

## The Denationalization of Peace

—*Der sinnhafte Aufbau der sozialen Welt*

and Professor Tomoo Otaka

*Mototaka MORI*

“Es mag Sie interessieren, dass ich einen Brief von Otaka erhielt. Ich habe ihn durch Freunde, die nach Japan gingen, suchen lassen. Er ist jetzt Dean der juristischen Fakultät der Universität Tokio, es geht ihm anscheinend sehr gut und er hat eine Menge Bücher in japanischer Sprache über Rechtstheorie publiziert.” (A letter from Alfred Schütz to Eric Voegelin on August 25, 1953).<sup>1</sup>



Professor Otaka's lecture at the University of Keijo

The memorial book *Der sinnhafte Aufbau der sozialen Welt* was published in Vienna 1932. Very interestingly one Japanese law-philosopher helped to publish it. His name is Tomoo Otaka, who became later Professor of Law Philosophy at the University of Tokyo. He studied firstly jurisprudence at the Imperial University of Tokyo, and secondly modern philosophy, particularly phenomenology under the Kyoto School, which was a philosophers' group (Kitaro Nishida, Hajime Tanabe etc.) at the Imperial University of Kyoto.

In 1929 he was sent to Vienna and Freiburg i.Br. to do research into jurisprudence and sociology. His job description was Assistant at the Imperial University of Keijo. Keijo was the city name of Seoul in Korea colonized by Japan. He came up to Vienna, of course, to study 'Pure Theory of Law' under Hans Kelsen, and then he went to Freiburg in Germany to study phenomenology under Edmund Husserl. In those days a quite few young Japanese academicians studied under the famous scholars in Europe. In the last year of Otaka's stay in Europe he came back to Vienna again, and published his book *Grundlegung der Lehre vom sozialen Verband* by the Springer Verlag Vienna.

Otaka writes on the preface of his German book: „Der günstige Umstand, daß ich im Auftrage der Kaiserlich-Japanischen Regierung seit dem Frühjahr 1929 in Europa verweilen und mich weiteren Studien im Gebiet der Rechtsphilosophie und Soziologie widmen konnte, ermöglichte mir die Ausführung meines schon lange gefaßten Planes, die Lehre vom sozialen Verband philosophisch zu begründen. Mit dieser Arbeit habe ich mich zuerst in Wien, dann in Freiburg i. Br. und schließlich wieder in Wien beschäftigt. Diese Aufeinanderfolge meiner Aufenthaltsorte hängt mit dem Entwicklungsgang meines Gedankens eng zusammen.“<sup>2</sup>

Fortunately in the same year Schütz's *Der sinnhafte Aufbau der sozialen Welt* also was published by the same publisher.

When we open Schütz's book, we can find a Japanese name Tomoo Otaka again in the preface.

„Innigen Dank schulde ich Herrn Professor TOMOO OTAKA von der Universität Keijo (Japan) für das tiefe Verständnis, das er meinen Gedankengängen entgegenbrachte, und für seine teilnehmende Hilfsbereitschaft, ohne die das Erscheinen dieses Buches unter den jetzigen schwierigen Verhältnissen leicht in Frage gestellt gewesen wäre; ...“<sup>3</sup>

Of course, Otaka also never forgot to mention the name of Schütz on his preface.

„Zu innigstem Dank bin ich ferner Herrn Dozenten Dr. Felix Kaufmann und Herrn Dr. Alfred Schütz in Wien verpflichtet, die mit großer Bereitwilligkeit und Sorgfalt das Manuskript und die Korrekturbogen meiner Arbeit durchsahen und mir durch verschiedene Vorschläge sachlicher und stilistischer Natur wertvolle Unterstützung angedeihen ließen, ...“<sup>4</sup>

We know very well that Professor Helmut R. Wagner describes a very beautiful story between Schütz and Otaka.

“When Otaka negotiated the publication of his book with the Viennese publisher, Springer, he simultaneously negotiated the publication of Schütz's book. (...) Otaka provided the necessary money. He explained to Schütz that he had received it from an Imperial Japanese Society

<sup>1</sup> Alfred Schütz / Eric Voegelin, *Eine Freundschaft, die ein Leben ausgehalten hat. Briefwechsel 1938-1959*, Konstanz 2004, S.490.

<sup>2</sup> Tomoo Otaka, *Grundlegung der Lehre vom sozialen Verband*, Wien 1932, S.V. (Underlined emphasis by

Mori).

<sup>3</sup> Alfred Schütz, *Der sinnhafte Aufbau der sozialen Welt - Eine Einleitung in die verstehende Soziologie*, Wien/Konstanz 1932/2004, S.IV/76.

<sup>4</sup> Otaka (1932), S.VI.

for Sociology and the Science of law. Only when he departed from Vienna did he admit that this society did not exist; being the son of a very rich businessman, he had paid the subventions out of his own funds."<sup>5</sup>

In fact, if you trace Otaka's family line thorough two generations, we can find the name of Eiichi Shibusawa, who was one of the most famous Japanese industrialists. He founded the *First National Bank of Japan*. He is known as the "father of Japanese capitalism."

## 1. Vienna 1932

Otaka fell in love with Vienna as lots of people who have visited Vienna. Otaka also became to love Vienna. I assume that Otaka's three years in Vienna and Freiburg, above all his encounter with Schutz, Kaufmann and other members in Vienna should have left a very big intellectual legacy in his mind.

Indeed, to become friends with some of the greatest minds, to be included in their discussion groups etc, must have been an extraordinary experience. However, in 1932, when *Der sinnhafte Aufbau der sozialen Welt* and *Grundlegung der Lehre vom sozialen Verband* were pulished, the socio-political situation cast a shadow on Austria.

In 1931 the then biggest bank *Creditanstalt-Bankverein* has gone bankrupt. This bankruptcy was a deadly blow to the Austrian economy. The famous work *Die Arbeitslosen von Marienthal* by Lazarfeld, Jahoda and Zeisel has demonstrated the bad economic results of this exampling at that time and has become a classical example of empirical social research.<sup>6</sup>

Politically it seemed not to be strange that a civil war should have occurred at any moment of that year in Austria. After the burning of the *Palace of Justice (Justizpalast)* in 1927, nobody could never

reasonably (vernünftig) discuss on political affairs.<sup>7</sup>

Kelsen knew that the situation in Austria was serious. In the closing remarks of Kelsen's presentation "Democracy" at the 5<sup>th</sup> German Sociologists Congress in Vienna 1926 he expressed his longing for 'peace'.

„Und wenn es überhaupt eine Form gibt, die die Möglichkeit bietet, diesen gewaltigen Gegensatz, den man bedauern, aber nicht leugnen kann, nicht auf blutig-revolutionärem Wege zur Katastrophe zu treiben, sondern friedlich and allmählich auszugleichen, so ist es die Form der parlamentarischen Demokratie, deren Ideologie zwar die in der sozialen Realität nicht erreichbare Freiheit, deren Realität aber der Friede ist“.<sup>8</sup>

However, in February 1934 the Civil War broken out<sup>9</sup>. The Austrian First Republic, which was based on the Constitution drafted by Kelsen, collapsed under the Dollfuss' Dictatorship after the Civil War. From then on the era of Austrian Fascism began.

However, before this tragedy, the Constitution of Austria had already been amended in 1929. The opposition, the Social Democratic Labor Party also had compromised on this amendment with the conservatives and nationalists, in order to avoid a possible civil war.

This amendment, which included the strengthening of presidential power, disappointed Kelsen very deeply, who had been a lifelong judge of the Just ice of Constitution.

Kelsen criticized such the reactionary tendency very strongly: „Das geht unzweideutig aus der Art und Weise hervor, wie die Zustänigkeit des Staatsoberhauptes ausgedehnt werden soll. Dem Bundespräsidenten ist ein Notverordnungsrecht zudedacht, das weit über den Art. 48 der Deutschen Reichsverfassung hinausgeht und auch den berüchtigen §14 der alten österreichischen

this verdict and formed demonstrations on July 15 to protest. The mob vented their frustration, eventually moved towards the Palace of Justice (*Justizpalast*) and set the whole building on fire. Clashes with the police left 85 workers and four policemen dead, up to 600 people were injured. The burning of the *Justizpalast* and the bloodshed surrounding it symbolized a break within the republic, marking the coming end of democracy.

<sup>8</sup> *Verhandlungen des Fünften Deutschen Soziologentages vom 26. bis 29. September 1926 in Wien, Tübingen 1927, S.68.*

<sup>9</sup> Helene Majmann, Seigfried Mattl (Hrsg.), *Die Kälte des Februar -Österreich 1933-1938, Wien 1984.*

<sup>5</sup> Helmut R. Wagner, *Alfred Schutz –An Intellectual Biography*, Chicago1983, p.37.

<sup>6</sup> Marie Jahoda / Paul F. Lazarsfeld / Hans Zeisel, *Die Arbeitslose von Marienthal*, Frankfurt am Main 1975(1933).

<sup>7</sup> On January 30, 1927 an incident occurred in a small village (Schattendorf) in Burgenland, when members of the *Republikanischer Schutzbund* (the military organization of Social Democratists) got shot at by members of the conservative private military organization *Heimwehr*. Two people died. In the trial that followed, the accused were spoken free by the jury in July of that year. Members of the *Republikanischer Schutzbund*, the Social Democratic Labor Party Austria and workers were outraged by

Verfassung<sup>10</sup> in den Schatten stellt. Das Recht des Bundespräsidenten, gesetzändernde Veordnungen zu erlassen, soll keineswegs –wie im Reiche– nur auf den Fall einer Störung der öffentlichen Sicherheit und Ordnung, oder –wie im alten Österreich– auf die Zeit beschränkt werden, da das Parlament nicht versammelt ist.<sup>11</sup>

His disappointment with Austria was very deep. So, he accepted the offer of a position from the University of Cologne in Germany and left Vienna in November 1930. The Social Democratic Labor Party prepared to nominate him again as a judge of the Justice of Constitution in the 'renewed' system by the amendment. However, Kelsen could not accept it.

A famous Austrian scholar, Prof. Dr. Robert Walter, writes: „Dieser (Kelsen) lehnte aber ab, weil er ein solches Amt nicht als Vertrauensmann einer politischen Partei ausüben wollte; auch wollte er dem Gerichtshof durch seine Angehörigkeit auch nicht den Schein der Objektivität geben.“<sup>12</sup>

However, because of the NS-regime Kelsen had to leave even Cologne. After that he taught at the *Institute Universitaire des Hautes Etudes Internationales* in Geneva.

On June 20, 1932 Schutz visited Kelsen in Geneva on the way of his business trip<sup>13</sup>. He wrote a letter to Kaufmann in Vienna. „Ich habe Kelsen in Genf aufgesucht, um mit ihm Mittag zu essen. (...) Er war nett, amüsan, charmant –und oberflächlich wie immer. Zu einer Diskussion kam es natürlich nicht, doch erzählt er wie sehr er sich mit Ihnen gefreut habe. (...) Meine Erwärmungsversuche schnitt er ab, und war zu diesem Tag überhaupt wegen den politischen Verhältnisse und offenbar auch wegen eines Streites mit Spann recht deprimiert.“<sup>14</sup>

Otaka came up to Europe to study the 'Pure Theory of Law' under Kelsen in Vienna and, at the same time, phenomenology under Husserl in

Freiburg. Unfortunately when he came from Freiburg back to Vienna, Kelsen had already left there. Kelsen's 'emigration' from Austria was, of course, caused by the very bad political situations in those days' Austria. However, it meant that the 'Pure Theory of Law' itself had its limitation. Because we can interpret that the constitutional ordering of the First Republic was a praxis of 'Law Positivism' by Kelsen and Kelsen's school.

Kelsen's 'Pure Theory of Law' as well as Mises' 'Law of Marginal Utility', which Schutz took up two subjects for discussion on the advanced social sciences in his book (§49), had already faded out their theoretical validities and actualities in those days. Hayek, who was one of the Mises' private seminar members, had already criticized Mises' rationalism in the famous essay "Economics and Knowledge"<sup>15</sup>. Of course, Schutz also knew such various tendencies<sup>16</sup>.

Kelsen's Law Positivism had been already criticized not only from the social democrats but also from other various sides.

We know very well that Schutz had pointed out very theoretically some implicit critical comments on Kelsen's 'Pure Theory of Law' particularly in his book *Der sinnhafte Aufbau der sozialen Welt*. Schutz had already theorized the ideal types on 'state', 'law', etc. as constructed objects in his book. In other words, Schutz had asked theoretically how objective meaning constellations like 'state', 'law' etc. were possible.

At first, while I would like to theoretically focus on Voegelin's critique to Kelsen, I have to trace a theoretical-historical outline of the Law Positivism from the birth of Austrian First Republic to the Austro-fascism, namely the Dollfuss' dictatorship; the suspension of Parliament and Austrian Constitution, and the Authoritarian 'State of Estates (Ständestaat)'. Such the disturbing incidents were in making only in the next two years after the beautiful co-publications by Otaka and Schutz.

<sup>10</sup> Grundgesetz über die Reichsvertretung vom 26. Februar 1861.

<sup>11</sup> Hans Kelsen, „Verfassungreform in Österreich“, in: *Die Justiz*, Band, V., 1929/30, S.133-4. Hans Kelsen, „Die öffentliche Verfassungsreform,“ in *Der oesterreichische Volkswirt*, 22. Jahr, 1929 No.4, S.100.

<sup>12</sup> Robert Walter, „Hans Kelsens Emigration“, in: Friedrich Stadler (Hrsg.), *Vertriebene Vernunft II – Emigration und Exil österreichischer Wissenschaft*, Wien 1988, S.465.

<sup>13</sup> After having seen Kelsen, he went to see Husserl.

<sup>14</sup> Alfred Schützs „Briefwechsel mit Felix Kaufmann, Nachlaß Kaufmann“, Rolle 7, 011550-1.

<sup>15</sup> Friedrich von Hayek, "Economics and Knowledge", in: *Individualism and Economic Order*, Chicago / London 1948, pp.33-56.

<sup>16</sup> Alfred Schütz, „Kommentar zum Hayek Vortrag über Wissen und Wirtschaft“, in: Correspondence between F. A. Hayek and A. Schutz, in: *Collected Papers*, Volume IV (edited H. Wagner / G. Psathas), Dordrecht / Boston / London, pp.93-105.

The World War I changed everything. As we know very well, Schutz describes it.

“(…) the home to which he returns is by no means the home he left or the home which he recalled and longed for during his absence. And, for the same reason, the home comer is not the same man who left. He is neither the same for himself nor for those who await his return.”<sup>17</sup>

The end of the World War I meant the end of the Habsburg Empire. The old Europe had gone. Kelsen was the person that drafted the New Austrian Constitution. He was the most important scholar of constitutional law in those days. His theory ‘Pure Theory of Law’ became the main stream of the jurisprudence after the World War I. The centre of the jurisprudence had moved from Heidelberg, where Kelsen had studied, to Vienna, where he was to teach.

Kelsen’s theory is known as the ‘Law Positivism’. His philosophical ground comes from the new-Kantianism, particularly from the Marburg School. Kelsen intended to think of a social order as a law order as Hermann Cohen intended to grasp natural orders as nomothetical knowledge of natural sciences.

So, the ‘Pure Theory of Law’ was constructed of the formalistic categorical schemes of the law orders.

„Mehr als zwei Jahrzehnte ist es her, dass ich unternommen habe, eine reine, das heisst: von aller politischen Ideologie und allen naturwissenschaftlichen Elementen gereinigte, ihrer Eigenart weil der Eigengesetzlichkeit ihres Gegenstandes bewusste Rechtstheorie zu entwickeln. Von allem Anfang an war dabei mein Ziel: Die Jurisprudenz, die –offen oder versteckt- in rechtspolitischem Raisonement fast völlig aufging, auf die Höhe einer echten Wissenschaft, einer Geistes-Wissenschaft zu heben.“<sup>18</sup>

From this formalistic position he criticized any concrete materials in social contextures as ‘sociological’. Kelsen thought that only the ‘Pure Theory of Law’ was scientific in the moral sciences (Geisteswissenschaften). Others were sociological and ideological.

Kelsen’s antagonism against sociology comes originally from the controversy between him and Max Adler. Adler, as a very intellectual Kantian Marxist, would think of the principle of sociology as the Marxism modified by himself.

The important controversy on ‘political democracy’ or ‘social democracy’, namely ‘parliamentarian democracy’ or ‘Räte-Demokratie’ was held between these two well-matched theorists<sup>19</sup>.

A definitive controversial point between them was on the view point of state (Staatsauffassung) just after the War. Kelsen’s view point was a new style of ‘formal democracy.’ Not only social democrats like Adler but also conservatives criticized such a democratic view point by Kelsen.

Othmar Spann wrote in his famous book *Der wahre Staat*, „Die Vorträge, aus denen dieses Buch hervorging, wurden im Sommer-Semester 1920 an der Wiener Universität inmitten einer politisch hocherregten Zuhörschaft gehalten, in welcher Sozialisten aller Art und Farbe in der Überzahl waren. Davon haben diese Vorträge auf meiner Seite sowohl den Geist der Fehde empfangen, da es galt, dem kaum verhaltenen Groll und Widerstand mit gewaffneter Schärfe des Geistes entgegen zu treten; wie auch die vorherrschende Einstellung auf die sozialistische und demokratische Gedankenwelt.“<sup>20</sup>

Kelsen had to cope with two fronts at the same time, one was with social democrats and the other was with catholic conservatism.

Voegelin was not only a member of Kelsen’s school but also that of Mises’ private seminar. However, he was influenced by Spann’s philosophy.

Voegelin had already in 1929 explained every defect in the ‘Pure Theory of Law,’ particularly some problems on the unification of law and a social image of state, down to the minutest details.<sup>21</sup> Voegelin developed these points onto a historically related reconstruction of the Austrian First Constitution and the theory of ‘Pure Theory of Law’. This work was his book *Der autoritäre Staat* in 1936.<sup>22</sup> This work seems to me to be a justification of Austro-

<sup>17</sup> Alfred Schutz, “The Homecomer”, in: *Collected Papers II – Studies in Social Theory* (Ed. By Arvid Brodersen), The Hague 1964, pp.115-6.

<sup>18</sup> Hans Kelsen, *Reine Rechtslehre – Einleitung in die Rechtswissenschaftliche Problematik*, Wien 1934, S.IX.

<sup>19</sup> Max Adler, *Die Staatsauffassung des Marxismus – Ein Beitrag zur Unterscheidung von soziologischer und juristischer Methode*, Wien 1922. Hans Kelsen, „Vom

Wesen und Wert der Demokratie“, in: *Archiv für Sozialwissenschaft und Sozialpolitik*, 47(1), S.50-85.

<sup>20</sup> Othmar Spann, *Der wahre Staat*, Graz 1972 (Jena 1938), S.5.

<sup>21</sup> Eric Voegelin, „Die Einheit des Rechtes und des soziale Sinngelbte Staat“, in: *Internationale Zeitschrift für Theorie des Rechtes*, Jg. 5(1), S.58-89.

<sup>22</sup> Erich Voegelin, *Der autoritäre Staat – Ein Versuch über*

fascism. However, it makes me understand not only an instable constellation of state images of Austria but also the theoretical defects of 'Pure Theory of Law' very well.

Voegelin wrote there, „Österreich hat seit 1933 nicht nur sein demokratisch-parlamentarisches durch ein autoritäres Verfassungsrecht ersetzt, sondern es hat einen Schritt vom ›administrativen‹ zum ›politischen‹ Stil, es hat einen Schritt vom ›Reich‹ zum ›Staat‹ getan.“<sup>23</sup>

Voegelin estimated the transition from the First Republic to the authoritarian dictatorship as natural. I don't know how he explained the blood affairs in those days. In this point Voegelin's polito-philosophical image seems me to be very conservative.

„Der für den europäischen politischen Raum verbindliche Begriff des Staates orientiert sich geschichtlich an den westeuropäischen Nationalstaaten, im besonderen an der Entwicklung des kontinentalen Modellstaates Frankreich. Der Staat ist in diesem Verstande ein politisches Gebilde, das sich aus dem Mächtefeld des Mittelalters entwickelt hat durch die Aufrichtung der zentralen Herrschafts- und Verwaltungsorganisation über ein größeres Territorium zu einem politischen Volk, zur Nation. Der Staat ist in dieser Bedeutung des Wortes nicht die menschenwesentliche Form der Existenz in einem politischen Verband, sondern ein geschichtlicher Typus, dessen Entwicklung im Mittelalter in Westeuropa einsetzte und von diesem geographischen Zentrum aus sich als vorbildliche Form politischer Organisation ausbreitete.“<sup>24</sup>

I assume that Voegelins criticized Kelsen's 'Pure Theory of Law' very theoretically and fiercely from his ideological point.

„Wenn also der Staatsgegenstand mit dem ‚Recht‘ identifiziert wird, verschwinden nicht nur alle anderen Gegenstände aus dem Gesamtphänomen Staat, sondern auch das Recht als vorwissenschaftlich konstituierter Realzusammenhang aus dem Gegenstandsbereich der Staatslehre.“<sup>25</sup>

He writes exactly : „Innerhalb dieses Seinsbereiches aber ist nun das Rechtsphänomen, wenn es als eine Einheit begriffen werden soll,

keineswegs ein System von Normen, sondern ein sehr kompliziert verschachteltes System von Normen und Akten.“<sup>26</sup>

Voegelin attacked Kelsen's theoretical presupposition: a social order must be a law order. There is not any one-to-one correspondence between social order and law order. Moreover, we know that there is not any one-to-one correspondence between law system and law order. From our sociological view we can not so easily reduce such a complexity between them. In that way the positivistic reductionism caused an identification problem of the image of the state of Austria, and amplified various political confusions.

Certainly there is not any simple correspondence between law system and social order. As Voegelin pointed out in his book, we have to deal not only with the system of law propositions but also the very complicatedly connected actions of enactment, judgment, decision etc. Any social order is always and firstly a system of acts. In other words they have to be thought as an actionsystem.

Voegelin understood such a theoretically important construction very clearly in his book review on Schütz's book *Der sinnhafte Aufbau der sozialen Welt*. In this meaning, we have to understand Schütz's memorial book also as a theoretical transformation from a paradigm of 'Law Positivism' to another new dimension of sociology.

According to Voegelin, „Schütz hat in seinem Buch über den sinnhaften Aufbau der sozialen Welt aus dem Umkreis des Weberschen Werkes das Sinnproblem ausgegrenzt, und zwar nicht nur in der Bedeutung des Verfahrens der Soziologie als einer das sinnhafte Handeln verstehenden und ordnenden, sondern auch als Frage des Aufbaues der sozialen Welt selbst,“ and “Die Analysen von Schütz sind daher in erster Linie nicht als eine Methodenkritik anzusehen, sondern als Versuch zu einer Realontologie der Gesellschaft.“<sup>27</sup>

I also would like to support Voegelin's interpretation. And I would like to read Schütz's book *Der sinnhafte Aufbau der sozialen Welt* not only as a methodology of sociology but also a critical presentation of new dimension against confounding

*das österreichische Staatsproblem*, Wien 1936.

<sup>23</sup> Voegelin (1936), S.6.

<sup>24</sup> Voegelin (1936), S.3. (Underlined emphasis by Mori).

<sup>25</sup> Voegelin (1936), S.109.

<sup>26</sup> Voegelin (1936), S.111.

<sup>27</sup> Eric Voegelin, “Alfred Schütz, *Der sinnhafte Aufbau der sozialen Welt*”, in: *Zeitschrift für Öffentliches Recht*, Band XIV, S.669 and S.671.

the social order and the law order by the ‚Law Positivism.‘ It meant a criticism to a confused political actuality of those days in Austria.

## 2. Otaka’s Dilemma: ‘Verband’ or ‘Staat’

Now, I have to mention how Otaka’s work in Vienna can be related to Schutz’s work.

Otaka also writes in the chapter VI of his book: „Die transzendente Phänomenologie ist die Wissenschaft, die von dem absoluten Erfahrungsfeld der ‚transzendentalen Subjektivität‘ aus den Sinn der objektiven Welt bis zu ihrem letzten Grund aufzuklären berufen ist. Dagegen setzt die Lehre vom sozialen Verband das objektive Dasein der Welt der Sozialität schon voraus, indem sie aus dieser Welt heraus den sozialen Verband als ihren spezifischen Gegenstand feststellen und die wesensmäßige Seinsstruktur desselben erforschen will. In diesem Sinne steht die Lehre vom sozialen Verband, wie jede ‚mundane‘ Wissenschaft, auf der Grundlage der ‚natürlichen Einstellung‘. Allein die Lehre vom sozialen Verband, deren philosophische Grundlegung wir vermittle der radikalen phänomenologischen Erkenntniskritik durchgeführt haben, unterscheidet sich freilich grundsätzlich von den anderen, naiv-unkritischen Wissenschaften. Unsere Lehre vom sozialen Verband weist sich also als eine phänomenologisch gerechtfertigte, wahrhaft eigenständige Wissenschaft aus.“<sup>28</sup>

Such a theoretical standpoint by Otaka reminds us of the next counterpart by Schutz.

„Die Absicht dieses Buches, die Sinnphänomene in der mundanen Sozialität zu analysieren, macht eine darüber hinausgehende Gewinnung transzendentalen Erfahrung und somit ein weiteres Verbleiben in der transzendental phänomenologischen Reduktion nicht erforderlich. In der mundanen Sozialität haben wir es ja nicht mehr mit Konstitutionsphänomenen in der phänomenologisch reduzierten Sphäre, sondern nur mehr mit den diesen entsprechenden Korrelaten in der natürlichen Einstellung, zu tun.“<sup>29</sup>

Schutz had aimed at his own constitutional analysis of social worlds from Weber’s conception of social action and social relation. He had carved out and polished lots of important concepts during his

phenomenological exploration; Handeln, Handlung, Erlebnis, Gleichzeitigkeit, Quasigleichzeitigkeit; Umwelt, Mitwelt, Vorwelt, Folgewelt etc. Showing the meaning structure of social worlds generally, he was successful in explaining the existence structure of science and that of the objective meaning structure of state.

On the other hand, Otaka had focused his own theoretical interest on a concept of ‘menschlichen Verbände’, which came from a key concept of Gierke’s ‚Staatswissenschaft‘ (not political science!).

Today we might translate such a theory of ‘menschlichen Verbände’ to a theory of exchange by Peter Blau<sup>30</sup> or a theory of communication medias by Luhmann.<sup>31</sup> Schutz’s ‘Theory of Social Worlds’ may be Otaka’s counterpart of ‘menschlichen Verbände’.

While many phenomenologists would take up the concept of intersubjectivity as a main concept, Otaka would do originally explore the existence or the ‘eidos’ of ‘menschlichem Verband’ as his main problem. Such his expression meant that Otaka would maintain the transcendentalism.

However, the phenomenological concept of ‘intersubjectivity’ was totally different from Otaka’s concept of ‘menschlichem Verband’. Moreover, Otaka’s work in Vienna was totally different from Schutz’s phenomenology of social worlds.

After he came back to Keijo, he wrote his next book *The Structure of State* in Japanese in 1936. Although he mentioned to phenomenology in this book, he concentrated on describing the structural totality of state (Staat). He restricted very clearly his interest to the structure of state itself, which was only one example of plural ‘menschlichen Verbände’ in the former book in Vienna.

What was the matter with him? Here I would like to take up this basic difference in Otaka’s works.

Indeed, in this Japanese book *The Structure of State* also the state is one of ‘menschlichen Verbände’, however it is thought of as a totally integrated constellation composed of law, politics and society. We could find already such the conception of state in his former book in Vienna very theoretically and philosophically. But the latter book seems to have been on a jurisprudential depiction of structure of state. Certainly Professor Otaka as a jurist thought

<sup>28</sup> Otaka (1932), S.253.

<sup>29</sup> Schütz (1932), S.42.

<sup>30</sup> Peter M. Blau, *Exchange and Power in Social Life*,

New Brunswick / London, 1964

<sup>31</sup> Niklas Luhmann, *Gesellschaft der Gesellschaft*, Frankfurt am Main 1997.

of the organizational principle of state as law problems, at the same time he would grasp the being of 'menschlichen Verbände' as meaning structures. However, this Japanese book is, as its title says, on the structure of state. In this book he would not set such an objective meaning transformation of state onto the subjective and intersubjective constructing processes.

In his former book in Vienna, as if he had looked ahead to the 21<sup>st</sup> century, this Japanese scholar learned a very advanced idea 'Weltverband' from a colleague of Kelsen, Alfred Verdross etc. A general theory of 'menschlichen Verbände' is nothing else but a very strong normative theory like Habermas' discourse ethics. The conception of 'Weltverband' is no more and no less than to de-nationalize 'Verbände' and law. In this point Professor Otaka could have already prepared to develop his social theory to the *law of peoples* more than sixty years in advance of John Rawls' publication.<sup>32</sup>

Otaka extracted a concept of 'Körperschaft' in his book (§21).<sup>33</sup> I assume that he would have developed a universal theory of 'association' from this point. He should have learned Schutz's very elegant conceptualizing two types of ideal type (ideal type of process and that of person) and the theory of social worlds totally. However, we had to wait for such an advanced idea from him until the publication of his book *The Nomos Theory of Law* in 1955.<sup>34</sup> If anything, it had disappeared in his book *The Structure of State*.

### 3. Social Construction of 'basic norm'

If we seek a possibility of 'Weltverband', we have to inquire into the relation between a concept of a basic norm (Grundnorm) and that of international

law. The most important problem is whether the international relation is literally an inter-national relation between plural sovereign nation states<sup>35</sup>. Kelsen had already expressed his revolutionary theoretical point in his *Pure Theory of Law*.

„Der Staat als Organ des Völkerrechts: das ist nur ein bildlicher Ausdruck für die einzelstaatliche Rechtsordnung, die mit der Völkerrechtsordnung und, durch diese vermittelt, mit allen anderen einzelstaatlichen Rechtsordnungen in jenem Delegationszusammenhang steht, (...) Er stellt in einem durchaus positiven Sinne die Einheit des universalen Rechtssystems her. Es ist eine (...) nur erkenntnismäßige, keine organisatorische Einheit. In ihrem Gefüge wird der Einzelstaat als Rechtswesen aus der Absolutheit gelöst, in der ihn das Souveränitätsdogma erstarren läßt. Die Reine Rechtslehre relativiert den Staat. Sie erkennt ihn als rechtliche Zwischenstufe und gewinnt so die Einsicht: daß von der alle Staaten umfassenden universalen Völkerrechtsgemeinschaft zu den dem Staat eingegliederten Rechtsgemeinschaften eine kontinuierliche Abfolge allmählich ineinander übergehender Rechtsgebilde führt“<sup>36</sup>

Did Otaka inherit this Kelsen's idea, or abandon it? Kelsen's 'Pure Theory of Law' is designed as the hierarchy of norms. It is constructed as a Kantian architectonics; norms in the higher levels make ones in the lower levels valid. The highest and last norm should be presupposed as 'contra-factual'. However, such a Kantian contra-factual idea of the 'basic norm' has always a weak point. Like Voegelin we also will be easily able to ask its historical and empirical contents of this contra-factual presupposition. Otaka also had such a tendency.<sup>37</sup> But he would interpret the positive

<sup>32</sup> John Rawls, *The Law of Peoples*, Harvard Univ. Press 1999.

<sup>33</sup> Otaka (1932), S.190 ff.

<sup>34</sup> Tomoo Otaka, *Hou No Kyu-kyoku Ni Aru Mono*, Tokyo 1955.

<sup>35</sup> Jürgen Habermas, „Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?“, in: *Der gespaltne Westen*, Frankfurt am Main 2004, S.117.

<sup>36</sup> Kelsen (1934), S.152 f.

<sup>37</sup> Certainly Otaka's theory would not grasp the state itself only as logos science of Jurisprudence<sup>37</sup> Mentioning to Hans Freyer's new-Hegelianism, Otaka says definitely, "Wir wollen dagegen von der radikalen Einsicht ausgehen, daß "Logoswissenschaft" im Freyerschen Sinne gleichzeitig auch „Wirklichkeitswissenschaft" sein kann und daß die Lehre vom sozialen Verband als Zentralgebiet der Soziologie einzig und allein als eine

„Logoswissenschaft von der sozialen Wirklichkeit“ — als eine Ontologie des wirklichen und geschichtlichen sozialen Daseins begründet werden kann. Damit muss der Begriff der "Wirklichkeit" freilich in einem ganz anderen Sinne verstanden werden als in dem der „Faktizität“ Der Begriff der „Wirklichkeit“, der schon von dem der bloß idealen „Existenz“ unterschieden wurde, ist hier wieder dem Begriff der schlichten „Faktizität“ entgegengestellt“ (Otaka 1932, S.16.).

However, I assume, Otaka was not able to discard the 'facticity' of state itself. I assume that he had always set the concept of state in his central position. I wish he could inquire the 'facticity' of 'sozialem Verband' itself. He should have set such the objective meaning onto the subjective or intersubjective meaning structure.



law as more formalistic.

Certainly, Otaka would later deconstruct Kelsen's hierarchical idea in his own most famous book *The Theory of Positive Law Order*.<sup>38</sup> He would find the validity not in any hierarchical models but in a simple distinction model (a set of normative validity and factual validity). This idea reminds me of the distinction of the 'primary rule' and 'secondary rule' by the English analytical jurisprudence (Austin, Hart)<sup>39</sup>. It means that a validity of norm is defined by its presupposition (secondary rule). Whether this secondary rule on the higher lever exists or not, is quite another matter for the analytical jurisprudence.

Otaka would point out the 'facticity' in Kelsen's contra-factualism. If a normative order can be performed, and if it can have any validity, it is why we can understand and explain various factual matters to which this norm very closely related.

"It is the factual acts by lots of people that directly guarantee the factuality of basic norm and makes it develop and improve. At the same time the factual acts are supporting the basic norm and integrating lots of people toward a target of basic norm. On the ground of factual acts by the people the main idea of state will be hypostatized as a factuality of its idea. The basic norm of state will perform its true effectiveness. The effectiveness of basic norm should be indeed negatively supported by a compulsory order, but positively exist on the ground of integrative factuality by the people."<sup>40</sup>

Such a conceptualization by Otaka is not so formalistic as Kelsen's. In other words, we can find very easily some political and historical contents since Rousseau and Abbé Sieyès in Otaka's conceptualization?" Otaka has rarely cited the name of Voegelin in his own books. If we can interpret Otaka's conception of the basic norm as that of Voegelin's historicism, Otaka's effectiveness also will lead to a kind of objectivistic historicism. Their mentor Kelsen would overcome such all kinds of objectivistic historicism of nationalism, by the law-positivism.

Their friend Schutz presented us another theoretical plan; the theory of social worlds (Umwelt,

Mitwelt, Vorwelt and Folgewelt). The objective historicism lacks the former two worlds. Otaka should have known Schutz's book very well. However, he did not adopt Schutz's theory of social worlds. Otaka thought that the state as 'Verband' were an ensemble constellated of law, politics and society. However, every society itself had have its own complexity of multiplex worlds.

It seems to me that such a theoretical ensemble by Otaka were a kind of Spann's universalism (Ganzheitstheorie). I feel certainly sometimes Otaka's 'universalistic' tendency in his book *The Structure of State*. Therefore, his theoretical interest itself might, in spite of his conservatism, paradoxically have a strong orientation to the anti-nationalistic state theory.

"The basic norm is essentially law-transcendent norm."<sup>41</sup> From this theoretical point, Otaka would do overcome an ensemble, namely an inseparably linked corpus of the state constellated of law, politics and society. However, I think that his concept of basic norm was not free from the then Imperial Japanese domestic law system. The concept of effectiveness might have been dependent on the militarism in the imperial Japan. In those days the way to the 'Weltverband' was quite away from him.

#### 4. Social Reality of Peace

After the defeat of the World War II Otaka wrote a famous textbook called *Democracy* which was published from the Ministry of Education<sup>42</sup> for Japanese middle high school pupils just like his mentor Kelsen, who also wrote *Vom Wesen und Wert der Demokratie* just after the end of the World War I.

However, it was Otaka true worth in Japan that he as a law philosopher participated very actively in a famous discussion on the continuity-discontinuity problem between the Constitution of the Empire of Japan before the war and the Constitution of Japan after the war.

On August 15, 1945 Japan capitulated to the Allies unconditionally to accept the Potsdam Declaration<sup>43</sup>. Professor Toshiyoshi Miyazawa,

<sup>38</sup> Tomoo Otaka, *The Theory of Positive Law Order*, Tokyo 1942.

<sup>39</sup> H. L. A. Hart, *The Concept of Law*, Oxford 1961; Kelsen (1957), p.266 ff.

<sup>40</sup> Otaka (1936), p.499 f. (Underlined emphasis by Mori).

<sup>41</sup> Otaka (1936), p.477.

<sup>42</sup> The Ministry of Education, *Democracy*, 1948.

<sup>43</sup> 1) Militarism in Japan must end. 2) Japan would be occupied until the basic objectives set out in this proclamation were met. 3) The terms of the Cairo



who was also a professor of the faculty of law at the University of Tokyo, explained a discontinuity between them very theoretically. The Constitution of the Empire of Japan also has a provision of its amendment (§73). However, Miyazawa explained that the acceptance of the Potsdam Declaration meant a Revolution. This is called the theory of 'August Revolution'. The old constitution was abrogated then. The basic norm of the old constitution was abolished, at the same time the world of new constitutional order began. On November 3, 1946 the new constitution was promulgated. At that time the ancient regime ended, the new era began.

In opposition to this theory, Otaka advocated the continuity between two constitutions. It was well-known as the theory of 'Nomos Sovereignty'. "Following Japanese tradition the Emperor has reified the idea of the 'constantly right ruling'. If all kinds of real political impurities are cleared away of this traditional position, it is nothing but the 'Emperor as symbol'. (...) The actions of the Emperor as symbol are not any meaningless form but filled with the idea and meaning of the national people's sovereignty. They are the most important affairs of state. That is the true harmony between the national people's sovereignty and the Emperor system.<sup>44</sup>

Otaka idealized the concept of sovereignty, namely he idealized both the democracy and the Emperor completely. He would like to reach to the highest idea of Nomos. He thought that both the imperial sovereignty and the people's sovereignty can exist under the Nomos. So, he maintained that

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Declaration would be carried out and Japanese sovereignty would be limited to the islands of Honshū, Hokkaido, Kyūshū, Shikoku, and such minor islands as the Allies determined. 4) The Japanese army would be completely disarmed and allowed to return home. 5) Those who had led Japan to war must be permanently and finally discredited, and abandoned. 6) War criminals would be punished including those who had "visited cruelties upon our prisoners". Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established. 7) Japan should be permitted to maintain a viable industrial economy but not industries which would enable her to re-arm for war. 8) The treaty was not intended to enslave the Japanese as a race or as a nation. 9) Allied forces would be withdrawn from Japan as soon as these objectives have been accomplished 10) "We call upon the government of Japan to proclaim now the unconditional surrender of all Japanese armed forces, and to provide proper and adequate assurances of their good faith in such action. The alternative for

there should not be any discontinuity between the old constitutions and the new one.

Of course, Otaka's position should be thought of as conservative. Many of Japanese learn generally this issue as the discontinuity between the old and the new.

Now I would not like to criticize his conservatism, because I would like to turn the attention to his logics. In his book *The Structure of State* he had already mentioned a conception of the norm that transcends the law. Such an idea of transcendentalism comes from his conception of the 'Weltverbund' in his first book in Vienna. Otaka as phenomenologist would seek to reach to the primordial social world philosophically.

I wish Otaka should have reached to a next level beyond a distinction between the Emperor system and the people's sovereignty. Kelsen as well as Verdross suggested such a tendency. Perhaps, the highest level of value could have been an abstract and universal image of 'peace'.

Above all, Verdross' life-long theme should be directly related to a trend toward the concept of 'peace' in the international affairs just after the World War I. *The League of Nations*, particularly *Permanent Court of International Justice*, and the '*Kellogg-Briand Pact*<sup>45</sup>' etc. were some characteristic concrete realities. Verdross was one of the founding fathers of the Neutrality of Austria after the World War II<sup>46</sup>.

The Article 9 (Renunciation of War) in the Constitution of Japan seems to us to be transplanted from the Kellogg-Briand Pact.<sup>47</sup> Therefore, it could have been a concrete reality of

Japan is prompt and utter destruction."

<sup>44</sup> Tomoo Otaka, *National Sovereignty and the Emperor System*, Tokyo 1947, pp.205-6.

<sup>45</sup> ARTICLE I: The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.

ARTICLE II: The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

<sup>46</sup> Alfred Verdross, *Die immerwährende Neutralität Österreichs*, Wien 1977.

<sup>47</sup> "CHAPTER II: RENUNCIATION OF WAR. Article 9:

1) Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international

peace.

Otaka also mentioned his own plan toward a peaceful world in his book *Theory of Liberty*<sup>48</sup> in the midst of the Korean War. Particularly he took up *the Universal Declaration of Human Rights*, which is an advisory declaration adopted by the *United Nations General Assembly*, as a motivated end.

I wish he could have developed the Nomos of peace more theoretically. Even if we theoretically presuppose Otaka's concept of state as an ensemble constellated among law, politics and society, at the same time, if we know that every society today has already become a denationalized world-society, the system of codified written laws as well as the political system symbolically constituted of various kinds of power will have to be changed by the total relations among them.

Such a theoretical transformation must not result in the 'international terrorism' or the 'War against Terror'. The totality of state will have to be transformed to another level. If we use more positively Spann's old-fashioned term, it may be expressed as the 'Entzweiung' des Staaten'.

Very unfortunately he died from a case of penicillin shock in 1956. That was a very brief life of 57 years. However, Professor Otaka could have already been prepared to denationalize and develop the concept of state as a 'Universale Theorie des Verbandes' in his very intellectual youth days in Vienna. I assume it must be a theory of denationalization of peace.

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If we walk on the Ring Strasse in Vienna, we are going to understand a series of images of Austria; Doppelkoepfige Adler, Feldmarshall Radetzky, Deutscher Meister, Börse, Votivkirche, Universität, Rathaus, Parlament, Burgtheater, Kaiserin Elisabeth, Karl, Kaiser Franz-Josef, Mozart, Oper, Fuerst Schwarzenberg, Strauss etc.

Such a sequence can make us understand an image of Austria. I wish we could reach to the Nomos from an imaginary ensemble of such concrete historical contents.

In Japan we are being confronted with the

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disputes.

2) In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of

amendment of the Constitution, particularly that of the article 9. While the last 40 years the Japanese have failed to grasp a concept of peace more theoretically and idealistically as Nomos. I wish that Japan had had only transformed itself from a nation state to a peaceful state after the World War II. The concept of peace has been always dependent on the domestic political and ideological discussions. Very unhappily we could not denationalize this concept from the nation level to the Nomos.

It seems to me that Austria may have overcome the tragedy in 1934. And in the last 20 years Austria may have overcome the old fashioned, namely 19th Century type of nationalism under the enlargement of the transnational system of the EU.

However, it will be very difficult for Japan to construct a similar kind of system and to participate in such a transnational relation. If anything, Japan is going to proceed on the other way. Today's governmental idea 'the beautiful homeland of Japan' is nothing other than that of the revised old-fashioned nationalism. The vector to the transnationalism has already been cut very shortly and has been compressed into a mutual military alliance between Japan and the United States.

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belligerency of the state will not be recognized."

<sup>48</sup> Tomoo Otaka, *Jiyuu-Roi (Theory of Liberty)*, Tokyo 1952.

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