurland (ed), *Felix Frankfurter on the Supreme Court. Extrajudicial Essays on the Court and the Constitution*, The Belknap Press of Harvard University Press 1970) 286, 299.

455 The ambivalence in terms of racial equality is embodied in the infamous Supreme Court judgment in *Plessy v. Ferguson*, 163 U.S. 537 (1896). Here, the Court upheld a law passed by the state of Louisiana which stipulated that railway companies should provide "equal but separate accommodations for the white, and colored races".

firm belief in individualism, yet a tendency towards collectivization of labour relations.[456]

But in the economic sphere, one trend was unequivocal: the increasingly industrialized economy was growing rapidly. Notwithstanding the economic depression that hit the United States, just like Germany, in 1873, the annual per capita gross national product more than doubled between the 1870's and the first decade of the 1900's.[457] An important driver – literally speaking – for this growth was the railroad, which made it possible to transport raw materials, people, and goods over vast distances.[458] Yet the railroad visualized the Janus-faced reality of industrial capitalism; in the 1890's, it killed between 6,000 and 7,000 people and injured 30,000 to 45,000 per year. The railroad was perhaps the dominant issue in administrative and regulatory law, tort law, and corporation law in the second half of the century.[459] The significance of the railroad issue is demonstrated by the fact that the first federal regulatory agency, the Interstate Commerce Commission (ICC), was established in 1887 to regulate transportation rates.[460] Another sign of the economic developments and its transformative social effects was the growth of large-scale corporations. The trusts emerged in the 1880's, with Standard Oil as the first one in 1882, and later came the holding companies.[461] Furthermore, the period saw a drastic intensification of labour conflicts, with major strikes in 1877, 1886, and the early 1890's.

456 For an overview, see Morton Keller, *Affairs of State. Public Life in Late Nineteenth Century America* (The Belknapp Press 1977). The tendency of contradicting trends is pointed out several places, see e.g. summaries on 85, 162, 289, and 409.

457 *Ibid.* 371 with further references.

458 On the railroad as "the age's symbol of mechanization and of economic and political change", see Alan Trachtenberg, *The Incorporation of America. Culture & Society in the Gilded Age* (Hill and Wang 1982) 57 f.

459 Keller (1977) 402 and Friedman (1973) 389.

460 Keller (1977) 429 considers the agency to be "a milestone in the late nineteenth century effort to impose some restraints on an industrial economy of frightening scale and power." Horwitz (1992), *The Transformation* 216 describes it as "the first institutionalization of the regulatory state".

461 For the developments, see Horwitz (1992), *The Transformation* chapter three, in particular 80–85; Keller (1977) 431 f.

The importance of these and other developments was that they challenged some widely held conceptions in American society. The centrifugal forces of industrial capitalism called into question the possibility of a decentralized small-business economy. The concentration of power also resulted in grossly unequal bargaining power between employers and employees, a development that would have implications for the classical views on freedom of contract. Furthermore, increased communication and trade across the state borders called for coordination and harmonization, ultimately something that the federal government would have to ensure.[462] And faced with the many dark sides of industrial production and urbanization, the need for public control and regulation became more pressing.

And indeed, the government *did* struggle in the second half of the 19th century to regulate railroads, insurance companies, public utilities, occupational licensing, and labour relations, as well as to protect society by adopting a number of public health related laws.[463] The Interstate Commerce Commission is already mentioned, and well known is also the Sherman Antitrust Act in 1890, which was an attempt to combat monopolization and restraint of trade. Writing in 1889, Thomas M. Cooley, the chairman of the ICC and, as we will see later, an influential constitutional scholar in the period, had the following impression, which is worth quoting at length:

> The power to regulate interstate commerce when the constitution was adopted had so little immediate interest that it scarcely afforded occasion for the slightest forensic discussion. How is it to-day? The application of steam to locomotion and of electricity to correspondence has worked relatively as great a change in government as it has in the industrial world; it is the federal government, whose functions at first concerned the citizen in his private relations

462 On this, see Keller (1977) 419.

463 See Lawrence M. Friedman, *A History of American Law* (Simon and Schuster 1973), part III, chapter V. The increased number of bills that were introduced in Congress, as well as the specialisation of congressional committees, are testimonies to the developments, see Keller (1977) 300 and 304–305.

> so remotely, which now through its control over internal and external transportation, its cheap and rapid postal service, its taxes that reach us all and reach us often, its absolute control of the currency, and the not remote probability that it may grasp with its unquestionable powers still other subjects which constitute public conveniences; it is the central government rather than the State that now seems to stand before the people as the chief representative of public order and governmental vigor, and as the possessor of general rather than of exceptional and particular powers.[464]

In short, from looking at the government and law as "ways to unleash the capacity of the nation" before the Civil War, the government was now seen more as "regulator and trustee".[465] With higher ambitions for governmental regulation, there was also a need for professionalisation of the growing bureaucracy. In this regard, the Civil Service Reform Act of 1883 was important, as it stipulated that positions within the federal civil service should be awarded based on merits. The federal bureaucracy increased from 51,000 employees to 100,000 between 1871 and 1881.[466]

As the 19th century came to a close, some of the tensions that had built up over the last decades were unleashed in the Progressive Era. The years up until the First World War were marked by forward-oriented reformism and progressivism, revolving – as in many other industrialized countries – in particular around social politics and the "labour question".[467] The progressives even entered the White House, with Theodore Roosevelt as president from 1901 to 1909 and Woodrow Wilson from 1913 to 1921. From a constitutional perspective, Roosevelt's opposition to state courts that hampered social legislation is of par-

464 Thomas M. Cooley, 'Comparative Merits of Written and Prescriptive Constitutions' (1889) 2 HARV. L. REV. 341, 355.

465 Friedman (1973) 297.

466 See Keller (1977) 239.

467 For an overview, with strong emphasis on the international dimensions of progressivism, see Daniel T. Rodgers, *Atlantic Crossings. Social Politics in a Progressive Age* (The Belknap Press of Harvard University Press 1998) in particular 52–75.

ticular interest. In his (unsuccessful) run for presidency in 1912, he even made it a part of his campaign that the people should have the opportunity to overturn State court judgments that struck down reform legislation.[468] Wilson, for his part, had as a political scientist put forward an organic constitutional theory. He presented this as an alternative to a Newtonian-mechanistic theory based on checks and balances, contending that "[n]o living thing can have its organs offset against each other as checks, and live." For Wilson, "[l]iving political constitutions must be Darwinian in structure and in practice."[469]

But progressivism was not confined to the field of politics. The years around the turn of the century was also a period of academic avant-gardism. The pragmatism of William James was already mentioned in the introduction to this book; in addition, one finds figures such as the sociologist and economist Thorstein Veblen, the philosopher John Dewey, and the historians James Harvey Robinson and Charles A. Beard – the latter famous for his *An Economic Interpretation of the Constitution of the United States* from 1913. The historian Morton G. White has pictured these scholars, in company with Oliver Wendell Holmes, as "revolting against formalism" in their respective fields. According to White, they were "convinced that logic, abstraction, deduction, mathematics, and mechanics were inadequate to social research and incapable of containing the rich, moving, living current of social life."[470]

This, then, was the political and intellectual environment – the life – that surrounded the legal community around 1900. They were influenced by the dominant progressivism and became, seen from a posterior perspective, part of progressivism themselves. But they also

468 Theodore Roosevelt, 'The Right of the People to Rule' (address delivered 20 March 1912, Carnegie Hall, New York, available at <https://www.americanrhetoric.com/speeches/teddyrooseveltrightpeoplerule.htm> (accessed 7 September 2024).

469 Woodrow Wilson, *Constitutional Government in the United States* (lectures delivered in 1907, Columbia University Press 1917) 56–57.

470 White (1949) 11. See similarly the overview in Kalman (1986) 14–16 of functionalism as a broad intellectual phenomenon in the social sciences.

stood with one foot planted in the legal system, a legal system that had undergone profound changes in the late 19th century.

The legal system had, more precisely, tried to adapt to the more general modernization of society during the 19th century. In 1848, the State of New York had enacted a new Code of Civil Procedure. The Code abolished the centuries-old common law system of different forms of action and introduced a much more simplified procedure for litigation. For business, it was important to have a well-functioning and attractive court system that could handle an increased number of disputes that followed with the growing market economy. Over the next decades, other states would adopt similar procedural reforms.[471]

There was a movement for codification of the private law as well, but this was in general unsuccessful. The traditional common law persisted, which meant that law was still to a great extent developed by the courts. Yet an inherent challenge in the American legal culture was how to ensure the legal unity of the common law within a multijurisdictional system of different states.[472] Added to this was an immense growth in the number of published judgments, especially as West Publishing Company began to publish volumes of case law reporters successively from 1879, something that made it increasingly difficult for legal actors to try to keep up with the overwhelming case law.[473] In 1897, West published a fifty-volume digest where references to more than 500,000 cases were ordered thematically, and the company also indexed the cases with a key-number system. Moreover, another company introduced the Citator system in 1873, which provided an overview of all citations made to different cases. These were mitigating factors, but for the legal profession, both the dismantling of the common law

471 See Friedman (1973) part III, chapter III on the procedural reforms.

472 See Twining (1985) 6–7.

473 Writing about case law in common law England in 1913, Eugen Ehrlich compared it to "a tropical jungle, where the lost traveller is threatened by surprises and danger at every new tree he sees", see Ehrlich (1929) 238. James Bryce wrote in 1907 that "[t]he Common Law is admittedly unsymmetrical. Some people might call it confused, however exact may be the propositions that compose it." The latter quote is taken from Tamanaha (2010) 26.

system of forms of action that they were used to and the constant flow of new cases, led to a need for reconciliation of conflicting cases, re-systematisation of the law, and a search for general principles.[474] The following prediction made by the legal scholar John Chipman Gray in 1909 illustrates the mood:

> The enormous number of judicial decisions, and the rapidity in their rate of increase, has been so great as to indicate that the function of the jurist will rise more and more in importance in the Common Law, from the mere fact that the mass of material will become too great for any one to cope with it all, and that it can be dealt with only by systematic study directed to particular parts.[475]

Similarly, Benjamin N. Cardozo noted dryly in 1924 that "[t]he fecundity of our case law would make Malthus stand aghast" and that "[t]he perplexity of the judge becomes the scholar's opportunity."[476]

Another by-product of the modernisation and increased complexity of the American society and legal system was a growing need for lawyers. The number of lawyers grew from approximately 22,000 in 1850 to 60,000 in 1880, and 114,000 in 1900.[477] From 1870, lawyers started to organize in state and federal bar associations (the American Bar Association was founded in 1878), and particularly after 1890, there was a tightening of admission requirements to the bar. The increased demand for lawyers affected, in turn, the educational system. Up until around 1850, most lawyers had received training in private law offices or were self-educated. The number of law schools increased from 15 in 1850 to 31 in 1870 and to 102 in 1900. In 1870, there were 1,611 law

474 See Horwitz (1992), *The Transformation* 11 f. and 200–201; Wiecek (1998) 88. See also Tamanaha (2010) 33–36 on the legal uncertainty resulting from the growth of published cases, and how it fuelled demands for codification.

475 John Chipman Gray, *The Nature and Sources of the Law* (first published 1909, reprint of second revised edition by Roland Gray from 1921, Columbia University Press 1972) 280

476 Benjamin N. Cardozo, *The Growth of the Law* (first published 1924, reprinted in *Cardozo on the Law,* The Legal Classics Library 1982) 4 and 6.

477 Friedman (1973) 549.

students, a number that had risen to 7,600 in 1894.[478] But the scientific level of the universities was poorly developed in the common law tradition. In 1846, an English committee set up by the House of Commons had stated that "no Legal Education, worthy of the name, of a public nature, is at this moment to be had" in either England or Ireland.[479] The same was true for the United States. When the above-mentioned Christopher Columbus Langdell arrived at Harvard in 1870, he wanted to do something with this. He tried to reform the didactical methods by introducing the case method and a new genre of case-books, that is, compilations of cases. Langdell's reform at Harvard also included stricter admission criteria, a requirement of three years of studies, and annual examinations.[480] In addition, he created a model where the law school was "staffed by a career faculty committed to research", something that "has since been the institutional basis for the development of modern legal thought".[481]

To sum up, the United States was undergoing a period of great change in the last decades of the 19th century, propelled by the transition to an industrialized society. In this regard, it paralleled the developments in Germany. Classical liberalist thought had a stronger hold in the United States than in Germany, but the Americans as well responded to the needs of an industrialized society by increased regulation, albeit on a smaller scale. One of the responses of the legal system was an increased professionalisation, in particular through the reform or, perhaps more apt: the real birth of legal education at the universities. From this, two fundamental legal cultural differences between the Ger-

478 *Ibid.* 525–527. Friedman offers an instructive account of the development of American legal education, including different ways of professionalisation, and goes more into detail than I will do here. For a contemporaneous description, see Roscoe Pound, 'The Evolution of Legal Education' (inaugural lecture delivered 19 September 1903, Jacob North & Co. 1903)

479 Quoted from Peter Stein, *Legal Evolution. The story of an idea* (Cambridge University Press 1980) 78.

480 Christopher Columbus Langdell, 'The Harvard Law School' (celebration speech at the Harvard University 5 November 1886, printed in (1887) 3 LQR 118) 124–125. See more on Langdell below in section 4.2.3.

481 Grey (2014) 47.

man and the American legal system should be highlighted: First, the Germans had strong university traditions and consequently a sophisticated legal scholarship, whereas this was something the Americans had to build up from scratch. And second, while German legal scholarship laid the fundament for the great codifications, the emerging American scholarship entered first and foremost into a dialogue with courts.[482]

4.2.2 Constitutional law: The Fourteenth Amendment and the infamous due process of law

In the field of constitutional law, there were important developments taking place as well after the Civil War. Generally speaking, a persistent source of tension in the American legal and political system ever since its foundation has been that between popular government – "We the People" – and the protection of "certain unalienable Rights".[483] These "radical and conservative traditions have coexisted as a polarity of American constitutionalism" since the Founding era, and "[s]ubsequent constitutional development has oscillated between them."[484] Closely related is the question of constitutional review. Alexander Hamilton advocated that the courts should be vested with this competence, arguing in *The Federalist Papers* from 1788 that the judiciary would be the department of power "least dangerous to the political rights of the Constitution" and that the courts would "be an intermediate body between the people and the legislature", as the people had expressed their will in the Constitution.[485] Constitutional review was then confirmed and established on a federal level by the Supreme Court during the Mar-

482 See, however, section 4.3.5 on the Restatement Project in the 1920's, where scholars tried to make a quasi-codification of private law.

483 See the Preamble of the Constitution of the United States (1789) and the American Declaration of Independence (1776).

484 Wiecek (1998) 24.

485 Alexander Hamilton, *The Federalist Papers*: No. 78, 1788. I have used the digital version published by Yale Law School, Lillian Goldman Law Library, 'The Avalon Project. Documents in Law, History, and Diplomacy'. Available at http://avalon.law.yale.edu/18th_century/fed78.asp (accessed 7 September 2024).

shall Court (1801–1835). In the landmark decision *Marbury v. Madison*, Justice John Marshall (1755–1835) basically affirmed and translated into case law what Hamilton had argued in the Federalist.[486]

After the Civil War, three amendments to the Constitution were adopted, sometimes referred to as the Reconstruction Amendments. In our context, the Fourteenth Amendment from 1868 is the most important one.[487] The first section of the Amendment grants a right to federal and state citizenship for all persons born or naturalized in the United States, and forbids states to "abridge the privileges or immunities of citizens of the United States" (the Privileges and Immunities Clause), to "deprive any person of life, liberty, or property, without due process of law" (the Due Process Clause), or to "deny to any person within its jurisdiction the equal protection of the laws" (the Equal Protection Clause).[488] With its open-ended wording, the Amendment had the potential to become a powerful tool for courts. And if so, the vertical division of power between state and federal level could be affected, as the Amendment was a check upon the states' exercise of power.[489] But in the first case where the Supreme Court had to construct the meaning of the Amendment, the *Slaughter-House* cases from 1873, the

486 *Marbury v. Madison*, 5 U.S. 137 (1803).

487 The other two were the Thirteenth Amendment (1865) and The Fifteenth Amendment (1870), abolishing slavery and ensuring voting rights for black people respectively.

488 The Fifth Amendment from 1791 already contained some similar restrictions on the federal government. It prescribes, *inter alia*, that no person shall "be deprived of life, liberty, or property, without due process of law" and that private property shall not "be taken for public use, without just compensation".

489 In this regard, the fifth section of the Amendment is important, as it states that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article". Thus, the scope of application of the Amendment would affect the competence of Congress to regulate affairs within the states. On the issue of federal balance, see Edward S. Corwin, 'The Supreme Court and the Fourteenth Amendment' (1909) 7 MICH. L. REV. 643, 644 f. It is, in a comparative perspective, interesting to note that similar concerns about the federal balance was present in the scholarly debates in Weimar about the status of the equality clause of the Constitution (Art. 109). See Anschütz, *VVDStRL* 1927 47, 48; Thoma, *VVDStRL* 1927 58, 58.

majority chose a narrow and cautious construction.[490] Justice Samuel F. Miller, writing for the majority, saw the Amendment first and foremost as a consolidation of the emancipation of the former black slaves. Hence, it did not apply to the disputed case, which concerned a law that conferred upon a corporation the exclusive privilege to operate the livestock-landing and slaughter-house business in a certain area for reasons of public health. Other farmers could not claim that this monopolization violated their rights under the Amendment, the majority concluded. There were three concurring dissenting opinions, and in one of those, Justice Bradley held that the law, being an "onerous, unreasonable, arbitrary, and unjust" restriction upon the privilege of free trade, was a violation of all of the three clauses of the first section of the Amendment.

And Bradley's broader construction would eventually prevail. Around 1890, the Supreme Court made a turnaround and started to develop a doctrine of so-called substantive due process, including freedom of contract as part of the protected individual liberty.[491] At the same time, cases involving general socio-political issues and the relationship between individuals and public authorities, typically decided under the Fourteenth Amendment, started to occupy a greater part of the Court's docket.[492] The ensuing decade has generally been seen

490 *Slaughter-House Cases*, 83 U.S. 36 (1872).

491 See e.g. the *Chicago, M. & St. P. Ry. Co. v. State of Minnesota* ex rel. *Railroad and Warehouse Commission* 134 U.S. 418 (1890) (the *Milwaukee* case); *Reagan v Farmers Loan and Trust Co*, 154 U.S. 362 (1894); *Allgeyer v. Louisiana,* 165 U.S. 678 (1897). Relevant in order to understand the criticism levied against the Court for being conservative are also a row of cases decided in 1895 on other grounds than the Fourteenth Amendment: One rejecting a federal antitrust measure (*United States v. E. C. Knight Co.,* 156 U.S. 1 (1895)), two invalidating a federal progressive income taxation scheme (*Pollock v. Farmers' Loan and Trust Co.,* 157 U.S. 429 (1895) and *Pollock v. Farmers' Loan and Trust Co.,* 158 U.S. 601 (1895)), and one denying a writ of habeas corpus in a labour case (*In re Debs*, 158 U.S. 564 (1895)). For an overview, see Linda Przybyszewski, 'The Fuller Court 1888–1910: Property and Liberty' in Christopher Tomlins (ed), *The United States Supreme Court. The Pursuit of Justice* (Houghton Mifflin Company 2005) 147; Wiecek (1998) 136–146.

492 Felix Frankfurter, 'The Supreme Court and the Public' (first published 1930, reprinted in Philip B. Kurland (ed), *Felix Frankfurter on the Supreme Court. Extrajudicial Essays on the Court and the Constitution,* The Belknap Press of

as a period where the Court took a conservative position and struck down a considerable amount of laws. In most of the cases, however, the Court actually upheld the legislation in question. A study conducted in 1927 showed that in cases involving substantive legislation of a social or economic character that were decided under the due process clause by the Court in the period 1868–1912, the Court struck down legislation in only 6 % of the cases.[493] Thereinafter, the numbers of cases struck down remained stable at 7 % in the period from 1913 to 1920 but would rise to 28 % in the period from 1921 to 1927.[494] A similar statistical survey from 1913 concluded likewise in regard to the period 1887–1911, the author contending that "the alleged evil in the trend of the Court is a purely fancied one" and that "[t]he National Supreme Court, so far from being reactionary, has been steady and consistent in upholding all State legislation of a progressive type."[495] In a speech delivered the same year, Felix Frankfurter noted with satisfaction that

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Harvard University Press 1970) 218, 220. According to Edward S. Corwin, as referred to in Friedman (1973) 302, the Court decided three cases concerning the Amendment in the first decade following the adoption, then 46 in the next decade, and then 297 in the period from 1896–1905. Charles Warren counted fourteen cases decided under the due process or the equal protection clauses in the period 1868–1886, and 560 such cases in the period 1887–1911, see 'The Progressiveness of the United States Supreme Court' (1913) 1 COLUM. L. REV. 294, 295.

493 Ray A. Brown, 'Due Process of Law, Police Power, and the Supreme Court' (1927) 40 HARV. L. REV. 943. See 944 for a description of the criteria Brown used for selection, in particular footnote 7. As apparent there, Brown has excluded cases decided under the equal protection clause of the Fourteenth Amendment.

494 The number of cases in the latter time sequence were significantly lower than in the two first time sequences, with only 38 cases, compared to 92 and 90.

495 Warren (1913) 295. Warren studied cases where State laws "involving a social or economic question of the kind included under the phrase 'social justice' legislation" were being tested against the due process or the equal protection clauses. Out of the 560 cases in the period 1887–1911, the Court only struck down the legislation in three of the cases. Those were, in addition to *Lochner*, the *Allgeyer* case (cfr. footnote 491) and *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902). See in the same direction Przybyszewski (2005) 148, who contends that the Fuller Court (1888–1910) "sustained the overwhelming majority of exercises of the police power [...] that came before it." See, further, Howard Lee McBain, *The Living Constitution. A Consideration of the Realities and Legends of our Fundamental Law* (The MacMillan Company 1928) 258: "The Supreme Court, by reason of one

the more progressive direction he preferred had, "during the last few years, received the tremendous authority of, and increasing application from, the Supreme Court of the United States".[496] Louis Brandeis, another progressivist and later an important Supreme Court Justice from 1916–1939, remarked a few years later in an article titled 'The Living Law' that a movement, which had begun some years prior to 1912, had "resulted in a better appreciation by the courts of existing social needs." Courts had, namely, turned away from "reasoning from abstract conception" and started "reasoning from life".[497] This was perfectly in line with Brandeis' progressive views on legal reasoning. As a counsel for the state of Oregon in *Muller v. Oregon* in 1908,[498] a case concerning maximum hour laws, Brandeis had revolutionized legal thinking with his famous "Brandeis brief" before the Court. "The people's lawyer" Brandeis, assisted by his social reformist sister-in-law Josephine Goldmark, devoted three pages to legal arguments, while the remaining 110 contained sociological, economic, medical, and psychological data from a wide range of sources.[499]

The statistical numbers are worth emphasizing in light of the infamous *Lochner* case from 1905, a case which lends its name to the pejorative term "Lochner jurisprudence" – the American equivalent to "jurisprudence of concepts".[500] In *Lochner*, the Supreme Court struck

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or two unfortunate decisions, came in for far larger opprobrium than was its just desert."

496 Felix Frankfurter, 'The Zeitgeist and the Judiciary' (first published 1913, reprinted in Philip B. Kurland (ed), *Felix Frankfurter on the Supreme Court. Extrajudicial Essays on the Court and the Constitution*, The Belknap Press of Harvard University Press 1970) 1, 3. See similarly Frankfurter, 'The Law and the Law Schools' (1915) 38 *Annual Reports of the American Bar Association* 365, 367.

497 Louis D. Brandeis, 'The Living Law' (address delivered before the Chicago Bar Association, January 3, 1916) (1916) 10 ILL. L. R. 461, 464–465. The address was delivered a couple of weeks before he was nominated to the Supreme Court by Woodrow Wilson, see 'Louis Brandeis', *Wikipedia, The Free Encyclopedia*, available at <https://en.wikipedia.org/wiki/Louis_Brandeis> (accessed 7 September 2024).

498 208 U.S. 412 (1908).

499 On the brief, see e.g. John W. Johnson, *American Legal Culture, 1908–1940* (Greenwood Press 1981) chapter 3; Horwitz (1992), *The Transformation* 209.

500 *Lochner v. New York*, 198 U.S. 45 (1905).

down a provision in the labour law of the state of New York providing that no employees should be required or permitted to work in bakeries more than sixty hours in a week, or ten hours a day. Under the substantive doctrine developed by the Court since the 1890's, freedom of contract was protected by the Fourteenth Amendment as part of individual liberty. At the same time, the states could make limitations on this freedom under the doctrine of the so-called police power of the state, as long as the limitation related to safety, health, morals and general welfare of the public. Justice Peckham, writing for the majority, found, however, that the maximum work hour provision fell outside the scope of the police power; it was not a health law, but an illegal interference with the freedom of contract of the employer and the employee.[501] No doubt, most people would probably say today, an odd view. Nevertheless, if one looks at the statistics, the much-told story in American constitutional history that *Lochner* testifies to a Supreme Court chopping down reform legislation becomes questionable.[502] In fact, a more representative case was probably the above-mentioned *Muller v. State of Oregon* from 1908, where the Court upheld a maximum hours labour law for women employed in laundries.[503] A conservative turn would only take place in the 1920's, as I will come back to. But *Lochner* is nevertheless considered as "epitomiz[ing] the abuse of judicial power" and one that "galvanized Progressive opinion and eventually led to a fundamental assault on the legal thought of the old order."[504] And even if the judgment was perhaps not very representative, there were indeed vehement reactions against it and court practice in general at the time. It is important, first, to keep in mind that even if the legislation was left untouched in most of the cases, the mere *threat*

501 *Ibid.* at 61.

502 See similarly Jacobson and Schlink (2000) 33.

503 The Court distinguished the case from *Lochner* by pointing to the different physical capacities of men and women. Moreover, "as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."

504 Horwitz (1992), *The Transformation* 33.

of judicial review was latent.[505] Moreover, not only the Supreme Court, but state supreme courts as well could hamper reform legislation.[506] It is illustrating that in a speech titled 'The Right of the People to Rule', delivered in 1912, Theodore Roosevelt proposed a system where the people by referendum could overturn judgments where state courts had struck down legislation as unconstitutional. But he underlined that he did not propose anything like that for the Federal constitution.[507]

That *Lochner* has been the chosen target for innumerable pages of criticism may perhaps be, at least in part, due to the rhetorical power of Oliver Wendell Holmes's dissenting opinion (cfr. Section 4.3.1). The main point to be emphasized at this stage, is that when American legal thinkers in the first half of the 19th century claimed that "law" had gotten out of joint with "life", they were oftentimes having in mind cases where courts used the broadly formulated constitutional provisions to strike down reform legislation.

4.2.3 A bird's view on some of the legal thinkers in the period: Christopher Columbus Langdell and James C. Carter

In contrast to the sophisticated German legal scholarship, a theoretical scholarship remained undeveloped in the United States until the end of the 19th century.[508] It was to some extent Oliver Wendell Holmes, but first and foremost Roscoe Pound who, as we will see, were the first legal thinkers to develop an elaborated theoretical program. Still, there were some voices preceding, and contemporary to, Holmes and

505 Friedman (1973) 316 and, as a more general point, McBain (1928) 246–247.

506 Wiecek (1998) 126 claims that in the period 1885–1900, state supreme courts "sprinted ahead as the avant-garde of classicism in public law." For a similar contention by a contemporary witness, see Horace A. Davis, *The Judicial Veto* (Houghton Mifflin Company 1914) 4. In 1914, Congress amended the procedural framework so that also cases where a state supreme court had found a *violation* of the federal constitution could be appealed to the Supreme Court. The reform was introduced precisely to place a check on conservative state courts, see McBain (1928) 249–250.

507 Roosevelt (1912).

508 See Herget and Wallace (1987) 419.

Pound. As pointed out in the chapter on methodology, the connection to general theoretical debates is important in order to understand the more specific debates within the realm of constitutional legal thinking. And if one wants to understand these general debates, it is necessary to have a look at some of the forerunners and those who were criticized by Holmes, Pound, and their descendants.

The need to take a closer look at the predecessors becomes even more pressing when taking into consideration that one of the main controversies in the debates about the legacy of Holmes, Pound, and the legal realists has been precisely the interpretation of the legal thinking of the late 19th century. One main interpretation of this legal thinking has been that it was "classicist", "formalist", "orthodox" or so. It was, according to one commentator, "abstract, formal, conceptualistic, categorical, and (sometimes) deductive", marked by individualism, (opportunistic) laissez-faire and social Darwinism, and with a belief that "law was derived from universal principles of justice and moral order" and constituted a closed system.[509] Another interpretation is that legal thinking in this period tried to "create an autonomous legal culture as part of their 'search for order'", and that this de-politicization was sought by a clear distinction between public and private law, generalization and abstraction of legal concepts, a self-contained system of legal reasoning, categorical thinking, and an ideal of a neutral state.[510] More recently, like in Germany, this picture of late 19th century thinking has been challenged. One scholar has argued that several of the ideas that have been ascribed to the realists in the 1920's and 1930's as ground-breaking, were actually rather common in the "classical" period, in particular when it comes to their views about judging.[511] Another scholar has stressed the historical element of legal thinking in the period, claiming that "the late nineteenth-century American legal scholars were historically sophisticated thinkers in the mainstream of

509 Wiecek (1998) prologue.
510 Horwitz (1992), *The Transformation* chapter one, the quote is from 9.
511 Tamanaha (2010) e.g. chapter 5.

transatlantic intellectual life, often dedicated to legal reform, and sometimes in the vanguard of original scholarship in legal history."[512]

The first scholar to take a closer look at is *Christopher Columbus Langdell* (1826–1906).[513] Langdell would later be seen by many as the stereotype representative of the "classical" era in American legal thinking. This claim is contested, but Langdell is in any event worth mentioning because he played an important role in the modernization of the law schools and legal education, which, as we have seen, ran parallel to the general modernization of society. Langdell was appointed professor at Harvard Law School in 1870 and became the law school's first dean the same year. At this time, university and college based legal education was in a rather poor state, both at Harvard and in the common law cultures in general. As already mentioned, legal education in the United States mainly took place outside of law schools before 1850. One of Langdell's main objectives when he entered Harvard was to do something with the "anomalous condition of legal education in English-speaking countries" and to bring the law school closer to "the position occupied by the law faculties in the universities of continental Europe."[514] Langdell thought that if law was not a science, "a university will consult its own dignity in declining to teach it". He had an *ad fontes* approach, which in the American system meant that the object of study should be cases, printed in the case reports. The relevant materials of legal science were "contained in printed books" and the "proper workshop of professors and students alike" was the library, which was to the lawyer all that the laboratories were to the chemists and physicists.

Langdell's didactic approach influenced the way law was presented in books and taught to students. His *Selection of Cases on the Law of Contracts* (1871) was the first case-book in American scholarship. A *prima facie* challenge when composing such a book, Langdell noted

512 Rabban (2012) 473.

513 For bibliographical information, see Marcia Speziale, 'Langdell's Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory' (1980) 5 VT. L. REV. 1, 8 f.

514 For this and the following quotes, see Langdell (1887) 118–125.

in the preface, was the vast amount of court decisions. But this challenge could easily be overcome by the fact that "[l]aw, considered as a science, consists of certain principles or doctrines." In order to grasp these principles and doctrines, which was the result of a growth that took place through a series of cases, only a small proportion of the reported cases would have to be presented. This, and the fact that "the number of fundamental legal doctrines is much less than is commonly supposed" would make it possible to "select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines".[515] As a parallel within legal teaching, Langdell introduced the case method, which was based on a discussion of cases with the students instead of lectures.[516] This method would spread to other law schools and eventually become paradigmatic in American legal education.[517] Langdell also stressed that practical experience from the bar or the bench did not in itself qualify for teaching, but that the teachers had to be professional qua teachers.[518]

In other words, Langdell held a belief that law could be studied scientifically as an autonomous and independent object, and that it could be reduced to a few principles or doctrines. The proper method was an inductive one, where the principles were to be established through

515 Christopher Columbus Langdell, *Selection of Cases on the Law of Contracts* (2nd edn, Boston 1879) vii–ix.

516 See on this Speziale (1980) 15 f.; Friedman (1973) 531 f.

517 Friedman (1973) 535.

518 Langdell (1887) 124. This was a controversial point. A colleague of Langdell complained in a letter to the President of the university in 1873 that Langdell was "contemptuous" of judges, because they did not treat "this or that question as a philosophical professor, building up a coherent system as they would have done." Langdell also had an "extreme unwillingness to have anything furnished by the School except the pure science of the law". The letter is cited in Friedman (1973) 533–534 with reference to Arthur E. Sutherland, *The Law at Harvard, A History of Ideas and Men, 1817–1967* (1967). Another colleague, John Chipman Gray, complained to the President the same year, with reference to Langdell, that "a school where the majority of the professors shuns and despises the contact with actual facts, has got the seeds of ruin in it and will and ought to go to the devil." This letter is cited in DeWolfe Howe (1963) 158.

a study of cases – something that could be done at the library desk. A challenge, however, that is sometimes overlooked when Langdell's general theory of law is analysed, is that he did not develop anything even close to an elaborate theory in his writings. The sparse material calls for a certain cautiousness, and the temptation to draw broad conclusions from the sources is probably one of the reasons why one can find very diverging characteristics of "Langdellian" thought. One possible strategy employed by Thomas C. Grey is to examine one of Langdell's doctrinal expositions within contract law and reconstruct a methodology from that analysis.[519] Grey describes Langdell's system as a division of law into three levels: principles, rules, and decision of cases. The principles were established by induction from cases, rules were derived conceptually from principles, and cases were decided conceptually from rules.[520]

The idea of law as an autonomous object of study and as a system consisting of some fundamental principles and doctrines resembles the classical German *pandectism*. There are, however, certain important differences. Langdell drew his conclusions inductively from court practice, while the *pandectists*' concepts were more abstract. Somehow schematically and simplified, one could say that the *pandectists*' method was modelled more on mathematics and speculation, while Langdell's approach bore closer resemblance to the methods of biology.[521] Another way of putting it is to compare Langdell's method with John Stuart Mill's geometry, where Mill established axioms by way of induction, and then deduced theorems from these axioms.[522]

Another influential writer in the late 19th century was *James C. Carter* (1827–1905). Carter was an influential jurist, and Roscoe Pound

519 Grey (2014) 48 f. The example Grey uses is how Langdell derives the rule that an acceptance by mail is binding only when it is received and read from principles of consideration as a necessary element in the making of contracts.

520 *Ibid.* 61 f., especially 65.

521 Mathias W. Reimann, 'Holmes's *Common Law* and German Legal Science' in Robert W. Gordon (ed), *The Legacy of Oliver Wendell Holmes, Jr.* (Stanford University Press 1992) 72, 108. Reimann sees Langdell as "a hybrid with parents from two different ages", that is, the Pandectists and Oliver Wendell Holmes.

522 See Grey (2014) 64–65.

considered him to be a prominent exponent of mainstream legal thinking.[523] Carter, who was a close friend of Langdell in law school, is perhaps most famous for his strong criticism of codification proposals.[524] The basis for this scepticism was his evolutionary theory of law. For Carter, the "great feature of society" was human conduct, and human conduct was determined by thought. Thought was again determined by society, which *a fortiori* meant that our conduct must follow rules of custom. In other words, these rules could not "be formed or changed per saltum by an act of legislation".[525] Law, Carter claimed, "being nothing but enforced custom, is self-existent, and cannot be made by legislation [...]".[526] Carter stressed a distinction between the activity of stating the law and the activity of enacting it. To state the law was "the scientific work of putting into orderly form those customary rules of conduct which men in society have come to observe, and requires scientific knowledge in any one undertaking the task." Enactment of law was

> the giving of a command such as a superior gives to an inferior, and does not absolutely require any knowledge at all in him who gives it, and such commands are in fact often given by those who have

523 Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 AM. L. REV. 12. In his classical economic study of the American Constitution from 1913, Charles A. Beard as well mentioned Carter as a characteristic representative of mainstream legal thinking, which was poorly developed and dominated by "all sorts of vague abstractions". Beard was more enthusiastic about European legal scholars, such as Jhering, Anton Menger, and Rudolf Stammler, who paid due attention to socio-economic factors. See *An Economic Interpretation of the Constitution of the United States* (first published 1913, reprinted version with a new introduction, Free Press 1986) 7 f.

524 For bibliographical notes, see Rabban (2012) 27 f.

525 James Coolidge Carter, *Law: Its Origin, Growth, and Function* (published posthumously, G.P. Putnam's Sons 1907) 269. See also 320: "Law we have found to be based upon and to be dependent upon Custom, and therefore we cannot materially change Law without changing Custom, and to change Custom, is, as we have found, a thing beyond our power, that is beyond our direct and immediate power."

526 *Ibid.* 312–313. This did not completely exclude the possibility of legislation, which could "shape, enlarge, and modify" law, see e.g. 318.

> no, or little, knowledge or whose knowledge is of a kind not at all desirable."[527]

Custom, which originated in society, was reflected or reproduced in law by judges. Learned judges, who were "men of science", were "the experts in ascertaining and declaring the customs of life".[528] In other words, judges did not create, but merely found and applied the already existing customs. If a case arose where there was no precedent, however, the role of the judge was to "observe the consequences of the conduct in question and approve or condemn it according as it appears to be or not to be in accordance with fair expectation".[529] The idea of a mere declaration of the law in hard cases is even more outspoken in a speech delivered in 1890:

> It is agreed that the true rule must be somehow found. Judge and advocates – all together – engage in the search. Cases more or less nearly approaching the one in controversy are adduced. Analogies are referred to. The customs and habits of men are appealed to. Principles already settled as fundamental are invoked and run out to their consequences; and finally a rule is deduced which is declared to be the one which the existing law requires to be applied to the case.[530]

Like Langdell, Carter stressed law's scientific character. The judge was supposed to "put into orderly form" the customs of society, and the scholars to conduct an "Inductive Science engaged in the observation and classification of facts".[531] And by this scientific character, law also attained an autonomy and a sharp distinction from politics, something

527 *Ibid.* 271.
528 *Ibid.* 327 and 332.
529 *Ibid.* 332–333.
530 James Coolidge Carter, 'The Ideal and the Actual in the Law' (address delivered at the Thirteenth Annual Meeting of the American Bar Association 21 August 1890, reprinted from the Report of the Transactions of the Association, Dando Printing and Publishing Company 1890) 10.
531 *Ibid.* 17.

that is characteristic for the opponents of codification.[532] While being in opposition to politics, law had, in Carter's view, a close relationship to society. Carter approved of the new Langdellian way of teaching at the universities, because he saw cases as being in reality a compilation of vast amounts of human conduct, and the way to achieve a scientific understanding of human conduct was to study it.[533] Moreover, his anti-legislation ideal of law was a purely negative one, bent towards classical liberalism: "[T]he function of Government is the same as that of Law – to mark out the line within which each individual can freely act without encroaching upon the like freedom in others' […]".[534]

4.2.4 A bird's view on constitutional scholarship in the period: Thomas M. Cooley and Christopher G. Tiedeman

If we move on to constitutional scholarship more specifically, the idea here is the same as in the previous subsection; if one wants to understand the scholarly debates in the first part of the 20th century, one has to start by taking a look at the forerunners. The two most prominent American constitutional scholars in the late nineteenth century were Thomas M. Cooley and Christopher G. Tiedeman.[535] Cooley wrote the influential book *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the United States of the American Union,* first published in 1868, while Christopher G. Tiedeman published the similarly popular A *Treatise on the Limitations of Police Power in the*

532 Horwitz (1992), *The Transformation* 9 (primarily related to antebellum debates over codification).

533 Carter (1907) 339: "All the actions of men – *quidquid agunt homines* – are the proper theme of the lawyer's study."

534 *Ibid.* 343.

535 See Stephen A. Siegel, 'Historism in Late Nineteenth-Century Constitutional Thought' (1990) Volume 6 *Wisconsin Law Review* 1431, 1452: "Other than Cooley and Tiedeman, no late-nineteenth-century constitutional commentator is an indispensable subject in a study of that era's dominant jurisprudence." In addition to Cooley and Tiedeman, Siegel studies John Norton Pomeroy in his overview article. See 1452 (footnote 87) for a list of other constitutional law treatise writers in the late nineteenth century.

United States Considered from both a Civil and Criminal Standpoint in 1886. Already the titles are instructive, in the sense that their focus was the *limitations* of public power.

Thomas M. Cooley (1824–1898), whose diverse career included practice as a politician, professor, judge, treatise-writer, and, as already mentioned, the first chairman of the Interstate Commerce Commission, did not try to hide his political-ideological views in his writings.[536] In the preface to his treatise on constitutional law, Cooley admitted that he had "full sympathy" for the restrictions on official power that the founding fathers had written into the constitution and that he had "faith in the checks and balances of our republican system".[537] In a later article, he made it plain that he regarded a constitution to be good that "yield[s] to the thought of people; not to the whim of the people, or the thought evolved in excitement or hot blood […]".[538] This view was part of a more general reluctance towards legislation: "The power to legislate, the people of America have discovered, unless carefully restrained and limited, is quite likely to prove a 'power to frame mischief by a law;' and by their constitutions they give special and careful attention to the necessary restraints." He was content to note that "[t]here is no legislative omnipotence in America, nor ever likely to be."[539]

At the same time, he underlined in the preface to the treatise that he would not present his personal views and that he had not "designed to advance new doctrines, or to do more than state clearly and with reasonable conciseness the principles to be deduced from the judicial decisions."[540] Moreover, he stated that "[t]he courts are not the guard-

536 For bibliographical information, see Rabban (2012) 21 f.; Siegel (1990) 1485 f.

537 Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the United States of the American Union* (5th edn, Little, Brown, and Company 1883) iii (preface).

538 Cooley (1889) 350. See further 354: "[I]n changing things excellent in government, no maxim of statesmanship can be wiser than to make haste slowly. The constitution stands before the people as an emblem of strength and stability, and it begets in them a conservative habit of thought and of action which of itself is invaluable."

539 Thomas M. Cooley, 'The Uncertainty of the Law' (1888) 22 AM. L. REV. 347, 367.

540 Cooley (1883) iii (preface).

ians of the rights of the people of the State, except as those rights are secured by some constitutional provision which comes within the judicial cognizance."[541] But this positivism – in the sense that he rejected natural, social, or political rights as the basis for constitutional claims – was to some extent neutralized by his view that constitutional provisions had to be interpreted in light of common law principles. According to one scholar, this "historism turns his positive approach to constitutional law into a vision of America as founded upon principles of civil liberty and natural law."[542]

Christopher G. Tiedeman (1857–1903) followed in Cooley's footsteps, but added some new ideas transported from abroad as well. In the mid-1870's, American students started to travel to German universities,[543] and the young Tiedeman – who came from an upper-class family – went to Göttingen and Leipzig to study in 1877–1878.[544] This was, it should be noted, one year after the publication of Laband's treatise, but I have not found any references to it in Tiedeman's writings. Instead, he attended the lectures of another prominent scholar, namely Rudolf von Jhering in Göttingen.[545] And in his general legal theory, he adopted some heritage from Jhering. Tiedeman regarded it as "a general proposition that a legal rule is the product of social forces, reflecting the prevalent sense of right." The prevalent sense of right was not "the quiet, smooth, uneventful development, which is found to prevail in the growth of a language, and which is claimed by the jurists of the Savigny-Puchta school to prevail in the growth of a system of jurisprudence", but rather the result of a "vigorous contest between opposing forces."[546] In order to apply this general theory to the field

541 *Ibid*. 168.
542 Siegel (1990) 1514, see also the accompanying footnote 488 to the quote for some closer remarks.
543 See Rodgers (1998) 76.
544 See Rabban (2012) 57, also for more general bibliographical information.
545 Christopher G. Tiedeman and others, 'Methods of Legal Education' (1892) 1 YALE L.J. 139, 151.
546 Christopher G. Tiedeman, *The Unwritten Constitution of the United States*, (G. P. Putnam's Sons 1890) 9 and 11–12, where the latter quote is accompanied by a reference to Jhering's *Kampf ums Recht*.

of constitutional law, he introduced a distinction between written and unwritten constitutional law:

> [T]he Federal Constitution contains only a declaration of the fundamental and most general principles of constitutional law, while the real, living constitutional law, – that which the people are made to feel around them, controlling the exercise of power by government, and protecting the minority from the tyranny of the majority – the flesh and blood of the Constitution, instead of its skeleton, is here, as well as elsewhere, unwritten; not to be found in the instrument promulgated by a constitutional convention, but in the decisions of the courts and acts of the legislature, which are published and enacted in the enforcement of the written Constitution.[547]

The basis for the decisions of the courts and acts of the legislature was "the popular will", because all law "is but an expression of the popular sense of right through the popular agents, the legislator or the judge […]".[548] In order to interpret the law rightly, the judge or the practitioner "must find out what the possessors of political power now mean by the written word."[549] Thus, the real driver for legal development, and indirectly the source of the unwritten constitutional law, was changing beliefs in civil society, which were to be merely declared by the legislator or the courts.[550]

Tiedeman's writings contain, however, certain tensions. While claiming that the "popular sense of right" was the real source of law, he feared

547 *Ibid.* 43.

548 Tiedeman and others (1892) 154.

549 Tiedeman (1890) 151.

550 It seems like Tiedeman believed that legal provisions or judgments were only part of the "living law" as far as they reflected the popular will, see 'Doctrine of Stare Decisis, And a Proposed Modification of its Practical Application, in the Evolution of the Law' (1896) 3 *The University Law Review* 11, 18: "The Legislature and the Court, alike, consciously or unconsciously, obey the popular mandate, and so far as either of these departments of the Government correctly interpret this mandate, the enactment or judgment, as the case may be, becomes a part of the living law of the land. To the extent to which the Legislature has failed in its enactment to interpret the popular will, the enactment will become a dead letter, unless the Courts, under the influence of a more correct conception of the popular will, may by construction and interpretation, bring the statute into closer conformity therewith".

the democratic majority, which he juxtaposed with socialism, communism, and anarchism.[551] Furthermore, he claimed on the one hand that courts "must find out what the possessors of political power now mean by the written word", and on the other hand – 12 pages later – that the real value of a written constitution and judicial review was that "[i]t legalizes, and therefore makes possible and successful, the opposition to the popular will."[552] In addition, he warned on one hand, in his treatise from 1896, against "encroachments by the judiciary upon the sphere and powers of the legislature" and argued for a presumption of constitutionality in cases of doubt.[553] But on the other hand, he wrote four years later that

> [i]n these days of great social unrest, we applaud the disposition of the courts to seize hold of these general declarations of rights as an authority for them to lay their interdict upon all legislative acts which interfere with the individual's natural rights, even though these acts do not violate any specific or special provision of the Constitution. These general provisions furnish sufficient authority for judicial interference.[554]

Perhaps the solution lies in the distinction Tiedeman draws – like Cooley did – between "the people's will" and "their whims and ill-con-

551 Christopher G. Tiedeman, *A Treatise on the Limitations of Police Power in the United States Considered from both a Civil and Criminal Standpoint* (first published 1886, reprinted version, The Lawbook Exchange 2001) vi–vii. See also Tiedeman (1896) 17, where he has a remarkable theory about why the doctrine of *stare decisis* was confined to the common law system. His theory was that *stare decisis* ensured more legal certainty, and that the need for stability was more prominent among the Anglo-Saxon peoples because there, the threat to "vested interests" by democracy had been more serious than at the continent. And thus, even though he opposed the doctrine in general, he had to make some concessions: "So far as the doctrine of *Stare Decisis* serves the purpose of a brake on the wheels of democracy, with its socialistic and other more or less revolutionary demands for change, it is a precious heritage of the common law, and should be jealously guarded against destruction or abrogation".

552 Compare Tiedeman (1890) 151 with 163–164.

553 Tiedeman (2001) 12. The limit should, according to Tiedeman, be "clear cases of natural injustice".

554 Tiedeman (1890) 81. The paragraphs preceding this quote are more or less identical to the treatise from 1886, but this paragraph is added in the book from 1890.

sidered wishes."[555] But then, who was to decide authoritatively on the 'real' versus the 'apparent' will of the people? In the quote above, Tiedeman praises the courts, but it seems like it is the legal scholars who are supposed to occupy the most prominent place in Tiedeman's legal universe. Like so many others in this era, he was concerned with law's scientific character. He was of course full of reverence for judicial giants in the history of common law like Marshall, Kent, Story, Taney, Miller, but he claimed that they

> could have rendered as incalculably greater service in the development of our jurisprudence along scientific lines if they had been charged by the country with duties similar to those required of the Roman jurisconsults, viz., the analytical composition and construction of the law in all its branches.[556]

In an American context, this was not an insignificant thesis. Again, the influence from his days of studies in Germany is an important explanation. When discussing methods of legal education, Tiedeman made it clear that he preferred the German way of teaching law that he had "learned to admire" from Jhering's lectures. Adapted to an American context, a main issue was the role of cases in the education. Tiedeman commended that the advocates of the case method had infused "more life" into the education, but warned against moving in a too practically oriented direction at the expense of theoretical studies.[557] His position was that cases should be used "not for the purpose of learning directly from them what is the law, but to discover, as the scientific investigator hopes by his experiments with the forces of nature, the fundamental principles underlying the concrete manifestations of their influence."[558]

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555 *Ibid.* 164. Tiedeman does not refer to Cooley here, but instead to James Russell Lowell's *Democracy, and Other Addresses* from 1887. It might be that this was the source for the expression made by Cooley in his article from 1889 as well, cfr. footnote 538 above.

556 Tiedeman (1896) 21–22.

557 Tiedeman and others (1892) 157.

558 *Ibid.* 154. See also the following from the same page: "[t]he adjudicated cases constitute nothing more than materials out of which the scientific jurist is to construct a science of jurisprudence."

A lawyer who wanted to learn their subjects should go "to his library, instead of to his laboratory." And in the library, he should primarily consult treatises, not commentaries or casebooks. In treatises, he would find a scientific system, constructed by a learned mind who had done what at least the average student would not be able to do, namely to "construct for himself, out of the mass of judicial decisions, an orderly and logical presentation of the fundamental principles, which are the groundwork of every system of jurisprudence".[559] In sum, what he wanted was a more theoretical education.[560] (He even dared to propose what is perhaps the secret dream of many university lawyers: "During the entire course in the law school I would place the ban upon the resort of the student to the law office"[561]).

To sum up, the scientific character of law was a constant concern for the late 19th century American legal thinkers, both in general and within constitutional scholarship more specifically. It was nothing like the concept-building *pandectism* they had in mind, but still, their ideal picture of science maintained a rather narrow scope. Regardless of whether they preferred cases (Langdell and Carter) or scholarly works (Tiedeman), the object of the study was law as a relatively autonomous and isolated phenomenon – something that could be studied in the law library.[562] Even the "society" Carter wanted lawyers to study was in reality case law. And precisely this idea, that law could be seen as phenomenon isolated from the broader "life" of societal and political developments, was something that would be challenged intensively by the critical scholars in the early 20th century.

559 *Ibid*. 153–155.

560 But he regarded a pure transplantation of the German teaching method to be unsuited for "the ordinary American law school, for the reason that the average law student does not come to the law school with such a trained mind as a college course generally insures.", cfr. *ibid*. 151.

561 *Ibid*. 158.

562 Twining (1985) 13 makes a similar observation in regard to Langdell.

4.3 Crisis and criticism, ca. 1900–1937

4.3.1 Oliver Wendell Holmes: Experience as the life of the law

The real founding father of a theoretical doctrine in American legal scholarship was Oliver Wendell Holmes (1841–1935). With his famous article 'The Path of the Law' from 1897, Holmes "pushed American legal thought into the twentieth century."[563] And as Justice at the U.S. Supreme Court from 1902 to 1932, Holmes wrote influential opinions, among other a dissenting opinion in the *Lochner* case (cfr. below). In our context, it is worth mentioning that as an academic, Holmes barely touched upon constitutional issues. Both the small articles and reviews he published in *The American Law Review* from 1867 and onwards, and his major work from 1881, *The Common Law*, mainly concerned different fields of private law. But in these works, he trod the path that would culminate with 'The Path of the Law'.

One thread that runs through Holmes's authorship is his scepticism towards the role of logic and deduction in law. In an article from 1870, he writes that "[i]t is the merit of the common law that it decides the case first and determines the principle afterwards."[564] Here, Holmes rejects the idea of a syllogistic way of reasoning and seems to claim that the judge bases his or her decision more or less on intuition. Only when several cases have been decided, he continues, will there be a need for reconcilement, but this will happen through an inductive process where a more general principle is established. Ten years later, he published – anonymously –[565] a harsh critique of Langdell's *Summary of the Law of Contracts*, where he wrote the following:

563 Morton J. Horwitz, 'The Place of Justice Holmes in American Legal Thought' in Robert W. Gordon (ed), *The Legacy of Oliver Wendell Holmes, Jr.* (Stanford University Press 1992) 31, 69.

564 Holmes (1870), here cited from Sheldon M. Novick, *The Collected Works of Justice Holmes. Complete Public Writings and Selected Judicial Opinions of Oliver Wendell Holmes*, Vol. 1 (The University of Chicago Press 1995) 212.

565 According to Reimann (1992) 93–94, Holmes's *The Common Law*, where German legal scholarship is criticized, was in reality, at least partly, a hidden attack on Langdell. His cautiousness is explained by the fear of serious detriment to his

> Mr. Langdell's ideal in the law, the end of all his striving, is the *elegantia juris*, or logical integrity of the system as a system. [...] If Mr. Langdell could be suspected of ever having troubled himself about Hegel, we might call him a Hegelian in disguise, so entirely is he interested in the formal connection of things, or logic, as distinguished from the feelings which make the content of logic, and which have actually shaped the substance of the law. The life of the law has not been logic: it has been experience.[566]

The famous last sentence was also repeated in the opening passage of *The Common Law* from 1881.[567] In the book review, he followed up by claiming that judicial reasoning was dressed up in a logical form, but that "[t]he important phenomenon is the man underneath it, not the coat". In *The Common Law*, moreover, he argued that

> "[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[568]

In 'The Path of the Law', the nucleus of Holmes's theory is developed even further and given a more definite and clear-cut form. Legal reasoning, Holmes argues, is draped in the language of logic in order to satisfy our longing for certainty and repose. But the logical form

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personal reputation and career, as Langdell was the most respected man at Harvard. This may of course also be one of the reasons why he published the review anonymously.

566 Oliver Wendell Holmes, 'Unsigned Book Notice' (1880) 14 AM. L. REV. 233. In Mark DeWolfe Howe, *Justice Oliver Wendell Holmes. The Proving Years 1870–1882* (Harvard University Press 1963) 157, it is quoted from a letter from Holmes to Frederick Pollock, where the former writes that Langdell "is all for logic and hates any reference to anything outside of it".

567 Oliver Wendell Holmes, *The Common Law*, Lecture I: Early Forms of Liability (1881). Here cited from Sheldon M. Novick, *The Collected Works of Justice Holmes. Complete Public Writings and Selected Judicial Opinions of Oliver Wendell Holmes*, Vol. 3 (The University of Chicago Press 1995) 115.

568 *Ibid*. He also insisted that law "cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."

conceals what is "the very root and nerve of the whole proceeding": a judgment.[569] Now, a decisionist element is moved to the forefront, and there is a certain link between this element and Holmes's famous prediction theory presented in the same article: that "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[570] With this, the courts were regarded as the gravitation point of the legal system and the proper object of study. In an article written two years later, the decisionist element is, however, somewhat modified. Now Holmes introduces a distinction between doubtful and indisputable cases, and the judges' "sovereign prerogative of choice" is restricted to the former.[571]

If logic was thrown overboard, at least in doubtful cases, then one could ask what the replacement would be. For Holmes, experience was the life of the law, but what kind of experience? The analytical-descriptive part of Holmes's theory is the aforementioned idea that law is a prophecy of what the courts will do in fact. But Holmes also presents normative ideas about how the jurist should reason. In *The Common Law*, Holmes had claimed that "[w]e must alternately consult history and existing theories of legislation".[572] In 'The Path of the Law', there is a remarkable shift in the relationship between history and policy.[573] Now, history has lost its value and has become a purely auxiliary discipline. Historical inquiries were still considered useful as a first step, in order to understand the law – to "get the dragon out of his cave". But the real task lay in a critical consideration of the worth of the rules – the decision on whether "to kill [the dragon], or to tame him and make him a useful animal".[574] This critical consideration was to be based on articulate references to the social ends which the rules subserve and

569 Holmes (1897) 466.
570 See *ibid.* 461.
571 Oliver Wendell Holmes, 'Law in Science and Science in Law' (1899) 12 HARV. L. REV. 443, 460–461.
572 Novick (1995), *Collected Works of Justice Holmes* Vol. 3 115.
573 This development in Holmes's thought is described and analysed by Horwitz (1992), 'The Place of Justice Holmes'.
574 Holmes (1897) 474 even "look[ed] forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious

the grounds for desiring these ends. In other words: the path of the law led straight to social ends; policy considerations were the kind of experience that should guide the judge when breathing life into law.

One of the implications of this new guiding principle of social ends was that it was "the man of statistics and the master of economics", not "the black-letter man", that would be "the man of the future" for the rational study of law.[575] Secondly, the recognition of the significant element of choices in legal reasoning, and that judges had an inevitable duty to weigh considerations of social advantage, led to an insistence on openness, articulation and transparency. Holmes thought that the Constitution was used by some judges as a class instrument, that new principles were "transplanted" into it from the outside, and that the judges would be more hesitant if they actually considered the social consequences of the rules they laid down.[576] This was further combined with an insistence that law would have to be justified "in some help which the law brings toward reaching a social end *which the governing power of the community has made up its mind that it wants*."[577] With this, a powerful conclusion was implicitly reached: the courts should defer to the policy considerations decided by the legislator. In other words, the economic and statistical education should *not* make the judge a (social) philosopher king. It should only make him realize and reflect over the fact that his choices had real and social effects.

It was as Supreme Court Justice that Holmes would perhaps level the most serious and influential attack on mainstream legal thinking. His dissenting opinion in *Lochner* has become one of the most appraised dicta in the history of the Supreme Court and contributed to the picture of Holmes as a legal sage. To recap, the majority of the Court had struck down a maximum hours provision as an unconstitutional inference with the right to liberty protected under the Fourteenth Amendment. Holmes was relentless in his dissent, where one finds

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research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them."

575 *Ibid.* 469.

576 *Ibid.* 467–468.

577 *Ibid.* 452 (emphasis added).

several elements from his legal theory.[578] By stating that the case was "decided upon an economic theory which a large part of the country does not entertain" and that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics", Holmes bluntly dismissed the majority opinion as a personal, not a legal reasoning, based on non-legal factors.[579] "General propositions", he wrote, "do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." There were, of course, no references to neither Spencer's theory nor other economic theories in the majority opinion, so the allegation Holmes made was in fact that the majority had failed to reason in an open and transparent way. Holmes positively proposed a constitutional test that testifies to his idea about judicial deference. It was only when a "rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law" that it should be found unconstitutional.

With his wit, his brilliant, sharp pen, and his vivid catchphrases, Holmes was successful in effectively spreading the new message to a large audience. His *bon mot* about "the life of the law" as experience, not logic, painted a radically different picture of law and legal reasoning than mainstream legal thinking before him. Moreover, his thoughts about law resonated well with the progressive ideas that were in the air in this period. In sum, one could say that Holmes introduced a kind of legal "futurism": Instead of perceiving legal decision-making as a logico-deductive application of pre-existing legal norms to facts, he looked at it as a forward-looking, consequentialist activity concerned with social policy. Secondly, law was thought of as predictions about

578 198 U.S. 45 (1905). Justice Harlan wrote another dissenting opinion, to which Justice White and Justice Day concurred.

579 Holmes' reference to Spencer might also have been subtly directed against Tiedeman. According to Tiedeman, Spencer's understanding of freedom in his *Social Statics* was "the ruling principle of police power in the United States, and the necessary fundamental principle in every system of sociology in a free State". Cfr. Tiedeman (2001) 329, see also 67.

how courts would decide in the future. Holmes's man of the future, then, had to be precisely that: a man of the future.

4.3.2 Roscoe Pound: "Law" and "life" as a question of continuity and change (I)

Around the turn of the century, there was a baton handoff between Oliver Wendell Holmes and Roscoe Pound (1870–1964). Holmes went to the US Supreme Court in 1902, while Pound became dean of the Law School of Nebraska in 1903.[580] Over the next ten years, Pound would publish a number of important law review articles, and he also became professor of law at Harvard (1910) and eventually dean (1916), a position he would hold for 20 years. The message conveyed by Pound in these early articles was that the American legal system was in a state of crisis. There was a "real and serious dissatisfaction with courts and lack of respect for law" in the United States, he wrote in 1906.[581] Pound argued that law and legal scholarship had become "mechanical" and out of touch with societal and scientific developments, and that a "sociological jurisprudence" would be needed in order to escape the lamentable state of affairs. Pound was a towering character in American legal scholarship for several decades, and a complete overview of his writings would exceed the limits of this study. In the following, I will focus mostly on his pre-WWI writings, which "had an enormous influence in shaping the Progressive ideal of social reform through law."[582]

At the core of Pound's legal theory is the tension between continuity and change. Pound makes a distinction between law and public opinion and observes that as a general rule, the former develops more slowly than the latter.[583] Thus, there is a tendency that there will be

580 Pound had studied law at Harvard for one year in 1889–1890. For a biographical overview, see Paul Sayre, *The Life of Roscoe Pound* (Iowa 1948).

581 Roscoe Pound, 'The Causes of Popular Dissatisfaction with the Administration of Justice' (paper read at the 29th Annual Meeting of the American Bar Association, 29 August 1906, reprinted in (1964) 10 (4) *Crime & Delinquency* 355).

582 Horwitz (1992), *The Transformation* 217.

583 See e.g. Pound (1964) 358–359.

a discrepancy between the two. Moreover, he claims that law contains an inherent mechanical and rigid element, in the way that rules have a general form but are supposed to apply in individual cases, where there may be conflicting ethical demands.[584] These were constant sources of tension, but Pound claims that they would play out differently in different historical contexts. He operates with an evolutionary theory where law oscillates between "periods of growth, periods in which the law is developing through juristic activity", and "periods of stability, periods in which the results of juristic activity of the past are summed up or worked out in detail or merely corrected here and there by legislation".[585] The state of crisis he felt he was witnessing stemmed from the fact that both public opinion and the socio-economic forces had developed, while law was in a period of stability. Legal scholarship more specifically was lagging behind developments in other scientific branches. As a result, Pound felt that there was a wide gulf between "law" and "life", a gulf he wanted to bridge by leading legal thought in a new direction.

The importance of socio-economic change for Pound's analysis can be seen from the several references he makes to "our modern industrial society", "an era of transition", "the business world of today", and so on.[586] According to Pound, the common law was built on theories of equality, but industrial progress had led to a state of actual inequality.[587] Moreover, there was a conflict between "the individualist spirit of the common law and the collectivist spirit of the present age".[588] One of

584 *Ibid.* 357–358.

585 Pound (1910) 22; see also Roscoe Pound, 'Mechanical Jurisprudence' (1908) 8 COLUM. L. REV. 605, 607–608 and 611–612.

586 See e.g. Pound (1964) 358 and 361; Roscoe Pound, 'The Need of a Sociological Jurisprudence' (1907) 19 *Green Bag* 607, 607 and 608; Roscoe Pound, 'Liberty of Contract' (1909) 18 YALE L.J. 454, 468; Roscoe Pound, 'The Scope and Purpose of Sociological Jurisprudence' (1912) 25 HARV. L. REV. 489, 501; Pound (1910) 33.

587 Pound (1912) 501 and 502; Pound (1909) 454.

588 Pound (1964) 361. See also Pound, 'Do We Need a Philosophy of Law?' (1905) 5 COLUM. L. REV. 339, 344, on the common law: "[I]t exhibits too great a respect for the individual, and for the intrenched position in which our legal and political history has put him, and too little respect for the needs of society, when they come in conflict with the individual, to be in touch with the present age."

the fields where this clash was most acutely felt was, he asserted, in the field of constitutional law. Here, the individualistic concept of liberty of contract was used as an *a priori* rule from which conclusions were drawn, and the field was full of natural law reasoning.[589] Moreover, the courts were "privatizing" political matters by handling cases of great public importance as mere private law disputes between two individuals.[590] The courts played a double negative role, in the sense that they were on the one hand failing to develop new doctrines to meet new conditions, while on the other hand they were striking down legislation that sought to do so. The courts, Pound lamented, were "doing nothing and obstructing everything".[591]

Even though Pound located the problem on several levels, his main concern was the state of legal thought. It is illustrating that in an early article, from 1905, Pound argued that the remedy for the backwardness of the legal system would be neither to pack courts nor to codify the law. It was rather to be found in law schools and in "training the rising generation of lawyers in a social, political and legal philosophy abreast of our time."[592] Legal thought had become mechanical, that is, it had degenerated into "a rigid scheme of deductions from a priori conceptions."[593] Pound saw James C. Carter as a prototype of American legal thought, as he "lays down a criterion of law and legislation a priori, deduces from it an absolute test of right and wrong and proceeds to define the limits of legislative law-making accordingly."[594] Pound held this to be an "acceptance of Herbert Spencer's Kantian formula of justice". This method was anachronistic, because "[w]e no longer hold anything

589 See in general Pound (1909, but also Pound (1905) 344 and Pound (2010) 28.
590 See Pound (1964) 364. See also Pound (1905) 353, where he dryly speaks of the US as "a state wherein the most intimate problems of sociology and economics are tried in actions of trespass and suits to enjoin repeated trespasses".
591 Pound (1964) 362; see Pound (1905) 344 as well.
592 Pound (1905) 352; Pound (1907) 611 as well. In addition, compare the space he devotes to elaborating the problems of "juristic thought" on the one hand, and legislation and administration as other causes behind the state of affairs on the other hand, in Pound (1910), see in particular the comments on 34.
593 Pound (1908) 608.
594 Pound (1910) 28.

scientific merely because it exhibits a rigid scheme of deductions from a priori conceptions."[595] Pound – who had received a doctoral degree in botany in 1897 – noted that legal thinking was "in the rags of a past century, while kindred sciences have been reclothed".[596] His ideal was a pragmatist philosophy, which, as Pound quoted William James, the leading philosopher of pragmatism, saying, saw theories as "instruments, not answers to enigmas, in which we can rest".[597]

Another element of mechanical jurisprudence was, Pound argued, that principles had ceased to have importance and that law had become a body of rules.[598] Pound offers no precise definition of what he means by "rules" and "principles", but it seems like his ideal principles were something like the general clauses in the German Civil Code (BGB). When he states that the BGB was in conformity with a sociological theory of legal science, because it "lays down principles from which to deduce, not rules, but decisions", he highlights the "good faith" clause in § 242 as an example.[599] The problem with American jurisprudence was that:

> [w]e have developed so minute a jurisprudence of rules, we have interposed such a cloud of minute deductions between principles and concrete cases, that our case-law has become ultra-mechanical, and is no longer an effective instrument of justice if applied with technical accuracy.[600]

But this was only in theory. Pound thought that "[i]n practice, flesh and blood will not bow to such a theory. The face of the law may be saved by an elaborate ritual, but men, and not rules, will administer justice."[601]

595 Pound (1908) 608.
596 Pound (1910) 30.
597 Pound (1908) 608, cfr. James (2010) 22.
598 Pound (1909) 462. See also Pound (1908) 607: "it is in the nature of rules to operate mechanically."
599 Pound (1908) 613 (footnote 33).
600 Pound (1910) 20.
601 *Ibid.* 20.

Pound's suggested way out of the impasse was to replace mechanical jurisprudence with a sociological jurisprudence. As noted earlier, a source of inspiration was pragmatist philosophy, but Pound, who was extremely well-read, was also influenced and inspired by German and French legal theoretical writings. The sociological tendency was "already well-marked in Continental Europe", he noted in 1907, referring to works by Stammler, Ehrlich, Gumplowicz, Vaccaro, and Grasserie.[602] In 1915, he wrote the following about Ehrlich in a letter to Oliver Wendell Holmes, who wanted to have Ehrlich's address from Pound: "To my mind for many years he has been very close to the top, if not at the top among Continental legal scholars."[603] Yet another source of inspiration was other branches of science. According to Pound, the new general scientific ideal, which legal scholarship should adopt as well, was that science should be measured according to its utility:

> Law is not scientific for the sake of science. Being scientific as a means towards an end, it must be judged by the results it achieves, not by the niceties of its internal structure; it must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation.[604]

The insistence on law as a mere tool implies that the ends to be achieved were externalised. This instrumentalization of law and externalisation of ends are crucial features of Pound's theory, and they illustrate clearly his attempt to bridge the gulf between "law" and "life", as well as between legal thinking and other sciences. Instead of looking to the past and end up with a "government of the living by the dead",[605]

602 Pound (1907) 609. It is worth mentioning that several of these works were very recently published when Pound wrote his article, indicating that he was following closely the developments in Europe. In Pound (1908) 610, he refers to Jhering as "the pioneer in the work of superseding [the] jurisprudence of conceptions (*Begriffsjurisprudenz*) by a jurisprudence of results (*Wirklichkeitsjurisprudenz*)." See also all the references to German authors in Pound (1912) 515 (footnote 101).

603 Letter dated 22 July 1915, printed in Sayre (1948) 272.

604 Pound (1908) 605.

605 Pound (1964) 359. The quote is taken from Herbert Spencer.

the lawyers should look to the present conditions, put "the human factor in the central place"[606] and focus on "a scientific apprehension of the relations of law to society and of the needs and interests and opinions of society to-day."[607]

In order to implement this, norms had, as we have seen, to be formulated and understood differently than what was commonplace. Jurists had to be given more leeway and discretion. With reference to authors such as Ehrlich and Kantorowicz (whom he held in high esteem[608]) he argued for an "equitable application of law":

> [The sociological jurists] conceive of the legal rule as a general guide to the judge, leading him toward the just result, but insist that within wide limits he should be free to deal with the individual case, so as to meet the demands of justice between the parties and accord with the general reason of ordinary men."[609]

It might seem like a paradox that Pound opted for more flexibility for judges, taking into account the experience with broad constitutional provisions and judgments like *Lochner v. New York*. Wouldn't a more feasible solution be to restrict the judges' scope of discretion? A plausible answer is that as we have seen, the fundamental distinction for Pound was between continuity and change, where he had a marked inclination towards progress. Progress could be achieved through judicial developments, yes, perhaps even better so than for instance through legislation.[610] There was in other words nothing inherently wrong with legal development through court practice, but of course, there was a

606 Pound (1908) 610.
607 Pound (1907) 611.
608 On Pound's admiration for Kantorowicz, cfr. the letters referred to in Schmidt (2023) 97–98.
609 Pound (1912) 515. See 516 as well: "legal precepts are to be regarded more as guides to results which are socially just and less as inflexible molds."
610 In Pound (1908) 612, he points out that usually, legislation had consisted mainly of codification. "The further step, which is beginning to be taken in our present era of *legal development* through legislation, is in reality an awakening of juristic activity, as *jurists perceive that they may effect results through the legislator as well as through the judge or the doctrinal writer*." (emphasis added)

risk that judges could favour conservatism and stability and turn out to be the most dangerous branch. For Pound, this implied, as noted above, that the curricula and teaching methods of law schools, where judges were educated, were of utmost importance. The solution would be to ensure that judges were taught a philosophy of law "founded on a sound knowledge of the elements of the social and political science of to-day".[611] This implied an approach to legal education that was radically different from the Langdellian ideal, and which deserves a lengthy quotation:

> The modern teacher of law should be a student of sociology, economics, and politics as well. He should know not only what the courts decide and the principles by which they decide, but quite as much the circumstances and conditions, social and economic, to which these principles are to be applied; he should know the state of popular thought and feeling which makes the environment in which the principles must operate in practice. Legal monks who pass their lives in an atmosphere of pure law, from which every worldly and human element is excluded, cannot shape practical principles to be applied to a restless world of flesh and blood. The most logical and skilfully reasoned rules may defeat the end of law in their practical administration because not adapted to the environment in which they are to be enforced. It is, therefore, the duty of American teachers of law to investigate the sociological foundations, not of law alone, but of the common law and of the special topics in which they give instruction, and, while teaching the actual law by which courts decide, to give to their teaching the color which will fit new generations of lawyers to lead the people as they should, instead of giving up their legitimate hegemony in legislation and politics to engineers and naturalists and economists.[612]

To summarize, Pound offered a way more comprehensive theoretical underpinning to the criticism of mainstream legal thinking than

611 Pound (1905) 353.
612 Pound (1907) 611–612.

Holmes had done. Holmes stood out with his memorable aphorisms, whereas Pound wrote lengthy articles where he drew upon extensive knowledge of legal history and contemporary continental legal thinking in order to formulate a more elaborated theoretical program. The main message that was rammed home, and theorized as a concrete manifestation of a more general pattern of how law developed, was the diagnosis of a society where "law" and "life" had drifted apart from each other.

4.3.3 Benjamin N. Cardozo: "Law" and "life" as a question of continuity and change (II)

Benjamin N. Cardozo (1870–1938) was born the same year as Pound but came from a different background. His family was part of the distinguished Sephardic Jewish community in New York, although the family prestige had suffered severely when his father was involved in a corruption scandal in 1872 and had to resign from the New York State Supreme Court. With Benjamin, who would rise to become one of the most esteemed personalities of American law in the 20th century, the family pride would eventually be rehabilitated. After having practiced as a New York lawyer for some 20 years, Cardozo was appointed judge at the New York Court of Appeals in 1914. In 1927, he advanced to the position of chief judge, and then, in 1932, his career was coronated with the appointment to the Supreme Court as Holmes's successor, a position he held until his death in 1938.[613] His Supreme Court turn was brief, but intense, located in a turbulent period dominated by the New Deal quarrel between the Court and Franklin D. Roosevelt. Together with Louis Brandeis and Harlan Fiske Stone, Cardozo made up the liberal fraction of the bench, usually branded as the Three Musketeers. They were, as I will come back to in more detail later,

613 For a brief overview of Cardozo's life, see David G. Dalin, *Jewish Justices of the Supreme Court. From Brandeis to Kagan* (Brandeis University Press 2017) chapter 4. A more complete biography is Richard Polenberg, *The World of Benjamin Cardozo. Personal Values and the Judicial Process* (Harvard University Press 1997).

often outnumbered by the conservative wing of the Four Horsemen.[614] The following analysis will focus on some of Cardozo's extrajudicial writings from the 1920's. Cardozo gave two lectures at Yale in 1921 and 1923 that secured him nation-wide fame, published as *The Nature of the Judicial Process* and *The Growth of the Law*.[615]

Cardozo's writings were impregnated with Poundian thought, in particular the idea about a persistent tension between stability and progress.[616] "Law must be stable, and yet it cannot stand still", he quoted Pound saying, and added that "[h]ere is the great antinomy confronting us at every turn." It was the task of legal philosophy to "mediate between the conflicting claims of stability and progress, and supply a principle of growth."[617] In constitutional law, the tension was particularly felt in relation to the concept of liberty. Cardozo referred to Holmes's dissenting opinion in *Lochner* as "the conception of liberty which is dominant today" and spoke additionally of a "fluid and dynamic conception which underlies the modern notion of liberty".[618]

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614 Cfr. section 4.3.8 below.

615 For an overview of the lectures and the positive reception, see Polenberg (1997) 85 f. According to Horwitz (1992), *The Transformation* 189, *The Nature of the Judicial Process* "remained perhaps the most widely read American work on legal thought for over a half century."

616 Cardozo referred to Pound's 'Mechanical Jurisprudence' as an "illuminating paper" and held that "[i]n the analysis of ends, the most fruitful generalizations yet reached, at least in Anglo-American law, are those of Roscoe Pound", see *The Growth of the Law* (first published 1924, reprinted in *Cardozo on the Law*, The Legal Classics Library 1982) 66 and 81.

617 Cardozo (1982), *The Growth* 1 and 2, quoting Roscoe Pound, *Interpretations of Legal History* (1923) 1. In Cardozo's *The Paradoxes of Legal Science* (first published 1927, reprinted in *Cardozo on the Law*, The Legal Classics Library 1982), two of the subheadings in the first chapter are titled "rest and motion" and "stability and progress".

618 Benjamin N. Cardozo, *The Nature of the Judicial Process* (first published 1921, reprinted in *Cardozo on the Law,* The Legal Classics Library 1982) 79–81. He also predicted, quite rightly so, that "[i]t is the dissenting opinion of Justice Holmes, which men will turn to in the future as the beginning of an era." Cardozo admired, by the way, Holmes. "He is", Cardozo wrote in 1931, "today for all students of the law and for all students of human society the philosopher and the seer, the greatest of our age in the domain of jurisprudence, and one of the greatest of the ages.", see Benjamin N. Cardozo, 'Mr. Justice Holmes' (1931) 44 HARV.

Courts had to be aware of this fluidity and seek as much factual and up-to-date information as possible – he extolled, in this context, Justice Brandeis's opinions – or, if unable to disclose the facts fully, defer to the legislator.[619]

While an admirer of Pound, he noted that the value of sociological jurisprudence had first and foremost been of a negative character.[620] Cardozo's own theory can be seen as an attempt to take a positive step further and systematize the principles of legal reasoning at work in the judicial process into four categories, or, in his own terminology, "forces". He distinguished between a principle of logic ("the rule of analogy or the method of philosophy"), a principle of historical development ("the method of evolution"), a principle of customs ("the method of tradition"), and a principle of justice, morals, and social welfare ("the method of sociology").[621] But this taxonomy of principles was, or could at least only work as, a descriptive account, not a methodological programme offering guidance to lawyers. As a description, moreover, it was crude and general. Cardozo's writings are pervaded by countless reservations and qualifications pervading his writings, almost to the point of straight-forward hesitation; as such, it was possible for anyone to find something to his or her liking. In a symptomatic fashion, Cardozo concluded that "[i]f you ask how [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself."[622]

L. REV. 682, 684. Furthermore, in a personal letter to Holmes in 1928, Cardozo described him as "the greatest judge that ever lived", see Polenberg (1997) 173.

619 Cardozo (1982), *The Growth* 117; Cardozo (1982), *The Paradoxes* 124–125.

620 Cardozo (1982), *The Growth* 84.

621 Cardozo (1982), *The Nature* 30–31, see also a succinct summary on 112.

622 *Ibid.* 113. Similarly, when concluding the 1923 lecture with some final remarks on the relationship between stability and progress, he said that "I shall not take it amiss if you complain that I have done little more than state the existence of a problem. It is the best I can do.", see Cardozo (1982), *The Growth* 143. Karl N. Llewellyn comments that "[e]xactly what the proper limits [for judges to drive legal change] are he did not describe; he *felt* them, and then he used them. What they are, you gather not from his books; those books tell you chiefly that there is some freedom for a judge, and that it is severely restricted […]", see 'On Reading

Notwithstanding all the reservations, there is no doubt that Cardozo was a legal progressivist. His writings are, just like Pound's works, full of references to continental scholars such as Gény, Ehrlich, Kantorowicz, Saleilles, Duguit, Zitelmann, Stammler, and many more, as well as to the pragmatists James and Dewey. More importantly, he referred to the method of sociology as "the force which in our day and generation is becoming the greatest of them all" and claimed, in a Holmesian way, that "[t]he final cause of law is the welfare of society."[623] He also referred approvingly to Jhering's teleological method and contended as well that "[r]ules derived by a process of logical deduction from pre-established conceptions of contract and obligation have broken down before the slow and steady and erosive action of utility and justice."[624] The reference to "justice" and not merely "utility" is indicative of Cardozo's broad definition of a sociological method and his belief in a close connection between law and morals. The judge was, within the limits of his discretionary powers, under a duty "to

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and Using the New Jurisprudence' (I) (1940) 26 *American Bar Association Journal* 300, 301–302 (emphasis in original). Horwitz (1992), *The Transformation* 191–192 has also pointed out that Cardozo's theory was full of opposing propositions. Polenberg (1997) 87 notes that *The Nature of the Judicial Process* "had something to please everyone". Another scholar has called Cardozo's approach to judging "eclectic and pragmatic", see James B. Staab, 'Benjamin Nathan Cardozo: Striking a Balance Between Stability and Progress' in William D. Pederson and Norman W. Provizer (eds), *Leaders of the Pack. Polls & Case Studies of Great Supreme Court Justices* (Peter Lang Publishing 2003) 99, 108.

623 Cardozo (1982), *The Nature* 65–66, see also 73. In this context, the ambivalence of Cardozo's theory can be illustrated by juxtaposing two statements. On 66, he writes that "[l]ogic and history and custom have their place. We will shape the law to conform to them when we may; but only within bounds. The end which the law serves will *dominate* them all." (emphasis added). On 137, however, we learn that the scope of discretion for the judge is very limited and that "[a]ll that the method of sociology demands is that within this narrow range of choice, [the judge] shall *search* for social justice." (emphasis added).

624 Cardozo (1982), *The Nature* 99–100 and 102. Yet he was far from an iconoclast advocating a banishment of concepts and logic from judicial reasoning, see e.g. 32–33 and 46. In Cardozo (1982), *The Paradoxes* 61, he spoke of a potential "tyranny of concepts", but this could be avoided by dealing with concepts as "provisional hypotheses to be reformulated and restrained when they have an outcome in oppression or injustice."

maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience."[625] This idea of law's moral value distinguished him from the more nihilist inclinations of some of the legal realists.[626]

Cardozo's sociological legal theory was built on a premise about the creative role of the judge. In his characteristic prose style, he spoke of "that strange compound which is brewed daily in the caldron of the courts" and declared bluntly that "I take judge-made law as one of the existing realities of life."[627] In a manner that bears a striking resemblance to a significant element in Kelsen's *Stufenbau* theory, he asserted that the difference between the judge and the legislator was one of degree, not of kind.[628] Furthermore, he argued that "[t]he law which is the resulting process [of the judge's creative acts] is not found, but made." Even though he hastened to add that there was "in truth nothing revolutionary or even novel in this view of the judicial function", these words were not insignificant when they came from the mouth of a judge.[629]

To sum up, Cardozo furthered the progressive agenda by following in the footsteps of Holmes and Pound; in relation to the former, also in the sense that he inherited his robe. In one way, it is possible to see him as a hybrid of the two – in terms of theoretical depth more sophisticated than Holmes, but not as thoroughgoing as Pound; in terms of eloquence, not as sharp-penned as Holmes, still more audience friendly than Pound. The fame he achieved from his speeches in the 1920's,

625 Cardozo (1982), *The Nature* 133–134.

626 See Staab (2003) 119; Horwitz (1992), *The Transformation* 190–191.

627 Cardozo (1982), *The Nature* 10.

628 Cardozo (1982), *The Nature* 113 and 119, where he makes a reference to Gény. I have found no references to Kelsen in Cardozo's theoretical writings from the 1920's. And anyways, Kelsen's theory on interpretation was not developed in 1921, see text accompanying footnote 150 above. A later acquaintance with Kelsen cannot be ruled out, though, as he makes a reference to Kaufmann's *Kritik der neukantischen Rechtsphilosophie* in Cardozo (1982), *The Paradoxes* 36.

629 Cardozo (1982), *The Nature* 115–116. Cardozo's attempt to normalize his own views was not unfounded. As Tamanaha (2010) has shown, an acknowledgment of the discretionary and creative element of judicial decision-making can be found in a number of writings dating at least back to the 1880's, see e.g. 71–84.

which were also published, bears witness to his qualities, but they also indicate a public that was receptive to progressivist ideas. For the judge Cardozo, it was obvious that the judiciary *made* – and should make – law, and that the judges' source of knowledge would have to be "life itself".

4.3.4 Felix Frankfurter: Law as the reading of life

Felix Frankfurter (1882–1965) was, like Cardozo, another renowned and influential 20th century American Jewish jurist. The Frankfurter family belonged to a completely different social stratum than the Cardozo's, though, arriving in New York as Austrian immigrants in the 1890's. Yet Felix quickly climbed the ladders and joined the Harvard Law School faculty staff in 1914, served as an adviser to President Franklin D. Roosevelt in the New Deal era, and replaced the deceased Cardozo at the Supreme Court bench in 1939, where he stayed until 1962. Frankfurter's judicial enterprise turned out to be a great disappointment to the many who had expected him to be a liberal judge because of his affiliation with progressive circles. For whereas the postwar years, especially under the Warren Court (1953–1969), was a period of markedly judicial activism in favour of civil rights, Frankfurter remained a staunch and principled advocate of judicial restraint. For that reason, he gained a reputation as a conservative judge, and one of his biographers has noted that "[h]istory has not been kind to Felix Frankfurter."[630] We will leave this fascinating part of Frankfurter's biography aside and focus on some of his small academic pieces.

630 Michael E. Parrish, 'Justice Frankfurter and the Supreme Court' in Jennifer M. Lowe, *The Jewish Justices of the Supreme Court Revisited: Brandeis to Fortas* (Supreme Court Historical Society 1994) 61, 71, quoted in Dalin (2017) 178. For an overview of Frankfurter as a judge, see Dalin (2017) chapter 6, in particular 159–168, and 176–183 for his legacy. For positive assessments of Frankfurter, underlining his principled ideal of judicial deference, see Dennis J. Coyle, 'Felix Frankfurter: Constitutionalist Progressive' in William D. Pederson and Norma W. Provizer (eds), *Leaders of the Pack. Polls & Cases of Great Supreme Court Justices* (Peter Lang 2003) 142; William D. Bader, 'Felix Frankfurter's Transition to the

Frankfurter was heavily influenced by Holmes and Pound, to whom his writings are full of references. About Holmes, whom he held an intimate personal friendship with, he stated in 1929 that "[i]t may fairly be said that we have been living on Holmes ever since – that the effort of the modern science of law is to investigate law in the perspective in which he has set the problems of law."[631] Another place he wrote, with reference to Pound, that "the eternal struggle in the law between constancy and change is largely a struggle between the forces of history and the forces of reason, between past reason and present needs."[632] What is more, his theory about legal development was fully in line with that expounded by Pound. An early article from 1915 opens with the following Poundian statement: "Public opinion, the dominant factor in our national life, is also the most elusive."[633] Frankfurter sensed a dramatic shift in the direction of the American mindset – asking if they were not "in the very midst of a definite shift of emphasis from individualistic ends to co-operative ends" – caused by the industrial developments since the Civil War, again an idea that was present in Pound's writings. And, Frankfurter reasoned, these changing public perceptions implied in turn that law had to change as well: "If facts are changing, law cannot be static. So-called immutable principles must accommodate themselves to facts of life, for facts are stubborn and will not yield."[634]

Judicial Role' in Stephen K. Shaw, William D. Pederson and Frank J. Williams (eds), *Franklin D. Roosevelt and the Transformation of the Supreme Court* (M. E. Sharpe 2004) 126.

631 'The Conditions for, and the Aims and Methods of, Legal Research' (paper read at a meeting of the Association of American Law Schools at New Orleans, Louisiana, 27 December 1929, printed in (1930) 15 IOWA L. REV. 15 *Iowa Law Review* 129, 133. On the friendship between Frankfurter and Holmes, see Dalin (2017) 122.

632 Felix Frankfurter, 'Twenty Years of Mr. Justice Holmes's Constitutional Opinions' (1923) 36 HARV. L. REV. 909 (reprinted in Philip B. Kurland (ed), *Felix Frankfurter on the Supreme Court. Extrajudicial Essays on the Court and the Constitution*, The Belknap Press of Harvard University Press 1970) 112, 138. The reference is to Pound's *Interpretations of Legal History* chapter I.

633 Frankfurter (1915) 365.

634 Frankfurter (1970), 'The Zeitgeist and the Judiciary' 3, cfr. as well the foregoing pages of the article.

Frankfurter regarded constitutional law, at least in its relation to social legislation, to be "not at all a science, but applied politics, using the word in its noble sense".[635] It was a "sheer illusion to assume that this power [to decide questions of policy] is exercised by drawing meaning out of the words of the Constitution"; the questions were not to be answered "by mechanical magic distilled from the four corners of the Constitution".[636] Instead, judges made choices and exercised creative power. They were dealing with "things", not "words", and they gathered meaning "not from reading the Constitution but from reading life".[637] In general, he argued, "[l]aw is seen to be more and more related to the organic processes of life outside of the law."[638] The turn to "the life outside of the law" can be illustrated by his comments on *Muller v. Oregon*, the previously mentioned Brandeis Brief-case where the Supreme Court upheld legislation restricting the hours of work for women. The Court, Frankfurter notes, "invoked no legal principles, it resorted to no lawbooks for guidance, but considered the facts of life".[639]

It is important to underline that Frankfurter was not an opponent of judicial review.[640] What he called for was judicial restraint when facing social legislation that aimed to mitigate the negative consequences of industrial developments. The lawyers' mindset had to be changed, and they had to be more sensitive towards "the facts of life" and present needs. Again, this is a view fully in line with Pound's theory.

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635 *Ibid.* 4.

636 Frankfurter (1970), 'Mr. Justice Holmes's Constitutional Opinions' 114 and 116. See also Felix Frankfurter, 'The Task of Administrative Law' (1926–1927) U. PA. L. REV. 614, 620: "[W]e must travel outside the covers of lawbooks to understand law."

637 Frankfurter (1970), 'Mr. Justice Holmes's Constitutional Opinions' 135; Frankfurter (1970), 'Social Issues' 290.

638 Felix Frankfurter, 'The Paradoxes of Legal Science' (first published 1929, reprinted in Philip B. Kurland (ed), *Felix Frankfurter on the Supreme Court. Extrajudicial Essays on the Court and the Constitution,* The Belknap Press of Harvard University Press 1970) 202, 205. In Frankfurter (1915), he writes that "law is not outside of life; it is part of it.", see p. 367.

639 Frankfurter (1970), 'The Zeitgeist and the Judiciary' 2–3.

640 See e.g. Frankfurter (1970), 'The Zeitgeist and the Judiciary' 6–7.

One important way to bring about this change of mindset was to adopt a more appropriate legal education. Once again, this point was also one made by Pound and Holmes. Frankfurter formulated this as a more general critique of the Langdellian ideals about legal didactics and legal thought:

> Langdell's method was inductive, but his outlook was that of a theologian – he was an implacable logician, a brilliant reasoner within a fixed formal framework. The extent to which every law library and every law writer today goes beyond case law for the understanding of cases is the measure of Langdell's preoccupation with formal law – marvelously tough-minded in his preoccupation and serving as a constant admonition against loose talk, but nevertheless too neglectful of "the secret root from which the law draws all the juices of life."[641]

What was to come instead of the Langdellian education was – not surprisingly – an education oriented towards life: "We fail in our important office if [the students] do not feel that society has breathed into law the breath of life and made it a living, serving soul. We must show them the law as an instrument and not an end of organized humanity".[642]

4.3.5 Legal realism and its context: The Restatement Project and proposals for educational reform

If we move to the 1920's and 1930's, an influential current in American legal thinking emerged that came to be known as legal realism. In the following, I will briefly have a look at the context of legal realism, and then the next two sections will be devoted to an analysis of two leading realists: Karl N. Llewellyn and Jerome Frank.

641 Frankfurter (1930) 132. Frankfurter's reference at the end of the quote is to Holmes's *The Common Law* (1881) p. 35.

642 Frankfurter (1915) 372.

A major concern for the legal realists was, broadly speaking, that law was out of touch with life.[643] To remedy this problem, they made what I will call two broadening operations. First, they broadened the idea of law internally, by turning their attention from rules to other legal factors. Secondly, they broadened the idea of law externally, by urging that law had to be understood in its social context and by directing a considerable amount of their efforts precisely to this context and to factual issues. This externally broadened understanding of law was accompanied by an openness towards other social sciences and a belief that legal research would become more scientific if it drew upon neighbouring disciplines.

These basic common denominators notwithstanding, there is a certain scepticism among legal historians towards the use of the term "legal realism". The first problem is that it brings the idea of a movement or a school of thought, which might conceal the heterogeneity of the different actors.[644] The idea of a definable entity of legal realists may in part have to do with the fact that Karl N. Llewellyn, a leading realist, compiled a list of twenty realists in a famous article from 1930 (cfr. below). There seems to be a general agreement that the list had considerable shortcomings.[645] In fact, it was never Llewellyn's intention to make an exhaustive list of legal realists, and he emphasized time and again that the legal realists were not a group or a school of thought. The second problem with the term is that it underscores the continuity between the progressive and sociological legal thinkers – such as Pound and Holmes – and thus "oversells" the novelty of the realists.[646]

One way of trying to come to grips with legal realism as an intellectual current is to situate it in a broader legal cultural context. Two

643 Horwitz (1992), *The Transformation* 187. Kalman (1986) 9 writes that all realists tried to "breach the gap between 'law in books' and 'law in action.'".

644 See Horwitz (1992), *The Transformation* 169; Wiecek (1998) 198; Johnson (1981) 13, for a contemporary witness, see Hermann Kantorowicz, 'Some Rationalism about Realism' (1934) 34 YALE L.J. 1240, 1240. Twining (1985) 82 finds it meaningful to speak of a movement up until 1928, but then it became too diverse.

645 Horwitz (1992), *The Transformation* 180–185; Twining (1985) 73–77.

646 Horwitz (1992), *The Transformation* 169–170; Wiecek (1998) 198; Kalman (1986) 17.

important contextual factors were the general state of law and the state of legal education. As described earlier, the American legal profession faced considerable challenges in the late 19th century. The explosion of published cases made the law chaotic and fragmented, precisely at a time when a commercialized and increasingly regulated society was in need of a more sophisticated law and skilled lawyers. Moreover, the law students made their inroad at the universities, adding further to the need for professionalization. A legal academic culture was in its inception, but Rome wasn't built in a day; it takes time to erect and consolidate robust academic structures. The challenges in terms of systematization and educational improvement would continue to confront the profession in the first decades of the new century.

One of the most significant responses was the founding of the American Law Institute (ALI) in 1923 and the Institute's Restatement of the Law project. In a 1923 report leading up to the foundation of the Institute, a Committee on the Establishment of a Permanent Organization for the Improvement of the Law noted that "the two defects in the American law are its uncertainty and its complexity." This uncertainty and complexity arose from a lack of common agreement upon the fundamental principles of the common law, "conflicting and badly drawn statutory provisions", "lack of precision in the use of legal terms", "the ignorance of judges and lawyers", and "the number and nature of novel legal cases".[647] The idea behind the incredibly ambitious Restatement project was to have legal experts work through the piles of case law and "restate" the applicable legal principles in statutory form. This idea of a quasi-code was supposed to make some order out of the chaos, and thus remedy the "uncertainty and complexity". Several Restatements were published in the 1930's and the 1940's, with *The Restatement of the Law of Contracts* from 1932 as the first one.

647 Quoted from Herbert F. Goodrich, 'The Story of the American Law Institute' (1951) No. 3 *Washington University Law Quarterly* 283, 283 and 285. See also White (2000) 176–177.

Yet the Restatement project was not to everyone's liking. Many legal realists rebuffed it as a narrow "black-letter law" project.[648] It has even been claimed that the Restatements played an analogous role to the BGB in Germany as a crown jewel of ivory tower legal positivism unleashing a counter-attack from critical opponents.[649] The controversy over the project is suggestive in the sense that it reveals two conflicting ideas about law.[650] The Restatement project sought to remedy the "uncertainty and complexity" by improving the level of conceptual and terminological clarity. It maintained, in other words, a conception of law as a relatively self-contained system, as illustrated by the fact that the project was driven entirely by legal experts. Moreover, the project had its roots in progressive and reform-oriented circles, who believed optimistically in the social benefits of an improved conceptual apparatus.[651] The driving forces behind the establishment of the institute were inspired by, among others, Wesley Newcomb Hohfeld, whose analysis of fundamental legal concepts is still widely read today.[652] Hohfeld had claimed in a 1914 speech that "[t]he clarifying and refining of our terminology is […] an indispensable prerequisite

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648 See Wiecek (1998) 199; White (2000) 187–193. See Horwitz (1992), *The Transformation* 183 (footnote 106) for references to critical articles written by legal realists. For a historian's critique, see Friedman (1973) 582: "They took fields of living law, scalded their flesh, drained off their blood, and reduced them to bones."

649 Herget and Wallace (1987) 430 and 437.

650 The following is to a considerable degree informed by White (2000) chapter 6.

651 For the progressive origins of the Institute, see N. E. H. Hull, 'Restatement and Reform: A New Perspective on the Origins of the American Law Institute' (1990) 8 LAW & HIST. REV. 55. Commenting on Hull's article, Wiecek (1998) 199 contends that even if the foundational intention was built on progressivism, the actual Restatements were not. In a nuanced assessment, Johnson (1981) 61 points out that the Depression reduced the ALI's finances, and as a result, they abandoned the planned publication of supplementary treatises. These commentaries might have added information about the socio-economic context of the rules.

652 See Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1916) 23 YALE L.J. 16. For Hohfeld as a source of inspiration for the ALI founders (he himself passed away untimely in 1918), see Hull (1990) 58 f. and White (2000) 184 f.

to any substantial improvement of our future legislation".[653] Benjamin Cardozo, who was elected vice president of the Institute in 1923, said about the Restatement project that he had "great faith in the power of such a restatement to unify our law".[654] The realists' idea about law, on the other hand, was diametrically opposite in the sense that they rejected the feasibility of reducing uncertainty and complexity by means of conceptual sophistication. Consequently, they argued that a sound methodology for the study of law should not be geared towards concepts, terminology, and classification, but rather position itself open towards the empirical social sciences.

The realists' attempt to open the gates of the law schools and introduce a more interdisciplinary approach could be observed in debates over educational reform as well. While Harvard had been the focal point of the development of modern legal education in the United States since Langdell's days in the 1870's, some scholars from other universities now started to look upon Harvard – where Pound was dean – as "the headquarters of 'legal theology'".[655] In the 1920's and 1930's, Johns Hopkins Institute of Law and in particular Yale and Columbia stepped up as the central loci for academic avant-gardism.[656] These movements sought didactic reforms and the replacement of what they regarded as an insufficient case method. At Columbia in the early 1920's, Noel Dowling and Herman Oliphant started to offer what they termed "functional courses". These courses resystematized the classification of the subjects along "functional" instead of "legal" categories, and they placed law in a social context and interacted with the social sciences. The courses were successful and after a couple of years a

653 Wesley Newcomb Hohfeld, 'A Vital School of Jurisprudence and Law: Have American Universities Awakened to the Enlarged Opportunities and Responsibilities of the Present Day?' (address delivered before The Association of American Law Schools, at its Annual Meeting in Chicago, December 28, 29 and 30, 1914) 23.

654 See Cardozo (1982), *The Growth* 9, see also 6.

655 Twining (1985) 25.

656 The following builds on *ibid.* chapter 2 and 3, and Johnson (1981) 96–106. As Johnson documents elsewhere, another part of the criticism that comes in addition to the aspects I am focusing on here was that the common-law centred case method failed to give due attention to statutory materials, see 83 and 94–95.

process was initiated to reorganize the entire curriculum of the law school. Oliphant, a leading force behind the reform process, had in his earlier days left the study of philology for law school, hoping to "get in touch with something more closely allied to life." He would learn the hard way that the grass is always greener on the other side of the fence, noting that "I completed the Law School course with a pretty keen feeling as to law's detachment from life."[657] Working on the curriculum reform, he claimed that "[o]ur present classification is pretty much out of touch with life", a problem he sought to remedy with the functional approach.[658] But the reform process eventually stranded, to a great extent due to disagreement over whether the faculty should be a "teaching" or a "research" institution as well as an agonizing debate over the appointment of a new dean. A host of scholars subsequently left the law school for Johns Hopskins and Yale. Still, the proposals were significant, and a Columbia student at the time referred to the reform movement as "a frontal challenge to the concept of the common law as a closed legal system, yielding answers to all questions by conformity to earlier decisions or deductions from the principles that they declared."[659] Similarly, at both Johns Hopkins and Yale, empirical legal studies, including both gathering of statistics and field research, bloomed in the late 1920's and early 1930's.

The demands for educational reform and the opposition against the Restatement project shows that the progressivists' attack on mainstream legal thinking was now being further developed. The reform proposals can be seen as a concrete attempt to implement progressivism in legal education. But the destiny of the proposals indicates that they perhaps went too far.

657 Quoted from Twining (1985) 44.
658 Quoted from *ibid.* 48.
659 The words belong to Herbert Wechsler, quoted in Johnson (1981) 98.

4.3.6 Karl N. Llewellyn: In the Beginning was Behaviour

Karl N. Llewellyn (1893–1962), the perhaps most well-known American legal realist, had affiliations with both of the avantgarde universities in New Haven and New York. He taught at Yale in the period 1914–1918 and 1922–1923 and moved to Columbia in 1924, where he stayed until 1951.[660] According to his biographer, his position on the educational debates there was ambivalent. He supported the reformers but wanted to maintain the faculty as a "teaching" and not merely a "research" institution.[661]

Llewellyn played a crucial role in shaping the idea of a legal-intellectual current labelled "realism", through two law review articles published in 1930 and 1931. Llewellyn's first article was titled 'A Realistic Jurisprudence: The Next Step'.[662] In the article, already his opening move is interesting. He deliberately avoided to attempt a definition of the concept of law and saw it more fruitful to choose a certain "*focus* of matters legal" or a "*point of reference*".[663] The reason was that he had "no desire to exclude anything from matters legal. In one aspect law is as broad as life, and for some purposes one will have to follow life pretty far to get the bearings of the legal matters one is examining."[664] While primarily an attempt to find a suitable strategy for approaching and discussing legal phenomena, the choice at the same time displays a view that law cannot be seen as something autonomous and distinctly separated from other social factors. His next step was to argue that traditional legal thinking was too obsessed with rights and rules – that "the use of precepts, or rules, or of rights which are logical counterparts of rules – of *words*, in a word – as the *centre* of reference in thinking about law, is a block to a clear thinking about matters legal".[665]

660 See Twining (1985) 102–103.
661 *Ibid.* 103–104.
662 Karl N. Llewellyn, 'A Realistic Jurisprudence: The Next Step' (1930) 30 COLUM. L. REV. 431.
663 *Ibid.* 432 (emphasis in original).
664 *Ibid.* 432.
665 *Ibid.* 442 (emphasis in original).

Llewellyn's Copernican turn was to substitute *behaviour* for "words" as the centrepiece of the legal universe, a move Holmes had hinted at already in 1899 when he wrote that "[w]e must think things not words".[666] Llewellyn emphasized that there was still a place for rules in legal thinking but admitted, at the same time, that his shift of focus "turns accepted theory on its head."[667] Again, it is worth noting that a close relation between law and society plays a crucial role in Llewellyn's argument: it was precisely because behaviour was particularly well-fitted to elucidate this relation that he chose it as a centre of reference.[668] His more precise idea was, namely, that instead of taking for granted that the written rules actually described the judicial decision-making process and actually controlled the behaviour of ordinary people, an empirical legal scholarship had to investigate *if* this was the case. And this could only be done by investigating behaviour, not by looking at mere "words".

The following year, Roscoe Pound published an article in *Harvard Law Review* titled 'The Call for a Realist Jurisprudence'.[669] Although not explicitly presented as a reply to Llewellyn, it is difficult not to read it as, at least in part, precisely that.[670] And indeed, Pound had his reasons to respond. In his article, Llewellyn had presented some polite and laudatory comments about Pound, but these seemed to drown amidst the not-so-diplomatic criticism. Pound was "partially caught in the traditional precept-thinking of an age that is passing", his "brilliant buddings ha[d] in the main not come to fruition" and his

666 Holmes (1899) 460. See also Frankfurter (1970), 'Mr. Justice Holmes's Constitutional Opinions' 135.

667 Llewellyn (1930) 442 and 443.

668 *Ibid.* 443: "And it would seem to go without demonstration that *the most significant* (I do *not* say the *only* significant) aspects of the relations of law and society lie in the field of behavior [...]" (emphasis in original).

669 See Roscoe Pound, 'The Call for a Realist Jurisprudence' (1931) 44 HARV. L. REV. 697.

670 Horwitz (1992), *The Transformation* 175 suggests that Pound's reply might also have been sparked by the publication of Jerome Frank's eccentric *Law and the Modern Mind* in 1930 (on this book, cfr. section 4.3.7). Twining (1985) 71 also points out that Llewellyn's *The Bramble Bush* was published in 1930.

works were "embarrassed by the constant indeterminacy of the level of his discourse" – sometimes he wrote "on the level of considered and buttressed scholarly discussion", sometimes on level of the "thoughtful but unproved essay", and sometimes "on the level of bed-time stories for the tired bar".[671] Pound's reply, which was allegedly written in a haste,[672] was somewhat ambiguous. He stressed that he tried to "understand" the realists, yet he did not refer to any concrete authors or works in his text. Moreover, the reply is written with an apparently positive and sympathetic tenor, yet he criticized the realists along several lines. Pound's main objection was that "the new juristic realists" exaggerated their points. They had, so he argued, a naïve belief in finding "the pure fact of fact", they wrongly excluded the challenging question of ought – law's normative element – from legal thinking, and they ignored the logical and rational elements of law and the "art of the common-law lawyer's craft", which served as stabilizing factors and ensured a certain degree of uniformity to legal application.[673] Overall, however, I think Pound's article can best be understood as an attempt, albeit somewhat obscurely formulated, to bring together and reconcile the new realism with the sociological jurisprudence he himself had advocated. In my opinion, it is significant that when he launched a seven-point program for legal research at the end of the article, he called it a program for a "relativist-realist jurisprudence";[674] he did not, in other words, reject legal realism. And this might help underscore the point Morton J. Horwitz has made, that "[f]or many purposes, it is best to see Legal Realism as simply a continuation of the reformist agenda of early-twentieth-century Progressivism."[675]

Llewellyn's rejoinder, titled 'Some Realism about Realism – Responding to Dean Pound', was published in *Harvard Law Review* a

671 Llewellyn (1930) 434 and 435 (partly in footnote 3).
672 This was, according to Twining (1985) 72, later admitted by Pound.
673 See Pound (1931) 700, 703 and 706.
674 *Ibid.* 710.
675 Horwitz (1992), *The Transformation* 169. Horwitz' explanation of Pound's 1931 critique is that Pound himself had begun to change, see also 174–175.

few months later.[676] The article served (at least) three purposes: First, it gave Llewellyn an opportunity to convey with even more force the message that the realists were the ones who negated, the ones who were trying to wipe out an old-dated way of thinking about law. His opening lines read: "Ferment is abroad in the law. The sphere of interest widens; men become interested again in the life that swirls around things legal. Before rules, were facts; in the beginning was not a Word, but a Doing." And he followed up by situating this in a broader intellectual context:

> The ferment is proper to the time. The law schools threatened at the close of the century to turn into words – placid, clear-seeming, lifeless, like some old canal. Practice rolled on, muddy, turbulent, vigorous. It is now spilling, flooding, into the canal of stagnant words. It brings ferment and trouble.[677]

The second purpose was to refute Pound's criticism as being unwarranted and completely undocumented, in fact a strawman. Llewellyn did this in a systematic fashion, by providing a list of twenty potential realists and going through their works in order to see whether Pound's claims could be supported. The answer was on the whole negative.[678] Third, Llewellyn tried to sketch positively some common characteristics for the legal realists – who he, by the way, was at pains to underline did not make up a school of thought or a group.[679] A general description was the following:

> They want to check ideas, and rules, and formulas by facts, to keep them close to facts. They view rules, they view law, as means to ends; as only means to ends; as having meaning only insofar as they are means to ends. They suspect, with law moving slowly and the

676 Karl N. Llewellyn, 'Some Realism about Realism – Responding to Dean Pound' (1931) 44 HARV. L. REV. 1222. Jerome Frank contributed to the article, see 1222 (footnote).

677 Llewellyn (1931) 1222.

678 The "test" is presented on 1228–1233. The meticulous methodology is presented in more detail on 1226–1228 (in footnote 18).

679 See *ibid.* 1224, 1225, 1233, 1246, and 1256. On 1234 he spoke instead of a "movement", on 1250 of "a mass of trends".

> life around them moving fast, *that some law may have gotten out of joint with life*.[680]

In addition, Llewellyn pointed out seven more concrete characteristics; one of these are of particular interest in our context. The realists, he claimed, sought "[t]he *temporary* divorce of Is and Ought for purposes of study".[681] But in a Kelsen-turned-upside-down-way it was the "Is"-es that were the proper study object.[682] Similarly, he explained in the preface to a book he wrote on American law in German language, published in 1933, that he would deal with "*Seinstoff*", not "*Sollstoff*".[683] The idea was simply that the proper researcher should deal with a science of observation, and therefore had to start by investigating the actual content of the law before he or she could put on normative glasses and take an evaluative position.

A recurring theme in Llewellyn's writings was, as we have seen, the contrast between "words" (alternatively "rules") and "behaviour". Sometimes, this was dressed up in a "law" and "life" clothing; he wrote about "making law and life allies",[684] about the importance for legal research of "checking up on the effects of the law in life", and he hoped that his scientific program would have the result that "the law of the

680 *Ibid.* 1223 (emphasis added).

681 *Ibid.* 1236 (emphasis in original).

682 Speaking of Kelsen; Llewellyn was not very fond of his theory. "I see Kelsen's work as utterly sterile," he wrote, "save in by-products that derive from his taking his shrewd eyes, for a moment, off what he thinks of as 'pure law'.", see 'Law and the Social Sciences – Especially Sociology' (1949) 62 HARV. L. REV. 1286, 1290 (footnote 5).

683 Karl N. Llewellyn, *Präjudizienrecht und Rechtsprechung in Amerika. Eine Spruchauswahl mit Besprechung* (Verlag von Theodor Weicher 1933) VIII (preface) (emphasis added). The background for the book was that Llewellyn had been a visiting professor at the Faculty of Law in Leipzig in 1928–1929. In his young days, Llewellyn had also studied at a *Realgymnasium* in Mecklenburg in 1911, and during the First World War, he actually fought for the Germans, was wounded in Flanders in November 1914 and received the Iron Cross. For the fascinating details about Llewellyn's relation to Germany, see Twining (1985) 89–91, 106–109 and in particular 479–487 (appendix). On the relationship between Llewellyn and Hermann Kantorowicz (cfr. section 3.3.2 above), see Schmidt (2023).

684 Llewellyn (1933) 94.

schools will no longer be out of joint with the life of the lawyer."[685] At this point, his theory reached its most complete form in *The Common Law Tradition* from 1960, where he launched a dichotomy of two "period-styles" of legal reasoning: a Grand Style and a Formal Style. In The Formal Style – which had been the dominant style in the late 19th century and at the beginning of the 20th, and for which Langdell was the archetype – "the rules of law are to decide the cases; policy is for the legislature, not for the courts, and so is change even in pure common law." Moreover, "[o]pinions run in deductive form with an air of expression of single-line inevitability" and "what had been life-closeness has drifted away from life".[686] The Grand Style reasoning, by contrast, was a more complex process. It relied on precedent but additionally, it took into consideration the reputation of the opinion-writing judge, broad "principles" of common sense and order, and future-oriented "policies". It sought a "functioning harmonization of vision with tradition, of continuity with growth, of machinery with purpose, of measure with need."[687] The Grand Style had been dominant in the period 1820–1860 and was, so Llewellyn claimed to observe, once again gaining foothold. It shouldn't come as a surprise that Llewellyn's sympathy lay with the Grand Style.

What is of particular interest here is that the distinction between the two period styles offers a window into an important feature of Llewellyn's legal thinking: his attempt to broaden the idea of things legal. While the Formal Style, according to his view, equalled "law" and "rules", he sought, with his numerous references to "the crafts of law" and "institutions", to underline that rules were embedded in a number of legal-professional factors.[688] Legal rules were not islands

685 Karl N. Llewellyn, Felix Frankfurter and Edson R. Sunderland, 'The Conditions for and the Aims and Methods of Legal Research' (addresses delivered at the meeting of the Association of American Law Schools, 27 December 1929, printed in (1930) Volume 6 *American Law School Review* 663) 674.

686 Karl N. Llewellyn, *The Common Law Tradition. Deciding Appeals* (Little, Brown and Company 1960) 38 and 186.

687 Llewellyn (1960) 36–37.

688 See in particular the line of argument in Llewellyn (1960) 184 f.

surrounded by an anarchic sea of extra-legal and random psychological and social facts; they rather belonged to an archipelago of various legal-professional factors. Illustrating is the list he presented in *The Common Law Tradition* of 14 major steadying factors in the work of the appellate courts, which included, *inter alia*, legal doctrine, known doctrinal techniques, adversary argument by counsel, a collegial decision, and the judges' responsibility for justice.

The question of how the discretionary freedom of judges was kept within certain boundaries – boundaries that were not made by rules – was of course an issue with constitutional undertones, yet Llewellyn did not explicitly phrase his discussions in this language. Nevertheless, the link is present through his confrontations with the classical formulation of so much pride in American political-constitutional history: that of a "Government of Laws, not of Men". He rebutted the formula and argued that it was more apposite to speak of a government of laws *and* men or of decisions *by* the law, and then precisely with a broad and professional-institutional understanding of "law".[689] In general, Llewellyn barely wrote about constitutional law. In *The Common Law Tradition*, he had deliberately omitted the Supreme Court from his study.[690] And in his German *Präjudizienrecht und Rechtsprechung in Amerika*, he seemed to claim that constitutional law was something atypical, merely a political balancing of interests.[691] But in 1934, he advanced a somewhat embryonic theory of the Constitution as an institution, i.e., "in first instance a set of ways of living and doing" instead of "a matter of words or rules."[692] Not very surprisingly, he contrasted

689 Karl Llewellyn (1934), 'The Constitution as an Institution' (1934) 14 OR. L. REV. 108, 110; Llewellyn (1960) 12, with reference to 184 f. See also Karl N. Llewellyn, 'On Reading and Using the New Jurisprudence' (II) (1940) 40 COLUM. L. REV. 581, 583 f.

690 See, however, Llewellyn (1960) 384–393.

691 Llewellyn (1933) 70–71. On a side note: Llewellyn explained the conservatism of the Supreme Court in constitutional cases by referring to their class background and their old age. The old age argument was precisely what Roosevelt would use when he launched his court packing plan in 1937.

692 Karl N. Llewellyn, 'The Constitution as an Institution' (II) (1934) 34 COLUM. L. REV. 1, 17.

the words of the Constitution with the practice of the government, and gave the latter precedence. He spoke of "the working Constitution", "the going Constitution", and "the living Constitution", wanted to "dethrone the Words", and exclaimed that it was practice that gave "continuing life" to the constitutional text.[693] The radicality of the theory is shown by his claim that "the working Constitution is amended whenever the basic ways of government are changed."[694]

Llewellyn's idea about informal amendments of "the working Constitution" is important. It was a natural part of a theory that sought to switch the focus from "words" to "behaviour". But it is striking that Llewellyn did not elaborate on the consequences of such a shift within constitutional law. Again, we are confronting the problem discussed in relation to Rudolf Smend: if a constitutional theory assigns precedence to constitutional practice rather than constitutional legal norms, isn't there an obvious risk that a core constitutional function – the fact that constitutional law is supposed to be more difficult to change – is undermined? Llewellyn did not say much about this, apart from vague references to a government of laws *and* of men. What seemed to be Llewellyn's main concern was to do something with the unlucky situation where law had "gotten out of joint with life", and where lawyers had forgotten that "law is as broad as life". His recipe was radical enough: legal scientists and lawyers should focus on "behaviour" instead of "words", on the "*Seinstoff*" instead of the "*Sollstoff*".

4.3.7 Jerome Frank: In the Beginning was Certainty

In 1930, the same year as Llewellyn published his famous article about realism, Jerome Frank, at that time a practising lawyer, printed a con-

693 Llewellyn (1934) 'The Constitution as an Institution' (II) 14–16; Llewellyn (1934), 'The Constitution as an Institution' 114.

694 Llewellyn (1934), 'The Constitution as an Institution' (II) 22 (the entire quote was italicized in the original text). Llewellyn would, by the way, claim that he was merely offering a theory that would reveal what was *actually* going on in constitutional law, see 39–40.

troversial book called *Law and the Modern Mind*. The book was to become widely read, and the picture of legal realism intimately associated with its content, albeit Frank was seen by many of his colleagues as a peripheral outsider.[695]

Law and the Modern Mind was a psychoanalytically oriented book, and the writing had commenced while Frank was himself undergoing psychoanalytic therapy. The fundamental problem of the book was the following puzzle: Most people, both laymen and lawyers, want law to be certain and predictable, yet law is, according to Frank, inherently unstable, unpredictable, and changing. The longing for stability – a longing for something unreal – had consequently to be based on a myth.[696] Frank offered a partial explanation of the roots of this "basic myth". He traced it back to a feeling of utmost certainty and control in our infancy, a feeling that turns, as the child grows up and realizes its lack of omnipotence, into a demand for fatherly authority. In a next developmental stage, the child realizes that this fatherly certainty-by-proxy is insufficient as well, and now law enters the stage as a haven of stability. The diagnosis of people seeking an unrealizable certainty in law, then, was that "they have not yet relinquished the childish need for an authoritative father and unconsciously have tried to find in the law a substitute for those attributes of firmness, sureness, certainty and infallibility ascribed in childhood to the father."[697]

This had bearings on legal thinking. As most legal thinkers shared an infantile longing for certainty, they refused, according to Frank, to acknowledge that judges created and not merely applied established law.[698] What is more, they were inbred with a mechanistic thinking where law was treated as formulas, as something settled once and for all, abstract and generalized, inflexible, and static – no leeway was made for novelty, creativity, discretion, and adaption to concrete

695 Horwitz (1992), *The Transformation* 176.
696 See Jerome Frank, *Law and the Modern Mind* (Brentano's 1930) 3–12.
697 *Ibid.* 21.
698 *Ibid.* 35.

circumstances.[699] Creativeness was the life of the law, he wrote, alluding to Holmes.[700]

Frank pursued several motives that testifies to his intellectual affinity with the other American thinkers that have been analysed so far, but his rhetoric is more reminiscent of Ernst Fuchs, the German free lawyer. Frank poured out epithets like "verbalism", "scholasticism", "absolutism", "legal fundamentalism", and "Bealism" (after the Harvard professor Joseph Beale) to describe his opponents. He attacked "Word Magic", formal logic, and deductive models of legal decision-making.[701] At the heart of his theory was, not very surprisingly, a certain rule-scepticism: Rules and principles

> may be the formal clothes in which [the judge] dresses up his thoughts. But they do not and cannot completely control his mental operations and it is therefore unfortunate that either he or the lawyers interested in his decision should accept them as the full equivalent of that decision.[702]

This did not mean, however, that he rejected the place of rules in law. But, just like Llewellyn, he directed the spotlights away from rules and towards courts instead. Their past and future *decisions* – emphasized here in order to distinguish from the reasoned opinion, which "you will study […] in vain to discover anything remotely resembling a statement of the actual judging process" –[703] were the essence of law.[704] Frank was not alone among the realists in emphasizing this distinction.[705]

In Frank's theory, there is also an important grand story about the need for emancipation. The lawyer must grow up, that is, he must break free from the shackles of his childish longing for certainty and repose, and reconcile himself with the uncertainty of law, and, most

699 *Ibid.* 118–119.
700 *Ibid.* 138.
701 See *ibid.*, e.g. the subheadings of part one, chapter VI and VII, and pp. 60 and 66.
702 *Ibid.* 131–132. See also appendix II (264 f.) on "rule-fetichism [sic] and realism".
703 *Ibid.* 103.
704 See *ibid.* 46, 55, 128.
705 See Kalman (1986) 6–7.

fundamentally, life itself. Frank made this grand story vivid by filling in well-known legal names. Roscoe Pound, for instance, had – one can read between the lines – not reached maturity, as he seemed to recognize as socially desirable the strive for legal certainty in some areas.[706] Even though Pound was also duly acclaimed, it is no wonder that the relationship between him and Frank grew cold.[707] What about Benjamin Cardozo? Frank was full of reverence, but even Cardozo had a vision about legal certainty and a "yearning for the absolute".[708] But weren't there any grown up jurists (except, one might guess, Frank himself)? Yes, there was, and the subheading of the final chapter of the book (apart from the several appendixes) speaks for itself: "Mr. Justice Oliver Wendell Holmes, the Completely Adult Jurist". Holmes had "abandoned, once and for all, the phantasy of a perfect, consistent, legal uniformity" and had "put away childish longings for a father-controlled world".[709]

The glorification of Holmes at the end of the book doesn't come as a surprise, taking into account the fact that Frank's thinking was full of Holmesian elements. Frank spoke of rules and principles as "the formal clothes in which [the judge] dresses up his thoughts"; Holmes had contended that the important phenomenon was "the man underneath it, not the coat". Frank rejected the longing for legal certainty as an expression of infantilism; Holmes had trumpeted that "certainty generally is illusion, and repose is not the destiny of man."[710] And finally, Frank's decisionism was in line with Holmes's thinking. This means that Frank was following up on ideas that were already existing in American legal thinking, yet he dressed up his theory in a novel psychoanalytic clothing that made him, not very surprisingly, extremely controversial.

706 See Frank (1930) 207–216, see also 289–294. On 214, Frank contends that "Pound has never completely freed himself of rule-fetichism [sic]".

707 For an appraisal of Pound, see *ibid.* 207. For Pound's reaction to the book, see Horwitz (1992), *The Transformation* 180.

708 Frank (1930) 238–239.

709 *Ibid.* 253.

710 See Holmes (1897) 466.

4.3.8 "The Living Constitution" and the Supreme Court's volte-face

The American constitutional system is, as already noted on several occasions, full of tensions and frictions. Most fundamentally, it encompasses the ideas of both "We the People" and "certain unalienable rights". Moreover, the basic tenet of "a Government of Laws, not of Men" is a powerful ideological component; but it has still, as we have seen, not been completely uncontested. In addition, the system has over the course of the time struggled to find a balance between stability and change – something probably all legal systems do, and in particular the ones governed by an archetypical modern constitution with a built-in rigidity through strict amendment requirements. A final and closely related tension – that will be looked at in the following – is the one between "originalism" on the one hand and the idea of a "living Constitution" on the other. The general inclinations among the scholars and movements that have been analyzed in the previous sections went in the direction of "We the People" (progressivism in general), towards questioning the postulate of "a Government of Laws, not of Men" (Llewellyn), towards favoring change before stability (Pound and Cardozo), and – not surprisingly – towards a concept of a *living Constitution*.

One Supreme Court case that is illuminating as a starting point is *Home Building & Loan Association v. Blaisdell* from 1934.[711] The essence of the case is that in 1933, in the wake of the Great Depression, the state of Minnesota had enacted a Mortgage Moratorium Law where mortgage debtors were offered an extended time for redemption of their debts. The emergency measures were introduced in order to protect homeowners who were unable to pay their mortgage from foreclosure. The creditors claimed that this violated their rights under the Contracts Clause in Article I, section 10, clause 1 of the Constitution, which forbids states to pass any "Law impairing the Obligation of Contracts". A majority of five judges upheld the statute, while a minority of four held it to be unconstitutional. What is of interest here is how the

711 290 U.S. 398 (1934).

judges drew upon different authorities to substantiate their arguments. Chief Justice Hughes, writing for the majority, invoked famous dicta by Chief Justice John Marshall in *McCulloch v. Maryland* from 1819: "We must never forget, that it is a *Constitution* we are expounding", "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."[712] The spokesperson of the dissenting minority, on the other hand, Justice Sutherland, called upon another notability from the graveyard of famous Chief Justices: Roger B. Taney, and his opinion in the landmark *Dred Scott* case:

> [Taney] said that, while the Constitution remains unaltered, it must be construed now as it was understood at the time of its adoption; that it is not only the same in words but the same in meaning, 'and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.'[713]

These are two diametrically opposite ideas about constitutional interpretation. While Hughes and Marshall considered the Constitution to be dynamic and adaptable – a *living constitution* – Sutherland and Taney argued that it had a fixed meaning, was stable and rigid, something that expresses more of an *originalist* position.

The context of *Home Building* is important. It was handed down in 1934, that is, in a period in which the Supreme Court is generally seen as anti-reformist and known for a string of conservative decisions that eventually led to the clash with President Roosevelt in 1937. In *Home Building*, it was the dynamic and reform-friendly interpretation

712 *Ibid.* at 443, with reference to *McCulloch v. Maryland*, 17 U.S. 316 (1819), at 407 and 415. I have quoted directly from *McCulloch*, where the word "Constitution" is written with capital letter and in italics, something that is omitted in Hughes' reference.

713 *Ibid.* at 450, with reference to *Dred Scott v. Sandford*, 60 U.S. 393 (1857), at 426.

of the Constitution that prevailed. Yet the dissent 5–4 reveals a sharply divided Court. And the four judges dissenting in the case – George Sutherland, Willis Van Devanter, James Clark McReynolds, and Pierce Butler – are often referred to as "The Four Horsemen": the reform-hostile, conservative wing of the Court in the early and mid 1930's, (in)famous for their strong opposition against Roosevelt's New Deal legislation. The pro-government liberals in the opposite corner counted Cardozo (from 1932), Brandeis, and Harlan Fiske Stone – "The Three Musketeers". Then there were Owen J. Roberts and Chief Justice Evan Hughes moving to and fro and tipping the scales. In *Home Building*, they joined the Musketeers, but in a row of New Deal cases in 1935 and 1936, at least one of them parted with the Horsemen and formed a majority against Roosevelt's reforms (although several of the cases where New Deal legislation was struck down were in fact unanimous).[714] Following the renewal of his popular mandate in the landslide victory in the 1936 elections, Roosevelt tried to strike back at the Court with his infamous court-packing plan, officially named the Judicial Procedures Reform Bill.[715] The Bill, submitted to Congress in February 1937, would permit the President to appoint one new judge per judge that had not retired within six months after he had turned 70 years. This would have given Roosevelt an immediate opportunity to appoint six new judges and thus redistribute the balance of power within the Court. The proposal was met with fierce criticism and public outcry and was eventually never enacted. But through a number of cases during the spring of 1937, the Court made a volte-face on its own and turned remarkably more government friendly, a change which is sometimes referred to as a "constitutional revolution".

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714 See in particular *Panama Refining Co v. Ryan,* 293 U.S. 388 (1935) (Cardozo dissented); *A.L.A. Schechter Poultry Corporation v. U.S.,* 295 U.S. 495 (1935); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935); *Humphrey's Ex'r v. U.S.*, 295 U.S. 602 (1935); *U.S. v. Butler,* 297 U.S. 1 (1936) (the Musketeers dissented); *Carter v. Carter Coal Co*, 298 U.S. 238 (1936) (the Musketeers dissented, Hughes dissented in part); *Morehead v. People of State of New York ex rel. Tipaldo,* 298 U.S. 587 (1936) (the Musketeers and Hughes dissented).

715 For an overview, see e.g. Barry Cushman, *Rethinking the New Deal Court. The Structure of a Constitutional Revolution* (Oxford University Press 1998) 1.

In standard accounts of American legal and political history, the "revolution" is often seen as a direct response by the Supreme Court to Roosevelt's threat.[716] The turning point is considered to be *West Coast Hotel Co. v. Parrish* from March 1937, where Judge Roberts reversed his position on the constitutionality of minimum fair wage laws for women and tipped the scales of the Court – "the switch in time that saved nine", i.e., the number of nine judges on the bench.[717] The standard account has been challenged, however. For instance, research has shown that the formal voting in *West Coast* actually took place in December 1936, in other words, before Roosevelt launched his court packing plan.[718] More generally, and based on several additional and more detailed counter-arguments to traditional accounts that we will leave aside here, some scholars have asked whether the explanation of the altered course should be sought more in internal factors within law rather than external ones like political pressure.[719]

And at this point we may turn back to our domain, that of legal thinking. Could it be that the Court's lasting volte-face in 1937 should

716 The literature on the Supreme Court and the New Deal is voluminous. For a traditional account, see e.g. Wiecek (1998) 218–234. For a critical yet nuanced and informative overview of the mainstream story-telling, see White (2000) chapter 1. For a short version, see William G. Ross, 'The Hughes Court (1930–1941): Evolution and Revolution' in Christopher Tomlins (ed), *The United States Supreme Court. The Pursuit of Justice* (Houghton Mifflin Company 2005) 223, 231–238.

717 300 U.S. 379 (1937) (the Horsemen dissented). Less than a year before, the majority of the Court – including Roberts – had struck down a similar statute in *Morehead v. People of State of New York ex rel. Tipaldo*, 298 U.S. 587 (1936), thus the reference to a "switch" by Roberts. An important difference between the cases was, however, that in *Morehead*, the parties had not argued that an earlier precedent – *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) – should be overruled, whereas this was precisely what the Court was asked to do – and did – in *West Coast Hotel*. Roberts would claim that this was the reason why he voted as he did, see Cushman (1998) 18.

718 Cushman (1998) 18. In December, justice Stone was absent due to illness. Because everyone knew how Stone would vote, the case was stayed until Stone returned in early February and cast his vote – before the court-packing plan was announced. The publication of the opinion was withheld until the end of March because Chief Justice Hughes wanted to avoid the impression that the Court was influenced by Roosevelt's proposal. This was obviously unsuccessful.

719 See e.g. White (2000) 28–32 and 198–204.

be seen against the background of a decades-long criticism of a legal system out of touch with "life", and that the judges were now finally leaving the idea of "mechanical magic distilled from the four corners of the Constitution" (Frankfurter) and instead joining the forces that were becoming "interested again in the life that swirls around things legal" (Llewellyn)? Was the truth finally revealed to them that law's task was to reach "a social end which the governing power of the community has made up its mind that it wants" (Holmes) and that the "final cause of law is the welfare of society" (Cardozo)?

Writing on the New Deal and legal development, the American legal historian G. Edward White has put forward a theory about an *interpretive* revolution in the 1930s and 1940s, centring on "a crisis in the meaning of constitutional adaptivity". The essence of this alleged interpretive revolution was that the legal community went from viewing the Constitution as a document not designed to change with time to seeing it as a "living" document, whose meaning was capable of changing with time. Two main features of this change of mindset were an idea about the Constitution's ability to respond to changed circumstances and an idea about the human or subjective element in constitutional interpretation.[720]

One of the works White draws upon to substantiate his argument is Howard Lee McBain's *The Living Constitution* from 1927. In his book, McBain started out by discussing the notion of "a Government of Laws, not of Men". He rejected it by asserting that "[a]ll governments are governments of men as well as of laws" and that "under democratic conditions it is absurd to strike a complete contrast between a government of laws and a government of men." And then he continued:

> We speak of the 'living' body of the law, but this is mere metaphor. The life of the law is a borrowed life. It is, like the life of man's other material and intellectual products, borrowed from the life of man. Laws live only because men live and only to the extent that men will to have them live. Apart from men a government of laws is a thing

720 *Ibid.* 204–206.

> inert, a thing that is harmless because useless, a thing that has no existence outside the realm of imagination.[721]

Intimately connected with this more nuanced view on constitutional law was the idea that "a living constitution cannot remain static" and that the Constitution had changed informally in various ways, including in particular through judicial interpretation.[722] McBain quoted Holmes saying that a word "is the skin of an idea" and commented that "[a]s applied to the words of a living constitution the expression is peculiarly apt; for living skin is elastic, expansile, and is constantly being renewed."[723]

McBain's scepticism towards the idea of a "Government of Laws, not of Men" and his concept of a "living constitution" resonated, as we have seen, well with Llewellyn, who had read his book and probably gathered some inspiration there.[724] But these ideas were not entirely new in the late 1920's and the 1930's. The concept of a "living constitution" was used by an American author at least as far back as in 1900,[725] and ten years earlier, the conservative Christopher Tiedeman had presented similar thoughts about the dynamic nature of the Constitution in his *The Unwritten Constitution of the United States*. More generally, and more importantly, a number of critical propositions and ideas had permeated American legal thinking at least since Holmes's *Lochner* dissenting opinion and Pound's writings at the beginning of the century.[726] Pound had, for instance, argued in 1910 that "men, and not rules, will administer justice".[727]

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721 McBain (1927) 1–3.
722 *Ibid.* 11.
723 *Ibid.* 33.
724 Llewellyn (1934) 'Constitution as Institution' (II) 1–2 refers to McBain's book, see also 11 (footnote 26).
725 White (2000) 356 refers to Arthur W. Machen, Jr.'s 'The Elasticity of the Constitution' (1900) 14 HARV. L. REV. 200, 205, as the first text where he has found the expression.
726 Tamanaha (2010) chapter 5 even contends that a number of the ideas often ascribed to progressivism and legal realism were present in American legal thinking from the late 19th century.
727 Cfr. above at footnote 601.

With this in mind, one could ask: If the academic criticism had been blowing in the wind since at least about 1900, why was it only in 1937 that it seemed to reach the Supreme Court, or, more precisely, the majority of the men in robes? This question could be developed even further by considering that in the 1920's, the Court made a conservative turn. As I have argued earlier, the Lochner era around 1900 was not as Locknerish as it is often portrayed, and it is rather the Taft Court (1921–1930), named after Chief Justice William Howard Taft (who was also President of the United States from 1909–1913), that is seen today as an archconservative court.[728] Felix Frankfurter, for instance, who, as we have seen earlier, was content with the progressive trend of the Court in 1913, regretted in 1930 that "[…] the Court has invalidated more legislation than in fifty years preceding. Views that were antiquated twenty-five years ago have been resurrected […]".[729] And then comes the point: If the explanation of the Court's volte-face in 1937 is developments in legal thinking, and these developments can be traced back to at least the beginning of the century, how come that the Court not only did not respond to these developments at an earlier point, but even made a conservative turn in the 1920's?

According to White, and this would probably be his answer to the questions raised here, it was only in the 1930's that the critical ideas – and at this point he is focusing specifically on the proposition that judges were making law – went from "the status of critique" to "something approaching orthodoxy".[730] As a general observation, leg-

728 Melvin I. Urofsky, 'The Taft Court (1921–1930): Groping for Modernity' in Christopher Tomlins (ed), *The United States Supreme Court. The Pursuit of Justice* (Houghton Mifflin Company 2005) 199, 219; Paul L. Murphy, *The Constitution in Crisis Times 1918–1969* (Harper & Row 1972) 219; Robert C. Post, 'Defending the Lifeworld: Substantive Due Process in the Taft Court Era' (1998) 78 B. U. L. REV. 1489, 1492; Roger W. Corley, 'Was There a Constitutional Revolution in 1937?' in Stephen K. Shaw, William D. Pederson and Frank J. Williams (eds), *Franklin D. Roosevelt and the Transformation of the Supreme Court* (M. E. Sharpe 2004) 36, see in particular 38 (table 1); Wiecek (1998) 205 and 207; Brown (1927).

729 Quoted from Murphy (1972) 60 (footnote 57). For Frankfurter's position in 1913, see footnote 496 above. He was, moreover, not alone, see Post (1998) 1493 (footnote 30) with numerous references to other contemporary works.

730 White (2000) 235.

al cultural changes pertaining to patterns of thinking and theoretical paradigms often take place gradually, and consequently, White's thesis seems plausible.

These discussions turn on a more general question about the nature of legal developments. White himself speaks of "internalist" versus "externalist" explanations, where he defends an internalist explanation of the New Deal Court. This means that he emphasizes how the Court was influenced by law-internal factors, *in concreto* new modes of thought. At the same time, he decentres law-external factors, in particular the threat from Roosevelt's court-packing plan. By doing so, he manages to shed light on a crucial explanatory factor; it can be no doubt that the theoretical developments in American legal thinking played an important role in preparing the ground for the Court's volte-face. But there seems, in my opinion, to be a missing link somewhere, and that missing link might very well be located law-externally. It seems plausible, for instance, that the Court's conservative turn in the 1920's in part can be seen as a counter-reaction against the massive expansion of government power during the Great War,[731] and that its progressive turn in the late 1930's was influenced by the strong position progressivism had gained in the American society in general.

This, then, is probably from one perspective the life of the law, if we look at it as an historical phenomenon – it is influenced and shaped by both internal and external factors, but we are constantly struggling to grasp the relative weight the different factors contribute with.

731 In this direction Post (1998) 1491 and 1493.

5 Ideas of what it means to live: some reflections

> "The light shines in the darkness, and the darkness has not overcome it."
>
> John 1:5

5.1 Introduction

"Germany has declared war on Russia – swimming in the afternoon.", Franz Kafka wrote in his diary on 2 August, 1914.[732] Reading the sentence in hindsight, one is struck both by the innocence it conveys and how bizarre this innocence now seems in light of what we know would follow in the ensuing decades, when this ceremony of innocence was drowned, when the lights were turned off, and when the world went "to hell and back".[733] In a similar vein, some of the motifs that popped up everywhere at the beginning of the century would be distorted in an almost morbid fashion after 1914 – "spring" being replaced by spring offensive, "nature" by mechanic, industrialized warfare, "body" by mutilated corpses, "movement" by immovable frontlines, "youth" by massacres of youth, and, finally, "life" by death. Like a phoenix, "life" was reborn in Western metropoles in the "Roaring Twenties", only to be quelled even more decisively by the Great Depression and the devastating horrors of totalitarianism, world war, and genocide.

732 Eksteins (1999) 55.

733 The expression is borrowed from Ian Kershaw, *To Hell and Back. Europe 1914–1949* (Penguin Books 2016).

But what remains of "law" and "life" today? As explained in the introduction, this thesis has operated with a dual perspective on "law" and "life" as a motif. One task has been to investigate how this pair of concepts was used by constitutional thinkers in the first half of the 20th century, while at the same time, I have taken it to be a legal theoretical antinomy and used it as an analytical and narratological tool. Now it is time to try to tie things together, and in this final chapter, I will discuss and reflect closer upon the developments presented thus far. With the historical investigations serving as the starting point for my discussions, I will stay within the realm of legal history. But my *perspectives* will be of a somewhat more theoretical nature. In section 5.2, I will approach the discussion from a theoretical angle, by tying the discussions to the keyword "rationality". The idea is that the use of this concept as a specific perspective might enrich our understanding of the historical developments and of the "law" and "life"-antinomy. In the final discussion, I will discuss some comparative aspects, focusing mainly on what I previously referred to as an analogical comparison (section 5.3).[734]

5.2 The rational life of the law

There is a long-standing tradition of thinking about law as something that is or should be rational. According to the Finnish legal theorist Kaarlo Tuori, for instance, reason (*ratio*) can be seen as a persistent component of the Western legal tradition.[735] Chief Justice Edward Coke's famous distinction from 1607 between a "natural reason" and an "artificial reason [...] of law" indicates, moreover, an idea about a specific legal rationality.[736] Law and rationality as a theme is of course

734 On analogical comparisons, see section 2.3 above.

735 Kaarlo Tuori, *Ratio and Voluntas. The Tension Between Reason and Will in Law* (first published 2011 at Ashgate, Routledge 2016) ix. Tuori's basic idea is that there is a fundamental tension in law between this reason on the one hand and power (*voluntas*) on the other.

736 Sir Coke's statement reads: "[T]hen the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges:

almost infinite in scope and the following can only be an attempt to carve out a few perspectives that might enrich the historical interpretation. A natural point of departure for a discussion of law and rationality in our context is Max Weber's (1864–1920) legal sociology, which he developed in particular in Part Two, Chapter VIII of his *Economy and Society*, titled 'Economy of Law (Sociology of Law)'. Weber is a natural starting point for two reasons: First, because he constructed a conceptual apparatus of different types of legal rationality and irrationality, and secondly, because his writings date from precisely the period we are dealing with.

In Weber's taxonomy, law, in the sense of both what he calls "lawmaking" and "lawfinding", may be rational or irrational, both formally and substantively.[737] Law is *formally irrational* if it includes elements that cannot be controlled by the intellect, for instance when oracles are consulted. It is *substantially irrational* to the extent that decisions, either by "lawmakers" or "lawfinders" are influenced by concrete circumstances of the particular case instead of general norms. *Formal rationality* means that only general characteristics are considered legally relevant. These general characteristics may be either of a perceptible and tangible character, which tends to drive law in a *casuistic* direction, and which in the extreme version turns into a rigid formalism, or they may be of an abstract nature, which tends to drive law in a *systematic* direction, and which is a softer version of formalism. Finally, *substantive rationality* is characterized by a tendency to favour non-legal norms,

to which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life [...] or fortunes of his subjects are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience [...]". I have taken the quote from Robert M. Cover, 'Nomos and Narrative', (1983) 97 HARV. L. REV. 3, 42, who again refers to Prohibitions del Roy, 12 Co. 63, 64–65, 77 Eng. Rep. 1342, 1343 (K.B. 1655).

737 For the following, see Max Weber, *Economy and Society. An Outline of Interpretive Sociology*, Volume 2 (Guenther Roth and Claus Wittich ed, 2nd edn, University of California Press 1978) 656–657.

such as ethical imperatives, utilitarian and other expediential rules, and political maxims.

According to Weber, law had developed, at least theoretically speaking, through different stages, with a corresponding development of law's formal qualities.[738] In the final stage, where law was marked by an increased professionalisation and specialisation, the formal qualities of law assumed an "increasingly logical sublimation and deductive rigor and develop[ed] an increasingly rational technique in procedure." This was the case with German law, which, in other words, had achieved a high degree of formal rationality.[739] But Weber, who was writing this part of his *magnum opus* in the years before the Great War, sensed that there were several "anti-formalistic tendencies" in play, in particular in Germany and France.[740] Some of these tendencies came from within the legal community, and more specifically the free law and sociological movements. At this point, Weber's analysis is somewhat cursory, but his point seems to be that the free law movement was challenging the idea that legal decision-making consisted in applying general norms to concrete facts. Thus, the distinction between "lawmaking" and "law-finding" would fall apart. The free lawyers even replaced the normative element of law with a reference to "concrete evaluations, i.e., not only nonformal but *irrational* lawfinding."[741] A second point made by Weber was that the sociological legal thinking of for instance Eugen Ehrlich was confusing legal and sociological methods of analysis.[742]

In our context, not only Weber's comments on legal thinking, but also his observations of currents within general intellectual thought are of interest. In his *Science as Vocation* from 1919, where he advocated a strict separation of science and politics ("politics is out of place in

738 For this and the following, see *ibid.* 882–883. Weber underlined that his theoretically constructed outline was simplified, and that historical developments had not always followed the typical path. This is reminiscent of Weber's concept of "ideal types".
739 See *ibid.* e.g. 657–658, where Weber describes the German Pandectism.
740 *Ibid.* 882–895.
741 *Ibid.* 887 (emphasis added).
742 *Ibid.* 753 and 887.

the lecture-room"), he made several comments about the trends of "the youth".[743] For instance, he recalled Plato's famous allegory of the cave, where a group of people are chained up in a way that the only images that they can see are shadows on the wall inside the cave, until one of them is able to get rid of the shackles and turn around to see the sun and things as they *really* are. For Plato, the basic message was that the truth lies not in the "shadows" that most people sense in ordinary life, but rather in the general and abstract ideas, ideas we can only grasp through intellectual reflection and philosophic contemplation. Weber's use of the allegory to comment on contemporary thought is almost as intriguing as the allegory itself:

> Today youth feels rather the reverse: the intellectual constructions of science constitute an unreal realm of artificial abstractions, which with their bony hands seek to grasp the blood-and-the-sap of true life without ever catching up with it. But here in life, in what for Plato was the play of shadows on the walls of the cave, genuine reality is pulsating; and the rest are derivatives of life, lifeless ghosts, and nothing else.[744]

Weber does not explicitly specify who he has in mind with this comment, but his remarks are at least spot on as an analysis of the *Lebensphilosophen* described in the first chapter of this work and also several of the critical legal scholars. Additionally, with the references to "youth", it might be that he is alluding to the "youth movement" in Germany. This seems even more so to be the case when Weber notices that the da Vincian belief in "science as the way to nature" would "sound like blasphemy to youth. Today, youth proclaims the opposite:

743 Max Weber, *Wissenschaft als Beruf* (speech delivered at the University of Munich, 1918, first published in 1919, 11th edn, Duncker & Humblot 2011). In the following I use translations from Max Weber, 'Science as Vocation' in *From Max Weber: Essays in Sociology* (H. H. Gerth and C. Wright Mills tr and ed, 1948, reprinted version, Routledge 1991) 129–156. I will refer to the pagination of the German version and put the pagination of the English translation in brackets. The quote on politics in the parenthesis is taken from p. 23 [p. 145].

744 *Ibid.* 18 [tr. 140–141].

redemption from the intellectualism of science in order to return to one's own nature and therewith to nature in general."[745]

If one tries to apply Weber's framework to the legal theoretical debates that have been examined in this study, the first thing to note is that in Germany, the classical constitutional thinking of Gerber and Laband, but also that of Kelsen, was marked by a high degree of formal rationality. The same goes for classical thought in the United States, albeit this feature was not as strongly developed and outspoken there. Inherent in all kinds of thinking that are concerned with form is that *borders* come to play an important role. We have seen that for Kelsen, the question of the borders of legal scholarship was at the heart of his thinking.[746]

In the criticism of mainstream constitutional thought in the first half of the 20th century, there were certain elements of substantive irrationality (in a Weberian sense). This aspect was most manifest in Carl Schmitt's writings. With his decisionism, Schmitt sought to abolish the normative orientation of legal application and replace it by vague notions of the sovereign's "concrete will" and "decisions". Oliver Wendell Holmes's aphorism in his *Lochner* dissenting opinion – "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." – as well as his claim that a judgment was "the very root and nerve of the whole proceeding", similarly suggest a non-normativist attitude. Holmes's general proposition about general propositions must, however, be considered as more of a rhetorical strategy in a dissenting opinion than a well-founded and substantiated theoretical statement, and it was also a descriptive, not a normative statement.

More important than the tendencies of substantive irrationality was perhaps the gravitation towards substantive rationality. A recurring theme throughout this study has been various scholars' critique of an isolated and self-sufficient law and legal thinking and a call for the consideration of historical, social, political, and sometimes ethical

745 *Ibid.* 20 [tr. 142].
746 See footnote 136 above.

contexts. If the construction of borders around law had been important for classical legal thinking, now there were widespread attempts to tear down these borders, or at least to relocate them. In some cases, the references to non-legal elements were so vague and lofty that it is possible to question whether it did not rather collapse into a certain irrationalism – think of Kaufmann's "higher objective order" or Smend's obscure concept of integration.[747] But there were also voices like Gierke and Triepel, whose main concern seemed to be that the social and political embeddedness of law had disappeared.[748]

In the United States particularly, the quest for a more socially and politically oriented approach to law was, as I see it, *the* leitmotif for the critical scholars. This idea is for instance succinctly expressed in Holmes's prediction that the future belonged to "the man of statistics and the master of economics". Paradigmatic is also Frankfurter's approval of *Muller v. Oregon* – the case where Brandeis had submitted his famous brief – as the Court "invoked no legal principles, it resorted to no lawbooks for guidance, but considered the facts of life". John W. Johnson has, in a brilliant, little study which is fascinating for its simple but clear analytical idea, argued that "[w]hat particularly marked the legal history of early twentieth-century United States was a seemingly ubiquitous concern for finding, fashioning, and using new sources of information". This "paradigmatic quality of early twentieth-century American legal history" he refers to as a "penchant for information".[749] If this idea is slightly reconceptualized, one may say that drawing borders around law means to restrict the amount of relevant

747 Kaufmann himself would probably have rejected this, as he was at pains to distance himself from the "nihilism" of the free law movement. On the irrational element in Smend's theory of integration, see Korioth (2005) 324. For an interpretation of Kaufmann emphasizing the irrational element, see Lepsius (1994) 171 and 350–351.

748 In Triepel's writings, however, one also finds references to a "supra-individual spirit" and "the eternal *justice*", see around footnote 346 above.

749 Johnson (1981) 4.

information.[750] This is something every legal system does, but similarly to the point I made just recently, one may say that the "penchant for information" was an attempt to expand the outer limits of law.

In order to understand this "penchant for information", one has to take into account that the American critics were *not* attacking a constitutional system that was marked by a high degree of formal rationality. With its numerous vague concepts and doctrines, American constitutional law was rather infused with ethical values and thus marked by substantive rationality, or perhaps even substantive irrationality. Commenting on the majority opinion in *Lochner*, for instance, H. L. A. Hart notes that it "may indeed be a wrongheaded piece of conservatism but there is nothing automatic or mechanical about it."[751] In a similar vein, Frederick Schauer argues that "[w]e criticize *Lochner* not for being narrow, but for being excessively broad."[752] The American scholars were, in other words, operating inside a system where the substantive elements were already prominent, and what they strived for was a different outlook of these substantive elements. They wanted to breathe a different life into law, in order to avoid, in the much-used Spencerian formula, a rule of the dead over the living.

5.3 A tale of two legal cultures – the debates compared

In both the chapter on Germany and the chapter on the United States, this study started out by tracing some general historical developments from around 1870 to 1914. If we compare these courses of development, we find several similarities. Admittedly, if the 1870's is taken as a starting point, the countries' recent political experiences could barely have been more different; Germany having gained a long sought for national

750 With Niklas Luhmann, one may speak of the legal system's *redundancy*, which, *inter alia*, functions as a selection mechanism that restricts the amount of relevant information, see *Das Recht der Gesellschaft* (Suhrkamp 1993) 353–354.

751 H. L. A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 HARV. L. REV. 593, 611 (footnote 39).

752 Schauer (1988) 511.

unity, arrived at after a victory over France, whereas the United States had had to fight a bitter civil war against some of its constituents in order to retain *its* unity. But for the decades to come, the countries shared the analogous experience of vast societal transformations that were closely related to the immense growth in industrial output. These developments can be recapped here in the form of some keywords: population growth, urbanization, the emergence and growth of big business, the rise of the working class as a strong political force and intensification of class conflicts, increased regulation and thus a considerable growth of public law, more centralization, and social policy as a major political concern.[753] This sketch of similarities is of course rudimentary and simplified but instead of carving out general socio-historical differences, I will have a closer look at some factors that made the respective internal legal contexts quite dissimilar. The dissimilar contexts may then explain some of the differences between the theoretical debates within the German and the American scholarly communities.

The first level to locate certain major differences at is the level of constitutional law. Here, a first observation is that Germany experienced a major (and to many people traumatic) constitutional rupture in 1918/1919, when the Imperial Constitution was replaced by the Weimar Constitution. The doctrinal changes within American constitutional law in the period were indeed significant as well, but compared to the stormy constitutional developments in Germany, the American experiences were ripples in the water. In short, it was evolution versus revolution. Secondly, the countries carried constitutional traditions of a very different nature. In the United States, the tension between majority rule and minority rights was at the heart of the constitutional and political system, and broadly formulated constitutional provisions coupled with a tradition of constitutional review meant that contested political issues were frequently brought into the legal arena and decided in the courtroom. The Imperial Constitution from 1871, conversely, was

753 On social policy as a transatlantic phenomenon, see Rodgers (1998).

officially proclaimed not by "We the people" but by the Kaiser. And whereas all American men were endowed by their Creator with certain unalienable rights, it was the German Kaiser who was endowed with the Grace of God. It was, in brief, a Bismarckian document, not a Madisonian one. Without constitutional guarantees in the Constitution nor established constitutional review, the legal-political dynamics in the *Reich* were of a different nature than across the Atlantics. The Germans got their "We the People"-reference in 1919, when the preamble of the Weimar Constitution declared that the document was the work of the German people, and the National Assembly endowed the Germans – men and women – with certain constitutional rights. But even if perhaps unalienable, the rights were, more or less, unenforceable, as there was no firm constitutional review. In addition, the entire constitutional order was fragile and suffered from a lack of a fundamental consensus about the raison d'être of the Weimar Constitution and its form of government. It was only later, with the Basic Law of 1949 and its later development, that Germany obtained two assets that the Americans had already possessed for a long time: a powerful constitutional court and a powerful constitutional patriotism.

There were also important differences between the two countries if we move below the surface and to the more fundamental levels of the respective legal cultures. In the German legal culture the most influential actors were, particularly in the 19th century, the legal scholars. The country had strong university traditions, and the scientific community produced a sophisticated conceptual apparatus as well as legal dogmatics and theories of a high quality. With the establishment of a common legislator in 1871, there was, in the words of the legal historian Franz Wieacker, a shift from legal scientific positivism to statutory positivism, but the position and influence of legal scholars remained strong in the German legal culture. In the realm of constitutional law more specifically, the *Staatsrechtswissenschaft* enjoyed a great standing and reputation.[754] In the common law culture of United States, by

754 Bernhard Schlink, 'Die Entthronung der Staatsrechtswissenschaft durch die Verfassungsgerichtsbarkeit' (1989) 28 *Der Staat* 161.

contrast, the institutional focal point was the courts, with the Supreme Court on top. Case law was undoubtedly the main source of law, and considerable attention was thus paid to the work of the courts. The academic community was way smaller and more immature than in Germany. Statutory law grew slowly in importance and the community of scholars became more robust, something the Restatements project illustrates very clearly, but still, they were not able to dethrone the courts.

Having noted these comparative similarities and differences at a general level, how did they play out in practice? Or, more precisely, can these general features explain some of the concrete similarities and differences between the debates in Germany and the United States? As argued in the chapter on methodology, the principal merit of analogical comparisons is that they may enhance our understanding of the historical developments. I will suggest four main points:

First of all, both countries underwent immense social transformations in the last decades of the 19th and the first decades of the 20th century, intrinsically connected to the emergence and growth of an industrial economy. The relevance of industrialisation is most explicit in Roscoe Pound's writings. Pound considered, as we have seen, that the industrialised society had sprinted ahead of law and legal thinking and turned the latter into anachronisms; law and life had become separated by an abyss. This was a more general concern among legal scholars in the period. Another consequence of the industrialisation was a growing need for regulation. When law attains a distinct regulative and thus purposive character, the issue of its application becomes of particular significance, as this is the point where law ultimately meets reality. Law is either applied in daily life by those who are subjects of regulation – businessmen, testators, spouses, and so on – or in the courtroom, and this is probably an important explanation why legal sociology and theories focusing on legal decision-making became so important in this period. Furthermore, as regulation in a highly complex society is an ongoing process, the idea that judges strictly and purely apply the law

can't explain the role of courts.[755] This undermined what was at least in Germany the paradigmatic model, with a strict separation of law and politics as a core methodological tenet. In sum, it seems plausible to assume that the similar social developments in Germany and the United States – and indeed in other Western countries as well – in part explains the blossoming of similar legal movements.[756]

The analogue processes of industrialisation might help explain why there were ruptures in constitutional legal thinking in both countries around the turn of the century. But, and this is the second point, in Germany, the debates were remarkably radicalized in the 1920's. We do not find the same intensification in the United States. There were of course the legal realists who radicalized the debates around 1930, but on the whole, they did not write much about constitutional law. The escalation of the debates in Germany is a strong indicator of the intrinsic connections between the methodological quarrel and the radical overturning of the old order during and following the Great War. In part, the debates were connected to a general sense of crisis, in part to the fact that the Weimar Constitution contained several elements that could easily be disputed, such as the numerous constitutional rights and the powers of the President. A methodological rupture had been looming since around the turn of the century, but with the new constitutional order, methodological issues became more important and more complicated. As Michael Stolleis puts it, scholars were forced to take sides as political conditions altered in Weimar.[757]

A third point is that in Germany, the debates took the form of truly academic disputes, in the sense that the criticism was levelled primarily against other legal scholars and their legal thinking.[758] In the United States, on the other hand, the primary target was the courts,

755 Korioth (1992) 231.

756 See similarly Friedmann (1967) 327–328.

757 Stolleis (2001), *Public Law 1800–1914* 440. In a similar vein, see Jan-Werner Müller, *A dangerous Mind. Carl Schmitt in Post-War European Thought* (Yale University Press 2003) 25.

758 In the theoretical debates concerned more with private law, a considerable part of the criticism was also aimed at the German Civil Code (BGB).

while outspoken criticism of peers was more unusual. As an example, one may consider Otto von Gierke's 100 pages long recension of Paul Laband's treatise and compare it with Oliver Wendell Holmes's brief and cursory critical remarks about Christopher Columbus Langdell. Another remarkable point of illustration is that the leading constitutional treatise writers from the late 19th century, Thomas M. Cooley and Christopher G. Tiedeman, were barely mentioned in the writings of the progressivists and the realists, even though it – seen from a progressive point of view – were several elements that could be criticized in their works. Finally, the point can be underpinned by a comparison of Heinrich Triepel's and Karl Llewellyn's respective writings on legal style. In *The Common Law Tradition*, Llewellyn substantiated and illustrated his theory of a "grand style" and a "formal style" primarily by references to case law, whereas Triepel's *On the Style of Law* was an encounter with other academic writings. An exception from this general pattern was Roscoe Pound, who more eagerly interacted with other legal thinkers, but symptomatically, he was informed by debates in German legal thinking. These differences indicate that the debates were deeply influenced and shaped by the respective legal cultures in Germany and the United States, and it illustrates more generally how legal phenomena are embedded within their legal culture.

The fourth and final point is that the discourses proceeded on fundamentally different levels of abstraction. The German scholars operated on a way more abstract and theoretically sophisticated level than their American counterparts, whose debates were more "down to earth". In fact, this difference cannot be overemphasized, and it is in my point of view the most important difference between the German and the American debates. If one looks for explanations for the different level of abstractions, one plausible theory would be that it was intimately connected with the previous observation of a legal scholar-centred versus a court-centred legal culture. Usually, courts do not discuss theoretical and methodological questions, and thus, a court-centred academic debate, like in the United States, will often tend to gravitate towards more practical and mundane issues. In addition,

court decisions have, in contrast to academic writings, immediate effects in real life – for real human beings and for a real society – and this may contribute to a more practically oriented outlook among scholars. In this context, it is interesting to note that with the creation of the German Constitutional Court, constitutional scholarship in Germany has, according to some, taken a more practical turn.[759] Another element that played an important role was how the rich university traditions in Germany created a vigorous and diverse community of legal scholars. Together with a strong German *Bildungsideal*, it created a combination of a specialized, yet philosophically and theoretically oriented scholarship of high standing.

In sum, the legal cultural differences between Germany and the United States breathed different lives into the constitutional debates on "law" and "life". These differences must be taken into account when interpreting the developments comparatively. As mentioned in the introduction to this study, further comparative research on legal thinking in the first decades of the 20th century is needed. Such studies would plausibly offer more in-depth and fine-tuned knowledge about how the trajectories in various cultures were shaped by (internal) legal cultural and (external) societal factors.

759 In an article on "the dethronement of constitutional scholarship through constitutional adjudication", Schlink (1989) speaks, *inter alia*, about a "Constitutional Court positivism" (*Bundesverfassungsgerichtspositivismus*), see 163; see more generally the point made by Jacobson and Schlink (2000) 3.

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