KELSEN'S PURE THEORY OF LAW

IN 1925 Professor Kelsen published his *Allgemeine Staatslehre*,[1] summarizing in systematic form the contributions made in a series of earlier monographs on theoretical questions of legal philosophy, together with the results of his experience as an expert adviser to the Austrian Republic, as the author of the Austrian Constitution, and later as a member of the Austrian Constitutional Court (*Verfassungsgerichtshof*). Based on fifteen years of painstaking research and practical work of the highest type, this treatise is the first great system of German *Staatslehre* since Georg Jellinek's work. It is likely to be the standard treatise on the subject for some time. Its rank as a scientific achievement and its importance for the sciences of law and government in Germany are recognized by its reception into the *Enzyklopaedie der Rechts- und Staatswissenschaft.*

It is impossible in a short review to deal with even a small number of the problems expounded by Professor Kelsen. He divides the subject into three parts. The first deals with the nature of the state, going into detailed analysis of the relations of the state to society, morals and law, with sidelights on the parallels between certain legal and theological theories: for example, between the autolimitation of the state and the adoption of human form by the deity, and between the problems of state wrong and theodicy. The second part has the general title "Validity of the Order of State", with the sub-title "Statics", and is devoted to such problems as sovereignty, the relations between state law and international law, centralization and decentralization, self-government, colonies, federations, confederations and unions. The third part deals with the "Dynamics" of government: the different layers of the legal system such as the constitution, statute law, courts, execution of judgments; the separation of powers; the position of state officials, representation, autocracy and democracy, monarchy and republic. The book closes with a chapter on forms of government and philosophy.

For information on any particular part in this wealth of material the book itself must be consulted. I wish to point out here only some of the underlying principles of its legal philosophy that may be less well

[1] Hans Kelsen, *Allgemeine Staatslehre*, vol. 23 of *Enzyklopaedie der Rechts- una Staatswissenschaft.* Berlin, 1925.

known to the American public because the sources are not easily accessible.

Professor Kelsen's theory of law and government is styled a "Pure Theory of Law" (*Reine Rechtslehre*), with the accent on the word *pure*. It is an attempt to separate the elements of legal theory in a strict sense out of a mass of problems traditionally thrown together under the somewhat vague description of *Staatslehre*. The movement in this direction was started in Germany by Gerber, Laband and Jellinek, the great writers on the public law of the North German Federation and imperial Germany in the period from the sixties to the Great War. The unification of Germany and the emergence of a federal constitutional and administrative law stimulated speculation on the problems of legal theory, and the sight of a magnificent legal structure rising out of the former unsatisfactory state of disunion drew attention particularly to the problems of concrete positive law as against abstract natural law. One might say that the rise of the empire, the spectacle of a new body of law being created, proved fatal to the survival of eighteenth-century speculations on natural law. The hang-over is by no means eliminated even now, but to be found guilty of adherence to natural law theories is a kind of social disgrace. The elimination was not achieved at once and Kelsen's earlier works are directed in their thoroughgoing and keen criticism chiefly against his predecessors in the German science of *Staatslehre*, particularly Jellinek.[1] This constant and vigorous criticism may mislead many to overrate the difference between Kelsen and the earlier writers. But in the preface to his new book, the *Staatslehre*, he stresses the point that he considers himself to be carrying on the tradition of these men and to be doing in a more perfect way what they were able to achieve only in part.

The new starting point of Professor Kelsen in his purification of legal theory is to be found in his training in Neo-Kantian logic. In the *Hauptprobleme der Staatsrechtslehre* he tries to separate the realm of law from the realm of natural existence with the aid of the philosophy of Windelband and Simmel. It is not easy to give an account of the separation of the realms of *Sein* (existence) and *Sollen* (essence) to

[1] Kelsen, *Hauptprobleme der Staatsrechtlehre, entwickelt aus der Lehre vom Rechtssatz* (Tuebingen, 1911; 2nd ed. with a new preface, Tuebingen, 1923); *Das Problem der Souveraenitaet und die Theorie des Voelkerrechts* (Tuebingen, 1920); *Der soziologische und der juristische Staatsbegriff* (Tuebingen, 1922). For the development of the details of the pure theory of law *cf. Zeitschrift fuer oeffentliches Recht* (Vienna, since 1919). A history of the theory is given by Fritz Schreier in his essay, "Die Wiener rechtsphilosophische Schule", in *Logos*, vol. XI, 1923.

Americans, as the Kantian theory of the *a priori* which is the origin of this division in German logic is regarded in America with justifiable suspicion and the explanations given by German logicians are not overwhelmingly clear. Law, in Kelsen's opinion, belongs to the realm of essence, not of existence. To define this realm he relies on the formulations of Simmel, who maintains that *Sollen* (essence) is an "original category" and that a definition is impossible, just as it is impossible to define Being or Thinking. That is very discouraging. But if not a definition, a roundabout description can at least be given: The realm of *Sollen* is a realm of postulates, not of existences in time and space. These postulates may demand that acts be performed in time and space, but the postulate itself has its being in a different realm. The postulate exists as a postulate regardless of whether it is put forward by any human being, regardless of whether any one hears, reads or knows it. Usually a postulate arises out of concrete historical situations in the realm of existence, and it demands certain future concrete situations in the same realm. Thus its conception is caused by existential being, and, if effective, the conception motivates, is causative for, certain other existential events. But only the *conception* of the postulate by an individual human being is caused or causative in the chain of existence, whereas the ideal meaning of the postulate itself is beyond causality in its realm of *Sollen*. Setting aside all the differences of tradition and the more intimate hues of the concepts, it is permissible to identify the realm of *Sollen* with the realm of essence as it is defined in the English and American epistemology of critical realism.

Positive law is a system of postulates in the realm of *Sollen*. Its elements are the legal rules or norms, and the first task of a pure theory of law is the analysis of the elemental structure. The analytical element of the legal system differs somewhat from the actual contents of statute-books and decisions; the codes are adapted to practical purposes and divided into parts which contain chiefly substantive law, as e. g. the Civil Code or the Law Merchant, and other parts which consist in their bulk of remedial law, as e. g. the Penal Code. The theory of law has to go beyond this surface appearance of legal rules and reduce them to the "pure and simple legal rule". This rule is composed of two parts: the first contains a statement concerning unqualified human behavior, the second makes a statement concerning the coercive behavior (*Zwangsakt*) of the state official. The complete rule is a hypothesis making the coercive behavior of the state official dependent on the previous occurrence of the behaviors and events as

stated in the first part of the rule. Kelsen adopts for the whole rule the formula:

$$\text{If } M^h + E \text{ (or } M^u + E), \text{ then } Z \rightarrow M.$$

In this formula M means a human behavior, either a performance (M^h) or an avoidance (M^u); E signifies an event, usually produced by the behavior (M); Z is the enforcing behavior of the official, and the arrow directed against M indicates that as a rule the behavior of the official is directed against the same individual that is responsible for the behavior (M^h or M^u).

The center of gravity in the rule clearly rests with the enforcement. Starting from the behavior of an official that is directed in a more or less unpleasant way against some human being, this behavior is conditioned by the occurrence of other behaviors and events. These operative facts for state activity will be those that usually are called "wrongs", and consequently, if Kelsen's formula is supposed to contain the elementary legal concepts, "wrong" is an elementary legal concept but not right or duty. The problem of law is reduced to the governmental enforcing machinery, and other behaviors and events are introduced into the realm of law only as conditions for governmental action.

The simplification of the legal concepts will surprise the American lawyer who is accustomed to a wealth of rights, duties, privileges, powers, liabilities and disabilities, and finds them reduced to events and behaviors of a nondescript color; but the advantages of the reduction from a theoretical point of view are undeniable. The reduction is no attempt to eliminate the various so-called legal relations from existence; on the contrary, their elimination from the realm of essence gives them their status in existence. There may be all kinds of social relations and interests that I should like to have protected, but such wishes are of a subjective nature, changing with the development of society. Some of these interests and wishes may be considered justified by the present code of ethics (e. g., my desire not to have my watch stolen); others are considered wrong by the same code of ethics (e. g., picketing); but, right or wrong, these adjectives are categories of an ethical description, and to enforce the present code of ethics by social action a legal order is erected and maintained. It often happens that for technical reasons the concrete legal rule on the statute-book talks of "rights" and gives a description of the protected status but does not specify the behavior or the events on which the enforcing action of society depends. This form of language, however,

introducing the ethical purpose into the legal means, should not obscure the issue. Legal concepts in the strict sense are confined to enforcing action and operative facts. Every so-called legal relation of a complicated type may be dissolved easily into these elementary concepts. A right means that after the occurrence of a certain behavior on the part of another person, affecting me, I may request the courts to exact damages from him. A duty means that when I behave in a certain way, the person affected may request the courts to exact damages from me. A privilege means that when I behave in a certain way, no one can sue me for damages (e. g., when I have a license). When a condition of no-right exists, e. g. when I have given another person a license, I may not exact damages from him for behavior permitted by the license. Power means that my behavior is an operative fact in changing another person's legal status (e. g. the case of an offer). Liability means that another person's behavior is an operative fact in changing my legal status (e. g. I have the power to accept the offer). Immunity means that another person's behavior is no operative fact in changing my legal status (e. g. the case of tax exemption). Disability means that my behavior is no operative fact in changing another person's legal status (e. g. I cannot sue and get judgment after the statute of limitations has run). The concepts thus analyzed may be indispensable in the description of social relations, but they are no elementary legal concepts.

As a system of law is part of the realm of essence, its categories are different from those of existence, the most notable difference being that the category of causality has no meaning for law. Between the statement, on one hand, of operative facts in the first part of the pure and simple legal rule, and on the other hand the statement of social action, there is no causal relation. Theft may be the cause of imprisonment, but even when the police do not catch the thief and the expectations of the law-abiding citizen are disappointed, the ideal relation between the operative facts constituting theft and the penalty of imprisonment is not destroyed; even when the thief actually escapes he *ought* to be punished. To distinguish the peculiar ideal relation of the *ought to be* from the causal existential determination, Kelsen introduces the term *imputation* (*Zurechnung*); imputation creates in the realm of essence the connection between operative fact and enforcement parallel with, but independent of, the causal relation between them.

Other peculiar legal categories are those of independence and substance. The category of independence, usually called sovereignty,

signifies the independence of an internally coherent legal system from any superior set of legal rules. The charter of a corporation is not sovereign because its validity is dependent on the state issuing the charter; a statute is not sovereign because its validity depends on the constitution; only the highest stratum of the legal order that is the origin of validity for all the rest may be called sovereign. Sovereignty of a state means that there is no legal order above the state from which the legal order of the state itself derives its validity.

But at this point the theory of state sovereignty clashes with the problems of international law. As a matter of fact, we have in our present-day international law the process of "recognition" by which a state is accepted as a member of the society of nations and has to obey certain rules of international intercourse. The international legal order rises above the legal orders of the individual states and there is good reason to name this highest order as the truly sovereign one and to consider the states entirely devoid of sovereignty. This is not a mere form of language, for in the case of a national revolution, when new institutions are created in a way not provided by the former constitution, the old and the new legal order are entirely disconnected. The connection created between them by international law is a very substantial one, as usually the most important part of it is the recognition of the foreign debts of the old government by the new government. In case such debts are not at once recognized international pressure is usually brought to bear upon the new government until the "connection" of the otherwise disconnected legal orders is effected. The stratum of international law produces unity in the legal history when otherwise ruptures would have occurred.

The category of substance, usually called state, means the internal coherence of any legal order as a unit. It indicates that every part of it is derived from some superior part up to the highest layer of legal rules in the constitution or in international law. There is actually no difference between the state and the law for all legal purposes. There may be a social reality in the realm of existence that produces the legal order with its unity or substance, but to mix up the problem of existence with the legal problem of state is, to Kelsen, an unpardonable mistake.

It seldom happens that a legal philosopher has a chance to put his theories into practice. Professor Kelsen had the singular opportunity of drafting the Austrian Constitution in accordance with his principles. The result is a legal document that from a technical point of view may fairly be called the best of its kind now in existence. The

first criterion of the quality has to be the restriction of the content to statements of operative facts for enforcing actions, and, so far as they are embodied in the constitution, statements of the enforcing behaviors. The constitution ought not to contain any matter of purely declaratory character or of merely political importance, e. g., a preamble, or any talk about legislative and executive powers at large that are vested in some person or another. A second criterion would be the completeness of these statements.

The Austrian Constitution lives up to both of these criteria to a remarkable extent. There are, however, several deficiencies due to the political demands of the parties concerned; moreover, there are one or two points of incompleteness due to oversight. In conformity to the principle of restriction in general the language is confined to the one legal concept of *Zustaendigkeit* (jurisdiction), meaning a set of operative facts. The clauses of the Constitution are in the main nothing but definitions of jurisdictions. For instance, "The federal army has to protect the borders of the republic" (art. 79, 1). This clause defines a jurisdiction of the federal army and clearly implies that it is not to be used for any other purposes if they are not expressly stated in the constitution. Jurisdiction is also defined negatively, for example, "The courts have no jurisdiction to question the validity of laws published in the proper way" (89, 1). Again, "To be valid all acts of the president must be signed by the chancellor or the competent ministers" (67, 2).

Beyond such statements the "unnecessary" contents are reduced to a minimum. There is no conventional preamble; yet, for reasons of "political optics," it was impossible to avoid such declarations as "Austria is a democratic republic" (1, 1). This sentence does not define an operative fact, it has no legal consequences, and from a strictly technical point of view, it ought to be eliminated. The statement that "The law of the republic issues from the people" (1, 4) is not only unnecessary but even legally incorrect, for the laws of the republic issue from the National Council; only in the rare cases of initiative and referendum may some legal sense be attributed to the statement. A similar case is presented by the postulate, introducing the section on juries, that "The people must participate in the judicature". Again, not the people, but the jurors, participate; and therefore the whole statement has no legal consequence. Such cases, however, are very few and all of them are are pointed out by Professor Kelsen in his commentary on the constitution as unfortunate inroads of political demands on the domain of science.

Cases of incompleteness are even fewer; in fact, there is only one, and that is of slight practical importance. Article 138 runs: "The Constitutional Court decides on conflicts of jurisdiction (a) between courts and administrative magistrates, (b) between the Administrative Court and other courts, particularly between the Administrative Court and the Constitutional Court, (c) between the states among themselves, as well as between a state and the federation." This article ignores the possibility of a conflict of competency between the Constitutional Court and the other courts; there is no final decision provided for this case. However, this deficiency may be pointed out as the only one, the better to show the high technical standard of the document. Most other constitutions are full of deficiencies, e. g., article 5 of the United States Constitution requires two-thirds of the votes of both houses for a proposal to amend the constitution and omits to state whether a quorum is sufficient or not; the same article does not specify a time-limit for the ratification by the states and omits to state whether Congress has the right to fix a time-limit or not.

The Austrian Constitution, especially when taken together with Professor Kelsen's commentary,[1] which corrects the deficiencies introduced for political reasons, is the most important event in the modern history of constitutions from the point of view of legal technique. Moreover, with its background of the pure theory of law, it is a remarkable contribution to the development of democracy. In the German tradition of eliminating natural law ideas from the theory of positive law, Kelsen has gone to the radical extreme of separating the problem of legal technique entirely from its social purposes. The interests protected by law can no longer appeal to the sanctity of law to avoid changes in their present status, for law is shown in its quality as an apparatus or a machinery capable of protecting any set of social relations according to the current code of social ethics. Laws are a technical means for the performance of certain social ends. If any one wants to preserve the present legal order he has to defend the equity of his demands against any one who ventures to challenge them. He cannot insist on the status quo by maintaining that legal standards must not be changed and that everybody who desires change is a Bolshevik. This development in European democracy may be of particular interest to Americans, because the "due process of law" clause and the powers of the Supreme Court have effectively blocked the popular demand for legis-

[1] Kelsen, *Die Verfassungsgesetze der Republik Oesterreich*, vol. V, *Die Bundesverfassung* (1922).

lation on certain important labor problems, and have tenaciously preserved, as regards labor legislation, the survivals from the "natural law" period.

By transferring the legal system into an ideal realm of meanings and reducing it to an instrument Kelsen destroys any undue respect for existing legal institutions. The content of law is shown to be what it is: not an eternal, sacred order, but a compromise of battling social forces—and this content may be changed every day by the chosen representatives of the people according to the wishes of their constituencies without fear of endangering a divine law. The political import of his doctrine explains in part the critical stand that Kelsen takes against certain theories of his predecessors, particularly against the theory of autolimitation. Under the German conditions of constitutional government the autolimitation of the state was interpreted as a limitation of the absolute powers of government, embodied in the monarch, by the controlling power of parliament, the amount of limitation being flexible. Consequently it was a perfectly legal procedure, whenever the control of the parliament became too oppressive to the interests of the monarch, to evade this limitation in some way, e. g., by a dissolution of parliament, and to enjoy a period of absolutism. In a true democracy the legal order is not produced by limiting somebody's unlimited powers, but by defining in the plainest possible way operative facts and jurisdictions of officials. No state entity hides behind the law and issues the legal rules; every rule can be traced to its origin in a definite governmental agency, which again is but a part in the machinery set up for turning out legal rules in accordance with the desires of different social groups. The pure theory of law thus signifies not only an important progress in legal analysis and technique, but also a development from the half-absolutistic philosophy of the German Empire toward the spirit of the new democracy.

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