

Die Rechtsphilosophische Schule der Reinen Rechtslehre.¹ By William Ebenstein. Prague, Czechoslovakia, 1938. Pp. 180. (Rechts- u. Staatswissenschaftliche Studien, Vol. I. Ed. by Fr. Weyr and H. Kelsen.) With a preface by Frantisek Weyr.

The Philosophical School of the Pure Theory of Law by Dr. Ebenstein is a correlating presentation of the legal theories of a group of men who, during the last twenty-five years, have obtained a leading position in the jurisprudence of the civil law countries. Aided by a revived interest in the philosophy of law and drawing from the rich sources of a then flourishing intellectual life in Austria and Germany, this legal philosophy, founded by Hans Kelsen² and further developed by Adolf Merkl and Alfred Verdross at Vienna, Frantisek Weyr at Brno and many others, grew, under Kelsen's leadership, into a philosophical school, which is frequently called the Vienna School of Law or the School of Pure Theory of Law. Notwithstanding some differences and disputes among the members of this group, the similarity of their philosophical attitude, their co-operative efforts and their far-reaching agreement make a combined presentation of their views a meritorious undertaking.

The distinctive character of the School of the Pure Theory of Law is its program to purify legal science of all heterogeneous elements, to exclude all consideration of metajudicial factors and to conceive of the legal order as a purely normative system. It seeks to ascertain the unifying idea in the confusing multitude of legal phenomena and to establish the law as a consistent system of legal norms.

The first chapter of the present book deals with the *philosophical foundations* of the Pure Theory of Law. Like Rudolf Stammler, who inaugurated a new era of German jurisprudence by a formalistic philosophy of law based on Kantian concepts, Kelsen takes the foundations of his system from Kant's critical idealism. He accepts the methodological dualism of the *is* and the *ought* and the distinction between a causal and a normative science as two irreconcilable systems of knowledge. The first one is concerned with the sphere of factual phenomena, the nature of reality, which is described as sequences of cause and effect. The second has as its subject the precepts guiding men as rational beings, norms which tell what *ought* to be done.³ As a norm can never be based upon a fact, the sciences of the *is* and of the *ought* are separated by an unsurmountable abyss. Kelsen concludes that legal science is necessarily a normative science which can inquire only into the reason for the "validity" of a norm. Any inquiry into the factual conditions surrounding the materialization of a norm raises metajudicial problems which are beyond the limits of a normative science and belong properly to such causal sciences as history, sociology or political science.

Having established legal science as a normative system, the Pure Theory must look further for a criterion by which to distinguish legal norms from moral, aesthetic or other norms. Here, the Pure Theory encounters the problem of defining law, a problem of which Kant's remark that the lawyers still contend for the definition of the law still holds true. This criterion is found, again following Kant's categorical system, in a

¹ Some sections of this book are translated and published in Jerome Hall, *Readings in Jurisprudence* 156, 660, 811 (1938).

² For a résumé of the leading ideas of Kelsen's theory, see Kelsen, *The Pure Theory of Law*, 50 *Law Quarterly* 474 (1934), 51 *Law Quarterly* 517 (1935).

³ The same distinction is adopted by Austin, *Lectures on Jurisprudence* 86, 178 (5th ed. 1885); Salmond, *Jurisprudence* 24, 28 (9th ed. 1937).

formal quality of the norm which is the process of its creation by law making agencies. The legal norm is analyzed as a formal relation of facts and legal consequence which appears in the form of a hypothetical judgment. The legal order is merely an apparatus for the orderly exercise of force without any immanent ethical or political value, a means toward a purpose which transcends the law and is therefore beyond the province of legal science.⁴

The Pure Theory is thus devoid of any concrete or material principles. It consists in a system of purely formal categories and relations which shall safeguard it against the vicissitudes of time. However, whether the Pure Theory is successful in establishing the independence of legal science from factual considerations is a question which we shall consider later.

The second chapter of Ebenstein's book is devoted to a more detailed exposition of Kelsen's theory of the relation of *law and nature*. Legal science takes cognizance of a natural act or event only inasmuch as it bears a specific meaning in relation to the legal order. The selection of a relevant fact as well as the determination of its meaning presupposes the existence of a legal norm which, therefore, is an *a priori* category of legal thinking. This furnishes the author a basic argument against the behaviorists who seek to find the law in the actual behavior of certain officials without a means of determining its legal relevancy. Legal science is, therefore, antecedent to legal sociology or history because knowledge of the reality of law presupposes knowledge of the idea of law.

In the third chapter the author discusses the distinction between *natural law and legal positivism*. In line with Kant, Stammler, Radbruch and many others, Kelsen adopts the traditional distinction of the moral norm as autonomous order while the legal norm is heteronomous in that it derives its validity and contents from a superior authority. The legal norm is valid if it corresponds to a formal criterion regardless of its contents. While natural law can lack the elements of force, being founded on self-evident truths, the positive law must be a compulsory order, being ethically indifferent and having no other claim to validity than through a formally correct process of creation. The violation and enforcement of a legal norm is not an exception, but the legal order becomes actual only through a wrong which materializes the condition for the application of legal sanctions.

In this connection, the author of our book points to a similar statement by Holmes that the law is to be understood as made for the bad man who cares only for its material consequences. Yet, it is interesting that for Holmes this result follows from his realistic attitude toward the law, while in Kelsen's theory it is the consequence of the ideality of the legal norm which is materialized only through application of its sanctions.

If a norm of positive law is distinguished from natural law in that it derives its validity only from a certain process of its creation in conformity with a superior legal norm, the question arises what ultimately determines the positiveness of a legal order. If, according to Kelsen's premises, legal science must be confined to the consideration of purely normative phenomena and if the question of the validity of a norm cannot be answered by reference to what *is*, the Pure Theory evidently faces an unsurmountable difficulty owing to the necessity of explaining the positiveness of the ultimate

⁴ This positivistic attitude is represented by Austin, *op. cit. supra* note 3, at 172, 200, 214, 330; Salmond, *op. cit. supra* note 3 at 3; Holland, Elements of Jurisprudence 9, 41, 77 (10th ed. 1908).

legal norm which is at the top of the legal order. Kelsen seeks to solve this problem by a hypothetical basic or primary norm which ordains that certain persons shall have authority to create legal norms. The hypothesis of such a primary norm is a logical necessity in order to confer legal validity upon all inferior norms. This methodological artifice, however, cannot solve the question which one of two or more contending orders shall constitute the positive law. Here, Kelsen admits that the positiveness of the law depends on what is actually done and that only that normative order has the quality of positive law which corresponds to the actions of those who, as a matter of fact, determine the rule of the community. It is noteworthy that in the determination of the essential question as to the constitutive elements of positive law the Pure Theory must resort to phenomena of the factual world.

In the fourth chapter on *the unity of the law* Ebenstein presents what is probably the most significant contribution of the Vienna School. Here, the analytical qualities of the Vienna School find its greatest opportunities. In the Theory of Legal Gradation, as developed mainly by A. Merkl, the legal order is conceived as a process of gradual individualization of legal norms which begins with the primary norm and progresses step by step to the final materialization of the legal order by an act of execution.⁵ The positive constitution of a state represents the first application of the primary norm—the constitution in a logical sense—and at the same time creates legal authority to set inferior norms. The legislature materializes the constitution by creating more concrete norms, usually statutes, which in turn delegate other agencies to establish legal relations and so forth. Each step on this ladder of norms constitutes a case of application of a higher norm and creation of a norm of lower rank. The Gradation Theory thus assigns every legal phenomenon a definite place in the legal order and explains its functional significance. A private contract, for instance, is a concretization of a general norm delegating authority to private persons to regulate certain affairs and an act creating a more concrete norm which henceforth governs the relations of the transacting parties and determines the law to be applied by the court. A judgment or administrative order is an application of a rule of law, be it a common law principle or a statute or a contract, etc., and also the creation of an individual norm commanding the parties to act in a certain manner and authorizing certain other persons to apply the legal sanctions.

This process of materialization of the legal order stops at the final execution of the legal command by voluntary performance or by force which constitutes a mere application of law, just as the primary norm at the beginning of the ladder is an original creation of law which cannot be conceived as applying any higher norm.

The Theory of Legal Gradation is thus able to comprehend every legal phenomenon as a part of a dynamic legal order. Yet, in showing the double functions of all intermediate legal agencies, the Vienna School transgresses its Kantian foundations and reveals the influence of Hegel's dialectic method.

In this connection, we anticipate a problem discussed by Ebenstein in a later chap-

⁵ This conception of the legal order surpasses other systems of analytical jurisprudence inasmuch as it conceives the legal order as a dynamic and never completed process of law making. Austin's jurisprudence contains a crude system of a hierarchy of legal norms. The same approach, in a highly developed manner, is represented by Hohfeld's system of jural relations applying the methods of normative jurisprudence in the analysis of certain legal phenomena.

ter which is important for an understanding of the judicial function. The Vienna School maintains that a normative process and particularly a judgment is never completely determined by the determinating higher norm, but that the latter is never more than a frame within which there are several possibilities of its execution. The higher norm being necessarily more general, the judge has always a certain discretion in materializing its command, just as the legislator has a discretion in applying the constitutional norm. Since the choice among the several possibilities is an act not of logical thinking but of volition, the judgment and, according to the Vienna School, every other normative act is determined by non-legal factors. The Pure Theory admits the constant influx of factual elements during all steps of the process of the law, whereby every legal phenomenon becomes a synthesis of normative ideality and social reality.

In the fifth and last chapter, Ebenstein discusses certain results of the Theory of Legal Gradation. Its application to the analysis of the forms of government produces valuable insights into the real nature of a governmental system. While the traditional distinction of forms of government is based on the method of general legislation, the knowledge that the acts of the legislature are only steps in the process of the materialization of the legal order of the state directs attention to the lower agencies that participate in the making of the law, *e.g.*, judicial and administrative authorities. If democracy means participation of the governed in the government, the degree of actual democracy must be measured also by the representation of the people in the processes of administrative and judicial law making. Applying this method of analysis to the German Republic as it succeeded the monarchy, Ebenstein remarks that "judiciary and administration were taken over without many changes in personnel or organization, and both have proved that a state is still far from being a democracy if only its statutory legislation proceeds according to democratic methods. On the other hand, England and the United States demonstrate how important a role is played by a democratic organization of judiciary and administration in the maintenance of democracy."⁶

Another interesting part of this chapter is devoted to the application of the Theory of Legal Gradation to the doctrine of the separation of powers. While admitting that this doctrine can be a principle for the organization of a government, a functional distinction of legislature, executive and judiciary is considered untenable. The functions of the so-called divisions of government are not merely blurred, but each performs in a normative sense the same function of both creating and executing law. While there is no qualitative difference, the separation of legislation and execution can be understood as a relative differentiation according to the formal organization of the state, in the language of Jennings as a mere "distinction of machinery" or, with Carré de Malberg, as a distinction according to the degrees of formal power. Legislation means the process of law making which is closest to the constitution and execution comprehends the norm-creating processes for which the norms created by the legislature represent the immediate and the constitution the indirect basis. Judiciary and execution can be distinguished only on the basis of their organization which establishes the courts as formally equal and independent authorities while executive agencies are in a relation of over- and subordination to each other.

This criticism of the doctrine of separation of powers affords an excellent illustration of the peculiar approach of the Pure Theory. If regarded as elements of a purely

⁶ P. 144.

normative order, the separation of powers becomes a mere formal distinction without substantive meaning. Yet, it was conceived as a political idea covering certain processes of the state as a social reality and was intended to establish a system of political checks and balances.⁷

In the final phase of his discussion, Ebenstein points to the moment of indeterminacy and therefore unpredictability of the law which results from the volitional element in all steps of the legal process. Emphasizing that the Pure Theory includes the unknowable as an inevitable part of the legal order, the author quotes a significant statement of Merkl: "The science of law as a science of legal norms does not compromise itself when it says that it does not know what is the law for a particular case; after all, it does know it in rendering the unequivocal and doubtlessly correct judgment: law is what the law-applying authority on the basis of the legal norm recognizes as law."⁸

This statement is, of course, a contradiction of the traditional theory that the legal norm as a rule of human conduct must possess certainty and if lacking this quality does not constitute positive law. Here, one remembers Holmes' remark, also quoted by Ebenstein, that law is nothing but the *prophecies* of what the courts will do. The Pure Theory recognizes the inherent dependence of the legal process on social and other factual phenomena. The purity of the theory consists only in confining its scope to the formal structure of the legal system and excluding the consideration of all other elements which enter into the positive order of the law.

The time has not yet come for a full appraisal of the historical importance of the Pure Theory. Yet it seems that it represents a climax of an era of analytical jurisprudence foreboding in its own system the rise of a new conception of legal science.

The foregoing review was necessarily limited to some important points of the Pure Theory which is almost completely presented in Mr. Ebenstein's book. The only principal topics which the author has omitted are the Vienna School's theories of the state and of international law. Mr. Ebenstein's book, however, is more than a scholarly presentation of the Pure Theory of Law. His many references to related and parallel thoughts in German, English, American, French and Italian legal literature make it instructive and stimulating reading. It is hoped that a translation will make it accessible to all American readers interested in jurisprudence.

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American Foreign Relations. By John Mabry Mathews. New York: D. Appleton-Century Co., 1938. Pp. xvi, 766. \$4.00.

This is a "revised and enlarged edition" of the same title which appeared in 1928 and which was in turn a greatly enlarged revision of *The Conduct of American Foreign Relations*, published in 1922. The book is divided into two parts with fifty pages of source material in appendices. Part I, consisting of eleven chapters, is concerned with a general statement on international relations and the development and content of American foreign policy. Part II, consisting of twenty-one chapters which constitute more than half of the book, is devoted to the conduct of and the machinery for carry-

⁷ See Sharp, *The Classical American Doctrine of the "Separation of Powers,"* 2 Univ. Chi. L. Rev. 385, 434 *et seq.* (1935).

⁸ P. 180.

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