

AWP

Hans Köchler

PHILOSOPHY – LAW – POLITICS
Essays on Political and Legal Philosophy

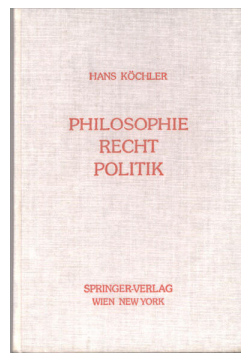
I: The Problem of Legal Positivism

II: Democracy and Human Self-determination

III: International Law and International Relations

English summary of

PHILOSOPHIE – RECHT – POLITIK
Abhandlungen zur politischen Philosophie und zur
Rechtsphilosophie



Springer: Vienna/New York, 1985
vii + 112 pages, ISBN 3-211-81899-5

© ARBEITSGEMEINSCHAFT FÜR WISSENSCHAFT UND POLITIK
University of Innsbruck, Austria, 1985

PHILOSOPHY – LAW – POLITICS

General outline

The papers contained in the volume “Philosophy – Law – Politics” address three main subjects:

1. Problems and contradictions resulting from traditional positivist philosophy of law.
2. Self-determination in society: the problem of democracy and the deficiencies of the traditional concept of representation.
3. The application of democratic principles to international relations and international law: elaboration of a normative framework beyond the actual concept of international legality.

In the first chapter, a detailed analysis is presented on the contradictions and theoretical inconsistencies of legal theory in Hans Kelsen’s “Pure Theory of Law” (*Reine Rechtslehre*). It is explained that legal norms cannot be justified by founding them on a “basic norm” (*Grundnorm*) that has no material content. Special emphasis is laid on the problems and risks of a philosophy of law (such as legal positivism) that could be used to justify any system of power (even a fascist one). This is illustrated by reference to the equation of *validity* and *effectiveness* of a norm in Kelsen’s legal theory. Finally, epistemological questions resulting from this version of legal positivism are elaborated. The second chapter of the book describes the framework for a new foundation of legal norms and the corresponding definition of the concept of democracy. The interrelation between philosophy of law and political philosophy is further explained. It is demonstrated that the definition of democracy has specific implications for *how* legal norms are justified. The chapter deals, in particular, with (a) the concept of **representation** and its fictitious idealistic assumptions; (b) the question of the **validity of law** (legal norms) in the context of representation; and (c) the doctrine of representation and the **crisis of Western democracy**. The third chapter explains the application of the approach developed in the previous chapters to relations between states.

Structure of argument

The book gives a detailed overview of the history of the concept and ideology of representation. In each instance, it is shown in which respect the concept was used for the **legitimation** of the exercise of power by certain groups of society over the entire people. It is explained that representation **in itself** is defined by an unequal power relationship and that, all through history, this has contributed to a kind of socio-political **alienation**, preventing the individual citizen from fully realizing the democratic potential (in the sense of **direct**, or participatory, democracy).

The concept of representation as tool of legitimation is analyzed in a threefold sense:

- (a) Representation as **ontological** fiction means that a non-existing totality of “the people” is postulated (supposed), which the deputy claims to represent, whereas, in reality, only individual citizens exist who – in their manifold interactions – constitute the people (nation).
- (b) Representation also constitutes a **psychological** fiction because, in his decisions, a representative actually reflects his party’s or pressure group’s particular interests, and not the general will of the people.
- (c) Representation furthermore is a **normative** fiction insofar as the *will* (the act constituting a norm) can never be exercised by another on my behalf. The will is nullified if it is not exercised by myself. Acts of will by way of “representation” are tantamount to a form of *alienation* that deprives the citizen of his real political and legal status.

On the basis of a critique of the ideology of representation, an alternative **theory of law** is outlined, which roots the validity of norms exclusively in **acts of will of all citizens**, and not merely upon decisions of a group of privileged representatives.

It is demonstrated that no constitution or legal norm is valid unless it can be derived from acts of will of the citizens constituting the particular polity. The **voluntaristic** theory of the validity of norms necessarily implies **direct democracy**. Any state constitution not based on an act of will of the citizens of the state lacks the **legitimacy** that is necessary to ensure

respect for the constitutional order.

It is furthermore explained that the crisis of the political system – in the Western world in particular – results from a lack of democratic legitimation of power. Some of the crucial challenges of industrial societies such as environmental degradation or the nuclear threat cannot be tackled adequately in a system where mainly pressure groups are allowed to determine the decision-making process. Such groups do not reflect the general will (*volonté générale*), but merely their own particular (mainly economic) interests. This may make democratic consultation and coordination of decisions among the citizenry virtually impossible and finally result in constellations that no individual citizen – if asked – would accept.

A drastic example for the democratic legitimation deficit in today's representative (parliamentary) systems has been the stationing of nuclear missiles in Europe, which was decided by legislative bodies (i.e. by representatives officially acting on behalf of the entire nation, whereas in actual fact a large majority of the people in the states concerned was against such measures). This indicates a profound **crisis of credibility** of representative decision-making. It amounts to an effective suppression of the will of the citizens in favour of the interests of political parties and interest groups.

Finally, the critique of the representative concept of democracy and of the doctrine of the validity (legitimacy) of legal norms associated with it is applied to **relations among sovereign states**. It is demonstrated that the normative quality of "sovereignty" is not rooted in governments (i.e. executive power) or "representative" bodies (i.e. derived legislative power), but in the will of the citizens who constitute the respective polity.

This adds an entirely new quality to international relations and diplomacy, in particular, which is not anymore exclusively perceived as being conducted by privileged representatives of state power, but also as interaction between the "sovereign" citizens of different polities.

Accordingly, the book postulates that democracy – as system of citizen **participation** – should not merely be applied on the national, but on the trans-national (international) level as well. Only this will guarantee **peaceful coexistence** in the long term. As long as foreign policy is essentially shaped by domestic pressure groups, international relations will mainly be governed by the strive for power and influence, at the expense of respect for the equal rights of the citizens of other nations on the basis of mutuality.

It is further emphasized that **democratization** of international relations is the main precondition for the establishment of a new and **just international economic order** – where the rules are not an instrument in the hands of a few nations, sharing power among themselves, but a means for the governing of relations between communities of citizens on an equal level.
