Modern Intellectual History (2022), **19**, 421–443
doi:10.1017/S1479244320000542

CAMBRIDGE
UNIVERSITY PRESS

ARTICLE

Imperial Diversity, Fractured Sovereignty, and Legal Universals: Hans Kelsen and Eugen Ehrlich in their Habsburg Context

Franz Leander Fillafer*

IKT, Austrian Academy of Sciences
*Corresponding author. E-mail: franz.fillafer@oeaw.ac.at

(Received 22 May 2019; revised 31 August 2020; accepted 31 October 2020)

This essay places Eugen Ehrlich and Hans Kelsen afresh in their common context, the late Habsburg Empire. It reframes Ehrlich's legal sociology and Kelsen's pure theory of law as co-original and connected responses to the problem of legal universals under conditions of fractured sovereignty and imperial diversity. At first glance, Kelsen and Ehrlich seem antipodes, an impression apparently confirmed by their prickly exchange in the 1910s: while Kelsen made universality reside in the formal features and sequences of imputation that held the normative order together, Ehrlich claimed that every normative system which purported to be meta-social and meta-cultural merely camouflaged its local conditions of emergence. Once resituated in their Habsburg environment, these strategies can be read as articulations of a broader set of common proclivities. Ehrlich's and Kelsen's proficiency in the empire's techniques of plurality management enabled them to demystify the state and to dismantle the nation: both perceived the state as a juristic construction, hence they unmasked its alleged social, cultural, and ontological unity as a delusion. The same held true for the nation: Ehrlich challenged its supremacy by showing that social relationships—"associations"—cut across national divides, while Kelsen delegitimized the nation's status as a rights-bearing collective and blurred the distinction between citizens and alien residents, working toward the civic enfranchisement of the latter. This dovetailed with Ehrlich's and Kelsen's unmaking of the distinction between private and public law: the false belief in the latter's superiority over the former served to license arbitrary rule. Both jurists deterritorialized state sovereignty by highlighting the brittleness of spatial dominion and the artificiality of political boundaries: Ehrlich and Kelsen discovered a gamut of sovereign authorities with overlapping spatial areas of jurisdiction that coexisted within the Habsburg polity. This in turn permitted them to effectively transcend the distinction between domestic and international law: while, according to Ehrlich, the state fizzled out on the local level, Kelsen redescribed it from a global perspective, turning it into a mere subordinate organ of world law. Ehrlich's legal pluralism and Kelsen's pure theory were the two most successful juristic legacies of the Habsburg polity whose imprint they bore. Both creatively reworked Habsburg constitutional reality into templates of legal order that survived the empire's demise.

The late Habsburg Empire spawned two brands of jurisprudence that refashioned legal science and came to be applied on a global level: Eugen Ehrlich's legal sociology and Hans Kelsen's pure theory of law. Regarded as antipodes, Kelsen and

Ehrlich are rarely discussed in tandem. Hans Kelsen designed his pure theory as a universally valid analysis of norms that was neatly separated from the social and natural sciences. Cleansed of all culture-specific traits with surgical precision, Kelsen's concept of statehood complemented his scientific agenda: his state was identical with its legal order; it was law. Eugen Ehrlich, conversely, took great relish in sapping the foundations of Kelsen's sanitized science of norms. For Ehrlich, laws were inextricably woven into the fabric of society whose countless associations and corporate bodies lived their legal life largely unaffected by state legislation. According to Ehrlich, Kelsen's project was futile because every normative system that claimed to be universal and detached from its social and cultural context merely camouflaged its indelible conditions of existence.

My essay departs from the convention of treating Kelsen and Ehrlich as intrinsically opposed, seeking instead to bring out the common proclivities that their projects shared. It is true that Kelsen and Ehrlich did see themselves as antipodes, and the crushing repartees they exchanged possess all the pizzazz and panache of *fin de siècle* scholarly polemics. By looking at the local conduits and catalysts that made Ehrlich's and Kelsen's *oeuvres* possible I offer a fresh reading of their works as varieties of Habsburg legalism. Not only did Kelsen and Ehrlich study each other's works—Ehrlich's *Foundations of Legal Sociology* and Kelsen's vitriolic response will be discussed below—but they also both grappled with the practical challenges their Habsburg polity produced. Indeed it can be argued that Ehrlich's sociology and Kelsen's pure theory of law constitute the two most significant and broadly resonant vocabularies of late Habsburg jurisprudence.[1] Further, both have had a global following, and the international appeal of both Kelsen's and Ehrlich's work, as of other conceptual resources from the region, was due to their shared ability to grasp and shape the multilingual and multi-religious reality of Habsburg Central Europe in a manner that permitted them to scale their local insights up into global ones.[2] In what follows I seek to unravel the formative imprint the daily

[1]See Stefan Vogl, "Eugen Ehrlich's Linking of Sociology and Jurisprudence and the Reception of His Work in Japan," in Marc Hertogh, ed., *Living Law: Reconsidering Eugen Ehrlich* (Oxford, 2009) 95–123; Günther Teubner, "Globale Bukowina: Zur Emergenz eines transnationalen Rechtspluralismus," *Rechtshistorisches Journal* 15 (1996), 255–90; Marc Hertogh, "A 'European' Conception of Legal Consciousness: Rediscovering Eugen Ehrlich," *Journal of Law and Society* 31/4 (2004), 457–81; Hubert Rottenleutner, "Das lebende Recht bei Eugen Ehrlich und Ernst Hirsch," *Zeitschrift für Rechtssoziologie* 33 (2016), 191–206. A series published under the auspices of the Hans Kelsen Institute is devoted to the global appeal of the pure theory, *Der Einfluß der Reinen Rechtslehre auf die Rechtstheorie in verschiedenen Ländern*, 3 vols. (Vienna, 1978–2010).

[2]Illuminating studies on the global fortunes of Central European climate research, psychoanalysis, ethnography, neoliberal economics and logical empiricism have sought to transcend the appetizingly allusive, yet frequently insubstantial, arguments about the Habsburg Empire as a nutshell-like miniature of the global order. See Bernd Weiler, "Über das Identische im Vielfältigen und die Monotonie des Uniformen: Einige Überlegungen zur österreichischen Ethnologie und deren Ursprung im Vielkvölkerstaat der Monarchie," in Barbara Boisits and Sonja Rinofner-Kreidl, eds., *Einheit und Vielfalt: Organologische Denkmodelle in der Moderne* (Vienna, 2000), 273–301; Deborah Coen, *Climate in Motion: Science, Empire, and the Problem of Scale* (Chicago, 2018); Quinn Slobodian, *Globalists: The End of Empire and the Rise of Neoliberalism* (Cambridge, MA, 2019); Christiane Hartnack, *Psychoanalysis in Colonial India* (Oxford, 2001); George A. Reisch, *How the Cold War Transformed Philosophy of Science: To the Icy Slopes of Logic* (Cambridge, 2005).

management of imperial diversity left on Kelsen's and Ehrlich's works and thereby to untangle their shared conceptual premises.

By countering the standard image of Kelsen and Ehrlich as opponents, my objective is to retrieve the shared substratum on which their projects rested. In reflecting on how the legal system of the Habsburg Empire worked, Ehrlich and Kelsen formulated a prescient ideology critique: Kelsen's pure theory debunked the myth of a substantive "will of the state" that tied the legal system together. Not only did Ehrlich fully share this line of attack; his sociology of law also subverted the nation whose organic unity and polity-founding agency he exposed as a sham. Taken together, Kelsen's and Ehrlich's works shattered the three dogmas that served as threshold prerequisites of statehood for most contemporary jurists: the state's impermeable territory, its homogeneous subject population, and its unitary authority based on an overarching state will.

What is the broader conceptual purchase of my enquiry? I believe that a specific constellation enabled Kelsen and Ehrlich to develop their insights. The period in which Ehrlich and Kelsen worked on their projects was a time when two crucial debates had begun to interact and cross-fertilize: the foundations of knowledge and the nature of Habsburg statehood were equally at stake.[3] It was this combination that turned Habsburg Central Europe into the workshop of world knowledge that it was.[4] The Habsburg realms are often conveniently grouped together with other allegedly gridlocked, ramshackle multinational conglomerates like the Ottoman and the Russian monarchies. Recent research, however, not only reevaluates these ostensibly "backward" polities but also calls for a recalibration of the terms of comparison that frame this juxtaposition. The study of the Habsburg Empire, then, is no longer a safely self-contained, antiquarian specialism; rather, it promises to rediscover a previously skirted fulcrum of "world making" that produced a portfolio of conceptual resources for the twentieth century.[5] The excavation

[3]On the former debate and its Austrian ramifications see Johannes Feichtinger, *Wissenschaft als reflexives Projekt: Von Bolzano über Freud zu Kelsen. Österreichische Wissenschaftsgeschichte, 1848–1938* (Bielefeld, 2010). When public lawyer Georg Jellinek visited Budapest in 1905 he was amazed that the public sphere bristled with talk of public law which was the subject of chitchat in railway compartments, streets and coffee houses by the Danube alike. Georg Jellinek, "Ungarisches Staatsrecht: Eine politische Reisebetrachtung," *Neue Freie Presse*, 11 June 1905, c.i. Joachim Bahlcke, "Hungaria eliberata? Zum Zusammenstoß von altständischer Libertät und monarchischer Autorität in Ungarn an der Wende vom 17. zum 18. Jahrhundert," in Petr Maťa and Thomas Winkelbauer, eds., *Die Habsburgermonarchie 1620–1740: Leistungen und Grenzen des Absolutismusparadigmas* (Stuttgart, 2006), 301–16, at 305. The nooks and crannies of these controversies can only be grasped in their conceptual and practical ramifications through an exhaustive study of the contemporary material which, has yet to be digested into a synthetic, analytically informed study. Convenient starting points are Hermann Ignaz Bidermann, "Die rechtliche Natur der österreichisch-ungarischen Monarchie," *Juristische Blätter* 6 (1877), 219–32 ("state of states"); Georg Jellinek, *Die Lehre von den Staatenverbindungen* (Vienna, 1882), 227; Gyula Wlassics, "Alkotmányjogunk védelme Tezner és Turba ellen," *Budapesti Szemle* 150/424–6 (1912), 346–66; Louis Le Fur and Paul Posener, *Bundesstaat und Staatenbund* (Breslau, 1902), 301–2.

[4]See Deborah R. Coen, "Climate and Circulation in Imperial Austria," *Journal of Modern History* 82 (2010), 839–75, at 873; Franz L. Fillafer and Johannes Feichtinger, "How to Write the History of Knowledge from a Central European Perspective," at https://historyofknowledge.net/2019/10/09/global-history-of-knowledge-making-from-central-european-perspective/#more-12923.

[5]For practices of world making see Duncan Bell, "Making and Taking Worlds," in Andrew Sartori and Sam Moyn, eds., *Global Intellectual History* (New York, 2013), 254–79.

of Kelsen's and Ehrlich's works enables me to lay bare the common local pedigree that shaped these two rival, yet co-original, visions of world legal order.

The title of my article features three concepts: imperial diversity, fractured sovereignty, and the brittleness of legal universals. Each of these three aspects can be found elsewhere in the world of the *fin de siècle*, but what made Habsburg Central Europe special was the coexistence and entanglement of all three dimensions: it was this specific configuration that gave rise to Ehrlich's and Kelsen's connected innovations. They both wove these three strands together, albeit each in his distinct way, making the problem of Habsburg statehood, with its smorgasbord of territories and highly differentiated population, produce original solutions for the study of legal universals.

Hans Kelsen and Eugen Ehrlich in their Habsburg environment

The Habsburg Empire of Kelsen's and Ehrlich's days was no stubborn toehold of feudalism, no gristly medieval leftover in a modern world. Over the course of the nineteenth century, Habsburg jurists had modeled the empire into a constitutional state with functioning parliamentary and judiciary institutions that possessed a highly ramified, publicly accountable administration and a sprawling civil society. While historians have long feasted on the allegedly inexorable rise of national animosity that sealed the empire's fate, recent studies have begun to dispel this cliché. Indeed, nationalist politicians jostled cheek by jowl since the 1860s, seeking to enlist among their electorate the many still uncommitted citizens who refused to declare allegiance to either of the national groups in the making. Meanwhile, trailblazers of the region's nations deftly used Habsburg constitutional institutions to enhance their standing within the empire, rather than causing its collapse.[6]

Kelsen and Ehrlich both came from Jewish families whose polyglotism, interregional marriage patterns and high mobility were characteristic of the late empire's social dynamics—like Sigmund Freud, Karl Kraus, Gustav Mahler and Ludwig von Mises they had come to Vienna from small towns in Bohemia, Galicia or the Bukovina.[7] Kelsen, the son of the modestly successful businessmen Adolf Kelsen, a trained belt maker from Galician Brody who dabbled in the production of water pipes, bronze flambeaus and candle holders, was born in Prague in 1881 and attended the Protestant elementary school in the Karlsplatz once his family had relocated to Vienna.[8] Kelsen's and Ehrlich's Jewish descent familiarized

[6]See Milan Hlavačka, *Zlatý věk české samosprávy 1862–1913* (Prague, 2006); Gary C. Cohen, "Nationalist Politics and the Dynamics of State and Civil Society in the Habsburg Monarchy," *Central European History* 40 (2007), 241–78; Pieter M. Judson, *The Habsburg Empire: A New History* (Cambridge, MA, 2016).

[7]Eliav Lieblich, "Assimilation through Law: Hans Kelsen and the Jewish Experience," in James Loeffler and Moria Paz, eds., *The Law of Strangers: Critical Perspectives on Jewish Lawyering and International Legal Thought* (Cambridge, 2019), 74, to my mind unconvincingly argues for a link between the dilemmas of Kelsen's status as an assimilated Jew and his monist absorption of normative materials into an overarching world-legal system. Lieblich seeks to draw a parallel between the emancipated Jew's self-renunciation and the disintegration of the rights-bearing individual who in Kelsen's theory signifies a mere point of imputation, a bundle of obligations and entitlements.

[8]Thomas Olechowski, *Hans Kelsen: Biographie eines Rechtswissenschaftlers* (Tübingen, 2020), 27–43; Anna Lea Staudacher, "Zwischen Emanzipation und Assimilation: Jüdische Juristen im Wien des Fin de

them with the empire's latticework of crownlands and local authorities, each of which possessed their jealously guarded competencies, as well as with the special matrimonial laws the Habsburg civil code prescribed for the faiths it recognized. Both factors were important for Kelsen: one of Kelsen's earliest publications dealt with the jigsaw of Austria's right of residency according to which a citizen's district of origin wielded authority over him and his spouses long after the respective person had moved elsewhere.[9] Kelsen's conversions, to Catholicism and then to Protestantism, were respectively motivated by his attempt to dodge invisible obstacles caused by confessional regulations. Jewish professionals were barred from high office, particularly at the universities, which were hotbeds of anti-Semitism, hence his Catholic conversion. Further, Catholics were precluded from divorce, leading to Kelsen's second conversion to Protestantism before he married Margarethe Bondi in 1912.[10]

Ehrlich, whose father was a lawyer from the first generation of Jewish advocates, hailed from a multilingual Czernowitz family.[11] Born in 1862 in the capital of the Bukovina, the easternmost promontory of the empire, Ehrlich received his early education in Sombor/Samir.[12] After initial studies at the university of Czernowitz and at Lemberg/L'viv, Ehrlich went to Vienna, where he earned his juristic doctorate under the supervision of Anton Menger, whose interest in the social foundations of legal life he imbibed.[13] When Kelsen defended his habilitation *Main Problems of the Doctrine of Public Law* at the University of Vienna in 1911, Ehrlich had already begun to develop his fully fledged sociology of law at his native Czernowitz, whose religious and linguistic patchwork of inhabitants seemed particularly conducive to this project.[14]

What were the common conceptual points of departure that Ehrlich and Kelsen shared? From very early on, both jurists rebelled against the jejune Pandectist jurisprudence of concepts (*Begriffsjurisprudenz*), scolding its practitioners for their focus on systematic architectures of norms which failed to reflect the grounds of

Siècle," in Rudolf Walter, Werner Ogris, and Thomas Olechowski, eds., *Hans Kelsen: Leben—Werk—Wirksamkeit* (Vienna, 2009), 41–53, at 47.

[9]Hans Kelsen, "Naturalisation und Heimatberechtigung nach österreichischem Rechte" (1907), in *Hans Kelsen Werke*, vol. 1 (hereafter *HKW* 1), *Veröffentlichte Schriften und Selbstzeugnisse, 1905–1910*, ed. Matthias Jestaedt (Tübingen, 2007) 545–60, at 560. Here Kelsen disproved the claim that awarding Austrian citizenship was contingent on a candidate's certificate of residency awarded by a municipality.

[10]Olechowski, *Hans Kelsen*, 119. When Kelsen and his fiancée decided to get married they became Protestants beforehand, enabling them to seek divorce in the future in case the marriage failed to shape up the way they expected—which it did. When Margarethe Kelsen died in 1973 her husband Hans survived her only by a couple of weeks.

[11]Roger Cotterell, "Ehrlich at the Edge of Empire: Centres and Peripheries in Legal Studies," in Herthog, *Living Law*, 75–94, at 81. In 1909 Ehrlich described assimilation to German culture as inevitable also for those Jews who lived among Slavs in eastern Central Europe, whereas in 1916 he noted that the proneness to assimilate vanished due to rampant anti-Semitism. Eugen Ehrlich, *Die Aufgaben der Sozialpolitik im österreichischen Osten (Juden- und Bauernfrage)*, 4th edn (Munich 1916), 6–7.

[12]Rehbinder, *Begründung*, 10–11.

[13]On Anton Menger, the brother of Carl, founding figure of the Austrian school of marginal-utility economics, see the obituary by Eugen Ehrlich, *Adolf Menger* (Stuttgart, 1906).

[14]An excellent recent bibliographical guide to Ehrlich's abundant output is Sergiy Nezhurbida, Maria Diachuk and Manfred Rehbinder, *Eugen Ehrlich: Bibliographic Index*, ed. Slávka Tomaščíková (Wilmington and Malaga, 2018).

validity that made laws binding.[15] Both jurists were equally sanguine critics of the étatist public-law positivism that flourished in the German Reich. Pioneered by Paul Laband, German positivist jurists made the state act as the pinnacle of rationality, as the supreme embodiment of a governing "will" that permeated all of its subordinate organs, a conception Kelsen and Ehrlich found feeble and baleful.[16]

Ehrlich and Kelsen were not alone in their loathing of Labandian positivism, but it is revealing to contrast their misgivings with the comments of another young jurist who cut his teeth on the critique of Labandian state law, namely Carl Schmitt. Built on firsthand knowledge of the Habsburg polity, Kelsen's and Ehrlich's projects can be counted among the most potent twentieth-century counterblasts to Schmitt's apotheosis of racially grounded sovereignty.[17] If Laband's state-law positivism failed to make a splash among Habsburg jurists, the work of their compatriot Georg Jellinek did not fare much better.

Jellinek, son of Vienna's chief rabbi, had begun his career at the university of the Habsburg capital, but, being begrudged his promised full professorship after anti-Semitic intrigues, left for Basle before assuming a chair in international law at Heidelberg in 1889. When Jellinek described subjective rights as mere results of objective, state-sponsored law, and boldly envisaged a constitutional court for the Habsburg hereditary lands, he sowed for Kelsen to reap.[18] A spry and prolific public lawyer, Jellinek conceptually refurbished Laband's state-law positivism and famously defined three basic conditions of statehood: a neatly defined common territory, a clearly demarcated state people, and a unitary state authority that crystallized around a common will.[19] Making material from Habsburg constitutional

[15]Rudolf Jhering, *Scherz und Ernst in der Jurisprudenz: Eine Weihnachtsgabe*, 3rd edn (Leipzig, 1885; first published 1884), 7; Okko Behrends, "Rudolf von Jhering: Der Rechtsdenker der offenen Gesellschaft. Ein Wort zur Bedeutung seiner Rechtstheorie und zu den geschichtlichen Gründen ihrer Mißdeutung," in Behrends, ed., *Rudolf von Jhering: Beiträge und Zeugnisse aus Anlaß der einhundertsten Wiederkehr seines Todestages am 17.9.1992* (Göttingen, 1992), 8–10; Herbert Hofmeister, "Jhering in Wien," in ibid., 38–47.

[16]On Paul Laband see Michael Stolleis's seminal *Public Law in Germany, 1800–1914* (New York, 2001), 323–8. For Laband's critics see Stefan Korioth's perceptive "Erschütterungen des staatsrechtlichen Positivismus im ausgehenden Kaiserreich: Anmerkungen zu frühen Arbeiten von Carl Schmitt, Rudolf Smend und Erich Kaufmann," *Archiv des öffentlichen Rechts* 117 (1992), 212–38. On Ehrlich's critique see Manfred Rehbinder, *Die Begründung der Rechtssoziologie durch Eugen Ehrlich* (Berlin, 1967), 13; Hans Kelsen, "The Pure Theory of Law, 'Labandism', and Neo-Kantianism: A letter to Renato Treves," in Stanley L. Paulson and Bonnie L. Paulson, eds., *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Oxford, 1998), 169–75, at 170–71.

[17]Reinhard Mehring, "Staatsrechtslehre, Rechtslehre, Verfassungslehre: Carl Schmitts Auseinandersetzung mit Hans Kelsen," *Archiv für Rechts- Staatsphilosophie* 80 (1994), 191–202, at 199.

[18]See Christoph Schönberger, "Ein Liberaler zwischen Staatswille und Volkswille: Georg Jellinek und die Krise des staatsrechtlichen Positivismus um die Jahrhundertwende," in Stanley L. Paulson and Martin Schulte, eds., *Georg Jellinek: Beiträge zu Leben und Werk* (Tübingen, 2000), 3–32. Schönberger stresses that Jellinek's Habsburg experience sharpened his sociological acumen and made him skeptical of Laband's stodgy dogmatism. Ibid., 17. Thomas Olechowski, "Georg Jellinek und Hans Kelsen: Ein Beitrag zur Geschichte der Staatsrechtslehre an der Universität Wien um 1900," in Elisabeth Röhrlich, ed., *Migration und Innovation um 1900: Perspektiven auf das Wien der Jahrhundertwende* (Vienna, 2016), 375–98.

[19]Georg Jellinek, *Allgemeine Staatslehre*, 3rd edn, *Unter Verwertung des handschriftlichen Nachlasses durchgesehen und ergänzt von Dr. Walter Jellinek* (Berlin, 1914), 394–434.

reality grist to their mill, Kelsen and Ehrlich dismantled all three parts of Jellinek's theory.[20]

Imperial diversity management

How did Kelsen and Ehrlich tackle the challenges of imperial diversity they faced, and how did they tweak and transform their shared conceptual resources? When Kelsen addressed the Viennese Sociological Association in 1911 with a nutshell summary of some aspects of his *Main Problems*, he pointed out that the "idea of a uniform will of the state" was simply an expression of the "uniformity of the law, of the logical coherence and required consistency of legal norms." The "will of the state," Kelsen explained, is a "normative construction established for the purpose of imputation," having to do "nothing whatsoever with a social-psychological collective will."[21] Kelsen traced this pathbreaking insight to two sources of inspiration, to the *fin de siècle* humanities and sciences in Austria, and to the pluricultural space of the empire. When delivering another lecture before the Viennese Psychoanalytical Association in 1921, Kelsen sought to show that his own project dovetailed smoothly with Ernst Mach's and Sigmund Freud's anti-substantialist, functional analysis of nature and society:

> If it can be shown that the state as conceived by politics and differentiated in contrast to law, "behind" the law, as the "bearer" of the law, is just as much a duplicating "substance" productive of pseudo-problems like the "soul" in psychology, or "force" in physics, then there will be a stateless theory of the state, just as to-day there is already a psychology without a "soul" … and just as there already is a physics without forces.[22]

In a later autobiographical essay, Kelsen links this depiction of a congenial milieu of Habsburg scholarship with a crisp sketch of the empire's diversity:

> in the light of the Austrian state which was made of so many groups that differed by race, language, religion, and history, scientific approaches which tried to base the unity of the state on some form of socio-psychological or sociobiological connection between the people legally belonging to the state had clearly

[20]In his *Main Problems* of 1911, Kelsen, who had studied abroad at Heidelberg to attend Jellinek's seminaries in 1907 and 1908–9, considered himself lucky to have been among his students. Kelsen expressed the hope that his book would contribute to the blessed memory of the great Jellinek, *Hauptprobleme*, 63.

[21]Hans Kelsen, "Über Grenzen zwischen juristischer und soziologischer Methode" (1911), in *Hans Kelsen Werke*, vol. 3, *Veröffentlichte Schriften 1911–1917*, ed. Matthias Jestaedt (Tübingen, 2007) (hereafter *HKW* 3), 23–75, at 51; compare Kelsen, "Sociologická a právnická idea státní," *Sborník vědprávních a státních* 14 (1913–14), 69–101. On Kelsen's membership in the Viennese Sociological Association, which devoted itself to the promotion of sociology as a university discipline and as a subject of popular education see Olechowski, *Kelsen*, 164.

[22]Hans Kelsen, "The Conception of the State and Social Psychology" (1921), *International Journal of Psycho-analysis* 5 (1934), 1–38, at 36. Cf. Johannes Feichtinger, "Intellectual Affinities: Ernst Mach, Sigmund Freud, Hans Kelsen and the Austrian Anti-essentialist Approach to Science and Scholarship," in Ian Bryan, Peter Langford, and John McGarry, eds, *The Foundation of the Juridico-Political: Concept Formation in Hans Kelsen and Max Weber* (New York, 2016), 117–39.

> proven to be fictions. Inasmuch as this theory of the state is an essential component of the Pure Theory of Law, the Pure Theory can be regarded as a specifically Austrian theory.[23]

Ehrlich displayed a fine eye for the Habsburg realms' role as a sanctuary of positivist formalism when he described his homeland as a "paradise of the narrowest sort of worship of the letter of the law."[24] Yet while Ehrlich denounced positivism, his basic premises bore a greater resemblance to Kelsen's than both were prepared to admit. As he developed his sociology of law in the Bukovina, Ehrlich noted how congenial this location was to his pursuits and invoked kindred legal ethnographers like Valtazar Bogišić, Bogdan Petriceiu Hașdeu and Stanislav Dnistrjans′kyj, all of whom worked at the interstices of empires.[25] As Ehrlich explained in an 1912 essay that presented his Seminary of Living Law at Czernowitz,

> At present there are nine races (*Volksstämme*) who … live together in the duchy of Bukovina: Armenians, Germans, Jews, Romanians, Russians (Lipovanians), Ruthenians, Slovaks … Hungarians, Gypsies. A jurist of the old school would certainly claim that all these peoples have only one, and indeed the same law, the law valid in all of Austria. Yet a perfunctory glance would convince him that each of these races observes entirely different legal rules in all legal matters of daily life. The ancient principle of personality in law lives on here, although it has on paper been replaced by the principle of territoriality …[26]

Ehrlich's sociology of law focused on the disparities between the statutory law, the civil code (Allgemeines Bürgerliches Gesetzbuch) and what he called "living law." Ehrlich's churlish remark on the civil code's limited impact ruffled feathers at a time when the codification was celebrating its first centenary: enacted for all Austrian hereditary lands by Emperor Francis I in 1811, the code was widely

[23]Hans Kelsen, "Autobiographie" (1947), in *HKW* 1: 29–132, at 59–60; Kelsen, "Reichsgesetz und Landesgesetz nach österreichischer Verfassung" (1914), in *HKW* 3: 360–425, at 398. Compare the reflections Hans Kelsen devoted to the interaction and reconciliation of diverse interests in the wide territorial sphere of an empire in Kelsen, *Die Staatslehre des Dante Alighieri* (Vienna, 1905), 6, 8, 15, 16, 35, 135. Cf. Manfred Baldus, "Hapsburgian Multiethnicity and the 'Unity of the State': On the Structural Setting of Kelsen's Legal Thought," in Dan Diner and Michael Stolleis, eds., *Hans Kelsen and Carl Schmitt: A Juxtaposition* (Gerlingen, 1999), 13–25.

[24]Ehrlich, *Fundamental Principles*, 470.

[25]See Irina Stahl, "Balthazar Bogišić et Bogdan Petriceiu Hașdeu, deux scientifiques à la recherche des coutumes juridiques dans le sud-est de l'Europe," in Luka Breneselović, ed., *Spomenica Valtazara Bogišića: O stogodišnjici njegove smrti 24. apr. 2008. godine*, 2 vols. (Belgrade, 2011), 1: 187–205; Sima Avramović, "Srpski građanski zakonik (1844) i pravni transplanti: kopija austrijskog uzora ili više od toga?", in Milena Polojac, Zoran S. Mirković, and Marko Đurđević, eds., *Srpski građanski zakonik: 170 godina* (Belgrade, 2014), 13–45; Stanislav Dnistrjans′kyj, *Das Gewohnheitsrecht und die sozialen Verbände* (Czernowitz, 1905); Katherine Lebow, Małgorzata Mazurek and Joanna Wawrzyniak, "Making Modern Social Science: The Global Imagination in East Central and Southeastern Europe after Versailles," *Contemporary European History* 28 (2019), 137–42.

[26]Eugen Ehrlich, "Das lebende Recht der Völker der Bukowina" (1912), in Ehrlich, *Recht und Leben: Gesammelte Schriften zur Rechtstatsachenforschung und Freirechtslehre*, ed. Manfred Rehbinder (Berlin, 1967), 43–60, 43.

praised throughout its jubilee as the apogee of enlightened liberalism, tailor-made for the aspiring and self-reliant bourgeoisie of the Habsburg lands.[27]

By studying the intricacies of local practice, Ehrlich exposed the limits of the legal system devised by the imperial authorities. In doing so, Ehrlich did not merely scavenge for facts to satisfy his curiosity, piously recording a provincial past that threatened to melt into air. Instead, he sought to reassess the legal system in its totality: designing questionnaires on day-to-day legal practice to be completed in breweries and chaplaincies, at village fairs, on markets and in insurance companies, Ehrlich and his Czernowitz collaborators sought to encompass the entire social fabric of contemporary family, inheritance, labour and business law "in action." This law, Ehrlich maintained, was not the product of the statutes enacted by the public authorities, but of a plethora of "associations," each of which possessed a legal life of its own and created its own norms to regulate obligations that concerned the basic "legal facts" (usage, domination, possession and declarations of will).[28] It is crucial to note that Ehrlich's "associations" did not form a holistic overarching structure, a "society" with an internally consistent mechanism of self-reproduction: neither were they self-contained; indeed Ehrlich clarified that every person belonged to many associations simultaneously: to families, confessional congregations, factories, merchant guilds, leisure clubs and educational societies.

Discovering a new world of lawgiving beyond the state, Ehrlich also traced the historical pedigree of abstract legal provisions, arguing that all state-enacted law had originally arisen from concrete, informal and local decision norms.[29] Ehrlich hoped that his studies would furnish courts with material on legal transactions beyond jurisdiction and state ordinances, supplying judges with evidence on the inner life of society. This chimed nicely with Ehrlich's advocacy of judges' free finding of the law,[30] and with his withering critique of the Roman-law idolatry of the unification of free wills. Ehrlich's argument matched Kelsen's, who castigated the belief that the "will" that jurists ascribed to norm addressees corresponded to an actual psychological fact.[31] While Kelsen developed his far-flung theory of imputation from this kernel, Ehrlich's aim was to unveil social injustice: used to design contract and obligations law, the figure of the "free will" according to Ehrlich served as a smokescreen that concealed glaring inequalities and legitimized enforceable property claims against the socially disprivileged.[32]

[27]See the festive two-volume flagship publication the Viennese Juristic Association released on the occasion of the jubilee, *Festschrift zur Jahrhundertfeier des Allgemeinen Bürgerlichen Gesetzbuches, 1. Juni 1911*, 2 vols. (Vienna, 1911), in particular Franz Klein, "Die Lebenskraft des Allgemeinen Bürgerlichen Gesetzbuches," in ibid., 1: 3–32.

[28]Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, tr. Walter L. Moll (New York, 1962; first published 1913), 192.

[29]Ibid., 38, Cotterell, "Ehrlich at the Edge," 87; Eugen Ehrlich, "Die freie Rechtsfindung," *Das Recht: Volkstümliche Zeitschrift für österreichisches Rechtsleben* 4/5 (1906), 35–41.

[30]Eugen Ehrlich, "Judicial Freedom of Decision: Principles and Objects" (1903), in Ernest Bruncken and Layton Bartol Register, eds., *The Science of Legal Method: Selected Essays by Various Authors* (New York, 1921), 48–84, 83.

[31]Kelsen, *Hauptprobleme*, 191–300; Kelsen, "Über Grenzen," 27–9, 31–3, 36–47.

[32]Eugen Ehrlich, *Die stillschweigende Willenserklärung* (Berlin, 1893); Ehrlich, *Fundamental Principles*, 105–6.

https://doi.org/10.1017/S1479244320000542 Published online by Cambridge University Press

Seeking to throw Ehrlich's conception of law and empire into relief, we may turn to his insistence on every person's affiliation with multiple associations. Ehrlich postulated the universality of legal facts that undergirded the diverse transactions every association chose to regulate according to its own standards. By endorsing the principle of "personality" quoted above, Ehrlich conceived every individual's membership in an association as situation-dependent—very much like the situational usage of different languages that Ehrlich observed in his daily life—and thereby also effectively deterritorialized the law. To amplify this point we may explore Ehrlich's discussion of a Romanian merchant's legal life. This Romanian tradesman from the Bukovina belongs to the community of Romanian Orthodox believers whose places of worship were scattered all over the monarchy, while he submitted to the different market rights of the trading places of Lemberg, Vienna or Odessa that he wished to access. Our merchant may also have contracted an insurance with a pan-monarchic company whose provisions on premium refund, turnover calculation and seizure exemption varied for each crownland according to the local social structure; further, he may possess a plot of arable land and contribute to a loan fund of his manorial lord that settles his subjects' tax arrears; at the same time our merchant could also submit to the inheritance laws of his village, and to the norms of family conduct of Romanian Orthodoxy which diverged from the regulations designed by other Orthodox churches. This brief sketch alerts us to the fact that Ehrlich deprioritized ethnic affiliations in his studies, showing the permeability and brittleness of this type of association. Incisively arguing that professional status was crucial for the ascription and changing self-perceptions of ethnicity, Ehrlich also highlighted the significance of religion, e.g. when noting that the various Orthodox and Greek–Catholic priesthoods of the monarchy, with their special customs, privileges of hereditary office, proprietary rights and tax exemptions, existed as "nations" within their respective nations.[33]

As a denizen of Czernowitz, Ehrlich by no means felt marooned in a gritty, dodgy place, nor did he envy Kelsen for his role as a blazing light of Viennese jurisprudence. Ehrlich did not intend to celebrate the fringes of the empire; indeed his entire project aimed at undoing the disparity between "centre" and "periphery" in a manner that paralleled young Kelsen's rigorous claim that jurisprudence knew no above and below.[34] It was not only in the ostensibly peripheral Bukovina that ideas about the benign percolation of the civil code to all strata and segments of society proved an illusion; the very same applied to the core of the Austro-Bohemian hereditary lands. Already during his time as an advocate and freelance juristic author in Vienna and Lower Austria, Ehrlich had devoted important essays to

[33]Monica Eppinger, "Governing in the Vernacular: Eugen Ehrlich and Late Habsburg Ethnography," in Hertogh, *Living Law*, 21–47, at 34; Eugen Ehrlich, "Professor Ehrlich's Seminary of Living Law," presented by William H. Page, *Proceedings of the Fourteenth Annual Meeting of the Association of American Law Schools* (Chicago, 1914), 46–75, at 58–9.

[34]Cotterell, "Ehrlich at the Edge", 88; Kelsen, *Hauptprobleme*, 872. For Kelsen's return into three-dimensional space with the "hierarchical structure of the legal order" (*Stufenbau der Rechtsordnung*) pioneered by his student Adolf J. Merkl see Thomas Olechowski, "Legal Hierarchies in the Work of Hans Kelsen and Adolf Julius Merkl," in Ulrich Müßig, ed., *Reconsidering Constitutional Formation II: Decisive Constitutional Normativity. From Old Liberties to New Precedence* (Berlin, 2018), 353–62.

the self-regulation and self-obligation of stockbrokers at the Vienna exchange and their arbitration procedures, as well to "gaps in the law" and their significance for jurisdiction.[35] Ehrlich continued to pursue these enquiries in Czernowitz, bringing them to fruition with his 1913 *Fundamental Principles of the Sociology of Law*.

A reappraisal of the Kelsen–Ehrlich debate

Previous scholarship has devoted much attention to the skirmish between Ehrlich and Kelsen, whose high-pitched, bellicose tone occluded the lines of reasoning that the contestants shared. The theoretical approaches may seem irreconcilable, prima facie: while Kelsen sought to turn jurisprudence into a science of norms unmoored from sociological, natural-science-based and cultural modes of enquiry, Ehrlich regarded the law as an assemblage of social facts. When Ehrlich released his hefty *Fundamental Principles of the Sociology of Law* in 1913, Kelsen greeted it with a hatchet-job review.[36] Rankled by Ehrlich's failure to explain what distinguished legal norms as elements of a coercive order from other types of moral and social injunctions, Kelsen found fault with Ehrlich's psychological theory of a common-sense-based *opinio necessitatis* rooted in popular conceptions that decided over the validity of norms. The lack of this *opinio* among the norm addressees entailed the derogation of laws through disuse. Ehrlich even went so far as to assign distinctive emotions, i.e. affective correlates to different types of norms, which to Kelsen seemed a relapse into fumbling psychologizing.[37] Sociologists like Ehrlich remained ensnared in metaphysical concepts when they professed to ascertain quasi-natural laws of development instead of analysing values and aggregates of evaluative acts. While Kelsen never denied that "all lawgiving unfolds as a social process in society," he took issue with Ehrlich's approach for three reasons that may seem purely theoretical at first glance but were in fact saturated with tangible problems posed by the rule of law in the Habsburg realms.[38]

First, Ehrlich diluted the singularity and specific character of legal norms. By doing so, he made it impossible to ascertain the validity and gapless deduction of rights whose universality consisted in the fact that they were indifferent to the origin, social status and religious belief of their bearer. Ehrlich's approach imperilled the administration of justice. Second, by dissolving society into a maze of associations with unclear relationships of subordination between each other, Ehrlich also made it impossible to recognize the state as a legal order that created its norm addressees. As a consequence, Ehrlich tacitly disenfranchised the citizens called upon to mould and control the state.[39] Ehrlich's distinction

[35]Eugen Ehrlich, "Die Börsenschiedsgerichte," *Neue Revue* 6 (1895), 262–9, 305–10; Ehrlich, "Über Lücken im Rechte" (1888), in Ehrlich, *Recht und Leben*, 80–169; Stefan Vogl, *Soziale Gesetzgebungspolitik, freie Rechtsfindung und soziologische Rechtswissenschaft bei Eugen Ehrlich* (Baden-Baden, 2003), 83–91.

[36]Hans Kelsen, "Eine Grundlegung der Rechtssoziologie" (1914–15), in *HKW* 3: 317–58. Cf. Klaus Lüderssen, "Hans Kelsen und Eugen Ehrlich," in Stanley Paulson and Michael Stolleis, eds., *Hans Kelsen: Staatsrechtslehrer und Rechtstheoretiker des 20. Jahrhunderts* (Tübingen, 2005), 264–75.

[37]Such specific "overtones of feeling" included "sentiment(s) of revolt," "indignation," "disgust" and "disapproval." Ehrlich, *Fundamental Principles*, 165; Kelsen "Grundlegung", 329.

[38]Quoted from Kelsen, "Eine Grundlegung", 357.

[39]Ibid., 347–8.

https://doi.org/10.1017/S1479244320000542 Published online by Cambridge University Press

between "state law" and "real law" was nonsensical. Third, when appealing to the "legal consciousness" of his "associations" as guideline for judicial finding of the law, Ehrlich failed to supply conflict rules for collisions between them.

Kelsen also charged Ehrlich with foolishly mixing up "is" and "ought" by appealing to the binding force of social facts. Yet according to Kelsen, ties of subordination and obligation can only be understood as ought-relations. These ought-relations were constituted by norms that served as "mental constructions,"[40] which is why Ehrlich's conflation of the form and content of the law was so wrongheaded and perilous: "Law is the *form* under which economic and political life unfolds or should unfold. Legal science therefore has to appraise the forms, but, due to the intrinsic limitations of its specific means and object, cannot say anything about the *content* supposed to happen [*sich abspielen*] within these forms."[41]

What follows from this brief juxtaposition of Ehrlich's and Kelsen's varieties of jurisprudence? Ehrlich's reparticularized legal universals, while Kelsen's sought to buttress their validity by generalizing their formal features and by fleshing out the recursive sequences of norm deduction. Both strategies constitute salient examples of the conceptual management of imperial diversity and they reflect the specific conditions of statehood that Ehrlich and Kelsen encountered in the Habsburg Empire. Neither of the two jurists treated nations as inexorable glaciers, as powerful pressures that smoothed whatever lay in their path.[42] Kelsen's purified conceptualization of the state as law, as the only scientifically ascertainable "form of social unity," was shaped by the imbricated structure of sovereignty that characterized the Habsburg polity.[43]

Kelsen supplemented his doctrine of the state with an elaborate theory of democracy, with judicial norm control, and with strong safeguards of minority protection, which is why he found Ehrlich's separation of state and society so misguided.[44] Yet Ehrlich's legal sociology intersected with Kelsen's approach in one highly significant regard: Ehrlich charted the overlaps of public and private governance functions (e.g. in manorial lordship[45]) and the residual special private laws

[40]Ibid.

[41]Ibid., 354, original emphasis.

[42]Helmut W. Smith, "Prussia at the Margins, or the World Nationalism Has Lost," in Neil Gregor, Nils Roemer, and Mark Roseman, eds., *German History from the Margins* (Bloomington, 2006), 69–83, at 79.

[43]Kelsen, "Eine Grundlegung," 348.

[44]See Hans Kelsen, *Vom Wesen und Wert der Demokratie*, 2nd edn (Tübingen, 1929).

[45]See Friedrich Tezner, "Die landesfürstliche Verwaltungsrechtspflege in Österreich vom Ausgang des 15. bis zum Ausgang des 18. Jahrhunderts," *Zeitschrift für das Privat- und öffentliche Recht der Gegenwart* 25 (1898), 1–89, at 75–80; Georg Holzgethan, "Über Collisionen bei der den Kammer-Prokuraturen obliegenden Pflicht zur gerichtlichen Vertretung der unterthänigen Gemeinden und einzelnen Gutsunterthanen," *Zeitschrift für österreichische Rechtsgelehrsamkeit und politische Gesetzeskunde* 1 (1844) 129–41; István Kállay, *Úriszéki bíráskodás a XVIII–XIX. században* (Budapest, 1985); Anton von Schmerling, "Allerunterthängister Vortrag des treugehorsamsten Justizministers Dr. Anton von Schmerling betreffend die Organisirung der Gerichte in den Kronländern Galizien und Lodomerien mit Krakau, Auschwitz und Zator und in der Bukowina," in *Az ausztriai birodalmat illető közönséges birodalmi törvény- és kormánylap/Allgemeines Reichs- Gesetz- und Regierungsblatt für das Kaiserthum Oesterreich, Jahrgang 1850, IV. Theil, Stk. CXXVII–CLXV* (Vienna, 1850), 2103–2115.

https://doi.org/10.1017/S1479244320000542 Published online by Cambridge University Press

(for the peasantry, for the nobility and for religious confessions) that continued to shape the daily legal life of different social strata in the Habsburg Empire.[46]

While Kelsen pleaded for a meta-social and meta-cultural system of law, Ehrlich showed that any system that makes pretences to this effect is, even if deracinated from its context of emergence, inevitably rooted in a specific sociocultural constellation. For Ehrlich the state was a mere larger-scale private authority, cut from the same cloth as the patrimonial and clerical dominions that still existed within it.[47] Hence Ehrlich's effort to decentralize lawgiving, dislodging the state's omnipotence and supremacy, was in unison with Kelsen, but he drew different conclusions: Kelsen reduced the state to law, whereas Ehrlich refused to reduce law to the state.

In the following sections of my article I will show how Kelsen's and Ehrlich's concepts were embedded in a set of contemporary juristic squabbles over the "dispersed and qualified sovereignty" of the Habsburg polity.[48] I do so in order to bring out two shared dimensions exhibited by Ehrlich's and Kelsen's work, namely the blurring of the divide between private and public law and the deterritorializing of sovereignty that entailed a slew of corollaries: chief among them was the obliteration of the frontier between municipal and international law.

Unmaking the divide between public and private law

Kelsen's and Ehrlich's caustic remarks about the benignly bamboozling metaphysical master concepts of state law are no isolated statements; rather, they form the tip of an iceberg. Many Habsburg jurists dismissed the idea of a separate realm of public law that was distinct from and superior to private law as a piece of absolutist subterfuge. They did so for several reasons: Habsburg private law had been the

[46]Until 1848, the Bukovinian peasants had remained *sujets mixtes*, deriving their corvée regulations from the so-called *chrysow* (charter) enacted by the Moldovan prince Grigore III Chica in 1766 whose further validity was stipulated by the treaty between the Ottoman Empire and the Viennese authorities when the Bukovina became a Habsburg possession after the peace of Küçük Kaynarca in 1775. See *Verhandlungen des österreichischen Reichstages nach der stenographischen Aufnahme*, vol. 1 (Vienna, 1849), 466. For confessional, marital and family laws see Bruno Primetshofer, *Rechtsgeschichte der gemischten Ehen in Österreich und Ungarn (1781–1841): Ein Beitrag zur Geschichte der Beziehungen zwischen Kirche und Staat* (Vienna, 1967); and for the loopholes the intra-imperial diversity of marriage laws opened up for potential bridal couples see Christian Neschwara, "Eherecht und 'Scheinmigration' im 19. Jahrhundert: Siebenbürgische und ungarische, coburgische und deutsche Ehen," *Beiträge zur Rechtsgeschichte Österreichs* 1 (2012), 101–17. Cf. Otto Freydenegg und Monzello, "Zur Geschichte des österreichischen Fideikommißrechtes," in Berthold Sutter, ed., *Reformen des Rechts: Festschrift zur 200-Jahr-Feier der Rechtswissenschaftlichen Fakultät der Universität Graz* (Graz, 1979), 777–808; Ignaz von Zingerle and Josef Egger, eds., *Die tirolischen Weisthümer. IV. Theil: Burggrafenamt und Etschland. 1. Hälfte* (Vienna, 1888), 164; Antonín Haas, "Omezení odúmrti a vdovská třetina v starém českém právu městském," *Právněhistorické studie* 17 (1973), 199–218. On Bohemia's contested status in the German Confederacy and the problems of personal mobility, loan-brokerage and property turnover this entailed up to the 1866 peace of Prague, see Bohumil Baxa, "Jednání o připojení zemí koruny české k německému Bundu," *Časopis Musea Království českého* 80 (1906), 322–66, 497–510.

[47]Compare the penetrating analysis of Otto Hintze, "The Preconditions of Representative Government in the Context of World History" (1931), in *The Historical Essays of Otto Hintze*, ed. Felix Gilbert (New York, 1975), 302–53.

[48]Natasha Wheatley, 'Law, Time, and Sovereignty in Central Europe: Imperial Constitutions, Historical Rights, and the Afterlives of Empire' (PhD thesis, Columbia University, 2016), 68.

https://doi.org/10.1017/S1479244320000542 Published online by Cambridge University Press

engine of imperial unification since the promulgation of the 1811 civil code. While the old self-government of the Habsburg lands was never entirely effaced but rather baked into the imperial constitutions after 1848, the civil code's validity for all realms with the exception of Hungary remained sacrosanct.[49] When the civil code received its finishing touches during the Napoleonic wars, its authors, the jurists around Franz von Zeiller, adjusted to Habsburg anti-Revolutionary intellectual realignment, cleansing their code of any public-law ingredients redolent of French models. They exalted eternal, ostensibly antipolitical private law over slipshod, fickle and spasmodic public law.[50]

While the empire's official moniker remained a "composite body of states" until the Revolution of 1848, the textbooks taught at the Habsburg universities were predicated on natural law, basing public authority in the social contract.[51] Not only was there a patent mismatch between contract theory and the chequered constitutional reality of the empire, but also natural law lost its prestige in the Revolution of 1848 for which it was held responsible by the educational reformer of the 1850s, minister Leo Thun-Hohenstein.[52] Thun-Hohenstein's campaign to eradicate natural law from Habsburg jurisprudence gave leverage to the antimetaphysical knowledge regime that suffused the empire's humanities from the 1850s. Like scientists and scholars from adjacent fields, jurists realized that it was they who created their object of enquiry as they studied it.[53] While Habsburg public-law education in the second half of the nineteenth century remained playfully promiscuous, the twenty years of post-1848 constitution giving which finally culminated in the Austro-Hungarian compromise and the so-called December Constitution of 1867

[49]See Waltraud Heindl, "Die Einführung des ABGB in Ungarn: Eine ideologische Auseinandersetzung in Österreich," *Levéltári közlemények* 66 (1995), 137–45; Helmut Slapnicka, "Österreichische Rechtsgeschichte als Geschichte multinationaler Lösungsversuche," in Ursula Floßmann, ed., *Rechtsgeschichte und Rechtsdogmatik: Festschrift Hermann Eichler* (Vienna, 1977), 527–47.

[50]Franz L. Fillafer, *Aufklärung habsburgisch: Staatsbildung, Wissenskultur und Geschichtspolitik in Zentraleuropa, 1750–1850* (Göttingen, 2020), 345–47; Mónica García-Salmones Rovira's superb study traces Austrian jurists' penchant for what she calls a de-teleologizing of private law and a concomitant teleologizing of public law: the former was portrayed as a neutral matrix for the pursuit of the "interests of the individual," whereas the latter appeared as a pliable tool in the hands of the norm addressees. See Mónica García-Salmones Rovira, *The Project of Positivism in International Law* (Oxford, 2013), 277.

[51]Waltraud Heindl, "Bildung und Recht: Naturrecht und Ausbildung der staatsbürgerlichen Gesellschaft in der Habsburgermonarchie," in Thomas Angerer, Birgitta Bader-Zaar and Margarete Grandner, eds., *Geschichte und Recht: Festschrift für Gerald Stourzh zum 70. Geburtstag* (Vienna, 1999), 183–206.

[52]Franz L. Fillafer, "Leo Thun und die Aufklärung: Wissenschaftsideal, Berufungspolitik und Deutungskämpfe," in Brigitte Mazohl and Christof Aichner, eds., *Die Thun-Hohenstein'schen Universitätsreformen: Konzeption—Umsetzung—Nachwirkungen* (Vienna, 2017), 55–75. The deep epistemic aftereffects of this reorientation deserve an exhaustive study. Compare e.g. Jiří Hoetzel's remarks about Jiří Pražák, his predecessor as professor of public law at the Prague Czech University founded in 1882, whom Hoetzel called a "Puritan positivist"; another former student of Pražák's, František Vavřínek, says that Pražák regarded belief in the existence of a "general state law" as a leftover of long-debunked natural jurisprudence, *Památník Spolku českých právníků Všehrd (1868–1918)* (Prague, 1918), 122 and 228.

[53]See Franz L. Fillafer and Johannes Feichtinger, "Habsburg Positivism: The Politics of Positive Knowledge in Imperial and Post-imperial Austria, 1804–1938," in Johannes Feichtinger, Franz L. Fillafer and Jan Surman, eds., *The Worlds of Positivism: A Global Intellectual History, 1770–1930* (New York, 2018), 192–238; Kelsen, "Reichsgesetz und Landesgesetz", 398.

did little to make jurists stop worrying and love the state.[54] The Austrian part of the empire had absorbed its lands without dissolving their status as sovereign entities, and the normative substance, territorial scope and grounds of validity of the imperial constitution remained bones of contention. Consequently there was no tendency to venerate public law as an emanation of the quasi-sacred, inscrutable state will.[55]

Habsburg jurisprudence produced several harbingers of law as a "purely constructive science" that dismantled the divide between public and private law.[56] Chief among them was Kelsen's friend František Weyr, who, in an essay of 1908 on the unity of the legal system, debunked the idolatry of the state as a heritage that divine law had bequeathed to natural law.[57] Born in Vienna to a Czech-speaking couple, Weyr studied under Kelsen's mentor, administrative lawyer Edmund Bernatzik,[58] before becoming the founding figure of the Brno school of legal theory in post-1918 Czechoslovakia, which took up many of Kelsen's tenets.[59] Weyr emphasized that "it is through the constructions of the jurist" that the associations of public law are "created" and they are "bound to perish with this creation."[60] Noting the feebleness of the distinction between private debtor–creditor relationships and public-law liabilities, Weyr reminded his readers that "there are no transcendental–immanent purposes [*Zwecke*], let alone interests."[61] In unison with Kelsen and Ehrlich, Weyr's study of the sequence of imputation that impelled liable subjects of the law to enforceable transactions whittled away the difference between state prerogatives and private-law claims. Weyr's strategy aimed at substantive civic enfranchisement. Prefiguring Kelsen's famous statement that "the state is us,"[62]

[54]Bohuš Rieger, *O Rakousko-uherském vyrovnání roku 1867 s přehledem vývoje do roku 1899: dle přednášky v České společnosti národohospodářské dne 29 října 1902* (Prague, 1903); Ľudovít Holotík, ed., *Der österreichisch-ungarische Ausgleich 1867* (Bratislava, 1971); Gerald Stourzh, "Die österreichische Dezemberverfassung von 1867," in Stourzh, *Wege der Grundrechtsdemokratie: Studien zur Begriffs- und Institutionengeschichte des liberalen Verfassungsstaates* (Vienna, 1989), 239–58. On public-law teaching see Helmut Slapnicka, "Die Lehre des öffentlichen Rechts an der Prager Karl-Ferdinands-Universität bis zu ihrer Teilung 1882," *Bohemia* 14 (1973), 222–42; Robert Walter, "Die Lehre des öffentlichen Rechts an der Grazer Karl-Franzens-Universität zu Graz von 1827–1938," *Juristische Blätter* 88 (1966), 546–53.

[55]Hugo Preuß, "Zur Methode juristischer Begriffskonstruktion," *Schmollers Jahrbuch* 24 (1900), 359–72, at 359. Preuß discusses Austria's "inextricable and unedifying [*unentwirrbare und unerqickliche*] problems," from which its scholars presumably fled into the "rarefied, ethereal realm of the idea."

[56]František Weyr, "Zum Problem eines einheitlichen Rechtssystems," *Archiv für öffentliches Recht* 23 (1908), 529–80, 544.

[57]Ibid., 534. "We have grown used to ascribing to the sober, written laws the same effects once ascribed to heaven knows what unwritten natural or divine comandments." Ibid. 535.

[58]See Gernot D. Hasiba, "Edmund Bernatzik (1854–1919): Begründer der Theorie des österreichischen Verwaltungsrechts," in Helfried Valentinitsch and Markus Steppan, eds., *Festschrift für Gernot Kocher zum 60. Geburtstag* (Graz, 2002), 93–109; Edmund Bernatzik, "Die Rechtssprechung in Verwaltungssachen," in Bernatzik, *Rechtssprechung und materielle Rechtskraft: Verwaltungsrechtliche Studien* (Vienna, 1886), 2: "Be it noted for the sake of clarity that the individual legal norms never belong to one sphere or the other; the legal norm in itself is neither of private- nor of public-legal nature."

[59]Tanja Domej, "František Weyr und Hans Kelsen: Eine biographische Skizze," in Robert Walter, Clemens Jablober and Klaus Zeleny, eds., *Hans Kelsens stete Aktualität* (Vienna, 2003), 45–56, 47; Ota Weinberger and Vladimír Kubeš, eds., *Brněnská škola právní teorie (normativní teorie)* (Prague, 2003); Miloš Večeřa, "František Weyr a brněnská normativní škola," *Právník* 158 (2019), 107–18.

[60]Weyr, "Zum Problem eines einheitlichen Rechtssystems," 552–3.

[61]Ibid., 558.

[62]Hans Kelsen, *Staatsform und Weltanschauung* (Tübingen, 1933), 23.

https://doi.org/10.1017/S1479244320000542 Published online by Cambridge University Press

Weyr stressed that citizens were no longer "passive objects of the arts of statecraft practiced by others." The polity had long ceased being ruled by a monarch or a president but was instead governed by "every juristic person entitled to demand or prohibit any action of another juristic person on the basis of a legal rule."[63] Weyr invoked Habsburg administrative justice established in 1876 to drive home his key point: "In the sphere of law there are only fellow norm addressees [*Rechtsgenossen*] with equal rights, and no relationships of force or of any other extralegal nature obtain in this realm."[64]

While, according to Ehrlich, the state fizzled out on the local level, deducing it from the congeries of social arrangements, pre- and preterlegal arrangements and parochial authorities, Kelsen targeted the very category of public law itself. It was, Kelsen claimed, a capacious residual category invented by nineteenth-century constitutional monarchy and used by its jurists to vest arbitrary acts of power in the garb of lawfulness.[65] "Public law" was designed to curb parliamentary control and the judicial review of monarchical statecraft.[66]

Imperial precedents: from the deterritorializing of sovereignty to the world legal order

A last conspicuous aspect that deserves to be highlighted is the deterritorializing of sovereignty. Here again Ehrlich's and Kelsen's initiatives tallied with earlier advances of Habsburg jurists who knew the empire's tessellated structure inside out. Once viewed afresh, both projects reveal that the deterritorializing of sovereignty hinged on Central Europe's constitutional reality: mirroring the empire's internal structure, it also triggered a conceptual refashioning of the global legal order.

Above I have quoted Eugen Ehrlich's remark that in the Habsburg Empire the older "principle of personality" persisted under the superimposed pattern of territoriality.[67] Legal personhood, be it of the empire's Austrian and Hungarian

[63]Weyr, "Zum Problem eines einheitlichen Rechtssystems," 563 n. 16. In the same vein Kelsen argued that "the state is us." See Hans Kelsen, *Staatsform und Weltanschauung* (Tübingen, 1933), 23.

[64]Weyr, "Zum Problem eines einheitlichen Rechtssystems," 577.

[65]See Hans Kelsen, "God and the State" (1922), in Kelsen, *Essays in Legal and Moral Philosophy*, sel. and intr. by Ota Weinberger (Dordrecht, 1973), 61–82, at 76–7; Kelsen, "Rechtsstaat und Staatsrecht" (1913), in *HKW* 3: 148–55; Kelsen, *Hauptprobleme*, 57, 872, where Kelsen anticipates the criticism that he overstretched a specific private-law-inflected logic to encompass public law: "This accusation can be confidently accepted, as long as one gains approval for the necessity of unitary juristic basic concepts for the entire territory of the law."

[66]See also Adolf Merkl, "Die monarchische Befangenheit der deutschen Staatsrechtslehre," *Schweizerische Juristenzeitung* 16 (1919–20), 378–83.

[67]See above. It is beyond the remit of this essay to investigate the richly layered discussion about the principles of personality and territoriality in the late Habsburg Empire. The concept Ehrlich used was a buzzword of this debate, the Austromarxist principle of personal autonomy formulated by Karl Renner and enshrined during the Social Democrats' party convention at Brno/Brünn in 1899—the attempt to calm the roiled waters by granting the nations cultural autonomy, while eviscerating the historical crownlands of the Empire and dissolving their frontiers. See Hans Mommsen, *Die Sozialdemokratie und die Nationalitätenfrage im habsburgischen Vielvölkerstaat: Das Ringen um die supranationale Integration der zisleithanischen Arbeiterbewegung (1867–1907)* (Vienna, 1963), 336–7.

components, of the historical lands each of them contained, or of the region's self-enhancing "nations," was a prickly issue in the Habsburg state assemblage.[68] Since 1867 the old contenders for legal personhood, the empire's multilingual historical crownlands, were slowly turning into vessels for the self-assertion of national groups. Squeezing every citizen into the Procrustean grid of the nation, the system of pacification through segregation split the inhabitants of every crownland into parallel monolingual groups with separate national electoral curias for the local diet, with language-segregated schools and associations.[69] Nations seemed to enjoy skyrocketing success as new legal entities nested in the empire's old lands, but both Ehrlich and Kelsen were skeptical of their corporate personality.

While Ehrlich studied human associations—families, churches, mercantile networks—that cut across political boundaries, Kelsen spoke of the flimsy commonalities among the citizens of a given state: "If we ask ourselves why an individual belongs to a certain state together with other individuals," the only criterion was "that he and the others are subjects to a certain, relatively centralized, coercive order." It was evident, Kelsen added, that "individuals belonging to different states may be connected spiritually much closer than those who belong to the same state."[70]

Habsburg jurists poked fun at their earthbound colleagues whose territorialist view of sovereignty they found shaky: "No state can exist without a territorial realm," František Weyr remarked half-jokingly in 1908, "but to this statement another one should be added: no state can exist without air, either. The last remark may well give rise to a promising new theory about the essence of statehood."[71] Kelsen's doctoral supervisor, Leo Strisower, and Ernst Radnitzky, a public servant at the Austro-Hungarian Ministry of Finance, divested sovereignty of its territorial pivot.[72] In an article from 1906, Radnitzky projected intra-imperial modes of governance onto the planetary order. Radnitzky drew on Habsburg administrators' proficiency in bridging the individual crownlands' different legal regimes, and clarified its significance for global law as he depleted the distinction between "citizens" and "aliens."[73] By making his approach crystallize around "residency," Radnitzky

[68]Natasha Wheatley, "Making Nations into Legal Persons between Imperial and International Law: Scenes from a Central European History of Group Rights," *Duke Journal of Comparative & International Law* 28 (2018), 481–94. Edmund Bernatzik tartly noted that the state's multiple "subordinate organs" were described as persons, while the state was ostensibly a person too: "By comparison the attempt to understand the dogma of Trinity would be a trifle." Edmund Bernatzik, "Kritische Studien über den Begriff der juristischen Person," *Archiv des öffentlichen Rechts* 5 (1890), 169–318, 210.

[69]Jeremy King, "Group Rights in Liberal Austria: The Dilemma of Equality in Proportional Representation," in Lukáš Fasora, Jiří Hanuš and Jiří Malíř, eds., *Moravské vyrovnání z roku 1905: Možnosti a limity národnostního smíru ve střední Evropě* (Brno, 2006), 27–42.

[70]Hans Kelsen, *Pure Theory of Law*, 2nd edn (Berkeley, 1967; first published 1960), 287–8.

[71]Weyr, "Zum Problem eines einheitlichen Rechtssystems," 551 n. 8.

[72]Rovira, *Positivism*, 189–97. On Strisower see Ihor Zeman, "Die völkerrechtliche Tätigkeit von Leo Strisower und sein Einfluß auf Hans Kelsen, Alfred Verdroß und Hersch Lauterpacht," *Zeitschrift für öffentliches Recht* 73 (2018), 373–96.

[73]Ernst Radnitzky, "Die rechtliche Natur des Staatsgebietes," *Archiv für öffentliches Recht* 20 (1906), 313–55. See also Felix Stoerk, *Option und Plebiszit bei Eroberungen und Gebietscessionen* (Leipzig, 1879), 67. Since the eighteenth century, Habsburg jurists had concocted a wealth of intra-imperial stopgap solutions to bridge the different property regimes between the Austro-Bohemian lands and Hungary, thereby

elided the essential difference between domestic and international law.[74] Radnitzky positioned the Habsburg state as the germ of the international legal system he predicted, as it simultaneously encapsulated the present and (desirable) future of that global order: a malleable agglutination of crownlands with a liberal, pliable citizenship law, the empire was also a constitutional state that should be "governed exclusively in the interest of its members."[75] Radnitzky's scheme eased the peaceful turnover of people and territories: "residents" could be enfranchised, and the cession and acquisition of spatial dominion was equivalent to the redistribution of territorial competences within a composite empire.[76] The state was no omnipotent juggernaut; it was the template of a global legal order modeled after its Habsburg archetype.

Through the travails of Radnitzky and jurists of his ilk, a process of sustained conceptual engineering unmoored the state from its territorial hinges; likewise, the obvious absence of a unified "state will" in the Habsburg setting made theories about the self-obligation of the state as foundational moment of international law seem insufficient.[77] Rather, it would seem that the international order was a replica

smoothing the collateralizing and borrowing and the redemption of bills of exchange between the halves of the monarchy. See Sándor Gyömrei, "A kereskedelmi tőke kialakulása és szerepe Pest-Budán 1849-ig," *Tanulmányok Budapest múltjából* 12 (1957), 197–278, at 224–5; György Kerekes, *A kassai kereskedők életéből harmadfélszázad 1687–1913* (Budapest, 1913), 198; Hans Kelsen, "Der Buchforderungseskont und die inakzeptable deckungsberechtigte Tratte" (1913), in *HKW* 3: 94–103.

[74]Radnitzky, "Die rechtliche Natur des Staatsgebietes," 348–9.

[75]Ibid., 349.

[76]On enfranchisement compare Kelsen's sheaf of writings devoted to the essence and value of democracy in the 1920s, where he gave a novel twist to Radnitzky's scheme: Kelsen switched from guarantees of non-discrimination to the extension of rights bearing, arguing that in radical democracies the blurring of the distinction between citizen and resident may lead to the enfranchisement of the respective polity's alien inhabitants. Kelsen, *Vom Wesen und Wert*, 17–18; Hans Kelsen, *General Theory of Law and the State* (Cambridge, MA, 1949), 241. The current European Union still deplorably falls short of this promise, failing to enfranchise its citizens at their respective place of residency. See Fillafer, "Das Imperium als Rechtsstaat." On spatial dominion see Radnitzky, "Die rechtliche Natur des Staatsgebietes," 353: "The procedure within the state that corresponds to the foundation and dissolution of states is the erection and abolition of agencies and authorities [*Ämter und Behörden*] with local competence. Nowhere is this fact more tangible than in a polyglot state … where the striving for national autonomy creates a corresponding design of the institutional system. If Bohemia and Tyrol should ever be split up into German and Czech or, respectively, Italian administrative areas, these processes that unfold within a state would stand in perfect analogy to the secession of Belgium from the Netherlands." Cf. Wilhelm Brauneder, "Die Habsburgermonarchie als zusammengesetzter Staat," in Hans-Jürgen Becker, ed., *Zusammengesetzte Staatlichkeit in der europäischen Verfassungsseschichte* (Berlin, 1996), 197–223.

[77]The classic statement of the theory of self-obligation is Georg Jellinek, *Die Lehre von den Staatenverbindungen* (Vienna, 1882), 34. Its most prominent critics include Hans Kelsen and his students. Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts*, 2nd edn (Aalen, 1960; first published 1928), 182–7. Hersch Lauterpacht, *The Function of Law in the International Community* (New York, 1973; first published 1933), 409–12; Alfred Verdroß, *Die Verfassung der Völkerrechtsgemeinschaft* (Vienna, 1926), 12–20. In 1914, Kelsen noted that it was a fundamentally flawed assumption to believe that the laws of the empire and the laws of its lands were norms of the same state simply because they were sanctioned by the same monarch and countersigned by the same ministers. Instead, jurists would first need to demonstrate that these signatories really acted as organs of one state rather than as common organs of several states when doing so. Kelsen, "Reichsgesetz und Landesgesetz", 399. The post-1867 hurly-burly of claims about constitutional agents' relevant volitional substrates will satisfy any connoisseur of the monophysitic theologies of antiquity. see e.g. Friedrich

of the empire's palimpsest-like sovereignty: conflicts of competence in international law should no longer be perceived in analogy to disputes between individuals—as the hackneyed anthropomorphism of international lawyers suggested—but as disagreements among organs of the same state that could be solved through judicial decisions.[78]

Kelsen's pure theory emerged from the murky smithies of Habsburg imperial governance: this applies to his claim that the state is identical with the law as much as to the theory of imputation that posited a presumptive "basic norm" at the roots of the legal order.[79] When Kelsen designed the constitutional court of the post-1918 federal republic of Austria, assigning it the key tasks of norm control and norm revision, Kelsen again created an analogy between the confederacy of Austria and the global community of states, showing the indispensability of norm-reviewing courts for peaceful life in either.[80] Habsburg jurists had learnt to analyze their imperial salmagundi of legal materials as emanations of a unified normative system. Casting antagonisms that arose within this system as conflicts of competence between offices of the same administration, jurists from Habsburg Central Europe entrusted supranational judiciaries with the arbitrational capacity to decide in these conflict situations. This is why the empire proved fertile soil for concepts of the global legal order that stressed its cognitional unity and superiority over municipal law.[81] Seen in this light, Kelsen's interwar theory of international law should be read as a global solution for vexatious local problems: new composite states arose from the embers of vilified Austria–Hungary after 1918, reproducing the defunct empire's diversity while territorial disputes were left smouldering and citizens

Tezner, *Der österreichische Kaisertitel, das ungarische Staatsrecht und die ungarische Publicistik* (Vienna, 1899); Ferenc Deák, *Adalék a magyar közjoghoz (Észrevételek Lustkandl Venczel munkájára* Das ungarisch-österreichische Staatsrecht *a magyar közjog történelmének szempontjából)* (Pest, 1865). The monarch's will in budgetary controversies between the two constituent parts of the Austro-Hungarian Empire unleashed a long debate over the unification of two constitutional volitional tendencies in the physical person of the monarch.

[78]Radnitzky, "Die rechtliche Natur des Staatsgebietes," 355; Rovira, *Positivism*, 196.

[79]For Kelsen's claim that the state was identical with its legal order see above. The rich historical background of Kelsen's elaboration of the "basic norm" can be best discerned in Kelsen, "Reichsgesetz und Landesgesetz", 385–6, 410–11: the preference jurists gave to the December Constitution of 1867 was an essentially arbitrary choice of an endpoint of imputation; this strategy aimed at thwarting the constitutional powers of the crownlands' diets enshrined in the prior constitution, the February patent of 1861.

[80]While the latter was designed to make war between peoples superfluous, the former ensured domestic political peace. See Kelsen's remarks Hans Kelsen, *Wesen und Entwicklung der Staatsgerichtsbarkeit: Überprüfung von Verwaltungsakten durch die ordentlichen Gerichte* (Berlin, 1929), 81–4. Jellinek's call for a constitutional court was motivated precisely by the crestfallen realization that there were no reliable rules about what laws were subject to the qualified constitutional majority (§15 StGG of the imperial constitution of 1867) in parliament; with this initiative Jellinek also responded to the turf battles between national pressure groups who used the constitution as a blind pawn and accused each other of its violation. See the fine chapter by Alfred J. Noll, "Georg Jellinek's Forderung nach einem Verfassungsgerichtshof für Österreich," in Paulson and Schulte, *Georg Jellinek*, 261–76.

[81]Kelsen, *Das Problem der Souveränität*, 152; Hans Kelsen, "Les rapports de système entre le droit interne et le droit international public," *Recueil des cours de l'Académie de droit international* 14 (1926), 227–331. Kelsen himself claimed that the primacy of international law over state law was an unintended by-product of the methodological rigor of his pure theory. Kelsen, *Reine Rechtslehre* (Vienna, 1934), 129–32, 134–6; Peter Langford and Ian Bryan, "Hans Kelsen's Concept of Normative Imputation," *Ratio Iuris* 26 (2013), 85–110.

remained disenfranchised, displaced or stateless.[82] When Kelsen highlighted the supremacy of international over municipal law, he turned the former into a filter of validity for the latter. Its judicial organs could repeal discriminatory norms in municipal law that contradicted its overarching principles.

Conclusion

A strange lopsidedness marks the history of legal science: while its students have extensively dealt with Western European public law, as well as with the ever-intoxicating Carl Schmitt and the tussles of German interwar state lawyers, the reconceptualization of statehood that issued from the Habsburg intellectual milieu of the *fin de siècle* has remained a Cinderella subject.[83] Indeed, Joseph Redlich, the shrewd constitutional and administrative expert, opened his brilliant 1920 history of Austria's problematic statehood by deploring the baleful impact of German public law on Habsburg jurisprudence. Adopting "rigid" German "theories of empire and statehood" to measure domestic political developments, Austrian jurists failed to "do justice to the historically given, special nature" of the Habsburg polity, as well as to its basic predicaments.[84] By assuming an unchecked seepage of German state law into imperial Austria, Redlich overlooked that it was precisely Habsburg jurists like Kelsen and Ehrlich who turned its key assumptions to shambles. True, what Redlich yearned for, an "organic remedy" for what he dubbed the "Habsburg imperial problem," failed to materialize, but Austria–Hungary's meltdown in 1918 reinforced the global circulation of its conceptual resources. Sticking with Redlich's terminology one might say that both the problem and the proposed solutions survived the demise of the Habsburg polity, and they did so in the guises of the global legal order as well as of the small-scale replicas of multinational empires that emerged from the bankruptcy assets of Austria–Hungary. As Holly Case and Natasha Wheatley have noted, the empire's sovereignty problems were turned "inside out" with its demise.[85]

[82]Paul Miller and Claire Morelon, eds., *Embers of Empire: Continuity and Rupture in the Habsburg Successor States* (New York, 2019); Olechowski, *Kelsen*, 630, for a brief discussion of Kelsen's proposals to federalize Czechoslovakia made in 1936 and 1938, as professor at Prague.

[83]Kelsen's critics from Weimar and postwar German jurisprudence polemically conflated his allegedly philstine, vapid "formalism" with the Labandian positivism Kelsen excoriated. See Carl Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität* (Berlin, 1934), 54; Oliver Lepsius, "Hans Kelsen und die Pfadabhängigkeit in der deutschen Staatsrechtslehre," in Matthias Jestaedt, ed., *Hans Kelsen und due deutsche Staatsrechtslehre* (Tübingen, 2013), 241–66, and Christoph Schönberger's comment in ibid., at 62. For Schmitt's misidentification of Kelsenian "positivism" with the project Kelsen sought to scupper, namely the nomothetic naturalism of nineteenth-century jurisprudence, see Mehring, "Staatsrechtslehre," 200.

[84]Joseph Redlich, *Das österreichische Staats- und Reichsproblem: Geschichtliche Darstellung der inneren Politik der habsburgischen Monarchie von 1848 bis zum Untergang des Reiches*, vol. 1, *Der dynastische Reichsgedanke und die Entfaltung des Problems bis zur Verkündigung der Reichsverfassung von 1861* (Leipzig, 1920), xiii–xiv. Redlich's indispensable diaries are a superb guide to intellectuals' active grappling with the "problem" unraveled by his classic book. See Redlich, *Schicksalsjahre Österreichs: Die Erinnerungen und Tagebücher Joseph Redlichs*, ed. Fritz Fellner and Doris Corradini, 3 vols. (Vienna, 2011).

[85]Holly Case, "The Quiet Revolution: Consuls and the International System in the Nineteenth Century," in Timothy Snyder and Katherine Younger, eds., *The Balkans as Europe, 1821–1914* (Rochester, 2018),

My article has reframed Eugen Ehrlich's legal sociology and Hans Kelsen's pure theory of law as products of their Habsburg polity. Both sought to conceptually encompass the legal order of a multireligious and multilingual state, and they grappled with the epistemic and political purchase of universals in a heterogeneous society. Previous research has tended to focus on the allegedly insurmountable rift that separated Kelsen from Ehrlich. Indeed, while Hans Kelsen based his framework of legal universals on the generality of formal features and sequences of imputation, Ehrlich reparticularized universality: despite the inbuilt obfuscation of its conditions of emergence, all statutory law was inevitably the product of a specific cultural configuration and of relationships of social domination.

This article has sought to show not only that Ehrlich and Kelsen developed their respective theories within the same Habsburg framework, but also that their shared experience of imperial diversity supplied them with a set of common premises and proclivities. Taking up the cudgels against German public-law positivism, both Ehrlich and Kelsen demystified the state, dismantling assumptions about its supreme rational and moral agency, as well as about its desirable homogeneity based on culture, race or religion. Ehrlich dissolved the state into a plethora of self-regulating associations whose interactions he studied, while Kelsen reduced it to a legal order that created its norm addressees. Both refused to see the nation-state as the apogee of world history; instead they deprived it of its pivot and purveyor of coherence, the nation. Kelsen was an incisive critic of nationalist strategies of self-enhancement and antidemocratic power bargaining, while Ehrlich resolutely deprioritized the nation: he showed it to be less life-suffusing and all-permeating than the families, churches and mercantile networks studied by himself and his Bukovinian grassroots research team.

Ehrlich's and Kelsen's demolition of the state's supremacy had two important corollaries: it culminated in the unmaking of the divides between private and public law as well as between municipal and international law. According to Kelsen and Ehrlich, public law was no sacrosanct order foisted on the state's citizens to preserve the eternal purpose of the polity. On the contrary, it should serve the citizens who were subjects to nobody else but their own elected organs. For Ehrlich the state was a mere larger-scale private authority, cut from the same cloth as the patrimonial and clerical dominions that still existed within it. Ehrlich's unmaking of the state from below dovetailed with its global de-limiting proposed by Kelsen. Kelsen treated the state as an intermediary point of imputation in a sequence that led up to the world legal order whose superiority over municipal law he ardently defended.

By the same token, Kelsen and Ehrlich managed to deterritorialize lawgiving. They documented the myriad sources of nested public authority in the Habsburg composite state: older laws, treaties and conventions remained in force for lands by now absorbed into the empire, making the distinction between domestic and foreign law a moot one. The interregional economic, social and religious associations studied by Ehrlich preexisted political boundaries, which he showed to be extremely artificial and brittle.

110–38; Natasha Wheatley, "Central Europe as Ground Zero of the New International Order," *Slavic Review* 78 (2019), 900–11.

Ehrlich's and Kelsen's theories were results of and responses to specific Habsburg predicaments. Ehrlich's and Kelsen's distinct but connected strategies entailed a deterritorializing of lawgiving and, by consequence, of sovereignty. Once sovereignty was divested of its previous linchpin, the state territory, it was transformed from a foundational moment of international law into a subordinate competence bestowed upon the state by the world legal order. Thereby, as had been the case in the history of Habsburg empire building, the distinction between citizens and foreign nationals was effectively blurred; instead all residents should enjoy the same rights as native subjects. In Kelsen's case, this led to a program of radical enfranchisement when he envisaged democracies' extension of suffrage to all their permanent residents.

Ehrlich midwifed global legal pluralism: curtailing the significance of state-enacted norms for human transactions, he saw social life as the crucible of "living law" that was produced by self-governing "associations." Developed to grasp the crazy-quilt sociocultural composition of the easternmost crownland of the Habsburg Empire, this Bukovinian legal sociology was amenable to globalization because Ehrlich jettisoned territorialism and methodological nationalism: Ehrlich's associations straddled political frontiers and cut across national divides. Every person belonged to a multitude of associations defined by her workplace, religious creed, family ties and further social relationships. By showing that both the Bukovinian peasant and the Viennese stockbroker used local sets of non-codified and socially authorized, but by no means haphazard, customs for their legal transactions, Ehrlich forcefully challenged spatial and civilizational hierarchies.

Habsburg Central Europe spawned a distinct brand of domestic plurinational law whose architects deftly mapped it onto the globe. The empire provided the archetype for the Kelsenian vision of world law: a conglomerate structure with different bodies of norms that were molded into an integrated normative system by a common supreme judiciary. Here again Kelsen refracted the model of intra-imperial unification through law. Very much as in the Habsburg setup, it was through the constructive effort of jurists that all humans would be treated as citizens of one state in the sense that they were subjected to the same global legal system. Kelsen believed that world law could ideally resolve the abiding post-1918 dilemmas of plurinational statehood that its imperial predecessor had left to the novel micro-empires that emerged from Austria–Hungary's breakup. His world law should serve as a safeguard of democracy, human rights and equality before the law; it would invalidate the discriminatory clauses of national legislation that defied these firmly ensconced principles.

By way of concluding, then, I would like to suggest that Ehrlich's legal sociology and Kelsen's pure theory of law were answers to the same problem, namely the validity of legal universals under the conditions of Habsburg imperial diversity and fractured public authority. This shared substratum enabled Kelsen and Ehrlich to develop conceptions of legal life and rights bearing that acquired fame and lasting significance in the respective guises of legal pluralism and the world legal order. Kelsen's and Ehrlich's programs were rival, yet co-original and congenial, responses to the challenges of their Central European polity. The salient features their theories have in common, namely the unmaking of statehood and territorial sovereignty in their traditional senses, explain Ehrlich's and Kelsen's planetary resonance. The

empire's constitutional heritage bifurcated into Kelsen's and Ehrlich's works. Austria–Hungary's legal legacy survived the shipwreck of the empire in 1918, precisely because these two jurists had carved it into templates for legal relationships on a global scale.

Cite this article: Fillafer FL (2022). Imperial Diversity, Fractured Sovereignty, and Legal Universals: Hans Kelsen and Eugen Ehrlich in their Habsburg Context. *Modern Intellectual History* **19**, 421–443. https://doi.org/10.1017/S1479244320000542