California Law Review

Volume 40 | Issue 1 Article 2

3-31-1952

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Recommended Citation

Edwin W. Patterson, *Hans Kelsen and His Pure Theory of Law*, 40 Cal. L. Rev. 5 (1952).
Available at: http://scholarship.law.berkeley.edu/californialawreview/vol40/iss1/2

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Hans Kelsen and His Pure Theory of Law

*Edwin W. Patterson**

DR. HANS KELSEN'S formal retirement from his professorship at the end of the current university year will mark another milestone in his varied and significant career. He has survived or escaped from two revolutions and a ruthless tyranny in central Europe. He has held honored and influential academic positions in five nations and on two continents. He has built and rebuilt a systematic philosophy of law and the state which has won him a place among the most distinguished legal-political philosophers of the present century. In this short article I propose to sketch his career and to state concisely what I conceive to be the most valuable contributions to American legal theory which can be derived from his writings.

Born in Prague, Czechoslovakia, on October 11, 1881, Hans Kelsen attended the University of Vienna and received his doctorate in law there at the age of twenty-five. After a few years of additional study at the Universities of Heidelberg and Berlin, he became in 1911 professor of public law and jurisprudence at the University of Vienna. Here he remained for nineteen years, the most creative period of his life. As a legal adviser to the Austrian government shortly after World War I he was asked to present several drafts of a constitution for the newly established Austrian republic. One of these drafts was, with a few changes, adopted as the Austrian Constitution of 1920. Professor Kelsen then had the honor and the valuable experience of membership on the Supreme Constitutional Court of Austria (1921-30). His theories of constitutional law, of the relation between law and state, which he developed during and shortly after this period, were based upon ample opportunity for observation of governmental operations. He was Dean of the Faculty of Law at Vienna in 1922-23. He went in 1930 to the University of Cologne, where he became professor of international law and jurisprudence and Dean of the Faculty. With the advent to power of Adolph Hitler he moved to Geneva, where he joined the faculty of the Graduate Institute of International Studies.

He came to Harvard in 1941, and while there he wrote for American readers a summary and in part a revision of his earlier legal philosophy. This volume, translated into English,[1] was published in 1945 as the first volume of the Twentieth Century Legal Philosophy Series, sponsored by the Association of American Law Schools. In that same year he became an American citizen, and accepted an appointment as professor of political science in the University of California (Berkeley).

The principal themes of Kelsen's writings have been his theories of law and the state, and his conception of international law. Yet he has written on legal sociology,[2] on Plato's changing conception of justice,[3] and on *The*

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[1] KELSEN, GENERAL THEORY OF LAW AND STATE (Wedberg's trans. 1945) (hereafter cited as GENERAL THEORY). The translation was made by Professor Anders Wedberg of the University of Stockholm.

[2] SOCIETY AND NATURE. A SOCIOLOGICAL INQUIRY (1943).

[3] *Platonic Justice,* 48 ETHICS 367-400 (1937-38).

Soul and the Law.[4] One or more of his writings has been translated into each of fourteen different languages.[5] His pure theory of law has been the subject of numerous scholarly and critical articles in many different countries.[6] Probably no legal-political philosopher of the present century has attained more world-wide fame than has Dr. Hans Kelsen.

In this brief article it is not my intention to try to explain fully Kelsen's Pure Theory of Law, much less his novel and related theory of the basis of international law, which is to be discussed in a separate volume.[7] Kelsen's fundamental philosophy of law was erected by means of a scaffolding of Kantian metaphysics, epistemology and legal philosophy, which seems to me unnecessary for the understanding of American readers. A full account of his legal theory would bring in certain features of which I cannot but be critical. Here I present what Kelsen, seen through the spectacles of an American-trained law-teacher, has contributed to the answering of certain fundamental questions about law.

The first of these is the relation of law to theories of what the law should be, on the one hand, and to the institutions, practices and mores of its society, on the other. The separation of law from each of these, begun by John Austin in 1832 and carried on by a succession of English writers, has been improved and clarified in some important respects by Kelsen's theory. If law be conceived to include the rules of the courts and legislature of the state, and if these officials hold office under a system of representative government with universal adult suffrage, then how can, or why should, any other individual's or group's conceptions of rightness or goodness or what-law-should-be be placed on a basis of equality with, let alone superiority to, those norms of human conduct in temporal matters which have been created by the duly constituted political authorities? Those who claim that such duly constituted norms are subordinated to or invalidated by some "higher law" either present their own conclusions as having superior validity, or they refer to some external *authority,* clerical, religious, philosophical or otherwise, as the basis for their pronouncements that certain political "laws" are *invalid, i.e.,* not laws at all. This type of argument rests, in the last analysis, on the pronouncement of some human authority other than those duly constituted by the process of representative government. Contemporaneous examples of this extreme position, the "ideal" conception of law, are not easy to give. It is represented, in the guise of constitutional interpretation, in some Supreme Court decisions of an earlier period which regarded the "natural law" of Adam Smith's political-economic theory or Herbert Spencer's survival theory as a kind of higher law written into the federal Constitution.[8] While Kelsen's theory asserts that a legal norm (rule

[4] 1 REV. OF RELIGION 357 (1937).

[5] A bibliography of his writings down to about 1944, included in GENERAL THEORY 447-458, lists 31 books and 84 articles, besides translations into foreign languages. The editors of this REVIEW have kindly compiled a list of Professor Kelsen's articles in English, most of which are available in a good law library. See *post* at . . . .

[6] A partial listing is set forth in GENERAL THEORY 458-465.

[7] FESTSCHRIFT, to be published by the Department of Political Science, University of California, University Press, 1952.

[8] See, *e.g.,* HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS (1930); WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW (1931).

or principle, judicial or legislative in origin) may be valid law despite its incompatibility with some such extraneous norm, his theory of the dynamic process of creating and applying law leaves a place for all such arguments, to be addressed to officials engaged in lawmaking or law-interpretation. In other words, one could accept most of Kelsen's conception of "pure law" and still be an ardent believer in a theory of natural law or natural rights, of Bentham's utilitarianism or Hegel's evolutionary-cultural theory, or any other ought-law theory, as the proper guide for the lawmaker. Aside from these arguments, the argument of terminology or method also supports the separation in thought of the test of legal validity from that of the rightness or goodness of a law.[9] It should be possible to ask as a meaningful question: "Is this law good or bad?"

On the other side, Kelsen's theory excludes, somewhat less rigorously, from his conception of law the institutions, practices and mores of the society whose political organization has duly constituted that law. Kelsen's "pure law" would exclude the pressures in society and in the legislative or other political processes, which contributed to bring about the enactment of a statute. A similar exclusion follows, I think, from the American professional conception of law. The Eighteenth Amendment and the Volstead Act were not treated as products of the anti-saloon league or of the religious bodies which brought pressure for their enactment, but were, until repealed, interpreted as duly constituted norms created by the representative process. Moreover, an offer to prove that a certain statute would not have been enacted but for the influence of a certain pressure group working for its own selfish ends, would be rejected as irrelevant to the question of the constitutional validity of the statute.[10] Likewise, Kelsen's Pure Theory of Law does not include a study of the consequences of law in general or of a law in particular, in society. These questions belong to the sociology of law, a separate discipline. Such a separation is a useful one. Often it is the task of law in a mature society to repress the customs or mores of a particular group in society: a recent example is the suppression of polygamous marriages in Utah.[11] Both the practices of trade associations in fixing prices to consumers and the practices of gangsters in pledging secrecy frequently are societal facts; they do not affect the validity of legal norms designed to overcome them though they may seriously limit the effectiveness of such norms.

However, Kelsen, as well as Austin, has to make at least one exception: A legal norm is not an unqualifiedly "valid" norm unless the legal order of which it is a part is on the whole effective in the society in which it is supposed to prevail. This effectiveness may or may not be due to the coercion of law;[12] Kelsen does not identify law with force. Nor does he, on the other hand, identify law with a mere paper régime. Because the validity of any

[9] In support of the view just stated, see the article by the late Professor Morris R. Cohen, *Should Legal Thought Abandon Clear Distinctions?*, 36 ILL. L. REV. 239 (1941).

[10] See Daniel v. Family Security Life Ins. Co., 336 U.S. 220, 224 (1949).

[11] See Cleveland v. U.S., 329 U.S. 14 (1946).

[12] See, *e.g.*, Kelsen, *Law, State and Justice in the Pure Theory of Law*, 57 YALE L. J. 377, 378-79 (1948). Austin's "habit of obedience" to the sovereign is a parallel concept.

legal norm in question is not dependent upon either its being enforced by officials or obeyed by laymen, one can ask, as a sensible question: "Is this law being enforced, or complied with?"

By distinguishing pretty clearly the imperative or professional conception of law from the ideal conception and the institutional conception, one can make it clear that both ideals and societal facts are raw materials for the lawmaker, for the jurist's art.

A second contribution of Kelsen's theory is that it provides a conception of law which includes the case law of judicial and administrative tribunals as well as the legislative norms of legislatures, administrative bodies and even courts (as to judicial procedure). The English imperative school ascribed all of these to a "command" or a rule of the "sovereign," as if one personified despot were uttering all of them. The Pure Theory regards legal norms as having two functions: to confer power on subordinate officials to create subordinate legal norms, and to indicate, at least in part, the content of those norms. Thus one may distinguish two classes of norms: power norms and decisional norms. Of course, the two are often combined. What *may* a court decide and what *must* it decide, or what *should* it decide in the exercise of its discretion, are distinct aspects of the judicial process. A good deal of any mature system of law is taken up with grants of and limitations on official power, in an ascending and descending hierarchy of power. These provisions are vital to the effective control of governmental actions from above, and to the protection of both laymen and subordinate officials from the tyranny of higher officials. Kelsen's theory is designed to trace the validity of every official act to the ultimate authority of the original constitution of the state. While constitutions have not been expressly framed on Kelsen's theory, it seems to me to present a useful analysis for most written constitutions, and to be less useful for a nation, such as the United Kingdom, which has no written constitution.

A third aspect of Kelsen's theory is that it presents us with a dynamic legal order rather than a merely static one. The law tends to be orderly through maintaining consistency between its various parts, through the broadening and simplifying of principles and conceptual compartments and, in short, through tending to become a logical system. A perfect and complete logical system, like Euclidean geometry (which is an almost perfect system), would be static: from the axioms, definitions and postulates, the theorems of the system can be (indeed, have been) deduced. Now the legal order does have a good deal of this quality of a static system.[13] However, the legal system is continually being modified by the acts of officials who not only apply or extend old norms but also create new definitions, assume new postulates and create new norms. This process is only in part a formal-logical one. Kelsen's theory, as is typical of all imperative theories of law, stresses the value of orderliness as an end of law; it may properly be said to overstress that value of law. Yet it provides a new conception of

[13] However, even in a mathematical system, the mathematician who seeks to develop it fruitfully must introduce new postulates from time to time.

orderliness different from that of either the geometry textbook or the lawyer's digest of judicial precedents.

As a fourth contribution Kelsen's theory of the legal order serves to answer the question: "Do courts make law?" An affirmative answer has been given to this question, since Bentham's time, quite generally by educated men outside the courtroom. Holmes even brought it into the official reports, but confined it to "molecular motions." Kelsen's theory states that every act of law-applying is also an act of law-creating. I take this to mean that every judicial application of a legal norm to a set of facts not previously adjudicated adds something to the denotative reference of a subject or predicate term of some legal norm and thus affects, though often very slightly, its connotation, *i.e.*, its significance for future cases. Or, to put it more simply, every judicial precedent creates at least a new analogy for an old concept, and some do a good deal more. Appellate courts have a moderate power to change law even though their power of innovation (at least as they conceive it) is small as compared with the "bulk and pressure" of the decisional norms that hem them in on every side.[14] Kelsen's theory does not reject the separation of powers; the judicial lawmaking function is, in all save a few aspects, subordinate to the legislative. Kelsen's theory seems to me to provide a useful analytic instrument for reconciling this principle of judicial subordination with the rejection of the Blackstonian theory, all too prevalent during the last century, that courts merely find and declare the law—with the rejection, in short, of what Professor Roscoe Pound has called "the slot-machine theory" of judicial decisions.

Finally, Kelsen's conception of the legal order serves to exemplify and in part to resolve that ancient jurisprudential paradox: the law must be stable, and yet it cannot stand still.[15] The stability of law does not consist merely in the rules and principles which prescribe lay conduct and are guides to judicial or administrative decisions, but also in the powers of officials to change the law and in the limitations on those powers. To say that every official act of law-applying and of law-creating is an "act of the will," as Kelsen does, is not to say that it is unpredictable, tyrannical, capricious; it is, on the contrary, subject to legal evaluation by reference to the norms, both of power and of guidance, which limit the official. In providing an orderly and rational account of the process of legal change in politically mature societies Kelsen has made a contribution toward relieving the tension between the "being" and the "becoming" of law.[16]

In the foregoing discussion I have left out some aspects of Kelsen's Pure Theory of Law which do not seem to me important or useful, and have almost completely iguored most of the arguments that he gives for his philosophical system. Professor Kelsen grew up intellectually in the old world of nineteenth century German philosophy, and in that world, it seems, one had to speak dogmatically in order to be heard at all. With us, perhaps, just the reverse is true. The American reader of Kelsen should take account of

[14] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 136-137 (1921).

[15] See CARDOZO, THE PARADOXES OF LEGAL SCIENCE 1-30 (1928).

[16] This tension appears in a good many discussions of legal theory. A recent example is, I think, Hart, *Holmes' Positivism—An Addendum*, 64 HARV. L. REV. 929, 930, 936 (1951).

this difference. In my effort to interpret some of his principal ideas to American readers I have not, I hope, done violence to his philosophical system. At any rate I am glad to have this opportunity to express in my own way some of his contributions to jurisprudence, to salute him on the occasion of his formal academic retirement and to express the hope that he will not soon retire from his writing on legal and political philosophy.

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