

BETWEEN POLITICS AND SCIENCE: THE DILEMMA OF REASON

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ABSTRACT

Curiosity, our deepest inner intellectual need and concern brought about what we today call science. This Article will try to address the problem of the interrelation between politics and science. There is no need to discuss which of the two came first, but rather the real question is to what extent can science influence the political process? Can it help proper decision-making and, if it can, to what extent? Decision-making is most often prefixed with the term *political*. Can the intellectual class representing the world of science have an influence on political decision-making? As C. Wright Mills rightly noticed, if an intellectual is a knowledgeable individual, he will not opt for any particular political direction. An intellectual's politics is, therefore, the politics of truth. Does an intellectual have a legitimate right (or not) to be active in practical politics? Should not the enormous body of knowledge that science has accumulated in the intervening centuries be harnessed to the ordering and governing of society? Perhaps, but the paradox that then emerges is the harsh reality that this corpus of knowledge that science has provided to mankind in the past centuries has not been able, to date, prevent wide-scale violence and decadence. This is one of the biggest paradoxes of civilized society and the key issue that this Article will attempt to address.

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INTRODUCTION

This Article explores the role of the intellectual¹ in the political sphere. It seeks to answer the question of what happens when the intellectual enters the political arena and sacrifices the world of empirical knowledge for the harsh normative realities of political decision-making. In a nutshell, the dilemmas posed by this question encapsulate what this Article terms as “the intellectual’s dilemma” --- the dilemma the intellectual faces between dedicating his life to the pure pursuit of knowledge versus sacrificing the pursuit of knowledge for that of power and consequently entering the world of politics.² The dichotomy between the exercise of “thought” and the exercise of “power” is key here. Power, especially political power, is in one way antithetical to the development of science³ (for at its basest it relies not on pure reason, but rather instead on force), but in another way essential to the development of science, for without power and the order that oftentimes accompanies it, a civilized society cannot develop and advance.

What is politics and what is science? Does politics necessarily hinder the development of science or is this too strong of a statement? On the one hand politics most definitely does not obey fundamental scientific principles. The interaction of these two forms of social action, politics and science, produces a series of complex and dynamic social processes. Apart from wars and violence, science and what we mean today by politics, were the main factors that brought about the industrial and technological development in the various societies and cultures that can be found throughout history and the present day. The question which then emerges is can science help proper decision-making and proper strategic planning? How great is the importance of scientific analysis in such matters and how important is the empirically based way of thinking and problem solving? In other words, can the gap between politics and science be narrowed?

The intellectual today faces many constant and changeable dilemmas. These dilemmas originate from the principles of scientific knowledge and ethical codices but, most of all, from the area of complex social directives (at the root of which is some sort of real center of power⁴). These social dilemmas can be sublimated into the following questions:

¹ For the purposes of this Article (following the line first set out in the pro-Dreyfusard “Manifesto of the Intellectuals”) an *intellectual* is defined as a person who uses reason (critical analysis of problems) in order to comment, study, and critique the important issues of the day. *See also infra* § I (C).

² For the purposes of this Article, *politics* is defined as the process through which a ruling organization within a set territory exercises its power. *See also infra* § I (A).

³ For the purposes of this Article, *science* can be defined as an inquiry into truth. A *philosophy of science* seeks to observe phenomena and, perhaps more importantly, come up with verifiable methods to study and categorize said phenomena. For an excellent review of the literature on this topic, *see* Cassandra Pinnick & George Gale, *Philosophy of Science and History of Science: A Troubling Interaction*, 31 J. GEN. PHIL. SCI. 109 (2000).

⁴ *See supra* note 2.

(□) whether to participate in the harsh realities of politics; or (b) opt out of the political world for the scientific one devoted to the categorization of knowledge? Should the intellectual or, more precisely, does the intellectual have a legitimate right (or not) to be active in practical politics? Should not the enormous body of knowledge that science has accumulated in the intervening centuries be harnessed to the ordering and governing of society? Perhaps, but a paradox that then emerges in opposition to this proposition is the harsh reality that this corpus of knowledge that science has provided mankind in the intervening centuries has not been able, to date, prevent wide-scale violence and decadence in history. This is one of the biggest paradoxes of civilized society and the key issue that this Article will attempt to tackle.

I. Defining the Terms

Before any meaningful discussion of the interplay between politics, science, and the role of the intellectual can occur these terms must first be defined in sufficient detail. The need for a political system is a vital part of every society, but what is politics? Along these same lines, the interests of human curiosity and creative disposition have given birth to science, but is this exploration a part of defining philosophy or more of a methodology? These issues of conceptualization aside, what is the role of the individual in these debates?

A. Politics

Together with economic, military, and cultural systems, a political system is a vital part of every society. What is politics? In the narrow sense, politics is the skill of running the state and building relations with other states. This narrow sense also comprises those viewpoints that place an emphasis on political behavior as a type of social behavior. In the wider sense, politics is portrayed as any conscious organization of social relations (i.e. as an activity directed towards achieving all types of preset goals). In this way politics is considered to be the practical action of governing in all areas of social life. Apart from these two general definitions of politics, there are other definitions: politics as the art of illusion, the art of governance, the art of the possible, a public affair, as well as politics as a contract and agreement, of power, etc.⁵ In ancient Greece politics was seen as a community (political canon), that is, as a public affair (*res publica*). To achieve general good was the main goal that was set by one-self, and thus this is why it was defined as a practical ethic.

⁵ LJUBOMIR TADIĆ, NAUKA O POLITICI 48-52 (Beogradski izdavacko-graficki zavod 1996); DRAGAN SIMEUNOVIĆ, TEORIJA POLITIKE 18-32 (OPN praktikum 2002); ANDREW HEYWOOD, POLITIKA 11-29 (Jovan Jovanović trans., Clio 2004).

In the medieval period politics and morality were determined by the Church, and in the modern era Niccolo Machiavelli developed the realistic view on politics, considering it merely a merciless fight for gaining and keeping rule. However it should be said that Machiavelli is not the preacher of evil. Do good things, he says, if they guarantee success to you or at least the biggest chance of success. In other words, be a hypocrite and do not care about moral norms for our lives are a struggle. Politics is only a reflection of the ancient societal order, and of man's domineering traits in a society that was established, organized, regulated, and controlled in that way.

B. Science

The needs and interests of human curiosity and creative disposition gave birth to science. Science then in this sense can, in part, itself be defined as a methodology, for in order to gather and organize scientific information, the researcher has to respond to the following requests: to be organized and to plan his research, empirically base said research on rationally formulated methodical ways of gaining knowledge, define laws as the basis for explanation and prediction, and synthesize the epistemological and practical in order not to lose the connection between the subject of the research and scientific-theoretical aspects (as a reflection of the subject of research).⁶ Science is a form of social consciousness, a clear set of objects to be studied, research goals, scientific principles, and a categorical system. Being a systematized notional knowledge, science programmatically performs research of empirical facts, thus achieving the synthesis of the cognitive and the practical, as well as the verifiability of its conclusions. To put it more simply, science is a systematized notional knowledge which can be verified and is gained through certain methods.⁷

As a specific branch of science, sociology studies the society as a unity of interrelated phenomena (if one is talking about general sociology), or it studies a specific area of social reality through its interaction with other problems, as well as with society in general. Society in general can help the development of science, can benefit from its findings, and indeed incorporate them into progressive social development. Such things are possible, but not necessarily probable, for history teaches us that sooner or later the findings of science, directly or indirectly, will be used by the powerful in the society for the purpose of keeping and reinforcing power. Political regimes move the amplitude of such a relation in one or the other direction, seldom keeping it in balance point of the societal requirements which are manifested as common social interest and the interests of those who run the wheel of power in a society.⁸

⁶ BOGDAN ŠEŠIĆ, OSNOVI METODOLOGIJE DRUŠTVENIH NAUKA 14-16 (Naučna knjiga 1982).

⁷ ZORAN NIKOLIĆ, SOCIOLOGIJA 1-9 (Univerzitet u Istočnom Sarajevu 2005).

⁸ ZORAN NIKOLIĆ, SOCIOLOGIJA MOĆI 182-184 (Univerzitet u Istočnom Sarajevu 2007).

C. The Intellectual

The intellectual class is made of highly educated individuals who are characterized by spiritual, scientific, and artistic creation as well as of those individuals dealing with the reproduction of the accepted cultural values by imbuing them with a certain amount of creativity and inventiveness. In the middle of the 19th century in Russia, and later on in Eastern Europe, the term *intelligence* was beginning to be used, while in Western Europe they used the term *intellectual*. No significant difference can be established when it comes to these two words. It is more likely that they are synonymous. Neither science nor laymen can agree on the objective meaning of the word *intellectual*. The only dilemma is whether intellectuality is gained through higher education or if higher education is only its stepping stone. It is possible to extract the basic requirements that have to be met in everyday and professional life if it is wished to be determined whether somebody is an intellectual or not:

Figure 1: *The Basic Requirements of an Intellectual*

Requirements:	<ul style="list-style-type: none">▪ Creativity▪ High education▪ Top professional training▪ Awareness of one's role in society▪ Conscientiousness regarding one's intellectual work and the importance of one's achievements in the community▪ Criticality and the freedom of thought▪ Professionalism at work (i.e. dedication to one's profession)
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Trying to describe and explain an intellectual's profile in contemporary society, Ayn Rand pointed out that they have to be able to use their reason in their attempts to decipher the riddles of contemporary civilization, and to be prepared to take the initiative in the progressive development of society as well as their own actions.⁹ Rand

⁹ Ayn Rand, *Za novog intelektualca, i novog intelektualca*, in *SOCIOLOGIJA FORVER* 187-189 (Jovan Jovanović trans., Dragoljub Đorđević ed., 1996).

also noticed the fact that true intellectuals were not particularly practical, and that the ethical character of their deeds outweighed their usefulness. New modern conditions of life and work require the intellectual to bring the moral and practical dimension together in his actions. The question of which class is to be given the special status of the intellectual depends on the elementary characteristics of type of society one is dealing with. In the Hindu caste system, those that were given this status were the Brahmins (priests), in ancient Greece it was the philosophers, and in medieval Europe it was the spiritual nobility. In each of these historical periods, the intellectual class played one of the key roles in societal development. The factor of knowledge and expertise was the key component in the creation of the optimal conditions for the society's functioning.

Knowledge, expertise, and scientific achievements are always necessary for societal order and the subjects that shape it. However, the social status of the intellectuals does not correspond to the importance of their spiritual achievements. They need something else to be able to move up the vertical ladder. This is, before anything else, the readiness to reach a compromise with the factors of real power in society. Knowledge and expertise are one of the most important factors and footholds of power in a society. This does not mean however that they hold power themselves. Knowledge is the precondition of power, especially in the contemporary society, but those who have it do not necessarily have the power proportional to the importance of their knowledge. It is more likely that obedience and suitability will provide social promotion, more than colossal and independent intellect will. It is not a rare occurrence that in order to get closer to the powerful elite in such a social environment, an intellectual chooses to place his intellect in the hands of the powerful, thus becoming their tool and support. The compromise of this kind means giving up on one's intellectual freedom and conscience for personal gain, mostly for the purpose of achieving a more comfortable and peaceful existence. If they lose the freedom of critical thought, the intellectuals' wings are clipped. Gone is their freedom of speech and power of thought --- it is as if they are put in a cage. In *Knowledge and Power*, C. Wright Mills concluded that if only half of the knowledge that is at the disposal to the mankind were utilized by the ideals about which various *leaders* talk about, those ideals would materialize in a short span of time.¹⁰ Hypocrisy is one key characteristic of the epoch we live in, no matter what its origins. The same author pointed out that there are many well-known illusions today, and that knowledgeable people, though they are aware of these are illusions, are inclined to keep quiet or even support them more than they are prepared to reveal the truth about them.¹¹

II. The Problematic Relationship Between the Intellectual and Politics

¹⁰ C. WRIGHT MILLS, ZNANJE I MOĆ 15 (Olivera Stefanović trans., Savremena administracija 1966).

¹¹ *Id.* at 15.

The problem of the relationship between the intellectual and politics dates from the beginnings of philosophy and extends till the present day of Western civilization. As Plato famously said in *The State*, the rulers have to become philosophers, whereas philosophers have to become rulers. In his *Laws* he corrects himself by claiming that it is better to have wise laws than wise rulers, since if laws are wise, even those who are not possessed with wisdom will be able to run the state in a proper way. Aristotle, on the other hand, views man as *zoon politikon* --- a political being. Outside politics there is only God or the barbarian. Human mind and the ability of speech result in *logos* which is the basic assumption of political life. Therefore, Aristotle promotes science into the matrix of successful politics, for only then will politics represent public practice of morality.

Immanuel Kant pointed out that the possession of authority and power corrupts the application of the mind. The intellectuals, therefore, should not practice politics. To apply one's mind without constraints is the elementary precondition for a man who, without doubt, has the intellect enough to rise to the true intellectual. Politics, as Kant believes, completely takes away one's ability to become an intellectual. Niccolo Machiavelli proves that the possession of power projects the need for its constant gaining and augmentation. This is also what Thomas Hobbes notices and elaborates upon. Power then serves as a positive feedback loop, continually reinforcing itself. For Hobbes, taking pleasure in power not only clouds one's mind and limits his freedom, but it also hinders the valorization of the general interests that are the reason a social community exists.

The magnates of sociology, Auguste Comte and Max Weber, however, pointed out the need for the sociologist to be active in politics, because central societal aims can only be achieved in that way. Both of them pleaded for and were active in practical politics. C. Wright Mills, on the other hand, thought that if one was a knowledgeable man, he would not strive to enter politics. Rather instead his politics was first and foremost the politics of truth. Practical politics, especially in the process of the deterioration of traditional democratic institutions, only hindered the creativity of intellectual, turning him into a slave or dissident.

III. The Inter-relationship Between Politics and Science

Political leadership (in order to advance and develop) needs science. As such, this relationship is not one-sided nor is the influence of politics on science exclusively a one-track one. Political leadership that aims to be successful and to stay at the top needs the findings that science offers. This does not only concern practical governance. Indeed, to gain people's trust, the authorities need to make citizens feel content or at least need to diminish their discontent to the least possible degree. To do that, ideally, scientific findings need to be implemented in all spheres of a society. Such circumstances are

productive for the expansion of scientific development and the status of the intellectual. However, the position of the intellectual here depends on the willingness to compromise, with compromise appearing in the shape of a series of experiential modalities. None of them are favorable for what Kant calls the freedom of the mind. Indirectly they contribute to the stagnancy or involution of scientific understanding. Extremely repressive regimes do not care about scientific achievements unless such findings can be incorporated into the structure of their rule. The intellectual represents the true or imaginary danger for absolutist and totalitarian regimes or in any case, that is what he is potentially. To know the truth may not be a problem if it is more difficult not to see it than to see it. The process of finding a way to project a strategy for the resistance to, and bringing down of, a repressive order, requires knowledge and adequate usage of that knowledge. Science and laymen are familiar with the issue of the seen but unnoticed. The screen over the intellectual's eyes does not have to be the result of careless observation, failure in analysis, etc. It is most often the result of the factor of power in a society which in that way reveals itself as the *factor of perception*.¹²

A. Participation and Political Decision-Making

The participation and changeable influence of the intellectuals on political decision-making has been known in history: ever since the Sophists, Plato, Aristotle, Erasmus of Rotterdam, Marsilio da Padova, Niccolo Machiavelli, Thomas Jefferson, and all the way to Joseph Nye. Several theories and their modalities exist in science regarding strategies, tactics, methods, and technique of planning and realizing political decisions. The analytics of practical politics¹³ has been intensified through scientific explorations in the 1960s and 1970s. To enhance and to ensure the efficiency of practical politics is the basic goal of political analytics. The planning of practical politics depends on the type of organization: that is, whether one is talking about a democratic or centralist organization.¹⁴ The group size can also influence the success of projecting and valorizing what was conceived.¹⁵ Smaller groups are more suitable for bringing ideas into practice than the bigger ones. Andrew Heywood analyzes four basic models of decision-making: (1) the *rational actor model*, (2) the *incremental model*, (3) the *organizational process model*, and (4)

¹² ZORAN NIKOLIĆ, FENOMEN PERCEPCIJE MOĆI 243 (NDS 2003).

¹³ *Policy* is an expression denoting practical and concrete politics in various social spheres. *Practical politics* denotes those human actions that bring about the creation, promotion, protection or change of the rules of social life.

¹⁴ *Strategy* is a widely used term that comes from the military doctrine, but is today used in the game theory, theory of systems, politics, sports games, science, etc. It can be defined as clearly planned project which comprises a set of interconnected actions leading to reaching the set aim.

¹⁵ The term *tactics* cannot be used the same as *strategy*, although it is related to it, i.e. it is derived from it. *Tactics* can be contrasted to strategy in that it can be seen as a sublimation of skills, methods, and capabilities in achieving the tasks that were set while doing interrelated actions. Therefore, it is narrower than the category of strategy.

the *belief system model*.¹⁶ It is through exploring these models that one can see the method through which intellectuals can engage in politics.

B. Models of Decision-Making: How the Intellectual Enters the Political Sphere

Utilitarianism is the basis of the *rational actor model*. The anthropological dimension of this model is obvious because the theory of rational choice incorporates human nature, individualism, but also the egotistical traits people exhibit in wanting to satisfy their own needs and to reach material gain. How useful and satisfying is it to reach a decision? In order to make a decision it is necessary to take into consideration the following aspects: the nature of the problem, the definition of goals starting from the hierarchy of personal priorities, the evaluation of the means available for reaching a goal on the basis of success and cost, and choosing the means that most definitely can guarantee success.¹⁷ In any case, the model requires formulating the degree of usefulness and satisfaction and eventual dissatisfaction. The accuracy of the information regarding the problem that the decision is about is a top priority. The difficulties that can arise regarding this problem inspired Herbert Simon to devise the concept of *bounded rationality*. Human rationality is context specific, in that it is the product of the environment in which it is formed.¹⁸ Institutions, as “collections of interrelated rules and routines that define appropriate actions in terms of relations between roles and situations,”¹⁹ can be key to understanding how individuals have their preferences shaped not by any individual calculation of maximizing “values” and / or “expectations,” (i.e. a pure *rational actor model* as described above), but rather by the “rules of behavior, norms, roles, physical arrangements” that encapsulated the institutional structure of their environment.²⁰ The ideological and value connotation of decision-making then are completely irrelevant. This model is particularly applicable in smaller social groups (precisely because of the need to coordinate various interests) and, ideally, it is optimal when the projection of the strategy of a particular decision concerns an individual.

Incrementalism is a theory according to which decisions are made by adapting to new social conditions and circumstances, and not by clearly defining the goals and the vision that those making the decisions have. David Braybrooke and Charles Lindbloom devised this model as a theory about coping and managing new situations. Innovation is almost completely excluded from this concept precisely because of this general orientation, but

¹⁶ HEYWOOD, *supra* note 5, at 737-745.

¹⁷ *Id.* at 737-738.

¹⁸ JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS 11-14 (Free Press 1989).

¹⁹ *Id.* at 160.

²⁰ James G. March & Johan P. Olsen, *The New Institutionalism: Organizational Factors in Political Life*, 78 AM. POL. SCI. REV. 734, 741 (1984).

also because of the awareness of the lack of information as well as possible faint comprehension of the present and the future. The reactions of the objects of the past decisions determine the present course of decision-making.²¹ To avoid problems and not to deal with them, regardless of the consequences, is the credo of this model of decision-making. It goes without saying that such a model can be catastrophic for a community in the near future.

The *organizational process model* and its several variants is basically a simple theoretical concept according to which the basis of decision-making is within the organization. Key here are the internal organization rules (and patterns of behavior that result from them), and the values that characterize the given organization.²²

The *belief system model* is based on beliefs, ideologies, and values (or value orientations) as patterns of behavior and also as the foundation for political decision-making. Paul Sabatier developed the concept of policy subsystems which are supposed to contribute to the firmer integration of ideas, beliefs, and convictions. The need for policy makers to achieve set goals leads them towards a desire to learn more about the issues facing them and to turn towards constructing an environment where research and information is freely debated and exchanged, leading to a clearer understanding of policy impacts over time.²³

IV. Case Study: Hans Kelsen, the Supreme Court of Pakistan, and *Revolutionary Legality*

Though at first glance an eminent Austrian legal philosopher and the Supreme Court of Pakistan would seem to have little in common, this is not the case. Intellectual Hans Kelsen though active in politics in his native Austria had, by the 1950s, moved to the United States and focused his efforts almost exclusively on teaching and scholarship. It would be up to the Supreme Court of Pakistan, in its infamous decision rendered in the case *The State v. Dosso and another*,²⁴ in 1958, to push Kelsen, or at the very least his scientific theories, back into the realm of politics --- the results would be equally tragic and catastrophic and serve as a cautionary tale for the intellectual in the world of politics.

Hans Kelsen can be considered an intellectual of the first order. Born in Prague in 1881 (then part of the Austro-Hungarian Empire) and raised in Vienna, Kelsen became a

²¹ DAVID BRAYBROOKE & CHARLES E. LINDBLOM, A STRATEGY OF DECISION 48-50, 111-114 (Free Press 1963).

²² GRAHAM ALLISON & PHILLIP ZELIKOW, ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS (Pearson Longman 2nd ed. 1999).

²³ Paul Sabatier, *An Advocacy Coalition Framework of Policy Change and the Role of Policy-Oriented Learning Therein*, 21 POL'Y SCI. 129, 148-157 (1988).

²⁴ *The State v. Dosso and another*, [1958] P.L.D. Supreme Court 533. (2013) J. JURIS. 90

renowned expert on public administrative law and philosophy of law and, by the end of World War I, not only was a full professor at the University of Vienna, but was also one of the principle drafters of the post-World War I Austrian Constitution.²⁵ Kelsen was later appointed a justice on the Austrian Constitutional Court, and during the inter-war period gained great renown for the publication of his jurisprudential works, *General Theory of Law and State* and the *Pure Theory of Law*. Following the rise of the Nazi Party, Kelsen left his native Austria for the United States, where he would assume a professorship at the University of California at Berkeley. Kelsen continued his career in the United States until his death in 1973.

A. Norms, Efficacy, and Legality: Kelsen's Theories Explained

In *Pure Theory of Law* Hans Kelsen defined law as consisting of merely a system of interlocking norms. A law was only a law if it was based on a norm, which in turn Kelsen defined as something that controlled action and compelled subjects to behave as the norms required --- in other words, the test for normativity was bindingness.²⁶ Further expanding on this definition in later works, Kelsen further stated that the only source for a norm could be another norm --- history, past social practice, etc. could never qualify as a norm (for how one "ought" to do something cannot logically emerge from how one "is" doing something).²⁷ Given this, Kelsen held that all legal systems could be traced (through their various norms) to the hypothetical *grundnorm*, or *basic norm*.²⁸ Law then was, under the Kelsenian system, both non-moral and internally validated.

Utilizing this definition of law as laid out in *Pure Theory of Law*, Kelsen in his later years attempted to formulate a scientific theory on the origins of law. Exploring this theme in the revised English edition of his work *General Theory of Law and State*, Kelsen claimed that law consisted of two elements: (1) the *basic form* (a new concept); and (2) the *basic norm* (as first outlined in *Pure Theory of Law*). The rule of law simply consisted of a system in which what were purported to be laws in fact were --- nothing more. The *basic form* held that laws consisted of punishments ("delict") to be performed on people if they did not comply.²⁹ Law then as properly understood was simply a direction to relevant

²⁵ Though the post-world War I Constitution Kelsen helped draft is no longer in effect in Austria today, large portions of it inspired the current Austrian Constitution. Kelsen can also be credited with creating the European model of judicial review which, in opposition to its Anglo-American counterpart, sets up a separate court with powers of judicial review (i.e. instead of imbuing courts of general jurisdiction with this power).

²⁶ HANS KELSEN, PURE THEORY OF LAW 3-17 (Max Knights trans., University of California Press 2nd ed. 1967).

²⁷ HANS KELSEN, GENERAL THEORY OF LAW AND THE STATE 408-410 (Anders Wedberg trans., Harvard University Press 1949).

²⁸ *Id.* at 131, 395-396.

²⁹ *Id.* at 50-57.

officials on what punishments they were to inflict on those who did not follow it.³⁰ Following from this conceptual framework, Kelsen then attempted to formulate an understanding of what in fact triggered the demise of one constitutional order and its replacement by another. Kelsen surmised that the criterion for the replacement of an old constitutional order with a new one was whether the new order could: (a) be successful in replacing / overthrowing the old order; and (b) be efficacious in its actions.³¹ It would be the demise of an old constitutional order in Pakistan in 1958 and its replacement by something terrible and new that would thrust Hans Kelsen, or at the very least his theories, back into the world of politics.

B. Kelsen's Theories Put into Action: The Supreme Court of Pakistan and *The State v. Dosso and another*

Pakistan in many ways can be considered an invented country. Carved out of the old British Raj of India, it was designed to serve as a homeland for the sub-continent's Muslims. Native opposition to British rule in the Indian sub-continent had originally centered on the multi-confessional Indian National Congress (INC), which had been founded in 1885 with the modest goal of increasing native participation in the political administration of the British Raj. Eventually the INC would come to gravitate towards demanding the full independence of the Indian sub-continent from Great Britain and take a key role in agitating for this goal. Within a few decades however, growing splits emerged as many of the key Muslim leaders in the sub-continent began to diverge from the demand of an independent united India, and instead called for the sub-continent's Muslim areas to be split off into a separate independent state. Increasingly these Muslim leaders gathered around Muhammad Ali Jinnah, a former member of the INC, and his All-India Muslim League (AIML). By the time the British authorities agreed to grant independence in 1947, the consensus had emerged that the sub-continent would indeed be divided or "partitioned" into two separate independent states, India, and a Muslim homeland to be called Pakistan.³²

Partition, the birth of Pakistan, was a violent and traumatic affair. Huge population transfers of Muslims and Hindus took place, often accompanied by bloody massacres, as many of the sub-continent's Muslims moved into the boundaries of the new Pakistan and vice-versa.³³ Most of the old British Raj's industrial capacity fell within the new state of India, with the result being that the new Pakistan, largely agrarian, was separated from

³⁰ *Id.*

³¹ *Id.* at 41-42, 117-118.

³² The name "Pakistan" is an amalgamation of the five, mainly Muslim majority, northern units of the old British Raj: Punjab, Afghan Province, Kashmir, and Sind-Baluchistan.

³³ Pakistan's 1951 Census put 10% of the 70 million population as refugees. See IAN TALBOT, PAKISTAN: A MODERN HISTORY 101 (St. Martin's Press 1998).

what had been the traditional markets for its raw materials.³⁴ Geo-politically, the new state also faced hurdles, facing a hostile Afghanistan of one flank and an even more hostile India on the other.³⁵ Politically, the new state was robbed of its most capable leader when, Muhammad Ali Jinnah, who had become the country's first Governor-General, died after little over a year in office. Jinnah's death would mark the beginning of a period of deep instability in the new nation. It took fully nine years for the state to promulgate a Constitution amid rivalries and in-fighting amongst various political groups.³⁶ The chief philosophical difference between the political groups rested on the question of whether Pakistan should be a strongly centralized unitary state or a looser federation of quasi-autonomous provinces. Given the multi-ethnic make-up of the new state, this question was an important one.³⁷ The 1956 Constitution centralized power and dissolved the traditional provincial boundaries that had existed at independence in an effort to marginalize the populous province of East Bengal.³⁸ Far from creating any sense of stability however, the re-drawn provincial boundaries created more chaos as political leaders scrambled for control. On October 8, 1958, the President of Pakistan, Iskander Mirza, proclaimed martial law in the country and appointed the head of the armed forces, General Ayub Khan, as the Chief Martial Law Administrator (CMLA). By the end of the month President Mirza himself had been forced to leave Pakistan and Ayub Khan and the Pakistani Army were in full charge of the country.

Under the Martial Law regime put in place in October 1958, the martial law authorities headed by Ayub Khan (as the CMLA) replaced the majority of the elected civilian officials. Federal and provincial parliaments along with political parties were disbanded -- many politicians were also arrested.³⁹ The 1956 Constitution was replaced by Martial Law Regulations, though the Martial Law Regulations charged the new authorities to run the civil institutions of the country, to the extent possible, under the 1956 Constitution.⁴⁰ The Civil Courts, including the Supreme Court of Pakistan, were not dissolved, but their powers were severely curtailed and they were prevented (by the Martial Law Regulations)

³⁴ *Id.* at 96-98.

³⁵ *Id.* at 99. The hostility with Afghanistan stemmed from its refusal to recognize the 1893 "Durand Line" which had demarked the border between the old British Raj and Afghanistan. The hostility with India stemmed from pre-Independence rivalries between the INC and AIML, as well as mutual grievances over the inter-communal violence that had accompanied the partition of the sub-continent and birth of independent Pakistan and India.

³⁶ For a detailed description of this tumultuous period, see PAULA R. NEWBERG, *JUDGING THE STATE: COURTS AND CONSTITUTIONAL POLITICS IN PAKISTAN* 35-68 (Cambridge University Press 1995).

³⁷ NEWBERG, *supra* note 36, at 35-68.

³⁸ The idea was known as "one unit" and was designed to group together all of the provinces in the western half of the country into a new super-province or "one unit" which would then marginalize the power of the populous province of East Bengal. See TALBOT, *supra* note 33, at 143-144.

³⁹ NEWBERG, *supra* note 36, at 72.

⁴⁰ *Id.* at 72-73.

from challenging any ordinances promulgated by the martial law authorities.⁴¹ On October 27, 1958, a mere three weeks after the promulgation of martial law, the Supreme Court of Pakistan was faced with ruling on the legality of the proclamation of martial law and the rule of Ayub Khan as CMLA in the case *The State v. Dosso and another*.⁴²

At issue in *The State v. Dosso and another* were the 1901 Frontier Crimes Regulations (FCR) which regulated governance in the ethnically Pashtun dominated tribal areas (principally the North-West Frontier Province). Prior to the declaration of martial law in October 1958, writs challenging the FCR as contravening Article 5 of the 1956 Constitution had been laid out, and the High Court of West Pakistan had found the FCR in contravention of the 1956 Constitution. In a far reaching decision that went beyond the scope of the original case before it, the Supreme Court of Pakistan, in a near-unanimous verdict (with only one justice dissenting), held that the FCR could no longer be held to be in contravention of Article 5 of the 1956 Constitution as said Constitution was on longer in effect. Relying on Hans Kelsen and his theories of how old constitutional orders were replaced by new ones, the Supreme Court of Pakistan held that revolutions could become, if successful, “law creating fact[s].” As the imposition of martial law was indeed judged to be successful, the abrogation of the 1956 Constitution through the Martial Law Regulations was legal.⁴³

The majority decision in *Dosso*, led by Chief Justice Muhammad Munir, anchored its analysis in *legal positivism*⁴⁴ and, as such, focused its attention on the Constitutional-legal framework of the country. Taking a page from Kelsen’s *grundnorm* or *basic norm*, Munir held that the validity of all laws in a polity could be traced to the “first Constitution” of a state (i.e. its founding principles) and the way in which all other secondary laws followed.⁴⁵ Munir continued his analysis by discussing instances in which constitutional orders are disrupted by revolutions. Such revolutions could be either violent or peaceful and have varied motivations, but the important theoretical question was, according to Munir, what effect the revolution would have on the existing constitutional order.⁴⁶ Munir answered the question in the following manner:

⁴¹ *Id.*

⁴² *Dosso*, [1958] P.L.D. Supreme Court.

⁴³ The specific Martial Law Regulation the Supreme Court considered was the *Laws Continuance in Force Order*, President’s Order No. 1 of 1958 (Gazette Extraordinary, Oct. 10, 1958).

⁴⁴ *Legal positivism* holds that law (as a general ideal) consists of that which has been promulgated (“posited”) by the proper authority. Law is not held to have any timeless or universal principles of note as claimed by, for example, *natural law theory* which holds that here are certain principles inherent to the law itself.

⁴⁵ *Dosso*, [1958] P.L.D. Supreme Court at 538.

⁴⁶ *Id.* at 538-539.

[I]f the revolution is victorious in the sense that the persons assuming power under the change can successfully require the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law-creating fact because thereafter its own legality is judged not by reference to the annulled Constitution but by reference to its own success.⁴⁷

For Munir it was the “efficacy of the change” (i.e. its effectiveness or success) that presumed the revolution’s validity and therefore legitimacy. In making such claims Munir relied totally upon Kelsen and his theories of how old constitutional orders were replaced by new ones. Citing Kelsen’s *General Theory of Law and State* in his opinion, Munir quoted Kelsen’s formulation that legitimacy in legal orders emerged from efficacy and how the criterion for the replacement of an old constitutional order with a new one was whether the new order could: (a) be successful in replacing / overthrowing the old order; and (b) be efficacious in its actions.⁴⁸ Holding that a “successful *coup d’Etat* is an internationally recognized method of changing a Constitution,” Munir justified illegal seizures of power (e.g. a *coup d’Etat*) as legitimate, and indeed legal (if successful) method of political contestation.⁴⁹

The holding forwarded by Chief Justice Munir in *Dosso*, which would come to be known by the shorthand of *revolutionary legality*, would have far-reaching negative consequences for Pakistan’s political development as Ayub Khan’s *coup* would be the first of many military seizures of government. By legitimizing the military’s foray into government, Munir in *Dosso* set the stage for the military’s permanent involvement in the politics of the state. Though certain scholars, most notably Paula R. Newberg, have attempted to “rescue” Kelsen by claiming that Munir in *Dosso* misread Kelsen’s theories on legitimacy in legal orders, these claims fall flat.⁵⁰ Newberg’s main defense of Kelsen is that Munir misread the connection between efficacy and the validity (i.e. legitimacy) of laws that Kelsen had formulated. While it is true, as Newberg points out, that Munir over-emphasized the role of efficacy in creating valid laws, holding it to be an “essential condition,” whilst Kelsen only held it to be a only a “necessary condition,” one cannot draw out from this over-emphasis on the part of Munir in *Dosso* that he misread Kelsen. Kelsen is crystal clear in *General Theory of Law and State* when he states that efficacy is a key component in determining the replacement of one legal order with another⁵¹ ---

⁴⁷ *Id.* at 539.

⁴⁸ *Id.* at 539-540.

⁴⁹ *Id.*

⁵⁰ See NEWBERG, *supra* note 36, at 73-75

⁵¹ Later intellectuals, chief amongst them Joseph Raz, have attempted to correct some of the defects they perceive in Kelsen’s conception of law and legitimacy and the struggle between viewing legitimate authority as morally justified versus viewing legitimate authority as an internal, non-moral, system. See JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 124-147 (Oxford University Press 1979).

indeed Munir was sure to quote the following passage from *General Theory of Law and State* verbatim in *Dosso*⁵²:

No jurist would maintain that even after a successful revolution the old constitution and the laws based thereupon remain in force, on the ground that they have not been nullified in a manner anticipated by the old order itself. Every jurist will presume that the old order --- to which no political reality any longer corresponds --- has ceased to be valid, and that all norms, which are valid within the new order, receive their validity exclusively from the new constitution. It follows that, from this juristic point of view, the norms of the old order can no longer be recognized as valid norms.⁵³

Successful revolutions create their own legitimacy or, to put it in a cruder way, might, if successfully employed, can make right. Kelsen was exploring these ideas and themes on a purely hypothetical basis, but the chain of events that *Dosso* put into place in Pakistan were anything but hypothetical --- they would have terrible long-term consequences for millions of people.⁵⁴

V. The Eternal Intellectual's Dilemma: The Question of Double Offer and Choice

The case of Hans Kelsen and the Supreme Court of Pakistan's ruling in *The State v. Dosso and another* serves as a cautionary tale of what happens when the world of science inhabited by the intellectual is invaded by that of politics. Kelsen's entry into Pakistani politics is even more interesting due to the fact that his entry was an involuntary one. Unlike the models of decision-making described previously,⁵⁵ Kelsen's entry into Pakistani politics was purely involuntary --- his theories were taken by others and used for political ends in ways that Kelsen, the intellectual concerned with hypothetical *grundnorms* and the origin of legal orders, never necessarily intended.⁵⁶

⁵² See *Dosso*, [1958] P.L.D. Supreme Court at 540.

⁵³ See KELSEN, *supra* note 27, at 118.

⁵⁴ It would take nearly fifteen years and the restoration of democracy for the Supreme Court of Pakistan to overturn *Dosso* in *Asma Jilani v. Government of Punjab*, [1972] P.L.D. Supreme Court 139. The Supreme Court, in *Asma Jilani*, ruled that Kelsen's theories on revolutions as law creating facts and the *revolutionary legality* doctrine derived from them in *Dosso* would no longer be valid in Pakistan.

⁵⁵ See *supra* § III.

⁵⁶ It should also be noted that the use of Kelsen's theories on revolutions and their replacement of old constitutional orders was not limited just to the Supreme Court of Pakistan. Both the High Court of Uganda in *Uganda v. Commissioner of Prisons, ex p. Matom*, [1966] E.A. 514, and the High Court of Rhodesia in *Madzimbamuto v. Lardner-Burke* N.O., [1968] 1 R.L.R. 192, used Kelsen's theories in much the same way.

The true intellectual dedicated to science must, in the end, seek to continually expand his realm of knowledge whilst, at the same time, staying away from the realm of politics. Compromise is the expression of the man's rationality, but reaching a compromise with the often destructive forces of politics does not belong to the realm of the rational, and especially not to the realm of the rationality that is produced by the intellect combined with conscience. Has the saying that the intellectuals represent humanity's conscience faded away? Conscience results from morality, the morality of the universal kind, which is the indicator of the true values that mark one as a human being. In the examples of decision-making models presented earlier, the intellectual is given a choice: He is asked, he offers solutions, he builds his knowledge into the mechanisms of power, and this power is mainly built upon ego. An extremely authoritarian regime can be disguised under the democratic cane. This regime can function in only one interest --- its own. The rings of power diffusely rising around its core give only a portion of power. Power, in its essence, aims at its own augmentation. How can one expect to keep others under control except by repression, fear, and manipulative rewards? Modern authorities need scientific information for something like this. The intellectual can enter politics through the examples of decision-making models discussed, but in doing so he compromises himself.

Who is the best possible legal democratic bearer of political power? Is it the one whose name most people are not familiar with? The one who trades wallowing in privileges for strict professionalism, for his own sacrifice so he can contribute to the good of the institution he is running and whose true servant he is? As Mark 10:44 advises: "Whoever wants to be first must be slave of all." Yet unless he can create the core of followers and unless he is the first among the equals, he is, sooner or later, doomed to failure. The compromise itself of entering politics and the world of power is doomed to failure because the intellectual ultimately lacks influence. This is one of the many reasons why people in some communities oppose reform. The conditions of chaos and disorder are good for decadence, and they result from time to time in the need for destruction, decomposition. In such a condition, those who were raised to accept such a pattern of behavior can easily organize to act on the basis of the irrational. In their own representations of auto-suggestive deceit, they represent the irrational as rational. Their cooperation and integration is not based on liking one another, on mutual respect, nor on serving the idea which is the product of the morale of virtue, and which is focused on the well-being of the other. Such people are not capable of understanding such ideas. Evgeny Evtushenko warned us about this by saying: "Since a long time ago I have noticed that the bad people of this world flock together, although they hate one another. In that lies their strength. Good people are alone and that is their weakness."

Conscientiousness does not automatically equal intellect. Top intellectuals put their knowledge, quite legitimately, on the market, where it can be sold it like any other good. This act would not be bad in itself if we knew who the buyer was. Dictators in all

institutional planes need those who know how to manipulate the masses. Scipio Zigele concluded that the psychology of the mob is based on impulsiveness, being prone to violence and suggestion. The psychology of the pack is known in practicing other forms of violence over an individual, which we today dub *mobbing*.⁵⁷ Gustave Le Bon said that the crowd is an organized, and in various degrees continuous, social group. The individuals in the crowd think, work, and feel quite differently that they would do if they were separate from said crowd.⁵⁸ Who is the one that can devise the primary strategy of the psychology of the mob? --- the intellectual.

The issue of conscience and wisdom was not clearly formulated, even by Socrates. Socrates' inner voice is not exclusive when it comes to the balance of wisdom and conscience of an individual or a group. It is the question of choice based on reason --- whether to do something or not, in the way influenced by circumstances, transposed by the mind in the individual or collective consciousness and reflected through conscientiousness. This does not mean that intellectuals should reject conscientiousness altogether, for indeed in the end the true path of the intellectual must be resistance to tyranny. He can choose to fight using his mind and knowledge: by way of uncovering lies and by telling the truth, as well as by taking small or large scale radical action. He can opt for other modes of opposition as well --- even if this means cooperating with the bearers of power and decadence. This strategy can be based on the effort to agree on everything that could be called "common interest" under the guise of the protection of the interests of the powerful. This strategy however is burdened by a multitude of aggravating factors, for both the actor and the result of the action. To get caught and punished without finishing what was intended to be done is the biggest drawback. The subject has to be aware of the limited time and space for action, and do as much and be as efficient as he can in a shortest span of time --- a problematic situation to say the least.

An intellectual should not opt for a political direction. If he is a knowledgeable individual, his politics is the politics of truth in the first place, and he has the ability to state this truth in due course to the right people, as C. Wright Mills stated. These words explain then that the best guidelines intellectuals should follow is a political option of the mind and consciousness.⁵⁹ In the end, the true role of the intellectual, the only role, is to speak truth to power.

CONCLUSION

The more knowledge one possesses the more hindrance. In this sentence lies the crux of one of the series of paradoxes of modern civilization. If there is no will to achieve the

⁵⁷ GUSTAV LE BON, *PSIHOLOGIJA GOMILE* 9-11 (Živan Živanović trans., Algoritam 2005).

⁵⁸ *Id.*

⁵⁹ MILLS, *supra* note 10, at 5-27.

irrational and problematic compromises that have been discussed throughout this Article, then the power of knowledge leads to the objective social lack of power. This tragedy of the intellectual is not a matter of personal experience --- it is the reflection of objective circumstances on which a society is based on. The system of organized irresponsibility, typical for modern society, is fed by and maintained partially by verified and confirmed scientific information. This is one option out of the two possible ones, but this does not mean that by making a choice the intellectuals become bearers of real social power. No, they put their knowledge at disposal the fundamentals of power in a society.⁶⁰ Modern society is awash in illusions offered to the public at large. Some of them are quite well known, others more hidden. Regardless, those who seriously dedicate themselves to science know that these are mere illusions. Those who silently or explicitly confirm these illusions rather than try to discover the truth about them take away freedom from their very own minds, and without freedom there can be no true science.

⁶⁰ ZORAN NIKOLIĆ, MILSOVA KRITIČKA SOCIOLOGIJA 48 (NDS 1998).
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