

On Hans Kelsen's
Proceduralist
Democracy – Starting
from Stephen Turner's
Book

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Abstract: Starting from recognizing how both Turner' and Kelsen's work are characterized by a demystifying realism which brings both to recognize the relevance of the proceduralist dimension of modern democracy, the present essay focuses on Kelsen's theory of democracy and why the jurist retained that just a proceduralist approach is useful to understand that "core" of such form of government and coexistence, regardless of which the latter would lose itself.

Keywords: Democracy, proceduralism, freedom, integration, plurality

I. PRELIMINARY REMARKS: ON SOME
INTERESTING AFFINITIES BETWEEN HANS
KELSEN AND STEPHEN TURNER ON THE
PROCEDURALIST CONCEPT OF DEMOCRACY

In his book Stephen Turner investigates the complex interplay between democracy, law and administration, while providing us with a proceduralist concept of democracy. As he writes: "democracy is a largely majoritarian procedure of law making and leader selection for a state with a significant administrative and judicial apparatus": not least, such procedures imply "equal political liberty" (Turner and Mazur 2023, p. x; Przeworski 1999, pp. 23-55). Hans Kelsen immediately comes to mind, being one of the fathers of the 20th century proceduralist theory of democracy (Lagerspetz 2017, pp. 155-179). In Turner's book, the Austrian jurist—along with Max Weber—is one of the main reference points.

At a general glance, the parallel between Turner's point of view and Kelsen's is even more substantial. It is not only a matter of defining democracy in proceduralist terms; it deals more with the common engagement in countering a certain use of the word and concept of democracy that for both is distorted. Turner declares that he opposes "the temptation to claim that a legal order is not really legal or that a democratic electoral procedure through legal democratic process is not democratic" (Turner and Mazur 2023, p. xii).

To me, this is in many respects the same kind of "temptation" that Kelsen himself wanted to fight in his life. But there is more: indeed I think that both for Kelsen and Turner fighting that so-called "temptation" implies taking a clear distance from all those theories where a fundamentally liberal and proceduralist definition of democracy is *not enough* to grasp the most profound significance of the concept and even more to carry out a "good democracy" just

because the proceduralist approach would shut out the dimension of “strong principles” (whatever they might signify) (Turner and Mazur 2023, pp. xvii-xxi). In his book, Turner indeed seems to defend the relevance of the proceduralist dimension of democracy *per se* against what he defines as “valuing claims” such as, for example, Robert Dahl’s claim for making the American constitution “more democratic” or John Rawls with his theory of justice (Turner and Mazur 2023, p. xvii) *Mutatis mutandis*, I think that Kelsen developed his democratic theory to give a strong response to a series of ideologies, political movements, and figures who, with diverse intensity and from different perspectives, advocated that a “true democracy” could be achieved only on the condition of carrying out specific principles or values considered as objectively just. In the light of a radical critique of natural law doctrine, Kelsen denied the existence of self-evident, universally true, indisputable values, truths, and principles (Kelsen 1928, 1945). Neither Kelsen, nor Turner intend to ignore the relevance of the dimension of values or principles in democracy: in my opinion, rather they recall our attention to their intrinsic plurality as much as plural are—as Turner argues in many parts of his book—people’s ends. It seems to me that starting precisely from recognizing such a plurality and complexity, both Kelsen and Turner search for a definition of democracy that does not necessarily depend on the presence and sharing of strong and common values: both seem to be inspired by a very similar demystifying realism. In the light of this Turner critically addresses Woodrow Wilson’s politics as the expression of “anti-democratic ideas to be presented as ‘saving democracy’, or true democracy, when it is in fact a means of expanding the power of the state, and its discretionary power, which can then be used for ‘progressive’ ends” (Turner and Mazur 2023, p. 82).

Partly due to their common demystifying realism, both seem to invite us to look at democracy not in terms of “content” but rather in terms of “rules” and “procedures”, which means looking at democracy primarily as a set of specific legal procedures by means of which legitimate political decisions are concretely taken and put into effect, while binding the whole community. It is likewise undeniable that Turner, more than Kelsen, poses us much the problem of what determines adherence to procedures and rules, while developing his idea of “ultimate and intermediate ends” (Turner and Mazur 2023, pp. iv-xx, 153f). It is equally clear that Turner’s reflection about *Making Democracy more Democratic* is here related to an articulated critical discussion about the rule of law and the huge issue of how to control state abuses (Turner and Mazur 2023, pp. 82, 170). At the same time, it is important to notice and stress that for Kelsen, modern democracy assumed one core, strong principle, i.e. that of freedom (in terms of freedom rights) enabling—as I am going to argue—the functioning of democracy itself. Yet, I think that both in Kelsen and Turner the presence of certain legal procedures represents an integral component of democracy as it has developed within modern States, equipped with a complex and articulated administrative apparatus. In a nutshell, I think that Kelsen and Turner bring us to reflect and focus on the relevance of the proceduralist dimension of democracy within a broader political reflection aiming to separate democratic theory from ideologically connoted contents. In doing so, I think that both end up arguing that in many crucial respects the consciousness of how relevant procedures are in modern democracy, is necessary to comprehend its meaning and functioning. In this essay, starting precisely from recognizing the above-mentioned affinities between Kelsen and Turner, I would like to discuss Kelsen’s proceduralist theory and why he retained such a theory capable of identifying—better than other theories—that ultimate “core” regardless of which democracy would lose itself, becoming or risking becoming something radically different.

2. NOT THE PEOPLE: PLURALITY POLITICALLY AND SOCIALLY INTEGRATING

In his book, Turner identifies two “myths” at the very basis of modern democracy: the “myth” of people’s rule and that of political representation (Turner and Mazur 2023, p. 66). Precisely these two “myths” are frontally criticized by Kelsen in all his major works on democratic theory. I believe that such a critique is one of the keys to understanding the sense and the reach of his proceduralist theory of democracy.

Since the first edition of *Vom Wesen und Wert der Demokratie* (1920), Kelsen’s primary interest was to investigate and understand the meaning of *real* democracy while distinguishing it from the *ideal* one

(Kelsen 192), pp. 1-4). In this sense, Kelsen as a democratic theorist was animated by the will to develop a *realistic* definition of democracy whereby for the term “realistic” I am referring to the belief, which is profoundly rooted in the history of Western political thought, that there is a fundamental distinction between the ideal and real dimension of politics.¹ This is true for all his works on democratic theory from his 1920s essays such as the two editions of *Vom Wesen und Wert der Demokratie* (1920; 1929) until the *Foundations of Democracy* (1955), passing through his *General Theory of Law and State* (1945) that was largely an attempt to bring the American academic audience closer to his *Reine Rechtslehre* (1933). In my opinion, it is precisely by drawing the line between real and ideal democracy that Kelsen wanted to explain what, in his opinion, democracy *actually is* and thus what it *can never be*. In both editions of his *Vom Wesen und Wert der Demokratie*, the Austrian jurist outlined the distinction between ideal and real democracy by directly confronting with Jean Jacques Rousseau whom the Austrian jurist considered the “greatest theorist of ideal democracy” (Kelsen 1920, 1929). To Kelsen, the Geneva philosopher was the one who defined “ideal” democracy as full “self-determination” in terms of citizens’ direct participation to public functions, that implied a perfect identity between the rulers and the ruled (Kelsen 1920). Kelsen thus identified ideal democracy with a direct form of democracy. In the specific case of Roussoviaan theory, democracy assumed the existence of a people as a unitary and homogeneous subject, equipped with the “general will” that stems from the social contract (Rousseau 1762/1945). I think that the “core” of Kelsen’s critique of Rousseau’s theory of democracy consists of two main philosophical argumentations: on the one hand, the jurist contested the feasibility of a direct democracy because of the objective existence of an inevitably heteronomous social order that implied the hiatus between rulers and ruled. On the other, he challenged the unitary nature of people and the existence of a “general will”. As Kelsen argued, nothing like that existed in reality, because even though direct participation of citizens to politics was feasible, “opposition of interests”, diverse opinions and ideas could always be possible and thus the dichotomy between majority and minority could always manifest (Kelsen 1920/2006, pp. 4-5; 1929/ 2006, pp. 156-158). The Roussoviaan distinction between “general will” and “opinions” according to which the will of the minority had ultimately to be seen as an integral part of the “general will” itself was considered by Kelsen as theoretically weak and an unrealistic attempt to combine the principle of the “general will” (and its assumed unitary essence) with the ever-possible existence of a minority (Kelsen 1955/2006, pp. 246-248).²

My intention is not so much to discuss the ultimate validity of Kelsen’s interpretation of Roussoviaan democracy—which is undoubtedly more articulated and richer in nuances than what Kelsen retained³—as to observe that for Kelsen, no unitary entity called the people, as well as no unitary “general will” pre-existed to real social and political life. In a few words, in Kelsen’s view, no political unity preceded social plurality.⁴

I think that we are literally facing a radical *demythization* of the people. How shall we interpret it? In my opinion, it has a lot to do with that radical process of *depersonalization* of legal and political concepts such as the State and sovereignty that Kelsen began to develop since 1911, with his imponent monograph entitled *Die Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre der Rechtssatze*. Here he critically addressed the major representatives of the German-speaking jus-positivist tradition of the late 19th century: from Carl F. von Gerber to Georg Jellinek passing through the “jurist of the Wilhelmine Empire”, Paul Laband. For that prestigious school of legal thought, the State was the “sovereign subject” and most importantly it was a “legal person” equipped with its own will, with respect to which, Parliament was a mere “organ”, precisely an “organ of the State” (Costa 2007, p. 96f). The very political objective of German jus-positivism was to conceptually separate the ownership of sovereignty both from the figure of the Monarch and from the People, in order to found and legitimate a political order which was imagined as an alternative both to monarchic absolutism and (most importantly) to democracy.⁵

Based on a radical distinction between facts and norms whose roots can be traced to a series of crucial intellectual influences such as Hermann Cohen’s Neo-Kantianism, the Vienna Circle and Sigmund Freud’s lesson on psychological anthropology, Kelsen rejected any form of *personalisation* applied to the realm of Law. As he argued, the State was nothing but a “legal entity” made up of norms hierarchically organized,

and sovereignty had to be logically reconsidered in the terms of the “quality” of that legal order (Kelsen 1911).

I think that, coherently with such a theory, Kelsen depersonalized the concept of people as well: just as no State as a “person”, whose well-defined will was expressed by Parliament existed for him, so no people as a unitary, homogeneous subject equipped with its own will pre-existed to the concrete presence of democratic institutions. As he argued, in empirical reality, people as a unity did not exist; people represented a unity only as “subject” to the same legal order, i.e. in “normative” terms (Kelsen 1929/2006, p. 165). In Kelsen’s work, people as a pre-existing, unitary, homogeneous subject was replaced by a social, political, ideal plurality. Accordingly, understanding what real democracy was and how it worked signified for Kelsen to understand how just that plurality socially and politically *integrated* in the form of a democratic government.⁶

I retain that within Kelsen’s political reflection, the *integration* of social, political, ideal plurality assumed two key principles underpinning, moreover, all his democratic theory: on the one hand, the recognition of fundamental freedoms to all citizens; on the other, the (for Kelsen) realistic consciousness that within a complex and modern society “labour divisions” and “competence specialization” actually impeded direct participation to public life while rendering a bureaucratic system necessary (Kelsen 1920/2006, pp. 18-20). Kelsen was evidently adopting Weber’s sociological lesson which the Austrian jurist openly recalled in the first edition of *Vom Wesen und Wert der Demokratie*.⁷ After arguing that the Roussovian concept of the people was unrealistic, Kelsen added that direct participation to public functions was unrealistic too because within modern societies—as the French-speaking Liberal political thinker Benjamin Constant explained much before Max Weber and modern sociology appeared on the scene—citizens did not feel the same necessity to be involved in politics with the same commitment and participatory intensity.⁸

With regards to this, Kelsen thus made a distinction between those who did not even exercise their right of voting and those voting each time a political election was called, then between the latter and those who gathered together forming *political parties* in order to concretely influence political life and decisions (Kelsen 1929/2006, pp. 164-166). In the second edition of *Vom Wesen und Wert der Demokratie*, Kelsen’s words leave no room for doubts: “democracy can only exist if individuals group themselves according to their political affinities, to direct the general will towards their political ends, so that between the individual and the state, [...] political parties find their place” (Kelsen 1929/2006, pp. 166). In real democracy the people politically exists when citizens decide to create political parties, that means when they integrate themselves in a variety of political parties “stirring up all those social forces that, in some respects, we can call the people”.⁹ In this sense, as it has been correctly stressed, Kelsen’s theory of real democracy ends up by coinciding with the theory of “political parties’ democracy”.¹⁰

The crucial and necessary condition, without which the forming of political parties and thus the process of integration would be unfeasible, was the provision of freedom rights to citizens. With that, the Austrian jurist delivered a serious and direct blow to the modern “myth” of people’s rule—that owes much to Rousseau—which means, in my opinion, a direct blow to the idea of democracy as the rule of a unitary and uniform subject equipped with its own pre-existing political will.

Starting from the distinction between ideal and real democracy, Kelsen argued indeed that what we define as the people in democracy should realistically be seen as the result of a social and political integration process that brings citizens together to form political parties to “give a certain direction to the formation of the state will” (Kelsen 1929/2006, p. 166). There would be much to say about how Kelsen’s argumentations must resound in the early post war period and chiefly in Weimar Germany when political party pluralism was blamed by many prominent intellectuals for threatening the political unity of the State. Just to mention two significant representatives of that debate, the jurists Carl Schmitt¹¹ and Heinrich Triepel frontally attacked parliamentary democracy based on political party pluralism as a source of a widespread political instability and moreover as the ultimate source of dangerous divisions into the body politic.¹² With his theory of real democracy, Kelsen instead took a clear stance in favor of political parties as an instrument of integration rather than of division.

3. THE “FICTION” OF POLITICAL REPRESENTATION: PARLIAMENTARISM AS A “SOCIAL TECHNIQUE”

If, in reality, the people as a unitary, homogenic subject, considered as occurring previously to democratic institutions does not exist, the concept and definition of political representation must change as well. Kelsen depersonalized—or maybe it would be much more correct to say demystified the latter, as he did for the concept of the people. To do that, he turned his gaze toward the French Revolution when in Europe the principle of political representation was encoded both in theoretical terms with Emmanuel Joseph Sieyès’ popular pamphlet on *Qu’est-ce que le Tiers État?* (1789) and in practical terms with the creation of the National Constituent Assembly (1789-1791) (Manin 2010, pp. 79-93).

In both editions of *Vom Wesen und Wert der Demokratie* Kelsen stressed how since the French Revolution parliamentarism was justified as the representation of the people’s real will and thus in the name of people’s sovereignty (Kelsen 1929/2006, pp. 176-177). According to the jurist, such a definition, which corresponded to the “ideal” meaning of political representation, tried to “save” the principle of “self-determination” when in an empirical dimension the creation of laws was indirect because it was mediated through the elected legislative body.

In other words, political representation was equivalent for Kelsen to a colossal “fiction” (Kelsen 1920/2006, p. 11; 1929/2006, p. 177): there was no people as a unitary subject equipped with its own well-defined will as well as there was no parliament actually representing people’s will. In order to grasp the real meaning of parliamentarism, it was necessary for Kelsen to change perspective, to look at it from a totally different point of view exactly as done for the concept of the people (and earlier, in his legal works, for that of State and sovereignty): parliamentarism did not have to be justified in the name of the “what” (the parliament really represents likewise the real people’s will) but rather in the name of the “how”. Kelsen indeed argued that parliamentarism was essentially a special instrument that served for “the formation of the executive will of the state through a collegial body elected by the people on the basis of universal and egalitarian suffrage, i.e. democratic, according to the principle of the majority” (Kelsen 1929/2006, p.176). With that, Kelsen delivered a major blow to the “myth” of political representation. Parliamentarism was thus re-defined as a “social technique”, by means of which citizens equipped with full freedom rights elected those who joined the legislative body whose objective was to create the political content of the “State will”,¹³ according to the principle of majority. We face a proceduralist and Liberal¹⁴ justification of parliamentarism (and in a broad sense, of real democracy) that assumes both the demythization of the concept of the people as well as that of political representation.

Yet, I think that the abovementioned quote includes two distinct and yet inter-connected elements which deserve to be scrutinized: on the one hand, the issue of choosing (electing) representatives from the below, on the other the peculiar way in which political decisions are taken within parliament, i.e. through the majority principle. Now, I will discuss both aspects. In Kelsen’s theory of real democracy, the issue of elections is strictly connected to the relationship between the rulers and the ruled. Once argued that ideal democracy as a direct form of democracy is unfeasible, and therefore the split between rulers and ruled is unavoidable, the crucial issue for Kelsen became understanding how such a split could be combined with the principle of freedom. In other words: if heteronomy could not be eliminated how did it reconcile real democracy with the principle of “equal freedom” to all citizens? According to the jurist, such a reconciliation was made possible in real democracy because of the peculiar way in which “Leaders” were “created” within it. Kelsen was very eloquent on this point: “the creation of numerous Leaders becomes the central problem of real democracy-which, contrary to its ideology, is not a collective without leaders-which stands out from real autocracy not so much for the absence as, rather, for the great number of heads. And so, a special method of selecting leaders from the governed community appears element of real democracy. This method is election” (Kelsen 1929/2006, p. 214). Rulers became such because they were chosen (elected) by the people, which means that the “creation” of the rulers moved from below to the top and this was made possible by the recognition of freedom rights to citizens. If ideal democracy corresponds to the reign of full

political “self-determination”, signifying having overcome heteronomy, in terms of the identity between the rulers and the ruled, real democracy corresponds to that social and political system in which the split between rulers and ruled persists, although it is fluid and dynamic: the ruled can become the rulers of tomorrow and the rulers of today can be removed. This is possible because of the peculiar way in which rulers become such, i.e. through elections that imply the recognition of fundamental freedoms. In this way Kelsen reconfigured the concept of heteronomy in the light of the principle of freedom. Not freedom in the Roussevian sense of the word—at least according to Rousseau interpreted by Kelsen—but the freedom in the sense that, by virtue of freedom rights, citizens could “create” their rulers who were removable not only because they were chosen from below for a determined period, but chiefly because, in terms of freedom rights, they were perfectly equal to the ruled. From here, for Kelsen, other specific components of real democracy derived, i.e. the right for the ruled to criticize the rulers’ actions and the rulers’ political duty to be responsible for their actions before the ruled: “since in democracy—Kelsen writes—rulership has no supernatural quality, and the ruler is created by a rational, publicly controllable procedure, rulership cannot be the permanent monopoly of a single person. Publicity, criticism, and responsibility make it impossible that a ruler becomes irremovable. Democracy is characterized by a more or less quick change of rulership” (Kelsen 1955/20026, p. 291).

As I was observing, Kelsen’s definition of parliamentarism also implied a second crucial aspect, related to the particular way in which decisions are taken within the legislative body, i.e. the majority principle. If taken literally, such a principle should be considered the quintessential of heteronomy: the majority decides and imposes its decisions on the minority. Yet, it is not so, at least not for Kelsen. As I previously tried to stress, within Kelsen’s reflection, the principle of freedom—i.e. the provision of equal fundamental freedoms to citizens—substantially mitigated the insuppressible heteronomous nature of social order. Similarly, for the jurist such a principle was capable of mitigating the majority principle as well. In order to understand how, it is crucial to focus on the way in which, according to Kelsen, parliamentary life is conducted. Within the legislative body political parties re-organize themselves in the form of a majority and a minority (Kelsen 1929/2006, p. 196f): in this sense, I retain that majority-minority should be seen, in Kelsen’s perspective, as a *second, relevant form of political integration*, characterizing real democracy, after the creation of political parties.

In real democracy, the relationship between the majority and minority is everything but oppressive or abusive, according to Kelsen, essentially because the latter enjoy the same fundamental freedoms as the former (Kelsen 1929/2006, pp. 195-197). This has two crucial and interconnected implications within Kelsen’s reflection: first, exactly as the relationship between the rulers and the ruled, that between the majority and the minority is fluid, changeable and dynamic as well. In other terms, the minority of today might become the majority of tomorrow and the majority of today is not unmovable; second, political decisions taken in parliament are everything but a “diktat”. They are rather, the final result of a “compromise” between the majority and the minority, both provided with the same “amount” of freedom (Kelsen 1929/2006, p. 196). To me, political decisions as the result of the compromise between majority and minority represent *the third and maybe highest level of integration* within real democracy as theorized by Kelsen.

Once argued that the people as a unitary, homogeneous subject equipped with its defined will is a “fiction” as well as the parliament as that body actually representing the people’s will, Kelsen’s focus shifted from the “what” to the “how”. In other terms, the jurist adopted and applied a proceduralist perspective, posing the problem of *how* plurality integrated in the form of a democratic government. In responding to such a crucial issue Kelsen argued that starting from a condition of recognized freedom rights the process of integration took shape through political parties and the dialectic between majority and minority. In a nutshell, even though ideal democracy as complete “self-determination” was unfeasible, Kelsen retained that an effective balance between heteronomy and freedom was possible within real democracy: freedom rights, the dynamic relationship between rulers and ruled as well as laws as the result of a compromise between the majority and the minority, for Kelsen, all contributed to mitigate the heteronomous connotation of social order.

Yet, there is one more aspect to explore: Kelsen's major works on democracy were not conceived within a vacuum: first of all, they were written in order to target specific movements, figures, theories and ideologies that he considered dangerous for the existence of (real) democracy, if applied. In the following paragraph I will show how in doing so Kelsen both delineated what real democracy can never be, without losing itself, while defending just a proceduralist concept of democracy.

4. WHAT REAL DEMOCRACY CAN NEVER BE: IN DEFENSE OF A PROCEDURALIST VIEW OF DEMOCRACY

Behind Kelsen's major essays on democracy there were tangible targets he wanted to address: in my opinion, all of them can be ideally divided into two major groups: on the one hand, those ideologies, movements, figures believing that representative, liberal democracy based on political parties is a form of government that has to be replaced by something radically new or reformulated in its founding principles. On the other, those proposing to modify the representative-parliamentary mechanism in the name of a "better" and "more effective" kind of representation. Within the first group, Kelsen situates, for example, Lenin, the Soviet ideology and—in some key respects—Neo-jusnaturalism; within the second, he situates both the attempt of the early post-war European conservative and reactionary forces to introduce "professional representation", and his former pupil Eric Voegelin's theory of "existential representation".¹⁵ To me, a space apart was occupied by the figure of Friedrich von Hayek whom Kelsen critically addressed for his *The Road to Serfdom* (1944) in which the Austrian economist established a direct connection between democracy and capitalism (Hayek 1944/2005). For the jurist, instead, the existence and health of a democratic system did not depend on a specific economic system (Kelsen 1955/2006, pp. 361-362).

In the first edition of *Vom Wesen und Wert der Demokratie* (1920), Kelsen retained that the major challenge to real democracy came from the new-born Soviet Republic, Bolshevism and notably Lenin. By referring to Lenin's *State and Revolution* (1917), Kelsen argued that the Bolshevik Leader considered the Soviet system as a great and successful experiment of "direct democracy", i.e. as a "true democracy". Here, the point is obviously not so much to critically consider Lenin's point of view as Kelsen's argumentation against him. First of all, to Kelsen, the new Russian political system was far from carrying out a direct democracy since the many Soviets established in the country were for him nothing but a plethora of micro-parliaments, reestablishing the hiatus between rulers and ruled, typical of an indirect form of government (Kelsen 1920/2006, pp. 11-14). Most importantly, the jurist blamed Lenin and the Bolsheviks for creating a government based on a systematic social and political discrimination at the detriment of the bourgeoisie, which was deprived of fundamental freedoms, on the basis of 1918 Russian constitution, while introducing a voting mechanism according to socio-economic criteria rather than to the universality of rights and duties (Kelsen 1920/2006, pp. 23-25). Accordingly, for Kelsen, defining this kind of political system the highest achievement of democracy implied endorsing a completely distorted and perverted significance of this word. In Kelsen's eyes, Soviet Russia was precisely the opposite to a "true democracy" because it established heteronomy without freedom: heteronomy in the sense that the split between rulers and ruled persisted as, for Kelsen, was testified by the widespread network of micro-parliaments (Soviets), while—differently from real democracy—the recognition of the principle of freedom in the terms of universal rights was cancelled. The jurist reiterated a very similar concept many years later in his American work on the *Foundations of Democracy* (1955).

During the Cold War, Kelsen again looked at Soviet Russia as a powerful threat to democracy not least because of the use that Marxism and Leninism made of the word "democracy", by repeating the identification of the Soviet system as a "true democracy" because capable of pursuing "the good of the proletariat". In this way—Kelsen argued—the criterium by which the distinction between a democratic and a not democratic system became the "who" and the "what" for which that system was established. Following just this kind of reasoning for Kelsen meant admitting the dangerous paradox for which a government for the "good of the proletariat" could be considered an example of "true democracy", even though it violated all

fundamental freedoms and the dignity of citizens (Kelsen 1955/2006, pp. 256-258). In this sense, for Kelsen, the “good of the proletariat” ended up for becoming the paravent for establishing an anti-democratic and liberticidal regime: the point is that for the Austrian jurist exactly this kind of situation materialized when democracy was defined and subsequently carried out according to principles—in other words according to the “what”—considered as objectively and universally valid rather than according to a set of *procedures*—i. e. to the “how”—whose function was to mediate between heteronomy and freedom.

In my opinion, Kelsen followed the same kind of argumentation when discussing Neo-jusnaturalism. Kelsen reminded how the post-totalitarian age was characterized by the resurgence of natural law doctrine in the form of the Neo-jusnaturalist school of thought (Kelsen 1955/2006, p. 307 ff). Historically speaking, its blooming was in part due to an attempt in legal and political philosophy to go beyond the ultra-positivist “law is law” that seemed to be co-responsible for the rise of totalitarian ideology and the tragedy of the Holocaust.¹⁶ In *Foundations of Democracy* Kelsen identified three intellectuals in particular as key representatives of Neo-jusnaturalism: the Protestant theologians Emil Brunner and Karl Niebhur, on the one hand, and the Catholic philosopher and pedagogist Jacques Maritain, on the other. Despite their confessional differences, for Kelsen, all of them conceptually operated in the same way and with the same purpose: they proposed to rethink post-WWII democracy in terms of strong religious values, while anchoring democracy to the principle of justice—as Brunner argued—or more precisely to “Christian justice” as advanced by Niebhur, or to the values embedded in the Christian Gospel, according to Maritain (Kelsen 1955/2006, pp. 307-346).

In a nutshell, for Kelsen, there was no substantial difference between the supporters of Soviet ideology and Neo-jusnaturalists because in both cases we would be facing an attempt to justify and found democracy based on principles and values retained as objectively valid and true, i.e. following the “what” rather than the “how”. Most importantly, Kelsen argued that just that profound belief in the existence of objectively valid and true values or principles implied for both a lack of attention to the issue of freedom. There would be much to discuss on this sort of equation made by Kelsen between Neo-jusnaturalism and the Soviet ideology, with regard to the issue of freedom. For me, it is controversial to put a religiously oriented kind of philosophical and political movement that was concerned about the refoundation of democracy and the restoration of human dignity after totalitarianism, on the same level of an ideology characterizing a real dictatorship. Yet, what I want to stress now is that within Kelsen’s reasoning, the ultimate criteria adopted by the Soviet ideology and by Neo-jusnaturalists to identify what a “true” and good democracy was, ended up becoming functional to the establishing of an undemocratic and illiberal kind of government.

A similar kind of problem emerged for Kelsen when approaching the proposals to reform the political and parliamentary mechanism of representation. In the second edition of *Vom Wesen und Wert der Demokratie* (1929), he addressed the major European conservative and reactionary forces of that time and their plan to combine or replace political with professional representation. This in order to accomplish two objectives: on the one hand, to render the decision-making process more effective during the early post war period when most European parliaments were accused of being nothing but useless “hotbeds of gossip” (Kelsen 1929/2006, p. 182f). On the other, to contain or even dismantle a political system based on the centrality of political party pluralism seen by such forces as a source of instability and growing divisions into the body politic. With his reply Kelsen stressed two main controversies arising from professional representation. In the first instance, since the latter was based on socio-economic criteria rather than on the principle of equal rights for all citizens it would make it extremely difficult for the involved forces to reach a point of encounter: every group represented would perceive itself as radically different from the other and thus less inclined to open dialogue (Kelsen 1929/2006, pp. 190-193).

Also, many problems to discuss would go beyond the specific socio-economic interests of the single groups and this would make decision-making process tremendously problematic and slow. As a result of this, no form of political integration would be possible and therefore socio-economic differences would turn into a source of growing conflict that could be solved only at the condition that one group autocrati-

cally imposed its own agenda on the others: to sum up, for Kelsen, the condition would be to undermine democracy itself (Kelsen 1929/2006, pp. 192-193).

In *Foundations of Democracy*, Kelsen returned to the issue of representation as well: this time in controversy with his former pupil Eric Voegelin's theory of representation as expressed in *The New Science of Politics: An Introduction* (1952). Here, the Austrian political scientist—like Kelsen an *émigré* to the U.S.—stressed the limits of “formal democracy” and traditional political representation (“elemental representation”) which, in his opinion, needed to be integrated with what he defined as “existential representation”. For Voegelin, the latter indicated the key relationship between ruler/s and the “society as a whole”. Voegelin's final judgement was peremptory: if such a relationship failed, democracy was doomed to fail too.¹⁷ Exactly as for professional representation, for Kelsen, the “existential” one could open the doors to an autocratic rule: as the jurist argued, if “existential representation” was more essential to democracy than the “elemental one”, once established who the ruler/s was/were and once established that the connection between them and the “society as a whole” actually existed, the issue of how ruler/s would exercise their role, and even the problem of granting fundamental freedoms would become of secondary relevance. Not by chance, Kelsen polemically reminded how Voegelin retained the distinction between political party pluralism and party-monism not that crucial to distinguish between democracy and its exact opposite (Kelsen 1955/2006, pp. 260-269).

As I previously observed, Kelsen's critique of Von Hayek deserves a comment apart: the Austrian economist argued that capitalism served the principle of freedom and thus democracy much better than an economic system controlled by the government like in Socialist countries. At a very first glance, the two Austrians gave the same relevance to the principle of freedom but with one major difference, to me: Kelsen contested the direct and necessary connection between the granting of economic freedom, on the one hand, and that of civil, political freedom, on the other: for the jurist there was indeed no evidence that an economic system controlled by the government would inevitably and always lead to the loss of freedom rights and thus to the end of democracy (Kelsen 1955/2006, pp. 365-369).

Kelsen's critique of this series of targets allows us to better comprehend what real democracy could never be for him and simultaneously what kind of theory was for him the most suitable to explain the meaning and functioning of real democracy: a political system that did not grant full freedoms to all citizens regardless of their socioeconomic status, as well as rejected or drastically limited political representation centered on political parties pluralism and the majority-minority dialectic could not be considered a democracy at all. Likewise, importantly, what Kelsen seemed to strongly dispute in the diverse political and ideological positions discussed so far was their attempt to define democracy according to the “what” rather than on the “how”: more precisely according to a “what” retained as objectively valid and true -- the accomplishment of the Marxist-Bolshevik ideology and the refoundation of democracy in the light of Christian values. Accordingly, for Kelsen, we are faced with theories and movements, for him, sharing the same substantial indifference toward the issue of freedom rights and the same substantial inability to admit its centrality in the shaping of real democracy. To the jurist, in other words, all of them appeared as incapable of thinking, establishing, and justifying a real balance between heteronomy and freedom. Following Kelsen's reasoning, even von Hayek failed to comprehend and coherently justify such a compromise because in hindsight Kelsen retained the necessary relationship posed by the economist between capitalism and freedom nothing but another attempt—although ideologically different from those previously addressed—to found and explain the meaning and functioning of democracy according to the “what” rather than to the “how”. Conversely, Kelsen retained that a proceduralist theory of democracy allowed to effectively conceptualize the compromise between heteronomy and freedom: from his perspective, such a theory looked indeed at real democracy as a “government by the people” which assumed the existence of citizens equipped with full freedom rights and “creating” their “Leaders” who were removable and responsible for their actions by virtue of their peculiar selection from below.

5. BRIEF CONCLUDING REMARKS

In this essay, I have tried to delineate what I think are some of the core components of Kelsen's proceduralist theory of democracy. Starting from Stephen Turner's book and recognizing some interesting affinities between the two thinkers with regards to their common demystifying realism and the relevance of proceduralist dimension in democracy, my intent was to explain the internal logic—so to say—to Kelsen's way of conceiving democracy. Once rejected the Roussovian ideal of freedom as “self-determination”, while demythizing both the concept of the people and political representation, Kelsen identified real democracy with a form of government based on the balance between the unavoidable heteronomy of social order and freedom, in the sense of freedom rights. For Kelsen such a balance and how it worked could be fully comprehended and well explained particularly if adopting a proceduralist point of view, i.e. by doing without explaining the meaning and functioning of democracy on the basis of the “what”. According to the jurist, the compromise between heteronomy and freedom in real democracy indeed turned out to be the final outcome of a peculiar *way in which* political decisions were created: starting from the provision of widespread freedom rights, social, ideal and political plurality integrated through different and gradual steps in the form of a “government by the people”. Concretely this consisted of a series of procedures—among which the voting mechanism and parliamentarism were particularly relevant—which allowed to produce binding political decisions on the basis of an authorization process moving from below to the top, i.e. from the ruled to the rulers. In other terms, in real democracy, for Kelsen, the dichotomy rulers-ruled could not be eliminated but it could be mitigated just because of *the way in which* political decisions were taken. Understanding this “how”—that is at the center of the proceduralist perspective—meant understanding how, in reality, heteronomy and freedom were combined and reconciled. Yet, in my opinion, the proceduralist connotation of his democratic theory has an even more profound implication: for Kelsen a democratic theory centered on the “how” served the principle of freedom much better than those—of diverse inspiration—centered on the “what”. Or to put it differently, a proceduralist theory seriously assumed the principle of freedom and its centrality for understanding how the political content of social order was established within real democracy more than one focused on the “what”. In this sense, I think that Kelsen's proceduralism served a view of real democracy that was profoundly and clearly embedded in a Liberal kind of sensitivity and mentality. After all, in my opinion, his controversy with the series of political and ideological movements, schools of thought and figures whom I have previously discussed should be partly interpreted in the light of this.

In conclusion: in the first paragraph of this essay, I argued that Kelsen and Turner seem to share the belief that a proceduralist approach to democracy is actually useful to comprehend the meaning of modern democracy within complex social systems. As for the jurist, I would say that such an approach, which is in my opinion profoundly connected with his close attention paid to the issue of freedom, is *enough* just because in his opinion it allows us to comprehend that ultimate “core” beyond which democracy would vanish giving way to something different. For Kelsen, this “core” is the balance between heteronomy and freedom.

NOTES

- 1 On this point, see, Schuett and Hollingworth 2018.
- 2 Kelsen was perfectly aware of Rousseau's hostility toward the minority which was considered by the Geneva philosopher as a dangerous breach into the body politic founded on the social contract. After all, such aversion to the minority is one of the reasons why intellectuals and political thinkers such as Jacob Talmon and Isaiah Berlin defined the Roussovian concept of democracy as animated by an intrinsic "totalitarian" attitude and spicity. See, Talmon 1952 and Berlin 1958/2002.
- 3 See, Qvortrup 2003.
- 4 See, Kelsen 1920/2006; 1929/2006; 1945/2009; 1955/2006.
- 5 After the constitutional revolution of 1848-1849, the major German legal theorists committed to developing a new form of legal science whose most political objective was precisely to legitimate a conservative social and political order (Fioravanti 1979, pp. 56-60).
- 6 Kelsen used the concept of "integration" in both editions of *Vom Wesen und Wert der Demokratie* even though such a concept became more relevant in the second edition.
- 7 Kelsen [1920], *Vom Wesen und Wert der Demokratie*, 2006, p. 19.
- 8 See, Constant 1819.
- 9 Kelsen [1929], *Vom Wesen und Wert der Demokratie*, 2006, pp. 171-172.
- 10 See, Dreier 1986.
- 11 It is interesting to notice that Schmitt was a reader and interpreter of Rousseau's work. On this point, see: Salzborn 2017, pp. 11-34.
- 12 See, Schmitt 1923/2017; Triepel 1927. On the contrary, within the Weimar debated two intellectuals such as Hermann Heller and Gustav Radbruch who defended political party pluralism, although they were both critical toward Kelsen's theory of Law. See, Dyzenhaus 2003.
- 13 It is important to remember that for Kelsen the "State will" is a conventional expression with which certain particular "actions" are ascribed to the State itself.
- 14 In this case I am using the term "Liberal" according to the European tradition of political thought, particularly to that of liberal-democratic thought, as it developed since the late 19th century, centered on the principle according to which civil and political freedoms should be equally recognized to all citizens in the form of individual rights.
- 15 See, Kelsen 1920/2006; 1929/2006; 1955/2006.
- 16 See, Facchi 2007.
- 17 See, Voegelin 1952.

REFERENCES

- Berlin, I. 2002/1958. *Two Concepts of Liberty*, ed. H. Hardy. Oxford: Oxford University Press.
- Constant, B. 2016/1819. *De la Liberté des Anciens comparée à celle des Modernes*. Oxford: Berg International.
- Costa, P. 2007. *The Rule of Law: A Historical Introduction*. In: P. Costa-D. Zolo (eds.), *The Rule of Law. History, Theory and Criticism*. Springer Verlag: Dordrecht.
- Dreier, H. 1986. *Rechtstheorie, Staatssoziologie und Demokratietheorie bei Hans Kelsen*. Baden-Baden: Nomos Verlag.
- Dyzenhaus, D. 1999. *Legality and Legitimacy. Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*. Oxford: Oxford University Press.
- Facchi, A. 2007. *Breve storia dei diritti umani*. Bologna: Il Mulino.
- Fioravanti, M. 1979. *Giuristi e costituzione politica nell'Ottocento tedesco*. Milano: Giuffrè.
- Hayek von, F. 2005/1944. *The Road to Serfdom*. London: Institute of Economic Affairs.
- Kelsen, H. 1911. *Die Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze*. Tübingen: Mohr.
- _____. 1920/2006. *Vom Wesen und Wert der Demokratie*. In: Hans Kelsen. *Verteidigung der Demokratie*, hrsg. von Matthias Jestaedt und Oliver Lepsius, 1-33. Tübingen: Mohr.
- _____. 1928/2006. *Die Grundlagen der Naturrechtslehre und des Rechtspositivismus*. Charlottenburg: R. Heise.
- _____. 1929/2006. *Vom Wesen und Wert der Demokratie*. In: *Verteidigung der Demokratie*, hrsg. von Matthias Jestaedt und Oliver Lepsius, 149-228. Tübingen: Mohr.

- _____. 1945/2009. *General Theory of Law and State*, with an Intro. by J. A. Treviño. Cambridge: Harvard University Press.
- _____. 1955/2006. *Foundations of Democracy*. In: *Verteidigung der Demokratie*, hrsg. von Matthias Jestaedt und Oliver Lepsius, 248-286. Tübingen: Mohr.
- Lagerspetz, E. 2017. Kelsen on Democracy and Majority Decision. *Archiv für Rechts und Sozialphilosophie* 103(2):155-179.
- Manin, B. 2010. *The Principles of Representative Government*. Trans. Cambridge: Cambridge University Press.
- Przeworski, A. 1999. *Minimalist Conception of Democracy*. In: Ian Shapiro and Casiano Hacker-Cordón (eds.). *Democracy's Value*, pp. 23-55. Cambridge: Cambridge University Press.
- Qvortrup, M. 2003. *The Political Philosophy of Jean Jacques Rousseau. The Impossibility of Reason*. Manchester: Manchester University Press.
- Rousseau, J.-J. 1762/1947. *The Social Contract*. London: Collier Macmillan.
- Salzborn, S. 2017. The Will of the People? Carl Schmitt and Jean Jacques Rousseau on a Key Question on Democratic Theory. *Democratic Theory* 4(1):11-34.
- Schmitt, C. 1923/2017. *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*. Berlin: Duncker & Humblot.
- Schuett, R. and M. Hollingworth (eds.). 2018. *The Edinburgh Companion to Political Realism*. Edinburgh: Edinburgh University Press.
- Talmon, J. L. 1952/1970. *The Origins of Totalitarian Democracy*. London: Sphere Books.
- Turner S. and G. Mazur. 2023. *Making Democratic Theory Democratic. Democracy, Law and Administration after Weber and Kelsen*. New York: Routledge.
- Triepel, H. 1927. *Die Staatsverfassung und die politischen Parteien*. Berlin: Druck der preussischen Druckerei und Verlags-Aktiengesellschaft.
- Voegelin, E. 1952. *The New Science of Politics. An Introduction*. Chicago: University Chicago Press.