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Hermann Kantorowicz and Hans Kelsen: from debating legal sociology to constructing an international legal order

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ABSTRACT
In this article the development of the thought of two important twentieth-century legal theorists is compared. Although Hans Kelsen is primarily known for his Pure theory of law and Hermann Kantorowicz is one of the founders of the Free law movement, the article will revolve around their respective proposals for the post-War restoration of the international legal order. It is argued that these are based on their respective conceptions of 'law' and 'the state'. By virtue of this comparison, it is possible to shed light on the basic thinking behind their complex ideas, as well as show how these were formulated and influenced by the political circumstances of their times. Lastly, the article shall concern the concrete post-War influence of Kantorowicz and Kelsen, as a result of the shared and different philosophical, methodological and scientific convictions of both scholars.

KEYWORDS
Hans Kelsen; Hermann Kantorowicz; law; international law; refugee scholarship

1. Introduction: parallel lives, parallel thought

The primary purpose of this article is to better understand the thought and its influence of two of the twentieth century’s foremost legal scholars: Hermann Kantorowicz (1877-1940) and Hans Kelsen (1881-1973). Going beyond the biographical, the scholarship of Hans Kelsen has in recent times been compared and contrasted to a number of other great legal minds, naming for example Carl Schmitt,1 Hans Morgenthau,2 and Leo Strauss.3 From the general biographical work as well as these individual comparisons, the image is formed of Kelsen’s initial centrality in various Austrian and German legal and philosophical debates in the advent of the twentieth century, with an increasingly marginalized role of his thought after his forced displacement to the US, and a neglect of – even a vehement opposition to – his scholarship in Germany after the War. A nuanced version of this narrative can be found in the recently completed biography of Kelsen by Thomas Olechowski.4 A similar academic trajectory can be inferred with respect to Hermann Kantorowicz, although he is nowadays the lesser known of the two scholars, which may have something to do with his early death in 1940. Likewise, comparisons between Kantorowicz and other scholars have been made, primarily Walter Ullman by David Ibbetson in his ‘double biography’,5 but also to his (otherwise unrelated!) namesake and fellow Mediaevalist Ernst Kantorowicz, who like Hermann ended up in England in the 1930s,6 and more recently to the legal philosophers Gustav Radbruch, Emil Lask, Herbert Hart and Karl Llewellyn.7 The value of these comparisons is that by virtue of the juxtapositions based on differences and similarities in the lives and thought of these scholars we may comprehend better how and why they may have come to certain concepts and
ideas. As regards this contribution, this is also the aim of the comparison between Kelsen and Kantorowicz, both of whom advanced a wealth of complex ideas in their lifetime. Several parallels in their life and works bind the two scholars together. These parallels form the core structure of this contribution. Although Kelsen and Kantorowicz are primarily known for major advancements in twentieth-century legal theory, the Pure theory of law and the Free law movement respectively, the focus of this contribution is not these advancements, but their works on international law emanating from their conceptions of ‘law’ and ‘the state’. Despite their primary background as legal philosophers, recently the contributions of Kantorowicz and Kelsen to the discipline of international law have merited some attention. In either scholar, the conceptions of ‘law’ and ‘the state’ are intricate and complex to say the least, however these are also the two conceptions in which Kantorowicz and Kelsen seemed to have been involved in a longer direct and indirect debate. The context of this debate varies, but the basic scholarly starting-points and contentions remain remarkably similar. Four periods can be distinguished: (1) the sociological debate (1911–1920), (2) the turn towards constitutional and international law (1920–1933), (3) exile and reflections on the political situation in Germany and Austria (1933–1945), and (4) their influence in the post-War period in the United States and Europe. The contribution will demonstrate that the conceptions of ‘law’ and ‘the state’ of Kantorowicz and Kelsen in these four periods lead to specific ideas about the shaping of an international legal order, pre-empting the aftermath to the Second World War. As such, of these four periods, the last one is of interest the most: the lacking influence of Kelsen in the United States and on the European continent is the object of current research, whereas in general a post-War return of refugee scholarship to its original context beyond the treatment of individual scholars has not received the attention it merits, at least in the context of the humanities. Kantorowicz is one of the scholars who perished in exile, and thus would never physically return to Germany. Yet, his scholarship lived on, in the works of his English and American colleagues, among fellow refugees, and after the War on the European continent. However, precisely because of an early acquaintance with Anglo-American law and thought, Kantorowicz develops a specific set of ideas that may have proven crucial after the War in a number of contexts. The main purpose of this contribution therefore is not so much to determine whether Kelsen influenced Kantorowicz (which is clear) or whether Kantorowicz influenced Kelsen (which is less clear, but has recently been argued by Paulson), but rather if by focusing on their respective plans for a post-War international legal order a more general shared academic trajectory can be discerned, one that may be exemplary for an even wider tendency among refugee scholars: concretely, this trajectory may have manifested itself in Kelsen’s later wartime and early post-War works, by means of which Kantorowicz’s ideas gained a new-found currency, specifically in the field of international law, i.e. far removed from the context in which they were originally developed.

2. Hermann Kantorowicz, Hans Kelsen and the initial debate on sociology (1911–1920)

Hermann Kantorowicz and Hans Kelsen both hail from traditional German-speaking academic backgrounds. Kantorowicz was born in Posen, in what is now Poland, but what was then a part of Germany, in 1877. In his youth, he and his family moved to Berlin, where he came to pursue a legal study from 1896 onwards. After his graduation at Berlin, he started what was to become a twenty-year-long project on the late-Mediaeval lawyer Albertus Gandinus and his place in scholastic criminal law. On the topic, Kantorowicz would receive his Habilitation at the University of Freiburg-im-Breisgau in 1907, with a second volume published almost twenty years later, in 1926, on Gandinus’s Tractatus de maleficis. His work on Gandinus, however, is not the publication he is generally known for: one year prior to his Habilitation, Kantorowicz composed one of the central programmatic documents in the Freirechtsbewegung or Free law movement, the Kampf um die Rechtswissenschaft or ‘Battle for legal science,’ under the pseudonym Gnaeus Flavius. As the impact of the Kampf was by all accounts enormous, much has been written on the background of the work
and its central place in the emerging Free law movement and beyond. For now, it suffices to state there seems to be clear relation between Kantorowicz’s contemporary legal-historical work, i.e. on Gandinus, the volumes of which were titled *Die Praxis* and *Die Theorie* respectively, and the content of the *Kampf*, seeing in both the complex relation between legal practice and legal theory, or rather, between legal practice and legal science is crucial. Even though the *Kampf um die Rechtswissenschaft* made Kantorowicz’s name as a legal theorist, coupled with his extensive political activism, its polemical character may have also contributed to stalling his academic career. Only in 1929 at the age of 51 did Kantorowicz obtain a full professorship in criminal law at the University of Kiel, having been made a titular professor from 1913, and an auxiliary one from 1923, at the University of Freiburg. The chair at Kiel was even vetoed in 1927, again most likely for political reasons, although Muscheler in his biography suggests his Jewish family background likely had something to do with this. Between 1907 and 1920, Kantorowicz mainly worked on legal-historical publications, such as his text-edition of a sixteenth-century work concerning the ancient Roman jurists, *De claris iuris consultis* of Thomas Diplovatatius, together with the Roman law scholar Fritz Schulz. However, after 1920 Kantorowicz’s work basically starts moving into two different but seemingly related directions: writings on contemporary political and international questions, and an emerging interest in Anglo-American law and legal theory. In 1924 and 1926, the latter interest took him to England, even travelling to Columbia University in New York in 1927 where he would meet with one of the figureheads of Legal realism, Karl Llewellyn. His visits to England continued until 1931, taking up the deanship of the law faculty at Kiel in the same year. On 7 April 1933, the *Gesetz zur Wiederherstellung des Berufsbeamtentums* was enacted, on the basis of which civil servants who either had shown politically undesirable viewpoints with respect to the ideology of the Nazi party, or who were of non-Aryan descent, were targeted. At the time, Kantorowicz was spending a semester in the libraries in Florence, travelling to England when the news broke, where he was followed by his family in the course of 1933. However, upon coming to England, Kantorowicz accepted an offer to help build the University in Exile (or: graduate faculty of political and social science) at the New School in New York for a year. Back in England in 1934, Kantorowicz actually enjoyed a relatively successful academic career despite his advanced age: in 1935 he was in the running for the Cambridge professorship of comparative law, in the same year he became a lecturer at All Souls College Oxford, in 1937 the assistant director of research at Cambridge and a graduate member of Gonville & Caius College in 1939. He kept his connections with the US, speaking at Columbia in 1934 and Harvard at Roscoe Pound’s seminar, often linking the German and American traditions of legal theory and legal history in his lectures and publications. His last great project was to be a posthumously published one, editing a large-scale series for OUP on the history of legal science together with the Oxford Regius Professor of Civil Law Francis de Zulueta. The series as a whole would never materialize. Kantorowicz died in 1940 in Cambridge. Since he is the more well-known of the two scholars, a much briefer introduction may suffice for Kelsen: he was born in 1881 in Prague, becoming a professor of constitutional law at the University of Vienna in 1919. Having composed the Austrian constitution, he became a judge at the Austrian Constitutional Court in 1921. In 1930 he then moved to the University of Cologne in Germany, in 1933 to Geneva, and in 1940 to the United States, briefly to Harvard and then to California. His writings are numbered at 604, on a large variety of topics, but he is perhaps best known for developing his Pure theory of law, first in 1934, but greatly elaborated in 1960. He died in 1973. The first instance of a debate between Kantorowicz and Kelsen is one on legal sociology. Four years after the *Kampf um die Rechtswissenschaft*, Kantorowicz had spoken at the first German Soziologentag held in October 1910, a lecture published in 1911. The *Tag* was the initiative of a group of influential German sociologists, and Kantorowicz had been invited to lecture on the relation between law and sociology. Olechowski suggests it is this lecture in particular that contributes to Kelsen’s strong separation of *Sein* and *Sollen* in his later publications. The lecture and a 1912 response by Kelsen are included in a volume edited by Stanley Paulson concerning a wider discussion surrounding the relation between sociology as an emerging academic discipline and law. The discussion also
involved Eugen Ehrlich, at the roots of the Free law movement together with Kantorowicz. In his 1910 lecture, Kantorowicz aims to connect the basic tenets of the Free law movement as set out in the Kampf particularly with respect with the role of the judge to the formation of legal sociology as a discipline: crudely put, the judge should take heed of societal interests and developments in interpreting and applying the law. Determining and researching these interests and developments are to be the subject of empirical sociological research, allowing for a judge to make a well-informed decision either when the law is unclear or when there is no definite legal rule. Kelsen shows a principled opposition to this argument. First, he takes up the defense of the ‘old’ doctrine Kantorowicz is arguing against, in his previous article on legal sociology as well as the Kampf: even the most hard-core Pandektist would not dispute that the wording of a law (Gesetz) should be interpreted according to the societal purpose of that law by a judge. The ‘Pandektists’ were the extremely dogmatic Roman law scholars such as Bernard Windscheid who would be responsible for drafting the German Civil Code. However, Kelsen continues, the problem emerges when the Free law movement severs the logical bond between legal order and judicial decision, because it may lead to arbitrariness beyond the scope of the law. Kelsen then reduces the thesis of Kantorowicz to a greater legal-political choice between a judge either being bound by the law or enjoying a measure of freedom in his decision-making still based on what the law will allow for. Here, it seems Kelsen underestimates the radical character of what Kantorowicz and the Free law movement propose, not only unintentionally severing the logical bond, but actually aiming to do so, placing the judge’s authority on the same footing of – if not higher than – that of the legislator. Rather than in the debate with Kantorowicz, Kelsen’s opposition to the basic tenets of the Free Law movement came to a head in a fierce discussion with Eugen Ehrlich, then a professor at Czernowitz in exile, leading to a minimal influence of the movement in Austria.

3. The turn towards constitutional and international law (1920–1933)

From this initial debate, it is clear that the discussion between Kantorowicz and Kelsen regarding the function of sociology touches on and even pre-empts wider and deeper convictions of both scholars. Their perspective differs: whereas Kelsen writes from the perspective of a constitutional law expert (Staatsrechtswissenschaftler) emphasizing a separation between law and politics, or rather law and non-law, Kantorowicz takes a broader approach. Evidently, there is a principled difference of opinion on the definitions of the concepts of law and state, expedited particularly in the 1930s after the publication of Kelsen’s famous Reine Rechtslehre in 1934. However, fundamental to the respective arguments is the reasoning from real-world problems and concerns in the early twentieth-century German-speaking context. In many ways, these problems came to a head in the First World War and its aftermath. It is interesting to note both Kelsen and Kantorowicz show fairly drastic turns in their scholarship after 1920, primarily evidenced by a new focus on international law (Völkerrecht). Kantorowicz published a series of articles and lectures concerning the League of Nations (Völkerbund) culminating in a 1924 lecture to the Fabian Society. Already in 1920 Kelsen had started writing about international law, above all in Das Problem der Souveränität und die Theorie des Völkerrechts. In the following, the main (interrelated) works of Kantorowicz and Kelsen on constitutional law and international law will be compared in a chronological order, showing the similarities and differences between the developments in their thinking. The central thesis of Kelsen’s Das Problem is an essential monism between national law and international (public) law, not really in a practical or idealistic sense, but from a rather more methodological standpoint of ‘cognition’ (Erkenntnis). Crudely put, much like one can only understand ‘the state’ from a legal perspective, international law and its development should be primarily seen as a version of national or municipal law to be properly viewed. The idea found its expression in the adoption of Christian Wolff’s theory of the civitas maxima, emphasizing a decentralized system of coercion depending on individual states rather than a utopian ‘world-state’, thus leading to the primacy of the law of nations over national law. The structure is present in several of Kelsen’s later writings in the 1920s, but already in 1920 explicitly excluded ‘societal
concerns’ over ‘pure’ jurisprudential thinking. This aspect of Kelsen’s writings was developed further in the context of his philosophy of constitutional law, particularly his concept of the state as a legal entity as separate from the sociological notion. In 1921, one year after Das Problem, he would set it out in detail in a dedicated work. Contrary to Kelsen, the turn of Kantorowicz to international law was a practical and political one, very much inspired by the failure of the The Hague Peace Conferences and the League of Nations to prevent the First World War or properly dealing with its aftermath. The argument at the Fabian Society followed a series of articles denouncing the role of Germany, emphasizing the obligation of the country to join the League of Nations to prevent further conflict, and taking an extremely pacifist stance, conceptualizing acts of war as ‘breaches of the peace’ (Friedensbruch) to be penalized as a crime committed by a state. At the request of the Reichstag, he would later compile a report on the ‘question of war guilt’ (Kriegsschuldfrage), a report that was deemed so controversial that it would not see the light of day until long after his death. Being trained as a criminal lawyer and legal historian, there seems to be a parallel here with his ongoing work on the Medieval scholastic jurist Albertus Gandinus, the second volume of which was published in 1926. A year before, and in the same year as Kelsen published his Allgemeine Staatslehre, Kantorowicz finished Staatsaufassungen. In Staatsaufassungen, Kantorowicz criticizes Kelsen’s thesis of the ‘legal’ view being the only possible perspective on the state. It is noteworthy Kantorowicz employs fundamental aspects of Kelsen’s own theory as for example set out earlier in Das Problem in his critique: the notion of ‘cognition’ (Erkenntnis) for instance plays a large role, but primarily to demonstrate a measure of dogmatic singlemindedness in what had been termed the ‘Vienna School’. In brief, a ‘state’ like any other legal notion can be viewed from any perspective, as long as there is a particularly defined purpose to it. Thus, Kantorowicz advocates a wider concept of the state, by-and-large in the sense of a ‘territorial corporation’ (Gebietskörperschaft) in the sense of Gierke, simply because it is more useful (zweckmäßig) as an analytical category than Kelsen’s definition of the state hall-marked by a strong ‘sovereign’ connotation. Despite the theoretical and methodological focus on the concept of the state, Kantorowicz ends with a reference to the First World War, literally making ‘sense’ (Sinn) of it as a ‘a war against war’ (Krieg gegen den Krieg) in the Anglo-Saxon conception. Here, he both builds on his earlier and pre-empts his later works on the law of nations and the question of war guilt. In this context it is always interesting to note how Kantorowicz maintains an apparently singular core and convictions to his thought even when writing for different audiences and on different topics. For Kelsen it can be similarly said there is a strong continuity in his thinking, specifically with respect to the centrality of cognition as a method and the state as a concept binding together the various contexts in which he published. There appears a definite common ground between Kantorowicz and Kelsen. This concerns the theories of Free law and the Pure theory of law more broadly speaking, although the solutions the two scholars offer differ significantly. Moreover, it is noteworthy Kantorowicz and Kelsen are at pains to include international law into their theories as a form of ‘law’. Kantorowicz employs a very wide definition of the notion much like his of the ‘state’, whereas Kelsen makes its cognition dependent on whether or not it can be viewed as law in the same sense as municipal or national law. Following Das Problem, we can see a reiteration of this argument in Allgemeine Staatslehre. In general, there are some paragraphs reminiscent of Kantorowicz in the work, for example concerning various modes or perspective of seeing the state, the relation between law, politics and social norms, and the position of non-state entities inside and outside the state. Ostensibly the writings of Kantorowicz and Kelsen in the 1920s concern real-world problems of black-letter constitutional and international law, approached from comparable philosophical and theoretical viewpoints. Seven years after the respective publications of Staatsaufassungen and the Allgemeine Staatslehre both Kantorowicz and Kelsen would return to the concept of the state in the wider context of their legal theories. In 1932, Kantorowicz would revisit his critique of Kelsen concerning the juristic conception of the state as the only possible one in a lecture held at the London School of Economics. Here, he explicitly also includes international law, and reiterates his preference for the Gebietskörperschaft
as an analytical category for understanding the state. Yet, at this time, the political situation in Germany had yielded an additional problem, namely the collapse of the Weimar Constitution and the rise of Nazism. Thus, we encounter references to the collapse, formulated on the basis of a different mentality among the British and the Germans. Moreover, in 1932 the definitions of 'the state' and the 'law' are more explicitly related, stating that whereas the state is created by the law, it then cannot be overridden by it, making it a dangerous creation. Here Kantorowicz pre-empts a debate that would last far into the post-War period. Central to this debate would be the nature of law, and its formal and material connection to the idea of the state. Regarding international law, both scholars take strong and similar stances in the controversy of the question of war guilt. Kelsen does so in his academic writings from 1932 onwards. Central to his argument is article 231 of the Treaty of Versailles, under which Germany was made liable for the damages caused by the war. In 1932, it is primarily the wording of the article that is criticized: whether or not Germany ‘imposed’ the ‘war of aggression’ is legally irrelevant, it matters only if the war was started and conducted contrary to the law of nations, making the article superfluous at best. Already in the early 1920s Kantorowicz had conceived of a system of the prevention of war in the context of the question of war guilt and the possible membership of the League of Nations: this system is greatly expounded in his controversial report on the question of war guilt from 1927. Crucially, the crime of ‘breaching the peace’ is formulated as a traditional category of (national) criminal law. As such, it is clear Kantorowicz envisions an individual criminal liability for acts of war, without however clearly elaborating on an institutional structure to effect this, inside or outside the context of the League of Nations. Rather, the context is one of a ‘law of nations to be’ (werdend Völkerrecht), which lives in the consciousness of peoples but has not yet been institutionalized. It has been stated that the theory of Kantorowicz barely connects to the main-stream academic literature on international law of his age. There are however definite similarities to the practical thought of Kelsen concerning an international legal order. These similarities would only be expeditated after the 1933 catastrophe.

4. Exile and the political situation in Germany and Austria (1933–1945)

In April of 1933, the Law for the reinstitution of the civil service (Gesetz zur Wiederherstellung des Berufsbeamtentums) was enacted. The law was aimed at purging universities and government structures from undesirable elements. The two criteria upheld by the law for the reinstitution of the civil service for those to be ousted were either a ‘non-Aryan descent’ (Paragraph 3.1) or previous political convictions on the basis of which a lack of commitment for the national interest could be inferred (Paragraph 4). The ground given in the decisions to oust or retire the first set of professors is overwhelmingly the second. At the time, as a professor of criminal law and the dean of the faculty at Kiel, Kantorowicz was in Florence as a visiting professor. Several years earlier Kelsen had moved to Cologne also as the law faculty’s dean and as a professor of constitutional law, having been retired from the Austrian Constitutional Court for political reasons. Like Kantorowicz, Kelsen was abroad on April 1st, touring Sweden and giving lectures in Lund and Uppsala for the Scandinavian legal realists. Both Kantorowicz and Kelsen were among the first group to be ousted (‘sent on holiday’) based on the Law for the reinstitution of the civil service. Apart from affecting them personally, their exile experience shows through in their respective academic works. Under the rubric Personalien in the Deutsche Juristenzeitung of May 1933, they are named among the economists Emil Lederer and Moritz Bonn, and the legal scholars Ernst Cohn, Herman Heller and Hugo Sinzheimer. Kantorowicz remained abroad, first moving to Cambridge and almost immediately after to New York to work at the ‘University in exile’ at the New School. Kelsen actually returned to Cologne, but the situation soon became untenable. In the late spring of 1933 Kelsen thus first moved to Geneva, eventually ending up at UC Berkeley. The first book Kelsen published ‘in exile’ was his famous Reine Rechtslehre or ‘Introduction to the problems of legal science’ (Einleitung in die Rechtswissenschaftliche Problematik) as it was titled in 1934, with Kantorowicz bringing out Tat
und Schuld, a work on what we would now call comparative criminal law. The character of the respective books is obviously quite different: however, both Kantorowicz and Kelsen wrote introductions to the works in which they explicitly refer to their situation in exile, the former from Cambridge, the latter in Geneva. The irony of having set out a system purged of political elements under the circumstances, which in itself was taken as a political statement, had not escaped Kelsen. In a peculiar turn of events, it is at this point Kantorowicz and Kelsen both formulate analyses of 'dictatorships' as a concept. Kelsen lectured on the topic in 1934, with a publication following in 1935 and an English translation in 1936. Kantorowicz composed his analysis in the same English journal as Kelsen a year earlier, in 1935. The concurrent turn is all the more peculiar, because neither scholar appears to refer to the writings of the other explicitly. The contribution of Kantorowicz contains a detailed 20-page bibliography on dictatorships from which Kelsen's 1934 work seems to be missing. On the other hand, Kelsen's 1936 article does not contain references at all. Comparing the two LSE articles, both scholars build on their earlier thought. Kelsen ostensibly expounds on his views on the value of partisan parliamentarism in claiming that democracy can only exist in a multi-party system, not in a single-party one. However, following Baume there is a deeper relation between Kelsen's perspective on party-dictatorships and his basic theory: since all positive law emanates from the state and thus the democratic process, the conflicts of interests in that process can fully determine the law. No value can claim superior legitimacy. Therefore, one-party systems are at odds with Kelsen's legal positivist theory. Kantorowicz approaches the problem of the dictatorship in a much more abstract sense of designing 'useful' analytical categories in the vein of his concept of the state. The category of 'dictatorship' is then sociologically determined, for example by defining its autocratic character as the government not needing the consent of the governed to exercise it whether or it is bound by law. Once again, there are noteworthy similarities between the arguments of Kantorowicz and Kelsen, such as the strong differentiation between Nazi Germany and Soviet Russia, the nationalist/anti-internationalist character, an emphasis of the religious element and the need to stifle out academic criticism. In comparing the articles of Kantorowicz and Kelsen on dictatorships, one matter however stands out most of all: the lack of a discussion of the legal dimension. For Kantorowicz, this is not so strange, as he explicitly sets out from a sociological perspective, which is then coupled to the extra-legal character of the dictatorship itself, however much it is purported to be founded in law. When viewed in conjunction with his earlier theoretical work, the absence of legal analysis in Kelsen's piece is all the more noteworthy. Beyond the problem of the lack of multiple political parties, if the state can only be understood through its law, this does not seem to hold through for the fascist, autocratic or dictatorial state. Kelsen refers throughout to economic and societal conditions in his analysis. This either means he does not consider the fascist state a 'state' in the theoretical sense, seeing as the law it enacts is not 'law', or there indeed is a methodological turn in his thinking in 1934/5 as argued by Heidemann. In exile Kantorowicz continues his work on international law. After having gone back to Cambridge, in 1935 he holds a series of four lectures at the Nobel Institute in Oslo detailing a plan for an international order excluding dictatorial states based on the premises set out in Dictatorships. Since these lectures are unpublished, it is worth discussing their content for a moment based on the synopsis found in the Nachlass Kantorowicz. The purpose of the lectures is to show the relation between democracy and the politics of peace on the one hand, and autocracy and the politics of war on the other (1st lecture, 1st page):

Der Redner versprach in seinen vier Vorlesungen ueber den Zusammenhang von Demokratie und Friedenspolitik, Autokratie und Kriegspolitik zu sprechen; im ersten und zweiten Teil das Wesen dieser Ideen zu konstruieren, im dritten Teil zu zeigen dass die Wirklichkeit der Konstruktion keineswegs entspricht, da die sog. Demokratien nur eine schwachliche Friedenspolitik betreiben, im vierten Teil Vorschlaege zu machen, wie Freiheit und Frieden demnoch gerettet werden koennen.

‘Breaching the peace’ committed by a state or an individual should be treated as a crime punished by a league of nations (1,2):
Kantorowicz then makes the link to his taxonomy of dictatorships and their belligerent tendencies (2,2-4). However, it is possible dictatorships actually strive for peace, and on the other hand can democracy and pacifism turn out to be weak, by leaving warmongering unpunished, and allowing for autocracies to have joined the League of Nations (3,4-5). The solution to this is to make peace the aim of war, under a monocratic chancellor, in a League comprised of the 15 democratic Kultur-völkern including the United States, and excluding all autocracies (4,6):

Dennoch kann Freiheit und Friede gerettet werden, wenn sie als Kampfziele aufgefasst werden. Die Rettung der Freiheit verlangt, dass aus der Krise der Demokratie heraus eine Demokratie der Krise geschaffen werde.

Much like his earlier work on international law, the lectures have a strongly pacifist, political and pragmatic character.

Supporting Heidemann’s thesis of a measure of realist turn in Kelsen’s thinking in the course of the 1930s, or at least an attempt to frame a response to realist critiques, is his involvement with the legal structure of the League of Nations. Following Paulson, the new focus on legal interpretation – particularly because of the fact of a fundamental existence of gaps and open norms in the League Covenant – may have been inspired by the tenets of the Free law movement. More substantial similarities to the thought of Kantorowicz can be found in Kelsen’s works from 1941 and 1944. Kantorowicz died in 1940. His last great project was to edit together with the Oxford Regius Professor of Civil Law Francis De Zulueta the Oxford History of Legal Science. The full project would never materialize, but the introduction he wrote was published in 1958 under the title The Definition of Law. In it, Kelsen is mentioned on several occasions, for example concerning the distinction between law and fact, an original norm founding the norms it is based on, viewing law from the perspective of legal rights and duties and above all the problem of ‘enforceability’ as a constitutive element of a definition of law. In the definition of Kantorowicz, it is rather considering rules ‘justiciable’ than enforceable that makes law what it is. Here, Kantorowicz again formulates a concept that is more sensitive to its application in earlier historical periods, periods where governments were legally or practically unable to enforce their own rules. But does this make these rules less ‘legal’?

5. The return of refugee scholarship, the uses of history and the prevention of war

As a German-language legal theorist working in the early twentieth century, it is near-impossible not to have taken heed of the ideas of Hans Kelsen. The centrality of the scholar in a wide variety of fields made reflections on his thought on a number of issues ranging from the philosophical to the political and legal central to the work of many contemporaries. It is therefore no surprise Kantorowicz employs Kelsen’s works at times as a starting-point for his own scholarship. Whether the opposite also occurred, Kelsen reflecting on or employing Kantorowicz, is harder to determine. Kelsen seems to rarely refer to Kantorowicz explicitly. However, as regards their basic considerations concerning legal interpretation, Paulson has shown there is a distinct possibility of Kelsen’s familiarity with the Free law movement, and Kantorowicz in particular. Moreover, there appear to be substantial similarities as well, specifically concerning their construction of an international legal order aimed at preventing excesses of national states. In the following, first the influence of Kantorowicz and Kelsen in the post-War context will be assessed, particularly with respect to the creation of an international legal order aimed at preventing war and other atrocities. Second, at the basis of their respective creations seem to be specific historical models, in Kantorowicz by virtue of his work as a legal historian, in Kelsen due to his conception of international law as law in a ‘primitive state’. The question will be asked how these models relate to each other, and in what measure the scholars employed them to create their visions of a post-War international legal order. The thought of
both Kantorowicz and Kelsen was initially received badly in post-War Germany. Scholars decried Kelsen’s legal positivistic scholarship in particular, since his hypothetical stance would have been that Nazi law had indeed been law since it had been enacted as such, i.e. according to a Nazi Grundnorm. Similarly Kantorowicz’s works particularly surrounding his theory of Free law were subject to criticism. The idea behind the criticism is that by virtue of his argument for a free role of the judge in creating the law where the codification has gaps, the floodgates could be opened for judges to adjudicate according to Nazi ideology. Contrary to Kelsen, it seems the main influence of the thought of Kantorowicz is to be found in the United States and above all in Great Britain rather than in Germany. He himself lamented, even mocked, his significant influence on the American Legal realists. Nevertheless, the measure of influence of Kantorowicz and the Free law movement in general on the Legal realists is nowadays generally recognized, and thus inexorably bound with the importance of Legal realism as a scientific current as a whole. Concerning the post-War influences of Kantorowicz on international law it is particularly interesting to note the afterlife of his pluralistic conception of law for example in a comparative law context as demonstrated by Kelsen, more often than not the question on how to construct a functional legal order depends on whether international law is to be viewed as a form of law at all. Conceptually speaking, the notion of ‘justiciability’ as central to the definition of law of Kantorowicz seems much more useful for the construction of an international legal order than the idea of ‘coercion’ to which Kelsen clings. With respect to the post-War influence of the international legal systems constructed by Kantorowicz and Kelsen after 1933, the centrality of Kelsen’s thought in the United States is disputed, but in legal philosophy he seems to have been behind the curve of the legal positivism of Hart in particular. For international law, the main contributions of Kelsen are paramount in the post-War landscape: the conception of acts of state leading to criminal liability in the context of the Nuremberg Trials, and the construction of the United Nations as an international organization. Like in Kantorowicz, the advances in substantial law are made rooted in strong methodological, philosophical and scientific considerations. If a mutual influence is to be discerned it should be sought precisely in connecting legal method and substantial legal reform by means of legal science, in the idea that since international law is a form of law like any national field of law it is susceptible to the same developments, and can thus be formed by the same legal scientific means. According to Jeremy Telman, Kelsen’s vision of a post-War international order has three interrelated constituent elements: centralization, collective security and the important role of international courts. In the context of all three elements it is clear Kelsen continues to employ the national state as a model for international law, however as a law emanating from the relations between states above all. According to this vision, international law is national law in a ‘primitive state’. The development (or centralization) of such an international law is mainly effected through decisions of courts, specifically a newly to be erected court with a compulsory jurisdiction over the member states of a league of nations. While the aim of the prevention of future conflict is similar, there is a contrast between the organic conception of judge-made international law in Kelsen and the creation of an international organization under a monocratic chancellor solely including democratically inclined peoples in Kantorowicz’s 1935 Oslo lectures. This contrast is all the more marked seeing the emphasis of the role of judges in creating the law, as well as the search for a definition of law that explicitly includes ‘international law’ (and non-state dependent forms of law) throughout the works of Kantorowicz. The historical model for the creation of ‘law’ and a ‘state’ on an international level employed by Kelsen is that of the early developments of Roman law and English common law. Instead of the legislative or executive branches, inasmuch as this existed as a separate branch of government in these times it was the judiciary that primarily functioned as a law-maker. Contrary to Kelsen, Kantorowicz does not envision a clear historical model or predecessor for his construction of an international organization as far as is apparent from his works in the 1920s and the synopsis for the 1935 Oslo lectures. This is noteworthy since at least from the Kampf in 1906 onwards the ‘Romans and the Britons’ are presented as the historical instances of legal orders in which law was created beyond the state, by individual judges or legal
scientists, without an authoritative act of state to back it up or otherwise found it. Dealing with a lack of centralized authority is a primary concern in Kantorowicz’s legal-historical works as well by virtue of his focus on the criminal law of the Mediaeval Italian city-states, exactly the problem emerging in the post-War debate on punishing war crimes. Being the legal historian of the two scholars, the lack of employment of this or another (explicit) historical model by Kantorowicz in his construction of an international legal order seems strangely out of place. Planning for the political, economic, social and legal aftermath of the Second World War did not start in 1945. Due to their previous experiences and prior engagement with the problem of the punishment and prevention of war, some scholars were ahead of the curve, and when they were dismissed or pressured by the Nazi regime from 1933 onwards it expedited the development of solutions. Generally speaking, the First World War had already shown the failure of the Hague Peace Conferences and the League of Nations. Some scholars argued for the abolition of international law altogether, replacing it with realist versions of international relations, or setting up conflict rules to balance out closed national legal systems. Others such as Kantorowicz and Kelsen pursued the strengthening of international legal systems, primarily through setting up international organizations with enhanced powers of their member states, and regulating the conflicts between them. This would eventually result in the formation of organizations such as the United Nations, the Council of Europe and the European Communities. Among all these scholars the similarities and continuities in the progression of the thought of Kantorowicz and Kelsen is more than noteworthy. It speaks of a shared experience of two brilliant legal scholars faced with dire circumstances, and using that brilliance to counter them in the way they knew how best.

6. Conclusion

The methods of Kantorowicz and Kelsen differ fundamentally, as does the practical structure of international law and conflict resolution both scholars envision. The purpose of their respective works however is similar from the 1920s onwards: the prevention and punishment of wars and armed conflict between states. The political circumstances and the consequences of the circumstances on a personal level resulted in these ideas gaining a large measure of urgency in the early 1930s. Where Kelsen and Kantorowicz had been enveloped in a twenty-year-long theoretical debate, they found each other academically in the course of the 1930s, in preparing fundamental aspects of the post-War international legal order. Taking into account the manner in which their thinking is based on separate premises, in the following contexts there are similarities in their respective works and conclusions.

Crucial really from the 1910s onwards for both Kantorowicz and Kelsen is the (non-) separation of law and ‘not-law’, meaning primarily morals, politics and societal interests. In Kantorowicz up until his 1940 The definition of law there is no problem with law being defined essentially by societal norms or interests. This results in a very wide definition of ‘law’ and an early argument for employing more empirical sciences such as sociology to determine what these interests are exactly, and how judges can employ them to reach satisfactory and proper judgments. Naturally, the separation in Kelsen is much stricter, however, in his 1925 work on Staatsaufgaben he recognizes there are various ways to at least view the concept of the state, as well as treating the relation between legal, political and societal norms. As such, in both the Concept of the state and The definition of law Kantorowicz on several occasions refers to Kelsen.

Moreover, at least from the 1920s onwards, both Kantorowicz and Kelsen view their concepts of the state in an essentially broader context, either in the more theoretical sense of the civitas maxima in Kelsen’s Das Problem der Souveränität from 1920, or in the more practical sense of its relation to the League of Nations as argued by Kantorowicz. After the 1933 catastrophe the work of Kelsen gains a more practical dimension in the sense of the actual structuring of an international organization to prevent atrocities being committed by individual states becoming prominent. Here, following Paulson, Kelsen could harken back to Kantorowicz with respect to the problems of legal
interpretation as a form of law-making on an international level. Furthermore, a definite similarity of thought in this regard is the emphasis on the criminalization of acts of war and aggression by-and-large under traditional criminal law categories. It is Kelsen who is prominent in the post-War practical application of this idea, in various publications, but primarily also in the context of the Nuremberg Trial.

A final interesting parallel between the thought of Kantorowicz and Kelsen then is their respective emphasis on historical models as a basis for the creation and functioning of law in a modern context. For a legal historian such as Kantorowicz, it is not that surprising to see him employing Roman jurists or the judge in the Italian city context. For a legal positivist such as Kelsen referring to the 'Roman and the Britons' as any kind of model is somewhat surprising, the context of international law notwithstanding. Here, there is again the possibility of a more direct influence of Kantorowicz on Kelsen, then again, this could be an idea that was shared a lot more broadly among refugee scholars in the 1930s and 1940s, particularly those that had moved from Germany or Austria to the UK or the US.

Notes

10. Paulson, ‘Formalism’, 7–39. The comparison in the context of the question of war guilt is also made by Rigaux, ‘Hans Kelsen’, 335–6, however underlining that the similarities in the two theories are coincidental. This may be true, however the report is not the only publication in which Kantorowicz presents his theory, nor does Kelsen first treat the problem in the 1940s.
20. Ibid., 604.
21. Ibid., 605: ‘Das fragliche logische Band zwischen Rechtsordnung und richterlicher oder sonstiger staatlicher Tätigkeit ist deshalb notwendig, weil es das einzige Kriterium dafür ist, daß eine staatliche, das heißt dem Staate zuzurechnende Tätigkeit und keine Willkürhandlung einzelner Menschen vorliegt.’
22. Ibid., 607: ‘Es handelt sich um ein rechtspolitisches-legislatorisches Problem. Weitgehende Gebundenheit durch das Gesetz oder richterliche Freiheit (natürlich nur im besondere eingeräumte Ermessensfreiheit) das ist die Frage:’
23. Cfr. Koskenniemi, ‘Hersch Lauterpacht’, 622: ‘If rules do not have essential meanings, but those meanings result from interpretation, the project to chain states into the rule of law by legislation is insufficient. Instead,
“Who interprets” becomes the key-question; Auer, 'Kampf', 787: ‘Die radikale Prämisse des Freirechts lautet insoweit, dass selbst die Ausübung methodisch gebundener richterlicher Freiheit niemals durch die Autorität des Gesetzgebers legitimiert, sondern dieser gegenüber stets als heteronome Rechtsschöpfung anzusehen ist.’ Moreover, Kelsen’s statement may provide an early reflection of conflating discovery and justification in his theory of cognition: Paulson, 'Formalism', 33–4.

27. See primarily Kelsen, Das Problem, 187–90. Compare Paulson, 'Formalism', 9 and 31; Olechowski, Hans Kelsen, 265.
34. Kantorowicz, 'Germany', 8–9. Strongly decrying German nationalism. See also Muscheler, Hermann Kantorowicz, 54–8.
37. Kantorowicz, Staatsaufassungen', 69–82.
38. Ibid., 69: 'Hingegen [the sociological concept of the state as advocated by Weber] will die kräftig aufblühende Wiener Schule der Rechts- und Staatsphilosophie, die Richtung Hans Kelsens, um der "Methodenreinheit" willen, nur eine, die "juristische" Seite des Staates gelten lassen. Hier soll gezeigt werden, daß der Staat von sehr viel mehr als ein oder zwei Seiten betrachtet werden kann, also betrachtet werden Muß.' At 80, he makes clear he is referring to Kelsen, Problem, in particular. Compare in general Frommel, 'Hermann Kantorowicz', 633.
40. Ibid., 73–4: for one, Kelsen’s notion seems to exclude territories of which the “state-hood” is disputed, e.g. the dominions of the British Commonwealth.
41. Ibid., 79–80.
42. Paulson points to the rejection of traditional forms of legal interpretation as simply concealing the introduction of political arguments in legal decision-making: Paulson, 'Formalism', 21–2.
44. Ibid., 7–21: as social reality, ideal system and legal order.
45. Ibid., 44–4.
46. Ibid., 180–93. However, in the Belege und Verweise no works of Kantorowicz are mentioned.
47. Kantorowicz, 'Concept', 3: ‘(...) (T)he German Classical School of Laband and the present Vienna school of Professor Kelsen have sinned by considering the juristic conception of the State as the only one possible. On the other side, there is a tendency in English, French and American thought to put the empirical concept in the place of the juristic one, or to confuse both.’ The lecture was delivered in October 1931.
49. Ibid., 20–1: ‘If, on the whole, democracy has proved a failure in Germany and a success in Great Britain and the Dominions, this is due to their different political mentality, and it can be of no use, and must be of great harm, if we try to impress the same political institutions on peoples with opposed mentalities (...). The looser the legal texture of the British Empire, the stronger will be its political unity, and this I believe, even in these cloudy days, to be the bulwark of every nation’s welfare and safety, my own country not excluded.’
50. Ibid., 12. Considering the theological dimension of “the theory of originality” in German state theory, Kantorowicz refers to Kelsen in this regard as well, at 9.

52. Kelsen, Unrecht, 600, note 1; Kelsen, Peace, 90: ‘The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.’


55. E.g. Ibid., 109–10 and 423.


57. Ibid., 139.

58. ’Beamte, die nach ihrer bisherigen politischen Betätigung nicht die Gewahr dafür bieten, daß sie jederzeit rückhaltlos für den nationalen Staat eintreten; (…)’


60. Kantorowicz attempted to found an Institute for legal theory and legal sociology at Kiel, but declined to invite Kelsen as a member: Lepsius, ‘Habitus’, 204.


64. Col. 613 (the full text !): ’Der Preuß. Kultusminister hat zunächst u.a. mit sofortigen Wirkung beurlaubt: in Berlin Lederer und Bonn (Handelshochschule), in Breslau Cohn, in Frankfurt Heller u. Sinzheimer, in Kiel Kantorowicz, in Köln Kelsen.’ Kelsen was definitively “retired” (in den Ruhestand versetzt) on September 11th 1933, based on his Jewish family background per paragraph 3 of the law: Olechowski, Hans Kelsen, 565.


67. Declining positions at the LSE and the New School because he deemed his English not good enough: Jestaedt, Selbstzeugnis, 81.


72. Kelsen, ‘Party-dictatorships’, 19–32. A further German translation was envisioned for the Festschrift of four Slovenian legal scholars, but for unknown reasons this never materialized: Olechowski, Hans Kelsen, 597–8, nt. 610.


76. Baume, Democracy, 15.

77. Kantorowicz, ‘Dictatorships’, 470: ‘Every definition (…) must be fruitful for the purposes of the particular science, must be useful as a tool for illuminating questions, true descriptions, clear distinctions, and exhaustive classification.’ The definition of Kantorowicz is (471): ‘We propose to call that government a dictatorship which is autocratic; works through dictation; and in which the governed still remember a less autocratic or less illiberal system.’

78. Ibid., 471–2.

80. Kantorowicz, 'Dictatorships', 476: '(A)n appeal to ideas of a universal nature would be hopeless', 479: '(T)he distinction between States believing in dictation and others that do not, explains the failures of the present attempts of establishing a "collective system" in Europe without previously creating a certain uniformity of the political structure'; Kelsen, 'Party-dictatorships', 25: '(A)n Internationale of fascist dictatorships, given their imperialistic tendency, is a self contradiction.'


82. Kantorowicz, 'Dictatorships', 478–79: the ultimate undoing of the dictatorship, since it cuts itself off from producing capable civil servants; Kelsen, 'Party-dictatorships', 26: '(S)cientific freedom can no longer be respected.

83. Kantorowicz, 'Dictatorships', 472.

84. Compare e.g. Kelsen's review of Smend's theory of integration: Integration, 75: 'Diese [the dictatorship] ist ein Ausnahmezustand, bei dem die normale Form der Gesetzgebung (...) zurückgedrängt wird (...).’ See on the other hand: Kelsen,'Law and Peace', 4: 'From the point of view of social science, it is impossible to prefer democracy and liberalism to autocracy and socialism, and vice versa. The basis of such a preference would be a moral or political judgment of value, which has no scientific character'; Kelsen, 'Foundations', 100, note 13: 'Law may be created in very different ways; the democratic way is one of them, not the only one (...) (H)ence also by the autocrat.'

85. Heidemann, Norm, 103–58, founded on his confrontation with Legal realism in the US; see however Paulson, 'Four Phases', 153–66 and Paulson, 'Periodization', 351–64.

86. Universitätsarchiv Freiburg C0036, signature 056, pre-signature II B. Compare Muscheler, Hermann Kantorowicz, 116–7. Now treated in Aust, 'Freirecht', 141–2. The author wishes to thank Professor Aust for the opportunity to look at the lecture notes and the Nachlass Kantorowicz at the archives of the University of Freiburg for their kind permission to cite them.


89. Kelsen, 'International Peace', 575: 'The history of Roman and Anglo-American law shows how judicial decisions create law (...) The law is what the court finally decides (...). One will avoid overestimating the function of legislation and will understand why there can be no legislator without a judge even though there can very well be a judge without a legislator. The basis of the bellum iustum doctrine and imperial tendencies in Roman Antiquity he notes in Law and peace, 43–44 and 137. On Law and peace, see Olechowski, Hans Kelsen, 685–7. The exclusion of fascist states from international organizations and the relation to a united Europe is indicated first in interviews and unpublished lectures and research proposals: Olechowski, Hans Kelsen, 639–44. It is however to some degree present in 'Law and peace', e.g. 144.

90. Kelsen, Peace, 91: 'When the Second World War broke out, the legal situation was different from that at the outbreak of the First World War. The Axis Powers were contracting parties to the Brian-Kellogg Pact by which resorting to a war of aggression is made a delict; (...) Hence, there is no reason to renounce a criminal charge made against the persons morally responsible for the outbreak of WWII.'

91. Kantorowicz, Definition, vii and xi-xiii.


93. Ibid, 32.

94. Ibid, 38.

95. Ibid., 59–61 (Kelsen as one of the best known legal thinkers). Kantorowicz refers to two works of Kelsen, Hauptprobleme der Staatsrechtslehre from 1911 and the 1934 Reine Rechtslehre.

96. The library of Kantorowicz is preserved at the University of Minnesota. It contains six of Kelsen’s works: ‘Zur Soziologie des Rechtes’ (1912), Allgemeine Rechtslehre (1931), Die Philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus (1928), ‘Über Grenzen zwischen Juristischer und Soziologischer Methode’ (1911), Vom Wesen und Wert der Demokratie (1929) and Der Staat als Übermensch (1926).


99. See the debate between Okko Behrends and Vivian Grosswald Curran: Behrends, 'Freirechtsbewegung zum konkreten Ordnungsdenken', 34–79 and Grosswald Curran, 'Free Law', 66–91, e.g. 87. See also Schmidt, 'Law, modernity, crisis', 135.

100. Auer, 'Kampf', 778; Schmidt, 'Insight', 232.
102. Compare Auer, ‘Kampf’, 795–805, also with respect to the “justiciability” of international law from a criminal law perspective in relation to for example the Nuremberg Trials and the ICJ.
110. E.g. Kantorowicz, Definition, 14–15. See also Lepsius, ‘Utopie’.
112. See Van Caenegem, European law, 38–9 for a comparison along this line.
113. This may have been intentional, compare for example Kantorowicz, Definition, 99–103: ‘Rechtspolitische, nicht historische, ethische oder formaljuristische Fragestellung’ with respect to solving the question of war guilt
116. For the complicated process of the reconfiguration of the European (legal) tradition after the War: Tuori, Empire, 173–220.

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