
At the end of 1939 the Association of American Law Schools decided to publish again, as twenty-five years ago, a series of translations of outstanding European works on philosophy of law. The committee appointed for this purpose started its work at the beginning of 1940. The book under review is the first volume of this series. Originally this reviewer had been asked by the chairman of the committee, Professor Jerome Hall, to enter into correspondence with Professor Kelsen in Geneva, concerning the choice of works to be translated and published. But after Kelsen’s arrival in this country in the summer of 1940 it was decided that the principal parts of this volume should consist of an entirely new work.

The present volume contains in an appendix Kelsen’s well-known study of Natural Law Doctrine and Legal Positivism. Originally published in German in 1928, it is now presented in an excellent English translation by Wolfgang H. Kraus, now at the University of Michigan. But the principal part, the “General Theory of Law and State” was written, in part in German, in this country and translated by Anders Wedberg of the University of Stockholm.

The book therefore offers more than a mere translation; it gives the latest and, so to speak, definitive version of the “Pure Theory of Law” by its creator. It is written as an exposition of the author’s ideas, almost without footnotes, references, and quotations. A list of publications gives Kelsen’s own writings, the translations of his works and the most important studies on the pure theory of law.

It is not possible within the framework of a review to give a full report on the ideas presented, nor is it necessary, for Kelsen’s theory is sufficiently well known. What this reviewer intends to do is to show how far this latest version of the “Pure Theory of Law” is different from Kelsen’s earlier statements of his ideas in German and French. The author himself states in his preface two differences: the “Pure Theory of Law” has been so reformulated as to bring it near to readers who have grown up in the traditions and the atmosphere of the Common Law, and in such a way as to enable it to embrace the problems and institutions of English and American law as well as those of the Civil Law countries for which it was formulated originally.

The whole volume has been given an easy touch; it reads, indeed, more easily than Kelsen’s works in his mother tongue. Purely philosophical discussions have been avoided; it is significant that in the whole work the name of Kant is mentioned only once. Examples from Continental European law and references to or polemics with Continental European literature are wholly excluded. Instead, examples are taken from the American Constitution; a few American cases are quoted and theoretically analyzed. As to literature, Blackstone, Holland, Jerome Hall, Roscoe Pound, Holmes, Gray, Bingham, Llewellyn, and, as far as international law is concerned, Oppenheim’s standard work are quoted, in order to build up the author’s ideas in harmony or in polemics with their opinions.

Of particular importance is Kelsen’s analysis of Austin’s Analytical Jurisprudence. It is hardly necessary to say that Kelsen’s theory has been developed in complete independence from Austin. But in this volume Kelsen shows, by a critical analysis of many parts of Austin’s “Lectures on Jurisprudence,” that Austin’s theory is in the spirit of the “Pure Theory of Law,” but does not go far enough. Austin is trying to reach a
normative attitude, but is still unable to cut away from the sociological approach; he is, particularly, unable to reach and state clearly the fundamental concept of the legal norm, and he fails to do so because of a basic error in defining the legal norm psychologically as “the command of a political superior to a political inferior.”

Equally interesting is Kelsen’s critique of the American sociological jurisprudence and the realistic school. He admits that a sociology of law, as part of sociology, is fully justified. But the so-called “sociological jurisprudence” has so far not made any attempt to investigate the causes of the efficacy of a certain legal order, a genuine problem of the sociology of law. To establish a sociology of justice would be another problem. But to present “sociological jurisprudence” as a science of law is not tenable. Cohen has said that, “The sociological jurists, even if successful, would give us a descriptive sociology, not a science of law.” This reviewer remarked in 1934 that the talk of the “observable behavior of judges” introduces the whole normativism in disguise, for how do the realists know that a man is a judge? Kelsen states that, in spite of the talk of an observable behavior the realists must come to the same conclusions as the normativists, because “Sociological jurisprudence presupposes the juristic concept of law, the concept of law defined by normative jurisprudence.”

The fact that Kelsen’s theory embraces in this book the particular problems and institutions of English and American law means more than an adaptation to American readers: it has vital significance for the “Pure Theory of Law” itself, because it proves this theory to be a general theory of law, fitting the Common Law as well as the Civil Law.

But a third difference of this work, as compared with Kelsen’s previous exposés, is of still greater importance: the clarification and, sometimes, change of positions previously established.

A salient feature of this work is its pervasion in toto by international law. The volume is thus not only a general, abstract theory of law, but also a special, concrete theory of the positive international law of the present day. Kelsen’s contributions to the theory of international law are very great. There are some errors as to the positive law itself—e.g., the duty of a previous declaration of war is not, as Kelsen says, a “time-honored rule of common international law,” but on the contrary, strictly a particular treaty-law rule. Kelsen also states that the Covenant of the League requires that each member must be a “fully self-governing State,” whereas this is only a requirement for admission, and even for admission it is enough to be a fully self-governing dominion or colony. Apart from that, there are a number of theoretical constructions with which this writer disagrees as not in harmony with positive international law. These include Kelsen’s interpretation of breach of blockade and the carrying of contraband as a delict for which international law provides direct sanctions against individuals; Kelsen’s statement that municipal law can create sovereign states (Newfoundland has under the Statute of Westminster the same legal status as Canada, yet it has not become a sovereign state); Kelsen’s definition of the “people” of the state, his statement as to the identity of a state in international law, his theory of recognition, and his pages on bellum justum. And certainly the theoretical construction must...
fit the positive law. But it is not possible to go into details here; this must be left for
a separate article.

Kelsen's work, finally, contains important clarifications and, to a certain extent, in-
novations or changes in the pure theory of law itself. We may point here to the im-
portant pages dealing with the "secondary norm,"8 or with the conception of legal
right.9 Basic importance is given—and this is a relatively recent development in Kel-
sen's thought—to the ascertaining of facts by the competent legal authority.10 Also
noteworthy are Kelsen's treatments of customary law,11 the problem of reparation,12
the so-called "gaps" of law,13 and law as a dynamic system of norms.14 The whole
system is now divided into two parts: Nomostatics and Nomodynamics.

Of particular importance seems his clarification of the relation between validity and
efficacy of a legal norm, hitherto perhaps a weak spot in his theory.15 This relationship
is now thus defined: efficacy is a condition of validity—a condition but not the reason
of validity. Kelsen also clarifies the relation between law and force. He says law is a
coercive order: in an advanced legal order the State monopolizes the use of force, and
law is the organization of force. Whereas hitherto in Kelsen's system force could ap-
ppear only as a sanction or as a condition of a sanction (as an illegal act), it is now ad-
mitted that coercion can also legally appear apart from sanction, e.g., coercive acts
by administrative organs, such as the demolition of buildings to stop the spread of fires.

As to the "basic norm," Kelsen now clearly states what Verdross and this writer
have defended long ago, namely, that the choice of the basic norm cannot be made
arbitrarily by the jurist. It is a gnoseological condition for legal cognition, "the neces-
sary presupposition of any positivistic interpretation of the legal material."17 It fol-
lows that the cognition of law is dependent on an act of volition. For example, an
anarchist cannot be logically forced to recognize any empirically given acts as law.
That is why in a recent American article it was stated that "Kelsen's basic norm is a
twentieth century version of Rousseau's contrat social." On the other hand "the basic
norm, in a certain sense, means the transformation of power into law."18 The section
on "legal value judgments" is new. In it "lawful" and "unlawful" are treated as
specifically juristic and objective values, whereas moral and political values and values
of justice are subjective, not verifiable, and based on ideologies.

The philosophical foundation of the "Pure Theory of Law" has largely remained
the same: it is normative theory, a theory in terms of oughtness, not of isness; it has a
strictly anti-metaphysical tendency; it is based on relativism. The pure theory of law
has no love for phenomenology; it is not a mere juridical logic; there is no special
juridical logic; Kelsen uses the general logic only in application to judgments of ought-
ness, not isness. The pure theory of law tries to use for the science of law the modern
principles of science in general. The "hermetic unity and completeness of the legal
order" is merely a consequence of the logical axiom of non-contradiction: "X ought to
be" and "X ought not to be" cannot be supposed to be valid at the same time.

8 Pp. 60-61.
9 Pp. 75-90.
10 P. 136.
13 Pp. 146-49.
14 Pp. 113-14.
16 P. 279.
17 P. 116.
18 P. 437.
19 P. 47-49.
Yet the philosophical foundation of the "Pure Theory of Law" seems to this writer to have been somewhat changed and weakened in the present work. Kelsen's foundation since his magnum opus of 1911 was the strict Kantian distinction between the worlds of oughtness and isness, between a physical law of nature with its "must" and a normative rule of law with its "ought," between nature and society, between causality and legal imputation. But in the present work Kelsen has taken over some of his new formulations, expressed in his sociological inquiry, "Society and Nature." He now accepts the newer theory of natural scientists, according to which causality is no longer a "must" but merely a probability. This naturally weakens the basic conception of the two worlds of facts and of norms. It may also be asked: What about the new "non-Aristotelian" logic, for which X is A and non-A?

Kelsen, while defending a monistic conception of law, retains in this work the dualism of nature and society, causality and legal norms. But in his work, "Society and Nature," he admits a development toward scientific monism, according to which society is scientifically a part of nature, so that the dualism of society and nature would be replaced by the dualism of reality and ideology; then law would become an ideology of power and the "Pure Theory of Law" a systematic exposition of the ideology of power. And what is an ideology? Kelsen nowhere clarifies this problem.

Kelsen's "Pure Theory of Law" has won all over the world enthusiastic followers, and has created earnest and benevolent critics and bitter enemies. Many of these enemies simply do not understand the "Pure Theory of Law," others do not want to understand it and misrepresent it. Finally, some of the most outspoken, and at the same time most intelligent, enemies, like Carl Schmitt, are enemies purely from political, not from scientific, motives.

But the "Pure Theory of Law" has also produced many divergent interpretations among ardent followers of Kelsen. The Argentinian scholar Carlos Cossio sees in the "Pure Theory of Law" the discovery of a new and particular "juridical" logic and nothing but juridical logic, not a science of law; and the Colombian scholar Nieto Arteta, in spite of Kelsen's personal strong stand against this interpretation in a conversation with him, believes that Cossio is right.

Subtle remarks have recently been made to the effect that one must distinguish between the theory of Kelsen and his philosophy, in which this theory has been borne; disagreement with Kelsen's philosophical presuppositions in no way diminishes the lasting value of his theoretical achievements. This approach was taken from fundamentally different points of view. Bergmann and Zerby of the University of Iowa, starting from the standpoint of scientific empiricism, find Kelsen "still deeply steeped in German metaphysics," and hold that his theory "must be freed from its metaphysical trappings."21

Legaz y Lacambra, the eminent Spanish philosopher of law and ardent theoretical follower of Kelsen, holds that, as a consequence of Kelsen's anti-metaphysical relativism and his negation of absolute values, his formal conceptions of oughtness and of the legal norm lack ontological consistency. Kelsen is a relativist, and only as a relativ-

20 Kelsen, Society and Nature 266 (1943).
ist is he a democrat. But in spite of his anti-metaphysical relativism he desperately tries to save the absolute value of science and scientific truth—the eternal dilemma of any relativistic philosophy. The Spaniard speaks of the bankruptcy of neo-Kantianism and sees in the “Pure Theory of Law” philosophically an epigonal product of a period of disillusion, a typical phenomenon of an era of spiritual crisis and of a period which no longer believes in the liberal essence of democracy, but wants to save it as a method of coexistence. Whereas for the Iowa authors Kelsen is still too metaphysical, for the Rector of the most Catholic University of Santiago de Compostela the fault is that Kelsen is an agnostic.

But the Iowa authors and the Spaniard give high praise to the lasting value of Kelsen’s theoretical achievements. The Iowa authors, “deeply impressed with the significance of the Pure Theory,” praise Kelsen’s “profundity, originality and erudition,” his “admirable lucidity and precision,” the “greatness of his individual achievement.” And the Spaniard states that Kelsen’s theory is a product of intrinsic greatness which will remain definitively incorporated in the thinking of jurists, because he has given to legal science a series of precious instruments the handling of which the science of law can never renounce without renouncing itself.

For this reviewer, who had the advantage of following the development of Kelsen’s theory step by step, it is fascinating to compare his magnum opus of 1911 with his magnum opus of 1945. In this span of more than thirty years of unceasing work by a man of genius his theory of law has gained a world-wide appeal. Kelsen, still in the full vigor of his creative work, has not only lived to see the importance given to his work everywhere, but also to see—what is even rarer—that the historical position of his work and his own position as one of the greatest jurists of all time is firmly and securely established.

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