

Cohen, Kelsen and the Question of Cosmopolitanism

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The consideration of the relationship between the work of the philosopher, *Hermann Cohen*, and the legal theorist, *Hans Kelsen*, has centred, in particular, upon the question of the degree of correspondence between *Cohen's* philosophical project and *Kelsen's* formulation of the central elements of his pure theory of law.¹ This, in turn, has entailed that the parameters of this question have tended to be bounded by the comparison of *Cohen's* work and *Kelsen's Pure Theory of Law (Reine Rechtslehre)* of 1934.² The tendency for these particular parameters to be established derives explicit textual support from *Kelsen's* self-interpretation of his relationship to *Cohen*, in his *Letter to Renato Treves* of 1933³, in which *Kelsen* introduces a sharp demarcation between the epistemologico-cognitive orientation offered to a pure theory of law, by *Cohen's Logik der reinen Erkenntnis*, and the rejection of *Cohen's* ethico-legal theory, developed in *Cohen's Ethik des reinen Willens*.⁴ The effect of these parameters, as the predominant framework for the consideration of the relationship between *Cohen* and *Kelsen*, is a tendency to detach, and render relatively unthematized, the question of the cosmopolitan orientation of their work.

The reintroduction of the question of cosmopolitanism enables the relationship between the theoretical projects of *Cohen* and *Kelsen* to be considered in a different manner. From this position of the question of cosmopolitanism, the analysis can proceed to extend to, and acknowledge that, *Kelsen's* development of a pure theory of law contains a sustained critique of the 'dogma of the state', which has as its necessary corollary a theory of legal monism. These elements are, in turn, the articulation of the potential for an international juridical order, in its primacy over states, to encompass the

¹ This consideration has been one which has been largely absent from English language work in legal theory which, in its predominant focus upon the work of *Herbert Hart* (*The Concept of Law*, 1961; 2nd ed. 1994), as the origin of a contemporary theory of positive law or legal positivism (its antecedents, as identified by *Hart*, are in the legal theories of *Jeremy Bentham* and *John Austin*), initiated a significant period of marginalization of *Kelsen's* work. This situation has begun to change, and the impetus for this has resulted from the distinctive and original work of *Stanley L. Paulson*.

² See, for example, *Edel*, *Zum Problem der Rechtsgeltung. Kelsens Lehre von der Grundnorm und das Hypothesis-Theorem Cohens*, FS Holzhey, 1997, 178 ff.; *Holzhey*, *Die Transformation neukantianischer Theoreme in die Reine Rechtslehre Kelsens*, in: Fischer/Mock/Schreiner (Hrsg.), *Hermeneutik und Strukturtheorie des Rechts*, 1984, 99 ff.; *Holzhey*, *Kelsens Rechts- und Staatslehre in ihrem Verhältnis zum Neukantianismus*, in: Paulson/Walter (Hrsg.), *Untersuchungen zur Reinen Rechtslehre*, 1986, 167 ff.

³ *Kelsen*, *Letter to Renato Treves*, in: Paulson/Paulson (Hrsg.), *Normativity and Norms*, 1998, 169 ff.; for a different perspective, see *Carrino*, *Das Recht zwischen Reinheit und Realität: Hermann Cohen und die philosophischen Grundlagen der Rechtslehre Kelsens*, 2011, and *Merle*, *La conception du droit de Hermann Cohen et de Hans Kelsen*, *Revue Germanique Internationale*, 6 (2007), 123 ff.

⁴ *Cohen*, *Logik der reinen Erkenntnis*, 2. Aufl. 1914; *ders.*, *Ethik des reinen Willens*, 2. Aufl. 1907.

possibility for world peace.⁵ The revelation of the cosmopolitan orientation of *Kelsen's* pure theory of law then offers the capacity to reconfigure the relationship to *Cohen* on the basis of the question of cosmopolitanism. In this reconfiguration, the characterization of their relationship becomes that of identity and difference: a shared cosmopolitanism combined with a divergent articulation of its theoretical foundation and development.

I. The Emergence of Cosmopolitanism in Cohen: The Critique of Lange

The distinctive conception of cosmopolitanism, beyond its initial presentation and discussion in *Cohen's Kants Begründung der Ethik*⁶ of 1877, emerges in *Cohen's* reworking and development, in 1902 and 1914, of his original introduction to the fifth edition *F. A. Lange's Geschichte des Materialismus*⁷ of 1896. In the condensed overview of *Cohen's* philosophical project that the Introduction eventually came to represent, the conception of cosmopolitanism proceeds from *Cohen's* methodological overcoming of *Lange's* theoretical materialism. This particular methodological approach is distinguished by a critique which establishes a philosophical position – methodological idealism – which separates itself from both *Lange's* materialism and from a non-methodological idealism. The separation of *Cohen's* philosophical position is combined with a continued adherence to an explicitly political orientation, as an integral aspect of the task of philosophy, which underlay *Lange's* theoretical materialism.⁸

The methodological overcoming of *Lange* involves a critical reflection upon the coherence of *Lange's* distinction, within his theoretical materialism, between a realm of material reality and a realm of ideas. The theoretical materialism of *Lange* can be considered as an essentially non-systematic philosophical theory which preserves the Kantian concern to establish the *a priori* conditions of experience while situating their 'origin' in "the psycho-physical 'generic organization' of man".⁹ The effect of this interpretative position upon *Kant's* philosophical system and, in particular, upon the *Critique of Pure Reason*, is to produce a radical reduction in the degree to which *Kant's* philosophical concepts, and the structure of their interrelationship, retain their pertinence for the determination of the relationship between materialism and idealism. This enables the selective appropriation and reinterpretation of Kantian concepts, from within the *Critique of Pure Reason*, and their redeployment, by *Lange*, in order to differentiate and preserve a realm of ideas within the psycho-physical constitution of the human subject.

⁵ As will become evident, Kelsen's work, while continuing to adhere to this potential of international law, indicates certain differences and modifications in its mode of theoretical presentation.

⁶ *Cohen*, *Kants Begründung der Ethik nebst ihren Anwendungen auf Recht, Religion und Geschichte* (1877), 2. Aufl. 1910/2011.

⁷ *Cohen*, *Einleitung mit kritischem Nachtrag zur „Geschichte des Materialismus“ von F. A. Lange*, 1896.

⁸ *Lange's* political position is expressed initially expressed in *Lange*, *Die Arbeiterfrage in ihrer Bedeutung für Gegenwart und Zukunft beleuchtet*, 1865.

⁹ *Holzhey*, *Idéalisme et Matérialisme*. Hermann Cohen, sur Friedrich Albert Lange, *Revue de Métaphysique et de morale* 69 (2011), 7 (11).

In this demarcation of a realm of ideas, the Transcendental Dialectic of the *Critique of Pure Reason* becomes the focus of the process of selective appropriation and reinterpretation. The Kantian presentation of the Ideas, in this part of the *Critique of Pure Reason*, is reconstructed, by *Lange*, as a product of the specific psychological mechanism of the imagination. The reconstruction retains the Kantian characterization of the realm of the Ideas, as lacking “any value for knowledge”¹⁰ of external material reality, whilst simultaneously rejecting the distinctively Kantian deductive procedure for their determination and justification. The effect of this approach is to transform the previously restrictive sphere of the Kantian definition of the Idea into a more general realm of ideas in which the “term ‘Idea’ is utilized in a very vague and broad sense, since it covers a spectrum which extends from the ideas that individuals have created in relation to the actual or future conjuncture and relation to utopias until the principles which guide life and visions of the world”.¹¹

The corollary of the transformation of the definition and locus of production of the Kantian Idea is the materialist recognition of idealism: a realm of ideas without connection to, or direction by the concern for verification in the realm of material reality. The realm of ideas, with its ‘origin’ in the psychological processes of the imagination, constitutes ‘an imagined world’ which, for *Lange*, “confers upon it its specific value”.¹² Metaphysics, understood as the systematic philosophical form of idealism, thus becomes an aspect of this more general ‘free-play’ of the imagination, and its particular theoretical constructions reflect, the essentially *aesthetic* character of this realm of ideas. The conceptual production of metaphysics is a “freedom of Ideas [which] corresponds to the freedom of art”.¹³

The art of conceptual production creates specific concepts as the representation of this realm of ideas, and these concepts exist as a set of representation-images which, as phenomena, are distinct both from the phenomena produced directly by material reality and from the individual imagination from which they originated. The relationship between these representation-images and material reality is one of psychological effect – the capacity of these representation-images to affect the psychological apparatus of the individual human being. In their affective psychological capacity, is also contained “their ethical function”.¹⁴ Ethics thereby becomes the expression of the direction of human action by a representation-image: the alteration of material reality by a form of human action which is not determined from within the material reality whose domain is that of the sciences of nature (*Naturwissenschaften*). This passage from aesthetics to material reality, through the ethical orientation of human action, is the possibility for a materialist theory, in its incorporation of the realm of ideas, to align itself with a wider project of social and political reform. The project of social and political reform had,

¹⁰ Ibid., 12. *Holzhey* refers, here, to *Lange*, *Geschichte des Materialismus und Kritik seiner Bedeutung in der Gegenwart*, Bd. II, 5. Aufl. 1896, 270 ff.

¹¹ *Holzhey*, *Revue de Métaphysique et de morale* 69 (2011), 11 f.

¹² Ibid., 12.

¹³ Ibid.

¹⁴ Ibid. Here, one should also note the central position accorded to *Schiller*, by *Lange*, in the consideration of this ‘ethical function’ of the realm of ideas, in both the *Geschichte des Materialismus* and the posthumously published *Einleitung und Kommentar zu Schillers philosophischen Gedichten*, 1897. On this connection between *Lange* and *Schiller*, see *van Zantwijk*, *Begriffsdichtung. Schiller und Friedrich Albert Lange*, in *Manger/Immer* (Hrsg.), *Der ganze Schiller. Programm ästhetischer Erziehung*, 2006, 487 ff.

with the publication of the third edition of *Die Arbeiterfrage*, of 1875, become a cosmopolitan project composed of the complementary elements of improvement of the social and political conditions of the German working class, anti-colonialism and peaceful coexistence among the peoples of the world.¹⁵

The coherence of the intersection of these elements of *Lange's* project was not itself the subject of extended, methodological reflection. The materialist theory of *Lange* remained one in which

“[t]he ‘conception of the natural world’ of *Lange* and his ethico-aesthetic idealism are complementary positions. Neither one nor the other have the character of a vision of the world understood in the sense of a systematic project founded metaphysically, they are fundamental attitudes, which coincide with the pragmatism of *Lange* in the socio-political field.”¹⁶

1. The Parameters of Cohen's Critique of Lange

a) Methodological Transformation and Cosmopolitan Affinity

The reconstruction and transformation of *Lange's* project, by *Cohen*, is centred upon a methodological response to the underlying question of its coherence. The methodological response, at the theoretical level, simultaneously preserves and renders equally coherent, for *Cohen*, the initial cosmopolitan project of *Lange*. The progressive expansion of *Cohen's* *Einleitung mit kritischem Nachtrag zur "Geschichte des Materialismus"* von F. A. Lange from 1896 to 1914 attests to the increasingly comprehensive character of *Cohen's* response to *Lange*; and, already with the expanded second edition of 1902, a definitive distance has been introduced between the two projects.¹⁷

The methodological transformation of *Lange* focuses, in particular, upon a critical reflection upon the connection between the realm of material reality and the realm of ideas. For *Cohen*, *Lange's* project should be understood as that of a

“sincere idealist towards the history of materialism: he found idealism ambiguous, although on the contrary, he recognized in the rebellious spirit of materialism a sense of the truth; while he declared clearly and sufficiently expressly that materialism was itself incapable of realizing its best tendencies, as it sought to free itself from false idealism – sterile spiritualism –, and that, on the other hand, materialism owed to idealism the success of this achievement.”¹⁸

¹⁵ *Lange*, *Die Arbeiterfrage: Ihre Bedeutung für Gegenwart und Zukunft*, 3. Aufl. 1875. On this, see *Teo*, Friedrich Albert Lange On Neo-Kantianism, Socialist Darwinism, and a Psychology Without a Soul, *Journal of History of the Behavioral Sciences* 38 (2002), 285 ff.; see also, *Freimuth*, Friedrich Albert Lange – Denker der Pluralität: Erkenntnistheorie, Pädagogik, Politik, 1995; *Klein*, „Die Arbeiter haben sich selbst um die Angelegenheiten ihres Standes zu kümmern“. Friedrich Albert Langes Theorie eines strategisch reflektierten Reformismus, in: *Holzhey* (Hrsg.), *Ethischer Sozialismus*, 1994, 125.

¹⁶ *Holzhey*, *Revue de Métaphysique et de morale* 69 (2011), 13.

¹⁷ *Ibid.*, 16. The distance from *Lange*, as *Holzhey* emphasizes, is accentuated by the publication of the expanded second edition of *Cohen's* *Einleitung* of 1902 in the same year as the publication of the first edition of *Cohen's* “Logik der reinen Erkenntnis”. This initial element of *Cohen's* distinct philosophical project, the “Logik der reinen Erkenntnis”, is also distinguished by its absence of reference to *Lange*.

¹⁸ *Cohen*, *Einleitung mit kritischem Nachtrag zur „Geschichte des Materialismus“* von F. A. Lange, 3. Aufl. 1914, 14 f.; all references are to the French translation, *Cohen*, *Introduction critique à l'histoire du matérialisme de Friedrich Albert Lange*, 2012, 30. The pagination of the German original will be cited in brackets, after that of the French translation.

The sincerity of this idealism is, however, for *Cohen*, hampered by its lack of sufficiently rigorous foundation in logic; and logic, in turn, is accorded the purpose of foundation as the “most profound task and the supreme content of logic”.¹⁹

The attribution of this role to logic is the expression of *Cohen's* particular resolution of the definition of ‘the concept of philosophy’²⁰ which involves the determination of the relationship between systematic philosophy and the history of philosophy.²¹ The determination of this relationship, as the ‘*bringing together*’²² of these two elements, also requires that the concept of philosophy comprehends that the connection to the history of philosophy is the link with science, namely, ‘*the relation with the whole of culture*’.²³ Hence, philosophy is a combination of systematization and history which, as a ‘philosophical system’, is oriented towards ‘the coherent and homogenous connection between the whole diversity of problems’.²⁴ The formulation of the character of philosophy, in this manner, results in the recognition of a number of “*orientations of culture*” – science, morality and art – to which philosophy responds by articulating the particular fields of “*logic, ethics and aesthetics*”.²⁵ In relation to these diverse fields of philosophical comprehension of culture, coinciding with the development of these diverse orientations of culture, the central question, for *Cohen*, becomes that of their underlying unity. The response to the question of unity leads to the elaboration of the coherent philosophical framework within which the relationship between these philosophical fields can be considered as a unity.

The philosophical framework is elaborated through the concept of law which is held, by *Cohen*, to constitute the basis upon the underlying unity of the three particular fields of philosophy is to be established. The systematic orientation – the elaboration of unity – is combined with the history of philosophy through the identification of Plato as “the founder of the system of philosophy of which Socrates had outlined the problematic, because he had founded logic, and upon it, philosophy”.²⁶ The double sense of the Platonic conception of *epistèmè*, for *Cohen*, in its differentiation of the notions of knowledge and rigorous knowledge, contains the methodological distinction between knowledge and science (*Wissenschaft*).²⁷ This distinction, exemplified in Plato’s approach to the relationship between philosophy and mathematics, is marked by the difference introduced between the realm of ideas (philosophy) and the realm of concepts (mathe-

¹⁹ Ibid., 30.

²⁰ Ibid., 21.

²¹ Ibid., 17.

²² Ibid., 19 (Italics in the original).

²³ Ibid., 24 (Italics in the original).

²⁴ Ibid.

²⁵ Ibid. (Italics in the original).

²⁶ Ibid., 29.

²⁷ Ibid., 31. The discussion of *Plato*, in the “Einleitung”, is itself the product of *Cohen's* *Platons Ideenlehre und die Mathematik*, 1878. On the question of the relationship between *Cohen* and *Plato*, see *Fronterotta*, *L'interprétation néo-kantienne de la théorie platonicienne des idées et son “héritage” philosophique*, *Revue Philosophique de Louvain* 98 (2000), 318 ff.; *Laks*, *Platon entre Cohen et Natortp: aspects de l'interprétation néokantienne des idées platoniciennes*, *Cahiers de Philosophie Politique et Juridique* 26 (1994), 15 ff.; *Lembeck*, *Platon in Marburg. Platonrezeption und Philosophiegeschichtsphilosophie bei Cohen und Natortp*, 1994; *Seron*, *L'idéalisme de Cohen et Natortp: Entre Kant et Platon*, in: *Delcomminette/Mazzú* (ed.), *L'Idée platonicienne dans la philosophie contemporaine*, 2012, 97 ff.

matics). For *Cohen*, the realm of ideas becomes, through the attribution of the “*meaning of the idea as hypothesis*”²⁸,

“pure thought, which, as a consequence, is scientific thought, produces the principle (*Grundsatz*) in its foundational ground laying (*Grundlegung*). Thus, pure thought becomes the legitimate means which permits the production of the idea”.²⁹

The idea establishes or furnishes the ground for the concepts which mathematics has developed.

From this recourse to the philosophy of history, a philosophical trajectory is then presented of the idea as hypothesis, from Plato to *Kant*, which, for *Cohen*, establishes the combination of systematic orientation and the history of philosophy.³⁰ This, in turn, enables *Cohen* to conclude that the analysis, as the combination of systematic and historical approaches to philosophy, has demonstrated that

“philosophy and its history, must be equally understood as the internal relationship of philosophy to the sciences, including the moral sciences (*sciences morales*) (*Geisteswissenschaften*) in all their scope”.³¹

The distinctive combination of elements in *Cohen’s* philosophical analysis provides the theoretical resources to undertake the methodological transformation of *Lange’s* materialism. The presentation of Plato, as the emergence of a methodological idealism which comes to full expression in the work of *Kant*, introduces an alternative manner of conceiving the relationship between the realm of material reality and the realm of ideas. In place of the relationship *Lange* establishes between the two realms, in which the realm of ideas is “the poetic complement of a materialistically orientated scientific research”³², *Cohen* substitutes a “concept of idealism, which intends to be neither a doctrine proposing a vision of the world, nor a conceptual poetry”.³³ Philosophy, as “logic in the widest sense, or as critique of knowledge”³⁴, extends itself, as its “second act”³⁵, to the justification of ethics understood as the task of establishing the logical foundation for the realm of culture constituted by morality. Hence, the uncertain relationship which *Lange* establishes between the two realms becomes the problem of the logical justification of ethics: the philosophical critique of ethics.

In this critique of ethics, in the last two chapters of the final edition of the *Einleitung*, the methodological transformation of *Lange* proceeds to preserve the cosmopolitan orientation of *Lange’s* project. The initial path of *Cohen’s* philosophical critique of ethics is to establish the realm of morality as one governed by a distinctive moral law which is irreducible to either a law of nature (psychology) or to a law of God (religion):

“[T]he moral law can be neither a law of nature nor a law of history – if the latter is, in an equivocal manner, conceived as nature –, but nor moreover a law of God. The validity of the moral law is deter-

²⁸ *Cohen*, Introduction critique à l’histoire du matérialisme de Friedrich Albert Lange, 2012, 35.

²⁹ *Ibid.*, 35.

³⁰ *Ibid.*, 38–51.

³¹ *Ibid.*, 51.

³² *Holzhey*, Revue de Métaphysique et de morale 69 (2011), 15.

³³ *Ibid.*

³⁴ *Cohen*, Introduction critique à l’histoire du matérialisme de Friedrich Albert Lange, 2012, 169.

³⁵ *Ibid.*

mined by the fact that it is the human spirit, confused and sinful, which must itself forge it and assume the responsibility for it faced with the ultimate instance of human reason.”³⁶

The particular combination of systematization and the history of philosophy, of which *Cohen's* critique of ethics is comprised, accords the central position to *Kant's Critique of Practical Reason*. The moral law, for *Cohen*, is furnished, by *Kant*, with a basis upon which the ideal is connected with the real in a manner in which “the two problems, those of the community and those of the individual”³⁷ are brought into a genuine relationship with each other.

The connection is provided by the distinctively new Kantian concept of autonomy, which expresses the Kantian concept of freedom as the moral law founded upon “man as legislator”.³⁸ The methodological potential of the Kantian concept of autonomy requires that it be separated from *Kant's* later work, *Religion within the Limits of Reason Alone*, which, for *Cohen*, represents a “deviation”.³⁹ For it effectively reintroduces “religion as the belief in moral laws identified as God’s commandments” thereby undermining the philosophical framework of the *Critique of Practical Reason* in which religion is excluded as a “doctrine of divine commandments”.⁴⁰ The realization of the potential contained in the concept of autonomy thereby entails *Cohen's* explicit development of this concept, beyond its initial Kantian formulation, in order to introduce the idea of God into an ethics rendered systematic through its critique.

The integration of “God, as idea, into the science of ethics”,⁴¹ in which it “can no longer be principle nor foundation”⁴², is, for *Cohen*, the philosophical method by which belief, as an ethical notion, is rendered coherent. The notion of belief becomes an aspect of the concept of autonomy in which the “interiority of conviction detaches itself from tradition and all external authority to the extent that it commences the difficult, laborious, but free work of autonomy”.⁴³ Hence, the philosophical method transforms the determination of the moral law into “the task of human science in progress”⁴⁴, and, with this transformation, the theoretical specificity of ethics requires an additional “guarantee in order to establish its concepts”.⁴⁵ This additional guarantee is, however, one which initially confronts the philosophical critique of ethics with a question: “[i]t searches equally in the effective reality (*Wirklichkeit*) of history in order to assure itself of their [the concepts of ethics] reality”.⁴⁶ The question indicates the ‘limit’ revealed by the philosophical critique of ethics, namely, that it concerns the realm of the ideal – the ‘ought’ (*Sollen*) – and not the real – the realm of being (*Sein*) or that which exists.⁴⁷

³⁶ *Ibid.*, 174 f.

³⁷ *Ibid.*, 172 f.

³⁸ *Ibid.*, 174.

³⁹ *Ibid.*, 177.

⁴⁰ *Ibid.* *Kant's* Religion within the Limits of Reason Alone is held, by *Cohen*, to mark the origin of the regressive cultural movement in which Protestantism becomes anti-semitic (*Cohen*, Introduction critique à l’histoire du matérialisme de Friedrich Albert Lange, 2012, 178–188).

⁴¹ *Ibid.*, 192.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, 193.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

The cosmopolitan import of ethics – the “community of free persons, – requires, beyond the Kantian notion of signs of a cosmopolitan history, a messianic comprehension of the relationship between the realm of the ‘ought’ and the realm of the ‘is’. The idea of God, within the system of ethics, provides the passage between the ‘ought’ and the ‘is’, through its inherence in the belief in the “future of humanity” intertwined with that of the “power of the good”.⁴⁸

“The future of the belief in God will depend upon the degree of clarity, depth and total sincerity with which this historical sense and value of messianism seizes the moral conscience of men in order to install itself in the confidence – impassive in the fact of every possible experience – in the perpetual peace of a unified humanity at the centre of moral *knowledge*.”⁴⁹

The psychology of the will, which *Lange* substituted for the Kantian framework of practical reason, is thus simultaneously transformed and preserved by *Cohen’s* philosophical critique of ethics. The will is situated within the parameters of a “an ethico-juridical concept of man as individual, a man upon whom it is incumbent to become, through the moral knowledge of the self, a member of the kingdom of ends”.⁵⁰

b) From Cosmopolitan Ethics to Cosmopolitan Politics

The systematization of morality, as a cosmopolitan ethics, enables *Cohen* to proceed to the further transformation of *Lange*, through the engagement with “the second cultural problem of ethics”.⁵¹ The problem is that of the conflict of ethics with

“the history of mankind at the centre of the natural life of peoples, and with the institutions at the centre of the economy, law and the state of whose correlates are the disciplines of economics, law and politics”.⁵²

The intersection between this problem and the overtly political work of *Lange* centres upon the question of socialism⁵³ and the prevention of its dissolution by either materialism or atheism. The retention of the ethico-juridical framework of ethics, resulting from *Cohen’s* philosophical method of critique, preserves the socialist orientation of *Lange’s* work, and through this preservation, in the particular form of *Cohen’s* “ethical idealism”⁵⁴, facilitates the resolution of this problem.

The resolution entails an initial focus upon the reconception of the notions of law and state and of their relationship to the economy. The double sense that *Cohen* accords to the notions of law and the state involves the internal modification of their form of relationship, within a theory of materialism, to the economy. The attribution of this double

⁴⁸ *Ibid.*, 194.

⁴⁹ *Ibid.*, 195 (Italics in the original).

⁵⁰ *Holzhey*, Les néo-kantiens et la philosophie de l’histoire de Kant, *Revue germanique internationale*, 6 (1996), 161 (174). See also *Wiedebach*, Physiology of the Pure Will: Concepts of Moral Energy in Hermann Cohen’s Ethics, *Journal of Jewish Theology and Philosophy* 13 (2004), 85 ff.

⁵¹ *Cohen*, Introduction critique à l’histoire du matérialisme de Friedrich Albert Lange, 2012, 199.

⁵² *Ibid.*

⁵³ As *Liebeshütz* emphasizes, the political concordance between *Lange* and *Cohen* is evident from their correspondence in the 1870s (*Liebeshütz*, Hermann Cohen and his Historical Background, *Leo Baeck Yearbook XIII* (1968), 3 [15]). The Lange-Cohen correspondence is collected in *Lange*, *Über Politik und Philosophie. Briefe und Leitartikel 1862-1875*, 1968, 360–379.

⁵⁴ *Cohen*, Introduction critique à l’histoire du matérialisme de Friedrich Albert Lange, 2012, 200.

sense responds to the potential severance of ethics from the notions of law and state, through the respective appropriations of this materialist theory, by anarchism and conservatism. For the materialist theory, in its ascription of the domain of material, and hence true, reality to the notion of society renders the notion co-terminus with that of the economy: “the domain in which commerce undertaken within society operates”.⁵⁵ This designation of the notion of society detaches it from “the idea, of the ethical order, reformative of the state and of the law,, and, in its essentially economic definition, it constitutes “the living and material condition of the law and of the state”.⁵⁶ Thus, the notions of the law and of the state, in relation to the material reality of society, are merely a reflection of “the fluctuating association of men who are responsible for this economic commerce”.⁵⁷ The notions of the law and the state inhabit the realm of the ideal, which, in their exclusively reflective role in relation to material reality, renders them “simply fictional realities”.⁵⁸

For *Cohen*, the fictionalism attributed to the notions of law and state contains the potential for an anarchist appropriation in which law and state, as mere reflections of the existing society, are without capacity for reform, and the possibility for the alteration of society can only arise from revolution.⁵⁹ The anarchist challenge is accompanied, as its reverse, by the conservative appropriation in which the fictionalism of the notions of law and state are asserted as a mere façade for the capacity to engage in economic practices untrammelled by considerations of justice.⁶⁰ The prevention of these two possibilities – the reduction of politics of anarchism or conservatism – is also to distinguish and assert a position of ethical socialism which reconceives the relationship between the realm of society and the notions of law and state as a form of equilibrium.

The introduction of the notion of an equilibrium is a reconstruction based upon the ethical relationship between the realm of the ideal (notions of law and state) and the realm of the real (the economy), and represents the presence of the thought of *Rudolf Stammler* in *Cohen's* reconceptualization.⁶¹ The notion of an equilibrium, for *Cohen*, maintains the initial primacy which *Stammler* accords to the notions of law and the state, as the framework for, rather than the mere reflection of, the economy (the realm of human action comprised of economic commerce). The framework is characterized as a fluid or mobile equilibrium whose balance – between the two realms – is reproduced through its capacity for adaptation or change. The fluidity and mobility are accompa-

⁵⁵ *Ibid.*, 208.

⁵⁶ *Ibid.*, 209.

⁵⁷ *Ibid.*, 208 f.

⁵⁸ *Ibid.*, 209.

⁵⁹ *Ibid.* Although there is no reference to *Rudolf Stammler* here, it could be argued that this position draws upon *Stammler*, *Die Theorie des Anarchismus*, 1894.

⁶⁰ *Cohen*, *Introduction critique à l'histoire du matérialisme de Friedrich Albert Lange*, 2012, 118 f.

⁶¹ The presence is explicit, in the first two editions of the “Einleitung”, through *Cohen's* footnote reference to *Stammler*, *Wirtschaft und Recht nach der materialistischen Geschichtsauffassung. Eine sozialphilosophische Untersuchung*, 1896. In the final edition of 1914, this explicit reference has been removed as the expression of the subsequent collapse of the academic contact between *Cohen* and *Stammler*. For *Natorp's* evaluation of their respective positions, see *Natorp*, *Recht und Sittlichkeit*, *Kant Studien* 18 (1913), 1. On the wider comparison between the approaches of *Cohen* and *Stammler*, within Marburg Neo-Kantianism, see *Müller*, *Die Rechtsphilosophie des Marburger Neukantianismus: Naturrecht und Rechtspositivismus in der Auseinandersetzung zwischen Herrmann Cohen, Rudolf Stammler und Paul Natorp*, 1994. On *Stammler's* theoretical project, see *Wenn*, *Juristische Erkenntnis-kritik: Zur Rechts- und Sozialphilosophie Rudolf Stämmers*, 2003.

nied by the assertion of the assumption, by ethical socialism, of the role of a “defender of the law and the state”.⁶² For, *Cohen* proceeds beyond *Stammler* in the substitution of the essentially ethical character of the notions of law and state which is tied to the development of individual autonomy. The substitution renders the mobility of the equilibrium one of a “metamorphosis of the moral idea” in which the notions of the law and the state are the “modalities” of this process of ethical change and development.⁶³ Hence, the notions of the law and the state are unconditional ideas, whose modality is the sole manner in which “justice becomes effective reality”.⁶⁴ This, in turn, expresses the relationship between two senses of society in which the exclusively economic conception of society is that which demands to be “relentlessly improved” through reference to the moral sense of society contained in the notions of the law and the state.⁶⁵ The notion of the equilibrium, as a conceptual method for overcoming the materialist theory of society, is also a necessary ethical presupposition. For,

“[w]ithout law, no freedom, and without the community, of which law is the existence, no free personality. Without the fiction of the equilibrium in the law and the state, there is no effective and corresponding community of moral beings.”⁶⁶

The maintenance of this relationship between individual autonomy, as self-legislation, and community, through the effect of the form of ethical equilibrium, transforms the existing framework of the law and the state into one which is not reduced to the mere external constraint of individual behaviour through obedience to the norms of this framework. The effective reality of law and the state, for *Cohen*, as an ethical equilibrium, contains external constraint as the necessary corollary of the “stimulation of moral freedom”⁶⁷ within the individual. The “recognition and respect for”⁶⁸ the existing framework of law and the state is accompanied by the recognition of the gap between the notions of law and state as moral ideas and the degree to which they find their realization in the existing equilibrium. It is from the recognition of this gap that the project of ethical socialism is perpetually reanimated: “the reformist aspirations with regard to the law and the state”.⁶⁹

The ethical equilibrium is, however, only the preliminary methodological construction for the confrontation with

“[a]nother difficulty, almost more serious, result[ing] from the conflict between the concept of nationality, the factor constitutive of the state, and the idea of humanity which is equally represented by that of society”.⁷⁰

This difficulty, and its potentially greater seriousness, derives, for *Cohen*, from its more concrete character. The materialist conception of the notion of society, as the

⁶² *Cohen*, Introduction critique à l’histoire du matérialisme de Friedrich Albert Lange, 2012, 210.

⁶³ *Ibid.*, 210.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, 211.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, 209.

⁷⁰ *Ibid.*, 212.

sphere of commercial interaction encompassed by the economy, is rendered ethical, through the relationship – mobile equilibrium – to the ideal notions of the law and the state, as moral ideas. The greater concretion of this preliminary relationship emerges once the material reality of the economy, and its components – “[those] who are responsible for commerce and the economy”⁷¹ – are themselves accorded a more significant material reality through their enhanced personification. The process of enhancement involves the introduction and placing into relation of the notion of territory with that of the state.

The effect of this methodological process of enhancement is to enable the passage from the exclusively economic conception of society, whose members are acknowledged solely as a labour force, to a conception of society whose members are also situated within an ideal community. The material reality of the economy thereby becomes more material through the “concept of territory”, but, in this enhanced concretion, it “assists in the production of the concept of the people”.⁷² The historical genesis of this concept of the people is traced, by *Cohen*, as an aspect of an early cosmopolitanism, from the end of the Middle Ages in Italy to the German Reformation. The conclusion of this period of early cosmopolitanism is one in which the emergence of an ideal people, and its inherence within a nation-state, confronts the underlying tension between a secular state and a Protestant form of Christianity which confines itself to “promulgat[ing] the moral foundation of a purely secular state”.⁷³ This, in turn, introduces the difference between “the orientation towards secular history and the ecclesiastical order of Protestantism: according to this difference, morality and Christianity do not coincide in complete unanimity”.⁷⁴ The ‘resolution’ of this tension, which is also the creation of conformity between the state and Protestantism, is the articulation, through the “apparently naturalistic concept of the people conceived as a confederation in order to realize and render tangible the idea of the state”.⁷⁵

A modern cosmopolitanism emerges, in the eighteenth century, initially as an enlarged conception of history in which cosmopolitanism is “almost the same thing as world history”.⁷⁶ The enlargement is the expansion of the “horizon of history to universal history”, and is, for *Cohen*, an essentially self-contained development without being situated, at this juncture, in “direct opposition to nationalism”.⁷⁷ The parallel development, in which the conformity between Protestantism and the state, is transformed by the substitution of nationality for the previous concept of the people as a confederation, only enters into potential opposition with modern cosmopolitanism with the development of the distinction between a people and the “moral idea of humanity”.⁷⁸ The distinction becomes one of potential opposition with the assertion of the concept of nationality, as an exclusively anthropological concept, which “renders obscure for the concept of the people its ideal, moral character”.⁷⁹ The opposition between nationalism and cosmopolitanism, centred upon the concept of humanity, is analogous to the previous oppo-

⁷¹ Ibid.

⁷² Ibid., 213.

⁷³ Ibid., 214.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid., 214 f.

⁷⁹ Ibid., 215.

sition between the material and ideal conceptions of society. Hence, *Cohen's* approach is the reassertion of the primacy of the ideal, cosmopolitan conception of humanity, as the basis for the coherent method of presentation of the relationship between a people and all other peoples. For *Cohen*,

“humanity is nothing other than a moral idea; in every anthropological relationship, there is only, on the other hand, the non-sense of the universal, which is exactly the matter for the natural sciences. Humanity is not a natural reality; I cannot love it, but only revere it as an idea. It is not physically that I belong to humanity, but solely from the moral perspective. It is a moral concept directive of the history of peoples. It is a concept interchangeable with those of autonomy, of personality, of moral law. [As the] [e]xpression of this moral law, it signifies the obligation to respect every person within each people. The categorical imperative contains the idea of humanity for the individual, but the individual, as a person would only comprehend it in an atomistic manner. It is thus that the idea of humanity becomes the directive concept above all for the superior community constituted by the people, and at the centre of it, for all its members. The idea of humanity appears therefore as a specification of the idea of society which requires the concept of the people in order to realise itself.”⁸⁰

The state is, thus, positioned between the concept of society and the concept of the people as the expression of “a moral task incumbent upon the national whole”.⁸¹ This moral task is both particular and universal, as “[i]n the same manner that ‘humanity ennobles the individual, it also moralises men through the idea of the community of the people’”.⁸² Hence, a reverence for humanity “which holds for all peoples, becomes a particular obligation in regard to the people within the state to which one belongs”⁸³: “perpetual peace is the guiding word of the existence and not of the decline of individuality of peoples”.⁸⁴ Yet, the particularity of this obligation, is not the locus from which the universal arises, but is to be understood, rather, as a particular instantiation of the universal. For the reverence of humanity, from which the love of the fellowman emerges,

“must address itself more directly to the foreigner and not in essence to the co-citizen already enveloped by the egoism of the heart. Similarly, the idea of humanity should enjoin not only to love one’s people, but also to honour where appropriate other peoples, and to show their population consideration and sympathy.”⁸⁵

Hence, in place of nationalism’s extension of its anthropologization to the foreigner, as a ‘foreign body’, the cosmopolitanism of *Cohen*, situates the foreigner as inextricably intertwined with the idea of humanity through its inherence in the concept of a fellowman.

⁸⁰ *Ibid.*, 215 f.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*, 217. It is arguable that the only traces of this position to re-emerge, within the Weimar Republic, are to be found in the work of *Hermann Heller*. See, in particular, *Heller*, *Sozialismus und Nation* (1925), in: *Gesammelte Schriften*, Bd. I, 1971, Bd. I, 439 ff.; the distance between *Heller* and *Cohen* is, however, evident once one refers to the later essay, *Politische Demokratie und Soziale Homogenität* (1928), in: *Gesammelte Schriften*, Bd. II 1971, 432 ff.

⁸⁵ *Cohen*, *Introduction critique à l’histoire du matérialisme de Friedrich Albert Lange*, 2012, 217.

II. The Further Development of Cosmopolitanism: An Excursus on Cohen's Final Period

The cosmopolitanism with which the final edition of the *Einleitung* concludes situates the potential for its emergence in a theory of cultural formation within a nation – “the intellectual and moral education of the people”⁸⁶ –, in relation to which, Germany becomes a particular example through which this theory is presented. The theory of culture, as a theory of the formation of moral personality, simultaneously individual and collective, is predicated upon the existence and development of a system of public education, extending from schools to universities, which is free and open to those of any religious denomination. The historical legitimacy or ‘origin’ of this theory of culture, is sought in *Luther's* advocacy of public education, and is methodologically detached, from an exclusive relationship to Protestantism, and transformed into an ethical cosmopolitanism. For, „[t]he modern concept of the people is a concept of culture, and the latter signifies the whole of the forces of conscience“.⁸⁷

It is the collapse of *Cohen's* sense of a common culture, during the First World War⁸⁸, which leads to the re-centring of the conceptualization of cosmopolitanism from its sources in Judaism. The final, posthumously published work, *Religion der Vernunft aus den Quellen des Judentums*⁸⁹, engages in this philosophical task through the methodological systematization of an interpretative approach to the sources of Judaism. In this process of systematization, the relationship between ethics and religion is established as the foundational framework within which the concepts of nationality, cosmopolitanism and humanity are then situated and rearticulated. The initial elements of this foundational framework are established in the Introduction which proceeds to delineate the

⁸⁶ *Ibid.*, 220. Here, one should also indicate a certain degree of affinity with the project of social pedagogy of *Cohen's* Marburg colleague, *Paul Natorp*. See, for example, *Natorp*, *Sozialpädagogik. Theorie der Willensbildung auf der Grundlage der Gemeinschaft*, 1899.

⁸⁷ *Cohen*, Introduction critique à l'histoire du matérialisme de Friedrich Albert Lange, 2012, 223.

⁸⁸ *Cohen* is, of course, aware of the fragility of this common culture from the publication and his response, to *von Treitschke's* attack, in 1880, on *Graetz*; and specifically demarcates two periods of history, after German unification, based upon this fragility, in his “Vorrede” to his *Der Begriff der Religion im System der Philosophie*, 1915. However, the sense of impending collapse, emerges, beyond the essay *Deutschtum und Judentum mit grundlegenden Betrachtungen über Staat und Internationalismus*, 1915, with the exchange of letters between *Cohen* and *Natorp*, in 1916, (the letters are collected in *Holzhey*, *Cohen and Natorp*, Bd.2, 1986, 454–466), and the subsequent response to *Schmoller's* initial book review of *Delbrück and Preuß* (Obrigkeitsstaat und Volksstaat, ein missverständlicher Gegensatz, *Schmollers Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reiche* 40 (1916), 423 ff.) and *Schmoller's* reply to critics (Die heutige deutsche Judenfrage, *Schmollers Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reiche* 41 (1917), 563 ff.), of 1917 (Betrachtungen über *Schmollers* Angriff, *Neue Jüdische Monatshefte* 1 (1917), 222 ff.). One should also acknowledge the effect, during the same period, of the Protestant theologian, *Ernst Troeltsch's* characterization of the Hebrew Prophets in relation to wider project of the reassertion of a tradition of Christian natural law, and *Cohen's* reply. See *Troeltsch*, *Das Ethos der hebräischen Propheten*, *Logos* 6 (1916/17), 1 ff.; and *Cohen's* reply, *Der Prophetismus und die Soziologie*, *Neue Jüdische Monatshefte* 22 (1917), 652 ff.

⁸⁹ *Cohen*, *Religion der Vernunft aus den Quellen des Judentums. Eine jüdische Religionsphilosophie* 1919, 2. Aufl. 1929. All references are to the English translation, *Religion of Reason Out of the Sources of Judaism*, 1995. On the conceptualization of God in *Cohen*, see *Dryer*, *Die Idee Gottes im Werk Hermann Cohens*, 1985.

methodological task through the determination of the relative position of reason, religion and the sources of Judaism.⁹⁰

The relationship which this methodology establishes between ethics and religion is one which arises from ethics itself as the limitations of the universalism which it achieves through the “systematic opposition to everything sensual and everything empirical in man”.⁹¹ Ethics effects a transformation in which „*the I of man becomes the I of humanity*“, a process of „self-objectivization“ constituting man as a „historical individual“. ⁹² The notion of a historical individual is to be understood as the ethical representation of man as the „carrier of humanity“, a „symbol of humanity“, though which „[h]umanity bestows upon him true individuality with this symbol“. ⁹³ Ethics is, however, for *Cohen*, accompanied by a parallel process – the actualization of the „abstraction of humanity“ in the history of the formation of a state.⁹⁴ The state provides the point of mediation „between the empirical individual and the idea of humanity, whose carrier man becomes“, and, thus contains, in its development from „the natural concept of man“ to „constitutional system“ within a „federation of states“, the dissolution of „the illusion that the state and nationality, state and people, are identical“. ⁹⁵

The mediation of the state provides only the preliminary stage for this ethics, as, by divesting the individual of all “sensible characteristics”, the relationship between the I and humanity, remains centred upon the „neutrality“ of the He, which, for *Cohen* is „hardly distinguishable from the It“. ⁹⁶ Hence, this „man of humanity“, established by this preliminary stage renders the I indistinguishable in the He of its “unifying goal of totality”. ⁹⁷ The limit of this position, and, thus, of its necessarily preliminary character, emerges with the question of the Thou and its status as an essential supplement to the “authority of ethics”. ⁹⁸ In place of the He, the Thou, introduces “division and gradation”, and orientates ethics “in the general direction of *plurality (Mehrheit)*”. ⁹⁹ This, in turn, for *Cohen*, renders the question of the “contribution that the discovery of the Thou makes to the concept of the human individual” synonymous with the question of the determination of “the *share religion wins in reason*”. ¹⁰⁰

The “discovery of the Thou” arises with the experience of suffering, in particular, “through the observation of the other man’s suffering”, in which “the other *is changed from the He to the Thou*”. ¹⁰¹ The experience is essentially ethical, because it places into

⁹⁰ *Cohen*, Religion of Reason Out of the Sources of Judaism, 1995, 1–34.

⁹¹ *Ibid.*, 13.

⁹² *Ibid.* (Italics in original).

⁹³ *Ibid.*

⁹⁴ *Ibid.*, 14.

⁹⁵ *Ibid.* (Italics in original).

⁹⁶ *Ibid.*, 16.

⁹⁷ *Ibid.*, 15.

⁹⁸ *Ibid.*, 16.

⁹⁹ *Ibid.*, 15.

¹⁰⁰ *Ibid.* (Italics in original).

¹⁰¹ *Ibid.*, 17. One should note here, that this discovery is also the rejection, by *Cohen*, of Stoicism as the historical model “for supplementing ethics by religion” (*ibid.*, 16); and this rejection should be understood as a critique of the Troeltschean project, as exemplified by the 1910 paper, entitled, Stoic-Christian Natural Law and Modern Profane Natural Law, at the First Conference of the German Society for Sociology of 1910. For *Cohen*, Stoicism contains the “double error” of indifference to suffering at both the level of “one’s own suffering” and that of “the other man’s suffering” (*ibid.*).

question the individual's "whole orientation in the moral world"¹⁰² since what is encapsulated in suffering is the wholly negative expression of a particular person's worth. It is here, for *Cohen*, that "we touch here upon the borderline at which religion arises, and at which it illuminates the human horizon with suffering".¹⁰³ The discovery of suffering leads to a renewed question of "self-knowledge", as a self-knowledge of sin which retains its ethical orientation in its refusal to constitute the Thou as "a carrier of evil": the rejection of all questions of "the cause of ill fortune" and of "the origin of evil".¹⁰⁴ In this rejection, the self-knowledge of sin is simultaneously "the foundation for the self-origination of his morality".¹⁰⁵

In order for this self-origination to develop – the path from sin to virtue – *Cohen* introduces the concept of God as "the guarantor of humanity".¹⁰⁶ The introduction reveals the limits of an ethics, demarcated by the individual as the representative of humanity, which detaches itself from the question of "the outward success or failure of moral duty", and confines itself merely to "dutiful striving".¹⁰⁷ In this, ethics maintains and reproduces a separation between the ideal and actuality and "the illusion that ethics deals only with law and rule, but never with human actuality".¹⁰⁸

The capacity to overcome the limits of this ethics involves the methodological transformation of the God of Judaism, as a Messianic God, into the "God of ethics", and, in this transformation, to insist upon the centrality of the relationship "between God and the individual".¹⁰⁹ The relationship between ideal and actuality is restored through the disequilibrium between intensity of the self-knowledge of sin and the knowledge of the Thou, or fellowman's, sin. This disequilibrium or asymmetry – "I do not know any man's wickedness as deeply, as clearly, as my own"¹¹⁰ – prevents both the resurgence of concepts of fate and pessimism and enables the primacy of politics to be asserted over philosophy. The Hebrew prophets, for *Cohen*, provide the theoretical resources to conceive of an idealistic politics – the passage between the ideal and actuality – in which "with all their patriotism, messianic world citizens. Their own state was for them merely a stepping-stone to the federation of mankind".¹¹¹

The cosmopolitan project is the necessary corollary of the recognition that suffering involves "the distinction between poor and rich", and that "[t]he poor become for them the symbol of human suffering": "the symptomatic sign of the sickness of the state".¹¹² The messianic God "becomes the God of the poor",

"concerned with men in the economic stream of the state and with its seemingly deep-rooted poverty, which manifests for the prophets the root of social suffering, the only one that can be redressed and therefore the only one worthy of notice".¹¹³

¹⁰² *Cohen*, Religion of Reason Out of the Sources of Judaism, 1995, 19.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid., 20.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid., 21.

¹⁰⁹ Ibid., 21 f.

¹¹⁰ Ibid., 22.

¹¹¹ Ibid., 23.

¹¹² Ibid.

¹¹³ Ibid.

The supplement or compliment that religion, in the discovery of the Thou and the Messianic God, introduces into ethics constitutes the final expression of the *Cohen's* conception of cosmopolitanism which is to be derived from “the *sources of Judaism*”.¹¹⁴ These sources become the “*primary origin*” of a religion of reason in which the “connection between theory and practice remains decisive”.¹¹⁵

III. Kelsen and Cosmopolitanism

The presence of a notion of cosmopolitanism in *Kelsen's* work emerges with the expansion of the object of a theory of legal science from the state to international law. In this expansion, which, from a chronological perspective, has its origin in *Kelsen's* work immediately after the First World War¹¹⁶, the methodological elaboration of a theory of legal science, as a pure theory of law, determines the position and character of *Kelsen's* concept of cosmopolitanism. It is at this juncture that the specific process of methodological reflection and construction is most evident in relation to *Kelsen's* subsequent approach to cosmopolitanism in the later 1920s. The initial methodological stages, represented by *Kelsen's* essay of 1919, entitled, *Zur Theorie der juristischen Fiktionen. Mit besonderer Berücksichtigung von Vaihingers Philosophie des Als Ob*¹¹⁷, and the essay of 1922/3, entitled, *Gott und Staat*¹¹⁸, reveal the development of a critique of the state predicated upon a distinct transformation of materialism from that of *Cohen*. The critique of the state then becomes, in the work of the later 1920s, the methodological condition for the capacity to adequately comprehend international law: the assertion of the primacy of international law in which the pure theory of law is a theory of legal monism.

1. The Initial Methodological Stages

a) The Traces of Lange: Kelsen, Vahinger and Legal Fictions

The *Zur Theorie der juristischen Fiktionen* article involves *Kelsen* in the qualification of *Vaihinger's* approach to the conception of fictions in the *Philosophie des Als Ob*.¹¹⁹ The qualification entails the general adherence of *Kelsen* to *Vaihinger's* approach combined with the insistence upon the inadequacy of its specific conception of legal fictions. *Kelsen* then undertakes a further reworking or modification of *Vaihinger* in order to construct a more coherent conception of legal fictions.¹²⁰

¹¹⁴ Ibid., 24 (Italics in original).

¹¹⁵ Ibid., 25 (Italics in original).

¹¹⁶ This is emphasized by *Losano*, *Kelsen's Theory on International Law during his Exile in Geneva*, *Ratio Juris* 28 (2015), 470 ff.

¹¹⁷ *Annalen der Philosophie und philosophischen Kritik* 1 (1919), 630 ff.; all references are to the French translation in *Bouriau*, *Les fictions du droit. Kelsen, lecteur de Vaihinger*, 2013, 59. The pagination of the German original will be cited in brackets, after that of the French translation.

¹¹⁸ *Logos* 11 (1922/23), 261 ff.; all references are to the English translation in *Kelsen*, *Essays in Legal and Moral Philosophy*, 1973, 61.

¹¹⁹ *Vaihinger*, *Philosophie des Als Ob*, 1911.

¹²⁰ *Kelsen*, *Les fictions du droit. Kelsen, lecteur de Vaihinger*, 2013, 59 (*Annalen der Philosophie und philosophischen Kritik* 1 (1919), 632).

The qualified acknowledgement of *Vaihinger's* approach, accompanied by additional precision, results in an essential, underlying concordance or agreement with *Vaihinger's* philosophy of the 'As if' (*Als Ob*). The importance of this underlying concordance relates to the development of *Vaihinger's* Neo-Kantian philosophical position from a critical engagement and transformation of the German materialist tradition. The rudiments of this critical position were initially elaborated in *Vaihinger's* initial work, *Hartmann, Dühring und Lange. Zur Geschichte der deutschen Philosophie im XIX. Jahrhundert; ein kritischer Essay*¹²¹, published 20 years before the first edition of *Cohen's* *Einleitung mit kritischem Nachtrag zur „Geschichte des Materialismus“ von F. A. Lange*. The critique which *Vaihinger* undertakes, in particular, in relation to *Lange*, becomes, as *Vaihinger* notes, in the Autobiographical Preface to the 1922 reedition of *Philosophie des Als Ob*, the delineation of one of two paths of critical transformation of *Lange's* materialism in order to enable the elaboration of its implicit Neo-Kantianism. For *Vaihinger*,

“[e]ither the Kantian standpoint could be developed, on the basis of a closer and more accurate study of *Kant's* teaching, and this is what *Cohen* has done, or one could bring *Lange's* Neo-Kantianism into relation with empiricism and positivism. This has been done by my Philosophy of 'As if', which also leads to a more thorough study of *Kant's* 'As if' theory.”¹²²

Hence, *Vaihinger's* *Philosophie des Als Ob* is an alternative reconstruction of *Lange's* distinction between the ideal and the real in which the realm of the ideal is rearticulated as a realm of heuristic fictions. The relationship between the real and the ideal is, therefore, orientated by the primacy of a practical reason in which the realm of the ideal, as the realm in which fictions are created, is accorded a position of utility in relation to the further progress in both the knowledge of the real and the improvement of human life within reality.

Kelsen's approach to *Vaihinger*, in which critical attention is exclusively devoted to the status and character accorded to legal fictions, leaves *Vaihinger's* more general distinction, in the *Philosophie des Als Ob*, between the real and the ideal essentially untested. Thus, the origin of *Vaihinger's* *Philosophie des Als Ob* in the preceding transformation of *Lange's* materialism becomes the horizon against which *Kelsen* formulates his further precisions in relation to *Vaihinger's* notion of legal fictions. These further precisions relate to the limitation and regulation of the attribution of the notion of a fiction to legal concepts. The process of limitation and regulation is determined by a preliminary substitution of *Vaihinger's* overly narrow designation of *reality* as the object of knowledge by “the term *object of knowledge* in general”.¹²³ For, a science of law, as knowledge, is not related to reality as that which exists (*Sein*), not even, in *Vaihinger's* presentation of this reality, as “free human institutions”.¹²⁴ This knowledge relates only

¹²¹ *Vaihinger*, *Hartmann, Dühring und Lange. Zur Geschichte der deutschen Philosophie im XIX. Jahrhundert. Ein kritischer Essay*, 1876.

¹²² *Vaihinger*, *The Philosophy of 'As if': A System of the Theoretical, Practical and Religious Fictions of Mankind*, 1968, xxxvi, fn.1. One should also note here that *Vaihinger's* path also produces a detailed *Commentar zu Kants Kritik der reinen Vernunft* (Bd. I, 1881; Bd. 2, 1892), which differs from those of *Cohen*.

¹²³ *Kelsen*, *Les fictions du droit. Kelsen, lecteur de Vaihinger*, 2013, 62 (*Annalen der Philosophie und philosophischen Kritik* 1 (1919), 633).

¹²⁴ *Ibid.*, 61 (632).

to that which ought to be (*Sollen*), namely, a juridical order or system of norms. Within this normative realm, delineated by that which ought to be, the science of law will utilize fictions in a manner which adheres to *Vaihinger's* definition of the 'as if': "a detour through which it [knowledge] consciously enters into contradiction with its own object – of course, with the sole intention of subsequently apprehending it even better".¹²⁵

In order for this improved apprehension to be attained, the science of law maintains the transparently methodological or heuristic character of the notion of a fiction when attributed to a particular concept within the theory of law. This character has to be actively maintained and preserved in relation to the continual possibility that the fictive character of the concept – an object of the imagination – will be accorded the status of a natural thing – an object of reality. The possibility is that of hypostatization – "strongly transgressing of the limits of the theory of law"¹²⁶ – in which "the *correction* of the fiction"¹²⁷ is lost, and replaced with a series of "artificially created,, difficulties and contradictions resulting from the "inadmissible reification" of the fiction."¹²⁸

The methodological or heuristic character of a legal fiction is, however, for *Kelsen*, only present within the conceptual framework of a science of law and, as such, finds no inherence in the practice of "the *legislator* and by those *who apply the law*".¹²⁹ For a legal fiction is solely a product of the knowledge of a science of law of which the juridical order, encompassing the legislator and all other instances of the application of law, is its object. This represents a further precision, by *Kelsen*, in relation to *Vaihinger* for whom legal fictions are present in *both* the science and practice of law.¹³⁰ In contrast to *Vaihinger*, *Kelsen* distinguishes the practice of the application of law as one in which there is only the semblance of legal fictions. These are pseudo-fictions, exemplified by the use of analogic interpretation, which are merely techniques to enlarge an existing norm to ensure that it is sufficient to encompass a particular case which, at present, remains undetermined. Hence, the initial appearance of heuristic 'invention' of these pseudo-fictions dissolves once it is acknowledged that they are not orientated to the *knowledge* of law, but to *conformity* with the law as a normative order.¹³¹

From this further precision, there is, for *Kelsen*, the necessity to insist upon the essential relationship between a science of law and a distinct object, namely,

"an autonomous system of norms, not thus deriving from a superior order. Otherwise there could only be a moral science (an ethics) or a theology, according to which one considers law as a reject of morality or of religion".¹³²

In this insistence, *Kelsen* also qualifies *Vaihinger's* original application of the notion of a fiction through the exclusion of *Vaihinger's* attribution of a fiction to the separation or isolation of law from morality. The separation of law and morality – the positiviza-

¹²⁵ Ibid., 62 (633).

¹²⁶ Ibid., 63 (634).

¹²⁷ Ibid., 65 (636).

¹²⁸ Ibid., 66 (637).

¹²⁹ Ibid., 66 (638).

¹³⁰ This, for *Kelsen*, is due to *Vaihinger's* overextension of the similarity of mathematical method and the conceptual technique of the science of law which leads, in turn, to "the total equivalence which he [*Vaihinger*] establishes between legislative fictions and mathematical fictions" (ibid., 70 [641 f.]).

¹³¹ Ibid., 75 (647).

¹³² Ibid., 79 f. (652).

tion of law – for *Kelsen*, results not from the operation of the imagination, which can simply be restored by a subsequent operation of the mind, because this would be to presuppose that law and morality are merely differentiated from a common, natural reality.¹³³ In this presupposition, *Vaihinger*; for *Kelsen*, effectively renders impossible a distinct and autonomous object of the science of law, because

“neither the law nor morality – both conceived as complexes of norms – are found in the domain of reality which *Vaihinger* considers as the line from which the fiction deviates, and which is nothing other than nature, the sensible world; furthermore, neither the science of law nor ethics, orientated to their objects, seek to apprehend this reality.”¹³⁴

Rather, the science of law is centred upon *normative* knowledge, which arises from ‘the category of obligation’¹³⁵, and it is ‘the world of obligation’ which is the object of this normative knowledge. This object also has sufficient independent reality, from that of ‘natural reality’, in order that, within the science of law, normative knowledge proceeds, in part, through the use of fictions.¹³⁶

b) The State as Legal Fiction: Hans Kelsen’s *God and the State*

The further precisions which *Kelsen* introduces into *Vaihinger’s Philosophie Als Ob*, in regard to the particular area of legal fictions, indicates the initial divergence of *Kelsen’s* approach from that of *Cohen’s* in relation to the conceptualization of the relationship between law and morality. *Kelsen’s* science of law commences from the requirement for a fully autonomous object which is fundamentally distinct from a science of ethics centred upon the object of morality. The autonomy of the object of a science of law, and the normative knowledge which it generates, is provided with critical supplement, in *Kelsen’s God and the State*. The supplement involves the concentration upon a specific legal concept – the state – and the determination of the extent and consequences of its fictional character.

The reinterpretation of *Vaihinger’s* notion of a legal fiction becomes the basis for the elaboration of a methodological framework within which to consider the “parallelism” of “the mode and manner in which God and society, the religious and the social, are experienced by the individual”.¹³⁷ *Kelsen* acknowledges psychology as establishing the initial outlines of this parallelism in the analogous sensation or feeling, in both forms of experience, of an object of external authority combined with that of “subordination and dependence” and “unconditioned obedience”.¹³⁸ The initial analogy also operates to dissolve any essential distinctiveness of religious experience from social experience, and *Kelsen* traces this to the origin of religion in mythology. Here, for *Kelsen*, mythology reveals an essential interweaving and interdependence “between the ethico-normative [God as absolute good] and a natural cause [God as highest principle]”.¹³⁹ The res-

¹³³ Ibid., 80 (653).

¹³⁴ Ibid.

¹³⁵ Ibid., 85 (657).

¹³⁶ Ibid.

¹³⁷ *Kelsen*, *Essays in Legal and Moral Philosophy*, 1973, 61.

¹³⁸ Ibid.

¹³⁹ Ibid., 63.

toration of this mythological origin, thus, presents a world of generalized normativity within which the relationship between man and nature is situated.¹⁴⁰

From, this initial psychological parallelism, the work of *Durkheim*¹⁴¹, *Feuerbach*¹⁴² and *Freud*¹⁴³ is then utilized in order to reinforce and extend this parallelism, through the presentation of the connection between self-subjection and exaltation of the group.¹⁴⁴ The further extension of this parallelism marks the passage to *Kelsen's* epistemological critique of the underlying reductionism of this parallelism, through its presentation of God and the State, as mere masks beneath which is “men putting coercion on other men”.¹⁴⁵ For *Kelsen*, this is effectively to reduce the social to nature in which, behind these masks, all that remains is the “causally determined motions of souls and bodies”.¹⁴⁶ This reductionism is prevented by the comprehension of God and the State as concepts which have the epistemological function of fictions which furnish “the abstract idea of the unity of [the religious and social] order”¹⁴⁷ through personification. This, in turn, is accompanied by the always attendant possibility of hypostatization: “the confusion between a means and an object of cognition”.¹⁴⁸

The analysis then turns to the concept of the State as a legal fiction, and this methodological approach entails the presentation of the theory of constitutional law (*Staatsrechtslehre*) as the conception of “the state as law”.¹⁴⁹ It is the hypostatization of the concept of the state which, for *Kelsen*, introduces the dualism of state and law; and this is both “a contradiction in the logically systematic sense” and “the source of political-legal abuse”.¹⁵⁰ Hypostatization creates “the dualism of two different and contradictory norm-systems”,¹⁵¹ and, if maintained, this dualism then leads a theory of constitutional law to operate in a manner analogous to that of theology in its presentation of dualism as a unity. In particular, it seeks to comprehend, “in a legal manner”, the existence of a “supralegal state distinct from a system of law”, which is analogous to the theological comprehension of “a supernatural order of the divine will beyond nature”.¹⁵² From this “juxtaposition”¹⁵³, there then emerges the further question of the capacity of the state to will “both law and its negation”, which is analogous to the theological problem of theodicy. Both these attempts to conceive dualism as a unity are situated within the wider question of the dualism of the state and the individual which, for *Kelsen*, simply oscillates between the attempts of individualism and universalism to provide the theory of their unity.¹⁵⁴

For *Kelsen*, legal cognition, the knowledge of the legal order produced from a science of law, operates with the concept of the state as a legal fiction. The difficulties of dual-

¹⁴⁰ Ibid.

¹⁴¹ *Durkheim*, *The Elementary Forms of Religious Life*, 1995.

¹⁴² *Feuerbach*, *The Essence of Religion*, 2004.

¹⁴³ *Freud*, *Totem and Taboo*, 1955.

¹⁴⁴ *Kelsen*, *Essays in Legal and Moral Philosophy*, 1973, 66 f.

¹⁴⁵ Ibid., 67.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid., 69.

¹⁴⁸ Ibid., 67.

¹⁴⁹ Ibid., 69 f.

¹⁵⁰ Ibid., 75.

¹⁵¹ Ibid., 75 f.

¹⁵² Ibid., 78.

¹⁵³ Ibid.

¹⁵⁴ Ibid., 80.

ism, generated by the hypostatization of the state, are removed by the understanding of the transparently epistemological function of personification represented by the legal concept of the state. The state, thereby, ceases to be an “absolute reality”¹⁵⁵, and, “concedes to the state no other criterion beyond the formal character of a supreme coercive order”.¹⁵⁶ At the level of a science of law, the epistemological function of the legal fiction of the concept of the state, has the effect of generating a “*purely legal theory* of the state”: “the reduction of a supralegal concept of the state to the concept of law”.¹⁵⁷ In this reduction, the “[S]tateless theory of the [S]tate” is “the indispensable precondition for the development of a genuine science of law, as a *science of positive law*”.¹⁵⁸

2. The Science of Positive Law as Legal Monism: Kelsenian Cosmopolitanism

The full realization and articulation of the potential of a stateless theory of the state enables the expansion of *Kelsen's* theoretical framework of the science of positive law to encompass international law. The expansion commences with *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer Reinen Rechtslehre*¹⁵⁹, of 1920, and international law becomes a significant part of *Kelsen's* work during the 1920s and 1930s. This period of *Kelsen's* work, and its underlying theoretical framework, concludes with the decision, in 1940, to leave his initial exile in Geneva, and to emigrate to the USA.¹⁶⁰

The expansion of the theoretical framework proceeds, in the 1920s, through the demonstration that the stateless theory of the state – the purely cognitive character of the distinction between the state and the law – is the theoretical precondition required for a science of positive law to pose the question of the relationship between national and international law. The exemplary formulation and presentation of this theoretical framework is contained in *Kelsen's* 1926 Lecture Course, *Les rapports de système entre le droit interne et le droit international public*.¹⁶¹ Here, the transition to the question of the relationship between national and international law centres upon the transformation of the notion of the public power of the state, in particular, the concept of sovereignty, into a juridical category. The state, as a legal fiction, the personification of the legal order, becomes, with the juridical transformation of the concept of sovereignty, an aspect of a process of attribution.¹⁶² It is within this process that the question of the relationship between national and international law arises, in accordance with a juridical concept of

¹⁵⁵ *Ibid.*, 81.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*, 81 f. (Italics in original).

¹⁵⁸ *Ibid.* (Italics in original).

¹⁵⁹ *Kelsen*, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer Reinen Rechtslehre*, 1920.

¹⁶⁰ For *Losano*, the final work of this period is represented by *Kelsen*, *Zur Lehre vom Primat des Völkerrechts*, *Internationale Zeitschrift für Theorie des Rechts* 12 (1938), 211 ff. (*Losano*, *Ratio Juris* 28 [2015], 482.).

¹⁶¹ *Kelsen*, *Les rapports de système entre le droit interne et le droit international public*, *Recueil de cours de l'Académie de Droit International* 14 (1926), 227 ff.; *Kelsen* indicates the importance of this lecture course in *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer Reinen Rechtslehre*, 2. Aufl. 1928, III.

¹⁶² *Kelsen*, *Recueil de cours de l'Académie de Droit International* 14 (1926), 249 ff.

sovereignty. For sovereignty, as the attribution of supremacy within a legal order, becomes the question of whether

“the theory of the state can or must admit, in order to interpret its contents [*matériaux*], the sovereignty of the state order or, on the contrary, the sovereignty of the sole international order”.¹⁶³

This, in turn, for *Kelsen*, constitutes this question as merely a specific instance of the more general question of the relationship between two normative systems. It is to be considered as a purely logical investigation concerning the manner in which “different normative orders can be logically combined with each other”.¹⁶⁴ The possibility of logical combination presupposes the existence of a logical space underlain by an essential identity and unity. The capacity for combination thus entails both the identification of the sole, obligatory normative order and reproduction of the identity and unity of the logical space. *Kelsen* accords to the principle of non-contradiction the status of the primary logical operation, in thought, for this possibility of combination. In place of the initial appearance of conflict between two normative orders, the application of the principle of non-contradiction produces a unified framework by establishing the relationships of subordination and coordination between the two normative orders.¹⁶⁵ Hence, an apparently intractable conflict between two normative systems is replaced with a unified, normative hierarchy in which the only sources of uncertainty are limited to those of its “internal coherence”: the relationship between “the superior and the inferior order of the same system of norms”.¹⁶⁶

In its specific application to the relationship between the normative orders of national and international law, *Kelsen* utilizes the principle of non-contradiction to reject the initial position of dualism, and to distinguish two further theoretical positions which commence from the presupposition of a unified, normative hierarchy. The two hypotheses are, in their common presupposition of a unified, normative hierarchy, theories of legal monism. These initial positions, or hypotheses, are themselves distinguished through the differing primacy which they accord to either national or international law in the relationships of subordination and coordination.

The hypothesis which attributes primacy to national law thereby renders the international law as the normative order which is subordinated and co-ordinated by national law. For *Kelsen*, the application of the principle of non-contradiction reveals that the assertion of this primacy, through the notions of self-limitation and recognition, is logically defective.¹⁶⁷ This logical deficiency is evident once it is acknowledged that

“there cannot exist many coordinated state orders, equal in law, and its discovers through this the true, logical sense of the notion of the sovereignty of the state, namely, the unity and necessary uniqueness of the juridical order thus denominated. Besides, there is not there a trait common to the law nor to juridical science: each system pretends to be solely valid, in its unity.”¹⁶⁸

¹⁶³ Ibid., 255.

¹⁶⁴ Ibid., 263.

¹⁶⁵ Ibid., 267–270.

¹⁶⁶ Ibid., 274.

¹⁶⁷ Ibid., 290–297.

¹⁶⁸ Ibid., 296.

The hypothesis which attributes primacy to international law then assumes, for *Kelsen*, the position of the only coherent theory of the relationship between the two normative orders of national and international law.

The passage to this hypothesis is also the passage from the subjective to the objective existence of international law, as it is international law, in this hypothesis, which is accorded primacy. Within the unified, hierarchical order based upon the primacy of international law, the question of internal coherence, namely, the maintenance of the relationship between the two orders is, for *Kelsen*, to be conceived by analogy with the internal coherence of the national order. Thus, the three forms or methods of nullity, annullability and sanction¹⁶⁹ are transposed to the international level, and are each examined, in turn, to establish their degree of inherence within this relationship between international and national law.

The limit of this hypothesis arises with the consideration of the method of sanction, as nullity and annullability will be operative, for *Kelsen*, depending upon their presence, in Constitution of the national legal order, in relation to the application of international law within the national legal order.¹⁷⁰ It is in the absence of either nullity or annullability that the violation of international normative order by a norm of the national normative order renders the sanction as the sole method to ensure the continued maintenance of the primacy of international normative within the unified, hierarchy. Here, however, the notion of a sanction can only take the form of war, and, for *Kelsen*, in order to remain coherent with the requirements of the unity of this hierarchy, it would have to be “a juridical act”: punishment for the violation of the international normative order.¹⁷¹ The lack of juridification of war, and the continuing inherence of the implementation of the sanction of war at the level of the national legal orders, reveals the gap between the science of law and the “primitive” stage of international law.¹⁷²

The comprehension of this gap is the point of emergence of *Kelsen's* legal cosmopolitanism. For, the science of positive law understands this gap as representing the limit of its methodological demonstration. While it refutes the presumption that the primitive stage expresses the impossibility of the further evolution of the international normative order, *Kelsen* understands that the methodological demonstration remains at the level of a theory of knowledge. The unified, normative hierarchy, can only be presented in the form of two hypotheses, and these hypotheses can themselves only be subject to an evaluation based upon the application of the principle of non-contradiction. The theoretical superiority accorded to the hypothesis of the primacy of the international normative order can never attain the degree of demonstrable certainty of the natural sciences, because, for *Kelsen*, there is no juridical equivalent of an *a priori* realm of external nature.¹⁷³ However, the comparative weakness of the science of positive law is also the basis upon which, in the 1920s, *Kelsen* conceives the relationship of the science of positive law to the fields of ethics and politics. For, the hypotheses are the theoretical conclusions of a science of law which, in the form of a written text, extend beyond *Kelsen* to a wider public. Hence, the science of law offers these hypotheses in the form of

¹⁶⁹ It should be emphasized here that this conception of the relationship between the national and international normative order is influenced by *Adolf Merkl's* notions of the Stufenbaulehre.

¹⁷⁰ *Ibid.*, 316 f.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*, 319.

¹⁷³ *Ibid.*, 313 f.

an initial clarification which then becomes the basis for a decision, an act of will, which transforms these hypotheses into two radically antagonistic “ethico-political conceptions”.¹⁷⁴ The decision to adopt the hypothesis which accords primacy to the national normative order will confine the theory of legal monism to “the nation and the national form of state” and, in diametrical opposition, the hypothesis which accords primacy to the international normative order will, in its assertion of “a juridical world community superior to different states”, realize the cosmopolitan project of a *civitas maxima*.¹⁷⁵

With this juridical cosmopolitanism, *Kelsen*, then manifests, despite the rigour of his theoretical construction and argumentation, a significantly reduced and limited understanding of the potential of systematic theoretical reflection to found and expound a cosmopolitan project. The connection which the Lecture Course of 1926 establishes between a science of positive law and the field of ethics and politics, is itself reconsidered by the early 1930s. This is exemplified in the 1932 Lecture Course, *Théorie Générale du Droit International Public. Problèmes Choisis*¹⁷⁶, in which all reference to the cosmopolitan project of the *civitas maxima* is absent. The purpose of a legal theory, as a science of positive law, in the 1932 Lecture Course, is to introduce a strict separation between the juridical perspective and other perspectives (historical, sociological and political) upon international law. For *Kelsen*, it is necessary to operate “above all [by] avoiding the dangerous confusion between the question of the nature and of the content of positive law and the political demands concerning its future development”.¹⁷⁷ This, in turn, is accompanied by *Kelsen*’s understanding of a legal theory as, of necessity, both “abstract and formal”.¹⁷⁸ It is

“the necessary condition of the history, of the sociology and of the politics of international law. Such a perspective is explained above all by the fact that a rigorous juridical analysis is indispensable in order to attain much needed improvement of the *technique of international law*. It is exactly in order to fulfil this task of the politics of [international] law that a pure theory of law is necessary, in the same manner that there is no scientific medicine without biology, no technics [*technique*] without physics.”¹⁷⁹

A further distance is marked with the *Pure Theory of Law*, in 1934, in which the particular form of the elaboration of a science of positive law treats the question of international law with an enhanced, methodological strictness. The *Pure Theory*, merely recognizes that the theoretical clarification resulting from the argumentative framework of the science of positive law may have, as “one of the most substantial achievements”, the effect of dissolving the “dogma of sovereignty, the principle instrument of imperialist ideology directed against international law”.¹⁸⁰ This effect is, in itself, not the central purpose of the *Pure Theory* as a pure theory of positive law. For *Kelsen*, it is a particular aspect within the more general and overarching process of the construction of a pure theory of law. The process of construction is orientated by the “aim” of “pure cogni-

¹⁷⁴ *Ibid.*, 323.

¹⁷⁵ *Ibid.*, 326.

¹⁷⁶ *Kelsen*, *Théorie Générale du Droit International Public. Problèmes Choisis*, Recueil de cours de l’Académie de Droit International 42 (1932), 121 ff.

¹⁷⁷ *Ibid.*, 122.

¹⁷⁸ *Ibid.*, 123.

¹⁷⁹ *Ibid.*, 122.

¹⁸⁰ *Kelsen*, *Introduction to the Problems of Legal Theory*, 2002, 124.

tion”, in which the cosmopolitan project now exists at the entirely cognitive level of “a presupposition not without significance for the organizational unity of a centralized system of world law”.¹⁸¹

3. Excursus on Kelsen and the Post World War Two International System

The emigration of *Kelsen*, from his original place of exile in Geneva to the United States, leads initially to a reversal of the increasing distance in the 1930s from a wider cosmopolitan project. The appearance and discussion of the notion of just war, in *Law and Peace in International Relations*¹⁸², combined with the presentation and analysis of an institutional framework for the reproduction of the primacy of the international normative order¹⁸³, represent a conscious reconception of the place of the theory of international law. The purity of the science of positive law is displaced by the “foremost political task” of “world peace”.¹⁸⁴ In place of the distinction between the realm of pure cognition and the realm of ethics and politics, *Kelsen* now installs that between the “simple writer” and the “active statesman” in relation to this political task.¹⁸⁵ The distinction relates to the different form of duty applicable to the simple writer and the active statesman flowing from the common task of world peace.

For the simple writer, the duty, which renders him “no less responsible than the former [the active statesman]”¹⁸⁶, is to be understood as an ideal – world peace – which requires that “[h]e must [...] accommodate his postulates to what is politically possible”.¹⁸⁷ The definition of political possibility is, therefore, the foundation for the juridical response to the ideal of world peace. The determination of this definition commences from the understanding of the insufficiency of The League of Nations and the inappropriateness of “the dream of a World State”.¹⁸⁸ Within these initial limits, the further elaboration of the definition of political possibility creates “no revolution of international relations but reform of their order by improvement of the social techniques prevailing in this field”.¹⁸⁹ The final precision of this duty, as juridical, concerns the type of social technique which regulates “the relation between states”: “the Law of Nations”.¹⁹⁰ Hence, the simple writer’s postulates are to be orientated to the possibility of improvement of the social technique of international law which is confined, by *Kelsen*, to “one of a slow and steady perfection of the legal order”.¹⁹¹ The duty is thus recognised and assumed through the juridical reflection upon international law and the formulation of proposals for its improvement.

¹⁸¹ *Ibid.*, 124 f.

¹⁸² *Kelsen*, *Law and Peace in International Relations*, The Oliver Wendell Holmes Lectures, 1940–41, 1942.

¹⁸³ *Kelsen*, *Peace Through Law*, 1944.

¹⁸⁴ *Ibid.*, viii.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*, ix. See, also *Kelsen*, *The Law as a Specific Social Technique*, *The University of Chicago Law Review* 9 (1941), 75.

¹⁹⁰ *Kelsen*, *Peace Through Law*, 1944, ix.

¹⁹¹ *Ibid.*

The proposals are an attempt to situate a permanent international court, with compulsory jurisdiction¹⁹², within a Permanent League for the Maintenance of Peace.¹⁹³ This is combined and supplemented by the introduction of the notion of individual criminal responsibility for those “who as members of government have violated international law by resorting to or provoking war”.¹⁹⁴ This particular improvement of the social technique of international law is formulated as additional treaty stipulations, which replace or modify the original Covenant creating the Permanent League for the Maintenance of Peace.¹⁹⁵ The effect of these additional stipulations is to confer international criminal jurisdiction upon the permanent international court in regard to those states who are signatories of both the Covenant and the Treaty. The ideal of world peace is embedded in an attempt to reinvigorate the potential of international law through the collective security provided by membership of the League and the compulsory jurisdiction and the adjudication of the permanent international court within the framework of the League. The intention of *Peace Through Law* is to present the statesman with the capacity to improve the Law of Nations by implementing the proposals for the improvement of the social techniques of international law. The fulfillment of the duty of the simple writer furnishes the statesman with the basis for the fulfillment of his duty in relation to the ideal of world peace. The passage from the formulation of the proposals for improvement to their application initiates the slow path of perfection of the international legal order.

Cosmopolitanism, as world peace, is to be realized through the development of international law. For *Kelsen*, “there is no essential social progress possible as long as no international organization is established by which war between nations of this earth is effectively prevented”.¹⁹⁶ The international organization is, however, predicated upon a notion of collective security which preserves the legal forms of interwar Europe – the Covenant and the Treaty –, and has no conception of the creation of the United Nations, nor the division of post World War II international order into the rival blocs.

The project which *Kelsen* envisages, in *Peace Through Law*, is rendered redundant by the institutional reconfiguration of the post-World War II international order. The establishment of the United Nations, the creation of the separate Nuremberg Tribunal and The International Military Tribunal for the Far East, and the formation of the North Atlantic Treaty Organization effectively transform the position and centrality of the Law of Nations and the legal forms of interwar Europe. The emergence of new international order leads to a modification of *Kelsen's* position in which the critical analysis of the normative coherence of this transformation is coupled with the assertion of the continued primacy of a legal science of international law.

¹⁹² In contrast, as *Kelsen* emphasizes, to the Permanent Court of International Justice established by the Covenant of the League of Nations in 1920, had no “compulsory jurisdiction (ibid., 56).

¹⁹³ The proposals are contained in Annex I, in the form of a Covenant, ibid., 126 ff.

¹⁹⁴ Ibid., 71. *Kelsen* refers to his article, Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals, *California Law Review* 31 (1943), 530 ff.

¹⁹⁵ The Treaty stipulations are contained in *Kelsen, Peace Through Law*, 1944, 141 ff.

¹⁹⁶ Ibid., viii.

Kelsen's juridical critique is centred, in particular, upon the normative framework and operation of the United Nations¹⁹⁷, and the United Nations Charter is itself subjected to detailed analysis in *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*.¹⁹⁸ Here, as exemplified by the Preface entitled, On Interpretation, *Kelsen* defines his task as one of identifying and enumerating the range of possible interpretations of the relevant legal provisions of the Charter. The juridical clarification, itself merely an expression of the “fact that legal norms as formulated in words hav[e] frequently more than one meaning” entails that the law is “adaptable to changing circumstances, without the requirement for formal alteration”.¹⁹⁹ The process of interpretation is linked to a division which *Kelsen* institutes which displaces that between the simple writer and the statesman with that between scientific commentary and “the competent legal authorities”.²⁰⁰ The task of scientific commentary which *Kelsen* attributes to himself is merely to concentrate upon “the problems of legal technique” arising from the interpretation of the Charter.²⁰¹ These problems, and the potential range of interpretations which arise from their resolution, are then presented to the competent legal authorities. Here, *Kelsen* adopts an essentially indirect approach, predicated upon the underlying separation between interpretation (scientific commentary) and decision (the choice and imposition of a particular interpretation by the competent legal authorities). The indirect approach is the effective contraction and reduction of *Kelsen's* cosmopolitanism to a position of scientific commentary upon the “basic legal problems” of certain elements of the newly established international legal order.²⁰²

The modification of *Kelsen's* understanding of his methodological position is the expression of the decline in the central position of a science of positive law, as a theory of legal monism predicated upon the primacy of international law.²⁰³ The decline, and

¹⁹⁷ See, *Kelsen*, The Old and the New League: The Covenant and the Dumbarton Oaks Proposals, *American Journal of International Law* 39 (1945), 45 ff.; *Kelsen*, Limitations on the Functions of the United Nations, *Yale Law Review* 55 (1946), 997 ff.; *Kelsen*, Membership in the United Nations, *Columbia Law Review* 46 (1946), 391 ff.; *Kelsen*, Organization and Procedure of the Security Council of the United Nations, *Harvard Law Review* 59 (1946), 1087 ff.; *Kelsen*, The Preamble of the Charter, *The Journal of Politics* 134 (1946), 8 ff.; *Kelsen*, Sanctions in International Law Under the Charter of the United Nations, *Iowa Law Review* 31 (1946), 499 ff.; *Kelsen*, Sanctions Under the Charter of the United Nations, *Canadian Journal of Economics and Political Science* 12 (1946), 429 ff.; *Kelsen*, Collective Security and Collective Self-Defense Under the Charter of the United Nations, *American Journal of International Law* 42 (1948), 783 ff.; *Kelsen*, The Settlement of Disputes by the Security Council, *International Law Quarterly* 173 (1948), 2 ff.; *Kelsen*, Withdrawal from the United Nations, *Western Political Quarterly* 1 (1948), 29 ff.; *Kelsen*, The Atlantic Pact and the UN Charter, *The New Leader* 32 (1949), 10 ff.; *Kelsen*, Conflicts Between Obligations Under the Charter of the United Nations and Other International Agreements, *University of Pittsburgh Law Review* 10 (1949), 284 ff.; *Kelsen*, Is the North Atlantic Treaty in Conformity with the Charter of the United Nations?, *Kansas Law Review* 19 (1950-1951), 1 ff.; *Kelsen*, Is the North Atlantic Treaty a Regional Arrangement?, *American Journal of International Law* 45 (1951), 162 ff.; *Kelsen*, Recent Trends in the Law of the United Nations, *Social Research* 18 (1951), 135 ff.; *Kelsen*, What Happened to the Security Council?, *The New Leader* 27 (1951), 10 ff., 31 ff.; *Kelsen*, Collective security under international law, 1957.

¹⁹⁸ *Kelsen*, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*, 1951.

¹⁹⁹ *Ibid.*, xiv–xv.

²⁰⁰ *Ibid.*, xvi.

²⁰¹ *Ibid.*, xvii.

²⁰² *Ibid.*

²⁰³ This is evident from the lack of extensive or enduring academic interest which was accorded to *Kelsen*, *Principles of International Law*, 1952.

with it the conception of law as a distinct and autonomous realm of normativity, is reflected in the increasing substitution or replacement of a science of positive law by the primacy of international politics and the emerging discipline of international relations.²⁰⁴

Conclusion

The notion of cosmopolitanism reveals itself to be an integral aspect of the work *Cohen* and *Kelsen*. The presence of this notion represents both an identity and a distinction between the thought of *Cohen* and *Kelsen*. The initial identity is located in the common insistence upon the reconception of the notions of law and of the state. The degree of identity is increased by the acknowledgement of the dependence of the process of reconception on the adoption of a position of theoretical reflection located outside the confines of the state. With this acknowledgement, the presence of the Kantian cosmopolitical position²⁰⁵ (*eine weltbürgerliche Absicht*) appears to have a degree of inherence in the work of *Cohen* and *Kelsen*. This inherence, however, becomes progressively weaker with the development of *Cohen's* philosophical system and finds no explicit acknowledgement in *Kelsen's* project.

The lack of enduring (*Cohen*) or evident (*Kelsen*) inherence of the Kantian conception of cosmopolitanism constitutes the distinctiveness of the work of *Cohen* and *Kelsen*, and it is in the further development of the conception of cosmopolitanism that their differences emerge. For *Cohen*, the critical engagement with *Kant's* thought, as Neo-Kantianism, responds to the challenge of *Lange's* materialist philosophy in a manner which, through a combination of ethical socialism and cosmopolitanism, seeks to preserve *Lange's* political project. The final, posthumous work, *Religion of Reason Out of the Sources of Judaism*, constitutes *Cohen's* previous work as the preparation for the philosophical presentation of Judaism as the origin of a cosmopolitanism which transcends the limits of the Kantian notion of cosmopolitanism. The origin is to be understood as one which requires a philosophical framework for its presentation in order that ethics, law and religion in the sources of Judaism are clearly delineated and their relationship systematically comprehended. In this shift, *Cohen's* position becomes closer to that of a 'hermeneutics' in which the position outside the confines of the state is produced through the interpretative distance introduced by the philosophical framework of analysis of the sources of Judaism.

²⁰⁴ Initiated through the work of *Kelsen's* two former students and fellow exiles in the USA, *John H. Herz* and *Hans Morgenthau*. On this see *Scheuerman*, Professor Kelsen's Amazing Disappearing Act, in Rösch (ed.), *Émigré Scholars And The Genesis Of International Relations: A European Discipline in America?*, 2014, 81 ff.; *Stirk*, John H. Herz: realism and the fragility of the international order, *Review of International Studies* 31 (2005), 285 ff.

²⁰⁵ As articulated in *Kant*, *Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht*, 1784. See, also *Kersting*, *Wohlgeordnete Freiheit: Immanuel Kants Rechts- und Staats-philosophie*, 1993; *Foessel*, *Kant: du droit cosmopolitique à l'habitation du monde*, in Vincent (ed.), *Citoyen du Monde: Enjeux, responsabilités, concepts*, 2004, 19 ff.; *Höffe*, *Kant's Cosmopolitan Theory of Law and Peace*, 2006; *Kleingeld*, *Kant and Cosmopolitanism: The Philosophical Ideal of World Citizenship*, 2013, and *Rorty/Schmidt* (eds.), *Kant's Idea for a Universal History with a Cosmopolitan Aim. A Critical Guide*, 2011.

The concentration, by *Kelsen*, upon a legal science of positive law immediately detaches the notion of cosmopolitanism from a Kantian framework. The Kelsenian notion of cosmopolitanism arises through its simultaneous rejection of all analogies to natural phenomena and their causality and of a theory of morality. Hence, the Kelsenian notion of cosmopolitanism is, from the outset, of exclusively juridical origin, and, thus, separates itself methodologically from the Kantian concerns of the moral progress of humanity and the sense of human history.²⁰⁶ This, in turn, initiates the difference between the conceptualization of cosmopolitanism of *Kelsen* and *Cohen*, as *Kelsen's* path to the notion of cosmopolitanism arises from the demonstration of the primacy of law over the state, and the existence of this law as essentially international. The demonstration originally derives from the appropriation and development of another strand of Neo-Kantianism represented by *Vaihinger's* notion of a fiction, and its application to the concept of the state. It is the transformation of the state into a juridical fiction – an entirely heuristic device – which is the precondition for the comprehension of law as essentially international. *Kelsen's* work of the 1920s, which is orientated by this critical impetus, contains a notion of cosmopolitanism as a legal order predicated upon the comprehension of the primacy of international law. This position is then modified, during the 1930s, with the further methodological development entailed by the *Pure Theory of Law* in which cosmopolitanism is an *indirect* effect of the plausibility of its theoretical approach. The increasing distance from the earlier cosmopolitanism is, however, reversed with the outbreak of World War II, and is combined, in the works of the 1940s, with an attempt to articulate a revived primacy for international law centred upon the project of collective security – a Law of Nations – supported by the operation of an international court. The revival of the direct cosmopolitan intent of *Kelsen's* project reflects the final reassertion of the conceptual resources of international law in relation to an international order which, with the establishment of the United Nations, situates itself outside the framework of *Kelsen's* project. The work of the 1950s – the critical analysis of the juridical structure of the United Nations Charter and the *Principles of International Law* – represent the final attempt to retain a degree of inherence for this project in the form of the improvement of the techniques of international law. This inherence becomes progressively weaker with the emergence of the rudiments, in the work of Herz and Morgenthau, for the assertion of the predominance of a discipline of international relations through the insistence upon the primacy of state sovereignty coupled with a form of analysis which withdraws from the improvement of the techniques of international law as a Law of Nations. With this, the last remnants of Kelsenian cosmopolitanism also disappear.

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²⁰⁶ It is arguable that *Kelsen's* dissertation on Dante (*Die Staatslehre des Dante Alighieri*, 1905), and the later references to *Wolff's* notion of a *civitas maxima*, in: *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre*, 1920, 2. Aufl. 1928 and the *Les rapports de système entre le droit interne et le droit international public*, *Recueil de cours de l'Académie de Droit International* 14 (1926), 227 ff., indicate a resolutely non-Kantian genesis for *Kelsen's* conception of cosmopolitanism.