

Book Review – Kelsen's Highest Moral Ideal

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Review of Jochen von Bernstorff, *Der Glaube an das universale Recht. Zur Völkerrechtstheorie Hans Kelsens und seiner Schüler*, Baden-Baden: Nomos, 2001 (233 pp.; €45,00).

A. Kelsen, the Habsburgs and the Austrian Republic

[1] Hans Kelsen was born in Prague in 1881. His parents, a Jewish couple of middle class background, moved to Vienna three years later. Kelsen lived in this city until 1930 and, in the years preceding the First World War, became a distinguished public lawyer in the Austro-Hungarian Empire. The latter fact bears witness to the renowned liberalism of the Habsburg regime at the turn of the century. Kelsen's own secular vision of the law, as an instrument for peace and union between different peoples, was very much inspired by the tolerant policies of the Dual Monarchy concerning the ethnic and national minorities in its territory. The Habsburg open-mindedness was not unrestricted, however. In order to be allowed to pursue an academic career, Kelsen had to pretend to convert to Catholicism in 1905.

[2] After the end of the monarchy, in 1918, the Chancellor of the first republican government, Karl Renner, entrusted Kelsen with the task of drafting a constitution for Austria. Kelsen's position as a respected law scholar and his close links to Renner's Social Democratic Party (SDAP) were, certainly, the main reasons for the appointment. But his formal political independence – he never became a member of the SDAP – allowed him to design a constitution that was acceptable for the Christian Socialists and the Liberal Nationalists as well, the other two political groups forming part of the governing coalition along with the Social-Democrats. Kelsen's draft was approved with minor modifications as the Austrian Constitution of 1920. In a further expression of public esteem, Kelsen was appointed, in 1921, to be a member of the Austrian Constitutional Court.

[3] The year 1920 marked, furthermore, the birth of his "Pure Theory of Law." Kelsen introduced the methodological conception of "purity" as well as the – later famous – designation itself in his work of that year *The Problem of Sovereignty and the Theory of International Law. Contribution to a Pure Theory of Law*. (1) In the following two decades, Kelsen's Pure Theory of Law had an enormous resonance in Europe, the United States and Latin America. Thus, it became one of the most well known and most discussed theories of the law in the history of the discipline, a position that it maintains to the present day.

[4] Students from all over the world soon started arriving in Vienna and Kelsen was able, in the decade of 1920-1930, to establish a legal school (the "Vienna School") of international relevance. However, this whole promising phase came to an abrupt end in 1930. A constitutional controversy on the remarriage of Catholics led to a political campaign against Kelsen, orchestrated in the press and in academic circles by the increasingly anti-Semitic Christian Socialists. In an ominous foretaste of the political climate about to beset Austria and Germany, Kelsen was ruthlessly dismissed from the Constitutional Court and forced into exile, first in Cologne until the Nazis came to power (1933), afterwards in Geneva (1933-1935), Prague (1936-1938) and the USA (Harvard University 1940-1942 and University of California, Berkeley 1942-1952). He remained in the USA until his death in 1973.

B. The Vienna School and German scholarship

[5] Jochen von Bernstorff's recently published study on the Theory of International Law of Kelsen and his disciples deals with a very much neglected subject in the vast corpus of literature on Kelsen: The very problematic relationship between, on the one hand, his passionate political belief in the need for strong international institutions (including an international court of law) and, on the other hand, his ideal of an objective, "apolitical" science of the law. These two directions of Kelsen's thinking seem, indeed, not entirely compatible. Von Bernstorff scrutinizes carefully the development of this internal tension in Kelsen's thought between 1916 and 1950 and *its effects* on the construction and method of the Pure Theory of the Law.

[6] Von Bernstorff's study deals extensively as well with the work on international law of two of Kelsen's most renowned disciples: Joseph L. Kunz and Alfred Verdross. Bearing in mind that the development of the Pure Theory of the Law was considered from the start as a collective enterprise, such attention to other members of the Vienna School should be usual in the literature on the subject, but it is not. Many, even most, authors tend to concentrate entirely on Kelsen. Von Bernstorff's analysis reveals, in contrast, a very interesting "dialogical" dimension in the development of the central thesis of the Pure Theory of Law. However, the dialogical perspective of the book does not end here: It includes the general context of the legal and political discussions in the German-speaking world at

that time. With an obvious mastery of the somber cultural climate in the Inter-war Period, von Bernstorff provides a fascinating panorama, bringing many a fresh insight into the political intentions and implications of the Vienna School's theory of international law. The tortuous relationship between Germany and the former Allied Powers contribute thus to explain much of the viciousness in the debates between the Vienna School and its critics (the anti-Semitic element was of course also present, especially concerning Carl Schmitt and some of his followers in those times).

[7] Among other German law scholars who contributed to the theory of international law in the 19th and in the first decades of the 20th century, Kaltenborn, Jellinek and Triepel were the most influential in the development of the Vienna School's theory of international law and they are the subjects of short critical studies by von Bernstorff.

[8] Kaltenborn was repeatedly quoted by Kelsen as one of his main sources of inspiration: He was the first to postulate the "objective" character of the international law, that is to say, its validity with independence of the changing, "subjective" will of the nation states. As a consequence of this thesis, the law of the nation state had to be considered as "subordinated" or "delegated" in its relationship to international law; both normative systems as parts of a whole. The Vienna School would later extend and develop this "monistic" conception of the international law ("monistic" meaning that national and international law are considered as a unity, *i. e.* as parts of a whole).

[9] Jellinek and his disciple Triepel, on the contrary, tried to describe the law of the nation state and the international law as wholly separate legal systems, with different sources of validity. Jellinek's and Triepel's "dualistic" theory of the international law represents, as von Bernstorff points out, the main critical target of Kelsen and his disciples.

[10] The source of the obligations of the state, under international law, are for Jellinek the acts of self-obligation of the nation states themselves. This approach has its roots in Hegel's thesis of an absolute predominance of the state will in international relations. But such a "voluntary" foundation for the validity of the international law leaves open the door for a unilateral "release" of the state from its obligations, as soon as the state changes its will and decides not to honor its past commitments. If that is the case, however, it cannot be affirmed that obligations, under international law, properly exist. What kind of obligation would suppose the possibility of instant release when the person under the obligation so wishes? In order to resolve this difficulty, Triepel proposed the idea of a "common will" attributable to all states, which supports the validity of the international law, independently of the changing will of each individual state. However, the compulsory character of this "common will" rests again on the fact that the states "feel" compelled by it. According to von Bernstorff, Triepel failed thus in his attempt to solve the tension between the objective and subjective principles of international law. Triepel's conception of international law had a considerable influence in Europe, nonetheless, but this was primarily because Triepel, following Jellinek, elaborated carefully on the complete separation of international law and state law. Jellinek's and Triepel's "dualistic theory" turned out, in the end, to be the dominant perspective on international law in the first decades of the 20th century.

1. The state and national sovereignty in discussion

[11] Kelsen and his disciples join the debate with the quite polemical aim of establishing a new methodological basis and, in fact, a wholly new intellectual outlook for the theories of the law, the state, and international relations. In the charged political climate of the time, the Vienna School directs a profound and certainly provocative critique against two very traditional and, in fact, highly valued concepts of the European political and legal thinking: the concept of the state and the concept of national sovereignty. From his first major contribution to the legal theory in 1920, Kelsen attempted to show that the idea of national sovereignty is an irrational "dogma" and the idea of state itself a possibly useful, but eventually dangerous "fiction".

[12] Kelsen maintained that Triepel's (as well as Jellinek's) "dualistic" theory of the relationship between state law and international law, *i. e.* the idea that they are two completely independent norm systems, has logical flaws. Triepel affirms that international law regulates the behavior of the states, while considering the state law and the international law as separate. But for Kelsen, the state and the law are one and the same (the so called "identity thesis"). Consequently, it is a contradiction to regard the international law as a separate legal system in respect to the state law, precisely because the former regulates certain aspects of the latter. They are thus "normatively linked".

[13] Kelsen's argument rests here entirely, of course, on the identity thesis, *i. e.* the identity of the state and the legal system. This thesis is one of the new and most important methodological tenets of the Pure Theory of the Law. According to the identity thesis, the "reality" of the state must be considered as entirely legal or normative. The state is a legal fiction, namely the "personification" of a particular legal system. The legal mind tends to consider a particular normative system as a "person", but it would be a mistake to think that there is more to the state than a system of legal norms thus "personified". All theories that attempt to proclaim certain non-legal elements such as "race", "culture", "language", "territory", or every other form of "empirical affinity" between human beings as essential for the unity of the state, have no scientific value whatsoever. They are ideologies with a political purpose, disguised

as a form of knowledge. The "fiction" of the state becomes dangerous when appropriated by these ideologies, precisely because they pretend that the state represents some sort of reality over and above the purely legal or normative. Therefore, in regulating the interaction between states, international law coordinates in practice the application of different national legal systems.

[14] A further argument against the dualistic theory results from a second methodological thesis of the Pure Theory of Law. The thesis claims that the science of the law, as every other science, must attempt to present its material as a coherent whole. Because international law and state law are normatively linked, it is necessary to consider them as parts of one over-arching legal system. However, the dualistic theory fails to present its material in a logically consistent way; in fact, it refuses to do this. From this results a further question. If two legal systems are linked, forming a coherent whole, the relationship must be considered either as subordination or as delegation. In case of a conflict between norms of the two systems, it is necessary to establish which one of them prevails. One of the systems is thus "subordinated" to the other, in other words, the validity of the norms of the first is "delegated" from the validity of the norms of the second.

[15] According to Kelsen, several practical and theoretical reasons make it advisable to consider state law as subordinate to international law. This point of view became known as the "primacy thesis" (meaning, needless to say, primacy of the international law) and was strongly endorsed by Kelsen's disciples Kunz und Verdross. In the first part of the book, von Bernstorff describes thoroughly the development of the primacy thesis as well as certain disagreements, inside the Vienna School, about its justification and its consequences.

[16] The primacy thesis can be considered as the most important endeavor of the "Vienna School" in the field of international legal theory. Its political consequences are enormous. The primacy thesis entails the outright denial of state sovereignty, be it as a scientific idea or as a civilized political belief. In order to show the superior plausibility of the primacy thesis, Kelsen submits the "dogma" of the state sovereignty to a devastating critique.

[17] The argument proceeds in the form of a "*reductio ad absurdum*". Kelsen tries to make clear that the idea of state sovereignty, while seemingly reasonable, has bizarre consequences. He who proclaims the sovereignty of his own state, affirms Kelsen, regards the validity of this state's law as superior to any other. The idea of state sovereignty, in fact, is employed to assert the validity of the legal norms of a particular state, whenever there is a conflict between these and international law. Confronted with a certain obligation founded on international law, the state (or the legal scholar) can point out that this particular international norm contradicts specific legislation of the state itself, and it would be contrary to its national sovereignty to comply with the international legislation. In other words, the idea of state sovereignty provides an enduring justification to resolve conflicts between international law and the law of the state in favor of the latter. The sovereignty of the nation state and the primacy of state law are one and the same. From this point of view, international law must be regarded as subordinated to state law.

[18] Moreover, from the perspective of the sovereign state, no legal norm can be considered valid if it is not "recognized", *i. e.* declared to be valid by the nation state itself. This applies not only to international legislation but to the legislation of the other states as well. This point leads to an important discovery: In its original sense, the sovereignty of the state turns out to be incompatible with the sovereignty of the other states. One particular sovereign state must be at the center of this construction, and all other legal norms, be it international legislation or the law of other states, are regarded as subordinated to this state's law. This is certainly bizarre. The one nation state at the center of the construction must pretend to represent the source of validity for every single legal norm in the world.

[19] The defenders of the idea of sovereignty will try to retire to a dualistic construction, of course, in order to evade such a counterintuitive outcome. They will affirm that, when proclaiming the sovereignty of one particular state, the validity of the international law and the sovereignty of other states are not affected. The sovereign state regards certain international legislation (or legislation of other states) as invalid concerning this particular state, but the same legal norms remain valid for other states and the international community. For Kelsen, this amounts to proclaiming the validity and the invalidity of the same norms at the same time. The attempt to avoid the bizarre consequences of the idea of sovereignty leads thus to logical inconsistencies.

[20] The defenders of the idea of sovereignty must present the legal material as a coherent whole and admit thus that, from their point of view, the validity of every possible legal norm depends upon the will of the sovereign state at the center of the construction, namely from the will of their own nation state. Kelsen is even willing to acknowledge that, presented in this way, the idea of national sovereignty can form the basis of a logically sound conception of the (state) law. As long as the contradictions of a dualistic point of view are avoided, it is possible to describe all the law as having its source of validity in the will of the one sovereign state. International law thus becomes "assimilated" by the state law: Its validity rests on the recognition of the one sovereign state. Now, this would be an absolute subjectivism, just like the philosophical positions that only recognize the existence of the perceiving subject, the "I", and are skeptical or negative about all the rest, *i. e.* the world and the other subjects. While logically sound, this would

not be a defensible theory of international law. From the point of view of the sovereignty, that is to say the primacy of the state law, international law simply does not exist. The attempt to include the idea of state sovereignty in a theory of international law has no rational justification whatsoever. For the purposes of international law theory, sovereignty is only a "dogma", an irrational belief with a political purpose.

[21] According to Kelsen, sovereignty and its corollary, the primacy of the state law, are the instruments of a particular ideology, namely imperialism. The goal of imperialism is to advance the power of one nation state. International law counts as a possible obstacle to this goal and the "dogma" of sovereignty shall neutralize it when necessary.

[22] The opposite of imperialism in the field of international relations is pacifism, a political position that, needless to say, champions the primacy of international law. From this point of view, the state law is subordinated to international law and the state itself must be considered as an "organ" (in the sense of a subordinated organization) of the international community. It is through the operation of a well-established principle of international law, the "principle of recognition", that the international community consents to a given political power calling itself a "state" and acknowledges it as such. The international recognition can be understood, according to Kelsen, as a delegation on the part of the international community to the state of the authority to create legal norms.

[23] But the decision for an imperialistic or a pacifistic political outlook cannot be taken on scientific grounds. For Kelsen, the Pure Theory of Law must avoid subscribing to one or the other position. It must show the logical consequences of both, but keep its political neutrality, *i.e.* its "purity".

[24] Nonetheless, as von Bernstorff points out, merely to entertain the idea of the primacy of international law constituted, especially at that time, a deliberate exercise in taboo breaking. What is more, Kelsen flirted with the idea of a world state and he did not reject it out of hand (more on this later). The reception of such ideas was not particularly forthcoming in the German-speaking legal community. In von Bernstorff's absorbing description of the ensuing theoretical struggle, Carl Schmitt, Kelsen's most renowned scientific adversary and personal nemesis, assumes a leading role.

[25] Two practical consequences of the primacy thesis attracted the hostility of many critics. The Pure Theory of Law, in the name of logical coherence, regarded the League of Nations as an autonomous legal entity, a legal persona in its own right. Moreover, Kelsen and his disciples proclaimed the Treaty of Versailles to be a legally binding instrument for Germany. However, for the German critics of Kelsen, the Treaty of Versailles was no more than an "unjust imposition" of the Allied Powers. According to these critics, in a misguided application of the supposedly "pure" methodological principles, the Vienna School refused to consider the "morally wrong" character of the Treaty, which should deprive it of the status of a legal norm. The League of Nations, for its part, was proclaimed by the same critics to be a mere "political construct" (no legal persona) aiming at the perpetuation of the Treaty of Versailles and the continuing "oppression" of Germany. By refusing to concentrate on these political and "moral" questions, concluded the critics, the Pure Theory of the Law impaired the German efforts to obtain a revision of the Treaty. Carl Schmitt elaborated on these arguments. The attempt at a "juridification" of international politics had to be denounced, according to Schmitt, as a conspiracy of the Vienna School and the French science of international law. It was necessary, on the contrary, to bring about a "politization" of the science of law, in order to contribute to the establishment of a "more just" system of international relations.

[26] Von Bernstorff concludes the second part of the book with a detailed analysis of Kelsen's proposals of 1944 for the creation of a "Permanent League for the Maintenance of Peace". This international organization was designed in such way as to bring the international law system to a higher level of centralization and efficacy. For Kelsen, the international law of his time corresponded to a "primitive" phase in the evolution of the normative systems. He applied to this analysis several insights obtained through the historical and sociological study of early, rudimentary state organizations. In the "primitive" phase, a legal order is already in place, but the creation and application of the law remains in the hands of the members of the legal community. In the international law order of that time, the states themselves had to decide if and by whom the law was violated and which legal sanctions, such as reprisals and war, were to be applied.

[27] The next phase in the evolution of a legal system is accomplished through the creation of central institutions. A division of labor is necessary, such that the functions of creation/ modification and application of the law are assigned to different legal bodies. The first step in this direction, according to Kelsen, consists in the introduction of an independent judge. This role had to be assumed, in a future world order, by an international law court with jurisdiction over all kind of disputes between the states and the with the authority and material resources to apply sanctions either against states or individuals. The punishment directed against the heads of state would allow replacing, for the most part, reprisals and war as international sanctions. In their collective logic, independent of personal responsibility, war and reprisals are deemed by Kelsen to be "primitive" kinds of punishment, very much analogous to "blood revenge" in certain undeveloped social systems.

[28] As could be expected, Kelsen was greatly disappointed by the UN Charter and the limits imposed on this international institution by its founding members, especially considering the deferential stance of the Charter *vis-à-vis* the principle of national sovereignty. However, von Bernstorff regards Kelsen's main arguments against the Charter as inadequate. Indeed, Kelsen's review of the UN Charter exposes, according to von Bernstorff, one of the weakest points in his whole theory of international law. Because of the self-imposed restriction on the expression of political views resulting from the "purity" of the method, the critique has to assume a merely "technical", "legal" perspective. But this pretense of technical neutrality produces, in the end, a critique that is only destructive. As a consequence, the opportunity for a constructive interpretation of the Charter after Kelsen's own cosmopolitan project is lost.

[29] The assessment of Kelsen's critique of the UN Charter opens the concluding remarks of the book. Von Bernstorff concedes that the analytical precision of Kelsen's method enabled the Vienna School to carry out a much-needed critical revision of the theory of international law, showing in the process the political and ideological core of many central concepts and received doctrines. In this way, the Pure Theory of Law removed many obstacles for the development of its own cosmopolitan project in international relations. Destruction and construction were two linked moments in this theoretical apparatus. In the end, however, the ideal of an "apolitical" and "exact" science of the law tended to predominate, leading to a diminished role for the legal scholar and for the legal science itself. The Vienna School's idealistic cosmopolitan project remains easily recognizable, certainly, but only in the form of an outline, behind the demolished constructions of previous legal theories and ideologies.

II. Kelsen the ethical positivist

[30] As mentioned before, von Bernstorff's critical analysis of the political and legal debates in the German speaking world of the Inter-War Period is brilliant, and it provides a new and better understanding for the construction and development of the Pure Theory of the Law in those early years. Von Bernstorff's conclusions and especially his overall assessment of the Vienna School's method in the field of international law are refreshingly provocative and very well argued. Two minor omissions are worth mentioning, nonetheless, as well as their impact on von Bernstorff's overall assessment of the Vienna School and especially of Kelsen.

[31] The first minor omission concerns the strongest of all the taboo-breaking thesis in the whole theoretical outlook of the Pure Theory of the Law, *i.e.*, the open proclamation of a world state as the highest political task confronting humanity. Kelsen presents this thesis in his book on national sovereignty published in 1920 (2nd edition 1928) *The Problem of Sovereignty and the Theory of International Law*, which is one of his major works on international legal theory. Von Bernstorff discusses at length different parts of this book, of course, but he barely deals with the thesis of the political desirability of a world state, except to draw attention to the fact that Kelsen was aware of the scarce prospects for its realization in the political circumstances of the time. (2)

[32] Von Bernstorff reduces considerably, in this way, the significance that the thesis of the desirability of a world state had for Kelsen. Yet the thesis is summarized in the last sentence of the work quoted above, amounting in fact to a conclusive statement for Kelsen's whole theory of international law:

"To every political quest must be assigned [...] the never ending task of such a world state as an organization of the world." (3)

[33] More interesting still, Kelsen presents in the same book several arguments supporting the idea of a world state, which von Bernstorff does not discuss at all. Considering that this idea remains as much a taboo today as it was seventy years ago, Kelsen's thoughts on the subject are surely worth mentioning. For the present reviewer at least, they are perfectly convincing. The main thrust of the argumentation can be briefly rendered as follows: The foundation of a world state, that is, of powerful international institutions, able to create and apply (international) law, exactly as this is done by the nation states in their own territories at present time, entails certainly the danger of abuses of power. A given subject of the international community (a state) could very well be able to use illegitimately ("capture") the institutions of the world state with the aim of tyrannizing another state or several at once. This danger constitutes one of the usual reasons for the rejection of the idea of a world state.

[34] Kelsen points out that, in the first place, this is not at all different with the state institutions in a national community: They can be – and often are – abused for the advancement of particular interests. In the second place, one must ask if the small, weak states of the earth are better off in the current system. As a matter of fact, the powerful states are constantly trampling upon the weaker ones. What would happen if world state institutions were created? This can at best be discerned through an analogy with the equality of the citizens in a nation state. Are the state institutions a menace for the legal equality of the citizens, or rather their only guarantee? (4) In a state of anarchy, after all, it is the powerful who in all probability impose their will on the weak. This state of anarchy represents the situation of international relations in our time. In the name of national sovereignty, the weaker states

are wary of lending support to the creation of a world state. But the idea or rather "dogma" of national sovereignty only benefits the powerful, giving them the legal justification to ignore international law when it does not suit them. As mentioned before, for Kelsen the idea of national sovereignty is a tool of imperialism and nothing else. The weaker states of the earth would do well to discard this notion entirely, and promote instead the creation of powerful international institutions, endowed with authority over and above the sovereign states.

[35] The second minor omission in von Bernstorff's book is closely related to the first; it concerns the ethical content of the idea of a world state. This is an interesting aside of Kelsen's political proposals in the legal theory: He was very conscious of the circumstance that legal concepts and moral ideas have some sort of intrinsic connection. Certainly, this goes flatly against the traditional reading of Kelsen as a strict positivist (in one of the myriad of possible senses for the word), a Kelsen who supposedly avoids in his "Pure" Theory of the Law every ethical (or political, for that matter) substance. Von Bernstorff's book has the great merit of showing that this received opinion does not accord very well with Kelsen's theory of international law. There are political notions and political ideals intertwined with the apparently "technical" proposals of the Pure Theory of Law, albeit their relationship is very problematic, and sometimes denied by Kelsen himself. But there is one more twist to the complexity of Kelsen's thought. In the work already quoted above, *The Problem of Sovereignty and the Theory of International Law*, Kelsen identifies openly the idea of the supremacy of international law (the primacy thesis) with the ethical – and legal – concept of a "*civitas maxima*", defended by Christian Wolff in the 18th Century. The ethical foundation of the law assumes therefore a certain role in the development of a theory of international relations according to Kelsen. This question cannot be discussed extensively in this review, of course, but the following quote should make sufficiently clear that the point is worth looking upon:

"The legal unity of mankind, which only provisionally is divided in states formed in a more or less arbitrary way, the civitas maxima as an organization of the world: This is the political core of the legal hypothesis of the primacy of international law. But this is, at the same time, the fundamental idea of pacifism, which represents, in the field of international politics, the opposite of imperialism. For an objectivistic conception of life, the ethical concept of the human being is the concept of humanity. In the same way, for an objectivistic legal theory the concept of law is identical with the concept of international law and, precisely for this reason, an ethical concept." (5)

[36] Von Bernstorff does not discuss this ethical aspect of the primacy thesis, which admittedly was not elaborated by Kelsen in later works. Nonetheless, Kelsen never retreated openly from this position and continued to affirm the "universalistic" and "objectivistic" character of the Pure Theory of Law in more popular works like his handbook of 1934. (6) He contradicted himself, certainly, and many times pretended that "pure" means value-free. Nevertheless, these contradictions are closely related to the "tensions" between his political ideals and his theory of international relations, which form, after all, the main subject of Von Bernstorff's book.

[37] Von Bernstorff deals extensively, instead, with the issue of the "free choice hypothesis", namely the option between one of the two fundamental perspectives of the international law, which Kelsen regarded as a necessarily open question. On the one hand, the "pacifist" position, sustaining the primacy of the international law and, on the other hand, the "imperialistic" position, defending the primacy of the nation state's law. As mentioned above, Kelsen declared that a theory of law based on the primacy of state law (the law of the one sovereign state at the center of the construction) is logically sound in itself. There are no scientific reasons, in other words, for rejecting the idea of national sovereignty or the perspective on the law ensuing from it. This is a political (and ethical) decision, and the Pure Theory of Law, while showing the logical consequences of both fundamental points of view, must keep its political neutrality, *i.e.* its "purity".

[38] In the opinion of the present reviewer, nevertheless, this free option between fundamental positions is more apparent than real. Kelsen shows clearly that the first alternative, the primacy of the sovereign state's law, cannot serve as the basis of a conception of international law as such. From the point of view of one's own sovereign state, it is only possible to construct a theory of one's own state law. It amounts, as Kelsen stressed repeatedly, to a radical subjectivism or solipsism, negating the existence of other states as *persona* in their own right. The decision between the points of view constitutes a moral one, in any case, and Kelsen avoids the substitution of moral considerations for scientific ones (this is entirely appropriate in the Kantian or Neo-Kantian tradition he belongs to). The decision cannot be taken on scientific grounds. However, one would think that, for Kelsen, the immorality of the radical subjectivism is obvious enough. Indeed, in the work quoted above he says as much:

"Is there a higher degree of universalism as the one embodied by the idea of humanity as conceptual and ethico-political unity? Is there a surest way to the negation of everything ethical as subjectivism, given that everything ethical is related to objective norms, to an "ought-value" [Sollen], whose validity must be independent from the subject, in order to be able to speak of validity at all?" (7)

[39] Admittedly, he was not equally open and explicit on this subject in later works. Considering the political evolution

of the time, this is perhaps all too understandable. Anyway, the immorality of radical subjectivism remains in other writings implicit, but obvious enough. In missing this point, von Bernstorff misses an interesting dimension of Kelsen's political beliefs: The ethical foundation and ethical consequences of his universalism or cosmopolitanism.

C. Conclusion

[40] Von Bernstorff's overall critical assessment of the Pure Theory of Law seems, in view of these two minor omissions, perhaps not entirely fair to Kelsen. According to von Bernstorff, the ideal of an "apolitical" science of the law tended to predominate in Kelsen's thought and, therefore, the critical apparatus of the Pure Theory of the Law was directed to theoretically necessary but mainly destructive purposes. However, Kelsen's arguments in favor of a world-state, on the one side, as well as his attempt at establishing a link between ethics, politics and legal theory, on the other side, are without a doubt highly constructive theoretical enterprises. If they are omitted from a discussion of the Pure Theory of Law (they almost always are), the result is going to be perhaps more unfavorable than it need be concerning the "constructive" and "destructive" tendencies of Kelsen's work.

[41] In another sense, however, von Bernstorff's assessment is right and the omissions are quite minor. Both "constructive" theoretical – and political – projects are introduced and elaborated by Kelsen in his already quoted work of 1920 (2nd edition 1928), but they are not developed in later writings. They are not rejected either; they remain "implicit", as it were. In view of the political evolution of the thirties and forties, with the criminal ascent of nationalism and imperialism at first, and the establishment of a world order based on the principle of national sovereignty later on, it is surely understandable that Kelsen was not able or willing to pursue such constructive but "idealistic" projects. The triumph of the dogma of national sovereignty was indeed complete, after its almost sacramental sanction by the UN Charter. Even in our days, the commitment to national sovereignty remains a serious obstacle to the construction of working international institutions, provided with a higher authority than the nation states. Under these circumstances of international politics, Kelsen was doubtless conscious of the need to keep a mainly critical line of work, holding back the finer elaboration of his "universalistic" and "cosmopolitan" political and legal ideas for future, more auspicious times. His optimistic outlook of the twenties, when he still was able to predict confidently that "The Law shall become the organization of humanity and, in this way, it will become one with the highest moral ideal", (8) was in the thirties and afterwards almost completely lost.

(1) Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer Reinen Rechtslehre* (1st edition Tübingen 1920), 2nd reprint of the 2nd edition (Tübingen 1928), Aalen, Scientia Verlag, 1981.

(2) Jochen von Bernstorff, *Der Glaube an das universale Recht. Zur Völkerrechtstheorie Hans Kelsens und seiner Schüler*, p. 97-99 (2001).

(3) Hans Kelsen, *Das Problem der Souveränität*, op. cit., p. 320.

(4) Hans Kelsen, *Das Problem der Souveränität*, op. cit., p. 272.

(5) Hans Kelsen, *Das Problem der Souveränität*, op. cit., p. 319.

(6) Hans Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik*, 2. reprint of the 1. edition Leipzig and Vienna 1934, Aalen, Scientia Verlag, 1994.

(7) Hans Kelsen, *Das Problem der Souveränität*, op. cit., p. 318 (n. 2).

(8) Hans Kelsen, *Das Problem der Souveränität*, op. cit., p. 205.