

The One and the Many: A Critical Reflection on the Foundations of Hans Kelsen's Democratic Theory

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Abstract

This paper offers a critical examination of the foundations of Hans Kelsen's democratic theory in neo-Kantian epistemology. It argues that, while such an epistemological framework provides coherence to his intellectual endeavor by reconciling his monistic legal theory with a pluralist democratic theory, it weakens the theoretical fertility and analytic edge of his political thought. Furthermore, I also claim that the Kelsenian epistemological turn, in its understanding of both law and politics, remains very much entangled in the dilemmas and modes of thought of a philosophical tradition that Kelsen himself believed to have entirely surpassed. His nevertheless insightful analysis of modern democratic institutions would therefore benefit from being read through different philosophical spectacles.

Keywords

Monism, Pluralism, Relativism, Indeterminacy, Democracy, Epistemology

Der Eine und die Vielen: Eine kritische Reflexion über die Grundlagen der Demokratietheorie von Hans Kelsen

Zusammenfassung

Dieser Aufsatz ist eine kritische Untersuchung der Grundlagen von Hans Kelsens Demokratietheorie in der neo-kantianischen Erkenntnistheorie. Es wird argumentiert, dass ein solcher erkenntnistheoretischer Rahmen seinen intellektuellen Bestrebungen zwar Kohärenz verleiht, indem er seine monistische Rechtstheorie mit einer pluralistischen Demokratietheorie in Einklang bringt, dass er aber die theoretische Fruchtbarkeit und analytische Schärfe seines politischen Denkens schwächt. Darüber hinaus behaupte ich, dass die Kelsen'sche erkenntnistheoretische Wende in ihrem Verständnis sowohl des Rechts als auch der Politik sehr stark in die Dilemmata und Denkweisen einer philosophischen Tradition verstrickt bleibt, die Kelsen selbst glaubte, vollständig überwunden zu haben. Seine nichtsdestotrotz aufschlussreiche Analyse der modernen demokratischen Institutionen würde daher davon profitieren, durch eine andere philosophische Brille gelesen zu werden.

Schlüsselwörter

Monismus, Pluralismus, Relativismus, Unbestimmtheit, Demokratie, Epistemologie

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1. Introduction

Verdicts on Hans Kelsen's thought present the student of law and politics with an enigma. On the one hand, Kelsen's insistence on the purity and self-consistency of legal theory has led many commentators for whom methodological concerns take second place to view his thinking as politically fruitless. Harold Laski (1938, vi) epitomized this stance, in the introduction to his magnum opus *A Grammar of Politics*, when he dismissed the pure theory of law as "an exercise in logic and not in life." On the other hand, more recently, a burgeoning literature has emerged stressing precisely the political relevance of Kelsen's work (Ehs 2009; Baume 2012; Lagi 2020; Schuett 2021). This literature argues, compellingly, that the political Kelsen stood for too long in the shadow of the pure theorist of legal positivism, and shows that his pluralist democratic thinking offers valuable resources to tackle the challenges of diversity and complexity faced by modern democratic regimes. The rediscovery of Kelsen by students of politics – be they political scientists, political theorists, IR scholars or historians of political thought – is a most welcome phenomenon, considering that his insight into the functioning of modern democracies is much more sophisticated than that of other modern classics, who so far have been more fashionable in the field.¹ However, this renewed interest in the political Kelsen cannot avoid an inquiry into the relationship between the author's fundamental views on law and politics. More precisely, it must work through the puzzle of how a rigorously monistic legal theory goes hand in hand with a pluralist democratic theory. The present article shows how Kelsen's neo-Kantian epistemology ultimately unites his visions of law and politics yet argues that such a common framework weakens the theoretical fertility and analytic edge of his political thought.

In a provocative vein, I propose to read that puzzle as a variation on possibly the oldest philosophical theme in the Western tradition: the question of the One and the Many.² For although Kelsen (1973, 70) dismissed as pseudo-problems the issues that preoccupied Western metaphysicians and theologians for millennia, his own thinking grapples with rather analogous problems when it comes to the nexus – or the boundary – between law and politics. Indeed, just as Platonic philosophy sought to reconcile the unity of being with the plurality of its appearances, Kelsen's thought struggles to harmonize the unity of law as a self-generating realm of cognition with the irreducible pluriverse of social and political forces that law seeks to regulate and from which, in actual fact, it arises. Of course, Kelsen believed to have

left metaphysics behind him by shifting from ontology to epistemology, by replacing the intractable question of being by that of the conditions of possibility of human knowledge. This epistemological turn, as we shall see, supplies coherence to his theoretical enterprise, in that it allows him both to affirm the autonomy and objectivity of legal science and to justify democracy by reference to the relativity of human cognition, to the impossibility of grasping absolute truth and arriving at a definitive hierarchy of values. However, much like the metaphysical and theological tradition he claims to be breaking from, Kelsen's own obsession with the One also comes at the cost of the Many.³ More specifically, I contend, his epistemological fixation prevents him from considering the novel political condition that modern democratic revolutions have inaugurated. Working with a too strict analogy between the problems of knowledge and politics, Kelsen fails – despite the undeniable merits of his analysis of democratic institutions and the impeccable logical consistency of his reasoning – to do justice to the singularity of the modern democratic experience.

The essay is organized in three parts. First, it outlines Kelsen's monistic legal theory, his vision of law as one, paying special attention to its philosophical grounding in neo-Kantian epistemology. Far from liberating legal doctrine from metaphysics, I argue, his epistemological move remains entangled in similar impasses due to its longing for methodological purity. In a subsequent section, the article focuses on Kelsen's pluralist democratic theory. Although the Austrian scholar succeeds, with an impressive sociological insight, in grasping the functioning of parliamentary democracy and overcoming several mystifications and reifications of traditional state theory, his recourse to the theory of knowledge to justify democracy leads to much too narrow an understanding of democracy. Finally, the conclusion draws on Claude Lefort's phenomenological approach to the modern democratic revolution to suggest a new, more promising philosophical horizon for Kelsen's democratic thought.

2. Law as One

Hans Kelsen's chief intellectual endeavour, spanning more than half a century and ca. 400 published works, was to vindicate the autonomy of law as a self-sustained universe of meaning and cognition. He pursued this goal with as much rigour as vigour.⁴ The philosophical

¹ I am of course referring to the often careless and usually unhelpful reception of Carl Schmitt's work in contemporary political studies.

² On the Pre-Socratic roots of this problem, see Stokes 1971.

³ For a thought-provoking critique of the excessive focus on unity in the Western theological tradition, stretching from Parmenides through Plato to Aquinas, see Gunton 1993.

⁴ Here and there possibly with too much vigour, prompting him to misunderstand and oversimplify the scholarly enterprises of other thinkers.

resources for the task, he claimed, were furnished by the philosophy of Immanuel Kant. However, his actual inspiration was not so much the work of the eighteenth-century philosopher, whom Kelsen barely cites in his legal-theoretical writings, but rather the neo-Kantian revivalism of the late nineteenth-century, which put forward an epistemologically oriented reinterpretation of Kant's philosophy. In a distinctly neo-Kantian vein, Kelsen took the transcendental method as developed in the *Critique of Pure Reason* for the highest achievement of Kant's thought and ventured to extend it to the field of normativity, where Kant himself, rather unfortunately in Kelsen's view, had still surrendered to metaphysics. Drawing on a philosophical movement that, ironically, was already exhausted and declining after the First World War, Kelsen aspired to – and, considering his legacy and influence, did in effect – accomplish a Copernican revolution in jurisprudence.⁵

This revolution, nevertheless, was not originally sparked by Kelsen's encounter with neo-Kantian epistemology. In fact, Kelsen had already made substantial progress in the development of a new positivist legal theory before his engagement with neo-Kantianism got serious.⁶ The deployment of a neo-Kantian transcendental grounding for legal science proved to be indispensable, however, for Kelsen's aim was not just to affirm a science of legal positivism that eschews natural law and its metaphysical presumptions, but also to assert the autonomy of legal science vis-à-vis the empirical social sciences. To that end, the Austrian jurist insisted on reading the Kantian dualism of Is and Ought as a sharp formal-logical contrast, which generates two distinct and wholly unconfutable fields of knowledge, one pertaining to the cognition of reality or facts, the other to the cognition of ideality or norms.

But not all philosophers in the neo-Kantian movement adhered to such a strict understanding of the methodological dualism of Is and Ought. In Heidelberg, Heinrich Rickert and his students argued that, notwithstanding the dualism and the clear distinction between the natural and the normative sciences it establishes, a third realm of knowledge should be considered. The so-called cultural sciences, such as history, deal with empirical phenomena, yet are concerned not with regularities and the formulation of

general scientific laws, but rather with the singularity and meaning of certain events. For Rickert, the realm of culture implied relating value to facts, a relation which marked it off from nature. In Kelsen's view, this approach amounted to a logically hopeless attempt to close an unbridgeable gap. As he put in a demolishing critique of Rickert and his followers in legal philosophy, a scientific content “exists only *either* through the specific form of cognition of the Is *or* through that of the Ought' and no way leads from one to the other” (Kelsen 1968, 46).⁷ The Austrian jurist found more auspicious resources to defend the autonomy and purity of legal science as a strictly normative discipline in another stream of neo-Kantian epistemology, spearheaded by Hermann Cohen and his followers in Marburg. This school, in contrast to their Heidelberg colleagues, was firm in upholding the distinction between facticity and normativity, and remained immune to the temptations of methodological syncretism.⁸

However, establishing a clear demarcation between legal science as a normative discipline and the empirical social sciences was not the only concern of Kelsen's pure theory of law. Indeed, an even greater threat to the autonomy of his discipline was posed by “the deeply rooted custom” (Kelsen 1992, 2) of subordinating its scientific claims to political imperatives or absolute metaphysical convictions. In that sense, the precinct of legal science had to be strictly marked off from ethics as an entirely different approach to normativity. Legal science, to be sure, does not exhaust the whole field of the Ought. Yet, according to Kelsen, its approach to the sphere of norms is the only one that can satisfy the conditions of objective cognition. The nature of ethical norms is such that they involve committing to an ultimate substantive value which lies beyond rational cognition. Legal norms are different, and can therefore be known objectively, because of their purely formal nature. Their substance, their inherent qualities are irrelevant for their standing as legal norms, since validity *as legal norms* depends solely on their being “created according to a certain rule, issued or set according to a specific method” (Kelsen 1992, 56). By “dissolv[ing] substance into function” (Kelsen 1973, 82) the pure theory of law elevates the treatment of the Ought from the level of

Kelsen's (1921) skewed treatment of Max Weber's interpretive sociology is quite illustrative in this regard.

5 On the rise of neo-Kantianism in the German philosophy of the imperial era, see Köhnke 1986. On the post-war decline of the movement, see Beiser 2013.

6 Heidemann (1997, 19) labels the first phase in the development of Kelsen's legal theory “constructivist”, where the neo-Kantian influence, though not absent, is not yet very pronounced. The point being that Kelsen, especially in his post-doctoral dissertation *Hauptprobleme der Staatsrechtslehre* (1911), sought to construct the concepts of legal science from the positive normative material alone.

7 “Realität und Idealität können sich niemals in einem Begriff verbinden oder von demselben Standpunkt einer Wissenschaft aus erfasst werden, da sich Realität nur unter einem wesentlich anderen Gesichtspunkt der Betrachtung ergibt als die Idealität, da ein Inhalt nur *entweder* in der Erkenntnisform des Seins *oder* in der des Sollens, in dem ersten Falle als Wirklichkeit, im zweiten als Wert sich darstellt.” (translation P.T.M., emphasis in the original)

8 On Cohen's influence on Kelsen, see Holzhey 1986; Paulson 1992; Edel 1998; Carrino 2011. Kelsen's reception of the second generation of Marburg neo-Kantians, and in particular of Ernst Cassirer's early epistemological writings, remains largely unexplored. More generally on the two main schools of neo-Kantianism, see Krijnen/Noras 2012.

a metaphysically grounded ethics to that of a modern science.⁹

The intellectual construct that Kelsen deploys to achieve this isolation of the field of legal cognition from, on the one hand, the perspective of the empirical social sciences and, on the other hand, that of prescriptive ethics or politics is the concept of the Basic Norm (*Grundnorm*).¹⁰ The theoretical problem this construct seeks to solve is that of the terminus of the positivist chain of legal validity. Indeed, the notion that only positive law can create and apply positive law faces a rather obvious difficulty at the very top of the system. Namely, the highest positive norm in any given legal system cannot be logically imputed to another positive norm. Paradoxically, therefore, the validity of the highest norm in a legal system rests on shakier grounds, from a legal-positivist perspective, than all the other, inferior norms which, in the final analysis, it validates. At the end of the chain of validity/imputation, the temptation to step beyond the realm of positive law, by tracing the validity of the legal Ought back to empirical efficacy or to a substantive, foundational moral Ought, seems almost irresistible. However, taking that step would mean giving up on the autonomy of legal cognition and falling prey to methodological syncretism. To avoid such a disastrous denouement, Kelsen submits, the jurist must assume that the validity of the highest positive norm comes from one single Basic Norm. The presupposition of such a 'hypothetical foundation', devoid of any substance and standing simply as a sign of pure legal normativity, is what allows the jurist to interpret the material presented to him or her strictly as a system of legal norms (Kelsen 1992, 58).

Ultimately, thus, far from creating a new approach to law, the theory of the Basic Norm constitutes "an attempt simply to reveal the transcendental logical conditions of [a] long-standing method of cognizing positive law" (Kelsen 1992, 58). From a broader philosophical perspective, however, its reasoning is much akin to an even more long-standing drive, which has left a deep mark in the Western tradition of thought, to lead all plurality back to unity. Of course, the Basic Norm has no reality, no ontological status, and performs a purely epistemological function. Structurally, however, it

serves the same purpose as the constitutive, no further derivable first principles of Aristotelian metaphysics, and shares with the latter the assumption that things can only be known as true if they can be brought back to one origin or gathered under a unitary point of view. "A plurality of norms", Kelsen (1992, 55) argues, "forms a unity, a system, an order, if the validity of the norms can be traced back to a single norm as the ultimate basis of validity" (Kelsen 1992, 55; emphasis added). Law shall be known as one or it shall not be known at all. Entangled in an age-old civilizational fixation with unity, Kelsen assumed that the distinctiveness of a legal perspective could only be affirmed by closing positive legal cognition in on itself.

3. The Politics of the Many

Considering the monistic orientation of Kelsen's main intellectual project, his pluralist vision of democracy might come across as surprising. However, the paradox is only apparent, for both the assertion of a pure theory of law and his defence of pluralist democracy rely on the same theory of knowledge. While the former affirms the autonomy and objectivity of legal science, Kelsen's case for democracy emphasizes the relativity of human cognition. In this section, I outline, first, Kelsen's views on party pluralism and his non-ideological conception of parliamentary rule, specifying how these broke from nineteenth-century German state theory to meet the challenges of modern mass politics,¹¹ and second, I show how such political thinking is grounded in Kelsen's relativistic, epistemologically oriented worldview. The epistemological case for democracy, I argue, supplies coherence to Kelsen's theory, but it also sets narrow limits to his understanding of politics.

Despite the professed Rousseauian inspiration of his thinking on democracy, Kelsen rejects the concept of the people as a unified subject of sovereignty and source of legitimacy.¹² In his democratic theory, the people is not one, but plural. Kelsen's focus shifts, thus, from

9 In opposing "function" to "substance" Kelsen seems to be following the argument of Cassirer's *Substanzbegriff und Funktionsbegriff* (1910), which Beiser (2013, 123) views as "the most sophisticated work on the philosophy of science in all neo-Kantianism". Cassirer's contention was that "theory cannot be verified or falsified by its encounter with bare facts, which do not exist, but only by its consequences and coherence with other constructions" (Beiser 2013, 123). Like Cassirer, Kelsen sees science – be it a science of reality or one of norms – as a self-constituted and entirely self-referential endeavour.

10 On the different formulations of the Basic Norm across Kelsen's vast oeuvre, see Paulson 1993. Our analysis focuses on the concept as it is elaborated in *Reine Rechtslehre* (1934), the work that constitutes the apex of Kelsen's transcendental phase.

11 Kelsen's break with the strictly monistic conceptions of political unity that prevailed in the German *Staatslehre* tradition attests his sociological acumen, and his pluralist democratic theory occupies thus a rather unique position within that tradition. Indeed, in its substance, Kelsen's political thought shares much more with English pluralism than it does with late nineteenth-century German public law. On the striking affinities between Kelsen's and John Stuart Mill's democratic theory, with a special focus on the concept of compromise, see Dalaqua (2019).

12 At a very abstract level, Kelsen does follow Rousseau. Like the Genevan philosopher, indeed, he frames the basic problem of legitimate government as the sublimation of a primordial – yet ultimately destructive – call for freedom by the recognition of the necessity of social order (Kelsen 2013, 27-33). However, when he elaborates on how the legislative will of a democratic order should be formed, Kelsen swiftly parts ways with Rousseau's inclination to reify the general will. In that sense, as Pasquino (1995, 124) argues, Kelsen's invocation of Rousseau is rather misleading. On this topic, see also Baume 2019.

the unity of the democratic state as a legal order, which pertains to its formal-normative dimension only, to the ineradicable pluralism of interests and worldviews that marks the real life of a modern democratic society. Rejecting the monistic orientation of early modern democratic thought, whose conceptions of popular sovereignty aimed at dissolving conflict and overcoming pluralism, for Kelsen the challenge of democratic theory lies in delineating institutions that acknowledge political pluralism and at the same time channel its contribution to the formation of a social order.

From this break with the early modern paradigm of popular sovereignty, a radical reevaluation of political parties emerged. Parties, indeed, had so far been the *bête noire* of modern political philosophy. Chastised by both democratic and monarchic thinkers for fostering division and factionalism and for promoting special interests at the expense of the common good, the political parties were deemed a threat to the unity of the political community, a state-dissolving force (Sartori 2005, 3-12; Rosenblum 2008).¹³ Furthermore, this negative judgment on parties translated to legislation and constitutional law, which irrespective of the crucial role that parties play in modern democratic societies, still largely ignored them.¹⁴ Against this dominant view, espoused by most public law professors in the European continent until as late as the Second World War, Kelsen puts forward the bold thesis that opposition to parties as vehicles of democratic politics amounts to no more than a poorly disguised opposition to democracy itself – or at any rate, to democracy as it could be achieved in a modern polity. For him, to presuppose the existence, or the attainability by whichever means, of a unifying common interest or general will dictating the direction of democratic politics was ‘a metaphysical – or, better, a meta-political – illusion’ (Kelsen 2013, 40). If the legal order, i. e. the objectively valid will of the state, shall express more than the interests and views of a single dominant group, then there is no alternative to having it derived from compromises between contending

interests and views as these are represented by the political parties. Their indispensable role must therefore be recognized by democratic theory and anchored in the constitutional law of democratic states. “A democratic state is necessarily and unavoidably a multiparty state [*Parteienstaat*]” (Kelsen 2013, 39).

As collective bodies emerging spontaneously based on voluntary association, the political parties mediate between the political goals of individuals in their empirical plurality and the sphere of norm-production. In other words, they are supposed to represent said plurality as accurately as possible – to achieve that accuracy Kelsen favored proportional representation over first-past-the-post electoral systems – in the legislative decision-making process. When it comes to the latter, however, democracy must rely on the institutionalization of the principle of the majority accomplished by the methods of parliamentary government.

Kelsen (2013, 48) defines parliamentarism as “government by a collegial organ democratically elected by the People based on universal, equal suffrage and the principle of the majority.” The stress on the democratic credentials of parliamentary government is, to be sure, rather a-historical, with Kelsen glossing over the fact that the emergence of parliamentary government generally predated the establishment of universal and equal suffrage by many decades and was not deemed incompatible with the disenfranchisement of the propertyless and the uneducated. By framing the struggle for parliamentary government as a fight for democratic self-determination, Kelsen was offering an ideologically embellished reading of a complex historical relationship. A more accurate examination would point out that, at the level of empirical analysis, a distinction must be made between the processes of parliamentarization and democratization in Europe.¹⁵ Kelsen’s rhetorical strategy, however, must be understood as a reaction to those critics of the parliamentary system, such as Carl Schmitt, who, in an equally simplistic and a-historical fashion, affirmed that the fundamental principles of parliamentarism and democracy were at odds with one another.

The strength of Kelsen’s reply to the critics of parliamentarism, notwithstanding the ideological embellishment of the historical processes leading to the parliamentarization of political regimes, comes from his treating it as a form or method rather than an ideal of government. Instead of arguing that parliamentarism and democracy share some substantial ideals, he interprets the parliamentary system as an instrument that serves the realization of the democratic ideal, as the specific method of legislative production

¹³ To be sure, as Rosenblum (2008, 108 ff.) shows, there are some scattered “moments of appreciation” of parties and partisanship in a modern politico-philosophical canon dominated by anti-partyism. Burke’s praise of parties as instruments for regulating political rivalry is probably the most well-known amongst the outliers in modern political philosophy who – albeit rather hesitantly and half-heartedly – had something positive to say about the nature and role of parties. Yet Burke does not stand alone: Rosenblum’s compelling study also explores “moments of appreciation” in the works of Hume, Hegel, and J. S. Mill. Such moments, however, are tiny islands in an ocean of anti-partyism, whose iterations and variations are simply far too many to be comprehensively studied. Rosenblum neglects, for instance, the specific tradition of anti-partyism targeted by Kelsen, namely, that of imperial German jurisprudence, which remained influential in the aftermath of WWI (see Triepel 1927).

¹⁴ The Weimar constitution was a case in point. The word “party” (*Partei*) appears only once in the text – and in a pejorative sense – when Article 130 posits that state officials serve the community as a whole and not a party.

¹⁵ See, in this regard, Weber 1978, 1442.

that modern societies cannot do without if they aim to be ruled democratically. This reasoning disconnects the parliamentary system from any essential link with the interests and worldviews of a specific social carrier – a linkage eagerly exploited in Schmitt's (1988) critique – and provides the defense of parliamentary government with a forward-looking, rather than merely defensive, horizon. Thus, Kelsen discards certain aspects that nineteenth-century liberal ideology saw as defining features of parliamentary government, such as the independence and legal immunity of parliamentarians. In his view, these were mere remnants of a bygone struggle of parliaments against monarchic authorities. Although a return to the imperative mandate in its pre-modern guise was out of the question, making representatives more accountable to their constituents by subjecting them to a permanent control by the political parties was not only technically feasible, but also politically desirable inasmuch as it “could help reconcile the broad masses with the parliamentary system” (Kelsen 2013, 58). By bringing to the fore its procedural dimension, the Austrian thinker builds a compelling case for viewing parliamentary government as an indispensable tool for approximating the ideal of democratic self-determination in the specific conditions of modern mass societies.

Kelsen's reasoning in justifying parliamentarism unmistakably reveals the epistemological orientation of his thinking, marked by the permanent attempt “to dissolve substance into function” and thus contribute to the progress of modern science (Kelsen 1973, 82). The democratic ideal of self-determination constitutes, for sure, a basic motivating force, but it would be a sign of primitive, unscientific, substance-oriented thinking to presume that it could ever emerge in social reality in its pure essence. Just like valid scientific knowledge, political order is determined by the specific method that constitutes it. And parliamentary government is the only method that offers “a compromise between the democratic demand for freedom and the division of labor, which is the necessary basis for all progress in social technique” (Kelsen 2013, 49).¹⁶

¹⁶ Interestingly enough, “the essential desire for a division of labour and social differentiation” (Kelsen 2013, 49) appears to be assumed by the author, just as the elemental instinct of freedom that fuels the demand for democratic self-determination, as an anthropological premise. Thus, one could argue that the defence of parliamentary government emerges as an attempt to conciliate Kelsen's fundamental anthropological premises, i. e. of humans as both freedom and progress-seeking beings. However, by conceiving parliamentary government strictly as a social technique for producing general norms, Kelsen disregards the nature and impact of parliamentary debate – between independent representatives rather than instructed party delegates – both on the quality of legislation and on the type of responsible political leadership furthered by such a form of government. On these dimensions of the parliamentary system, which Kelsen largely ignores, see above all Max Weber's (1994, 80ff.) wartime pieces on ‘Suffrage and Democracy in Germany’ and ‘Parliament and Government in Germany under a New Political Order’.

The commitment to democracy, in the final analysis, comes from that very same orientation. As the author clarified in a footnote to *The Essence and Value of Democracy* (2nd ed., 1929), his own personal decision in favor of democracy derived “solely” from the affinity “between the democratic form of state [and] a relativistic worldview” (Kelsen 2013, 96 n4). This affinity, he contended in another, longer footnote to the same work, traversed the whole history of ideas in the Western tradition. While all metaphysicians since Heraclitus, in their hunger for absolute truth and absolute value, have ended up promoting autocratic political systems, empiricist and positivist thinkers since the Sophists consistently stood for democracy. Kelsen's historico-philosophical scheme runs into an obvious difficulty, however, when it comes to Kant. For the pioneer of transcendental philosophy, who delivered a crushing blow to metaphysical thinking in his *Critique of Pure Reason*, succumbed to metaphysics, to an orientation towards absolute values, in his practical philosophy and political thought. According to Kelsen, Kant failed to extract the correct democratic consequences from his relativistic theoretical philosophy. More precisely, he failed to discern the fundamental affinity between, on the one hand, a philosophical attitude that refuses “all metaphysical absolutes” in its inquiry into the formal conditions of possibility of knowledge and, on the other hand, “a political disposition, which, instead of concerning itself with the right content of the social order, asks about the way in which or the method according to which that order is generated” (Kelsen 2013, 105-06 n1).

The nexus between mutually opposed basic attitudes to the problems of knowledge and politics is most articulately outlined in ‘Foundations of Democracy’, the most important political writing Kelsen penned in America. As one would expect, Kelsen focuses first on the irreconcilable dualism of absolutism and relativism in epistemology. The former “is the metaphysical view that there is an absolute reality, i. e., a reality that exists independently of human cognition”, while the latter “advocates the empirical doctrine that reality exists only within human cognition, and that, as the object of cognition, reality is relative to the knowing subject” (Kelsen 1955, 16).

The relativistic notion that man is “the creator of his world, a world which is constituted in and by his knowledge” (Kelsen 1955, 17) requires, however, some qualification. For knowledge is not the result of non-rational human volition, but rather of the aprioristically limited human understanding, which is bound by “the laws of rational cognition” (Kelsen 1955, 18). These provide a common framework for the human experience of reality and allow it to be intersubjectively shared. Although a relativistic epistemology cannot vouch for

the objective existence of the world beyond the limits of human cognition, it can nevertheless secure objectivity by conceiving all human beings, *qua* knowing subjects, as equals. In other words, rational cognition of reality is objective, and not a mere expression of subjective belief, because the categories constituting it are identical in each individual human mind. According to Kelsen, this equality of men as knowing subjects, strikingly analogous to the formal equality of democratic citizenship, allows a consistent relativistic epistemology to avoid two erroneous interpretations of the axiom that reality is constituted by the subject of cognition, namely, a solipsistic and a pluralistic interpretation. “Uncompromised solipsism”, defined as “the assumption that the ego as the subject of knowledge is the only existent reality”, reverts to “philosophical absolutism”, while a “*paradoxical pluralism*”, positing as “inevitable that there are as many worlds as there are knowing subjects” (Kelsen 1955, 17; emphasis in the original), overlooks that reality is constituted according to universally shared categories of rational cognition.

Relativistic democracy, in turn, faces similar risks. Solipsism in politics seems to emerge, though Kelsen does not draw the analogy in a systematic fashion, in two different shapes: anarchism and authoritarianism/totalitarianism. Solipsistic anarchism derives from the same source as the desire for democratic self-determination, i. e. from the primeval, deep-seated reaction of the individual against the heteronomy of social reality. However, it exhausts itself in a purely negative gesture, refusing to let go off an unachievable ideal of absolute freedom, which is irreconcilable with social order. According to this view, all forms of social order, be they democratically or autocratically generated, are epitomes of the domination of man over man. Yet solipsism can also arise in a politically more ominous clothing as authoritarian or totalitarian rule by an “exaggerated egoconsciousness” (Kelsen 1955, 27), which treats social order as the product of the ego’s own will. Relativistic democracy avoids both variants of political solipsism by shifting the emphasis from the freedom or domination-seeking subject to the specifically democratic method of establishing social order, which allows political subjects to participate as equals in creating the order to which they must submit.¹⁷

When it comes to the challenge of pluralism, however, the analogy between epistemology and political theory reaches to its limits. Indeed, a relativistic epistemology succeeds in casting aside a pluralism of incommensurable worlds of knowledge by conceiving

the constitutive categories of cognition as inherent to the very structure of the human mind. The democratic methods of establishing order, in contrast, lack such foundations entirely, even though the analogy to the process of cognition seeks precisely to compensate for such a lack. More concretely, this means that, as far as content is concerned, democratic methods can produce literally anything – progressive policies or conservative policies, a capitalist or a socialist economic system, a pacifist or a militarist society, and so on. What is more, it means that the democratic process can abolish itself, that a democracy can morph, through democratic means, into an autocracy. While, in the realm of cognition, methods yield their own peculiar types of object – empirical methods produce, by necessity, empirical objects; normative methods generate, unavoidably, normative objects – in the realm of politics democratic methods can ultimately result in a non-democratic social order.

Kelsen (1932, 97–98), on the one hand, acknowledges this radical openness of democratic methods to a plurality of political ends, and accepts the implication that a democratic regime might have to bear a “tragic fate” if it wishes to avoid “the fateful contradiction of resorting to dictatorship to save democracy”.¹⁸ Such a recognition, along with the keen sociological insights it draws upon, elevates his democratic thought above the traditional, pluralism-denying theories of popular sovereignty. In that sense, Kelsen’s democratic theory does rise to the challenge of a modern politics of the many. On the other hand, however, his concept of relativism still entails an attempt, notwithstanding the rejection of absolute truth and absolute value, to secure meta-political foundations for democracy. By insisting on the parallel between political theory and epistemology, Kelsen substitutes a transcendental for a transcendent justification of political forms. Yet, the transcendental apparently still provides firm enough grounds to allow him to nurture an all-encompassing dualistic scheme that one would deem more fitting of a metaphysician oriented towards transcendence. Indeed, in a move ironically reminiscent of Plato – whom he accused of being the intellectual forefather of modern totalitarianism¹⁹ – Kelsen (1955, 15, 26–27) avers that his dualistic “typology of political and philosophical doctrines must finally result in a characterology”, which opposes the “exaggerated egoconsciousness” of

¹⁷ It should be noted that the two variants of political solipsism, anarchism and authoritarianism/totalitarianism, are not mutually incompatible. Kelsen’s (1948, 1–2) critical analysis of the Soviet system accused Bolshevism, precisely, of embracing anarchism in theory and totalitarianism in practice.

¹⁸ “Sie [die Demokratie] ist diejenige Staatsform, die sich am wenigsten gegen ihre Gegner wehrt. Es scheint ihr tragisches Schicksal zu sein, dass sie auch ihren ärgsten Feind an ihrer eigenen Brust nähren muss [...] [W]er für die Demokratie ist, darf sich nicht in den verhängnisvollen Widerspruch verstricken lassen und zur Diktatur greifen, um die Demokratie zu retten.“ (translation P.T.M.)

¹⁹ For a helpful overview of the twentieth-century controversy on Plato as a proto-totalitarian, which pitted progressives such as Kelsen, Popper and Russell against conservatives like Voegelin and Strauss, see Lecoutre 2020.

absolutism/autocracy to the relativistic-democratic type of personality, “whose desire for freedom is modified by [the] feeling of equality”. Instead of exploring the modern democratic experience in its uniqueness and novelty, Kelsen sought to relate it to a fundamental dualism of philosophical doctrines, political dispositions, and personality traits, which allegedly cuts across the entire history of ideas. In this sense, he remained caught in the spell of a tradition of thought he believed to have completely surpassed.

4. Concluding Remarks: From Relativism to Indeterminacy

Reading democracy through the lenses of a relativistic epistemology, and thereby tying the political form to a definitive, fundamental worldview, supplies coherence to Kelsen’s oeuvre. The epistemological case for democracy brings his political thought and his legal theory under the same cosmological umbrella. However, coherence can only be achieved by denying the political sphere the same – or a similar – claim to autonomy which Kelsen so fiercely sought to assert for the realm of law. In the end, his obsession with law as one removes from sight the singularity of modern democratic politics and prevents him from probing deeper into the nature and meaning of its pluralist institutions. It can of course be argued that, in many respects, the epistemological framing of the problem of democracy has only a negligible impact on Kelsen’s political analysis, and that, for many useful purposes, one can simply ignore it. I believe, nonetheless, that his perceptive understanding of the democratic institutionalization of social division and conflict would gain a sharper analytic edge if it were approached from a different philosophical angle.

The concept of democratic indeterminacy, developed by Claude Lefort, provides a fruitful corrective to the Kelsenian notion of relativism. In his most cited essay, the French philosopher argues that modern democracy “is instituted and sustained by the *dissolution of the markers of certainty*” and that it “inaugurates a history in which people experience a fundamental indeterminacy as to the basis of power, law and knowledge” (Lefort 1988, 19; emphasis in the original). This suggests a reading of the meaning of modern democratic revolutions which, while insisting on the break between the old monarchical regime and democracy, refrains from interpreting it according to a progressive teleology or a dualistic scheme. The new experiential condition inaugurated by modern democracy is not the by-product of the triumph of modern science over metaphysics, as Kelsen would ultimately have it. Instead, it is the result of the collapse of an image of society as an organic whole and of the ensuing disarticulation of the spheres of power, law, and

knowledge, which are *all* deprived of an undisputable claim to having any firm foundations. Democratic institutions, whose operation Kelsen grasped like few, should therefore *not* be related to a scientific concept of form as order-inducing method, and thus be given a surrogate foundation in the structure of the knowing mind to compensate for the lack of substantial ultimate grounds. Rather, they must be interpreted as signs of the impossibility of attaining full closure and unity in the political sphere.

In addition to a post-foundational reading of the meaning of democratic institutions, the ambivalence at the heart of Lefort’s concept of indeterminacy also allows for a more nuanced view on the relation between democracy and the autocratic political forms of modern society. In Kelsen’s dualistic scheme of worldviews, a triumph of autocracy over democracy can only mean a return to old absolutist metaphysics, in whichever new guises. Democracy “must nourish its worst enemy from its own breast” only in the specific sense that it “must grant it [formally] the same opportunities as any other political persuasion” (Kelsen 1932, 97-98). When it comes to the ideological sources of modern autocratic – neo-authoritarian or totalitarian – political forms, they are treated by Kelsen as wholly extrinsic to the relativistic, democratic worldview. The concept of indeterminacy suggests a different interpretation, in the sense that it acknowledges that liberation from the pre-modern theologico-political framework, while it opens a new horizon of political possibilities, also entails an experience of loss, which in turn nurtures a longing for new representations “of a homogeneous and self-transparent society” (Lefort 1988, 13). Attempts to actualize the unity of the people, the nation, or the state in political discourse, which bear the seed of authoritarianism, cannot be eradicated, because democratic politics also thrives on the articulation of collective subjectivities, and these cannot simply be dismissed as sheer fiction or reduced to rhetorical tricks. But they can and must be counteracted, again and again, ‘by the reference to power as an empty place and by the experience of social division’ (Lefort 1988, 232). Such a dialectical grasp of the relationship between democracy and authoritarianism/totalitarianism certainly constitutes an analytically more fruitful point of departure to study the present populist challenge to pluralist democracy than the rigid dichotomy implied in Kelsen’s concept of relativism.

In sum, Kelsen’s thinking on democracy, especially in its pluralist aspect, stands only to gain from being approached from a philosophical perspective different to Kelsen’s own. The violence thereby inflicted upon the coherence of his intellectual endeavour must be acknowledged but should not prevent us from taking the risk. Reading Kelsen’s analysis through Lefort’s

philosophical spectacles seems, indeed, to offer promising new openings in democratic theory.

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