From Judgment to Imperative: Hans Kelsen critical of ideologies

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If one wishes to try to extract from this interesting work of Stephen Turner and George Mazur the critical core that moves the authors' arguments, I will say that this core lies in the relationship between validity and effectiveness in the law. It is not by chance that the two great thinkers who act here as fundamental benchmarks are Max Weber and Hans Kelsen, who to the theme of the relationship fact-value, effectiveness-validity, factual judgments-value judgments have devoted much of their writings in the field both of philosophy and sociology of law. To what extent does this issue affect democracy as explained by Kelsen, in other words the idea of democracy and its possibilities for a concrete, practical translation in the world of the social organization? Specifically: what is Hans Kelsen's contribution to this?

For Turner and Mazur "[t]he core idea of the book is simple: democracy is a largely majoritarian procedure of law making and leader selection for a state with a significant administrative and judicial apparatus. Moreover, law and democracy are linked: "democracies produce decisions through legal procedures, and law is the means by which the decisions are put into effect" (p. x). Now, without doubt, democracy for Kelsen is a method for the choice of leaders, but that it is in its essence a procedure for the formation of law is an accidental element: it is in fact only one of the two methods (democracy and autocracy) of choosing leaders, which, in truth, are in this aim equivalent.

Now, the originality of the Kelsenian defence of democracy consists in the fact that it is 'founded' on the critique of ideology, which by its radicality invests the democratic ideology itself. Kelsen avoids, in short, the contrast "good democracy-bad autocracy", precisely because "good-bad" is not a contrast that is part of his conceptual scientific baggage, being the subjective evaluation something proper of ideologies, not of the science.

Thus, Kelsen knows and strongly denounces the gap existing between the democratic *ideal* and the democratic *reality*, between democratic ideology and real democracies. As a scientifical theorist of law and the State, as a jurist and political scientist, he does not consider in his method the democratic ideal based on subjective motives, on psychic emotions, on the distorted or tendentious representation of the real facts in order to cover personal or group interests or simply linked to impulses and instincts deposited deep in the personality; he takes into consideration, on the contrary, only the "transformation" that the democratic ideal must *necessarily* undergo to become a reality, a political and legal order existing in the world of social relations, dominated by the law of difference between those who command and those who are commanded. The scien-

tist 'knows': according to the principle of causality when it comes to natural facts (*Sein*), according to the normative principle (*Sollen*) when it comes to values, duties, norms. The object of the Kelsenian doctrine of democracy is therefore not 'democracy', but a particular democracy, the juridical-formal one, that Turner and Mazur bring back to the Weberian legal-rational State; as Horneffer observed already in the Twenties of the past century, "Kelsen does not describe democracy, but two democracies, at a time when he separates the idea of democracy from its reality" (Horneffer 1926, p. 24). We are faced with two completely different objects of consideration, and yet we need to verify the distance between one (democratic ideology as freedom of the individual from every social coercive order) and the other (the democratic reality as a state, coercive order) where real democracy can move away from the ideology of individual freedom without ceasing to be a democracy. In other words, to investigate which needs of the ideal must necessarily be realized in, and through, the law so that a form of state can still be characterized as democracy. What matters "is to find the real or legal concept of democracy" (Horneffer 1926, p. 25).

Knowledge of the democratic reality, of democracy not as ideal but as method, as a social organization, is also part of normative knowledge, just like law. In this way the opposition between ideal democracy and real democracy can also be brought back to the original methodological opposition of the two «orientations of our visual field» (*Blickrichtungen*) of the natural intellect (Kelsen 1916/2010, p. 551ff): the democratic ideal, that is, the ideological representation of democracy, falls within the framework of naturalistic knowledge, because here it is a matter of explaining—according to the principle of causality proper to natural science—the real, effective, precisely psychic motives, which determine the ideological representation of a materially 'just' democracy, or lead to the derivation of an abstract subjective value from an objective form of valid value, according to an undue and fallacious derivation of an is (subjective value as a psychic fact) from an ought (the valid norm) (Kelsen 1920/2013, p. 175ff).

Democracy as a reality—obviously 'reality' in the sense of the specific existence of democracy as a method, organization, technique, and legal form—is, on the contrary, itself part of normative knowledge, of knowledge-of-ought. If a scientific knowledge of law is possible (as a complex of state norms), it is also possible to have a scientific knowledge of democracy as a form of real government, an instrument, a social technique suitable for the realization of an end, in this case the limitation of the «torment of heteronomy», the guarantee of minorities, and especially the defense of possible freedom in its various forms, especially in that of the freedom of science from power. So (apart from the definition of every state as *Rechtsstaat*) Kelsen, leaning on his pupil and friend Adolf Merkl, is forced to abandon the original static conception of law as presented in the *Hauptprobleme der Staatsrechslehre* to accommodate—albeit in a manner not devoid of contradictory effects on the structure of the legal order as imagined by the method of neo-Kantian-an imprint—a dynamic perspective of the legal order, no longer composed exclusively of rules, but of acts producing norms and norms produced, whereby each level of the legal order appears both as production and product at the same time. This is a necessary step in order to give meaning to Kelsen's legal positivism, but the original normativism—founded on a *Grundnorm* as a constructive hypothesis of the coherence of law as a legal order—contradicts Merkl's realistic vision, attentive to the proper element of the rule of law understood as an administrative state yet founded on the primacy of the law.

This original contradiction leads not by chance the Kelsen critic of ideologies—including democratic ideology—to the realist Kelsen of the posthumous *Allgemeine Theorie der Normen*, not coincidentally based on the primacy of the norm understood, contrary to the original normativism of 1911, as a command-based imperative: *Kein Imperativ ohne Imperator*, no imperative without emperor. From this perspective, which considers the "pure theory of law" a doctrine in evolution also on the basis of the specific personal experiences of its author (especially in the United States), the interpretative position of Turner and Mazur seems to me not to give the sufficient, necessary attention to these processes of transformation and periodization, accepting on the contrary a certain interpretation of Kelsen that accentuates the importance of the 'American Kelsen' (the Kelsen of the *General Theory of Law and State* of 1945 and of the second edition of the *Reine Rechtlehre*, 1960) compared to the Austrian Kelsen of the 1910's and 1920's, in my opinion, the Kelsen truly important in the legal and political science of the Twentieth century (see my Carrino 1984).

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