

Chapter VII

Some misunderstandings concerning Hans Kelsen's concepts of democracy and the rule of law

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Although Hans Kelsen's *Pure Theory of Law* is arguably one of the most influential theories of law in Europe, it has been occasionally misunderstood. One of the most common misunderstandings is the claim that Kelsen's concept of the *Rechtsstaat* (the rule of law) legitimizes any regime, the Nazi one included.¹ This misunderstanding stems from the fact that Kelsen ascribed a double meaning to the concept of *Rechtsstaat*. While in a broad sense, Kelsen identified every legal order and state with *Rechtsstaat*, and that meaning is recalled by Holmes, he also recognized the classical meaning of the *Rechtsstaat* in the narrow sense, which corresponds with the concept of the rule of law.²

The aim of this paper is to analyze the basis of this fundamental misunderstanding and demonstrate that on the contrary, Kelsen was one of the strongest supporters of democracy of that time. It will involve the analysis of several concepts, such as the pure theory of law, as well as the constitutional and political theories which Kelsen developed during his lifetime. The greatest emphasis will be placed on Kelsen's theory of democracy, since its detailed and precise construction is the best evidence it could not act as a justification for the Nazi regime. This confusion stems from the fact that Kelsen's theory of democracy is very often wrongfully ascribed to the pure theory of law, which has a different aim and a very general character. An analysis of democracy demands

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¹ See: e.g. S. Holmes, *Kelsen, Hans*, in: Seymour Martin Lipset (ed.), *The Encyclopedia of Democracy*, Vol. 2, Routledge, London, p. 698.

² See also: Stanley L. Paulson, *Hans Kelsen and Carl Schmitt: Growing Discord, Culminating in the 'Guardian' Controversy of 1931*, in: Jens Meierhenrich, Oliver Simons (eds.), *The Oxford Handbook on Carl Schmitt*, Oxford University Press, Oxford, <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199916931.001.0001/oxfordhb-9780199916931-e-34> (access: 30.11.2016), p. 12–13.

a lower-level approach than usual with a greater level of detail, and an analysis of legal norms which is universal for every legal system. Hence, in section one, the concept of *Rechtsstaat* as part of the pure theory of law will be presented as a starting point for Holmes, along with the reasons why Kelsen could not use *Rechtsstaat* in its classical meaning. This will be followed by an elaboration of its constitutional dimension. Finally, section three will entail a detailed analysis of democracy; confirmation that Kelsen was a great supporter of democracy understood in terms of freedom and equality, values which contradict those of the Nazi regime.

1. Hans Kelsen *Rechtsstaat* and the Pure Theory of Law

It is said that when a lawyer, an economist and a psychiatrist go to the market, each has a different story to tell. However, Stephen Holmes seemed oblivious to this tale when he made his famous objection to Kelsen's thought in the *Encyclopedia of Democracy* (1995). Namely, he writes: "Kelsen made a notorious statement that even the Nazi regime qualified as a *Rechtsstaat* — a constitutional state in which the rule of law prevails". This statement seems to be a result of a common error in understanding Kelsen's discourse, which lies in disregarding the fact that Kelsen operated on more than one level of thought. The highest, most general and abstract level, which could be referred to as a metatheory of law, is his *Pure Theory of Law*, in which he queries the valid conditions of legal science, through which a specific vision of legal order emerges through methodological assumptions such as the *Is* and *Ought* dichotomy. Under this level several dimensions exist with constitutional, political, international law and even ethnological aspects, and despite sharing some common points, each has its own distinct aim. To account for Holmes' misunderstanding mentioned above, it will be sufficient to consider the constitutional and political dimensions of the pure theory of law.

The history of ascribing to Kelsen responsibility for laying the theoretical foundations for the Nazi regime is a long one. After the Second World War, legal positivism in Germany was perceived as a "legal philosophical scapegoat for National Socialism's perversion of the law".³ Probably because of the great influence of Kelsen's theory at the time, legal positivism was closely associated with his name.⁴ This state of affairs often failed to recognize that legal positivism is not a homogenous concept and Kelsen's *Pure Theory of Law* in particular cannot be strictly identified with such features as statute- or subsumption-positivism and

³ Matthias Jaestaed, Oliver Lepsius, *Der Rechts- und Demokratietheoretiker Hans Kelsen-Eine Einführung*, in: Matthias Jaestaed, Oliver Lepsius (eds.), *Verteidigung der Demokratie Abhandlungen zur Demokratietheorie*, Mohr Siebeck, Tübingen 2006, p. IX.

⁴ *Ibidem*.

Jurisprudence of Concepts (*Begriffsjurisprudenz*).⁵ Clearly Holmes refers to this tradition but elaborates it by demonstrating an example which supports his belief, namely the concept of *Rechtsstaat* in the *Pure Theory of Law*. In his theoretical speculations, Kelsen does not raise the problem of *Rechtsstaat* very often, the reason being that his theory, which abstracts from any references to the Is sphere, as well as the question of the content of law, has not much to offer to develop the theory of *Rechtsstaat*. On the grounds of the *Pure Theory of Law*, Kelsen could only state that from this point of view, every state is a *Rechtsstaat*.⁶ Namely Kelsen claims that: “If the state is comprehended as a legal order, then every state is a state governed by law (*Rechtsstaat*).”⁷ It was probably this statement which drew Holmes to his unfortunate conclusion.

And indeed, taken out of the context of the *Pure Theory of Law*, the statement may be interpreted to imply that every legal order, even that of the Nazi regime, is not only legitimized but also has an axiological value as a *Rechtsstaat*. This conclusion, however, is only possible if the entire background of the *Pure Theory of Law* is disregarded, together with the fact that, to be accepted as scientific, the theory must be clear, critical of ideology, relative and positivistically oriented.⁸ Hence, it should be universal and abstract from any content of the law, as it must describe any legal order (even one as unjust as Nazi regime).⁹ Kelsen interprets ‘scientific’ as abstaining from any evaluations of legal content; it is irrelevant whether law is good or bad, just or unjust, as all these factors can be changed in time. What is significant is the form of law, which should be universal and eternal. On the other hand, the content of legal rules has no direct influence on the methodology of legal science, so they are not regarded in the *Pure Theory of Law*.¹⁰ Hence the only thing which Kelsen, who regarded law and state as equal, could say about *Rechtsstaat* in his *Pure Theory of Law* was that every state is *Rechtsstaat*.¹¹ Even so, perhaps to prevent misunderstandings, in the following paragraph, Kelsen mentions the traditional, political meaning of the *Rechtsstaat*. He defines it as “a special type of state or government namely that which conforms with postulates of democracy and legal security”,¹² and Kelsen

⁵ *Ibidem*, p. XIV.

⁶ Hans Kelsen, *Pure Theory of Law*, trans. by Max Knight, The Lawbookexchange, LTD. Union, New Jersey 2002, p. 313; *idem*, *Was ist die Reine Rechtslehre?*, in: *Demokratie und Rechtsstaat, Festschrift für Zaccaria Giacometti*, Zürich 1953, p. 143–161; reprinted: Hans R. Klecatsky, René Marcic, Robert Schambeck (eds.), *Die Wiener rechtstheoretische Schule. Schriften von Hans Kelsen, Adolf Merkel, Alfred Verdross*, Franz Steiner Verlag, Stuttgart–Wien 2010, p. 508.

⁷ Hans Kelsen, *Pure Theory of Law*, p. 313.

⁸ Matthias Jaestaed, Oliver Lepsius, *op. cit.*, p. IX.

⁹ In positivistic paradigm law can have any content. On the other hand, supporters of natural law doctrines would not agree that law which is so unjust is still law.

¹⁰ Matthias Jaestaed, Oliver Lepsius, *op. cit.*, p. XIII.

¹¹ Hans Kelsen, *Pure Theory of Law*, p. 312–313.

¹² *Ibidem*, p. 313; *idem*, *Was ist die Reine Rechtslehre?*, p. 508.

specifies the elements of *Rechtsstaat*: 1) a relatively centralized legal order, 2) in which norms of administration and jurisdiction are bound by general legal norms, 3) such norms are created by parliament, 4) parliament is elected by the People, 5) the government is responsible for its acts, 6) the courts are independent, 7) guarantees exist of certain civil liberties, especially freedom of speech and freedom of religion.¹³ Kelsen's intentions are clear. There is no doubt that he uses the term *Rechtsstaat* in both *sensu largo* and *sensu stricto*, he binds it with the idea of democracy, which will be elaborated in the following paragraphs.

The scientific character of legal theory is also one reason why Kelsen rejects such values as justice and equality in the Appendix to the 2nd edition of the *Pure Theory of Law*. Although Kelsen is a relativist in the sphere of cognition of moral norms and values, he is certainly not a moral relativist or nihilist. On the contrary, he believes in moral pluralism.¹⁴ Hence, he regards the consideration of any moral formula intended to provide a criterion for what is just and unjust, equal and unequal and so on, as problematic: it demands specific criteria which cannot be objective. For example, in the formula "you shall treat people equally in equal circumstances" there is a problem with defining 'equal' and 'equal circumstances'. One potential objection could be why people can vote when they are 18 and not at age 17: Is that not equal? Another could be that one could ask, if all women are equally deprived of the right to vote, does it mean that, according to the formula, there is equality in society? After all, they are treated equally in equal circumstances. Such a rejection of values in law leads to another rejection in the constitutional sphere which will now be discussed.

2. The constitutional sphere

Hans Kelsen is known not only as one of the most influential legal theorists, but also as an architect of the constitutional court. Not only did Kelsen have the opportunity to build a theoretical basis, as a constitutional judge he was also a practitioner, when such a court was created in Austria. His thoughts about the constitutional court and the role of the constitution in the legal system can be perceived as a continuation of the *Pure Theory of Law*. He begins his reflections on constitutionalism where he had to end the *Pure Theory of Law* if he wanted it to remain scientific. In these reflections, Kelsen could not fully abstract his theory from content and from the practical dimension anymore. In particular, he could not abstain from considering whether there were any values which should be incorporated into the constitution. Although Kelsen's answer appears negative and radical at first glance, he provides an interesting justification of his views.

¹³ *Idem*, *Pure Theory of Law*, p. 313.

¹⁴ Matthias Jaestaed, Oliver Lepsius, *op. cit.*, p. XVI.

He states that as such values either bear some kind of ideology as part of their meaning, and that their general nature allows them to justify any point of view, it is better to refrain from placing them in the constitution.¹⁵ What is more, Kelsen claims that if we agree with his view about values, insofar that it is impossible for a scientific definition to be provided for them, we must agree that they are relative and dependent on personal views, including those of constitutional judges. Incorporating such values, such as justice, into the constitution could mean that the whole legislative process might be paralyzed in constitutional court by these judges, who might claim, for example, that a certain act of parliament is unjust, and hence, invalid.¹⁶ Kelsen concludes that if lawmakers intend to introduce policies, general rules or limitations for the content of parliamentary acts, they must be as precise as possible.¹⁷ This radical view might be explained by the times in which Kelsen lived. His view stems from the 1930s, where he could observe the process of democracy in Germany being supplanted by the Nazi dictatorship. As a great advocate of democracy, he was skeptical of any attempts which could render it a mere façade. Nowadays, the situation is different, and practice has shown that the presence of values in a constitution rather strengthens democracy than weakens it. However, this is only possible because some aspect of the basic values is specified and set in international treaties concerning human rights. This is one of the main reasons why today we can say that Kelsen was wrong. Nevertheless, his remarks may still be valid as a warning for the future, since Kelsen was right in reasoning that such a situation is possible. Kelsen also appears to have had great faith in law (and lawmakers), perceiving it as some kind of perfect construct, while also seeming to have very little trust of judges. Another example will be presented in the following paragraph concerning democracy to support this thesis.

3. Hans Kelsen and the theory of democracy

As Matthias Jestaed and Oliver Lepsius point out, the theory of democracy is more akin to a theory of state, which is distinct from the legal theory mentioned above.¹⁸ Although at first glance, this analysis may appear to be reminiscent of the previous one in which Kelsen built a picture of law, its writing has a completely different character, being more emotional and much less analytical: More bound

¹⁵ Hans Kelsen, *Wesen und Entwicklung der Staatsgerichtsbarkeit*, “Veröffentlichung der Vereinigung der Deutschen Staatslehrer”, Heft 5, 1929, reprinted: Hans R. Klecatsky, René Marcic, Robert Schambeck (eds.), *op. cit.*, p. 1516–1517.

¹⁶ *Ibidem*, p. 1517.

¹⁷ *Ibidem*.

¹⁸ Matthias Jestaed, Oliver Lepsius, *op. cit.* p. XVIII.

with political philosophy than a theory of state. In this paper, I will concentrate on the latter, as it is focused on the value of democracy and the values within it rather than its institutional aspect. However, I will supplement this picture with Kelsen's publications of a more analytical character.

The second meaning of the *Rechtsstaat*, *sensu stricto*, can be found in writings which concern the political sphere, especially those written in the 1930s, when Kelsen suffered political harassment both in Austria and Germany. That was also the time of his famous polemic with Carl Schmitt, in which, among other topics, the essence of democracy was discussed. Some of his writings about democracy such as *Staatsform und Weltanschauung* from 1933 are very untypical of him, since they are written in emotional language. Kelsen confronts in this text the idea of democracy with the dictatorships whose development he observed, as he claimed in the text, in the Soviet Union and Italy.¹⁹ As Kelsen points out, the aim of the text is different to that of his other analysis of democracy. While the earlier text is of a scientific character, this one is directed toward understanding the idea and roots of both regimes: democracy and dictatorship. From his perspective, the analysis will be based on the parallel between social science and philosophy. Kelsen is convinced that such an approach will demonstrate that the difference between the two is much deeper than just their mode of organization.²⁰

Both social science and philosophy characterize similar distinction. While in epistemology, the focus of any problem is the distinction between the subject and object of cognition as regards its external aspect, ethical and political thought concern the subject and object of hegemony.²¹ In contrast, its internal aspect concerns the nature and predispositions of the subject, which in turn determine its relation to the object. Kelsen concludes that the basis of political or philosophical belief lies in the mental structure and personality of political theorists and philosophers, how they experience themselves, and view the relationship between themselves and either You or It.²²

However, Kelsen also has several reservations. First of all, he concedes that this parallel between philosophy and political thought is not absolute, and that there are exceptions. It should not be anticipated that every time someone has certain epistemological beliefs, he also shares certain political beliefs. Such an approach is impossible because human nature is not rational. What is more, it is often the case that those unhappy with democracy become supporters of autocracy, and vice versa.

¹⁹ Hans Kelsen, *Staatsform und Weltanschauung*, Recht und Staat in Geschichte und Gegenwart Series, J.C.B. Mohr, Tübingen 1933, reprinted: Hans R. Klecatsky, René Marcic, Robert Schambeck (eds.), *op. cit.*, p. 1575. Although it seems that he discusses processes of Soviet Union and Italy, it seems that considering the year of the article in fact he refers to much closer situation to him: in Germany and Austria.

²⁰ *Ibidem*, p. 1576.

²¹ *Ibidem*.

²² *Ibidem*, p. 1576–1577.

Much depends on historical circumstances.²³ Hence, Kelsen's intention is to describe tendencies rather than absolute rules. Secondly, Kelsen's aim is to present some ideal types rather than what exists in reality, where it is more likely to find a variety of blends of both democracy and autocracy.²⁴ As such, his analysis is more of a practical than theoretical character. Namely, not how it is, but how it ought to be.

One of the main motives given in this text, which acts as a basis for further analysis, is the contradiction of rational versus irrational. Kelsen finds this opposition essential to the contradiction between democracy and autocracy. Additionally he claims that the starting point of the division between democracy and autocracy is worldview, namely the question of whether absolute values exist and can be cognized.²⁵ Relativism and rationalism accompany democracy since they are bound to tolerance for the views of others. This tolerance makes discourse and compromise possible, while autocracy is bound to absolutism and irrationality. As a result of these key features, Kelsen attributes more characteristics to both democracy and autocracy, with freedom being the main category for democracy, presented in table 1.²⁶

Table 1

| Democracy | Autocracy |
|--------------------------|---------------------------------|
| Rational | Irrational |
| Relativism | Absolutism |
| Freedom | Captivity |
| Equality | Inequality |
| Discourse and compromise | Leader followed unconditionally |
| Legality | Justice |
| Critical view | Metaphysical view |
| Mother figure | Father figure |
| Pacifism | Imperialism |
| Individualism | Collectivism |

3.1. Freedom

Contrary to the classical understanding of democracy, which emphasizes equality, the distinctive feature of democracy according to Kelsen's theory is freedom, more specifically mental freedom (*geistig*), which is distinct from, for

²³ *Ibidem*, p. 1577–1578.

²⁴ *Ibidem*, p. 1578.

²⁵ *Ibidem*, p. 1587; *idem*, *On the Essence and Value of Democracy*, Nadia Urbinati, Carlo Invernizzi Accetti (eds.), trans. by Brian Graf, Rowman and Littlefield Publishers, Inc., Lanham, MD–Plymouth, UK 2013, p. 103.

²⁶ *Idem*, *Staatsform...*, p. 1578–1583; see also Matthias Jestaed, Oliver Lepsius, *op. cit.*, p. XXIV.

example, economical freedom.²⁷ The freedom necessary for democracy is based on tolerance, and entails such freedoms as freedom of religion, beliefs, speech, consciousness and, last but not least, scientific freedom. This final freedom ensures that when facing a dilemma between will (subjective, directed into someone's preferences) and cognition (objective, directed on truth), cognition prevails.²⁸ Another division of freedom important for Kelsen's theory of democracy is that of individual freedom, bound to self-determination, and collective freedom, understood as codetermination.²⁹ Hence, the principle of freedom must embody social order by being transformed into social and political freedom.³⁰ To support his reasoning, Kelsen presents the evolution of the meaning of 'freedom'. First, the idea of freedom from state rule was substituted with the idea that the individual should be able to participate in this rule.³¹ Later, to be politically free meant: "to be subject to a will, which is not, however, a foreign, but rather one's own will".³² The final step of this transformation of meaning is the substitution of individual freedom with popular sovereignty, and the subject being ruled by the citizen.³³

The third division, which Kelsen regards as the most important, and is associated with the second, is the division between natural and social freedom. While natural freedom negates social order, social freedom is an expression of free will, as it represents the negation of causality. One is either bound by the rules of the causal world of nature, but free from social reality, or is bound by social, normative rules, but is also free from causality. Kelsen defines the social freedom as such which entails such principles as political self-determination of the citizen, participation in government.³⁴

3.2. Equality and majority

To elaborate this concept of freedom, Kelsen in *On the essence and Value of Democracy* notes that in any relationship between master and subject, the question from the subject about equality is inevitable. The form of equality that "no man has a right to rule over another" supports negative freedom, understood as freedom from any social limits.³⁵ However, such freedom does not guarantee real equality. According to Kelsen, equality is only possible if we allow ourselves to be ruled.³⁶

²⁷ Matthias Jestaed, Oliver Lepsius, *op. cit.*, p. XXV, Hans Kelsen, *Staatsform...*, p. 1581.

²⁸ Hans Kelsen, *Staatsform...*, p. 1581.

²⁹ *Ibidem*, p. 1578; Matthias Jestaed, Oliver Lepsius, *op. cit.*, p. XXV.

³⁰ Hans Kelsen, *On the Essence...*, p. 28.

³¹ *Ibidem*, p. 32.

³² *Ibidem*, p. 28.

³³ *Ibidem*, p. 33.

³⁴ *Ibidem*, p. 28.

³⁵ *Ibidem*, p. 27.

³⁶ *Ibidem*, p. 27.

Such a concept of freedom allows Kelsen to reject the paradox based on the discord of individual freedom and the democratic legal order based on factious representation of the will of the people. He rather perceives freedom as a value which can only be ensured by indirect democracy, since democracy should not express only the will of the majority, manifested by direct democracy, as it could lead to infringement the right of minority.³⁷ For Kelsen the majority principle is bound with the freedom of minorities, which might apply to anyone at some point,³⁸ thus such freedom is also bound with equality. Freedom directed solely towards ‘Myself’ without equality rule cannot be the foundation of democracy. Only freedom directed towards the equality relationship defined by Me — You, which entails a sense of responsibility, recognition of the other, and which directs I not into Myself but rather You, can be the basis of democracy. And only such meaning of freedom encompasses the idea of equality.³⁹ Equality understood in this way is defined as the equal chance to take part in discourse, understood as the free competition of ideas, which is a result of taking a relativistic approach.⁴⁰ All of this can be achieved by a specific type of personality, which perceives others not as strangers or foes, but rather as equals and friends. Such a person directs the energy from aggression not into the outside world but rather internalizes it as self-criticism and a sense of responsibility, and values freedom. On the contrary, the more a person supports autocracy and dictatorship, the more he needs to limit his support for freedom.⁴¹ As autocracy entails a radical inequality between rulers and ruled, there is no room for the acknowledgment that Your experiences are as important as Mine. Subjects rather identify themselves with the ideal-I or, as Kelsen describes it, the *Über-ich*, represented by a dictator unlimited in power. Such identification with authority is the reason why subjects are voluntarily obedient in dictatorships.⁴²

Kelsen disagrees with the claim that equality can be derived from the majority principle, not the contrary, as it has been often argued. For Kelsen it is based on a false assumption that the principle that the ‘majority should rule’ can be derived from the claim that “the will of one person should not count more than the will of other person”, which would result in a majority dictatorship based on the claim that the “many are stronger than the few”.⁴³ Instead of basing equality rule on the majority principle, Kelsen proposes an alternative idea based on the freedom concept. In this version, the principle would be “If not all, then at least as many individuals as possible should be free”,⁴⁴ which according to Kelsen,

³⁷ Matthias Jestaed, Oliver Lepsius, *op. cit.*, p. XXII.

³⁸ *Ibidem*, p. XXIII.

³⁹ Hans Kelsen, *Staatsform...*, p. 1579.

⁴⁰ *Idem*, *On the Essence...*, p. 103.

⁴¹ *Idem*, *Staatsform...*, p. 1579–1580.

⁴² *Ibidem*, p. 1580.

⁴³ *Idem*, *On the Essence...*, p. 31.

⁴⁴ *Ibidem*, p. 31; *idem*, *Staatsform...*, p. 1579.

should ensure the principle of equality. It would mean that an absolute majority is not enough to secure this principle, and more efforts need to be made to fulfil this basic requirement of democracy. On the other hand, Kelsen notes that a numerical majority seldom occurs in reality. The lawmaking process is more dependent on the mutual interactions between groups of interests and their persuasive power, and that in democracy, discourse and its result, compromise, are the factors which decide the shape of law. Kelsen concludes that at least in parliamentary democracy, the majority principle means “compromise and balancing political differences”.⁴⁵ Kelsen also points out that although the concept of majority presupposes the existence of a minority, it does not directly predict the security of the rights of minorities, but it at least entails the possibility of such protection.⁴⁶

3.3. Discourse and compromise

If all conditions mentioned above are fulfilled, then a place exists for a specific discourse based on compromise.⁴⁷ Discourse is made possible by free speech, as well as freedom of beliefs, religion and consciousness, and compromise is made possible by tolerance and relativism, which in democracy is perceived as a distinct value, understood as the expression (in the political sphere) of free will, which is legally equal.⁴⁸ In contrast, there is obviously no room for discussion and compromise in autocracy, since no tolerance exists for different views and even religions. There is no room for an objective science serving the truth: it is supposed to support the whole system so that the will prevails over cognition.⁴⁹

In this context, Kelsen presents also the problem of leader (*Führer*) in autocracy and in democracy. The dictator represents absolute values, which puts him in the sphere of the irrational. His power is very often justified as having its source in God, thus he only answers to God. This allows him to be above the law. His autocratic power is constant and of static character, while democracy is more dynamic in character. Dynamism stems from the fact that leaders are responsible to the People, and so can be controlled and criticized. The power of the leader is not permanent; he can be changed if he fails as a leader of the People.⁵⁰ Next, in considering such aspects of democracy as cooperation, Kelsen compares it to the relationship between mother and brother (or rather, *mutterliche Brüderschaft* — matriarchal brotherhood) which is bound with the ideas of the

⁴⁵ *Idem*, *On the Essence...*, p. 69–70; see also *idem*, *Demokratie*, “Schriften der Deutschen Gesellschaft für Soziologie”, I. Serie, V. Band, 1927, reprinted: Hans R. Klecatsky, René Marcic, Robert Schambeck (eds.), *op. cit.*, p. 1448.

⁴⁶ *Idem*, *On the Essence...*, p. 67.

⁴⁷ *Idem*, *Staatsform...*, p. 1580.

⁴⁸ *Ibidem*, p. 1581; Matthias Jestaed, Oliver Lepsius, *op. cit.*, p. XXIV.

⁴⁹ Hans Kelsen, *Staatsform...*, p. 1581.

⁵⁰ *Ibidem*, p. 1584.

French Revolution: Equality, Freedom and Brotherhood, and contrasts it with the father–child relationship present in autocracy. No horizontal relationships exist in the paternal relationship, rather a vertical relationship with a strict hierarchy.⁵¹ He also binds democracy with rational pacifism, which can also be bound with mother figure, and autocracy with imperialism, which could be perceived as a father and hero archetype, bound with no respect to any cultural or national differences. Kelsen points out that autocracy, as one of the tools of imperial policy, uses aggression on another country, which is ‘justified’ as a defensive war.⁵²

3.4. Legalism, certainty of law and justice

Kelsen also believed that democracy is bound with certainty of law and legalism. He rejects justice as irrational and defines it as what a dictator believes is just, and what legitimizes statutory acts of violence. Such legal order is, according to Kelsen, unpredictable since it is impossible to derive individual from general norms, as the content of the former depends on the will of the dictator.⁵³ Many general norms simply cannot be effective. Conversely, Kelsen reasons that firstly, in democracy, individual acts of state are rational because of their accordance with law, and secondly, that law reflects the will of the people. Hence, the courts have to respect the law.⁵⁴ Kelsen adds that the principle of legality can only function properly when combined with the principle of transparency (*Publizität*). Transparency not only prevents such negative phenomena as corruption, but also makes the work of administration more effective, and is a guarantee that none of the rights of citizen will be infringed as part of the relationship with the state.⁵⁵

While it is difficult to refute that certainty of law is an important component of democracy and *Rechtsstaat*, it can be said that although Kelsen concedes that he describes an ideal type of democracy, it is obvious that this ideal type will not work in the world of Is when acts of Parliament reflect the will of the People. It is a work of fiction of which Kelsen is aware when he writes about the People and representation. An even more serious objection can be raised at this point. Kelsen errs when he contradicts justice with legalism and the certainty of law because he also defines justice very arbitrarily. While he uses an idealized picture of legal reality with certainty, he takes the worst case scenario for granted when it comes to justice. Not only does he abstain from any solid definition of justice, and is

⁵¹ *Ibidem*.

⁵² *Ibidem*, p. 1585.

⁵³ *Ibidem*, p. 1582.

⁵⁴ *Idem*, *Staatsform...*, p. 1582; *idem*, *Geschworenengericht und Demokratie. Das Prinzip der Legalität*, “Neue Freie Presse” 1929/23128, reprinted: Hans R. Klecatsky, René Marcic, Robert Schambeck (eds.), *op. cit.*, p. 1582.

⁵⁵ Hans Kelsen, *Staatsform...*, p. 1583.

not eager to treat it as regulative ideal, he also assumes that it must stem from an irrational, probably cruel, tyrant. It is worth noting that Kelsen seemed to be aware of the danger of such a mistake. In *The Essence and Value of Democracy* he notes: “In arguments over democracy a lot of misunderstanding is repeatedly created by the fact that one side only talks about the idea, while the other side only talks about the reality of this phenomenon.”⁵⁶ Why, then, didn’t Kelsen avoid this mistake in his other writings? Perhaps in his defense, he discusses legalism in the context of democracy, where legalism works properly, but talks about justice in the context of autocracy, where it does not. Of course it is dubious whether Kelsen properly presents the ideal type of autocracy as a worst-case scenario. Kelsen based his description on his own observations in 1930s Europe and if looking at the consequences of the rule of autocratic regimes of that time, it could be said say his observations at that time were perhaps even too optimistic. It also seems that although nowadays Kelsen’s observations are accurate, the current conflict in Ukraine perhaps being a good example, they certainly do not concern every autocracy in the world.

3.5. The People

To understand the argument of legalism as supporting the will of the People, the People as a category should be explained. In *The Essence and Value of Democracy*, Kelsen perceives the People in terms of unity in its normative meaning. Hence, this unity is created by law, which decides whether an individual belongs to the People. Such a bond might be created by law based on historical, national or social criteria.⁵⁷ Kelsen remarks that not each aspect of human activity can be accounted to the ‘People’ category. For him, unity of the people is “understood as a unity of human acts normatively regulated by the legal order”.⁵⁸ In this regard, the People can only be considered in the normative sphere. The whole of human activity outside law belongs outside this category. Kelsen points out that there is also another meaning of the People, confused with the first one, bound with participation in the lawmaking process. Obviously not all those subjected to the rules can participate in legislative activity.⁵⁹ Participation in lawmaking by the people can be considered here as an ideal. Kelsen claims that in democracy, the division of the People into political parties might help at least with resolving the issue of conflicts of interest. For Kelsen “The ‘People’ does not actually exist as a viable political force prior to its organization into parties [...]”⁶⁰ It seems that

⁵⁶ *Idem, On the Essence...*, p. 35.

⁵⁷ Matthias Jestaed, Oliver Lepsius, *op. cit.*, p. XX; Hans Kelsen, *On the Essence...*, p. 36.

⁵⁸ Hans Kelsen, *On the Essence...*, p. 36.

⁵⁹ *Ibidem*, p. 36–37.

⁶⁰ *Ibidem*, p. 40.

we are a little closer to fulfilling this ideal, thanks to the existence of different forms of public participation and NGOs which are outside the party structure, which were unknown to Kelsen. If Kelsen understands People in terms of their organization into parties, then his argument that the law expresses the will of the people seems not that controversial. However, as it was demonstrated earlier, Kelsen's definition of the People nowadays is not exactly adequate.

With the People is bound another fundamental category for democracy: representation. Kelsen regards it as the relationship between Parliament, understood in normative terms, and people. For that reason, Kelsen perceives representation, understood as the identity of the ruler and ruled, as fiction. At the same time, Kelsen criticizes the belief that the will of the People is of natural, substantive character which binds the parliament and can only be reproduced by Parliament. Such a will of the People, independent from the will of the organs of state, does not exist: on the contrary the will of the people as a fiction is imputed to the will of the organs of the state. For Kelsen, only such a construction can ensure individual interest and social pluralisms. The postulated identity of ruler and ruled must lead to the negation of pluralism, since the consequence of such concept (identity of the ruler and ruled) would be the will of the People which must be the only one. It results in the disappearance of pluralism, and its substitution with a homogeneous and anti-liberal model of democracy.⁶¹

4. Summary

To sum up, an analysis of Kelsen's writings on *Rechtsstaat* and democracy allows several conclusions to be drawn.

Firstly there are clearly two meanings of *Rechtssaar* in Kelsen's writings. The first has a theoretical character concerning legal science and derives from Kelsen's claim that law and state are equal. The second, *sensu stricto*, meaning is strictly bound with the idea of democracy, which Kelsen contrasts with an autocratic regime.

Secondly, Kelsen's concept of democracy is not coincidental. It is a sophisticated theory which consists of elements which are important features of democracy, such as freedom, equality, discourse, compromise, the People, representation and legalism. These elements are ascribed very precise meanings, and the relations between them are exhaustingly described. It is also clear that Kelsen's vision of democracy is a liberal one, which can be perceived as the antithesis of the Nazi regime. His concept of democracy seems valuable and relevant, and universal.

⁶¹ *Ibidem*, p. XX–XXI.

And finally, we can conclude that Kelsen never supported the Nazi regime by his theory. Rather, he opposed it, which he expressed clearly by discrediting autocracy. The observations which he made in the 1930's were accurate at that time and to some extent, remain accurate today. Holmes claim appears false and based on a serious misunderstanding. By the same token, it could be said that Schrodinger was a sadist who performed cruel experiments on almost dead cats.

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