Afterword

Hans Kelsen and the Time of Democracy

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How should we interpret Hans Kelsen's writings on democracy? As a second-order activity in 'political theory', which ran alongside his larger enterprise in determining a 'pure' theory of law, or of a piece with it? In his own self-presentation from 1927, Kelsen refers to his 1920 publication of the short essay-cum booklet, *Vom Wesen und Wert der Demokratie*, which first appeared in the *Archiv für Sozialwissenschaft und Sozialpolitik*, as a form of political theory that ran alongside his work on state-legal thinking.[1] His thinking about democracy would be developed through the 1920s, and was reiterated in different ways in the 1950s. However, what were the early meanings of a political theory of democracy for him, and how might the sequencing of his writings on that topic intersect with his writing on legal theory? This seems to be one of the driving questions of this volume, which tracks the evolution of his anti-systemic approach to democracy, firstly by noting its early anti-Bolshevik tenor. The strengthening of the essay came later, at a moment in 1929 when Kelsen moved to defend pluralism and then multiparty democracy in the 1920s and 1930s. This he did against what he saw as ideological forms of tyranny and political simplification. Then, his defence of democracy returned anew, during the 1940s and 1950s, when he sought to safeguard the values of pluralism, particularly from drifting (but seemingly stable) forms of liberal democracy, re-emphasising the importance of political parties as vehicles of popular will and of compromise. The contributors to this book amply make the case for the seriousness of Kelsen's arguments and locate his thinking in multiple

[1] H. Kelsen, 'Selbstdarstellung', [1927] in M. Jestaedt (ed.), *Hans Kelsen Werke* Bd. 1 *Veröffentliche Schriften 1905–1910 und Selbstzeugnisse* (Mohr Siebeck, 2007), pp. 19–28, at 26. The text in question is H. Kelsen, *Vom Wesen und Wert der Demokratie* (J. C. B. Mohr (Paul Siebeck), 1920).

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contexts and competing timeframes. In writing this brief afterword, my aim is to highlight some of the novelties of the arguments made by the contributors here, with reference to a particular question that has arisen in the 'historical turn' in scholarship around Kelsen. More specifically, using Natasha Wheatley's recent consideration of Kelsen in *The Life and Death of States* as an example, one major theme that drove Kelsen and his Viennese *Kreis* towards the pure theory of law, was the absence of 'time' from most contemporary legal thinking about what the state was and how it lived (and died) in both real time and juridical time.[2] My question, following on from this is, what difference might it make if we looked at his early writing on democracy with such a focus in mind?

In some ways, it is an obvious starting point. During the First World War, between service and writing, Kelsen worried about the problem of time as it applied to the problem of sovereignty in general. If sovereignty was a presumption of the state (defined as a combination of territory and a relatively stable population with an effective government), then how should questions of state birth, and more pointedly, state death, be understood? A concern about the latter had been part of the background cultural mood music in the Habsburg Empire for several generations. The threat of impending death and decay seemed to have been hard-wired into the fabric of Habsburg modernity, in fact, where the dual empire was thought of, analogously to the Ottoman empire, as one of the 'sick men' of Europe; destined to crumble, its crumbling would in turn precipitate a major European cataclysm. This sense of manifest destiny as imperial destruction and European war led to myriad and mordant reflections about how life might continue after death and gave a distinctive and ironic cast to Habsburg literary and psychological culture, as writers such as Marjorie Perloff have taught us.[3] Therefore, from the perspective of a theory of law, when Kelsen reflected on the problem of the real life of the state, as opposed to the fictitious eternal life of the state that had been sustained by a theory of the two bodies of the ruler from medieval kingship into the modern state, he asked a different question. What happened when states died, in practice, if fiction theory was insufficient for a rational, modern science of jurisprudence? How might law as an abstract science, one that dealt in artifice but which rejected fiction

[2] N. Wheatley, *The Life and Death of States: Central Europe and the Transformation of Modern Sovereignty* (Princeton University Press, 2023), esp. pp. 225ff, 229.

[3] M. Perloff, *Edge of Irony: Modernism in the Shadow of the Habsburg Empire* (Chicago University Press, 2016).

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theory, come to frame and interpret such events? The circle of scholars that Kelsen gathered around him went in search of metaphors and models through which to understand the problem – one such model was outlined by Adolf Merkl, who proposed a 'stepped structure' (*Stufenbau*) of law, one that built, node to node, layer upon layer, until you could see both the wood and the trees (his was a forest-inspired construction). Whether such structures were organic or mechanical, inbuilt or separate, Kelsen and his colleagues wondered how best to understand law and authority if you were interested less in their description (the 'is'), and more in their form (the 'ought')? What sort of psychological perspective would make sense of any of this, if you asked where law came from in the first place? Only if you could answer that, it seemed, could you answer the question of where state authority began or ended, and thus when it lived, or when it died. For law, the idea of a basic norm, latterly a *Grundnorm*, would simply have to be the cognitive presumption through which this made sense. Law was a juridical system of artifice (not a fiction), constructed around a philosophical presumption; other arguments, from natural law, power out of time, and so forth, from the history of legal argumentation as well as the realities of a complex, multi-confessional, sprawling imperial world, meant there was no de facto sovereign point outside of anywhere to judge from, or reason back to when trying to singularly consider law and politics. Everything was plural, multiple, and complicated.[4]

If this foundational norm from which everything else radiated and found meaning was outside of the historical messiness of the domestic nation-state, then where was it to be found? Kelsen and his circle fixed this norm as part of the international sphere, and such fixing of sovereignty outside of the realms of state histories and conflicts gave it a different kind of temporal heft. By presuming a systemic continuity outside the nation-state or empire, real moments of rupture within those spaces (politics and history, put simply) could be explained with reference to a higher-order juridical argument. One might now easily say that there have been many Austrian states, for example, with new constitutional arrangements, new revolutionary transformations, and so on through history. If there have been many different states, juridically speaking, then questions of the life and death of states and sovereignties could be explained with reference to the wider juridical architecture whose *Grundnorm* was its apex, but simultaneously be normalised as part and

[4] Wheatley, *Life and Death of States*, p. 231.

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parcel of what legal thinking is supposed to explain. Put another way, what made sense of the radical transformation or rupture embodied in revolution and war in the present was the fact that a still higher level of continuity existed at the international level from which these domestic ruptures could be explained.[5] At the level of the state, revolution and transformation, life and death, were juridically understandable, normal even, because they were framed by an argument about continuity as an epistemic presumption at a more abstract level. The temporality of international law, rather than national or imperial state law, was the thing that was, in principle, limitless.[6] The nation-state was hereby relativised, which in turn downgraded the place of merely historical argument and explanation, or the hyper-politicised justifications of empire and conquest that the idea of national sovereignty as eternal and limitless had given rise to. That was now seen as quite as backwards or retrograde a sensibility as earlier theories of natural law and divine right.

In fact, it seemed for Kelsen that such historically fixed and conventional notions of sovereignty as the defining attributes of statist politics were to blame for the horrors of the First World War, and he thought that radical jurists had found a way to say so clearly. By explaining its backwardness, they could signal a way of moving forwards into a world in which states themselves were given much more modest roles as the containers through which sequences of legal and political and historical structures come and go, while the meanings of such comings and goings were to be found within still wider frames of reference. Here, democracy would be a major part of that story.

Kelsen opened his first essay on the essence and value of democracy, with a conventional historical background about the rise of democracy in Europe from its revolutionary origins in 1789 and 1848, to its repurposing in the midst of global war. The idea of democracy, like the idea of law, however, was something more foundational than its practical history could show. It grew out of social and psychological foundations. Individual psychology bristles at the idea of social constraint, Kelsen wrote, but at the same time, individuals recognise that selfsame desire in others. This means that society is grounded upon a 'negative equality', whose recognition fosters a 'negative demand' (*negative Forderung*) for freedom. Here, Kelsen pursued a thought that could, for political and legal theorists today, suggest a line of thinking running back to Kant and forwards into

[5] Ibid., p. 244f.
[6] Ibid., p. 249.

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the twentieth century, through Isaiah Berlin's value pluralism and into Ronald Dworkin's attempts to synthesise freedom and equality.

Nevertheless, Kelsen's focus on the intersubjective and instinctual presumptions behind democracy was, of course, even more deeply connected to his proximity to Sigmund Freud, in whose journal he published a major essay on the state and social psychology.[7] And as Kelsen also noted, democratic demands progressed alongside wider historical and political developments. Movements towards majority rule and the self-determination of peoples ran alongside revolutionary transformations, reshaping both the theory of the state and the theory of democracy in turn. This seemed to make the freedom of the individual derivative of the freedom of a wider people, society, or state.[8] However, all these connections, according to Kelsen, were relative. Rousseau's 'anthropomorphic expression' of a general will as the sum of all individual wills was a form of political tyranny rather than democratic freedom, because it presumed a true essence to democracy that was immediate, direct, and unmediated. According to Kelsen, by contrast, the time of modern democracy was representative and therefore plural, fractious, distanced, and contingently fixed into shape by modern political parties. The time of post-Rousseauvian democracy clearly had problems, but the modern world on Kelsen's account, was not like Rousseau's world, and modern democracy (like modern law) needed alternative foundations. Political freedom (or democracy) required the 'conversion' of natural freedom into politics, which required the veridiction of general law rather than the highly localised and radically patriotic versions that Rousseau proposed. All of which is to say, as several essays in this collection do say, particularly those by Przeworski, Urbinati, and Invernizzi-Accetti, that Rousseau could not stand as the founder of modern democracy according to Kelsen.

Furthering the historical turn in scholarship about Kelsen, it might be worth adding a rider to the general claim. Namely, that this was also an argument with a distinct historical edge that lawyers in German-speaking Europe had long been cognisant of. If the postrevolutionary

[7] Also see H. Kelsen, 'Der Begriff des Staates und die Sozialpsychologie. Mit Besonderer Berücksichtigung von Freuds Theorie der Masse', *Imago: Zeitschrift für Anwendung der Psychoanalyse auf die Geisteswissenschaften*, 8 (1922), 97–141.

[8] Kelsen, *Wesen und Wert*, pp. 6, 8f. For discussion on this and other points, see O. Lepsius, 'Kelsen, théoricien de la démocratie', in O. Jouanjan (ed.), *Hans Kelsen: Forme du Droit et politique de l'autonomie* (Presses Universitaires de France, 2010), pp. 135–70, esp. 148–57.

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possibilities of democratic politics in Europe were shaped by national communities under modern states, then the theory of the state most compatible with pluralist democracy could not, these lawyers suggested, route its genealogy back to Hobbes (the absolutist) or to Rousseau (the spark for Jacobin tyranny). Therefore, Kelsen, like many others, turned to Kantian ideals of autonomy and historically relativist accounts of the state and democracy as a way of seeing how similar psychological foundations played out differently in different historical contexts. Kelsen's genealogy of modern politics and its foundation in the constituent power of a democratic people evolving over time, looks instead like a genealogy where Sieyès, rather than Hobbes or Rousseau, might provide a route towards the complexities of representation that could secure the pluralism he sought to defend. This was the sort of argument his younger colleague Egon Zweig had made, in fact, in his study of the origins and influence of the idea of constituent power. Zweig also rejected Rousseau in favour of Sieyès and thought that Sieyès was a better guide to properly democratic modern politics grounded in a complex division of labour, one that might render sensible the complexities of time and scale in representative politics, such that it could work within the Habsburg framework.[9] In Kelsen's version of this, an aversion to militant democracy (well outlined by Baume in this volume) required a model of democracy within which majorities and minorities had to compromise within structures not of their own choosing, and which could not be easily changed. Like his theory of law, where a plurality of norms forms a unity within a hierarchical system owing to the *Grundnorm*, in Kelsen's account of democracy, complex schemes of representation and compromise through parties and leadership structures within the state help to generate temporary unity out of plurality, which becomes both the essence and the value of democracy.[10]

What all this also meant, of course, was that Kelsen's sense of democracy as a modern fate could not be located through what he called the 'neo-communist' worldview of Lenin's Bolsheviks, who claimed to return to true democracy without the trappings of parliamentarism or

[9] D. Kelly, 'Egon Zweig and Constituent Power as Habsburg Modernism', in P. Niesen, M. Patberg and L. Rubinelli (eds.), *The Oxford Handbook of Constituent Power* (Oxford University Press, 2026).

[10] For a modern updating of Sieyès's place in thinking about the history and theory of modern democratic politics, see R. Tuck, *Active and Passive Citizens* (Princeton University Press, 2024); the classic recent study of Sieyès as a political thinker in context, is P. Pasquino, *Sieyes et l'invention de la Constitution en France* (Odile Jacob, 1998).

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bureaucracy.[11] The tensions between the ideal and the reality of democracy were here expressed in a judgement that saw war and revolution as threats to the vitality of pluralism and compromise. At the same time, Kelsen's pursuit of a depersonalised account of democratic politics might, as Jagi's contribution to this book makes clear, be seen as a response to the multifaceted quality of the Habsburg imperial polity. In a sort of reversal of a well-established distinction in European political theory between sovereignty and government, by dethroning the radicalism of sovereignty, Kelsen turned democratic government into both norm and exception, a historical and political novelty wherein the will of an administration or bureaucracy is formed differently than the will of a people, but both build into a larger democratic compound. He further rejected the idea that the Bolshevik 'democratic' experiment was novel, by showing that its interest in short-term offices, mandates, and so on, was merely part and parcel of how democracy in general can and does function.[12] In any event, his early concerns with Bolshevik models were relegated by the late 1920s in the second edition of his text, as his own theorems were tested in the fires of postwar reconstruction in law and politics in Europe.

Here, Kelsen as the activist scholar was undoubtedly more politically consequential in the evolution of legal and political practice than his sharpest and most public critic, Carl Schmitt, even if, as several contributors to this volume make clear, his defence of compromise seemed to come without any wider foundational justification than just its necessity. However, this might simply signal another proximity in his democratic theory, to his simultaneous search for the *Grundnorm* as a cognitive presumption, which made forms of law juridically thinkable and interpretable. For democracy to be politically thinkable, perhaps compromise had to be a similar sort of presumption, something one couldn't question as a foundational principle even if it could on occasion also be explained with reference to exogenous conditions, such that compromise and parliamentarism were mutually constituted, and the development of parliamentary politics in Europe since the revolutions of 1789 and 1848 had fixed that into a historical reality. Whether this overlaps with the Freudian thought of a background condition of shared and totemic sacrifice, morphing into the shared acceptance of compromise as a psychological foundation of electoral democracy, remains an interesting case, also

[11] Kelsen, *Wesen und Wert*, p. 16.
[12] Ibid., p. 17f.

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brought up in this volume. But these social – psychological foundations of democracy and the state also connect, in some other ways, with straightforwardly Hobbesian thoughts about shared subjection to a common authority through representation, which turns plurality into union, and wherein one major compromise undertaken (or contract entered into) in the pursuit of self-interest, sets off another sequence of reasoning and political outcomes, whose implications can only receive proper historical and juridical judgement after the fact. The Hobbesian state exists for as long as it protects citizens and makes their lives better in general, and when that ceases, it exists no longer. This is perfectly normal in Kelsen's rendering of state life and death, given the wider legal framework within which such matters can be put. Could democracy live and die in the same way? That democracy was in danger of being fixed as an ideology rather than a value, as mere procedure rather than pluralism, whether in wartime or through revolution and antiparliamentary forms of fascism during reconstruction and into the 1930s, was a major concern. Like others, such as Elie Halévy in France, Otto Neurath in Germany, and Nikolai Kondratiev in Russia, who worried about the 'statification' (and hence the simplification) of modern politics, a process through which peacetime politics masked the continuation of political and economic warfare by other means by simply calling it democracy, Kelsen sought to defend democratic pluralism through robust compromise and political parties.

This made him understandably obsessed with questions of electoral reform and state law, particularly because it was of crucial importance to political education, something Jaestadt makes clear in their chapter. From the early years of the century, through teaching and writing about state law in the Habsburg Empire, moving into radical debates about electoral reform and administrative oversight, and even taking part in the practical reconstruction of state law and the constitutionalising of democratic politics, Kelsen moved continuously from theory to practice and back again. He did so whether thinking abstractly about time, sovereignty, and law, or about the history and psychology of politics and democracy. It also shows up across the sequential transitions in Kelsen's varied attempts to defend democracy from its enemies from the 1920s to the 1950s, which the introduction to this book clarifies so well, but it does suggest a rather radical thought. Namely, that without the compromise structures of democracy through party politics, there might be no democracy at all.

Recent political science has been obsessed with the question of whether democracy is already dead, or with how it has died in the past and whether it might soon die again in the future, and of whether threats

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to democracy in the present require a rethinking of the categories of compromise, respect, and perhaps even of anger and resentment in politics. Across the board, questions of democratic life and its timeframes have been raised in particularly piquant ways. However, these might profitably be seen as a structural mirror to Kelsen's concern with the life and death of states. Put another way, might the long-term effect of democracy in theory and in practice, in Europe and Anglo-America particularly, have been to make democracy into something like the political analogue of Kelsen's *Grundnorm*? This could allow us to understand how states can die while democracy lives on, or see that individual democracies might die while the idea of democracy lives on, and so on and so forth, in varying configurations. Democracy as the political *Grundnorm*, so to speak, becomes the point of reference from which to measure political success and failure in different times and places. Or is it that democracy is the concept that most easily captures what Kelsen thought of as the natural, instinctual, and intersubjective demand for freedom, at least until some other mode or model of political legitimation is provided that can more readily meet those demands? Whatever it is, the fact that we have not been able to get much further than this in our thinking about the essence or the value of democracy since Kelsen's time, suggests that there are good reasons to return to his lessons in our own moment, just as this revisionist collection suggests.[13]

Nevertheless, there is also a tragic dimension to this predicament. Consider Max Weber's contemporaneous assessment of such austere neo-Kantianism as that which he had found in the work of Georg Jellinek as well as that of Kelsen. He saw it as the historical embodiment of a productive attempt to reason through the distinctiveness of Occidental politics, law, and history from a comparative perspective, tracing a path towards increasingly general applications of law that could frame the evolution of modern liberalism and globalised forms of commercial capitalism.[14] However, like his Habsburg compatriots, Weber's analysis had sharp edges. The pursuit of a model or mode that could only ever be a partial and incomplete attempt to theoretically grasp the otherwise

[13] For democracy as the most appropriate form of politics that might align with the tasks of science, to understand and order the world, see M. Jestaedt, 'La science comme vision du monde: science du droit et conception de la démocratie chez Kelsen' in O. Jouanjan (ed.), *Kelsen: Forme du Droit*, pp. 171–220, esp. 200–14.

[14] M. Weber, 'Wirtschaft und Gesellschaft: die Wirtschaft und die gesellschaftlichen Ordnungen und Mächte', in W. Gephart and S. Hermes (eds.), *Max Weber Gesamtausgabe I/22–23,* Teilband 3*: Recht* (Mohr Siebeck, 1999), p. 282.

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unfathomable realities of social and political life was itself tragic. The ideas that once offered totalising explanations for the nature of things, like politics or religion, had been secularised and compromised. While the fine-grained armature of juridical science offered the possibility of relevant specialisation and could afford the skilled practitioner a certain historical-developmental clarity, it also came with a cost. Here, democracy (and its concomitant requirements of international credit and bureaucratic state structures, as much as international law), became a peculiarly modern kind of fate.

In part, this was why Kelsen effectively set out to dethrone the idea that there was anything like a substantive 'will of the state' or a 'subject' (the state) that could be thought to exist independently of the emergence of an appropriate juridical form of knowledge or epistemological construction that would come to explain it.[15] Only this type of proposition could make sense of Habsburg diversity, and bring it into line with the developmental trajectories of modern democracy.[16] The logic of Kelsen's juridical argument seems to mirror the ways in which democracy has become both the presumption and the legitimating ground of modern politics, even if the preconditions for its success, at least in Kelsen's terms, hardly seem any more secure today than they did when he first began to write about it over a century ago. Perhaps that is entirely the point, however, if democracy (like any form of politics) only ever lives on borrowed time.

[15] Wheatley, *Life and Death of States*, esp. pp. 168–80.

[16] F. Filafer, 'Imperial Diversity, Fractured Sovereignty, and Legal Universals: Hans Kelsen and Eugen Ehrlich in their Habsburg Context', *Modern Intellectual History*, 19 (2022), 421–43.

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