

But there are also weighty political arguments against nipping in the bud the promising beginnings of a revival of the feeling for law in a country which, whatever plans one may hold today, will one day again occupy an influential place in the world.

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*El Derecho en el Derecho Judicial.* By Carlos Cossio. Buenos Aires: Editorial G. Kraft Ltda., 1945. Pp. 252.

Carlos Cossio first presented a systematic statement of his theory of law in an earlier book published in 1944.<sup>1</sup> In this, his second book, compiled from a series of lectures given before large audiences of Argentinian jurists and judges, Cossio goes further in the development of his theory. In his previous book he had introduced the "phenomenology of the judicial decision," and the present book is entirely devoted to an amplification of this subject.

The author starts from the three fundamental modern philosophies which form the bases of his theory, those of Husserl, Kelsen, and Heidegger. Applying Husserl's phenomenology to the problem of the essence of law, he finds law to be "human conduct in its inter-subjective relationship." Law concerns the ego, hence the name "egological theory of law" for his doctrine. Law is "living human life," and therefore the science of law is an empirical science, a science of reality and the object of this dogmatic science of law is human conduct, not norms. But just as every science needs logic, so does the law, and of necessity it must work with concepts. At this point Kelsen's "pure theory of law" is introduced but Cossio reduces it to a mere formal juridical logic, indispensable, it is true, but not the science of law itself. Kelsen's great merit, according to Cossio, is in having discovered a new logic applicable to the egological theory of the science of law, namely, the logic of "oughtness." The objectives of a formal juridical logic are the norms, representing human conduct. Human conduct cannot be neutral to values and therefore values cannot be eliminated from law, but if law is truly a science, it must approach its objectives in a spirit of neutrality and impartiality. Hence, it is the "positive values" given to the jurist in a positive legal order which must be taken into account rather than the "ideal values" assignable to the realm of politics and metaphysics. Heidegger's philosophy of life, which is next introduced, stresses human conduct as the full life of man as distinguished from his mere biological life, a phenomenon of liberty, not of necessity, occurring in existential time as opposed to chronological time.

The judicial decision is a fact of juridical experience, indeed, for Cossio, the primary fact of juridical experience. Statutes are only possibilities in the abstract which come to life only when individualized and made concrete in the decisions of the judge. To Kelsen, the judicial decision created by the judge is a concrete, individual norm; for Cossio it is juridical experience merely represented in thought by a norm. Like all juridical experience, the decision is made up of three elements: the formal-logical and necessary structure (e.g., the statute), the material-contingent element (the "circumstances of the case"), and the juridical valuation, which is both material and neces-

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<sup>1</sup> See this writer's review of Carlos Cossio's *La Teoria egológica del Derecho*, 12 Univ. Chi. L. Rev. 226 (1945).

sary. The judge is not outside the law but within it. He is never, under any system of law, a mere syllogistic automaton; he always creates law in applying it and therefore has immense power which rationalism, pursuing the chimera of legal certainty, tried to hide.

Cossio next presents a philosophical survey of the different schools of thought dealing with the problem of interpretation, namely, the intellectualist and voluntarist schools. He arrives at Kelsen's conception, according to which the judge exercises his will but restricted to the possibilities which the law leaves open.

The author next raises the following questions: How does the judge choose among the different possibilities so as to reach a judicial decision rather than an arbitrary, subjective, personal, and capricious opinion? What obstacles does the legal order set up against such tendencies? How does the legal order reconcile the necessarily immense power of the judge with the postulate of the basic juridical value, legal certainty? The judge, answers Cossio, reaches his decision according to his knowledge and conscience. The whole problem of interpretation has up until now been falsely stated. It is not norms but human conduct which the judge has to interpret and human conduct cannot be interpreted by mere logical deduction but only by comprehension. What the judge does is interpret human conduct through norms, which are the concepts with which we evaluate human conduct.

The judge considers not only the circumstances of a case but also the statute; he has to decide whether a particular statute is "applicable" to the case before him or not. It is this necessary valuation which gives the judge his great power and which makes it impossible to predict decisions with mathematical certainty. But this power is not unlimited. First, there is the hermetic completeness of the legal order; if the judge decides that a particular statute is not applicable he must apply another rule of law. Thus if he decides that a certain transaction is not an agency contract he will decide that it is a sale. Further, the judge must interpret objectively. In considering the juridical value of justice it is not his conception of justice but the positive value of justice embodied in the positive law which is important. The fact that juridical experience happens in existential time explains that judicial interpretations can change. A court in overruling a precedent values the harm done to legal certainty, the lowest but most powerful juridical value, against the advantage of realizing justice, the highest but less powerful juridical value.

Cossio ends his book with a perusal of the revolutionary effects of his theory, citing many Argentinian jurists who have adopted his theory and the growing number of his disciples. He exhorts his readers to join him in his efforts to create an independent and original Argentinian philosophy of law.

There is no doubt that American lawyers will agree with many features of Cossio's theory, especially with his emphasis on the judicial decision and the law-creating function of the judge. But he is not an adherent of "sociological jurisprudence" nor of the "realist school." His theory is opposed to both rationalism and empiricism. Cossio is a normativist. He stems from Kelsen and his own theory is a development, not a negation, of Kelsen's "pure theory of law." What he wants is, in his own words, "to go beyond Kelsen, without leaving him." Starting from Kelsen's "logical normativism," he arrives at his "valuating normativism." But two radical differences separate him from Kelsen: the interpretation of the "pure theory of law" as mere formal juridical logic and the conception of the dogmatic science of law as an empirical science. A

critique of Cossio's theory is therefore bound to inquire into the correctness of these two radical differences. Kelsen himself categorically denies the interpretation of his theory by Cossio. Cossio answers that the author's own meaning cannot be decisive—Columbus discovered America, not a new route to India. But we need not go further into this problem because it is closely connected with Cossio's conception of the dogmatic science of law as an empirical science.

Kelsen's goal was to create a science of law by liberating the traditional jurisprudence from the foreign elements of natural law and natural science. Now, Cossio, who only considers the *positive* values of a legal order, remains strictly within positive law with no excursion into metaphysics. But the moment he considers human conduct as the object of the dogmatic science of law, is he not bound by, or, at least, in danger of arriving at, a sociology of law? Certainly, this is not his intention but, as he himself points out, the author's own opinion would not be decisive. Cossio defends himself vigorously against the "sociological reproach." True, he says, his theory and sociology of law both take human conduct as their object but the object and methods are entirely different. Sociology of law applies the method of explaining on the basis of the principle of causality; his theory studies human conduct through the comprehension of spiritual meanings. The jurist is not interested in a causal explanation of human conduct; he is interested in the significance of human conduct. Human conduct is not viewed by his theory, he says, as a part of nature but as the full life of man; it is viewed phenomenologically, or from the point of view of the philosophy of life.

To this writer it seems that one can disagree with Kelsen's philosophical convictions. One can say that the juridical approach toward law is neither the only scientific nor a self-sufficient approach; one can criticise Kelsen's relativism and skepticism in seeming to imply that a sociological cognition and a valuating critique of the law are hardly possible on scientific lines. But all that does not alter the fact that in his "pure theory of law," in which Kelsen voluntarily restricts himself to the juridical approach, Kelsen is right. *For the jurist* law is a system of norms. The juridical approach, as Kojouharoff stated, deals with verbal propositions which are capable of a formal approach *only*. As the great English jurist Holland said, "Jurisprudence is the formal science of positive law."

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**Breaking the Building Blockade.** By Robert Lasch. Chicago: The University of Chicago Press, 1946. Pp. xiii, 309. \$3.00.

Though but a few months have passed since the appearance of Mr. Lasch's excellent volume, much has happened in the housing field. Or to be more precise—much has been allowed to happen and much more undone. The OPA has been scuttled, the Wagner-Ellender-Taft housing bill stymied in committee, and controls vital for the channelling of materials and labor into home construction have been removed. The Veterans Housing Program itself, inaugurated so vigorously by Mr. Wyatt and supported so enthusiastically by the White House at one time interested in "no little plans," has been abandoned.

With the departure of Mr. Wyatt from the Washington scene, it should be plain to all that our housing policy is "building-as-usual." Mr. Wyatt said that that wouldn't

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