A Flight to Rome: The Intellectual Itinerary of Ernst Rabel

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Abstract – How can one explain that Ernst Rabel (1874–1955), born in Vienna, with Jewish roots, became the architect of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and one of the foremost authorities ever on Private International Law? Was this a mere coincidence or was his method of looking for similarities in the law of different nations, rather than looking for its disparities, the product of a universalism rooted in the example of the Roman Empire and its law and the experience of the multiethnic Empire of the Habsburgs?

Cela seul est rationnel qui est universel.
Émile Durkheim[1]

I. The dilemma of the Jews in the Habsburg monarchy

"A Jew in *lederhosen* does not become a Tyrolean," according to an aperçu by Ernest Gellner on the dilemma of the Jews in the Habsburg monarchy.[2] Gellner knew all too well what he was talking about, as he himself had to leave his home country, Czechoslovakia,

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[1] *De la divison du travail social* (Paris 1978), 275. I would translate "Only that is rational which is universal."

[2] E. Gellner, *Language and Solitude: Wittgenstein, Malinowski and the Habsburg Dilemma* (Cambridge 1998), 82.

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in 1939 because of his Jewish origins.[3] What did he mean by the tragic absurdity of this sentence?

A. The "Habsburg nation"

The Habsburg monarchy[4] was Europe's supranational state *par excellence* with its exemplary problems: the two strong ethnic groups of Germans and Magyars (Hungarians) dominated a good dozen other "nationalities" (Poles, Ukrainians, Romanians, Serbs, Croats, Slovenes, Bosnians (Muslims), Slovaks, Czechs, Italians). These weaker "nationalities" wanted to leave the monarchy, either to found new states or to join existing ones, such as the Italians, who did not want to feel "redeemed" as long as parts of them lived in the monarchy, a move called *irredentismo* in Italian. The two "master races" of Austro-Germans and Magyars on the other hand were only prepared to continue participating in the monarchy on the condition that they were given the opportunity to dominate the small peoples or nations. This, in turn, increased their inclination to separate from it. Catholicism and loyalty to the imperial house visibly lost the power to integrate the state as a whole. This had become unmistakably clear in 1848, when it was ultimately only sheer force that could save the state and hold it together. And while they waited for the state to finally fall apart, they fought incessantly and at the same time prepared for the times after the resolution.

Roughly speaking, there were only two solutions: either the monarchy had to break apart or a new form of unity would have to be found. The overwhelming majority of all peoples of the monarchy thought nationalistically, i.e. were hostile to the monarchy. A small group, however, thought supranationally and was interested in the preservation of their *patria*. This group knew that they could only lose in the new national states. This group included the high-

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[3] J. A. Hall, *Ernest Gellner: An Intellectual Biography* (London 2011).

[4] On the Habsburg Monarchy, the best work is: R. A. Kann, *A History of the Habsburg Empire 1526–1918* (Los Angeles 1974); and in general the collective work: A. Wandruszka et al., eds., *Die Habsburgermonarchie 1848–1918*, 1–18 (Vienna 1973–2021). See also P. M. Judson, *The Habsburg Empire: A New History* (Cambridge, MA 2018). On the problem of nationalities, the standard work is R. A. Kann, *Das Nationalitätenproblem der Habsburgermonarchie*, 2nd ed. (Graz 1964), 2 vols.; now also J. Deak, *Forging a Multinational State: State Making in Imperial Austria from the Enlightenment to the First World War* (Stanford 2015); J. Osterkamp, *Vielfalt ordnen. Das föderale Europa der Habsburgermonarchie* (Göttingen 2020). Still important is J. Redlich, *Das österreichische Staats- und Reichsproblem* (Leipzig 1920); on cultural history C. F. Schorske, *Wien, Geist und Gesellschaft im "Fin de Siècle"* (Munich 1982); J. W. Boyer, *Karl Lueger (1844–1910), Christlichsoziale Politik als Beruf* (Vienna 2010).

ranking functionaries of the empire, the aristocracy and – with particular vehemence – the Jews. They were the actual "citizens" of the monarchy.[5] The Jews, who had only been emancipated by the revolution of 1848, were well aware of the danger that the ethnically – not to say racially – minded nationalism would treat them as foreigners and thus as people of inferior rights if it came to rule after the fall of the empire.[6] At the same time, the empire offered them almost unrestricted opportunities for development after 1848, whereby a Christian confession was certainly required in the civil service:[7] Joseph Unger (1828–1913)[8] is a shining example for such a career[9] and explains the otherwise difficult to understand coalition of throne and political liberalism:[10] as a modernizer of Austrian civil law, who adapted the Austrian Civil Code of 1811 to the current of "pandectism" (*Pandektismus*) in Germany, he became professor of civil law in Vienna and later president of the Imperial Court of Justice. Another very impressive example for this attitude is Eugen Ehrlich (1862–1922),[11] originally a professor of Roman law, who became world-famous for the sociology of law he founded as an academic subject.[12] After the First World War, the student body, indulging in antisemitic, that is nationalist, agitation, drove him from his chair in Czernowitz – formerly the easternmost university in the empire, now part of

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[5] S. Beller, *Wien und die Juden 1867–1938* (Vienna 1993), 198; Gellner (note 2), 11–12. See also G. Botz et al., eds., *Eine zerstörte Kultur: Jüdisches Leben und Antisemitismus in Wien seit dem 19. Jahrhundert*, 2nd ed. (Vienna 2002).

[6] With ample references G. V. Strong, *Seedtime for Fascism: The Disintegration of Austrian Political Culture 1867–1918* (New York 1998), 77–78, 119–120. Very vividly B. Hamann, *Hitlers Wien* (Munich 1996).

[7] Beller (note 5), 206–208.

[8] W. Brauneder, "Unger, Joseph," in *Neue Deutsche Biographie*, 26 (Berlin 2016), 634–36.

[9] On this J. F. Stagl, "Die Rezeption der Lehre vom Rechtsgeschäft durch Josef Unger," *Zeitschrift für europäisches Privatrecht* (2007), 37–55 with further references.

[10] Gellner (note 2), 32.

[11] S. Nezhurbida, "Lebensspuren Eugen Ehrlichs," in M. Auer and R. Seinecke, *Eugen Ehrlich – Kontexte und Rezeptionen* (Tübingen 2024), 41–43.

[12] On the person and work M. Rehbinder, *Die Begründung der Rechtssoziologie durch Eugen Ehrlich* (Berlin 1967), 17–18, and H. Sinzheimer, *Jüdische Klassiker der deutschen Rechtswissenschaft* (Frankfurt am Main 1953), 187–201, as well as S. Vogel, *Soziale Gesetzgebungspolitik, freie Rechtsfindung und soziologische Rechtswissenschaft bei Eugen Ehrlich* (Baden-Baden 2003).

Romania.[13] The welfare of the Jews – or so it must have seemed – was linked to the continued existence of the supranational monarchy. It was therefore not surprising that Ehrlich had defended in a somewhat clumsy English the monarchy during the World War against the accusation that it was a "dungeon for the peoples":

> At the present moment there exists no Austrian nationality in the sense for instance, that English nationality is spoken of, as comprising English, Scotch, Welsh and some colonials. . . . Nevertheless the Austrian nation [*sic*!] is growing steadily beneath our eyes. . . . Poles, Bohemians, Serbs and German Austrians do not feel as strangers to one another. . . . When Austrians of different races meet in a foreign country, they greet each other as countrymen. . . . There is no doubt about it, that there exists something like an Austrian nation.[14]

Ehrlich is attempting nothing less than to merge the more or less dozen peoples/nations of the monarchy into one nation: the "Habsburg nation."[15] The scope of this endeavor is so broad that it includes practically all major European language groups (Slavic, Germanic, and Romance) as well as all book religions, i.e. Jews, Christians, and Muslims. The only thing that should unite all these people was the will and the feeling to form a unity.

This idea of a "Habsburg nation" (the term is mine) does not appear in Kann's vast and authoritative study on the "nationality problem." For basically the idea of a Habsburg nation amounts to negating the possibility of a "multi-ethnic state": if the monarchy cannot be atomized into nation states, then its population must be amalgamated into a nation of its own.

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[13] On the particularly difficult situation of Jews in Romania, see D. Diner, "Zweierlei Emanzipation, Westliche Juden und Ostjuden gegenübergestellt," in D. Diner, ed., *Gedächtniszeiten: über jüdische und andere Geschichten* (Munich 2003), 130, 255–56.

[14] "The National Problems in Austria," in *International Congress for the Study of the Principles of a Durable Peace* (Berne 1916), cited after the Dutch edition (The Hague 1917), 39–40.

[15] C. von Wurzbach, for example, is an important exponent of this trend. In his work *Biographisches Lexikon des Kaiserthums Österreich, enthaltend die Lebensskizzen der denkwürdigen Personen, welche 1750 bis 1850 im Kaiserstaat und in seinen Kronländern gelebt haben* (Vienna 1856–1891), 60 vols., written by him alone in titanic labor, biographies of people of all nations, classes, and professions can be found according to a studied but not pedantic proportional system.

B. The enemies of the Habsburg nation: nationalism and antisemitism

For us today, nationalism seems almost an anachronism, especially in Western Europe,[16] but in the nineteenth century it was the most fundamental political force. If – as is common – the nineteenth century is described as the "century of nationalism," then it is likely to mean that, at that time, the bond to one's own speech community (*vulgo* "people" or "nation") became more important than other bonds such as family, clan, church, city, historical unity (Bohemia), dynasty; this was probably mainly due to the importance of language in modern society.[17] Knowledge of languages is an essential prerequisite for making good progress in a mobile and, due to its economic form, large-scale and standardized society, and a common language creates a sense of belonging.[18] Although – or precisely because – language was the decisive factor, at least in the nationalist ideologies of the Habsburg monarchy, the linguistic community was understood as a community of descent, as an association of relatives.[19] And these communities would close themselves off to the Jews, no matter how hard they knocked on their doors with gifts – this atmosphere was in the air.

But if one had gone on to ask why these doors would remain closed, then one would have had to give the obvious answer, that the Jews in another community of descent could *per definitionem* only ever be strangers. And this precisely because the ideological construction of these imagined communities of descent pursued to a large extent the very purpose of excluding the Jews. After all, the Jews were often the bearers and thus symbols of modernity which was perceived as a threat,[20] i.e. the capitalist economic system and the liberal world view that underpins it. And the antiquated houses of the national communities were supposed to offer protection

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[16] This phrase was written fifteen years ago, now, summer of 2025, we are in the midst of a rise of nationalism and broad array of other identarian movements.

[17] E. Gellner, *Nations and Nationalism* (Ithaca 1983), 19–38; idem (note 2), 26–29; and Justin Stagl, "Zur Phänomenologie der Nationalkulturen," in S. Scheichl and E. Brix, eds., *"Dürfens's denn das?" Die fortdauernde Frage zum Jahr 1848* (Vienna 1999), 255–61.

[18] This is exemplified in recent times in the history of India: the historically established borders of the federal states have been permanently changed since 1949 according to linguistic-nationalist criteria: R. Guha, *India after Gandhi: The History of the World's Largest Democracy* (New York 2007).

[19] The same assessment: Diner (note 13), 252–53.

[20] Gellner (note 17), 104–105; D. Diner, *Kreisläufe* (Berlin 1995), 17.

against the large, cold-rationalist, shapeless world of modernity promoted and embodied by the Jews.[21] Another reason was, naturally, traditional European antisemitism, as it lived on above all in the religiously motivated antisemitism of the Christian social movement.[22]

Zionism, founded in the "Jewish State" (*Der Judenstaat*) by Theodor Herzl (1860–1904)[23] from Budapest, can be read as a reaction to this situation: if you won't let us join your communities of descent, then we'll just make our own – Zion.[24] Of course, in the days of the monarchy, this was a utopia and not a political possibility. The only realistic option for the Jews was to fight for the continued existence of the monarchy and, should it cease to exist, to restrain nationalism ideologically. Of course, this was accompanied by great uncertainty regarding one's own identity: how should a Jew in the monarchy define his place in society; what costume should he wear, as it were, at a time when all nations were beginning to dress in re-invented national costumes like the *lederhosen*? Ernst Rabel's work – to which we now turn – can be read as an answer to this question.

C. Ernst Rabel as an exponent of the Habsburg nation

Jewish identity as a personal question

Rabel (1874–1955)[25] was one of the greatest jurists of the twentieth

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[21] Gellner (note 2), 19.

[22] Beller (note 5), 211–16; now Justin Stagl, *Die Vogelsang-Schule* (Wiesbaden 2022), 19–21, 38–55, 93–96. For Vogelsang and his movement the point was that the Jews had not converted to Christianity, not embraced the commandments of universal love. This Anti-Judaism was not racial by its own standards. Whether this translated into unrestrained acceptance of assimilated, a.k.a. converted, Jews, is a different question.

[23] A sound biography is D. Penslar, *Theodor Herzl: The Charismatic Leader* (New Haven 2020).

[24] Theodor Herzl, *Der Judenstaat: Versuch einer modernen Lösung* (Wien 1896), 1–19. Likewise, Diner (note 13), 127, 250.

[25] On Rabel's person and work: U. Drobnig, "Die Geburt der modernen Rechtsvergleichung – Zum 50. Todestag von Ernst Rabel," *Zeitschrift für europäisches Privatrecht* (2005), 821–31; D. J. Gerber, "Sculpturing the Agenda of Comparative Law: Ernst Rabel and the Facade of Language," in A. Riles, ed., *Rethinking the Masters of Comparative Law* (Portland 2001), 190–209; G. Husserl, "Ernst Rabel – Versuch einer Würdigung," *Juristen Zeitung*, 11 (1956), 385–92, 430–34; M. Kaser, "Ernst Rabel," *IVRA*, 7 (1956), 621–25; G. Kegel, "Ernst Rabel – Werk und Person," *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 54 (1990), 1–23; idem, "Ernst Rabel (1874–1955) – Vorkämpfer des Weltkaufrecht," in H. Heinrichs et al., eds., *Deutsche Juristen jüdischer Herkunft* (Munich

century. He was a hero of two worlds: first of Roman law, and later of comparative law and private international law. His writings have become classics of jurisprudence,[26] not only in Europe but also in his second homeland, the United States of America.[27] Rabel came from Vienna and can be categorized as Jewish. We do not use this pale wording carelessly, as the following quotation from his disciple Rheinstein on this delicate point makes clear:

> The fact that Rabel did not have a positive attitude towards Judaism should not be held against him. The contact had already been severed by an earlier generation. Judaism was not his religion . . . .[28]

1993), 572–81; E. A. Kramer, "Ernst Rabel – Ein Lebensbild," *Basler Juristische Mitteilungen*, 52 (2006), 118–28; W. Kunkel, "Ernst Rabel als Rechtshistoriker," in H. Dölle et al., eds., *Festschrift für Ernst Rabel* (Tübingen 1954), 2–6; O. Lando, "Ernst Rabel (1874–1955)," in S. Grundmann et al., eds., *Festschrift 200 Jahre Juristische Fakultät der Humboldt Universität zu Berlin* (Berlin 2010), 605–26; H. G. Leser, "Ein Beitrag Ernst Rabels zur Privatrechtsmethode: 'Die wohltätige Gewohnheit, den Rechtsfall vor der Regel zu bedenken'," in C. Ficker et al., eds., *Festschrift für Ernst von Caemmerer* (Tübingen 1978), 891–906; M. Rheinstein, "Gedächtnisrede für Geheimrat Professor Dr. Ernst Rabel," *Juristische Rundschau* (1956), 135–38; idem, "In memory of Ernst Rabel," *Am. J. Comp. L.*, 5 (1956), 185–96; H. Rösler, "Siebzig Jahre Recht des Warenkaufs von Ernst Rabel. Werk- und Wirkgeschichte," *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 70 (2006), 793–805; T. Utermark, *Rechtsgeschichte und Rechtsvergleichung bei Ernst Rabel* (Frankfurt am Main 2005); Ernst Wolff, "Ernst Rabel," *ZSS* (RA), 73 (1956), xi–xxviii; R. Zimmermann, "'In der Schule von Ludwig Mitteis', Ernst Rabels rechtshistorische Ursprünge," *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 65 (2001), 1–38.

[26] Cited works by E. Rabel: *Die Haftung des Verkäufers wegen Mangels im Rechte* (Berlin 1902); *Gesammelte Aufsätze*, 1–3, ed. H. G. Leser (Tübingen 1965–1967), 4, ed. H. J. Wolff (Tübingen 1971); *Das Recht des Warenkaufs. Eine rechtsvergleichende Darstellung*, 1 (Tübingen 1936), 2 (Tübingen 1958); *The Conflict of Laws* (Oxford 1945–1958), 4 vols.; "Vorträge – Unprinted Lectures 1954," *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 50 (1986), 287–95.

[27] D. S. Clark, "The Influence of Ernst Rabel on American Law," in M. Lutter et al., eds., *Der Einfluß deutscher Emigranten auf die Rechtsentwicklung in den USA und in Deutschland* (Tübingen 1993), 107–108.

[28] My translation. Rheinstein, "Gedächtnisrede" (note 25), 138: "Daß Rabel zum Judentum keine positive Einstellung hatte, sollte ihm nicht vorgeworfen werden. Der Kontakt war schon von einer früheren Generation gelöst worden. Das Judentum war nicht seine Religion . . . ." See the brochure of the American Law Institute, "A Treatise on Comparative Conflict of Laws by Ernst Rabel," cited in B. Grossfeld and P. Winship, "Der Rechtsgelehrte in der Fremde," in M. Lutter et al., eds., *Der Einfluß deutscher*

However, despite his inherited Catholic faith, Rabel was clearly aware of his Jewish roots – even before the racist ideology of National Socialism reminded him of his grandparents' Jewish religion. As a matter of fact, Rabel's children are said to have known nothing of his ancestry.[29] This sounds plausible when you consider why Rabel's parents had converted and that he himself also wanted to make a career as a normal German-Austrian in Wilhelmine Germany. Rheinstein remarked on Rabel's relationship to his homeland:

> What is certain . . . is that Rabel was a German patriot. Like many other Austrians who came to the Reich, Rabel was impressed by the splendor of Wilhelmine Germany, by the contrast between Germany's disciplined unity and industriousness and Austria's international quarrels and the ease of life of its capital.[30]

An attitude that was typical of the Viennese Jews and was often depicted: through Germanism with its overwhelming achievements especially in the nineteenth century, they wanted to merge with humanity and shed their identity,[31] which they felt was embarrassing due to the pressure of the predominant nationalism respecting antisemitism. After an illustrious academic career with stops in Leipzig, Basel, Kiel, Göttingen, and Munich, Rabel came to Berlin, the first faculty of the Reich, in 1926. There he became the founding director of the Kaiser Wilhelm-Institut for Foreign and International Private Law. In 1933 he was Dean of the Faculty of Law. He was forced into retirement in 1935 and emigrated in 1939. This *vita* represents the Habsburg dilemma of the Jews in an almost classic form: the German national community (whether in the Reich or in "Austria," that is to say the German speaking part

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Emigranten auf die Rechtsentwicklung in den USA und in Deutschland (Tübingen 1993) 13, 191.

[29] According to W. Flume in an interview, quoted from A.-M. v. Lösch, *Der nackte Geist: die Juristische Fakultät der Berliner Universität im Unterbruch von 1933* (Tübingen 1999), 366.

[30] My translation. Rheinstein, "Gedächtnisrede" (note 25), 138: "Sicher ist . . . , daß Rabel ein deutscher Patriot war. Wie mancher andere der ins Reich gekommenen Österreicher war Rabel beeindruckt vom Glanz des Wilhelminischen Deutschland, von dem Gegensatz zwischen der disziplinierten Einheit und Arbeitsamkeit Deutschlands und dem Völkerzank Österreichs und der Leichtlebigkeit seiner Hauptstadt." For evidence of this attitude see Lösch (note 29), 367–408. Strong (note 6), 93, rightly emphasizes that this commitment to Germanness was typical of the Jews in the western half of the Reich.

[31] Beller (note 5), 159–80.

of the monarchy with its capital Vienna) refused Rabel's entry, despite and perhaps precisely because of his successes combined with his complete assimilation, and the supranational homeland of the Habsburg monarchy could no longer offer protection. Where should he turn to?

If jurisprudence is considered "dry" or boring, this probably means that it has no part in the big questions of politics, art, or even the heart. As we hope to show, this is not the case, for Rabel at least. The broad sweep of his work can very well be read as a rational response to the dilemma of the Jews in the Habsburg monarchy and represents – according to our thesis – an attempt to overcome this dilemma.

This thesis could, of course, be countered *a limine* with the argument that it is contradictory to want to explain a person based on his Jewish origins if this person – according to one of the many possible definitions – is not a Jew and does not want to be one. It could be argued that this would have a racist connotation – albeit unintentional, but nevertheless unavoidable. This objection is not substantive, because it was precisely the racist antisemitism that had been spreading endemically since the 1870s that prevented the Jews from being what they wanted to be:[32] they could neither be completely absorbed into the ethnic communities around them, nor could they simply remain Jews. If one were to disregard the extent to which this attitude of their social environment had a profound influence on the Jews of that time in their thoughts and actions, one would be denying a social-psychological fact of the first degree. Such artificial blindness leads neither to the realization of humanity nor the deepening of knowledge. Two examples: the famous constitutional lawyer Bernatzik wanted to prevent his disciple Hans Kelsen (1881–1973)[33] from pursuing an academic career, in Kelsen's own well-understood interest, of course, because he was a "Jewish candidate" (*jüdischer Kandidat*): because he was an Evangelical Christian of Jewish origin.[34] As we shall see, Kelsen is a parallel case to Rabel in the field of public law. The subtle

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[32] Beller (note 5), 209–11; from a European perspective L. Poliakov, C. Delacampange, and Patrick Girard, *Über den Rassismus: sechzehn Kapitel zur Anatomie, Geschichte und Deutung des Rassenwahns* (Stuttgart 1976), 111–35.

[33] N. Leser, "Hans Kelsen (1881–1973)," in *Neue österreichische Biographie*, 20 (Wien 1979), 29–39.

[34] H. Kelsen, "Autobiographie," in M. Jestaedt, ed., *Werke*, 1 (Tübingen 2007), 40.

playwright Arthur Schnitzler (1862–1932)[35] masterfully summarized this situation in his autobiography when he wrote about the years that also shaped Rabel from his own experience:

> It was not possible, especially for a Jew [i.e. person of Jewish origin] who was in the public eye, to refrain from being a Jew, because the others did not, the Christians did not and the Jews even less. You had the choice of being considered insensitive, pushy, cheeky or sensitive, shy, persecution-mad. And even if one maintained one's inner and outer demeanor to such an extent that one showed neither the one nor the other, it was as impossible to remain completely unaffected as it would be for a person to remain indifferent if they had their skin anaesthetized but had to watch with their eyes wide open and awake as unclean knives carved and cut them until the blood came.[36]

Like Schnitzler, Rabel was also characterized by this climate of "closed roots against universalism, blood and soil against bloodless cosmopolitanism" as Gellner put it.[37] In addition, a change of identity such as the one Rabel's ancestors had undergone by baptism (in modern research this is referred to as "secondary conversion" to emphasize that it was less about religion than about social position)[38] is a process that is not completed from one day to the next. It is unimaginable how Rabel could have been unaware that both

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[35] P. Gay, *Das Zeitalter des Doktor Arthur Schnitzler. Innenansichten des 19. Jahrhunderts* (Frankfurt am Main 2002).

[36] My translation. A. Schnitzler, *Jugend in Wien: eine Autobiographie* (Frankfurt am Main 1994), 322:

> Es war nicht möglich, insbesondere für einen Juden, der in der Öffentlichkeit stand, davon abzusehen, dass er Jude war, da die anderen es nicht taten, die Christen nicht und die Juden noch weniger. Man hatte die Wahl, für unempfindlich, zudringlich, frech oder für empfindlich, schüchtern, verfolgungswahnsinnig zu gelten. Und auch wenn man seine innere und äußere Haltung so weit bewahrte, dass man weder das eine noch das andere zeigte, ganz unberührt zu bleiben war so unmöglich, als etwa ein Mensch gleichgültig bleiben könnte, der sich zwar die Haut anästhesieren ließ, aber mit wachen und offenen Augen zusehen muss, wie unreine Messer sie ritzen, ja schneiden, bis Blut kommt.

[37] Gellner (note 2), 38. See the introductory chapter on the Danube Monarchy in Hitler's, *Mein Kampf*, 922nd–926th ed. (Munich 1933), 1–137.

[38] R. Stark, *The Rise of Christianity: A Sociologist Reconsiders History* (Princeton 1996), 3–29; The Leibniz Institute for Jewish History and Culture – Simon Dubnow, "'Secondary Conversions' – Transforming Religious and Ethnic Emblematics of Judaism and Jewishness," International Conference (Feb. 22–24, 2003) (summary and program available from the Institute website).

of his grandparents had grown up in Vienna's *ghetto*[39] – only after 1848 all restriction for Jews, including that of choosing their residence were lifted.[40]

Jewish identity as a historiographical question

It seems imperative to make Rabel's Jewish origins the vanishing point of his intellectual biography, even though he wanted to shed his Jewish origins. Beller, for example, uses the same method in his standard work on the history of Vienna's Jews. He believes that Jewish ancestry in a particular person is "synonymous with a world view that is fundamentally different from that of fellow citizens of non-Jewish descent."[41] On this basis, he treats all persons of "Jewish" descent as Jews. Landau pursues the same approach in his encyclopedic essay on "Jurists of Jewish origin in the German Empire and the Weimar Republic" (*Juristen jüdischer Herkunft im Kaiserreich und in der Weimarer Republik*)[42] from the lexical anthology "German Jurists of Jewish Origin" (*Deutsche Juristen jüdischer Herkunft*). In their foreword the editors (H. Heinrichs et al.) refer to the dilemma that they can hardly avoid adopting the demarcation criteria of antisemitism if they wanted to reach their goal countering antisemitism by "honoring the achievements made by people of Jewish origin for our [German] society and culture."[43] But this is precisely what the editors of this volume – as well as the author of this article! – consider to be an honorable and sensible undertaking. For let there be no mistake about one thing: antisemitism would celebrate an even greater triumph if – like under the spell of a *damnatio memoriae* – we no longer dared to speak at all about who was of Jewish origin and how this origin characterized the individual's work. And it is very likely that Rabel's Jewish background shaped his world view. In the article cited above, Landau also refers to an affinity of the lawyers of Jewish origin he dealt with for "cosmopolitan ideas" – an affinity that also existed in Rabel's case, as will now be shown.

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[39] On "Jewish consciousness" see Beller (note 5), 85–96.

[40] K. Lohrmann, "Politische und rechtliche Lage der Juden in Österreich 1848–1890," in *Austriaca*, 31 (1990), 19–28.

[41] Beller (note 5), 85–96.

[42] Now published as a *separatum*: P. Landau, *Juristen jüdischer Herkunft im Kaiserreich und in der Weimarer Republik* (Munich 2020).

[43] H. Heinrichs et al., eds., *Deutsche Juristen jüdischer Herkunft* (Munich 1993), x (Vorwort).

II. The idea of a worldwide legal order

Rabel's life's work is dominated by one major idea, the idea of a worldwide legal order in the field of private law, that is a uniform order for the law of private legal relationships. An important approach to this can initially be found in his teachings on private international law (conflicts law).[44]

A. The doctrine of autonomous qualification in private international Law

Private international law links a specific case with foreign implications to a specific legal system (for example, the validity of the marriage between two Ruritanians may be reviewed before a German court according to Ruritanian and not German law; in this case, the German court would apply Ruritanian law). This foreign legal system is selected by the conflict-of-law rules, which have very general terms in the facts of a norm, which circumscribe its scope of application – the so-called "systemic terms" (*Systembegriffe*). For example, the codification of German private international law uses the term "marriage"[45] and stipulates that the divorce of a marriage is subject to the law of the state that is decisive for the general effects of that specific marriage, which in turn is primarily the state to which the spouses belong. But what is a "marriage" in the sense of German private international law? Would this also include, for example, a *matrimonium* under classical Roman law, which could be entered into without any formality and could be dissolved completely informally by declaration of one party without any important reason, just like a "non-marital cohabitation" today?[46] This touches on the "problem of qualification" (*Das Problem der Qualifikation*),[47] the title of Rabel's famous essay on the subject. When Rabel dealt with these questions,[48] the doctrine assumed that private international law had the task of assigning *legal* relationships and not matters of life to a particular legal system for

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[44] Likewise B. Großfeld, *Macht und Ohnmacht der Rechtsvergleichung* (Tübingen 1984), 49.

[45] EGBGB Art. 13.

[46] On comparable problems today P. Mankowski, "Art 13-17b EGBGB: (Internationales Eherecht)," in *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* (Berlin 2010), *Anhang* to Art. 13, para. 58–59.

[47] On this C. von Bar and P. Mankowski, *Internationales Privatrecht*, 1, 2nd ed. (Munich 2003), § 7; G. Kegel and K. Schurig, *Internationales Privatrecht* (Munich 2004), § 7; K. Schurig, *Kollisionsnorm und Sachrecht* (Berlin 1981), 215–20.

[48] *Gesammelte Aufsätze* (note 26), 2:189–90; *Conflict* (note 26), 1:47–50.

decision.[49] Following this approach, the problem of qualification, from the point of view of the doctrine at the time, had to be presented as the question of which substantive law governed the legal relationship to be connected. There were only two possibilities: the substantive law of the *lex fori* (i.e. the place of jurisdiction) or that of the *lex causae* (i.e. the place of origin):[50] whether a *matrimonium* is, for example, a marriage, could only be judged according to the law of state X or Y, *tertium non datur*. Rabel's epochal essay changes the perspective: for him, it is no longer a question of linking the concepts of conflict of laws to one or other substantive law; rather, he emancipates conflicts law from substantive law. According to him, both conflict of laws and substantive law have the same "original substance" (*Urstoff*) in the facts of life, to which the respective facts refer.[51] This emancipation of conflict of laws from substantive law paves the way for an autonomous (i.e. no longer determined by substantive law) qualification of the facts of life. This is followed by the question of how the terms of autonomous conflict of laws are to be defined, according to which *criteria* it is to be determined whether the relationship between a man and a woman is to be categorized as marriage. In Rabel's view, the material on marriage must first be compiled by a comparative examination of the legal systems of the "Western civilized people" and then the common features of this material must be determined by induction.[52] The "idea" of a certain legal institution found in this way then serves to charge or fill out the systemic concepts of conflict of laws. Rabel gives an example:

> In Article 23, guardianship is to be understood as what not only the Civil Code, but the entire cultural world generally understands it to mean, and more precisely: all legal institutions intended to regulate the representation or personal care of

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[49] See Rabel and the modern literature on the qualification problem in note 47 above.

[50] Kegel and Schurig (note 47), 583. These two forms of qualification lead to considerable difficulties, which is why practice today – not least because of Rabel – qualifies functionally. See J. Kropholler, *Internationales Privatrecht,* 6th ed. (Berlin 2006), § 17, with further proof. Illustrative for this method: BGHZ 47, 324, and D. Henrich, "Die Morgengabe und das Internationale Privatrecht," in M. Coester and K. A. von Sachsen Gesaaphe, eds., *Privatrecht in Europa. Festschrift für Hans Jürgen Sonnenberger* (Munich 2004), 389–400.

[51] *Gesammelte Aufsätze* (note 26), 2:193.

[52] Id., 2:238.

> persons who are not under paternal or parental authority and do not have full legal competence . . . .[53]

The ideas of legal institutions found in this way naturally no longer belong to German law or any other positive law but are common to all civilized nations. This method leads to a meta jurisdiction that prevails over national rights. This is a jurisdiction in the full sense of the word, because the substantive definition of the systemic concepts of private international law means an arrangement, albeit indirect, of legal consequences for certain situations.[54] For example, certain unions of people fall under the concept of marriage and others do not, which has the corresponding consequences under private international law. Conflict rules not only have the same "original substance" as substantive law rules, but they also make the same judgments: "Let us remember," writes Rabel, "what we ultimately hope for is a universal legal doctrine with its own concepts and standards of judgment."[55]

B. The *ius gentium* of the Romans as a historical model

Rabel's most significant achievement in the field of legal standardization is his "Law of the Sale of Goods" (*Das Recht des Warenkaufs*), a comparative study of international law with the aim of creating a uniform law for cross-national sales contracts. He leaves no doubt as to what he is getting at: the national characteristics of international sales contracts have receded to such an extent that one could believe they have been overcome. "It follows from this, first of all," according to a presentation of his project written in 1932 –

> that there is certainly no national heritage [*sic*] left to save in this area. If the historical differences among the civil law systems disappear, there is no need to shed a tear for them,

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[53] My translation. Id., 2:206:

> Unter Vormundschaft ist in Art. 23 füglich das zu verstehen, was nicht nur das Bürgerliche Gesetzbuch, sondern die ganze Kulturwelt darunter im Allgemeinen begreift und genauer: alle Rechtsinstitute, die dazu bestimmt sind, die Vertretung oder persönliche Sorge für die nicht in väter- oder elterlicher Gewalt stehenden, nicht voll geschäftsfähigen Personen zu regeln . . . .

[54] Id., 2:218: "Das Kollisionsrecht verfügt über den ganzen Reichtum an Mitteln, den ein Rechtssystem nur haben kann." On the evaluative character of IPR norms see Kropholler (note 49), 24–25.

[55] My translation. *Gesammelte Aufsätze* (note 26), 2:362: "Erinnern wir uns, was wir letzten Endes erhoffen, ist eine universale Rechtslehre mit eigenen Begriffen und Wertungsmaßstäben." See also id., 3:379.

> and since the connection with the general doctrines of the law of obligations is very close, the national general law of obligations is by no means to be spared. . . . Nevertheless, the step away from the national legislations would be too great for a world law [*sic*] if we wanted to abolish them now already.[56]

In addition, the resistance to a regulation of domestic sales law would also be too great, which is why he limits himself to interstate sales and comments on this:

> The chosen path will . . . give the countries the opportunity to try out the new and the old law side by side. A further piece of modern *ius gentium* emerges, which stands alongside the *ius proprium civium* in each country and competes with it for the prize of perfection.[57]

In order to understand what is meant by this, it is necessary to visualize what is meant by *ius gentium* and *ius proprium* in Roman law. The following is not about how this concept actually worked in Roman law; that is a very controversial and difficult question, but only about Rabel's concept[58] of the *ius gentium* of the Romans.[59] His view is not outdated or even indefensible, it is rather the prevailing

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[56] My translation. Id., 3:498:

> . . . dass auf diesem Gebiete sicherlich kein nationales Erbgut [*sic!*] mehr zu retten ist. Wenn die historischen Verschiedenheiten unter den zivilrechtlichen Systemen verschwinden, so braucht man ihnen keine Träne nachzuweinen, und da der Zusammenhang mit den allgemeinen Lehren des Schuldrechts sehr enge ist, so ist auch das nationale allgemeine Obligationenrecht keineswegs zu verschonen . . . . Dennoch wäre für ein Weltgesetz [*sic!*] der Schritt von den nationalen Gesetzgebungen weg zu gewaltig, wollten wir diese jetzt schon abschaffen.

[57] My translation. Rabel, *Warenkauf* (note 26), 1:35:

> Der gewählte Weg wird . . . den Ländern die Gelegenheit geben, das neue und das alte Recht nebeneinander zu erproben. Es entsteht ein weiteres Stück des modernen *ius gentium*, das sich in jedem Land neben das *ius proprium civium* stellt und mit ihm um den Preis der Vollkommenheit ringt.

[58] Rabel's conception of *ius gentium* can be inferred on the one hand from his few remarks about it and on the other hand from the works of his teachers: K. von Czyhlarz, *Lehrbuch der Institutionen des römischen Rechts* (Vienna 1889), 29–31; L. Mitteis, *Das römische Privatrecht bis auf die Zeit Diocletians* (Leipzig 1908), 62–63; R. Sohm, L. Mitteis, and L. Wenger, *Institutionen des römischen Rechts*, 20th ed. (Leipzig 1949), 64–65.

[59] This also applies to precisely this question: H. Honsell, T. Mayer-Maly, and W. Selb, *Römisches Recht*, 4th ed. (Berlin 1987), 59.

opinion.[60]

The law of the city of Rome originally only applied to Roman citizens, and only those who had a share in the cults of the city of Rome were considered legal comrades. This situation became unbearable by the third century BC at the latest, as the city was full of foreigners and Rome's trade spread to the entire Mediterranean. In order to deal with legal relations with foreigners (*peregrini*), an additional office was created around the middle of the third century,[61] that of *praetor peregrinus*. The jurisdiction of this magistrate responsible for foreigners initially covered legal disputes among foreigners, but also between Romans and foreigners, as the sacred origin of the law meant that the Romans could not conceive of a foreigner's legal acts being subject to Roman law. In his occupation, the *praetor peregrinus* was not bound by local Roman law. He found the applicable law by stripping the business types of Roman law of the formalities perceived as typically Roman and applying them to matters relating to foreigners. Influences from foreign law, namely from Greece, were added.[62] The main basis of the legal creativity of the *praetor peregrinus* was the idea of *fides*, or loyalty, which was believed to bind Romans and non-Romans alike, as it was a principle arising from natural reason, i.e. common to all people. The *ius gentium* is thus closely related to Aristotelian natural law, as it was taken up by the Stoa and found its way into Roman jurisprudence through the mediation of Cicero.[63]

The *praetor peregrinus* published the promises of legal protection he had created in this way in a separate edict. This meant that non-Romans knew where they stood when doing business with Romans or other non-Romans.[64] The Romans referred to this law, which arose from practical experience, as *ius gentium*, which can best be translated as "common international law." These

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[60] For example: M. Kaser, *Das römische Privatrecht*, 1, 2nd ed. (Munich 1971), 202–205; idem, *Ius gentium* (Cologne-Vienna 1993).

[61] M. Kaser and K. Hackl, *Das römische Zivilprozeßrecht*, 2nd ed. (Munich 1996), 172–73; F. Wieacker, *Römische Rechtsgeschichte*, 1 (Munich 1988), 443–44.

[62] Czyhlarz (note 58), 30.

[63] In detail on the philosophical background: O. Behrends, "Che cos'era il ius gentium antico?," in M. Baccari and C. Cascione, eds., *50 anni Corte Costituzionale*, 1 (Milan 2006), 481–514, and Kaser (note 59), 54–56; Wieacker (note 61), 642–50.

[64] In favor of a separation of *ius gentium* and the activity of the *praetor peregrinus*: C. G. Bruns and O. Lenel, "Geschichte der Quellen des römischen Rechts," in J. Kohler, ed., *Enzyklopädie der Rechtswissenschaft in systematischer Bearbeitung*, 9th ed. (Munich 1915), 303, 330–31; Wieacker (note 61), 444.

connections are clearly formulated in a passage from the "Institutions" of Gaius (G.1.1):

> Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur: nam quod quisque populus ipse sibi ius constituit, id ipsius proprium est vocaturque ius civile, quasi ius proprium civitatis; quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur. Populus itaque Romanus partim suo proprio, partim communi omnium hominum iure utitur . . . .
>
> All peoples that are under the government of laws and customs use in part their own law, in part what is common to mankind; for what each people has established on its own account is peculiar to itself, and is called its civil law, in the sense of being the proper law of the particular state or *civitas*; whereas what its natural reasonableness has caused to be received by mankind generally is observed by all peoples alike, and is called the law of nations, that, as it were, which all nations make use of. The Roman people therefore, employs a body of law which is partly its own, partly common to all men.[65]

The Romans therefore did not solve the problem of the conflict between different legal systems as we do, who must find the relevant law for the respective situation with highly complicated conflict rules,[66] but by creating a uniform law for situations relating to foreigners. Mitteis, the revered teacher[67] of Rabel, writes about the relationship between this international common law and national law to the *ius proprium*:

> The *ius gentium* was rejuvenated *ius civile*. It was precisely as a result of this fact that it gained the power to exert a remodeling, formative influence on the *ius civile*. Just as commercial law influenced our entire development of private law, the *ius*

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[65] My translation.

[66] However, the Romans also had approaches to a PIL. Thus against H. J. Wolff: F. Sturm, Review of H. J. Wolff, *Das Problem der Konkurrenz von Rechtsordnungen in der Antike*, *IVRA*, 31 (1980), 131, 159–62; L. Winkel, "Einige Bemerkungen über *ius naturale* und *ius gentium*," in M. J. Schermaier and Z. Végh, eds., *Ars boni et aequi. Festschrift für Wolfgang Waldstein* (Stuttgart 1993), 443–45.

[67] On the relation between the two in detail: Zimmermann (note 25), 13–17.

> *gentium* had a leading, reforming effect on the peasant-agrarian *ius civile*.[68]

C. Rabel's "Law of the Sale of Goods" as modern *ius gentium*

Rabel's quote above therefore means that his "Law of the Sale of Goods" should establish a modern international common law and that this law, stripped of its national peculiarities, will again have an effect on the respective national rights, the *ius proprium*. National law must face up to the competition of international common law and will sooner or later discard what is not worth preserving.

However, the pragmatic Roman solution of a uniform law for "international matters" presupposed that there was a community powerful enough to make its concept of international common law binding on other peoples and that it could therefore be content to present its law in a purified form as an expression of the *ratio iuris*. However, Rabel's idea of a new international common law is not so much aimed at freeing a particular law from its peculiarities, but rather at recognizing the common ground in the existing material.[69]

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[68] My translation. Sohm et al. (note 58), 67: "Das *ius gentium* war verjüngtes *ius civile*. Gerade infolge dieser Tatsache gewann es die Kraft, umgekehrt selbst wieder auf das *ius civile* umgestaltenden, fortbildenden Einfluss auszuüben. Wie bei uns das Handelsrecht auf unsere gesamte Privatrechtsentwicklung, so wirkte das *ius gentium* führend, reformierend auf das bäuerlich-agrarische *ius civile*."

[69] He writes about the linguistic problem, *Gesammelte Aufsätze* (note 26), 3:379:

> Of course, the linguistic problem becomes more difficult the further one moves away from the pandectist community. I see the only satisfactory solution to the linguistic difficulties in the formation of universal legal concepts, to which the terms of the national languages will adapt themselves. Just as the international doctrine of Roman law has created a restricted field of unambiguous legal terms on the basis of the Corpus Iuris and was therefore so readily chosen as a starting point by international lawyers, in future the universal basic concept must find its means of expression in the various languages. However, the basic concept itself can only be grasped through scientific comparative law and is therefore considered utopian by most lawyers.
>
> [Freilich erschwert sich das sprachliche Problem, je weiter man sich aus der pandektistischen Gemeinde entfernt. Die einzige befriedigende Lösung der sprachlichen Schwierigkeiten erblicke ich in der Bildung der universalen Rechtsbegriffe, denen sich die Termini der nationalen Sprachen von selbst anpassen werden. Wie die internationale Lehre vom römischen Recht auf Grund des Corpus Iuris ein begrenztes Feld unmißverständlicher juristischer Fachausdrücke geschaffen hat und deshalb so gern von Völkerrechtlern zum Ansatz-

Accordingly, Rabel's common international law is not based on the instrument of power of one state, but on the better understanding of all jurists. If Roman international common law applied by virtue of Rome's power (*ex ratione imperii*), Rabel's international common law should apply by virtue of its intellectual quality (*ex imperio rationis*).[70]

D. Methodological implications of universalism

History of law, comparative law, conflict of laws: Rabel always sought the general in the particular,[71] from the beginning of his work to the end:

> [C]omparison makes a great lot of historical national clothing [*Tracht*, in German] of otherwise universal ideas disappear and also a still greater mass of accidental formalities and complications evoked by arbitrary law making. . . . Yet there is, among others, a second experience which I esteem in my present situation most, and that is: however, many differences there may be, right or wrong, between men and nations, there is but one legal science.[72]

According to Rabel's vision, this meta jurisdiction should lead to a kind of general part of legal phenomena, which would relate to comparative law and legal history in the same way that sociology relates to history:[73]

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punkt gewählt wurde, muß in Zukunft der universale Grundbegriff seine Ausdrucksmittel in den verschiedenen Sprachen finden. Nur ist der Grundbegriff selbst erst durch wissenschaftliche Rechtsvergleichung erfaßbar und gilt daher den meisten Juristen als utopisch.]

[70] Id., 3:254:

> It was plain, indeed, after the First World War, in innumerable diplomatic conferences, in the numerous international tribunals of that time, in rapidly growing literature fighting for vital interests of the various countries, that Roman law culture proved the only common language and the only undoubted measure for justice. We Romanists, for this reason had, per force, to become practitioners of *ius gentium*.

[71] Thus Rabel on himself, id., 3:211, 224; this has been observed many times: Kunkel (note 25), 3; Kaser (note 25), 625; Leser (note 25), 903–904; Wolff (note 25), xxiv.

[72] Rabel, *Unprinted Lectures* (note 26), 302.

[73] *Gesammelte Aufsätze* (note 26), 4:167–68. This was quite timely; see the report by D. S. Clark, "Nothing New in 2000?," *Tul. L. Rev.*, 75 (2001), 871–75, 895, on the International Congress of Comparative Law 1900 in Paris.

> In the future, historical comparative law and, with it, the history of law as a whole will find their highest expression in a philosophical section, in a general theory of legal phenomena as abstractly considered products and levers of culture, an exposition of causality in the emergence and effect of law. This part will separate itself from legal history and be classified as legal philosophy, just as sociology, the science of typical social phenomena, separates itself from history and falls under general historical philosophy.

In the words of Max Weber, sociology aims to "understand social action by interpreting it and thereby explain its course and effects."[74] For this purpose, ideal types of social phenomena are to be obtained from history by induction.[75] Since sociology is not concerned with the individual historical event, but with explaining the individual event from social regularities, it belongs rather to the philosophy of history than to history. In order to develop this "general theory of legal phenomena," Rabel certainly needs a *tertium comparationis*. He finds this in the social function of the respective legal institutions. His focus is therefore not on the respective legal constructs and dogmas, but on the function of the norms in a social context. This is illustrated by several quotations:

> It is recognized here that comparative law reveals sufficiently strong similarities between legal institutions of different countries to replace a foreign norm with a specific one of one's own. Kahn speaks of commensurable legal relationships when the core of a legal institution is the same when peeled out of its technical shells.[76]

> How far we have thereby distanced ourselves from the concrete appearance of national law; from its legal principles as well as

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[74] M. Weber, *Wirtschaft und Gesellschaft*, 6th ed. (Tübingen 1972), ch. 1, § 1 pr.

[75] Id. Their applicability for comparative law has recently been emphasized by N. Jansen, "Comparative Law and Comparative Knowledge," in M. Reimann and R. Zimmermann, *Oxford Handbook of Comparative Law*, 2nd ed. (Oxford 2019), 306, 315–36.

[76] My translation. *Gesammelte Aufsätze* (note 26), 2:205: "Hier wird anerkannt, daß die Rechtsvergleichung genügend starke Verwandtschaften zwischen Rechtsinstituten verschiedener Länder aufdeckt, um eine fremde Norm an die Stelle einer bestimmten eigenen zu setzen. Kahn spricht von kommensurablen Rechtsverhältnissen, wenn der Kern eines Rechtsinstitutes aus den technischen Hüllen herausgeschält derselbe ist."

> from its legal institutions! We take from it only one basic idea, and this because of its recurrence in foreign laws.[77]
>
> Functional similarity or relatedness are aptly criteria for legal history and comparative law, and thus indirectly also for the structure of the facts of the conflict rules.[78]
>
> If comparative research teaches us anything, it is to look to the essentials. It ascertains throughout the world the facts common to all, the common life problems, the common functions of legal institutions.[79]

Accordingly, this method is referred to as the "method of functionality." It has become the prevailing method of comparative law. It is accompanied by the presumption that similarly constituted societies solve their problems in a similar way, which is referred to as the "presumption of similarity" (*praesumptio similitudinis*).[80]

Rabel's position is very close to natural law,[81] i.e. to the idea that there is a law flowing from the nature of things and thus ultimately from divine command and that this law is independent of state legislation.[82] This attitude of Rabel's follows inevitably from what has been said so far but can be substantiated even more clearly. The "General Civil Code" (*Allgemeines bürgerliches Gesetzbuch*) for the German part of the Habsburg monarchy of 1811 is one of

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[77] My translation. Id., 1:207: "Wie weit haben wir uns dabei von der konkreten Erscheinung des Landesrechts entfernt; von seinen Rechtssätzen sowohl wie von seinen Rechtsinstituten! Wir nehmen aus ihm nur einen Grundgedanken, und diesen wegen seiner Wiederkehr in fremden Rechten."

[78] My translation. Id., 1:231: "Funktionsgleichheit oder Verwandtschaft sind trefflichen Kriterien für die Rechtsgeschichte und Rechtsvergleichung, dadurch mittelbar auch für den Aufbau des Tatbestandes der Kollisionsnormen."

[79] Id., 1:432.

[80] Most important representatives: M. Rheinstein, *Einführung in die Rechtsvergleichung*, 2nd ed. (Munich 1987), 25–30, and K. Zweigert and H. Kötz, *Einführung in die Rechtsvergleichung*, 3rd ed. (Tübingen 1996), § 3 II. A comprehensive analysis and defense of functionalism can be found in R. Michaels, "The Functional Method of Comparative Law," in M. Reimann and R. Zimmermann, eds., *Oxford Handbook of Comparative Law*, 2nd ed. (Oxford 2019), 419–47. Against functionalism see, e.g., O. Brand, "Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies," *Brook. J. Int'l L.*, 32 (2007), 405–66.

[81] This is also Vivian Curran's assessment: "Cultural Immersion, Difference and Categories in U.S. Comparative Law," *Am. J. Comp. L.*, 46 (1998), 66–77.

[82] J. Messner, *Das Naturrecht*, 7th ed. (Berlin 1984); also presented in H. Kelsen, *Reine Rechtslehre*, 2nd ed. (Vienna 1960), 402–44.

the so-called "codifications of natural law" (*Naturrechtsgesetzbücher*). The existence of natural law is presupposed by this codification. § 7 ABGB, reads:

> If a legal case cannot be decided either from the words or from the natural meaning of a statute, consideration must be given to similar cases that have been decided in the statutes and to the grounds of other related statutes. If the legal case remains doubtful, it must be decided according to the *natural principles of law* with regard to the carefully collected and maturely considered circumstances.[83]

Rabel writes: "There is something, after all, to the 'nature of things' (*natürliche Rechtsgrundsätze*) to which the authors of the Austrian Civil Code ultimately referred the judges."[84]

III. The way out of the Habsburg dilemma: from "lederhosen" to "toga"

A. The nationalist dimension of exegetical positivism

We asked ourselves how a jurist of Jewish descent in the Habsburg monarchy typically reacts to the particular political situation of his own group. Rabel's position is clear: on both a small and large scale, he is in favor of a world law on the basis of natural law. This is quite clearly and *tout court* a supranational, universal position, or to put it metaphorically: *toga* instead of *lederhosen*. And this is clearly the opposite of the position of those who shaped the environment to which Rabel, as a Jewish jurist, had to react. This antithesis to Rabel was formulated with commendable clarity by one of the fiercest antisemites of the nineteenth century, Paul de Lagarde (1827–1891).

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[83] My translation. *Allgemeines buergerliches Gesetzbuch fuer die gesammten Deutschen Erblaender der Oesterreichischen Monarchie* (Vienna 1811) § 7:

> Läßt sich ein Rechtsfall weder aus den Worten, noch aus dem natürlichen Sinne eines Gesetzes entscheiden, so muß auf ähnliche, in den Gesetzen bestimmt entschiedene Fälle, und auf die Gründe anderer damit verwandten Gesetze Rücksicht genommen werden. Bleibt der Rechtsfall noch zweifelhaft; so muß solcher mit Hinsicht auf die sorgfältig gesammelten und reiflich erwogenen Umstände nach den natürlichen Rechtsgrundsätzen entschieden werden.

On this, W. Waldstein, "Vorpositive Ordnungselemente im römischen Recht," *Zeitschrift für öffentliches Recht*, 17 (1967), 1–26; F. Bydlinski, *Juristische Methodenlehre und Rechtsbegriff*, 2nd ed. (Vienna 1991), 483–84.

[84] *Gesammelte Aufsätze* (note 26), 3:700.

> We must break with humanity: for it is not what all people have in common that is our real duty, but what unites us. Humanity is our fault, individuality is our duty.[85]

For the Habsburg monarchy, it was a matter of survival to seek the general in the particular, while its mortal enemy, nationalism and with it antisemitism, saw it as a virtue to cultivate the particular against the general. The Jews had no choice but to opt for the universal: the particular was not well-disposed towards them and would continue to be not well-disposed towards them.

Of course, the connection between the vision of a worldwide legal order and Jewish identity in the Habsburg monarchy shown here is not inevitable, but it is "purposefully rational" (*zweckrational*)[86] and therefore very probable. For a world legal order of Rabel's character is a positive, visionary, and by no means utopian alternative to the exegetical positivism that prevailed in civil law scholarship at the time. What is meant by this is that German civil studies – with the exception of Kohler and Post – were primarily concerned with the interpretation and further development of their own national legal system at the time.[87] One felt all the more entitled to do so, because Germany's codification of civil law, the Civil Code of 1900, had a similar national-symbolic significance for the legal profession as other achievements of "German" culture. In terms of the sociology of knowledge, however, such an exegetic positivism is hardly anything other than a nationalism transposed into the abstract, as it is content to concern itself with itself. From a nationalist perspective, however, this is not only sufficient, but also the only legitimate thing to do: because from the point of view of

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[85] My translation. *Programm für eine konservative Partei Preußens* (1884), cited in T. Nipperdey and R. Rürup, "Antisemitismus," in O. Brunner et al., eds., *Geschichtliche Grundbegriffe*, 1 (Stuttgart 1972), 3: "Mit der Humanität müssen wir brechen: denn nicht das allen Menschen Gemeinsame ist unsere eigentliche Pflicht, sondern das nur uns Einigende ist es. Die Humanität ist unsere Schuld, die Individualität ist unsere Aufgabe."

[86] "Purposeful rationality" (*Zweckrationalität*), a term coined by Max Weber, describes a behaviour in which a person directs his actions towards a specific goal and weighs up the means and consequences in order to achieve the goal efficiently. It is a form of rationality in which the choice of means depends on the effectiveness in achieving the specified purpose.

[87] See K. Larenz, *Methodenlehre der Rechtswissenschaft*, 7th ed. (Berlin 1991), 36–43; and F. Wieacker, *Privatrechtsgeschichte der Neuzeit*, 2nd ed. (Göttingen 1967), 430–58, 458–558. J. Rückert, *Fälle und Fallen in der neueren Methodik des Zivilrechts seit Savigny* (Baden-Baden 1997), 99–24, 315–35, places these – still indispensable – overall portrayals in the context of the times.

nationalism, the commonality of culture is what makes a nation.[88] If one agrees with the sociology of knowledge that science and thus also its methods depend considerably on the social situation of the individuals who pursue it, then – assuming purposeful rational thinking – there was no reason for Rabel to be an exegetical positivist like many of his colleagues. He would have participated in the self-celebration of the community, which ultimately denied him access.

B. Kelsen's positivism as law without characteristics

The "Pure Theory of Law" (*Reine Rechtslehre*) developed by the legal positivist Kelsen was born from a completely different spirit than exegetical positivism. Kelsen, like Rabel, stemmed from Vienna and was of the same descent and generation.[89] A comparison of the two is therefore not only appealing, but also necessary. Kelsen is a "positivist" insofar as, according to him, the validity of legal norms has its basis exclusively in two facts: the norm must be set by a competent body and it must be effective, i.e. it must be followed on the whole.[90] From this point of view, natural law cannot be the subject of jurisprudence, because natural law is pre-positive and is ultimately based on deriving an ought (*Sollen*), that is the norm, from a being (*Sein*), from nature, which is a false conclusion, since no path leads from being to ought. The doctrine describes itself as "pure" to the extent that it claims to dispense with all metaphysics and sociology. True to his doctrine, Kelsen wrote twenty years after the end of the Second World War that the legal positivism which he significantly founded resulted in the separation of law and morality; norms are therefore legally binding even if they violate the moral law (legal norms are derived from legal norms, they require no further legitimation and therefore also do not risk delegitimization by other systems, such as that of morality). Jurisprudence only must describe the applicable law and develop the necessary terms for this. The question of what law *should* be, on the other hand, is a matter of opinion and therefore not scientific.[91] As is well known, according to this theory, the norms as a result of which Kelsen had to give up his chair in Weimar Republic after 1938 and emigrate to the United States

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[88] Gellner (note 17), 3.

[89] On its significance: M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, 3 (Munich 1999), 164–71.

[90] H. Kelsen, "Was ist juristischer Positivismus?," *Juristen Zeitung* (1965), 465, 467.

[91] Kelsen (note 90), 468.

were also essentially lawful. In normal linguistic usage, it is offensive to refer to norms as "law" even though they negate morality. The initially offensive nature of this doctrine is lost, however, if we bear in mind that Kelsen takes a completely sober view of the most value-charged and thus emotionalized concept of all, that is, law, in Greek *nomos*, in Latin *lex*, and in Hebrew *tora*! What is understood colloquially as "law" is not "law" in Kelsen's sense. Kelsen's is nominalist: anything, even the worst dispositions can be called a law, whereas the other position is essentialist: only that is law which corresponds to the idea of law.

From Kelsen's point of view, this doctrine is reasonable because it has an affinity for value relativism and thus for democracy. In a democracy, the setting of norms and compliance with norms, as the two facts leading to the validity of a norm, are both derived from the people and controlled by them. In contrast, the determination practiced by natural law of what is "the" morality that stands above the law and even derogates from it can only ever affect a minority: after all, if these moral concepts claiming primacy were generally shared, they would be law and there would be no conflict between morality and law in the first place. Natural law is therefore always a matter for the *happy few*, and these no longer have priority in the system of democracy. Kelsen's legal positivism can be understood as a methodological safeguard for democracy, and democracy in turn is a safeguard against tyranny. Among the constitutional lawyers of the interwar period, Kelsen was one of the few convinced democrats[92] – certainly not without good reason, as for him this form of government served the realization of two values: freedom and, along with it, equality.[93] Mindful of the ideological character of this teleology, he invoked Cicero's *De re publica* 1.31:

> Itaque nulla alia in civitate, nisi in qua populi potestas summa est, ullum domicilium libertas habet: qua quidem certe nihil potest esse dulcius et quae, si aequa non est, ne libertas quidem est.
>
> Therefore liberty has no home in any state except where the power of the people is the highest: for indeed nothing can be

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[92] H. Dreier, "The Essence of Democracy – Hans Kelsen and Carl Schmitt Juxtaposed," in D. Diner and M. Stolleis, eds., *Hans Kelsen and Carl Schmitt. A Juxtaposition* (Gerlingen 1999), 72–74.

[93] H. Kelsen, *Vom Wesen und Wert der Demokratie* (Tübingen 1929), 3–13.

> sweeter than this liberty which, if it is not equal, is no liberty at all.[94]

Kelsen's position is just as rational as Rabel's;[95] it is "purposively rational" (*zweckrational*) in the Weberian sense. The field, of course, on which he argued, required different methods than Rabel's field. Therefore, they outwardly come to the opposite positions of extreme positivism and practiced natural law. In the field of private law, Rabel had to seek what unites rather than what divides. Anything else would have meant practicing an ideology that was hostile to him. Natural law and Roman law as *ratio scripta* were welcome helpers here. Kelsen had to become a positivist, i.e. despise natural law, because the pure doctrine of law has the greatest affinity for democracy and this form of government was in turn the most reliable guarantor of civil freedom. One knew how urgently people of Jewish descent needed civil liberty if one came from Vienna, the city of which the worst enemy of the Habsburg nation was to say that he had "turned from a weak cosmopolitan into a fanatical antisemite" (*vom schwächlichen Weltbürger zum fanatischen Antisemiten*).[96] What these two jurists of the century were striving for was a jurisprudence "without characteristics" (*ohne Eigenschaften*);[97] one wanted to separate out metaphysics, the other national characteristics. Both had a good reason for this; they sought salvation from the Habsburg dilemma in a rational and thus universal legal system. The inspiration for both was "Rome."

C. Habsburg international bickering and Roman international common law

This brings us full circle to Rabel and his – enigmatically – named "Flight to Rome." "Rome" is the historical model of a supranational state and a unified civilization encompassing the whole world. As the heir to the Holy Roman Empire, the Habsburg monarchy carried this idea into the twentieth century. Rabel was well aware of this connection:

> On the main gate of the Imperial Palace of Vienna, the seat of the House of Habsburg who ruled the core of Europe for six

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[94] My translation.

[95] On other effects of the political-sociological background on Kelsen's work, convincingly M. Baldus, "Hapsburgerian Multiethnicity and the 'Unity of State.' On the Structural Setting of Kelsens's Legal Thought," in D. Diner and M. Stolleis, eds., *Hans Kelsen and Carl Schmitt. A Juxtaposition* (Gerlingen 1999), 13–25.

[96] Hitler (note 37), 69.

[97] According to Beller (note 5), 229–31, a typical strategy.

> hundred years, the inscription reads: *Justitia Fundamentum Regnorum.* In these three words "justice is the foundation of government" which has significance for international life as well as internal administration, the function of law was summarized exactly as under the Roman emperors. It was not by accident that the motto was in Latin. In the origin and consolidation of the European monarchies at the dawn of the modern state, Roman law was an essential factor.[98]

When this empire was falling apart because it was considered completely out of date, Rabel did not go into wistful mourning like others, but instead turned powerfully to the roots of the vanishing order, to what became the "world of yesterday" (*Die Welt von Gestern*).[99] These roots lay in "Rome." Here he sought and found an alternative to the nationalist tendencies of his time. Mentally, the "Flight to Rome" was not a flight into the past, but into the future.[100] With his studies on sales law, he became the "mastermind" of the 1980 United Nations Convention on Contracts for the International Sale of Goods[101] adopted in Vienna. His dream of a world sales law had thus in the meantime become positive law for over 70 countries.

As Jhering had said, Rome had already given the world laws and unity three times before: first in the form of the Roman Empire, then through Christianity and finally by the proliferation of Roman law.[102] In the twentieth century, the creative power of *Roma aeter-*

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[98] *Gesammelte Aufsätze* (note 26), 3:278–79.

[99] Title of memoirs by Stefan Zweig, also a Jew from Vienna, written during his exile and published after his suicide: *Die Welt von Gestern. Erinnerungen eines Europäers* (Stockholm 1942).

[100] On the affinity of pre-modern, i.e. also pre-nationalist, and post-modern tendencies in the history of European Jewry: Diner (note 13), 246–47.

[101] P. Schlechtriem, I. Schwenzer, and U. G. Schroeter, *Kommentar zum einheitlichen UN-Kaufrecht*, 8th ed. (Munich 2025), i (Introduction).

[102] R. von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, 1, 2nd ed. (Leipzig 1866), 1:

> Dreimal hat Rom der Welt Gesetze diktiert, dreimal die Völker zur Einheit verbunden, das erstemal, als das römische Volk noch in der Fülle seiner Kraft stand, zur Einheit des Staats, das zweitemal, nachdem dasselbe bereits untergegangen, zur Einheit der Kirche, das drittemal infolge der Rezeption des römischen Rechts, im Mittelalter zur Einheit des Rechts; das erstemal mit äußerem Zwange durch die Macht der Waffen, die beiden anderen Male durch die Macht des Geistes.

na reincarnated itself a fourth time: in the idea of a world legal order, a new *ius gentium*. We have tried to show why a Viennese of Jewish descent was the midwife in this endeavor: in the pre-modern transnationality of the Habsburg monarchy, combined with the universality of Roman law, the necessary attitude and knowledge were available.[103] Rabel's vision is the confession of the "Habsburg nation":

> The right of every developed people shimmers and trembles a thousandfold under the sun and wind. All these vibrating bodies together form a whole that no one has yet beheld.[104]

A very similar view can be found in A. Fernández de Buján, "La influencia del Derecho romano en el sistema jurídico iberoamericano," *Derecho y opinión*, 2 (1994), 181–88, and idem, "Ciencia jurídica europea y derecho comunitario: Ius romanum. Ius commune. Common law. Civil law," *Glossae*, 13 (2016), 275–306; see also F. Fernández de Buján, "Retorno a Roma en la elaboración del futuro código europeo de contratos," *SDHI*, 66 (2000), 245–61.

[103] Beller (note 5), 265–66, is of the same opinion.

[104] My translation. *Gesammelte Aufsätze* (note 26), 3:5: "Tausendfältig schillert und zittert unter Sonne und Wind das Recht jeden entwickelten Volkes. Alle diese vibrierenden Körper zusammen bilden ein noch von niemanden mit Anschauung erfaßtes Ganzes." It's saddening to read how nowadays this legacy is banalised without any real arguments as a footnote of legal history like in the study of M. Reimann, "Rabel's Magnificent Failure: 'The Conflict of Laws: A Comparative Study'," *Zeitschrift für europäisches Privatrecht* (2024), 105, 127–28. All those who, like P. Legrand, *Le droit comparé*, 5th ed (2015), 68, 104–105 and *passim*, want to adhere to a "principium individuationis," believe in "différance," are either professing some identitarian ideology or simply are practicing some other kind of "obscurantisme"; both their way of thinking and of hiding their thoughts would have been abhorred by Rabel, and belong to the arsenal of his enemies; see H. Rauschning, *Die Revolution des Nihilismus: Kulisse und Wirklichkeit im Dritten Reich* (Zurich 1938).