ANALYTICAL JURISPRUDENCE AND REVOLUTION

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The very pervasiveness of revolution as a social and political phenomenon should alert us to its importance in our theorising about law and society. The approach to the philosophy of law known as analytical jurisprudence has sought to describe the nature of revolution as a topic of interest to legal theorists, and in this paper I wish to offer a brief exposition, and outline some points of criticism, of the work in this area by Hans Kelsen. I have chosen Kelsen not only because of the central place he holds in the analytical tradition in jurisprudence but also because, although other analytical philosophers of law such as Bentham, Austin and Hart (and in different approaches to jurisprudence other writers such as Olivercrona and Ross) have provided us with some discussion of revolution, it is only Kelsen who offers anything like a fully developed theory on the relationship between revolution and law and on the place of revolution in legal theory.

Before looking at Kelsen's views on the nature of the connexion between revolution and law it will be as well to make some generalisations about the deficiencies which I wish to show underlie his theory. For Kelsen's arguments on revolution have two main sorts of failings, which apart from being substantive points of criticism in their own right, together point to weaknesses not in Kelsen's views on revolution but also in his whole enterprise of 'pure' legal theory, if not also in general analytical jurisprudence. More particularly, I suggest that Kelsen falls down from the standpoints of both theoretical and practical reflection on law. In other words his theory of revolution is inadequate at a theoretical level in failing to conceptualise satisfactorilly the nature of revolution, and this is the case even if our interest in the topic, or our point of view, is that of the lawyer or legal scientist (types of interest which Kelsen confusingly runs together in his discussion of the jurist's point of view.[1]) But his theory is also

1 See J. Raz, *The Authority of Law* (Oxford, 1979), p. 141.

inadequate at the level of practical reasoning, that is to say it does not provide us with anything, whether by way of information or insight, as to how the law instructs us on what ought to be done during or after revolutions. Although Kelsen would deny that his theories were designed to provide assistance in practical reasoning, the fact that they have been so used itself indicates a mode of assessing the adequacy of an approach to legal philosophy which on its face eschews all normative considerations. More succinctly, I am arguing that Kelsen's pure theory, which seeks to avoid both sociological and normative considerations, is fatally flawed by the way it determines its own boundaries.

What is fairly clear, however, is the main thrust of Kelsen's theory of revolution, for Kelsen advances in quite explicit tems a major thesis about the effects of revolution on law and legal systems.[2]. He presents what has been described as the discontinuity thesis, that is the thesis that revolutions, which involve in some way change in the basic norm of a legal system, have the effect of totally interrupting the identity and continuity of the legal system in question.[3] Kelsen describes revolution as a change in the constitution (or the historically first constitution) in a way not authorised by that constitution. The more substantive thesis of discontinuity then follows in consistent fashion from Kelsen's views on the necessarily systematic nature of law, the systematisation of legal norms being a function of the basic norm, and the role of the principle of effectiveness as a guide to the legal scientist in selecting the appropriate basic norm for a particular legal system. A corollary of the discontinuity thesis is the point that all legal systems must have some revolutionary originis, for the need to presuppose a basic norm on the principle of effectiveness arises only when we lack legal justification for norms linked in a chain of validity, at least at the level of the constitution which is without legal authority.

Why should this discontinuity thesis be thought to be inadequate at a theoretical level? It has the merit at least of emphasising the radical nature which revolutions have in relation to law and legal systems, and is thus consistent with the pre-theoretical reflection that revolutions are not concerned simply with any sort of change but rather have a more far-reaching and profound effect.

2 See especially, *General Theory of Law and State* (New York, 1945), pp. 115-122; *The Pure Theory of Law* (Berkeley & Los Angeles, 1970), pp. 208-214.

3 For general discussion and criticism, see J. J. Finnis, "Revolutions and Continuity of Law in Simpson (ed.), *Oxford Essays in Jurisprudence, Second Series* (Oxford, 1973), pp. 44-76.

But one initial problem which confronts us is the concept which Kelsen tries to capture by the term "revolution". Kelsen himself talks of adopting the point of view of the jurist and so informs us what does not concern him, such as the type of revolution (is it a broad social revolution or a mere coup d'etat?), or its mode (what forms of violence, if any, have been used?), or its social consequences (is the revolution reformist, or conservative, or reactionary?). A revolution is simply that which involves change of a constitution in an unauthorised fashion.[4] But the crucial point is that it is not clear whether the jurist has stipulatively defined revolution as an illegal change in the constitution or whether he is interested in the same phenomenon of revolution which is of concern to social and political scientists, albeit looking at it from a specialised point of view. The former sense of revolution is metaphorically derived from the usual notion of revolution (although it is equally consistent with etymology,[5] though it is a metaphor increasingly resorted to. (The paradigm example of this, if you pardon the expression, must be T.S. Kuhn's account of revolutions in scientific thought.[6] But in the present context the use of such a term is profoundly misleading, and the adoption of some more neutral word such as "substitution" (i.e. of the basic norm)[7] would have avoided a great degree of confusion.

On the other hand, Kelsen does refuse to attach the label revolution to a number of situations where there are legal developments in ways not authorised by the constitution and where it is unusual to talk of revolution (except in some metaphorical sense). The most general situation of this type is the development of custom where the constitution makes no allowance for this form of law-making or even where it expressly forbids it.[8] Kelsen also discusses the case of usurpation of power by judges, which, given Kelsen's views on the nature of legal personality and legal office, would include such obviously non-revolutionary matters as the development of a system of precedent. In this context, Kelsen, in a manner of outright (as opposed to imputed) inconsistency, refers to "revolutionary partial change", thereby contradicting the main thrust of the discontinuity thesis.[9]

4 *General Theory*, p. 117.

5 A. Hatto, "Revolution": an Inquiry into the Usefulness of an Historical Term" (1949) 58 Mind 495.

6 T. S. Kuhn, *The Structure of Scientific Revolutions* (2nd ed., Chicago, 1970).

7 Cp. H. Kelsen, "The Pure Theory of Law" (1935) 51 L.Q.R. 517, 519.

8 G. Maher, "Custom and Constitutions" (1981 1 *Oxford Journal of Legal Studies*, forthcoming.

9 *Pure Theory*, pp. 275-276.

So at the outset we can note that there is a good deal of confusion in Kelsen whether he is using revolution as a term with a meaning special to analytical jurisprudence or is discussing the same concept of interest to social scientists from the point of view of a legal theorist. Moreover the substance of his theory of revolution, that revolutions totally interrupt the continuity of legal systems, is also open to fundamental criticism.

A number of commentators have shown that Kelsen's views on revolution and identity of legal systems face a variety of problems in seeking to describe some matters of obvious relevance to the issue. One such defect is the case of peaceful devolution, where for example there is state A which has a colony B such that there is one legal system for both A and B. Colony B is then given its independence from A by means of a (valid) act of independence by the legal system of A and B, and in due course B sets up its own structure of courts, legislature, constitution and the rest. However, such developments could not, on Kelsen's arguments, allow us to say that there had come about two legal systems, namely those of A and of B, as opposed to the previously existing one of A and B. This is so because there has been no break in the legality of the acts establishing B as an independent state or legal system and hence no revolution.[10] The converse case of merger of legal system creates similar problems. Imagine two separate legal systems X and Y decide to amalagamate so as to form one system (X+Y) by means of each system (validly) enacting a statute of union. But in this case again there is hence no revolutionary break in the identities of either X or of Y, and so on Kelsenian reasoning we cannot point to one legal system of X+Y with its own separate identity.[11]

These two instances may be thought to be so rare in practice that they can be explained away simply as exceptions to the discontinuity thesis. But there is another type of development which is experienced by almost every legal system and which causes further and direct problems for the discontinuity thesis, that is, the growth of custom-based changes in the legal system. It was noted earlier that there are some inconsistencies in Kelsen's very characterisation of custom as revolutionary in nature, but here it is sufficient to point to the variety of changes which legal systems can experience, perhaps spanning many years (as for example the development of a system of *stare*

[10] J. Raz, *The Concept of a Legal System* (2nd ed., Oxford, 1980), pp. 100-109; Finnis, *op. cit.*

[11] G. Maher, "The Identity of the Scottish Legal System", 1977 *Juridical Review* 21.

decisis), which are subsumable under the heading of custom. What are required are criteria for telling us what particular types of change have the effect of changing the identity of legal systems. Kelsen's monolithic discontinuity thesis, according to which all revolutions totally destroy the continuity of legal systems, offer us no guide in distinguishing the different types of change (some but not all of which would be thought revolutionary in a social or political sense) and their differing effects of social (including legal) identity.

It should come as no surprise, therefore, to discover that critics of Kelsen have shown that the answer, if not the question, of the effect of revolution on the identity of legal systems (and indeed the general problem of the identity and continuity of legal systems) lies beyond the narrower confines of analytical jurisprudence in the social sciences.[12] And once we turn our attention to those disciplines we find a richer account of theories of social identity, including the identity of sub-systems such legal systems (a term used by social scientists in a wider sense than the juristically created type of system which Kelsen has in mind and which is primarily concerned with the problem of ordering and arranging legal norms in accordance with certain logical principles). Furthermore, political science has for long been concerned with exploring and explaining the very distinctions which Kelsen so casually collapses about the types of revolutionary change, the range of means used in carrying out revolutions and their effects upon the societies which experience them. It is only when we turn to this source of analysis that we can begin to explain the difference, as far as the effect on the general social system as well as the legal system is concerned, between the "mere" coup d'etat (in some states almost part of the identity of the political system) and the great social revolutions.

Now it might be thought that we can save analytical jurisprudence, if not Kelsen's discontinuity thesis, simply by consigning the problem of the identity of legal systems away from jurisprudence to the realm of social science. But this reasoning seems perverse. The topic of identity of legal systems, which Kelsen links with his discussion of revolution, is one which clearly arises within the traditional framework of analytical jurisprudence. Moreover, the answer, to the questions involved come from the social sciences. The appropriate conclusion to draw is that, given the theoretical concerns which jurisprudence has adopted, we should cease to regard social science considerations as involving disciplinarian trespass but rather redraw the boun-

[12] Raz, *Concept of a Legal System*, p. 189; Finnis, *op. cit.*, p. 69.

daries of jurisprudence to include the theoretical level of social science analysis.[13]

Mention of the boundaries of jurisprudence brings us to the second source of failure of Kelsen's theory of revolution, namely its inadequacy as a guide to practical reasoning about revolution and the law. Of course, Kelsen never intended the pure theory of law to be capable of "application"; indeed the contrary, it was to be a descriptive theory and only so. On the other hand, there are a number of law-cases where the special problems of practical reasoning known as judicial reasoning have involved consideration of Kelsen's discontinuity thesis; but despite this appeal to Kelsen's work, it can scarcely be said to shed much in the way of instruction for judges faced with the problems of locating judicial duty in and after revolutions.[14]

It is a feature worthy of note, complementing the point made earlier about the need to maintain distinctions between different types of revolutions, that these cases all involved legal systems which had recently experienced revolutions in the form of coups d'etat which had changed political life (and at least prima facie the law) only in a limited though imporant number of ways. It was precisely this feature which presented problems for the judges facing regimes who claimed, whether presumptively or successfully, that their decrees ought to be enforced as law by the courts. The issue then confronting the judges was how to justify the use of the power of the state in post-revolutionary circumstances. Now all that Kelsen can offer is to tell us that if the revolution is not yet complete than either the legal system of the old regime continues fully in force or that there is no law at all. But although the complete incompatibility of revolution and law may be true of certain types of revolutionary change, it is certainly not true of them all.

In the cases where these problems arose, the courts looked to a wide variety of considerations in seeking to arrive at their answers, considerations ranging from social policies and legal values to Kelsen's own work. But Kelsen's theory cannot even account for the existence of this problem for the key question facing the courts cannot arise as a legal problem if we adhere to the discontinuity thesis. Since for Kelsen there is no law during revolutions (unless they pose no threat

[13] *Raz*, loc. cit.

[14] E.g. *State v. Dosso* 1958 1 P.L.D. (S.C. Pak.) 533; *Asma Jilani* v. *Government of the Punjab* P.L.D. 1972 S.C. 139 (Pakistan). *Uganda* v. *Commissioner of Prisons, ex parte Matovu* [1966] E.A.L.R. 514 *Sallah* v. *Attorney-General* (1970) Current Cases (Ghana) 55. *Lakanmi* v. *Attorney-General (Western State)* (1970) 5 *Nigerian Lawyers Qu.* 133. *Madzimbamuto* v. *Lardner-Burke* 1966 R.L.R. 756; S.A. 1968 (2) 284; [1969] A.C. 645 (S. Rhodesia).

to the old regime), and successful revolutions totally destroy the former legal systems, it follows that after a revolution courts either cease to exist or owe their legal origins and authority to the newly established constitution. If either be the case, there can be no issue of the courts even considering the extent to which they should recognise the new regime's new laws or constitution. Yet in the cases referred to, almost all the judges accepted that they held the same office as that set up in the pre-revolution legal system, and in some cases they held other parts of the legal system, such as the legislature, as continuing in being as the same institution.[15] As far as the judges were concerned, revolutions at least of the type they had experienced did not change all of the legal system.

What then do we make of the reasoning actually used in these cases? Obviously, the judges could not casually look to the "law" to guide their decisions, for, in the absence of the former constitution, law in its standard form did not exist. But the the judges did talk of their duty to apply the law, their difficulty being that of locating the appropriate source of legal duty in revolutionary circumstances. Thus we find appeals to such notions as the principle of necessity, public policy factors such as the need for order and public safety, and even in one case the law of allegiance and treason. Kelsen writes off such reasoning as appeals to justice or policy as "ideological" even in standard instances of legal reasoning but the revolution cases indicate that even if we accept this rather misleading label we should not follow Kelsen further in dismissing such considerations as legally irrelevant. Clearly the judges were reasoning about their legal duties as appropriate in the circumstances and clearly notions of policy and the like played a role in their arriving at decisions. There is no reason why any values or policies which have normative implications for judges deciding upon their judicial duty should be thought to be irrelevant to legal theory.

The final matter which merits some scrutiny is the fact that in these cases the judges explicitly looked to Kelsen's work for assistance and attempted in some cases to "apply" his theory. Although the idea of judicially applying a purportedly pure theory involves a blatant inconsistency, the very ocurrence of this in practice points to the inadequacy of seeking to exclude normative considerations from a theory of law, or at least attempting to provide a descriptive theory

[15] In the cases cited only two judges in the Rhodesian cases held views consistent with Kelsen's theory. For a discussion of the issues of the status and authority of post-coup courts, see S. Guest "Revolution and the Position of the Judiciary", 1980 *Public Law* 168.

with no normative implications. In keeping with the abnormal nature of the revolution cases in terms of the central instances of legal reasoning, the range of issues raised and sources consulted was phenomenally wide. The judges in these cases looked not only to earlier revolution cases but also to the United States Civil War cases, classical legal writers such as Grotius, de Vitoria, Suarez, Lessius and von Bynkershoek, and more modern jurists such as (in addition to Kelsen) Hart, Paton, Friedman, Lloyd, Bryce, and Olivecrona. The conclusion to draw from this is that judges, as others, will look to legal theory for at least insight in matters of practical reasoning, for even descriptive legal science will carry implications for action for persons in the situations described.[16] The reason that Kelsen's discontinuity thesis caused confusion when "applied" in the revolution cases and was inappropriate to the decisions in them had less to do with methodological requirements of purity than the failure of the thesis as a description. Its own normative implications are higly suspect in any case, for in some cases the assumption was raised that revolutionary regimes could do anything, including abrogating human rights, *because* their origins were "revolutionary", a trend kept in check by those courts which explicitly and directly refused to apply Kelsen in their decisions.

[16] J. W. Harris, 'When and Why does the *Grundnorm* Change?' 1977 *Cambridge L.J.* 103. Harris argues that Kelsen's pure theory does and should have normative implications for the judges, but this point is distinct from the appropriateness or otherwisde of the discontinuity thesis.