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Hans Kelsen and the Case for Democracy

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SANDRINE BAUME, MAY 8 2013

At the end of the First World War, Austria and Germany tried out a democratic political system, hastily built upon the ruins of their empire. During the 1920s the innovations that the Republic embodied and the fears that it inspired gave rise to some intense debates, to which Hans Kelsen made a major contribution. In response to antiparliamentary arguments and to a kind of disenchantment with political institutions, he offered a definition of democracy that met the standard and often-repeated objections to it. The political upheavals that emerged in 1918 stirred up the question of the stability of democratic institutions, an issue that made itself central not only for Kelsen but also for other jurists, such as Carl Schmitt (1888-1985), Hermann Heller (1891-1933), Rudolf Smend (1881-1975), and Erich Kaufmann (1880-1972). We should not let the variety of their reactions resulting from their diverging doctrinal positions – liberal, social-democratic, statist or even authoritarian – obscure the fact that they all shared a constant concern with a bundle of basic questions about the sustainability of the state and how a social plurality can coexist politically. That these discussions emerged in a post-imperial context, in which democracy had been in place only a few years, added intensity and perhaps also a degree of clarity to these questions that urgently demanded answers.

In the widely-known work of Kelsen, the theory of democracy is not tangential; it is intimately tied to his thinking about law, primarily in his refusal to surrender to any of the mythologies that denature the investigation of legal and political phenomena. His legal positivism and his reflections on the characteristics of democracy echo each other, and set out a coherent doctrine profoundly marked by relativism. In the first place, Kelsen's understanding of democracy has rid itself of the fictions of the general will, of political oneness, and of the objective interest of the state; the Kelsenian understanding takes conflicts of interest to be the central objects of enquiry, and resolutions of these conflicts occur only through compromises. In the second place, his definition of law, that of legal positivism, renounces all claims to produce just ruling. [...] This "primitive" association that Kelsen makes between democracy and relativism was perfectly understood by his radical intellectual enemy, Carl Schmitt: "When Kelsen gives the reasons for opting for democracy, he openly reveals the mathematical and natural-scientific character of his thinking. Democracy is the expression of a political relativism and a scientific orientation that are *liberated from miracles* and dogmas and based on human understanding and critical doubt" (Schmitt 2005: 42, my emphasis). The Kelsenian concept of the state, especially in its democratic form, is completely free from "miracles," in fact from any heteronomous intervention, and indeed from anything that eludes rational criticism. Democracy is the form of government best suited to the rationalization of the political order, which autocracy disdains. Kelsen's association of relativism with democracy has implications for his characterization of the political leader. While autocracy tends to confer absolute power on leaders, in democracy their selection is associated with rational considerations, and reflects only a relative value, subject to regular reassessments or penalties. A leader, like everything else in a democracy, is subject to criticism (Kelsen 1973: 105).

In the system of democratic ideology, the problem of creating leaders brings only rational considerations into play. Governing by the leaders is not an absolute value, but a value that is completely relative. The leader is a leader only for a certain period and from certain points of view; moreover, leaders are only the equals of other members of the group, and are subject to criticism. From this there follows the publicity of actions by those who exercise power, in contrast to the principle of secrecy applied in autocracies. From the fact that in autocracies leaders are transcendent to the community, while in democracies they are immanent, follows the characteristic consequence that in autocracies the ruling individuals are always regarded as superior, and not subject, to the social order; therefore they are essentially irresponsible, whereas the responsibility of leaders is a characteristic feature of real democracy

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(Kelsen 2006: 216-217).

This relativism with respect to values should not be interpreted as a negation of them. For Kelsen, they do play a certain part in the formation of political opinions, especially in the parliamentary arena. But when one value is preferred to another, that is not a cognitive process in action, it is a decision-making process that follows clearly-stated rules.[1] The guarantee of the democratic character of the decision resides in the procedure that precedes and enables it. For Kelsen, this reasoning establishes a relationship between relativism and procedural or formal democracy. Democracy is primarily a form of government that respects codified procedures (Kelsen 1955: 5).

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[1] "Kelsen's value-relativism naturally implies no denial of values or making light of value-attitudes; it is simply a matter of regarding them as decisions, as something that cannot be demonstrated in purely cognitive fashion. Kelsen's pure positivism and his relativist theory of value are not unrealistic and neutral in their pragmatic consequences; they lead, rather, to a critique of ideology, to an understanding of value-pluralism, to the postulate of tolerance, to a pluralistic democracy based on the free play of ideas in the self-correcting dialectic of clashing opinions within the field of legal development. They do this, however, without the fiction that in the process we shall simply apprehend 'correct' law that has somehow been previously given" (Weinberger 1973: xxv-xxvi).

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