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OSCAR CORREAS

Kelsen y los Marxistas

México: Ediciones Coyoacán, 1994, Volume 3 in the series "Filosofía, política y derecho" in collaboration with the Universidad Autónoma Benito Juárez de Oaxaca, 363 p.

Under the general title *Kelsen and the Marxists*, Oscar Correas has collected eleven essays dedicated to examining the relation between the pure theory of law outlined by the Austrian jurist and legal philosopher, on the one hand, and, on the other, the contributions to social and legal theory emerging from the broad line of thinking encompassed by the term 'Marxism'. Correas's central insight, which he develops with great originality and boldness, is that, rather than being merely disparate or even opposing viewpoints, a pure theory of law and a critical theory of society are complementary theoretical endeavors. In a sense, 'complementary' is still too weak a formulation for the nature of the relation implied in the copula of the title of Correas's book. In the author's opinion, the core of the pure theory of law is the same as that of Marx's mature work, *Das Kapital*, namely, the interpretation of reason as critique. "What Kelsen in fact achieved is a critique of legal science as it is. His pure theory of law is not 'pure'; it is critical." (pg. 247) Although Marx's immediate interest was the capitalist mode of production, and Kelsen's was the kind of justification of power brought about by legal dogmatics, both thinkers share a common critical intention. Thus, Correas aims at rehabilitating Kelsen as a properly political philosopher. As he notes in the essay titled "The political philosophy of Kelsen", this reading runs against the grain of the three dominant interpretations of the pure theory of law prevalent in Latin America, namely, as legal methodology, as legal formalism (the natural law view) and as the legal ideology inherent to capitalism (the standard Marxist view). In open polemic with these views, the author rescues what he also calls 'the other Kelsen': "The Pure Theory of Law is a book on political philosophy that, for political reasons, founds a 'pure' science." (pg. 96) Nevertheless, the threefold classification and facile reduction of the meaning of Kelsen's contribution to legal and social theory is not a merely Latin American

phenomenon. By and large, it is a pattern equally visible in Anglosaxon and European analyses. In this sense, Correás's contribution opens up a perspective which considerably exceeds the regional scope he attributes to it. Rather than providing a piecemeal résumé of the book's articles, I shall concentrate on providing an overview of the critical concept of rationality which emerges from his analyses of Kelsen and Marxism, and how these make possible a complementary reading of both lines of thinking.

This concept of rationality is most clearly unveiled and worked out in what undoubtedly is the key passage of the essay titled "The Effectivity of Law and Political Hegemony", and probably of the book as a whole. The issue under consideration is the function of the basic norm (*Grundnorm*) within a legal system. In the traditional reading of Kelsen, the basic norm is the touchstone that lends unity to the hierarchy of norms composing a legal system. Whereas the mode of being proper to individual norms and even of the legal system in its entirety is that of validity, validity finds its condition in effectivity. The function of the basic norm can only be understood in relation to the problem of effectivity. From the point of view of the legal practitioner, the basic norm functions as the 'hypothesis' or 'presupposition' necessary such that certain acts performed by certain individuals can be interpreted as acts of norm-production. As is well known, Kelsen's own thoughts on the meaning and function of the basic norm shifted over time. But, in Correás's opinion, the decisive breakthrough, a breakthrough which determines Kelsen's significance as a political philosopher, comes when he characterizes it as a 'fictional' norm, and no longer as a 'presupposition' or 'hypothesis'. Kelsen himself recognized that the fictional character of the basic norm not only implied that it contradicted reality, but also that it was self-contradictory. Correás comments on this novel characterization of the basic norm: "The fiction consists in that someone confers authority on the authority to which he subordinates himself, feigning that he is an authority over that authority. Someone elevates himself into an authority, although he is not such, to confer authority on the person which will exercise power over him." (pg. 158) And he adds: "... we find here two feigners: he who bestows another with authority over him, and he who takes advantage of this act of bestowal. And there can be yet a third feigner: he who 'scientifically' justifies who has taken advantage..." (idem) Correa draws a far-reaching implication from the fictional character of the basic norm. In effect, he understands Kelsen as asserting that the exercise of power cannot be justified. A justification for law and for the exercise of power must be invented or, what means the same thing, the only way of justifying power, and of law as the ordered exercise of power, is by making belief that the acts of will (of an authority) ought to be obeyed. But, then, if the 'grounding' character of the basic norm is feigned, rather than real, then this exposes the essential groundlessness of power. The author draws yet a further corollary from this bold insight. Whereas the recognition of the fictive character of the basic norm serves to unmask and bring into focus the ultimate groundlessness of power, legal dogmatics views it as an 'hypothesis' or

'presupposition', assigning it a real status. "When legal dogmatics, the 'scientific' and 'pure' legal practitioners introduce an hypothesis, what they are doing is justifying power. They don't want to or don't dare to confess that they are engaging in a fiction..." (pg. 159) Hence, Correas argues that rather than an apology of legal dogmatics and of the legal discourse, Kelsen's chief concern was to expose its ideological function. Kelsen condemns the prevalent 'legal science' because it conceals its apologetics of power and justification of law under the guise and prestige of what it isn't: a science. Against this pseudoscience, the object of a pure, i.e. truly scientific, theory of law is to show that, at bottom, all norms are acts of power, and that nobody, by the mere fact of domination, is justified in dominating. In other words, the fictionality of the basic norm exposes the act giving birth to law as an act of power, thereby inhibiting the dogmatic concealment of its real nature. "The norm is an act of power; who produces it has no other 'right' to do so than democratic consent." (pg. 101)

The properly critical implication of Kelsen's insight, and its internal connection with the concept of rationality deployed by Marx, is highlighted in a footnote that immediately follows Correas's explanation of the fictional character of the basic norm. Indeed, the author argues that exposing the fictional character of the basic norm, hence the groundlessness of power, is rigorously comparable to the famous critique of fetishism in the first chapter of *Das Kapital*. "... Marx indicates that value appears to the producers of commodities as a quality these things possess of themselves, due to some reason based on their materiality... actually, their commodity character is bestowed on them by men themselves... Kelsen says the same thing about the state: it is a fiction created by men, and that now turns against them as a person distinct from human beings themselves. Both Marx's commodity and Kelsen's state are human creations that have turned against them, and which dominate them." (pg. 158) The nature of the complementarity implied in the title of Correas's book becomes visible at this point: unmasking the hypostasis and reification of social relations, such that human being can again gain control over its own creations, becomes the elemental demand unifying a critical (pure) theory of law and a critique of political economy. Although the conceptual framework in which the author develops his analysis remains foreign to an enquiry into the concept of modern rationality as such, Correas is in effect saying that Kelsen has worked out the legal implications of the principle of modern rationality as such: 'ego cogito sum'. After all said and done, Kelsen is faithful to his master Kant, who, in turn, succeeded in presenting the full breadth, originality and radicality of the principle of modern rationality, first articulated in Descartes' *Meditations of First Philosophy*, and which culminates in Marx's critique of fetishism.

Kelsen and the Marxists evokes at least two topics for further consideration. The first concerns the concept of ideology. Entirely within the critical line of thinking apposite to modern rationality, Correas ascribes ideology a masking, distorting function. Ideology, in this perspective, is the moment of self-loss of human reason; it

denotes the situation wherein man loses himself in his own creations rather than recognizing himself as their producer. Critically dissolving this self-loss, to regain control over those creations, is, as noted, the achievement brought about by assigning the basic norm a fictive character. But does this interpretation exhaust the significance of ideology for political practice? The traces of this problem are apparent, for instance, in the following comment: "the Mexican state is the set of norms for which the government succeeds in securing their acceptance... within a certain territory that, additionally, defines itself as Mexican precisely because it is the part of the planet where it succeeds in securing obedience to this law." (pg. 217) Yet 'Mexico' is not a label that, as it were, adheres to a piece of land, but the name whereby a political community identifies itself and is identifiable for other political communities. The expression 'the Mexican state' already stands on this side of the twofold achievement of inclusion and exclusion necessary for the constitution of a community as a political identity. Could we not see in this differentiation, in this overcoming of the sheer indifference of time and space, the original achievement of ideology? If such is the case, how could this concept of ideology be connected to its masking function? The second question concerns a peculiar tension at the heart of the fictional character of the basic norm which impinges on the concept of democracy. In effect, doesn't the fictional bestowal of authority bring into focus the philosophical and political problem of representation and representationalism? On the one hand, that the fiction is at all enacted indicates that law cannot do without representation, i.e. that the legal discourse necessarily presupposes a 'referent' located outside of itself. On the other hand, if it is fictional, rather than real, what or who does the authority re-present? Don't we stand here on the threshold of the difficult problem of the relation between popular sovereignty and democracy? Working out this problem would be the challenge which faces Correas when he, in a still too unreflected manner, speaks about "the legal discourse and its referent".

H. Lindahl