Hans Kelsen is widely acknowledged as one of the master thinkers in modern positivist legal theory. Some scholars have classified him as a fundamental opponent of sociology in general and the sociology of law in particular. However, one can make a case to include Kelsen among sociolegal scholars.

Born in Prague, Kelsen was the son of Jewish parents and thus had to overcome the usual animosities against Jews before he became a full professor of public law at Vienna University in 1919. On invitation from the socialist chancellor Karl Renner (1870–1950), he drafted the Austrian Constitution of 1920 and became a judge on the new Austrian Constitutional Court. In 1930, Kelsen accepted a professorship at the University of Cologne.

Sacked by the Nazi government in 1933, he took a job at the Institut Universitaire des Hautes Études in Geneva, where in 1934 he finished his programmatic Reine Rechtslehre (Pure Theory of Law). A brief interlude at Prague University (1936–1938) was marred by violent Nazi student protests. In 1940, he accepted a Rockefeller Foundation grant and worked at Harvard Law School. When the Foundation did not renew the grant in 1942, Kelsen secured another temporary position as visiting lecturer in political science at the University of California at Berkeley. That university finally approved his appointment as full professor in the Political Science Department in 1945, where he stayed until his retirement in 1952.

Kelsen's work spans legal theory, constitutional law, and international law, but as Oscar Correas notes, it also includes important contributions to the social sciences. This latter work is a quest for clarity and methodological rigor. Kelsen held that a truly scientific analysis of the law should be purified from ethical and political criteria. This puts him in an anti-metaphysical and anti-ideological camp, together with Max Weber (1864–1920), Theodor Geiger (1891–1952), and many other social scientists.

Nevertheless, Kelsen also insisted on keeping sociological and psychological considerations out of legal analysis. This latter position was based on his neo-Kantian belief that the law (along with ethics, grammar, and so on) belongs to the realm of the “Ought.” As such, it requires an epistemology different from that of the sciences of the “Is.” This seeming formalism led inevitably to conflict with some of the early sociologists of law. In a review of Eugen Ehrlich's now classic Fundamental Principles of a Sociology of Law (1913), Kelsen took Ehrlich to task for “syncretism of methods” and claimed that sociology could only deal with norms in general but not distinguish legal norms from other norms.

Kelsen's stance was and is ignored or rejected by most sociologists of law. A notable exception to this situation was Renato Treves (1907–1992), who maintained that Kelsen “has identified and defined the nature and the object of empirical sociology of law with more precision than the founding fathers of this discipline” (Correas 1989: 195). Kelsen was indeed not inimical to an empirical sociology of law, as long as it did not claim to be the only true science of law. Moreover, Kelsen's work—the logical reconstruction of the state's legal order in his Pure Theory of Law (1967) and his posthumously published General Theory of Norms (1991), even though more skeptical of the enterprise—may even be seen as a (formal) sociology of law in its own right.

See also
Constitutional Courts; Ehrlich, Eugen; Geiger, Theodore; Kelsen and Legal Sociology; Positive Law;

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Further Readings


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