

Kelsen's Criticism of Platonic Justice

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Hans Kelsen has been recognized as one of the leading legal theorists of the twentieth century but in the last decade scholars have begun to examine his political writings. In the conflict between the state's need for order and the individual's right to freedom, Kelsen always defended the latter. Scholars have started to investigate his political writings from the Weimar era, but one essay that has remained neglected is an essay that he published in *Kant-Studien* in 1933. Although the main target in "Die platonische Gerechtigkeit" was Plato, Kelsen's criticism of the irrational basis for order was applicable to the early defenders of Nazism like Carl Schmitt. This 1933 essay was neither a period piece nor a rehash of Nietzschean relativism, but was an acute analysis of the Platonic notion of justice. Kelsen argued that rather than providing a metaphysical foundation for justice, the *Republic* was an almost mystical basis for Plato's own need for authority and order. Kelsen would make many of the same points much later in "What is Justice?" but that only underscores both the continuity of his thinking and the radicality of his criticism of Platonic justice.

Key words: Kelsen, Plato, justice

"Ich, Plato, bin die Wahrheit"

Nietzsche

In his recent intellectual biography of Hans Kelsen, Robert Schuett suggested that Kelsen's antipode and enemy was Carl Schmitt. Kelsen may have simply disliked Schmitt and fought against his theory of law, but Schmitt and his followers hated Kelsen and all that he represented. As Schuett observed, Schmitt and the Nazis hated Kelsen so much that they wanted him dead (Schuett, 2021, pp. 1–5, 63, 67). Schuett and others have made this point forcefully, but there was another of Kelsen's contemporaries who, while he probably did not hate Kelsen, he nevertheless disliked Kelsen and his legal thinking.¹ This contemporary was Leo Strauss

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¹ Besides Schuett, other recent Kelsen scholars who regard Schmitt as Kelsen's opposite include Horst Dreier and Sara Lagi (Dreier, 2021, pp. 52–56 and Lagi, 2021, pp. 80–81, 117–118, see also p. 41).

and he believed that Kelsen's cardinal sin was his critique of the theory of natural law. In the late nineteen twenties, Kelsen published several critiques of natural law, including the booklet *Die philosophischen Grundlagen der Naturrechtslehre und der Rechtspositivismus* and the article "Die Idee des Naturrechtes." He also attacked it in his 1931 argument with Carl Schmitt regarding the question of who should be the defender of the constitution in *Wer soll der Hüter der Verfassung sein?* (Kelsen, 1928a, 1928b, 1931). Schmitt criticized Kelsen for his liberalism and his defense of democracy; Strauss objected to his fight against natural law. While Schmitt was vociferous in his attacks on Kelsen, Strauss' were largely clothed in philosophical theories.²

In an unpublished foreword to a planned book on Hobbes, Strauss attacked Kelsen's positive theory of law and his criticism of natural law.³ Strauss focuses on both *Die philosophischen Grundlagen der Naturrechtslehre und der Rechtspositivismus* and *Wer soll der Hüter der Verfassung sein?*" and he both criticizes Kelsen and defends Schmitt (Strauss, 2001). Strauss and Schmitt ended up at considerable odds, but in the early 1930s they shared their adherence to natural law and their belief in absolutism. In this sense, they were followers of one of the founders of natural law and the theory of absolute justice: Plato.

What is Justice?

Both Plato and Kelsen tried to answer the question "What is justice?" As every philosophy student knows, Plato's *Republic* is the search for the definition of justice. The *Republic* is regarded as a foundation for metaphysics because it contains Plato's theory of Forms. In his chapter on Plato in his *History of Political Philosophy*, Strauss insisted that the search for truth was the highest activity of man. He also suggested that Plato provided the philosophical foundation for the ideal state that has been dominate for more than two thousand years. In 1957 Kelsen published a collection of essays entitled *What is Justice?* This collection contains an essay "Platonic Justice" which was a revision of an article that was published in 1938 in the journal *Ethics* (Kelsen, 1957a). The 1938 article was a translation of a German article that Kelsen had published in 1933. In "Die platonische Gerechtigkeit" Kelsen takes issue with the idea that Plato's notion of justice is

²This may be much of the reason that there is so little on the connection between Kelsen and Strauss.

³Peter Gostmann mentions this preface in his "Hans Kelsen and Leo Strauss on *Naturrecht* and the Post-Theological Wager." Gostmann noted that Strauss never intended to publish this preface and he was reluctant to attack Kelsen in public. But Gostmann emphasized that Strauss objected to Kelsen's positive law and translates a letter that Strauss wrote in October 1931: "What hair-raising thoughtlessness!" (Gostmann, 2014, p. 479). Gostmann does not spend any more time on Strauss' preface nor does he mention "Die platonische Gerechtigkeit." The original is reprinted in Strauss, (2001). The original is even more powerful than Gostmann's translation: "Augenblicklich bin ich dabei, die Kritik am Naturrecht seitens den zünftigen Juristen nachzuprüfen. Ein haarsträubende Gedanklosigkeit — diese Kritik!"

metaphysically based. Kelsen contends that Plato was not a philosopher, but was a political ideologue. Rather than providing an ontological-based theory of the state, Plato's *Republic* is a political treatise promoting autocracy. The following essay is an exploration of Kelsen's "Die platonische Gerechtigkeit" which is often overlooked, but is a major part of Kelsen's defense of democracy.⁴ Yet, it would be an error to regard Kelsen's essay as a minor period piece because it is a radical criticism of one of the classical texts of political philosophy.

Kelsen's "Platonische Gerechtigkeit"

Hans Kelsen (1881–1973) is regarded by many as one of the leading jurists of the twentieth century because of his writings on constitutional law. He taught in Austria and Germany before he emigrated to the United States just prior to the outbreak of the Second World War. While his writings on jurisprudence are justifiably famous, his articles on democracy and law are worthy of study.

Kelsen's 1933 "Die platonische Gerechtigkeit" is not an account of the entire *Republic*; indeed, it is too short and too focused to be regarded as any type of commentary. Instead, it is a radical critique of Plato's philosophy. Despite the importance of Kelsen's subject and his radical critique, Kelsen's essay is not well-known. The main focus of my essay is on the 1933 German version found in the journal *Kant-Studien*. The journal and the issue provide a much-needed context to Kelsen's article.

Kant-Studien was not just any German journal; it had a lengthy history and was internationally recognized as one of the most important philosophical journals. Although it had intended to focus on Kantian philosophy, it then expanded to include almost every aspect of philosophy. The journal was founded in 1897 by the eminent Kantian expert and founder of the philosophy of "as if," Hans Vaihinger. Between 1897 and 1933, many prominent philosophers published essays on issues pertaining to Kant and related topics. In 1933, the co-editors included Ernst Cassirer, Nicolai Hartmann, Paul Tillich, and Norman Kemp Smith. Volume XXX-VIII, issue 1/2, contained five articles which indicate the range of topics. The first article was in honor of the Neo-Kantian Heinrich Rickert while the second article was on language and the third one was Kelsen's "Die platonische Gerechtigkeit." The fourth article was on realism and idealism as human types, while the fifth one was an essay on Josiah Royce and an American Kantian. While the article on Rickert was backward-looking — an essay in honor of Rickert's seventy-fifth

⁴ The sole reference that I could find is in "Hans Kelsen's and Ernst Cassirer's conception of natural law" by Pellegrino Favuzzi, but it is not cited in his text. In fact, there is no mention of Plato in the entire collection devoted to Kelsen's critique of natural law (Favuzzi, 2014, p. 367). However, in his Kelsen biography, Thomas Olechowski noted that the 1933 essay was based upon Kelsen's inaugural lecture at Bonn and Olechowski suggested that it was designed mostly to point out that people needed to choose between democracy and the rule of citizens or tyranny and the domination of the leader (Olechowski, 2020, pp. 495–496.)

birthday — the second, fourth, and fifth were contemporary accounts. Issue 3/4 was forward-looking with an essay on Husserl by Eugen Fink, an essay on overcoming utilitarianism through biology, and a lengthy discussion of Nicolai Hartmann's recent book. The cover notes for that issue indicated significant publication changes, such as the move from double issues twice a year to four separate issues beginning in 1934. But the entire 1933 volume contained some less-than-subtle hints about the future. It contained an announcement "The books of the hour!" ("Die Bücher der Stunde!") which included *The National-Socialist Worldview* (*Die nationalsozialistische Weltanschauung*) and *National-Socialism* (*Nationalsozialismus*). But what also indicates the political thinking of the future was the review of Carl Schmitt's *Der Begriff des Politischen*, which was written by Helmut Kuhn, who at the time was a "Privat-Dozent" in Berlin.⁵ As Kuhn observed, Schmitt was attacking Weimar liberalism because it embraced a type of relativism while Schmitt insisted that there were absolutes in terms of "good" ("Gut") and "evil" ("Böse") [Kuhn, 1933, pp. 190–191]. Kuhn noted that relativism was connected to Nietzsche and the absolute to Hobbes. Kuhn refers to Strauss' comments on Hobbes which had been recently published in the *Archiv für Sozialwissenschaft und Sozialpolitik* (Kuhn, 1933, p. 194 and note 1). Kuhn's reference to Strauss is enlightening for two reasons.

In his 1932 remarks on Schmitt's *Begriff des Politischen*, Strauss began by noting that Schmitt's book dealt with human order and that meant the state. But he also noted that Schmitt insisted that the political precedes the state and that liberalism was actually destroying the political (Strauss, 2001, pp. 217–218, 226). That is largely because liberalism has rejected metaphysics and has embraced economics (Strauss, 2001, pp. 220–221). Liberalism has also rejected the natural state, which leads both Schmitt and Strauss back to Hobbes. Unfortunately, according to Strauss, Schmitt did not have a complete understanding of Hobbes and until Schmitt masters Hobbes' political philosophy, his radical critique of liberalism cannot be a complete success (Strauss, 2001, pp. 235, 238).

Kelsen began his "Die platonische Gerechtigkeit" by remarking that Plato's philosophy stands under the sign of a "radical dualism" and his world is no unity. Rather, there are two worlds: one that is known by the eye of the soul which is the "transcendent, spaceless and timeless realm of the idea" ("transzendente raum-zeitlos Reich der Idee"). As a nod to Kant and to *Kant-Studien*, Kelsen refers to this world as the "Ding an Sich" and regards it as the "true, absolute reality of restful Being" ("wahre, absolute Wirklichkeit" des ruhenden Seins"). This is the

⁵Like Kelsen and Strauss, Kuhn would also be forced into exile because of his Jewish background, but he returned to Germany after the war and became a prominent professor, first at Erlangen and then at Munich. He founded the journal *Philosophische Rundschau* in 1953 with Hans-Georg Gadamer. When he retired in 1968, Dieter Henrich was one of those who spoke in honor of Kuhn and his philosophical contributions.

world of the real object that is known through “reason-knowledge” (“Vernunft-Erkenntnis”), thus by “pure thinking and true knowing” (“reinen Denkens und wahrhaften Wissens”). Then there is the world that is apprehended by the senses. These objects exist in the world of time and space and in the “area of deceptive illusions” (“Bereich des trügerische Scheins”). It is the world not of Being, but of Becoming; the realm not of knowledge, but of opinion (“Doxa”). Kelsen adds that this world is the opposition between “Peras” (“limited”) and “Aperion” (“unlimited”); between “form” and “matter.” It is also the opposition between freedom and compulsion, or as Kelsen puts it in modern terms, the distinction between “spirit” (“Geist”) and “nature” (“Natur”), meaning between “value” (“Wert”) and “reality” (“Wirklichkeit”). It is the contrast between “active creations” (“aktiv Schöpferischen”) and “passive receptions” (“passiv Empfangenden”) and between “unity” (“Einheit”) and “multiplicity” (“Vielheit”), and it is the opposition between the “One” (“Eine”) and the “Other” (“Andere”). Kelsen maintains that the Platonic doctrine is the meaningful opposition between the divine-like reason and the sense-bound body. Finally, Platonic metaphysics is the immense opposition between “supra-mundane-divine beyond” (“überirdisch-göttlichen Jenseits”) and the “mundane-human present” (“irdisch-menschlichen Diesseits”) [Kelsen, 1933, p. 91].

Kelsen insists that this “multiple-shaped, Protean dualism” (“vielsgestaltige, proteusartige Dualismus”) is expressed through space and time symbolism of “up and down, right and left, before and behind, earlier and now.” However, in its most fundamental basis and in its original sense, dualism is the “opposition between good and evil” (“Gegensatz von Gut und Böse”). Kelsen concedes that this ethical sense is not the only sense of Platonic dualism, but he insists that it is the primary sense of that dualism. And, he maintains that the epistemological–theoretical as well as the ontological “rings” surround the inner core of the increasingly important ethical dualism (Kelsen, 1933, p. 92).

Kelsen also insists that as much as Plato emphasized the dualism of his two-world doctrine, it is fundamentally a value dualism. It is the difference between a higher order world and a lower order one: a region of “value” (“Wert”) and an area of “nonvalue” (“Unwert”). However, it is only by freeing the mind from the body is it possible to comprehend what is truly valuable; only by pure thinking can the good be known. Regardless of which Platonic dialogue one considers, the goal is still the same and that goal is the “*absolute Good*” (“*absolut Gute*”). However, Kelsen also contends that the “absolute Good” cannot be thought about without the notion of evil. Kelsen admits that the notion of evil is far less pronounced than the idea of the “absolute Good,” but it still must be present in order for the “absolute Good” to be thought. Just as important, Kelsen insists that for the “ethicist” (“Ethiker”), “Good” and “evil” must not just be thought,

but must be “willed.”⁶ Kelsen also admits that for most of Plato’s writings, “evil” tended to remain in the “shadow” of the “light of the Good” (“Licht des Guten”) and that it is only in the last dialogues that “evil” begins to adopt a shape of itself. It is only in the later dialogues that “evil” becomes “something real, a being” (“ein Wirkliches, ein Sein”). Prior to these last dialogues, “evil” was only a representation in Plato’s ontological dualism. It was a Becoming, a “non-Being.” Thus, in the “world of the Idea” (“Welt der Idee”), or what is the same thing, in the “world of the Good” (“Welt des Guten”), the “Idea of the Good” is the central idea. In contrast, the idea of the “evil” can only be conceived of in opposition to the “Good”; unlike the “Good,” “evil” cannot be expressed. “Only the Good should — in its sense — be; evil should not be” (“Nur das Gute soll — seiner Sinne nach Sein — das Böse soll nicht sein”) [Kelsen, 1933, p. 93]. Here, Kelsen points out that for the ethicist, knowledge is not primary; rather willing is. “Evil” may appear to exist in the world of knowledge, but it has no place in the realm of values. “There is no place for evil in the pure system of the Good” (“Im reinen System des Guten ist für das Böse kein Platz”) [Kelsen, 1933, p. 93]. What may have a semblance of existence in the ontological dualism cannot be said to exist in ethical dualism. In ethical dualism, “evil” is “simply the negation of the Good” (“schlechthinige Negation des Gutes”) [Kelsen, 1933, p. 94]. Furthermore, the Good is the absolute; the opposition between the Good and the evil is also an absolute opposition; this is a further indication that this contrast is a matter of values rather than about reality.

The history of Greek philosophy is the emancipation of natural reality from “religious-ethical speculation” (“religiös-ethischen Spekulation”) and the diminishing of the opposition between the realm of nature and the supernatural realm of values. It was this slow process of emancipation that would eventually lead to modern science. For Plato, however, there was no point to this process because the physical realm was ontologically inferior, and for all intents and purposes, ethically irrelevant. For Plato, the opposition between the world of Being and the world of Becoming did not matter as much as the world of the Good. In Platonic thinking, the physical world is inferior and the philosopher must turn away from it. Kelsen invokes Plato’s Parable of the Cave to prove his point that the sensible world is composed of illusions. It is only when the philosopher leaves the cave and goes to the surface that he sees the things as they really are. Kelsen points out two things: first, this is the intelligible world and second, the “last thing to be seen is the Form of the Good.” But Kelsen also points out that Socrates admits that whether this account is “true or not, only the gods know” (Kelsen, 1933, p. 95; Plato, 1992, p. 189/517b). But the point is not just the opposition between the phenomenal world

⁶In this essay, “Good” will be capitalized because Plato held that it was an “Idea” or “Form” and had absolute existence. As Kelsen pointed out that “evil” was not very important to Plato’s account except as a relative and negative negation, accordingly “evil” will be found only in lower case.

of illusions and the noumenal realm of reality; it is also the pessimistic dualism that allows a bridge between the two realms (Kelsen, 1933, pp. 95–96).

In the second section Kelsen analyzes Plato's notion of love. He argues that Plato's conception was not developed by some "cool-contemplative scholar nature" ("kuhl-kontemplative Gelehrtennatur") but from "passion" ("Leidenschaft"). Kelsen points out that men love to build and they build to love, and that the community is formed from these interactions. But Kelsen notes that the natural community does not meet with Plato's approval and Plato insisted that the community must be reformed through the proper education. Kelsen may not be completely right about this, but Plato does spend an enormous amount of time on education in the *Republic*. Kelsen was not the only one to notice this; he refers to the great classical scholar and Aristotle expert Werner Jäger (Kelsen, 1933, p. 95 and note 1). Kelsen noted that domination of man over man is not just a problem of the state, it is also a problem of education. And, he points to the source of Plato's "pedagogical political passion" ("pädagogisch politische Leidenschaft") of his "own Eros" ("seine Eros") [Kelsen, 1933 p. 96]. Kelsen continues to psychoanalyze Plato's concept of love, his relation to Greek society, and his flight from this world. Kelsen insists that Plato differed from other Greek men: he never married and had no children. For the Greeks, young boys were important but were second to the family. The family was the foundation for the Greek state. Lacking children, Plato could not contribute to the state like other Greek men. Kelsen also stresses the fact that Eros played such an important function in Plato's writings, not just the *Republic* but also in the *Symposium*, the *Phaidros*, and even the *Laws* (Kelsen, 1933, pp. 97–99).

Kelsen begins the third section by pointing out that recent Platonic investigations had shaken the prevailing conviction that Plato was a "theoretical philosopher" and that the goal of his philosophizing was the founding of "strict science" ("strenger Wissenschaft"). "Today" one recognizes that Plato's nature was oriented towards politics rather than to theory. Plato was more concerned about willing and dominating, which are practical matters. Kelsen admits that it is debatable whether Plato was constitutionally capable of carrying out these practical tasks, but that there is no question that Plato's approach was to achieve his personal ideal. This ideal was "a view of being as a consideration based upon should" ("eine Sicht des Seins als eine Rück-Sicht auf Sollen") and that this was founded upon the Will and not upon knowledge. Kelsen allows that Plato's "ethical-political willing" ("ethisch-politisches Wollen") may be metaphysically based but that it is more of a religious ideology. Thus, the picture is of Plato as less of an "educated systematic thinker of moral science" ("gelehrten Systematiker der Moralwissenschaft") than it is of Plato as a "prophet of the ideal state" ("Propheten des Idealsstaates"). Plato appears more like a psychologist or a sociologist of social reality than he does as a "preacher of justice" ("Prediger der Gerechtigkeit"). Kelsen refers us to Plato's confession in the Seventh Letter that he was naturally

drawn towards politics. But Kelsen adds that we need not rely on this Letter, for confirmation we need only read the dialogues to know that he valued political willing over theoretical knowledge. The fact that the main problem of his philosophy was the question of justice reveals that he was concerned to find “a moral founding for action” (“eine sittliche Grundlage für das Handeln”) [Kelsen, 1933, pp. 99–100]. Kelsen adds that the “hottest wish” (“heißester Wunsch”) of his political passion is “ruling in the state” (“Herrschaft im Staat”). Kelsen insists that this implies the hard-nosed demand that “All power in the state belongs to philosophy” (“Alle Macht im Staat der Philosophie”), but Kelsen also insists that this does not mean just any philosophy. Rather, it means the only true philosophy which leads to the knowledge of justice and the legitimacy of the “claim to rule” (“Herrschaftsanspruch”) — Plato’s philosophy (Kelsen, 1933, p. 100).

Kelsen maintains that the claim to rule is not just evident in Plato’s philosophy; it is also evident in his life. Plato’s voyage to Sicily and his later founding of the Academy reveals Plato’s primacy of the political. Previously, Kelsen had cited Werner Jäger; here he is referencing the first volume of Paul Friedlander’s *Platon* (Kelsen, 1933, p. 101 and note 1). The Academy was not devoted to independent study; rather, it was justly regarded as a “metaphysical sect.” Rather than being devoted to Socratic rationalism, it turned towards the “transcendence of the objects of all ethical cognition” (“Transzendenz des Gegenstandes aller ethischen Erkenntnis”) coupled with the increasing conviction of the impossibility that the results could be rationally presented. In other words, Plato was becoming increasingly preoccupied with the irrational. Kelsen says simply “That is no man of science” (“Das ist kein Mann der Wissenschaft”) [Kelsen, 1933, p. 101]. Kelsen suggests that this may be behind Plato’s “Second Letter” in which he denied that he had ever written his philosophy. Whether one believes that or not, it is evident Plato’s thinking is not as concerned with genuine philosophical theory as it is with a “prophetic dark word” (“prophetisch dunkeln Wortes”) [Kelsen 1933, p. 101]). Kelsen adds that Plato did not intend to help people free themselves from the “thirst for knowledge” (“Wissensdurst”) but to build people’s character and to educate them to be ruled. Kelsen suggests that since Plato did not give his name to any theory, there really is no Platonic theory. Instead, Plato speaks through “Socrates,” the “Stranger,” and later still, the “Athenian.” In addition, Kelsen reminds us that Plato chose the dialogue in order to promote his ideas rather than as a monologue of scholarly investigation. The dialogue also promotes the clash of ideas, which is political, rather than a discussion of facts. Plato’s dialogues may be considered as art or as poetry, but they are not scientific treatises. Socrates is not allowed to speak of the most essential, because that is irrational and inexpressible. Plato may be a philosopher, but in fact, he is foremost a dramatist. But Plato did not want to be an aesthetic dramatist; his concern was always with the ethical-religious effects. For Plato, knowledge is not an end in itself, it is simply a means to an end. And, that end is ruling and being ruled. Kelsen emphasizes that

Plato is not so much interested in the "ideal of objective reality" ("Ideal objektiver Wirklichkeit") but is preoccupied with an "ideology of power" ("Ideologie der Macht"). This is not a Platonic conception of the *truth* but the *Platonic truth* (Kelsen, 1933, pp. 102–103).

In section four Kelsen turns his attention to one of the most central and most troubling themes in the *Republic*: Plato's questionable relationship with the truth. Kelsen allows that Plato often talks about the truth but he also talks about lies. Kelsen suggests that Plato not only justifies the use of lies, but that he actually requires using lies in the ideal state. Kelsen points specifically to the lie that is used in educating the young. In Book Two, Socrates extolls the virtues of the gods and insists that any stories about them which are not sufficiently pious should be discarded as harmful. He also maintains that the gods cannot be depicted as changing because that undermines our notions of them. Finally, he takes issue with any account of the gods which is not true. Not only do the gods hate lies, but humans do as well (Plato, 1992, pp. 57–58, 381c–382d). Yet in Book Three Socrates suggests that the way to convince the citizens that their ideal state is ordered correctly is to provide them with a "noble lie." This "noble lie" is that the citizens were "fashioned" in the earth and therefore the earth is their mother who they must all defend (Plato, 1992, p. 91, 413b–d). Kelsen argues that Plato believed not only that the ends justified the means, but that the ends even sanctify the means. So, when Socrates insists that the state is entitled to determine who gets paired with whom and when the state further maintains that children do not belong to their parents but to the state, it is totally justified. Kelsen again emphasizes that Plato places willing above knowing and "justice" ("Gerechtigkeit") over "truth" ("Wahrheit") [Kelsen, 1933, p. 104]. It is not surprising to Kelsen that Platonic "education" is not about what to know but is about what should be believed. Instead of the individual's "freedom of thought" ("Geistesfreiheit") there is the state-sanctioned ideology. When citizens must adjust their opinions and beliefs to conform to the state, then it is not a state but a dictatorship (Kelsen, 1933, p. 105).

The fact that Plato the political person bases his ideas on what is pragmatic is, for Kelsen, not very surprising. But what is surprising is Plato's willingness to insist on attempting to combine popular religion with his doctrine of the immortality of the soul. Although this is supposed to be a psychological explanation of how our souls are reincarnated, it is really just an expression of a religious belief. Kelsen insists that this is not based upon "scientific experience" ("wissenschaftliche Erfahrung") but upon an "ancient priestly conviction" ("uralte Priesterweisheit"). Kelsen concludes section four by insisting these presuppositions are necessary in order to understand Plato's particular doctrine of justice.⁷

⁷ "Das sind die Voraussetzungen, von denen aus man Platons eigentliche Gerechtigkeitslehre erst ganz verstehen kann" (Kelsen, 1933, p. 106).

In section five Kelsen scrutinizes Plato's doctrine of justice and he does so by referring to what he calls the "Thrasymachos." This, Kelsen claims, was an early work of Plato's, written prior to his first voyage to Syracuse. Kelsen is uncertain whether this book was directly or indirectly influenced by Socrates, but he notes that it contains "unfruitful analyses of a concept" ("unfruchtbare Begriffsanalysen"), it has "empty tautologies" ("inhaltlose Tautologien"), and it ends without results. Kelsen also maintains that Plato must have written it during his "fully rationalistic early period" ("noch ganz rationalistische Anfangsperiode"). Plato did not popularize it as a separate dialogue but used it as Book One of the *Republic*. Kelsen reminds us that after repeated attempts at defining justice, Socrates declared that he and the others were unable to find a suitable definition. Socrates concluded that so long as he did not know what was just, he would not be able to arrive at the definition of justice. In addition, Socrates admitted that he was at a loss to even say whether justice was a "virtue" ("Tugend") [Kelsen, 1933, pp. 106–107; Plato, 1992, p. 31, 352b–c].

Kelsen suggests that if we take Book One to be the beginning of the *Republic*, then why was there so much time between Plato writing Book One and the rest of the book. The answer was that with all of his rationalism, Socrates was unable to define justice and that it appeared to Plato that rationalism was unsuited to determine the concept of the just. In between the writing of "Thrasymachos" and the rest of the *Republic*, Plato underwent a major transformation. In his travels to southern Italy, Plato became acquainted with the Pythagoreans and with their "political-religious metaphysics." It was not Socrates' rationalism that could answer the question "What is justice?" It was the Pythagorean's political-religious beliefs which could answer "the most burning question, the secret of justice" ("die brennendste Frage, das Geheimniss der Gerechtigkeit") [Kelsen, 1933, p. 107].

The Pythagorean doctrine was in agreement with the Orphic mysteries regarding what happens to the soul after death. In the afterlife, those who have done evil are punished while those who have done good are rewarded. Kelsen reminds us that this is not a philosophy but is an ethical-religious doctrine. It is a justification of the distribution of power in this world by the demonstration of the power of good over evil. But it is also the explanation why good does not appear to triumph in this world but does so in the next. Kelsen argues that the "Gorgias" must have been written during Plato's first voyage or shortly thereafter because the main theme of this dialogue is the claim that it is better to suffer unjustly than to act unjustly. However, the proof for this is not Socrates' rational ground but the "grandiose myth" which delineates how the wicked are punished and the good are rewarded. Kelsen indicates that the "Gorgias" is the first dialogue in which Plato offers a "truth of faith" ("Glaubenswahrheit"). He further notes that this theory of "retribution" ("Vergeltung") in the beyond dominates the rest of Plato's writings until his death (Kelsen, 1933, p. 107).

Kelsen returns to his discussion of the *Republic* and suggests that the problem of justice runs throughout most of the book. He suggests that the passage that introduces the notion of justice is frequently overlooked — it is when Cephalus insists that his wealth saved him from having done unjust actions like cheating someone. As he is getting closer to death, he does not need to fear paying a penalty in the afterlife for his unjust deeds. It is at this point that Socrates introduces the term “justice” (“dikaiosunē”) [Plato, 1992, pp 4–5, 330c–331c; see Kelsen, 1933, pp. 107–108 and note 1]. But Kelsen maintains that Plato’s notion of justice is not a conceptual one, but a myth regarding how the soul is rewarded or punished in the afterlife. Kelsen reminds us that this myth is found in the “Gorgias” as well as in the “Laws” (Kelsen, 1933, p. 108).

There is an inner connection between the soul and justice for Plato that needs to be recognized. But this connection is found in the “Phaidros” as much as in the *Republic*. This leads to Plato’s doctrine of the soul with the belief in reincarnation; that is, the belief that the soul exists prior to birth and continues to exist after one’s death. It also serves as the basis for Plato’s doctrine that knowledge is remembering. The beginnings of this doctrine can be glimpsed in the “Meno” but are developed in the middle dialogues into the “doctrine of the Ideas” (“Ideenlehre”). The central idea of the doctrine of the Ideas is the “Idea of justice” (“Idee der Gerechtigkeit”).

The identification of the “Idea of justice” with the doctrine of retribution is not the only thing Plato borrowed from the “Orphic–Pythagoreans.” He also adopted their idea about how the Greeks tended to think about justice. When Plato discusses justice in the “Gorgias” and seems to offer the doctrine of retribution as the answer to the question “What is justice?” this is only an illusionary answer. It is no real answer because it does not offer an account of the “essence of justice” (“Wesen der Gerechtigkeit”). Kelsen explains that this merely describes the “actual function of positive law” (“tatsächliche Funktion des positiven Rechts”); that is, it describes the connection between the bad deed that the doer did with legal repercussions. In other words, it merely describes the mechanics of guilt and penalty that is found in the given social order. In this case it is only a special instance of the “general law” (“allgemeine Gesetzes”) which is the “will of the divinity” (“Will des Gottheit”) that is the retribution (Kelsen, 1933, p. 109). But the formal notion of retribution is just as empty as the formal notion of equality. Kelsen attempts to clarify this by pointing out that this is really a tautology: the good is good, the evil is evil, and the equal is equal. However, this does not say what the “good” is. Insisting that the good is the negation of the evil still leaves the “deciding question” (“entscheidende Frage”) unanswered. Kelsen maintains that the question regarding the essence of justice leads to the question of the essence of the good (“Die Frage nach dem Wesen der Gerechtigkeit wird so zur Frage nach dem Wesen des Guten”) [Kelsen, 1933, p. 109].

This is the central problem of the doctrine of Ideas: the light which gives light to all the other ideas in the realm of “true Being” is the “Idea of the Good.” Kelsen insists that the *Republic* is not so much a great dialogue regarding the nature of justice as it is a great dialogue about the essence of the Good. In other words, Plato’s notion of justice gets its content through his concept of the Good — the Good is really the specific core of justice because Plato frequently identifies the just with the Good. If one attempts to separate the two then retribution becomes only the technical realization of the Good. It is the state that can guarantee the “victory” (“Sieg”) of the Good over evil. In this sense, the Good is a social category that maintains that humans will act good in the state. Kelsen concludes from this that in Plato’s doctrine of the state, the highest Idea in the realm of Ideas, must appear as the Idea of the Good (Kelsen, 1933, pp. 109–110).

However, Kelsen points out that Plato does not establish what the highest Good is, only that it exists. As he points out, the “entire grandiose heaven of Ideas” (“ganz grandiose Himmel der Ideen”) which helps determine that the earthly realm offers only a “philosophical-poetic expression of this guarantee” (“philosophisch-dichterische Ausdruck dieser Versicherung”) [Kelsen, 1933, p. 110]. He concludes that the picture of the Ideal State that Plato set out in the *Republic* does not provide a solution to the material problem of justice. Anyone who maintains that Plato’s true state provides a finished design of a just state is laboring under a misunderstanding. Kelsen insists that the portion that Plato actually devoted to the Ideal State is rather minimal and that the main goal of the *Republic* is not even the Ideal State. He also reminds us that the whole purpose of even talking about the state was that it was a larger version of a human being and that it would be easier to identify justice in the state than it would justice in the individual. Further, Plato was not attempting to define justice itself but to seek the presuppositions for justice to exist (Kelsen, 1933, p. 110). These presuppositions are abstract, so Plato avoids the multiplicity that is found in actual human communities. Even the framework that Plato uses to describe his ideal state is not much more than technical legalities. Rather than attempting to address what justice is, Plato spends an inordinate amount of time detailing the women’s and children’s community and how it is shared with the Guardians and the Warriors. The education and the selection of the Warrior and the leader has “not the slightest” to do with economic or political communism. Kelsen complains that even this is mostly empty formalism and that there is nothing in Plato’s notion of ruling that provides content for what justice could be (Kelsen, 1933, pp. 110–111).

This omission does not appear to have troubled Plato, and that the delineation of the three-classes simply postpones the attempt to answer “What is?” The notion that the members of each class should concentrate on what they are best suited to do does not answer this any more than the idea that “justice” is each class doing what it is naturally suited to do (Kelsen, 1933, pp. 111–112). Similarly, Plato does not indicate what the “Good” itself is; instead, Socrates speaks only about the

“offspring” of the Good. Kelsen says that the “son” is the “sun” and it makes things “thinkable.” It is the “highest” (“allehöchste”) but this only tells us the position of the “Good,” not what its essence is. “In the ideal state the reigning philosopher sees the Good. That suffices” (“Der im Idealstaate regierende Philosoph wird das Gute schauen. Das genügt”) [Kelsen, 1933, p. 113]. Instead, Plato gives an account of the path that should lead to it.

Plato designed a plan of education for the reigning philosophers and the steps end with the final step of dialectic. Plato’s dialectic is the abstraction of concepts from all sensible experience and in doing so, approaches the “boundary of the knowable” (“Grenze des Erkennbaren”). Accordingly, the dialectic does not lead to the Good, but to its boundary. Kelsen insists that the Good is beyond Being and that it lies beyond “all rational or scientific knowables” (“alle rational oder wissenschaftlich Erkennbaren”). It is not approachable by “scientific reason” (“wissenschaftliche Vernunft”). As in the “Symposium,” the “Phaidros,” and the “Seventh Letter,” one can only approach the highest Good through an “intuitive act” (“intuitiven Akt.”) This is not some slow scholarly process of comprehension but sudden and powerful illumination. This approaches a “condition of ecstasy” (“Zustand der Ekstasis”) [Kelsen, 1933, p. 114]. Plato’s Good cannot be intuited by the senses or even thought by the intellect; it lies beyond and can be approached only by an extraordinary religious experience. For an esoteric thinker to admit that the Good cannot be described is understandable; but when a philosopher who is discussing the ideal state and is in the position to determine the laws for its citizens, then that is something else. Yet, Kelsen maintains that Plato does not shrink from the consequences of this thinking; in fact, he seems to hold it in high regard. There can be no answer to the question “What is justice?” just as there can be no answer to the question “What is the Good?” That is because we are beyond the transcendent realm into divinity. The question about the content of what is justice or what is the good is senseless (Kelsen, 1933, pp. 114–115).

The Sophists had denied the existence of an absolute justice. In response, Socrates passionately defended the notion, but admitted he did not know what justice is. Plato maintained that one could approach the idea of justice by his philosophy, but even he admitted that he could not say what absolute justice was. In fact, he insisted that the question was not only unanswerable, but that the question could not even be posed. Thus, instead of leading from rationalistic relativism to metaphysical absolutism, Plato’s way ends in “religious mysticism” (“religiöse Mystik”) [Kelsen, 1933, p. 115].

Kelsen confesses that one can argue that Plato was a mystic and one can in fact doubt it. One can doubt it because Plato’s philosophy has an expressed social character and his idea of justice is politically oriented. But as Kelsen points out, “Genuine mysticism, however, is asocial” (“Echte Mystik aber ist asozial”) [Kelsen, 1933, p. 115]. Kelsen insists that the true mystical experience isolates the individual from all others. The mystic does not care about this world and its inhabitants,

the mystic only wants union with God. The mystic does not want any part of this social world, in fact, he only wants to be free of it. This world is the world of will and power, which is of no use and is of no interest to the mystic. “The experience that he seeks is the melting the I with God” (“Das Erlebnis, das er sucht: die Verschmelzung des Ich mit Gott”). This is the final goal and not some means to a social end. Kelsen concludes that “Plato’s doctrine [is] genuine mysticism” (“Platons Lehre [ist] echte Mystik”) [Kelsen, 1933, pp. 115–116].

Kelsen concludes that rather than providing a philosophical account which leads to the concept of justice, Plato offers mystical speculation. However, Plato also insists that the philosopher should be king in this ideal state because of his wisdom and that he “knows” what is good and what is bad — in contrast to others who only have opinions. Kelsen asks how can the philosopher be the one to rule if he does not have shareable knowledge but only a secret revelation? What Plato is insisting is that the citizens submit to the leader because of his special “charisma”; that they must have faith that he possesses this special power. It is not knowledge or even opinion but faith that is the basis for obedience to the authority in the Platonic state. Kelsen writes “Plato’s mysticism is the most complete expression of irrationalism and is the justification of his anti-democratic politics and is the ideology of every autocracy” (“Die Mystik Platons, dieser vollkommenste Ausdruck des Irrationalismus, ist eine Rechtfertigung seiner antidemokratischen Politik, ist die Ideologie jeder Autokratie” [Kelsen, 1933, p.116].

Platonic love and Platonic truth overshadow Platonic justice, but that does not minimize the importance of Platonic justice. There may not be an absolute justice, but unlike the relative justice of the Sophists, Plato insists on the universality of his justice. Plato insists that his path is the only path — the path through “blood and tears.” This is the path that Plato chose, the “path of religion” (“Weg der Religion”) [Kelsen, 1933, p. 117].

The *Republic* is regarded as a seminal philosophical work which contains the metaphysical theory of Forms. However, Kelsen showed in “Die platonische Gerechtigkeit” that it was not a philosophical book, and instead of the Form of Justice, there is only Plato’s own ethical-religious belief. There is no absolute Justice; only Plato’s own conception. As much as Kelsen disagreed with Plato, they were in agreement that there was no absolute, eternal idea of justice, only one’s own concept of justice. But Kelsen disagrees with Plato because Plato insists that *his* notion of justice is the only correct one and is applicable to everyone. That is why in his *Götzendämmerung*, Nietzsche noted “Ich, Plato, bin die Wahrheit” (“I, Plato, am the truth”). In contrast, Kelsen’s justice was strictly his own; hence, his repudiation of natural law.

Kelsen spent much of his life attacking the various conceptions of natural law. If Plato had had a natural law doctrine, Kelsen would have criticized it, but Plato believed in the metaphysical ideal of absolute justice. This was Plato’s own concept, yet he believed it should apply to all others. Towards the end of his final Berkeley

lecture, Kelsen mentions that the “classical representative of the metaphysical type” of absolute values was Plato. But he also insists that Plato’s doctrine is a mystical experience. “What is Justice?” was given in 1953, twenty-three years after “Die platonische Gerechtigkeit,” so Kelsen did not change his mind about Plato. But writing in 1953 was fundamentally different than writing in 1933. Kelsen was smart enough in 1933 not to name the Nazis, but his warning about the “ideology of autocracy” and their grasp for power was clearly a reference to them. Kelsen preferred truth to power and law over politics (Schuett, 2021, pp. 3, 7, 40, 65, 71, 89), but Plato believed in power even more than in truth and although he talked about law, the ultimate force for him was political. Unlike Plato, Kelsen did not believe in the ideal state and divine justice, but rather, in human law and human justice. He rejected absolutes and embraced relativism. But as Horst Dreier pointed out: value relativism does not mean value nihilism (“Wertrelativismus meint nicht Wertnihilismus”) [Dreier, 2021, pp. 84, 87]. As a result, Kelsen was comfortable spelling out what the law is and what it does, but he resisted trying to spell out what justice is. In fact, he insisted “there can be no answer to the question what is justice.” Those who followed Plato and insisted that there was a permanent and absolute concept of justice were, in Kelsen’s eyes, intellectually wrong. But those like Carl Schmitt believed that Kelsen was not only a moral threat whose theories needed to be refuted, but that the man should be destroyed.

Regarding the issue of justice, Kelsen contended that there cannot be “THE justice”; there is only what he called “my justice.” Kelsen concludes his “What is Justice?” with a hidden slap at Plato’s authoritarian religious belief with the insistence that “My’ justice, then, is the justice of freedom, the justice of peace, the justice of democracy — the justice of tolerance” (Kelsen, 1957a, pp. 11, 14). Schmitt, Strauss, and many others rejected the idea of democracy and the belief in tolerance and instead embraced the notions of power and authority. After the war, they insisted that liberalism led to Nazism and they were not to blame for atrocities the Nazis inflicted. For them, the problem was not that the Nazis believed in authority, it was that they did not believe in the *right* authority. Kelsen rejected the concept of external authority and insisted that responsibility was a matter for each individual. It is not surprising that Kelsen believed it necessary to attack the dogma of obedience, autocracy, and intolerance — whether in the Platonic form or any of its modern incarnations.

References

- Dreier, H. (2021). *ad Hans Kelsen Rechtspositivist und Demokrat*. Hamburg: Europäische Verlagsanstalt.
- Favuzzi, P. (2014). Hans Kelsen’s and Ernst Cassirer’s conception of natural law. In P. Langford, I. Bryan, and J. McGarry (Eds.), *Hans Kelsen and the natural law tradition* (pp. 327–371). Leiden: Brill.
- Gostmann, P. (2014). Hans Kelsen and Leo Strauss on *Naturrecht* and the post-theological Wager. In P. Langford, I. Bryan, and J. McGarry (Eds.), *Hans Kelsen and the natural law tradition* (pp. 478–499). Leiden: Brill

- Kelsen, H. (1928a). *Die philosophischen Grundlagen der Naturrechtslehre und der Rechtspositivismus*. Charlottenburg: Rolf Heise Verlag.
- Kelsen, H. (1928b). Die Idee des Naturrechtes. *Zeitschrift für öffentliches Recht*, VII (2), 221–250.
- Kelsen, H. (1931). *Wer soll der Hüter der Verfassung sein?* Berlin: Rothchilds
- Kelsen, H. (1933). Die platonische Gerechtigkeit. *Kant-Studien*, XXXVII, 91–117.
- Kelsen, H. (1957a). *What is justice? Justice, law, and politics in the mirror of science. Collected essays by Hans Kelsen*. Berkeley: University of California Press.
- Kelsen, H. (1957b). Platonic justice. In H. Kelsen, *What is justice? Justice, law, and politics in the mirror of science. Collected essays by Hans Kelsen* (pp. 82–109). Berkeley: University of California Press.
- Kelsen, H. (1957c). What is justice? In H. Kelsen, *What is justice? Justice, law, and politics in the mirror of science. Collected essays by Hans Kelsen* (pp. 1–24). Berkeley: University of California Press.
- Kuhn, H. (1933). Carl Schmitt. *Kant-Studien*, XXXVII, 190–196.
- Lagi, S. (2021). *Democracy in its essence. Hans Kelsen as a political thinker*. Lanham, Maryland: Lexington Books.
- Langford, P., Bryan, I., and McGarry, J. (Eds.). (2014). *Hans Kelsen and the natural law tradition*. Leiden: Brill.
- Meier, H. (1988). *Carl Schmitt, Leo Strauss und "Der Begriff des Politischen" zu einem Dialog unter Abwesenden. Mit Leo Strauss' Aufsatz über den "Begriff des Politischen" und drei unveröffentlichten Briefen an Carl Schmitt aus den Jahren 1932/1933*. Stuttgart: J.B. Metzler.
- Meier, H., and Meier, W. (Eds.). *Leo Strauss. Hobbes' politische Wissenschaft und zugehörige Schriften-Briefe*. Stuttgart: Verlag J.B. Metzler.
- Olechowski, T. (2020). *Hans Kelsen. Biographie eines Rechtswissenschaftlers*. Tübingen: Mohr Siebeck.
- Plato (1992). *The Republic* [Trans. by G.M.A. Grube and revised by C.D.C. Reeve]. Indianapolis: Hackett Publishing.
- Schuett, R. (2021). *Hans Kelsen's political realism*. Edinburgh: Edinburgh University Press.
- Smith, S. B. (Ed.) (2009). *The Cambridge companion to Leo Strauss*. Cambridge: Cambridge University Press.
- Strauss, L. (1959). *What is political philosophy and other studies*. Chicago: University of Chicago Press.
- Strauss, L. (1987). Plato. In L. Strauss and J. Cropsey (Eds.), *History of political philosophy* (pp. 33–89, third edition), Chicago: University of Chicago Press.
- Strauss, L. (2001). Anmerkungen zu Carl Schmitt, Der Begriff des Politischen. In H. Meier and W. Meier (Eds.), *Leo Strauss. Hobbes' politische Wissenschaft und zugehörige Schriften-Briefe* (pp. 217–242). Stuttgart: Verlag J.B. Metzler.