

Kelsen, Jellinek, and the Sociology of State

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Hans Kelsen and Georg Jellinek are often regarded by legal scholars as two of the most influential constitutional experts from the last two hundred years.¹ Despite their prominent places in the history of legal philosophy, little attention has been paid to them together. Yet, Jellinek was not only regarded as the most important legal scholar in Germany, he was also Kelsen's professor at Heidelberg. What is even more crucial was that Kelsen later criticized Jellinek's "two-sided theory." Jellinek held that a political object had two different sides: the causal explanatory sociological side and the juristic normative legal side. Kelsen rejected this and argued that in terms of law, there was and only could be one view and that was his legal normative one. Furthermore, Kelsen objected to Jellinek's combining the political with the legal: politics focuses on unity; law deals with rules. Kelsen's critique of Jellinek is the focus of this essay.

In the ten years from 1920 until 1930, Hans Kelsen published more than a hundred writings.² Some of these, like *Allgemeine Staatslehre* (1925), became famous and still attract considerable attention.³ Others, such as *Von Wesen und Wert der Demokratie* (1920/1929) and *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus* (1928) have recently become objects of discussions. Of these hundred-plus works, a majority are of little interest to most scholars because they are brief, or they dealt with minor issues or even a combination of the two. There is one work that is neither short nor of limited historical interest; rather, it is a wide-ranging and an extensive examination of a slew of crucial legal theories. This work is *Der soziologische und der juristische Staatsbegriff*. As the title indicates, Kelsen intended to set out the contrast between the sociological concept of the state and the juridical concept of the state. But as the subtitle clarified, it was also a critical investigation of the relationships between state and law (*Kritische Untersuchung des Verhältnisses von Staat und Recht*). Kelsen published the first edition in 1922 and then released a mostly unchanged version in 1928 (Kelsen 1928, p. v). Both editions were published by the Tübingen firm J. C. B. Mohr (Paul Siebeck). The book has four major sections: the first is on the sociological concept of the state; the second is on the juridical concept of the state; the third is on the issue of the identity of state and law; and the fourth is on the notion of the state as substance. Each of these four sections is ripe for detailed examination; the concern of this essay is on section three. Unfortunately, section three itself is almost one hundred pages in length and covers ten different thinkers, including Georg Jellinek, Max Weber, Wilhelm Wundt, Edgar Loening, and Weber's "nemesis"

Rudolf Stammler.⁴ This essay focuses on the first of these legal scholars: Georg Jellinek. As Stephen Turner notes in *Making Democratic Theory Democratic*, Jellinek was not only Max Weber's friend and ally, he was also Kelsen's teacher at Heidelberg. There are a number of writings devoted to the connections between Jellinek and Weber, but there are very few that explore Kelsen's critical appraisal of his former professor.⁵ Although Jellinek died in 1911, his *Allgemeine Staatslehre* would continue to be the standard legal textbook for almost another twenty years. Because of Jellinek's prominence, Kelsen recognized that he would have to address his former professor's philosophy in considerable detail. Whereas Kelsen spent several pages each on Loening, Wundt, and Stammler, and close to ten on Weber, he devoted almost twenty just to Jellinek. Who was Georg Jellinek and why did Hans Kelsen feel the need to concentrate so much fire on his former professor's legal philosophy?

Georg Jellinek (1851-1911) was not just Weber's friend and colleague and he was not only Kelsen's professor at Heidelberg.⁶ Jellinek is regarded as one of the three outstanding thinkers of the theory of the state—along with Carl Friedrich von Gerber and Paul Laband. Jellinek adhered to the “Sein-Sollen” (Being-Ought”) distinction and he divided human studies into social-empirical and normative-legal categories. He was recognized as one of the first to investigate the notion of human rights but his reputation rested primarily on his *Allgemeine Staatslehre*.⁷ It was first published in 1900, in a second edition in 1905, and a third edition was published in 1914. The fourth edition (1921 and 1922) were reprinted unchanged by Jellinek's son. A fifth edition appeared in 1929 and by that time Walter Jellinek had long been regarded as one of the leading legal scholars. For this fifth edition Walter Jellinek went through the work and added notes and brought the bibliography up to date.

In his authorized biography of Kelsen, R. A. Métall related that Kelsen had studied Jellinek's works with great attention but when he was at Heidelberg, his assessment of Jellinek changed. He attended Jellinek's seminar but did not try to establish any personal contact with his professor and instead devoted himself to his own original work (Métall 1969, pp. 11-12). Métall's account fits with some of Kelsen's own autobiographic writings. In his “Selbstdarstellung” from 1927 there is no mention of Jellinek although he attended the seminar given by Jellinek and Gerhard Anschütz during the winter semester 1907/1908 and the winter semester 1908/1909.⁸ In his “Autobiographie” from 1947 there is a brief mention of Jellinek. Kelsen had been granted a generous travel stipendium which he used to spend his time in Heidelberg. He suggested that he had been granted it not because of his published works but probably because he was the only person to apply for it. He wrote that he used it to accomplish two things: to study with Jellinek who was regarded as the greatest authority in the area of “general doctrine of state” (“allgemeine Staatslehre”) and to complete his “Habilitationsschrift” (Kelsen 2007, pp. 39-40). Kelsen explained that he had no time to go to lectures but he did attend Jellinek's seminar. However, he added that he was not excited by what he heard and he had even less interest in developing a personal connection. Kelsen occasionally accompanied Jellinek home after the seminar and the exchanges were not exactly positive. He complained that Jellinek was rather vain and he encouraged his students to compliment him. In Kelsen's view, Jellinek was a better scholar than a teacher (Kelsen 2007, p. 40). In his impressive biography of Hans Kelsen, Thomas Olechowski provides a fuller and a more objective picture of Kelsen's professor. Olechowski wrote that in the late 1880s, Jellinek was recognized by many scholars in and outside of Austria as that country's leading “expert on public law” (“Öffentlichrechtler”). Since Jellinek had no real hope to gain a professorship in Austria because of antisemitism, he went to Berlin where he “habilitated” in 1889.⁹ After finishing and spending a year at Basel, he moved to Heidelberg. Jens Kersten noted that when Jellinek suddenly died on 11 Jan. 1911 there was a broad national and international “echo” upon hearing the news (Kerstein 2000, p. 30). Olechowski wrote that the seminar that Kelsen attended was famous and he attracted students from all parts of Europe (Olechowski 2018, p. 102). It appears difficult to reconcile the international respect that Jellinek had as scholar and teacher with Kelsen's negative opinion. But is not difficult to assume that Kelsen had a complex relationship to Jellinek: he learned much from him but he was intent on going in own way.¹⁰

KELSEN'S CRITICISM OF JELLINEK IN DER SOZIOLOGISCHE UND DER JURISTISCHE STAATSBEGRIFF

Thomas Olechowski accurately described Kelsen's *Der soziologische und der juristische Staatsbegriff* as a discussion of a series of legal scholars' thinking. However, he devoted a single page to it and mentioned Jellinek in passing (Olechowski 2018, p. 331). This is mentioned only because most commentators on Kelsen tend to ignore it and to minimize Jellinek's role in it.¹¹ Métall in his biography barely mentions Kelsen's book and it is mostly to note that it was reprinted and translated into Japanese. Jellinek was not even mentioned (Métall 1969, pp. 42-43). In his introduction to the version included in *Hans Kelsen Werke* Stanley L. Paulson devotes four pages to Jellinek; however, he spends much of these four pages on Gottlob Frege, Rudolf Carnap, and neo-Kantianism (Paulson 2022a, pp. 76-80; 2022b, pp. 90-94).

Kelsen's critique of Jellinek is found in the third section entitled "Kritischer Beweis der Identität von Staat und Recht" ("Critical Proof for the Identity of State and Law") and has the first subsection "Der Staat als Voraussetzung des Rechts" ("The State as Presupposition of Law"). The first chapter of this subsection in Kapitel 6 is: "Soziallehre vom Staat und Staatsrechtslehre" ("Social Doctrine of the State and the Doctrine of States Law"). The "§20. Die juristische Zwei-Seiten-Theorie (Jellinek)" (§20. The juridical Two-Sides Theory [Jellinek]) and "§21. Der Staat als 'Verband' (sozialer Staatsbegriff) und als 'Korperschaft' oder Rechtssubjekt (juristischer Staatsbegriff) Identisch." (§21. The State as 'Group'[social concept of the state] and as 'legislative body' or legal subject (Juridical Concept of the State) [are] identical") jointly cover 18 pages and both together are devoted to criticizing Jellinek's legal philosophy (Kelsen 1922, pp. 114-132; 2022, pp. 212-232).

Kelsen opened his critique of Jellinek not just by referring to Jellinek's most famous book *Allgemeine Staatslehre*. This book was first published in 1900 and then revised in 1905. After Jellinek's death it went through several more editions. Nor did Kelsen begin with *System der subjektiven öffentlichen Rechte*. Jellinek published this work in 1892 and revised it the same year as he did *Allgemeine Staatslehre*. Instead, Kelsen included *Die Lehre von den Staatenverbindungen* which Jellinek published in 1882. It was this work that earned him the right to teach in Austria. Jellinek did not think it was worth revising but was evidently still proud of it.

Kelsen began §20 by indicating that Jellinek offered a judicial conception of the "Two-Sides-Theory" in comparison with the sociological version given by Simmel's former student Theodor Kistiakowski. Kelsen had admitted to be rather critical of Kistiakowski's account because it was sociological in nature rather than legal. He was also critical because Kistiakowski had relied primarily on neo-Kantian epistemology for distinguishing between the causal and the normative notions of law (Kelsen 1922, pp. 107-110; 2022, pp. 206-208). Kelsen indicated that Jellinek and Kistiakowski shared a similar methodological conception; namely, that "The state is a social construction that has an independent existence separate from law." ("Der Staat ist ein soziales Gebilde, an sich eine vom Recht unabhängige Existenz hat.") (Kelsen 1922, p. 114; 2023, p. 212). If it is viewed as a social doctrine, then its social factor is a "force" ("Macht"). Kelsen cites two passages in *Allgemeine Staatslehre* and one in *Lehre von den Staatenverbindungen*. All three passages indicate that ultimately it is force that guarantees the continued existence of the state (Jellinek 1929, pp. 168, 333; 1882, p. 262). Although Kelsen does not mention it, this is fundamentally Weber's definition of the state as having the sole legitimate possession of physical force. But Kelsen is not interested in the social aspects here; his focus is on Jellinek's legal philosophy. Kelsen praised Jellinek's theory for being a "standard work" and offering the highest scholarly account. But Kelsen insisted that Jellinek's great contribution was not because it was new and groundbreaking; rather, he provided a brilliant formulation of previous explorations. Jellinek had offered an account of the contemporary doctrine of the state as a closed system (Kelsen 1922, p. 114; 2023, p. 213).

Jellinek and others begin from the premise that the state is "one and the same object" ("ein und dasselbe Objekt"). The state is not one object for sociologists and another for jurists; it is the same but is viewed differently by jurists than by sociologists. Hence, the name "Zwei-Seiten" ("Two-Sides"). The jurist is not

concerned about the sociological factors of the state but only the legal ones. Kelsen quotes Jellinek but not from *Allgemeine Staatslehre* but from the *System der subjektiven öffentlichen Rechte*: “How have I to think about the state legally? (“Wie habe ich mir den Staat rechtlich zu denken?”) (Kelsen 1922, p. 115; 2022, p. 213; Jellinek 2011, p. 13). Kelsen noted that Jellinek answered his own question by pointing out that one cannot approach the matter as if there is only one single way to do so. He pointed to Jellinek’s observation that there are two ways to consider a symphony—from a physiological way and from an aesthetic way. The first case has the sound considered from a natural science point of view. There are only sounds to consider on a scale. Later, Jellinek described this as “theoretical knowing” (“theoretischen Erkennens”). The second case has the sound considered from an artistic point of view, or as he contrasts it with theoretical knowing—“aesthetic feeling” (“ästhetischen Empfindens” (Jellinek 2011, p. 15). That means that different people are likely to respond based upon their musical tastes. The first case can be regarded as “objective”, the second case is obviously subjective (Jellinek 2011, pp. 14-15). To put it bluntly, in the first case, there is no “symphony” but only noise; in the second case, there is no “noise”, but a beautiful piece of music—a symphony. Kelsen responded by stating that “The identity of the object of knowledge is determined by the identity of the method of knowledge!” (“Die Identität des Erkenntnis-Objektes ist bedingt durch die Identität der Erkenntnis-Methode!”) (Kelsen 1922, p. 116; 2022, p. 214). Kelsen suggests that Jellinek is “almost entirely correct” (“beinahe ganz richtig”) and quotes Jellinek again: “For the physiological and the juristic observation the symphony does not exist as a constant object in general” (“Für die physiologische und psychologische Betrachtung existiert eine Symphonie als konstantes Objekt überhaupt nicht.”) (Jellinek 2011, p. 14). Kelsen suggested a correction: dropping the “constant” but adding that Jellinek’s dualism of sociological and juridical are problematic. It is problematic because he constantly insists on his principal dualism of “explicative being—and normative ought observation” (“explikativer Seins—und normativer Sollensbetrachtung”) and he constantly warns about a syncretism of both methods (Kelsen 1922, p. 116; 2022, p. 214).

Kelsen maintained that the logical impossibility of this is demonstrated if one considers the “legal properties” (“rechtlichen Eigenschaften”) of something real; that is, something regarded as an object in the sense of a natural thing (Kelsen 1922, p. 116; 2022, p. 214). It is with this paragraph that Kelsen turns his attention away from Jellinek’s *System* to the *Allgemeine Staatslehre*. He points out that Jellinek regards the state in two different ways: as a real sociological entity and as something that is “covered” (“bekleidet”) with a juristic “property” (“Eigenschaft”). Kelsen quotes “The juristic knowledge of the state will not grasp on his real essence” (“Die juristische Erkenntnis des Staates will daher nicht sein reales Wesen erfassen”). Kelsen pauses his citing in order to interject the question regarding how it is even possible to think about this sociologically when what is being discussed is really legality. He then returns to Jellinek’s sentence: “that is, to find a concept in which all *legal properties of the state* can be considered without contradiction.” (“d.h. einen Begriff auffinden, in dem alle *rechtlichen Eigenschaften des Staates* widerspruchlos zu denken sind”) (Jellinek 1929, p. 163; Kelsen 1922, p. 117; 2022, p. 215, Kelsen’s emphasis).

Kelsen insisted that the attempt to regard the state as having a content that has two different concepts; namely, a social one and a legal one, must naturally lead to “the most difficult contradictions and (“schwersten Widersprüchen und Verrenkungen”) (Kelsen 1922, p. 117; 2022, p. 215). He adds that if a “state” is regarded as a “legal concept” (“Rechtsbegriff”) then it can be understood as an object of a legal concept. Kelsen argued that a natural concept is either a concept of nature in general or a concept of some part of nature. Similarly, a legal concept is either a concept of law in general or is a concept of some part of law. However, Kelsen claimed that Jellinek tends to confuse the two, but more importantly, it makes no sense to speak about the “validity” of a natural entity (Kelsen 1922, p. 117; 2022, p. 215).

Kelsen insisted that it is almost inconceivable how Jellinek has built his system on the dualism of “Sein und Sollen”, between the explicative sociology and the normative judicial. Yet, Jellinek appears to overstep that strict division when he insists that “No state is possible without law” (“Kein Staat ist ohne Recht möglich”) (Jellinek 1929, p. 163; Kelsen 1922, p. 118; 2022, p. 215). Moreover, Kelsen continued with Jellinek’s statement “There the law is *essential* to the state, so is a completed knowledge of the state with-

out knowledge about its legal nature is not possible.” (“Da das Recht dem Staate *wesentlich* ist, so ist eine vollendete Erkenntnis des Staates ohne Kenntnis seiner rechtlichen Natur nicht möglich.”) (Jellinek 1929, p. 162; Kelsen 1922, p. 118; 2022, pp. 215-216). Kelsen complained that this passage makes little sense and he continued his criticism by indicating that Jellinek’s claim about law needing to be founded upon “real factual findings” (“reale Tatbestände”). It is problematic to regard this as a necessary substrate for law because, in Kelsen’s view, this conflates the sociological and the natural science concept of law. Kelsen again quotes Jellinek: “The real factual findings (the ‘substrate’ of the legal concept) are not the legal concepts themselves” (“Allein die realen Tatbestände [die das ‘Substrat’ der Rechtsbegriffe sind] sind nicht die Rechtsbegriffe sind.”) to which Kelsen adds “Of course! The real factual findings are also not the sociological concepts themselves!” (“Natürlich! Die realen Tatbestände sind auch nicht die soziologischen Begriffe selbst!”). Kelsen further criticizes Jellinek for making a turn that renders superfluous what he had been saying: “They (the legal concepts) are moreover abstractions” (“Sie [die Rechtsbegriffe] sind vielmehr Abstraktionen”). Kelsen turns to his own ideas and insists “The substrates of legal concepts are accordingly not ‘real factual findings’; but rather, *legal norms*.” (“Die Substrate der Rechtsbegriffe sind somit nicht ‘reale Tatbestände’, sondern *Rechnormen*”). For Kelsen, the state can be the substrate only as the totality of the legal norms. Thus, the state cannot have a real existence because it is not an object but a composite of norms (Jellinek 1929, p. 162; Kelsen 1922, p. 118; 2022, p. 216).

On the basis of this, Kelsen suggests that one must honestly doubt whether Jellinek really understood the notion of norms, the concept of “Sollen” when he keeps talking about reality, thus confusing the kingdom of ought with the realm of is. What is more problematic is that “Jellinek seeks the specific existence of norms, its *validity*, in its *effectiveness*.” (“Jellinek sucht die spezifische Existenz der Normen, ihre *Geltung*, in ihrer *Wirksamkeit*.”) (Kelsen 1922, p. 119; 2022, p. 216). Kelsen insisted that this misunderstanding is bad because it confuses the two types of orders; but what makes it so incomprehensible for Kelsen is that Jellinek had insisted that explanatory/ causal science is different from norms so how can there be any overlap? In particular, Kelsen criticizes Jellinek for thinking his norms are something real, meaning that they have cause and effect like real objects do. Yet, Kelsen points out that Jellinek contends that norms belong to a special world, evidently something between the physical world and the realm of nothingness. This is what Jellinek meant when he wrote of “the world of *legal norms*” (“die Welt der *Rechnormen*”) and when he insisted that norms are not fictions. Kelsen quotes two sentences from Jellinek’s *System*: “The juristic concepts here have no essentialness to an object; the juristic world is a pure world of thought. It is to the world of real occurrences much as the world of aesthetic impressions have to theoretical knowledge. It is, however, a world of abstractions, not [a world] of fictions.” (“Die juristischen Begriffe haben daher keine Wesenheiten zum Objekt, die juristische Welt ist eine reine Gedankenwelt, die zu der Welt des Geschehens sich ähnlich verhält wie die Welt der ästhetischen Empfindung zu der theoretischen Erkenntnis. Sie ist aber eine Welt der Abstraktionen, nicht der Fiktionen.”) (Jellinek 2011, p. 17; Kelsen 1922, pp. 120-121; 2022, p. 217). Having stated this, Jellinek appeared to have muddied this by explaining that fictions are total inventions whereas abstractions are based upon real occurrences. Kelsen objected that rather than keeping this a “pure world of thought” Jellinek insisted that abstractions are tied to the physical world as the substrate. Rather than having the two worlds of “Sein” and “Sollen” remain separate of one another, Jellinek merges the “normative” discipline with the explanatory function of natural science. Kelsen concluded §20 with the claim that Jellinek’s view of the legal life is one that is neither empirical nor real but can be explained as one that is “certainly unthinkable” (“wohl undenkbar”) (Jellinek 2011, pp. 17, 34-35; Kelsen 1922, p. 120; 2022, p. 218).

The focus of §21 is a continuation of Kelsen’s critique of Jellinek but here it is on the notion of the state as an “association” (“Verband”). Before Kelsen criticizes that he returns briefly to Jellinek’s contention that the state is a presupposition of law and that the state has an existence prior to, and independent of, the law. Jellinek’s conception of the state is that it is an object that exists in the real realm of causality and that it can be explained as easily as any other object. In line with this Jellinek contends that the state can be regarded as a sociological entity and that law is based upon an abstraction from that world. Hence, Jellinek contends

that the state is both a sociological structure as well as a realm of norms. Kelsen sums up Jellinek's methodology with the observation that he held that the state could be considered as part of a "causal-scientific social doctrine" ("kausalwissenschaftliche Soziallehre") as well as a form of "legal norms" ("Rechtsnormen"). The state is regarded in the first instance as a "social concept" ("sozialen Begriff") while it is considered as a "legal concept" ("Rechtsbegriff") in the second case (Kelsen 1922, p. 121; 2022, p. 218). In addition, Jellinek contended that the first concept was epistemologically prior to the second concept; hence, the legal concept rested upon the social concept. However, Kelsen insisted that this supposition was problematic because Jellinek consistently maintained that law also belonged to the essence of the state. Kelsen did not quote Jellinek but the likely passage that he had in mind was "As law is essential to the state" ("Da das Recht dem Staate wesentlich ist") (Jellinek 1929, p. 162). Kelsen refers to a second and much later passage, one that is more difficult to locate. It is possible that "It is essential that a state possess a legal order" ("Ist es aber dem Staate wesentlich, eine Rechtsordnung zu besitzen") (Jellinek 1929, p. 477). Kelsen attacks Jellinek's repeated claims about the objective, psychological basis for his legal philosophy and he ridicules his claim that this is an exclusively psychical type (Kelsen 1922, p. 121; 2022, p. 219). Kelsen questions how is it possible for this to be a psychological type and at the same time be an "outer power" and serve as a "relationship of domination" ("Herrschaftsverhältnisse"). Kelsen complained that Jellinek's insistence on order meant "that this unity of order is not *causal*, but is teleological" ("daß diese Ordneinheit keine *kausale*, sondern eine teleologische ist.") (Kelsen 1922, p. 122; 2022, p. 219).

Kelsen maintained that in making order into something teleological Jellinek broke with his fundamental methodological principles. What Kelsen meant was that Jellinek dispensed with the opposition between the explanative and the normative that he had so carefully constructed. Rather than insisting that there was a sociological concept to explain the state and law, Jellinek replaced it with a normative and teleological one (Kelsen 1922, pp. 219, 122). Kelsen quotes three passages: one from the *Allgemeine Staatslehre* and two from the *System der subjektiven öffentlichen Rechte*. All three place the notion of an "unity" ("Einheit") in the teleological category (Jellinek 1929, p. 178; 2011, pp. 25-26). Kelsen draws from this the conclusion that "the 'juridical' concept of the state is a teleological unity!" ("der 'juristische' Staatsbegriff ist eine teleologische Einheit!") (Kelsen 1922, p. 122; 2022, p. 220). Given this, it makes little sense to continue to speak of a difference between a sociological and a juridical concept of the state. Instead, it would make more sense to speak of the two concepts more along the lines of two different orders which have two different purposes—like the state and the church. Kelsen insisted that they are two different organizations which regard one and the same human being from different points of view (Kelsen 1922, p. 122; 2022, p. 220).

Kelsen maintained that there is no real doubt that the order that Jellinek is referring to is nothing more than the "unity of the state" ("Einheit des Staates") and this is a "legal order" ("Rechtsordnung") that provides security because the "law is essential to the state" ("dem Staat sei das Recht wesentlich") (Kelsen 1922, p. 122; 2022, p. 220). Furthermore the "legal order" ("Rechtsordnung") and the "legal purpose" ("Rechtzweck") are identical. But this moves the notion from the "objective" realm of the causal world to the "subjective" realm of ideas and ideals. As much as Jellinek insisted on the distinction between "Sein" and "Sollen", he basically undercut the "psychological will (being)" ("psychologischen Wollen [Sein]") and that left only the normative "Sollen" (Kelsen 1922, p. 123; 2022, p. 220). Kelsen quotes Jellinek: "also the unity of the state is essentially [a] teleological unity" ("Auch die Einheit des Staates ist wesentlich teleologische Einheit") (Jellinek 1929, p. 179; Kelsen 1922, pp. 123, 220). Although Jellinek goes on to talk in terms of many purposes, Kelsen suggests that it meant something slightly different than what Jellinek seemed to have meant. On the one hand, Jellinek appeared to think of the purpose as subjective when he maintained that the more intensive the purpose, the stronger is the unity. But on the other hand, Jellinek thinks that this strengthens the organization. In Kelsen's opinion, this is not only confusing; it also has limited value for practical purposes. It has little theoretical value because it does not provide the least amount of value for either practical life or for practical law (Kelsen 1922, p. 124; 2022, p. 221). Kelsen explained that the notion that a number of individuals who actually strive for the shared goal can be understood only under the "point of view of theoretical knowledge" ("Geschichtspunkt theoretischer Erkenntnis") and the no-

tion of the unity can be understood only as a concept in the “*explanatory social psychology*” (“*explikativen Sozialpsychologie*”) (Kelsen 1922, p. 124; 2022, p. 222). Kelsen has particularly harsh words for Jellinek’s penchant for psychology in part because it thinks in terms of causality so it is like considering how plants grow under certain light conditions. But in this case, it is like trying to determine the “teleological purpose of consciousness” (“teleologischen Zweckbewußtsein”). Worse, Kelsen condemns Jellinek for thinking that this is a matter of studying how legal processes work—as if they are matters of how the world runs. Kelsen accuses Jellinek of having an ambiguous notion of the state: as a social reality and as a mental construct. Kelsen contends this duality is a consequence of Jellinek’s “theoretical knowledge unclarity” (“*erkenntnis-theoretischen Unklarheit*”) (Kelsen 1922, p. 125; 2022, p. 222).

Towards the end of this almost four-page paragraph Kelsen offers three quotations from one page from Jellinek’s *System der subjektiven öffentlichen Rechte*. Kelsen’s point is that there is a contradiction between what Jellinek writes here and what he wrote in the *Allgemeine Staatslehre*. Before turning to Kelsen’s criticisms, it is crucial to point out a few problems with Kelsen’s citations. In the first one, Kelsen not only begins the quotation with the wrong word but he also mangles another word in this quotation. Kelsen’s citation is as follows “Für die vor keiner Konsequenz zurückschreckende” whereas Jellinek’s was “Denn für die vor keiner Konsequenz zurückscheuende” (Jellinek 2011, p. 27; Kelsen 1922, p. 125; 2022, p. 222). Although these two changes may appear minor, they are further indications of either Kelsen being careless or his lack of concern about accuracy. The second option gains more credence with Kelsen’s second quotation: “wird die staatliche Einheit nicht vorhanden sein” and that is because it was Kelsen who placed the emphasis and not Jellinek. The third quotation is a very lengthy fifty word and six commas sentence. Kelsen criticized it not just for its ambiguity but because Jellinek insisted that the state is both something that does not yet exist but is still a “sociological reality” (“soziologische Realität”) (Jellinek 2011, p. 27; Kelsen 1922, pp. 125-126; 2022, p. 223). Kelsen pointed out that this is not the only contradiction in Jellinek’s legal doctrine; there is also the problem regarding the essence of the state. Either it is a normative juridical concept, meaning that “the state is an unity of order” (“*der Staat eine Ordnungseinheit ist*”) or else it is a sociological concept of “domination” (“*Herrschaft*”). Kelsen criticizes Jellinek’s assertions about dominance: on what grounds does Jellinek’s claim that an association’s unity is based upon a unity of wills and that is provided by the need for sharing the same goal. In addition, Kelsen claimed that there is a tension in Jellinek’s claims. Jellinek suggested that dominance is not prior to the state and that without dominance the state cannot exist. Moreover, Kelsen asks what a “*Herrschaftverhältniss*” even is. Is it a condition of ruling or is it a ruling relationship—Jellinek failed to clarify. Instead, Kelsen believed that Jellinek was engaged in hypostasizing; especially when he wrote about the “objective component of the state” (“*objektive Bestandteile des Staates*”) (Jellinek 1929, p. 177; Kelsen 1922, p. 126; 2022, p. 224). Kelsen focuses on the tension between the two ideas regarding the state. Previously, Jellinek had insisted that the state was an association in which its members shared the same goal; that is, “order” (“*Ordnung*”). Now, however, Kelsen points to Jellinek’s insistence that the associations do not share the same goal but that the state has authority and domination over its members. Kelsen quotes several passages from the *Allgemeine Staatslehre* but the most important one is “The state has the power of domination” (“*Der Staat hat Herrschaftengewalt*”). The second quotation is almost as critical as it explains the first: “Domination means the capacity to have one’s own will unconditionally overcome another’s will” (“*Herrschen heißt aber, die Fähigkeit haben, seinen Willen anderen Willen unbeding*”) (Jellinek 1929, p. 177; Kelsen 1922, p. 127; 2022, p. 224). Kelsen pays considerable attention to Jellinek’s conceptions of the state and its power of domination. The term “conception” is in the plural because Kelsen contends that Jellinek shifts the notion of “*Herrschaft*” from one conception to another. Kelsen quotes: “The state with the original power of domination the furnished associational unity of established humans.” (“*Der Staat ist die mit ursprünglicher Herrschermacht ausgerüstete Verbandseinheit seßhafter Menschen.*”) (Jellinek 1929, p. 177; Kelsen 1922, p. 127; 2022, p. 224). Kelsen argues that previously Jellinek had maintained that the state was a “unity of domination-*relations*” (“*Einheit von Herrschaftsverhältnissen*”) whereas it has been altered to the claim that the state is “now suddenly a ruler!” (“*jetzt plötzlich ein Herrscher!*”). Kelsen insists that Jellinek must not have been aware of this quantum leap

because if he had, he would have corrected this change. What Jellinek has done has been to change from a conceptual ideal to a “real, will-possessing, powerful entity” (“realen, willensbegabten, machtvollen Wesen”) (Kelsen 1922, p. 127; 2022, p. 224). Moreover, Jellinek has altered his conception of the state from a teleological unity to one of sheer power of one’s capacity to force another to submit to one’s will. Although Kelsen does not say it, what Jellinek has done is to move from the circle of law into the realm of politics. What he does say is that Jellinek has shifted from the claim “no one *should* steal” (“niemand *soll* stehlen”) to the unconditional power of the state (Kelsen 1922, p. 128; 2022, p. 225). To put it differently, Jellinek now claims that it is not law that instructs, but it is power that compels. This is no longer the realm of “should” but is the world of “must”—not a place for ideas and ideals but a world of being and force. Kelsen adds that Jellinek’s insistence on the “origins” of this power just complicates the issue. He claims that Jellinek’s attempts to ground the notion of law/power in its origins is nothing more than to reason that it is based in the state’s sovereignty (Kelsen 1922, p. 129; 2022, p. 226). It is odd that Kelsen did not expand upon the notion of sovereignty because it was not only a major topic of discussion during this time but it also was one of his favorite subjects. Regardless, he returned to his critique of Jellinek’s “social” concept of the state. He also continued his claim that Jellinek had “personified” the state by making it into the “Herrscher” and he undercut the state’s claim to law by concentrating on force. In Kelsen’s opinion, this emphasis on the “social” concept of the state diminishes the juridical concept of the state. Kelsen further objected that Jellinek was unable to minimize this problem with the insistence that the state is somehow the picture of law. Kelsen takes particular aim at Jellinek’s claim that the state must be regarded as a “legal subject” (“Rechtssubjekt”) and as a “state person” (“staatsperson”) (Jellinek 1929, p. 183; Kelsen 1922, pp. 129-130; 2022, p. 226). Kelsen admits that Jellinek writes about the state as having rights and duties but he suggests that this talk does not obscure the fact that Jellinek’s real concern is not so much law and rights as its authority and power. Kelsen insisted that the “legal person” is nothing other than the expression of personification for the unity of the legal order.” (“Rechtsperson—nichts anderes als der personifikative Ausdruck für die Einheit der Rechtsordnung ist”) (Kelsen 1922, p. 130; 2022, p. 227). But Kelsen continues to concentrate on Jellinek’s social notion of the state. He allows that Jellinek continued to view the object as having the two sides of social and juridical but Kelsen insisted that Jellinek’s discussion mostly centered on the former and that the latter was neither that important nor was it really relevant. To support his claim Kelsen again quotes from the *Allgemeine Staatslehre*: “As a legal concept the state is connected to the original power of authority derived from a developed body of an established people.” (“Als Rechtsbegriff ist der Staat demnach die mit ursprünglicher Herrschaftsmacht ausgerüstete Körperschaft eines Seßhaften Volkes.”) (Jellinek 1929, p. 183; Kelsen 1922, p. 130; 2022, p. 227). Of course, this definition raises a number of problems. Kelsen points to one problem in that Jellinek is promoting a sociological notion with his notion of the state as an association while he is also promoting a legal concept with the emphasis on a legal body. A further problem is again Jellinek’s teleology—that the state is constituted to guarantee order. An additional problem is Jellinek’s insistence on the unity of wills needed to promote and preserve order. Kelsen points out that despite Jellinek’s claim, the sociological and the legal are two totally different ways of looking at two different things: one social and one legal. The first one is psychological and determined by ends and goals; the second is legal and is concerned with rules and laws (Kelsen 1922, p. 130; 2022, p. 227).

Kelsen further objects to Jellinek’s preoccupation with the development of the state and how this is somehow based upon a “becoming” (“Werden”) of some “objective” reality (“objektive” Realität). What concerns Kelsen more is Jellinek’s attempt to show that the development of the state “falls outside the legal area” (“außerhalb des Rechtsgebiets fällt”) (Jellinek 1929, p. 182; Kelsen 1922, p. 131; 2022, p. 238). Yet, Jellinek also wants to maintain that the state must be something that is independent of “all teleological synthesis of consciousness” (“aller teleologischen Bewußtseinsynthese”). Kelsen argues that all of this is in contradiction to what Jellinek frequently maintained. He points to a sentence in the *Allgemeine Staatslehre* where Jellinek wrote “that the state’s order itself is [a] legal order” (“daß die Staatsordnung selbst Rechtsordnung sei”). Kelsen notes that in the *Lehre von den Staatenverbindungen* Jellinek had insisted “The most essential moment in the concept of the state is that it is *order*.” (“Das wesentlichste (!) Moment

im Begriffe des Staates ist, daß der *Ordnung* ist”). The exclamation point and the italics are Kelsen’s. It is unclear why Kelsen did not quote the rest of Jellinek’s sentence: “and an order before the order is a contradiction in itself.” (“und eine Ordnung vor der Ordnung ist ein Widerspruch in sich selbst.”) (Jellinek 1929, p. 182; 1882, p. 266; Kelsen 1922, p. 131; 2022, p. 228). This is surprising since Kelsen points out that Jellinek contended that the constitution of a state was needed prior to the establishment of the state itself. That is because Jellinek believed that the constitution was the foundation of the state. Kelsen objected to this because this meant that the foundation of the state was not something legal but was something factual. Kelsen continues: “Thus the state as factum and the state’s order as factum are to be distinguished. And yet they are again identical.” (“Es sind also Staat als Faktum und Staatsordnung als Faktum zu scheiden. Und doch sind wieder beide identisch.”) (Kelsen 1922, p. 132; 2022, p. 229).

Kelsen concludes the second section (§21) by criticizing Jellinek’s attempt to combine the state with law. He complained in particular of Jellinek’s dualism of sociological and juridical concepts to show that the state is fundamentally an “order” (“Ordnung”). This is, according to Kelsen, nothing less than domination (“Herrschen”) which is when the ruler sets his will against the will of the other. As much as Jellinek might have wished this to be as innocuous as it sounds, Kelsen clarifies that it is not because what it is, is really “forcing” (“zwingen”). Although Kelsen did not mention it, Jellinek’s concept of “Herrschaft” is not really any different from that of Max Weber. That means that the state is not a system of norms; but rather, the entity that has legitimate possession of force.¹²

CONCLUDING COMMENTS

Kelsen devoted just under twenty pages to his criticism of Jellinek. He cited three of Jellinek’s works but one was less relevant. He focused on Jellinek’s two major writings: *System des subjektiven öffentlichen Recht* and *Allgemeine Staatslehre*. The first book is 366 pages in length and the second one contained more than 800. From the first book, Kelsen cited from seven pages; from the second, he cited twenty pages. That means that he was quoting or citing from twenty-seven pages out of more than 1150.¹³ But Kelsen did more than just let Jellinek occasionally speak, he also altered Jellinek’s voice. In two instances, Kelsen eliminated Jellinek’s emphasis (Kelsen 2022, p. 224 notes 422, 227, 430). However, in fourteen cases he emphasized words and phrases that Jellinek had not.¹⁴ This may suggest that Kelsen was less concerned with a scholarly critique of his former professor’s legal philosophy than he was in providing a polemical attack—an attack that was intended to dislodge the great master from his esteemed position in the pantheon of legal scholars. Kelsen’s attacks might not have been very polite, but they were certainly political. That does not render them unworthy of study; if anything, they should draw more interest and more scrutiny. Kelsen criticized Jellinek’s *Allgemeine Staatslehre* not only because he found it contained flaws; he attacked it to make way for his own *Allegemeine Staatslehre* that he published three years after *Der soziologische und der juristische Staatsbegriff*. Kelsen’s 1922 book did not achieve the fame that some of his later books did, but it is a book worth reading (Adair-Toteff 2023). It is especially worth reading §20 and §21 because these two sections contain the criticism of one of the legendary philosophers of law by another one of the leading legal theorists. It is nothing less than Kelsen and Jellinek on the meaning and purpose of the “sociology of the state.”¹⁵

NOTES

- 1 The following essay does not address any specific point that Turner makes in *Making Democracy More Democratic*; but it stems from Turner's long-standing interest in Kelsen's legal thinking. It is my contention that one cannot understand Turner's conception of democracy without having some idea of his ideas on Kelsen and Weber. It is in this sense that this essay is a contribution to Turner's *Making Democracy More Democratic*.
- 2 See Olechowski 2020, pp. 936-939. Métall lists 150 for this period, from number 43 to number 194. See Métall 1969, pp. 126-133.
- 3 Although it never achieved the prominence nor the notoriety that his later *Reine Rechtslehre* (1934) did.
- 4 While Kelsen thought that Stammler's philosophy of law was misguided, he did not issue the blistering critiques that Weber did. See Adair-Toteff 2014.
- 5 These include Bobbio 1987; Treiber 2016; Colliot-Thélène 2016; Anter 2000, and Breuer 2004. There is also some discussion of Weber and Jellinek in Adair-Toteff 2022b. One of the few works which contrasts Kelsen and Jellinek is Donhauser 2016. However, he concentrates primarily on Kelsen's *Pure Theory of Law*. Hans-Joachim Koch takes up Kelsen's criticisms of Jellinek but like Donhauser, he ignores Kelsen's 1922 work. Koch 2000, pp. 377-384. Similarly, Stefan Koriath briefly discussed Jellinek but it was only to provide some context because his focus was on the Smend/Kelsen controversy (Koriath 2005, pp. 320-322).
- 6 Turner and Mazur 2023, p. xiv. Turner mentions Jellinek in a note in the chapter "The Rule of Law Deflated" in which Turner suggests that Weber borrowed the term "ideal type" from Jellinek. Turner and Mazur 2023, p. 175, note 4. This has been a matter of debate but cannot be addressed here. That chapter also includes a lengthy quotation from an English translation of *Der soziologische und der juristische Staatsbegriff*. Turner and Mazur 2023: 163. The passage is found in Kelsen 1922, p. 187; 2022, pp. 282-283.
- 7 Keller 1995, pp. 323-324. Not all scholars agree with this, Kersten points out that Jellinek's work on human rights remains influential and he insists that Jellinek's *System der subjektiven öffentlichen Rechte* was Jellinek's first internationally recognized juristic work. There is little doubt that it is also a "classic" and there is no doubt that *System* was Jellinek's favorite book. Kersten 2011, pp. 8, 15, 16, 23.
- 8 See Kelsen 2007, p. 20, footnote 3 and also 39, note 57.
- 9 In his "Georg Jellineks System—Eine Einleitung" Jens Kersten discusses Jellinek's reputation in the 1880s and how the Austrian university authorities discriminated against him, finally compelling him to leave Austria for Germany (Kersten 2011, pp. 11-12).
- 10 See Olechowski 2018, pp. 109-11 and also see Kersten 2000, p. 87. Kersten pointed to Jellinek's international reputation and to the fact that Jellinek's students referred to him with the superlative "Meister." Even Jellinek's scholarly opponents recognized his immense academic fame (Kersten 2000, pp. 24-25).
- 11 In his sixty page "Editorial Report" devoted to *Der soziologische und der juristische Staatsbegriff* Rodrigo Cadore noted that by a wide margin Jellinek is the most cited author in the entire work. Yet, he devoted less than a full page to discussing Kelsen's criticism of Jellinek (Cadore 2022, p. 545, note 279).
- 12 The state as considered from the sociological point of view is a political body and it is defined not by its content but by what it does. What it does is to maintain order because it has the "*monopoly of legitimate physical force*" ("*Monopol legitimer physischer Gewaltsamkeit*") (Weber 1994, pp. 158-159).
- 13 If the 330 pages of *Die Lehre von den Staatenverbindungen* are included then the total number of pages approaches 1500.
- 14 Kelsen 2022, pp. 214 n.387, 215 n.391, 216 n.383, 394, 217 n.398, 218 n.401, 402, 219 n.405, 220 n.409, 221 n.411, 414, 222 n.415, 223 n.418, 228 n.436.
- 15 Kelsen was not content to keep the sociological and the juridical separate; he wanted to prove that the law did not need a theological foundation. Moreover, he wanted to show that a pure theory of law provides "*a doctrine of the state—without a state*" ("*eine Staatslehre—ohne Staat*") (Kelsen 1922, p. 283; 2022, p. 458).

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