

# BIOGRAPHICAL RESEARCHES ON HANS KELSEN IN THE YEARS 1881–1920

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## I. Introduction

### *a) Legal History versus Legal Philosophy?*

„Legal History versus Legal Philosophy?“ is the title of a little-known monograph written by Hans Kelsen in 1928.<sup>1</sup> It was written in reply to Ernst Schwind’s book “Basics and Basic Questions of the Law”, written in the same year.<sup>2</sup> Schwind, a legal historian, was professor at the same faculty as Hans Kelsen. In 1918, when Kelsen applied for the position of an associate professor at the Vienna University, Schwind tried to prevent his appointment. In his expertise, Schwind wrote that Kelsen’s theories were “destructive and subversive, in the scope of academic teaching for the students, possibly brilliant, but on the whole confusing and utterly questionable (...) Frequently one gets the impression that Kelsen anxiously refuses every glimpse into history, because the impossibility of these concepts would immediately collide with the might of the historical facts. Who could imagine, if only for a moment, a State without power, without superiors and subordinates?”<sup>3</sup>

Schwind’s first aggression against Kelsen failed in 1918 – and so did the second in 1928. The main problem was that Schwind specialized in legal history not legal philosophy, which was unfamiliar territory to him. Consequently, his attempts to counter Kelsen’s legal philosophy with historical arguments proved hopeless. Kelsen disdainfully said that it is not possible to argue in a way that the one says: “It’s dark”, and the other says: “But there is standing a tower”.<sup>4</sup>

### *b) The historical context of Kelsen’s scientific work*

However, while it may not be possible to use legal history to contradict legal philosophical arguments, legal history is able to explain where legal philosophical arguments come from. That is to say, it can help to explain legal philosophy itself. Kelsen’s theories achieved everlasting importance, but they originated from a very concrete background and can only be understood in this context. Kelsen himself confirmed this, when he explained the way he found his theory of the identity of Law and State: “It is possible”, he wrote, “that I developed that theory, because the state that is nearest to me, the Austrian State, was obviously only a legal order. The Austrian State is made up of so many different races, languages, religions, and different ethnic groups with their own histories. Consequently theories that tried to establish a governmental entity on some socio-psychological or socio-biological context, with a unifying legal base for the inhabitants, were evidently a mere fiction. Insofar as governmental theory is an essential part of the Pure Theory of Law, this theory can be regarded as specifically Austrian.”<sup>5</sup>

We are convinced that not only Kelsen's governmental theory but also many other elements of his theories, in spite of their formulation that seemed independent from place and time, have been the answer to questions of particular interest to that period. Kelsen considered these circumstances only briefly, as they were assumedly well-known. In the course of time this knowledge was lost and has to be explained once again. This now is the basic aim of our work.

### ***c) Kelsen's Autobiography and the New Biography***

For this reason, the two directors of the Hans Kelsen-Institute, Robert Walter († 2010) and Clemens Jabloner, have invited the first author of this article to write a scientific biography of Hans Kelsen. It is the intention of this project to portray the course of life of Kelsen, his descent, childhood and adolescence, the ensuing steps of his academic career in Europe and in the U.S.A. and the diffusion of his legal theory across the globe.

For decades, knowledge of Hans Kelsen was dominated by one book, namely the biography written by Rudolf Aladár Métall, who collaborated with Kelsen during his last years in Vienna and in his first months in Cologne.<sup>6</sup> In 1940, very shortly after Kelsen, Métall also immigrated to America, and he maintained good relations with Kelsen for the rest of his life.<sup>7</sup> Métall writes that in 1966 he used Kelsen's private library and private correspondence to elaborate the biography. Most important for him were two autobiographic descriptions of Kelsen, one from 1927 and another from 1947. For a long time these descriptions were thought to be lost, but in 2006/07 they were published by Matthias Jestaedt.<sup>8</sup> An examination of these descriptions reveals that Métall borrowed extensively from Kelsen's 1947 autobiography, even reproducing the text verbatim in places. Beyond that, it seems that Métall's book was largely based on personal memories. As he provides no footnotes or any other scientific proof, the individual sources he mentions cannot be re-examined. For instance, he quotes verbatim an article about Kelsen's escape from Nazi-Germany and says only that it is a quotation from "a Viennese newspaper" printed in April 1933.<sup>9</sup> In fact, the article appeared in the "*Neue Freie Presse*" on April 18<sup>th</sup>, 1933.<sup>10</sup> It remains unclear as to whether this article was amongst Métall or Kelsen's papers from this time, or whether the former scrutinized the "*Neue Freie Presse*" as a source for his book.

Furthermore, it is not clear why Kelsen wrote in 1947 an autobiography at all.<sup>11</sup> We can only assume that he wrote the text for a compendium of autobiographies of famous Austrian jurists, edited by Nikolaus Grass in 1952.<sup>12</sup> Kelsen's disciples Merkl and Verdross, but also his sworn enemy Alexander Hold-Ferneck<sup>13</sup> and the former president of the Constitutional Court Ernst Düring, feature in this collection. Surprisingly, Kelsen was not included. It is possible that his autobiography was originally meant to appear in an omnibus volume that was never published because of a contingent dispute between Kelsen and Grass. The size of Kelsen's autobiography, which at 60 pages would have been double length of the other entries, and his refusal to shorten it, may also explain its absence from the compendium.

Autobiographies can be an invaluable historical source, but they may also be problematic. It is nearly impossible to write down all of one's memories without making mistakes. A case in point is Kelsen's assertion that he was appointed associate professor in 1917,<sup>14</sup> when in fact this took place on July 8<sup>th</sup>, 1918.<sup>15</sup> Although incorrect this detail was still reproduced in dozens of short biographies. In addition to such comparatively unimportant mistake his autobiography also contains some more profound inaccuracies.

The latter raise the question as to whether Kelsen was intentionally trying to present the facts in a more favourable light, or whether he truly believed that events had happened in the manner in which he described them. The following chapters should serve as a confirmation.

## II. Family, childhood, education

### a) *Family*

Kelsen's autobiography begins as follows: "I was born on 11 October 1881 in Prague. My father, Adolf Kelsen, who was born in Brody, Galicia, came to Vienna when he was an impecunious boy of only fourteen. There he first started working as an apprentice in a small business, later on earning his living as a clerk."<sup>16</sup>

With this description the scholar draws what would have been an evocative picture for many of his readers: Brody, the hometown to the Jewish poet Josef Roth, a forlorn spot at the very outskirts of the monarchy.<sup>17</sup> From here, in the last years of the 19<sup>th</sup> century and especially during the First World War, thousands of Jews fled to the west. In Vienna, as in many other central European cities, these Jews from the east, with their traditional clothing and characteristic hairstyles, made a great impression on the appearance of the city.<sup>18</sup> However, for Adolf Kelsen the situation was different: If he really moved to Vienna at the age of fourteen, this would already have been in 1864, decades before the migration of Jews from Eastern Europe. One indication of his rapid integration is the fact that Kelsen's father, who was entered under the name Abraham Littman Kelsen in the Galician birth register, changed his name to Adolf – the German version of Abraham – as soon as he arrived in Vienna. Therefore, in Hans Kelsen's birth certificate his father is registered under the name "Abraham Littman *vulgo* Adolf Kelsen".<sup>19</sup>

On 22 August 1880 Adolf Kelsen married the 21-year-old Auguste Löwy in the Leopoldstadt synagogue. The bride was born on 29 December 1859 in Jindřichův Hradec where her father, Aron Löwy, owned a vinegar factory.<sup>20</sup> Together the young couple moved to Prague, where Adolf Kelsen initially tried to set up a business on plumbing supplies. One year later, on 11 October 1880, their first son, Hans Kelsen, was born.<sup>21</sup> It was a difficult time for his family: Conflict with the authorities and hard competition from other entrepreneurs contributed to the fact that Adolf Kelsen was subject to a foreclosure proceeding. Because of the Kelsen's difficult financial situation, the family had to leave Prague and returned to Vienna.<sup>22</sup> Adolf Kelsen now focussed on the production of bronze merchandise and chandeliers, establishing a business in Vienna, together with a partner. From 1895 on he directed this business on his own and founded a small factory in the back yard of Goldeggasse 20, in the IV. District of Vienna.<sup>23</sup> The area where the factory was established was not situated within the Jewish quarter, so we can only assume that Adolf Kelsen chose this location because his brother Samuel already lived on the same street. In January 1901 Adolf Kelsen obtained the "*Heimatrecht*"<sup>24</sup> (rights of residence) in Vienna for himself, his wife and his children. It was only the last act of assimilation, baptism into the Catholic Church, that Adolf Kelsen never went through with. Presumably, his reason for the not fulfilling this last step may have had to do with his membership in the Masonic Lodge "*Humanitas*".<sup>25</sup> It was Hans Kelsen himself, who got baptised as the first member of the Kelsen family in 1905.<sup>26</sup>

### ***b) Kelsen's school years***

Following the Jewish tradition, Hans, the first born, did not join his father's business. Instead he enjoyed a higher education as a step in furthering the family's rise in social status. As soon as Kelsen reached schooling age he was sent to the (private) Protestant elementary school on Karlsplatz, which was situated close to where he lived. After spending the first three years of his elementary school education there, his father got into financial difficulties again and Kelsen was obliged to finish his last year of elementary school at a public institution in the Alleegasse (today Argentinierstrasse). No records are extant from this time, but apparently Kelsen's grades were not good enough for him to obtain the school fee exemption that would have enabled him to remain at the Protestant school.<sup>27</sup> Kelsen probably felt humiliated by the fact that he had to change schools, and therefore did not mention this in his autobiography. Kelsen's father was still trying to provide his son with the best education possible and so in 1892 he inscribed Hans at the *Akademische Gymnasium* at Beethovenplatz.<sup>28</sup> At the *Akademische Gymnasium*, one of the most prestigious institutions of its time, the young Kelsen received not only an extensive humanistic education, with tuition in Latin and ancient Greek, but was also instilled with a patriotic attitude. (For his graduation exam in German he had to write a composition on the topic: "What kind of moral impulse do we receive in our study of Austrian history?"<sup>29</sup>) Surprisingly, Kelsen was not taught any modern foreign languages. In his autobiography Kelsen did not have a good word to say of any of his teachers. He simply observes: "My teachers did not spark any interest in school. (...) In particular the primitive religious attitude at school triggered my opposition."<sup>30</sup> He was especially critical of the religious education (like roughly 45% of the pupils at that time, Kelsen attended classes in Hebrew religion).

What was Kelsen's attitude towards philosophy class? After all, Kelsen reports in his autobiography that he had already become interested in philosophy as a student and had started reading books by Schopenhauer and Kant at an amazingly early age.<sup>31</sup> We can fairly well rule out the possibility that his philosophy teacher Johann Schmidt had any hand in awakening his interest in philosophy. We can best imagine Kelsen as a highly gifted adolescent, who was bored by the way things were taught at school and therefore only achieved average grades, but was enough of a "bookworm" during his school years to succeed in acquiring, auto-didactically, an enormous store of knowledge. Kelsen explained his interest in philosophy as owing to the "influence of an older friend" – we can assume that this so-called "older friend" was Otto Weininger.<sup>32</sup> But the school book of logic by Alois Höfler also undoubtedly contributed to Kelsen's interest in philosophy. Kelsen reports that he was profoundly shaken when he learned that the reality of the exterior world is problematic.<sup>33</sup> It is precisely this problem that is brought to the reader's attention in the first pages of Höfler's book.<sup>34</sup>

### ***c) Kelsen's time as a student at the University of Vienna***

On 9 July 1900, Hans Kelsen graduated from the Akademische Gymnasium, along with 29 fellow students.<sup>35</sup> More than 50% of the graduates intended to inscribe at law school, among them Hans Kelsen, Ludwig v. Mises and Hans Mayer. All three were destined not only to obtain doctorates in law, but also to go on to academic careers at the University of Vienna – Mises and Mayer as professors for economics – Kelsen as a professor for public law and legal philosophy. However, it would take Hans Kelsen some time to get there.

“The first lecture I attended at university was disappointing”, Kelsen wrote in his autobiography. And he continues: “after only a short time I stopped attending most of the lectures and instead devoted myself to reading philosophical works on my own.”<sup>36</sup> This, in fact, was very common in Kelsen’s days. Most of Kelsen’s fellow students eventually stopped attending lectures, since at law school this was not compulsory and lectures in general were considered to be very poor. Moreover, the curriculum of the time foresaw only very little compulsory attendance and almost no intermediate examination. The so called “Thunsche Studienreform”, an academic reform that was undertaken in 1855, and on which the curriculum was based when Kelsen joined university, placed a high value on the principle of independence in teaching and studying alike.<sup>37</sup> Apart from one legal history examination, which took place after the first two years of studies, the exams all occurred right before graduation, when the student was about to complete his studies. Then – and in Kelsen’s days this was the difficult thing about studying law – the student had to take almost all of his exams at once. Since most of Kelsen’s fellow students spent their free time in other pursuits than reading philosophical works, many of them had to attend private intensive courses, where the material that they should have been learning over the past four years was drummed into them within a few weeks. Carl Stooß, a professor for criminal law, reported that only few of the students inscribed at law school attended lectures, most of them attended private intensive courses in order to prepare themselves for the final examination. „Some attend those private law courses because they do not have time to attend lectures, for the simple reason that they have to earn money, and yet they want to study.”<sup>38</sup>

Among of the few lecture series that Kelsen actually attended was one entitled “The History of Legal Philosophy”, given by Professor Leo Strisower in the summer term of 1903.<sup>39</sup> As Kelsen relates in his autobiography, it was here that the works of Dante were first brought to his attention. He decided – probably inspired by his friend Weininger’s book “Gender and Character” – to publish an article dealing with Dante’s work. This happened in same year when Weininger committed suicide (4 October 1903). To his own surprise, the article was published in a book series called “Viennese Governmental Law Studies” and was favourably reviewed.<sup>40</sup> Encouraged by the success of his first article, the law student Hans Kelsen decided to continue his scientific work: “While I was still dealing with the political philosophy of Dante Aligheiri, my interest in legal theory, above all in the legal entity, the subjective right, (...) began to grow. (...) Soon after the first exam [the exam in legal history, Kelsen passed on 13 July 1903], I started to work on a book, examining the most essential problems of governmental science.”<sup>41</sup> The book which would later become Kelsen’s habilitation thesis, was apparently begun by Kelsen when he was a barely 22-year-old law student! Indeed, it must be acknowledged that Kelsen possessed a “high degree of spiritual asceticism”<sup>42</sup> to have spent eight years working on this opus magnum, the “Hauptprobleme der Staatsrechtslehre”. In the preamble to this book, Kelsen wrote: “(...) I kept on working on this book despite all difficulties and obstacles and therefore it became more for me than the mere solution of a specific scientific problem: this work has shown me the long and up to this point missing connection between juridical discipline and ideology.”<sup>43</sup> His further reference to “the small world of legal science and the huge world of a universal philosophical system” can be taken as a hint that his poor opinion of law professors seemed only to have been reinforced over the years. This is especially true of the two professors of public law, Adolf Menzel and Edmund Bernatzik,

who examined his habilitation thesis. Kelsen later on wrote that Menzel's assessment of his thesis was especially favourable only because Menzel "was not at all familiar with the problems of legal theory". Bernatzik, for his part, did nothing more than agree with Menzel's opinion. Kelsen therefore assumed that "he didn't even read the thesis".<sup>44</sup>

These comments are very typical for Kelsen and fit in with the style of his autobiography, in which Kelsen's teachers – regardless of whether they were his teachers at school or later on his professors at university or even the professors he met on his educational journeys (especially his journey to Heidelberg, where he met Georg Jellinek) – collectively appear in a bad light.<sup>45</sup> He repeatedly gives the impression that there was hardly anything they could teach him. Hans Kelsen was indeed an autodidact and it is very likely due to this fact that he became one of the greatest jurists of the 20<sup>th</sup> century. This may also be the source for the originality of his assumptions. Nonetheless, it should be noted at this point that Jellinek, Menzel and Bernatzik were of great importance for Kelsen's later career, the first one with his methodological approach, the latter of them who supported him at university. So, in spite of everything, it can be said that Kelsen owed them a great deal.

Kelsen took his final exams between October 1905 and May 1906. Against all odds he only obtained average grades. The best grade he obtained was an A minus, at the former mentioned exam of professor Schwind, in the field of legal history. On May 1906 Kelsen was awarded a PhD in the field of law.<sup>46</sup>

### **III. The Young Graduate**

#### ***a) Career until 1914***

The economic situation of Kelsen's family in the meanwhile became worse. In fact when Kelsen was still a student, his father already started to suffer from heart problems, he finally died of on 12 July 1907.<sup>47</sup> Due to that circumstances Hans Kelsen was forced to postpone his dreams of an academic career and instead had to look for a decent job. For a certain period of time he seriously intended to become a lawyer. Back then, in order to be admitted to the barrister exam, it was necessary that after graduating from law school, a one-year internship at Court was accomplished. In addition to that, every young graduate had to work for at least six years as a trainee solicitor under the supervision of a lawyer. So between March 1906 and September 1908 Hans Kelsen accomplished internships at several Viennese Courts and then started working at different lawyers.<sup>48</sup>

However, during his free time he continued working on his book *Hauptprobleme der Staatsrechtslehre* ("Main problems in the theory of public law"). He also applied for scholarships that would allow him to travel abroad and embarked on educational trips to Berlin and Heidelberg to attend lectures given by Prof. Georg Jellinek and Prof. Gerhard Anschütz there.<sup>49</sup> However, the records of the Viennese Bar Association show that Kelsen was registered as a trainee solicitor at the same time. How is this possible? Due to the fact that one of the lawyers' name was Löwy (Kelsen's mother's maiden name), it is likely that he was registered only pro forma with an uncle, an arrangement that might have enabled him to travel abroad.<sup>50</sup>

From 1 July 1908 on, Hans Kelsen was employed at the "k.k. Handelsmuseum", a federal institution that dedicated its work to the export trade and also hosted the export

trade academy. This employment allowed Kelsen to finalize the “*Hauptprobleme*”.<sup>51</sup> In April 1911, “*Hauptprobleme*” was published by the publishing house J. C. B. Mohr in Tübingen. Already on 6 February, Kelsen named this book his “habilitation thesis” and applied for the habilitation (permission to give lectures) in the field of Austrian public law and legal philosophy at the faculty of law at the University of Vienna. The book consisted of 733 pages and therefore was much longer than other habilitation treatises published at the same time. Regarding its content, it was undoubtedly the foundation for what later on became Kelsen’s pure theory of law. Already back then Kelsen demanded a strict separation of legal science from sciences such as sociology and psychology. Central legal terms such as the “subjective rights” (*subjektives Recht*), proxy (*Stellvertretung*) or „person“ have been subject to Kelsen’s examination in this book.

The professors Bernatzik and Menzel had been nominated by the faculty of law to give an expertise on Kelsen’s *habilitation*. Due to their favourable expertises, the faculty decided on 10 July 1911 to approve Hans Kelsen’s habilitation thesis.<sup>52</sup> However, that did not automatically mean that Kelsen was offered a job at law school. It only meant that Kelsen now had the official right to hold lectures there. Kelsen however, continued his work at the export trade academy until the year 1914.

### **b) The First World War**

The turning point in Kelsen’s career subsided with the beginning of the First World War. As many other Austrian high school graduates as well, Kelsen had served in the army as a volunteer after graduating from high school.<sup>53</sup> Therefore, Kelsen was in the military rank of a lieutenant since 1902. Following the outbreak of the First World War he was drafted on 4 August 1914, but due to his position as a lieutenant never had to serve at the front line. Since he became sick, he had to work in the office during the first months of the war. Through the support by general Ignaz Verdroß Edler von Droßberg (the father of Kelsen’s student Alfred Verdroß) Kelsen was finally transferred to the „Kriegsfürsorgeamt“, an agency, which focussed on the social treatment of invalids. As the situation became worse Kelsen was transferred in October 1915 to the k.u.k. ministry of war where he worked until the end of the First World War.<sup>54</sup>

At the k.u.k. ministry of war Kelsen gained the trust of the minister of war Rudolf Freiherr Stöger-Steiner von Steinstätten and finally became his personal adviser. In this position Kelsen drafted not only propositions for different reforms in the army, but developed plans to reform the Habsburg monarchy.<sup>55</sup> Even though the plans were never put into reality, his plans gained the attention of the University of Vienna. Professor Bernatzik tried to get Kelsen a permanent job as an associate professor for public law. That was the reason why Ernst von Schwind, as already mentioned in the beginning, edited an expertise in which he opposed to Kelsen’s nomination as an associate professor. All the other professors however, supported Kelsen and so he finally was nominated 8 July 1918 associate professor at the University of Vienna. The nomination itself was effected by emperor Karl.<sup>56</sup>

Almost exactly one year after that, on 19 July 1919 Kelsen was nominated full professor.<sup>57</sup> This nomination was no longer preceded by the emperor, but by the president of the republican federal assembly, which shows that his nomination already took place during the foundation of the first republic.

### *c) The collapse of the Monarchy*

Kelsen very much took actively part in the foundation of the first republic. That is the reason why he dedicates great parts of his autobiography to that period of time, describing the circumstances of the fall of the Habsburg monarchy in great detail. However, this very part of his autobiography has been subject to huge academic discussions, since it contradicts other sources. Therefore the events followed by the fall of the monarchy should be subject to close examination in the new Kelsen biography:

Kelsen considered the war to be over the very moment, when Bulgaria was forced to accept an offer of cease-fire proposed by the Entente, on 29 September 1918.<sup>58</sup> In view of these circumstances and especially due to the hopeless military situation, the Austro-Hungarian Empire and Germany communicated an offer for cease-fire to the President of the United States, Woodrow Wilson. While the German offer was immediately met with a negative response from the Americans, the Austro-Hungarian offer remained unacknowledged for two weeks. Considering the fact that the Austro-Hungarian offer for cease-fire expressly referred to Wilson's fourteen points program, one demand of which was autonomy for the different nations within the Habsburg monarchy, it is not quite clear why there was no immediate response from the American side. Rumours spread according to which the US-President first wanted to see concrete actions on the part of the Austro-Hungarian government demonstrating its willingness to grant autonomy to its subject nations.<sup>59</sup> "For this purpose, and also in order to avoid an economic and political catastrophe, I drafted a memorandum which concluded with the proposal that the Emperor should set up a commission composed of representatives from the various nations, which would handle the liquidation of the monarchy and enable the formation of nations based on the principle of self-determination of the people", Kelsen reports.<sup>60</sup> The Emperor would only stay in power and on top of this "Central European Commonwealth" if the various nations agreed. In Kelsen's opinion, the creation of a "Central European Commonwealth" was, particularly from an economic point of view, unavoidable. Nevertheless, in the end the Emperor did not follow Kelsen's advice, but instead adopted the recommendation of a German nationalist representative named Oskar Teufel. In his proposal, Teufel suggested "rebuilding Cisleithania by establishing national councils, which in their turn should be made up of representatives from each nation". On 16 October the Emperor issued a manifesto which endorsed Teufel's proposal.<sup>61</sup>

The historical context of this manifesto has been subject to exhaustive investigation. Surprisingly, Kelsen's proposal is mentioned by no other source. In addition, no document has been uncovered in the archives that could be identified as Kelsen's. It is hard to understand why Kelsen writes about his memorandum in his autobiography if it is not based on historical facts. However, there does exist a document, which largely corresponds in content and style to the document Kelsen describes in his autobiography. The document in question was found by Heinrich Benedikt in the private archive of the Meinl family, a family of industrialists, and was published by him in the sourcebook: "The efforts for peace of the Meinl circle".<sup>62</sup> The businessman Julius Meinl II. (1869–1944) was the head and probably also the financier of an influential pacifistic group. Among its members were among others the professor for international and criminal law, Heinrich Lammasch, as well as Kelsen. It is therefore very likely that Kelsen was indeed the author of the text that was later ascribed to Julius Meinl II.<sup>63</sup>



The manifesto issued by Karl I. did not achieve the hoped-for effect. It was simply ignored by the USA. Mere autonomy for the different nationalities within the Habsburg monarchy, which President Wilson had still been demanding in January, at this point no longer seemed to go far enough, since by then the Entente had already granted Czechoslovakia status as a war power. Kelsen reports that (probably in the evening of 21 October) he was contacted by Major Albin Schager, a member of the Emperor's military administration.<sup>64</sup> On this occasion Schager explained that the emperor had approved a plan drafted by the liquidation commission and asked Lammasch to become the head of this commission. Lammasch agreed, and for a couple of days it seemed as though his work would bear fruits. But when he met with the Czech and Slovene leaders Karel Kramář<sup>65</sup> and Anton Koroseč<sup>66</sup> on 24 October in the hotel Continental in the Praterstraße, they both refused his request to form an "executive committee of the national governments in Austria". Lammasch's attempt had failed. Immediately following this meeting, Lammasch went to see his friend the German national representative Josef Redlich. Both of them sought out Kelsen in his apartment in the Wickenburgstrasse and together they decided to go to the Ministry of War and send a telegraph to the Emperor, who at that time was travelling through Hungary. There exist two sources of information concerning the conversation between Kelsen, Redlich and Lammasch: Kelsen's autobiography and Redlich's diary. They both refer that Redlich persuaded Lammasch to run for the office of the Prime Minister. But though Redlich writes that Kelsen supported him in this, Kelsen in his autobiography denies that. Redlich reports that Lammasch drew up a list of possible ministers in which he proposed to nominate the Jewish doctor Julius Tandler as Health Minister. Redlich was of the opinion that Kelsen tried to talk him out of doing so. Kelsen thought that Redlich himself was against Tandler's nomination, since he wanted to become Minister of Finance and the Emperor was unlikely to accept the appointment of two Jews to ministerial posts.<sup>67</sup>

So Redlich's description seems to contradict Kelsen's narration. Of particular interest is the fact that Redlich's diary was not published until 1953, which means that Kelsen could not possibly have known of its existence before then, especially not when he wrote his autobiography in 1947. Perhaps rumours were spread orally. We do not know which of the two accounts can be trusted.

#### **IV. Kelsen and the Austrian Constitution**

##### ***a) The Architect of the Constitution***

Kelsen's struggle for a continuation of the monarchy failed. Nevertheless, through his activities he came into contact with those individuals who were involved in transforming the political system, and at once Kelsen found himself working for the Republic. Thus, on 8 November 1918 Kelsen issued a legal assessment on the status of the newly created Republic of German-Austria.<sup>68</sup> He concluded that the Republic of German-Austria was not the legal successor to the Austro-Hungarian monarchy, but like Czechoslovakia, a totally new legal entity. This thesis had far-reaching consequences: According to Kelsen, the new state of German-Austria was not at war with the Entente, and therefore a peace treaty conceding German-Austria's culpability for the war was out of the question. The price for Kelsen's growing influence was his acceptance of the "resolution for the establishment of the state power", passed on 30 October 1918 by the provisional assembly, as a constitution of the

newly created Republic, although the resolution failed to address important issues such as the legal status of the Austrian provinces.<sup>69</sup> In particular, Kelsen's very controversial thesis that German-Austria had been founded as a centralised state (and not as a federal state) was based on his legal opinion, in which he basically stated that the resolution dated 30 October had the legal quality of a constitution.<sup>70</sup> In November 1918, Kelsen signed a formal contract in which he agreed to work for the State Chancellery of German-Austria, in addition to his job as a professor at the University of Vienna.<sup>71</sup> This secondary employment, which would last until 1921, formed the highpoint of his career: As legal advisor to the Austrian head of state, it would become his main duty to draft the final constitution of the young republic. Since the chancellor Karl Renner had to leave Austria on 12 May 1919 in order to participate in the negotiations over the Austrian State Treaty (*Staatsvertrag*) in St. Germain, he gave Kelsen a free hand. On 4 July Kelsen sent a preliminary draft of the constitution to St. Germain.<sup>72</sup>

Before leaving for St. Germain, Renner met with Kelsen to discuss the framework of the constitution.<sup>73</sup> The idea of an accession (*Anschluss*) to Germany, which was supported not only by the Austrian people but also by Renner and Kelsen, was finally forbidden by the victorious powers of the First World War, and consequently had to be abandoned. In the event that the provision for an accession to Germany would not enter into effect, Kelsen had drafted a proposition for setting up a federal constitution following the Swiss model.<sup>74</sup> According to Kelsen's first draft, the provinces should participate in federal legislation through the establishment of a federal council (*Bundesrat*), which should be made up of members from each provincial council. In addition, the federal council would be granted an absolute right to veto bills passed by the national council (*Nationalrat*). The head of state – the president – would be directly elected by the people. The draft also contained a catalogue of fundamental rights, which, as many other provisions of the draft, were copied from the Constitution of 1867.<sup>75</sup> In particular, the provisions concerning the federal council, the president and the fundamental rights were subject to numerous changes and amendments, since they had to take into account the range of different political possibilities.<sup>76</sup>

It would be false to assume that Kelsen's personal political attitude was reflected in his constitutional drafts. His theoretical works concerning democracy show that he personally preferred a parliamentary democracy to a presidential one and that he was rather sceptical towards the idea of establishing a federal system.<sup>77</sup> However, it was not his task to reflect his personal opinion in his constitutional drafts. His duty rather was to transform his constituents' (in this case the social democratic Chancellor Karl Renner and the Christian social Secretary of State Michael Mayr) political goals into a technically impeccable legal framework. His job was that of an architect, obeying his constituents' requests and transforming their concrete plans into reality.<sup>78</sup>

## ***b) Legal Theory and Practical Experience***

### *1. Constitutional Justice*

On this point, we would like to abort our examination of Kelsen's curriculum vitae. However, last but not least, we want to show by pointing out two examples; how Kelsen's professional experience in the Austrian state service has deeply influenced his legal theory:

The first example concerns his article "Essence and Development of State Jurisdiction" from 1929, which is among his most influential publications.<sup>79</sup> As a general theoretic

article, it describes the meaning and the function of a public-law-court, without mentioning a specific country, law, or court. Nevertheless, the preliminary phrase “State Jurisdiction is equal to Constitutional Jurisdiction” instantly indicates that Kelsen’s view on this topic excludes the 19th century “Staatsgerichtshöfe”, which existed in several states for impeachment proceedings. In fact, what Kelsen refers to, is an institution called Constitutional Court. At that time only two Constitutional Courts existed in Europe:<sup>80</sup> The first one was set up in Czechoslovakia, but couldn’t unfold considerable action and the other one was established in Austria. Concerning the Austrian Constitutional Court, Kelsen had actively participated in its creation and remained a member of it until 1930.

A closer examination of the history of the Austrian Constitutional Courts shows that the intellectual preconditions for it already existed in the late 19<sup>th</sup> and early 20<sup>th</sup> century. Indeed Kelsen was not the first person to demand the creation of a Constitutional Court;<sup>81</sup> – the term itself had already been in use since at least 1875. So although the Austrian Constitutional Justice, established in 1920, may be said to have many founding fathers, Kelsen may be considered the most important amongst them.<sup>82</sup> No general theory of constitutional justice was written before 1920. Kelsen later completed his theory on constitutional justice in his lecture in 1929. Legal practice, which had been developed over the course of history, was subsequently legalized and finally considered as the only “possible and correct solution” by Kelsen nine years later.<sup>83</sup>

This is not as amazing as it might seem at first sight. What happened to Kelsen, the so-called father of the Austrian Constitutional Court, had also happened half a century earlier to Karl Lemayer, the so-called father of the Austrian Administrative Court. Lemayer had similarly been only one person amongst many who discussed the possibilities of creating a judicial control of administration. During these works, he admitted that the ultimate solution only could be the result of the existing circumstances. Some twenty years after enacting the Administrative Court Legislation, Lemayer wrote his “Apologetic Studies Concerning Administrative Justice”. In this article, he depicts the Austrian model not only as very successful solution, but also as nearly the only possible form that Administrative Justice could have taken.<sup>84</sup> Evidently, fathers tend to regard their own children as the most beautiful.

There is another reason for mentioning Lemayer: It was him who claimed that administrative justice is based on the idea that the activity of administrative authorities in a constitutional state is fundamentally dual in nature. In his own words, it is “a free act of volition and thereafter an action bound to objective law.”<sup>85</sup> Who on this point doesn’t think of the doctrine of the “Hierarchical Structure of the Legal Order” and the words of Adolf Merkl according to whom the creation of law is an act of volition on the one half, and an act of legal thinking on the other one?<sup>86</sup> Over Karl Lemayer and Friedrich Tezner,<sup>87</sup> it is possible to construct a direct genealogy of ideas down to Hans Kelsen and Adolf Merkl. Without questioning the originality of Kelsen or Merkl’s ideas, it is necessary to consider the fact that the ideas of both are based on the tradition of the Austrian doctrine of constitutional law.

## *2. The Kelsen-Merkl-Model of Administration*

This leads us to a second example, the so-called Kelsen-Merkl-Model of Administration; an expression not used so much by representatives of the Pure Theory of Law, but rather by its antagonists, who always imbued it with distant or even negative meaning.<sup>88</sup> Indeed, in Austria the “Hierarchical Structure of the Legal Order” is more than a model of legal

theory, it is also a maxim of administrative structure, in order to co-ordinate democracy and bureaucracy.<sup>89</sup> In other words, the whole administration in Austria is structured in a hierarchical manner, and only those individuals at the apex of this pyramid (for instance a minister) have democratically legitimized. All other executive bodies are made up of officials, who do not have a political will of their own. These officials all follow the orders of a minister, who is himself politically responsible to the Parliament, the proper body of state will. Emanating from parliamentary laws, this democratically legalized will is passed on to the last member of the administrative machinery by decrees and orders. In this way orders have a specifically democratic function.<sup>90</sup> This model, as insinuated before, has been severely criticized in past years mainly for alleged being impractical. The law decreed by Parliament would not determine in advance the complete administrative action up to the last detail, and even a minister could not lead the entire administrative machinery.

The question arises whether Kelsen and Merkl were unrealistic scientists, living in an ivory tower without knowledge of practical administration, or whether they achieved their maxims through a specific range of experiences. For example, Merkl practiced at law courts and in the administration for a long time, and so did Kelsen. Both were very much influenced by the k.u.k. administration, which dates from absolutistic times and which was characterised by its strictly hierarchical structure. In 1917, Kelsen and Merkl were confronted with the Russian Revolution. Those who attentively read the first edition of Kelsen's book "Essence and Value of Democracy", published in 1920, will notice that he can see positive aspects in the Soviet system, since in this system, the highest-ranking official as well as each individual councillor was elected.<sup>91</sup> Therefore Kelsen classified this system as a rule model for democracy. In Interwar Austria, there existed several tendencies to move in a similar direction. During the First World War even the later state chancellor Karl Renner had considered establishing a general administrative model based on the Soviet system as well as on the English system of self-government.<sup>92</sup> However it seems like in 1921, Kelsen changed his point of view. In his article "Democratization of Administration" he points out that Lenin's attempts to replace the old czarist administration by the Soviet system led to a catastrophe.<sup>93</sup> Two years later, in 1923, also Merkl came to the same conclusion. He was convinced that a democratization of the lower-standing administrative structures would mean a total collapse of the State.<sup>94</sup> In the second edition of Kelsen's "Essence and Value of Democracy", written in 1929, the author definitely rejects the idea of democratization of the administration, while affirming the compatibility of a democratic state and autocratic administration.<sup>95</sup>

## V. Conclusion

The above article represents only a small portion of a biography in progress. We deliberately chose to deal with only a few essential details, rather than providing a scholarly overview, since such an overview can already be found in Métall's biography. This article particularly aims to reveal the extent to which Métall's biography is a "mere extrapolation" of Kelsen's autobiography, which is in many ways an unreliable source. Thus, the main purpose of our new biography will be to show the relationship between Kelsen's life and his scientific work. "Nobody can imagine that his soul can think or move a body at Oxford, whilst he is at London", wrote John Locke in 1690.<sup>96</sup> Although this was said in a totally different context,

the statement is still true and shows the influence of time and place regarding the elaboration of Kelsen's theories. In this sense, legal history acts as a "servant" of legal philosophy.

## Poznámky

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- 1 Hans Kelsen, *Rechtsgeschichte gegen Rechtsphilosophie?* (Vienna 1928).
  - 2 Ernst Schwind, *Grundlagen und Grundfragen des Rechts* (Munich 1928). See to the controversy: Thomas Olechowski, „Rechtsphilosophie gegen Rechtsgeschichte?“ in Gerald Kohl / Christian Neschwara / Thomas Simon (eds) *Festschrift für Wilhelm Brauner zum 65. Geburtstag* (Vienna 2008) 428–442.
  - 3 Statement of Ernst Schwind, dated from 11 March 1918, in Austrian State Archive [Österreichisches Staatsarchiv, ÖStA] AVA, Unterrichts Allgemein, Sig 4 Universität Wien, Jus, (Personalakt Herrnritt, Fasz 752, Z 9583 ex 1918, Beilage Z 355).
  - 4 Kelsen (n 1) 26.
  - 5 Hans Kelsen, 'Autobiographie (1947)' in Matthias Jestaedt (ed) *Hans Kelsen Werke* Vol. I (Tübingen 2007) 29–91 (59).
  - 6 Rudolf Aladár Métall, *Hans Kelsen. Leben und Werk* (Vienna 1969).
  - 7 Nicoletta Bersier Ladavac, 'Rudolf Aladár Métall', in Robert Walter / Clemens Jabloner / Klaus Zeleny (eds.), *Der Kreis um Hans Kelsen. Die Anfangsjahre der Reinen Rechtslehre* (Vienna 2008) 315–324 (316).
  - 8 In 2006, Jestaedt published a special edition: Matthias Jestaedt (ed) *Hans Kelsen im Selbstzeugnis* (Tübingen 2006). See now Matthias Jestaedt (ed) *Hans Kelsen Werke* Vol. I (n 6), including: 'Selbstdarstellung (1927)' 19–27 and 'Autobiographie (1947)' 29–91.
  - 9 Métall (n 6) 62.
  - 10 Neue Freie Presse, Abendblatt, No. 24540, 18 April 1933, 4.
  - 11 The 'Selbstdarstellung (1927)' was written on invitation of Julius Moor; see Jestaedt (n 5) 586. Concerning the 'Autobiographie (1947)', Jestaedt (n 5), 591 found out that part of it, the detailed description how Kelsen experienced the collapse of the Monarchy, had already been published elsewhere. This does not, however, give us an answer to the main question.
  - 12 Nikolaus Grass (ed.) *Österreichische Rechts- und Staatswissenschaften der Gegenwart in Selbstdarstellungen* (Innsbruck 1952).
  - 13 See Jürgen Busch / Kamila Staudigl-Ciechowicz, 'Ein Kampf ums Recht? Bruchlinien in Recht, Kultur und Tradition in der Kontroverse zwischen Kelsen und Hold-Ferneck an der Wiener Juristenfakultät', in Szabolcs Hornyá et al (eds.) *Turning Points and Breaklines* (Munich 2009) 110–138.
  - 14 Kelsen (n 5), 55; Métall (n 6) 17.
  - 15 Allerhöchste EntschlieÙung, 8 July 1918, in ÖStA, AVA Unterrichts Allgemein, Personalakt Pisko (Karton 612).
  - 16 Kelsen (n 5), 30.
  - 17 Börries Kuzmany, 'Juden in Brody. Das soziale, wirtschaftliche und geistige Umfeld der Vorfahren Kelsens', in Robert Walter / Werner Ogris / Thomas Olechowski (eds.), *Hans Kelsen: Leben – Werk – Wirksamkeit* (Vienna 2009) 9–20; Börries Kuzmany, *Brody. Eine galizische Grenzstadt im langen 19. Jahrhundert* (Köln-Weimar-Wien 2011).
  - 18 Marsha L. Rozenblit, *Die Juden Wiens 1867–1914. Assimilation und Identität* (Vienna-Cologne-Graz 1989) 45.
  - 19 Thomas Olechowski 'Über die Herkunft Hans Kelsens', in Tiziana J. Chiussi et al (eds), *Das Recht und seine historischen Grundlagen. Festschrift für Elmar Wadle zum 70. Geburtstag* (Berlin 2008) 849–863 (858).
  - 20 Olechowski, (n 19) 859.
  - 21 Czech National Archive Prague (Národní Archiv Praha), HB Ma 251, 1881, Geburtsbuch Lit. 14, Abth. 9 – Knaben, Pag. 179, Z 179.
  - 22 Petr Kreuz, 'Zu den Prager Wurzeln Hans Kelsens', in Walter/Ogris/Olechowski (n 17) 21–39.
  - 23 Olechowski, (n 19) 860.
  - 24 The right of residence was obtained by Kelsen's family on 25 November 1901; compare hereto Olechowski (n 19) 862.
  - 25 Günter K. Kodek, *Unsere Bausteine sind die Menschen. Die Mitglieder der Wiener Freimaurerloren (1869–1938)* (Wien 2009) 178.
  - 26 Pfarre Sta. Maria Rotunda zu Wien, Geburts- und Taufbuch Nr XII (1905–1941, Konvertiten), fol 9f = Taufregister VI B (Copie VI) fol 233. See Anna L. Staudacher, 'Zwischen Emanzipation und Assimilation. Jüdische Juristen im Wien des Fin-de-Siècle', in Walter/Ogris/Olechowski (n 17) 41–53.
  - 27 Métall, (n 6) 3.
  - 28 Kelsen (n 5) 31.
  - 29 *Jahresbericht über das k.k. Akademische Gymnasium in Wien für das Schuljahr 1900/01* (Wien 1901) 9–10.

- 30 Kelsen (n 5) 32.
- 31 Kelsen (n 5) 32.
- 32 Clemens Jabloner, 'Kelsen and His Circle: The Viennese Years', in *European Journal of International Law* 9 (1998) 368–385 (370). Compare to Weininger also: Jacques Le Rider / Norbert Leser (eds.), *Otto Weininger. Werk und Wirkung* (Wien 1984); William M. Johnston, *Österreichische Kultur- und Geistesgeschichte* (4th edition in German, Wien-Köln-Weimar 2006).
- 33 Kelsen (n 5) 33.
- 34 Alois Höfler, *Logik* (Prag-Wien-Leipzig 1890) 2.
- 35 Akademisches Gymnasium Wien, Protokoll der am k.k. akadem. Gymnasium zu Wien im Monate Juli 1900 abgehaltenen Maturitätsprüfung, Nr 18.
- 36 Kelsen (n 5) 34.
- 37 Thomas Olechowski, 'Zweihundert Jahre österreichisches Rechtstudium', in Clemens Jabloner et al (eds.), *Vom praktischen Wert der Methode. Festschrift Heinz Mayer zum 65. Geburtstag* (Vienna 2011) 455–479 (464).
- 38 Carl Stooß, 'Autobiographie' in Hans Planitz (ed), *Die Rechtswissenschaft der Gegenwart in Selbstdarstellungen* Vol. II (Leipzig 1925) 21. See also Thomas Olechowski, 'Stooß Carl', in *Österreichisches Biographisches Lexikon*, 61<sup>st</sup> booklet (Vienna 2009) 321.
- 39 Professor Edmund Bernatzik has announced to hold a lecture in spring 1903. Kelsen inscribed himself for the lecture, but probably Bernatzik became sick and therefore the lecture was given by Strisower. This incidence might have been essential for Kelsen's later career. See Thomas Olechowski, 'Strisower Leo', in *Österreichisches Biographisches Lexikon*, 62<sup>nd</sup> booklet (Vienna 2010) 405.
- 40 Hans Kelsen, *Die Staatslehre des Dante Alighieri* (Wien-Leipzig 1905), newly edited by Jestaedt (n 5) 134–300.
- 41 Kelsen (n 5) 37.
- 42 Egon Zweig 'Die Staatslehre Dantes' in: *Studien und Kritiken* (Vienna-Leipzig 1907) 26–32.
- 43 Hans Kelsen, *Hauptprobleme der Staatsrechtslehre* (Tübingen 1911), new edited by Matthias Jestaedt (ed) *Hans Kelsen Werke* Vol. II (Tübingen 2008) 21–878 (62).
- 44 Kelsen, (n 5) 43.
- 45 Kelsen, (n 5) 40.
- 46 Archive of the University of Vienna (Archiv der Universität Wien), Promotionsprotokoll 1905/06, Sig M 32.3-32.6, Zahl 762. See Olechowski (n 1) 6.
- 47 Neue Freie Presse, Morgenblatt No. 15405, 13 July 1907, 22; see Olechowski (n 19) 862.
- 48 The records of the Viennese Bar Association name the following stations: 2 March – 7 June 1906: law firm Heinrich Singer / 9 June – 26 December 1906: district court Leopoldstadt No. 1 / 27 December 1906 – 3 February and 7 February – 17 March 1907: criminal provincial court / 9 April 1907 – 28 February 1908: law firm Alois Löwy / 28 February – 30 April 1908: criminal provincial court / 1 May – 28 May 1908: military service (see below Footnote n 53) / 29 May – 22 June 1908: criminal provincial court / 24 June – 22 September 1908: law firm Josef Beth.
- 49 Kelsen, (n 5) 40.
- 50 Whilst not wanting to drift too far into the field of speculations, a degree of detective work is nevertheless necessary when attempting to establish such links.
- 51 Jürgen Busch, 'Hans Kelsen an der Exportakademie in Wien', in Thomas Olechowski et al (eds.), *Grundlagen der österreichischen Rechtskultur. Festschrift für Werner Ogris zum 75. Geburtstag* (Vienna-Cologne-Weimar 2010) 69–108.
- 52 Rechts- und Staatswissenschaftliche Fakultät, 12 July 1911, Zl. 665 ex 1910/11, in *ÖStA, AVA Unterricht Allgemein, Personalakt Kelsen* (Karton 611). See Thomas Olechowski, 'Hans Kelsen und die Universität Wien', in *Hans Kelsen und die Bundesverfassung. Ausstellungskatalog* (Vienna 2010) 33–36 (39).
- 53 Jürgen Busch, 'Hans Kelsen im Ersten Weltkrieg', in *Walter/Ogris/Olechowski* (n 17) 57–80 (58).
- 54 Busch (n 53) 64.
- 55 Compare the polemic book against Kelsen: Gerhard Oberkofler / Eduard Rabofsky, *Hans Kelsen im Kriegseinsatz der k.u.k. Wehrmacht* (Frankfurt ua 1988) and its critique by Busch (n 53) 72.
- 56 See above Footnote n 15.
- 57 Deutsch-österreichisches Staatsamt für Unterricht, 22 July 1919 Z. 15646/6, in *ÖStA, AVA Unterricht Allgemein, Personalakt Kelsen* (Karton 611).
- 58 Kelsen (n 5) 50.
- 59 Helmut Rumppler, *Das Völkermanifest Kaiser Karls vom 16. Oktober 1918* (Vienna 1966).
- 60 Kelsen (n 5) 50.
- 61 Lothar Höbelt, 'Karl I., der "Teufelsspek" und die Deutschböhmen', in Andreas Gottsmann (ed.), *Karl I. (IV), der Erste Weltkrieg und das Ende der Donaumonarchie* (Vienna 2007) 47–58.
- 62 Heinrich Benedikt (ed.), *Die Friedensaktion der Meinlgruppe 1917/18* (Graz-Cologne 1962).
- 63 Only a scientific examination of the original document could give a definite answer to this question. However a request addressed towards Julius Meinl V., the great-grandchild of Julius Meinl II., who disposes of the document in question has not been answered so yet.
- 64 Kelsen, (n 5) 51.
- 65 Leader of the Czech politicians and 1918/19 the first prime minister of Czechoslovakia; compare Walter Goldinger, 'Kramář Karel', in *Österreichisches Biographisches Lexikon*, Vol IV (Vienna 1969) 202–204.

- <sup>66</sup> Leader of the Slovene politicians and 1928–1929 prime minister of the Serbian-Croatian-Slovenian Kingdom; compare Feliks Bister / Reinhold Lorenz, Koroseč Anton, in *Österreichisches Biographisches Lexikon*, Vol IV (Vienna 1969) 135–136.
- <sup>67</sup> Kelsen, (n 5) 53; Josef Redlich, Diary's entry from 24 October 1918, in Fritz Fellner et al (eds) *Schicksalsjahre Österreichs*, Vol II (Vienna 2011) 455.
- <sup>68</sup> Enderle Burcel/Hans Haas/Peter Mähner (ed), *Der österreichische Staatsrat I* (Vienna 2008) 219–223. See Thomas Olechowski, 'Der Beitrag Hans Kelsens zur österreichischen Bundesverfassung', in Walter/Ogris/Olechowski (n 17) 211–230 (212).
- <sup>69</sup> Hans Kelsen, *Die Verfassungsgesetze der Republik Deutschösterreich I* (Wien-Leipzig 1919), newly edited by Matthias Jestaedt (ed) *Hans Kelsen Werke* Vol. V (Tübingen 2011) 24–129 (35).
- <sup>70</sup> Kelsen (n 69) 43, 116.
- <sup>71</sup> Edited in: Georg Schmitz, *Karl Renners Briefe aus Saint Germain und ihre rechtspolitischen Folgen* (Vienna 1991) 50. See also Olechowski (n 68) 212.
- <sup>72</sup> Georg Schmitz, *Die Vorentwürfe Hans Kelsens für die österreichische Bundesverfassung* (Vienna 1981); Olechowski (n 68) 216.
- <sup>73</sup> Hans Kelsen / Georg Fröhlich / Adolf Merkl, *Die Bundesverfassung vom 1. Oktober 1920* (Wien-Leipzig 1922, reprint Vienna 2003) 54.
- <sup>74</sup> Hans Kelsen, 'Die Stellung der Länder in der künftigen Verfassung Deutschösterreichs mit besonderer Berücksichtigung des Anschlusses Deutschösterreichs an das Deutsche Reich', *ÖStA, AdR, NPA* (Karton 106) 344–363.
- <sup>75</sup> Schmitz (n 72) 114–307.
- <sup>76</sup> Kelsen/Fröhlich/Merkl (n 73) 54.
- <sup>77</sup> Hans Kelsen, 'Vom Wesen und Wert der Demokratie' (1920), newly edited by Matthias Jestaedt / Oliver Lepsius (eds.), *Hans Kelsen, Verteidigung der Demokratie. Abhandlungen zur Demokratietheorie* (Tübingen 2006) 1–33 (18). See Thomas Olechowski, 'Von der Ideologie zur Realität der Demokratie', in Tamara Ehs (ed.), *Hans Kelsen. Eine politikwissenschaftliche Einführung* (Baden-Baden-Wien 2009) 113–132 (128).
- <sup>78</sup> Olechowski (n 68) 228.
- <sup>79</sup> Hans Kelsen, 'Wesen und Entwicklung der Staatsgerichtsbarkeit' (1929), newly edited by Robert Chr. van Ooyen (ed.), *Hans Kelsen, Wer soll der Hüter der Verfassung sein? Abhandlungen zur Theorie der Verfassungsgerichtsbarkeit in der pluralistischen, parlamentarischen Demokratie* (Tübingen 2008) 1–57.
- <sup>80</sup> Theo Öhlinger, 'The Genesis of the Austrian Model of Constitutional Review of Legislation', in *Ratio Juris* 16 (2003) 206–222; Jana Osterkamp, *Verfassungsgerichtsbarkeit in der Tschechoslowakei (1920–1939)* (Frankfurt 2009); Kurt Heller, *Der Verfassungsgerichtshof* (Vienna 2010).
- <sup>81</sup> Georg Jellinek, *Ein Verfassungsgerichtshof für Österreich* (Vienna 1885). Compare f.e. Gerald Stourzh, 'Verfassung und Verfassungswirklichkeit Altösterreichs in den Schriften Georg Jellineks', in Stanley L. Paulson / Martin Schulte (ed.), *Georg Jellinek. Beiträge zu Leben und Werk* (Tübingen 2000) 247–260.
- <sup>82</sup> Olechowski (n 68) 227.
- <sup>83</sup> Thomas Olechowski, 'Hans Kelsen als Mitglied der Deutschen Staatsrechtslehrervereinigung', in Matthias Jestaedt (ed.), *Hans Kelsen und die olentache Statsrechtslehre* (Tübingen 2013) 11–27..
- <sup>84</sup> Karl v. Lemayer, Apologetische Studien zur Verwaltungsgerichtsbarkeit, in *Zeitschrift für das Privat- und öffentliche Recht der Gegenwart* 22 (1895) 353–488; compare Thomas Olechowski, *Die Einführung der Verwaltungsgerichtsbarkeit in Österreich* (Vienna 1999) 108.
- <sup>85</sup> Karl Lemayer, Zur Frage der Kompetenz des künftigen Verwaltungsgerichtshofes, in *Allgemeine österreichische Gerichtszeitung* 1872, 245–247 (246).
- <sup>86</sup> Adolf Merkl, *Die Lehre von der Rechtskraft, entwickelt aus dem Rechtsbegriff* (Leipzig-Wien 1923) 219.
- <sup>87</sup> Tezner, who was member of the Administrative Court 1907–1925, gave good advices to Kelsen, when he wrote his „Hauptprobleme“, see Kelsen (n 43) 64. Nevertheless, the contribution of Tezner for the Development of the Pure Theory of Law is not examined yet. See the short biography by Nikolaus Schwärzler, 'Friedrich Tezner', in Wilhelm Braunereder (ed), *Juristen in Österreich* (Vienna 1987) 242–247.
- <sup>88</sup> See f.e. Theo Öhlinger, *Der Stufenbau der Rechtsordnung. Rechtstheoretische und ideologische Aspekte* (Vienna 1975) 34; Peter Pernthaler, *Österreichisches Bundesstaatsrecht* (Vienna 2004) 170.
- <sup>89</sup> Clemens Jabloner, 'Stufung und Entstufung des Rechts', in *Österreichische Zeitschrift für Öffentliches Recht* 60 (2005) 163–185 (184).
- <sup>90</sup> Hans Kelsen, 'Vom Wesen und Wert der Demokratie' (2<sup>nd</sup> edition 1929), newly edited by Jestaedt/Lepsius (n 77) 149–228 (207).
- <sup>91</sup> Kelsen (n 77) 13, see Olechowski (n 77) 124.
- <sup>92</sup> Karl Renner, *Demokratie und Bureaukratie. Studien zur Kultur- und Wirtschaftsgeschichte Österreichs I* (Vienna 1946) 30; Schmitz (n 71) 82.
- <sup>93</sup> Hans Kelsen, 'Demokratisierung der Verwaltung', in: *Zeitschrift für Verwaltung. Neue Folge* 1 (1921) 5–15 (12).
- <sup>94</sup> Adolf Merkl, *Demokratie und Verwaltung* (Wien-Leipzig 1923) 81, 84.
- <sup>95</sup> Kelsen (n 90) 208.
- <sup>96</sup> John Locke, *An Essay Concerning Human Understanding* (24<sup>th</sup> ed, London 1823) 234 (§ 20).