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Book Reviews

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BOOK REVIEWS

General Theory of Law and State. By Hans Kelsen. Cambridge, Massachusetts: Harvard University Press. 1945. Pp. 465. $6.00.

Professor Kelsen's GENERAL THEORY OF LAW AND STATE is the first volume of the TWENTIETH CENTURY LEGAL PHILOSOPHY SERIES published under the auspices of the Association of American Law Schools. The purpose of this series is to present to American students of law the great legal thinkers of this century, such as Kelsen, Max Waber, the French Institutionalists, and others. No choice could have been happier than to select Kelsen to initiate this series.

Professor Kelsen has published in the last forty years a very large number of books and articles in various fields of legal philosophy, jurisprudence, constitutional law, international law, and political theory. He has successfully avoided the pitfalls of academic over-specialization, and all his writings thus bear the imprint of a rich and fertile mind as well as of wide interests and types of problems. In addition, he is one of the most brilliant stylists in the field of juristic literature. The clarity of his style and the incisive analysis of his approach to legal and political problems are even evident in translation, although naturally not as obvious as in the original.

In the whole story of jurisprudence and legal philosophy, no man has ever been discussed and written about as intensely and passionately as Hans Kelsen. Regardless of the intrinsic value and validity of Kelsen's doctrines and teachings, he can at least claim that he has stimulated systematic thinking about fundamental legal and juristic problems more than any other man in the annals of his science. It is remarkable, though, that interest in Kelsen's ideas developed in the English-speaking countries long after the rest of the world had become familiar with his name and all it stands for. This may be due, perhaps, to the relative lack of interest in legal theory and analytical jurisprudence, in an environment which emphasizes, in the world of law, the specific and concrete rather than the general and the abstract. Now, that more and more of our American law schools are attempting to supplement the traditional materials of teaching and study with a sounder and more comprehensive grasp of fundamental legal problems, it may be hoped that Kelsen's GENERAL THEORY OF LAW AND STATE will prove of very real value in familiarizing the student of law with the systematic and philosophical foundations of jurisprudence.

The first part of Kelsen's book deals with the basic concepts and

problems of the law. Kelsen establishes the nature of law as a coercive order, and analyzes the reasons which, in his opinion, separate the law from other systems of ordering and regulating human behavior. This leads Kelsen into a discussion of the necessity of separating the science of law from natural law doctrines on the one hand, and sociology and psychology on the other hand. Practitioners and theorists of the law in Common Law countries have been relatively free from the tendency to confuse positive law with natural law, ideology and politics, as has been only too frequently the case in Roman Law countries. This is partly due to the fact that the preoccupation with specific cases tends to discourage lawyers and jurists from losing themselves in the vagaries of the abstract world of natural law doctrines. In addition, it seems to this reviewer that the relative freedom from natural law thinking among Common Law jurists may be due to the fact that the Common Law countries have succeeded in building a world of social reality which offers enough satisfaction and happiness to those who live in it. In other words, the absence of strong natural law doctrines in the Common Law countries may be taken as the consequence of the existence of a social order which has achieved stability through a happy mixture of happiness and justice. On the other hand the traditional prevalence of natural law ideas in Civil Law countries may be due to the fact that their degree of social dissatisfaction is so high that the hankering after a new order of things is more prevalent.

Thus we may safely predict that Kelsen's opposition to the confusion of law with natural law will generally meet with approval on the part of Anglo-American jurists. It is more doubtful whether his opposition to any contamination of the science of law with elements of sociology and psychology will meet with equal approval. It is very difficult for Anglo-American lawyers to see in the law essentially a coercive order, as Kelsen puts it. The long continuity of the Common Law, the fact that it contains such strong elements of immemorial custom and collective consent built up over many generations, will make it rather difficult for lawyers trained in the tradition of the Common Law to accept this part of Kelsen's analysis.

Taking up specific problems of the law, Kelsen discusses in the first part of his book the sanction, the delict, the legal duty, legal rights and responsibilities and the old stand-by of jurisprudence, the juristic person or corporation. These problems are of practical interest to the lawyer and judge, and while Kelsen's theory does not purport to make the law, his clarification of fundamental concepts and his exposure of ideological and political elements in some traditional methods of handling these basic legal problems, will be found both intellectually stimulating and practically helpful. In this first part of the book, Kelsen also

discusses the problem of the dynamic elements in the legal process and this discussion is so valuable because it contains an excellent analysis of his famous theory of the "basic norm." This is undoubtedly one of the most brilliant contributions of Kelsen to the science of law and legal philosophy. In connection with the problem of the creation of the law, Kelsen also takes up the question of so-called defective law such as the unconstitutional statute, the unlawful administrative account, etc. American jurisprudence especially has grappled for a long time with this problem owing to the peculiar relationship of the United States Supreme Court to our Congress. This section of Kelsen's book will therefore be found one of the most worthwhile to read and re-read.

The second part of the book deals with the state. Following continental precedent, Kelsen is unable to separate the law from the state, especially since in his view the state is nothing but a personification of and typical instance of "hypostasizing" a concept or system of relations into a being endowed with life and characteristics of its own. The less democratic tradition of politics and government in Civil Law countries has led to a conception of the state which ranges from the conscious idealization and deification of the state of a Hegel to those writers on the state who are less conscious of their feelings of awe and reverence for the state. It is, therefore, understandable that most continental orthodox writers in this field have looked upon Kelsen's identification of the legal order with the state as the work of an iconoclast to whom nothing is holy and worthy of respect. In Common Law countries, though, Kelsen's analysis of the nature of the state and the fundamental problems pertaining to it, should not come as such a shock. Fortunately, even the word, "state," is either relatively unknown in the English-speaking world outside the United States. In this country, too, the word "state" is used essentially in the sense of a geographical subdivision of government and administration, and does not possess the connotations of mystical superiority and domination as in Civil Law countries. In his analysis of the state, Kelsen takes up such specific problems as forms of constitution, the basis of public authority, the concept of separation of powers, the implications of democracy and autocracy, centralization and decentralization, and finally the relationship of national and international law. His discussion of the latter problem is especially timely after two bloody and destructive world wars in one generation have begun to convince some that the chaos of a world of sovereign states cannot be endured indefinitely.

The last part of the book contains, as an appendix, a famous study of Kelsen's on "Natural Law Doctrine and Legal Positivism." This is probably Kelsen's most brilliant contribution to legal philosophy that he has ever written, and it is one which can be equally enjoyed and

studied by the lawyer, political scientist, and philosopher. It lays bare the fundamental assumption, logical, psychological, philosophical, and metaphysical, of natural law doctrines as contrasted with legal positivism.

If there is one criticism of a general kind that can be made with regard to Kelsen's new book, it is the regret that, apart from a few rare instances, Kelsen has not included enough legal materials of the Common Law countries into the presentation of his ideas. In many places, the inclusion of such material would have greatly facilitated the American reader of the book in comprehending the meaning of Kelsen's doctrines. This reviewer is convinced that Kelsen's approach to the basic problems of the law and the state can be extremely fruitful and rewarding especially for English and American students of the law, and it is to be hoped that in future works Kelsen will make a more systematic effort of utilizing common law materials for his analyses of legal problems.

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William Howard Taft, Yale Professor of Law and New Haven Citizen. By Frederick C. Hicks. New Haven, Conn.: Yale University Press. 1945. Pp. xiv, 158. $2.50.

The author of this delightful, entertaining and altogether interesting and amusing book, rightly calls it an "Interlude" in the life of President Taft.

After having been a State Judge, Solicitor General, Judge of the Circuit Court of Appeals of the United States, and during his judgeship connected with the Law School of the University of Cincinnati in various capacities; Chairman of the Philippine Commission; Secretary of War; President of the United States, for a bit over eight years, he became a Professor at Yale University, his Alma Mater. Having spent eight years at Yale, he then became Chief Justice of the United States. It will thus be seen that his time in New Haven was an "Interlude." This "Interlude" was spent in teaching, writing, delivering addresses and lectures throughout various parts of the country—in the meantime devoting one year to the Presidency of the American Bar Association.

Mr. Hicks, the author of the book, does not wax very enthusiastic over the teaching capacity of Mr. Taft. Mr. Taft seemed to have an individual way of his own in teaching law rather than following the professional methods. Not having been reared and trained as a professional law teacher, he somewhat followed in the line of many very

successful teachers of the past, who made their reputations as lawyers, judges and in other capacities before beginning the teaching of law. Such was the case of Story, Kent, Holmes, George Wharton Pepper, Minor, Manning and many others.

Perhaps this method gives a strong, if not a stronger impression of the teacher upon the student than does the professional method. It is more individualistic. We are not undertaking to say that it turns out better trained lawyers, but such teachers have a way of impressing themselves upon their students, perhaps by their idiosyncrasies. I rather believe it is due to their tendency to relate their own experiences as practitioners and judges to the students. Having studied law under a successful practitioner and a Chief Justice, I remember many incidents told by them in the course of their lectures, relating their experiences, illustrative of the point under discussion. Such has a tendency to draw the student to the teacher, as well as to the subject.

It is interesting to note that at the time President Taft went to Yale, the makeup of the Yale Faculty of Law was about one-half full-time professors—professionals, and about one-half part-time teachers—judges, successful lawyers and other such men. In other words, Yale University had not entirely swung to professional law teaching, although it appears that thereafter it did so, along with many other of the main Law Schools of the Country.

This little book is crammed full of incidents, anecdotes in regard to President Taft's life during this "Interlude." These incidents and anecdotes are amusing and entertaining and make the book more interesting.

During these eight years, President Taft delivered many lectures throughout the United States. He was a most interesting and entertaining lecturer and had a widespread vogue, undoubtedly substantially supplementing his rather meagre salary as a teacher. It is interesting to note that after having served the United States as President at a salary of $75,000.00, he went to the Law School at a salary of $5,000.00.

We find that President Taft was a Yale man through and through. He enjoyed the social, academic and athletic part of college life.

Mr. Hicks has written a book well worth reading, entertaining, instructive, filling a gap in the life of an interesting man of unusual public activities.

The few hours that will be required to read the book will repay the reader manyfold, and I predict that the book will enjoy a wide reading throughout the United States.

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Justice for My People. By Ernst Frankenstein. New York: Dial Press. 1944. Pp. 208. $2.50.

Mr. Frankenstein has an admirable command of the English language coupled with a thorough grasp of his subject. He deals with the major phases of the world Jewish problem. His decidedly superior comprehension of the legal aspect of the Palestine situation is very evident throughout the two-hundred page book. Viewed as a whole, all the component parts of the historical, moral, social, political and the legal blend into a well balanced and capable presentation of one of mankind's most ancient and troubled groups on earth.

Our author emphasizes the striking thought that the mere Jewish survival excells in importance, by far, the contribution of the Old Testament to our Western Civilization. This stubborn triumph over their unfriendly surroundings attests to the ultimate superiority of faith and the spiritual domination over the material obstacles. The very continued existence constitutes the most eloquent message conveyed to the baffled world. To this unique contribution of Israel he adds, of course, the Bible and Judaism.

In the long and winding road of Jewish survival, extending to the dim past of two thousand before the Common Era, the Jewish people encountered three forces of great magnitude in the Western world: the first one was the elegant aesthetic culture of the ancient Greeks, with Judaism emerging from this impact with renewed vitality and greater amplitude. The Roman Empire was successful only in conquering the Jewish State but their spirit escaped unscathed in this titanic contest. What really prepared for this victory was their nimbleness to transform the political community into a spiritual one. To them the real and inner life was set into an unreal world. Such spiritual hibernation necessarily intensified the estrangement and animosity of the surrounding peoples. The Catholic Church figures the third of this triangle of opposing forces. The Jew was purged and forged in the school of suffering, having thus acquired the quality of psychological adaptability.

Mr. Frankenstein gropes for the simple formula that would explain the cause for the Jewish problem. He finds his answer in the twelve-lettered word—HOMELESSNESS. This lack of a permanent political habitat for eighteen long centuries caused unspeakable hardships not only for the Jews but also the non-Jewish world was burdened with a deep sense of guilt that is entirely inexcusable. Evidently, the only possible solution to this protracted riddle is the reconstitution of Israel to his historical land—Palestine. That this is the only spot on earth which can and should serve as the scene of the Hebraic rejuvenation

can be established by the fact that the attempted settlements in Argentina, Santa Domingo, Biro-Bidjan and many other places did not alleviate humanity's sore spot. It takes more than mere soil, stones, or mountains to heal this wound; historical associations are more real than such geological realities. Hebraic traditions have left an indelible impression on the Jewish conscience of Palestine's role in the entire fabric of their history. The Jew lovingly remembers the divinely "Promised Land." Babylonian Jewry embraced it with all the fervor of home-returning children. It was precisely this land that the Maccabees liberated, and for 1800 years this coast line has been the object of Israel's dreams and aspirations.

But aside from these imponderables the Jews have old and modern claims to this Promised Land. They had been inhabiting it for more than a thousand years. With the disappearance of the Romans, Palestine was left without any other legal heir. The present Mandatory Power, England, holds Palestine only as a trust on behalf of the League of Nations and the allied powers for the future sovereign ruler. True enough, the Turks exercised sovereignty over it for four centuries (with a few breaks) ultimately having surrendered their rights to the Allies in 1923. Prior to Turkish rule this land had been administered by a long series of Caliphs of Damascus, Baghdad, and Cairo as well as the Western Crusaders. Article 2 of the Covenant of the League of Nations brought into existence a special type of "tutelage" under a Mandate by which the former Turkish possessions are to be ruled.

Possibly the only group that may submit any claim is the Arabic-speaking people—a claim on the basis of conquest. But according to international law this method of acquisition is limited by the condition of complete renouncement by the vanquished. As long as subsequent possession is disturbed by protests and claims such exercise of sovereignty is challenged. The Jews have never renounced their right to Palestine. Their liturgy is replete with passionate yearning for it. This longing is likewise embodied in their ritual. Then again, Palestine was never completely bereft of Jewish population throughout all these centuries. Furthermore, the Arabic-speaking inhabitants hardly ever identified themselves with the country's fate; in 1917-18 they evinced little disposition to help the allies. They chose to assist their very persecutors—the Turks.

The old Jewish claim to Palestine was explicitly recognized in the preamble of the Palestine Mandate: (Paragraph 2) "The Mandatory should be responsible for putting into effect the Balfour Declaration. . . ." (Paragraph 3): ". . . recognition has thereby been given to the historical connection of the Jewish people with Palestine and

to the grounds for reconstitution of the national home in that land." In referring to these legal provisions Field Marshal Smuts remarks: "The promise to Abraham had at last become a part of the international law of the world." (Broadcast, 1941.)

Then again clause 3 of the Atlantic Charter provides clearly: ". . . to see sovereign rights and self-government restored to those who have been forcibly deprived of them." No limitations in space or time were attached to this legal formulation. The forcible removal of the Jewish people and its heroic struggle for 1800 years will be recognized now that the principles of the Atlantic Charter will be the new international law.

The validity of the Mandate was contested by the Arabs' claim that it was formulated in violation of the McMahon promise made in 1915 by Great Britain. In his attempt to win the cooperation of the Arabs against the Turks the High Commissioner of Egypt, Sir Henry McMahon, opened negotiations with the Sheriff (later King) Hussein of Hedjaz. The resulting understanding reads in part: ". . . and in regard to those portions of territories in which Great Britain is free to act without detriment to the interest of her ally, France, I am empowered, in the name of the government of Great Britain, to give the following assurance: 'Subject to the above modifications, Great Britain is prepared to recognize and support the independence of the Arabs within the territories included in the limits and boundaries proposed by the Sheriff of Mecca.'"

McMahon himself said clearly that this nebulous statement does not include Palestine. But even if it did we must distinguish between political and legal provisions. It was a political move to make such a vague promise, but legally England had never (then or now) the sovereignty to dispose of Palestine; what is more, the League of Nations never ratified this diplomatic step. Article 22 of the Covenant of the League of Nations entrusts Palestine to Britain as a Mandatory or as an agent only, entailing no sovereignty whatever. Oddly enough, the Arabs had not presented it publicly as a legal leg to stand on from the date of its issuance to the year 1921.

On the other hand, the Balfour Declaration of 1917, whose purpose it is to establish the Jewish National Home in Palestine, was accepted by the Allied Powers and became embodied in Article 2 of the Palestine Mandate. This basic provision specifies three duties that fall on the Mandatory Power:

(1) establish the Jewish National Home (Balfour Declaration);

(2) develop self-government institutions;

(3) safeguard the civil and religious rights of all inhabitants of

Palestine, irrespective of race or religion. This proviso merely enunciates a principle that is well accepted by any civilized group; it does not contradict the first responsibility devolving on Great Britain.

Transjordania is a part of the territory referred to by the Balfour Declaration. In fact, Article 25 of the Mandate unmistakably calls for: "between the Jordan and the Eastern boundaries of Palestine." But the Anglo-French antagonism of 1921 caused bitter political intrigues that later resulted in the forceful occupation of Transjordania by the Emir Abdulah. This new state of affairs necessitated the insertion of a clause in Article 25 which authorizes the Mandatory Power, with the consent of the League of Nations: "to postpone or withhold application of such provisions of the Mandate as he may consider inapplicable to the existing local conditions."

The Palestine Moslems are not true Arabs but rather Arabic-speaking people "of the most mixed race" as the Handbook of the Foreign Office No. 60 (London 1920, p. 60) puts it. The same source further contends: "The People West of the Jordan are not Arabs but only Arabic-speaking. . . ." To be sure they enjoy rights as individuals but by no means collective ones, according to Article 2 of the Palestine Mandate.

The riots of 1929 and 1936 clearly prove that the Mandatory Power failed to maintain order (Minutes of the Permanent Mandate Commission, 32nd Session, 1937). It failed to discharge its primary duty to establish the Jewish National Home in Palestine. Every single Jew has the unlimited right to be admitted; instead Britain limits Jewish immigration, thus dealing a body blow to the ultimate objective of establishing that permanent home for Israel in his historical land. The very fact that some of the Arabs oppose Jewish immigration only accentuates Britain's failure to live up to its sacred and legal obligations to place the country under such conditions as would secure the establishment of the promised National Home.

More specifically, Great Britain has shown negligence in the following instances:

(1) The sale of land to the Jews is restricted, and in some parts it is completely prohibited.

(2) The Jews have been and still are being refused admittance into their own National Home. There are many cases on record showing tragic deportations on dangerously overcrowded ships.

(3) The Mandatory Power should have educated the Arabic-speaking inhabitants in preparation for the ultimate step of the creation of the Jewish National Home.

(4) Transjordania has not been developed, and the Jews are not allowed to settle there.

(5) The Palestine administration is in the hands of officials hostile to the building of the National Home.

(6) The Jews are being excluded from the higher posts of the administration of their own Homeland.

(7) The White Paper severely curtails immigration to Palestine.

These facts speak for themselves; Great Britain did not carry out the pledge that it took when it had assumed the Mandate from the League of Nations. In keeping with the demands of its imperialism the political and not the legal approach was taken by the Mandatory Power. In other words, Great Britain turned this legal instrument into a useful diplomatic tool in order to further the selfish needs of the Empire.

Statistically speaking, seventy-five per cent of the Arabic-speaking population of Palestine are either immigrants themselves, or descendants of persons who immigrated into Palestine during the last one hundred years, for the most part after 1882, when the modern Jewish settlements began. Their long connection with the land is a myth. Their lack of cultural achievements and complete indifference to the fate of the land further weaken any claim to Palestine.

In the two decades between World War I and II, the Jews have accomplished more for the land than the Arabic-speaking people in thirteen centuries. Motivated and inspired by the Messianic enthusiasm and "religion of labor" they were able to clear swamps, conquer arid land, develop industry and agriculture, and a new Hebraic culture, crowned by the Hebrew University on Mount Scopus.

As a result of Jewish colonization the Arab population has increased by leaps and bounds, as the Palestine Royal Commission frankly admitted. It made the valid observation that this increase is most pronounced in urban centers enriched by Jewish development. The Arabs do everything in their power to enter this blooming land. Consequently, not only have the Jews not dispossessed and exploited their fellow-semites, but on the contrary, the Arabs have exploited the Jews. If not incited by the wealthy absentee landlords they will yet benefit from the successful communal settlements now dotting all of the Jewish Palestine. They might, in due time, be genuinely motivated by the Prophetic social justice just as the Jews have been.

The social causes for the Arab problem are serious indeed. The Arab rule of Palestine is based on the exploitation of the masses, kept in ignorance and superstition. The big landowners dread reforms; no wonder that they always refused giving support to the democracies in their struggle against the totalitarian nations. Evidently, any attempt

at appeasement is doomed to failure. It is quite clear that if unprovoked by this ruling clique the Arabs would work out fraternally their common fate with the Jewish people.

The author of this book consciously restrains himself from indulging in cheap sentimentalism. He is interested in the facts and their true motivation as well as literal interpretation. He appeals for justice on behalf of a people that has suffered a more horrible fate than any other on this globe. He presents this cool, dignified, and most timely appeal in the light of forty centuries, ever since its inception in the hazy age of the first Patriarch Abraham in the land of Ur. He presents this case before the highest court of justice—the human conscience. Mr. Frankenstein closes with the following pungent words: "We do not want words and praises, we want action, we trust you and distrust politics. We do not compromise, for there is no compromise between justice and injustice."

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An Adventure in World Order. By Philip C. Nash. Boston: Beacon Press. 1944. Pp. x, 139. $1.50.

The title "An Adventure in World Order" does not give Philip C. Nash's book a good send-off. It implies rather that he is treading in untried fields, or that he has suggested a number of experiments. Actually Mr. Nash has re-stated the results of twenty years of his experience gained as Director of the League of Nations Association.

The book presents a tentative and preliminary draft of the constitution of a new league of nations, and is especially timely, because this subject is being studied all over the world in order to determine whether a charter for a universal society can be written that will remove the defects of the Covenant of the League and preserve its many virtues.

The approach which Mr. Nash has used is novel. He has written in statutory language at the beginning of each chapter the phrasing of the proposed article of the constitution. He then discusses each article. There is no doubt that Mr. Nash presents a well-balanced constitution, though there will be differences of opinion as to certain cardinal points.

For example, the question of representation for the large and small nations is tackled by Mr. Nash with a feeling that he is organizing a world parliament rather than a continuing international conference. He would have the representatives of the Assembly based on population, so that each nation would have one representative if its population is

less than six million. Representation would be by districts, retaining of course the principle of geographical distribution. He would have the representatives paid a yearly salary out of the treasury of the international organization.

There will be differences of opinion also on Mr. Nash's proposal of an international police force of the United Nations, which he would build out of the armed personnel of all nations, but subject to the direction of the Executive Council. The concentration of such a police force in the hands of a single international organization is one of the most difficult problems that have to be faced, for obviously the tradition of sovereign nations is to offer their armed forces to collaborate with other armed forces for particular tasks. We have never had an international police force as such, even between two nations. Whether it is the jealousy or the national pride of the armed forces, or whether it is the instinct to independence, there are many hurdles to be surmounted before an international police force can exist in actuality as well as in theory.

On the whole Philip Nash has dealt with these subjects not only intelligently, but with keen understanding of the practical nature of the problem. His articles on mandates and the handling of disputes arising from justiciable questions are well phrased. It is on the whole a stimulating book, especially in these times.

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