Pierluigi Chiassoni*

Kelsen o naravnopravniški teoriji
Dolgotrajno kritiško razmerje

V nizu razprav, objavljenih med koncem dvajsetih in sredino šestdesetih let prejšnjega stoletja, je Hans Kelsen v naravnopravniško teorijo uperil radikalno kritiko. Avtor te razprave skuša to kritiko analitično obnoviti in kritično ovrednotiti. Njegov zapis je sestavljen iz dveh delov. V prvem se posveča temeljem Kelsnove argumentacijske strategije zoper naravno pravo in naravnopravniške teoretike. V drugem delu pa se osredotoči na dva kritična odgovora na Kelsnov napad. Enega je v imenu tradicionalne naravnopravniške teorije podal Edgar Bodenheimer, drugega pa je v imenu »Nove naravnopravniške teorije« izoblikoval Robert P. George. Avtorjeva analiza nakazuje, da se Kelsnova kritika uspešno zoperstavlja tem kritičnim odgovorom.

Ključne besede: Hans Kelsen, naravnopravniška teorija, razsodišče znanosti, Edgar Bodenheimer, Robert P. George

1 RAZSODIŠČE ZNANOSTI

V pisanjih Hansa Kelsna se izraz »naravnopravniška teorija« (tudi »naravnopravniška doktrina«; oba izraza sta prevoda nemškega *Naturrechtslehre*) nanaša na pisano množico teorij od antike do današnjih dni, ki si delijo tri temeljne trditve: (i) naravno pravo obstaja kot objektivni normativni red, ki je ločen in neodvisen od pozitivnega prava (ontološka trditev); (ii) ljudje ga lahko spoznajo (epistemološka trditev); (iii) naravnopravniški teoretiki na znanstven način razlagajo naravno pravo, kakršno je v resnici (trditev o znanstvenosti).

Kritika naravnopravniške teorije (NPT) predstavlja eno od osrednjih tem v Kelsnovem pravoslovju. Kelsen se je od konca dvajsetih let prejšnjega stoletja pa vse to konca svojega dolgega in plodnega akademskega udejstvovanja držal istega kritiškega pristopa: obtoži NPT pred »razsodiščem znanosti« (kot to izrecno stori v svoji znameniti razpravi iz leta 1949), izpostavi njene različne slabosti in tako poskrbi, da bo NPT dokončno obsojena kot ideologija (natančneje: kot ideološko premišljevanje o in utemeljevanje pravičnosti) po večini konzervativne naravnanosti, zakrinkana v pristno znanstveno dejavnost.[1]

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1 Glej, na primer, Kelsen 1928a; Kelsen 1928b; Kelsen 1949; Kelsen 1953; Kelsen 1957; Kelsen 1960b; Kelsen 1961; Kelsen 1964.

Da bi preprečili morebitne nesporazume, je treba nekaj razjasniti že zdaj. Po Kelsnovem mnenju obstaja zgolj eno pravo razsodišče znanosti. Gre za razsodišče, ki deluje na temelju radikalne pozitivistične epistemologije (»znanstveno-kritiška filozofija«, »relativistični pozitivizem«, »kritiški pozitivizem«, »kritiški empirizem«). Njegova temeljna načela je mogoče na kratko obnoviti takole:

1. *ontološki monizem*: obstaja zgolj ena resničnost, ki je podvržena znanstvenemu proučevanju, in to je resničnost iskustev, svet naravnih in družbenih pojavov, ki jih je mogoče zaznati s čutili in urediti z razumom (naša »sposobnost védenja«);
2. *relativistično epistemološko merilo*: absolutne »Resnice« ni, so le izkustvene resnice, ki so odvisne od racionalnih kriterijev znanstvenega proučevanja;
3. *zmerni epistemološki optimizem glede razuma in čutil*: ne glede na to, da so razum in čutila nezmožni proučevanja onkraj meja izkustva, in ne glede na to, da je njihova raba odvisna od določenih predpostavk in zahteva nenehno izvrševanje epistemičnega dvoma, jih je kljub temu treba imeti za precej učinkovita in zanesljiva orodja empiričnega proučevanja;
4. *epistemološki pesimizem glede različnih domnevnih orodij proučevanja*: razum in čutila so, naj bodo še tako nepopolni, edina pristna orodja znanstvenega proučevanja, ki so nam na voljo; druga domnevna orodja resnično ne zadovoljijo »iskanja [znanstvene] resnice«, temveč predstavljajo bolj ali manj odprte oblike »domišljije, ki uresničuje pobožne želje«;
5. *univerzalna epistemična veljavnost*: znanstveno-kritiški pristop ne velja zgolj za proučevanja na področju (vzročno povezanih) dejstev, temveč tudi za tista, ki zadevajo področje norm in vrednot. Isto razsodišče, ki je pristojno za razsodbo glede NPT (in v splošnem za pravo, politiko, moralo in njihove teorije), bi prav tako odločalo o primeru glede domnevnega čudežnega terapevtskega odkritja v medicini.
6. *metaetični subjektivizem in nekognitivizem*: z vidika znanosti sta *subjektivizem* (po katerem ne obstajajo objektivne moralne norme ali objektivne moralne vrednote, saj so te odvisne od voljnih dejanj človeka in odražajo njegove preference, čustva, interese) in *nekognitivizem* (po katerem razum – naša sposobnost védenja – ne more samostojno razrešiti problemov pravičnosti ali katerega koli drugega praktičnega problema) edini sprejemljivi metaetični stališči. Zgodovina, sociologija, psihologija in antropologija združeno podpirajo ta zaključek.[2]

Ta zapis je sestavljen iz dveh delov. V prvem delu stremim k analitični obnovi Kelsnove kritike NPT (§ 2), v drugem delu pa se osredotočam na dva zago-

2 Kelsen (1928b: 433 in nasl.); glej tudi Kelsen 1934; Kelsen 1948; Kelsen 1949; Kelsen 1950; Kelsen 1952; Kelsen 1953; Kelsen 1960b; Kelsen 1961.

vora NPT, ki se osredotočata na Kelsnovov razpravo *The Natural-Law Doctrine before the Tribunal of Science*:[3] prvi je zagovor »tradicionalne«, racionalistične NPT, ki ga je podal Edgar Bodenheimer (§ 3);[4] drugi pa je zagovor »nove« tomistične NPT, ki ga poda Robert P. George (§ 4).[5] Sledi nekaj zaključnih vrstic glede trajnega pomena Kelsnove kritike naravnopravniškega mišljenja (§ 5).

2 KELSNOVA KRITIKA

Kot sem dejal že na začetku, Kelsen, ob zvesti rekonstrukciji, NPT pripiše tri temeljne trditve: ontološko trditev, po kateri obstaja objektivni normativni red – naravno pravo, ki je ločen in neodvisen od pozitivnopravnega reda; epistemološko trditev, po kateri ljudje lahko naravno pravo spoznajo; ter trditev o znanstvenosti, po kateri naravnopravniški teoretiki razlagajo naravno pravo, kakršno je v resnici. Kelsen uperi zoper vsako od teh trditev niz kritičnih argumentov. Te bom skušal predstaviti v njihovi najboljši luči in kar najbolj razumljivo.

2.1 Kritika ontološke trditve

Ontološka trditev NPT je v resnici sestavljena iz štirih medsebojno povezanih trditev: (1) obstaja naravno pravo (2) kot normativni red, (3) ki je ločen in (4) neodvisen od pozitivnega prava.

Strategija, ki jo Kelsen ubere, da bi spodbil ontološko trditev NPT, se osredotoča na domnevno ločenost (3. trditev) in neodvisnost (4. trditev) naravnega prava od pozitivnega prava. Njena struktura se kaže kot dvostopenjska. Kelsen najprej identificira razlike med naravnim pravom in pozitivnim pravom, do katerih je mogoče priti na podlagi obnove najbolj razširjene NPT, ki jo Kelsen šteje za korektno. Nato izpostavi probleme, ki jih takšne razlikovalne značilnosti naravnega prava povzročajo z znanstvenega vidika. Pri tem Kelsen, kot bomo videli v nadaljevanju, trdi, da naravno pravo »kot sistem norm, ki je ločen in neodvisen od pozitivnega prava«, nima nobene znanstvene veljave (»njegove veljavnosti z znanstveno-racionalnega gledišča *ni mogoče sprejeti*«)[6] in je v vsakem primeru »nemogoče«.[7]

3 Kelsen 1949.
4 Bodenheimer 1950.
5 George 2000.
6 Kelsen (1964: 114).
7 Kelsen (1928a: 39).

2.1.1 Ločevanje naravnega prava od pozitivnega prava

Po Kelsnovem mnenju NPT trdi, da se naravno pravo od pozitivnega prava razlikuje v petih ozirih: po objektivnosti, absolutni vrednosti, absolutni veljavnosti, statični strukturi in hierarhični nadrejenosti.

Objektivnost. Naravno pravo je *objektivni red* človeškega vedenja. Njegov obstoj ni odvisen od človeške pravodajne dejavnosti. Gre za naravni red, ki je lasten (»inherenten«) naravi v splošnem oziroma v specifični naravi človeka in kot tak za človeka predstavlja nekakšno »danost«, podobno kot gore, oceani ali zvezdnato nebo. Nasprotno je pozitivno pravo ustvarjeno s strani človeka: gre za človeško stvaritev, ki je nujno *subjektivnega* značaja, saj je neizogibno odvisno od subjektivne volje ljudi, ki po naključju opravljajo vlogo pravne oblasti v človeški družbi.[8]

Absolutna vrednost. Naravno pravo se odlikuje z absolutno vrednostjo – njegove norme so nujno norme absolutne *pravičnosti*, ki predpisujejo vedenje, ki je za vsakega človeka, v vsakem času in prostoru, *samo po sebi pravično* v odnosu do drugih ljudi. Nasprotno so norme pozitivnega prava zgolj priložnostno tudi norme pravičnosti, tj. če in samo če utelešajo naravnopravne standarde absolutne pravičnosti. Posledično imajo zgolj *relativno vrednost*. Če že obstaja vrednota, ki jo je mogoče razumeti kot nujno povezano s pozitivnim pravom, ta vrednota ni pravičnost, temveč *mir*, tj. vrednota mirne (pacificirane) družbe. Seveda pa je mir združljiv tudi z očitnimi kršitvami meril pravičnosti – kot vsi vemo, je cena miru, ki ga prinaša pozitivno pravo, lahko zelo visoka za prikrajšane družbene skupine (vladani razred, »manjvredna« kasta, »prekucniške« stranke ali gibanja in tako naprej).[9]

Absolutna veljava. Če se naravnopravne norme odlikujejo z absolutno vrednostjo, potem so tudi absolutno veljavne: upoštevane in uporabljene naj bi bile *kot take*, ne glede na čas in prostor. Dana jim je, kot to včasih trdijo naravnopravniški teoretiki, »notranjo nujnost«.[10] Zaradi te absolutne veljave oziroma notranje nujnosti je naravno pravo *anarhičen* normativni red: prisila in organizacija nista lastnosti njegove zasnove. Nasprotno so pozitivnopravne norme zgolj *relativno veljavne*: s strogo pozitivnopravnega gledišča naj bi jih upoštevali in uporabljali, če in samo če predpostavimo – s pomočjo pravne »domneve«[11] oziroma pravne »fikcije«[12] – veljavnost temeljne norme, katere funkcija je preoblikovati neko izvorno zgodovinsko dejstvo nepooblaščene stvaritve prava s strani ljudi, ki so posedovali večjo zmožnost prisiljevanja (»moč«, nem. *Macht*),

8 Kelsen (1928a: 28–30); Kelsen (1949: 142).
9 Kelsen (1928a: 37 & 56–57); Kelsen (1928b: 435).
10 Kelsen (1928a: 37–38).
11 Kelsen 1934; Kelsen 1960a; Kelsen (1960b: § 52).
12 Kelsen 1979.

v pooblaščeno pravodajno dejanje.[13] Pravniki – v vlogi razlagalcev pozitivnega prava – ne morejo kar po mili volji predpostaviti veljavnosti temeljne norme pozitivnega normativnega reda. Slednje je mogoče, če in samo če so norme tega reda po večini učinkovite. Učinkovitost spodbujajo prisilne sankcije, za uporabo katerih so pooblaščeni uradniki. Tako je v končni posledici relativna veljavnost pozitivnega pravnega reda odvisna od prisile in organizacije. Medtem ko je naravno pravo anarhično, pozitivno pravo najde svojo »izpopolnitev« v obliki *državnega* pravnega reda, tj. v prisilnem in visoko organiziranem normativnem redu.[14]

Statična struktura. Naravno pravo, vsaj kar se tiče prevladujoče NPT, idealno stremi k temu, da obstaja kot *statičen* normativni red, tj. kot množica norm, ki vključuje *eno temeljno vsebinsko normo* in druge norme, ki jih je iz prve mogoče izvesti z »golo umsko operacijo«.[15] Tako je, na primer, naravnopravni red, opredeljen na podlagi temeljne norme »*Suum cuique tribuere*« (»Vsakomur svoje«), sestavljen iz te norme ter iz norm, ki so iz nje izvedene s (pravilnim) sklepanjem, kot na primer »Ne kradi«, »Izpolni sklenjene pogodbe«, »Ne izkoriščaj ljudi v hudi stiski« itd. Nasprotno so pozitivnopravni redi v svojem bistvu *dinamične* normativne ureditve: gre za množice norm, ki vključujejo eno *temeljno formalno* oziroma *normo o pristojnosti* ter norme, oblikovane s strani organov, ki jih takšna temeljna norma neposredno ali posredno ustanavlja.[16] Na primer: pozitivnopravni red, opredeljen na podlagi temeljne norme »Kar koli odredi kraljica, je pravo«, je sestavljen iz te pooblastilne norme in vseh norm, ki jih kraljica ali njeni delegati. Statična narava naravnega prava kaže na še eno temeljno razliko glede na pozitivni pravni red. Naravnopravne norme so postavljene enkrat za vselej – so imune pred spremembami, njihova vsebina se v času ohranja. Z drugimi besedami: so »večne in nespremenljive« norme. Nasprotno pa pozitivnopravne ureditve, kot dinamične ureditve, izkazujejo vgrajeno strukturno podvrženost spremembam v času in prostoru.[17]

Hierarhična nadrejenost. Končno predstavlja naravno pravo zaradi svoje absolutne vrednosti in absolutne veljave tudi normativni red, ki je *nadrejen* pozitivnopravnim ureditvam (slednje so mu torej *podrejene*). Odnos med obema normativnima redoma je nujno hierarhičen odnos.[18]

13 Kelsen (1928b: 435–437).

14 Kelsen (1928a: 33–34); Kelsen (1928b: 441).

15 Kelsen (1928b: 399–400); kot bomo videli v § 2.2, Kelsen naravnopravniške teorije, ki zagovarjajo dinamične, »izključno pooblaščujoče«, naravnopravne temeljne norme, razume kot »neskladne« s »čisto idejo naravnega prava«.

16 Kelsen (1928b: 400).

17 Kelsen (1928: 38).

18 Kelsen (1928b: 410–411); Kelsen (1960b: § 50).

2.1.2 Spodkopavanje ontološke trditve

Kot sem že dejal, je razgrnitev posebnosti, ki naj bi, skladno s »čisto idejo« naravnopravnega reda, naravno pravo ločevale od pozitivnopravnih redov, prva, pripravljalna stopnja Kelsnove kritike ontološke trditve NPT.[19] Zdi se, da želi Kelsen napeljati na naslednjo misel: ko smo si enkrat ustvarili jasno predstavo o domnevnih temeljnih lastnosti naravnega prava in jih želimo zatem zaradi intelektualne poštenosti jemati resno z znanstvenega stališča, naš »kritični razum«[20] ne more ravnati drugače, kot da v njih prepozna pomanjkljivosti, sporna stališča in pobožne želje.

Argumenti, ki jih Kelsen uperi zoper ontološko trditev NPT, so usmerjeni zoper tri tarče: prvič, zoper idejo naravnega prava kot objektivnega normativnega reda, ki se odlikuje z absolutno vrednostjo; drugič, zoper idejo norm naravnega prava, ki ji je dana notranja nujnost; tretjič, zoper idejo naravnega prava kot statičnega, samouresničujočega se reda, ki ga je mogoče »razvijati« preko čistih umskih operacij, v povezavi z idejo naravnega prava kot reda, ki je ločen in neodvisen od pozitivnega prava.

A. *Prevpraševanje objektivnosti in absolutne vrednosti naravnega prava*

Da bi spodkopal domnevno objektivnost in absolutno vrednost naravnega prava, Kelsen uporabi štiri argumente: argument nenavadnosti, genealoški argument, argument, ki temelji na človeški psihologiji (psihološki argument) in končno, argument o nujnosti teizma. Vsa poimenovanja tu in v nadaljevanju so rezultat moje rekonstrukcije Kelsnove kritike.

Kot bomo videli, ni mogoče za nobenega od teh argumentov trditi, da ima uničujočo moč – a se Kelsen niti ne pretvarja, da jo imajo. Namesto tega so namenjeni vzpostavitvi mreže razlogov, ki skupaj nakazujejo na možnost zavrnitve ontološke trditve NPT z znanstvenega vidika (Pod pogojem, da bi *te* bile temeljne značilnosti naravnopravnega reda, se lahko vprašamo: so sprejemljive z vidika nepristranskega racionalnega proučevanja? Bi ga naredile za *obstojen* normativni red?).

Argument nenavadnosti. Naravnopravniški teoretiki navadno predstavljajo objektivnost in absolutno vrednost naravnega prava kot nekaj samoumevnega. A brž ko nanju vržemo hladen pogled razuma, se ti domnevni lastnosti narav-

19 Mimogrede: za Kelsnovo obnovo »čiste ideje« naravnopravnega reda se zdi – daleč od tega, da bi bila nenavadna ali idiosinkratična – da je skladna celo z različnimi obnovami avtorjev, ki so naklonjeni naravnopravniškemu mišljenju. Tako na primer Mark Murphy identificira tri temeljne lastnosti »paradigmatičnega naravnopravniškega pogleda«: (1) objektivnost (»naravno pravo je dano od Boga«); (2) absolutna veljavnost (»po naravi poseduje avtoriteto nad vsemi človeškimi bitji«); (3) podvrženost védenju (»po naravi ga lahko spoznajo vsa človeška bitja«). Glej Murphy (2011: § 1.4.).

20 Kelsen (1928: 435).

nega prava izkažeta za izrazito sporni, saj svoje podpornike zavezujeta k *ontološkemu dualizmu*. Ideja naravnega prava kot normativnega reda, ki ga ni ustvaril človek, temveč zanj predstavlja nekakšno *danost*, nosi s seboj idejo dvojne normativne resničnosti: empirične, površinske resničnosti s strani človeka ustvarjenih norm pozitivnega prava in družbene morale, ki jih je mogoče zaznati s čutili in razumsko urediti, ter »višje« oziroma »globlje« resničnosti naravnopravnih norm, ki jih ni ustvaril človek. Tudi ideja absolutne veljave naravnega prava – ki je, kot smo videli, absolutna veljava pravičnosti, utelešene v normah naravnega prava – nakazuje dvojno resničnost vrednot: empirično, površinsko resničnost subjektivnih, relativnih človeških vrednot, ki so odvisne od človeških norm ter »višjo« oziroma »globljo« resničnost objektivnih vrednot, ki so odvisne od objektivnih norm in so »vrednote same po sebi« – tako kot obstajajo »stvari same po sebi«, drugače kot običajne, nepopolne stvari v empirični resničnosti.

Kelsen vztraja, da ontološki dualizem (»podvojitev območja zaznavanja«) »tvori jedro celotne metafizike in religije«, da je temeljni gradnik »tragikomičnega podvzema«, s katerim »človek ustvarja iluzijo preraščanja samega sebe«.[21] Brž ko naravnopravniškim teoretikom zastavimo neizogibna vprašanja, kot so: »Kako nastanejo naravnopravne norme?«, »Od kod prihajajo?«, »Kaj je vir – če ta sploh obstaja – absolutne vrednosti pravičnosti?«, »Kakšne vrste reč je ta višja oziroma globlja resničnost norm in vrednot, ki jih ni ustvaril človek?« itd., dobimo odgovore, ki kažejo na naravo, ki je pravodajna, na naravo, ki se odlikuje z objektivno usmerjevalno močjo, oziroma, še pogosteje, na (transcendentno) božanstvo, ki je ustvarilo naravo in človeka kot njen del ter vanjo umestilo naravnopravne norme in merila absolutne vrednosti.

Kelsen pa nas z argumentom nenavadnosti pozove, da pred vstopom in začetkom skrbnega proučevanja v (čudoviti) svet metafizične in religiozne misli zastanemo. Kot sodnike razsodišča znanosti nas povabi, da premislimo ontološki dualizem kot tak: tj. kot trditev, ki je ne glede na njene odlike v nasprotju z ontološkim monizmom kritiškega empirizma. Če bomo ravnali tako, potem nam po Kelsnovem prepričanju ne preostane drugega kot sklep, da je hipoteza o ontološkem dualizmu norm in vrednot nenavadna: da je nenavadna ideja o nekem drugem svetu »višjih« oziroma »globljih« norm in vrednot, ki zadevajo človeško ravnanje, a jih vendar ta ni ustvaril – tako kot pozitivne in moralne zakone empiričnega sveta.[22]

Argument nenavadnosti izvablja razumljiv odgovor: domnevna nenavadnost ontološkega dualizma norm in vrednot je odvisna od opazovalca. Če naj bi bil ontološki dualizem res tako »nenavadna hipoteza«, kot to trdi Kelsen,

21 Kelsen (1928b: 419).

22 Kot je dobro znano, je podoben argument – »argument čudnosti« – zoper moralni objektivizem na splošno naperil Mackie (1977: 38–42).

kako je potem mogoče, da ga celotne generacije filozofov in ljudi na splošno – vključno z nekaterimi izmed največjih umov, ki so bili kdaj rojeni – jemljejo kot nekaj samoumevnega?

Zoper takšen odgovor se Kelsen zateče h genealoškemu in psihološkemu argumentu. Kot bomo videli kmalu, prvi dozdevno odreka ontološkemu dualizmu kakršno koli znanstveno verodostojnost s tem, ko se sklicuje na njegov zgodovinski izvor v človeških družbah in kulturah; slednji pa se nameni razložiti trajni uspeh ontološkega dualizma s sklicevanjem na človeško psihologijo, posebno na dva značilna gona človeškega uma.

Genealoški argument. Od kod izhaja ontološki dualizem? Kot vsi drugi človeški konstrukti ne more biti nič drugega kot proizvod človeškega mišljenja. A kakšne vrste mišljenja? Ideja naravnega prava je ideja norm, zakonov oziroma načel za človeško ravnanje, ki so naravi »lastna«, ki »izhajajo iz« narave, ki jih je v naravi »mogoče najti«. Vendar pa je *narava* z vidika znanstveno-kritiškega mišljenja kaos dejstev, ki jih (lahko) zaznavajo naša čutila, razum pa jih ureja preko načela vzročnosti in drugih načel znanstvenega proučevanja.[23] Zato narava, kot jo vidi kritični empirizem, ne more biti narava, ki podaja oziroma vsebuje norme in ki jo imajo v mislih teoretiki naravnega prava. Biti mora narava drugačne vrste. Ideja o naravi, ki postavlja oziroma vsebuje norme, ima, tako Kelsen, svoj izvor v primitivnem mišljenju. Primitivni ljudje v naravnem okolju, ki obdaja njihove vasi (drevesa, gozdovi, vodni izviri, jezera, hribi, divje živali, zvezde itd.) vidijo naseljene duhove, ki jih je treba primerno častiti in miriti, da bi se tako izognili zlim posledicam (bolezni, lakoti, suši ipd.). Takšno poduhovljeno naravo primitivni ljudje razumejo kot del njihove družbe – kot množico entitet, ki nagrajujejo pravilna in kaznujejo napačna ravnanja. Z opazovanjem »obnašanja« takšnih entitet se ljudje naučijo, kako morajo oziroma kako ne smejo ravnati. Primitivni animizem predstavlja izvor ideje, da obstajajo *objektivne* norme za človeško ravnanje in posledično tudi izvor ontološkega dualizma norm in vrednot. Tovrstno primitivno mišljenje so do zdaj že skorajda povsod postopoma nadomestile bolj prefinjene oblike religioznega mišljenja, vse tja do velikih monoteističnih religij. Čeprav duše dreves in gora nadomešča transcendentno božanstvo, se temeljna oblika mišljenja ohranja: transcendentno božanstvo je izvor objektivnih zakonov – zakonov, ki jih ni ustvaril človek, ki jih je mogoče odkriti z »branjem« teleološko-teološke »knjige narave« in ki so za ljudi absolutno zavezujoči.[24]

Psihološki argument. Zakaj so generacije filozofov in ljudi na splošno podpirale – in to počno še danes – ontološki dualizem norm in vrednot? Zakaj so tako nedovzetni za argument nenavadnosti in genealoški argument? Po Kelsnovem mnenju razlog ni v tem, da je ontološki dualizem *resnična* znanstvena trditev –

23 Kelsen (1960: § 31).

24 Glej Kelsen (1928b: 422–423); Kelsen (1949: 137 in nasl.).

kritičnemu empirizmu navkljub. Prav nasprotno: kot kaže genealoški argument, je razlog v tem, da ontološki dualizem sploh ni znanstvena trditev. Pripada namreč domeni prakse. Gre za ideološko pripravo, katere primež nad omenjenimi generacijami filozofov in ljudi na splošno je mogoče razložiti z medigro dveh značilnih gonov človeškega uma. Na eni strani gre za gon »primitivnega uma«, ki stremi k iskanju takšnega absolutnega in heteronomnega temelja (tj. vira in utemeljitve) temeljnih meril človeškega vedenja, ki omogoča izogibanje osebni odgovornosti. Na drugi strani imamo opravka z oportunističnim gonom, naklonjenim načinom mišljenja, ki so zmožni zagotoviti spodbujanju lastnih interesov (individualnih ali skupinskih) pečat objektivnih in absolutnih vrednot. Skladno s tem naj bi bila torej prikladnost temeljni motiv v ozadju trdovratnega vztrajanja ontološkega dualizma norm in vrednot.[25]

Argument o nujnosti teizma. Nekateri naravnopravniški teoretiki skušajo, lahko bi rekli, ločiti usodo naravnega prava – ali bolje, tistega pojmovanja naravnega prava, ki ga zagovarjajo – od usode teizma (vere v transcendentno božanstvo) s tem, da zanikajo kakršno koli nujno povezanost med naravnim pravom na eni strani in kakršnim koli teološkim temeljem le-tega na drugi strani. Na ta način, trdi Kelsen, skušajo zagovor naravnega prava okrepiti s tem, da pokažejo, kako to ne potrebuje teološke utemeljitve, ki je s filozofskega gledišča sporna. Žal pa po Kelsenovem mnenju takšna ločitev naravnopravniške teorije od religioznih temeljev ni mogoča. Argument o nujnosti teizma je precej zapleten, Kelsen pa z njim udejanja temeljna načela svojega empiricističnega pogleda na svet (nem. *Weltanschauung*) in teorije norm. Povzeti ga je mogoče takole: naravno pravo je normativni red, čigar norme niso človeški proizvod. Norma je predpisovalna pomenska vsebina (nem. *Sinngehalt*) voljnega akta, usmerjenega k nekogaršnjemu ravnanju. Naravnopravne norme pa že po izhodiščni predpostavki ne morejo biti pomenska vsebina človeških voljnih aktov. Tako sledi, da morajo biti pomenska vsebina voljnih aktov neke nečloveške entitete. Če nismo primitivni animisti, ki verjamejo v duše dreves, rek, gora itd., imamo zgolj eno možnost: predpostavljati moramo obstoj transcendentnega božanstva, po volji katerega so bile naravnopravne norme ljudem postavljene kot vodila.[26]

Če strnemo: Kelsen meni, da obstajajo vsaj štirje dobri razlogi za to, da se znebimo ideje o obstoju naravnega prava kot objektivnega normativnega reda,

25 Kelsen (1928b: 419 in nasl.); Kelsen (1952: 22); Kelsen (1953: 10–11 & 22–24); Kelsen (1960b: § 51); Kelsen (1964: 114 in nasl.). Zdi se, da se Kelsen popolnoma zaveda prepričevalnega »razkoraka« v njegovih argumentih. Kritiški empirizem sicer lahko v ospredje prikliče temeljne praktične motive za človeško vero v ontološki dualizem. Prav tako se lahko – nasproti »primitivnemu umu« – zavzema za »moderni um« moralne avtonomije in končne osebne odgovornosti v praktičnih zadevah. A se mora, glede na to, da kot neosnovan molče zavrača t. i. »optimizem razuma«, zadovoljiti s tem in upati, da bo – prej ali slej – med ljudmi prevladalo zrelo in iskreno mišljenje.

26 Glej Kelsen (1928b: 422 in nasl.); Kelsen (1949: 138); Kelsen (1964: 114 in nasl.).

ki se odlikuje z absolutno vrednostjo. Prvič, s čisto racionalno-znanstvenega gledišča gre za nenavadno domnevo. Drugič, izhaja iz animističnega mešanja med družbo in naravo, ki je značilno za primitivno mišljenje. Tretjič, pripada domeni prakse in ideologij, kjer se prilega dvema značilnima gonoma človeškega uma, ki se tu združita v prikladnosti domneve o obstoju objektivnega reda človeškega ravnanja. Četrtič, ta ideja ne more obstati »sama po sebi«, temveč potrebuje teološko »utemeljitev« (v obeh pomenih te besede, tj. kot polaganje temeljev in kot opravičilo), da bi ji uspelo utemeljiti to, kar bi danes poimenovali »normativnost« naravnega prava.

B. *Prevpraševanje notranje nujnosti naravnopravnih norm*

Naravnopravniški teoretiki včasih trdijo, da je naravnopravnim normam dana »notranja nujnost«.[27] S Kelsnovega gledišča je to trditev mogoče razumeti na dva načina.

Po prvem možnem razumevanju je ideja o »notranji nujnosti« enaka trditvi o *absolutni veljavi* naravnopravnih norm. Kot smo videli, je absolutna veljava odvisna od absolutne vrednosti. Slednja pa je odvisna od obstoja objektivnega reda naravnopravnih norm. Tako je prvo razumevanje trditve o »notranji nujnosti« sporno iz tistih štirih razlogov, ki pod vprašaj postavljajo ontološki dualizem.

A nam je na voljo še drugo razumevanje te trditve. Po tem je zatrjevanje »notranje nujnosti« naravnopravnih norm enako trditvi, da povezava med prorekom (antecedentom) in porekom (konsekventom) naravnopravne norme ni normativna povezava pripisovanja, temveč neke vrste vzročna povezava med prorekom, ki izraža pogoj, in porekom, ki izraža njegovo nujno posledico.

To drugo razumevanje pa po Kelsnovem mnenju zaznamuje nepopravljiva zmešnjava, ki ima za NPT neprijetne posledice.

Prvič, s tem ko naravnopravne norme – ki so *najstveni* oziroma deontični zakoni (»Če se nekdo znajde v položaj, ko bi lahko kradel, potem naj ne krade«) – predstavlja kot zakone *nujnosti* oziroma vzročnosti (»Če se nekdo znajde v položaj, ko bi lahko kradel, potem nujno ne bo kradel«, kar je enako kot: »Če se kovinsko telo segreje, se bo nujno razširilo«), zmotno izniči razliko med pravimi normami na eni strani in izjavami o empirični vzročnosti na drugi strani. Ko ravna tako, NPT izkazuje primitiven, kulturno slabo razvit miselni ustroj, saj je mešanje normativnih in vzročnih povezav (mešanje med družbo in naravo) značilno za primitivno mišljenje.

Drugič, s tem ko NPT naravnopravne norme predstavlja kot neke vrste zakone vzročnosti, postavlja trditev, ki spodbija samo sebe: če so naravnopravne norme res (take kot) zakoni vzročnosti, potem so »izgnane iz domene

27 Kelsen (1928a: 35).

normativnega«.[28] Kot takšne nikakor ne morejo *usmerjati* človeškega ravnanja, prav tako kot nas zakon gravitacije ne more »usmeriti« k temu, da ostanemo z nogami na zemlji. Če, na primer, stavka »Moč je enaka pravici« (angl. »*Might is right«)* ne razumemo, kot da izraža normativno načelo, ki upravičuje in legitimira neko učinkovito oblast (»Ljudje z močjo naj vladajo«), temveč tako, kot da izraža zakon vzročnosti v človeški družbi (»Ljudje z močjo morajo vladati«; »Ljudje z močjo morajo nujno voditi«, »Če so v družbi ljudje z močjo, potem morajo ti nujno vladati«), potem takšna izjava izgubi vsakršno usmerjevalno moč. Takšen naravni zakon, sestavljen iz izjav o nujnem človeškem ravnanju, sploh ne bi bil nikakršen zakon oziroma normativni red, saj ne bi mogel izpolniti normativne funkcije, ki mu jo naravnopravniški teoretiki pripisujejo.[29]

C. *Prevpraševanje možnosti naravnega prava kot normativnega reda, ločenega in neodvisnega od pozitivnega prava*

Zadnji argument zoper ontološko trditev NPT je naslednji: četudi bi pustili ob strani vse prejšnje argumente, bi se ontološka trditev vseeno soočala z usodnim problemom. Po Kelsnovih besedah gre kar za »celoten problem« naravnega prava.[30] Gre za problem individualizacije (nem. *Individualisierung*, *Konkretisierung*). Kelsen pravi, da gre za problem, s katerim se mora NPT uspešno soočiti – tega pa ne more storiti, ne da bi se odpovedala trditvi, da je naravno pravo normativni red, ki je ločen in neodvisen od pozitivnega prava. Ta, lahko bi mu rekli, *argument o nujnosti pozitivizacije*, gre približno takole: tako kot vsak normativni red mora tudi naravno pravo vsebovati splošne norme (tudi najčistejši dinamični sistem mora vsebovati vsaj eno splošno normo, ki pooblašča vrhovno normodajno avtoriteto, kot, na primer, »Ljudje naj se ravnajo skladno s kraljevimi zakoni«). Kot statični normativni red (§ 2.1.1) mora naravno pravo vsebovati splošne materialne norme (kot, na primer, »*Bonum faciendum, malum vitandum*«). Vendar pa splošne materialne norme zaradi svoje »abstraktne« narave ne morejo delovati kot merila za posamične primere, tj. v posamičnih primerih jih ni mogoče uporabiti, ne da bi jih poprej individualizirali oziroma konkretizirali (z drugimi besedami: nujno se soočajo z »individualizacijskim razkorakom«). Postopek individualizacije splošnih materialni norm je, kar se pozitivnopravnih ureditev tiče, nujno diskrecijski postopek: gre za postopek diskrecijskega nadomeščanja splošnih norm z (ne-nujno »ustrezajočimi«) individualnimi normami, ki ne temelji zgolj na védenjskih, temveč tudi na voljnih aktih (izvršilni organ mora na »konstitutiven« način ugotoviti, da ima pred seboj individualni primer iste vrste, kot ga predvideva prorek splošne norme, prav tako pa mora na »konstitutiven« način ugotoviti, kakšna pravna posledica

28 Kelsen (1928a: 50).

29 Kelsen (1928a: 34); Kelsen (1949: 139); Kelsen (1956: 177).

30 Kelsen (1928: 39).

naj iz tega sledi). NPT ta problem navadno spregleda in splošne naravnopravne norme razume kot samouresničujoče se, tj. kot take, ki se na posamezne primere nanašajo preko čistih miselnih aktov njihovih naslovnikov. Da bi takšni rešitvi uspelo ohraniti identiteto in obstoj naravnega prava kot posebnega normativnega reda, bi morala NPT predpostavljati, da so vsi ljudje enako modri in dobri moralni akterji. Zgolj na podlagi takšne predpostavke bi lahko splošne naravnopravne norme enako uporabili v posamičnih primerih; zgolj na podlagi takšne predpostavke bi te norme delovale kot »samouresničujoče se« v posamičnih primerih. Žal pa je predpostavka, da so vsi ljudje enako modri in dobri moralni akterji, pretirana celo za domišljijo NPT. Le sorazmerno malo ljudi je dovolj modrih in dobrih, da bi lahko uporabljali splošne naravnopravne norme. Da bi naravnopravni red lahko deloval, je tako treba tem posameznikom zaupati uporabo splošnih norm naravnega prava v oblikah in na načine, ki so univerzalno zavezujoči. Vendar pa ta poteza pomeni, da se te modre in dobre ljudi spremeni v prav toliko organov, ki uporabljajo naravnopravne norme. Poleg tega pa je, da bi zagotovili učinkovitost njihovih sodb, treba zagotoviti tudi neko vrsto prisile. Vendar pa to pomeni, da mora naravno pravo postati pozitivno pravo: da bi bilo naravno pravo delujoč normativni red, mora prestati postopek pozitivizacije. A če je tako, moramo skleniti, da naravno pravo kot normativni red, ki je ločen in neodvisen od pozitivnega prava, enostavno »ni mogoče«.[31]

Kelsnov argument o nujnosti pozitivizacije se morda zdi v očeh privrženca naravnega prava prikrojen lastnim potrebam. A vendar kaže na ključen tehnični problem NPT. Če želimo namreč trditev NPT o obstoju naravnopravnega reda jemati resno, se neizogibno soočimo s problemom praktičnega delovanja takšnega reda. In če je mogoče pokazati, da ta v obliki popolnoma objektivnega, samouresničujočega se normativnega reda ne more delovati, potem se zdi, da celoten podvzem NPT obljublja več, kot lahko izpolni. Njegova celotna usmerjevalna vrednost se tako zdi navidezna – ta je v najboljšem primeru sestavljena iz izpostavljanja sklopa (zelo) abstraktnih načel, ki naj jih razvijajo izbrani modri in dobri razlagalci in uporabniki. Kelsen se sicer zaveda, da naravnopravniški teoretiki po večini vztrajajo pri tem, da naravno pravo *zahteva* obstoj pozitivnopravnih ureditev. A kot bomo videli (§ 2.3), to razume kot zgovorno »neskladje« v njihovi argumentaciji.

Do zdaj smo se ukvarjali s Kelsnovo kritiko ontološke trditve. A kot sem povedal že na začetku, s Kelsnovega vidika NPT podaja še dve nadaljnji trditvi: prvič, da ljudje naravno pravo lahko spoznajo (epistemološka trditev NPT); in drugič, da naravnopravniški teoretiki na znanstven način razlagajo naravno pravo, kakršno je v resnici (trditev o znanstvenosti NPT). Trditev o znanstvenosti se zajeda v epistemološko trditev, saj obstane ali pade kot posledica osnovanosti ali neosnovanosti slednje – če namreč ljudje naravnega prava ne morejo

31 Kelsen (1928a: 39–56).

spoznati, potem naravnopravniški teoretiki ne morejo biti njegovi znanstveni razlagalci. Vseeno pa Kelsnova kritika NPT očitno vsebuje tudi nekaj argumentov, ki so usmerjeni neposredno zoper trditev o znanstvenosti. V nadaljevanju bom ločeno pretresel Kelsnovo kritiko teh dveh trditev.

2.2 Kritika epistemološke trditve

Skladno z epistemološko trditvijo ljudje naravno pravo lahko spoznajo: kot objektivna ureditev človeškega vedenja, ki se odlikuje z absolutno vrednostjo in veljavnostjo, je naravno pravo primeren predmet človeškega védenja.

Kelsen zoper to trditev ubere argumentacijsko strategijo, s katero naj bi pokazal, da nobena od metod, ki jih NPT predstavlja kot metode za spoznavanje naravnopravnih norm, ne prestane preizkusa znanstveno-kritiške filozofije. Z drugimi besedami, nobene od teh ni mogoče razumeti kot pristne metode znanstvenega proučevanja. Kelsen pri tem razvije tri temeljne argumente: (1) argument logične zmote, (2) argument nesamoumevnosti, (3) argument protislovnosti praktičnega uma.

Argument logične zmote. NPT trdi, da je naravnopravne norme mogoče »izpeljati« oziroma »deducirati« iz narave. Razumljene dobesedno, takšne izjave ni mogoče sprejeti z vidika racionalno-znanstvene filozofije, saj je logično zmotna. Izjava namreč molče predpostavlja, da je narava množica dejstev. Vendar pa iz samih izjav o dejstvih še ni mogoče logično izpeljati nobenih zaključkov: na primer, iz izjav: »ljudje se po naravi nagibajo k družbi« in »velike ribe žrejo male ribe« ne sledi, da »naj se ljudje vedejo tako, da ohranjajo družbo« niti ne, da »naj velike ribe žrejo male ribe«. Takšno sklepanje je mogoče če in samo, če je neka norma predpostavljena, na primer: »ljudje naj se vedejo skladno z njihovimi naravnimi vzgibi« ali »živali naj se vedejo kot ponavadi«.[32]

Seveda lahko naravnopravniški teoretiki na argument logične zmote odgovorijo rekoč, da po njihovem gledanju narava ni zgolj množica dejstev, tj. da vsebuje tudi naravnopravne norme, ki so vanjo že vgrajene. Nadalje lahko trdijo tudi, da naravnopravnih norm pravzaprav ne »izpeljujejo« iz narave (izjav o naravi), temveč da jih v njej zaznavajo, najdejo oziroma odkrivajo.

Vendar pa bi lahko, gledano s Kelsnovega stališča, odvrnili, da je govoriti o »izpeljavi« ali »dedukciji« naravnopravnih norm »iz narave« zavajajoče. Prej bi lahko rekli – kot predlaga argument o nujnosti teizma – da gre za postopek *razlaganja* tiste transcendentne volje, ki je (kot se predpostavlja) ustvarila naravo in naravnopravne norme.[33] Vendar pa NPT v povezavi s takšno razlagalno dejavnostjo ni ponudila nobene jasne, v rezultat usmerjene in zanesljive metode.

32 Kelsen (1949: 141); Kelsen (1959: § 31: 68–69); Kelsen (1960b: § 32: 72–73).

33 Glej zgoraj § 2.1.2; glej tudi Kelsen (1949: 138: »proučevanje narave je pravzaprav enako proučevanju Božje volje«).

Tako se zdi, da argument logične zmote izpostavlja resen metodološki problem NPT, ne glede na to, kako razumemo ključni pojem narave.[34] Takšen zaključek podpirata tudi druga dva argumenta Kelsnove kritike.

Argument nesamoumevnosti. NPT prav tako trdi, da so norme naravnega prava ali pa vsaj njegova vrhovna načela samoumevna (očitno obstoječa, očitno veljavna sama po sebi). Vsi ljudje bi jih mogli doumeti na podlagi lastnega (racionalnega) umévanja. Vendar pa nam zgodovina NPT pokaže, da se je skozi čas različnim naravnopravniškim teoretikom kot samoumevna kazala množica različnih, pogosto med seboj neskladnih naravnopravnih norm (na primer glede enakosti, suženjstva, zasebne lastnine, avtokratske vlade, socialne varnosti ipd.). Tako moramo, gledano s strogo znanstvenega stališča, skleniti, da samoumevnost odpove kot zanesljiv, objektiven preizkus razlikovanja med pravimi in nepravimi naravnopravnimi normami. Morda bi lahko celo rekli, da trditev o samoumevnosti naravnopravnih norm ni nič drugega kot sredstvo, s katerim naravnopravniški teoretiki na podlagi lastnih vrednostnih sodb – kadar se jim to zdi prikladno – naravnopravne norme predstavljajo kot nekaj popolnoma samoumevnega.[35]

Naravnopravniški teoretiki racionalistične provenience – ki navadno delujejo v okviru tradicije, ki jo navdihuje Tomaž Akvinski – bi lahko odgovorili, da v nasprotju z argumentom nesamoumevnosti ljudje *dejansko* kot samoumevna dojemajo *ista* naravnopravna načela. Pomislimo, na primer, na načela kot so »vsakomur svoje« (lat. *suum cuique tribuere*), »delaj dobro, izogibaj se slabega« (lat. *bonum faciendum, malum vitandum*), »vedno ravnaj s pravo mero« itd. Pomislimo, če se spomnimo na uglednega predstavnika »Nove NPT« Johna Finnisa, na katalog temeljnih dobrin (življenje, védenje, igra, estetska izkušnja, prijateljstvo, družabnost, praktična razumnost in religija), ki so nujne za človeški razvoj, in takšne, da vodijo do »splošnih moralnih standardov« – ki so preko načel praktične razumnosti tudi same del naravnega prava.[36]

A s Kelsnovega stališča je na voljo nekaj (preprostih) odgovorov.

Prvič, nikakor ni *očitno*, da vsa ta načela pripadajo enemu in edinemu pravilnemu naravnopravnemu redu; daleč od tega, da bi bila resnično objektivna – so zgolj kulturno odvisna, priložnostna merila.

Drugič, v vsakem primeru so tovrstna, domnevno univerzalna, samoumevna načela tako abstraktna, da so dejansko prazna in posledično praktično neuporabna: v resnici ne zmorejo zagotoviti nikakršnih smernic za človeško ravnanje, če in dokler niso ustrezno razlagana, podrobneje opredeljena, konkretizirana, individualizirana ter usklajena. Žal pa NPT glede teh nujnih operacij ne

34 Zdi se, da to priznava tudi Murphy 2011.

35 Kelsen (1949: 172–174); Kelsen (1949: 142, besedilo in op. 9; 143–144; 151 in nasl. & 172–174); Kelsen (1959: § 45); Kelsen (1960b: § 45 & 105–106).

36 Finnis (2011: 23 in nasl. & 85 in nasl.).

ponuja nobene zanesljive znanstvene metode.[37] Kar vidimo iz nepristranskega zornega kota, so zgolj vaje v normativni argumentaciji.

Argument protislovnosti praktičnega uma. Včasih se NPT v podporo epistemološkemu argumentu sklicuje na praktični um. Načela naravnega prava naj bi bila dostopna človekovemu praktičnemu umu: šlo naj bi za načela, ki se razkrijejo preko sposobnosti, ki istočasno vé, kaj je absolutno pravilno in dobro storiti, ter želi, da se to tudi zgodi. Vendar pa je z vidika racionalistično-znanstvene filozofije treba védenje, pridobljeno preko človekovega praktičnega uma, zavrniti kot nezanesljivo. Že sama ideja praktičnega uma, ki istočasno vé, kaj je dobro, in si želi, da se to zgodi, je namreč protislovna. Z znanstvenega stališča sta namreč védenje in hotenje dve ločeni, čeprav empirično sorodni sposobnosti. Kakršno koli trditev o njuni ontološki povezavi v eni sami sposobnosti je treba zavrniti kot neznanstveno: podprejo jo lahko zgolj metafizični argumenti in dejanja vere.[38]

2.3 Kritika trditve o znanstvenosti

Kritika epistemološke trditve spodbija tudi trditev o znanstvenosti – ki pravi, da so naravnopravniški teoretiki znanstveni razlagalci naravnega prava, kakršno je v resnici – glede njene predpostavke, in sicer z zanikanjem možnosti obstoja kakršnega koli resničnega, znanstveno zanesljivega védenja o naravnem pravu. Kot takšna je tudi kritika trditve o znanstvenosti, saj zatrjuje, da naravnopravniški teoretiki dejansko *ne morejo* opravljati dela, za katerega trdijo, da ga opravljajo. Ta kritika, usmerjena neposredno na trditev o znanstvenosti, vzame v ozir kritiko epistemološke trditve ter jo, lahko bi rekli, dopolni, s tem ko trdi, da naravnopravniški teoretiki dejansko opravljajo drugačno, in heterogeno, nalogo od tiste, za katero trdijo, da jo opravljajo. Na kratko: sodelujejo pri ideološki dejavnosti, ki je sestavljena iz oblikovanja normativne, s subjektivnim vrednotenjem obremenjene moralne, politične in pravne filozofije, pod pretvezo znanstvenega razlaganja objektivne ureditve človeških odnosov. V podporo takšnemu zaključku Kelsen vpreže tri temeljne argumente: (1) argument protislovja, (2) argument obratne dedukcije (oziroma argument »projekcije«), (3) argument funkcij.

Argument protislovja. NPT trdi, da naravnopravni red obstaja, da se odlikuje z absolutno vrednostjo in absolutno veljavo ter da je hierarhično nadrejen pozitivnopravnim redom. Če vzamemo takšne trditve zares, potem bi, tako Kelsen, morali pridi do zaključka, da gre z naravnopravnega stališča pozitivno pravo razumeti bodisi kot odvečno – kadar se njegove norme skladajo z naravnopravnimi normami – bodisi kot neveljavno (nično) – kadar se njegove norme ne

37 Kelsen (1952: 13 in nasl.); Kelsen (1960b: §§ 10–13 & 15).

38 Kelsen (1960b: §§ 39–43: 86–89).

skladajo z naravnopravnimi.[39] Vendar pa se naravnopravniški teoretiki navadno izogibajo obema zaključkoma.

Po eni strani trdijo, da pozitivno pravo, ki spoštuje naravno pravo, ni odvečno, temveč je dejansko nujno. To pa zato, dodajajo, ker bi številni, če ne bi bilo pozitivnopravnih norm, ki predvidevajo prisilne sankcije, zaradi arogance in zlih vzgibov ravnali v nasprotju z naravnim pravom.[40]

Po drugi strani pa razmerje med naravnim in pozitivnim pravom pojmujejo tako, da je kakršen koli konflikt med njima v celoti nemogoč (Hobbes), ali pa tako, da če je že mogoč, neveljavnost pozitivnopravnih norm, ki nasprotujejo naravnopravnim, ni samodejna in navadno tudi ne pomeni, da so akterji odvezani obveznosti ravnati se po njih.[41] Vrh tega večina naravnopravniških teoretikov izključuje obstoj naravne pravice do upora zoper (tudi močno) nepravične pozitivnopravne norme in poverja razlaganje naravnopravnih norm (državnim) uradnikom pozitivnopravnega reda.[42]

Po Kelsnovem mnenju NPT na obeh mestih zagovarja stališča, ki so protislovna njenim lastnim temeljnim trditvam. Kelsen trdi, da je to protislovje tako resno, da pomeni že »popolno razvodenitev naravnopravniške doktrine«.[43] Zakaj je tako? Morda bi lahko takšno protislovje pripisali malomarnemu razlogovanju. Po drugi strani pa bi lahko trdili, da je napaka dejansko v očeh opazovalca, tj. da »protislovja«, ki ga v NPT vidi Kelsen, ob dobrohotnem branju v resnici sploh ni.

Vendar pa Kelsen, da bi poudaril svoje stališče, predlaga drugačno branje: takšno »protislovje« NPT gotovo ni logične narave. Lahko bi rekli, da je »pragmatične« narave; natančneje, da gre za zgovorno »nenavadnost«. Nadalje pa to protislovje NPT tudi ni naključno, temveč načrtno. Razgrinja namreč dejstvo, da ima večina naravnopravniških teorij vgrajen jasen *upravičevalni cilj*: stremijo k upravičevanju obstoječih pravnih redov kot (bodisi *prima facie* bodisi ob upoštevanju vseh dejstev) moralno pravičnih in legitimnih. To pa je očitno ideološka, in ne znanstvena funkcija.[44]

Argument obratne dedukcije (oziroma *argument projekcije*). Po Kelsnovem mnenju na ideološko naravo NPT nakazuje še eno stališče, ki ga deli večina na-

39 Kelsen (1949: 142 & 144).

40 Kelsen (1960b: 113–114, kjer se sklicuje na Akvinskega: »*quidam protervi, et ad vitia proni, qui verbis de facile moveri non possunt /.../ quidam male dispositi non ducuntur ad virtutem, nisi cogantur*«).

41 Kelsen (1949: 144–151); Kelsen (1960b: 114–115).

42 Kelsen (1949: 146–147 & 148–150); Kelsen (1960b: 119–121).

43 Kelsen (1949: 150).

44 Glej na primer Kelsen (1960b: § 50), kjer, sledeč Troeltshu, izpostavi preoblikovanje pozitivnega prava s strani stoikov in krščanske cerkve v nepopolno obliko naravnega prava – ne glede na njegovo vsebino.

ravnopravniških teoretikov. Gre za stališče, da naravnopravne norme niso izpeljane iz človeške narave kot celote, temveč zgolj iz njenega dobrega (razumnega, pravega) dela. Na ta način pa se dozdevna »dedukcija« (»izpeljava«, »doumetje«) naravnopravnih norm iz narave človeka oziroma narave na splošno obrne na glavo:

> Pufendorf – in vsi drugi pisatelji – ne izpeljujejo tega, kar razumejo kot naravno pravo, iz človeške narave, kakršna je v resnici, temveč iz človeške narave, kakršna naj bi bila in kakršna bi bila, če bi se skladala z naravnim pravom. Ni torej naravno pravo izpeljano iz (prave) narave človeka – narava človeka, idealna narava človeka, je tista, ki je izpeljana iz naravnega prava, ki je tako ali drugače predpostavljeno.[45]

Kelsen meni, da je mogoče oblikovanje standardne NPT razumeti kot dvostopenjski postopek. Na prvi stopnji se naravnopravniški mislec odloči, katera so načela naravnega prava – tistega pravega, pristnega, naravnega prava. Na drugi stopnji pa zanje poišče oporo v naravi človeka in človeškega stanja. Na ta način naravnopravniški teoretik v naravo projicira svoje videnje naravnega prava. To projekcijo razgrinja neizbežna izbira naravnih podatkov, ki jo opravi vsak naravnopravni teoretik, pri čemer izključi tiste podatke, tista naravna nagnjenja oziroma gone človeškega uma (navadno gre za nagnjenja k agresiji, dominaciji, zastonjkarstvu itd.), ki ne bi smeli tvoriti podlage nobenega naravnopravnega načela.[46]

Argument funkcij. Argument (dejanskih) funkcij NPT – zadnji, ki ga bom proučil v tej predstavitvi Kelsnove kritike naravnopravniškega mišljenja – se resnično zajeda v predhodne argumente. Povzeti ga je mogoče takole: naravnopravniški teoretiki trdijo, da so znanstveni razlagalci naravnega prava, kakršno je v resnici. Argumenti zoper epistemološko trditev spodnašajo tla pod nogami takšni trditvi o znanstvenosti (glej zgoraj § 2.2). A če jih pustimo ob strani, je mogoče do enakega zaključka priti preko naslednjih vprašanj: Kakšna je oziroma je zgodovinsko bila neposredna funkcija NPT? Pripada takšna funkcija sferi znanstvenga védenja ali pa mogoče sferi prakse (politika, morala, pravo)? Kot namiguje že argument protislovja, so imele in imajo še danes naravnopravniške teorije upravičevalno funkcijo: ideja naravnega prava je bila (in je) uporabljena za upravičevanje bodisi ohranitve bodisi reforme – v redkih primerih celo revolucionarnega prevrata – obstoječe vladavine in pozitivnopravnega reda. Takšna upravičevalna funkcija je – ne glede na njen moralni, politični in pravni pomen – očitno izven domene znanstvenega proučevanja, kot ga opredeljuje racionalno-znanstvena filozofija »relativističnega pozitivizma«. Gre za ideološko, normativno funkcijo.[47]

45 Kelsen (1949: 144); Kelsen (1960b: §§ 33–36).

46 Kelsen (1960b: §§ 33–36).

47 Kelsen (1960b: §§ 50–52).

3 NARAVNOPRAVNIŠKA TEORIJA VRAČA UDAREC: BODENHEIMER PROTI KELSNU

Edgar Bodenheimer je leta 1950 objavil zapis z naslovom *The Natural-Law Doctrine before the Tribunal of Science: A Reply to Hans Kelsen*. Tam si zastavi nalogo obraniti tradicionalno, racionalistično, neteološko NPT pred Kelsnovim »silovitim napadom«, in sicer tako, da se z njim – »vodilnim predstavnikom logičnega pozitivizma v pravoslovju« – sreča »na njegovem terenu«: tj. s tem, da »izzove veljavnost njegovih zaključkov na 'sekularni' osnovi, brez pomoči verskih ali metafizičnih aksiomov«.[48]

Bodenheimerjeva obramba NPT temelji na več argumentih. Nekateri izmed njih celo predstavljajo odprto priznanje ideološke narave NPT. Tako je na primer, ko Bodenheimer kritizira Kelsna, ker ta zagovarja vrednostno nevtralen pojem prava, ki niti ne izključuje možnosti vključitve »arbitrarnih, spremenljivih in neracionalnih zapovedi v izrazu 'pravo'«, namesto da bi predstavil racionalen pojem, ki bi »podpiral prizadevanja prava« in »ohranjal dobro ime prava«.[49]

V nadaljevanju puščam ob strani tovrstne rešitve, ki očitno spodkopavajo same sebe in se osredotočam na pet argumentov, za katere se vsaj *prima facie* zdi, da pomenijo resen izziv Kelsnovi kritiki NPT. Gre za (poimenovanja in rekonstrukcija so, kot že prej, moja): (1) argument nedobrohotnosti, (2) argument kontingentnosti teizma, (3) argument uspešnosti, (4) argument netogega ločevanja med dejstvi in normami, (5) argument empirične nevzdržnosti etičnega subjektivizma. Vsakega od teh argumentov bom premeril enega za drugim in pogledal, kakšen, če sploh kakšen, odgovor nanje je mogoče ponuditi s Kelsnovega gledišča.

3.1 Argument nedobrohotnosti

Bodenheimer trdi, da je Kelsnov napad na NPT pretirano nedobrohoten, saj spregleduje enega temeljnih vidikov naravnopravniškega mišljenja. Na ta način podaja nepošteno podobo NPT.

> Izhodišče tega pristopa bi preprosto lahko bil *premislek o nekaterih temeljnih človeških značilnostih in potrebah, ki jih pravo ne sme zanemariti*. Na primer, *izjava v smislu, da naj bi bil človeški zakon, ki bi prepovedoval spolno občevanje med moškim in žensko, v nasprotju z »naravnim pravom«, ne bi nujno zahtevala teološke podpore*. Tako verniki kot agnostiki bi se strinjali, da *zakon, ki predpisuje dvaindvajseturni delovnik, nasprotuje zakonom narave*, ki zahtevajo, da človek določen čas počiva. Zakon, ki bi predpisoval, naj ljudje hodijo po vseh štirih ali da je treba novorojene otroke hraniti s koščki mesa, bi najverjetne vsakdo zavrnil kot »nenaraven« /.../; *naravnopravniška doktrina,*

48 Bodenheimer (1950: 335).

49 Bodenheimer (1950: 363).

> *v tej določeni različici, zgolj priznava obstoj določenih osnovnih značilnosti, gonov in instinktov človeške narave, ki jih ni mogoče zanemariti oziroma v celoti zatreti, četudi jih človeški zakonodajalec lahko ureja in usmerja*. Zakonom, nesprejemljivim za človeško naravo, se bodo ljudje aktivno ali pasivno uprli in jih kar najhitreje odpravili. *Vse, kar je v igri pri tem vidiku te doktrine, je ugotovitev, da obstaja v človeški naravi prvina, ki omejuje moč zakonodajalca in brzda njegovo arbitrarnost*. Takšno stališče je skladno tako s sekularnim kot z religioznim pristopom k pravu.[50]

Z gledišča Kelsnove teorije pa je argument o nedobrohotnosti vendarle mogoče zavrniti z različnih vidikov.

Prvič, Kelsnova kritika NPT se jasno zaveda empiričnih omejitev, ki jih za učinkovitost pozitivnopravnih norm predstavlja človeško stanje (tj. človeška fiziologija in psihologija). Tako, na primer, pri obravnavanju problema socialne pravičnosti vztraja, da bo pravni red, utemeljen na kompromisu, ki zadovoljuje različne med seboj tekmujoče interesne skupine, verjetno bolj stabilen (miroljuben, učinkovit) kot pa pravni red, v katerem »zmagovalec pobere vse«.[51]

Drugič, Kelsen bi ugovarjal opredelitvi množice empiričnih izjav o običajnih fizičnih in psiholoških lastnostih ljudi (»moški in ženske ne morejo preživeti brez spolnih odnosov«, »ljudje ne morejo delati dvaindvajset ur na dan«, »novorojenčki ne morejo biti hranjeni s koščki mesa« itd.) kot »naravno pravo«. To pa zato, ker bi takšna raba izraza »naravno pravo« najverjetneje povzročala zmešnjavo med tovrstnim čistim empiričnim »naravnim pravom« na eni strani in normativnim naravnim pravom, kot množico norm, domnevno »izvedenih« iz naravnih človeških lastnosti, na drugi strani. Poleg tega pa to – kot to počne Bodenheimer v zgornjih omenjenih vrsticah – neupravičeno namiguje, da je prehod iz prvega v drugo pojmovanje nekaj samoumevnega.

Tretjič, Kelsen bi Bodenheimerja opomnil, da osrednje opravilo NPT ni ukvarjanje z nujnimi oziroma nemogočimi človeškimi ravnanji kot vsebino pozitivnopravnih norm, temveč ukvarjanje s področjem fakultativnih ravnanj in njihovim »pravilnim« urejanjem s strani »pravične« oblasti.

3.2 Argument kontingentnosti teizma

Videli smo, zakaj mora po Kelsnovem mnenju NPT stati na teoloških temeljih (glej zgoraj, § 2.1.2).

Vendar pa Bodenheimer meni, da je mogoče to Kelsnovo trditev zavrniti. Za podporo temu zaključku se Bodenheimer zateče k avtoriteti Huga Grotiusa, očeta racionalistične NPT 17. stoletja:

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50 Bodenheimer (1950: 336–337; kurziva dodana; glej tudi 338–339, glede Grotiusa, Hobbesa in Puffendorfa).

51 Glej Kelsen (1952: 21–22).

> Grotius gre v svojem poskusu *postaviti naravno pravo na imanentno racionalistične temelje* še dlje, s tem ko razglasi pravo narave zavezujoče za Boga in zanika njegovo moč, da ga spremeni. To so njegove besede: »Naravno pravo je še enkrat več, nespremenljivo – tudi v smislu, da ga ne more spremeniti Bog. Ne glede na neizmernost Božje moči je mogoče trditi, da obstajajo stvari, na katere se ta moč ne razteza /.../. Prav tako kot niti Bog ne more povzročiti, da dva in dva ne bi bilo štiri, tako tudi ne more povzročiti, da to, kar je samo po sebi zlo, ne bi bilo zlo.« *Grotius je tako naravno pravo ločil od razodete volje transcendentnega Boga. Utemeljil ga je na neodvisnem večnem razumu, ki prežema celoten kozmos, dasiravno je priznal alternativno možnost teološke utemeljitve*.[52]

S Kelsnovega gledišča je mogoče odgovoriti takole. Grotiusove besede niso nikakršen argument zoper nujnost teizma. Dejansko zgolj porajajo vprašanje. Grotius trdi, da je naravno pravo mogoče ločiti od razodete volje transcendentnega Boga. Namesto tega naj bi bilo naravno pravo »utemeljeno« na »neodvisnem večnem razumu, ki prežema celoten kozmos«. Žal pa za takšne trditve ne predstavi nobene opore: razen morda, sklicevanja na njihovo samorazvidno pravilnost. Vendar pa Kelsnovo dovršeno razlogovanje pokaže, da je v tako kočljivi zadevi sklicevanje na samorazvidnost v resnici sklicevanje na domišljijo, ki uresničuje pobožne želje. Bodenheimerjev argument se opira na Grotiusovega – Grotius pa ne predstavi nobenega argumenta: temelj »neodvisen večni razum, ki prežema kozmos« postane, če nanj pogledamo s hladnim očesom, še bolj skrivnosten in begajoč, kot je katero koli transcendentno božanstvo. Posledično Bodenheimerjev zagovor kontingentnosti teizma ni oprt na noben argument – kot vse kaže, je zgrajen iz čistih pobožnih želja.

3.3 Argument uspešnosti

Kot smo videli, je eden ključnih elementov Kelsnove kritike trditev, da NPT ne predstavlja pravega znanstvenega podvzema, temveč zakrinkano moralno, politični in pravno ideologijo (in argumentacijo; glej zgoraj, § 2.3).

Vendar pa je po Bodenheimerjevem mnenju Kelsnova trditev prenagljena:

> Dejstvo, da so postulati pravičnega prava, ki so jih [teoretiki racionalističnega naravnega prava] postavili, v 18. in 19. stoletju postali temelj zakonov v vseh civiliziranih državah v Evropi in Ameriki, *kaže na to, da so bile njihove predpostavke glede človeške narave in »naravnega prava«, ki se tej prilega, vendarle morda manj »neznanstvene«, kot trdijo [njeni] sodobni nasprotniki*.[53]

A vendar gre Bodenheimerjev argument predaleč. S Kelsnovega gledišča je namreč mogoče nanj odgovoriti, kot navajamo v nadaljevanju.

Prvič, neizpodbojno zgodovinsko dejstvo je, da političnega in institucionalnega uspeha niso doživeli vsi postulati pravičnosti znotraj modernega, raciona-

52 Bodenheimer (1950: 338, kurziva dodana).

53 Bodenheimer (1950: 339, kurziva dodana).

ličnega naravnopravniškega mišljenja, temveč zgolj tisti, ki izvirajo iz Lockea in Rousseaja.

Drugič, politični in institucionalni uspeh postulatov liberalno-demokratične vladavine nikakor ne »izkazuje« »znanstvenega« značaja z njimi povezanih pogledov na človeško naravo; izkazuje zgolj dejstvo, da so se vplivne skupine ljudi odločile privzeti in podpreti te postulate kot lastna usmerjevalna načela, medtem ko so se istočasno druge vplivne skupine odločile ravnati po drugačnih načelih, načelih političnega absolutizma in verske nestrpnosti, prav tako utemeljenih na »naravnem pravu«.

Tretjič, človeška narava, ki jo v obzir jemlje NPT, je, kot kaže, že argument obratne dedukcije (glej zgoraj, § 2.3), resnično idealen, ideološki konstrukt, in ne izid resničnega znanstvenega proučevanja.

3.4 Argument netogega ločevanja med dejstvi in normami

V svoji kritiki NPT Kelsen zagovarja »togo ločitev« dejstev in vrednot, resničnosti in norm – vsaj zdi se, da Bodenheimer tako razume Kelsnovo vztrajanje pri ločitvi biti in najstva ter argumentu logične zmote (glej zgoraj, § 2.2).

Bodenheimer meni, da je treba takšno togo ločitev zavrniti, in sicer iz naslednjih razlogov:

> *[Š]tevilne pravne norme so globoko zakoreninjene v objektivnih okoliščinah resničnosti in se zakonodajalcu vsiljujejo bodisi zaradi določenih posebnosti človeške narave bodisi zaradi dinamičnih zakonov družbenega in ekonomskega razvoja* /.../. Pomena in namena pravne norme pogosto ni mogoče dognati, ne da bi raziskali zgodovinske in sociološke okoliščine, iz katerih izvira /.../. *[V] družbenem razvoju prihaja do zapletenega prepletanja vrednot in dejstev, pravo pa je eden od pomembnejših odsevov njunega medsebojnega vplivanja* /.../. [N]ormativni predpisi so lahko brez učinka že od nastanka ali pa postanejo s časom mrtve črke na papirju, zato je temeljito razumevanje normativnega sistema pogosto nemogoče brez poglobljenega študija njegovega dejanskega »delovanja« v praksi. Na tak način *domnevni prepad med vrednotami in dejstvi premoščajo številni trdni mostovi*.[54]

S Kelsnovega gledišča je Bodenheimerjev kritika »prepad med vrednotami in dejstvi« zgrešena. Gre za očiten primer nepoznavanja sporne točke (lat. *ignoratio elenchi*). Poglejmo, zakaj. Bodenheimer nasprotuje »togemu« razlikovanju med dejstvi in vrednotami, resničnostjo in normami, z izpostavljanjem številnih empiričnih povezav, ki dejansko obstajajo med predmeti, ki pripadajo tema domnevno ločenima svetovoma. Vendar pa niti Kelsnova kritika NPT niti njegova splošna teorija prava (»čista teorija prava«) nista nikoli zanikala, da vsebina pravnih norm izhaja »iz družbe«: iz človeških potreb in interesov, iz človeških pogledov na pravičnost in političnih strategij.[55] »Prepad« med dejstvi

54 Bodenheimer (1950: 341, 342 & 344, kurziva dodana).

55 Glej, na primer, Kelsen (1960b: 69–71).

in vrednotami, med dejstvi in normami, ki ga zagovarja Kelsen, ni, kot smo videli, empiričen, temveč logični prepad. Pomeni logično neizvedljivost izpeljave normativnih zaključkov iz čisto faktičnih premis. A vendar Bodenheimer ta poudarek povsem spregleda.

3.5 Argument empirične nevzdržnosti etičnega subjektivizma

Kot smo videli (§ 2), je Kelsnova kritika NPT utemeljena na trdi različici metaetičnega subjektivizma in nekognitivizma.

Vendar pa je po Bodenheimerjevem mnenju takšno »doktrino etične relativnosti« mogoče ovreči na podlagi izkustev:

> Doktrina etične relativnosti izgubi svojo moč, če nam uspe dokazati, da 90 ali 95 % zgodovinsko znanih družb soglaša glede potrebe po prepovedi določenih praks, ki so razumljene kot neskladne z zahtevami organiziranega družbenega življenja. Vendar pa, da bi ovrgli teorijo, da sta pravo in etika v celoti relativna, niti ni treba pokazati na univerzalno soglasje vseh ljudstev glede določenih meril vedenja. Če nam uspe pokazati, da civilizirane in zrele družbe delijo določene vrednostne sodbe in se strinjajo glede določenih temeljnih aksiomov družbeno zaželenega ravnanja, bi nam s tem uspelo izoblikovati pomembno področje absolutnih ali skoraj absolutnih standardov civiliziranega človeka. V resnici so klasični naravnopravniki imeli v mislih prav takšno naravno pravo.[56]

Gledano s Kelsnove perspektive, Bodenheimerjev argument izvablja naslednji odgovor.

Prvič, izkustva res kažejo, da nobena človeška družba ni mogoča brez prepovedi določenih praks za zaščito življenja, telesne celovitosti in dobrin. Vendar pa ta izjava o »minimalnem« ali »empiričnem« naravnem pravu (kot ga poimenuje Hart)[57] pravi zgolj to, da življenje, telo in dobrine *morajo* biti zaščiteni, če naj bo družba mogoča. Ne pove pa ničesar o tem, *kako naj* bi bili življenje, telo in dobrine zaščiteni; prav tako ne pove ničesar o tem, *čigavo* življenje, telo in dobrine naj bi bili zaščiteni. Prav vprašanja glede »čigav« in »kako« tega »minimalnega naravnega prava« so tista, kjer v igro vstopajo skupinski in individualni interesi; so tista, kjer so bila skozi prostor in čas sprejeta različna končna, med seboj neskladna načela pravičnosti; kjer so bile vzpostavljene najbolj različne družbene ureditve, ki so vse upoštevale tovrstne »naravne omejitve« in si vse zase lastile blagoslov absolutne pravičnosti.

Drugič, Bodenheimerjev argument se sklicuje tudi na »pomembno področje absolutnih ali skoraj absolutnih standardov civiliziranega človeka«, ki naj bi bili objektivni, naravnopravni standardi. A tak sklep je popolnoma neupravičen: liberalno-demokratični standardi so standardi, ki so jih odobrili ljudje, ki jih Bodenheimer odobravajoče imenuje »civilizirani«. Iz strogo empiričnega,

56 Bodenheimer (1950: 347–348).

57 Hart (1961: pogl. IX).

znanstvenega gledišča so ti standardi omejeni na te ljudi in njihove kulture. Kot smo že videli, njihov končni uspeh ni nikakršen dokaz njihovega privilegiranega »naravnopravnega« statusa.

Gledano v celoti je z gledišča Kelsnove znanstveno-kritiške filozofije Bodenheimerjev zagovor NPT popolna polomija. Če ji sploh kar koli uspe, je to – paradoksalno – da pokaže, kako NPT resnično ni nikakršen znanstveni podvzem, temveč vrednostno obremenjen, ideološki podvzem, utemeljen na moralnem in političnem argumentu.

4 ZAGOVOR NOVE NARAVNOPRAVNIŠKE TEORIJE: GEORGE PROTI KELSNU

Izraz »Nova naravnopravniška teorija« se, kot je dobro znano, nanaša na naravnopravniško teorijo, navdahnjeno s tomizmom, ki jo od 60. let prejšnjega stoletja naprej med drugimi razvijajo Germain Grisez, John Boyle in John Finnis.[58]

Ob petdeseti obletnici Kelsnove *The Natural-Law Doctrine before the Tribunal of Science* iz leta 1949 je Robert P. George, pripadnik Nove NPT, temu besedilu posvetil recenzijo, v kateri se nameni obraniti naravnopravniško doktrino Tomaža Akvinskega in temeljne gradnike Nove NPT, ki so na njej osnovani (George 2000). Ob koncu recenzije George trdi, da mu je uspelo dokazati naslednje:

Prvič, da Kelsnova ocena NPT iz leta 1949 »nima praktično nobenega stičišča z mislijo Tomaža Akvinskega«, čigar dela sploh ne omenja.

Drugič, da se Kelsnova kritika NPT posledično »komajda oziroma praktično ne nanaša na tomistično naravnopravniško teorijo. Niti teorija identifikacije naravnopravnih načel Tomaža Akvinskega niti njegova razlaga njihovega odnosa do božanske moči in pozitivnega prava ne njegovi pogledi glede njihovih posledic za probleme pravne nepravičnosti in tiranije niso zajeti v Kelsnovem komentarju in kritiki«.

Tretjič, »lahko bi sklenili, da je Kelsen ravnal dobro, ko se je izognil omembi Tomaža Akvinskega, če je želel vztrajati pri takšnem opisu 'naravnopravniške doktrine'. Vendar pa je najmanj nenavadno, da je 'razsodišče znanosti' pustilo neslišano in neomenjeno misel tako pomembnega zagovornika naravnopravniške tradicije.«[59]

George v imenu Nove NPT zastavi resen izziv Kelsnovi kritiki. Če ima George dejansko prav, bi bila Kelsnova kritika NPT istočasno prikrojena la-

58 Glej Grisez, Boyle, Finnis 1987; Finnis 1980; George 1999; Bix (2002: 85–89); Murphy 2011.

59 George (2000: 30).

stnim potrebam (saj bi se spoprijemala s slamnatim možem) in nesmiselna (saj bi se izogibala »pravemu spopadu« s Tomaževo NPT, tj. z NPT v njeni domnevno najboljši in najmočnejši obliki).

Žal pa menim, da se George moti, in sicer iz naslednjih razlogov:

1. Res je, da Kelsen v razpravi iz leta 1949, ki jo George recenzira, nikoli ne omenja Tomaževega naravnopravniškega nauka. Vendar pa Kelsen ni ignoriral njegove naravnopravniške doktrine. To smer razmišljanja je namreč izrecno obravnaval v drugih svojih pisanjih, posvečenih kritiki NPT.[60] Posledično Georgeva tretja trditev, čeprav resnična, kar se tiče razprave iz leta 1949, ne drži v luči Kelsnove kritike NPT kot celote.
2. Zanašajoč se na tako nepopoln opis Kelsnove kritike NPT George v drugi točki svojega odgovora trdi tudi, da se ta kritika »komajda oziroma praktično ne nanaša na tomistično naravnopravniško teorijo«. Še posebno – če omenim le vprašanje, na katerega se želim osredotočiti v nadaljevaju – naj bi Kelsnova kritika ne imela nič za povedati o »Tomaževi teoriji identifikacije naravnopravnih načel«.

V luči celotne Kelsnove kritike NPT pa je treba tudi to Georgevo trditev zavrniti.

Poglejmo si »Tomaževo teorijo identifikacije naravnopravnih načel«, kot jo predstavi George. Jedro teorije pravi, da so naravnopravna načela objektivni, samoumevni razlogi za ravnanje, ki jih ljudje lahko preko praktičnega uma spoznajo in zanje predstavljajo motivacijo za ravnanje.

Je Kelsnova celotna kritika NPT res nesposobna soočiti se s takšnim pogledom? Menim, da nikakor ni tako.

(a) Za začetek se spomnim na tri argumente, ki jih Kelsen uporabi v svoji kritiki epistemološke teze in teze o znanstvenosti NPT: argument nesamoumevnosti, argument protislovnosti praktičnega uma in, ne nazadnje, argument obratne dedukcije (oziroma argument projekcije; § 2.2, 2.3).

Če se spomnite, je prvi argument poudarjal, kako nezanesljiv je preizkus samoumevnosti kot objektiven, znanstveni preizkus spoznavanja pravih naravnopravnih načel. Pri tem se je skliceval na zgodovino etiških teorij, ki so (in tako še danes) kot »samoumevne« »odkrivale« kopico med seboj neskladnih izvornih naravnopravnih načel.

Izpostavil je tudi (morda še bolj uničujoče za NPT), da je bil argument o samoumevnosti določenih domnevnih načel naravnega prava, na primer »Vsakomur svoje«, »Delaj dobro, izogibaj se slabega«, »Vedno ravnaj s pravo mero« itd. – in, lahko dodamo, takšnih sodb, kot so »Štej življenje, védenje, igro itd. za temeljne dobrine človeškega razcveta« – sprejet za ceno »odkritja« pov-

60 Glej Kelsen (1960b: §§ 32, 34, 35, 40, 43, 47, 50 a., e. & f.); Kelsen (1964: 136 in nasl.).

sem praznih praktičnih načel: tj. načel, ki so popolnoma nezmožna zagotoviti jasna vodila za človeško ravnanje, če jih ne dopolni postopek razlage in konkretizacije, ki jih napolni z vsebino.

Prav tako je Kelsnova analiza praktičnega uma nakazala, da je takšna ideja protislovna s stališča empirične psihologije človeka, saj bi pri tem šlo za *eno* sposobnost človeškega uma, ki bi skrivnostno povezovala dve raznovrstni sposobnosti védenja in hotenja. Tako so z vidika Kelsnove kritike ključne značilnosti Tomaževe teorije o identifikaciji načel naravnega prava (samoumevnost z vidika praktičnega uma) – daleč od tega, da bi »ostale nepoškodovane« – tarče radikalne kritike.

Morda bi lahko nekoliko postali in pomislili, da je Kelsnova kritika Tomaževega pojmovanja praktičnega uma na neki način nedobrohotna.[61] Vendar pa bi lahko Kelsen, v luči argumenta obratne dedukcije (oziroma argumenta projekcije), Akvinskemu – ter Georgu in drugim teoretikom Nove NPT – odgovoril, da se sklicuje na praktični um, to nenavadno in skrivnostno sposobnost, kot na temeljno orodje za *projiciranje njihovih lastnih pogledov* na dobro življenje, resnično védenje, pravo prijateljstvo in podobno, na podlagi dozdevno objektivnih podatkov o naravnih temeljnih dobrinah.[62]

(b) Ali v svoji razlagi Tomaževe teorije George po naključju doda kakšno sestavino, s katero se Kelsnova teorija ne sooči in se ne more uspešno soočiti? Poglejmo.

George napravi dva poudarka, ki ju je vredno proučiti. Prvič, Tomaževa naravnopravna načela niso predpisi, temveč razlogi za ravnanje. Drugič, Kelsnov etični subjektivizem, ki ga navdihujeta Hume in kritika praktičnega uma, je v popolnem nasprotju z običajnim načinom razmišljanja posameznikov o njihovem moralnem življenju; z drugimi besedami, gre za slab prikaz le-teh, čeprav trdijo, da so skladni z empirično človeško psihologijo.

George pravi, da načela naravnega prava niso predpisi, ki jih je treba ubogati zato, ker prihajajo s strani nadrejene volje, temveč so razlogi za ravnanje; njihova usmerjevalna sila izhaja iz dejstva, da so razumna, tj. da se kot razumna kažejo racionalnim bitjem:

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61 Navedeni odlomek iz Tomaža, ki se nanaša na velelno naravo praktičnega uma – posebno vrstica »*ratio imperat de his quae sunt ad fnem*« – je mogoče brati tudi tako, da um »uči«, katera ravnanja so instrumentalno nujna, da bi prišli do cilja, ki ga je volja že poprej izbrala. Glej Kelsen (1960b: 88 in nasl., besedilo in op. 4). Vendar pa je treba pripomniti, da se zdi, da George po zgledu Akvinskega sprejema prav takšno mešano pojmovanje praktičnega uma, ki ga Kelsen kritizira.

62 Mimogrede, Kelsen bi bil navdušen, ko bi videl, da različni »novi naravnopravniki« identificirajo različne kataloge temeljnih naravnih dobrin in da lahko na njihovi podlagi iz njih tudi »izvajajo« različna pravila, s tem ko uporabljajo lastno praktično razumnost. Glede tega glej jasno razlago, ki jo podaja Murphy 2011.

> Drugače kot drugi teoretiki naravnega prava se je Akvinski izognil voluntarizmu, ki ga implicira to pojmovanje moralne obveznosti. Moč praktičnih načel, vključno z moralnimi, je po mnenju Akvinskega *racionalna*; ta načela podajajo *razloge* za (ne)ravnanje; oporekati jim je ravno toliko narobe, kot je to *nerazumno*. V tem smislu naravno pravo ni nekakšno zunanje vsiljevanje tuje volje – bodisi »volje« narave bodisi česa (ali kogar koli) drugega. Izvira namreč iz človeških bitij; njegovi osnovni naslovniki so človeške dobrine, ki predstavljajo človeško dobrobit in izpopolnitev ter so točno kot takšne razlogi za ravnanje.[63]

Ta odlomek nakazuje možnost, da je Kelsnov argument o nujnosti teizma zmoten ali pa vsaj zastreljen, če ga uporabimo zoper tomistično navdahnjeno NPT. Če se spomnite: argument pravi, da mora, če so naravnopravne norme res *norme,* in ne empirične izjave, obstajati normodajna avtoriteta – ki mora biti po predpostavki transcendentno božanstvo – po volji katere so te norme ustvarjene. A Akvinski trdi, da je naravno pravo »vrojeno človeškim bitjem« in da zadeva »človeške dobrine«, ki »predstavljajo človeško dobrobit in izpopolnitev ter so točno kot takšne razlogi za ravnanje«.

Se je Kelsnova kritika NPT zmožna uspešno soočiti s takšnim racionalističnim stališčem? Menim, da se je. Naravnopravna načela ljudem kažejo, kaj naj bi počeli, da bi kot človeška bitja dosegli popolnost (»dobrobit in izpolnitev«). Popolnost je tu razumljena kot objektivni pojem, neodvisen od človeškega uma in volje. Celotna podoba je tako očitno oblikovana na podlagi Aristotelove doktrine *entelehije*: gre za teleološko podobo človeka z vgrajenim objektivnim gonom k objektivnemu cilju izpopolnitve. Takšna teleološka podoba ne more biti nič drugega kot načrt nekega stvaritelja vesolja. In dejansko gre za načrt božjega praktičnega uma. Tako pride torej teološki temelj na plano tudi pri pristopu, ki naravno pravo razume kot razlog(e) za ravnanje.

A si zavoljo razprave zamislimo, da se takšna teološka podpora sploh ne pojavi, niti ji tega ni treba. Zamislimo si, da lahko, kot je trdil Grotius, razlogi za ravnanje, ki jih identificira praktični um, stojijo sami po sebi. Bi bila tedaj Kelsnova kritika NPT neškodljiva? Morda bi morali argument o nujnosti teizma postaviti na stranski tir. A ima Kelsen v svojem arzenalu tudi druge argumente – tiste tri, na katere sem spomnil malo prej – h katerim se je mogoče zateči in ki so Novi NPT sposobni zadati nekaj usodnih udarcev.

George vseeno ne bi soglašal. Ko kritizira Kelsnov etični subjektivizem in kritiko praktičnega uma, trdi, kot sem že dejal, da nasprotujeta temu, kar ljudje navadno menijo o svojem moralnem življenju:

> Hume in njegovi privrženci, morda tudi Kelsen, predpostavljajo, da če »vrednot« ni mogoče izvesti iz »dejstev«, potem te ne morejo biti objektivne (oziroma »resnične«), temveč morajo biti zgolj projekcije občutij, čustev ali drugih neracionalnih dejavnikov, ki so zmožni motivirati človeško ravnanje. Zanikajo, da lahko praktični razlogi

63 George (2000: besedilo pri op. 23-25; kurziva dodana).

> kot taki motivirajo ljudi. Zato zaključijo, da se, kolikor naravnopravniški teoretiki ne zagrešijo »naturalistične zmote« z zatrjevanjem izvajanja »najstva« iz »biti«, njihova doktrina sesede v neke vrste etični nekognitivizem. A to zgolj poraja vprašanje v odnosu do tomistov in drugih, ki trdijo, da lahko razumemo in smo torej motivirani za ravnanje zavoljo praktičnih razlogov, ki so več kot zgolj instrumentalni. *Slabo jim uspeva razložiti izkušnje večine, ki vendarle pogosto šteje, da je motivirana za to, da nekaj storiti (oziroma da nečesar ne stori tako, kot bi sicer) ne zaradi golih želja, temveč zato, ker razume vrednost, in s tem praktični smisel, tovrstnega početja (oziroma nepočetja).*[64]

Ključni odlomek za sedanje potrebe je zadnji, poudarjeni. Tu je mogoče z gledišča Kelsnove teorije podati tri pripombe.

Prvič, lastne »domneve« ljudi o tem, kako deluje njihovo moralno razlogovanje, so lahko napačne: »domnevati«, da miselni proces pride do zaključka, da je nekaj tako in tako (tj. da odkrije objektivno vrednost danega ravnanja), ni dokončen in zanesljiv dokaz, da dejansko zaključi, da je nekaj tako in tako (tj. da dejansko *odkrije objektivno vrednost* tistega ravnanja).

Drugič, jasno se kaže, kako je čudež praktičnega uma, tj. sposobnosti, ki bi bila hkrati védenje in usmerjanje, odvisen od besednega uroka. A takoj, ko se takšnega uroka znebimo, spoznamo, da nekaj ni v redu z idejo o »biti spodbujeni napraviti nekaj« zaradi »razumevanja vrednosti« takšnega ravnanja. Zamislimo si naslednje. Za začetek, zaznavanje cene oziroma vrednosti neke slike me ne spodbudi k temu, da bi jo kupil, *razen* če sem, recimo, pohlepen zasebni zbiratelj ali pa jo želim pridobiti za mestni muzej. Neodvisna želja (namen, cilj) je nujna, da bi prišlo do ravnanja. Nadalje ni niti približno jasno, da je »zaznavanje« tisti glagol, ki ga je primerno uporabiti v povezavi z vrednostjo človeškega ravnanja; ali je res smiselno reči: »Zaznavam vrednost obglavljenja vseh krivovercev, ki mi pridejo pod roke?« Za kakšne vrste »zaznavanje« gre pri tem? Ali ni ta beseda uporabljena zunaj svojega običajnega konteksta, tako da se izneveri svoji običajni rabi in postane retoričen trik? Menim, da bi Kelsen nekako v tem smislu nasprotoval Georgu.

Tretjič, tako kot vsi nasprotniki etičnega subjektivizma ga George predstavlja kot zavezanega »surovim poželenjem«. Vendar ni nujno tako. Etični subjektivizem trdi, da so končne norme našega ravnanja odvisne od naših osebnih preferenc in čustev; da um ne more namesto nas rešiti naših etičnih problemov. Vendar pa ta pogled ne izključuje nujno možnosti, da izbira končnih norm ne bi bila odvisna od poželenj, ki temeljijo na izkušnjah in refleksiji.

64 George (2000: besedilo ob op. 44–47; kurziva dodana).

5 IMA NAVSEZADNJE KELSEN PRAV?

Ta moj prikaz Kelsnove kritike NPT vodi do morda nevznemirljivega zaključka: Kelsnova kritika NPT se kaže kot trpežna. Očitno se ji uspe upreti tako odgovorom tradicionalne, racionalistične NPT, ki jih predstavi Edgar Bodenheimer, kot tudi nasprotnim kritikam Nove NPT, ki jih predstavi Robert George. Če imam prav, bodo morali čudaki iz *Götterdämmerung*-a počakati na novo priložnost.

Iz angleškega izvirnika prevedel
*Matija Žgur.***

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Pierluigi Chiassoni*

Kelsen on Natural Law Theory
An Enduring Critical Affair

In a series of essays published from the late 1920s up to the mid-1960s, Hans Kelsen carried out a radical critique of natural law theory. The present paper purports to provide an analytical reconstruction and critical assessment of such a critique. It contains two parts. Part one surveys the fundamentals of Kelsen's argumentative strategy against natural law and its theorists. Part two considers, in turn, two critical reactions to Kelsen's criticisms: by Edgar Bodenheimer, on behalf of traditional natural law theory; by Robert P. George, on behalf of "the new natural law theory". As the analysis suggests, Kelsen's critique stands up to the criticisms.

Keywords: Hans Kelsen, natural law theory, Tribunal of Science, Edgar Bodenheimer, Robert P. George

1 THE TRIBUNAL OF SCIENCE

In the writings of Hans Kelsen, the phrase "natural law theory" (or else "natural law doctrine", both translating the German expression '*Naturrechtslehre*') refers to the variegated set of theories, from antiquity to the present age, sharing three fundamental claims: (*i*) a natural law does exist as an objective normative order different and independent from positive law (the ontological claim); (*ii*) men can know it (the epistemological claim); (*iii*) natural law theorists are scientific expositors of natural law as it really is (the scientificity claim).

The critique of natural law theory (NLT) represents a core issue in Kelsen's jurisprudence. In fact, from the late 1920s until the end of his long and productive scholarly life, he painstakingly pursued one and the same critical approach, along the following lines: prosecute the NLT before the "Tribunal of Science" (as he sets out expressly to do in a famous 1949 essay), bring to the fore its several shortcomings, and, on the basis thereof, get the NLT definitively sentenced as being ideology (and precisely: ideological thinking, and argument, about justice), mostly of conservative allegiance, operating under the guise of a genuinely scientific enterprise.[1]

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To prevent misunderstandings, one point must be made clear from this point on. In Kelsen's opinion, there is only one, true, tribunal of science. This is the tribunal acting on the basis of a radical positivistic epistemology ("scientific-critical philosophy", "relativistic positivism", "critical positivism", critical empiricism). The main tenets thereof may be briefly recounted as follows:

1. *Ontological monism*: there is only one reality liable to scientific inquiry, and this is the reality of experience, the world of natural and social phenomena that can be perceived by our senses and ordered by reason (our "knowing faculty");
2. *Relativistic epistemological standard*: there is no absolute "Truth", but only experience-based truths relative to rational criteria of scientific inquiry;
3. *Epistemological moderate optimism as regards to reason and senses*: even though they are unable to carry our inquiries beyond the boundaries of experience, even though their use requires basic assumptions and the constant exercise of epistemic doubt, reason and senses are to be considered as fairly efficient and reliable tools for empirical investigations;
4. *Epistemological pessimism as regards to different pretended tools of inquiry*: imperfect as they may happen to be, reason and senses are the only genuine tools of scientific inquiry available to us; other pretended tools really do not do for "the quest of [scientific] truth", being instead tantamount to more or less open forms of "wish-fulfilling imagination";
5. *Universal epistemic validity*: the scientific-critical approach holds not only for inquiries into the realm of (causally connected) facts, but also for those concerning the realm of norms and values. The tribunal competent to adjudicate upon NLT (and, more generally, upon law, politics, morality and the theories thereof) is the same that, say, would hear a case about an allegedly miraculous therapeutic discovery in medical science;
6. *Meta-ethical subjectivism and non-cognitivism*: from the standpoint of science, *subjectivism* (there are no objective moral norms, no objective moral values; moral norms and values depend on human acts of will mirroring their preferences, emotions, interests) and *non-cognitivism* (reason, our knowing faculty, cannot solve the problem of justice by itself, nor any other practical problem) are the only acceptable meta-ethical views. History, sociology, psychology, and anthropology all converge to support this conclusion.[2]

1 See, e.g., Kelsen 1928a; Kelsen 1928b; Kelsen 1949; Kelsen 1953; Kelsen 1957; Kelsen 1960b; Kelsen 1961; Kelsen 1964.

2 Kelsen (1928b: 433 ff.); see also Kelsen 1934; Kelsen 1948; Kelsen 1949; Kelsen 1950; Kelsen 1952; Kelsen 1953; Kelsen 1960b; Kelsen 1961.

My paper contains two parts. The first one aims at providing an analytical reconstruction of Kelsen's case against NLT (§ 2). The second one considers, in turn, two critical reactions in defense of NLT, both centered on Kelsen's *The Natural-Law Doctrine Before the Tribunal of Science*:[3] on the one hand, the case for "traditional", rationalistic, NLT, as argued by Edgar Bodenheimer (§ 3);[4] on the other hand, the case for "the new" Thomistic NLT, as argued by Robert P. George[5] (§ 4). A few concluding lines will follow concerning the enduring significance of Kelsen's critique of natural law thinking (§ 5).

2 KELSEN'S CASE

Upon a fair reconstruction, Kelsen characterizes NLT, as I said at the outset, as making three fundamental claims: an ontological claim, according to which there is an objective normative order, natural law, that is different and independent from positive legal orders; an epistemological claim, according to which men can know natural law; a scientificity claim, according to which natural law theorists are scientific expositors of natural law as it really is. Kelsen makes each claim the target of a set of arguments. In accounting for these arguments, I will try to present them in their best, perspicuous, light.

2.1 The Critique of the Ontological Claim

The NLT ontological claim is in fact the combination of four related claims: (1) there exists a natural law (2) that is a normative order (3) different and (4) independent from positive law.

The strategy Kelsen adopts for undermining the NLT ontological claim focuses on the alleged difference (3) and independence (4) of natural law from positive law. It shows a double-tiered structure. First, Kelsen identifies the differences between natural law and positive law, as they may be gathered from what he considers a fair reconstruction of mainstream NLT. Secondly, he brings to the fore the problems such differential traits of natural law make from a scientific perspective: arguing, as we shall see, that natural law, as "a system of norms distinct and independent from positive law", has no scientific standing ("one *cannot accept* its validity" from "a *scientifically* rational standpoint"[6]) and is, in any case, "not possible".[7]

3 Kelsen 1949.
4 Bodenheimer 1950.
5 George 2000.
6 Kelsen (1964: 114).
7 Kelsen (1928a: 39); Kelsen (1960b: §33).

2.1.1 Sorting out Natural Law from Positive Law

According to Kelsen's account, NLT claims natural law to be different from positive law under five counts: objectivity, absolute value, absolute validity, static structure, and hierarchical superiority.

Objectivity. Natural law is an *objective* order of human conduct: its existence does not depend on any human act of law-making or law-creation. It is instead a natural order, intrinsic ("inherent") in nature generally or in the specific nature of man, and being for humans something "given" like mountains and oceans and the starred sky. Contrariwise, positive law is man-made law: it is a human artifact, having necessarily a *subjective* character, since it necessarily depends on the subjective acts of will of men who happen to act as legal authorities in human societies.[8]

Absolute value. Natural law is endowed with *absolute value*: its norms are necessarily the norms of absolute *justice*, prescribing what is *in itself just* for every man at every time and place to do as regards to other men. Contrariwise, positive law norms are norms of justice only by way of contingence: namely, if, but only if, they embody the natural law standards of absolute justice; they have consequently only a *relative value*. Indeed, if there is a value that may be considered as necessarily connected to positive law, this value is not justice, but *peace*: the value of a peaceful (i.e., pacified) society. Obviously, peace may go along with gross violations of the standards of justice: (as we all know) positive law may bring peace at a very high price for the disadvantaged groups of a society (the ruled class, the "inferior" caste, the "subversive" parties or movements, etc.).[9]

Absolute validity. Provided natural law norms are endowed with absolute value, they are also endowed with *absolute validity*: they ought to be obeyed and applied *as such*, whatever the time and space. They enjoy, as natural law theorists sometimes claim, an "inner necessity".[10] Because of the absolute validity or inner necessity of its norms, natural law is an *anarchical* normative order: coercion and organization do not figure among its structural features. Contrariwise, positive law norms are only endowed with *relative validity*: they ought to be obeyed and applied, from a strictly positive-legal point of view, if, but only if we presuppose – by means of a juristic "hypothesis"[11] or a juristic "fiction"[12] – the validity of a basic norm the function of which is turning some original historical fact of un-authorized law-making by men disposing of su-

8 Kelsen (1928a: 28–30); Kelsen (1949: 142).

9 Kelsen (1928a: 37 & 56–57); Kelsen (1928b: 435).

10 Kelsen (1928a: 37–38).

11 Kelsen 1934; Kelsen 1960a; Kelsen 1960b: § 52.

12 Kelsen 1979.

perior physical force ("power", *Macht*) into an authorized act of law creation.[13] Jurists, *qua* expositors of positive law, cannot presuppose at will the validity of the basic norm of a positive normative order. This can be done if, but only if, the norms of that order are by and large effective. Effectiveness is motivated by the coercive sanctions officials are empowered to apply. Accordingly, the relative validity of positive legal orders depends, ultimately, on coercion and organization. Whereas natural law is anarchical, positive law gets its "perfection" in the form of *state* legal order, i.e., of a coercive and highly organized normative order.[14]

Static structure. At least so far as mainstream NLT is considered, natural law "ideally tends to be" a *static* normative order: i.e., a set of norms that includes one *basic material norm* and the norms derivable from it by means of "a mere intellectual operation".[15] For instance, the natural law order identified by the basic norm "*Suum cuique tribuere*" ("Give to everyone his own") is composed of that norm, plus the norms derived from it by way of (right) reasoning, like, e.g.: "Do not steal", "Comply with duly entered contracts", "Do not take undue advantage of people in dire straits", etc. Contrariwise, positive legal orders are essentially *dynamic* normative orders: they are sets of norms that include one *basic formal* or *competence norm* and the norms produced by the authorities that such a basic norm directly or indirectly establishes.[16] For instance, the positive legal order identified by the basic norm "Whatever the Queen enacts is law" is made of that empowering norm, plus all the norms enacted by the Queen or her delegates. The static nature of natural law points to another fundamental difference from positive legal order. Natural law norms are set once and forever: they are immune to changes, they persist in their content through the ages; they are, in other words, "eternal, unalterable" norms. Contrariwise, positive legal orders, as dynamic orders, display an in-built, structural liability to change over time and place.[17]

Hierarchical superiority. Finally, due to its absolute value and absolute validity, natural law represents a *superior* normative order as regards to *inferior* positive legal orders. The relationship between the two normative orders is necessarily a relationship of *hierarchical ordering*.[18]

13 Kelsen (1928b: 435–437).

14 Kelsen (1928a: 33–34); Kelsen (1928b: 441).

15 Kelsen (1928b: 399–400); as we shall see at § 2.2, Kelsen considers the theories of natural law making the case for dynamic, "purely delegating", natural law basic norms as "inconsistent" with the "pure idea of natural law".

16 Kelsen (1928b: 400).

17 Kelsen (1928a: 38).

18 Kelsen (1928b: 410–411); Kelsen (1960b: § 50).

2.1.2 Undermining the Ontological Claim

As I said, the laying bare of the peculiarities that would mark natural law off, according to the "pure idea" of a natural law order, from positive legal orders is the first, preparatory, stage of Kelsen's critique of the NLT ontological claim.[19] Indeed, he seems to suggest, as soon as we get a clear picture of the alleged basic features of natural law, as soon as we try, out of intellectual honesty, to take them seriously from a scientific standpoint, our "skeptical reason"[20] cannot help but seeing flaws, questionable views, and wishful-thinking.

The arguments Kelsen deploys against the NLT ontological claim aim at three targets: first, the idea of natural law as an objective normative order endowed with absolute value; second, the idea of natural law norms as endowed with inner necessity; third, the idea of natural law as a static, self-applying, order that can be "developed" by means of purely intellectual acts, in its connection with the idea of natural law as a distinct and independent order from positive law.

A. *Questioning Natural Law's Objectivity and Absolute Value*

To undermine natural law's alleged objectivity and absolute value, Kelsen apparently deploys four arguments, namely: an argument from strangeness, a genealogical argument, an argument from human psychology (the psychological argument), and, finally, an argument from the necessity of theism. All the labels, here and in the following, are the outcomes of my own reconstruction of Kelsen's critique.

None of these arguments, as we shall see, may be properly regarded as having knock-down force; nor does Kelsen in fact pretend them to be so. Rather, they are meant to set up a web of reasons jointly suggesting the plausibility of rejecting the NLT ontological claim from a scientific standpoint (Provided *these* would be the main features of a natural law order: Are they acceptable from the standpoint of a dispassionate rational inquiry? Would they make of it a *viable* normative order?).

The Argument from Strangeness. Natural law theorists tend to present the objectivity and absolute value of natural law as a matter of course. However, as soon as we cast the cold eye of reason on them, such alleged properties of natural law look deeply controversial. In fact, both commit their supporters to *ontological dualism*. The idea of natural law as a normative order not made by

19 By the way, Kelsen's reconstruction of the "pure idea" of a natural legal order, far from being weird or idiosyncratic, seems in line with different reconstructions even by authors sympathetic to natural law thinking. For instance, Mark Murphy identifies three basic features of "the paradigmatic natural law view": (1) objectivity ("the natural law is given by God"); (2) absolute validity ("it is naturally authoritative over all human beings"); (3) liability to knowledge ("it is naturally knowable by all human beings"). See Murphy (2011: § 1.4.).

20 Kelsen (1928b: 435).

men, but being instead, for them, something of a "given", carries with it the idea of a double normative reality: on the one hand, the empirical, surface, reality of man-made norms of positive law and social morality, which can be grasped by our senses and ordered by our reason; on the other hand, the "higher" or "deeper" reality of natural law norms, that are not man-made. Likewise, the idea of the absolute value of natural law, which is, as we have seen, the absolute value of justice embodied in natural law norms, suggests a double reality of values: on the one hand, the empirical, surface, reality of subjective, relative, human values, that depend on man-made norms; on the other hand, the "higher" or "deeper" reality of objective values, that depend on objective norms and are "values in (and by) themselves", like there are "things in themselves" as opposed to the ordinary, imperfect, things within empirical reality.

Ontological dualism ("the duplication of the sphere of cognition") – Kelsen maintains - "forms the elementary kernel of all metaphysics and religion", the building block of a "tragi-comic undertaking" by which "man produces the illusion of growing beyond himself".[21] Indeed, as soon as one asks natural law theories such unavoidable questions as "How were natural law norms made?", "Where do they come from?", "What is the source, if any, of the absolute value of justice?", "What sort of thing is the higher or deeper reality of not man-made norms and values?", etc., one gets answers that point to a law-giving nature, to a nature intrinsically endowed with objective directive force, or, more often, to a (transcendent) deity who created nature, and men as part thereof, and put inside of it natural law norms and the standards of absolute value.

By the argument from strangeness, however, Kelsen, so to speak, asks us to stop one step before entering, and scrutinizing, the (fantastic) world of metaphysical and religious thought. He asks us, in our quality of judges in the tribunal of science, to consider ontological dualism as such: as a claim, whatever its merits, that runs contrary to critical empiricism's ontological monism. If we do so, Kelsen suggests, we cannot help concluding how "strange" the hypothesis of an ontological dualism of norms and values is: how weird is the idea of a second world, made of "higher" or "deeper" norms and values concerning human conduct, which nonetheless are not man-made like the positive and moral laws of our empirical world.[22]

The argument from strangeness elicits an obvious reply: the alleged strangeness of an ontological dualism of norms and values is in the eye of the beholder. If ontological dualism really were such a "strange hypothesis" as Kelsen claims it to be, why whole generations of philosophers and people at large, including

21 Kelsen (1928b: 419).

22 As it is well known, a similar argument, "the argument from queerness", has been deployed against moral objectivism in general by Mackie (1977: 38–42).

some of the most brilliant minds ever born, would have considered it a matter of course?

Against such a reply, Kelsen resorts to the genealogical and psychological arguments. As we shall see in a moment, the former purports to deny ontological dualism any scientific plausibility by appealing to its historical origins in human societies and cultures. The latter purports to explain the ever-lasting success of ontological dualism by appealing to human psychology: in particular, to two typical drives of the human mind.

The Genealogical Argument. Where does ontological dualism come from? Like any human construct, it cannot be but the output of human thinking. Which sort of thinking? The idea of a natural law is the idea of norms, laws, or principles for human behavior that are "inherent" in "nature", that "come from", are "to be found in", nature. From the standpoint of scientific-critical thinking, however, *nature* is a chaos of facts perceived and perceivable by our senses, and ordered by reason by means of the principle of causality and other principles of scientific inquiry.[23] Accordingly, nature as conceived by critical empiricism cannot be the norm-giving and norm-containing nature that natural law theorists have in mind. It must be a different kind of nature. Now, Kelsen claims, the idea of a norm-giving, norm-containing nature has its most ancient origin in primitive thinking. Primitive men see the whole natural environment surrounding their villages (trees, woods, sources, lakes, hills, wild animals, stars, etc.) as inhabited by spirits which ought to be properly worshipped and appeased in order to avoid evil consequences (illness, famine, drought, etc.). Primitive men see such an animated nature as part of their society: as a set of entities who prize men's right behaviors and punish the wrong ones. By observing the "behavior" of such entities, men learn what they ought to do or to forbear. Primitive animism is the cradle of the idea that there are *objective* norms for human behavior, and, consequently, the cradle of ontological dualism of norms and values. Primitive thought has been gradually replaced, almost everywhere by now, by more sophisticated forms of religious thought, up to the great monotheistic religions. A transcendent deity is replaced to the spirits of trees and mountains, but the basic thinking-format is preserved: some transcendent deity is the source of objective laws, laws not-made by men, which can be discovered by "reading" the (teleological-theological) "book of nature", and are absolutely binding upon the humans.[24]

The Psychological Argument. Why generations of philosophers and people at large did endorse, and do keep endorsing, ontological dualism concerning norms and values? Why are they so watertight to the argument from strangeness and the genealogical argument? Kelsen suggests that this is so not because

23 Kelsen (1960b: § 31).

24 See Kelsen (1928b: 422–423); Kelsen (1949: 137 ff.).

ontological dualism is a *true* scientific claim, critical empiricism notwithstanding. Rather, this is so because ontological dualism, as suggested by the genealogical argument, is no scientific claim at all. It belongs to the realm of practice. It is an ideological device, whose grip on the said generations of philosophers and people at large may be explained by the interplay of two typical drives in the human mind. On the one hand, there is the "primitive mind" drive towards a personal-responsibility eschewing, absolute, heteronomous foundation (that is to say, source and justification) for the ultimate standards of human conduct. On the other hand, there is the opportunistic drive that favors ways of thinking which are able to secure to the promotion of one's own (individual- or group-) interests the stamp of objective and absolute value. Practical convenience would be, accordingly, the ultimate motive behind the persistence of ontological dualism of norms and values among humans.[25]

The Argument from the Necessity of Theism. Some natural law theorists try, so to speak, to severe the destiny of natural law – or rather, of the peculiar natural law they argue for – from the destiny of theism (the belief in a transcendent deity): they tend to deny any necessary connection between natural law, on the one hand, and any theological foundation thereof, on the other. This is so, Kelsen suggests, for they wish to make the case for natural law stronger, by showing that natural law does not need a foundation of theological kind, which is philosophically controversial. Unfortunately, Kelsen claims, such a separation of natural law theory from a religious foundation is not possible. The argument from the necessity of theism is quite complex. Kelsen brings to bear on it the key tenets of his empiricist *Weltanschauung* and theory of norms. In a nutshell, it may be recounted as follows. Natural law is a normative order whose norms are not man-made. A norm is the prescriptive meaning-content (*Sinngehalt*) of an act of will directed at somebody's behavior. Natural law norms, by hypothesis, cannot be the meaning-contents of human acts of will. Consequently, they must be the meaning-contents of acts of will of some non-human willing entity. Unless we are primitive animists, believing in the souls and spirits of trees, rivers, mountains, etc., we have only one way to go: we must assume the existence of a transcendent deity by whose will the natural law norms have been posited for men's guidance.[26]

25 Kelsen (1928b: 419 ff.); Kelsen (1952: 22); Kelsen (1953: 10–11 & 22–24); Kelsen (1960b: § 51); Kelsen (1964: 114 ff.). Kelsen seems perfectly aware of the persuasive "gap" of his arguments. Critical empiricism can bring the ultimate practical motives of men's belief in ontological dualism to the fore. It can also advocate "the modern mind" of moral autonomy and ultimate personal responsibility in practical matters, against the "primitive mind". But, since it tacitly rejects so-called "reason's optimism" as unsound, it must stay content with that and hope for mature and honest thinking to prevail among humans, sooner or later.

26 See Kelsen (1928b: 422 ff.); Kelsen (1949: 138); Kelsen (1960b: § 32); Kelsen (1964: 114 ff.).

To sum up. According to Kelsen, there are at least four good reasons to get rid of the idea that there exists a natural law as an objective normative order, endowed with absolute value. First, it is a strange hypothesis from a strictly rational-scientific standpoint. Second, it originates from the animistic confusion between society and nature, which is typical of primitive thinking. Third, it belongs to the realm of practice and ideologies, where it fits two typical drives of the human mind, converging on the convenience of postulating an objective order for human conduct. Fourth, it cannot stand "on its own", but needs of a theological "foundation" (in both meaning of such a word) in order to account for what we now would call the "normativity" of natural law.

B. *Questioning the Inner Necessity of Natural Law Norms*

Natural law theorists sometimes claim natural law norms to be endowed with an "inner necessity".[27] Now, from Kelsen's perspective, that claim can be understood in two different ways.

According to a first reading, the idea of the "inner necessity" of natural law norms is tantamount to the idea of natural law norms' *absolute validity*. Absolute validity depends, as we have seen, on absolute value. Absolute value depends in turn on the existence of the objective order of natural law norms. Accordingly, the first reading of the "inner necessity" claim is questionable for the four reasons making ontological dualism questionable.

There is, however, a second reading available. In this case, claiming that natural law norms are endowed with an "inner necessity" is tantamount to claiming that the connection between the antecedent and the consequent of natural law norms is not the normative connection of imputation, but is, rather, a (sort of) causal connection between an antecedent expressing a condition, and a consequent expressing its necessary effect.

This second reading, Kelsen suggests, is affected by unredeemable confusion and has obnoxious effects for NLT.

First, by presenting natural law norms, that are *ought*, deontic laws ("if somebody finds oneself in a situation in which he could steal, then he ought not to steal"), as if they were *must*, causal laws ("if somebody finds oneself in a situation in which he could steal, then he will necessarily not steal", which is like "if a metallic body is heated, then it will necessarily expand"), it erroneously obliterates the distinction between norms proper, on the one hand, and causal empirical statements, on the other. In so doing, NLT shows a primitive, culturally under-developed, cast of mind, for the confusion between normative and causal connections, between society and nature, it typical of primitive thinking.

27 Kelsen (1928a: 35).

Secondly, by presenting natural law norms as (a sort of) causal laws, NLT makes a self-defeating claim: indeed, if natural law norms really are (like) causal laws, then they are "banished from the sphere of the normative".[28] They cannot in any way *direct* human behavior, like the law of gravity cannot "direct" us to stay with our feet on the ground. If, for instance, the sentence "might is right" is read not as expressing a normative principle that justifies and legitimizes whatever rule is effective ("Mighty people ought to rule"), but as expressing a causal law of human societies ("Mighty people must rule", "Mighty people are necessarily led to rule", "If in a society there are mighty people, then these people will necessarily rule"), it loses any directive force. A natural law made of such statements about necessary human behaviors would be no law, no normative order, at all: it could not fulfill the normative function natural law theorists usually do ascribe to it.[29]

C. *Questioning the Possibility of Natural Law as a Normative Order Distinct and Independent from Positive Law*

The last argument against the ontological claim of NLT runs as follows: also leaving aside all the preceding arguments, the ontological claim would face, in any case, a fatal problem. In Kelsen's terms, "the whole problem" of natural law.[30] This is the problem of individualization (*Individualisierung*, *Konkretisierung*). According to Kelsen, it is a problem NLT must cope with; but, unfortunately, it cannot do so without giving up the ontological claim of natural law as a normative order distinct and independent from positive law. This (as we may call) *argument from the necessity of positivization* runs, roughly, as follows. Natural law, like any normative order, must contain general norms (even the purest of dynamic systems must contain one general norm empowering its supreme norm-making authority, like, e.g., "People ought to behave according to the King's enactments"). Natural law, being a static normative order (§ 2.1.1), must contain material general norms (like, e.g., "*Bonum faciendum, malum vitandum*"). Material general norms, being "abstract" norms, cannot work as standards for individual cases, cannot be applied to individual cases, without being individualized or concretized (they necessarily face the "individualization gap"). The process of individualization of material general norms, so far as positive legal orders are considered, is necessarily a discretionary process: a process of discretionary substitution of general norms by (not necessarily "corresponding") individual norms, that depends not only on acts of knowledge, but also on acts of will (the law-applying organ must establish "constitutively" that an individual case of the same kind considered in the antecedent of a general norm has oc-

28 Kelsen (1928a: 50).

29 Kelsen (1928a: 34–36); Kelsen (1949: 139); Kelsen (1956: 177).

30 Kelsen (1928a: 39).

curred and must also establish "constitutively" what precise legal consequences ought to follow for it). NLT usually overlooks this problem, tacitly regarding natural law general norms as self-applying: as applying to individual cases by means of pure acts of cognition on the part of their addressees. In order for such a solution to be capable of preserving the identity and existence of the natural law order as a separate normative order, however, NLT would have to assume that all men are equally wise and good moral agents: only on such an assumption would the general norms of natural law be applied uniformly to individual cases; only on such an assumption would these norms work as "self-applying" to individual cases. Unfortunately, the assumption that all men are equally wise and good moral agents is too strong even for NLT's imagination. Only relatively few men are wise and good for the task of applying natural law general norms. Accordingly, in order to make the natural law order viable, these men must be entrusted with the application of natural law general norms in forms and ways that are universally binding. This move, however, is tantamount to transforming these wise and good men into as many applying organs of natural law norms; furthermore, in order to make their judgments effective, some form of coercion must be provided for. This means, however, that natural law must become positive law: to be a viable normative order, it must undergo a process of positivization. If such is the case, however, we must conclude that natural law, as a normative order distinct and independent from positive law, is simply "not possible".[31]

In the eye of a natural law fan, Kelsen's argument from the necessity of positivization may seem self-serving. It points, however, to a capital technical problem for NLT. If we take NLT's claim about the existence of a natural legal order seriously, the problem of how such an order can work in practice becomes unavoidable. And if it may be shown that it cannot work in the form of a purely objective, self-applying, normative order, the whole NLT enterprise appears to promise more than it can maintain. Its overall directive value appears illusory: consisting, at most, in pointing out a set of (very) abstract principles to be developed authoritatively by a selected set of wise and good interpreters, expositors and appliers. In fact, Kelsen is aware that natural law theorists usually maintain natural law does *require* the existence of positive legal orders. And, as we shall see (§ 2.3), he regards that as a telling "incoherence" on their part.

So far, we have dealt with Kelsen's critique of the ontological claim. As I said at the outset, however, in Kelsen's perspective NLT makes two further claims: men can (get to) know natural law (the epistemological claim of NLT); natural law theorists are scientific expositors of natural law as it really is (the scientificity claim of NLT). The scientificity claim is parasitic upon the epistemological claim: it stands, or falls, as a consequence of the soundness or unsoundness of

31 Kelsen (1928a: 39–56).

the latter; indeed, if men cannot know natural law, natural law theorists cannot act as its scientific expositors. Nonetheless, Kelsen's critique of NLT contains, apparently, a few arguments that are aimed against it directly. In what follows, I will consider Kelsen's criticisms of these two claims in two separate sections.

2.2 The Critique of the Epistemological Claim

According to the epistemological claim, men can (get to) know natural law: as an objective order of human conduct endowed with absolute value and validity, natural law is a suitable matter for human knowledge.

Against this claim, Kelsen adopts an argumentative strategy purporting to show that none of the methods NLT sets forth as methods for knowing natural law norms lives up to the test of scientific-critical philosophy. No one can be regarded, in other words, as a genuine method of scientific inquiry. Three main arguments are deployed here: (1) the logical fallacy argument, (2) the no self-evidence argument, (3) the argument from the self-contradiction of practical reason.

The Logical Fallacy Argument. NLT claims that natural law norms can be "derived" from nature, that they are "deduced" from nature. Now, taken at face value, such a claim cannot be accepted from the standpoint of rational-scientific philosophy, for it is logically flawed. The claim tacitly assumes nature to be a set of facts. From statements about facts alone, however, no normative conclusion can be logically derived; for instance, from the statements "men are naturally inclined to society" and "big fish eats small fish", it does not follow that "men ought to behave in such a way as to preserve society", nor that "big fish ought to eat small fish". Such an inference is possible if, but only if, some norm is being presupposed: like, e.g., the norms that "men ought to behave according to their natural inclinations", and "animals ought to behave as they usually do".[32]

Of course, natural law theorists can reply to the logical fallacy argument that, in their view, nature is not just a set of facts; that it also contains natural law norms, that it has in-built norms. Furthermore, they may claim that they do not properly "derive" natural law norms from (statements about) nature; that they rather perceive, find, discover them in it.

In such a case, however, from a Kelsenian perspective one may retort that talking of "deducing" or "deriving" natural law norms "from nature" is misleading. The process of knowledge would be, rather, one of *interpreting* the transcendent will that, by hypothesis, has created nature and natural law norms, as suggested by the argument from the necessity of theism.[33] Concerning such an

32 Kelsen (1949: 141); Kelsen (1959: § 31: 68–69); Kelsen (1960b: § 32: 72–73).

33 See above, § 2.1.2; see also Kelsen (1949: 138: "examining nature amounts to exploring God's will").

interpretive activity, however, NLT has provided no strict, outcome-determining, reliable, method. The logical fallacy argument seems, accordingly, to point to a serious methodological failure of NLT, whichever way one understands the key notion of nature.[34] This conclusion is further corroborated by the two other arguments of Kelsen's critique.

The No Self-Evidence Argument. NLT also claims natural law norms, or, at least, its supreme principles, to be self-evident (evidently existing, evidently valid, in and by themselves). All men would be able to grasp them by means of their (rational) understanding. The history of NLT, however, shows that a plurality of different, often incompatible, natural law norms have appeared as self-evident to different natural law theorists (for instance, concerning equality, slavery, private property, autocratic government, social welfare, etc.). Accordingly, from a strictly scientific standpoint, one must conclude that self-evidence fails as a reliable, objective, test for telling true from false natural law norms. And one may even venture to suggest that the claim about natural law norms' self-evidence plays the role of a device by which the natural law norms each natural law theorist, on her subjective value judgment, finds convenient, can be presented as a matter of pure evidence.[35]

Natural law theorists of a rationalistic allegiance - usually working within a tradition inspired by Thomas Aquinas – may reply that, contrariwise to the no self-evidence argument, men *do in fact* see as self-evident the *same* basic natural law principles. Think, for instance, of such principles as "*suum cuique tribuere*", "*bonum faciendum, malum vitandum*", "always do act according to the right mean", etc. Think, to consider an eminent representative of the "New Natural Law Theory", John Finnis, at the catalogue of basic goods (life, knowledge, play, aesthetic experience, friendship and sociability, practical reasonableness, and religion) that are necessary for humans to flourish and such as to lead to "general moral standards", by way of the principles of practical reasonableness, themselves part of natural law.[36]

From a Kelsenian perspective, however, a couple of (easy) replies are available.

First, it is by no means *evident* that all those principles belong to the one true natural law order; that, far from enjoying of true objectivity, they are just culturally dependent, contingent standards.

Second, in any case, such allegedly universal, self-evident, principles are so abstract as to be empty and, consequently, practically pointless. Indeed, they cannot provide any guidance whatsoever to human actions, unless and until

34 This point is conceded, apparently, by Murphy 2011.

35 Kelsen (1949: 172–174); Kelsen (1949: 142 text and fn. 9; 143–144; 151 ff. & 172–174); Kelsen (1959: § 45); Kelsen (1960b: § 45: 105–106).

36 Finnis (2011: 23 ff. & 85 ff.).

they are duly interpreted, specified, concretized, individualized, and coordinated. Unfortunately, as to the way of performing such necessary operations, NLT does not provide any reliable, scientific method.[37] Indeed, from a dispassionate standpoint, what we see are but exercises in normative argument.

The Argument from the Self-Contradiction of Practical Reason. Sometimes, NLT supports the epistemological claim by appealing to practical reason. The principles of natural law would be knowable to men's practical reason: they would be the principles revealed to them by a faculty that, at the same time, knows what it is absolutely right and good to be done, and wants that it ought to be done. From the perspective of rational-scientific philosophy, however, knowledge by practical reason must be rejected as unreliable. Indeed, the very idea of a practical reason, of a reason that simultaneously knows the good and wants it to be done, is self-contradictory. From a scientific standpoint, knowing and willing are two separate, though empirically related, faculties. Any claim about their ontological combination in one and the same faculty is to be rejected as unscientific: only metaphysical arguments and acts of faith can support it.[38]

2.3 The Critique of the Scientificity Claim

The critique of the epistemological claim undermines the scientificity claim – natural law theorists are scientific expositors of natural law as it really is – as to its presupposition: namely, by denying any true, scientifically reliable, knowledge of natural law to be viable. In so doing, it is a critique of the scientificity claim since it suggests that natural law theorists are in fact *unable* to do what they claim to be doing. Taking stock of the critique of the epistemological claim, this one is directly addressed to the scientificity claim and completes it, so to speak, by suggesting that natural law theorists do in fact perform a different, and indeed heterogeneous, task from what they claim to be performing. In short, they are participating in an ideological enterprise, consisting in doing normative, subjectively value-laden, moral, political and legal philosophy, under the pretense of scientific exposition of an objective order of human affairs. To support such a conclusion, Kelsen deploys, apparently, three main arguments: (1) the incoherence argument, (2) the reverse deduction argument (or argument from "projection"), (3) the functional argument.

The Incoherence Argument. NLT claims a natural law order does exist, that is endowed with absolute value and absolute validity, and is hierarchically superior to positive legal orders. If we take such claims seriously, Kelsen suggests, we should come to the conclusions that, from the standpoint of natural law,

37 Kelsen (1952: 13 ff.); Kelsen (1960b: §§ 10, 11,12, 13 & 15).

38 Kelsen (1960b: §§ 39–43: 86–89).

positive law is to be considered either as superfluous, whenever its norms do correspond to natural law norms, or as invalid (null, void), whenever its norms do not correspond to natural law norms.[39] Natural law theorists, however, usually do resist both conclusions.

On the one hand, they usually claim that a natural law-abiding positive law, far from being superfluous, is in fact necessary. This is so because, they add, many men, out of arrogance and vicious inclinations, would fly in the face of natural law norms unless there were positive law norms providing coercive sanctions.[40]

On the other hand, they usually conceive the relationship between natural law and positive law in such a way that any conflict between them is made either altogether impossible (Hobbes), or, if possible, such that the invalidity of positive legal norms contrary-to-natural-law does not follow automatically, and usually does not imply agents are relieved from the duty to obey them.[41] Furthermore, most natural law theorists rule out the existence of a natural right to resist (even seriously) unjust positive law norms, and entrust the interpretation of natural law norms to state, positive law, officials.[42]

On both counts, in Kelsen's opinion NLT defends views that are incoherent with its own basic claims. Now, Kelsen claims, such incoherence is so serious that it amounts "to a complete denaturation of the natural-law doctrine".[43] Why is that so? One may suppose such an incoherence to be the output of careless thinking. Or, alternatively, one may even suppose that the flaw is in fact in the eye of the beholder: that is to say, that the presumed "incoherence" Kelsen sees in NTL is, on a charitable reading, no incoherence at all.

To press his point, however, Kelsen suggests the following reading. Surely, such an "incoherence" of NLT is not a logical one. It is, we may say, a "pragmatic" one; more accurately, I would say, a piece of a telling "weirdness". It is, furthermore, not by chance, so to speak, but by design. In fact, it denounces that most natural law theories have an unmistakable, built-in, *justificatory goal*: they tend to justify existing legal orders as – either presumptively, or all-things-considered – morally just and legitimate normative orders. Such a function, however, is clearly ideological, not scientific.[44]

39 Kelsen (1949: 142 & 144); Kelsen (1960b: § 50).

40 Kelsen (1960b: 113–114, quoting Aquinas on men "quidam protervi, et ad vitia proni, qui verbis de facile moveri non possunt /…/ quidam male dispositi non ducuntur ad virtutem, nisi cogantur").

41 Kelsen (1949: 144–151); Kelsen (1960b: 114–115).

42 Kelsen (1949: 146–147 & 148–150); Kelsen (1960b: 119–121).

43 Kelsen (1949: 150).

44 See e.g. Kelsen (1960b: §50), where, following Troeltsch, he set to the fore the Stoics' and the Christian Church's transformation of positive law, whatever its content, into an imperfect form of natural law.

The Reverse Deduction Argument (or Argument from Projection). The ideological nature of NLT is suggested, according to Kelsen, also by another view which most natural law theorists endorse. This is the view that natural law norms are to be deduced not by human nature as a whole, but only from the good (the rational, the right) side of it. Now, by this way of proceeding the pretended "deduction" ("derivation", "grasping") of natural law norms from the nature of man or nature in general is turned upside down:

> It is not from the nature of man as it actually is that Pufendorf – and all other writers – deduce what they consider to be the natural law: it is from the nature of man as it should be, and as it would be if it would correspond to natural law. It is not the law of nature that is deduced from the nature, the real nature, of man – it is the nature of man, an ideal nature of man, which is deduced from a natural law presupposed in some way or another.[45]

In fact, Kelsen suggests, the building up of a standard NLT may be regarded as a two-stage process. In the first stage, the natural law thinker decides which are the principles of natural law: of the true, genuine, natural law. In the second stage, she finds support for them in the nature of man and human condition. In this way, the natural law theorist projects her view about natural law upon nature. Such a projection is denounced by the inevitable selection of natural data any natural law theorist performs, ruling out those data – those natural inclinations, or drives, of the human mind (typically, the inclination to aggression, domination, free-riding, etc.) – which should not form the basis for any corresponding natural law principle.[46]

The Functional Argument. The functional argument (the argument from actual functions of NLT), the last that I am going to consider in this account of Kelsen's critique of natural law thinking, is really parasitic upon the preceding ones. It may be recounted as follows. Natural law theorists claim to be scientific expositors of natural law as it really is. The arguments against the epistemological claim cut the grass beneath such a scientificity claim (see § 2.2. above). Leaving them aside, however, it seems possible to reach the same conclusion by the following questions: What is, what has been, in fact the historical, immediate, function of NLT? Does such a function belong to the sphere of scientific knowledge or, rather, to that of practice (politics, morality, law)? As the argument from incoherence already suggests, natural law theories have always played, and do play, a justificatory function: the idea of a natural law has been, and is being, used to justify either the conservation, or the reform, or even, in rare cases, the revolutionary change of existing governments and positive legal orders. Such a justificatory function – whatever its moral, political and legal significance – is clearly outside of the domain of scientific inquiry, as defined by

45 Kelsen (1949: 144); see also Kelsen (1960b: §§ 33–36).

46 Kelsen (1960b: §§ 33–36).

the rational-scientific philosophy of "relativistic positivism". It is an ideological, normative function.[47]

3 THE NATURAL LAW THEORY STRIKES BACK: BODENHEIMER *V.* KELSEN

In 1950, Edgar Bodenheimer published *The Natural-Law Doctrine before the Tribunal of Science: A Reply to Hans Kelsen*. There he set to the task of defending traditional, rationalistic, non-theological, NLT against Kelsen's "vehement attack", by meeting him, "the leading representative of logical positivism in jurisprudence", on "his own battleground": that is to say, by "challenging the validity of his conclusions on a 'secular' basis, without the aid of religious or metaphysical axioms".[48]

Bodenheimer's defense of NLT rests on several arguments. Some of them are in fact open confessions of the ideological character of NLT. This is the case, for instance, when Bodenheimer criticizes Kelsen for endorsing a (we would say) value-neutral concept of law, one that does not even rule out the possibility of including "arbitrary, capricious, and irrational commands in the term 'law'", instead of setting forth a rational concept that would "advance the cause of the law" and "preserve the good name of the law".[49]

Leaving aside such overtly self-defeating moves, I will focus on five arguments that, at least *prima facie*, seem to pose a real challenge to Kelsen's critique of NLT. They are – the labels and reconstruction are, as before, mine: (1) the no charitableness argument, (2) the argument from the contingency of theism, (3) the argument from success, (4) the argument from no rigid separation between facts and norms, (5) the argument from the empirical un-tenability of ethical subjectivism. I will consider them in turn and see which reply, if any, can be made from a Kelsenian perspective.

3.1 The No Charitableness Argument

According to Bodenheimer, Kelsen's attack on NLT is grossly uncharitable, since it overlooks one of the basic aspects of natural law thinking and, in so doing, provides an unfairly debasing picture of it.

> The point of departure of this approach may be simply *a consideration of certain basic traits and needs of human beings which the law cannot afford to disregard*. For example, *a statement to the effect that a human law prohibiting any sexual intercourse between*

47 Kelsen (1960b: §§ 50–52).

48 Bodenheimer (1950: 335).

49 Bodenheimer (1950: 363).

> *men and women would be contrary to "natural law" would not necessarily require the support of theology*. Religious believers as well as agnostics would agree that *a law prescribing a working day of twenty-two hours contravenes the laws of nature* which demand of men a certain amount of sleep. A law providing that people should walk on all fours, or that infants during their first weeks of life should be fed with chunks of meat, would most certainly be held 'unnatural' by any-body /…/ *the natural-law doctrine, in this particular facet of its manifold ramifications, merely recognizes the existence of certain elementary traits, drives, and instincts of human nature which, although they may be controlled and channeled by the human lawmaker, cannot be disregarded or entirely suppressed*. If laws unbearable to human nature are enacted, men will actively or passively resist such laws and set them aside at the earliest opportunity. *All that is involved in this particular aspect of the doctrine is a realization that there is an element in human nature that limits the power of the legislator and acts as a restraint on his arbitrary will*. Such a position is compatible with a secular as well as a religious approach to the law.[50]

From a Kelsenian perspective, however, the argument from no charitableness can be rejected on several counts.

First, Kelsen's critique of NLT is perfectly aware of the empirical limits the human condition (i.e., human physiology and psychology) sets to the efficacy of positive legal norms. For instance, while dealing with the problem of social justice, he maintains that a legal order grounded on a mutually satisfactory compromise between the several competing interest groups is likely to be more stable (peaceful, effective) than a legal order where "the winner party takes all".[51]

Second, Kelsen would object to calling "natural law" the set of empirical statements about the normal physical and psychological features of humans ("men and women cannot endure a life without sexual intercourse", "humans cannot work twenty-two hours per day", "babies cannot be fed with chunks of meat", etc.). This is so, for such a use of the phrase "natural law" is likely to promote confusion between such a purely empirical "natural law", on the one hand, and normative natural law, as a set of norms allegedly "derived" from natural features of humans, on the other hand. Furthermore, this unduly suggests, as Bodenheimer does in the afore-mentioned lines, the passage from the former to the latter to be a matter of course.

Third, Kelsen would remind Bodenheimer that NLT's core business is not to be concerned with necessary or impossible human conducts as contents of positive law norms; it is, rather, to be concerned with the sphere of optional behaviors and their "right" regulation by a "just" government.

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50 Bodenheimer (1950: 336–337; italics added; see also 338–339 as to Grotius, Hobbes and Pufendorf).

51 See Kelsen (1952: 21–22).

3.2 The Argument from the Contingency of Theism

We have seen why NLT must have a theological foundation according to Kelsen (see § 2.1.2 above).

According to Bodenheimer, however, this claim of Kelsen's can be rejected. In order to support that conclusion, Bodenheimer appeals to the authority of Hugo Grotius, the father of 17th century rationalistic NLT:

> Grotius goes even further in his attempt *to put the natural law on an immanent rationalistic foundation*, declaring the law of nature to be binding on God and denying His power to alter it. These are his words: 'The law of nature, again, is unchangeable - even in the sense that it cannot be changed by God. Measureless as is the power of God, nevertheless it can be said that there are certain things over which that power does not extend /.../ Just as even God, then, cannot cause that two times two should not make four, so He cannot cause that that which is intrinsically evil be not evil.' *Grotius thereby dissociated the natural law from the revealed will of a transcendental God. He grounded it on an independent eternal reason pervading the cosmos, although he admitted the alternative possibility of a theological foundation*.[52]

From a Kelsenian perspective, one may reply as follows. Grotius's words are no argument against the necessity of theism. In fact, they beg the question. Grotius claims that natural law "can be dissociated from the revealed will of a transcendental God". He also claims natural law to be "grounded", instead, on "an independent eternal reason pervading the cosmos". Unfortunately, he provides no support for such claims: except, perhaps, for an appeal to their self-evident correctness. However, in such a thorny issue, as revealed by Kelsen's elaborate reasoning, the appeal to self-evidence is an appeal to wish-fulfilling imagination. Bodenheimer's argument rests on Grotius's argument. Grotius provides no argument: indeed, if we cast a cold eye over it, the grounding "independent eternal reason pervading the cosmos" is an entity even more mysterious, and baffling, than any transcendental deity. As a consequence, Bodenheimer's case for the contingency of theism rests on no argument; it is made, apparently, of pure wishful thinking.

3.3 The Argument from Success

One of the key features of Kelsen's critique, as we have seen, is the claim that NLT is not a genuinely scientific enterprise, but rather a moral, political and legal ideology (and argument) in disguise (see § 2.3 above).

According to Bodenheimer, however, Kelsen's claim is, so to speak, too swift to be good:

> The fact that the postulates of a just law set forth by them [rationalistic modern natural law theorists] became, in the eighteenth and nineteenth centuries, the basis of the

52 Bodenheimer (1950: 338, italics added).

> laws of all civilized countries of Europe and America *tends to show* that *their assumptions with regard to human nature and a "natural law" conforming to it were perhaps less "un-scientific" than the modern opponents of the doctrine would have us believe*".[53]

Bodenheimer's argument, however, claims too much. Indeed, from a Kelsenian perspective, one could reply as follows.

First, as a matter of undisputable historical fact, political and institutional success came not for all the postulates of justice within modern, rationalistic, natural law thinking, but only for those traceable to Locke and Rousseau.

Second, the political and institutional success of the postulates of a liberal-democratic government does not "show" at all the "scientific" character of the connected views about human nature; it simply shows that influential groups of men chose and endorsed them as their guiding principles, while other influential groups, at the same time, chose and acted upon different principles, the principles of political absolutism and religious intolerance, as likewise grounded on "natural law".

Third, the human nature NLT takes into account, as suggested by the reverse deduction argument (see § 2.3 above), really is an ideal, ideological, construct, not the outcome of a piece of genuine scientific investigation.

3.4 The Argument from No Rigid Separation between Facts and Norms

In his critique of NLT, Kelsen defends a "rigid separation" between facts and values, reality and norms – this, apparently, is the way Bodenheimer understands Kelsen's insistence on the is/ought divide and the logical fallacy argument (see § 2.2 above).

Such a rigid separation, Bodenheimer claims, must be rejected. For the following reasons:

> *many legal norms are deeply rooted in the objective conditions of reality and are forced upon the lawmaker either because of certain peculiar traits of human nature or by the dynamic laws of social and economic development* /…/ The meaning and purpose of a legal norm frequently cannot be ascertained without an examination of the historical and sociological circumstances in which it had its origin /…/ *a complex interpenetration of value and fact occurs in social development, and the law is one of the most significant reflections of their mutual interaction* /…/ normative regulations may be still-born or may become dead letters in the course of time, and a proper understanding of the normative system is frequently impossible without a thorough study of how it actually "works" in practice. By this approach, *the alleged chasm between value and fact is spanned by numerous solid bridges*.[54]

53 Bodenheimer (1950: 339, italics added).

54 Bodenheimer (1950: 341, 342 & 344).

From a Kelsenian perspective, Bodenheimer's argument against "the chasm between value and fact" misses the point. It is indeed a clear instance of *ignoratio elenchi*. Let us see why. Bodenheimer argues against the "rigid" separation between facts and values, reality and norms, by pointing to the several empirical connections that do in fact hold between items belonging to the two allegedly separate worlds. However, neither Kelsen's critique of NLT, nor his general theory of law ("the pure theory of law"), has ever denied that the content of legal norms comes from "society": from human needs and interests, from human philosophies of justice and political strategies.[55] The "chasm" Kelsen defends between fact and value, between facts and norms, as we have seen, is not an empirical, but a logical chasm. It amounts to the logical impossibility of deriving normative conclusions from purely factual premises. This point, however, totally escapes Bodenheimer's scrutiny.

3.5 The Argument from the Empirical Un-tenability of Ethical Subjectivism

Kelsen critique of NLT is grounded, as we have seen (§ 2), on a staunch version of meta-ethical subjectivism and non-cognitivism.

According to Bodenheimer, however, such "doctrine of ethical relativity" would be disproved by experience:

> The doctrine of ethical relativity loses its force if it is proved that 90 per cent or 95 per cent of the historically known societies agree on the need of out-lawing certain practices deemed incompatible with the requirements of organized social life. It is not even necessary, however, in order to disprove the theory that all law and ethics are relative, to show a universal agreement among all peoples with regard to certain standards of conduct. If it can be demonstrated that civilized and mature societies tend to share certain value judgments and concur in some fundamental axioms of socially desirable conduct, we would thereby carve out an important area of absolute or near-absolute standards of civilized men. It was, in fact, a natural law of this type that the classical law-of-nature jurists had in mind.[56]

From a Kelsenian perspective, Bodenheimer's argument invites the following reply.

First, experience does indeed show that no human society is viable unless certain practices are outlawed in order to protect life, personal integrity, and goods. This statement concerning a "minimal" or "empirical" natural law (as H. L. A. Hart calls it),[57] however, simply says that life, limbs and goods *must* be protected, if a society is to be viable. It does not say anything, though, about *how* life, limbs and goods *ought* to be protected; nor does it say anything about

55 See, e.g., Kelsen (1960b: 69–71).

56 Bodenheimer (1950: 347–348).

57 Hart (1961: ch. IX, § 2).

whose life, limbs and goods ought to be protected. The whom and the how of such a "minimal natural law" constraints are precisely where group- and personal- interests and preference step in; where a variety of ultimate, incompatible, principles of justice has been adopted over times and places; where the most different social arrangement, all taking into account those "natural constraints", have been established, each one claiming for itself the blessing of absolute justice.

Second, Bodenheimer's argument also refers to "an important area of absolute or near-absolute standards of civilized men" which would be objective, natural law, standards. Such a conclusion, however, is totally unwarranted: the liberal-democratic standards are the standards approved by the men Bodenheimer approvingly calls "civilized". From a strictly empirical, scientific, standpoint, they are relative to these men and their culture. Their eventual success, as we saw before, is no evidence of their privileged "natural law" status.

As a whole, from the standpoint of Kelsen's scientific-critical philosophy, Bodenheimer's case for NLT is a total failure. Indeed, if it succeeds in something, its success consists, paradoxically, in showing that NLT is really no scientific undertaking at all, but a value-laden, ideological, enterprise grounded on moral and political argument.

4 THE CASE FOR NEW NATURAL LAW THEORY: GEORGE *V.* KELSEN

The phrase "New Natural Law Theory" refers, as it is well known, to the Aquinas's inspired natural law theory developed from the 1960s, among others, by Germain Grisez, John Boyle, and John Finnis.[58]

On the fiftieth anniversary of Kelsen's 1949 *The Natural-Law Doctrine before the Tribunal of Science*, Robert P. George, a follower of the New NLT, dedicated to it a review essay, where he purports to defend Aquinas's natural law doctrine and the central tenets of the New NLT built upon it (George 2000). At the end of the essay, George claims to have established the following points:

First, Kelsen's 1949 account of NLT "has virtually no points of contact with Aquinas's thought", whose work is not even mentioned.

Second, Kelsen's critique of NLT has, as a consequence, "little or no applicability to Thomistic natural law theory. Neither Aquinas's theory of the identification of natural law principles, nor his account of their relation to divine power and to positive law, nor his views regarding their implications for the problems of legal injustice and tyranny, are captured in Kelsen's exposition and critique".

58 See Grisez, Boyle, Finnis 1987; Finnis 1980; George 1999; Bix (2002: 85–89); Murphy 2011.

Third, "Kelsen did well, one might conclude, to avoid mentioning Aquinas if he was to insist on describing 'the natural-law doctrine' as he did. Still, it is odd, to say the least, for the 'tribunal of science' to have left unheard and unmentioned the thought of so central an exponent of the natural law tradition".[59]

On behalf of New NLT, George poses a very serious challenge to Kelsen's critique. Indeed, if George is right, the Kelsenian critique of NLT would be, at the same time, self-serving, since it would deal with a straw-man, and pointless, since it would avoid playing the "real match", against Aquinas's NLT, i.e., against NLT in its assumedly strongest and best form.

Unfortunately, in my view George is incorrect in his accusations and for the following reasons.

1. Kelsen – it is true – never mentions Aquinas' natural law thinking in the 1949 essay that George reviews. However, Kelsen did not ignore Aquinas' natural-law doctrine. In fact, he expressly considered that line of thought in other of his writings devoted to the criticisms of NLT.[60] As a consequence, the third point George makes, correct as it may be so far as the 1949 essay is concerned, does not hold in the light of Kelsen's critique of NLT as a whole.
2. While relying on such an incomplete account of Kelsen's critique of NLT, George also claims, in the second point he makes, that such a critique does have "little or no applicability to Thomistic natural law theory". In particular, to mention the issue that I wish to focus on in the following, Kelsen's critique would have nothing to say about "Aquinas's theory of the identification of natural law principles".

In the light of Kelsen overall critique of NLT, however, George's second point must also be rejected.

Let us consider "Aquinas's theory of the identification of natural law principles" as George accounts for it. The core of the theory runs as follows: natural law principles are objective, self-evident, reasons for action, which men can know, and be motivated by, by means of their practical reason.

Is Kelsen's overall critique of NLT really ill equipped to cope with such a view? I think it is by no means so.

(a) To begin with, we should recall three arguments that Kelsen deployed in his critique of the epistemological and scientificity claim of NLT: the no self-evidence argument, the argument from the self-contradiction of practical reason, and, not least, the reverse deduction argument, or argument from projection (§§ 2.2, 2.3).

59 George (2000: 30).

60 See Kelsen (1960b: §§ 32, 34, 35, 40, 43, 47, 50 *a*., *e.* and *f.*); Kelsen (1964: 136 ff).

The former, if you remember, emphasized how unreliable the self-evidence test is as an objective, scientific, test for knowing true natural law principles; and it did so by appealing to the history of ethical theories, where a variety of incompatible first principles of natural law have been, and are being, "discovered" by different natural law theorists as "self-evident".

It also pointed out, perhaps in a way even more damaging to NLT, that the self-evidence of certain pretended natural law principles, like "Give to everyone his own", "Do what is good and abstain from what is bad", "Act according the just mean", etc. – and, we may add, of such judgments as "Consider life, knowledge, play, etc., as basic goods for human flourishing", and the like –, was bought at the price of "discovering" absolutely empty practical principles: that is to say, principles totally unable to provide any clear guidance to human actions, unless supplemented by a content-providing process of interpretation and concretization.

Likewise, Kelsen's analysis of practical reason suggested such a notion to be self-contradictory from the standpoint of empirical human psychology, since it would be *one* faculty of the human mind mysteriously combining in itself two heterogeneous faculties such as knowing and willing. So, from the standpoint of Kelsen's critique, the key features of Aquinas's theory of the identification of the principles of natural law (self-evidence from the standpoint of practical reason), far from "passing unscathed", as George claims, are the full targets of a radical criticism.

Perhaps, we may stop to consider that Kelsen's critique of Aquinas's notion of practical reason is, in a way, uncharitable.[61] Nonetheless, in the light of the argument from reverse deduction (or argument from projection), Kelsen may reply to Aquinas – and to George and his fellow New NL theorists – that they invoke practical reason, such a prodigious and mysterious faculty, as the basic tool for *projecting their own views* about good life, true knowledge, true friendship, and the like, on the seemingly objective data of natural basic goods.[62]

(b) In his account of Aquinas's theory, does George perchance add some further ingredient that Kelsen's critique does not, and cannot, cope with? Let's see.

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61 The passages he quotes from Aquinas concerning the imperative nature of practical reason – in particular, the line "ratio imperat de his quae sunt ad finem" – may also be read to mean that reason "teaches" which courses of actions are instrumentally necessary to get to a goal that the will has previously selected. See Kelsen (1960b: 88 ff. text and fn. 4). It must be observed, however, that George seems to adopt precisely such a hybrid conception of practical reason Aquinas' style that Kelsen criticizes.

62 Kelsen would be delighted, by the way, in seeing that different "new natural lawyers" identify different catalogues of the basic natural goods, and may also "derive" different rules out of them, by exercising their practical reasonableness. See, on this point, the clear account provided by Murphy 2011.

George emphasizes two points worthwhile considering. First, Aquinas's natural law principles are not prescriptions, but reasons for actions. Second, Kelsen's Hume-inspired ethical subjectivism and critique of practical reason fly in the face of people's ordinary ways of thinking about their own moral life; in other words, they provide a poor account of them, notwithstanding their claim to be in tune with empirical human psychology.

The principles of natural law, George says, are not prescriptions to be obeyed because they come from a superior will, but reasons for action; their directive force comes from their being reasonable, from their appearing reasonable to rational creatures:

> Unlike many later theorists of natural law, Aquinas eschewed the voluntarism implied by this conception of moral obligation. The force of practical—including moral—principles, according to Aquinas, is *rational*; these principles state *reasons* for action and restraint; to defy them is wrong inasmuch as it is *unreasonable*. And, in this sense, the natural law is no extrinsic imposition of an alien will—whether the "will" of nature or anything (or anybody) else. It is, rather, intrinsic to human beings; its fundamental referents are the human goods that constitute human well-being and fulfillment and precisely as such are reasons for action.[63]

The passage seems to suggest that Kelsen's argument from the necessity of theism may be wrong or, at least, misfired, if used against Aquinas-inspired NLT. That argument, if you remember, claimed that provided natural law norms are *norms* and not empirical statements, there must be a norm-giving authority which, by hypothesis, must be a transcendent deity by whose will they are created. But Aquinas claims natural law to be "intrinsic to human beings", and to concern "human goods", that "constitute human well-being and fulfillment and precisely as such are reasons for action".

Is Kelsen's critique of NLT able to cope with such a rationalistic stance? I think it can. Indeed, the principles of natural law show to men what they ought to do in view of reaching perfection ("well-being and fulfillment") as human beings. Perfection, here, is an objective notion, independent of human reason and will. The whole picture, then, is clearly informed by the Aristotelian doctrine of *entelechy*: it is a teleological picture of man, as a being with an inbuilt objective drive to an objective goal of perfection. Such a teleological picture cannot be but the design of some maker of the universe. It is indeed the design worked out by God's practical reason. Accordingly, a theological foundation eventually seems to pop out, even in a natural law as reasons for action approach.

Suppose for the sake of argument, however, that such a theological back-up does not (and need not) show up. Suppose that the reasons for action identified by practical reason can stand by themselves, as Grotius himself suggested. Would Kelsen's critique of NLT be harmless? Perhaps, we have to set aside the

63 George (2000: text by fn. 23–25).

argument from the necessity of theism. However, there are other arguments from Kelsen's panoply – the three I recalled a moment ago – that may be resorted to, and are capable of imparting a few fatal blows to the New NLT.

George, however, would dissent. In his criticism of Kelsen's ethical subjectivism and critique of practical reason, he claims, as I said, that they fly in the face of people's ordinary ways of thinking about their own moral life:

> Hume and his followers, perhaps including Kelsen, suppose that if "values" cannot be derived from "facts," then they cannot be objective (or "true"), but must, rather, be mere projections of feeling, emotion, or other sub-rational factors capable of motivating human behavior. They deny that practical reasons, as such, can motivate people. So they conclude that, unless natural law theorists commit "the naturalistic fallacy" of purporting to derive "ought" from "is," their doctrine collapses into a form of ethical non-cognitivism. But this simply begs the question against Thomists and others who claim that we can understand, and thereby be motivated to act for the sake of, more-than-merely-instrumental practical reasons. *It does a poor job of accounting for the experience of most people who, after all, often suppose that they are moved to do things (or to avoid doing things that they might otherwise do) not as a matter of brute desire, but, rather, because they perceive the worth or value, and thus the practical point, of doing (or avoiding doing) them.*[64]

The key-passage, for the present purpose, is the last, italicized one. Here, from a Kelsenian perspective, three remarks are in order.

First, people's own "suppositions" about the way their moral thinking works may be wrong: "supposing" that a mental process realizes such and such (namely, discovers the objective value of a given course of action) is not a conclusive, reliable, evidence that it does in fact realize such and such (namely, that it in fact *discovers* the *objective value* of that course of action).

Second, it appears in a clear light how the miracle of practical reason, namely of a faculty that would be, at the same time, knowing and direction, depends on the spell of words. As soon as we get rid of such a spell, however, we realize that there is something wrong in the idea of "being moved to do things" by "perceiving the worth or value" of doing them. Let us consider the following. To begin with, perceiving the worth or value of a painting does not move me to buy that painting *unless* I am, say, a rapacious private collector, or wish to insure it for the City Museum. An independent desire (purpose, goal) is necessary for that action to take place. Furthermore, it is by no means clear that "perceiving" is the proper verb to employ with regards to the worth or value of human conduct: does it really make sense to say that "I perceive the worth of beheading all the misbelievers I can put my hands on"? Which sort of "perception" is that? Is not that word being used outside of its ordinary contexts, so that it runs afoul to play a rhetorical trick? Kelsen, I think, would have opposed George with something like this line of argument.

64 George (2000: text by fn. 44–47; italics added).

Third, like all detractors of ethical subjectivism, George presents ethical subjectivism as committed to "brute desires". But that is not necessarily the case. Ethical subjectivism claims that the ultimate norms of our behavior to depend on our own preferences and emotions; that reason cannot solve the moral problem for us. This view does not necessarily rule out, however, that the choice of ultimate norms may depend rather on "educated" and "reflexive" desires.

5 IS KELSEN RIGHT, AFTER ALL?

My survey of Kelsen's critique of NLT leads to a perhaps unexciting result. Kelsen's critique of NLT looks enduring. It resists, apparently, both the replies on behalf of traditional, rationalistic, NLT, as presented by Edgar Bodenheimer, and the counter-criticism on behalf of the New NLT, as presented by Robert George. If I am right, the freaks of *Götterdämmerung* will still have to wait for another occasion.

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Synopsis

Pierluigi Chiassoni

Kelsen and Natural Law Theory
An Enduring Critical Affair

SLOV. | *Kelsen in naravnopravniška teorija: dolgotrajno kritiško razmerje*. V nizu razprav, objavljenih med koncem dvajsetih in sredino šestdesetih let prejšnjega stoletja, je Hans Kelsen v naravnopravniško teorijo uperil radikalno kritiko. Avtor te razprave skuša to Kelsnovo kritiko analitično obnoviti in kritično ovrednotiti. Njegov zapis je sestavljen iz dveh delov. V prvem se posveča temeljem Kelsnove argumentacijske strategije zoper naravno pravo in naravnopravniške teoretike. V drugem delu pa se osredotoči na dva kritična odgovora na Kelsnov napad. Enega je v imenu tradicionalne naravnopravniške teorije podal Edgar Bodenheimer, drugega pa je v imenu »nove naravnopravniške teorije« izoblikoval Robert P. George. | Razpravo je v slovenščino prevedel Matija Žgur.

Ključne besede: Hans Kelsen, naravnopravniška teorija, razsodišče znanosti, Edgar Bodenheimer, Robert P. George

ENG. | In a series of essays published from the late 1920s up to the mid-1960s, Hans Kelsen carries out a radical critique of natural law theory. The present paper purports to provide an analytical reconstruction and a critical assessment of the Kelsenian critique. It contains two parts. Part one surveys the fundamentals of Kelsen's argumentative strategy against natural law and its theorists. Part two considers in turn two critical reactions to Kelsen's criticisms: by Edgar Bodenheimer, on behalf of traditional natural law theory, and by Robert P. George, on behalf of "the new natural law theory".

Keywords: Hans Kelsen, natural law theory, Tribunal of Science, Edgar Bodenheimer, Robert P. George

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