

Some Issues in the Exchange between Hans Kelsen and Erich Kaufmann

Stanley L. Paulson¹

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¹ I wish to express my gratitude to the Alexander von Humboldt-Stiftung (Bonn - Bad Gotesberg) which supported this work through the conferral of the Humboldt Research Prize (2003-04). In my capacity as awardee, I spent the year in residence at the University of Kiel, and I remain grateful to my host there, Professor Robert Alexy, for his gracious hospitality. Finally, I am grateful, as always, to Bonnie Litschewski Paulson for her splendid editorial work, not least of all on the numerous quotations translated from the German.

1 Introduction: Four Rounds in the Exchange

Unlike Hans Kelsen, Erich Kaufmann (1880-1972) is not a household name in juridico-philosophical circles. Kaufmann was, however, a prominent figure in the legal community in Wilhelmine and Weimar Germany, and his work in constitutional law and public international law was well known in his own day.² What is more, he is generally credited with having in effect launched the extraordinary Weimar public law debates,³ from 1926 to the end of the Weimar Republic, seven years later. These debates were the most significant exchanges by far on issues in Weimar constitutional law and constitutional politics, with important lessons reaching well beyond Weimar Germany. All of the leading figures in the field were on stage – Gerhard Anschütz, Hermann Heller, Walter Jellinek, Kaufmann, Kelsen, Hans Nawiasky, Carl Schmitt, Rudolf Smend, Richard Thoma, and Heinrich Triepel. The debates reached their pinnacle in the 1931 exchange between Carl Schmitt and Hans Kelsen on the question of who, in Weimar Germany, ought to be the “Guardian of the Constitution”.⁴

There were of course earlier exchanges, in books and in the scholarly journals. Although they have received less attention than the Weimar public law debates, these earlier exchanges are in some instances of genuine interest, a good example being the exchange between Hans Kelsen and Erich Kaufmann. It consists of four rounds and culminates in their dispute in 1926, a central part of

² For an informative general sketch of Erich Kaufmann’s life and work, see Friedrich, Manfred, *Erich Kaufmann (1880-1972). Jurist in der Zeit und jenseits der Zeiten*, in *Deutsche Juristen jüdischer Herkunft*, ed. Helmut Heinrichs *et al.*, C.H. Beck, Munich, 1993, p. 693-704.

³ See generally Stolleis, Michael, *A History of Public Law in Germany 1914-1945*, trans. Thomas Dunlap, Oxford U.P., Oxford, 2004 [*abbrev. title below: Stolleis, History*], p. 69, 139-197, *et passim*. I say “in effect”, for neither a program of such debates nor a forum for them had been envisaged (apart from the annual meetings of the Society of German Public Law Teachers). Rather, it was the controversy generated by Kaufmann’s lecture of 1926 that started the ball rolling. On his arguments and the response thereto, see the text at nn. 24-40 below.

⁴ Schmitt, Carl, *Der Hüter der Verfassung*, Archiv des öffentlichen Rechts 55 (N.F. 16) (1929) p. 161-237; Schmitt, Carl, *Der Hüter der Verfassung*, J.C.B. Mohr, Tübingen, 1931 (the text in the latter is greatly expanded); Kelsen, Hans, *Wer soll der Hüter der Verfassung sein?*, Die Justiz 6 (1930/31) p. 5-56. On the Schmitt-Kelsen exchange, see Balakrishnan, Gopal, *The Enemy. An Intellectual Portrait of Carl Schmitt*, Verso, London and New York, 2000, at ch. 10 (138-154). This was almost certainly the most celebrated of all the Weimar exchanges, both for its subject matter – Reich President vs. constitutional court (although the Republic had already displaced the Parliament by turning to the so-called “reserve constitution” with its emergency powers) – and for the caliber of its participants, for Schmitt and Kelsen were without a doubt the most formidable intellects of all the talented people on the stage. This pinnacle was not, however, the last of the Weimar exchanges. The last exchange stems from the case *Prussia vs. the Reich*, heard before the *Staatsgerichtshof* in 1932. For the proceedings, see *Preußen contra Reich vor dem Staatsgerichtshof*, Verlag Dietz, Berlin, 1933. See also the response: Kelsen, Hans, *Das Urteil des Staatsgerichtshofs vom 25. Oktober 1932*, Die Justiz 8 (1932/33) p. 65-91. A general monographic study is: Grund, Henning, “*Preußenschlag*” und *Staatsgerichtshof im Jahre 1932*, Nomos, Baden-Baden, 1976. On Schmitt’s central role, representing von Papen’s government, see Seiberth, Gabriel, *Anwalt des Reiches. Carl Schmitt und der Prozess “Preußen contra Reich” vor dem Staatsgerichtshof*, Duncker & Humblot, Berlin, 2001.

the greater debate that marks the beginning of the Weimar public law debates. In the first of the four rounds, there is, in Kelsen's treatise of 1920, *The Problem of Sovereignty and the Theory of International Law*,⁵ his response to points in Kaufmann's treatise of 1911, *The Nature of International Law and the Clause rebus sic stantibus*.⁶ A second round is marked by Kaufmann's sharply worded and broad-ranging criticism of Kelsen, found in Kaufmann's little book of 1921, *Critique of Neo-Kantian Legal Philosophy*.⁷ In a third round, Kelsen, in his treatise of 1922, *The Sociological and Legal Concept of the State*, criticizes Kaufmann further, in the course of answering him on several of the points he had made in his *Critique* of 1921.⁸ The fourth and final round, separated both in theme and setting from the first three, consists of Kaufmann's lecture defending article 109 of the Weimar Constitution, its equality clause, along with the reaction of Kelsen (and others) at a meeting of the Society of German Public Law Teachers⁹ held in Münster in 1926.

My contribution to this *Festschrift* for my colleague and friend Jes Bjarup has two parts. In this introductory section – the first part of my contribution – I provide as a general orientation a sketch of the four rounds in the Kelsen-Kaufmann exchange. Then, in the sections that follow – the other part of my contribution – I take up specific issues in the second round of the Kelsen-Kaufmann exchange, with an eye to answering, on Kelsen's behalf, Kaufmann's criticisms. Since Kaufmann, with a single important exception, misunderstands or misreads Kelsen, my effort here is to set the record straight on some specific issues stemming from the exchange that are of interest in legal theory and legal philosophy, to wit: the status of the neo-Kantians' and Kelsen's "two-worlds" doctrine, which represents their escape from naturalism, then the issue of legal monism and, in this connection, Kaufmann's mistaken attribution to Kelsen of

⁵ Kelsen, Hans, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre*, J.C.B. Mohr, Tübingen, 1920 [abbrev. title below: Kelsen, *PS*, with section and page nos.]. See generally Paulson, Stanley L., *Souveränität und der rechtliche Monismus. Eine kritische Skizze einiger Aspekte der frühen Lehre Hans Kelsens*, in *Demokratie und sozialer Rechtsstaat in Europa. Festschrift für Theo Öhlinger zum 65. Geburtstag*, ed. Stelzer, Manfred, et al., WUV Universitätsverlag, Vienna, 2004, 21-40.

⁶ Kaufmann, Erich, *Das Wesen des Völkerrechts und die Clausula rebus sic stantibus. Rechtsphilosophische Studie zum Rechts-, Staats- und Vertragsbegriffe*, J.C.B. Mohr, Tübingen, 1911.

⁷ Kaufmann, Erich, *Kritik der neukantianischen Rechtsphilosophie*, J.C.B. Mohr, Tübingen, 1921 [abbrev. title below: Kaufmann, *Kritik*], repr. Kaufmann, *Gesammelte Schriften*, 3 vols., ed. van Scherpenberg, A.H., et al., Otto Schwartz, Göttingen, 1960 [abbrev. title below: Kaufmann, *Ges. Schr.*], vol. 3, 176-245.

⁸ See Kelsen, Hans, *Der soziologische und der juristische Staatsbegriff*, J.C.B. Mohr, Tübingen, 1922, § 18 (at p. 99-104).

⁹ On the Society, see Stolleis, *History* (n. 3) p. 178-197, and also: Scheuner, Ulrich, *Die Vereinigung der Deutschen Staatsrechtslehrer in der Zeit der Weimarer Republik*, *Archiv des öffentlichen Rechts* 97 (1972) p. 349-374; Smend, Rudolf, *Die Vereinigung der Deutschen Staatsrechtslehrer und der Richtungsstreit*, in *Festschrift für Ulrich Scheuner zum 70. Geburtstag*, ed. Ehmke, Horst, et al., Duncker & Humblot, Berlin 1973, 575-589; Stolleis, Michael, *Die Vereinigung der Deutschen Staatsrechtslehrer. Bemerkungen zu ihrer Geschichte*, *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 80 (1997) p. 339-358.

Mach's principle of economy in thought, and, finally, Kaufmann's charge that Kelsen's legal theory is "formalistic".

The first round of the Kelsen-Kaufmann exchange centers on Kelsen's treatise, *The Problem of Sovereignty*, which contains, *inter alia*, his blistering criticism of arguments in Kaufmann's major work, *The Nature of International Law*. As always in Kelsen's criticism of both his predecessors and his contemporaries, the thrust of his remarks turns on the charge of naturalism¹⁰ – the view, in a word, that *everything* is a part of nature, that everything belongs to the world of the physical and the psychical. Kaufmann, failing to distinguish between psychological and juridical will,¹¹ cannot see his way clear to distinguishing between power and law either. Indeed, as Kelsen argues, Kaufmann determines what is lawful in the international sphere by looking to whose exercise of power has prevailed. That is, Kaufmann champions the doctrine that "*victory in war* proves to be confirmation of the idea of law, proves to be the ultimate norm that decides which of the states is *lawful*".¹² This, Kelsen replies, is "to give voice not to an idea of law but to the principle of naked power".¹³

Kelsen's treatise appeared in 1920. Kaufmann's response – the second round of the exchange – came quickly. He published his *Critique of Neo-Kantian Legal Philosophy* in 1921, addressing, *inter alia*, Kelsen's legal theory with criticism that at some points can only be described as a diatribe. One example is his response to Kelsen's case for legal monism, that is, the unity of municipal and international law, where Kelsen defended a juridico-conceptual scheme and endorsed, on legal policy grounds, a system of world government, going so far as to invoke the *civitas maxima* of Christian Wolff.¹⁴ Exercised by what he saw

¹⁰ See generally Paulson, Stanley L., *Zwei radikale Objektivierungsprogramme in der Rechtslehre Hans Kelsens* in Hans Kelsen, – Rechtsphilosoph und Staatslehrer, ed. Stolleis, Michael, *et al.*, Mohr-Siebeck, Tübingen (at the press). One might well think that my remark, "As always ...", is exaggerated, for it is well known that Kelsen did battle on two fronts, that of fact-based legal theories and that of natural law. See, however, Kelsen's response to Kaufmann's 1926 lecture, text at nn. 37-40 below, for another view of the status of the second front.

¹¹ Kelsen, *PS* (n. 5) § 45 (p. 199 n.). See also Kelsen, Hans, *Hauptprobleme der Staatsrechtslehre*, J.C.B. Mohr, Tübingen, 1911, at ch. 5 (121-162); Paulson, Stanley L., *Hans Kelsen's Earliest Legal Theory: Critical Constructivism*, *Modern Law Review* 59 (1996) p. 797-812, repr. *Normativity and Norms. Critical Perspectives on Kelsenian Themes*, ed. Paulson, Stanley L. and Litschewski Paulson, Bonnie, Clarendon Press, Oxford, 1998, 23-43.

¹² Kaufmann, *Das Wesen des Völkerrechts* (n. 6) p. 153 (emphasis in original) quoted in Kelsen, *PS* (n. 5) § 54 (p. 265).

¹³ *Ibid.* Others, too, criticized Kaufmann from this standpoint. See e.g. Nelson, Leonard, *Rechtswissenschaft ohne Recht*, Veit, Leipzig, 1917, at ch. 8 (144-189) repr. Nelson, *Gesammelte Schriften*, 9 vols., Felix Meiner, Hamburg, 1972, vol. 9, 248-285; Brecht, Arnold, *Aus nächster Nähe. Lebenserinnerungen eines beteiligten Beobachters 1884-1927*, Deutsche Verlags-Anstalt, Stuttgart, 1966, p. 105. See, too, the rewarding overview of Kaufmann's work in public international law in Koskeniemi, Martti, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960*, Cambridge U.P., Cambridge, 2002. Koskeniemi is more charitable to Kaufmann than I am, but he does not have occasion to consider the *Schmähschrift* of 1921, Kaufmann's *Kritik* (n. 5).

¹⁴ Kelsen, *PS* (n. 5) § 53 (p. 249-257).

as formalism in Kelsen's legal theory, Kaufmann replies: "[I]f Kelsen is convinced that the purification of *concepts* according to the ideal of a world-law monism could contribute anything to the *realization* of that ideal, this is a conviction that can only be based on a radically 'logicistic' metaphysics (*logizistische Metaphysik*).... The metaphysics of this rationalistic logicism is so grotesque as to take on something of the grandiose."¹⁵

The quotation is instructive, for it illustrates the charge underlying virtually everything Kaufmann says in his often intemperate criticism of Kelsen. The charge is formalism. Taking our cues here from the legal historians (who, in my view, have made more sense of the notion than their counterparts in legal theory),¹⁶ we can say that "formalism" is used, in its familiar pejorative sense, to refer to a judicial decision that fails to address the problem that gave rise to litigation in the first place, offering instead definitions, conceptual distinctions, categories, and the like – in a word, "formalistic" parries. Such a decision was taken, for example, in the case of the *United States v. E.C. Knight Co.* (1895).¹⁷ The Supreme Court heard a challenge to the 1887 Sherman Antitrust Act, which the Congress had enacted in an effort to break up the American Sugar Refining Company with its 93% monopoly of the nation's sugar market. The Act regulated interstate commerce and, according to article I of the Constitution, could only regulate interstate commerce. But here is the rub: The Court, drawing on an earlier, narrow reading of the term, defined "interstate commerce" as *transport*, concluding that the Act did not reach to manufacturing, which by its nature was intrastate.¹⁸ Since the company was engaged in manufacturing, the Act did not – and constitutionally could not – apply to it. In short, a formalistic definition, which served in its day to forestall the government's efforts to break up the cartell.

The same thread, *mutatis mutandis*, is picked up in Kaufmann's criticism of Kelsen. That is, Kaufmann was clearly of the view that Kelsen's legal theory was formalistic in failing to address the problems of the day.¹⁹ Would that

¹⁵ Kaufmann, *Kritik* (n. 7) p. 29 (emphasis in original) repr. *Ges. Schr.* (n. 7) vol. 3, 198. The concept "logicism" was introduced early in the twentieth century to counter "psychologism". See e.g. Wundt, Wilhelm, *Psychologismus und Logizismus*, in Wundt, Kleine Schriften, 3 vols., Wilhelm Engelmann, Leipzig (vols. 1-2) 1910-11, Alfred Kröner, Stuttgart (vol. 3) p 1921, vol. 1, p. 511-634, and see generally Gabriel, Gottfried, *Logizismus*, in *Historisches Wörterbuch der Philosophie*, vol. 5, Schwabe, Basel, 1980, 483-484. At roughly the same time, the concept was also used to characterize a particular position in the foundations of mathematics. In European legal science, however, "logicism" was simply a term of abuse. It was understood as a synonym for "formalism", but its connotations were, I think, even nastier. To be sure, Kaufmann was not the only Weimar figure who criticized Kelsen in "logicistic" terms; one thinks of both Hermann Heller and Gerhard Leibholz, see Paulson, Stanley L., *Neumanns Kelsen*, in *Kritische Theorie der Politik*, ed. Iser, Matthias and Strecker, David, Nomos, Baden-Baden, 2002, p. 107-128, at 109-113.

¹⁶ See e.g. Gilmore, Grant, *Ages of American Law*, Yale U.P., New Haven, 1977, p. 64-67; Nelson, William E., *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth-Century America*, *Harvard Law Review* 87 (1973-74) p. 513-566.

¹⁷ *United States Reports* 156 (1895) p. 1-46.

¹⁸ See *ibid.* 12 *et passim*.

¹⁹ "It is without a doubt correct that the concepts of empirical legal science contain political, psychological, and sociological elements that cannot be logically 'created' from the concept

Kaufmann's charge of formalism could be put to the test in the context of the Kelsen-Kaufmann exchange. As it happens, however, Kaufmann's criticisms of Kelsen invariably go off the track. I have already suggested and will argue below that he egregiously misreads or misunderstands Kelsen's position, so that while we can say with some confidence that Kaufmann's motivation for criticism stems from his conviction that Kelsen's legal theory was formalistic, it is not easy to evaluate the charge as it is made by Kaufmann. I return to the "formalist issue" in section 4, below.

As already noted, the third round in the exchange consists of Kelsen's replies to a handful of points in Kaufmann's *Critique*.²⁰ I do not take up these replies here, reserving to the later sections of the paper my discussion of Kelsen's general replies to Kaufmann's *Critique*.

A bit of background helps to set the stage for the fourth round in the exchange. Kaufmann's penchant for power politics, if not his defense of law as power (as we saw in the international context), is given expression in what he says about domestic law and politics, reflecting, in particular, his cynical attitude toward parliamentary government and political 'parties. Quoting approvingly some lines from the Swedish politician Gustav F. Steffan – lines that might have come, a few years later, directly from Carl Schmitt's *The Historico-Intellectual Condition of Contemporary Parliamentarism* (1923)²¹ – Kaufmann writes, in 1917: "In states that have in fact been democratized, the whole political system of elections and parties is inextricably linked to... 'a pandemonium of quarreling, terribly mendacious, slandering, impudently exaggerating, political humbug-fabricators, to whom honor, truth, and the common welfare actually mean nothing at all alongside their interest in pushing through the election of certain candidates.'"²²

of the pure 'ought'. Precisely for this reason, however, comprehension of these concepts cannot be purely 'logico-normative', but, rather, must derive from historical, psychological, and sociological methods as well." Kaufmann, *Kritik* (n. 7) p. 28, repr. *Ges. Schr.* (n. 7) vol. 3, 198.

²⁰ See reference at n. 9 above.

²¹ Schmitt, Carl, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, in Bonner Festschrift für Ernst Zitelmann, ed. Krüger, Paul, Duncker & Humblot, Munich and Leipzig, 1923, 413-473; 2nd edn. published as self-contained book: Duncker & Humblot, Munich and Leipzig, 1926. An English translation appeared under the title *The Crisis of Parliamentary Democracy*, trans. Ellen Kennedy, MIT Press, Cambridge, Mass., 1985. See quotation at n. 22 below.

²² Kaufmann, Erich, *Bismarcks Erbe in der Reichsverfassung*, Julius Springer, Berlin, 1917, 102, repr. *Ges. Schr.* (n. 7) vol. 1, 220-221. Quoted in part in Stolleis, *History* (n. 3) p. 64-65 (trans. altered). It is worth noting that Gustav F. Steffan, the Swedish politician from whom Kaufmann quotes, was a Social Democrat. Compare Carl Schmitt: "In numerous brochures and newspaper articles, the most blatant deficiencies and mistakes of the parliamentary enterprise have been pointed out: the dominance of the parties, their unprofessional patronage politics, the 'government of amateurs', the constant governmental crises, the aimlessness and banality of parliamentary debate, the declining standard of parliamentary etiquette, the destructive methods of parliamentary obstruction, the misuse of parliamentary immunities and privileges by a radical opposition that is contemptuous of parliamentarism itself, the undignified daily order of business, the poor attendance at sessions." Schmitt, *The Crisis of Parliamentary Democracy* (n. 21) p. 19 (trans. altered).

What is more, Kaufmann's acceptance of parliamentarism, an institutional *fait accompli* once the Weimar Constitution was in place in August 1919, reflected not his convictions but a calculation. Looking back on the "November Revolution" of the immediate post-War period with its revolutionary *Räte* or councils, Kaufmann wrote in 1921 that the only choice had been either rule by parliamentary majority or the "dictatorship of the proletariat". The parliamentary system was accepted by all the parties, from the German Nationalists to the Social Democrats, but solely on "tactical grounds", while they bided their time.²³ Kaufmann's wish, shared by many others, was to return to a constitutional monarchy.²⁴

In light of this background, Kaufmann's "conversion", at the annual meeting of the Society of German Public Law Teachers held in Münster in March 1926, is truly remarkable. Save for his contempt for legal positivism, everything had changed for Kaufmann. His new appeal was to natural law, and his starting point was not naïve, although the arguments he adduced on behalf of his new position, with its "natural law" inspiration, quickly got out of hand. This brings us to the fourth round of the Kelsen-Kaufmann exchange.

In a lead paper at the meeting in Münster, Kaufmann delivered a spirited defense of the equality provision, article 109 of the Weimar Constitution.²⁵ Principles of law stand above statutory law and bind the lawmaker, Kaufmann asserted. Looking to the past, his position strikes a blow against statutory legal positivism (*Gesetzespositivismus*), the view that the law consists solely of statutory law. Looking ahead, Kaufmann anticipates article 20.3 of the post-World War II German *Grundgesetz* or Basic Law, namely, that the judiciary is bound by statute *and* the law (*Gesetz und Recht*),²⁶ which is interpreted to mean that the latter reaches beyond the former, as reflected – according to Kaufmann – in principles of law. The equality provision, too, is to be understood as a principle of law.

²³ Kaufmann, Erich, *Die Regierungsbildung in Preußen und im Reiche in die Rolle der Parteien*, Die Westmark. Rheinische Monatsschrift für Politik, Wirtschaft und Kultur 1 (1921) p. 205-218, at 206, repr. *Ges. Schr.* (n. 7) vol. 1, p. 374-387, at 375. See also Stolleis, *History* (n. 3) p. 65.

²⁴ See, above all, Kaufmann, *Bismarcks Erbe* (n. 22) repr. *Ges. Schr.* (n. 7) vol. 1, p. 143-223, and also Kaufmann, *Die Regierungsbildung* (n. 23) p. 218, repr. *Ges. Schr.* (n. 7) vol. 1, p. 386-387. See also Stolleis, *History* (n. 3) p. 7-9, 28, 34-35, 64-66.

²⁵ Kaufmann, Erich, *Die Gleichheit vor dem Gesetz im Sinne des Art. 109 der Reichsverfassung*, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 3 (1927) [abbrev. title below: Kaufmann, *Gleichheit*], 2-24, repr. *Ges. Schr.* (n. 7) vol. 3, 246-265. For references to a good bit of the rest of the Weimar literature on art. 109, see Lepsius, Oliver, *Die gegensatzaufhebende Begriffsbildung*, C.H. Beck, Munich, 1994, p. 348-349 n.25.

²⁶ *Grundgesetz* or Basic Law, art. 20.3: "Legislation shall be subject to the constitutional order; the executive and the judiciary shall be bound by statute and the law." On the import of art. 20.3, see Alexy, Robert, *The Argument from Injustice. A Reply to Legal Positivism*, trans. Bonnie Litschewski Paulson and Stanley L. Paulson, Clarendon Press, Oxford, 2002, p. 8-10 *et passim*. For a recent monographic study with special attention to the juridico-theoretical dimension of art. 20.3., see Hoffmann, Birgit, *Das Verhältnis von Gesetz und Recht. Eine verfassungsrechtliche und verfassungstheoretische Untersuchung zu Art. 20, Abs. 3 GG*, Duncker & Humblot, Berlin, 2003.

“The origin and meaning of the precept of equality before the law show that in this precept a principle of law is to be set out that has suprapositive validity. Thus, *the precept is directed first and foremost to the lawmaker*, who is called upon to create written law and who, in so doing, may not violate this principle of law. Only when certain highest principles of law have not been violated [in the course of enacting positive law] does the ‘statute’ truly create ‘law’.”²⁷

As is well known, a legal philosophy based to a very considerable extent on principles of law has been developed, impressively and in rich detail, by Ronald Dworkin and Robert Alexy.²⁸ From this perspective, and drawing on the best in Kaufmann’s 1926 lecture, one might well say that Kaufmann’s new view is perspicacious. His arguments, however, fall far short of the high standard set by his *leitmotif*. Kaufmann continues in his lecture with the familiar point that unequal treatment, under the equality clause, is acceptable only if it is justified. Differential treatment of persons must be “*just*”.²⁹ But, Kaufmann asks, what does this mean? He says he rejects relativistic answers to the question, moving instead to what he terms a concept of material justice: “It is not that the lawmaker and every other party engaged in legal matters ought to follow certain rules and methods, it is, rather, that they ought to create a certain material *system* [of law] that is *in its content just*.”³⁰

So far, so good, but now Kaufmann confronts the more difficult question in his inquiry: How, as he puts it, is this system to be defined? Here Kaufmann resorts to altogether dubious measures. This system, he says, cannot be defined, for nothing that is “known directly” is definable. “The good, the true, and the beautiful are not definable either”, for they, too, are known directly.³¹ But, he goes on, what is at stake is not a definition but a just decision, which “can only be taken by a just personality”. What is more, there is “*no subjectivism in this*”. Rather, it is simply recognition “of the fact that justice is something *creative, not the mechanical application of rigid, abstract norms*”.³²

From a “just personality”, Kaufmann moves toward the end of his lecture to a “just judicial personality”, contending that it is better to shape “the soul of the young jurist on the basis of the great *precedents of outstanding judicial personalities*” than to burden him with the familiar “juridico-technical training”. Who are these personalities? Kaufmann refers to “the method of the Romans and the Anglo-Saxons, the two greatest peoples of the law”.³³ In closing, Kaufmann

²⁷ Kaufmann, *Gleichheit* (n. 25) p. 5-6 (emphasis in original) repr. *Ges. Schr.* (n. 7) vol. 3, 249.

²⁸ Dworkin, Ronald, *Taking Rights Seriously*, Harvard U.P., Cambridge, Mass., 1977; Dworkin, Ronald, *Law’s Empire*, Harvard U.P., Cambridge, Mass., 1986; Alexy, Robert, *A Theory of Constitutional Rights*, trans. Julian Rivers, Oxford U.P., Oxford, 2003; Alexy, *The Argument from Injustice* (n. 26). See also Borowski, Martin, *Grundrechte als Prinzipien*, Nomos, Baden-Baden, 1998.

²⁹ Kaufmann, *Gleichheit* (n. 25) p. 10 (emphasis in original) repr. *Ges. Schr.* (n. 7) vol. 3, 253-254.

³⁰ Kaufmann, *Gleichheit* (n. 25) p. 11 (emphasis in original) repr. *Ges. Schr.* (n. 7) vol. 3, 254.

³¹ *Ibid.*

³² Kaufmann, *Gleichheit* (n. 25) p. 12 (emphasis in original) repr. *Ges. Schr.* (n. 7) vol. 3, 255-256.

³³ Kaufmann, *Gleichheit* (n. 25) p. 22 (emphasis in original) repr. *Ges. Schr.* (n. 7) vol. 3, 264.

adds that the “good and just judge” serves “eternal values” and is “called to help build a world, a material order, that corresponds to the idea of justice”.³⁴

The one thing that had not changed in Kaufmann’s “conversion” of 1926 was his contempt for legal positivism, as evident in the 1926 lecture as in his *Critique of Neo-Kantian Legal Philosophy*, five years earlier. Indeed, he announced at the outset of the 1926 lecture that “positivism in legal science can be seen today as virtually finished”.³⁵ Rudolf Smend, commenting a quarter of a century later on Kaufmann and the significance of his *Critique*, agreed: “[Kaufmann’s] *Critique of Neo-Kantian Legal Philosophy* (1921) does not do justice to every single opponent. If all of them, from [Paul] Laband to [Julius] Binder, from [Heinrich] Rickert to [Hans] Kelsen, appear as a single general front against which this criticism stands in sharpest contrast, if this criticism fundamentally challenges their internal consistency, overthrows to a great extent their interpretation of Kant, indeed, saddles their failure with a substantial responsibility for Germany’s collapse [at the end of World War I], then one understands the indignant protest from all sides of the camp under attack. The juridico-philosophical merit of this book shall not be judged here. But its historical role ought to be recalled with gratitude even today. For surrounding the wasteland into which positivism had led us, there still stood the fence erected by neo-Kantianism, and the penalty for every attempt to break out of this concentration camp (*Konzentrationslager*) was the automatic loss of honor and standing among our peers. But our generation, in so far as it was of one mind, had now found [in Kaufmann’s *Critique*] the programmatic expression of its emancipation, marking the end at last of the old order.”³⁶

Kelsen, who was present at the March 1926 meeting, ignored the equality clause in his reply to Kaufmann. Rather, “[t]he most important problem that Mr. Kaufmann has touched upon in his lecture seems to me to be the problem of *positivism*”.³⁷ Understandably, Kelsen saw Kaufmann’s “audacious” claim that positivism was finished³⁸ as addressed to him, and he was not without a reply.

“I am namely a *Positivist*.... Positivism is not finished and never will be, no more than *natural law* is finished or ever will be. This opposition is eternal. The history of ideas shows simply that now the one standpoint, now the other, enjoys priority. Indeed, it appears to me that this is not simply an opposition in the history of ideas but is an opposition that lives in the heart of every thinking person. Natural law is juridical metaphysics. And – following a period of

³⁴ Kaufmann, *Gleichheit* (n. 25) p. 23, repr. *Ges. Schr.* (n. 7) vol. 3, 265.

³⁵ Kaufmann, *Gleichheit* (n. 25) p. 3, repr. *Ges. Schr.* (n. 7) vol. 3, 247.

³⁶ Smend, Rudolf, *Zu Erich Kaufmanns wissenschaftlichem Werk*, in *Um Recht und Gerechtigkeit*. Festgabe für Erich Kaufmann zu seinem 70. Geburtstag, W. Köhlhammer, Stuttgart and Cologne, 1950, p. 391-400, at 395. Compare Smend, *Die Vereinigung der Deutschen Staatsrechtslehre und der Richtungsstreit* (n. 9) p. 578, 585, where the message is the same, but without the shrill tone of the quoted statement.

³⁷ Kelsen, Hans, *Ansprache* [contribution to the discussion of Kaufmann’s lecture], *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 3 (1927) p. 53-55, at 53 (emphasis in original).

³⁸ *Ibid.*

positivism and empiricism – the call for metaphysics is heard again, everywhere and in all fields of inquiry.”³⁹

Kelsen would not be Kelsen had he been content to leave the matter there, as though he might have been ready tacitly to endorse a “metaphysics in our time” and so Kaufmann’s appeal to natural law, too.

“Where does this call for metaphysics and natural law in the field of jurisprudence lead? It leads, first, to a radical *subjectivism*. That Kaufmann spoke of professing his belief [in natural law] is telling. Professing belief is an expression of subjective opinion. But this leads not to *the* metaphysics but to many very different kinds of metaphysics, and so not to *the* natural law as an objective, clearly delineated system but to many very different, opposing kinds of natural law. If one seeks a way out of this chaos of subjective metaphysics, one arrives necessarily on the ground of a *positive religion*. I would like to emphasize as strongly as possible that an *objective* metaphysics and, therefore, also an *objective* natural law as a system of material value principles can only be based on a positive religion. A ‘positive’ religion is, however, manifest in historical facts, a religion *revealed* through a prophet, a savior, and so on. Between positive, revealed religion and *positive*, that is, enacted law, revealed in historical acts, there exists a far-reaching analogy. Thus, recourse from positive law to natural law in no way means the ‘overcoming of positivism’, but means only the substitution of one species of positivism for another. In place of the positive law, positive religion is acknowledged as the ultimate authority.”⁴⁰

Kelsen’s reply to Kaufmann is of significance quite apart from the Kelsen-Kaufmann exchange, for it casts light on the status of Kelsen’s “purity postulate”. Following the postulate,⁴¹ Kelsen seeks purity in two directions, doing battle on two fronts: He is combating empirical or fact-based legal theories on the one hand and the natural law theory on the other. As we have seen in his reply to Kaufmann in 1926, however, Kelsen is prepared to reduce claims of natural law – and by the same token, claims of moral theory – to their positivist or factual counterparts. The same can be gleaned from other statements of Kelsen’s that reflect his moral scepticism.⁴² The result, of course, is that Kelsen is correctly understood in the end as doing battle on a single front, that of the fact-based theories. Kelsen confirms this position in the closing lines of his reply to Kaufmann: “The problem of natural law is the eternal problem of what lies behind positive law. And whoever seeks the answer will find, I fear, neither

³⁹ *Ibid.* 53-54 (emphasis in original).

⁴⁰ *Ibid.* 54 (emphasis and quotation marks in original).

⁴¹ See Kelsen, *Hauptprobleme* (n. 11) new *Vorrede* to 2nd printing, J.C.B. Mohr, Tübingen, 1923, p. v-xxiii, at v, trans. as “Foreword” to the *Second Printing of Main Problems in the Theory of Public Law, in Normativity and Norms* (n. 11) p. 3-22, at 3-4 (emphasis in original).

⁴² Here, for example, is Kelsen on Kant’s moral philosophy: “That this theory is entirely worthless can easily be shown and [this is claimed, too,] by those who see in the Kantian transcendental philosophy the greatest philosophical achievement of all times.” Kelsen, Hans, *Reine Rechtslehre, “Labandismus” und Neukantianismus. Ein Brief an Renato Treves*, in Hans Kelsen and Renato Treves, *Formalismo giuridico e realtà sociale*, ed. Paulson, Stanley L., Edizioni Scientifiche Italiane, Naples and Rome, 1992 (Kelsen’s letter to Treves is dated 3 August 1933).

the absolute truth of metaphysics nor the absolute justice of natural law. Whoever lifts the veil without closing his eyes will confront the gaping stare of the *Gorgon's naked power*.”⁴³

This completes my overview of the Kelsen-Kaufmann exchange. I now turn to a closer examination of several specific issues, the first being the “two-worlds” doctrine. Here I begin with Kaufmann’s criticism, which he addresses to neo-Kantianism generally, and I then turn to Kelsen’s version of the doctrine.

2 Kaufmann’s Criticism: The “Two-Worlds” Doctrine

Kaufmann argues that the neo-Kantians’ hard-and-fast separation between the two worlds goes too far, rendering impossible any understanding of the relation between them. Kaufmann is entirely right on this point, though he fails to appreciate the philosopher’s reason for turning to dualism, to a two-worlds doctrine. He writes: “A transcendental world of pure forms and values is supposed to lend support and meaning to the empirical world. But the two worlds are so torn apart in dualistic terms that their relation to each other becomes incomprehensible.”⁴⁴

Very early in his career, Kelsen had taken over the Baden neo-Kantians’ two-worlds doctrine.⁴⁵ It is instructive to see how he first develops the doctrine and then in effect grants the point made by Kaufmann, using the language of a dilemma to spell out the problem of an unbridgeable gap between the two worlds.

Kelsen begins with distinct scientific methods, distinct “standpoints” (*Standpunkte*) or “points of view” (*Gesichtspunkte* or *Betrachtungsweisen*), which he draws from Wilhelm Windelband, Georg Simmel, and Wilhelm Wundt.⁴⁶ One point of view is directed to the natural sciences, the other to the

⁴³ Kelsen, *Ansprache* (n. 37) p. 54-55 (emphasis in original).

⁴⁴ Kaufmann, *Kritik* (n. 7) p. 7, repr. *Ges. Schr.* (n. 7) vol. 3, 184. Others, criticizing Kelsen, have made the same point. See e.g. Ross, Alf, *Towards a Realistic Jurisprudence*, trans. Annie I. Fausbøll, Einar Munksgaard, Copenhagen 1946, p. 42-44, and see the rewarding discussion of this and other criticisms raised by Ross in Frändberg, Åke, *Die skandinavische Reaktion auf Hans Kelsens Reine Rechtslehre*, in *Der Einfluß der Reinen Rechtslehre auf die Rechtstheorie in verschiedenen Ländern* [no editor] (Schriftenreihe des Hans Kelsen-Instituts, vol. 2) Manz, Vienna, 1978, 69-97, esp. 81-90. On Scandinavian Realism generally, see the broad-ranging study by the scholar we are celebrating here: Bjarup, Jes, *Skandinavischer Realismus*, Karl Alber, Freiburg and Munich, 1978.

⁴⁵ See Kelsen, *Hauptprobleme* (n. 11) p. 3-24 *et passim*; Kelsen, Hans, *Die Rechtswissenschaft als Norm- und als Kulturwissenschaft*, Schmollers Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reiche 40 (1916) p. 1181-1239, at 1181-1182; Kelsen, Hans, *Allgemeine Staatslehre*, Julius Springer, Berlin, 1925, §§ 5(c) (at p. 19) 13(b) (at p. 62-63). See also Kelsen, Hans, *Introduction to the Problems of Legal Theory* (a translation of the First Edition of the *Reine Rechtslehre*, Deuticke, Leipzig and Vienna, 1934) trans. Stanley L. Paulson and Bonnie Litschewski Paulson, Clarendon Press, Oxford, 1992, § 11(b) (at p. 25).

⁴⁶ See Windelband, Wilhelm, *Normen und Naturgesetze*, in Windelband, *Präludien*, 1st edn., J.C.B. Mohr, Freiburg i.B., 1884, 211-246; Simmel, Georg, *Einleitung in die Moralwissenschaften*, 2 vols., Hertz, Berlin, 1892-93, vol. 1, p. 1-84; Wundt, Wilhelm, *Ethik*, 3rd edn., 2 vols., Ferdinand Enke, Stuttgart, 1903, vol. 1, p. 1-10.

normative fields. His second step, following naturally upon the distinction between points of view, is to introduce a strict “is”/“ought” distinction, familiar in his own day from the neo-Kantians and from Georg Simmel and Max Weber. Kelsen’s third and last step is the adoption of the Baden neo-Kantians’ two-worlds doctrine, their ontology. His outline of these steps is found initially in *Main Problems*, and I briefly retrace them here.

Distinct points of view. Citing Wundt’s *Ethics* and referring, too, to an early paper of Windelband’s, Kelsen refers to the distinction between the explanatory and normative disciplines and uses, in *Main Problems*, the language of “standpoints” (*Standpunkte*) to introduce distinct scientific methods or points of view: “This distinction, which is of the greatest significance for the method of the normative disciplines, in particular legal science, is based on a difference between the standpoints taken in considering objects. The natural sciences undertake to delineate and to explain the actual behavior of things, to grasp what ‘is’, while other disciplines set out rules that prescribe behavior, that require [something] to be or not to be, which is to say, that lay down an ‘ought’. The former is designated as the explicative standpoint, the latter as the normative standpoint, and the rules that lay down an ‘ought’ are designated as norms, while the rules [addressed] to what ‘is’ count as laws of nature in the broadest sense.”⁴⁷

Twice around, first in the natural sciences and then in the normative disciplines, Kelsen links a particular type of method with a particular type of object.

The “is”/“ought” distinction. The distinction between the two types of method reflects the “is”/“ought” distinction, and Kelsen, here following Simmel, goes on to introduce the distinction expressly: “A complete opposition between law of nature and norm is possible only on the basis of a complete disparity of ‘is’ and ‘ought’. Just as I claim of something that it is, so I can say of the same thing that it ought to be, and I have asserted in each case something completely different.”⁴⁸

The referents of “is” and “ought” are general determinants of thought (*Denkbestimmungen*), Kelsen explains, or – again following Simmel – of fundamental modes of thought. At one point Simmel compares these referents with grammatical categories, for example with future and past tenses, and subjunctive and optative moods.⁴⁹ But, Kelsen intervenes, the referents of “is” and “ought” are more fundamental than the purely grammatical categories. As basic modalities, they reflect two distinct patterns of thought, represented by the indicative and the normative.

A characterization in terms of distinct patterns of thought does not, however, reach to the heart of the matter. The principle difference in the forms of thought represented by “is” and “ought”, Kelsen contends, can only be captured in terms of an ontology, the two-worlds doctrine.

The Two-Worlds Doctrine. Kelsen introduces the two-worlds doctrine with reference to the “insuperable abyss” found between the two worlds, the natural or external world and the normative or “ideal” world: “The opposition between

⁴⁷ Kelsen, *Hauptprobleme* (n. 11) p. 5.

⁴⁸ *Ibid.* 7.

⁴⁹ Simmel, *Einleitung in die Moralwissenschaften* (n. 46) vol. 1, 9.

‘is’ and ‘ought’ is a logico-formal opposition, and in so far as the boundaries of logico-formal inquiry are observed, no path leads from one to the other; the two worlds are separated by an insuperable abyss.”⁵⁰

If this were all Kelsen had to say on ontology, his two-worlds doctrine and his talk of an insuperable abyss between the worlds could be regarded as merely metaphorical. In fact, however, Kelsen takes very seriously the ontological implications of the two-worlds doctrine and of the insuperable abyss between them, writing with remarkable candor that the insuperable abyss leads to an antinomy. He readily concedes that “the human being of biology and psychology ... cannot be comprehended by legal science at all”,⁵¹ a concession that leads straightaway to the antinomy. On the one hand, the jurist must recognize “a connection in content between the two orders”, the two worlds. On the other, the jurist, “necessarily presupposing” the methodological dualism reflected in all three steps above – distinct points of view, the “is”/“ought” distinction, and the two-worlds doctrine – must grant that there cannot be any connection at all between the two worlds.⁵²

So far, Kaufmann’s criticism is correct and, as we have seen, developed by Kelsen himself. Missing in Kaufmann’s very brief statement, however, is an appreciation of *why* one might resort to a two-worlds doctrine in the first place. After all, this was a doctrine espoused not only by Kelsen but also by the Baden neo-Kantians⁵³ and, indeed, by Gottlob Frege.⁵⁴ There must have been a reason for it.

The reason, shared by all these thinkers, can be understood in the context of Kelsen’s campaign against naturalism, the point of departure in Kelsen’s initial criticism of Kaufmann. A useful illustration of naturalism in legal science and Kelsen’s response to it is provided by the case of Georg Jellinek, a towering figure in European legal science at the turn of the century.⁵⁵ On first glance, Jellinek’s “two-sides” theory of law seems to include a normativity thesis, namely, a juridico-normative “side” that seems to be irreducibly normative.⁵⁶ Kelsen, however, argues correctly that on Jellinek’s view, legal norms cannot be “anything other than ‘is’-rules”, with the “‘ought’ reflected – psychologically –

⁵⁰ Kelsen, *Hauptprobleme* (n. 11) p. 8.

⁵¹ Kelsen, *Allgemeine Staatslehre* (n. 45) § 13(b) (p. 62).

⁵² *Ibid.*

⁵³ See, in particular, Rickert, Heinrich, *System der Philosophie, Theil I*, J.C.B. Mohr, Tübingen, 1921, at ch. 5 (233-318).

⁵⁴ Frege, Gottlob, *Thoughts*, trans. Peter Geach and R.H. Stoothoff, in Frege, *Collected Papers on Mathematics, Logic and Philosophy*, ed. McGuinness, Brian, Blackwell, Oxford, 1984, 351-372 (Frege’s paper was first published in 1918-19).

⁵⁵ In the first decades of the last century, Jellinek’s *Allgemeine Staatslehre* (n. 56) had already been translated into the major Indo-European languages (save for English) and, reflecting the influence of European legal science, into Japanese, too. On Jellinek, see generally *Georg Jellinek – Beiträge zu Leben und Werk*, ed. Paulson, Stanley L. and Schulte, Martin, Mohr-Siebeck, Tübingen, 2000; Kersten, Jens, *Georg Jellinek und die klassische Staatslehre*, Mohr-Siebeck, Tübingen, 2000.

⁵⁶ See Jellinek, Georg, *System der subjektiven Rechte*, 2nd edn., J.C.B. Mohr, Tübingen, 1905, 12-41; Jellinek, Georg, *Allgemeine Staatslehre*, 3rd edn., O. Häring, Berlin, 1914, 74, 136-140, *et passim*.

in one's subjective consciousness of rule-governed action". On the basis of "this thoroughly psychologistic orientation toward the nature of legal norms",⁵⁷ Jellinek's legal theory is revealed for what it is, a species of naturalism.

It is no accident that Kelsen speaks here of Jellinek's *psychologistic* orientation. The anti-naturalism of Kelsen's legal theory is a reflection of other anti-naturalistic programs developed in philosophy at the same time, not least among them the campaign against psychologism in logic and in the theory of knowledge – the view, that is to say, that these fields are reducible to psychology. The campaign against psychologism was waged, above all, by Frege and the early Edmund Husserl,⁵⁸ and Kelsen was aware of the role Husserl played.⁵⁹

From the beginning, Kelsen was convinced that naturalism in legal science was wrongheaded. The objectivity of the law, undermined by naturalism, required that he develop an alternative, which took the form of the two-worlds doctrine – and all that it portends. Kaufmann seems oblivious to the problems that led philosophers to turn to the two-worlds doctrine.

I turn now to the issue of Kelsen's legal monism. I take up, in particular, Kaufmann's claim that Kelsen's argument on behalf of legal monism rests on Mach's principle of economy in thought.

3 Kaufmann's Criticism, continued: Kelsen's Legal Monism and the Postulate of Unity in Normative Cognition

Kaufmann goes to some lengths in linking Kelsen's argument in *The Problem of Sovereignty* to Ernst Mach's principle of economy in thought.⁶⁰ In his treatise, Kelsen addressed the problem of justifying efficacy as a condition of legal validity.⁶¹ Appealing to Mach's principle, he argued that "economy in thought" means the "greatest possible reduction of tension" between the worlds of "is" and "ought".⁶² That is, if legal norms are by and large efficacious, then the "ought" of legal validity is reflected to that degree in the "is" of efficacy, reducing to a minimum the tension between them.

⁵⁷ Kelsen, *Der soziologische und der juristische Staatsbegriff* (n. 8) § 20 (p. 119).

⁵⁸ See Frege, Gottlob, *Grundgesetze der Arithmetik*, 2 vols., Hermann Pohle, Jena, 1893/1903, vol. 1, Vorwort, v-xxxii, at v-xxvi; Frege, Gottlob, review of: E.G. Husserl, *Philosophie der Arithmetik I*, in *Zeitschrift für Philosophie und philosophische Kritik* 103 (1894) p. 313-332, repr. Frege, *Kleine Schriften*, ed. Angelelli, I., Georg Olms, Hildesheim 1967, 179-192; Husserl, Edmund, *Logical Investigations*, 2 vols., trans. J.N. Findlay, Routledge & Kegan Paul, London, 1970, vol. 1, p. 51-247 ("Prolegomena to Pure Logic").

⁵⁹ See Kelsen, *Hauptprobleme* (n. 11) p. 67 n. 1, and new *Vorrede* to 2nd printing (n. 41) p. ix-x, trans. as "Foreword" (n. 41) in *Normativity and Norms* (n. 11) p. 7-8.

⁶⁰ See Kaufmann, *Kritik* (n. 7) p. 25-30, repr. *Ges. Schr.* (n. 7) vol. 3, p. 196-199. On the principle, see Mach, Ernst, *Contributions to the Analysis of the Sensations*, trans. C.M. Williams, Open Court, Chicago, 1897, p. 25.

⁶¹ See Kelsen, *PS* (n. 5) § 24 (at p. 98-99).

⁶² *Ibid.* § 24 (p. 99).

Kaufmann reports on this attempt of Kelsen's to justify efficacy as a condition of legal validity,⁶³ and if he had stopped there, I would have no quarrel with him. He goes on to say, however, that Kelsen's appeal to Mach's principle is part of Kelsen's greater enterprise in *The Problem of Sovereignty*, namely, his effort to provide a demonstration of legal monism. Kelsen's argument, Kaufmann writes, serves "to deduce the 'monistic view' as required by the 'unity of cognition'", and this doctrine is something "Kelsen, and also [Fritz] Sander, understood in terms of Mach's principle of economy in thought".⁶⁴

This is simply false. In his treatise, Kelsen relies on Mach's principle in a short section devoted to efficacy as a condition of legal validity, but neither the doctrine of efficacy nor Mach's principle plays any role at all in Kelsen's argument on behalf of legal monism. To understand Kelsen here, it is well to begin with the dualist position against which he is reacting. My goal is not a full explication of Kelsen's position, a major undertaking. Rather, I want simply to offer a sketch of his argument in order to underscore the point that Mach's principle plays no role. Unity, as Kelsen understands it in the context of legal monism, is an epistemic *desideratum*, not a reflection of the principle of economy in thought.

Writing six years before Kelsen published *The Problem of Sovereignty*, Alfred Verdross, Kelsen's younger colleague in what would become the Vienna School of Legal Theory, set out in conceptual terms the three possibilities for resolving the problem of the relation between public international law and state law (municipal law, domestic law).⁶⁵ In a dualistic construction, the systems of international law and state law are understood to be altogether separate and independent of one another, while in a monistic construction, either state law is brought within the system of international law or international law is brought within the system of state law.⁶⁶

The dualists were outspoken in defending separation. Heinrich Triepel, whose defense of dualism at the turn of the century set the stage for the modern European debate on the unity of law, wrote that international law and state law were at best "two spheres that impinge upon one another but do not intersect".⁶⁷ The distinguished Italian jurist, Dionisio Anzilotti, argued that dualism was "the concept of the absolute and complete separation of the two legal systems", international and state.⁶⁸ Kelsen himself wrote that the dualist envisaged the two

⁶³ The problem was also discussed by those in Kelsen's Vienna School of Legal Theory, see e.g. Verdross, Alfred, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung*, J.C.B. Mohr, Tübingen, 1923, p. 78-79.

⁶⁴ Kaufmann, *Kritik* (n. 7) p. 26, repr. *Ges. Schr.* (n. 7) vol. 3, 196. Kaufmann refers here to Sander, and the text in question is: Sander, Fritz, *Alte und neue Staatsrechtslehre. Kritische Bemerkungen zu Karl Bindings "Zum Werden und Leben der Staaten"*, *Zeitschrift für öffentliches Recht* 2 (1921) p. 176-230.

⁶⁵ Verdross, Alfred, *Zur Konstruktion des Völkerrechts*, *Zeitschrift für Völkerrecht* 8 (1914) p. 329-359, at 336, compare Kelsen, *PS* (n. 2) § 25 (at p. 104).

⁶⁶ I have drawn this paragraph from my *Introduction* in *Normativity and Norms* (n. 11) p. xxiii-liii, at l.

⁶⁷ Triepel, Heinrich, *Völkerrecht und Landesrecht*, C.L. Hirschfeld, Leipzig, 1899, 111.

⁶⁸ Anzilotti, Dionisio, *Lehrbuch des Völkerrechts* (a translation of the third edition of *Corso di diritto internazionale*, Athenaeum, Rome, 1928) trans. Cornelia Bruns and Karl Schmid,

legal systems as standing “alongside one another, unconnected, like windowless monads”.⁶⁹ From the dualist’s standpoint, one legal system or the other can be considered genuinely normative, but not both.

This radical separation, this lack of any common normative ground, gives rise to problems. In particular, Kelsen contends, dualism in public international law precludes any resolution of what might be termed *inter-systemic conflicts* – the ostensibly valid norm of state law, say, that is ostensibly illegal under public international law. Pursuing the argument, Kelsen sees the dualist’s radical separation as limiting legal cognition (*juristische Erkenntnis*) to the legal system of the individual *qua* participant in that legal system. One cannot cognize a legal norm stemming from outside one’s own system and so cannot recognize it as legal or illegal either. What the monist counts as a norm stemming from outside the dualist’s legal system may of course count in the dualist’s view as a factual barrier that stands in his way. By hypothesis, however, the dualist has no basis for cognizing the barrier *as a norm* and so no basis for recognizing the barrier as legal or illegal either. Inter-systemic conflicts, barring transformation, incorporation, or adoption rules that bring the international law norm inside the dualist’s state law system, simply go unresolved. They do, at any rate, as long as the dualist adheres strictly to his own position.

If Kelsen is justified in rejecting this consequence, and if this consequence does stem from dualism, then Kelsen is justified in rejecting dualism, too. I have my doubts about whether the inability to resolve inter-systemic conflicts is indeed a consequence of dualism, but I shall not pursue the point here. It is enough to note that Kelsen attributes this consequence to dualism. Having suspended judgment on the viability of dualism in an earlier study,⁷⁰ he emphatically rejects, in *The Problem of Sovereignty*, the dualist position.

The alternative is monism, which, Kelsen believes, points the way to a juridico-normative resolution of inter-systemic conflicts. His idea is this. What have been referred to as “*inter-systemic*” conflicts can be resolved in genuinely juridico-normative terms only if normative cognition reaches to the norms of both systems. And normative cognition will reach to the norms of both systems only if these systems are properly understood as parts of a single, unified juridico-normative whole. These conflicts, then, are properly understood as “*intra-systemic*” conflicts.

This is only one argument on behalf of monism, and it is, by itself, incomplete. Its conclusion presupposes the truth of a fundamental thesis in Kelsen’s work, namely, the postulate of the unity of normative cognition. Just as the unity of cognition is presupposed in the sciences, so, likewise, “[t]he postulate of the *unity* of cognition ... applies without qualification in the normative field, finding its expression here in the unity and exclusivity of the system of norms.... The unity of the system is the fundamental axiom of all normative cognition.”⁷¹

Walter de Gruyter, Berlin and Leipzig, 1929, 48.

⁶⁹ Kelsen, *PS* (n. 5) § 36 (p. 152).

⁷⁰ See Kelsen, Hans, *Über Staatsunrecht*, Grünhutsche Zeitschrift für das Privat- und öffentliche Recht der Gegenwart 40 (1914) p. 1-114, at 100-1 *et passim*.

⁷¹ Kelsen, *PS* (n. 5) § 25 (p. 105) (emphasis in original) § 27 (p. 111). On Kelsen’s conception

As I read him, the driving force behind Kelsen's defense of monism is this idea of the unity of normative cognition. It is as though normative validity enjoyed a field of discourse comparable to that of truth. Both are universal, and while this is recognized in the sphere of truth, dualists have refused to see a comparable application in the sphere of normative validity.

The key to understanding the problem Kelsen sees in the dualist's position is found in the dualist's rejection (or ignorance) of the requirement of the unity of normative cognition. Without this unity, the greater legal system is fragmented to the point that inter-systemic conflicts cannot be resolved. But the fact that we do resolve these conflicts every day of the week underscores the need for an altogether different theory, namely – as Kelsen argues – legal monism. What is more, the dualist's own ability to resolve inter-systemic conflicts means that he, too, is in fact, albeit unwittingly, resorting to monistic premises.

The merits of Kelsen's argument aside – and I find it highly problematic⁷² – nothing in the argument turns on Mach's principle of economy in thought, and Kelsen makes no appeal to Mach's principle either. The "problem" Kaufmann sees in Kelsen's monism represents Kaufmann's misreading of Kelsen's text, nothing more.⁷³

Turning to the last of Kaufmann's criticisms that I take up here, I consider his repeated charge that Kelsen's legal theory is "formalistic".

4 Kaufmann's Criticism, continued: Kelsen's Legal Theory is "Formalistic". Some Thoughts on Kelsen's Reconstruction

Kaufmann is outspoken about Kelsen's "formalistic" legal theory, writing: "If one considers reality according to a certain abstract point of view, disregarding everything else as 'insignificant', then the result is always going to be merely this abstract point of view. This is so obvious that one really never has to read Kelsen's thick books, with innumerable examples demonstrating the same supposed *tour de force* over and over again."⁷⁴

One is tempted to ask whether Kaufmann had read very many of the thick books he mentions. For he speaks of their "innumerable examples", and examples in Kelsen's books are conspicuous by their absence. But never mind. Kaufmann moves right along.

"If the essence of legal science consists in drawing from empirical material the pure relations of the formal 'ought',...then 'juridically' there is nothing but the pure relations of the formal 'ought'. This is the triviality, the great tautology that Kelsen *qua* 'pure theorist of law' fails to get past."⁷⁵

of legal cognition or legal knowledge, see Bjarup, Jes, *Kelsen's Theory of Law and Philosophy of Justice*, in *Essays on Kelsen*, ed. Tur, Richard and Twining, William Clarendon Press, Oxford, 1986, p. 273-303, at 279-293.

⁷² See Paulson, *Souveränität und der rechtliche Monismus* (n. 5).

⁷³ See Kelsen, *Der soziologische und der juristische Staatsbegriff* (n. 8) p. 100 n. Here Kelsen briefly addresses Kaufmann's charge.

⁷⁴ Kaufmann, *Kritik* (n. 7) p. 21, repr. *Ges. Schr.* (n. 7) vol. 3, 193-194.

⁷⁵ Kaufmann, *Kritik* (n. 7) p. 21-22, repr. *Ges. Schr.* (n. 7) vol. 3, 194.

It would be pointless to dignify these remarks with any comment whatever, did they not raise Kaufmann's most fundamental concern in Kelsen's legal theory, namely, "formalism". Can Kaufmann be answered here?

I think he can, at least for those who are sympathetically disposed to Kelsen's enterprise, in a word, the *reconstruction* of the law with an eye to a particular goal. As an illustration, I turn to Kelsen's deep concern with the confusion generated by claims about the dualism of subjective and objective law, particularly as this dichotomy was understood by certain nineteenth-century writers. As Kelsen puts it: "When general legal theory claims that its object of enquiry, the law, is given not only in an objective sense but also in a subjective sense, it builds into its very foundation a basic contradiction, that is, the dualism of objective law and subjective right. For general legal theory is thereby claiming that law – as objective law – is norm, a complex of norms, a system, and claiming at the same time that law – as subjective right – is interest or will, something altogether different from objective law and therefore impossible to subsume under any general concept common to both. This contradiction cannot be removed even by claiming a connection between objective law and subjective right, by claiming that the latter is defined as interest that is protected by the former, as will that is recognized or guaranteed by the former. In line with its original function, the dualism of objective law and subjective right expresses the idea that the latter precedes the former logically as well as temporally."⁷⁶

The concept of objective law is tolerably clear. "Objective law" refers to the sum total of general, abstractly formulated legal norms in the legal system. Underscoring Kelsen's conception of objective law is his thesis of the identity of state and law, of state and legal system. "Subjective law", in terms familiar from the later nineteenth-century, refers to the rights and obligations of the legal subject, which reflect applications of general, abstractly formulated legal norms in the legal system. German, like other European languages but unlike English, employs a single expression, "*Recht*", to refer both to the law (*das Recht*) and to a legal right (*ein Recht*). In order to distinguish the two, references to the latter include the adjective "subjective" (*subjektives Recht*), that is, an individual's legal right.

If, however, the dualism of subjective and objective law could be boiled down to an elementary point about the German language, Kelsen would have had no occasion to claim that this species of dualism generated a contradiction. In fact, he had something quite different in mind. In his argument against dualism, he is addressing the dualism of subjective and objective law as understood by its nineteenth-century proponents, in particular, by Georg Friedrich Puchta and Heinrich Dernburg. Puchta's commitment to personal liberty, expressed in the Kantian language of "self-determination or autonomy",⁷⁷ is prominent here. Dernburg explains in his treatise in a helpful way the import of Puchta's position for the law.

⁷⁶ Kelsen, *Legal Theory* (n. 45) § 19 (p. 38) see also at § 20 (p. 39-40).

⁷⁷ Puchta, Georg Friedrich, *Cursus der Institutionen*, 2 vols., 10th edn., ed. Krüger, Paul, Breitkopf and Härtel, Leipzig, 1893, vol. 1, §§ 2-4 (p. 4-6) quoted in Kelsen, *Legal Theory* (n. 45) § 20 (p. 40). (Puchta's *Cursus der Institutionen* was first published in 1841-42.)

“Historically speaking, rights in the subjective sense existed for a very long time before a conscious political order developed. They were based on the personality of individuals, and on the respect these individuals were able first to win for themselves and their property, and then to enforce. It was only by way of abstraction that contemplation of existing subjective rights gradually led to the concept of the legal system. It is therefore unhistorical and incorrect to view rights in the subjective sense as nothing but emanations of law in the objective sense.”⁷⁸

In Puchta’s and Dernburg’s conception of the subjective law, the basic idea is that a system of subjective rights⁷⁹ not only antedates but, indeed, exists independently of the system of objective law. Kelsen regards the latter point as well-nigh wrongheaded. Rights and duties are legally valid only if their validity stems from the objective law, from a legal system. The “contradiction” to which Kelsen refers stems from granting this point and saying at the same time that the system of subjective law can exist independently of the system of objective law. The only way to resolve the contradiction, Kelsen contends, is to eliminate the system of subjective law altogether. That process – salvaging subjective rights while throwing over the unwanted remnants of subjectivity– is termed objectification.

In his treatise of 1911, *Main Problems in the Theory of Public Law*, Kelsen takes up the question of “the essence of the objective law” – the general, abstractly formulated legal norms in the legal system – by posing the question of their “ideal linguistic form”. As he writes: “The question of whether the legal norm is to be understood as an imperative or as a hypothetical judgment is the question of the *ideal* linguistic form of the legal norm or, indeed, the question of the essence of the objective law. The practical wording used in concrete legal systems is irrelevant to the solution of the problem. The legal norm (in its ideal form) must be constructed from the content of statutes, and the components necessary to this construction are often not present in one and the same statute but must be assembled from several.”⁸⁰

The essence of the objective law is manifest in the “objectified” or “reconstructed” legal norm, that is to say, the legal norm whose formulation is “ideal” in the required sense. In short, the “essence of the objective law” and the “ideal linguistic form” of the legal norm are intimately related questions. Already clear to Kelsen, in *Main Problems*, is the notion that the legal norm be formulated hypothetically and that it be addressed to the legal official, the latter a move that represents, of course, a shift away from the legal subject and the concomitant trappings of subjectivity.

Kelsen conceives of the “ideal linguistic form” of the legal norm as a central part of his general program of concept formation, and the program represents in

⁷⁸ Dernburg, Heinrich, *System des Römischen Rechts*, 8th edn. (of Dernburg’s *Pandekten*, as it was called in earlier editions) ed. Sokolowski, Paul, pt. 1 (Berlin: H.W. Müller, 1911) § 33 (p. 65) quoted in Kelsen, *Legal Theory* (n. 45) § 19 (p. 39). (Dernburg’s treatise first appeared in 1884-87.)

⁷⁹ The concept of a *system* of subjective rights – in contrast simply to subjective rights – stems from Puchta, *Cursus der Institutionen* (n. 77) vol. 1, §§ 28-30 (p. 45-51).

⁸⁰ Kelsen, *Hauptprobleme* (n. 11) p. 237 (emphasis and parentheses in original).

turn his initial response to naturalism in legal science: Concepts in the law, normative as they are, resist the naturalist's penchant to reduce them to what the naturalist sees as their factual counterparts. Kelsen was not the only theorist engaged in concept formation. There was, for example, Ernst Zitelmann (1852-1923), who, with an eye to establishing the *desideratum* of the objective law, had posed the question of the form of the legal norm nearly a quarter of a century before Kelsen did in *Main Problems*. All objective law, Zitelmann wrote, "whatever the time, whatever the place, has one and the same logical form. This form of juridical thought, capable of encompassing the most various of material content, is itself simply form, completely devoid of content."⁸¹

Over a period of some thirty years, Kelsen seeks further properties of the legal norm in its ideal linguistic form, and, beginning in the late 1930s, he defends the idea that the hypothetically formulated legal norm, addressed to the legal official, is an empowerment.⁸² This same development is reflected in Kelsen's *General Theory of Law and State*, which appeared in 1945, where Kelsen argues for the first time that the legal "ought" is not to be seen as giving expression to the concept of legal obligation but, rather, is now to be seen as a placemaker.⁸³ Specifically, in the "objectified" or "reconstructed" legal norm, the presence of the legal "ought" marks the possibility that under certain conditions a sanction can be imposed, that is, the legal organ is empowered under certain conditions to impose a sanction. To be sure, it may be the case that a legal official, say A, is obligated to impose a sanction, which is to say, on Kelsen's analysis, that a higher-level legal official is empowered to impose a sanction on legal official A, should A fail to impose the sanction on the legal subject. Thus, the concept of legal obligation is preserved, but its analysis now turns on a bi-level construction of empowering norms.⁸⁴

At this point in time – the late 1930s and beyond – the ideal linguistic form of the legal norm is captured, for Kelsen, in the idea of empowerment.⁸⁵ The task of

⁸¹ Zitelmann, Ernst, *Die Möglichkeit eines Weltrechts*, Allgemeine österreichische Gerichts-Zeitung, 39 (N.F. 25) (1888) p. 193-5, 201-03, 209-12, at 194, repr. Zitelmann, *Die Möglichkeit eines Weltrechts*, Duncker & Humblot, Munich and Leipzig, 1916, with a postscript, 10.

⁸² See Kelsen, Hans, *Recht und Kompetenz. Kritische Bemerkungen zur Völkerrechtstheorie Georges Scelles*, in Kelsen, *Auseinandersetzungen zur Reinen Rechtslehre*, ed. Ringhofer, Kurt and Walter, Robert, Springer, Vienna and New York, 1987, 1-108, esp. 72-75 (the text is reproduced from a ms. of the late 1930s).

⁸³ See Kelsen, Hans, *General Theory of Law and State*, Harvard U.P., Cambridge, Mass., 1945, p. 61, see also 62-63. The doctrine is stated more clearly in Kelsen's later treatise, see Kelsen, Hans, *Reine Rechtslehre*, 2nd edn., Deuticke, Vienna, 1960, at §§ 4(b)(c) (at p. 4-5, 10) 28(b) (at p. 124); see also Hart, H.L.A., *Kelsen's Doctrine of the Unity of Law*, in *Normativity and Norms* (n. 11) p. 553-581, at 569-570, and Raz, Joseph, *Concept of a Legal System*, 2nd edn., Clarendon Press, Oxford, 1980, at 47.

⁸⁴ See Paulson, Stanley L., *The Weak Reading of Authority in Hans Kelsen's Pure Theory of Law*, *Law and Philosophy* 19 (2000) p. 131-171, at 139-155.

⁸⁵ In a recent paper, my colleague and friend Torben Spaak suggests that Hans Kelsen is of the view "that norms conferring competence are really a *species of duty-imposing norms*". See Spaak, *Norms that Confer Competence*, *Ratio Juris* 16 (2003) p. 89-104, at 95 (emphasis in original). Spaak quotes precisely to this effect from Kelsen's posthumously published work, *Allgemeine Theorie der Normen*, ed. Ringhofer, Kurt and Walter, Robert, Manz, Vienna,

reconstruction with an eye to objectification is now complete. Different legal theorists, reading Kelsen on these points today, will of course react in different ways, but their problems are not the problems that exercised Kelsen in his day. The point, quite simply, is that Kelsen succeeds in making at least a *prima facie* case on behalf of the theses he explicates and defends in the name of a reconstruction. And that is a far cry from Kaufmann's charge of formalism. Having apparently no interest in the problems Kelsen confronted and no willingness to inform himself either, Kaufmann was nevertheless eager to cast Kelsen's project in the worst possible light.

5 Retrospect

If Erich Kaufmann's *Critique of Neo-Kantian Legal Philosophy* (1921) – in particular, the criticism in that book directed to Kelsen's legal theory – is

1979, p. 210 (English edn., *General Theory of Norms*, trans. Michael Hartney, Clarendon Press, Oxford, 1991, p. 260). The position to which Spaak refers is not, however, Kelsen's predominant position. In writings from the 1930s up to and including the second edition of *Reine Rechtslehre* in 1960 (n. 83) Kelsen's predominant position, discernible though hardly crystal clear, is that the *reconstructed legal norm*, primary or fundamental, is a competence norm. As a *prima facie* case on behalf of the predominant position, I might make the following points. *First*, in his early treatise, *Hauptprobleme* (n. 11) Kelsen states his program clearly (*see text at n. 80*). He seeks to establish the "ideal linguistic form" of the legal norm, its ideal formulation, with an eye to distinguishing the legal norm *through its form* from its counterpart in morality. From this standpoint it is, then, unlikely that Kelsen would arrive at the duty-imposing norm, addressed to the legal subject, as exemplifying the ideal formulation. Indeed, in *Hauptprobleme* (n. 11) he repeatedly rejects the imperative *qua* ideal linguistic form (*see e.g. p. 210-212*). *Second*, after a good bit of pulling and hauling in various writings, *see Paulson, The Weak Reading of Authority in Hans Kelsen's Pure Theory of Law* (n. 84) p. 139-155, Kelsen arrives in the late 1930s at his solution: The ideal formulation of the legal norm – the reconstructed legal norm – is hypothetical, its addressee is the legal official, and its modality is that of empowerment. *See Kelsen, Recht und Kompetenz* (n. 82). *Third* – backing up a step chronologically – both the official's empowerment and the corresponding liability on the part of the legal subject are reflected in what Kelsen calls the "law of normativity" (*Rechtsgesetz*) whose function *qua* "methodological form" is to shape the raw material of the law, to dictate the form of the legal norm. On the law of normativity, *see Kelsen, "Foreword" to the Second Printing of Main Problems in the Theory of Public Law* (n. 41) p. 5-6, and Kelsen, Hans, *Reine Rechtslehre*, 1st edn., Deuticke, Leipzig and Vienna, 1934, § 11(b) (at p. 22) and on "methodological form", Rickert, Heinrich, *Der Gegenstand der Erkenntnis*, 2nd edn., J.C.B. Mohr, Tübingen and Leipzig, 1904, p. 205-228. *Fourth*, Kelsen relativizes his "Sollen" (*see references at n. 83*) treating it as akin to a variable expression, which marks, so to speak, the emancipation of "Sollen" from the concept of obligation. *Fifth*, Kelsen introduces the "dependent legal norm" (*unselbständige Rechtsnorm*) *see Reine Rechtslehre*, 2nd edn. (n. 83) at § 6(e) (p. 55-59). It depends on and is a component of the "independent legal norm" (*selbständige Rechtsnorm*) *see ibid.* §§ 6(e) (at p. 58) 28(b) (at p. 123-124) 29(f) (at p. 144) which is, in turn, an empowering norm. The result comes full circle, back to the program Kelsen announced at the outset: The reconstructed legal norm *qua* empowerment serves to distinguish sharply the legal norm from its counterpart in morality. Since Torben Spaak is a recognized authority on competence norms – *see his admirable book, The Concept of Legal Competence. An Essay in Conceptual Analysis*, trans. Robert Carroll, Dartmouth, Aldershot, 1994 – it would be a fine thing if Kelsen were to find his rightful place in Spaak's repertoire of legal theorists who have developed the concept of the competence norm.

adopted as the standard, it is not unfair, I think, to depict Kaufmann as the bull in the china shop who brings everything crashing down around him. It is reassuring, then, to be able to report on a more congenial Erich Kaufmann in the post-World War II period.

Kaufmann, like Kelsen, was of Jewish ancestry, and both found themselves in Hitler's Germany in the spring of 1933. Kelsen lost his professorship at the University of Cologne at once, ousted on the authority of the notorious Nazi statute of April 7, 1933, dubbed the "Law for the Restoration of the Professional Civil Service", which provided for the dismissal of those of Jewish ancestry as well as those who were deemed politically unreliable. Kelsen fled Nazi Germany with his family shortly thereafter. Kaufmann, who had given up his professorship at the University of Bonn in 1927 in order to take up a post in Berlin as a government attorney, lost that position when Hitler came to power in 1933. Kaufmann was appointed in 1934 to a professorship at the University of Berlin and ousted in the same year. He survived in Nazi Germany for four more years, conducting a private seminar known as the "Nicolas Lake Circle" in his home. He and his wife fled the country in 1938 and spent the War years in Holland. In 1946, Kaufmann returned to Germany. After holding a professorial post at the University of Munich, he served from 1950 to 1958, with distinction, as a legal advisor to the Federal Republic's Foreign Office.⁸⁶

With this background in place, I turn to the more congenial Erich Kaufmann in the post-World War II period. Reading an article of Ernst Forsthoff's in 1958,⁸⁷ in which Forsthoff defends Carl Schmitt, Kaufmann felt compelled to reply. "[You, Mr. Forsthoff,] proceed on the assumption that 'order' as such is the presupposition for the distinction between right and wrong, whereas the reverse is true: The distinction between right and wrong is the presupposition for an order or a system worthy of the name. For if the distinction between right and wrong does not antedate the creation of a system and lay its foundation, then any system whatever could set the criteria for making the distinction, with the result that every kind of injustice could be legitimated by this 'system'. *Auctoritas non veritas.*"⁸⁸

If this insight of Kaufmann's, prompted no doubt by the horrors of the Hitler regime, had been there from the beginning, a great deal of his earlier work would surely have been written rather differently.

⁸⁶ See Partsch, Karl Josef, *Der Rechtsberater des Auswärtigen Amtes 1950-1958. Erinnerungsblatt zum 90. Geburtstag von Erich Kaufmann*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 30 (1970) p. 223-236.

⁸⁷ Forsthoff, Ernst, *Der Staatsrechtler im Bürgerkrieg. Carl Schmitt zum 70. Geburtstag*, *Christ und Welt* (17 July 1958).

⁸⁸ Kaufmann, Erich, *Carl Schmitt und seine Schule. Offener Brief an Ernst Forsthoff*, *Deutsche Rundschau* 84 (1958) p. 1013-1015, at 1013, repr. *Ges. Schr.* (n. 7) vol. 3, p. 375-377, at 375.