

Hans Kelsen and the Natural Law Tradition

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Natural Law and the Vienna School: Hans Kelsen, Alfred Verdross, and Eric Voegelin

Franz Leander Fillafer and Johannes Feichtinger

Abstract

Hans Kelsen's critique of natural law remained a guiding theme of his oeuvre from the 1920s to the 1960s. This chapter combines an analytical exploration of the epistemic and political dimensions of Kelsen's critique with a multi-layered reconstruction of its historical contexts. It first traces how Alfred Verdross elaborated his endorsement of natural law and his theory of international law in critical response to his mentor Kelsen. The second part of the chapter is devoted to Kelsen's conflict with another one of his erstwhile students, with Eric Voegelin. The third, last part of the piece recovers the natural law revival in Austria after 1945 and shows its significance for the obliteration of the Pure Theory of Law in Austrian jurisprudence. Kelsen's disavowal of natural law, leading to his trenchant exposure of its flaws and inconsistencies, was not merely based in his disagreement with natural law's philosophical tenets. The critique of natural law lay at the centre of a broad array of concerns that animated Kelsen's work. According to Kelsen, natural law destroyed the separation between society and nature that had made modern law and modern science possible. To Kelsen it was no coincidence that the proponents of natural law reasserted its salutary and comforting effects in Cold War academia as it promised access to an absolute standard by which to measure human conduct. Yet, as Kelsen pointed out in his dialogue with Verdross and Voegelin, this consolation was highly deceptive, even dangerous. The appeal to ostensibly "natural" fundamental and universal truth jeopardised the free, open-ended pursuit of democracy and science.

De iure natura multa fabulamur¹

Natural law was one of the central objects of the Kelsenian critique. Kelsen argued repeatedly that the lofty, sanctimonious talk of natural law and natural rights had camouflaged repression and atrocities throughout history. Despite the dynamic development of Kelsen' theoretical oeuvre, a continuity

¹ Martin Luther, *Werke. Kritische Gesamtausgabe* 56, (Berlin–Weimar: Böhlau, 1883), 355.

can be observed in the continual reaffirmation of the critique of natural law. It is imperative to note here that Kelsen's continued commitment was shaped by controversies of the 1920s and 1930s which resurfaced after 1945. Already in the 1930s Kelsen's brand of legal positivism had been denounced as a relativist menace that destroyed the values upon which social and political life was predicated, and thereby paved the way for Nazism.²

This chapter seeks to isolate the central elements of Kelsen's critique of natural law from the 1920s to the 1960s. It begins by focusing on Kelsen's conflict with his former student, the eminent expert in international law, Alfred Verdross. Then, the subsequent trajectory of Kelsen's critique of natural law is traced into the period after 1945. The chapter thereby throws into relief why Kelsen's critique of natural law remained at the core of his oeuvre. It places Kelsen's theoretical and political proclivities in the context of the post-war revival of natural law. The chapter then proceeds to reconstruct the transatlantic dimension of the natural law revival by analysing Kelsen's exchange with Eric Voegelin, another of his erstwhile students from Vienna who had also emigrated to the US. The final section shifts the focus to postwar Austria and, in particular, to Alfred Verdross's role in the reassertion of Catholic natural law in Austrian academia. Here, the analysis recovers the political functions of the natural law revival and the resistance it provoked among scholars of different stripes who subscribed to basic tenets of Kelsen's work. August M. Knoll, another of Kelsen's Viennese disciples from the 1920s, and Ernst Topitsch, a young intellectual steeped in the anti-metaphysical logical empiricism of the Vienna Circle figure prominently here.

Kelsen's critique of natural law flows from his theory of democracy and science: The transcendentalist pretension to absolute and eternally valid norms cut against the grain of modern science and of popular sovereignty alike whose truths are provisional and open to transformation. Hence, for Kelsen, natural law rendered legal science impossible: it suspends the distinction between society and the realm of nature. According to Kelsen, it was society's separation from nature which gave rise to law as a man-made order of coercion and to legal science pursued as the study of procedurally enshrined and democratically negotiable norms that structured this very order.

² Matthias Jestaedt, and Oliver Lepsius, "Der Rechts- und der Demokratitheretiker Hans Kelsen – Eine Einführung," in *Hans Kelsen. Verteidigung der Demokratie: Abhandlungen zur Demokratietheorie*, eds. Matthias Jestaedt, and Oliver Lepsius, (Tübingen: Mohr Siebeck, 2006), xii–xxix.

1 Verdross and Kelsen

Alfred Verdross, born as Knight of Drossberg in 1890, came from a distinguished family of civil servants and military officials which belonged to the functionary elite of the Habsburg empire.³ After secondary education in Rovereto and Meran, Verdross moved to Vienna, and later, to Munich to study with some of the most renowned scholars of his age. Verdross combined a thorough study of the basic branches of jurisprudence with an interdisciplinary curriculum which ranged from philosophy to national economy. In Vienna, Verdross attended the lectures and seminars of Edmund Bernatzik, Eugen Böhm-Bawerk, and Friedrich von Wieser; in Munich he studied with Franz Brentano. Verdross soon became acquainted with the two other main representatives of what was later to become the Vienna School of legal theory: Adolf Merkl, who began his studies in the same year as Verdross introduced him to Hans Kelsen, then Privatdozent at the University of Vienna. At this period, Kelsen assembled a salon-like regular weekly meeting in his private home in the Wickenburggasse 23 in Vienna's eighth district.⁴ This private seminar was to become the hotbed of the later Vienna School.⁵ Here, Kelsen invited his colleagues and students to discuss the cutting-edge products of neo-Kantian philosophy, in particular the work of Hermann Cohen and Paul Natorp.⁶ In 1919, in the newly established Austrian First Republic, Hans Kelsen became full professor of state and administrative law, and he was Verdross' mentor when the latter submitted his Habilitationsschrift on *Die völkerrechtswidrige Kriegshandlung und der Strafanspruch der Staaten in 1920*.

Verdross's soaring academic career began in 1924 when he was awarded an extra-ordinary professorship of international law at the University of Vienna,

3 Kamila Staudigl-Ciechowicz, and Thomas Olechowski, "Allgemeines und österreichisches Staatsrecht, Verwaltungslehre und österreichisches Verwaltungsrecht – Alfred Verdross-Droßberg," in *Die Wiener Rechts- und Staatswissenschaftliche Fakultät 1918–1938*, eds. Thomas Olechowski, Tamara Ehs, and Kamila Staudigl-Ciechowicz, (Göttingen: V&R unipress, 2014), 533–538.

4 Clemens Jabloner, "Kelsen and his Circle: The Viennese Years," *European Journal of International Law* 9 (1998): 375.

5 Robert Walter, Clemens Jabloner, and Klaus Zeleny, eds., *Der Kreis um Hans Kelsen. Die Anfangsjahre der Reinen Rechtslehre*, (Vienna: Manz, 2008).

6 Johannes Feichtinger, "Intellectual affinities: Ernst Mach, Sigmund Freud, Hans Kelsen and the Austrian anti-essentialist approach to science and scholarship," in *The Foundation of the Juridico-Political Concept Formation in Hans Kelsen and Max Weber*, eds., Ian Bryan, Peter Langford, and John McGarry, (New York: Routledge, 2016), 117–139.

closely followed by his 1925 appointment as professor ordinarius.⁷ Hans Kelsen became, in addition to his academic position, the architect of the Austrian Constitution of 1920. He implemented his model of a Constitutional Court and became one of its judges,⁸ thereby establishing an institution that did not exist in the German Weimar Constitution. In 1929, the Christian Socialist government of Ignaz Seipel introduced a revision of the Constitution which accorded more prerogative powers to the Federal President, and changed the nomination mode for the members of the Constitutional Court: the original constitutional framework had required their election through a vote in the Austrian parliament, while the new system involved the direct appointment of these judges by the government. Both initiatives prompted Kelsen to resign from his post as a judge of the Constitutional Court.⁹ These ‘reforms’ which, for Kelsen, were symptoms of a drift towards authoritarianism in Austria, prompted him to give up his professorship at the University of Vienna and to leave Austria for the University of Cologne, in Germany, where he had been offered a professorship in international law.

In common with the majority of the Austrian academics at that time, Alfred Verdross managed to smoothly combine his Catholic convictions with a sense of pan-German identity.¹⁰ Verdross found it easy to align his views with the dominant political Catholicism of the 1930s, which culminated in the anti-Nazi

⁷ “Univ. Prof. Dr. Alfred Verdross (Wien)” [Selbstdarstellung], in *Österreichische Rechts- und Staatswissenschaften der Gegenwart in Selbstdarstellungen*, ed. Niklaus Grass, (Innsbruck: Universitätsverlag Wagner, 1952), 204–205; Jürgen Busch, “Alfred Verdross – Ein Mann des Widerspruchs? 1: Verdross im Gefüge der Wiener Völkerrechtswissenschaft vor und nach 1938,” in *Vertriebenes Recht – Vertreibendes Recht. Zur Geschichte der Wiener Rechts- und Staatswissenschaftlichen Fakultät zwischen 1938 und 1945*, eds., Franz Stefan Meissel, Thomas Olechowski, Ilse Reiter-Zatloukal, and Stefan Schima, (Vienna: Manz, 2012), 150.

⁸ On the question of the Kelsenian origin of the Constitution of the First Austrian Republic see Thomas Olechowski, “Der Beitrag Hans Kelsens zur österreichischen Bundesverfassung,” in *Hans Kelsen: Leben – Werk – Wirksamkeit*, eds., Robert Walter, Werner Ogris, and Thomas Olechowski, (Vienna: Manz, 2009), 211–230.

⁹ Hans Kelsen, “Autobiographie (1947),” in *Hans Kelsen Werke 1: Veröffentlichte Schriften 1905–1910 und Selbstzeugnisse*, ed. Matthias Jestaedt in Kooperation mit dem Hans Kelsen-Institut, (Tübingen: Mohr Siebeck, 2007), 70–77.

¹⁰ Gernot Heiss, “Zwischen Wissenschaft und Ideologieproduktion – Geschichte an der Universität Wien 1848 bis 1965,” in *650 Jahre Universität Wien – Aufbruch ins neue Jahrhundert 4: Reflexive Innensichten aus der Universität. Disziplinengeschichten zwischen Wissenschaft, Gesellschaft und Politik*, eds., Karl Anton Fröschl, Gerd B. Müller, Thomas Olechowski, and Brigitta Schmidt-Lauber, (Göttingen: V&R unipress, 2015), 311–324; Julie Thorpe, *Pan-Germanism and the Austrofascist State, 1933–38*, (Manchester: Manchester University Press, 2011).

and anti-Bolshevik Austrofascist dictatorship from 1933–1938.¹¹ Although Verdross sympathised with Austrian Fascism, this identification was coupled with opposition to the violation of the Constitution.¹² The Nazi seizure of power in Austria, in 1938, led to a brief period in which Verdross was dismissed, but he was sufficiently versatile to have himself reinstalled as a professor. However, Verdross was only allowed to resume his university professorship in international law on the condition that he would cease to teach legal philosophy.¹³

When Kelsen left Austria, in 1930, his colleague Verdross did not fail to send a 'letter of farewell'. In this essay, originally published in the *Juristische Blätter*, Verdross praised Kelsen lavishly as a brilliant theoretician and dogmatist: After having provided a fair and sympathetic appraisal of Kelsen's work, commencing from the *Hauptprobleme* of 1911, Verdross managed to advertise his normative convictions in the concluding section of his *éloge*, where he gently recommended that Kelsen should relinquish one of the basic elements of his theory, namely "the neo-Kantian prejudice that the method creates the object of enquiry".¹⁴ As we shall see in Section four of this chapter, this was not the last time that Austrian jurists paid homage to Kelsen only to suggest that he should abandon his key principles. In the following, second part of our analysis, we focus on Verdross's reworking of Kelsen's theory which will be situated in its interwar context.

2 Natural Law and the Law of Nations in Interwar Vienna

What permeates Verdross's work, from the 1930s, is an increasingly critical engagement with the epistemological foundations and theoretical oeuvre of

¹¹ Emmerich Tálos, *Das austrofaschistische Herrschaftssystem: Österreich 1933–1938*, 2nd edition, (Vienna–Berlin: Lit, 2013); Werner Bischof, Anton Pelinka, and Alexander Lassner, eds., *The Dolfuß/Schuschnigg Era in Austria: A Reassessment*, (New Brunswick–London: Transaction, 2003).

¹² Verdross, "Univ. Prof. Dr. Alfred Verdross (Wien)" [Selbstdarstellung], 207; Thomas Olechowski, and Kamila Staudigl-Ciechowicz, "Die Staatsrechtslehre an der Universität Wien 1933–1938," in *Österreich 1933–1938. Interdisziplinäre Annäherungen an das Dolfuß-/Schuschnigg-Regime*, eds., Ilse Reiter-Zatloukal, Christiane Rothländer, and Pia Schölnberger, (Vienna–Cologne–Weimar: Böhlau, 2012), 232–239.

¹³ Staudigl-Ciechowicz, and Olechowski, "Allgemeines und österreichisches Staatsrecht," 537–538; Busch, "Alfred Verdross," 157–161; Antony Cartwright, "Alfred Verdross and Othmar Spann: German Romantic Nationalism, National Socialism and International Law," *European Journal of International Law* 6 (1995): 78–97.

¹⁴ Alfred Verdross, "Die Rechtstheorie Hans Kelsen's" [1930], in *Die Wiener rechtstheoretische Schule. Schriften von Hans Kelsen, Adolf Merkl, Alfred Verdross*, eds. Hans R. Klecatsky, René Marcic, and Herbert Schambeck, (Stuttgart: Franz Steiner Verlag, 2010), 1069.

his mentor Hans Kelsen. This dissociation can be subdivided into three elements: first, Verdross came to reject Kelsen's neo-Kantian groundwork under the initial impact of both neo-Aristotelian philosophers such as Nicolai Hartmann, and champions of phenomenology such as Edmund Husserl. Seeking to sustain law's reliance on "natural" value-orientations, Verdross however did not espouse the phenomenological science of the subjectivist consciousness of values but, instead, turned to Aristotelian and scholastic sources.¹⁵ Verdross was guided by an interest in the discovery and substantiation of an objective ethical dimension for both national and international law. This desire for objectivity, for a preexisting ethical order of hierarchical ends and means of legal life, made him renounce the Neo-Kantian presupposition that science constituted its objects of enquiry by means of its methodological operations and choices.¹⁶ Verdross, on the contrary, was convinced of the existence of a preexisting ethical cosmos directed by a divinely preordained purpose. For Verdross, jurisprudence was capable of grasping and formalising these foundations. This led him to the second decisive shift in his relationship with Kelsen, to his advocacy of natural law.

In the interwar period, Verdross's partisanship for natural law was something of a minority phenomenon among the members of the Viennese school, although some other students of Kelsen, such as Josef Laurenz Kunz, partially subscribed to Verdross's doctrine.¹⁷ It would be no overstatement to claim that Verdross's early rediscovery of natural law was decisive for its triumph after the collapse of Nazism, it would propel Verdross into his position as one of the power brokers of Austrian jurisprudence in the decades after 1945. Verdross's

¹⁵ Gerhard Luf, "Naturrechtsdenken im Banne Kelsens. Erwägungen zum Verhältnis von Kelsen und Verdross," in *Grundlagen der Rechtskultur. Festschrift für Werner Ogris zum 75. Geburtstag*, eds., Thomas Olechowski, Christian Nerschwara, and Alina Lengauer, (Vienna–Cologne–Weimar: Böhlau, 2010), 245; Oskar Kraus, "Die aristotelische Werttheorie in ihren Beziehungen zu den Lehren der modernen Psychologenschule," *Zeitschrift für die gesamte Staatswissenschaft* 61 (1905): 537–592.

¹⁶ Oliver Lepsius, *Die gegensatzaufhebende Begriffsbildung: Methodenentwicklungen in der Weimarer Republik und ihr Verhältnis zur Ideologisierung der Rechtswissenschaften unter dem Nationalsozialismus*, (Munich: Beck, 1994), 304–341; Oliver Lepsius, "Erkenntnisgegenstand und Erkenntnisverfahren in den Geisteswissenschaften der Weimarer Republik," *Ius Commune: Zeitschrift für Europäische Rechtsgeschichte* 22 (1995): 283–310; Sibylle Hofer, "Schwierige Vielfalt [Review of Oliver Lepsius, Die gegensatzaufhebende Begriffsbildung]," *Rechtshistorisches Journal* 15 (1996): 122–125.

¹⁷ Jörg Kammerhofer, "Josef L. Kunz," in *Der Kreis um Hans Kelsen. Die Anfangsjahre der Reinen Rechtslehre*, eds., Robert Walter, Clemens Jabloner, and Klaus Zeleny (Vienna: Manz, 2008), 253–256; Adolf J. Merkl, "Zum Interpretationsproblem" [1918], in Adolf J. Merkl, *Gesammelte Schriften I/I: Grundlagen des Rechts*, eds., Dorothea Mayer-Maly, Herbert Schambeck, and Wolf-Dietrich Grussmann, (Berlin: Duncker & Humblot, 1993), 63–83.

turn toward natural law was predicated on his intense engagement with the thought of Thomas Aquinas and the school of Salamanca, the so-called second scholastics, represented by Francisco Suárez and Francisco de Vitoria.¹⁸

Kelsen's critique of natural law maintained that the attempt to ground the validity of positive law within a system of natural jurisprudence was futile.¹⁹ The discourse of natural law had been used to legitimise various forms of government, be they democratic or authoritarian and, on the level of material law, it was invoked to justify slavery, warfare and other repellent atrocities.²⁰ According to Kelsen, the virtue usually ascribed to natural law, namely, that it provided a foundation for justice which superseded the empirical positive legal order, was a dangerous illusion. Alfred Verdross, instead, maintained that there remained a path through which to substantiate the validity of natural law, and his critical stance emphasized a fundamental gap in Kelsen's theory: Kelsen restricted the sources of international law to contract and customary law and obstinately refused to recognise pristine and universal moral principles.²¹ Kelsen insisted upon the exclusivity of positive law, but failed to engage with the material conditions and aims of the legislation beyond the parameters of the content of norms and sanctions: with the behaviour of norm addressees the legal order sought to mould, affect, or countervail.

Kelsen's stubborn reticence to theorise "justice" was, in this sense, exemplary for Verdross: Kelsen fleshed out the structural requirements of legal security (renunciation of force, the state's monopoly of force, dispute resolution before regular courts) and vaguely alluded to the desirability of a peaceful order. For Verdross, these apparently technical issues cut to the very heart of the validity of law abidance and moral obligations in society. Kelsen emphasised the indefeasible autonomy of the individual conscience vis-à-vis the coercive legal order and stressed every citizen's right to resistance, but he failed to specify under what conditions such resistance or disobedience was in fact legitimate.²²

¹⁸ Alfred Verdross, "Vierhundert Jahre Völkerrechtswissenschaft," *Stimmen der Zeit. Monatschrift für das Geistesleben der Gegenwart* 125 (1933): 36–41; Alfred Verdross, *Abendländische Rechtsphilosophie. Ihre Grundlagen und Hauptprobleme in geschichtlicher Schau*, (Vienna: Springer, 1958), 65–79, 85–92.

¹⁹ Hans Kelsen, *Introduction to the Problems of Legal Theory. A Translation of the 1st edition of the Reine Rechtslehre or Pure Theory of Law* [1934], trans. B.L. Paulson and S.L. Paulson, (Oxford: Oxford University Press, 1992), 7–14, 21–36.

²⁰ Hans Kelsen, *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus*, (Berlin–Charlottenburg: Heise, 1928).

²¹ Alfred Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung*, (Tübingen: Mohr Siebeck, 1923), 120.

²² Alfred Verdross, "Die Erneuerung der materialen Rechtsphilosophie" [1957], in *Die Wiener rechtstheoretische Schule. Schriften von Hans Kelsen, Adolf Merkl, Alfred Verdross* eds. Hans

Kelsen's purism was a self-delusion because, as Verdross strove to demonstrate, it implicitly presupposed material definitions of lawfulness and legal order which it failed to disclose.²³ Verdross's deftly summarised these points in his 1930 'letter of farewell'. When Kelsen left for Cologne, Verdross invoked the *genius loci* of Kelsen's destination, and the manes of Albertus Magnus, the thirteenth century renovator of Aristotelianism, in particular:

Only the return to material philosophy which we currently witness in a plethora of fields can liberate law from its isolation, and prompt us to appreciate it again as a link in the cosmos of values. Then also the deep desire of *Kelsen* for an ought-validity (*Sollgeltung*) will be fulfilled. Also his entire oeuvre will gain additional merit, because his categories, albeit with certain modifications, can be transformed from mere thought categories into object-categories (*Gegenstandskategorien*). We wholeheartedly wish *Hans Kelsen* that he may liberate his great, deeply thought system from the carapace of Neo-Kantianism in the city of Albertus Magnus and that he may thereby bring it to full fruition.²⁴

Natural law remained a subject of contention, and in grappling with this vexatious legacy both Verdross and Kelsen grafted their arguments through recourse to arguments from Graeco-Roman, Christian, and Western European intellectual history. Neither of them utilized the conceptual resources of the Habsburg natural law tradition that had flourished until 1848²⁵ prior to effective obliteration with the university reforms of the 1850s that established the study of Roman law, in the vein of the German pandectist school, and German legal history as chief subjects of scholarship and of the law curriculum.²⁶ The only exception here is the German legal philosopher, Heinrich Ahrens, appointed to a chair in Graz in 1850, to whom Verdross payed homage for imparting the Kantian *bonum commune* with religiously grounded concrete definitions of felicity,

R. Klecatsky, René Marcic, and Herbert Schambeck, (Stuttgart: Franz Steiner Verlag, 2010), 601–602; Luf, "Naturrechtsdenken", 243.

²³ Luf, "Naturrechtsdenken", 244.

²⁴ Verdross, "Die Rechtstheorie," 1069.

²⁵ Franz Leander Fillafer, "Franz von Zeiller und der Kantianismus in der Rechtswissenschaft," in *Umwege: Annäherungen an Immanuel Kant in Wien, Österreich und Osteuropa*, ed. Violetta L. Waibel, (Göttingen: V&R unipress, 2015), 83–94.

²⁶ Werner Ogris, "Die österreichische Schule der Zivilistik" [1969], in *Elemente europäischer Rechtskultur: Rechtshistorische Aufsätze aus den Jahren 1961–2003*, ed. Thomas Olechowski, (Vienna–Cologne–Weimar: Böhlau, 2003), 345–400.

social welfare, and a purpose-guided “good life”.²⁷ Yet, the essential theoretical and philosophical orientation of Verdross was derived from the School of Salamanca and the Aristotelian-Thomist heritage, with occasional deference paid to the Church Fathers, particularly to Gregory of Nyssa and Lactantius.²⁸ Modern jurisprudence needed to distinguish between so-called “primary” or “static” natural law, on the one hand, and “positive” or “dynamic” natural law on the other.²⁹ With this distinction, Verdross sought to expose the fundamental error of the Kelsenian critique of natural law: Kelsen whittled away the extrinsic, malleable doctrines of natural law, but he failed to properly appreciate its dogmatic core: the eternal stipulations of human dignity and liberty.

This brings us to the third area in which Verdross’s theory came to diverge from Kelsen’s, to the field of international law. It is here that we can distinguish clearly how Kelsen and Verdross conceptualised the universal validity of law in fundamentally different ways: To Kelsen the unity of the legal order consisted, on the one hand, in its hierarchical architecture of norms (*Stufenbau*), on the other hand, in the addressees scope of its norms. For Verdross, the Catholic-Aristotelian foundation of law stipulated the existence of values that could be objectively acquired, attained, and realised (a life *χατά φύσιν/ secundum naturam* was possible).³⁰ Hence, Verdross conceptualised the basis of the universal validity of law in an entirely different manner: According to the scholastic view of human nature, man was endowed with the capacities to recognise and realise a just, divinely ordained framework by means of human reason.³¹ The truths of Christian revelation were compatible with the demands of reason.

²⁷ Verdross, “Die Erneuerung”, 611–612; Peter Goller, *Naturrecht, Rechtsphilosophie oder Rechtstheorie? Zur Geschichte der Rechtsphilosophie an Österreichischen Universitäten (1848–1945)*, (Frankfurt am Main: Peter Lang, 1997), 46–54.

²⁸ Verdross, Abendländische Rechtsphilosophie, 53–59.

²⁹ Alfred Verdross, “Primäres Naturrecht, sekundäres Naturrecht und positives Recht in der christlichen Rechtsphilosophie” [1959], in *Die Wiener rechtstheoretische Schule. Schriften von Hans Kelsen, Adolf Merkl, Alfred Verdross*, eds. Hans R. Klecatsky, René Marcic, and Herbert Schambeck, (Stuttgart: Franz Steiner Verlag, 2010), 643–650; Alfred Verdross, “Dynamisches Naturrecht” [1965], *ibid.*, 765–770.

³⁰ Erhard Mock, “Die Erschließung der materialen Rechtsphilosophie durch Alfred Verdross,” in *Ius Humanitatis. Festschrift zum 90. Geburtstag von Alfred Verdross*, eds., Herbert Miehsler, Erhard Mock, Bruno Simma, and Ilmar Tammelo, (Berlin: Duncker & Humblot, 1980), 18–22.

³¹ Merio Scattola, “Eine innerkonfessionelle Debatte: Wie die Spanische Spätscholastik die politische Theorie des Mittelalters mit Hilfe des Aristoteles revidierte,” in *Politischer Aristotelismus und Religion im Mittelalter und Früher Neuzeit*, eds., Alexander Fidora, Johannes Fried, Matthias Lutz-Bachmann, and Luise Schorn-Schütte, (Berlin: Akademie Verlag, 2007), 139–162; Theodor W. Köhler, “Gleiche Menschennatur – naturgegebene soziale Unterschiede: Die Rezeption der aristotelischen Lehre vom *physei doulos*,” *ibid.*, 47–64.

When it came to the scope of revelation, Verdross vacillated but then concluded that the foundations of the main world religions suggested similar ethical precepts. However, Verdross also operated with a model of different cultural stages, from primitive and advanced cultures, which was also a necessary prerequisite for the distinction between civilised and uncivilised states so important in international law (the “legal conscience of civilised nations”, later rephrased as *les principes généraux de droit reconnues par les nations civilisées*).³²

It is important to note that Kelsen and Verdross both repudiated the older German school of state law positivism which had translated Hegelian individualism into a notion of entelechetic state wills and state entities.³³ Yet, Kelsen’s and Verdross’s break with the Hegelian tradition led them to different solutions to the post-Kantian predicament: While Kelsen adopted neo-Kantian epistemology as the guiding principle for the *Pure Theory of Law*, Verdross strove to realise material guarantees for a peaceful coexistence of states, not dissimilar to Kant’s *Weltbürgerrepublik (foedus amphyctionum)*. The former creatively appropriated South-Western neo-Kantianism³⁴ when elaborating his method, whereas the latter sought to realise Kant’s doctrine of cosmopolitan right as a scheme for international politics.

Verdross’s universalism prompted him to accord primacy to international law over state law. Kelsen also was an ardent supporter of the idea of a *Weltrechtsordnung* (world legal order). In contrast to Verdross, Kelsen did not presuppose that the foundation of this order rested on universal natural law. Instead, it had to be achieved by a new stage of social consciousness that reached beyond state boundaries. So, although Kelsen maintained that the question of the primacy of the international legal system over the state law lay beyond the purview of a positive science of law,³⁵ he enumerated basic premises for such a system:

³² Bruno Simma, “The Contribution of Alfred Verdross to the Theory of International Law,” *European Journal of International Law* 1995 6: 33–54; Marc Pauka, *Kultur, Fortschritt und Reziprozität: Die Begriffsgeschichte des zivilisierten Staates im Völkerrecht*, (Baden-Baden: Nomos, 2012); Miloš Vec, “Warten auf die Barbaren. Angst vor dem Fremden: Marc Pauka schreibt die Begriffsgeschichte des ‘zivilisierten Staates’ im Völkerrecht,” *Frankfurter Allgemeine Zeitung*, August 15, 2013.

³³ Simma, “The Contribution”, 41; Klaus-Ekkehard Bärsch, “Der Gerber-Laband’sche Positivismus.”, in *Staat und Recht: Deutsche Staatslehre im 19. und 20. Jahrhundert*, ed. Martin J. Sattler, (Munich: List, 1972), 43–71.

³⁴ See Krijnen, *Kelsen and South-West German Neo-Kantianism on Natural Law. Transcendental Philosophy beyond Metaphysics and Positivism*, in the present volume.

³⁵ According to Kelsen, the demonstration of the primacy of international law can only occur within the boundaries of a legal science, i.e., it can only demonstrate the superior logical plausibility of a legal monism which accords primacy to international law. The passage from logical plausibility to the development of international law is the passage from a

It would determine the jurisdiction of states; it would make them organs of international law; it would rest on a gapless sequence of deducible norms; and it would entrust permanent international courts with deciding whether a given norm was applicable to the respective case.³⁶

Verdross became the chief theorist of the *ius cogens* in international law, postulating that neither interstate treaties³⁷ nor customary law could subvert the general principle on which international law rested.³⁸ This general principle

science of positive law to politics, the separation between mind and will. The possibility of this passage is acknowledged by Hans Kelsen in his: "Les rapports de système entre le droit interne et le droit international public," *Recueil des cours de l'Académie de droit international* 14/4 (1926): 231–331, as well as in his *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrag zu einer reinen Rechtslehre*, (Tübingen: Mohr 1920).

³⁶ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, (Cambridge: Cambridge University Press, 2004), 246.

³⁷ Alfred Verdross, "Forbidden Treaties in International Law: A Comment on Professor Garner's Report on 'The Law of Treaties,'" *The American Journal of International Law* 31 no. 4 (1937): 573.

³⁸ It is an eloquent testimony to the internal rifts and disjunctions which permeate the natural law "tradition" – whose coherence can only be presupposed by someone as eager to dismantle it as Kelsen was – that Verdross repudiated eighteenth-century natural jurisprudence. Verdross argued that the belief in the legitimacy and binding normative value of interstate treaties was, in fact, an aftereffect and shallow replica of the subjectivist interpersonalism of the eighteenth century (der "getreue Abklatsch [...] des 'zwischenmenschlichen' Individualismus" (Alfred Verdross, "Die gesellschaftswissenschaftlichen Grundlagen der Völkerrechtstheorie" [1924/1925], in *Die Wiener rechtstheoretische Schule. Schriften von Hans Kelsen, Adolf Merkl, Alfred Verdross*, eds. Hans R. Klecatsky, Rene Marcic, and Herbert Schambeck, (Stuttgart: Franz Steiner Verlag, 2010), 1712). Carty, "Alfred Verdross", 84). These doctrines made the state arise from a social contract among the citizens (*pactum subjectionis, appetitus societatis, οἰκείοσις*), Verdross castigated this subjectivist-secularist programme which was blended with the *etiamsi daremus*-strand of late scholasticism and recycled the thought of the fourteenth-century occasionalists to subvert the divinely ordained character of natural law. See Hans Kelsen, "Die Grundlagen der Naturrechtslehre," in *Das Naturrecht in der politischen Theorie*, ed. Franz-Martin Schmözl, (Vienna: Springer, 1963), 31; for Verdross's argument against William of Ockham see „Die Erneuerung“, 610, c.f. Michael Stolleis, Lorraine Daston, eds., *Natural Law and the Laws of Nature in Early Modern Europe*, (Aldershot: Ashgate, 2008). On the malleability and constant refashioning of "traditions", see J.C. Heesterman, "India and the Inner Conflict of Tradition," in *The Inner Conflict of Tradition. Essays in Indian Ritual, Kingship, and Society*, ed. J.C. Heesterman, (Chicago: Chicago University Press, 1985), 10–25, on the remaking of natural law's key tenets regarding the primordial treaties that constituted the state, see Jan Rolin, *Der Ursprung des Staates: Die naturrechtlich-rechtsphilosophische Legitimation der Staatsgewalt im Deutschland des 18. und 19. Jahrhunderts*, (Tübingen: Mohr Siebeck, 2005). Verdross' stance was also anti-pandectist in that it shed doubt on the tenability of the Roman law approach to treaty obligation which had to be concluded among members of a predefined legal community in order to be binding (Verdross, "Die gesellschaftswissenschaftlichen Grundlagen", 1710–1711); see Gerhard Hammerstein, *Die*

was predicated on natural law, to be more precise on a shared legal conscience (*Rechtsbewusstsein*). In this context, Verdross employed Kelsen's term "basic norm" (*Grundnorm*), the methodological foundation of Kelsen's theory, but creatively twisted its meaning. The basic norm was a formal, methodological prerequisite of the internal coherence and objective validity of the law, which itself contained no determinate content nor specifications about the "just" or "unjust" nature of the law: "Only the validity, not the content of a legal order can be derived from the basic norm."³⁹ Verdross inflected Kelsen's term, filling the basic norm with concrete normative substance,⁴⁰ that is: with the preservation of human liberty, dignity and basic standards of inviolability.⁴¹

The gulf that separated Kelsen's and Verdross's approaches becomes evident in the way both thinkers conceptualised the position and purpose of international courts: Verdross, who was one of the architects of the Permanent International Court of Justice installed by the League of Nations, maintained that the court should adhere to and objectify "general principles of law", and was not completely free in determining its findings. For Verdross, neither customary law⁴² nor interstate treaties were deemed a sufficient basis for international law, the courts had to objectify the general principles of international justice derived from international law. Kelsen rejected all recourse to natural law as sufficiently vague to legitimise the very horrific crimes against humanity it purported to ban, but he retained an affinity with Verdross in the call for permanence in the work of international courts of justice such as in his essay on the Nuremberg War Crime Trials ("Will the judgment in the Nuremberg Trial constitute a precedent in international law?" (1947). According to Kelsen, it did not.)

Entwicklung des Naturrechtsgedankens in der katholischen Rechtsphilosophie des neunzehnten Jahrhunderts, PhD thesis, Albert-Ludwigs-Universität Freiburg im Breisgau, 1950; Heinrich Rommen, *Die ewige Wiederkehr des Naturrechts*, 2nd edition, (Munich: Kösel, 1947).

39 Hans Kelsen, *Pure Theory of Law* [1967], trans. M. Knight from the 2nd revised and expanded German edition, (Clark, NJ: The Law Book Exchange, 2005), 217; Hans Kelsen, *Introduction*.

40 Robert Walter, "Die Rechtslehren von Kelsen und Verdross unter besonderer Berücksichtigung des Völkerrechts," in *Hans Kelsen und das Völkerrecht*, eds., Robert Walter, Clemens Jabloner, and Klaus Zeleny, (Vienna: Manz, 2004) 42; Walter Rudolf, *Völkerrecht und deutsches Recht. Theoretische und dogmatische Untersuchungen über die Anwendung völkerrechtlicher Normen in der Bundesrepublik Deutschland*, (Tübingen: Mohr Siebeck, 1967), 137–150; Alfred Kleinlein, "Alfred Verdross as a Founding Father of International Constitutionalism?", *Goettingen Journal of International Law* 4, no. 2 (2012): 385–416.

41 Simma, "The Contribution", 49.

42 Alfred Verdross, "Das Problem des freien Ermessens und die Freirechtsbewegung," *Österreichische Zeitschrift für öffentliches Recht* 1 (1914): 616–644.

Verdross's outspoken advocacy of the supremacy of international over national law has become clear from the skeletal outline of his argument presented above. It is not surprising that, for Kelsen, the question is not one of a necessary priority, but of the more limited methodological demonstration of logical primacy. Hence, it was not a necessary element of a legal science of positive law,⁴³ but, rather, the subject of extra-legal, political choice.⁴⁴ Clearly this theory of political choices impinged on the respective definitions of basic determinants of sovereignty, and it is within these parameters that Kelsen's exchange with Verdross was particularly fertile: In Kelsen's accounts from the 1920s, it was still directly deducable from the hypothetical basic norm without positive-legal interpositions,⁴⁵ while later on – arguably under Verdross's influence – Kelsen came to define sovereignty as the "[...] legal authority of the States under the authority of international law [...]]. Consequently, the State's sovereignty under international law is its legal independence from other States."⁴⁶ Also, Kelsen's exposition of the reason for the distinct, conflictual possibilities of the primacy of either international or national law is explicitly shaped by political predilections: Kelsen stated that "subjectivist imperialist ideologies" tended to opt for the primacy of national law, whereas objectivist pacifist ideologies sustained the primacy of international law.⁴⁷

We have already alluded to Kelsen's and Verdross's common rejection of German fin-de-siècle public law positivism with its doctrines of state wills and self-sufficient state entities. It is quite intriguing that Verdross would refract his disagreement with his former mentor precisely by accusing Kelsen of perpetrating the very Hegelian individualist fallacy they both rejected: Verdross defined his overarching position as "a battle against voluntarist legal positivism".⁴⁸ Thus, Kelsen is credited with a voluntarist world

43 Walter Pauly, "Concepts of Universality – Hans Kelsen on Sovereignty and International Order," in *Hans Kelsen and Carl Schmitt: A Juxtaposition*, eds., Dan Diner and Michael Stolleis (Gerlingen: Bleicher, 1999), 46.

44 Compare e.g. Josef L. Kunz, *Völkerrechtswissenschaft und reine Rechtslehre* (Leipzig–Vienna: Deuticke, 1923), 82; and Alfred Verdross, *Die völkerrechtswidrige Handlung und der Strafan spruch der Staaten* (Berlin: Engelmann, 1920).

45 Kelsen, „Les rapports“, 251, 256.

46 Hans Kelsen, "The Principle of Sovereign Equality of States as Basis for International Organization," *Yale Law Journal* 53, no. 2 (1944): 208; Alfred Rub, *Hans Kelsens Völkerrechtslehre: Versuch einer Würdigung* (Zurich: Schulthess, 1995), 418.

47 Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre*, 2nd edition (Tübingen: Mohr Siebeck, 1928); Kelsen, *Introduction*, 111–125; Hans Kelsen, *Principles of International Law* (New York: Rinehart, 1952), 446–447.

48 "Univ. Prof. Dr. Alfred Verdross (Wien)" [Selbstdarstellung], 204; Verdross, "Zwei empirische Begründungen", 147.

view,⁴⁹ but this is an unfounded accusation: Kelsen conceptualised the notion of free will in a constructivist manner. The principle of imputation, according to Kelsen, does not rest on the presupposed free will of the individual, but, instead, the individual is made free by becoming subject to imputation. The underlying theme of German public law positivism resurfaced again when Kelsen maintained that Verdross's dualism between the positive law and the higher divine, or rational order surreptitiously replicated the very dualisms Kelsen rejected (subjectivist – objectivist, public – private). In nineteenth century German legal positivism, the state acted as the embodiment of divine and rational order. Verdross's theory seemed structurally indebted to this framework, installing international law in the place previously occupied by the state.⁵⁰

Let us pause here to recapitulate the argument of our chapter so far, and to offer some signposts for the following sections. The preceding analysis has revealed three central areas of contestation between Kelsen and Verdross during the 1920s and 1930s, the neo-Kantian analysis of the validity grounds of the law, natural law, and the significance both acquired for the foundations of international law. In the subsequent parts of the chapter, we continue our enquiry into the vicissitudes of natural law legalism, but shift the focus to the decades after 1945. The next section is devoted to Kelsen's conflict with another of his erstwhile students, the political philosopher Eric Voegelin. This permits us to demonstrate that Kelsen's critique of natural law was no epiphenomenon: it was pivotal both for his advocacy of democracy and for his philosophy of science after World War II. Kelsen considered both these pursuits imperilled by a resurgence of natural law legalism and this, in turn, leads to the final part of our chapter. Here, we return to Verdross's Austria after 1945: we reconstruct

⁴⁹ Verdross relished teasing out the consequences of Kelsen's protracted re-statements of the problem of the will, such as in his paper on Johannes Messner and Victor Kraft from 1967, where he gleefully noted that Kelsen had recently come close to William of Ockham's voluntarism when he maintained that every norm needed an "imperator" (Alfred Verdross, "Zwei empirische Begründungen naturrechtlicher Normen: Eine vergleichende Untersuchung der Ermittlung des Naturrechts durch Johannes Messner und der sozialen Moral durch Viktor Kraft," in *Ordnung im sozialen Wandel: Festschrift für Johannes Messner zum 85. Geburtstag*, (Berlin: Duncker & Humblot, 1976), 147): "Since 1963 Kelsen maintains that every norm needs an 'imperator', a norm-setting will as necessary prerequisite, therewith he returns to the nominalist foundations of law laid by William of Occam." See Hans Kelsen, "Zum Begriff der Norm," in *Festschrift Hans Carl Nipperdey*, vol. 1 (Munich–Berlin: Beck, 1965a), 57–70; Hans Kelsen, "Law and Logic," in *Philosophy and Christianity. Philosophical essays dedicated to Professor Dr. Hermann Dooyeweerd*, (Amsterdam: North Holland Publishing Company, 1965b), 231–238; Ewald Wiederin, "Das Spätwerk Kelsens," in *Hans Kelsen: Leben – Werk – Wirksamkeit*, eds., Robert Walter, Werner Ogris, and Thomas Olechowski, (Vienna: Manz, 2009), 358.

⁵⁰ Kelsen, *Introduction*, 37–38.

the circumstances and epistemic core of the natural law revival among Austrian scholars who, in parallel, at the same time sought to ingratiate themselves with their compatriot Kelsen and to bask in the light of his international reputation.

3 The Promise and Perils of Natural Law in the Cold War: Voegelin and Kelsen on Science and Democracy

In 1962, a congress was held at the Archbishop of Salzburg's very own research institute for the basic questions of the sciences. Hosted in the Edmundsburg, a Baroque palazzo ensconced over the old city on the foothills of the Mönchsberg, the event brought together the *crème* of German, Austrian, and Italian natural law-theorists. Hans Kelsen who had travelled to Austria, from his home at Berkeley, also figured among the invitees, and so did two of his former students: Alfred Verdross and Eric Voegelin. The workshop conveners' aim to discuss natural law in political theory can be placed in two contexts: On the one hand, this was a by-product of the natural law-revival in Austria after 1945 whose conditions we analyse in the fourth part of our chapter. On the other hand, and this will be the main theme in the present section, it permits us to survey Kelsen's engagement with Eric Voegelin, its roots in the academic life of interwar Vienna, and its re-elaboration after 1945 under the conditions of the Cold War.

Voegelin studied with Kelsen in the 1920s, he was among his doctoral advisors, but Voegelin's estrangement from his mentor began fairly early. Like Verdross, Voegelin chided Kelsen for occluding the social and political problems of statehood: Kelsen's dissection of competing and interlocking norms ignored the mechanisms of symbolic sense-constitution that held political communities together;⁵¹ in 1936 Voegelin published *The Authoritarian State*,⁵² an apologia for the Austrofascist regime. Here, Voegelin portrayed Kelsen's desiccated legal positivism as a result of the Central European experience. According to Voegelin the absence of genuine statehood in the old Habsburg Monarchy had spawned an "administrative style", and Kelsenian positivism was the "logified" consummation of this imperial legacy: a purportedly neutral analysis of aggregations of norms that sorely neglected the guiding principles

⁵¹ Erich Voegelin, "Reine Rechtslehre und Staatslehre," *Zeitschrift für öffentliches Recht* 4 (1924): 80–131.

⁵² Eric Voegelin, *The Collected Works of Eric Voegelin 4: The Authoritarian State: An Essay on the Problem of the Austrian State*, ed. Gilbert Weiss, trans. Ruth Hein, (Columbia: University of Missouri Press, 1999 [1936]).

of statehood.⁵³ The content of these “principles” which Voegelin envisaged becomes clearer if one considers his 1931 endorsement of Carl Schmitt’s defence of the ethnically homogeneous state.⁵⁴ For Voegelin, true statehood in Austria was established by Austrofascist authoritarianism which had overturned the “imperial” and “administrative style” – and abrogated the republican Constitution Kelsen had co-authored.

Voegelin, the supporter of Austrofascism, found his future prospects jeopardised by the subsequent Nazi occupation of Austria. After having been deprived of his *venia legendi* at the University of Vienna,⁵⁵ due to his sympathies for the previous regime, in April 1938, Voegelin emigrated to the U.S.⁵⁶ Voegelin’s partisanship for the Austrofascists, and the ensuing war years, brought a long lull in the correspondence between Kelsen and Voegelin. Toward the end of 1953, Voegelin, then professor of political science at Louisiana State University in Baton Rouge, approached his former teacher in a courteous letter, and Kelsen expressed interest in Voegelin’s *New Science of Politics*.⁵⁷ In February 1954, Kelsen wrote to Voegelin informing him that he had already devoted several weeks to the study of the *New Science*. Indeed Kelsen would go on to pen an extensive essay on Voegelin’s book.⁵⁸ Kelsen’s devastating critique permits us to unravel the political subtexts of a broader post-war debate on the foundations of science and democracy.

The majority of liberal and conservative Cold War political theorists in the West sought to locate and drain the – allegedly equiprimordial – intellectual sources of Nazism and of Soviet communism, increasingly lumping them together under the elusive and inchoately defined umbrella term of “totalitarianism”.⁵⁹ Voegelin’s aim was to restore society and political theory through the elaboration of a solid transcendental foundation, which was to

⁵³ Johannes Feichtinger, *Wissenschaft als reflexives Projekt. Von Bolzano über Freud zu Kelsen: Österreichische Wissenschaftsgeschichte 1848–1938*, (Bielefeld: Transcript, 2010), 342–346.

⁵⁴ Erich Voegelin, “Die Verfassungslehre von Carl Schmitt: Versuch einer konstruktiven Analyse ihrer staatlichen Prinzipien,” *Zeitschrift für Öffentliches Recht* 11 (1931): 89–109.

⁵⁵ Staudigl-Ciechowicz, and Olechowski, “Allgemeines und österreichisches Staatsrecht”, 601.

⁵⁶ Johannes Feichtinger, “Transatlantische Vernetzungen. Der Weg Hans Kelsens und seines Kreises in die Emigration,” in *Hans Kelsen: Leben – Werk – Wirksamkeit*, eds., Robert Walther, Werner Ogris, and Thomas Olechowski, (Vienna: Manz, 2009), 324, 330–334.

⁵⁷ Michael Ley, and Gilbert Weiss, *Voegelin in Wien: Frühe Schriften 1920–1938*, (Vienna: Passagen, 2007), 116.

⁵⁸ Hans Kelsen, *A New Science of Politics. Hans Kelsen’s Reply to Eric Voegelin’s New Science of Politics: A Contribution to the Critique of Ideology* [1954], ed. Eckhart Arnold, (Frankfurt am Main–Lancaster: Ontos, 2004), 115.

⁵⁹ Clemens Vollnhals, “Der Totalitarismusbegriff im Wandel des 20. Jahrhunderts.” *Böhemia* 49, no. 2 (2009): 385–398; Jan-Werner Müller, “Fear and Freedom: On ‘Cold War Liberalism’,” *European Journal of Political Theory* 7, no. 1 (2008): 45–64.

be achieved through a dual strategy: a return to natural law cleansed of its Enlightenment accretions, and the exposure of purportedly value-free, areligious modern science as a “political religion” that relied on distorted theological assumptions. In common with Verdross, and in unison with other critics, such as Jacob Talmon and Leo Strauss,⁶⁰ Voegelin yearned for a brand of non-desecrated and non-vulgarised natural law, for a natural law that had not yet been misappropriated by liberal individualism: Rousseau, in particular, was censured for having inaugurated “totalitarian democracy”, a dictatorship of the majority.⁶¹

Kelsen immediately grasped the post-war political thrust which animated Voegelin’s theory. In his “crusade against positivism”, Voegelin engaged in a valiant combat against a construct: Voegelin wrongly accused positivism of conflating different logics and methods of inquiry, and of genuflecting before the “natural sciences”.⁶² To Kelsen, this accusation of absolute positivist “scientism” barely concealed Voegelin’s central objective – the conceptual revitalization of the “transcendental” and universal foundations of social and legal order. Voegelin’s theory was emblematic of the postwar intellectual climate: Whenever “wars and revolutionary movements” disrupt the “social equilibrium”, Kelsen states in his extended critical review of *The New Science of Politics*, the desire for “metaphysical speculation” about the “absolute [...] justification” of the political becomes ubiquitous.⁶³ Natural law⁶⁴ is but one symptom of this recrudescence of the “absolute”. Voegelin’s desire for the “absolute” also threatened to impair university education: For Kelsen, who believed that the intersubjective disclosure and functional analysis of value-statements and truth-claims⁶⁵ was the precondition of scholarly work in general, and of a legal science as a study of norms, Voegelin’s plea for a higher education that instilled “values” was tantamount to indoctrination.⁶⁶

60 See Gostmann, *Kelsen and Strauss: Variants of the post-theological Wager*, in the present volume.

61 José Brunner, “From Rousseau to Totalitarian Democracy: The French Revolution in J.L. Talmon’s Historiography,” *History and Memory* 3 (1991): 60–85; Verdross, *Abendländische Rechtsphilosophie*, 117–121.

62 Kelsen, *A New Science*, 13.

63 Kelsen, *A New Science*, 11.

64 Eric Voegelin, *Modernity without Restraint: The Political Religions, The New Science of Politics, and Science, Politics, and Gnosticism*, ed. Manfred Nenningsen, (New York: Columbia University Press, 2000).

65 Kelsen, *A New Science*, 11.

66 Kelsen, *A New Science*, 25; for a succinct statement of Voegelin’s argument see: Eric Voegelin, “The German University and the Order of German Society: A Reconsideration of the Nazi Era” [1966], in *The Collected Works of Eric Voegelin 12: Published Essays, 1966–1985*, ed. Ellis Sandoz, (Baton Rouge–London: Louisiana University Press, 1999), 26.

Voegelin's position was replete with contradictions: He wrongly accused positivism of utilizing the guiding framework of the natural sciences whilst maintaining that scholarship and society should emulate some purported "natural" standard. The concept of nature Voegelin had in mind was opposed to the corresponding concept designed by nefarious "scientism", yet at the same time Voegelin – again in the vein of Carl Schmitt, this time indebted to his *Political Theology* (1922) – accused modern science and politics of tacitly replicating the theological dogmas they sought to supplant. Kelsen took up the gauntlet in another lengthy text devoted to "secular religion", a manuscript he drafted in the years that surrounded the 1962 Salzburg conference. This posthumously published study⁶⁷ is both a sweeping rejection of Schmitt's and Voegelin's reading of modern science and politics, as essentially eschatological and soteriological ideologies of progress, and the interpretive rescue of a long cast of thinkers (ranging from Hobbes over the philosophers of the Enlightenment, the nineteenth-century positivists, to Marx, Nietzsche, and twentieth-century natural scientists) from the clutches of the "theologisers".⁶⁸

For our analysis, it is crucial to highlight the paradoxical constellation of three elements Kelsen identified in Voegelin's work. Voegelin asserts the irreducible, individual belief in transcendence as an important counterweight to the omnipotence of modern science and of the modern state. Voegelin conceives the state as an entity which perpetuates specifically religious, salvational ideologies that were divested of their – to Kelsen dangerously elusive and combustible "humanist" – value substance. Concomitantly, Voegelin views modern science and statehood as saturated with "relativism", and calls for a return to a form of "transcendental" and "natural" supreme order.⁶⁹ All this added up to a confused argument: Overbearing modern science and statecraft forced citizens to be relativists. Citizens, if liberated from this double stricture, would freely experience the purity of absolute, transcendental values whose content "nature" generously enables them to grasp.

At the Salzburg meeting of 1962, Kelsen restated his excoriating critique of natural law. In his opening lecture, Kelsen defended the distinction between "is" and "ought" and the functional analysis of value-statements: These

⁶⁷ Hans Kelsen, *Secular Religion. A Polemic Against the Misinterpretation of Modern Social Philosophy: Science and Politics as 'New Religions'*, eds., Robert Walter, Clemens Jabloner, and Klaus Zeleny, (Dordrecht: Springer, 2012).

⁶⁸ From the perspective of the history of science, both Voegelin's and Kelsen's reconstructions remain essentially polemic, marked by a slipshod and episodic approach. Both accounts fail to address the conventions and techniques that reveal the inextricable connectedness of "religious" and "scientific" concerns, particularly in the early modern age; see Steven Shapin, *The Scientific Revolution*, (Chicago: University of Chicago Press, 1996).

⁶⁹ Hans Kelsen, *Secular Religion*, 3, 271.

value-statements are always subjective and, if politically negotiable, subject to democratic elaboration and contestation, hence the pretension to the universality and objectivity of “natural law” is fallacious and unscientific.⁷⁰ Kelsen’s crisp review of postwar natural-law discourse complicated its venerable ancestry: its proponents stressed the smooth transition between Aristotelian and Thomist natural law, thereby draping themselves in the mantle of the classical-Christian heritage. Kelsen undermined this claim: contrary to what postwar natural lawyers suggested the idea that moral principles are “divinely implanted” did not in fact derive from Aristotelianism, it was a Thomist distortion of the Aristotelian doctrine.⁷¹

In his Salzburg lecture, Kelsen also contended that the advocacy of natural law inevitably required the belief in a divinely ordered cosmos that was comprehensible to God’s creatures:⁷² Natural law ineluctably hinges on a theonomous worldview. Here, Kelsen reworked a critical framework he had already articulated in the 1920s and 1930s: The flourishing of science required a democratic design of society, and the postwar resuscitation⁷³ of natural law constituted a disavowal of democracy and scientific enquiry, sacrificing both to the pursuit of ostensibly eternal and immutable truths. In contrast

he who relies on worldly truth alone, who makes human cognition [*Erkenntnis*] formulate and direct social goals, cannot justify the inevitable coercion required for their realisation but by consent of at least a majority of those for whose benefit the coercive order is erected.⁷⁴

⁷⁰ Kelsen, “Die Grundlagen der Naturrechtslehre”; Gilbert Weiss, “Repräsentative Menschlichkeit. Hans Kelsen versus Eric Voegelin in Salzburg,” in *Verdrängter Humanismus – verzögerte Aufklärung VI: Philosophie in Österreich 1951–2000*, eds., Michael Benedikt, Reinhold Knoll, Franz Schwedauer, and Cornelius Zehetner, (Vienna: Facultas, 1962), 203–214.

⁷¹ Hans Kelsen, “Die Grundlagen der Naturrechtslehre,” 30; Panajotis Kondylis, *Die neuzeitliche Metaphysikkritik*, (Stuttgart: Klett-Cotta, 1990).

⁷² Hans Kelsen, “Die Grundlagen der Naturrechtslehre,” 35–37.

⁷³ Alfred Verdross, “Die Erneuerung der materialen Rechtsphilosophie” [1957], in *Die Wiener rechtstheoretische Schule. Schriften von Hans Kelsen, Adolf Merkl, Alfred Verdross*, eds. Hans R. Klecatsky, René Marcic, and Herbert Schambeck, 601–621. Stuttgart: Franz Steiner Verlag, 2010, 614. In this essay from 1957, Verdross rather pointedly speaks of the “mass grave” in which natural law theories had been collectively buried by their late nineteenth-century detractor, Karl Bergbohm, (Bergbohm 1892).

⁷⁴ Hans Kelsen, “Vom Wesen und Wert der Demokratie” [1920], in *Hans Kelsen. Verteidigung der Demokratie: Abhandlungen zur Demokratietheorie*, eds., Matthias Jestaedt, and Oliver Lepsius, (Tübingen: Mohr-Siebeck, 1996), 32; see the superb discussion in: Horst Dreier, “Secular Religion’ im Kontext von Kelsens Gesamtwerk,” in *Secular Religion: Rezeption und Kritik von Hans Kelsens Auseinandersetzung mit Religion und Wissenschaft*, ed. Clemens Jabloner, Thomas Olechowski, and Klaus Zeleny, (Vienna: Manz, 201), 1–18. Kelsen, *Secular Religion*, 265–268, emphasizes that Voegelin’s repudiation of what he

Open-endedness, reversibility, and falsifiability are the distinctive traits of modern science and democracy, but Kelsen's critique of the renascence of natural law proceeds even further: In his 1941 book on *Causality and Retribution* (Kelsen 1941, cf. also the English translation with slight alterations Kelsen 1943), Kelsen trenchantly argued that modern legal science had emerged out of the analytical and ideological separation of society and nature. According to Kelsen, the lawfulness of causalational regularities in nature had been modelled after the principle of retribution, hence "natural laws" were a curious inversion of this sociomorphous and socio-normative conception of nature: Now the lawfulness nature had initially been imparted with was by human contrivance, a lawfulness originally modelled after a type of social interaction (retribution), and was invoked to structure society. "Nature" was transformed from a replica of rules of social interaction into a repository for overarching laws society should obey.⁷⁵

Kelsen's postwar critique of Voegelin and Verdross has to be read in relation to these backgrounds: Kelsen perceived the natural law-vogue as a recrudescence of the "primitive" conflation of nature and society that was imimical to both democracy and scientific enquiry. The subject of legal science, norms, could only emerge once society was recognised as a sphere of human value and truth-statements that was sharply distinct from nature. Hence, Kelsen's impatience about the churlish and calumnious claim of Voegelin that legal positivism advocated the application of natural science-methods to the humanities.

calls "gnostic" secular-religious forms of political life extends to modern liberal-Western democracies. Verdross's advocacy of an "organic" structuring of the internal life of states as well as of the world community was sufficiently pliable to be compatible with a Greater German Christian-*völkisch* design of political order as well as with the peaceful world society protected by an international judiciary he advocated (Busch, "Alfred Verdross," 156; Inge Marboe, "Teil 2: Verdross' Völkerrechtstheorie vor dem Hintergrund des Nationalsozialsozialismus," in *Vertriebenes Recht – Vertreibendes Recht. Zur Geschichte der Wiener Rechts- und Staatswissenschaftlichen Fakultät zwischen 1938 und 1945*, eds. Franz-Stefan Meissel, Thomas Olechowski, Ilse Reiter-Zatloukal, and Stefan Schima, (Vienna: Manz, 2012) 171–193). In Verdross's 1937 textbook on international law, National Socialism is portrayed as organic, "anti-imperialist and federalist" (Marboe, "Teil 2", 185).

75 On Kelsen's reflections about probability as a way to reconcile the conceptions of lawfulness that obtain in the natural and the social realm, see Wiederin, "Das Spätwerk Kelsens," 353–354. On Kelsen's re-elaboration of the distinction between "is" and "ought" on the basis of speech act theory, as illocutionary and perlocutionary functions of utterances that describe ("is") and prescribe ("ought") ibid., 354.

Voegelin and Verdross held that Kelsen ignored the responsibility that had come to weigh heavily on legal science since 1945. This led to Kelsen's insouciance concerning three problems: the preservation of democracy, the validity sources of international law, and the remarkable success of the social-behavioural, economic, and natural sciences in postwar academia that threatened to engulf legal science and political philosophy. Natural law seemed a panacea, providing the desperately needed conceptual resources to tackle these problems. To Kelsen's postwar detractors, the collapse of the Weimar republic threw the central dilemma into sharp relief: the preservation of democracies prone to self-annihilation would not be possible with Kelsen's moral agnosticism, and with his advocacy of equality and participation in an open-ended process that negotiated the constitutional framework of each society.⁷⁶ Kelsen reiterated his interwar position: to him a democracy that curtailed the freedom of conscience and public debate in order to preserve its "values" cut the ground from under its own feet.⁷⁷

The establishment of the United Nations, with its international conventions and treaties that banned atrocities, human rights violations, and genocide, made recourse to natural law-arguments.⁷⁸ "Natural law", Verdross claimed at the 1962 Salzburg workshop, "is cultural law anchored in the being (*Wesen*) of man".⁷⁹ For Verdross, international law was rooted in the "natural-legal idea of the unity of mankind which not only comprises the [...] sovereign peoples organised in states, but is also recognised in the principle of human rights as sanctioned by international law".⁸⁰ Kelsen retorted that no absolute and uncontested conception of universal moral values could ever be attained, and, therefore, objective insights into the "nature" of universal justice were equally unobtainable: Hence, the conceptual inflation and buttressing of "morality" often concealed ulterior motives and power-interests.⁸¹

76 Alfred Verdross, „Primäres Naturrecht“, 649.

77 Horst Dreier, "Kelsens Demokratietheorie: Grundlegung, Strukturelemente, Probleme," in *Hans Kelsens Wege sozialphilosophischer Forschung*, eds., Robert Walter, and Clemens Jabloner, (Vienna: Manz, 1997), 101.

78 Jochen von Bernstorff, *The Public International Law of Hans Kelsen: Believing in Universal Law*, trans. Thomas Dunlap, (Cambridge: Cambridge University Press, 2010), 27, 49, 115, 251–252; Kleinlein, "Alfred Verdroß".

79 Alfred Verdross, "Dynamisches Naturrecht," 770.

80 Alfred Verdross, "Der Einfluß der Naturrechtslehre auf Theorie und Praxis der internationalen Beziehungen," in *Das Naturrecht in der politischen Theorie*, ed. Franz-Martin Schmözl, (Vienna: Springer, 1963), 116.

81 Jochen von Bernstorff, *The Public International Law of Hans Kelsen*, 253.

The final area of contestation concerned the politics of the disciplines: Modernisation theory thrived in postwar U.S. higher education, and its increasing success was to trigger conflicts of distribution. Once academia was awash with behaviourist, social-psychological, and political-economical models,⁸² the prestige of a distinctive socio-normative legal and political theory seemed shattered. Voegelin's argument from nature sought to repel the invasion of modernisation theory in the U.S. humanities⁸³ and, in Austria, Verdross's students and colleagues invoked natural law in order to prevent the establishment of political science as an autonomous discipline with its own infrastructure.⁸⁴ Voegelin and Verdross targeted the conflation of social and natural ontologies: They regarded the new regimes of quantifiable evidence derived from predictable human behaviour and the manipulation of citizens' choice architectures as the products of a new, culturally illiterate, immoral expertocracy that supplied leadership techniques for enhanced governance. Yet, Verdross's and Voegelin's contention that Kelsenian "positivism" bore intellectual responsibility for the rise of these "naturalist" epistemologies is fundamentally flawed. Kelsen trenchantly observed that Voegelin's and Verdross's appeals to a natural order of human life, their "renaturalization" of legal theory, effectively undermined the distinction between the social realm and the natural world and, thereby, threatened both democracy and science. Kelsen's critique was prescient, as the knowledge about the regularities of putative "human nature", and the processing of policy-relevant data on citizens' natural inclinations and susceptibilities, have come to assume a prominent position in the configuration of current law-making and legislative procedures in Western democracies. Hence, Kelsen's critique is validated to the effect that these arguments from nature, whether articulated by metaphysical theorists and "theologisers", or by behaviourists, legal realists, and advocates of "law and

82 Wolfgang Knöbl, "Aufstieg und Fall der Modernisierungstheorie und des säkularen Bildes 'moderner Gesellschaften,'" in *Moderne und Religion: Kontroversen um Modernität und Säkularisierung*, eds., Ulrich Willems, Detlef Pollack, Helene Basu, Thomas Gutmann, and Ulrike Spohn, (Bielefeld: Transcript, 2013), 75–116.

83 Barry Cooper, and Jodi Bruhn. *Voegelin Recollected: Conversations on a Life*, (Columbus, Missouri: University of Missouri Press, 2008), 23; David Ricci, *The Tragedy of Political Science: Politics, Scholarship, and Democracy*, (New Haven: Yale University Press, 1984), 217; James Farr, "The new science of politics," in *The Cambridge History of Twentieth-Century Political Thought*, eds., Terence Ball, and Richard Bellamy, (Cambridge: Cambridge University Press, 2003), 443–444.

84 Thomas König, "Vom Naturrecht zum Behavioralismus und darüber hinaus. Konzeptionelle Grundlagen der Disziplin Politikwissenschaft in Österreich," *Österreichische Zeitschrift für Politikwissenschaft* 41, no. 4 (2012): 419–438.

economics", both destroy the very identity of law as a coercive and normative order: if law is supposed to adjust to the purported order of nature, how can it continue to act as a system of man-made norms, and as a regulatory order that counteracts "natural" inclinations?⁸⁵

4 The Renascence of Catholic Natural Law in Austria after 1945

In 1967, another festive occasion was held in Salzburg: The newly established Paris Lodron University conferred its honorary doctorate upon the three main representatives of the Austrian school of legal theory, namely, to Hans Kelsen, Adolf Merkl, and Alfred Verdross. This celebration testifies that the bonds between Verdross, Merkl, and Kelsen had never been severed. What is more remarkable, however, is another aspect. Balduin Schwarz, the Dean of the Faculty of Philosophy of Salzburg, closed his laudatory speech on Kelsen with a piece of good advice that effectively repeated the suggestion from the 1930 essay in which Verdross bid farewell to Kelsen. Schwarz addressed Kelsen with the following exhortation: "I wonder whether [...] the separation of ought and is, the thesis of the hypothetical character of the basic norm, and the purely subjective character of the concept of justice should not better be abandoned."⁸⁶

The conferral of the Salzburg honorary degree was part of Verdross's compensation strategy, of a programme of "moral indemnification" for his erstwhile mentor Kelsen. This strategy of moral indemnification was fine-tuned with the wider project of Austrian self-exculpation after 1945 which presented Austria as Hitler's first victim.⁸⁷ After the demise of the Third Reich,

⁸⁵ See Franz Leander Fillafer, and Małecka, Magdalena, "What Nature, What Law?", *Max Weber Programme Newsletter* 9, Summer 2015. Florence: European University Institute [https://blogs.eui.eu/maxweberprogramme/2015/07/16/what-nature-what-law/].

⁸⁶ Balduin Schwarz, "Laudatio," in *Philosophie huldigt dem Recht. Hans Kelsen, Adolf J. Merkl, Alfred Verdross. Ehrendoktoren der Universität Salzburg. Erinnerungsband zum 1. Juni 1967*, (Vienna–Frankfurt am Main–Zurich: Europa Verlag, 1968), 40.

⁸⁷ Busch, "Alfred Verdross," 164. Verdross remained in close contact with Kelsen and, in 1957, even asked him to revise the account of legal positivism in his forthcoming *Occidental Legal Philosophy* (Verdross, *Abendländische Rechtsphilosophie*). Kelsen rewrote the passage in a very conciliatory tone, stressing that the question of the justice or injustice of positive law was beyond the remit of his legal theory: "K.'s legal doctrine [...] is also not irreconcilable with natural law [...] when it comes to the validity grounds of positive law. K. gives a *conditional* answer to this question; he says: a positive order of law is valid as it is actually enacted [...], if one presupposes the existence of a basic norm according to

German and Austrian academia were marked by power-bargaining and the retrofitting of scholars' previous Nazi sympathies. The old interwar charge that Kelsenian relativism and subjectivism had enfeebled democracy was revived in this context, now the Nazi seizure of power was conveniently added to positivism's register of sins.⁸⁸ In Austria and Germany, the critique of Kelsen was articulated by scholars who worked for the local "renascences of natural law."⁸⁹

In Austria, Johannes Messner, rémigré from England and professor of theology in Vienna, was the primary proponent⁹⁰ and Alfred Verdross, who had become the uncrowned king of Austrian jurisprudence after 1945, was among Messner's coadjutors. This reassertion of natural law was situated within a more extensive alibi: Many scholars who had been embroiled in Nazism retained their interwar epistemologies and animosities, in particular their anti-modernism and anti-liberalism. Yet, by a creative twist of argument, these intellectuals managed to gloss over that they had welcomed Nazism just a few years before as the triumphant destroyer of relativism. Now, they chose to portray Nazism as the result of the very relativism they had always rejected, as the consequence of value-free science and of the rise of the masses.⁹¹ In Germany and Austria, this process of self-disculpation often came in the guise of natural law-based "humanism".

which everybody shall act in compliance with the constitutional provisions [...]. With this hypothetical formula K. merely characterises the condition of a positivist account of the law [*Rechtsbetrachtung*]. K. sharply insists on the premise that the basic norm can, but must not be accepted as a guiding assumption." (Busch, "Alfred Verdross," 164).

⁸⁸ For U.S. refractions of these themes, see e.g. Franz Neumann, *Behemoth: The Structure and Practice of National Socialism* (Oxford: Oxford University Press 1944), 46; Leo Strauss, *Natural Right and History* (Chicago: Chicago University Press, 1953), 5; William Scheuerman, "Professor Kelsen's Amazing Disappearing Act," in *Émigré Scholars and the Genesis of International Relations: A European Discipline in America?*, ed. Felix Rösch (Hounds-mills, Basingstoke: Palgrave-Macmillan, 2014), 87.

⁸⁹ Lena Foljanty, *Recht oder Gesetz: Juristische Identität und Autorität in den Naturrechtsdebatten der Nachkriegszeit* (Tübingen: Mohr-Siebeck, 2013).

⁹⁰ Johannes Messner, *Social Ethics: Natural Law in the Modern World*, trans. J.J. Doherty (St. Louis–London: Herder, 1949); Johannes Messner, *Das Naturrecht. Handbuch der Gesellschaftsethik, Staatsethik und Wirtschaftsethik* (Innsbruck–Vienna: Tyrolia, 1950); Johannes Messner, "Aktualität des Naturrechts," *Österreichische Zeitschrift für öffentliches Recht* 27, no. 1–2 (1976): 43–66.

⁹¹ Franz Leander Fillafer, "The Enlightenment on Trial: Reinhart Koselleck's Interpretation of Aufklärung," in *The Many Faces of Clio. Cross-Cultural Approaches to Historiography*, eds., Franz L. Fillafer, and Q. Edward Wang (Oxford, New York: Berghahn, 2007), 322–345.

The revival of natural law lends itself particularly well to surveying the intellectual climate of the postwar Austrian Republic, and for exploring the post-1945 restoration of interwar theories. There were two significant exceptions to this general tendency of revival and reassertion: Kelsen's Pure Theory of Law was effaced, and this fate was shared by the logical empiricism of the Vienna Circle. Adherents of both had been forced to leave Austria since the 1930s, and none of them was to return. However, clear reverberations of both schools' theoretical tenets can be detected in the postwar conflict over Catholic natural law. Ernst Topitsch, a young Viennese intellectual, merits attention here as mediator and multiplier of both strands.⁹² Topitsch had studied with Victor Kraft, the only adherent of logical positivism to survive with a professorial chair in Austria, Topitsch also was an avid reader and editor of Hans Kelsen's work.⁹³ Topitsch launched a vitriolic attack on Verdross's claim that Catholic natural law was the sole effective safeguard of liberty and dignity in the battle against totalitarianism, be it Nazism or Communism. In a central essay of 1950, published also as a rejoinder to Messner's *Naturrecht*, Topitsch emphasized the problem that the adherents of the natural law revival purposefully avoided to discuss: the "natural-legal tendencies under National Socialism".⁹⁴

In post-1945 Austria, the renascence of Catholic natural law fulfilled the double function of exonerating scholars whose political involvement in the Nazi era was effectively obscured, and of securing the postwar predominance of right-wing scholarship. It fulfilled the former function because these intellectuals maintained that they were value-oriented Christian

⁹² Franz Leander Fillafer, "Ernst Topitsch und Kant," in *Umwege: Annäherungen an Immanuel Kant in Wien, Österreich und Osteuropa*, ed. Violetta L. Waibel, (Göttingen: V&R unipress, 2015b), 95–102; Ernst Topitsch, *Erkenntnis und Illusion. Grundstrukturen unserer Weltaufassung*, 2nd edition, (Tübingen: Mohr Siebeck, 1988); Ernst Topitsch, *Die Sozialphilosophie Hegels als Heilslehre und Herrschaftsideologie. Hans Albert zum 60. Geburtstag*, 2nd edition, (Munich: Piper, 1981); Ernst Topitsch, "Die 'Himmelsstadt' des Jürgen Habermas. Ein Kapitel zur politischen Theologie," in *Im Irrgarten der Zeitgeschichte: Ausgewählte Aufsätze*, ed. Ernst Topitsch, (Berlin: Duncker & Humblot, 2003), 95–96, 99, 103.

⁹³ Hans Kelsen, *Staat und Naturrecht: Aufsätze zur Ideologiekritik*, ed. Ernst Topitsch (Neuwied–Berlin: Luchterhand, 1964).

⁹⁴ Ernst Topitsch, "Das Problem des Naturrechts," *Wiener Zeitschrift für Philosophie, Psychologie, Pädagogik* 3, no. 1 (1950): 136; Michael Stolleis, *Recht im Unrecht: Studien zur Rechtsgeschichte des Nationalsozialismus. Mit einem neuen Nachwort* (Frankfurt am Main: Suhrkamp, 1994), 32; Karl Larenz, "Rechts- und Staatsphilosophie der Gegenwart. Auszug," in *Rechtfertigungen des Unrechts. Das Rechtsdenken im Nationalsozialismus in Originaltexten*, eds., Herlinde Pauer-Studer, and Julian Fink, (Frankfurt am Main: Suhrkamp, 2014 [1935]), 185.

humanists and, hence, could not possibly have been Nazis; and it served the second function because it permitted the adherents of natural law to tar leftist intellectuals as crypto-communists. The conflict over Catholic natural law in Austria reached its peak in 1962 when the left Catholic Viennese professor of sociology August Maria Knoll⁹⁵ published his book *The Catholic Church and Scholastic Natural Law (Katholische Kirche und scholastisches Naturrecht)*. Knoll's effort parallels that of Ernst-Wolfgang Böckenförde's 1960 *Hochland* essay which quashed the myth that natural law had inoculated German Catholics against Nazism.⁹⁶ Knoll's was also a pamphlet directed against those turncoat Catholic supporters of Nazism who had reinvented themselves as natural law humanists. The book caused a major stir in postwar Austria with bishops, professors, and journalists castigating the author's malice and lack of moral responsibility. Knoll, who had studied with Kelsen in the 1920s,⁹⁷ exposed the legitimising and power-preserving character of scholastic natural law: It made the church forget its main duty, the struggle for social equality and individual liberty. Knoll pointedly accused the Catholic church of having forsaken its proper mission, namely "to turn slaves into free men", instead, scholasticism made it content itself "with turning bad slaves into good slaves".⁹⁸

The origins of Knoll's essay lie in a manuscript he submitted to the *Festschrift* that was to honour Hans Kelsen's eightieth birthday, a volume edited by none other than Alfred Verdross. On June 29 1961, Knoll received

⁹⁵ Anton Pelinka, "August Maria Knoll," in *Neue Österreichische Biographie: Große Österreicher*, eds., Kurt Skalnik, and Heinrich Studer, 19, (Vienna: Amalthea, 1977), 69–77. Knoll's first book was devoted to the Catholic social movement and its romantic roots. On Knoll's background in the Christian Young Workers Association of Anton Orel, see, most recently, the recollections by two of Knoll's former students published on the fiftieth anniversary of his death in 1963, Otto Hausmann, "Zwischen Marx und Ignaz Seipel: Vor fünfzig Jahren starb der katholische Soziologe und Kirchenkritiker August Maria Knoll, dessen Denken und akademisches Wirken mit ideologisch-politischen Zuordnungen schwer zu erfassen ist," *Wiener Zeitung*, December 20, 2013; Norbert Leser, "Kirche und soziale Frage. Am Heiligen Abend vor fünfzig Jahren verstarb der Soziologe August Maria Knoll, neben Friedrich Heer und Wilfried Daim einer der Protagonisten des österreichischen Reformkatholizismus," *Die Furche*, December 19, 2013.

⁹⁶ Ernst-Wolfgang Böckenförde, "Der deutsche Katholizismus im Jahr 1933: Eine kritische Betrachtung," *Hochland* 53 (1960/61): 215–239.

⁹⁷ Norbert Leser, "August Maria Knoll," in id., *Grenzgänger: Österreichische Geistesgeschichte in Totenbeschwörungen*, 2 vols., 1, (Vienna–Cologne–Graz: Böhlau, 1981), 56.

⁹⁸ August Maria Knoll, *Katholische Kirche und scholastisches Naturrecht* [1962], 2nd edition, (Neuwied–Berlin: Luchterhand, 1968), 26, c.f. Johannes Messner, "Aktualität des Naturrechts," *Österreichische Zeitschrift für öffentliches Recht* 27 (1976): 43–66.

a terse letter from his friend Verdross, which deserves to be presented in full.⁹⁹

Most esteemed colleague,

Regrettably I have to inform you that your essay does not fulfil the demands of a strictly scholarly periodical since it is not written in a calm and matter of fact-manner, but instead adopts a strikingly polemical tone, and that it therefore must be regarded not as a scholarly contribution but as a piece of slander. [...] I do hope you will appreciate my motives after due consideration and realise that the publication would cause you considerable harm. Herewith I return your manuscript.

I remain with the best regards

Yours A. Verdross

5 Conclusion

Our chapter has recovered and reconstructed the origins of Kelsen's critique of natural law in the 1920s and 1930s, and it has also unearthed its postwar significance. Kelsen eloquently defended democracy against those anti-relativists who wished to protect its "values" by curbing the liberty of opinion and debate. Appeals to natural law, such as those of Verdross and Voegelin, were accomplices to this baleful absolutist and transcendentalist return to the 'fundamental'. As we have seen this was no minor squabble: Voegelin and Verdross accused Kelsen of assisting the rise of "scientism", while he had always stressed the irreducible autonomy of legal science from the study of nature. Kelsen, in response, argued that the natural lawyers shattered the distinction between society and nature that had made modern law, legal science, and majoritarian, participatory democracy possible. Voegelin attacked modern statehood and science as quasi-religious ideologies of salvation that estranged man from eternal moral values, and Verdross appealed to the same universal and immutable realm of "natural" laws. The liberty both promised was warped and faulty: Citizens should be free to obey nature. To Kelsen, this was both unscientific and undemocratic: it transformed science into the servant of metaphysics and it eviscerated democratic society by subordinating its ethics and institutions to eternal truths.

99 Ernst Topitsch, "Naturrecht im Wandel des Jahrhunderts," *Aufklärung und Kritik* 1 (1994): 5–6.

The post-1945 revival of natural law in Austria served the triple purpose of exonerating scholars who had been implicated in the Nazi regime, of blurring the distinction between the Catholic resistance and the Catholic collaboration, and of enhancing the unity of a robust anti-Communist phalanx. The natural law-revival in Austria dovetailed smoothly with broader preoccupations of Cold War theory in the Western hemisphere, in particular, with its critique of potentially totalitarian mass democracy and of positivist relativism. The postwar denigration of Kelsenian legal positivism, accusing it of having caused the crisis of values that made the rise of National Socialism possible, held together an otherwise divergent set of thinkers: conservative metaphysicians and critics of scientism and state omnipotence, such as Voegelin; members of the Catholic resistance in Austria; as well as intellectual fellow-travellers of Nazism who were eager to cover over their recent past. Hans Kelsen never ceased to re-elaborate his theoretical framework, but he did not heed the suggestion made by either Alfred Verdross in 1930 or by Balduin Schwarz, the Salzburg dean, in 1967 that he should abandon the formalist design and premise of his system, the basic norm, although he substantially refashioned its character.¹⁰⁰ Natural law remained Kelsen's *bête noire*, he reiterated his ardent criticism of natural law until 1973, the year of his death.¹⁰¹ The Austrian Constitution of 1920, whose main architect was Kelsen, and which was re-enacted in 1945, excludes any reference to natural law. Its first article reads: "Austria is a democratic republic. Its law derives from the people."

¹⁰⁰ In his last major work, the *General Theory of Norms* [1979], trans. Michael Hartney, (Oxford: Oxford University Press, 1991), Kelsen extended his contention that norms are postulated and established by volition from the domain of legal norms to all norms, (Wiederin, "Das Spätwerk Kelsens," 356). Kelsen replaced his previous definition of the norm as a hypothetical judgment about the oughtness (*Gesolltsein*) of an order of organised coercion with the concept of norms as (fictional or imputed) imperatives (*Befehle*); on the problems of delegation and derogation this elicited as well as on Kelsen's critique of the principle of non-contradiction see Wiederin, "Das Spätwerk Kelsens," 358–359. Wiederin connects this rejection of the principle of non-contradiction to Kelsen's curtailing of natural-legal elements from his own theory. The principle of non-contradiction provides a filter that enables legal theory to dispute the rightfulness of laws despite their lawful enactment (Wiederin, "Das Spätwerk Kelsens," 362–363) which is no less of a natural legalist argument than the denial of the fact that ethically reprehensible law can nevertheless be positively valid law.

¹⁰¹ Wiederin, "Das Spätwerk Kelsens," 363.

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