



היסטוריה של המשפט – סדנת יגאל ארנון ושות'  
The Yigal Arnon & Co. Law and History Workshop

משפט והיסטוריה – מאמרים בדרך  
Law and History Working Papers  
8/5776

*Assimilation through Law:  
Hans Kelsen and the Jewish Experience*

Eliav Lieblich  
IDC, Law

28 December 2015

Workshop Coordinators:	מנחי הסדנה:
Dean Ron Harris harrisr@post.tau.ac.il	דיקן רון חריס harrisr@post.tau.ac.il
Prof. Assaf Likhovski likhovsk@post.tau.ac.il	פרופ אסף לחובסקי likhovsk@post.tau.ac.il
Dr. Lena Salaymeh slena@post.tau.ac.il	ד"ר לינא שלאימה slena@post.tau.ac.il

## Assimilation through Law: Hans Kelsen and the Jewish Experience

Eliav Lieblich\*

*Hans Kelsen was perhaps the foremost continental lawyer of the 20th century. The founder of the immensely influential Pure Theory of Law, he is primarily remembered as a groundbreaking Austrian jurist. However, Kelsen was also a Jew, albeit an extremely assimilated one. His life story – from his early days in Vienna until his death in California – is truly representative of the tragedy of European Jewry in the 20th century. This Chapter discusses Kelsen in light of the ever-present tensions between Jewish and European identity, with particular attention to his position as an international lawyer. Focusing on the period surrounding the publication of the first edition of his Pure Theory of Law (1934), the Chapter discusses Kelsen along three interrelating themes relevant to the Jewish experience of the time. The first part situates Kelsen in relation to a key dilemma of Jewish politics: the tension between Jewish nationalism and assimilationism. It highlights the different constructions of Kelsen’s identity, and their uses by various actors. The second theme focuses on assimilationist politics in Kelsen’s jurisprudence, suggesting a reading of Kelsen’s Pure Theory which I call “assimilation through law.” The third theme pitches Kelsen’s Pure Theory of (international) law against the ideology of progress – a key idea in the thought of assimilated Jewish internationalists. As I demonstrate, although Kelsen’s Pure Theory famously claimed to be “anti-ideological,” the notion of progressivism still shines through its cold and analytic reasoning.*

### **I. Introduction**

### **II. Austrian Kelsen versus Jewish Kelsen**

- A. A Quintessential Jewish Dilemma
- B. Constructing “Austrian” Kelsen: The Assimilationist Narrative
- C. Constructing “Jewish” Kelsen: The Collectivist Narrative

### **III. Assimilation through Law**

- A. The Unavailability of Assimilation through Universal Rights
- B. Dissolving the Individual

### **IV. Pragmatic Progressivism**

- A. Descriptive Progressivism
- B. Normative Progressivism

### **V. Conclusion: Law without Qualities**

### **I. Introduction**

Hans Kelsen’s 1969 biography, written by his former assistant Rudolph Aladár Métall, does not begin – as perhaps expected in the genre – by describing Kelsen’s immediate family or early childhood. Rather, Métall takes us many centuries back, to an age when Roman Legionaries defended the borders of the Empire, between Germany and Luxemburg. For supplies, the Romans relied on Jewish sutlers,<sup>1</sup> who eventually settled in the area. A small village – “Kelsen über Saarbürg” – was one of these settlements. In the 18<sup>th</sup> century, when

---

\* Assistant Professor, Radzyner School of Law, Interdisciplinary Center (IDC), Herzliya. I am grateful to Eyal Benvenisti, Anat Rosenberg, Yoram Shachar and Adam Shinar for the helpful comments and discussions.

<sup>1</sup> Historically, sutlers were civilians who sold provisions to military units.

Austrian Jews were given German surnames, many took the names of their places of origin. In this manner, Métall tells us, the surname “Kelsen” came to be.<sup>2</sup> Hans Kelsen, thus, is not a foreigner: he is of firm Habsburgian-German roots. We even have *maps* to prove it – to convince us, Métall provides the exact geographical coordinates of his ancestral village.<sup>3</sup>

Métall’s well-meaning intention was to dispel the longstanding attempts by Austrian anti-Semites to “expose” that Kelsen’s true name was Kohn (Cohen) – and that therefore, he can never be *really* German (or Austrian).<sup>4</sup> While Métall immediately qualified that in any case this should not be a cause for shame,<sup>5</sup> this peculiar opening encapsulates the tensions of European Jewish identity, underlying and undermining assimilationist attempts, until the catastrophe of the 20<sup>th</sup> century brought them to an abrupt end.

This Chapter discusses Hans Kelsen in light of these ever-present tensions, with particular focus on his position as an international lawyer. Indeed, recent scholarship recognizes the particular importance of questions of identity when discussing international law, precisely because of the latter’s ambiguities.<sup>6</sup> To be sure, since the “cause” of international law was consistently driven, in its formative years, by committed individuals,<sup>7</sup> it is of special interest to explore their motivations, as well as the uses and constructions of their identities.

In this context, Kelsen’s life trajectory is truly representative of the tragedy of European Jewry in the 20<sup>th</sup> century. He was born in 1881 in Prague – then part of the Austro-Hungarian Empire – to assimilated Jewish parents, who moved shortly after his birth to Vienna.<sup>8</sup> The world of his childhood and young adulthood was described by his contemporary Stefan Zweig as “the Golden Age of Security,” where everything in the “thousand-year-old Austrian Monarchy seemed based on permanency.”<sup>9</sup> However, the age of security did not last long. At the closing of World War I and the collapse of the Empire, Kelsen, then a young jurist in the Ministry of War, became – by force of circumstance – instrumental in forming the new federal order, and is widely credited for authoring Austria’s 1920 democratic Constitution.<sup>10</sup> Thereafter, he was simultaneously a prominent academic in the University of Vienna’s faculty of law – where he developed his immensely influential brand of positivism known as the *Pure Theory of Law* – and a judge in Austria’s Constitutional Court, which he helped to establish.<sup>11</sup> In 1930, with the beginning of the slide towards Austro-fascism and the dissolution of the Court, he left Vienna for the University

---

<sup>2</sup> R.A. Métall, *Hans Kelsen: Leben und Werk* (Vienna: Franz Deuticke, 1969), p. 1.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.* On the perplexities of German and Austrian identities, and in particular among educated Jews, see S. Beller, *Vienna and the Jews, 1867–1938: A Cultural History* (CUP, 1989), pp. 144–164.

<sup>5</sup> *Ibid.*

<sup>6</sup> See R.Y. Paz, ‘A Forgotten Kelsenian? The Story of Helen Silving-Ryu (1906–1993)’, *European Journal of International Law*, 25 (2015), 1123–1146, 1125–1126.

<sup>7</sup> For the definitive work on this see M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (CUP, 2001).

<sup>8</sup> Hans Kelsen, *Autobiografía*, LV. Borda (trans.), (Bogotá: Universidad Externado de Colombia, 2008), p. 67; Métall, *Kelsen*, pp. 1–2.

<sup>9</sup> S. Zweig, *The World of Yesterday*, A. Bell (trans.), (University of Nebraska Press, 1964), p. 1.

<sup>10</sup> M. Garcia-Salmones Rovira, *The Project of Positivism in International Law*, (OUP, 2013), p.166; R.Y. Paz, *A Gateway between a Distant God and a Cruel World: The Contribution of Jewish German-Speaking Scholars to International Law* (Leiden: Martinus Nijhoff, 2012), p. 178–179.

<sup>11</sup> Kelsen, *Autobiografía*, pp. 119–149.

of Cologne, only to escape Germany by the skin of his teeth in 1933, after Adolf Hitler took power.<sup>12</sup> Continuing his academic work from Geneva's Graduate Institute of International Studies, he also attempted, in 1936 – under impossible circumstances – to teach part-time at the German University of Prague, only to leave in 1938.<sup>13</sup> With the outbreak of World War II, Kelsen resolved to leave Europe, fearing that Switzerland would not remain neutral. He left for the United States in 1940, ultimately settling at UC Berkeley's Department of Political Science in 1945.<sup>14</sup> He died in California in 1973.

Kelsen was perhaps the 20<sup>th</sup> Century's most influential continental jurist. Encompassing almost eight decades of prolific work, his writings addressed not only fundamental legal problems, but also issues of psychology, sociology, philosophy and politics.<sup>15</sup> He engaged in intellectual exchanges with figures such as Freud,<sup>16</sup> and his debates with Carl Schmitt are canonical in constitutional theory.<sup>17</sup> Especially challenging for commentators is the fact that Kelsen's thought, while returning to some basic premises, was constantly evolving, even well into his eighties.<sup>18</sup> Unsurprisingly, his works are discussed in vast secondary literature, celebratory as well as critical.<sup>19</sup> It is beyond this Chapter to address this vastness. Nonetheless, it is still helpful, before moving on, to recount the basic tenets of his legal thought.

Since Kelsen's jurisprudence envisioned all levels of law as unity – this is his famous concept of *monism* – international law was an integral part of his analysis. In fact, it became increasingly dominant as his career progressed and his life circumstances took him away from Europe. His writings on international law can be roughly divided to four periods. Until the mid-1930s, Kelsen mainly addressed the nature of international law within his general jurisprudence. Writing against predecessors such as Georg Jellinek,<sup>20</sup> he chiefly dealt, in this period, with *descriptive* theoretical issues such as the nature of the state, of sovereignty, and of international law *qua* legal system, including its relation with domestic law.<sup>21</sup> Before and

---

<sup>12</sup> *Ibid*, pp. 150–153.

<sup>13</sup> *Ibid*, pp. 153–168.

<sup>14</sup> *Ibid*, 168–173; Paz, *Gateway*, p. 183; D. Kennedy, 'The International Style in Postwar Law and Policy', *Utah Law Review*, 1994 (1994), 7 –103, 30–59.

<sup>15</sup> For chronological bibliographies, see Métall, *Kelsen*, pp. 124–155; for a bibliography of key writings on international law see N.B. Ladavac, 'Hans Kelsen (1881 –1973), Biographical Note and Bibliography', *European Journal of International Law*, 9 (1998), 391–400, 394–396.

<sup>16</sup> Hans Kelsen, 'The Conception of the State and Social Psychology, with Special Reference to Freud's Group Theory', *International Journal of Psycho-Analysis*, 5 (1924), 1–38; C. Jabloner, 'Kelsen and His Circle: The Viennese Years', *European Journal of International Law*, 9 (1998), 368 –385, 382 –383.

<sup>17</sup>For an overview in English see D. Dyzenhaus, "'Now the Machine Runs Itself': Carl Schmitt on Hobbes and Kelsen", *Cardozo Law Review*, 16 (1994), 1–19.

<sup>18</sup> See, e.g., S.L. Paulson, 'Four Phases in Hans Kelsen's Legal Theory? Reflections on a Periodization', *Oxford Journal of Legal Studies*, 18 (1998), 153–166.

<sup>19</sup> For a bibliography of main secondary literature in English (as of 1992) see H. Kelsen, *Introduction to the Problems of Legal Theory*, B. Litschewski Paulson and S.L. Paulson, (trans.) (OUP, 1992), pp. 145 –153; perhaps the foremost collection of secondary literature in English is S.L. Paulson and B. Litschewski Paulson (eds.), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (OUP, 2007); for secondary literature on Kelsen's international legal theory (as of 1998) see Ladavac, 'Hans Kelsen', 396 –400; for recent analysis see Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (CUP, 2010); Garcia-Salmones Rovira, *Positivism*; see also volume 9 of the *European Journal of International Law* (1998).

<sup>20</sup> Von Bernstorff, *International Law Theory*, pp. 26 –38, 44.

<sup>21</sup> See, e.g., Hans Kelsen, *Das Problem der Souveränität un die Theorie des Völkerrechts* (Tübingen: Mohr, 1920); Kelsen, *Introduction*, pp. 107–125.

during World War II, until the establishment of the UN, Kelsen was preoccupied with *normative* problems of world organization.<sup>22</sup> His writings from these years analyze the failure of the League of Nations, while suggesting a new world order structured around a compulsory world court.<sup>23</sup> In the decade following the founding of the UN, Kelsen mainly engaged critically with the emerging law of the organization,<sup>24</sup> while completing his comprehensive treatise on international law in 1952.<sup>25</sup> Thereafter, until his death, Kelsen returned to revisit the issues he addressed along the years, challenging some of his early assumptions.<sup>26</sup>

Throughout the years, Kelsen's positivist international legal jurisprudence was elaborated and disseminated by a close circle of students. Together with Kelsen, the "Vienna School" of international law included namely Josef Kunz, Rudolph Métall and to a varying extent, Alfred Verdross.<sup>27</sup> Collectively – and in seeming disconnect from Kelsen's normative projects – they offered a "scientific" description of international law as a distinct object of cognition, as a response to what they saw as political abuse of legal concepts.<sup>28</sup> They followed the logic of the Pure Theory, which famously attempted to describe "law" as an independent concept, disconnected from "foreign elements" such as ethics, theology, psychology and biology –<sup>29</sup> meaning – both from morality and from natural facts.<sup>30</sup> To Kelsen, a legal norm, domestically as internationally, is merely a link between extralegal fact (the *Sein*) and an "imputed" coercive consequence.<sup>31</sup> In fact, the coercion is constitutive of the legal norm itself.<sup>32</sup> In international law, coercion is effected through reprisals and war,<sup>33</sup> which can only be undertaken against an international "delict."<sup>34</sup> Law is distinct from morality, since the "ought" (the *Sollen*) in law refers strictly to the link between fact and

---

<sup>22</sup> On Kelsen's dual descriptive/normative legal project see Von Bernstorff, *International Law Theory*, pp. 2–3.

<sup>23</sup> See, e.g. H. Kelsen, *Peace through Law* (University of North Carolina Press, 1944). This period also saw his treatment of international criminal law. See H. Kelsen, 'Collective and Individual Responsibility in International Law with Particular Regard to Punishment of War Criminals', *California Law Review*, 31 (1943), 530–571.

<sup>24</sup> Notably, H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (NY: Praeger, 1950).

<sup>25</sup> H. Kelsen, *Principles of International Law* (NY: Rinehart & Co., 1952).

<sup>26</sup> Most Notably, the 1960 major revision of the *Introduction*. H. Kelsen, *Introduction of Law*, 2<sup>nd</sup> edn, M. Knight (trans.), (U.C. Press, 1967).

<sup>27</sup> J.L. Kunz, 'The "Vienna School" and International Law', *New York University Law Quarterly Review*, 11 (1933–1934), 393–394; von Bernstorff, *International Law Theory*, pp. 4–5; for short "career sketches" of Kunz and Verdross see *id.*, 281–286; for others in Kelsen's wider circle see Jabloner, 'Kelsen and His Circle', 370–421, 375–385. Verdross deviated, eventually, from the *Introduction*. Other prominent students of Kelsen deviated more significantly, notably Hersch Lauterpacht and Helen Silving-Ryu, See e.g. Paz, *Forgotten Kelsenian*.

<sup>28</sup> von Bernstorff, *International Law Theory*, pp. 54–55.

<sup>29</sup> Kelsen, *Introduction*, §1; S.L. Paulson, 'Introduction', in Kelsen, *Introduction*, p. xix (1934); Kunz, 'The "Vienna School"', 377–380.

<sup>30</sup> Paulson, 'Introduction', p. xxi.

<sup>31</sup> Kelsen, *Introduction*, §§15–16, §31(c).

<sup>32</sup> Kelsen, *Principles*, p. 7.

<sup>33</sup> *Ibid.*, §49(b)

<sup>34</sup> To Kelsen, if international law is to have a legal character, force can only be used as sanction, and not at will (*bellum iustum*). See H. Kelsen, *Law and Peace in International Relations* (Hein, 1942), p.13, 34; Later on, he based his just war theory also on positive law. See Kelsen, *Principles*, pp. 33–64; for a discussion of Kelsen's *bellum iustum* theory see Paz, *Gateway*, pp. 276–277.

prescribed coercive consequence, *not* between fact and moral outcome.<sup>35</sup> In this sense, Kelsen emphatically denied “that it can be the task of legal science to justify anything whatever.”<sup>36</sup> Law is also distinct from natural science since it is ruled not by “causality” but by normativity (the imputed coercive consequence), and therefore cannot be analyzed and identified by scientific measures.<sup>37</sup> Thus, according to the Pure Theory, every legal norm derives its validity, domestically and internationally, not from ethical ideals but from a higher norm, the highest of which is a presumed *grundnorm* (basic norm).<sup>38</sup> The basic norm of the international legal system is that *custom* is a law-creating material fact.<sup>39</sup> Given the unity of all systems of law, the primacy of international law must be acknowledged, if this unity is to be workable and coherent.<sup>40</sup> If this view is accepted, the international basic norm must also be the ultimate norm of states’ legal systems.<sup>41</sup>

Beyond the above, this Chapter does not offer a comprehensive outline or critique of Kelsen’s general or international jurisprudence, except when needed to exemplify the argument – this has already been done by many others. Rather, and since at issue is *Jewish* international lawyering, it only makes sense to restrict the analysis to a point in time when the Jewish condition in Europe came to a boiling point, and to situate Kelsen within these tensions. Accordingly, this Chapter focuses, when discussing Kelsen’s writings, mainly on the period around the first edition of Kelsen’s Pure Theory of Law, published in 1934.<sup>42</sup> This work is significant not only on account of its canonical status as the most concise expression of Kelsen’s theory, but also because it was written in the last moments of the longstanding attempts by “educated” Jews to assimilate in their surrounding society. It was literally written on the brink: hope still existed, but catastrophe already loomed large.

Before proceeding, a disclaimer is required. Any discussion of an intellectual endeavor in light of a person’s collective background – Jewish or otherwise – can collapse into essentialism, if not worse. There is something potentially degrading in attempting to demonstrate that the work a thinker, who – as we shall see – manifestly did not consider himself a *Jewish* thinker, reflects the work of a “Jewish mind.” However, it is completely fair to discuss a thinker in light of the challenges his “collective” faced within a certain society; challenges that might translate to common reactions and trends in thought. Thus, I do not aim to discuss the “Jewishness” of Kelsen, but rather his *experience* as a Jew.

---

<sup>35</sup> Kelsen, *Introduction*, §§15–16.

<sup>36</sup> *Ibid.*, §48(f).

<sup>37</sup> *Ibid.*, §2, §8, §15–16.

<sup>38</sup> *Ibid.*, §§27–29.

<sup>39</sup> *Ibid.*, §49(a); for a discussion of why *pacta sunt servanda* itself cannot be the basic norm of international law (as Kelsen initially claimed) see Kunz, ‘The “Vienna School”’, 403–404. Later on, Kelsen clarified that the international basic norm maintains that “states ought to behave as they have customarily behaved.” Kelsen, *Principles*, p. 418.

<sup>40</sup> Kelsen, *Introduction*, §49(a), §50(d–e); Kelsen emphatically leaned towards the supremacy of international law, while half-heartedly acknowledging that the primacy of domestic law was also possible. See Kunz, ‘The “Vienna School”’, pp. 398–403; the choice between the two approaches was “political,” but Kelsen clearly implied his own preferences. Kelsen, *Principles*, pp. 428–447. Compare von Bernstorff, *International Law Theory*, pp. 93–107.

<sup>41</sup> Kelsen, *Introduction* §50; Kelsen, *Principles*, p. 446–447.

<sup>42</sup> This work was translated only in 1992 as *Introduction to the Problems of Legal Theory*, to distinguish it from the second version of the Pure Theory. Kelsen’s 1960 rework of the Pure Theory modified some of his previous arguments, specifically in its emphasis on will and volition. See e.g. Kennedy, ‘International Style’, 35; Paulson, ‘Introduction’, p. v. However, this is less relevant for our purposes.

That this experience affected Kelsen cannot be reasonably denied. Indeed, while his academic writings adhered to the rational tradition of separating emotion from reason – after all, he saw the “emotional component” as part of “primitive consciousness”<sup>43</sup> – it must be recalled that some of his seminal works were written just as his world was crumbling around him, sometimes under imminent physical danger. The bridge between Kelsen’s detached analytical writing and his personal upheavals can be found in the usually overlooked part of great works, the preface. For instance, in the preface to 1934’s *Pure Theory*, written in Geneva after Kelsen escaped Germany, he vehemently defends his theory against critics. This would hardly be unusual, had the tone of the defense not been so *emotional*. Kelsen’s tone, in fact, is reminiscent of a cry from a drowning vessel: the *Pure Theory* is “besieged,” a victim of an “all-out battle” waged by a hateful opposition.<sup>44</sup> The critics tear at the *Pure Theory* from opposing ideological angles, simultaneously condemning it as fascist, communist, or liberal.<sup>45</sup> Kelsen laments the state of the world, in which those who “place intellectual values before power” are few, while hoping that the younger generation, “caught in the raucous hue and cry of our times” will not abandon the belief in “independent legal science.” Hope and despair are mixed in Kelsen’s closing statement, expressing his “firm conviction that in some distant future, the fruits of such a legal science will not be lost.”<sup>46</sup> When considering Kelsen’s personal circumstances at the time, the thought that he was writing about his own fate when decrying the treatment of the *Pure Theory* becomes inescapable. Like the *Pure Theory*, Kelsen was besieged, embattled and victimized by intense hate. Like the *Pure Theory*, Kelsen was subject, as a Jew, to propaganda that Jews were simultaneously behind opposing ideologies.<sup>47</sup>

Bearing this in mind, this Chapter discusses Kelsen along three interrelating themes especially relevant to the situation of educated Jews – and perhaps, more so, to Jewish international lawyers – in the first half of the 20<sup>th</sup> century. The first part is biographical, situating Kelsen in relation to that era’s key dilemma of Jewish politics: the tension between Jewish nationalism and assimilationism. As I show, like many Jews in the Viennese intellectual elite, Kelsen’s public stance shunned Jewish collectivism, in favor of a supposedly neutral Austrian identity. “Austrian Kelsen” was challenged, however, by two extremes. Both anti-Semitism, and, from an opposing angle, Zionism, rejected the possibility of assimilation and thus constructed Kelsen as a Jew. “Jewish Kelsen,” in turn, was utilized both as a legitimizing and de-legitimizing figure by collectivist ideologies.

The second theme zooms in on the question of assimilationist politics in Kelsen’s jurisprudence. Regardless of the attempts to construct a “Jewish Kelsen,” Kelsen was an Austrian patriot with strong cosmopolitan leanings, an assimilated Jew *par excellence*. However, since his “neutral” positivist jurisprudence, on its face, rejected cosmopolitanism as a *legal* construct, it is impossible to place his thought within the strand of assimilationist jurisprudence that placed universal rights at the basis of the legal system. Still, I suggest that an assimilationist reading of Kelsen’s *Pure Theory* is possible, going beyond the rather obvious observation that the mere attempt to construct “neutral” concepts could in itself

---

<sup>43</sup> Hans Kelsen, *Society and Nature: A Sociological Inquiry* (NY: Routledge, 1946), pp. 1–23.

<sup>44</sup> Kelsen *Introduction*, p. 2.

<sup>45</sup> *Ibid*, p. 3.

<sup>46</sup> *Ibid*, pp. 4–5.

<sup>47</sup> See, e.g., J.W. Bendersky, *A Concise History of Nazi Germany* 21, 37 (3<sup>rd</sup> ed., 2007); see generally I. England, ‘Nazi Criticism against the Normativist Theory of Hans Kelsen: Its Intellectual Basis and Post-Modern Tendencies’, *Israel Law Review*, 32 (1998), 183–249.

be an assimilationist endeavor.<sup>48</sup> A profoundly assimilationist vision is revealed if we “reverse” Kelsen’s top-down perception of a universal legal system, in which law pulsates dynamically from a universal basic norm to individual transactions, to a bottom-up process in which the individual dissolves into the international community. This process can only be described as *assimilation through law* – a starkly different concept from the attempts of some Jewish internationalists to pursue assimilation through *universal rights*.

The third theme pitches Kelsen’s Pure Theory of (international) law, which he describes in a striking oxymoron as “radically anti-ideological,” against the notion of “progress” – the latter being a key idea in the thought of assimilated Jewish internationalists. As I argue, the notion of “progress” shines through Kelsen’s attempts to shun ideological perceptions of law. In particular, it lies in the core of his view of the proper international order, which informed, in turn, his construction of the nature of international law *qua* legal system. Nonetheless, the tragic events of his time were reflected in his adoption of a pragmatic version of progressivism in his vision for a world order.

## II. Austrian Kelsen versus Jewish Kelsen

### A. A Quintessential Jewish Dilemma

Like other key European-Jewish thinkers of the 20<sup>th</sup> century, Kelsen’s experiences can be discussed in light of the quintessential dilemma of Jewish politics of the time – between assimilation in surrounding society and asserting Jewish identity – whether by positively embracing “Jewish” traits, or as a form of reactive identity politics.<sup>49</sup> Assimilationist politics of Jewish internationalists, in particular, were bolstered by strong cosmopolitanism, as a vehicle to transcend exclusionary nationalisms.<sup>50</sup> These tensions were burning in the extreme public discourse of turn-of-the-century Vienna: local politics were dominated by anti-Semitic mayor Karl Lueger, just as Theodor Herzl founded the Zionist movement, which advocated a solution to the “Jewish problem” in the form of a Jewish state.<sup>51</sup>

Choosing assimilation could entail denying the relevance of one’s Jewish background for all practical purposes, or perhaps, one’s Jewishness altogether. It could also imply a division between one’s public, assimilated identity, and a private, Jewish identity.<sup>52</sup> In any case, it was effected through attempts to integrate in non-Jewish society,<sup>53</sup> and was characterized by the adoption of key Enlightenment tenets, namely liberalism, progressivism and the value of education (*bildung*).<sup>54</sup> Assimilation was common among the Jews in Vienna’s cultural elite and bourgeoisie, as a perceived entry-ticket to Austrian society.<sup>55</sup>

Kelsen was described as an “extremely assimilated” Jew,<sup>56</sup> an admirer of the old Austrian Empire, and in particular its multinational ideals.<sup>57</sup> He was said to have treated his

---

<sup>48</sup> E.g., the idea of the ethnically neutral “*mensch*.” Beller, *Vienna*, p. 236.

<sup>49</sup> See, e.g., H. Arendt, *Men in Dark Times*, (NY: Harcourt, 1955) p. 18.

<sup>50</sup> Paz, *Gateway*, pp. 23–28.

<sup>51</sup> Beller, *Vienna*, p. 74.

<sup>52</sup> See *infra*, n. 157.

<sup>53</sup> Beller, *Vienna*, p. 76.

<sup>54</sup> *Ibid*, p. 76, 122.

<sup>B</sup> *Ibid*, p. 84.

<sup>56</sup> Akzin, at 326.

<sup>57</sup> Garcia-Salmones Rovira, *Positivism*, p. 159–160.



Judaism as an “irrelevancy,”<sup>58</sup> although he did not actively deny his Jewish origins or Jewishness.<sup>59</sup> That *formal* religious identity was not central to Kelsen is clearly evidenced by his double conversion – once to Catholicism (1905) and then to Lutheran Protestantism (1912) – although these were not for reasons of faith.<sup>60</sup> As Beller rightly notes, however, actively considering something – such as Jewishness – as “irrelevant,” actually implies that the same thing is undesirable.<sup>61</sup> Since there are no transparent social categories, choosing *not* to stress an aspect of one’s identity is an active choice of other identities. And indeed, Kelsen did not perceive his assimilation as neutral. In the preface to 1944’s “Peace through Law,” he laments the tragedies of the time, asking dramatically “have we men of a *Christian civilization* really the right to relax morally?”<sup>62</sup> Assimilation here is pursued not only by positively adopting “Christian civilization,” but is also augmented by juxtaposing this civilization to other, “primitive peoples.”<sup>63</sup>

However, assimilation was pressured from two divergent viewpoints. As is well known, 20<sup>th</sup> century anti-Semitism did not base “Jewishness” on subjective perceptions but on ancestry.<sup>64</sup> Thus, Kelsen, like many others, was regarded as a Jew by society and as we shall see, suffered grave persecution. This persecution encompassed not only Kelsen’s person but also his work. In an infamous 1936 conference, organized by Carl Schmitt, Kelsen’s jurisprudence was condemned as “Jewish.”<sup>65</sup> His Pure Theory was even described in a Nazi encyclopedia as a “typical expression of the corroding Jewish spirit” in its “community destroying” nihilism.<sup>66</sup> On the other hand, some strands of Zionism, either essentially or reactively, held that “Jewishness was a matter of the blood” and thus that assimilation was impossible.<sup>67</sup> Ultimately, both stressed the Jew’s eternal foreignness.<sup>68</sup>

### B. Constructing “Austrian” Kelsen: The Assimilationist Narrative

These tensions of Jewish identity never played an explicit role in Kelsen’s work. Still, they can nevertheless be implied from the manner *others* constructed his *personal* identity, adopting either an assimilationist or Jewish-collectivist narrative. These narratives have political significance. On the one hand, treating Kelsen as “Austrian” (or “European”) places one in firm opposition to the exclusionary discourse of anti-Semitism, while risking, unintentionally, its denial. On the other, incorporating him into a Jewish

---

<sup>58</sup> Beller, *Vienna*, p. 76.

<sup>59</sup> Garcia-Salmones Rovira, *Positivism*, p. 159.

<sup>60</sup> *Ibid.*, pp. 158–159; Paz, *Gateway*, p. 178. Conversion to Protestantism – the religion of German enlightenment – was considered a progressive move. Beller, *Vienna*, p. 153; Paz, *Gateway*, p.232–233. Arendt notes that conversion was common among educated Jews for economic reasons, but that this usually did not make them “cease to be Jews, neither in their own opinion nor in that of their environment.” H. Arendt, ‘Privileged Jews’, *Jewish Social Studies*, 8 (1946), 3–30, 21. Kelsen continued to harbor some Jewish awareness, conversions notwithstanding. Garcia-Salmones Rovira, 159.

<sup>61</sup> Beller, *Vienna*, p. 74–75.

<sup>62</sup> Kelsen, *Peace through Law*, p. vii [emphasis mine].

<sup>63</sup> *Ibid.*

<sup>64</sup> See, e.g., Beller, *Vienna*, pp. 190–192.

<sup>65</sup> See, e.g., D.F. Vagts, ‘Carl Schmitt in Context: Reflections on a Symposium’, *Cardozo Law Review*, 23 (2001–2002), 2157–2163, 2158.

<sup>66</sup> Cited in England, ‘Nazi Criticism’, at n. 1.

<sup>67</sup> See Beller, *Vienna*, p. 79, citing T. Lessing, *Der Jüdische Selbsthaas* (Berlin: Jüdischer Verlag, 1930), pp. 68 ff.

<sup>68</sup> Arendt, ‘Antisemitism’, pp. 54–55.

collective could be a source of political capital, especially for Zionists:<sup>69</sup> indeed, leading jurists – perhaps even more so, prominent international lawyers – can serve as agents of legitimacy for political aspirations.<sup>70</sup>

Thus, some “Kelsenists” outright object to discussing Kelsen’s work in terms of his Jewish identity. Jabloner, for instance, states bluntly that “there is no sense ... in seeking to detect ‘Jewish’ characteristics” in Kelsen’s thought, both since this will be ‘ambivalent’ and because many in Kelsen’s elite circles were not Jewish.<sup>71</sup> Others, likewise, do not emphasize Kelsen’s Jewish background as having a substantial impact on his thought, beyond, of course, the objective fact that it triggered anti-Semitic attacks.<sup>72</sup> As Garcia-Salmones Rovira points out, stressing Kelsen’s Viennese cultural, political and philosophical influences, implies the construction of an “Austrian Kelsen.”<sup>73</sup> It is clear that in effect, discussing Kelsen as an “Austrian” figure adopts the assimilationist narrative: at the end of the day, his Jewish identity was secondary, if at all relevant.

This is probably loyal to the way Kelsen would have presented himself, at least *publically*. Along several phases of his career, Kelsen was simultaneously persecuted not only for being Jewish, but also for being a liberal Austrian jurist. When narrating each of these junctions, one could stress either one of these causes. Interestingly, when presenting himself to the general public, Kelsen chose to emphasize the latter. Although this type of “denial” was criticized by some Jewish thinkers,<sup>74</sup> it could be understandable, since highlighting one’s group-based persecution reiterates the same group identity that speaker wishes to transcend. It might also be perceived as a self-compromising act, where the victim admits her weakness and adopts the discourse of the aggressor.<sup>75</sup>

In accordance with these dynamics, in Kelsen’s 1947 autobiography, “Austrian Kelsen” is constantly present, while “Jewish Kelsen” is at most implied. Thus, when describing his childhood and his family background, Kelsen tells us of his Galician father, and of his German-Czech mother. He likewise speaks at length of the German literature that influenced his early years. He does not, however, mention that his parents were Jewish, nor does he refer positively or negatively to any Jewish experience in these formative years.<sup>76</sup>

Similarly, when explaining Kelsen’s 1930 departure from Vienna, one can choose to stress the relevant political-constitutional circumstances – and thus emphasize Kelsen’s identity as an Austrian democrat – or, conversely, to emphasize the anti-Semitic underpinnings of the affair. Again, when describing this episode, Kelsen (and others) chose the former. Under this narrative, Austrian Kelsen’s leaving was a result of the “strong

---

<sup>69</sup> See, e.g., Z. Rosenkranz, *Einstein before Israel: Zionist Icon or Iconoclast*, (Princeton University Press, 2011), pp. 2–3.

<sup>70</sup> If international law has a deep relation to legitimacy, prominent international lawyers, arguably, can serve the same function. See generally T. M. Franck, *The Power of Legitimacy among Nations* (OUP, 1990).

<sup>71</sup> Jabloner, ‘Kelsen and His Circle’, 368–385, 374–375.

<sup>72</sup> von Bernstorff, *International Law Theory*; Kennedy, ‘International Style’, at 36–37 (constantly referring to Kelsen as *European*).

<sup>73</sup> Garcia-Salmones Rovira, *Positivism*, pp. 124–125.

<sup>74</sup> Arendt saw this as an illusion, self-denial and betrayal. Arendt, ‘Antisemitism’, 46–59, 99.

<sup>75</sup> See A. Stein, ‘“As Far as They Knew I Came from France”: Stigma, Passing, and Not Speaking about the Holocaust’, *Symbolic Interaction*, 32 (2009), 44–60.

<sup>76</sup> Kelsen, *Autobiografia*, pp. 67–72. Conversely, in Kelsen’s 1968 biography, Métaill devoted considerable attention to Kelsen’s Jewish roots. It could be speculated that by that time Kelsen, almost 30 years in the US, felt more at ease to talk about these issues, or that it was easier to do so through others.

reaction” by conservatives to a ruling by the Constitutional Court, authorizing administrative bodies to dissolve Catholic marriages.<sup>77</sup> During 1929, the increasingly influential proto-fascist Christian-Social Party (CSP), reacted wildly to this decision, including by launching personal attacks against Kelsen.<sup>78</sup> As Kelsen writes, this was part of the CSP’s plan to eliminate the Court altogether.<sup>79</sup> Once the CSP gained sufficient power, it moved to carry out the plan. In order to secure the Social-Democrats’ support for the move, the new CSP government offered them to nominate two of the fourteen judges of the new, “reorganized” Court. One position was offered to Kelsen, who was sympathetic to the Social-Democrats. He refused decisively.<sup>80</sup> As Kelsen tells it, “these events” angered him deeply and “discouraged me to continue my work in Austria.”<sup>81</sup> Kelsen’s emphasis of the constitutional-political circumstances surrounding his departure is telling. It is clear that anti-Semitism played a significant part in the attacks on Kelsen and the Court,<sup>82</sup> not least because the CSP was overtly anti-Semitic.<sup>83</sup> Nonetheless, in Kelsen’s narrative it is “Austrian,” rather than “Jewish” Kelsen, who suffers these attacks.

We find similar undertones in two other episodes described by Kelsen – his 1933 escape from Cologne and his 1936-1938 experience in Prague. In 1930, he took up a chair at the University of Cologne. When Hitler ascended to power in 1933, Kelsen was one of the first professors dismissed. He managed to escape Germany only through the police-connections of a university employee.<sup>84</sup> Of course, the chief reason for his dismissal was his Jewish background: Kelsen’s termination was based on the notorious “Law for the Restoration of the Professional Civil Service” of July 1933,<sup>85</sup> which barred Jews (non-Aryans) from German civil service.<sup>86</sup> However, in his description of these events, Kelsen chose to focus on his position as a “pacifist” and the “author of the democratic constitution of Austria.”<sup>87</sup> The word “Jewish,” while obviously implied, is not directly mentioned.

In late 1936, while holding a professorship at Geneva, Kelsen undertook a part-time position in the German University of Prague – a courageous decision, considering the growing tensions in Czechoslovakia.<sup>88</sup> Kelsen vividly paints the nightmarish scene of his first lecture. The university building was occupied by members of German nationalist

---

<sup>77</sup> Jabloner, ‘Kelsen and His Circle’, 375. The issue was the most controversial legal problem of Austria at the time. See Garcia-Salmones Rovira, *Positivism*, n. 51.

<sup>78</sup> Kelsen, *Autobiografia*, pp. 145–146.

<sup>79</sup> *Ibid*, p. 146.

<sup>80</sup> As Kelsen writes, he was requested to serve as the Social Democrats’ “confidant” in the new Court. Kelsen resisted for obvious reasons. Kelsen, *Autobiografia*, p.148; see also Garcia-Salmones Rovira, p. 166 –167; Jabloner, ‘Kelsen and His Circle’, n. 29 (adopting this account).

<sup>81</sup> Kelsen, *Autobiografia*, p. 150.

<sup>82</sup> Von Bernstorff, *International Law Theory*, p. 278; Métall, *Kelsen*, p. 54; Democratic Austria was attacked by Christian Socialists a “vile concoction of indignation against the eternal order” masterminded by “Jewish Professor Kelsen (Kohn)”. See J. Feichtinger, *Wissenschaft als Reflexives Projekt: Von Bolzano über Freud zu Kelsen: Österreichische Wissenschaftsgeschichte 1848-1938* (Bielefeld: Transcript, 2010) p. 478.

<sup>83</sup> Beller, *Vienna*, pp. 193–197.

<sup>84</sup> Kelsen, *Autobiografia*, pp. 152 –153.

<sup>85</sup> *Ibid*, 152 n. 244.

<sup>86</sup> See J. Matthäus and M. Roseman, *Jewish Responses to Persecution: 1933 –1938*, vol. 1, (Plymouth: Altamira, 2009), p. 439.

<sup>87</sup> Kelsen, *Autobiografia*, p. 153; compare Métall, *Kelsen*, pp. 57–63.

<sup>88</sup> Kelsen, *Autobiografia*, pp.160 –161.

organizations. He was barely able to pass through the hostile crowd, only to learn that the lecture hall itself was also overtaken by Nazi sympathizers. “Upon my entrance to the room,” writes Kelsen, “no one rose from the chair.” As he attempted to start his lecture, the crowd uniformly chanted “down with the Jews.”<sup>89</sup> Kelsen was rushed out of the classroom, while his students were beaten and thrown down the stairs.<sup>90</sup> Ultimately, due to repeated death-threats, and in light of the deteriorating political climate in the country, Kelsen left the university in 1938.<sup>91</sup> Although he by no means denied the motivation behind these attacks, the *only* reference made to his Jewishness is extrinsic – when quoting the racist chants he encountered. Austrian Kelsen, thus, is made Jewish only through the words of his persecutors.

### C. Constructing “Jewish” Kelsen: The Collectivist Narrative

Throughout the years, some Zionist commentators sought to incorporate Kelsen into their *own* collective narrative, perhaps as a legitimizing figure for political choices. This incorporation requires two steps: (a) constructing a “Jewish Kelsen,” either positively by revealing that Jewishness was an active part of his identity; or negatively by stressing that his assimilation failed; and (b) demonstrating that Kelsen ultimately realized that Zionism was the answer to the “Jewish question.”

Positively integrating Kelsen into the Jewish collective can entail uncovering a Jewish essence in his jurisprudence. Thus, Izhak Englard, a law professor and a retired Justice of the Supreme Court of Israel, tells of a 1968 conversation between Kelsen and Avigdor Levontin – one of the founders of Hebrew University’s Faculty of Law.<sup>92</sup> Since Levontin (and Englard) paraphrased the discussion, we can learn about the motivation to construct “Jewish Kelsen” both from the questions posed to Kelsen, as well as through the interpretation they gave to his answers. The discussion, as reported, reveals a Levontin keen to expose Jewish influences in Kelsen’s jurisprudence and a rather reluctant but polite Kelsen. Levontin asked Kelsen whether there was a Jewish-cosmopolitan influence in his universal theory of law. As reported, Kelsen “did not object the direction of the question,” but answered that since Austria was a multinational state, it was the *Austrian* influence that was dominant in the Pure Theory.<sup>93</sup> Thereafter, Levontin asked whether Kelsen’s hierarchical perception of law was influenced by Jewish Law, which gives primacy to the norms of the Torah. As Levontin reported, “it seemed that Kelsen agreed, this time without noting another dominant influence.” The third question was whether Kelsen’s legal monism was influenced by Jewish monotheism. Here, too, Levontin “thought that Kelsen agreed with him, once again without citing a more dominant influence.”<sup>94</sup> The need to stress that Kelsen “did not object” to a question or refrained from citing other influences is above all revealing of Levontin’s (and Englard’s) eagerness to recover Kelsen’s Jewish essence.

Other examples of positive incorporation could involve searching for manifestations of Kelsen’s Jewishness in his day to day. Benjamin Akzin, another founder of

---

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*, pp. 162 –166.

<sup>92</sup> I. Englard, *God, State, Nature, Man: Hans Kelsen on Political Theology and Natural Law*, (in Hebrew), (Jerusalem: IDI, 2010), p. 15, n. 15.

<sup>93</sup> For a similar statement by Kelsen, see Métall, *Kelsen*, p. 42.

<sup>94</sup> Englard, *God, State*, p. 15, n. 15.

Hebrew University's Faculty of Law and a staunch Zionist, noted, for instance, that a certain Jewish "kinship-feeling" could be implied, perhaps, in Kelsen's cordial treatment of young Jewish students from Eastern Europe.<sup>95</sup> Nathan Feinberg narrates a conversation with Kelsen – to which we return shortly – in which Kelsen admitted that when meeting people, he was interested, "first and foremost, to know, whether they are Jewish or not."<sup>96</sup> Stressing these anecdotes tells us less about Kelsen and more about how others would like to *perceive* him.

A negative construction of "Jewish Kelsen" can be effected by emphasizing his failed assimilation, which could serve to reinforce the basic Zionist conviction that assimilation was impossible, merely a "prelude to a catastrophe."<sup>97</sup> The point is further solidified when the failure is accompanied by "redemption:" when the assimilationist realizes his mistake. This archetypical trajectory of failed assimilation and late realization is as old as Zionism itself. Theodor Herzl's 1894 play, *Das Neue Ghetto*, revolved precisely around the key protagonist's realization that his assimilation has failed,<sup>98</sup> implying that the only way for a Jew to assimilate is through an honorable death.<sup>99</sup>

Akzin painted Kelsen's ideological trajectory exactly in this manner.<sup>100</sup> Akzin, who knew Kelsen personally,<sup>101</sup> noted that Kelsen disconnected himself from the Jewish community in Vienna, but that "unlike many extremely assimilated Jews, Kelsen showed no trace of either an inner or an active antagonism" towards Jewish nationalism.<sup>102</sup> Rather, his attitude was one of "distant intellectual curiosity." From the point of view of Zionism, "[h]e neither helped nor hindered."<sup>103</sup> "Austrian Kelsen" thus viewed the Zionist endeavor as a detached spectator. Only with the rise of Nazism, "Jewish Kelsen" emerges: "[h]is attitude changed," as "he proclaimed himself a Jew, showed much interest in Zionism [and the Jewish State], followed its development and expressed anxiety over its future."<sup>104</sup> According to Akzin, Kelsen even agreed to settle in Jerusalem but this failed to materialize.<sup>105</sup>

Even more explicit in terms of this narrative was Nathan Feinberg, early Israeli international lawyer and first dean of Hebrew University's faculty of law. In his obituary for Kelsen, Feinberg generalized Kelsen's experience as "reflecting the tragedy of the life of a Jew in the diaspora."<sup>106</sup> Feinberg tells us of a pseudo-confessional interaction, in which Kelsen symbolizes an archetypical assimilated Jew, while Feinberg plays the symbolic role of a "Jew from the Land of Israel."<sup>107</sup> This archetypical Kelsen turned his back on his Jewish identity, only to unexpectedly confess, in a 1932 meeting with Feinberg in The Hague, that

---

<sup>95</sup> B. Akzin, 'Hans Kelsen – In Memoriam', *Israel Law Review*, 8 (1973), 325–329, 326.

<sup>96</sup> N. Feinberg, 'Hans Kelsen and his Judaism', *Molad*, 5 (1973) 638–640, 639 (in Hebrew).

<sup>97</sup> See H. Arendt, 'Antisemitism', in *The Jewish Writings*, pp. 46–121, 51.

<sup>98</sup> J. Golomb, 'Nietzsche and Zion' 28–29 (2004).

<sup>99</sup> Beller, *Vienna*, p. 133.

<sup>100</sup> Akzin, 'In Memoriam', 326.

<sup>101</sup> Akzin was Kelsen's former student. Métall, *Kelsen*, p. 85.

<sup>102</sup> Akzin, 'In Memoriam', 326.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

<sup>106</sup> Feinberg, 'Kelsen and his Judaism', 638. For another short take on this Feinberg-Kelsen interaction, see Paz, *Gateway*, pp. 183–184.

<sup>107</sup> Feinberg, 'Kelsen and his Judaism', 639.

“the Land of Israel is my miserable love.”<sup>108</sup> In Feinberg’s narrative, the discussion was cut by a French colleague who entered the room.<sup>109</sup> The scene of two Jews discussing their mutual fate, silenced by the sudden presence of a gentile, further adds to the archetypal atmosphere of a secret confession.

In a trip to the beach a day later, Kelsen elaborated further. Attributing special importance to his words, Feinberg wrote them down that evening.<sup>110</sup> According to Feinberg, Kelsen regretted that he “was not active in the Zionist movement.” “I confess,” says Feinberg’s Kelsen, “that I have made a grave mistake which becomes increasingly clear ... I believed in the possibility of complete assimilation of the Jews; moreover: I condoned assimilation as the solution to the Jewish question ... today, I am forced to admit that assimilation is impossible.”<sup>111</sup> As Feinberg notes, Kelsen exclaimed that “the voice of Jewish blood” was speaking through his voice.<sup>112</sup> Feinberg evidences Kelsen’s turn to Zionism by a 1939 letter, in which Kelsen agreed that “despite the current difficulties,” the Land of Israel continued to be “the only safe haven for Jews.” Feinberg sums up Kelsen’s experience in dramatic words, invoking a rhetoric of judgment and atonement: “Kelsen’s life-story reveals ... the doubts of a Jew, who recognizes and admits, when the final account is made, the mistake in his long path of life.”<sup>113</sup> Assimilation is thus portrayed as a colossal mistake, and the realization of Zionism as its remedy. If Kelsen, the “genius,”<sup>114</sup> realizes this, so should everybody else. Kelsen, as a key international jurist and thinker, thus becomes a legitimizing figure for political choices.

Above all, this reveals the complex position of the cosmopolitan Jewish international lawyer in Zionist discourse: on the one hand, he is derided for his assimilationist choices, but on the other, revered for his international status, accumulated *precisely* through the same assimilation.<sup>115</sup> In turn, this tension is relieved through a discourse of redemption: Kelsen is “redeemed” from diasporic assimilationism by his latter day realizations.

Kelsen’s potential as an agent of legitimacy was noticed also by Israeli institutions. He was invited, in 1950, to teach at Hebrew University, but this failed to materialize for economic reasons.<sup>116</sup> As Englard notes, Kelsen was even offered to serve as the dean of Hebrew University’s nascent Faculty of Law.<sup>117</sup> He also granted legal advice to the Israeli UN delegation in its first years.<sup>118</sup> Significantly, he was offered, in 1953, to advise the Israeli

---

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.* Indeed, Feinberg describes Kelsen’s words as a “personal confession.”

<sup>110</sup> *Ibid.* The fact that Feinberg found it necessary to write these things down reflects his evidence gathering state of mind, out to prove Kelsen’s *true* stance towards Zionism.

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*, 640.

<sup>114</sup> *Ibid.*

<sup>115</sup> See Beller, *Vienna*, p. 84 (pointing out that assimilation was, de facto, a precondition for Jews’ becoming central figures in European culture). This position reflects the duality in Zionist discourse between the rejection of Europe on the one hand, and the aspiration to reconstitute it in the Land of Israel on the other, as classically reflected in Herzl’s *Altneuland* (1902).

<sup>116</sup> Feinberg, ‘Kelsen and his Judaism’, 1940; Métall, *Kelsen*, p. 85.

<sup>117</sup> Englard, *God, State*, p.14 n.12

<sup>118</sup> Feinberg, ‘Kelsen and his Judaism’, 639; Métall, *Kelsen*, p. 85.

Ministry of Justice on matters of international law – but refused due to his old age.<sup>119</sup> This invitation, extended through a formal government decision, was initiated by a group of jurists who thought that Kelsen’s mere presence in Israel – in any role whatsoever – could “add prestige to the young State.”<sup>120</sup> We cannot know whether Kelsen’s reply was a diplomatic refusal, or rather, that he would have entertained this option under other circumstances: in fact, Kelsen never visited Israel, although his daughter, Hanna, lived in Israel in the 1940s.<sup>121</sup> What is clear, however, from these offers, is that Kelsen was not known in Jerusalem circles as unsympathetic to the state, and that in any case, his legitimizing potential was widely recognized.

Nonetheless, assuming that Kelsen – a cosmopolitan who was known to be “indifferent to nationality” –<sup>122</sup> was not antagonistic to Jewish nationalism, his exact position on the spectrum of opinions concerning the Palestine question remains debatable.<sup>123</sup> Kelsen’s interactions with Feinberg do not reveal much in this context. In Feinberg’s 1932 meeting with Kelsen, he stressed the need for a “wise and just” policy concerning the Arabs in Palestine.<sup>124</sup> In a letter sent to Feinberg during the 1948 War, Kelsen wrote that he believed a compromise between Arabs and Jews was possible, and that “under the circumstances ... it would be the best available solution.”<sup>125</sup> However, he quickly qualified that as an “outsider,” he could not judge the situation, and in any case, did not elaborate on the nature of such compromise.<sup>126</sup> Perhaps, some parallels can be drawn from Kelsen’s opinions in comparable circumstances. As is well known, he strongly identified with the multi-national nature of the old Austrian Empire.<sup>127</sup> During the transition between the Empire and the Austrian Republic, he drafted a report advocating the establishment of a federal state, recognizing the self-determination of its different nationalities.<sup>128</sup> When Kelsen met, in 1936, with Czechoslovakian President Benes, he strongly urged to establish a federal state, to better accommodate the Sudeten-Germans and the Slovaks.<sup>129</sup> Risking oversimplification, if we apply this logic to Palestine at the time, it is possible – but of course, not certain – that Kelsen would prefer, at least as an *ideal* solution, a Jewish-Arab bi-national model advocated, for instance, by the 1946 Anglo-American Committee of Inquiry.<sup>130</sup>

---

<sup>119</sup> Englard, *God, State*, p. 15; Métall, *Kelsen*, p. 85.

<sup>120</sup> Feinberg, ‘Kelsen and his Judaism’, 640.

<sup>121</sup> The Kelsen Genealogy, [http://www.univie.ac.at/kelsen/family/11511\\_Rolf\\_Hanna.html](http://www.univie.ac.at/kelsen/family/11511_Rolf_Hanna.html).

<sup>122</sup> Garcia-Salmones Rovira, *Positivism*, p. 158. Citing Métall *Kelsen*. p.18.

<sup>123</sup> Indeed, at the time, there were different voices within the Zionist movement regarding the desirable model of government in Palestine. See, e.g., E. Lieblich and Y. Shachar, ‘Cosmopolitanism at a Crossroads: Hersch Lauterpacht and the Israeli Declaration of Independence’, *British Yearbook of International Law*, 84 (2014), 1–51, 14–15.

<sup>124</sup> Feinberg, ‘Kelsen and his Judaism’, 639.

<sup>125</sup> *Ibid*, 639 –640.

<sup>126</sup> *Ibid*, 640. Chiefly, it is unclear whether he argued for a territorial compromise with the Arabs or, rather, a substantial compromise on the nature of the future state.

<sup>127</sup> Garcia-Salmones Rovira, *Positivism*, pp. 159 –160.

<sup>128</sup> *Ibid*, p. 166

<sup>129</sup> Kelsen, *Autobiografia*, pp.166 –167; Garcia-Salmones Rovira, *Positivism*, p.169.

<sup>130</sup> Anglo-American Committee of Inquiry, ‘Report to the US Government and His Majesty’s Government in the UK (1946); as is well known, the UN. has rejected this idea in favor of a two state solution in its famous 1947 Partition Plan. See UNGA Res 181 (II) (29 November 1947).

Last, it is interesting to highlight one more appearance of “Jewish Kelsen,” from another angle, also demonstrating the legitimizing potential of the Jewish international lawyer, but this time for those *opposing* Zionism. In 1950, speaking at the UN General Assembly, the Iraqi ambassador contested the legality of the UN’s famous Partition Plan for Palestine, by invoking Kelsen’s somewhat ambiguous position on the issue.<sup>131</sup> It is far from a coincidence that he referred to Kelsen as “a great Jewish scholar,”<sup>132</sup> while denouncing the opposing Israeli position as one that “cannot tolerate truth” even if it “happens to come from a great scholar who is a Jew.”<sup>133</sup> The position of the Jewish international lawyer – then as now – is thus presented as especially credible when speaking *against* her perceived collective, since it would presumably be in her personal interest to do otherwise.<sup>134</sup>

### III. Assimilation through Law

#### A. The Unavailability of Assimilation through Universal Rights

Kelsen’s above reply to Levontin that the Pure Theory was primarily *Austrian* reflects his own personal identification. Since assimilation was a powerful force in Jewish politics, it is fair to ask whether there are assimilationist traces in Kelsen’s jurisprudence. Arguably, a convenient method to promote assimilation is by appealing to higher norms of universal rights, since these transcend the local order and redefine sovereignty. Ideally, such norms challenge and deconstruct the categories within a given society, and allow for new, common identities to emerge. Thus, it is unsurprising that Hersch Lauterpacht – a prominent Jewish international lawyer, a student of Kelsen and a lifetime stranger himself – advanced an understanding of international law as a system of natural-law based individual rights, in which the sovereign state is only an “administrative convenience” for the fulfillment of such rights.<sup>135</sup>

However, this luxury was unavailable to Kelsen. While Kelsen himself definitely held cosmopolitan views,<sup>136</sup> the Pure Theory, at least on its face, negated any substantive characteristics – including cosmopolitan values such as individual rights – as inherent components of either law or sovereignty (which to Kelsen, are essentially the same). Since the legal nature of a norm is independent of its content, the idea of individual rights preceding and constraining the (domestic or international) legal system must be rejected as “ideology.”<sup>137</sup> For this reason, Kelsen admitted that his theory could be objectionable for liberals, who found it “intolerable that the system of the Soviet Union is to be conceived of as a legal system in exactly the same way as is that of Fascist Italy or democratic,

---

<sup>131</sup> Generally, Kelsen thought that the General Assembly was authorized to recommend partition, but not to establish an international commission to execute it. Kelsen, *Law of the UN*, pp. 195–196, n. 7. This is reminiscent of the Israeli position that partition was the substance of the plan, while the rest was mere procedure. See Lieblich and Shachar, ‘Cosmopolitanism’, n. 65.

<sup>132</sup> UN Doc. A/PV.543 (17 November, , 1955), ¶15

<sup>133</sup> UN Doc. A/PV.547 (21 November, 1955), ¶56. For the Israeli position see *ibid*, ¶¶58–59.

<sup>134</sup> Some of the debate concerning the Goldstone Report struck this chord. See e.g., A.M. Dershowitz, ‘UN Probe of Israel Will Only Encourage Hamas War Crimes’, Gatestone Institute, (July 24, 2014), <http://www.gatestoneinstitute.org/4512/un-war-crimes-hamas-israel>.

<sup>135</sup> See H. Lauterpacht, *International Law and Human Rights* (NY: Praeger, 1950), p. 68; Koskenniemi, *Gentle Civilizer*, p. 396; Lieblich and Shachar, ‘Cosmopolitanism’, 19–20.

<sup>136</sup> In fact, Kelsen claimed that cosmopolitan values are “a higher religion which impresses upon us the supreme duty of preserving the life of man.” Kelsen, *Peace through Law*, p. vii.

<sup>137</sup> Kelsen, *Introduction*, §§18–19; in the context of “state” rights, see Kelsen, *Principles*, 148–157.



capitalistic France.”<sup>138</sup> In sum, since the Pure Theory, *on its face*, is non-cosmopolitan, it cannot openly rely on the “nature” of law to reconstruct substantive common identities conducive to assimilation. However, the assimilationist potential of the Pure Theory does not end here.

### *B. Assimilation and the Antinomy between Individual, Community, State and World*

Much of Kelsen’s legal theory attacked various “dualisms” that occur if we assume that above positive law there is an additional, superior legal system based on natural law. These dualisms give rise to tensions across the board of legal theory: between “objective” (positive) law and “subjective” (natural-law) rights; between public and private; between law and state, and between sovereignty and the international community. In each of these cases, dualism serves the *ideological* function of either legitimizing or constraining the content of law, thus blurring the meaning of law as a distinct object of cognition.<sup>139</sup> Importantly, by pitting individual rights against the positive legal system, dualism assumes an “antinomy” between the individual and the community.<sup>140</sup> Kelsen’s theory, conversely, offers a monist approach to law in which, in essence, these seemingly opposing constructs *assimilate* to form a legal unity.

The ideological role, according to Kelsen, of the dualism between “objective law” and natural-law based “subjective rights,”<sup>141</sup> is mainly to entrench the pre-political and superior status of *private property* against state interference.<sup>142</sup> Granted, while rebuking the pre-political status of property is a classic endeavor of the excluded stranger against “sole and despotic dominion,”<sup>143</sup> the same logic must also negate extra-legal individual rights as a whole. This fact could justify the critique that Kelsen’s theory was not conducive to the promotion of universal human rights in the emerging world order.<sup>144</sup> It must be remembered, however, that superior “subjective rights” in the form of individual rights were not the only transcendental rights invoked at the time – and by far not the most “dangerous” ones. Pre-political rights could also be used to enshrine the inherent dominance of a particular group, such as the German *Volk*, over others within a given political system.<sup>145</sup> Deconstructing the latter is a prerequisite for any society in which minorities can integrate. In a sense, this form of assimilation is an invitation to engage on

---

<sup>138</sup> Kelsen, *Introduction*, p. 25. Thus, while the Pure Theory presumed to be universalist – by suggesting a jurisprudence equally applicable in all societies – it could not be openly cosmopolitan. *Ibid*, §§25 –26. For a discussion of non-cosmopolitan types of “universalisms” see S. Moyn, *The Last Utopia: Human Rights in History*, (Harvard University Press, 2010), pp. 13-24.

<sup>139</sup> Kelsen, *Introduction*, §18, 25(f).

<sup>140</sup> *Ibid*, §25(f).

<sup>141</sup> *Ibid*, §§18 –19.

<sup>142</sup> *Ibid*, §19, 21, 22, 11(c); see also Moyn, *Last Utopia*, pp. 35 –37.

<sup>143</sup> Blackstone, *Commentaries on the Laws of England*, Bk II, ch. 1.

<sup>144</sup> See also Kennedy, ‘International Style’, 45.

<sup>145</sup> Nazi thought, for instance, claimed that “German racial inheritance gives them [Germans] inherent superior rights over other peoples.” See Memorandum to the Embassy on the “Main Purpose of the Nazis,” written by Douglas Miller, the Acting Commercial Attaché, 21 April 1934, in *Peace and War: United States Foreign Policy, 1931 –1941* (Washington DC: US Government Printing Office, 1943), pp. 211 –214; see also M.L. Rozenblit, ‘European Jewry: 1800 – 1933’, in J.R. Baskin and K. Seeskin (eds.), *The Cambridge Guide to Jewish History, Religion, and Culture* (CUP, 2010), pp. 169–208, 194.

(liberal) neutral grounds, rather than one adopting a romantic perception of the dominant group in society.<sup>146</sup>

Rejecting the “antinomy between individual and community” is another crucial aspect of the assimilationist leanings in Kelsen’s jurisprudence. It is key to understand, in this context, Kelsen’s counter-intuitive perception of the “person” within the legal system, at least as late as 1934. To Kelsen, a legal system is simply a self-contained net of obligations and rights. Within this system, the “person” is merely an artificial construct assisting the jurist in describing a “unity of a bundle of legal obligations and legal rights.”<sup>147</sup> The person, thus, is only a “common point of imputation” for normative regulation.<sup>148</sup> As such, it lacks any essential characteristics. Of course, such characteristics might exist – Kelsen does not deny, or course, the existence of human beings beyond the legal system – but these are matters for ethics, sociology, psychology or biology.<sup>149</sup> The upshot, as aforementioned, is that there are no extra-legal, natural law “rights” attached to the individual *qua* person beyond those positively recognized by the community’s legal system.<sup>150</sup> The interesting aspect, however, is that to Kelsen asserting the significance of the extralegal “person” within the legal system actually places a bulwark between individual and community. An objective legal system, conversely, *dissolves* the person into a bundle of legal obligations and rights, which can then only be understood as relational vis-à-vis the relevant legal community, in itself a net of obligations and rights.

It is worthwhile to explore this argument further. According to Kelsen, if the “person” is simply “the personification of a norm complex,” the person becomes “part of the system of objective law,” comprising “the obligations and rights of all ‘persons,’ *and creating among them an organic, that is, a systemic unity* – so that the right of one is always the obligation of another, and right and obligation can never be isolated from each other.”<sup>151</sup> If this understanding is accepted, “even the pseudo-antinomy between individual and community dissolves.”<sup>152</sup> From a proper legal standpoint, therefore, there is no individual person viewed in isolation from the community: both are just subsets of the legal system.<sup>153</sup> Indeed, the argument that the individual dissolves into the community, even if only in the legal realm, is a blunt, albeit legalistic, argument for assimilation. It is in essence the same “renunciation of characteristics” which Arendt identified in radical assimilationism, which sought to transform the Jew into a neutral, pure entity, devoid of any characteristics.<sup>154</sup> If, as Feinberg tells it, Kelsen has reached the harrowing conclusion that in the real world, assimilation was not possible – perhaps *assimilation through law* was.

---

<sup>146</sup> In this Kelsen differed from the likes of Adolf Lasson, whose assimilationist tactics involved adopting German antirationalism. See S.C. Neff, *Justice among Nations: a History of International Law* (Harvard University Press, 2014), p. 238. I wish to thank Eyal Benvenisti for this point.

<sup>147</sup> Kelsen, *Introduction*, §25.

<sup>148</sup> *Ibid*, §25(a).

<sup>149</sup> *Ibid*.

<sup>150</sup> *Ibid*, §25(a), 10.

<sup>151</sup> *Ibid*, §25(f).

<sup>152</sup> *Ibid*.

<sup>153</sup> *Ibid*.

<sup>154</sup> H. Arendt, ‘Die Verborgene Tradition’: Acht Essays (Frankfurt: Suhrkamp, 1976), p. 67; cited in Beller, *Vienna*, p. 211. As Beller notes, it was “the logic of the assimilation of the Viennese Jews to become *men without qualities*.” *Ibid*.

When the person dissolves into the community, another result is the negation of the dualism between “public” and “private” law. To Kelsen, this dualism is rooted in the “ideology” that individual autonomy somehow precedes the state. This distinction lacks substance, since actions on both levels are “acts of the state” as a unified legal system: private transactions are merely extensions of the state’s coercive power, emanating from the basic norm, but exercised through individuals acting as law-creators.<sup>155</sup> This is clearly a statement about jurisprudence. However, it also brings to mind the classic public/private divide which formed the basis of key strands of *moderate* liberal assimilationism.<sup>156</sup> According to the latter, the proper balance between identity and community was reflected in the maxim “be a man in the streets and a Jew at home” – a straightforward application of the Enlightenment’s public/private divide.<sup>157</sup> This famous maxim was also critiqued as introducing a sub-category of dualism: that between “Jew” and “man,”<sup>158</sup> the latter supposedly representing a neutral construct of humanity. Kelsen’s vision of the dissolving individual is radically assimilationist as it does not only deny, in practice, the bifurcation of “Jew” and “man,” but also the claim that a system of law inherently protects one’s ability to abide by the maxim.

But assimilation through monism does not end in the domestic legal community. Kelsen’s international legal theory went further. Kelsen famously rejected the dualism between state (*qua* power) and law, meaning, the perception that the “state” exists independently of its legal system. He viewed the latter as ideological apologetics meant to justify state power through law.<sup>159</sup> State power – like the state itself – is merely an expression of the efficacy of its legal system.<sup>160</sup> The individual, thus, when dissolving into the legal community, unites with sovereignty itself. And here the cards are set for Kelsen’s final cosmopolitan-assimilationist move: assimilation into the *world* community.

To Kelsen, the international legal system is merely a net of sub-legal systems, differentiated one from another by their “spheres of validity,” determined spatially by the effectiveness of each legal system over a certain territory.<sup>161</sup> The separation of the spheres is regulated by international law, which delegates powers to each state to act within its sphere, and can therefore be understood as superior to state legal systems, uniting them all in a “universal legal community” built around a hierarchical normative structure.<sup>162</sup> By virtue of the unity of all legal systems and of international law, and through their law-making capacity delegated by international law, states can be seen as organs of the international legal community.<sup>163</sup> If viewed as an organ of a superior system, the state is thus freed of the “absolutism of the dogma of sovereignty:” it is “relativized” into a “continuous sequence of legal structures, gradually merging into one another, [which]

---

<sup>155</sup> Kelsen, *Introduction*, §§44–45.

<sup>156</sup> See Arendt, ‘Antisemitism’, 99.

<sup>157</sup> This famous phrased was penned by Judah Leib Gordon in his 1862 (or 1863) poem “Awake, My People!” For the text of the poem and discussion see M. Stanislawski, *For Whom do I Toil? Judah Leib Gordon and the Crisis of Russian Jewry* (OUP, 1988), pp. 49–52. R.Y. Paz, for instance, identifies this type of model in the assimilation of Lauterpacht: “a Jew at home and a cosmopolitan outside.” Paz, *Gateway*, p. 198.

<sup>158</sup> Stanislawski, *For Whom do I Toil?*, p. 51.

<sup>159</sup> Kelsen, *Introduction*, §46, 47, 48(a).

<sup>160</sup> *Ibid*, §48(e).

<sup>161</sup> *Ibid*, §50(g).

<sup>162</sup> *Ibid*, §31(g), §50(b), §50(g).

<sup>163</sup> *Ibid*, §50(h).

leads from the universal legal community ... to the legal communities incorporated into the state.”<sup>164</sup> Conversely, the idea of absolute state sovereignty, which justifies dualism and a voluntarist approach to international law, is the opposite of assimilation: because it conditions the legal nature of other legal systems, and of international law, on subjective acts of “recognition,” it collapses into “solipsism:” the “I”, the individual, is comprehended as the center of the world rather than an integral part of it.<sup>165</sup>

Here lies a striking realization: since the antinomy of individual and community is negated; and in turn, the antinomy of community *qua* state and *international* community is too negated – the logical consequence is that the individual dissolves into the international community. Whether this position is convincing, or consistent with Kelsen’s other writings, is well beyond this Chapter.<sup>166</sup> Important, for our purposes, is to highlight the extent to which Kelsen’s seemingly neutral international legal monism bespeaks the discourse of ultimate assimilation. In Kelsen’s world, law is a dynamic, fluctuating phenomenon constantly created, applied and created again, in waves that emanate from the international basic norm. However, it is possible to describe this process also in “reverse:” as a counter-movement in which the individual dissolves back into the basic norm. Thus, what Kelsen calls a unity of “hierarchically structured, consecutive strata of law”<sup>167</sup> encompassing national and international law, is essentially a consecutive strata of assimilation, in which the individual is assimilated into the world community – *without* the need to invoke a natural-law theory of universal human rights.<sup>168</sup>

However, for this perception to be somehow practicable, we need to say something also about institutions. And this leads us to our third and last theme, that of progressivism.

#### IV. Pragmatic Progressivism

##### A. Descriptive Progressivism

A central ideal of the Enlightenment, dominant among the Jewish bourgeoisie of Austria, was the perception of history as a linear process of progress, brought about through science and education.<sup>169</sup> Arguably, the idea of progress was inherent to liberalism itself: as put by Leo Strauss, “liberalism implies a philosophy of history,” through which humanity “is essentially changing; that this change constitutes History; and that through History man has developed from most imperfect beginnings into a civilized or humane being.”<sup>170</sup> In other words, the basic notion of history in liberal thought is related to an idea of progress.

---

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*, §50(d).

<sup>166</sup> For a relatively recent discussion see A. Somek, ‘Kelsen Lives’, *European Journal of International Law*, 18 (2007), pp. 409 –451; the multitude of writings on monism and dualism are listed in Kelsen, *Introduction*, pp. 152 –153.

<sup>167</sup> *Ibid.*, §31(g).

<sup>168</sup> Interestingly, Kelsen tempered the language concerning individual and community in the 1960 version of the Pure Theory, written in the US, to encompass merely the “abolition of the dualism of right and obligation.” *Pure Theory of Law*, 2<sup>nd</sup> edn, pp. 171 –174, 191–192. This could reflect his changing thought as well as his changing circumstances as a Jew in America. See H. Arendt, ‘The Crisis of Zionism’, in *The Jewish Writings*, J. Kohn and R.H. Feldman (eds.), (NY: Schocken, 2007), pp. 329 –338, 335.

<sup>169</sup> Zweig, *The World of Yesterday*, at pp. 3 –6; see generally Beller, *Vienna*, pp. 122 –143. For a classic manifestation of the progressive view of history see G.W.F. Hegel, *The Philosophy of History* (1899).

<sup>170</sup> L. Strauss, ‘The Liberalism of Classical Political Theory’, *The Review of Metaphysics*, 12 (1959), 390 –439, 400.

It is easy to understand why a progressive view of history – perhaps a “naïve faith in the future”<sup>171</sup> – was especially appealing to Jewish assimilationists. To say that the realization of liberal ideas is inevitable was a powerful argument that assimilation is indeed possible.<sup>172</sup> Progressivism was especially important in the argumentation of Jewish internationalists, and in particular international lawyers such as Hersch Lauterpacht. It allowed them to describe the well-known shortcomings of international law as temporary features of a “primitive” legal system, which will eventually develop into a centralized system capable of enshrining individual rights and world peace.<sup>173</sup>

Progressivism’s appearance as objective “science” makes it an especially stealthy form of ideology. Nonetheless, it has been increasingly challenged just as such.<sup>174</sup> One critique challenges its supposed value-neutral basis, in order to expose its ideological core: indeed, progressivism does not only endorse a particular, almost religious view of history,<sup>175</sup> but it must also encompass a normative claim about what progress means.<sup>176</sup> Thus, while discussing international law in terms of progress was perfectly compatible with the jurisprudence of the likes of Lauterpacht – which contained a strong ideological, natural law-based component –<sup>177</sup> progressivism, if exposed as ideology, could not be available for Kelsen, precisely because it required a statement about the proper content of the legal system.<sup>178</sup> Ironically, however, while Kelsen’s theory sought to reveal the political-ideological content of seemingly “neutral” theories,<sup>179</sup> the ideology of progress, concealed as value-neutral, permeates the Pure Theory, *especially* when applied to international law, and specifically in its belief in the value of centralized institutions. The deep intertwining between progressivism and the Jewish experience of the time makes it hardly surprising.

Particularly, progressivism emanates from Kelsen’s extensive use of the notion of the “primitive.”<sup>180</sup> Since, in the Enlightenment’s terms, *primitive* is the opposite of the desired – meaning, the progressive or the civilized –<sup>181</sup> the employment of the term in itself

---

<sup>171</sup> Beller, *Vienna*, p. 141.

<sup>172</sup> See *ibid* (noting that the basic assimilationist logic was built on the belief “that one day there would be a common humanity”). Contra the Zionist deterministic view of Jewish/Non-Jewish relations. H. Arendt, ‘Antisemitism’, pp. 50–52.

<sup>173</sup> Lauterpacht, *Human Rights*, pp. 103–111; Koskenniemi, *Gentle Civilizer*, p. 356; Paz, *Gateway*, pp. 23 –28, 235, 332; Lieblich and Shachar, ‘Cosmopolitanism’, 20 –21.

<sup>174</sup> One famous critic of progressivism was Nietzsche. See F. Nietzsche, *On the Genealogy of Morals* (1887); see also P. Goulimari, *Literary Criticism and Theory: From Plato to Postcolonialism* (NY: Routledge, 2015) pp. 115 –116.

<sup>175</sup> Moyn, *Last Utopia*, pp. 5–6.

<sup>176</sup> Indeed, holding a progressive view of history has become looked upon as non-progressive in itself. See for instance, R. L. Howse and R.G Teitel, ‘Does Humanity-Law Require (Or Imply) A Progressive Theory of History? (and Other Questions for Martti Koskenniemi)’, *Temple International & Comparative Law Journal*, 27 (2013), 377 – 397.

<sup>177</sup> Lieblich and Shachar, ‘Cosmopolitanism at a Crossroads’, 19.

<sup>178</sup> Kelsen, *Introduction*, §§15 –16.

<sup>179</sup> *Ibid*, p. 124. Koskenniemi argues that a key weakness in Kelsen’s body of work lies precisely in the separation of law from politics, which undermined Kelsen’s ability to justify his own cosmopolitan project. Koskenniemi, *Gentle Civilizer*, pp. 247 –249.

<sup>180</sup> For a comparable argument see Kennedy, ‘International Style’, 47 –50, 56 –58. Kennedy too identifies a “progress narrative” in Kelsen’s use of the primitive. However, he refers mainly to Kelsen’s *normative* thought rather than his descriptive writings, and does not stress the ideological aspect of progressivism.

<sup>181</sup> See e.g. F.G. Whelan, *Enlightenment Political Thought and Non-Western Societies: Sultans and Savages* (NY: Routledge), p.11; compare Kelsen, *Society and Nature*, p. vii.

implies an ideological choice. Like other progressivists, thus, Kelsen describes international law as a “primitive legal system,” chiefly for its lack of central institutions.”<sup>182</sup> Granted, a statement about the primitive does not necessarily connote progressivism. Some of Kelsen’s contemporaries saw the primitiveness of international law as an unchangeable, even desired feature.<sup>183</sup> However, this was certainly not Kelsen’s view. To him, “primitive” was a chronological point along a general continuum of progress. When describing international law, he constantly uses *temporal* language: it is “*still* marked by wide-ranging decentralization;” there are “*still*” no organs to create and apply legal norms; in sum, it is “*still*” primitive, situated “at the *beginning* of a development that the state legal system has already completed.”<sup>184</sup> Even international-legal dualism itself reflects “the standpoint of the primitive man,”<sup>185</sup> in relation to which Kelsen’s monism must be progressive and thus desirable.

Kelsen’s progressivism, in the Pure Theory, does not only imply the desired development of world institutions, but also an underlying perception of the inherent value of individual rights – which seems to run counter to his assault on “subjective rights” elsewhere. In international law, reprisals are undertaken against the “mass of human beings” comprising the state, and not against a specific liable individual. In its emphasis on “the principles of collective and absolute liability” over *personal* liability and fault, international law is “primitive.”<sup>186</sup> If collective responsibility is “primitive,” an *individual* approach to liability – basically, the idea of fairness and due process – must be progressive, and thus desired. Kelsen makes this argument indirectly through historical progressivism, by claiming that as international law develops, individual liability “*must*” replace collective liability. Simultaneously, in a seemingly automatic process “the development of central organs for creating and applying legal norms” emerge.<sup>187</sup> The “result” of this process “appears to have as its ultimate goal ... the development of a world state,”<sup>188</sup> as if this goal exists objectively, as an autonomous progressive will.<sup>189</sup> In order to stay clear of value judgments, Kelsen presents these political developments as an “evolution,”<sup>190</sup> meaning, a scientific chain of progress.

The ideology of *cosmopolitan* progress is also found in Kelsen’s monism which leads, as aforementioned, to the dissolution of sovereignty. While Kelsen does not explicitly judge this process – after all, it is only a “cognitive,” not normative unity –<sup>191</sup> it is impossible to understand it as disconnected from his idea of international progress. In this context, the closing paragraphs of 1934’s Pure Theory are the most telling. In a sharp tonal shift from

---

<sup>182</sup> Kelsen, *Introduction*, §49(b); see also Kunz, “The “Vienna School”, 412. The notion of the “primitive” is also found in Kelsen’s autobiography: his interest in philosophy has been spurned in reaction to the “primitiveness” of religion. Kelsen, *Autobiografia*, p. 71.

<sup>183</sup> For a survey of such thought see H. Lauterpacht, *The Function of Law in The International Community* (OUP, 1933), pp. 411–413.

<sup>184</sup> Kelsen, *Introduction*, §49(b).

<sup>185</sup> *Ibid*, §50(c).

<sup>186</sup> *Ibid*, §49(b).

<sup>187</sup> *Ibid*, §49(c).

<sup>188</sup> *Ibid*.

<sup>189</sup> As Paz points out, in other earlier works, Kelsen explicitly endorsed the normative desirability of a world state. Paz, *Gateway*, pp. 228–229.

<sup>190</sup> Kelsen, *Introduction*, §50(a); see also Kennedy, ‘International Style’, 57.

<sup>191</sup> Kelsen, *Introduction*, §50(g)

the otherwise detached style of most of that work, Kelsen closes with an argument about its contribution to the “development of world law.”<sup>192</sup> Here, he hails the dissolution of the “dogma of sovereignty” as one of the most “substantial achievements” of the Pure Theory: by exposing sovereignty as an ideological construct, it facilitates the centralization of the international legal system.<sup>193</sup> Of course, this achievement was “not arrived by political design,” since this would “besmirch” the Pure Theory with ideology; the Pure Theory simply “facilitates” this process without judging it. Again, the notion of progress shines through: just as “progress” is a collateral consequence of natural science, so is a centralized system of world law a coincidental product of the Pure Theory’s “cognitive unity of all law.”<sup>194</sup>

### B. Normative Progressivism

The encroachment of progressivism into Kelsen’s descriptive work is unsurprising, as in his openly normative writings he never presumed to be ideologically neutral. Indeed, what makes Kelsen an especially complex thinker is his own dualism: simultaneously advancing a “radically anti-ideological” conception of law and vigorously defending ideological-cosmopolitan agendas.<sup>195</sup> In 1944’s “Peace through Law,” thus, he outlined the desired *content* of international law as an instrument of cosmopolitan values. Perhaps predictably, these are the same ones that the Pure Theory collaterally facilitated. Again, these values are phrased in terms of “progress:” either as an “essential” social goal,<sup>196</sup> or as a construct juxtaposed, on a linear process of development, against “regress.”<sup>197</sup> Linear progress, as a “given tendency,” appears also as a powerful historical argument as to why legal centralization is possible and even inevitable.<sup>198</sup>

As noted earlier, progressivism was especially central to the Jewish-assimilationist experience of the time. But equally tangible was the fragility of progress, perhaps to the point of despair. To some, like Viennese writer Stefan Zweig, the catastrophes of the century exposed that progressivism was nothing but a delusion.<sup>199</sup> To international lawyers, however, abandoning hope for progress would render their project meaningless. As a Jew writing in dark times, Kelsen could not adopt a blind belief in the progress of humanity, but could also not abandon it entirely. His progressivism was an increasingly pragmatic one, heavily dependent upon human political action, and undertaken in the shadow of looming regress.<sup>200</sup> Thus, while 1934’s Pure Theory attacked the dogma of sovereignty as a barrier to

---

<sup>192</sup> *Ibid.*, §50(i)

<sup>193</sup> Compare Garcia-Salmones Rovira, *Positivism*, p. 126 (arguing that the political aspect of Kelsen’s international legal theory “is revealed in the way he seeks a method for pursuing the evolution of law.”).

<sup>194</sup> Koskenniemi criticizes this paragraph as reflecting Kelsen’s “covert insincerity.” Koskenniemi, *Gentle Civilizer*, p. 247.

<sup>195</sup> Von Bernstorff explores how these opposing pillars interact, revealing how cosmopolitan ideology repeatedly encroached into Kelsen’s doctrinal work. See particularly von Bernstorff, *International Law Theory*, pt. II.

<sup>196</sup> Kelsen, *Peace through Law*, p. vii (“there is no essential social progress as long as no international organization is established” to prevent wars).

<sup>197</sup> *Ibid.* p. vii (in the context of preventing war, history “shows regress rather than progress.”)

<sup>198</sup> *Ibid.* pp. 21–22.

<sup>199</sup> Zweig, *The World of Yesterday*, pp. 3–6; see generally Beller, *Vienna*, pp. 122–143.

<sup>200</sup> Kelsen, *Peace through Law*, p. viii, ix (urging a pragmatic view towards the international order, warning otherwise “there would be no hope for progress.”). On Kelsen as a pragmatist see Kennedy, ‘International Style’, 9–10, 33.

world law, in 1944 Kelsen conceded that “[o]pinions may differ as to the value and justification nationalism; but one must reckon with this phenomenon” when envisioning the post-war world order.<sup>201</sup> He accordingly rejected utopianism, rebuking “intellectuals” who dreamed of “too much,” such as establishing a world state. World peace, to Kelsen, was possible, but only through efforts and compromises leading to “a slow and steady perfection of the international legal order.”<sup>202</sup> This required, as a first step, a body capable to make binding legal decisions – a compulsory world court,<sup>203</sup> competent to limit the use of force only as a response for international delicts,<sup>204</sup> and to impose individual criminal responsibility.<sup>205</sup>

It is difficult to overlook that Kelsen’s suggestion for a new international order built around a world court, is reminiscent of his successful attempt, decades before, to introduce a Constitutional Court in Austria.<sup>206</sup> Perhaps this was an attempt to reconstruct the Age of Security of his youth. To Kelsen’s visible disappointment, however, this idea was not incorporated in the UN Charter;<sup>207</sup> and although he found physical security in the US, Kelsen always remained a stranger – an “eternal outsider.”<sup>208</sup> American scholars of the emerging policy-oriented approaches to international law were rather impatient with his hyper-logical and theoretical mode of argument.<sup>209</sup>

Nonetheless, while uncertainty of progress is a central Jewish lesson from the 20<sup>th</sup> century, the belief that a court could substantially improve the world order reflects the essential optimism that characterized many Jewish international lawyers: even if progress was uncertain, it should still be fought for, since the alternative is catastrophic. It is perhaps this frame of mind that led Kelsen to write, during one of the darkest times in history, that “[t]he idea of law, in spite of everything, still seems to be stronger than any other ideology of power.”<sup>210</sup>

## V. Conclusion: Law without Qualities

Kelsen’s Pure Theory attempted to present a neutral jurisprudence while vigorously defending law as a distinct object, defined precisely by this neutrality. Interestingly, this is

---

<sup>201</sup> Kelsen, *Peace through Law*, pp.10-11. Kennedy reads this turn to pragmatism in light of Kelsen’s move to the US. Kennedy, ‘International Style’, 30 –42. Nonetheless, this could also be a response to the catastrophes of World War II. As Kelsen writes: “to secure world peace is our foremost political task, a task much more important than the decision between democracy or autocracy, or capitalism or socialism.” Kelsen, *Peace through Law*, p. viii.

<sup>202</sup> *Ibid*, p. ix.

<sup>203</sup> *Ibid*, pp. 13 –18. Not only did Kelsen claim that the problem of war was chiefly a problem of unsatisfactory law, it seems that to him the main problem was actually one of legal *theory*.

<sup>204</sup> *Ibid*, pp. 66 –67.

<sup>205</sup> *Ibid*, pp. 110 –116.

<sup>206</sup> Kelsen was especially proud of that achievement. Garcia-Salmones Rovira, *Positivism*, p. 166.

<sup>207</sup> See von Bernstorff, *International Law Theory*, p. 9.

<sup>208</sup> Paz, *Gateway*, p. 230.

<sup>209</sup> *Ibid*, p. 183; Kennedy, ‘International Style’, 21-22, 35 –36. Kelsen’s American contemporaries attacked his critical approach towards the UN Charter, in particular his restrictive interpretations which they saw as disregarding the Charter’s spirit. See L.B. Sohn, ‘Book Review’, *Harvard Law Review*, 64 (1950-1951), 517 –519; O. Schachter, ‘Book Review’, *Yale Law Journal*, 60 (1951), 189 –193; A.H. Feller, ‘Book Review’, *Columbia Law Review*, 51 (1951), 537 –539, 538 (1951).

<sup>210</sup> Kelsen, *Peace through Law*, p. 21.



remarkably similar to the Jewish assimilationist experience in the first half of the 20<sup>th</sup> century. On the one hand, Jewish assimilationists strived to “purify” themselves from “Jewish” characteristics, thus becoming “men [and women] without qualities.”<sup>211</sup> On the other, they remained acutely aware of their distinct status as strangers, even if they could not positively define *what* constitutes this foreignness.

Kelsen’s separation between his descriptive and normative writings parallels, in a way, the manner in which the seemingly neutral “Austrian Kelsen” was publically constructed, while “Jewish Kelsen” was reserved mainly for those who utilized his Jewish identity for political capital. Just as Kelsen’s cosmopolitan international-legal project crept into his descriptive writings, his Jewish experience, arguably, also found its way into his theory.

Hopefully, these observations shed another light on the identity and work of one of the most important jurists of the 20<sup>th</sup> century. Above everything, however, the tensions discussed reiterate the realization that we cannot transcend our own experiences, as many international lawyers – in their desire to dissolve into the “invisible college” of their profession<sup>212</sup> – aspire to do.

---

<sup>211</sup> *Supra*, n. 154.

<sup>212</sup> O. Schachter, ‘The Invisible College of International Lawyers’, *Northwestern University Law Review*, 72 (1978), 217–226, 218–219.