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Hans Kelsen and the Tradition of Natural Law: Why Kelsen's Objections to the Natural-law Doctrine Does Not Apply Against Aquinas's Theory of Natural Law

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Abstract: In his works, Hans Kelsen elaborates several objections to the so-called "doctrine of natural law", especially in his essay The Natural-Law Doctrine Before the Tribunal of Science. Kelsen argues that natural law theorists, searching for an absolute criterion for justice, try to deduce from nature the rules of human behavior. Robert P. George, in the essay Kelsen and Aquinas on the 'Natural Law Doctrine' examines his criticism and concludes that what Kelsen understands as the Natural-law doctrine does not include the natural law theory elaborated by Thomas Aquinas. In this paper, we will try to corroborate George's theses and try to show how Aquinas' natural law theory can be vindicated against Kelsens criticisms.
Keywords: Natural Law, Hans Kelsen, Thomas Aquinas, Aristotle.

1. Introduction

The so-called "natural-law doctrine" is a constant target of criticism by Hans Kelsen. In his essay *The Natural-Law Doctrine Before the Tribunal of Science*, published originally in 1949, Kelsen elaborates one of the most forceful criticism to it. Kelsen argues that natural law theorists, searching for an absolute criterion for justice, try to deduce from nature the rules of human behavior. In his opinion, that demand is not an acceptable project to the court of science.[1]

The Natural-Law doctrine before the Tribunal of Science concentrates the core of Kelsen's objections to the natural-law doctrine. However, in that text, Kelsen does not make any reference to Thomas Aquinas. In fact, references to Aquinas appear in other texts on the natural law and the question of justice, but they are always, in the context of Kelsen's thought, isolated and superficial references.

Robert P. George, in the essay *Kelsen and Aquinas on the 'Natural Law Doctrine'*, examines *The Natural-Law doctrine before the Tribunal of Science* and concludes that what Kelsen understands as the Natural-law doctrine does not include the natural law theory

[1] Hans Kelsen, The Natural-Law Doctrine Before the Tribunal of Science, originally published in: The Western Political Quarterly, December, 1949. Reprinted in: What is Justice? Justice, Law, and Politics in the Mirror of Science: Collected Essays by Hans Kelsen (brazilian edition: O problema da Justiça, 1988)

elaborated by Thomas Aquinas. So, according to Robert P. George, Kelsen's criticism cannot be applied to the natural law theory of St. Thomas Aquinas.[2]

In this paper, we will try to corroborate Robert P. George's theses. We will try to show how Aquinas' natural law theory can be vindicated against Kelsens criticisms.

II. Kelsen's Criticism and the Response of the Thomistic Theory of Natural Law

One of Kelsen's critiques of natural law ethics and jurisprudence refers to its supposed idealist and immutable character. Kelsen argues that the doctrine of natural law is an "idealist legal doctrine." In Kelsen's account of the natural law, the jusnaturalism asserts the existence of an ideal, unchangeable right identified to the justice and recognizes in nature the source from which emanates its precepts.[3]

This characterization is suitable to the modern conceptions of natural law. However, according to Aquinas, natural law does not involve anything ideal. Rather, its definition, which has its roots in Aristotelian thought, implies the observation and the study of reality.

Unlike modern natural-law doctrines, for Aristotle and Aquinas, natural precepts are not deducted from *a priori* principles. Neither Aristotle nor Aquinas was carried away by abstractions. Natural law, in the Aristotelian perspective, and also in the Thomist account, is described based on concrete concepts, concepts derived from the observation of reality, like, for example, the description of human nature. If the characteristics of abstraction and idealism can be attributed to some jusnaturalistic theory, they can, and should, be attributed exclusively to the modern description of natural law, not to the classic one. In its various versions, the modern theory of law emptied the contents of the concepts presents in the definition of natural law, making them ambiguous, and departing, definitely, from the anthropological perspective of classical ethics.

The definition of law in the Thomistic and Aristotelian perspective reveals that concrete character present in the classical jurisprudence. In this perspective, law (*ius*), in its primary sense, has no connection with power and is directly attached to the virtue of justice. *Ius* means, primarily, the just thing, the *suum* in the Roman formula of justice *suum cuique tribuere* (giving to each one his own). It is therefore an object of the virtue of justice, namely, the thing on which falls the just action. Law (*lex*), in turn, is only one dimension of legal practice and consists in determined rule or measure of law (*ius*). It is a fundamental dimension, of course, but does not exhaust, in itself, the whole universe of the legal practice.

[2] Robert P. George, Kelsen and Aquinas on the 'Natural Law Doctrine', in: St. Thomas Aquinas & the natural law tradition: contemporary perspectives, 2004.
[3] Hans Kelsen, O problema da Justiça, 1988, 71.

The practice of law in classical philosophy refers to concrete things and law (*ius*) is understood as a reality. In this context, *ius naturale* and *lex naturale* are also found on the nature of things.

Ius naturale, according to Aquinas, consists in an ordered set of principles determined by reason, related to human behavior. In the Treatise on Law (*Summa Theologica*), Aquinas introduces the concept of *lex naturale*. *Lex* in general is a certain dictate of reason (*rationis ordinatio*) for the common good, made by him who has the care of the community and promulgated. *Lex naturale*, in this sense, is the participation of eternal law in the rational creature. Eternal law (*lex aeterna*), in turn, is a set of archetypes, analogous to the world of Ideas, which are found as the divine ideas in the mind of God.[4]

The precepts of *ius naturale* are, therefore, "the first principles of human works"[5] and the primary and fundamental precept is: "good is to be done and sought and evil avoided".[6] The good is thus the end sought by human action, through practical reason. Thus, what makes us distinguish between good and evil is nothing more than the impression of divine light in humans, namely, the natural law (*lex naturale*). The primary principle is known by all humans. The others natural precepts, however, modify according to specific circumstances in which the man is placed.

According to Hans Kelsen, in turn, the natural law theories support the existence of immutable natural precepts. This characteristic can in no way be attributed to Aquinas' description of natural law. There is, indeed, an unalterable core formed by the primary and general precept of natural law, which derives the other principles. Man possesses the innate ability to know practical judgments and, for that reason, captures, unerringly, this fundamental and unchangeable principle. However, from this first precept, the man judges, through practical reason and, therefore, *a posteriori*, in the concrete conditions in which he acts, something as good or as bad, as they are directed, or not, to the human being purposes. Thus, the secondary precepts can change because they depend on particular contexts.

In his critique of natural law, Hans Kelsen, in his essay *The Natural-Law doctrine before the Tribunal of Science* and in his work *The Problem of Justice* (brazilian edition of 1998: *O problema da Justiça*), supports also that the natural law doctrine attribute to nature the function of legislative authority, as if the natural precepts were "norms which we are already

[4] Summa Theologiae I-II, q. 90 ff.
[5] *Summa Theologica*, Ia IIae, q. 94, a. 1.
[6] *Summa Theologica*, Ia IIae, q. 94, a. 2.

given to us in nature before to its possible determination by acts of human will, norms that are, in essence, unchangeable and immutable." [7]

For Aquinas, natural precepts are not derived from any kind of authority - whether human or suprahuman. *Lex naturale* connects to human nature and its force derives from practical reason. Thus, the classical theory of natural law is not based on any kind of voluntarism and it is not necessary, therefore, appeal to any entity with authority to get to know natural principles. According to Robert P. George "[natural law] is 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".[8]

III. Conclusion

Therefore, examining the Hans Kelsen's objections is not difficult to see that they do not apply to Aquinas's natural law theory, because what Kelsen understands as "the natural-law doctrine" does not include the Thomist description of law and legal practice. The real object of Kelsen's criticism is the modern account of natural law. In its proper sense (it means: while directed against modern conceptions of natural law), Kelsen's criticisms are well developed and effective. Notwithstanding, Kelsen's criticism cannot reach the classical elaborations of natural law. More specifically, those criticisms do not reach Thomas Aquinas's theoretical elaboration of natural law.

Hans Kelsen is an example of legal theorist capable to gather and take to the extreme, with consistency and depth, the typical features of modernity. His criticism of natural law is developed from modern theoretical elaborations that have failed in the attempt to fill the gap caused by the rupture with classical thought. Thus, their objections only reach theses inserted within the same theoretical context, namely, the modern jusnaturalism. Moreover, the analysis of the objections to the jusnaturalistic theories highlights the demand to recover classical jurisprudence and ethics so that we can face, with depth and consistency, fundamental questions concerning justice and law. Issues that were not proper addressed neither by jusracionalists nor for juspositivists.

[7] See Kelsen (note 1).
[8] See George (note 2), 241.

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