

Kelsen, the Enlightenment and Modern Premodernists

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Hans Kelsen did not want his latest book to be published. However, the Hans Kelsen-Institut in Vienna, after lengthy deliberation, has respectfully disagreed with him. *Secular Religion: a Polemic Against the Misinterpretation of Modern Social Philosophy, Science, and Politics as 'New Religions'*¹ has little to say about positive law and does not mention the Pure Theory of Law. It is an attack on those who contend that modern thought, despite its secularism, displays so many parallels to western religion that it should be characterised as a set of 'new' or 'secular' religions, which may then be dismissed as impoverished analogues of true religion (QED).

The book may be assessed on three planes, which will not be wholly separate. First: as to what it may contribute to current debate on 'science and religion'. Second: as to the relation, both for Kelsen and in general, between science of law and the Enlightenment. Third: as to how this book may illuminate the Pure Theory. There is no 'new Kelsen' here, rather aspects of Kelsen that so far have been little seen in English yet which are fundamental to his thought.² They involve the reasons why the Pure Theory

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¹ Hereafter, *SR*: published in 2012 by Springer Verlag for the Hans Kelsen-Institut (which holds most of Kelsen's papers and maintains a free online database of works by and on Kelsen); edited by Robert Walter (a founding Director of the Institut, who died in 2010), Clemens Jabloner (one of the current Directors) and Klaus Zeleny (Secretary of the Institut). Other works by Kelsen will be referenced here as follows: *ELMP – Essays in Legal and Moral Philosophy* (sel and ed Ota Weinberger, trans Peter Heath, 1973); *GTLS – General Theory of Law and State* (trans Anders Wedberg) (1945, 1961); *IPLT – Introduction to the Problems of Legal Theory* (trans Bonnie Litschewski Paulson and Stanley L Paulson, 1992); *PTL – Pure Theory of Law* (*RR*, trans Max Knight) (1967); *RR – Reine Rechtslehre* (2nd ed, 1960); *WIJ – What is Justice?* (1957). References to 'Métall' are to Rudolf Aladár Métall: *Hans Kelsen: Leben und Werk* (1969).

² I will refer little to periodisation of Kelsen's work: rather, what strikes me more here is the continuity of *SR* with his enduring concerns. On

of Law is proposed, as well as the intellectual and political conditions for a rationalist, materialist science of law.

Defending Enlightenment

This book is not directed at professional theologians. Kelsen considers it 'futile' to argue with them 'from the point of view of someone who in his scientific view of the world does not presuppose their creed'.³ His target, instead, is religious thinkers who set themselves up as 'scientific' – who contend that 'science' would be better if it were imbued with theology. Since that argument is applied primarily to 'scientific' discussion of politics and society, in attacking it Kelsen seeks to defend the *acquis* of the Enlightenment:

The author wants to show the fundamental misinterpretation in seeing theology in the thought of men who, like the philosophers of the Enlightenment, Lessing, Comte, Marx, Nietzsche, tried to emancipate human thinking from the bondage of theology. This misinterpretation is, in the author's opinion, disastrous; for it implies the view, consciously or unconsciously, that a social science or philosophy (and especially a science or philosophy of history) independent of theology can have no satisfactory results because it does not lead to the absolute values that can be based only on true religion and without which society and history are meaningless; that politics is by its very nature religion or cannot be separated from it; and that, consequently, the open return of science and philosophy to theology, the return of politics to religion, is indispensable.⁴

Kelsen is not, however, a thoroughgoing *philosophe*.⁵ He does not spell the difference out and he does not stick to it entirely, but in general his defence is not of all the *lumières* but only of the light of science. Yet the defence is not only of the sciences as such but, even more, of the scientific spirit. It is

periodisation of Kelsen's work, see Stanley L Paulson, 'Introduction' in Stanley L Paulson and Bonnie Litschewski Paulson (eds), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (1998); also papers by Paulson and others in Letizia Gianformaggio (ed), *Hans Kelsen's Legal Theory: a Diachronic Point of View* (1990).

³ SR, 3-4.

⁴ SR, 3.

⁵ Though he defends the *Encyclopédistes* against Voegelin's allegation that the *Encyclopédie* is a 'Gnostic koran': SR, 124.

a defence, as he puts it, of 'modern times' – which in German would be '*die Neuzeit*', and in English one would now say 'modernity'.

The development of modern science is the result of its emancipation from religion and theology. This emancipation is particularly important to social science and especially to historical science, for in these areas of thought theology serves definite political interests, and submission to it is incompatible with an objective science of society and history.

If any criterion distinguishes modern times from the Middle Ages it is – in Western civilization – the existence of objective and independent science. A retrogression of science to metaphysics and theology means the return to the spirit of the Middle Ages. The literature against which this book is written seriously endangers the existence of an objective and independent science and therefore the spirit of modern times.⁶

The book's title and subtitle fit Kelsen's strategy of hoisting these writers upon their own petars of what he contends are false claims and self-contradictions. The title 'secular religion', as will be shown, is a quotation from some of those writers. The subtitle's characterisation of the book as a 'polemic' is ironical: the theologically committed will be attacked within one of their favourite categories. The tone of the book, which was written in the 1950s and early 1960s, closely resembles that of Karl Popper's *The Open Society and its Enemies*.⁷ Kelsen and Popper oppose all metaphysics. They also, as well as those whom Kelsen attacks, abhor totalitarianism both left and right. Popper attacks metaphysics within totalitarianism; Kelsen attacks metaphysics when it is used against totalitarianism. Kelsen's concern is that these anti-totalitarians themselves argue with such a totalitarian tendency that they are dangerous comrades.

Many writers are attacked: principal among them are émigré philosophers Eric Voegelin, Karl Löwith and Ernst Cassirer, as well as historians of ideas Crane Brinton and Carl L Becker. These writers' brushes are broad. Kelsen quotes Brinton's claim that 'modern natural science' has 'made possible a whole set of heresies of Christianity'. The set includes 'materialism, rationalism, "humanism", scientism, naturalism, secularism, evolutionism, positivism, ethical culture'. For Brinton these are 'great

⁶ SR, 4.

⁷ Karl R Popper, *The Open Society and its Enemies* (1945; 5th ed, 1966); summarised in *The Poverty of Historicism* (1964).

secular religions' and their culprits include Galileo, Newton, Darwin, Locke, Spencer and Marx. This is to claim, Kelsen objects, that 'science itself' has the character of a secular religion.⁸ Kelsen at first limits his defence to science. But his reasons for mounting that defence find broader ground, in that Brinton's range of malefactors to be hammered reaches so far as to include not only western totalitarianism but even western democracy. Kelsen protests that democracy 'is a specific form of government by men exercised over men on this Earth' and 'has nothing to do with religion'.⁹

'Gnosticism': if you only knew

Kelsen's main attention is to Voegelin, whose strategy is more elaborate and at points even more bizarre. Voegelin contends that the 'secular religions' are not just parallels to Christianity, but heresies of a particular and far from novel kind. They are, he claims, new forms of 'Gnosticism'. Now, the present writer, being no theologian, used not to know a Gnostic from a GNU and had been prepared to gather his news of Gnosticism merely from the protagonists here. But he has found it necessary to look at current assessments of Voegelin on Gnosticism in order to work out why Kelsen is so perplexed and what may be the current value of his perplexity.¹⁰

Voegelin draws his conception of Gnosticism principally from the twelfth-century heretic Joachim of Fiore.¹¹ Already puzzled, Kelsen engages in his own research on the identity of Gnosticism. He claims that Voegelin has misunderstood Joachim, who in his view actually is not a Gnostic: Gnostics believe that the world was created by an evil demiurge and that God stands apart from the world, whereas Joachim believes, like Augustine, that God is immanent in the world.¹² But Voegelin extends his crusade against 'Gnostic insanity' to all of modernity, including liberalism

⁸ SR, 252. Though I would let Brinton have Spencer, whom Kelsen mentions only as one of Brinton's targets: my 'Commandeering Time: the Ideological Status of Time in the Social Darwinism of Herbert Spencer' (2011) 57 *Australian Journal of Politics and History* 389.

⁹ SR, 268.

¹⁰ See the 50th anniversary symposium on Voegelin's *The New Science of Politics* in (2005) 34 *Political Science Reviewer*.

¹¹ Voegelin and Kelsen, as well as others, latinise him as Joachim of 'Flora'. Voegelin's type of argument lives on in the Vatican. In 2009 a theologian informed Pope Benedict XVI that allusions to Joachim could be found in speeches by US President Obama: Richard Owen, 'Medieval monk hailed by Barack Obama was a heretic, says Vatican', *The Times Online*, 27 March 2009.

¹² SR, 71-83.

and democracy. To do that, he loosens the meaning of ‘Gnosticism’ until, Kelsen objects, he is using the label ‘arbitrarily’.¹³ Indeed, absurdly: ‘Has he forgotten’, Kelsen protests, ‘that the “Gnostic insanity” of the Western societies destroyed the nazi(sic) movement after a very short existence?’¹⁴ And not only absurdly but bizarrely: ‘Gnostic politicians have put the Soviet army on the Elbe, surrendered China to the Communists, at the same time demilitarized Germany and Japan and in addition demobilized our own army’.¹⁵ And that was only what Voegelin published. Privately, he could write in 1953: ‘In every visage of a positivistic professor or liberal pastor I see the visage of the SS-murderer that he causes.’¹⁶ In Voegelin, liberal Professor Kelsen had not just a scary comrade but a dedicated enemy. Kelsen may not have known that, but he had reason to suspect it.

The so-called ‘secular religions’, Kelsen maintains, are certainly secular but they cannot be religions: ‘religion’ by definition involves belief in a supernatural being or beings and these outlooks reject, and indeed often condemn, any such belief. Voegelin acknowledges that rejection and responds that in the heart of the rejection and condemnation lies an unadmitted reproduction of that which is rejected and condemned. This reproduction of the divine within the material, Voegelin calls ‘immanentisation’. He claims that it is typical of Gnosticism and accordingly he feels able to classify his targets as modern Gnostics. Kelsen responds, with painstaking analysis, that the allegations of Voegelin and his like are simply untrue and, moreover, riddled with self-contradiction.

What is ‘immanentised’, for Voegelin, is above all the *eschaton*. As Kelsen explains this, Christian ‘eschatology’ is the study of ‘last things’ – of the final stage, *eschaton*, of the world when material reality will be resumed into the transcendent and last judgement passed upon both the quick and the dead, with salvation for the righteous and retribution for the rest.¹⁷ For Voegelin, then, ‘Enlightened’ outlooks are ‘secular religions’ because they attempt to ‘secularise’ the *eschaton*. They too envisage progress toward a final stage of humanity – only immanently, ie in merely material terms. What is transcendent, and most of all the *eschaton*, is surreptitiously reproduced within the immanent.

¹³ SR, 261. Cp Eugene Webb, ‘Voegelin’s “Gnosticism” Reconsidered’ (2005) 34 *Political Science Reviewer* 48.

¹⁴ SR, 266.

¹⁵ Quoted: *ibid*.

¹⁶ Quoted: Stefan Rossbach, ‘“Gnosis” in Eric Voegelin’s Philosophy’ (2005) 34 *Political Science Reviewer* 77, 113.

¹⁷ SR, 9-14, 20-21, 114-117, 150-156, 168-174.

Voegelin endeavours to identify such reproduction in both likely and highly unlikely quarters – most prominently Hobbes, Hume, Kant, Saint-Simon, Proudhon, Comte, Marx and Nietzsche. Kelsen has fun with Voegelin's claim that Nietzsche's proclamation that God is dead is a 'Gnostic murder' because Nietzsche is denying God in the name of 'salvation'. Kelsen maintains that, for Nietzsche, salvation is an entirely human self-salvation to which any idea of transcendent divinity is otiose; we are saving ourselves from ourselves by killing off the idea of a divinity.¹⁸ Comte and Marx, Kelsen observes, are certainly materialists and do envisage progress toward a better state of society. But their anticipations, he insists, do not involve religious salvation or retribution, nor the 'soul' or moral judgement. Nor do they involve finality, but rather – and especially for Marx – an indefinite continuation of society in a different, albeit preferable, form. The *eschaton* is an 'irruption of the supernatural into empirical reality' whereas, in science, any prediction of a future state is an observation in terms of causal law.¹⁹

According to enlightened doctrine, the future state of mankind, the result of progress, is not to be brought about by divine interference or by any kind of suprahuman power, but by man himself, by his own will directed by his own reason. Progress is not a supernatural, but a natural process. It takes place exclusively in this world, without any end of it being predicted.²⁰

Unlike the *eschaton*, this does not involve ideas of salvation or retribution.²¹ In sum, Kelsen says: 'A "secularized" eschatology is the negation of eschatology.'²² In all of these cases, he maintains, what is alleged to be a reproduction can hardly be so, since the author has actually rejected what the critic identifies as the necessary foundational assumptions.

The arbitrariness of Voegelin's conception of Gnosticism has been recognised by others and, without greatly modifying it, he came to include it among a broader set of ideas.²³ In its 1952 expression, all the same, it

¹⁸ SR, 215-223. The seriousness with which Kelsen takes his task is evident in the chapter that follows (SR, ch 12), which is a critical review of Heidegger's then recently collected claims to find 'metaphysics' in Nietzsche: Martin Heidegger, *Nietzsche* (1961).

¹⁹ SR, 115.

²⁰ SR, 116.

²¹ Ibid.

²² SR, 21.

²³ Symposium, above n 10. Kelsen refers to only one of Voegelin's later works: *Wissenschaft, Politik und Gnosis* (1959).

predates the transformation of studies in Gnosticism that followed the publication and assessment, from 1977, of the Nag Hammadi 'library' of codices, sometimes known as the Gnostic Gospels.²⁴ Kelsen's own researches in Gnosticism are likewise outdated.

Relevance to current debates

How relevant can this book be today? Voegelin still has a following.²⁵ More generally, Kelsen's book might now be of interest to modernists resisting postmodernist attacks on scientific 'objectivity'.²⁶ More broadly still, it might be relevant to current debate on 'science and religion'. That relevance, however, might be only tangential. Unlike Richard Dawkins or Christopher Hitchens,²⁷ Kelsen is neither attacking theologians nor arguing partly from moral grounds. Nor is Kelsen's argument generally on behalf of science and the scientific attitude, but specifically against attempts to infect them with religion. Nonetheless, Kelsen would be with Dawkins and Hitchens against Stephen Jay Gould's compromise. For Gould argues strategically that, in the USA today, outright rejection of religion is ineffective. He prefers a strategy of characterising science and religion as 'non-overlapping magisteria' (NOMA); one should render to science the things that are science's and leave the godly to their own business.²⁸ To Dawkins and Hitchens, that is to give up: one does not serve truth by creating a reservation for dedicated falsehood.²⁹

This book will, however, find a readership among jurists who already have an interest in Kelsen. Both jurists and others can also find in it an attack on the 'political theology' of Kelsen's arch-enemy, Carl Schmitt. I will turn to these matters in a while.

²⁴ Webb, above n 13, 50.

²⁵ Voegelin's *Collected Works* have been published in 34 volumes (the last in 2006) by University of Missouri Press and the Eric-Voegelin-Archiv in Munich continues to publish on him.

²⁶ Richard Potz, 'Introductory(sic) Remarks' in *SR*, vii-x at x.

²⁷ Richard Dawkins, *The God Delusion* (2006); Christopher Hitchens, *God Is Not Great* (2007).

²⁸ Stephen Jay Gould, 'Non-Overlapping Magisteria' (1997) 106 (*March*) *Natural History* 16, repr in *Leonardo's Mountain of Clams and the Diet of Worms* (1999); *Rocks of Ages* (1999).

²⁹ Dawkins, above n 27, 54-61; Hitchens, above n 27, 282.

How *Secular Religion* came to be published

Kelsen did not want this book to be published. He withdrew it when it was already set up in print. The story behind that is, as the book's back cover advertises, 'mysterious'. The mystery may be of more than historical interest since, when such a major thinker goes wrong, the errors are likely to be instructive.³⁰

The text was written in English and originated in a review, in English, of Voegelin's 1952 book *The New Science of Politics*.³¹ However, the review was not published.³² The editors of the present work speculate on three reasons for this.³³ First: since the draft had reached 125 pages, it had become too long to publish as a review; but I would doubt that, in the USA, that would have prevented publication as an article, and it certainly would not have prevented publication altogether. Second: that Kelsen had 'made plans to carry out a more extensive examination of metaphysical doctrines, containing also his criticism of Voegelin'. The present work is that 'more extensive examination'.

A third possible reason, which the editors leave in the realm of reasonable speculation, lies in the work's 'positive valuation of Marx's criticism of religion'. The US authorities already suspected Kelsen of sympathising with Marxism, which in the McCarthy era could have had 'far-reaching personal consequences'.³⁴ In the present book, Kelsen provides what the malevolent might so understand. 'Hegelian dialectic', he

³⁰ Cp Eckhard Arnold, 'Hans Kelsens Auseinandersetzung mit den Säkularisierungstheorien' (address at the book launch of *SR*, Hans Kelsen-Institut, 30 November 2011), 1; I am grateful to the author for a copy of this paper.

³¹ Eric Voegelin, *The New Science of Politics: an Introduction* (1952, repr 1987). By the early 1940s, Kelsen was attacking in English the importation of politics into legal science: 'Science and Politics' (1941) in *WIJ*.

³² The review would eventually appear as Eckhart Arnold (ed), *A New Science of Politics: Hans Kelsen's reply to Erik(sic) Voegelin's 'New Science of Politics': a Contribution to the Critique of Ideology* (2004); with Introduction and Afterword (both in German) by Arnold.

³³ The story is related in the 'Editorial Remarks' by Clemens Jabloner, Klaus Zeleny and Gerhard Donhauser: *SR*, xi-xv.

³⁴ The suspicions could have reached back to Vienna, where Kelsen, although he had never supported the communists, had taken their scholarship seriously enough to debate it in their own journals – though most of his journalism had appeared in the liberal *Neue Freie Presse*. However, Kelsen was a member of no political party and in 1920 his appointment 'for life' to the new Constitutional Court, of which he had been an architect, had all-party support: Métall, 48.

says, is ‘rescued by Marx and Engels from Hegel’s silly idealism about “spirit” and put squarely on the solid ground of “matter”’. Thus: ‘So far as dialectic materialism is a causal explanation of social reality – and this is its main concern – it is certainly a scientific theory.’³⁵ Yet, by 1964 McCarthyism was spent.

Voegelin himself thought that he might have had a hand in Kelsen’s reluctance. They knew, or had known, each other well. Kelsen had been one of the supervisors of Voegelin’s doctorate in political science and Voegelin had been a junior academic (*Assistent*) under Kelsen.³⁶ Voegelin had also reviewed Kelsen’s books with high praise, in English from as early as 1927.³⁷ He would continue to praise the Pure Theory as a theory of law, while considering it thoroughly mistaken as an account of the state and generally inadequate in its understanding of politics. This had made relations between the two men difficult as early as 1936.³⁸ Nevertheless, Kelsen sent a draft of his review of *A New Science of Law* to Voegelin for comment.³⁹ In his *Autobiographical Reflections*, Voegelin characterises it as ‘an elaborate book-length critique crushing me thoroughly’. However, he records that he warned Kelsen, cautiously by letter and ‘more outspokenly’ through mutual friends, that publication ‘would damage his prestige rather than mine’.⁴⁰

³⁵ SR, 167. ‘Dialectic’ is an error for ‘dialectical’ – in German they are the same, ‘*dialektisch*’. Importantly, however, ‘dialectical materialism’ was the Stalinist name for a form of historical determinism, distinct (or distinguished today) from Marx’s expression ‘historical materialism’, which I understand to refer to a form of radical relativism.

³⁶ Métall, 29; Voegelin, *Autobiographical Reflections (Collected Works)*, vol 34; 1989, rev ed 2006), 49.

³⁷ He had praised Kelsen’s *Allgemeine Staatslehre* of 1925 for its scientific rigour and its commitment to democracy: ‘Kelsen’s Pure Theory of Law’ (1927) 42 *Political Science Quarterly* 268. In 1945 he had termed the theory ‘the outstanding achievement of our time in legal theory’, including its separation of politics and legal science; in spite of its ‘positivistic metaphysics’ in opposition to theory of natural law, as well as a limited grasp of the nature of politics, it was ‘a magnificent contribution to the science of law’: review of *GTLS* and of William Ebenstein, *The Pure Theory of Law*, (1945) 6 *Louisiana Law Review* 489.

³⁸ Voegelin, *Autobiographical Reflections*, above n 36, 81.

³⁹ A typescript by Kelsen, ‘A New Science of Politics’, remains among Voegelin’s papers: Hoover Institution Archives, ‘Register of the Eric Voegelin Papers, 1907-1997’, box 63, folder 13 (<<http://www.oac.cdlib.org/findaid/ark:/13030/tf4m3nb041>> accessed 26 August 2012).

⁴⁰ Voegelin, *Autobiographical Reflections*, above n 36, 81.

However, in 1955 Kelsen would condemn Voegelin's book within his long essay 'Foundations of Democracy'.⁴¹ Voegelin had distinguished between merely 'elemental' representation and 'existential' representation. He had argued, Kelsen quotes, that:

A representative system is truly representative when there are no parties, when there is one party, when there are two or more parties, when the two parties can be considered factions of one party ... a representative system will not work if there are two or more parties who disagree on points of principle.⁴²

Voegelin nevertheless rejects the concept of a 'one-party state' as 'theoretically of dubious value'. Kelsen objects, deadpan, that a one-party state may 'offer an ideal case of "existential" representation' and the 'most characteristic type of one-party state is the Soviet Union'.⁴³ Voegelin digs himself deeper: a form of government that is 'nothing but representative in the constitutional sense' will be overthrown by 'a representative ruler in the existential sense' and 'quite possibly the new existential ruler will not be too representative in the constitutional sense'. Kelsen fills in the hole: this would be 'a ruler who represents the people in a fascistic sense – "Fuehrer" or a "Duce" who effectively organizes the mass of the people for action and may claim to realize democracy'.⁴⁴ Kelsen may therefore have thought that he had dealt with Voegelin's views on politics as such. He could now deal with Voegelin and others regarding politicisation of science.⁴⁵

⁴¹ Kelsen, 'Foundations of Democracy' (1955) 66(1/2) *Ethics* 1. The uncharacteristic vehemence of this attack upon communism, as well as in *The Communist Theory of Law* (1955), was perhaps motivated by the above-mentioned suspicions of fellow-travelling.

⁴² 'Foundations of Democracy', above n 41, 6-10. This is hardly consistent with Voegelin's praise of the British and US democracies as, among 'the major European political societies', the 'most resistant against Gnostic totalitarianism' (quoted: SR, 268). Voegelin seems never to have found himself between a British socialist and a Tory.

⁴³ 'Foundations of Democracy', above n 41, 10.

⁴⁴ Id, 14.

⁴⁵ On Kelsen in relation to Voegelin's *œuvre*, see Dietmar Herz, 'Das Ideal einer objektiven Wissenschaft von Recht und Staat: Zur Kritik Eric Voegelins and Hans Kelsen', Eric-Voegelin-Archiv, Occasional Papers III (1996; 2nd ed, 2002); see also Herz, 'The Concept of "Political Religions" in the Thought of Eric Voegelin' in Hans Maier (ed), *Totalitarianism and Political Religions*, vol 1 'Concepts for the Comparison of Dictatorships' (Jodi Bruhn trans, 2004); Peter J Opitz, 'Eric Voegelins *The New Science of Politics* – Kontexte und Konturen eines Klassikers', Eric-Voegelin-Archiv, Occasional Papers XLI (2003).

The ‘more extensive examination’ had its own vicissitudes, going through several versions whose titles included ‘Defense of Modern Times’, ‘Theology without God?’ and ‘Religion without God?’ Various possibilities of publishing the whole work, or an extract from it as an article, seem to have emerged but been forgone. In 1963 the University of California Press set up the whole work in galley proof, followed by revised galleys in 1964. Then Kelsen decided to withdraw it, at considerable personal expense in reimbursing the publisher.⁴⁶ On Kelsen’s death in 1973, his papers passed to his former student, now friend and biographer, Rudolf Aladár Métall. After Métall’s death in 1975, they passed to the Institut. In 1979 the Institut took the view, which Métall had shared, that Kelsen’s wishes should be respected and the work should not be published. That decision was maintained, despite recommendations for publication from one of Kelsen’s daughters and from others. However, the earlier version was published in 2004,⁴⁷ which could have weakened the argument regarding content against publishing the later text as well as increasing the text’s historical value. In 2008 – on the advice of Richard Potz, who would contribute an introduction – the Institut decided to seek a publisher. Springer Verlag agreed, with a subsidy from the Austrian government. The text that is this book is based on the 1964 galley proofs, with (it is stated) very conservative corrections.⁴⁸

One might reasonably suspect that Kelsen, born in 1881, was just tired. That speculation, however, does not fit with his continuing to work on logic and legal science or with the quick and sprightly demolition in 1966 of a complaint that the Pure Theory of Law fails to measure up to the *philosophia perennis*. This, Kelsen hits back, is simply ‘not legal science but legal theology’.⁴⁹

‘Religion’ for all

One further reason for withdrawing the book had been offered in the biography by Métall, who one can suppose had heard it from Kelsen. It had to do with the book’s highly stipulative insistence that the central defining element of ‘religion’ is a belief in a metaphysical God or gods. Kelsen rejects the suggestions of Bertrand Russell and Julian Huxley that ‘religion’

⁴⁶ SR, xiii.

⁴⁷ Above n 32.

⁴⁸ The present text has, unfortunately, significant editorial weaknesses which must be remedied before it is included in the *Werke*. These have been indicated separately to the editors.

⁴⁹ Kelsen, ‘Rechtswissenschaft oder Rechtstheologie? Antwort auf: Dr. Albert Vonlanthen, *Zu Hans Kelsens Anschauung über die Rechtsnorm*’ (1966) 16 *Österreichische Zeitschrift für öffentliches Recht* 233, 233. Vonlanthen’s small work – Kelsen calls it a ‘pamphlet’ (ibid) – had appeared in 1965.

might be defined without this assumption.⁵⁰ Russell, says Kelsen, defines 'religion' in two ways: first, it consists of a church, a creed and a code of personal morals; second and more broadly, it is a 'way of feeling' concerning human suffering and the hope of its alleviation. For Huxley, religion consists simply of feeling – a feeling of 'awe and reverence'. Russell is then able to characterise communism and fascism, including national socialism, as 'new religions'. Kelsen objects that Russell contradicts himself and in a way that is shared by Huxley. Russell, says Kelsen, 'uses the word "religion" to designate two phenomena which – in spite of a certain similarity – are so essentially different that such a terminology is inadmissible'. Russell commits this contradiction because his first characterisation of 'religion' has 'missed the essential point: the belief in God or gods'. That omission from the first characterisation allows Russell to maintain the second. Then the second, Kelsen complains, weakens Russell's preference for science over religion. For Russell is forced to admit: 'In so far as religion consists in a way of feeling, rather than in a set of beliefs, science cannot touch it.' But Russell is then quite wrong, Kelsen claims, in his identification of the 'new religions': for fascism and communism are not 'feelings' but 'political systems, that is, doctrines, ideas'. They do involve feelings, like the 'persecuting zeal' that Russell finds in both of them. Yet hostility to opposition, Kelsen notes, is a mark of any political system. Therefore Russell, through both of his characterisations of 'religion', 'obliterates the difference between religion and politics'.

The editors are puzzled, supposing that Kelsen 'would have attached great value to the views of Huxley and Russell'.⁵¹ They are motivated by Métall's suggestion that this book was withdrawn because Kelsen had eventually come around to those views – accepting that, as Métall puts it, 'intensive religious feelings are also possible without a belief in a metaphysical God (or gods)'.⁵² Kelsen would then have been faced with a thorough and very difficult rewrite of a book whose structure is already shaky. The book is arranged in chapters, but the discussion proceeds more author-by-author than idea-by-idea – very differently from Kelsen's usual practice. It is also imbalanced among the authors criticised – still too much the review of Voegelin, rather than a survey of a range of like-thinking writers.⁵³ Part of the problem is that, the more Kelsen organises his

⁵⁰ SR, 32-38. Kelsen's references are to Bertrand Russell, *Religion and Science* (1935) and Julian Huxley, *Religion without Revelation* (1957).

⁵¹ SR, xiii.

⁵² Métall, 91; Métall refers, apparently mistakenly, to Julian Huxley's brother Aldous.

⁵³ Also, some arguments remain in footnotes that stretch through several pages, instead of being integrated into the main text: SR, notes 92, 199, 571,

discussion around the concept of Gnosticism as he researches it, the deeper he is led into expecting exactitude of a term that was only ever a modern label and, often, a sweeping accusation.⁵⁴ A larger part of the problem is the extent to which the book's structure hangs upon the narrow definition of religion – though less as a premiss for Kelsen himself than as the central feature of his subject matter, since Voegelin takes a stand upon it in order to denounce heretical departures from it. Worse for Kelsen, Voegelin characterises 'religion' without God or gods not only as 'secular religion' but specifically as 'Gnosticism'. This does not leave Kelsen without a place to stand, which would still have been 'science'. But, from that place, he would have been combating less a set of arguments against deviation, in which it was fairly clear what the deviation was from, than whatever Voegelin had chosen to label 'Gnosticism'. He might also have found it difficult to distinguish, except merely in principle, between a scientific sense of wonder and transcendently oriented reverence.

Kelsen, Marx and Freud

If it is often unclear why Voegelin attaches the label 'Gnosticism', it is usually clear to whom he attaches it. Of all the targets selected by Voegelin and his like, the most politically important was Marx. Kelsen, throughout the present book, defends Marxism against the allegation that it is a 'secular religion'. He places it, overall, on the side of 'science'.⁵⁵ That defence is clearly accurate. It could also have endangered Kelsen, in three dimensions. First: the more successfully he can show that these attacks on Marx are misguided, the more he can seem to be defending not just science with Marx as a representative of it but Marx and Marxism specifically. Second, and capable of reinforcing such an impression: when Kelsen defends Marx and Engels by praising their materialism for its scientific character, he is praising the standpoint from which they attack Christianity – not a very safe path in the USA in the 1950s. Third: there are even moments when Kelsen's own attacks on the Christian idea of 'transcendence' are so similar to those made by Marx and Engels that Kelsen might have been borrowing from them. In criticising Voegelin's allegation that Marxism is one of the secular religions, Kelsen quotes Engels:

It is the Christians who, by presenting a peculiar 'History of the Kingdom of God[',] deprive real history of its very essence and claim this essence solely for their transcendent[], abstract and merely invented history, who have history arrive at an imaginary end in

711 and 812.

⁵⁴ Rossbach, above n 16, 102 (tracing it to eighteenth-century France).

⁵⁵ Eg *SR*, 167, 271-272.

their Christ as the perfection of the human race; who interrupt history in the midst of its course; and consequently are compelled to declare the eighteen hundred years following Christ as absurd nonsense and void of content. *We* reclaim the content of history; but we see in history not the revelation of 'God' but of man and only of man.⁵⁶

Engels is attacking all Christians. Yet the terms in which Kelsen attacks those who talk about 'secular religions' are much the same.

It is perhaps in awareness of this similarity that, within the book's single-page Conclusion,⁵⁷ Kelsen's language switches from that of the dispassionate scientist to that of a cold warrior who is finding some of his comrades troubling. To give a theological interpretation to history and society and to introduce religion into science and politics, he says,

might be considered to be merely a more or less exaggerated presentation of certain similarities, a *façon de parler* chosen because of its effect on the reader, a quasi poetical licence, without serious consequences.

However, this is a dangerous error in the author's opinion. The purpose – and if not the purpose, the inevitable effect – of the interpretation stigmatized in this book is to undermine the powerful dam which has been erected to protect science and politics from being flooded by metaphysico-theological speculation. This speculation is not the product of man's rational cognition, but of his imagination rooted in his wishes and fears.

The terminology becomes Freudian, yet Kelsen's concern is not individual but social. He goes on:

⁵⁶ SR, 170 (my corrections in brackets); Kelsen's translation from Friedrich Engels, 'Die Lage Englands' (1844), a review of Thomas Carlyle, *Past and Present* (1843), in Karl Marx and Friedrich Engels, *Historisch-Kritische Gesamtausgabe* (1930), Erste Abteilung, II, 427; the passage can be found in Marx and Engels, *Werke*, vol 1 (1976), 545. I have presumed to correct to 'transcendent' what is – apparently – Kelsen's translation of *jenseitige* as 'transcendental'. The standard English translation has, better, 'other-worldly': Marx and Engels, *Collected Works*, vol 3 (1975), 463. Also: query 'transcendental' at the bottom of SR, 62.

⁵⁷ SR, 271.

The interpretation against which the author is fighting is part of an intellectual movement within Western civilization which can be understood only by recognition of its social function. Provoked by the social instability following the two World Wars, the Russian Revolution, and the establishment of communism in great parts of the world, this movement is aiming at returning religion to politics, and theology to science. For it is assumed that only by this return, and that means by the belief that the capitalist-democratic social order maintained in the Western Hemisphere corresponds to the will of a transcendent and hence absolute authority, can this social order be absolutely justified in its conflict with communism.

On that plane, nonetheless, even in 1964 he was courting trouble from some quarters with this plain allusion, a few pages earlier, to McCarthyism: stating that those whom he is attacking are employing 'the same tactic as smearing as Communists those who do not conform with one's own opinion'.⁵⁸ Risk of this order is perhaps why Kelsen continues his Conclusion in more subtle terms:

Whether any such justification is possible, however, is no concern of science, scientific philosophy or political theory. For science is not, as the Marxists pretend, a mere intellectual superstructure over political reality – a view which the anti-marxists, without being aware of it, confirm by attributing to science the function of justifying a definite political system.

Yet, if Kelsen's road sometimes runs parallel to that of Marx and Engels, it is not more than parallel. It is parallel in critique of ideology, and critique of ideology is an exercise primarily in theoretical reason. On that plane, however, Kelsen's framework is sourced not to Marxism but to Freud. Moreover, while the more political arguments of Marx and Engels demonstrate a commitment to practical reason, Kelsen continues to deny the existence of practical reason:

The philosophers' assumption that moral and political principles can be found in human reason is certainly an illusion, for these values have their ultimate source in the emotional, not in the rational, component of the human mind.⁵⁹

⁵⁸ *SR*, 267.

⁵⁹ *SR*, 98. His sustained position was that there is a fundamental difference

Science, therefore, must be independent of morality and politics, in the same breath as admitting nothing transcendent or supernatural. The book ends:

Science can only describe and explain; it cannot justify reality. It has the immanent tendency to be independent of politics and, as a rational and comprehensive cognition of reality, cannot presuppose in the description and explanation of its object the existence of a transcendent authority beyond any possible human experience.

All the same, Kelsen has put a lot of reason into his politically aligned defence of science.

The whole Kelsen

This is, nonetheless, the dry sort of language to be found at the beginning of the first chapter of *Pure Theory of Law*.⁶⁰ That should not be a surprise. Yet neither should the philosophical depth and political engagement of the rest of the present book.

Anglophones are hampered in their overall understanding of Kelsen by the absence in English of an up-to-date survey of his work,⁶¹ or of a biography in English,⁶² the paucity of English translations of his earlier works⁶³ and inaccuracies⁶⁴ and omissions⁶⁵ in the best known of the

between thinking, which can be rational, and willing, which cannot. Accordingly, logic is applicable to legal propositions (*Rechtssätze*), which describe legal norms (*Rechtsnormen*), but not to the norms themselves. Logical ‘validity’ and legal ‘validity’ are quite different. See Kelsen, ‘Law and Logic’ (1965), ‘Law and Logic Again’ (1967) and ‘On the Practical Syllogism’ (1968) in *ELMP*. See further Stanley L Paulson, ‘A “Justified Normativity” Thesis in Hans Kelsen’s Pure Theory of Law? Rejoinders to Robert Alexy and Joseph Raz’ in Matthias Klatt (ed), *Institutionalized Reason: the Jurisprudence of Robert Alexy* (2012).

⁶⁰ PTL, 1.

⁶¹ One awaits Stanley L Paulson, *Kelsen’s Legal Philosophy* (forthcoming, Oxford UP).

⁶² The only biography so far, which has not been translated, is that by Métall, above n 1. *SR* is dedicated to Métall, ‘my faithful friend’. Kelsen’s autobiography, now published for the first time in volume 1 of his *Werke* (which I have not seen), goes up to 1947. *Hans Kelsen Werke* (2007-), edited by Matthias Jestaedt, is published by Mohr Siebeck in cooperation with the Hans Kelsen-Institut.

⁶³ Among them, his higher-doctoral thesis *Hauptprobleme der*

translations that we do have.⁶⁶ Later translations have been more accurate and complete, but mostly they have been of Kelsen's works on norms and logic.⁶⁷ Kelsen's vast *œuvre*, however, ranges from the start through not only general theory of law but also constitutional law, administrative law, philosophy and politics; a specialisation on international law is added in the

Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze (1911, 2nd ed, 1923), followed by 'Die Rechtswissenschaft als Norm- oder als Kulturwissenschaft' (1916) 40(3) *Schmollers Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reiche* 95; *Der soziologische und der juristische Staatsbegriff* (1922, 2nd ed, 1928); *Rechtsgeschichte gegen Rechtsphilosophie?* (1928). An exception is the very long article of 1928 that appears as an appendix to *General Theory of Law and State*; but, having in the volume little more than the translations of the book and the article, it is difficult to relate the two works. There is now a fine translation, with an extensive introduction, of the first version of *Reine Rechtslehre* (1934): *Introduction to the Problems of Legal Theory (IPLT)*, using what had been the subtitle, *Einleitung in die rechtswissenschaftliche Problematik*, in order to distinguish this book from *PTL*. The two 'editions' of *Reine Rechtslehre* are substantially different books, the second much bigger than the first; I refer to them as 'versions'.

⁶⁴ As when the key expression *Rechtssatz* is rendered 'rule of law in a descriptive sense': *GTLS*, 45ff. The German original of this text appears to have been lost (as I have been told by the Hans Kelsen-Institut), but from other of Kelsen's works the expression used is evidently *Rechtssatz*. In *PTL*, absurdly for a translation of a strongly Kantian work, *transzendent* is rendered at least once as 'transcendental': *RR*, 29; *PTL*, 28. For Kant, 'transcendental' refers to intellectual conditions of the possibility of knowledge: Stanley L Paulson, 'Introduction' in *IPLT*, xvii-xlii at xxx; 'A "Justified Normativity" Thesis in Hans Kelsen's Pure Theory of Law?', above n 59, 71-73.

⁶⁵ In translation, the second version of *Reine Rechtslehre* lost its more philosophical footnotes, even those that refer to well known philosophers writing in English. For example, the opening discussion of the difference between 'is' and 'ought' (*PTL*, 5-6) is referenced in the original (*RR*, 5) to George Edward Moore, *Principia Ethica* ('1922', actually 1903) and Arthur N Prior, *Logic and the Basis of Ethics* ('1944', actually 1949). Also missing in the translation are Moore, in the same book, famously on the 'naturalistic fallacy' (*RR*, 11) and a reply to criticisms of Kelsen's views on 'is' and 'ought' in Alf Ross, *Towards a Realistic Jurisprudence* (1946) (*RR*, 19). Deplorably, too, *PTL* has no index whereas *RR* has a very good one.

⁶⁶ A good early translation, however, is the work through which Kelsen first became well known to anglophones: 'The Pure Theory of Law: its Method and Fundamental Concepts', (Charles H Wilson trans, 1934) 50 *Law Quarterly Review* 474 and (1935) 51 *Law Quarterly Review* 517. The text translated was developed into the first version of *Reine Rechtslehre* (1934).

⁶⁷ Kelsen, *ELMP*; *General Theory of Norms* (1979; Michael Hartney trans, 1991), which does not mention Voegelin.

1930s. In Vienna, from 1919 to 1930, he was a public figure: a professor of law at the University of Vienna, an architect and a judge of the Constitutional Court, an architect of the Austrian constitution of 1920 and a contributor to both liberal and left-wing newspapers.⁶⁸ A summary in English of his political views appeared in 1955, but it is more a statement of positions than a comprehensive argument.⁶⁹ During his long retirement, he returned increasingly to philosophy – that is, to considerations of normativity, logic, politics and justice.⁷⁰ There is therefore no ‘new Kelsen’ in this book, only aspects of Kelsen that have been unfamiliar to anglophones and that it is good to see more of now.

For science of law

Does this book, then, cast new light upon the Pure Theory of Law? At first sight, that may not seem likely. Or, if it does, the light might be of interest solely to Kelsenologists – who are many in Continental Europe and in Latin America, yet in the English-speaking world are few.⁷¹ For surely the Pure Theory of Law has little or even nothing to do with society, politics or history? On the contrary, I would argue, it has first nothing but then everything to do with society, politics and history. In that perspective, I will suggest, this book can also be important to the broad project of a rationalist, materialist science of law.

The first version of *Reine Rechtslehre* contains an author’s preface which begins with a solid commitment to modernism in science of law:

More than twenty years ago I undertook to develop a pure theory of law, that is, a legal theory purified of all political ideology and every element of the natural sciences, a theory conscious, so to speak, of the

⁶⁸ Métall, 28-57; see also Horst Dreier, ‘Hans Kelsen (1881-1973): “Jurist des Jahrhunderts”?’ in Helmut Heinrichs et al (eds), *Deutscher Juristen jüdischer Herkunft* (1993).

⁶⁹ ‘Foundations of Democracy’, above n 41. On Kelsen’s political writings, see Stanley L Paulson, ‘Kelsen as Political Theorist’ (1990) 17 *Cahiers de philosophie politique et juridique* 81.

⁷⁰ He regretted all his life that he had not become a philosopher, but the realistic prospect for a philosophy graduate of modest origins had been school teaching: Métall, 4-5.

⁷¹ Maybe two or three each in the USA, the UK and Australasia. See Robert Walter, Clemens Jabloner and Klaus Zeleny (eds), *Hans Kelsen anderswo – Hans Kelsen abroad: Der Einfluß der Reinen Rechtslehre auf die Rechtslehre in verschiedenen Ländern, Teil III* (2010), including my chapter ‘Kelsen’s Reception in Australasia’. My thanks to ASLP members who responded to my request for information on that topic.

autonomy of the object of its enquiry and thereby conscious of its own unique character. Jurisprudence (*Jurisprudenz*) had been almost completely reduced – openly or covertly – to deliberations of legal policy, and my aim from the very beginning was to raise it to the level of a genuine science, a human science (*Geistes-Wissenschaft*). The idea was to develop those tendencies of jurisprudence that focus solely on cognition of the law rather than on the shaping of it, and to bring the results of this cognition as close as possible to the highest values of all science: objectivity and exactitude.⁷²

The Pure Theory, he records, had received recognition and had inspired imitation. It had also encountered ‘an impassioned resistance rarely seen in the history of legal science’. That resistance had been based partly on misunderstandings, often ‘less than completely unintentional’, and partly on ‘political motives – that is, motives highly coloured by the emotions’.⁷³

That preface is reproduced in the second version of *Reine Rechtslehre*, which adds a new preface. There Kelsen says that, as in the first version:

an objective, solely descriptive science of law is hurled against the stubborn resistance of all those who, misunderstanding the borderlines between science and politics, in the name of the former prescribe a particular content for law – that is, ‘right law’ – and thereby suppose that they have been able to establish a set of values to which positive law must conform (*ein Wertmaß für das positive Recht*).⁷⁴

All of this material is omitted from the translation of the second version.⁷⁵ If one now reads it in, one can see that the present book, far from being alien to the Pure Theory, is a counterpart, on another front, of its struggle against politicisation in science. The present book illuminates what we do find in *Pure Theory of Law*, on the opening page of its first chapter. The Pure Theory, Kelsen repeats, is concerned only to describe. It will state what law is, not what it ought to be; it is a ‘science of law (*Rechtswissenschaft*)’ and not ‘legal politics (*Rechtspolitik*)’.

⁷² *IPLT*, 1; my interpolations from *Reine Rechtslehre* (1934), iii.

⁷³ *IPLT*, 1-2.

⁷⁴ *RR*, viii; ‘right law (*das gerechte Recht*)’.

⁷⁵ Albeit that the ‘Translator’s Preface’ (*PTL*, v-vi) is largely a reworking of the rest of the author’s preface to the second version. The omission is understandable; Kelsen’s new, anglophonic audience was very different.

It is called a 'pure theory' of law, because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law: Its aim is to free the science of law from alien elements. This is the methodological basis of the theory.⁷⁶

This correspondence of form extends to the content of the Pure Theory. The present book focuses centrally upon the idea of transcendence, which within the various presentations of the Pure Theory of Law receives less emphasis in *Pure Theory of Law* itself, but this is an alteration only of focus and not of standpoint. Earlier, in *General Theory of Law and State*, Kelsen says:

The dualism of law and State is a superfluous doubling or duplication of the object of our cognition; a result of our tendency to personify and then to hypostatize our personifications. ... Thus, we imagine behind the law, its hypostatized personification, the State, the god of the law. The dualism of law and State is an animistic superstition.⁷⁷

Then in 1961 he would say:

Whoever believes that norms can be discovered in facts, or that values can be found in material reality, is deceiving himself. For he must – though possibly unconsciously – be *projecting* (*projizieren*) the norms that he has somehow presupposed, or the values that are constituted by those norms, into material reality, so as to be able to deduce them from it. Just as a circus magician pulls out of his top hat doves and rabbits which he had put into it beforehand. ... A nature that is endowed with a will is either an *animistic superstition* or else a nature that has been created by God and in which God's good will is manifested. The will of nature is God's will *in nature*.⁷⁸

⁷⁶ *IPLT*, 1; *Reine Rechtslehre* (1934), iii. At the same time, the tone of this chapter's title switches from oddness to defiance. It is not, as the theologically inclined might have written, 'Natural Law', but 'Law and Nature'; and in the original, even more clearly, it is not '*Naturrecht*' but '*Recht und Natur*'. Kelsen is booking space to say that they are separate.

⁷⁷ *GTLs*, 191; cp *PTL*, 293.

⁷⁸ Kelsen, 'Naturrechtslehre und Rechtspositivismus' (1961) in *Die Wiener rechtstheoretische Schule* (ed Hans Klecatsky et al, 1968), 817-832, 821. Such imagery, of course, is a game at which two can play. In 1965 Vonlanthen would call the Pure Theory 'fairytales in a juristic magic mirror'

Marx would have applauded both the ideas here and the imagery. But the inspiration drawn upon is Freud. In the 1920s, Kelsen had earlier written such a critique in Freudian terms⁷⁹ and had linked state personification to the personification named 'God'.⁸⁰ His arguments are also close to Marx's early critiques of Christianity and, although Kelsen would not have been aware of it at that time, of Hegel's conception of the state.⁸¹ His path from Freud, however, would also be followed by some of the American legal realists, as with Thurman Arnold on law as both a comforting heaven on earth and a 'brooding omnipresence in the skies'.⁸² Marx as well as Freud trace illusion to conflict, but for Marx both are primarily social whereas for Freud both are primarily psychological. The two perspectives can be combined, and each can be applied to the other's primary subject matter, but they are differently focused.

If Kelsen's concern with the idea of transcendence, as renewed and intensified in the present book, were to be taken back into debate on the identity of legal science, the prime target would probably have to be Schmitt. His 'political theology' appears early but briefly in the book and is not mentioned again.⁸³ For this reader, however, it lurks in the background all the way through.⁸⁴

and Kelsen's conception of a legal norm a 'magical witch's cauldron' (quoted: Kelsen, above n 49, 236).

⁷⁹ Eg Kelsen, 'The Conception of the State and Social Psychology: with special reference to Freud's Group Theory' (1924) 5 *International Journal of Psycho-Analysis* 1. Kelsen had mixed closely with Freud's circle while in Vienna: Métall, 40-43; Clemens Jabloner, 'Hans Kelsen and his Circle: the Viennese Years' (1998) 9 *European Journal of International Law* 368.

⁸⁰ Kelsen, 'God and the State' (1922-1923) in *ELMP*.

⁸¹ Karl Marx, 'Contribution to the Critique of Hegel's Philosophy of Law' (1843, first published in 1927) in Karl Marx and Frederick Engels, *Collected Works*, vol 3 (1975), 3-129.

⁸² Thurman W Arnold, *The Symbols of Government* (1935), 33-38. Another American legal realist, Jerome Frank, draws directly upon Freud to liken law to father-authority and to emphasise the emotional drives of non-realist jurists: *Law and the Modern Mind* (1930, 1970), 216-218, 265, 395. Also, Kelsen's conception of positive law as 'dynamic' legal order – a chain of authorisation, not of deduction – has much in common with the Free Law Movement (*Freirechtslehre*), whose inspiration is found in the 'indeterminacy thesis' of American legal realism and Critical Legal Studies: Stanley L Paulson, 'Formalism, "Free Law", and the "Cognition" Quandary: Hans Kelsen's Approach to Legal Interpretation' (2008) 27 *University of Queensland Law Journal* 7.

⁸³ *SR*, 17-19. See further Stanley L Paulson on Kelsen and Schmitt in *The Oxford Carl Schmitt Handbook* (forthcoming); also Olivier Beaud and Pasquale Pasquino (eds), *La controverse sur 'le gardien de la Constitution'*

The present book's relevance to the Pure Theory may, however, be mainly through the second way in which, as I take it, the theory is 'pure'. Kelsen excludes elements of natural science, in that he excludes behaviourism. At the same time, in several respects the Pure Theory is constructed by analogy with natural science. Thus, to the natural-scientific principle of causality will correspond a legal-scientific principle of 'imputation (*Zurechnung*)' and to a 'law' of natural science will correspond a 'law of law (*Rechtsgesetz*)' that will describe regularities in legal phenomena. In the light of this programme of analogy with natural science, I take the Pure Theory to be analogous to Kant's 'pure part' of natural science.⁸⁵ In both, the basic concepts of the science are stated *a priori*, in order to make possible an 'empirical part' in which there will be an account of particular phenomena.⁸⁶ In the empirical part of legal science, these phenomena will be understood as legal. That would not, however, be to exclude – but, on the contrary, to engage in – description of their social, historical and political context. Further: description of law and its context could include describing and explaining any illusions that might be found – for example, personification of the state.

Enlightenment, science and democracy

An additional reason for Kelsen to withdraw his book, or at least not to attempt to revive it, may now be speculated. In 1964, the historian Peter Gay published *The Party of Humanity: Essays in the French Enlightenment*.

et la justice constitutionnelle: Kelsen contre Schmitt / Der Weimarer Streit um den Hüter der Verfassung und die Verfassungsgerichtsbarkeit: Kelsen gegen Schmitt (2007).

⁸⁴ To contend that legal science should be grounded in theology is very different from observing historical connections and actual similarities between law and religion and between legal doctrine and theology. As to such description, see eg Jacques Lenoble and François Ost, *Droit, mythe et raison* (1980).

⁸⁵ Immanuel Kant, *Metaphysical Foundations of Natural Science* (1786; James Ellington trans, 1970), 5-6. By 'metaphysics' here, Kant means universal postulates. See further my 'The Critical Legal Science of Hans Kelsen' (1990) 17 *Journal of Law and Society* 273, 282-283.

⁸⁶ The Pure Theory provides 'the fundamental principles by means of which any legal order can be comprehended': Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence' (1941) in *WIJ*, 266. It is a 'general jurisprudence' which furnishes 'the basic conceptions that enable us to master any law' and accordingly it serves as 'the theoretical basis for all other branches of jurisprudence', such as 'dogmatic' (ie doctrinal), historical or comparative jurisprudence: Kelsen, 'The Function of the Pure Theory of Law' in Alison Reppy (ed), *Law: a Century of Progress 1835-1935* (1937), vol 2, 231-241, 231-232. Even sociology of law: *GTLS*, 175-177.

A specialist on Voltaire, Gay characterised that *philosophe* as a ‘pagan’, indeed a ‘belligerent pagan’.⁸⁷ The idea of an eighteenth-century ‘paganism’ does not, however, play a dominant rôle in his book. His characterisation of the Enlightenment is, rather, in terms of paradoxes: ‘aristocratic liberalism’, ‘passionate rationalism’, ‘tragic humanism’ and ‘a mixture of activism and acceptance’.⁸⁸ But Gay foreshadows, in a footnote that Kelsen, if he had seen it,⁸⁹ could have found ominous:

Voltaire’s paganism is representative of the pagan world view of the Enlightenment as a whole. I shall allude to this paganism throughout this book, and I am now completing a general interpretation of the Enlightenment that will attempt to give full weight to the affinity of the *philosophes* for ancient ways of thinking.⁹⁰

Enlightenment irreligiosity as religion, and from a specialist historian. This was already ammunition for Kelsen’s targets and it promised much more.

The promise was fulfilled and amply. In 1966 appeared the first volume of Gay’s *The Enlightenment: an Interpretation*.⁹¹ This magisterial survey made an instant impact⁹² and would be central to Enlightenment studies for the next four decades. The subtitle to the first volume would have been most unwelcome to Kelsen: ‘The Rise of Modern Paganism’. It would have been even less welcome that Hume, who in Kelsen’s view ‘much more than Kant deserves to be called the destroyer of metaphysics’,⁹³ is characterised as ‘the complete modern pagan’.⁹⁴ Gay’s second volume would appear in 1969 with the more welcome subtitle ‘The Science of Freedom’, but the theme of ‘modern paganism’ is continued.

The issue to confront here is whether Gay shows Kelsen’s targets to have been right all, or some of the way, along. Or at least, on the several

⁸⁷ Peter Gay, *The Party of Humanity: Essays on the Enlightenment* (1964), 10-14.

⁸⁸ Id, 288-290.

⁸⁹ SR does not mention Gay; neither does Métall.

⁹⁰ Gay, above n 87, 11.

⁹¹ Peter Gay, *The Enlightenment: an Interpretation* (vol 1 ‘The Rise of Modern Paganism’, 1966; vol 2 ‘The Science of Freedom’, 1969).

⁹² The first volume won the 1967 National Book Award for History and Biography.

⁹³ Kelsen, ‘Absolutism and Relativism in Philosophy and Politics’ (1948) in *WIJ*, 205; repeated in ‘Foundations of Democracy’, above n 41, 38.

⁹⁴ Gay, above n 91, vol 1, 401.

occasions when Kelsen associates himself with the Enlightenment,⁹⁵ is he grievously mistaken? That depends, to begin with, on what Gay means by 'modern paganism'. Gay identifies the Enlightenment mainly with the writings of the *philosophes*. In his first volume, while acknowledging their diversity and inconsistencies he contends that the *philosophes* thought of themselves as a family – with normal family quarrels – and can even be seen as an 'army' of intellectual liberation.⁹⁶ Their experience

was a dialectical struggle for autonomy, an attempt to assimilate the two pasts they inherited – Christianity and paganism – to pit them against one another and thus to secure their independence. The Enlightenment may be summed up in two words: criticism and power.⁹⁷

They were, in short, 'modern pagans': they drew upon classical pagan culture for inspiration against Christian superstition, both ecclesiastical and as ideological support for state absolutism. Gay prefers the label 'pagan' to others such as 'Augustan, Classical, Humanist' because these 'illuminate segments of the Enlightenment but not the whole'.⁹⁸ He means by 'modern pagan' no more and yet no narrower than 'the affinity of the Enlightenment to classical thought'.⁹⁹ In his second volume, Gay comes closer to Kelsen's concern with science:

I have defined the Enlightenment as a mixture of classicism, impiety, and science, and the philosophes as modern pagans; what made the pagans modern and gave them hope for the future was that they could use science to control their classicism by establishing the superiority of their own, second age of criticism over the first, and thus keep their respect for their ancestors within proper bounds.¹⁰⁰

It turns out that Gay understands 'modern paganism' to be irreligious, at least if Christianity is taken to be the paradigm of a religion. Importantly for

⁹⁵ SR, index entry 'Enlightenment, enlightened'.

⁹⁶ Gay, above n 91, vol 1, 3-8. This claim of consistency is criticised as overstated: eg James Schmidt, 'Introduction' in his (ed), *What is Enlightenment?* (1996); Annelien de Dijn, 'The Politics of Enlightenment: from Peter Gay to Jonathan Israel' (2012) 55 *The Historical Journal* 785. Gay's perspective, however – of intellectual history rather than social and cultural history – may be enjoying a revival: Dan Edelstein, 'The Classical Turn in Enlightenment Studies' (2012) 9 *Modern Intellectual History* 61.

⁹⁷ Gay, above n 91, vol 1, xiii.

⁹⁸ Id, vol 1, 8-10.

⁹⁹ Id, vol 1, 9.

¹⁰⁰ Id, vol 2, 125; Gay prefers not to italicise 'philosophe'.

Kelsen, Gay understands ‘paganism’ to involve a resolute opposition to the idea of transcendence. Only in that light could he have termed Hume a ‘complete pagan’.¹⁰¹ Whether Gay should have spoken at all of ‘paganism’, or in this context even of ‘science’,¹⁰² need not be pursued here. There remains for Kelsen the problem that Gay does speak of ‘paganism’, that he applies the term comprehensively to the Enlightenment and that what he means by ‘paganism’ is close to what Huxley and Russell meant by ‘religion’.

Kelsen would not have gone along with ‘pagan’, but he was keenly interested in ‘criticism and power’. On that plane, he is in line with Gay in subscribing to what has been termed (albeit, criticising Gay) the ‘modernisation thesis’ – the idea that key themes identifiable as those of an ‘Enlightenment’ have been motors for modernity.¹⁰³ Kelsen, like Gay (and, more so, Gay’s critics), is aware of the Enlightenment’s diversity and inconsistencies. He defends Enlightenment rationalism only so far as it is relativistic, rejecting absolutisation of reason.¹⁰⁴ Then he defends Enlightenment relativisation of reason so far as it counts toward modernity and, centrally to modernity, toward modern science. He says, as has been seen: ‘If any criterion distinguishes modern times from the Middle Ages it is – in Western civilization – the existence of objective and independent science.’ That is wholly consistent with the positivism, in the philosophical sense, of the Pure Theory of Law. By ‘positivism’ in that sense Kelsen understands two principles, to both of which he strives to adhere. First: that *reality is exclusively physical*; obversely, that there is no metaphysical reality. Second, which possibly follows from the first: that *statements of what is and of what ought to be are qualitatively different, so that neither can be inferred from the other*. By ‘legal positivism’ he understands the application of these principles to the study of law.¹⁰⁵

These two principles can be attributed to some of the enlighteners, such as Hume, but by no means to all. There is, however, a further principle which can be attributed to all: *freedom of thought*. An application of that principle is rejection of transcendence, where a claim of transcendence is

¹⁰¹ Id, vol 1, 401-419; referring especially to Hume, *Enquiry Concerning Human Understanding* (1748), ch 10 ‘Of miracles’ and ch 11 ‘Of a particular Providence and of a future State’.

¹⁰² Eg James A Leith, ‘Peter Gay’s Enlightenment’ (1971) 5 *Eighteenth-Century Studies* 157.

¹⁰³ de Dijn, above n 96. This thesis is, however, broadly favoured in the trilogy by Jonathan Israel: *Radical Enlightenment* (2001), *Enlightenment Contested* (2006) and *Democratic Enlightenment* (2011).

¹⁰⁴ SR, 103-104, 114-117.

¹⁰⁵ Eg ‘*Naturrechtslehre und Rechtspositivismus*’, above n 78.

seen as a phoney claim to an objectivity in which an idea will appear as undeniably evident. In the present book, Kelsen makes that sort of criticism emphatically of all religion. In his science of law, he also makes it emphatically of claims to transcendence that are made in theory of law – in all claims to the existence of natural law and in conceptions of positive law that personify the state. Then he has to account for the bindingness of positive law without accepting that it has a basis in transcendence.

The principle of freedom of thought had, for the enlighteners, a political twin: the principle of *freedom of action*. That principle, however, was troublesome: pushed far enough, it could require anarchy. The enlighteners were not prepared to go that far; some of them, entirely or eventually, recoiled even from democracy. Montesquieu opposed democracy beyond the very limited and, as he knew, corrupt system of mid-eighteenth century England; he regarded the common people as ‘rabble (*canaille*)’ and his preferred rulers were enlightened aristocrats, such as his good self, perhaps serving an enlightened prince.¹⁰⁶ And Diderot’s regicidal use for sacerdotal innards¹⁰⁷ is not in the same street as Kant’s obsequious (if tactical) attribution to his sovereign of the maxim ‘*Argue as much as you like and about whatever you like, but obey!*’¹⁰⁸

Regarding freedom of action, Kelsen’s life is made even more difficult by his denial – parting company with most of the enlighteners and especially with Kant – of the existence of practical reason. This seems to contradict his strong commitment to democracy: for one might think that the difference between democracy and mob rule is a commitment to practical reason in politics. In Kelsen’s perspective, however, this problem does not appear. He accepts that, if there is no practical reason, judgements about ultimate ends, including a preference for democracy, must be irrational.¹⁰⁹ However, he maintains, judgements about means toward ends can be theoretically rational. This is because ‘the relationship between

¹⁰⁶ Montesquieu was a political advisor to ‘Bonnie Prince Charlie’ in his efforts to restore his family and Catholicism to power in Britain. See my ‘Montesquieu in England: his “Notes on England”, with Commentary and Translation’ (2002) *Oxford University Comparative Law Forum* 6.

¹⁰⁷ ‘Et ses mains ourdiraient les entrailles du prêtre, / Au défaut d’un cordon pour étrangler les rois (And his hands will plait the guts of some priest, / If he can’t find a rope, to strangle all kings’: Denis Diderot, ‘Les Éleuthéromanes’ (1772) in his *Œuvres complètes* (1875-1877), vol 9, 12 at 16.

¹⁰⁸ Immanuel Kant, ‘An Answer to the Question “What is Enlightenment?”’ (1784) in Hans Reiss (ed) and H B Nisbet (trans), *Kant’s Political Writings* (1971), 55.

¹⁰⁹ ‘Foundations of Democracy’, above n 41, 97.

means and end is a relationship between cause and effect, objectively ascertainable by science, whereas the recognition of an end as an ultimate value, which is itself not the means for a further end, lies beyond scientific cognition'.¹¹⁰ Matters of means and end are matters of 'technique' and positive law is rational in that it is a 'social technique'.¹¹¹

In these terms, he claims, democracy – or liberal democracy, the only kind of democracy that he approves – has a 'rationalistic character'. This character is relative, not absolute: liberal democracy is rationalistic not outright but in contrast with autocracy; it is merely more rationalistic than autocracy. That has a positive and a negative side. The negative side is that, while both democracy and autocracy make use of ideologies, the use made by democracy is thinner because democracies have less to hide.¹¹² The positive and more important side stems from the fact that, in a liberal democracy, procedure predominates over substance: the predominant factor is not liberalism, focusing on individual freedom, but the procedures through which the freedom of each individual is limited in the interest of the freedom of all.¹¹³ Those procedures are established in positive law. Hence:

The rationalistic character of democracy manifests itself especially in the tendency to establish the legal order of the state as a system of general norms created by a procedure well organized for this purpose. There is a clear intention of determining, by a pre-established law, the individual acts of the courts and administrative organs in order to make them – as far as possible – calculable. There exists an outspoken need for rationalizing the process in which the power of the state is displayed.¹¹⁴

These procedural guarantees of freedom of action would include guaranteeing freedom of scientific practice. Kelsen is then able to speak of justice as a combination of such means with the ultimate ends that they serve. He understands as 'justice' a 'relative justice', which is 'that justice under whose protection science, and with science, truth and sincerity, are able to flourish'; this is 'the justice of freedom, the justice of peace, the

¹¹⁰ Id, 40.

¹¹¹ Kelsen, 'The Law as a Specific Social Technique' (1941) in *WJL*.

¹¹² 'Foundations of Democracy', above n 41, 30.

¹¹³ Id, 3-4, 18; cp the proceduralist conception of democracy in Jürgen Habermas, *Between Facts and Norms* (1992; William Rehg trans, 1996).

¹¹⁴ 'Foundations of Democracy', above n 41, 29.

justice of democracy, the justice of tolerance'.¹¹⁵ Justice in all of these respects is defended in *Secular Religion*.

¹¹⁵ Kelsen, 'What is Justice?' (1953) in *ELMP*, 24.

Book Symposium

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