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).

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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:

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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.

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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.

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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].

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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.

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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.

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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.

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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).

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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.

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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

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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).

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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,

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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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