

REVIEW

*Hans Kelsen's Writings
1920-1921*

CHRISTOPHER ADAIR-TOTTEFF

University of South Florida

Hans Kelsen is often regarded as one of the most contentious legal philosophers of the twentieth century. For an example, Robert Schuett begins his review of Thomas Olechowski's recent (and massive) biography of Kelsen with the sentence: "Few figures divide opinion like Hans Kelsen." Schuett goes on to explain that his adherents admired Kelsen for his fearless pursuit of the truth while his critics condemned him as a failed rebel (Schuett 2020, p. 11). However, both Kelsen's admirers and his critics have tended to focus on his mature legal and political writings and mostly ignore his earlier works. Volumes Six and Eight of the *Hans Kelsen Werke* contain some of his earlier writings. These are from only three years—1920 to 1922—but they contain many important works, both small and large. Volume Eight is a large work of almost 650 pages and constitutional scholars will welcome it because it contains the complete commentary on the Austrian constitution. That constitution was originally drafted by Kelsen in 1920 and is still largely in effect in Austria today (Kelsen 2020b). Volume Six is even larger at close to 1,000 pages, but it differs from Volume Six in that it contains eighteen writings on a number of different topics. These range from Kelsen's draft of the constitution and other constitutional issues, a book review, an official birthday note, and several brief articles focusing on the economic hardships of the Viennese professors. Most of these writings will probably appeal only to small groups with different interests; however, there are three sets of works which will be of interest to any one concerned with the concept of the state, the value of democracy, and the inherent problems of Marxism. These three areas will be the focus of this review essay.

THE STATE

There are two essays in Volume Six which focus on the state. They were not independent articles but were two chapters that would appear in Kelsen's *Der Soziologische und der Juristische Staatsbegriff* (Kelsen 1922). As Kelsen wrote in the introduction to the book, the question regarding the concept of the state is necessarily connected to the question concerning the conceptual relation between state and law. In order to clarify this connection Kelsen believed it necessary to investigate such legal concepts as norms and such sociological notions as organizations (Kelsen 1922, pp. 1-3). In Volume Six, the article "Der Staatsbegriff der 'verstehende Soziologie'" comes later than "Das Verhältnis vom Staat und Recht im Lichte der Erkenntniskritik"; however,

the latter will be examined before the former because in the book the latter is §27 and the former includes §33-45 (Kelsen 1922, pp. 156-171, 205-251).

The two articles differ not only in length but especially in focus. The inclusion of “*verstehende Soziologie*” is an explicit reference to Max Weber and his posthumously published *Wirtschaft und Gesellschaft* (1921). But Kelsen did not discuss the entire book but concentrated on the first chapter which contained Weber’s basic sociological concepts (“*Soziologische Grundbegriffe*”). Despite Max Weber’s claim that the chapter is on basic concepts, that chapter is notoriously difficult to understand. It is to Kelsen’s credit that he made the attempt. He followed Weber’s notion of an ideal type and he applauded Weber for employing it in discussing different social groupings. And, he seemed to have praise for Weber’s insistence on using “understanding sociology” to help explain actual social interactions. This is a reference to Weber’s insistence that we attribute meaning to other’s actions and then interpret those meanings. That is, they possess “significance” (“*Deutung*”) (Kelsen 2020a, pp. 238-241). Kelsen then turned to the concept of the state and he again follows Weber’s claim that the state is an “order.” In this, both Weber and Kelsen reject the idea that a state is some kind of entity or organism. Instead, for both it is a formal abstraction and one that is founded upon the sense of duty and the need for norms (Kelsen 2020a, pp. 243-245). In other words, it is a particular type of organization; one that is in the possession of the power to compel—either by the use of force or even by the mere threat to use it (Kelsen 2020a, pp. 248-250). Kelsen’s emphasis on Weber’s definition of the state as the order which has the monopoly on force underscores the decisive indication that the state is an order that is fundamentally concerned with judicial norms—that is—the sovereignty of the state (Kelsen 2020a, pp. 251-252).

“*Der Staatsbegriff der ‘verstehende Soziologie’*” was focused on just one scholar, but in contrast “*Das Verhältnis vom Staat und Recht im Lichte der Erkenntniskritik*” was devoted to examining a significant number of thinkers. There are also two differences between the article and the part in the book. One is that the article is divided into numbered sections whereas the book has titles for them. Second, Kelsen adds an introduction to the article which provides a context that otherwise would have been missing. He indicated that this is the concluding part of the book and that the overall intent of it was to delineate the differences between the juridical concept of the state and the sociological one. The main difference is that the latter is devoted to the state as an organization whereas the former is focused on law. However, the latter tends to lead one to believe that the state is some kind of entity like a church and that is because both the state and the church appear to believe in absolutes. As Kelsen will later clarify, God is the absolute in the church, whereas the state is regarded as an absolute because of the issue of sovereignty (Kelsen 2020a, pp. 168-171).

Kelsen invokes the philosopher Hans Vaihinger. Vaihinger was best known for being a Kantian scholar: he wrote a massive two-volume commentary on Kant’s *Critique of Pure Reason*. It covered the first fifty pages and was left uncompleted; he also started the journal *Kant-Studien*. But he was one of the first philosophers in Germany to take Nietzsche seriously, and helped lead him to his philosophy of “as-if” and the role of fictions. Kelsen appropriates Vaihinger’s notion of fiction and applies it to the claim that the state is like a person. It is not, he argues, a substance but a power; just as force is a power in nature, law is the power in the state (Kelsen 2020a, pp. 171-177). Thus, law is a function and not a substance and he noted that it was Ernst Cassirer who, in his “brilliant” work, distinguished the real differences between the concept of substance and the concept of function (Kelsen 2020a, pp. 178-182).

In the second section Kelsen returns to the notion of the state as absolute in its relationship to God as the absolute in the church—both are invoked as the personification of will—God’s and the state’s (Kelsen 2020a, pp. 193-209). In the third section Kelsen noted that scholars often contend that there is not only a logical parallel between “God” and the “State” but there is a real relationship. Kelsen clarifies this more in his *Logos* essay on “*Gott und Staat*” (Kelsen 1922/1923) but here he explains that thinkers believe that the state is the human incarnation of the Kingdom of God and that God rules in both (Kelsen 2020a, pp. 217-220). But there is a dualism between God and nature and it leads to a pure natural science. In the same way there is a dualism between politics and positive law which can also lead to a pure theory. This is an indication of Kelsen’s later pure theory of law upon which his fame largely rests. But Kelsen’s concern here is with the

doctrine of natural law, but one which is not based on nature but on God. And, he concluded with the observation that there is no dualism between state and law because “every state is a legal state.”

DEMOCRACY

Prior to 1921, Kelsen had been preoccupied with the concepts of democracy and the issue of sovereignty. The latter issue was dealt with in a slim volume from 1919 which was entitled *Das Problem der Souveränität und die Theorie des Völkerrechts*. This work is reprinted in Volume Four of *Hans Kelsen Werke* and would be of interest to any one concerned about sovereignty and peoples’ rights. However, this volume is not under review here so that is irrelevant. However, this volume contained Kelsen’s November 1919 speech on the essence and value of democracy. In fact, it has both a shorter version and a lengthier one and both are important here because they are briefer versions of the work that was published in the *Archiv für Sozialwissenschaft und Sozialpolitik*. This was the journal that Edgar Jaffé purchased in 1903 and brought in Werner Sombart and Max Weber as co-editors. Within a very short time it had established itself as one of the leading socio-political journals. Kelsen published “Vom Wesen und Wert der Demokratie” in that journal and the publishing firm J. C. B. Mohr (Paul Siebeck) also printed it as a separate volume. Finally, Kelsen published a second edition in 1929; accordingly, there are many differences among the five variations. The two lectures from 1919 which are found in Volume Four differ in length and in focus; the two versions which were published in 1920 are mostly the same, while the second edition was expanded from roughly 35 pages to 119. The focus here is on the 1920 version of “Vom Wesen und Wert der Demokratie” which was published in the *Archiv* and as a separate pamphlet.

As the title indicates, Kelsen has two concerns: one is the essence or nature of democracy while the other is its value. Kelsen noted that the revolutions of 1789 and 1848 brought forth the democratic ideal and throughout the rest of the nineteenth century the term democracy became a slogan. But with many slogans, the word has lost its specific meaning. Kelsen’s attempt to define it began by noting its twin pillars: freedom and equality. However, he noted that the idea of freedom is a negative one—freedom from rather than freedom to do. The same is true regarding equality in the sense that if someone is a human just like me, then we are equal. Because he and I are equal, then how can he have the right to dominate me (Kelsen 2020a, pp. 124-126). But another feature of democracy is the principle of majority rules. Kelsen reminds us of Rousseau’s notion of the majority as an expression of the general will—thus, the people have sovereignty over themselves. This led to the problem of protecting the minority against the tyranny of the majority. But Kelsen argued that the essence of democratic politics is the compromise (Kelsen 2020a, pp. 132-133). The problem with communism as with any absolute, is the unwillingness to compromise. That lies in part in the communist belief that the state is like a business and that its primary function is to organize and control (Kelsen 2020a, pp. 135-136, 142). Thus, there is a tension between the anarchist’s insistence on eliminating the state and the state taking control over every aspect of life; that is, a tension between an idealistic theory and its concrete application (Kelsen 2020a, pp. 145-146). There is also tension regarding the claim about the “unity of the people” (“Einheit des Volkes”) and the idea that the “people” can rule. Kelsen invoked Nietzsche’s observation about the lie: “I, the state, am the people” (“Ich, der Staat, bin des Volkes”) and he reminded us of another of Nietzsche’s remarks about the state being the coldest of all monstrosities (Kelsen 2020a, pp. 147-148). Kelsen then turned to the idea that democracy is the best political association to be able to select the leader. In fact, democracy has always maintained the ideal of not needing a leader (“Führerlosigkeit”) (Kelsen 2020a, pp. 149). That is because of the democratic principle of equality that was best represented by Rousseau. The opposite is the monarch or the dictator because both represent the belief in absolutes, thereby revealing the highest value of democracy—relativism. Because all are equal, opinions are relative. Since there is no absolute, compromise is possible. Kelsen is realistic and he recognized that the people’s opinion is not always right. He concluded by invoking the story of Jesus before Pontus Pilate who famously asked “What is truth?” Seeing that Jesus had done nothing wrong he asked the people. But the

people wanted the Son of God put to death and the robber set free. And, Kelsen thought that just might be an argument against the essence and the value of democracy (Kelsen 2020a, pp. 155-157).

MARXISM

Volume Six also contains two of Kelsen's writings on Marxism. "Die ökonomische und politische Theorie des Marxismus" is only six pages and it briefly treats Marxism as an economic and a political theory. In contrast, "Sozialismus und Staat. Eine Untersuchung der politischen Theorie des Marxismus" is actually a book of almost 170 pages. In effect, Kelsen wrote an entire history of communism, beginning with an introduction to the problem and methods of historical materialism. The second chapter is devoted to the *Communist Manifesto* and the idea of a stateless community. The third chapter is on the writings of Marx and Engels while the fourth chapter is an examination of the party doctrines as outlined by Karl Kaustky, August Bebel, and other German political thinkers. The fifth chapter is on Russian "Neo-Kommunismus" and Kelsen notes the shift from Marx's early stateless communism to the Neo-Communist takeover of the state. Instead of Lenin's belief that the state would die out, the communists transformed the political state into an administrative state of control (Kelsen 2020a, pp. 472-475). And, while the Communists claimed to believe in the twin principles of democracy—freedom and equality—they actually reject democracy in favor of the dictatorship of the proletariat (Kelsen 2020a, pp. 478, 488-492). Freedom and equality are sacrificed in the name of political domination and economic control.

CONCLUDING COMMENTS

These three areas regarding the nature of the state, the value of democracy, and the critique of Marxism, demonstrate Kelsen's belief in the democratic principles of freedom and equality and the need for law and liberalism. The years 1920 to 1923 were among the most problematic for Austria but even more so for Germany. That is because Carl Schmitt was strenuously attacking democracy and was promoting dictatorships in his belief that democracy and parliamentarism were undermining Germany's position in the world (Adair-Toteff 2020, pp. 25-46). While Schmitt's writings may have helped Hitler's rise to power in 1932, the Allies defeated Nazism in 1945. For most of the remaining years of his life, Schmitt would occasionally receive visitors in his home in Plettenberg. In contrast, Kelsen was welcomed by thousands of people on several continents. And, at least four different scholarly journals dedicated special issues to him in honor of his 80th birthday (Olechowski 2020, pp. 886-892). Whether Kelsen should really be regarded as the "Jurist of the twentieth century" ("Jurist des zwanzigsten Jahrhunderts") (Métall 1969, III) may be debatable. What is not debatable is the importance of these two volumes of the *Hans Kelsen Werke*. What makes them especially important is that they contain Kelsen's early efforts in vigorously defending both democracy and law.

NOTES

- 1 "jeder Staat Rechts-Staat ist" (Kelsen 2020a, pp. 222-223). Kelsen repeats this final paragraph as part of the final paragraph of "Gott und Staat", including "jeder Staat Rechtsstaat ist" (Kelsen 1922/1923, p. 284).
- 2 Volume Six has a valuable 300-page explanatory section written by Rodrigo Cadore while Volume Eight has a helpful 170-page explanation also written by Cadore (Kelsen 2020a, pp. 533-847; Kelsen 2020b, pp. 505-673).

REFERENCES

- Adair-Toteff, Christopher. 2020. *Carl Schmitt on Law and Liberalism*. London: Palgrave Macmillan.
- Kelsen, Hans. 1922. *Der Soziologische und der Juristische Staatsbegriff. Kritische Untersuchung des Verhältnisses von Staat und Recht*. Tübingen: Verlag von J. C. B. Mohr (Paul Siebeck).
- _____. 1922/1923. Gott und Staat. *Logos. Internationale Zeitschrift für Philosophie der Kultur*. Band XI: 261-284.
- _____. 1929. *Vom Wesen und Wert der Demokratie*. Tübingen: Verlag von J. C. B. Mohr (Paul Siebeck). Zweite Auflage.
- _____. 2013. *Hans Kelsen Werke. Band 4. Veröffentlichte Schriften 1918-1920*. Herausgegeben von Matthias Jestaedt in Kooperation mit dem Hans Kelsen-Institut. Tübingen: Mohr Siebeck
- _____. 2020a. *Hans Kelsen Werke. Band 6. Veröffentlichte Schriften 1920-1921*. Herausgegeben von Matthias Jestaedt in Kooperation mit dem Hans Kelsen-Institut. Tübingen: Mohr Siebeck.
- _____. 2020b. *Hans Kelsen Werke. Band 8. Veröffentlichte Schriften 1922*. Herausgegeben von Matthias Jestaedt in Kooperation mit dem Hans Kelsen-Institut. Tübingen: Mohr Siebeck.
- Métall, R. A. 1969. *Hans Kelsen. Leben und Werk*. Wien: Verlag Franz Deuticke.
- Olechowski, Thomas. 2020. *Hans Kelsen. Biographie eines Rechtswissenschaftlers*. Tübingen: Mohr Siebeck.
- Schuett, Robert. 2020. Hans Kelsen: Biographie eines Rechtswissenschaftlers. *OZP—Austrian Journal of Political Science*. Vol. 49. Issue 3: 11-12.