

Properties of Law

Properties of Law is a legal theoretical analysis about modern state law; about sociality, normativity, and plurality as its properties; and what will come after modern state law. The main objective of this study is to offer a legal theoretical recapitulation of modern state law that avoids the fallacies of Legal Positivism. This calls for a relationist approach where law's sociality is related to normativity, and normativity to sociality. Avoiding Legal Positivism's fallacies also includes refraining from extrapolating from modern state law to law in general; replacing Legal Positivism's conceptual universalism with sensitivity to the varieties of law; and acknowledging that law existed before modern state law, that it will exist after modern state law, and that other law exists alongside modern state law. The book concludes with a discussion of the impact of digitalisation on law.

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(continued after the index)

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Modern Law and After

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Preface

This is an essay in legal theory, not a doctoral thesis. I have tried to keep the footnotes to a minimum and shunned textual footnotes. The essay is, of course, based on extensive reading. In addition to the sources of direct quotations, I have wanted to indicate merely the literature I have most profited from. Yet I have not considered it necessary to identify the sources of all household premises of legal theory and sociology, say, the views and insights of classics such as Hobbes, Bentham, and John Austin or Kant and Weber.

In elaborating my ‘reflexion theory’ of modern law, I employ two primary methodological tools: the ideal-type method of Georg Jellinek and Max Weber and criticism of Legal Positivism. Criticism of Legal Positivism continues through Parts I–III. Still, this is not a book about other books, but the criticism serves to develop my own ideas. Because I share the basic tenet of modern law’s fundamental positivity, my criticism could also be termed internal. I mostly limit my discussion to the Masters of modern Legal Positivism, namely Hans Kelsen and H. L. A. Hart. This I consider sufficient for my purposes: I am not engaged in a wholesale critical presentation of contemporary Legal Positivism. Much of subsequent positivist discussion consists merely of glosses on the oeuvre of the Masters. I deliberately try to avoid getting involved in tribal positivist debates or repetitive positivist criticism of Ronald Dworkin, the favourite straw man of especially the Hartian school.

Legal theorists, too, seem to divide into hedgehogs and foxes. I find my place among the hedgehogs. I am surprised to realise how persistent my interest has been in some fundamental issues of legal theory and sociology, such as the relationship between legal normativity and social facticity, or between legal repression and emancipation. I am also surprised to realise how relevant the authors who impressed me early in my career still are: in addition to Kelsen and Hart, let me only point to Weber, Habermas, Luhmann, and Foucault and – perhaps as my chosen straw man – Schmitt. I had the privilege of having as my professor in constitutional law Paavo Kastari, who had introduced Kelsen to Finnish legal scholars before World War II; who wrote of *The Concept of Law* as early as the 1960s; who loaned me Weber’s *Sociology of Law*, with the dedication of the editor of the English edition; who invited Luhmann to Helsinki at a time when nobody in Finnish

academia had heard of him, not even the janitors who were ordered to complement Kastari and myself as the audience at Luhmann's lecture on *Der Begriff der Verfassung*; and who circulated photocopies of the proofs of Luhmann's *Rechtssoziologie* in Helsinki – in a shoebox.

After I had finished my *European Constitutionalism*, Hans Lindahl managed to get my thoughts moving again. My foray into European law had taught me the importance of non-state law for legal theory; Hans showed the importance of the phenomenological approach. Hans also facilitated my stay in Stellenbosch at STIAS in 2017 – a highly inspiring academic environment with highly inspiring colleagues, none of them a lawyer or a legal theorist!

My thanks also go to my friends and colleagues who have kindly read and commented on the manuscript of this essay, either as a whole or on individual chapters. Sakari Hänninen and Martti Koskeniemi have tirelessly reminded me of the fact that law is also about power and interests – a fact which from time to time I tend to sidetrack in my predilection for coherence and system-building. Other commentators, too, have greatly contributed to the end result: Ilkka Hiidenheimo, Ari Hirvonen, Juha Karhu, Emilia Korkea-aho, Riikka Koulu, Visa Kurki, Susanna Lindroos-Hovinheimo, Hans-W. Micklitz, and Kaius Tuori. The Law Faculty at Helsinki University have provided me with the infrastructure necessary for completing the project.

The final phase of work with the manuscript coincided with the COVID-19 pandemic. We have stayed in Sysmä, at Mataristo. She has painted in her studio – one of the paintings can be seen on the cover of this book – while I have written in my study or in the summer house. We have missed our children, grandchildren, friends, and colleagues. Still, we have been lucky.

There are many people to whom I would want to dedicate this book. Fortunately, a choice is not necessary: I dedicate the book to all of you.