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# The Politics of Interest in International Law: A Reply to Mónica García-Salmones Rovira

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## Abstract

*In this response to Mónica García-Salmones Rovira's article 'The Politics of Interest in International Law', the argument is developed that an interpretation of Kelsen's legal theory as founded on 'interests' or 'conflicts of interests' is not adequately supported by the primary materials, if read in their context. 'Interests' do not play a major role in Kelsen's writings, and where they are discussed, they do not form part of his legal theory, i.e., the Pure Theory of Law. This response argues that this 'context insensibility' in reading Kelsen may have its roots in the unwitting adoption of one over-arching method of scholarly cognition. It thereby implicitly discards one of the crucial axioms of Kelsen's theory of scholarship: the avoidance of a syncretism of methods through a consistent separation of scholarly enterprises and methods. Not to adopt such a separation is a legitimate stance; to foist the non-separation on an author whose theory hinges upon it is not.*

## 1 Introduction

Mónica García-Salmones Rovira is a scholar whose breadth of learning is such that we can expect truly innovative scholarship at the highest level. And, indeed, the idea in 'The Politics of Interest in International Law' of a tradition of interest positivism in early 20th century international legal scholarship is remarkable and new.<sup>1</sup> In this response I will focus on Kelsen, not on Lassa Oppenheim and Philip C. Jessup, but I do not wish to act as apologist for Kelsen either; there is plenty to criticize in Kelsen's *oeuvre* and I have repeatedly done so.<sup>2</sup> Instead, I will seek to point to instances where

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<sup>1</sup> See also M. García-Salmones Rovira, *The Project of Positivism in International Law* (2013).

<sup>2</sup> E.g., Kammerhofer, 'Kelsen – Which Kelsen? A Re-Application of the Pure Theory to International Law', 22 *Leiden J Int'l L* (2009) 225; J. Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (2010).

García-Salmones Rovira's interpretation of Kelsen is not supported by primary materials, and I will attempt to provide an explanation as to why this is so. In a nutshell, my argument is that her reading of Kelsen's *legal theory* – using that term as a restriction to my inquiry – cannot be upheld, because the evidence we have available is too weak to allow us to say that it is grounded in a politics of (the collision of) interest(s). The opposite thesis can be developed using the same evidence: once replaced in its context, the evidence presented is such that it warns us against reading Kelsen's legal theory as being influenced by a philosophy of 'interests'.

Following Matthias Jestaedt's and Oliver Lepsius' exhortation, García-Salmones Rovira rightly sets herself the task of not succumbing to a *Schlagwortjurisprudenz*,<sup>3</sup> a 'jurisprudence of key words' (at 781). The two German scholars remind us that any interpreter of Kelsen should proceed 'on the basis of an in-depth study of his works',<sup>4</sup> rather than on the basis of words taken out of their context. 'The Politics of Interest' is full of references and citations to a wide range of Kelsen's works; clearly, the author has been extraordinarily thorough in her search, and she must be commended for a very high level of scrutiny of the primary materials. However, one might wonder how much García-Salmones Rovira read into Kelsen what she wanted to say in the first place. My uneasiness with her interpretation can be formulated in this way: while the references and citations *prima facie* seem to support García-Salmones Rovira's thesis, no Kelsen specialist has ever read Kelsen in that way. And this is less because we all allegedly share that *portmanteau* stigma of critical scholarship: a 'liberal' agenda. No, it is because a close analysis of the citations and sources in this text reveals that hardly any of these – when read in their context – are capable of filling the *Schlagwort* 'interest' with the meaning the author ascribes to them. Yes, the word '*Interesse*' and the phrase '*Interessenkonflikt*' do occur from time to time in Kelsen's works, but not in this central and meaningful way, not as part of his legal theory and certainly not as its very foundation.

## 2 A Context-Insensible Kelsen Interpretation

The problem, as I see it, could therefore be termed 'context insensibility'. As scholars, we are all familiar with the problem of quoting out of context. As lawyers, we refer to Article 31 VCLT, which gives us several *strata* of context to work with in the interpretation of treaty texts. The same applies to Kelsen's writings: his sentences have to be read in light of the structure of the text or even whether it is a work of legal theory, of sociology, or of political philosophy. Accordingly, I have carefully looked at each of the references and citations to Kelsen's works in 'The Politics of Interests'. Of course, some of these references are such that legitimate disagreement about their interpretation can exist. However, a number of these are, I submit, too context-insensitive to serve

<sup>3</sup> Jestaedt and Lepsius, 'Der Rechts- und der Demokratietheoretiker Hans Kelsen – Eine Einführung', in M. Jestaedt and O. Lepsius (eds), *Hans Kelsen: Verteidigung der Demokratie: Abhandlungen zur Demokratietheorie* (2006) vi, at xvii.

<sup>4</sup> '[A]uf der Grundlage einer eingehenden Auseinandersetzung mit dessen ... Schriften': *ibid.*, at xvii (my translation).

as proof of García-Salmones Rovira's contention. None of the passages referred to are such that they support her thesis unequivocally. Two examples of the contextual *problematique* will be presented *pars pro toto* below.

(1) *Intra-Textual Context*. Perhaps the clearest instance of a context which would change the results of García-Salmones Rovira's interpretation had it been taken into account can be found at note 95. A citation from Kelsen's *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus* (1928) is introduced thus: '[n]o, for Kelsen the social and the political was *always* a struggle. ... The function of law was to channel that struggle by an activity of balancing the different interests' (at 786–787); this is followed by a translated piece of Kelsen's text:

Every legal order ... represents a balance of groups of interests opposed among themselves, which strive to attain power ... These social forces ... act by no means as what they really are, as mere factional interests (*Gruppeninteressen*), but pretend to represent the *truth*, which if not recognised actually by everyone as such, it is nevertheless *elegantly understood*, as *common interest*. (at 787)<sup>5</sup>

Apart from the citation containing two minor translation errors,<sup>6</sup> the text above the cited passage sheds a different light on what Kelsen meant by this. Kelsen introduces the sentences cited by García-Salmones Rovira thus:

[Legal positivism] abstains from following any political interests ... and pretending to interpret the law ... This does not mean that the critical positivist [scholar as human being] cannot be aware of the fact that the content of the legal order which he cognises [as legal scholar] is the result of political efforts. 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:<sup>7</sup>

At this point, the passage cited by García-Salmones Rovira 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. On Kelsen's view, then, from the perspective of a social or political

<sup>5</sup> '[D]aß jede Rechtsordnung ... einen Ausgleich zwischen den einander entgegengesetzten, um die Macht ... ringenden Gruppen-Interessen darstellt. Diese sozialen Kräfte ... geben sich keineswegs als das, was sie wirklich sind, als bloße Gruppeninteressen, sondern als das "wahre", das, wenn auch nicht von allen tatsächlich eingesehene, so doch als das "wohl verstandene" *Gesamt-Interesse* aus': H. Kelsen, *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus* (1928), at 67–68 (translation by García-Salmones, shortened by me; a different translation of this text is included in: H. Kelsen, *General Theory of Law and State* (1945), at 438–439).

<sup>6</sup> Not 'the truth', but 'the real ... common interest'; not 'elegantly', but rather 'correctly understood as'.

<sup>7</sup> '[D]aß [der juristische Positivismus] darauf verzichtet, unter dem Vorwande der Interpretation des positiven Rechtes ... irgendwelche politische Interessen zu realisieren ... Das hindert nicht, daß sich der kritische Positivist durchaus bewußt bleibt, wie sehr der Inhalt der von ihm zu erfassenden rechtlichen Ordnung selbst nur das Ergebnis politischer Bestrebungen ist. Die Frage, wie der Inhalt der positiven Rechtsordnung zustande kommt, welches die diesen Inhalt ursächlich bestimmenden Faktoren sind, liegt freilich – methodisch – bereits außerhalb einer auf dieses nun einmal gegebene Normensystem in seiner Soll-Geltung gerichteten Erkenntnis. Wird sie gestellt, dann ergibt sich kaum eine andere Antwort als die – nicht sehr vielsagende – Einsicht': Kelsen, *Grundlagen*, *supra* note 5, at 67 (my translation; less precise translation at: Kelsen, *General Theory*, *supra* note 5, at 438).

science the statement that follows may be valid, but it is so independently of the Pure Theory's very different focus. This reading of the passage – an *obiter dictum* on the possible factual/political motives that underlie law-creation in modern western societies in what is otherwise a text about legal-philosophical and legal-theoretical *topoi* – is thus much closer to Kelsen's basic commitment/scholarly ethos of avoiding the syncretism of methods in scholarship<sup>8</sup> than García-Salmones Rovira's syncretistic one. The Pure Theory of Law is, as Kelsen points out, not a theory of 'pure law' (at 769), but a theory that seeks to 'purify' (separate) the method(s) used.<sup>9</sup>

But this seemingly small point about semantics lays bare a much more central problem with the author's narrative. 'Pure law' and 'pure theory' are confused, because García-Salmones Rovira consistently conflates law and legal science. She assumes that Kelsen wants to purify the object, rather than the method, e.g.: 'positivism ... seeks a strict separation of law from reason, morality and political ideologies and realities' (at 770). There is hardly a distinction in Kelsenian theory which is more crucial. Negating this distinction for one's own scholarly enterprise, e.g., by announcing that one's focus is on legal discourse,<sup>10</sup> is legitimate. To foist the premise on Kelsen that law and legal science are not separable is not.

To understand Kelsen's positivism as seeking to purify *law* – not legal science – from morality and thus to be near-necessarily reduced to interests supposes a binary structure (if not metaphysics then facts), e.g.: 'to undermine the work of law so as to make it incapable of justice, and to transform that law into an arbiter between interests' (at 784). This is but an expression of a more traditional question of legal philosophy: the search for an ultimate foundation for law. Thus, yet another premise is foisted on Kelsen. The key to understanding the Pure Theory of Law is that it is not another attempt to find a foundation for law in something else, neither in a cosmos of absolute values nor in facts. Kelsen's theory is not reductivist; instead, he aims at the *Aufhebung* of these traditional antagonists.<sup>11</sup> The solution is a Copernican revolution of legal/norm-theoretical thought: validity is not founded in any meaningful substantive sense, but the conditions for the possibility of cognition of law/norms are explored; a shift from ontology to epistemology.

(2) *Extra-Textual Context.* We also find citations from texts which are part of different scholarly enterprises. Kelsen was, after all, working not just on legal theory, but also

<sup>8</sup> I have elsewhere sought to explain this aspect of the Pure Theory of Law: e.g., Kammerhofer, 'Hans Kelsen's Place in the Theory of International Law', in A. Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law* (2011) 143, at 143–148; Kammerhofer, 'Orthodox Generalists and Political Activists in International Legal Scholarship', in M. Happold (ed.), *International Law in a Multipolar World* (2011) 138, at 154–157.

<sup>9</sup> H. Kelsen, *Reine Rechtslehre* (2nd edn, 1960), at 1.

<sup>10</sup> See M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989; re-issued 2005).

<sup>11</sup> Kletzer, 'Absoluter Positivismus und Normativer Monismus: Zur Idee einer Reinen Rechtslehre', in C. Jabloner et al. (eds), *Gedenkschrift Robert Walter* (2013) 256, at 259: '[v]ielfach sagt Kelsen ganz im Sinne der Kant'schen Auflösung der Antinomie, dass beide Thesen Ausdruck desselben fehlerhaften Zugangs zum Recht sind. Beide nehmen das Recht als das Derivat von etwas anderem.' 'Rather, Kelsen demonstrates, quite in line with the Kantian resolution of the Antinomy, that both theses are expressions of the same erroneous approach to the law. Both take the law to be derivative of something else' (Kletzer's translation).

on the theory of democracy, on political theory, on sociology, and on other topics. The problem is that these texts now serve to prove ‘interests [as] the foundation of Kelsen’s positivism’ (at 781), despite Kelsen’s exhortation to keep methods and scholarly enterprises apart.<sup>12</sup> One example of this can be found at notes 24 and 82. Kelsen writes, ‘The living together of individuals, in itself a biological phenomenon, becomes a social phenomenon by the fact of being regulated’.<sup>13</sup> This is connected in García-Salmones Rovira’s narrative to a claim about individualism. The first time this sentence is quoted, it serves as proof of the following assertion: ‘in their treatment of the notion of “interests”, 20th century legal positivists no longer analysed how self-interest constructed society. Despite their individualism they took society for granted, as a historical or biological fact’ (at 769). The second time, the same sentence is used to support the following statement: ‘Kelsen’s starting-point for constructing the legal theory founded on interests was his extreme individualism. ... But Kelsen’s individualism is complex because it lies in the realm of the normative sciences, and not in nature’ (at 784).

This is taking too much liberty with this sentence; it does not prove what García-Salmones Rovira wants it to *in concreto*. Nor, *in abstracto*, can this serve as proof of a feature of Kelsen’s legal theory, let alone of its foundation. The problems *in concreto* are perhaps best seen in the sentence immediately preceding note 24, as Kelsen quite plainly does not write in this text that society is a ‘biological fact’ (emphasis mine), which is then taken ‘for granted’. Rather, the living together of individuals may be perceived both as biological and as social *phenomena*. Kelsen is quite unconcerned with ‘facts’, but with the perception of phenomena through different lenses. Since his epistemology includes the (neo-Kantian) idea of the constitutive effect of different methods of enquiry – which the author acknowledges later (at 783, note 74) – these two modes will result in different objects. Thus, nothing could be further from Kelsen’s mind than to take society *only* as a biological fact, and it is more than a little tendentious to read the sentence in this manner. Besides, it is in any case not operable ‘despite’ Kelsen’s individualism, but because of it. The very next sentence in Kelsen’s text makes this clear (and insofar the citation is again selective): ‘society is the ordering of the living together of individuals’.<sup>14</sup>

But the problems of this specific quotation pale in significance with the larger point: the text from which García-Salmones Rovira cites is entitled ‘The Law as a Specific Social Technique’. Despite its publication in the *University of Chicago Law Review*, it is not a legal (or legal-theoretical), but a *sociological* text. It was not written as a contribution to the Pure Theory of Law, but as one belonging to a different enterprise. One can regret that García-Salmones Rovira did not investigate Kelsen’s sociological enterprise on its own terms, but even if a sociological text (such as this one) contains traces of legal-theoretical argument, this does not mean that the two methods are intermingled (see below). This is the context, and not to heed it can only lead to an interpretation which does not accord with the foundations of the Pure Theory.

<sup>12</sup> Kelsen, *supra* note 9, at 1.

<sup>13</sup> Kelsen, ‘The Law as a Specific Social Technique’, 9 *U Chicago L Rev* (1941) 75, at 75, reprinted in H. Kelsen, *What is Justice? Justice, Law, and Politics in the Mirror of Science* (1957), at 231.

<sup>14</sup> *Ibid.*

### 3 Taking Kelsen's Plurality of Methods Seriously

There is ample evidence in 'The Politics of Interests in International Law' for the contention that García-Salmones Rovira assumes an admixture of methods. For example, '[f]rom the foundation of this economic and economic-biological notion of man ... Kelsen developed a theory of law' (at 787); '[t]he key to understanding Kelsen's universalist thinking is to interpret it as an outcome of his economic view of political life' (at 784); or 'if one does not accept his political, ontological, and epistemological premises in the observation of reality ... the normative side of the theory does not make sense' (at 788).

This text makes an argument about the content of a particular legal theory. The author does so, however, by arguing that we can know something about field A by looking at field B; she could also be arguing that field A is identical to field B. Neither presupposition is shared by Kelsen. The question is whether one can give an interpretation of an author's work while ignoring fundamental axioms of that author's theory of scholarship. This may be a hallmark of critical scholarship, expressed in the idea that (a very wide understanding of) politics dominates everything.

Here is the rub and perhaps also the main reason why Kelsen's writings have such a different meaning attached to them in García-Salmones Rovira's text: Kelsen's approach to scholarship *hinges* upon the view that there is not one, but many, methods of scholarship, that methods of enquiry cannot be combined, and that no one method is hierarchically higher than another. García-Salmones Rovira's text may *imply* that this view is false, that we have to find an over-arching interpretation. However, the most important argument of an author's theory of scholarship cannot simply be ignored, left by the wayside, assumed to be false, as it seems to be in this text. The text ought to have, but does not contain, argument why this theory of scholarship is false – but then, the ascription of an 'interest' theory would no longer have been possible in the light of the fact that its ascription to Kelsen is based on a very different conception of how scholarship ought to be conducted.

A critique on the terms described must thus also be what critical scholars find so abhorrent elsewhere: it is hegemonic. This is the fetishization of one viewpoint and the suppression of legal scholarship as an autonomous method of cognition. One cannot simply criticize/deconstruct the privileging of one viewpoint (the legal viewpoint) and then not justify the privileging of another (the economic or political viewpoint). This is only so if we *presuppose* that one point of view is the only valid, the one true meta-view. To argue thus is a *petitio principii*. Yes, law 'is' (can be seen as) politics or social construct, but also and equally it is norms; also and equally, it is a collective psychological delusion; also and equally, it is a series of neurons firing etc.

### 4 Conclusion

This critique could be expanded, further examples given, but that would be beyond the scope of this response. García-Salmones Rovira's proposition is an interesting one, even an intriguing one, as she proposes to analyse the role that 'interest' plays

in the Pure Theory of Law: one could certainly discuss where one would position this approach *vis-à-vis* the *Begriffsjurisprudenz* and *Interessenjurisprudenz* schools as well as the *Freirechtsschule*.<sup>15</sup> In the end, however, García-Salmones Rovira's foundational critique fails to convince and Maslow's hammer hits: the stronger the desire to find 'x', the more of 'x' we tend to see. Notwithstanding the indisputably high intellectual quality of the text, I believe that its connection to what Kelsen wrote is too tenuous. Too little does he say on 'interests', too remote from the core of his trademark Pure Theory are occurrences of the word. Polemically speaking, making 'interests' the foundation of Kelsen's positivism is like standing a man up on his left earlobe.

After reading 'The Politics of Interests in International Law', one is left wondering whether the author's project was ever about what Kelsen actually held. It looks more like a projection of a pre-conceived notion. It could be an expression of the author's own anxieties more than of Kelsen's own liberal-individualist-economic bias. Perhaps we can learn from this text that for all its radicality of critique, critical streams of legal scholarship will in the end have to prove their assertions just as we humdrum orthodox lawyers do. If we do not, we will, I fear, find that we are speaking from a pulpit, rather than a lectern.

<sup>15</sup> As to the latter school, two interesting early studies by Kelsen's most important students are: Verdross, 'Das Problem des freien Ermessens und die Freirechtsschule', 1 *Österreichische Zeitschrift für öffentliches Recht* (1914) 616 and Merkl, 'Freirecht und Richterfreiheit', 16 *Schweizerische Juristen-Zeitung* (1920) 265.