

Law and psychoanalysis: close intertwining between Hans Kelsen and Sigmund Freud*

Direito e psicanálise: estreitas interconexões entre Hans Kelsen e Sigmund Freud

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Abstract

This paper offers an original analysis of the interconnections between law and psychoanalysis through the personal and academic exchanges between Hans Kelsen (1881-1973) and Sigmund Freud (1856-1939). After a brief analysis of the similar cultural background of both scholars as Jews who grew up in *fin-de-siècle* Vienna, the text focuses on the personal encounters between them and subsequently analyzes Kelsen's reception of Freud's work in "The State-Concept and Social-Psychology" (*Der Begriff des Staates und die Sozialpsychologie*). Kelsen's text was originally published in 1922 in Freud's review, *Imago*, resulting from a conference he held at the Viennese Psychoanalytical Society. This paper analyzes the relevance of Freud's theory to the construction of the Pure Theory of Law, especially regarding his concept of the state. Furthermore, it presents a new hypothesis for the subjective reasons behind Kelsen's attraction to psychoanalysis, and for his admiration of Freud, which it tries to understand through the personal context of Kelsen's life. Finally, it deals with the possible influence of Kelsen on Freud's work, especially with regards to the term "Super-Ego."

Keywords: Freud. Kelsen. Law. Psychoanalysis. Super-Ego.

Resumo

Esse artigo oferece uma análise inédita das interconexões entre direito e psicanálise através das trocas pessoais e acadêmicas entre Hans Kelsen (1881-

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1973) e Sigmund Freud (1856-1939). Após uma breve análise dos contextos culturais similares de ambos os acadêmicos enquanto judeus que cresceram na Viena *fin-de-siècle*, o texto foca-se nos encontros pessoais que tiveram, e analisa na sequência a recepção de Kelsen da obra de Freud em “O Conceito de Estado e a Psicologia Social” (*Der Begriff des Staates und die Sozialpsychologie*). O texto de Kelsen foi publicado originalmente em 1922 na Revista de Freud, *Imago*, resultando de uma conferência que fez na Sociedade Vienense de Psicanálise. O presente artigo analisa a relevância da teoria freudiana na construção da Teoria Pura do Direito, especialmente no que concerne o seu conceito de estado. Além disso, apresenta uma nova hipótese para as razões subjetivas por detrás da atração de Kelsen pela psicanálise, e para a sua admiração por Freud, que busca compreender a partir do contexto pessoal da vida de Kelsen. Finalmente, aborda a possível influência de Kelsen na obra de Freud, especialmente com respeito ao termo “Superego”.

Palavras-chave: Direito. Freud. Kelsen. Psicanálise. Superego.

1. Different ages, same *fin-de-siècle* generation

Sigmund Freud was born in 1856 in Freiberg, Moravia. Hans Kelsen was born in 1881 in Prague, Bohemia.² Despite their 25-year age difference, one could say that both the psychoanalyst and the jurist belong to the same *fin-de-siècle* generation.³ They each grew up in the multicultural milieu of *fin-de-siècle* Vienna, after the liberal reforms of the mid-1860s.⁴ Therefore, they are both authors of the famous “Viennese modernity” (*Wiener Moderne*).⁵ While Freud changed his Jewish first name, Sigismund, to Sigmund after his university years,⁶ Kelsen had no need

² For the most recent biographies of Kelsen and Freud, see ROUDINESCO, Élisabeth. **Freud in his time and ours**. Cambridge: Massachusetts, Harvard University Press, 2016 and OLECHOWSKI, Thomas. **Hans Kelsen**: Biographie eines Rechtswissenschaftlers. Tübingen: Mohr Siebeck, 2020.

³ See ADAMOVICH, Ludwig. Kelsen und die Tiefenpsychologie. Stattgefunden und nicht stattgefunden Begegnungen. In: WALTER, Robert; JABLONER, Clemens (Orgs.). **Hans Kelsens Wege sozialphilosophischer Forschung**: Ergebnisse eines internationalen Symposiums in Wien (14.-15. Oktober 1996). Wien: Manz, 1997.p. 130.

⁴ See SCHORSKE, Carl E.: **Fin-de-siècle Vienna**. Politics and culture. New York: Vintage Books, 2012.

⁵ AVSCHAROVA Alina; Martina HUTTAR. Ohne Seele, ohne Staat. Hans Kelsen und Sigmund Freud. In: Tamara EHS (Org.): **Hans Kelsen** – Eine politikwissenschaftliche Einführung. Wien: Facultas, 2009. p. 171-176.

⁶ GAY, Peter. **Freud**: a life for our time. New York, London: W. W. Norton & Company, 1988. p. 5.

to change his own, because he didn't have as overtly Jewish of a name to begin with. The latter was born during a period when the Jewish community was already more assimilated. Furthermore, it is not known if Kelsen's father spoke Hebrew, while according to Freud's report, his own father "spoke the holy language as well or better than the German."⁷ There is also no indication that Jewish religious traditions and beliefs ever played an important role in Kelsen's family. Kelsen makes no mention of religion/Judaism in his autobiography.⁸ His biographer and former student Rudolf Aladár Métall (1903-1975) states that Kelsen's relationship to religion was one of "indifference."⁹ Indifferent as it might have been, it is nonetheless pointless to deny the influence religion had on Kelsen's life, even if one of a "negative sort," as something imposed from the "outside" by the cultural ambiance. As with Freud's career, Kelsen's Jewish descent would create many difficulties for him throughout his life. He states in his autobiography, for instance, that he faced some challenges during the period of his habilitation thesis (*Habilitationsschrift*).¹⁰ Furthermore, his own conversion to Catholicism in 1905 was more of a pragmatic than spiritual decision, as clarified in the following passage by Métall:

He made this decision after having decided to try an academic career. He thought he had to take this step, otherwise he would not stand a chance to advance in the not only racially, but also religiously, marked antisemitism that dominated the Austrian colleges. Therefore, it was not religious motives that made him take this step, because he was completely indifferent to religion. But Kelsen certainly never concealed his Jewish descent, as he never did make publicity out of it or showed comprehension towards any intolerant racial Judaism; he was and is religiously agnostic and nationally indifferent.¹¹

⁷ GAY, Peter. **Freud**: a life for our time. p. 6.

⁸ See: KELSEN, Hans. Autobiographie (1947). In: Matthias JESTAEDT (Org.). **Hans Kelsen Werke Band 1**: veröffentlichte Schriften 1905-1910 und Selbstzeugnisse (HKW 1). Tübingen: Mohr Siebeck, 2009.; KELSEN, Hans. Autobiographie (1947). In: Gabriel Nogueira DIAS. **Hans Kelsen**: Autobiografia de Hans Kelsen. Rio de Janeiro: Forense, 2011.

⁹ See for instance MÉTALL, Rudolf Aladár. *Hans Kelsen*. Leben und Werk. Wien: Franz Deuticke, 1969, p. 11.

¹⁰ See KELSEN, Hans. Autobiographie (1947). p. 40; and KELSEN, Hans. Autobiographie (1947). The habilitation is the equivalent of the old Brazilian title *livre docente*.

¹¹ See MÉTALL, Rudolf Aladár. **Hans Kelsen**. Leben und Werk. Wien: Franz Deuticke, 1969. p. 11. Free translation from German by the author.

Kelsen converted again in 1912, this time to the Lutheran confession. He was apparently motivated by the fact that he was about to get married, and only non-Catholic couples were able to divorce during that period¹². Despite Freud's efforts to assimilate, the psychoanalyst stated that his father Jacob never felt ashamed by, or tried to hide, his Jewish background. He even continued reading the Hebrew Bible at home. It was probably through this fatherly influence that Freud acquired a long-lasting admiration for biblical history. This admiration finally found a way into his academic writing, especially in his last essay, "Moses and Monotheism" (1939).¹³ Freud never converted to any other religion and "remained a Jew,"¹⁴ as he himself would state, even if his biographer Peter Gay (1923-2015) qualifies it as "Judaism without religion."¹⁵ While Freud considered himself an atheist—or "a godless Jew," as Gay puts it¹⁶—Kelsen considered himself an "agnostic."¹⁷ The British historian Eric Hobsbawm (1917-2012), himself of Jewish descent and born in Vienna, describes conversion as a sign of assimilation, whether it is done out of belief or for more pragmatic reasons,¹⁸ as was the case for Kelsen. Therefore, perhaps because of the age difference between Kelsen and Freud, one could say that the former was

¹² See MÉTALL, Rudolf Aladár. **Hans Kelsen**. p. 11. and KORB Axel-Johannes; KRITIKER Kelsens. **Ein Beitrag zur Geschichte der Rechts - und Staatstheorie** (1911-1934). Tübingen: Mohr Siebeck, 2010. p. 250. His personal position regarding the controversial matter of divorce might have also played a role in his decision to convert to Lutheranism. On this subject, see also BORRMANN, Ricardo G. Hans Kelsen and the Austrian Constitutional Court: Family law, political conciliation, and religious culture (1919-1930). **Sociologia del Diritto**, 3, 2014. Available at: <https://www.torrossa.com/en/resources/an/3041650>. Accessed on: 20 jan. 2021.

¹³ FREUD, Sigmund. **Der Mann Moses und die monotheistische Religion**. Amsterdam: de Lange, 1938. Available at: <http://opacplus.bsb-muenchen.de/title/BV020382481/ft/bsb10931295?page=7>. Accessed on: 22 jan. 2021. On Freud's critical views in this essay, see FEICHTINGER, Johannes. **Wissenschaft als reflexives Projekt**. Von Bolzano über Freud zu Kelsen: Österreichische Wissenschaftsgeschichte 1848-1938. Bielefeld: transcript Verlag, 2010. p. 408-414.

¹⁴ GAY, Peter. **Freud: a life for our time**. p. 6.

¹⁵ GAY, Peter. **Freud: a life for our time**. p. 6.

¹⁶ See GAY, Peter. **A godless few: Freud, atheism, and the making of psychoanalysis**. New Haven: Yale Univ. Press, 1987.

¹⁷ See MÉTALL, Rudolf Aladár. **Hans Kelsen**. p. 11, and KORB Axel-Johannes; KRITIKER Kelsens. **Ein Beitrag zur Geschichte der Rechts - und Staatstheorie** (1911-1934). p. 252.

¹⁸ See HOBBSBAWM, Eric. **Fractured times**. Culture and society in the twentieth century. London: Little, Brown, 2013, p. 66.

a “step further” in the assimilation process. Freud apparently never considered converting. The cost he had to pay for this decision may have been being denied the chair at the University of Vienna. At least at the beginning, psychoanalysis was therefore a discipline that mainly developed in circles outside the University¹⁹. In the case of Kelsen, one could say that his conversion was clearly for pragmatic purposes²⁰. In this vein, Kelsen’s specialist Axel-Johannes Korb suggests a hypothesis which may be particularly useful when reflecting on Kelsen’s views about marriage, which are always a good measure for personal beliefs regarding secularization, laicism, etc., and even law and religion:

By 1912 he, who once attended the Protestant elementary school in Vienna, had converted to the Lutheran religion, before his marriage and almost at the same time as his future wife Ms. Margarete Bondi (1890-1973). Religious motives alone would not have forced him to take this step. The decision to convert was rather motivated by the possibility of divorce, opened by Austrian law for non-Catholic marriages. According to paragraph 111 of the valid version of the Austrian Civil Code in 1912, a wedlock was already unbreakable when just one of the parties belonged to the Catholic religion at the time of the matrimonial register. (...) Assuming that the definitive reason for Hans Kelsen’s and Margarete Bondi’s conversion to the Lutheran confession really lies here, this testifies not only to the emancipated views of the future wife, but also to Kelsen’s valorization of legal motives over religious ones.²¹

The author concludes as follows:

In a broader sense, he thus belonged to those parts of the Jewish population that were completely assimilated and neither cared for their religious roots nor for the cultivation of a personal Jewish tradition, orientating themselves instead towards the nonreligious part of society.²²

¹⁹ HUTTAR, Martina. **Hans Kelsen und Sigmund Freud** – Unmittelbare und mittelbare Bezugnahmen sowie mögliche Einflüsse. Master-thesis(Magistra der Philosophie). University of Vienna. Fakultät für Sozialwissenschaften, 2011. Available at: http://othes.univie.ac.at/16125/1/2011-09-06_0306445.pdf. Accessed on: 30 jan. 2021. p. 25.

²⁰ See for instance KORB Axel-Johannes; KRITIKER Kelsens. **Ein Beitrag zur Geschichte der Rechts - und Staatstheorie** (1911-1934). p. 250-253.

²¹ KORB Axel-Johannes; KRITIKER Kelsens. **Ein Beitrag zur Geschichte der Rechts - und Staatstheorie** (1911-1934). p. 250-251. Free translation from German by the author.

²² KORB Axel-Johannes; KRITIKER Kelsens. **Ein Beitrag zur Geschichte der Rechts - und Staatstheorie** (1911-1934). p. 251. Free translation from German by the author.

Although he was a step further in the assimilation process compared to Freud (who “remained a Jew”²³), by the beginning of the 20th century, intolerance toward the Jewish population had grown much stronger than it was during the golden age of liberalism (the second half of the 18th century) in the dual monarchy.²⁴ Perhaps this was exactly the reason why Kelsen felt he had to convert. If he had any hopes for an academic career in the Austrian empire, conversion seemed to be the only suitable way by then,²⁵ although it was surely not a guarantee of success. In the Habsburg Empire at the time, “not only an inclination towards the Jewish religion, but mere Jewish descent, constituted enough of an obstacle for an academic career.”²⁶ Even so, Kelsen faced problems regarding his Jewish background. At the time of Freud’s youth, on the other hand, “Jewish schoolboys (...) caressed in their fantasies a general’s uniform, a professor’s lectern, a minister’s portfolio, or a surgeon’s scalpel.”²⁷

The age difference between Kelsen and Freud did make a difference regarding the degree of assimilation required, as Gay points out that the economic crisis of 1873 was a turning point in the previously liberal times.²⁸ After the crash, Jews were used as scapegoats for the numerous bankruptcies that occurred. It was during this time that Freud reports becoming very conscious of his own Jewish identity. The election of Karl Lueger (1844-1910) as mayor of Vienna in 1897 can be seen as a clear sign of the collapse of the liberal era.²⁹ Lueger used demagoguery as a political tool and instrumentalized the already existing antisemitic atmosphere in favor of his opportunistic political platform. He ended a 35-year period of increasing liberalism in Austria. It was exactly during this period that Freud grew up, studied,

²³ GAY, Peter. **Freud: a life for our time.** , p. 6.

²⁴ GAY, Peter. **Freud: a life for our time.** p. 16-18.

²⁵ MÉTALL, Rudolf Aladár. **Hans Kelsen.** p. 11.

²⁶ MÉTALL, Rudolf Aladár. **Hans Kelsen.** p. 10.

²⁷ GAY, Peter. **Freud: a life for our time.** p. 21.

²⁸ GAY, Peter. **Freud: a life for our time.** p. 15.

²⁹ GAY, Peter. **Freud: a life for our time.** p. 16.

married, had kids, formed his family, and started researching psychoanalysis³⁰. Kelsen, on the other hand, grew up in somewhat different times, when antisemitism was acquiring a more political face. Nevertheless, one can say that they were both sons of the liberal era that flourished in the Austrian empire after the 1860s.³¹

2. Personal encounters between Freud and Kelsen

Kelsen first had the chance to make personal contact with the already famous physician Freud during a summer retreat in the Austrian countryside.³² The personal encounter took place in Seefeld, Tirol, in the summer of 1921.³³ The only available report on this meeting is an interview given by Kelsen to Kurt Eissler (1908-1999) in 1953.³⁴ According to Kelsen's report to Eissler, the two scholars undertook "walks" together and spoke about the interpretation of dreams, which deeply interested Kelsen.³⁵ In the only existing biography of Kelsen until 2020, however, it says that the jurist had already met Freud prior to 1921.³⁶ His biographer Métall states that Kelsen attended Freud's private Wednesday seminars during the war. Apparently,

³⁰ GAY, Peter. **Freud: a life for our time**. p. 15-21.

³¹ GAY, Peter. **Freud: a life for our time**. p. 14-21.

³² MÉTALL, Rudolf Aladár. **Hans Kelsen**. p. 40.

³³ MÉTALL, Rudolf Aladár. **Hans Kelsen**. p. 40.

³⁴ The original interview manuscript can be found in the "Manuscript Division" of the Library of Congress in Washington DC under "Sigmund Freud's Papers." I relied here on Martina Huttar's master-thesis on the reciprocal influences of Kelsen and Freud. See HUTTAR, Martina. **Hans Kelsen und Sigmund Freud – Unmittelbare und mittelbare Bezugnahmen sowie mögliche Einflüsse**. I wish to point out that Huttar's master-thesis on the personal and academic relations between Kelsen and Freud is of outstanding quality. It is the most comprehensive study I have encountered and should therefore be considered as an important reference for anyone seeking to study this theme. Huttar's research is also recommended for those who wish to get an introduction to Kelsen's thinking far from the traditional legal focus. One will get the (more realistic) impression of an open-minded and multifaceted intellectual, which he was, far from any commonly used labels, especially in Brazil. The work deepens investigations undertaken in her previous essay, AVSCHAROVA Alina; Martina HUTTAR. *Ohne Seele, ohne Staat. Hans Kelsen und Sigmund Freud*.

³⁵ RATHKOLB, Oliver. Hans Kelsens Perzeptionen Freudscher Psychoanalyse (unter Berücksichtigung rechtstheoretischer Auseinandersetzungen). In: LIST, Eveline (Org.): **Psychoanalyse und Recht, Schriftenreihe der Verwaltungsakademie des Bundes**. Band 5, Wien: Orac, 2000. p. 38.

³⁶ MÉTALL, Rudolf Aladár. **Hans Kelsen**. p. 40.

his friend and lawyer Hanns Sachs (1881-1947), who would soon dedicate himself exclusively to psychoanalysis, took him to the gathering.³⁷ Sachs belonged to Freud's closer circle and the latter even became editing director (*Schriftsleiter*) of *Imago*, the journal for psychoanalytical studies published by Freud. According to Métall, Kelsen visited the "Wednesday Meetings"³⁸ for a whole semester.³⁹ Newer researchers, however, have remarked that Kelsen got into contact with Freud and his circle much earlier than Métall mentions in the biography.⁴⁰ H. Nunberg and E. Federn have analyzed the protocols of the Viennese Psychoanalytic Society (*Wiener Psychoanalytische Vereinigung*) and found that Kelsen had already become one of its members on December 13th, 1911.⁴¹ On that same day, the lawyer and later psychoanalyst Dr. Hanns Sachs, gave a lecture at the meeting.⁴² Therefore, it makes sense that Sachs, being a lawyer already with strong connections to psychoanalysis at that time, might have been the one who introduced Kelsen to Freud's circle, inviting him to a meeting on the exact day he was going to give his lecture.⁴³ Apparently, Kelsen attended subsequent Society meetings, but with one insignificant exception, he did not make any statements worth a note in the protocols.⁴⁴ Huttar also adds that during the time that he was an associate member of the Society,

³⁷ MÉTALL, Rudolf Aladár. **Hans Kelsen**.

³⁸ JABLONER, Clemens. Kelsen and his circle: The Viennese years. **European Journal of International Law**, 9 (1998). p. 382.

³⁹ MÉTALL, Rudolf Aladár. **Hans Kelsen**. p. 40.

⁴⁰ For a resume of those approaches, see HUTTAR, Martina. **Hans Kelsen und Sigmund Freud – Unmittelbare und mittelbare Bezugnahmen sowie mögliche Einflüsse**. p. 8-10.

⁴¹ HUTTAR, Martina. **Hans Kelsen und Sigmund Freud – Unmittelbare und mittelbare Bezugnahmen sowie mögliche Einflüsse**. p. 38. In his paper Jabloner mentions the date December 15, 1911, see JABLONER Clemens. Kelsen and his circle: The Viennese years. p. 382. As I have not directly consulted the study of Federn/Nunberg, from which the information derives, I opted for the date of December 13, as present in Huttar's work.

⁴² MÉTALL, Rudolf Aladár. **Hans Kelsen**. p. 40.

⁴³ Besides Métall, Oliver Rathkolb also reinforces this hypothesis, see RATHKOLB, Oliver. *Hans Kelsens Perzeptionen Freudscher Psychoanalyse (unter Berücksichtigung rechtstheoretischer Auseinandersetzungen)*. Rathkolb was perhaps the first to directly analyze and report to Kelsen's interview to Eissler in 1953, see HUTTAR, Martina. *Hans Kelsen und Sigmund Freud – Unmittelbare und mittelbare Bezugnahmen sowie mögliche Einflüsse*. p. 9.

⁴⁴ JABLONER, Clemens. Kelsen and his circle: The Viennese years. p. 382.

(December 1911-October 1912) he participated in 12 meetings.⁴⁵ For many jurists, especially in Brazil, who solely know Kelsen as a positivistic legal scholar, an early link to Freud and to the Society would be completely unimaginable.⁴⁶ But even back then Kelsen's interest in psychoanalysis perplexed his colleagues and he was considered an "exotic figure" in his own area, because of his multidisciplinary interests towards psychoanalytical theory⁴⁷.

3. Academic encounters: the Viennese Psychoanalytical Society

Some academic collaborations resulted from that meeting in 1921. These activities would bind the two Austrian scholars from two seemingly different fields of knowledge—law and psychoanalysis—closer together. My hypothesis is that Kelsen was the first legal scholar to absorb the theoretical contributions of Freud's psychoanalysis into law theory. Freud's thinking definitely contributed to the construction of Kelsen's legal philosophy, particularly in his deconstruction of the duality between State and Law, which is a key element in the construction of the Kelsenian State concept and a basis of his further Pure Theory of Law theory.⁴⁸

The first concrete outcome of this encounter in the Austrian countryside was in November 1921, only a few months after they met in Tirol, when Kelsen was invited to hold a conference at the Psychoanalytical Society, apparently by Freud himself.⁴⁹ The Society derived from the "Wednesday meetings" organized by Freud in his own apartment and was founded in 1908. The affiliation of non-medical members was perhaps the result of a wish to open the psychoanalytical circle to

⁴⁵ HUTTAR, Martina. **Hans Kelsen und Sigmund Freud** – Unmittelbare und mittelbare Bezugnahmen sowie mögliche Einflüsse. p. 38.

⁴⁶ JABLONER, Clemens. Kelsen and his circle: The Viennese years. p. 382.

⁴⁷ HUTTAR, Martina. **Hans Kelsen und Sigmund Freud** – Unmittelbare und mittelbare Bezugnahmen sowie mögliche Einflüsse., p. 40.

⁴⁸ MÉTALL, Rudolf Aladár. **Hans Kelsen.**, p. 42. See also KELSEN, Hans. **General theory of law and state.** Massachusetts: Harvard University Press, 1945. p. 189.

⁴⁹ MÉTALL, Rudolf Aladár. **Hans Kelsen.** p. 41. See also HUTTAR, Martina. **Hans Kelsen und Sigmund Freud** – Unmittelbare und mittelbare Bezugnahmen sowie mögliche. p. 53.

other intellectuals who were not directly involved with psychoanalysis but accepted it as a method and as a new scientific approach.⁵⁰ Kelsen's essay "The State-Concept and Freud's Mass Psychology" was published in 1922 in *Imago* and was based on the homonymous lecture held at the Society the year before.⁵¹ Having a law scholar as a lecturer inside the Society was, by all accounts, exceptional.⁵² In the inside back cover of Freud's second reviewed edition of "Group Psychology and the Analysis of the Ego" (1923), Kelsen's article comes up in the advert of the journal, accompanied by this title: "in the volumes I-IX (1912-1923) the following contributions in the fields of sociology, collective psychology and religious sciences, among others."⁵³ Under those contributions, one will find Kelsen's essay. The fact that Kelsen's essay was rather uncommon in the psychoanalytical milieu attests to the rather unconventional role he played as a legal scholar, as well as to his own intellectual affinity to Freud.

4. Kelsen's motives with regards to Freud and psychoanalysis: The father-son conflict

Before directly approaching Kelsen's intellectual and theoretical interests towards Freud's psychoanalytical theories, I would like to explore some of the personal reasons that could have triggered them during the early 1920s. As I mentioned before, Kelsen first encountered Freud and his work in the early 1910s, thanks to Sachs. However, why did it take him almost 10 years to really dedicate himself to studying Freud's work more deeply and to incorporate psychoanalytical concepts into his legal thinking? Was the meeting with Freud in Tirol the sole reason

⁵⁰ See AVSCHAROVA, Alina; MARTINA, HUTTAR. Ohne Seele, ohne Staat. Hans Kelsen und Sigmund Freud. p. 39.

⁵¹ See KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie**. Mit besonderer Berücksichtigung von Freuds Theorie der Masse, *Imago*, VIII. 2, 1922.

⁵² HUTTAR, Martina. **Hans Kelsen und Sigmund Freud** – Unmittelbare und mittelbare Bezugnahmen sowie mögliche Einflüsse. p. 53.

⁵³ See FREUD, Sigmund. **Massenpsychologie und Ich-Analyse**. Leipzig et. al. Internationaler Psychoanalytischer Verlag, 1923.

for this shift, or did it have more to do with his theoretical interests? I would like to suggest the hypothesis that Kelsen's approach to psychoanalysis, as well as his approach to Freud, transcended purely academic interests—which Kelsen undoubtedly also had. I argue here that those interests derive from specific subjective connections and are strongly linked to feelings. Furthermore, the purpose of trying to excavate the personal motivations behind Kelsen's interest in Freud and his work is in keeping with the very tradition of psychoanalysis, which examines the sentimental (and mostly unconscious) aspects involved in certain choices: academic, as well as theoretical, or even political ones.⁵⁴

My following report is mostly based on the information extracted from Métall's biography on Kelsen,⁵⁵ in particular his description of the jurist's encounters with Freud and psychoanalysis, which took place just after Kelsen's conflict with his student Fritz Sander (1889-1939).⁵⁶ According to Kelsen's own description of the matter, Sander's dissent had a huge impact on his life at the time, which caught him emotionally unprepared to deal with what felt like a punch coming from someone so close to him.⁵⁷ Métall describes the case in the chapter dedicated to Kelsen's professorship in Vienna (1919 to 1930).⁵⁸ Kelsen, however, in his own private assessment of the matter, spends many pages describing the conflict, reinforcing that the event was not of a minor importance to him.⁵⁹ Métall describes it as “a personal event that is associated, for Kelsen, with painful memories.”⁶⁰ Despite

⁵⁴ CERQUEIRA FILHO, Gisálio. **Autoritarismo afetivo**. A Prússia como sentimento. São Paulo: Escuta, 2005.

⁵⁵ MÉTALL, Rudolf Aladár. **Hans Kelsen**. p. 39-40.

⁵⁶ For more details on the conflict between Sander and Kelsen, see KORB, Axel-Johannes. Geschichte einer Feindschaft. In: WALTER, Robert et al. (Org.). **Hans Kelsen: leben – werk – Wirksamkeit**. Wien: Manz. p. 195-208.

⁵⁷ The relationship between Kelsen and Sander and its subjective consequences for the former were recently developed in CERQUEIRA FILHO, Gisálio. **Projeto JFK: juntar Sigmund Freud & Hans Kelsen: uma aproximação entre subjetividade e direito**. Rio de Janeiro: Mauad X, 2020.

⁵⁸ CERQUEIRA FILHO, Gisálio. **Projeto JFK: juntar Sigmund Freud & Hans Kelsen: uma aproximação entre subjetividade e direito**. p. 28-47.

⁵⁹ See KELSEN, Hans. Autobiographie (1947). In: Matthias JESTAEDT (Org.). **Hans Kelsen Werke Band 1: veröffentlichte Schriften 1905-1910 und Selbstzeugnisse (HKW 1)**. p. 59-65.

⁶⁰ MÉTALL, Rudolf Aladár. **Hans Kelsen**. p. 39.

being only eight years younger than Kelsen,⁶¹ Sander belonged to his early circle of students. He was promoted in 1912,⁶² which indicates that he got to know Kelsen even earlier than Métall points out (during the war).⁶³ According to Métall, Sander was not willing to take his habilitation and aspired instead to become a lawyer. Nevertheless, inspired by the discussions led by Kelsen in his seminars, he began feeling more and more interested in theoretical legal issues and finally published his first major paper in a journal led by Kelsen (*Zeitschrift für öffentliches Recht*).⁶⁴ Kelsen describes Sander as one of his “most talented students.”⁶⁵ After a certain point, Sander aspired to follow a more independent way of thinking. Métall describes this as a completely natural step,⁶⁶ to which I would like to add the following: especially if the Professor had practiced a constructive influence over his student.

Kelsen gave Sander crucial support in publishing his thick habilitation thesis. Despite some theoretical differences between the two, already noticeable in Sander's habilitation, Kelsen still wrote a favorable letter of recommendation supporting him for a vacant post at the University of Prague. He ultimately got the position, partially due to Kelsen's emphatic support.⁶⁷ Soon, however, Sander began what seemed to be an apparently unjustified campaign against his former mentor, accusing him of plagiarism. Shackled by the unexpected accusations, Kelsen nonetheless dealt with the situation calmly and immediately demanded that the University of Vienna's disciplinary commission open an investigation into the case. The commission eventually came to the conclusion that the accusations were false.⁶⁸ Nevertheless, the personal damage had already been done. Afterwards,

⁶¹ I now realize that due to the small age difference between Kelsen and Sander, the conflict could also be interpreted as an older-younger brother conflict. Nevertheless, in this case, who or what would represent the disputed parental (maternal) love?

⁶² KORB, Axel-Johannes; KRITIKER, Kelsens. **Ein Beitrag zur Geschichte der Rechts - und Staatstheorie** (1911-1934). p. 166.

⁶³ MÉTALL, Rudolf Aladár. **Hans Kelsen**. p. 39.

⁶⁴ MÉTALL, Rudolf Aladár. **Hans Kelsen**, 1969.

⁶⁵ KELSEN, Hans. Autobiographie (1947). p. 59-65, p. 62.

⁶⁶ MÉTALL, Rudolf Aladár. **Hans Kelsen**. p. 39 and KELSEN, Hans. Autobiographie (1947), p. 62.

⁶⁷ MÉTALL, Rudolf Aladár. **Hans Kelsen**. p. 39.

⁶⁸ MÉTALL, Rudolf Aladár. **Hans Kelsen**. p. 39-40 and KELSEN, Hans. Autobiographie (1947)., p. 62-63.

Sander tried to reconcile with Kelsen, who resisted these attempts until he got a professorship in Prague⁶⁹ (after being dismissed by the national socialists in Cologne) and became Sander's colleague. Despite having been invited to dine with Sander and his wife at their house, Kelsen knew that his former student was somehow connected with the protests he faced in the already inflamed atmosphere of the German University of Prague.⁷⁰ Kelsen describes Sander as a most "contradictory personality," who had many problems with his father, whom he disliked and to whom he did not feel any identification at all.⁷¹ Métall concludes that his proximity to psychoanalysis (and to Freud) considerably helped Kelsen in understanding Sander's psychological ambivalence. Kelsen regarded his student's attitude as a classic "case of an unresolved Oedipus complex, a typical patricide."⁷²

Despite the lack of existing evidence, the description of this case tempts one to formulate the following hypothesis: Kelsen's move towards psychoanalysis was directly influenced by the conflict with his former student. This hypothesis is reinforced by the fact that the dates of the conflict with Sander coincide closely with his gravitating towards psychoanalysis (1921-1923). Even though Kelsen had already known Freud since the 1910s, when he was affiliated with the Vienna Psychoanalytical Society, the Sander case may have delivered the subjective occasion to engage more deeply with Freud's psychoanalytical theories. Perhaps one could go further and even consider the possibility that when Freud and Kelsen met in Tirol in 1921, Kelsen asked the psychoanalyst's opinion on Sander. Obviously, this hypothesis lacks any consistent proof and is the result of mere speculation. Empirically unfounded as it may seem, however, I would like to stretch my speculations a bit further...

Kelsen did not have any sons. From his own description of his student, there is no doubt that he felt a great admiration for Sander. Therefore, if Sander took

⁶⁹ MÉTALL, Rudolf Aladár. **Hans Kelsen**. p. 40 and KELSEN, Hans. Autobiographie (1947)., p. 64.

⁷⁰ KELSEN, Hans. Autobiographie (1947). p. 64.

⁷¹ KELSEN, Hans. Autobiographie (1947). 2009, p. 63.

⁷² MÉTALL, Rudolf Aladár. **Hans Kelsen**, p. 40 and KELSEN, Hans. Autobiographie (1947). p. 63.

Kelsen for a father-figure, Kelsen, for his part (even if he had the best of intentions), may have also willingly put himself in this position. One can assume that Kelsen exceeded his simple role as an academic adviser, treating Sander much more as a father-figure, because of the admiration he felt for Sander. He opened his student up to a completely new life perspective, as Sander never ceased to emphasize himself.⁷³ My argument is that Kelsen willingly accepted (though perhaps unconsciously) this fatherly role by giving Sander much more than just the usual academic support. One could imagine he treated Sander with a “father-like affection.” Furthermore, I would go as far as stating that Kelsen even identified with Freud because of his own role as father-figure over his own circle. Kelsen is not reported to have had any direct conflicts with his own father, yet it can also be assumed that (just like Freud) he did not feel any sort of strong identification with him, either. Ultimately, one can take away from both Kelsen's biography and autobiographical report that he regarded his father as a simple man, distant from any intellectual or academic ambitions. Kelsen, on the other hand, always displayed a persistent curiosity towards philosophical and abstract matters. In this sense, I am inclined to say that Kelsen's fatherly role towards his own circle of students could even have been inspired by Freud's model. Freud may have represented the sort of orientation Kelsen might have wanted from his own father. He finally saw himself in the position of giving this sort of orientation to his own group of students when he later became a professor. Especially regarding the one who seemed to be his preferred one: Sander.⁷⁴ Kelsen had already witnessed Freud's central position in the Psychoanalytical Society as early as the 1910s. That may have been the reason why Kelsen felt such a strong identification with Freud and his theory of the “primitive father” (*Urvater*) in “Totem and Taboo.”⁷⁵ Kelsen too “rebelled” with his legal theory

⁷³ KELSEN, Hans. Autobiographie (1947). p. 63.

⁷⁴ Kelsen does not mention this directly. I am assuming it based on his affective description of Sander. KELSEN, Hans. Autobiographie (1947). p. 62.

⁷⁵ See FREUD, Sigmund. **Totem und Tabu**: einige Übereinstimmungen im Seelenleben d. Wilden und d. Neurotiker. Leipzig et. al.: Internationaler Psychoanalytischer Verlag, 1922. For this paper I also used the following Brazilian Vers.: FREUD, Sigmund. **Totem e tabu**: algumas concordâncias

against the authority of the “primitive father” hidden behind the traditional State concept and, hence, “castrated” the traditional State theory when he elaborated “a Theory of State without a State.”⁷⁶ His State concept is no more than a set of legal norms created by men and detached from any theological commandments, natural law presuppositions or superhuman powers.

5. The meaning of Kelsen’s Pure Theory of Law

Outside the circle of Kelsen’s specialists and researchers, very few people have asked themselves the following questions: What is the meaning of Kelsen’s Pure Theory of Law? In relation to what is it pure? I now wish to address those questions, stressing the fact that it is a complex issue, which requires a much deeper analysis than I will be able to deliver here. Like the Austrian mathematician and philosopher Ernst Mach (1838-1916), both Freud and Kelsen shared the same empirical-positivist (rational) worldview.⁷⁷ This implies stripping concepts of their substantial, essential meanings and giving them a more “functional” content. Kelsen’s legal positivism is mainly “a theory of the positive law and a comprehensive structural analysis of the legal order... not the doctrine of the ‘pure’ (good, desirable, correct) law, but the (unfalsifiable) doctrine of positive law.”⁷⁸ This means a doctrine of the purely legal sphere strictly connected with the very logic of the normative

entre a vida psíquica dos homens primitivos e a dos neuróticos. São Paulo: Penguin Classics Companhia das Letras, 2013.

⁷⁶ KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie**. Mit besonderer Berücksichtigung von Freuds Theorie der Masse. p. 139.

⁷⁷ HUTTAR, Martina. **Hans Kelsen und Sigmund Freud** –p. 30. On this subject, see also FEICHTINGER, Johannes. **Wissenschaft als reflexives Projekt**. Von Bolzano über Freud zu Kelsen: Österreichische Wissenschaftsgeschichte 1848-1938.

⁷⁸ DREIER, Horst. Hans Kelsen (1881-1973): Jurist des Jahrhunderts?. In: Helmut HEINRICHS et al. (Orgs.). **Deutsche Juristen jüdischer Herkunft**. München: Beck, 1993. p. 718, apud HUTTAR, Martina. **Hans Kelsen und Sigmund Freud** – Unmittelbare und mittelbare Bezugnahmen sowie mögliche Einflüsse. p. 5. On this subject, see mainly KELSEN, Hans. Was ist juristischer Positivismus. In: KLECATSKY, Hans; MARCIC, René; SCHAMBECK, Herbert (eds.). **Die Wiener Rechtstheoretische Schule**. Schriften von Hans Kelsen, Adolf Merkl, Alfred Verdross. Wien et. al.: Europa Verlag Wien. p. 941-953.

(positive) order, hence a pure doctrine of the norms. Distinct from the Brazilian intellectual panorama, where positivism is usually associated with the French-speaking deterministic (and politically authoritarian) positivist tradition inspired by Auguste Comte (1798-1857), Kelsen's legal positivism has different philosophical groundings.⁷⁹ It was much more influenced by (the Anglo-Saxon tradition of) empiricism and received a crucial influence of the German idealism inscribed in Kant's transcendental logic.⁸⁰ This Kantian mark on Kelsen's thinking appears particularly in his insistence on a strict separation between the dimensions of "to be" (sein) and "ought to" (sollen), the latter of which belongs to a particular legal order. Kelsen strictly separates the spheres of "to be" from "ought to" so that one can never be reduced to, or deduced from, the other. Kelsen's legal positivism was crucially against the reification of concepts and is therefore strictly antimetaphysically and, most of all, against any natural law. For him, it would be a mistake to consider a concept as a 'thing-in-itself.' Kelsen often criticized what he called the "hypostasis" (*Hypostasierung*) of concepts.⁸¹ There is no doubt about the fact that since the early days of his doctoral thesis (*Hauptprobleme der Staatsrechtslehre*, 1911), the legal doctrine of State played a fundamental role in Kelsen's legal theory. In his own words:

⁷⁹ I have analyzed Kelsen's reception in Brazil under the influence of Catholicism and Thomism in the following article: BORRMANN, Ricardo G. A recepção de Kelsen na Constituinte de 1933-34: entre positivismo jurídico e neotomismo. In: NEDER, Gizlene; DA SILVA, Ana Paula Barcelos Ribeiro; DE SOUZA, Jessie Jane Vieira (Orgs.). **Intolerância e cidadania: secularização, poder e cultura política**, Rio de Janeiro: Autografia, 2015. p. 396-421. On this subject, see also HOFFMANN Florian F.; LEITE, Fabio Carvalho. Die Wirkung der Weimarer Verfassung: ein Blick nach Brasilien. **KJ – Kritische Justiz**, Jahrgang 52, 2019. p. 265-279; SIQUEIRA, Gustavo Silveira; et. al.: A visita de Hans Kelsen ao Rio de Janeiro (1949). **Revista Culturas Jurídicas**, v. 4, n. 7, jan./abr. 2017. p. 158-188.; SIQUEIRA, Gustavo Silveira; FERREIRA, Bruna Mariz Bataglia; DE LIMA, Douglas de Lacerda. Kelsen na Constituinte Brasileira de 1933-1934. **Revista da Faculdade de Direito-RFD-UERJ**, Rio de Janeiro, n. 30, dez. 2016. p. 248-265.

⁸⁰ See FEICHTINGER, Johannes. **Wissenschaft als reflexives Projekt**. Von Bolzano über Freud zu Kelsen: Österreichische Wissenschaftsgeschichte 1848-1938. p. 315-320 and KELSEN, Hans. Was ist juristischer Positivismus.

⁸¹ KELSEN, Hans. Staat und Recht. Zum Problem der soziologischen oder juristischen Erkenntnis des Staates. In: KLECATSKY, Hans; MARCIC, René; SCHAMBECK, Herbert (Orgs.). **Die Wiener Rechtstheoretische Schule**. Schriften von Hans Kelsen, Adolf Merkl, Alfred Verdross. Wien et. al.: Europa Verlag Wien. p. 164-166.

The thesis that due to his nature the State is a (relatively centralized) legal order—and therefore the duality between State and Law is a fiction based on an animistic hypostasis of the reification, through which one usually represents the legal unity of the State—has become a fundamental element of my State theory.⁸²

Kelsen builds on his theory in a critique of Georg Jellinek's (1851-1911) traditional State theory, as presented in the latter's famous book "General Theory of the State" (*Allgemeine Staatslehre*) in 1900. Jellinek, who had been Kelsen's professor in Heidelberg,⁸³ divides the State theory into a "legal" part and a "sociological" one. Kelsen qualifies this as "a two-side theory" since it grants the State a different and parallel existence from the legal dimension.⁸⁴ According to Kelsen, this dual State theory opens the backdoor for political forces to instrumentalize the legal order and obtain certain "reserves of power."⁸⁵ What Kelsen wished to avoid at any cost was politics making use of the normative order in favor of interests of any kind. In the German-speaking scenario of the 1920s and 30s, this was not an obvious objective. If one follows Jellinek's thinking, the State would be interpreted as a "social reality" and thus could be the object of a "social doctrine of the State" completely separate from the legal sphere. It was exactly with this "social doctrine" that Kelsen envisioned the possibility of a political instrumentalization of the State through ideas such as "sovereignty" or "people's will." After all, who has the power to define what "sovereignty" is and where the so-called "people's will" lies? This process would end up converting the State into a *Makroanthropos* (a "super-human"), which imposes and embodies the Law.⁸⁶ As one can see, the relationship between State and Law are at the center of Kelsen's theory. Against the (traditional)

⁸² KELSEN, Hans. Autobiographie (1947). p. 59.

⁸³ KELSEN, Hans. Autobiographie (1947). p. 39-40.

⁸⁴ KELSEN, Hans. Gott und Staat. In: KLECATSKY, Hans; MARCIC, René; SCHAMBECK, Herbert (Orgs.). **Die Wiener Rechtstheoretische Schule**. Schriften von Hans Kelsen, Adolf Merkl, Alfred Verdross. Wien et. al.: Europa Verlag Wien. p. 186.

⁸⁵ HUTTAR, Martina. **Hans Kelsen und Sigmund Freud** – Unmittelbare und mittelbare Bezugnahmen sowie mögliche Einflüsse. p. 43.

⁸⁶ KELSEN, Hans. Gott und Staat. p. 191.

State theory, Kelsen proposes the identity between State and Law, which makes up the basis of his purely legal theory of Law (and State).⁸⁷

6. The reception of Freud's "Totem and Taboo" in Kelsen's legal theory: The concept of state and social psychology

The matter that most attracted Kelsen to Freud's psychoanalysis was the question of the nature (the specificity) of the State. Can the State be considered a human aggregate, a human "mass," as it is in traditional French sociology? Is there something superior to it that confers its unity, something such as a "collective soul"? With those questions in mind, Kelsen approaches and leans specifically on Freud's essays "Group Psychology and the Analysis of the Ego"⁸⁸ from 1921 and on his 1913 classic writing on totemism, "Totem and Taboo: Resemblances between the Psychic Lives of Savages and Neurotics."⁸⁹ Kelsen is primarily interested in Freud's theory of the (human) "libido," which he finds useful to investigate the nature of human relationships. Freud regards those primarily because of psychological and individual factors.⁹⁰ According to Kelsen, Freud does not absorb the same hypostasis of concepts as Gustave Le Bon (1841-1931) or Herbert Spencer (1820-1903) do when they consider "mass" as something that possesses a "collective soul" (*Kollektivseele*), or as forming an "organic whole."⁹¹ Kelsen is interested in how Freud understands the phenomenon of the masses in its "libidinous structure," as an outcome of individual "affective connections" (*Gefühlsbindungen*).⁹² In this sense, what he (Kelsen) considers the specific value of psychoanalysis is most of all the effort to understand social relations through the lens of psychological and individual

87 MÉTALL, Rudolf Aladár. **Hans Kelsen**. p. 42.

88 See FREUD, Sigmund. **Massenpsychologie und Ich-Analyse**.

89 The original German title is "Totem und Tabu. Einige Übereinstimmungen im Seelenleben der wilden und der Neurotiker."

90 KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie**. p. 109-113.

91 KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie**. p. 109-113.

92 KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie**. p. 113.

factors, hence not interpreting those relations as having any sort of super-human coercive force. Kelsen is ultimately seeking to draw on Freud's discoveries in psychoanalysis for a new understanding of the State and its specific (legal) nature.⁹³ He effectively ends up absorbing psychoanalysis in his legal thinking. Kelsen's primary question is the following: "What is it that holds the masses together?" As described by Kelsen, Freud's argument talks about "affective connections" (*Gefühlsbindungen*) and Eros, "shift of impulses" (*Ablenkung des Triebes*) to an external object; the shift of self-love to another person ("identification").⁹⁴ The primary form of identification would be the one from a child to its father (which becomes a sort of ideal). In the mass phenomenon, "a strong reciprocal affective affinity" emerges between the individuals through the identification with the one "leader" (*Führer*). He then becomes the target of their "love impulses" (*Liebestriebe*).⁹⁵

Where the father once stood, the figure of the leader now emerges, which gains the form of a concrete person. This leader assumes the function of an "external Ideal Self" (*Ichideal*).⁹⁶ Hence, Freud's definition of "mass" would be a number of individuals who have exchanged their Ideal-Self for the same leader-figure and, therefore, identify with one another because of this "affective connection" (*Gefühlsbindung*) with the leader.⁹⁷ In this precise moment, Kelsen refers to Freud's ideas in "Totem and Taboo," especially the supposition of a primitive form of clan

⁹³ KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie**. p. 113. On this matter, see also KELSEN, Hans. **General theory of law and state**. p. 189.

⁹⁴ KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie**. p. 114.

⁹⁵ KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie**. p. 114-115.

⁹⁶ Not to be confused with Lacan's posterior distinction between the Ideal-Ego and Ego-Ideal. I am referring here to the term "Ideal-Self" exclusively as a translation to *Ichideal* as referred by Freud in "Group Psychology and the Analysis of the Ego" (1921) and mentioned by Kelsen in his own essay. This concept is linked to Freud's division of the Self into two spheres: the "Self" (Ego) and the "Ideal Self" (latter translated into English as "Super-Ego"). In his 1923 essay "The Ego and the Id," he will complete this division with another part, the "It" (or "Id"). FREUD, Sigmund. **Das Ich und das Es**. Leipzig et. al.: Internationaler Psychoanalytischer Verlag, 1923. This is also the reason why I have purposely chosen the less common translation of "Ideal-Self" for the German term *Ichideal* and not the most common "Ideal-Ego." See KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie**. p. 116.

⁹⁷ KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie**. p. 117.

ruled by a tyrannical father.⁹⁸ The legend of the “primitive father” (*Urvater*) plays a central role in the Kelsenian understanding of the State, hence the identification he proposes between State and Law.

Inspired by Charles Darwin (1809-1882), Freud assumes the existence of a primitive form of community governed by an all-mighty father that controls the tribe in a tyrannical way.⁹⁹ He disposes of all the women (daughters) of the tribe at will and forbids his sons to have any sexual relations inside the community. One day the sons rebel against the powerful father, sacrificing him. Finally, the patriarchal clan becomes a “brotherhood.” According to Freud, this “primitive tribe” would have left “inerasable traces in the human ancestral history” (*unzerstörte Spuren in der menschlichen Erbgeschichte*).¹⁰⁰ Freud then transports the idea present in this legend to his understanding of the mass phenomenon, stating that it would be a regression to this primitive state, a sort of “resurrection of the primitive tribe” (*Wiederaufleben der Urhorde*).¹⁰¹ Kelsen then asks the following question: Could the State be considered as “mass”?¹⁰² On this point, his views diverge a bit from Freud’s. Kelsen puts more emphasis on the aspects he considers crucial, which he thinks Freud did not stress enough. I am talking here about the differentiation (Freud borrowed this concept from the English psychologist Douglas McDougall, 1871-1938¹⁰³) between “unorganized” and “organized” masses.¹⁰⁴ The latter type of masses would give birth to institutions, revealing an elaborate form of organization, defined as a “conscious system of norms that regulate its inner relations.” In those kinds of masses, the “disadvantages” (*Nachteile*) of the other type, especially their volatility, would not be present.¹⁰⁵ After having exposed this difference, Kelsen

⁹⁸ KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie**. 1922.

⁹⁹ FREUD, Sigmund. **Totem e tabu**: algumas concordâncias entre a vida psíquica dos homens primitivos e a dos neuróticos. p. 128-130.

¹⁰⁰ KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie**. p. 117.

¹⁰¹ KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie**. p. 118.

¹⁰² KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie**. p. 118.

¹⁰³ McDougall is referred by Kelsen as a “sociologist.” See KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie**. p. 120.

¹⁰⁴ KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie**. 1922.

¹⁰⁵ KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie**. p. 120-121.

issues a small critique of Freud. The former refers concretely to the latter's statement that "the aim is to attribute to the mass the properties of the individual that were characteristic to him and were erased when the mass was formed."¹⁰⁶ Kelsen regards this suggestion of Freud's as a hypostasis which, according to the jurist, contradicts the very concept of mass that Freud had just defined so precisely. He considers the statement as a rupture in Freud's individual psychological method since the masses are seen here as having supra-individual characteristics.¹⁰⁷ Kelsen argues that those characteristics of the so-called "organized" mass stand in clear contradiction to those of the "primitive" kind of mass. He then asks himself if the former type (the "stable" mass, which gives birth to institutions) can really be regarded as "mass" in the sense that was previously defined by Freud: as a resurrection of the primitive tribe, where the individuals give up their Ideal-Self in favor of a leader, who personifies the mass.¹⁰⁸ According to Kelsen, "if the conceptual determination of mass does not correspond to the artificial mass, then this last one is in fact no mass in the sense of a social-psychological unity."¹⁰⁹ Here, Kelsen absorbs a hint of Freud, which the former considers of fundamental importance to his own concept of the State: the "variable," "unstable," and "disorganized" mass requires a leader-figure, whereas the "stable" form can exist without any. This means that in that second kind, the leader can be substituted by an idea, an abstraction (*Abstraktum*).¹¹⁰ Alternatively, it can be replaced by a "secondary leader," which represents that same idea.¹¹¹ Kelsen now formulates his concept of the State:

¹⁰⁶ KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie.**, p. 120.

¹⁰⁷ KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie.** p. 121.

¹⁰⁸ KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie.** p. 121.

¹⁰⁹ KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie** p. 122.

¹¹⁰ KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie.** 1922, p. 123.

¹¹¹ KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie.** p. 123.

Above all, the State seems to correspond to a mass of such last kind. If one takes a closer look, however, then the State is not that 'mass,' but the 'idea,' a 'leading idea,' an ideology, a specific meaning, that differs from other ideas—like religion, nation, etc.—through its particular content (...), the State is not one of the countless, ephemeral kinds of mass, very unstable in its scope and libidinous structure, but a leading idea that the individuals belonging to the variable mass have set in the place of their Ideal-Self to identify with one another.¹¹²

As to the relationship between State and Law, Kelsen affirms that the specifically legal idea of State can only be understood as an ideal system with specific internal (legal/normative) relations.¹¹³ In the third and last part of his essay, Kelsen deals with the question of authority. If the State is no more than a "leading idea" (*führende Idee*), where does its authority come from? Does it originate from any element external to the individual—a superior moral instance, such as God in theology, or as the "social facts" in the Durkheimian sociology? To answer that question, Kelsen once again refers to Freud's "Totem and Taboo" and to the legend of the "primitive clan" (*Urhorde*). However, before approaching it, he makes a hard critique of Emile Durkheim (1858-1917) and his "Rules of the sociological method" (1895). He criticizes above all Durkheim's concept of "social facts," a concept that allegedly should serve to construct a sociology based in scientific groundings. Kelsen considers Durkheim's "social facts doctrine" as something that works as a living macroorganism and that concretely impresses its marks on individuals, thus subordinating them: social facts as "things," as disposing of their own coercive power. Kelsen regards this as the ultimate form of hypostasis: the supposition of a supra-individual reality with a concrete coercive force.¹¹⁴

Durkheim's concept of "social facts" is a non-functional concept, owner of a substantial reality ("hypostasis"). This idea diverges completely from the Kantian transcendental logic followed by Kelsen's scientific views.¹¹⁵ The opposition between Kelsen's idealistic science conception and Durkheim's positivism becomes clear

¹¹² KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie**. p. 123.

¹¹³ KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie**. p. 124.

¹¹⁴ KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie**. p. 127-133.

¹¹⁵ On this subject, see KELSEN, Hans. Was ist juristischer Positivismus. p. 948.

when the French sociologist extracts ethical-moral conclusions from a “normative order” (“ought to” dimension). When he mixes the “to be” dimension with the normative dimension of the “ought to,” he breaks with Kelsen’s imperative of the method’s “purity.” Kelsen criticizes what he considers the theological elements behind the positivist sociological conceptions of Durkheim, latent in his doctrine of the “social facts.” Kelsen perceives a similitude between Durkheim’s concept and the theological concept of God as a superior moral (and concrete) force, who can control individuals and enforce its authority. Society for Durkheim, like God in theology, is a concrete reality (“a fact”) endowed with a transcendent (divine) power, which confers its authority. Like God, like society; like father, like son.¹¹⁶

In Durkheim’s (theological) concept of society, Kelsen opposes Freud’s hypothesis about the origins of authority based on individual-psychological aspects. According to Kelsen, and unlike Durkheim, the Austrian physician does not justify the existence of social authorities of any kind, he only makes sober explanations of psychic phenomena. While Durkheim’s explanation of religion and the totemic principle can be understood as a reflex of (the power of) society, Freud reduces the totemic phenomenon to its individual and psychic aspects.¹¹⁷ Therefore, in Freud’s interpretation, authority has its origins in the most prime form of authority: obedience to the father. After reconstructing the legend of the “primitive clan,” Freud concludes that the totem represents the father and what he formerly prohibited (sexual intercourse inside the clan). The father’s prior prohibition is transformed into taboo (the most primitive form of interdiction). It consists of an ex-post obedience to the (murdered) father, who now becomes a deity (totem).¹¹⁸ Through the sacrifice of the totem-animal and the sharing of his substance, the brotherhood’s social bond is reinforced. The social connections are established by an “idea” of sharing the same

¹¹⁶ In my master-thesis, I have analyzed the connections between the idea of “perfect prince” in the modern political theory and the idea of “perfect market” in Adam Smith’s political economy. They both have their theoretical groundings in the medieval theology. See BORRMANN, Ricardo. **Tal mercado, tal príncipe: o paradigma da perfeição na economia política burguesa.** Mestrado (Mestrado em Ciência política). Universidade Federal Fluminense, Rio de Janeiro, 2009.

¹¹⁷ KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie.** p. 134.

¹¹⁸ KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie.** p. 134.

“essence” of the former (sacrificed) father, represented now by the totemic-animal—he, the father, who previously guaranteed the cohesion of the clan through his tyrannical authority.¹¹⁹

For Kelsen, the parable presented by Freud in “Totem and Taboo” has two main meanings: 1) In primitive forms of thinking, social unity is “concretely” expressed by the totemic ritual and by the sharing of the (divine) essence of the killed animal, which ultimately represents the sacrificed (and “primitive”) father. 2) This social unity is explained by Freud in its psychic, individual aspects and as directly related to the primitive form of authority exercised by the father-figure.¹²⁰ How does Kelsen then use Freud’s teaching in “Totem in Taboo” to reflect on the relationship between State and Law? In fact, Kelsen’s State concept has a lot to do with Freud’s understanding of the totemic phenomenon. The State is the “totem-animal.” The concrete father-figure, personified by the leader, is substituted in this case by an idea, a “hypothesis,” a ritual. Its previous concrete authority is now replaced by an idea, represented and reinforced by the ritual of sharing the same “essence” of the sacrificed animal (father). What is our relation to the State and Law if not the one of an imagined ritual? It all lies in a belief supported by the imaginary.

7. Kelsen’s influence in Freud’s term “Super-Ego”

A hypothesis previously raised by Étienne Balibar¹²¹ has led some authors to argue that Kelsen might have influenced Freud in the construction of his term “Super-Ego.”¹²² Nevertheless, one must be extremely careful here, because Freud had

¹¹⁹ KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie**. p. 136-137.

¹²⁰ KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie**. 1922.

¹²¹ See BALIBAR, Étienne. **The Invention of the super-ego**. Freud and Kelsen 1922. Unpublished Manuscript (to be found on the Internet). Available at: <https://documents.pub/document/balibar-the-invention-of-the-superego.html>. Accessed on: 20 jan. 2021. See also HUTTAR, Martina. **Hans Kelsen und Sigmund Freud – Unmittelbare und mittelbare Bezugnahmen sowie mögliche Einflüsse**. p. 90.

¹²² For a resume of those arguments, see HUTTAR, Martina. **Hans Kelsen und Sigmund Freud – Unmittelbare und mittelbare Bezugnahmen sowie mögliche Einflüsse.**, p. 89-96.

already referred to the concept of “Super-Ego” by different names long before defining it as such. In this sense, I would like to stress that the hypothesis about Kelsen’s influence on Freud would be more plausible if it were circumscribed to this sober limit: as referring exclusively to the term “Super-Ego” and not exactly to the idea behind it. As researcher Martina Huttar states, the lack of concrete evidence notwithstanding, this hypothesis (which I would rather call a “possibility”) will have a speculative character.¹²³

Despite this speculative dimension, I would like to stress some aspects of the argument that I think have not been underlined enough by the literature. Those aspects refer primarily to the historical indicia related to some dates and to both Kelsen and Freud's texts. Kelsen’s essay analyzed here was published in *Imago* in 1922. The essay was the result of the conference held by Kelsen in the Viennese Psychoanalytic Society at the end of the previous year. It is a fact that Freud was present at the lecture and even gave Kelsen some feedback on his article, since he directly refers to it in a note in the second edition of his “Group Psychology and Ego Analysis” (1923).¹²⁴ The first time Freud clearly refers to the term “Super-Ego” is in his essay published by the “International Psychoanalytical Publishing House” (*Internationaler Psychoanalytischer Verlag*) in 1923, called “The Ego and the Id.” Especially in the third chapter, “The Ego and the Super-Ego (*Ichideal*),” he establishes a clear and direct connection between the new term “Super-Ego” and his former idea of a “Ideal-Self.” The Ideal-Self is exactly the concept to which Kelsen refers many times in his essay published in *Imago* the year before. Therefore, the dates coincide neatly. Furthermore, Kelsen always refers in his article to how Freud’s individual psychology is of fundamental importance to criticize the traditional State concept, which transforms it in a *Makroanthropos*, or into a “super-human” (*Übermensch*). Kelsen even uses the German *Über* (“Super”) to refer to the hypostasis of concepts various times throughout his essay. For example, in one

¹²³HUTTAR, Martina. **Hans Kelsen und Sigmund Freud** – Unmittelbare und mittelbare Bezugnahmen sowie mögliche Einflüsse. p. 96.

¹²⁴ FREUD, Sigmund. **Massenpsychologie und Ich-Analyse**. p. 31.

passage he criticizes traditional sociology for giving “a super-individual character” to sociological concepts.¹²⁵ Finally, he closes his argument by stating that the State should not be regarded as a “substantial thing” or as a “super-biological creature” (*überbiologischen Lebewesen*).¹²⁶ Kelsen uses the prefix *Über* several times throughout his article to refer to the hypostasis of concepts. So, Freud's idea of an *Über-Ich* (“Super-Ego”) could very well have been inspired by Kelsen's article.

¹²⁵ KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie**. p 125.

¹²⁶ KELSEN, Hans. **Der Begriff des Staates und die Sozialpsychologie**. p. 139.

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