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The Politics of Interest in International Law: A Rejoinder to Jörg Kammerhofer

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I am very grateful to Jörg Kammerhofer for his engagement with my text. Not only does he know Kelsen's main writings on legal theory very well, but he is himself a Kelsenian scholar.[1] One is led, therefore, to speculate on the extent to which his reply comes close to what Kelsen himself would have written in respect of my article, and more generally in respect of the book on which it is based.

Despite its being a very different debate as to its content, I was reminded of another exchange of views, which took place almost a century ago, when reading his reply. I refer to the controversial exchange between Hans Kelsen and Eugen Ehrlich, on the occasion of the former's review of Ehrlich's *Foundation of the Sociology of Law* (1913).[2]

With characteristic sharpness Kelsen's review dismissed the whole of Ehrlich's project. He asserted that a sociology of law in the manner Ehrlich proposed it was impossible, without quite disclosing the grounds on which he based such a forceful critique. Instead, Kelsen had recourse to an argument about Ehrlich's 'syncretism of methods' and, despite his text running to almost 40 pages in length, he refused to engage with Ehrlich's work on its own terms.[3]

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1 See J. Kammerhofer, *Uncertainty in International Law. A Kelsenian Perspective* (2011), generally and at xii–iii.

2 Kelsen, 'Eine Grundlegung der Rechtssoziologie', 39 *Archiv für Sozialwissenschaft und Sozialpolitik* (1915) 839; Ehrlich, 'Entgegnung', 41 *Archiv für Sozialwissenschaft und Sozialpolitik* (1916) 844, at 847, 849; Kelsen, 'Replik', 41 *Archiv für Sozialwissenschaft und Sozialpolitik* (1916) 850; Ehrlich, 'Replik', 42 *Archiv für Sozialwissenschaft und Sozialpolitik* (1916/17) 609; Kelsen, 'Schlusswort', 42 *Archiv für Sozialwissenschaft und Sozialpolitik* (1916/17) 611.

3 'Eine Grundlegung', *supra* note 2, at 841. Kelsen concluded his review with the following words: '[t]here can be no doubt that Ehrlich's attempt to produce a foundation for the sociology of law has failed completely': at 876. More than 50 years later, Kelsen regretted his radical negative appraisal: 'just recently Kelsen has remarked that he was unjust at that time with Ehrlich. He was sorry that due to his fierce polemic he had barred the way for the recognition of Ehrlich and of the sociology of law': Rottleuthner quoting M. Rehbinder's *Die Begründung der Rechtssoziologie durch Eugen Ehrlich* (1967), in Rottleuthner, 'Rechtstheoretische Probleme der Soziologie des Rechts. Die Kontroverse zwischen Hans Kelsen und Eugen Ehrlich (1915/1917)', in W. Krawietz and H. Schelsky (eds), *Rechtssystem und gesellschaftliche Basis bei Hans Kelsen, Rechtstheorie*, bk 5 (1984) 521, at 547.

At the end of his rejoinder, Ehrlich complained that 'Kelsen's critique gives absolutely no idea of the actual content of my book'.[4] I felt the same absence of engagement with my wider argument in Kammerhofer's text, and although I understand both Kelsen's and Kammerhofer's standpoint in protecting their particular project, I cannot fail to point to the limitations, not to say narrowness, of their method. In particular, the method used in the exposition of their arguments misleadingly denies that jurisprudence, especially international jurisprudence, has an impact on reality, and that like any other science it contributes to explaining reality.

As to 'translations' and 'context', Kammerhofer is convinced neither by my translations nor by my reading of Kelsen's text. In this respect, he refers to a problem he terms 'context insensibility',[5] while at the same time failing to accept Wolfgang Kraus's translation, which was approved by Kelsen himself.[6] Does this mean that he is becoming more Catholic than the Pope? For my part, I am afraid that I am equally uneasy with his translations and contextualizations. Let me for the sake of brevity simply take the very example Kammerhofer uses – the quotation from Kelsen's *Die philosophischen Grundlage der Naturrechtslehre und des Rechtspositivismus*:

> The question, however, of how the content of the positive legal order comes about [in fact], which are the [socio-political] factors which cause the content to take this form, is already part of a different, alien [scholarly] method, a method which does not aim at the cognition of a normative order in its validity as Ought. If this [other question] is asked, we will hardly be able to avoid the – not very telling – insight.

And he comments:

> At this point, the passage cited by García-Salmones begins. It is clear that the 'not very telling … insight' that is to follow can thus *not* serve as basis for the legal theory discussed.[7]

I can accept Kammerhofer's translation up to a point, although he has omitted the word 'answer'. Here is mine:

> If this [other question] is asked, we will hardly receive any other answer than the [following] – not very telling – insight: every legal order, with its necessary level of efficiency bound to its condition of positivity … represents a balance of groups of interests opposed among themselves, which strive to attain power; that is to say, to achieve the inner configuration of the social order. These social forces appear in their struggle for power always behind the mask of *justice* and always avail themselves of the ideology of *natural law*. They act by no means as what they really are, as mere factional interests (*Gruppeninteressen*), but pretend to represent the 'true' (interest), which if not recognised actually by everyone as such, appears indeed as the 'well-understood' *common interest*.[8]

4 Ehrlich, 'Entgegnung', *supra* note 2, at 849.

5 See Kammerhofer, 'The Politics of Interest in International Law: A Reply to Mónica García-Salmones Rovira', this issue, at 796.

6 As is evident from the Preface to H. Kelsen, *General Theory of Law and State* (1945), at xviii.

7 Kammerhofer, *supra* note 5, at 797.

8 However, I am thankful that Kammerhofer pointed out the inadequacy of rendering '*wohl verstandene*', as 'elegantly'. When I checked this translation, I discovered what might be an ironic reference to Kant's famous 'well-understood self-interest': see I. Kant, *The Conflict of the Faculties* (trans. and intro. M.J. Gregor, 1992), at 167. More intriguing in terms of the increasing importance of the notion of interests is the fact that in the original Kant used the words '*aus wohlverstandenen eigenen Vortheil*'; that is, 'from well-understood self-advantage': I. Kant, *Der Streit der Fakultäten* (1798), at 157.

Kelsen's statement that 'the question of how the content of the positive legal order is brought about' ('*Die Frage, wie der Inhalt der positiven Rechtsordnung zustande kommt*') has, in Kelsen's own words, 'no other answer' ('*kaum eine andere Antwort*') than the one that he spells out in the previous paragraph. That Kelsen found that that answer was, as an insight, not very telling simply confirms my argument. On the one hand it shows that Kelsen took that answer for granted; while for others the debate starts precisely with the attempt to provide an answer to that question. On the other hand, it helps to show that Kelsen had a reply to the question of content readily to hand, dispelling the myth that he was oblivious to the content of law and only concerned with 'ought' questions of legal science. Similar quotations, views, and themes appeared throughout Kelsen's entire *oeuvre.*

The aim of my project was to make a comprehensive study of Kelsen's work, and more generally of international positivism, *not* by adopting a method of 'separating the principled opposition of *Sein* and *Sollen*, content and form',[9] but rather by using the opposite method: through 'a study of the content and of the form of positivist international law'.[10] This method led, among other things, to the finding that Kelsen partook of a tradition of interests that has been very influential in the history of modern European public law, and that he was possibly its last great representative. At the outset of the research this finding was unexpected, and now it deprives Kelsen of nothing but an obscure air of mysticism.

[9] H. Kelsen, *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze* (1911), at v.

[10] M. García-Salmones Rovira, *The Project of Positivism in International Law* (2013), at 1.