

## The Life and Death of States. Central Europe and the Transformation of Modern Sovereignty. By Natasha Wheatley.

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“There should be no doubt about it: the precondition of an Austrian consciousness is the knowledge of the state’s history. Without the knowledge of what the dynasty and the people have achieved and what kind of role Austria fulfills in the development of humanity, no one will enthuse over the state.”<sup>1</sup> This statement was formulated in a memorandum in 1889 by Alfons Huber, perhaps the most remarkable Austro–German historian of his generation. Like several historians in the twentieth and twenty-first centuries, Huber also identified Austrian imperial identity with enthusiasm for the state; nevertheless, if someone had posed the question, “Very well, Professor, but what *is* the state?” Huber might have been in trouble giving a straight answer. How did they define the state in the late Habsburg Monarchy, when such a concept was particularly convoluted and the former presented several peculiarities which contemporary ideas about the state could only interpret as anomalies? This is only one question to which the remarkable book of Natasha Wheatley provides us with new answers.

Austria is again thought of as a “little world in which the big one holds its try-outs,”<sup>2</sup> as it was for Carl E. Schorske and Moritz Csáky, among several others. This time, however, these tryouts do not concern modern culture (as for Schorske<sup>3</sup>) or globalization (as for Csáky<sup>4</sup>) but modern legal thought. As legal theories could not make sense of the Monarchy, it became a stimulating environment for innovation in modern legal thought concerning questions of state and sovereignty—innovations which largely determine our contemporary world order. Wheatley advises those of

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1 Huber’s Memorandum is published in *Alfons Huber*, 451.

2 From the poem of Friedrich Hebbel as quoted by Schorske, *Fin-de-siècle Vienna*, xxvii.

3 Schorske, *Fin-de-siècle Vienna*.

4 Csáky, *Das Gedächtnis Zentraleuropas*.

her readers who are only interested in the development of modern legal thought to skip the chapters that mainly deal with the questions of historical context. However, this reviewer would advise the reader not to do so for two main reasons. First of all, this contextualization is not a redundant enumeration of historical events but a substantial part of understanding the complex nature of the Habsburg Monarchy, which inspired some of its best minds to rethink legal theory. Furthermore, and more importantly, there is a great deal to learn about the Monarchy from Wheatley's book, which fits with the most important trends in Habsburg historiography in four aspects. As a historian of the Habsburg Monarchy, I will mainly concentrate on these aspects of this rich work.

In the past few decades, leading historians of the Habsburg Monarchy have broken with the traditional nation-focused way of looking at its history and treating it as a conglomerate of nations. Rather, they strive to examine the Monarchy as a whole.<sup>5</sup> Wheatley follows this now increasingly dominant way of thinking when presenting the constitutional workings of 1848–49 (chapter one), and the Compromise of 1867, its varying interpretations, and its opponents (chapters two and three). The Monarchy's polyglot nature does not pose difficulties for her, as proposals for reshaping the empire's structure were all written in German in order to reach the necessary circles in the imperial elite. In chapter one, Wheatley pays particular attention to the Kremsier Constitution, especially the clash between the linguistic-national concept, which implied a complete reshaping of the historical regions, and those ideas which aimed at preserving historical aspects in the empire's structure. Although the constitution never came into force, its importance can hardly be overexaggerated: it was the first time that the nationalities were accepted as the empire's constituent parts. Also, the dilemmas the constituents faced would constantly reemerge for every reformer. The remainder of the chapter presents the different plans for the reorganization of the Monarchy up to 1861, including the ideas of some often-forgotten figures such as Antal Szécsen.

Besides some minor issues (e.g., contrary to what the author says, Josef Alexander von Helfert was not a liberal politician [p. 48]), I have two remarks regarding the chapter. The author constantly speaks of the 'national' aspect; however, this term (nation, national) was extremely vague; the notion was used by lawmakers to express very different things, as Gerlad Stourzh has shown in detail.<sup>6</sup> Moreover, contemporaries were also aware of the problems with the notion and

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5 Pieter M. Judson sees the essence of the paradigm-changing works on the Habsburg Empire over the last three decades in the choice of either the imperial or the (micro) local level, apart from the nation, as the scale of research. Judson, "»Where our commonality«," 7, footnote 13 (with a rich bibliography). Of course, Wheatley's approach falls into the former category.

6 Stourzh, *Die Gleichberechtigung*.

urged terminological clarifications.<sup>7</sup> Naturally, it was not Natasha Wheatley's task to provide a full genealogy of the concept; nevertheless, she could have alluded to the problem. Furthermore, it is a bit puzzling that while Wheatley discusses in detail how the Habsburg Monarchy's structure was that of a composite monarchy, she constantly calls the Habsburg polity an 'empire' instead of referring to it with the more natural term 'monarchy.' In my view, this solution is also tenable (after all, many contemporaries called it that); however, some more reflection on the terminology would have been welcome.<sup>8</sup>

Chapter two discusses the legal debates leading to the Compromise of 1867 and the opposing Austrian and Hungarian interpretations of it. This exhaustive analysis is even more welcome, considering that the landmark book of Pieter Judson does not discuss this unique formation in much detail.<sup>9</sup> The significance of the Compromise lies also in the fact that, as Wheatley shows, Austrian constitutional history and theory as a discipline developed largely as a consequence of the debate between Wenzel Lustkandl and Ferenc Deák.

Chapter three presents the debates about the legal status of the Monarchy's lands and nations. In the works of three major Czech figures (Josef Kalousek, Hugo Toman, and Karel Kramář), we see striking similarities between their arguments and those of Deák. Their main strategy consisted of opposing law and fact: although Habsburg rule encroached on their *Staatsrecht*, this never ceased to exist *de jure* and only waited to be awakened. Other reform theorists, such as Karl Renner and Otto Bauer, proposed acknowledging ethnic nations as legal collectives.

The two main protagonists of the book, Georg Jellinek and Hans Kelsen, are introduced in detail in chapter four. With this, we have arrived at another important field of Habsburg history, the research of *fin-de-siècle* Vienna. One might assume that after the great number of monographs and studies devoted to the subject, there is not much left to say. However, the contrast between the two great legal minds is a perfect example of the opposition of the liberal and the psychological man, as well as of Vienna's generational conflicts—that is, if Jellinek had not been chased away from the imperial capital by antisemitism.

Although both men broke with historical thinking, Jellinek did so still in the spirit of liberal optimism. He was convinced that Western theories were inadequate for grasping the problem of the state in Central Europe; a new, different knowledge was needed. He reinterpreted the phenomenon of the state in the framework of neo-Kantianism, making the distinction between *Sein* (is) and *Sollen* (ought).

7 E.g., Palacky, *Oesterreichs Staatsidee*.

8 The most recent literature on the problem is Connelly, "Was the Habsburg Empire?"

9 Judson, *The Habsburg Empire*.

Jellinek found that as far as legal thought was concerned, the state was a *Sollen*: law was a science of abstraction, the sole task of which was to make the state juridically thinkable; it was not its duty or even capacity to grasp its 'real essence.' Jellinek hence concluded that positivism, which had been based on the empirical observation of the material world, was not adequate for legal phenomena. Nevertheless, in his next major work, the scholar set out to study the connection between the state as a legal phenomenon and the state as a social-political order; that is, he wanted to research *Sein* and *Sollen* at the same time. This ambition was heavily criticized by Hans Kelsen. The Viennese legal scholar accepted that the state is essentially a *Sollen*, a system of 'ought.' But Kelsen went even further: he vehemently denied the validity of the essentialist, anthropomorphic fictions about the state. According to him, no one stands behind the state; these sorts of concepts were created based on the model of God worship, the decline of which reinforced this false idea even more. Not only was it false, but it also led to the dangerous fetishization of the state. Kelsen argued that the state and the legal order were not two separate things, as if the former were something standing outside or above the latter. Instead, the state existed only as the unity of the legal order. It is easy to see how the multi-national Habsburg state could not lend itself to any essentialist definitions. In fact, as Kelsen himself explained, his theory can be regarded as one of many anti-essentialist Austrian theories: Sigmund Freud, who had a strong influence on the scholar, denied the existence of the soul (after all, another essence), while physicist Ernst Mach elaborated a theory of physics without force.

Chapters five and six discuss the challenges which emerged with the fall of the Habsburg Monarchy and the creation of new states. Contemporary theories of the state lacked a temporal aspect and could not conceptualize the death and birth of states. How could one imagine the state dying when its most important feature was precisely that it outlived all of us, enabling the state to take upon itself obligations that could not be met within the lifetime of several generations? The birth of a state was equally problematic: as positive legal thought broke with the idea of the divine or the dynasty legitimizing law, it assigned this right to the state. Yet how can a state be started legally when the essential condition of legality is the state itself?

By presenting these dilemmas and their solutions, Wheatley joins yet another exciting trend in Habsburg historiography: research into the questions of continuity.<sup>10</sup> Interestingly, continuity is very perceivable in the case of the new Czechoslovak state. Leading Czech statesmen argued with the logic of the imperial legal order. Following the footsteps of the personalities discussed in chapter three, they emphasized the difference between the legal and factual survival of statehood. In their

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10 Judson underlined the importance of continuity. Inspiring research in this regard is e.g., Egry, *The Empire's New Clothes*.

official acts, the Habsburgs always acknowledged the existence of a Bohemian state (legal continuity), even if their governing practices contradicted this idea (factual discontinuity). With this argument, Czech statesmen avoided the theoretical problems that came with the birth of a new state: there was no birth, only the revival of a state which existed a long time before the Habsburg Monarchy itself. However, the problems of the imperial constitutions were inherited as well, namely the dilemma of the linguistic-ethnic versus the historical principle as it first appeared to the Kremsier constituents. The arbitrary mixture of these two principles (the historical in the case of Bohemian territories inhabited by Germans and the ethnic in the case of Slovaks) created a grave legitimacy deficit for the Czechoslovak state.

The dilemmas regarding death and birth posed themselves to the greatest extent in the case of the new Austria. Austrian statesmen declared complete discontinuity between their new state and the fallen Monarchy, even claiming that the name 'Austria' only had dynastic significance; 'Austria' did not exist legally. But how could a new state come to life? Contemporary legal theory thought of such an event as a 'pure fact,' which practically meant that, legally, it was an empty space. Hans Kelsen and his circle set out to integrate the phenomenon into a logically consistent legal system. Eventually, their solution consisted of placing international law at the apex of the legal pyramid: international law is above, before (not necessarily historically, but in terms of legal logic), and after the state; accordingly, it could determine the conditions for the formation of a new one. Wheatley presents brilliantly how the hectic Habsburg constitutional developments of the second half of the nineteenth century influenced the elaboration of the key concepts (e.g., the *Grundnorm* and the *Stufenbau*) behind this idea.

The final chapter is, to a certain extent, also related to a prominent question in Habsburg historiography: the problem of (post-)colonialism and the Monarchy. Nevertheless, Wheatley's question does not concern whether the Monarchy had colonies or whether the post-colonial theoretical framework could be applied in the research of its history, but the impact of its legal innovations on the legal interpretations of decolonization. For the death and birth of states became a constant problem in the world during the twentieth century. The legal innovations inspired by its early arrival in Central Europe became 'legal flash points' during the process of decolonization after World War II.

Leading legal minds of postcolonial states structured their arguments according to some version of the above-mentioned strategies elaborated in Central Europe after World War I. Many claimed that their state possessed pre-imperial sovereignty, which existed long before colonialism and only had to be reverted. The reference to international law was much more problematic: whereas international law was

the answer for the Kelsen circle and the great legal minds of the twentieth century influenced by it (e.g., Krystyna Marek), it tended to represent the problem for legal thinkers in postcolonial states. The main dilemma was how states that had just got rid of colonial rule could integrate themselves into an international legal system which was created by the colonial powers without the consent or contribution of the new states. With the closing thoughts of the final chapter, the reader is guided back to Central Europe, where the major questions regarding the death and birth of states posed themselves yet again after 1989.

“Easy to fly through the book [it] is not”—this remark made by Otto Mayer to one of Georg Jellinek’s main works (p. 158) is also valid for Natasha Wheatley’s book. However, the author’s talent for explaining complex legal theories in a way that non-specialists can understand them has to be admired. Also exemplary is how Wheatley handles central notions of Habsburg history, which have no real equivalent in English (e.g., *Staatsrecht* and *Volksstam*): she explains the specificities of the notions and then refers to them in their original form. *The Life and Death of States* is an intellectually highly rewarding read which deserves an eminent place among the most important literature on Central Europe published in recent decades.

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