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***What Is Justice?*, by Hans Kelsen (1957)**

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BOOK REVIEWS

WHAT IS JUSTICE, by Hans Kelsen. Berkeley, University of California Press, 1957. 397 pp.

The critic of Kelsen enjoys the unenviable position of crossing swords with the lordly; and so one is tempted to concede value to his works rather than to analyze that work as distinct from the aura of the author. Indeed, one need not fawn to find much that is worthwhile in Hans Kelsen's recent book, "WHAT IS JUSTICE?" Particularly significant, and generally expressive of Kelsen's jurisprudential view are the chapters entitled: The Law as a Specific Social Technique; Law State and Justice in the Pure Theory of Law; and Science and Politics. Provocatively presented are the tenets of law as a function devoid of quality, law as an entity outside of politics, and the positive or normative system of law. Law is, reduced to its simplest denominator, a means whereby a group or community may be coerced into following a specific social pattern. It is this coercive element (or effectiveness or compulsion as preferred by the author), acting upon a communal unit, which distinguishes law from acts or abstentions induced by moral or religious pressures on the one hand and the "coercion" whereby a brigant exacts a toll or specified conduct from the individual. And this coercive means may be traced to a final source: an avowedly accepted constitution, custom, or the force of an autocratic government. Thus law need only be consistent with its source, i.e., Basic Norm, to be "law" and only incidentally will be good or bad; the latter element of quality being of no concern to the legal scientist. When, for example, a legislative body grants the right of franchise to those who have reached the age of eighteen years, our enquiry is not directed at the wisdom or desirability of such an act but only whether the promulgating body had authority to so legislate.

Granting this premise, then, law creates itself from the Basic Norm (e.g., our federal and state constitutions) and there is no need for its justification. Justification or motivation are political questions not to be confused with the juristic one. Yet even more dangerous is the substitution of political aims or ideology for legal reasoning. The stern scrutiny of Kelsen's theory denudes much of our hysteria-induced and politically proclaimed "law" of its juridical vesture; e.g., the present day passport situation, Japanese internment during World War II. Our complex civilization makes it imperative, if law is not to become subservient to politics (as indeed it was to religion for many centuries), that we maintain a clear and thorough concept of jurisprudence. The positive law system affords a firm foundation from which to do this. It is, perhaps, the simplicity of this definition which is so universally perplexing. A thing of such consequence in ordering the lives of humanity must have a more oracular formula. And so it is that often we search, not to determine whether this "law" is in accord with the charter power of the governmental unit declaring it (constitution, etc.), but for its effect on one group or another. The result is that an act may be lawful or unlawful as one may have peace or war, as capital, labor or the farmer may be favored, or as one group or another may exert sufficient pressure. While this may well serve a social purpose, is there any more reason why the content or validity of law should change with one's mood than an apple? An apple does not become a lemon by reason of wishing it so, nor should law.

There is, however, a marked weakness inherent in presenting a collection of essays as having a specific aim. First, the material will lack adequate coherency of structure as a progressive unit. Second, duplication is inevitable. Both faults are apparent in this book and the more conspicuous not only because of the stature of the author, but

because it is evident that with little revision this could have been avoided. The result of the latter fault is boredom; of the former, vacuity. When the volume has been read, if we grant merit to the individual essays, the question remains, when do we consider what is justice? By its very indefinability, justice requires a comprehensive approach, not a narrow one, though it be ever so minute or technically correct. The perspective must coincide with the nature of the problem. Discussing justice in the Scriptures, as is done in a lengthy chapter, by considering isolated passages out of context is neither a rational consideration of the one nor the other.

This gun-barrel vision approach involves Kelsen in another difficulty. His analytical critique is merciless to others, yet he does not subject himself to the crucible of enquiry. He ridicules the Social Contract, is anathema to Natural Law, and finds no place for Justice within any system or theory of law. But that any of the foregoing be imperfect does not make of it offal. Do we not, in many respects, and emphatically here in America, have Social Contract as a fact? Is not our constitution the hierarchical peak or Basic Norm, and do we not modify, and did we not originally accept it by popular expression, and is this neither more nor less than Social Contract? And, *a fortiori*, is this not so with reference to state and municipal government? True enough, the earlier writers thought of Natural Law in terms of "nature" and nature is a physical, not a moral, system. But what was not entirely clear to those men is that mankind lives "apart" from and in defiance of nature. They sought to derive from nature that which is man's own creation and exists not in nature: justice. Or, that which is in the nature of man. Natural Law must be equated with justice, not nature. I cannot conceive that there exists an inherent sense of justice. The notion of justice is conceived by the individual or community as a product of his environment. Thus that which is just at a given time and place may be considered unjust at another. Justice, then, is coincident with the Golden Rule, not, however, with the universal application but with each communal unit or sphere as a distinct standard. Justice need not be the same at all times and at all places any more than any other thing which appertains to social structure or values and this includes positive law. Justice pervades the law and more is to be gained by its cognition than its denial.

Unfortunately, there remains a further legitimate criticism to be voiced. Kelsen prides himself on being a "scientist," yet his definition of science is obviously knowledge per se and not its systematic utilization. He clarifies our understanding of law but remains aloof to reality. It is enough that the legal philosopher deal with abstractions, but the legal scientist must apply his knowledge to life. As lawyers, legislators and jurists, we deal with life and we need tangible standards that enable us to effectively concretize or apply the law as a necessary part of our affairs. Kelsen, in a time when sorely needed, has failed to blaze a trail and we remain, perhaps less confused, but still lost.

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