

On Kelsen's *Sein*: an approach to Kelsenian sociological themes

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To study Kelsen with the unaccustomed purview of how he understood society is fruitful in two respects. Firstly, as distinct from the perspectives offered in his legal writings one is instantly immersed in the scientific discourse of *fin de siècle* Vienna and the developments, which followed later. Illustrious names such as Charles Darwin, Ernst Mach, or Sigmund Freud appear as the sources from which Kelsen, as a good Viennese, drew inspiration.¹ Within this setting, logically, the Neo-Kantian aspect of Kelsen's *Sollen* remains in the background. The second reason for the interest in exploring Kelsen's understanding of *Sein* is that it provides insight into the genesis of the methods he used in developing the pure theory of law. In this reading, Kelsen's legal theory may be viewed as an outcome, or simply a mirror of his view of the real world. In turn, this approach helps trace the manner in which Kelsen's work within the ambit of the *Sein*-sciences is put at the service of his critique to metaphysics.

In this regard, the fact that Kelsen was a true interdisciplinarian is often glossed over by his jurist commentators. His highly idiosyncratic but successful legal theory is supported by a profound knowledge and use of philosophy, as well as by studies of sociology and anthropology, to name but a few of the disciplines that he drew upon.²

Based on an analysis of Kelsen's much disregarded writings on sociology and the sociology of law, I want to narrow down the broad theme of 'Kelsen on society' to three main research questions. Firstly, I shall consider how Kelsen represents the nature of sociological life. Kelsen denies that there are norms of social action in reality, and this influences his understanding and subsequent rejection of the discipline of sociology of law. We shall examine how this sociological atomism

¹ On this period, see Schorske 1980; Jürgen Nautz und Richard Vahrenkamp 1996; Friedrich Stadler 1997; Janik 2001.

² Psychology, logic and principles of biology are also important here. For a recent comment on the dangers of interdisciplinarity in law, Klabbers 2010.

pushes his theory to the extreme of normative purity. Next, I shall analyse the individualism of his sociology and his avoidance of what he considers to be fictional entities, society included, which runs parallel to his dismissal of legal use of concepts like the state. Finally, I shall investigate Kelsen's employment of evolutionism as an epistemological method in his main sociological studies. In addition to the fact that we are dealing with hard-core sociological studies, the reason for taking up this question here is that Kelsen's main metaphysical problem becomes apparent through this method. What I mean by Kelsen's metaphysical problem is his conviction that there is no possibility to know about the existence of a Supreme Being. This is best expressed in his foreword to *Society and Nature*, an important text in which the evolutionist method is used (Kelsen 1946). The foreword describes that study as an exploration of the problem of justice which aims to ascertain, from a sociological perspective, the real function of justice in society. Thus, Kelsen characterises *Society and Nature* as an exercise in using 'sociology as culture-critique, and thus, as ideology-critique' (Kelsen 1941, xi-xii).

Through these questions we shall acquire an insight into the wider (existential) context of Kelsen's *Weltanschauung*. An interest in the epistemological desubstantiation of the worlds of both *Sein* and *Sollen*, together with a claim for the purity of law, is what brought Kelsen to start many of his polemics.³

I shall begin by discussing Kelsen's critique of the sociology of law, a discipline then in its infancy. In particular I shall use Kelsen's memorable academic debate with Eugen Ehrlich to offer a different and indirect perspective on Kelsen's epistemological standpoint in respect of the world of *Sein*. Through the comparison with Ehrlich I shall demonstrate that *Sein* entirely determined Kelsen's view of law. Further, the analysis of this early debate proves that the atomist view of society was already formed in Kelsen's early theoretical works.

After that I shall examine Kelsen's own sociological writings. It shall become apparent that in an important sense his sociological findings made after the 1920s coincided with those which were incorporated within his legal theory from the start. Hence, it becomes clear that his theory evolves over time, but its essential elements are present in embryonic form from the publication of *Hauptprobleme* (1911) onwards (Kelsen 1911).⁴A brief insight into his sociological

³ Erich Kaufmann, probably also writing under the effect of Kelsen's critique in *Das Problem der Souveränität* against his *Wesen des Völkerrechts* affirmed that 'his books are simply a chain of polemics', Kaufmann 1921, 79. Nevertheless Kaufmann took Kelsen's work very seriously, as that text evidences.

⁴ Weinberger takes a similar view to mine: 'I would even venture to claim that already in the *Hauptprobleme* all his essential attitudes are present at least in embryo',

individualism provided by means of a piece of social-psychology will be followed by an analysis of *Society and Nature*. Before exploring that text I shall contextualise it by describing the Darwinian scientific circles in which Kelsen moved during his formative years. In the analysis of *Society and Nature* I shall argue that Kelsen reformulates what I termed before his main metaphysical problem into a problem of scientific method (Popper 1944, 94). With regard to law his agnosticism brings him to the conclusion that justice is not accessible to human beings. He reframes this question into a scientific argument in favour of atomism using evolutionary Darwinism. Nevertheless, he draws on other thinkers, especially David Hume, for important elements of his sociological thinking.

Kelsen on the sociology of law

From the point of view of an atomist observation of reality the idea of a normativity embedded in society is meaningless. For it is only due to the lack of normativity in the world of *Sein* that Kelsen's *Sollen* becomes normativity and as such exists. No wonder, that Kelsen put in doubt the possibility of the existence of the sociology of law as a discipline.⁵

One of its founders, Eugen Ehrlich, sought to ascertain, by means of observation, a distinct demarcation between the sociology of law and the sociology of morals, and to discover how the rules of factual action (*das tatsächliche Verhalten*) differ from other rules. Kelsen's opposed attitude to the sociology of law is apparent, among other moments, in his controversy with Ehrlich after the publication of Kelsen's review in 1915 of his *Grundlegung der Soziologie des Rechts* (1913).⁶ Later in life Kelsen would come to regret the ferocity of his attack both on Ehrlich and the sociology of law.⁷

Weinberger 1973, x. Interesting in this regard the comment by Engel that places the origin of the Pure Theory around 1914, Engel 1964.

⁵ For a recent call not to ignore Ehrlich's studies 'again', see Roberts 2005, 3.

⁶ The first article by Kelsen appeared in *Archiv für Sozialwissenschaft und Sozialpolitik* in 1915. Ehrlich responded the following year, to which Kelsen responded again. There was yet another exchange of remarks in the next volume of the same journal, with a 'Replik' Ehrlich's in the volume of 1916/17 and closing words by Kelsen.

⁷ '(...) 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. Reh binder's *Die Begründung der Rechtssoziologie durch Eugen Ehrlich*, Berlin, 1967. Rottleuthner 1984, 547. The tone of Kelsen's article is indeed harsh. Ehrlich's is also quite harsh, stating

As stated above, the purpose of bringing up this exchange here is to gain purchase on Kelsen's understanding of society and of the world of *Sein* in a text pertaining to his first period. In this early theoretical attack on the possibility of capturing legal manifestations *per se* in society, and the new clarification of the sharp distinction between *Sein* and *Sollen*, Kelsen gives important clues on his early view of the world as an indeterminate empiric reality.

Kelsen's critique concentrates on the concept of science and the notion of norms of social action. He found Ehrlich's idea of science confusing because Ehrlich was only prepared to regard as sciences fields which used inductive methods and causal explanations. This put the science of jurisprudence – that is to say, a normative discipline – in the position of losing its status as a science. Kelsen thought that the definition needed to be more flexible. Thus, the science of law could be either a discipline that conceived law as a *Sollen*, and therefore constituted a normative science; or one that observed law as part of social reality, and thus a part of the real world and which focused on social regularity (*Regelmässigkeit*). The former would be the normative jurisprudence; the latter what Kelsen termed 'explicative legal sociology'. To be sure, Kelsen calls law a normative science, but he hastened to add that the value transmitted by law is only a relative value, and therefore the concept of *Sollen* had to be taken only in a formal sense. Further, the task of the legal science was to *recognise* the legal *Sollen* and not to state it (Kelsen 1915, 840).

Put briefly, Ehrlich understood jurisprudence to be the law of the courts and other public organs. On the other hand, the sociology of law viewed law as 'living law' – law governing all human action with its 'living' manifestations in marriage, family, private property order, the reality of contracts and so on.

The philosophical viewpoints of the two authors evidently belong to different territories: 'Does he (Ehrlich) seriously believe that the qualities "legal", "illegal", "obligation" and "entitlement", inhere in the processes of "what is" as colour or heat?' (Kelsen 1915, 849). To this Ehrlich retorted: 'Incidentally, the whole exposition by Kelsen gives the impression that to him would be totally unknown the doctrine that can be traced back to Aristotle of how perception in the mind originate out of impressions in the senses' (Ehrlich 1916, 848).

that the review by Kelsen, due to his abstruse terminology and theories had made of the *Hauptprobleme* a 'refreshing' work, and quoting several of Kelsen's definitions, stating in conclusion 'it is like a millwheel mulling in one's head', Ehrlich 1916, 849. The last exchanges centre around what was interpreted as a misquote by Ehrlich and a misunderstanding by Kelsen. See also, a somehow nostalgic critique to Kelsen revolving around his controversy with Ehrlich, in Lüderssen 2005.

The different perspectives held by these authors that Rottleuthner believed made dialogue between them close to impossible is evident in the concept of rule of human action, which was in effect the bone of contention between the sociologist of law and the purist: was it a rule of 'is' or a rule of 'ought'? (Rottleuthner 1984, 545-546). Ehrlich claimed that the rule of human action was evidently not only a rule in accordance with which 'one acts', but also one in accordance with which 'one ought to act'.⁸

Thus, in response to the statement that in Finland 'a child of 13 years age goes to school', Ehrlich would have said that this captures two realities: both that a child of 13 *usually* goes to school and that he or she *ought to* go to school.

Kelsen's reply to this denies the claim that from what is regular can arise an 'ought' (*Sollen*) (Kelsen 1916, 851). Faithful to his theory of knowledge, Kelsen asserts that a science of observation such as he takes the sociology of law to be, cannot ascertain the existence of obligations. This would amount to 'a syncretism of methods': only fact and reality fell within the scope of an observation of 'factuality', but 'not values' (Kelsen 1915, 841). Ehrlich, Kelsen stated, mixed rules of 'is' and rules of 'ought' (Kelsen 1915, 855-856; Rottleuthner 1984, 528-529).

In turn, Ehrlich was thinking of rules that were known to the actor – rules that had to be obeyed – and therefore only of those rules that actors used for the purposes of orientation, in fact those that regulated (*bestimmen*) his or her will. The crucial difference between Kelsen and Ehrlich is that for the latter rules of *Sein* (*Seinsregel*) were only rules of nature (such as gravity) and not rules of society (Ehrlich 1916, 844).

Rottleuthner's table summarises both positions neatly (Rottleuthner 1984, 532).

	Kelsen	Ehrlich
Rules of 'is' (<i>Seinsregel</i>)	Empirical correlations (e.g. social regularities without considering the orientation of action)	Laws of nature (e.g. law of gravity)
Rules of 'ought' (<i>Sollensregel</i>)	A norm = a rule that ought to be followed	A rule according to which the actor orientates her action; that regulates her action

⁸ Of this Kelsen says: 'This sentence is manifestly wrong.' Kelsen 1915, 843.

An interpretation of the table shows that Kelsen envisaged a world of empirical phenomena or facts lacking rules of orientation. On the other hand, the rules of 'ought' are clearly commands that ought to be followed. This sharp distinction is not a distinction of realities. Both boxes – rules of 'is' and rules of 'ought' – may contain, for instance, the category of society considered as a real entity (a group of people) in the first, and the category of a normative-moral organisation in the second. Whether we observe reality or think about reality, what changes is the method of study.

Thus, in Kelsen's case, as far as society (viewed as a reality of the outer world) is concerned we cannot say more than that there are a number of empirical facts. However, when we think about society we can identify normative rules of morality and law – we might recall that this is Hans Kelsen writing in 1915.

As an observer of a group of people called society Kelsen's incapacity to tell us anything about the normativity embedded in that society is apparent.⁹ This is an epistemological incapacity that goes beyond his other argumentative reasoning. At the opposite end of the spectrum, this is exactly what Ehrlich aims at. Kelsen's incisive critique of this idea of 'living law' involves asking rhetorically how Ehrlich knows, for instance, that in economic relations between spouses, knowledge of facts is gained for the sociology of law and not for the science of economy (Kelsen 1915, 875-876; Rottleuthner 1984, 537).

The tables also show that Kelsen is absolutely against a determinative understanding of society, a conception in respect of which Ehrlich's position might be opened to criticism. It is likely that Kelsen's theory of separation of 'is' and 'ought' conceals within it the intention to preserve epistemologically the radical freedom of individuals – or, in other words, to preserve a methodological individualism.

There is also clearly in Kelsen an absence of the perception of teleology when observing reality. Reality is constituted by empirical facts. Although in the world of 'ought', norms and rules can be found, as norms they are posited by a will and do not form part of a rationality of the world as it is. The norms of the world of ought, moral and legal, have no rational connection with the world of *Sein*.

Since a certain degree of teleology is unavoidable in the construction of concepts of a social science like legal science, Kelsen's way of covertly accepting the idea of teleology is to rely on the notion of meaning as something embedded, or immanent in social reality.

⁹ This idea is helpfully expressed by Jestaedt and Lepsius: 'The factual does not receive normative force due to its mere factuality, but exclusively due to its normative imputation (*Zuschreibung*).' Jestaedt & Lepsius 2006, xv.

When he later became increasingly aware of the fruitfulness of observing society for the purposes of legal theory he expressed it in this way:¹⁰

If one analyses a parliamentary enactment, say or an administrative act, a judicial decision, a private law transaction, a delict – all of which are referred to as [belonging to the] law – one can distinguish two elements. There is an act perceptible to the senses, taking place in time and space, an external event, usually an instance of human behaviour. And there is a specific meaning, a sense that is, so to speak, immanent in or attached to the act or event. People assembled in a hall, they give speeches, some rise, others remain seated – this is the external event. Its meaning: that a statute is enacted. [...] A plant cannot say anything about itself to the botanist. [...] A social act, however, may very well carry with it a self-interpretation, a statement about what it means. (Kelsen 1992, 8-9.)

The notion of meaning that was to be so helpful for Kelsen in distinguishing objective law from other manifestations of apparent or subjective law would come quite close to aspects of Ehrlich's study of the living law.

Sociology without society

Only 'an uncritical dogmatism can think that a system of positive law can be possible without presuppositions' (Kelsen 1920, vi). Kelsen was candid about his working method when he admitted that his famous basic norm as a *conditio sine qua non* was, in essence, an arbitrary principle (Kelsen 1920, 97).

His appraisal of the real world appears deviate from this. He takes the world as a given and in that he appears to be guided by a more or less empiricist principle.¹¹ In this regard, in Kelsen's writings it is often stated that he does not believe in the existence of anything called society either on a national or a universal level, or at any rate not in the existence of something with that name which could be ascertained scientifically (Kelsen 1925, 15-16). Neither does he conceive the idea of a society that can protect the individual.¹²

¹⁰ See Weinberger: '[f]rom an initially somewhat dismissive attitude to the sociology of law, Kelsen began increasingly to recognize and become interested in it'. Weinberger 1973, xii.

¹¹ Kletzer 2008, 459. On empiricism see Roth 1993.

¹² 'The necessity of justification and rationalisation is maybe one of the differences that exist between human beings and animals. The external behaviour of humans is not very different to that of animals: the big fishes eat the small ones. That applies both

A brief insight into Kelsen's sociological individualism is provided by means of a piece of social-psychology published in the nineteen twenties in *Imago*, Freud's review. In a discussion of the role of the individual in his 1922 essay on 'The Concept of the State and Social Psychology' (Kelsen 1922) Kelsen argued firmly in favour of individualism as the best basis for sociological thinking. It is instructive to undertake a counter-reading of Kelsen's deconstruction of various sociological theorists who, he thought, reified society and the state, in order to grasp how crucial it was for him to identify the individual as *the only element and object* of social and human sciences.

Kelsen argued that Freud's psychological analysis had successfully deprived crucial words of their magic of personification. These personifications – of God, of society, and of the state – were dissolved by Freud into individual-psychological elements (Kelsen 1922, 141). Nevertheless, Freud's theory of masses had, according to Kelsen, some negative connotations, in that it might be taken to suggest that the state as a unity could constitute a mass (Kelsen 1922, 119). The hard critique goes, however, to studies undertaken by Gustave Le Bon (1841-1931) on the mass, and to the work of Emile Durkheim (1858-1917) on the divinisation of society. Le Bon, a sociologist with a psychological orientation, argued that the interactions between individuals crystallised and consolidated to produce a social structure separate from them as individuals. Kelsen took the view that since only the individual has a soul, anything beyond the individual must have a meta-psychological character (Kelsen 1922, 125).¹³ Clearly Kelsen was once again defending purity of method – this time in the field of psychology – as he had previously done in *Hauptprobleme* with the theory of the state and would do later with his theory of law. For Kelsen, the sociological significance of purification was to isolate the individual, and its legal significance was to remove the aspect of holism that the concepts could bear. Thus, by the 1920s he had already accepted that, from a legal perspective, the state was simply a legal order and that no unified reality stood behind that order.

Moreover, Kelsen opines that the question of how a mass of subjectivities metamorphoses into an objective structure is left unexplained by sociologists. Durkheim's method was considered to be a naïve approach to substantialisation

to humans and to animals. However when a human fish behaves likes this driven by his instincts, he seeks to justify that behaviour to him or herself and to the society, to calm his conscience with the idea that his behaviour towards his fellow men is good.' Kelsen 1953, 13.

¹³ Le Bon's study nevertheless contains important insights and possesses originality, Le Bon 1922.

involving a mythological use of human behaviour. Durkheim ultimately identifies the authority of society with God, the typical personification deplored by Kelsen (Durkheim 1964, 418-419). Nevertheless, Kelsen takes advantage of its deconstruction and develops his Pure Theory on the basis of the claim that the identification of God and society, and of God and the state occurs within the course of intellectual history (Kelsen 1964, 29-55).

It is hard to disagree with Kelsen's critique of Le Bon and Durkheim. His point that individuals who integrate into the mass lose the specific characteristics of individuals (will, freedom etc) precisely because they form part of the mass is of particular value. Thus, the mass is defined negatively by reference to its shortcomings and not by the fact of producing something new.

But the conclusions he draws from the criticisms relating to the state are far from obvious. He argues that there is no state, but only individuals. Thus, 'the problem of the state in political and legal theory [...] is only an illusory problem', because there is no such a thing as a state – there is only a legal order (Kelsen 1922, 137-138). In other words Kelsen believes that the unity of society is based on positive norms.¹⁴ These statements make it apparent that his methodological opposition of *Sein* and *Sollen* is not able to address, let alone provide answers to, key questions of political theory; such as for example, how the formation of political communities takes place.

Kelsen urges us to emancipate ourselves from fictional entities such as the state; or indeed, from the fiction of representation in a democratic state. For him the plurality of individual interests can only be recognised by drawing a sharp normative distinction between represented and representatives (Jestaedt & Lepsius 2006, xxiv). He contends that there is out there nothing more than individuals, and that a pure theory of formal law is apt to peacefully channel (through law) the outcome of these individuals' political struggle.¹⁵ However, this individualist view of the world and his conception of the state merely as a legal order leave us unequipped for political reasoning and imagination. The formal law takes the space that ought to be occupied by the plurality of politics, by shared identities and by a sense of social cohesion. Is democracy, as Kelsen would have it, only a system of political compromises whose unity is only guaranteed by

¹⁴ For instance, in his critique to Rudold Smend, Kelsen 1930, 45-59.

¹⁵ Jestaedt and Lepsius describe the foundation of Kelsen's theory of democracy as 'an ideology-critical norm-realism', Jestaedt & Lepsius 2006, xxiv.

the legal order? Or has ‘demos’, after all, a meaning?¹⁶ As usual, Kelsen’s idea of individual freedom, which he could only think of as *individualised freedom*, helps to explain his position (Dreier 1997, 82). If one accepts that an individual is also free in a community – or, even more radically, that an individual can only be free in communion with other individuals – then Kelsen’s defence of democracy, although genuine, becomes unsatisfactory (MacIntyre 2002).

Interestingly, it is possible to connect the *Imago* piece of the 1920s and the evolutionist study of the early 1940s, *Society and Nature* through another text, *Die Philosophischen Grundlangen der Naturrechtslehre und Rechtspositivismus*, written in 1929. The latter bears like the *Imago* piece a marked psychological emphasis. It deals, among other things, with the liberation of the Western theory of knowledge from metaphysics (Kelsen 2009). There the personality of the ‘metaphysicians’ is stressed – pessimists, optimists and those who favour compromise – according to the mode of thought that they produced. At that moment Kelsen was at pains to emphasise that his analysis was not guided by evolutionism:

Above all, the following schematic presentation should not (or at least not primarily) be understood as a historical-genetic description of evolutionary stages succeeding one another according to a strict rule. (Kelsen 2009, 421.)

Later, during the 1930s, Kelsen devoted much time and effort to his ethnographic and sociological studies and transformed the psychological exposition of his anti-metaphysical thesis already present in *Philosophische Grundlagen* into the evolutionist study, *Society and Nature*. Nevertheless, in both cases the argument defended is that emotionalist thought is the cause of metaphysics. This shows that while he changed the method of exposition, substituting psychologism for evolutionism, he retained his main anti-metaphysical theory as well as his individualism and atomism. Nevertheless, it seems likely that this anti-metaphysical conviction is in itself the outcome of Kelsen’s own evolutionist thinking. We shall next explore those two issues.

¹⁶ If Kelsen sees no ‘demos’ due to his atomist view of the world, interestingly, the other extreme – the statist view – cannot discover ‘demos’ except within closed political entities. Thus in the case of Europe, for instance, Weiler states: ‘At the root of the No Demos thesis is ultimately a world view which is enslaved to the concepts of *Völk*, *Staat* and *Staatsangehöriger* and cannot perceive the Community or Union in anything other than those terms’. Weiler 1995.

Vienna, Darwin and the pride of science

Darwin was in vogue in *fin de siècle* Vienna. The most important philosophers in the capital of the empire devoted their time to in-depth study of his works, as shown in the records of the *Philosophische Gesellschaft* for instance. This society was a meeting-point for intellectuals, and the friends and teachers of the young Kelsen numbered among their most frequent visitors and speakers. While Kantians were also represented in the talks organised by the *Philosophische Gesellschaft*, between the years 1898-1903, Nietzsche and Darwin were the authors discussed at more length.¹⁷

An interesting triangle might be drawn between the doctrines of Charles Darwin, Ernst Mach and Hans Kelsen. On the basis of that linkage, two ways in which Kelsen is both Machian and Darwinist may be highlighted. Firstly, in his sociological studies, Kelsen follows important aspects of Mach's previous teachings. In particular, Kelsen benefitted from Mach's argument that human knowledge, including science, was plagued by a constantly evolving animism. As a legal scientist, Kelsen also followed Mach's methodological work (Kelsen 1920). For Mach, science and knowledge *per se* became Darwinist, with the new findings being viewed as involved in a struggle for a place in the future final theory (Mach 1897).

The following section deals with Kelsen's sociology, but I also want to say a few words about Mach's Darwinist science. The circle of famous natural scientists and philosophers of science in *fin de siècle* Vienna, and in particular Ernst Mach as one of its greatest representatives, attributed principles of universal validity and unity to natural sciences. In his view, the physical and the psychical, man (or rather the ego) and nature, were united. On the other hand, the Darwinian principle of selection of the struggle for survival had long been incorporated in every type of scientific and philosophical research. In Mach's case, the resulting intellectual framework was the economical representation of the actual and the economy of thought. In a nutshell, according to Mach the purpose of science was to give the most economical description of nature as possible. The reason for this was that science was to provide conceptions, which could help us better position ourselves in relation to the world. Darwin found a perfect explanation for the economy of nature in natural selection, and Mach recognised the inspiration drawn from Darwinian theories by his own economic thinking. Nevertheless,

¹⁷ For the complete list of talks and discussions in the *Philosophische Gesellschaft*, Rodlauer 1990, 23. 1898-1905 are the years of Kelsen's study at the University of Vienna and, it is my thesis, his more important formative years, Kelsen 2006.

Mach traced back the type of economy of thought that he developed to an older source: Adam Smith.¹⁸ Darwin's theory helped him to consider sensory data as facts provided by a brain constantly in evolution, and the economic element originated in the laws and theories of physics as instruments assisting in the reduction of the work of the brain (Oeser 1997, 219). In fact, in his recollections about the way in which he developed the theory, Mach repeatedly asserted that it was through his conversations with his friend the Austrian political economist Emanuel Hermann in 1864 that he came to understand how science was in essence *ökonomisch* (Haller 1996, 426; Pojman 2009).

But evolution as explained by Darwin in his *The Origin of Species* was not only economical. It was also the result of the principle of selection that occurred within a universal struggle for existence (Darwin 2010).

And here is at least one important sense in which Kelsen was more authentically Darwinian, than say, Mach. As Pojman states, the original theory of natural selection maintains that evolution is a directionless process, without a guiding factor or end-point (Kuhn 1970, 172). Chance, sometimes, or adequate physical conditions were the only guide in the course of the evolution of species. In late nineteenth century continental Europe a different notion of 'direction' existed than the one that Darwin directly attacked. Mach and other scientists adhering to the German tradition still held that there is an inner *telos* in nature. On the contrary, as a legal theorist and as a scientist studying law, Kelsen decisively rejected the idea of an inner direction in law. One can also trace his anti-teleological view of society in his own development as a sociologist, from *Hauptprobleme to Society and Nature*.

Teleology, however, was far from being a simple concept in the German-speaking world. There is little doubt that Darwin was also understood as 'teleological' by other continental authors. Sigwart, a logician quoted often in Kelsen's

¹⁸ Thus Mach defends 'the economic function of science, according to which nothing is important except what can be observed or is a datum for us, and everything hypothetical, metaphysical and superfluous, is to be eliminated'. Mach 1996, 27-28. For an accessible explanation of Mach's principle of economy of thought and his description as one of the main introducers of Darwin to the German-speaking scientific world, see Pojman 2009. 'A broad foundation is laid for the theory in question (of the economy of thought) and light is shed upon it from new sides, if, in conformity with the stimulus given by Darwinism, we conceive of all psychical life – including science – as biological appearance, and if we apply to the theory the Darwinian conceptions of struggle for existence, of development and of selection'; the view that the economy of science was very near to the thought of Adam Smith, 'it can be traced back to Adam Smith, and, as P. Volkmann holds, in its beginnings even to Newton'. Mach 1996, 49-50.

work, thought that Darwin had pronounced a final unbiased word on teleology. When Darwin stated that less purposeful and organised individuals necessarily succumb in the struggle for the existence, Sigwart took the view that he was putting forward an important teleological principle (Sigwart 1881, 24-67). Kelsen indeed concurrently accepts an anti-teleological sociological Darwinism and a sense of evolution in law with a clear teleological principle towards (global) centralisation. The latter was probably derived from his use of the economical thinking. What he nevertheless particularly opposed was a description of teleological thinking as a principle applied to human action. Science, and legal science least of all, could know nothing and could anticipate nothing in respect of the human will acting under a supposedly teleological principle.

There were also notorious examples of Darwinism in *fin de siècle* Vienna. Houston Stewart Chamberlain (1855-1927), *Privatdozent* of Philosophy at the University of Vienna depicted the history of Western civilisation as a struggle for the existence of species; more concretely, as the struggle of the Semites against the *Germanen*.¹⁹ If it were not for the dramatic experiences of the twentieth century, Chamberlain's *Die Grundlagen des Neunzehnten Jahrhunderts* would appear today as a solemn collection of absurdities, or perhaps a summary of a scientific facts guided by a hallucinatory principle. But the book was influential then.²⁰ Even Kelsen used it in his piece on Dante (Kelsen 1905). And as a matter of fact, the struggle depicted by Chamberlain in respect of the alliance between Semites and Roman Catholicism, portrayed as universalism against Aryanism, is reproduced later in Kelsen's theory of international law. For him the struggle over the primacy of international law took place between a universal order and the state-centered law (of an Empire).²¹ As expected, in his argumentation Kelsen favoured the universal order. None of this is to say that Chamberlain influenced Kelsen's thought. It is more to the point that Darwinist ideas, actively present in *fin de siècle* Vienna, were absorbed by different thinkers, sometimes in terms of a struggle between races, and sometimes – as in Kelsen's case – as a struggle between different views regarding the future world order. Another interesting instance of Darwinist ideas in the Vienna of that period may be found in the historical study made by Adolf Menzel (1857-1928) on the law of the strongest.

¹⁹ Houston Stewart Chamberlain was a British-born German writer. He was also an invited speaker at the meetings of the *Philosophische Gesellschaft*; Chamberlain married Richard Wagner's daughter.

²⁰ Stolleis calls it 'pseudo-scientific', but adds that 'it had an enormous success', Stolleis 1999, 49.

²¹ Forcefully so in Kelsen, 1920.

Menzel, professor of administrative law and administrative policy and later rector of the law faculty in Vienna, was in 1911 first advisor in Kelsen's *Habilitation* (Jabloner, 1998, 373). In his 1922 study, Menzel analysed the theory of the law of the strongest of Kallikles, the Greek sophist of the fifth century BC. Menzel examined Kallikles' critique of democracy, and traced his influence through Spinoza until Nietzsche. Menzel did not hide his admiration for Nietzsche and drew attention to the fact that the German philosopher, under the influence of Darwin, had recourse to the natural sciences for the foundations of his doctrine of the *Übermensch* (Menzel 1922/1923, 80-84). My point is that while Ernst Mach applied the Darwinist theory to his studies of organic and intellectual life (*das geistige Element im Menschen*) (Mach 1896, 371), authors writing on politics somehow inevitably tended to incorporate Darwinist principles into questions more directly related to political theories.

Die Grundlagen des Neunzehnten Jahrhunderts is important today in one specific sense. It testifies to the way in which the genuinely incredible scientific discoveries happening during that period of history (the discovery of the DNA for instance) could go to people's heads in dangerous and unexpected ways; for instance, in the form of a demand of purification. How does one purify life? In Chamberlain's case, once it had been 'proved' that they (*die Germanen*) were scientifically a species, he proposed a new start involving self-purification from admixtures of other species.²² The 'question of race becomes pressing, because it is one of the vital questions in the threatening new struggle for the existence, in which we are entering now' (Chamberlain 1903, xxxiii).

While Chamberlain allowed himself to be ruled by an overestimation of the wisdom and possibilities of (natural) sciences, he also lived in a mental climate characterised by chaos (*Völkerchaos*). Apparently this was a general experience in Vienna. As Schorske explains, in the last years of the nineteenth century, the Austro-Hungarian Empire seemed to be pulling itself apart, along both ideological and national lines (Schorske 1980, 181-207). Its very sovereignty constituted an obscure problem of legal theory. After the 1867 Austro-Hungarian Compromise dissolved the central state and reconstituted the Empire on the basis of the two parallel legal systems of Austria and Hungary, questions as

²² *Germanen* is for Chamberlain a general concept that describes moral and physical characteristics. The latter are traced to those of the group of north European peoples of Celtic, German and Slavic origin that later constituted 'modern Europe'; the former characteristics are described as being 'the fighters of chaos', 'the designers' or framers (*Gestalter*) and, in a word, 'the artists'. Chamberlain 1903, 259; 313-316. For a classic analysis of the origins of pangermanism and panslavism, see Arendt 1962.

fundamental as the legal nature of the common monarchy and the identity of the holder of sovereignty became a matter of speculation among perplexed lawyers (Seidler 1905, 90; Jellinek 1882, 227-238).

Science and chaos seem to have been important antinomies of the time. The principle of evolution partook of both. Evolution was, after Darwin, scientific, and it transformed science itself into an evolutionary technique. But it was thanks to the seemingly existential chaos surrounding scientists and politicians that evolution was able to take root in a threefold manner: epistemologically, scientifically and politically.

Evolution and the primitive man

The sociological studies that Kelsen conducted from the thirties onwards were done in the service of his legal-theoretical concerns. In this regard Jabloner's reading of the impressive study *Society and Nature* as Kelsen's attempt to unify his *Ideologiekritik* and his legal theory is interesting. Kelsen is described as using *Society and Nature* to make his personal contribution to the unity of science (*Einheitswissenschaft*), probably influenced by the philosophical atmosphere of the Vienna Circle. Specifically, he explored the position occupied by normative science, in particular legal science, in the process of the evolution of sciences into a unified science (Jabloner 1982, 47-62; Topisch 1964, 329-339).²³ However, Jabloner took the view that arguing in favour of the unity of sciences was a flagrant contradiction of the Kelsenian distinction of *Sein* and *Sollen*, which makes Kelsen's book a very interesting text (Jabloner 1982, 51).

Another plausible interpretation of *Society and Nature* can be found by locating it within the overall narrative of Kelsen's lifelong search for unity of cognition (*Einheit des Erkenntnisses*). He outlines in the work his understanding of the historical evolution of the structure of thought from primitive man to modern man's atomist rationalism. *Society and Nature* can be taken as a survey of primitive views of the laws of causality and retribution that reaches until the last achievements in the knowledge of physics about statistical probability. According to Kelsen, the latter science conclusively relativised the principle of causality in the laws of nature. *Society and Nature's* method is clearly evolutionist. The book concludes by stating that the epistemological dualism of nature and society cannot

²³ According to Jabloner, after *Society and Nature* Kelsen retreated from the attempt of the *Wissenschaftseinheit*.

be thought of as the last step in the evolution of science. As was shown in the discussion of the debate with Ehrlich, Kelsen held an atomist view of the world very early in his career. Therefore, the evolving epistemological scheme proposed in *Society and Nature* had been accepted long before the book appeared. Arguably, with *Society and Nature*, Kelsen seeks not only to substantiate his early theories but also to find a means by which his legal theory might evolve. After all, he had always sought to reconcile two opposing principles: the norm as a command – that is, a factual event in the world of *Sein* – and the law of normativity as a special category or custom of thought.²⁴

The primitive man (and also the child) is conscious of his will, and therefore attributes it to every remarkable process that he cannot otherwise account for. This was, in a nutshell, Kelsen's explanation in *Society and Nature*, which aimed to describe his sense of the evolution of knowledge in human society. Ernst Mach explains the same question in exactly the same way, although he refers to the 'natural man' (*Naturmensch*) as opposed to the cultural man (*Culturmensch*). 'That tendency to observe everything as similar to us, with life, with soul, is transmitted to every useful or harmful object in the manner explained (by attributing a will to it) and leads to fetishism' (Mach 1896, 369).

The 'primitive man' did not grasp nature as being guided by the laws of causality (Mach 1996).²⁵ Instead, 'primitive peoples' understood the world – society and nature – as a whole that they identified as being guided by the principle of retribution.

For these reasons the customary characterisation of primitive man as a 'man in a state of nature' or a 'natural man' is inept. Nothing appears 'natural' to him because everything, as soon as he seeks to explain it, is 'artificial' or 'made', not necessarily by himself but by his fellow-men or even by superhuman beings; a typical example is the interpretation of death either as murder or as a punishment. (Kelsen 1946, 48.)

Retribution constitutes, in Kelsen's words, an ideology, and 'the basic norm of primitive society' as well (Kelsen 1946, 66;77). This, in essence, is also how

²⁴ See for instance, much later the definition of law: 'As a "norm", the law is the specific meaning of an act of will directed at a definite human behaviour'. Kelsen 1966, 1; Kelsen 1960, 107-113.

²⁵ A similar essence of animism in Kelsen 1973, 159.

Spinoza explains the general understanding of evil in the world by people who believe in the existence of teleology.²⁶

This conception originated in the fact that the primitives had a relationship with nature based on the idea of a connection between people, upon a social relationship. Therefore, it had ‘a marked normative character’ (Kelsen 1946, 44; v. Kirchmann 1873, 96). According to Kelsen, primitive man had no sense of an objective connection between facts determined by the laws of causality. The assumption of a concept of impersonal force that brought about a causal nexus necessitated a degree of scientific abstraction unknown to primitive man (Kelsen 1946, 41-44). This was related with the reduced presence of the rational element in primitive man, who was felt to be ruled by the emotional.

If something happens which calls for explanation in the primitive’s mind – and that is only something which directly touches his interests – he does not ask what is the cause of it, but who is responsible for it? (Kelsen 1973, 158.)

In a few words, Kelsen conveys the message, although in different terms, that primitive man is a monist for whom everything is normative.

The other main argument of *Society and Nature* goes to explain that the law of causality expressed in modern natural science is guided too by the principle of retribution.

As Kelsen saw it, the crisis of the principle of causality was attributable to Hume. Earlier modern natural science had been established upon that principle by such luminaries as Bacon, Galileo and Kepler. Hume was the first to question the objectivity of the cause-effect relationship, and to transfer the objective connection between cause and effect to a sphere of subjectivity, ‘thus making an epistemological problem out of an ontological one’.²⁷ What Kelsen had against

²⁶ As explained by Sigwart: the *teleologists* think ‘dass die Übel, die sie in der Welt finden, daher kommen, dass die Götter ihnen wegen der Beleidigung zürnen’ (that the evil that they find in the world originate in the fact that the gods are angry with them). Sigwart 1881, 27. For Spinoza, these gods (or god) are a projection of the individuals, in a similar way to the view taken of moral norms by Kelsen and Kirchmann, (used by Kelsen to ground his moral philosophy) as a projection of individual’s desires. Kelsen 1911; v. Kirchmann 1873.

²⁷ ‘Starting from this point and carrying on in the direction Hume had indicated, Kant arrived at his own doctrine. He declared the mere observation of reality could not establish the necessity of a connection between two facts, such as cause and effect; consequently, he pointed out, the concept of causality is an inborn notion, and a priori category’. Kelsen 1946, 249- 250. See also on the impact of Hume, Husserl 1970, 230-231.

Hume's explanation of the origin of the relationship between cause and effect was that Hume attributed that connection to custom. When bringing an object near to fire, Hume explained, '[t]he mind is carried by custom to expect heat or cold and to believe that such a quality exists'.²⁸ Kelsen thought that Hume's idea of custom was influenced by views on customary law prevailing in England. But custom, added Kelsen, was not free of exceptions, and was therefore an invalid ground for an explanation of a causal rule of absolute necessity.

Crucially, Kelsen traced back the idea that the connection between cause and effect has the character of absolute necessity not to the custom or habit of thought as Hume did, but to the principle of retribution. The principle of retribution was, in Kelsen's opinion, the expression of a transcendental will in disguise (Kelsen 1946, 249). The explanation he gives in this regard is worth quoting at length:

As long as there is a belief in the existence of a transcendental authority ruling over human society as well as nature, the will of this authority is the objective bond which holds cause and effect together even though the law of causality has separated itself from the principle of retribution. (Kelsen 1946, 251.)²⁹

From the point of view of Kelsen's epistemological critique, a belief in God is a bar to absolute rationalism, since theorists tend to simply metamorphose the transcendental will into a metaphysical cause (Kelsen 1946, 251).

On the other hand, from a strictly sociological perspective, the reason why Kelsen rejects the principle of retribution is that it *presupposes* a society and *produces* a society among individuals. This Kelsen attributes to the existence of vengeance and retribution in societies, which still lack a judicial system. Thus '[v]engeance and hence retribution – in the narrower sense of the word indicating a qualified reaction – are possible only in society, not in nature' (Kelsen 1946, 50).

Kelsen described the work of later philosophers as taking the will of God for granted. In his thinking this signifies a command, and by extension a law – here he is truly Hobbesian³⁰ – acting as a norm in the relationship between two facts usually called cause and effect. Leibnitz, Locke, Spinoza, Berkeley and Malebranche are described by Kelsen as followers of this particular expression of a *providentialist* understanding of the law of causality.

²⁸ Hume 1894, 46.

²⁹ For the differences between Kelsen and Weber in the type of historical analysis of religion in modernity, Seidman, 1983.

³⁰ 'Une fois encore, pour un positiviste coherent, *auctoritas non veritas facit legem.*' Bobbio 1981, 486.

Through the argument developed in *Society and Nature*, Kelsen makes the point that the natural scientist of modernity was in fact guided by the principle of retribution disguised as an ostensible law of causality. On the other hand, Kelsen arguably also aims to restate the principle that nature contains no *objective* law of causality capable of guiding human understanding of the real world. According to Kelsen, the natural scientists of modernity were able to separate society from nature. They were therefore dualists, but their reasoning was still ruled by the principle of retribution.

Despite Kelsen's critique of Hume's interpretation, which revolved around the notion of custom, Kelsen attributed to Hume the achievement of having altogether rejected the idea that 'the law of causality was an expression of the divine will, a norm' (Kelsen 1946, 262). In this manner, in rejecting the existence of an inviolable norm, Hume contributed to liberate the interpretation of reality of an element of necessity, thereby opening up the possibility of renouncing the principle of retribution.

After Hume, the next definitive step in the evolution of the notion of causality was the substitution of necessity 'by simple statistical probability'. This was considered, in Kelsen's view correctly, "revolutionary" in scientific thinking' (Kelsen 1946, 262; Kelsen 1973, 160). In this regard Kelsen gives the credit to Heisenberg who discovered the principle of indeterminacy in the field of atomic physics. Put briefly, this principle states that the initial state of motion can never be fully determined, and consequently it does not help to gain knowledge of subsequent motion (Kelsen 1946, 256).

For Kelsen's purposes in *Society and Nature*, Heisenberg and later studies of modern physics helped show that the real world is indeterminate. This was of critical importance in the context of a study of society, since modern sociological thinking had begun to view social events as part of reality, determined by the same laws as a natural event. Kelsen took the view that, until Hume, natural scientists were mired in religious speculation and regarded nature as a part of society ruled on the basis of the law of retribution. By the twentieth century, modern science had freed causality from retribution, which meant that society became part of that indeterminate nature, now conceived as composed by facts:

No essential difference between natural and social laws, i.e. between the laws determining nature and the laws determining society exists as soon as the natural itself relinquishes its claim to absolute necessity and satisfies itself with being an assertion of statistical probability. (Kelsen 1946, 266.)

The conclusion of *Society and Nature* was that the dualism of nature and society was not the last step in the evolution of science. One interpretation of this would be to state that, as distinct from primitive man's normative monism and modern man's dualism between factualism and normativism, Kelsen saw the future of advanced man in a return to a special type of monism in which everything, including the norms, was factual. In other words, atomism transposed not only to the life of society but also to the realm of normativity.

As a matter of fact, Kelsen's legal theory follows the stages of evolution of modern man as he depicted them. Firstly he maintains a (lifelong) dualism between *Sein* and *Sollen* in which legal theory is only concerned with *Sollen*. In his last period, Kelsen's ontological dualism of *Sein–Sollen* is set aside, 'since the *Sollen* takes its origin from *Sein* and is upheld by *Sein*' (Opalek 1980, 24; Kelsen 1991).³¹ Arguably Kelsen's metaphysical problem and hence his critique of ideology would find in this latter period the most congenial solution. Indeed, in Kelsen's view a factual monism of norms would, in the extreme case, stand its ground by the force of statistics. However, it could never be suspicious of having an ideological foundation.

Kelsen the evolutionary sociologist criticised

Kelsen was able to describe international law as primitive law only because he was an evolutionist (Jablonek 1997, 60–62). What he defends is not progress, with the hint of naïvety it implies, but rather (bio-legal) evolution.³² His evolutionism also highlights the perfect unity of an intricately wrought theory: to the extent that he negates any juridical dimension in the nature of human beings, or any innate notion of justice, a purely positivist theory of law becomes indispensable. But as with many other features of his thought, Kelsen's evolutionism is rich and contains many nuances that may occasionally give a misleading impression of his standpoint. On the one hand, when referring to primitive peoples, he claims that it is illogical to state that they have no morality or that they lack any sense of the distinction between good and evil, while at the same time asserting that

³¹ Paulson presents the following, generally accepted periodisation: critical constructivism (1911–21); long classical phase (1921–60); late sceptical phase (1960–73), Paulson 1998, xxii–liii. A different periodisation by Thaler 1997.

³² For a description of the vocabulary of progress in international law which shows it simultaneously to hold positions of power while possessing a naïve intellectual background, see Skouteris 2010, 58–64.

the principle of vengeance or retribution prevails among them. On the other hand, he comments on the stance taken by Christian morality: 'From the point of view of Christian morality, which commands one to love one's enemy and to forgive those who trespass against you, primitive man appears – wrongly – as immoral'. Nevertheless, his own conclusion is that the sphere of morality is contained only in the will of the individual, and all the rest are earlier stages in evolution. (Kelsen 1946, 56; 65.)

Without a doubt Kelsen's evolutionary theory suffers from the same weaknesses as contemporary discussion on non-rationalist epistemologies such as that of the primitive man. Those scientific studies, as well as Kelsen's, portrayed primitive peoples rather simplistically, characterising their way of thinking as decidedly inferior. But Kelsen is original in another respect: my main aim now is to highlight the political potential of Kelsen's epistemological debate when he suggests that the advanced epistemology should replace outdated views aimed at understanding the world.

The first chapter of *Society and Nature* shows to a great extent the primacy of the emotional over reason in primitive peoples, and the attachment to tradition produced by this. The study is based in a wealth of ethnographical and anthropological fieldwork with contemporary tribes in Africa, the Arctic and the Pacific. In fact, as one of the reviewers wrote, the use of these materials is somehow unbalanced. Almost two-thirds of the book consists of an account of the testimony of Western scientists and missionaries among those peoples.³³

Kelsen's interpretation of the reports is imbued with a pronounced Darwinist and Freudian tone of a kind very much in vogue among ethnographers at that time (Fuller 2000, 148), which involved studying the behaviour of non-Western peoples through the rational, liberal glass of Westerners. Therefore, his conclusions sound alien today: 'Lack of ego consciousness is only the negative side of a mentality completely determined by social life.'³⁴ Kelsen explained what he regarded as a weak ego consciousness in his previous account of anthropologists' experiences: politeness, conviction that one's own successes are produced by supernatural forces, respect for and lack of punishment of children due to the belief that the soul of a dead person lives in them, and so on. Their apparently

³³ To be sure, critiques, especially from the sociological field were very hard, because Kelsen judged phenomena 'without any analysis of their relation to the society'. Parsons 1944-1945, 140-144.

³⁴ Kelsen 1946, 11. 'Not according to the analogy of his ego, but according to the analogy of the tu, which he has experienced earlier, does primitive man, like the child, conceive the world.' Kelsen 1946, 30.

remarkable sense of justice is simply a consequence of subjection to the social order. Their fears when afflicted by illness are simply fears of evil spirits – the reader cannot help but enquire whether Kelsen thought Westerners have no fear of illness? On the whole the modern reader is struck by the sense that Kelsen conveys not only of referring to the ‘Other’ when describing ‘primitive man’, but of being situated *above* the ‘Other’ in the way he regards them as being subjected to the interplay of good and evil.³⁵ Thus the sociological model of the advanced man that Kelsen proposes in *Society of Nature* is that of a ‘superman’, placed beyond good and evil.

The collectivistic attitude also appears as evidence of a rigid conservatism, in which the past rules over the present – what was done by one’s ancestors must be still be done:

A weak ego-consciousness connected with a strong collectivistic consciousness leads to an increased sensitiveness as far as the judgment of society is concerned, particularly to an increased fear of public disapproval. (Kelsen 1946, 21.)

The main object of criticism in the ‘primitive man’ is therefore tradition. The irrational connection between sticking to tradition and the success expected from retribution lies in the fact that the ‘primitive man’ believes in pleasing or offending his forefathers depending on whether he follows what they did or not.

Kelsen’s comments upon a conversation between a Western scientist and a shaman (a priest who uses magic for the purposes of curing the sick) are illustrative of his standpoint. Close to the end of the chapter he quotes from Rasmussen’s study on the intellectual culture of the Inuit:³⁶

Finally, a particularly intelligent shaman said to Rasmussen: ‘Therefore it is that our fathers have inherited from their fathers all the old rules of life which are based on the experience and wisdom of generations. We do not know how, we cannot say why, but we keep those rules in order that we may live untroubled. And so ignorant are we in spite of all our shamans, that we fear everything unfamiliar. ... Therefore we have our customs.’³⁷

³⁵ There is a similar idea in Topitsch who admires Kelsen’s sense of superiority, which was only to be found in the same degree in Hume’s writings; the difference between them being that Kelsen lacked Hume’s ‘naïvete of the enlightenment’, Topitsch 1982, 27.

³⁶ The study Kelsen refers to is Knud Rasmussen, ‘Intellectual Culture of the Iglulik Eskimos’. *Report of the Fifth Thule Expedition 1921-1924* of 1929.

³⁷ Kelsen 1946, 22. As the recent study of Laugrand shows, Kelsen is faithful to a somehow simplistic vision of ethnographers portraying the shamans as charlatans and

Kelsen views the statement by the shaman about the ignorance of the Inuits and their emotional behavior as confirmation of his theory. Thus he concludes, pointing to the way in which the nature of primitive man tends to evade its inherent dualism of reason and emotions by giving precedence to feelings, that:

In accordance with primitive traditionalism, social authority is the source of truth. This is only another form of the primacy of the emotional over the rational sphere of consciousness. (Kelsen 1946, 23.)

In this regard, it is clear from Kelsen's explanation that no rationality is to be expected from the traditions of non-Westerners. As is evident Kelsen uses the critical-liberal concept of tradition as well as that of rationality. Later Kelsen described the primitive man straightforwardly as a neurotic (Eissler 1953).

In a recent study of aesthetics and history in Arctic communities the concept of tradition has a different content. It is 'widely used with reference to the cultural continuity of a "complex" of clusters of culture traits, some of which may later, disappear, or be replaced without disrupting the overall continuity of the tradition' (Auger 2005, 7). This notion of tradition concentrates on tradition as the transmitter of culture.

This indicates by way of contrast that when Kelsen criticised tradition by reducing it to lack of knowledge, irrationality and ignorance he did so with polemic intent. He was certainly not alone in this. As scholars writing on the history of international law have shown, the nineteenth century rhetoric of civilised versus uncivilised and enlightened versus ignorant had served the definitive purpose of demonstrating Western superiority over other peoples and thus of justifying the civilising mission (Koskenniemi 2002; Craven 2007).

In this regard, Jabloner proves that in studying the thinking of 'primitive man', Kelsen falls into the typical ethnocentric trap. Kelsen's study cannot give a comprehensive account of primitive thinking and rather seems to show that his own analysis uses a method of causal thinking in order to translate primitive thinking into a language that he could understand (Jabloner 1982, 56-62). This was a product of his philosophical attitude.

Nevertheless, as an ethnographer Kelsen addressed the right problems and used sources that are still relevant today. As a study of ethnography, Kelsen's work

impostors, which only in the 1960s started to be corrected. Nevertheless, Rasmussen's work is still quoted by Laugrand as one of the authorities on the topic. Laugrand explains the ambivalent role of the shamans between that of dangerous sorcerers, instruments of evil, and that of holder of traditions, Laugrand 2006, 15.

was within the mainstream. Although severely criticised for not using tools of sociological analysis, the reason for that was probably not that he did not know how to use them. Rather Kelsen did not do that analysis, simply because he did not admit the existence of something called society. As pointed out by Jabloner, however, Kelsen did not make use of the innovative work of Evans-Pritchard on ‘primitive thinking’, which would have been available to him (Jabloner 1982, 57). In his study of the Azande, the British ethnographer accounted for rational thinking combined with witchcraft, which serves to explain the evil (produced by coincidence) in the world, whereas the good is everywhere as created by the (rational) Supreme Being:

Fire is hot but it is not hot owing to witchcraft, for that is its nature. It is a universal quality of fire to burn, but it is not a universal quality of fire to burn *you*. This may never happen; or once in a lifetime, and then only if you have been bewitched. [...] Their philosophy (of the Azande) is explicit, but is not formally stated as a doctrine. A Zande would not say: ‘I believe in natural causation but I do not think that that fully explains coincidences, and it seems to me that the theory of witchcraft offers a satisfactory explanation of them’, but he expresses his thought in actual and particular situations. (Evans-Pritchard 1937, 69; 70-71.)

While it is evident that Kelsen’s text is a plea for rationalism, this standpoint could arguably be viewed as political. At the same time, analysis of epistemology by reference to a strict principle of evolution points to the irrational or non-scientific principle guiding other modes of thought that differ from atomism. In a nutshell, we are speaking about the majority of Western and non-Western philosophical and religious traditions. Hence Kelsen’s critique is far-reaching:

And if we can assume that the condition of today’s primitive men corresponds to an early stage – long ago overcome – of more civilised men; that more civilised men have in their evolution passed through a stage of primitiveness, whose features remain in certain customs, legends, religious notions and so on; then one could suppose that, in the same way that the whole of civilisation has emerged from its primitive origins, – as we may reconstruct from the given ethnographic materials – equally its scientific and therefore specially its causal thinking has emerged from those primitive origins.³⁸

Thus the point is to contrast primitiveness with civilized and by the same token to emphasize the traces of primitiveness in Western culture. How embed-

³⁸ Only in the introduction of the German original work *Vergeltung und Kausalität*, Kelsen 1941.

ded in emotional beliefs, in irrationalism, but also through teleology and causal thinking, in morality does our (legal) culture remain? The timing of the publication of *Society and Nature* (during World War II) does not lack a certain dramatic irony regarding the praise of Western rationalism: after six years of the highest expression of Western irrationality, and of repeated and violent use, in Kelsen's terminology, of the principle of retribution (war), Kelsen insists on the superior value of Western rationality, if only Westerners would take it seriously.

Conclusion

Atomism, individualism, and epistemological evolutionism of *Sein* or, in other words, the chaos that it suggests for a social or for a humanistic science and the formalisation of *Sollen* and its accompanying ordering principle, are in Kelsen's work but two sides of the same positive-empiricist theory. That theory had 'the legal expert of the century' (as an already established tradition described him) as one of its best advocates.³⁹

My general critique of Kelsen's claim that we (Western civilisation) are now in an advanced evolutionary stage – ultra rational empiricism – is that it leaves little room for pluralism, either of a political or existential nature. Kelsen's efforts towards conceiving a transcendental principle in the pure theory is well known. But his transcendentalism is not open. The empiricism and atomism of his view of society and of knowledge – that is to say, his non-normative approach to reality – demand that closure. The universalisation of that atomist position is ideology at work.⁴⁰ In political terms, to consent to de-normativised reality amounts to yielding up one's political position, or that held by one's state or community, to the figure that holds the position of power. Of course this might in certain circumstances be a desirable position. But when presented as an epistemological necessity it becomes a(nother) banal mode of imperial operation.

³⁹ 'This expression has almost become standard', Jabloner 1998, 371. Kelsen is also called usually the 'jurist of the 20th century'. Métall, 1976, v. Also Roscoe Pound referring to Kelsen: '[u]nquestionably the leading jurist of the time' quoted in Gross 1973, 491; also by Paulson and Stolleis *Hans Kelsen Staatsrechtslehrer des 20. Jahrhunderts*.

⁴⁰ Marks, 20-25. For Kelsen himself as a critic of ideology, see Kelsen, 1964.

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