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Recht en vrede bij Hans Kelsen : een herwaardering van Kelsens rechtsfilosofie : juridisch pacifisme als stilzwijgende betekenis van zijn Zuivere Rechtsleer

Notermans, M.E.

Citation

Notermans, M. E. (2016, March 24). *Recht en vrede bij Hans Kelsen : een herwaardering van Kelsens rechtsfilosofie : juridisch pacifisme als stilzwijgende betekenis van zijn Zuivere Rechtsleer*. Retrieved from <https://hdl.handle.net/1887/38607>

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Note: To cite this publication please use the final published version (if applicable).

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Issue Date: 2016-03-24

Summary

Law and peace in the work of Hans Kelsen

A re-evaluation of Kelsen's legal philosophy: legal pacifism as tacit meaning of his Pure Theory of Law

Hans Kelsen is renowned in the world of legal philosophy and theory as one of the most important legal scholars of the 20th century and his most important work which brought him this renown, *Pure Theory of Law* (*Reine Rechtslehre*), is therefore 'world famous'. However, he is less well known as a legal pacifist and his main writings on law and peace, such as *Peace through Law*, are very rarely studied and almost never considered in relation to his Pure Theory of Law. Even the more recent studies of Kelsen's theory of democracy, which increased familiarity with Kelsen as an advocate of democracy and actually looked at his political work *Vom Wesen und Wert der Demokratie* in the light of the Pure Theory of Law, contain almost no systematic or critical consideration of the value of peace, although both Kelsen's legal theory and his theory of democracy at least give cause for this. Since others have already made the connection between the concepts of law and democracy in Kelsen's work, in this thesis I have restricted myself to the concepts – also closely connected in his work – of law and peace, even though a three-way treatment of Kelsen's conceptual framework would have done most justice to his (legal) philosophical thinking. In this thesis, consisting of the discussions presented separately in the foregoing chapters, I researched the meaning of peace in Kelsen's legal philosophy as follows.

In the first, introductory chapter, I introduced the subject of law and peace in the work of Kelsen, and raised the problematic connection between his 'pure' or 'value-neutral' theory of positive law on the one hand, and his 'impure' or 'value-laden' view of social peace on the other. With the aim of resolving this problem, a problem statement was formulated, namely the question of whether, on the basis of a critical re-evaluation of Kelsen's legal philosophy, it can be concluded that the meaning of the Pure Theory of Law is essentially that it begins and ends with peace and, if so, what this pacifist basic principle and ultimate aim of Kelsen's legal theory then entails for the practice of law. In order to answer this question, and to resolve the seeming contradiction between Pure Theory of Law and legal pacifism, an alternative method of interpretation is proposed. In a manner somewhat analogous to that in which others have offered an alternative interpretation

of Wittgenstein's *Tractatus Logico-Philosophicus*, allowing its tacit meaning to be construed as ethical, in this research I developed an explanation of the Pure Theory of Law that enables us to make explicit its inherent pacifism, and to interpret Kelsen's legal philosophy as pacifist. I then attempted to further explain the significance of this for, in particular, (supra)national (criminal) adjudication.

In chapter 2, I started the research with the idea of justice, an idea that by tradition is related to the concept of law and where much legal philosophy has begun. Kelsen's legal philosophy too can only be understood, at least in a negative sense, after his destructive but far from nihilistic criticism of this basic idea has been closely examined. An analysis of Kelsen's relativistic approach to the question of justice, in which that idea must be radically transformed before it can become an attainable value of a social order, led me to two kinds of justice that Kelsen can characterize as most objective or least subjective. Although only the most objective (yet tautological) kind of formal justice, *legality*, is immanent to the law and can therefore be known and discussed by the Pure Theory of Law, it appeared that Kelsen implicitly attaches a more than personal importance to the least subjective kind of material justice, *social peace*. In his scientific search for a solution to the problem of justice, which mainly arises when there are conflicts of interests and values, Kelsen regards the metamorphosis of meaning from (absolute) justice to (relative) peace as essential for finding the most objective possible solution to such conflicts. Now, according to Kelsen, it turns out that positive law is able to achieve a social order that at least guarantees peace between individuals through peaceful resolution of their inevitable conflicts. And he sees the instrument of adjudication, aimed primarily at peaceful dispute resolution, as ideal for achieving that goal of peaceful coexistence.

In the third chapter, the research on the implicit moral-political meaning of the Pure Theory of Law continued, but now with particular attention to adjudication. At first sight, such research seems contradictory to the 'purity' of Kelsen's legal theory, but on closer consideration this contradiction turns out to be only an appearance due to the paradoxical effect that is created by the pure theory itself. After all, from an analysis of three *seeming contradictions* of the Pure Theory of Law – the paradoxical effects of 1. the formalized concept of law; 2. the relativized idea of justice; and 3. the objectified value of social peace – there emerged a *clear representation* of Kelsen's notion of judicial justice. In his legal theory, pacifying jurisprudence, which is essentially every legal judgment aimed at peaceful conflict resolution, can be understood as a paragon of 'pure' (objective and impartial) administration of justice. This means that every judge (with peace as his aim) who

simply by giving a judgment – i.e. without use of force – puts an end to the dispute between the parties, can make this judgment all the more satisfactory for those parties by demonstrating that he has listened to all the parties concerned (*audi alteram partem*) and has weighed their interests as fairly as possible. Only then will the parties feel that the equal value of their interests has been recognized, and be satisfied with the relatively just judgment. Social peace is therefore seen here as a Kelsenian representation of judicial justice, albeit not as a sufficient or necessary condition for a just administration of law, but nevertheless as a *tacit condition*. Whether this moral-political condition and value also form the basis for Kelsen's concept of the positive legal order as a whole was the subject of my research in the sixth chapter.

Before that, in chapters 4 and 5, I proceeded further with the research on Kelsen's concept of pacifying jurisprudence, now shifting the attention to his explicitly pacifist works in the area of international (criminal) law. The fourth chapter was restricted to Kelsen's plea made before and during the Second World War for the primacy of supranational adjudication in securing world peace. That Kelsen considered law to be a suitable means for achieving the aim of this peace is not – given the (legal) philosophical tradition running from Hobbes to Kant – so very innovative, but the primary role that Kelsen ascribes to adjudication in guaranteeing world peace is indeed highly original. First, the philosophical (epistemological and moral-political) foundations of Kelsen's theory of international law were sketched, and from this sketch an implicit – and sometimes even explicit – legal objectivism and especially pacifism became visible. I then examined the implications of this for legal theory and practice by analyzing Kelsen's argumentation for the primacy of adjudication within the international legal order. In his plea, three main arguments were distinguished, each of them calling for a supranational judge as the guardian of international peace: 1. in evolutionary terms, the centralization of judicial organs precedes that of executive and legislative organs; 2. in legal-technical terms, the judicial function has precedence over the legislative and executive functions; and 3. in moral-political terms, the authority of an objective and impartial organ is greater than that of an organ of political power. Finally, the primary importance of supranational adjudication is again emphasized by Kelsen's comparison to the pacifying significance of the constitutional judge in a national legal order, who functions there as the guardian of the political (and possibly also democratic or federal) peace.

The fifth chapter continued to build on the research into Kelsen's pacifist views on supranational adjudication, namely in the area of international

criminal law. The originality of these views is not, after all, limited to his plea for the primacy of an international court in securing world peace, but also extends to his argument that the jurisdiction of such a court should be expanded to include criminal law. Before focusing on the pacifying relevance of this expanded jurisdiction, I researched whether and to what extent the Pure Theory of Law can facilitate in its practical-political application. It can be said that the Pure Theory of Law in fact implicitly facilitated in a pacifist development of the world legal order, and hence in a certain sense is less 'pure' in its theory than it wishes to appear, but this tacit facilitation with and aim of pacifism certainly do not diverge from, but consistently follow from the universalist and objectivist principles assumed by this same theory. Now, Kelsen took the view – based on the aim of world peace through law and adjudication – that it was important that in a world legal order to be constructed after the Second World War, a future international court would not only have primacy over an organ of political power, but would also have criminal jurisdiction. On the basis of Kelsen's three requirements with which such a construction must comply – namely: 1. establishment of individual responsibility; 2. distinction between illegal and legal war; and 3. universal and obligatory jurisdiction – I explained, with reasons, that this 'extension' into criminal law is needed for a better maintenance of peace, and that the current peace 'construction' is not entirely satisfactory. A proposal was therefore made that this construction should be renovated.

Finally, in chapter 6, I returned to the question raised earlier about whether the condition and value of social peace do not implicitly form the moral-political starting point of Kelsen's basic theoretical ideas on positive law. My hypothesis was that Kelsen considers 'social peace' to be a *conditio tacita* for the validity of the positive legal order, just as in the Pure Theory of Law he regards the 'basic norm' as a *conditio per quam* and 'effectiveness' as a *conditio sine qua non* for the validity of the legal order. First, I outlined why Kelsen on the one hand makes a strict distinction between Is (fact and reality) and Ought (norm and value) and on the other hand sees a necessary relation between these two basic categories. From this outline emerged Kelsen's basic idea of legal validity, which enabled me to bridge the seemingly unbridgeable gap between positive legal order and social reality with the value of social peace. I then confirmed the aforesaid hypothesis by demonstrating that in the other conditions (basic norm and effectiveness) for the validity of the (to a greater or lesser extent centralized and developed) positive legal order, Kelsen's Pure Theory of Law assumes the *conditio tacita* of social peace. From this evidence, I conclude that social peace is not only the tacit *condition* for legal validity, but also the social-ethical basic *value*

of positive law. This implication or assumption of the value of peace means that the presumed 'value-neutral' Pure Theory of Law – and hence also its 'pure' concept of law – is in need of a thorough re-evaluation, in the sense that it can be understood as a pacifist theory of pacifying law.

In the seventh and last chapter, the research concluded with a summarizing final reflection. First, the foregoing chapters and the conclusions arising from them were briefly summarized. After this, a concluding survey was conducted of the discussed subject of law and peace, in which I answered the problem statement and reached a conclusion. On the basis of my research, in which I used an alternative interpretation to make explicit and to explain that legal pacifism is the tacit meaning of the Pure Theory of Law, the question in the problem statement was answered in the affirmative. After all, the implicit meaning of Kelsen's legal philosophy is that it – not only in its practical but also in its theoretical concept of law – begins and ends with peace. In the final section, this conclusion about the pacifist basic principle and ultimate aim of Kelsen's positivist legal philosophy was further elaborated and, where necessary, nuanced. First, the conclusion that peace is the *basic principle* of the Pure Theory of Law, in the sense that in the concept and meaning of law it always implicitly starts out from this basic social-ethical condition and value, was made less absolute. Second, a nuance was added to the conclusion that peace is the *ultimate aim* of the Pure Theory of Law, in the sense that it implicitly sets itself the goal of (world) peace through law and adjudication and therefore can be conceived as pacifist legal theory. Third, an answer was given to the question of what Kelsen's legal pacifism now entails for legal *practice*, especially for adjudication in general and supranational (criminal) adjudication in particular. Finally, I expressed the hope that this thesis contributes to a re-evaluation of Kelsen's positivist legal philosophy by showing that the undervalued yet essential aspect of his legal pacifism can be understood as the tacit, *ethical* meaning of the Pure Theory of Law. For the concepts of law and peace are so strongly related in Kelsen's work that the one concept cannot entirely be understood without the other.

