UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 21 | Number 1 Article 10

12-1-1942

Book Reviews

North Carolina Law Review

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Law and Peace in International Relations. The Oliver Wendell Holmes Lectures for 1940-1941. By Hans Kelsen. Cambridge: Harvard University Press. 1942. Pp. xi, 191. $2.00.

This volume includes six lectures by Hans Kelsen delivered in memory of Mr. Justice Holmes at Harvard Law School in March, 1941. This first comprehensive study published by Hans Kelsen in this country contains a convenient distillation of many of his former studies, somewhat reshaped and amplified by current events and by his most recent research. It is regrettable that we are still lacking English translations of Kelsen's principal works; however, through the efforts of the Association of American Law Schools these translations are in progress. The student of legal theory and of international law will find *Law and Peace* an engagingly provocative discussion of Kelsen's "pure theory of law" as it is related to the international horizon. In addition, the study contains two penetrating essays on the political problem of reshaping that social technique, generally referred to as law, to make it an effective instrument for the peaceful collaboration of nations.

Hans Kelsen's teaching has been characterized from the outset of his career by his effort to establish an all-comprehensive legal epistemology. He has particularly attempted to determine clear-cut criteria to distinguish legal systems and legal rules from other social rule systems and rules of human behavior. For the sake of a complete architectonic structure of his doctrine he sometimes applies propositions which seem to be bold and somewhat strained. But even those somewhat strained links of his doctrine are most instructive. Like that genius of legal speculation of the nineteenth century, John Austin, Kelsen directs a considerable section of his polemic against what he calls the "traditional" doctrine, even though the substance and boundaries of traditional legal theory have become gradually more and more indiscernible. In former years some aristocrats of jurisprudence and lesser authorities passed glacial judgments on Kelsen's "heresy." However, more and more in the last two decades foremost publicists have found his inspiring crusades and doctrines invaluable for the development of legal theory and international law. There is today little doubt that among contemporary jurists Kelsen has few peers and no superior.

The first four lectures are concerned with the framework of a theory of international law. Because such a theory presupposes an investigation of what law in general is, Kelsen indicates the elements

of a universal concept of law. Indeed, he attempts to describe legal systems and legal rules in an all-comprehensive proposition, broad enough to include both the so-called law of ancient Babylon and the modern law of Switzerland and the United States. From the essential elements of his concept of law he elevates one element as a decisive criterion; he regards this specific element as distinguishing law as a social technique from all other social rule systems known in human history. And because, in his opinion, international law as a social rule system possesses that decisive element, he includes international law in his universal concept of law. What are the essential elements of Kelsen's legal concept? Law is a specific social technique, consisting of legal rules, which either are originally formulated as hypothetical judgments or which may be transformed by a logical operation into hypothetical judgments. A hypothetical judgment states, "that under certain conditions a certain measure of coercion (sanction) is to intervene. . . . The rule of law, the term used in the descriptive sense, is a hypothetical judgment in which certain definite consequences are attached to certain definite conditions" (p. 20). The law, according to Kelsen, implies two fundamental facts, delict being one, and sanction the other. "To connect them as condition and consequence is the fundamental function of the law" (p. 26). Kelsen implies that a legal rule system binds an aggregate of people into a social community by regulating human social conduct (pp. 18, 75, 87). The existence of certain organs (p. 59), a monopoly of the use of force for the community (p. 56), and the intention to regulate in principle at least *all* human relations (p. 71) are further essential elements of law. It is essential to law that individuals must not be subordinated to men, but to rules, i.e., not to the lawmaker but to laws made by him under the authority of a constitution. "*Non sub homine sed sub lege* is the principle not only of a democratic but of any legal order" (p. 66). "A common condition of all sanctions stated in a rule of law is that the norm attaching a certain sanction to a certain delict has been created by a constitutional procedure" (p. 22). Professor Kelsen recognizes that the purpose of law lies beyond the limits of its substance (pp. 23-24), and he regards the promotion of peace as essentially inherent in a legal order (Introduction). Although juristic thinking takes into account only the validity of the law (as contrasted to its efficacy), "the validity of the law presupposes a minimum efficacy of the law" (p. 16). That essential criterion of law, which distinguishes it from all other social rule systems, is its coerciveness, i.e., its attempt "to bring about the desired conduct of individuals by the enactment of sanctions" (p. 7).

Kelsen bases his definition of the concept of law on the usual mean-

ing of the word. And although he admits that narrower concepts may exist, limited to certain time periods or to certain geographical regions or taking as their basis certain political doctrines, he believes that the extent of his concept transcends all these boundaries and "coincides by and large with the common usage" (p. 4). He calls his concept the static concept of law, as contrasted with dynamic concepts, which are based on legal definitions of law as enacted in positive constitutions (p. 16). Thus, in the opinion of Kelsen, there is a common usage in regard to the concept of law, because the decisive criterion, coerciveness, has been a common element of all social orders called law over all ages, over all geographic regions, and in all political doctrines. Naturally, one may object that though common usage accepts potential coerciveness as an essential element of law, there are other decisive elements, whose presence or absence determines whether common usage accepts a social rule system as law. One may even question whether there is common usage (in the universal sense suggested by Kelsen) in regard to the concept of law.

It is widely accepted that the concept of law and the concept of state exist collaterally, one being necessary to the other; in this conception there is no place for extra-statal law. Kelsen, though viewing statal law as the most developed law, recognizes as well two types of extra-statal law, pre-statal law and super-statal law. Pre-statal law is the law regulating individual relationships of primitive communities which have not yet attained centralization of the law-making process and of the execution of legal rules—two elements essential to Kelsen's concept of state. Super-statal law, regulating the relationship between states, also lacks these two essential elements. Kelsen designates pre-statal law and super-statal law as law, but in an embryonic stage. And because he assumes that an "embryo in a woman's womb is from the beginning a human being," he calls "law in *statu nascendi*" law in the real sense (p. 51). He finds the difference between primitive (pre- and super-statal) law and state law in the degree of centralization manifested in the making and in the execution of law; thus a primitive legal system is a relatively decentralized legal system. Decentralization is characteristic of primitive law because the members of the community at large create law in the form of custom and execute the law in the form of self-help in the name of the community itself.

Kelsen's synthesis of law raises many questions. One may ask whether in pre-statal communities the making and execution of law is as decentralized as Kelsen assumes. For is not the rule of a tribal chieftain a highly centralized rule-making process? And is it not merely a figurative expression to assert that decentralization of law-making

exists because many persons have contributed to the existence of a custom (such as the vendetta) that has become "law"? Furthermore, one may ask whether it is not commonly regarded today that law exists only in those social systems where self-help is an exception to the general rule. Kelsen argues that the self-help practiced today in the international community may be viewed as comprehended within a legal system because the rules of international law provide norms which distinguish self-help which is legal from self-help which is illegal. Thus the two main categories of self-help in international relations, reprisal and war, may be either justified by international law or not justified, in which case they are in themselves international delicts. He admits that his conception of international law is based on the recognition of the doctrine of *bellum justum,* i.e., of distinguishing between just war and unjust war. In a just war one belligerent functioning as an organ of the international community, administers the sanction provided by international law upon the nation that commits the delict. In an unjust war the attacker commits an international delict. However, Kelsen accentuates the fact that the adoption of the *bellum justum* doctrine is not the mere result of a scientific consideration but a political decision (p. 54). Kelsen fails to recognize the historic possibility of a logically inconsistent co-existence of mutually independent concepts of municipal and international law. However, one may assume that the present confusion in the conception of international law, including the confused terminology, is a true mirror of the social status of the international community and that common usage, though logically inconsistent, truly reflects this inconsistency in conceiving "sovereign" nations as subjected to international law. There is no doubt that this present situation is as unsatisfactory as it is tragic in its consequences.

In the political part of his study and in the conclusion attached to his lectures, Kelsen admonishes those who are longing for a peaceful collaboration of nations not to exaggerate the requirement of establishing a strongly centralized international community. Though he regards a centralized international law-making mechanism and an international administration as desirable, he does not believe that they are attainable in the near future. International peace, he contends, would be best served, if we reduce our requirements of an international organization to the establishment of an international court with jurisdiction embracing both legal and (so-called) political questions. Kelsen refers to the extremely useful role that courts play in administering and making laws in the national community. He does not elaborate upon the question that there is a considerable difference between the institution of courts which operate subordinated to or side-by-side with established legislative agen-

cies within a governmental structure and between courts which might operate as a master wheel of an international government. He does not differentiate between customary law, as it arises in a legal community containing the necessary mechanisms to control and to change it, and between customary international law which arises without a potentially controlling legislative power.

The political part of Kelsen's study contains a brilliant criticism of the present technique of international law and of the League of Nations as it existed until the beginning of the Second World War. He discusses almost all objections actually raised against the recognition of international law as proper law.

Kelsen's study is characterized by his courage in facing many delicate problems without applying often used "escape mechanisms." His book, in which each sentence carries interesting ideas, necessarily leaves a reviewer dissatisfied because the consideration of many important ideas of the author must be omitted. A proper review of Kelsen's *Law and Peace* would require space transcending the volume reviewed.

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The Rule Against Perpetuities. By John Chipman Gray. Fourth edition, edited by Roland Gray. Boston: Little, Brown & Co. 1942. Pp. xcv, 895. $12.50.

For nearly sixty years the monumental work of John Chipman Gray on The Rule Against Perpetuities has been accepted as standard and authoritative, not only in the United States but in all parts of the English-speaking world. Shortly before his death in 1915 Gray sent to the press the third edition of his work. During the intervening twenty-seven years (from 1915 to 1942) over 1,300 new cases involving the Rule have been reported and many articles discussing its application have been written. Since the third edition is out of print, the demand for a modern edition of the work by a competent craftsman has become urgent. This urgency is readily understandable in light of the fact that, more than any other rule in the law of property, the Rule Against Perpetuities constitutes a trap for the unwary grantor, settlor, or testator—especially one who seeks to attain a sort of immortality for himself by postponing the ultimate vesting of the interests created by him too far in the future. Mr. Roland Gray has undertaken the task of editing the fourth edition of the work of his learned father. An examination of the book will indicate that he has succeeded admirably in synthesizing the new material with the old.

Mr. Gray in his preface to the fourth edition indicates that two courses were open to him in the preparation of a new edition of a legal textbook after the author's death: either to keep intact the author's language and insert, in separate sentences and clauses, the additions and qualifications necessary to bring the work up to date; or to "proceed as if he were writing a new book, following the general plan of the earlier work, but adopting only so much of its language as seems to state accurately the present law or to indicate the historical development of the law where he thinks it necessary to show such development." He chose to steer between these two courses. However, in the arrangement of materials comprising the subject matter he followed exactly the plan of Professor Gray.

Where no radical changes in the text were necessary the editor has reprinted the language of the author and has inserted in the notes new authorities with appropriate explanatory remarks. Occasionally, however, one finds that the editor has left unchanged remarks of Gray which today are not sound in the light of modern decisions, and then has made modifying statements in the footnotes indicating that the law is contrary to the textual statement.[1] This tends to be confusing to the reader. It is suggested that, in such cases, it would have been better had the editor rewritten the text on the basis of the present law.

In general, however, where the editor was convinced that Gray's statements, in the light of developing authority and recent discussions, did not state the existing law, he has completely rewritten several sections and has inserted new material pertinent thereto. The important subject matter thus revised is as follows: Sections 39-41, on possibilities of reverter in the United States; sections 259-267, on Conflict of Laws; sections 487-509.18, on powers of sale; sections 541-561.7, on election with respect to appointments under powers; and sections 753-772, on Foreign Law.[2] Appendix H, sections 894-909, on gifts for non-charitable purposes has also been rewritten. Appendix N, sections 975-977, is entirely new. In this appendix the editor takes issue with Professor Vance as to the construction of the Statute *Quia Emptores* regarding the possibility of subinfeudation after the statute's passage.

Fortunately for the reader, the editor has not attempted to distinguish the new material from the old by any system of marks.

As a result of the editing process the new edition consists of 833 pages as contrasted with the third edition which contained 663 pages. The new edition is printed in somewhat larger and more readable type than the old. The footnotes have been greatly expanded by the in-

[1] See page 47 and footnote 2 in connection with the discussion of possibilities of reverter.

[2] The section numbers referred to are as they appear in the fourth edition.

clusion of many new cases and have been enriched by citations to law review comments and articles, and by references to the Restatement of Property. Instead of numbering consecutively all of the footnote references as they appear in each page of the text, the editor has departed from that method (which was employed in the third edition), and has numbered the footnotes according to sections, repeating the number of the section in the footnotes. This latter method is somewhat confusing to the reader, especially if three footnotes numbered "1," or two sets of footnotes, "1" and "2," appear at the bottom of the same page. One more minor criticism. Although it would have added considerably to the mechanical task of the editor to include the dates of the cases cited, in this reviewer's opinion the documentation would have been more complete and serviceable had this been done.

Professor Gray's master work has not suffered at the hands of a new editor. The editor of the fourth edition has done a thorough and scholarly job in revising and bringing up to date a most complicated and difficult subject. This new edition of The Rule Against Perpetuities will receive a hearty welcome from the entire legal profession.

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The Judicial Function in Federal Administrative Agencies. By Joseph P. Chamberlain, Noel T. Dowling, and Paul R. Hays. New York: The Commonwealth Fund. 1942. Pp. xii, 258.

The clue to just what kind of book this is lies in the preface. Therein it appears that this modest-sized book of 234 pages is the work of three authors and a staff of ten persons. It further appears in the foreword that the work was under the auspices of a committee of the Commonwealth Fund. A number of federal administrative agencies were selected and studied. One deduces that the procedure was to decide what to study, set up a staff, gather a considerable quantity of information, arrange it somehow, and present it in a book. The strengths and weaknesses of the book reflect the strengths and weaknesses of the method.

In the first place the study was confined to certain material, notwithstanding the fact that much additional available material beyond that studied has a bearing upon the ideas advanced and subjects discussed in the book. The result is that parts of the discussion are sketchy and incomplete. For example, when the authors consider the question whether administrative agencies may base decisions on evidence not duly introduced as such[1] they are treating a problem by no

[1] P. 34.

means confined to their selected group of federal administrative agencies, but rather a problem common to administrative agencies in general. Because their materials were limited their treatment touches only the surface of this important matter. Thorough discussions of it are available,[2] but these were not cited; neither was any indication given that a movement is on foot by legislation to enable commissions after a hearing is had to use the wealth of data at their disposal, though not introduced in evidence at the hearing, provided the party affected is thereafter given an opportunity to rebut the additional matter thus taken into account.[3] Again, the authors state,[4] "These informal procedures of settling and adjusting differences are generally not appropriate in those situations in which the agency is performing a legislative function, as in rate making. . . ." Some eyebrows may be politely lifted at this positive declaration that rate-making is a legislative function,[5] but whether it is or not the reviewer doubts the accuracy of the assertion that informal adjustment is generally not appropriate in making rates. Certain it is that outside the boundaries of the rather narrow segment of the administrative field here chosen for study, much rate fixing is done by informal negotiation.[6] In situations where reduction in the whole level of rates of a public utility appears desirable, but formal rate hearings would make it necessary to produce at prohibitive expense the complicated data necessary legally to justify the reductions, it is hard to see why the result should not be accomplished by informal negotiation. The interests of the utility are protected, for after all it may refuse to consent; the rate payers stand to gain, for if the result is not achieved by negotiation it may not be achieved at all.

When the authors do make an excursion into state administrative law for the light it may shed on some subject they are discussing the light shed may not be strong enough to enable the reader to see very well, due to the fact that the state materials have not been made the subject of any complete research. Thus it is said that state statutes "giving administrative agencies the power to imprison have been held unconstitutional as encroaching upon the judicial power."[7] No mention is made of a far-reaching state decision going away beyond the idea

[2] For example, Davis, *An Approach to Problems of Evidence in the Administrative Process* (1942) 55 HARV. L. REV. 364, 410.

[3] *A Survey of Statutory Changes in North Carolina in 1941* (1941) 19 N. C. L. REV. 435, 437, especially the material there cited.

[4] P. 13.

[5] People *ex rel.* Central Park, N. & E. R. R. R. v. Willcox, 194 N. Y. 383, 87 N. E. 517 (1909); FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY (1928) 15.

[6] Examples: In the Matter of the Rates of the Carolina Power & Light Co., N. C. Corp. Comm. Rep. 1933-34, 20; in the Matter of the Rates of the Duke Power Co. and Southern Pub. Utilities Co., N. C. Corp. Comm. Rep. 1933-34, 33.

[7] P. 97, n. 33.

that a statute could constitutionally confer such power, to hold that the power to imprison for contempt is *inherent* in an administrative agency when performing duties judicial in nature, even though the statute failed to grant such power.[8]

One of the consequences of this kind of study of selected materials is likely to be a presentation of the materials as if they were all of the same weight, without regard for obsolescence. A field developing as fast as administrative law passes quickly through stages of development, and cases and other materials belonging to a stage already passed should not be placed on a par with current materials. The proposal of a committee of the American Bar Association that the judicial powers of federal administrative agencies be severed from them and transferred to an administrative court is set forth in the book and then demolished.[9] This is hardly necessary; the proposal represented a mere transitory stage in the development of the viewpoint of the Bar Association. It is now superseded by the view that abuses of judicial power should be eliminated by providing adequate safeguards,[10] rather than by attempting to dismember the administrative tribunals.

Notwithstanding deficiencies in this study arising from the fact that it appears to be a planned project rather than the product of matured experience or long continued study and observation, still the book has its contribution to make. For one thing it is illumined throughout by the thoughtful opinions and conclusions of its authors. Although many of the views presented are already familiar, the book is nevertheless valuable as another independent confirmation of criticism directed to the workings of administrative agencies; thus it adds to the current of unbiased opinion on a subject where such opinion is especially important, since administrative control is still in the formative stage. Among noteworthy suggestions the reviewer found particularly intriguing the proposal that a subcommittee of Congress be charged with the duty of keeping in contact with each administrative agency.[11] By such continuous contact Congress would have at its disposal ready knowledge of any agency's affairs, and a clearinghouse for complaints about or requests by each agency.

The treatment by the authors of the various subjects within the scope of their title varies greatly in emphasis. Some subjects, such as evidence before administrative tribunals, are passed over rapidly, whereas others receive full and detailed examination. Probably the principal contribution is the thorough discussion of the sanctions em-

[8] *In re* Hayes, 200 N. C. 133, 156 S. E. 791 (1931).
[9] P. 212.
[10] *Report of the Committee on Administrative Agencies and Tribunals* (1939) 64 A. B. A. REP. 407, 431; *Report of the Special Committee on Administrative Law* (1939) 64 A. B. A. REP. 575.
[11] P. 231.

ployed by administrative agencies. One of the revolutionary changes introduced into the legal system by the mushroom growth of administrative agencies lies in the great variety of means whereby they can bring about compliance with their rules and orders, or even their desires. This detailed study of such sanctions is timely. The book also displays proper emphasis on the policies of administrative agencies. By reason of this much greater emphasis on some portions of the subject perhaps the book should have been entitled "Some Observations on the Judicial Function in Federal Administrative Agencies."

Probably what has already been stated shows that this is no reference book wherein to find the law on the subject announced. It is a study of a new phase of the legal order, not a digest of cases and statutes. It is for the reader who seeks to understand a development, not for the lawyer who is looking for some law on a point.

The reviewer thinks that the best books are those written by men with wide experience or knowledge in a particular field who write under the urge of a strong and growing feeling that there are things which need to be said. But this book proves that a project, a deliberately planned undertaking to study something and write about it, may still be worth while.

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