

rudimentary belief in the value of order between states; an order beyond moral hypocrisy, double standards, and Great Power instrumentalization of the law.

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Mónica García-Salmones Rovira. ***The Project of Positivism in International Law***. Oxford: Oxford University Press, 2013. Pp. 448. £70.00. ISBN: 9780199685202.

That positivism is not the promised land of legal methods has become a truism among critical international lawyers. All too often the proclaimed objectivity, neutrality and science has turned out to be intertwined with ideology and domination. In line with the historical-economic turn of the Helsinki school, Monica García-Salmones Rovira's book *The Project of Positivism in International Law* finds the historical roots of positivism deeply embedded in the development of a global neo-liberal economy. The economic foundations of the method are unearthed with two intellectual biographies of its founding fathers, Lassa Oppenheim and Hans Kelsen, whose life projects have so far escaped critical scrutiny. The book weaves into these two biographical studies the story of international law as a pragmatist and scientific project that freed the discipline from the tradition of natural law to become a servant of global economic interests.

Lassa Oppenheim is known as a representative of the British tradition and one of the most progressive international lawyers of the era before World War II. His biography illustrates how particularly the lawyers of the Empire answered to a specific demand: the need for law and adjudication in the light of a growing global economic interdependence. In terms of method, García-Salmones Rovira describes how Oppenheim could paradoxically argue for an international society and the principle of the balance of power, simply by stripping his legal method of philosophy and replacing it with the content-independent notion of progress (at 48). In the English tradition of liberal political thought, it was the power of interest per se that could create an international community, a community with its roots in commerce and free trade (at 67): 'Interests claimed monopoly over normativity, interests being at the centre of the theory and the measure of the ethical value of the legal enterprise' (at 73). Political problems merely played a disruptive role for the progress of the family of nations. Still, Oppenheim had a preference for constitutionalism and democracy (at 111). He argued, however, for a specific coupling of private and public interests in the course of the colonialist enterprise. For example, he claimed that native tribes did not have a place in international law but, paradoxically, granted private companies permission to acquire territory and sovereignty (at 105). Oppenheim, in the author's words, 'managed to be both a formalist, whose aim was to reduce patches of law to a system, and a pragmatist in pursuit of utilitarian interest' (at 119).

Legal science and economic pragmatism hit the spirit of the Empire, and Oppenheim was at the centre of the modernization of international law. Still, through the negligence of philosophy, his method was not convincing. Crucial for his scientific endeavour was the origin of rules, and García-Salmones Rovira argues that this is where his method ultimately fails: '[T]he test of whether a rule was a legal rule was whether a rule had been recognized. But to gain that knowledge one would need to inquire whether the Family of Nations had recognized it as a legal rule, which was exactly what we [the international lawyers] were searching for' (at 117). Oppenheim's methodological failure – the *fondement mystique* – paves the way for the Copernican turn in positivism in the person of Hans Kelsen. This second intellectual biography occupies the greatest part of the book. Some references to Oppenheim are made, but still one cannot fail to see that this book is for the most part aimed at a demystification of Kelsen. And this treatment

of Kelsen is an argumentative masterpiece. The author dives so deeply into his personality, his life choices and his philosophical and sociological studies that one is tempted to think that she knows him better than he knew himself. The analysis of his thought is so detailed that it is in part quite hard to follow. Sometimes one gets lost, and one is tempted to ask what purpose all of the little details of Kelsen's life serve for the author's argumentation. However, a few pages later, the author manages to masterfully weave together her lines of argument, and the temporary confusion is replaced by admiration for the complexity of her argument.

In order to unearth Kelsen's hidden economic positivism, García-Salmones Rovira places her reading of Kelsen in the Austrian liberal intellectual circle, in which he flirted with neo-liberalism. Whereas for Oppenheim economic positivism is a clear political preference, the case for Kelsen is more complicated. Kelsen did not have an open political inclination towards economic unity. To the contrary, his thought was a project of dominant epistemology and the fight against such ideologies in law. Still, for García-Salmones Rovira, it is his economic perspective on political life through which one can approach his universalist thinking: 'The most authentic experience that Kelsen observed, in political, economical, and sociological life, was that individuals or states were constantly struggling for their interests' (at 129). Pure law liberated from ideology would not substantively impact the struggle and, at the same time, channel the interests into the legal system by technical judicial decisions: 'Thus, for Kelsen, jurisprudence as a science would be concerned only with questions *de lege lata*. Arguments *de lege ferenda* – that is, legal political questions that contained evaluations of law – would not be a true science in the Kelsenian sense' (at 137). The law thus becomes a medium with an empty normativity as a scientifically based concept (at 143). The fetishism with objectivity and neutrality in the struggle of social forces was thus grounded in Kelsen's epistemology (we cannot know what is good) and his constant fight against ideology. The epistemological dualism between *Sein* and *Sollen* necessarily translates in Kelsen's mindset into legal monism – and the political project of the primacy of international law. This project, after all, should guarantee peace through economic interdependence. The struggle between interests should not be solved by constant political discourse but, rather, by a formalist, administrative apparatus. As García-Salmones Rovira shows, this process leads to an understanding of law detached from reality – an anti-transcendental medium that grounds its competence in territory rather than in the people.

Remarkably, the author's relationship to Kelsen constantly oscillates between admiration and disagreement. Most clearly, she disagrees with the epistemological project. Right in the introduction, she makes clear that she uses a philosophical realist method. When Kelsen is constantly renouncing the metaphysical, and, with it, the possibility for humanity to recognize what constitutes a good life, her method 'emphasizes the possibility, indeed the fact, that we human beings have knowledge of the world in which we live' (at 12). Since he fails to take into account the complexity of humanity in technically isolating the individual, he produces 'a formality without soul' (at 16). Consequently, it is the challenge of the last part of the book to argue that this epistemological project ultimately fails because there is no law without substance – instead, positivism brings about a market of the social forces that has no place for concepts of humanity. The methodological individualism does not provide for Kelsen's universal community that considers that 'each inhabitant of the planet is a legal subject with equal rights [that] must be considered in the perfect cosmopolitan legal order' (at 331). Instead, the project of 'individualism is an understanding of human beings that distorts reality, among other reasons, because it underestimates the political capacity of human beings' (at 360). Since interests are always defined in economic terms, they undermine a common human project.

While this diagnosis is hard to deny in light of the global economic crisis, whether this critique can be used constructively depends on a credible alternative. García-Salmones Rovira presents the work of Carl Viktor Fricker, whose book *Das Problem des Völkerrechts* incorporates a more humane standpoint based on the sociability of human beings (at 315). According to her, Fricker

does not isolate the individual but, rather, perceives it as ‘totality, over which the true foundation of international law had to be established’ (at 318). She claims that this project ‘might reflect the idea that the progress of culture diminishes the divisions caused by space; that the need to share the benefits of culture is embedded in the sociability of human beings’ (at 320). It is somehow unfortunate, but to the same extent understandable given the length of the book, that with these lines the treatment of Fricker ends. I would have liked to read more about an alternative model of international law since that is precisely where things have become difficult in theory so far. Culture is to some extent not more than ideology, and ‘the culture of formalism accepts that the translation of every voice to the ideolect so as to give it a fair hearing may not always succeed. But it insists that absent the possibility of building human life on unmediated love or universal reason, persuading people to bracket their own sensibilities and learn openness for others, is not worthless’¹ Surely, one can argue for a balanced positivism, but who is going to define what this balance is?

The main message of this study is that positivism is inevitably a political project for political ends, and the book succeeds in showing the economic blind spot in international law literature about Kelsen. However, what does this critique lead us to? Next to the meaning of politics as concrete struggle – *la politique* – it stands for another meaning, namely that of the political essence that is connected with the sociability García-Salmones Rovira is missing – *le politique*. The apolitical, scientific law Kelsen wanted to bring about seems crucially political in the second sense – that it allows for emancipation in the form. It might be the case, and I would follow García-Salmones Rovira’s argument here, that the emancipatory potential of formal law comes with a market of the social, necessarily with an alienated individualistic methodology and maybe a preference for neo-liberal capitalism. Nevertheless, the notions of community and the metaphysical that García-Salmones Rovira suggests always raise the question about who determines what kind of culture is the recipe for justice? This question is why I hesitate to share the critique of empty positivism, even though to my knowledge nobody has argued it so convincingly before. What clashes here are models of emancipation: rights encountering laws. Both might have their downsides, and many of the connected difficulties are highlighted in this book.

Hopefully, this book will find the readership it deserves, and there will be more books of this kind in the future – intellectually challenging, well researched and with a concise and personal message. The book is not only a reconstruction of Oppenheim’s and Kelsen’s thought but also a very intimate insight into the personal struggle of García-Salmones Rovira with their work. I would be interested to read more of Fricker and the model of human sociability as an alternative to the formalist method of international law. This book is an exciting debut in international legal theory and a great composition – it contains a love and commitment to the discipline of international law.

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¹ M. Koskeniemi, *The Gentle Civilizer of Nations* (2004), at 501–502.