

Developments

Review Essay – Erich K. Before the Law: Reflections on Degenhardt's Study of Erich Kaufmann

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Book Review of Frank Degenhardt, *Zwischen Machtstaat und Völkerbund. Erich Kaufmann (1880-1972)*. Baden-Baden: Nomos, 2008, pp. 244. Price: 54,- €

ABSTRACT:

This article is a review-essay of Frank Degenhardt's *Zwischen Machtstaat und Völkerbund. Erich Kaufmann (1880-1972)*, published in 2008. While this review discusses Degenhardt's achievements, it pays much attention to the different academic contexts this research implies: On the one hand this review-essay contextualizes Degenhardt's own research endeavors, and discusses how *Zwischen Machtstaat und Völkerbund* is part and parcel of the growing historical analysis in international law both in Germany and elsewhere. On the other hand, it pays attention to Erich Kaufmann's historical context both on a personal and professional level. Furthermore, this review-essay examines Degenhardt's book dedicated to Kaufmann's contributions to international law in light of Kaufmann's Jewish German identity that was a lifelong *Leitmotiv* reflected both in his theoretical and practical work.

A. Introduction

In his novel *The Trial* and (especially) in his short parable, *Before the Law*, Franz Kafka, like Erich Kaufmann a lawyer educated in the German-language legal tradition, struggles with the tangibility, limitations and accessibility of the law using as his literary device a famous parable.¹ This parable features two nameless

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¹ *Vor dem Gesetz*, (Before the Law) originally titled *Legende von dem Türhüter* ("Legend of the Doorkeeper) was first published in 1915. (A translation of *vor dem Gesetz* by Ian Johnston of Malaspina University-College, Nanaimo, BC, can be found in the following website: <https://records.viu.ca/~Johnstoi/kafka/beforethelaw.htm>) While this parable is also told to Josef K., the main protagonist of *The Trial*, by a priest who is also the prison chaplain, it was published originally

protagonists, a *Mann vom Lande* (man from the country) and an authoritative gatekeeper with a long black beard and pointed nose who denies the *Mann vom Lande* entry to the Gates to the Law.² The gatekeeper explains to the *Mann vom Lande* that he may enter, but not now (“*jetzt aber nicht*”), and that in any case this gate is only the first of many. Awaiting his admission, and despite his numerous attempts to convince and even bribe the gatekeeper, the *Mann vom Lande* sits before the Gates to the Law for the rest of his life. Shortly before his death, the gatekeeper reveals that this Gate to the Law was designated for him alone and now upon his death it will remain closed to posterity.³

Some scholars have suggested that law, for Kafka, stands for the space in which the meaning of human existence can be found, if only because the law is the highest authority to govern our lives.⁴ While the inaccessibility of the law could indicate the inherent futility of such quests, the commanding gatekeeper could be read as

twice without any reference to *The Trial*. Kafka's diary entry of 13 December 1914 disclosed his wish (to Max Brod) to publish it as a part of *The Trial*. Arguably, this parable seems to represent Kafka's view of the human condition in general. (See Harmut Binder, *Parable as Problem: Formal Aspects of Kafka's Before the Law*, 10 JOURNAL OF THE KAFKA SOCIETY OF AMERICA 26 (1986). For more on Kafka's relationship to the tangibility of the law see Jacques Derrida and Gil Anidjar, ACTS OF RELIGION (2002), at 172; Erwin R Steinberg, *Kafka's Before the Law—A Reflection of Fear of Marriage: And Corroborating Language Patterns in the Diaries*, 13 JOURNAL OF MODERN LITERATURE 129 (1986).

² While a *Mann vom Lande* might refer to a rural simpleton, or “*am-ha'aretz*” in Hebrew, the protagonists in both stories, *The Trial* and *Before the Law* are extremely Kafkaesque in their characteristics. This refers to the impossible and absurd, the irresolvable paradoxes that are destined to remain a permanent feature of Kafka's figures. Given that “Kafka's fiction describes a fundamentally post-enlightened world in which the circumscription of a finite, digestible body of knowledge has become impossible ... an additional meaning of the word ‘Kafkaesque’ can also be the impenetrability of meaning as such, the inability to gain an overview, the absence of stable definitions – the hallmark of what has come to be called the ‘postmodern condition.’” See A FRANZ KAFKA ENCYCLOPEDIA (Richard T. Gray et al., eds, 2005), xliv, 288-289.

³ Clearly, this story is far from being simple or even resolved by Josef K.'s own interpretation based on the concepts of justice and injustice. The reader is purposely left with many unsolved questions. For instance, what are these nameless protagonists meant to signify? Why was the *Mann vom Lande* deferred admittance, especially if these gates were made especially for him? What is the law and why is it gated? More specifically, what does the law mean here for both protagonists (Josef K. and the *Mann vom Lande*), the reader but also to Franz Kafka himself?

⁴ John Sandford, *Kafka as Myth-Maker: Some Approaches to ‘Vor dem Gesetz’*, 29 GERMAN LIFE AND LETTERS (1975), at 137. An interesting interpretation of Kafka's understanding of the law in general and this story more specifically is the way Slavoj Žižek distinguishes between the *Jouissance* (enjoyment) in Jewish legal traditions versus the Christian ones. Žižek uses Kafka's narratives of the law to argue that in the Jewish tradition the enjoyment of the law originates from the “‘senseless’ detailed hairsplitting which, in precise contrast to the Western tradition of metaphorical-gnositic reading, undermines the obvious meaning not by endeavoring to discern beneath it layers of ‘deeper’ analogical meanings, but by insisting on a too-close, too literal reading (‘the man from the country was never ordered to come there in the first place.’)” See Slavoj Žižek, *THE PLAGUE OF FANTASIES* (1997), 47-48.

representing the ultimate excuse onto which we project our own shortcomings and failures. After all, it cannot be only a strange-looking gatekeeper that has the power to paralyze human desire and to prevent it from attaining meaning and enlightenment. According to Kafka, the void that marks the modern condition is expressed in our inability even to admit our “primitive” desire to reach unity with the mystic law.⁵ It might also be argued that if this mystic law stands in the way of wisdom, values and meaning, perhaps the law represents the definitive gate, or access-point to God.⁶ In order to understand Kafka’s desires and yearnings as well as the logic of the law, it is necessary to put Kafka’s modern condition in the context of his position as a 20th century Jewish German-speaking lawyer.

Erich Kaufmann (1880-1972), a contemporary of Kafka, was one of the most influential legal scholars in German public law both during the interwar era and again after 1945, when he began to be acclaimed as the “*Doyen des Völkerrechts*” (the ‘doyen’ of Public International Law).⁷ In contrast to Kafka’s open and self-conscious confrontations with modernity, Kaufmann attempted to escape his Jewish/German condition by first negating and then undoing and/or re-creating his own identity.⁸ Given that international legal discipline (i.e. its knowledge) is socially constructed, scholars inscribe their own specific social sphere in over-arching categorical debates.⁹ Thus, Kaufmann’s struggles with his identity are necessarily reflected in

⁵ This is made clearer in the “Cathedral” in the parable “Before the Law.” See also Walter Herbert Sokel, *THE MYTH OF POWER AND THE SELF: ESSAYS ON FRANZ KAFKA* (2002), 54-55.

⁶ The difference between this “search for God through law” and the universalistic aspirations inherent to law in general is discussed in further detail in Reut Yael Paz, *A GATEWAY BETWEEN A DISTANT GOD & A CRUEL WORLD: THE CONTRIBUTION OF 20TH CENTURY JEWISH GERMAN SPEAKING SCHOLARS HANS KELSEN, HANS J. MORGENTHAU, HERSCH LAUTERPACHT AND ERICH KAUFMANN TO INTERNATIONAL LAW* (2010, *forthcoming*).

⁷ Quoted by Frank Degenhardt from an article by R. Stödter in der *Wochenzeitung* (Weekly) “DIE ZEIT” dedicated to Erich Kaufmann on his 70th birthday on August 21, 1950. (See FRANK DEGENHARDT, *ZWISCHEN MACHTSTAAT UND VÖLKERBUND. ERICH KAUFMANN (1880-1972)* (2008) at 3.) (Hereinafter *ZWISCHEN MACHTSTAAT UND VÖLKERBUND*)

⁸ For more on Kafka’s self-reflective struggles with his racial identity, masculinity and modernity, see Sander L. Gilman, *Kafka wept*, 1 *MODERNISM/MODERNITY* (1994) 17-37.

⁹ Sarasin describes this as “*Eigenlogik*,” (intrinsic-logic). Accordingly, all symbols expressed through language and discourse depend on the way the individual “writes himself/herself in”. Through the structures of “objective knowledge” the individual scholar organizes, first and foremost, his/her own personal experiences and perceptions. The subject however, never loses his or her personal identity in these “objective” structures. (See PHILIP SARASIN, *GESCHICHTSWISSENSCHAFT UND DISKURSANALYSE* (2003) 10-60 at 50. See also Philip Sarasin, *Subjekte, Diskurse, Körper. Überlegungen zu einer diskursanalytischen Kulturgeschichte* in *KULTURGESCHICHTE HEUTE*, 16 (Wolfgang Hardtwig and Hans-Ulrich Wehler eds.) *GESCHICHTE UND GESELLSCHAFT (A Supplement)* (1996) 131-164.)

his legal approach and *situationality*.¹⁰ His confessed craving to return to the “primitive” circumstance that implies an automatic and absolute harmonization with the spirituality of the law suggests a deeper and more personal desire: to be submerged and identified with the German law. The result is tragic: Kaufmann turned into a Kafkaesque figure who spent his entire life attempting to harmonize with the (German public) law not only before but also during and after Hitler became Reichs-Chancellor in 1933.

B. Between Judaism and Junkerism

Frank Degenhardt, a former doctoral graduate student at the Johann Wolfgang Goethe-University of Frankfurt, Faculty of Law and fellow at the Max-Planck-Institute for European Legal History in Frankfurt, begins his book on Kaufmann, *Zwischen Machtstaat und Völkerbund. Erich Kaufmann (1880-1972)*, with the description of Kaufmann by the US military Government Special Branch Records in 1949, which labeled him “a specimen of the Jewish Junker”.¹¹ There is an ironic twist in the very grouping of Judaism together with Junkerism (Junkers were the aristocratic members of the landed nobility of Prussia and eastern Germany).¹²

¹⁰ Speaking of *Situationality* assumes that the social characteristics of the people involved in each instance determine its outcome at least as much as historically socially based legal principles, rules, doctrines, interpretations etc. “[T]he situation comprises the interplay between the social, biological, cultural, etc. constraints on the human freedom, the effort towards objective justice, and self expression, and the diverse potentials to manage the maximum amount of freedom from these constraints.” (OUTI KORHONEN, *INTERNATIONAL LAW SITUATED: AN ANALYSIS OF THE LAWYER’S STANCE TOWARDS CULTURE, HISTORY AND COMMUNITY* (2000) at 8.)

¹¹ These conclusive words used by the rapporteur to characterize Erich Kaufmann in 1949 are quoted in *ZWISCHEN MACHISTAAT UND VÖLKERBUND*, at 1.

¹² Albert S. Lindemann has convincingly pointed to the dichotomous contradiction between the Prussian Junkers and the Jews: while Prussian Jews were overwhelmingly middle-class and liberals who held intellectuals in esteem, the Junkers were known to be suspicious of intellectuals, especially liberal ones; “Junker wealth was based in the land; Jewish wealth lay in commerce, banking and industry. Junker social prestige derived from lineage and ancestry; Jews gained social prestige in German society through personal accomplishment, usually in professional excellence or through wealth accumulated in business. Jewish style was lively, verbal; Junkers were reserved taciturn.” (Albert S. Lindemann, *Esau’ Tears: Modern Anti-Semitism and the Rise of the Jews* (2000), at 112.) Similarly, Lamar Cecil describes the Junkers as follows: “To outsiders, the Prussian nobility appeared arrogant boors, ladies and gentlemen of unrelieved monotony, hopelessly deficient in chic, hostile to intellectuality, but enthralled by genealogical and ceremonial minutiae; jealous, pedantic, quarrelsome, rigidly self-centered and fearfully tiresome. ... And no one seemed to them so irremediably bourgeois, so grotesquely alien as the Jews.” This “tightly controlled area by the nobility” was, however, a space where the Jews had distinct ambitions to enter, but only superficially successful in doing so. (Lamar Cecil, *Jew and Junker in Imperial Berlin*. 20 (1) *THE LEO BAECK INSTITUTE YEARBOOK* (1975) 47-58) In a nutshell and as Frederic Austin Ogg expressed it: “if Prussia ruled Germany, the Junkers ruled Prussia, and through it the Empire itself.” See *FREDERIC A. OGG, THE GOVERNMENT OF EUROPE* (1920) at 681.

Degenhardt's preference to begin his research with this description of Kaufmann is understandable: from the little that can be read from the scant biographical information Kaufmann left behind it seems that his lifespan embodies the contradictory desire of rejecting his Jewish background while aspiring to become a Prussian Junker.¹³ Approaching this tension from his legal contributions reveals a similar void: Kaufmann did not leave much material to more fully illustrate and explain the legal and political inclinations, which led him to construct his unique theoretical position. This position can be depicted as having been based simultaneously on ardent Prussian conservatism, vigorous monarchism (transformed after 1919 into "sensible republicanism"¹⁴) and vehement criticism of Western Liberalism, in particular as it found, in Kaufmann's eyes, expression in the political, economic and legal culture of the Weimar Republic.¹⁵ Degenhardt points to the contradiction of Kaufmann's rise of fame despite (but perhaps because of) this exceptional and isolated position: Kaufmann became not only one of the most prominent *Staatsrechtler* (specialist in public law) and protagonists of the so-called "*Geisteswissenschaftliche Richtung*" (humanistically-inclined science), but also a hugely successful international legal practitioner, representing Germany, Austria and the Free City of Danzig at the Permanent Court of International Justice. Although Degenhardt assures the reader from the start, that his research cannot and will not resolve this paradox,¹⁶ his book on the subject constitutes an important step towards our understanding of this particular constellation.

¹³ Evidence for this desire is detected mostly from Kaufmann's military record mentioned in more detail below. For more on Kaufmann's "closeted" Jewish background see Reut Yael Paz, A GATEWAY BETWEEN A DISTANT GOD & A CRUEL WORLD *supra* note 6.

¹⁴ To identify Kaufmann as a "Vernunftrepublikaner" Degenhardt relies on KLAUS RENNERT, DIE „GEISTESWISSENSCHAFTLICHE RICHTUNG“ IN DER WEIMARER REPUBLIK: UNTERSUCHUNGEN ZU ERICH KAUFMANN, GÜNTER HOLSTEIN U. RUDOLF SMEND (1987), as well as MICHAEL STOLLEIS, GESCHICHTE DES ÖFFENTLICHEN RECHTS IN DEUTSCHLAND 1914-1945 (1999) at 175. (The English translation is Michael Stolleis, A HISTORY OF PUBLIC LAW IN GERMANY 1914-1945, (THOMAS Dunlap trans.) (2004). See more in ZWISCHEN MACHTSTAAT UND VÖLKERBUND.

¹⁵ As Martti Koskenniemi formulates it: "Though as legal theorist, Kaufmann was a determined enemy of the liberal rationalism represented by most German internationalists, this by no means classed him among the "deniers" ... He was not, unlike Kelsen, a friend of parliamentary democracy and held the Weimar constitution a *Lebensfremd* abstraction, pieced together from French and English sources and unrespectful of German legal traditions." See Martti KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS (2001) at 250. (Hereinafter THE GENTLE CIVILIZER)

¹⁶ "Die vorliegende Untersuchung will und kann diese Polarität in der öffentlichen Wahrnehmung nicht auflösen. Schließlich war die Polarisierung von Kaufmann selbst erwünscht und wesentliches Stilmittel seiner staats- wie völkerrechtlichen Arbeiten." (The following research will not and cannot solve the polarity in this public perception. After all, Kaufmann himself welcomed this polarisation and used it as a vital styling-element of his work in public and international law.), see ZWISCHEN MACHTSTAAT UND VÖLKERBUND, at 2

This book grew out of Degenhardt's PhD thesis, written under the supervision of Michael Stolleis, the former Director at the Max Planck Institute in Frankfurt, and Stefan Kadelbach, a professor of public international law at the Goethe-University in Frankfurt, as part of a comprehensive Legal History Project conducted by the *Max-Planck-Society* and the *Deutsche Forschungsgemeinschaft* (German Research Council) on the History of Public International Law between the *Kaiserreich* and National Socialism ("*Wissenschaftsgeschichte des Völkerrechts zwischen Kaiserreich und Nationalsozialismus*"). This book is a part of the series of monographs recently published as a result of this project.¹⁷ Historical analysis in international law with the aim of contextualizing and defining the profession against other legal traditions and/or politics has over the years and significantly driven by the Frankfurt project, gained importance both within and outside the German legal scholarship.¹⁸ As Matthew Craven argues, the recent engagement with history stems from post Cold War newly found optimism on the one hand, but also from anxiety and discomfort that originates from the rise of unilateralism, the persistence of hegemonic influence and a re-emergence of the rhetoric of Great Powers rise, on the other hand.¹⁹ Given that Degenhardt examines the role Kaufmann played "in arguments about law itself,"²⁰ and that it is his stated goal to bring Kaufmann back into

¹⁷ The result of this project is accessible through the monographs edited in the series "*Studien zur Geschichte des Völkerrechts*" edited by Michael Stolleis (Max-Planck-Institute of European Legal History, Frankfurt), Armin von Bogdandy (Max-Planck-Institute for Comparative Public Law and International Law Heidelberg) and Wolfgang Graf Vitzthum (University of Tübingen). Other monographs published on similar themes in recent years include, *inter alia*, BERNHARD ROSCHER, DER BRIAND-KELLOGG-PAKT VON 1928. DER "VERZICHT AUF DEN KRIEG ALS MITTEL NATIONALER POLITIK" IM VÖLKERRECHTLICHEN DENKEN DER ZWISCHENKRIEGSZEIT (2004); see also Roscher, *Der Briand-Kellogg-Pakt von 1928*, 44 ARCHIV DES VÖLKERRECHTS 514 (2007); CLAUDIA DENFELD, HANS WEINBERG (1885-1962). DIE ORGANISATION DER STAATENGEMEINSCHAFT (2008); SANDRA LINK, EIN REALIST MIT IDEALEN: DER VÖLKERRECHTLER KARL STRUPP (1886-1940) (2003).

¹⁸ For more on this historical turn see Alexandra Kemmerer, *The Turning Aside. On International Law and Its History*, PROGRESS IN INTERNATIONAL LAW 71 (Rebecca Bratspies and Russell Miller eds., 2008). Jochen von Bernstorff and Volker Roeben, *International Law as Public Law: On Recent and Historical German Approaches to International Law (Review Essay on Denfeld, C. Hans Wehberg (1885-1962): Die Organisation der Staatengemeinschaft ; Degenhardt, Frank. Zwischen Machtstaat und Völkerbund: Erich Kaufmann (1880 -1972); STEFAN TALMON, KOLLEKTIVE NICHTANERKENNUNG ILLEGALER STAATEN (2006); ARMIN VON BOGDANDY ET AL., PLURALISTISCHE GESELLSCHAFTEN UND INTERNATIONALES RECHT [43 BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT, 2008]; Klaus Dicke (ed.), WELTINNENRECHT: LIBER AMICORUM JOST DELBRÜCK (2005); NELE MATZ, WEGE ZUR KOORDINIERUNG VÖLKERRECHTLICHER VERTRÄGE (2005); ANGELIKA NUßBERGER, SOZIALSTANDARDS IM VÖLKERRECHT (2005); Martin Scheyli, *Konstitutionelle Gemeinwohlorientierung im Völkerrecht*, 103 AM J. INT'L L. 609 (2009).*

¹⁹ See Matthew Craven, *Introduction: International Law and Its Histories*, in: MATTHEW CRAVEN, TIME, HISTORY AND INTERNATIONAL LAW 1 (2007), 4-6.

²⁰ As Matthew Craven specifies, this is one of the three ways in which the relationship between international law and history are discussed in contemporary scholarship (the other two forms include narratives that examine institutions or particular ideas within international law and histories with the purpose of discovering meaningful trajectories and teleologies within the discipline. (See *ibid.*, 7.)

contemporary discourse,²¹ his approach is part and parcel of German legal history as well as of international legal history.

C. Kaufmann's Life in Legal Science

Erich Kaufmann enrolled at the University of Berlin in 1898 and majored in Literary History and Philosophy. A year later he transferred to the law faculty, having come to the opinion that law was more practical and had to be approached from a philosophical perspective and, in reverse, with a view to philosophy (“*im Hinblick auf Philosophie*”).²² In 1903, Kaufmann paused his studies and volunteered to the 10. *Bayerisches Feldartillerie-Regiment* (The Tenth Bavarian Field Artillery Regiment) and by December 1906 became lieutenant.²³ He graduated from the University of Halle in the same year and finished his *Habilitation* (post-doctoral professorial qualification) at the University of Kiel (1912) where he was appointed Honorary Professor of Law. In 1913 he was appointed professor of law in Königsberg. A year later, after he was drafted to serve in World War I, he was promoted to the rank of *Oberleutnant*.²⁴ In late summer 1916, Kaufmann took part in the excruciating battle of the Somme, remembered for the highest numbers of injuries and losses during World War I. Kaufmann earned a first class *Eisernes Kreuz* (Iron Cross) but he was also seriously injured.²⁵ From 1917 onwards Kaufmann collaborated with Carl Georg Bruns (1890-1931) at the Kaiser Wilhelm Institut for Comparative Public Law and international law,²⁶ the forerunner to the today-existing Max-Planck-Institute

²¹ See ZWISCHEN MACHTSTAAT UND VÖLKERBUND, at 3.

²² „Ich studierte Rechtswissenschaft im Hinblick auf Philosophie, und die Probleme, welche die Beschäftigung mit dem Recht aufwarf, waren der Gegenstand meiner philosophischen Bemühungen.“ (Erich Kaufmann, *Vorwort*, GESAMMELTE SCHRIFTEN 1, 2, 3 (1960), at xiv.

²³ For more on this see Reut Yael Paz, A GATEWAY BETWEEN A DISTANT GOD & A CRUEL WORLD *supra* note 6.

²⁴ As Ludwig Biewer tells, in December 1913 acted as a lieutenant in command of the reserve. Significantly, while military service was obligatory in Prussia – university graduates were obliged to serve a year – a military career was barred from Jews in Prussia. (See AMOS ELON, THE PITY OF IT ALL: A HISTORY OF THE JEWS IN GERMANY 1743-1933 (Dani Urbach, trans., 2004), at 223, 234-5.) Given that the military service in Austria and Bavaria was more tolerant to Jews because there they were accepted to officer schools and even promoted, it is not surprising that Kaufmann volunteered to a Bavarian regiment. (Ludwig Biewer, *Erich Kaufmann, der erste Völkerrechtsberater des Auswärtigen Amtes der Bundesrepublik Deutschland*. 55 AUSWÄRTIGER DIENST. VIERTELJAHRESSCHRIFT DER VEREINIGUNG DEUTSCHER AUSLANDSBEAMTEN I-IV. (1992), 6-10, and Ludwig Biewer, *Erich Kaufmann – Jurist aus Pommern im Dienste vom Demokratie und Menschenrechten*. 75 BALTISCHE STUDIEN (1989), 111-124.

²⁵ *Ibid.*

²⁶ The On his collaboration with Carl Georg Bruns see more below.

for Comparative Public Law and International Law (in Heidelberg),²⁷ and acted as full professor in Bonn as well as in Berlin. During this time he also worked as a legal advisor to the German Foreign Ministry, hence his already mentioned involvement in the work of the International Court at The Hague. However, due to his “non-Aryan descent” Kaufmann was relieved of duties and replaced by Carl Schmitt (1888-1985) at the University of Berlin a year after the coming into force of the *Gesetz zur Wiederherstellung des Berufsbeamtentums*, the (infamous) Law for the Restoration of the Professional Civil Service in 1934.²⁸

To reconstruct, highlight and unfold Kaufmann’s international jurisprudence and his overall unique approach to international legal theorizing, Degenhardt limits his research to Kaufmann’s international legal contributions during the interwar era and avoids dealing with his post World War II contributions. In other words, his focus is on Kaufmann’s activities as a legal adviser and German Law professor in Berlin and Bonn. Degenhardt divides the book into three sections: the first focuses on Kaufmann’s conceptualization of international law and its development. The second links his theoretical contributions to his international legal practice and the third examines several topics to which Kaufmann dedicated much of his attention: the protection of minorities; liquidation and *iura quaestita*; “political” international law and justice; equality and justice; sovereignty and the independence of the state.

²⁷ The Kaiser Wilhelm Gesellschaft was a German entity formally known as the Kaiser-Wilhelm-Gesellschaft zur Förderung der Wissenschaften e. V. (Kaiser Wilhelm Society for the Advancement of Science). Founded in 1911, this “umbrella” organization for numerous institutes, promoted scientific contributions independently from the German state. Many private persons and companies that included Notgemeinschaft der Deutschen Wissenschaft (Emergency Association of German Science) and the American Rockefeller Foundation, made essential contributions to the Society. Up to World War II, the Kaiser-Wilhelm-Gesellschaft was heavily sponsored by Jewish donations, securing – however intentionally – the ability of Jews to participate in scientific research. Richard Martin Willstätter (1872-1942), the director of the Kaiser-Wilhelm Institute for Chemistry (1912) and the winner of the Noble Peace Prize in Chemistry in 1915, described this phenomena: “A conspicuously and disproportionately large fraction of the appointments went to Jewish or non-Arian scientists – too large, in my opinion. They just happened to be available since the universities certainly did not make it hard to lure them away.” (See JEFFERY ALLEN JOHNSON, *THE KAISER’S CHEMISTS: SCIENCE AND THE MODERNIZATION IN IMPERIAL GERMANY* (1990) at 166.) Another informative history is how the philanthropist and entrepreneur Leopold Koppel (1843-1933) offered to finance completely the Kaiser Wilhelm Institute for physics and chemistry under the condition that the Chemist Fritz Haber (1868-1933), also a Nobel Prize winner (1918) becomes its director. (See Eckhardt Fuchs and Dieter Hoffmann, *Philanthropy and Science in Wilhelmine Germany*, in *PHILANTHROPY, PATRONAGE, AND CIVIL SOCIETY: EXPERIENCES FROM GERMANY, GREAT BRITAIN AND NORTH AMERICA* 103 (Thomas Adam ed., 2004), at 108. For more on anti-Semitism in German law faculties culminating with Hitler’s rise into power see. REUT Yael PAZ, *A GATEWAY BETWEEN A DISTANT GOD & A CRUEL WORLD* *supra* note 6.)

²⁸ For more on Kaufmann’s biography see KOSKENNIEMI, *THE GENTLE CIVILIZER*, at 250. And see REUT Yael PAZ, *A GATEWAY BETWEEN A DISTANT GOD & A CRUEL WORLD* *supra* note 6.

Although Degenhardt clearly wishes to avoid responding to biographical paradoxes and inconsistencies,²⁹ he is nevertheless successful in reconstructing an atmosphere, perhaps even a feeling for Kaufmann's life, upon all the promises and disappointments entailed for a legal scholar of Jewish origin in Germany at that time.³⁰ This atmosphere makes itself felt indirectly but particularly strongly in the second section, which is dedicated to the conflicts of interests that arose between Kaufmann's scientific research and his professional practice. Through Degenhardt's profound analysis of Kaufmann's legal approach, the reader is exposed, *inter alia*, to a striking example of the tragic failure of Jewish German assimilation, especially in German-speaking university law faculties.³¹ This is perhaps only to be expected, given that Kaufmann's life spans over the collapse of the German Empire, the Weimar Republic, the Third Reich and the birth of the (West-German) Federal Republic of Germany and the (East-German) German Democratic Republic. Each of these phases of German history, nationality, identity and/or statehood, had direct implications for the Jewish German minority.³² Thus, however (un)consciously, Kaufmann's life and career appear to have mirrored the *Zeitgeist* of these years just as much as the dialectic between his self-denied Jewishness and enthusiastic German patriotism seems to have propelled much of his academic orientation and career. Phrased differently, Kaufmann's complete rejection of his background – he never confronted or even admitted his Jewish origins in public at a time when such origins were of such profound significance for life (and death) – poses an enormous question. The fact that Kaufmann remained silent on these issues screams louder than words: his suppression of his identity necessarily turns his Jewish background into a lifelong *Leitmotiv*.³³

²⁹ See *supra* note 16.

³⁰ A rather recent work studying this constellation in a more direct manner is the edited volume by Jack Beatson and Reinhardt Zimmermann dedicated to 20th century German speaking Jewish legal scholars who have immigrated to Britain. See *Jurists UPROOTED: GERMAN-SPEAKING ÉMIGRÉ LAWYERS IN TWENTIETH-CENTURY BRITAIN* (Jack Beatson and Reinhardt Zimmermann, eds., 2005). For an account dedicated to a Jewish international lawyer see Martti Koskenniemi, *Hersch Lauterpacht 1897-1960*, in *JURISTS UPROOTED*.

³¹ For more on the failure of Jewish German assimilation see DAVID J. SORKIN, *THE TRANSFORMATION OF GERMAN JEWRY 1780-1840* (1999) and JACOB KATZ, *JEWISH EMANCIPATION AND AUTO-EMANCIPATION* (1986). For more on anti-Semitism in German speaking law faculties see REUT Yael PAZ, *A GATEWAY BETWEEN A DISTANT GOD & A CRUEL WORLD* *supra* note 6.

³² These consequences were not necessarily experienced similarly. In fact, German Jewry was deeply divided along religious, political, and ideological fault lines. (For more on this topic see for example DONALD L. NIEWYK, *THE JEWS OF THE WEIMAR REPUBLIC* (1980)

³³ It is as if being Jewish became an anxiety of influence that determined Kaufmann's life choices and legal Weltanschauung. (See HAROLD BLOOM, *THE ANXIETY OF INFLUENCE: A THEORY OF POETRY* (1997) His dissertation topic, for instance, dedicated to the works of an earlier Jewish convert, Friedrich Julius Stahl, reflects such an influential anxiety. This dissertation, entitled "STUDIEN ZUR STAATSLEHRE DES MONARCHISCHEN PRINZIPS" (1906), conceives Stahl as "der Rechtsphilosoph der Staatslehre des

So why does Degenhardt, who opens his book with the US Military Government Special Branch Record that describe Kaufmann as “a Jewish Junker”,³⁴ avoids to further delve into this topic?³⁵ The biographical void that Kaufmann left behind and the difficulty of unfolding these topics when the protagonist of the research tabooed them himself go some way towards explaining why Degenhardt avoids raising these questions in a direct manner. While the underlying reasons continue to remain obscure, Degenhardt’s book is nevertheless incredibly revealing about German (and Jewish) legal history. For instance, his focus on Kaufmann’s devotion to minority issues (“*Minderheitenproblematik*”) could be seen as a revealing manifestation of Kaufmann’s sublimated Jewish German identity. According to Degenhardt’s historical reconstruction, the connection between Kaufmann and the issue of German minorities was made by Carl Georg Bruns during Kaufmann’s recovery from the injuries suffered during World War I.³⁶ Following Bruns, Kaufmann started to legally advise the German People Council of Bromberg (Bydgoszcz) as well as other German minority organizations in Poland, Posen and West Prussia.³⁷ Kaufmann soon understood the “magical appeal” of the struggle facing the German minorities.³⁸ After the Germans lost real military and political power over these areas, the German minorities represented a “German Reich

monarchischen Prinzips.” In fact, Kaufmann’s conversion to the Lutheran church can be understood as an attempt to follow Stahl’s footsteps and convert into the predominant universal current, which at this time implied adherent nationalism. (See more in REUT YAEL PAZ, *A GATEWAY BETWEEN A DISTANT GOD & A CRUEL WORLD* *supra* note 6).

³⁴ See above pp. 443-446. PLEASE CHECK THE PAGES OF THIS FOOTNOTE ON THE LAST VERSION (IF IT MAY STILL CHANGE)

³⁵ In fact, examining Kaufmann’s “*jüdische Herkunft*” (Jewish origins) remains difficult for the others who have attempted to contextualize his theory with his biography. If it is mentioned at all, it is only in some biographical traces in an almost secretive and ex post facto manner. In most instances when Kaufmann’s Judaism is referred to, it is done only through the overarching title of the books the article dedicated to him. Likewise when religion is mentioned as a category, it is Kaufmann’s Protestantism that is mentioned. (See for instance Peter Lerche, *Erich Kaufmann Gelehrter und Patriot*, in *Grosse Jüdische Gelehrte an der Münchener Juristischen Fakultät 20* (Peter Landau and Hermann Nehlsen, eds., 2001)

³⁶ Carl Georg Bruns was one of the most important lobbyists and the General Secretary to the *Verband der Deutschen Minderheiten in Europa*, formed in 1922 and fittingly turned into the *Verband der Deutschen Volksgruppe* in 1928. Officially, Kaufmann was Bruns’ *Doktorater*. Nevertheless, their relationship seems to have been of a much closer nature that included mutual geographical relocations from 1914 onwards. See *ZWISCHEN MACHTSSTAAT UND VÖLKERBUND*, at 90, 95.

³⁷ Some of the associations/unions that Kaufmann participated in include the “*Deutsche Liga für den Völkerbund*”, “*Volksdeutscher Klub*” and the “*Deutscher Schutzbund für das Grenz- und Auslandsdeutschtum*”.

³⁸ As Degenhardt describes it, Kaufmann, together with Bruns, saw the magic appeal of the German minority issue because it “availed the possibility to unite legal theory and legal dogmatism together with national political commitments.” (*ZWISCHEN MACHTSSTAAT UND VÖLKERBUND*, at 96).

possession” that could exert much economic, political and cultural influence within the European context.³⁹ This was a way for Kaufmann to link legal theory and legal dogmatism together with questions of national politics.⁴⁰ But it also was an unconscious way for Kaufmann to avoid dealing with his Jewishness. While it is possible that Kaufmann knew little or nothing of the major contributions of contemporary Jewish thinkers of the time to the issue of national minorities,⁴¹ he could not have been entirely unaware of the growing concern shown by some of his colleagues for the international legal rights of the Jews as a national minority. One episode, Kaufmann’s mission to Stockholm for the International Law Association (ILA) meeting of 1924, might illustrate this point. Kaufmann, who since 1921 had worked for the German Ministry of Foreign Affairs as an independent consultant, was instructed to be present at the meeting.⁴² He was asked to act as a “moderator”, to guarantee the necessary “political restraint” against the efforts of two other German Jewish international lawyers, Erwin Loewenfeld (1888-1979) and Edwin Katz (1856-1927), who intended to set on the agenda a global system of legal minority protection (“*Weltminderheitenrecht*”). For the Ministry, Kaufmann embodied a dream come true for such a task. Not only was he, as Degenhardt argues, a dedicated and reliable patriot who had the “right” sentiment and the necessary contacts,⁴³ he was also a Jew.⁴⁴

³⁹ For more on the issue of German minorities see John Hiden and Martyn Houdsen, *Peaceful Coexistence, NEIGHBORS OR ENEMIES? GERMANS, THE BALTIC AND BEYOND (ON THE BOUNDARY OF TWO WORLDS: IDENTITY, FREEDOM, AND MORAL IMAGINATIONS IN THE BALTICS 19* (John Hiden and Martyn Houdsen eds., 2008).

⁴⁰ *Supra* note 38. For more details about Kaufmanns’ involvement with the minority issue see ZWISCHEN MACHTSSTAAT UND VÖLKERBUND, 90-100.

⁴¹ To name just a few persons who contributed to philosophical, cultural, legal, economical and political minority issues – the Russian Vladimir Medem and Simon Dubnow, the Austrian Otto Bauer, the Lithuanian born American Mordechai Kaplan and many others.

⁴² His work at the foreign ministry began only after Kaufmann made a name for himself earlier through his efforts to secure the rights of the German national minorities, as mentioned above. (ZWISCHEN MACHTSSTAAT UND VÖLKERBUND ,at 91.)

⁴³ As Degenhardt phrases it: “for the Foreign Ministry Kaufmann was the *Idealbesetzung* (ideal-occupant): on the one hand he was respected in “the minority cliques” of the time ... while on the other hand he was, also thanks to his renowned scientific stature, well-connected with international decision-makers. Methodologically speaking, Kaufmann did not even need to distort his approach.” (See *Ibid.*, 99)

⁴⁴ See more on this issue in REUT Yael Paz, *A GATEWAY BETWEEN A DISTANT GOD & A CRUEL WORLD* *supra* note 6.

D. Kaufmann's Legal Science at Work

Unlike other prominent scholars of his time, Erich Kaufmann, did not develop a closed system or theory of law. Neither did he create, as – for example – Hans Kelsen (1881-1973) did, a “school” or “circle” of like-minded lawyers.⁴⁵ Michael Stolleis has described Kaufmann as a *provocateur*, as a jurist who rebelled against the conventional thinking of his time.⁴⁶ It can be argued, however, that Kaufmann, who understood the dynamics that had divided the German international law community better than everyone else,⁴⁷ developed his rather esoteric legal style deliberately in order to evade criticism from both “legal camps” (the liberal moralists and the empirical positivists, not to mention the increasingly powerful supporters of various authoritarian “anti-legal” positions).⁴⁸ Be that as it may, considering the small number of students for whom he acted as *Doktorvater* (doctoral supervisor and mentor) – an important signifier in German academia to this day⁴⁹ – and the relatively few scholarly works he dedicated to international law proper, it seems that it was never Kaufmann's intention to lead a “school” or “circle”. Instead, and as Degenhardt argues, Kaufmann's contributions must be seen as an attempt to bridge the gap between theoretical reflections and concrete legal practice.⁵⁰

⁴⁵ Interestingly Kelsen was Kaufmann's everlasting target of condemnation. For more on Kelsen's life and work and the relationship between the two see REUT Yael PAZ, *A GATEWAY BETWEEN A DISTANT GOD & A CRUEL WORLD* *supra* note 6. For more on Kelsen's “school” see JOCHEN VON BERNSTORFF, *DER GLAUBE AN DAS UNIVERSALE RECHT: ZUR VÖLKERRECHTSTHEORIE HANS KELSSENS UND SEINER SCHÜLER* (2001).

⁴⁶ “Im Grunde war jede These seines Referats eine Provokation für die bislang herrschende Meinung.” (Stolleis, *supra* note 14 (German version) at 191.)

⁴⁷ KOSKENNIEMI, *THE GENTLE CIVILIZER*, at 257.

⁴⁸ For more on the differentiation between these “camps” see ZWISCHEN MACHTSSTAAT UND VÖLKERBUND, 57-59.

⁴⁹ For an analysis of the German legal education system see Annette Keilmann, *The Einheitsjurist - A German Phenomenon*, 7 GERMAN LAW JOURNAL 293 (2006), available at: <http://www.germanlawjournal.com/index.php?pageID=11&artID=712>. For a recent critique, see Stephan Leibfried, Christoph Möllers, Christoph Schmid and Peer Zumbansen, *Redefining the Traditional Pillars of German Legal Education and Setting the Stage for Contemporary Interdisciplinary Research*, 7 German Law Journal 661 (2006), available at: http://germanlawjournal.com/pdfs/Vol07No08/PDF_Vol_07_No_08_661-680_Articles_Leibfried.pdf, and for a comparative perspective see the contributions to the Symposium on “TRANSNATIONAL LEGAL EDUCATION”, 10 GERMAN LAW JOURNAL (2009), available at: http://www.germanlawjournal.com/pdfs/Vol10No07/PDF_Vol_10_No_07_SI_859-876_Scott.pdf

⁵⁰ ZWISCHEN MACHTSSTAAT UND VÖLKERBUND, 11-12.

Kaufmann connects his theory and his practice through the concept of the sovereign state. For him, the sovereign state represents a “*Sittliches Reich*” which keeps the ethics and spirituality of the community together.⁵¹ As Degenhardt formulates it, to describe this “*sittliche Macht*”, Kaufmann perceives the state as a real and objective power that affects the individual in a directly and indirectly fashion. The individual however, forms the state (“weaves its look”) by his/her participation in the state’s “*Volksgeist*”.⁵² The state is, therefore, the predominant order responsible for yielding justice, especially because it is imbedded in its own historical and national traditions. The idea that national state law (*Staatsrecht*) is supreme in relation to all other laws, especially international law, was a clear strike against the German ‘positivist’ international lawyers such as Gerhard Anschütz (1867-1848) and Richard Thoma (1874-1957) who had conceived of this relationship in opposite direction.⁵³ It also explains why for Kaufmann, the Weimar Republic, crowded with empirical positivists and liberal moralists, could hardly embody an ethical or spiritual state. In Kaufmann’s eyes, the Weimar Republic’s lack of power, made it inapt to legally adjudicate.⁵⁴ The sovereign state, according to Kaufmann, had the dual task of controlling and channeling its power – seen as the state’s ethics, laws, culture, religion, traditions etc. as a whole – both within and outside its borders. Only through the fulfillment of this double mission could the sovereign-state reach its historical destiny.

To differentiate (and perhaps even “protect”) national law from international law, Kaufmann developed a meticulous separation between *horizontal law*, or the law of coordination (international law), on the one hand, and *vertical hierarchical law*, the law of subordination (national public law), on the other.⁵⁵ But his argument does not stop there; on the contrary, it goes on to assert that international law, the law of coordination, is essential because the legal *Geist* (spirit) of the state becomes increasingly concrete in and through interactions with other states. This postulate turns the “victorious war” into a “social ideal” in Kaufmann’s notorious *clausula*

⁵¹ Ibid., 25-29.

⁵² “Der Staat ist ihm einerseits ‚objektiv reale Größe, die sich in und an den Individuen auswirkt‘; andererseits prägt aber auch das Individuum den Volksgeist. ‚webt es mit an seinem Gewande.“ (ZWISCHEN MACHTSSTAAT UND VÖLKERBUND, at 23.)

⁵³ For more on the ‘quarrel over method’ between the open-ended label ‘positivists’ and ‘anti-positivists’ in Germany and Austria, mainly the Vienna School, see Stolleis (English translation) *supra* note 14, 145-175.

⁵⁴ For more on Kaufmann’s understanding of state’s power see ZWISCHEN MACHTSSTAAT UND VÖLKERBUND, at 26.

⁵⁵ Ibid., 26-27.

rebus sic stantibus formulation (1911).⁵⁶ As Martti Koskenniemi phrases it, for Kaufmann “the State – and not the shallow and discontinuous realm of the cosmopolitan – was the concrete enfolding of human spirituality, international law could never aspire to a normativity higher than the State.”⁵⁷ Although Kaufmann’s view that “only those who can, may” was neither entirely exceptional nor particularly original in the pre-1914 context,⁵⁸ this formulation earned Kaufmann much opposition. According to Hersch Lauterpacht (1897-1960) and Kelsen, such a differentiation amounted to the complete denial of international law.⁵⁹ Indeed numerous international lawyers of the time perceived Kaufmann to be pessimistic with respect to the future of international law,⁶⁰ to the extent that Eduard Bristler argued that Kaufmann had become an unconscious facilitator of fascism.⁶¹

That such an assertion should carry much weight, however, seems improbable, even if Kaufmann’s denial of the need to protect the integrity of the abstract individual, and his clear preference for a powerful state as the representative form of the collective will of the people remains can only be depicted as anti-liberal. For him, the state, despite all rumours of its ‘withering away’, continued to be the only reliable apparatus to protect and to look out for values, humanity, tradition and even international justice.⁶² Kaufmann was convinced that only the state’s acting in international concert and interdependence could guarantee humanity’s progress,

⁵⁶ “The victorious war is the ultimate means for every highest objective. In war the state demonstrates its real being, it is the fullest proof of the special quality of the state ... In the victorious war legal thought sets the ultimate norm which decides which state has the right on its side ... Who can, may also.” ERICH KAUFMANN, *DAS WESEN DES VÖLKERRECHTS UND DIE CLAUSULA REBUS SIC STANTIBUS* (1911) at 146. See also KOSKENNIEMI, *THE GENTLE CIVILIZER*, at 179.

⁵⁷ *IBID.*

⁵⁸ The rising, conformist and even blind German patriotism energizing the righteousness atmosphere at the beginning of World War I was shared by Jewish intellectuals and scientists to a unprecedented level. See more in Elon, *supra* note 24, at 295-352.

⁵⁹ *ZWISCHEN MACHTSSTAAT UND VÖLKERBUND*, at 26. For more on the relationship between the three legal scholars see REUT YAEL PAZ, *A GATEWAY BETWEEN A DISTANT GOD & A CRUEL WORLD* *supra* note 6.

⁶⁰ In addition to Kelsen and Lauterpacht, Kaufmann’s position was highly criticised by the Austrian Heinrich Lammasch (1853-1920); the French Léon Duguit (1859-1928) and George Scelle (1878-1961); the Greek Nicolas Politis (1872-1943); the Chilean Alejandro Alvarez (1868-1960) and James Brierly (1881-1955). See *ZWISCHEN MACHTSSTAAT UND VÖLKERBUND*, 12-84 at 56. The neo-Kantian radical socialist Leonard Nellson (1882-1927) saw Kaufmann’s conceptualisation to destroy legal concepts altogether, just as Eduard Bristler (John H. Hertz) saw this to be “the crowning theory of the imperialist *Machtstaat*.” (Koskenniemi, *The Gentle Civilizer*, at 256.)

⁶¹ EDUARD BRISTLERS, *DIE VÖLKERRECHTSLEHRE DES NATIONALSOZIALISMUS* (1938) at 53, 62, 170. See also KOSKENNIEMI, *THE GENTLE CIVILIZER*, at 256.

⁶² *IBID.*, 259.

although not necessarily through peace, because such international cooperation may also result in frictions and wars.⁶³

With this anchoring of the state as the guarantor of spirituality in providing a link between the individual, the national and the international, Kaufmann sought to invert modern liberalism's dichotomies between the particular and the universal both at the national and international level.⁶⁴ The function of international law, in his view, was to sustain the minimal stability necessary to the achievement of such solidarity. For Kaufmann, accepting the supremacy of *Staatsrecht* was the only guarantee that international law had of sustaining its main purpose, the enhancement of the state's *Geist*.⁶⁵ Degenhardt correctly diagnoses Kaufmann's subtle change of heart, a process that appears to have culminated in his Hague lectures (1935), at which time he emphasized the independence of his approach by arguing that the traditional models such as, *positivisme étatique* (state positivism) and/or *positivisme sociologique* (positive sociology) as well as monism and/or dualism could only serve as negative examples for the delimitation of his own understanding of the state and the law.⁶⁶ To further concretize his position, he emphasized the *limits* of state power in international relationships.⁶⁷ For Kaufmann, the state now – in an internationally structured world – was “put in a hierarchy, controlled, enveloped, co-ordinated, organized and put in harmony with each other and with the superior interests of the national community.”⁶⁸ According to Martti Koskenniemi, by 1935, Kaufmann's approach, despite its authoritarian tendency, had turned closer to a realistic compromise between the traditions of German public law conservatism on the one hand and internationalism on the other.⁶⁹ Perhaps it was also the growing precariousness of his situation as a Jew in Germany during the 1930s that softened and limited his earlier understanding of

⁶³ IBID.

⁶⁴ For more on this see version of Kaufmann's legal approach see REUT YAEL PAZ, A GATEWAY BETWEEN A DISTANT GOD & A CRUEL WORLD *supra* note 6.

⁶⁵ IBID.

⁶⁶ ZWISCHEN MACHTSSTAAT UND VÖLKERBUND, at 53.

⁶⁷ To do this he constructed the notion of sovereignty's “elasticity”: its ability to “contract” allows for a differentiation between sovereign “substance” from sovereign “practice”. And this, among other things, prevents Kaufmann's approach to state-sovereignty becoming entirely dependent on power politics. (This is particularly visible in Kaufmann's general course at The Hague, 1935. ZWISCHEN MACHTSSTAAT UND VÖLKERBUND, 55-57.)

⁶⁸ Erich Kaufmann, *Règles générales du droit de la paix*. 54 RECUEIL DE COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL (1935/IV), 313-615 at 363.

⁶⁹ As Koskenniemi puts it: “Like legal realists, Kaufmann now saw the state as the access-point for those values, the medium...” The Gentle Civilizer, 258-261: at 259.

the state's right to resort to wars, which in his earlier work he had conceived as being justifiable with reference to God's will.⁷⁰ Whatever the situation was, it remains the case that for Kaufmann international law had now become just as imperative as *Staatsrecht* because it would be through international law that states reach agreements with respect to their shared international interests. It seems that Kaufmann's anti-liberal or rather anti-positivistic arguments were more easily misunderstood and more easily remembered because they were expressed by a "Volljude".⁷¹

As already mentioned in the juxtaposition between Judaism and Junkerism,⁷² unlike the aristocratic nobility, the German-speaking Jews were mostly members of the professional and commercial classes who gravitated towards liberalism.⁷³ This liberal inclination reached its peak in Berlin of the 1920's where most Jewish German artists and intellectuals attempted, more than ever before, to rise above nationalism and religious difference.⁷⁴ Nationalists, conservative thinkers, Junkers

⁷⁰ IN BISMARCK'S ERBE IN DER REICHVERFASSUNG (1917), KAUFMANN refers to wars as "*Gottesurteil*" (judgment of God) and "*Glied der Göttlichen Weltordnung*" (element of God's world order). See ERICH KAUFMANN, BISMARCK'S ERBE IN DER REICHVERFASSUNG (1917), 1 GESAMMELTE SCHRIFTEN 4 (1960), at 4. See ZWISCHEN MACHTSSTAAT UND VÖLKERBUND, at 30 and 57.

⁷¹ Carl Schmitt used this exact word when referring to Kaufmann during his interrogation at the Nuremberg Trials. Interestingly, at Nuremberg, Schmitt answered Robert Kempner's question, ("Did you consider the influence of your Jewish colleagues, who were teachers of international law, a misfortune?") with the following sentence: "With the exception of Erich Kaufmann, there were no Jewish legal scholars there [in Nazi Germany]. He was a belligerent militarist. He originally coined the phrase 'The social ideal is the victorious war.'" (See complete narrative in Joseph Bendersky, *The Expendable Kronjurist: Carl Schmitt and National Socialism, 1933-36*, 14 *Journal of Contemporary History* 309 (1979). Degenhardt's analysis of Schmitt's relationship to Kaufmann is of significance for the understanding of life at the German law faculties before and during World War II. For instance, to make sure that Kaufmann would finally be "removed" from the law faculty but also from Berlin entirely (so that Schmitt could take Kaufmann's academic chair and have no competition altogether) Schmitt brought to the attention of the German cultural ministry the "troubling" "Hamel Case". This was an incident involving Walter Hamel, who was one of Kaufmann's few habilitation students and a NSDAP member since 1932. Hamel dedicated to Kaufmann his habilitation thesis - published in 1933 - because he seems to have been "tricked" into believing that Kaufmann was Arian. (See Degenhardt, "Kaufmann und Schmitt - vom 'Freund' zum Feind", ZWISCHEN MACHTSSTAAT UND VÖLKERBUND, 119-123).

⁷² See above 443-446. PLEASE CHECK AGAIN BEFORE PUBLICATION

⁷³ Statistically this meant that a large presence of Jews in liberal and free professions. For example, while Jews constituted less than 1 percent of the general population in Germany by the early 1930's, 10.9 percent of the general population, were Jewish medical doctors, 10.7 percent were dentists, 5.1 percent were editors and authors and up to 16.3 percent were lawyers. As Marvin Perry phrases it: "as victims of persecution, they naturally favored societies that were committed to the liberal ideals of legal equality, toleration, the rule of law and equality of opportunity." (See more in Marvin Perry WESTERN CIVILIZATION: IDEAS, POLITICS AND SOCIETY, VOL. II (2009) at 615-616.

⁷⁴ See Elon, *supra* note 24, at 357.

and as Kaufmann's example shows, even some Jews, reacted against such secular and cosmopolitan ideals by creating other forms of intellectual standards: ones that rely mainly on severe criticism of liberalism and/or its negation altogether.⁷⁵ Making clear political and legal differentiations but also alliances during this time was (and remains) a difficult matter, especially because so many others crossed the lines of intellectual debates and began to concretize an anti-liberal version of reality, to say the least.⁷⁶ Kaufmann's anti-liberal and anti-positivistic approach, however rare, did not cross these boundaries. In the final analysis, it is not too different than the approach of an earlier German-speaking lawyer Heinrich Heine (1797-1856). While Heine was perhaps the first Jewish cosmopolitan, to him a cosmopolitan society remained an unreachable utopia that could only be found in *Kuckuckshimmel*.⁷⁷

E. Conclusion

In 1934, Kaufmann was dismissed from both professorships at the Universities of Berlin and Bonn. His unquestionable loyalty, dedication and even attachment for Germany did nothing to help him to hold on to his posts.⁷⁸ Neither did it stop the Ministry of Finance from discontinuing all payments for his legal advice to the German Foreign Ministry from the end of October 1934.⁷⁹ Left only with his patriotism, Kaufmann tried to fight back by writing directly to the Ministry of Culture to reclaim his professorship in Berlin. In this letter, Kaufmann makes his allegiance to Germany as obvious as possible, insisting that he is not looking for favors; after all, he wrote, his military record ("the oldest soldier at the front fighting for the honor, freedom and law of Germany") and his decades of legal contributions were sufficient "self-evidence" of the fulfillment of his duties.⁸⁰ Interestingly, Kaufmann does not even question the reason for his discharge, as that

⁷⁵ See for instance, Hans. J. Morgenthau, *The Tragedy of German Jewish Liberalism*, LEO BAECK INSTITUTE INC. (1961) : 5-16.

⁷⁶ For more on the possible differentiation between forms of liberalism/anti-liberalism and/or positivism/anti-positivism in German legal debates until the outbreak of World War II see Reut Yael Paz, A GATEWAY BETWEEN A DISTANT GOD & A CRUEL WORLD *supra* note 6. And KOSKENNIEMI, THE GENTLE CIVILIZER 179-261..

⁷⁷ (Elon, *supra* note 24, at 373)

⁷⁸ Or as Martti Kosekenniemi sees Kaufmann's nationalistic stance as indissociable from his romantic conservatism. See also THE GENTLE CIVILIZER, at 256.

⁷⁹ IBID., 121-122.

⁸⁰ Ibid. See also ANNA MARIA VON LÖSCH, DER NACKTE GEIST. DIE JURISTISCHE FAKULTÄT DER BERLINER UNIVERSITÄT IM ÜMBRUCH VON 1933, (1999), at 201.

– for him – was equally self-evident. It seems that what he sought after was some recognition and respect. The letter concludes with “*Heil Hitler!*”⁸¹

Kaufmann remained hopeful for another four years, during which he was allowed to teach at his house in Berlin (the so-called “*Nikolassee-Kreis*”).⁸² Only after the infamous *Kristallnacht* of November 9, 1938 did Kaufmann suspend his hope and go into exile in Holland. At the beginning of 1946, as soon as the gatekeeper to the (German) law was stripped of his Nazi uniform, Kaufmann returned to sit by the Gate. In contrast to Kafka’s *Mann vom Lande*, we will never know whether Kaufmann wondered about other Gates to the Law,⁸³ nor can we tell whether he minded his isolated and eternal anticipation. Kaufmann’s only hope was that the main barrier, his Jewishness – the only obstacle to his entry into the law as he must have seen – could eventually be wished away and/or forgotten.

⁸¹ IBID.

⁸² Rather paradoxically Kaufmann ends up creating a “Kreis” of like-minded people only after he lost his official positions and most of his Jewish colleagues have already left Germany. As he himself describes this *Kreis*: “Ich war vom Lehrstuhl vertrieben und sollte jeder akademischen Wirkungsmöglichkeit beraubt werden. Aber es fügte sich, dass, was die Menschen Böses an mir tun wollten, zum Segen wurde.” (ZWISCHEN MACHTSSTAAT UND VÖLKERBUND, 125.) The suspension of the *Nikolassee-Kreis* could also be attributed to Carl Schmitt’s anti-Semitic meddling, although it cannot be proven. (IBID., 126 note 225)

⁸³ Or as Kafka phrased it in *Before the Law*: “Wieso kommt es, daß in den vielen Jahren niemand außer mir Einlaß verlangt hat?” (How does it happen that for all these many years no one but myself has ever begged for admittance?) See FRANZ KAFKA, VOR DEM GESETZ, ERZÄHLUNGEN VERÖFFENTLICHT ZU LEBZEITEN (1904-1924) available at <http://www.textlog.de/32064.html>