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Important, Unimportant

A critical anticipation of the assumptions of legal positivism in *Alice in Wonderland*

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Abstract: Almost a full century separates Lewis’ *Alice in Wonderland* (1865) and the second, lengthier and more elaborate edition of Hans Kelsen’s *Pure Theory of Law* (1960; first edition published in 1934). And yet, it is possible to argue that the former anticipates and critically addresses many of the philosophical assumptions that underlie and are elemental to the argument of the latter. Both texts, with the illuminating differences that arise from their disparate *genre*, have as one of their key themes norms and their functioning. Wonderland, as Alice soon finds out, is a world beset by rules of all kinds: from the etiquette rituals of the mad tea-party to the changing setting for the cricket game to the procedural insanity of the trial with which the novel ends. *Pure Theory of Law*, as Kelsen emphatically stresses, has the *grundnorm* as the cornerstone upon which the whole theoretical edifice rests².

This paper discusses some of the assumptions underlying Kelsen’s argument as an instance of the modern worldview which Lewis satirically scrutinizes. The first section (*Sleepy and stupid*) discusses Lewis’ critique of the idea that, to correctly apprehend an object (in the case of Kelsen’s study, law), one has to free it from its alien elements. The second section (*Do bats eat cats?*) discusses the notion of systemic coherence and its impact on modern ways of thinking about truth, law and society. The third section (*Off with their heads!*) explores the connections between readings of systems as neutral entities and the perpetuation of political power. The fourth and final section (*Important, Unimportant*) explains the sense in which a “critical anticipation” is both possible and useful to discuss the philosophical assumptions structuring some positivist arguments. It also discusses the reasons for choosing to focus on Kelsen’s work, rather than on that of Lewis’ contemporary, John Austin, whose *The Province of Jurisprudence Determined* (published in 1832) remains influential in legal debates today.

Keywords: Positivism; Kelsen; Jurisprudence; Law and Literature.

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² Cf. GREEN, Michael Steven. Hans Kelsen and the Logic of Legal Systems. Available at: <<http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1172&context=facpubs>>; and POSNER, Richard A. **Pragmatism, Law and democracy**. Cambridge, MA: Harvard University Press, 2005.

1 Sleepy and stupid

ALICE was beginning to get very tired of sitting by her sister on the bank and of having nothing to do: once or twice she had peeped into the book her sister was reading, but it had no pictures or conversations in it, “and what is the use of a book,” thought Alice, “without pictures or conversations?”

So she was considering, in her own mind (as well as she could, for the hot day made her feel very sleepy and stupid), whether the pleasure of making a daisy-chain would be worth the trouble of getting up and picking the daisies, when suddenly a White Rabbit with pink eyes ran close by her.³

Right at the beginning of his masterpiece, Lewis portrays his heroine as the perfect antipode of what mainstream Victorian society would consider the model rational human being. Alice is presented as being dismally ill-equipped to adequately understand the world. First of all, she is a woman, thus less equipped (as it was then often believed) to abstract thinking than men⁴. Hormonal cycles and the emotional turmoil they supposedly entail were alleged to make them more suited to the concrete, trivial chores of domestic errands than to philosophical speculation. Second, she is a child and therefore lacks the intellectual acumen of adults. In Victorian society, children are taught self-restraint; they are told to obey those who know better until they are educated enough to formulate and express their own views.⁵ To make things worse, the physical world represented both by nature (it is a hot day) and by the girl's body and its needs (she is sleepy) makes any attempt by Alice to think properly even more improbable.

It is therefore very fitting that she fails to see any use for a book without pictures or conversations such as the one her sister is reading (*what is the use of a book,*” thought Alice, “*without pictures or conversations?*”). Pictures and conversations, after all, are likely to appear above all in fictional works (e.g. novels, book for young children) which routinely mimic everyday life and its petty, ephemeral episodes. They are absent (apart from the odd chart or graph) from academic or theoretical texts devoted to discussing general ideas and propositions. Alice cannot value these ‘serious works’ because, sleepy and stupid, she lacks the skills necessary to grasp and enjoy the conceptual wealth they embody.

The girl thus seems indeed little inclined to follow her sister's example and engage in the serious reading of a useful book. Her lazy slumbering is the very opposite of Franklin's

³ CARROLL, Lewis. **Alice's Adventures in Wonderland**. In: GARDNER, Martin (Ed.). **The Annotated Alice**. New York: W. W. Norton & Company, 2001. Chapter 1, p. 11.

⁴ For an analysis of perceptions of women in Victorian England see DYHOUSE, Carol. The role of women: from self-sacrifice to self-awareness. In: LERNER, Laurence. **The Victorians**. New York: Holmes & Meier, 1978.

⁵ See GAY, Peter. **The Bourgeois Experience**. New York: Norton, 1984-1993. 5 v.

injunction: “*Lose no time; be always employ’d in something useful; cut off all unnecessary actions*”⁶. In what some might humorously qualify as Utilitarian style, the girl tries to decide on what to do based on the balance between the amount of pleasure and pain she will derive from her actions (*is the pleasure of making a daisy-chain worth the trouble of getting up and picking the daisies?*). She is thus idle, sleepy and stupid when, as unexpectedly as always, reality kicks in – a White Rabbit wearing a waistcoat runs by – and prompts her to respond instinctively to a puzzling new reality.

It is significant that, in Lewis’ novel, Alice is capable of noticing the incongruous intricacies of everyday life only because, unlike her sister, she is looking outwardly to the world *around* her, not inwardly to discourses *about* the world. Had she been as absorbed as her sister in the reading of a book, the White Rabbit would have passed by without disturbing her certainties. The fact that she is not thinking right, that is to say, that her reasoning and discriminatory powers have been hampered by her torpid state allows her to “suspend disbelief” and see things that her traditional mental schemata would have deemed impossible. At the end of the novel, Alice will have experienced a wealth of situations which arguably help her achieve a wisdom her studious sister will never find in books.

Meaningfully, Lewis observes that “*when she thought it over afterwards it occurred to her that she ought to have wondered at this, but at the time it all seemed quite natural*”⁷. Alice *ought to have wondered* because a rabbit with a waist-coat pocket and a watch in it is not foreseeable (nor even possible) within the representations of the world she had been brought up with. *Eppure it just ran by me*, she could say – in spite of the fact that she has been told that an event like this ought not to be possible, it is nevertheless taking place right in front of her⁸. The sharp division between *ought to* and *is*, which is a key assumption for Kelsen’s legal theory, does not cross Alice’s mind when the girl is confronted with the self-imposing reality of facts.

The self-imposing reality of facts, however, is exactly what Kelsen’s theory has to control before it even starts. In diametric opposition to Alice, Kelsen will develop his work by treating law itself as a clear-cut, well-defined object cleansed from *ought to* considerations (*the theory attempts to answer the question what and how the law is, not how it ought to be*)⁹. He proceeds like a natural scientist examining a specimen: a botanist studying a hitherto

⁶ See **The Autobiography of Benjamin Franklin**. Dover Thrift Editions, 1996.

⁷ CARROLL, op. cit., p. 11.

⁸ In *We “Other Victorians”* Michel Foucault discusses the ways Victorian society silences and treats as impossible or non-existent aspects of life it does not want to in the social system. Cf. FOUCAULT, Michel. **History of sexuality**. New York: Random House, 1978. v. 1. p. 1-14.

⁹ KELSEN, Hans. **Pure Theory of Law**. Berkeley: University of California Press, 1967. p. 1.

unknown tree, a geologist perusing a new rock. Law is an object that exists regardless of what we might think of it and must be properly understood by reason. No moral, religious or philosophical views the scientist holds must get in the way of his objective assessment of what is before him.

Legal systems, however, are not trees or rocks. They do not occur naturally in the universe but are the product of human action, more often than not the result of heated battles of interests. By applying the methodology of the modern hard sciences to law, Kelsen (knowingly and willingly) excludes from consideration the intentional, political rationale that is elemental to the dynamic of the system. He *murders to dissect*, to quote Wordsworth's famous line in *The Tables Turned*, that is to say, he decides to study an eminently political, intentional human creation (which is filled with decisions on what ought to be done) by setting aside exactly these political, intentional dimensions.

The new object which is created by this extirpation becomes then suited to be treated as a *pure* object – law as it is – and is submitted to the neutral objectivity of modern science (*Its aim is to free the science of law from alien elements. This is the methodological basis of the theory*)¹⁰. Pretty much like Alice's sister, the legal theorist here has to make a decision to be oblivious to the world outside and focus exclusively on the text on the page. During the reading, one has to act as if the only reality was that of the work at hand, the only nature that which is created by discourse. All the landscape around Alice's sister – trees, animals, daisies – is, for her, a potential distraction. There is a method to serious reading.

For Alice, on the other hand, this landscape is a powerful attraction, much stronger, as already pointed out, than the work her sister is reading. She casually peruses the world, too lazy to even remember the existence of categories pre-defining the conditions to usefully observe natural phenomena. Lying on the grass under the hot sun, Alice is equipped with neither theory nor method to analyze life.

Had she then had a theory and a method, had she then been capable of thinking right, Alice would probably have realized that it ought to be impossible for rabbits to be late, once they are governed by the time of their own natural urges, not by the clockwork time of industrial capitalism. However, thinking right (i.e. applying logic and method to judge according to the prevailing assumptions of the Victorian worldview) is exactly what this little girl is incapable of doing.

¹⁰ KELSEN, op. cit., p. 1.

Thus, the otherwise disarming oddity of the unexpected incident does not paralyze Alice because, just at this point, she is not worried (as she later would be) in judging what occurs in the world in terms of ought to/is. Her reasoning powers suspended, she is ready to accept possibilities that she would have promptly dismissed under other circumstances. This is what will allow her to discover a totally new world, bizarre and fascinating, with its uncanny similarities to her well-known England.

This lack of rational judgment is also apparent in the reckless abandon with which she enters the rabbit-hole, “*never once considering how in the world she was to get out again*”¹¹. Alice reacts instinctively, pushed forward by raw curiosity. Her emotions make her incapable of defining what she *would* do based on what she *should* do. No Victorian girl in her right mind would enter in any situation or do anything without seriously considering the risks, least of all diving headlong into the unknown. *Burning curiosity* is certainly not one of the accepted reasons for acting in a society that teaches girls that being curious is a serious character flaw, as eloquently shown by *The Young Lady’s friend*, an etiquette book for girls published in 1853:

Of another kind of calamity, an old writer has said, ‘As the first of the evils, as the source of calamity, as the beginning of pain, avoid, O daughter of Eve, the bewitching charm of curiosity. Seek not know what is improper for thee; thirst not after prohibited knowledge; far happier is she who but knoweth a little, than she who is acquainted with too much’.¹²

Having accepted to act in disregard for conventional wisdom, Alice soon loses touch with her previous reality – the ground underneath her feet literally disappears – and she falls into the unknown, being deprived, for a while, of all points of reference.

2 Do cats eat bats?

When describing Alice’s long, slow fall down the well, Lewis carefully lists the objects she is leaving behind: “*she looked at the sides of the well, and noticed that they were filled with cupboards and book-shelves; here and there she saw maps and pictures hung upon*

¹¹ CARROLL, op. cit., p. 12.

¹² **The Young Lady’s friend**: a manual of practical advice and instruction to young females on their entering upon the duties of life after quitting school. 6th edition. London: Parke and Son, 1853. Available at: <<https://archive.org/stream/youngladyfriend00farruoft#page/n3/mode/2up>>.

pegs”¹³. Far from being a random enumeration of apparently unrelated objects, this list brings elements which are crucial to the overall dynamic of the novel and to its critique of some of the key modern assumptions that would later be adopted by Kelsen-style positivism.

Maps, for instance, are arguably the quintessential example of *representation*, “the making present *in some sense* of something that is not present literally or in fact”¹⁴. By using the language of cartography, they artfully reduce the wide variety of natural landscapes to a definite set of lines and curves: the whole geography of Europe can be described in one small page. This translation of reality into a conventional object is not, of course, a futile exercise of mental skills. Maps are drawn to perform the specific task of giving information about territories and helping people orient themselves. They enable people, as it were, to see things from a distance so as to decide on the best course to follow in order to get to their desired destination.

It is exactly because of their use-oriented nature that maps, their dazzling ingenuity notwithstanding, can become utterly useless even while maintaining intact their internal coherence. The unspoken demand they make on any user is that they be applied to those realities from which they spring and which they intend to represent. If one were to be so unwise as to try to orient oneself in São Paulo, Brazil, by using a perfectly drawn map of London, England, one would be at a complete loss to find out both one’s present position and possible future routes. Maps are mental constructs intrinsically linked to the realities they ultimately derive from.

Thus, Lewis seems to be pointing to the fact that Alice needs to abandon the traditionally accepted representations of the world as a precondition to enter Wonderland and fully live her adventures. So familiar is the title of the novel that it becomes easy to forget how pregnant with meaning the idea of *Wonderland* is. As the Webster dictionary informs us, to wonder can refer to *a cause of astonishment or admiration*, to *astonishment at something awesomely mysterious or new to one’s experience* and to *a feeling of doubt or uncertainty*¹⁵. Wonderland, therefore, is a place where that which is known disappears, where traditional maps become suddenly nonsensical.

At the heart of the narrative tension that runs throughout the novel is Alice’s stubborn belief that the rules she has learned in *England* must, *ipso facto*, make sense and be valid in *Wonderland* and in every other part of the world. The colonial practices of Victorian England

¹³ CARROLL, op. cit., p. 12-3.

¹⁴ Cf. PITKIN, Hanna Fenichel. **The Concept of Representation**. Berkeley: University of California Press, 1967. Introduction, p. 9.

¹⁵ Available at: <<http://www.merriam-webster.com/dictionary/wonder?show=0&t=1397829311>>.

suggest that the girl was not alone in her steadfast trust in the universality of her culture, as the old saying *only mad dogs and Englishmen go out in the midday sun* humorously illustrates.

Such belief is arguably linked to the modern notion of the universal value of truth, which posits that the validity of any one proposition must be verified by culture-independent paradigms, once the accuracy of statements cannot be dependent on idiosyncratic elements. Modern science defines itself by the capacity of discovering and describing universal laws that exist and affect our lives regardless of what we think about them. This model, by sharply separating *fact* from *opinion*, has deeply impacted the very idea of what science is. It is a model that, although based on the observation of individual phenomena, aims to transcend them and to explain them by formulating a universal law. Theory sublimates individual experience, cleans it from the unrepeatable aspects of its singularity to make it valid for everyone, everywhere. This universal law, once in place, functions as a paradigm, as a map, to understand reality and to act upon it.¹⁶

It is unsurprising, thus, that Kelsen so strongly emphasizes that his theory can only make sense if read as the description of Law as an abstract entity, not as the discussion of any legal system actually existing in the world:

The Pure Theory of Law is a theory of positive law. It is a theory of positive law in general, not of a specific legal order. It is a general theory of law; not an interpretation of specific national or international legal norms; but it offers a theory of interpretation.¹⁷

Kelsen offers us a map that, although not representing any one particular order, can help understand all of them. It follows that his theory cannot be impeached by claims that the functioning of actual legal systems may sometimes be seen as generating injustice and oppression. Things as they happen in everyday reality do not fall within his theoretical purport, as he makes abundantly clear:

As a theory, its exclusive purpose is to know and to describe its object. The theory attempts to answer the question what and how the law is, not how it ought to be. It is a science of law (jurisprudence), not legal politics.¹⁸

¹⁶ See KHUN, Thomas. **The Structure of Scientific Revolutions**. 3rd Edition. Chicago: University of Chicago Press, 1996.

¹⁷ KELSSEN, op. cit., p. 1.

¹⁸ Idem, ibidem.

The necessary assumption is that law *is* or *exists* as a theorizable object beyond and irrespective of any concrete instance of it in the real world. Whatever consequences the functioning of actual legal systems may in practice bring to people's lives is irrelevant to the theory. Kelsen is interested in approaching law from a (modern) scientific point of view; a thorny enterprise that can only be adequately understood if its object is studied in its ideal purity, i.e. uncontaminated by anything that is not *law*. This methodological option is one of the major contributions the work intends to offer:

It is called "pure" theory of law, because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law: Its aim is to free the science of law from alien elements. This is the methodological basis of the theory.¹⁹

A caveat is perhaps needed here: nowhere does Kelsen say that the potential harms caused by actual legal systems are or should be indifferent to the *theorist*. Quite the contrary: it is reasonable to suppose that Kelsen's formidable intellectual effort to understand law in its purity ultimately springs from a desire to improve the quality of its impure real-world renderings. But whatever his intentions as an individual may have been, the fact remains that this quest to isolate its object, to wrestle it away from the inescapable messiness of life, is the price to pay to guarantee the scientific nature of his work.

Throughout *Alice in Wonderland*, Lewis presents such a belief in any neat, absolute separation between science and life, theory and politics, as misguided at best, dangerous at worst. An extraordinary mathematician himself and, therefore, not prone to be biased against abstract thinking nor inclined to belittle the importance of scientific rigor, Lewis makes his novel a powerful indictment against the dangers of the autistic self-containment of modern science.

Falling down the well, Alice remembers perfectly well the abstract categories she has been taught at school. If she is in trouble, it is certainly not due to her lacking respectable concepts:

Down, down, down. Would the fall NEVER come to an end! 'I wonder how many miles I've fallen by this time?' she said aloud. 'I must be getting somewhere near the centre of the earth. Let me see: that would be four thousand miles down, I think—' (for, you see, Alice had learnt several things of this sort in her lessons in the schoolroom, and though this was not a VERY good opportunity for showing off her knowledge, as there was no one to listen to her, still it was good practice to say it over) '—yes, that's about the right distance—but then I wonder what Latitude or Longitude I've got to?' (Alice had no idea what Latitude was, or Longitude either, but thought they were nice grand words to say.)²⁰

¹⁹ Idem, *ibidem*.

²⁰ CARROLL, *op. cit.*, p. 13.

Latitude and longitude are theoretically extremely useful as ways of conceptualizing space and allowing one to make sense of one's whereabouts. Likewise, it is potentially very relevant, for a myriad of reasons, to know the distance from the crust to the center of the Earth. The humor in this passage comes not from the unsoundness of the concepts *per se*, but from their utter practical uselessness to tackle the challenges posed by everyday life. Concepts may be absolutely consistent in their own terms and still be absolutely non-sensical if applied to different realities. Slowly falling through a dark well, Alice still thinks it is *good practice* to repeat, yet once again, the taught certainties of Victorian England even though they look pathetically lame in face of her current predicament.

We are amused by Alice's childish confidence that the lessons she had at school will be immediately applicable to every possible situation. She is certain that the internal logic of her learning – her mental maps – survives intact when facing a radically new external context. As her adventure develops, she will grow less confident of what she knows (the *feeling of doubt or uncertainty* that characterizes wonder will slowly creep in) and more open to the possibility that this belief in the necessary usefulness of *pure*, reality-untouched concepts may be a peculiar type of madness.

A second example of this gap between the inner logic of a conceptual system and its capacity to meaningfully answer the demands deriving from the outer world comes up a little later in the text, while Alice is still falling down (*will the fall never end?*) and resumes talking to herself just to pass the time. Missing the company of her beloved Dinah, the girl starts thinking about what her pet would eat there and muses whether it would be possible to feed the cat with bats:

Dinah my dear! I wish you were down here with me! There are no mice in the air, I'm afraid, but you might catch a bat, and that's very like a mouse, you know. But do cats eat bats, I wonder?' And here Alice began to get rather sleepy, and went on saying to herself, in a dreamy sort of way, 'Do cats eat bats? Do cats eat bats?' and sometimes, 'Do bats eat cats?' for, you see, as she couldn't answer either question, it didn't much matter which way she put it.²¹

Syntactically, both sentences ('*Do cats eat bats?*'; '*Do bats eat cats?*') are correct. Verb, subject and object are in the expected order for questions in standard English grammar. Semantically, however, there is a clear difference between them (hence the humor): real-life experience makes the first utterance the expression of a reasonable, plausible doubt. In the real world, larger mammals do eat smaller animals (Alice knows that because she has possible

²¹ CARROLL, op. cit., p. 14.

seen her Dinah chase mice) so the first question provides an example of Alice cautiously wondering if her past experience can be taken further and generalized.

The second question, however, runs contrary to common sense and average everyday observation. Though bats may sometimes suck the blood of animals, they do not eat them entirely (as it is implicit in the first utterance). Syntactic equivalence does not mean semantic identity. By making Alice consider the latter dimension irrelevant, Lewis satirizes the reliance on the formal accuracy of the first as a guarantee that is a useful way to talk about the world. Disconnected from its referential connection to external events, language may become a self-contained, irrelevant game of no real consequence (*as she couldn't answer either question, it didn't much matter which way she put it*).

Throughout *Alice in Wonderland*, Lewis criticizes the fascination with theoretical models for their own sake. His satire seems to suggest that a system may be perfectly rational or logical when looked from within and utterly irrational or illogical when seen from the point of view of its practical application. Inner logical coherence of pure systems does not automatically justify them, nor does it necessarily make them a good paradigm for deciding on what to do in the real world. There are numerous other passages which could be used to illustrate Lewis' mistrust of the usefulness of isolating theory from life, maps from territory. But this is not the whole of his critique. He will further say that this belief in or support for a discourse advocating a neat separation between the two dimensions is not only misleading and unwise. He will denounce it as an illusion which ultimately serves the interests of those in power.

3 Off with their heads

Virtually every chapter in *Alice in Wonderland* involves a comical gap between rules and their functioning, between the inner logic of norms and the senselessness of their application to the outer world. From the overture (*Through the rabbit-hole; The pool of tears*, which recounts her arrival to a new reality) onwards, the novel moves forward by showing a puzzled Alice trying to make sense of a world in which, for apparently no good reason, everybody strives to meticulously follow rules which cause them considerable anguish and discomfort.

In *A Caucus-Race and a Long Tale*, Alice participates in a frantic race in which neither the numerous rules nor the purpose are at all clear (*"What is a Caucus-race", said*

*Alice?...."Why, said the dodo, the best way to explain it is to do it")*²². The girl could have conceded that running around to get their clothes dry would (perhaps) have made sense, but she is puzzled that the way to do it is by translating natural action into a regulated activity, which must by force have winners and prizes. The seriousness with which the game is taken makes the participants forget why they engaged in it in the first place and creates a separation between *running* and *racing* in which the latter becomes more important than the first. Since the (forgotten) goal was to get dry, Alice gets baffled by the importance the animals attach to this obscure, non-sensical institution (*Alice thought the whole thing very absurd, but they all looked so grave that she did not dare to laugh*).²³

The Rabbit sends in a Little Bill, the commands of the self-important Rabbit at first disconsider the blatant reality ordinary people can see and then try to make the new events conform to the old order:

"Now, tell me, Pat, what's that in the window?"

"Sure, it's an arm, yer honour!" (He pronounced it arrum)

"An arm, you goose! Who ever saw one that size! Why, it fills the whole window!"

"Sure it does, yer honour: but it's an arm for all that".

"Well, it's got no business there, at any rate: go and take it away!"²⁴

Yer honour has no problems giving orders to regulate a situation which he clearly fails to understand. As an official to the queen, his business is to make sure the *ought to* is respected, not to understand the idiosyncrasies of the *is*. The institutional solemnity, the perceived authority and the self-assurance that mark the orders of this agent of the Crown hide from view the raw reality of his practical powerlessness (*Alice knew it was the Rabbit coming to look for her, and she trembled till she shook the house, quite forgetting that she was now about a thousand times as large as the Rabbit, and had no reason to be afraid of it*)²⁵. The whole social apparatus of norm-enforcing institutions keeps everyone in awe and allows for the otherwise incomprehensible power structure in Wonderland.

In *Advice from a Caterpillar*, the poetic rules (rhythm, rhyme, structure) governing the construction of the moral-instilling *How doth the busy bee* and *You are old, Father William* are rigorously preserved while their sententious content is transformed to acidly comic nonsense. *Pig and Pepper*, the traditional social norms of family life and child-rearing remain undisturbed by the fact that the baby is in fact no child but a piglet.

²² CARROLL, op. cit., p. 32.

²³ Idem, ibidem, p. 34.

²⁴ Idem, ibidem, p. 42-3.

²⁵ Idem, ibidem, p. 41.

A Mad Tea-Party, perhaps one of the most celebrated chapters in the book, is also one that most clearly shows the absurdity that can arise from the disconnect between norms and reality. Not only the etiquette rules, so socially powerful in Victorian England, are madness. The mock polite-conversation at table abides by the rules of grammar (as already pointed out in the previous section), but make no sense at all: *Alice felt dreadfully puzzled. The Hatter's remark seemed to her to have no sort of meaning in it, and yet it was certainly English*²⁶. Pure grammatical rules do not guarantee the communication of meaning, which is the social function of language.

The Queen's Croquet Ground opens with a wonderful critique of the *ought to/is* divide and the way in Wonderland even natural reality has to conform to the expectations of the wishes of the powerful:

“Would you tell me, please”, said Alice, a little timidly, “why you are painting those roses?”

Five and Seven [the playing-cards which are the soldiers in Wonderland] said nothing, but looked at Two. Two began, in a low voice “Why, the fact is, you see, Miss, this here ought to have been a red rose-tree, and we put a white one in by mistake; and if the Queen was to find out, we should all have our heads cut-off, you know.”²⁷

The solemn procession in the scene that follows this dialogue and the weird conditions for the croquet game reinforce the subtle connection Lewis makes between the absurdity of norms and power. The pure rules of croquet would have made sense on a field in which croquet balls were not hedge-hogs and mallets were not flamingos. In Wonderland, however, they remain unchanged and valid even in the face of extraordinarily diverse circumstances. Everybody plays *as if* there was no incongruence between rules and life, *as if* that was a perfectly ordinary game only with minor aspects changed.

The Mock-Turtle Story and *The Lobster Quadrille* play again with the possibilities of grammar-perfect statements and formally-correct discursive genre becoming the means of making absurd ideas sound sensible: “*Very true*” said the Duchess “*flamingos and mustard both bite. And the moral of that is – ‘Birds of a feather flock together’*” (*The Mock-Turtle Story*)²⁸. However, as the novel approaches its end and Alice gets closer to waking up from her dream, she starts slowly realizing how much oppression lies hidden in this seemingly innocent madness (and in her everyday life in Victorian England: “*How the creatures order*

²⁶ CARROLL, op. cit., p. 75.

²⁷ Idem, ibidem, p. 84.

²⁸ Idem, ibidem, p. 96.

one about, and make one repeat lessons!” thought Alice “I might just as well be at school at once” – The Lobster Quadrille)²⁹.

The book ends with the memorable trial of Alice in which the rigid, complex procedural rules and court proceedings not only prevent, but indeed foster mayhem. In *Who Stole the Tarts?*, the labyrinth of rules that constitutes the nonsensical logic of Wonderland’s legal procedures suggests that one may get so engrossed in the game of Law to the point of forgetting who they in fact are in ordinary life (*“They [the twelve jurors] are putting down their names, “the Gryphon whispered in reply, “for fear they should forget them before the end of the trial.”)*³⁰.

The tension between *who you are* and *who you are for Law* gets complicated by the parallel tension between the meaning of one’s actions in real life and the meaning of one’s actions for Law. Alice’s actually knowing anything about the alleged stealing of the tarts (that is to say, her capacity to inform about events that take place in the world outside) is absolutely indifferent to the apparently random internal logic of the trial. The relative importance of depositions depends on the obscure rationale informing the proceedings:

“What do you know about this business?” the King said to Alice.

“Nothing,” said Alice.

“Nothing whatever?” persisted the King.

“Nothing whatever,” said Alice.

“That’s very important, the King said, turning to the jury. They were just beginning to write this down on their slates, when the White Rabbit interrupted: “Unimportant, your Majesty means, of course” he said, in a very respectful tone, but frowning and making faces at him as he spoke.

“Unimportant, of course, I meant”, the King hastily said, and went on in an undertone, “important – unimportant – important –” as if he were trying which word sounded best.³¹

The value of the statement (important/unimportant) ultimately depends on the overall interpretive structure from which it is seen, but it is exactly this commanding element that is hidden from view³². Alice’s inability to question *why* the rules are in place results in her concluding that it is irrelevant to discuss *which* norm is applied or decision is made (*Some of the jury wrote it down “important,” and some “unimportant.” Alice could see this, as she was near enough to look over their slates; “but it doesn’t matter a bit,” she thought to herself)*³³.

²⁹ CARROLL, op. cit., p. 110.

³⁰ Idem, ibidem, p. 115.

³¹ Idem, ibidem, p. 124-5.

³² This is arguably linked to the problem of principles in positivism. For a good discussion, see DIMOULIS, Dimitri; LUNARDI, Soraya. **Perspectiva positivista: reflexões em torno de Hans Kelsen**. Rio de Janeiro: Forense, 2013. p. 213-31.

³³ CARROLL, op. cit., p. 125.

She can see the legal system working, but fails to see the purpose it serves. She is just moments away from waking up.

This intricate self-containing system and the disturbing irony of its imperviousness to life make the last chapters the perfect ending for the story. Having the King decide on what is important or not based on which of the words sound best becomes comical because this criterion clearly has nothing to do with the expected fact-finding function of depositions in a trial. Logic of procedure and function of procedure are blatantly separated, but the norm-applying authority seems nonplussed by it. As a summary of the specific breed of madness that runs throughout the book, court proceedings in Wonderland are totally oblivious and indifferent to any connection with factual reality. The inner grammar of the trial is a self-sustained, self-justified reality.

Alice's epiphany – and her ensuing liberating waking-up – occurs when she realizes that the whole power structure is funded on “*nothing but a pack of cards*”³⁴. Alice knows that the value of each card in a pack is given by the game one chooses to play. There is no intrinsic, essential value attached to any of them, no natural hierarchy, no necessary order preexisting the game to be played. A valuable trump in one type of game may be an encumbrance in another: establishing the difference between valuable/valueless, relevant/irrelevant, legal/illegal is a function of the political decision on which game to play. If, contrary to what Rawls assumes in his veil-of-ignorance theory, this decision is made by someone who already knows the cards everyone has been dealt, chances are that those choosing the game will be those winning it. This seemed painfully clear in Victorian England.

It remains possible, nevertheless, to make a decision and analyze the game exclusively from the point of view of the internal logic of its rules, suspending for a while, as it were, any concern with why people play the game in the first place. For the modern mind, this would be indeed necessary to have any real scientific knowledge of the *game as it is*, uncontaminated by the vast array of *alien elements* (to use Kelsen's phrase) which gravitate around the game (types of players, their intentions, wishes, etc.). The possibility of the scientific analysis of the rules of the game entails, therefore, that it resists the temptation to bring into the analysis any value that is not derived from the premises of the system itself.

Kelsen's *pure theory* assumes and requires the possibility of such a *pure object*. It is not only that his theoretical perspective must be uncontaminated by idiosyncrasies of specific legal orders: his object, also, must be rid of anything *which is not law*. This requirement,

³⁴ CARROLL, op. cit., p. 129.

however, makes the scientific neutrality of the system depend on a belief that defining *what law is* is a value-free task, that it derives from reason alone³⁵. Otherwise, that is to say, if one were to admit that cultural constraints impact the definition of object, then it would be impossible to say that one is studying law *as it is* because this definition varies substantially among cultures. In tandem with the modern conception of science, the ideological, value-laden choices involved in defining the boundaries of law must be presented as neutral, as the necessary by-product of the sound functioning of reason. The exclusions such choice operates are thus of universal import and a pre-condition for the scientific study of law. Particularly important among the exclusions needed to create a pure object for a pure theory are those of nature and history (in the form of jurisprudence).

The idea that legal norms must somehow conform to an alleged *natural law* seems understandably misled to positivism at least as a reliable basis on which to build a scientific understanding of Law as an objective phenomenon. Centuries of debates on this seminal concept to legal scholarship had generated more doubts than consensus. The cacophony of arguments on the matter – what kind of command, if any, is rooted in the natural order? What notion of nature does such believe articulate? – is arguably part of the problem Kelsen tries to solve by his pure theory. Beliefs about the way the world naturally functions, that deep set of assumptions Charles Taylor defines as *social imaginary*³⁶, have no right of entry in a pure theory which must resist the implicit morality such imaginary brings.

History is also denied a place in the setting up of Kelsen's theoretical model, at least when considered as the building up of customs and decisions within specific legal orders. The pure theory does not deny time – as it assumes that legislation must occur before adjudication – but it rejects jurisprudence in the sense of a binding force deriving from the way individual decisions have been made in the past. Jurisprudence is by force rooted in the history of individual legal orders, and this kind of individual peculiarity is exactly what the pure theory stands up against.

This rejection of history and nature as sound elements on which to base the understanding of Law springs from a series of beliefs that are characteristic of the modern mind-frame: science must strive to move beyond individual occurrences of events and come up with universal laws; cultural values held by the observer must not distort his objective view, that is to say, his unencumbered observation of a pre-existing object, etc.

³⁵ Compare this view of that expressed by Fernand Braudel “there is obviously nothing like the economy per se” expressed not long after Kelsen published the second version of his *Pure Theory*. BRAUDEL, Fernand. **La Dynamique du capitalisme**. Paris: Flammarion, 1988.

³⁶ See TAYLOR, Charles. **Modern Social Imaginaries**. Durham: Duke University Press, 2004. p. 23-30.

Implicit in this point of view is the belief in the superiority of science over other forms of knowing, which is at work in Auguste Comte's tremendously influential works. Primitive forms of describing, understanding and dealing with the world (e.g. magic) and even more evolved systems (e.g. religion) are less apt to perform any of these tasks than science. In Law, this tenet will translate into a sharp separation between law and politics that will disqualify some types of discourses as *activism* or *opinion* not as *reason* and *fact*. The *morality* of the system is of a procedural, not substantive order.

Kelsen explains with great care the distinction of Law and Morals to avoid the charges that he believes that there is no real morality in ordinary life. He carefully stresses that morals and morality do exist and perform an essential social function. His point is, however, that morality is not the one that can be usefully applied in a *pure theory*:

It is paramount and cannot be emphasized enough to understand that not only one moral exists, but many different and even conflicting ones; that a positive legal order may on the whole conform with the moral views of a certain group of the population (specially the ruling one), yet may conflict with the moral views of another group; and that, above all, the judgment of what is morally good or evil, morally justifiable or unjustifiable, is subject to continuous change, as is the law, and that a legal order (or some of its norms) that at the time of its validity may have conformed with the postulates of the moral order so prevalent, may still be judged to be immoral today. The thesis, widely accepted by traditional science of law **but rejected by the Pure Theory of Law** [emphasis added] that the law by its nature must be moral and that an immoral social order is not a legal order, presupposes an absolute moral order, that is, one valid at all times and places. Otherwise it would not be possible to evaluate a positive social order by a fixed standard of right and wrong, independent of time and place.³⁷

Kelsen's sharp understanding of both moral relativism and its dangers leads him to insulate the science of law from the ever-moving sets of conflicting values that shape social life. They are ultimately irrelevant to assess the inner functioning of law as an abstract system. It is from this point of view that he will consistently tackle the difficulties of interpreting and applying law.

This insulation has many advantages when perceived from a modern point of view. It allows one to identify universal aspects of *law* as such because it hovers above the culturally-determined differences of existing legal orders. It also makes it easier for the legal scientist to maintain that subject/object separation, which is a key feature of scientific knowledge. Scholars will not be tempted to bring their moral prejudices to their analysis of the system because they are observing it from its internal functioning not from any outer result it may generate. Pretty much like the official in Kafka's *Penal Colony*, they can admire the

³⁷ KELSEN, op. cit., p. 68.

perfection of the design of the execution machine without having to focus on the lot of the executed.

Lewis' satirizing of the modern views held by Victorian England focuses exactly on this implicit hierarchy, which has science as the beacon that must illuminate and shape social life, once science alone (unlike religion or politics) is devoid of ignorance, mystification or petty interests. Every system in *Wonderland* – including law – could be described from a scientific, internal point of view which would hide from view the insanity it represents in the world. An insanity at the service of those who have the power to determine whose head will be taken off.

4 Important, Unimportant

The argument that a literary work written in 1865 can be read as a critical anticipation of the philosophical assumptions structuring a theoretical work written in 1934 deserves some clarification. It certainly does not mean any premonitory powers on Charles Lewis. *Alice in Wonderland* functions of a critique of social and philosophical beliefs prevailing in the England for which Lewis wrote. The work of Lewis contemporary, John Austin, is arguably the most eminent translation of such beliefs to legal theory³⁸. Austin's meticulous insulation of Law from other areas (in his most celebrated book, aptly titled *The Province of Jurisprudence Determined*), has been justly been considered a landmark in legal thinking and the key predecessor to Kelsen's positivism. The option to contrast *Alice in Wonderland* with 20th century Kelsen rather than with 19th century Austin may thus seem odd, a deliberate anachronism which requires justification.

A first reason for it lies in the fact that Kelsen's version has replaced Austin's as the reference point for most contemporary debate on this line of legal positivism. In important ways, his *Pure Theory of Law* seems to rearticulate Austin's intuition while at the same time expanding it. It is thus to Kelsen's diction of the positivist argument that today's scholars usually refer to, rather than to Austin's – whose continuing relevance, it is possible to suggest, may be in part explained by the fact that they are seen as preparatory moves to Kelsen's fuller depiction of the positivist tenets.

³⁸ Lewis was born in the year Austin's major work was published (1832). *Alice in Wonderland* appeared just six years after Austin's death.

The option for choosing Kelsen springs also from a second reason, less directly connected to the vagaries of analytical jurisprudence. The fact that the same beliefs that shaped Austin's work were still at work in the positivism of Kelsen is yet another instance of the resilience of the key assumptions of modernity that shape what Eric Hobsbawm has called "the long 19th century".

Such assumptions include the belief of reason, as expressed by science (patterned according the hard-science paradigm), as the only means for the objective knowledge necessary to order social life. They went by no means unchallenged (Romanticism being an early example of the many attacks these assumptions would suffer from the 19th century onwards), but they were hegemonic, that is to say, they made up that ideological framework, which needs no explanation or justification³⁹.

The narrative strategy of *Alice in Wonderland* makes extended use of one of the features of this ideological mind-set, namely, the analytical divide between inner and outer logic of systems. The scientific requirement that objects be cleansed from *alien elements* to be properly understood (key to both Austin and Kelsen) bespeaks the kind of essentialism that would come under such unswerving attack in the 20th century⁴⁰ and which elevated *the end of metaphysics* to the position of a new candidate for hegemonic belief.

The literary allegory of *Alice in Wonderland* denounces the unreasonableness of separating the assessment of individual systems from their very concrete historical setting and social consequences. Swift's *A Modest Proposal* had used the same technique in what may be a testimony of a more widespread malaise in industrial England.

Literature, a genre unconstrained by the demands of scientific rigor, is allowed to and capable of mixing (like in real life) the various elements that pure theory must keep apart. It is thus a valuable instrument to observe contradictions in hegemonic ideological constructs, which will only much later become perceived by a wider public. By the same token, academic works, a genre which must abide by rigid cause-consequence, evidence-theory standards, often progress by reaffirming core paradigms (even to challenge some of their specific applications or renderings, as Khun points out). They are thus very frequently rooted in beliefs whose truth-value has been established much earlier. This may help understand why Kelsen's assumptions seem closer to those satirized by 19th century *Alice in Wonderland* than by those of the *Kulturkritik* of his own 20th century.

³⁹ See EAGLETON, Terry. **Marxism and Literary criticism**. London: Methuen, 1976.

⁴⁰ For a good discussion of these topics, see VATTIMO, Gianni. **La Fine della Modernità**. Milano: Garzanti, 1985.