

The Relations Between Hans Kelsen's Concept of Law and the Theory of Democracy

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Abstract : Hans Kelsen was a versatile legal thinker whose achievements in the fields of legal theory, international law, and the theory of democracy are remarkable. All of the fields tackled by Kelsen are regarded as part of his "pure theory of law." While the link between international law and Kelsen's pure theory of law is apparent, the same cannot be said about the link between the theory of democracy and his pure theory of law. On the contrary, the general thinking concerning Kelsen's thought is that it can be used to legitimize authoritarian regimes. The aim of this presentation is to address this concern by identifying the common ground between Kelsen's pure theory of law and his theory of democracy and to show that they are compatible in a way that his pure theory of law and authoritarianism cannot be. The conceptual analysis of the purity of Kelsen's theory and his goal of creating ideology-free legal science hints at how Kelsen's pure theory of law and the theory of democracy are brought together. The presentation will first demonstrate that these two conceptions have common underlying values and meta-ethical convictions. Both are founded on relativism and a rational worldview, and the aim of both is peaceful co-existence. Second, it will be demonstrated that the separation of law and morality provides the maximum space for deliberation within democratic processes. The conclusion of this analysis is that striking similarities exist between Kelsen's legal theory and his theory of democracy. These similarities are grounded in the Enlightenment tradition and its values, including rationality, a scientific worldview, tolerance, and equality. This observation supports the claim that, for Kelsen, legal positivism and the theory of democracy are not two separate theories but rather stem from the same set of values and from Kelsen's relativistic worldview. Furthermore, three main issues determine Kelsen's orientation toward a positivistic and democratic outlook. The first, which is associated with personality type, is the distinction between absolutism and relativism. The second, which is associated with the values that Kelsen favors in the social order, is peace. The third is legality, which creates the necessary condition for democracy to thrive and reveals that democracy is capable of fulfilling Kelsen's ideal of law at its fullest. The first two categories exist in the background of Kelsen's pure theory of law, while the latter is an inherent part of Kelsen's concept of law. The analysis of the text concerning natural law doctrine and democracy indicates that behind the technical language of Kelsen's pure theory of law is a strong concern with the trends that appeared after World War I. Despite his rigorous scientific mind, Kelsen was deeply humanistic. He tried to create a powerful intellectual weapon to provide strong arguments for peaceful coexistence and a rational outlook in Europe. The analysis provided by this presentation facilitates a broad theoretical, philosophical, and political understanding of Kelsen's perspectives and, consequently, urges a strong endorsement of Kelsen's approach to constitutional democracy.

Keywords : hans kelsen, democracy, legal positivism, pure theory of law

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