
Hans Kelsen on Dante Alighieri's Political Philosophy

Oliver Lepsius*

Abstract

Hans Kelsen's first book was a thorough investigation of Dante's The Monarchia. Why did Kelsen become interested in medieval political theory? This article deals with Kelsen's treatment of Dante's political philosophy and asks what one can infer from Kelsen's reading of Dante for the intellectual development of the young Kelsen and his further research interests and philosophical convictions.

It may be surprising that Hans Kelsen's first book deals with a subject he never took up again: medieval political theory. Is it incidental that Kelsen's first scholarly work is a study on Dante and his political theory? In this article, I will discuss the origins of Kelsen's book: why did he write it; what attracted him in Dante; does he represent Dante correctly; and what do we learn from this book about Kelsen, the formation of his intellectual universe and his research agenda?

1 The Genesis of Kelsen's Book on Dante

Originally, Kelsen did not want to become a lawyer. Under the influence of Viennese modernism and with a mature judgment for the intellectual developments that later brought him in contact with the *Wiener Kreis*, he intended to study philosophy, mathematics and physics.¹ Deficient employment prospects made him reconsider. As he

* Professor for Public Law, University of Bayreuth, Bayreuth, Germany, 2015–2016 fellow at the Institute for Advanced Study, Konstanz, Germany. Email: oliver.lepsius@uni-bayreuth.de. A German variant of this article appeared in 37 *Zeitschrift für Neuere Rechtsgeschichte* (2015) 80. Translation by Angela Whale and Oliver Lepsius. This essay was supported by funds made available by the Center of Excellence in the Cultural Foundations of Social Integration at the University of Konstanz, which was established in the framework of the German Federal and State Initiative for Excellence.

¹ See Jabloner, 'Objektive Normativität: Zu einem Bezugspunkt von Reiner Rechtslehre und Wiener Kreis', in R. Walter, W. Ogris and T. Olechowski (eds), *Hans Kelsen – Leben – Werk – Wirksamkeit* (2009) 169; also in C. Jabloner, *Methodenreinheit und Erkenntnisvielfalt* (2013) 337. On the intellectual climate in Vienna around 1900, see A. Janik and S. Toulmin, *Wittgenstein's Vienna* (1973); C. Schorske, *Fin de Siècle Vienna: Politics and Culture* (1979); on the political situation, see J.W. Boyer, *Political Radicalism in Late Imperial Vienna* (1981). Kelsen's friendship and acquaintance with Ludwig von Mises, Otto Weininger

knew lawyers from among his parents' friends and envisaged to become a judge at some point in time, he eventually enrolled in the Faculty of Law.² Yet, in his first semesters, being compelled to attend rather tedious lectures on legal history, Kelsen was not attracted to law. In his reminiscences, he rather discloses an articulate interest for ancient culture, for contemporary social issues and, of course, for philosophical questions.³

It was Kelsen's curiosity that made him write the study 'Die Staatslehre des Dante Alighieri', which was published in the Viennese series on the theory of the state in 1905.⁴ The topic was self-selected and original in every respect.⁵ It is not Kelsen's dissertation since a doctorate in law at the University of Vienna only required the completion of a degree programme and an oral doctoral examination and did not include a written dissertation, as was also common at that time at southern German universities. Kelsen first became aware of Dante's legal philosophy, specifically *The Monarchia*, first published in 1310–1320,⁶ during a class taught by Leo Strisower (1857–1931). Strisower was a financially independent *Privatdozent*, who had just been appointed associate professor at the University of Vienna after working as a lecturer for 20 years.⁷ After Kelsen had independently deepened his interest in *The Monarchia* and determined that no monograph dealt with Dante's political philosophy, he turned his attention to Strisower in the search for an account of Dante's political philosophy in the context of the philosophical theory of Dante's time. Strisower, however, advised against the study, given the overabundance of literature on Dante and recommended that Kelsen

and Sigmund Freud is mentioned by Walter, 'Nachwort', in H. Kelsen (ed.), *Was ist Gerechtigkeit?* (2000) 59, at 63.

² Kelsen, 'Autobiographie (1947)', in M. Jestaedt (ed.), *Hans Kelsen Werke (HKW)* (2008), vol. 1, 29, at 34. See also, referring to the autobiography, R.A. Métall, *Hans Kelsen: Leben und Werk* (1969), at 4–5. On Kelsen's life and work, see also R. Walter, *Hans Kelsen: ein Leben im Dienste der Wissenschaft* (1985), at 11ff; H. Dreier, *Rezeption und Rolle der Reinen Rechtslehre* (2001), at 17–35, with further references.

³ Cf. Kelsen, *supra* note 2, at 34.

⁴ H. Kelsen, *Die Staatslehre des Dante Alighieri* (1905), E. Bernatzik and E. von Philippovich (eds), *Wiener Staatswissenschaftliche Studien*, series 6, vol. 3), also in *HKW*, *supra* note 2, vol. 1, 134–300. The book was reprinted in the USA three times between 2010 and 2013. On origin and context, see *HKW*, *supra* note 2, vol. 1, at 598–601.

⁵ Kelsen, however, had already access to German translations of *The Monarchia*. He lists three German translations, see Kelsen, *supra* note 4, at 49 (also in *HKW*, *supra* note 2, vol. 1, at 193–194): 'There are three translations of *The Monarchia*. The first is by Herold zu Basel 1559, the second by J Kannegiesser and finally the already mentioned version by Oskar Hubatsch.' After an earlier translation of *The Monarchia* by C. Sauter (1913), we now have the study edition. Imbach and Flüeler, 'Introduction and Commentary', in D. Alighieri, *The Monarchia* (1989). This translation is also used as a basis in this essay.

⁶ Kelsen, *supra* note 4, at 48–49, assumes 1318 as the date of origin, following F.X. Kraus. This is consistent with recent research, which mostly dates *The Monarchia* between 1316 and 1321; the exact date is disputed. Currently, it is assumed that it was composed after Henry VII's Italian campaign. On dating between 1308 and 1313, see Bezzola and Ringger, 'Article Dante Alighieri', in *Lexikon des Mittelalters* (1986), vol. 3, at 549; J. Miethke, *De potestate papae* (2000), at 156, n. 450.

⁷ Kelsen, *supra* note 2, at 35; Métall, *supra* note 2, at 6, 43. For Strisower, see *HKW*, *supra* note 2, vol. 1, at 35, n. 35; Kunz, 'In Memoriam Leo Strisower', 7 *Revue de Droit International* (1931) 419. Strisower is also from Brody/Galicia, the birthplace of Kelsen's father.

first complete his doctorate.⁸ Kelsen did not follow this advice, and his treatment of the political philosophy of Dante was published before he even completed his doctorate.

At that time, Dante's political philosophy was rarely dealt with outside Italy, and work on it in Italy itself was limited because *The Monarchia* had been seized by the Papal Index in 1881. Kelsen rediscovered Dante for the field of political philosophy.⁹ Nevertheless, German political philosophy still marginalized Dante's *The Monarchia*.¹⁰ One exception is Hermann Conrad, who later engaged with Dante as no other German lawyer has.¹¹ In German studies dealing with 14th-century political philosophy and political philosophy, it is rather customary to focus on the Munich heroes Marsilius of Padua and William of Ockham. This position is fully justified because their writings address perfectly the conflict between emperor and pope.¹² At the end of his inquiry, Kelsen also emphasizes the importance and clarity of Marsilius' *Defensor Pacis* and acknowledges that it is only the *Divine Comedy* that keeps alive the memory of the author of *The Monarchia*.¹³

What stimulated Kelsen so intensively to deal with a text that he himself did not fully assess positively? My thesis is that Kelsen's first work demonstrates his interest for jurisprudential questions in a concrete social and political context. *The Monarchia*

⁸ Kelsen, *supra* note 2, at 35–36; Métall, *supra* note 2, at 7.

⁹ Meanwhile, interest in *The Monarchia* has naturally and greatly increased. Recent literature includes: E. Cheneval, *Die Rezeption der Monarchia Dantes bis zur Editio princeps im Jahre 1559* (1995); R. Imbach, *Dante, la philosophie et les laïcs: Initiation à la philosophie médiévale* (1996); A. Cassell, *The Monarchia Controversy* (2004); Miethke, *supra* note 6, at 156–161.

¹⁰ See also E.-W. Böckenförde, *Geschichte der Rechts- und Staatsphilosophie* (2002), at 289; previously W. Fikentscher, *Methoden des Rechts in vergleichender Darstellung* (1975), vol. 1, at 300, 379, 389–390; vol. 2, at 18–19, 29. See also Bielefeldt, 'Von der päpstlichen Universalherrschaft zur autonomen Bürgerrepublik. Aegidius Romanus, Johannes Quidort von Paris, Dante Alighieri und Marsilius von Padua im Vergleich', 104 *Zeitschrift für Rechtsgeschichte Kanonistische Abteilung* (1987) 70, at 94–101; overviews can be found in Rheinfelder, 'Dante Alighieri 1265–1321', in H. Rausch (ed.), *Politische Denker I* (6th edn, 1987) 69; Herde, 'Dante als Sozialphilosoph', in E. Mock and G. Wiland (eds), *Rechts- und Sozialphilosophie des Mittelalters* (1990) 83; Lüddecke, 'Dantes Monarchia als politische Theologie', 37 *Der Staat* (1998) 547; see also Schmidt, 'Dante und die strafrechtliche Praxis seines Zeitalters', 9 *Dante-Jahrbuch* (1936) 52.

¹¹ H. Conrad, *Dantes Staatslehre im Spiegel der scholastischen Philosophie seiner Zeit* (1946); revised edition published in 27 *Deutsches Dante-Jahrbuch* (1948) 43; H. Conrad, *Deutsche Rechtsgeschichte: Frühzeit und Mittelalter* (1954), at 329–330, 384; Conrad, 'Dante', in Görresgesellschaft (ed.), *Staatslexikon* (6th edn, 1958), vol. 2, at 534–537; Conrad, 'Recht und Gerechtigkeit im Weltbild Dante Alighieris', in C. Bauer et al. (eds), *Speculum Historiale*, Festschrift Johannes Spörl (1965) 59; Conrad, 'Der Reichsgedanke bei Dante und Nikolaus von Kues', in H. Conrad, H. Friedrich and B. Haussler, *Dante: Der Dichter des Abendlandes* (1969) 21. For Conrad's interpretation of Dante, see note 66 below.

¹² Consider especially Miethke, *supra* note 6, at 204ff, 248ff; see also Miethke, 'Politische Theorien im Mittelalter', in H.-J. Lieber (ed.), *Politische Theorien von der Antike bis zur Gegenwart* (1991) 47; Miethke, 'Marsilius von Padua: Die politische Philosophie eines lateinischen Aristotelikers des 14. Jahrhunderts', in H. Brockmann et al. (ed.), *Lebenslehren und Weltentwürfe im Übergang vom Mittelalter zur Neuzeit* (1989), 52; J. Miethke, *Ockhams Weg zur Sozialphilosophie* (1969).

¹³ Kelsen, *supra* note 4, at 148 (also in HKW, *supra* note 2, vol. 1, at 295). On philosophical aspects in Dantes *Divine Comedy* see J. Petersen, *Dante Alighieris Gerechtigkeitssinn* (2nd edn, 2016), on the relation of the *Divina Commedia* to the *Monarchia* at 9–15; A.M. Chiavacci Leonardi, 'La Monarchia die Dante alla luce della Commedia', in 28 *Studi medievali* (1977) 147.

offered him the opportunity to address the political background of epistemological positions. Thus, it provided him with not just a lesson in medieval epistemology and political philosophy but also a training ground for the criticism of ideologies. But, before we discuss his investigation, it is perhaps appropriate to say a few words about Dante, his time and, being at the centre of Kelsen's investigatory work, *The Monarchia*.

2 Dante Alighieri's Political Philosophy

Dante Alighieri (born 1265 in Florence), the greatest poet of the Middle Ages, earned his living as a local politician and diplomat.¹⁴ He was actively involved in politics in Florence from the age of 24: he participated in the victory of the Florentine Guelfs over the Ghibellines in 1289 and subsequently held a number of posts, including as an ambassador and on the council of the priors in 1300. The republic of Florence had a decidedly participatory constitution.¹⁵ It limited the influence of the nobility to a minimum and excluded magnates from the highest offices. Rule was instead given to elected officials from the bourgeoisie (Popolane), which, in turn, were subject to the control of corporative councils in which two parties used any instruments to gain the political majority: the white Guelfs, who came from the economically prosperous and politically assertive middle class, and the black Guelfs, who were loyal to the pope and devoted to the common people.

Dante belonged to the bourgeois white Guelfs, and, in 1300, while sitting in the council of the priors, he agreed to the banishment of the heads of the warring black and white Guelfs. This was supposed to ensure continued peace in Florence. However, the black Guelfs seized the city just one year later with the help of the new papal envoy in Florence, Charles of Valois. The priors were deposed, it rained exile and death sentences, and the goods and houses of the white Guelfs were confiscated or burned. Dante had already left the city in 1301 as an ambassador to Rome. He learned of his death sentence on the return journey from Rome to Florence and never saw his hometown again. Until his death in 1321, he lived as a political refugee in various northern Italian cities, including Verona and Ravenna, where he died. Seven hundred years later, in 2008, the ban was lifted by the city of Florence, and Dante was rehabilitated.¹⁶ Dante began to write his great works while in exile, including *Il convivio* in 1306/08 (*The Banquet*), his great philosophical work *De Monarchia*, written in Latin and begun after 1316, and *Divina Commedia*, which he worked on until his death.

Dante's fate is marked by a deep longing for peace and his return to Florence. Politically, he could not rely on the pope and had little faith in the participatory,

¹⁴ The literature on Dante is very rich. On the life, work and ideas of Dante in addition to the information in the following note, see E. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (1957); Bezzola et al., 'Dante Alighieri', in *Lexikon des Mittelalters* (1986), vol. 3, at 544–563, n. 10.

¹⁵ Additionally, in regard to the effect of Dante over time, see Meier, 'Konsens und Kontrolle: Der Zusammenhang von Bürgerrecht und politischer Partizipation im spätmittelalterlichen Florenz', in K. Schreiner and U. Meier (eds), *Stadtregiment und Bürgerfreiheit* (1994) 147, at 149–154, on the political groups in question at the end of the 13th century.

¹⁶ 'Firenze si pente e dopo 700 anni riabilita Dante': *La Repubblica*, 31 May 2008, at 37.

democratic civil constitution of Florence. In the *Divine Comedy*, citizen democracy is described as such a pillaging evil that one can vividly picture the struggles in Florence. Instead, Dante placed his hopes on the Italian reign of Emperor Henry VII, which began in 1310 and ended with the untimely death of the Luxembourger in 1313.

The Monarchia is written in a specific political situation and in the context of a personal fate. It combines a factual analysis with political objectives, namely settling disputes within and between cities, bringing home exiles and establishing peace so that people can develop as individuals. Dante devised these objectives on the basis of a theory of the universal world domination of the emperor and the corresponding devaluation of the claim to universality that Pope Boniface VIII had raised in 1302 with the papal bull *Unam Sanctam*.¹⁷ The purpose of *The Monarchia*, thus, is the refutation of papal claims in order to strengthen the temporal power of the emperor so that he, equipped as a universal monarch, can enforce the political objectives of peace, happiness and freedom. Dante developed a utopia of state power with concrete and individualized offices. Of course, neither Boniface nor Henry were named as actors nor was Florence named as the dominion.

The universal monarchy has triple foundations, the first being a material purpose of the state that Dante saw in the triad of peace, freedom and justice.¹⁸ Only under these conditions can human life be happy. The state's purposes of peace, freedom and justice primarily serve individual happiness, not a community deprived of individuals. Frequently quoted and interpreted is Dante's justification of individual liberty in Book I, Chapter XII, paragraph 2 of *The Monarchia*: '*Principium primum nostre libertatis est libertas arbitrii*' ('The first condition of our freedom is the freedom of volition'). Reason should not be determined by desires, conversely, human demands should be motivated by reason (I, XII, 2, 4–5). Freedom of volition is the greatest gift that God has given human nature (I, XII, 6). Individual freedom is therefore attributed a philosophical, cognitive dimension, which, in the eyes of Dante, is threatened politically. Accordingly, Dante is extremely sceptical in assessing how reason governs collective action. When people act politically, individual freedom is endangered by the desires of the political actors. Those living under the rule of the monarch enjoy the greatest freedom, as the human species can only exist for its own sake under the rule of a monarch (I, XII, 8–9). A universal monarch has nothing to desire, no personal interests to pursue. His rule is not limited to a particular territory but, rather, extends to the ocean. As Dante says, it is universal. Because there is nothing for the monarch to desire, only he, among all mortals, can be the purest subject of justice (I, XI, 12).

¹⁷ Ubl, 'Die Genese der Bulle *Unam Sanctam*: Anlass, Vorlagen, Intention', in M. Kaufhold (ed.), *Politische Reflexion in der Welt des späten Mittelalters/Political Thought in the Age of Scholasticism: Essays in Honour of Jürgen Miethke* (2004) 129.

¹⁸ On the interpretation of *The Monarchia* and its philosophical contexts, see Imbach and Flüeler, *supra* note 5, at 13–57 and the comments in the respective passages on 253ff; renewed tracing of the argumentation can be found in D. Lüddecke, *Das politische Denken Dantes: Überlegungen zur Argumentation der Monarchia Dante Alighieris* (1999). See also S. Gagnér, *Studien zur Ideengeschichte der Gesetzgebung* (1960), at 146–152.

Thus, we see that the individual human being and his happiness (peace and freedom) are clearly foregrounded by Dante, both in determining the state order as well as the subject of legitimation, if this modern term may be used here. It is illuminating that Dante in Book I, Chapter XII, paragraph 11, citing the *Politeia* of Aristotle, states that citizens do not exist for the sake of the consuls nor the people for the sake of the king. But, conversely, that the consuls are subject to the will of the citizens and the king to that of the people. Respectively, the state constitution is not designed with regard to the laws but, instead, the laws are designed with respect to the constitution. Although the king as the ruler of the population determines the direction, in pursuing the state's objectives, he serves the population. Thus, it is quite clear that, in Dante's opinion, the monarch is classified as a servant of all. The monarch, when he enacts the laws, is bound by the specified objectives. Dante concludes the chapter with the words: 'So, the human species comes off best under the rule of the monarch. It follows that the monarchy is necessary for the good of the world' ('*Ergo genus humanum sub Monarcha existens optime se habet; ex quo sequitur quod ad bene esse mundi Monarchiam necesse est esse*' [I, XII, 13]).

The first reason for a universal monarchy (Book I) grounds the purpose of peace in the protection of the individual and aligns the universal monarchy with the achievement of individual happiness. The second rationale (Book II) reaches back to the first principle of unity, the *principium unitatis*, as the basis of the moral order – the idea of a universal empire – as it was promoted according to these medieval treatises. The universal empire traditionally attributed to the Romans continued under the secular monarchy of the Christian emperor, whose authority did not come from the pope but directly from God. This brings up the third strand. Book III justifies papal and imperial power independently. Dante takes the side of imperial power and contests the subordination of the empire under the papacy as Boniface VIII had recently proclaimed. Dante examines and rejects the usual arguments (the two swords doctrine, the two lights doctrine, the donation of Constantine)¹⁹ and even adds a positive justification – namely, that the autonomy of the papacy and the empire is derived from the nature of man. Humans have an ephemeral physical nature and an immortal spiritual nature. God has assigned each its own objectives, earthly happiness and heavenly paradise, each requiring different instances. The emperor guides men to earthly happiness against their selfish desires, the Pontifex Maximus leads men to eternal life by revealing the truth. Papal and imperial power are kept strictly separate and autonomous and find their reason and their unity in divine, but not ecclesiastical, power. Although *The Monarchia* ends with some much-discussed conciliatory words towards the church and emphasizes the sovereignty of God, it was mainly due to his crucial points in Book III that Dante's *The Monarchia* was placed on the Index.

Two of the arguments in *The Monarchia* deserve special emphasis. First, *The Monarchia* justifies an autonomous secular rule with respect for the individual. Dante is thereby benefiting from Aristotelian philosophy that had become available through

¹⁹ Additionally, W. Kölmel, *Regimen Christianum: Weg und Ergebnisse des Gewaltverhältnisses und des Gewaltverständnisses (8.-14. Jahrhundert)* (1979); Watt, 'Spiritual and Temporal Powers', in J.H. Burns (ed.), *The Cambridge History of Medieval Political Thought: c. 350–c. 1450* (1988) 367.

translations a few decades earlier.²⁰ In *The Monarchia*, man is awarded not only a theological, but also a philosophical, designation. Thus, epistemology is linked with political philosophy. Second, Dante's treatment of theory and practice merits attention. While the motifs of the text are all practical, their treatment is entirely theoretical. Dante's work is an exception within the literature around 1300. Works that differentiated an autonomous, secular dominion from papal authority were primarily composed by French authors, who wanted to maintain the territorial integrity of the French kingdom, or by writers close to the German emperor.²¹ Italians are rarely found among authors who are critical of the pope (we should not consider Marsilius of Padua as an Italian author because he wrote *Defensor Pacis* in Paris before fleeing into exile at the court of Ludwig of Bavaria in Munich).²²

However, Dante cannot be ascribed a purely secular position because authors loyal to the emperor could hardly attribute to the emperor a spatially indeterminate, universal dominion. One could devise such a utopia only in Italy where the emperor was rarely seen and did not raise taxes or summon troops, as the German princes did. Moreover, an altruistic position could only have been attributed to the emperor in the practical ignorance of real claims to power typically found north of the Alps. Dante's theory is therefore probably only plausible in the absence of the emperor, while the solution of the practical problems at the bottom requires his presence.

3 Kelsen's Interpretation of *The Monarchia*

How does Kelsen interpret *The Monarchia*? Kelsen's 150-page text has two goals. On the one hand, he intends to represent Dante's political philosophy as a result of his view of life and provide a study of its place in medieval political philosophy. On the other hand, Kelsen's curiosity extends well beyond *The Monarchia*. Not only does he examine the text itself, but he also discusses Dante's political philosophy in broader terms. To this end, he returns to previous works, including the *Divine Comedy* and the *Banquet*. Kelsen refers to other important works on political theory before Dante,²³ situates Dante in the discourse and discusses Dante's sources and the influence of other thinkers, including John of Paris, Jordanus of Osnabrück and Engelbert of Admont.²⁴ Kelsen is well read in medieval political theory and judges confidently. The 23 year old delved into the late Middle Ages. It is clear that he benefited from Richard Scholz's recent publication on French treatises in the 13th century.²⁵ His knowledge of the

²⁰ See Miethke, 'Politische Theorie in der Krise der Zeit: Aspekte der Aristotelesrezeption im früheren 14. Jahrhundert', in G. Melville (ed.), *Institutionen und Geschichte* (1992) 157.

²¹ See Watt, *supra* note 19, at 402–422.

²² See Gagnér, *supra* note 18, at 121ff; Courtenay, 'University Masters and Political Power: The Parisian Years of Marsilius of Padua', in Kauffhold, *supra* note 17, 209.

²³ Kelsen, *supra* note 4, at 18–37 (also in HKW, *supra* note 2, vol. 1, 157–180).

²⁴ Kelsen, *supra* note 4, 136–149, especially those listed at 143–147 (also in HKW, *supra* note 2, vol. 1, 283–296).

²⁵ R. Scholz, *Die Publizistik zur Zeit Philipps des Schönen und Bonifaz VIII: Ein Beitrag zur Geschichte der politischen Anschauungen des Mittelalters* (1903). Another frequently cited source for Kelsen was S. Riezler, *Die literarischen Widersacher der Päpste zur Zeit Ludwigs des Bayers* (1874).

literature seems to be more than just reiteration. Kelsen's arrangement of the material and his intellectual acuity indicate an independent investigation assessing multiple sources and providing independent judgments.

Together with the introductory chapter, which is devoted to a description of the political conditions of the 13th century, about two-fifths of the book deal with genuinely historical issues and sources. Kelsen has never written more about history than in these approximately 60 pages. The remaining 90 pages analyse Dante's political thought. In seven chapters, Kelsen investigates: (i) the bases of Dante's political philosophy; (ii) the justification and the origin of the state; (iii) the purpose of the state; (iv) the form of government; (v) the relationship between princes and people; (vi) the relationship of state and church; and, finally, (vii) Dante's ideal of a state, namely the universal empire.

In my opinion, the investigation is consistently reliable, well based and accurate in focus and judgment. The book was well received at the time, and Kelsen retrospectively reported, in his autobiography, that it was the only one of his books for which he received no negative criticism.²⁶ Undoubtedly, Kelsen deserves recognition for being the first to appreciate and demonstrate Dante's political philosophy in detail in German. His study exercised such an authority that even the Catholic Görres Society's 1926 political dictionary based its five-column article on Dante on Kelsen's work.²⁷ The book has since been translated into Italian as well as Japanese,²⁸ not into English though, and receives continued attention in Italy.²⁹ If Kelsen later devalued his book and described it as 'certainly no more than an unoriginal piece of schoolwork',³⁰ he is only correct in so far as this book contains few original contributions to theory and therein differs from the many later works.³¹

4 What Drew Kelsen to Dante?

Perhaps Kelsen was too modest in his assessment of his early work. What image of Kelsen can we gain from his treatment of Dante? Does Kelsen's analysis of Dante's utopia indicate Kelsen's own utopic ideas? What attracted the law student of 1904 to

²⁶ Kelsen, *supra* note 2, at 36; see also Métall, *supra* note 2, at 8.

²⁷ Finke, 'Dante', in *Staatslexikon* (5th edn, 1926), vol. 1, at 1304–1308. Finke's reference to Kelsen is clearly represented by his misquoting of *Monarchia*, Book I, ch. XII, para. 2 ('*principium primum nostrae libertatis est libertas arbitrii*') in Book I, ch. XIV, where he transcribes one of Kelsen's mistakes (*ibid.*, at 69).

²⁸ H. Kelsen, *La Teoria dello Stato in Dante*, trad. di W. Sangiorgi (1974), Japanese translation by R. Nagao (1977).

²⁹ Frosini, 'Kelsen e Dante', in Kelsen, *supra* note 28, at ch. VII; Riccobono, 'Gli inizi di Kelsen e la teoria dello Stato in Dante', 53 *Rivista internazionale di filosofia del diritto* (1976) 261; Cau, 'Hans Kelsen et la théorie de l'État chez Dante', 5 *Laboratoire Italien: Politique et société* (2004) 125. Cau is looking for elements of Kelsen's later theories and assesses it as a preliminary step to Kelsen's theory of the state (see 138, 140, 144–145); Ancona, 'Dante l'Anti-Sovrano', 64 *Sapienza* (2011) 343 at 343–345, n. 3, 4.

³⁰ Kelsen, *supra* note 2, at 36: '[S]icherlich nicht mehr als eine unoriginelle Schülerarbeit'; Métall, *supra* note 2, at 9. For technical inadequacies in the text, see HKW, *supra* note 2, vol. 1, at 600ff.

³¹ Positive assessment also in HKW, *supra* note 2, at 601.

Dante and what could he have been looking for in him? A survey of his investigation reveals some priorities. Kelsen accentuated Dante's substantive objectives: primarily peace, which is highlighted in Kelsen's representation. He also carefully addresses the individualistic justification of secular rule and refers to the relationship between the state and the individual as depicted by Dante with obvious interest.³² Kelsen gives special attention to Dante's claim of freedom of judgment, which Kelsen interprets as having recourse to passages from other texts by Dante demanding general intellectual freedom.³³ He also pays particular attention to the relationship of the ruler to the people.³⁴ The earlier-quoted passage stating that the consuls are responsible to the citizens and the king to the people, as well as that the monarch is the servant of the general public, is fervently exploited by Kelsen who interprets this passage as an expression of popular sovereignty. God appears in the background as a basis for rule and figures as *causa remota*, 'while the people are seen as an immediate source of power – according to the notions of the popular sovereignty doctrine – and the ruler appears as direct representative of the people'.³⁵

Kelsen also locates another view most resolutely advocated by Dante within the doctrine of popular sovereignty, namely that the power of the ruler is limited by legal barriers.³⁶ Here we encounter one of the rare places where Kelsen resorts to conjecture. Although he admits that Dante does not explicitly express this idea, he argues that numerous circumstances indicate that Dante was close to such a concept of sovereignty or at least had a similar idea of popular sovereignty.³⁷ Kelsen certainly overinterprets the text in this respect, and it is not without reason that this construction has encountered opposition.³⁸ We learn from it less about Dante than about Kelsen himself.

Another issue that attracts Kelsen is the contrast of imagined unity and actual diversity. With his contemporary Viennese background, Kelsen can hardly support the medieval idea that unity is the equivalent of good, yet diversity the equivalent of evil, and that the multiple should be subordinated under the one.³⁹ His doubts predominate. He objects to the idea of unity – the idea of 'Rome' – and opposes it with the social diversity of peoples and a resulting need for regionally limited forms of rule. He criticizes Dante for postulating that the whole of mankind, not individual nations, can produce and have a uniform imaginary culture. According to Kelsen, Dante is not taking into account 'that the deep differences between races, milieus and other similar factors necessarily lead to fundamentally different cultures'.⁴⁰ Elsewhere,

³² Kelsen, *supra* note 4, at 68–71 (also in HKW, *supra* note 2, vol. 1, 213–216).

³³ Kelsen, *supra* note 4, at 69 (also in HKW, *supra* note 2, vol. 1, 214).

³⁴ Kelsen, *supra* note 4, at 86–97 (also in HKW, *supra* note 2, vol. 1, 232–244).

³⁵ Kelsen, *supra* note 4, at 88 (also in HKW, *supra* note 2, vol. 1, 235) referring to Book I, ch. XII, paras 11–12. Kelsen even attacks an idea from ch. III, as popular sovereignty (at 114).

³⁶ Kelsen, *supra* note 4, at 89 (also in HKW, *supra* note 2, vol. 1, 235ff).

³⁷ Kelsen, *supra* note 4, at 88–89 (also in HKW, *supra* note 2, vol. 1, 234ff).

³⁸ Finke, *supra* note 27, at 1307; Cau, *supra* note 29, at 141–143.

³⁹ Kelsen, *supra* note 4, at 41, 78, 80 (also in HKW, *supra* note 2, vol. 1, 182ff, 224, 226).

⁴⁰ Kelsen, *supra* note 4, at 64 (also in HKW, *supra* note 2, vol. 1, 210); similarly at 122 (also in HKW, *supra* note 2, vol. 1, 270).

he complains that Dante's work does not include any consideration of the national moment:

The complete disregard of nationality must nevertheless appear somewhat surprising since it is precisely during the time in which Dante wrote *The Monarchia* that a vigorous flourishing of national idea was making its presence felt everywhere – particularly in France, which we know was the starting point of these efforts. From a national point of view, the idea of a levelling, balancing universal rule was already being openly fought for during Dante's time. The Dantesque ideal of the state must therefore be referred to in this regard as reactionary, the same ideal, which, as shown above, yields essential features of the modern state.⁴¹

Kelsen once more problematizes the idea of unity irradiating another aspect. The populace of the universal monarchy includes all of humanity – that is, even the non-Christians. Since the idea of unified world domination is based upon Christianity, Dante should give the emperor the duty to evangelize the heathens. Dante, however, wisely says nothing on the problem of heathens, as Kelsen complains, because when the emperor acts as a missionary he is fulfilling a task of the church, which, in turn, contradicts the emperor's impartial role.⁴² Thus, Kelsen uses practical circumstances to reassert his argument against the theory. At any rate, his objections that are based on social, national and religious diversity demonstrate that, far from being a purely abstractly thinking man who is blind to reality, he seeks to take actual conditions and their practical implications into consideration. In this respect, the following passage is particularly revealing: 'However, Dante's ideal state was by no means fitting to the time: not yet, because it was in many ways far ahead of its time, and no longer, because its foundations had outlived the basis on which it was built, namely the "world empire".'⁴³ One may already recognize some traits of the basic norm in his objections to the idea of unity, at least in so far as an imaginary unity may not presume reality in its composition, but can only be considered fiction, as reality itself contradicts imaginary unity.⁴⁴

In Book I, Chapter XIV, Dante addresses the legislative competence of the universal monarchy in relation to subordinated countries, using – as he does so often – Aristotle to support his argument. Kelsen is particularly interested in this point, namely the distribution of powers between the universal monarch and the territorial rulers, so to speak, a federalism issue of ensuring normative unity while maintaining diversity in regional governance. The relation of the monarchy to the subordinate kingdoms,

⁴¹ Kelsen, *supra* note 4, at 135–136 (also in HKW, *supra* note 2, vol. 1, 282–283). Original: 'Das völlige Ignorieren der Nationalität muß aber dennoch schon verwunderlich erscheinen, da gerade in jener Zeit, in welcher Dante die *Monarchia* verfaßte, sich schon allenthalben ein kräftiges Aufblühen der nationalen Idee fühlbar machte – besonders in Frankreich, das ja bekanntlich den Ausgangspunkt dieser Bestrebungen bildete. Der Gedanke einer alles nivellierenden, alle Gegensätze ausgleichenden Universalherrschaft wurde schon zur Zeit Dantes gerade vom nationalen Standpunkte aus bewußt bekämpft. Das Dantesche Staatsideal muß also in dieser Hinsicht als reaktionär bezeichnet werden, dasselbe Ideal, das, wie gezeigt, wesentliche Merkmale des modernen Staates trägt.'

⁴² Kelsen, *supra* note 4, at 126–127 (also in HKW, *supra* note 2, vol. 1, 237–238).

⁴³ Kelsen, *supra* note 4, at 136 (also in HKW, *supra* note 2, vol. 1, 283). Original: 'Zeitgemäß aber ist Dantes Staatsideal durchaus nicht. Noch nicht, weil es seiner Zeit in vielen Punkten weit voraus geeilt war; nicht mehr, weil seine Grundlage sich bereits überlebt hatte, die Basis, auf der es aufgebaut war, das Weltkaisertum.'

⁴⁴ Additionally, Frosini, *supra* note 29, at ch. XIX.

states Kelsen, can only be resolved when the subordinate countries renounce sovereignty and become mere autonomous provinces.⁴⁵ According to Dante, they should manage their local affairs, but legislative authority over matters of common interest belongs to the universal monarch.⁴⁶ In this context, Kelsen emphasizes Dante's biblical example of the Jewish tribes who united under the leadership of Moses.⁴⁷ Retaining control of more important decisions and those of common interest, Moses gave them responsibility for less significant decisions (I, XIV, 9). Dante uses biblical and philosophical documents to explain the distribution of power in the sense of subsidiarity. At least it is revealing that, among so many arguments in *The Monarchia*, Dante's ideas on unity and diversity notably catch his attention. In 1905, when Kelsen is emphasizing these ideas of Dante's, he might also have thought of the nationality questions in the multiethnic state of Austria, since unity and diversity were major political issues in the Habsburg empire.

Democracy eventually receives special accentuation. With great benevolence, Kelsen outlines the constitution of Florence and, along with Jacob Burckhardt, names Florence as the first modern state of the world.⁴⁸ He also discusses the first and second democratic revolutions in Florence in 1250 and 1282.⁴⁹ In fact, he emphasizes the role of the Italian cities, on the one hand, by using the modern terminology to name them states and, on the other hand, by positively describing them in light of their republican and democratic constitution.⁵⁰ Although Kelsen does not consider these ideas to be Dante's, the thought is remarkable for 1905. The dominant perspectives in 19th-century Prussian historiography focused on the state and dynastical dominion, whereas the roots of republican and democratic ideas in Italian communes and (mostly southern) German free imperial towns seldom received sufficient attention. Kelsen's research interests align with the Austrian–South German approach – that is, they are oriented towards the peaceful organization of real diversity under conditions of nominal unity rather than that of the Prussian/North German attitude that emphasizes the aggressive manufacturing of state unity through the suppression of social diversity.

These are the main emphases in Kelsen's work on Dante. They allow his own research interests to shine through. What fascinated Kelsen in Dante? What did he

⁴⁵ Kelsen, *supra* note 4, at 129–131 (also in HKW, *supra* note 2, vol. 1, 276–279), with recourse to Book I, ch. XIV, paras 4–9.

⁴⁶ Book I, ch. XIV, para. 5: 'The nations, kingdoms and cities have peculiarities in their respective territories. The laws have to adjust to them just because the law gives general directions for life.'

⁴⁷ Kelsen, *supra* note 4, at 131 (also in HKW, *supra* note 2, vol. 1, 278). Dante's recycling of the Old Testament, Genesis 29, 34, also sparks Kelsen's interest in his treatment of Book III, chs V–VIII. See *supra* note 4, at 103 (also in HKW, *supra* note 2, vol. 1, 250).

⁴⁸ Kelsen, *supra* note 4, at 8 (also in HKW, *supra* note 2, vol. 1, 147), citing J. Burckhardt, *Die Cultur der Renaissance in Italien* (7th edn, 1899), vol 1, at 78: 'In the history of Florence, one finds the highest political consciousness combined with the greatest variety of developmental forms; In this sense, Florence deserves to be named as the first modern state.' In section 1, ch. 7, Burckhardt presents the republics of Venice and Florence as brilliant representations of the Florence exemplified by Dante.

⁴⁹ See Kelsen, *supra* note 4, at 11–12, 16 (also in HKW, *supra* note 2, vol. 1, 151–152, 155–156). On the Florentine constitution as an ideal model in Kelsen. See also Frosini, *supra* note 29, at ch. XVI.

⁵⁰ Kelsen, *supra* note 4, at 6 (also in HKW, *supra* note 2, vol. 1, 144).

seek in Dante? The answer is the substantive conformity of Kelsen's objectives with many ideas of the poet, whom Kelsen occasionally overstates. These objectives are: (i) peace; (ii) the centrality of the individual to the establishment of rule as well as the limitation of power; (iii) the idea of liberty; (iv) popular sovereignty; (v) democracy and, finally, (vi) the organization of national diversity within an imaginary unit. One also gets the impression that some of Kelsen's later research interests are beginning to emerge, reflecting the political and social situation of the multi-ethnic Austrian state.

In addition, his style of argumentation is illuminating. Factuality and normativity, practice and theory, political reality and utopia are in a constant state of tension in his argumentation. Kelsen treats them in a dichotomous way but, at the same time, sticks to the facts with a passion for reality. In his first work, Kelsen constantly bases his criteria on social reality, refers to religious differences and mentions national characteristics and the diversity of peoples. His analytical frame consists of both social and political criteria. Hence, Kelsen has to present *The Monarchia* as an ingenious utopia that contrasts grim reality in more than one respect.⁵¹ However, he does not only draw on the social conditions or political issues that govern this line of thought. A clear interest in constitutional history, actual political infighting and institutional anchoring pops up in the introductory chapter on the political conditions of the 13th century. Political goals also play an important role in Kelsen's presentation. His discussion of the various authors and sources consistently aims to clarify the texts' political intentions and discursive contexts – that is, to address their motives and intentions rather than simply understanding the theories in isolation. That the use of literary sources is interest driven or that a theoretical idea pursues a political purpose appears as a natural and almost inevitable circumstance of theory in Kelsen's representation.⁵² Anyone who wants can already foresee the great relativist and ideology critic here.⁵³ In any case, it is clear to the 23 year old that theories pursue political purposes. Finally, the obvious pleasure our author takes in convicting other writers of inconsistencies or a circular argument is already shining through, as becomes clear in the argument concerning the conversion of the heathen.⁵⁴ All of these points show us that, although we are dealing with a juvenile Kelsen, we are nevertheless dealing with a genuine one.

Let us then rephrase our question and enquire about what does not interest Kelsen. In the first place, Dante's theological argumentation belongs here, at least as far as Dante refers to the New Testament. Kelsen dutifully addresses Dante's extensive investigation of the doctrines of the two swords, the two lights, the donation of Constantine

⁵¹ Kelsen, *supra* note 4, at 126 (also in HKW, *supra* note 2, vol. 1, 273).

⁵² E.g., see Kelsen, *supra* note 4, at 140 (also in HKW, *supra* note 2, vol. 1, 286): 'Dante only uses the Bible, to select the one passage which supports his theory. ... In general, Dante behaves similarly to his opponents when explaining the scriptures. That is, he extracts the sections he agrees with. ... Although Dante is moved to speak, in *The Monarchia*, against misinterpreting the bible, he cannot even preclude himself from committing this error.'

⁵³ On the prophetic evaluation of Kelsen's early works regarding his later works, see Cau, *supra* note 29, at 138, 140, 144–145.

⁵⁴ A further example is the analysis of the doctrine of the two lights, whose argumentation Kelsen describes as clumsy due to the constant confusing or confounding of the symbol and the symbolized object. See Kelsen, *supra* note 4, at 101 (also in HKW, *supra* note 2, vol. 1, 248).

and so on in Book III,⁵⁵ which are central to the theoretical challenges of arguing the relationship of the world emperor to the universal church, the most difficult concept of Dante's universal state idea in the medieval context.⁵⁶ However, Kelsen is not inspired by it since he develops no sense for the intricacies of medieval theological reasoning, which appears to lack sufficient rational and logical reasoning to satisfy him. Regarding the relationship of state and church, he complains of internal contradictions of Dante's system and inconsistencies of the poet.⁵⁷ Kelsen pays much greater attention to the philosophical and epistemological discourses in Book I.

Second, there is a recklessness in applying modern terminology to the thinking of the Middle Ages. The concept of 'political philosophy', like that of the state itself, is foreign to the Middle Ages, even though Jacob Burckhardt called Florence a 'modern state',⁵⁸ Heinrich Mitteis spoke of the state in the Middle Ages,⁵⁹ and Hermann Conrad chose the term 'theory of the state' (*Staatslehre*) for his book on Dante.⁶⁰ Otto Hintze and Otto Brunner first raised awareness of the historical contingency of such basic concepts.⁶¹ In any case, Kelsen did not deprive himself of the use of the concept 'state' to describe the basic form of organization of official authority. The inappropriateness of the concept of popular sovereignty has already been mentioned in a different context. We can observe that the search for a contextual usage of medieval terms gives way to contemporary cognitive interests, and modern terminology is projected onto the Middle Ages.⁶² Here, Kelsen's conceptual understanding is rather ahistorical and oriented towards abstract issues that transcend time (state, public purpose, democracy, popular sovereignty and unity).

5 The Renaissance Man and the Scholastics

Now that we see more clearly what Kelsen sought and only partially found in Dante, is it any wonder that Kelsen's opinion on the political philosophy of Dante remains divided? He considers it a brilliant utopia regarding its goals and a pitiful attempt regarding the possibility of its realization. He detects progressiveness and backwardness. Dante's political philosophy is a superb expression of the medieval doctrine and, at the same time, overcomes the doctrine. This is why the political philosophy of Dante merits attention: medieval scholastics struggle with the modern Renaissance man,

⁵⁵ Kelsen, *supra* note 4, at 99–114 (also in HKW, *supra* note 2, vol. 1, 246–262).

⁵⁶ Conrad, *Dantes Staatslehre*, *supra* note 11, at 38.

⁵⁷ Kelsen, *supra* note 4, at 98 (also in HKW, *supra* note 2, vol. 1, 245). E. Gilson, *Dante und die Philosophie* (1953), at 216. Kelsen traces Dante's 'desperate solution', as he terms it, back to its beginnings in an attempt to explain Dante's philosophical ambivalence. *Ibid.*, at 217–223.

⁵⁸ Burckhardt, *supra* note 48, at 78.

⁵⁹ H. Mitteis, *Der Staat des Hohen Mittelalters* (1940).

⁶⁰ Conrad, *Dantes Staatslehre*, *supra* note 11.

⁶¹ Hintze, 'Wesen und Wandlung des modernen Staates' (1931), in O. Hintze (ed.), *Staat und Verfassung* (2nd edn, 1962) 470; O. Brunner, *Land und Herrschaft* (5th edn, 1965), at 111ff; see also W. Conze, 'Staat, Souveränität', in O. Brunner, W. Conze and R. Koselleck (eds), *Geschichtliche Grundbegriffe* (1990), vol. 6, at 5–8.

⁶² Aptly elaborated by Cau, *supra* note 30, at 131, 133, 135–136, 141–142.

says Kelsen.⁶³ His preference becomes evident. It is the Renaissance man and not the scholastic he is attracted to. In the final chapter, which is dedicated to the sources of Dante's political philosophy, Kelsen emphasizes Dante's Greek roots, particularly the influence of Aristotle,⁶⁴ and minimizes the accolades accorded to Thomas Aquinas,⁶⁵ thereby anticipating later Dante research.⁶⁶ Kelsen's overall interpretation plays Greek philosophy against medieval scholasticism. The progressive Renaissance man – the man advocating democracy, peace and individuality – is ultimately based in Hellenic philosophy.⁶⁷ The dark, contradictory and unclear sections of Dante's political philosophy, primarily the unity doctrine, on which Dante ultimately relies, are beholden to scholasticism and Christian sources. The progress of philosophy stands in contrast to the theological standstill. According to Kelsen, 'even Dante's entire conception of the values and importance of the state and of their relationship to the individual displays Hellenic spirit. It stands in stark contrast to those medieval doctrines, arising from the ascetic life-denying theories of early Christianity, that damned the state of serving a mere earthly purpose or regarded the state as a necessary evil, or, in the best case, subordinated the state to the church'.⁶⁸

⁶³ Kelsen, *supra* note 4, at 2 (also in HKW, *supra* note 2, vol. 1, 139).

⁶⁴ Kelsen, *supra* note 4, at 137–139 (also in HKW, *supra* note 2, vol. 1, 283–285).

⁶⁵ Kelsen, *supra* note 4, at 44, 142–143 (also in HKW, *supra* note 2, vol. 1, 186, 288–290). Dante's system bears clear Thomistic features; however, Dante did not follow Thomas. He was an outspoken opponent of Thomism, particularly regarding the relationship between state and church, and openly opposed Thomistic principles. Kelsen's interpretation of Thomistic influences on the internal contradictions in Dante's work is explored and disputed by Conrad, *Dantes Staatslehre*, *supra* note 11, at 45.

⁶⁶ After the Papal Index seized *The Monarchia* in 1881, interpretation of the text was primarily in the Italian tradition and sought to define the influence of Thomistic principles on Dante and his work. See Finke, *supra* note 27, at 1306. See also Conrad, *Dantes Staatslehre*, *supra* note 11, at 14, clearly stated that the strongest influence on Dante's work came from the Thomists. Conrad asserts that Thomas was Dante's true instructor and that Dante's political philosophy clearly follows Thomistic state philosophy (see *ibid.*, at 20–21, 36–37, 43–44) while ignoring any deviations (see *ibid.*, at 29). For renewed emphasis of Thomism in Dante's work, see Conrad, 'Recht und Gerechtigkeit', *supra* note 11, at 59. In contrast, recent research has ascertained that the predominate influences are Aristotelian and Averroistic and that Dante's work differs substantially from Thomas, see B. Nardi, *Saggi di filosofia dantesca* (1967); B. Nardi, *Dante e la cultura medievale*, edited by P. Mazzantini (1985); Gilson, *supra* note 57, at 210, 215, 220, 227, 234; Imbach and Flüeler, *supra* note 5, at 50–53; Imbach, 'Dante Alighieri', in *Lexikon des Mittelalters* (1986), vol. 3, at 555; Miethke, *supra* note 6, at 157–158; Ogor, 'Das gemeinsame Ziel des Menschengeschlechts in Dantes "Monarchia" und des Averroes Lehre von der Einheit des separaten Intellekts', 40 *Freiburger Zeitschrift für Philosophie und Theologie* (1993) 88; Conrad, *Dantes Staatslehre*, *supra* note 11, at 24–25, who had indicated Averroistic influences. Following W. Ullmann, *Principles of Government and Politics in the Middle Ages* (1961), at 259–260, Dante's world view is not specifically Christian but, rather, cosmic, because his world state is dependent on God but not the Church. As man's natural intellect creates a direct connection between God and man, the Catholic Church and the pope do not need to operate as mediators.

⁶⁷ Kelsen, *supra* note 4, at 137 (also in HKW, *supra* note 2, vol. 1, 284).

⁶⁸ *Ibid.* Original: 'Schon die ganze Auffassung Dantes von dem Werte und der Bedeutung des Staates und von dessen Verhältnis zum Individuum atmet hellenischen Geist. Sie steht in einem deutlichen Gegensatze zu jenen, aus den asketischen lebensverneinenden Theorien des Urchristentums erwachsenden, mittelalterlichen Doktrinen, die den Staat als eine, irdischen Zwecken dienende Vereinigung völlig verdammt, oder ihn als notwendiges Übel betrachteten, oder bestenfalls ihn als minderwertig der Kirche unterordneten.'

This perception could have influenced Kelsen's further research interests. It appears that the Middle Ages and large parts of its legal history no longer attracted him after his work on Dante. Instead, he seeks the ideal model in philosophy, primarily in ancient philosophy, rather than history, which is something he addressed for decades. Additionally, sociology and the political critique of ideology also provided more ideal models to Kelsen, particularly in the treatment of contemporary issues. Never again would Kelsen write a historical work of this scope. History had done its duty; he could relinquish it. For the oeuvre of Kelsen, the value of his first book cannot be underestimated. It cleared Kelsen's future research interests. It foreshadowed his interest not only in democracy, in the legitimation of power and in international systems of peace-keeping but also in argumentative candor and the critique of speculative assumptions and ideologies. In this respect, the book on Dante is of importance not in Kelsen's work but to Kelsen's work.