DIACHRONIC INDEX AND GLOSSARY TO WHAT IS JUSTICE

JOHN PREBBLE AND NINA OPACIC

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A Diachronic Index and Glossary to What Is Justice? Collected Essays by Hans Kelsen

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A Diachronic Index and Glossary
to
Hans Kelsen: What is Justice?
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to
What is Justice?
Collected Essays by Hans Kelsen

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Introduction

What is Justice?: collected essays by Hans Kelsen was first published in 1957 by the University of California Press, Berkeley by arrangement with Hans-Kelsen Institut, Vienna. What is Justice? is a compilation of essays by Hans Kelsen that deal with the problems of justice and their relationships to law, philosophy, and science. Some were published in the book for the first time, and some were presented in a revised version.¹

The general applicability and broad scope of What is Justice? makes it a uniquely valuable source for research and writing across jurisdictions and in almost any area of law. Surprisingly for such a highly regarded and influential book, the English version of What is Justice? was published without an index. The authors of this present index hope that it will provide scholars everywhere with a key to access Kelsen’s work.

The Index is diachronic in that, unlike ordinary indexes, it attempts to present Kelsen’s theories in a manner that enables readers to apply them to any area of law whether Kelsen addressed that area or not and even whether the area of law in question has evolved since Kelsen’s time, or was not an identified field of study when Kelsen was alive.

Composing a comprehensive and navigable index for *What is Justice?* that achieves these objectives presented many challenges. The first consideration was that *What is Justice?* is a jurisprudential text, primarily comprising arguments and theories, rather than concrete concepts or facts that lend themselves naturally to the generation of key words. The index must necessarily capture these arguments and theories and make them findable by readers. References in the index to reasoning and arguments leads to longer index entries than may be conventional for other texts.

Kelsen’s analysis is broad and conceptual, characterized by remarkable generalizations. He rarely narrows his analysis to a particular legal doctrine, and applied examples of his theories are uncommon in his writing. The breadth and all-encompassing nature of Kelsen’s theories that contributes to continuing influence at the same time results in essays that are densely packed and not always easily accessible. This Index endeavours to identify legal doctrines and categories that Kelsen refers to only indirectly. The authors hope that this approach will allow Kelsen’s arguments to be more intelligible and practically useful. An implication of including these specific concepts and categories is that the Index includes concepts or categories that Kelsen never directly mentioned.
The authors have included a glossary to provide an additional aid to navigating *What is Justice?*, by means of definitions, and in some cases explanations, of concepts that may be unfamiliar to readers.

The authors have a common law perspective; a perspective that from time to time challenged their own understanding of Kelsen’s general theory and how it can be applied to particular legal institutions. A number of entries in the glossary identify possible inconsistencies between civil and common law understandings and concepts. An example is Kelsen’s use of the term “Rule of Law”.

The indexing method chosen for the present work employs traditional indexing techniques: a careful reading of the book and recording of entries by hand on index cards. The cards were consolidated and arranged into alphabetical order before being entered into word processing software. One advantage of this approach is the several stages of consolidation and editing required before the index itself is produced. This staged process in itself generates additional synonyms and corresponding concepts that can be given index entries. Index cards for the whole book were reviewed and merged so that multiple references to the same concept or argument were

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2 See the entry for “Rule of Law” in the *Glossary*, page 92.
logically grouped together. The final stage of entering the alphabetically arranged slips into the computer was essentially a task of data entry.

In producing the index, the authors followed A.R. Hewitt and C.C. Branwell, “A Practical Guide to Law Indexing” (occasional paper, London, 1977), though the authors departed from one of the conventions of indexing that Hewitt and Branwell recommended: namely, that cross references should be used only where there are three or more entries for the same concept under a particular heading. In that event, Hewitt and Branwell recommended moving the entries to their own heading. Fewer than three similar entries stay where they are. An example of a cross reference is: Capital punishment see Death Penalty. In this example, the cross reference would conform to the convention only if there were at least three entries under the heading Death Penalty. The reason for the convention is to strike a balance between, on one hand, the undesirability of sending readers hither and yon within the index instead of directly furnishing page references to the text itself, and on the other hand, avoiding repetition of identical lists of entries. The convention limits repetition to cases where there are fewer than three entries under the particular heading. The authors made an exception for non-english terms. Where the text employs non-english words the index cross-refers to the
corresponding English term, regardless of how many entries appear under the English word.

This organisational technique appears frequently because some translations of Kelsen’s essays have retained many non-English words. A reason is that one can often make distinctions in a foreign language that are not linguistically possible in English or possible only at the expense of pleonasm.

*What is Justice?* uses American spelling; the Index has adopted American spelling for consistency.

The main motivation for composing an index was to increase the accessibility of Kelsen’s *What is Justice?*. Kelsen’s writing has already influenced and informed a great deal of legal scholarship throughout the world. Kelsen’s tightly packed generalisations and conceptual arguments, which are intended to apply generally to all laws and legal systems, are impressive, but are not comprehensible and accessible to all readers. Students, and readers from non-civil law backgrounds are important targets of the Index. The authors hope that the Index will allow scholars of all levels of experience to take full advantage of Kelsen’s wisdom, especially in areas of the law that Kelsen may not have considered or even come across, such as, to take random examples, tax law
and the law relating to intellectual property and competition.

Despite the deep, general, and conceptual nature of *What is Justice?*, and despite the relevance of the work to almost any legal scholarship, in practice the use of *What is Justice?* tends to be confined to scholarly writing on legal philosophy. In fact, Kelsen’s insight can inform work on areas of law that are often thought of as discrete subjects, such as contract, torts, trusts, property, taxation and so on. The authors hope that scholars writing on such topics will find it useful to search the Index for Kelsenian generalisations that shed light on the nature of law in their particular areas of study. This aspiration of the authors is one reason for the length of the index. The authors have included many synonyms and terms from a variety of areas of law in the hope of enabling scholars to locate material in *What is Justice?* that is relevant to their particular line of inquiry.

The authors hope that they can reasonably claim originality and insight in respect of the Index and its companion Index to Kelsen’s *Pure Theory of Law*. Unlike workmanlike indexes that can be compiled electronically, the present index is diachronic and conceptual. It connects relationships between Kelsen’s thought and legal reasoning that even Kelsen himself did not perceive. It thus opens the way to applying
Kelsen’s reasoning across far wider areas of law than he ever considered. Of all literary forms, the Index is perhaps the best adapted to this approach. For example, the Index allows us to see the light that Kelsen’s reasoning sheds on certain oddities of the law of income taxation. Some aspects of taxation law that are logically matters of factual causation, upon examination, show themselves to be creatures of imputation and legal reasoning. References to this reasoning can be found in the Index under “causation”, “imputation”, “norm” and “rule”.

Finally the authors are anxious to make Kelsen’s work accessible to students. Despite its great distinction, *What is Justice?* is little read by students and seldom recommended to them. A good illustration is J.C Smith and David N Weisstub (eds) *The Western Idea of Law* (Butterworths, Canada 1983). In their work, Smith and Weisstub have collected one of the best and most comprehensive selections of excerpts from writings on jurisprudence that is available. The work extends from Aristotle to the late twentieth century. As well as excerpts from works that are virtually canonical, it includes many interesting but relative obscure pieces. But Kelsen is omitted. The authors hope that their Index will go some distance in preventing such omissions from future collections.
Kelsen “welcome[ed] constructive criticism. He regards his works not as the final word but as an enterprise that would benefit by continued additions, refinements, or improvements in general”. The authors of the present Index and Glossary respectfully adopt Kelsen’s words and, like Kelsen, will be grateful for suggestions for “additions, refinements, or improvements in general”.

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**Introduction to the Glossary**

The authors intend the Glossary to supplement the Index, to clarify terms, and to make concepts more accessible to readers. While no work of writing can be entirely original, this aphorism is particularly true of dictionaries and glossaries. The authors have tried to frame the glossary entries in terms that are particularly relevant for the subject matter of *What is Justice?*, but they have checked them against and often relied on standard sources, such as the Concise Oxford Dictionary,\(^3\) Butterworths New Zealand Law Dictionary,\(^4\) and a number of helpful but anonymous entries in Wikipedia.

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Glossary

Aetios
Sometimes referred to as Aetius, Aetios was an Eastern Roman eunuch official and one of the most trusted advisers of Empress Irene of Athens during the 8th century BCE.

Animism
Animism is the belief that all natural things, such as plants, animals and rocks, have living souls and can influence human events.

Anthropomorphic metaphor
Using a thing with human characteristics to symbolize another thing. A key example in What is Justice? is the concept of a state as a juristic person.

Apeiron/ἄπειρον
Apeiron is a Greek word meaning that which is unlimited, or boundless. In What is Justice?, it refers to the cosmological theory created by Anaximander in the 6th century.

Augustine, Saint
Also known as Augustine of Hippo, Saint Augustine was a philosopher and theologian from the 4th century. Saint Augustine’s two main texts City of God and Confessions were highly influential in the development
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of medieval philosophy and theology.

**Bellum iustum**

*Jus bellum iustum* (or *justum*) is also known as the Just War Theory. The theory contends that war, although not desirable, is not always the worst outcome. The doctrine attempts to justify war morally through a series of criteria. These criteria are split into two categories: *Jus ad bellum* and *jus in bello* “the right to go to war” and the “right conduct in law” respectively.

**Causality**

Kelsen uses the term “principle of causality” to refer to the concept of cause and effect. He uses “law of causality” and “principle of causality” interchangeably, and sometimes often simply refers to causality as a concept.

An example is seen on page 330 of *What is Justice?*, where Kelsen talks about the first formulation of the law of causality and then goes on to refer to it as the “principle” of causality. There is no difference in meaning between the two. Kelsen uses “causality” in contexts similar to where others might use “causation”.

**Civitas Dei**

City of God, a Treatise by Saint Augustine. *See*, next entry.
City of God, Saint Augustine

A highly influential treatise on Christian philosophy written by Saint Augustine. See also Augustine, Saint.

Conditio per quam

(Latin, condition by means of which). Conditio per quam is the operating condition in a particular cause and effect relationship; it is the condition that causes the particular effect.

Conditio sine qua non

(Latin, condition without which not) a conditio sine qua non is an indispensable or requisite condition in a cause and effect relationship. As an essential condition, a conditio sine qua can be contrasted with a conditio per quam, which is the condition that causes the effect. See Conditio per quam.

Copernican theory

The Copernican system was a theory proposed by the Polish astronomer Nicolaus Copernicus (1473-1543). The theory proposed that the sun is the centre of solar system, orbited by the planets, including the earth.
Delict

Kelsen uses “delict” to refer to an act or omission that is wrong according to a norm, generally a legal norm. The most obvious example of a delict is a crime, but Kelsen uses “delict” also to refer to tort and other wrongs, such as breaches of contract. Kelsen’s use of “delict” should be distinguished from “delict” in Scottish law, where a delict is closely equivalent to a tort in the common law.

Democritus

Democritus was an influential pre-Socratic Greek philosopher. At page 205 and 311-314 of What is Justice?, Kelsen uses the Roman and Greek spellings “Democritus” and “Demokritos” to refer to the same person.

Demokritos, see Democritus

Divine justice

Means the same thing as “absolute justice”. An example can be found on page 26 of What is Justice? where Kelsen uses the two terms interchangeably.

Duguit, Léon

Léon Diguit was a French scholar known for his theory of the state and its relationship to state administration.
Epistemology*

The branch of philosophy that is commonly referred to as the theory of knowledge. Epistemology is primarily concerned with the scope and nature of knowledge.

Estates

In this context “estate” refers to the estate of a realm, that is, a class or order forming part of a body politic.

Before the French Revolution, society was commonly conceived as three hierarchical estates of the Clergy, the Nobility and the Commoners. In Britain the three estates were the Lords Spiritual, the Lords Temporal and the Commons. The presence of a “fourth estate” first emerged in the 18th century, meaning a political force outside the three officially recognised estates. Ordinarily, the term “fourth estate” refers to the media as a political force independent of the orthodox estates.

Existentialist philosophy

Existentialist philosophy emphasizes individuals’ unlimited free will, choice, and responsibility and their ability to determine their own development. The theory rejects any notion of determinism and promotes personal choice and responsibility without the need for religious or legal rules.
General International law, see International law, general

German Historical School

The German Historical School of legal philosophy emerged in the nineteenth century. It was rooted in the theories of Friedrich Carl von Savigny (see Savigny, Friedrich Carl von) and Gustav Hugo. The German Historical School’s jurisprudential theory is in opposition to theories of legal positivism.5 See also Popular spirit.

Heraclitus

Heraclitus (c. 535-475 BCE) was a pre-Socratic Greek philosopher who influenced the fields of ethics, epistemology, cosmology and metaphysics. He is famous for his theory that the only true reality is the reality of change, the idea that “all things are in flux and nothing is stable”.6

Hume, David

David Hume (1711-1776) was a Scottish philosopher, most famous for his theory of causality. Humism and Humean ethics are evidence of Hume’s lasting influence on

6 Complete Dictionary of Scientific Biography (Charles Scribner’s Sons, a part of Gale, Cengage Learning, 2008) vol 6 Heraclitus of Ephesus.
philosophical ideas.

**Imputation**
Kelsen uses the term “imputation” to describe normative relationships between conditions and consequences, for example the relationship between delict and sanction. Delict and sanction are connected normatively because where a delict has occurred the relevant sanction ought to be executed.

On the other hand, causality refers to conditions and consequences connected by facts such as the laws of nature.

**International law, general**
In his references to international law, Kelsen frequently distinguishes between general and particular international law (*see*, international law, particular). General international law can be created only by custom and is binding on all members of the international community.

**International law, particular**
Particular international law is created by treaty and is binding only on the states that are signatories to the treaty, though it is occasionally argued that certain norms of multilateral treaties deserve respect as general international law.
**Jus talionis**

Refers to the principle of retribution, or the law of talion. The English word talion is derived from this term, meaning a retaliation authorized by law, in which the punishment corresponds in kind and degree to the injury.

**Kant, Immanuel**

The 19th century German philosopher Immanuel Kant was a leader in many fields of philosophy, a number of which are directly relevant to legal philosophy in general and to analytical jurisprudence in particular. Kelsen particularly draws on Kant’s work on epistemology.

**Kingdom of God**

The Kingdom of God is not another term for “heaven”. Kelsen refers to heaven descending to Earth as the Kingdom of God on judgment day. The Kingdom of God is the same as the Messianic Kingdom in Jewish belief.

**Law**

When referred to with no qualification, “law” means “positive law”

**Laws of nature, see Nature, laws of**
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**Legal security**

The concept of “legal security” as used in *What is Justice?* is more commonly referred to as “legal certainty”. “Legal certainty” is the principle that stipulates that subjects of a legal order must be able to regulate their conduct according to the legal order. The principle requires law to meet minimum standards of accessibility and clarity.

**Lex posterior derogat priori**

(Latin, the later law abrogates or repeals the earlier law). A later law overrules an earlier inconsistent law.

**Natural law**

Kelsen uses natural law to mean moral law as opposed to laws of nature. In modern times, natural law refers to law that complies with the moral principles of the speaker, as opposed to the laws of god.

**Nature, laws of**

Laws of *science* such as the law of gravity. Laws of nature can be proven by the scientific method. Laws of nature are different from *natural* law, which comprises laws that satisfy principles of morality.

**Metaxý**

Defined in Plato’s Symposium as “in-
between” or “middle-ground”.

Negligence

From the perspective of the common law, absolute liability and liability for negligence are separate categories. Kelsen argues that from certain conceptual perspectives the mental element of each is the same.

Objective approach

In his discussion of the interpretation of contracts Kelsen describes what is known as the objective approach to contract formation at common law. The courts will look to the objective, rather than the subjective intentions of the parties to determine whether a contract has been formed. Broadly speaking, the subjective intention is the intention that a party actually has, whereas objective intention is the intention that a party’s words and actions appear to others to indicate.

Pacta sunt servanda

(Latin, agreements must be kept) Pacta sunt servanda is a fundamental principle of general international law, which stipulates that states are bound by, and must fulfil, their international treaty obligations.

Par excellence

(French, by excellence) “Par excellence”
refers to a thing that is the best of its kind or the ultimate in a selection. Kelsen uses the phrase “par excellence” to express the idea that the coercive act of a sanction is the archetype of a consequence because it is not the condition of any other coercive act.

**Particular international law, see International law, particular**

**Plato’s ideal state**

In his book *The Republic*, The Greek Philosopher, Plato (427-347) advanced theories about an ideal state. In an ideal state judges would have full discretion to decide cases on the basis of their merits. This approach would achieve the maximum degree of justice in any individual case, as opposed to decisions based on positive rules of law, which, while more predictable, may appear unjust in individual cases.

**Rule of law**

Kelsen uses “rule of law” in a sense different from the more common sense of that expression. In the more common sense, “rule of law” refers to certain standards that are obligatory for laws to be acceptable. Lon Fuller famously proposed eight standards for an acceptable law. These standards included that the law is of general application, is promulgated, is prospective not retrospective, and has a minimum of
Fuller uses a fictional story of King Rex, who is unable to rule effectively, to illustrate the indispensability of these standards. The authors of this index call this common sense of “rule of law”, “Rule of Law, legal principle of”.

Kelsen does not use “rule of law” as part of a joined-up idiosyncratic expression. He uses the term “rule” in its ordinary sense, to mean a “rule”, not of, for example, morality, but of law. He uses the term to distinguishes rules of law from other types of rules. However, because of the density of his discussion, it can appear as though Kelsen is using “rule of law” in the more general sense.

“Rule of law” in What is Justice? is used to describe the distinction between Rechts-norm and Rechts-satz in German. A rule of law (Rechts-satz) is a description of the law, while legal norms (Rechts-norm) are prescriptive. While a rule of law may be true or false, a legal norm can only be valid or invalid, using “valid” in the sense in which Kelsen uses “valid” in this context.

The Index of What is Justice? refers to the sense of rule of law as Rule of Law (as description of norm). Kelsen defines this on page 325 of What is Justice? where he says that “A rule of law is, for instance, the statement that, if a man has committed a

\[\text{7 Lon Fuller} \ The \ Morality \ of \ Law \ (Revised \ ed, \ Yale \ University \ Press, \ 1969) \ at \ 39.\]
crime, a punishment ought to be inflicted upon him; or the statement that, if a man does not pay a debt, contracted by him, a civil execution ought to be directed against his property”.

Savigny

Friedrich Carl von Savigny (1779-1861) was a German jurist who was one of the founders of the German Historical School. He was also influential as a legal historian.

Sham problem

What is Justice? uses “sham problem” to describe a pretended or illusory problem.

Theodicy

The defense of God's goodness and omnipotence despite the acknowledgment of the existence of evil.

Totalitarianism

A centralized and dictatorial system of government that demands complete subservience to the state by its subjects.

Trust

The Index uses “trust” in a substantive sense that Kelsen might have understood rather

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8 Ratnapala, above n 11, at 310.
than in a strict common law sense where a “trustee” holds the legal title to and enjoys full legal rights over the subject matter or property of a trust while at the same time being bound to act for the benefit of the beneficiary, who holds the “beneficial” interest in the property.

μοναρχία
Monarchy

Valid, validity
Questions of validity, that is, validity of constitutions, of laws, of actions of officials, and of actions of judges, are major themes in What is Justice?. In discussing these themes Kelsen and his translator for the most part employ the common English words “valid” and “validity”. And yet much of this writing is opaque. One reason is that, while a common word, “validity” has several meanings, and Kelsen does not always make it clear which he means. A second reason is that although Kelsen’s usage is correct as to the strict meaning of the English words, he sometimes uses “valid” and “validity” in a manner that, at least in the experience of the authors of this glossary, is not standard among legal writers. A standard dictionary definition of “valid” is: 9

9 Stevenson and Waite, above n 3.
1 (Of reason, objection, argument, etc) sound, defensible, well-grounded; 2a (Law) sound and sufficient, b executed with proper formalities, (valid contract, the marriage was held to be valid); c legally acceptable (valid passport); hence or cognomen, validity.

In the context of works of legal philosophy written in English one would expect meaning 2a to be one meaning of valid, and probably its primary meaning. For instance, we might say that a statute is valid because, inter alia, the majority of legislators who were present and who voted, voted to adopt the statute.

In contrast, consider a rule in a statute where the statute was passed with due formality, but where the particular rule is defective in some way or other: perhaps it is ambiguous, or perhaps it contradicts another rule in the same or in a different statute. While we would recognise such a rule as being deficient, we would probably not say that it is not valid. That is, to deploy the words of dictionary definition number 1, quoted above, while we might agree that the rule is not sound, defensible, or well-grounded, we would probably not impugn the rule as not valid. Kelsen, however, does use “valid” and “validity” in this kind of context, as well as in the context of constitutional or formal validity. Indeed, one sometimes finds both meanings employed in What is Justice? in the same discussion. This usage can be confusing, but readers who are alert to the problem can
usually work their way through it.

**Yahweh**

Yahweh is a form of the Hebrew name for God used in the Bible. Kelsen refers to “God” in the Holy Scriptures as “Yahweh”.