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Kelsen and Legal Sociology

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Drawing on his own theory, Hans Kelsen (1881–1973) had little to say about legal sociology. Still, in the role of critic he consorted with the giants in the field, Eugen Ehrlich (1862–1922) among others. As a critic, Kelsen relentlessly followed through on the implications of his various positions, even where those implications were decidedly counterintuitive. The result is usually instructive.

There are two high points in Kelsen's criticism of the legal sociologists. Early in his career, his review article on Ehrlich's 1913 book *Fundamental Principles of the Sociology of Law* prompted a heated exchange with Ehrlich. Kelsen was not prepared to yield any ground whatever in favor of Ehrlich's sociological jurisprudence. Much later, in *General Theory of Law and State*(1945), Kelsen's attitude had softened a bit; there he wrote approvingly on one aspect of Max Weber's (1864–1920) legal sociology. Only his provocative reaction to Ehrlich's work will be addressed in this entry.

Ehrlich, early in his *Sociology*, remarked that the whole of the law is conceived as being “nothing other than a collection of legal norms” (1936: 34). Giving the lie to this view, he argued, is a fundamental distinction between two types of legal norm. Alongside the familiar “norms of decision” stemming from statutory and judge-made law, there are the norms of the living law, that huge body of legal norms governing the “whole field of human conduct” (1936: 13). These norms lend order to, indeed, in the first instance create, the various practices that Ehrlich understood collectively—by analogy to Otto von Gierke's (1841–1921) associations (*Genossenschaften*)—as the social law (*gesellschaftliches Recht*).

Drawing on such institutional forms of the social law as the family, contract, and inheritance, Ehrlich invited attention to a temporal ordering of the two types of legal norm. The “family is older than the order of the family; possession antedates ownership; there were contracts before there was a law of contracts; and even the testament, where it is of native origin, is much older than the law of last wills and testaments. If jurists think that before a binding contract was entered into, before a valid testament was made, there must have been in existence a norm [of decision] according to which agreements or testaments are binding, they are placing the abstract before the concrete” (1936: 35–36). In a word, the norms of the living law—creating and ordering the contract, the testament, and so on—antedate norms of decision.

In the course of his blistering criticism, Kelsen began with questions about the nature of Ehrlich's enterprise. Was Ehrlich conducting an empirical inquiry? No, Kelsen answered; Ehrlich sought above all to establish a sociologically based theory of legal science. Thus, he could not proceed by simply reciting historico-empirical findings to the effect that contracts precede the existence of a law of contracts. For if a promise between two parties "establishes a *legal* relation between them, a contract with *legal* effects," then, however underdeveloped the law may be, "the legal norm that an agreement expressed in this way is supposed to be binding must be presupposed as valid" (Kelsen 1915: 847).

This line of argument contains the germ of Kelsen's basic norm (*Grundnorm*), to which he was inexorably driven, given his hard and fast distinction between "is" and "ought," coupled with his purity postulate. The problem he faced and attempted to resolve by means of the basic norm takes as its point of departure the question of legal validity. One answers a question about the validity of a norm in the legal system by appeal to the appropriate higher-level norm, a norm empowering officials to issue the norm in question. One can ask the same sort of question, in turn, about the empowering norm, and if this line of questioning continues, one will eventually reach a norm at the constitutional level. By definition, there is no legal norm at a still higher level to which one might appeal in answering the question of the constitutional norm's validity. In addition, Kelsen's purity postulate **[p. 880 ↓]** rules out any appeal to fact or morality. The sole alternative, Kelsen argued, is a basic norm. To be sure, Kelsen did not rest content with a mere assumption that the basic norm is valid, but attempted, rather, to adduce a Kantian transcendental argument on its behalf. The force of his reply to Ehrlich turns on whether his effort succeeded.

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See also

- Constitutional Courts
- Ehrlich, Eugen
- Gierke, Otto von
- Kelsen, Hans

- Positive Law
- Sociology of Law
- Weber, Max

Further Readings

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