KELSEN VERSUS KELSEN: DEMOCRACY OR CONSTITUTIONAL DEMOCRACY? *

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Abstract

This paper seeks to offer food for thought on the current state of democracy in modern states starting from Kelsen's thought as a liberal thinker.

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1. Two introductory remarks and a clarification

I would start with two introductory remarks and a clarification.

The first remark addresses the complexity of Hans Kelsen's theory. The thought of a prolific author such as Kelsen cannot be simplified and reduced to the theses argued at a certain time of his life. For example, although the first edition of the *Reine Rechtslehre* is perhaps Kelsen's most popular work, alone it does not encompass his entire philosophy.

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It is well-known that there exist as "many Kelsens" as the several different "phases" of his refined theoretical thought. This is due to Kelsen's theory evolving over time whether imperceptibly or blatantly, rather than him being static over time[1].

The second remark addresses the nature of Kelsen's thought anomalies. It may be deemed pretentious or reckless to detect a contradiction, or in any case an incongruity, in a thinker of Kelsen's stature[2]. In reality, the (apparent?) anomalies in Kelsen's works about democracy, which will be immediately discussed, are plausibly due to the natural evolution of a complex thought and the necessary "political-practical" application of a merely "logical-theoretical" elaboration.

On the basis of these introductory points, I would argue that it is always necessary to be aware of the historical context during which an author writes. It explains or even justifies the choices made about the socio-political applications of abstract legal principles.

To summarise, the general thesis supported here is that Kelsen, while speaking simply of democracy, in reality wanted to reflect on a particular type of democracy, the *constitutional* one, which is only one of the many possible forms of application of the abstract principle of popular sovereignty. In truth, Kelsen emphasises especially the *relativity* of democratic decisions, but it is precisely the formal and relativistic nature of majority decisions that ultimately forces Kelsen himself, albeit between the lines, to admit the need for the existence of substantial and *meta-democratic* limits – therefore *constitutional*! – to mere democratic procedures.

The clarification concerns the term '*meta-democratic*', to which this paper often refers (especially in para. 5). By using this compound word, I here intend to recall all those values whose legitimacy is not purely democratic, insofar they *precede* (and *pre-exist* to) the expression of popular will and, hence, are not subject to the majority principle. According mostly to the *European* legal tradition, these values correspond in a greater part to 'natural law' claims and, in Anglo-American tradition, to the 'universal human rights' topic. Obviously, the two approaches differ in several

[1] See, for example, J. Kammerhofer, *Kelsen - Which Kelsen? A Reapplication of the Pure Theory to International Law,* in 22 *Leiden Journal of International Law* 225 ff. (2009).

[2] But see, for example, recent and authoritative: L. Ferrajoli, *La logica del diritto. Dieci aporie nell'opera di Hans Kelsen* (2016).

aspects: the former relies on *human dignity* and takes in due account mutual duties and balancing of rights, while the latter «does not explicitly refer to limitations [of rights], nor correlates them to responsibilities or other rights»[3]; in this respect it could be defined as a libertarian or individualistic approach (especially for some supposed 'new rights'), basically informed to self-determination[4].

I am fully aware that these rights «originate from the peculiar mix of the Enlightenment and the Jewish-Christian tradition»[5], and I also do not intend to directly address the controversial question of the 'foundation' of human rights[6]. Nonetheless, I believe that the assessment of universal and/or natural rights largely reduces the differences between the abovementioned approaches, as very neatly confirmed by the proposition used by Chung-Shu Lo (the philosopher representing the Communist China at the UNESCO symposium in 1948) to translate the words 'human rights' in Chinese cultural context: «Heaven loves the people; and the Sovereign must obey Heaven»[7]. Briefly, the concepts argued during the drafting of the 1948 UN Charter were quite shared to be

[3] M.A. Glendon, *La visione dignitaria dei diritti sotto assalto*, in L. Antonini (ed.), *Il traffico dei diritti insaziabili* (2007) at 63, according to which «a Country in which everyone is free to act as he or she pleases in not a free Country […] Human rights Declarations run the risk of becoming bulletin boards where one or another interest group manages to post its new favorite right» (at 73 and 79). However, the distinction proposed in the paper is approximate: for a natural law-based approach in American scholarship, see J. Finnis, *Natural Law*, 2 vols, New York University Press 1991

[4] I have elsewhere argued the need for 'self-limitation', beside 'self-determination': see A. Spadaro, *Dall'indisponibilità (tirannia) alla ragionevolezza (bilanciamento) dei diritti fondamentali. Lo sbocco obbligato: l'individuazione di* doveri *altrettanto fondamentali*, in 1 *Politica del diritto* 167 (2006) (also published in Aa.Vv., *Il traffico dei diritti insaziabili*, cit., 129 ff.) and Id., *I "due" volti del costituzionalismo di fronte al principio di* auto-determinazione, in 3 *Politica del diritto* 403 (2014), spanish transl. *Las «dos» caras del constitucionalismo frente al principio de auto-determinación,* in 92 *Revista de Derecho Político* 27 (2015).

[5] M.A. Glendon, *La visione dignitaria*, above cited, at 78.

[6] On this issue, see A. Spadaro, *Il problema del "fondamento" dei diritti "fondamentali"*, in 3 *Diritto e società* 453 (1991), also published in *I diritti fondamentali, oggi* (1995).

[7] Chun-Shu Lo, *Human Rights in the Chinese Tradition*, in *Human Rights: Comments and Interpretation*, A Symposium edited by UNESCO, (1949). The fact is also witnessed by J. Piper, *Ueber die Gerechtigkeit*, It. transl. (1975). On the drafting of the UN Charter, see amongst all M.A. Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001).

considered «inherent in the *very nature* of man»[8] as a member of a society.

The strict connection between 'human rights' and 'natural law' should appear clearer now. By using the term *meta-democratic*, I mean to refer (at least empirically and in a nonreligious sense) to a Law that precedes positive Law (*ius positum*). Given that contemporary Constitutions incorporate and sanction natural law aspirations of this kind – not depending on democratic negotiations – in this paper I assume that Constitutions themselves are partly *meta-democratic* too.

2. Notes on Hans Kelsen's democratic theory

Kelsen's conception of democracy is widely well-known and it is not necessary to herein discuss it *funditus* and in detail. Summarising to a great extent his thought, but – I hope – without altering it, it is possible to argue that Kelsen's general, "systematic" approach is, by author's admission, not *liberal* (subsequently not inspired by the *ideology* of "Constitutionalism"). Indeed, Kelsen affirmed to have *unintentionally* «contributed to the misunderstanding of the pure theory of law as liberalism (…) as an appendix of the liberal-individualistic Rule of law theory, or political democratism and pacifism»[9]. On the contrary, he rejects any sort of political theology and assumes that also *illiberal* regimes may be considered 'legal' systems[10]. His method and theory, then, aims to be scientific, neutral, descriptive, and non-evaluative[11].

In this framework, from a clearly *relativistic* axiological point of view, «the values supported by the majority are not less valuable

[8] R.P. McKeon, *The Philosophic Bases and Material Circumstances of the Rights of Man*, in *Human Rights*, above cited, at 45 (emphasis added).

[9] See H. Kelsen, *Formalismo giuridico e dottrina pura del diritto*, in *Lineamenti di una teoria generale dello Stato ed altri scritti* (1933). A more recent paperback edition of this work is edited by S.L. Paulson (1992).

[10] See now C. Luzzati, *Il nodo di Kelsen. Ancora liberali nonostante tutto*, in 15 *Lo Stato* 102 (2020). Kelsen's reject of political theology, however, does not deny his interest in the topic, stated by one of his less known work: H. Kelsen, *Die Staatslehre des Dante Alighieri* (1905), It. trans. *Lo Stato in Dante. Una teologia politica per l'impero*, Mimesis (2017). On this point see O. Lepsius, *Hans Kelsen on Dante Alighieri's Political Philosophy*, in 27 *EJIL. European Journal of International Law*, 1153 (2016).

[11] This is well explained by G. Gavazzi, *Introduzione*, in H. Kelsen, *La democrazia* (1981), especially 8.

than those supported by the minority»[12]. Hence, the minority can always become majority, confirming the absolute unknowability and total mutability of values.

Anyway, at the moment of turning to practical applications of his doctrine, Kelsen seems to mitigate the initial 'pureness' of his legal theory, as attested by his well-known contribute to the drafting of the Austrian and Czech Constitutions in the 1920s[13].

However, in theoretical terms, the alternatives to relativistic democracy are not attractive. According to Kelsen's perspective, democracy (where the values of the majority prevail, whether they are right or wrong) is the more preferable, or convenient, form of State compared to the opposing regimes of anarchy (*libertarianism*, which denies the existence of common values) and tyranny (*authoritarianism*, which imposes values with violence). This is due simply because in a democracy the majority of the associates is free (autonomy) and only the minority[14] remains in a state of subjection (heteronomy). Inexorably, in a democracy «the fewest people suffer»[15].

In short, my critic to Kelsen's theory does not focus on the *acknowledgment* of minority rights – a core topic, in *procedural/formalistic* terms, of his thought – but on the fact that his axiological relativism appears inadequate to legitimize the existence of *substantial* values 'shared' by both majority and minority, that is 'common' constitutional values.

Given that Kelsen realistically excludes the hypothesis of decisions taken unanimously, according to him the ideal regime would be that of *direct democracy*, where at least governed and rulers coincide. Nevertheless, in the practical impossibility of

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[12] G. Gavazzi, *Introduzione*, above cited, at 18.

[13] See, among others: P. Carrozza, *Kelsen and Contemporary Constitutionalism: The Continued Presence of Kelsenian Themes*, in 67/1 *Estudios de Deusto* 55 (2019); M.G. Losano, *Presentazione* to H. Kelsen, *Scritti autobiografici*, in *Acc. Sc. Torino, Atti Sc. Mor.* (2009), 95 ff. and Id., *La nascita della garanzia costituzionale in Europa (la Costituzione austriaca del 1920)*, in 1 *Consulta Online* (2021).

[14] See H. Kelsen, *Vom Wesen und Wert der Demokratie* (1920-1929), It. transl. *La democrazia*, cit., 94 ff. Note: Of the work, not the 1920 version is used here, but the 1929 version.

[15] In such a way, I elsewhere summarised Kelsen's point of view. See A. Spadaro, *Su alcuni rischi, forse mortali, della democrazia costituzionale contemporanea. Prime considerazioni*, in 1 *Rivista AIC (Associazione italiana dei Costituzionalisti)* 16 (2017), but see also Id., *Contributo per una teoria della Costituzione*, I, *Fra democrazia relativista e assolutismo etico* (1994), especially 245 ff.

implementing it, one must fall back on the "fiction" of representative democracy (parliamentarism)[16], which should be improved by tying the electoral body more to the elected representatives through a mechanism that closely resembles a binding mandate from the party, despite in the perspective of a proportional electoral system and effective internal party democracy[17]. In the end, and in opposition to Rousseau's thought, Kelsen joins the idea of deliberative democracy promoted in North America, for example, by Jefferson and Madison.

3. Historical limits of Kelsen's theory…

Although rigorously logical and acute, Kelsen's approach is strongly influenced by context and time. For example, Kelsen could not imagine the incredible evolution that telematics and the internet would soon have, up to the unpredictable developments of artificial intelligence today. Naturally, *ratione temporis*, he is still tied to the traditional role of parties and does not take into account the influence that *social media* and *algorithmic models* exert on democratic decisions. In short, he could not witness the rise of *digital democracy* and what is now known as *algocracy*[18].

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[16] «The fate of parliamentarism will also decide the fate of democracy»: H. Kelsen, in *Vom Wesen und Wert der Demokratie*, cit., at 67. See also Id., *Das Problem des Partamentarismus*, Wien - Leipzig 1924.

[17] H. Kelsen, *Vom Wesen und Wert der Demokratie*, cit., at 82 and 84: «We can certainly no longer think of a return of the imperative mandate in its ancient form; but [...] today we cannot categorically reject the idea of permanent control of deputies by groups of voters constituted in political parties. The possibility of legally carrying out this control exists [...] The irresponsibility of the deputy vis-à-vis his constituents, which is undoubtedly one of the essential causes of the discredit into which the parliamentary institution has fallen today, is not at all, as transpired by the 19th century doctrine, a necessary element [... it should not be surprising if ...] deputies, even if they are not tied to the mandate of their constituents, lose it as soon as they leave the party for or from which they were elected or as soon as they are excluded from it».

[18] Among a long list, see for example: C. O'Connor, J. Owen Weatherall, *L'era della disinformazione. Come si diffondono le false credenze* (2019); A. Soro, *Libertà, algoritmi, umanesimo digitale. Democrazia e potere dei dati*, Baldini e Castoldi (2019); L. McIntyre, *Post-verità* (2019); F. Donati, *Internet e campagne elettorali*, 16 Federalismi (2019); A. D'Atena, *Sul cortocircuito tra democrazia illiberale e* Internet, 13 Lo Stato (2019), 261 ff.; P. Gerbaudo, *The Digital Party* (2019), 105 ff.; M. Barberis, *Come Internet sta distruggendo la democrazia* (2020); F. Zambonelli, *Algocrazia. Il governo degli algoritmi e dell'intelligenza artificiale* (2020).

My concern is not about the *electronic* vote as a tool with pros and cons (having regard to the risk of electoral frauds) but relates rather to the strong (perhaps excessive) influence of statistic/algorithmic data on democratic processes as well on social networks' manipulation, especially if directed by foreign Countries. It is the case of *political bots* in US 2016 presidential election[19] and, in a more positive (though not completely satisfying) sense, of the 2013 web-participated constituent process in Iceland.

I also refer to the possibility of letting the Members of the Parliament to use the electronic vote staying at home. The issue has come at stake after the Covid-19 pandemic, due to the risk of virus circulation when the MPs gather during each session.

Kelsen stands firm on the idea, reasonable for his time, that *direct democracy* in mass society was impossible. For theoretical reasons that cannot be explored here, in my opinion the principle is still valid, but now it is possible to realise some type of *direct democracy*, despite in a primitive form. This stems from the possibility of easily voting "from home", or from wherever one is, simply by clicking on one's computer. There remains the insurmountable problem of the vote's freedom, which certainly no password can guarantee, since it cannot ensure with certainty the essential *secrecy* of the vote. However, it is possible to imagine at least a purely *consultative* telematic democracy rather than a truly *deliberative/decisional* one, but obviously in Kelsen's thinking there does not seem to be room for direct democracy in the form of *e-democracy*.

Additionally, today it appears inadequate Kelsen's 'recipe' of a closer link between elected representatives and voters through an imperative party mandate. Although this recipe is still popular, for example some political forces in Italy support it, it does not seem to be a valuable solution for various reasons, especially due to the current high levels of distrust towards parties, which are often de-ideologised and characterised by excessive personalism from their leaders. This idea of an imperative party mandate is proposed by the latest Kelsen, the "American" one, who is perhaps influenced by the clearly different US recall model. Nonetheless, this idea certainly does not appear to be suitable for solving the long-standing problems that representative democracies currently face all over the world.

[19] A. Chadwick, *The hybrid media system: Politics and Power* (2017).

Representative democracy would probably fall in a deeper crisis with the introduction of an imperative party mandate. This would make the elected members simple "puppets", emptying the freedom of thought that should always guide every parliamentarian. In Europe, the debate on this issue is very heated but it is largely prevalent the idea that the essence of political representation still stems from the idea of a free mandate (free even from party ties), while recognising the need to avoid the so-called *political transformism* of the elected representatives.

4. …and the inadequacy of democracy as mere procedure

The most radical and direct criticism to Kelsen's theory stems from his *neutral*, non-evalutative and merely *procedural* idea of democracy. This idea has never been appropriate for the existence and the survival of contemporary state, since it may introduce the risk for a state to be "democratic" … but not "liberal" anymore, refusing the indispensable values of constitutionalism, as it will be further discussed in the last paragraph, where I will mention the risks of contemporary national populism, as the dangerous Capitol Hill riot at the end of Donald Trump's presidency confirms[20].

As it is well known, Kelsen refers to the Gospel of John, chs. 18 and 19, as the main example to "explain" the relativistic, non-evaluative and merely procedural nature of democracy. This chapters allude to Pilate's famous appeal to the crowd, which ends with the condemnation of Jesus and the release of Barabbas. Kelsen almost *obsessively* employs the trial of Jesus as an illuminating historical precedent to explain the "democratic procedure", mentioning it at least six times in six different works (1920-29, 1933, 1948, 1955-6,1960 and 1979), written in German and English[21].

[20] For a further analysis on populism, see A. Spadaro, *Les évolutions contemporaines de l'État de droit*, in *Civitas Europa*, 37 Revue semestrielle de l'Université de Lorraine (2016), 95 ff. [published also in 8 Lo Stato (2017), 139 ff.], but especially Id., *Dalla "democrazia costituzionale", alla "democrazia a maggioranza populista/sovranista" alla "democrazia illiberale", fino alla.... "democratura"*, 3 Rivista di Diritto Pubblico Comparato ed Europeo (*DPCE online*) (2020).

[21] This passage of the Gospel is commented in these essays by Kelsen: *Vom Wesen und Wert der Demokratie* (1920), rev. in 1929; *Staatsform und Weltanschauung* (1933); *Absolutism and Relativism in Philosophy and Politics*, XVII The American Political Science Review 5 (1948); *Foundations of Democracy*, in *Ethics*, LXVI, 1, part II, 1955-56. He mentions it also in *Das Problem der Gerechtigkeit* (1960) and in *Allgemeine*

Several years ago, I dedicated an entire volume to critically comment on Kelson's interpretation of this event described in the Gospel of John and I refer to that work for a more detailed analysis[22].

Herein, I only highlight that this is an evident case of demagogy/ochlocracy/populism where irrational and inherently manipulative components of the democratic process emerge, but Kelsen seems to fail to acknowledge this. We know relatively little of how things actually went, but the very question that Pilate posed to the crowd, whether to free Jesus or Barabbas, is inherently equivocal and manipulative. In addition, the name of Barabbas, removed from the Gospels, was "Jesus" and also the Aramaic word "Bar Abba" (Son of the Father) constituted a messianic name of the Nazarene. Therefore, it cannot be excluded that Pilate ambiguously asked: do you want me to free "Jesus Bar Abba" or "Jesus Barabbas"? The ambiguity is also in the answer: Jesus! (which one?), Bar Abba! Barabba (which?). The episode, whether true or false, is a sufficient indication of how every "direct appeal to the people" with subsequent decision (*Volksabstimmung*) presents irrational and emblematic aspects of irresolvable complexity. In any case, this is a dangerous historical simplification, which is an example of "ochlocracy" (government of, and over, the crowd), not of democracy (government of the people) and certainly not of "constitutional democracy" (government of the people "limited" also by meta-democratic principles).

As it should be clear by now, the democratic procedure alone does not necessarily lead to *fair* decisions. Even without mentioning the endless issue related to the mechanism of political representation (*Repräsentation*, *Vertretung*, identity, identification, etc.), nowhere is it stated that what the greatest number decides is fair. *Vox populi* is not necessarily *vox dei*. On the contrary, historical experience tells us that the opposite is often true. In particular, *truth* (scientific, empirical, philosophical, moral, political, etc.) has nothing, or very little, to do with the *democratic principle*, that is, the principle by which majority wins/prevails and minority

Theorie der Normen (1979). For a further analysis in this respect, see my *Contributo per una teoria della Costituzione*, cit. at 15, 333, pp. 190, especially fn. 3.

[22] See A. Spadaro, *Contributo per una teoria della Costituzione*, cit. at 15, 333, especially 189 ff.

loses/succumbs[23]. Unfortunately, at least in this respect, from a political viewpoint democracy by itself (*i.e.*: without a *constitutional* trait, that means *liberalism* and some kind of 'limited government'), is not a particularly preferable regime to another, since we all know very well that the *maior pars*, which decides in a democracy, is not necessarily the *melior pars*[24].

In short, if democracy is meant as a synonym of mere *procedure*, it cannot grant the well-functioning of complex societies and citizens' freedoms. All these goods need a *Constitution*, whose concept does not flatly coincide with *democracy*. Indeed, the Constitution is not an 'empty box' that temporary political majorities can fill as they please: this would lead to a minimal, substantially *wertfrei* (value-free), basically procedural idea of Constitution, in opposition to the American notion of Higher Law in natural law terms. US *Bill of Rights* or article 16 of the 1789 *Déclaration des Droits de l'Homme et du Citoyen* are excellent paradigms of *substantial* limit to pure democratic will. As well known, article 16 runs as follow: « Toute société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de Constitution ».

5. Logical need for meta-democratic (largely "constitutional") limits to democracy

I believe that democracy is historically the best form of government, mainly for two reasons:

a) Democracy is historically the best form of government not specifically because in a democracy "the least number of people" suffer (as Kelsen implies), but rather since it is the only regime which "tries" to reach "shared" social decisions, albeit rarely unanimously, as a government by discussion (*government par la discussion*). Unlike all the others, being preceded

[23] See especially A. Spadaro, *Contributo per una teoria della Costituzione*, cit. at 15, 333, 121 ff., and *passim*; P. Häberle, *Wahrheitsprobleme im Verfassungsstaat* (1995), It. transl., (2000); and now, J. Nida-Rumelin, *Demokratie und Wahrheit* (2006), It. transl., (2015). The latter (at 13) reminds that «Democracy without pretentions of truths is void of content. Democracy is not reduced to a mere game of interest».

[24] See, above all, G. Sartori, *Democrazia e definizioni* (1979), 80 ff., and *passim*.

by a public discussion[25], democratic social decisions could be wrong, and not infrequently they are, but they also are, or at least seem to be, more *persuasive*[26] and, consequently, they "try" to be *non-violent*[27].

b) The democratic form of state is the best one only whether inspired and "limited" by a framework of values-principles (meta-democratic) contained in the constitutional charts (and, a fortiori, in the many "universal declarations" of human rights), without resulting in an aberrant heterogony of ends (*Heterogonie der Zwecke*), that is, an "ethical" state. Unfortunately, unlike some philosophers, as jurists we are not able to establish what is the "foundation" (*Grund*) of these principles, whether natural law or not, but we can reasonably contend that, *without them*, a democracy cannot work.

What is certain is that the constitutional principles mentioned herein – recognised in terms of *human rights* in the American tradition, and of *natural law* in the European context (*supra*, para. 1) – are capable of constituting a real "limit" to popular sovereignty, and subsequently to democratic power, precisely since they refer to "over epochal" social values. As stated above, these values must be "not" simply of procedural derivation, that is, democratically decided, but *substantial* and self-legitimating (*selbst-legitimation*). To this end, in order to avoid an insuperable logic aporia, namely "a dog biting its own tail", it seems unthinkable that a procedure (democracy) is limited simply and exclusively by another procedure (the Constitution, at least understood according to Kelsen's pure/formalistic approach).

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[25] As it is well-known, J. Habermas's contribution in this respect is decisive, for example in *Faktizität und Geiltung. Beiträge zur Diskurstheorie des Recths und des demokratischen Rechtsstaats*, (1992), It. transl., (1996), especially 341 ff.

[26] As J. Nida-Rumelin rightly observes: (*Demokratie*, cit. at 37 e 40): «In a democracy, the discussion of arguments and the use of good reasons play a greater role than in any other form of government [...] It is the public use of reason that legitimises political action in a democracy, not the continuous approval of every single political decision in parliament and government».

[27] That this is a mere hope or attempt, and unfortunately not a certainty, is confirmed by the fact that constitutional states often provide for, or better phrased, they must provide for, the right to *conscientious objection*, which is the last extreme guarantee of the single individual to protect the principle of dignity of the human person from majority decisions. On this point, see my *Libertà di coscienza e laicità nello Stato e laicità nello Stato costituzionale* (sulle radici "religiose" dello Stato "laico") (2008).

In sum, drawing on incontrovertible logical-legal reasons partly attributable to mathematician K. Gödel's incompleteness theorems [*i.e.*: the 'inner' aporia of a (democratic) system can be solved only by means of an 'outer' factor (constitutional values)][28], the rules of the democratic game must be inspired and limited by substantial and *meta-democratic* values, as from a legal viewpoint O. Weinberger[29] well puts. In particular, I am herein referring to the supreme values constituting the so-called "intangible hard core of constitutions": those that, in Italy, the Constitutional Court calls «fundamental principles and inviolable rights» (starting from sentence no. 1146/1988), which *are* not and cannot be subject to the mutability of democratic public opinion.

Nonetheless, the aforementioned fundamental principles and inviolable rights cannot be 'selected' and 'determined' *exclusively* and *arbitrarily* by Constitutional Courts, not by chance depicted in Kelsen's theory as 'super-legislators' (*Uberparlament*), albeit only with repealing functions (*negative Gesetzgebung*)[30]. By contrast, it is a non-viable option to 'freeze' constitutional texts at a certain historical moment, excluding appropriate hermeneutical updates besides the path of formal revision procedures. To this end, affirming the need for 'constitutional' (and not mere or simple) democracy' does not mean, in the context of the theories on constitutional interpretation (just briefly mentioned herein), flatly adhering to the *originalist* theses, in the most extreme *textualist*

[28] *Human dignity* represents the ultimate goal of a liberal-democratic Constitution; even if it were formally unexpressed, it will remain a super- and meta-constitutional value. On this point, and for further references, see my *L'idea di Costituzione fra letteratura, botanica e geometria. Ovvero: sei diverse concezioni "geometriche" dell'"albero" della Costituzione e un'unica, identica "clausola d'Ulisse"*, in F. Fernández Segado (ed.), *The Spanish Constitution in the European Constitutionalism Context*, (2003), 169 ff., published also 6 Revista Brasileira de Direito Constitucional (2005), 119 ff.

[29] See the bold and sharp commentary by O. Weinberger, *Abstimmungslogik und Demokratie*, in *Reform des Rechts. Festschrift zur 200 Jahr-Feier der Rechtswissenschaftlichen Facultät der Universität Graz* (1979), 605 ff.; but also Id., *Rechtspolitische Istitutionanalyse*, in *Geseztgebunstheorie und Rechtspolitik* (1988), It. transl. in N. Mac Cormick - O.Weinberger, *Il diritto come istituzione* (2009) especially 313 ff. Despite from a different perspective, it relates to what L. Ferrajoli (*Iura Paria. I fondamenti della democrazia costituzionale*, (2017), 48, calls «sphere of the non-decidable».

[30] See H. Kelsen, *La garantie jurisdictionnelle de la Constitution (La justice constitutionnelle)*, XXXV Rev. dr. publ. et sc. pol. (1928), 197 ff., It. trans., (1981), 143 ff.

version, which tend to "mummify" a constitutional Charter. Instead, a *balanced* but evolutive interpretation of the Constitution is indeed needed, without this leading to the so-called "free judge-made law" (*freie Recht*)[31].

As I already argued in many of my works, democracy, left alone, could be compared to a "child" abandoned to itself: it can rarely survive. If a child does not become "adult", he/she can very easily get into trouble. Out of metaphor, if a democracy does not grow into a *constitutional* democracy, its wellbeing can be at serious risk. The failure of most of the so-called "Arab springs" (in countries with very modest, if non-existent, constitutional traditions) or the recent elections of "unreliable leaders" (in countries with great constitutional traditions) essentially constitutes the failure of the *democratic* political procedure rather than of the legal model of *constitutionalism*, which is imperfect but still valid. The outcome of a democratic procedure can be not only naturally unpredictable but also ominous or even counterproductive, due to the phenomenon of widespread and sophisticated manipulation of public opinion.

This issue is ancient and could be summarised as follows: *how to defend democracy from itself*. Therefore, the mere democratic regime risks being a form of dictatorship in some respects perhaps even worse than the other regimes. Although, in a parliamentary system, limited in time (until the transformation of the minority into a "new" majority), the *tyranny of majority* presents strong totalitarian aspects, due to the intrinsic violence and psychological oppression that the force of number can determine on individual free conscience[32]. In conclusion, it is thereby necessary that in order not to degenerate democracy becomes "constitutional". Nonetheless, this process requires an adequate historical context and a unique *civil and political maturation*.

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[31] On this aspect, see A. Ruggeri, A. Spadaro, *Lineamenti di giustizia costituzionale*, 6th ed., (2019), especially at 19 (with further references).

[32] See, above all, L. Talmon, *The origins of totalitarian democracy* (1952), It. transl. Il (1967). Nonetheless, the risk of a tyranny by the majority is an issue widely discussed by the literature. See for example A. de Toqueville, *La démocratie en Amérique* (1835-1840), It. transl., (1971), for example 107 ff. (it is the well-known chapter on the "Omnipotence of the majority in the United States and its effects"). On democracy and non-violence, see G. Sharp, *Come abbattere un regime. Manuale di liberazione non violenta* (2011), especially 109 ff.

6. Kelsen as a thinker (involuntarily) liberal and thus (implicitly) in favour of constitutional democracy

As I indicated in another work, «the links between Kelsen's *Reine Rechtslehre* and *Politischer Wertrelativismus* […] are more than evident: they represent two sides of the same coin»[33]. Paradoxically, it is the fragility of Kelsen's political relativism that makes the purity of his legal doctrine less credible.

As previously mentioned, he always denies that his theories have an ideological content, that is, distinctly "liberal", and excludes any axiological contamination external to his thought. However, he is not only surely a convinced liberal democratic, but he is forced to contradictorily contaminate his theory of democracy, which is a merely *procedural* construction, with *substantialist* arguments (liberal ideology).

On the one hand, Kelsen is aware that political *liberalism*, the other side of legal *constitutionalism*[34], essentially means «limitation of power […] also limitation of democratic power», to the point of admitting that a social order that did not provide for «guarantees for certain intellectual freedoms, especially for freedom of conscience […] would not be considered democratic». On the other hand, he continues to stubbornly say that «even liberal democracy is first and foremost a procedure»[35]. At this point, it seems that the issue is almost "terminological": Kelsen regards as and calls *political* freedoms "procedures" as well. Nevertheless, even considering them mere "logical" presuppositions of the majority or democratic procedure, there is no doubt that the principles that enunciate political rights and freedoms are not mere procedural techniques, but on the contrary have a remarkable substantial "axiological" nature.

This is a result of Kelsen's decision to remain within the "logical citadel" of rigid formal purity of the law, where the formal-hierarchical distinction between the normative sources, for example between the Constitution and primary law, is not also axiological-

[33] See my *Contributo per una teoria della Costituzione*, cit. at 15, 333, at 319.

[34] Indeed, 'constitutionalism' is nothing else that the translation in *legal* terms of the *political* ideology of 'liberal democracy'. See, amongst all, cfr. A. Spadaro, *Costituzionalismo,* in *Enciclopedia filosofica*, vol. III, (2006), 2369 s. (with further references).

[35] H. Kelsen, *Foundations of democracy*, in *La democrazia*, cit, at 188.

substantial but only procedural. He goes so far as to imagine that the Constitution prevails only because the procedure for its drafting or modification is more complex than that approving primary law. According to Kelsen, all defects of the law are mere formal/procedural defects, and it would thus be sufficient to adopt the correct procedure (for example of constitutional revision) to remedy the defect of a law that "substantially" violates a rigid Constitution[36]. It is surprising that Kelsen does not seem to realise that this leads to overcome only *psychologically* but not *logically* the substantial defects of the law, since "before" adopting the right revision process (instead of the ordinary one) it is always necessary to ascertain the existence of a substantial defect.

Above all, in such a closed and apparently perfect construction, Kelsen clearly lacks the idea of the existence of a "hard constitutional core" – by and large shared by European contemporary constitutions, as for Italy under the formula 'constitutional counter-limits'[37] – that *definitively* fixes the principles of liberal democracy, subtracting them from any majoritarian-democratic logic[38]. In reality, as already argued, he does not ignore the need for constitutional "guarantees" but he does not make explicit, or he forgets, their nature as an axiological supra-majoritarian framework. Indeed, it is worthless acknowledging, with Kelsen, the importance of liberties (and of 'constitutional adjudication' mechanisms devoted to their protection) and at the same time admitting, as in Kelsen's theory, that *any* prevision of the Constitution may be modified simply following the appropriate formalistic procedures provided therein[39]. Fortunately, Kelsen

[36] See again H. Kelsen, *La garantie jurisdictionnelle de la Constitution*, cit. at 23, 334, at 154.

[37] On this topic, see S. Polimeni, *Controlimiti e identità costituzionale nazionale. Contributo per una ricostruzione del «dialogo» tra le Corti* (2018) (with further references).

[38] On this point, amogst all, A. Ruggeri, A. Spadaro, *Lineamenti di giustizia costituzionale*, cited above, especially 130 ff.

[39] Albeit widely known, it is worth recalling Kelsen's own thought: «a statute may result unconstitutional both for a lack regarding the procedures for its adoption and for a substantial contrast with some principle or directive set forth by the constituent power, when the statute exceeds predetermined limitations (…) This distinction, however, is acceptable only under the condition that even the so-called substantial lack is turned into a procedural lack, for the contrast of statute and constitution's contents would be overcome if the former were adopted following the procedures for constitutional revision». See H. Kelsen, *La garantie jurisdictionnelle de la Constitution*, cited above, at 154. But it should be

himself refrains from a 'literal' application of his theory, for examples in the drafting of the Austrian Constitution, where the distance between the severe formalistic *legal* doctrine and concrete *political* thought and conduct followed by the Author clearly emerges.

The transfer of such a great extent of abstract formal logic from legal to political theory is immediate. As a political philosopher, Kelsen argues that the *majority principle*, which represents the foundation of a democracy, neutrally expresses a "quantitative" method that always cancels any "qualitative" judgment[40]. He does not admit the principle "*princeps legibus solutus est*" and he contends that the "compromise" is born from the parliamentary confrontation between majority and minority and this is made possible only by *political relativism*. Nonetheless, it is the same person that, arguably contradictorily, then appeals (or acknowledges) what he calls, a little euphemistically, the "principle of tolerance", which on closer inspection is not very relative: «democracy cannot be an absolute domination [...] of the majority [...] not only because of the fact that by definition it presupposes an opposition, that is, the minority, but also because it recognises its political existence and it protects its rights» to the point of finally admitting that «modern democracy cannot be separated from political liberalism. Its principle is that the government must not interfere in certain spheres of individual interests, which must be protected by law as fundamental human rights or rights to liberty; respecting which minorities are safeguarded from the arbitrary domination of majorities»[41].

Naturally, the narrative that Kelsen employs to admit this recalls and suggests a procedural dimension, perhaps owning to an intimate need for consistency. It is as if he said: "guarantees are needed for the minority to survive and become a majority, respecting the procedures".

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added (and Kelsen did not add) that no statute, *even of constitutional rank*, could really question what is *definitively out of question*, that is fundamental freedoms and democratic procedures themselves. On this point, see also below in the next footnote. On the risks of interpreting constitutional adjudication as an implicit consequence of finalizing democratic theory to the protection of minority rights, as in Kelsen's though, see now O. Pfersmann, *Natura e valore della democrazia cento anni dopo. Dalla procedura del compromesso alla trasformazione giurisdizionale*, 3 Dir. pubbl. 2020, 887 ff.

[40] See H. Kelsen, *Foundations of democracy*, cit. at 21, 336, at 231, especially fn. 1.

[41] *Ivi*, 237 et seq.

However, the fact remains that "guarantees", whether they are called *liberal* or *constitutional*, are *not* procedures but (substantial) limits to the democratic procedure! And the democratic "compromise" that led to the *stable* drafting of those (constitutional) guarantees is absolutely not comparable to the everyday parliamentary "compromise" that leads to the more widespread and *variable* production of (legislative) legislation[42].

In addition, it does not seem sufficient to recall the *generic principle* of tolerance, as Kelsen does, on the basis of the (questionable) thesis that «tolerance presupposes the relativity of the sustained truth or of the postulated value, and this relativity implies that the truth or the opposite value are not entirely excluded»[43]. For an easy critique of this hasty conceptual simplification, it would be enough to remember, for example, that "tolerating" the deniers/flat-earthers does not at all presuppose the relativity of the opposite truth supported by science[44]. In short, it does not seem enough to recall the principle of tolerance as a limit (by the way implicit) to the democratic procedure. In fact, «modern pluralist democracy is not the regime of full tolerance, which is the regime where the majority, from time to time, decides the content and limits of *values*, thus identifying, in an ever-changing way, *what truth is*. A democracy without "fixed points" [...] is a regime of tolerance paradoxically willing to tolerate also the intolerants, therefore even willing to commit suicide [instead] a true democracy is intrinsically the regime of "relative" tolerance or, in other words, of "partial" relativism: but it is now evident, at this point, that herein the concept of democracy ends and that of Constitution begins»[45].

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[42] According to H. Kelsen (*La garantie jurisdictionnelle de la Constitution*, cit. above, at 202), «If the essence of democracy lies not just in majority omnipotence rather than in the continuous compromise between majority and minority parliamentary groups, and thus in the social peace, constitutional adjudication appears the most adequate means to put this idea in practice».

[43] See H. Kelsen, *Foundations of democracy*, cit. at 21, 336, at 313.

[44] For a further analysis, see my *Contributo per una teoria della Costituzione*, cit. at 15, 333, above, 261 ff.

[45] Quoted from my *Contributo per una teoria della Costituzione*, cit. at 15, 333, at 277 e 287, but see *passim*. Instead, on the issue of a democracy that can always "democratically" question itself, see in Italy, more explicitly, F. Rimoli (*Pluralismo e valori costituzionali. I paradossi dell'integrazione democratica* (1998), 378 ff.) and, with some uncertainty, G. Zagrebelsky (*Il «crucifige!» e la democrazia* (1995) 101 ff.), alluding to a *critical democracy*, that is, perpetually under discussion. However, this type of democracy evidently is NOT a "constitutional democracy":

Certainly, the contradiction or aporia just discussed is not the only one within a thought as rich and articulated as Kelsen's[46], but surely the sought-after scientific "purity" of the *Reine Rechtslehre* method in the legal elaboration does not help a "coherent" construction of the *Politischer Wertrelativismus* as the basis of a functioning democracy[47].

In fact, «relativism is in kelsenian thought the matching point between the defence of science and the defence of liberal democracy (…) the Achille's heel of kelsenian democratic theory is exactly the same of his general law theory: the impossibility – and, I would say, the uselessness too – of an *indifferent*, neutral viewpoint when the protection of democratic values is at stake».

In conclusion, Kelsen is a convinced liberal-democratic and certainly seems to adhere to the historical model of *constitutional democracy*, where the popular will is not absolute, but "limited" by superior values, also (not especially) scientific[48]. However, Kelsen clearly avoids recognising the imperative *logical* necessity of fixed points, that is, of a stable substantial *axiological* framework, since it is removed from the variable majorities. Why? Perhaps for the fear that this recognition could lead to an involuntary *return of natural law*, which, to the father of the "pure doctrine" of law, would appear as an even more intolerable inconsistency.

7. Conclusions: the current risks to *constitutional democracy*: towards a *démocrature*?

The limits but also the merits of Kelsen's contribution to democratic theory can perhaps be better noticed today than yesterday.

At the time of writing, the "constitutional" state is in crisis in many countries around the world, which accept (or pretend to

for a critical analysis on this point, see my *Libertà di coscienza e laicità nello Stato costituzionale*, cit. at 16, 331, 209 ff. but see *passim*.

[46] This is not the right place to list Kelsen's aporias. On this point, see my *Contributo per una teoria della Costituzione*, cit. at 15, 333, 235 and 277 ff.

[47] In critical perspective, among others, see also: S. L. Paulson, B. L. Paulson, *Normativity and Norms. Critical Perspectives on Kelsenian Themes* (1988); A. Somek, *Stateless Law: Kelsen's Conception and its Limits*, 26 Oxford Journal of Legal Studies 4 (2006), 753 ff.

[48] In particular, H. Kelsen (*Foundations of democracy*, cit. at. 21, 336, 238 ff.) mentions a «rational science» in contrast with «any metaphysical or religious intrusions».

accept) the *democratic* procedures but do not accept, or evade, the *liberal* guarantees of the rule of law. In my view, the expression popular/political/populist/illiberal[49] constitutionalism constitutes an intolerable *oxymoron* or at least delineates a constitutionalism seriously ill. Unlike the past, when the *law* was an instrument of *political* power, today *constitutionalism* in its essence is the exact opposite: an instrument of *legal limitation of political power*[50].

Although it is highly desirable for a *democracy* (a purely procedural concept) to be *constitutional* (a predominantly axiological-substantial concept), nevertheless it cannot be excluded that in practice there are also imperfect forms of democracy. However, a "simple" democracy, without adjectives, inevitably tends to also become totalitarian (majoritarian autocracy): this is the case of "uncertain" or "illiberal" democracies[51]. Some examples are H. Rouhani's Islamic Republic of Iran or N. Maduro's Bolivarian Republic of Venezuela. In both cases, on closer inspection, we are faced with "democracies": in fact, with all imaginable reservations, people ... "vote".

It follows that democracy or primacy of the popular will, alone without the adjectives necessary to qualify it (*liberal, constitutional* ...), is a bad regime, not too dissimilar from authoritarian and totalitarian ones. In recent times, "intermediate" entities are being formed between the *democratic-constitutional* and the *non-democratic states*, which can be briefly examined diachronically with the following scheme:

I stage:

• **DEMOCRACIES WITH «POPULIST/SOVEREIGN» MAJORITIES** [H.-C. Strache's Austria, the yellow-green Di

[49] Among a long list, see M. Tushnet, *Authoritarian Constitutionalism*, 100 Cornell Law Review 2 (2015, Jan.); G. Frankenberg, *Authoritarian Constitutionalism - Coming to Terms with modernity's nightmares*, in H.A. García,G. Frankenberg (eds.), *Authoritarian Constitutionalism. Comparative Analysis and Critique* (2019). See also A. Di Gregorio, *Le transizioni alla democrazia nei Paesi dell'Europa centro-orientale, baltica e balcanica*, in A. Di Gregorio (ed.), *I sistemi costituzionali dei paesi dell'Europa centro-orientale, baltica e balcanica* (2019), 1 ff.

[50] On this point, see again A. Spadaro, *Costituzionalismo* cit. at 34, 342, 2369 f.

[51] This issue has been widely discussed in the literature (see for example G. Sartori, *Democrazia e definizioni*, cit. at 24, 338, especially 226 ff.) but reached global recognition with Fareed Zakaria, *The rise of Illiberal Democracy*, 76 Foreign Aff. 6 (1997, nov./dec.), 22 ff. ,T.G. Daly has even listed many ways to indicate the decay of democracies: see www.democratic-decay.org/index.

Maio/M. Salvini's Italian government, D. Trump's USA, etc.: anti-Europeanism, economic protectionism, masked xenophobia, intolerance to the checks and balances of constitutional guarantees]

II stage:

• **«ILLIBERAL DEMOCRACIES»** [V. Orban's Hungary, twins Kaczyński's Poland, etc.: the tendency towards the tyranny of majority, *very strong nationalist/sovereign identity*, limitations of judicial powers and civil rights]

III stage:

• **«*DÉMOCRATURES*» [**V. Putin's Russia, R.T. Erdogan's Turkey, Lukašėnka's Belarus, etc.: limitations of freedom of the press, control of the judiciary, repressions of the oppositions**]**

Illiberal democracies and *démocratures* could be defined as "post-constitutional" states, that is, intermediate entities between "constitutional" states (classical liberal regimes) and traditional "anti-constitutional" states (authoritarian/totalitarians regimes)[52].

If what hitherto briefly explained is true, the real problem that, today as yesterday, must be faced without unnecessary evasion remains that of "sovereign" or absolute power, regardless of who holds it: the individual, as Schmitt wanted (the *Führerprinzip* of the authoritarian regime), the ideological party (the *communist-Stalinist* party in a totalitarian regime) or even the people (the *political representation* of the democratic regime). In the rule of law, and thus in the *constitutional* order, a "sovereign" power is always inadmissible, because this system is historically characterised as the social organisation that has the "limitation of power" as its primary objective, whatever it may be.

Surely, everyone would benefit from a better selection of the political class and the existence of parties with true internal democracy. Nonetheless, if the basic problem remains that of the "limitation of power", it is not needed "more" democracy (*quantity*) but rather "better" democracy (*quality*). In short, more Constitution is needed, that is, greater attention to constitutional guarantees that constitute a 'limit' to the democratic process.

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[52] For a further analysis, and references, of this issue, that here can be inevitably just touched, see my *Dalla "democrazia costituzionale", alla "democrazia a maggioranza populista/sovranista" alla "democrazia illiberale", fino alla.... "democratura"*, cit. at 20, 336.

It must be said that to a certain extent this was clear to Kelsen, at least in the case of his defence of the Constitutional Court against Carl Schmitt. However, in the current difficult international and comparative context mentioned earlier, which calls into question the very idea of *limitation of power*, the "limit" of Kelsen's approach is given precisely by the insufficient explanation of the value of "constitutional" democracy and, in particular, by the failure to recognise *substantial* axiological limits to democratic *procedures*.

Paradoxically, perhaps the "value" is also hidden in the "limit". After all, Kelsen reminds us, with a certain ruthlessness but not wrongly, that democracy alone *without adjectives* is simply the regime of the majority, a mere "procedure", the results of which are not necessarily "right", but only welcome to most or, perhaps better phrased, unwelcome to least. Nothing more and nothing less.

This is precisely the necessary knowledge base, minimum I would say, from which to start to recognise that the legitimation of power "from below", of democratic origin, alone is insufficient for a good functioning of the state. It is also required a legitimation "from above", given, on the one hand, by the micro-truths continually discovered by science, and, on the other, by a necessary supra-majority legal-political axiological framework: the "Constitution".