

PREMESSA

L'idea di scrivere un volume sui temi dell'artificio, della ragione e dei valori trae origine da un seminario organizzato presso l'università degli studi di Salerno il 23 giugno 2014.

Un'occasione di confronto e di scambio che abbiamo coltivato e poi tradotto in questa pubblicazione, a partire da domande teoriche comuni sulla fisionomia che assume il diritto oggi e sulla metodologia più appropriata a rappresentare il mondo dei processi di creazione e di applicazione del diritto, la cui complessità è testimoniata dalla fioritura di teorie etico-morali e pratiche argomentative.

Esse evidenziano un incremento delle attività di *judge-made law* che danno vita a percorsi del diritto diversificati, costituendo, al tempo stesso, uno strumento decisivo per l'espansione del diritto transnazionale.

Indubbiamente, un aspetto enigmatico è rappresentato oggi dalla flessibilità di alcune categorie centrali costruite dalla Scienza giuridica e modellate sul carattere autoreferenziale del diritto. Aspetto che appare derubricato dinanzi alle trasformazioni imposte su scala globale dalla costituzionalizzazione dei sistemi giuridici che comportano una rilettura delle forme e dei limiti del diritto e l'estensione dei luoghi della decisione giuridica, sempre più spesso demandata alle corti, in una progressiva istituzionalizzazione dei conflitti.

Se, infatti, la crisi della mediazione politica comporta un ampliamento dei poteri dei tribunali, nell'ottica di una crescente rivalutazione di una razionalità pratica del diritto, si registra sul piano della ricostruzione teorica la difficoltà di descrivere il *judicial decision-making* con una cassetta degli attrezzi immutata. D'altro canto, le pratiche di bilanciamento costituzionale che impegnano su scala globale la giurisprudenza, dinanzi alla difficoltà di arginare il disaccordo in campo morale, sembrano rivitalizzare alcuni punti chiave del modello artificialistico del diritto e della sua metodologia.

Quale dunque il rapporto oggi fra artificio, ragione, valori nelle forme che assume il *judicial-making* giuridico e quale la rilevanza di questa relazione per la teoria giuridica?

A partire dalla difficoltà di gestire e di circoscrivere il carattere arbitrario e soggettivo dei giudizi di valori chiamati in gioco dalla ponderazione costituzionale, si evidenzia nel dibattito filosofico-giuridico come sia indispensabile importare da una parte della filosofia morale concetti e categorie applicabili nel *judicial decision making*, riducendo in questo modo la configurabilità dei conflitti interpretativi.

Una prospettiva nella quale si dà nuova linfa vitale alla dialettica artificio/ragione che costituisce classicamente un crocevia di domande e interrogativi per il teorico del diritto.

Tale dialettica mostra, per un verso, un'inedita compatibilità in un quadro sempre più sottoposto a contaminazioni e a ibridazioni. Per un altro, riproduce l'antitesi dentro un modello di diritto strutturato su una corretta ed unitaria interpretazione dei valori e da intendersi come parte della morale.

Conflitti che nascono dalla necessità di tutelare i diritti costituzionali, azionandoli e rendendoli giustiziabili. Conflitti che realizzano diritti e che costruiscono strade di "senso", ma che non sfuggono alla difficoltà di una ricostruzione teorica omogenea, testimoniando la ricchezza del pluralismo morale.

Valeria Giordano, Peter Langford

HANS KELSEN'S GOD AND THE STATE: THE THEORY OF POSITIVE LAW AS METHODOLOGICAL ANARCHISM

by *Peter Langford*

Introduction

Hans Kelsen's *God and the State*, of 1922¹, is conventionally considered to be a text whose minor position and importance is determined by a process of theoretical development resulting in the *Pure Theory of Law: Introduction to the Problems of Legal Theory* (*Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik*), of 1934². The reconsideration of this text does not seek to directly place into question the minor status of this text in relation to this wider characterization of the path of Kelsen's theoretical development of a theory of positive law. Rather, it seeks to situate the text against the horizon of the explicit and implicit theoretical frameworks upon which Kelsen draws in order to construct the theory of positive law as methodological anarchism.

From this perspective, the explicit textual citation, reference and interpretative discussion of Durkheim, Feuerbach and Freud is supplemented by the consideration of the implicit presence of Bakunin in Kelsen's text. The introduction of Bakunin, as an implicit presence, derives, initially, from the identity between the title of Kelsen's text and that of one of Bakunin's final, posthumously published

¹ H. KELSEN, *God and the State*, in ID., *Essays in Legal and Moral Philosophy*, Springer, Dordrecht, 1973, pp. 61-82.

² H. KELSEN, *Introduction to the Problems of Legal Theory*, Oxford University Press, Oxford, 1997.

works, *God and the State*, 1882³. The revelation of this identity then becomes the basis for the attribution of Bakunin's text as an 'intertext' within Kelsen's own text: the shaping of Kelsen's text by the implicit presence of Bakunin's text⁴.

The recognition of Bakunin as this intertextual presence provides the initial interpretative orientation for the detailed analysis of the argumentative structure of Kelsen's text. The elaboration of the position of methodological anarchism, with which Kelsen's text concludes, can then be situated as a reworking which circumscribes the tradition of Left Hegelianism (Feuerbach) with its political extension, or radicalization, in Bakunin⁵.

This level of analysis is then combined with the further questioning of Kelsen's text in relation to the methodological construction of 'a purely legal theory of the state': 'a stateless theory of the state'⁶. In this effect of methodological purification, the text can be considered, or, suggested to contain the prefiguration of the question of the relationship between law and life in contemporary Italian theoretical work orientated by the notion of biopolitics. This enables the methodological structure of Kelsen's text to be comprehended as the separation of law from life. Here, the purpose is not to pass to the simple reversal of Kelsen's methodological procedure, as the materialism of Feuerbach and Bakunin is not the origin which Kelsen's methodology obscures. Rather, the question becomes whether, and in what manner, it is possible to distinguish law from life without repeating the opposition between the materiality of life and the abstraction of law prefigured in Kelsen's text.

³ M. BAKUNIN, *God and the State*, Dover Publications, New York, 1970.

⁴ The notion of intertext is utilized here with the limited purpose of opening the possibility for a particular interpretative approach this specific text of Kelsen, and the question of the subsequent trajectory of Kelsen's theory of positive law. It does not seek to enter into the further theoretical questions which arise from the notion of intertextuality developed in the early work of Kristeva. See, in particular, J. KRISTEVA, *The Bounded Text and Word, Dialogue, and Novel*, both in ID., *Desire in Language: A Semiotic Approach to Literature and Art*, Columbia University Press, New York, 1980, pp. 36-63 and pp. 64-91.

⁵ On the origin of Bakunin's thought in Left Hegelianism, see the excellent examination in J.-C. ANGAUT, *Bakounine jeune hégélien. La philosophie et son dehors*, ENS, Paris, 2007.

⁶ H. KELSEN, *God and State*, p. 81.

1. *The initial methodological step: The psychological parallelism of the religious and the social*

The object of research is initially designated through the adoption of the insights of psychology in order to connect the concept of God with the concept of the state. The ‘and’ of God and the state is created by introducing the ‘parallelism’ or analogy which psychology identifies between the religious question and the social question: the individual’s experience of God (the religious) and the individual’s experience of society (the social).

The parallelism or analogy commences from the “consciousness of a supraindividual authoritarian being”⁷. At this level, psychology holds that there is no essential difference between the normative authority of God, through the possession of “the soul of the individual”, and the claim of unconditioned obedience “with which society enters into [the individual] consciousness”⁸.

This consciousness of a supraindividual authoritarian being contains the elements of dependence and subordination, but Kelsen also introduces further complexity into this parallelism. Psychology is utilized to disqualify the claims of theology relating to the position and authority of God, as there is “no psychical phenomenon having absolute power, efficacy or intensity”⁹.

This deflation of theology is the corollary of the psychological acknowledgement of the capacity of society – mere social authority – “to [compel] men against their deepest instincts”¹⁰.

The complexity of this psychological phenomenon is increased by the acknowledgement that dependence and subordination, as the effect of the consciousness of a supraindividual authoritarian being, is accompanied by the “complementary idea of an authority creating the social nexus”¹¹. While this is evident at the social level, as the basis upon which “the social group takes root in individual consciousness”¹², the acknowledgement of this, at the religious level, extends

⁷ *Ibid.*, p. 62.

⁸ *Ibid.*, p. 61.

⁹ *Ibid.*, p. 62.

¹⁰ *Ibid.*

¹¹ *Ibid.*, p. 61.

¹² *Ibid.*

the question of the initial parallelism to the relationship between authority and community.

In this extension, the religious community, as the “universal interconnection” – “an intimate communion between [the individual] himself and all other beings imbued with the spirit and will of God” – reveals a underlying pantheistic logic of cosmic community, of merger “into a single being”¹³. The dynamic of religious experience removes the sense that the logic of the social and the religious are opposites (religious: community to authority social: authority to community). For Kelsen, authority and community are “not two distinct objects”, “merely different stages in the mind’s progress, which are not successive in only one way”¹⁴.

The further development of the methodological insights of this parallelism confronts a potential limit in the comparative parameters of the cosmic community and social community. The cosmic community, predicated upon the indistinction of nature and society, “embraces all objects whatsoever, organic and inorganic alike”¹⁵. The human community is “confined to men, and is merely a human association”¹⁶.

The limit is overcome by acknowledging the dual concept of God which contains both the notion of highest purpose and the notion of absolute good. From this acknowledgement, there arises a further displacement of the theological understanding of God by anthropology. Here, the primacy of the mythological comprehension of God is the origin from which all further notions of the dual concept of God arise, and, in relation to which, Kelsen identifies a process of secularization.

The origin in mythology enables a comprehension of the “intimate relation between the religious and the social pattern”¹⁷. For, the essential indistinction of mythology “between the ethico-normative and a natural cause” reveals a generalized normativity in which “the essential dividing line between man and the rest of nature disappears”¹⁸. In this attribution of human behaviour to things, in which nature is itself a society, there is a universal system of norms which have as their content the behaviour of all things and hence

¹³ *Ibid.*, p. 62.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, p. 63.

¹⁶ *Ibid.*, p. 62.

¹⁷ *Ibid.*, p. 64.

¹⁸ *Ibid.*, p. 63.

make all things into “men”, i.e., into men in the ethico-normative sense of “persons” or recipients of norms¹⁹. This comprehension of original normativity is dissolved in the process of secularization which Kelsen attributes to the passage from myth to science. The transformation of myth to science results from the reorientation of the questioning of “the behaviour of things” – from “why they should so behave, or be obliged to so to do” to “the effect of a cause”: the purification of the conception of causality from the idea of a command directed to, or aiming at, the effect²⁰.

This dissolution renders the ethico-normative level increasingly marginal with the generalization of this scientific concept of causality from nature “to men as well”²¹. The original indistinction between society and nature of mythology is replaced with another form of indistinction in which “society so far as it is regarded as an aggregate of actual, causally determined modes of behaviour among men, becomes transformed into nature, into a branch of nature not essentially to be distinguished from other parts of the universal causal order of things. And only insofar as consideration directed to the social maintains itself as an ethically (or juristically) normative viewpoint, can society be constituted as an object distinct from nature”²².

Kelsen, therefore, insists that in order to retain the insights of the psychological parallelism of religion and society, access to this origin be retained by re-centring consideration upon “the original ethico-normative meaning” of God as opposed to an exclusively causal conception of God²³. From this re-centering, the parallelism is retained, as it remains comprehensible that “[t]he essence of the religious experience involves a social element [and] the essence of the social experience a religious one”²⁴: “[t]he two orders in fact coincide, since for the primitive his kind is identical with God, or ranks at least as the representative, the son, servant or instrument of God, and his command as God’s will”²⁵.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*, p. 64.

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

The co-implication of religious and social experience, which this psychological parallelism reveals, provides the transition to the consideration of Durkheim, Feuerbach and Freud. In this approach, Kelsen's approach breaks with a strictly chronological approach by situating Durkheim prior to Feuerbach in order to utilize Feuerbach to extend, and deepen further, this initial parallelism. The final move to Freud's *Totem and Taboo*²⁶ then enables Kelsen to pass from psychology to psychoanalysis in which Freud assumes the position of the psychoanalytic 'origin' of the Durkheimian and Feuerbachian enquiries into the psychology of religious experience.

Durkheim's *The Elementary Forms of Religious Life*²⁷, and, in particular, the notion of totemism, generated from "psychological enquiry into the facts"²⁸, indicates that "the religious experience is exhaustively describable as the social, and that in the element of authority and community which is equally essential to religious and social experience alike, no difference of content is discernible in either case"²⁹. Feuerbach's *The Essence of Religion* (1845)³⁰ then extends the equality of religious and social experience, from a psychological standpoint, to indicate that there is "no special religious feeling, no special religious sense, and consequently no special religious object either, to which the religious experience is wholly and solely related, or religious veneration directed"³¹. Hence, from the psychological standpoint, there is no essential difference between "the worship of God and the worship of idols", nor between "reverence for heroes and princes [...] [and] the adoration of the deity"³².

These initial indications, from the psychological standpoint, in Durkheim and Feuerbach, of the "similarity of the religious and so-

²⁶S. FREUD, *Totem and Taboo*, in J. STRACHEY (ed.) *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, Volume XIII (1913-1914): *Totem and Taboo and Other Works*, Hogarth Press and the Institute of Psychoanalysis, London, 1955, pp. VII-162 (Kelsen refers to the 2nd German edition published by Internationaler Psychoanalytischer Verlag, Leipzig-Wien-Zurich, pp. VIII-216).

²⁷E. DURKHEIM, *The Elementary Forms of Religious Life*, The Free Press, New York, 1995.

²⁸H. KELSEN, *God and State*, p. 64.

²⁹*Ibid.*, pp. 64-65.

³⁰L. FEUERBACH, *The Essence of Religion*, Prometheus Books, New York, 2004.

³¹*Ibid.*, p. 65.

³²*Ibid.*

cial attitudes” find their origin, for Kelsen, in Freud: the “elementary psychical experience” of “the child’s relationship to his father”³³. This primary (primal) experience of paternal authority is the origin of the experience of every subsequent authority “as father”³⁴. The structure of paternal authority, in its psychoanalytical comprehension, is “equivocal”, as the drive to self-subjection “which in some way aims at pleasure is at the same time the wish to subject others to oneself”³⁵. This, again, leads Kelsen to the insistence that there is no “special psychology of the religious man, for in fact it is simply the psychology of social man”³⁶.

The continued insistence on the psychological parallelism is accompanied by a more complex presentation of “self-subjection under the authority of the group”³⁷. Here, equality of subjection to the authority of the group is the experience of indirect mastery, through subjection to the individual member’s chosen authority. The individual group member’s indirect authority, is not simply the acknowledgement of (common) subjection, but the authority which the individual derives from group membership. This introduces a structure of complementarity between self-subjection and exaltation of the group. Hence,

“[j]ust as the primitive at certain times, when he dons the mask of the totem animal which is the idol of his tribe, may commit all the transgressions which are otherwise forbidden by strict norms, so the civilized man, behind the mask of his God, his nation or his state, may live out all those instincts which, as a simple group-member, he must carefully repress within the group”³⁸.

The logic of this form of approach, however, is metaphorically a “stripping of masks” to reveal “men putting coercion on other men”³⁹: “this discounting of the masks, this looking through them to the naked, naturally necessary, causally determined motions of souls and bodies, is the viewpoint adopted by a scientifically orientated

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*, p. 66.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*, pp. 66-67.

³⁹ *Ibid.*, p. 67.

psychology and biology. From it one sees neither religion, nor the nation, nor the state. For these are simply the ‘masks’, the specific ideologies which arise upon the foundation of the real facts; ideal systems of value-relations or norms which the human mind creates for itself, and into whose own immanent schemes of law one must enter and install oneself, in order to be vouchsafed any of those objects that are referred to as religion, the nation, the state, etc.”⁴⁰.

The “final methodological insight” is the critique of the attempt, in the further development of psychological parallelism, to reduce the social to nature. The application of the language of cause and effect, in which “an expression of will on the part of one organism should become a cause of the behaviour of another”, is in its generality, the impossibility of a “specifically social meaning”⁴¹.

A specifically social meaning entails detaching oneself from the scientific, psychological standpoint, and attributing an independent existence to these “masks” of God and the state. This, in turn, involves the attribution of an initial coincidence of God and the state: “the national God is simply the deified nation in a personified form”⁴². The subsequent separation, exemplified by Christianity, involves the “separation of the concept of God from the national community”⁴³. In this separation is contained “a supranational God” and “a consciousness of mankind”⁴⁴. From this separation emerges “the idea of a society above the state, a community of all men which bursts the bounds of the individual state”⁴⁵. Yet, this “cosmopolitan God of Christianity” exists with the “multitude of other Gods” of other nation states. For, the co-belonging of the social and the religious is expressed in the triad people-national feeling-God. This triad provides the concluding parallel between religion and the social, and the passage to the consideration of the question and response to the theory of the state through its parallels in the theology.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*, p. 68.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

2. *The final methodological step: From psychological parallelism to the critique of knowledge*

The passage to the theory of the state and its parallels in theology, involves the transition from psychology to epistemology, in the form of a critique of knowledge. In this passage, the psychological parallelism is replaced with parallelism in “the abstract idea of the unity of this order [which] seeks an intuitive expression for itself in the anthropomorphic mental aid of personification”⁴⁶. The transition from a parallelism established by psychology to one established by a critique of knowledge reflects the effect of the preceding engagement with Vaihinger’s *Die Philosophie des Als Ob*⁴⁷ in Kelsen’s article, of 1919, entitled “*Zur Theorie der juristischen Fiktionen*”⁴⁸. Kelsen adopts a qualified acceptance of Vaihinger’s notion of a fiction in which the central importance of this notion, for a critique of knowledge, is recognized while insisting upon the requirement for a more refined and precise formulation of the Vaihingerian notion of a fiction, as a specifically ‘legal fiction’, within the field of law.

The connection between “*God and the State*” and “*Zur Theorie der juristischen Fiktionen*” derives from the first part of “*Zur Theorie der juristischen Fiktionen*” in which Kelsen specifies the character and operation of the ‘legal fiction’ in a science or theory of law⁴⁹. This character and operation, within a theory of law, is to be “clearly distinguished” from that which underlies the fictions utilized by “the legislator and by those who apply the law”⁵⁰. For, it is within a theory

⁴⁶ *Ibid.*, p. 69.

⁴⁷ H. VAIHINGER *Die Philosophie des Als Ob. System der theoretischen, praktischen und religiösen Fiktionen der Menschheit auf Grund eines idealistischen Positivismus. Mit einem Anhang über Kant und Nietzsche*², Felix Meiner Verlag, Leipzig, 1913. This is the edition to which Kelsen refers rather than the 3rd Edition of 1918.

⁴⁸ H. KELSEN, *Zur Theorie der juristischen Fiktionen. Mit besonderer Berücksichtigung von Vaihingers Philosophie des Als Ob*, in *Annalen der Philosophie und philosophischen Kritik*, I, 1919, pp. 630-658. All references are to the French translation, in C. BOURIAU, *Les Fictions du Droit. Kelsen, lecteur de Vaihinger*, ENS Editions, Paris, 2013, pp. 59-85. The pagination of the German original will be cited afterwards.

⁴⁹ H. KELSEN, *Zur Theorie der juristischen Fiktionen*, pp. 60-67 and pp. 630-638.

⁵⁰ *Ibid.*, p. 67 and p. 638. The italics are those of Kelsen (English translation by Peter Langford).

of law that the Vaihingerian notion of a fiction can be held to inform the emergence and existence of specifically legal fictions. The Vaihingerian notion of a fiction, as an object created by the imagination, is an essentially heuristic device which enhances the comprehensibility of a particular field of knowledge⁵¹. The fiction, therefore, has a distinct status, as means of cognition which is continually open to the risk of being confused with an object of cognition. It is this risk – hypostatization – which a theory of knowledge both recognizes and seeks to limit by insisting upon the maintenance of fictions strictly within the parameters of a *means* of cognition. The theory of knowledge becomes a critique of knowledge to the extent that a particular field, or a particular fiction within a field, is subject to a lack of clarity over the status of fictions.

In “God and the State”, Kelsen emphasizes that the critique centres upon the confusion “between a means and an object of cognition” in which “the personification is hypostatized, i.e., what was merely a tool for grasping the object is taken for a real object; but in this way the object of knowledge is duplicated, and hence is created the pseudo-problem of the relationship of the two entities, where at bottom only the unity of one and the same object should come to be expressed”⁵².

In application of this critique to the personification of the state, the state is to be understood as “merely the personification of an order: the legal order”⁵³. For Kelsen, “the object of legal cognition is only the law and nothing but the law, and to conceive the state legally – which is the purpose of constitutional law theory (*Staatsrechtslehre*) – can only mean to conceive the state as law”⁵⁴. If the personification of the state assumes the form of hypostatization, then, for Kelsen, the theory of state produces “exactly the same

⁵¹ The shaping of Vaihinger’s notion of fictions by the wider neo-Kantian orientation of his thought is to be sought in the particular interpretation of Kant’s *Critique of Pure Reason* which Vaihinger offers in the two volumes of his *Kommentar zu Kants Kritik der reinen Vernunft* published in 1881 and 1892 respectively (both volumes were then published together in a single volume: H. VAIHINGER, *Kommentar zu Kants Kritik der reinen Vernunft*, Union Deutsche Verlagsgesellschaft, Berlin-Leipzig-Stuttgart, 1922).

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*, pp. 69-70.

problem – or pseudo-problem – situation as in theology”⁵⁵. The “existence of a supernatural God above and beyond the universe”, thus finds its parallel in “the transcendence of the state vis-à-vis the law, in the existence, or more exactly the pseudo-existence, of a metalegal, supralegal state”⁵⁶.

The parallelism is evident in the notion of state sovereignty – “If the sovereignty of the state is interpreted as a power, so power it is likewise which every theology declares to be the essence of its God, and which, exalted to absolute omnipotence, is also proclaimed of the state”⁵⁷. This omnipotence has, initially, a normative sense – “the legal order can incorporate any desired content” – but has the tendency to proceed to naturalization: “to confuse the power of the state, which as a legal power is a potential for validity, with a natural source of efficacy, a psycho-physical force”⁵⁸. From the epistemological perspective of legal cognition, “two mutually distinct and independent systems, God and the world, the state and the law, make their appearance within one and the same sphere of knowledge, whereas the inherent tendency of all knowledge is towards systematic unity”⁵⁹.

This perspective enables the difficulty or problem to be conceived as “the common pseudo-problem of the relationship between a system and its hypostatization (a relationship being conceivable only *within* the system)” with the same “solution”⁶⁰. The “solution” entails the notion of “self-limitation and self-obligation” of God and of the state⁶¹.

The separation of law and state is situated within a unity by the transformation of “a logical postulate” “into a political postulate”⁶². In this transformation, the notion of unity is transformed from that of necessity to that of contingency – historical development with its conclusion in “the modern constitutional state”⁶³. For Kelsen, unity

⁵⁵ *Ibid.*, p. 70.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, p. 71.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*, p. 72.

⁶⁰ *Ibid.*, p. 73.

⁶¹ *Ibid.*

⁶² *Ibid.*, p. 75.

⁶³ *Ibid.*

can only be conceived “as a conceptual reality, independent of all historical development, the union of state and law can be no historical fact, and every state, even the absolute police state, must be a legal order”⁶⁴.

The dualism of state and law is both “a contradiction in the logical systematic sense and the source of a political-legal abuse”⁶⁵. At this level, “it becomes the dualism of two different and mutually contradictory norm-systems, of which one, under the names of ‘state’, reason or interest of state (also public welfare, public ‘law’), is then repeatedly brought to bear whenever the other, namely ‘positive’ law, leads to a consequence unwelcome to the rulers, who are in truth identical with this ‘state’”⁶⁶.

Here, for Kelsen, the question of imputation arises. The question of the nature of the state, from the perspective of legal cognition, becomes “under what conditions is a human action (and only the acts of individuals are initially there to be explained) to be attributed, not the agent himself, but to an entity, the state, conceived to be ‘behind’ him, under what conditions are human acts to be interpreted as acts of state?”⁶⁷

For legal cognition, “the criterion for ascription to the state can only be a legal one”⁶⁸. Hence, an individual action can be comprehended as an action of the state if and only if “it is qualified in a specific manner by a legal norm, [and, therefore,] if decreed in the system of the legal order”⁶⁹. Imputation, as legal cognition of an individual action as an action of the state, “is simply an expression for the unity of this order, the legal order. To apprehend an act legally, especially an act of state, is to apprehend it as a determinately qualified content of the legal order”⁷⁰.

Legal cognition, in its separation from politics, and, in particular, through the notion of imputation, reveals that those acts “not covered by the legal order” and ascribed to the state as “an order differ-

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, pp. 75-76.

⁶⁷ *Ibid.*, p. 76.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

ent from the positive legal one” must then construe “law out of non-law, and a legal act out of a naked act of power”⁷¹. The possibility of unity – as “the juxtaposition of two systems independent of each other” – “an excursion beyond nature”, “a supernatural order of the divine will beyond nature”, reveals the parallelism in method of theology and of state-theory⁷². For Kelsen,

“the method of state-theory, which, with its supralegal system of a meta- or supra-legal state distinct from the system of law, endeavours to render the legally unintelligible intelligible nonetheless – in a legal manner – and to secure belief in a legal miracle, exactly as theology does with a natural one”⁷³.

The revelation that this “other-than-legal-state” is “merely the expression of certain political postulates extending beyond the positive legal order”, then leads to the further parallelism of the presence of wrong within the “unitary person of the state”⁷⁴: the simultaneous capacity for the state to will “both law and its negation”⁷⁵. This introduces the parallelism with the theological problem of theodicy: “How can God, whose will is goodness, will sin and evil? And yet evil, too must be ascribed to Him, for nothing is possible without His will”⁷⁶.

The final parallelism is revealed in “the relationship between *God and man*, or *state and individual*”⁷⁷. Here, the presence of man as a soul – “a spiritual being”, “made in the image of God”⁷⁸, finds its parallel, in the “person” of the “a specifically legal entity” created “after the image of the state”⁷⁹. For Kelsen, it is “the aim of religious and political thinking alike to restore unity between the two opposite poles, and to portray their duality as really a unity”⁸⁰, and this parallelism of aim is reflected in a parallelism of ‘solutions’:

⁷¹ *Ibid.*, p. 77.

⁷² *Ibid.*, p. 78.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*, p. 79.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*, p. 80.