
Book Reviews

Von Bernstorff, Jochen. *Der Glaube an das universale Recht: Zur Völkerrechtstheorie Hans Kelsens und seiner Schüler*. Baden-Baden: Nomos, 2001. Pp. 233. ISBN 3-7890-7649-X.

It is sometimes said that the best books are those from which one learns or those that stimulate thinking. This is only partially true; after all, bad books can also be thought-provoking, and figuring out why a book fails is a highly educational experience in its own right. Instead, the best books are invariably those that one would have liked to have written. Jochen Von Bernstorff's recent study of aspects of Kelsen's work falls into this category. Despite the fact that its main point does not come across with full conviction, *Der Glaube an das universale Recht* is a very good book indeed.

Von Bernstorff's main objective is to explore an inherent tension in Kelsen's work. On the one hand, Kelsen is known as the formalist, the pure theorist, who wished nothing more than to strip law of all non-legal concerns. On the other hand, however, Kelsen is also known as a social-democratic sympathizer and a committed cosmopolitan, who advocated such things as international organization and individual criminal responsibility. What Von Bernstorff sets out to do is to demonstrate how these two seemingly contradictory tenets hang together. In other words, he aims to demonstrate how Kelsen's theoretical purism depended on his political preferences, and *vice versa*.

Put like this, the magnitude of Von Bernstorff's task becomes obvious. It is one thing to say that Kelsen was both purist and cosmopolitan, but it is quite another (and probably well-nigh impossible) to cogently argue that the two strands depended on each other. In effect, such would boil down to an argument

that if it had not been for the cosmopolitan social-democrat, the purist could not have existed; and if it had not been for the purist, the cosmopolitan would not have written much.

Occasionally, there are hints at how the two strands could hang together, or at least how Kelsen's ideas on what the international order should look like inform his theoretical purism. Thus, the idea of the primacy of international law (one of the elements of Kelsen's pure theory) is explained by the desire to combat the dangers of sovereignty (mainly, incidentally, through the work of Kelsen's pupil Josef Kunz). Yet, here one may wonder whether Von Bernstorff (or Kelsen or Kunz, for that matter) takes the analysis to its logical conclusion: if it is the case that law validly enacted within a state may continue to exist even if it is in violation of international law and is merely set aside for the time being, then how supreme is international law really? Or more accurately perhaps, how integrated are the systems if two conflicting but valid rules may continue to exist alongside each other? One might just as easily maintain that this does not demonstrate primacy and integration, but rather a sort of peaceful co-existence between the fundamentally distinct international and domestic legal systems in which the international might take temporary precedence but does not have priority as a matter of principle. Moreover, it leaves open the question whether primacy is a consequence of international law itself or, as committed dualists would argue, whether it is the result of a choice made within the domestic legal system. And if the latter is the case, then it is eventually the primacy of domestic law, not international law, that would call for celebration.

Obviously, Kelsen's choice for the primacy of international law over domestic law can be

explained by a desire to combat sovereignty: here the cosmopolitan in Kelsen would have guided the purist. Yet, it can also be explained by Kelsen's sympathy for theoretical order (itself duly noted by Von Bernstorff, who traces it back to Kelsen's early work on Dante): celebrating the primacy of domestic law would not have enabled Kelsen to develop a systematic and uniform theory of law applicable to all legal systems in quite the same way. Kelsen himself, at any rate, never made a secret of being aware of the need to make political choices on occasion.

Von Bernstorff's main thesis does not really get off the ground; yet, it is of course far from implausible to presume a relation between the cosmopolitan and the purist. Regardless of Von Bernstorff's effectiveness in demonstrating how Kelsen deconstructed and reconstructed central dogmas (and Von Bernstorff is very effective in this), it is not always self-evident that Kelsen did so in order to further his cosmopolitan agenda (and where it is self-evident or even self-confessed, one may wonder what Von Bernstorff adds besides systematization¹).

Then again, perhaps it would have been unrealistic to expect much more to begin with. Perhaps in Kelsen's *Brust*, like in that of so many others, there were *zwei Seelen* striving for priority, with the theorist sometimes gaining the upper hand and at other times the idealist. Many, perhaps most international lawyers, would confess to feeling occasionally torn between two different pulls: the academic versus the activist, the realist versus the dreamer, the model-builder versus the pragmatist. Kelsen, I would suspect, was not in that sense so much different from most of his colleagues; it's just that he was so much better at what he did than most of us.

It is one of the great merits of Von Bernstorff's study that it creates a desire in the

reader to go back to the source and read or re-read Kelsen's work. It is another great merit that he also stimulates an interest in the reader to delve into German public law writings more generally. In particular, the first part of the book is truly superb: Von Bernstorff sketches elegantly and with just the right amount of detail how Kelsen fitted into a tradition; how influences from Wolff and (in particular) Von Kaltenborn can be traced, and how Kelsen's work took shape in part through critiques of Jellinek and Triepel.

The second part of the book consists of an equally intelligent analysis of the cosmopolitan strand, and fully succeeds in laying bare the structure of Kelsen's cosmopolitanism, meaning that Von Bernstorff demonstrates that Kelsen's cosmopolitanism was systematically organized, and not just the random rationalization of rather primary emotions. Indeed, perhaps with this in mind Von Bernstorff's main thesis does succeed, in a thin if not a thick sense: while it occasionally remains elusive how the purist and the cosmopolitan fed off each other (this would have been the thick version), it does become clear that both the idealist and the theoretical strands are, ultimately, products of the mind, both having a rational structure.

There is, in the end, fairly little wrong with Von Bernstorff's book. One point that comes to mind is that the role of Kelsen's pupils remains less illuminated than the book's subtitle would seem to suggest. There is no attention to Metáall, fairly little to Merkl or Herz, and not overly much to Verdross. All of this can be explained: Verdross and Kelsen parted ways, as did Herz and Kelsen; Merkl developed mainly in directions other than international law, and Metáall never became very prominent. Yet, it is somehow curious that of Kelsen's pupils only Josef Kunz makes a sustained appearance.

A second point of criticism is even more trivial: the bibliography is somewhat haphazard in its construction. Its organization seems to owe much to the skills of a creative ten year-old who knows the alphabet but refuses to take it too seriously, making it sometimes more difficult than necessary to find complete

¹ See, e.g., the way Kelsen pre-empts possible criticism along these lines concerning his ideas on the primacy of international law. H. Kelsen, *Introduction to the Problems of Legal Theory* (1992, B. Litschewski Paulson and S. L. Paulson transl.), esp. at 117.

titles, for instance (and recourse to the bibliography is necessary as references in footnotes are invariably limited to abbreviated titles).

These relatively minor criticisms aside, Von Bernstorff has written a wonderful book. He writes with obvious sympathy and admiration for Kelsen, but without losing his critical faculties; he has an impeccable command of his sources, and he manages to write lucidly in an accessible German (now there are two words not often used in tandem). The fact that Von Bernstorff's main point does not fully come across takes nothing away from this excellent study. Indeed, in a surprising way it even adds to it, in that it subtly suggests that rationality has its limits: Kelsen could not escape his own political sympathies and had to live with the resulting ambivalence, just like the rest of us have to live with our own senses of right and wrong and how those relate (if at all) to more cerebral concerns.

University of Helsinki

Jan Klabbers