HANS KELSEN—*IN MEMORIAM*

By Benjamin Akzin

At the age of 91, one of this century's greatest legal scholars, Hans Kelsen, died in April 1973 at Berkeley, California. As a student of his at the zenith of his scholarly activity, in Vienna of the twenties, and ever since his friend and admirer, I would like to dedicate these lines to the memory of the man who, more than anyone else, influenced my legal thinking and my approach to scholarship generally.

Kelsen was born in Prague in 1881 and moved to Vienna in his childhood. There he grew up, studied, taught, and acquired his renown as one of the world's masters of public law and jurisprudence. A lecturer in 1911 and a full professor in 1919 at the University of Vienna, he stayed with that institution until 1930. With reactionary trends growing steadily stronger, he then embarked on a 12-year long period of wanderings. For a few years he taught at the University of Cologne, in Germany, and was even elected its rector, but after the Nazis came to power, Kelsen, who had long been attacked by them as the embodiment of the "Jewish-Talmudic spirit", moved to the German University in Prague, in the still democratic Czechoslovakia of those days. But at that university, too, pro-Nazi tendencies made themselves felt, and his next station was the famous Institute of International Studies in Geneva. When the Second World War broke out, he left for the United States.

Kelsen's approach to legal science, based as it was on systematic logical analysis, with profound philosophical underpinnings, was foreign to the pragmatic American conception of law, a conception which—to quote Justice Oliver Wendell Holmes—considered that "the life of the law is not logic, but experience", and it was not easy for Kelsen to find his place on the American academic scene. But in 1942 he was appointed professor of political science at the University of California at Berkeley, and gradually Kelsen's influence made itself felt among political scientists, international lawyers, and legal philosophers in the United States as well. Retiring in 1952, Kelsen, by then the recipient of countless academic honours on all continents, continued his research activities, gave guest lectures at many universities in Europe and Latin America, but his home remained in Berkeley. Just as he had been attacked by Nazis in the past, he became, and remained to the end, the foremost adversary of legal scholars in the Soviet Union and its satellites, who invariably consider it necessary to devote a large part of their theoretical writings to polemics with Kelsen.

Kelsen was of Jewish origin, but until the rise of the Nazis he felt no particular relation toward Jewish tradition, culture, or aspirations. Fairly early in life he declared himself an "undenominational", thus formally severing his links with the Jewish community. Ever since the twenties, I often discussed with him problems of Judaism and Zionism, and would like to put on record that unlike many extremely assimilated Jews, Kelsen showed no trace of either an inner or an active antagonism toward the movement of Jewish national revival. His attitude toward it was one of a somewhat distant intellectual curiosity, but not sharing either national or religious Jewish consciousness, he simply watched it from afar. He neither helped nor hindered. Still, one characteristic might have indicated a certain kinship-feeling on his part: Vienna was, at the time, full of Jewish youngsters from Eastern Europe who encountered difficulties in getting admitted to the University. Kelsen used to help them to gain admission, and if they proved talented, he would treat them with special cordiality. His attitude changed with the rise of Nazism. From then on, he proclaimed himself a Jew, showed much interest in Zionism (and later—in the Jewish State), followed its development and expressed anxiety over its future. One of his daughters settled in Palestine in the thirties, but had to leave the country in the fifties for family reasons. After the establishment of the State, there was talk of inviting Kelsen to settle in Jerusalem, an idea with which he concurred most heartily, but complications arose and the scheme fell through.

Kelsen's fields of specialization were unusually broad. His friendship with Siegmund Freud caused him to delve deeply into psychology, on which he published several papers. He did noted research in political theory and wrote on the ideas of Plato, Aristotle and Dante. In philosophy he inclined toward neo-Kantianism, and his better students were expected by him to familiarize themselves with philosophical literature, especially that dealing with epistomology and methodology of science. At a later period he did much work in sociology, anthropology and the history of religion. But his main domains, and those in which he attained fame, were constitutional law, international law, and jurisprudence. It was he who, in the main, authored the Austrian Constitution of 1920—a model for many democratic constitutions and a document under which Austria is ruled to this day. During the entire democratic span of pre-war Austria, 1920–1929, he served as judge of the country's Constitutional Court and, as its permanent *rapporteur,* wrote most of the Court's decisions. Though his renown rests mainly on his theoretical writings, Kelsen also disclosed an exemplary clarity of thought and a pronounced sense of reality when interpreting legal systems (thus his commentaries on the Austrian Constitution and on the United Nations Charter), when analyzing specific problems (thus his book on the foundation of Czechoslovakia and its citizenship problems) and when writing judicial decisions.

However, Kelsen's main contribution to legal science was in the domain of jurisprudence. His principal books in this field were: *Main Problems of the*

Theory of Constitutional Law (1911); *The Problem of Sovereignty and the Theory of International Law* (1920); *The Sociological and the Juristic Concept of the State* (1923); *General Theory of the State* (1925); *The Pure Theory of Law* (1934). Much of the substance of these books, written originally in German, was incorporated in his *General Theory of Law and State,* written by Kelsen in English in 1945 for the English-speaking public. This series of studies had an enormous impact on modern legal thinking, and they, together with his numerous articles, laid the foundation to the trend known as the School of the pure theory of law or the Viennese School. While Kelsen's own writing was done in three languages—German, French, English—his work has been translated into 24 languages at least, thus making him the most translated jurist or political scientist of the century.

Kelsen regards positive law as an autonomous normative system. To attribute legitimacy to the precepts of the system it is necessary to share the assumption that their source, the "basic norm", from which all others derive their validity, is itself valid, i.e., that its binding force and claim to obedience are acknowledged. The sovereign is the entity to which the authority is attributed in a given society to determine the basic norm. Since that entity stands at the summit of all other institutions of the society in question, the society itself can be considered sovereign; but basically legal institutions are nothing else than personifications of bundles of normative authority delegated to individuals or collective groups, and therefore it is the norm rather than the institution that is, theoretically, the essential factor. The sovereign State, from a juristic viewpoint, is accordingly identical with the complete legal system, a system that does not derive its authority from an outside source. The rest of the norms and commands and institutions within the State constitute a hierarchical structure, with the validity of each determined by the extent to which it is authorized by the system's higher norms and can be reconciled with them. The so-called "unlawful" acts of the State and of all public authorities within the State are merely deeds of individuals or collective bodies who act beyond the powers conferred upon them. Therefore, they should not be properly attributed to the State or to the authorities in question, and this is the ground upon which they should be considered unlawful. If international law is regarded as superior to the domestic law of the State, this means that the body known as State is not sovereign, but that its authority is determined and limited by a universal legal system at whose apex stand the fundamental rules of international law.

The only meeting-point of this scheme with social reality, according to Kelsen, is the requirement that the attribution of sovereignty to any given entity (an individual, a group, the sum-total of a State's population, the international community, or a metaphysical being) corresponds sufficiently to average behaviour in society to serve as a reasonable explanation (Kelsen's own expression is *ein brauchbares Deutungsschema*—a usable interpretative scheme) of human behaviour. If this correspondence drops beneath a reason-

able minimum, as in the case of a successful revolution, the previous assumption does not necessarily hold any longer, and the legal system may have to be construed anew, around a new sovereign and a new basic norm, even if the material contents of most legal rules remains identical. In any case, the correspondence between actual social behaviour and the normative system—and this goes for *any* normative system, not only for that of positive law—can be approximative at best. Complete congruence between them is excluded, for there is a necessary tension between the *is* and the *ought*. It is this tension which explains the phenomena of unlawful behaviour and of criminality. The legal system reacts to these deviations by sanctions, and judicial agencies are those authorized to determine whether a given behaviour is contrary to valid legal norms.

This "positivistic" approach, negating as it does the relevance for the positive law of natural law principles on the one hand and of sociological considerations on the other, has met with serious criticism on various sides. Its opponents can be found among legal sociologists, historians of law, and followers of different ideologies—religious believers, moralists, liberals, socialists, and adherents of totalitarian schools from the right and the left alike. All of them accused Kelsen of dry formalism. Indeed, like many an abstract model, Kelsen's scheme is somewhat narrow, it eliminates (knowingly, in the interest of the purity of an *ought*-oriented method) a number of factors, and the picture presented by it is therefore one-sided and somewhat artificial. But as an exercise in legal logic and as a means to clarify the phenomena of validity and unlawfulness of presumed legal norms (with a private law contract also a norm which is *prima facie* binding on the parties), the Kelsenian approach has added to legal analysis a dimension of sharpness and precision that was lacking heretofore.

It would be wrong to think that Kelsen himself was oblivious of social realities or indifferent to values. The point he made was that while the validity and form of legal norms is to be determined solely within the premises of the given legal system, their material contents is a function of social pressures and of political and ethical values, and that the two spheres should not be intermingled. As to the "meta-juristic" realities and values themselves, especially the values of ethics and of liberal democracy, Kelsen was very sensitive and even attached to them. Witness his writings that dealt with social and political problems, such as his classical essay *On the Meaning and Value of Democracy* (1920), *Socialism and the State* (1920), *The Problem of Parliamentarism* (1926), *Society and Nature* (1943), and *Political Theory of Bolshevism* (1948). The title of one of his monographs, *Peace Through Law,* has been adopted as the name of an important international organization.

Ever since 1925, Kelsen devoted much thought to problems of international law, with the concept of sovereignty and the relationship between international law and domestic ("municipal") law as the starting points of his enquiries. His articles on the subject and especially his courses in the Academy

of International Law at the Hague constitute a most significant contribution to the theory of that branch of legal science. But he also dealt with the positive law of nations as such, and his already noted commentary on the Charter of the United Nations, first published in 1950, has been received as an authoritative and masterly exposition.

And finally, a few words on Kelsen as a teacher and educator. Despite the complexity and abstractness of his speaking style, Kelsen was a most eloquent lecturer, and exuded great personal charm. His lectures invariably attracted students in masses. To the better students he was easily accessible, and he liked to draw them nearer, to encourage them and to help them to advance. Even when they disagreed with his views, he took it in good spirit, as long as they knew how to bolster their position by sound argument. The universities of the world, from the Far East to the two Americas, not to speak of Europe, are full of teachers who have been influenced in some measure by his teachings. In Israel, Kelsen's closer disciples are represented by Professor Hans Klinghoffer of the Hebrew University and by myself.[1]

All those of us who were privileged to know him more intimately, cherish the memory not only of an outstanding scholar but also of a warm and inspiring personality.

[1] For my own views on Kelsen's jurisprudential scheme, see: B. Akzin, "Analysis of State and Law Structure" (in: S. Engel and R. A. Metall, ed., *Law, State and International Order, Essays in Honor of Hans Kelsen,* 1964); a German version is: "Die Struktur von Staat und Recht" (*Der Staat,* 1964, pp. 261–280). For my attitude toward Kelsen's views on international law, see: B. Akzin, "Les Problèmes Fondamentaux du Droit International Public", 1929; and: "L'Ecole Autrichienne et le Fondement du Droit International Public" (1929) *Revue du Droit International.*