

BOOK REVIEWS

What Is Justice? By Hans Kelsen. Berkeley: University of California Press, 1957. Pp. 397. \$7.50.

Hans Kelsen's farewell address as an active member of the University of California Faculty is a fitting introductory chapter to the collection of fifteen essays which comprise his latest book. In keeping with his persistent legal positivism he answers the question "What Is Justice?" by advising his colleagues and students that a rational definition is not to be had by men. The book is indeed, as is appropriate for one deeply imbued with the Kantian critical spirit, dominantly an essay criticising earlier attempts to find such a definition; Kelsen analyses the failures, as he sees them, of such attempts in the Scriptures, in Plato, Aristotle, and both the classical and modern "dynamic" formulations of natural law. In significant contrast with Kant, Kelsen occupies the first half of his book with the "negative" (Kant would say, the "dialectical") aspect of the discussion—the refutation of the claims of "pure reason." All of the rational attempts to find a satisfactory account of Justice commit, in one way or another, the fallacy—"metaphysical" or "naturalistic"¹—of arguing from what Is to what Ought to Be. Were this influence possible, Kelsen contends, a rational account could be achieved, for one then could appeal to the "facts." But any such inference from "is" to "ought" is unsound. Ultimately, one must rest his normative position on a preference directly felt. One's ultimate norm of conduct must be, Kelsen insists, subjective and non-rational.

The last eight essays might be grouped under the title "The Study of Law within the Bounds of Pure Science Alone"; they include such essays as "Value Judgments in the Science of Law" and "The Law as a Specific Social Technique" and define with precision and care that "pure" study of law which it has been Professor Kelsen's special concern to promote. Clearly the refinement and clarification of that theory is as pleasant to Professor Kelsen as it is congenial to his great faculties of analysis and learning. Yet it must be noted that one of the new essays in the volume bears the title "Why Should the Law Be Obeyed?" (Pp. 257–65.) Kelsen is not content in this summary volume to leave unconsidered the problem of how the "scientific" study of law may touch upon the "normative" assessment of the law's relation to conduct. If, like a modern critical philosopher, he starts off by rejecting

¹ I follow the terminology of G. E. Moore, in *Principia Ethica* in this review.

the unsuccessful "flights of reason," still he undertakes his own ascent in terms which are, he claims, "true to science."

Why does Kelsen begin on the dominantly negative note, by a recital of history's rationalistic errors, rather than with the factual material available in the scientific study of law? The answer is, I think, to be found partly in his assessment of the present condition of "the field," the persistence or resurgence of conceptions of justice which are supposed to provide an objective measure for the law and also a conceptual instrument for study of the law. Such erroneous notions must be eliminated. And yet in their very elimination Kelsen shows a familiar crusading zeal. "It is a peculiarity of the human being that he has a deep need to justify his behavior, that he has a conscience." (P. 8.) And Kelsen himself clearly feels the need to find the normative principle which can underlie the law, though not at the cost of corrupting the scientific study of the law. I propose to raise the question, in considering the book as a whole, whether in his enthusiasm for science he has not improperly rejected or repressed his concern for justification.

The problems of the moral justification of the law have been made especially sharp in our time by recurrent constitutional controversy over a citizen's, or an entire section of the country's, right to challenge agencies of government. Citizens rebel against allegedly improper demands of congressional committees; others announce they will not pay a tax which goes to purposes they disapprove; others proclaim the superiority of a local "way of life" to nationally ratified procedure. More generally, in the world-wide opposition between East and West, there is on both sides a propensity to appeal, beyond the conflicting systems of law, to ultimate normative principles by which one's own side can be shown to be more nearly "right."

The common-sense account of such distinctions between moral and legal justifications is, while perhaps unreflective, tolerably definite. One who declines to answer the questions of a congressional committee is considered eligible at least for "moral," if not for "legal," standing; and though we may hope in time to close the gap between the two, still it seems likely that in any foreseeable future men of moral stature will on occasion find themselves obliged to dissent from the official coercions of the law. Public opinion on this topic, as on most, lives along in unadjusted contradiction. Not infrequently, we admire such objectors—and we punish them—and we are uneasy.

Professor Kelsen advises us, if I understand him, to forget our uneasiness, while maintaining both our admiration and our punishing ways. For in his view, our ultimate values are beside the point when legal judgment is involved. Our likes and dislikes are one thing; our attitude toward legality is something else. The grounds of objection to law can be scientifically pursued, for Kelsen, only as an essay in psychology, externally. Internally, as a matter of judgment in respect to values, a man stands alone, privately preferring, responsible to no one else (cf. p. 5). Indeed, any community of values be-

tween him and others is accidental. And if one pushes the position to its logical extreme, what one ultimately values at any one moment is not relevant to what he values at another moment.

Common sense takes the view that the law should be obeyed because it is just and, though here the common judgment may be less clear, only in so far as it is just. In serious cases involving life and liberty, says common sense, resistance to tyranny is obedience to God, or to Justice. But this Kelsen cannot admit. One must not, he contends, look beyond the law to find why, or how far, it should be obeyed. Rather, he argues,

To the question why we ought to obey its provisions a science of positive law can only answer: the norm that we ought to obey the provisions of the historically first constitution [which, on Kelsen's argument, underlies all present laws] must be presupposed as a hypothesis if the coercive order established on its basis and actually obeyed and applied by those whose behavior it regulates is to be considered as a valid order binding upon these individuals; if the relations among these individuals are to be interpreted as legal duties, legal rights, and legal responsibilities, and not as mere power relations; and if it shall be possible to distinguish between what is legally right and legally wrong—and especially between legitimate and illegitimate use of force. [P. 262.]

The law ought to be obeyed, because it is the law—the law as revealed by the objective analysis of Kelsen's "Pure Theory." But why does its being the law involve this obligation? We ought, we are told, to obey it, in order to confirm the hypothesis that the law be considered a valid order binding on individuals. If we do not obey it, we contribute to that extent to depriving it of that effectiveness which is the necessary condition of any valid legal order. (Pp. 262–63.)

It is characteristic of Kelsen's procedure to hew with passion to the "objectively ascertainable facts" and to avoid the confusion of normative and descriptive categories. He pursues his search for the facts with thoroughness, consistency and learning. And yet I must say that I find that a study of the very facts he recites produces an account of legal obligation somewhat different from his. His "facts" are, I think, themselves a good deal of an abstraction.

If we consider the case of one who objects to a law on the grounds of conscience, we may suppose that Kelsen will say to the objector: "Of course, you have no duty higher than your own ultimate preference here, and so, ultimately, you may do as you like. But if you protest against, or disobey this law, you are weakening the effectiveness of law generally." To this it seems to me that the objector could reply on two levels. He could point to what he considers internal inconsistencies in the legal system, or he could note the acknowledged appropriateness, at all times, of advocating even fundamental changes in the whole system. In the United States he could observe that even the Supreme Court has reversed itself.

The objector can in the first place retort that he aims to strengthen, not weaken, the effectiveness of the law in general by his resistance to what he regards as a seriously bad law. He may say, "To comply with this committee, this tax, this education requirement, is to weaken people's respect for law. To adhere literally to silly or wicked laws breeds indifference to, or hatred of, the law." That is, the objector may claim that in the general legal system there is real difference of quality. He wishes, he claims, to help bring the sour sections of the law into consistency with the sweet. And so he chooses to apply "negative resistance" to the "sour sections." The objector's view is that the law is not one single and self-reinforcing thing but that it tends to be, especially during situations of stress, an expression of conflicting tendencies. Thus the "fact" of the situation, to which a "positive" analysis must attend, is that one must reckon with different aspects of the law—as, in current civil liberties cases, with the First Amendment as well as with the investigative authorization of a congressional committee.

The law is, in its serious aspects, always subject to internal tensions. In our day, as Kelsen continually reminds us, this tension reflects particularly the demands of freedom and security. But if such tension exists, then one may not simply obey "the law" in order to assure effectiveness. To increase this law's effectiveness is to decrease the effectiveness of that law. Consideration thus must be given to the consistency of the whole as a distinct principle. This is indeed a "formal" criterion, and yet it must be practically effective over and above the individual legal provisions. The facts of our legal situation, then, include this directly known tension and the effort to overcome it.

The familiar example of this tension, in constitutional terms, is the judicial dissent. On what grounds, in Kelsen's theory, may such dissents occur? Does he argue that they actually strengthen the effectiveness of law—that dissents in Supreme Court rulings actually tend to confirm their effectiveness? Or does Kelsen's position not lean to a kind of democratic centralism in which, though there may be discussion before decision, thereafter there should be only unanimity? Kelsen might allow that an individual member of the Court may cite his own personal preference. But this is not the language that dissenters employ; rather they appeal to such considerations as Mr. Chief Justice Hughes' "brooding spirit of the law" or that "Court of calmer times" which Mr. Justice Black mentioned at the end of his *Dennis* dissent. No doubt both majority and minority must be concerned about effectiveness, but what the facts of their deciding entail is the effort to make effective the principles that are most nearly just.

Dissenting judges, like outvoted legislative minorities, point the moral that is very close to Kelsen's own political creed, that absolute truth in human judgments is very hard to find, that tolerance is proper even for the thought we hate. They point, thus, to the second important aspect of our legal situation—that is, its imperfection. Kelsen does not, it seems to me, provide an

adequate analysis of the persisting incompleteness and consequent amendability of all human arrangements. In what terms is the need for "improvement" to be understood? One might answer, that an individual demanded a change to suit his own preference. But in our situation that is not how such demands are stated; rather, they are put in terms of an objective demand, a principle that applies equally to the mover and to others. It is true that we discover, as we live along, that many of our preferences are "subjective" in the sense that they are not shared by others. This is a discovery. It is not, as Kelsen appears to claim, true by definition. It remains possible, nay, if we consider the everyday judgment of men it remains in fact the case, that a persistent preference, or motive, in human behavior is for "objectivity," for the achievement of lawfulness in human relations.

Professor Kelsen sets forth with eloquence the familiar argument for regarding Plato as the prototype of the authoritarians. (Pp. 82-109.) One may concede the propriety of stressing Plato's distrust of the "many." But Kelsen practically ignores the most fundamental of the Platonic theses—that all particulars, including individual men and systems of law, are imperfect and admit of reference to a reflective standard against which they are found deficient. The heart of the Socratic-Platonic doctrine was the question "Is there not something lacking in this? And by what is the lack measured?" The Sophists, including Kelsen, insist on translating this question to read "Is not this thing different from those things?" But it was Plato's special genius, in those early dialogues which Kelsen dismisses rather lightly (p. 98), to show that men actually do in everyday discourse refer to rational comparisons, that particulars are compared with respect to their approximation to a standard which is not a particular at all. For Plato, any particular thing including an entire legal system, or the plan of his Republic, or the wisdom of his guardians must be measured against a standard which it does not fully exemplify. And it is to this that the objector to law may appeal. This is, presumably, that ideal to which Socrates and Jesus appealed; and indeed Kelsen faces courageously the difficulties his theory confronts in these rather heroic instances. (P. 207.) For him appeal from a legal system to something else can only be appeal to an ultimate private preference that means more to a man than does an effective system of laws. But both Socrates and Jesus claimed to be speaking, not for their own preferences, but for a system of laws which would be common to them and their accusers.

I argue then that both particular and general imperfections of the law point to the validity of an objective ideal as a real element in men's thinking on normative questions. We must indeed take note of Professor Kelsen's warning that philosophic "absolutism" is likely to lead us into political "absolutism." In an article reprinted from the *Political Science Review* of 1948 (pp. 198-208) he traces a history of Western thought to show how the two absolutisms have been associated, while there also has been an association of "relativism"

with anti-absolutist political belief. But the correlation is too rough to be very convincing. He does not mention Hobbes, surely empiricist and relativist in ethical theory, nor T. H. Green, whose philosophic idealism underwrote a democratic political theory. Nor does Kelsen accord much attention to Kant, who declared that the ultimate and proper check on the executive power was discussion and decision by the governed and who formulated, abstractly, Rousseau's conception of self-government.

Quite apart from such external correlations, moreover, there is much in the merits of the argument to refute Kelsen's insistence that "[t]olerance, minority rights, freedom of speech, and freedom of thought, so characteristic of democracy, have no place within a political system based on the belief in absolute values." Such a belief, he claims, "irresistibly leads—and always has led—to a situation in which the one who assumes to possess the secret of the absolute good claims to have the right to impose his opinion as well as his will upon the others who are in error." (P. 206.) But however dangerous the assumption of infallibility, at least equally dangerous is the assumption that the values of others are wholly irrelevant to one's own. Tolerance is, surely, born of the discovery that what one earnestly believes is contradicted by the equally earnest belief of another who also has a claim to know the truth. Without some common framework, there can be no ground for tolerance, though there may be occasion for wonder or dismay. If we democrats believe one way and the communists another, what justifies tolerance other than the notion that they, like us, are trying to state a perspective on something we both are thinking about? The "what we both are thinking about" can be meaningful only if it stands outside us, only if it is, with respect to our beliefs and attitudes, more than relative. Probably, rather than "absolute," it is more happily called "objective," or "common." To call it common is not indeed to guarantee that, in a given situation, there will be full agreement on it. It may well be, as so often in human affairs, that men will fight even though they know they should reason together. But reference to a common standard, as the objective of the process of discussion and reflection, makes tolerance intelligible. On Kelsen's account, per contra, men with different ultimate preferences have for it nothing but battle or indifference.

If, then, consideration of the facts of legal controversy directs our attention "beyond" the law, to what do we look? I think that Kelsen is correct in rejecting the arguments from theology and from the law of nature. But I find more promise than he does in the formal "rationalisms" which he reviews critically in his first chapter. (Cf. pp. 13–18.) A more thoroughgoing attention to the political theory of Kant and Rousseau² enables us, I think, to avoid

² Kelsen notes that Rousseau assigned to the general will the role of ideal standard for actual political decisions, but he claims that Rousseau offers no criterion by which a voting body can know whether it is expressing the general will. (P. 298.) It is true that absolute certainty is un-

Kelsen's "relativism." And such an approach would recognize in the facts of the legal situation facts which are at once objectively real and yet normatively significant; it would indeed demand some qualification in the "purity" Kelsen demands in the study of law.³

Kelsen argues that obedience to law is to be justified only conditionally, as necessary to the hypothesis that lawfulness is to prevail. I have argued that neither particular provisions of the law nor the law as a whole can be viewed, as our experience presents it, as simply "to be obeyed." Of course effectiveness must be considered, but, as Rousseau would say, "to effectiveness we must add justice." But if we insist on referring to such justice, what can we say about it—how can we meet the sceptical demonstration of Kelsen's first chapter? I think that Kelsen's own argument from effectiveness, the contention that men do find it desirable to live by law—that all human societies employ law as "a specific social technique"—supplies the objective basis we need to delineate a justice which is definite enough to provide a common reference for criticism yet "formal" enough to make admissible men's infinite varieties. (Cf. pp. 231–56.)

If we attribute the obedience men accord to law to their accepting the hypothesis that "lawfulness should be," then we may argue from the virtually universal prevalence of legality in human societies to an equally wide willingness on the part of men to embrace this hypothesis. There are to be sure criminals and outlaws, and of course one lawfulness may in details clash with another. But existing legal systems are to be interpreted as expressions of human will and, so far, as evidence of common principles. They are objects of will on which there is actual agreement. The commonplace recital of the varieties of legal codes from one society to another is intelligible only on the supposition that comparable elements are being compared.

Ever since Kant formulated the categorical imperative, argument has raged about whether, as a "formal" principle, it can mean anything. Kelsen follows the familiar trend of noting in Kant's thought the culmination of the rationalist effort to find a normative principle that will transcend the obvious varieties of specific value judgments. And Kelsen takes the familiar stand that such a transcendence is achieved only by resort to "emptiness." "[T]he categorical imperative," he writes, "can serve as a justification of any social order." (P. 18.) Like equality, or giving each his due, the categorical imperative only has

attainable; but Rousseau devotes a chapter of Book IV to explaining why the majority normally, but not always, should be taken as expressing the general will. Substantively, Rousseau assumes that particular and general interests can be distinguished, and here common sense certainly agrees with him.

³ This is to say that the "ought" of legal discussion is basically continuous with the "ought" of moral obligation—that law must be treated as an expression of common moral intent. It does not mean that detailed and particular provisions of law are individually subject to check by moral intuition—this is, it seems to me, the sound feature of the "pure theory."

normative import when it is supplied concrete meaning from the "social order of the times." And it is in fact this emptiness, Kelsen remarks, that explains why these "formulas . . . are still, and probably always will be, accepted as satisfactory answers to the question of justice." (P. 18.)

Yet Kelsen does not appear himself to regard effective lawfulness as merely an "empty form"; if it is that, it also is an effective and specific social technique as well. On his own account, there is a difference between a collection of men who live according to "effective legality" and those who do not. Willingness to follow universal principles in conduct makes a difference even when the particular forms of such conduct vary. Minimally, common lawfulness means agreement on procedure, and this tends to extend itself to substance as well. It need not be total agreement; but it need not be either that total emptiness cited ironically by Kant when he quoted one ruler as saying of another "What my brother wants, that I want too."⁴

The reason why a common procedure, though "formal," is not empty is to be found in Kant's analysis of the moral situation in which different persons confront one another. Both the recalcitrant witness at the congressional hearing and the spokesman of a great power confronting those of another give ample testimony to the validity of this analysis. To assert the need for "effective legality" as distinct from force is to assert the existence of different moral agents who have in some sense or other equal standing with respect to a common principle. Such equality, Kelsen concedes, is to be found in every legal order. (P. 15.) But its very universality leads him to insist that equality has nothing to do with justice, since to discover what is just in a particular society one must specify the respect in which the equality of persons is to be asserted. It may be granted that such respects differ from one society to another. Yet however they are designated, to acknowledge their existence, and to recognize them—that is, to avoid inequality—is meaningful. It is, in effect, to promote human dignity.

Two of the most urgent issues of our day are school desegregation and the achievement of a durable peace with the Soviet Union. In both of these, with fluctuating hope and despair, men wrestle with one another, in suspicion, in hate, and yet with ideals too. For liberals of Professor Kelsen's persuasion there is no doubt the inclination, as he would phrase it, to count Negroes as "human beings," to count Communists as human beings also. Both internal equality, in our system of effective legality, and external equality, in a lawful society of nations, appear as ideals which we believe should be common. The exact meaning of this equality is not completely explicit. The Supreme Court's dictum in the segregation cases indicated the propriety of local differences; that there will be continuing heterogeneity in detail between our politics and those of the Communists is obvious. It is possible that in the end

⁴ Kant, *Critique of Practical Reason* 139 (L. W. Beck translation, 1949).

variety, rather than unity, may prevail, and that human affairs may turn out to be a truly Hobbesian state of nature.

I have been trying to answer Professor Kelsen on the ground of "facts" to which he is devoted, and it is not, I hope, improper to summon as a final basis for optimism the fact of his own language. At the close of "What Is Justice" he affirms his belief that democracy, with its commitment to freedom and tolerance, must run the risk involved in applying its standard of free expression even to its enemies. "We have a right to reject autocracy and to be proud of our democratic form of government" only as we do this; he says "it is the essence and honor of democracy to run such risk, and if democracy could not stand such risk, it would not be worthy of being defended." (P. 23). I have been arguing that in the "right," the "pride," the "honor," the "worth" of which he speaks, Professor Kelsen refers to more than his own private preferences, that he employs the language of a common morality in which men who respond to principles stand in some sense on the same footing. Certainly such morality is not all there is to the situation, any more than it is all there is to law. Certainly such morality, like the law, always is in need of development and clarification. But with it both the coercions of law and the fumbings of diplomacy offer some prospect of serving human freedom. Without it they can be only ingenious devices by which some men exploit others.

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The Presidency in the Courts. By Glendon A. Schubert, Jr. Minneapolis, Minn.: University of Minnesota Press, 1957. Pp. xi, 366. \$5.50.

"The tools," Napoleon insisted, "belong to the man who can use them." Professor Schubert's thesis appears to be that as far as the courts are concerned not only do the powers of the presidency belong to the presidents who wish to use them and who can use them, but more significantly the courts generally will support presidents in the exercise of even the broadest of executive powers upon their claim that they are constitutionally theirs.

To present but a few examples, the courts will not question the exercise of presidential powers in connection with such activities as the disposition of troops, the declaration of martial law, the establishment of military courts, the proclamation of a national emergency, the recognition of foreign powers, the conclusion of executive agreements, the regulation of aliens, and the control of personnel and property within the executive branch. Nor will the courts review "executive discretion" or "intervene in presidential decisions of political questions"; they will not "compel him to act" nor force him to "divulge official information that he chooses to withhold." (Pp. 347-54.)