

Biographical Researches on Hans Kelsen in the Years 1881–1920

I. Introduction

1. Legal History versus Legal Philosophy?

“Legal History versus Legal Philosophy?” is the title of a little-known monograph written by Hans Kelsen in 1928.¹⁾ It was written in reply to Ernst Schwind’s book “Basics and Basic Questions of the Law”, written in the same year.²⁾ Schwind, a legal historian, was professor at the same faculty as Hans Kelsen. In 1918, when Kelsen applied for the position of an associate professor at the Vienna University, Schwind tried to prevent his appointment. In his expertise, Schwind wrote that Kelsen’s theories were “destructive and subversive, in the scope of academic teaching for the students, possibly brilliant, but on the whole confusing and utterly questionable ... Frequently one gets the impression that Kelsen anxiously refuses every glimpse into history, because the impossibility of these concepts would immediately collide with the might of the historical facts. Who could imagine, if only for a moment, a State without power, without superiors and subordinates?”³⁾

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

Zuerst erschienen in: *Právěhistorické studie* 43 (2013) 279–293.

¹⁾ *Hans Kelsen*, *Rechtsgeschichte gegen Rechtsphilosophie?* (Vienna 1928).

²⁾ *Ernst Schwind*, *Grundlagen und Grundfragen des Rechts* (Munich 1928). See to the controversy: *Thomas Olechowski*, „Rechtsphilosophie gegen Rechtsgeschichte?” in *Gerald Kohl / Christian Neschwara / Thomas Simon* (eds) *Festschrift für Wilhelm Brauneder zum 65. Geburtstag* (Vienna 2008) 428–442 [Anmerkung 2019: in diesem Sammelband 109–126].

³⁾ Statement of *Ernst Schwind*, dated from 11 March 1918, in Austrian State Archive [Österreichisches Staatsarchiv, ÖStA] AVA, Unterricht Allgemein, Sig 4 Universität Wien, Jus, (Personalakt Herrnritt, Fasz 752, Z 9583 ex 1918, Beilage Z 355).

⁴⁾ *Kelsen* (n 1) 26.

2. The historical context of Kelsen's scientific work

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

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

3. Kelsen's Autobiography and the New Biography

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

For decades, knowledge of Hans Kelsen was dominated by one book, namely the biography written by Rudolf Aladár Métall, who collaborated with Kelsen during his last years in Vienna and in his first months in Cologne⁶⁾. In 1940, very shortly after Kelsen, Métall also immigrated to America, and he maintained good relations with Kelsen for the rest of his life.⁷⁾ Métall writes that in 1966 he used Kelsen's private library and private correspondence to elaborate the biography. Most important for him were two autobiographic descriptions of Kelsen, one from 1927 and another from 1947. For a long time these descriptions were thought to be lost, but in 2006/07 they were published

⁵⁾ *Hans Kelsen*, 'Autobiographie (1947)' in Matthias Jestaedt (ed) *Hans Kelsen Werke* Vol. I (Tübingen 2007) 29 – 91 (59).

⁶⁾ *Rudolf Aladár Métall*, *Hans Kelsen Leben und Werk* (Vienna 1969).

⁷⁾ *Nicoletta Bersier Ladavac*, 'Rudolf Aladár Métall', in Robert Walter / Clemens Jabloner / Klaus Zeleny (eds.), *Der Kreis um Hans Kelsen. Die Anfangsjahre der Reinen Rechtslehre* (Vienna 2008) 315–324 (316).

by Matthias Jestaedt.⁸⁾ An examination of these descriptions reveals that Métall borrowed extensively from Kelsen's 1947 autobiography, even reproducing the text verbatim in places. Beyond that, it seems that Métall's book was largely based on personal memories. As he provides no footnotes or any other scientific proof, the individual sources he mentions cannot be re-examined. For instance, he quotes verbatim an article about Kelsen's escape from Nazi-Germany and says only that it is a quotation from "a Viennese newspaper" printed in April 1933.⁹⁾ In fact, the article appeared in the "*Neue Freie Presse*" on April 18th, 1933.¹⁰⁾ It remains unclear as to whether this article was amongst Métall or Kelsen's papers from this time, or whether the former scrutinized the "*Neue Freie Presse*" as a source for his book.

Furthermore, it is not clear why Kelsen wrote in 1947 an autobiography at all.¹¹⁾ We can only assume that he wrote the text for a compendium of autobiographies of famous Austrian jurists, edited by Nikolaus Grass in 1952.¹²⁾ Kelsen's disciples Merkl and Verdross, but also his sworn enemy Alexander Hold-Ferneck¹³⁾ and the former president of the Constitutional Court Ernst Düring, feature in this collection. Surprisingly, Kelsen was not included. It is possible that his autobiography was originally meant to appear in an omnibus volume that was never published because of a contingent dispute between Kelsen and Grass. The size of Kelsen's autobiography, which at 60 pages would have been double length of the other entries, and his refusal to shorten it, may also explain its absence from the compendium.

Autobiographies can be an invaluable historical source, but they may also be problematic. It is nearly impossible to write down all of one's memories without making errors. A case in point is Kelsen's assertion that he was appointed associate professor in 1917,¹⁴⁾ when in fact this took place on July 8th,

⁸⁾ In 2006, Jestaedt published a special edition: *Matthias Jestaedt* (ed) *Hans Kelsen im Selbstzeugnis* (Tübingen 2006). See now *Matthias Jestaedt* (ed) *Hans Kelsen Werke* Vol. 1 (n 6), including: 'Selbstdarstellung (1927)' 19–27 and 'Autobiographie (1947)' 29–91.

⁹⁾ *Métall* (n 6) 62.

¹⁰⁾ *Neue Freie Presse*, Abendblatt, No. 24540, 18 April 1933, 4.

¹¹⁾ The 'Selbstdarstellung (1927)' was written on invitation of *Julius Moor*; see *Jestaedt* (n 5) 586. Concerning the 'Autobiographie (1947)', *Jestaedt* (n 5), 591 found out that part of it, the detailed description how *Kelsen* experienced the collapse of the Monarchy, had already been published elsewhere. This does not, however, give us an answer to the main question.

¹²⁾ *Nikolaus Grass* (ed.) *Österreichische Rechts- und Staatswissenschaften der Gegenwart in Selbstdarstellungen* (Innsbruck 1952).

¹³⁾ See *Jürgen Busch / Kamila Staudigl-Ciechowicz*, 'Ein Kampf ums Recht? Bruchlinien in Recht, Kultur und Tradition in der Kontroverse zwischen *Kelsen* und *Hold-Ferneck* an der Wiener Juristenfakultät', in Szabolcs Hornyá et al (eds.) *Turning Points and Breaklines* (Munich 2009) 110–138 [Anmerkung 2019: in diesem Sammelband 127–150].

¹⁴⁾ *Kelsen* (n 5), 55; *Metall* (n 6) 17.

1918.¹⁵⁾ Although incorrect, this detail was still reproduced in dozens of short biographies. In addition to such comparatively unimportant mistakes his autobiography also contains some more profound inaccuracies. The latter raise the question as to whether Kelsen was intentionally trying to present the facts in a more favourable light, or whether he truly believed that events had happened in the manner, in which he described them. The following chapters should serve as a confirmation.

II. Family, childhood, education

1. Family

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

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

¹⁵⁾ Allerhöchste Entschließung, 8 July 1918, in Austrian State Archive (Österreichisches Staatsarchiv – ÖStA), AVA Unterricht Allgemein, Personalakt Pisko (Karton 612).

¹⁶⁾ *Kelsen* (n 5), 30.

¹⁷⁾ *Börries Kuzmany*, 'Juden in Brody. Das soziale, wirtschaftliche und geistige Umfeld der Vorfahren Kelsens', in *Robert Walter / Werner Ogris / Thomas Olechowski* (eds.), *Hans Kelsen: Leben – Werk – Wirksamkeit* (Vienna 2009) 9–20; *Börries Kuzmany*, *Brody. Eine galizische Grenzstadt im langen 19. Jahrhundert* (Köln-Weimar-Wien 2011).

¹⁸⁾ *Marsha L. Rozenblit*, *Die Juden Wiens 1867–1914. Assimilation und Identität* (Vienna-Cologne-Graz 1989) 45.

¹⁹⁾ *Thomas Olechowski* 'Über die Herkunft *Hans Kelsens*', in *Tiziana J. Chiussi et al* (eds.), *Das Recht und seine historischen Grundlagen. Festschrift für Elmar Wadler zum 70. Geburtstag* (Berlin 2008) 849-863 (858) [Anmerkung 2019: in diesem Sammelband 21–34].

On 22 August 1880, Adolf Kelsen married the 21-year-old Auguste Löwy in the Leopoldstadt synagogue. The bride was born on 29 December 1859 in Jindřichův Hradec/CZ where her father, Aron Löwy, owned a vinegar factory.²⁰⁾ Together the young couple moved to Prague, where Adolf Kelsen initially tried to set up a business in plumbing supplies. One year later, on 11 October 1880, their first son, Hans Kelsen, was born.²¹⁾ It was a difficult time for his family: Conflict with the authorities and hard competition from other entrepreneurs contributed to the fact that Adolf Kelsen was subject to a foreclosure proceeding. Because of the Kelsen's difficult financial situation, the family had to leave Prague and returned to Vienna.²²⁾ Adolf Kelsen now focussed on the production of bronze merchandise and chandeliers, establishing a business in Vienna, together with a partner. From 1895 on he directed this business on his own and founded a small factory in the back yard of Goldeggasse 20, in the IV. District of Vienna.²³⁾ The area where the factory was established was not situated within the Jewish quarter, so we can only assume that Adolf Kelsen chose this location because his brother Samuel already lived on the same street. In January 1901 Adolf Kelsen obtained the "*Heimatrecht*"²⁴⁾ (rights of residence) in Vienna for himself, his wife and his children. It was only the last act of assimilation, baptism into the Catholic Church, that Adolf Kelsen never went through with. Presumably, his reason for the not fulfilling this last step may have had to do with his membership in the Masonic Lodge "*Humanitas*".²⁵⁾ It was Hans Kelsen himself, who got baptised as the first member of the Kelsen family in 1905.²⁶⁾

2. Kelsen's school years

Following the Jewish tradition, Hans, the first-born, did not join his father's business. Instead, he enjoyed a higher education as a step in furthering the family's rise in social status. As soon as Kelsen reached schooling age he was sent to the (private) Protestant elementary school at the Karlsplatz, which was situated close to where he lived. After spending the first three years of his elementary school education there, his father got into financial difficulties again and Kelsen was obliged to finish his last year of elementary school at a

²⁰⁾ *Olechowski*, (n 19) 859.

²¹⁾ Czech National Archive Prague (Národní Archiv Praha), HB Ma 251, 1881, Geburtsbuch Lit. 14, Abth. 9 – Knaben, Pag. 179, Z 179.

²²⁾ *Petr Kreuz*, 'Zu den Prager Wurzeln Hans Kelsens', in *Walter / Ogris / Olechowski* (n 17) 21–39.

²³⁾ *Olechowski* (n 19) 860.

²⁴⁾ The right of residence was obtained by Kelsen's family on 25 November 1901; compare hereto *Olechowski* (n 19) 862.

²⁵⁾ *Günter K. Kodek*, *Unsere Bausteine sind die Menschen. Die Mitglieder der Wiener Freimaurerlogen (1869–1938)* (Wien 2009) 178.

²⁶⁾ Pfarre Sta. Maria Rotunda zu Wien, Geburts- und Taufbuch Nr XII (1905–1941, Konvertiten), fol 9f = Taufregister VI B (Copie VI) fol 233. See *Anna L. Staudacher*, 'Zwischen Emanzipation und Assimilation. Jüdische Juristen im Wien des Fin-de-Siècle', in *Walter/Ogris/Olechowski* (n 17) 41–53.

public institution in the Alleegasse (today Argentinierstrasse). No records are extant from this time, but apparently, Kelsen's grades were not good enough for him to obtain the school fee exemption that would have enabled him to remain at the Protestant school.²⁷⁾ Kelsen probably felt humiliated by the fact that he had to change schools, and therefore did not mention this in his autobiography. Kelsen's father was still trying to provide his son with the best education possible and so in 1892 he inscribed Hans at the *Akademisches Gymnasium* at Beethovenplatz.²⁸⁾ At the *Akademisches Gymnasium*, one of the most prestigious institutions of its time, the young Kelsen received not only an extensive humanistic education, with tuition in Latin and ancient Greek, but was also instilled with a patriotic attitude. (For his graduation exam in German he had to write a composition on the topic: "What kind of moral impulse do we receive in our study of Austrian history?"²⁹⁾ Surprisingly, Kelsen was not taught any modern foreign languages. In his autobiography Kelsen did not have a good word to say of any of his teachers. He simply observes: "My teachers did not spark any interest in school. (...) In particular the primitive religious attitude at school triggered my opposition"³⁰⁾. He was especially critical of the religious education (like roughly 45% of the pupils at that time, Kelsen attended classes in Hebrew religion).

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

²⁷⁾ *Métall*, (n 6) 3.

²⁸⁾ *Kelsen* (n 5) 31.

²⁹⁾ Jahresbericht über das k.k. Akademische Gymnasium in Wien für das Schuljahr 1900/01 (Wien 1901) 9–10.

³⁰⁾ *Kelsen* (n 5) 32.

³¹⁾ *Kelsen* (n 5) 32.

³²⁾ *Clemens Jabloner*, 'Kelsen and His Circle: The Viennese Years', in *European Journal of International Law* 9 (1998) 368–385 (370). Compare to *Weininger* also: *Jacques Le Rider / Norbert Leser* (eds.), *Otto Weininger. Werk und Wirkung* (Wien 1984); *William M. Johnston*, *Österreichische Kultur- und Geistesgeschichte* (4th edition in German, Wien-Köln-Weimar 2006).

³³⁾ *Kelsen* (n 5) 33

It is precisely this problem that is brought to the reader's attention in the first pages of Höfler's book.³⁴⁾

3. Kelsen's Time as a Student at the University of Vienna

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

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

³⁴⁾ Alois Höfler, *Logik* (Prag-Wien-Leipzig 1890) 2.

³⁵⁾ Akademisches Gymnasium Wien, Protokoll der am k.k. akadem. Gymnasium zu Wien im Monate Juli 1900 abgehaltenen Maturitätsprüfung, Nr 18.

³⁶⁾ Kelsen (n 5) 34.

³⁷⁾ Thomas Olechowski, 'Zweihundert Jahre österreichisches Rechtstudium', in Clemens Jabloner et al (eds.), *Vom praktischen Wert der Methode. Festschrift Heinz Mayer zum 65. Geburtstag* (Vienna 2011) 455–479 (464).

³⁸⁾ Carl Stooß, 'Autobiographie' in Hans Planitz (ed), *Die Rechtswissenschaft der Gegenwart in Selbstdarstellungen* Vol. II (Leipzig 1925) 21. See also Thomas

Among of the few lecture series that Kelsen actually attended was one entitled “The History of Legal Philosophy”, given by Professor Leo Strisower in the summer term of 1903.³⁹⁾ As Kelsen relates in his autobiography, it was here that the works Dante were first brought to his attention. He decided – probably inspired by his friend Weininger’s book “Gender and Character” – to publish an article dealing with Dante’s work. This happened in same year that Weininger committed suicide (4 October 1903). To his own surprise, the article was published in a book series called “Viennese Governmental Law Studies” and was favourably reviewed.⁴⁰⁾ Encouraged by the success of his first article, the law student Hans Kelsen decided to continue his scientific work: “While I was still dealing with the political philosophy of Dante Alighieri, my interest in legal theory, above all in the legal entity, the subjective right, ... began to grow. ... Soon after the first exam [the exam in legal history, Kelsen passed on 13 July 1903], I started to work on a book, examining the most essential problems of governmental science.”⁴¹⁾ The book, which would later become Kelsen’s habilitation thesis, was apparently begun by Kelsen when he was a barely 22-year-old law student! Indeed, it must be acknowledged that Kelsen possessed a “high degree of spiritual asceticism”⁴²⁾ to have spent eight years working on this opus magnum, the “Hauptprobleme der Staatsrechtslehre”. In the preamble to this book, Kelsen wrote: “... I kept on working on this book despite all difficulties and obstacles and therefore it became more for me than the mere solution of a specific scientific problem: this work has shown me the long and up to this point missing connection between juridical discipline and philosophy.”⁴³⁾ His further reference to “the small world of legal science and the huge world of a universal philosophical system” can be taken as a hint that his poor opinion of law professors seemed only to have been reinforced over the years. This is especially true of the two professors of public law, Adolf Menzel and Edmund Bernatzik, who examined his habilitation thesis. Kelsen later on wrote that Menzel’s assessment of his thesis was especially favourable only because Menzel “was not at all familiar with the problems of legal theory”. Bernatzik, for his part, did nothing more than agree with Men-

Olechowski, ‘Stoß Carl’, in Österreichisches Biographisches Lexikon, 61st booklet (Vienna 2009) 321.

³⁹⁾ Professor Edmund Bernatzik has announced to hold a lecture in spring 1903. Kelsen inscribed himself for the lecture, but probably *Bernatzik* became sick and therefore the lecture was given by *Strisower*. This incidence might have been essential for Kelsen’s later career. See *Thomas Olechowski, ‘Strisower Leo’*, in Österreichisches Biographisches Lexikon, 62nd booklet (Vienna 2010) 405.

⁴⁰⁾ *Hans Kelsen, Die Staatslehre des Dante Alighieri* (Wien-Leipzig 1905), newly edited by *Jestaedt* (n 5) 134–300.

⁴¹⁾ *Kelsen* (n 5) 37.

⁴²⁾ *Egon Zweig ‘Die Staatslehre Dantes’ in: Studien und Kritiken* (Vienna/Leipzig 1907) 26 – 32.

⁴³⁾ Hans Kelsen, *Hauptprobleme der Staatsrechtslehre* (Tübingen 1911), new edited by *Matthias Jestaedt* (ed) *Hans Kelsen Werke* Vol. II (Tübingen 2008) 21–878 (62).

zel's opinion. Kelsen therefore assumed, that "he didn't even read the thesis".⁴⁴⁾

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

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

III. The Young Graduate

1. Career until 1914

The economic situation of Kelsen's family in the meanwhile became worse. In fact when Kelsen was still a student, his father already started to suffer from heart problems, he finally died of on 12 July 1907.⁴⁷⁾ Due to that circumstances Hans Kelsen was forced to postpone his dreams of an academic career and instead had to look for a decent job. For a certain period of time he seriously intended to become a lawyer. Back then, in order to be admitted to the barrister exam, it was necessary that after graduating from law school, a one-year internship at Court was accomplished. In addition to that, every young graduate had to work for at least six years as a trainee solicitor under the supervision of a lawyer. So between March 1906 and September 1908 Hans Kelsen accomplished internships at several Viennese Courts and then started working at different lawyers.⁴⁸⁾

⁴⁴⁾ *Kelsen*, (n 5) 43.

⁴⁵⁾ *Kelsen*, (n 5) 40.

⁴⁶⁾ Archive of the University of Vienna (Archiv der Universität Wien), Promotionsprotokoll 1905/06, Sig M 32.3-32.6, Zahl 762. See *Olechowski* (n 1) 6.

⁴⁷⁾ *Neue Freie Presse*, Morgenblatt No. 15405, 13 July 1907, 22; see *Olechowski* (n 19) 862.

⁴⁸⁾ The records of the Viennese Bar Association name the following stations: 2 March – 7 June 1906: law firm *Heinrich Singer* / 9 June – 26 December 1906: district court Leopoldstadt No. 1 / 27 December 1906 – 3 February and 7 February – 17 March

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

From 1 July 1908 on, Hans Kelsen was employed at the “k.k. Handelsmuseum”, a federal institution that dedicated its work to the export trade and also hosted the export trade academy. This employment allowed Kelsen to finalize the *“Hauptprobleme”*.⁵¹⁾ In April 1911, *“Hauptprobleme”* was published by the publishing house J. C. B. Mohr in Tübingen. Already on 6 February, Kelsen named this book his “habilitation thesis” and applied for the Habilitation (permission to give lectures) in the field of Austrian public law and legal philosophy at the faculty of law at the University of Vienna. The book consisted of 733 pages and therefore was much longer than other habilitation treatise published at the same time. Regarding its content, it was undoubtedly the foundation for what later on became Kelsen’s pure theory of law. Already back then Kelsen demanded a strict separation of legal science from sciences such as sociology and psychology. Central legal terms such as the “subjective rights” (*“subjektives Recht”*), proxy (*“Stellvertretung”*) or person have been subject to Kelsen’s examination in this book.

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

1907: criminal provincial court / 9 April 1907 – 28 February 1908: law firm *Alois Löwy* / 28 February – 30 April 1908: criminal provincial court / 1 May – 28 May 1908: military service (see below Footnote n 53) / 29 May – 22 June 1908: criminal provincial court / 24 June – 22 September 1908: law firm *Josef Beth*.

⁴⁹⁾ Kelsen, (n 5) 40.

⁵⁰⁾ Whilst not wanting to drift too far into the field of speculations, a degree of detective work is nevertheless necessary when attempting to establish such links.

⁵¹⁾ Jürgen Busch, ‘Hans Kelsen an der Exportakademie in Wien’, in Thomas Olechowski et al (eds.), *Grundlagen der österreichischen Rechtskultur. Festschrift für Werner Ogris zum 75. Geburtstag* (Vienna-Cologne-Weimar 2010) 69–108 [Anmerkung 2019: in diesem Sammelband 35–68].

⁵²⁾ Rechts- und Staatswissenschaftliche Fakultät, 12 July 1911, Zl. 665 ex 1910/11, in ÖStA, AVA Unterricht Allgemein, Personalakt Kelsen (Karton 611). See Thomas Olechowski, ‘Hans Kelsen und die Universität Wien’, in Hans Kelsen und die Bundesverfassung. Ausstellungskatalog (Vienna 2010) 33–36 (39).