

# Kelsen's Realistic Theory of Modern Democracy

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## Abstract

Hans Kelsen and his work are sometimes associated with a sort of idealist way of conceiving politics and with a general indifference toward the issue of values. The objective of this essay is instead to address his democratic theory – as it was developed between the 1920s and 1950s – by identifying the realistic elements of his reflection and thus showing how such elements are functional to developing a procedural view of democracy with a real value content.

## Keywords

Democracy, realism, parliamentarism, freedom, tolerance

## Kelsens realistische Theorie der modernen Demokratie

### Zusammenfassung

Hans Kelsen und sein Werk werden manchmal mit einer Art idealistischer Politikauffassung und einer generellen Gleichgültigkeit gegenüber der Wertefrage in Verbindung gebracht. Das Ziel dieses Aufsatzes ist es vielmehr, seine Demokratietheorie – wie sie zwischen den 1920er und 1950er Jahren entwickelt wurde – zu thematisieren, indem die realistischen Elemente seiner Reflexionen identifiziert und damit gezeigt werden, wie funktional diese Elemente für die Entwicklung einer prozeduralen Sicht der Demokratie mit echtem Wertegehalt sind.

### Schlüsselwörter

Demokratie, Realismus, Parlamentarismus, Freiheit, Toleranz

The author has declared that no competing interests exist.

## 1. Appearances can be Misleading

Hans Kelsen and his work are sometimes associated with a sort of idealist and abstract way of conceiving politics at its many pivotal points. His pacifism, for example, has been identified too easily and too quickly with a form of idealist “legal cosmopolitanism” based on the primacy of international law and culpably indifferent toward what today we call “world diversity” (Zolo 2002, 138-142; Hathaway-Shapiro 2018, 296-297). Similarly, his procedural view of democracy has been traced back to his formalist legal theory as it seems to emerge from the influential interpretation of Kelsen's work provided by Norberto Bobbio (for example Bobbio 1999).<sup>1</sup> What I want to stress here is that, in my opinion, the realistic component of his political thought and democratic theory deserves to be emphasized more. This is the objective of this essay.

It is indeed interesting to notice that most of Kelsen's writing on democratic theory implied a sort of “dialogue” with his time and with specific historical-political transformations, which embodied, in his eyes, tangible challenges for democracy and its principles (Olechowski 2020). This becomes evident from his early articles on which voting system to adopt in Austria after the collapse of the Habsburg Empire to his “Foundations of Democracy” (1955), in which he criticized the movement of neo-jusnaturalism and its project of a Christian-oriented kind of democracy, as well as from the first edition of *Vom Wesen und Wert der Demokratie* (1920), addressing the Bolshevik system, to its second edition (1929), counter-replying to the Austrian conservatives' plan in favor of a professional kind of representation.

My intention is to argue how Kelsen developed a *realistic* theory of modern and representative democracy, assuming a specific concept of people and society, which was anything but idealistic, or worse, naïve. In this essay, I will use the word “realistic” with the specific meaning used in the history of political thought. I will show how – in line with the realistic tradition of thought from Niccolò Machiavelli onwards – Kelsen identified a hiatus between “reality” and “ideal” in politics, between an ideal meaning of democracy and a real one. More precisely, the essay will be structured into two main sections: in the first part, I will investigate Kelsen's concept of real democracy – focusing on the meaning of people and parliamentary mechanisms – whereas in the second I will examine its value-dimension by arguing how the latter is connected just with the *procedural* one.

In both parts, I will seek to show how important the *realistic* argumentation is within Kelsen's reflection on the *essence* and *value* of democracy.<sup>2</sup>

## 2. In the Beginning There was Rousseau

If we ideally match the first two editions of *Vom Wesen und Wert der Demokratie* with “Foundations of Democracy” – assumed to be Kelsen's three leading contributions to democratic theory – we will immediately notice that there is a recurring figure in all of the three essays: the Geneva-born philosopher Jean-Jacques Rousseau, whom Kelsen defined as the major “theorist of democracy” (Kelsen 1920, 3). It is useful to remember that Rousseau's work was quite popular amongst some of the leading German-language intellectuals living during the post-World War I period. His political theory, and notably his concept of the “*volonté générale*,” were discussed by thinkers such as Hermann Heller and Carl Schmitt. The former looked at Rousseau's “general will” as a crucial concept for rethinking the significance of popular sovereignty within post-World War I democracies, although he distanced himself from a Rousseauian critique of minorities as a breach in the sovereign body of the people (Heller 1971, 97-98; Herrera 2013). For his part, Schmitt provided a personal and controversial interpretation of the chapter in the *Social Contract* on dictatorship in order to justify his theory of “sovereign dictatorship” (Schmitt 1921; De Wilde 2019, 1107-1124). Instead, Robert Redslob and Hugo Preuss demonstrated a critical attitude toward the Genevan thinker. If Redslob was “skeptical about the Rousseauian notion of the general will,” for Preuss Rousseau's theory of democracy was far from being a “guide for the modern world”, but rather a major source of inspiration for Jacobin fanaticism (Stirk 2002, 501-503). Such a peremptory view is totally absent in Kelsen's works.

It was precisely by returning to Rousseau that Kelsen identified the dichotomy between ideal and real democracy. For him, Rousseau's merit lay in providing a convincing definition of ideal democracy as the perfect realization of the “self-determination” principle, interpreted by Kelsen as that particular condition of full equality and freedom according to which – in politics – citizens were asked to obey laws which they directly made. In other terms, for Kelsen, Rousseau's thinking culminated in his *Social Contract*, by theorizing the creation of a specific form of democracy, the direct one, whose idea dates back to ancient Athenians (Kelsen 1920, 3-4; 1929, 154-169).

Kelsen identified the latter with “ideal democracy” and immediately compared it with the “real” one, while

<sup>1</sup> In the last years scientific scholarship has sought to develop a more articulated approach to Kelsen's proceduralism. See Vinx 2006; Baume 2012; Ragazzoni 2016; Lagerspetz 2017.

<sup>2</sup> On Kelsen's (progressive) political realism, see Schuett 2021.

arguing that the necessary and unavoidable existence of social order – intrinsically heteronomous – prevented the creation of a direct democracy (Pasquino 2018, 13–18). Kelsen stated many times that coercion, heteronomy, and thus the split between the rulers and the ruled, were inevitable. As proof, he underscored that in a real democracy, decisions could be taken only through the majority system (Kelsen 1920, 5–6; 1925, 55–58; 1929, 193–194; 1955, 282–283). In this way he was clearly advancing a *realistic* kind of argumentation, which is also relevant for comprehending his anti-Marxism (Kelsen 1923; 1926; 1941). In *Sozialismus und Staat* (1923), he reproached Marx for sketching a society without the state, i.e., for developing a philosophy with an anarchic tendency, which – for Kelsen – was present in Lenin's political theory as well (Kelsen 1923, 57). As he argued later, any anarchic idea of suppressing the state was a mere illusion, since human nature was anything but intrinsically good (Kelsen 1941; Schuett 2018, 310–311).

The impossibility of eliminating heteronomy did not, however, imply for Kelsen that the principle of “self-determination” should be put aside; rather, we should reflect on *how* such a principle could be carried out *within a modern social order* (Kelsen 1920, 4–7; Kelsen 1929, 154–158). Kelsen's distinction between ideal and real democracy did not aim to reject the former as merely unfeasible. Kelsen's *realistic* argumentation was more nuanced and refined: he did not intend real democracy as the total negation of ideal democracy, rather as the inevitable outcome of a complex social and political process by means of which people remained free and equal by respecting laws which they could not directly create. Starting from the principle according to which real democracy – unlike the ideal one – assumed a compromise between the ideal of “self-determination” and the existence of a social order, one of the main theoretical challenges was, for Kelsen, to understand how such a compromise was feasible and how it actually worked. In the first instance, Kelsen developed his reasoning by addressing the significance of the people.

### 3. From Ideal to Real Democracy

Returning to the *Social Contract*, Kelsen argued that in ideal terms the people were basically conceived as a monolithic, homogeneous entity equipped with a similarly homogeneous and well-defined kind of will (Kelsen 1920, 26–27; 1929, 159–163). He disputed the view of the people as a unitary subject, a sort of living creature possessing an autonomous and structured will. In his Habilitationsschrift of 1911, *Die Hauptprobleme der Staatsrechtslehre*, and in *Das Problem der Souveränität* (1920), Kelsen already directly attacked the traditional legal theory embodied by Carl F. von Gerber, Paul Laband,

and notably Georg Jellinek, for conceiving the State as a “legal and sovereign person”. Such a critique should be situated within Kelsen's broader redefinition of the state and sovereignty in formalist terms, i.e. the state as an order of legal norms hierarchically organized and sovereignty as the specific “quality” of that order (Kelsen 1911, 3–94; 1920, 9–47). Kelsen's critique of the so-called ideal concept of the people could thus be traced back to that complex operation of de-personalization of state and sovereignty that was partly influenced – as Kelsen admitted in 1922 – by Sigmund Freud's work. From him, Kelsen indeed learned to relate the “personification” of society, state, and God to “individual psychology” (Kelsen 1922, 141; Jabloner 2016, 331–333).

Just as there was no state equipped with a substantial, monolithic will, as if it were a “person,” a people equipped with an equally substantial, monolithic will was not conceded. Yet, this would give a partial view of the whole picture. The de-personalization of the state and the ensuing identification of the latter with a purely normative entity allowed Kelsen also to critically reconsider the political function of the legislative body. According to the traditional *Staatslehre* previously mentioned, the state had to be intended as a “legal person” with a “will” and the legislative body was nothing but a mere “organ” of the state expressing its will (Stolleis 1993). Kelsen reformulated such principles in an innovative way. The “will of the state” had to be rethought as a “center of legal imputation” (*Zurechnung*) of a series of actions that had to be classified as “actions of the state”: a series of actions that were “legally imputed” to the state, amongst which Kelsen identified the legislative process. The latter was “imputed” to the state, but its political content was determined by the legislative body (Kelsen 1911, 469–477).

In this way, the state was no longer the main political actor: it was replaced in this function by the parliament, which Kelsen defined as an “organ of the society.” The de-personalization of the state and the principle of *Zurechnung* thus appeared as two key legal conditions for rethinking the political role of the legislative organ in a different way – compared to the traditional one of late jus-positivism – while reevaluating the role of society itself, which Kelsen described as a “plural entity” (Kelsen 1911, 472).

In his Habilitationsschrift Kelsen established the connection between the legislative body and society (Dreier 1986, 41–42). I want to bring the reader's attention to one relevant aspect: Kelsen's critique of the traditional way of conceiving the state and its will – i.e., the de-personalization of both – seemed to lead to a more *realistic* view of society and its relationship with the legislative body. Kelsen re-proposed a similar kind of reasoning in his works on democratic theory, and more precisely in relation to the meaning of “the people.” For him, in real

democracy this was anything but a monolithic entity. By recalling the distinction between norms and facts, which corresponded to that between legal science and sociology, Kelsen argued that the people was a unitary entity only from a legal point of view, whereas from a concrete, empirical, and sociological perspective it was a diversified, complex, plural dimension (Kelsen 1929, 162-163).

As previously seen in the *Hauptprobleme der Staatsrechtslehre*, Kelsen identified parliament as the “place” in which the plurality of ideas, interests, and projects changed into the content of legislative acts. As a political thinker, one of his main interests was to explain how such a crucial transformation could take place and manifest itself. Kelsen's democratic theory was thus characterized by an interesting shift of focus: his major problem was not so much to reflect on *who* retained sovereign power – which had always been crucial to all classical theorists of democracy – rather on *how* laws were made, starting from one core assumption: the plural dimension of the real people.

Once he had identified the dichotomy between ideal and real democracy, Kelsen did the same for the meaning of the people. In particular, as I have tried to show, both the concept of real democracy and that of real people were strictly related to one specific institutional body, the parliament. Unlike ideal democracy, real democracy was indirect and, unlike the democratic ideal of the people, according to which the latter was a unitary subject with a unitary will, the real one was plural and diversified.

Yet, *realistically*, Kelsen argued that such a plurality could generate social conflict (Kelsen 1926, 1929; de Angelis 2009, 537). He was openly against the idea of interpreting society through the lens of Marxist “class struggle,” but this did not mean that he had an idyllic and harmonious vision of the social body. One of the challenges for him was indeed to understand how social conflict could be “mitigated.” The main solution Kelsen proposed was fundamentally the principle of “integration,” by means of which plurality as a blueprint for real people and the necessarily unitary content of laws could reconcile (Kelsen 1920; 1926; 1929; 1955). More precisely, for Kelsen it was in parliament that plurality (social, ideal, political) found a robust form of “integration,” thanks to political parties, whose importance for the functioning of real and representative democracies he always stressed greatly (Kelsen 1926; 1929; 1931; 1948; 1955; Mersel 2006, 158-181).<sup>3</sup>

Starting from a basic and again *realistic* assumption, according to which only a relatively small part of

the people, and particularly of those having political rights, participated in public life, Kelsen introduced a distinction between those who confined themselves to voting and those exercising their rights in an active way, by influencing their fellow citizens. Political parties played a crucial role in making “integration” real because they gathered together people sharing the same view, ideals, and projects while allowing them to influence public life. He looked at real democracy not only as representative but also as party-centered (Kelsen 1929, 166-173).

The implication of this is relevant in historical-political terms. Kelsen's defense of political parties – defined by him as “one of the most important elements of democracy” – was almost unique within the European post-World War I context and particularly within the German-speaking world (Kelsen 1929, 166; Jestaedt/Lepsius 2006, XXIV-XXVI). While prominent German intellectuals and jurists of the time such as Heinrich Triepel and Carl Schmitt expressed a ferocious critique of political parties' pluralism as a source of instability and fragmentation, Kelsen situated himself on the opposite side of the debate (Schmitt 1931; Triepel 1927). Contrary to Triepel, Kelsen argued that any attempt to demonize political parties instead disguised the will to delegitimize democracy and political pluralism, which, for him, were intertwined: real democracy did not imply the suppression of pluralism but rather its “integration” (Kelsen 1929, 166-170; Ooyen 2003).

At the same time, *realistically*, in 1929 Kelsen proposed to “constitutionalize” political parties to better control them because – as the German-born but naturalized Italian sociologist Robert Michels taught – every organization had an oligarchical and undemocratic inner tendency, including those parties (e.g., Socialist ones) professing ideals of equality and emancipation (Kelsen 1929, 182-184).

Yet, for Kelsen, the existence of political parties was not sufficient *per se*: he argued that an effective way to promote “integration” within the legislative body was to adopt the proportional voting system. In his opinion, it had a great advantage in terms of “integration” of plurality: unlike the pure majority voting system, the proportional system would provide a multifaceted and broad political representation, which would thus imply a similarly articulated representation of political minorities. In this way, the majority would be unable to impose laws as “Diktate”, i.e., as mere expression of its own will, and the process of “integration” would thus be improved because a dialectic relationship between the majority and the minority would be established (Kelsen 1920, 10; 1929, 174-178).

Here, in my opinion, the point is not so much whether or not Kelsen's stance in favor of proportional voting was politically shareable or not but rather to reflect on

<sup>3</sup> Yet, it is important to observe that, for Kelsen, the principle of majority itself represented also a first, very basic form of “integration” because at least the result was that the majority of the people did not feel the burden of heteronomy particularly oppressive (Kelsen 1920, 6-10; 1929, 193-196).

the particular argumentation he developed about both “integration” and the proportional system. So far, I have situated Kelsen's concept of “integration” mainly within a major framework, that of the passage from ideal to real democracy. There is, however, another element to take into account: a sort of *inner tension*, underpinning Kelsen's political thought, toward the ideal of democracy. As previously observed, the latter was based, for him, on the principle of “self-determination”, which assumed the perfect identity between those making the laws and those obeying them, i.e., between the rulers and the ruled, and which *realistically* clashed with the heteronomous nature of real social order. Yet – as he stated – this did not imply getting rid of such a principle but rather thinking on how to get closer to it within a real democratic system. For him, the key was to soften the burden of heteronomy, which – in other words – meant, softening the hiatus between the will of those ruling and the will of those obeying. In his view, one of the key solutions was to make “integration” within the parliament truly effective, capable of generating laws, which had to be the outcome of *compromises* between the majority and the minority rather than the imposing of the former's will on the latter's. The proportional voting system providing a strong voice to minorities could thus contribute to such a result (Kelsen 1920, 4-10; 1929, 162-180). A sort of subtle tendency towards unanimity has been seen behind Kelsen's argumentation in favor of this particular voting system (Ferrajoli 2017, 221-225).

Although interesting, such an interpretation seems to undervalue the point that, for Kelsen, one of the recognized scopes of the proportional system was to provide minorities with strong representation as one of the basic conditions for granting them protection against the “tyranny of the majority” (Kelsen 1920, 9-10; 1929, 174-178). This argumentation is traditionally liberal and liberal-democratic (Fawcett 2014), and thus far from any concern that unanimity had to be achieved. The issue of minority protection also represented one of the core elements of divergence between Rousseau and Kelsen as theorists of modern democracy. Whereas the former looked at any minority as a dangerous breach in the sovereign body and thus in the general will (Douglass 2013, 742-744), the latter considered the presence of minority/ies as an integrative part of a democratic government.

In my opinion, Kelsen's positive view of the minority, which might have been influenced by the fact that Kelsen was raised in the multi-ethnic Austro-Hungarian Empire, was coherent both with his pluralist conception of people and with the idea that the main political challenge was to consider how to preserve and politically integrate plurality rather than to neutralize or eliminate it. This was also one of the main reasons behind the popular dispute between Kelsen and

Schmitt on the *Hüter der Verfassung*. Kelsen theorized the constitution as the supreme “compromise” amongst a plurality of projects and ideals, whereas Schmitt looked at the constitution as the expression of the sovereign people's will, given as homogeneous and monolithic. They elaborated two completely different concepts and definitions of constitution assuming – amongst other things – a likewise completely different approach to the principle of pluralism. Kelsen thus proposed a theory of real democracy starting from two core distinctions: that between ideal and real democracy and that between ideal and real people. Both real democracy and real people had, for Kelsen, a so-to-speak plural implication: “real people” was intended as a plural dimension and real democracy was that kind of government in which just social, ideal, and political pluralism could be integrated through the parliamentary mechanism. On the contrary, Schmitt strongly criticized pluralism, and notably party-pluralism, as a threat to political unity and stability (Kelsen 1929, 63-64; Schmitt 1931, 141-158; Kelsen 1931, 14-56).

A plural conception of the people, political “integration”, the centrality of political parties, and the dialectic between the majority and the minority emerged as core aspects of real democracy in Kelsen's reasoning. I have sought to stress how Kelsen identified such elements developing a fundamentally *realistic* kind of argumentation. This – as I am going to argue in the next section – is relevant to understanding the value-dimension of his theory too.

#### 4. Real Democracy and its Value-dimension

As I suggested at the beginning of the article, Kelsen's democratic theory was grounded in historical and political reality. Many of Kelsen's writings had declared political targets, i.e., a political ideology, a political system, a political personality or thinker and most importantly – at least for me – they had a direct connection with their historical time.

In the first edition of *Vom Wesen und Wert der Demokratie* Kelsen admitted that his purpose was to reason on real democracy in controversy with the Bolshevik and Soviet experiment (Kelsen 1920, 1-2). In the second edition, his attention shifted from the Bolsheviks to the Austrian situation, characterized by the growth of conservative forces whose aim was to adopt a professional kind of representation against the political and parliamentary one (Kelsen 1929, 153-154). Some years later, in 1932, he directly addressed the problem of the dying Weimar democracy in *Verteidigung der Demokratie*. In 1937, three years before leaving Europe, he published another essay entitled *Wissenschaft und Demokratie*, in which he compared the US with Europe

in terms of scientific and research freedom, arguing that the latter could find no room in countries such as Germany, Austria, and Italy, where the power was in the hands of a dictatorship (Kelsen 1937, 244-247). Even his last important work on democratic theory, "Foundations of Democracy" (1955), which was published when Kelsen was already in the US, was no exception in this sense. Here Kelsen again targeted the Soviet regime, within a context characterized by Cold War logic, and criticized a series of coeval intellectuals – from Jacques Maritain to Eric Voegelin – whose political theories were, for him, controversial if used to interpret democracy as a form of government and as a form of coexistence (Kelsen 1955, 307-335). During the post-World War I period, Kelsen identified two major challenges for democracy; the first was the Bolshevik Revolution and the second was the growth of authoritarian right-wing movements. The Bolsheviks and Lenin claimed the creation of a true democracy, based on the Soviets, whereas the reactionary wing of the European bourgeoisie pushed for dismantling parliamentary democracy and the principle of political representation in favor of an authoritarian system (Kelsen 1920; 1929).

With regards to Bolshevism, in the first edition of *Vom Wesen und Wert der Demokratie* Kelsen referred to Lenin's and his followers' interpretation of the Soviet system as a form of true democracy, i.e., a truly direct democracy.<sup>4</sup> Kelsen replied that the Soviets themselves were nothing but many micro-parliaments, generating an "hypertrophy of parliaments" (Kelsen 1920, 14). Kelsen believed that this was inevitable because of the complexity and intrinsic heteronomy of social order: the representative mechanism could not be overcome, not even in Russia, and this was the practical reason why, for Kelsen, the Soviet regime was far from being a direct democracy. In this way, in my opinion, Kelsen was again providing a kind of *realistic* argumentation in favor of the representative mechanism.<sup>5</sup> He argued that it, unlike the Soviet system, recognized equality of civil and political rights, which made the dialectic between the majority and the minority possible (Kelsen 1920, 12-14). What is worth stressing is not so much his evident anti-Soviet stance but the connection he established between real democracy – as previously described – and rights of freedom, starting from a *realistic* assumption about the impossibility of creating a direct democracy.

4 In particular, Kelsen referred to Lenin's *State and Revolution* (1917); see Kelsen 1920, 12-13; 1955, 256-257.

5 It was in the light of the controversy over Lenin and the Soviet experiment that – in my opinion – Kelsen defined the parliament as an "organ of the State" in 1920 instead of an "organ of society" as he did in 1911. Not because he wanted to recover the traditional legal theory and its conception of the legislative body, previously mentioned but because he wanted to stress that it was impossible to establish some sort of direct democracy, going beyond the representative mechanism and thus beyond the intrinsic heteronomy of social order (Lagi 2007, 132).

In my opinion, Kelsen ended up tracing a similar kind of reasoning in the second edition of *Vom Wesen und Wert der Demokratie*, in which he defended parliamentary representation to the hilt against another kind of political force, the reactionary one in Austria. Kelsen denounced the country's attempt to replace parliament with a corporatist/professional chamber in the name of an allegedly more efficacious representation of the people. Against such a project, Kelsen took a strong stance in favor of parliamentarism and political representation: he repeated that real democracy was characterized by an indirect creation of "political will" through the legislative body. Exactly as for his views about the Soviet system, he underscored just how that particular process assumed the provision of full rights to all citizens, all considered equal and free. The creation of professional representation, based on the division of the electoral body into different segments according to socio-economic criteria, would be a blow to exactly the democratic principle of the people as bearer of equal rights and freedoms. Behind the conservative push for a professional chamber, Kelsen also identified a threat to the role of political parties, which he considered a key factor of "integration". What made parliamentarism and political representation acceptable from a democratic perspective for Kelsen was that – as previously argued – both served to find a compromise between the sacred principles of equality and liberty on the one hand, and the existence of social order on the other (Kelsen 1929, 182-189).

Many years later, in the US, Kelsen returned to reflection on the meaning of democracy with his "Foundations of Democracy," which was published for the journal *Ethics. An International Journal of Social, Political and Legal Philosophy*. Kelsen advanced a kind of critique of the Austrian political scientist Eric Voegelin – a former pupil of his in Vienna – which echoed some core concepts already expressed in 1929. Voegelin theorized the necessity of rethinking the concept of political representation in order to prepare democracy to face the challenges of the post-war order and within a reflection aimed at rediscovering political science. In his *New Science of Politics* (1952), Voegelin identified political and parliamentary representation with an "elemental" one, which had to be integrated with an "existential one." The latter, unlike the former – as Kelsen himself stressed – assumed a strong relationship between the rulers and society as a whole, which for Voegelin was vital to carry out true democracy as a form of political organization going beyond the formal political representation based on political party pluralism (Voegelin 1952, 27-35). Where Kelsen disagreed with Voegelin was in the idea that political representation was secondary in regard to the so-called "existential one." To him, Voegelin's reasoning suggested that once established, any kind

of alleged connection between the ruler/s and the people – assuming that the former “represented” the latter, whether or not the “elemental” representation was granted and whether or not rights of freedom were provided – became fundamentally irrelevant. For Kelsen, the ultimate proof of Voegelin's indifference toward the issue of freedom was the fact that in his political theory he did not consider the distinction between party pluralism and party monism as essential for distinguishing democracy from a dictatorship (Kelsen 1955, 258-269).

Kelsen's replies discussed so far can be interpreted not only as his attempt to reaffirm a certain view of modern democracy as representative and party-based against specific targets but also as motivated by a precise (liberal) concern for the guarantee of freedom as a set of rights. To Kelsen, the Bolshevik experiment, the corporatist project, and Voegelin's theory seemed to share the same lack of interest in the provision of fundamental liberties. For him, the main challenge that they posed was exactly this: the idea of redesigning politics in contention with the representative institutions and thus with the principle of fundamental freedoms, which – as he argued – were presupposed by parliamentary mechanisms (Kelsen 1955). Moving from a *realistic* argumentation establishing that heteronomous social order was insuppressible, Kelsen ended up developing a defense of parliamentary representation and freedom rights. Freedom and equality were the two core principles underpinning democracy (both ideal and real): as seen so far, for Kelsen, real democracy maintained both, albeit transformed through representative institutions. It was exactly in the light of this that Kelsen elaborated another fundamental distinction, along with that between ideal and real democracy: that between democracy and autocracy. I think it is crucial to take the latter into account in order to comprehend the value-dimension of his democratic theory. Kelsen again adopted a clear *realistic* argumentation when he stated that in both democracy and autocracy the discrepancy between rulers and ruled was ineradicable, meaning that the burden of heteronomy was unavoidable as well. Yet, in autocracy such a gap was particularly large and evident because, unlike with democracy, there was no selection of ruler/s since there were no elections, which for Kelsen was the special method of selecting leaders from the “governed community” provided with equal fundamental liberties.

The absence of elections based on the guarantee of rights of freedom and thus the absence of a true representative system generated, according to him, a condition in which the heteronomous content of legislation would become particularly oppressive. Following his reasoning, in real democracy “how to choose” the leaders was central, whereas in autocracy

– in the absence of elections and freedoms – the main question was “who ruled,” independently of the way in which that “who” achieved and maintained power (Kelsen 1929, 210-220; 1955, 290-294).

The centrality of the “how to rule” issue immediately evokes the *proceduralist* feature of Kelsen's theory of democracy. Such a connotation characterized all of Kelsen's writings but it was strongly focused on in his “Foundations of Democracy,” where he addressed the principle of democracy as “government for” in contrast with democracy as “government by.” According to him, the former defined a political system as democratic on the basis of its ability to carry out a particular principle, value, or project; the latter, instead, by identifying the way in which political will was created.

With regard to democracy as “government for,” Kelsen discussed the Soviet doctrine with its claim of creating a just government for the proletariat, as well as neo-jusnaturalists such as Jacques Maritain, who justified democracy in the name of a “Christian divine absolute natural law,” or such as the Protestant Pastor Emil Brunner, who advocated democracy as an expression of Christian justice (Kelsen 1955, 312-315). In both cases, Kelsen argued, the ultimate legitimation of democracy relied on a scope or a principle regarded as absolute and objective. But for him, just identifying the essence of any government with its final purpose resulted in putting the issue of freedom in the background. As proof of this, Kelsen argued that from the perspective of “government for” no substantial difference between democracy and autocracy could emerge because – as so often in history – the autocrat could depict himself as the one carrying out the supreme “common good,” which in the autocrat's hands became the ideological instrument to justify and maintain his power (Kelsen 1955, 257-258). Instead, for him, assuming democracy as “government by the people” implied shifting one's attention to the way in which the people, as a plural entity made up of citizens equally equipped with the same freedom rights, participated in political life and elected their representatives. The central role was not played by identifying a supposed “common good” and therefore those who would make it real but rather by the “procedures” and “methods” by means of which electors contributed to the shaping of political will. In other words, for Kelsen, the *procedural* view – expressed in terms of democracy as “government by” – served the principle of freedom much better than any justification in terms of “government for” (Kelsen 1955, 290-294).

This aspect emerges powerfully if we take into account Kelsen's reflection on the philosophical world outlooks underpinning autocracy and real democracy. For him, autocracy was marked by a total submission of the ruled to the ruler, whose authority was indeed not determined through free elections but rather by

advocating, for example, the knowledge of some alleged absolute truth to convey to the people. Kelsen thus argued that within autocracy the prevailing philosophical *Weltanschauung* was the “absolutist” one, believing in the existence of one core truth or universally valid good to be carried out and imposed, a kind of vision that Kelsen labelled without appeal as intolerant in all of his major writings on modern democracy. On the contrary, in democracy, leaders were leaders because of free elections involving free and equal citizens. As a result of this, for Kelsen, democracy was marked by a “relativist” mindset estimating all people’s opinions as worthy of being expressed and discussed through peaceful and respectful discussion. This made democratic systems – at least on paper – a suitable space for tolerance and respect (Kelsen 1920, 31-33; 1929, 223-228; 1955, 303-306).

One might disagree with the connection established by Kelsen between absolute truth and intolerance, on the one hand, and lack of absolute truth, relativism, and tolerance on the other (Pintore 1999, 5-36). Yet, the point for me is another one: the different way of generating political will in autocracy and democracy – i.e., the procedural aspect of Kelsen’s reflection on real democracy – assumed a precise *value-dimension* because autocracy was depicted as a realm of intolerance whereas democracy is a fertile soil for a tolerant and respectful coexistence. The particular dialectic existing between the majority and the minority itself assumed for Kelsen a relativist *Weltanschauung* because only a person convinced to possess an absolute truth could remain deaf to others’ opinions (Kelsen 1955, 303-306). He believed (for his whole life) that a relativist mindset nurtured a tolerant vision of the world and politics. Tolerance and reciprocal respect emerged as the value of real democracy, presupposing – politically speaking – all citizens as equally free and – through elections and the party system – equipped with the right to select (and change) their rulers.

Kelsen’s stance in favor of tolerance, respect, and rights of freedom was clearly present in all of his writings including those published in the 1930s, when the European *Zeitgeist* was moving in the opposite direction. In this sense, one of the most emblematic of Kelsen’s work was the brief essay *Verteidigung der Demokratie*, published one year before the Nazis rose to power. The title was evocative because the word *Verteidigung* might induce one to think that Kelsen advocated some emergency measures to defend democratic institutions. Instead, after *realistically* stressing how fragile real democracy could be exactly because of its granting everyone the right of expressing their opinion, which could be exploited by non-democratic forces to achieve visibility, Kelsen refused any kind of emergency government and suspension of fundamental rights because this would signify

democracy surrendering itself. If real democracy wanted to remain as such, for Kelsen, it could not give up its *essence*, i.e., the provision of fundamental liberties to all citizens, the parliamentary system based on the dialectic between the majority and the minority, and party pluralism. It could not even give up its intrinsic *value*, tolerance, and respect (Kelsen 1932, 232-236). Such an argumentation can appear extremely controversial: a first objection might be that his idea of real democracy sounds fully realistic only if referring to relatively stable and liberal social contexts. A second objection might be that notably his defense of tolerance appears weak applied to situations of crisis. From a perspective of a “militant democracy”, Kelsen’s argumentation on tolerance would be considered dangerously idealist (Müller 2012, 1257-1258).

Instead, I propose a different kind of interpretation. In his American essay *What is Justice?* (1957), Kelsen reaffirmed again and *realistically* that real democracy could be potentially subverted from the inside. In this sense, Kelsen advanced in both essays a kind of reflection about real democracy and the potential dangers to which it could be exposed that recalls Karl Popper’s *Open Society and its Enemies* (1952).

Yet, most importantly, in 1957 Kelsen openly declared that living in a democratic system implied being ready to face the “risks” that such a complex form of government and coexistence could encounter. If real democracy means the selection of rulers from free and equal citizens, the latter had to be responsible for this. For me, Kelsen was *realistically* appealing to the citizens’ sense of responsibility – rather than some special guardian of the constitution – as a method to protect a democratic system without giving up its *essence* and *value* (Kelsen 1957, 22-24).

The centrality of such a principle within Kelsen’s work and life is clearly testified to in a brief and dense essay, dating back to 1913, *Politische Weltanschauung und Erziehung*. Here the legal theorist emphasized the importance of developing a robust education in democracy and its institutions and functioning as a way to make it prosper, while cultivating responsible and conscious citizenship (Kelsen 1913). Also, consistent with this view, Kelsen himself was a member, for example, of the “Wiener Volksbildungsverein”, established in 1887, whose purpose was to spread scientific and artistic knowledge across diverse social groups, notably those who had more limited access to a good education (Ehs 2009, 81-95). In my opinion, the challenge for Kelsen was not so much to identify special measures to protect democracy in times of crisis but rather to reflect on how to make it work properly. I have mentioned two key potential objections to Kelsen’s stance, but as far as my essay is concerned, I have sought to identify some (for me) crucial aspects of this “how”.



Kelsen was thus anything but an intellectual detached from reality. I have tried to show how his democratic theory itself, which can be seen in some crucial aspects as a response to actual, historical-political challenges and figures, was characterized by a *realistic* form of argumentation, representing, for me, an interesting aspect of his thought.

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