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FROM KANT TO KELSEN

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From Kantianism to Kelsenism in Politics? Some Introductory Remarks

If we had to find another title for this book, it could certainly have been: *From Kantianism to Kelsenism in Politics*. On the one hand, the contributions collected here have the objective of analysing the political thought of Kant and Kelsen on the three axes of analysis of democracy, education and peace; on the other hand, they emphasized how these authors can be linked with later eras through the (critical) reuse of their thought. The fact that the theories of Kant and Kelsen have become "isms" of politics shows, of course, the greatness of the authors, but also the possibility that the scholar can face the most influential political thinkers from different points of view.

If Kant's thought can undoubtedly be inserted at the end of the early modern era, reinterpreting the juridical and political traditions of natural law and enlightenment, political Kantianism, especially of the twentieth and twenty-first centuries, is outlined as a large container within which an important part of the contemporary ideological confrontation is polarized. Many and very different thinkers have recalled Kant's politics in the contemporary world, but political Kantianism, which has risen to the rank of paradigm and decontextualized, has often been flanked by an anti-Kantianism that is perhaps even more influential.

Kant reuses previous authors of natural law, as the essays on Grotius, Hobbes and Rousseau here collected make clear, often forcing their interpretation far beyond

philological accuracy or, at least, emphasizing elements functional to his own original theoretical elaboration, and managing to hold together theories and authors that can be rightly regarded as clashing views: i.e. the theory of sovereignty between Hobbes and Rousseau, or the political path for peace between Grotius and Hobbes. Francesca Russo, dealing with *International Arbitration or Universal Republic: the Formation and Consolidation of Peace in Grotius and Kant*, highlights how much Kant is linked to Grotius' internationalist thought, but also how much he detaches himself from it, influenced by the different historical context in which he writes. If the Dutch thinker analyzes international law mainly from the point of view of moderating wars and finding common ways to end conflicts; Kant adopted some of his intuitions more than a century and a half later, but developed a comprehensive approach to the question of peace, based both on republican constitutionalism and on international law (between republics) aimed at the perpetual abolition of war. Flavio Silvestrini, questioning *"Against Hobbes"?: Kant and the Historical Education to Republicanism*, shows through Kant's political writings of the Nineties how the author, on the one hand, critically reuses Hobbesian thought, foreseeing the political overcoming of the Leviathan within the State, with republican constitutionalism, and outside, with peaceful international law; on the other hand, he is willing to adopt historically the model of Hobbesian contract, according to which every legal improvement takes place to advance coexistence between individuals. Francesco Berti addresses *Rousseau and Kant's Republicanism: Questions About Liberty*, pointing out that although both authors describe the state theorized in their works as "republican", they develop a very different, if not conflicting, doctrine of republicanism. The two phi-

losophers differ in the way they use the "positive" version of freedom, since only in Kant it results in a form suitable for granting negative freedom, regarded under the liberal-Lockean perspective.

Similarly, contemporary authors who recall Kant in their writings move with the intention of affirming new ideas, with a functional, often distorting, use of the authoritative source. Of course, there remains a line of contact on the main themes of Kantian politics, such as the legal-political construction of republican constitutionalism, the role of politics in opening the era of rights, the search for peace as a fundamental political issue for the development of human coexistence. If they can only be addressed theoretically in Kant's work, they recur historically throughout intellectual and public debate, especially since the twentieth century, because they are now strongly determining the political agenda of governments. The history of ideas, especially political ideas, is never linear, but it is the task of the researcher to find solid points, through the in-depth study of an author's thought, as well as the internal dynamics, which have led to the realization of certain foundations of politics in contemporary contexts.

Dario Caroniti, in his contribution on *The Philosophy of History of Eric Voegelin: Critique of Kant and Weber*, notes the constant presence of Kantian thought (and neo-Kantian approach developed by the school of Marburg) in the period of Voegelin's philosophical formation. The Prussian philosopher stands as an influential and critical point of reference even in the years of Voegelin's intellectual inquiry and allows him to open his philosophy of history to the fundamental question of composite human nature, dealing with the relationship between rationality and morality, and the purposes connected to individual existence, deeply rooted in the (Kantian) idea of perfectibility of humanity. Frances-

co Raschi, with an overview on *Kant and the Liberal Tradition of International Relations*, reconstructs how Kant's thought has been used during present times to create the idealist or liberal paradigm of international theories. But the author points also out that this resistant one-sided approach to Kantian thought obscures fundamental issues of his theory: the role of law inside and outside the state, the historicity of the processes through which peaceful relations between peoples can be gradually established, the role of a deeply conflictual nature of individuals.

However, it remains necessary for the scholars to reconcile a profound analysis with comparability, the irreducibility of a thinker with the possibility of discovering the elements that bind him to his intellectual heritage. Isolating the weight of Kant's political reflection is an undeniable necessity: not only, although easier, than his contemporaries, but in the whole of Kant's writings, where political questions are concentrated in last years, but should not be treated as secondary or tangential issues within Kant's very broad speculation. Emphasizing the greatness of a thinker does not exempt us from the study of the "sociology of genius", which Norbert Elias provocatively regarded as a mandatory attitude for understanding Mozart's musical art, and which shows us how much for Kant the development of political thought proceeds in agreement with the intellectual biography of the author, but is also affected by the Prussian and European historical-political context of the late eighteenth century: the philosopher decides to be a (critical) witness of his age, especially in the last part of his life, involving himself into a political-cultural struggle in which he foresees chances of development for civil coexistence.

Maria Chiara Pievatolo's *Faculty of Opposition. The University and the Public Use of Reason in "Der Streit der Fakultäten"*

deals with one of the most controversial disputes in which Kant is involved during the last years of the eighteenth century. In his last published work, he praises the faculty of Philosophy against the supposed higher faculties of Theology, Law and Medicine. The ministerial function of the latter, at the service of the government, is critically matched with the non-ministerial function of opposition to the government itself, provided only by the former. Also Andrea Gentile, dealing with *The Kantian Concept of «Limit» in Relation to «Moralitas», «Legalitas», «Bildung» and «Democracy»*, aims to investigate the public and political role that, according to Kant, philosophy and philosophers should play. Since the essay on the *Enlightenment* of 1784 to the discovery of republicanism during the Nineties, the means of philosophy are useful to build a political system based on the ability to improve the legal status of individuals and on the freedom granted above all to the philosophers to think and communicate within an open society. Dealing with *Kant, Criticism and Publicity*, Franco Maria Di Sciullo raises *A Few Doubts as to the Political Implications of the Public Use of Reason*. On this question, scholars have been substantially divided between a liberal, a conservative, or a dualist Kant. But Kant's reluctance to overlap the "whole public of readers" and the sovereign public sphere mirrors the philosopher's awareness of how difficult it would be to enact republicanism into historical constitutions, embodying the transcendental principle of publicity in an accomplished institutional system.

The theoretical symmetry between the political reading of Kant in his time and the political reading of the following authors who grounded on Kant their own theories mirror the differences between historical contexts, linked by the vicissitudes of the political organization that shaped Western modernity, the State. The power of the State to pro-

foundly shape the juridical reality of individuals, organized as peoples too, becomes the core of Kant's reshaping of the internal (public law) and external (international law) organization of a political community. But it was only in the twentieth century that the questions addressed by Kant actually entered the political struggle, so it was necessary to move from the idea of a republic to the reality of democracy; from an educational project for the republican citizenship to ensure the involvement of conscious citizens in contemporary democracies; from the recognition of peace as the most important task of politics, to the implementation of democratic constitutions able to support international efforts to build peaceful relations among peoples. It is clear that this book is not intended to be a repertoire of contemporary political Kantianism or neo-Kantianism, an excessively vast container in which very different, if not even contrasting, theories and thinkers have gathered, all of them claiming their own privileged approach to Kantian thought and not always aiming to protect the letter of Kant's theory in order to make it readable for contemporary audience; the fact that the "translator" has often become a traitor is another aspect of the troubled history of Western political culture.

An excellent example of long-lasting Kant's legacy is certainly the work of one of the leading jurists of twentieth century, Hans Kelsen, whose legal and political thought has been often traced back to Kant: Kelsen's reflection can be reread in the wake of a contemporary recovery of Kantian legal and political theory. The writings by Francesco Maiolo, *Remarks on the Philosophical Dispositions of a Jurist: Hans Kelsen between Normativism and Voluntarism*, and Annalisa Furia, *From Kant to Kelsen. Hannah Arendt and the Many Roads to Pluralism*, give evidence to support this line of development, while representing an "ideal" bridge between the parts of this volume.

According to Maiolo, Kelsen, as a legal theorist, was able to move from a normativistic epistemology to a voluntarist one over the course of his long career. This evolution reflects the different impact that the Kantian and neo-Kantian tradition exerted on his thought: while the transcendental conception of law elaborated during the first forty years of speculation rested on a solid Kantian framework, the final theoretical period began with the renunciation of this heritage, but without definitively rejecting rationalistic and normativistic arguments. Furia addresses the question of pluralism as the possible common issue linking Hannah Arendt's political philosophy to that of Kant and Kelsen. All these authors, despite having different theoretical frameworks and purposes, are willing to entrust to pluralism the task of shaping a society moulded on the values of individual responsibility and freedom: this condition would be suitable for ensuring a democratic political system, also providing a point of reference for studying the crisis of today's democracies.

The twentieth century, with regard to the fundamental questions of this book (democracy, education, peace), represents, on the one hand, the most threatening reality, with the most oppressive politics of individual rights and the most devastating conflicts in history, but also the most favourable terrain for the advancement of political ideas and institutions. It is no coincidence that, in parallel with Kantianism, a no less influential Kelsenism developed, which updated the main themes of Kelsen's thought from the second postwar period to the last part of the short century and beyond, increasingly accelerating times.

We were saying from Kantianism to Kelsenism and more precisely from Kant to Kelsen. The second part of this volume is devoted to the latter one. Here, the analysis of some

relevant components of Kelsen's legal, philosophical and political thought are intertwined with a broader reflection on how and to what extent Kelsen's work is still today relevant for those facing challenges in the field of democracy, international politics, peace, and justice. More precisely, some crucial aspects of Kelsen's legal and political thought are explored while focusing on his theory of Law and Democracy, rendered in its multi-dimensional nature. The essays on Kelsen's legal and political thought can be divided into two main groups: the first four (including Maiolo's and Furia's ones) address Kelsen's theory of democracy with a special insight on the intellectual roots of his work, his proceduralist approach to democracy and his commitment to an authentic education to politics. The second four discuss Kelsen's thought, both from an internationalist and constitutionalist perspective, which also implies taking his theory of sovereignty into account, as well as his position on how to pacify international order after WWII. All these essays are not merely juxtaposed: they follow a logical arrangement aiming to show how and why Kelsen's legal and political dimensions of his rich work are reciprocally interconnected.

After discussing Kelsen in relation to Neo-Kantianism and the issue of pluralism, the focus of the volume shifts to Kelsen's political thought, with special attention to his theory of democracy. The Neo-Kantian component of Kelsen's legal work has been connected to the undoubtedly proceduralist "soul" of his *Demokratielehre* as it developed between 1920s and 1950s. Pedro Magalhães explores just this aspect in his *The Method of Freedom. Kelsen, Schumpeter, and the Value of Democracy,* in which he argues that the proceduralist conception of democracy is far from being monolithic and he does this by comparing Kelsen's proceduralism with Joseph A. Schumpeter's. In doing so, this essay shows that the for-

mer is essentially «normative» whereas the latter is essentially «descriptive» and mainly that the former – unlike the latter – is «a function of freedom» and seems to be characterized by a peculiar attention towards modern politics. If it is true that Kelsen developed a proceduralist theory of modern and representative democracy with a strong focus on the principle of freedom, it is also true – although this aspect has been generally considered as less relevant – that he was everything but detached from the challenges of contemporary society. In *Kelsen unexpected: Education to Politics and the Making of his Democratic Theory*, Sara Lagi investigates his involvement in a series of educational ventures all concerning the so-called Viennese *Volksbildung* which consisted of public lectures for adults who could not access university. Within this peculiar context Kelsen developed a reflection on education to politics which is discussed in relationship to the making of his democratic theory during the 1920s. Still with the objective of offering an intellectual portrayal of Kelsen that goes beyond the labels of formalism and proceduralism, Peter Langford's essay on *Kelsen and Socialism* critically reconstructs and problematizes such a complex relationship, while showing how and to what extent Kelsen engages with the concept of Socialism (in its diverse forms) throughout his intellectual journey and how his reflection on Socialism can be useful to better comprehend his democratic theory.

Kelsen's legal and political work has also an internationalist dimension. It could not be otherwise. Firstly because – as Dario Tosi explains in his essay on *Kelsen and International Law* – Kelsen theorized the primacy of international Law which represents one of the pillars of his pacifist theory based on a radical critique of Nation-States. Yet, Tosi invites us to reflect on how it's really the current international situ-

ation that seems to challenge Kelsen's approach to the issue of how to pacify international order. With a different approach, instead, Robert Schuett's *Hans Kelsen and the English School of I.R.* claims not only how useful Kelsen's theory of international dynamics can be for us nowadays but most importantly how it is far from being the expression of an "idealist" vision of politics. By highlighting a series of similarities between Kelsen's internationalist work and the English School of I.R., Schuett situates Kelsen's *Peace Through Law*[1] – the "manifesto" of legal pacifism[2] – within a broader, «realistic» reflection on «the interplay between power politics and societal norms». Kelsen as international theorist makes way for Kelsen as constitutional theorist. In his essay, *The Gods of Constitution*, Or Bassok critically addresses all those who have tried to transform Kelsen into the "prophet" of judiciary power as the highest and untouchable power having the "last word" on democracy. By discussing Kelsen's critique of the existence of eternal values and by relating such a critique to a series of references to the biblical tradition, Bassok claims that Kelsen's theory and defense of constitutional justice, which for Kelsen however represents a precious tool to protect the correct functioning of a democratic government, never implies putting the constitutional judges on a pedestal.

On closer inspection, the two approaches to political thought of Kant and Kelsen are mutually helpful: the richness of their thought has allowed to adapt their politics to very different theoretical requirements and historical con-

[1] Cf. Hans Kelsen, *Peace Through Law*, The Lawbokk exchange Ltd., New Jersey (2008) (1st edition 1944).

[2] Cf. Danilo Zolo, *Cosmopolis. La prospettiva del governo mondiale*, Feltrinelli, Milano 1995.

texts; on the other hand, it is the often instrumental adoptions of their theories that have made it possible to open new frontiers in the study of their work. When the *auctor* becomes *auctoritas*, it is legitimate to detach him from his time, for the interpretation of new times, for a new theorization of politics, or to provide new practical alignments to be enacted in civil life.

Croce is right arguing, in an apparently contradictory way, that «every true history is contemporary history»[3], so that the object observed, the event occurred in the past, obtains new features before the eyes of a new observer, who acts in a different time and in a different cultural context. Michel Foucault is even righter when, following the Fernand Braudel's lesson on the uselessness of history as a causal sequence of facts and actions, the *histoire événementielle*[4], is willing to update the traditional, linear history of ideas, claiming for a new *archéologie du savoir*[5]: political thought does not only enter dialogue with historical reality but it also contributes to its renovation, often through radical theoretical ruptures. A double attitude towards history of which Kant was already aware when, in his essay on human progress (1797), he re-evaluates the French Revolution for transforming the mentality of the European public, certainly not for the concrete, constitutional outcomes gained in France. The distinction between *Historie* and *Geschichte*, firstly introduced in the *Idea for a Universal History* (1784), is resumed, under a different historical method, for analysing post-revolutionary

[3] Benedetto Croce, *Theory & History of Historiography*, trans. by D. Ainslie, Harrap & Co., London 1921, 13.

[4] Cf. Fernand Braudel, *Préface*, in *La Méditerranée et le Monde méditerranéen à l'époque de Philippe II*, Colin, Paris 1949, 13-14.

[5] Cf. Michel Foucault, *L'archéologie du savoir*, Gallimard, Paris 1969.

Europe. Few authors have been able to become privileged and then essential witnesses of their time, but even fewer have been able to elaborate ideas that are universally and constantly used to orient individuals and institutions, operating in times other than their own; and it is no coincidence, as this book on Kant and Kelsen demonstrates, that authors of this type can be keep in contact with each other in useful ways. This gives us the opportunity to take a general look at the history, certainly not linear, of Western political cultures, grasping, with a better understanding, the origins of the reality we live in nowadays.

In other terms: in a sort of "circular movement" connecting the two parts of this volume, Kant and Kelsen's imponent *opus* – although they belong to diverse historical and political periods, and beyond the objective differences between the two – thus offers a privileged viewpoint for reflection on democracy, peace and education.

Sara Lagi
Flavio Silvestrini
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Francesca Russo

International Arbitration or Universal Republic: the Formation and Consolidation of Peace in Grotius and Kant

The reflection on strategies to ensure international pacification is particularly relevant in the political thought of the modern age, following the new configuration of the international order characterised by the recognition of the plurality of nation states and the persistence of multi-national empires. The extension of the spaces of politics towards the inclusion of non-European scenarios, which followed the discovery of the Americas, and the struggle for dominance among European powers in the New World also give rise to the image of a political reality that has become highly globalised. In it, conflicts are conducted on a global scale and the types of wars change profoundly compared to the past. In fact, there is also a noticeable presence of trade wars between states, which evidently assume significant political implications.

With the age of revolutions, a new type of warfare also asserts itself, the revolutionary war, aimed at defending and expanding in other institutional contexts the founding values of the new political order, inspired by principles of a universal nature.

Here, I would like to focus on some aspects of the political organisation of peace in the thought of Hugh Grotius and in the philosophical reflection of Immanuel Kant. These authors are fundamental in reconstructing decisive

strategies with respect to the urgent and complex question of limiting war.

Both authors have, in fact, at different times and facing radically different political scenarios, and following interpretative perspectives that are extremely distant from each other, endeavoured to make their philosophical contribution to the complex and main issue of the international political order, namely the establishment and definitive consolidation of peace, an issue that is unfortunately still of pressing relevance even in Europe.

For Perpetual Peace. A Philosophical Project is written by Kant in 1795 in the wake of the enthusiasm for the Peace of Basel, signed in the spring of that year between Prussia, Spain and Holland and the revolutionary republic of France[1].

With this peace, Prussia recognised the existence of the French revolutionary state. This choice provokes an attitude of substantial optimism on the part of the author and his satisfaction with the Prussian acceptance of the existence of the new revolutionary France, which he strongly welcomes. In Kant's work, the Enlightenment rationalist approach appears decisive.

One perceives the clear detachment from the previous tradition of political thought and legal elaboration dedicated to the design of a new peaceful order for Europe and, in residual cases, also for the entire international order.

Kant thus substantially adheres to the cosmopolitan demands present in the culture of his time through the political reflection of the Enlightenment, characterised by universalist tensions.

[1] The quotations in this essay are taken from: Immanuel Kant, *Perpetual peace. A philosophical essay*, translated by B.F. Trueblood, The American peace society, Washington 1897.

In the Kantian project, in fact, there is evidence of an optimistic hope for the future. This hope had already emerged in the *Projet puor rendre la paix perpétuelle en Europe* drafted by the Abbot of Saint-Pierre because of his personal disappointment with the effects of the politics of equilibrium, sanctioned in the Peace of Utrecht, in the drafting of which the author had the opportunity to take part as a member of the French delegation[2].

Saint-Pierre criticises in his project the expedients that had been devised up to then to avert war, namely international treaties and the principle of equilibrium. He consequently believes that peace can be maintained through a more ambitious project, the permanent union of all European states, perpetually represented by deputies of each prince gathered in a free city of Europe. Saint-Pierre expresses confidence in the possibility of sovereigns agreeing to implement his project, understanding the convenience of guaranteeing the internal and international order favoured by the implementation of his perpetual pacification plan[3].

The *projet pour rendre la paix perpetuelle en Europe* consists of twelve fundamental articles requiring a three-quarters majority of voters and eight useful articles requiring a simple majority of voters for approval. The Union proposed by Sanit-Pierre consists of all Christian states, including Russia. These states formally pledge to maintain peace among themselves by settling their disputes through international arbitration. The author envisages, however, the establishment of a confederate force to intervene against those who

[2] Charles-Irénée Castel de Saint-Pierre, *Projet pour rendre la paix perpétuelle en Europe,* avec présentation de C. Marrey, Éditions du Linteau, Paris 2013.

[3] *Ibidem.*

attack a member of the Union and argues that this force could also be used in addition to guarantee the internal political order to suppress any uprisings that may arise in individual states.

The main institution of the union desired by Saint-Pierre is the Senate, which in the author's prediction should have its seat in Utrecht. In it the delegates of the twenty-four powers that make up the union meet. Each state, through its delegates, can only cast one vote, thus placing all players on the international stage on an equal footing and consequently avoiding overpowering by the most powerful states. From his peace project, Saint-Pierre excludes non-Christian powers.

At the same time, however, the author states his hope that the European union will give rise to a similar confederation of Asian states, to facilitate trade between the two continents. Trade is therefore considered in the *Projet* as a factor of great progress for mankind[4].

In keeping with Enlightenment culture, Saint-Pierre expresses an optimistic faith in progress and a rational hope in the applicability of his project.

The choice to define peace as perpetual peace and not as universal peace, as it had been indicated by Emeric Crucé in the *Nouveau Cynée* published in Paris in 1623, testifies to the broadening of perspective in the need to achieve lasting peace and to condemn not so much a specific war, but war as a phenomenon. The rejection of war was in seventeenth-century publicity circumstantial in the sense that it

[4] *Ibidem*. See also Peter Schröder, *Trust in early modern international thought 1598-1713*, Cambridge University Press, Cambridge 2017, 176-98.

was strongly but not always explicitly influenced by the historical and political events of the moment[5].

There was in fact a relevant presence of a tradition that connected the theme of European pacification to the determination of a specific balance of power, aimed at limiting the political influence of a state, as in the case for example of the Grand Dessein of the Duke of Sully, where the prediction of a «république très-chretienne» was based on the choice of constituting a political order aimed at limiting the power of the Habsburg family, France's traditional enemy, to the maximum. Sully's plan, fictitiously attributed to Henry IV, was ideally connected to the defence of a certain idea of Europe based on the values of Christianity, also overcoming the conflict between Catholics and Protestants. To this end, it seemed of great use to resort to the myth of the anti-Ottoman crusade, using the external enemy to strengthen relations between Christians and the French in particular, already divided by the wars of religion, thus subverting a traditional line of foreign policy of the French court, also based on the alliance with the Ottoman Empire signed in 1536[6].

Saint-Pierre's work, on the other hand, leads to a moral and phenomenological condemnation of war, a position that would be better defined on a philosophical level and

[5] Émeric Crucé, *Le nouveau Cynée ou Discours des occasions et moyens d'établir une paix générale et la liberté du commerce par tout le monde*, chez Jacques Villery, Paris, 1623. See also Francesca Russo, *Pacifismo nella cultura politica francese del primo Seicento: Émeric Crucé*, in Stefano Dall'Aglio, Alessandro Guerra, Michaela Valente (eds.), *Storie nascoste. Studi per Paolo Simoncelli*, Franco Angeli, Milano 2021, 97-114.

[6] Cf. Francesca Russo, *Idea d'Europa e pacificazione internazionale nel «Grand Dessein» del Duca di Sully*, «Annali di Storia Moderna e Contemporanea», Nuova serie IV, 2018, 9-34.

expressed in a praiseworthy manner in Kant's *Project for Perpetual Peace*.

In his project, Kant proposes a bold new perspective on the question of peacekeeping. Kant goes beyond the project definition of supranational institutions and arbitration courts to indicate the existence of a new level of legal regulation: cosmopolitan law.

A new universal republic is to be founded on it, containing within itself the overcoming of the national dimension and the evident definitive resolution, philosophically and not without interpretative difficulties, of the problem of war.

Kant's draft is, as is well known, divided into two parts: the six preliminary articles and the three definitive articles for perpetual peace between states. Also, part of the draft is to be considered the first supplement on the guarantee of perpetual peace and the second supplement containing the secret article for perpetual peace.

As stated by Luca Scuccimarra, in *I confini del mondo. Storia del cosmopolitismo dall'Antichità al Settecento*:

> Se, infatti, nei sei articoli preliminari che costituiscono la prima sezione del saggio, Kant si limita a enunciare le condizioni negative – necessarie ma non sufficienti – che occorre soddisfare affinché tra gli Stati possa essere instaurata una vera pace, intesa come fine e non come mera sospensione di ogni ostilità, con i tre articoli definitivi si entra nel vivo del dispositivo normativo, attraverso l'enunciazione di un dovere dotato di un'esplicita «valenza positiva»[7].

The preliminary articles discuss critical assumptions that are in the line of the earlier pacifist tradition. The principle is affirmed that peace treaties are invalid if they are signed

[7] Luca Scuccimarra, *I confini del mondo. Storia del cosmopolitismo dall'Antichità al Settecento*, Il Mulino, Bologna 2006, 331-2.

with a mental reservation on the part of the contracting parties that they may foresee a new war. It is argued that independent states cannot be treated as material goods and therefore cannot be acquired, inherited, exchanged, donated or sold at the instance of other states. One hopes for the future disappearance of standing armies, which are a legacy of the politics of absolutism, sharply criticised by Kant. The impossibility of contracting public debts in anticipation of new international conflicts is affirmed. The principle of non-interference by one state in the institutional and political life of other states is reaffirmed. It also emphasises the need for the political action of states not to reach such levels of hostility as to undermine expectations of future peace, condemning acts of private violence, poisonings, violation of capitulations and the organisation of treason in the enemy state.

These principles, affirmed by Kant in the preliminary articles of his *Perpetual Peace project*, highlight Kant's consideration of all previous pacifist treatises.

In particular, the anti-militarist spirit that emerges from the third preliminary article leads the author to identify in the presence of standing armies as the cause of international conflicts. The polemic against "les gens de guerre" had also emerged in a similar way in Émeric Crucé's *Nouveau Cynée*, published in Paris in 1623. Here, the author identifies the existence of standing armies and the excessive power of the military in European courts as one of the main causes of the outbreak of wars. The author proposed converting the military to professions useful for trade and economic development, both to promote the general welfare of states and humanity, and to prevent them from using their boundless ambitions to influence the choices of rulers in favour of new conflicts.The definitive articles for perpetual peace, which

represent the core of Kant's philosophical project, are introduced by the author with the consideration that peace is not a natural situation for human beings. This condition must be formally established, going beyond the situation of the absence of hostilities, which, although it may seem ideal, does not constitute a real and definitive guarantee of peace[8].

Perpetual peace can only be established, according to Kant, if a republican civil constitution is adopted in each state.

And it is precisely in the context of Kant's design of the definitive articles that we read a vehement criticism of the theorists of the law of nations, to justify the statements of the proposed second article.

In the second definitive article for perpetual peace, it is stated that «international right shall be founded on a federation of free states»[9].

The author here amply manifests his scepticism towards the legal rules devised by the European natural law tradition to prevent the use of war.

> The baseness of human nature is openly exhibited in the unrestrained relations of peoples to one another, whereas it is much concealed, through the restraint of government, in the civil life of each people where law is in force. It is matter of wonder therefore that the word "right" has not yet been wholly excluded from the policy of war as pedantic, and that no state has yet been bold enough openly to declare itself in favour of such exclusion[10].

[8] Cf. Daniele Archibugi, Franco Voltaggio, *Filosofi per la pace*, Editori Riuniti, Roma 1999, 222-36.

[9] Kant, *Perpetual peace. A philosophical essay*, cit., 14.

[10] Ivi, 15-16.

In showing how ineffective the instruments offered by the tradition of international law and peoples' law are at peacefully resolving disagreements between states and guaranteeing a peaceful order of the international community, Kant expresses his judgement on the uselessness of the contribution made by the thinkers who laid down the fundamental rules of this tradition, expressly quoting Grotius.

> For Hugo Grotius, Pufendorf, Vattel and other – all miserable comforters, unfortunately – although their philosophically or diplomatically conceived codes have not, and can not have, the least legal force, because states as such are not under any common outward restraint, are nevertheless always sincerely quoted to justify any outbreak of war. No example, however, is to be found on the other hand where a state has been induced by arguments supported by the theories of these influential men to desist from any warlike undertaking[11].

Thus, from the perspective of a realistic reflection on the international order, Kant argues that the law of the strongest remains in fact the only rule for determining the international political balance. In fact, he argues that the way in which states pursue their rights cannot in reality be based on the provision of an external tribunal, a court of arbitration, as indicated in *De iure belli ac pacis*, but unfortunately only on war as the only instrument capable of determining a new international order, which would then be guaranteed by a new peace treaty aimed at securing the outcome of that specific war.

Even peace treaties prove, however, following the Kantian interpretation, as history has taught, incapable of ending all wars. Rather, they represent a momentary truce between conflicts. Indeed, it is always possible to find a pre-

[11] Ivi, 16.

text to change the political order achieved. This is amply demonstrated by the succession of wars in European and world history.

Kant believes that reason and moral law mandatorily impose an absolute condemnation of war as a legal process and necessarily require the construction of a condition of peace as an immediate duty.

This arrangement must, in fact, be guaranteed through a mutual pact between the states. Thus, Kant states in the *Project of Perpetual Peace* that there must necessarily be a federation of a particular kind, which may be called a peace federation, which would differ from the peace treaty in that the latter seeks to simply end one war, the former to end all wars forever.

Kant's overcoming of the system of international norms and international arbitration suggested as instruments for guaranteeing peace by the tradition of the law of nations is evident. Specifically, it is the Grotian juridical construction from *De iure belli ac pacis* that is set aside, being judged by the author of the *Project of Perpetual Peace* to be inadequate to guarantee stable conditions for the international order. This tradition had also found partial application in the Treaties of Westphalia signed to guarantee the European political order after the Thirty Years' War.

The contribution to the elaboration of the Treaties of Münster and Osnabrück made by Claude de Mesmes Count of Avaux, one of the two French plenipotentiaries in charge of the diplomatic negotiations, was fundamental to the realisation of this aim. Claude was the brother of Henri de Mesmes, President of the Parliament of Paris and patron of Grotius. At Henri de Mesmes' residence in Balagne, Grotius had prepared the first draft of *De iure belli ac pacis* and his friendship with Claude represented a very strong link for

the Dutch jurist with the negotiations taking place in Westphalia. Claude was in fact the bearer of an idea of just peace, based on the stable resolution of disputes and not on the imposition of an order favourable only to the victors. His political line is not a majority one, but it is evidence of the presence of Grotius' principles in the peace negotiations[12].

With the *pax westphalica*, Europe attempted to stabilise a new peaceful order, ending the phase of wars caused by religious differences and recognising the significant principle of the autonomy of states within the imperial structure, in the management of foreign policy. The new political constitution of Europe, founded on the balance established at Westphalia, was then overwhelmed by the expansionist pretensions of Louis XIV's absolutism. It is precisely France, which together with Sweden is the guarantor of the new political order, that undermines the peace that was so difficult to achieve. During the 18th century, with the wars of succession, the partitions of Poland, and the Seven Years' War, the first conflict fought on a world stage, it is shown that the political equilibrium achieved and guaranteed through international arbitration and through the efforts of diplomacy, fails to be the basis for a lasting peace.

This balance, despite the learned legal articulation provided for in Grotius' work and in all the interpretations offered by the tradition of the law of nations, is immanently linked to the interests of the European courts, and to the expansionist projects of monarchical absolutism. It is therefore an unstable equilibrium, liable to be overwhelmed by the new demands of national politics, inspired by power dy-

[12] Cf. Francesca Russo, *Il «desiderio di società». Sulla fortuna di Grozio tra Westphalia e Napoli*, Università Suor Orsola Benincasa, Quaderno degli Annali, 2006-2007, Napoli 2006, 9-37.

namics and justified according to the principles of *raison d'état*.

When Kant wrote the *Project of Perpetual Peace*, he also had the opportunity to observe a new aspect of war, namely the revolutionary war, waged first by the insurgent American colonists against the mother country and then later by revolutionary France against the absolutist courts of Europe defending the political values of a world destined to fade away among many contradictions following the affirmation of revolutionary principles.

After the peace of Basel, at a time of new-found stability in the international order, the author outlines a project for a clean break from the legal provisions of international law, aimed at the creation of a federalism of free states, based on republican civil constitutions, to defend cosmopolitan law under the conditions of universal hospitality.

Even Grotius, the celebrated and esteemed founder of the principles of international law, a "jurisconsult of mankind" is critically outdated in Kant's thinking from this perspective. Kant's theory aims to establish not a prediction of theories of war limitation and peace guarantees, but to envisage the foundation of a universal and perpetual peace.

It must be remembered that Grotius' philosophical-legal system does not aim at the definitive elimination of war but rather intends to limit the use of the instrument of war by identifying all possible legal strategies to contain conflicts[13].

Grotius elaborates a theory of the *temperamenta* of war, a forecast of the legal limits within which war can be reduced and contained to the most extreme cases, seeking to

[13] Cf. Francesca Russo, *Alle origini della Società delle Nazioni. La pacificazione internazionale fra idea d'Europa e cosmopolitismo*, Studium, Roma 2016, 199-234.

make the ways of law prevail over those of force. It is not among the ambitions of the author of *De iure belli ac pacis*, the well-founded and optimistic hope of guaranteeing universal nor perpetual peace[14]. In his work there is a strong condemnation of war and an attempt to make it an option less and less chosen by states, especially Christian states, to resolve international crises[15].

The wish for peace in Europe can already be clearly read in the dedication, not devoid of courtly elements, that the Dutch author, exiled in France, consecrates «to his most Christian Majesty Lewis XIII, King of France and Navarre»[16]. In outlining the qualities, the aspiration for justice of the king of France, the author, addressing the sovereign states:

> Worthy is this of Your Piety, worthy of Your high Pitch of Grandeur, not to attempt the Invasion of any Man's Right by Force of Arms, or the Alteration of ancient Limits; but together with War, to carry on Negotiations of Peace; nor to begin it, but with a Desire of bringing it to a speedy Conclusion[17].

This wish, which manifests the rationality and pragmatism of the lawyer and jurist Hugh Grotius, leads him not to deny the possibility of resorting to the instrument of war to settle disputes and it is connected to the vehement criticism expressed in the twenty-nine principle of the preliminary discourse to his work, in which the author expresses

[14] *Ibidem*.

[15] See also Carlo Galli, *Prefazione*, in Ugo Grozio, *Il diritto di guerra e di pace*, edited by C. Galli and A. Del Vecchio, 3 vols., Istituto italiano per gli Studi Filosofici Press, Napoli 2023, XI-XXIII.

[16] Hugo Grotius, *The rights of war and peace*, edited and with an Introduction by Richard Tuck, from the edition by Jean Barbeyrac, Liberty Fund, Indianapolis 2005, I, 71.

[17] Ivi, I, 72.

his disappointment at the current situation in Christian Europe:

> I observed throughout the Christian World a Licentiousness in regard to War, which even barbarous Nations ought to be ashamed of: a Running to Arms upon very frivolous or rather no Occasions; which being once taken up, there remained no longer any Reverence for Right, either Divine or Human, just as if from that Time Men were authorized and firmly resolved to commit all manner of Crimes without Restraint[18].

The author's fundamental intention is to limit as far as possible the conditions under which war is considered acceptable, which in fact boils down to the recognition of defensive warfare aimed at responding to immediate aggression by restoring political-institutional legality.

Grotius disagrees with the precept expressed by the pacifist tradition that preceded him, especially Wild and Erasmus, defined as supreme advocates of civil and religious peace, that Christians should be forbidden to use all weapons. He states in fact in principle XXX of the Preliminary Discourse:

> The Spectacle of which monstrous Barbarity worked many, and those in no wise bad Men, up into an Opinion, that a Christian, whose Duty consists principally in loving all Men without Exception, ought not at all to bear Arms; with whom seem to agree sometimes Johannes Ferus and our Countryman Erasmus, Men that were great Lovers of Peace both Ecclesiastical and Civil; but, I suppose, they had the same View, as those have who in order to make Things that are crooked straight, usually bend them as much the other Way. But this very Endeavour of inclining too much to the opposite Extreme, is so far from doing Good, that it often does Hurt, because Men readily discovering Things that are urged too far by them, are

[18] Ivi, I, 106.

> apt to slight their Authority in other Matters, which perhaps are more reasonable. A Cure therefore was to be applied to both these, as well to prevent believing that Nothing, as that all Things are lawful[19].

Thus in defining the purpose of his work, he asserts that he wants to distance himself from extreme pacifism and also from the unruliness with which war is conducted in Europe, intending to pursue a median path, to define all those rules that can induce the actors of the international scenario to limit recourse to war, but also aiming to write those legal rules that must still apply, even if a war takes place, in order to disavow the belief that now everything now nothing is lawful.

It would be particularly interesting to be able to retrace in detail the complex juridical previsions envisaged in the articulation of Grotian's work to limit recourse to war. Here I would like to limit myself exclusively to considering some fundamental aspects of the author's reflection in *De iure belli ac pacis*.

He argues that war must not be waged except for the attainment of a right, nor after it has broken out can it be brought back except within the framework of law and good faith. Indeed, it is specified that war is to be waged against those who cannot be restrained by the normal ways of justice. Grotius elaborates his theory of international arbitration, considering arbitration between states as obligatory, to arrive at solutions, especially between Christians, that can be permanently maintained.

In his work, the author offers an outline of a system of guarantees and collective security that considers international arbitration as an instrument capable of guaranteeing

[19] Ivi, I, 106-7.

a lasting peaceful order in the international arena. Thus, his work concludes with an exhortation to mutual good faith and peace to which he entrusts his hopes for the troubled Europe that is experiencing a vast and bloody conflict, fought for political as well as religious causes. The author, despite the difficulty of the European situation, expresses a profound confidence in the potential of diplomacy and mutual commitment between states to achieve peace, a confidence that Kant would clearly not have shared.

Grotius writes in the conclusion of his *De iure belli ac pacis*:

> But Peace being made, whatever the Conditions be, they ought to be punctually observed, on account of the Faith given, the Obligation of which I have proved to be sacred and indispensable. And we ought to be very careful to avoid not only Perfidiousness but whatsoever may exasperate the Mind. For what Cicero said of private Friendship, may be fitly applied to publick. That all the Duties of Friendship are to be observed religiously at all Times, but especially when it has been renewed by a Reconciliation[20].

Grotius, although fully aware of the negative virtues of men and despite having experienced extremely tribulating political events, clearly and determinedly manifests his adherence to the values of European humanism and his faith in the rules of international law and in the ability of men to keep their word.

This perspective certainly appears limiting, following Kant's absolute and consistent rationalism. Kant believes, in fact, that in the free relations between peoples, one experiences the «weakness of human nature»[21]. It is therefore

[20] Ivi, III, 1643.

[21] Kant, *Perpetual peace. A philosophical essay*, cit., 44.

necessary, for the author of the *Project for Perpetual Peace*, to enunciate clear and pregnant rules that only reason can dictate. States must make drastic choices by definitively opting for a republican constitution, the only form of state that can be accepted as a derivation of the original contract, to ensure that the peace achieved is not just a specific peace valid for a limited period, but that it is the universal and perpetual peace to which the author aspires.

Kant, with his affirmations, leads pacifist political thought to an absolute apex, to a philosophical theorisation that is evidently unfulfilled, such as to bring about a profound change in thinking about the construction of a stable and peaceful order in international relations.

Intending to affirm an absolute condemnation of war, as a phenomenon, Kant proposes the creation of a new world order, based on republican constitutions, the self-determination of peoples and the right of individuals to live as free citizens in the cosmopolitan order.

It would be very interesting to be able to outline the different impact of the interpretative perspectives of Grotius' and Kant's internationalist theory in subsequent political reflection and historiography, since both authors still represent indispensable references for those who wish to reflect on the theme of the political organisation of the global cosmopolis.

In fact, the history of political reflection dedicated to the theme of peace can also be reconstructed in the light of the critical reference to these two great authors of the European and Western philosophical tradition, who contributed in different and extremely relevant ways to making Europe, torn apart by violent and continuous wars, reflect on the need to find and consolidate the path of peace and civil coexistence in the international order.

Flavio Silvestrini

"Against Hobbes"?: Kant and the Historical Education to Republicanism

1. *The need to exit the state of nature and the danger of its return*

Although knowledge of Hobbes' Leviathan emerges since lectures of the 1760s[1], it is truly remarkable to find Kant's first in-depth reference to the Hobbesian conception of the state of nature in the second edition of the *Critique of Pure Reason* (1787); to explain, by means of a similitude, the institution of the tribunal of reason[2],

[1] Hobbes' politics in Kant's thought can already be detected in the notes on Baumgarten's *Initia* from 1764-1768. (AA XIX, 99f; references to the original German text are from Immanuel Kant, *Gesammelte Werke*, ed. königlich preußische (später deutsche) Akademie der Wissenschaften, Berlin 1900-), where the Prussian philosopher mentions Hobbes's *Leviathan*, as the consequence of a contractualism based on jusnaturalism.

[2] On the attitude of critics towards the relationship between Hobbes' politics and Kant, Herbert states that «There should be no surprise that comparisons and contrasts of their respective moral and political theories should begin to appear, first, to consider the ways in which Hobbes's political theory may have influenced Kant, what ideas of Hobbes Kant actually adopted and how he saw them integrated with his philosophy as a whole» (Gary B. Herbert, *Introduction: Hobbes and Kant*, «Hobbes Studies», 25, 2012, 1-5, 3). Recently, a very innovative attitude towards this topic has been enacted, underlying the general tendency in polarizing the theoretical relation between

> just as Hobbes asserted, the state of nature is a state of injustice and violence [*des Unrechts und der Gewaltthätigkeit*], and one must necessarily leave it in order to submit himself to the lawful coercion which alone limits our freedom *[Freiheit*] in such a way that it can be consistent with the freedom of everyone else and thereby with the common good[3].

Indeed, no danger can arise from the freedom to express one's judgment publicly, having voice in the community, «and since all improvement [*alle Besserung*] of which our condition is capable must come from this, such a right is holy [*Recht Heilig*], and must not be curtailed»[4].

Even though the legal-political assessment is only instrumental to the question under study, the central points of a reflection that Kant will develop over the following decade emerge: the possibility of maximizing individual freedom, compatible with the equal rights of all others, is only realized on the condition of legality, where public coercion establishes the limits of everyone's freedom. To this right is added the freedom to express one's opinion publicly according to reason, and it is a sacred right, intangible even

Hobbes' and Kant's politics under two opposite paradigms in order to emphasize antithesis or similarities between the two authors, and adopting an ideological approach towards Hobbes (Hobbism) or Kant (Kantianism), see, for example, Chia-Yu Chou, *Rethinking Hobbes and Kant: The Role and Consequences of Assumption in Political Theory*, Routledge, London 2016, 23-5.

[3] *Critique of Pure Reason* (CPR), translated by P. Guyer and A. Wood, Cambridge University Press, Cambridge 2000, B779f, 650. For an accurate analysis of this passage, see Sofie Møller, *The Critique of Pure Reason as the Establishment of Reason's Lawful Condition*, in Ead., *Kant's Tribunal of Reason: Legal Metaphor and Normativity in the* Critique of Pure Reason, Cambridge University Press, Cambridge 2020, 16-31, 24-6.

[4] CPR, 650.

by the public authority, because it is the only source from which ideas can come to advance legal forms of coexistence.

A few years earlier (1784), Kant wrote the essays on the *Enlightenment* and on *Universal History*, raising some questions that are taken up again in the quoted text; but here he adds his own version of the Hobbesian doctrine of sovereignty, which will later influence his political texts. Nonetheless, the analytical framework of the natural state, which is clearly Hobbesian in its origins, remains unchanged in later Kantian philosophy[5]. Natural condition is fundamentally the absence of a legal framework, an anarchic state in which the unfettered right of everyone poses an existential threat to everyone else. This requires the rational imperative to overcome the insecurity, through a normative approach; the responsibility for regulating the relationship between force (*Gewalt*) and freedom (*Freiheit*) is entrusted to the coercive positive law (*Gesetz*), from which every right (*Recht*) can be derived. The theme is explicitly addressed in the *Religion* (1793), where a meticulous examination of the Hobbesian proposition «status hominum naturalis est bellum omnium inter omnes» and its direct corollary «exeundum esse e statu naturali» is provided. Outside legality, each

[5] Many scholars have highlighted how, within the philosophy of the seventeenth and eighteenth centuries, Kant is one of the few to use the Hobbesian reading of the state of nature; as evidently, this closeness is due to the fact that Kant recognizes in the Hobbesian *status naturae* not only the absence of a political regime but also the ethical state of nature of man (see, on this, Gianluca Sadun Bordoni, *Il concetto di* status naturae *tra Hobbes e Kant*, «Studi Kantiani», XXXII, 2019, 25-46, 32). But on the very peculiar way in which Kant uses the state of nature in the Hobbesian sense, see Karlfriedrich Herb, Bernd Ludwig, *Naturzustand, Eigentum und Staat. Immanuel Kants Relativierung des Ideal des Hobbes*, «Kant-Studien», LXXXIV, 1993, 283-316.

person acts «as his own judge, decides his own rights and property, and has no security for them except what results from his own strength [*Gewalt*]»[6]. The rejection of this condition, in search of the assurance of «mine» and «yours», implies the separation of personal security from individual arbitrariness (*Willkur*).

In the 1790s, with the refinement of legal doctrine, the implementation of the Hobbesian theory on the undesirability of the natural condition is definitive, to support the inevitability and certainty of the sovereign. In the *Common Saying* (1793), sovereignty is again addressed from a Hobbesian perspective, through the critique of the right of resistance as a logical antecedent for a possible return to the natural condition: through a polemical approach to the British system resulting from the Glorious Revolution, the contradictions of a constitution rooted on a rebellion are highlighted. Consistent with the defence of the principle of sovereignty,

> The people have no right of coercion against their ruler, since they can legally exercise coercion only through him. But if the will is there, no force can be applied to the ruler by the people, otherwise the people would be the supreme leader. Thus, the people can never possess a right of coercion against the head of state, nor can they have the right to oppose him in word or deed[7].

[6] *Religion Within the Boundaries of Mere Reason: and Other Writings*, translated and edited by A. Wood and G. di Giovanni; revised with an introduction by R.M. Adams, Cambridge University Press, Cambridge 2018, 172 (AA VI, 97).

[7] *On the Common Saying: "This May Be True in Theory, But it Does not Apply in Practice"* (TP), in *Kant's Political Writings* (KPW), edited with an Introduction and notes by H.S. Reiss, translated by H.B. Nisbet, Cambridge University Press, Cambridge, 1991, 61-92, 83.

The British constitution is implicitly based on the right of resistance of the people, which they supposedly reserve to themselves to employ if the sovereign violates the founding pact. However, public English narrative depicts the Glorious Revolution as a voluntary renunciation by the dethroned ruler; in that case, constitution would have been contradictory, as it would have provided for a rightfully instituted ruler guaranteeing the legal status of subjects, as well as the right of these to oppose him by creating an alternative ruler.

The definition of the revolution as a return to the state of nature is taken to extremes in the *Doctrine of Right* (1797), with the harshest judgment on the executions of Charles I and Louis XVI. These events marked a moment in which violence not only smashed all legal structures – as in all revolutionary processes – but also to a point that is difficult to outline within the limits of public right, thus undermining the moral foundations of civil coexistence. The deep feelings aroused can only be understood through the prism of «horror». Kant distinguishes between the realistic «*assassination*» of a deposed ruler, a political act motivated by fear of revenge, and «formal *execution*»[8], a profound transgression that subverts the very principles of the relationship between the sovereign and the people. The result is an abyss from which it is impossible to escape, preventing «to generate again a state that has been overthrown»[9]. To the properly Hobbesian fear of revolution as a return to the state of nature, the totally Kantian fear of a return to anarchy is added, which can no longer be overcome by a new constitutive pact. *The pars destruens*, which is widely regarded as the

[8] *The Metaphysics of Morals. The Theory of Right*, in KPW, 131-75, 145n.

[9] I *Ibidem*.

most dangerous side of a revolution, leads to conclude that any possible legal condition arising from a revolution must be obeyed, no matter how illegal and illegitimate it may be. But, within the same logic, any form of sovereignty, even the farthest from the pure form of law as in despotism, is preferable to the absence of any given authority.

2. *In search for a mediation: between Hobbesian paternalism and revolution*

In the rest of the chapter, within the *Common Saying*, Kant plans to find a point of mediation between the prerogatives of monarchs and those of the people, wanting to prevent the authority of the former from being considered «too much inviolable», while the subjects have «too […]inalienable rights [*unverlierbaren Rechte*] against the head of state, even if they cannot be rights of coercion [*Zwangsrechte*]»[10]. Under a «paternal government», subjects live like immature children who do not know what is truly good or bad for them. They would be forced to rely passively only on the judgment of the head of state [*Staatsoberhaupt*] how to be happy: this is «the greatest conceivable despotism, i.e. a constitution which suspends the entire freedom of its subjects, who thenceforth have no rights whatsoever»[11].

This totalizing conception of sovereignty, which seeks to restrain subjects to a state of full dependence, depriving them of their innate rights because of their presumed inability to think autonomously, is inherently fragile from a legal point of view. Paradoxically, this weakness could be used to argue for an alternative scenario, where the people

[10] TP, 83.
[11] Ivi, 84.

claim an absolute right against the sovereign, thus acting as a counterpower.

> For the head of state can just as readily claim that his severe treatment of his subjects is justified by their insubordination as the subjects can justify their rebellion by complaints about their unmerited suffering, and who is to decide?[12]

Taking state sovereignty to extremes, attacking any individual right to get out of the natural condition, paradoxically entails legal uncertainty. The natural condition, as conceived by Hobbes, may return not only because of the absence of sovereignty, but also because of the revolutionary consequences of an unlimited authority. The greatest injustice that the people can do, the violation of sovereignty, is factually possible and justifiable, it is the same paternalistic version of sovereignty that makes it happen. In this way, any legal constitution is no longer secure, and the way is opened for a return to a condition in which any law ceases to have a coercive effect (*status naturalis*).

The act of governing by spoiling the people of all their rights and relying solely on the force and dictates of prudence – that is, the arbitrary actions of the ruler – is, in fact, a return to natural logic. By breaking the link between the public use of force (*Gewalt*) and right (*Recht*), within a despotic government, any legal condition is impossible to maintain. According to Kant, the paradox inherent in *De Cive* (Chap. 7, § 14) is that the creation of paternal power goes far from guaranteeing sovereignty.

> the head of state [*Staatsoberhaupt*] has no contractual obligations to the people [*Volk*]; he cannot do injustice to a citizen, but he can act towards him as he pleases. This proposition

[12] Ivi, 82.

> would be perfectly correct if injustice were understood to mean any injury which has given the injured party a *coercive right* [*Zwangsrecht*] against the person who has done him injustice. But in its general form, the proposal is quite terrifying[13].

Despotic politics is far from universal principles of law, since it causes only apparently alternative forms of power, which, as the former, are based solely on the pure effectiveness of force. In the *Vorarbeiten*, Kant frames even more precisely the point of mediation, between a Hobbesian paternalistic model and the idea that the people have coercive rights of resistance against the sovereign. These no more alternative legal conditions result from the same interpretation of the relationship between right and politics[14].

> Hobbes argued that the people no longer had any rights after abandoning them through the social contract. But he should have said only the right of resistance [*das Recht des Widerstandes*], certainly not the right of opposition and of making public the idea of the best [*der Gegenvorstellung und der Bekanntmachung der Idee des Besseren*][15].

[13] Ivi, 84.

[14] As clearly stated by Williams: «should be no right of resistance to the sovereign's authority, Kant thinks it wrong for the sovereign to be regarded as an unrestricted master of the society. Kant feels that Hobbes accords to the sovereign the ownership of the land and its people to use and exploit in the way the sovereign thinks fit. Hobbes's sovereign can apparently do no wrong. But Kant thinks it is entirely possible the sovereign may be mistaken in the policies it forms and the measures it takes […] In this respect, the sovereign must not see itself as superior to the people; each is obligated to the community in a permanent way. The sovereign must see itself as the servant of the community as well as its head» (Howard L. Williams, *Kant's critique of Hobbes: sovereignty and cosmopolitanism*, Wales University Press, Cardiff 2003, 78).

[15] AA XXIII, 133 (English translation ours).

Kantian republicanism emphasizes the ability of a community to improve the coexistence of its members[16]. This notion implies that individuals, now organized within a polity, have the freedom to express their ideas, even critical ones, on public choices. The contradiction inherent in Hobbesian contractualism becomes clear: free and equal individuals exited from a state of existential uncertainty, while simultaneously alleging their inability to improve their coexistence. The autonomy of the individual, even considered as a subject, cannot logically be abandoned, because it represents a progressive instrument to make the exit from the natural condition more and more certain. Kant is willing to apply the logic of the Hobbes' contract, the path of rationality and legality of human choice, rather than the morality of intentions, to understand the necessary evolutions of the state, beyond the first stage already recognized by the English philosopher. Constitution must guarantee the inviolable sovereignty represented by the head of state as the right of the people to improve their legal condition, a lawful space in which it is possible to replicate the logic of the contract, which has already made it possible, albeit in a precarious way, to get out of the natural state with the invention of the Leviathan. Republican constitutionalism poses two fundamental questions, closely related, avoiding the legal extremisms of paternalism and revolution: the sovereignty (of the head) of the state must stop where it endangers the right

[16] As highlighted by Vatter, the great difference between Kantian and Hobbesian politics is that for the former the search for a just society is linked to the political judgment capacity of the people, while for the latter it relies exclusively on the absolute judgment of the sovereign (see Miguel Vatter, *The People Shall Be Judge: Reflective Judgment and Constituent Power in Kant's Philosophy of Law*, «Political Theory», XXXIX, 2011, 749-76, 751-2).

of the people to have a public discussion over the general interest; but this right must be limited so as not to leading to a rebellion, that is, in contrast to sovereignty. The search for the balance between the duty of obedience and the right to complain is clarified within the republican nomopoietic process, where the role of the people's consent over coercive public laws gains a central position, with the link between *irreproachability* and *irresistibility* of public norms[17].

To circumvent the inherent self-contradiction of the legal system, any public norm must be «in harmony with right»[18]. Within the passage from the state of nature to the civil state, human force does not disappear, but must return to the civil community concentrated in the hands of the sovereign and no longer disseminated among individuals. Despite Hobbesian theory, this power relies not only on a compelling law, but should be blameless, that is, to the fact that those who are subject to the coercive command of the law have also given their approval to that norm. Therefore, the British constitution emerged from the Glorious Revolu-

[17] The Kantian needs for a balance between freedom and safety is underlined by Herlinde Pauer-Studer, *Zwischen Leviathan und Kantischem Rechtszustand. Über das schwierige Verhältnis von Freiheit und Sicherheit*, «Aus Politik und Zeitgeschichte», LXII, 2022, 32-33. But, as Horn underlines, «Hobbesian elements in Kant are especially the principle of authority in the description of the legislating monarch as well the voluntarism contained in the principle volenti not fit iniuria [No injury is done to a willing person]» (Christoph Horn, *Kant's Political Philosophy as a Theory of Non-Ideal Normativity*, «Kant-Studien», CVII, 2016, 89-110, 104n); so that the normative approach to politics, in which Kant repeatedly refers to the ability of people to express their consent, is based on a clear Hobbesian matrix; this can be found at the moment of the contract in which individuals decide to escape natural condition.

[18] TP, 81.

tion, rooted on the right of the people to rebel against the sovereign, can be demonstrated to be self-contradictory. But also, the Hobbesian (paternalistic) legal system, which implies the loss of every individual 's rights, not only the right to active rebellion, should be considered incongruous[19].

Between despotism and an established republican constitution, Kant can thus envisage historical, purely empirical ways of adapting sovereignty to the people's demand for right, within the figure of the *moral politician*: the one who rules autocratically but is willing to govern in a republican way, as if the people were able to give their assent to public decisions. This is a provisional formula that would appease the people[20], otherwise, the «so-called 'moderate' political constitution [*gemäßigte Staatsverfassung*] is therefore an ab-

[19] See, also the diagram provided in the *Anthropology* (1798) AA VII, 330-331: A. Law and freedom without violence (anarchy). B. Law and violence without freedom (despotism). C. Violence without freedom and without law (barbarism). D. Violence against freedom and the law (Republic).

[20] This, obviously, does not mean that Kant does not raise the question of a real popular sovereignty, in particular in the *Doctrine of Right*, where the distance with Hobbesian theory definitively widens; see on this aspect, Macarena Marey, *The Ideal Character of the General Will and Popular Sovereignty in Kant*, «Kant-Studien», CIX, 2018, 557-80, 560-3, with a clear critique of Katrin Flikschuh (*Elusive Unity: The General Will in Hobbes and Kant*, «Hobbes Studies», XXV, 2012, 21-42, 22), over Kant theory about the ruler, and his relationship with executive power and legislative power. The republican doctrine developed by Kant in the 1790s aims to show how the duty to obey the sovereign arises precisely from the implementation in the political system of republican institutions, which are based on the ability of the people to impose coercive norms on themselves (see, on this, Helga Varden, *Kant's Non-Absolutist Conception of Political Legitimacy – How Public Right 'Concludes' Private Right in the "Doctrine of Right"*, «Kant-Studien», CI, 2010, 331-51; Martin Welsch, *Anfangsgründe der Volkssouveränität. Im-*

surdity»[21]: it is simply a means by which a de facto despotic government can erase every right of the people by exercising its arbitrary influence over the government and disguising it as the right of opposition recognized to the people. Conversely, a constitution that enables subjects to legally resist the executive power and its ministers, through their representatives in parliament, must be a «limited constitution [*eine eingeschränkte Verfassung*]»[22]. It does not involve «any active resistance [*activer Widerstand*]», but rather «a *negative* form of resistance [*ein negativer Widerstand*]»[23].

In the former condition, the people would supplant the executive power, forcing it to adopt measures deemed appropriate; in the latter, the people can only address their grievances, potentially influencing subsequent changes. This constitutes a clear reinterpretation, in much more fixed legal terms, of that right of the people to discuss the general improvement, introduced years earlier. However, it is remarkable how Kant shows the possible corruption of this system, where representatives do not defend the rights of the people but merely please the power at every opportunity, so that «the head of the government is a despot through his minister, and the minister himself a traitor to the people»[24].

manuel Kants ‚Staatsrecht' in der „Metaphysik der Sitten", Klostermann, Frankfurt am Main 2021).

[21] MM, 144 (AA VI, 320).

[22] Ivi, 146 (AA VI, 322).

[23] Ivi, 148 (AA VI, 322).

[24] Ivi, 146. It is therefore clear that for Kant the theme of the legal resistance of the people, through the representatives, passes through the separation of powers, an evident difference with the Hobbesian State authority, so that a people only if represented by a parliament have their rights guaranteed against the executive, even though that executive only has a monopoly on the coercive enforcement of the

The need for a legal balance between the prerogatives of sovereignty and the right of resistance is here suitable to show the differences between a *moderate constitution* and a *limited constitution*: while behind the former lies a surreptitious form of despotism, the latter should be truly regarded as a form of republicanism, albeit to be improved. The way in which this passage literally mirrors the contradictions of the "British constitution", as in the essay on *Progress* (1798), is particularly relevant to our purpose: the British Parliament, tainted by the influence of the monarchy, is commonly recognized as a bastion of the liberties of the people, but, on the contrary, it plays a supporting role for the absolute power of the king, although disguised under the appearance of constitutional warranties. Only a «mendacious form of publicity» allows to conceal the reality of «an absolute monarchy [*unbeschränkte Monarchie*]», while the people, blinded by this false public narrative, are not certainly looking for a true «limited monarchy [*eingeschränkte Monarchie*]»[25]. The tormented path of the Slave Trade Act, which marked the last years of the reign of George III and the long period of government of William Pitt the Younger, would be proof of the corruption of the system, but Kant adds an undisputable evidence: since the *Perpetual Peace* (1795), what distinguishes a republican government from a despotic one is the ability of the people to decide on peace and war, «now the monarch of Great Britain has waged numerous wars without asking the people's consent. This king is therefore an abso-

parliament's laws (see, on this, Paul Guyer, *"Hobbes Is of the Opposite Opinion". Kant and Hobbes on the Three Authorities in the State*, «Hobbes Studies», XXV, 2012, 91-119).

[25] *The Contest of Faculties. A Renewed Attempt to Answer the Question: 'Is the Human Race Continually Improving?'* (CF), in KPW, 176-90, 186 (AA VII, 90).

lute monarch, although he should not be so according to the constitution»[26]. However, he can always bypass the latter because by controlling the various branches of government, he ensures that the people's representatives agree with him.

The ability of the people to legally express their consent (or dissent) is measured by the ability of a constitution to adopt the principles of republicanism, warranting that balance, constantly sought by Kant in the 1790s, between the certainty of rule and the possibility of legal progress, as consequences of the prerogatives of the sovereign and the rights of the people. But in the critique of false British republicanism, we find the same contradictions of Hobbesian contractualism: a sovereignty that destroys the rights of the people justifies rebellion; but a theoretical right of resistance of the people, in the kingdom of Great Britain, has practically resulted in an unlimited government of the monarch.

Paradoxically, despotisms are responsible for the return to the state of nature: to avoid revolutions, they compress the liberties of the subjects as much as possible, and trigger rebellion, so that individuals are back in a natural condition; but despotisms are also responsible for the wars of peoples, which, according to Kant, restore the state of nature to a much worse degree than conflicts of individuals: «nowhere does human nature appear less admirable than in the relationships which exists between people»[27]. The Leviathan marks a very precarious exit from the state of nature[28], while

[26] Ivi, 187n.

[27] TP, 91, but see also *Perpetual Peace: a Philosophical Sketch*, in KPW, 93-130, 103.

[28] As stated by Shell, Kant's mediation between sovereign and people, eventually leads to «republicanize Leviathan», adopting a «Rousseauian civil freedom understood as obedience only to the civil laws of one's own making», avoiding, at the same time, the more radical

is the cause of its return, in the decomposition of the civil state and intensified in the external conflict. An international condition that Hobbes associates with the very existence of (absolute) states, in the famous passage in chapter XIII of *Leviathan*, where he briefly describes the reality of Europe transformed by the Thirty Years' War, «but because they uphold thereby the industry of their subjects, there does not follow from it that misery which accompanies the liberty of particular men».

Hobbes statement that this condition is, in any case, preferable to the absence of the state, is explicitly contradicted by Kant, for whom the state of nature of peoples is the most unstable legal condition. But this reveals how far the Hobbesian paternalistic solution is from the realization of mankind's juridical goal, getting out from the natural condition with certainty: not only does it not prevent the return of anarchy among individuals, but it creates an entirely new state of nature, among peoples organized in power-states, which is increasingly more dangerous.

> Peoples who have grouped themselves into nation states may be judged in the same way as individual men living in a state of nature, independent of external laws; for they are a standing offence to one another by the very fact that they are neighbours[29].

Nevertheless, the analogy is not limited to the analysis of the negative condition. In the *Doctrine of Right*, Kant refines this argument, affirming that states, organized with an internal legal order, however far from the pure form of law, are

positions of Rousseian democracy (Susan Meld Shell, *Republicanizing Leviathan: Kant's Cosmopolitan Synthesis of Hobbes and Rousseau*,«Critical Review: A Journal of Politics and Society», XXXV, 2023, 219-32, 226).

[29] PP, 102.

not properly in an ajuridical (otherwise natural) condition. But the Hobbesian logic of the contract also works here, pushing rational beings to find a legal solution to this situation of mutual insecurity, renouncing the recourse to war at this level too. As Hobbes already points out, individuals want to escape natural state because they perceive its undesirable character, and with the same movent Kant wants to explain the constitutional development, from despotism to republicanism, as the construction of an international (republican) law aimed at guaranteeing peace among (republican) peoples. Once again, the improvement of a juridically precarious condition can only rely on the responsibility of human beings, now considered in the aggregate form of peoples, but as Hobbes has already shown, certainly not in function of morality, but guided by reason.

> Since the state of nature in nations (as in individual human beings) is a state which must be abandoned in order to enter into a state of law, all international rights, as well as all external property of states, such as may be acquired or retained by war, are purely provisional until the state of nature has been abandoned. It is only within a universal union of states (analogous to the union by which a nation becomes a state) that these rights and properties can acquire peremptory validity and a true state of peace be achieved[30].

As the text suggests, the idea of a world state is impractical and perhaps even undesirable, insofar as it could be the consequence of a global despotism, i.e., a Hobbesian Leviathan that would have absorbed the entire human race. On the contrary, the analogy between the state of nature of individuals and that of peoples remains, as because it is worthy to escape the same condition of uncertainty. The solutions

[30] MM, 171, AA VI, 350.

to these two crucial questions last linked, although different, by the aim of building an internal and international condition that will eliminate precariousness of legal status and allows the stable enjoyment of individual rights within the framework of a peaceful existence. It is no coincidence that for Kant the progress of republican constitutionalism is not only the process aimed at changing the constitution of the state, with the adoption of a legal order based on the principles of liberty, equality and independence and governed by the transcendental principle of publicity, but also leading to the creation of international rules among republics, willing to renounce aggressive war as a means of resolving disputes. Since the *Idea* (1784), Kant has clear had in mind that the two legal solutions must proceed together, but within the republicanism of the 1790s, he identifies these processes in a coherent and increasingly effective way to avoid the return of the state of nature, by consolidating legal relations of individuals, as well as of peoples[31].

3. *With Hobbes: republicanism as a lesson from history*

What Kant retains from Hobbesian contractualism is that politics, from its founding moment, responds to the need of individuals for change, in order to improve the predictability of their interactions and to increase the certainty of their legal relations. For this reason, it is impossible to

[31] Although Hobbesian and Kantian theories have been indicated to establish two alternative paradigms in the study of international relations, at least in the second half of the twentieth century, many authors analysed what the points of contact are between the two philosophers on the subject. For a comprehensive survey of the debate, see David Singh Grewal, *The Domestic Analogy Revisited: Hobbes on International Order*, «The Yale Law Journal», CXXV, 2016, 618-80.

limit human politics at the Hobbesian Leviathan, as it leaves open and creates new occasions for the return to the natural condition (revolutions and wars). If politics is enacted as a process, it has an undeniable confirmation in history, all the more so because, as Hobbes teaches, it responds to practical needs: it is only after having acquired the lesson of history through painful experiences, that human reason acts with the corrective tools of politics and law.

Hobbes' critique allows Kant not to flatten the historical analysis on the reductive consequences of political realism, as an empiricism that reduces politics to prudence, abandoning legal principles. It is the critique of *abderitism*, the idea that man will forever remain in a state of stasis, torn between progression and regression, that makes his condition irreversible.

> Our politicians, to the extent that their influence is extended, behave in exactly the same way, and they are just as successful in their prophecies. Men must be taken as they are, they tell us, and not as the ill-informed pedants of the world or the good-natured dreamers imagine they should be. But "as they are" should read "as we have made them by unjust coercion, by treacherous designs which the government is in a good position to carry out." For that is why they are intransigent and prone to rebellion, and regrettable consequences follow if discipline is relaxed in the slightest. In this way the prophecy of the so-called intelligent statesmen is fulfilled[32].

The same arguments of Hobbes are taken up here in a historical perspective, according to which despotism generates revolution, or prevents the search for legal solutions that improve coexistence. But Kant proposes to apply the historical-political method of the Hobbesian contract pre-

[32] CF, 177.

cisely to get out of the impasse created by the Leviathan, according to which man cannot consciously be satisfied within despotism, because he cannot fail to recognize its limits on the internal and international level in the pursuit of the juridical goal of human nature: the certainty of the law in detachment from the natural condition. The purely realist politician is paradoxically the architect of the history he predicts and on which he grounds his political choices: human beings have always been incapable of improving themselves, their corrupt nature prevents any institutional progress. But, as Hobbes teaches, it is precisely the consequences of corrupt nature, the negative experiences that men inflict on themselves, that «force» them to change, towards an evolution of legal relations. This is the most important Hobbesian lesson on the historical method, which has been clear to Kant since the *Idea*: politics provides solutions suitable not only for good men, but even for «a nation of devils (as long as they possess understanding)»[33]. It would at least be meaningless to think of politics as a tool to govern a «state of angels», with the aim of creating coercive norms for a community of individuals who are already morally formed and therefore eager to pursue good in common life.

On the other hand, Kant tries to find a limit to *eudaemonism*, according to which the progress of the mankind implies an improvement in the moral basis of individuals. The mediation between the prerogative of the sovereign and the right of opposition of the people, already developed in the republican theory, is easily reflected in the search for a balanced position for the philosophy of history, between a *realism*, which preaches the immobility of humanity, and an *idealism*, which preaches the moral improvement of man

[33] PP, 112.

in history. Again, it is the critical reception of Hobbes that provides the starting point: historically, human progress can only be a slow and troubled development of the juridical condition «from bad to better»[34], through continuous, even contradictory, attempts to make coexistence safer, certainly not the possibility of dichotomously eliminating evil with good. The analysis of the Hobbesian state of nature shows that political solutions must start from the real humanity, where morality is cleverly and providentially confused with its opposite, and which without doubt cannot be the basis of progress. Kant proves to be "more Hobbesian than Hobbes", where by using the motive – the rational duty to escape from the natural condition – with which the English philosopher explained the creation of the state, he becomes able to figure out how to overcome the Leviathan, demonstrating the required discovery of the republican state constitution and of republican international laws, «through the expansion of the sphere of legality, not only in the relations of the sovereign with the subjects but also in the relations among peoples»[35]. This will happen, without any increasing of human moral capacity, «for we must not expect too much of human beings in their progressive improvements, or else we shall merit the scorn of those politicians who would gladly treat man's hopes of progress as the fantasies of an overheated mind»[36].

Hobbesian theory is firstly useful for understanding the limits of any ideal speculation about politics, which should be rooted on a reliable approach to human nature. But, within the Kantian reading, it is also useful to justify an un-

[34] CF, 183.
[35] Ivi, 186.
[36] *Ibidem.*

failing approach to human progress, not to limit it. From this point of view, the distinction made in the last part of the *Progress*, between the *respublica noumenon* and the *respublica phaenomenon* is emblematic; the Hobbesian method is definitely used to rethink human evolution in historical, legal and political terms:

> All forms of state are based on the idea of a constitution which is compatible with the natural rights of man, so that those who obey the law should also act as a unified body of legislators. And if we accordingly think of the commonwealth in terms of concepts of pure reason, it may be called a Platonic ideal (*respublica noumenon*), which is not an empty figment of the imagination, but the eternal norm for all civil constitutions whatsoever, and a means of ending all wars. A civil society organised in conformity with it and governed by laws of freedom is an example representing it in the world of experience (*respublica phaenomenon*), and it can only be achieved by a laborious process, after innumerable wars and conflicts[37].

In the connection between noumenal and phenomenal republicanism, the weight which Hobbes' teaching has gained over the Kantian method is evident, since the Prussian philosopher is looking for arguments which will enable him to defend his theory against the accusation of abstract idealism. But Kant's philosophy shows how the realist matrix can be well balanced with the heuristic dimension of a purely theoretical model, which he certainly does not want to do without. The image of the Hobbesian contract must therefore be read as the representative model that combines an ideal republican form of government with its possible real implementations, within the limits that each context, the historical situation, imposes on politics.

[37] Ivi, 187.

For this reason, republicanism is not only «a difficult art»[38], which must be learned and revealed in the dramatic history of the human civilization, but also «an enforced art»[39], to which man will not reach voluntarily, but will eventually be forced by nature through the clear contradictions of his own behaviour: he will not advance as a result of the practical declination of theoretical wisdom, established by the philosopher as a pure and universal law, but much more realistically if human politics will be able to absorb a negative education from history, seeking practical solutions to the intolerability of a condition from which all human beings, reasonably, wish to escape.

Of course, the ideal survives, as a point of reference, as a measure to know where human coexistence stands and could potentially arrive but emptied of all the characteristics that would make republicanism vulnerable to realists, as a chimerical project. Republicanism can only be born out of terrible human history, after an unreasonable accumulation of negative experiences, to which natural reason, as Hobbes teaches, prescribes rules of conduct: this will remain the phenomenal motive of human action, even if its results are uncertain, until the political virtue of the person (the moral politician) will be replaced by the juridical goodness of the constitutive norm (moral politics): since republicanism is configured as a set of procedures given to govern change towards an improvement in coexistence, a «constitution based on genuine principles of right, which is by its very nature capable of constant progress and improvement without forfeiting its strength»[40].

[38] PP, 125.

[39] *Idea for a Universal History with a Cosmopolitan Purpose*, in KPW, 41-53, 46.

[40] CF, 189.

Only by seeking a progressive balance between maintaining sovereignty and expanding the sphere of individual rights is it possible to obtain a positive development in the external relations of human beings, but the search for a balance «between politics, as an applied branch of right, and morality, as a theoretical branch of right»[41] is necessary, to make the legal profile of individuals less and less precarious, or, as Hobbes advises, the return to the state of nature less and less probable.

[41] PP, 116.

Francesco Berti

Rousseau and Kant's Republicanism: Questions About Liberty

According to a compelling yet controversial historiographical framework – most notably advanced by Quentin Skinner and Philip Pettit in recent decades – the republican tradition constitutes a distinct and coherent strand in the history of political thought[1]. This tradition, in Pettit and Skinner's views[2], is characterized less by a theory of a specific form of government and more by an original interpreta-

[1] Following Magrin's suggestion, in this essay, we will refer to «neo-republican theorists» and «neo-republicanism» to indicate, respectively, the interpreters and the contents of the interpretations; and to the republican tradition to refer to the historical repertoire of reference. See Gabriele Magrin, *La repubblica dei moderni. Diritti e democrazia nel liberalismo rivoluzionario*, FrancoAngeli, Milano 2007, 105-48.

[2] Neo-republicanism, as Marco Geuna pointed out, is a very complex historiographical current, because it encompasses several disciplinary fields and is internally divided into different strands. In this respect, it is possible to isolate two tendencies: the works that, starting from Pocock's research, identify the core of republicanism in the topic of political participation, rooted in the Aristotelian tradition; the studies, exemplified by the works of Skinner and Pettit, which consider that the republican tradition must be distinguished above all by an original elaboration of the concept of freedom, derived from classical Roman and Machiavellian thinking, and by an instrumental conception of political participation. See Marco Geuna, *La tradizione repubblicana e i suoi interpreti: famiglie teoriche e discontinuità concettuali*, «Filosofia politica», XII, 1, 1998, 101-32.

tion of 'negative' (neo-roman) liberty. This interpretation must be clearly distinguished from both liberal and democratic conceptions of freedom[3]. The critical focus of these studies has primarily been directed toward liberalism, which neo-republican theorists deem culpable for having developed, from the nineteenth century onward, a comparatively impoverished concept of negative liberty[4]. In their view, liberalism reduces freedom to the protection of individual privileges, overlooking the importance of the common good, the resistance to private and public domination and the institutional protection of citizens' civil liberties.

While neo-republican scholars have predominantly focused on reviving the thought of figures within the Italian civic humanist tradition and the Anglo-American republican discourse of the early modern period, they have not ignored contributions from continental European thinkers. Notably, Pettit explicitly identifies a Franco-German republican tradition exemplified by Rousseau and Kant[5].

[3] See at least: Philip Pettit, *Republicanism. A theory of freedom and government*, Clarendon Press, Oxford 1997; Quentin Skinner, *Liberty before liberalism*, Cambridge University Press, Cambridge 1998. See also Quentin Skinner, *Liberty as independence: the making and unmaking of a political ideal*, Cambridge University Press, Cambridge 2025. According to Pettit, the Republicans would have developed a conception of freedom based on the absence of «domination»; for Skinner, on the absence of «dependence». In *Libertà della città, libertà del cittadino. Riflessione sul neo-repubblicanesimo*, Cleup, Padova 2008, I tried to critically discuss the neo-roman theory of Liberty elaborated by Pettit and Skinner.

[4] See Lars J.K. Moen, *Republicanism as critique of liberalism*, «The Southern Journal of Philosophy», LXI, 2023, 308-24.

[5] See Philippe Pettit, *Two Republican Traditions*, in Andreas Niederberger, Philipp Schink (eds.), *Republican democracy: liberty, law and politics*, Edinburgh University Press, Edinburgh 2013, 169-204. On the

This strand of republicanism – Pettit argues – diverges in important ways from the Italian-Atlantic model, especially in its theorization of State structure. It is within this context that both Rousseau and Kant, though not part of the Italian-Atlantic lineage, emerge as pivotal figures. Each explicitly identified his political philosophy with republicanism, not only in terms of government forms per se, but as a vision of a rational State governed by the rule of the legislative will[6].

Both Rousseau and Kant are considered among the greatest theorists and advocates of human liberty. As Isaiah Berlin observed, Rousseau equates liberty with the very essence of humanity, so that asserting that a man is free is nearly synonymous with asserting that he is human[7]. Kant, similarly, is credited – by scholars such as De Ruggiero – with offering the most rigorous definition of freedom: «The capacity of the will to legislate itself according to rational law, thus converting the Pure Reason into Practical Rea-

difficulty of fitting Kant into the tradition of republicanism according to the categories developed by the neo-republicans, see Alessandro Pinzani, *Il cittadino in Kant tra liberalismo e repubblicanesimo*, «Filosofia politica», XVII, 1, 2003, 109-26. On Rousseau republicanism, see in particular Maurizio Viroli, *Jean-Jacques Rousseau e la teoria della società bene ordinata*, Il Mulino, Bologna 1988. The republican perspective developed by Kant has been explored in depth by, among others, Flavio Silvestrini, *Il filosofo e lo Stato. Leggere il Decennio politico kantiano (1790-1800)*, IF Press, Roma 2023.

[6] In this context, it is important to highlight Kant's reflections on the rising American republicanism and its consequences for European republicanism. See Flavio Silvestrini, *Rethinking the American exception: Kant's republicanism and the foundation of the United States*, «Politica. eu», IX, 2, 2023, 32-60: http://www.rivistapolitica.eu/wp-content/uploads/Politica_2_2023.

[7] Isaiah Berlin, *Freedom and its betrayal: six enemies of human liberty*, Chatto & Windus, London 2002.

son». Moreover, Kant grounds «the entirety of his political system on this conception of freedom»[8].

In the political thought of both philosophers, republican theory is inextricably bound to the notion of freedom. Kant's republicanism is directly indebted to Rousseau's doctrine, suggesting a deep philosophical continuity. Indeed, when both speak of republic and liberty, they appear to be referring to something very similar. It is this very congruence that invites the classification of both thinkers within the republican tradition – a tradition defined more by a commitment to liberty than based on formal governmental typologies.

Kant, in his seminal political treatise *Perpetual Peace*, contends that the establishment of a lasting peace among nations requires the adoption of a *republican constitution*. This constitution, he argues, must be grounded in an original contract and based on three core juridical principles: the freedom of individuals as human beings, their subjection to the law as citizens, and their equality as members of a commonwealth[9].

Kant distinguishes between two axes of State classification: the *forma imperii* – «in accordance with the difference in the people who hold sovereign power» (autocracy, aristocracy, democracy) – and the *forma regiminis*, or the mode by which power is exercised, and in this latter sense, regimes may be either republican or despotic: «The republican re-

[8] Guido De Ruggiero, *Storia del liberalismo europeo*, Laterza, Roma-Bari 1995, 230-1.

[9] Immanuel Kant, *Per la pace perpetua. Progetto filosofico*, in *Scritti politici e di filosofia della storia e del diritto*, edited by N. Bobbio, L. Firpo and V. Mathieu, UTET, Torino 1956, 292-3. In this essay, Kant specifies that the republican State is also founded on the transcendental juridical principle of *Publizät*. On this topic, see Silvestrini, *Il filosofo e lo Stato*, cit., 37-42.

gime applies the principle of the separation of executive power (government) from the legislative one; despotism is the arbitrary execution of the laws that the state has given itself: in this state the public will is replaced by the private will of the sovereign»[10]. Considering the three typical forms of State, Kant specifies that the worst is undoubtedly the democratic one, which necessarily degenerates into despotism, «because it establishes an executive power in which all deliberate over one and maybe also against one (who disagrees with them)»[11].

This definition of republicanism, as many scholars have pointed out, appears clearly inspired by Rousseau[12]. In *The Social Contract*, the 'Citoyen de Genève' argues that «I therefore call every State governed by laws, whatever its form of administration: because only in this way does the public interest govern […]. Every legitimate government is republican»[13]. Rousseau, who also connects the republican doctrine to the theory of separation of powers, even though he assigns a disproportionate authority to legislative power, had previously explained that republican is any govern-

[10] Like Rousseau, Kant conceives of the powers of the State as functions that must express a unique will, and therefore presents their separation not in terms of a theory of checks and balances, but as an articulation resulting from the unity of the will, capable of making its effective exercise possible. See Gaetano Rametta, *Potere e libertà nella filosofia politica di Kant*, in Giuseppe Duso (ed.), *Il potere. Per la storia della filosofia politica moderna*, Carocci, Roma 1999, 261.

[11] Kant, *Per la pace perpetua*, cit., 295.

[12] Viroli, *Jean-Jacques Rousseau e la teoria della società bene ordinata*, cit., 18-19.

[13] Jean-Jacques Rousseau, *Il contratto sociale*, edited by R. Derathé, Einaudi, Torino 1997, II, 6, 54. On Rousseau's (modern) use of the terms «State» and «government» see Robert Derathé, *Rousseau e la scienza politica del suo tempo*, Il Mulino, Bologna 1993, 463-72.

ment «guided by the general will, which is the law»; that the general will is characterized by aiming at the «common good»[14]. He had also observed that the republican nature of the State was not conferred by the form of government[15] and that democracy is not the best kind of exercise of executive power, because, among other things, «it is against the natural order for the majority to govern and the minority to be governed»[16].

Thus, for Rousseau too, republicanism is, among other things, a way of establishing the distinction between legitimate and arbitrary government, and in many writings he also presents the «republic» as the opposite regime to «despotism»[17]. It should also be noted, under the concept of despotic or arbitrary government, we must presuppose for both philosophers not only a level of philosophical and political meaning, but also a deeper political-social sense, rooted in the philosophy of Enlightenment: despotic and arbitrary, according to Rousseau and Kant, is any government based on an outdated and unacceptable system of caste privileges, which were typical expressions of the ancient regime: societies that, albeit in different ways, both philosophers harshly and repeatedly criticized.

If we now consider the relationship between the republican conception of the State and the idea of freedom developed in their works, and then try to reflect more specifically on the meaning of the concept of freedom elaborated in

[14] Rousseau, *Il contratto sociale*, cit., II, 1, 37.

[15] Ivi, II, 6, 54.

[16] Ivi, II, 4, 92.

[17] See in particular *ivi*, III, 1, 83, where Rousseau presents as «despotic» the situation in which the State can degenerate if the confusion of the powers of the State takes over, nullifying the principle of the distinction of powers.

their political thought, we are led to point out other similarities, which would prompt us to consider the theoretical influence of Rousseau in Kant's reflections in an even more decisive sense. According to Kant, the legal liberty underpinning the republican State should be «the capacity to obey no external laws except those to which one has consented»[18]. This notion of liberty as autonomy or self-legislation directly echoes Rousseau's moral philosophy[19]. In the *Philosophy of Law*, Kant asserts, moving from the moral sphere into the political discourse, that «the act by which the people founded itself inside the State […] is the original contract, according to which all (*omnes et singuli*) in the people lay down their external freedom, in order to take it up again immediately as members of a common body, that is, as members of the people insofar as it is a State (*universi*)». Building on this argument, he observed that, with the transition from the state of nature to the political State, we witness man abandoning his wild liberty to «find again his liberty in general undiminished, in a legal dependence, that is to say, in a juridical State, because this dependence springs from the legislating will»[20].

Kant's philosophical and political lexicon undoubtedly recalls Rousseau. According to the latter, indeed, civil liberty in the republican State is founded and established by the social contract: «What man loses by the social contract is his natural liberty and an unrestricted right to anything

[18] Kant, *Per la pace perpetua. Progetto filosofico*, cit., 292.

[19] Norberto Bobbio, *Eguaglianza e libertà*, Einaudi, Torino 1999, 49. In an earlier study, Bobbio had also pointed out the relevance of negative freedom in Kantian thought. See Norberto Bobbio, *Kant e le due libertà*, in Id., *Da Hobbes a Marx*, Morano, Napoli 1965, 147-63.

[20] Immanuel Kant, *La dottrina del diritto*, in *Scritti politici*, cit., II, 47, 502.

he wants and can get. What he gains is civil liberty and the ownership of everything he possesses. […]. We could add on the "profit" side the fact that in the civil state a man acquires moral liberty, which alone makes him truly master of himself; for the drive of sheer appetite is slavery, while obedience to a law that we prescribe to ourselves is liberty»[21].

From what has been summarized above, we can provisionally deduce that Rousseau and Kant release the doctrine of republicanism from a pure theory of the forms of government, thus fulfilling one of the necessary requirements to be part of the republican tradition as reconstructed by neo-republican theorists like Pettit and Skinner; however, they root their republican theory to a 'positive' conception of freedom, thus being close to one another, but distant from the neo-roman tradition represented by scholars such as Pettit and Skinner. If, however, we go deeper, that is, if we move beyond some similar expressions and other, albeit important, formal and conceptual agreements, and if we try to reach a more detailed understanding of what republicanism means in Rousseau and Kant's philosophical system, we are led to the conclusion that the differences far outweigh the similarities. Our starting point is precisely the aforementioned 'positive' conception of liberty, which Kant elaborates under the clear influence of Rousseau.

The fact is that Kant's philosophical and political theory is based on the main distinction between ethics and law. One of the most important assumptions of this distinction lies in the fact that, according to Kant, the sphere of autonomy, of self-determination, is a primary characteristic of the moral world; whereas the sphere of law is where heterono-

[21] Rousseau, *Il contratto sociale*, cit., I, 8, 29-30.

mous law is expressed[22]. As Bobbio observed, «as legality, the legal will differs from the moral because it can be caused by impulses which are different from that of the respect for the law: which is precisely the very definition of heteronomy»[23].

Law is therefore for Kant primarily concerned with the outward conformity of citizens' actions to the legal framework: the Kantian State does not want to enter the sphere of their conscience. This conception of law legitimizes moral pluralism among citizens and prevents the State, by definition, from becoming an ethical body[24]. Kant truly succeeds in founding moral freedom of the subject and making man an end in himself[25], precisely because he clearly distinguishes, bringing to fruition an entire Western legal and philosophical tradition, the inwardness of moral behaviour and the outwardness of legal behaviour and considers the human being an end in itself.

The Kantian State, finally, is a political institution in which citizens are not meant to exercise their sovereignty directly: «Every true republic is not and cannot be other than a representative system of the people, instituted to protect their rights in their name, that is, in the name of

[22] Giovanni Sartori, *Democrazia e definizioni*, Il Mulino, Bologna 1957, 198-9.

[23] Norberto Bobbio, *Diritto e Stato nel pensiero di Emanuele Kant*, Giappichelli, Torino 1957, 101-2.

[24] As is well known, the distinction between the «morality of intentions» and the «legality of actions» is introduced by Kant on the basis of the realistic view that leads one to consider society as a space where individuals with different values coexist. This is the reason why the existence of politics and the State is also presented by Kant as necessary. See Silvestrini, *Il filosofo e lo Stato*, cit., 23-30.

[25] Mario A. Cattaneo, *Dignità umana e pace perpetua: Kant e la critica della politica*, Cedam, Padova 2002, 10-6.

all the citizens assembled, and by means of their delegates (their deputies)»[26]. In Kant's view, the institutionalization of political representation, which must also concern the legislative power, is so important in determining the level of republicanism in the State – and therefore that of anti-despotism –, that he regarded the ancient republics – lacking political representation – as inherently despotic and thus not genuinely republican, so much so that they could not be considered proper republics. While a 'disciple' of Rousseau in the moral sphere, Kant, as we shall shortly observe, appears more 'Lockean' in his political doctrine: the law and the State are the necessary instruments for coordinating the spheres of individual (negative) liberties pertaining to men as subjects[27].

The separation of ethics and law – on one hand – and the theory of political representation – on the other – certainly appear to be distinct concepts, but they entail, in other respects, closely connected domains. In fact, the moral life of citizens can unfold freely, precisely because every one of them can enjoy a private space in which one can seek their own happiness «by the way that seems good to them, so long as they do not infringe upon others' freedom to do the same»[28].

[26] Kant, *Per la pace perpetua. Progetto filosofico*, cit., 296. See Silvestrini, *Il filosofo e lo Stato*, cit., 58-61.

[27] Franco Todescan, *Storia della filosofia del diritto*, CEDAM, Padova 2009, 243.

[28] Immanuel Kant, *Sopra il detto comune: «Questo può essere giusto in teoria, ma non vale in pratica»*, in *Scritti politici*, cit., 255. A critical approach to the Kantian conceptualisation of the right to happiness has been developed by Luca Scuccimarra, *Kant e il diritto alla felicità*, Riuniti, Roma 1997.

In this respect, Rousseau's philosophy – one of the most distinctive features of which is the absence of a clear separation between ethics, law, and politics – stands in radical contrast. «If it is good to know how to use men as they are», Rousseau writes in one of his most famous essays, «it is better still to make them as they ought to be. The most absolute authority is that which penetrates to the inner being of man and is exercised not only over his actions, but also over his will. It is a known fact that peoples become, in the long run, what the government makes them»[29]. This idea ultimately prevents Rousseau from fully realizing the philosophical revolution he himself initiated with his advocacy of moral autonomy in works such as *Emile*, set against the deterministic and materialist outlook of his contemporaries[30].

Rousseau stands out in the eighteenth century for having articulated two profoundly innovative ideas: the concept of moral autonomy grounded in the value of conscience[31] – an idea that would later exert a profound influence on Kant[32] – and the idea of the primacy of politics[33], according to which everything ultimately depends on the political

[29] Jean-Jacques Rousseau, *Economia politica*, in *Scritti politici*, 1, edited by E. Garin, Laterza, Roma-Bari 1997, 288.

[30] As Cassirer observed, Kant above all took from Rousseau the idea that the essential element of human nature is the ethical and not the physical. See Ernst Cassirer, *Kant and Rousseau*, in his *Rousseau Kant Goethe. Two essays*, Princeton University Press, Princeton 1970.

[31] Paolo Casini, *Introduzione a Rousseau*, Laterza, Bari-Roma 1996, 116.

[32] See, among many others, Pierre Burgelin, *Kant lecteur de Rousseau*, in *Jean-Jacques Rousseau et son œuvre. Problèmes et Recherches*, Commémoration et Colloque de Paris (16-20 octobre 1962), Librairie C. Klincksieck, Paris 1964, 303-16.

[33] Sergio Cotta, *La position du problème politique chez Rousseau*, in Études sur le *«Contrat social» de Jean-Jacques Rousseau*, Actes de Jour-

sphere[34]. These two powerful concepts are, however, potentially contradictory. According to the first, the moral law to which the individual ought to conform is discovered internally, in a state of reflective detachment from the passions – if not even from the society itself; according to the second, the citizen must seek this law in the 'collective conscience' embodied in the general will – that is, in the political law – which he is to obey, even forcibly, because it represents the rational principle common to all men, which cannot but be his own[35].

As the passage from *The Social Contract* quoted earlier illustrates, for Rousseau ethics derives from politics, from the legal and institutional structure of the republican State; it is, in effect, a product of the social contract. While in other writings Rousseau suggests that conscience emerges from the long process of civilization[36], in *The Social Contract* he affirms decisively that the moral law the citizen obeys – and through which he realizes his liberty as its author – is the political law itself, insofar as this is the expression of the «general will».

This convergence emerges in at least three interconnected domains: law, custom, and religion. The first point concerns Rousseau's conception of the «general will». For him, the general will is, in principle, always right: it expresses not a quantitative but a qualitative and moral value, as it

nées d'études tenues à Dijon les 3, 4, 5, et 6 mai 1962, Société Les Belles Lettres, Paris 1964, 177-90.

[34] Jean-Jacques Rousseau, *Le confessioni*, in *Scritti autobiografici*, edited by L. Sozzi, Einaudi-Gallimard, Torino 1993, IX, 398.

[35] Rousseau, *Il contratto sociale*, cit., I, 7, 28.

[36] Paul Hoffman, *Conscience*, in Raymond Trousson and Frédéric S. Eigeldinger (eds.), *Dictionnaire de Jean-Jacques* Rousseau, Honoré Champion, Paris 2006, 163-5.

embodies the rationality shared by all[37]. Individual will – being the expression of particular interests and autonomous judgment – is viewed with deep suspicion within Rousseau's republican State. It must be subordinated or even suppressed. This is evident in his advocacy for restrictions on political debate prior to voting, to prevent the crystallization of particular wills[38].

The second point pertains to the relationship between laws and customs. In Rousseau's republican State, public morals are generated by the law and, once established through political processes, must be continuously safeguarded by a censorial authority, to prevent a divergence between public law and individual morality: «The opinions of a people arise from its constitution; although the law does not directly regulate customs, it is legislation that gives rise to them». The task of censorship, therefore, is to maintain the purity of public opinion by «preventing its corruption»[39].

The third point concerns the relationship between politics and religion, and thus, once again, the relation between law and ethics. Here too, Rousseau's texts, though complex and open to varied interpretations, ultimately advocate in *The Social Contract* the establishment of a «civil religion» that neutralizes any conflict between private morality and public virtue. It is no accident that among the three types of religion discussed in his most celebrated political writing – the religion of the «citizen» (akin to the national cults of ancient peoples), the religion of «man» (identified with the pure gospel), and the religion of the «priest» (exemplified

[37] Francesco Berti, *Purezza e redenzione. Jean-Jacques Rousseau e il diritto naturale*, Wolters Kluwer CEDAM, Milanofiori Assago (MI) 2021, 147.

[38] Rousseau, *Il contratto sociale*, cit., II, 3, 42-43.

[39] Ivi, IV, 7, 168-69.

by Catholicism) – it is the third that receives the strongest criticism, as it establishes a system of authority parallel to and potentially in conflict with that of the State[40].

In conclusion, in the republican State envisioned by Rousseau, any conflict between conscience and the law is deemed intolerable, for the general will represents the collective conscience in which each citizen must recognize himself – because it is, by definition, his own. The citizen can and must will only what the community wills. The happiness of the individual citizen must coincide with the happiness of the State.

Consistently with this view, the Rousseauian State rejects the modern principle – accepted by Kant – that distinguishes between the ownership of sovereignty and the exercise of power. According to Rousseau, the moral-political law is a manifestation of will, and will cannot be represented[41]. The citizen must be the literal author of the law. This leads to the theory of direct democracy and to a radical rejection of political representation. It also explains why, contrary to Kant's later view, Rousseau praises the ancient republics as the highest expression of true republicanism[42].

The differing conception of the relationship between ethics and politics in Kant and Rousseau, however, reflects even deeper divergences – arguably more fundamental still – which deserve to be briefly recalled. To fully grasp their nature and scope, we must situate both philosophers within the broader framework of modern natural law theory, in which their reflections emerged.

[40] Ivi, IV, 8, 176.

[41] Ivi, II, 1, 37.

[42] Denise Leduc-Fayette, *J.-J. Rousseau et le mythe de l'antiquité*, Vrin, Paris 1974.

Following the tradition of the 'School' of modern natural law, Kant begins from a non-optimistic view of human nature – the famous «crooked timber»[43] – and from the premise that conflict is intrinsic to human spiritual constitution, marked by the antinomic principle of «unsocial sociability». Yet in the context of the Enlightenment's optimistic vision of history, this «unsociability» takes on a positive role, functioning as a stimulus that propels humanity beyond its natural inertia[44]. Like Locke, Kant presents the pre-political condition of humanity as one in which morality and natural rights exist – albeit precariously. The social contract, then, is not intended, despite the reference to Rousseau's lexicon, to alter the nature of these rights or to suppress the positive effects of conflict[45], but rather to regulate and coordinate them through the establishment of law and a coercive legal order. In this sense, Kant remains one of the last representatives of natural law theory, whose historical-ideological function was to redefine the boundary between authority and liberty in order to *legitimize* a cultural, political, and economic order that was already emerging[46].

A distinctive feature of modern natural law is that it offered a new, secular legitimization not only of political power but also of the nascent 'bourgeois' society – characterized by the separation of the sacred and the profane, the dis-

[43] Immanuel Kant, *Idea di una storia universale da un punto di vista «cosmopolitico»*, in *Scritti politici*, cit., 130.

[44] Ivi, 127-128.

[45] Alessandra Mazzei, *Un patto «di specie particolare». Immanuel Kant*, in Fabio Corigliano, Francesco Berti, Alessandra Mazzei, *La pace perpetua del buon selvaggio. Illuminismo politico e diritto naturale*, Wolters Kluwer CEDAM, Milanofiori Assago (MI) 2022, 365.

[46] Gioele Solari, *La scuola del diritto naturale nelle dottrine etico-giuridiche dei secoli XVII e XVIII*, Fratelli Bocca, Torino 1904, 11.

tinction between political and socio-economic spheres, the subordination of the State to civil society, the institutionalization of a market society based on economic competition, and the elevation of the individual as a subject endowed with inalienable rights. In short, the natural law tradition elaborated – often implicitly, and with varying degrees of critical distance – a rational justification for the modern social order[47].

Turning now to Rousseau, we encounter a radically different outlook. In contrast to other thinkers of the natural law tradition, Rousseau advances an optimistic view of human nature, grounded in the idea of original goodness, and a pessimistic, anti-Enlightenment conception of historical development, centered on the notion of a 'fall' into moral corruption, caused by the rise and entrenchment of inequality among men[48]. According to Rousseau, it is an external factor that rouses man from his natural indolence and sets him, step by step, on a downward spiral of injustice and abuse – a dynamic that, for Rousseau, encapsulates the essence of socialization and civilization[49].

Unlike Kant, Rousseau holds a fundamentally negative view of the pre-political human condition, which he considers profoundly immoral. For this reason, the task of the republican State brought into being by the social contract

[47] Norberto Bobbio, *Il giusnaturalismo*, in Luigi Firpo (ed.), *Storia delle idee politiche, economiche e sociali*, UTET, Torino, vol. 4, *L'età moderna*, t. 1, 1980, 491-558.

[48] Ernst Cassirer, *Il problema Gian Giacomo Rousseau*, in Ernst Cassirer, Robert Darnton, Jean Starobinski, *Tre letture di Rousseau*, Laterza, Roma-Bari 1994, 38-9.

[49] Henri Gouhier, *Filosofia e religione in J.-J. Rousseau*, Laterza, Roma-Bari 1977, 1-50.

is to establish a society founded on principles diametrically opposed to those of existing society.

Rousseau's political philosophy, particularly in relation to modern natural law theory, may thus be interpreted as a substantive *delegitimization* of the long historical process of human civilization. More specifically, it constitutes a rejection of modern 'bourgeois' society, though Rousseau's writings – on issues such as liberty and property – sometimes leave space for diverging interpretations[50]. Yet, if one attempts to distill the general tenor and final orientation of Rousseau's political-philosophical discourse, it is difficult to deny that the negative, critical, and oppositional dimension predominates. Rousseau's doctrine does not serve to legitimate modern 'bourgeois' society, but instead gestures – however utopically – toward a society based on entirely different values, aimed at rectifying what he views as the fundamental contradictions and injustices of the existing social order.

This is the essential meaning of Rousseau's theory of the double social contract, which emerges from his triadic conception of the historical process. The contract used by other natural law theorists to justify political authority and the social relations it governs is, for Rousseau, a null and illegitimate agreement: a 'leonine pact' that institutionalizes inequality – a legalized extortion whereby «the rich» have shackled «the poor».

The true contract has yet to be realized. It must rest on entirely different assumptions and give birth to a wholly new society – one of egalitarian liberty, which for Rousseau is the only legitimate and desirable form of freedom. As a result,

[50] Augusto Illuminati, *J.J. Rousseau e la fondazione dei valori borghesi*, il Saggiatore, Milano 1977.

the very elements that other natural law theorists – including Kant – sought to legitimize, either directly or indirectly, become, for Rousseau, the object of moral and political condemnation: the separation of politics and religion, the distinction between society and State, the relative autonomy of the former from the latter, the competitive market, and individualism – indeed, the primacy of the individual over the State – are all subjected to Rousseau's withering and unappealable critique.

From all of this it follows that although both Kant and Rousseau describe the State envisioned in their respective works as «republican», the substance of their republicanism is markedly different – if not diametrically opposed. One may therefore assert that, while Kantian political theory originates partly from Rousseauian premises, it ultimately diverges in essential respects from Rousseau's philosophical vision[51].

We thus arrive, in conclusion, at the following paradox: the two foremost eighteenth-century philosophers associated with republicanism – Kant and Rousseau – do not ground their republican theories in a concept of 'negative' liberty that clearly distinguishes them from the liberal tradition. Rousseau explicitly links republicanism to a 'positive' conception of liberty understood as autonomy and self-determination. Kant similarly adopts this view, yet ultimately affirms that the aim of the republican State is to safeguard the spheres of liberty defined in Lockean terms – as domains of negative freedom in the liberal sense.

[51] Georges Vlachos, *L'influence de Rousseau sur la conception du Contrat social chez Kant et Fichte*, in *Etudes sur le «Contrat social»*, cit., 461-76.

Even if we set aside the conceptualization of republicanism developed by Skinner and Pettit – which is based on a purported notion of liberty distinct from that of liberalism – we may nonetheless observe that, from a comparative perspective, the category of republicanism, while it certainly reveals important analogies between Rousseau and Kant, ultimately fails to capture the profound differences that separate them in terms of their conception of the individual, of history, of the function of the social contract, and of the essential features of the political State.

From the standpoint of a comparative analysis of their political and philosophical thought, republicanism thus emerges less as an explanatory category, than as a conceptual label in need of further elucidation.

Dario Caroniti

The Philosophy of History of Eric Voegelin: Critique of Kant and Weber

The philosophy of Immanuel Kant was a constant critical reference point for Eric Voegelin (born in Cologne in 1901, died in Palo Alto in 1985) throughout his life[1]. Quotes from Kant's texts are recurrent in all of his works, from his early writings to those of his later years. Moreover, the academic environment that shaped Voegelin, that of Vienna in the years immediately following the Great War, was steeped in the doctrines of the neo-Kantian school of Marburg[2]. Hans Kelsen was his main academic influence during his PhD, and Voegelin himself stated that Kelsen inspired legal theories based on the theoretical foundations of Hermann Cohen's thought, through a «neo-Kantian methodology, which determined the field of a science by the method used in its exploration – in this case, by the logic of the legal system»[3].

[1] Biographical reference in Ellis Sandoz, *The Voegelinian Revolution. A Biographical Introduction*, Transaction Publishers, London 2000.

[2] Nicoletta Scotti Muth, *Eric Voegelin Rekurs auf aristotelische Denkmotive im Theorierahmen von "Order and History"*, in Ignacio Carbajosa, Nicoletta Scotti Muth (eds.), *Israel and the Cosmological Empires of the Ancient Orient. Symbols of Order in Eric Voegelin's "Order and History", vol. 1*, Brill/Fink, Paderborn 2021, 39 e ss.

[3] Eric Voegelin, *Autobiographical Reflections*, edited by Ellis Sandoz, University of Missouri Press, Columbia 1984, 21; Sandoz, *The Voegelinian Revolution*, cit., 46.

Voegelin's intellectual departure from the neo-Kantian school occurred due to two factors: the decline of German culture, which led to the rise of National Socialism first in Germany and then in Austria, and his encounter with American culture[4]. These two factors led him to flee Nazism and seek refuge in the United States, not as a promised land for self-actualization, but as a place of refuge where he could rediscover the sense of restraint and the dignity of the individual that the German derailment had overwhelmed. This marked a definitive and radical break with both Europe and his mentors' positions. They had, in any case, been victims of National Socialism, like Kelsen, who had to flee Austria because he was Jewish. The worst fate had befallen his other intellectual reference from his years at the Vienna university, Othmar Spann, one of the leading figures of the Conservative Revolution, who was arrested after the Anschluss and detained for over a year and a half. However, they and their doctrines had, in his eyes, failed to develop a valid alternative to the derailment, not only political but cultural, of the Germanic world and, in general, of Europe.

In a different way, there was the American culture that he had begun to explore in 1928, thanks to a Rockefeller Foundation scholarship. This allowed Voegelin to travel to the United States to study aspects of the country's institutional legal system, and gave him the opportunity to attend courses at Columbia University taught by John Dewey. Reflecting on those years in his *Autobiographical Reflections*, published in 1973, Voegelin stated that it was the reading of

[4] Barry Cooper, *The Context of Voegelin's Race Books*, in Bernat Torres Morales, Nicoletta Scotti Muth (eds.), *Eric Voegelin Studies: Yearbook. Volume 3. Body Ideas and Political Communities in Eric Voegelin's Early Work on Race*, Brill/Fink, Paderborn 2024, 37.

Human Nature and Conduct by Dewey that introduced him to the Anglo-Saxon philosophy of Common Sense, which he further explored through the works of Thomas Reid and Sir William Hamilton[5]. Thanks to these, he began to understand the foundations of the political and legal order of the United States and England, which he eventually contrasted with the German political structure.

The philosophy of Common Sense immediately appeared to him as a possible foundation for the restoration of the entire field of political science, after neo-Kantianism had limited it to the core of *Normlogik*:

> Cohen, in his interpretation of Kant's *Critique of Pure Reason*, concentrated on the constitution of science by the categories of time, space, and substance – science meaning Newtonian physics as understood by Kant. This pattern of constituting a science through the categories applied to a body of materials was the model of the construction of the Pure Theory of Law. Everything that would not fit into the categories of *Normlogik* could no longer be considered science[6].

On the contrary, during his reading of Dewey's works, Voegelin found the concept of '*like-mindedness*', which indicated that at the foundation of a political society there was a community of spirit. This translated the Greek term *homonoia*, and expressed a political category entirely foreign to *Normlogik*, yet it «explained what the substance of society really is»[7]. It demonstrated how American culture was in continuity with the classical and Christian tradition, translating the concept without altering its meaning. It was undoubtedly a modern culture and certainly not in

[5] Voegelin, *Autobiographical Reflections*, cit., 20-1.
[6] Ivi, 22.
[7] Ivi, 30.

contradiction with the scientific revolution, but rather a more complete expression of it. Voegelin believed that the concept of modernity should include both the process of destruction of reality perpetrated by ideologues, alienated human beings, and the counter-movement of philosophers and scholars that culminates in the splendid progress of historical sciences, revealing the grotesque nature of modern ideological constructions. The «great neo-Kantian methodological debates», which Voegelin had until then «considered the most important things intellectually», turned out to be «of no importance». Differently, he noted how in American culture, «the background of the great political foundation of 1776 and 1798, and the unfolding of this founding act through a political and legal culture primarily represented by the lawyers' guild and the Supreme Court» had gained pre-eminence. «There was the strong background of Christianity and Classical culture», which was almost entirely absent from the German culture of the period[8].

Voegelin noticed the same indifference towards the neo-Kantian method in George Santayana. He never met him in person, but Santayana was the author he read most passionately during his time in the United States, and the one who brought him closest to a mystical approach to philosophy[9]. Voegelin described him as «a man with a vast background of philosophical knowledge, sensitive to the problems of the spirit without accepting a dogma», and it was precisely the recovery of the spiritual dimension, without

[8] Ivi, 32.

[9] Ted V. McAllister, *Revolt Against Modernity. Leo Strauss, Eric Voegelin and the Search for a Postliberal Order*, University Press of Kansas, Lawrence 1995, 19.

falling into dogmatism, that became the true objective of Voegelin's theoretical reflection from then on[10].

This can already be seen in his early work on Jonathan Edwards, *A Formal Relationship with Puritan Mysticism*, published in 1928 as part of *On the Form of the American Mind*. Voegelin notes here how Santayana «stands at the frontier where the European and the American mind abut»[11]. Both William James and Santayana, Voegelin asserts, «make it possible to disintegrate dialectic by the claim that both self and world are made of the same substance». The critical point of convergence between self and world is, for James, pure experience, while for Santayana, is essence. The difference between them is that Santayana refers to classical thought, to Plato and Socrates, while James refers to the Anglo-Saxon tradition, from Locke to Berkeley and Hume:

> Essence is both the form of external reality and the subject matter of an intuition; pure experience is ordered in various functional connections that, though they are subject to different laws, otherwise consist of the same material[12].

The *pure experience* for James is a type of experience that precedes thought or rational awareness, where objects and perceptions are simply given as experience. It forms the basis of his pragmatist view of knowledge, which emphasizes direct and immediate contact with the world rather than with abstract concepts. It was through reading *Does Consciousness Exist?* – where James argued that consciousness is not a thing

[10] Voegelin, *Autobiographical Reflections*, cit., 31.

[11] Eric Voegelin, *A Formal Relationship with Puritan Mysticism*, in *The Collected Works of Eric Voegelin, Volume I, On the Form of the American Mind*, translated by R. Hein, edited by J. Gebhardt and B. Cooper, Louisiana State University Press, Baton Rouge 1995, 126.

[12] Ivi, 127.

or substance but rather a process or function that does not exist independently – that Voegelin realized a rational foundation could be found for the tension toward the divine, and this could be done without renouncing the scientific advancements of modern culture, but by definitively abandoning both *Normlogik* and the approach to transcendence that he defined as spiritual obscurantism, which had characterized post-Enlightenment European thought[13]. The recovery of transcendence, therefore, according to Voegelin, can take place through the experience of the divine, which can be found, for example, in the Puritan mysticism of Edwards, which he believes is the true point of synthesis between the thought of James and Santayana.

Even before knowing the thoughts of Giovanni Battista Vico and delving into the philosophy of history of Augustine of Hippo[14], Voegelin understands that the recognition of a common experience, through which the perception of the divine is expressed, constitutes the foundation not only of transcendent faith but also of political order. The *like-mindedness* – the substance of political society – consists, according to Voegelin, «in spiritual agreement between men; and it is possible between men only insofar as these men live in agreement with the *nous*, that is, the divinest part in themselves»[15]. This agreement is historically realized through the

[13] Glenn Hughes, *Transcendence and History. The Search for Ultimacy from Ancient Societies to Postmodernity*, University of Missouri Press, Columbia 2003, 56.

[14] About Voegelin and Vico: Francesco Mercadante, *La Democrazia Plebiscitaria*, Giuffrè, Milano 1974, 213-4; Paolo Cevasco, *Il Corpo Cristiano. Vico, Voegelin e l'Idea di Storia*, Rubbettino, Soveria Mannelli 2009.

[15] Eric Voegelin, *The New Science of Politics. An introduction* (first published by The University of Chicago Press, Chicago 1952) in *The*

common recognition of an experience of the sacred, which, in the case of the United States, can be traced back to the experience of the Mayflower Compact and the Pilgrim Fathers.

The dogma of predestination, Voegelin states, would be based on this reflection: «being one of the chosen or one of the damned is irrevocably predetermined; conduct in this life does not influence divine providence; therefore, one can arrange one's conduct without regard to the future». However, he adds, the Boston Platform – a key Puritan theological document that defined the form of government of the New England Congregationalist churches in 1658 – «prevents such reflections with the commandment: 'The doctrine of this high mystery of predestination must be handled with special prudence and care, that men attending the will of God revealed in his word, and yielding obedience thereunto, may from certainty of their effectual vocation be assured of their eternal election'»[16]. Therefore, one is left only to hope or, if you will, to bet on being among the chosen and behave accordingly.

This certainty was achieved, according to Voegelin, with the reform of American Calvinism carried out in the 18th century by Edwards, thanks to his mystical approach, which eliminated the distance with an arbitrary, absolute God, «who deals with believers as a king deals with the subjects». On the contrary, «in mysticism – Voegelin states – he perilous superiority disappears, and the religious life is dissolved in the immediate relationship to divinity, in a sequence of ecstasies that do not require dogma»[17]. In this way, mystical

Collected Works of Eric Voegelin, vol. 5, Modernity without Restraint, edited by M. Henningsen, University of Missouri Press, Columbia 2000, 150.

[16] Voegelin, *A Formal Relationship with Puritan Mysticism*, cit., 131.

[17] *Ibidem.*

communion frees the individual from the pressure of uncertainty, for man does not meet God as a «stranger», as «a different kind of being». God thus becomes characterized by «intimacy», to use James's words, and not by «foreignness». This same intimacy, Voegelin says, does not cancel the dogma of predestination but shifts it from the religious realm to the political, founding a doctrine of national election:

> The Constitution of the United States, with the religious faith it demands of its citizens, serves a function similar to that of the earlier dogma, but the circle of the chosen is no longer indifferently taken from among all of humanity; here there can be no doubt that America's citizens are the elect, definably belonging to a race distinct from the rest of humankind[18].

Therefore, the Americans were a chosen people distinct from the rest of humanity, which became a community of equals, the foundation of a democratic society opposed to any form of absolutism. A chosen people, however, joined not by origin, but through belief in shared principles. In this regard, Voegelin emphasizes that, whereas «the stranger» is an exceptional phenomenon in Europe, «the United States consisted virtually entirely of strangers», and these strangers had the same influence on the formation of American political institutions as those who had previously settled[19]. In this way, the history of the Pilgrim Fathers has symbolically become the foundation of the collective experience through which strangers and settled individuals were able, together, to recognize the noetic self, the substance of the American political community.

[18] *Ibidem.*
[19] Ivi, 126.

In the first volume of *Order and History*, Voegelin had clarified that the symbolization of society and its order can also occur «by analogy with the order of a human existence that is well attuned to being»[20]. This happens through an event he defines as «the leap in being», a transformative insight into transcendent order, the discovery of transcendental being as the source of order in man and society[21]. Voegelin states that men express their experiences through symbols, and symbols are the key that allows us to understand the experiences that are expressed through them.

> [It is history that] reveals a mankind striving for its order of existence within the world while attuning itself with the truth of being beyond the world and gaining in the process not a substantially better order within the world but an increased understanding of the gulf that lies between immanent existence and the transcendent truth of being. Canaan is as far away today as it has always been in the past[22].

In this sense, Israel «constituted itself by recording its own genesis as a people as an event with a special meaning in history»[23]. Israel was a people moving on the historical stage, while aiming for a goal beyond history. «The promised land can be reached only by moving through history, but it cannot be conquered within history. The Kingdom of God lives in men who live in the world, but it is not of this world»[24].

[20] Eric Voegelin, *Order and History, volume I, Israel and Revelation*, Louisiana State University Press, Baton Rouge 1956, 43.

[21] Ivi, 164-5.

[22] Ivi, 171.

[23] Ivi, 165.

[24] Ivi, 164.

Similarly, the United States would have constituted itself as a people through a new *Exodos* toward the promised land, the new Canaan. John Bunyan's *The Pilgrim's Progress* can be seen as having been transfigured into a movement of people on a journey toward a historical existence, understood as an experience of the present under God. Edwards, Voegelin reminds us, believed that «the earth is drawn nearer and nearer to God, and the union with him becomes firmer and closer: and, at the same time, the creature becomes more and more conformed to God». This historical tendency to conform to the Creator became the substance of the American people. However, the way in which the transcendental truth of being is perceived does not lead to a fundamentally better order in this world. Rather, it leads to a greater understanding of the rift that exists between an immanent existence and the transcendental truth of being[25]. Nevertheless, this approach serves to articulate the forms of democratic representation of a people of equals, as articulated in Abraham Lincoln's Gettysburg Address: «Democracy is the government of the people, by the people, for the people». In this formula – Voegelin affirms in *The New Science of Politics*, published in 1952 – the *people* «means successively the articulated political society, its representative, and the membership that is bound by the acts of the representative». This definition, he adds, represents «the unsurpassable fusion of democratic symbolism with theoretical content»[26].

The principles of the Declaration of Independence are therefore not mere statements. Voegelin believes that the

[25] Paul Caringella, *Voegelin: Philosopher of Divine Presence*, in Ellis Sandoz (ed.), *Eric Voegelin's Significance for the Modern Mind*, Louisiana State University Press, Baton Rouge 1991, 177.

[26] Voegelin, *The New Science of Politics*, cit., 119-20.

appeal to the «self-evident truths» of the Declaration of Independence was intrinsic to American *like-mindedness*, even before Thomas Jefferson drafted the Declaration itself. The order of Creation – from which «unalienable Rights», such as «Life, Liberty, and the pursuit of Happiness» derive – expresses the Americans' effort to achieve their own existential order within the world, tuning in with the truth of being beyond the world. It is for this reason, to secure this idea of order, or in other words, «to secure these rights», that «governments are instituted among Men, deriving their just powers from the consent of the governed». According to Voegelin, the political scientist's attention should therefore be directed towards this constitutive substance, rather than the legal structure of the constitution. Voegelin had further dissociated himself from neo-Kantian theories through his reading of Maurice Hauriou's works during his stay in Paris between 1924 and 1926[27]. It is exactly from Hauriou that he takes the three principles that serve as the premise and explanation for his political theory[28]:

> 1. The authority of a representative power precedes existentially the regulation of this power by positive law. 2. Power itself is a phenomenon of law by virtue of its basis in the institution; insofar as a power has representative authority, it can make positive law. 3. The origin of law cannot be found in legal regulations but must be sought in the decision that replaces a litigious situation with ordered power[29].

Representative authority can therefore erode or be replaced by another when it no longer realizes «the idea of the institution». This is precisely what is stated in the Dec-

[27] Sandoz, *The Voegelinian Revolution*, cit., 40-1.
[28] Mercadante, *La Democrazia Plebiscitaria*, cit., 217-8.
[29] Voegelin, *The New Science of Politics*, cit, 126.

laration when it states, «that whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government». In this way, the actions of the government not only have worldly limits, but are subordinated to the transcendent order, to the cosmological principles from which the particular *cosmion* (a miniature cosmos representing a political order), the American political order, draws inspiration and legitimacy. This establishes a concrete and effective barrier against all forms of state absolutism, because it recognizes its own ordering and constitutional principle outside the state.

By contrast, the weakness of German democracy, according to Voegelin, was found in the theory that «describes the state as an organizational unit of a sedentary body of people that is endowed with original power to rule»[30]. Voegelin does not explicitly cite George Jellinek's *General Theory of the State* theory – «The State is an association of men with a fixed habitation, endowed with original and sovereign power of domination»[31] – but it is evident his reference[32].

Voegelin subjects this theory to severe criticism, stating that if «the original power to rule» means that «the power has no other source than the state itself», this claim «is

[30] Eric Voegelin, *The Political Religion*, in *The Collected Works of Eric Voegelin, Volume 5*, cit., 28.

[31] George Jellinek, *General Theory of the State*, translated by M. Knight, The Free Press, New York 1914, 3-4.

[32] This definition gained widespread acceptance among legal and political schools and was also referenced by Max Weber, *Politics as a Vocation* (original title *Politik als Beruf*, Munchen 1919), translated by H.H. Gerth and Ch. Wright Mills, Oxford University Press, New York 1946, 77-8.

false»[33]. This falsehood emerges when looking at a political order like the American one, where there is precisely no idea of the state as an original power. Where, above all, there is no cultural tradition, such as the Neo-Kantian tradition represented by Heinrich Rickert, which, according to Voegelin, underlies a conceptual error that made the democratic institutions indefensible against the attacks of the ideological schools of the twentieth century[34].

In his work *The Limits of Conceptual Knowledge* (*Die Grenzen der Begriffserkenntnis*), Rickert addresses the role of "values" in the context of his philosophical system, particularly in relation to the philosophy of culture and axiology (the study of values)[35]. Rickert distinguishes between cultural values and scientific knowledge. He argues that concepts like the state and religion are not merely empirical entities but rather values that shape the cultural world and guide human actions. These values, in Rickert's view, exist within a higher realm of meaning and significance that transcends empirical observation, focusing instead on the cultural, ethical, and social ideals they represent.

The major problem with Rickert's theory, according to Voegelin, stemmed from the intrinsic weakness of his *wertbeziehende Methode* (value-related method). It suffers from the «grave defect» that values are «highly complex symbols, dependent for their meaning on the established culture of Western liberal society»[36]. It was a kind of cultural provincialism that made it impossible to apply this model to under-

[33] Voegelin, *Autobiographical Reflections*, cit., 28.

[34] Sandoz, *The Voegelinian Revolution*, cit., 39.

[35] Heinrich Rickert, *The Limits of Conceptual Knowledge,* The University of Chicago Press, Chicago 1929.

[36] Voegelin, *Autobiographical Reflections*, cit., 23.

stand political orders foreign to it, such as the Greek *polis* or, worse, ancient Egypt, and which made it vulnerable to attacks from those who sought to challenge Western liberal society, such as «The apocalyptic, metastatic dreams», or «'Marxist ideology», in short, the National Socialists and the Communists.

It was of decisive importance for Voegelin to overcome the opposition between cultural values and scientific knowledge[37]. This opposition was the result of what he considered «The third manifestation of positivism», which occurred between 1870 and 1920, characterized by the development of methodology. «The movement – he argued in *The New Science of Politics* – was distinctly a phase of positivism in so far as the perversion of relevance, through the shift from theory to method, was the very principle by which it lived». It is very interesting to note that Voegelin, while distancing himself from it, stated that generalizing «the relevance of method», this movement «regained the understanding of the specific adequacy of different methods for different Sciences». In this way, this movement ended up expressing both Husserl's critique of psychologism and Cassirer's philosophy of symbolic forms, which were, for him, «important steps toward the restoration of theoretical relevance»[38].

[37] Sandro Chignola (*Pratica del Limite. Saggio sulla Filosofia Politica di Eric Voegelin*, Unipress, Padova 1998, 193-4) notes that «Voegelin does not deal at all with a reintroduction of the theme of *value* in political science», but instead seeks «to go beyond the very logical framework in which the language of *value* has historically settled». In opposition to Nicola Matteucci, *Filosofi Politici Contemporanei*, Il Mulino, Bologna 2001, 132.

[38] See also Mercadante, *La Democrazia Plebiscitaria*, cit., 238: «The new science of politics», is «new because it encompasses modernity, retraces its trajectory retrospectively, and rejects its outcomes».

The same Voegelin, in a certain sense, could be considered a product of this movement, which he believes culminates in the person and work of Weber[39]. He saw himself as a student of Weber[40], «whose work Voegelin – Francesco Mercadante affirms – would continue along certain, partly indirect lines»[41]. He had inherited his legacy as Weber's successor to the chair of Political Science at the University of Munich. He wrote that his early familiarity with Weber's work was very important for his way of thinking. He considered Weberian essays to be crucial in making him view Marxism as scientifically unsustainable. For him, the Weberian distinction between the ethics of intention and the ethics of responsibility was a firm possession. He learned from him that ideologies are not science and ideals are not a substitute for ethics. The vastness of his comparative knowledge served as a model for him to follow[42]. Yet, it is to Weber that, according to Voegelin, the paternity of the «destruction of Science» should be attributed, that is, the attempt to make political science (and the social sciences in general) «objective» through a methodologically rigorous exclusion of all «value-judgments»[43].

The break with Weber runs precisely along the line of the notion of a value-judgment (*Werturteil*)[44]. Voegelin believes that it is "meaningless in itself" because «it gains its meaning from a situation in which it is opposed to judgments concerning facts (*Tatsachenurteil*)». In his view, this

[39] Voegelin, *The New Science of Politics*, cit., 98.

[40] Barry Cooper, *Hans Kelsen and Eric Voegelin: the History of a Divergence*, «Political Science Reviewer», XLVII, 2023, 61-91.

[41] Mercadante, *La Democrazia Plebiscitaria*, cit., 211.

[42] Voegelin, *Autobiographical Reflections*, cit., 13-5.

[43] Voegelin, *The New Science of Politics*, cit., 96-105.

[44] Sandoz, *The Voegelinian Revolution*, cit., 39-40.

notion owes its origin to the positivist conception according to which only propositions concerning «facts of the phenomenal world» were «objective» and «scientific», in contrast to «judgments concerning the right order of soul and society» which would be «subjective», expressing «personal preferences and decisions, incapable of critical verification and therefore devoid of objective validity»[45].

This approach, however, entails a series of consequences. First, it immediately presents an intrinsic logical weakness, because it could be accepted, Voegelin claims, «only by thinkers who did not master the classic and Christian Science of man». Precisely because neither classic nor Christian ethics and politics contain «value-judgments» but – he adds – elaborated, empirically and critically, the problems of order[46]. Furthermore, it reduces political science to a «description of existing institutions and the apology of their principles». In this way, Voegelin asserts, political science is degraded into a «handmaid of the powers»[47]. Finally, it exposes Weber to subordinating the validity of his ethics of

[45] Voegelin, *The New Science of Politics*, cit., 97. On the same theme he returned in 1974 with his *Reason. The Classical Experience* (in *Published Essays. 1966-1985. The Collected Works of Eric Voegelin, vol. XII*, edited by E. Sandoz, Louisiana State University Press, Baton Rouge 1990, 265): «I shall not deal with the 'idea' or a nominalist 'definition' of Reason but with the process in reality in which concrete human beings, the 'lovers of wisdom,' the philosophers as they styled themselves, were engaged in an act of resistance against the personal and social disorder of their age. From this act there emerged the Nous as the cognitively luminous force that inspired the philosophers to resist and, at the same time, enabled them to recognize the phenomena of disorder in the light of a humanity ordered by the Nous. Thus, Reason in the noetic sense was discovered as both the force and the criterion of order».

[46] Voegelin, *The New Science of Politics*, cit., 96.

[47] Ivi, 89.

responsibility to what he himself defined as «demonic decision beyond rational argument»[48].

In effect, in his essay *The Profession and Vocation of Politics* (*Politik als Beruf*), Weber explores the role of values and ethics in political life. Weber refers to the idea that some political decisions, especially those involving charisma or a sense of calling, transcend rational discourse and can be seen as rooted in a kind of "demonic" will or decision. This notion speaks to the intensity of the commitment to values that cannot be fully rationalized, emphasizing a kind of passion or will that goes beyond traditional, logical argumentation[49]. In this way, however, the only defence against those «political intellectuals who are driven by ideological passion and the intense belief in their values»[50] – whom he criticizes harshly and foresees the troubling rise of – can only occur on an emotional level. It becomes necessary to blindly trust in progress – Weber believed that history moved toward a type of rationalism that relegated religion and metaphysics into the realm of the irrational – or to take refuge – as Voegelin says – in an appeal to a sense of shame:

> Weber, as an educator, could rely only on shame (the Aristotelian *aidos*) in the student as a sentiment that would induce rational consideration. But what if the student was beyond shame? If the appeal to his sense of responsibility would not even make him uncomfortable but rather fall back on what Weber called an "ethics of intention", that is, on the thesis that is creed contained its own justification, that the consequence did not matter if the intention of action was right? This question, again, was not clarified by Weber[51].

[48] Ivi, 99.
[49] Weber, *Politics as a Vocation*, cit., 115-6.
[50] Ivi, 115.
[51] Voegelin, *The New Science of Politics*, cit., 100.

Voegelin had direct experience of the answer to the question of whether the student was beyond shame when, the day after the Anschluss, he saw many scholars who, until the day before, had attended his courses at the University of Vienna, now dressed in SS uniforms. This observation and the events that followed convinced him definitively that a «restoration of political science» was both necessary and urgent, in other words, «a return to the consciousness of principles»[52].

Yet it is once again Voegelin who explicitly states that it was thanks to Weber's influence that he began to hate National Socialism from the moment he encountered it in the 1920s. This was due to the intellectual honesty that Weber demanded from his students. Even in the 1970s, recalling Weber's lesson, Voegelin could find no other reason to work in the social sciences except for the Weberian honest will «to explore the structure of reality»[53]. Very simply, he came to believe that this honesty needed to be grounded in something other than a sense of shame, something more solid and rationally formed. For this reason, he had turned, already as a young man, to studying James and the American pragmatism, and, in his mature years, he found it necessary to deepen his knowledge of classical culture:

> James put his finger on the reality of the consciousness of participation, inasmuch as what he calls *pure experience* is the something that can be put into the context either of the subject's stream of consciousness or of objects in the external world. This fundamental insight of James identifies the something that lies between the subject and object of participation as the experience. Later I found the same type of analysis had been

[52] Ivi, 89.

[53] Voegelin, *Autobiographical reflections*, cit., 45.

> conducted on a much vaster scale by Plato, resulting in his concept of the *metaxy* – the In-Between[54].

In Voegelin's political philosophy, *metaxy* is a central concept for understanding how human beings experience reality, caught between their earthly existence and their spiritual or divine aspirations. The term, originating from Greek philosophy, captures the tension between the human and the divine. Voegelin examines how individuals, throughout history, have sought to understand the relationship between their earthly existence and the transcendent realm. In *The New Science of Politics*, he owes to Plato, and to those he calls «mystic philosophers», the discovery of the new truth, that the psyche itself is found as «a new center in man at which he experiences himself as open toward transcendental reality»[55]. This is a discovery – Voegelin adds – «which produces its experiential material along with its explication; the openness of the soul is experienced through the opening of the soul itself»[56]:

> These experiences become the source of new authority. Through the opening of the soul the philosopher finds himself in a new relation with God; he not only discovers his own psyche as the instrument for experiencing transcendence but at the same time discovers the divinity in its radically nonhuman transcendence. Hence, the differentiation of the psyche is inseparable from a new truth about God. The true order of the soul can become the standard for measuring both human types and types of social order because it represents the truth about human existence on the border of transcendence[57].

[54] Ivi, 73.
[55] Voegelin, *The New Science of Politics*, cit., 141.
[56] *Ibidem*.
[57] Ivi, 142.

This was considered a new truth about God but also a new standard for the critique of society. In this way, Voegelin establishes the anthropological principle, which he uses to explain the articulation of existential representation: when Plato stated, «God is the Measure», he meant it in opposition to the Protagorean «Man is the Measure». However, the truth of man is not opposed to the truth of God, because it is always a man, through metaxy, who becomes the representative of divine truth[58]. In any case, Voegelin affirms, it is not possible to revolt against God without revolting against reason[59]:

> The In-Between – the metaxy – is not an empty space between the poles of the tension but the "realm of the spiritual"; it is the reality of "man's converse with the gods" (Symposium 202-203), the mutual participation (*methexis, metalepsis*) in reality of the human in the divine, and the divine in the human. The metaxy symbolizes the experience of the noetic quest as a transition of the psyche from mortality to immortality. […] Because of the divine presence that gives the unrest its direction, the unfolding of noetic consciousness is experienced as a process of immortalizing[60].

The spiritual obscurantism of the modern age, however, is not, according to him, a mere return to Protagoras and sophistry. *Metaxy*, in fact, has been replaced by metastatic construction. Voegelin defined metastatic faith as the belief that reality can be transformed through an act of human will – a faith in a worldly "metastasis" meant to replace divine order[61]. Thus, the consciousness of eschatological expectation

[58] *Ibidem.*
[59] Voegelin, *Autobiographical Reflections*, cit., 76.
[60] Voegelin, *Reason: The Classic Experience*, cit., 279.
[61] Voegelin, *Autobiographical Reflections*, cit., 138.

is an originating force in existence, the pilgrim's progress that occurs in this world, always recognizing God above oneself[62]. By contrast, spiritual obscurantism introduced the replacement of divine intervention with the demand for direct action by man, which would bring about the new world, at any cost, because the metastatic construction has become both the tool and the measure[63]. In this way, he asserts, the modern deformation of reality has excluded the most important aspect of reality: the relationship between man and the divine, which is the foundation of consciousness[64].

However, Voegelin had direct experience of a generation of men who seemed to be devoid of conscience. In this sense, the National Socialist expressed such a vulgar culture that they could not be considered interlocutors; rather, they were able to be an object of research. From this point of view, the real criminals, guilty of the Nazi atrocities, were, in his view, the corrupters of language, both at the journalistic and literary levels. Voegelin's belief was that totalitarianism in general, and National Socialism in particular, were errors of culture and not against culture. Only through the corruption of language and the consequent establishment of a regime, that he defined as *oclocratic*, enabled a generation of

[62] Ivi, 122.

[63] «The attempt at immanentizing the meaning of existence is fundamentally an attempt at bringing our knowledge of transcendence into a firmer grip than the *cognitio fidei*, the cognition of faith, will afford; and Gnostic experiences offer this firmer grip in so far as they are an expansion of the soul to the point where God is drawn into the existence of man. This expansion will engage the various human faculties; and, hence, it is possible to distinguish a range of Gnostic varieties according to the faculty which predominates in the operation of getting this grip on God». (Voegelin, *New Science of Politics*, cit., 189).

[64] Voegelin, *Autobiographical Reflections*, cit., 145.

men to be brought to power in Germany who killed people for the pleasure of doing so.

To understand the reasons for this cultural decay, Voegelin's turns to the past, seeking to investigate the turning point that led to the legitimization, even before the success, of such vulgarity. It is therefore necessary to trace back to a philosophical moment in which the theoretical capabilities of the Germans had not yet been corrupted. Thus, Voegelin once again turns to what was the recognized master of the entire generation of scholars with whom he had been trained: Kant.

According to Voegelin, these metastatic constructions find their foundation in the replacement of the purpose of existence, «no longer a transcendent community of the spirit but an earthly condition of perfected humanity». In his essay *The Political Religion*, published in 1938, a month after the Anschluss, Voegelin sought to trace the roots of this metastatic belief in the belief in the perfectibility of humanity, a view widespread in German culture, back to Kant's essay *Ideen zu einer Geschichte in weltbürgerlicher Absicht* (*Ideas for a Universal History with a Cosmopolitan Aim*). In it, Voegelin asserts, «Kant propounds a view of history in which the rational, enlightened person climbs to ever-higher stages of perfection as an inner-worldly being until, finally, he moves forward to the repression-free, cosmopolitan community with suitable leaders». The great collective body to whose progress each man must contribute is mankind. It progresses only as a whole, and – Voegelin concludes – «the meaning of individual existence is to participate instrumentally in the collective progress," thus outlining a conception that he defines as "radically collectivistic»[65].

[65] Voegelin, *The Political Religions*, cit., 60-1.

The problem becomes even more significant when Voegelin criticizes Kant for attributing value to the biological evolution of the race. In Kant's work, Voegelin maintains, «the expression *race* is no longer a vaguely applied synonym for variety but encapsulates a well thought out concept of a natural subdivision»[66]. He considers Kant's system is the first step on the way to a reworking of an image of man increasingly distant from the Christian[67]. The Kantian «blows» were aimed at eliminating «the devaluation of subhuman nature» and «that of human existence itself»[68]. Especially because Kant had defined «the phenomenon of organic life» as an «autonomous realm between mechanistic nature and the realm of reason»[69]:

> The human soul or spiritual substance can be elucidated in thought images, for example as the something added to the faculties man has in common with the animals that makes him human: man is animal plus spiritual substance. The Cartesian separation of bodily mechanism and soul and Kantian distinc-

[66] E. Voegelin, *The History of the Race Idea. From Ray to Carus*, (originally published in Berlin 1933 as *Die Rassenidee in der Geistesgeschichte von Ray bis Carus*) in *The Collected Works of Eric Voegelin,* III, translated by R. Heine, edited by K. Vondunug, Louisiana State University Press, Baton Rouge 1998, 76.

[67] Peter J. Opitz, *The New Science of Politics and the Crisis of Modernity*, in Thomas L. Pangle (ed.), *The New Science of Politics Revisited*, University of Chicago Press, Chicago 2017, 109-37.

[68] Voegelin, *The History of the Race Idea*, cit., 6.

[69] *Ibidem.* Stradaioli (Sara Lagi and Nicoletta Stradaioli, *Eric Voegelin e Isaiah Berlin Storici delle Idee. Una Riflessione sul Monismo*, Centro Editoriale Toscano, Firenze 2017, 27) notes that «Voegelin clearly emphasizes how man, in his entirety, is Leib (body), Seele (soul), and Geist (mind, spirit), and this unified complex cannot be the object of a positive science, nor can it be reduced to the mere corporeal content».

tion of the sensory nature and rational substance are further examples of this construction type[70].

Kant could therefore be seen as contributing to a decline in the idea of man, but it would be wrong to believe that Voegelin intended to accuse Kant of being the origin of racism[71]. In 1933, on the eve of Adolf Hitler's rise to power, Voegelin wrote two works on the race issue, *The History of the Race Idea* and *Race and State*, which Hannah Arendt considered among the most valuable works on the subject[72]. In these works, he certainly attributes to Kant the development of a «system of nature» in contrast to the scholastic system, where «the nominal genera are replaced with real genera», and where the «description of nature as the noncommittal description of presently existing forms must be supplemented with natural history as a 'natural science of origins'». In this way, offering «the first systematic justification for the use of the word race in connection with the description of man»[73]. Voegelin wonders, however, how many biologists today «know that the idea of the descent of species was enunciated by Kant»[74].

But above all, Voegelin notes: «It was made clear», in Kant's work, «that the parts of the phenomenon cannot 'explain' each other – that is, the individual form cannot be 'explained' by the species and the species cannot be 'explained' by the evolution of form; morphologically and historically, life as a whole is a primary phenomenon»[75]. More-

[70] Voegelin, *The History of the Race Idea*, cit., 15.

[71] Cooper, *The Context of Voegelin's Race Books*, cit., 44.

[72] Hannah Arendt, *Race-Thinking Before Racism*, «Review of Politics», VI, 1944, 36-73.

[73] Voegelin, *The History of the Race Idea*, cit., 75.

[74] Ivi, 22.

[75] Ivi, 19.

over, according to Kant – Voegelin adds – «finite reason was by nature corrupt and could never be the source of a pure, meaningful fulfilment [*Sinnerfüllung*] of earthly existence. But the idea of the perfect man, whose perfection of being in this earthly life could be the impetus for an improvement of human character in society, had become conceivable through the actual appearance of such a man, just as the theory of the antagonism of forces and the fragmentation of the community had been shaped by the reality of eighteenth-century society. The perfect man, who nourished hopes for a happier age, was Goethe»[76].

This new image of human perfection was, according to Voegelin, incompatible with «the imagination of a development toward the Kingdom of God and of the immortal rational substance imprisoned in the body». In Kant's thought, he therefore also finds the antidotes to the *derailment*, to the psychopathology that has progressively caused the loss of the sense of limits in German culture[77]. It is only with Goethe and Schiller – Voegelin adds – that the process of demonizing human existence is brought to completion:

> Soul and reason have a Christian hue-the soul is destined to suffer the trials and tribulations of earthly existence and ultimately to be redeemed; in accordance with the example of Christ, its existence is a Passion, not an action. Reason is the secularized bearer of moral characteristics, of the virtues; it is the source of moral law and, its hue being more active, the source of the moral deed. The idea of the demonic, by contrast, consciously takes up pagan nuances; the sacred and the moral recede and the fertile, generative element ("the produc-

[76] Ivi, 160.

[77] Alex Mumbrù Mora, *Kant, Voegelin, and Race. A Commentary on Eric Voegelin's Reception of Kant's Race Idea*, in *Eric Voegelin Studies*, cit., 244-5.

> tive," in Goethe's terms) comes to the fore. For Goethe, the demonic nature signifies the great productivity that confers on works and deeds a condition of enlightenment, of grace; the demon is the ecstatic human being living entirely out of the center of a productive self, without tiring, without falling into periods of weakness – Napoleon is the primal image of a demon of action, Shakespeare of the demon of poetic works[78].

Voegelin attributes to Schiller a «purpose of a progressivist philosophy of history» based on «the achievement of imaginary immortality through participation in the imaginary meaning of history», which entails «a universal history progressing toward the realm of Reason aimed at replacing the meaning of existence that had been lost with the loss of faith in personal immortality»[79]. The antidote is once again Kant, according to whom «the participation in the meaning of history was no substitute for the meaning of personal existence because it offered no answer to the problem of a man's personal death in time»[80].

It seems that Voegelin, while adopting a critical stance toward Kant's thought, continued to appreciate the formative lessons he had received during his university years[81]. This was similar to his relationship with his mentor Kelsen, a mix of deep respect and sharp, profound criticism, and with Weber, whose legacy he saw himself as continuing, even though he questioned some of its foundations.

[78] Voegelin, *The History of the Race Idea*, cit., 9-10.

[79] Voegelin, *Reason: The Classic Experience*, cit., 282.

[80] Ivi, 282-3.

[81] Thomas W. Heilke, *"Out of Such Crooked Wood": How Eric Voegelin Read Immanuel Kant*, in Lee Trepanier, Steven McGuire (eds.), *Eric Voegelin and the Continental Tradition: Explorations in Modern Political Thought*, University of Missouri Press, Columbia 2011, 15-43.

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Kant and the Liberal Tradition of International Relations

The thought of Immanuel Kant has left a deep and lasting imprint in the field of international relations. His name is often mentioned among the main representatives of the so-called idealist or liberal current in international relations. In this paper we will try to show that this classification is not entirely adequate to grasp the real scope of Kant's contribution to international relations.

For Kant, international relations are a legal issue. International anarchy must be overcome through the establishment of the rule of law. In other words, the obligation to enter a legal constitution applies not only to individuals (from the state of nature to civil society) but also to states:

> Peoples who have grouped themselves into nation states may be judged in the same way as individual men living in a state of nature, independent of external laws; for they are a standing offence to one another by the very act that they are neighbors. Each nation, for the sake of its own security, can and ought to demand of the others that they should enter along with it into a constitution, similar to the civil one, within which the rights of each could be secured[1].

The state of nature for Kant, as for Hobbes, is a state of war that must be overcome, even at the international level.

[1] Immanuel Kant, *Political Writings*, edited by H.S. Reiss, Cambridge University Press, Cambridge 1991, 102.

However, the reasons why anarchy must be overcome are very different from those given by the English philosopher. In Kant they do not have to do with utilitarian or pragmatic reasons, but with a moral duty arising from the categorical imperative and having to do with the affirmation of law. Ultimately, therefore, states, as well as individuals, must overcome the state of nature because it is a state without law.

What form should this international civil state take, analogous to the domestic state? In his various works on the subject, Kant does not always take an unambiguous position.

In *Idea for a Universal History with a Cosmopolitan Purpose*, 1784, Kant states that, just as Nature made use of the discord of men for the creation of internal political society, so it uses of antagonism between states to overcome the misery of war. This process begins with imperfect attempts that are consistent with destruction and misery, and consists of leaving the lawless state of the barbarians and entering into a league of peoples. What form would such a league take? Kant's position oscillates between a strong stance of a federal state with unified and common power, and a weak stance of a Foedus Amphictyonum, which resembles simple covenants of alliance.

In *Theory and Practice*, a text of 1793, after pointing out that human nature in no field is as unlovable as in international relations, Kant states quite confidently that the misery that follows permanent wars will lead states themselves – «even against their will» – either to enter into a cosmopolitan constitution that will guarantee a truly universal peace or to a state that while not being a sovereign common body is nevertheless into «a lawful federation under a commonly accepted international right»[2]. The theory says, for Kant, that to establish the state of peace:

[2] Ivi, 90.

> And there is no possible way of counteracting this except a state of international right, based upon enforceable public laws to which each state must submit (by analogy with a state of civil or political right among individual men) […] But it might be objected that no states will ever submit to coercive laws of this kind, and that a proposal for a universal federation, to whose power all the individual states would voluntarily submit and whose laws they would all obey, may be all very well in the theory of the Abbé St Pierre or of Rousseau, but that it does not apply in practice[3].

Thus, from a theoretical point of view, the solution is clear to Kant: a sovereign *Völkerstaat* endowed with an apparatus of coercive laws (peoples' state). In practise, however, critics who find this theory incompatible with reality argue that states will never relinquish their sovereign prerogatives. Kant advocates the state of people:

> For my own part, I put my trust in the theory of what the relationships between men and states ought to be according to the principle of right. It recommends to us earthly gods the maxim that we should proceed in our disputes in such a way that a universal federal state may be inaugurated, so that we should therefore assume that it is possible (*in praxi*)[4].

The best-known text in which he addresses international issues is, of course, the 1795 philosophical project on perpetual peace. In this work too, the two models for overcoming international anarchy are re-proposed. However, after the ambiguities of his previous works, Kant's solution seems definitive. Kant still distinguishes between a federation of peoples (confederal solution or *Völkerbund*) and a state of peoples (*Völkerstaat*). Overcoming anarchy should go in

[3] Ivi, 92.

[4] *Ibidem.*

the confederal direction. In theory, it remains true that the (definitive) overcoming of the state of war consists in the renunciation by States of their «wild freedom» in favour of State of the Peoples that as the monopoly of coercive laws and progressively extends to embrace all the peoples of the earth. However, Kant does not consider this solution to be credible. States, in fact,

> According to their present conception of international right (so that they reject *in hypothesi* what is true *in thesi*), the positive idea of a world republic cannot be realized. If all is not to be lost, this can at best find a negative substitute in the shape of an enduring and gradually expanding federation likely to prevent war. The latter may check the current of man's inclination to defy the law and antagonize his fellows, although there will always be a risk of it bursting forth anew[5].

For practical reasons, the *Völkerstaat* is not feasible. And so, *in hypothesi*, for all not to be lost, for peace to be realized here and now, we must be content with confederation. War remains, Kant seems to say, the way in which states protect their rights as judges in their own cause. The only realistic solution is to be content with the *Völkerbund*, a negative substitute for the final solution:

> thus, a particular kind of league, which we might call a pacific federation (*foedus pacificum*), is required. It would differ from a peace treaty (*pactum pacis*) in that the latter terminates one war, whereas the former would seek to end all wars for good. This federation does not aim to acquire any power like that of a state, but merely to preserve and secure the freedom of each state in itself, along with that of the other confederated states, although this does not mean that they need to submit

[5] Ivi, 105.

> to public laws and to a coercive power which enforces them, as do men in a state of nature[6].

This *Völkerbund* is a pragmatic retreat to a realistic solution; does not put an end to war once and for all, but only to some wars. The confederation stops – only in part – the torrent of hostile tendencies towards peace, not guaranteeing that pacification itself will sooner or later be interrupted. Thus, at the end of the 18th century, Kant does not believe that the *Völkerstaat* is possible, i.e. perpetual peace is not possible, the need for which, let it be said in passing, would be an unconditional duty. Why is Kant content with the negative surrogate? Why does he apply criteria to law that have to do with experience and utility[7]? The reasons lie in a decidedly pragmatic (or realist) approach, certainly far from the alleged utopianism which Kant is accused of when it comes to his international liberalism[8].

The arguments Kant uses to explain this pragmatic attitude concern the territorial extension of the nation-state. It would be so large extensive that central government would be impossible, thus promoting anarchy itself (thus

[6] Ivi, 104.

[7] «But reason provides a concept which we express by the words political rights. And this concept has binding force for human beings who coexist in a state of antagonism produced by their natural freedom, so that it has an objective, practical reality, irrespective of the good or ill it may produce (for these can only be known by experience). Thus, it is based on a priori principles, for experience cannot provide knowledge of what is right, and there is a theory» (Ivi, 86).

[8] The reasons for Kant's rejection of the *Völkerstaat* that we will illustrate below, are indebted to the masterly pages that Massimo Mori has dedicated to the same theme. See Massimo Mori, *La pace e la ragione. Kant e le relazioni internazionali: diritto, politica, storia*, Il Mulino, Bologna 2008, 103-27.

reproducing the evil that it was intended to remedy: «power which has overruled the rest and created a universal monarchy. For the laws progressively lose their impact as the government increases its range, and a soulless despotism, after crushing the germs of goodness, will finally lapse into anarchy»[9]). Kant also uses an argument which, conversely, is not concerned with weakening power, but with its maximum development. Acknowledging in fact the prescriptions of authors such as Montesquieu and Rousseau, who link free government to small (republics) and medium-sized powers (in this case monarchies, only for Montesquieu), Kant states that the State of peoples would build peace which «saps all man's energies and ends in the graveyard of freedom, this peace is created and guaranteed by an equilibrium of forces and a most vigorous rivalry»[10], on the most fearful despotism («Or if such a state of universal peace is in turn even more dangerous to freedom, for it may lead to the most fearful despotism»[11]). The only possible *Völkerstaat*, at world level, is only that produced by a merger desired by one power that engulfs all others, a sort of world Leviathan. Strangely enough, he sees no difference between the American federal model, which is founded on consensus, and the universal monarchy, which is founded on prevarication and arbitrariness[12]. Generally speaking, Kant's views emphasise the positive aspects of state pluralism at the international level: the confederation, unlike the *Völkerstaat*, constitutes an arrangement that, while not being is not completely free from danger, ensures that «the lest human energies should

[9] Kant, *Political Writings*, cit., 113.
[10] Ivi, 114.
[11] Ivi, 90.
[12] Ivi, 113-4.

lapse into inactivity»[13]. Ultimately, confederation is preferable because the peoples, mostly European, subsist as distinct entities due to the diversity of languages, customs, characters, religious confessions and traditions. For this reason, Kant believes that states have the right to be autonomous and independent (a right that would be denied by a state of central peoples). Kant also gives other reasons for rejecting the *Völkerstaat*. In the text on perpetual peace, for example, he states that for

> Yet while natural right allows us to say of men living in a lawless condition that they ought to abandon it, the right of nations does not allow us to say the same of states. For as states, they already have a lawful internal constitution and have thus outgrown the coercive right of others to subject them to a wider legal constitution in accordance with their conception of right[14].

States having already realised law internally, would not find themselves in an extra-legal condition *altogether*. This position is close to that of Thomas Hobbes, who excludes the exit from the international state of nature. In this context, the condition of anarchy does not make the life of States as «solitary, poore, nasty, brutish and short», as opposed to that of isolated individuals[15]. The internal assertion of law and political monopoly and violence is more than sufficient to guarantee individual life. Moreover, no one would have the strength to create the world Leviathan (oth-

[13] Ivi, 49.

[14] Ivi, 104.

[15] «But because they uphold thereby, the Industry of their Subjects; there does not follow from it, that misery, which accompanies the Liberty of particular men» (Thomas Hobbes, *Leviathan*, edited by R. Tuck, Cambridge University Press, Cambridge 1996, 89-90).

erwise perhaps even Hobbes would have thought of it). The real problem is that, while Hobbes justifies such a position, Kant does not. This is precisely because the possibility of conflict in the international arena contradicts the morally practical reason that pronounces in own veto in everyone's conscience: here must be no war, neither among individuals in the state of nature, nor even among states. And above all because the establishment of a true federation is not necessarily the consequence of forceful action against states that are too grown up for the coercion of others. It could also, in short, be based on consensus.

There is one last consideration worth noting. In the 1795 text Kant adds a further reason to those analysed so far for rejecting the *Völkerstaat*. He writes:

> A constitution, similar to the civil one [would be] a federation of this sort would not be the same thing as an international state. For the idea of an international state is contradictory, since every state involves a relationship between a superior (the legislator) and an inferior (the people obeying the laws), whereas a number of nations forming one state would constitute a single nation. And this contradicts our initial assumption, as we are here considering the right of nations in relation to one another in so far as they are a group of separate states which are not to be welded together as a unit[16].

Kant argues that international law presupposes the existence of several independent states, and that a nation state would therefore be contradictory because it would presuppose unity rather than plurality. In fact, the state of peoples does not necessarily deny the plurality of states. Kant could have followed the US model to propose his own federal model: a central government endowed with certain coer-

[16] Kant, *Political Writings*, cit., 102.

cive powers, but within an institutional framework that is still compatible with a certain freedom and independence of the individual states[17]. For Kant, in short, the State of Peoples which in 1793 still seemed to be the ideal regulatory model for solving the problem of war, later became synonymous with despotism in his later works.

Having devoted the previous pages to the subject of the second article[18], we will now turn to the first article, which should, in Kant's view, have directed towards perpetual pacification[19]. That is, Kant wishes the states to move towards a republican constitution. It is, in his words, the constitution that springs «from the pure concept of right» and derives «from the idea of an original contract, upon which all rightful legislation of a people must be founded»[20]. It is the only form compatible with the freedom of men and the equality of subjects before the law. As opposed to the despotic form, it is a form of government in which legislation respects the general will.

A republican form of government approximates perpetual peace because it requires the people's consent to decide whether to wage war. In a representative government, the final decision on a conflict cannot be made without consulting the representatives of the people. In despotic constitutions, however, where there is no such assent, war becomes a simple matter. Why are the people and their representatives generally opposed to war? Because the main calamities of wars have always fallen on the people:

[17] See Mori, *La pace e la ragione*, cit., 124-6.

[18] «The Right of Nations shall be based on a Federation of Free States».

[19] «The Civil Constitution of Every State shall be Republican».

[20] Kant, *Political Writings*, cit., 99-100.

> If, as is inevitably the case under this constitution, the consent of the citizens is required to decide whether or not war is to be declared, it is very natural that they will have great hesitation in embarking on so dangerous an enterprise. For this would mean calling down on themselves all the miseries of war, such as doing the fighting themselves, supplying the costs of the war from their own resources, painfully making good the ensuing devastation, and, as the crowning evil, having to take upon them – selves a burden of debt which will embitter peace itself and which can never be paid off on account of the constant threat of new wars[21].

In a despotic constitution, waging war is easy since the sovereign owns the state and the consequences of war never affect him. A monarch who is republican is a sovereign who, before deciding whether or not to wage war, must seek and obtain the consent of the people, i.e. their representatives; a despotic monarch, on the other hand, is one who can decide independently whether to wage war.

The theme of republican government, in the 1795 essay on perpetual peace, acquires a centrality does not present in earlier texts. In the 1784 essay on universal history from cosmopolitan point of view, in fact, it is evident how, to achieve peace, the *prius* is the institutional form and the *posterius* the republican form of government. The title of the seventh thesis is, in this sense, clarifying: «The problem of establishing a perfect civil constitution is subordinate to the problem of a las a governed external relationship wit other states, und cannot be solved unless the latter is also solved»[22]. In other words, establishing a republic within a state cannot be separated from the establishment of a binding constitution between states. In the 1795 text, however, the centrality

[21] Ivi, 100.
[22] Ivi, 47.

lies with the republican form of government. It is no coincidence that the very first article is dedicated to this. It is precisely the realization of the republican constitution that is the condition for starting the pacification process[23]. This different approach undoubtedly depends on the optimism with which Kant observed the events of his time, such as the successes of the French Republic (of real and hoped-for 'exportation' of the republican model to Europe):

> It can be shown that this idea of federalism, extending gradually to encompass all states and thus leading to perpetual peace, is practicable and has objective reality. For if by good fortune one powerful and enlightened nation can form a republic (which is by its nature inclined to seek perpetual peace), this will provide a focal point for federal association among other states. These will join up with the first one, thus securing the freedom of each state in accordance with the idea of international right, and the whole will gradually spread further and further by a series of alliances of this kind[24].

The perspective is thus reversed. An enlightened and powerful country that is republican can set in motion a virtuous mechanism of emulation (or even imposition) that facilitates, in this case, the achievement of confederation. Ultimately

> with the process of the internal republicanisation of states, the problem of peace coercion loses importance […] The different republics tend to have peaceful relations with each other that prelude the formation of a single universal *Weltrepublik* – probably to be understood as *Republik der* Republiken[25].

[23] Mori, *La pace e la ragione*, cit., 159.
[24] Kant, *Political Writings*, cit., 104.
[25] Mori, *La pace e la ragione*, cit., 161.

Since the republic is the form of government that does not incorporate bellicist tendencies, it is to it, rather than to the construction of the third, that Kant seems to entrust the greatest hopes for the pacification of international relations. In this respect, Kant truly seems to be the forerunner of that current of liberalism that some international relations textbooks call republican. This research tradition assumes that liberal democracies are more peaceful and respectful of international law than non-democratic states. Firstly, such regimes are based on cultures, values and political practices that lead them to resolve disputes in a peaceful manner by seeking compromises and excluding violence. Secondly, the opinions of citizens are generally taken into account, and they are generally hostile to the use of violence (an argument, this one, of clear Kantian derivation). Also, liberal democracies are economically interdependent. Ultimately, the assertion that democracies do not fight each other would have a forerunner in Kant.

One final point to consider is the pacifying role of spirit of commerce. In the appendix to the text on Perpetual Peace, he also inserts himself into the strand of so-called commercial pacifism, the one, to be clear, that considers trade capable of pacifying relations between states. For Kant too, in fact, spirit of commerce unites their mutual self-interest. The spirit of commerce, also, «cannot existe side by side with war»[26]. The theme of free trade links directly to the final third article, which states: *Cosmopolitan Right shall be limited to Conditions of Universal Hospitality*. The spherical shape of the earth, which makes it possible to overcome all geographical barriers, allows men to encounter each other. Does this principle prefigure the historical realization

[26] Kant, *Political Writings*, cit., 114.

of universal citizenship, as theorized anciently by Stoicism? Not exactly. On this point, too, Kant's thought appears ambivalent. On the one hand, the overcoming of the state dimension seems to represent, in the economy of his philosophy, the culmination of the progress and perfectibility of mankind. On the other, the German philosopher remains deeply attached to the principle of state sovereignty, to the point of not fully admitting the affirmation of a real cosmopolitan citizenship.

Relations between states and individuals belonging to other political communities must be characterized by 'universal hospitality'. According to Kant, this means that individuals visiting another state than their own must be treated with hostility if they behave peacefully. However, it is important to point out that the right of visit is not equivalent to the right of residence. The right of visitation must be guaranteed to all foreigners based on a fundamental concept: the original common possession of the earth's surface (original common possession). This right, however, has well-defined limits: «But this natural right of hospitality, i.e. the right of strangers, does not extend beyond those conditions which make it possible for them to attempt to enter into relations with the native inhabitants»[27]. The cosmopolitan right is reduced to a guarantee of the safety of those who engage in trade. It is also true that, despite this principle, a state can expel a foreigner without having to provide any justification. Indeed, state sovereignty always prevails over cosmopolitan citizenship[28]. Therefore, Kant does not envisage dual citizenship for individuals – whereby they are subject to their

[27] Ivi, 106.

[28] «He can indeed be turned away, if this can be done without causing his death, but he must not be treated with hostility, so long

state authority while also dependent on a supranational authority. The fact that cosmopolitan law, according to Kant, has no binding force outside the framework of existing public law does not imply that it is without value[29]. On the contrary, it can act as a supplement to an 'unwritten code': an ideal orientation that, as it spreads gradually, could influence social and political behaviour, fostering pacification and international cooperation[30].

As has already been mentioned above, it is not so easy to distinguish realism and liberalism even from the point of view of negative anthropology. In the field of international relations, liberalism is considered an optimistic doctrine that contrasts with the radical pessimism of the so-called realists. Liberals, or most of them, would have a deep-rooted faith in the rational capacity of individuals (and hence) the same faith in progress. But above all for these liberals the positive view of human nature would allow for collaboration and cooperation; in a specular way the realists see human wickedness as the cause of conflict and war.

Anthropological pessimism also seems present in Kant's work. Indeed, according to him, both social life and the political order are the result of an antagonism that is always potentially destructive of civil and international peace: «By

as he behaves in a peaceable manner in the place he happens to be in» (Ivi, 105-6).

[29] Some interpreters maintain that Kant, with his idea of cosmopolitan law, intended to define an autonomous global sphere of legal rights and obligations, distinct both from the domestic law of states and from the pactual agreements between them. See (and the bibliography indicated) Luca Scuccimarra, *I confini del mondo. Storia del cosmopolitismo dall'antichità al Settecento*, Il Mulino, Bologna 2006, 396-401.

[30] Mori, *La pace e la ragione*, cit., 148.

antagonism, I mean in this context the unsocial sociability of men, that is, their tendency to come together in society, coupled, however, with a continual resistance which constantly threatens to break this society up». Man is driven to associate by the desire for honours, power and wealth: «it drives him to seek status among his fellows, whom he cannot bear yet cannot bear so leave»[31].

According to Kant, social antagonism plays a positive, providential role: without «his self-seeking pretensions, man would live an Arcadian, pastoral existence of perfect concord, self-sufficiency and mutual love. But in this condition all human talents would remain hidden forever in a dormant state». Progress itself is based on human beings' natural egoism and antagonism, for which Kant is thankful: «Nature should thus be thanked for fostering social incompatibility, enviously competitive vanity, and insatiable desires for possession or even power»[32]. But the benefits of unsocial sociability, according to Kant, depend on antagonism developing in a balanced way: within a precinct like that of civil union, under an overriding law that enables differing judgments to coexist:

> Man, who is otherwise so enamoured with unrestrained freedom, is forced to enter this state of restriction by sheer necessity. And this is indeed the most stringent of all forms of necessity, for it is imposed by men upon themselves, in that their inclinations make it impossible for them to exist side by side for long in a state of wild freedom. But once enclosed within a precinct like that of civil union, the same inclinations have the most beneficial effect. In the same way, trees in a forest, by seeking to deprive each other of air and sunlight, compel each other to find these by upward growth, so that they grow

[31] Kant, *Political Writings*, cit., 44.
[32] Ivi, 44-5.

> beautiful and straight-whereas those which put out branches at will, in freedom and in isolation from others, grow stunted, bent and twisted[33].

From a Kantian perspective, one could conclude that without evil, which is therefore inherent in man, no progress (no good) would be possible. Evil is an intermediate cause that unites humans by forcing them to coexist, and it is always what allows them to develop their talents[34]. Furthermore, when he reiterates man's need – a being endowed with a selfish animal instinct – for a master, i.e. a ruler who must guarantee the coexistence of the various individual arbiters, he states incontrovertibly that the definitive solution to this political problem is impossible: «This is therefore the most difficult of all tasks, and a perfect solution is impossible. Nothing straight can be constructed from such warped wood as that which man is made of»[35].

For Kant, human wickedness, although often disguised within states, is fully manifested in inter-state relations:

> Although it is largely concealed by governmental constraints in law-governed civil society, the depravity of human nature is displayed without disguise in the unrestricted relations which obtain between the various nations. It is therefore to be wondered at that the word right has not been completely banished from military politics as superfluous pedantry, and that no state has been bold enough to declare itself publicly in favour of doing so[36].

According to this view, the root of wars lies in the very nature of man. It is war that is natural, as we have seen, while

[33] Ivi, 46.
[34] See Mori, *La pace e la ragione*, cit., 243.
[35] Kant, *Political Writings*, cit., 46.
[36] Ivi, 103.

peace is artificial (the state of peace must be formally instituted). However, Kant's optimism – often evoked by realists to oppose Machiavelli's thought – seems more an act of faith than a deduction based on facts:

> This homage which every state pays (in words at least) to the concept of right proves that man possesses a greater moral capacity, still dormant at present, to overcome eventually the evil principle within him (for he cannot deny that it exists), and to hope that others will do likewise. Otherwise the word right would never be used by states which intend to make war on one another, unless in a derisory sense, as when a certain Gallic prince declared: 'Nature has given to the strong the prerogative of making the weak obey them[37].

Despite this belief in humanity's ability to improve itself, Kantian hope, however noble, does not seem sufficient to overcome the evil inherent in human nature.

Kant's arguments as to the defective nature of mankind are not confined to the texts on the philosophy of history, political philosophy, and law. In *Religion within the Boundaries of Mere Reason* he goes even deeper into the issue of human nature and its built-in limitations. That is where he introduces the theme of «radical evil». He writes,

> the statement, "The human being is evil," cannot mean anything else than that he is conscious of the moral law and yet has incorporated into his maxim the (occasional) deviation from it. "He is evil by nature" simply means that being evil applies to him considered in this species we may presuppose evil as subjectively necessary in every human being, even the best[38].

[37] Ivi, 103.

[38] Immanuel Kant, *Religion within the Boundaries of Mere Reason*, edited A. Wood and G. di Giovanni, Cambridge University Press, Cambridge 1998, 55-6.

It has been pointed out that radical evil is a kind of secular version of original sin, which is agreed to lie behind certain political realists' anthropological typecasting. The religious doctrine of original sin, engrained evil, tends to rule out free will and hence treat human nature deterministically. Grace alone can save human beings. Yet, Kant's political theology does not leave us mired in his equivalent of original sin, because the tendency to evil stems from an act of freedom and may thus be «imputed» to the individual[39]. Human beings know the moral law and may freely decide not to observe it, following that tendency to wickedness. When an individual act from self-love instead of the law of universal reason, they commit evil. Kant concludes the argument in these words:

> It follows that the human being (even the best) is evil only because he reverses the moral order of his incentives in incorporating them into his maxims. He indeed incorporates the moral law into those maxims, together with the law of self-love; since, however, he realizes that the two cannot stand on an equal footing, but one must be subordinated to the other as its supreme condition, he makes the incentives of self-love and their inclinations the condition of compliance with the moral law whereas it is this latter that, as the supreme condition of the satisfaction of the former, should have been incorporated into the universal maxim of the power of choice as the sole incentive[40].

Undoubtedly, Kant believed in a progressive, enlightened cultural and political development, thanks to the teleological rationality i.e. the capacity to deliberate about ends

[39] Ivi, 50. See Sean Patric Molloy, *Kant's International relations: The Political Theology of Perpetual Peace*, Michigan University Press, Ann Arbot 2017, 121.

[40] Ivi, 59.

as well as means. According to the German philosopher, humans are not moved by a deterministic nature; they can make choices because they have a predisposition to become rational animals and decide what to make of themselves. They are capable of self-correction. Interestingly for our argument, Kant goes on to state that a similar «corrupt propensity» is confirmed in the relations among states which are characterized by «raw nature» to which they deliberately cling, despite its being «directly in contradiction to official policy»:

> So philosophical chiliasm, which hopes for a state of perpetual peace based on a federation of nations united in a world-republic, is universally derided as sheer fantasy as much as theological chiliasm, which awaits for the completed moral improvement of the human race[41].

In *Religion*, Kant's pessimism regarding the formation of a State of Peoples [*Völkerstaat*] which was designed to end the international state of nature once and for all, seems even more radical than in his writings on perpetual peace, where he propends for a negative substitute.

In his famous text on the three theoretical traditions of international relations, Martin Wight places Kant among the revolutionists, who firmly believe in the moral unity of humanity and are convinced this unity can be translated into a concrete institutional reality through the adoption of specific international political practices. In addition to being profoundly optimism, revolutionists share a deep belief in the perfectibility of humankind[42].

[41] Ivi, 57 (see also Kant, *Political Writings*, cit., 92).

[42] Martin Wight, *International theory: The three traditions*, Leicester University Press, Leicester 1991.

As we have already seen in part, Kant is recognised as one of the fathers of progressivism. In line with the language of the Enlightenment, he subscribes to the idea that the process of perfecting mankind is an ongoing, probably irreversible process, while recognising that this progress can never be fully realised. This progress will never reach a final stage.

According to Kant, the conflict between evil and good, as well as that between insouciance and sociability, is directed by nature (or Providence) towards a historical perspective of progress. As a philosopher, Kant sets out to identify, in the contradictory course of human events, the *thread* that reveals the design of nature. This providential plan guides humanity from barbarism to the full development of its dispositions, through the progressive work of generation. Within the framework of Kant's teleology of history and nature, the dispositions of creatures are intended to develop in accordance with their purpose. Accordingly, man's rational disposition is directed towards the realisation of a civil society in which law is universally valid. As we have seen, nature's design utilises unsociability to achieve this goal.

For Kant, the ordering of civil society is rational and represents both an ideal to strive towards and the ultimate end of nature. Although fraught with obstacles and characterised by setbacks and regressions, Kant's vision of progress seems to proceed in the long run towards the establishment of a perfect constitution, both domestic and international.

Curiously, the selfishness of states also contributes to this solution through a sort of heterogenesis of ends. Their wars and devastation force them, sooner or later, to establish some form of shared authority to ensure their mutual survival. Despite the many resistances present in human na-

ture, Enlightenment, understood as the public use of reason, will eventually influence even the highest spheres of power, ascending to thrones and guiding the decisions of governments.

> For my own part, I put my trust in the theory of what the relationships between men and states ought to be according to the principle of right. It recommends to us earthly gods the maxim that we should proceed in our disputes in such a way that a universal federal state may be inaugurated, so that we should therefore assume that it is possible (*in praxi*). I likewise rely (*in subsidium*) upon the very nature of things to force men to do what they do not willingly choose (*fata volentem ducunt, nolentem trahunt*)[43].

This goal does not seem to be historically feasible, but rather a regulative ideal to be pursued. Indeed, as we have seen, Kant is not exactly an optimist. His vision of progress is not based on a naive faith in the inevitable improvement of humanity, but on a rational analysis that identifies morality and reason as the guiding principles of human action.

Kant certainly has a connection to liberalism as an international tradition, albeit perhaps less than is generally believed. From an anthropological point of view, he is not an optimist. Although he believes in progress, he thinks that the future of the world is uncertain and that humans cannot predict it with any certainty. Moreover, he never questions the sovereignty of individual states. For this reason, his positions are not so far removed from those that commonly characterise the thinking of realists. Analysing his thought, it emerges that the achievement of perpetual peace can be approached on three distinct levels of discourse.

[43] Kant, *Political Writings*, cit., 92.

Firstly, the issue of war must be addressed at a legal level. Kant sets aside the ideal solution of a Völkerstaat (a state of peoples united under a single authority) in favour of a *Völkerbund*, a federation of states that only partially limits international anarchy. This compromise stems from the realisation that states are unwilling to relinquish their sovereignty to a third authority. For Kant, too, state pluralism – which is the main cause of conflict – remains the ineliminable context of international politics, as argued by many realist thinkers.

Secondly, the international question must be addressed politically. From this point of view, Kant identifies the republican form of government as a key element in overcoming war. In his view, republican governments are inherently more peaceful than despotic ones, because citizens, having to bear the burden of war, would be less inclined to support it. However, he emphasises that this model cannot and must not be imposed by force or through aggression. The spread of the republican form must be based on the diffusion of enlightenment through two parallel paths: the education and upbringing of citizens, and the transmission of Enlightenment principles to rulers ('to the thrones'). Nevertheless, even here, Kant acknowledges that there are no guarantees that this process will be fully realised.

Thirdly, Kant identifies another guarantee of perpetual peace in the way nature is designed. He believes that providence promotes peace among humans, even against their will. However, this trust does not imply absolute security. Progress is not a linear process guaranteed once and for all; it can be slowed down, hindered, or even temporarily halted. Ultimately, Kant's faith in progress is an act of trust rather than rational certainty.

In conclusion, the pursuit of a binding international legal order, the republicanisation of states, and finally faith in progress are all regulative ideals for Kant. These ideals are not absolute guarantees, but rather goals that humanity must pursue with perseverance as a moral purpose. However, their attainment and full realisation remain uncertain, leaving open the possibility that mankind may never fully realise them.

Maria Chiara Pievatolo

Faculty of Opposition. The University and the Public Use of Reason in "Der Streit der Fakultäten"

1. *The university as a factory*

According to current encyclopedias[1], the university is no longer a republic of scholars enjoying institutional autonomy and academic freedom, as it used to be. The so-called neoliberal university is more and more like a business, organized according to an internal hierarchy and permeable to the interests of external actors, ranging from the state to private funders. But the transition from a system of «decentralized organized anarchies» to a complex of «penetrated hierarchies» is not just a late modern process: it is deeply rooted in the early modern period.

At the beginning of his last published work, *The Conflict of the Faculties* (1798), Kant himself presents the university as organized like a factory, with a division of labor that apportions the complex of knowledge by grouping professors into faculties[2]. Their community, however, is autonomous, for "only scholars can pass judgment on

[1] Ivar Bleiklie, *New Public Management or Neoliberalism, Higher Education*", in *Encyclopedia of International Higher Education Systems and Institutions,* Springer, 2018, doi:10.1007/978-94-017-9553-1_308-1.

[2] Kant's debt to Adam Smith is evident (*The Wealth of Nations*, edited by E. Cannan, 1776-1937, https://standardebooks.org/ebooks/adam-smith/the-wealth-of-nations,I.I). See Samuel Fleischacker, *Va-*

scholars as such"[3]. This idea, for Kant extemporaneous but not bad (AK VII, 017), brings together two historically and institutionally different concepts:

1. the medieval community university, autonomous[4] as part of a legally pluralistic[5] system that reported to the universal but distant authorities of church and empire;

2. the modern bureaucratic university, whose political-economic regime is controlled by the state[6]. The university in which Kant worked was becoming «like a factory», a bureaucratic organization of professionals for the purpose of training efficient officials and obedient subjects under the control of a cameralistic government. Professors were hired on the basis of merit and eloquence, modestly paid but highly honoured, and granted a certain amount of freedom for the sole purpose of making them more productive[7]. When Weber, in the second decade of the last century, described the rationalization that was transforming the German uni-

lues behind the Market: Kant's Response to the 'Wealth Of Nations, «History of Political Thought», XVII, 1996, 379-407.

[3] Immanuel Kant *The Conflict of the Faculties,* translated by M. Gregor, Abaris Book, New York 1979, 23.

[4] Jean-Luc De Meulemeester, *Quels modèles d'université pour quel type de motivation des acteurs? Une vue évolutionniste*, «Pyramides», XXI, 2011, https://journals.openedition.org/pyramides/804 261-89. Jacques Le Goff, *Pour un autre Moyen Âge: temps, travail et culture en Occident: 18 essais,* Gallimard, Paris 2013, "Les universités et les pouvoirs publics au Moyen Age et à la Renaissance", II.

[5] Paolo Grossi, *A History of European Law*, translated by L. Hooper, 1st edition, Wiley-Blackwell, Chichester (UK)-Malden (MA) 2010, part 1.

[6] Paolo Prodi, *Università e città nella storia europea*, in Id. *Università dentro e fuori,* Il Mulino, Bologna 2013, §1.

[7] William Clark, *Academic Charisma and the Origins of the Research University*, The University of Chicago Press, Chicago 2006, 12 ff.

versity into an enterprise of state capitalism populated by proletarianized researchers deprived of control over the means of production[8], he was not reporting the beginning of a new process, but rather a station on a long march.

A decade after *Der Streit der Fakultäten*, Wilhelm von Humboldt's reform transformed the Prussian university "into one of the powers of the state, endowed with its own specific position and protected autonomy, like the judiciary, within the overall political system."[9] But when Kant was writing, the conflict was not only of the faculties, but *within* the faculties. How can a professor, who is a civil servant under the government, do research in the service of truth? Conversely, why should the government fund scholars who serve the truth, even against its interests and purposes? And why should an employee enjoy the special freedom that we would call "academic freedom"?

The Conflict of the Faculties is a posthumous response to a cabinet order sent privately to Kant four years earlier by the late Prussian monarch Friedrich Wilhelm II Hohenzollern, or rather (according to Kant) his minister Johann Christoph von Wöllner[10]. Kant had circumvented Prussian censorship

[8] Max Weber, *Wissenschaft als Beruf,* Duncker & Humblot, München und Leipzig 1919, 5, https://de.wikisource.org/wiki/Wissenschaft_als_Beruf.

[9] Prodi, *Università e città nella storia europea,* §4. Humboldt's plan, however, was only partially and precariously implemented. See Robert D. Anderson, *European Universities from the Enlightenment to 1914,* Oxford Scholarship Online, 2010, https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198206606.001.0001/acprof-9780198206606-chapter-4 and Fritz K. Ringer, *The Decline of German Mandarins*, Harvard University Press, Cambridge (MA) 1969.

[10] See Mary Gregor, *Introduction* to Immanuel Kant, *The Conflict of the Faculties*, 1979 (SdF).

by publishing *Religion within the Limits of Mere Reason* after receiving its imprimatur in the Duchy of Sachsen-Weimar from the dean of the Philosophy Faculty of Jena. Formally, his conduct was not illegal. However, the order reprimanded Kant for misusing his philosophy by distorting and disparaging some basic teachings of the Christian religion[11] and for behaving irresponsibly in his role as a teacher of youth, i.e. as a university professor, and threateningly urged him to conform to the educational intentions of the crown (AK VII, 6).

Kant had privately defended himself against the accusations of the cabinet order with two arguments:

1. as a teacher of youth, i.e., as a university professor, he had always remained within the limits of his discipline, and had adopted common philosophical books – such as Baumgarten's – that did not deal with Christianity and the Bible; after all, one of the fundamental purposes of his critical philosophy was precisely to draw the boundaries within which reason can legitimately make its claims (AK VII, 007).
2. as a «teacher of the people» (*als Volkslehrer*), his essay on religion was so closed and unintelligible to the public that it could only be understood by scholars in university faculties (AK VII, 008).

The first argument concerns the institutional role of the professor in the bureaucratic spirit of the modern university: Kant appeals to widespread professional practices and

[11] As Daniela Tafani remarks (*Religione e diritti civili: la questione ebraica in Kant*, «Studi kantiani», XXII, 2008) Kant could be accused of violating Article 8 of the *Edict, die Religions-Verfassung in der Preußischen Staaten betreffend*, which prohibited the teaching of deistic and naturalistic theories.

disciplinary divisions with which he agrees, albeit on philosophical grounds rather than administrative compliance.

The second argument concerns the public use of reason: rather than claiming its freedom, Kant obliquely and elusively attempts to minimize its impact by stating that his text is intelligible only to a very few scholars. And yet, if Kant had really wanted to speak to the few, he would have circulated his manuscripts only among his colleagues, without bothering to circumvent censorship in order to print them. Once published, a book, whether easy or difficult, circulates through the hands of anyone who can read it[12].

As the very elusiveness of Kant's answer reveals, the friction point of the university, conceived as a factory under government control, is a crucial legacy of the modern scientific revolution: the publicness of researchers' work[13]. Again, why should a collective organization, whether political, religious, or economic, pay employees who are empowered to publicly criticize the ideologies and theories it professes?

2. The Enlightenment essay: officials *or* scholars?

In the *Answer to the Question: what is the Enlightenment?,* Kant's main concern was not the freedom of universities or of university professors as privileged employees *within* this particular institution, but the emancipation of all those who are capable of learning *from* the institutions to which each of them belongs. The freedom to make public use of reason, to speak as scholars to a public of readers, is connected to a vocation [*Beruf*] to think for oneself that calls

[12] Plato, *Phaedrus*, 275d-e.

[13] Paolo Rossi, *The Birth of Modern Science,* Blackwell, Oxford 2001, II.5.

every human being and not only university professors (AK VIII, 036)[14].

Specific collective organizations develop and apply some form of knowledge, and therefore need officials who are capable of reasoning. But this use of reason is "private", that is, incomplete or defective, because officials must limit their reasoning to what the institutional mechanism requires. They can, of course, criticize their own organization or disagree with some of its principles, but only, so to speak, outside of working hours, when they put on a scholarly robe to address everyone.

> But in so far as this or that individual who acts as a part of the machine also considers himself as a members of a complete commonwealth or even of the cosmopolitan society [*Weltbürgergesellschaft*], and thence as a man of learning who may through his writings, address a public in the truest sense of the word, he may indeed argue, without harming the affairs

[14] In 1783, Minister Karl Abraham von Zedlitz had acquitted Pastor Johann Heinrich Schulz, who was accused of holding heterodox ideas as a scholar, on the grounds that it was sufficient that he did not profess them as a preacher: "The author may defend the philosophical-speculative statements contained in the book to the public for whom the book is intended, but the people who make up his congregation are not called and have no vocation [*Beruf*] to examine and judge them.(Gisbert Beyerhaus, *Kants 'Programm' der Aufklärung: aus dem Jahre 1784*, 1921, 16, https://doi.org/10.1515/kant.1921.26.1-2.1) The public of readers here is an *elite*, distinct from the community of simple believers. Kant reverses the thesis of the Prussian minister by using the same vocabulary (Daniela Tafani, *Il palladio dei diritti del popolo. La libertà di stampa come contropotere in Kant e negli scritti rivoluzionari*, «Bollettino telematico di fulosofia politica», 2021, https://commentbfp.sp.unipi.it/daniela-tafani-il-palladio-dei-diritti-del-popolo-la-liberta-di-stampa-come-contropotere-in-kant-e-negli-scritti-rivoluzionari, §4).

> in which he is employed for some time in a passive capacity (AK VIII, 37)[15].

Kant dissociates[16] the "public" from the state. But his examples of private use, which concern not only the branches of state administration but also the churches, point to a more radical dissociation: whoever speaks as a scholar speaks as part of the whole commonwealth, or even of the cosmopolitan society. But the commonwealth, the *res publica,* is here set in opposition to the current government of the state, and the society of world citizens is an ideal horizon that is not institutionally structured and therefore free of hierarchies.

Before its modern domestication, the medieval university was a corporate yet international place, open to all strata of society[17]. Kant, however, without looking back, prefers to locate scholarly freedom in an ideal realm that is distinct from the limited and circumscribed but historically concrete realm of the university, or rather its medieval past. The commonwealth and the society of world citizens have no administration and no officials: and because they are indeterminate, anti-institutional, ideally universal, they are a space of discussion open to all because of their very virtuality. The freedom of the public use of reason is for everyone who has the courage and the energy to learn, no matter what office imprisons them. This is precisely why the public use of reason is always potentially in tension with every kind of institutional knowledge[18].

[15] Immanuel Kant, *Political Writings*, translated by H.B. Nisbet, Cambridge University Press, Cambridge 1989, 56.

[16] John Christian Laursen, *The Subversive Kant: The Vocabulary of 'Public' and 'Publicity'*, «Political Theory», XIV, 1986, 584-603.

[17] Le Goff, *Les universités et les pouvoirs publics au Moyen Age et à la Renaissance*, cit.

[18] Tafani, *Il palladio dei diritti del popolo*, cit., §3.

The distinction between the public and the state is only a special case of a more general distinction between the public and the institutional. It is no coincidence that Kant presents this distinction using the example of a non-governmental organization, the church[19], both to discuss the position of the official who is institutionally bound by doctrines he does not share, and to ask within what limits an institution can bind its members to doctrines they would not choose for themselves. The two questions posed sequentially in the essay on the Enlightenment are two sides of the same coin: to what extent can knowledge be institutionalized without violating the autonomy of reason, and thus of knowledge itself?

I. If we take persons one by one, distributively, the contrast between the public use and the institutional or private use of reason manifests itself as a conflict of conscience. A clergyman, acting as a teacher within the church of which he is a minister, makes a private use of reason: as such, he must inform its members of the doctrines of the church that employs him. As a scholar, however, he must remain free to publish writings that contradict them. But what if he disagrees not with marginal and incidental parts of his church's doctrine, but with fundamental articles of faith? Kant suggests that such a situation should cause him to resign (AK VIII, 38): why should he remain part of an institution whose principles he does not share?

If the friction between institutions and research were only experienced within the boundaries of conscience, the

[19] The semi-ecclesiastical character of medieval universities (Stefan Collini, *What Are Universities for?*, Penguin Books, London 2012, 2.II), which was reflected in the status of professors, could also have been a historical basis for extending Kant's argument.

problem of the researcher's freedom would only be ethical and personal, rather than political and collective. There are institutions in which I cannot remain, if I am honest with myself. Politically, however, these institutions would remain unchallenged or, better, their eventual disintegration would depend only on a fortunate convergence of individual deliberations leading to mass resignations. The only freedom here is the ethical freedom of leaving an institution for reasons of conscience, not the legal and political freedom of trying to change it while remaining in it.

II. If freedom within institutions were only an individual and ethical matter, the domain of knowledge would be divided into an institutional, restricted domain and an extra-institutional, unrestricted domain. The former, however, would be historically existing and externally visible, while the latter would be internal and mostly virtual or imaginary[20], alive only in a twilight zone of public dissent on marginal issues (at least where officials were involved). Most importantly, internal dissent within institutions would not be possible: the insiders would obey and publish their insubstantial criticisms elsewhere, and the true dissenters would be ethically obliged to leave. For Kant, however, freedom within institutions is also a political matter:

> But should not a society of clergymen, for example an ecclesiastical synod or a "venerable presbytery" (as the Dutch call it),

[20] Bill Readings, *The University in Ruins*, Harvard University Press, Cambridge (MA) 1996), 50-60. Not surprisingly, Kant does not mention Klopstock's much criticized *deutsche Gelehrtenrepublik* (Francesca Di Donato, *Comunicare la cultura: il dibattito sulla repubblica delle lettere nell'Illuminismo tedesco,* «Bollettino telematico di filosofia politica», 2011, https://btfp.sp.unipi.it/it/2011/12/francesca-di-donato-comunicare-la-cultura-il-dibattito-sulla-repubblica-delle-lettere-nellilluminismo-tedesco/).

> be entitled to commit itself by oath to a certain unalterable set of doctrines in order to secure for all time a constant guardianship over each of its members, and through them over the people? (AK VIII, 38-39)[21]

Can an ecclesial community legitimately deliberate to maintain a particular doctrine in perpetuity? According to Kant, such deliberation would "violate the sacred rights of mankind" because it would deprive future generations of the same right to discuss and think for themselves by which the previous generation arrived at the doctrine. If the legitimacy of collective decisions rests on the freedom of internal discussion, to deny it to future generations is to delegitimize the community that made them.

In general, "to test whether any particular measure can be agreed upon as a law for a people we need only ask whether a people could well impose such a law upon itself" (AK VIII, 38-39); "something which a people may not even impose upon itself, can still less be imposed on it by a monarch; for his legislative authority depends precisely upon his uniting the general will of the people in his own" (AK VIII, 39-40). What a church cannot do, *a fortiori* cannot be imposed by the state, and still less by a university.

Although Kant seems much more interested in defending freedom *from* institutions, his Enlightenment essay also contains a powerful argument for freedom *within* institutions, albeit shrouded in an issue of ecclesial politics: a community whose legitimacy depends on consensus can only partially and temporarily limit the (private) use of reason within itself. Kant's Enlightenment is more than a virtual

[21] Kant, *Political Writings*, cit., 57.

and indeterminate attitude[22]: for it challenges the legal and political legitimacy of the very institutions of the private use of reason.

Institutions, whether governmental or not, that do not include the legal conditions for their own discussion and revision are simply illegitimate, even more so when they claim to be based on a choice made freely and legally in the past. There must be political alternatives: human beings are more than machines (AK VIII, 42).

Thus, to the question, "Why should the government fund scholars whose research may contradict its interests and purposes?" we must add a question that is not only ethical but also political: how can a bureaucratic research institution controlled by the state be legitimized not only scientifically but also politically?

3. Der Streit der Fakultäten: officials *and* scholars?

3.1. *Conflict and war*

The secret article that Kant added as a second supplement to the 1796 edition of the *Perpetual Peace* anticipates the topic of the conflict of the faculties, by explaining why states should grant philosophers freedom of speech on the

[22] Michel Foucault, *Dits et écrits*, Gallimard, Paris 1984, IV, 562-78 https://foucault.info/documents/foucault.questcequeLesLumieres.fr/) instead reads the Kantian Enlightenment as «une attitude, un êthos, une vie philosophique où la critique de ce que nous sommes est à la fois analyse historique des limites qui nous sont posées et épreuve de leur franchissement possible», making everyone able to accommodate themselves in any institution (see for example Bashar Sunkara, *Can We Criticize Foucault?*, «Jacobin», 2014, https://jacobinmag.com/2014/12/foucault-interview/).

«conditions under which public peace is possible» (Ak VIII, 368).

> The jurist, who has taken as his symbol the scales of right and the sword of justice, usually uses the latter not merely to keep any extraneous influences away from the former but will throw the *sword* into one of the *scales* if it refuses to sink (*vae victis*)[23]. Unless the jurist is at the same time a philosopher, at any rate in moral matters, he is under the greatest temptation to do this, for his business is merely to apply existing laws, and. not to enquire whether they are in need of improvement. He acts as if this truly low rank of his faculty were in fact one of the higher ones, for the simple reason that it is accompanied by power (as is also the case with two of the other faculties). But the philosophical faculty occupies a very low position in face of the combined power of the others. Thus we are told, for instance, that philosophy is the *handmaid* of theology, and something similar in relation to the others. But it is far from clear whether this handmaid bears the torch before her gracious lady, or carries the train behind. (Ak VIII, 369)

In Kant's university, the Faculty of Philosophy, which housed basic research[24], was an inferior faculty that prepared students for the higher studies of theology, law, and medicine. The former, we would say today, was "self-referential" and "self-serving"; the latter, on the other hand, was in the service of the state and related to it[25].

[23] "Livy" o "Titus Livius",*Ab urbe condita*, http://data.perseus.org/citations/urn:cts:latinLit:phi0914.phi0015.perseus-lat2:48.9.

[24] Encompassing both historical knowledge (history, geography, philology and the humanities, natural sciences) pure rational knowledge (pure mathematics and pure philosophy, the metaphysics of nature and of morals) (SdF, Ak VII 28),

[25] Charles E. McClelland, *State, Society and University in Germany: 1700-1914,* Cambridge University Press, Cambridge 1980, 66.

The Faculty of Law, wielding the governmental sword, is both bureaucratically stronger and scientifically weaker. Like Brennus, it may have the last word, but for that very reason it has no scientific authority, because the reasons of reason are not those of the sword, even when it comes to determining whether the scales are rigged or not.

It is not by chance that the question of war brings out the conflict of faculties. In order to overcome war as a means of settling international disputes, it must first be recognized that although there are wars that are, or seem to be, sadly necessary, there can be no just wars in which one side is right and the other is wrong[26]: the very use of force delegates the resolution of the dispute no longer to law, but to force, as in an ordeal[27]. The faculties in the service of the government, with their borrowed sword, will make the interest of the government, which may well be that of war[28], and devise arguments in favor of its *ius ad bellum*. It takes independent scholars who, unlike philosopher-kings, are far from power and free to make public use of reason to say that the only just war is the war that ends forever.

Calling an article that actually demands that philosophers be allowed to speak freely and publicly "secret" is an ironic device for claiming (and using) freedom of speech while seemingly asking for permission. Since «it may seem

[26] Kant reverses the position of one of the founders of modern international law, Alberico Gentili, for whom *Bellum iuste geri utrinque* (*De Jure Belli Libri Tres*, 1877, https://archive.org/details/dejurebellilibri00gent), I.VI), because war is justified by the sovereign reason of the states.

[27] *Zum ewigen Frieden*, VI preliminary article (Ak VIII, 346-347).

[28] Especially if the state's constitution is structured in such a way that those who decide to start a war do not bear the burden of its consequences (Ak VIII, 351).

humiliating for the legislative authority of a state, to which we must naturally attribute the highest degree of wisdom, to seek instruction from subjects», the stratagem of keeping this article secret may be advisable (Ak VIII, 369).This article should therefore be «objectively» public, since it belongs to public law, but «subjectively» it can be kept secret. But in order to listen to philosophers in secret, Kant explains, it is enough to let them speak freely. Thus, objectively, the contradiction will be resolved, for philosophers, once they have gained freedom of speech, will be able to publish in their books even the subjectively secret articles, possibly as supplements, as in the *Perpetual Peace*.

It is not prudence [*Klugheit*] that is at issue, but wisdom [*Weisheit, sapientia*][29]: the philosophers are not secret advisors to the prince because of some alleged worldly practice, but scholars who speak in public and can be heard by everyone. With a twist: in 1796, these scholars can also be professors at the inferior faculty of a cameralistic university, where reason is supposed to be put to a very private use.

3.2. *A "privatized" reason?*

The introduction to *The Conflict of the Faculties* (Ak VIII, 17) describes a cameralistic university: like a factory, it is organized into small companies called faculties, to which professors belong as public teachers, according to a division of labor established by the government; it grants ranks recognized by all, in imitation of noble titles, and enjoys a certain autonomy justified in an instrumental sense («only scholars can pass judgment on scholars as such»).

[29] Giuliano Marini, *Figure di uomo politico tra sapienza e prudenza. Considerazioni sulla prima appendice al progetto kantiano per la pace perpetua*, 2001, https://doi.org/10.5281/zenodo.12786521.

Moreover, scholars are classified according to an articulated social distribution of knowledge:

1. Scholars
    1. university scholars (incorporated)
    2. independent scholars:
        1. academicians
        2. solitary
2. Literati (officials or technicians of knowledge)
3. People (uncultivated)

Outside of the university corporation, there are independent scholars who gather in academies that deal, like workshops, with sections of the knowledge complex. There are also solitary amateurs who live in a kind of knowledge in the state of nature, not subject to public norms and rules.

The literati, on the other hand, are officials or technicians of knowledge who have attended university but work in the service of the government for purposes other than science. Their expertise, which depends on the work of scholars, must include at least empirical and practical knowledge of the statutes of their office. These officials, who may be clergymen, magistrates or physicians, are disciplined by the government because they have a legal influence on the people, and the theoretical content of their work is subject to the censorship of the faculties. Their power, therefore, is only executive and their use of reason is only private or limited because they address uncultivated people [*Idioten*], in a relationship similar to that between the laity and the clergy (Ak VIII, 18).

To sum up, the literati and a good part of the scholars are included in specific collective organizations. Only the uncultured people and the isolated amateurs are left out and seem to be directly related to the cosmopolitan society. But if being a scholar is mostly connected with belonging to

institutions concerned with learning itself, how will an effectively free public use of reason remain possible for them?

3.3. *The conscience of the clerks*

Kant emphasizes that the naming and subdivision of the faculties does not depend on the advice of scholars, but on the choice of the government (Ak VIII, 18). The faculties whose field of study enables the government to influence the people in a lasting way are called superior, because they are concerned with the motives that cause people to act (Ak VIII, 18-19). The faculty whose only interest is knowledge is called inferior. In other words, disciplinary divisions and their hierarchy are not primarily a matter of science, but of management and power: over the body, through medicine; over the state, through law; and over the soul, through theology.

Accordingly, the government sanctions the teachings of the higher faculties, which are thus given additional, extra-scientific authority. Professors, by the contract they sign when they are hired, agree to teach according to what the government prescribes (Ak VIII, 19). A contract ensures legal control over the choice of others with respect to certain acts[30]. Thus, science at the service of the state, and, we might add, at the service of other organizations such as churches, corporations, or political parties, seems legitimate if there are professors who are willing to freely sign a contract to teach its doctrines.

On the other hand, the government must not usurp the role of the professors by claiming to research and teach in their place: if it were to enter the scientific debate, it would expose itself to the criticism of the scholars, to the detri-

[30] Immanuel Kant, *Metaphysik der Sitten*, Ak VII 247.

ment of its authority. In a footnote, Kant praises the same British constitution he criticizes elsewhere precisely because it conceals the true holder of sovereignty (Ak, VII, 90; Ak VIII, 303): if the monarch's speech from the throne is to be considered the work of his ministers, the dignity of the former is not tainted by the errors it may contain, exposed to the scrutiny of parliament (Ak VII, 19n). Likewise, the higher faculties play a "ministerial" role: they teach doctrines sanctioned by the state, but under their scrutiny. Kant seems to accept the principle of state science, but only on the condition that it is not the state, if not nominally, but the university that evaluates science. Moreover, state-sanctioned doctrines can only be taught by professors under contract, with their consent.

The professor who teaches a state-sanctioned doctrine under contract is not required to sell his conscience. According to the Enlightenment essay, a clergyman may continue to exercise his ecclesiastical function only if his disagreement with the Church's doctrine concerns marginal matters; but if his disagreement is deeper, he would be better off resigning (Ak VIII 38). Religious conscience, like scientific integrity, is non-negotiable and cannot be given away by contract, provided, of course, that "ministerial" scientists have the will and the strength to follow its voice.

3.4. *A faculty that does not serve*

Even if we were to believe, without being able to see, that the consciences of the professors employed in the higher faculties were upright and truthful, their ministerial science would have no public guarantees.

> Therefore, it is absolutely essential that the learned community at the university also contain a faculty that is independent of

> the government's command with regard to its teachings; one that concerns itself with the interests of the sciences, that is, with truth. (Ak VII, 19-20)[31]

The cameralistic university was a university in the service of the state; therefore, the lower faculty, which did not serve any of the utilities of interest to the state, was at issue. But a dispute between faculties on the basis of utility is for Kant a structurally illegitimate conflict, «by reason of its form» (Ak VII, 29-32).

Those who seek only utility ask the scholars for operational answers to their problems (Ak VII, 30-31), not caring whether they are sound and what they are based on, but only that they work. They are similar to the clients of magicians and soothsayers, who are only interested in divination and healing and take their alleged magic for granted. Their position seems strong: they can afford to ask applied scientists to solve questions that they themselves pose. Moreover, as patrons and masters, they can avoid criticism, refrain from studying for themselves, and delegate the effort to problem-solvers in their service. But their cognitive passivity makes them theoretically superstitious and practically minor. They are superstitious because they rely on knowledge they believe in and whose professors they can order around but are unable to understand and demonstrate. They are also minor because they refuse to reason for themselves.

When minority and superstition afflict not only individuals but also states, the very legitimacy of their power and the knowledge they control is in jeopardy (Ak VII 31-32). For if everything is a question of utility, or rather of the utility that the strongest claims from time to time, why should we be-

[31] Kant, *Conflict of Faculties*, cit., 27-9.

lieve the witch doctors in the service of power? And if power seeks only its own usefulness, why should we obey it, except by force, as long as it is able to wield it?

This would be inevitable if the university were made up only of clerks and did not house scholars in the exclusive service of the interest of truth and with the freedom to publicly oppose "ministerial" professors (Ak VII 30): therefore, any regime that aspires to a legitimacy not based exclusively and precariously on force must recognize and protect the freedom of scholars who do not serve.

3.5. *Faculty of opposition*

What are the general conditions for a legitimate cognitive claim? We cannot hold a claim to be true simply because we are commanded to do so: not only is this morally impermissible, but we cannot even do it subjectively (AK VII 27). The autonomy of reason cannot be circumvented: to accept an idea as true, we must be convinced of it through reasoning and debate. Therefore, the general conditions for a legitimate cognitive claim, since they involve the autonomy of reason and the freedom of its public use, are also political.

> The rank of the higher faculties (as the right side of the parliament of learning) supports the government's statutes; but in as free a system of government as must exist when it is a question of truth, there must also be an opposition party (the left side), and this is the Philosophy Faculty's bench. For without its rigorous examinations and objections, the government would not be adequately informed about what could be to its own advantage or detriment (Ak VII, 35-36)[32].

[32] Ivi, 57-9.

On September 11, 1789[33], the French Constituent Assembly split between left and right when, in the debate over the king's veto over legislation, the monarchists in favour of an absolute veto moved to the right of the president, while those in favour of a suspensive veto moved to the left. At stake was the power of the king's government against the power of the people's representatives. With this episode in mind, the contemporary readers of Kant could well understand what he meant: a free university is structurally opposed to the government and, in a republican regime, must have the same rank and protection as the parliamentary opposition.

The opposition of the faculty does not only take place in the university lecture hall, but also directly in front of the people. In the second part of *The Conflict of the Faculties*, dealing with the Faculty of Law, Kant seems to deny this (Ak, VII, 89). However, the obliquity of his language is rather similar to that of his response to Frederick William II's cabinet order.

> Enlightenment of the masses is the public instruction of the people in its duties and rights vis-a-vis the state to which they belong. Since only natural rights and rights arising out of the common human understanding are concerned here, then the natural heralds and expositors of these among the people are not officially appointed by the state but are free professors of law, that is philosophers who, precisely because this freedom is allowed to them, are objectionable to the state, which always desires to rule alone; and they are decried, under the name of enlighteners, as persons dangerous to the state, although their voice is not addressed confidentially [*vertraulich*] to the people (as the people take scarcely any or no notice at all of it and of their writings) but is addressed respectfully [*ehrerbietig*]

[33] *Discussion sur la sanction royale, lors de la séance du 11 septembre 1789* https://www.persee.fr/doc/arcpa_0000-0000_1875_num_8_1_4968_t2_0610_0000_4

> to the state; and they implore the state to take to heart that need which is felt to be legitimate. This can happen by no other means than that of publicity in the event that an entire people cares to bring forward its grievances (*gravamen*). Thus the prohibition of publicness [*Publicität*] impedes the progress of a people toward improvement, even in that which applies to the least of its claims, namely its simple, natural right[34].

This text contains two opposing arguments:

1. The first asserts that the «public instruction» of the people about their «duties and rights vis-a-vis the state to which they belong» should be entrusted to philosophers, «free professors of law», since they are subject only to the law of reason, and not to professors of positive law.
2. For the second argument, philosophers do not address the people, who ignore them, but the state, through publicness. But why do philosophers need publicness if they address the state and not the people?

We find the answer on the immediately following page (Ak, VII, 90), where Kant explains that in the British constitution the people are deceived by a «mendacious publicity» that conceals the monarch's power in order to make it appear that the people's representatives limit it instead of being influenced by it. Surely the British government does not need to be informed of this deception, since it is itself the deceiver, while the public use of reason can be useful to enlighten the deceived, i.e. the people. On the other side of the Channel, Kant can afford to state more clearly what he can only hint at on the Continent[35]: if the government is to have any legitimacy, it must not only pay professors spe-

[34] Kant, *Conflict of Faculties*, cit., 161. I replaced "publicity" by the less ambigous "publicness".

[35] On this strategy see Domenico Losurdo, *Autocensura e compromesso nel pensiero politico di Kant,* Bibliopolis, Napoli 2007.

cifically to be criticized, but to be criticized in public, and it must also provide and secure the infrastructure that enables them to do so.

> A French minister summoned some of the most esteemed merchants, to ask them for suggestions on how he could lift the fortunes of commerce, as if he intended to choose the best notice. After one had suggested this and the other that remedy, an old merchant, who had hitherto remained silent, took to saying: build good roads, mint good coinage, grant a streamlined right in matters of exchange, and so on; as for the rest, 'let us do it!' This would be the answer that the faculty of philosophy should give, if the government asked it what doctrines it should impose on scholars: only not to impede the progress of ideas and sciences. (AK VII, 19n)

Kant not only emptied the cameralistic university by contaminating it with the freedom of the public use of reason, but he also allowed himself to disrupt the meaning of liberal *laissez faire*[36] by transferring it from the market to the (university) factory. Since he was dealing not with a republic but with an absolute monarchy, he was also able to avoid the politically easy but philosophically heteronomous justification that liberal education is indispensable for the formation of democratic citizens and to make a much bolder claim. If the state does not want to stand by force alone, it is not the faculties that need the government, but the government that needs (and must finance) the faculties, especially and above all in their non-ministerial function of opposition to the government itself, whatever form it may take.

[36] For the origin of the expression *laissez faire,* see John Maynard Keynes, *The end of laissez-faire*, 1926, now in https://panarchy.org/keynes/laissezfaire.1926.html

Andrea Gentile

The Kantian Concept of «Limit» in Relation to «Moralitas», «Legalitas», «Bildung» and «Democracy»

Immanuel Kant, in his essay *Beantwortung der Frage: Was ist Aufklärung?,* regarded as a manifesto of the German Enlightenment and published in 1784 in the «Berlinische Monatsschrift», observes that *Aufklärung* is marked by autonomy, «sapere aude», and the public, free and critical use of reason. «*Aufklärung* ist der Ausgang des Menschen aus seiner selbstverschuldeten Unmündigkeit. Unmündigkeit ist das Unvermögen, sich seines Verstandes ohne Leitung eines anderen zu bedienen. Selbstverschuldet ist diese Unmündigkeit, wenn die Ursache derselben nicht am Mangel des Verstandes, sondern der Entschließung und des Mutes liegt, sich seiner ohne Leitung eines andern zu bedienen. *Sapere aude!* Habe Mut, dich deines eigenen Verstandes zu bedienen! ist also der Wahlspruch der Aufklärung. […] Der öffentliche Gebrauch seiner Vernunft muß jederzeit frei sein, und der allein kann Aufklärung unter Menschen zustande bringen»[1].

Human Freedom in the «public use of reason», which is a peculiar achievement of the German *Aufklärung*, in its ad-

[1] Immanuel Kant, *Beantwortung der Frage: Was ist Aufklärung?*, in Id., *Was ist Aufklärung? Ausgewählte kleine Schriften,* with an introduction by E. Cassirer, edited by H. Brandt, Meiner Verlag, Hamburg 1999, 21.

dress to all human beings as endowed with reason, implies the affirmation of equality, justice, tolerance, democracy and a renewed critical analysis of the world of history and nature. Claims of equality, freedom, and a religion reduced to *moralitas* and purified of the superstition of positive religions, arise from the conviction that there is an authentic and universal human nature, identical in its fundamental determinations. In recalling this concept of human nature, in the *Institutiones jurisprudentiae divinae*, Thomasius defines *ius naturae* as «the divine law written in the hearts of all men, which obliges them to do what is necessarily in conformity with the nature of rational man and to abstain instead from what is repugnant to that reason»[2].

The constant reminder of that nature makes it possible to presuppose a universal capacity for understanding on the part of all men that makes possible the task of «Enlightenment of reason» and on which is based the construction of a state whose laws, insofar as they respect the rights of nature, are not tyrannical. Reason, nature, spontaneity and creativity have a central significance in the *Aufklärung*: reason is common by nature to all men, and its proper use emerges spontaneously from their deep and authentic nature, when this has been purified from superstition, ignorance and «fanaticism» (*Schwärmerei*). «Durch diese kann nun allein dem *Materialism*, *Fatalism*, *Atheism*, dem freigeisterischen *Unglauben*, der *Schwärmerei* und *Aberglauben,* die allgemein schädlich werden können, zuletzt auch dem *Idealism* und *Skeptizism*, die mehr den Schulen gafährlich sind, und schwerlich

[2] Christian Thomasius, *Institutiones jurisprudentiae divinae libri III: in quibus fundamenta iuris naturalis secundum hypotheses illustris Pufendorffi perspicue demonstrantur*, Scientia Verlag, Amsterdam 1994, 155.

ins Publikum übergehen können, selbst die Wurzel abgeschnitten werden»[3]. Critique, then, means not only the examination of the limits of reason, but also the analysis of the internal constitutive structure of knowledge in which philosophy aims to determine: a) the «sources» of human knowledge; b) the «extent» of the possible use of human knowledge; c) the «limits of reason» (*Grenzen der Vernunft*).

Within this horizon, the German Enlightenment caused a profound turning point and revolutionary change in the sphere of Western philosophy and culture in the 18th century. Enlightenment reason presents itself as a strictly and pragmatically limited reason and makes this finiteness its boast; in fact, the more it acknowledges itself as limited, the more it asserts its dominance in the field it recognises as its own and legitimate. This field is experience analysed as the multiplicity and complexity of natural, historical and social phenomena. In the Enlightenment, the conception of humanity, reason and knowledge brought to completion that detachment from tradition that had been implemented in various fields of culture, science and society and entailed – as a fundamental aspect of independence and autonomy – the primacy of the free, creative and critical use of reason.

1. *The «Berlinische Monatsschrift» and the German* Aufklärung

The journal «Berlinische Monatsschrift» was the most important organ of the German *Aufklärung*: founded in 1783 and edited by Johann Erich Biester and Friedrich Gedike, it was published in Berlin from 1783 to 1796. Later, under Biester's direction, publication continued under other

[3] Immanuel Kant, *Kritik der reinen Vernunft*, edited by G. Mohr and M. Willaschek, Akademie Verlag, Berlin 1998, BXXXV.

titles: from 1797 to 1798 as «Berlinische Blätter» and then until 1811 as «Neue Berlinische Monatsschrift». The «Berlinische Monatsschrift» had hundreds of contributors, among whom were many of the best philosophers and intellectuals of the time. Johann Erich Biester invited Kant to write and publish several of his essays in the journal «Berlinische Monatsschrift». The many contributors to the «Berlinische Monatsschrift» and the members of the Berlin «Gesellschaft von Freunden der Aufklärung» (a society that was named the «Berliner Mittwochsgesellschaft») shared the orientation of Enlightenment reason, in its autonomy and critical spirit, aimed at eradicating the prejudices, superstitions and fanaticisms of the time.

In the journal «Berlinische Monatsschrift» (December 1783 issue), the Berlin Lutheran pastor Johann Zöllner published an article entitled: *Ist es rathsam, das Ehegebundnis nicht ferner durch die Religion zu sancieren*[4]. Precisely in the interest of the state and in favor of a differentiation of powers, Zöllner intended to defend the religious marital union. Although he joined the «Gesellschaft von Freunden der Aufklärung», his article is deeply critical of those who use the term «Aufklärung» without knowing its cultural, philosophical, social, religious and political meaning and purpose. Notably, in a note to his article, Johann Zöllner inserted a provocative remark criticizing the proponents of the Enlightenment, arguing that none of them has been able to provide an adequate and complete answer to the question «*Was ist Aufklärung?*»: no one, according to Zöllner, had specified the characteristics of the «Enlightenment of society» that the *Aufklärung* wanted to implement. «This question that is almost as important as asking "what is truth?" should

[4] *«Berlinische Monatsschrift»*, III, 1783, 508-17.

also be answered, before we realise the Enlightenment! But this answer – writes Johann Zöllner – I have not yet found anywhere»[5].

Zöllner's article was occasioned by critical discussion regarding another article, written by Johann Erich Biester, editor together with Friedrich Gedike of the «Berlinische Monatsschrift», but published anonymously under the title: *Vorschlag, die Geistlichen nicht mehr bei Vollziehung der Ehen zu bemühen*[6]. Zöllner's footnote was only the last offshoot of an in-depth critical discussion that took place in the secrecy of the Berlin «Mittwochsgesellschaft» meetings. This central question («*Was ist Aufklärung?*»), initially relegated to the margins of the article by Johann Zöllner, later proved to be rich in consequences and extremely fruitful for developments in the history of philosophy in the German Enlightenment. Within a year, the answer to this question would be given by two of the most influential philosophers of the Enlightenment: Kant and Mendelssohn[7]. In promoting the journal «Berlinische Monatsschrift», the editors Johann Er-

[5] Ivi, 516.

[6] Ivi, 265-76.

[7] In 1784 Moses Mendelssohn published in the journal «Berlinische Monatsschrift» the article, *Über die Frage: was heisst aufklären?* The core of this paper focuses on the correlation between the terms «Aufklärung», «Kultur» and «Bildung». The term «Aufklärung» is marked by a free, active and critical orientation of reason. The formation (*Bildung*) of human beings in the Enlightenment implies a process of orientation and rational autonomy within civil society, with ethical respect for the rights and duties of each of its members. See Moses Mendelssohn, *Über die Frage: was heisst aufklären?*, «Berlinische Monatsschrift», IV, September 1784, 193-200, in *Gesammelte Schriften*, Frommann-Holzboog, Stuttgart und Bad-Cannstatt 1981, 6 vols., I, 115-9, in Ehrhard Bahr (ed.), *Was ist Aufklärung? Thesen und Definitionen*, Reclam, Stuttgart 1974, 3-8.

ich Biester and Friedrich Gedike will write that the «concept of Enlightenment will be analysed by two philosophers (Mendelssohn and Kant) with more relevance than any other German book on the market»[8].

2. Beantwortung der Frage: Was ist Aufklärung?

In 1784 Immanuel Kant published in the «Berlinische Monatsschrift» his response to Johann Zöllner's question. In his essay *Beantwortung der Frage: Was ist Aufklärung?*, the Königsberg philosopher analyzes the philosophical concept of «*Aufklärung*», urging human beings to make a free and critical use of reason. The structure of the Kantian essay is divided into four basic parts: an initial part, in which Kant lays out the central thesis of the answer to the question «what is the Enlightenment?», i.e., the answer proper; a second part, focusing on the idea of freedom of thought and the vocation for the autonomy of reason, where a semantic distinction between the public and private use of reason is defined; a third part, focusing on the limits of the public use of reason; and finally, a concluding part, in which Kant critically analyzes the historical period in which he lives (the Age of Enlightenment) and asks whether it is possible to call his age as «enlightened».

The central thesis of the essay *Beantwortung der Frage: Was ist Aufklärung?* is expressed in the statement that opens the paper: «Aufklärung ist der Ausgang des Menschen aus seiner selbst verschuldeten Unmündigkeit»[9]. By the term «Unmündigkeit» Kant refers to a condition of passive subservience, of slavery, characterized by the «inability to make use

[8] «Berlinische Monatsschrift», III, 1783, 365.

[9] Kant, *Beantwortung der Frage*, cit., 21.

of one's own intellect without the guidance of another, on whom one relies as a guardian». In the course of our lives, it is often much easier and more convenient, out of laziness and cowardice, to delegate our choices to others, rather than taking responsibility for them, letting others think for us. «Faulheit und Feigheit sind die Ursachen, warum ein so großer Teil der Menschen, nachdem sie die Natur längst von fremder Leitung frei gesprochen (*naturaliter maiorennes*), dennoch gerne zeitlebens unmündig bleiben; und warum es anderen so leicht wird, sich zu deren Vormündern aufzuwerfen. Es ist so bequem, unmündig zu sein. Habe ich ein Buch, das für mich Verstand hat, einen Seelsorger, der für mich Gewissen hat, einen Arzt, der für mich die Diät beurteilt, u.s.w.: so brauche ich mich ja nicht selbst zu bemühen. […] Es ist also für jeden einzelnen Menschen schwer, sich aus der ihm beinahe zur Natur gewordenen Unmündigkeit herauszuarbeiten. […] Satzungen und Formeln, diese mechanischen Werkzeuge eines vernünftigen Gebrauchs oder vielmehr Mißbrauchs seiner Naturgaben, sind die Fußschellen einer immerwährenden Unmündigkeit»[10].

This «eternal underage» attitude is so ingrained in human beings that it is not easy to overcome. However, Kant suggests a method to initiate the process of getting out of this «passive slavery»: encouraging the public use of reason in all fields of our existence. The Enlightenment of consciences is possible, only by ensuring «freedom of thought» and giving space to free thinkers in order «to spread the spirit of a rational appreciation for both their own worth and for each person's calling to think for himself»[11]. Thinking freely and autonomously assumes a central role because

[10] Ivi, 22.
[11] Ivi, 23.

every human being has his own «vocation» potentially inherent in his subjectivity: a personal call to which each person can only respond spontaneously, according to conscience and without external imposition. «Selbstdenken heißt den obersten Probierstein der Wahrheit in sich selbst (d.i. in seiner eigenen Vernunft) suchen; und die Maxime, jederzeit selbst zu denken, ist die *Aufklärung*»[12].

To the lack of decision, courage and critical autonomy of reason in which the state of «Unmündigkeit» is expressed, Kant contrasts what for him is the motto of the *Aufklärung*: *Sapere aude!*, that is, «Have the courage to use your own understanding!». The expression *Sapere aude!* («Dare to know!», but also translatable as «Have the courage to know!») is a Latin exhortation, the earliest attestation of which can be traced to Horatius (*Epistole* I, 2, 40). In one of his letters, addressed to his friend Maximus Lollius[13], Horatius offers a series of precepts, all based on the philosophy of «aurea mediocritas». These include an invitation to «resolve to be wise», devoting oneself to honest studies and occupations, in honor of the autonomy of reason, the search for truth and freedom of thought. Horatius' expression «*Sapere aude!*» is taken up by Kant in his essay *Beantwortung der Frage: Was ist Aufklärung?* which makes it the motto and core of the German Enlightenment: «*Sapere aude!* Habe Mut, dich deines eigenen Verstandes zu bedienen! ist also der Wahlspruch der Aufklärung»[14].

[12] Immanuel Kant, *Was heisst: sich im Denken orientieren?*, in Id., *Schriften zur Metaphysik und Logik*, *Wekausgabe*, Band V, *Werke in zwölf Banden*, edited by W. Weischedel, A.A. VIII, 133-47, Suhrkamp, Frankfurt am Main 2000, 283.

[13] Quintus Horatius Flaccus, *Epistola* II, Book I, *Ad Lollium*, 40.

[14] Kant, *Beantwortung der Frage*, cit., 21.

3. *The «private» and «public» use of reason*

In Kant's philosophy, freedom leads to the full use of human reason in its critical and creative autonomy[15]. «Zu dieser Aufklärung aber wird nichts erfordert als *Freiheit*; und zwar die unschädlichste unter allem, was nur Freiheit heißen mag, nämlich die: von seiner Vernunft in allen Stücken öffentlichen Gebrauch zu machen»[16]. But within this horizon it is necessary to distinguish between a «public use» and a «private use» of reason. The first use refers to the intellectual freedom of the scholar; the second use concerns the role of an individual as a member of a community, invested with responsibilities that affect the general interest of our society. Each of us may find ourselves having to limit the use of our reason, obeying what the common ends require even if in private we do not share them. In this regard, Kant offers two examples: that of the soldier required to abide by discipline and the pastor required to abide by the creed of his church in carrying out his ministry. «Nun höre ich aber von allen Seiten rufen: räsonniert nicht! Der Offizier sagt: räsonniert nicht, sondern exerziert! Der Finanzrat: räsonniert nicht, sondern bezahlt! Der Geistliche: räsonniert nicht, sondern

[15] For a historical-critical analysis of the concept of «freedom» in Kant's transcendental philosophy and the semantic correlation between «creative freedom» and «critical autonomy of reason», see Paul Guyer, *Kant and the Experience of Freedom*, Cambridge University Press, Cambridge 1996; Klaus Düsing, *Subjektivität und Freiheit. Untersuchungen zum Idealismus von Kant bis Hegel*, Frommann Holzboog, Stuttgart 2013; Christopher Insole, *Kant and the Creation of Freedom: A Theological Problem*, Oxford University Press, Oxford 2016 and Henry Edward Allison, *Kant's Conception of Freedom. A Developmental and Critical Analysis*, Cambridge University Press, Cambridge 2021.

[16] Kant, *Beantwortung der Frage*, cit., 23.

glaubt! (Nur ein einziger Herr in der Welt sagt: räsonniert, so viel ihr wollt, und worüber ihr wollt; aber gehorcht!) Hier ist überall Einschränkung der Freiheit. Welche Einschränkung aber ist der Aufklärung hinderlich? welche nicht, sondern ihr wohl gar beförderlich? – Ich antworte: der öffentliche Gebrauch seiner Vernunft muß jederzeit frei sein, und der allein kann Aufklärung unter Menschen zu Stande bringen; der Privatgebrauch derselben aber darf öfters sehr enge eingeschränkt sein, ohne doch darum den Fortschritt der Aufklärung sonderlich zu hindern»[17].

In analysing the «public use of reason», Kant notes how it is necessary to take into account «in a first and fundamental measure» what is the «actual nature of humanity», what is his authentic and essential «destination»: advance in knowledge and be in full possession of the ability to choose freely and independently, relying on the critical use of reason. The subjective choice not to «enlighten oneself» is perfectly legitimate, but it must be clear at the same time that the renunciation of «enlightening oneself», which in itself is nonetheless a decision to remain in the state of «Unmündigkeit», dictated by a defect of will that leads to laziness or cowardice, cannot in any way translate into imposing a similar renunciation on future generations. In this way, the «sacred rights of humanity», which are such even for the sovereign, in whose will is concentrated the general will of the people, are denied and trampled upon.

In conclusion, Kant observes that «freedom of thought» will prospectively make the people capable of «freedom of action» (gradually leading them to civil liberty, i.e., political participation) and will cause the government eventually to understand that it is to its own advantage to treat human

[17] Ivi, 24.

beings in a manner consistent with their dignity. Kant recognises, however, that the age in which he lives in, is not yet an «enlightened» age, but only «an age of Enlightenment», that is, the beginning of a new historical phase that will lead to the emancipation of humanity in the future. The dignity of humanity is inherent in the freedom and critical autonomy of reason: this is a central horizon of the German Enlightenment and Kant's philosophy.

4. *Boundaries of reason*

The German Enlightenment claims the primacy of critical thinking, creative freedom and the autonomy of reason and makes the assertion and recognition of this autonomy in all fields of human life. Within this horizon, the German *Aufklärung* does not interpret reason as a fixed content of cognitions, or truths, but rather as a faculty in its free, active, creative and critical use. What reason is and what it can be, will be judged by its results and its function, recognizing its limits and fields of possibility. Critical philosophy is «autonomy»[18] because human reason «determines itself» and creates its own «field» (*Feld*), «ambit» (*Bereich*), and its own «limits» (*Grenzen*), according to a complete system.

From this perspective, Kant's critical philosophy is constituted as a philosophy of limit: tracing the «conditions of possibility» of knowledge in relation to its limits and in relation to its internal constitutive structure. The limits of reason and of human knowledge are connected with a philosophical analysis of the authentic and specific nature of subjective and creative activity of our reason: genesis, origin,

[18] Immanuel Kant, *Opus Postumum*, edited by E. Förster and M. Rosen, Cambridge University Press, Cambridge 2012, 138.

principles of cognitive and metacognitive processes. Determining the limits of human reason has a decisive function and role in Kant's criticism and in German *Aufklärung*: it is very important to relate our subjectivity to the limits of our reason, analysing the different conditions, fields, ambits and limits of possibility of our knowledge. In this horizon, the specific and authentic purpose of Kant's critical philosophy is to search and analyse: a) the origin of human knowledge; b) the extent of the use of our knowledge; c) the sources, principles and conditions of possibility of human knowledge; d) the limits of human reason.

Lessing's famous words that, the «true strength of reason» is not to be sought in the «possession of truths», but in the «critical, free and autonomous use of reason», find their confirmation throughout the philosophy of German *Aufklärung*. «It is not the truth that a man possesses or believes he possesses, but the sincere effort he has expended to conquer it, that makes a man's worth. It is not through possession (*Besitz*), but through the search (*Nachforschung*) for truth that his potentialities (*Kräfte*) increase and are strengthened, and only in this increase of potentialities does his ever-increasing perfection (*Vollkommenheit*) consist. […] The original strength of the spirit leads to the research and discovery of truth: this act is the germ and indispensable premise of every process of knowledge. The whole Age of *Aufklärung* understands reason in this meaning»[19].

[19] Gotthold Ephraim Lessing, *Eine Duplik*, 1778, in Id., *Sämtliche Schriften*, edited by K. Lachmann, Göschen, Leipzig, 1897, 13 vols. (first edition: 1838-1840), XIII, 23, in *Gesammelte Werke*, edited by P. Rilla, Aufbau Verlag, Berlin 1954-1958, 9 vols., VIII, 26-7.

In this perspective, fully interpreting the German Enlightenment's concept of reason, Kant's transcendental philosophy is a philosophy of limit in which rationality is connected to reflection in a critical-transcendental and reflexive-transcendental horizon. In the *Last Notes* of the *Opus Postumum* Kant observes that transcendental philosophy is the complex of the ideas of all the principles of not only theoretical-speculative, but also ethical-practical reason: reason can hypothesise and venture both in the theoretical field and in the practical field (ethical, anthropological-social and political) some legitimate use of its hypothetical and creative function. This use is constituted in the reflection according to which, «without the slightest offence being done to the laws of empirical use, reason opens up new paths unknown to it»[20].

The continuous rising from the particular to the universal, from the «conditioned» (*Bedingt*) to the «conditions of possibility» (*Bedingungen der Möglichkeit*) is the research process that characterises and constitutes the method of a transcendental philosophy that defines and constitutes itself according to a "trichotomy": a) the condition; b) the conditioned; c) the concept that originates and springs from the union of the condition with the conditioned[21]. The typical Kantian method is characterised by going back from the conditioned to the condition: this process can only be an effort «to revive (a word equivalent to "reflection" but more appropriate) experience in its internal conditions»[22], in its

[20] Kant, *Kritik der reinen Vernunft*, cit., B708/680.

[21] Immanuel Kant, *Kritik der Urteilskraft*, edited by O. Höffe, Akademie Verlag, Berlin 2008, 41.

[22] Emilio Garroni, *Senso e paradosso*, Laterza, Roma-Bari 1995, 286.

horizon that cannot be traced from the outside, and thus a necessary attempt to recognise the conditioned and the boundaries of experience in its internal conditions.

5. *The «art of education» and the «art of government»*

Immanuel Kant in his *Lectures on Pedagogy* (*Über Pädagogik*) delivered at the University of Königsberg observes: «There are two human inventions which may be considered more difficult than any others – the *art of government*, and the *art of education*. All the natural endowments of mankind must be developed little by little out of man himself, through his own effort. […] There is great potential in man, and it is up to us to unfold our natural dispositions proportionately and to give humanity all its unfoldment so that it reaches its goal»[23].

Education, which is related to Kant's concept of *Bildung*, has the task of developing and implementing all the potential inherent in our subjectivity and of which we do not yet have a full knowledge. Therefore, the work of education is progressive as well as rational: in the rational design, each generation and each educator inscribes their own discovery, their own experience in the development of humanity. «The only thing necessary is not theoretical learning, but the *Bildung* of human beings, both in regard to their talents and their character». This Kantian observation in his 1778 letter to Christian Wolke, director of the Philanthropin[24], outlines not only his mature sense of "Enlightenment" but

[23] Immanuel Kant, *L'arte di educare*, edited by A. Gentile, Armando Editore, Roma 2001, 94.

[24] The Philanthropin was an educational institute founded in Dessau in 1774. Its programme of study was based on Locke's and Rousseau's philosophy.

also the pedagogical role of his critical philosophy. According to Kant, «education is the greatest and most difficult problem that can be proposed to us. In fact, cognitions depend on education and education, in turn, progresses little by little as a result of those cognitions. Education is an art, the art of educating is pedagogy»[25].

A theory of education or a philosophy of education is a «very noble ideal: an ideal, however, is nothing more than the conception of a perfection that has not yet been found in experience, such as, for example, the ideal of a Republic governed by laws of justice. In the primacy of *moralitas* (pure moral rational legislation) is the realisation of a Republic governed by laws of justice possible?»[26].

Kant presents an Enlightenment reading of human history with the publication of the essay *Idee zu einer allgemeinen Geschichte in weltbürgelicher* (1784) in the «Berlinische Monatschrift». The Enlightenment is conceived according to a progressive philosophy of history, based on the role of human institutions. It is only with the *Aufklärung* that it is possible to move on to a further stage of «ethical discernment» in humanity, arriving at the identification of «determined practical principles», and thus, finally, a concordance with a pathologically extorted society in a moral horizon.

The absence of morality in public acts, even when they show themselves to be consistent with the intentions of nature, leads Kant to analyse the evolutionary condition of humanity, attributing to states, which monopolise politics through war, the greatest responsibility for keeping human beings in a miserable ethical condition.

[25] Kant, *L'arte di educare*, cit., 94.
[26] Ivi, 92.

«To a high degree we are, through art and science, *cultured*. We are *civilized* – perhaps too much for our own good – in all sorts of social grace and decorum. But to consider ourselves as having reached *morality* – for that, much is lacking. The ideal of morality belongs to culture; its use for some simulacrum of morality in the love of honour and outward decorum constitutes mere civilization. So long as states waste their forces in vain and violent self-expansion, and thereby constantly thwart the slow efforts to improve the minds of their citizens by even withdrawing all support from them, nothing in the way of a moral order is to be expected. For such an end, a long internal working of each political body toward the education of its citizens is required»[27].

In the *Kritik der praktischen Vernunft*, taking up what was written in the *Idee zu einer allgemeinen Geschichte in weltbürgelicher*, Kant analyses the boundaries between the «morality of intentions» (*Moralität*) and the «legality of actions» (*Legalität*), in a perspective whereby the former presupposes the latter. If the motive for the action is only external, the dictate of the norm, one has acted «in accordance with duty», evaluating the consequences that the action could have concretely brought about; quite different is acting «out of duty», in compliance with the dictate of the norm that can only be morally pure, because it is free and determined in the subject. If with the *Idee zu einer allgemeinen Geschichte in weltbürgelicher Absicht* Kant anticipated an element of his own future political theory (institutions play a fundamental role in shaping the legal and indirectly moral life of individuals), in the last period of Kant's philosophy, with the discovery of republicanism, the focus of investigation is definitively

[27] Immanuel Kant, *Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht*, «Berlinische Monatsschrift», IV, 1784, 385-411.

on a legal-political path: inside and outside the state, one can employ the potential for the improvement of earthly coexistence, but in order to do so, an established epistemological distinction between the ethical and civil planes is necessary, clarifying the relationship that both have with the principles of a legal doctrine.

6. *«Moralitas» and «legalitas». Ethical community and juridical-political community*

The aim of the late Kant is to legally ground politics in a transcendental horizon, to link it to universally valid principles, while taking into account that these can only be applied in the particular conditions in which politics becomes «true politics» (*wahre Politik*). Pursuing this change of research direction, in *Religion within the Bounds of Bare Reason* (1793), with the third essay of the work (*The Victory of the Good over the Evil Principle and the Founding of a Kingdom of God on Earth*), Kant draws the fundamental distinction between «ethical community» and «juridical-political community». In an «ethical community» all laws tend to the morality of intentions, an entirely internal matter, not adjustable through external, positive norms; these, on the other hand, promote a «juridical-political community» and are aimed simply at the legality (*legalitas*) of actions, which falls under the senses, and not at internal morality.

«If an ethical community is to come about, then all individuals must be subjected to a public legislation, and all laws that bind them must be able to be regarded as commands of a common lawgiver. Now, if the community to be established were intended to be a juridical one, then the multitude unifying to form a whole would have to be itself the lawgiver (of the constitutional laws), because legislation

starts from the principle to limit the freedom of everyone to the conditions under which it can coexist with the freedom of everyone else according to a universal law, and here the universal will thus establishes a legal external coercion. But, if the community is to be an ethical one, then the people itself, as such a people, cannot be regarded as legislative. For in such a community all the laws are aimed quite precisely at furthering the morality of actions (which is something internal), [and] hence cannot stand under public human laws, whereas the public laws, by contrast – this would amount to a juridical community – are aimed only at the legality of actions, which meets the eye, and not at (inward) morality, which alone is at issue here»[28].

Kant's argument is that, whereas the people can quite properly be regarded as «itself the lawgiver» in a political community, the same cannot be the case for a community whose purpose is to further «the morality of actions», because legislation enacted by «the multitude unifying to form a whole» (as in a democracy) can never constitute more than public human laws; as we have seen, these are capable of enforcing only the "legality" of actions.

In an ethical community the morality of acts (*moralitas*) is «an entirely internal thing, which consequently cannot be regulated by public human laws, whereas external law, that would establish and form a juridical-political community, only aims at the legality of acts (*legalitas*), which falls under the senses, and not at internal morality»[29]. The conformity of an action to positive laws is *legalitas* (*Gesetzmäßigkeit)*,

[28] Immanuel Kant, *Religion within the Bounds of Bare Reason*, in *Comprehensive Commentary on Kant's Religion within the Bounds of Bare Reason*, edited by S. Palmquist, Wiley Blackwell, Oxford 2016, 293.

[29] *Ibidem.*

the conformity of the maxim of action (where by maxim is meant the subjective principle of action that the subject himself erects as a rule) to the law of duty is *moralitas* (*Sittlichkeit*). «The duties imposed by revealed, positive, heteronomous legislation can only be external duties, whereas ethical legislation refers in general to everything that is a duty»[30]. It is an external duty «to keep one's promises in accordance with a contract of employment (*legalitas*), but the command to do so solely because it is a duty (*moralitas*) without regard to any other impulse, belongs exclusively to internal moral legislation»[31].

The peculiarity of ethical legislation consists, in fact, «in ordering us to perform actions solely because they are duties and in erecting the fundamental principle of the duty itself regardless of where it comes from, as a sufficient impulse for the will»[32]. Thus, statutory positive laws are those that «without real external legislation do not oblige at all and have no binding character, whereas those laws whose binding character can be recognised even without external legislation (and this a priori by means of reason) are moral laws»[33].

Pure rational moral legislation, «through which the divine will is originally written in our hearts, forms not only the indispensable condition of all true religion, but is what properly constitutes religion»[34]. Kant observes that «a pure moral rational faith must be the foundation of every other

[30] Immanuel Kant, *Metaphysik der Sitten*, edited by B. Ludwig, Meiner Verlag, Hamburg 2023, 82.

[31] Ivi, 95.

[32] Ivi, 53.

[33] Ivi, 25.

[34] Ivi, 102.

faith and every revelation»[35]. The primacy of a rational faith is the primacy of pure rational moral legislation that imposes itself as an ought on the conscience of the moral subject. Human beings, however, always understands «by religion a faith of the church of worship, while religion is kept hidden in the depths of humanity and depends only on inner moral intentions»[36].

A faith that is based solely on an external adherence to statutes (*legalitas*) without a real internal moral adherence is «a faith of slaves and mercenaries (*fides mercenaria, servilis*) and cannot be considered sanctifying at all because it is not moral at all»[37]. In fact, «the latter (a rational moral faith) must be free and founded on pure sentiments of the heart (*fides ingenua*). The former (historical faith) flatters itself that it is pleasing to God through acts (of the cultus) which (although painful) have no moral value in themselves and are consequently only actions imposed by fear or hope, which even a bad person can perform; whereas the latter (a rational moral faith) in order to be pleasing to God necessarily presupposes a morally good intention»[38].

Kantian ethics is not a theory (of an abstract duty) alien to the world, but a self-reflection of practical reason and its behaviour in the dimension of morality. In ethics, Kant reflects on what is always already present in moral consciousness, thus on a fact, on an is. Reflection must lead to a moral principle, the foundation of duty. It is the irrefutable (apodictically certain) fact that moral consciousness is given: the consciousness of an unconditional obligation. Now,

[35] Kant, *Was heisst: sich im Denken orientieren?*, cit., 98.
[36] Kant, *Religion within the Bounds of Bare Reason*, cit., 116.
[37] Ivi, 125.
[38] Ivi, 128.

through the consciousness of unconditional obligation, reason announces itself as originally legislative: *sic volo sic iubeo.*

7. Zum ewigen Frieden. Ein philosophischer Entwurf

The semantic distinction between *moralitas* and *legalitas* and the problem of the boundaries between the ethical community and the juridical-political community undergo a critical reworking in the essay *Zum ewigen Frieden. Ein philosophischer Entwurf* (1795). Kant presents his writing as a hypothetical peace treaty, which should prevent the occurrence of any future conflicts. Kant's project is philosophical, not juridical: he does not want to construct an international legal system to maintain peace, but a republican political practice at the state and international level that keeps political change open. The work, published in 1795, is structured in six preliminary articles and three definitive articles, followed by two supplements (in which he investigates the conflicting state of nature and takes up the question of the «salvation clause» for philosophers) and in conclusion, two appendices (on the discordance and agreement between morality and politics), on which Kant's reflection focuses. Kant drew inspiration from the American Revolution that resulted in the Declaration of Independence of the United States of America and the Federal Constitution, as well as the French Revolution that culminated in the Universal Declaration of Human Rights. In his eyes, this showed that peoples cultivated ideas of freedom and justice and attempted to translate them into concrete historical forms.

The work is divided into two ideal parts in turn: the first considers the articles (preliminary and final) necessary to make perpetual peace possible. The second part deals with topics relevant to the development and realisation of Kant's

project (first and second supplements, and the two appendices).

In the first part Kant defines the conditions by which perpetual peace can be established within a community of states united in a league for peace[39]. In the preliminary articles, the philosopher analyses the conditions that individual states must fulfil. He considers that states must eliminate armies and may not incur debts to finance military actions. States may not interfere in the internal politics of other states, nor may they acquire new territories. They must also undertake not to perform any acts that might undermine trust in their word, whether in peace or war, so that they can always find their way back to agreement.

There are three definitive articles. Firstly, states must have a republican constitution, «the only constitution derived from the idea of the original contract on which all legal legislation of a people must be based»[40]. The constitution is based on the principle of the «freedom of the members of a society, the dependence of citizens on a single legislation and the equality of citizens before the law»[41]. The second article states that international law, with the aim of perpetual peace, is based on a «federation of free states». The third article states that «cosmopolitan law shall be limited to the conditions of universal hospitality», i.e.: states wishing to join the league for peace shall be respectful of the preliminary articles, and so be admitted to membership of the league.

[39] See Wolfgang Ertl, *The Guarantee of Perpetual Peace*, Cambridge University Press, Cambridge 2019.

[40] Immanuel Kant, *Perpetual Peace: a Philosophical Sketch*, in *Kant's Political Writings*, edited by H.S. Reiss, Cambridge University Press, Cambridge 2019, 115.

[41] *Ibidem.*

In the first supplement, Kant provides three arguments that guarantee the viability of the project. He intends to prove that peace is possible. Firstly, nature forces human beings to peace because the earth is limited in size and does not allow for unlimited expansion: for this reason, human beings are forced to find a way to live together. Secondly, peace is advantageous because it allows one to suspend the condition of permanent struggle with one's fellow human being. Finally, if perpetual peace is possible, then it is our duty to pursue it. We must therefore do everything in our power to achieve peace.

In the second supplement, Kant argues that philosophers should be free to discuss their theses, because they are the only ones who can provide unbiased political perspectives. In this sense, Kant argues that philosophers should not rule precisely because «the exercise of power inevitably corrupts the free judgement of reason». In the first part of the *Anhang* to *Zum ewigen Frieden*, titled *Über die Mißhelligkeit zwischen der Moral und der Politik in Absicht auf den ewigen Frieden*, Kant defines the figure of the «moralischer Politiker»: a kind of model of what a statesman should be in order to be able to contribute effectively to the realisation of world peace based on law. The central figure of the «moral politician» (*moralische Politiker*) is contrasted with that of the «political moralist» (*politische Moralist*). The latter subordinates the idea of law to politics, constructing a morality in accordance with his own interests as a statesman, while the former does exactly the opposite. The moral politician follows the dictates of moral reason, the political moralist uses morality for his political actions. Kant defends the first figure and hopes that the highest rulers will be of this kind, precisely so that they can follow the dictates of morality, in line with the ideal of perpetual peace.

It is with the first appendix to *Zum ewigen Frieden*, where Kant again reflects on the relationship between theory and praxis, that the legal foundation of politics is explored, as the causes of the discord between morality and politics are identified. This contrast can be neutralised by avoiding any «conflict of politics (*Politik*), understood as an applied doctrine of law (*ausübende Rechtslehre*), with morality (*Moral*), understood indeed as a doctrine of law, but theoretical (*theoretische*)»[42]. The steps forward compared to the previous decade are now evident: every political (practice) must proceed in accordance with a previous (and prevailing) rule provided by legal morality, since this identifies the general principles valid for the protection of the legality of actions; in this process, in parallel, politics is made independent of the other sphere of morality, understood as the «doctrine of virtue», aimed at investigating the morality of intentions. The ordering of political utility to universal principles of justice must never be questioned, but certainly the politician is required to identify concrete principles to make the legal foundation workable.

The theoretical skills provided by «political wisdom» (*Staatsweisheit*)[43], with which the criteria to inspire public action are identified, allow legal principles to be clarified; but in order for them to take shape in concrete cases, passing judgement, political action must also take into account the teachings of «political prudence» (*Staatsklugheit*)[44]. The relationship between legal principles and the guiding principle of publicity is effectively clarified when Kant frames the characteristics of «true politics» (*wahre Politik*). In *Per-*

[42] Ivi, 121.
[43] *Ibidem.*
[44] Ivi, 123.

petual Peace, the *wahre Politik* should not take a step without first submitting to morality, but, as is further specified in the *Vorarbeiten zum Öffentlichen Recht*, conditioned by the need to agree with the idea of public law, it should «not only proceed honestly, but also openly (*offen*)». In this perspective, Kant outlines the tasks of «politics as science» (*Politik als Wissenschaft*): «a system of laws for the protection of the rights and satisfaction of the people»[45]. True politics reveals the soul of «every true Republic», which can be encapsulated in «a representative system of the people, established to protect and guarantee rights on their behalf, through their delegates (deputies)»[46].

[45] Ivi, 128.
[46] *Ibidem.*

Franco M. Di Sciullo

Kant, Criticism and Publicity. A Few Doubts as to the Political Implications of the Public Use of Reason

1. In a remarkable book published in 1983, Howard Williams wrote that while «in principle Kant is a liberal», «in practice he is often conservative and authoritarian». A few years later, John Laursen argued that «Kant's writings on politics were indeed subversive» and Ronald Atkinson criticized the philosopher's rigorism, saying that «many startlingly authoritarian statements» can be found in his writings». Allen Rosen, for his part, sharing Williams' opinion, has written that, because of a «pervasive dualism», Kant's approach to politics is «characterized by alternating strands of liberalism and conservatism». In particular, «Kant's insistence on the legitimacy of existing authority, whatever its composition or disposition, goes far beyond the demands […] of moral or pragmatic gradualism». This dualism, according to Rosen, is partly due to Kant's reaction to historical events, and partly depends on the fact that Kant presents his political theory as a purely ideal theory of law[1]. All these writers, as well as many other scholars, emphasize the part played in Kant's

[1] Howard L. Williams, *Kant's Political Philosophy*, Blackwell, Oxford 1983, 128; John C. Laursen, *The Subversive Kant: The Vocabulary of "Public" and "Publicity"*, «Political Theory», XIV, 1986, 584-603; Ronald F. Atkinson, *Kant's Moral and Political Rigorism*, in Howard L. Williams (ed.), *Essays on Kant's Political Philosophy*, University of Wales

moral and political thought by what he called «the public use of reason», in connection with *«publicity»* and the freedom of public opinion, but none of them sees conservative implications in his treatment of these issues. To assess their criticisms, let us start from this point.

As far as I know, Kant's sole reference to a «public use of reason» can be found in his celebrated essay on enlightenment[2]. However, he stressed the importance of a free public discussion of one's ideas and opinions in several writings and lessons throughout the years. Starting from the *Preface* to the first edition of the *Critique of pure reason*, Kant uses the image of a court of justice to describe the role played by reason[3]. The aim of this court of justice, which is «none other than the critique of pure reason itself», is to safeguard reason in its rightful claims, removing those that are unfounded «not by mere decrees, but according to its own eternal and unchangeable laws»[4]. Kant adds in a footnote that, in the «genuine age of criticism», even religion and legislation

Press, Cardiff 1992, 228-48; Allen Rosen, *Kant's Theory of Justice*, Cornell University Press, Ithaca and London 1993, 115-71.

[2] Susan M. Shell, *Public Reason and Kantian Civic Education, or: Are the Humanities 'Dispensable' and If Not, Why Not?*, in Paul Formosa, Avery Goldman and Tatiana Patrone (eds.), *Politics and Teleology in Kant*, University of Wales Press, Cardiff 2014, 93.

[3] Onora O'Neill, *Constructions of Reason: Explorations in Kant's Practical Philosophy*, Cambridge University Press, Cambridge 1989, 15-27; Ead., *Reason and Politics in the Kantian Enterprise*. In Williams (ed.), *Essays on Kant's Political Philosophy*, University of Wales Press, Cardiff 1992, 50-80. Hannah Arendt, *Lectures on Kant's Political Philosophy*, The University of Chicago Press, Chicago 1982, 38, wrote that «it is clear that the art of critical thinking always has political implications».

[4] Immanuel Kant, *Kritik der reinen Vernunft* (1781), trans., *Critique of Pure Reason*, ed. by P. Guyer and A.W. Wood, Cambridge University Press, Cambridge 1998, (A XI-XII) 101.

cannot «seek to exempt themselves» from the judgment of reason without losing «that unfeigned respect that reason grants only to that which has been able to withstand its free and public examination»[5]. In another section of the book, that deals with «the discipline of pure reason with regard to its polemical use», Kant writes that its claim («Ausspruch») «is never anything more than the agreement of free citizens, each of whom must be able to express his reservations, indeed even his *veto*, without holding back»[6]. Starting from the premise that he «presupposes readers who would not want a just cause to be defended with injustice»[7], he equates the disposition to express thoughts and doubts for public judgment freely, in a rational critique of reason itself, with that, which, according to Hobbes, leads men out of the state of nature[8]. The connection between reason and public discussion is therefore a constitutive and essential feature of Kant's criticism: they must go hand in hand in «the genuine age of criticism».

Indeed, since the 1770s Kant had already begun to teach his students that men have «a calling to use their reason socially and to make use of it». For this reason, «everyone who has the *principium* of conceit, that the judgments of others are for him utterly dispensable in the use of his own reason and for the cognition of truth thinks in a very bad and blameworthy way» and behave as a *logical egoist*. Logical egoism «consists, then, in nothing but the presumed but often false self-sufficiency of our understanding»; or, in other words, in the belief to be «infallibly correct and incorrigible

[5] Ivi (A XI), 100-01.
[6] Ivi (A 738; B 766), 643.
[7] Ivi (A 750; B 778), 649.
[8] Ivi (A 752; B 780), 650.

in all […] judgments. And we easily see that this conceited mode of thought is not only completely ridiculous but is even most contrary to real humanity».

Those who think that their own understanding is perfectly self-sufficient refuse the idea that human understanding is essentially *communication*. In fact, «one cannot be certain whether one has judged rightly or not if one has not compared his judgments with the judgments of others and tested them on the understanding of others. For a cognition is not correct when it agrees with my private understanding but when it agrees with the universal laws of the understanding of all men». So, a learned man is expected to present his thoughts to the judgment of universal human reason[9].

In the *Anthropology* lectures, too, public discussion makes it possible a correct use of reason, the correction of wrong reasoning and a rational reaction to dogmatism and despotism, since it puts reason before the court of criticism. Logical egoists, who do not accept an objective standard of truth, refuse an open public discussion from a *private* point of view. Censorship, for its part, prevents free public debate from a *public* point of view. Therefore, it must be condemned by learned citizens, who have both a right and a duty to claim a full «freedom of the pen». This freedom is a means necessary to a common search for truth, under the condition of *pluralism*, «that is, the way of thinking in which one is not concerned with oneself as the

[9] *Vorlesungen über Logik*, 2 voll., Walter de Gruyter & Co, Berlin 1966; *Lectures on Logic*, trans. and ed. by J.M. Young, Cambridge University Press, Cambridge 1992, 118-19; 141; 323-24; Norbert Hinske, *Tra illuminismo e critica della ragione. Studi sul corpus logico kantiano*, Scuola Normale Superiore, Pisa 1999, 93-116.

whole world, but rather regards and conducts oneself as a mere citizen of the world»[10].

Although «publicity» becomes a *transcendental formula* both from an ethical and a juridical point of view in *Toward Perpetual Peace* (1795), according to Laursen all these writings demonstrate that it was part of Kant's philosophical project even before. Indeed, Kant's politics was a «politics of publicity». Flavio Silvestrini stresses this point, writing that the principle of publicity lies at the centre of Kant's republican system of rights[11].

An answer to the question: What is enlightenment? (1784) should be read against this background. Kant famously starts by saying that «*enlightenment is the human being's emergence from his self-incurred minority*» and by making some sarcastic remarks about those who remain minors for life (the majority of human beings, «including the entire fair sex»), because of their fear to take even a single step without the «walking cart» in which they have been confined by their benevolent «guardians». Then, in a much more serious way, he goes on to say that, it is difficult for a single individual «to extricate himself from the minority that has become almost nature». This is due, on the one hand, to the lack of confidence in freely using one's intellect, and,

[10] Kant, *Anthropologie in pragmatischer Hinsicht* (1798); *Anthropology from a pragmatic point of view*, *Anthropology, History, and Education*, ed. by G. Zöller and R.B. Louden, Cambridge University Press, Cambridge 2007, 240-42; Hinske, *Tra illuminismo e critica*, 97; Massimiliano Tomba, *La «vera politica». Kant e Benjamin: la possibilità della giustizia,* Quodlibet, Macerata 2006, 98-100.

[11] Laursen, *Scepticism and intellectual Freedom: The philosophical Foundations of Kant's Politics of Publicity*, «History of Political Thought», X, 1989, 439-55; Flavio Silvestrini, *The communicative foundation of Kant's Republicanism*, «Metàbasis.it», XIII, 2018, 69-94.

on the other, to the legal constraints to the exercise of this free use. «But that a public should enlighten itself is more possible; indeed, this is almost inevitable, if only it is left its freedom».

The concept of *public use of reason* connects publicity, pluralism, criticism and intellectual emancipation, since «for this enlightenment» – i.e. the emergence from self-incurred minority – «nothing is required but *freedom,* and indeed the least harmful of anything that could even be called freedom: namely, freedom to make *public use* of one's reason in all matters». Consequently, «the *public* use of one's reason must always be free, and it alone can bring about enlightenment among human beings». According to Kant, *public* use must be distinguished from *private* use. By public use of reason, it is to be understood «that use which someone makes of it *as a scholar* before the entire public of the *world of readers*», while «the private use of reason is that which one may make of it in a certain *civil* post or office with which he is entrusted». The relationship with «the entire public of the *world of readers*» makes it possible to overcome logical egoism, emancipate oneself from self-incurred minority, and realize enlightenment[12].

[12] Kant, *Beantwortung der Frage: Was ist Aufklärung?* (1784), trans., *An answer to the question: What is enlightenment?*, in Id., *Practical Philosophy*, ed. by M.J. Gregor and A. Wood, Cambridge University Press, Cambridge 1996, 17-18. According to Katerina Deligiorgi, *The Public Tribunal of Political Practical Reason: Kant and the Culture of Enlightenment*, in *Kant und die Berliner Aufklärung. Akten des IX Internationalen Kant-Kongresses*, Band V, von V. Gerhardt, R.P. Horstmann, R. Schumacher, Walter de Gruyter, Berlin and New York 2001, 149, «'private' here does not mean relating to personal matters, but signifies a limitation imposed upon the speaker, which amounts to a *privation»;* O'Neill, *Constructions*, 17-19.

2. It is now appropriate to take a closer look at some political consequences of the interaction between public use of reason and «freedom of the pen». In the *Conclusion* of the second part (*Against Hobbes*) of *On the common saying: That may be correct in theory, but it is of no use in practice*, published in 1793 (the year in which revolutionary France declared war against Britain and Spain and the First Coalition was formed), Kant revisited the issue in a clear polemical mood:

> *Freedom of the pen* […] is the sole palladium of the people's rights. For to want to deny them this freedom is not only tantamount to taking from them any claim to a right with respect to the supreme commander (according to Hobbes), but is also to withhold from the latter – whose will gives order to the subjects as citizens only by representing the general will of the people – all knowledge of matters that he himself would change if he knew about them and to put him in contradiction with himself. […] The universal principle by which a people has to appraise its rights *negatively* – that is, appraise merely what may be regarded as *not ordained* by the supreme legislation, as with its best will – is contained in the proposition: *What a people cannot decree for itself, a legislator also cannot decree for a people*[13].

Kant's first step is to highlight the existence of a sort of political relationship within the public sphere, expressed through a public discussion – a discussion that, for instance, is not in the reach of the «multitude» in the Hobbesian model. The public use of reason enables the citizens to submit legislation to the court of reason, as if they were themselves «the entire public of the *world of readers*». Moreover, the de-

[13] Kant, *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis,* (1793), transl., *On the common saying: That may be correct in theory, but it is of no use in practice,* in Id., *Practical Philosophy,* 302.

bate within the public sphere aims at an improvement of legislation, in a perspective of progressive amelioration of the decrees of the legislator, according to the judgment of what could be considered a 'learned public opinion'. Up to this point, what Kant writes about the «freedom of the pen» seems to fully fit into the process by which a Habermasian, self-aware public sphere is formed and explains why several Kant scholars place him within the tradition of liberalism and gradual reformism[14]. However, a few lines further down, Kant relates legislation with the principle of universalization, and this does not seem reconcilable with the judgment of public opinion[15]. Indeed, in the same article, Kant says that «the touchstone of any public law's conformity with right» is «*an idea* of reason, which, however, has its undoubted practical reality, namely to bind every legislator

[14] Jürgen Habermas, *Strukturwandel der Öffentlichkeit. Untersuchungen zu einer Kategorie der bürgerlichen Gesellshaft*, Suhrkamp Verlag, Frankfurt am Main, 1962, trans., *The Structural Transformation of the Public Sphere. An Inquiry into a Category of Bourgeois Society*, ed. by T. Burger and F. Lawrence, The MIT Press, Cambridge (MA) 1989, 102-29; Thomas McCarthy, *Enlightenment and the Idea of Public Reason*, «European Journal of Philosophy», III, 1995, 242-56; Howard L. Williams, *Liberty, Equality and Independence: Core Concepts in Kant's Political Philosophy*, in Graham Bird (ed.), *A Companion to Kant*, Blackwell, Oxford 2006, 364-82; Golan Moshe Lahat, *The Political Implications of Kant's Theory of Knowledge. Rethinking Progress*, Palgrave Macmillan, New York 2013; Flavio Silvestrini, *Il filosofo e lo Stato. Leggere il* Decennio politico *kantiano*, IF Press, Roma 2023. For an interesting discussion, Elizabeth Ellis (ed.), *Kant's Political Theory. Interpretations and Applications*, The Pennsylvania State University Press, University Park 2012.

[15] According to Tomba, *La «vera politica»*, 161-72, the Kantian principle of publicity is not the same as the core of a Habermasian public sphere; rather, it is the transcendental of public law, or, in other words, it is what enables the lawgivers to legislate as if the laws were given by the universal will of the people.

to give his laws in such a way that they *could* have arisen from the united will of a whole people». Lawgivers must therefore think as if each citizen were effectively autonomous from both a moral *and* a political point of view. In other words, a law is legitimate only if it could be approved by the common will of the people. The philosopher's reasoning is extremely complex. Kant argues that «if a public law is so constituted that a whole people *could not possibly* give its consent to […], it is unjust; but if it is *only possible* that a people could agree to it, it is a duty to consider the law just, even if the people is at present in such a situation or frame of mind that, if consulted about it, it would probably refuse its consent»[16].

This approach is clearly of a normative kind. Indeed, according to Katerina Deligiorgi, the very idea of the public use of reason «is not descriptive, but normative»[17]. The people's «frame of mind», expressed through public opinion, gives us an idea of how people would vote if, in a given situation, an election were called. However, it cannot tell us what is justifiable from a normative point of view: public opinion can either approve or disapprove of measures that must be considered just because a people, unconditioned by circumstances, in a purely rational «frame of mind» could approve them[18]. Moreover, a whole people's consent is to be seen as the consent of a political community and must not be confused with the empirical will of a majority. Kant's idea of

[16] Kant, *On the common saying*, 296-97.

[17] Katerina Deligiorgi, *Kant and the Culture of Enlightenment*, State University of New York Press, Albany, 2005, 59.

[18] According to O'Neill, *Constructions*, 25, Kant «makes it clear that what is at stake here is not a requirement to accommodate to actual public opinion [...]. The categorical imperative, applied to reason itself, demands that we reason only on principles that others *can* (not 'will' or 'would') act on».

a community is very different from Bentham's. It is not of an aggregative kind[19]. The word «whole» does not refer to a sum of individuals. The «united will» is more similar to a Rousseauian general will than to a consent of a majority of individual persons, since this can still be the expression of a particular (although majoritarian) will[20]. For instance, in Deligiorgi's example, it can be the result of the citizens' misunderstanding what is universally valid for what is acceptable for people like them[21].

A normative criterion is required a) in the legislator, b) in every citizen and, c) in the people as a whole. Let us start from the legislator. According to «the *transcendental formula* of public right», set out in *Toward perpetual peace*, «all actions relating to the rights of others are wrong if their maxim is incompatible with publicity». We can reach «the form of publicity» if we stick to «a criterion to be found *a priori* in reason», «after abstracting […] from everything empirical that the concept of the right of a state or the right of nations contains». Therefore, a lawgiver is required to consider the citizens as members of a virtual deliberative process that «is not to be regarded as *ethical* only […] but also as *juridical*». Just as members of the 'public of readers' should free them-

[19] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, ed. by J.H. Burns and H.L.A. Hart, Clarendon, Oxford 1996, 12: «The community is a fictitious *body*, composed of the individual persons who are considered as constituting as it were its *members*. The interest of the community then is, what? – the sum of the interests of the several members who compose it».

[20] Allen Wood, *Kant's Principles of Publicity*, in Formosa, Goldman, Patrone, *Politics and Teleology*, 76-91 (77-9). However, Lahat, *The Political Implications*, 168, stresses the differences between Kant's and Rousseau's ideas of general will.

[21] Deligiorgi, *Kant and the Culture*, 66.

selves from logical egoism, it is necessary to emancipate legislation from logical egoism, too, in order to protect the rights of individuals, even if only in a *negative* way, that is, «only for cognizing what is *not right* toward others»[22]. We may say that Kant overturns Hobbes' argument: as Williams has argued, sovereignty is not created by individuals giving up their independence[23]. Political power, based on pure practical reason, must always be exercised on behalf of the general will[24].

As to the citizen, he has to ask his own critical reason to distinguish between what a «whole people *could not possibly* give its consent to» and what is contrary to his own interests and feelings, but it is «*possible* that a people could agree to», and he is required to obey the decrees of pure practical reason. He must be aware of the fact that the idea of social contract goes beyond experience and has nothing to do with empirical consent. Moreover, he is supposed to understand, as O' Neill has argued, that there might be a considerable difference between what the whole people *cloud not* agree to and what they *would* agree to[25]. He must therefore both ensure compliance and give his rational assent to the law that *could* have been approved by the community as a whole.

As far as the whole people are concerned, the negative and normative character of the «simple idea of reason» leads Kant to a conclusion that is different from Rousseau's.

[22] See Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf von Immanuel Kant* (1795), trans., *Toward perpetual peace*, in Id., *Practical philosophy*, 347-8.

[23] Williams, *Liberty, Equality and Independence*, 374.

[24] Katrin Flikschuh, *Elusive Unity: The General Will in Hobbes and Kant*, «Hobbes Studies», XXV, 2012, 21-42.

[25] Onora O' Neill, *Kant and the Social Contract Tradition*, in Ellis, *Kant's Political Theory*, 25-41.

According to a social contract theorist like Rousseau, the general will depends on public reason, i.e. on the citizens' capacity to give common good priority over personal or partial interests: the act of voting implements the public use of reason and self-legislation is a consequence of rational autonomy, manifested in laws approved through the majority rule. According to Kant, for whom social contract is a pure idea of reason devoid of any empirical content, thanks to publicity, rational autonomy enables each citizen, through a public use of reason, to submit legislation to the court of reason. In this way, it is possible to reconcile politics with morals, without reducing morality to politics and without giving up politics, that is, without renouncing the external and coercive nature of laws[26]. In a few words, publicity and public use of reason act together. They go beyond logical egoism and unilateralism and can realize a society characterized by the morality of laws. In Habermas' phrase, «the juridical relationships […] originated in practical reason» and are conceived «as the possibility of a mutual constraint that, on the basis of general laws, harmonized with the freedom of every single person»[27].

[26] Kant, *Die Metaphysik der Sitten* (1797), trans., *The Metaphisics of Morals*, in Id., *Practical philosophy*, 375: «The positive concept of freedom is that of the ability of pure reason to be of itself practical. But this is not possible except by the subjection of the maxim of every action to the condition of its qualifying as universal law. […] These laws of freedom are called *moral* laws. As directed merely to external actions and their conformity to law they are called *juridical* laws; but if they also require that they (the laws) themselves be the determining grounds of actions, they are *ethical* laws, and then one says that conformity with juridical laws is the *legality* of an action and conformity with ethical laws is its *morality*»; *Silvestrini, Il filosofo e lo Stato*, 67-8.

[27] Habermas, *The Structural Transformation*, p. 103.

3. As we have seen, «freedom of the pen» is conceived by Kant as a normative principle. The condition of publicity implies the absence of censorship, the citizen's willingness to emancipate himself from logical egoism, and his ability to address the entire public of readers, to overcome all forms of authoritarianism, sectarianism and exclusivism[28]. This freedom lives in the citizen's participation in a universalization procedure that is different either from an aspiration to majority consensus or from a mere tension toward generalization. In fact, Kant makes it clear in the *Critique of Practical Reason* that universalizable is that which always and necessarily must be valid; generalizable is that which has a high probability of being accepted by a majority of citizens. According to Habermas, at first, «this agreement of all empirical consciousnesses, brought about in the public sphere, corresponded to the intelligible unity of transcendental consciousness»; later on, the concept of public opinion «obtained a constitutive significance, beyond its pragmatic value. Political actions, that is, those referring to the rights of others, were themselves to be able to be in agreement with law and morality only as far as their maxims were capable of, or indeed in need of, publicity». In other words, «politics

[28] Deligiorgi, *Universalisability, Publicity, and Communication: Kant's Conception of Reason*, «European Journal of Philosophy», X, 2002, 143-59; O'Neill, *Constructions*, 35-37; Id., *The Public Use of Reason*, «Political Theory», XIV, 1986, 523-51. Arendt, *Lectures*, 61, writes that the condition of publicity implies that «the more people participate in it, the better». On the other hand, according to Tomba, *La «vera politica»*, 83-4; 96, the word *Publikum* does not have any sociological meaning or implication; rather, it defines the context of a free and universal debate, open to anyone, provided he is capable of making use of public reason.

could not be conceived of exclusively as moral», but «legality was to issue from morality»[29].

Baynes has argued that the condition of publicity, rather than a stage in a process of universalization, is a kind of «interface», which, on the side of the citizens, allows the free expression of dissent, while it plays the role of a medium of universalization for the lawgiver[30]. However, according to Deligiorgi, when he writes about enlightenment and the public use of reason, Kant «is concerned with defining a process, of which, he claims, we have "distinct indications"»[31]. Moreover, the reader is led to conceive of both enlightenment and the public use of reason as processes especially if he pays attention to the role of communication, since communication is both the result of an intellectual and cultural capacity and a factor that tends to produce this capacity.

To appreciate the part played by the condition of publicity, it seems therefore necessary to understand what Kant means by saying that his age is the unenlightened age of the enlightenment[32]. Michael Clarke emphasizes Kant's «educa-

[29] Habermas, *The Structural transformation*, 108; 115.

[30] Kenneth Baynes, *The Normative Ground of Social Criticism. Kant, Rawls, and Habermas*, State University of New York Press, Albany 1992, 45.

[31] Deligiorgi, *Kant anf the Culture*, 57.

[32] Kant, *An Answer*, 21: «If it is now asked whether we at present live in an *enlightened* age, the answer is: No, but we do live in an *age of enlightenment*. As matters now stand, a good deal more is required for people on the whole to be in the position, or even able to be put into the position, of using their own understanding confidently and well in religious matters, without another's guidance. But we do have distinct [indications] that the field is now being opened for them to work freely in this direction and that the hindrances to universal enlightenment or to humankind's emergence from its self-incurred minority are gradually becoming fewer».

tional project», since «enlightenment, after all, is the point at which human beings recognize their autonomy and begin to take responsibility for their own affairs»[33]. In other words, in the age of enlightenment man has just begun to become aware that he has a long way to go and that he can only reach the goal through a continuous and free communication with others, under the authority of the court of critical reason.

In the *Critique of the Power of Judgment*, Kant writes that the liberation from prejudices in general and, above all, from superstition, which is prejudice *par excellence* («*in sensu eminenti*»), «is easy *in thesi*», but «*in hypothesi* it is a difficult matter that can only be accomplished slowly». Moreover, he stresses the normative character of the freedom of expression, since a broad-manner way of thinking entails an inner disposition to communicate with others, taking on their point of view. Here, Kant does not think of *the others* in their concrete (personal or sociological) specificity, but as the whole public of readers. In other words, one is not expected to identify with someone else or to share the judgment of other persons, but to adopt a way of thinking that «sets himself apart from the subjective private conditions of the judgment […] and reflects on his own judgment from a universal standpoint (which he can only determine by putting himself into the standpoint of others)»[34].

The judgment that is expected to be shared by the whole public of readers must have the normative characteristic of universality. It must be conceived in such a way that it can

[33] Michael Clarke, *Kant's Rhetoric of Enlightenment*, «The Review of Politics», LIX, 1997, 53-73 (61).

[34] Kant, *Kritik der Urtheilskraft* (1790), trans., *Critique of the Power of Judgement*, ed. by P. Guyer, Cambridge University press, Cambridge 2000, 173-6.

be shared by others – in particular, by those who may not share the ideas, experiences and feelings of the speaker or writer – without thereby assimilating itself to the judgement of some other person or of the majority of others in order to gain consensus[35]. In short, according to Tomba, it is a matter of deploying a capacity for «self-transcendence», as a function of «something common and in which everyone participates to a certain degree», not of «assuming one point of view to be truer than another»[36].

Although the rigidity of Kant's views regarding the obedience owed to legitimate rulers has often been emphasized, we must be aware of the fact that the public use of reason, in his thought, is certainly not resolved, as in Hobbes', into an irrevocable devolution; on the contrary, it continues to have normative value for rulers and decision-makers. The condition of publicity, for its part, safeguards both the possibility and the correctness of political communication and provides a criterion for the objective evaluation of fundamental rights legislation. However, the lack of a theory of government makes it difficult to understand what institutional guarantees should go hand in hand with moral ones to protect citizens from power abuses[37]. In fact, the posthumous manuscripts show that the philosopher had been well

[35] Arendt, *Lectures*, p. 43: «To accept what goes on in the minds of those whose "standpoint" (actually, the place where they stand, the conditions they are subject to, which always differ from one individual to the next, from one class or group as compared to another) is not my own would mean no more than passively to accept their thought, that is, to exchange their prejudices for the prejudices proper to my own station».

[36] Tomba, *La vera politica*, 93-4.

[37] Nicolao Merker, *Introduzione* in Kant, *Stato di diritto e società civile*, Editori Riuniti, Roma 1982, 17.

aware of this problem for a substantial part of his intellectual and political life[38]. According to Luca Scuccimarra, the readers of those pages notice a «sudden emergence» of a sort of «speculative continent», that is, that of modern sovereignty: a concept thought of in a «monolithic» and rigidly constructive way, not far from Hobbes'[39].

In addition to this, in his later years, Kant seems to have ceased to think that the corruption of power is possible even in well-ordered states, assuming that the condition of publicity could prevent both a degeneration of power and a conflict between political power and the people, even in the absence of an effective balance of forces. This is a clear example of a dissolution of politics into morality. In fact, the element of coercion cannot be oriented only toward citizens; it must include means and procedures aimed at avoiding and possibly correcting the degeneration of political power. A century before Kant, Locke was well aware of the fact that politics cannot be limited to a coherence of thought and a relationship between concepts. Politics copes also with the possible inconveniences of the empirical world, and this coping implies a relationship between different and contrasting actions[40]. Kant's conviction that «any resistance to

[38] Luca Scuccimarra, *Obbedienza resistenza ribellione. Kant e il problema dell'obbligo politico*, Jouvence, Roma 1998, 267-320

[39] Ivi, 285-87; Merker, *Introduzione*, in Kant, *Stato di diritto e società civile*, 15-6.

[40] According to Arendt, *Lectures*, 19, Kant «spelled out man's basic "sociability" and enumerated as elements of it communicability, the need of men to communicate, and publicity, the *public* freedom not just to think but to publish – the "freedom of the pen"; but he does not know either a faculty or a need for *action*». In a subsequent session, 40, she emphasises the fact that «Kant's position […] is not the position of the political man but of the philosopher or thinker».

the supreme legislative power, any incitement to have the subjects' dissatisfaction become active, any insurrection that breaks out in rebellion, is the highest and most punishable crime within a commonwealth, because it destroys its foundation»[41] may demonstrate his conservatism. However, his belief that this is «perfectly compatible» with the idea that «if the people's rebellion should succeed, that head of state would return to the status of a subject and must not start a rebellion for his restoration but also need not fear being called to account for his previous administration of the state»[42] arouses serious problems about the very coherence of his political thought.

4. According to Deligiorgi, Kant's approach to political obligation is quite different from Rousseau's. In Rousseau's *Social Contract*, citizens, as members of the body politic, are bound to the criterion of the public good and, at the same time, they exercise self-legislation through majority rule. Kant's shift to a purely normative level on the one hand causes a serious limitation on the (individual or collective) legislator, who finds himself unable to impose on citizens what they could not agree with[43]; on the other hand, it deprives the citizen of an effective participation in decision-making processes that determine the aims of a real political community. Are we facing a refusal to think of politics as made of confrontation and opposition, too, or as the result of a practical rationality destined not only to scrutinize the legitimate expectations of men, but also to confront their concrete sufferings? Nicolao Merker's criticism is severe on this

[41] Kant, *On the common saying*, 298.
[42] Id., *Towards perpetual peace*, 348.
[43] Deligiorgi, *Universalisability*, 148.

point: in his opinion, in the last decade of the eighteenth century Kant chose to lock himself in a metaphysical formalism[44].

However, we must be aware that, on Kant's part, there is no substantial devaluation of the criterion of publicity, no exchange of the freedom of the pen for a renunciation of political action, no fearful retreat to a sort of bourgeois security. Kant's freedom of the pen is not a bourgeois liberal claim, so to speak, in place of an inadmissible right of resistance. In fact, it aims at a normative production that integrates a shared reason, within a project of rationalization. According to Tomba's and Silvestrini's careful readings, it is an ideal claim that goes beyond any pattern of existing political power, to start a process of self-reform toward a form of historical republican freedom[45].

Nevertheless, one cannot help but wonder how a process of self-reform, which should take place through the public use of reason, can be realized when public reason renounces enacting its deliberations by means of political action, as if politics could do without living subjects. Because of the lack of a search for political legitimation in the real world, rational justification seems only, and always, value-oriented and unable to become goal-oriented.

The difference from any utilitarian system of public choice here is extremely clear. Kant's severe criticism of the «perplexing speculations» of those schools that, by defending «the principle of one's own happiness», are destined «to

[44] Merker, *Introduzione*, in Kant, *Lo Stato di diritto*, Editori Riuniti, Roma 1973, 28-9; Id., *Introduzione* in Kant, *Stato di diritto e società civile*, 47-8.

[45] Tomba, *La «vera politica»*, 169-70; Silvestrini, *Il filosofo e lo Stato*, 66-7.

ruin morality», since that principle can «give *general* rules but never *universal* rules», plays a role in marking an unbridgeable divide, that is particularly explicit in the *Critique of Practical Reason*[46]. However, the central issue appears to be another: Kant's normativism does not open up to mediation at all. The correctness of the rational construction is its only concern.

Kant confines the universalization process to personal reflection[47]. The empirical experience of inter-subjective cross-confrontation of wills, in his view, leads to *generalizations* that are quite different from the result of a *universalization* process. However coherent this may be as to an internal relationship of thought with itself, an effective overcoming of logical egoism does not appear possible without a practice of communication, and serious doubts arise in the reader who attempts to attribute a concrete meaning to the autonomy of judgment. Even on the assumption that this autonomy implies the capacity to reach the *universal*, not limiting oneself to the *general*, one cannot in fact see how it could manifest itself without an effective political participation. As Habermas puts it:

> Citizens are politically autonomous only if they can view themselves as the joint authors of the laws to which they are subject as individual addressees. The dialectical relation between private and public autonomy becomes clear in light of the fact that the status of such democratic citizens equipped with lawmaking competences can be institutionalized in turn only by means of coercive law. But because this law is directed to persons who could not even assume the status of legal subjects without subjective private rights, private and public autonomy of citizens mutually presuppose each other. […] There can be

[46] Kant, *Critique of Practical Reason*, 168-9.

[47] *Contra*, Deligiorgi, *Universalisability*, 147-9.

> no law at all without actionable subjective liberties that guarantee the private autonomy of individual legal subjects, and no legitimate law without collective democratic lawmaking by citizens who, as free and equal, are entitled to participate in this process[48].

Kant's search for what «objectively […] is to hold for everyone having reason and will» ends up avoiding, or making superfluous or misleading, the participation of the citizens and even the investigation of what is of value to them. Consequently, it creates a methodological (not merely empirical) disconnection between the «whole public of readers» and the sovereign public sphere. Such a disconnection evidently arises from the identification of the sovereign public sphere with the self-sufficient lawgiver's reason and runs the risk of casting doubts even on the effectiveness of the public use of reason. Therefore, any assessment of Kant's liberalism, conservatism, or dualism, should take into account his way of thinking the public use of reason in connection with his rejection of the legitimacy of the citizens' political action against absolutism. Is the first step toward enlightenment in the «true age of criticism» also the first step toward political participation within a republican constitution?

[48] Jürgen Habermas, *Die Einbeziehung des Anderen. Studien zur politischen Theorie*, Suhrkamp Verlag, Frankfurt am Main, 1996, trans., *The Inclusion of the Other. Studies in Political Theory*, The MIT Press, Cambridge (MA) 1998, 71-2.

Francesco Maiolo

Remarks on the Philosophical Dispositions of a Jurist: Hans Kelsen between Normativism and Voluntarism

Introduction

More than twenty-five years ago, Hans Kelsen studies seemed «deplorably underdeveloped» in three areas to Stanley Paulson: biographical research; philosophical research; periodization[1]. Much has been done for reconstructing Kelsen's intellectual profile. A remarkable contribution, for example, came from Thomas Olechowski's comprehensive biography[2]. Some of the sources of Kelsen's intellectual inspiration are still clouded for he was extremely well-read in various fields. There is no agreement on the nature and impact of the Kantian and neo-Kantian influences. Periodization remains a contested matter. A number of formulas are in use (constructivism; transcendentalism; logicism; empiricism; realism; irrationalism) to describe Kelsen's changing theoretical perspectives. It is also in the light of issues of the kind that his theoretical orientation remains difficult to

[1] Stanley L. Paulson, *Four Phases in Hans Kelsen's Legal Theory? Reflections on a Periodization*, «Oxford Journal of Legal Studies», XVIII, 1998, 153-66.

[2] Thomas Olechowski, *Hans Kelsen. Biographie eines Rechtswissenschaftlers*, Mohr Siebeck, Tübingen 2021 (1st ed. 2020). See also Rudolf A. Métall, *Kelsen. Leben und Werk*, Franz Deuticke, Wien 1969; Robert Walter, *Hans Kelsen. Ein Leben im Dienste der Wissenschaft*, Manz, Wien 1985.

comprehend exhaustively and unambiguously. This essay is a concise survey of some of the uncertainties surrounding the meaning of what Kelsen intended to do, and actually did, philosophically.

The burden of normativism

In his 1947 autobiography, Kelsen mentioned his early interest for the methodological problems related to the study of law, which he found to be lacking systematic foundation. Hermann Cohen's work, he wrote, induced him to pursue the 'purity of method'[3]. During the last quarter of the nineteenth century, separating the domain of law from all the others, with a view to consolidating its scientific status, become a priority[4]. Kelsen put his theoretical abilities at the service of the edification of legal knowledge as a 'normative social science'. This project, however, would never have taken place without a passion for philosophical reasoning. One way to appreciate his theory of normativity is to focus on his critique of the early German-speaking legal positivists. The reference is particularly significant because the will theory of law he initially criticized seems to be the epilogue of his theoretical adventure.

In philosophy, the noun *normativity* and the label *normativism* are associated with David Hume, who distinguished descriptive from prescriptive propositions. Morally relevant conclusions about what-ought-to-be, he wrote, cannot be properly inferred from merely descriptive statements about

[3] Hans Kelsen, *Autobiographie* (1947) in *Hans Kelsen Werke*, I, Matthias Jestaedt, Hans Kelsen-Institut (eds.), Mohr Siebeck, Tübingen 2007, 29-91, 36.

[4] Franz Wieacker, *Privatrechtsgeschichte der Neuzeit*, Vandenhoeck & Ruprecht, Göttingen 1967, 399-401, 416-30 (1st ed. 1952).

what-is[5]. Immanuel Kant proposed to consider ethical, legal, and religious principles as «spheres in which ideas alone render experience possible». As far as the knowledge of natural phenomena is concerned, experience is «the source of truth». Yet, with regard to all that is considered morally important, experience is «the parent of illusion». It is reprehensible, Kant asserted, to deduce the maxims which dictate what we ought to do, from what is actually done[6]. The German term *Normativismus* gained significance in legal studies once it began to be associated with Kelsen's formalist approach. In *Politische Theologie* Carl Schmitt presented normativism, along with decisionism and institutionalism, as one of the three main types of legal thinking. He employed the term polemically[7]. When the book first appeared in 1922, Schmitt had just moved from the University of Greifswald to the University of Bonn. At the time he was a rather unfulfilled jurist in search of fame[8]. Kelsen was a renowned figure in Austria, and a staunch supporter of parliamentary democracy[9]. The Austro-Hungarian Empire collapsed in

[5] David Hume, *A Treatise of Human Nature*, David F. Norton and Mary J. Norton (eds.), Oxford University Press, Oxford 2006, 294, 302.

[6] Immanuel Kant, *Critique of Pure Reason*, edited by V. Politis, Everyman, London-Rutland 1998, 247.

[7] Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty*, translated by G. Schwab, The University of Chicago Press, Chicago-London 2005, 2.

[8] Gopal Balakrishnan, *The Enemy. An Intellectual Portrait of Carl Schmitt*, Verso, London-New York 2000, 42, 53.

[9] See Hans Kelsen, *Vom Wesen und Wert der Demokratie*, J.C.B. Mohr (Paul Siebeck), Tübingen 1920 (2nd ed. 1929); Id., *Das Problem des Parlamentarismus*, W. Braumüller, Wien-Leipzig 1925; Id., *Foundations of Democracy* in «Ethics» LXVI, 1955, 1-101. See also Ota Weinberger, *Normentheorie als Grundlage der Jurisprudenz und Ethik. Eine Auseinan-*

the autumn of 1918. One year later, shortly after he was appointed full professor at the University of Vienna, on the initiative of Karl Renner, the social-democrat Chancellor of the newly established small German-speaking Austrian republic, Kelsen contributed to the design of the 1920 Federal Constitution, hence to the establishment of the Constitutional Court, which he served from 1921 to 1929 as an elective member for life[10].

In 1911, Kelsen obtained the habilitation with a thesis aimed at revising, on neo-Kantian bases, the methodological foundations of public law theory. His study, entitled *Hauptprobleme der Staatsrechtslehre*, was published thereafter. The author sought to consolidate the autonomy of law as an object of scientific cognition against the claims of sociology and natural law theories that causally linked legal normativity to socio-political interests and ethical postulates respectively. Kelsen argued that in law validity is to be seen as the basis of volition, not vice versa[11]. In his 1920's study on sovereignty, he developed what it would later become

dersetzung mit Hans Kelsens Theorie der Normen, Duncker & Humblot, Berlin 1981, 179-98; Horst Dreier, *Rechtslehre, Staatssoziologie und Demokratie bei Hans Kelsen*, Nomos, Baden-Baden 1986; Norberto Bobbio, *Diritto e potere. Saggi su Kelsen*, ESI, Napoli 1991; Anna Pintore, *Democrazia senza diritti. In margine al Kelsen democratico* in «Sociologia del diritto» II, 1999, 31-52; Sandrine Baume, *Hans Kelsen and the Case for Democracy*, ECPR Press, Bruxelles 2012. For an account of the motivations underlying Kelsen's writings on democracy in the history of political thought of the first half of the twentieth century, see Sara Lagi, *La teoria democratica di Hans Kelsen: un tentativo di storicizzazione (1920-1932)*, «Teoria Politica», VII, 2017, 363-88.

[10] Kelsen, *Autobiographie*, cit., 59-77.

[11] Hans Kelsen, *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze*, J.C.B. Mohr, Tübingen 1911 (reprinted with new foreword 1923).

the 'pure theory of law'. He focused on the German-speaking jurists who, despite identifying the State with its legal order, failed to keep validity separate from facticity. First, he mentioned Felix Somló, one of his critics, who lamented a neglect of the empirical nature of legal norms on the side of Kelsen. The latter replied that the empirical substance of legal norms was equated to the substance constituting the will of the legislator. In this sense, saying that in law a certain thing must be done amounts to saying that it must be done because the will posing that particular obligation prescribed it. From the empirical fact that an assembly or a monarch made something obligatory does not follow that the content of the act of their will must occur, Kelsen argued. Rather, we need to look for a norm stating that the prescriptions coming from an authority can validly stand as duties. To this effect, the notion of *Ursprugsnorm* was introduced. This 'original norm' could be thought of as being identical to the Constitution, but only in a logical-juridical sense. It was a logically necessary hypothesis for every system of legal norms, and it functioned as the fundamental condition of validity and unity of all possible contents that are stated legally. It is thanks to this hypothetical 'authorizing' agency that a given system of norms can be rightly called a legal system[12]. Kelsen also mentioned Karl Bergbohm and Gustav Radbruch. The former promoted the view of the juridical nature of statehood and dismissed any pretensions to ground the validity of legal norms upon metaphysical presuppositions. Norms that are legal are to be distinguished from other types of norms on account of their positivity,

[12] Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre*, J. C. B. Mohr (P. Siebeck), Tübingen 1928 (1st ed. 1920), 32-3.

namely of their being posited by a legislator. In claiming that legal norms are positive because they receive their being from the factual circumstances of the legislative process, Bergbohm attributed historical significance to law-making as it actually exists, and no one whatsoever to the element of reflection in natural law theories. Accordingly, he created an opposition between the domain of being represented by positive law and the domain of mere thinking represented by all other kinds of norms. Yet, being law's positivity closely linked to the psychological component of the will of the legislator, according to Kelsen it is impossible to distinguish positivity from facticity. Gustav Radbruch too argued that validity stems from the will of the sovereign, but he related the validity of the legal norms to the constant and effective obedience that subjects or citizens accord to them as long as the norms are issued by the legislator. Kelsen objected that the question of the foundation of the validity of the legal norms is one about the reasons why such norms ought to be posed and obeyed, not one about the reasons why they are actually issued and effectively obeyed. Legal normativity and facticity form two separate orders. The first generations of legal positivists fused historical, naturalistic, and conceptual elements. The circumstance made their accounts 'sloppy' and 'senseless'. Legal science had to become knowledge of the legal norms seen as linguistic constructs provided with a meaning, not of ordinary facts, let alone that the legal norms are ontologically as real as ordinary facts[13].

Kelsen's critique had two major, inter-related, purposes. First, demonstrating that normativity is the constitutive feature of law. Second, consolidating the theory of statehood as a depersonalized and unified system of legal norms. The

[13] Ivi, 85-92.

Allgemeine Staatslehre, first published in 1925, contributed to the achievement of the said goals. Only on the assumption that there is a legal order superior to the other orders of rules within a given community – one associated with the State – an autonomous science of law concerned with the cognition and description of the legal norms and norm-constituted relations between norm-determined facts could be established[14]. In the 1934 edition of *Reine Rechtslehre*, Kelsen wrote that the word *norm* refers to something that ought to be or ought to happen. A legal order is a «normative order» and its objectivity pertains to the sphere of meaning. The question of the foundation of a legal duty can never be answered with reference to mere factuality, which is part of the casually determined sphere of life to which «causal interpretation» applies. What turns a fact into a legal (or illegal) act, hence into an object of legal cognition, is not its merely empirical existence, but «the objective meaning» resulting from its «normative interpretation». The legal meaning of this activity is derived from a norm whose content refers to the act itself. By saying that a norm confers legal meaning to an act, so that the act may be interpreted according to this norm, Kelsen meant that the norm functions as a «scheme of interpretation». He referred to a «presupposition» establishing the objective validity of the norms of a legal order. This presupposition is the *Grundnorm*. At some stage, in every legal system, we get to an authorizing norm that has not been authorized by any other legal norm. This 'basic norm' has to be presupposed to be legally valid[15]. On these

[14] Hans Kelsen, *Allgemeine Staatslehre*, Julius Springer, Berlin 1925.

[15] Hans Kelsen, *Introduction to the Problems of Legal Theory*, translated by B. Litschewski Paulson and S.L. Paulson, Clarendon Press, Oxford 1992, 4, 8.

grounds, Roscoe Pound described Kelsen's philosophy of law as "normative logicism"[16]. In the 1960 edition of *Reine Rechtslehre*, Kelsen restated that erroneously in the view of classical legal positivists "merely the natural, causally connected, events and the legal acts merely in their actuality", and not their "specific meaning" were taken into consideration. He emphasized the fundamental difference between the natural sciences, centred upon the principle of causality, whereby certain relationships among phenomena are governed by necessity, and the law as the subject of a 'normative social science' centred upon the principle of imputation, whereby the relationships between norms is governed by the normativity of law-making. In the natural sciences the relationship between conditions (causes) and consequences (effects), expressed in a law of nature, is independent of human interference. The principle of causality says: 'if A, then B is (or will be)'. The principle of imputation says: 'if A is, then B ought to be'[17].

[16] He was dean of the Harvard Law School, when Pound wrote that Kelsen was "unquestionably the leading jurist of the time". His disciples, "probably the most active group in contemporary jurisprudence", were "full of enthusiasm in every land", and his ideas were "discussed in all languages". See Roscoe Pound, *Law and the Science of Law in Recent Theories*, «The Yale Law Journal», XLIII, 1934, 525-36, 532. In September 1936, while in Geneva, where he was called as professor of international law after he was forced to leave Cologne, Kelsen was awarded a doctorate *honoris causa* by the University of Harvard. The circumstance, as he admitted, made him hope in a favourable treatment in the future, which did not occur. In April 1936, while temporarily teaching at the German university of Prague, Kelsen was granted an honorary doctorate by the University of Utrecht too. See Kelsen, *Autobiographie*, cit., 80-4.

[17] Hans Kelsen, *Pure Theory of Law*, translated by M. Knight, University of California Press, Berkeley-Los Angeles 1967, 76-84, 103.

In 1945, the year in which he became full professor at the Political Science Department of the University of California, Berkeley, and obtained USA citizenship, Kelsen published *General Theory of Law and State*. The jurist provided a reformulation of his 'pure theory of law' in order to present the essential elements of it to readers who grew up in the Common Law tradition, and gave to that theory such a form as to enable it to cover the problems and institutions of English and American law as well as those of the Civil Law countries. He specified that the orientation of the 'pure theory of law' is in principle the same as that of so-called analytical jurisprudence within which, following the teaching of John Austin, every assertion advanced is based on a positive legal order or on a comparison of the contents of several legal orders. It is through a structural analysis of positive law that legal science preserves the purity of its method. The general theory of law and State is designed to derive its concepts exclusively from the contents of positive legal norms. In order to be able to do so, it must not be influenced by the motives or intentions of lawmaking authorities, or by the wishes or interests of individuals with respect to the formation of the law to which they are subject, except in so far as these motives, intentions, wishes, and interests are expressed in the material produced by the lawmaking process. At the same time, «what cannot be found in the contents of positive legal norms cannot enter a legal concept». It is due to its anti-ideological character that the 'pure theory of law' proves to be a true science of law. Even if science as cognition has always the tendency to unveil its object, political ideologies veil reality either by 'transfiguring' it in order to conserve and defend it, or by 'disfiguring' it in order to destroy or to replace it by a different reality. Every political ideology has its root in volition, not in cognition, that is, «in the emo-

tional, not in the rational, element of our consciousness». It arises «from interests other than the interest in truth». According to Kelsen, there is no way to decide rationally between opposite values. It is from this situation that a 'tragic' conflict arises: the conflict between the fundamental principle of science (Truth) and the supreme ideal of politics (Justice). Political authorities creating the law, which they want to conserve, are normally indifferent toward promoting the merely scientific cognition of their products. Similarly, the radical forces aiming to destroy the present order and to replace it by another one believed to be better, are not interested in such a cognition of law either. Eventually, the true science of law «cares neither for the one nor for the other». The postulate of the separation of legal science from politics cannot be questioned if there is to be anything like a proper science of law. Doubtful is only the degree to which this separation is realizable in the very field of law[18]. In the 1960 edition of *Reine Rechtslehre*, signs of a change of attitude toward the status of the will of the legislator can be detected. The distinction between "rule of law" (*Rechts-Satz*) and "legal norm" (*Rechts-Norm*) expressed the difference between the function of legal cognition and the function of legal author-

[18] Hans Kelsen, *General Theory of Law and State*, translated by A. Wedberg, Harvard University Press, Cambridge (MA) 1949, xiii, xv-xviii (1st ed. 1945). Following a debate at the Law School at Berkeley in November 1961, Herbert Hart described Kelsen as "the most stimulating writer on analytical jurisprudence of our day". See Herbert L.A. Hart, *Kelsen Visited*, «UCLA Law Review», X, 1962-1963, 709-28; now in Stanley L. Paulson and Bonnie Litschewski Paulson (eds.), *Normativity and Norms. Critical Perspectives on Kelsenian Themes*, Oxford University Press, Oxford 1999, 68-87, 87. See also Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, «Harvard Law Review» LV, 1941, 44-70.

ity represented by the organs of the legal community. The science of law has to know the law "from the outside" and to describe it. Legal authorities create the law. The law-making and the law-applying organs have to know "from the inside" the law they are making and applying. Kelsen believed that this knowledge is not an essential element of their functions but only preparatory to their functions respectively[19]

Schmitt opposed the idea that a hypothetical norm could generate a constitution, or be the guarantor of the validity of a legal system. Kelsen was aware that no positive law authorized the *Ursprungsnorm*, yet he was adamant in repeating that the legitimacy of this enabling presupposition was a problem that ought not to be addressed and answered within the domain of legal science[20]. Schmitt suspected that Kelsen's attempt to depoliticize law-making and legal knowledge stemmed from «the utopian desire to replace the government of men with the administration of things». Hence, he rejected Kelsen's configuration of sovereign statehood as a system of legal norms for in his view sovereignty always involves «an irreducibly political relationship of authority between concrete persons»[21]. Schmitt equated normativism

[19] Kelsen, *Pure Theory of Law*, cit., 71-2.

[20] See Joseph Raz, *Kelsen's Theory of the Basic Norm*, «American Journal of Jurisprudence», XIX, 1974, 94-111. For a critical appraisal see Alida Wilson, *Joseph Raz on Kelsen's Basic Norm*, «The American Journal of Jurisprudence», XVII, 1982, 46-63. See also Simone Goyard-Fabre, *La normativité du droit. Son autorité, sa légitimité*, Edilivre, Saint-Denise 2015.

[21] Balakrishnan, *The Enemy*, cit., 47. See also David Dyzenhaus, *Legality and Legitimacy. Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, Clarendon Press, Oxford 1999, 38-101; Stanley L. Paulson, *Hans Kelsen and Carl Schmitt. Growing Discord Culminating in the "Guardian" Controversy of 1931* in Jens Meierhenrich and Oliver Simons

and liberalism. While flaunting his disregard for «liberal normativism» and the related conception of the Constitutional State, he claimed that the 'pure normativist' can only think in terms of impersonal rules. Due to this 'distortion', the law becomes a mere State bureaucracy's operational mode. Schmitt also claimed that, freed from natural law or the law of reason, normativism can only cling to «the normative power of the factual», not to a «genuine decision». Hence, it is «degenerate decisionism». Kelsen allowed a «methodological conjuring» to take place in so far as he tried to elevate legal knowledge to the rank of a normative science on the basis of a notion of purity that, eventually, could only draw on factuality. The «relativistic superiority» that the latter allegedly displayed was futile. Unity and purity are easily attained when the basic issue – the association of sovereignty with the state of exception and not with routine – is ignored, and when everything contradicting the formalist notion of legal order is excluded as «impure». Kelsen is said to have solved the problem of sovereignty by negating it. Setting aside the notion of sovereignty was all but a politically neutral move according to Schmitt, who strongly believed that «the political is the total and any decision about whether something is *unpolitical* is always a political decision»[22].

It is not easy to establish to what extent exactly Schmitt understood Kelsen's reform of legal knowledge. While approaching the end of the Weimar experience, the former still believed that constitutional frameworks should play a

(eds.), *The Oxford Handbook of Carl Schmitt*, Oxford University Press, Oxford 2019, 510-46.

[22] Schmitt, *Political Theology*, cit., 1-3, 20-1.

harmonizing or moderating role in political life[23]. Nevertheless, he also believed that the formalistic approach too was motivated politically. On the generic assumption that all is political, he could not avoid suspecting that defending legal normativism meant defending liberal-democratic values. On the other hand, Kelsen had actually defended the modern Constitutional State against the critical hammer of psychoanalysis, according to which there seemed to be only a difference of degree between the authority of the State and the affective and regressive attachment to a leader-figure. In 1921, to explain why the States had been able to mobilize large parts of the population during World War I, Sigmund Freud argued that once communities and groups are formed, their members identify with each other in as much as all of them relate to the same libidinal object – the leader – in a position of admiration and reverential affection[24]. Kelsen responded emphasizing that the normatively regulated relationships established within the framework of a liberal-democratic constitution would prevent the lowering of the reflexive capacities of the ego as part of the mass[25].

The last Kelsen: between life priorities and theoretical complexity

Finding permanent employment in British and American universities was all but simple. In part this difficulty

[23] Balakrishnan, *The Enemy*, cit., 175.

[24] Sigmund Freud, *Group Psychology and the Analysis of the Ego* (1921) in *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, vol. XVIII, translated by J. Strachey, The Hogarth Press-The Institute of Psychoanalysis, London 2001, 67-143.

[25] Hans Kelsen, *The Conception of the State and Social Psychology: with Special Reference to Freud's Group Theory*, «The International Journal of Psycho-Analysis», V, 1924, 1-38.

was related to the refugee crisis that occurred in the period 1938-1941. Mario Losano observed that Kelsen's practical priorities may appear to be in contrast with the type of relativism that inspired his work as a theorist constantly seeking analytic rigour. Once in the USA, Kelsen was not only a citizen from an enemy country, but also one known for his early social-democratic sympathies. Soon he had to cope with the harsh and intimidating anti-communist climate of McCarthyism[26].

Learned Europeans had generally regarded the USA as a country hostile to intellectual life. Leo Strauss, trained in the neo-Kantian tradition with Hermann Cohen and Ernst Cassirer, arrived in the country in 1937, under the patronage of Harold Laski. He became professor at the University of Chicago in 1949, where he tried to carry European philosophy. The same can be said of Hannah Arendt, another child of the Marburg School, who moved to New York in 1941. Their way of doing political philosophy consisted in taking up texts and engaging in interpretation. That style had fallen out of favour in USA universities. The critical potential of European philosophy was seen with suspect. Strauss quickly understood that culture was the terrain of politically signif-

[26] Mario G. Losano, *Hans Kelsen "criptocomunista" e l'FBI. In margine al suo libro postumo "Religione secolare"*, «Sociologia del diritto», I, 2017, 162-81. The said circumstances explain why *Secular Religion*, the text of cultural critique addressed against the conception of 'secular religions', was published posthumously. See Hans Kelsen, *Secular Religion. A Polemic Against the Misinterpretation of Modern Social Philosophy*, in Clemens Jabloner, Robert Walter and Klaus Zeleny (eds.), *Science and Politics as "New Religions"*, Franz Steiner, Wiesbaden 2017 (1st ed. 2014). See also Tommaso Valentini, *«Silete theologi in munere alieno»: la modernità filosofica e il concetto di "religione secolare" nell'analisi critica di Hans Kelsen*, «Percorsi costituzionali», III, 2023, 813-57.

icant value-battles, and he was keen on fighting the 'culture war' which American society was nourishing. Instead, Arendt refused to recognize the political significance of certain social issues. The ambition remained to shake those who believed that politics was a science conceived to cause the individual to act in a way functional to the realization of the predominant, shared, capitalist values[27]. Kelsen, for his part, wanted to carry European legal science into a new world, where he encountered a legal culture uninterested in formalism and transcendentalism. He found a mixture of pragmatism and realism, even though at the beginning he probably underestimated the degree to which that culture was keen on using modern science and its statistically based methods to secure social control. Becoming acquainted with the idiosyncrasies of American society was not easy. Despite his notoriety, many jurists who styled themselves as legal positivists dismissed Kelsen's approach as useless. Oliver W. Holmes' teaching that the life of the law has always been more experience than logic continued to be an inspiring point of reference[28]. Karl Llewellyn repeatedly affirmed that legal norms are not as important as commonly continental European jurists assume them to be. As a legal realist, the latter contextualized the practice of law by arguing that a variety of extra-legal factors (social, cultural, historical, and psychological) are as important in determining legal outcomes as are the rules and principles by which the legal system operates. Jurisprudence requires «a steady and persistent focus on the empirical social world» to avoid

[27] Anne Norton, *Leo Strauss and the Politics of American Empire*, Yale University Press, New Haven-London 2004, 36-7, 41-4.

[28] Oliver W. Holmes, *The Common Law*, Little, Brown & Co., Boston 1881, 1.

getting «caught up in the abstractions of legal precepts or rules». The law is a social «science of observation», which focuses on the behavioural interactions between law-officials and laymen. Llewellyn's notion of behaviour is directly geared toward the settling, through regularized official action, of disputes that do not otherwise get settled, and indirectly toward the use of regularized official pressure to get people to do (or not to do) particular things. According to Llewellyn, in the field of law Kelsen offered the closet approach to a «truly courageous logical system» with a «consequent almost complete sterility»[29]. Laski too, who otherwise appreciated Kelsen, was of the opinion that the latter's theory of law was more an exercise in logic than in life[30]. What appears to have been at stake theoretically was Kelsen's neo-Kantian outlook that, driven as it was by a will to identify and articulate the conditions of legal cognition, would create an unbridgeable gap between the concerns of the legal scholar and the problems faced by judges, lawyers and government officials.

Kelsen has always been aware of the difficulties attached to conveying the exact meaning of his vision. In the preface of the first edition of *Reine Rechtslehre*, he wrote that much of the criticism he received was directed not against the 'pure theory of law', but against a phantom of it. Mostly, the critical remarks advanced «cancel each other out», rendering a rebuttal superfluous. He added that some attacked his theory for being «an empty game of hollow concepts».

[29] Karl N. Llewellyn, *Jurisprudence. Realism in Theory and Practice*, with a new introduction by J.J. Chriss, Transactions Publishers, New Brunswick-London 2008 (1st ed. 1962), 7-8, 31, 90.

[30] Harold J. Laski, *A Grammar of Politics*, George Allen & Unwin-The Yale University Press, London-New Haven 1938 (1st ed. 1925), vi.

Others warned against its 'subversive' hidden character, which posed a serious threat to law and order. His critics also claimed that by pretending to be entirely free of politics, his theory stood apart «from the ebb and flow of life», and was therefore worthless scientifically. No less frequently it was said that his theory was not able to satisfy its own basic methodological requirement, being itself «the expression of a certain political value». Kelsen enumerated the clashing interpretations of the alleged political value of his own theory. Fascists placed his theory on the side of democratic liberalism, while liberal – and social democrats regarded it as a «trail-blazer for Fascism». Communists associated it with capitalistic Statism, whereas nationalists and capitalists considered it to be either Bolshevism or «covert anarchism». Some interpreters assured that the 'pure theory of law' was intellectually close to Catholic scholasticism. Others believed that it had the features of Protestant political and legal theory. Not a few branded it as atheistic. His theory «has been suspected of every single political persuasion there is». Eventually, he wrote, «nothing could attest better to its purity»[31].

In 1979, the Hans Kelsen Institute promoted the publication of the most recent version of a lengthy, incomplete, manuscript entitled *Allgemeine Theorie der Normen*, composed during the last decade of his life[32]. When in 1960 Kelsen published the second edition of *Reine Rechtslehre*, he was seventy-eight years old, and mostly the book was regarded as the completion of a life-long intellectual enterprise. During the 1960s, while clarifying various aspects of the 'pure the-

[31] Kelsen, *Introduction to the Problems of Legal Theory*, cit., 3.

[32] Hans Kelsen, *General Theory of Norms*, translated by M. Hartney, Clarendon Press, Oxford 1991.

ory of law' through restatements and replies to his critics, Kelsen tried to develop a general theory of norms based upon a reconsideration of the relationship between logic and law. To denote Kelsen's scepticism toward the applicability of logic to law, Ota Weinberger spoke of 'normative irrationalism'[33]. Losano observed that such scepticism constituted a development of the 'pure theory of law', which is to be seen as *opus perpetuum*[34]. According to Michael Hartney too it is unlikely that Kelsen gave up further developing his 'pure theory of law', which turned into a general theory of norms[35]. Paulson maintained that through the sceptical attitude of the last decade of his life, Kelsen dismantled «the Kantian edifice» built up over a period of forty years. He did so by dismissing the *Grundnorm* and the so-called «Kantian filter», namely the idea that cognition is constitutive of its object in so far as it wants to comprehend the latter as a meaningful whole. This «metamorphosis» resulted in «legal empiricism»[36]. Does this mean that in giving up neo-Kantian transcendentalism, Kelsen abandoned normativism too?

The word *norm*, when it refers to a legal prescription, Kelsen wrote, indicates that something is to be or is to happen. This obligation is linguistically expressed as an imperative. The act whose meaning is that something is prescribed is always an «act of will». Being the content of a prescription primarily a particular human behaviour, when someone issues a command or a prescription, that something ought to

[33] Weinberger, *Normentheorie*, cit., 157-78.

[34] Mario G. Losano, *La dottrina pura del diritto dal logicismo all'irrazionalismo* in Hans Kelsen, *Teoria generale delle norme*, edited by M.G. Losano, Einaudi, Torino 1985, xvii-xxi.

[35] Kelsen, *General Theory of Norms*, cit., ix-xiii.

[36] Stanley L. Paulson, *Metamorphosis in Hans Kelsen's Legal Philosophy*, «The Modern Law Review», LXXX, 2017, 860-94, 862, 875.

happen is willed. Kelsen insisted that in order to exist, namely to be valid, a norm must be posited by an act of will. No norm can exist without a norm-positing act of will. Rationally, moreover, we can only will the behaviour of a being who understands the meaning of an act of will and can behave accordingly. This is what distinguishes *willing* from *wishing*. At any rate, the meaning of an act of will, being it qualified legally, constitutes a valid norm. This legal qualification is in turn expressed in an imperative act which is 'empowered' by a norm part of a legal order. Kelsen's argument turns around the notion that the validity of a norm is conditional upon the act of will of which it is the meaning. Hence, the 'basic norm', which emerges not as a positive norm created by a 'real' act of will, now is merely presupposed in (juridical) thinking. So, the 'basic norm' is fictitious. Kelsen explained that fiction differs from a hypothesis in that it is accompanied, or ought to be accompanied, by «the awareness that reality does not agree with it»[37]. This sharp opposition between fiction and hypothesis would mark the end of the normative character of Kelsen's legal science[38].

Almost thirty years ago Carsten Heidemann, while focusing on the influence of Kantian and neo-Kantian epistemology on Kelsen, provided a comprehensive account of the developments of the jurist's thought[39]. Recently, this author came back to the issue of periodization. The first phase of Kelsen's thought covers the period between 1911 and 1920. It is the 'constructivist' period, the one in which legal science is config-

[37] Kelsen, *General Theory of Norms*, cit., 2-6, 26-30, 234, 256.

[38] Stanley L. Paulson, *Kelsen's Legal Theory. The Final Round*, «Oxford Journal of Legal Studies», XII, 1992, 265-74. See also Robert Walter, *Hans Kelsens Rechtslehre*, Nomos, Baden-Baden 1999.

[39] Carsten Heidemann, *Die Norm als Tatsache. Zur Normentheorie Hans Kelsens*, Nomos, Baden-Baden 1997.

ured as a normative discipline exclusively concerned with an object that it entirely determined as a whole by the legal scientist. Its material comes from the very activity of legal norming. The second one is the 'transcendental' phase. It is the period in which the Kantian and neo-Kantian influence is felt most. It covers the period between 1920 and the mid-1930s. Kelsen himself emphasized its transcendental character through the elaboration of the notion of the original or basic norm. The third phase covers the period between the first and the second edition of *Reine Rechtslehre*. In the early 1960s, Kelsen gradually abandoned the transcendental conception of cognition to move toward a kind of common-sense realism. While refining his view of the relationships between law, legal science and logic, he started considering the legal norms as a given to cognition. This given remained the subject of mere description. Hence, legal science assumed the function of a descriptive enterprise that merely apprehends pre-existing objects. In other words, cognition is no longer constitutive of its own object, and the objectivity of cognition itself is now guaranteed by empirical verifiability. Presumably, the desire to engage with the American legal environment too contributed to such development. It is debated whether the common-sense realist phase, which preludes the so-called sceptical turn, has its roots in the 1930s and ends in 1960, as Heidemann claims, or whether it started only in the early 1960s. Heidemann is convinced that from the early 1960s until the end of his life, Kelsen's sceptical attitude became more acute than ever. It would be the core of the 'analytical-linguistic phase', one that is characterized in a voluntaristic direction. By that time transcendental normativism was abandoned[40].

[40] Carsten Heidemann, *Hans Kelsen's Normativism*, Cambridge University Press, Cambridge 2022.

Conclusion

If the 'pure theory of law' is the most prominent example of legal normativism, the question is what is left of normativism once that theory is dismissed. On the contrary, if the general theory of norm is a development of the 'pure theory', the question is if, and how, normativism relates to voluntarism. The discussion of this issues exceeds the boundaries of this contribution. Much of the complexity inherent to thought of Kelsen *qua* jurist lies in the fact that he was more than merely a jurist. He was a prolific writer. His works constitute a whole difficult to master not only quantitatively, but also qualitatively for he was well-versed in fields other than law. Raz saw no contradiction between seeking to consolidate the scientific status of legal knowledge and bringing «the fruits of his incisive and uncompromising reflections» to other fields of research. Given the 'prodigious' range of interests that Kelsen cultivated, on many themes the latter's contributions will continue to stimulate students and scholars for many years to come. For Raz it will be so because of, not despite, the obscurities that sometimes make difficult to fully grasp some of his theses[41]. One may wonder about the extent to which such obscurities have to do with the variety of interests that Kelsen the jurist nourished, while never giving up his juristic vocation. Raz's opinion can be shared: in a dialectical perspective, that the thought of Kelsen, the jurist who fought against 'methodological syncretism', will continue to attract attention on account of intellectual adventures that are far from being 'purely' juristic is not so paradoxical after all. Kelsen started by a critique of legal

[41] Joseph Raz, *The Purity of the Pure Theory* in Paulson and Litschewski Paulson, *Normativity and Norms*, cit., 236-52, 236.

voluntarism on neo-Kantian presuppositions. He ended up rediscovering voluntarism, leaving behind the Kantian legacy and transcendental normativism. Surely the point is intellectually significant, but it is not the mark of irrationalism.

Annalisa Furia

From Kant to Kelsen. Hannah Arendt and the Many Roads to Pluralism

Introduction: An impossible triangle?

How useful is it to analyse together the intellectual relationships that exist between Arendt and Kant, on the one hand, and the similarities that might exist between Arendt and Kelsen, on the other? More specifically, is such an attempt fruitful in the context of a discussion on the crisis of democracy?

While clearly the insights that can be drawn respectively from Kant, Arendt and Kelsen's thought continue to be the subject of countless explorations in the debate on democracy and its many difficulties, the attempt to find a way to link the three of them by putting Arendt at the centre is at the same time challenging, hazardous and unusual.

It is known that Arendt maintained a privileged intellectual relationship with Kant in the development of her thinking – and she herself often highlighted the persistence of this continued ideal dialogue with the philosopher[1] –, while the methodological and theoretical assumptions dividing

[1] «So, let us return to Kant», said Arendt, for instance in Hannah Arendt, *Some Questions of Moral Philosophy,* in Hannah Arendt, *Responsibility and Judgment*, edited and with an introduction by J. Kohn, Schocken Books, New York 2003, 139.

Arendt and Kelsen's views are so pronounced as to make it prohibitive to attempt to somehow bridge their thoughts. This is also demonstrated by the fact that there are a good and growing number of contributions on the affinities between Arendt and Schmitt or Weber and yet very few on those, if any, between Arendt and Kelsen[2].

One way to find common ground among the three could be to investigate the impact Kant's critical philosophy and political reflections had on Arendt's and, also through Neo-Kantianism, on Kelsen's theorizing; but this would mean placing Kant, and not Arendt, at the centre[3]. Such a choice would surely add to the literature on the influence of Kant upon both Arendt and Kelsen – which is something that will emerge also from this attempt – but it does not represent the focus of this paper which aims to concentrate on one of the substantial, common concerns that emerge from the analysis.

[2] See, for instance, Andreas Kalyvas, *Democracy and the Politics of the Extraordinary, Max Weber, Carl Schmitt and Hannah Arendt*, Cambridge University Press, New York 2008. An interesting attempt, though it does not fully engage in any comparison between the two, is made by Alexandra Kemmerer, *Kelsen, Schmitt, Arendt, and the Possibilities of Constitutionalization in (International) Law: Introduction*, «Leiden Journal of International Law», XXIII, 2010, 717-22. An alternative way of trying to connect Arendt and Kelsen could be to concentrate on the figure of Hans Morgenthau, who was a close friend of Arendt (actually he would have loved to be something more than that) and one of Kelsen's most talented students.

[3] Unsurprisingly Arendt, who had studied under Heidegger at the University of Marburg, disregarded Neo-Kantianism, which in her view had drowned philosophy «"in a sea of boredom"». Hannah Arendt quoted in Nicolas De Warren, Andrea Staiti, *Introduction: towards a reconsideration of Neo-Kantianism*, in Nicolas De Warren, Andrea Staiti (eds.), *New Approaches to Neo-Kantianism*, Cambridge University Press, Cambridge 2015, 1.

The preliminary and limited attempt explored here thus contends, by taking some liberties and downplaying the impact of their respective inconsistencies and of some methodological discrepancies, that the question of pluralism, albeit seen in different ways, can be usefully seen as a possible common thread linking Arendt with Kant and Kelsen and pointing to a crucial, even excruciating, problem for contemporary democracies.

Why Judging?

As already highlighted, Arendt maintained a continuous ideal dialogue with Kant and often 'returns to Kant', as she does in relation to the question of aesthetic judgment.

Arendt's habit of reading and ruminating on Kantian texts however does not exempt her from neglect or forthright criticism by Kantian scholars, as her 'treatment' of Kantian writings has been variously defined as partial, inaccurate, pejorative, too creative or appropriative[4].

Whereas it falls beyond the scope of this paper to analyse how closely her interpretation adheres to Kant's text and perspective, it is worth noting that Arendt forestalled – and quickly liquidated – any criticism of her personal, presumedly too free interpretation of Kantian texts by recalling that Kant himself in a passage of the *Critique of pure reason* high-

[4] Nicholas Dunn has recently edited the first publication devoted exclusively to Arendt's lectures on Kant in which the reception of Arendt's interpretations by Kantians, as well as the need to take into consideration the other courses and published and unpublished works in which Arendt resorts to Kant's thoughts are addressed and investigated. See *Hannah Arendt's Lectures on Kant's Political Philosophy*, edited by Nicolas Dunn, De Gruyter, Berlin 2024 («Works of Philosophy and their Reception Series»).

lighted how posterity is often better able to understand the true intentions of an author than the author himself[5]. In addition to that, she clarified that her intention was to develop a set of ideas which in her view Kant never fully explored, and therefore to go «beyond Kant»[6].

The political value of aesthetic judgment is precisely, according to Arendt, one of the questions Kant underestimated, and one that she intends to bring to full light. But why does Arendt refer to aesthetic judgment in the first place?

The profound reasons for this choice are, as always with Arendt, linked with her personal experience as well as with her irresistible need to investigate and dissect reality in all directions, to understand historical events and contexts, to confront reality without discounts or consola-

[5] Hannah Arendt, *Lectures on Kant's Political Philosophy*, edited and with an interpretative essay by R. Beiner, The University of Chicago Press, Chicago 1992, 33. For a sample of the criticisms of Arendt's interpretation, see: Ronald Beiner, *Hannah Arendt on Judging,* in Arendt, *Lectures on Kant's Political Philosophy*, cit. 89-156; Jean-François Lyotard, *Sensus communis*, «Cahier du Collège international de Philosophie», III, 1987, 67-88; Ronald Beiner, Jennifer Nedelsky (eds.), *Judgment, Imagination and Politics. Themes from Kant and Arendt*, Rowman & Littlefield, Lanham 2001; Robert J. Dostal, *Judging Human Action: Arendt's Appropriation of Kant*, «The Review of Metaphysics», IV, 1984, 725-55; Matthew C. Weidenfeld, *Visions of Judgment: Arendt, Kant, and the Misreading of Judgment,* «Political Research Quarterly», II, 2013, 254-66; Bryan Garsten, *The Elusiveness of Arendtian Judgment*, «Social Research», IV, 2007, 1071-108; Laura Bazzicalupo, *Il Kant di Hannah Arendt*, in Giulio M. Chiodi, Giuliano Marini, Roberto Gatti (eds.), *La filosofia politica di Kant*, Franco Angeli, Milano 2001, 153-7; Teresa Serra, *H. Arendt e I. Kant*, in Chiodi, Marini, Gatti, *La filosofia politica di Kant*, cit., 201-5.

[6] Hannah Arendt, *The Promise of politics*, edited by and with an Introduction by J. Kohn, Schocken books, New York 2005,169; Ead., *Lectures on Kant's Political Philosophy*, cit., 19, 30-1.

tion. Already in *Understanding and Politics* (1954) Arendt focuses her attention on possibly extending Kant's aesthetic judgment to politics when she investigates the unprecedented crisis produced by totalitarianism – though it had already started beforehand with the modern dynamics of atomization of individuals and the progressive erosion of common sense –, which had in her view «clearly exploded our categories of political thought and our standards of moral judgment»[7]. Another determining factor was the Eichmann trial. In *The Life of the Mind* (1978) – her last work published posthumously and incomplete due to her premature death, the third part of which should have been dedicated to judging – Arendt clarifies that her interest in «mental activities»[8] stems from having witnessed the trial of Eichmann who – in spite of his proclaimed adherence to a Kantian ethic –, proved to be dramatically unable even to think[9]. Finally, the risks posed by conformism and alienation from the world fueled by mass society reinforced in her the urgent need to understand and counter the dramatic effects of the inability to think and the drying up of the public space.

It is thus under the pressure of these concerns that she decided to investigate what makes it possible to discriminate between right and wrong at moments of disruption, or ultimate dissolution, of the established norms and standards,

[7] Hannah Arendt, *Understanding and politics*, in Ead., *Essays in Understanding: 1930-1954. Formation, Exile, and Totalitarianism*, edited by and with an Introduction by J. Kohn, Schocken Books, New York1994, 310.

[8] Hannah Arendt, *The Life of the Mind*, Harcourt Inc., New York 1978, I, 3.

[9] Ivi, 4.

that is, without resorting to any outside authority; and so it was that she turned to the question of aesthetic judgment[10].

Judging, or saving our dignity

Drawing on Kant's analysis of the different kinds of judgment, Arendt concentrates her attention on aesthetic judgment as the paradigmatic example of «reflecting judgments», that is, the kind of judgment of the particular that occurs in the absence of a universal, general standard or rule under which to subsume it. These judgments do not – according to Kant – have a cognitive nature; they are grounded in feeling but can claim a special form of «subjectively universal validity»[11] which, not being based on the

[10] After the fatal break in tradition produced by totalitarianism, judgment for Arendt plays a crucial role also in allowing the recovery of a relationship with past, and therefore the possibility of culling meaning from it by judging, independently, what is worth remembering. On this see, Seyla Benhabib, *Hannah Arendt and the Redemptive Power of Narrative*, «Social Research», LVII, 1990, 181-90; Annalisa Furia, *Crisis and Vulnerability in Hannah Arendt's Political Thought: Political Action, Judgment and the Figure of the 'Conscious Pariah'*, in Cesare Cuttica and László Kontler with Clara Maier (eds.), *Crisis and Renewal in the History of European Political Thought*, Brill, Leiden-Boston 2021, 341-3. For the different interpretation of Kant's aesthetic judgment by Hans-Georg Gadamer, another disciple of Heidegger, see: Stefano Marino, *Giudizio estetico e Giudizio etico-politico. Gadamer e Arendt interpreti di Kant*, in Stefano Bacin, Alfredo Ferrarin, Claudio La Rocca and Margit Ruffing (Eds.), *Kant und die Philosophie in weltbürgerlicher Absicht*, Akten des XI. Kant-Kongresses 2010, De Gruyter, Berlin 2013, 131-40.

[11] Immanuel Kant, *Critique of the Power of Judgement*, edited by P. Guyer, translated by P Guyer, E. Matthews, Cambridge University Press, New York 2000, 100.

«mediation of a concept»[12], is to be derived by the individual, through imagination and reflection, from the particular itself.

The peculiar nature of this form of judgment stems from what Kant called a «broad-minded way of thinking» or «enlarged thought», which Arendt would mostly call an «enlarged mentality», that is, the capability of comparing one's own subjective standpoint with the possible judgments of other judging individuals by abstracting from the limitations of one's subjective conditions and circumstances and by visiting other people's standpoints[13].

The comparison of my judgment of taste with the possible judgments of others and its universal communicability are made possible by what Arendt calls «community sense» (that is, Kant's *sensus communis*), which she defines as «the political sense par excellence»[14], that allows me to judge not merely subjectively but as «a member of a community»[15], to be in «anticipated communication with others»[16] who are absent but with whom I know I can communicate and come to a potential agreement because we all share the same sense.

In opposition to speculative thought which can claim a validity independent of the existence of the world and of

[12] Ivi, p. 175.

[13] Arendt, *Lectures on Kant's Political Philosophy*, cit., 43. On the meaning and role of imagination and representation in Arendt's conception, see Hannah Arendt, *Imagination*, in Ead., *Lectures on Kant's Political Philosophy*, cit., 79-85, and Beiner, *Hannah Arendt on Judging*, cit., 175.

[14] Arendt, *Understanding and politics*, cit., 318.

[15] Arendt, *Lectures on Kant's Political Philosophy*, cit., 72.

[16] Hannah Arendt, *Between Past and Future. Six Exercises in Political Thought*, The Viking Press, New York 1961, 220.

other people by merely resorting to abstract standards, aesthetic judgment for Arendt does not transcend the public realm but is entirely concerned with it and with the plurality of individuals who inhabit it. In this way, it attains to intersubjective validity, a validity whereby the more positions I imaginatively represent and visit, the more impartial and general it becomes[17]. The validity of such a form of judgment, as well as the potential agreement with others, is thus not based on objective evidence or the pursuit of truth, nor on coercion, but rather on the adoption of critical thinking as a way of thinking from the position of «Kant's world citizen»[18], as a peculiar «method of rational argumentation»[19] that allows the communicability, dialogue and mutual engagement that can preserve the public realm.

Judgment for Arendt is a political faculty because it is integrally connected with plurality and the 'public use of reason', which Kant praised and defended; not with the existence of man as an intelligible being who has to prove the solidity of his reasoning but of «men in the plural»[20] as its condition.

[17] In this regard, Arendt translates Kant's '*allgemein*' with 'general' instead of 'universal' probably due to her hostility to (unattainable) cosmopolitan perspectives. See Jonathan P. Schwartz quoted in Nicholas Dunn, *Plurality and the Potential for Agreement: Arendt, Kant, and the 'Way of Thinking' of the World Citizen*, «Constellations», XXVII, 2020, 254.

[18] Arendt, *Lectures on Kant's Political Philosophy*, cit., 43. In this regard, Arendt points out: «When one judges and when one acts in political matters, one is supposed to take one's bearings from the idea, not the actuality, of being a world citizen» (ivi, 75-6).

[19] Dunn, *Plurality and the Potential for Agreement*, cit., 251.

[20] Arendt, *Lectures on Kant's Political Philosophy*, cit., 13.

It has been aptly noted that her conceptualization of judgment, which is unfinished, acquires divergent inclinations and problematically stands at the crossroads between the roles of actor and spectator, between 'vita activa' and 'vita contemplativa'. Whereas in some passages Arendt seems to consider judgment as a faculty that enables the political actor to decide what to do in practice (like the Greek *phronesis*), in other writings judging seems no longer to be configured as a modality that connects thinking and acting but rather as the privilege of the impartial spectator, the historian or the poet[21].

What remains is the fact that for Arendt judging – that is, engaging in critical thinking and being concerned with the particularities of reality 'without a banister', and not conforming to volatile moral norms or searching for the ultimate truth – is «the most political of man's mental abilities»[22] because it requires and preserves plurality and is the expression of the autonomy, dignity and responsibility of human beings; it is the only way to safeguard human

[21] See, for instance, Arendt, *Between Past and Future*, cit., 221 and Ead., *The Life of the Mind*, cit., I, 192-13. On the many possible interpretations of the relationships between the so-called 'historical' and 'political' declinations of Arendt's judgment, that are respectively embodied by the 'spectator' and the 'actor', see at least: Simona Forti, *Judging Between Politics and History*, «Finnish Yearbook of Political Thought», II, 1998, 15-36; Maurizio Passerin d'Entreves, 'Hannah Arendt', *Stanford Encyclopedia of Philosophy*, 2019: https://plato.stanford.edu/entries/arendt/; accessed on 13 March 2025; Pier Paolo Portinaro, *L'azione, lo spettatore e il giudizio. Una lettura dell'opus posthumum di Hannah Arendt,* «Teoria politica», V, 1989, 133-59.

[22] Arendt, *The Life of the Mind*, cit., I, 192. The reference here is to Hannah Arendt, *Thinking without a Banister: Essays in Understanding, 1953-1975*, edited and with an introduction by Je. Kohn, Schocken Books, New York 2018.

self-legislation and capacity for action even in the most desperate circumstances[23].

Arendt and Kelsen: two distant universes

Between Arendt and Kelsen there are numerous biographical affinities. Their lives are representative of both the richness of the closely interconnected – yet very different – cultural milieus of Germany and Austria in the 1920s, and the tragic destiny of European Jewry at the time. They both passed through the nightmarish experiences of the Nazi persecution and moved across many countries in search of a sanctuary they found in the US[24]. Again, they both witnessed the aberrant tragedies produced by totalitarianism and the early stages of the (national and international) process of reconfiguration of law and politics that took place afterwards. But they responded to these experiences in very different ways.

The biographical resemblances indeed exhaust the list of similarities for, apart from their apparent convergence on certain issues, their methodological, epistemological and theoretical background could hardly be more distant.

Where one is among the most brilliant and influential jurists of the 20th century, widely known for his pure theory of law, the other is likewise globally studied and appreciated, and continually cited, for her peculiar (and deliberately 'impure') theory of politics.

[23] Arendt, *Life of the Mind*, cit., vol. 1, 216.

[24] Kelsen lived in Vienna, Cologne, Geneva and Prague before being offered a post at the Universities of Harvard and Berkeley, while Arendt left Germany to go to Czechoslovakia, Switzerland, Paris and then held positions at the Universities of Berkeley, Princeton, Chicago and at the New School for Social Research of New York.

They share their reference to Kant, and more importantly Kant's rejection of any form of metaphysics; but while Kelsen's theorizing aspires to be scientific, systematic, positivist and monistic, and strongly opposes any form of methodological syncretism interfering with it, Arendt's method – if any – has been efficaciously described as anti-systematic, based on the constant confrontation with reality and history, and characterized by a hermeneutic and impressionistic stance as it mainly crystallizes around contingent events and intersubjective dynamics[25]. Kelsen is a son of the Enlightenment, who believes in the possibility of adopting a scientific approach to society, while Arendt, who cannot be defined as a post-positivist, is closer to postmodern and critical approaches[26]. Similarly, while Kelsen's approach is based on the distinction between *Sein* and *Sollen*, 'Is' and 'Ought', real and ideal, Arendt resists the «dichotomization between the real and the ideal via notions like natality and her radical intersubjectivity that stresses the elements of the ideal to be found in the real and especially in the interaction of human beings»[27].

If they thus share in criticizing some of the most important concepts of Western political thought like State,

[25] Pedro T. Magalhães, *Science, Relativism and Pluralism. Hans Kelsen's Conception of Modern Democracy*, in Id., *The Legitimacy of Modern Democracy. A study of the Political Thought of Max Weber, Carl Schmitt and Hans Kelsen*, Routledge, Abindgon (UK)/New York (NY) 2020, 153-4; John Williams, Anthony F. Lang Jr., *Introduction*, in John Williams, Anthony F. Lang Jr. (eds.), *Hannah Arendt and International Relations. Readings across the lines*, Palgrave Macmillan, New York-Basingstoke 2005, 9.

[26] Magalhães, *Science, Relativism and Pluralism*, cit., 153-4; Williams, Lang, *Introduction*, cit., 8-9.

[27] Williams, Lang, *Introduction*, cit., 8.

sovereignty or, as we will see, human rights, they get there starting from very different backgrounds and disciplinary perspectives. In this regard, however, be it noted that the centrality she assigns to politics does not mean that Arendt ignores the role of national or international law and institutions[28]. Likewise, the fact that Kelsen was above all a jurist and that he draws a clear line between law and politics, does not mean, as highlighted in the literature, that his theory of democracy can be understood in isolation from his legal theory, that the two were meant to be kept separate or that the purity of his legal theory cannot be seen as a political strategy in itself; or, finally, that any such separation was consistently maintained throughout his writings[29].

Kelsen and Arendt on Human Rights

At the very inception of the belief in the ordering and civilizing mission of human rights, Kelsen and Arendt strike a blow at human rights as based on natural law, and likewise

[28] On Arendt's conception of international law, see Peg Birmingham, *Hannah Arendt's Philosophy of Law Approach to International Criminal Law,* «International Criminal Law Review», XIV, 2014, 695-716 and Deborah Whitehall, *Hannah Arendt and International Law,* in Anne Orford, Florian Hoffmann and Martin Clark (eds.), *The Oxford Handbook of the Theory of International Law*, Oxford University Press, Oxford 2016, 232-57.

[29] Nadia Urbinati, Carlo Invernizzi Accetti, *Editors' Introduction*, in Hans Kelsen, *The Essence and Value of Democracy*, edited by N. Urbinati and C. Invernizzi Accetti, translated by B. Graf, Rowman & Littlefield Publishers, Plymouth (UK) 2013, 2-4 (this is the translation of the 1929 German edition); Sara Lagi, *La democrazia secondo Hans Kelsen: alcuni temi e controversie*, «Isonomía. Revista de Teoría y Filosofía del Derecho», LIX, 2023, 160-1; Magalhães, *Science, Relativism and* Pluralism, cit.,140-2.

at the idea that human rights could effectively limit State sovereignty – convictions which were both at the heart of the 17th century Declarations of Rights and of the prevailing conception of their political function[30].

Kelsen's dismissive treatment of the notion of natural rights and justification of fundamental rights is to be analysed in the context of his (procedural) realist theory of a parliamentary, party-pluralist, liberal democracy as distinct from an 'ideal' conception and as opposed to autocracy.

If autocracy in his view is coordinated with 'philosophical absolutism', democracy for Kelsen presupposes philosophical relativism – that is, the assumption, based on the separation between reality and value, that in the moral domain the absolute is beyond human knowledge which has access only to relative truths and values – as the «background epistemic standpoint»[31] and worldview. Relativism is thus what connects «Kelsen's conception of democracy with

[30] Arendt and Kelsen's approach to the international sphere and institutions was at once informed by political realism and coloured by the configuration of a, albeit very different, federalistic alternative. Arendt's view will be explored later in the chapter while for a convincing analysis of Kelsen's one, which was inspired by Kant's model, see Robert Schuett, *Hans Kelsens' Political Realism*, Edinburgh University Press, Edinburgh 2021, 153-97.

[31] Urbinati, Invernizzi Accetti, *Editors' Introduction*, cit., 8. In his 1955 text *Foundations of democracy* Kelsen highlights the links that exist between political theory and epistemology by establishing a parallelism between the process of domination at the centre of political theory and the process of cognition (Hans Kelsen, *Foundations of Democracy*, «Ethics», LXVI, 1955, 15). For a broader analysis of Kelsen's conception of relativism, see Carlo Invernizzi Accetti, *Reconciling legal positivism and human rights: Hans Kelsen's argument from relativism*, «Journal of Human Rights», 17(2), 2018, 215-8.

his epistemology»[32] and it is linked with his radical criticism of the 19th–century German legal doctrine and its main tenets including the mystified notion of a pre-existing unitary people (and popular will) to which he opposes the evidence of the intrinsically pluralistic articulation of society[33].

From a positivistic point of view rights can obviously be derived only from positive law, and in this sense Kelsen rejects natural law and natural rights by highlighting that: the fact that it is not possible to ascertain what natural law is demonstrates that natural rights have no advantage over positive law and cannot be a criterion or foundation for it; in the attempt to derive that which 'ought to be' from that which 'is' any natural law-doctrine falls into the trap of logical fallacy; nature cannot assign any right because it cannot prescribe any duty[34].

Human rights are thus normatively valid and legally binding only insofar as they are incorporated into a positive legal system – otherwise they are just religious or moral pretensions – and they are justified, in his view, on epistemological grounds[35]. They ought to be granted, first of all, because the relativity of any moral assumption implies that no majority must limit the free expression of values and convictions by individuals and minorities; and, secondly, because in a democracy based on the principle of majoritarianism it must be granted that minorities «can become the majority at any time»[36], and to do so they must be protected «against

[32] Magalhães, *Science, Relativism and Pluralism*, cit., 157.

[33] Lagi, *La democrazia secondo Hans Kelsen*, cit., 159-60.

[34] Kelsen, *Foundations of Democracy*, cit., 48,57; Hans Kelsen, *International Law*, Rinehart & Company, Inc., New York 1952, 149-50.

[35] Magalhães, *Science, Relativism and Pluralism*, cit., 149.

[36] Kelsen, *The Essence and Value of Democracy*, cit., 104.

arbitrary rule by majorities»[37]. Constitutional basic rights and freedoms – namely, active and passive voting rights, freedom of speech, conscience and opinion, freedom of research and of the press[38] – are thus essential to democracy, not because their function is to protect individuals from the State, but because they protect minorities from majorities, they preserve pluralism and, beyond the traditional, mystified conception of the State and of a unitary people, allow it to be integrated into the democratic system[39]. In Kelsen's view the need for giving a constitutional form and protection to these rights, however, does not imply that they have a substantive content or exert a substantive restriction upon legislative powers, but only that, in line with its procedural approach, they are protected for their instrumental role in the working and preservation of democracy intended as «a *method* to enact politic decisions»[40], and not as a content.

[37] Kelsen, *Foundations of Democracy*, cit., 27-8.

[38] Ivi, 28.

[39] On the constitutional protection of rights, see Véronique Champeil-Desplats, *Hans Kelsen's Works and the Modern Theories of Human Rights*, in Peter Langford, Ian Bryan and John McGarry (eds.), *Kelsenian Legal Science and the Nature of Law*, Springer, New York 2017, 188-90. Magalhães points out that the epistemologically grounded justification of rights explains why private property rights are not included in Kelsen's list of fundamental rights (Magalhães, *Science, Relativism and Pluralism*, cit., 149). On Kelsen's notion of integration and on the role he assigns in this regard to political parties, political representation, parliamentarism and law-making, see Lagi, *La democrazia secondo Hans Kelsen*, cit., 161-70.

[40] Sara Lagi, *Against Natural Law: The Political Implications of Kelsen's Legal Positivism*, in Langford, Bryan, McGarry, *Kelsenian Legal Science*, cit., 474; Christine Chwaszcza, *Kelsen on Democracy in Light of Contemporary Theories of Human Rights,* in Ivi, 199. For an interpretation that

For what concerns the internationalization of human rights, Kelsen recognizes, contrary to the predominant view in German legal thought at the time, that the individual can be considered in certain instances as a legal subject in international law but he specifies, applying the domestic analogy, that «without subjecting the state to the jurisdiction of an international tribunal, no "rights" of individuals in relation to the state are established»[41].

Likewise, in analysing the possible role of international law in ensuring and protecting human rights, Arendt expresses her perplexities that the approval of new international declarations of human rights would not solve the problem because this idea «transcends the present sphere of international law which still operates in terms of reciprocal agreements and treaties between sovereign states; and for the time being, a sphere that is above nations does not exist»[42]. For Arendt in fact the main problem with human rights lies in their genealogical link with the history and dilemmas of the sovereign nation-state.

Unlike Kelsen, Arendt approaches the question of human rights from 'outside' the political system, that is, by looking at the hopeless condition – which she, Kelsen and many Jews personally experienced due to the Nazi persecution – of stateless, refugee people, of those who had become rightless because they had been deprived «of a place in the

partially diverges from the above, see Invernizzi Accetti, *Reconciling legal positivism and human rights*, cit., 225-6.

[41] Kelsen, *Principles of International Law*, cit., 144.

[42] Hannah Arendt, *The Origins of Totalitarianism*, Harcourt Brace & Company, New York 1973[6], 298. She adds in this regard that the confusion created by these attempts demonstrates that «no one seems able to define with any assurance what these general human rights, as distinguished from the rights of citizens, really are» (ivi, 293).

world which makes opinions significant and actions effective»[43].

What makes this condition (especially evident after WWI) particularly symbolic and symptomatic of the dilemmas and dangers of the nation-state is, to Arendt, the fact that the loss of citizenship, the loss of a polity, means expulsion from humanity and condemnation to rightlessness; precisely for those who were reduced to the «abstract nakedness of being nothing but human»[44] and would have needed their protection most, it spelt the impossibility of enjoying those self-same 'human' rights.

This made it clear, according to Arendt, that to enjoy human rights one must be recognized as a citizen, one must enjoy «a right to belong to some kind of organized community»[45], a «right to have rights»[46].

This is so because, since the French revolution, even if they were predicated on the individual and presented as natural, inalienable and universal, human rights became «quickly and inextricably blended with the question of national emancipation»[47], and it became evident that «the people, and not the individual, was the image of man»[48]. It is thus the sovereignty- and nationality-centred organization of the European state system that, by making the sovereign state an instrument of the nation and not the protector of

[43] Ivi, 296.

[44] Ivi 300, 296-7. Arendt compares the condition of rightless people to that of «barbarians» produced from within the global civilization, of individuals who are forced into «the conditions of savages» (ivi, 302).

[45] Ivi, 296-7.

[46] *Ibidem.*

[47] Ivi, 291.

[48] *Ibidem.*

the individual, produced the coincidence between human rights and citizen/national rights, the intangibility of the state's right to deny (and withdraw) citizenship, and would dramatically determine the fate of refugees and stateless people, as well as of minorities, as testified by the 1919 Minority Treaties that Arendt analyses[49].

The fact that in the contemporary era humanity has taken the place once played by nature (and history before it) as the new guarantee of human rights thus did not seem to provide for a more certain solution. Arendt was deeply sceptical about the misuse of the idea of humanity, which in her view should be used as a 'yardstick', as a regulative idea but not as a practical end because the fatal risk of cosmopolitan, universal, and even humanitarian perspectives is that they tend to de-emphasize the uniqueness and particularity of conditions, and in so doing they assimilate and abolish distance and difference, they abolish plurality. In the same vein, a world government cannot offer a viable alternative for her; for regardless of its form, by concentrating and projecting the sovereign logic over a global sphere, the risks of having mutual limitations cancelled and plurality abolished, that is, the destruction of the conditions for politics to take place, would actually be multiplied exponentially[50].

[49] For her analysis of the Minority Treaties, see Arendt, *The Origins of Totalitarianism*, cit., 269-90. For a short comparison between Kelsen and Arendt's criticism of the concept of sovereignty, see Andrew Arato, Jean L. Cohen, *Internal and External Sovereignty in Arendt*, in Seyla Benhabib, Roy T. Tsao and Peter Verovsek (eds.), *Politics in Dark Times: Encounters with Hannah Arendt*, Cambridge University Press, Cambridge 2010, 137-9.

[50] Hannah Arendt, *Men in Dark Times*, Harcourt, Brace & World, Inc., New York 1968, 81-2.

Arendt's conception of politics is indeed radically distant from Kelsen's, as she argues that politics is not equivalent to vertical ruling and it is not based, *pace* Kelsen, on the distinction between rulers and ruled, but unfolds horizontally, it takes place 'in-between' individuals who act and talk together, and it means unpredictability, contingency and uniqueness. Against this background, she thought that only law and territorial boundaries, that is, limited communities, could provide a possible solution and she tried to solve the contradiction between the need for human rights to be universally granted and her «politics of limits»[51] by loosely arguing for a sort of Kantian federalism, «a world-wide federated structure»[52] formed through mutual agreements between republics, to be based on a civic (not an ethnic) conception «of polity and belonging»[53].

Which pluralism?

Dunn has recently convincingly argued that Arendt's conception of plurality is at the basis of her theory of judgment and influenced by her reading of Kant's texts, in particular his *Anthropology*, as borne out by the fact that in *The*

[51] Patricia Owens, *Between war and politics: international relations and the thought of Hannah Arendt*, Oxford University Press, Oxford 2007, 146.

[52] Arendt, *Men in Dark Times*, cit., 84. For an analysis of Arend's notion of federalism, its critical and contradictory points, see Shinkyu Lee, *Hannah Arendt and International Relations*, «Oxford Research Encyclopedia of International Studies», 29 November 2021, available at: https://doi.org/10.1093/acrefore/9780190846626.013.665.

[53] Seyla Benhabib, *The Rights of Others. Aliens, Residents and Citizens*, Cambridge University Press, Cambridge 2004, 60.

Life of the Mind she singles out Kant as being «more aware than any other philosopher of human plurality»[54].

In the first part of *Anthropology from a Pragmatic Point of View* Kant, after having analysed three forms of *egoism* (logical, aesthetic and moral), states that «the opposite of egoism can only be *pluralism*»[55]. Whereas he defines egoism as the attitude in which one is concerned with oneself as the whole world, pluralism is its opposite because it is the way of thinking in which one «conducts oneself as a mere citizen of the world»[56]. This pluralistic stance is related also to the three maxims of common understanding Kant identifies, – the second of which reads «Think from the standpoint of everyone else»[57] – and, according to Lenczewska, if analysed together with the public use of reason, the role of interpersonal communication and of education in Kant's thought, it would substantiate a peculiar Kantian, at the same time ethical and political, notion of pluralism that would pertain to both individuals and the human species as a whole[58].

To Arendt plurality is the fundamental feature of human existence and action, the condition of existence of the world and of humanity against the deadly threats posed by totalitarianism and mass society, and it is what we all share and what differentiates us, as she writes: «Plurality is the

[54] Arendt, *Life of the Mind*, cit., I, 96; Dunn, *Plurality and the Potential for Agreement*, cit., 247-8.

[55] Immanuel Kant, *Anthropology from a Pragmatic Point of View*, edited by R.B. Louden, with an introduction by M. Kuehn, Cambridge University Press, Cambridge 2006, 18.

[56] *Ibidem*.

[57] Ivi, 95. Kant describes these maxims in many texts, including the *Critique of the Power of Judgement*.

[58] Olga Lenczewska, *Becoming Pluralists: Kant on the Normative Features of Pluralistic Thinking*, «Kant Yearbook», XIII, 2021, 107-28.

condition of human action because we are all the same, that is, human, in such a way that nobody is ever the same as anyone else who ever lived, lives, or will live»[59]. Unlike otherness, plurality does not exclude the possibility of mutual understanding and communication and is indeed the condition of politics – which takes place only when unique individuals speak and act together, when they bring their irreducible uniqueness to the fore –, as well as, as we have seen, of understanding and judging[60].

In her view plurality is thus not only ontological evidence or an epistemic requirement, nor only the opposite of egoism. It has clear political and normative implications «which require us to take up a particular stance in our thinking»[61] and to actively resist egoism, alienation from the world and the destruction of the public realm[62]. Adopting an enlarged mentality, however, does not guarantee that agreement will be reached, for the dynamics of plurality remain unpredictable for her, but that agreement is possible and that the common world is preserved[63].

[59] Hannah Arendt, *The Human Condition*, The University of Chicago Press, Chicago (IL) 1998, 8. As she writes in *The Promise of Politics*: «human beings in the true sense of the term can exist only where there is a world, and there can be a world in the true sense of the term only where the plurality of the human race is more than a simple multiplication of a single species» (Arendt, *The Promise of Politics*, cit., 176).

[60] Williams, Lang, *Introduction*, cit., 11.

[61] Dunn, *Plurality and the Potential for Agreement*, cit., 249.

[62] Ivi, endnote 8, 255. It is to be noted that Arendt strongly criticizes Kant's notion of morality and refuses to establish any connection between morality and politics.

[63] Dunn, *Plurality and the Potential for Agreement*, cit., 251. See the same text by Dunn for the analysis of the critiques and divergent interpretations of Arendt's treatment of the question of adjudication

Kelsen rephrases Kant's distinction between egoism and pluralism by contending that philosophical relativism is capable of avoiding both the perils of what he calls 'solipsism', that is, «the assumption that the ego as the subject of knowledge is the only existent reality»[64] which leads to philosophical absolutism; and of 'pluralism', that is, the paradoxical situation in which «there are as many worlds as there are knowing subjects»[65]. Relativism, which as we have seen is the philosophical stance that for Kelsen is 'congenial' to democracy, manages to avoid these epistemic perils and compensate for its inability to secure the objective existence of one and the same world for all by distinguishing between genuine value judgements and propositions about reality and assuming, with regard to the latter, that individuals, as the subjects of knowledge, are equal, that is, have the same «processes of rational cognition»[66] that allow cognition of reality to be shared, and thus the conciliation of «the relativity of knowledge with its objectivity»[67].

In relation to value judgements, Kelsen's positivistic relativism does not mean that there are no values at all, but actually that there are many moral orders that can claim validity and universal application, and thus committing to one or the other is merely a matter of choice. As he will say: «Positivistic relativism means: moral autonomy»[68], as it «imposes upon the individual the difficult task of deciding for himself

between competing political opinions, the most famous of which is the one expressed by Jürgen Habermas in Id., *Hannah Arendt's Communications Concept of Power,* «Social Research», XLIV, 1977, 3-23.

[64] Kelsen, *Foundations of Democracy*, cit., 17.

[65] *Ibidem.*

[66] Ivi, 18.

[67] Magalhães, *Science, Relativism and Pluralism*, cit., 160.

[68] Kelsen, *Foundations of Democracy*, cit., 97 (footnote no. 70).

what is right and what is wrong»[69], which implies a serious responsibility, «the most serious responsibility a man can assume»[70]. And it is for these reasons that individuals ought to be granted the freedom of religion, opinion and press, the freedom of science and thus the freedom to adhere to their own normative beliefs. It is for these reasons that the unitary people is to be seen as the result of the process of integration, and not as its precondition, and the will of the State as the result of parliamentary discussion, of a compromise between majority and minority[71].

That such a compromise and integration can be effectively achieved and secured in the political domain is, however – despite (or perhaps because of) his confidence in human rationality and scientific knowledge – by no means assured. If his notion of pluralism, as for Arendt, calls into question the responsibility, self-determination and autonomy of the individual, it also made it impossible for him, for the sake of methodological consistency, to defend democracy (and pluralism itself) from its enemies, to acknowledge that a democratic theory aimed at granting freedom needs more than the procedural guarantees and methods he identified[72].

[69] *Ibidem.*

[70] *Ibidem.*

[71] Kelsen, *Foundations of Democracy*, cit., 28. Lagi, *La democrazia secondo Hans Kelsen*, cit., 159.

[72] Magalhães, *Science, Relativism and Pluralism*, cit., 163-4; Chwaszcza, *Kelsen on Democracy*, cit., 203; Lagi, *La democrazia secondo Hans Kelsen*, cit., 172-3. Kelsen in fact states: «The only consequence of a relativistic theory of values is: not to force democracy upon those who prefer another form of government, to remain aware in the struggle for one›s own political ideal that the opponents, too, may be fighting for an ideal, and that this fight should be conducted in the

Arendt and Kelsen were both fully aware of the fragility, immanence and mutability of politics, of its intrinsically contentious nature, as opposed to any form of deterministic, teleological, idealistic or utopian reading of reality and history, but they tried to come to terms with the 'burden' of reality in very different ways.

When confronted with the indeterminacy of political life, Kelsen tried to govern it by embracing and relentlessly defending the need for a neutral-scientific approach to politics and law, and by defending political pluralism, albeit only in a formal, weak, and self-defeating way. Arendt, on the contrary, in line with her conception of politics and political action, embraced the contingency and openness of reality and attempted to fix some minimal 'boundaries' by developing a stronger defence of plurality.

In the end, for both of them, albeit with a different level of political intensity, defending pluralism was a way to defend responsibility and freedom as the conditions of politics.

spirit of tolerance» (Kelsen, *Foundations of Democracy*, cit., 97 (footnote no. 70).

Pedro T. Magalhães

The Method of Freedom: Kelsen, Schumpeter, and the Value of Democracy

1. *Introduction: two varieties of democratic proceduralism*

Procedural conceptions of democracy maintain that a democratic regime is defined not by its outcomes, but by the procedures which a priori regulate the production of outcomes. Such an understanding of democracy, focusing on *form* rather than *substance*, on *means* rather than *ends*, is a product of late modern political thought, first articulated systematically by the Austrian jurist Hans Kelsen in the 1920s. However, although Kelsen pioneered the concept in the interwar years, it was not his version of procedural democracy that turned out to be more influential. In 1942, Kelsen's close friend, Joseph Schumpeter, who had emigrated to the United States in the early 1930s, published his *magnum opus Capitalism, Socialism and Democracy*. In Part IV of that work, with no reference to Kelsen, Schumpeter proposed a new, realist definition of democracy as «that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote»[1]. This nutshell definition offered empirically-oriented political scientists precisely what they sought in the post-WWII context:

[1] Joseph A. Schumpeter, *Capitalism, Socialism and Democracy*, 5th ed., Allen & Unwin, London 1976, 269.

«a reasonably efficient criterion [the selection of leadership positions via electoral competition] by which to distinguish democratic governments from others»[2]. In 1970, an insightful critic of such a 'minimalist' conception of democracy would already refer to Schumpeter's theory as «the orthodox doctrine»[3] in American political science.

Schumpeter's concern was definitional and analytical, not normative or justificatory, even if he claimed, somewhat misleadingly, that his theory «at the same time salvages much of what sponsors of the democratic method really mean by this term»[4]. Such a normative indifference has been emphasized by a few political theorists recently, who have argued for the need to distinguish, within the proceduralist camp, between the normatively barren 'minimalism' of Schumpeter and his followers, on the one hand, and a normatively robust proceduralism that is capable of articulating the *value* of the democratic method, on the other[5]. This chapter joins such an effort by underscoring the fundamental difference, despite the similarities, between Schumpeter's and Kelsen's conceptions of democracy. Contrary to widespread belief, which treats democratic proceduralism as a monolithic tradition[6],

[2] *Ibidem*.

[3] Carole Pateman, *Participation and Democratic Theory*, Cambridge University Press, Cambridge 1970, 1.

[4] Schumpeter, *Capitalism, Socialism and Democracy*, cit., 269.

[5] Cf. Gerry Mackie, *Schumpeter's Leadership Democracy*, «Political Theory», s. I, vol. XXXVII, 2009, 128-53; Gerry Mackie, *The Values of Democratic Proceduralism*, «Irish Political Studies», s. IV, vol. XXVI, 2011, 439-53; Maria Paula Saffon and Nadia Urbinati, *Procedural Democracy, the Bulwark of Equal Freedom*, «Political Theory», s. III, vol. XLI, 441-81.

[6] Cf. Adam Przeworski, *Kelsen and Schumpeter on Democracy*, 2025, available at https://ssrn.com/abstract=4243533.

a closer look at their theories reveals two sharply opposed conceptions of democracy.

I contend that Kelsen's democratic thought, notwithstanding its realism, remains firmly committed to the ideal of freedom as autonomy or self-determination, which any democracy worthy of the name must strive to approximate. Even if he discarded, earlier than Schumpeter, the mystifications of what the latter dubbed «the classical doctrine of democracy», Kelsen proposes a procedural understanding of democracy that is a refinement of, rather than a break from, the political thought of the eighteenth-century, in particular, that of Rousseau and Kant. In contrast to Kelsen, Schumpeter offers a descriptive theory of democracy where the notion of freedom as autonomy has no place. Indeed, Schumpeter does not merely reject, as Kelsen also does, the idea of a preexisting, rationally ascertainable common good which would form the basis of the *volonté générale*. More than that, he denies the significance of the concept of autonomy, of the very notion of free will. Schumpeter's 'democratic method' is thus merely an observable criterion that (supposedly) allows us to distinguish democratic from non-democratic regimes. For Schumpeter, democracy, in and by itself, realizes no ideal[7].

[7] In this sense, Schumpeter's philosophical anthropology can aptly be called Hobbesian. Reading his thoughts on «the will of the people and individual volition» and on «human nature in politics» (cf. Schumpeter, *Capitalism, Socialism and Democracy*, cit., 252-64), one could easily see him subscribe to Hobbes's apodictic rejection of free will in Chapter V of *Leviathan*: «And therefore, if a man should talk to me of a *round quadrangle*, or *accidents of bread in cheese*; or *immaterial substances*; or of a *free subject*; a *free will*; or any *free*, but free from being hindered by opposition, I should not say he was in an error, but

The chapter is structured as follows. Firstly, drawing on both the 1920 and 1929 editions of Kelsen's *The Essence and Value of Democracy*, I elucidate the pivotal role of freedom as self-determination in Kelsen's theory[8]. Secondly, I show that the lack of such a normative pivot in Schumpeter's theory, as articulated in Part IV of *Capitalism, Socialism and Democracy*, impairs his procedural account of democracy because it makes the theory unable to grasp the distinctiveness of free and fair elections vis-à-vis other methods of elite selection, such as acclamation. Thus, as I argue in conclusion, modern pluralist democracy has in Kelsen, not in Schumpeter, its first great analyst – and strongest paladin – on a procedural basis.

2. *Kelsenian proceduralism: democracy as a function of freedom*

Before diving into the theoretical contrast, some biographical details are in order. To say that Kelsen and Schumpeter knew each other well would be an understatement. They were so close that Schumpeter invited Kelsen to be best man at his second wedding, to Annie Reisinger, in the autumn of 1925[9]. Considering this proximity, the absence of

that his words were without meaning, that is to say, absurd.» (Thomas Hobbes, *Leviathan*, J. M. Dent & Sons, London 1914, 20).

[8] I draw on both editions to correct the misconception that the 1920 edition «had little in common with the 1929 edition» (cf. Przeworski, *Kelsen and Schumpeter on Democracy*, cit., fn. 1, available at https://ssrn.com/abstract=4243533). This is certainly not the case. Indeed, there is no significant revision of Kelsen's argument. The 1929 edition is essentially an *enlarged*, not a *revised* version of the 1920 edition.

[9] Cf. Robert Schuett, *Hans Kelsen's Political Realism*, Edinburgh University Press, Edinburgh 2021, 53.

any reference to Kelsen in *Capitalism, Socialism and Democracy* seems puzzling. Readers of their writings on democracy have noticed the many similarities and points of convergence, which indicate that Schumpeter learned a great deal from his best man. But why didn't he cite him?

We can only speculate. In 1942, when he published *Capitalism, Socialism and Democracy*, Schumpeter was already an American citizen. He moved to the US in 1932 to take up a professorship in economics at Harvard. Kelsen, in turn, left the European continent in June 1940 on the last voyage of the *SS Washington*. In 1942, he vied for a faculty position at Harvard Law School. Roscoe Pound, Dean of Harvard Law, supported Kelsen. However, this support did not overcome the resistance of the other faculty. Could it be that Schumpeter, aware of this dispute among fellow Harvard professors in the law department, thought it wise not to mention Kelsen in his chapters on democracy? Or was he afraid that the American audience could find out that his best man was also the father of the most innovative aspects of his theory of democracy? Be that as it may, Kelsen did not reproach Schumpeter for lacking originality in demystifying the 'classical' understanding of democracy. Instead, when the opportunity arose to assess Schumpeter's theory, Kelsen focused on the crucial difference between their varieties of democratic proceduralism. Namely, as he keenly argued, one must not infer from the procedural nature of democracy, as Schumpeter did, that the democratic method possesses no intrinsic value, independent of the decisions it produces, and serves no normative goal. Entirely on the contrary:

> If we define democracy as a political method by which the social order is created and applied by those subject to the order, so that political freedom, in the sense of self-determination, is

> secured, then democracy necessarily, always and everywhere, serves this ideal of political freedom[10].

By starting his major English-language essay on democracy with this precise demarcation from Schumpeter's proceduralism, Kelsen emphasizes the foundational normative framework of his theory of democracy. Thirty-five years earlier, in the first version of *Vom Wesen und Wert der Demokratie*, he had likewise posited that freedom as self-determination is the cornerstone of democratic thought. According to the author, the democratic idea is rooted in the primordial revolt of the human being against the social order itself, in an elemental rejection of what he, in distinctively Kantian parlance, termed the «torment of heteronomy»[11].

This assertion is, of course, beyond rational argument. Kelsen assumes it as a «postulate of our practical reason»[12] or, to use Mock's fitting phrase, as an «anthropological premise»[13]. This concept of freedom is profoundly individualistic and anarchic; it expresses the opposition of the individual, in the state of nature, to society itself. However, the other postulate of practical reason that Kelsen alludes to in these pages compels us to transcend the state of nature and live in society. How can we live in society and yet remain free? This is the fundamental problem of democracy, identi-

[10] Hans Kelsen, *Foundations of Democracy*, «Ethics», s. I, vol. LXVI, 1955, 4.

[11] Hans Kelsen, *Vom Wesen und Wert der Demokratie*, Mohr Siebeck, Tübingen 1920, 4. All translations from the original German texts are mine.

[12] *Ibidem.*

[13] Erhard Mock, *Hans Kelsens Verhältnis zum Liberalismus*, «Rechtstheorie», vol. IV, 1982, 442.

fied by Rousseau, whom Kelsen deems «the most important theorist of democracy»[14].

However, while Rousseau, in *The Social Contract*, legitimizes the transition from the state of nature to society as a process whereby freedom as self-determination is regained in a different, higher sense, i.e., as an attribute of a collective political subject, Kelsen remains more circumspect, not to say skeptical. Notice the terms that the Austrian jurist uses to describe this momentous shift in the understanding of freedom:

> The enormous importance that the idea of freedom has in political ideology can only be explained insofar as it springs from the depths of the human soul, from a primordial anti-state instinct that pits the individual *against* society. And yet, in an almost enigmatic self-deception, this idea of freedom becomes the mere expression of a specific position of the individual *within* society. The freedom of anarchy gives way to the freedom of democracy[15].

The crucial word in this passage is «self-deception» (*Selbsttäuschung*). While, for Rousseau, the general will seems to be something real and concrete, which is why it cannot be represented lest it be usurped[16], for Kelsen, the collective will is and remains an abstraction, an idealization, a representation. This representation belongs to the realm of normativity, not reality. Confusing these two realms leads to ideological mystification. The confusion amounts to an instrument of self-delusion through which the individual human being seeks to obscure the fact that entering society means, in

[14] Kelsen, *Vom Wesen und Wert der Demokratie* (1920), cit., 6.

[15] Ivi, 5-6. Emphasis in the original.

[16] Cf. Jean-Jacques Rousseau, *Du contrat social*, Mourer et Pinparé, Paris 1797, 228.

reality, giving up on natural freedom. From a perspective aiming at the apprehension of reality, the individual human being is the ultimate, irreducible unit of analysis. This methodological individualism distances Kelsen – perhaps much more decisively than he is willing to admit in 1920 – from the Rousseaunian alchemy of the general will[17]. Within the limits of this perspective, Kelsen redefines the freedom of democracy, the free state, as one in which each individual participates, on equal terms, in creating the objectively valid social order, which, to be sure, from the viewpoint of the individual subject, remains an external, compulsory will[18].

Regarding Kelsen's Rousseaunian inspiration, Pasquino evokes the image of an «armor of a non-existent knight»[19] and pushes the Austrian jurist closer to a Hobbesian understanding of the social contract. While it is true that Kelsen denies substance and reality to collective subjects, the concept of individual autonomy preserves in his political thought an a priori status that cannot be reduced to the Hobbesian absence of external obstacles[20]. The autonomous will of the members of the political community is at the heart of democracy. This plurality of wills must be treated as given and endowed with aprioristic dignity, which the institutional

[17] In a later writing, the Austrian jurist is more forthright in this regard: «It cannot be denied that the people as a mass of individuals of different economic and cultural standards have no uniform will, that only the individual human being has a real will, that the so-called "will of the people" is a figure of speech and not a reality». Cf. Kelsen, *Foundations of Democracy*, cit., 2.

[18] Cf. Kelsen, *Vom Wesen und Wert der Demokratie* (1920), cit., 10-11.

[19] Pasquale Pasquino, *Penser la démocratie: Kelsen à Weimar*, in Carlos-Miguel Herrera (ed.), *Le droit, le politique autour de Max Weber, Hans Kelsen, Carl Schmitt*, L'Harmattan, Paris 1995, 124.

[20] Cf. above, fn. 7.

apparatus of democracy vows to translate into the unity of a normative order. On the contrary, suppose one treats individual volition as a product – manufactured by propaganda or predetermined by our natural drives – and denies individual autonomy an axiomatic status. In that case, it becomes complicated to establish a meaningful distinction between democratic and nondemocratic regimes. Schumpeter's theory of democracy, as we will see below, is a case in point.

Individual autonomy is thus the fixed starting point of a dynamic institutional arrangement which, in modern states, is composed of elections, parties, parliaments, and governments. Of these four elements, Kelsen's writings on democracy focus predominantly on defending party pluralism and parliamentarism. Considering the interwar context, where fascist and communist critics of democracy targeted precisely multiparty rule and parliamentary politics as decrepit institutions and/or instruments of class domination, such a focus is understandable. Amongst the most pungent pages of the second edition of *The Essence and Value of Democracy*, one must surely count Kelsen's refutation of the idea of a supra-partisan general interest or common good as a metaphysical and metapolitical illusion. This illusion amounts, in reality, to a rejection of democracy, for democracy is necessarily a multiparty state (*Parteienstaat*)[21].

Regarding parliamentary rule, Kelsen conceives it as a compromise between the democratic idea of self-determination, of freedom as autonomy, and the need for a social division of labor, which is the condition of progress in modern, complex societies[22]. In other words, parliaments create

[21] Cf. Hans Kelsen, *Vom Wesen und Wert der Demokratie*, 2nd ed., Mohr Siebeck, Tübingen 1929, 20-22.

[22] Ivi, 28-29.

the conditions, under modern social conditions, for the operation of the majority principle at the level of government. However, for Kelsen, the electorate's role is not merely, as Schumpeter would have it, «to produce a government»[23]. The principle of individual autonomy compels one to conceive of parliamentary government as more than a mechanism of authorization, delegation, and accountability. Being a direct product of the aggregated will of autonomous citizens, the composition of parliaments should reflect the political diversity of the electorate as accurately as possible. For this reason, proportionality is the principle of representation required by the axiom of autonomy[24]. To draw on Hanna Pitkin´s helpful distinction, Kelsen's concept of parliamentarism merges a formalistic with a descriptive understanding of representation[25].

It must be conceded that Kelsen abandons the perspective of the autonomous citizen too abruptly and proceeds too swiftly to the more systemic aspects of modern democracy. A more careful and profound immersion into the perspective of the autonomous citizen as a voter might have helped him articulate more clearly the normative criteria of democratic elections. In any case, one can straightforwardly derive from his principle of freedom as self-determination the conditions that post-WWII political science would come to establish as those that define a democratic election: universal, free, and equal suffrage, through a secret ballot, producing significant effects on the distribution of political

[23] Schumpeter, *Capitalism, Socialism and Democracy*, cit., 1976, 269.

[24] Cf. Kelsen, *Vom Wesen und Wert der Demokratie* (1929), cit., 58-63.

[25] Cf. Hanna Fenichel Pitkin, *The Concept of Representation*, University of California Press, Berkeley and Los Angeles 1967.

power in a given political community[26].

Indeed, a keener phenomenological insight might have also allowed Kelsen to dismiss the claim that his theory of democracy cannot justify why certain individual rights should impose restrictions on the majority principle[27]. His is not a 'substantial' individualism derived from a full-fledged theory of justice or a 'natural' law, with all their inevitably metaphysical underpinnings. The anthropological premise of freedom as individual self-determination has no determinable substance; it merely locates in the individual human being the actual instance – the only actual instance – of intentionality. The catalog of fundamental individual rights and freedoms enshrined in all democratic constitutions should, therefore, not be interpreted as a liberal appendix to – and modification of – democracy, as Kelsen himself at times seems to view it[28]. In the same way, it is also imprecise to treat constitutionally anchored rights merely as anti-majoritarian institutions aiming to protect some particular minorities, as the author argues in *Vom Wesen und Wert der Demokratie*[29]. Alternatively, following the internal consistency of Kelsen's argument, one must interpret the protection of individual autonomy as the condition for the operation of the majority principle at the supra-individual level – therefore, as an essential feature of any democracy, liberal or otherwise. The constitutional guarantee of fundamental in-

[26] Cf., above all, Stein Rokkan, *Citizens, Elections, Parties: Approaches to the Comparative Study of the Processes of Development*, Universitetsforlaget, Oslo 1970.

[27] Cf. e. g. Peter Koller, *Zu einigen Problemen der Rechtfertigung der Demokratie*, «Rechtstheorie», vol. IV, 1982, 323-25.

[28] Cf. Kelsen, *Foundations of Democracy*, cit., 3-4.

[29] Cf. Kelsen, *Vom Wesen und Wert der Demokratie*, (1929), cit., 54-55.

dividual rights protects the irreducible and unsurpassable instance of intentionality that constitutes the source of all supra-individual democratic institutions[30].

Because it has its ultimate source in the autonomous individual, political freedom, i.e., democracy, can only be realized on a procedural basis that protects and builds upon this source. Regarding its 'actual content', what flows from such a form of government is uncertain, contingent, and reversible. Democracy, as a legal system open to the input of citizens and parties, is dynamic, not static – it is a system of positive law, not a natural law that could be deduced from immutable first principles. Whether progressive or conservative, socialist or liberal, the substance of democratic politics at any given historical circumstance is immaterial to political freedom. In the final analysis, this reconceptualization of freedom in functional rather than substantive terms follows the same pattern and pertains to the same broad project of Kelsen's theory of law and the state, which was to free – or, to use his preferred term, purify – political and juridical concepts from a transcendent, metaphysical fixation of their meaning[31].

[30] For this very reason, the catalog must not be extensive: the point is to protect the individual source of the supra-individual democratic dynamic; it is not to enshrine an ideological program – liberal or otherwise – in the constitution. In the *General Theory of Law and State*, Kelsen makes the point more clearly: «Insofar as public opinion can arise only where intellectual freedom, freedom of speech and press and religion, are guaranteed, democracy coincides with political – though not necessarily economic – liberalism». Cf. Hans Kelsen, *General Theory of Law and State*, Harvard University Press, Cambridge MA 1945, 287.

[31] Ernst Cassirer's *Substanzbegriff und Funktionsbegriff* (1910), one of the most sophisticated works in neo-Kantian epistemology, is explicitly mentioned by Kelsen in a 1921 essay as a model for his own

3. *Schumpeterian proceduralism: the false promise of normative indifference*

Despite the similarities that critics and commentators have identified in Kelsen's and Schumpeter's theories of democracy, the relationship each author establishes between individual autonomy and democracy sets them sharply apart. While freedom as self-determination is the cornerstone of democracy for Kelsen, Schumpeter writes only one ambiguous paragraph about this relation[32]. Freedom as autonomy is no concept for Schumpeter. Moreover, he refuses to erect his theory of democracy on a normative basis and to articulate the value of democracy *an sich*, irrespective of the actual policies carried out by democratic governments. His angle of approach is that of the detached observer who searches for palpable evidence. He claims to provide an efficient criterion – the selection of political leaders through electoral competition – «the presence or absence of which it is in most cases easy to verify»[33]. But is it possible to establish such a criterion and to distinguish democratic governments

reconceptualization of law and the state: «What Cassirer does for the basic concepts of natural science, such as atom, ether, matter, force, soul, etc., must also be done in a similar way for the concepts of jurisprudence, especially for the concept of the state: to transform them from concepts of substance into pure concepts of function, *to prove that the tendency to this transformation lies in the development of science itself.*» Cf. Hans Kelsen, *Das Verhältnis von Staat und Recht im Lichte der Erkenntniskritik*, in Hans Klecatsky *et alii* (eds.), *Die Wiener rechtstheoretische Schule. Schriften von Hans Kelsen, Adolf Merkl, Alfred Verdross*, 2 vols., I, Wien, Europa Verlag, 1968, 105.

[32] Cf. Schumpeter, *Capitalism, Socialism and Democracy*, cit., 272: «This relation between democracy and freedom is not absolutely stringent and can be tampered with».

[33] Ivi, 270.

from others in the absence of normative foundations? The answer, I contend, must be in the negative.

Even though political scientists and theorists usually read Part IV of *Capitalism, Socialism and Democracy*, and especially chapters XXI and XXII, in isolation, it must be noted that democracy is not the main subject of that work. Indeed, therein, the problem of democracy is secondary and adjacent to the grand question of the transition – which Schumpeter, not without some anxiety, deems inevitable – from a capitalist to a socialist society. In the Marxian jargon, Schumpeter was primarily concerned with the economic infrastructure, not the political superstructure. Regardless of the level of analysis, however, he was wary of ideological mystification getting in the way of clear scientific insight. Be it in the study of economics or politics, he sought to strip concepts off their dense ideological garb. His redefinition of democracy against the «classical doctrine» is akin to the redefinition of socialism strictly as collective property and planning by public authority, which ditches aside Marxism's unscientific, prophetic elements[34].

Epistemological concerns, thus, rank foremost in Schumpeter's redefinition of democracy. While these concerns were also relevant for Kelsen, in Schumpeter's theory of democracy, they stand alone and do not have a normative foothold. In addition, one also notices significant differences when comparing their epistemological approaches. Whereas Kelsen's reconceptualization of political freedom, as I have shown above, can fruitfully be read, in neo-Kantian terms, as part of a broader modern scientific project to transform «concepts of substance into pure concepts of

[34] Ivi, 421.

function»[35], Schumpeter's insistence on observable, verifiable criteria is much closer to the neo-positivist epistemology of the Vienna Circle[36].

Schumpeter's merciless assault on «the classical doctrine of democracy» exploits precisely the indeterminable, unverifiable, unobservable nature of the latter's key concepts, such as the common good, the general will, and, in the last resort, individual autonomy itself. As we have seen, most elements of this critique had already been developed by Kelsen in interwar Vienna with greater rigor and from a more sophisticated metatheoretical angle. However, one must give Schumpeter credit for his boldness and iconoclastic spirit. By carefully constructing a strawman – «the classical doctrine of democracy» is an amalgamation of Rousseaunian and utilitarian ideas, with the occasional wink to Marxism – against which he proposed his simpler and clearer theory, Schumpeter formulated the contrast explicitly as an epistemological break. In retrospect, considering that his theory turned into political science orthodoxy, one must acknowledge that the audacity paid off. But does the break deliver what it promises?

Beneath the iconoclastic style and the superficial clarity of the theory, problems abound. The first indication of these

[35] Cf. above, fn. 31.

[36] Notwithstanding his metatheoretical eclecticism and sense of irony, his openness to the insights of historicism and phenomenology, Schumpeter's redefinition of democracy, with its emphasis on observable behavior, is distinctly neo-positivist. This, I believe, goes a long way towards explaining its uncritical absorption by post-WWII American political science, where neo-positivism rapidly consolidated as the default epistemological position. On Schumpeter's philosophical influences, cf. Yuichi Shionoya, *Schumpeter and the Idea of Social Science: A Metatheoretical Study*, Cambridge University Press, Cambridge 1997.

appears as a note of nuance after the author establishes that his theory, in contrast to «the classical doctrine», conceives democracy as «a *modus procedendi* the presence and absence of which it is in most cases easy to verify»[37]. Attached to this sentence, a footnote cautions the reader to see «the fourth point below»[38]. If one turns the page and does so, one stumbles upon the frank admission that «our theory is of course no more definite than is the concept of competition for leadership»[39]. Applying the concept of competition to politics is problematic, and it replicates most of the difficulties that economists grapple with when they theorize markets. Competition for political leadership, like competition in economic life, cannot be coerced into a dummy variable. And thus, identifying the criterion of democracy might not be as easy as it was supposed to be.

In an arbitrary "I know it when I see it" move, justified by reasons of expedience only, Schumpeter restricts «the kind of competition for leadership which is to define democracy, to free competition for a free vote»[40]. However, since he refuses to derive the criteria of a free vote from a normative conception of freedom, this restriction proves unhelpful. All it does is exclude from the precinct of democracy cases of competition by ostensibly violent means. On the other hand, cases «strikingly analogous to the economic phenomena we label "unfair" or "fraudulent" competition or restraint of competition» – i.e., rigged elections, curtailment of civic and political rights, party bans restricting political pluralism, and so on – are not and should not be excluded

[37] Schumpeter, *Capitalism, Socialism and Democracy*, cit., 270
[38] *Ibidem.*
[39] Ivi, 271.
[40] *Ibidem.*

from the definition. Thus, Schumpeter's criterion includes every case that falls within a broad range defined, on one extreme, by the ideal case of perfect competition, «which does not exist», and on the other extreme, by «the cases in which all competition with the established leader is prevented by force»[41], i.e., totalitarian regimes[42].

In the final analysis, «there is a continuous range of variation within which the democratic method of government shades off into the autocratic one by imperceptible steps»[43]. After all, Schumpeter's purportedly efficient criterion only establishes a broad range, including, as the author admits, both democracies and autocracies, and within which it offers no further discernment. «[T]his is as it should be», Schumpeter claims rather unconvincingly, «if we wish to understand and not to philosophize»[44]. To my ears, this sounds like a veiled admission of the failure of the theory to offer what it promised, of its inability to discriminate between democracies and autocracies, to discern the «imperceptible steps» that make a regime cross the Rubicon. That kind of insight requires the stipulation of normative criteria, allowing us to distinguish democratic from non-democratic electoral competition[45]. Yet Schumpeter's theory, in contrast to Kelsen's, eschews all normativity and is not up to that task.

[41] *Ibidem.*

[42] To give concrete examples of contemporary regimes, Schumpeter's definition would exclude from the category of democracy Nazi Germany and Soviet Russia, but would include Francoist Spain and Salazar's Portugal. Fascist Italy would be sitting on the fence.

[43] Schumpeter, *Capitalism, Socialism and Democracy*, cit., 271.

[44] *Ibidem.*

[45] The phenomenon of non-democratic electoral competition has been studied by political science for decades now. Cf. the seminal study by Guy Hermet, Juan J. Linz and Alain Rouquié, *Des élections*

Finally, the most revealing indication of the failure of Schumpeter's theory is hidden in a footnote. When the author explains that his criterion excludes, as it should, military competition for political leadership, he hastens to add that «[i]t also excludes methods which should not be excluded, for instance, the acquisition of political leadership by the people's tacit acceptance of it or by election *quasi per inspirationem*». Furthermore, he says this «differs from election by voting only by a technicality»[46]. Here, as Scheuerman perceptively notes, the ghost of Carl Schmitt, who crossed paths with Schumpeter at the University of Bonn in 1926, makes an unmistakable appearance. The difference between the selection of leaders by election and by acclamation, Schmitt's fascist alternative to the secret ballot and the voting booth, is, for Schumpeter, only a matter of detail. He does exclude the latter, but rigorously speaking, he should not, for his theory is unequipped to discriminate between the two methods. «[H]istorically and philosophically naive political scientists», as Scheuerman remarks, were also unequipped to read in-between the lines and detect the proximity of Schumpeter's theory to «an onerous tradition of Central European authoritarianism»[47]. However, those groomed in the history of European political thought, like David Held, did not fail to conclude that Schumpeter's theory is «only one small step removed… from a vision which

pas commes les autres, Paris, Presses de la Fondation Nationale de Sciences Politiques, 1978, and more recently, Steven Levitsky and Lucan A. Way, *Competitive Authoritarianism: Hybrid Regimes After the Cold War*, CUP, Cambridge 2010.

[46] Schumpeter, *Capitalism, Socialism and Democracy*, 5th ed., London, Allen & Unwin, 1976, 271, fn. 271.

[47] William E. Scheuerman, *The End of Law: Carl Schmitt in the Twenty-First Century*, 2nd ed., Rowman & Littlefield, London 2020, 237.

is both anti-liberal and anti-democratic»[48]. The good news for all political scientists is that one can find a procedural alternative in Kelsen that is empirically more useful and normatively more robust. It's high time we revise the canon.

4. *Conclusion*

In examining the contrasting procedural theories of democracy put forth by Hans Kelsen and Joseph Schumpeter, it becomes clear that Kelsen's approach offers a more comprehensive, normatively grounded, and ultimately superior conception of democracy. While both theorists sought to move beyond mystified notions of democracy and provide more realistic accounts, Kelsen's theory preserves crucial normative foundations that allow for a meaningful distinction between democratic and non-democratic regimes – a distinction that Schumpeter's theory ultimately fails to establish.

The key difference lies in Kelsen's commitment to the ideal of individual freedom as autonomy or self-determination. For Kelsen, this concept of freedom forms the essential normative core of democracy, providing its justification and guiding principle. Democracy, in Kelsen's view, is valuable precisely because it aims to maximize political freedom by allowing citizens to participate in creating the social order to which they are subject. This normative grounding enables Kelsen to articulate clear criteria for democratic procedures, including universal suffrage, free and fair elections, multiparty competition, and constitutional protections for individual rights.

[48] David Held, *Models of Democracy*, 3rd ed., Polity, Cambridge 2006, 154.

Schumpeter, by contrast, eschews such normative foundations in favor of a purely descriptive, value-neutral account of democracy as a method for selecting political leaders through competitive elections. However, as our analysis has shown, this approach proves inadequate for distinguishing genuinely democratic procedures from authoritarian alternatives. Without normative criteria derived from a conception of political freedom, Schumpeter's theory struggles to differentiate between free and fair elections and manipulated or coerced forms of electoral competition. This shortcoming is starkly illustrated by Schumpeter's claim that acclamation differs from democratic election only by a "technicality" – a view that reveals the proximity of his theory to authoritarian conceptions of leadership selection.

Kelsen's procedural theory, rooted in the ideal of individual autonomy, avoids these pitfalls while still offering a realistic account of modern democratic institutions. His emphasis on party pluralism, proportional representation, and constitutional limits on majority rule reflects a sophisticated understanding of how democratic procedures can best approximate the ideal of collective self-determination in complex modern societies. Unlike Schumpeter, who reduces democracy to elite competition for votes, Kelsen recognizes the ongoing importance of citizen participation and the need for institutional arrangements that reflect and protect political pluralism.

To be sure, Kelsen's theory has its problems and shortcomings, some of which we have identified above and others we have delved into elsewhere[49]. Compared to Schumpeter's, however, it emerges as clearly superior. Its combination

[49] For a critique of the philosophical foundations of Kelsen's theory, see Pedro T. Magalhães, *The One and the Many: A Critical Reflection*

of realism and normative grounding, its ability to distinguish democratic from non-democratic regimes, and its potential for inspiring democratic practice and reform make it a more valuable resource for contemporary democratic theory. As democracies worldwide face new challenges and autocratization takes on subtler forms[50] that, through Schumpeterian spectacles, would genuinely look like «imperceptible steps», Kelsen's vision of democracy as a dynamic system rooted in the principle of individual autonomy offers indispensable normative and analytical guidance for defending and deepening democracy in our century.

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on the Foundations of Hans Kelsen's Democratic Theory, «Austrian Journal of Political Science», s. III, vol. LI, 2022, 32-41.

[50] Cf. Anna Lührmann and Staffan I. Lindberg, *A Third Wave of Autocratization is Here: What is New About It?*, «Democratization», s. VII, vol. XXVI, 2019, 1095-113.

Sara Lagi

Kelsen Unexpected: Education to Politics and the Making of his Democratic Theory

1. *Introductive remarks*

Why Kelsen Unexpected? Because Kelsen is almost automatically identified with his legal formalism and thus with a legal and philosophical vision seemingly separated from historical, social and political reality. After all, he claimed and theorized the purity of legal science as detached from history, sociology and politics[1].

Yet, there are at least two relevant objections that can be raised against such an interpretation: Kelsen indeed developed a theory of democracy which was everything but the mere application of his legal theory to the realm of politics[2]. In a series of works published between the 1920s and the 1950s, Kelsen targeted specific figures, ideologies and movements which he retained to be a serious threat to representative and liberal democracy. If the first edition of *Vom Wesen und Wert der Demokratie* (1920) polemically addressed the Bolsheviks' and precisely Lenin's claim to im-

[1] Hans Kelsen, *Die Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre der Rechtssatze*, Mohr Siebeck, Tübingen 1911.

[2] Cf. the "classical" Norberto Bobbio, *Diritto e Potere. Saggi su Kelsen*, Edizioni Scientifiche Italiane, Napoli 1992; Raimondo De Capua, *Hans Kelsen e il problema della democrazia*, Carocci, Roma 2003; Robert Schuett, *Hans Kelsen's Political Realism*, Edinburgh University Press, Edinburgh 2021; Horst Dreier, *Hans Kelsen zur Einführung*, Nomos Verlag, Baden-Baden 2023.

plement true democracy through the Soviets, the second edition (1929) warned against the corporativist representation which was defended particularly by conservative forces, while tracing a defence of political and parliamentary representation[3]. Not to mention Kelsen's last, important work devoted to political theory, *The Foundations of Democracy* (1955), in which he not only reiterated his critique of Bolshevism and Soviet Russia but he also focused – among other things – on what he thought were the "authoritarian" implications of Neo-jusnaturalism[4].

If we look at his major works on democratic theory, duly considering his firm will to attack a series of well identified political targets, then the idea that such a theory is a mere application of his legal theory or the product of a reflection with no direct connection with historical and political reality does not seem feasible. There is however a second element to consider which will be discussed in this essay: as Tamara Ehs has showed with her pioneering work, Kelsen was involved in a series of educational ventures, all concerning the so called Viennese Volksbildung (formation of the people)[5], which consisted of lectures for adults who could not access university. Between 1911 and 1928, Kelsen held

[3] Hans Kelsen, *Vom Wesen und Wert der Demokratie* (1st edition 1920), in Id., *Verteidigung der Demokratie*, hrsg. von Matthias Jestaedt und Oliver Lepsius, Mohr Siebeck, Tübingen 2006, 10-13; Hans Kelsen *Vom Wesen und Wert der Demokratie* (1st edition 1929), in Id., *Verteidigung der Demokratie*, cit., 182-193.

[4] Hans Kelsen, *Foundations of Democracy* (1st edition 1955), in Id., *Verteidigung der Demokratie*, cit., 250-258, 307-347.

[5] On Volksbildung and democracy with a focus on contemporary context, cf. Gerhard Bisovsky und Christian H. Stifter (hrsg.), *Wissen für Alle. Beiträge zur Stellenwert von Bildung in der Demokratie*, Verband Wiener Volksbildung, Wien 1996.

lectures on a variety of different topics, which in some cases were not taught in regular classes at university level. In fact, while lecturing for the Viennese Volksbildung Kelsen took on the issue of *politische Erziehung* (Political Education) in a modern State[6].

Is there any relationship between Kelsen's teaching activity outside of his academic community, his idea of political education and his democratic theory which he began to develop during the 1920s? In order to give a response to such a question, I will structure my argumentation into three main sections: Initially, I will briefly sketch out the meaning and context of the Viennese Volksbildung movement in which Kelsen played an important role. I will then concentrate on one of the lesser-known works of Kelsen: *Politische Weltanschauung und Erziehung* (1913)[7] in which Kelsen developed the meaning of political education. After that I will seek to explain how and to what extent Kelsen's idea of political education and some rather relevant aspects of his democratic theory are intertwined.

2. *The Viennese Volksbildung in brief*

Kelsen's attention to the issue of education seemed to reflect a long-term sensitivity that belonged to the Viennese

[6] Cf. Tamara Ehs, *Hans Kelsen und politische Bildung in dem modernen Staat. Vorträge in Wiener Volksbildung. Schriften zur Kritikfähigkeit und Rationalismus*, Manzsche Verlag, Wien 2007 and Id., *Die Entzauberung von Staat und Recht. Hans Kelsen als Vortragender in der Wiener Volksbildung*, «Spurensuche», 17, 2007, 67. Both works formed an essential reference point for this essay.

[7] Hans Kelsen, *Politische Weltanschuung und Erziehung*, «Annalen für Soziale Politik und Gesetzgebung», 2. Band, 1918 (1st edition 1913), 1-27.

and generally Austrian context. Already at the end of the 19th century, large sectors of the Austrian Liberal bourgeoisie promoted the so-called Volksbildung which consisted in adult education by means of a network of Volkshochschulen (high schools for the people) open to all social classes[8]. The overall ambition was to make science, literature, art accessible to the broadest audience as possible, in particular to those citizens who could not afford higher levels of education. If it is true that the promotion of the Volksbildung was initially seen as a good way to mitigate social struggle, differently from the past experiences of «national education projects» dating back to the 18th and 19th century, the late 19th century Viennese Volksbildung was no longer characterized by «paternalist» tendencies[9].

From the late 19th century until the late 1920s the Viennese Volksbildung rather turned into an educational project for the people as a whole, made up of men and women considered as equal holders of equal rights[10]. The Volksbil-

[8] On this topic, in general: Christian H. Stifter, *Die Wiener Volkshochschulbewegung in den Jahren 1887-1938: Anspruch und Wirklichkeit*, in Id., (hrsg.), *Wissenschaft, Politik und Öffentlichkeit. Von der Wiener Moderne bis zur Gegenwart*, WUV (Wiener Vorlesungen, Konversatorien und Studien. Bd. 12), Wien 2002, 95-116. See also: Id., *Making Popular Education known to the Public: Dissemination of Volkshochschulen in Austria 1870-1930*, in Stuart Marriott and Barry J. Hake, (eds.), *Cultural and Intercultural Experiences in European Adult Education. Essays on Popular und Higher Education since 1890*, University of Leeds, Leeds 1994, pp. 261-387.

[9] Michael Sturm, *Zur Geschichte der Wiener Volksbildung*, in Ursula Knitler-Lux (hrsg.), *Bildung bewegt. 100 Jahre Wiener Volksbildung*, Verband Wiener Volksbildung, Wien 1987, 43.

[10] Stifter, *Demokratie und Volksbildung in Wien um 1900*, «Die Österreichische Volkshochschule. Magazin für Erwachsenenbildung», Heft 261/68, 2017, available at the web site: https://magazin.

dung was also animated by the Enlightenment trust in social progress through education, by the belief that it was the time to develop a secularized education within the Austrian context which had always been under the strong influence of the Catholic Church and by the desire to experiment a new approach to education[11].

The historical development of the Viennese Volksbildung was gradual, systematic and characterized by a good level of internal organization. In 1887, the Wiener Volksbildungsverein (Viennese association for the formation of the people) was established: it also cooperated with other Volksbildungvereine situated in Lower Austria[12]. Since its very foundation, the Wiener Volksbildungsverein was also committed to developing a collaboration with Vienna university. In 1887 some Viennese university professors began to lecture for the Wiener Volksbildungsverein: ten years later, it was the time of the so called «volkstümliche Universitätsvorträge» (university seminars for the people), that is public speeches held by university professors and open to all citizens[13]. Kelsen's personal and passionate commitment for the Viennese Volksbildung, which I will take into account in the next paragraph, should be thus situated within the context of the more general commitment of many Viennese university professors for the same cause.

vhs.or.at/magazin/2017-2/261-juni-2017/geschichte/demokratie-und-volksbildung-in-wien-um-1900-eine-historische-skizze/

[11] *Ibidem.*

[12] Wilhelm Filla, *Zwischen Arbeiterbewegung und Bürgertum. Die Volkshochschuklen in der Monarchie und der Ersten Republik*, in Ursula Knitler-Lux (hrsg. von), *Bildung bewegt. 100 Jahre Wiener Volksbildung*, cit., 22.

[13] Sturm, *Zur Geschichte der Wiener Volksbildung*, cit., 43; Ehs, *Die Entzauberung von Staat und Recht*, cit., 67.

In the late 19th century, further efforts brought the creation of the Wiener Urania (1897) which was an adult educational Centre with a strong focus on hard sciences, and four years later, the creation of the Volksheim (House of the people) which was a modern night school situated in the working-class district of Ottakring. The creation of the Volksheim was paved by the collaboration between the Wiener Volksbildungsverein and the Vienna university. The mission of the Volksheim, for which Kelsen himself collaborated for many years, was to grant what we define nowadays as "lifelong learning", while educating adults to critical thinking. The Wiener Volksbildungsverein, Urania and the Volksheim represented the three leading institutions of the Viennese Volksbildung[14]. The latter aimed to sustain and spread modern adult education with a – shall we say "interclassist" aspiration which was testified by its slogan: «Wissen für Alle» («Knowledge for all»)[15]. In other terms, it was thought as adult education open to all social classes, with no preclusions: this was perfectly coherent with the ambition to promote progress for the entire social body[16].

With regard to its educational offer, the Viennese Volksbildung was always characterized by an undoubted focus on hard sciences (especially when referring to Urania center), even though humanistic, social science and artistic disciplines were taught as well[17]. All the disciplines had to be taught with a rigorously scientific approach which had to match an equally serious theoretical formation with more

[14] Ivi, 43-44; Ivi, 67-69.

[15] Cf. Stifter, *Demokratie und Volksbildung in Wien um 1900*, cit.

[16] Johann Dvořak, *Wissenschaftliche Weltanschuung und Volksbildung in Wien*, in Ursula Knitler-Lux (hrsg.), *Bildung bewegt. 100 Jahre Wiener Volksbildung*, cit., 37-38.

[17] Stifter, *Demokratie und Volksbildung in Wien um 1900*, cit.

practical and empirical indications in order to provide the students with the skills to apply what they learned to real life. In order to achieve this goal, the ability to clarify complex notions and concepts without simplifying them was considered as an essential component of the Volksbildung teaching philosophy[18].

The experience of the Viennese Volksbildung survived until the collapse of the Habsburg Empire, while reaching its peak in terms of development, impact and popularity chiefly during the brief season of the first Austrian democratic Republic (1919-1938). The first post war Viennese Volksbildung stayed in line with that of the Imperial age: the Enlightenment belief in social progress through education, the openness to all social classes, the direct connection between «scientific knowledge and educational commitment» still represented its leading ideas[19]. Since its very beginning, the Viennese Volksbildung had also been based on the principle of being «unpolitisch» (unpolitical), not connected to a specific political party, movement or political ideology. This certainly represented one of the major differences between the Viennese Volksbildung and the Arbeiterbildung (workers' formation) promoted and financed by the Austrian Social democratic Party (1889), whose objective was instead to politically form the working class and party officers[20]. Yet, the independence of the Viennese Volksbildung from polit-

[18] Dvořak, *Wissenschaftliche Weltanschuung und Volksbildung in Wien*, cit., 37.

[19] *Ibidem.*

[20] Filla, *Zwischen Arbeiterbewegung und Bürgertum. Die Volkshochschulen in der Monarchie und der Ersten Republik*, cit., 32-34; Ehs, *Die Entzauberung von Staat und Recht*, cit., 66. Yet, it is important to remind that Social-democrats always sympathized for the Viennese Volksbildung. Ehs, *Die Entzauberung von Staat und Recht*, cit., 73.

ical organizations never implied indifference towards political issues at all: the previously evoked concept of «Wissen für Alle» indeed assumed a clear vocation to the building of a democratic society made up of citizens with equal rights who also had the right to improve their educational background regardless of their socio-economic status. The focus on democracy became paramount for the early 20th century Viennese Volksbildung which took a strong stand for – and this was for sure one of reasons why Kelsen himself lectured for the Volksheim[21] – equality of rights, political freedom, women's emancipation, principles of political and religious tolerance[22].

To achieve such goals, the promotion of a truly scientific way of thinking, based on the rigorous use of reason and against any form of «metaphysics» was considered essential. The so-called «anti-metaphysical» attitude represented an important "bridge" between the first post war period Viennese Volksbildung and the famous Wiener Kreis[23]. Both shared the common belief that social progress depended on the promotion of an authentic scientific mindset to combat irrationality, obscurantism and prejudices in order to sustain the newborn Austrian democracy[24]. Hans Kelsen was close

[21] In will return to this point in the next paragraph.

[22] Ehs, *Die Entzauberung von Staat und Recht*, cit., 62-63.

[23] Friederich Stadler, *The Vienna Circle: Studies in the Origins, Development, and Influence of Logical Empiricism*, Wien, Springer, 2015; Thomas Uebel, *Intersubjectivity Accountability: Politics and Philosophy in the Left Vienna Circle*, «Perspectives on Science», 28(1), 2020, 35-62. The article is available at the web site: https://direct.mit.edu/posc/article/28/1/35/15448/Intersubjective-Accountability-Politics-and

[24] Dvořak, *Wissenschaftliche Weltanschuung und Volksbildung in Wien*, cit., 38-40.

to the Wiener Kreis[25] and most importantly he had actively participated in the Viennese Volksbildung since the early 1910s. He believed in the relevance of the Volksbildung and in the ambitious project of «Wissen für Alle». What kind of teaching activity was he engaged in? And most importantly what considerations did he develop about political education while lecturing at the Volksheim?

3. *What does "politische Erziehung" mean to Kelsen?*

In 1913 Kelsen was Professor of constitutional and public Law at the university of Vienna: beyond being a legal theorist committed to "purify" legal science from "undue" connections with no legal disciplines, Kelsen – as mentioned above– was interested in the Volksbildung like many other prominent Austrian scientists and intellectuals of his time[26].

Between 1910/11 and 1928, Kelsen combined university teaching with a series of courses and seminars held for the Volksheim, which ranged from public and constitutional law to the history of political and legal ideas – including a class on the Austrian electoral system. Most of all, his classes on the history of European modern political thought represented something really new within the Viennese educational environment mainly because Kelsen tried to teach this topic in the most scientifically rigorous way, for example avoiding labelling revolutionary movements like the French Revolution and its political heritage as negative or dangerous, which was exactly what was done in the Austrian schools during the Mo-

[25] Clemens Jabloner, *Kelsen and His Circle: The Viennese Years*, «European Journal of International Law», 9, 1998, 368-385.

[26] Clemens Jabloner, *In Defense of Modern Times: A Keynote Address*, in D. A. Jeremy Telman (ed.), *Hans Kelsen in America. Selective Affinities and the Mysteries of Academic Influence*, Springer, Switzerland 2016, 332.

narchic age. He also collaborated with the pedagogist and activist for women's rights Eugenie Scharzwald and her school for girls. His involvement in the Viennese Volksbildung was also practical. For several years he contributed to the management of the Volksheim and he also represented the «volkstümliche Universitätsvorträge» within the academic Senate at the university of Vienna until 1926[27].

Between 1910 and 1912 in particular, Kelsen's teaching activity concerned the general theory of the State, the constitutional history of Austria, history of modern and more recent political theories with special attention paid to Jean Jacques Rousseau who would remain an essential reference point for all of his works on the meaning of modern democracy[28], Max Stirner's anarchism and Wilhelm Von Humboldt's concept of the State and Liberalism. More precisely, in 1912 he held a speech entitled *Politische Weltanschuung und Erziehung* for the opening of the Vienna university academic year which he would publish in the form of an essay one year later to make it accessible – *inter alia* – to his Viennese Volksbildung students[29].

The essay was centered around the concept of *politische Erziehung*. What did Kelsen mean by political education? First of all, Kelsen argued that – unlike the 18th century – the 19th was profoundly unpolitical («unpolitisch»). He traced this phenomenon back to two major long-term factors: on the one hand, to the development of a natural sci-

[27] Ehs, *Hans Kelsen und politische Bildung in dem modernen Staat*, cit., 67-70; Jabloner, *Kelsen and His Circle: The Viennese Years*, cit., 377; Thomas Olechowski, *Hans Kelsen. Biographie eines Rechtswissenschaftlers*, Mohr Siebeck, Tübingen 2020, 144-146.

[28] Both editions of Kelsen, *Vom Wesen und Wert der Demokratie*, cit.

[29] Ehs, *Hans Kelsen und politische Bildung in dem modernen Staat*, cit., 60.

ence paradigm, on the other to the triumph of Liberalism which he considered, in some relevant respects, as a sort of "outcome" precisely of that particular paradigm. To him, Liberalism, both in philosophical and political terms, was indeed based on the idea that individuals continuously have to fight against limits and obstacles to assert themselves; an idea which Kelsen interpreted as the attempt to adapt the natural science theory of struggle for life to the social and political environment. It was in particular Von Humboldt's political theory to express – as Kelsen argued – the affinity between natural science and Liberalism: Von Humboldt's concept of the State as a «notwendiges Übel» (necessary Evil) for Kelsen implied looking at the State precisely as an "obstacle" which stood in front of the individual whose freedom, for Von Humboldt, indeed consisted of being free *from* the State itself[30].

Kelsen's idea and definition of Liberalism seems to have a strong debt toward Herbert Spencer's work although the Austrian jurist did not openly mention the English thinker in his 1913 essay. Kelsen's emphasis on Von Humboldt's idea of the State as an "obstacle" for individual's freedom indeed seems to re-echo Spencer's extremely critical approach to the State in relation to the individual as it emerges from his *The Man against the Individual* (1884). To me, the true point is another: starting from the assumption that there would be a direct connection between natural sciences and Liberalism, Kelsen looked at the latter as a political vision characterized by a profound mistrust towards the State and at the same time by the belief that the center of politics is the individual, who is busy asserting himself[31]. Precisely the lack

[30] Kelsen, *Politische Weltanschuung und Erziehung*, cit., 4-6.
[31] Ivi, 6-7.

of trust in the State and the prejudice against it was the reason, according to Kelsen, why the historical development of 19th century Liberalism coincided with the aftermath of an unpolitical mindset based on the primacy of the individual and the idea of society as a set of «atoms» in which everyone, not only the State, might become an enemy to one's self determination: for Kelsen, the unpolitical spirit and hostility toward the State were thus intertwined[32].

In my opinion, Kelsen's critical tone about Liberalism was functional to introduce Socialism as the response to extreme liberal individualism and unpolitical views. For Kelsen, Socialism reacted to Liberalism by posing collectivity at the center of its thought and action, while forcing to rethink politics beyond liberal extreme individualism and beyond the idea of society as a set of independent «atoms». Kelsen retained that the historical clash between Liberalism and Socialism gave rise to the re-emergence of a more tangible interest toward politics and the State which, in his opinion, became evident at the beginning of the 20th century corresponding to a profoundly «political» period, for Kelsen, in which the problem of political education returned to being crucial[33]. It is very likely that the other reason why Kelsen stressed the relevance of political education in the early 20th century also depended on the fact that in 1907 male democratic suffrage had been introduced in the Austria-Hungarian Empire and thus a vaster number of people appeared on the political stage.

In his essay of 1913, Kelsen's objective was to comprehend what political education signified and how it could be promoted practically. He developed its argumentation tak-

[32] Ivi, 8-9.
[33] Ivi, 10-12.

ing his distance from a series of theories which at that time tried to define the sense and the objectives of a true and effective political education. To his eyes, one of the most controversial seemed to be the theory identifying political education with an education to patriotism, while ascribing such a task to schools of every level. According to this vision, school had to instill the love and loyalty for one's State[34]. For Kelsen, the problems arising from such a perspective were not indifferent: in the first instance, it seemed to ignore or refuse the fact the mere existence of social and economic discrepancies among the various social classes made it extremely difficult (not to say impossible) to instil the love for one's State into the hearts of those living in poor conditions and at the margins of political life – and cultivate it[35].

Kelsen thus seemed to partially embrace the traditionally Socialist critique of the State as instrument of power into the hands of privileged social classes. Most importantly he retained that assigning the task of raising generations of patriots in schools implied turning it into both an instrument of State propaganda and political education in indoctrination[36]. Although school was – legally speaking – an «organ of the State» – as Kelsen himself admitted – it should not have been confused with being the sounding board of the State itself. In the light of this, Kelsen traced a parallel between the relationship between State-Church, on the one hand, and the State-school one, on the other. If the separation between the first two had historically implied recognizing and providing religious freedom, the separation between the second two was essential to grant freedom of teaching,

[34] Ivi, 13-15.
[35] Ivi, 15-16.
[36] Ivi, 16-17.

freedom of opinion and the respect of students' intellectual freedom[37].

To Kelsen, similarly controversial were two more theories about political education which were quite popular at that time. He referred to the German pedagogist Georg Kerschensteiner's work, according to whom school had to be the place where young people had to learn and experience in first person what being an active and conscious member of a community meant and implied. Kelsen stressed that Kerschensteiner's theory was based on the precise assumption that the school was a sort of State on a small scale and vice versa. Kelsen appreciated Kerschensteiner's passionate commitment as a pedagogist but he criticized the analogy between State and school. He indeed argued that such an analogy did not correspond to reality because school was a far cry from the complexity, contradictions and problems which were instead typical of living within a State[38].

Kelsen was even harsher toward the German Catholic philosopher and pedagogist Friederich W. Förster who saw in Catholicism, and notably in the wide distribution of Catholic schools, the best bulwark against anti-social tendencies. According to Kelsen, if such a theory of political education were applied on a widespread and systematic basis, the educational system would become confessional and the separation between State and religion as well as teaching freedom and freedom of opinion would be dramatically undermined[39].

Leaving aside their peculiarities and ideological connotations, for Kelsen all these theories shared the same be-

[37] Ivi, 17-19
[38] Ivi, 19-21.
[39] Ivi, 21-22.

lief that political education first of all signified education to certain values and principles retained as objectively true and universal. The point is that for Kelsen, political education, meaning transmitting specific values, principles or a peculiar political vision was something up to political parties, not schools[40]. With that Kelsen invited to rethink the relationship between schools and political education. In his opinion, schools could provide political education only on the condition that made people 'literate' to politics, that is, to provide a solid understanding of the State and Law which was essential for Kelsen to make citizens conscious of their role in the community they lived in[41]. Any other kind of approach would turn political education into the sounding box of ideologies and doctrines which, as such, were only the expression of a very partial and connotated world view. In this sense, in Kelsen's perspective, a true political education corresponded to an *education to politics*, which as such had to transmit a robust understanding of legal and political institutions[42]. This is certainly what he intended to do while teaching at the Volksheim[43].

Kelsen's concept of political education did not only assume the Enlightenment's trust in the power of knowledge as an instrument of social progress – which was a hallmark of the Viennese Volksbildung – but also a clear distinction between science and ideology: Kelsen indeed retained that a true political education had to be scientifically rigorous, to distinguish itself from ideology and indoctrination[44].

[40] Ivi, 22-26.
[41] Ivi, 25-26.
[42] *Ibidem*
[43] See the beginning of this paragraph.
[44] *Ibidem*

The separation between science and ideology acting as one of the pillars of Kelsen's legal and democratic theory, and traceable to a variety of influences like for example the Wiener Circle and Sigmund Freud's work[45], thus represents a relevant aspect in understanding his approach to political education. Not only. Kelsen's teaching activity for the Volksheim during the 1920s remained in the wake of the ideas expressed in the essay on *Politische Weltanschauung und Erziehung*. If in 1913 he argued that a true and scientifically serious political education was a condition to have conscious citizens, in the 1920s after the birth of the first Austrian democratic Republic such a political education, was even more essential: in the new Austria, the Viennese Volskbildung for him was thus asked to promote a solid comprehension of political facts and institutions as the necessary foundation upon which a likewise solid and true democratic citizenship could be built[46]. To do that he retained it essential for the Viennese Volksbildung to be totally independent from any political party influence[47]. In this sense, Kelsen repeated a judgment which was perfectly coherent with the educational mission of the Viennese Volksbildung, namely its will to be independent from political parties and organizations.

Yet, Kelsen's interest for democracy was not only confined to the urgent problem of how to create and nurture a true democratic citizenship in the new Austrian Republic through an adequate political education. During the 1920s he published a series of essays on the significance of modern democracy. Is there any relationship between the two?

[45] Jabloner, *Kelsen and His Circle: the Viennese Years*, cit.

[46] Ehs, *Hans Kelsen und politische Bildung in dem modernen Staat*, cit., 59.

[47] Ivi, 78.

4. *And what about a possible connection between Kelsen's idea of political education and his democratic theory?*

No way to find a direct reference to his teaching activity for the Viennese Volksbildung in Kelsen's works on political theory. The only exception is a very brief reference (one sentence actually) to his *Politische Weltanschauung und Erziehung* in the second edition of his *Vom Wesen und Wert der Demokratie*[48].

Yet – as I am going to argue – I retain that some core aspects of Kelsen's democratic theory are perfectly coherent with Kelsen's idea of political education. In all of his works on the significance and components of democracy, Kelsen defined the latter as representative, based on parliamentary representation, the majority-minority dialectic, political party pluralism and most importantly on the recognition of equal freedom rights[49].

He formulated such theory through a critical reconfiguration of the concept of people: if in *ideal* terms, which for Kelsen had been perfectly expressed by Jean Jacques Rousseau, democracy identified a process of political «self-determination» taking shape in the form of «direct democracy», while assuming the existence of a sovereign people as a homogenous and unitary pre-existing entity, in *real* terms democracy was something different[50]: moving from the assumption that heteronomy – i.e. the hiatus between rulers and ruled – was unavoidable, Kelsen argued that real democracy was indirect and had to be seen as a political process starting from an empirically existing social and political plurality made up of citizens who decided to politically or-

[48] Kelsen, *Vom Wesen und Wert der Demokratie* (1929), cit., 23

[49] Both editions of Kelsen, *Vom Wesen und Wert der Demokratie*, cit.

[50] Kelsen, *Vom Wesen und Wert der Demokratie* (1920), cit., 1-4.

ganize themselves at diverse levels of commitment: the objective of such process was essentially to form «the executive will»[51].

The definitory focus thus shifted from the "who" or "what" (democracy as the power of the people – democracy as the accomplishment of a certain political project/ideology) to the "how": once said that democracy is a process aiming to express the «executive will»[52] – that is to embody political will in the form of laws binding the whole community – it became crucial for Kelsen to understand *the way in which* that very process took shape and *at what conditions*. In other terms, he was outlining a proceduralist theory of democracy[53]. The "way in which" consisted of political elections, the existence of parliamentary representation and the dialectic between majority-minority inside the legislative body[54], whereas the "main condition" consisted in the provision of equal freedom rights to all citizens. The latter were indispensable to ensure that rulers were chosen by the ruled, namely that rulers were «created» by the ruled[55].

Kelsen's theory of democracy radically *demystified* the figure of rulers[56]. They were not such due to their being essen-

[51] Kelsen, *Vom Wesen und Wert der Demokratie* (1929), cit., 174-220.

[52] Ivi, 75.

[53] Allow me to refer to my Sara Lagi, *Democracy in its Essence. Hans Kelsen as a Political Thinker*, Lexington (Rowman & Littlefield), Lahnman 2021, 145-162.

[54] Kelsen, *Vom Wesen und Wert der Demokratie* (1929), cit., 174-220.

[55] Ivi, 210-220.

[56] Of the same opinion: Ehs, *Die Entzauberung von Staat und Recht*, cit., Robert Schuett, *Hans Kelsen's Political Realism*, cit., Stephen P. Turner and George Mazur, *Making Democratic Theory Democratic. Democracy, Law and Administration after Weber and Kelsen*, Routledge, New York 2023.

tially different and superior to the ruled, not because they possessed some sort of Truth to deliver or because of some characteristics and qualities which made them leaders *a priori*. They rather played their specific role because chosen, and thus authorized, by the ruled with whom they shared the same fundamental rights and thus the same status of citizens[57].

Saying that rulers were «created» by the ruled signified that the former were «immanent» to the community they ruled over[58]. This had two core implications: rulers were responsible for their actions and decisions toward the ruled. On the other hand, if we follow Kelsen's reasoning, the ruled themselves had a great responsibility to «create» rulers – which is equivalent to stating that they were responsible for creating the democratic government[59].

In real democracy, for Kelsen, rulers were thus politically responsible because they were chosen by the ruled, whereas the latter were politically responsible because they chose who would rule. It is precisely the word responsibility which represents, in my opinion, a strong convergence point between Kelsen's theory of democracy and his precise idea of political education. In his 1913 essay he argued that a true *politische Erziehung* had to give citizens the knowledge and intellectual skills to be conscious citizens and – chiefly following the foundation of the first Austrian Republic – to contribute to the shaping of an authentic democratic citizenship. If we ideally "match" his stance for the Viennese Volksbildung, his reflections on political education, on the one hand, and those on the meaning of democracy, on the

[57] Kelsen, *Vom Wesen und Wert der Demokratie* (1929), cit., 210-220.
[58] Ivi, 223 ff.
[59] Ivi, 210-220.

other, the picture emerging shows how the two aspects are profoundly intertwined: from Kelsen's perspective a good, solid and serious political education became necessary to enable the ruled to fulfill their enormous political responsibility within a democratic system.

As previously observed, the choice of rulers from the bottom was possible for Kelsen in a condition of widespread freedom rights, equally recognized to all citizens. This implied that the ruled could aspire to become the rulers of tomorrow and that rulers had thus a temporary position of power: equally recognized freedom rights and the electoral mechanism made the relationship between rulers and ruled fluid, mutable and dynamic[60].

In a nutshell, for Kelsen, this was the main reason why in real democracy the principle of heteronomy (the split between rulers and ruled) could be reconciled with the principle of freedom which for him also represented the ultimate criterion to distinguish democracy from autocracy and even to distinguish a truly democratic theory from those which *claimed* to be as such, without actually being democratic. Among the latter, Kelsen critically addressed for example both the Soviet doctrine according to which the Soviet system had been able to carry out the «good of the proletariat» and the Neo-jusnaturalist movement aiming to re-found post-totalitarianism democracies based on Christian values[61]. In his opinion both approaches – even

[60] *Ibidem*

[61] Kelsen, *Foundations of Democracy*, cit., 256-344. Here, Kelsen targeted three specific representatives of the Neo-jusnaturalist school of thought: the Catholic Jacques Maritain and the Protestant Emil Brunner and Karl P. R. Niebhur. All of them argued that totalitarian ideologies and regimes could be seen as the direct outcome of a dangerous "encounter" between ultra-positivism (the "Law is Law") and

though ideologically completely different – pushed the issue of freedom rights into the background, while focusing – respectively – on the fulfilment of the «good of the proletariat» or «Christian justice». On the contrary, he argued that only a proceduralist theory of democracy could adequately value the importance of freedom rights, simply because it rejected the idea that democracy was such, thanks to the achievement of some supposed objective and absolutely true principle/doctrine/set of values etc[62].

Kelsen did not only detach the meaning of democracy from embracing supposed objective values and principles but rather he challenged that these as such could actually exist: as the nature of democratic leadership was «immanent» because rulers were «created» by the ruled, values and principles were «immanent» too because they were a human product and as such, they were mutable and relative[63]. To him, values and principles took shape within the community through confrontation and sometimes clashes between diverse opinions, visions, even interests. They had no «transcendental» essence, they were precisely «created»

relativism. Cf. Tom Angier (ed.), *The Cambridge Companion to Natural Law Ethics*, Cambridge University Press, Cambridge 2019.

[62] Kelsen, *Foundations of Democracy*, cit., 256-344.

[63] Hans Kelsen, *Politische Weltanschuung und Erziehung*, cit., Hans Kelsen, *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus*, R. Heise, Charlottenburg 1928 and Hans Kelsen, *The Natural Law Doctrine Before the Tribunal of Science*, «The Western Political Quarterly», 2, 4, 1949 (The article is available at the web site: https://www.jstor.org/stable/442971?seq=1), 481-533. Kelsen's democratic theory had a clear relativist connotation. On this point: Ernesto Calogero Sferrazza Papa, *Compromised Truth: Political and Philosophical Relativism in Hans Kelsen's Foundations of Democracy*, «Soft Power. Revista euro-americana de teoria e historia de la politica e del derecho», Vol 10(2), 2023, 129-142.

by people and as such they were an important expression of people's freedom exactly like the «creation» of rulers by the ruled was a likewise relevant expression of the latter's freedom[64]. At the same time, the «creation» of rulers implied a great responsibility on the ruled side, just as the «creation» of values on the part of people implied a great responsibility too[65]. To Kelsen, an «immanent» vision of values and principles thus seemed particularly appropriate for real democracy[66].

[64] Kelsen, *Vom Wesen und Wert der Demokratie* (1929), cit., 210-228. It is not the place to discuss this aspect, but it is interesting to stress that Kelsen interpreted the difference between positive and natural Law just in terms of «immanence and transcendence»: in a jus-positivist perspective Law is «immanent», namely a human product whereas in the jus-naturalist one, Law finds its ultimate justification in principles/values «transcending» human and empirical dimension. He embraced a positivist view of Law, while rejecting the jusnaturalist one which he considered an expression of a «metaphysical» view and as such detached from reality. His aversion to metaphysics was a strong common ground with the Viennese Volksbildung teaching philosophy and with the Wiener Kreis. Hans Kelsen, *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus*, cit. On this point, see also: Hans Kelsen, *The Natural Law Doctrine Before the Tribunal of Science*, cit. and also Hans Kelsen, *General Theory of Law and State*, Harvard University Press, Cambridge, Mass. 1999 (1st edition 1945).

[65] Hans Kelsen, *What is Justice?*, in Id., *What is Justice? Justice, Law, Politics in the Mirror of Science. Collected Essays*, University of California Press, Berkeley 1957, 137-173.

[66] Both editions of Kelsen, *Vom Wesen und Wert der Demokratie*, cit., and Id., *Foundations of Democracy*, cit. On this point: Or Bassok convincingly relates the issue of the «immanent» nature of values and principles to Kelsen's concept of constitutional justice in relation to the famous dispute between Kelsen and Schmitt on the *Hüter der Verfassung*. Or Bassok, *The Absolutist Judiciary* (draft version February

It is precisely here – as regards the issue of values – that one more connection between Kelsen's concept of *politische Erziehung* and his democratic reflection emerges. In his 1913 essay, he targeted, for example, those theories identifying political education with education to patriotism and those identifying it with a religiously oriented kind of education. Both were animated by the belief – Kelsen argued – that there was only one admissible *Weltanschauung* and that as such it had to be conveyed and imposed to all. This was equivalent for him to perverting political education into indoctrination which he considered a serious threat to freedom rights, particularly to freedom of opinion[67] and thus – if interpreting Kelsen's idea of *politische Erziehung* in relation to his *Demokratielehre* – a threat to democracy itself. To Kelsen, if indoctrination looked at people as someone who simply had to passively and supinely accept a Truth retained as absolute and just, political education, just because it embraced the «immanence» of values and principles, instead assumed that people were fully responsible for them[68]; if indoctrination undermined freedom rights, a good political education valued them because its scope was to help citizens consciously and responsibly exercise their rights. To Kelsen, political education not indoctrination was thus functional to real democracy.

It is true – as I recalled at the beginning of this paragraph – that Kelsen never openly related his concept of political education and his teaching activity for the Viennese Volksbildung, on the one hand, to his theory of democracy,

2024, under revision), 1-61, available on SSRN at the following web site: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4687825

[67] Kelsen, *Politische Weltanschuung und Erziehung*, cit., 19-22.

[68] *Ibidem.*

on the other. What I have tried to do, rather, is to identify some possible convergence points and intersections between the two, through a reasoned analysis of some aspects of his work. I think that his decision to maintain the two dimensions separated is coherent with his proceduralist approach. As a political theorist, he indeed sought to redefine democracy in terms of the "how" rather than of the "what or who".

Yet, if we try to "match" Kelsen's commitment for the Viennese Volksbildung and more precisely his concept of political education, on the one hand, with some key components of his democratic theory, on the other, our comprehension of the latter is enhanced: the "unsaid" of his *Demokratielehre* emerges, namely the idea that the peculiar nature of democracy, precisely the peculiar «creation» of its leadership and the relationship between rulers and ruled required not only the recognition and the respect of fundamental freedoms but *also* a sense of consciousness and responsibility which could be nurtured – from Kelsen's perspective – thanks to a serious knowledge and understanding of how politics and institutions work, which means through a serious *education to politics*.

Peter Langford

Kelsen and Socialism

1. *Introduction*

The Kelsenian legal science of positive law founds its claim to scientificity upon law as an autonomous object of theoretical investigation. The claim is itself objective insofar as it is the result of the deployment and application of a methodology detached from values. The methodology separates law, as an autonomous domain, and in this separation, detaches it from the other domains of ethics, morality and politics and their associated values. The autonomy of law, resulting from this methodology of legal science, establishes law as a domain entirely composed of *legal* norms of positive law. The systematic, hierarchical delineation of the normative space, within which these legal norms are situated, is the further elaboration of the Kelsenian legal science of positive law. The explicitly value-neutral position of the Kelsenian legal science of positive law appears to exclude, from the outset, all attempts to attribute a connection to the other domains from which it has endeavoured to detach itself methodologically. This also appears to be reinforced by Kelsen's own subsequent, methodological self-limitation in which the statement in his original preface to the *Hauptprobleme* (1911), acknowledging a potential affinity with liberal theory, is never repeated[1].

[1] Hans Kelsen, *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze*, Mohr Siebeck, Tübingen 2008, 59.

The conjunction Kelsen and socialism would then seem to be one which would receive a simple response of a relationship of opposites: a value-neutral methodology separated from a particular political theory. This simple response is, however, predicated upon an exclusive concentration upon Kelsen's work in legal theory culminating in the *Reine Rechtslehre* (Pure Theory of Law) (1934). The effect of this exclusive concentration is to excise Kelsen's significant body of work on democracy together with Kelsen's specific engagement with the political theory of socialism[2]. In excising this body of work, the position and character of the legal science of positive law is itself deprived of a more complex relationship with the domain of politics[3].

The recognition of the partiality of this simple response leads to a different interpretative orientation which begins from, rather than excludes, this significant body of Kelsen's work. From this recognition, the further interpretative question becomes that of delineating the alternative character of this relationship arising from

[2] Hans Kelsen, *Sozialismus und Staat. Eine Untersuchung der politischen Theorie des Marxismus*, 3rd Edition, Wiener Volksbuchhandlung, Vienna 1965 (1st Edition 1920, 2nd Edition 1929); Hans Kelsen, *Marx oder Lassalle. Wandlungen In Der Politischen Theorie Des Marxismus*, «Archiv für die Geschichte des Sozialismus und der Arbeiterbewegung», 1925, 261-98; Hans Kelsen, *The Political Theory of Bolshevism. A Critical Analysis*, California University Press, Berkeley 1948; Hans Kelsen, *The Communist Theory of Law*, New York, Praeger, 1955; Hans Kelsen, *Foundations of Democracy*, «Ethics», s. II, Vol. I, 1955, 1-101; Hans Kelsen, *Democracy and Socialism*, «The Law School The University of Chicago, Conference on Jurisprudence and Politics. 30 April 1954», Conference Series, No. 15, 1955, 63-87.

[3] Cf. Helge Dedek, *Private Law Rights As Democratic Participation: Kelsen On Private Law And (Economic) Democracy* «University Of Toronto Law Journal», Vol. LXXI, 2021, 376-414.

the conjunction Kelsen and socialism. Within this alternative approach, the interpretative position will present this relationship by initially tracing its development from the 1920s as the background against which to focus upon Kelsen's *Democracy and Socialism* (1955). In this manner, it will indicate that this relationship is both static and dynamic: a continuous engagement with socialism which is simultaneously reorientated by the fundamental transformations of European and World politics during this period.

2. *The initial parameters*

The Kelsenian engagement with socialism – the conjunction Kelsen and socialism – commences from the defeat and collapse of the Austro-Hungarian Empire in the First World War. There is no preceding engagement with socialism either prior to or during World War I, as Kelsen is part of the Austro-Hungarian state engaged in the war, and part of the negotiations initially pursued to retain some form of monarchic form[4]. It is then with the subsequent failure of the Ansluß project – the German-Austria project[5] –

[4] See, Gerhard Oberkofler and Eduard Rabofsky, *Hans Kelsen im Kriegseinsatz der k.u.k. Wehrmacht: Eine kritische Würdigung seiner militärtheoretischen Angebote*, Peter Lang, Wien 1988; Jürgen Busch, *Hans Kelsen im Ersten Weltkrieg Achsenzeit einer Weltkarriere*, in Robert Walter, Werner Ogris, Thomas Olechowski (hrsg.), *Hans Kelsen: Leben – Werk – Wirksamkeit*, Hans Kelsen Institute, Mohr Siebeck, Vienna 2009, 211-30.

[5] This is rejected by the Allied powers at the separate peace process, with the newly instituted Austrian Republic, as part of the dissolution of the Austro-Hungarian Empire at Saint-German-en-Laye in 1919. Hans Kelsen, *Der Anschluß* (1919), in Id., *Hans Kelsen Werke*, Vol.4, Mohr Siebeck, Tübingen 2013, 97-110; Hans Kelsen, *Die Organisation*

that the project of an Austrian Republic, as a democratic, federal state arises to which Kelsen is intimately connected[6]. In relation to the institutionalisation – juridical and political – of the Austrian First Republic, the constitution of the Austrian First Republic arises from the process of the dissolution of the preceding form of an empire. The dissolution of the Austro-Hungarian Empire, and the creation of the Austrian First Republic, are accompanied by the prominent position of the Austrian Social Democratic Party in this process. Thus, Kelsen's contribution to the drafting of the constitution of the Austrian First Republic, involves a direct relationship with socialism, in the form of a Social Democratic Party, but also, with the wider theoretical foundations of Austro-Marxism, as the broader background for the positions within the Social Democratic Party, and for the formulation of the constitutional framework. It is against this background that the Kelsenian engagement with socialism is undertaken in the 1920s.

3. *From* Sozialismus und Staat *to* Marx oder Lassalle

In the second edition of *Sozialismus und Staat*, Kelsen appends a final chapter, Die Reaktion Auf Die Politische The-

der vollziehenden Gewalt Deutschösterreichs nach der Gesetzgebung der konstituierenden Nationalversammlung, Die Stellung der Länder in der künftigen Verfassung Deutschösterreichs (1919/1920), in Id., *Hans Kelsen Werke*, Vol.4, Mohr Siebeck, Tübingen, 2013, 101-114; Hans Kelsen, *Die Verfassungsgesetze der Republik Deutschösterreich*, Teile 1-3 (1919), in Id., *Hans Kelsen Werke*, Vol.5, Mohr Siebeck, Tübingen 2011, 24-129, 130-255, 256-437. See, also, Thomas Olechowski, *Das Anschlußverbot im Vertrag von Saint Germain,* «Zeitgeschichte», vol. 46, no.3, 2019, 371-86.

[6] Hans Kelsen, *Die Verfassungsgesetze der Republik Österreich* – Teil 4 (1920), in Id., *Hans Kelsen Werke*, Vol.5, cit., 438-610.

orie Des Bolschewismus In Der Marxistischen Literatur[7], in which there is a final subsection, entitled, Zurück zu Lassalle[8] – 'back to Lassalle' – and it is this section which is then further developed and extended in Kelsen's *Marx oder Lassalle*[9]. In this further development and extension, the underlying positions and argumentation elaborated in *Sozialismus und Staat* remain essentially unaltered[10], and are combined with a more substantial identification of the prefiguration of this return to the Lassallean 'origin' in the work of Austrian and German Marxists during and after World War I (Renner, Bauer, Hilferding, Cunow and Kautsky). This is also considered to be present in the parallel development of the pre-World War I work of Ramsey MacDonald in the British Labour Party[11].

[7] Kelsen, *Sozialismus und Staat*, cit., 163-74.

[8] Ivi, 170-4.

[9] Cf. Kelsen, *Marx oder Lassalle*, cit.

[10] The only further addition, in the second edition, is an earlier section, entitled, *Staat und Gesellschaft* (29-33), which is a response to Max Adler's work, *Die Staatsauffassung des Marxismus*. Wiener Volksbuchhandlung, Vienna, 1922. Adler's work is itself, in part, a critical engagement with the first edition of Kelsen's *Socialismus und Staat*. For a broader understanding of Adler's position, *Staatsauffassung des Marxismus* should be considered together with the earlier *Demokratie und Rätesystem*, Vienna, Wiener Volksbuchhandlung, 1919 and the later *Politische oder soziale Demokratie. Ein Beitrag zur sozialistischen Erziehung*, E. Laubsche Verlagsbuchhandlung, Berlin 1926.

[11] Kelsen, *Marx oder Lassalle*, cit., 36-38, refers to MacDonald's *Socialism and Government*, Independent Labour Party, London, 1909 (Kelsen refers to the German translation of 1912). The reference to, and discussion of, MacDonald is never renewed in Kelsen's work. This is potentially explained by MacDonald's subsequent political trajectory – the formation of a National Government with the Conservative Party and expulsion from the Labour party in the early 1930s – which

The Kelsenian return to Lassalle is the retention of the possibility of a general theory of the state which is distinguishable from that of the preceding German nineteenth-century tradition of *Staatswissenschaft/Staatslehre* and asserted against the Marxist critique of the state. This possibility is affirmed in the context of the collapse of the German and Austrian monarchies, after World War I, the creation of the German Weimar Republic and the Austrian First Republic and the Russian Revolution with its emerging, distinctive state form. The critical engagement with the Marxist tradition focuses upon the withering away of the state and the dictatorship of the proletariat as the central deficiencies of the theory of the state in the work of Marx and Engels. These aspects, marginalised in the development of the Social Democratic parties in Germany and Austria, returned to the centre of Marxist political theory as a result of the Russian Revolution, and Bolshevik political theory. For Kelsen, the further development, during and after World War I, in the work of Karl Renner, Karl Kautsy, Otto Bauer and Heinrich Cunow, exemplify a more explicit shift away from these two aspects of the theory of the state in Marx and Engels. This shift is an essential prefiguration of a socialist political theory capable of retaining a general theory of the state. The state ceases, in these prefigurations, to be an essentially oppressive and exploitative mechanism: an instrument maintaining both the unity of the dominant class and its dominance over the other social classes. In this reconfiguration of the position and definition of the state, it becomes a neutral institution which can be effectively utilised to improve the position of the proletariat or the

also further reinforces the sense of closure of this period of Kelsen's work by the end of the 1920s.

propertyless. The neutrality of the state – its institutional autonomy – entails a corresponding reconfiguration of the position and definition of political organisation and action with regard to the state. The political project encompasses, rather than rejects, the existing state institutions, replacing revolution with evolution: participation, as a political party, in a representative democracy, and through the process of a general election, to become the governing party. These prefigurations are then held to indicate an affinity with, and facilitate a return to, the alternative tradition of Ferdinand Lassalle.

The return to Lassalle which Kelsen stages is not a simple repetition and reiteration of the entirety of Lassalle's position. It is, rather, an interpretative appropriation centred upon Lassalle's positive position with regard to the conception and position of the state. This interpretative appropriation is accompanied and combined, in the preceding chapter of *Sozialismus und Staat*, with the rejection of direct democracy, which forms another central element of the Kelsenian position. This rejection relates both to the Bolshevik soviets and to theorists of council communism[12].

The Kelsenian injunction of 'back to Lassalle' initiates a break with Marxism enabling the articulation of a general theory of the state compatible with a non-Marxist socialism. It is a general theory of the state, which renders it capable of being conceived as a constitutional legal order and a representative democracy, within which the condition of the proletariat and the propertyless is capable of being improved.

[12] Kelsen, *Sozialismus und Staat*, cit., 28-60. On the Austrian council movement, see Hans Hautmann, *Geschichte der Rätebewegung in Österreich 1918-1924*, Europa Verlag, Vienna 1987.

4. *Excursus on* Vom Wesen und Wert der Demokratie

The effect of this engagement with socialism extends to Kelsen's conceptualisation of democracy during the 1920s. It is reflected in the difference between the first (1920) and second (1929) editions of *Vom Wesen und Wert der Demokratie* (*The Essence and Value of Democracy*)[13]. The second edition can be retrospectively considered as marking the closure of a certain period of engagement with socialism. It is the elaboration of a theory of representative democracy which, in the passage from the first to the second edition, has established a definitive distance from both Bolshevism and Austro-Marxism. The distance from Bolshevism is exemplified by the second edition's explicit rejection of the approach in the first edition to the relationship between democracy and administration. In the first edition, the understanding of the Bolshevik conception of this relationship – the democratisation of the administration as a democratisation of the function of the execution of norms – is replaced, in the second edition, with a strict separation between a representative democracy and an administration[14]. For the second edi-

[13] For a broader discussion of the compositional differences between the first and second editions of *Vom Wesen und Wert der Demokratie*, see Matthias Jestaedt, *The Making of Kelsen's Concept of Democracy*, in Sandrine Baume and David Ragazzoni, *Hans Kelsen on Constitutional Democracy: Genesis, Theory, Legacies,* Cambridge University Press, Cambridge (forthcoming in 2025).

[14] Compare, Kelsen, *Vom Wesen und Wert der Demokratie*, 1920, Mohr Siebeck, Tübingen, 23-26; and Hans Kelsen, *Vom Wesen und Wert der Demokratie*, 2nd Edition, 1929, Mohr Siebeck, Tübingen, 64-77. The comparison should also extend to, and be combined with, the short reflection contained in Hans Kelsen, *Demokratisierung der Verwaltung*, «Zeitschrift für Verwaltung». Neue Folge 1, 1921, 5-15. See, for further discussion, Thomas Olechowski, *Kelsen and the Problem of*

tion, representative democracy is the basis of the legislative function which is to be considered as fundamentally distinct from that of the administrative function of the execution of norms created by the legislative function. These distinct functions of legislation and administration entail that administration can only be regulated by judicial oversight and cannot be democratised. This passage is also an implicit restriction of the injunction of 'back to Lassalle' of the second edition of *Sozialismus und Staat* and its further development in *Marx oder Lassalle*. This injunction, which is also the divergence of Kelsen from the Austro-Marxism of Otto Bauer and Max Adler, is maintained, but this divergence is now centred upon its realisation within the parameters of the framework of representative democracy delineated by the second edition.

5. *The Reassertion of the Possibility of Socialism beyond the Critique of Bolshevism*

The emigration of Kelsen to the United States of America places the Kelsenian project, in the distinctly different context of the reconfiguration of international relations and institutions, during and after World War II, combined with Kelsen's purely academic position, itself marginal or marginalised, within the United States of America[15]. Within

Democratisation of the Administration, in Jorge Emilio Núñez, Gonzalo Villa-Rosas and Jorge Luis Fabra-Zamora (eds.), *Kelsen's Legacy Legal Normativity, International Law and Democracy*, Hart, London 2025, 301-9.

[15] On this general situation of Kelsen's thought in the United States of America, see Thomas Olechowski, *Kelsen in Berkley*, «Beiträge zur Rechtsgeschichte Österreichs», vol.1, 2016, 58-73; D.A. Jeremy Telmann (ed.), *Hans Kelsen in America - Selective Affinities and the Mys-*

this context, the works of the later 1940s and 1950s[16], on Bolshevism and Communism, appear to insert themselves within the wider, conventional political separation instituted by the Cold War. This presumes that Kelsen, in the process of emigration and reestablishment in the United States of America, relinquishes all significant connection to the work of the previous interwar period, and his work published during this period in the United States of America ceases to involve a connection to socialism. This presumption is qualified by the existence of Kelsen's *Democracy and Socialism*[17] which is an explicit reaffirmation of the continued presence of socialism in Kelsen's post-World War II thought. It is, in addition, also distinctive for the central critical focus upon the work of Austro-Marginalism, exemplified by Friedrich Hayek, many of whose members had themselves emigrated to the USA. Whilst this text is necessarily, from Kelsen's position in the USA, an academic discussion, without the direct connection to Austro-Marxism, Austrian Social Democracy and the institutional structures of the Austrian First Republic of the interwar period, it holds open the continued possibility of the conjunction of democracy and socialism.

The difference in the theoretical approach and argumentation of the 1954 essay reflects the parallel disappearance of Austro-Marxism – the deaths of Max Adler (1937), Otto

teries of Academic Influence, Springer, Switzerland 2016. See, also, Stephen P. Turner, *Kelsen in American Political Theory*, «Austrian Journal of Political Science», vol.51, no.3, 2022, 11-21. This is also overlain by Kelsen's formal retirement, as Professor of Political Science, in 1952, becoming an Emeritus Professor until his death in 1973.

[16] Hans Kelsen, *The Political Theory of Bolshevism. A Critical Analysis*, California University Press, Berkeley 1948; Hans Kelsen, *The Communist Theory of Law*, Praeger, New York 1955.

[17] Hans Kelsen, *Democracy and Socialism*, cit., 63-87.

Bauer (1938) and Rudolf Hilferding (1941) – which effectively removed left-wing, Austro-Marxism from Austrian Social Democracy in the post-1945 Austrian Republic. This was replaced with an opposition between a conventional social democratic party and a smaller communist party orientated to the Soviet Union. Thus, the preceding field in which Kelsen had intervened in the Austrian First Republic has itself already become irrecuperable and essentially historical. The effective disappearance of Austro-Marxism, as anything other than its body of published work, combined with the new, post-1945. international reconfiguration of political regimes, entails that the question of the conjunction of democracy and socialism is posed in a distinct manner. The essay is orientated by an indirect demonstration of the possibility of the conjunction of democracy and socialism through the critical analysis of a selection of the central argumentative positions held to exemplify the impossibility of collective property – the antithesis of human freedom – and impossibility of socialist democracy – the antithesis of the significant affinity or essential relationship between capitalism and democracy.

The selection of argumentation for this critical analysis ranges across contemporaneous work in the social sciences – Hayek[18] and Schumpeter[19] – the history of political philosophy – Locke[20] and Hegel[21] – and contemporaneous work

[18] Friedrich Von Hayek, *The Road to Serfdom: Text and Documents-The Definitive Edition*, Chicago University Press, Chicago 2007 (Originally published 1944).

[19] Joseph A. Schumpeter, *Capitalism, Socialism, Democracy*, Routledge, London 2010. (Originally published 1942).

[20] John Locke, *Second Treatise of Government*, Cambridge University Press, Cambridge 1988 (Originally published 1690).

[21] Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right*, Cambridge University Press, Cambridge 1991 (Originally pub-

in theological natural law – Brunner[22]. The range of the selection is also accompanied by the selective identification of particular passages from parts of the individual works of these thinkers as the origin and/or exemplification of these central argumentative positions. The argumentative progression develops, through each stage, by demonstrating the weakness of the purported identity between capitalism and democracy and then, private property and human freedom. The analysis will concentrate upon Kelsen's critique of Hayek and Schumpeter as it is separable from the subsequent critique of the essential connection between private property and freedom. The separability relates to the distinct form of the Kelsenian critique of private property and freedom, in Locke, Hegel and Brunner. In this later form of critique, Kelsen is concerned with revealing the theological and metaphysical foundations of this purportedly essential relationship and demonstrating the incoherence of these foundations[23].

The initial stage of *Democracy and Socialism*, involves a critique of Hayek's *The Road to Serfdom*, centred upon Hayek's insistence upon the exclusive identity of capitalism and democracy. Here, the focus upon this element of *The Road to Serfdom* also emphasises the divergence from the work of the early 1920s, as there is no engagement with the chapter of *The Road to Serfdom* entitled, *The Socialist Roots of Nazism*,

lished 1821).

[22] Emil Brunner, *Justice and Social Order*, Harper & Brothers, New York 1945.

[23] There is also the further question, in relation to Kelsen's textual analysis of Locke and Hegel, of the degree to which this textual analysis would itself require further reflection in relation to the substantial body of interpretative work, since the mid-1950s, in the history of political philosophy on Locke and Hegel.

in which Hayek indicates a historical origin for the close «connection between socialism and nationalism in Germany» – «the ancestors of National Socialism» – in the work of Fichte, Rodbertus and Lassalle[24]: there is to be no resumption of the 'back to Lassalle' of *Marx oder Lassalle*. Rather, the locus for Kelsen's initial critical intervention is the chapter entitled, *Planning and the Rule of Law*[25], in which Hayek's position is elaborated from the particular to the general. The particular is exemplified by the distinction between an economic sphere, determined by the free decision-making of individuals, whose background conditions are guaranteed by a legal framework and «the direction of economic activity by a central authority»[26]. The particular is then the expression of the more general distinction between the rule of law and arbitrary government[27].

The Hayekian position is then demonstrated to be dependent upon a defective conception of the rule of law as it fails to understand the essential limitations of this notion within a legal order of positive law. Here, Kelsen draws upon his *General Theory of Law and State* (1945) which, in turn, draws upon his earlier *Allgemeine Staatslehre* (1925), to indicate that the Hayekian opposition between the two exclusive pairings of the rule of law and capitalism and arbitrariness and state intervention in the economy cannot be maintained. Within a legal order, the principle of the rule of law, for Kelsen, is a principle of security not a principle of free-

[24] Hayek, *The Road to Serfdom*, cit., 181-92 (182). For a detailed, contemporaneous critique of this aspect of Hayek's position in *The Road to Serfdom*, see, Bert F. Hoselitz, *Professor Hayek on German Socialism*, «American Economic Review», Vol.35, No.5, pp. 929-934.

[25] Hayek, *The Road to Serfdom*, cit., 112-23.

[26] Ivi, p. 113.

[27] *Ibidem*

dom, as the rule of law cannot «restrict the legislative power»: «the power of enacting general legal norms» and the concomitant capacity to regulate human action[28]. Rather, it regulates the degree of expectational certainty between the individual and the application of law by «the administrative and judicial organs»[29]. Thus, it operates to maintain conformity between the law-creating and law-applying functions – «the rationalisation of the activity of government»[30]. It is a rationalisation confined to the generation and maintenance of expectational certainty in relation to the legal regulation of human action. From this understanding of the rule of law, a degree of potential arbitrariness is inherent within it, which, therefore, dissolves the Hayekian boundary between the rule of law and arbitrariness. The potential arbitrariness is located at a number of levels of a legal order of positive law commencing at the legislative level, the level of law-creation itself, as the primacy or unconditioned position of a parliament, within the legal order, in regard to the creation of general norms through legislation. The creation of legislation, and the resulting general norms, then confront further potential arbitrariness from the distinction, within the legal order, between law-creation (legislature) and law-application (administration and judiciary). Here, the general norm, at the level of law-creation, is limited, by its very generality, from a complete and definitive determination of the individual norm resulting from the level of law-application:

> The general norm is only a framework within which the individual norm is to be created; and the individual norm always contains something new, not yet contained in the general

[28] Kelsen, *Democracy and Socialism*, cit., 63.
[29] *Ibidem*
[30] *Ibidem*

> norm. Hence a certain degree of arbitrariness is inevitably involved in the application of the law which is necessarily also a creation of law. For the individual norm issued by the administration or judicial organ is as legal as the general norm issued by the legislative organ[31].

The passage from general to individual is a process of concretization of the general norm, and this process of concretization, as the transition between levels of the legal order, involves an irreducible moment or activity of interpretation. The rule of law is, therefore, unable to operate in the manner in which Hayek proposes, and becomes, instead, for Kelsen, the more limited regulation achieved within a dynamic, hierarchical system of positive law. This involves, the creation of an appellate process – higher and lower instances of law-application – in both the administrative and judicial institutions which determine the degree of conformity to the general norm by the lower instances of these institutions engaged in the function of law application. This remains an always relative rationalisation of potential arbitrariness as the appellate process will reach a final instance whose determination of conformity is final. Yet, this determination is itself the result of an interpretation of this degree of conformity and against which their can be no appeal[32].

From the arbitrariness which inheres in the rule of law, Kelsen then turns to the presence of law in arbitrary rule of autocracy. In relation to the other element of non-identity in the Hayekian opposition, autocracy, as the exemplary rule of arbitrariness, Kelsen demonstrates the impossibility of autocracy as pure, personified arbitrariness. For, whilst

[31] Ivi, 64-5.
[32] Ivi, 66.

the impetus for the broad rationalisation of the relationship between law-creation and law-applying is absent, there are practical limits to the individual capacity of the autocrat to encompass the entirety of the functions of law-creation and law-application. The effective limits of this form of government as entirely personified are evident from the appointment of «deputies and subordinate auxiliary organs»[33]. The effective limits of an entirely personified and arbitrary authority are then, through this distinction between law-creation and law-application, further manifested in the return of the accompanying distinction between the general norm of the autocrat and its concrete application, through interpretation, by these deputies and subordinate auxiliary organs[34].

The resurgence, rather than exclusion, of these aspects indicates that the distinction between a non-autocratic and an autocratic government is not that between one of law and non-law. Rather, it is between the degree of ease and rapidity with which the autocratic government, in comparison with the more 'rationalised' non-autocratic government, can create or modify existing general norms and acknowledge individual exemptions or exceptions. There is, therefore, for Kelsen, in contrast to the Hayekian absolute difference or non-identity, a difference of degree between legal orders of positive law. This Kelsenian conceptualisation of different manners of creating and applying law is the corollary of an understanding of the rule of law, as a principle of rationalisation and security, and its different degree of inherence or impetus in different legal orders. Kelsen then indicates that socialism is the extension of the principle of rationalisation and security to a capitalist economy which is

[33] Ivi, 67.
[34] *Ibidem*, fn.3.

itself unable – «the anarchy of production» – to guarantee. The Hayekian rule of law – the rule of law of a capitalist democracy – in which the economy is free from the direct regulation of law, leaves this anarchy of production intact. This intervention in the capitalist economy is not the initiation of arbitrary rule and the instantiation of the essential, Hayekian difference between law and non-law[35]. It involves an intervention in one sphere, which in the capitalist economy is not directly regulated, but this intervention itself entails no necessary passage to an autocracy, as the principle of rationalisation and security is not, by this particular invention, excluded «from other fields of the application of law of a socialist state, which may have in this respect a perfectly democratic character»[36].

The demonstration of the untenability of the central Hayekian distinction between the rule of law and arbitrariness and, with it, the identification of freedom, as the negative freedom of freedom from, with the rule of law, Kelsen turns to a critical analysis of Hayek's conceptualisation of positive or political freedom, in the chapter of *The Road to Serfdom* entitled, *Planning and Democracy*[37]. For Kelsen, the negative freedom which Hayek posits as the basis for the capitalist system of economy, is «not the decisive issue as far as the question is concerned whether the freedom essential to democracy is compatible with socialism»[38].

The historical development from the liberal to the state of the 1950s, while indicating an increased legal intervention in the economy – anti-trust and labour legislation – is

[35] Ivi, 68.
[36] Ivi, 66.
[37] Hayek, *The Road to Serfdom*, cit., 100-11.
[38] Kelsen, *Democracy and Socialism*, cit., 68.

not the essential determinant of the degree of freedom essential to democracy. For, it is «intellectual freedom – the freedom of religion, the freedom of science, the freedom of the press – that is essential to democracy»[39]. Thus, for Kelsen, the question is the more complex one of whether the limitation of the sphere of negative freedom within the economic sphere immediately and necessarily involves the limitation of intellectual freedom[40]. The Hayekian position, in its absolute difference or non-identity between liberal individualism and collectivism, asserts this essential connection between economic and intellectual freedom. All forms of collectivism, irrespective of the particular end which they pursue, involve the inevitable intervention and organisation of the whole of society in order to realise this end[41]. In relation to this Hayekian absolute difference, Kelsen, again, demonstrates that the difference is a comparative one. The Hayekian non-identity arises from a simplification of each of its elements in order to posit this absolute difference between them. The simplification rests upon rendering economic liberalism, and its conception of human interaction in the economy, the essential determinant of freedom. From this, there is an essentially reductive, economic or economistic interpretation of society, rendering the legal and political structures which facilitate intellectual freedom epiphenomenal[42]. In this manner, socialism, through its intervention in the capitalist economy, necessarily precipitates the dissolution of its accompanying legal and political structures leading to the advent of totalitarianism.

[39] Ivi, 69.
[40] *Ibidem*
[41] Hayek, *The Road to Serfdom*, cit., 100-101.
[42] Kelsen, *Democracy and Socialism*, cit., 69.

For Kelsen, this reductive economism becomes evident once one considers that a degree of collectivism is inherent in any normative regulation of human behaviour[43]. Normative regulation creates a collective body of norms and the difference is, therefore, within this system of norms with regard to «their material sphere of validity, that is, the extent to which they regulate human relations, and with respect to the degree of centralisation»[44]. The Hayekian position intervenes within a normative order characterised by the modern state which as a «centralised coercive order with a rather extensive material sphere of validity, exhibits a much higher degree of collectivisation without having necessarily a totalitarian character»[45]. It seeks, through the primacy accorded to the economic sphere – the economic liberalism of free individual decision – to determine the limits of the normative order of the modern state. For Kelsen, the economic sphere is unable to guarantee the freedom which this economic liberalism purports to engender. The primacy accorded to the economic sphere concerns not merely the human behaviour within that sphere itself but extends to encompass the sphere of intellectual freedom – the non-economic – insofar as it is the economy which determines the capacity for their realisation. The Hayekian economy provides the means to realise these non-economic ends of the individual and, thus, the economy, and, as such, emphasises that this separation between means and ends cannot involve a disproval of the particular non-economic end of the individual. However, this separation, at the level of the economic, between means and ends, introduces the separation between a formal and

[43] Ivi, 69-70.
[44] Ivi, 70.
[45] *Ibidem*

a material guarantee of the realisation of the individual's non-economic ends. The individual's free determination of non-economic ends confronts the freedom of those sources of finance to refuse to provide those means. There is no fundamental, absolute guarantee that the economic sphere will provide the means to realise an individual's freely determined non-economic ends. In each instance of this refusal, the Hayekian non-identity between collectivism – the central control over all ends in society – and economic liberalism dissolves with regard to the free realisation of an individual's non-economic ends. This absence of material guarantee is accompanied by a Hayekian legal order, whose rule of law, the formal expression in positive law of these non-economic ends as civil rights, cannot, on the basis of its non-intervention in the economy, provide the alternative guarantee of their realisation. Thus, the cumulative effect of each refusal is to render the realisation of these non-economic ends unequal and, as its corollary, to introduce as separation between the formal and material existence of the free and full enjoyment of these intellectual freedoms[46].

This separation reveals that economic liberalism itself involves a broader unequal distribution of freedom insofar as all basic, fundamental human needs – «nourishment, clothing, housing»[47] – are to be satisfied through market transactions. Hence, that the free and full enjoyment of intellectual freedoms is initially determined – the very capacity to conceive of and seek out intellectual freedom beyond the satisfaction of these basic, fundamental human needs – by the degree of compulsion the liberal economy exercises upon the individual to satisfy these fundamental human

[46] *Ibidem*
[47] Ivi, 71.

needs. It is to this unfreedom in the freedom of economic liberalism that socialism responds, and this response, for Kelsen, is neither the freedom of economic liberalism nor the freedom from the state, but for Kelsen, «the freedom from the compulsion resulting from the necessity to care for the satisfaction of economic needs»[48]. This freedom, which is necessarily unintelligible within the framework of Hayekian absolute difference, is a *relative* freedom:

> [It]is to be achieved by the suppression of freedom in the satisfaction of these economic needs is not as paradoxical as it seems. For the freedom from compulsion is by its very nature a relative freedom. The freedom of the one may be the bondage of the other; the freedom in one respect may be guaranteed by the suppression of freedom in another, and vice versa[49].

The Kelsenian critique transforms the Hayekian non-identity of freedom and unfreedom into the presence of freedom in both capitalism and socialism. For Kelsen, in contrast to Hayek, the «question can only be whether there is an essential difference as to the degree to which freedom is possible within the two systems»[50]. This question is, in turn, rendered more complex by commencing from the separation between the formal and the material revealed in the Hayekian approach to civil and political freedoms. For it is the presence in a legal order of «the constitutional prohibition» of any restriction by the legal order of these civil and political rights which is the «negative freedom which is essential to modern democracy»[51]. Whilst this constitutional

[48] *Ibidem*
[49] Ivi, 71-2.
[50] Ivi, 72.
[51] *Ibidem*

prohibition, confronts the limits of this separation between formal, legal positivisation and material realisation, there is, for Kelsen, no necessity that this constitutional prohibition disappears in a socialist society. The more direct control over the economy is to be distinguished from whether the state's «power cannot be restricted by the constitutional prohibition of legislative, administrative, and judicial acts characteristic of capitalist democracy»[52]. The Kelsenian critique of Hayek dissolves the two Hayekian conceptual oppositions between intervention in the economy and the rule of law and intervention in the economy and democracy. It demonstrates that the absolute non-identity, through which these oppositional pairs are constructed, is untenable, replacing it with a difference of degree within a common spectrum of legal orders.

6. *From Hayek to Schumpeter*

Kelsen then proceeds to focus upon two other purported absolute identities – democracy and free competition and capitalism and tolerance– in relation to which «a socialist economic system»[53] is situated as their absolute opposition. Here, Kelsen moves from the critique of Hayek to the critique of Schumpeter in *Capitalism, Socialism and Democracy*. The Schumpeterian identity between capitalism and democracy resides in the principle of free competition, and it is this competitive human behaviour of the economic sphere which also determines the political sphere: the competition for votes as the basis for the acquisition of political

[52] Ivi, 73.
[53] *Ibidem*

power in order to implement decisions[54]. For Kelsen, this absolute identity results from a redefinition of democracy as «government established by competition» rather than by the people[55]. The redefinition involves constituting the secondary phenomena of free elections and competition for votes as the exclusive content of democracy with the consequent displacement of democracy as government by the people. This displacement, which creates this purported absolute identity between competition and democracy, also misrecognises that «even where the government body is elected, the most democratic electoral system is the one which eliminates, or at least reduces to a minimum, the competitive struggle for the people's vote: the system of proportional representation»[56]. Hence, for Kelsen, it is in the non-identity between democracy and competition – the lack of the logic of free competition from the economic sphere – that the essence of democracy, government by the people, resides[57].

The Schumpeterian absolute identity between capitalism and tolerance is not a principle, but generated by a form of observable behaviour on the part of the dominant social class – the bourgeoisie – characterised as «democratic self-restraint»[58]. This behaviour – the «tolerance of political differences and respect for opinions he [the bourgeois] does not share»[59] – is a secondary or derivative expression of the primary feeling or sense that their economic interests are not threatened. For Kelsen, this derivation of tolerance, rather than instituting an absolute distinction between capi-

[54] Schumpeter, *Capitalism, Socialism and Democracy*, cit., 269.
[55] Kelsen, *Democracy and Socialism*, cit., 73.
[56] *Ibidem*
[57] Ivi, 74.
[58] Schumpeter, *Capitalism, Socialism and Democracy*, cit., 297-8.
[59] *Ibidem*

talism and socialism, provides a general theory of tolerance based upon the sense or feeling of the degree of challenge or contestation of particular values or interests[60]. Schumpeterian tolerance has no essential connection to a particular configuration of the economy and a particular social class.

The Schumpeterian theory of tolerance is, for Kelsen, a misrecognition of a broader notion of compromise between majority and minority in a democracy. This broader notion of comprise applies without distinction by economic system to both capitalist and socialist democracy. It is the disappearance of compromise, through challenge and contestation, which then potentially leads the majority in a democracy, whether capitalist or socialist, to «fear that it will be overthrown by force»[61]. If this fear – the threat to a particular interest – leads to the active suppression of challenge and contestation then, for Kelsen, the democracy, whether capitalist or socialist, «may lose one of its essential elements and break down»[62]. The Kelsenian critique demonstrates that the Schumpeterian absolute identity of competition and democracy and of tolerance and capitalism are created by a partial, limited conceptualisation. The absolute identity which Schumpeter posits between these notions results from a preceding reduction in the underlying understanding of democracy. The indication of these limits, when placed within a broader notion of democracy, removes Schumpeterian absolute identity and the essential, determinate position of competition and tolerance. The cumulative effect of the critique of Hayek and Schumpeter is to overturn the parameters of these theoretical frameworks by demonstrating

[60] Kelsen, *Democracy and Socialism*, cit., 75.
[61] *Ibidem*
[62] *Ibidem*

the untenability of the absolute conceptual identities from which they are derived. The Kelsenian critique, in overcoming the conceptual closure resulting from this positing of absolute identity, detaches socialism from the entirely negative position that these absolute conceptual identities impose upon it. The impossibility of socialism – as an absolute non-identity or negativity – is transformed into a continued possibility as «democracy as a political system is not necessarily attached to a definite economic system»[63].

7. *Conclusion*

The conjunction Kelsen and socialism, as the initiation of an examination of this relationship, indicates that this not a forced or arbitrary joining together of a name and a concept. Rather, there is a sustained and genuine connection which, is, however, one which undergoes change. The Kelsenian argument of *Democracy and Socialism*, in 1955, is in marked contrast to the manner in which Kelsen engages in the analysis of socialism in the 1920s. This is not only in in relation to the texts which are the focus of Kelsen's attention, but also with regard to the mode of critique.

The analysis of socialism in the 1920s consists of a direct, critical engagement with the Marxist tradition, in order to establish a non-Marxist, socialist theory capable of retaining a general theory of the state. The Kelsenian critique situates itself as a retrieval and reanimation of those aspects of Lassalle which contribute to the elaboration of a general theory of the state. This general theory considers that the state has no essential, determinate character and its 'neutrality' enables it to be or become an institutional entity facilitating the

[63] Ivi, 87.

reduction in socio-economic disparities. The further consideration of this process is then orientated by the Kelsenian theory of democracy and positive law which has differentiated the elements of legislation (general norms) and application (administrative application – the 'concretisation' of general norms – and judicial (constitutional) regulation)[64].

The approach to socialism, in 1955, is one which has relinquished all reference to Lassalle, and has become a critique of a selection of contemporaneous and historical conceptual frameworks in order to demonstrate the continued possibility of socialism. The possibility of socialism arises immanently through the dissolution of the purported non-identity of socialism with democracy and freedom.

[64] See, also, Hans Kelsen, *Justiz und Verwaltung*, Vienna, Springer 1929.

Dario Elia Tosi

Kelsen and International Law

1. *Introduction*

Hans Kelsen has been labelled by the academia in numerous ways. Because of the variety of his works, he has been characterized as a philosopher of law and politics, a constitutional law scholar, an internationalist, a political scientist, as well as an epistemologist[1]. Each analysis highlights specific issues, masking the theoretical framework's intricacy. From a different perspective, the studies on Kelsen's works tend to express the author's ideas in a fixed way. In other words, it seems that the construction of the author on a specific issue was constant during all his life.

These remarks can be expressed even regarding the Kelsen's approach to international law. For international law scholars, Kelsen's theory has always been based on a monistic scheme, upon which international law represents the ultimate source of the entire legal system. According to this idea, in the end, all national systems find their source of legitimacy in the international law, which stays at the apex of the pyramidal construction of the legal order. On the other hand, for constitutional law scholars, the key el-

[1] Recently, it has been suggested the classification of Kelsen also as a comparative law scholar. On this point, cf. Tommaso Edoardo Frosini, *Hans Kelsen comparatista*, «Percorsi costituzionali», s. 3, 2023, 625-627.

ement of the Kelsenian structure is the *Grundnorm*. Within the gradualist approach towards the erection of the legal system (*Stufenbau*), such a rule is the ultimate foundation of all the sources of law. Moving from a national perspective, the *Grundnorm* can be identified with the constitution or, better, with the fundamental constitutional principles. All the other sources of law, international law included, rely on this rule.

Similar contrast also can be observed in the classification of Kelsen's bibliography. Actually, according to the constitutional perspective, the Austrian author has always focused his work on constitutional law issues. Since the first publication of *Die Staatslehre des Dante Alighieri* in 1905, Kelsen's main interest has insisted on the analysis of issues related to state systems. Only in the second part of his life, the author broadened his work by starting to deal with the study of international law problems[2]. Nevertheless, as it can be detected in the last edition of *The Pure Theory of Law* published in 1960, the pivotal interest of his analysis has always been the gradualist construction of the legal system and, in the end, the key role of the *Grundnorm*.

On the contrary, from a different perspective, international law represents a *leitmotif* in Kelsen's studies. Since one of the first publications, the 1920 *Das Problem der Souveränität und die Theorie des Völkerrechts*, international law issues play a fundamental role in the analysis of national law systems. Different references to international law can be found even in the first edition of *The Pure Theory of Law*, published in 1934. In the most important works written during his American

[2] On this topic, among the others, cf. François Rigaux, *Hans Kelsen on International Law*, «European Journal of International Law», vol. 9, 1998, 325 f.

period, international law issues became the main interest of the analysis of the author[3].

Within this context, the only aspects of the Kelsenian theory, which researchers agree on, may be found in his steady idea of the inner unity of the legal order and the positivistic approach, that is the essential persuasion that the legal system is exclusively the result of legal procedures. In this framework, the legal phenomenon appears to be independent from any political, as well as social, aspects. Such a detachment of the legal provisions from material features is at the basis of the pure theory of law. Indeed, the proclaimed indifference towards social and political aspects, that is anything outside the field of law, is the distinctive element of the author's work.

That given, a deeper analysis of his principal publications offers a different view. Indeed, Kelsen's work reveals a more complex approach. Constitutional law and international law, as well as philosophy of law, are always intertwined. Above all, the ideas expressed in his works reveal a smooth but tangible change in the author's approach during his life[4]. Within this context, the present contribu-

[3] See: *Peace through Law* (1944) and *Principles of International Law* (1952).

[4] For an evolutive reading of the Kelsen's position, cf. Agostino Carrino, *Presentazione*, in Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer Reinen Rechtslehre*, Mohr, Tübingen 1920, transl. *Il problema della sovranità e la Teoria del diritto internazionale. Contributo per una dottrina pura del diritto*, ed. by Agostino Carrino, Giuffré, Milano 1989, XXXII ff.; Luigi Ciaurro, *Un diritto internazionale per la pace*, in Hans Kelsen *Peace through Law*, The University of North Carolina Press, Chapel Hill 1944, transl. *La pace attraverso il diritto*, ed. by Luigi Ciaurro, Giappichelli, Torino 1990, 14-15; Mario G. Losano, *Saggio introduttivo*, in Hans Kelsen, *Reine Rechtslehre*, Franz Deuticke Verlag, Wien 1960, transl. *La dottrina pura del dirit-*

tion wants to get across the main Kelsen's works that deal with international law issues in order to outline the role that this field of law plays in the erection of the theoretical building of the author and the evolution that such a construction got to undergo during the different periods of his activity.

The influence of Kelsen continues to be felt in areas as far-ranging as the general theory of law, constitutional law, and international law, sociology, and political theory. Indeed, Hans Kelsen remains an essential point of reference in the world of legal thought. However, his ideas changed during his life and such an evolution itself may represent an important element of his legacy for the current phase of constitutionalism and international relations.

2. *International law in the first writings: the problem of sovereignty*

The problem of the role played by the international law in the overall theoretical building of Kelsen comes out at the very beginning of the academic path of the author. After the first work on the *Doctrine of the State in Dante* and the rich study on the *Main Problems of Constitutional Law Theory Developed from the Doctrine of Legal Proposition*, respectively published in 1905 and 1911, in the 1920 *Das Problem der Souveränität und die Theorie des Völkerrechts* Kelsen tackles the problems triggered by the traditional interpretation of the principle of national sovereignty.

The main purpose of the study, expressed since the beginning of the foreword, is the attempt to establish a new

to, ed. by Mario G. Losano, Giulio Einaudi, Torino 1975[3], XIII ff..; Ryan Mitchell, *International Law as a Coercive Order: Hans Kelsen and the Transformations of Sanction*, «Indiana International and comparative law review», Vol. 29, 245 ff.

pure doctrine of law. Within this endeavour, the author emphasizes that the concept of sovereignty, as traditionally interpreted, represents one of the stumbling blocks to overcome. It is here, at the very starting point of the book, that Kelsen speaks out the need to delve into the relationship between the international law and the national legal order. In the author's view, such an analysis cannot be overlooked. By disclosing the conclusive remarks of the study, here Kelsen already affirms that the most important result of the analysis is the acknowledgement of the inner and unavoidable unity of the two different systems[5].

Dealing with the traditional jus-statualist theory of the sovereignty, in the first section of the book, the author outlines the need to pass from the idea of the state as a social phenomenon to the one of state as a legal order[6]. Within this new pattern, the concept of the sovereignty of the state turns into the idea of the sovereignty of the state's legal order. Here it comes out the essential conundrum of the two meanings of the term. Based on the perception of the sovereignty as the concept of absolute primacy, the study stresses the crucial issue of the double dimension of the notion, that is the internal and the external ones, that is usually evoked

[5] Hans Kelsen, *Il problema della sovranità e la Teoria del diritto internazionale. Contributo per una dottrina pura del diritto*, cit., I ff. The author starts here stressing his interest in dealing with systems of law only from a legal perspective. Therefore, the unity of such orders must be interpreted under the lens of legal knowledge. Right in the foreword, he rebuts any possible critics about the incapability of his pure theory of law to take into consideration the reality of «social facts», or better the 'praxis', simply by outlining that the law is an autonomous system that is different from the system of the nature. In the opinion of the author, these systems are alien to each other.

[6] Ivi, 17-18 and 23-26.

in the doctrine. Moving from the idea of the sovereignty as the ultimate supremacy over the subjects of a state system, Kelsen maintains, it is hard to hold that the same concept can take on the meaning of independence when viewed in relation to other national orders and, in general, the international system[7].

Hereafter, in the second part of the work, the analysis shifts directly on the key issue of the relationship between the dogma of sovereignty and the traditional theory of international law. After an analytical critic of the dualist theory of the mutual independence of the national legal system and the international one[8], Kelsen focuses on the remaining two alternatives: the ultimate supremacy of the state legal order and, on the opposite, the primacy of the international one.

Moving along the lines of reasonings repeatedly expressed even in his subsequent works, the author starts his analysis with the traditional theory of the primacy of the national order by insisting on two main considerations. On one hand, it observes that the superiority of the national systems regarding the international one relies on the idea that at the origins of the international order stands the free recognition expressed by the state[9]. In other words, it is the state that freely opens to the existence of a supranational system and confers legitimacy to it. On the other hand, recalling a largely accredited idea of the doctrine, the va-

[7] Ivi, 57 ff.

[8] In this regard, the author's main attention goes to the theorization proposed by Triepel and accepted by a large part of the German doctrine in the first part of the 20th century. On this point, cf. Agostino Carrino, *Presentazione*, cit., V-XIII.

[9] Hans Kelsen, *Il problema della sovranità e la Teoria del diritto internazionale. Contributo per una dottrina pura del diritto*, cit., 225 ff.

lidity of the international law relies on the self-obligation of the state[10], that is the free will of a national government to abide by the rules settled at the supranational level.

In both cases, the acknowledgement of the presence of different states that pretend to be sovereign prompts severe issues. Based on the idea of the absolute sovereignty that every state claims, a general parity of all the states must be recognized. Therefore, the international legal system is nothing but a 'common' law, that is a legal order 'created' and recognized by the national states[11]. However, such a coexistence of a plurality of legal orders that pretend to legitimate the international system contrasts with the idea of the exclusivity of the sovereignty. Based on the firm opinion that the sovereignty of a state is irreconcilable with the sovereignty of other states, the primacy of a single state should end in becoming the supremacy of a 'universal' order[12]. In other words, Kelsen maintains, the recognition of the sovereignty of a state is not compatible with the idea of the 'parallel' sovereignty of another state since it should derive its legitimacy from the 'recognition' of the first legal order.

However, the author does not definitely rebut the idea of a hierarchic approach that confers a preeminent role to the national legal order. From a general point of view, the study points out that such a theory is only a "gnoseological hypothesis". Indeed, Kelsen recognizes that the superiority of the state order stems from a subjective approach towards the structure of the law. In other words, such a position originates from the idea that every state claims to be pre-existent to the other legal order, both national and international.

[10] Ivi, 245 ff.
[11] Ivi, 267 ff.
[12] Ivi, 274 f.

Consequently, there is only one subject that can pretend to be sovereign, and any other system gets from that its legitimacy. From a different point of view, the supremacy of the national system can be understood as the result of an imperialist approach. On the grounds of the intimate exclusivity of the sovereignty and the inconceivability of a concurring existence of different systems equally sovereign, the state that pretends to be sovereign does not recognize objective limits to the dimension of its power and territorial extension of its jurisdiction, nor regarding the international system nor regarding the relationship with other national orders.

Likewise, it appears to be a "gnoseological hypothesis" even the opinion that insists on the supremacy of the international law. Here, the analysis moves from an objective approach and a pacifist idea. The solution of the pre-eminence of the international system originates from the acknowledgment of the inconceivability of the coexistence of a plurality of legal orders that pretend to be equally sovereign. Indeed, a community of states characterized by equal rights, despite their difference in term of demographic and territorial dimension and political power, can be envisaged only relying on the idea of a higher community, that is a higher legal system, providing for a mutual coordination[13]. In this framework, the international system is no longer conceivable as an external part of the state legal order. On the contrary, it acts as the ultimate source of validity of the different 'co-existent' state orders. Concrete evidence of the pre-eminence of the international order can be found with a new state. According to the recognition scheme, the international system would be granted legitimacy only on

[13] Ivi, 299 ff.

the basis of the free recognition expressed by the new state. However, this is not the reality, since international law exists even before the birth of the new national reality.

Within this context, the author urges finding a solution to systemize such a plurality of legal orders. On the grounds of a thorough analysis, Kelsen suggests that the traditional idea of the state as the supreme and absolute authority can be replaced by a different concept. In his opinion, over the state order, it exists a superior human community that includes states as subordinate parts of a higher unity[14]. Recalling the medieval idea of the *Civitas Maxima*, the author affirms the idea of the universal community as the basis of a universal state[15]. Similar order can act as the ultimate source of legitimacy of the different orders that operate at a lower level.

The codification of such a community opens to the possibility of overcoming the dogma of sovereignty, as traditionally understood, and, in the end, the essential aporia related to the coexistence of a plurality of legal orders that pretend to be sovereign to each other. In other words, despite the formal possibility to choose between the subjective or objective approach, Kelsens states that a progressive overcoming of the idea of the nation state will definitely defeat the dogma of the national sovereignty and trigger the consolidation of the existence of a *Civitas Maxima* as the basis of an international, better universal, legal order that does not need to rely on a 'national' recognition. In the author's opinion, such a change depends on a cultural revolution. However,

[14] Ivi, 355 ff.

[15] On this topic, also cf. Danilo Zolo, *Hans Kelsen International Peace through International Law*, «European Journal of International law», vol. 9, 1998, 309 ff.

similar evolution must rely on a new construction of the legal phenomenon. In this context, the attempt to establish a pure theory of law, with its aim to emphasize the intimate unity of the legal order, can be of great help[16].

3. *International law and the Grundnorm in the first establishment of the Pure Theory of Law*

The analysis performed on the sovereignty ends with a dream: through the attempt of the creation of a pure theory of law, the acknowledgment of the supremacy of the international law with respect to national law could open to a social revolution and, definitely, overcome the conundrum prompted by the traditional construction of the state legal order as the ultimate foundation of the other sources of law.

In the first edition of his *Pure Theory of Law*, published in 1934, such an ambition finds its accomplishment. In the construction of a science of law that pretends to be independent from any further social aspect, the supremacy of international law is no longer a mere aspiration.

Kelsen tackles the role of international law in three different parts of the book. Yet in the definition of the meaning of the *Grundnorm*, it can be found a specific focus on the issue. Given the idea of the gradualist construction of the legal order and the fundamental law as a condition of its conceivability[17], the international system, Kelsen maintains, confers legitimacy to a power that is effective in its action. Indeed, the principle of effectiveness is a legal principle of the international law that can act as the *Grundnorm* of different national orders: the constitution set by a legislator ap-

[16] Ivi, 469.

[17] Hans Kelsen, *La dottrina pura del diritto*, cit., 74 f.

pears to be valid only because of its capacity to be effectively abided by[18].

In the description of his gradualist approach, Kelsen revisits the problem of plural state legal orders, which he previously explored in his work on sovereignty. «If we admit –the author says – that there's not a unique state legal order, but a plurality of them», it is the international legal order that can provide for their coordination and reciprocal delimitation. Given this framework, the international system must be recognized as «a legal order that stands above the other national orders and gathers them in a universal legal community»[19]. Only in this way, Kelsen maintains, it is possible to settle the ultimate unity of the law in a system of legal levels that follows one another according to a gradualist scheme.

At the end of the book, the author delves again expressly into the relationship between state and international law[20]. Even though the international system can be classified as a primitive order because of the lack of subjects charged with the production and enforcement of legal provisions, nevertheless Kelsen affirms that it presents the same elements that shape the legal order of a state[21]. Accordingly, in the author's view, there is an ongoing process that will progressively erase any distinction between the two different sys-

[18] Ivi, 78.

[19] Ivi, 87.

[20] In this part the author substantially recalls the analysis already expressed in the previous study on sovereignty. Similar remarks can be found also in the appendix attached to the study. Dealing with the pure theory of the law and the analytical jurisprudence, Kelsen rebuts the theories traditionally expressed on the superiority of the national legal order.

[21] Hans Kelsen, *La dottrina pura del diritto*, cit., 123 f.

tems paving the way for the ultimate evolutionary step that will bring to a unitary organization of a universal legal community and a unique worldwide state[22]. Within this overall plan, the pure theory of law is no longer a mere useful means. Indeed, the theoretical dissolution of the traditional dogma on sovereignty is «one of the most important results of the pure theory of law». In the conclusive remarks of the book, Kelsen emphasizes that such a doctrine does not simply foster the completion of international law. Indeed, it ensures the conceptual unity of the legal order through the relativization of the concept of the state and offers a key premise towards the «unitary organization of a worldwide centralized legal order»[23].

In spite of the traditional reading of the pure theory of law offered by constitutional law scholars, which stresses a substantial identification of the *Grundnorm* with the national constitution, the idea underpinned by Kelsen moves towards the affirmation of the superiority of international law in the framework of an overall unity of the legal order. In expressing such a conclusion, the Austrian author seems to have smoothly changed his original approach. In the 1920 study on sovereignty Kelsen tackles the problems triggered by the traditional dogma of national sovereignty. Despite these challenges, he clearly declares that both the alternatives of the superiority of the state order or the primacy of the international one are admissible. Within the attempt to establish a pure theory of the law, with the consequent unavoidable unity of the legal order, the identification of the supremacy of the international system could ease overcoming the shortcomings related to the dilemma of sovereignty.

[22] Ivi, 126.
[23] Ivi, 141.

In the 1934 *Pure Theory of Law*, such a possibility of choosing the preferred version of the monist approach seems to have disappeared. The undisputed ascertainment of the plurality of national legal orders leads to the recognition of a system of rules that can provide for a coordination of such a variety so to make it possible to redraw the complexity in terms of hierarchy, replacing the concept of sovereignty of a subject with the supremacy of a rule (or, better, a set of rules). In this context, the only solution admissible is to confer the primacy role to the international legal order.

4. *International Law in Kelsen's American period*

The Kelsenian idea of the supremacy of international law, as previously mentioned, can be found also in the subsequent studies of the author. Having moved different times in Europe because of his Jewish origins, at the end of the '30s the Austrian scholar settled in the USA. During this second period of his life, he published different works. As stated at the beginning, also because of the conflict arisen in Europe and the redrawing of the world geopolitical order that characterized the aftermath of the Second World War, international law attracted the main attention of the author[24].

Besides several studies and publications on the newly established United Nations Organization[25], they can be

[24] On the different events that influenced Kelsen's life and choices, cf. Nicoletta Bersier Ladavac, *Hans Kelsen (1881-1973). Biographical Note and Bibliography*, «European Journal of International Law», vol. 9, 1998, 391-400.

[25] See: Hans Kelsen, *Limitations on the Functions of the United Nations*, «The Yale Law Journal», vol. 55, 1946; Id, *Organization and Procedure of the Security Council of the United Nations*, «Harvard Law Review»,

mentioned the *Oliver Wendell Holmes Lectures* held in 1940-41 at Cambridge, and the monographic work on *Peace through Law*, published in 1944[26].

In these works, the author repeatedly and openly recalls the thorough analysis performed in the 1920 study on sovereignty. However, the main issue at stake is no longer the establishment of a pure science of law. The interest of the author turns to the analysis of the reforms to implement regarding the current legal framework. In particular, the main attention focuses on the need to promote peaceful relations between the states. In this sense, the *Oliver Wendell Holmes lectures* move from the initial consideration that the law is an order aimed at promoting peace[27]; the essential function of the legal order is to enhance peaceful relations marginalizing and rationalizing the use of force.

Classifying war is one of the most problematic issues within this framework. Since his first studies, in Kelsen's opinion recourse to war can be admitted only in case of reaction against an anti-juridical act of a third state. From a different point of view, war could represent a legitimate sanction against the breach of legal provisions by a national

vol. 59, 1946; Id, *Sanctions in International Law under the Charter of the United Nations*, «Iowa Law Review», vol. 31, 1946; Id, *The Preamble of the Charter: A Critical Analysis*, «The Journal of Politics», vol. 8, 1946, and, eventually, Id, *The Law of the United Nations*, Frederick A. Praeger, New York 1950.

[26] Hans Kelsen, *Law and Peace in International Relations. The Oliver Wendell Holmes Lectures 1940-41*, Harvard University Press, Cambridge (Mass) 1948², transl. *Diritto e pace nelle relazioni internazionali. Le Oliver Wendell Holmes Lectures, 1940-41*, ed. by Carlo Nitsch, Giuffré, Milano 2009; Id, *Peace through Law*, cit.

[27] Hans Kelsen, *Diritto e Pace nelle relazioni internazionali*, cit., 5.

government. In this sense, it could be recalled the jusnaturalist idea of the *bellum iustum*[28].

Departing from the original idea of the attempt to overcome national sovereignty, Kelsen recognizes that the current period hinders any possibility of creating a global state: in his words, such a plan is a utopic project[29]. The international community is a decentralized organization where states interact with each other on the basis of rules freely agreed upon. Alike the analysis performed in the 1934 *Pure Theory of Law*, the international order is classified as a primitive system. However, in this context, there is no longer a reference to the absence of a subject charged with the production of legal provisions[30]. The only problem here is the enforcement. In other words, the international law system lacks effectiveness, being characterized by technical inadequacies[31].

In this context, the former idea of an irreversible process towards the consolidation of a global state seems to be far away. The identification of the international law as an «authentic system of law», Kelsen maintains, is possible, not necessary[32]. In order to move towards the transformation

[28] Indeed, Kelsen's position on war legitimacy is more complex. For a wider analysis, cf. Tecla Mazzarese, *Tutela della pace o (ri)legittimazione della guerra giusta?*, «Rivista internazionale di filosofia del diritto», series V, n. 4, vol. LXXXVII, october/december 2010, 519 ff; John H. Herz, *The Pure Theory of Law Revisited: Hans Kelsen's Doctrine of International Law in the Nuclear Age*, in Salo Engels *et alii* (eds.), *Law, State and International Legal Order. Essays in Honour of Hans Kelsen*, The University of Tennessee Press, Knoxville 1964, 109 ff..

[29] Hans Kelsen, *Diritto e pace nelle relazioni internazionali*, cit., 29 f.

[30] Ivi, 49.

[31] Ivi, 54.

[32] Ivi, 57. On the nature of international law, also, cf. Charles Leben, *Hans Kelsen and the Advancement of International Law*, «Euro-

of such a primitive community into something similar to a state, it is compulsory to establish specific organisms that can bring to a centralization of the use of force[33].

Even the conclusive remarks have been redrafted. In the final words, it is no longer expressed the ambition of a social revolution nor the idea that the pure theory has brought to the definitive overcome of the traditional idea of the ultimate sovereignty of the national legal order. On the contrary, there is the acknowledgment that those who strive for world peace should not urge for the achievement of goals, like the deep reform of the current system of international relations, that now are simply out of reach[34].

In line with such a redefinition of the goals to struggle for, in the subsequent study of *Peace through Law*, the author endeavours to restore the compatibility of the concept of national sovereignty with the establishment of a supranational legal order[35].

A direct connection of the international law in the codification of the pure theory of law can be traced in the subsequent work *Principles of International Law*, published in 1952, and the second edition of the *Pure Theory of Law*, published in 1960[36]. In both the studies, it can be found the thorough analysis performed in the first work on sovereignty. Indeed,

pean Journal of International Law», serie. 9, vol. 1987-1998, 288 ff.

[33] Hans Kelsen, *Diritto e pace nelle relazioni internazionali*, cit., 60 ff.

[34] Ivi, 159. According to Kelsen, an international court enforcing international law rules would represent an important step forward. In terms of unachievable reforms and the opportunity of an international court, it can be recalled also the starting point of the analysis caried out in Hans Kelsen, *La pace attraverso il diritto*, cit., 43 ff.

[35] Ivi, 71 ff.

[36] Hans Kelsen, *Principles of International Law*, Holt, Rinehart and Winston, Inc., New York 1952. For a first comment, cf. S. I. Shuman S.

here again Kelsen emphasizes the inconceivability of the dualist scheme. However, despite what he had written before, in these publications there is no specific preference for the model to choose. «In our choice between the two hypothesis we are as free as in our choice between subjectivist and an objectivistic philosophy … the choice between the primacy of international law and the primacy of national law is, in the last analysis, the choice between two basic norms» and it «cannot be made for us by the science of law and has no effect on it»[37]. Such a decision is «guided by ethical or political preferences» and, above all, «from the point of view of the science of law, it is irrelevant which hypothesis one chooses»[38].

In other words, as it has been written at the end of the last edition of the *Pure Theory of Law*, the decision falls outside the domain of the science of law. Its rationale grounds on sophisms and is strictly tied to specific ideological positions. In this framework, the role of the science of law is to complain about these sophisms and report them to political arguments. Here comes again the affirmation of the indifference of science of law towards political choices. Nevertheless, the irrelevance of social and political elements has a different meaning, since it is no longer the means through which the dilemma of sovereignty can be overlooked, and it can be established the primacy of international law as the legal order of a global universal community. Indeed, yet on the grounds of the analysis of the content of the book, it appears that the role of international law has smoothly but

Ed., *H. Kelsen: Principles of International Law*, «Michigan Law Review», s. 5, vol. 52, 1954, 768 ff. Hans Kelsen, *La dottrina pura del diritto*, cit.

[37] Ivi, 446.

[38] Ivi, 447.

significantly changed. Contrary to what had been done in the first edition, the last publication does not include any specific reference to «the position of international law in the gradualist construction» of the legal order, thus disconnecting it from the overall definition of the elements of the unitary system of the sources of law.

5. *Conclusive remarks*

Any attempt to summarise the position of Kelsen on a specific issue faces the challenge of giving a comprehensive outlook on the complexity of his thought. It is not different regarding the role of international law. As diffusely expressed, international law represents one of the main subjects of interest for the Austrian scholar. Since one of his first studies, the 1920 *Problem of the Sovereignty*, the author keeps rebutting the dualist scheme in vogue and tries to delineate a theory based on the inner unity of the legal order in its different constituent elements. Such a unity relies on a proclaimed indifference towards social and political elements: the science of law pretends to be 'pure' and create something that is true, irrespective of the reality of social, political and historical facts.

Although the reasoning used is repeatedly recalled even in the subsequent works, the position of the author undergoes a smooth but tangible change during his life. Indeed, in the first step of his career, behind the curtains of the irrelevance of facts it can be found the firm opinion that through a pure theory of law it is possible to definitely overcome the concept of national sovereignty and establish a *Civitas Maxima*, that is a global community, capable to establish a global world-wide legal order. Such an unwavering faith in the capabilities of legal science is doomed to,

smoothly but inexorably, fade in front of the outbreak of the Second World War and the deep crisis of the traditional relationships between states. Indeed, the tragedy of the war spurs Kelsen in two different directions. On one hand, the ruins of the conflict stimulate a more incisive intervention of the international system of law to punish any breach of provisions commonly agreed upon by the community of national states. To achieve this goal, the analysis insists on the need to establish a court charged with the enforcement of these rules.

On the other hand, the unwavering faith professed at the beginning of his career has vanished. There is no longer any footmark of an ongoing process of overcoming of the traditional scheme of the national sovereignty. In this context, the *Grundnorm* turns into the principle of effectiveness. Consequently, there is no certainty on the results of the evolution process: both the desired creation of a global worldwide state and, on the opposite, the restoration of the old conception of the principle of national sovereignty are conceivable. Within this context, the pure theory of law, with its pretended indifference towards non-juridical elements, represents the last means that allows to 'overlook' the reality. Nevertheless, in any case, such a theory cannot change it.

Similarities between the Kelsen's position and the current political landscape are significant. Indeed, the present framework reports a series of international crisis that undermine the idea, that until recently it seemed to have consolidated, of a set of rules drafted by the community of states and effectively binding for everyone. The Russia/Ukraine and the Israel/Palestine crisis, to mention only a few, give us concrete evidence of the "technical inadequacies" of the international law system that Kelsen already emphasized over 60 years ago. In this context, it seems necessary to establish

new organisms capable of restoring the effectiveness in the enforcement of international law, but it is not possible to maintain a steady faith in the consolidation of a world-wide community that overcomes national sovereignties.

Robert Schuett

Hans Kelsen and the English School in International Relations

1. *Introduction*

Today's power struggles are not new, but they are accelerating open societies toward something new and as yet undefined. We have been there before, and chances are we will be there again in the future. What matters is what happens *in-between* – how we deal with what we have been dealt, not by God, Nature, Reason, or any other natural law, but by ourselves: by You and Me: because in a Kelsenian political ethics of responsibility and moral psychology of ultimate human agency, there is no one else to blame than Us.

Looking at Kelsen from a political and International Relations (IR)[1] perspective is odd enough, but bringing in the English School style of theorizing – the so-called international society approach, or *via media* between realism and idealism – requires explanation. I will proceed in three steps. First, I begin with where Kelsen has been conventionally situated within IR theory. Then, I will briefly introduce the English School (ES) as a potential new contender. In the third section, I will examine both the realism and idealism

[1] Keeping with disciplinary conventions, "international relations" denotes the subject matter of what is known as "International Relations" (capitalized), the academic discipline that studies relations among nations.

within Kelsen's and ES thinking, synthesizing Kelsen's political and international relations thought through the lens of English School logic to offer a more nuanced interpretation and rescue Kelsen from overly simplistic or one-sided theoretical and political readings.

What I hope we gain from this comparative exercise in political theory and political method is not reaching back to Kelsen to tell us what is to be done in our Time, which would be futile in many ways, but rather to engage with his style of political thinking, which helps us think – and rethink – about *how* to think about our time and *what* we can reasonably and realistically hope to achieve. As I will argue in my concluding remarks: We destroy international law at our peril.

2. *Kelsen in International Relations*

The question of whether and where Hans Kelsen fits into the IR theory canon is certainly not a major theme in either Kelsen studies or IR theory. Surely, Kelsen pops up every now and then, especially in connection with Hans J. Morgenthau, the German-Jewish émigré to the United States who would become something of a godfather of Cold War political realism[2]. There is an interest in terms of intellectual history, with Kelsen being the one figure in Geneva who, in the early 1930s, helped the young and struggling Morgenthau secure his *Habilitation*, thereby paving the way for the latter's scholarly success.

But then, the Kelsen/Morgenthau story also highlights the tendency to pigeonhole Kelsen as a naive international

[2] Cf. Hans J. Morgenthau, *Politics among Nations: The Struggle for Power and Peace*, 4th edition, Alfred A. Knopf, New York 1967.

lawyer or a so-called political idealist by self-described political realists, including Morgenthau himself. And of course it wasn't only Morgenthau who, distraught with the failures of the League of Nations in preventing the rise of Nazi Germany, its geopolitical aggressions, and the Second World War, took a swipe at Kelsen's allegedly naive notion of «peace through law»[3]. There was also Hedley Bull, an intellectual heavyweight in the ES tradition to this day (and to whom I shall return shortly), who joined in the conventional critique of Kelsen, writing that «having strayed from the province of international law and ventured into the territory of international political science, his understanding was confined by the idealist or progressivist assumptions so common in that period»[4]. Meaning to imply that while Kelsen has indeed been important as the creator of the Pure Theory of Law, in terms of politics and international relations, he is little more than an idealistic has-been.

However, the story usually told is not entirely wrong, but not entirely correct either. Hence, I want to suggest here that we explore what might be called a "2+1" interpretation of Kelsenian political and international relations thinking.

3. *Political realism vs. political idealism*

The standard way of thinking has often been to neatly divide political and international relations thought into two camps: political realism on the one hand, and political idealism on the other, with Kelsen firmly placed in the latter.

[3] Hans Kelsen, *Peace through Law*, University of North Carolina Press, Chapel Hill 1944.

[4] Hedley Bull, *Hans Kelsen and International Law*, in Richard Tur and William Twining (eds.) *Essays on Kelsen*, Cambridge University Press, Cambridge 1986, 336.

Political realists, it is claimed, see the world as it is: a place where complex human nature drives individuals, groups, and societies toward inevitable conflicts of interest, clashes, and wars. For realists, a prudent balance of power or a calm and rational peace through diplomacy is the most reasonable course of action for achieving at least a modicum of stability and peace. From that theoretical and practical point of view, everything moralistic or legalistic, as well as any grand designs for societal and international order, is bound to fail[5]. Little wonder that Kelsen's idea of «peace through law» has been mocked – offering another neat and clean illustration – by the formidable British diplomat E.H. Carr, who dismissed Kelsen's legal philosophy and political thinking as merely «another distinguished international lawyer's dream»[6]. The general charge against Kelsen, and all the other so-called idealists, is that they simply couldn't see, or lacked the moral strength to acknowledge, that one cannot wish away notions of egoistic instincts, power, self-preservation, and self-interest. More often than not, Kelsen has been regarded and treated as a Kantian idealist, someone who believed in the ideals of international cooperation, cosmopolitanism, and democratic peace[7].

However, it's not as though the portrayal of Kelsen as a naïve Kantian idealist hasn't been challenged. Both jurists and historians of political thought with a deeper understanding and appreciation of Kelsen have pointed out that

[5] See, by way of an example, Hans J. Morgenthau, *Scientific Man vs. Power Politics*, Latimer House, Latimer 1946.

[6] Edward H. Carr, *The Twenty Years' Crisis, 1919-1939*, Macmillan, London 1939, 259.

[7] For the standard realist critique of Kelsen, see Robert Schuett, *Hans Kelsen's Political Realism*, Edinburgh University Press, Edinburgh 2021, 13-27.

there is much more to explore than just the Kantian theme – and that, upon closer examination, there emerges something like Kelsen-the-realist. Almost thirty years ago, Clemens Jabloner highlighted the rich relationship between Kelsen and Sigmund Freud; in this context, orthodox Freudian psychoanalysis has been shown to be a major influence on Kelsen's rather realistic view of human nature[8]. From Sara Lagi we learn that Kelsen's political thinking about the essence and value of democracy – understood in terms of pluralism, constitutionalism, relativism, and proceduralism – is not the product of naïve formalism (as the Schmittians would have us believe); instead, it represents a realistic reaction to the political challenges of his time and the power struggles he observed in all political communities: past, present, and future[9].

The view that Kelsen was not only an extremely versatile political thinker but also a highly realistic one has also been explored in the realm of political and IR theory. Most notably, in Robert Schuett's *Hans Kelsen's Political Realism*, the case is made – almost as a radical reinterpretation – that, in light of the recent and ongoing wave of "revisionist" takes on political realism, Kelsen can be seen as part of the realist camp: he may very well represent a most liberal or progressive strand, but he still belongs in the political realism corner[10].

[8] Clemens Jabloner, *Kelsen and his Circle: The Viennese Years*, «European Journal of International Law» 9, 2, 1998, 368-85.

[9] Sara Lagi, *Kelsen's Realistic Theory of Modern Democracy*, in Special Issue: R. Schuett (ed.), *Kelsen, Politics, and Realism*, «Austrian Journal of Political Science», vol. 51, no. 3, 2022, 22-31.

[10] Schuett, *Kelsen's Political Realism*, cit. The so-called "revisionist" realism strand in political and IR theory has grown into an impressive body of scholarship and at its core, it demonstrates that political real-

4. *Political realism and political idealism*

Yet, what these two lines of interpretation – Kelsen-the-idealist and Kelsen-the-realist – leave us with is somewhat unsatisfying. It seems that each of these camps has focused, whether deliberately or not, on either the idealist or realist elements in Kelsen, respectively, thereby presenting potentially one-sided views. As a contender in this debate, however, my aim here is not to make a more forceful case for Kelsen-the-realist.

Rather, I want to explore whether we must simply accept that Kelsen's political thinking contains elements of both idealism and realism, and that we may need to approach Kelsen's political and international relations thinking from an intellectual vantage point capable of transcending the boundaries dividing political idealism and political realism. I want to suggest that such a vantage point exists. In some ways, my point of departure here is Stanley Hoffmann's little-noticed yet extremely interesting sentence in his 1985 Cyril Foster Lecture, delivered at Oxford a half-year after Hedley Bull's premature death, in which he says that there is an element in Bull's political thinking that «cause him to appear perilously close to the construction of Hans Kelsen, which he himself criticizes»[11]. That very element, which Hoffmann refers to only in passing, is the tension between realism and idealism, or between the role of power and the influence of norms in international relations.

ism and Realpolitik are not synonymous; see William E. Scheuerman, *The Realist Case for Global Reform*, Polity, Cambridge 2011.

[11] Stanley Hoffmann, *Hedley Bull and His Contribution to International Relations*, «International Affairs», vol. 62, no. 2, 1986, 186.

Yet, what if it's not a tension, but rather a complementary dynamic? In other words, what I referred to as the "2+1" interpretation of Kelsen's political and international relations thinking introduces the English School (ES) as a sort of third way, potentially breaking open the often-absolutized idealism/realism impasse.

5. *The English School*

To begin with – setting the stage for reintroducing Kelsen at a later point – it is important to note that the English School in IR is neither particularly English nor tied to England in any meaningful or nationalistic way. In fact, many of the English School's concepts, ideas, and methodological premises are fairly Continental in nature and outlook; more on this later. For now, why is it necessary to include a brief introduction to English School thinking?

First, the English School suffers from a combination of neglect and misunderstanding within much of political and IR theory. With only a few exceptions across the Atlantic, English School thinking is often dismissed as a relic of a pre-behaviorist era (much like classical political realism) with its Weberian-hermeneutical *Verstehen* approach so very different to American-style behaviourism and causal style of reasoning. Alternatively, it is treated as a historical precursor to contemporary constructivism, owing to its emphasis on the role of ideas and values in politics and international relations. Furthermore, many scholars and commentators operating along the realism-idealism spectrum struggle to grasp that English School theorization does not fit neatly into either category. Instead, through its historical-sociological method, it remains fluid and resists rigid classification. Surely, the output of the English School's analysis and nor-

mativity often appears torn between a Hobbesian world and a Kantian vision.

However, this is not, at least to me and other English School theorists, a weakness but rather a strength. For the reality is that political structures and processes are rarely one or the other. The English School, so to speak, lacks a fixed analytical or normative starting point from which to view the world; instead, it remains unideological, in true Kelsenian spirit.

The second reason why a brief introduction to the English School (ES) and its core concept of international society is warranted lies in its relevance to practical politics and foreign policy. There is little doubt that the state of world politics is, in many ways, profoundly unsatisfactory, and that the post-war international order hangs precariously in the balance. This raises two pressing questions: How should we interpret what we observe? And, what is to be done? In this debate, it is crucial to recognize that, for better or worse, relations among nations are fundamentally *social* in nature. That is, foreign policy is shaped by a shared understanding of what constitutes legitimate behavior and what does not. Where realism places excessive emphasis on hard power and conflict, and idealism leans too heavily on soft power and cooperation, the English School offers a middle way. It underscores that the functioning of international society is shaped by both the balance of power and a shared sense of values and norms of rightful conduct.

At a time when the United States and Europe, on the one hand, and China and Russia, on the other, are locked in an intense great power competition, the English School provides a framework that is both realistic and nuanced. It captures the interplay between interests and ideas as they are distributed among the key actors on the global stage.

6. *Hobbes, Kant, and the societal approach*

If the English School has a birth year, it would be 1959, when the so-called «British Committee on the Theory of International Politics» convened for the first time. Interestingly, it wasn't even financed by the British but by the American Rockefeller Foundation[12]. This same foundation, just five years earlier in May 1954, had funded an American counterpart – the «Conference on International Politics» – which brought together intellectual heavyweights such as Hans J. Morgenthau, Karl Reinhold Niebuhr, George F. Kennan, and Walter Lippmann to discuss the best approaches to studying relations among nations. Where the American version advocated what is now known as the classical realist approach to international relations, with its heavy emphasis on human nature realism, the British variant across the Atlantic argued for the necessity of a so-called societal approach[13].

The leading thinkers of the first generation of the English School were both theorists and practitioners. Adam Watson (1904-2007), for example, served as a senior diplomat in the Foreign Office. The arguably most central figure of the English School, Hedley Bull (1932-1985),

[12] Brunello Vigezzi, *The British Committee on the Theory of International Politics (1954-1985): The Rediscovery of History*, Edizioni Unicopli, Milano 2005.

[13] The English School's intellectual overlap with classical realism, but its very limited connection to today's neorealism, is explored in Richard Little, *The English School vs. American Realism: a Meeting of Minds or Divided by a Common Language*, «Review of International Studies», vol. 29, no. 3, 2003, 443-460; see also Jodok Troy, *Political Realism and the English School: Is there really no international theory? Martin Wight and Hans Morgenthau on International Political Theory*, in Robert Schuett and Miles Hollingworth (eds.), *The Edinburgh Companion to Political Realism*, Edinburgh Uni. Press, Edinburgh 2018, 87-96.

who died prematurely, was Australian. Charles Manning (1904-1978), a trained lawyer, hailed from South Africa. Martin Wight (1913-1972), another early and influential figure who also passed away at a young age, was a trained historian. During his studies at the University of Oxford, Wight increasingly embraced Christian pacifism, and he worked – characteristically for the English School – at the intersection of diplomatic history, international law, and political philosophy. The Cambridge historian Herbert Butterfield (1900-1979) was the driving intellectual force behind distinguishing the «British Committee» from the overt realism of the «American Committee» (a goal he successfully achieved). He developed a theoretical perspective on international relations that not only emphasized their enduring features but also served as a seismograph to detect potential changes.

The «British Committee» – chaired by Butterfield (1959-1966), followed by Martin Wight (1967-1971), Adam Watson (1972-1978), and Hedley Bull (1979-1985) – effectively came to an end with Bull's death. However, this did not mark the conclusion of the English School itself. The so-called second generation of the English School, spearheaded by the work of Barry Buzan, Richard Little, and Nicholas Wheeler during the 1980s and 1990s, and the so-called third generation (which continues to this day), have confidently advanced the ES both theoretically and programmatically. Together, these later generations have secured the English School a significant, albeit somewhat reclusive, place within the field of IR theory[14].

[14] For a comprehensive introduction to the English School, see Barry Buzan, *An Introduction to the English School of International Relations: The Societal Approach*, Polity, Cambridge 2014; see also Cornelia

What unites the English School is a methodological triad developed by Martin Wight, offering a framework for understanding international relations[15]. This triadic approach consists of realism, rationalism, and revolutionism, represented respectively by Thomas Hobbes, Hugo Grotius, and Immanuel Kant – and the corresponding core concepts are the international system, international society, and world society[16].

7. *System, society, and «anarchical society»*

Probably no other English School thinker has been more forceful about the analytical and normative starting point of the societal approach to international relations than Hedley Bull in his seminal 1977 book *The Anarchical Society: A Study of Order in World Politics*[17]. The specific Grotian element, according to Bull, is something that seems awkward to both realists and idealists alike. It is the idea that sovereign states are members of a so-called «anarchical society», one that has the potential, through the actions of its members, to become either more societal (progress) or more anarchic (regress). There is no telos, no ultimate purpose or end[18].

Navari (ed.), *International Society: The English School*, Palgrave Macmillan, London 2021.

[15] The key text, published posthumously, is Martin Wight, *International Theory: The Three Traditions*, ed. by Brian Porter and Gabriele Wight, Leicester University Press, Leicester 1991.

[16] Please note that Hobbes and Machiavelli – along with Hobbesianism, Machiavellianism, and realism – are often used interchangeably.

[17] Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 4th edition, with forewords by Andrew Hurrell and Stanley Hoffmann, Columbia University Press, Columbia 2012.

[18] See Andrew Hurrell, *Hedley Bull and the Idea of Order in International Society*, in Navari (ed.), *The English School*, cit., 31-44.

According to English School thinking, and in contrast to hard-core realists, there is no such thing as a Hobbesian anarchy or Hobbesian «war of all against all» – at least not by Nature. Rather, what nations do is constitute and reproduce, day in and day out, an international society, where governments recognize (or not) one another as legitimate members of that order through various social practices.

Yet, in contrast to hard-core idealists, the dynamics of interests and ideas, power and legitimacy, are not inherently based on ethics of self-restraint, cooperation, or solidarity. Instead, they unfold in the absence of a centralized international governance structure – such as a world police or so – making international society an *anarchical* one. What the English School shares with political realism is both a state-centric worldview and a high premium on prudence. It parts company with *raison d'état* (Staatsräson, reason of the state), however, through its analytical and normative focus on *raison de système* – the idea that it pays to make international society work – and the social construction of international anarchy[19]. In this regard, the English School focuses on international cooperation, but unlike neoliberals, who treat state preferences as fixed and view cooperation as a result of rational choice logic, the English School emphasizes the importance of history, ethics, and culture in the contingent creation of international society. This society not only defines legitimate actors but also regulates their behavior through powerful socializing mechanisms. The «anarchical society» is predominantly ideational and normative,

[19] In contrast to *raison d'état*, the concept of *raison de système* was coined by Adam Watson as the «belief that it pays to make the system work». Adam Watson, *The Evolution of International Society*, Routledge, London 1992, 14.

emerging from long, deep-seated historical and sociological processes[20].

These processes are reflected in «primary institutions» that collectively shape the character of international society at any given historical moment. What's crucial to note here is that primary institutions «are deep and relatively durable social practices in the sense of being more evolved than designed»[21]. A durable set of primary institutions in world history includes, among many others, the balance of power, territoriality, sovereignty, and international law[22]. These primary social practices are manifested in so-called «secondary institutions», which include international organizations, ranging from global bodies like the UN and IMF to regional ones like the European Union, African Union and ASEAN. They cover issues from technical matters (e.g., satellite orbital slots) to high-stakes politics (e.g., NATO), including even international intelligence sharing (e.g. Five Eyes), with some rooted in treaties (e.g., the International Criminal Court) and others with smaller, more flexible memberships (e.g., the Missile Technology Control Regime)[23]. In essence, secondary institutions «link to interstate primary institutions in the sense both that they are reflections of underlying primary institutions (e.g. the UN reflecting sovereignty, diplomacy, multilateralism, international law) and that they

[20] Barry Buzan, *Making Global Society: A Study of Humankind across Three Eras*, Cambridge University Press, Cambridge 2023.

[21] Buzan, *English School*, cit., 16-17.

[22] Buzan, *Making Global Society*, cit., 15.

[23] Robert Schuett and John Williams, *Intelligence in International Society: An English School Perspective on the 'Five Eyes'*, «Global Policy», vol. 15, no. 2, 2024, 226-27.

serve as forums where primary institutions are produced, reproduced, renegotiated and sometimes made obsolete»[24].

That said, while the English School unites around a triadic methodological approach, clearly favoring the societal view of «anarchical society», there have always been two camps in English School historiography and theorization – pluralists and solidarists – almost naturally so[25]. The pluralist wing, perhaps more conservative, tends to align with the Hobbesian line of political thinking, emphasizing sovereignty, territoriality, and great power management. In contrast, the solidarist wing, which is more progressive, leans toward Kantianism, emphasizing shared universal values, humanitarian interventions, and the concept of a cosmopolitan world society rooted in human rights[26].

Now, returning to the intellectual starting point that Kelsen's political and international relations thinking contains both realistic (Hobbesian) and idealistic (Kantian) elements, where can Kelsen be positioned within the logic of the English School, or conversely, how does the English School align with Kelsen's method and politics?

8. *Man, the State, and Peace through Law*

What I want to suggest in this section is that if one looks at how Kelsen thinks of the nature of man, society, and politics – both in terms of method and politics – from a broadly

[24] Buzan, *Making Global Society*, cit., 16.

[25] See William Bain, *Pluralism and Solidarism*, in Navari (ed.), *The English School*, cit., 95-108.

[26] A compelling reformulation of English School pluralism, emphasizing the defense of ethical diversity, is offered by John Williams, *Ethics, Diversity, and World Politics: Saving Pluralism From Itself?*, Oxford University Press, Oxford 2015.

English School vantage point, the often-criticized tension between the inherent realism of Kelsen and his supposed idealism may no longer be seen as a theoretical flaw or ideological impasse but for what it really is: the deeply political understanding of politics as something that has both a materialistic and an ideational component. It is not an either-or outlook of realism versus idealism, but rather a both-and perspective that seamlessly integrates political realism and political idealism in Kelsen's political worldview.

To achieve this reconsideration of Kelsen's political and international relations thinking through the lens of the English School, I will begin with Kelsen-the-realist, who shared classical realism's and English School pluralists' concerns with human nature and power dynamics, before shifting focus to Kelsen-the-idealist, whose views occasionally align with English School solidarists, and finally synthesizing his position through his methodological and political program of «peace through law».

9. *Human nature realism and power politics*

Contrary to Hedley Bull and many others who pigeonholed Kelsen as an idealist, progressive, or naive legal and political theorist, there is actually very little, if anything, in Kelsen's life and work that suggests he was drawn to lofty ideas and ideals. From start to finish, Kelsen tells us that in all social life – no matter when or where, for You and for Me, or for Us – there is no escaping a fundamental fact: power. As Kelsen powerfully put it in the critical context of the inherent ideology of natural law theorizing and politics:

> The question on which natural law focuses is the eternal question of what stands behind the positive law. And whoever seeks the answer will find, I fear, neither an absolute metaphysical

> truth nor the absolute justice of natural law. Who lifts the veil and does not shut his eyes will find staring at him the Gorgon head of power[27].

Kelsen is right to point out that «the attitude of the individual toward the problem of government is essentially determined by the intensity of the will to power within the individual»[28], but that says it all: there is a will to power, the infamous *animus dominandi* (think of Nietzsche and Morgenthau), which means, at least to Kelsen, that our «behavior is not very different from that of animals. The big fish swallow the small ones, in the kingdom of animals as in that of men»[29]. And hence his warning: «To count on a human nature different from that known to us is Utopia»[30].

In essence, Kelsen's human nature realism closely aligns with the classical English School pluralism of early leading thinkers like Butterfield and Wight. Both come from the broader Christian realist tradition, with Butterfield, a vice-chancellor of the University of Cambridge, also serving as a Methodist lay preacher, while Wight, a conscientious objector during the Second World War, held firm to his pacifist convictions. The latter followed an Augustinian view, with Wight distinguishing between the perfect «city of God» and the imperfect «city of man», meaning that, in the realm of international politics, any attempt to theorize power dy-

[27] Thus argued Hans Kelsen in 1927, quoted in Schuett, *Hans Kelsen's Political Realism*, cit., 86.

[28] Hans Kelsen, *Foundations of Democracy*, «Ethics», vol. 66, no. 1, 1955, 26.

[29] Hans Kelsen, *What Is Justice?*, in Hans Kelsen (ed.), *What is Justice? Justice, Law, and Politics in the Mirror of Science*, University of California Press, Berkeley 1957, 8.

[30] Hans Kelsen, *The Law as a Specific Social Technique*, «University of Chicago Law Review», vol. 9, no. 1, 1941, 84.

namics is not about the good life (as in political philosophy) but about survival through diplomacy and the pragmatic realities of politicking[31]. Similarly, Butterfield's position was that wars «would hardly be likely to occur if all men were Christian saints»[32] and that having too much faith in human nature, driven by primordial forces, is not only «a recent heresy» but also «a very disastrous one»[33].

Actually, Kelsen's stance on what he perceives as the thorny Freudian dynamics of human nature appears even more realist than those of Butterfield and Wight. In his 1955 essay *Foundations of Democracy*, Kelsen criticizes Niebuhr for failing to grasp the depth of human nature[34]; while having earlier stated unequivocally that to believe in something like a higher law – whether Nature, God, or Reason – is «an illusion, the product of wishful thinking»[35].

What this human nature realism leads to – in Kelsen's case through Freudian-style psychoanalytic individual and group dynamics, and in Butterfield and Wight's case largely Christian realist – is the recognition of two fundamental facts of political and international life. First, that politics is indeed rooted in human nature (though this doesn't prescribe how You and Me ought to navigate this existential question), and second, that politics is intrinsically tied to power, that is, the striving for power[36]. In other words, inter-

[31] Troy, *Political Realism and the English School*, cit., 90.

[32] Quoted in Robert Schuett, *Political Realism, Freud, and Human Nature in International Relations*, Palgrave Macmillan, New York 2010, 76.

[33] Herbert Butterfield, *Christianity and History*, Bell, London 1949, 47.

[34] Kelsen, *Foundations of Democracy*, cit., 54.

[35] Kelsen, *The Law as a Specific Social Technique*, cit., 83.

[36] For a detailed exploration of Kelsen's Freudian human nature realism, see Schuett, *Hans Kelsen's Political Realism*, cit., 66-93.

national politics is a realm dominated by an almost relentless pursuit of power that resists easy solutions. In a world of sovereign states vying for power, where the primary institutions are essentially the balance of power and territoriality, Butterfield, Wight, and other English School pluralists, along with classical realists, place a high premium on the political agency of diplomacy to maintain peace. However, Kelsen argues that as long as anarchy persists, what we must work unceasingly towards is a «peace through law» – a theme to which I will return shortly.

10. *Norms, law, and international law*

From the perspective of how Kelsen's human nature realism and the English School pluralism's parallel outlook translate into the often-grim depiction of world politics as a realm dominated by looming threats, nationalism, and international anarchy, both appear to verge dangerously close to operating within the meaning of political realism. And yet, there is something very subtle in both that distinguishes them quite clearly from the uncompromising realist mindset of, let's say, John J. Mearsheimer's so-called offensive realism, with its pronounced focus on material power, particularly nuclear weapons[37].

What is so subtle about the English School – perhaps too subtle for quantitative political science-driven IR theory – is its insistence that while power is undoubtedly a central feature of all political and international life, it is not as dominant as today's neorealists portray it to be, and that a social dimension, often overlooked, plays an equally significant

[37] Robert Schuett, *The End of Open Society Realism?*, «Analyse & Kritik», vol. 44, no. 2, 2022, 219-42.

role. What the English School responds to, in many ways, is the reified state-of-nature narrative in political theory, where the realist logic of the balance of power – or the "kill or perish" dynamic – is presumed to be inextricably tied to the human condition, reducing its management to a matter of mathematics or game theory[38].

If there were only You and Me in the world and a rock, political realism would already have all it needed, even before You and Me had a chance to speak. The mere existence of the rock would mean that either of us could be the first to grab it and raise it over the other's head. The conversation that would then follow would be a conversation – or politics – taking place within the realm of nature and fear. The logic of the rock eventually evolved, in the nuclear age, into the MAD doctrine, that is, the military strategy of a mutually assured destruction[39]. In this worldview, states are treated as given entities, and international anarchy is viewed as an inherent material condition. The relationships between states are thus understood as part of a deterministic international system, where states are merely technical units to be managed pragmatically in a Realpolitik manner. Thus understood, international politics becomes the «realm of recurrence and repetition»[40], where the interactions among states are predictable and driven by the same material conditions, with little room for change or evolution beyond the constant balancing of power. Now, whether English School

[38] Buzan, *English School*, cit., 26-29.

[39] Wollingworth and Schuett, *Introduction: Political Realism, Liberal Democracy and World Politics*, in Id., *Edinburgh Companion to Political Realism*, cit., 1-8.

[40] Martin Wight, *Why Is There No International Theory?* in Herbert Butterfield and Martin Wight (eds.), *Diplomatic Investigations: Essays in the Theory of International Politics*, Allen & Unwin, London 1966, 26.

pluralists are skeptical of high degrees of shared norms, rules, and institutions, or whether English School solidarists are ethically committed to cosmopolitan projects where global justice holds equal weight to international order, both wings of the English School operate firmly within the international society logic. This means that states do not merely form a system, in the sense that the behaviour of each is a necessary factor in the calculations of the others, but also have established by dialogue and consent common rules and institutions for the conduct of their relations, and recognise their common interest in maintaining these arrangements[41].

This, in turn, means that power takes on a different meaning, and consequently, so does the concept of power politics, including great power politics. Certainly, power is something sharp, a material resource, often manifesting in physical, psychological, military, or economic capabilities, designed to compelling or forcing other actors – whether individuals, groups, or states – to do what they would not otherwise do; yet, the wielding of power does not occur in a vacuum, as it is embedded in constitutive social processes that shape all actors' social identities and capabilities, primarily in recognizing some actors as having legitimate authority while others do not[42]. Key here is that in political reality, these two elements of power are not mutually exclusive but rather two sides of the same coin. Which means

[41] Hedley Bull and Adam Watson, *Introduction*, in Hedley Bull and Adam Watson (eds.), *The Expansion of International Society*, Oxford University Press, Oxford 1984, 1.

[42] Barry Buzan and Robert Faulkner, *Great Powers and Environmental Responsibilities: A Conceptual Framework*, in Robert Faulkner and Barry Buzan (eds.), *Great Powers, Climate Change, and Global Environmental Responsibilities*, Oxford University Press, Oxford 2022, 15.

that even great power politics takes place within the broader framework of international society, where great powers, though possessing ultimate military and economic capabilities, must, in accordance with the *raison de système* ethic, «accept the duty, and are expected by others to have the duty, of modifying their policies in light of the managerial responsibilities they bear»[43].

If great powers do not accept the duty or the need for legitimate authority in international society, it is not due to hidden systemic or structural forces, nor to any other natural laws that supposedly force them to disrupt the coexistence of political communities; rather, it is because their respective governments – through the real deeds of Presidents, Prime Ministers, and so on – have consciously chosen this course of action over another. Where there is international society, there is human agency at work. Whether one wrecks longstanding primary institutions in international society, such as international law, out of ignorance, foolishness, or moral bankruptcy, the responsibility lies solely with the one who chose to wreck it. Lest we forget that the «centrality of law for the existence of international society has been reaffirmed by generations of English School writers»[44].

Where Kelsen and the English School appear remarkably aligned is in their (positive) acknowledgment of the central role of law – and the state – as a fact throughout human history. To Kelsen, the notion of You and Me ever living together without any form of norms or law is not only naive

[43] Thus argues Hedley Bull, quoted in Buzan and Faulkner, *Great Powers and Environmental Responsibilities*, cit., 16.

[44] Dennis R. Schmidt, *Pluralism and International Law in the English School*, «Cambridge Review of International Affairs», vol. 33, no. 4, 2020, 491.

but also historically and methodologically incorrect. His entire legal and political philosophy rests on the idea that law is a «specific social technique» with an inherent coercive element, and that the political concept of any *withering away of the state* is nothing more than a utopian illusion[45]. What that means is that Kelsen and the English School share a subtlety in their respective political and international relations thinking that moves beyond superficial narratives of human anarchy, or international anarchy. To which both Kelsen and the English School can subscribe is the powerful logic attributed to Grotius: «Ubi homo, ibi societas. Ubi societas, ibi ius. Ergo: ubi homo, ibi ius» (Where there is man, there is society. Where there is society, there is law. Therefore, where there is man, there is law). Or, to put it bluntly, there was never such a thing as pure anarchy, that is, a state of affairs devoid of any norms or law.

According to a recent groundbreaking English School world-historical analysis, human history – which is also the history of international, world, or global society – is a realm where material factors *and* social structures (or primary institutions) intersect in various ways: from the very beginning, across the ages, to the here and now, and most likely for the foreseeable future[46]. One can safely say that «[i]nternational law and international society had developed hand in hand. They were historically and logically inseparable»[47]. Reaching back to Freudian psychoanalysis and anthropological studies in his attempt to de-ideologize law and the state, Kels-

[45] Kelsen, *The Law as a Specific Social Technique*, cit., 83.

[46] As persuasively argued in Buzan, *Making Global Society*, cit.

[47] Peter Wilson, *Sovereignty, Law, and International Society: The Contribution of C.A.W. Manning*, in Navari (ed.), *The English School*, cit., 18; see also Buzan, *English School*, cit., 102-103.

en sought to break away from much of the anti-democratic natural-law ideologizing inherent in contemporary legal and political theory; for he was certain that in all social life, past and present, law has always been at work – it may have been primitive or decentralized law, but law nonetheless. As Kelsen put it, echoing Grotius: «History confirms the saying: *ubi societas, ibi jus*» (where there is society, there is law)[48].

11. *Working unceasingly toward peace though law*

Where realists – or, to put it provocatively, some pseudo-realists – persistently return to the notion that relations among nations have always been, and will always remain, a Hobbesian «war of all against all», with You and Me forever unable to establish a centralized authority with teeth, a sort of global Leviathan to govern nations, including great powers, regional powers and small states, both Hans Kelsen and the English School would respond as follows: Yes and no, it depends.

On the one hand, few political and international relations thinkers would deny the reality of human nature realism and its influence on the thorny social practices of sovereignty and territoriality. Indeed, Kelsen's entire body of legal and political philosophy is rooted in the challenge posed by human nature. For if You and Me were, by nature, good or perfectible beings, the timeless question of how to organize our peaceful living-together would never arise. Thus, from that very starting point, it is indeed highly unlikely that the world's political organizing principle will ever resemble a kind of Leviathan writ large, with a centralized coercive body of law at its very center.

[48] Kelsen, *The Law as a Specific Social Technique*, cit., 82.

But then, that's not necessarily what's required, and the kind of intellectual and political debate between proponents, analysts, or normative theorists of domestic politics and international politics, Leviathan and Global Leviathan, or State and World State, suffers from a similar degree of unhealthy absolutism as does the age-old debate between so-called realists and so-called idealists. If we accept, through the logic of the English School, that there may indeed be a third way to think about international relations – a middle path between the rigidity of both realism and idealism, often cloaked in the natural-law-like language of either fixed patterns or evolutionary paths – then Kelsen's wartime book *Peace through Law*, published in 1944, appears quite rescuable from the charge of being naive legalism. Not only that, from my perspective, I would argue that Kelsen's proposal is not only realistic, but also perhaps the only viable way forward: in general, and in our Time.

What Kelsen reminds us, time and again, is that the problem of war, at its core, is the challenge of how to manage the reality of international anarchy, and nothing more. We should neither place our hope in the democratic peace theory – believing that a world of democracies would inevitably bring eternal peace, as he critiques in *The Foundations of Democracy* – nor fall prey to the illusion that a Kantian peace can be achieved through Communism or a free market economy; for what we must always reckon with, as he writes in *Peace through Law*, is the «primacy of politics over economics»[49]. Contrary to popular myths about Kelsen-the-idealist, this is as realist or realistic as one could possibly get, and rightly so. This leaves us with essentially one choice: to ex-

[49] Kelsen, *Foundations of Democracy*, cit., 32; Kelsen, *Peace through Law*, cit., 18.

ploit the possibility of manipulating politics and diplomacy in such a way as to further centralize the primary institution of international law through secondary institutions, such as the United Nations. There is no need for any kind of full-blown world state, and Kelsen-the-realist understands full well how dangerously utopian that idea is. That's why, in keeping with broad English School logic, Kelsen advocates for a World Federal State, encompassing the greatest possible number of nations. What Kelsen presents is a «complete legal-institutional strategy to pursue a stable and universal peace among nations»[50]. But there is more to it: a deep-seated acknowledgment of human, social, and political reality. He reminds us that when confronted with the reality of power politics and the fact that even in anarchy there are norms – established through a long, historical socializing process – we must recognize that, to make international society function (*raison de système*), international law is as much a primary institution as the balance of power. We cannot simply wish either of these facts away, for that would be naïve; nor can we, or should we, prioritize the balance of power or power politics based on ideas or ideologies rooted in Nature, God, or Reason. The relationship between politics and law in international relations is not as absolute as it is often portrayed; rather, it is a matter of relative degree and priority. Whether we choose to pursue power politics at the expense of international law is ultimately a question of personal and political philosophy, as well as individual political responsibility. What Kelsen is firm on, however, is that manipulating international society in a piecemeal fashion to gradually strengthen and centralize a coercive body of in-

[50] Danilo Zolo, *Hans Kelsen: International Peace through International Law*, «European Journal of International Law», no 9, 1998, 317.

ternational law is the only solution that offers a reasonable chance of maintaining order, justice, and peace.

In international relations, as in political communities, power and law do not exclude one another. Just as law is an organization of power domestically, it can – and must be – an organization of power politics internationally.

11. *Conclusion*

In this essay, I have revisited – and hopefully reinforced – the argument that Hans Kelsen's political and international relations thinking is far from naive; rather, it is profoundly realistic, grounded as it is in a Freudian-style human nature realism – an account not so different from the perspectives advanced by classical realists, such as Morgenthau, Niebuhr, Kennan, and Lippmann. I did that, however, by attempting to bring in the English School in IR to argue that while Kelsen is far from being a utopian legalist, he cannot be firmly placed within the realist camp either. I say "attempted" because there is still much more to explore before confidently concluding that Kelsen's work aligns with English School perspectives on primary institutions in international society, where international law holds a distinctive place and value.

From the perspective of historians of political and IR theory, delving deeper into Hedley Bull's interpretation of Kelsenian legal positivism – spanning the theoretical question of whether international law qualifies as true law to the practical issue of how international law interacts with power politics – presents a promising avenue for further exploration[51]. The same applies to juxtaposing Kelsen's theory of

[51] The place to start is Hedley Bull's essay, *Hans Kelsen and International Law*, in Tur and Twining (eds.), *Essays on Kelsen*, cit.

law, state, and international order with that of Charles Manning, who was not only a leading English School intellectual but also a meticulous jurist and legal scholar, credited with publishing the first detailed exploration of the concept of international society[52].

Also, it appears worthwhile to bring in Georg Schwarzenberger as well, for his classical realist-inspired theory of international relations places significant emphasis on international law; contrasting Schwarzenberger and Kelsen could serve as another rewarding backdrop against which to assess Kelsen's notion of, and background to, «peace through law»[53]. And: From the perspective of theorists and practitioners of politics and international relations, re-reading Kelsen's *Peace through Law* – free from the ideological presuppositions passed down through generations, which often label Kelsen's work as merely liberal Kantian and therefore irrelevant in an age of fierce great power competition – is an essential undertaking; which makes an effort to re-publish Kelsen's wartime book from a hundred years ago, with a foreword and realistic introduction, so worthwhile.

That said, the case can be made that Kelsen's political and international relations thinking does not suffer from an in-built tension between realism and idealism. Rather, Kelsen, much like the English School, recognized early on that the political reality of international life cannot be easily captured through either realist or idealist lenses, whether

[52] Here, a good starting point might be Wilson's essay, *Sovereignty, Law, and International Society: The Contribution of C.A.W. Manning*, cit., 15-29.

[53] Particularly interesting here is Carmen Chas, *The Reality and Power of International Law: Georg Schwarzenberger's forgotten Theory of International Relations*, «Cooperation and Conflict», vol. 59, no. 4, 2024, 467-87.

Hobbesianism or Kantianism. Instead, it requires synthesizing elements of both realism and idealism into a distinct analytical and normative approach to international relations; and this very approach starts from the presumption that international relations are shaped by both material power politics and socializing norm processes, best captured in the idea of international society – which, in turn, is not only a theoretical matter for legal, political, and IR theorists, but also one for lawmakers, politicians, diplomats, and public intellectuals scratching their heads over how we might survive the dangerous geopolitical era ahead of You and Me, that is, Us. Politics is the deeply human arena of contingency, uncertainty, power, self-interest, and competing values. That's why one thing seems so rather certain: Destroying law – domestic or international – is a dangerously reckless path.

Or Bassok

The Gods of the Constitution

1. *Introduction*

The divergence between Hans Kelsen and Carl Schmitt on the question of eternity clauses can be understood as stemming from the divergence in their approaches towards religion. Schmitt puts forward the notion of political theology according to which «all significant concepts of the modern theory of the state are secularized theological concepts»[1]. In the context of this Chapter, an application of the political theology idea is Schmitt's concept of an eternal core of constitutions that reflects a political-existential decision that cannot be amended by any legal means[2]. Such a concept secularizes religious ideas of eternal fundamental divine legislation created by God. It mirrors the Catholic belief in the need for an absolute truth for the survival of legal systems[3]. It is no surprise then that Kelsen, who aimed to purge the conceptual structure of law from the influence

[1] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, translated by George Schwab, University of Chicago Press, Chicago (2005) (1st edition 1922), 36.

[2] Carl Schmitt, *Constitutional Theory,* translated and edited by Jeffrey Seitzer, Duke University Press, Durham (2008) (1st edition 1928), 79.

[3] Carlo Invernizzi Accetti, *Relativism and Religion: Why Democratic Societies do not Need Moral Absolutes*, Columbia University Press, New York (2015), 5-6.

of theology[4], is opposed to Schmitt's idea that at the core of every viable constitution there is a basic constitutional existential decision that cannot be changed by any legal means. Kelsen's vision of relativism as the *essence* of democratic regimes means that no values or concept of the good can be protected for eternity against a legal change[5].

While this neat distinction captures an important difference between the positions of these two scholars towards eternal legislation and absolute truths, it is faced with a serious problem in view of Kelsen's repeated use of the story of Jesus's trial in justifying his argument against absolute values[6]. The lessons he derives from that story stand at the core of his relativist position and his rejection of eternal laws[7]. If Kelsen wanted to purge law from the influence of religion and other metaphysical ideas to create a «pure theory of law,» why use the story of the Christian savior several times in his writings to support his arguments? This chapter aims to investigate the perplexity created by this religious tale's central role in Kelsen's thought.

The Chapter offers three arguments. First, in the next section, I explore the role the story of Jesus's trial plays in Kelsen's argument against absolute values as part of his political theory and in Kelsen's argument against eternal laws

[4] Hans Kelsen, *Introduction to the Problems of Legal Theory*, translated by Bonnie Litschewski Paulson & Stanley L. Paulsen trans., Clarendon Press, Oxford (1992) (1st edition 1934), 31-32, 98.

[5] Hans Kelsen, *The Essence and Value of Democracy*, translated by Brian Graf, Rowman & Littlefield, Lanham (2013) (1st edition 1920).

[6] Ivi, 104-05; Hans Kelsen, *Absolutism and Relativism in Philosophy and Politics*, «Am. Pol. Sci. Rev.», vol 42, 1948, 906, 914.

[7] Accetti, *Relativism and Religion* cit., 184-85 (noting that Kelsen's arguments on democracy and relativism are «condensed and illustrated» in the Jesus story he discusses).

as part of his constitutional theory. Second, I offer a defense for Kelsen's position based on the Hebrew Bible's approach towards eternal human laws. The Hebrew Bible confronts directly the issue of eternal human laws in the story of Daniel in the lions' den and the Esther Megillah. In both stories, the Bible is hostile to the idea that humans create eternal laws for two main reasons. First, eternity is an attribute of God, and an attempt by humans to possess such an attribute is a form of idolatry. Second, the essence of the biblical God is being free from any constraint, whether in terms of natural or normative laws, and the human aspiration to create eternal laws purports to defy such freedom.

Before concluding, I offer my third argument on the convergence between the biblical objection to eternal human laws and Kelsen's attack against secular religions. I argue that Kelsen saw the notion of a secular religion as the deification of human constructs that endanger the Enlightenment's basic lesson of making humans the measure for all things. For this reason, Kelsen opposed secular religions that have become so popular as the so-called solution for democracies' weakness post-WWII. I conclude by arguing that Kelsen exposes that once judges speak in the name of protecting transcendent values that are beyond the people's power to change, they insert a religious type of thinking into the secular endeavor of modern constitutionalism. In this manner, the judges take the role Kelsen attributes to Jesus in the story of his trial and become the gods of the constitution rather than its guardians.

2. *Kelsen on the Trial of Jesus*

In his attempt to establish a dichotomy between value relativism as a necessary component for democracy and

absolute values as a necessary counterpart of absolutist regimes, Kelsen repeats in several of his writings his interpretation of the New Testament's story of the trial of Jesus by the Roman Governor Pilate[8]. According to Kelsen's retelling of the story, in response to Pilate's ironic question, «[s]o, you are the king of the Jews?» Jesus, who took the question seriously, replied: «I should bear witness to the truth. Everyone who is on the side of the truth listens to my voice.» Pilate then responds by asking rhetorically, «[w]hat is truth?» He then proceeds to tell the Jews that «[f]or my part I find no case against him». Pilate is ready to release Jesus as part of the amnesty accorded to a single man each Passover. But to his query, «[w]ould you like me to release this king of the Jews?», the Jews are reported to answer, «[n]ot him; we want Barabbas!».

This story of the Jews' preference for a common thief rather than – according to Christianity – the son of God was one of the most important sources of Christian anti-Judaism for centuries[9]. Kelsen – who converted from Judaism to Christianity – offers a provocative interpretation of this tale as the cornerstone of a radical argument. According to Kelsen, the lesson of the story is that Pilate was correct in executing Jesus. A person who would lead a polity «to the truth» offers a recipe for an absolutist state[10]. A democratic legal system cannot know what the truth is. It cannot hold abso-

[8] See supra fn 6.

[9] Raphael Gross, *Carl Schmitt and the Jews: the "Jewish Question", the Holocaust, and German Legal Theory,* translated by Joel Golb, University of Wisconsin Press, Madison 2007, 136.

[10] Kelsen, *Absolutism and Relativism* cit., 913 («If one believes in the existence of the absolute, and consequently in absolute values, in the absolute good… is it not meaningless to let a majority vote decide what is politically good?»).

lute truths[11]. All it has is the people's decision. Not knowing what the truth was, Pilate behaved as a true democrat and deferred to the will of the majority rather than imposing his own will[12]. Kelsen concluded that this tale was «a tragic symbol for relativism and democracy»[13].

Based on this story of Jesus's trial, Kelsen contrasted democracy, which speaks in the name of «relative truths and relative values» and absolutism, which speaks in the name of absolute truths and values[14]. The relative nature of truth at the core of democracy translates to a regime of unending discussion and change with no final truth[15].

The insights Kelsen deduced from the story of Jesus's trial are also the backbone of his denial of eternal core values anchored in the constitution. In this manner, Kelsen's constitutional theory corresponded to his political theory as it excludes anchoring in the constitution, in a manner that prevents legal change, comprehensive ideas of just social order or absolutist political ideologies[16].

[11] Kelsen, *Absolutism and Relativism* cit., 911 («democracy is political relativism which has its counterpart in philosophical relativism»).

[12] Accetti, *Relativism and Religion* cit., 185.

[13] Kelsen, *The Essence* cit., 104.

[14] Hans Kelsen, *Foundations of Democracy*, «Ethics», vol. 66, 1955, 1, 39 («This is the true meaning of the political system which we call democracy and which we may oppose to political absolutism only because it is political relativism»). *See also* Sara Lagi, *Democracy in Its Essence: Hans Kelsen as a Political Thinker,* Lexington Books (Rowman & Littlefield), Lanham M.D. (2021), 103.

[15] Kelsen, *Foundations* cit., 28 («democracy is discussion»). *See also* Lagi, *Democracy in Its Essence* cit., 103.

[16] Hans Kelsen, *Pure Theory of Law*, translated by Max Knight (1989) (1st edition 1934), 106 («Specifically, the Pure Theory refuses to serve any political interest by supplying them with an 'ideology' by which the existing social order is justified or disqualified»).

In Kelsen's view, as long as the formal procedure of constitutional amendment is followed, everything in the constitution is subject to change. The democratic authority of the people means that they are subject to nothing but their own will[17]. True, due to his strict positivistic approach, Kelsen did not deny the possibility that certain constitutional amendments would be «prohibited»[18]. He explains that «the norm excluding any amendment has to be considered valid…»[19]. And yet, Kelsen denied the existence of anything outside the law that is relevant to the legal system from a juridical standpoint[20]. For this reason, according to Kelsen, no factor outside the law could give a heightened legal status to parts of the constitution or its basic structure in a manner that would transform them into a metric to scrutinize the legality of constitutional change[21]. Hence, limitations on constitutional amendments do not sit well with Kelsen's thought as they require a metric that is transcendent to the legal system and encapsulates an absolute truth[22].

The insights Kelsen derives from the New Testament story on the trial of Jesus can be criticized on various grounds[23].

[17] *See* Lars Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy*, Oxford University Press, Oxford 2007, 104-114.

[18] Hans Kelsen, *General Theory of Law and State*, Harvard University Press, Cambridge, Mass. 1999 (1st edition 1945), 259.

[19] Ivi, 259.

[20] Kelsen, *Pure Theory* cit., 31.

[21] Joel Colón-Ríos, *Constituent Power and the Law,* Oxford University Press, Oxford 2020, 202.

[22] Vinx, *Hans Kelsen's* cit., 142 (explaining that according to Kelsen, «the actual people….have to remain sovereign in the sense of retaining the power to change and amend any legal content through the employment of the democratic method»).

[23] Accetti, *Relativism and Religion* cit., 192 (discusses Gustavo Zagrebelsky's critique on Kelsen's insights from the tale of Jesus trial

Yet my interest lies elsewhere. I am interested in the role a religious tale plays in the jurisprudence of a theorist who aimed to purge the law of metaphysics, especially of religion, from his legal theory. Furthermore, I am interested in the way in which religion can converge with Kelsen's insights in a manner that goes to the root of his objection to allowing anchoring eternal values in a constitution. This last issue is the focus of the next section.

3. *The Hebrew Bible's Approach Towards Eternal Legislation*[24]

The Hebrew bible directly addresses the issue of eternal human legislation twice: in chapter six of the book of Daniel and the Esther Megillah. In both cases, the story deals with the «law of the Medes and Persians, which altereth not» (Daniel, ch. 6, v9). In both cases, the biblical story shows great hostility toward the idea of eternal human legislation. Prior to understanding the Hebrew bible's reasons for this hostility, I will briefly describe the tale in each of the two stories while focusing on the role eternal legislation played. This background will allow a better understanding of the biblical objection to eternal human legislation.

Before diving into the analysis, it is important to emphasize three caveats. First, my inquiry does not depend on

and noting that «Zagrebelsky contends that the means through which Jesus was ultimately condemned are more akin to an authoritarian kind of mob rule than to liberal democracy»).

[24] My discussion in this section relies on research I have written in Hebrew. On eternal laws in the book of Daniel see Or Bassok, *Eternal Laws in the Laws of Medes, Persia and… Israel*, «The Public Domain», vol 1, 2024, 29. On the Esther Megillah, see Or Bassok, *Sealed with the King's ring, May No Man Reverse*, «Haaretz», 11.3.25; Or Bassok, *Eternal Law as Idolatry* (under review).

whether such eternal human legislation existed in biblical times or whether the stories ever happened. Even if all these biblical tales are mere fiction[25], these two stories establish a biblical objection to eternal human legislation, and their reasoning may serve in establishing a political-theological argument to support Kelsen's approach. Second, chapter six of the book of Daniel was originally written in Aramaic; The Esther Megillah is originally written in Hebrew. In the case of the Daniel story, I used the 1917 JPS translation that is available online[26]. In the case of Esther Megillah, I preferred Michael Fox's translation[27], which uses modern English but is loyal to the original Hebrew version.

Third, while the Esther Megillah's Hebrew text is accepted as the canonical version by Jews and many Christians, there are other versions of the Esther Megillah that are based on early translations of the Megillah, before its final Hebrew version became part of the canonical Hebrew Bible (known as the Masoretic biblical text). In that regard, the Esther Megillah is unique. While other parts of the Masoretic canonical text have several translations, they are all based on the same Hebrew canonical text. In the case of the Esther Megillah, there are early versions in Aramaic, Latin, and Greek that include some additions and changes that may reflect an earlier Hebrew version of the Megillah

[25] On the historical validity of the Esther Megillah see David J.A. Clines, *Ezra, Nehemiah, Esther*, Morgan & Scott, Grand Rapids 1984, 256-61. For denying that historically eternal law could have existed as depicted in the Daniel and Esther stories see Michael V. Fox, *Character and Ideology in the Book of Esther*, WM. B. Eerdmans Publishing Co., Grand Rapids (2nd edition, 2001), 133.

[26] available at: https://mechon-mamre.org/p/pt/pt3406.htm

[27] Michael V. Fox, *Character and Ideology* cit.

than the one in the Masoretic text[28]. The Greek translation known as the Septuagint (The Translation of the Seventy) includes more than a hundred verses that the Hebrew version lacks, and this translation is the basis for the Catholic version of the Bible. The most significant difference is that while the Hebrew version is unique in the entire Hebrew Bible as the name of God is not mentioned, God plays an integral part in the Septuagint version[29]. For the purposes of this Chapter, the Masoretic Hebrew text remains the main reference point for my arguments.

The Esther Megillah contains no less than ten laws. Nine of them are the laws of Persia that are declared as eternal. The tenth law was created not by the Persian king but by the Jewish community. It anchors the celebrations of Purim to commemorate the events told in the Megillah. For the purposes of this Chapter, it would be sufficient to focus on two laws that deal with the core issue of the Megillah: the attempt to annihilate the Jewish people using an eternal law and the subsequent response to it that is also formulated in an eternal law.

Haman, King Xerxes's chief vizier, tells the King of «a certain people scattered and unassimilated among the peoples in all the provinces of your kingdom whose laws are different from those of every other people and who do not obey the laws of the king. It is not worthwhile for the king to leave them alone.» (ch. 3, v8)[30].

[28] Ivi, 9-10.

[29] Heidyn von Bose, *The Different Esthers of the Septuagint and Masoretic Text: How the Inclusion of God Changes the Character of Esther*, «Studia Antiqua», vol 22.1 (2023), 4.

[30] Fox, *Character and Ideology*, at 46.

Following Haman's request to «have them destroyed» (ch. 3, v9)[31], the King allows him to use the King's authority to legislate a law to do with the Jewish people as he pleases.

Using the King's legislation power, Haman legislates a law allowing «to slaughter, slay, and destroy all the Jews, young and old, together with children and women» (ch. 3, v13)[32] on a specific date within eleven months from the act of legislation. Queen Esther, who was selected queen while hiding her Jewishness, is able to plead and persuade King Xerxes, after reviling her religious background, that this law is a grave mistake. She asks him to revoke the law, but King Xerxes informs her that Persia's laws cannot be revoked once issued. In the words of the Megillah, «For a document written in the king's name and sealed with the king's signet ring cannot be revoked.» (ch. 8, v8)[33]. Instead, the King endows her and her uncle, Mordechai, with the authority to legislate in his name. Mordechai formulates a law that is legislated by the King, allowing Jews, on the date designated by Haman's law, to kill those who intend to kill them. As a result, more than 70,000 Persians are killed in this civil war.

Following their success in this bloody civil war, the Jews spontaneously celebrate their victory. After several years of such celebrations, a holiday is formalized in a legal dialectic of proposal and confirmation involving the Jews and their two leaders: Esther and Mordechai[34]. In this manner, the Megillah contrasts between the law created by the people, that never claimed to be eternal, and yet survived from the

[31] Fox, *Character and Ideology* cit., at 46.

[32] Ivi, 53.

[33] Ivi, 91.

[34] Michael V. Fox, *Three Esthers* in *The Book of Esther in Modern Research*, edited by Sidnie White Crawford & Leonard J. Greenspoon, T&T Clark International, London 2003, 50, 57.

time it was written to our times, and the laws of Persia that purported to be eternal but have been extinguished.

The story of Daniel in the lions' den also features an unalterable law. Several of King Darius's ministers suggest he enacts a law forbidding his subjects from petitioning or making requests to anyone divine or human – save to King Darius himself – for a period of thirty days. Anyone who defies the law would be punished by death. The idea behind such legislation is to fortify the King's rule. Darius just recently came into power, and by ensuring the population petitions exclusively him, his supreme authority would be solidified. But there is another motive to this advice. The ministers wish to eliminate their very successful colleague, Daniel, who has become King Darius's favorite advisor and is up for promotion to become the Prime Minister. The ministers know Daniel is Jewish and prays to his God, and they are creating a legal trap[35].

Subsequently, when Daniel continues to pray to the Jewish god, his rival ministers catch him violating the new law. The king is reluctant to apply the law as he recognizes Daniel as a loyal minister and good person. Yet, he is compelled to do so as the law, «like the law of the Medes and Persians, [it] may not be annulled» (ch. 6, v13). Daniel is thrown into a pit of lions, where it is expected that he would be devoured. Yet, Daniel is spared from punishment by his god: the lions do not devour him, he is proved righteous, and the king pledges allegiance to Daniel's god and throws the conspiring officials and their families to the lions instead[36].

[35] Chaya T. Halberstam, *Trial Stories in Jewish Antiquity: Counternarratives of Justice,* Oxford University Press, Oxford 2024, 38.

[36] Halberstam, *Trial Stories* cit., 38.

As these two stories are the only places in the Hebrew Bible that address eternal human laws directly, it is key to understand why the biblical author in these two stories is hostile towards the idea that humans create eternal laws and positions the failure of these laws as central to both stories. I propose two main reasons. First, eternity is an attribute of God. As we recall from the story of the Garden of Eden, by eating from the tree of knowledge, humans acquired the ability to perform normative evaluation. Subsequently, God expelled Adam and Eve as the fear was that in eating from the tree of life, they would gain eternity and become God-like figures. As the Bible states: «Behold, the man is become as one of us, to know good and evil: and now, lest he put forth his hand, and take also of the tree of life, and eat, and live for ever» (Genesis, ch. 3, v22). The objection to eternal laws retells the same theme: human have the ability to create laws that distinguish, according to their criteria, between good and evil. However, attempting to attribute these laws with the eternity property crosses the line by attempting to become God-like. Only God can create eternal laws[37]. For this reason, a human attempt to endow laws with eternity is a form of idolatry. An attempt to attribute state laws with eternity is an attempt to deify the state.

As Moshe Halbertal and Avishai Margalit have shown, the Hebrew Bible condemns as idolatry political leaders who attempt to arrogate divine attributes to themselves[38]. While

[37] J. H. H. Weiler, *Entrenchment – Human and Divine: A Reflection on Deuteronomy 13: 1-6*, in Mahnoush H. Arsanjani, Jacob Cogan, Robert Sloane, and Siegfried Wiessner (eds.), *Looking to the Future – Essays on International Law in Honor of W. Michael Reisman*, Martinus Nijhoff Publishers, Leiden 2011, 355.

[38] Moshe Halbertal & Avishai Margalit, *Idolatry*, Naomi Goldblum trans., Havard University Press, Cambridge, Massachusetts, 1992,

they do not discuss eternal law, their discussion reveals that the aspiration to touch eternity by creating a human eternal law is another example of an attempt to cross the boundary between humans and God.

Second, as Yehezkel Kaufmann showed, what sets the biblical God apart from all other gods of the ancient world is not its abstractness nor being the one god but its nature as free will. In Kaufmann's words, the biblical God «is subject to no laws, no compulsions, or powers that transcend him»[39]. Kaufmann continues and explains that «[t]he Bible knows only one supreme law: the will of God. Destiny is determined only by God; from him emanate the decrees that bind all. God alone has fixed the laws of heaven and earth, the world and all that is therein….No decree or fate binds him»[40].

The aspiration to create eternal human laws challenges God's freedom and, as such, is an attempt of humans to transgress their humanity into the realm of deity. This attempt is not very different than witchcraft in its aspiration to impose a change on the order of reality that no power can reverse[41].

A regular law may aim to proscribe a change in reality, yet the ability to change it is built-in and accepted, while an eternal law presents an aspiration to control reality for eternity. By denying the ability of any power to change the order of reality prescribed by an eternal law, an attempt is made to bind God. In trying to bind the present and the future to

216-17.

[39] Yehezkel Kaufmann, *The Religion of Israel*, University of Chicago Press, Chicago Illinois, 1960, 60.

[40] Kaufmann, *The Religion,* at 73.

[41] Compare to Halbertal & Margalit, *Idolatry,* at 192-93.

the work of their own hands, humans both transgress their nature as finite and attempt to bind God's will. In both ways, they attempt to turn the state, which is based on their eternal laws, into a deity[42].

4. *Kelsen and the Secular Religion of Constitutionalism*

The first chapter in Kelsen's book «Secular Religion» is a fierce attack on the attempt to find parallelism between secular ideologies that speak in the name of absolutes and religions[43]. This parallelism enables the creation of the concept of secular religions, which Kelsen wholeheartedly objects to. For Kelsen, the attempt to designate the term «religion» for ideologies that lack a core belief in a transcendent being obliterates an essential distinction[44]. In Kelsen's words, «A religious creed proclaims its truth to be absolute because it supposes this truth to originate in a transcendent being»[45]. According to Kelsen, secular ideologies that lack a transcendent being as the source of their absolutes cannot be considered as religions.

On its face, Kelsen's objection to secular ideologies that purport to be «secular religions» is a mere repetition of his earlier rejection of any ideology speaking in the name of absolutes. But Kelsen goes throughout his book with a painstaking – and sometimes tedious – analysis to emphasize that ideologies that speak in the name of absolutes but lack a belief in a transcendent source for these absolutes

[42] Halbertal & Margalit, *Idolatry* cit., 221-22.

[43] Hans Kelsen, *Secular Religion: A Polemic against the Misinterpertation of Modern Social Philosophy, Science and Politics as "New Religions"*, Springer Wien, New York 2012 (1st edition 1964), 17-38.

[44] Ivi, 171.

[45] Ivi, 33.

cannot be considered as «secular religions»[46]. Why is it vital for Kelsen to emphasize that ideologies that speak in the name of absolutes, while these absolutes do not emanate from a transcendent god, are not secular religions?[47]. As explained above, Kelsen was against any ideology that offers absolute truths and found them antithetical to the principles of liberal democracies. Why is it so crucial for him to stress that ideologies such as Communism or Fascism, which offer such absolute truths, should not be considered as secular religions? After all, he rejects such ideologies based on their adherence to absolutes. Why does it matter what the source of the absolutes is? If he attacks all types of thinking or beliefs that are based on offering absolutes, why is it crucial for him to distinguish between religious beliefs and secular ideologies that also offer absolute truths?

Moreover, Kelsen uses the story of Jesus's trial to show the problem of secular ideologies – such as Communism and Fascism – that offer absolute truths. From his use of Jesus's story, it seems that Kelsen found similarities between secular ideologies and religious, at least in the aspect of offering absolute truths, that allowed applying the insights he learned from the story on both. In other words, when using Jesus's trial story, the distinction between secular ideologies offering absolutes and religions did not seem to matter for Kelsen.

In my view, it took Kelsen several years post-WWII to fully understand a new problematic aspect of political theology that manifests itself in the problem of mixing religious absolutes with secular ones. Kelsen writes that the idea of secular religions is aimed at fortifying absolutes. As «an ab-

[46] Ivi, 103
[47] Ivi, 113.

solute in general, and absolute truths and absolute moral values in particular… can be consistently maintained only under the presupposition of a supernatural authority establishing them»[48]. Yet the insertion of religion into secular theories removes the enlightenment pillar of humans as «the measure of all things»[49]. Without this pillar, the great achievement of distinguishing between the absolutes of the pre-enlightenment age and the absolutes created during the enlightenment age is lost. The conflict is no longer between ideas measured by the same metric that modernity fortified: human reason. Rather, this is not an entirely secular age anymore, but an age in which the metric of enlightenment is lost[50]. When «the powerful dam which has been erected to protect science and politics from being flooded by metaphysico-theological speculation is broken»[51], we get medieval, and the age of reason is over. This is most evident in courts – the forum of reason – when suddenly elements that were supposed to disappear from the constitutional legal discourse, enter through the backdoor of «secular religions».

Kelsen had a very astute eye for the process of the rise of civil religions that began after WWII[52]. As a lesson from the collapse of the Weimar Republic, the ensuing World War, and the rise of Communism, secular religions – under various names such as constitutional patriotism or constitutional identity – were devised[53]. These attempts to harness

[48] Ivi, 102.
[49] Ivi, 47.
[50] Ivi, 164.
[51] Ivi, 271.
[52] *Ibidem.*
[53] See for example, Jan-Werner Müller, *Constitutional Patriotism*, Princeton University Press, Princeton N.J., 2007.

the power of religion in order to fortify liberal democracy can be best understood with Schmitt's pre-war critique of liberal democracy looming in the background. Schmitt had two main and connected points of critique on liberalism. The first was against liberalism's neutrality, and the second was against liberalism's inability to deal with the question of sacrifice. Let me briefly summarize these two points.

Schmitt argued that the liberal state functions under «an absolutely 'neutral', value and quality-free, formal-functional concept of legality without content»[54]. According to Schmitt, in its suppression of the political decision, in its attempt to empty politics of content, liberalism inevitably falls prey to all ideologies that explicitly do make the political distinction between friend and enemy, such as Communism and Fascism[55].

According to Schmitt, the political decision is existential not only in the sense that a stable state cannot exist without it, but also in the sense that to realize and maintain it, the community needs to be ready to sacrifice to the point of war and death[56]. Lacking it, liberalism is unable to harness anyone to fight for it. The contractual basis of liberalism makes it, according to Schmitt, emotionally arid and unable to explain the deeply felt emotional legitimacy of the state[57]. If you follow the liberal path, to die for the state becomes

[54] Carl Schmitt, *Legality and Legitimacy,* Duke University Press, Durham 2004 (1st edition 1932), 23.

[55] David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar,* Oxford University Press, Oxford 1997, 58.

[56] Paul W. Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty,* Columbia University Press, New York 2011, 27

[57] Carolyn Marvin & David W. Ingle, *Blood Sacrifice and the Nation,* Cambridge University Press, Cambridge 1999, 26.

is akin to dying for the phone company[58]. No wonder that «[n]owhere in the liberal accounts of the state does anyone die»[59].

Post-WWII, the solution offered to both problems was to fuse a-rational, religious elements embedded in concepts such as patriotism, identity, or nationality and mesh them together with liberal constitutionalism so we can enjoy the best of both worlds. The fusion between these concepts and liberal constitutionalism allows – or so the claim goes – to enjoy both the benefits of the civic emotional bond provided by concepts such as nationalism, yet without the negative exclusionary aspects, and all the while remain committed to liberalism. In this manner, under the banner of «constitutional patriotism» or «constitutional identity», liberalism would become part of a «civil religion,» and the problem of sacrifice and neutrality would be solved[60].

Secular religions, as all religions, require absolutes, and in constitutional form, these appear as eternity clauses aimed to ensure the survival of liberal democracy. To protect these dogmas, constitutional democracies appointed their new priests: constitutional judges. The judges were given the power to protect these dogmas by receiving the power to

[58] Alasdair MacIntyre, *Poetry as Political Philosophy: Notes on Burke and Yeats*, in Vereen Bell & Laurence Lerner (eds.), *On Modern Poetry: Essays Presented to Donald Davie,* Vanderbilt University Press, Nashville 1988, 145, 149.

[59] Paul W. Kahn, *Putting Liberalism in Its Place*, Princeton University Press, Princeton, N.J. 2005, 241.

[60] Müller, *Constitutional Patriotism* cit., 9 («I want to claim that constitutional patriotism theorizes the civic bond in a way that is more plausible sociologically and that leads to more liberal political outcomes than its main 'domestic' rival, liberal nationalism»).

strike down constitutional amendments[61]. They self-named themselves as the «guardians of the constitution» and they purport to fight to protect «constitutional identity» or the constitution's «basic structure» of democracies in the name of the newly minted civil religions[62].

Kelsen understood that letting religion re-enter the discourse through the concept of secular religion means that «the emancipation of science and political ideology from theology and religious authority, to which modern civilization owes its existence, shall be undone»[63]. Suddenly, there are «eternal truths» that are beyond the power of reason or human will. The distinction between politics as the realm of will and law as the realm of reason is also undone by an attempt to rely on human-created constructs that are deified beyond the power of will or reason to change them[64]. The interpreters of these constructs become not merely the guardians of the constitution holding the last word in the constitutional discourse, but the gods of the constitution with the final word on eternal laws that cannot be changed. Thus, the protection through eternity clauses of liberal democracy's absolutes becomes a double-edged sword. Rather than serving as part of the mechanism to ensure the survival of democracy, eternity clauses become a tool to undermine democracy's basic tenet of positioning the will of the people as the basis for the entire system of governance. The

[61] Or Bassok, *The Absolutist Judiciary* (under review, available on SSRN).

[62] Or Bassok, *The Schmitelsen Court: The Question of Legitimacy*, «*German L.J.*», vol 21, 2020, 131.

[63] Kelsen, *Secular Religion* cit., 43.

[64] On the distinction between reason and will see Paul W. Kahn, *The Cultural Study of Law*, The University of Chicago Press, Chicago 1999.

only option against these eternal clauses is a revolt against the gods of the constitution and creating a new system that would reposition we the people as having the final word.

5. *Conclusion*

In a nutshell, this Chapter first aim is to establish a Kelsenian rejection of the current secular religion of constitutionalism. The current reliance on courts to declare final constitutional truths is part of a vision of constitutionalism as a secular religion. It offers final and absolute truths that contradict Kelsen's vision of democracy[65]. Kelsen's interpretation to the story of Jesus's trial aims to show that inserting final truths is inserting the divine. The Hebrew Bible offers a similar insight by rejecting human legal systems that attempt to speak in the name of absolute truths as idolatry. In this manner, the biblical religion's approach converges with Kelsen's view against allowing the notion of eternal truths to enter secular legal systems making them secular religions.

Kelsen aimed to purge legal systems of any metaphysical meaning, exposing them for what they are: human constructs that cannot offer anything beyond relativist truths for the here and now. The entrance of religious type of thinking into a constitutional system means that the ability to speak in terms of reason is lost as the ascription of eternity to certain values relies on an attempt to resemble god and defy the freedom of will to change these values[66]. This is why Kelsen could accept the notion of eternal clauses in positivistic terms, but not if those clauses relied on transcendent values[67].

[65] Bassok, *The Absolutist* cit.
[66] Kelsen, *Secular Religion* cit., 18-19.
[67] Bassok, *The Absolutist* cit.

In constitutional discourse, Kelsen is often stripped of his political theory, which offers sophisticated theoretical grounds for his «pure theory of law». Thus, He is presented as a naïve figure who believed that law can be detached from values and discussed as a pure and fine oiled legal geometry. His lesson on what a democrat can do when the ship of democracy is sinking only contributed to this image. Kelsen wrote that when the majority wishes to destroy democracy, there is little that can be done in terms of constitutional law. A democracy that tries to assert itself against the majority's will has ceased to be a democracy. The rule of the people cannot continue to exist against the people. And the democrat, how should he behave? Kelsen writes that «[o]ne must remain true to his colors, even when the ship is sinking, and can take with him into the depths only the hope that the ideal of freedom is indestructible and that the deeper it has sunk, the more passionately will it revive»[68].

The second aim of this chapter is to dispel the idea that Kelsen was naïve in his rejection of secular religions. Kelsen's lesson from the story about Jesus's trial is not only that inserting eternal truths to legal systems means inserting god through the backdoor, but also that conceptual clarity is crucial for democracies to survive. Pilate unanswered question «[w]hat is truth?» exemplifies the danger that in rejecting absolute final truths, democratic systems would replace the pursuit for truth with the acceptance that «anything goes.» This is what Kelsen detected with the concept of «secular religion.» In his book on this concept, he surveys one by one theories that purport to create secular religions aiming

[68] Quoted in Clemens Jabloner, *Hans Kelsen – Introduction*, in Arthur J. Jacobson and Bernhard Schlink (eds.), *Weimar – A Jurisprudence of Crisis,* University of California Press, Berkeley 2000, 74.

to show the self-contradictory nature of this concept. With venom that does not fit his tedious work he conducted in that book, Kelsen attacks those who conflate secular theories with religions. He insists that secular ideologies should not be regarded as secular religions. In the same vein, if those responsible for juridical analysis use concepts such as «democracy,» «liberalism,» and «rule of law» in a manner that empties them of meaning, there is no hope to save democracies. Our conceptual array structures how we view reality; once we let it decay, there is little hope. There is not much difference between a sinking democracy and a «democratic» regime which is not democratic at all.

Reading time after time in newspapers headlines that the guardians of the Israeli constitution once again have saved democracy and the rule of law by sophisticated scholastic structures such as the unconstitutional constitutional amendment doctrine, while all this time these concepts have no meaning just several kilometers from the Supreme Court's building made Kelsen's sinking ship lesson clear to me. In a secular religion, the Gods of the Constitution can create sophisticated doctrinal mechanisms to explain how they protect democracy and the rule of law while reality conflicts with their fancy scholasticism. The moment the conceptual array is contaminated by transcendental values that are beyond the reach of human will or reason, that is the moment that judges can detach themselves from reality and move to guard their city of gods with its eternal truths and write hundreds of pages on the relationship between these eternal truths. All the while, in reality, not far from the city of gods, concepts such as «rule of law» and «democracy» have lost their meaning[69]. In such a reality, fighting for de-

[69] Or Bassok & Menny Mautner, *Israeli High Court's Pursuit of a*

mocracy or the rule of law using the legal discourse has little meaning because what can be achieved is a proclamation by the Gods of the Constitution of the truth of democracy as an eternal value while the actual ship of democracy has already sunk.

Constitutional 'Gospel', «Haaretz in English», 20.12.2020; Or Bassok, *The Silence of the Israeli Supreme Court Judges: How the Rise of Judicial Power May Lead to a Failure in the Core Judicial Role of Protecting Human Rights*, «VerfBlog», 27.11.24.

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