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Hans Kelsen at Boalt Hall: A Personal Impression

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But this low point in Kelsen's career led him to his final move to Berkeley. This, his biographer reports, he has never regretted. From 1943 until his retirement in 1951 at the age of 70 he taught in the Department of Political Science and for at least one semester at the law school.

Fame came early. When I—literally—sat at his feet in Vienna almost half a century ago, young disciples had formed a "Kelsen Circle" which met periodically to discuss the master's latest sayings—not always having the privilege of a personal exchange. How different the scene at Berkeley! His colleagues' awe and admiration for the great artist of incisive analysis and repartee was soon joined by his students' love and affection for the great man who looked upon the young with gentle interest and compassion. Unforgettable are his annual lectures in my class, which have been attended by eager students from all over the campus and followed by hour-long, patient expatiations upon much of his life's teaching. Perhaps I can most aptly conclude this Preface with the following story from Métall's biography.

In Geneva, Kelsen had noticed a former student in the classroom. Desirous of saying a few kind words to him but having forgotten his name, he apologized: "Please forgive me that I have not called you by your name. I have a very bad memory for names and often fear that when awakening one morning I may not be able to remember my own."

The young man, a Frenchman, bowed and replied: "Mon cher Maître, perhaps you may not be able to recall your name, but world history will never forget it."

Berkeley, May 1971

HANS KELSEN AT BOALT HALL: A PERSONAL IMPRESSION

There are two major apercus for examining Kelsen. One is to recall Kelsen's lectures before the Boalt Hall students. I personally found it very charming to watch Kelsen respond to student questions. He obviously found a familiar and comfortable role for himself in answering student queries and explaining the relevance of what he had to say. The students in turn were quite fascinated by him, his manner, and his ideas.

The other perspective for viewing Kelsen is that law is a structure for appraising any reality. Kelsen's arduous devotion to making clear this point of view is one of the bases of his light and a continuing source of his intellectual value.

Berkeley, May 1971

5. Id. at 78.
6. Id. at 94.
Less than a year ago, under the rubric “Philosophy of Law” of the forthcoming Encyclopedia Britannica, I wrote these words: “Roscoe Pound assessed Hans Kelsen in 1934 as ‘unquestionably the leading jurist of his time,’” an assessment which it is a singular pleasure to reaffirm in 1970, as Kelsen’s 90th birthday approaches at this time of writing.

It is a tribute to the brilliance of Kelsen’s mind that no informed legal scholar, anywhere, needs to be told what Kelsen means by his “pure science of law.” Its main themes, even for those least satisfied by them, have gone into universal legal currency for both the municipal and international orders: Kelsen’s life-long opposition to the blandishments of natural law and sociological jurisprudence; his insistence on the specificity of “legal science” alongside economics, history, logic, and metaphysics; his indefatigable stress on purity of method for this specific science, marking it off from psychological, sociological, and ethical considerations; his demonstration that such purity must be founded on the internal unity of each legal order, proceeding from dependence on its own basic norm and from the concern of legal science only with a certain specific meaning of facts; and his identification of that meaning with the question of what ought to be done or omitted according to the basic norm and norms subordinated to it. The manifold consequences of all this, which he elaborated, have also gone into common legal awareness: the successive levels of rules authorized by the basic norm, these constituting, along with the process of their concretisation, “the legal order”; the consequent nature of legal duties, liabilities, rights, legal personality, the power of contracting, “the State” and sovereignty, and private and public law.

For all this, and much else in our present understanding of the legal order, successive generations of our century have remained heavily in Hans Kelsen’s debt. I quoted above Roscoe Pound’s salutation to Kelsen as “unquestionably the leading jurist of his time.” These two nonagenarians stand out like giants still in the juristic world of the 20th century. The praise of one for the other is praise indeed, which lesser men should not seek either to emulate or to qualify. Nor, when the

† This message for Kelsen’s 90th-birthday Festschrift from Berkeley is penned with warm friendship and deep admiration, but also with unwonted haste. The friendship and admiration are of long standing; the haste is of only recent origin, arising from a clerical error which sent astray an invitation of four months ago for me to contribute to the volume. The haste was induced by a cable from Albert Ehrenzweig received as the Festschrift was almost on the press.

The measure of my dismay, had I missed this occasion, is also a measure of my happiness that there is still time to send this message, truncated though it must now be by the exigencies of the printer.
domains of thought which they subdued and controlled lie such poles apart, should we struggle to measure them one against the other.

Hans Kelsen's science of law still stands, indeed, like a great fortress amid the cross-currents of tempestuous winds now sweeping across the realms of politics, philosophy and the social sciences. In the legal area the main pressures since 1930 have been towards understanding the social functions and effects of law, and (next to these) a search for the ethical or other normative orders by which to test the goodness or justice of law. Even the ancient natural law, in its 20th-century revival shows adaptation to these dominant pressures. In all these regards jurisprudence, despite the integrity of the dominating Kelsenite fortress within it, has become a jousting ground for all ideologies, and a testing ground for many methodological problems of the social sciences. These same years may thus seem to have vindicated Kelsen's unswerving resolve to insulate "the science of law" from such uncertainties and confusions, from beguilements concerning a higher natural law, and generally from the syncretism of methods from which these spring.

Yet the Hans Kelsen who wrote rather passionately about justice in 1957 must long ago have recognized that, while the great structure of his pure theory stands firm as a secure base and retreat for the "scientist" of law, the rest of mankind must somehow contrive to live outside it, exposed to the tempestuous climate of the age, unguided for the hardest problems by the chaste integrity and beauty of the self-validating hierarchy of norms. And this rest of mankind, of course, must obviously include the actors in the law, the practicing lawyers, judges, and administrators, not to speak of the legislators and the citizenry. For them the monument is an inspiration (or a fantasy), a Utopia (or a refuge from reality), a modest renunciation of arbitrary legal power (or a gross repudiation of lawyers' responsibilities), the perfect notion of a legal order (or the coldly neutral prolegomenon to the heat and struggle of actual legal ordering).

It must be of truly abiding satisfaction to him that the body of ideas which Kelsen first outlined before World War I should, in the fantastically different world of 1970, still stir such conflicting responses from those concerned with the place of law and justice in human life. As this Festschrift marks Hans Kelsen's 90th birthday, the contributors and a host of others throughout the world will wish him good health for many years to come, even to the patriarchal age of 120.

Should Hans Kelsen protest that this is too much, we may well remind him that it was at the age of 100 that Patriarch Abraham learned that a son was still to be born to him by his 90-year-old wife, Sarah. Sarah, we are told, laughed out loud as she heard the angels' assurance of a son still to come. Abraham, as befitted a desert host
solicitous for the comfort of his guests (and perhaps because he had an advance intimation the year before) staidly contained his wonderment. Yet, indeed, the due fulfilment of Abraham's vision of the essential unity of the Divine Being demanded this belated begetting. Perhaps one might say, in like mood, that the complete fulfilment of Kelsen's vision of the unity of legal ordering continues to call, in our own day, for renewed creativeness issuing from the full union of heart and mind together.

It is perhaps also in point that the news of this progeny of Abraham's age immediately preceded the descent of the divine wrath on the depraved cities of Sodom and Gomorrah, so that the same divine messengers who announced the one, were charged to enquire and prepare concerning the other. For here may be the first reported explicit challenge, nearly 4,000 years ago, to the validity of norms clearly issuing from a legislator whose supremacy the challenger acknowledged. For when the Lord told Abraham of his resolve towards these Cities of the Plain, Abraham did not accept this merely on the divine authority. Abraham faced the one supreme Being of his own belief, accepting His competence under what might be termed the basic norm of the divine legal order. Yet Abraham did so, not as a passive subject, but in the full humanity of his heart as well as mind.

The import of what followed, when we come fully to understand it, may transcend the familiar issues between natural law and positivism. It certainly guides us, at the least, to the social and psychological foundations of all authority which endures. Abraham, we are told "drew near"; and he said: "Far be it from Thee to do after this manner, to slay the righteous with the wicked, that so the righteous should be as the wicked. That be far from Thee! Shall not the Judge of all the world do justly?"\(^1\)

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Julius Stone

Sydney, May 1971

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**HANS KELSEN IN PRAGUE: A PERSONAL REMINISCENCE**

Hans Kelsen spent the best part of his active life in Austria and in the United States, but in between these periods he also worked in Germany (1930-1933), Switzerland (1933-1936, 1938-1940) and Czechoslovakia (1936-1937). I am here concerned with his visit to Czechoslovakia. When he accepted the call from the German Uni-

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versity of Prague to take up the Chair in Public International Law, vacant since the retirement of Hofrat Rauchberg, three motives may have been intertwined: the wish to return to his birthplace, the most beautiful capital in Central Europe; the desire to lecture once more in his mother tongue—he had been lecturing in French in Geneva; and, to lend his support to the defense of democratic Czechoslovakia, one of the last strongholds of a vanishing liberal world. Before going to Prague, Kelsen could hardly have failed to notice how fast the "White Disease" of Fascism, as Karel Capek called it, was encroaching upon the Czechoslovak oasis, especially—though by no means exclusively—among the German-speaking minority. Even as early as 1933, when the issue of his appointment was first raised in the Faculty of Law and Political Science of the German University, the voting in his favor was as narrow as seven to five—a grave enough portent of impending political trouble which, indeed, became only too manifest in the May elections of 1935 when two-thirds of the Germans of Czechoslovakia cast their votes in favor of Henlein's Nazi-orientated Sudeten-deutsche Partei. In retrospect, it might almost be considered a quixotic act of defiance on Kelsen's part ever to have ventured near that hornets' nest. But the notorious hindsight of the historian should not blind us to the fact that, at the time—the second half of 1936—the cause of democracy, though gravely threatened, did not yet appear to be irretrievably lost. This is why I included in my first publication, a contribution to the Festchrift für Oskar Englaender, some reflections on the need for the self-protection of democracy—reflections which later, at the height of the Munich crisis of 1938, came out in Prague in the form of a pamphlet.

I shall never forget the occasion of Kelsen's inaugural lecture at the venerable Carolinum, in Prague, on the morning of October 22, 1936. A very large number of students had turned up which, under the circumstances, seemed rather sinister. By no means all of them were law students or even members of the university; several of those present were students from the Deutsche Technische Hochschule who were not renowned for their zeal for extra-curricular subjects. As soon as Kelsen had uttered the first sentence of his lecture nearly everybody rose and left the hall. Those who wished to stay were forcibly removed, but I was allowed to keep the professor company, presumably because I was an assistant at the Staatswissenschaftliche Institut of the University. I have very good reason to believe that the instigator of the demonstration was one of Kelsen's former disciples who, though himself of Jewish origin, tried to curry favor with the Henlein party. As a reprisal, the Ministry of Education ordered the German University closed and it was not reopened until three weeks later. Since the gov-
ernment feared that physical violence might be used against Kelsen, the professor, much to his discomfiture, had to be accompanied on his walks by a private detective.

When Kelsen was able to resume his lectures, they were as a rule attended by as few as four students and myself—a grotesque enough set-up which might have appealed to the imagination of Franz Kafka. Here was one of the world’s foremost experts on public international law, and in particular on the Covenant of the League of Nations, preaching to a few disciples in a near-totalitarian wilderness. Again, in historical retrospect, the law of the Covenant and the whole system of collective security were obviously in a highly precarious state by 1936-1937, but not until the inglorious Munich Agreement of September 1938 could they be definitely written off as a dead letter. However, Lord Halifax’s ominous visit to Berchtesgarden in November of 1937, four months before the Anschluss, was the writing on the wall, and Kelsen, who in the most adverse circumstances had held out for so long, abandoned his post at the beginning of 1938 and returned to Geneva where he had left his family 15 months earlier. Henceforth my own position at the Staatswissenschaftliche Institut became untenable though my emigration to England lay as yet in the future.

Now, in the 1970s, when I am engaged in an historical study of the twilight of the liberal world, I often think of Kelsen as one of the most illustrious representatives of that tolerant and truly pluralistic world. Its swansong, one might almost say, is contained in his work entitled Vom Wesen und Wert der Demokratie, which was also the theme of a talk given by Kelsen in Prague, in 1937, to a large audience, composed mainly of Czechs. This was a memorable occasion, but what impressed me most about Hans Kelsen was the indomitable spirit with which he pursued his scholarly researches in the midst of so many tribulations. While large parts of Europe were relapsing into what Vico would have called secondary barbarism, Kelsen imperturbably carried on with his anthropological investigation into the origins of the idea of justice. This was later to form the basis of his work entitled Nature and Society. To refugee scholars like myself—who are a generation younger than Hans Kelsen—his will forever be an abiding example.

Hans Georg Schenk

Wolfson College, Oxford, May 1971