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Kelsen: PRINCIPLES OF INTERNATIONAL LAW

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RECENT BOOKS

This department undertakes to note or review briefly current books on law and matters closely related thereto. Periodicals, court reports, and other publications that appear at frequent intervals are not included. The information given in the notes is derived from inspection of the books, publishers' literature, and the ordinary library sources.

BRIEF REVIEWS

PRINCIPLES OF INTERNATIONAL LAW. By *Hans Kelsen*. New York: Rinehart & Company. 1952. Pp. xvii, 461. $5.

In this volume, issued as one of the Fletcher School *Studies in International Affairs*, a world-renowned legal philosopher analyzes our contemporary system of international law. Professor Kelsen says of the work: "I have chosen the title *Principles of International Law* because I thought it necessary to present, in addition to the most important norms which form this branch of the law, a theory of international law, that is to say, an examination of its nature and fundamental concepts, an analysis of its structure, and the determination of its position in the world of law."

Although intended as "an introduction to the study of international law," the reviewer believes that the book will find greater appreciation among those already enjoying some acquaintance with legal theory and with international law. Indeed, it is with the theoretical analysis of the book that this review will be concerned, rather than with its virtues as a textbook. Suffice it to say that this book differs widely in both organization and content from what we generally expect to find in a casebook or textbook for an introductory course in international law.

Kelsen holds that for international law, as for national law, there must be juristic delicts (legal wrongs, violations of law) if the international order is to be a legal order at all. That is, an order is a legal order if it provides a sanction (punishment, unpleasant consequence) for a delict. Examining present international law, Kelsen finds that the international order is a legal one since it permits an injured state to act as an organ of the international community in applying force against the delinquent state. For international law the coercive acts of states "are, in principle, permitted only as a reaction against a delict, and accordingly the employment of force to any other end is forbidden." Thus under international law it is "possible to interpret the employment of force directed by one state against another either as sanction or as delict."

For Kelsen, as for most jurisprudents, the function of international law, as of all law, is to regulate the mutual relations of individuals. Because of this it would seem that no political, social, sociological, legal, or other unit composed of two or more individuals is by its nature an impossible subject for international law. This extension to its logical extreme of the category of subjects of international law is accompanied by a similar extension of the category of the subject-matter of international law. For Kelsen there is nothing which *by its nature* could not be regulated by international law. This would be true even of national constitutional problems, since by treaty a state may be required to adopt a par-

ticular constitution. One may wonder whether the subject-matter of international law can thus be pushed to its logical extremity, especially as regards a federal state such as the United States, wherein its constitution may prohibit the conclusion of certain types of treaties. However, if one were to agree that there is nothing which *by its nature* is necessarily within the exclusive domestic jurisdiction of a state, and that no group of individuals is by its nature an impossible subject of international law, then one might be able to agree with Kelsen that international law is not limited in all its spheres of validity: territorial, temporal, personal, and material.

By applying natural law doctrines to states, some writers have sought to deduce certain fundamental rights allegedly possessed by all states. The most vehemently championed fundamental rights have been those of absolute equality and absolute sovereignty. However, the deduction of such rights from nature is the characteristic defect of a natural law analysis. Rights presuppose duties and both presuppose a normative order, and such an order is creatable only by men. Natural or fundamental rights are not rights at all, but rather are political ideologies. An analysis of positive law reveals the invalidity of the theories of alleged fundamental rights since positive law reveals that states are neither equal nor free (as absolute sovereignty would imply). The conception of the absolutely unbound state is derived from the internationalization of the theory that a social compact explains the creation of a legal order. But an examination of positive international law reveals the inadequacy of such a view since new states are bound by international law when they come into existence and this without their consent.

It is characteristic of all law that it regulates its own creation. In national legal orders each norm takes its validity from some superior norm which regulates its creation. In the national legal order the hierarchy of norms is the constitution (which need not be written), statutes, judicial decisions, and finally the duty imposed upon the individual. As regards the international community, its constitution "is the set of rules of international law which regulates the creation of international law, or, in other terms, which determines the 'sources' of international law." For international law, these "sources" are custom and treaty. Absent either, and despite moral or political objections, a state is free to act as it wishes, and in so acting the state is behaving in accordance with the norm of international law which reflects the fundamental principle that what is not forbidden is legally permitted.

To the scrap-heap of non-positivistic theories which already includes natural law doctrines and doctrines of absolute sovereignty, Kelsen adds the doctrine of pluralism which holds that the various national legal orders and the international legal order are mutually independent. In the answer of the pure theory of international law to the pluralistic thesis, we reach what is for many purposes the keystone of Kelsen's system. The pluralist maintains that the national and international legal orders are independent because the ultimate reason of validity is different for each. To answer the question raised by such a view the relation between the norms of the two orders must be examined, since if different norms

"receive their validity from the same basic norm, then—by definition—they all form part of the same system."

For Kelsen, a legal order is a dynamic norm system, that is, one where the norms, whatever their content, are valid if created according to the basic norm of the system. This is distinguished from a static norm system where the content and validity of a norm is deducible from some self-evident basic norm. Since the legal order is dynamic and since all law regulates its own creation, a norm belongs to a particular legal order if it is created in the manner established by a superior norm of the order. By tracing through the hierarchy of norms from lowest to ever superior norm, there is eventually encountered some historically first "constitution" which is presupposed as the final postulate upon which depends the validity of all inferior norms. The validity of this constitution can be expressed as follows:

(1) "It is postulated that one ought to behave as the individual or individuals who laid down the first constitution have ordained. This is the basic norm of the national legal order. . . ." [p. 411; hereafter when (1) appears in this paper it will be this passage which will be intended. Similarly for (2), (3), etc.].

This norm is not one of positive national law, but rather it is presupposed in interpreting social relations in legal terms; it is the condition which makes juristic propositions possible.

The first criterion determining validity of a legal norm is found in the principle of legitimacy according to which a norm is valid if established in the way determined by the first constitution. However, compliance with the principle of legitimacy is not conclusive of validity, since, for example, a norm created today in Germany in the manner ordained by the 1871 Constitution may be said to be legitimate though clearly invalid. The reason for this invalidity lies not in failure to comply with the 1871 constitutional procedure for norm creation, but rather in the fact that the procedure is no longer valid; the 1871 Constitution has lost its efficacy. Thus it is clear that the efficacy of the legal order — the general observance and application of the order — is a necessary condition for the validity of any of the norms created by the order.

(2) "These norms are valid not because the total order is effective, but because they are created in conformity with the constitution. But this constitution is supposed to be a valid norm only on the condition that the total order, established in conformity with it, is effective." (p. 413)

From these considerations there follows a most central conclusion. The principle that a legal order must, by and large, be effective in order to be valid is itself a norm. The norm may be formulated as follows:

(3) "Men ought to behave in conformity with a coercive order which, as a whole, is by and large effective." (p. 414)

This is a norm of positive international law; it is revealed, for example, in the rule of international law that an effective government is the legitimate government of a state. Since this norm of international law determines the validity for norms of national law, the "source" of national law is within international

law and hence that pluralistic thesis becomes untenable which alleges the mutual independence of the two legal orders.

After indicating the basic norm of national law and demonstrating the existence of an intimate relation between national and international law, the pinnacle of the monistic legal order is reached when the basic norm of international law is deduced. To find this norm the same procedure is used as was used with national law: beginning with the lowest norm one proceeds to ever superior norms. In international law the starting point is the decision of an international tribunal. Finding that the validity of the norm created by that decision is derived from the treaty pursuant to which the tribunal was instituted, we look to the reason for the validity of the treaty. This is found in the norm *pacta sunt servanda,* a norm of general international law created by custom. The early efforts of the Vienna School of International Law stopped here and thought of *pacta sunt servanda* as the basis norm of international law, but clearly this was inadequate. It is now urged, instead, that

> (4) "The basic norm of international law . . . must be a norm which countenances custom as a norm-creating fact, and might be formulated as follows: The states ought to behave as they have customarily behaved." (pp. 417-418)

It is believed that the above brief synopsis constitutes a bare minimum depiction of the logical "bones" of the pure theory of international law as described by Kelsen in this book. No effort has been made to present Kelsen's views on the more traditional subjects found in international law casebooks or in other works intended for beginning students of international law. All those familiar with Kelsen's previous writings will require little assurance as to the high quality of his discussions on such matters as jurisdiction, territory, protection of nationals, etc.

There are at least two general criteria available for appraising a theory of the type here involved. One may endorse (or reject) the offered theory because it does (or does not) correspond to what appears to be the actual behavior of the phenomena with which the theory is concerned, or one may criticize the theory on what may be called aesthetic grounds. A third type of criticism frequently encountered in regard to writing on international law is here inapplicable; it is that which seeks to pass moral, political, or sociological judgment on the value of the theory in terms of what is thought to be its effect upon future moral, political, or sociological behavior. Such criticism may be desirable but is here irrelevant, or perhaps more accurately, it is here almost as irrelevant as would be like criticism of *Principia Mathematica.* Note that what is said to be inapplicable is moral criticism of the theory, not of the particular norms alleged to obtain within the theory. In any event, the most clearly relevant criticism of an investigation purporting to result in a *theory* of international law is criticism concerned with aesthetic factors, i.e., consistency, simplicity, completeness.

Without pretending to invoke any logically rigorous conception of consistency, there are grounds for questioning the consistency of Kelsen's constructions.

The apparent difficulties may be attributable solely to the vagueness and ambiguity of any natural language available for expressing admittedly complex ideas. However, consider in addition to (1) above, the following two further passages from Kelsen:

(5) "That the first constitution is a binding legal norm is presupposed, and the formulation of the presupposition is the basic norm of the national legal order." (p. 412)

(6) "According to international law, the constitution of a state is valid only if the legal order established on the basis of this constitution is, by and large, effective. It is this general principle of effectiveness, a positive norm of international law, which, applied to an individual national legal order, provides the basic norm of this national legal order." (pp. 414-415)

As regards the relationship between (1) and (5), what does "postulated" in (1) mean when considered in the light of "formulated" and "presupposition" in (5)? What does it mean to formulate a presupposition? Is the formulation of a presupposition a postulate? If (1) is correct, and the basic norm of a national legal order is a postulate, which by its very nature is extra-logical to the system, how can such a norm (postulate) bear a *logical* relation to another system? It will be recalled that such a relationship was alleged to exist between national and international law and hence the final argument of pluralism was answered.

A further problem in regard to (5). Can it be correct to say that the "first constitution is a binding legal norm," or even that the first constitution is a legal norm? In order for either proposition to be correct, especially the first, the constitution would itself have to be composed of one or more norms. Instead of a constitution typically asserting, for example, "All legislative powers herein granted shall be vested in a Congress," it would require that the norm read, "All legislative powers herein granted ought to be vested in a Congress." A constitution itself composed of legal norms is objectionable on two grounds: it would not correspond with reality, but more important, it would presuppose the validity of the legal order which is a condition for the validity of all norms created pursuant to the constitution. That is, the norm, "All legislative powers herein granted ought to be vested in a Congress" would not be valid unless and until the following norm was valid: One ought to behave in accordance with the norm that all legislative powers herein granted ought to be vested in a Congress. Quotation (6) attests to the correctness of this view; it also indicates why this apparent confusion has arisen.

Assuming that (1) and (5) are intended to mean the same thing and that there is no difficulty as regards the relationship between them, how then reconcile (1) and (6)? It appears that (6) states that: The basic norm of a national legal order (which is also an inferior norm of the international legal order) is that the constitution of the state is valid only if the legal order established on the basis of the constitution is, by and large, effective. Clearly, (1) and (6) cannot both be *the* basic norm of a national legal order, and clearly (1) means something quite different from what (6) means. This is evident from the fact

that (1) is a presupposition of the national legal order, whereas (6) is apparently deduced from the basic norm of international law and is not a presupposition at all. May the solution lie in the fact that there is more than one basic norm for a national legal order? Analogizing the norm of a legal order to the axiom of a logical order, it would appear that an order as rich as the legal order may indeed require more than one axiom. May it be that the pure theory of law is aesthetically too simple? Reading Kelsen as a whole, it is likely that his sense of parsimony would be offended by a multiplicity of basic norms, although such a multiplicity would in no way diminish the purity of the theory. If compelled to choose which Kelsen intends as *the* basic norm it is likely that (1) would prevail over (6); however, the reverse presents greater support to Kelsen's monistic demands.

Before concluding, two further problems will be merely indicated without attempting to offer any suggestions for their solution. First, does Kelsen intend, as (1) suggests, that one ought behave as the "drafters" of the first constitution intended; does he contemplate making the result of the latest historical researches into the "drafter's" intent the first constitution? Or, does he intend that the dynamic quality of the legal order lies only in the method of creating norms and not also in changing interpretations as to what was ordained by those individuals who laid down the initial procedure for creating law?

Second, it will be recalled that the basic norm of international law dictates that "states ought to behave as they have customarily behaved." In regard to this proposition there are at least two difficulties; the first concerns the word "they," and the second centers upon the concept of custom. Kelsen has devoted some attention to the latter subject and says of custom:

> (7) ". . . the frequency of conduct . . . is only one element of the law-creating fact called custom. The second element is the fact that the individuals whose conduct constitutes the custom must be convinced that they fulfill, by their actions or abstentions, a duty, or that they exercise a right. They must believe that they apply a norm, but they need not believe that it is a legal norm which they apply. . . . If the conduct of the states is not accompanied by the opinion that this conduct is obligatory or right, a so-called 'usage,' but not a law-creating custom, is established." (p. 307)

Kelsen rejects the *Volksgeist* of Savingy and the *solidarité sociale* of Duguit as explanations for the creation of law because they are scientifically unprovable "assumptions of social metaphysics, the purpose of which is to present moral-political postulates, based on subjective value judgments, as objectively valid principles." (p. 310) But is not an almost identical objection valid against Kelsen's conception of custom as law-creating fact? True, he posits no metaphysical entity as the force behind the creation of the custom, but are not moral-political postulates and subjective value judgments operating to create what are alleged to be objectively valid customs? Or is one to believe that a state's opinion that its conduct is obligatory is an objectively ascertainable fact involving few, if any, subjective value judgments? When Kelsen requires that the law-creating

custom be found only in repeated conduct accompanied by a belief on the part of the state that it is applying a norm, is the existence of that belief any more scientifically provable than the existence of the *Volksgeist*? In order to be consistent and have a truly pure theory of international law, it would seem to be necessary to conceive of law-creating custom as what states actually do with sufficient regularity to enable one to predict like responses to like circumstances. Beliefs, opinions, intentions, and other non-observable elements cannot very well be integral elements in an empirical, positivistic theory of law.

Furthermore, is Kelsen's explication of the concept of custom either realistic or desirable? It may well be morally undesirable since it would compel recognizing as a law-creating custom any repetitious conduct accompanied by a belief that such conduct was right, legally, politically, or otherwise. Thus a habitual course of aggressive conduct becomes a custom if continued for a long enough period of time and if accompanied by the belief that such aggression is the exercise of the political "right" of self-preservation. (Kelsen resists the notion that there is a legal right to self-preservation; rather he holds it to be a delict of international law, although perhaps morally excusable.) Kelsen would probably answer the above moral objection to his conception of custom by saying that positive international law bears out his analysis and therefore any moral objection is irrelevant. This reply would of course be persuasive if positive international law did regard as custom that frequently repeated conduct accompanied by a belief as to its "rightness." However, even if one cannot maintain that the validity of such a proposition is scientifically undemonstrable, it is surely not incorrect to maintain that the proof is still forthcoming.

The last question in regard to the alleged basic norm of international law chiefly concerns the word "they." When states are admonished to behave as they have customarily behaved, does this mean: (a) each state ought to behave as *it* has customarily behaved, or (b) each state ought to behave as a certain number of other states have customarily behaved? If the former, then international law can change and progress only by one or more states violating the basic norm by behaving other than as they have customarily behaved. If the latter, then surely we need to know what is the critical number. Since individuals as well as states are the subjects of international law, will the number represent a certain percentage of states or a certain percentage of states as reflecting the subject population of the states?

These difficulties with Kelsen's analysis are indicated not to detract from the very substantial value of the book, but rather to indicate that in Professor Kelsen one finds a writer coming to grips with truly substratum problems. In a time when such writers are increasingly rare, a master merits careful consideration.

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