Routledge
Taylor & Francis Group

Jurisprudence
An International Journal of Legal and Political Thought

ISSN: (Print) (Online) Journal homepage: www.tandfonline.com/journals/rjpn20

Hans Kelsen, international law and the 'primitive' legal order

Phil Edwards

To cite this article: Phil Edwards (09 Mar 2025): Hans Kelsen, international law and the 'primitive' legal order, Jurisprudence, DOI: 10.1080/20403313.2025.2457805

To link to this article: https://doi.org/10.1080/20403313.2025.2457805

Published online: 09 Mar 2025.

JURISPRUDENCE
https://doi.org/10.1080/20403313.2025.2457805

Routledge
Taylor & Francis Group

Hans Kelsen, international law and the 'primitive' legal order

Phil Edwards

Department of Sociology, Manchester Metropolitan University, Manchester, UK

ABSTRACT

Hans Kelsen's application of his Pure Theory of Law to international law was supported by two key theoretical assumptions. According to the systematicity assumption, present in Kelsen's work between 1920 and 1960, legal cognition constituted international law as a unified system, grounded in a presupposed basic norm. According to the evolutionist assumption, prominent between 1934 and 1945, social institutions underwent a teleological process of evolution, so that international law could be expected to recapitulate the development of domestic legal systems. This paper analyses the evolutionist model, identifying what Kelsen considered to be the minimum content of a legal order and the characteristics of the earliest legal orders, and showing how his analysis of international law followed the model. It then reviews the systematicity assumption and the difficulty of applying it to international law, particularly with regard to the basic norm. These difficulties, and some potentially unsettling implications of the evolutionist assumption, are discussed with reference to the broader history of Kelsen's theoretical work. In conclusion, the paper argues that the same drive for certainty that led Kelsen to champion these models led him to abandon or downplay them after 1945, discounting the insights that they could offer him – and us.

KEYWORDS

Kelsen; Pure Theory of Law; legal positivism; international law; neo-Kantianism

Introduction

Hans Kelsen published extensively on international law throughout his long career; he made significant specialist contributions to the topic as early as 1920 and as late as 1958, including 30 papers and two monographs published in the 10 years between 1943 and 1952. He contributed to international law on a political as well as a theoretical level, paying close critical attention to the development of the League of Nations and subsequently the United Nations.

Kelsen consistently held that international law was a factor in international relations whose role and reach should be increased. This position faced theoretical as well as political challenges throughout Kelsen's working life; advocacy was rarely entirely absent from his writing on international law[1], and was often overt. A 1934 paper concluded

CONTACT Phil Edwards p.edwards@mmu.ac.uk

[1]Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (Cambridge University Press 2010) 230.

by evoking 'the task incumbent upon us, to act consciously so as to further the development of the mechanisms of international law'[2]; in 1942's *Law and Peace in International Relations*, Kelsen acknowledged that he had adopted an interpretation of international law as likely to develop towards greater centralisation 'with the intention of strengthening as far as possible all the elements of present-day international law which tend to justify this interpretation'.[3]

Kelsen's analysis and advocacy of international law rested on two key theoretical assumptions: that international law could and should be understood as a logically consistent system, unified by a presupposed basic norm; and that international law was in a 'primitive' state, combining present underdevelopment with the potential for development into something like a national legal order. Both assumptions regarding international law – that it already had a minimum of systematic coherence and that it had an inherent capacity to develop into a more sophisticated form – made it more plausible to argue that reforms to international law and governance could result in a coherent and institutionally organised system.

The systematicity assumption, grounded in a neo-Kantian theory of 'legal cognition', was central to Kelsen's legal theory from a relatively early stage. The model faced difficulties when extended to international law, however; specifying the content of the basic norm of international law proved particularly problematic. Kelsen developed the 'primitive' framing, and the evolutionist model on which it was based, in the 1930s; the model shed light on some key features of international law, but at the cost of introducing disruptive assumptions about the nature of legal normativity. Kelsen was not quick to address either of these two challenges. Rather, in later work – between 1945 and the sceptical turn of 1960 – Kelsen largely neglected both the evolutionist model and the neo-Kantian concepts associated with the systematicity assumption; instead, he elaborated the Pure Theory without invoking either set of grounding assumptions, while maintaining his confidence in its unique validity.

Kelsen's recourse to these two assumptions was motivated by his belief that the Pure Theory of Law was uniquely scientifically valid, and hence the only appropriate analytical framework for the analysis of legal normativity. The problems that he encountered in elaborating them attest to the impossibility of justifying his theory in this way. Ironically, if the prior commitment to the unique validity of the Pure Theory of Law is set aside, it can be seen as a coherent and powerful analytical toolkit, particularly as regards international law – all the more so when supplemented by the two frameworks discussed here. Kelsen's troubled development of the theory demonstrates that it has to be taken on its own merits, however; it cannot be grounded – as he hoped – in logical necessity, whether epistemological or historical.

This paper is in seven sections. The first two sections respectively give accounts of the evolutionist model and of how Kelsen applied it to international law, drawing on two relatively neglected texts, *Society and Nature* and *Law and Peace in International Relations*. The third section sets out the systematicity assumption, bringing out the neo-Kantian framework on which it was based; the fourth section traces the application

[2]Hans Kelsen, 'La technique du droit international et l'organisation de la paix' (hereafter 'La technique du droit international') (1934) *Revue de droit international et de législation comparée* 5; in Hans Kelsen (ed. C. Leben) *Écrits français de droit international* (hereafter *Écrits*) (Presses universitaires de France 2001) 251, 257 (author's translation).
[3]Hans Kelsen, *Law and Peace in International Relations* (Harvard University Press 1942) 55.

of this model to international law, following the development of Kelsen's proposals for the basic norm of international law and the problems which they encountered. The fifth section discusses the disruptive potential of the evolutionist model, and in particular its capacity to identify features of existing legal orders as 'primitive'. The sixth section traces Kelsen's retreat, in the post–World War II period, from both the evolutionist model and the theoretical assumptions underlying the systematicity assumption; the seventh brings the preceding discussions to bear on debates about the periodisation of Kelsen's work. A brief concluding discussion assesses the continuing significance of Kelsen's theoretical model of international law, with or without the kind of logical grounding that Kelsen sought repeatedly to give it.

Evolution as framework and justification

The idea of international law as 'primitive' was common coin among international lawyers of the 1920s[4]; in 1928, J. L. Brierly argued that while international law was perhaps 'an immature, little developed system', this was 'what the history of law teaches us to expect'.[5] Kelsen was unusual both in how literally he took this idea, taking 'primitive' society as a direct point of comparison for international law, and in the theoretical grounding he sought for it: he invoked 'not progress, with the hint of naivety that implies, but rather (bio-legal) evolution'.[6] Kelsen postulated a teleological developmental process which had led from the earliest human communities to present-day society, and would in future see international law follow an analogous path. In support of this speculative model, he cited the 'biogenetic law', the (since discredited)[7] belief, derived from the nineteenth-century evolutionist Ernst Haeckel, that embryological development recapitulates the process of evolution:

> In the field of law we see an inverted form of the same process: here it is the international community as a whole – corresponding, so to speak, to the species – which still remains in an embryonic state, and must go through all the developmental stages through which national juridical orders had passed through previously[8]

For Kelsen, this model seemed to offer insights into the development of social institutions validated by the facts of human nature: 'social progress may be subject to inherent laws, proceeding from the nature of the human race and by extension from the human nature of its institutions'.[9] Adopting this viewpoint would thus enable reformers more effectively to identify the directions in which progress could be made: 'social reform has more chance of success if it follows the tendencies hitherto exhibited by social evolution'.[10] Study of the culture of 'primitive' societies could then shed light on the 'primitive' legal order of international law; this in turn would make it easier to identify where progress could best be made, cutting with the grain of the evolutionary process.

[4]von Bernstorff (n 1) 91 (footnote).
[5]James Brierly, 'The Basis of Obligation in International Law' in *'The Basis of Obligation in International Law' and Other Papers* (Oxford University Press 1958) 1, 54.
[6]Mónica García-Salmones Rovira, *The Project of Positivism in International Law* (Oxford University Press 2013) 216.
[7]Stephen Jay Gould, *Ontogeny and Phylogeny* (Harvard University Press 1977).
[8]Kelsen (n 2), 'La technique du droit international' 256.
[9]Ibid.
[10]Kelsen (n 3) 149.

Quite how literally Kelsen took this evolutionist model in this period can be gauged from a passage in a 1936 paper, in which he directly invoked 'the mentality of primitive peoples' as an explanation for a seemingly anomalous feature of international law:

> The legal distinction between freely-given consent and forced consent is entirely foreign to the mentality of primitive peoples. This is why it is not permissible to apply unchanged this principle of domestic law – which is a technically evolved form of law – to the primitive legal system which is international law, by declaring an international treaty to be void if one of the contracting parties … has been forced to make the treaty[11]

Nor was this a throwaway comment; it reappears almost unchanged in a paper from 1940.[12]

Kelsen's key work setting out his model of the 'primitive', *Vergeltung und Kausalität* (hereafter *Vergeltung*)[13], was completed around 1939 but remained unpublished in its original form until 1946. An English-language revision, *Society and Nature* (hereafter *S&N*)[14], appeared in 1943 in the USA and 1946 in the UK. Kelsen began work on *Vergeltung* in the mid-to-late 1930s, when he was working in Geneva with a specialism in international law. In this period he took a close interest in the philosophy of science and in the contemporary pursuit of 'unity of science', which was a natural fit with his own debunking rationalism; the aspiration for a 'pure theory' has itself been described as 'an echo of the philosophy of [Ernst] Mach – in particular the [idea] … that science must be stripped of metaphysical or meaningless decoration'.[15] In 1936, Kelsen began corresponding with Otto Neurath, a fellow Austrian exile, then living in the Netherlands; Neurath had been a leading figure of the interdisciplinary Vienna Circle, itself inspired by Mach.[16] Kelsen regretted his failure to make contact with Neurath and his colleagues in Austria[17], but became in effect a corresponding member of the Vienna Circle in exile. He took part in the 5th and 6th International Congresses for the Unity of Science in 1939 and 1941[18] and in 1941 gave a paper to the Harvard Science of Science Discussion Group, whose membership included Vienna Circle alumni Rudolf Carnap and Philipp Frank.[19] *Vergeltung* and *S&N* can thus be situated 'within the overall narrative of Kelsen's lifelong search for unity of cognition'.[20]

The central subject of *Vergeltung* and *S&N* was causality. Contemporary scientific developments appeared to cast doubt on causality as it had formerly been understood, as a universal and exceptionless pairing of a cause and a matching effect. This suggested to Kelsen an evolutionary process of development into greater scientific rationality, as well as raising the question of how the original belief in exceptionless cause and effect

[11]Hans Kelsen, 'Contribution à la théorie du traité international' (1936) *Revue internationale de la théorie du droit* 253; in Kelsen (n 2) *Écrits* 121, 125 (author's translation).
[12]Hans Kelsen, 'La théorie juridique de la convention' (1940) *Archives de philosophie du droit* 33; in Kelsen (n 2) *Écrits* 85, 110 (author's translation).
[13]Hans Kelsen, *Vergeltung und Kausalität* (Böhlau 1982).
[14]Hans Kelsen, *Society and Nature: A Sociological Enquiry* (University of Chicago 1943).
[15]Anne Orford, 'Scientific Reason and the Discipline of International Law' (2014) 25 *European Journal of International Law* 369, 378.
[16]García-Salmones Rovira (n 6) 334 et seq.
[17]From Kelsen's letter introducing himself to Neurath, quoted in García-Salmones Rovira (n 6) 335.
[18]Clemens Jabloner, 'Kelsen and his Circle: The Viennese Years' (1998) 9 *European Journal of International Law* 368, 380 (footnote).
[19]Gary Hardcastle, 'Debabelizing Science: The Harvard Science of Science Discussion Group, 1940–41' in Gary Hardcastle and Alan Richardson (eds), *Logical Empiricism in North America* (University of Minnesota 2003) 170, 173.
[20]García-Salmones Rovira (n 6) 212.

had itself developed. Kelsen argued (with copious supporting references) that 'primitive', pre-literate cultures understood both social relations and their dealings with the natural world exclusively in terms of retributivism; that ancient Greek religion had inherited its concept of inexorable divine retribution from this source; that the Greek philosophers had in turn secularised this concept in the form of exceptionless causality; that pre-Enlightenment scholars had upheld this concept, on the authority of the ancient Greeks, until it was called into question by Hume and subsequently Kant; and that nineteenth- and twentieth-century scholars had succeeded in supplanting it with genuinely scientific models of causation. Less systematically, *Vergeltung* and *S&N* also address the question of the legal ordering of the earliest human cultures (consistently labelled by Kelsen as 'primitive' and associated with credulous irrationality), and how something recognisable as law could have arisen out of a culture of 'primitive' retributivism. Despite the obvious flaws of its grounding assumptions – highlighted unsparingly by contemporary reviewers[21] – *S&N* includes some thought-provoking analysis and argument. In particular, Kelsen specifies what he considers the minimum requirements for a legal order to exist and the differences between such a minimal legal order and a contemporary legal system – a question with obvious relevance to international law.

In 1928's *Der Philosophische Grundlagen der Naturrechtslehre und Rechtsposivismus* ('The Philosophical Foundations of Natural Law and Legal Positivism'; hereafter *Grundlagen*), Kelsen had disdained attempts to show 'that all essential elements of the existing order may be found, at least in their germinal form, in the primeval paradise of humanity'.[22] In *Vergeltung* and *S&N*, alongside his prehistory of concepts of causality, Kelsen traced contemporary legal orders back to their 'primitive' origins (which, admittedly, were not at all a 'primeval paradise'). He argued that the retributivist legal orders of the 'primitive' societies he was describing could themselves be termed 'primitive', in the sense that they represented an earlier stage in the social evolution of law; that 'primitive' legal orders and contemporary legal systems shared many fundamental characteristics, which took different forms according to the stage of socio-legal evolution that a system had reached; and that contemporary international law remained at such a 'primitive' stage but – by the same token – could be expected to develop further, towards centralisation and institutionalisation.

Vergeltung and *S&N* are both in three sections: a long and rather unstructured ethnographic investigation of the belief systems of pre-literate societies is followed by shorter overviews of ancient Greek religion and philosophy and contemporary philosophy of science. In a brief concluding discussion of the social sciences, Kelsen canvasses the possibility that the legal norm, like exceptionless causality, represented a survival from 'primitive' legal orders and their retributivist mindset, and was likewise ripe to be superseded.

Perhaps the most significant theoretical innovation in this eclectic work is the model of the world view and legal order of 'primitive' communities developed in the first section. For Kelsen, 'primitive' societies had a world view of universal retributivism.

[21] E.g., C. Wright Mills, 'Review: Society and Nature, A Sociological Inquiry by Hans Kelsen' (1944) 59 *Political Science Quarterly* 102 and Talcott Parsons, 'Review: Society and Nature, A Sociological Inquiry by Hans Kelsen' (1944) 58 *Harvard Law Review* 140.

[22] Hans Kelsen, 'Natural Law Doctrine and Legal Positivism' (hereafter 'Natural law doctrine') in Hans Kelsen, *General Theory of Law and State* (tr A Wedberg, Russell and Russell 1945) (hereafter *General Theory*) 389, 433.

The legal order embodying this world view, custom-based and reliant for enforcement on 'self-help' by the victim's kin group, can be characterised as one of spontaneous community justice.

Kelsen describes the principle of retribution as 'the basic norm of primitive society'.[23] He breaks down retribution as a response to an unpleasant experience which involves identifying it not only as unwelcome but as a breach of social norms; identifying another person (or group of people) as responsible; and inflicting a responding normative breach on that person or group. Retribution is a preventive reaction, 'directed against [the] link in the chain of causes … which, if struck by the reaction, becomes a less probable cause for repetition of the evil'[24]; it also humiliates the person responsible, 'placing the injurer in the situation of the injured'[25] by imposing coercion on them, and thereby brings satisfaction to the victim.

Both aspects of retribution mark it as a social phenomenon: a transaction among people occasioned and justified by a factual situation, rather than a necessary or automatic response to the situation. Viewed 'objectively', 'the "causes" of a fact are always innumerable'[26]: it would be possible to prevent recurrence of an unwelcome experience by addressing another causal factor, e.g., by avoiding the area where it happened; 'subjectively', on the other hand, 'the neutralization of [the victim's] feeling of pain … [could] be brought about quite differently'[27], e.g., through self-care. In this passage Kelsen is contrasting the social response of retribution with an animal's instinctive reaction, but his argument also implies that non-retributive responses – responses not involving retaliatory coercion and humiliation – may be more effective and more satisfying: may, in short, be rationally preferable.

Kelsen argues that 'primitive' society applies the principle of retribution universally, even assimilating the natural world to human society: '[t]he fundamental principle which determines primitive man's behaviour toward nature is the same as that which decides his conduct toward the members of his own and other groups – the social principle of retribution'.[28] The 'primitive' observer's relationship with the natural world has 'a marked normative character'[29]; 'there is no such thing as "nature" in the sense of a connection of elements determined by causal laws and distinct from society'.[30] Events are interpreted in terms not of cause and effect but of what ought and ought not to happen. Misfortune is interpreted as a wrong calling for retribution, or else as retribution for a wrong already committed[31]; similarly, good fortune is either the reward for past suffering or a burden calling for a balancing sacrifice.

Secondly, there is a tendency to substantialise, seeing 'mental and especially moral qualities […] and even morally qualified acts […] as substances, which in some way stick to, or are inherent in, the body'.[32] This is why absolution of sins requires

[23]Kelsen (n 14) para 25.
[24]Ibid para 18.
[25]Ibid.
[26]Ibid.
[27]Ibid.
[28]Ibid para 17.
[29]Ibid para 15.
[30]Hans Kelsen, 'Causality and Retribution' (1941) 8 *Philosophy of Science* 533.
[31]Kelsen (n 14) para 33.
[32]Ibid para 5.

purification, and why anticipatory purification rituals – seen as supplying punishment earned by past wrongdoing – bring good luck.[33] Crucially, considering an act and its reciprocating act in these terms makes it possible for them to be quantified and figuratively matched to each other. This substantialising tendency 'makes man – even civilized man – believe that the evil which one sustains and the evil which one must inflict according to the principle of retribution can and shall be "equal"'[34]; this is what makes it possible to develop a practice of retribution into a philosophy of retributivism, characterised by the belief that it is both possible and appropriate to match a specific breach to a penalty believed to be of an equivalent severity.

A view of subjectivity as collective, thirdly, is grounded in the substantialising tendency, as the community is seen as the social embodiment of a literal substance such as blood. As such, 'the whole group is responsible for a wrong committed by a single member'[35]; Kelsen also notes a 'lack of any socially organized sanction' against crimes 'committed within the group itself'.[36] Moreover, '[w]here the principle of collective responsibility exists, absolute liability is almost unavoidable'[37]: if no distinction is made between individual and group, an individual's mental state cannot be relevant to the attribution of blame. Kelsen repeatedly stresses that both collective and absolute liability may be considered morally valid, and points out that these conceptions of responsibility are not entirely absent from contemporary law.[38]

The world view of a 'primitive' society, as Kelsen presents it, is thus one where all events are interpreted as motivated acts, charged with either good or evil intent; where both good and evil acts are seen as creating a quantifiable burden, to be discharged through equivalent acts of revenge or sacrifice; and where people are considered primarily as members of their kin group or community, to the point where these collective subjects, rather than individuals, are seen as committing and suffering actions both good and bad. Taken together, this amounts to a world view of universal retributivism. Even the conception of subjectivity as collective can be understood in these terms: if retribution can proceed directly from the experience of a wrong done, without the intermediate step of identifying a responsible individual, this minimises the likelihood that a wrong might fail to be paired with an offsetting act of retribution.

In describing the legal order of 'primitive' societies, Kelsen links 'the customary character of the formation of law' to '[the] submission of the individual to the group'.[39] The community is considered as extending into the past, or rather out of the past into the present: 'what the ancestors taught to be true […] is true'[40], with ancestors believed to reinforce customary observance through supernatural intervention in the present day.[41] Perpetuation of the community as established in the past thus takes priority over innovation; tradition and custom are not merely seen as sources of law but as the only possible source. Here again, Kelsen highlights continuities between 'primitive'

[33]Ibid para 30.
[34]Ibid para 23.
[35]Ibid para 42.
[36]Ibid para 6.
[37]Hans Kelsen, 'The Law as a Specific Social Technique' (1941) 9 *University of Chicago Law Review* 75, 92.
[38]Ibid 93; Kelsen (n 14) para 55, note 150.
[39]Kelsen (n 14) para 6.
[40]Ibid.
[41]Ibid.

and modern societies, specifically stressing the continuing validity of customary as well as statute law.

If in a 'primitive' community custom substitutes for legislation, 'self-help' substitutes for enforcement: blood revenge is the first recourse when it is 'the blood of the group that has been shed'.[42] Enforcement by 'self-help' should nevertheless be considered as enforcement through the legal order: '[t]he individual who, authorized by the legal order, applies [a] coercive measure […] acts as an organ of this order'.[43] As such – and despite appearances to the contrary – 'law makes the use of force a monopoly of the community'[44]: '[t]he decentralization of the application of the law does not prevent the coercive measures as such from being strictly monopolized'.[45] Indeed, the antiquity of blood revenge is cited as evidence that human society 'from the very beginning has the character of a legal and at the same time moral order'.[46]

As for the institutional location of the 'primitive' legal order, Kelsen's position on this question could be inferred from his denial of the dualism of law and state. Having previously argued that centralisation constituted a legal order as a state, in a 1941 paper he argued that the legal order develops with the community itself, predating any centralisation: 'History presents no social condition in which large communities have been constituted other than by coercive orders'.[47] By extension, the 'primitive', decentralised community was similarly indistinguishable from the legal order which constituted it: 'the value of a distinction between the social order and the social community is very problematical […] the order and the community are […] two different aspects of the same thing'.[48]

The 'primitive' community's world view, as we have seen, was characterised by universal retributivism, with subjectivity understood as collective and a meticulous reckoning of good and bad outcomes. To this we can now add the features of a 'primitive' legal order: custom-based law, socially approved vendetta in place of state-backed enforcement and the identity of the legal order with the community as a whole. These characteristics add up to a conception of justice to be enforced as necessary by any and all members of the community, with no debate as to the measures to be enforced and no separate authority to command enforcement of sanctions or hear possible appeals: a spontaneous community justice.

Kelsen repeatedly downplays the differences between modern forms of retributive justice and a 'primitive' legal order (universal retributivism enforced by spontaneous community justice), characterising them as relative rather than absolute: he typically refers to them in terms of 'decentralization' or as 'purely a quantitative [difference]'[49], in that the law proceeded from multiple sources, not from one only. For Kelsen, moreover, not only did the ethic of universal retributivism and the practice of spontaneous community justice amount to a valid legal order; they represented the legal order of the earliest human communities, from which all later orders have developed and

[42]Ibid para 5.
[43]Kelsen (n 37) 81.
[44]Ibid.
[45]Kelsen (n 3) 50.
[46]Kelsen (n 14) para 21.
[47]Kelsen (n 37) 82.
[48]Kelsen (n 3) 73.
[49]Kelsen (n 14) para 22.

whose traces they still bear. To say that international law existed in a 'primitive' state was then only to say that it remained somewhat more 'primitive' than domestic legal orders, which were themselves the intermediate results of an evolutionary process. International law's evolutionary deficit would, inevitably, be made up at some point – and identifying the areas in which international law was still lacking could hasten the process.

'Primitive' international law

In lectures given in 1941 and published in 1942 as *Law and Peace in International Relations* (hereafter *LPIR*), Kelsen systematically applies the model of the 'primitive' legal order to international law. First, Kelsen stresses the universality of retributivism in the 'primitive' mindset, and likens it to the *bellum justum* principle. The 'primitive' 'sees in every death either a punishment imposed by a superhuman authority, or a murder'.[50] Vengeance for such a murder would be taken against another tribe, however: the earliest legal order had thus been a system of inter-tribal law, which embodied 'in its very essence, the principle of "just war."'.[51] Collective responsibility is another point in common between 'primitive' and international law: '[b]lood revenge […] is the reaction of one group against another group. It is precisely this principle which characterizes the technique of international law'.[52] International law thus has two of the key features of the 'primitive' ethic of universal retributivism. Kelsen notes that the third – the 'substantialising' tendency which makes it possible to match the severity of sanction and delict – is lacking, with states free to respond to perceived injuries however they choose; he characterises this as 'one of the worst lacks in the technique of international law'.[53]

The international legal order, Kelsen argues, also has all the features of the 'primitive' order of spontaneous community justice. Given that treaty law rests on the customary norm *pacta sunt servanda*, which in turn depends on the validity of customary international law, international and 'primitive' legal orders share a common grounding in custom. Enforcement in international law relies on 'self-help': Kelsen draws a direct analogy between an individual carrying out blood revenge in a 'primitive' community and a state which 'resorts to reprisals or wages war' in response to a breach of international law, arguing that both act as 'an organ of the […] legal community', 'empowered by the order constituting the group'.[54] Lastly, the lack of any distinction between the legal order and the community itself can be reinterpreted in terms of a process of centralisation, which gives developed legal orders institutional shape and visibility. Thus, Kelsen characterised customary law as having 'a decentralized character', in the sense that it permits law to be made by ordinary individuals.[55] Elsewhere, he explicitly likened international law to 'primitive' law on the basis of a lack of centralisation:

> the international legal order is radically decentralized, and for this very reason the international community constituted by international law is not a state […] Similarly the

[50]Kelsen (n 3) 40.
[51]Ibid 42.
[52]Ibid 98.
[53]Ibid 106.
[54]Ibid 57.
[55]Hans Kelsen, 'Centralization and Decentralization' in *Authority and the Individual: Harvard Tercentenary Publications* (Harvard University Press 1937) 210, 226.

> completely decentralized community of a primitive tribe is not a state, although there is no doubt that the order constituting it is a legal order.[56]

Similar descriptive formulations appear in later works such as 1945's *General Theory of Law and State*[57] (hereafter *GTLS*) and 1952's *Principles of International Law*[58] (hereafter *PIL*). However, in *S&N*, the 'primitive' legal order, with the minimalism of its existence conditions, plays a more significant role: it exemplifies what a social order may lack while still being identifiable as a legal order. As such, it represents the state of minimal development out of which existing legal systems can be assumed to have developed. In *LPIR*, Kelsen goes still further, developing the parallel between 'primitive' law and international law into an identity: 'if law is the social organization of sanction, the original form of law must have been inter-tribal law, and, as such, a kind of international law'.[59] It is worth stressing here that the proposition that human communities had always been constituted by law did not entail that their members' behaviour had always been regulated by law; as we have seen, Kelsen suggested that the earliest laws were enforced by revenge attacks on another group.[60] Inter-tribal – and by extension international – law thus antedated domestic law; Kelsen even suggests that it predates the first nation states.[61] (This suggestion recurs in *GTLS*[62] alongside a slightly more cautious formulation: '[i]t would be quite possible that primitive social groups developed into States simultaneously with the development of international law'.[63])

The Kelsenian concept of the 'primitive' legal order, as developed in this period, thus brings with it three linked propositions, all highly relevant to the contemporaneous development of international law. Firstly, a legal order is defined as a body of norms which are enforced in a given community, with coercion applied in response to normative breaches: law was by definition the only normative system which '[brought] about the desired social conduct of men through threat of a measure of coercion which is to be applied in case of contrary conduct'.[64] If international law was to be seen as a legal order, Kelsen wrote in 1932, 'this system of norms, too, must be a coercive order'.[65] The question of whether a community is constituted as a legal order is thus the question of whether it has a set of norms whose infraction is the occasion for a coercive response – and this combination can be seen in 'primitive' as well as modern communities. International law qualifies in this respect owing to the existence of *bellum justum* norms – and, more importantly, the existence at all times of some international understandings, however informal and/or disputed, of when it is appropriate for a nation to go to war.

Secondly, legal orders thus understood have certain identifiable features which may exist in either a 'primitive' or a modern form; as such, the absence of any recognisably modern legal order does not equate to the absence of a legal order, as long as those

[56]Hans Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence' (1941) 55 *Harvard Law Review* 44, 66.
[57]Kelsen (n 22), *General Theory*.
[58]Hans Kelsen, *Principles of International Law* (Rinehart 1952).
[59]Kelsen (n 3) 42.
[60]Ibid.
[61]Ibid.
[62]Kelsen (n 22), *General Theory* 334.
[63]Ibid 370.
[64]Kelsen (n 37) 79; also see Kelsen (n 14) para 12.
[65]Hans Kelsen, *Unrecht und Unrechtsfolge im Völkerecht* (Springer 1932); quoted in von Bernstorff (n 1) 87.

features can be identified in a 'primitive' form. Given that no human society older than the 'primitive' can be identified, this proposition implies that even the earliest human societies had something retrospectively recognisable as a legal order, albeit in a wholly 'primitive' form. International law, for its part, had existed from the first time that a group of humans had identified another group as deserving to be punished for their infractions – and as such had arguably predated law applied within a community, and hence predated the development of the nation state.

Thirdly, Kelsen held that legal orders have an inherent tendency to develop from 'primitive' into modern forms. Like natural evolution, this process was uneven and unpredictable, meaning that temporary, partial or local survivals of 'primitive' features were to be expected – although they could also be expected to become less significant, and ultimately to cease to exist, over time. Those who called for a more formalised or institutionalised international legal order were looking ahead to a process that international law was ultimately certain to go through, given that all existing national legal systems had already gone through it.

The evolutionist model thus offers a distinct perspective on the development of legal orders, considered as a process of increasing centralisation and rationalisation which progresses unevenly and thus allows for the temporary survival of historical relics (such as the partial persistence of collective and absolute liability). It also offers a framework for the analysis of international law: as a body of norms binding on the international community with force as a response to breaches; as a largely 'primitive' legal order, characterised by its lack of central institutions, its paucity of general norms and its reliance on 'self-help'; and as a legal order that was nevertheless in the process of developing greater centralisation and formality – a process which was historically inevitable but could be hastened by the work of conscientious lawyers.

It also held potential challenges for the Pure Theory, however. The evolution of legal orders as Kelsen saw it was by no means complete, even in domestic legal systems; the supersession of customary law remained to be achieved, as did the elimination of collective responsibility and strict liability. Even more fundamentally, the evolutionist model plainly suggested that the philosophy of retributivism – the reciprocal quantification of crimes and penalties – and even the principle of retribution were relics of the 'primitive', and thus liable to be eliminated at some future point, as legal orders continued to evolve towards an end state of scientific rationality. Kelsen's attempts to engage with this prospect will be considered below.

Unity as framework and justification

At first sight, the proposition that Kelsen considered international law to be a system seems unexceptional. However, the systematicity assumption represented a specific conceptualisation of international law, and of law in general, grounded in assumptions about how law was perceived and understood rather than in speculative historical processes. This position derived partly from Kelsen's consistent denial that the state was an entity existing independently of its legal order; as he wrote in 1934's *Reine Rechtslehre* (translated as *Introduction to the Problems of Legal Theory* (hereafter *IPLT*)), '[w]hen the legal system has achieved a certain degree of centralization, it is characterized as a

state'.[66] Giving priority to law over the state, this assumption necessarily excluded the conventional perception of international law as imposed on, or emerging from, the interactions of nation states.

However, to say that Kelsen identified the state with its legal order does not only mean that he saw it as a body of law. For Kelsen, any legal order was a discrete logical system characterised by internal unity. This proposition derived from his model of legal cognition, which 'applied the Neo-Kantian notion of the object-creating power of methodology directly to legal scholarship'.[67] Following Hermann Cohen and the Marburg neo-Kantian school, Kelsen argued that '[c]ognition … creates its objects, out of materials provided by the senses and in accordance with its immanent laws'.[68] While Cohen's subject had been scientific knowledge, Kelsen 'does not hesitate to apply the transcendental method to legal science'[69], writing in 1922 that 'the material given to legal science … [is] formed into legal propositions in the same way as the perceptual material is formed in the synthetic judgments of natural science'.[70] For a contemporary commentator, law to Kelsen did not have 'a meaning and content existing independently of legal knowledge and science'; rather, he assigned to legal science 'the power to constitute its object as such, through the work it carries out on initially undifferentiated legal material', and as such was 'a typical follower of Marburg idealism'.[71]

Kelsen's model of legal cognition presupposed logical unity. In 1928's *Grundlagen*, Kelsen cites 'the principle of unity' as 'basic for all cognition, including the cognition of norms', associating logical unity with uniqueness as well as validity: '[a] system of norms can only be valid if the validity of all other systems of norms with the same sphere of validity has been excluded. The unity of a system of norms signifies its uniqueness'.[72] Kelsen viewed the unity of law 'in the same manner that biological science treated the unity of science'[73]: just as experimental results within a scientific field could be expected to arrive at a non-contradictory set of axioms, legal cognition, if successful, would derive a non-contradictory set of legal norms. Legal cognition would thus constitute law as a unified system with 'a field of discourse comparable to that of truth'[74]; just as no two propositions can be both true and mutually contradictory, no two valid legal propositions could contradict one another. Indeed, 'legal scholarship becomes a science to the extent that it fulfills the postulate of the unity of its knowledge, that it succeeds in conceiving of the law as a unitary system'.[75]

If nationally bounded legal orders could be identified where a conventional analysis would see nation states, the laws that applied to those legal orders could similarly be

[66]Hans Kelsen, *Introduction to the Problems of Legal Theory* (tr. Stanley Paulson and Bonnie Litschewski Paulson, Clarendon Press 1992) para 48.
[67]von Bernstorff (n 1) 52.
[68]Kelsen (n 22), 'Natural Law Doctrine' 434.
[69]Carsten Heidemann, 'Facets of "Ought" in Kelsen's Pure Theory of Law' (2013) 4 *Jurisprudence* 246, 248.
[70]Hans Kelsen, 'Rechtswissenschaft und Recht' (1922) 3 *Zeitschrift für Öffentliches Recht* 127; quoted in Heidemann (n 69) 249.
[71]Wilhelm Jöckel, *Hans Kelsens rechtstheoretische Methode* (Mohr 1930); quoted in Carsten Heidemann, "Noch einmal: Stanley L. Paulson und Kelsens urteilstheoretischer Normbegriff" (2007) 93 *ARSP* 346, 349 (author's translation).
[72]Kelsen (n 22), 'Natural Law Doctrine' 410.
[73]García-Salmones Rovira (n 6) 335.
[74]Stanley Paulson, 'Some Issues in the Exchange between Hans Kelsen and Erich Kaufmann' (2005) 48 *Scandinavian Studies in Law* 269, 285.
[75]Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Mohr 1928); quoted in von Bernstorff (n 1) 79.

identified as an international legal order – which would also be characterised by logical unity:

> Since the jurist regards international law, like the state legal system, as a complex of valid or binding norms, and not – or not merely – as a conglomerate of natural facts, he must conceive of these complexes of norms in one non-contradictory system[76]

In a key early work, 1920's *Das Problem der Souveränität und die Theorie des Völkerrechts* ('The Problem of Sovereignty and the Theory of International Law'; hereafter *Souveränität*), Kelsen critiqued the assumption that nation states were the subjects of international law as an example of the 'personifying' tendency of conventional legal thinking, likening it to 'mythological thinking, which … suspects a dryad behind every tree'.[77] International law was both a unified legal order in itself and one that existed in continuity with individual national legal orders, uniting them into a single overall 'universal' system.

It is important to note both the strength and the limits of Kelsen's commitment to a neo-Kantian model of cognition. Kelsen was not an epistemological pluralist: if the Pure Theory of Law constituted positive law as its object, this did not entail that another theory might constitute the same legal material into a different and equally valid understanding of positive law. Kelsen granted the validity of sociological perspectives on law[78], and even acknowledged that belief in legal norms was not necessary or universal: a committed sociologist, or an observer who subscribed to 'theoretical anarchism', might reasonably consider law as an 'ideology'[79] (a term which Kelsen consistently used disparagingly and counterposed to scientific rationality). However, these non-normative perspectives on law were labelled as inadequate to a full understanding of law: the cognitive object of legal sociology is 'not actually the law itself, but certain parallel phenomena in nature'[80], while the viewpoint of 'theoretical anarchism' is one that essentially denies the existence of law, 'refus[ing] to see anything but naked power where jurists speak of the law'.[81] Kelsen's adoption of Kantian and neo-Kantian positions more broadly was 'generally hesitant and rather eclectic'[82], however. While he did on occasion invoke the Kantian categories in the context of legal cognition, the connection was generally presented as an analogy, or else heavily qualified: thus, in *IPLT*, Kelsen classed the legal 'ought' as a category but distinguished it from a 'transcendent idea of law', describing it as 'cognitively and theoretically transcendental in terms of the Kantian philosophy, not metaphysically transcendent'.[83]

International law, the unity of law and the basic norm

The presupposition of systemic unity and its associated criterion of systemic non-contradiction were a vital underpinning to the Pure Theory of Law for most of Kelsen's career. Applied to national and international law, the postulate of systemic unity could be

[76]Kelsen (n 66) para 50b.
[77]Kelsen (n 75) 51.
[78]Kelsen (n 66) para 7.
[79]Ibid para 16.
[80]Ibid.
[81]Ibid.
[82]Heidemann (n 71) 347 (author's translation).
[83]Kelsen (n 66) para 11b.

understood, at its most basic, in terms of complementarity: since 'all law is essentially the governing of human behaviour', '[t]o say that international law imposes obligations on, and grants rights to, states means simply that it imposes obligations on, and grants rights to, individual human beings indirectly'.[84] The norms of international law are incomplete norms addressing individuals. They are completed by the legal systems of individual states, which specify the individual whose behaviour is to be affected: 'the norms which create rights or obligations for a juridical person presuppose the existence of the special legal order which constitutes the juridical person'.[85] There is also a larger relationship of complementarity between state law and international law: by granting and denying recognition to nation states, the international legal order 'determines the spatial and temporal sphere of validity of [each] state legal system'.[86] The authority of each national legal system is thus delegated to it by the international legal order.

However, relations of complementarity at most ensured procedural unity, not logical unity; it might still be possible for contradictory obligations to exist in domestic and international law, for example in the case of a national government legislating in defiance of obligations laid on it by a supra-national body. In *Souveränität*, Kelsen deals with this possibility by denying it, referring flatly to 'the impossibility of a contradiction between the content of the norms of the two systems'.[87] His position in later works is more nuanced. In *IPLT* and subsequently, Kelsen did not present the unity of the 'universal' system – or of any legal system – as an empirical fact, nor even as a regulatory ideal, a presupposition that it should be possible to interpret disparate laws in a way that delivers logical unity.[88] Instead, he was at pains to demonstrate how contradictory obligations can in practice be imposed by international and domestic law, with the result that legal provisions with mutually contradictory effect can subsist indefinitely within a single system.[89] The result might be that one or other of the conflicting norms was liable to be abrogated or that the authority enacting it was liable to sanction for doing so; however, the norms with contradictory effect would continue to obtain. Crucially, such cases would not create a logical contradiction; it would still be possible to cognise the structures and processes that allowed provisions with contradictory effects to subsist (temporarily or indefinitely), and so constitute the system as a logical unity. Kelsen's argument (never rich in illustrative examples) can be paraphrased by postulating three outline legal norms:

N1. Act *A* ought to be sanctioned.

N2. Failure to perform act *A* ought to be sanctioned.

N3. Enforcing any norm sanctioning act *A* ought to be sanctioned.

N1 and N2 impose what would usually be considered contradictory obligations, as do N1 and N3. However, there is no logical contradiction between either of these two pairings. Logical contradiction is unresolvable, and in both these cases the implication of the

[84]Ibid para 49c.
[85]Hans Kelsen, 'La transformation du droit international en droit interne' (1936) *Revue générale de droit international public* 5; in Kelsen (n 2), *Écrits* 175, 177 (author's translation).
[86]Kelsen (n 66) para 50g.
[87]Kelsen (n 75); quoted in von Bernstorff (n 1) 96 (footnote).
[88]Cf. discussion in Martin Golding, 'Kelsen and the concept of "legal system"' (1961) 47 *ARSP* 355.
[89]Kelsen (n 66) para 50f.

combination of two norms (while onerous and/or unjust) is straightforwardly comprehensible.

The logical unity of legal orders was ultimately assured by their presupposed basic norm: the norm laying down that sanctions ought to be applied according to the positive norms laid down by a particular constitution, 'the ultimate assumption and hypothetical basis of any positive legal order'.[90] In 1928's *Grundlagen*, Kelsen likens the basic norm to – but, tellingly, does not identify it with – 'the transcendental logical principles of cognition (in the sense of Kant)'[91]:

> as one cannot understand the empirical world from the transcendental logical principles, but merely by means of them, so positive law cannot be derived from the basic norm, but can merely be understood by means of it. The content of the basic norm … depends entirely upon the material claiming to be positive law[92]

Where international law was concerned, the question of its ultimate grounding had first been raised in *Souveränität*, which discusses the hypothetical 'original norm' [*Ursprungsnorm*] of international law. Kelsen suggested that this would encompass a number of different 'basic principles': 'the international legal rule *pacta sunt servanda* … along with the other basic principles of international law … [represent] an objectively necessary prerequisite for legal norms, a hypothesis through which an international law becomes possible'.[93] Subsequently, Josef Kunz objected that *pacta* in particular could not be the basic norm of international law as it was 'a positive rule of customary international law … [and was] therefore anchored in customary law'.[94] Kunz noted that Alfred Verdross (like Kunz, a follower of Kelsen) had proposed a more broadly worded alternative:

> The states shall behave in their relations with one another according to the general principles recognized by civilized nations, insofar as no special norms, derogating to these principles, have come into existence.[95]

Pacta was, moreover, a substantive norm, whereas (Kunz argued) 'the basic norm must be purely formal; its unique function is to institute the method of creation of the law'.[96]

In 1934's *IPLT*, Kelsen acknowledges this second point in his differentiation of 'static' and 'dynamic' basic norms: the precepts of moral and religious normative orders, he argues, have a 'static' basic norm, from which particular moral or religious norms can be derived through 'deduction from the general to the particular'.[97] The basic norm of a positive legal order, by contrast, is 'dynamic': legal norms are validated by showing 'that a particular norm was created in accordance with the basic norm'.[98] An outline for the basic norm of a domestic legal system, given in *IPLT*, states: 'Coercion is to be applied under certain conditions and in a certain way, namely, as determined by the framers of the first constitution'.[99]

[90]Kelsen (n 22), 'Natural Law Doctrine', 436.
[91]Ibid.
[92]Ibid.
[93]Kelsen (n 75) quoted in von Bernstorff (n 1) 162.
[94]Josef Kunz, 'The Vienna School and International Law' (1934) 11 *NYU Law Quarterly Review* 370, 403.
[95]Ibid 404.
[96]Ibid.
[97]Kelsen (n 66) para 27.
[98]Ibid para 28.
[99]Ibid.

Kelsen's understanding of the basic norm of international law developed over the next decade. In *IPLT*, he characterises *pacta* as a norm of 'special significance'[100] but does not nominate it as the basic norm of international law; he does not specify the latter but suggests that it must be 'a norm that establishes custom – the reciprocal behaviour of the states – as a law – establishing material fact'.[101] In a 1936 paper, Kelsen stresses that '*pacta sunt servanda* is absolutely not … the basic norm of international law', not least because the basic norm of international law must be capable of serving as the foundation of 'the entire universal legal system', national legal orders included; he concludes, 'I have set out the formulation of this unitary basic norm elsewhere'.[102] (It is not clear what this refers to, unless it is the broad description given in *IPLT*.) The relationship between *pacta*, customary law and the basic norm of international law is set out more fully in a paper published in 1939, where Kelsen writes: '*pacta sunt servanda* is … a legal rule created by custom. … In international law as in domestic law, there are norms much older than the rule *pacta sunt servanda*.'[103] Custom enjoyed historical priority over *pacta*, and the basic norm must account for this:

> [t]he question of the basic norm of international law is the question of the basis of validity of customary international law. … The basic norm of international law is the norm which institutes the state of affairs whereby custom is a law-creating act.[104]

In 1945's *GTLS*, Kelsen reiterates this last statement before offering, seemingly for the first time, a suggestion as to the content of this norm: 'The States ought to behave as they have customarily behaved'.[105] This latter formulation is repeated in subsequent work with minor variations.[106]

While the *GTLS* formulation meets the description of a 'norm which countenances custom as a norm-creating fact', it is worth noting that it is a norm exhorting compliant behaviour, rather than specifying the grounds on which behaviour might be sanctioned. Kelsen had distinguished between the 'direct' motivation characteristic of religion and morality, on one hand, and the 'indirect' motivation characteristic of law on the other: 'Morality, whose technique is direct motivation, says, thou shalt not steal. The law says, if one steals, he shall be punished.'[107] In this respect the proposed basic norm for international law is more like the putative basic norms of morality and religion than a basic norm of positive law.

In 1960's *Reine Rechtslehre* (translated as *Pure Theory of Law*; hereafter *PTL*), Kelsen offers a modified formulation (unfortunately garbled in the 1967 English translation):

> States, i.e., the governments of the states, in their mutual relations ought to behave in a way that conforms – or, coercion of state against state ought to be exercised under the conditions

[100]Ibid para 49a.
[101]Ibid.
[102]Kelsen (n 85) 189.
[103]Hans Kelsen, 'Théorie du droit international coutumier' (1939) X *Revue internationale de la théorie du droit* 253; in Kelsen (n 2) *Écrits* 61, 83 (author's translation).
[104]Hans Kelsen (n 103) 67 (emphasis omitted).
[105]Kelsen (n 22), *General Theory* 369.
[106]E.g., Kelsen (n 58) 418; Hans Kelsen, 'Why Should the Law be Obeyed?' in Hans Kelsen, *What is Justice?* (University of California 1957) 257, 264; Hans Kelsen, 'The Concept of the Legal Order' (1982) 27 *American Journal of Jurisprudence* 64, 74.
[107]Kelsen (n 37) 87.

> and in a way that conforms – with the custom constituted by the actual behaviour of the states.[108]

The reference to coercion brings the proposed basic norm closer to the postulated basic norm of a national legal system considered in isolation, suggesting a conceptualisation of the basic norm in terms of the sanctioning of non-compliant behaviour rather than of compliance. Kelsen had first outlined the content of the basic norm of a national legal system in 1934; the lack of any specification of the basic norm of international law until 1945, and the persistence of this divergence between the two until 1960, hint at the difficulties which grounding the 'universal system' in international law could pose for the Pure Theory of Law.

Kelsen's proposals regarding the basic norm of international law have drawn criticisms, some more cogent than others. Hart's suggestion that the *GTLS* formulation is 'a mere useless reduplication of the fact that a set of rules are accepted by states as binding rules'[109] is ill judged. The statement 'states should accept rules' is not logically a duplicate of the statement 'states currently accept rules': in Kelsen's own words, '[f]rom the fact that something is or happens, it does not logically follow that it […] ought to be or ought to happen'.[110] In any case, Kelsen's proposed basic norm makes no reference to rules but is itself a rule, grounded in and referring back to a stable set of customary (but not norm-governed) interactions among states. It is constructed so as to function as a normative reference point to which positive norms could henceforward refer, making it possible to build a rule-based order on a foundation of custom.

We can, however, question whether Kelsen's candidates for basic norm of international law are fit for purpose. Firstly, until the 1960 reformulation, as noted, the norm makes no reference to coercion or the application of sanctions. The basic norm as specified in *GTLS* is a norm that exhorts compliance with a standard based on existing practice: it is only distinguished from Verdross's exhortation to observe 'the general principles recognized by civilized nations' by its reference to custom, not by its use of a different 'technique'. The burden of the basic norm of a positive legal order, as Kelsen had presented it, is not that subjects of that order should act in certain ways (and avoid actions which would be sanctioned as delicts) but that the actions of subjects of the legal order should be sanctioned on certain conditions (thereby constituting those actions as delicts). A basic norm of international law formulated on this basis would specify the conditions under which coercion should be applied – or, more precisely, how to identify those conditions. This lack is addressed in *PTL*, with a proposed basic norm phrased in terms of the use of inter-state coercion. However, given that a state-centric framework was assumed, such a basic norm in effect specified that under certain conditions states ought to make war on one another – an emphasis which sat very oddly with Kelsen's lifelong commitment to the promotion of peace through international law.

The focus on nation states is also problematic in broader terms. Given Kelsen's much-reiterated insistence that norms can only bind individuals, the norms of international law are – as we have seen – incomplete. By extension, cognition of international law requires

[108]Hans Kelsen, *Pure Theory of Law* (tr Max Knight, University of California 1967) para 32h (translation modified).
[109]HLA Hart, *The Concept of Law* (3rd edn, Clarendon Press 2012) 236.
[110]Hans Kelsen, 'Value Judgments in the Science of Law' (1942) 7 *Journal of Social Philosophy & Jurisprudence* 312, 321.

the presupposition of national legal orders: 'international law presupposes the simultaneous validity of national legal orders within one and the same system of legal norms that embraces international law as well'.[111] However, the proposed basic norm bears on the putative behaviour of states, and thus itself requires the presupposition of national legal orders. The problem with this is that Kelsen's model situates national legal orders as subsidiary components of a universal system. To presuppose national legal orders thus means that not only they but their relation with the international system have to be presupposed – which amounts to presupposing the entire system so as to make it possible to presuppose its basic norm, which itself needs to be presupposed in order for legal cognition to comprehend the system. This argument – and hence Kelsen's proposed basic norm for international law – is only sustainable if legal cognition is given an almost mystical power to postulate a system abstracted from real-world processes of causation, sealed within its own circular logic.

Lastly, while Kelsen's model of international law extends (as noted) to the establishment of states and the determination of their extent and powers in space and time, the content of the proposed basic norm cannot do so. At most it could serve as a general norm governing the running of an existing system of states; and even this is problematic, as it assumes some form of continuing regularity of behaviour among nation states. History – the history of Kelsen's working life very much included – shows no such regularity; or rather, it shows multiple regularities, with nation states treating one another's subjects variously as friends, enemies, potential slaves or worthless subhumans. The proposed basic norm seems only to function if legal cognition is considered as reconstructing the international legal system as a timeless abstraction based on its state at a given moment, which – again – gives an odd scholastic quality to the model of a rule-based system grounded in customary norms.

A basic norm for international law, then, should specify that force should be used against unwanted behaviour, rather than directly exhorting desirable behaviour. It should have individuals rather than nation states as its addressees; it should not even assume the existence of nation states. It should not be grounded in pre-existing custom, or assume any regularity of behaviour between members of the international legal order. Moreover, given that international law delegated authority to national legal orders, the basic norm of international law should be capable of grounding the entire 'universal' legal order.

Ironically, a viable candidate may have been derivable from the evolutionist model. The systematicity assumption and its associated conceptual vocabulary, the basic norm in particular, are almost completely absent from Kelsen's writings on 'primitive' legal orders; Kelsen tends to keep the two grounding frameworks separate, making no attempt even to demonstrate that they are mutually compatible. However, it is worth noting a passing comment in *S&N*, referenced earlier, in which the principle of retribution is characterised as 'the basic norm of primitive society'.[112] Interpreted literally, this would imply that 'primitive' societies, although they were in some sense legal orders, had a static basic norm, as (for Kelsen) do religious and moral normative systems. This accords to some extent with Kelsen's observation that '[i]n a primitive … society, law

[111]Kelsen (n 56) 69.
[112]Kelsen (n 14) para 25.

and morality coincide'[113], and indeed with the argument that every 'primitive' community 'rests on a religious coercive order, gradually becoming secularized' and as such 'is a legal community'.[114] However, as we have seen, law and morality are also presented as having entirely different 'techniques' for motivating compliance, with law having the specific characteristic of attaching coercively imposed consequences to non-compliance; this makes it difficult to see how the legal order of a community could be based on both 'techniques', or develop from one to the other. That said, given that – as Kelsen described it – the 'primitive' community was both pre-literate and characterised by a norm of universal retribution, an appropriate dynamic basic norm is hard to imagine. It would not be possible to invoke 'the first constitution' or any such formal agreement; conversely, while a basic norm grounded in immemorial custom might specify (for example) that coercion should be applied according to usual practice, this would not ground the norm of universal retribution.

The implication of Kelsen's comment in *S&N* appears to be that 'primitive' legal orders rested on a static basic norm, but one which, unlike the static norms of contemporary morality and religion, did not command obedience but retribution. Alternatively, it may be that his reference to the 'basic norm' in *S&N* is not to be read literally but as specifying a foundational normative layer specifying that there should be retribution, before a dynamic basic norm specifies the conditions under which this should be done.[115] In either case, the dynamic basic norms of more developed legal systems would rest on this foundation. If, setting aside the theoretical novelty of such a formulation, we consider the characteristics ascribed by Kelsen to the 'primitive' legal order, it is not hard to infer the possible content of such a basic norm. As an order of universal retributivism, the 'primitive' legal order represents a community for which it is appropriate to treat any misfortune as the occasion for a corresponding and quantified counter-attack against the external agency held responsible, and any benefit as the occasion for corresponding and measured reciprocation or sacrifice. By implication, such a community's basic norm would be a norm of universal retribution grounded in an assumption of collective subjecthood; it would be a formulation along the lines of 'we as members of this community ought to react collectively and retributively to any influence from outside it', or more succinctly 'whatever they do to us, we should offer them a matching response'.

Without subscribing to Kelsen's faith in the direct application of the supposed 'primitive' world view to international law, it is worth noting that, applied to international law, this hypothetical formulation would have had none of the problems identified earlier in Kelsen's own proposal – and that it corresponds to numerous observable features of international law, including the principles *bellum justum* and *pacta sunt servanda*. Such a norm could even be taken to underlie the dynamic basic norms of national legal systems, if historical priority required this. A possible formulation would be 'just as we respond to other communities in kind, we ought to respond in kind, in the name of the community, to individuals among us whose actions affect the community' – or 'whatever one of us does to us collectively, we collectively should offer that person a matching response'. This approach would, however, ground the priority of

[113]Ibid para 22.
[114]Kelsen (n 37) 82.
[115]I am indebted for this suggestion to Carsten Heidemann.

the presupposed basic norm in history rather than logic, marking a decisive step away from the neo-Kantian underpinnings of the systematicity assumption – and towards the potentially troublesome assumptions associated with the evolutionist model.

Evolution and its discontents

The evolutionist model did not challenge the Pure Theory but arguably reinforced it, giving it an alternative grounding and making its application to international law more plausible; the minimalism of its definition of a legal order, in particular, helped Kelsen to visualise international law as a legal order, 'where others would already observe a lack of organization or even nothing at all'.[116] However, it also had a number of features which cut against the systematicity assumption and its underlying neo-Kantian assumptions. Firstly, the model – while teleological and highly speculative – was ultimately historical, providing a causal and genealogical explanation of law. Nor was this merely an explanation of law as an institution: Kelsen's narrative gave a history of the legal norm, from its first beginnings. It could be argued that Kelsen's exposition of the 'primitive' legal order was itself an exercise of legal cognition, constituting its ethnographic raw material in legal-normative form. Alternatively, the evolutionist model could be considered as offering a causal/historical explanation of law which could complement the normative explanation offered by legal cognition. But the fact that the evolutionist narrative could give a full account of legal normativity and its development, grounding the legal norm empirically in recorded social practices, must have raised the question of whether an empiricist approach to the legal norm could be adopted more generally.

Secondly, Kelsen's history of concepts of causality gave an important role to Kant, but suggested that his model of causation as a category of the understanding could not be upheld: 'causality is not, as Kant calls it, an "innate notion"'.[117] Rather, exceptionless causality could be seen as a norm, which 'may be valid without exception, even though experience […] warrants a description of reality only in terms of statistical probability'.[118] Whether it was considered as a norm or merely as the illusion of a constitutive category of perception, the Kantian model of causation represented an intermediate, and now superseded, evolutionary stage between the irrationality of the 'primitive' world view and contemporary scientific rationality.[119] This argument privileged the empiricism underpinning contemporary science over the idea of cognitive categories as constitutive of knowledge, suggesting that evolution had replaced the latter with the former. Its tendency was to loosen Kelsen's already uncertain attachment to the neo-Kantian assumptions underlying the systematicity assumption.

Thirdly and perhaps most importantly, the supposed evolution of legal orders did not only entail the supersession of features of legal orders which were already in decline (the grounding of legal judgements in custom) or apparent only in international law (the decentralisation of enforcement represented by self-defence against attack). As we have seen, as well as institutionalisation and the centralisation of adjudication and enforcement, the evolutionary process as Kelsen saw it envisaged development towards

[116]Alexander Somek, 'Kelsen Lives' (2007) 18 *European Journal of International Law* 409, 414.
[117]Kelsen (n 14) vii.
[118]Ibid para 77.
[119]Ibid para 73.

individual and fault-based liability; away from substantialisation, and hence away from any scaling of sanctions according to the perceived severity of delicts; and ultimately away from retribution, which Kelsen had presented not as a justifiable response to wrongful actions but as a particular kind of social transaction in reaction to an adverse experience, involving singling out a person as the cause for an event and responding to a wrong with an answering wrong.[120]

The substantialising tendency, which made it at least psychologically possible to match a quantum of punishment or compensation to a quantum of wrongdoing, might in theory be eradicated from a legal order aspiring to rationality: a sanction for a delict could be scaled so as to deter and otherwise prevent future occurrences of that delict. (None of the canonical formulations of the Pure Theory specify that sanctions should be scaled to the severity of the corresponding delict.[121]) In *LPIR*, Kelsen had proposed that 'in a relatively late stage of evolution … the idea of retribution [was] replaced by that of prevention', but that this represented 'a change only of the ideology justifying the specific technique of the law'; he acknowledged that 'the idea of retribution … lies at the base of this social technique'.[122] A passage in *S&N* on retributive and preventive responses to crime goes further, however:

> In criminal law, if the ideology of retribution, and thus the idea that wrong and punishment are substances, is abandoned and, in place of retribution, prevention as the purpose of punishment is accepted, then the equivalence of wrong and punishment loses its sense. … For the theory of prevention the equivalence of wrong and punishment has – in so far as it can be maintained at all – a totally different significance from that which it has for the theory of retribution.[123]

Kelsen goes on to liken the focus on crime prevention to the theory of conservation of energy: both break with the assumption that a cause (or a wrong done) could be matched to an effect (or a sanction), and hence 'both signify a triumph over the principle of retribution'.[124]

The passage is brief and the argument is not pursued further in *S&N*, but the implications are radical. Kelsen first suggests that retributivism ('the ideology of retribution') belongs to the 'primitive' past and not to the future: when it had evolved to a more rational state, the law would scale its sanctions according to what was effective in reducing the occurrence of delicts, as he had argued in *LPIR*. However, application of this principle across the full range of acts classifiable as delicts, and the full range of possible preventive measures, would inevitably depart from any one-to-one matching of an action committed by an individual to a corresponding measure imposed on that individual. Kelsen appears to acknowledge this prospect in this passage, suggesting that if crime prevention were adopted as the guiding principle of criminal law, 'the equivalence of wrong and punishment'[125] might not be maintained at all: a more rational society might view the social ills currently classed as delicts as a social problem requiring preventive interventions, representing a move beyond the principle of retribution as well as the

[120]See above, text accompanying nn 26–7.
[121]See Kelsen (n 66) paras 11–12, 31c; Kelsen (n 22), *General Theory* 50–3, 37–8; Kelsen (n 108) 27b, 35j.
[122]Kelsen (n 3) 13.
[123]Kelsen (n 14) para 74.
[124]Ibid.
[125]Ibid.

philosophy of retributivism. However, this would inevitably call into question the pairing of an individual delict with a specified sanction, and hence the legal norm as Kelsen understood it. Rather than match a sentence to a criminal offence, a penalty to a regulatory breach, a sum in damages to a breach of contract, in such a society delicts and sanctions would be merged into broader categories of social ills and preventive or remedial measures: regulatory penalties might give way to friendly persuasion and criminal sanctions to measures to prevent the occurrence of harm.[126] It is difficult to imagine what form a Pure Theory of Law adequate to this reality would take.

Similar speculations surface briefly in the final chapters of *Vergeltung* and *S&N*. Modern science had established that exceptionless causality was neither a law of nature nor a Kantian category of the understanding, a 'necessary condition of knowledge'.[127] Universal retributivism – applied to natural phenomena as well as to human behaviour – had characterised the 'primitive' past; the rational future would be organised around a scientific concept of causality, understood in terms of statistical regularity and functional dependency, which would be extended to human behaviour as well as nature. A single scientific vocabulary would then apply – as anticipated by the 'unity of science' project – to all sciences, the social sciences included: '[f]or modern sociology a social event appears as part of reality, determined by the same laws as a natural event'.[128] The 'evolution of science'[129] would culminate by replacing '[t]he dualism of nature and society' with that of 'reality and ideology'[130]; nature and society would be united under the aegis of a scientific understanding of causality extended from the natural to the social world, rather than a retributive norm extended (in the guise of mechanistic causality) from society to nature. As for normativity in the modern world, *Vergeltung* proposes 'a dissolution of the concept of norm', whereupon 'the claim of normativity to rank as a social order of law' would be 'seen through as mere "ideology", behind which there lies concealed the reality of highly concrete interests'.[131] (Kelsen's language in *S&N* is more cautious: he calls for 'a critical analysis of the nature of the norm' and glosses the demystification of normativity as a claim made by 'certain theorists'.[132])

The conclusion to *Vergeltung*/*S&N* can be read as setting out the world view of contemporary legal sociology, and thus as having no implications for legal cognition or for the Pure Theory. However, a more radical reading may also be justified by the evolutionist framing of *S&N*, and the placement of this final chapter. Kelsen's scepticism about Kantian categories demonstrates that the evolutionist model was associated – as we have seen – with a more general shift towards empiricism, typified by his faith in modern science's revised conceptualisation of causality. The unified scientific method of *S&N* had demonstrated that it was possible to identify as 'primitive' – and for social

[126]Cf. Toni Makkai and John Braithwaite, (1994), 'Reintegrative Shaming and Compliance with Regulatory Standards' 32 *Criminology* 361; Paddy Hillyard et al, *Criminal Obsessions: Why Harm Matters More than Crime* (Crime and Society Foundation 2005).
[127]Hans Kelsen, 'The Emergence of the Causal Law from the Principle of Retribution' in Hans Kelsen, *Essays in Legal and Moral Philosophy* (Reidel 1973) 165, 199. Originally published in 1939, the paper was drawn from *Vergeltung und Kausalität* (Stanley Paulson, 'Metamorphosis in Hans Kelsen's Legal Philosophy' (2017) 80 *Modern Law Review* 860, 886 (footnote)).
[128]Kelsen (n 14) para 82.
[129]Ibid.
[130]Ibid.
[131]Kelsen (n 127) 202.
[132]Kelsen (n 14) para 82.

evolution to develop beyond – not only blood revenge and strict liability but also the philosophy of retributivism and the practice of retribution. In the scientifically rational legal order which lay in the future, coercion would be exerted not as a retributive sanction but on the principle of cause and effect: harmful social events, seen as 'part of reality, determined by the same laws as a natural event'[133], would be prevented or remedied on the same, causal basis. The effect would be to dissolve the legal norm as hitherto understood; 'from Kelsen's perspective … the assumption of a category of "ought" appears to belong to a period of human thinking which should at some stage be overcome'.[134] A fully rational Pure Theory of Law would enable legal cognition to encompass the new, rationally organised reality. In short, Kelsen is not only emphasising but redrawing the boundary between 'reality' and 'ideology': 'Kelsen saw the future of advanced man in a return to a special type of monism in which everything, including the norms, was factual'.[135]

Kelsen's frolicsome years

Neither these unsettling speculations nor the evolutionist model in general are prominent in Kelsen's work after 1945, however. In 1952's *PIL*, indeed, Kelsen emphatically downgrades the evolutionist perspective, denying that the history of international law's development has any relevance to contemporary realities. In a passage running directly counter to his 1939 argument that *pacta* could not be considered as the basic norm of international law on causal/historical grounds ('there are norms much older'[136]), he now argued that there was no need for the basic norm of international law to be formulated in the light of history, since from the standpoint of legal cognition historical change was irrelevant:

> the international legal order possesses an unlimited validity in time and space […] It is vain to object […] that formerly there were periods when international law did not yet exist. This is without importance, for the norms of international law can also have retroactive effect.[137]

If long-term historical change was now dismissed, so too were the more short-term 'evolutionary' processes represented by the progressive development and centralisation of international law: the Kelsen who dismisses speculation on the historical roots of international law also seems to wish to dissociate himself from his earlier advocacy. He argued in *PIL* – and again, in greater detail, in 1960's *PTL* – that his 'monist' model of international law (as necessarily constituting a single 'universal' system with domestic legal systems and delegating validity to them) had no political implications. Kelsen acknowledged that some commentators (and politicians) adopted an 'imperialist' perspective, predicated on the primacy of an individual nation – in preference to the 'pacifist', cosmopolitan perspectives which took the international order as their starting point – but denied that the monist model had any necessary association with the latter. In order to accommodate an 'imperialist' perspective, all that was needed was to replace a single relationship of complementarity, with international law framing and delegating

[133]Ibid.
[134]Jabloner (n 18) 381.
[135]García-Salmones Rovira (n 6) 216 (emphasis omitted).
[136]Kelsen (n 103) 83 (author's translation).
[137]Kelsen (n 58) 94.

validity to domestic law, with a double relationship. A nation state's legal order, taken as the primary reference point, could be seen as granting international law whatever validity it had; within that relationship of delegation, international law would (as before) encompass and delegate validity to domestic law. Thus, those critics who championed the primacy of domestic over international law were in fact international law monists despite themselves.[138] While von Bernstorff suggests that with arguments like these Kelsen 'reduced the doctrine of the primacy of national law … to absurdity'[139], for some reviewers the absurdity was all Kelsen's. One review of *PIL* describes Kelsen's approach as 'touching […] the legal material and then frisking about in [an] odd frolicsomeness'[140]; a reviewer of *PTL* charges that '[t]he Pure Theory's whole treatment of international law is more than a little unreal'.[141]

However, if there is a movement away from the evolutionist model in Kelsen's post-War work, leaving the justificatory framework of systemic unity and non-contradiction in place, this does not signal a renewed commitment to the neo-Kantian assumptions underlying that framework. Rather, Kunz complained, 'the main effect of adopting "some of his new formulations"' in *GTLS* was that 'the philosophical foundation of the "Pure Theory of Law" […] [was] somewhat changed and weakened'.[142] Indeed, *GTLS* is notable for the paucity of direct references to concepts such as legal cognition, although in their absence a concept like the 'basic norm' is supported by little more than authorial fiat[143]; Stewart comments that '[t]he main body of the book has been de-Kanted'.[144] A striking example of this change – and of the movement in the direction of empiricism noted earlier – is the description of normative jurisprudence as an 'empirical science'[145] rather than as a cognitive discipline constituting its objects.

In 1960's *PTL*, a neo-Kantian conceptual vocabulary is again in evidence, but Kelsen's use of it is highly uneven; some familiar arguments on the constitutive role of legal cognition and the cognition of law as a unity[146] sit alongside the statement, offered 'tersely and without elaboration'[147], that '[t]he legal proposition is […] a judgment, a statement about an object given to knowledge'[148], which appears to situate knowledge as empirically given and prior to legal judgement. Elsewhere Kelsen wavers between writing as a Kantian ('according to Kant's epistemology, the science of law as cognition of the law […] has constitutive character'[149] and invoking Kant *per analogiam* ('if it is permissible to use by analogy a concept of Kant's epistemology'[150]). As Heidemann notes, the latter approach vitiates that epistemology, for Kelsen's purposes, by voiding it of any claim to logical necessity.[151]

[138]Ibid 437; Kelsen (n 108) paras 44, 43d.
[139]von Bernstorff (n 1) 106.
[140]JP Haesaert, 'Kelsen, H., Principles of International Law' (1953) 2 *American Journal of Comparative Law* 576, 579.
[141]RS Clark, 'Hans Kelsen's Pure Theory of Law' (1969) 22 *Journal of Legal Education* 170, 195.
[142]Josef Kunz, 'Review of General Theory of Law and State by Hans Kelsen' (1946) 13 *University of Chicago Law Review* 221, 224.
[143]Compare discussion at Kelsen (n 22), *General Theory* 115 with Kelsen (n 14) para 29.
[144]Iain Stewart, 'Hans Kelsen, Legal Scientist' (2023) 48 *Journal of Legal Philosophy* 119, 131.
[145]Kelsen (n 22), *General Theory* 163.
[146]Kelsen (n 108) paras 16, 35j.
[147]Heidemann (n 71) 353.
[148]Kelsen (n 108) para 18 (translation modified).
[149]Ibid para 16.
[150]Ibid para 34d.
[151]Carsten Heidemann, *Hans Kelsen's Normativism* (Cambridge University Press 2022) 60.

PTL also recapitulates the argument on the nature of causality set out in *S&N*, where Kelsen had proposed to treat exceptionless causality as a norm. By the time of *PTL*, Kelsen might have been expected to have jettisoned this ingenious attempt to split the difference between Hume and Kant, in favour of his earlier neo-Kantian position. Instead, he builds on and extends the argument, proposing that causality could be conceived either with or without 'the element of necessity': it could be treated as having 'the exceptionless validity of a postulate of human cognition' or be replaced by 'mere probability'.[152] This passage leads into a discussion of imputation – the mechanism whereby Kelsen connected an act with its legal consequences – concluding with the following, strikingly sceptical (and non-Kantian) formulation:

> Imputation, like causality, is a principle of order in human thinking, and therefore just as much or just as little an illusion or ideology as causality, which – to use Hume's or Kant's words – is only a thinking habit or category of thinking.[153]

In a backhanded attempt to set the principle of imputation on a par with the principle of causality, Kelsen brackets Kant's categories of understanding with Hume's sceptical empiricism, then suggests that in either case the principle of causality might be considered ideology and illusion – or might not, as the reader preferred. Kelsen seems first to have shelved the evolutionist framework, perhaps owing to its unsettling implications for the Pure Theory, then to have pursued the systematicity assumption to new heights of timeless perfection – but to have lost faith in the neo-Kantian assumptions underlying that assumption along the way.

While Kelsen was active in the field of international law between 1945 and 1960, on the plane of theory this was a period of a three-fold retreat. Alongside his retreat from commitment to neo-Kantian assumptions, Kelsen in this period put the evolutionist model and its implications to one side. *GTLS* includes an attempt to integrate the newly qualified notion of causality into the Pure Theory[154], but the discussion is neither extensive nor significant. *S&N*'s speculations on the supersession of retributivism and/or retribution, for their part, are briefly taken up in works from 1952[155] and 1955[156], but otherwise go undeveloped. These two retreats were covered by a third, Kelsen's retreat into the highly developed – but increasingly 'frolicsome' or 'unreal' – abstractions of later works such as *PIL* and *PTL*.

A shortlived revolution or an epochal break?

Major shifts in Kelsen's thinking are hard to identify with precision, at least prior to the self-confessed sceptical turn of 1960. Preferring to emphasise continuity in the Pure Theory, Kelsen only rarely reflected on or qualified his own earlier work and frequently reused passages from earlier work unchanged.[157] Some publication dates may also be misleading; a paper published in 1939 argues that in a 'primitive' community 'there is

[152]Kelsen (n 108) para 20.
[153]Ibid para 26; compare Alida Wilson, 'Is Kelsen really a Kantian?' in Richard Tur and William Twining (eds) *Essays on Kelsen* (Clarendon Press 1982) 37, 61.
[154]Kelsen (n 22), *General Theory* 45; Kelsen (n 108) para 20.
[155]Kelsen (n 58) 17.
[156]Hans Kelsen, *The Communist Theory of Law* (Praeger 1955) 101–2.
[157]See, e.g., Kelsen (n 3) 13 and Kelsen (n 58) 22.

only one organ [of the legal order]: the chief' and that the basic norm is 'everyone must behave as the chief commands'[158], two simplistic propositions which are flatly contradicted by *S&N* (whose German-language original, *Vergeltung*, had by then been written).

However, Kelsen clearly developed a detailed evolutionist framework during the late 1930s and applied it to international law, before effectively abandoning it in the mid-1940s – which is also a period in which Kelsen's relationship with the neo-Kantian orthodoxy underpinning the systematicity assumption grew perceptibly looser. Heidemann argues that Kelsen's Geneva explorations of philosophy of science led to a reconceptualisation of causality and 'a radical break' whose effects can be seen in 'the first writings of Kelsen following his emigration to the United States'.[159] In this period (1940–2) Kelsen 'abandons neo-Kantian transcendental idealism' altogether, instead embracing 'a naive form of commonsense realism'[160]; the 1960 sceptical turn was less a new development than a philosophical salvage effort, abandoning lingering (but now very loosely held) neo-Kantian positions in favour of a full-throated realism supported by 'a rather heterogeneous jumble of philosophical conceptions'.[161]

Conversely, Paulson argues that while the 'revolution in Kelsen's thinking' may have begun as early as 1936, it ended at the latest in 1941, when 'Kelsen reclaims […] virtually everything he had just abandoned'.[162] What followed was a 'hybrid period', marked by 'the *retention* of Kantian or neo-Kantian precepts alongside certain empiricist and analytical doctrines that were a good bit less evident earlier'.[163] *S&N* belongs to this hybrid period, suggesting (as compared with *Vergeltung*) a retreat from Humean empiricism and a readoption of Kant.[164] Kelsen reemphasised the neo-Kantian framework while at Harvard in 1941–2, wishing 'to look to his future from a position of strength, as the architect of the renowned Pure Theory of Law'.[165] The retreat was not total, however, and did prepare the ground for the later turn in 1960, when 'Kelsen throws overboard the entire Kantian edifice again'.[166]

It is certainly plausible that Kelsen in the mid-1940s might wish to draw attention to his responsibility for the Pure Theory of Law, and away from his later interdisciplinary ventures. Kelsen at this point was isolated geographically as well as academically: the international 'unification of science' movement had stalled after the USA entered the War, and of his fellow Vienna Circle émigrés who were in the USA, most were based on the East Coast, a continent away from Kelsen's new home at Berkeley. The alternatives facing him were to build on his Austrian body of work or to continue on the route laid down by *S&N*, reconceptualising the Pure Theory on purely rational lines while also putting forward a novel theoretical model with implications for law, anthropology, classical studies and the philosophy of science. The challenges posed by this option will have made the former course more attractive, as will the invitation to write *GTLS*[167] – not to

[158]Kelsen (n 103) 65.
[159]Heidemann (n 69) 255.
[160]Heidemann (n 151) 52.
[161]Ibid 24.
[162]Paulson (n 127) 885, 891 (footnote) 892.
[163]Stanley Paulson, 'Four Phases in Hans Kelsen's Legal Theory? Reflections on a Periodization' (1998) 18 *Oxford Journal of Legal Studies* 153, 161 (emphasis in original).
[164]Paulson (n 127) 891.
[165]Ibid.
[166]Paulson (n 127) 892.
[167]Kunz (n 142) 221.

mention the critical mauling of *S&N*.[168] The very different culture of American law schools meant that Kelsen could not recapture the eminence he had had in Austria[169], but here his post-Geneva specialism in international law came to his aid: contemporary interest in the challenges of post-War reconstruction, and the nascent United Nations in particular, created a distinct but fairly marginal professional niche, where Kelsen could build on his existing expertise without posing any threat to dominant ideologies.[170]

Some points of detail in Paulson's account may be qualified, however. While *S&N* shows some signs of a retreat from *Vergeltung*, it was not simply a toned-down version of its German-language original: new material added to *S&N* includes a reference to a 1942 paper on the concept of 'law' by Vienna Circle exile Edgar Zilsel[171] as well as an unfootnoted reference to the concept of norms as expressing 'motor-affective attitudes'.[172] This formulation appears to have derived from the Harvard-based 'New Realist' Ralph Barton Perry[173], himself a participant in the 'unity of science' movement.[174] (By the time of *S&N*'s publication, however, Kelsen had tested Perry's theory and found it wanting.[175]) More importantly, in connection with the argument that Kelsen in 1941 reclaimed 'virtually everything he had just abandoned', it is worth noting that the thoroughly 'evolutionist' *LPIR* began life at Harvard in 1941, and that the same 1941 paper cited by Paulson as evidence of 'the restoration of the old regime'[176] is cited by Heidemann as evidence of an abrupt shift on Kelsen's part 'from a transcendental-idealistic to a realistic conception of knowledge'.[177]

We should distinguish between the systematicity assumption which Kelsen had grounded in neo-Kantian assumptions and those assumptions themselves.[178] After a radical break in the mid-to-late 1930s, in which his pursuit of the evolutionist model led him towards empiricist positions, we can suggest that Kelsen did indeed abandon evolutionist speculations in the early 1940s – not least because of the unsettling implications that the model appeared to have for legal normativity – while continuing to uphold concepts such as logical unity and the basic norm. However, his belief in the scientific validity of the neo-Kantian tenets in which he had grounded that framework had been weakened by his forays into empiricism; he readopted those commitments unevenly and in an agnostic spirit. As of 1945, the postulate of the logical unity of all valid law and the invocation of a presupposed basic norm stood without any firm foundations; this was simply a way of approaching the law (and justifying the Pure Theory) which would serve until a more reliable grounding could be arrived at. In the meantime, ignoring the potential challenges associated with the evolutionist model and shoring up his theoretical model in splendid isolation put Kelsen in a position of strength, albeit one whose contradictions and lacunae could not be – and were not – ignored indefinitely.

[168]See especially Parsons (n 21).
[169]D Telman, *The Reception of Hans Kelsen's Legal Theory in the United States: A Sociological Model* (University of Valparaiso 2008) 24.
[170]On US hostility to Kelsen cf M Rooney, 'Law without Justice: the Kelsen and Hall Theories Compared' (1948) 23 *Notre Dame Law Review* 140.
[171]Kelsen (n 14) para 70, note 80.
[172]Ibid para 79.
[173]Ralph Barton Perry, *General Theory of Value* (Harvard University Press 1926).
[174]Charles Morris, 'The Unity of Science Movement and the United States' (1938) 3 *Synthese* 25, 27.
[175]Kelsen (n 110) 314 et seq.
[176]Paulson (n 127) 891 (footnote).
[177]Heidemann (n 71) 352.
[178]Ibid 361.

Conclusion

Kelsen's positivism is an unfamiliar beast in English-speaking jurisprudence. In one paper Kelsen takes as his topic 'the sources of law', which he glosses as 'the methods whereby law is created'[179]; however, he is emphatic that this phrase does not refer to 'all the distant and proximate causes, external circumstances, economic and political conditions and especially psychological motivations which resulted in the norms of a given legal order being created and people observing them', which one might instead study from a 'psycho-sociological viewpoint'.[180] Kelsen's expansive list of putatively non-legal 'sources of law' has the effect of relegating many contemporary and later schools of legal analysis to the 'psycho-sociological' bench, sources-based positivism arguably included. This was almost certainly his intention. Kelsen was unwavering in his belief that the Pure Theory of Law was not only correct but exclusively correct: once the field was cleared of political and sociological readings of law on one hand, and natural law theories 'extolling a nebulous idea of Justice'[181] on the other, it would be clear that only the Pure Theory of Law had any claim to validity.

A Kelsenian perspective on law begins with a body of legal norms, which are valid in a given place and time, and which control behaviour by applying a coercive measure (sanction) in response to a breach (delict). It argues that these norms derive their validity from their place within a legal order. What gives a legal order its identity is not the sociological fact of having particular rules of recognition but the logical fact of resting on a common, presupposed base, the basic norm (albeit that the basic norm can only be presupposed if the respective legal order has a degree of efficacy). It can then be demonstrated that all the other familiar features of law and legal systems can be spun out from this austere outline; thus, for example, a criminal judgement instantiates an individual norm derived from a general norm, deciding the application of an individual sanction to an individual delict.

Considering the Pure Theory as merely a 'legal point of view'[182], one way of looking at the law among others, was anathema to Kelsen, who was assiduous in justifying and communicating the logical necessity which he believed the Pure Theory to possess. Two relatively successful approaches to this task were the justificatory frameworks discussed in this paper. The systematicity assumption, the logical unity of all valid law and the basic norm rest on an idiosyncratic version of a neo-Kantian philosophy of knowledge[183] but were functional elements of the Pure Theory of Law; they only faced serious difficulties when applied to international law. Conversely, the 'evolutionist' framework rests on a wildly speculative teleological account of human evolution, which in turn is predicated on a simplistic equation of contemporary scientific empiricism with rationality; the framework itself can productively be applied to international law, however, and only caused problems for the Pure Theory inasmuch as it seemed to imply that a core element of legal normativity was a relic of an irrational past.

To a modern eye the theoretical commitments which Kelsen believed to underpin these models are their weakest and least interesting features. Even if we grant that

[179]Hans Kelsen (n 103) 62.
[180]Ibid 61.
[181]Kelsen (n 2), 'La technique du droit international' 253.
[182]Stanley Paulson, 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law' (1992) 12 *Oxford Journal of Legal Studies* 332.
[183]Ibid.

there is such a thing as legal cognition, it is not plausible that this is the only way to understand the law. Taken on its own, though, the systematicity assumption and associated concepts stand as a way of looking at law which highlights both its formal nature – as an assemblage of 'ought' statements, each individually mandating that non-compliant behaviour ought to be sanctioned – and its binding quality for every citizen of the respective legal order, of which the basic norm is the presupposed capstone. To presuppose the basic norm is to presuppose that the legal norms valid in a given space and time are indeed valid, forswearing 'theoretical anarchism': 'every normative order necessarily has a *Grundnorm*, because only through it can we cognise the alleged norms as norm'.[184] Even the assumption of non-contradiction has the merit of positing logical non-contradiction as a desirable state – supporting arguments for systemic non-contradiction as a regulatory ideal[185] – while drawing attention to the broader procedural framework of laws within which laws with conflicting provisions can in practice subsist.

Similarly, we can set aside the assumption that the 'primitive' legal order as Kelsen imagined it genuinely typified pre-literate communities, let alone that contemporary legal systems have literally evolved from such an order, or that contemporary science has evolved from irrationality into rationality. But, however unprepossessing its foundations, the evolutionist model gave Kelsen the framework for a sustained exercise in identifying the essential – minimum – features of a legal order, which in turn made it possible to identify a non-standard case, such as international law, as a recognisable legal order.

A legal order consisted of the socially recognised operation of legal normativity, involving a body of norms which might be statutory or consist entirely of unwritten custom; adjudication which might be formal or informal; and enforcement which might be centralised, and carried out in the name of the community, or diffuse, and carried out by the individual or group harmed. Legal normativity, beginning as a 'social technique' founded on the 'idea of retribution'[186], involved the assignment of responsibility for a harmful act – responsibility which might be collective or individual, fault-based or purely factual – and the coercive imposition of negative consequences, which might be scaled to equate to perceived harmfulness or on a more rationally justifiable basis. This extraordinarily capacious and flexible framework made it possible to recognise as legal orders not only international law but also the pre-literate communities with which it was often bracketed as 'primitive law'; it also suggested that development towards greater centralisation and greater codification, and away from strict liability and retributive penalties, would generally be appropriate, and could in any case be undertaken without any fundamental change to the system involved.

Kelsen's conviction that the Pure Theory was uniquely correct – that it corresponded to the nature of law itself – was held on different grounds at different times, but always held firmly. It is a stumbling block for many discovering Kelsen, particularly when it becomes clear that it cannot be justified. If, admittedly against his express desire, Kelsen's theory is relegated to the category of a 'legal point of view', it stands revealed as a peculiarly powerful one, particularly if the Pure Theory is supplemented with the

[184]Jörg Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (Routledge 2011).
[185]See Golding (n 88).
[186]See n 122 and accompanying text.

frameworks discussed above. We may find ourselves agreeing with Kelsen that the state is a myth, a hypostatisation of the legal order of a given community; or that everything that happens in domestic law also happens within international law; or that everything that is done by international law is done to individual people (as organs of their respective legal order). We may even find ourselves asking whether the 'idea of retribution' underpinning the 'technique' of legal normativity, and mandating a sanction as a matched response to any given delict, might come to be replaced by a more rationally justifiable alternative, managing unwanted behaviours through a range of reactive and preventive interventions – and what effect this would have on law as we have known it.

Acknowledgements

The author would like to thank Jorge Nuñez, Stanley Paulson, Carsten Heidemann, two anonymous reviewers and the organisers and participants in the Juris North Kelsen Congress 2021. The usual disclaimer applies.

Disclosure statement

No potential conflict of interest was reported by the author(s).

ORCID

Phil Edwards http://orcid.org/0000-0002-5814-4184