KELSEN'S "LAW AND PEACE."

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Hans Kelsen's recent work[1] provides an opportunity for considering both the contributions made to jurisprudence by the *pure science of law* and also the value of this method when applied to a very pressing problem in the world today. The book falls into two parts: firstly the analysis of the theoretic nature of international law and secondly the problem of the future of international relations.[2]

The writing is very clear and engagingly concise and is free from the defects of much jurisprudence—the use of imposing quadrisyllables in order to conceal the threadbare nature of the thought. When it is remembered that the author is not writing in his native language, one is surprised at the even flow of the style.[3] Misprints are difficult to discover and the book is produced on paper which is available neither in England nor Australia—at any rate for learned works.

Hans Kelsen was born in Prague in 1881. In 1911 he became a lecturer at the University of Vienna and eight years later was appointed to the Chair of Public Law and Philosophy of Law at the same University. In 1930 he became Professor of Public and International Law at the University of Cologne. He then took a chair at Geneva and is now at the University of Harvard as a Visiting Professor. Bibliographies and discussions of his theories may be found in the articles cited below.[4] His main interests have clearly been jurisprudence, public and international law.

It is not possible in a short review to discuss the real essence of the pure science of law. It is now clearly recognised that, however varied may be the writings of the moderns, there are three fundamental approaches, the pure science of law, functional jurisprudence, and theory of justice (or teleological jurisprudence).[5] Kelsen's critical work has removed much of the dead wood that was cumbering the growth of learning and even those who reject his views have gained great benefit because of the necessity of restating their thesis in order to withstand his penetrating attack. His work is stimulating and has had great influence in every field of jurisprudence. English academic writers on administrative law owe more to Kelsen than is usually recognised.

To an Englishman, Kelsen's work bears certain fundamental similarities to that of Austin, a writer of whom the former was apparently unaware until he reached America. This similarity appears in two ways:

1. Law and Peace in International Relations, by Hans Kelsen, Harvard Univ. Press, 1942, pp. xi, 181, being the Oliver Wendell Holmes Lectures 1940-41.
2. There are six lectures and the headings illustrate the scope of the work: The Concept of Law: The Nature of International Law: International Law and the State: The Technique of International Law: Federal State or Confederacy of States: International Administration or International Court.
3. Some sentences might be recast. "It is just in the degree of centralisation that the legal community of the primitives—the pre-statal legal community—like the international—the superstatal—legal community, is distinguished from the community we call state." (59-60)
4. Lauterpacht, Kelsen's Pure Science of Law in Modern Theories of Law (ed. Jennings, 1933) 105: J. W. Jones Historical Introduction to the Theory of Law, ch. IX.: Martyniak, Archives de Philosophie du Droit 1937 (1-2) 166: Kelsen, Annales de l'Institut de Droit Comparé (1936) Vol. II., 17: Kelsen, Allgemeine Staatslehre (1925): Kelsen, Reine Rechtslehre (1934): Law, A Century of Progress (New York Univ. Press) Vol. II., 231: Jones 47 L.Q.R. (1931) 62: Wilson, Politica, Vol. 1, 54: Carré de Malberg, Confrontation de la théorie de la formation du droit par degrés (Paris 1935).
5. Stone, 7 Modern Law Review (1944) 97.

firstly there is the strict definition of law in terms of the sanction: secondly the thesis that the basis of the legal order can be discovered only by examining the facts. Austin did not use these words: he wrote that we discover the sovereign by using the test of habitual obedience. Kelsen's phraseology is that we may give a legal reason for everything in the legal order except the basic norm on which all rests. In England, the foundation of the legal order is the dogma that the will of the King in parliament must be obeyed—there is no legal reason for this supremacy but only an historical basis of fact. All constitutions ultimately have an extra-legal origin, and we discover what legal order exists in any given community by asking what is the fundamental postulate accepted by it. The Soviet regime was founded as a result of a successful revolution, but however treasonable the acts of its leaders, a new legal order has emerged which is clearly in effective operation.

Humility was not a characteristic of the Viennese school—it was claimed that the dawn of jurisprudence had begun and that the dark ages were now over. It was, therefore, somewhat embarrassing to be told that John Austin had formulated some of these propositions a century before. Kelsen retorted with an article in the Harvard Law Review pointing out the great differences between his theory and that of the mere Englishman.[6] Undoubtedly there are advances. Kelsen's theory is more penetrating and he makes clear many truths to which Austin was only feeling his way; he also avoids many of the theoretical difficulties into which Austin falls. Kelsen knows exactly what he means by the scope of jurisprudence, whereas Austin has obvious difficulty in discovering an adequate basis for a general theory. Inevitably a century of human thought improves the tools we use.

If Austin was driven to confine the boundaries of jurisprudence because of the confusion of previous writers, Kelsen represents a reaction against the modern schools which have so far widened jurisprudence as to make it almost coterminous with social science itself. Kelsen desires a jurisprudence free of ideological cant and decides to study the legal rule, abstracted from all social conditions. He wishes to discover a theory of law which will be universally true. Law denotes that specific social technique of a coercive order which is essentially the same for all peoples. Law does not attempt to describe what actually occurs, but to lay down norms—If A, then B ought to follow. Rules of law are not valid because they are laid down by a sovereign but because they are recognised by the particular legal order accepted by the community in question. Law cannot be defined in terms of justice, because law is a social weapon that may achieve many ends. Kelsen's impartiality as between the conflicting social currents of the day has led the conservatives to call him a dangerous radical and the revolutionaries to dub him a hopeless reactionary. Neither charge is true—the pure science of law excludes a study of the purpose of law and strives only to understand the formal principles of juristic thought. As such, the discipline has proved a useful one for certain purposes, but the method obviously has limitations. Kelsen defines a rule of law as "a hypothetical judgment

6. 55 Harv. L.R. (1941) 44. This article sets out clearly and shortly the fundamental tenets of Kelsen's doctrine.

according to which a coercive act, forcible interference in the sphere of a subject's interest, is attached as a consequence to certain conduct of that subject."

He then turns to the problem of the nature of international law. Is it true law, and if so, what is its relationship to the law of the state ? It is here that the merits and disadvantages of the theory become clear. Kelsen rightly rejects the view that law can exist only where it is enforced by a state—the state is only a particular method by which the legal order achieves its results. One may have a legal order where no state exists. In international law the problem is two-fold—is there such a thing as a delict, conduct of a state usually characterised as illegal ? Is there according to general international law such a thing as a sanction, a coercive measure provided as a consequence of that delict and directed against a state which conducts itself illegally ?

Even on Kelsen's own theory a legal order exists only if it is in effective operation. Is there in international law evidence that the legal order is accepted and therefore capable of enforcement ? While it is true that we cannot be dogmatic about the meaning of such a term as law, the reviewer considers that in the long evolution from the mores of the tribe to the modern state, law begins only when there is a regulation of self-help and private violence is curbed. There need be no state in the modern sense, but so long as man is entirely free to take the law into his own hands, it is difficult to believe that law exists.

Kelsen admits that international law is primitive law, but he considers that the term law is rightly used. There is a theory of delicts—conduct considered illegal by the international order. But where is the sanction ? Others may treat the international rules as law even if there is no specific sanction, but Kelsen cannot do so, as he has defined law in terms of specific coercion. One form of penalty is the reprisal—the other is war. But the international community has taken no active steps to limit the exercise of self-help in these ways. There are agreements such as the Covenant of the League of Nations or the Kellogg Pact—but to general international law all wars are legal. There is no breach of law in declaring war against a neighbour, provided no treaty be broken. Kelsen, somewhat faintly, maintains the theory of *justum bellum*—that general international law forbids war in principle. It is difficult to discover what is the legal basis of this wishful thinking. Moreover, even if we accept the theory, the only sanction against an unprovoked war is self-help. In fact the only regulation of self-help in the international sphere is a somewhat anaemic attempt to diminish the rigours of war by such devices as Hague Conventions—and after all these depend on particular agreements and do not belong to general international law as such.

The fundamental axioms of an effective legal system are that no man shall be a judge in his own cause and that the right of self-help is so rigidly limited that, save in a few cases, rights can be enforced only through a court which brings an impartial mind to bear on the decision of the points at issue. Apart from special agreements, such as the Covenant of the League, where do we find in international law even the beginnings of these principles ?

Moreover, if law essentially depends in theory on the acceptance of the postulates of a legal order, in sociological fact it depends on the existence of a community which agrees in protecting certain values. Does such a community exist in the international sphere today? Goodhart, in referring to a learned paper entitled "What's wrong with International Law?"[7] states that the author seems to have reached the conclusion that what is wrong is that for all practical purposes it is dead.[8] It is easy to lose perspective at the moment by indulging in excessive cynicism and a review does not provide opportunity for a penetrating analysis of the real nature of international law, but it is somewhat surprising to read this sentence: "If international law can be counted as an order which monopolises the use of force—and such, as we have seen is the case—then it is similar to national law in a decisive point."[9]

The next problem is the relationship of international law to the law of the state. Kelsen's view is that the science of law demands a unified theory—it is difficult to conceive of independent systems of law existing without any relationship. At first the Viennese school said that logically either state law or international law could be treated as the superior body of rules. Later Kelsen really went beyond his abstract premises and supported the primacy of international law, thus giving to his formal theory an ethical core—the legal unity of mankind at large.[10] These abstract arguments have only a limited use. If the dogma is advanced on *a priori* grounds that law can have no source other than the state, it is legitimate to show by abstract logic that another view is possible. Whether, however, at any given time, there is a body of international law, whether it is supreme to state law— these are questions that depend on an analysis of the facts and not on pure theory alone. The test whether a legal order exists is whether it is effective—no degree of sweet reasonableness can make a set of rules into law unless they are accepted by, and therefore capable of enforcement over, a given community. There may be no such thing as international law in 1066 and a very effective body of rules in 2066—by 4066 international law may even be superior to the law of the state and provide the constitution of the world. These questions are determined by the facts—not by pure theories.

In turning to the future, Kelsen rightly concludes that a "federation of the world" cannot be regarded as a practical possibility, making the shrewd comment that the real difficulty is not the fear of losing abstract sovereignty, but dislike of the principle of democracy as applied to the central organs of the federation. Democratic representation arranged according to population would lead inevitably to the domination of the federation by USSR and China. The writer considers that the only practical step at the moment is to set up a world court with compulsory jurisdiction. These lectures were given in 1940-41 but, if Kelsen is still of the same opinion, he would reject the aim of organising force behind the law by setting up a Security Council or a central administration. One of the most important, if not the decisive, faults of the League of Nations was that its authors "placed at the centre of this international

7. A pamphlet by Dr. Friedmann published in 1941.
8. Transactions of the Grotius Society, Vol. 27, 289-290.
9. Law and Peace, 61.
10. Jones, XVI. Brit. Y.B. of International Law (1935) at 12.

organisation not the Permanent Court of International Justice, but a kind of international administration, the Council of the League . . ."[11] Administration brought in its train the theory of unanimity, whereas in the Court the wiser principle of majority decision was at once adopted. If territorial disputes are settled on the basis of self-determination, with the grant of international rights to any unavoidable minorities, then the compulsory jurisdiction of a court is the only solution to the problem of maintaining peace. Historically, the court evolves before the legislature, and a court can fill the gaps of international law by a wide use of equity. He rejects the view that there is any reality in the distinction between legal disputes and political conflicts. So far as an administrative organ is required, it should be confined to the execution of judicial decisions. History shows that states submit more easily to an international court than to an international government.[12] "Seldom has a state refused to execute the decision of a court which it has recognised in a treaty. The idea of law, in spite of everything, seems to be still stronger than any other ideology of power."[13] To discuss this thesis in detail would take us too far afield. Historically, courts have never succeeded in extending their jurisdiction beyond the bounds of community, with its sense of agreed values. Such community may be imposed by force, or grow from identity. Would the international sphere provide a community with sufficient agreement on basic issues to allow a real code of law to be developed ?

Such is a bare summary of a stimulating work. To the pragmatic Anglo-Saxon some of the writing will appear rather abstract and remote—indeed the work, while adept at dealing with the speculative problems of jurisprudence, is at times deficient in sociological and political insight. But that is inevitable when a writer deliberately places the relationship of law to society outside the scope of jurisprudence. The book shows that it is impossible to ignore such questions and it is preferable to form an honourable and open union with the Lady of the Social Sciences than to conduct the inevitable liaison by means of the back stairs.

11. 151-2.
12. 169.
13. 169-170