
Kelsen and his Circle: The Viennese Years

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Abstract

This article situates Kelsen and his work in the context of the Austrian culture in the early part of this century. After sketching out the cultural and social influences that affected his family life and education, the author outlines the basic ideas of Kelsen's principal work, the Pure Theory of Law. He then goes on to discuss the dynamic links and exchanges between Kelsen and his circle and other intellectual movements active at the time in Vienna. Three such movements are examined at length. While Kelsen never actually joined a political party, he expressed some sympathy for 'Red Vienna' and took part in discussions and activities associated with the Austrian Social Democratic Party. Kelsen's neo-Kantian concept of the norm was clearly not in line with the Logical Empiricism of the Vienna Circle. Yet, his concern with the development of human thinking brought him close to Neurath. Finally, Kelsen's contacts with Freud were manifold and the influence of Freud's theories is tangible in his writings.

1 Introduction

Hans Kelsen was born on 11 October 1881 in Prague, in the Austrian imperial part of the Austro-Hungarian monarchy. From 1883 on the family lived in Vienna. After completing his law degree, Kelsen undertook his *habilitation* in 1911. From 1919 to 1930 he held the position of 'ordentlicher Professor für Staats- und Verwaltungsrecht' (full professor of state and administrative law) at the University of Vienna. In 1930, Kelsen accepted a call to Cologne and left Austria permanently.¹

Kelsen's Vienna years fell in the heyday of Viennese modernism, which had begun with the famous *fin de siècle*. The modernist period continued for the first three decades of this century and it was only with the *Ständestaat* that it came to an abrupt end. In recent years numerous publications have appeared which address the social and historical conditions of this intellectually progressive period, the diverse ties among its

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¹ All biographical information in this paper is taken from R. A. Métall, *Hans Kelsen. Leben und Werk* (1969).

leading figures and, finally, the cultural exodus from Austria.² An important characteristic of Viennese modernism was the way it encompassed both culture understood in a more narrow sense and science. This may explain why there was a 'scientific' streak in the rational 'coolness' of the Second Vienna School's twelve-tone music, why the development of psychoanalysis transcended the boundaries of science and culture, and why even today the iron core of Viennese modernism, the neo-positivism of the Vienna Circle, may be seen as a cultural phenomenon.³

Hans Kelsen exerted a decisive influence on this period. With his *Pure Theory of Law*⁴ he subjected the theoretical underpinnings of a discipline that had been practised for centuries — namely, jurisprudence — to a fundamental critique, while at the same time constructing a new foundation for legal theory. Both in his life and work, Kelsen conforms with a pattern often found in the leading figures of Viennese modernism: family background of assimilated Judaism; Viennese gymnasium schooling; involvement in the most progressive intellectual movements of the time; radicalism and acuity in his particular revolutionary approach; a unique combination of rationalism with an ethic of scientific world conception; development of a 'theory', founding of a 'Viennese school'; world fame; emigration to America.

This essay cannot claim to exhaustively analyse Kelsen's unique position in this period.⁵ Moreover, Kelsen, being of a modest character himself, did not include an autobiography among his vast writings. We therefore seek in this paper to explore 'Kelsen' as a subject within a cultural context, referring mainly to his work and only occasionally to his life.

2 Background

It is generally thought that many of the leading figures of Viennese modernism were of Jewish origins. Whether this was 'merely' the consequence of particular social and demographic conditions or whether there was a specifically 'Jewish' element remains the subject of debate.⁶ There is no sense, however, in seeking to detect 'Jewish' characteristics in the *Pure Theory of Law*. Such an endeavour would certainly be highly ambivalent in itself and, besides, while Kelsen and many other scholars of his

² See, e.g., A. Janik and H. E. Toulmin, *Wittgenstein's Vienna* (1973); C. E. Schorske, *Fin-de-Siècle Vienna. Politics and Culture* (1979); F. Stadler (ed.), *Vertriebene Vernunft* (vol. 1 and II) (1988); J. Nautz and R. Vahrenkamp (eds.), *Die Wiener Jahrhundertwende* (2nd ed., 1996); Stadler, 'Die andere Kulturgeschichte. Am Beispiel von Emigration und Exil der österreichischen Intellektuelle 1930–1940', in R. Steininger and M. Gehler (eds.), *Österreich im 20. Jahrhundert*, vol. 1 (1997) 498, at 506.

³ Stadler, 'Wissenschaft als Kultur?', in F. Stadler (ed.), *Wissenschaft als Kultur. Österreichs Beitrag zur Moderne* (1997), at 9.

⁴ Kelsen used this expression for the first time as the title of a book: *Reine Rechtslehre* (1934), which translates into English as *Pure Theory of Law*. In the following, 'Pure Theory of Law' will be used, in Kelsen's sense, to refer to his legal theory work in general.

⁵ The main source thus remains Métall's biography, *supra* note 1. The Kelsen estate, archived at the Hans Kelsen Institute in Vienna, contains very few personal documents.

⁶ On this discussion see Beller, *Wien und die Juden 1867–1938* (1993), at 9, 85, and Fischer, 'Zur Theorie des Wiener Fin de siècle', in Nautz and Vahrenkamp, *supra* note 2, at 110.

circle did have Jewish family backgrounds,⁷ many other outstanding minds of the time did not. Alfred Verdross and Adolf Julius Merkl, Hans Kelsen's earliest companions, came from bourgeois families and this was very common among civil servants.⁸ Of course, Kelsen's Jewish background figured prominently in his socialization and career. Although Kelsen's father was a mill-owner, the family was by no means wealthy. Nevertheless, they were able to provide a first-class education by Viennese standards for their eldest son, who had a good mind but was not brilliant, at Vienna's *Akademisches Gymnasium*. The gymnasium schools of the imperial and royal monarchy mainly functioned as a sort of 'transmission belt', providing children from relatively modest backgrounds, who were not necessarily recognized as being 'brainchildren', with a good education at an early age. There are many accounts of how the *Bildung*-conscious Jewish bourgeoisie, to which the Kelsen family belonged, took advantage of this opportunity to help their children move up the social ladder.⁹

If one were to gauge the standard of Vienna's gymnasium schools at the turn of the century on the basis of the performance of their graduates, one could be excused for thinking that they were a remarkable academic achievement. Graduates of Kelsen's generation included the famous political economist Ludwig von Mises (the same class as Kelsen), the nuclear physicist Lise Meitner in 1901, the Nobel Prize laureate Erwin Schrödinger in 1906, to name but a few. As in all Viennese gymnasium schools, the percentage of 'mosaic' students — the official term for 'Jewish' students — was high and in 1900 it was almost 50 per cent.¹⁰ Indeed, the influential role of gymnasium education in this period should not be underestimated. Nevertheless, in spite of a relatively progressive education policy,¹¹ the school also had a reactionary and 'ugly' face.¹² It certainly does not appear, however, that Kelsen's schooling stunted the development of his remarkable talents.

Métall reports that Kelsen's decision to study law was primarily based on practical considerations. He was initially drawn more to literature and philosophy. Kelsen's friendship with Otto Weininger also seems to have been important for his intellectual development. At first Kelsen showed little enthusiasm for legal theory; however,

⁷ Kelsen converted to Roman Catholicism in 1905. Kelsen was basically agnostic and only chose to be baptized for reasons of expediency. Max Knight reports that by 1940 Kelsen regarded himself as Jewish, without, however, ever converting back formally. See Métall, *supra* note 1, at 11; Walter, 'Hans Kelsen (1881–1973)', in H. Eiler, E. L. Ehrlich and L. Heid (eds), *Meinetwegen ist die Welt erschaffen. Das intellektuelle Vermächtnis des deutschsprachigen Judentums* (1997), at 331; and Knight, 'Erinnerungen an Hans Kelsen', *Aufbau*, 4 March 1973.

⁸ On Merkl's biography see Walter, 'Adolf J. Merkl — Persönlichkeit und wissenschaftliches Werk', in R. Walter (ed.), *Adolf J. Merkl. Werk und Wirksamkeit* (1990), at 9, 16. On Verdross see Seidl-Hohenveldern, 'Alfred Verdross 1890–1980', in W. Brauneder (ed.), *Juristen in Österreich 1200–1980* (1987), at 304.

⁹ H. Rozenblit's study, *Die Juden Wiens 1867–1914* (1988) contains a wealth of evidence.

¹⁰ See R. Winter, *Das Akademische Gymnasium in Wien* (1996), at 161.

¹¹ See especially J. Schermaier, *Geschichte und Gegenwart des allgemeinbildenden Schulwesens in Österreich* (1990), at 129.

¹² Cf. Friedrich Torberg's famous novel *Der Schüler Gerber hat absolviert* (1930). Métall has no doubt that Kelsen was not at all happy in gymnasium where his 'self-awareness constantly starving for gratification' was equally constantly hurt.

during the course of his studies — and with the development of the methodological aspects of his work — his interest in the subject seems to have grown more intense.¹³

3 Development of the Pure Theory of Law

Hans Kelsen has been aptly described as the 'legal expert of the century'.¹⁴ He was particularly concerned with the development and gradual consolidation of a theory of 'critical legal positivism', a Pure Theory of Law. Notwithstanding the importance Kelsen gave to social philosophical works,¹⁵ his approach was based on issues of legal theory. Before moving on to an analysis of Kelsen's thought, a brief sketch of the basic ideas of the Pure Theory of Law is in order.¹⁶

- a. The basic issue of the Pure Theory of Law is the description of law as a specific social method involving the control of human behaviour by means of coercion.
- b. The Pure Theory is a theory about norms: it sees its subject — positive law — as an ought-system (*Sollensordnung*). The legal system is described as a structure of legal norms rather than of social facts. Only this normative interpretation is adequate in respect to the immanent meaning of law, its claim to validity. The Pure Theory of Law thus stands in opposition to certain theories of sociological jurisprudence, which deny the possibility of normative (legal doctrinal) jurisprudence.
- c. The Pure Theory of Law is a positivist theory: legal norms are defined as the meaning of human acts of will. It discards all natural law doctrines, whether they see law as a product of supernatural will or as constructions of reason. Accordingly, the task of legal doctrine is essentially to ascertain as precisely as possible the will of the law-maker.
- d. The Pure Theory of Law is based on the separation of Is and Ought (*Sein und Sollen*): its foundation is the epistemological dualism of facts and values, statements and norms, cognition and volition. In this way, it rejects all legal theories that derive the validity of law from its effectiveness. The ultimate justification for the objective validity of law is grounded in an assumption that Kelsen terms the *Grundnorm* (basic norm). This does not lie at the basis of just any normative ('ought') order, but — in accordance with legal positivism — of one

¹³ The only Viennese professor who impressed Kelsen was Leo Strisower, a legal philosopher and specialist in international law.

¹⁴ This expression has almost become standard. See, e.g., Leser, 'Hans Kelsen (1881–1973)', in *Neue Österreichische Biographie XX* (1979), at 29.

¹⁵ In a 1963 questionnaire, Kelsen named as his 'Subject of study and specialization': 'Theory of law, social philosophy' (see letter to Henk L. Mulder of 5 May 1963; source: Institut 'Wiener Kreis', Vienna).

¹⁶ See especially H. Kelsen, *Reine Rechtslehre* (2nd ed., 1960) (English: *The Pure Theory of Law*). Only the following secondary sources shall be cited: a complete account of Kelsen's work by H. Dreier, *Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen* (2nd ed., 1990) and the Introduction by Walter in *Der gegenwärtige Stand der Reinen Rechtslehre, Rechtstheorie* 17 (1986), at 129.

that is effective as a whole. However, social effectiveness does not provide the reason for the validity of law, rather it is (only) a reasonable condition for legal science, given that there exists an interest in describing effective coercive systems (*Zwangsordnungen*). It is also a result of the fact that the Pure Theory of Law relativizes the moral value of law. The interest in knowledge in positive law exists regardless of whether individuals should obey, disregard, or even fight the legal system; it is important to have knowledge even of an inhuman legal system — albeit if only in order to escape from it.

- e. The Pure Theory of Law leads to a strict separation of legal science and legal policy. In the sense of a relativism of epistemological values, superior ('absolute') values cannot be recognized. The purity of this legal theory also appears in its separation of positive law from other normative systems, especially that of morality. Positive law must thus remain distinct from its valuation. Hence, because the focus of legal science is the cognition of law and because the focus of legal policy is the creation of law, these two areas must be carefully distinguished.
- f. The Pure Theory of Law separates positive law and legal science, prescriptive legal norms and descriptive normative propositions (*Rechtssätze*). With normative propositions, legal scholars describe a legal situation. Legal science cannot 'create' legal norms.
- g. A further important element of the Pure Theory of Law is the structural notion of the dual legal perspective, expressed most notably by Merkl, i.e., the relativity of the opposition between the creation of law and its application. This insight leads, by extension, to a sceptical view of the possibilities of legal scientific interpretation.

All in all, the Pure Theory of Law thus has a dual function: on the one hand, it is an epistemology, a 'methodology' upon which jurists can base legal science (in the sense of *Rechtsdogmatik*, a specifically German concept); on the other hand, however, it also represents a critical dispute with conventional jurisprudence, which Kelsen accused of distorting positive law 'ideologically' under the guise of seemingly juridical constructions (*Ideologiekritik*). One could say that the Pure Theory of Law is a legal theory with both legal and sociological ramifications.

Kelsen began his juridical career during the period of constitutional law positivism, an approach advocated by the leading German and Austrian constitutional law scholars at the turn of the century. It in turn was strongly influenced by the 'juridical-dogmatic method' in the theory of public law.¹⁷ Of course, this older brand of positivism showed serious shortcomings: it sought to concentrate constitutional law, as the 'theory of constitutional law', on positive law, while in many respects still adhering to the earlier methodological diversity. An autonomous juridical discipline, as had already been established for civil law, for instance, was still a long way off. At the same time (and certainly in keeping with my first claim), the older brand of positivism was not aware of its own epistemological underpinnings. As legal

¹⁷ See, e.g., Walter, *Die Lehre des Verfassungs- und Verwaltungsrechtes an der Universität Wien von 1810–1938*, *ÖJZ* (1988), at 609.

positivism, it was in a sense a naive 'natural law' positivism that proceeded from the assumption that the orders of authority simply had to be followed.

In preparing his *Habilitationsschrift, Hauptprobleme der Staatsrechtslehre* ('Main Issues of the Theory of Constitutional Law'), subsequently published in 1911, Kelsen came into contact with the major German scholars.¹⁸ He was particularly influenced by Edmund Bernatzik, the leading Austrian professor of constitutional law. In legal theory terms, Bernatzik's text *Rechtsprechung und materielle Rechtskraft* (1886)¹⁹ was profound, even though his attention subsequently remained focused on individual dogmatic issues of the — certainly quite complex — positive Austrian constitutional law. It was not only through his writings that Bernatzik exerted a 'moderate' influence on the young scholar, he was also Kelsen's *Habilitation* advisor in 1911 (his first advisor was Adolf Menzel, professor of administrative law and administrative policy).²⁰

It has often been remarked that the difficult circumstances for constitutional law deriving from the dual monarchy contributed significantly to the development of the Pure Theory of Law. This assessment is certainly not incorrect. In an autobiographical sketch,²¹ Kelsen stated the following in reference to the 'Austrian aspect' of the Pure Theory of Law:

Considering the Austrian state which was made up of so many different racial, linguistic, religious and historical groups, theories that tried to found the unity of the state on some socio-psychological or socio-biological context of the persons legally belonging to a state clearly proved to be fictions. To the extent that this theory of state is an important part of the Pure Theory of Law, the Pure Theory of Law can be seen as a specifically Austrian theory.

Here, however, the Austrian reference to the Pure Theory of Law is also relativized. Merkl, in particular, developed highly important theoretical legal insights from his analysis of issues of constitutional dogma,²² but one would be misguided in viewing the Pure Theory as merely being a specifically Austrian conceptualization.

The main problems, however, became evident in Kelsen's first attempt to put legal positivism on a new methodological foundation. As opposed to the fully developed theory — the principal points of which were sketched out above — the legal dynamic between basic norm and the theory of stages (of development) as well as the distinction between (prescriptive) legal norm and (descriptive) legal doctrine were still lacking. The aspect of volition played a completely different role than in Kelsen's later work. Key elements of his early work are the rigid distinction between 'being' and

¹⁸ For instance, Jellinek and Anschütz. However, these personal acquaintances did not play an important role in Kelsen's development.

¹⁹ On Bernatzik, see Walter, *supra* note 17, at 616; G. Winkler, *Geleitwort zu Bernatzik. Über den Begriff der juristischen Person* (reprinted 1996), at V.

²⁰ On the more subtle connections, see Métall, *supra* note 1, at 14.

²¹ *Ibid.*, at 42.

²² See, e.g., A. J. Merkl, *Die Rechtseinheit des österreichischen Staates* (from 1918).

'ought' with the specifically normative link, i.e., imputation, and the introduction of the 'legal doctrine' as the constitutive central concept of juridical knowledge.²³

Kelsen's method can be seen to be influenced by Kant's transcendental philosophy in the broadest sense. Parallels to contemporary neo-Kantian approaches can be found — in particular, Cohen — but they only become evident in the later development of the Pure Theory of Law, most notably with the introduction of the basic norm.²⁴ Kelsen's originality lies in the fact that he had recourse to theoretical models already developed in philosophy, which he used in order to found his legal science. Indeed, Kelsen, with his strong cognitive interest in founding a legal science, borrowed those elements from philosophy and legal science which appeared useful to him.

In subsequent years Kelsen continued to elaborate this theory in his prolific writings. The following points are worthy of note in this ongoing development: Kelsen's methodological consolidation of the Pure Theory of Law by incorporating an explanation of the meta-theoretical aspect of theory as a constitutive element;²⁵ his expansion of the theory primarily by focusing on issues of international law; and his growing interest in socio-philosophical issues.²⁶ The success of the Pure Theory of Law was ultimately also founded on the 'elegant' solution (i.e., purely legal and consistent) of a number of problems of constitutional law that had until that moment remained unsolved, among which were the construction of the federal state, the relation between international law and domestic law, and the essence of state liability.

Kelsen also earned an important place for himself in the history of his country as co-drafter of the Austrian Constitution of 1920. The Constitution, to which Kelsen contributed in a significant manner, is also important from a cultural point of view. A functional legal approach and forthright wording reflected the spirit of modernism. For the period 1920–1929 Kelsen was a member of the Constitutional Court. Kelsen developed the theoretical underpinnings of constitutional jurisdiction as a constitutional option and defended it against the critique of German constitutional law in particular.²⁷

As an expert on constitutional law, Kelsen formulated the sixth main part of the Constitution, which covers the organization and procedures of the Constitutional Court. Austria thus introduced a specialized and functional constitutional jurisdiction for the first time in legal history.²⁸ Kelsen's decision to leave Austria in 1930 was not motivated so much by the increasingly hostile academic opposition to his Pure Theory

²³ On Kelsen's early work see C. Heldemann, *Die Norm als Tatsache* (1927), at 23; Paulson, 'Toward a Periodisation of the Pure Theory of Law', in L. Glanformaggio (ed.) *Hans Kelsen's Legal Theory. A Diachronic Point of View* (1990), at 11; M. Pascher, *Einführung in den Neukantianismus* (1997) 151.

²⁴ See in greater detail Pascher, *supra* note 23, at 162.

²⁵ Thus argues Pascher, *ibid.*, at 162.

²⁶ See especially *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920).

²⁷ See 5 *VVDStRL* (1929).

²⁸ See further Walter, 'Die mitteleuropäische Verfassungsgerichtsbarkeit und die Reine Rechtslehre', *Österreichische Richterzeitung* (1993) 266.

of Law, but rather the strong reaction of part of the conservative camp to a particular decision of the Constitutional Court.²⁹

Kelsen experienced a number of conflicts during his Austrian years with his colleagues at the University of Vienna. At the same time, though, he very soon succeeded in creating a circle of like-minded scholars. Seen from the perspective of a sociology of science, Viennese modernism developed via 'circles', characterized by both academic and private dynamics. Hans Kelsen lived with his family near the University and held regular weekly meetings with his circle. Indeed, it might be more apt to speak of the more prominent members of the circle, Adolf Julius Merkl and Alfred Verdross, as 'companions' rather than 'students'. In particular, Merkl's contribution to the development of the Pure Theory of Law was substantial — which Kelsen always acknowledged. Merkl is responsible for formulating the actual 'theory of hierarchy', and his *Allgemeines Verwaltungsrecht* (General Administrative Law) provides a clear illustration of the outstanding qualities of the Pure Theory as a methodological instrument in the hands of a talented legal scientist.

Among Kelsen's many companions and students — indeed, too many to name here — Fritz Schreier should be mentioned. His text, *Die Interpretation der Gesetze und Rechtsgeschäfte* (1927) ('The Interpretation of Laws and Legal Dealings'), which explored an issue remaining largely outside the scope of the Pure Theory of Law — namely, the issue of juridical interpretation — is now attracting renewed interest.³⁰

During his Viennese years, Kelsen also developed relationships with a number of scholars from abroad. One of the earliest was Leonidas Pitamic who contributed to the development of the theory of basic norms. Later Alf Ross, Charles Eisenmann and Luis Legaz y Lacambra became members of the Kelsen circle.³¹ All existing documentation indicates that the Vienna School of Legal Theory was largely free of serious problems of group dynamics which burdened comparable circles.³² One exception was of course Kelsen's complex relationship with Fritz Sander, which can only be explained, as we shall see below, in psychoanalytical terms.

4 Kelsen's Links with Other Modernist Movements in Vienna

It is clearly not possible in this context to describe the entire network of relations

²⁹ This had to do with the resolution of a conflict of competences which concealed the issue of 'marriage dispensations'. The jurisdiction of the Constitutional Court, to which Kelsen contributed significantly, brought him opposition from clerical circles. With the subsequent 'constitutional reform' Kelsen lost his post as judge. Out of principle, he rejected an offer of the Social Democratic Party to take part in the newly constituted Constitutional Court as a 'confidential agent' (for details see Métall, *supra* note 1, at 52).

³⁰ See R. Thienel, *Kritischer Rationalismus und Jurisprudenz* (1991) 184.

³¹ Worth mentioning are also the relations to the Brno School of the legal theoretician Franz (Frantisek) Weyr, who also had friendly contacts with Kelsen (see W. Kubes and O. Weinberger, *Die Brünner Rechtstheoretische Schule* (1978)).

³² This probably had to do with the fact that Kelsen only wanted to see his school as an association in which 'everyone tried to learn from the other, without having to stop from going one's own way' (see Kelsen, *supra* note 4, at III).

which made up Kelsen's life in Vienna. In one account of the 'Vienna Circle', primarily oriented towards social, rather than intellectual, groupings from the late 1920s³³ the Kelsen Circle is described as overlapping with the neo-positivist 'Vienna Circle', the circle of neo-liberal political economists (Schumpeter, Hayek and Haberler), Rosa Mayreder's 'Women's League for Peace' and the 'Pan European Movement of Count Coudenhove-Kalergi. The author, Edward Timms, who developed a 'theory of the Vienna Circle',³⁴ found that interactions among creative circles in Vienna, compared to similar phenomena in other large cities, was particularly dynamic. The most striking feature of the Vienna circles was precisely their points of contact. Almost all of these circles overlapped with other neighbouring circles which, in their various cultural formations — among which literature, music, architecture, satire, psychoanalysis, Zionism — pursued similarly radical goals.

Of Kelsen's various connections, there are three which merit particular attention: Kelsen's relations with the Austrian Social Democratic party, to which he contributed notably on an intellectual level although he was not a member; the links between the Pure Theory of Law and the Logical Empiricism of the Vienna Circle; and his contact with psychoanalysis and its founder Sigmund Freud.³⁵

A Kelsen and Austrian Social Democracy

Kelsen considered it incompatible with his scientific ethos to become a member of a political party. Accordingly, it can be assumed that he did not have more than a certain sympathy for social democracy.

The unique role of Austrian social democracy derives from the fact that it cultivated a traditional Marxist rhetoric while, in view of the notorious weakness of the liberal bourgeoisie in Austria, becoming a sort of protector of modern trends *per se*. The notable accomplishments of Municipal Vienna under social democratic rule in the areas of adult education, educational reform and housing ensured the social democratic movement support from many bourgeois intellectuals. A highlight of this close affinity was the renowned 1927 'certificate for the great social and cultural

³³ See Timms, 'Die Wiener Kreise. Schöpferische Interaktionen in der Wiener Moderne', in Nautz and Vahrenkamp, *supra* note 2, at 129 (130). The reference can be found in Métall, *supra* note 1, at 32, where Kelsen's social connections and in particular his regular caféhaus-visits typical of this Viennese culture are described.

³⁴ *Supra* note 33.

³⁵ One should also note Kelsen's influence on the Catholic left wing of the conservative groups which were dominant in the *Ständestaat* from 1934 to 1938, in particular Ernst Karl Winter: see more specifically A. Diamant, *Die österreichischen Katholiken und die Erste Republik* (1960), at 203. In this connection, two of Kelsen's assistants deserve mention, i.e., the conservative political economist and later minister in the 'Austro-Fascist' period, Josef Dobretsberger, who held a 'left' position within this circle, and the conservative political scientist Eric Vogelín who subsequently received acclaim. After Austria's annexation to Hitler's Germany, Dobretsberger emigrated to Turkey and Voegelin to the United States.

achievements of the City of Vienna'.³⁶ Among those who signed are Alfred Adler, Karl Bühler, Sigmund Freud, Robert Musil, Anton (von) Webern and Hans Kelsen himself.

In this connection, it is worth noting some of Kelsen's activities outside of the university setting.³⁷ He was involved in teacher training, which had been restructured as part of the educational reform measures,³⁸ and lectured at the newly founded Paedagogical Institute of the City of Vienna.³⁹ He was also active in the school founded by Eugenie Schwarzwald, an advocator of women's liberation, who ran a special secondary school and well-attended summer courses where prominent artists and scientists lectured.⁴⁰

Kelsen maintained social and intellectual contacts with the leading theoreticians of the Austrian social democratic movement, including Karl Renner, Otto Bauer and Max Adler.⁴¹ It was Renner who as Chancellor of State of the provisional German–Austrian government asked Kelsen in 1918 to contribute in the State Chancellery to the legal preparations of the federal Constitution. As theoreticians Renner and Kelsen show considerable parallels:⁴² in the Pure Theory of Law Kelsen demonstrated that a lot of traditional legal constructions cannot pass the test of consistent, formal analysis, thereby revealing the ideological function of these constructions. This also applies in a paradigmatic way to the distinction between laws of the individual and property laws. The traditional definition of property as one person's exclusive domination of an object was seen as obscuring the socio-economically decisive function of property, namely the exclusion of control by all others over the given object.⁴³ Here a strong correspondence with Renner's legal sociological studies may be seen.⁴⁴

What is more important is the convergence between Kelsen and Renner on the neutrality of state. In contrast to the Marxist dogma of the role of the state as an instrument of class rule and the consequent prediction of a 'demise of the state' in the wake of the proletarian revolution, Renner underlined the neutral function of the

³⁶ H. Maimann (ed.), *Die ersten 100 Jahre. Österreichische Sozialdemokratie 1888–1988* (1988), at 139. The manifesto closes with the following paragraph: 'The essence of the spirit is freedom above all, freedom which is now endangered and which we feel obliged to protect. The struggle for a higher humanity and the battle against inertia and desolation will always find us ready. It also finds us ready here and now.'

³⁷ On the 'background' to social democracy, see Stadler, 'Spätaufklärung und Sozialdemokratie in Wien 1918–1938', in F. Kadrnoska (ed.), *Aufbruch und Untergang* (1981) 441.

³⁸ See, e.g., F. Stadler, *Studien zum Wiener Kreis. Ursprung, Entwicklung und Wirkung des Logischen Empirismus im Kontext* (1997), at 580.

³⁹ See E. Glaser, *Im Umfeld des Austromarxismus* (1981), at 309.

⁴⁰ H. Deichmann, *Leben mit provisorischer Genehmigung. Leben und Werk von Dr. Eugenie Schwarzwald (1872–1949)* (1988), at 39, see also 222.

⁴¹ On the strange role of the 'bourgeois democrat' Kelsen as socialist theoretician, see Pfabigan, 'Hans Kelsen und Max Adlers Auseinandersetzung um die marxistische Staatstheorie', in *Reine Rechtslehre und marxistische Staatstheorie* (1978) 63, at 81. Pfabigan sees the federal Constitution of 1920 as the basis of an alliance between social democracy and certain bourgeois groups.

⁴² See Leser, 'Hans Kelsen und Karl Renner', in *Reine Rechtslehre und marxistische Rechtstheorie*, at 41.

⁴³ See *Pure Theory of Law* (2nd ed.), at 131: '... a function which (if it refers to ownership of the means of production) is, rightly or wrongly, labelled as "exploitation" by socialist theory'.

⁴⁴ See K. Renner, *Die Rechtsinstitute des Privatrechts und ihre soziale Funktion* (1904, reprinted 1965).

state as an instrument of social technique. This not only corresponds to a main point of Kelsen's critique of the political theory of Marxism,⁴⁵ but also represented the actual 'interface' between the Pure Theory of Law and social democracy: Only after the systems of law and state have been freed of ideological ballast can the appropriate legal technique act to bring about an evolutionary change of society, a reform that, for Kelsen, also included transforming the means of production into collective property.⁴⁶

Similarly, though more oriented towards issues of party tactics, Kelsen's dialogue with Otto Bauer developed. Kelsen wrote a critical response to Bauer's work *Die österreichische Revolution* (1923) in the social democratic journal *Der Kampf*. Against the backdrop of Marxist theory Bauer had described the actual situation in Austria in the period 1918–1923 as a state of 'class equilibrium'. For Kelsen this was a step in what he considered to be the right direction, namely the acceptance of the state as an instrument of socialism.⁴⁷ Kelsen then went on to study Max Adler's theory, according to which socialism was to be based on a new — neo-Kantian — foundation.⁴⁸

B *Pure Theory of Law and the Vienna Circle*

The Vienna Circle, which thrived in the interwar years, actively sought to found philosophy on the basis of Logical Empiricism. Its influence was far-reaching and represents — with its numerous ramifications — an exceptional Austrian contribution to intellectual life in the twentieth century.⁴⁹

It seems natural to link the legal positivism of the Pure Theory of Law with the Vienna Circle's neopositivism. But let us first hear what Kelsen had to say on the matter:

In response to your letter of March 31, I would like to inform you that I did not belong to the so-called 'Vienna Circle' in the stricter sense of the word. I had personal contacts with this circle through my acquaintance with Prof. Schlick, Dr. Otto Neurath, Prof. Philipp Frank and Prof. Victor Kraft. What connected me to the philosophy of this circle — without being influenced by it — was its antimetaphysical thrust. From the very beginning I rejected the moral philosophy of this circle — as is formulated in Schlick's 'Issues of Ethics'. However, the writings by Philipp Frank and Hans Reichenbach on causality did influence my view of this issue. The journal

⁴⁵ See H. Kelsen, *Sozialismus und Staat* (3rd ed., 1965), at 105. The text ends with the following telling words: '... back to Lassale!'

⁴⁶ See Kelsen's 'Democracy and Socialism', *The Law School, The University of Chicago, Conference on Jurisprudence and Politics*, 30 April 1954, Conference Series, No. 15 (1955), at 63. This late essay, which is mainly directed against the thesis endorsed *inter alia* by Hayek that socialism and democracy are incompatible, marks Kelsen's most 'left' position.

⁴⁷ The relevant essays — Kelsen, 'Otto Bauers politische Theorien' and Bauer's response, 'Das Gleichgewicht der Klassenkräfte', both from 1924, can be found in G. Mozetic (ed.), *Austromarxistische Positionen* (1983), at 205, 216.

⁴⁸ Max Adler was a friend of Kelsen and was supported by the latter on his *Habilitation*. Today the discussion is only of historical interest. See M. Adler, *Die Staatsauffassung des Marxismus* (1922, reprinted 1973); H. Kelsen, *Sozialismus und Staat* (2nd ed., 1923) and on the whole issue see Pfabigan, *supra* note 41.

⁴⁹ Sometimes also referred to as the 'neopositivist' movement. For a general account see R. Haller, *Neopositivismus. Eine historische Einführung in die Philosophie des Wiener Kreises* (1993) and Stadler, *supra* note 38.

'Erkenntnis' published my essay 'Die Entstehung des Kausalgesetzes aus dem Vergeltungsprinzip' in its 8th volume and an essay titled 'Causality and Retribution' in its 9th volume...⁵⁰

It should first be noted that there was an unbridgeable rift between neopositivism and the Pure Theory of Law: Kelsen founded legal science as a 'normativist' science that deals with 'objectively' valid law. Here (objective) 'validity' is understood as the specific existence of legal norms. According to the Pure Theory there can be no doubt that legal norms — which belong to the realm of 'ought' — are not to be found in reality by empirical means. However, a mental operation, the assumption of the 'basic norm', makes it possible to describe legal norms as special kinds of 'realities'. In connection with law, 'positivism' implies a limitation to a regularly effective system of orders created by humans.

By contrast, neopositivism focuses on the development of a 'unified science' modelled after logical empiricism. In this context, statements on social facts are also permissible, but these are of the nature of predictions that can be verified by observation. According to Neurath, it is important 'that all statements contain definitions with regard to the spatio-temporal order, the order familiar to us from physics'. A sociology that is expressed in such a way becomes, in physicalist language, 'social behaviorism' where one no longer speaks about 'norms *per se*' but only 'about people, things and their correlations'.⁵¹

One finds numerous references to Kelsen in Neurath's writings. While he always stressed that the Pure Theory of Law followed an anti-'metaphysics' tendency in its studies (cf. later in the text), he rejected Kelsen's idealism, as may be seen in his statement:

When certain legal theoretical problems are no longer dealt with as problems of 'divine law' or of 'natural law' but as problems related to the consistency of certain statements, we are on our way to logical empiricism. But why should we begin such a discussion with speculations on the category of 'being' and 'ought'?⁵²

The neopositivist argument against Kelsen's basic assumption of an 'ought' category illustrates why a concerted effort was made in the further development of critical legal positivism to clearly distinguish between the 'knowledge economical' function of the basic norm and its 'knowledge theoretical' function.⁵³ To the extent that the selection of the subject is at issue — i.e., the first function — the criterion of expediency is the only standard. Thus, a legal science that can refer to the expediency of a description of a given 'real' system of orders as an 'ought system' — an expediency

⁵⁰ Excerpts from a letter that Kelsen wrote to Henk L. Mulder on 5 May 1963. Mulder had sent out a questionnaire to study the background of the Vienna Circle. (Cited permission of Wiener Kreis Stiftung, Amsterdam. All rights reserved.)

⁵¹ See Neurath, 'Physikalismus', reprinted in R. Haller and H. Rutte (eds), *Otto Neurath. Gesammelte philosophische und methodologische Schriften*, vol. 1 (1981) 417, at 419; Neurath, 'Soziologie im Physikalismus', reprinted in R. Haller and H. Rutte (eds), *Otto Neurath. Gesammelte philosophische und methodologische Schriften*, vol. 2 (1981) 533, at 549: 'The sociologist is certainly uninhibited when it comes to looking for laws, he must always only speak of spatially and temporally given formations in his predictions.'

⁵² See *Sozialwissenschaft und Einheitswissenschaft*, in Haller and Rutte, vol. 2, *supra* note 51, at 898.

⁵³ See R. Walter, *Der Aufbau der Rechtsordnung* (2nd ed. 1974), at 13.

that has been practised for centuries and whose necessity remains indisputable — becomes ‘immunized’ against the neo-positivist argument.⁵⁴

The neopositivist positions on the Pure Theory, however, are ambivalent. It needs to be stressed that Kelsen’s ideas were not free of metaphysics, although he followed a tendency that could fit in with the logico-empiricist theory. It has been said about Kelsen that he had ‘contacts with logical empiricism’ ‘without accepting it’.⁵⁵

Here, Kelsen’s relatively little known, yet important book, *Vergeltung und Kausalität*, deserves mention.⁵⁶ Basing his arguments on a wealth of ethnological material, Kelsen illustrated the following: i) people interpret ‘nature’ normatively according to the principle of imputation (thus as society) or scientifically according to the principle of causality (thus as nature); ii) in the development of human thinking the normative method appears before the causal one; iii) the idea of ‘causality’ only gradually becomes liberated from that of ‘retribution’; iv) in the course of emancipation of the idea of causality from that of ‘retribution’ — through renunciation of absolute

⁵⁴ A further relatively detailed study of Kelsen can be found in R. von Mises, *Kleines Lehrbuch des Positivismus* (reprinted 1990). Here one finds a ‘milder’ version of the neopositivist argument against Kelsen’s basic ideas — a version which already reflects the linguistic analytic turn. With the repudiation of a strict criterion of meaning and thus of a single ideal language of science, one could also — according to von Mises — also classify statements on the manifestations of ‘forms of human behaviour’ characterized, in linguistic expression, by the use of modal verbs such as want, ought, may and must, etc. Mises rejects a ‘general theory of axiology’ and argues that the ‘impersonal and prescriptive norms’ had become detached from their actual establishment through acts of volition. This fact — and here Mises explicitly takes issue with Kelsen — tempted legal experts to give law a philosophical ‘superstructure’. For von Mises, this superstructure not only includes the search for the ‘true essence’ of law but also addresses the ‘existence of law’. On the basis of quotes taken from the *Reine Rechtslehre*, Mises elaborates that he agrees with Kelsen to the extent that ‘to be and ought are not the same thing, that they, as one could put it, lie “on different levels” and so on. However, to make statements regarding a special “mode of existence of ought” and such like is irreconcilable with the rules of ordinary language or any form of language that could be constituted.’ This view ultimately means the negation of precisely this type of normative legal science, as pursued by Kelsen. According to Mises, it cannot be reconciled with a reasonably critical view of language to begin with the existence of real norm statements and to thus assume that an absolute distinction can be made between normative and factual sciences. The science referring to the object of law is seen as part of a ‘general sociology’, which, in addition to internal issues, is mainly supposed to clarify on what implicit, i.e., ideological, claims the legal system is based.

⁵⁵ See Neurath, *supra* note 51, at 898, and *Grundlagen der Sozialwissenschaften*, vol. 2, *supra* note 51, at 971.

⁵⁶ *Vergeltung und Kausalität — Eine soziologische Studie* (1941, distributed 1946); English translation: *Society and Nature — A Sociological Inquiry* (1943, reprinted 1982). In the English version, the digressions of the German edition are lacking. The work was published as volume II of the ‘Library of Unified Science, Book series’, which Neurath published together with Carnap, Frank and others. The personal (epistolary) rapprochement between Kelsen and the Vienna Circle did not take place in Austria, but rather mainly between Geneva and the Hague. At the beginning of 1936, Kelsen wrote to Neurath that he wanted to participate in the ideology-critical studies of his circle. Subsequently, Kelsen participated in the 5th and 6th International Congresses for the Unity of Science. His essay ‘Causality and Retribution’ was published in both German and English in the *Journal of Unified Science* in 1939. He later submitted a large manuscript entitled ‘Vergeltung und Kausalität’, which however was not published until it was translated into English. See Stadler, *supra* note 38, at 429 and Institut Wiener Kreis (Neurath papers: correspondence Kelsen/Neurath, cited with permission of Wiener Kreis Stichting, Amsterdam. All rights reserved).

necessity — dualism could be overcome in favour of a unified science — also possible within the social field.

Particularly with the last claim, Kelsen moves a certain degree closer to the neopositivist idea: from Kelsen's perspective in these years, the assumption of a category of 'ought' appears to belong to a period of human thinking which should at some stage be overcome. Of course, with this nothing has been said of the expediency of their assumption *hic et nunc* (cf. above).

The interest of the neopositivists in Kelsen's thought may also be explained by the fact that Neurath proceeded from a largely historico-sociological approach in developing his new 'scientific world view' — very much like Kelsen. He critically reconstructed the development of human thought right up to his own scientific standpoint. In so doing, he built up a sort of 'social history of thought', the history of human forms of thinking — and thus also of science. According to Neurath, these can only be addressed — not isolated — as a history of certain tools within the context of the entire history of human thought. Depending on the level of development, manifestations of such tools can be magic, but they can also be modern science.⁵⁷ With his precise account of the development of human thought as a process of liberation from metaphysics, Neurath certainly made a contribution to 'unified science' (and not just in the trivial sense that his work appeared in the 'library of unified science').

In his comment on the Vienna Circle quoted above, Kelsen explains that he had always rejected ethics as advocated, for instance, by Schlick. In that context, Kelsen also alluded to the fact that in his second edition of the *Reine Rechtslehre*⁵⁸ he dealt with one of Schlick's arguments on ethics.⁵⁹ With an eye to the moral norm, Schlick asserted that a norm is nothing other than a mere rendition of a fact of reality, in that it only specifies the conditions under which an act, an opinion or a character can be actually referred to as good, i.e., be deemed moral. In his opinion, laying down norms is nothing but a matter of defining the concept of goodness, which ethics seeks to recognize. A judgment, the proposition that a form of behaviour corresponds to a norm, is thus a judgment on a fact. Kelsen argues against this, claiming that the point of moral evaluation — i.e., the judgment that a certain behaviour is good — is not stating a fact of reality, i.e., of being. This controversy leads back to the question of the possibility of a 'normativist' legal science.⁶⁰

To complete this discussion, I would like to briefly mention Felix Kaufmann, the renowned Austrian legal theoretician and philosopher. In both his life and his work, Kaufmann forms a sort of 'missing link' between the Vienna School of Legal Theory and the Vienna Circle. Kaufmann sought to avoid the idealist consequences deriving from the assumption of a category of 'ought', while also recognizing that the notion of

⁵⁷ Cf. O. Neurath, *Empirische Soziologie*, vol. 1, (*supra* note 51), at 423.

⁵⁸ *Reine Rechtslehre* (2nd. ed., 1960), at 17

⁵⁹ M. Schlick, *Fragen der Ethik. Schriften zur wissenschaftlichen Weltauffassung*, vol. 4 (1930), at 11.

⁶⁰ On the further development of this discussion between the Vienna Circle and the Pure Theory of Law, see R. Walter, *Österreichisches Bundesverfassungsrecht* (1972), at 2.

the unified sciences would lead the social sciences into a dead-end. He thus attempted to develop an all-embracing theory of science using a 'phenomenological' approach.⁶¹

C *Kelsen and Psychoanalysis*

Kelsen's contacts with Sigmund Freud and his school were manifold. Nevertheless, it is important to make a distinction between the personal relations of these two significant figures and the intellectual inspiration that Kelsen drew from psychoanalysis.

Earlier than Métall remarks, Kelsen participated in Freud's 'Wednesday Meetings'.⁶² He became a member of the Vienna Psychoanalytic Society on 15 December 1911. On this same day he attended an evening lecture where he spoke with a friend of his, the lawyer and psychoanalyst Hanns Sachs, on the 'feeling for nature'.⁶³ Kelsen attended further meetings, but it does not seem — with one rather insignificant exception — that he made any other statements.⁶⁴ He only began to study Freud's thought more intensely in 1921. Towards the end of that year, Kelsen gave a lecture at the Vienna Psychoanalytic Society on 'The Notion of the State and Freud's Mass Psychology', which was later published in Freud's journal *Imago*.

On a more personal note, Kelsen's psychoanalytical insights were also important in his conflict with Fritz Sander. The latter, a once particularly devoted student of Kelsen, turned away from the Pure Theory of Law and developed a theory of legal experience.⁶⁵ This, of course, did not stop Kelsen from giving his support to Sander, who ultimately became a professor at the German university in Prague. At this point, however, Sander accused Kelsen of academic plagiarism. Kelsen responded by immediately setting up a disciplinary inquiry to investigate the substance of these accusations, which naturally led to Kelsen being completely exonerated. In spite of this severe falling out, Kelsen later agreed, through Franz Weyr's intervention, to resume contacts with Sander during the dark Prague period which they both lived through. Kelsen was able to see in Sander's strange behaviour a 'case of an unresolved Oedipus complex that could be explained by means of psychoanalysis' and to interpret the accusation of plagiarism as an attempt at patricide.⁶⁶

In this context, it is interesting to note that in the 1950s Kelsen volunteered his services to the psychoanalyst K. R. Eissler for an extended 'psychoanalytic interview'.

⁶¹ See a recently published book by F. Stadler (ed.), *Phänomenologie und Logischer Empirismus. Zentenarium Felix Kaufmann* (1997).

⁶² See H. Nunberg and E. Federn (eds), *Protokolle der Wiener Psychoanalytischen Vereinigung*, vol. III (1910–11), at XIV.

⁶³ *Ibid.* at 331. In the discussion on this lecture, some aspects that were important to Kelsen were addressed. Freud enlarged on this: 'The ancients had an animist world view and a bit of aesthetic natural feeling. Sachs had pointed out that aesthetics, the feeling for nature evolved with the decline of animism. Only once the world was deprived of deities did the feeling for nature gradually emerge, i.e., when libido was withdrawn from objects of the past.'

⁶⁴ *Ibid.*, vol. IV, at 1, 5 (statement by Kelsen), at 26, 95, 104.

⁶⁵ F. Sander, *Staat und Recht, Prolegomena zu einer Theorie der Rechtserfahrung* (1922).

⁶⁶ For a detailed account see Métall, *supra* note 1, at 39.

The resulting material, which would be of vital interest to the study of Kelsen's life and thought is, unfortunately, not yet publicly available.

The lecture Kelsen gave at the Vienna Psychoanalytic Society took place during the time that he was preparing *Der soziologische und der juristische Staatsbegriff* ('The Sociological and Juridical Notion of State') (1922). Kelsen addressed one of Freud's arguments, which the latter had borrowed from the French mass psychologist Le Bon.⁶⁷ Freud held the view that a 'mass' united for a specific goal and, oriented towards a *Führer* figure, was connected by the element of 'libido'. Kelsen saw the progressive aspect of Freud's explanation as being that he no longer proceeded from a real phenomenon of the 'mass soul', while still attempting to rationally explain mass cohesion. Of course, Kelsen criticized Freud for seeing the constitutive element of the state as lying in the phenomenon of mass cohesion.

In this point, Kelsen may have misunderstood Freud. In his 'Massenpsychologie und Ich-Analyse', the latter had argued as follows: 'In opposition to an otherwise understanding and astute critique of Hans Kelsen, I cannot admit that the human soul's endowment with a given structure implies a reification of the same, i.e., the adjudication of an independence from the psychic processes in an individual.'⁶⁸

A further inspiration drawn by Kelsen from Freud was his recourse to social psychological studies for the ideology-critical aspect of the Pure Theory of Law. In his essays 'Der Staatsbegriff und die Psychoanalyse' ('The Notion of State and Psychoanalysis') and 'Gott und Staat' ('God and State'),⁶⁹ Kelsen made an extremely bold attempt as a legal theoretician to apply Freud's theory of totemism — collective consumption of the same sacrificed animal by the tribal community as an act of identification — to legal theory. In the idea of the state as person, the 'illustrative personification of the legal order constituting the social community and founding the unity of a diversity of human behaviour', an example of a 'reification' was to be replaced by the recognition of the state as a legal function. Kelsen saw parallels with other concepts of substance — such as 'force' in physics or 'soul' in psychology — and thus considered his thought to be part of an anti-metaphysical movement directed against enlightenment. In the 'totem-meal', it was possible to recognize the primal image of any conception of substance. Through an analysis of the common roots of man's religious and social outlooks, Kelsen developed his later highly ramified

⁶⁷ See A. Freud and I. Grubich-Simittis (eds), *Sigmund Freud. Werkausgabe in zwei Bänden*, vol. 2 (1978), at 427; Kelsen, 'Der Begriff des Staates und die Sozialpsychologie mit besonderer Berücksichtigung von Freuds "Theorie der Masse"', *Almanach für das Jahr 1927*; *idem*, *Der soziologische und der juristische Staatsbegriff. Kritische Untersuchung des Verhältnisses von Staat und Recht* (2nd ed., 1928), at 19. Cf. on this, and on the following passages, Adamovich, 'Kelsen und die Tiefenpsychologie. Stattgefunden und nicht stattgefunden Begegnungen', in R. Walter and C. Jabloner (eds), *Hans Kelsens Wege sozialphilosophischer Forschung* (1997), at 129.

⁶⁸ The quote is taken from the second edition of Freud's essay, *supra* note 67, at 440.

⁶⁹ *Der Staatsbegriff und die Psychoanalyse* (1927), reprinted in A. Klecatsky, R. Marcic and H. Schambeck (eds), *Die Wiener Rechtstheoretische Schule*, vol. 1 (1969), at 209; 'Gott und Staat' (1923), reprinted in E. Topitsch (ed.), *Kelsen, Staat und Naturrecht. Aufsätze zur Ideologiekritik*, with an Introduction (2nd ed., 1989), at 29.

social-psychological work which culminated in the monograph *Vergeltung und Kausalität* ('Retribution and Causality').

There is yet another aspect of psychoanalysis which influenced Kelsen's thought, though in a more implicit manner. The specific 'image of man', upon which Kelsen oriented his concepts of democracy and international peace, was clearly influenced by Sigmund Freud.⁷⁰

Relevant social psychological considerations by Kelsen can be found in particular in his *Staatsform und Weltanschauung* (Form of State and *Weltanschauung*) (1933).⁷¹ Here, Kelsen examines the democratic 'character' and finds it in the type of person who has a relatively reduced sense of ego, the type of sympathizing, peace-loving, non-aggressive Epsion, a person whose primary aggressive drive is not so much directed to the outside world but rather inwardly, manifesting itself as a tendency to self-criticism and a heightened disposition for a sense of guilt and responsibility. In his view, democracy did not form a favourable terrain for the principle of authority.

While explicit references to Freud are lacking here, we do find a reflection on the construction of the ego-ideal in its social dimension. Accordingly, the collective ideal is based on agreeing individual ego-ideals where the individuals replace their ego-ideal with one and the same object and thus identify on the basis of their ego. Key concepts are thus idealization, on the one hand, and identification, on the other. In a democratic and pacifist, rational person, Kelsen obviously saw the ideal of 'equality with the "you"' replacing subjugation under authority.⁷²

⁷⁰ See in more detail Jabloner, 'Menschenbild und Friedenssicherung', in Walter and Jabloner, *supra* note 67, at 57 (65).

⁷¹ Reprinted in A. Klecatsky, R. Marcic and H. Schambeck, *Die Wiener Rechtstheoretische Schule* vol. 2 (1923).

⁷² In this context it should also be noted that there is an interesting point where the individual psychologies of Kelsen and Alfred Adler meet. Kelsen and Adler did not actually meet by all accounts. The link between their two theories was, if one follows Adamovich's version (*supra* note 67, at 136), the influence of Vaihinger's philosophy (*Philosophie des 'Als Ob'*) and the paramount importance of the concept of fiction in Kelsen's late work. Weininger should also be mentioned here. Otto Weininger was one of the central figures of Viennese intellectual life at the turn of the century. With his questionable book *Geschlecht und Charakter. Eine prinzipielle Untersuchung* (1903, reprinted 1980), he hit the nerve centre of his times. In spite of various recent studies it is difficult to gain a real idea of Weininger's intellectual achievement and personal impact (see J. Le Rider, *Der Fall Otto Weininger*, 1985). Métall has shown that Kelsen and Weininger were friends in their youth. Apparently Kelsen's interest in philosophy was greatly spurred by his contact with Weininger. According to Métall, the young Kelsen's enthusiasm for Schopenhauer, which is still tangible in his later work (e.g., in 'Politische Weltanschauung und Erziehung', reprinted in Klecatsky, Marcic and Schambeck, *supra* note 71, at 1501, 1507), stems from his discussions with Weininger. No concrete intellectual relation, however, can be noted, unless one takes a certain pessimistic view of human nature that Kelsen had as being a trait of Weininger — as Norbert Leser argues in his 'Otto Weininger und die Gegenwart', in J. Le Rider and N. Leser (eds), *Otto Weininger, Werk und Wirkung* (1984) 15 (21). At any rate it is striking how intensely Kelsen dealt with the relation between state and sexuality in connection with his critique of Plato. Here — and in particular in occasional references to the idea of human bisexuality propagated by Weininger at the beginning of this century (see his *Die Illusion der Gerechtigkeit. Eine kritische Untersuchung der Sozialphilosophie Platons* (1985), at 81.

This essay has aimed to depict Kelsen in the context of the Austrian culture as it existed in the early part of this century. Kelsen and his circle shared certain characteristics and cultural patterns with other intellectual movements active at the time in Vienna. There also existed an astonishing amount of intellectual interaction. Nevertheless, in his attempt to set the Pure Theory of Law in a broader theoretical framework, Kelsen never lost sight of the fundamental questions of legal theory.

145) — one can recognise Weininger's continuing influence. A general influence of Weininger's thought on the Viennese intellectual style at the beginning of the twentieth century can be found in the emphasis of the ethical aspect of 'pure' knowledge (see A. Janik, *Essays on Wittgenstein and Weininger* (1985), at 71).