

# Hans Kelsen and the Natural Law Tradition

*Edited by*

Peter Langford

Ian Bryan

John McGarry



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# Against Natural Law: The Political Implications of Kelsen's Legal Positivism

*Sara Lagi*

## Abstract

In 1955, Hans Kelsen published an essay, entitled *Foundations of Democracy*, where he defined his conception of democracy through a critique of the democratic theology of Christian inspiration, represented by three prominent thinkers – Emil Brunner, Karl Niebhur and Jacques Maritain who, for Kelsen, embodied the resurgence of a neo-jusnaturalism. In response to their theories, posing democracy as a problem of justice and conformity to “superior, universal values”, Kelsen elaborated and defended the interconnectedness between relativism, freedom and a positivist conception of law as the central components of modern, parliamentary democratic systems based upon individual responsibility and the respect for fundamental liberties.

## 1 Introduction

In this chapter, I will address Kelsen's critique of the Natural Law tradition through the perspective of the history of political thought. This means, therefore, that I will seek to explain the political connotation of Kelsen's systematic and coherent refusal of any form of natural law, while devoting particular attention to the interconnections between such refusal and his theory of democracy. From this perspective, I decided to focus upon Kelsen's final relevant work devoted to political theory, entitled “Foundations of Democracy”, published in the journal, *Ethics*, in 1955. This decision to concentrate upon Kelsen's “American work”, derives from the characterization of this substantial article as the “summa” of his political theory of modern and representative democracy.<sup>1</sup>

The chapter will be structured into two main sections. The first part will be focused on Kelsen's critique of Natural Law included in the “Foundations of Democracy”, with a specific concentration, within this critique, upon his

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<sup>1</sup> Hans Kelsen, “Foundations of Democracy”, *Ethics* 66, no. 1 (1955): 1–101.

critical engagement with the so-called “democratic theology”;<sup>2</sup> represented by three prominent thinkers: Emil Brunner (1889–1966), Karl Reinhold Niebhuur (1892–1971) and Jacques Maritain (1882–1973). In the second part, I will seek to delineate and highlight the interconnections between this aspect of the critique and Kelsen’s idea of modern democracy and democratic spirit.

The “Foundations of Democracy” – written and published when Kelsen already lived in the U.S.A. – represents his last, significant contribution to political theory and theory of democracy, a contribution in which he investigated the *essence* and the ultimate *value* of democracy. Thus, despite the predominant categorization of this work as distinctly “American”, I think that a perfect continuity does exist between the “Foundations of Democracy” and the work which Kelsen undertook, while in academic positions in Universities in pre-WWII Europe. In the two editions of *Vom Wesen und Wert der Demokratie* (*Essence and Value of Democracy* 1920 and 1929) as well as in the “Foundations of Democracy”, Kelsen addressed the meaning of political representation, the persisting divide between “rulers” and “ruled”, the split between “ideal” and “real” democracy, and that between democracy and autocracy, the protection and guarantee of fundamental rights as a prerequisite of every democratic system and the idea of relativism and tolerance as central components of modern democracy.<sup>3</sup>

From the interpretative framework of the history of political thought, Kelsen’s theory of democracy, as it took shape and developed between the 1920s and the 1950s, was *realistic* in the sense that he sought to explain the split between political reality and ideology;<sup>4</sup> it was *procedural* because he considered real democracy as a means by which political decisions could be made; it was *liberal and pluralistic* from the enduring concern to ensure the protection of minorities; *tolerant and relativistic* from the refusal of every form of ideological, political, religious absolutism.<sup>5</sup> If we take into consideration the “American work” on the “Foundations of Democracy”, we can immediately observe

2 This is the term Kelsen used in his “Foundations of Democracy” to indicate Maritain, Niebhuur and Brunner.

3 Hans Kelsen, *Vom Wesen und Wert der Demokratie*, (Tuebingen: J.B.C. Mohr, 1920), 3–38; Hans Kelsen, *Vom Wesen und Wert der Demokratie, Zweite, umgearbeitete Auflage*, (Tuebingen: J.B.C. Mohr, 1929), VII, 1–119.

4 Here, I am using the term “realistic” with a deliberate reference to the late nineteenth century Italian tradition of realism, embodied and promoted by authors such as Gaetano Mosca, Vilfredo Pareto, and the German, but naturalized Italian, Robert Michels. Kelsen displays evident familiarity with these prominent thinkers, as is indicated by the references to, and quotations from, their work included in both editions of *Von Wesen und Wert der Demokratie*.

5 Mauro Barberis, “Introduzione”, in Hans Kelsen, *La democrazia*, (Bologna: Il Mulino, 1998, Italian Translation of Kelsen, *Vom Wesen und Wert der Demokratie*, 1929) 23.

that the idea of tolerance and relativism as central characteristics of modern democracy is strongly tied to Kelsen's discourse on and against natural law.

In the first edition of *Vom Wesen und Wert der Demokratie*, Kelsen criticized Lenin and Bolshevism, in the second edition of the same work he opposed the proto-Fascist reforms of democratic parliamentary and electoral systems. In the "Foundations of Democracy" he continued to attack the Bolshevik-Soviet system, which he considered the most serious threat to modern democracy, while analysing thinkers he personally considered a type of twentieth century version of the Natural Law Tradition: the Christian theologians Emil Brunner, Karl Niebhur and Jacques Maritain.<sup>6</sup> Even though these three prominent intellectuals belonged to different Christian denominations, all of them shared, according to Kelsen, the same faith in the principle of justice and the same mistrust toward positive law.<sup>7</sup>

Here, I exclusively focus on Kelsen's interpretation of these three authors' theory of democracy and justice in order to show *how and to what extent* such interpretation reflects Kelsen's opposition to natural law and his idea of democracy. From the viewpoint of the history of political thought, the "Foundations of Democracy" was published at period characterized in the U.S (but also beyond it) by an intense debate about the nature of post-WWII democracy, which was inextricably connected to the determination of the moral and political responsibilities for the emergence and development of totalitarianism and the Holocaust.<sup>8</sup> In their interventions, Brunner, Niebhur and Maritain attributed moral and political responsibilities to the combination of secularism and rationalistic positivism for the emergence of the phenomenon of totalitarianism. For, secularism and positivism entailed the recognition and promulgation of an extreme relativism, which effectively entailed the rejection of any principle of justice.<sup>9</sup>

6 Kelsen, "Foundations of Democracy", 40–62.

7 Despite this common Christian origin of these theories of natural law, Brunner and Niebhur were both Protestant, with an overtly critical attitude towards Catholicism and the Catholic tradition of Natural Law, whereas Maritain was Catholic.

8 Barberis, "Introduzione", 23 ff.

9 Emil Brunner, *Gerechtigkeit: Eine Lehre von der Grundgesetzen der Gesellschaftsordnung*, (Zürich: Zwingli-Verlag, 1943); Karl R. Niebhur, *The Children of Light and Children of Darkness: A Vindication of Democracy and a Critique of its Traditional Defense*, (New York: Charles Scribner's Sons 1950); Jacques Maritain, *Christianisme et démocratie*, (Paris: Paul Hartmann, 1947). On the development of Brunner's protestant theology, see David A. Gilland, *Law and Gospel in Emil Brunner's Earlier Dialectical Theology*, (London: Bloomsbury, 2013). On the wider question of the conception of natural law in Brunner, see Ivar H. Pöhl, *Das Problem des Naturrechtes bei Emil Brunner*, (Zürich-Stuttgart: Zwingli Verlag, 1963). On the question of the relationship between Niebhur's protestant theology and the conception of human nature and history, see Scott R. Erwin, *The Theological Vision of Reinhold Niebuhr's "The Irony of*

To Kelsen, Brunner, Niebhuur and Maritain perfectly embodied the Christian natural law tradition applied to politics, and more, particularly, democracy. Kelsen wrote:

I intend to present in the following a critical analysis of the main ideas of these writers, not only in order to demonstrate that Christian theology, too, can justify democracy only as a relative value, but also – and in the first place – to examine the claim of theology that it furnishes a foundation for democracy which it attempts to verify by showing that there is an essential connection between democracy and Christian religion.<sup>10</sup>

Under the “guise” of a neutral-scientific discourse, Kelsen sought to give a *political response* to Brunner, Niebhuur and Maritain in defense of the continued viability and legitimacy of a *positivistic and relativistic* conception of democracy.

## 2 Against Christian Natural Law: Kelsen’s Critique of Brunner, Niebhuur and Maritain

The first of the three authors Kelsen subjected to critical analysis was the Swiss Protestant Theologian Emil Brunner whose *Gerechtigkeit: Eine Lehre von der Grundgesetzen der Gesellschaftsordnung*, published in 1943, was orientated by the political objective to establish the superiority of a theory of Christian natural law in comparison to theories of positive law.

Kelsen presented Brunners’ conception of justice as one composed of two stages. First, the vague sense of, and demand for, justice which is, to Brunner, present throughout history. It is the systemization of this vague sense, through the application of Christian theology which transforms it into a transhistorical

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*American History*: “*In the Battle and Above It*”, (Oxford: Oxford University Press, 2013). On the genesis and development of the wider protestant theological movement in which Niebuhr participated, see Heather A. Warren, *Theologians of a New World Order: Reinhold Niebuhr and the Christian Realists, 1920–1948*, (Oxford: Oxford University Press, 1997). On the connection between Maritain’s interpretation of Catholic theology and politics, see Guillaume de Thieulloy, *Le chevalier de l’absolu: Jacques Maritain entre mystique et politique*, (Paris: Gallimard, 2005). On the connection between Maritain’s Catholic theology and the conception of modernity, see Michel Bressoulette and René Mougel, eds., *Jacques Maritain face à la modernité: Enjeux d’une approche philosophique*, (Toulouse: Presses Universitaires du Mirail, 1998). On the position of Maritain in the wider renewal of Catholic thought, in France, originating in the 1930s, see Charles Coutel and Olivier Rota, eds., *Deux personnalités en prise avec la modernité: Jacques Maritain et Emmanuel Mounier*, (Arras: Artois Presses Université, 2012).

<sup>10</sup> Kelsen, “Foundations of Democracy”, 41.



or eternal principle.<sup>11</sup> This, in turn, constitutes the Christian tradition whose collapse and marginalization is, for Brunner, to be located in the nineteenth century with the ascendancy of a juridical conception of justice. Kelsen inserted this significant quotation from *Gerechtigkeit: Eine Lehre von der Grundgesetzen der Gesellschaftsordnung*:

[It was] the positivism of the nineteenth century, with its denial of the metaphysical and superhuman, which dissolved the idea of justice by proclaiming the relativity of all views of justice. Thereby the idea of justice was stripped of all divine dignity and law abandoned to the vagaries of human will. The view that justice is of its nature relative became the dogma of the jurists.<sup>12</sup>

After addressing the substantial difference between natural and positive law, Brunner identified natural law as a supreme criterion for politics and positive law. According to Brunner, natural law included the Christian idea of justice which entailed the preservation of individual independence within a system under the rule of God. Submission to God was freedom, and every freedom, so Brunner stated, was derived from the order of divine natural law.<sup>13</sup> In response to Brunner, Kelsen observed that conceiving natural law as a criterion for positive law was contradictory for he indicated that the notion of a natural law, as an immutable law, confronted the difficulty of furnishing an eternally enduring criterion for human and social reality which was also subject to continuous change.<sup>14</sup>

The introduction of contradiction, and, thus, incoherence in the conception of a natural law was accompanied by a critical analysis of Brunner's idea of freedom. Kelsen considered that all those freedoms which Brunner allegedly deduced from the divine order of creation had to be correctly considered as negative freedoms, constituting restrictions of the government.<sup>15</sup> From this classification, Kelsen then proceeds to indicate that the origin of law, in this conception of natural law, is unable to articulate a notion of positive freedom – the “democratic freedom”. For Kelsen, this incapacity and indifference is to be attributed to Brunner's understanding of democracy, which only acknowledged democracy to exist when the laws which it promulgated and upheld

11 Ibid. Kelsen was quoting from Emil Brunner, *Justice and Social Order*, (London and Redhill: Lutterworth Press, Harper and Bros., 1945), the English translation of Brunner, *Gerechtigkeit: Eine Lehre von der Grundgesetzen der Gesellschaftsordnung*, 1943, 15 ff.

12 Brunner, *Justice and Social Order*, 15, in Kelsen, “Foundations of Democracy”, 41.

13 Kelsen, “Foundations of Democracy”, 50 ff.

14 Ibid.

15 Ibid., 53.

were the expression and application of principles of justice.<sup>16</sup> Kelsen quoted from *Gerechtigkeit: Eine Lehre von der Grundgesetzen der Gesellschaftsordnung*:

The so-called representative of the people should not decide what their electors want, but what is right. And this is precisely what the truly democratic citizens expect of them. The same is true of the government. It has not to do with what the people want but what is right. In actual fact it ought not even to do what the legislative body wants; it has to do justice, to do the right thing. In a genuine democracy with a responsible government, the government does not first consider the will of the people, but the weal of the people, justice.<sup>17</sup>

For Kelsen, such a definition of democracy was not significantly different from that of Soviet doctrine in which true democracy was a government for the good *of* the people rather than *by* the people. This indication of this parallel enabled Kelsen to proceed to demonstrate that: “the only point in which we are interested here is the fact that this doctrine – presented as a result of theological considerations – is neither a theoretical basis nor a political vindication of democracy. It may rather serve anti-democratic tendencies”.<sup>18</sup>

The second Christian thinker whom Kelsen subjected to critique was Karl Reinhold Niebhur, and in particular, his *Children of Light and Children of Darkness*. The American Protestant theologian promoted the idea that post-war politics needed to be refounded upon the basis of justice; and he shared, with Brunner, a deep mistrust toward positivism (both legal and political) but, in contrast to Brunner, his form of Protestant theology refused to accord to natural law the status of an absolute value. For, Niebhur’s theology consciously accepts its presence within a plurality of other approaches.<sup>19</sup> Hence, natural law, while comprised of purer principles than those of positive law, because of its ultimate source in Christian religion, is accompanied by the recognition that

there is no historical reality, whether it be church or government, whether it be the reason of wise men or specialists, which is not involved in the flux and relativity of human existence; which is not subject to error and sin, and which is not tempted to exaggerate its errors and sins when they are made immune to criticism.<sup>20</sup>

16 Ibid.

17 Brunner, *Justice and Social Order*, 191, in Kelsen, “Foundations of Democracy”, 53.

18 Kelsen, “Foundations of Democracy”, 53.

19 Ibid., 55.

20 Niebhur, *The Children of Light and Children of Darkness: A Vindication of Democracy and a Critique of its Traditional Defense*, 91, in Kelsen, “Foundations of Democracy”, 57.

The distinctive theological approach of Niebhur, for Kelsen, is undermined rather than strengthened by the recognition of relativism. The effect, for Kelsen, is a theology in which:

Niebhur carefully avoids referring to an absolute justice. He does not speak of the justice of natural law in its relation to positive law in terms of superlatives. He says only that the principles of natural law are more immutable and purer than those embodied in the obviously relative positive laws. But if natural law is only more immutable than positive law and hence mutable and not absolutely immutable then it is relative too. And if both are mutable then the question arises why the one is more and the other less mutable and pure; and to this question there is no answer in a relativistic philosophy of justice such as that presented by Niebhur.<sup>21</sup>

In Niebhur's theory Kelsen identified a fundamental incoherence arising from a theological juxtaposition of the conception of a natural law as a set of purer principles or criteria which underlie positive law and the refusal of a conception of absolute justice; a juxtaposition which – in Kelsen's opinion – led to a "relativistic jusnaturalism" which was contradictory *per se*. For Kelsen:

If the only principles of justice or natural law known by man [...] are those expressed in historical statements, and if these statements are subject to amendment because subject to error and sin [...] then there is no difference between Niebhur's philosophy and the relativistic moral theory which he rejects for the reason that it does not appeal to natural law as a plausible criterion for positive law.<sup>22</sup>

This indistinction between Niebhur's theology and relativism, revealed by Kelsen's critique, was the logical consequence of a political theory incapable of relinquishing the presupposition that systems of positive law required a "superior" principle or criterion for both their legitimacy and effectiveness.<sup>23</sup>

As Kelsen emphasized, Niebhur's theological project extended to establishing a direct connection between tolerance and religion, predicated upon the presumption that if tolerance was one of the central components of democracy, humility was the true point of contact between religion and democracy. In response, Kelsen observed that, if a government adopted a policy of tolerance

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<sup>21</sup> Kelsen, "Foundations of Democracy", 58.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid., 58 ff.

toward other religions, this decision was not determined by the religious belief in the absolute but by a rational wish to maintain peace. Kelsen, therefore, reveals Niebhur's attempt to harmonize democracy, religion and tolerance to be one which seeks to elaborate a form of religious relativism anchored in Christianity.

Thus, Kelsen's critique of Niebhur's democratic theology was double: on the one hand, he considered Niebhur's theology to represent a political theory which was an "updated", post-war version of natural law tradition, on the other hand, he rejected the attempt to establish and justify tolerance on a theological foundation because religion, which inevitably expressed absolute values, was incompatible with the spirit of tolerance which was intrinsically relativistic and anti-metaphysical.<sup>24</sup>

Although the French Catholic, Jacques Maritain, differed in both confessional and political development from Brunner and Niebhur, there was an affinity, particularly in relation to Niebhur, through the common orientation to demonstrate the necessary interrelation between Christianity and democracy. In his *Christianisme et démocratie (Christianity and Democracy)* Maritain presented a theological critique of modern democracy, based on the principles of liberalism and secularism. The critique, which characterizes this form of democracy as "bourgeois" and "God-less", situates democracy detached from God, as the precursor to the emergence and development of totalitarian regimes. The theological response of the Catholic Maritain, as with the Protestant Niebhur, was to reassert a necessary, intrinsic relation between the principles of Christian religion and democracy. For Maritain, Christianity inevitably leads beyond bourgeois, atheistic democracy to real democracy.<sup>25</sup>

Jacques Maritain was, for Kelsen, the exemplary representative, from Catholicism, of the so-called post-war democratic theology. Kelsen's approach is, therefore, also distinct from that adopted in relation to Brunner and Niebhur. Thus, Maritain's acknowledgement of the indifference of Christianity "as a religious belief" to the realm of "political life" – the separation, introduced by Christ between "the things that belong to Caesar and the things that belong to God"<sup>26</sup> – is presented as the initial obstacle to the derivation of an essential connection between democracy and Christianity.<sup>27</sup>

This detachment is continued, for Maritain, rather than resolved by the emergence and actions of the Catholic Church.<sup>28</sup> Thus, Maritain proceeds to

24 Ibid., 58–59.

25 Ibid., 62–65.

26 Ibid., 63.

27 Ibid.

28 Ibid.

seek the connection between Catholic Christianity and democracy beyond “Christianity as a religious creed and a way to eternal life”.<sup>29</sup>

It is these forms of connection which Kelsen then subjects to critical examination. The purported connection based upon “Christianity as a historic energy at work in the world”, and “the ferment of the social and political life of the people and as bearer of the temporal hope of the man”, indicates its internal contradiction.<sup>30</sup>

For, this “historical energy” of Christianity depends upon its explicit formulation as a “religious creed” in order for it to have the capacity to orient political life. However, this political orientation is already denied by the preceding separation between religious belief and political life. The purported connection between democracy and Catholic Christianity predicated upon the notion of the superior efficiency conferred upon a democracy which is Christian is also held to be untenable. This is belied, for Kelsen, by the connection between the pagan religions and the democracy of the Ancient world and the contemporary existence of democracies in non-Christian countries. The demonstration that these purported connections are inconsistent with Maritain’s position then reveals the central ground for Maritain’s connection to be a theory of natural law based upon:

a relationship between democracy and certain moral-political principles which he supposes to have the character of natural law and which he – without sufficient reason – considers to be in harmony, with the evangelical law (“*loi évangélique*”) as the specific Christian morality.<sup>31</sup>

Kelsen then proceeds to analyse the purported connection between democracy and evangelical law. In this analysis, Kelsen subjects Maritain’s theory to critical questioning predicated upon its capacity to demonstrate a passage between the real (democracy) and the ideal (evangelical law). For Kelsen, Christianity is distinguished from other religious systems by a single principle: love – “the new principle of Christian justice”.<sup>32</sup> This distinctive principle is, however, incapable of establishing the passage either to democracy or to a system of law as a system of constraint. It was hardly possible to derive a pro-democracy attitude from the Gospel, because of the fact that the teaching of Christ did not refer to any form of government. As Kelsen emphasized, the idea of “all men

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29 Ibid.

30 Ibid.

31 Ibid., 64.

32 Ibid.

as children of God and created in His image” contained in the Gospel was not intrinsically democratic.<sup>33</sup>

The attempt, in place of the principle of love, to establish the passage between democracy and the evangelical law rests upon Maritain’s presentation, for Kelsen, of “the idea that men are equal before God, although God has created them as different personalities, because all their differences are irrelevant in view of the fundamental difference which exists in the relation between men and God”.<sup>34</sup>

This principle is incapable of distinguishing between democracy and autocracy, because:

Democratic equality, on the one hand, implies the equality that is supposed to exist in relation between those who exercise the government and those who are subject to that government, because the governed participate in the government, because democracy, as political self-determination means the identity of the ruled with the rulers. Hence, there is an essential difference between the democratic and the evangelical equality.<sup>35</sup>

Maritain sought to “revitalize” democracy as a political system through its integral presence within a doctrine composed of Christian principles and, as Kelsen stated, such effort implied the recognition of a basic dichotomy between “true” and “false” democracy. In *Christianisme et démocratie*, Maritain considered a clear connection to exist between relativism and parliamentary-representative democracy and, in its essential atheism, to have repudiated the true foundation of democracy. In order to become a “true” democracy, democracy had to internalize the principles of Christianity, and, thus, to transform itself into a Christian democracy.<sup>36</sup> For Kelsen, the underlying form of argumentation is not substantially different from one of its central antagonists – the Soviet doctrine:

this is a device somewhat similar to that used by the Soviet doctrine of democracy which also declares that in order to become a real democracy, the merely formal bourgeois democracy must turn into a democracy entirely human. The difference consists in the fact that according to the Soviet doctrine democracy becomes entirely human not by becoming Christian but by becoming socialist.<sup>37</sup>

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33 Ibid.

34 Ibid., 66.

35 Ibid.

36 Ibid., 63.

37 Ibid.

For Kelsen, Brunner, Niebhur and Maritain were not only three perfect representatives of democratic theology and, more generally, of a post-war neo-jusnaturalism, but also three authors who, in different ways, posed the problem of democracy in the same manner: as a question of justice. This was combined with the identification of positivism (both legal and political) and relativism as the two sources which enable the emergence of totalitarianism.

### 3 Kelsen and the Positivist Defence of Modern Democracy

The pertinence of the Kelsenian critique of Niebhur, Brunner and Maritain, from the perspective of the history of political thought, concerns the wider interpretative position of Kelsen in relation to these three prominent thinkers. Within the Kelsenian framework, Brunner, Maritain and Niebhur are situated as natural-law oriented theorists whose consideration of politics, social reality and historic events, such as totalitarianism, is undertaken by theoretical reflection informed by a specifically Christian conception of natural law. The Kelsenian critique of Brunner, Niebhur and Maritain is elaborated at two levels: at the first level, the critique seeks to demonstrate the contradictions and logical incoherence of the overarching conception of politics. This is particularly evident in the critical approach to Niebhur and “relativistic jusnaturalism”. At the second level, the critique is centred upon the demonstration of the dependence of the principle of Christian justice, as the basis for the refoundation of the post-war democratic political system, upon the faith in an absolute principle – natural law – which itself is the reflection of a wider absolutist personality. This personality, and its attendant philosophical absolutism, is counterposed to “philosophical relativism”:

Philosophical absolutism is the metaphysical view that there is an absolute reality, i.e., a reality that exists independently of human cognition. Hence its existence is beyond space and time to which human cognition is restricted. Philosophical relativism, on the other hand, advocates the empirical doctrine that reality exists only within human cognition [...] Absolute existence is identical with absolute authority as the source of absolute values. The personification of the absolute, its presentation as the omnipotent and absolutely just creator of the universe, whose will is the law of the nature as well as of man, is the inevitable consequence of philosophical absolutism. [...] This metaphysics has the tendency to identify truth, that is, conformity with reality, with justice, meaning conformity with a value.<sup>38</sup>

<sup>38</sup> Ibid., 16–17.

Thus, the profound implications of Kelsen's critique of Brunner, Niebhur and Maritain's democratic theology become even more evident: the presentation of the legitimacy of democracy as dependent upon conformity to Christian natural law exemplifies philosophical absolutism. The enduring influence of Neo-Kantianism, in particular that of Hermann Cohen, upon the character of this Kelsenian critique is clear in the definition of philosophical absolutism as a belief in an absolute existence independent of human knowledge. The further definition of this Neo-Kantian influence is, however, not the central focus of this analysis of Kelsenian critique but, rather, the relationship which the critique establishes between philosophical absolutism and political absolutism. From a political perspective, according to Kelsen, the connection emerges through the appropriation, by autocratic political systems, of the previously distinct development of theories of philosophical absolutism. In this appropriation, these theories are often utilized as an "ideological instrument" whereby philosophical absolutism becomes the theory through which political absolutism is justified. Kelsen emphasizes that the autocrat becomes accustomed to justify his absolute power by means of the assertion of the existence of an absolute truth or by the assertion that his actions are guided by the good – itself absolute – for his people.<sup>39</sup>

The Kelsenian critique is effectively a meta-critique of Eric Voegelin's *New Science of Politics*,<sup>40</sup> in which the distinction between the two forms of political representation – "formal" and "existential" – reanimates the distinction between formal and substantial democracy. For Kelsen considers Voegelin's work indicative of the wider disparagement, reflected in the work of Brunner, Niebhur and Maritain, of the "concept of democracy as the concept of government representing the people in a merely 'constitutional' sense".<sup>41</sup> Voegelin initiates the Kelsenian critique in which an intrinsic connection exists between two

39 Ibid., 4–6.

40 See Eric Voegelin, *The New Science of Politics*, (Chicago: The University of Chicago Press, 1952). The extent of Kelsen's critical engagement with Voegelin, his former student, has only recently been revealed by the posthumous publication of his detailed critique of the *New Science*. Hans Kelsen, *A New Science of Politics*, ed. E. Arnold, (Berlin: De Gruyter/On-tos Verlag, 2004) and Hans Kelsen, *Secular Religion. A Polemic against the Misinterpretation of Modern Social Philosophy. Science and Politics as "New Religions"*, (Dortrecht: Springer, 2013); Nicoletta Bersier Ladavac, "La controversia di Hans Kelsen con le religioni secolari" ("Hans Kelsen's controversy with secular religions"), *Sociologia del Diritto* 3 (2013): 141–147; Francesco Riccobono, "Kelsen e la religione" ("Kelsen and religion"), *Rivista di filosofia del diritto*, special issue (2013): 121–136. For a wider analysis of the relationship between Voegelin and Kelsen see also Lee Trepanier and Steven F. McGuire, eds., *Eric Voegelin and the Continental Tradition*, (Missouri: Missouri University Press, 2011), 152 ff.

41 Voegelin, *The New Science of Politics*, 27 ff, in Kelsen, "Foundations of Democracy", 14.



antagonisms: “autocracy and democracy” and “philosophical absolutism and philosophical relativism”.<sup>42</sup>

Kelsen was firmly convinced that philosophical absolutism was the origin for those political theories and ideologies which sought to legitimize and support a particular form of government on the basis of values and principles considered absolute, true, objective and immutable.<sup>43</sup>

It was philosophical absolutism which, for Kelsen, indicated a fundamental analogy between Brunner’s and Maritain’s idea of democracy and that of the Soviet Doctrine: in both cases, the government was supposed to act in the name of a “superior value”, the role played by the people, and the role of representation, as the procedures to elect the rulers became irrelevant, of no importance.<sup>44</sup>

If, for the Kelsenian critique, philosophical absolutism is situated as the foundation of neo-jusnaturalism and democratic theology, philosophical relativism is presented as the basis for legal and political positivism. While Kelsen’s analysis of Brunner, Niebhur and Maritain specifically acknowledged that their orientation is towards democracy and against autocracy, the theoretical path toward a renewed and vibrant democratic system was not the right one because the theoretical foundations for the conception of democracy were revealed to arise from philosophical absolutism.<sup>45</sup>

The “Foundations of Democracy” can be considered to be a further exposition of the reflection upon, and defense of democracy, in the previous, inter-war European writings. The Kelsenian conception of democracy is a *method* to enact political decisions in which the ruled are accorded the right, through a process of election, to select the rulers, in the form of representatives of political parties. In this sense, democracy, as a party democracy, (in contrast to direct democracy which Kelsen rejected), defines itself through procedures which imply rights and freedoms: democracy was a specific procedure presupposing liberalism. Democracy was meant to be a government by the people not a government in the name of the people or in the name of a superior value. It is exactly because democracy was to be a method rather than a *content*, namely, because, for Kelsen, a true democracy system establishes *how to decide and not what to decide*, that democracy’s philosophical attitude was intrinsically anti-absolutistic: it was relativist. Democracy, as a political system, according to Kelsen, was not an instrument in the service of any absolute truth or principle,

42 Kelsen, “Foundations of Democracy”, 14.

43 Ibid., 6–10; 14–18.

44 Ibid., 10–14.

45 Ibid., 40–67.

rather, it was orientated to the ideal of freedom, as the recognition of fundamental rights, among which were freedom of speech, intellectual freedoms, freedom of press, religious freedom etc.<sup>46</sup>

The further development of the interwar conception of democracy, indicates a degree of detachment, in the “Foundations of Democracy”, from its previous theoretical framework. For this essay, should be situated within the context of the debate on neo-cognitivism, which the journal *Ethics*, where Kelsen published his essay, was leading at that time. However, this detachment leaves unaffected the explicit attempt to reveal the inner relationship between philosophical relativism and philosophical absolutism, between autocracy and democracy. This revelation, and, in particular, the purported demonstration that political theories founded upon the idea of a natural law are forms of philosophical absolutism, is the Kelsenian defence of the essential connection between positivism, relativism and democracy. It responds to Brunner, Niebhur and Maritain and many others who held the combination of positivism, relativism and traditional liberal-democratic systems to be the origins for the emergence of totalitarian regimes.

Kelsen's position *on* and *against* those criticizing positivism, both juridical and political, and relativism becomes even more relevant and consistent with the essential connection between philosophical absolutism and autocracy, on the one hand, and philosophical relativism and democracy on the other. The Kelsenian insistence upon this intrinsic connection is simultaneously the assertion of the resilience and responsibility of human action within a procedural, party political democracy shaped by relativism. This is the Kelsenian response to the resurgence of natural law and its characterization of the connection between positivism, relativism and political democracy as inherently nihilistic:

For many people are not able and not willing to accept the responsibility for the decision about the social value to be realized, especially in a situation in which their decision may have fatal consequences for their personal welfare. Therefore they try to shift it from their own conscience to an outside authority competent to tell them what is right and wrong, to answer the question: what is justice? [...] this explains the steadily increasing intellectual movement directed against rationalistic positivism and relativism toward religious metaphysics and natural law so characteristic of our time. [And referring to Brunner, Niebhur, Maritain he added] Christian theology, leading this movement, offers a vindication of

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46 Ibid., 40.

democracy which promises to be more effective than the problematical, because conditional, justification implied in a merely scientific theory of legal and political positivism.<sup>47</sup>

Thus, Kelsen's critique of natural law, exemplified by the "Foundations of Democracy", contains a political theory whose defence of a democratic order is predicated upon the demonstration of the interconnectedness of individual responsibility and relativism.

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47 Ibid.

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