

The Academic Portrait of the Creator of the Pure Theory of Law. Several Facts from Thomas Olechowski's Book Entitled Hans Kelsen. Biographie eines Rechtswissenschaftlers. Tübingen: Mohr Siebeck, 2020 (1027 pp.).

Abstract

The Academic Portrait of the Creator of the Pure Theory of Law was written by Thomas Olechowski, a professor of the University of Vienna, and a historian of law with an established academic position, having outstanding expertise in the field of the history of the system of law in Austria in the 19th and 20th centuries. Olechowski collected impressive source material - mainly archival, including Kelsen's extensive correspondence, university and administrative files connected with all the stages of his life and academic activity, and interviews with still-living persons (oral history) who had met Kelsen directly or indirectly. Owing to the obtained material, often secured through detailed source query in Austrian, Czech, German, and American archives, the author managed to correct and complete many details from his subject's life and works. Hence, the reviewed biography of Kelsen provides a great deal of new information, which presents a view of his life and academic achievements through a multithreaded method. Various examples of little-known or completely unknown facts from H. Kelsen's biography will be presented in the review.

Keywords: Hans Kelsen, the pure theory of law, constitutional judiciary, Austrian constitutionalism.

Słowa kluczowe: Hans Kelsen, czysta teoria prawa, sądownictwo konstytucyjne, austriacki konstytucjonalizm.

The history of 20th century European jurisprudence is not complete without a description of the person, and the professional and academic works, of Hans Kelsen (1881–1973). The Austrian scholar made a name for himself not only as the creator of the pure theory of law, but also as the promoter of liberal democracy and a constitutional judiciary. As is generally accepted, the ground-breaking nature of Kelsen's theory of law consisted in the fact that he formulated a system of law that is completely separated from morals, axiology, and ethics, as well as being free from connections to sociology, psychology,

and politics.¹ Such a suggestion of the analysis of law was necessarily in opposition to all the extant anti-positivist opinions towards the nature of law. Paradoxically, this contributed to its worldwide popularity, since every scholar conducting research on the theory of law had to *nolens volens* refer to Kelsen's pure theory of law. Similarly, the contemporary paradigm of the rule of law in the form of the so-called constitutional democracy results from the fact that interest in Kelsen's opinions on review of constitutionality (*judicial review*) and the rules of democracy are still maintained.²

Kelsen spent over half of his long life in Vienna, and his assumptions regarding the pure theory of law were mainly created during his Viennese period. Austria's constitutional experiences from both the monarchical and the republican periods influenced his views in the field of the theory of the state and law, judicial review of constitutionality, and mechanisms of parliamentary democracy. As Kelsen himself stated, the pure theory of law was, after all, to be used to overcome the elementary dilemma of the multicultural monarchy: how to secure state unity under the conditions of the diversity of races, languages, religions, and histories of numerous ethnic groups? In his opinion, maintaining the cohesion of a multinational and multi-faith state was only possible in the case of the identification of the state with a legal order created without any references to non-legislative factors.³ The state was to be the hypostasis of the legal order. Therefore, the pure theory of law was a specifically Austrian idea in its genesis, and Kelsen's model of protection of the constitution was also notably Austrian.

Thus, it seems obvious that an Austrian scholar, a historian of law with an established academic position, having outstanding expertise in the field of the history of the system and law of Austria in the 19th and 20th centuries should have undertaken to write a biography on Kelsen. The academic portrait of this, the creator of the pure theory of law, was written by Thomas Olechowski, a professor of the University of Vienna, who assembled a group of scholars interested in Kelsen's life and works (Jürgen Busch, Tamara Ehs, Miriam Gassner, and Stefan Wedrac) to collaborate with him in conducting the research. The reviewed monograph itself is the result of the extensive research carried out by this group, and is Kelsen's first fully academic biography. So far Kelsen's autobiography of 1947, and the biography prepared by his student R. A. Métall, that was published during Kelsen's lifetime in 1969, have been the principal sources of information about his life and academic activities. Olechowski collected impressive source material, mainly archival, including Kelsen's extensive correspondence, university and administrative files connected with all the stages of his life and academic activities, as well as interviews with still-living persons (oral history) who had met Kelsen directly or indirectly. Owing to the obtained material, often secured through detailed source query in Austrian, Czech, German, and American archives, the author of the discussed book managed to correct and complete numerous details from its subject's life and works. Hence, the biography of Kelsen that is being reviewed provides a great deal of new information that allows us to look at his life and academic achievements from a multi-faceted perspective. Examples

¹ Bosiacki, "Za i przeciw teorii Hansa Kelsena", 11–2.

² In 2009 the Polish translation of Kelsen's book *Istota i rozwój sądownictwa konstytucyjnego* was published in *Studia i Materiały Trybunału Konstytucyjnego*. See also the review of the publication by Morawski, "Kelsen a sądy konstytucyjne", 89ff.

³ Jabloner, "Zur Entwicklung der Reinen Rechtslehre", 106–7.

of little-known or completely unknown facts from Kelsen's biography will be presented later in the review.

However, the biography of the theorist of law written by the historian of law has some limitations too. The author of the monograph under review wrote with full awareness in the preface, that it is Kelsen himself who takes the central place in the book, and not the pure theory of law. The historical and legal aspects of his activities rather than the theoretical and legal field of academic considerations are emphasized clearly in the biography. Thus, the aim of the author of the biography was to highlight the historical conditions of Kelsen's works in order to understand his academic and professional opinions, in accordance with the motto: *sit Klio ancilla philosophiae!* It should be admitted that the author remained faithful to his motto throughout the book. Therefore, in the background of the outlined portrayal of this, the creator of the pure theory of law, the reader will find a great deal of information about the history of the Austrian political and legal systems, that is necessary to the completion of the discussed biographical episodes. Moreover, there are references to political events in the biography, which led to many of Kelsen's life adventures, while his long life, as the author notes can be perceived as a kind of microhistory. The final years of the Habsburg monarchy, anti-Semitism and the situation of assimilated Jews in the first half of the 20th century, the Great War, the construction of the democratic republic of Austria, its fall, the ascendancy of the German Nazis, emigration, World War II, and the post-war period all provided substance to the backdrop for Kelsen's turns of fate.

This does not mean at all that Kelsen's biography written in this way will attract exclusively historians or historians of law. Olechowski does not avoid presenting the theoretical and legal achievements of the protagonist of his book, depicting the substantive confrontation of the main assumptions of the pure theory of law with the critical voices of the numerous ensembles of its opponents. The author of the reviewed biography relates virtually all the theoretical and legal disputes that Kelsen had to be engaged in so as to defend his opinions competently and skillfully. For that reason, having read Kelsen's biography, it is fully justified that reading it should be obligatory for everyone who undertakes research in any aspect of the academic achievements of the most important Austrian lawyer of the 20th century. So far only the German version of Kelsen's biography has been launched on the bookselling market, but its publication in Spanish and English is also planned.

The author of the reviewed monograph divided Kelsen's profile into four parts. In the first part, including the times of the Habsburg monarchy, Olechowski presented Kelsen's ancestry, his childhood, his school and university years, his first publications, his obtaining of a postdoctoral degree at the University of Vienna, the beginnings of his professional work, and his employment in the military administration during the Great War. The second part of the biography includes the period of Kelsen's most substantial academic and professional activity in republican Austria.⁴ This part illustrates his university career, his participation in the preparation of the Austrian constitution of 1920, his activity as a judge on the Constitutional Tribunal, and his role in defining jurisprudence in the case of the so-called *Dispensehen*, which resulted in his loss of his position as a tri-

⁴ Höbel, *Die erste Republik Österreich*. Kelsen appears relatively rarely in Austrian historical studies.

bunal judge. This case also sealed the decline of his career at the University of Vienna. As a consequence of the atmosphere that was so unfavourable for him, he was forced to leave Vienna and move to the University of Cologne. The third part of Kelsen's biography concentrates on his life in Germany, Switzerland, and Czechoslovakia, including the three-year stay at the University of Cologne. In 1933, under pressure from Nazi Germany's anti-Jewish policies, he left Cologne for employment at the Institut universitaire de hautes études internationales in Geneva, which he combined with his professorial position at the German University in Prague. The fourth and last part of the monograph is focussed on the turns of life connected with the period of Kelsen's emigration to and residence in the United States.

Each of the periods elaborated in the biography has been documented and discussed equally accurately. Consequently, while presenting its rich content, it is not easy to choose the fragments of the work that deserve to be emphasized or evaluated more exceptionally. Kelsen's figure is so multidimensional that readers may differ widely from one another in their expectations with regard to the information included in the biography. Nevertheless, there is no doubt that all who read it will be duly pleased with their effort, and will find their knowledge enriched with plenty of facts, descriptions, and analyses. The erudite style of the author's deductions should also satisfy even the most sublime literary tastes. Yet, relating to the substantive part of the reviewed monograph in more detail, I would like to refer to Olechowski's decisions which modify many clichéd and popular opinions about Kelsen, and can be surprising for those who may be less familiar with his life and work.

Religious conversions in cases of persons coming from laicized Jewish families was nothing exceptional in the times of the Habsburg monarchy. For instance, Joseph Unger,⁵ one of the most eminent Austrian civilians at the turn of the 19th and 20th centuries, converted to Catholicism, and Georg Jellinek converted to Protestantism even though his father was a rabbi in Vienna.⁶ There were different reasons for Jews' conversions to Christianity. Sometimes they were not religious in character, but rather utilitarian. In spite of formal equality under the law, public positions in monarchic Austria were in general practice restricted to Christians. A conversion from Catholicism to a Protestant religion also had a political dimension in Habsburg Austria. In this case the conversion was a sign of identification with the purposes of the movement of German nationalists in the Habsburg state who recognized Protestantism as Germans' national religion.

Kelsen converted to Catholicism in 1905, just before graduating from his legal studies. Olechowski connects this fact with the publication of the first work entitled *Dante Alighieri's theory of law (Die Staatslehre des Dante Alighieri)*. He explains that Kelsen converted to Catholicism because he wanted to avoid criticism of his work from the anti-Semitic positions prevalent among the Church and the papacy. However, whether these reasons for his conversion were true or not, will remain a speculation. Similarly, Kelsen's next conversion in his life was from Catholicism to Lutheranism before his marriage to Margarete Bondi. His wife-to-be converted alongside him even though she was raised in a Jewish family. In this case the reason for the change could be the fact

⁵ Brauneder, "Joseph Unger", 179.

⁶ Olechowski, "Von Georg Jellinek", 376ff.

that Kelsen as a Catholic would not subsequently be permitted to divorce after marrying. *Nota bene*, Kelsen had a good marriage with his wife for 61 years, although accounts of relations between the spouses was not much discussed apart from mentioning that she was a housewife, his secretary, and raised their two daughters. In any case, the reason for the second conversion remains a speculation. The assumption that Kelsen, as a liberal socialist (a term given by himself), preferred to be a member of the more progressive religion of Catholicism seems to be unconvincing. What is surprising is the fact that Kelsen's father was a Mason (in Kelsen's own case, Masonic membership was not confirmed) and along with his mother remained a member of the Jewish community till the end of their lives, while his siblings were Christians (one of his brothers was a Catholic).

Kelsen owes his passion for the theory and philosophy of law as well as the ambition to devote himself to academic work, to his friend Otto Weininger, a student of philosophy and the author of philosophical dissertations, for example, the publication *Sex and character* (*Geschlecht und Charakter*), which can be a little surprising. It had many resonances for the environment of Viennese modernism. Although his friend's untimely suicide stopped his ambitious academic plans, Weininger's works remain an example of Austrian *fin de siècle* philosophical literature up to the present. The curriculum of legal studies, in which Kelsen did not find a field of study which would especially arouse his interest, appeared to be disappointing for him. Therefore, he decided to study a chosen subject matter on his own, trying to find academic support for his theoretical and philosophical concepts. Owing to this, he was twice in Heidelberg to avail himself of Jellinek's seminar. However, Jellinek, the greatest authority in the field of state law, did not appreciate Kelsen's modernistic approach to the theory of law. The studies under Jellinek were a big disappointment for Kelsen. Jellinek was not open to new ideas in the study of law. In his 1911 work entitled *Main problems of the theory of state law*,⁷ in which Kelsen laid down the foundations of the pure theory of law, Jellinek's name indeed appeared more often than any other, but only in the context of criticism of his views.

In any case, Kelsen did not acknowledge any of his university lecturers or non-university teachers as being mentors. Furthermore, he expressed his opinion poignantly about the reviewers of his thesis in the postdoctoral proceedings, accusing one (Edmund Bernatzik) of not having read it, and another (Adolf Menzel) of not having understood it. Yet, both professors fully supported him academically. Kelsen was also disappointed with the fact that the published book did not gain as much notice in the academic world as he had expected. Like every talented young researcher, he thought that he had made a discovery as significant as Euclid's algorithm! When his work was noticed, it generally faced critical assessment. One of these critics was Friedrich Tezner, who admittedly was favourably disposed towards him, but did not accept his approach to the essence of law. He wrote in his review that "jurisprudence is not only knowledge of abstract forms of law but also a science about the content of law in the form." He asserted that Kelsen "did not create a system of real law, but an ideal legal order" (p. 151). Nevertheless, Kelsen neither allowed himself to be forgotten nor forgot his theory. He entered into bitter dispute with any who expressed any different opinions on the nature of law. In 1915 he opposed the theses included in the book written by Eugen Ehrlich entitled *Assumptions*

⁷ Jestaedt, "Die »Entzauberung« des Rechtsdenkens", 172ff.

of sociology of law (*Grundlegung der Soziologie des Rechts*). The temperature of the academic discussion between the adversaries was so high that Ehrlich even accused Kelsen of trying to make an idiot of him (p. 165).

Olechowski outlined main theses of Kelsen's publication of 1911 for readers, emphasizing that they were subject to correction in the later period of his work. Kelsen's biographer managed to indicate those of his opinions from the comprehensive almost-700-page-long thesis that he changed or rejected in the later period. This category of Kelsen's opinions expressed in his postdoctoral thesis included a sentence that questioned the sense of liberal basic rights to some extent, because he stated that an act adopted in fulfillment of the conditions as stipulated by the American Constitution, in spite of its substantive contradiction to the First Amendment guaranteeing freedom of religion, was formally valid. In expressing his opinion on this sentence the author of the monograph contended that it was unbelievable that the man who said it a few years later was acknowledged as "the father of the constitutional judiciary"!

Nonetheless, Kelsen's deprecation of the constitutional judiciary at that time was not isolated. Jellinek also stopped being a proponent of the constitutional court at that time. In his 1906 work *Change and Transformation of the Constitution (Verfassungsänderung und Verfassungswandlung)*, he presented his critical evaluation of the court's review of the constitutionality of various acts in the American edition.⁸ Jellinek did not like the American Supreme Court's approach to the protection of laws. He believed that the constitutional court should be a guardian of the constitution (*Hüter der Verfassung*), but in his analysis of the Court's decisions, he ascertained that its judges were usurping the role of the legislature, and that the Court could therefore be called the third house of the Congress. He charged that the Court was slowly evolving from an interpreter of the constitution to its creator (*Schöpfer der Verfassung*). He quoted Americans' opinions that there were only three documents in the history of mankind which could be interpreted as broadly as the American constitution, i.e. the Bible, the Koran, and the Digest. So Kelsen's contact with Jellinek may have influenced his views more than he later claimed.

Having obtained his postdoctoral degree, apart from conducting lectures at the university, Kelsen opened a private seminar on the theory of law. In this way he managed to attract talented students of law for his academic research. Along with other followers of the pure theory of law, the group of his students also included distinguished future professors of law such as Adolf J. Merkl and Alfred Verdross. As many as five of his students were granted postdoctoral degrees during the first four years of Kelsen's professorship. One of them was also the future professor of the German University in Prague, Fritz Sander. In Kelsen's opinion Sander was an extremely gifted scholar, and he held many discussions with him. They even shared similar reflections on particular subjects. Nonetheless, in the book entitled *Sociological and legal concept of a state (Der soziologische und der juristische Staatsbegriff)*, Kelsen included a chapter with a title and theses that directly corresponded to Sander's postdoctoral dissertation, i.e. *God and State*. Therefore, Sander publicly accused Kelsen of plagiarism. The fact that Kelsen sometimes quoted other persons' thoughts without reference to their sources also offended Verdross, but the two men managed the affair in a gentlemanly manner. Kelsen

⁸ Jellinek, *Verfassungsänderung und Verfassungswandlung*, 16.

wrote an appropriate annotation in the next edition of the book. The case with Sander, however, played out very differently. Sander instituted a disciplinary action against his teacher from the University of Vienna.⁹ Did Kelsen steal his student's intellectual property? In any case the disciplinary action finished with a decision favourable for Kelsen. However, the above mentioned case presented in detail by Olechowski, apart from being sensationalized, is a good insight into the beginnings of the birth of the Viennese school of law from a previously unknown perspective (p. 321–344).

Although Kelsen had secured a position as a professor in the summer of 1918 owing to the support of the minister of war of the imperial and royal monarchy, his academic career advanced even further at the monarchy's downfall (p. 203). Thanks to his social contacts with representatives of Austrian social democracy, he was well positioned to play a key role in the establishment of the systemic foundations of the Austrian Republic. As an expert enjoying the confidence of Chancellor Karl Renner, he undertook the task of preparing the project of the future constitution under Renner's directive. This fact gave rise to the common opinion that Kelsen was a creator and "founding father" of the Austrian constitution of 1920. However, having thoroughly analysed Kelsen's participation in the work on the constitution, Olechowski concludes that the term "an architect of the constitution" would be the most adequate one for Kelsen's merits.

Participating in all phases of the creation of the constitution, Kelsen gave substance to its regulations in accordance with the expectations of the representatives of the political parties. This way he formulated the submitted organic suggestions in a legal form rather than arbitrarily settling them through substantial editing. What may be striking in these preparations is that the transformation of Austria into a federal state was then closely connected with joining the Austrian republic to the German state in the future. Kelsen was a supporter of *Anschluss*, the political incorporation of Austria into the German Reich, and authored a legal opinion in 1919 on the *Position of the countries in the future constitution of German Austria with the particular consideration of the connection of German Austria to the German Reich (Die Stellung der Länder in der künftigen Verfassung Deutschösterreichs mit besonderer Berücksichtigung des Anschlusse Deutschösterreichs und das Deutsche Reich)*. Kelsen did not find it necessary to unite the two states on the basis of the agreement. However, he postulated that popular referenda on *Anschluss* should be held. The bitter historical irony was the fact that Adolf Hitler's 1938 foisting of *Anschluss* onto Austria was perpetrated according to plans developed by Kelsen!

Olechowski's findings show that Kelsen's role in defining the system and the competences of the Constitutional Tribunal was less important than it would appear from his autobiography. Years later, he stated that the version of the provision on the rules prepared by him for the functioning of the Constitutional Tribunal was not amended during the work on the text of the constitution. But neither were the provisions of the Austrian constitution for the Constitutional Tribunal completely Kelsen's "personal work" (p. 292–295). In Kelsen's project of the constitutional tribunal, the tribunal's task would be exclusively to investigate the compliance of the national acts with the federal constitution at the request of the central government.

⁹ Staudigl-Ciechowicz, *Das Dienst-, Habilitations-und Disziplinarrecht*, 531ff.

Provincial governments were not entitled to request that the tribunal investigate the compliance of federal acts with the constitution, and the competences of the Constitutional Tribunal were only broadened after provincial representatives raised objections. Kelsen wanted to entrust the constitutional court with the function of the objective guardian of the constitution. Therefore, he supported the introduction of the regulation that would allow the Constitutional Tribunal to control the compliance of acts and resolutions with the constitution *ex officio*. Here, he achieved partial success. The Austrian Constitution of 1920 granted the Constitutional Tribunal the right to evaluate the constitutionality of any federal or national act *ex officio*. Nevertheless, it was possible only if such an act constituted a premise to issue a decision by the Tribunal, for instance, on a citizen's complaint about an administrative decision infringing any of his rights that were guaranteed in the constitution.

Thus, it is not unreasonable to conclude that the Austrian model of the constitutional court consists of both the constitutional tradition of the Habsburg monarchy and the views of a number of individual persons (Jellinek, Bernatzik, Renner, Stephan Falser). It should be noted here that Kelsen did not take the vision of the constitutional court by Jellinek of 1885 into consideration back then. It went beyond the boundaries of the constitutional framework, providing for an abstract constitutional review of acts at the request of the parliamentary minority as a means of protecting against the political dictate of the majority.¹⁰ Kelsen referred to Jellinek's view when he needed arguments against the claim that the constitutional judiciary threatens the principle of democracy. Thus, over time he emphasized the role of the constitutional tribunal as a guardian of democratic principles in the parliamentary political game.¹¹

The most gripping fragment of Kelsen's academic story is undoubtedly the exposé of his being excluded from the elite of Austrian academia and judiciary (he was a judge of the Constitutional Court from 1919). Thus, the author of the biography examined Kelsen's greatest setback thoroughly in order to determine to the greatest extent possible whether it was a coincidence of objective conditions, or whether he himself brought about his own downfall. Olechowski, not losing sight of the anti-Semitic aspect that was present in the creation of media hostility towards Kelsen, tries objectively to describe the background of the dispute over the matrimonial law which was the direct cause of the breakdown in his spectacular career. It is well known that the introduction of the secular matrimonial law was a politically sensitive issue. The regulations of the civil code ABGB were religious in character for Catholics, who were neither allowed to divorce nor remarry. Admittedly, in 1919 social democrats wanted to change this legal state, but owing to the opposition of the Christian and Social Party, they decided to maintain the *status quo*.

Nevertheless, the political compromise did not hinder the attempt to introduce the institution of divorce for Catholics through an administrative practice to some extent through a back door. Although it was known in Habsburg times, it was only used marginally but then became common in republican times. It became the principle from the exception: pursuant to provision § 83 of the ABGB, district governors could issue a dispensation from remaining within a marriage through an administrative decision for Catholics separated

¹⁰ Noll, "Georg Jellinek's Forderung", 261ff.

¹¹ Dziadzio, "Między idea a praktyką ustrojową", 9.

de facto from their spouses. A person who was granted such a dispensation was further permitted to conclude another marriage. As Kelsen persuaded in his autobiography, the practice of the socialist officials had the tacit agreement of the signatories of the political compromise. Nevertheless, his biographer did not find any confirmation of this fact in the sources consulted. As can be easily guessed, the actions of the administration led to the fact that one person could, according to the binding law, remain in two marriages simultaneously! By doing so, however, the person committed bigamy, which was punishable.

Therefore, in order to prevent this legal chaos, the Administrative Tribunal (*Verwaltungsgerichtshof*) and the Supreme Court (*Oberster Gerichtshof*) in 1921 issued consistent decisions, with both courts adjudicating that dispensation from a marriage was impermissible (*unzulässig*). However, practice did not comply with these rulings. The administration still issued the mentioned dispensations in subsequent cases of this kind. Then, the civil courts annulled them (*ungültig*). Eventually, the case was brought to the forum of the Constitutional Court, the competences of which were to settle disputes over powers between the administration and the judiciary. Yet, in 1926 the Constitutional Tribunal rejected the petition for the review of the positive conflict between the authorities owing to its lack of jurisdiction (*wegen offener Nichtzuständigkeit*). The Constitutional Tribunal asserted its incompetence because there was no dispute over powers between the administration and the courts as their settlements did not refer to the same case.

Kelsen did not agree with this argumentation. He believed that the cases were identical since they referred to the issue of the validity of the dispensation. The administrative organs had the right to issue them, and according to Kelsen, the courts that adjudicated invalidity of the dispensations simultaneously exceeded the range of their competences. In his opinion, the Constitutional Tribunal should accept the application for the consideration on the merits of the case, and conclude the exclusive competence of the administrative organs in the so-called *Dispensehen*.¹² But only one member of the adjudication panel shared his view. However, Kelsen did not give up. He maintained his point of view in the next analogous case when he fulfilled the role of reporting judge. The decision adopted by the majority of 8 votes against 5 settled the matter on the annulment of the judgement of the civil court by the Constitutional Tribunal. The Austrian academic world met Kelsen's interpretation of the regulations with substantial counter-argumentation, but the monograph provides a full analysis of the correctness of his views. It should be noted that his legal reasoning did not withstand the test of time, and that the Austrian Constitutional Tribunal later returned to the initial standpoint. There are even premises which assumed that Kelsen himself concocted the submission of the application for the examination of the dispute over powers between the administration and courts in order to change the course of jurisdiction of the Constitutional Tribunal, since the submission of the application came from a barrister of the matrimonial bond known to him, and was contrary to the will of all the parties to the court proceedings (p. 446).

The case of the so-called *Dispensehen* is vital in this monograph for obvious reasons. The Constitutional Tribunal found itself in the eye of the storm of the Austrian cultural war due to its decision in this case. As the author of the monograph remarks, at that time

¹² Neschwara, "Kelsen als Verfassungsrichter", 353ff.

Austrian policy was developing not in the forum of the parliament, but among the public. Furthermore, Kelsen acted against his own theory of law, calling for the formulation of a legal standard based on purely political premises! In other words, one can conclude that he triggered powers at his own request, which led to the end of his brilliant career even before he was deprived of his university professorship by the Nazi Third Reich because of his Jewish origins. In 1929 the Austrian parliament undertook a substantial reform of the Constitutional Tribunal. Kelsen's surname was not to be found in its new composition, and he left Vienna in 1930 and moved to the University of Cologne.

In light of this somewhat more developed discussion of the fragment of the reviewed monograph, there arises a compelling question as to why Kelsen fought with such determination to get the Constitutional Tribunal to settle the legalisation of the so-called *Dispensehen*. Was his insistence on the legal settlement ultimately worthwhile when he knew full well that it would lead to a deep crisis of state? Were Kelsen's philosophical beliefs the only decisive factor? He himself offered reasoning in a letter to university authorities when the Nazis ruled that the partial secularisation of the Austrian marriage law taken up by the Constitutional Tribunal at his initiative was to simplify the legal integration of Austria with the German Reich, but this explanation was hardly convincing! In this case, the reader can conjecture his own conclusion, since the author of the monograph was not able to give an unambiguous answer to these questions on the basis of the available sources. Yet, one more motivation of Kelsen's attitude might be considered, although it refers to partly personal reasons, and as a consequence, it would cast doubt on his actions being purely *pro publico bono*. Namely, Kelsen's friend, economics professor Joseph Schumpeter, married Anna Reisinger in 1925 after receiving an administrative dispensation from remaining in his prior marriage. The witness at the wedding was Kelsen himself.¹³

Regardless of this or any other evaluation of Kelsen's attitude, the fact that he was removed from the Constitutional Tribunal exactly at the time when he was providing exceptional meaning to the constitutional court for the development of the democratic state will remain a paradox in the published thesis. Leaving Vienna, Kelsen certainly did not expect that his "ill fame" would be known in Germany so quickly. Criticism of his person did not limit itself only to the anti-Semitic press, but appeared in the Jewish press as well. The latter wrote that a person such as Kelsen is a burden for Jews in Germany, reproaching him for the change of his surname, his religion, and even his nationality. Namely, since it was remembered that his family came from Brody in Galicia, he was accused of changing "Polish nationality into German" (p. 492). His three-year stay in Germany posed new academic challenges for Kelsen, which were manifested in lively disputes with top representatives of German law such as Rudolf Smend and Carl Schmitt. Therefore, the reader has a chance to learn about Kelsen's answer to Smend's attack on his theory of law in this part of the biography. For instance, the pure theory of law was, in his opinion, to contribute to the crisis of European jurisprudence because a state could not be treated as a part of the reality in its formulation. Moreover, the author of the monograph accurately renders Kelsen's famous dispute with Schmitt about who

¹³ Budischowsky, "Vom Ehehindernis des (noch) bestehenden Ehebandes", 65ff.

should be a guardian of the constitution. However, Kelsen did not manage to publish separate publications devoted to the systemic issues of Germany during his stay in Cologne.

Despite Hitler's seizure of power, Kelsen hoped that he would maintain his position at the University of Cologne. For example, in a letter to the dean of the department, he declared that he had never objected to the Christian rules of marriage, and that his actions concerning the so-called *Dispensehen* were within the scope of the German nationalists' point of view! Moreover, he agreed to hang a Nazi swastika flag (*Hakenkreuzflagge*) on his house to comply with the administrative order, even though, like many other people, he did not support the Nazi ideology. However, it did not help. In April 1933 the government of the German Reich passed a bill, transferring all officials of non-Aryan origin, with some few exceptions, into inactive status. The Nazi authorities did not make any exception for Kelsen in spite of a letter from university authorities about maintaining him in the position of professor.

An uncertain future awaited Kelsen together with the loss of his post. Nevertheless, due to favourable coincidences and the support of a group of numerous friendly persons, he started lectures first in Geneva and then in Prague. He was given the position at the University of Prague owing to the endeavours of his long-time friend Professor František Weyr, who was well-regarded by Thomáš Masaryk, the President of Czechoslovakia. Sander, his former student and then adversary, who was a dean of law at the University of Prague at that time, was one of those principally opposed to Kelsen's being employed at the university. Namely, he believed that Kelsen, known for many academic skirmishes, "would be a source of constant anxiety for the faculty" (p. 568). The beginning of his work in Prague was not the most enjoyable experience for Kelsen. At his first lecture the nationalistically disposed students left the classroom ostentatiously as he began to speak. In depriving the university faculty in Cologne of Kelsen's person and services the Nazis created widespread repercussions among circles of European lawyers. He received employment offers from various academic centres. Olechowski stated that the Jagiellonian University in Cracow was among those that would also welcome Kelsen to the cadre of their lecturers. The intention of appointing him to the university chair may have been initiated in the circles of Cracovian academics, since his legal thought was known in Cracow and developed creatively by such persons as Profs. Władysław Leopold Jaworski, Maciej Starzewski, and Kazimierz Władysław Kumaniecki.¹⁴ Yet, there is no trace of this initiative in the official protocols of the meetings of the Department of Law at the Jagiellonian University from this period.¹⁵

The annexation of Austria (*Anschluss*), the Munich Agreement in 1938, the dissolution of Czechoslovakia in March 1939, and finally the outbreak of war, only confirmed for Kelsen that he would not find a peaceful place for his academic work in Europe. In spite of the uncertainty of the promises that he could secure a post in the United States, he decided to emigrate with his wife in 1940. The emigration period of Kelsen's life was also reconstructed meticulously in the biography both in the aspect of very prosaic issues such as the extensive efforts to get financial means to support his family and to obtain a permanent university position (after 1945 a full professor in Berkeley), and from the point of view of

¹⁴ Bosiacki, „Wstęp”, 31ff.

¹⁵ Żukowski, *Wydział Prawa*, 328ff.

the continuation and change in academic studies (international public law). Olechowski's work reports Kelsen's engagement in the field of the analyses of international law in the post-war period step by step. His evaluations of the compliance with the objectives of the United Nations charter by the countries involved in armed conflicts can often be surprising. He referred to the actions of Western states more critically than he did to those of the Soviet Union as being guilty of violation of international law (p. 790).

Evidently, the most interesting part of the biographical narration of this long stage of his life is the monograph author's view of Anglo-American academia's reception of Kelsen's academic achievements. Despite his constant attempts to arouse the interest of the American academic world in the pure theory of law, it did not attain much recognition in North America. As it seems, the prevailing conviction about it was that Kelsen was a significant scholar, but that his ideas were mostly erroneous. The concept of relativism of values was rejected and the pure theory of law was considered to be an intellectual construction, anticipating authoritarian and dictatorial regimes. One has to agree with the author of the monograph that the differences between Anglo-Saxon and continental legal cultures were obstacles in the American perception of Kelsen's thoughts. In the system of *common law*, law was created as the result of a judge's reflections rather than an expression of a legislator's will, as was the case in Europe. The Anglo-Saxon "rule of law" did not correspond with the continental concept of *Rechtsstaat*. Thus, it was not easy to find an appropriate translation of terms used by a continental lawyer which would reflect an equivalent meaning in English. Indirectly, the rightness of such a conviction justifies the fact that the reception of Kelsen's theory happened in a completely different way in South America, where the patterns of the European legal culture prevailed.¹⁶

In the Anglo-American world of the 20th century, the main role will be played, and here the author of the monograph is right, by Herbert L.A. Hart's "soft" positivism. Contrary to Kelsen, Hart suggested a concept of minimum content of laws of nature. He criticised the idea that a concept of law is inseparably connected with punishment. He also questioned Kelsen's thesis that norms could not be derived from facts, but exclusively from other norms. Kelsen, adopting the radical division of facts and obligations (*Sein und Sollen*), and situating law in the sphere of obligations, could not agree to the reduction of the basic norm (*Grundnorm*) to facts. However, considering it as a right justified the charge of the vicious circle or *regressus ad infinitum*.¹⁷ Kelsen's dilemma was the weakest element in the presented concept of law. Kelsen's surname did not appear even once in a 1998 book about American legal positivism! Has Kelsen's pure theory of law been reduced to a has-been theory? Everybody who reads Olechowski's biography of Kelsen will certainly be able to answer this question for himself.

¹⁶ Gassner, "Hans Kelsen", 172–4.

¹⁷ Hart, *Pojęcie prawa*, 24–5.

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