Democracy and its limitations: a study on Hans Kelsen's political theory

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Abstract. This paper discusses the concepts developed by the legal philosopher Hans Kelsen on democracy, representation and the people. This serves the function of expanding the understanding about Kelsen's political philosophy, a much less studied aspect of his academic production than the Pure Theory of Law. Arguably, the same formalism seen in his most famous book is a key aspect of his defence of democracy, for the material content of the political regime is not a greater preoccupation than the means by which law is enacted. Being a formalist does not impede Kelsen – on the contrary, one might see – from being strictly realist about the subject of his studies. He does well know that social life provides no greater liberty than life as an individual. Democracy is seen as only a mechanism by which that freedom is the least restricted, for what is called "the people" has participation in the decision making. Thus, majority rule is the principle that guarantees that the minimum number of individuals is subject to laws enacted by a will that is not theirs. By the end of this article, the opposition between Kelsen's idea of democracy and the Marxist understanding about the political regime's material determination shall be analysed.

Keywords. Hans Kelsen, Democracy, Pure Theory of Law, Formalism, People.

1. Introduction

Every single politician, from the far left to the far right, refers to "the people" as their most important basis, the undisputed sovereign whence derives all political legitimacy and all of the political power. The question, however, is how to identify it: whilst the Marxist tradition localises the people among the proletarian masses, some reactionary leaders claim for an understanding of the people as a community of countrymen organised in traditional, monogamous and heterosexual families.

A similar phenomenon occurs with the definition of the concepts of law and legal system. Many legal theories tend to bind legislation and its validity with specific values — or principles, as some call it – such as justice, morals or rationality. Again, the meaning of those important, but intrinsically indefinite concepts is under dispute. Nevertheless, they are increasingly frequent in legal reasoning, most of the times as means to background different forms of legal activism.

Based on studies on Hans Kelsen and his oeuvre, this paper aims to present his positivist and, at the same time, realist theory of law and State. Most specifically, his account of the concepts of democracy and people and the logical limitations it brings to effectuation of the former's values is the main subject of the present work. Moreover, the implicit connections between this understanding and the description of a legal system presented in the Pure Theory of Law will be unveiled. Although they belong to different spheres, the thoughts of Kelsen about politics and law are not, as he would put, completely separated from each other.

The methodology here followed is the bibliographic analysis of the selected texts, namely, but not limited to, *Vom Wesen und Wert der Demokratie* (Essence and Value of Democracy), *Fundaments of Democracy* and *Reine Rechtslehre* (Pure Theory of Law), all written by Hans Kelsen. Other texts from Kelsen and other related authors, all of them contemporary to Kelsen, such as Evgeny Pashukanis with his General Theory of Law and Marxism, Carl Schmitt in *Politische Theologie* (Political Theology)

and Max Weber with *Wirtschaft und Gesellschaft* (Economy and Society), as well as their commentators, have also been studied along the research process. Even though not always directly mentioned, they have been the theoretical background of this research. That is justified by the fact that the reading method elected for this enquiry is a structural-symptomatic, which intends not only to describe the logical sequence of arguments developed within the philosophical writing but also to understand its underlying connections with other texts and the social structure and historical context whence the texts were written, namely, the Weimar debate on the State, economy and law.

2. Kelsen: context and project

First of all, this paper will describe and contextualise the general aspects of Kelsen's political and theoretical standpoints, in order to offer an overview on his work.

2.1 The Weimar debate

The general context of the studies of Hans Kelsen, as well as Max Weber's and Carl Schmitt's writings, was the so-called Weimar debate. Known as such for its concrete relation with the process of promulgation of the Weimar Republic's Constitution in 1919, the discussions on legal theory and its application at the time functioned as a kind of constitutional laboratory (1 p9).

Fig. 1 – The inaugural gathering of Weimar Republic's parliament

While Weber was responsible for a genealogical study on the development of capitalism and its relations to other spheres of society, such as law and the State (2) (3), Carl Schmitt dedicated to the critical analysis of sovereignty (4). Pashukanis, not included in the Weimar debate, for he was Russian, had other preoccupations: to demonstrate the relations between law and political economy, departing from a Marxist point of view (5). Kelsen, by his turn, is known all over the world for his theory of law, called The Pure Theory of Law. Nevertheless, he addressed important aspects of the political theories of his times, about which I shall discuss further on this essay. For now, it is valuable to offer an account on the method and the conclusions of his *magnum opus*, i.e, *Reine Rechtslehre*.

2.2 The Pure Theory

Probably the most well-known work on legal theory ever written – classics such as Plato and Aristotle are not contenders in this comparison, for their writings were not specifically dedicated to a theory of law and legal systems organized by a State, which are specific to modernity, that is, the capitalist mode of production – the Pure Theory of Law departs from a bold, but very simple premise: to radically separate legal science from any alien determinants, such as sociology or normative ideals of justice (6 pp1,2). It is only a methodological differentiation, not a negation of the existence of the importance external facts to law and its enactment, or even of its determination by concrete factors, such as the economy, i.e., the arrangement of the productive forces of determinate societies.

This methodological procedure detaches jurisprudence from all sorts of idealism, which would either define law as the consubstantiation of abstract values, e.g., Justice, Human Dignity, Natural Rights or First Principles of Law, or explain it as a superstructure entirely determined by social relations.

With this procedure, Kelsen develops a theory in which the validity of norms is studied as "ought" statements, instead of "is", based on a Kantian distinction (7, p310). According to his understanding, the validity of a norm can only be derived from the authorization by a superior norm to its promulgation by a competent public agency, such as the parliament (6, pp215-217).

Fig. 2 – Hans Kelsen in his office.

If the validity of a norm is based on a superior norm, this superior norm is, by its turn, based on another norm, and so on. Therefore, how to determine the fundament of validity of the "last" norm in the logical chain? In other words, what gives validity to the whole legal system? Kelsen tries to offer his solution to the idea by making the presupposition of a basic norm (*Grundnorm*), which would be a logical norm, that is, an abstract Kantian *Ding an sich* capable of logically sustaining the entire legal system (6, pp 217-221). Later on, Hart identifies this abstract norm with a concrete social practice of acceptance and obedience to the legal system, called rule of recognition (8, p94). As I see, based on Pashuknais, that concrete social practice is nothing

more that the material relations of production, whence legal form and subjectivity derives (13, pp91-94).

This is the general account of Kelsen's theory of law. In his writings, a legal system and a State are realistically and simply described as nothing more than an organised legal order (6, pp309-310). As I shall demonstrate, this cold, realistic and positivist account of the nature of various social relations is a Kelsenian brand applied to several other political and juridical contexts, such as the main one to be studied in this paper: democracy.

3. Kelsen's account of democracy

In this section, it will be discussed the main aspects of "Essence and Value of Democracy". We had access to that text in its whole within a Brazilian compilation of texts by Hans Kelsen on the subject, called "Democracy" (9).

3.1 A realistic view

Kelsen, differently from a whole apologetic tradition, can be seen as a critical theorist of democracy. He did not have any illusion about the "freedom" of "equality" it would bring. On the opposite, his writings must be seen as a relative defence of a system of law enactment that is the best option available among the systems of power, due to the premise that it is necessary for at least one to exist for social life to be possible (9 p28).

The criteria for stating that democracy is the best existing arrangement it that the majority rule is the means for submit the smallest number to the imposition of an external will (9 pp 31,32). If freedom means acting according to one's own will, therefore decisions based on majority are the ones of which the coercion is minimally inflicted.

The constraints to freedom within a democratic regime also are not the inclinations of an individual, rather the acts of an impersonal entity, the State. Ideologically, it represents the collective will, the result of the confluence of desires of all the people (9, pp 33,34). But, what is "the people"?

3.2 The idea of "people"

There must be no illusions about what is the identity of a society. There is no *de facto* sociological unity for any 'people'. The ones who claim for it are using a theoretical fiction for ethical or political purposes. What exists is a legal definition: the people are nothing more and nothing less than the aggregate of persons which are subject to the same State legal order (9, p36).

This absence of real unity hinders the democratic endeavour in several ways. First of all, there is only a limited life sphere of an individual that is in fact influenced by the State and its legal order. In other words, the binds that connect persons to each other in this sort of juridical unity are relatively meagre (9, pp36,37).

Second, being the people simply the assemblage of persons subordinate to the power of a legal order, it is clear that not necessarily the political subjects that create and enact law are always the same subjugated to it. That means that political rights are often restricted to a determinate group of persons (9, p37). Moreover, the fact in itself that a person holds those rights does not mean that they will actually be exercised, for manifold reasons, including pure indolence, even (9, p38). Finally, yet the active political partisans can be quite different from the ideal statesperson: their thoughts and convictions are potentially the mere result of – or at least to be significantly biased by – the ideas of their pairs (9, p40).

Indeed, the critique can be broadened if we question: whose ideas are not biased in a significant way? As Louis Althusser demonstrated, the ideological apparatuses are ubiquitous in contemporary, capitalist societies, and interpellate the people's subjectivity from the very first years of childhood – in reality, even earlier, if considered the name, the gender role and the social position defined by the family in which the person is born (10, p287) (7, p504).

We do not think as if the Althusserian critique would object Kelsen's argument, instead of corroborate it. Indeed, the will and the representation of any given person must be seen as a relative, rather than an objective truth – this is actually one of the core premises of democracy, as I shall discuss along the last section of this chapter. Thus, given the portrayal of democracy's limitations based on the hindrances to the ideology of the people as an articulated unity, it is time to describe the means by which the power applied upon that *de juris* body can be, in some way, chosen by that 'people'.

3.3 The role of elections and political parties

Kelsen suggests, in a – surprisingly – quite optimistic tone, the active presence of political parties as one of the main mechanisms to gather similar convictions and concerns and provide them actual influence on the decision making in given society. As the interests of different groups are inherently conflicting, their aggregation into collective entities facilitates the process of conciliation of those interests and values for they are reunited into a common agenda. Better than mere professional associations, which can only represent a determinate point of view based on the group's material conditions, the parties do can unite persons from variated classes in a common set of beliefs (9, pp40-42).

Fig. 3 – Brazilian national congress

The political parties, then, can indicate members to be elected to the parliament. Those members must not be seen as representants of the people, for they have no direct accountability, and can scarcely be pressured into one or another direction during their mandate (9, pp47,48). Parliaments serve, indeed, as collective organs that embody different interests and points of view about which they deliberate to conciliate the interests at stake. That deliberative process is a technical social mechanism for the creation of the legal order, which is made necessary since direct democracy, is incompatible with differentiation of work (9, pp49-51). It is far from being perfect, but it is at least realistic, according to Kelsen, who admits the inherent formality of the parliamentary democratic constitutional system, whose importance in terms of the value of democracy shall be discussed in the following section.

3.4 Formalism *contra* materialism

Kelsen reviews and deepens his analysis on the opposition between capitalism and socialism in a latter text, called *Foundations of democracy*, published in 1956. The references of this texts are between the pages 253 and 300, while *Vom Wesen und Wert der Demokratie* is comprehended from 23 to 107, within the *A Democracia* compilation.

One of the most criticised aspects of democracy is its strict formal character. Kelsen, as opposed to the Marxist tradition, by no means believes that democracy is inherently a capitalistic form, nor he denies the potential compatibility between democratic systems and the socialist mode of production (9, pp264,265). Kelsen denies any relation between form of law enactment (democracy or autocracy) and content of economic system (socialism or capitalism), for there is, in his view, no determination of the material sphere over the procedure of creation of the legal order (9, pp254-257).

Kelsen does not see wealth as determinant to the definition of elections and the will of "the people" – now it does not seem so abstract and ideological as before, in *Wesen und Wert* – since elections can be won with inferior economic power (9, p261) and, therefore, there is no obstacle for a socialist regime to emerge from democratic procedures such as plebiscites. Indeed, now Althusser would hinder his position. Since it is not simply a matter of wealth and winning elections that defines the mode of production, since there are material limitations for what a government can or cannot do without suffering a coup by the armies of capitalist countries. Moreover, if some left-wing politicians can win elections out of charisma, – in a Weberian sense of the word – it is clear that the socialist agenda is even feared by the common citizen, which learned in school, church and newspaper, that communism means evil or whatever. The ideological State apparatuses play the role of shaping subjectivities into docile and anti-communist workers, for their surplus to become for easily exploited (11, p255) (7, p494) (13, p98-101).

Anyway, the reason why Kelsen does not see democracy as incompatible with socialism is that he does not interpret social and political life as materially determined. It means that, since democracy is only the mode of creation of the legal order, there is no conflict between the means of production's collectivisation and the popular choice of the members of the parliament. Since some degree of undemocratic choice of means to attend the ends chosen by the people is necessary for a public administration to be efficient, since the technical decisions must not be influenced by the will of the masses, – this process is called bureaucratisation, as Weber describes – it is no absurd that the economy is planned without the people having the power to decide the means of this administration [9, pp79-85, 266-268].

It is clear that Hans Kelsen does not derivate form from material structure, which would be indeed one of the core aspects of the latter Marxist debate on law and the State [13]. This separation follows the same formalist method as the Pure Theory's approach on the science of law as being an understanding on the validity of norms detached from social causations.

3.5 Absolutism *contra* relativism: an epistemological dispute

The fundamental reason for Kelsen's formalism can be found by the end of *Vom Wesen und Wert*, where he discusses the epistemological basis for his positions. If he points democracy as being necessarily formal, as opposed to the Marxist view of democracy as being desirably the material equality and social justice [9, pp99-102] it is because he fears the abuse of the inversion of the meaning of the popular influence on law enactment for autocratic purposes [9, pp255,256]. This attachment to the formal process is due to his view of democracy as a mechanism of minimum restraint of the freedom, specially of the minorities: if some loss of freedom is inherent to social life, so be it the minimum possible, as the majority rule and special protection to the sensitive topics, such as individual rights [9, pp 28-32, 68].

The basis for believing that a will must be decided by the people, not imposed on them, is the relativist standpoint on epistemology. According to Kelsen,

the political suppression of the opposite worldview is only defensible if there is an absolute belief in the righteousness of one's thought. Moreover, only a metaphysical doctrine of objective and absolute truth would sustain the idea of eliminating the difference from the public decision-making. In opposition, a relativist position, such as in both Kant and Nietzsche, would defend that objective truth cannot be reached by humans in their observance of the world, since the mediation of the senses and the limited intellect impede us from reaching the *Ding an sich* – if there is any [9, pp. 103-107].

Thus, democracy is the recognition of the values and objectives as relative and mutable, instead of absolute such as science. The argument goes similarly to what Weber would denominate the undecidability of values based on science. For they are not objective, they are not referable to facts about the world, but to changeable intersubjective dispositions. Democracy lies on this mutable nature of human values.

4. Conclusions and discussion

Kelsen's approach on democracy leaves the question open whether the suppression of dangerous ideas such as the ones held by the Nazi party that would emerge in the context of Weimar Republic should or should not be suppressed. The liberal tradition, as seen in Rawls or Dworkin, tend to argue that it is only in self-defence that a democratic regime has the right to suffocate one standpoint, for it would undermine a much greater liberty that the one being suppressed. It is possible to see as if the deep relativism of Kelsen – and of formalist democrats, in general – have unwillingly cleaned the path for extremisms.

Even tending to a defence of reformist socialism, Kelsen continually defends the formal structure of the institutions of capitalism. He cannot be blamed, for by his time – and it may be still the case today – the socialist tradition itself was not enough to understand the formal and concrete relations between law and capitalism. The Marxist *renaissance* in the 1960s and 70s brought winds of change to the debate, and proved wrong several points of Kelsen. But perhaps not all of them.

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