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-

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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

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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

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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

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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*

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