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Can't We All Just Get Along?

Revisiting Kelsen's Account of Parliamentarism, Political Parties, and Compromise

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12.1 Introduction

One of the most intriguing – but for many scholars downright puzzling – claims in Hans Kelsen's democratic theory concerns the relationship between majorities and minorities. In a parliament, he argued, one party (or several parties) constituting a majority need to somehow compromise with a party (or several parties) in the minority. This clearly goes against common-sense understandings of what it means to have a majority in a democracy, but it is also likely to raise suspicions among majoritarian theorists of democracy who – rightly, I think – worry that such a claim can easily empower a minority to prevent, or at least water down, change desired by a clear majority (of course, we have to remember that not all minorities are, as the standard phrase goes, 'vulnerable minorities'; often enough, minorities are privileged, sometimes in evidently illegitimate ways).[1]

This chapter investigates whether Kelsen's central idea can possibly be redeemed. In the first section, I aim to show not merely that Kelsen's position is rather imprecise, as previous critics of this element of his account of 'party democracy' have argued.[2] Rather, I want to claim that his demand for compromise rests on numerous ambiguities and in fact also underdetermines the precise form of the political system. In the second

[1] M. Schwartzberg, *Counting the Many: The Origins and Limits of Supermajority Rule* Cambridge University Press, 2013).

[2] B. Manin, *The Principles of Representative Government* (Cambridge University Press, 1997); D. Ragazzoni, 'Political Compromise in Party Democracy: An Overlooked Puzzle in Kelsen's Democratic Theory', in C. F. Rostbøll and T. Scavenius (eds.), *Compromise and Disagreement in Contemporary Political Theory* (Routledge, 2018).

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section, I probe what I take to be the most plausible understanding of the imperative to compromise: the notion of respecting the members of parties in the minority as *co-rulers*, an intuition derived from a Rousseauian conception of democracy as collective self-rule adapted to societies characterised by persistent conflicts of interest and moral disagreements. This is the most attractive way of rendering Kelsen's imperative, and it also supports his core argument that democracy is primarily about freedom and hence committed to involving as many actors in rule as possible to approximate the ideal of collective freedom in a complex modern society. I go on to suggest that co-rulership might be achieved in ways other than compromising, not least because there are significant costs to a general imperative to compromise (even when one of the generally most urgent worries about compromise *über alles* – namely, that significant groups are not represented in parliament and hence excluded from any compromise – might not apply). I conclude that Kelsen's democratic theory remains an important source of arguments for a time often characterised as a 'crisis of democracy' and that his valorisation of parties and parliaments (in the face of rampant anti-partyism) is of special significance. However, his specific imperative to compromise – tempting as it might be to invoke it against the background of seemingly ever-increasing polarisation and majoritarian, sometimes outright antiparliamentary populism – is unlikely to prove particularly helpful.

12.2 Kelsen's Imperative to Compromise

Kelsen famously claimed that in the modern world, democracy must mean *party democracy*. He insisted that parliament is sovereign in a democracy but that there is no singular popular will that can be expressed in parliament. In fact, he stated that the very notion of a singular, homogeneous popular will is a metapolitical fiction (and the concept of popular sovereignty, as Kelsen, a careful reader of Freud, put it in a striking formulation, is a mere 'totem mask'). Modern societies are characterised not only by deep moral disagreements but also by persistent clashes of materially grounded interests. Unlike Rawls,[3] Kelsen did not in any normative way limit the kind of pluralism that, inevitably, is part and parcel of modern polities; there will always be reasonable and unreasonable forms of pluralism (one can of course question whether

[3] J. Rawls, *Political Liberalism* (Columbia University Press, 1996).

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such characterisations do not rely on completely cartoonish visions of premodern societies – republican Rome, to name just one obvious example, was hardly a monist polity).

Parties are the prime means of expressing this pluralism; elections generate a faithful legal representation of the strengths of different groups in society. As Veronique Zanetti put it, democracies are both a symptom of diversity and a means of coping with it.[4] Democracies and autocracies both create forms of social order, but it is only democracy that assumes conflicts and disagreements to be prima facie legitimate and that is committed to peacefully processing conflicts.[5] Democracies can do so because, philosophically, they are based on relativism (whereas autocracy is founded on absolutism: there is an objective common good, and the autocrat can know it).[6]

Some of these claims will appear very straightforward for theorists of representative democracy. However, Kelsen's further claim that the majority and minority somehow need to compromise deviates from standard accounts of representative democracy and parliamentarism in particular.[7] It is important to be attentive to the nuances of the ways in which Kelsen formulated this (deeply puzzling) imperative in relation to numerous other claims about the relationship between majorities and minorities.

At one point, Kelsen suggested that the right of the majority presumes the existence of a minority. This seems to be correct but almost tautological: one cannot meaningfully speak of a majority without some corresponding notion of a minority. However, this observation implies nothing specific about the legitimacy of a minority or about how exactly a majority should relate to a minority. It is not inconsistent with the idea of a majority largely disempowering a minority, for instance (and one might recall that contemporary authoritarians are in fact eager to keep an opposition in parliament – even a real one, not a 'system opposition', as in Putin's Russia – to demonstrate to outside observers that they still have a proper democratic system).[8]

[4] V. Zanetti, *Spielarten des Kompromisses* (Suhrkamp, 2022), p. 145.
[5] A. Przeworski, 'Consensus, Conflict, and Compromise in Western Thought on Representative Government', *Procedia – Social and Behavioral Sciences*, 2 (2010), 7042–55.
[6] H. Kelsen, 'Foundations of Democracy', Ethics, 66 (1955), 1–101.
[7] W. Selinger, *Parliamentarism: From Burke to Weber* (Cambridge University Press, 2019).
[8] S. Guriev and D. Treisman, *Spin Dictators* (Princeton University Press, 2022).

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At another point, Kelsen suggested that the very existence of a minority would somehow influence a majority; he also claimed that the larger the minority is, the greater the influence. Again, what follows from this claim is largely underdetermined. It is certainly plausible to assume that a majority will not fail to notice a minority and hence, in however minimal a way, factor the minority into its decision-making (if for no other reason than the explicit thought that the minority will not be any trouble, given the power of the majority). One can also, more ambitiously, imagine that a majority would seek debate with the minority to refine its positions and make them more robust – contestation would have both political and epistemic benefits.[9] A majority might also search for engagement because it does not want the minority to retreat from parliamentary affairs in total frustration and perhaps encourage extraparliamentary forms of political conflict (such as violent conflict). However, these considerations do not yield the result of substantive influence. Again, Kelsen's claims do not seem to have the normative implications that would bring us close to anything like a democratic imperative to compromise.

Kelsen also held that a majority can only be created through compromise. Again, this seems entirely plausible on an empirical level but appears to have no relevance for a normative level where a general imperative to compromise with minorities would have to be justified. To create a large party, or a large coalition of smaller parties, one clearly has to engage in negotiations with different groups (be they interest groups or political formations with an ideological agenda). However, one can evidently do this and then successfully gain a majority in parliament without ever having to make any concessions to parties that are not part of the coalition (or groups that generally do not support the one large party). It simply is a *non sequitur* to think that compromise in party formation and electioneering will necessarily have to carry over into conduct vis-à-vis one's opposition in parliament (unless one wishes, through compromise with group representatives, to encourage the group itself to vote for one's own party next time – in short, a purely strategic consideration).

Now, it is not impossible to make a more robust argument for compromise as the default (and not entirely instrumental) approach in parliament, but this argument depends on rather contingent empirical circumstances. Additionally, the most plausible mechanism to explain the path from majority through compromise to majority – minority

[9] Zanetti, *Spielarten des Kompromisses*, p. 155.

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compromise in parliament would appear to clash with another important claim by Kelsen, namely, one concerning the nature of parties themselves.[10]

What I mean is this: forming a majority though compromise might involve not only backroom bargaining but also processes of deliberative intraparty democracy.[11] Many parties base the partisanship they promote on a commitment to shared principles (to be realised over time), not just compromises among competing material interests.[12] However, no principle explains, let alone implements, itself. Partisans are by definition committed to particular shared principles, but sooner or later, their precise meaning will become contentious. Lyndon Johnson, not a pol with philosophical pretensions, once opined: 'what the man on the street wants is not a big debate on fundamental issues; he wants a little medical care, a rug on the floor, a picture on the wall'. However, as his party has learned the hard way, even 'a little medical care' will eventually become a matter of principled conflict inside the party (and of course also between parties). Principles simply do not implement themselves (nor do they magically generate actual political strategies). Moreover, hardly anyone is ever committed to one principle only but needs to reflect on how different principles relate to each other, whether there might be trade-offs, and so on.

What follows from this? Arguments must take place, and in general, a proper pluralist internal party democracy allows partisans to have them. There is also a potential learning effect: more views will be on the table, and the pressure to justify them and, ideally, make them mutually acceptable for partisans will render them more refined. However, there is also a less obvious side effect, which might bring us to Kelsen's imperative: internal debate *habituates* partisans to the notion that others might just *possibly* be right – and that those who lost the debate or lost at the ballot box can remain in loyal opposition (in fact, members whose side lost a mass plebiscite within a party are much more likely to head for the exits; those who made their case in discussion and then lost tend to stick around).[13] This, in turn, might improve the chances of all partisans accepting that democracy as a whole depends on the existence

[10] This paragraph is mostly adapted from J. W. Müller, *Democracy Rules* (FSG, 2021).

[11] P. Ignazi, *Party and Democracy: The Uneven Road to Party Legitimacy* (Oxford University Press, 2017).

[12] J. White and L. Ypi, *The Meaning of Partisanship* (Oxford University Press, 2016).

[13] T. Poguntke et al., 'Party Rules, Party Resources and the Politics of Parliamentary Democracies: How Parties Organize in the 21st Century', *Party Politics*, 22 (2016), 661–78.

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of legitimate disagreement and (perhaps) also the advantages of compromise, as at least some of what the other side claims might be right.

In short, the idea is that well-functioning forms of intraparty democracy habituate politicians to compromising; it might also make them more open to the expectation – in line with Kelsen's larger philosophical point about the affinity between democracy and relativism – that there are genuine values even within competing worldviews (relativism, after all, is not the same as nihilism).[14] Nevertheless, these are ultimately contingent outcomes, and any valorisation of intraparty democracy evidently conflicts with Kelsen's understanding that, on the inside, parties could be run like monarchies. Therefore, there is a path here, but there is no compelling reason why politicians in a democracy would take it (they could be habituated to compromising inside the party and yet be intransigent in dealing with other parties; there is no contradiction here). In any case, Kelsen's own theory presents an obstacle on that path to some degree.

Kelsen also suggested that a form of mutual understanding between majority and minority was needed for peaceful coexistence in a democratic polity more broadly and that such coexistence – he used the phrase 'getting along with each other' – would then be expressed in compromises. The claim here is ambiguous, and the normative implications are, once again, largely underdetermined. It is plausible that, on one level, the majority and minority have to 'understand each other' ('sich verständigen'); a parliament in which everyone speaks about completely different things, cannot agree on what it means to observe rules of procedure, and so on, is bound to descend into cacophony and chaos.[15] However, this is a rather trivial observation. The leap from 'understanding each other' to 'agreeing with each other' (from *Verständnis* to *Einverständnis* – agreement and then also to 'Sich-Vertragen' – getting along with each other, as Kelsen put it) is a very far one, and no real normative justification or, for that matter, psychological mechanisms for how one gets from one to the other were truly offered by Kelsen (a variation of this slippage, according to critics, can also be found in the theories of Jürgen Habermas).

One might say that 'getting along' is actually the equivalent of a desirable ideal of civic friendship. A majority entirely ignoring the wishes of a

[14] Of course, there is a question whether such values could always be made compatible (not to speak of commensurable) in various forms of compromise. There are good reasons to assume that Kelsen was committed to value pluralism, but I cannot make good on this claim here (Zanetti, *Spielarten des Kompromisses,* p. 153).

[15] H. Kelsen, *Verteidigung der Demokratie*, M. Jestaedt and O. Lepsius (eds.) (Mohr Siebeck, 2006), p. 58.

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minority would then constitute a violation of such an ideal. However, this line of reasoning will not go very far either: for one thing, Aristotle in no way thought that the notion of ruling and being ruled in turn somehow diminished civic friendship (perhaps to the contrary).[16] Second, parties opposing each other in parliament through words (as opposed to force used on the streets) would already seem to presume some good-enough level of shared citizen identity. In modern societies, strangers are not in any meaningful sense 'friends;' what they have to share is not friendly dispositions towards each other but commitment to a constitutional project that – without this constituting any kind of contradiction – can involve a parliament with a clear rule of the majority unwilling to make any concessions to other parties. Moreover, it is not clear that civic friendship as such necessitates continuous compromise for principled, as opposed to pragmatic, reasons; as Simon May has pointed out, the relations among citizens greatly differ from those between marriage partners who have an ongoing responsibility in the pursuit of shared ends.[17]

Finally, let me stress that the assertion of an imperative to compromise also makes one wonder why Kelsen so clearly endorsed majority rule in the first place. Supermajority rule or even a consensus requirement would seem to encourage even more compromise (strengthening social integration along the way). Why not make the imperative to compromise truly binding by abolishing majority rule in favour of a more demanding system? Only contingent claims about conflicts and disagreements would seem to supply an answer, but they underspecify institutional design choices.

Note that one can agree with many elements of Kelsen's democratic theory – the role of pluralism and parties, the affinity with relativism, and so on – and yet not arrive at the view that the majority and minority have to compromise. However, there is one important remaining argument that might help redeem his democratic imperative to compromise.

12.3 Democracy as Collective Self-Rule through Compromise – the Answer to Kelsen's Puzzle?

Kelsen categorically stated that democracy is primarily about freedom: in a democracy, more people would be free than in any other political

[16] Aristotle, *Politics*, C. D. C. Reeve trans. (Hackett, 2017), p. 1261b1, 23.

[17] S. C. May, 'Moral Compromise, Civic Friendship, and Political Reconciliation', *Critical Review of International Social and Political Philosophy*, 14 (2011), 581–602.

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system because more would be in favour (assuming majority rule) of any particular law. This is, of course, an adaptation of a Rousseauian intuition about the subjects of the laws also being the authors of the laws; it simply recognises that in modern pluralist societies, legitimate disagreement will persist (and could only be suppressed by autocracy); hence, all we could possibly have is a majority governing itself, not all governing themselves (which would require consensus).

Now, one question that follows is whether those in a minority simply have to put up with being unfree: do they have to experience heteronomy? Is waiting for the next election and hoping to generate a majority on their side (perhaps by forging new kinds of compromises) the best they are able to do? Obviously, many democratic theories argue that such (temporary) heteronomy is the price one pays for participating in representative government based on elections: losers will continue to play the game because they hope to win in the future.[18]

It is here that a principled, as opposed to pragmatic, argument can enter. A compromise might lessen the experience of heteronomy; it could also allow the minority to enjoy a form of freedom (although, depending on the nature of the compromises struck, perhaps not quite the extent of freedom enjoyed by the majority). This reasoning has been presented most coherently by Rostbøll.[19] Rostbøll asks whether 'majorities have any reasons of fundamental democratic principle to make concessions to minorities, if minorities have been properly included and listened to in the political process?'.[20] In other words, an imperative to compromise cannot be based on a general appeal to the value of 'mutual respect' or other instrumental considerations, such as enhancing the legitimacy (and sheer empirical acceptance) of an important law by including the minority. Only an ideal of co-ruling, not appealing to equality or community, he holds, provides a suitable principle to explain why losers of elections should participate in the process of law-making. Members of the majority demonstrate respect to their peers in parliament without denying disagreements (so, according to an argument extensively developed by Jeremy Waldron, they do not disrespect conflicts),[21] and they respect the idea that 'everyone can be a participant in self-legislation by

[18] Przeworski, 'Consensus, Conflict, and Compromise in Western Thought'.
[19] C. F. Rostbøll, 'Democratic Respect and Compromise', *Critical Review of International Social and Political Philosophy*, 20 (2017), 619–35.
[20] Ibid., p. 619.
[21] J. Waldron, *Law and Disagreement* (Oxford University Press, 1999).

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having some impact not only in the process but also on the outcome.[22] Not least, politicians who compromise would also model for the citizenry at large what it means to show distinctly democratic respect to others as actual or potential co-rulers (I write 'potential' because some might not wish to participate in the political process at all).

Note that one can accept this claim and still insist on the constraints often mentioned as necessary for proper compromises in a democracy: compromises must not be 'rotten',[23] i.e., they must not help establish inhuman policies, let alone regimes; they must not violate core democratic commitments to freedom and equality (a majority and a minority could strike a compromise to disenfranchise or in some other way oppress a minority not represented in parliament); and, as some theorists would argue, they should not violate justice.[24] For Rostbøll, compromise can have intrinsic value – because the ideals of shared self-government and respect for co-rulers are intrinsic to democracy – and yet the willingness to compromise on the part of a majority can also remain conditional.[25] Importantly, the danger of compromise at the expense of third parties, so to speak, is very real, but the alternative to Kelsen's imperative – straightforward rule by the majority – does not truly provide a remedy for it either.

12.4 The Costs of Compromise

Therefore, co-ruling with a view to maximising collective freedom might appear to be a plausible solution to the puzzle stated at the very beginning of the chapter. However, there are complications: for one thing, it is not evident that citizens will necessarily experience such compromises as freedom. They are not the ones in parliament, and they might not at all identify with a particular compromise. There is little in the account of co-rule that, apart from generally important constraints on compromising, tells us much about what political parties can legitimately compromise on. Kelsen himself, as Sandrine Baume and Yannis Papadopoulos have pointed out, did not truly give an account of the different incentives

[22] Rostbøll, 'Democratic Respect and Compromise', p. 630.
[23] A. Margalit, *On Compromise and Rotten Compromises* (Princeton University Press, 2010).
[24] P. Van Parijs, 'What Makes a Good Compromise?' *Government and Opposition*, 47 (2012), 466–80.
[25] Rostbøll, 'Democratic Respect and Compromise', p. 631.

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that might make politicians compromise;[26] it seems largely undetermined how particular compromises would be crafted.

Currently, it is often claimed that parties devoted primarily to the pursuit of material interests (this was also largely Kelsen's vision) can find it relatively straightforward to compromise without anyone feeling compromised.[27] However, this seems to be a very simplistic view: for one thing, it has a narrow focus on the success of corporatist arrangements in mid-twentieth century Western Europe, which has led to a sanguine view of people's general willingness to compromise on money matters; in many other instances, the pursuit, or sometimes just the protection, of material interests can fairly well explain turns to authoritarianism. There were indeed ideologically committed fascists, but, as Robert Paxton, among many other historians, has continued to emphasise, fascist parties only came to power because of the conscious collaboration of existing elites, business elites in particular.[28] Moreover, even parties that have many specific material demands in their programmes will offer appeals to principles (of justice, to name only the most obvious). It is simply not true that compromise on material issues can always be neatly separated from larger normative agendas. Partisans might eventually perceive compromising parties not as enabling their followers to engage in co-ruling but rather to be *selling out* – especially if compromises are determined in ways that are not transparent (as is usually the case). It is only one step from this sense to a dissatisfaction with democracy such that citizens feel that a political class – comprising members of all parties in parliament – is colluding at their expense.

Sometimes, parties have every reason to keep a conflict alive precisely to demonstrate to voters how important certain issues are, why compromise solutions are not real solutions, and that only a coherent, uncompromised program should be acceptable. To be sure, such a stance can also be described as fanaticism.[29] However, in general, given that minorities

[26] S. Baume and Y. Papadopoulos, 'Against Compromise in Democracy? A Plea for a Fine-Grained Assessment', *Constellations*, 29 (2022), 481, 47–91.

[27] C. Lepora, 'On Compromise and Being Compromised, *The Journal of Political Philosophy*, 20 (2012), 1–22.

[28] Paxton (2005).

[29] It is not true, though, that matters of identity or values automatically lead to intransigent conflict. People can see themselves in a new light, and they can interpret their values so that practices once considered anathema become acceptable or even celebrated. Pace Margalit, *On Compromise and Rotten Compromises*, not all political conflicts fit into images of economics on the one hand and religion on the other.

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should always hold out hope for the next election, there is nothing wrong, from a democratic perspective, with an intransigent stance.[30]

There might be further costs to permanent compromising in parliament. One straightforward cost is a proper sense of accountability (a charge frequently also levelled against systems of proportional representation that necessitate the formation of coalitions with many parties, Israel and the Netherlands being prominent contemporary examples).[31] Compromising makes it much more difficult for voters to assess who is responsible for what; in a perverse way, this might make alternations in power less likely and hence render it more difficult for minorities that can experience a bit of freedom as a result of compromises to enjoy the full freedom of being a ruling majority.

Compromising might also indirectly undermine a distinct benefit of elections. As Adam Przeworski (and before him, Elia Canetti) noted, elections measure the strength of different groups in society; they are a peaceful substitute for civil war (because the losing side truly learns that it is in the minority and that a violent overthrow of the regime is likely to be too costly).[32] I realise that these scenarios are rather far-fetched, but a general blurring of party identities as a result of permanent compromising could weaken this effect of elections since it will become increasingly difficult to read the distribution of forces in society. Obviously, if everyone always seems ready to compromise, one would not be very worried about civil war – except that the preferences of the compromising parties in parliament and political entrepreneurs outside parliament could diverge radically, with the latter testing violent means of reordering the polity.

There is also the concern, flagged at the very beginning of the chapter, that an imperative to compromise will empower veto players who, in all likelihood, will make important large-scale changes simply impossible. In contrast to anti-democratic cliches, which all too easily cast suspicion on majorities as being 'mobs' or using every opportunity to become 'tyrannical', there are many examples of majorities being the

[30] Also note, however, the tendency by minority parties to purposefully paralyze institutions – even when compromise could come easily to them – to maximise their vote share in the next election (by blaming the majority for not getting anything done, etc.) (F. E. Lee, *Beyond Ideology: Politics, Principles, and Partisanship in the U. S. Senate* (The University of Chicago Press, 2009)).

[31] F. M. Rosenbluth and I. Shapiro, *Responsible Parties: Saving Democracy from Itself* (Yale University Press, 2018).

[32] E. Canetti, *Masse und Macht* (Fischer, 1996), pp. 220–22; A. Przeworski, *Why Bother with Elections?* (Polity Press, 2018).

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key to rapid, large-scale emancipatory change; civil rights legislation in the US in the 1960s is one example.[33]

Finally, if one is inclined towards the Kelsenian imperative for the sake of co-ruling, one must answer the following question: why not consider supermajorities, or, even better, why not consider consensus as the basis of decision-making? This would allow everyone to experience freedom, after all (one would think). Or, as a slightly more modest proposal, why not make supermajority requirements, especially if these are combined with the imperative to compromise? Such a solution might itself be a compromise between maximising freedom and preventing a paralyzed parliament because one spoiler is always enough to prevent a decision if the norm happens to be consensus.

12.5 Democratic Alternatives to Compromise

Is compromise the only way to honour the notion of co-rulership? I want to suggest that it is not and that there are other ways of expressing a distinctively democratic form of respect without, prima facie, always letting actors not authorised to govern by a majority of citizens have a say in legislative outcomes.

First, losing an election does not have to mean disempowerment, and being a minority in parliament does not condemn its members to passivity, let alone idleness.[34] Indeed, perhaps losing is not always simply unfreedom or plain powerlessness. To be sure, there is such a thing as willing sacrifice, an acceptance of loss for the sake of keeping the game going and the polity together.[35] However, beyond such sacrifice for the whole, losing the right way can pave the path to winning and setting new terms for life in the polity as a whole; simply thinking of losing as resulting in unfreedom does not take proper note of the freedoms an opposition will enjoy in a halfway functioning democracy.

One obvious way for losers to at least partially succeed is to force the winners into major concessions during an election campaign or as a result of a strong showing at the polls.[36] Another, less obvious, way

[33] E. Schickler, *Racial Realignment: The Transformation of American Liberalism, 1932–1965* (Princeton University Press, 2016).

[34] This section is adapted from Müller, *Democracy Rules*.

[35] D. Allen, *Talking to Strangers: Anxieties of Citizenship since Brown v. Board of Education* (University of Chicago Press, 2004).

[36] J. Hochschild, 'Four Ways to Lose Politically, Review Essay on Jeffrey Tulis and Nicole Mellow, Legacies of Losing in American Politics', *Political Theory*, 48 (2020).

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involves the art of turning a loss into a demonstration of integrity. Barry Goldwater was trounced by Lyndon B. Johnson in the 1964 presidential elections – he only carried the South and his home state of Arizona. However, as political scientists Jeffrey Tulis and Nicole Mellow have pointed out, he lost with *integrity*: he kept his political principles intact and built a platform for the conservative movement such that Ronald Reagan – masking some of the crueller parts of the platform with sheer charm – could eventually succeed.[37] In an era when left-wing parties often abandon leaders after one election loss, it is worth remembering how often transformative figures such as Brandt and Mitterrand were defeated before they finally won.

There is an unambiguously democratic art of losing: when democratic losers concede by saying that because everyone had a roughly *equal say* – a meaningful opportunity to make their case in a fair process – defeat is acceptable.[38] Otherwise, one would in effect claim to be superior to one's fellow citizens, who happened to be in the majority at the polls. This does not mean that one resigns oneself to passivity until the next election. Rather, one forms a loyal opposition – one of the major innovations in modern democracy, as opposed to the ancient Athenian type: a coherent grouping that is, for principled reasons, against the government but *not*, for partisan reasons, against the political system. In other words, this is a group that criticises the government, even very harshly, if necessary, but that does not deny the government's legitimacy. A governing party, in turn, must recognise this special role. When Theresa May continued to repeat, with increasing exasperation in the face of loss after loss in Parliament, the seeming tautology 'Brexit is Brexit', she was in effect saying that the opposition must shut up until the next elections – a profoundly undemocratic intuition in obvious violation of the need for an opposition to question a government's approach from day to day and to provide a systematic, coherent, but precisely not anti-system, alternative.

The opposition's loyal role can be institutionalised in many different ways that in turn allow winners to demonstrate *their* loyalty to the political system: immediate replies by opposition leaders to ministers' speeches, thereby giving the opposition a chance to dramatise differences and demonstrate other policy ideas; low thresholds for

[37] J. K. Tulis and N. Mellow, *Legacies of Losing in American Politics* (The University of Chicago Press, 2018).

[38] D. Viehoff, 'Democratic Equality and Political Authority', *Philosophy and Public Affairs*, 42 (2014), 337–75.

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establishing committees of inquiry; opposition days, where the losers of an election set the agenda of a parliament's business; and even installing opposition figures as the chairs of important committees (where, after all, much of the real work of a parliament gets done). In any case, as Kelsen correctly pointed out, in a well-functioning parliament, the government and opposition are practically forced into engaging with each other somehow; the more this engagement can be understood as fair (and, ultimately, as a collaborative enterprise, but not necessarily one based on compromising on legislature), the better. This contrasts with a crude view of democratic rules as simply 'hydraulic mechanisms designed to move society in the direction of the greater force'.[39]

An opposition is not enslaved, pace Rousseau, just because it does not control the levers of power: it can keep making the case against the government; it retains the freedom to continuously campaign for its alternatives; and, ideally – again, I agree with Kelsen here – there is a running discussion between majority and minority, with arguments circling in an ongoing (yet also contained) political conflict. In fact, a skilled opposition will use all its rights to provide the majority with 'correction and instruction'; always being ready for compromise might well undermine these goals.[40]

12.6 Respect for the Disrespectful?

The question remains whether, in addition to those already mentioned, there are conditions that make compromising unacceptable. After all, compromise is a normatively dependent concept, or, as Margalit put it nicely, a 'boo-hurrah'-concept, sometimes for good reasons maligned and sometimes for equally good reasons celebrated.[41] In particular, in our era, it seems urgent to ask whether parties should ever compromise with actors who can broadly be described as populist.

This conundrum is familiar from the literature on militant democracy (here, Kelsen famously argued that if a majority rejects democracy, then democracy is indeed finished). However, there are novel aspects in our age that make it problematic to simply fall back on anti-extremism

[39] C. Beitz, *Political Equality* (Princeton University Press, 1989), p. 229.

[40] S. Holmes, 'Precommitment and the Paradox of Democracy', in J. Elster and R. Slagstad (eds.), *Constitutionalism and Democracy* (Cambridge University Press, 1993), pp. 234, 195–240.

[41] R. Forst, *Toleranz im Konflikt: Geschichte, Gehalt und Gegenwart Eines Umstrittenen Begriffs* (Suhrkamp, 2003); Margalit, On Compromise and Rotten Compromises.

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paradigms from the Cold War, let alone what has been described as 'negative republicanism', that is, the prohibition of parties that resemble ones that have already ruled once with disastrous consequences (for example, a fascist past allows for the banning of neo-Nazi parties in the present).[42] This is because many populist parties today not only distance themselves from violence but also emphasise that they are not a reincarnation of authoritarian formations from the twentieth century; not least, many of their programs can read as rather moderate. Rather, it is their exclusionary rhetoric – in particular, the claim that only they represent what they often refer to as 'the real people' – that reveals threats to democracy.[43]

Under such conditions, various paths are open to nonpopulist parties that find themselves in the majority. They can refuse not only any substantive concessions to populist parties but even the minimum level of engagement that, for Kelsen, appeared inherent in the majority – minority pair. Alternatively, they can offer populist parties plenty of compromises, hoping that, thereby, these parties will be drawn into some form of 'responsible government' (this argument is a variation of the moderation-through-inclusion hypothesis).

Both paths appear to me undesirable. The first would seem to deny real representation to all those who voted for populist parties. As argued above, losers in elections have all kinds of ways to remain politically effective and aim at the 'correction and instruction of the majority', but total exclusion from a parliament might well drive politicians to street politics (recall Kelsen's prudential argument in favour of engagement with minorities). One must remember that not all voters for populist parties are necessarily populists themselves; plenty might hold very specific policy preferences that are matched by the program of the populist party but have no interest in the exclusionary, anti-pluralist rhetoric of the party leadership. Such citizens would then have no opportunity to have their preferences count because the articulation of these preferences in parliament would simply be ignored by politicians guarding a *cordon sanitaire*.

The other extreme, compromise without conditions, is of course also problematic, especially if undertaken in the name of respecting populist

[42] P. Niesen, 'Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties', in S. Avineri and Z. Sternhell (eds.), *Europe's Century of Discontent: The Legacies of Fascism, Nazism and Communism* (Magnes Press, 2003), pp. 249–68.

[43] J.-W. Müller, *What is Populism?* (Penguin, 2017).

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politicians as co-rulers (or assuming that populist deputies necessarily mirror populist preferences). There are many reasons to suspect that such politicians would not act as co-rulers who would in turn respect the members of the current majority (who, in the future, might find themselves in a minority). After all, populist politicians often categorically deny the legitimacy of their political adversaries (and sometimes treat them as outright enemies), mostly with the charge that such supposed 'establishment figures' are fundamentally corrupt and, to coin a phrase, 'crooked'.

The worry is that, by excluding them completely, one does what one accuses the populist of doing: engage in exclusionary rhetoric and conduct. However, this worry about a fateful kind of symmetry can be addressed if one is nuanced about the forms of exclusion one is willing to undertake. There is certainly every reason to follow the Kelsenian idea of engaging with a (populist) minority: their questions to the majority should not be ignored; one should listen to their speeches, and, yes, one should try to enter a dialogue with them. However, talking with populists is not the same as talking like populists: one is not obliged to make any substantive concessions to their diagnosis of political challenges, to their framing of a particular crisis, or to the validity of their policy prescriptions. One should leave open the possibility of compromise but make compromises very clearly conditional: only if the populists change their approach – and, in particular, stop engaging in an anti-pluralist form of rhetoric – is something like co-rulership possible. Given that politicians generally wish to rule, this announcement might have an effect or might not.

12.7 Conclusion

Hans Kelsen argued that in a party democracy, majority and minority have to compromise and somehow 'get along'. As we saw, how exactly Kelsen derives this imperative remains obscure: it cannot be generated from the meaning of the concepts of majority and minority themselves; it is not simply guaranteed by the sheer existence of a minority, and majority and minority can certainly comprehend each other in the absence of any instances of compromising with each other. Conversely, one can compromise and still not get along. However, the very basis of Kelsen's theory of democracy – democracy serves to let as many people as possible get their way and hence experience freedom – helps generate a more meaningful argument for the imperative to compromise: if

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minorities have a say in policy, more people will experience a sense of self-government and be recognised as co-rulers (even if their freedom might not be realised to quite the same extent as that of the majority).

In some ways, this constitutes an attractive vision; if nothing else, it provides strong reasons why losers should stick with the democratic game beyond the standard argument that they can always change things at the next election. It is also not a wildly utopian vision: in consociational regimes, or in Switzerland's intricate political system, the notion of widely shared rulership would also appear to be a reality,[44] even if it has clear shortcomings as well.

However, I have also suggested that there are significant costs to such co-rulership, and just as compromise for the sake of co-rulership can be justified for principled democratic reasons, so can some of the scepticism about the imperative to compromise: the ideal of mastering a collective fate often requires ambitious and coherent agendas; allowing opponents of such an agenda a right to interfere with it diminishes the very promise of democracy. Some other costs depend on more speculative scenarios, such as threats of civil war.

As we also saw, there are alternatives to co-rulership with compromise that can make good on the need to properly recognise the minority, beyond the standard arguments for alternations in power: minorities in parliament have many means to put pressure on majorities through questioning, through the work of committees, and, not least, through mobilising public opinion against majority decisions in the legislature. The more skillful minority politicians are, the more likely it is that they will both correct and instruct the majority. However, the basic claim should remain: a minority must have its say, but a majority should still get its way.

As attractive as Kelsen's imperative might seem in an age of 'crisis of democracy' and majoritarian, sometimes outright antiparliamentary, populism, it is clear that a blanket call for compromise and 'moderation' as such is unlikely to help with today's challenges. Permanent compromising might in fact reinforce the framing of parliaments as being populated by a self-dealing political class; on the other hand, when anti-system parties have actually entered parliament, it is prima facie exactly wrong to demand that other parties enter compromises with them no matter what. This does not mean that democrats should exclude

[44] H. Kriesi and A. Trechsel, *The Politics of Switzerland* (Cambridge University Press, 2012). A. Lovett and J. Zuehl, 'The Possibility of Democratic Autonomy', *Philosophy and Public Affairs*, 50 (2022), 467–98.

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such actors completely under all circumstances. However, especially if one takes the notion of co-rulership seriously, it becomes problematic to respect 'co-rulers' who in fact are engaged in violating the fundamentals of a system promising collective self-government. Politicians will model respect for such figures (and many citizens might imitate them in this regard), while on the other hand, many citizens might feel that they are now ruled by politicians they find deeply problematic and who they distinctly did not authorise to rule them.

The most plausible approach to the dilemma of 'respect for the disrespectful', I have suggested, is to talk with populists but not talk like populists and to also make compromises (and hence co-rulership) clearly conditional. Such a strategy – taking Kelsen's imperative for engagement seriously but refusing his blanket endorsement of compromise – would also send the clearest possible message to the citizenry at large.

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