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What place should compromise be given in democracy? A reflection on Hans Kelsen's contribution

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“It makes all the difference in the world whether we put Truth
in the first place or in the second place”

Epigraph of *On Compromise*, John Morley, 1908

“All government, indeed every human benefit and enjoyment, every virtue, and every prudent act, is founded on compromise and barter. We balance inconveniences; we give and take; we remit some rights, that we may enjoy others. ... Man acts from motives relative to his interests and not on metaphysical speculations”

Edmund Burke (1987: 126)

This article focuses on the justifications Hans Kelsen gives for the widespread practice of compromise in democracies. First, I have disentangled the ingredients and functionalities of compromise in democracies as they appear in Kelsen's works, including *Allgemeine Staatslehre*, *The Essence and Value of Democracy* and *General Theory of Law and State*. Second, I have emphasised the current questions regarding Kelsen's zealous defence of compromise and the particular place he confers to it in his theory of democracy.

Key-words: Kelsen, compromise, democracy, integration, majority-minority relations.

Cet article se concentre sur les justifications d'une pratique élargie du compromis en démocratie, telles qu'elles sont produites par Hans Kelsen. Dans un premier temps, nous avons dégagé les composantes et fonctions du compromis en démocratie, telles qu'elles s'expriment dans les travaux kelséniens, tels que *Allgemeine Staatslehre*, *The Essence and Value of Democracy* et *General Theory of Law and State*. Dans la seconde partie, nous avons traité les questions contemporaines qui émergent eu égard à sa défense enthousiaste du compromis et à la place particulière que Kelsen confère à cette notion dans sa théorie de la démocratie.

Mots-clés : Kelsen, compromis, démocratie, intégration, relations entre majorité et minorité.

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1. INTRODUCTION

Among the political thinkers who have drawn our attention to the notion of compromise, Hans Kelsen must be rediscovered due to his major contributions to this topic. Surprisingly, he is almost never mentioned today, even in the erudite works on compromise (Fumurescu 2013)². In this article, I intend to focus on the precursory and substantial link that Kelsen established between compromise and democracy. We could say that he anticipated the puzzling question raised by Kuflik in 1979: “Is there a justification in democratic theory for the widespread democratic practice of compromise?” (Kuflik 1979: 41). The theoretical relationship between compromise and democratic regimes that Kelsen established constitutes his main intellectual contribution compared with other works on the understanding of the notion of compromise. I argue in this article that compromise plays a central role in his theory of democracy because it reconciles the essential features within his view of democracy, namely his positivism, his reluctance about the idea of the common good and his definition of democracy, as summarised via the enforcement of the self-determination principle.

Kelsen’s enthusiastic defence of compromise has to be situated in two specific contexts. On the one hand, Kelsen’s reflections on compromise took place during the interwar period, in a climate of social division and class warfare that was apparent in the political balance of and threat to the new republics, particularly the Weimar and Austrian republics. How could the class warfare that emerged in Europe be prevented from threatening political life? That is the question raised by Kelsen and other writers such as Hermann Heller³, Rudolf Smend⁴ and Erich Kaufmann⁵, who constantly thought about democratic political institutions, particularly parliamentary institutions, with a view towards getting a social plurality to coexist politically. If the question of integration in democracy remained essential for Kelsen, his reflection was not oriented towards the quest for social or political homogeneity, in opposition to the works of Smend, Kaufmann and Heller. His scientific contribution remains in theorising compromise as the privileged mechanism for managing and resolving the conflicts that are a part of democratic life.

On the other hand, Kelsen forged his own conception of compromise in the specific discursive context of the German interwar period, during which this notion acquired a strongly depreciative connotation, mainly by authors such as Carl Schmitt and Rudolf Smend (Caldwell 1997: 125). Note that the strongest critics of compromises or coalitions sometimes emerged from the same source that denounced the deleterious effects of parliamentarism and political parties. For instance, Moisei Ostrogorski, Gaetano Mosca, Robert Michels and Carl Schmitt

2. In 1979, Joseph H. Carens (123) indicated that “the first definition of ‘compromise’ [was] offered by Webster’s New Collegiate Dictionary (1951)”. Kelsen’s first unnoticed definition of compromise was given in *Allgemeine Staatslehre* (1925). Note that Nancy Rosenblum mentioned Kelsen and his valorisation of compromise in two specific notes in *On the Side of the Angels* (2008: n. 109, p. 473).

3. See (Heller 2000: 261).

4. See (Smend 1994: 475-481).

5. See (Jacobson, Schlink 2000: 20).

vehemently rejected this combination of intrinsically linked elements⁶. For these authors, political parties often make compromises that are irresponsible regarding the state's unity (Schmitt 1996: 88). Consequently, Kelsen's case for compromise has to be considered as an attempt, on the one hand, to re-evaluate the idea of compromise and, on the other hand, to revitalise the practice of compromise, notably among political parties⁷.

My contribution will take the following steps: First, I will disentangle the ingredients and functionalities of compromise in the context of democracy, as it appears in Kelsen's works, including *Allgemeine Staatslehre*, *The Essence and Value of Democracy* and *General Theory of Law and State*. Second, I will emphasise the questions that are currently arising regarding the special link that the Austrian jurist established between his conception of democracy and the notion of compromise.

2. THE INGREDIENTS OF KELSEN'S DEFINITION OF COMPROMISE

In *Allgemeine Staatslehre*, Kelsen characterised compromise as containing five elements that are compressed but connected and, above all, consistent with other reflections in several of his works:

- a. Compromise means to replace what breaks connections with what makes them.
- b. Every exchange, every contract, is a compromise, for to compromise means to contract.
- c. All social integration is ultimately possible only through compromise.
- d. Indeed, the majority itself can arise only through such compromise.
- e. The derogatory, contemptuous judgement that is not infrequently expressed about the principle of compromise, and about an attitude inclined towards compromise, comes neither from the ideology of liberty nor from thinking about self-determination⁸.

6. See (Schmitt 1988: 20).

7. "Since the Reichstag had no direct influence on the formation of a cabinet, the German parties had developed stubborn ideological convictions and a strong oppositional spirit. They lacked the ability to compromise, let alone to take practical responsibility [...]" (Schoenberger, 2000: 112-113).

8. These five elements are extracted from this occurrence: "Kompromiss aber bedeutet: Zurückstellen dessen, was die zu Verbindenden trennt, zugunsten dessen, was sie verbindet. Jeder Tausch, jeder Vertrag ist ein Kompromiss; denn Kompromiss bedeutet: sich vertragen. Alle soziale Integration ist letzten Endes nur durch Kompromiss möglich. Die Majorität selbst kann ja nur durch solches Kompromiss entstehen. Das abfällige, ja verächtliche Urteil, das nicht selten über das Prinzip des Kompromisses und eine kompromissgeneigte Haltung geäußert wird, stammt nicht aus der Ideologie der Freiheit, nicht aus dem Gedanken der Selbstbestimmung" (Kelsen 1925: 324).

Strictly considered, only two of these elements can be thought of as definitional components: *Compromise means to replace what breaks connections with what makes them, and to compromise means to contract.* The last three elements—the device for social integration, the dialectic process between the majority and the minority that is essential to the survival of both and the instrument of political self-determination—can be perceived as justifications for or rationalities of the principle of compromise. Note that in *The Essence and Value of Democracy*, Kelsen mentioned another functionality of compromise, which is the regulation of political emotions; this will also be developed. Let us assess these elements in detail:

Tableau 1. *Kelsen's components of compromise*

Definitional elements of compromise	To repulse what separates and to encourage what links	To contract between antagonist parts				
Rationalities of compromise			Device for social integration	Dialectic process between the majority and minority essential to the survival of both	Instrument of political self-determination	Regulation of political emotions

A) *To repulse what separates and to encourage what links*

The first element that Kelsen submitted—“to repulse what separates and to encourage what links”—is in line with classical definitions of compromise and may be regarded as being close to the requirement of “mutual concessions”. In *General Theory of Law and State*, Kelsen expressed the idea of ‘mutual concessions’ more directly: “Compromise means the solution of a conflict by a norm that neither entirely conforms with the interests of one party, nor entirely contradicts the interest of the other” (Kelsen 2007: 288). The component of mutual concessions—which Kelsen expressed in different ways in *Allgemeine Staatslehre* (1925), *The Essence and Value of Democracy* (1929) and *General Theory of Law and State* (1947)—can be seen again in later definitions, notably those given in the *Webster's New Collegiate Dictionary* (1951)⁹ and by Rintala (1969)¹⁰, Nachi (2006)¹¹,

9. Compromise is defined as “a settlement of differences by arbitration or by consent reached by mutual concession” in *Webster's New Collegiate Dictionary* (1951).

10. Rintala (1969: 327) described compromise in its positive meaning as an “adjustment to the views of others with the aim of common action”.

11. See also (Nachi 2006: 143–74).

May (2011)¹², Van Parijs (2012)¹³, Bellamy (2012)¹⁴ and Fumurescu (2013)¹⁵. Consequently, this aspect of Kelsen's definition of compromise presents nothing very original: It conforms to the definitions of compromise quoted above and is not directly—in opposition to other aspects expressed by the Austrian jurist—related to his theory of democracy.

Note that the distinguishing feature of “mutual concessions” or—as May expressed—of “support for an inferior position” allows compromise to be differentiated from consensus: “When parties reach consensus, they agree that a particular option is the best choice to make. When parties compromise with each other, they continue to regard other options as superior” (May 2011: 583). According to Bellamy, compromise can also be distinguished from coerced agreement by being voluntary. “[I]t is assumed that they [politicians] always have alternatives or could choose not to act at all” in making compromises (Bellamy 2012: 449). Note that Hans Kelsen's works do not distinguish among compromise, consensus and coerced agreements.

B) *Compromises as contracts between antagonist parts*

The second element of the contract introduced in Kelsen's definition is also present in Fumurescu's characterisation but is less frequent in other definitions. According to Fumurescu, compromise was originally considered a verbal contract to avoid the uncertainties engendered by recourse from a formalised court¹⁶. For Kelsen—for whom considerations regarding compromise are transposed on the level of collective political decisions—the notion of contract mostly concerns the relation between the minority and the majority. An implicit contract would compel the majority not to systematically act with violence against the minority¹⁷ and would compel the minority to tolerate, in accordance with democratic rules, the norms

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12. Here is the full definition of compromise that May gave: “This definition [of compromise] captures three essential features of the core meaning of compromise: it is (i) a collective action concept involving (ii) support for an inferior position motivated by (iii) the presence of disagreement between parties” (May 2011: 583).
 13. “To be able to say what constitutes a good compromise, we must first know what a compromise consists of. I shall here adopt a broad and value-neutral definition which is in line with the common usage of the French noun ‘compromis’ and the English noun ‘compromise’: *a compromise is an agreement that involves mutual concessions*” (Van Parijs 2012: 467, emphasis in the original).
 14. “According to the standard definition, compromise involves disagreement between two or more people who need to make a collective decision, in which all parties settle for less than they believe they are entitled to” (Bellamy 2012: 448).
 15. See n. 16.
 16. “Compromise is a word of Roman origin, designating a reciprocal promise (a co-promise) to solve a dispute by abiding by the decision of an impartial third party, a *compromissarius*. It was a verbal contract meant primarily to avoid the hassle of a formalized court of justice, and for this reason it was rather popular, especially during the early Middle Ages. It later acquired a second, mostly forgotten, meaning as a method of election, mainly but not exclusively inside the Church. In both cases, the selected *compromissarius* served as a representative for the parties or the communities involved. These basic facts are rather well known, at least by specialists” (Fumurescu 2013: 4-5).
 17. See (Kelsen 1925: 324).

that it would not have chosen itself. Compared with the so-called conventional definition that Fumurescu also conveyed, the Kelsenian definition contains an element of moderation and an attempt to avoid a violent confrontation, particularly between the minority and majoritarian parties. Compromise is praised here because it creates a climate of moderation among institutions and, above all, political parties¹⁸. In 1979, Kuflik expressed a similar argument when he affirmed that the “primary purpose of truly democratic institutions is to inhibit the formation of policies that are not, in large measure the product of accommodation on the widest possible scale” (Kuflik 1979: 41). This argument is central to Kelsen’s plea of compromise, and his defence can even be summarised around it, allowing him not to take into account substantial or “end-state” considerations and consequently to stay coherent with his positivist perspective on compromise. Note that in *Allgemeine Staatslehre*, Kelsen concluded his considerations regarding democracy’s ability to regulate political affect¹⁹ by mentioning the theory of contract, which he considered fiction but which remains according to him a useful heuristic device for characterising the relations between antagonist interests in democracy (Kelsen 2006: 139).

C) *All social integration is possible only through compromise.*

For the Austrian jurist, compromises constitute the privileged mechanism for managing and resolving the conflicts that are a part of democratic life. This is clearly expressed in *Allgemeine Staatslehre*, when Kelsen affirmed that “every social integration is in the end only possible through compromise” (Kelsen 1925: 324). According to him, the unity of the state is never sociological and is ultimately a product of the coherence of a juridical system that is created by being based on the successive decisions of the majority. However, these decisions emanating from the majority must be moderated by the will of the minority. Such a perspective on integration has engendered resistance from true defenders of democracy, such as Hermann Heller. According to him, integration cannot be summed up in a continuously renewed compromise between the majority and the minority. For Heller, and in opposition to Kelsen, social and political homogeneity are still meaningful and do not have to be considered a noxious illusion:

Democracy is supposed to be a conscious process of the formation of political unity from bottom to top; all representation is supposed to remain legally dependent on the community’s will. The people as a plurality is supposed consciously to form itself into the people as a unity. For the formation of political unity to be possible at all, there must exist a certain degree of social homogeneity. So long as there is belief in such homogeneity and the assumption that the possibility of arriving through discussion at political agreement with one’s opponent exists and so long as can one debate with one’s opponent and renounce suppression by physical force (Heller 2000: 260).

18. This element of moderation is also visible in the words of another very zealous defender of compromise, John Stuart Mill: “An indispensable requisite in the practical conduct of politics ... is the readiness to compromise, a willingness to concede something to opponents and to shape good measures so as to be as little offensive as possible to persons of the opposite view” (Mill 1977: 514).

19. See n. 24.

In Kelsen's view, theories that presuppose a social unity or that postulate homogeneity or a convergence of wills among members of the same community are untruthful. These doctrines are essentially used to deny the conflicts that can arise in a state and are, therefore and by nature, ideological. Moreover, granting a certain reality to the concept of the "will of the state" is "to hypostatize²⁰ an abstraction into a real agency, that is, to ascribe to a normative relation between individuals a substantial or personal character" (Kelsen 2007: 185). Essentially, "depicting the state as a tool for the common interests of a unified community confuses the *ought* with the *is*, the ideal with reality" (Kelsen 2013: 39-40, emphasis in the original). In the first place, Kelsen's understanding of democracy has been rid of the fictions of the general will, political oneness and objective interest of the state (Vinx 2007: 69). Therefore, in Kelsen's view, no harmonious society exists with a spontaneous conciliation of interests²¹, and neither the regulation of divergent interests nor, ultimately, social integration can be achieved except through negotiations that are always provisional. Harmony in a political community can result only from a renewable compromise between the different actors belonging to the plurality (Kelsen 1925: 324). Ultimately, the legal order represents a compromise among the interests of the most important groups.

Regarded from the point of view of rational cognition, there are only interests, and hence conflicts of interest. Their solution can be brought about by an order that either satisfies one interest at the expense of the other, or seeks to achieve a compromise between opposing interests. (Kelsen 2007: 13)

D) *The majority can arise only through compromise*

In *The Essence and Value of Democracy*, Kelsen established the dependency of the majority on the minority. According to him, the minority cannot be deprived of its rights without leaving the democratic process; the minority's ceasing to take part in the decision-making process would weaken the whole system of representation and consequently threaten the majority situation:

A dictatorship of the majority over the minority is not possible in the long run, if only because a minority reduced to having absolutely no influence will finally abandon a participation that is merely formal and therefore worthless or even harmful for it in terms of forming the general will; thereby it will take away from the majority its very character as a majority, since by definition a majority presupposes a minority (Kelsen 2013: 69).

To understand the particular link that Kelsen established between the majority principle and the notion of compromise, I have to call attention once again to his understanding of the principle of the majority. For him, the latter "does not

20. By "hypostatize", Kelsen means to change one category into another—in this instance, an abstraction into a real entity.

21. "First of all, basic harmony of interests in all areas does not exist right from the start in any human society; such harmony must be created through constant, continually renewed compromise, as even the most subordinate differences of opinion can become vital conflicts of interest" (Kelsen 2000: 103).

mean that the will of the numerical majority prevails” (Kelsen 2013: 69), but that it first reduces the countless impulses which engender social and political divisions in dividing society essentially into two groups (Kelsen 2013: 69). Regarding these two groups—the majority and the minority—Kelsen considered that even if they differ numerically, “their political significance and social potency” (Kelsen 2013: 69) are not so different, as they take part in the same “force of social integration that sociologically characterizes the principle of the majority” (Kelsen 2013: 69). In short, the principle of the majority has, for Kelsen, the function of aggregating and integrating the diversity of political preferences in dividing the latter in two groups. Under this perspective, every majority needs a minority to justify itself and consequently cannot be “dictate[d] from the majority against the minority” (White, Ypi 2016: 151). Consequently, the majoritarian system is intrinsically linked with the idea of compromise. To attest to this, Kelsen affirmed that the denigrators of the majoritarian principle are also the denigrators of the idea of compromise itself²².

Finally, and to summarise points C and D, the development of compromise between the majority and minority, for Kelsen, is a sign not only of good integration but also of democratic vitality. In a chapter of *Allgemeine Staatslehre* that Kelsen specifically dedicated to forms of government (“Staatsformen”), including the polar pair autocracy-democracy, he established as a distinguishing criterion the type of political integration that the state adopts (Kelsen 1925: 326-327). “Dynamic” integration characterises democracy, while “static” integration goes more with autocratic states. A dynamic integration of a plurality assumes that the “harmony” that reigns in the relevant system results from constant renewals of the arrangements between the majority and the minority, in contrast with autocratic regimes, which do not tolerate negotiations about the distribution of power. In 1969, Marvin Rintala reaffirmed Kelsen’s intuition that a political system can be characterised by its specific attitude towards compromise: “It could be argued that every political system can be classified by students of comparative politics on the basis of its prevalent attitude toward compromise” (Rintala 1969: 326).

E) *Compromise and self-determination*

Finally, for Kelsen, self-determination means that norms are worked out through the autonomy of the will of the members of the state or their representatives. Respect for the principle of autonomy or self-determination constitutes the dividing line between regimes. People live in a democracy insofar as they submit to the rules that they have chosen. However, this principle of self-determination has to be restricted because it is impossible to meet the requirements of unanimity without giving up on any changes to a given order. Hence, the inevitable existence of conflicts and divergent points of view within a state imposes limitations on self-determination, i.e. on respect for the principle of unanimity. According to Kelsen, majority rule is most likely to ensure maximum autonomy while allowing changes

22. “The majority principle is rejected because – rightly or wrongly – the compromise for which the majority principle provides the requirements is rejected” (Kelsen 2000: 103).

in the social order²³. Knowing this, relations between the majority and minority cannot become a domination of the latter by the former; if that were the case, the principle of self-determination would be openly violated. Even though the majority principle is compatible with his realistic definition of democracy, Kelsen tried in all of his works to moderate it. This moderation also works through the valorisation of compromises. The relations established between the majority and the minority should not be the oppression of one by the other:

Compromise is part of democracy's very nature. Compromise means the solution of a conflict by a norm that neither entirely conforms with the interests of one party, nor entirely contradicts the interests of the other. Insofar as in a democracy the contents of the legal order, too, are not determined exclusively by the interest of the majority but are the result of a compromise between the two groups, voluntary subjection of all individuals to the legal order is more easily possible than in any other political organization. It is precisely because of this tendency towards compromise that democracy is an approximation of the ideal of complete self-determination (Kelsen 2007: 288).

Consequently, for parliamentary compromise to be an instrument of political freedom, the representation of political forces must be as finely tuned as possible. Therefore, Kelsen defended proportional, rather than majority, representation (Kelsen 1925: 349). Kelsen's case for proportional representation coincides with a particular understanding of the political body as a set of groups with patently contradictory opinions and values. In his view, political parties represent this diversity by dividing up seats in accordance with their electoral strength (Kelsen 2013: 70).

When compromise brings together most of the political forces, Kelsen did not think this is just a second-best mode of the formation of the state's will. On the contrary, it is highly valued because it provides a solution to conflict, and although it does not naturally fully meet the interests of the minority, neither is it completely contrary to them (Kelsen 2007: 288); it therefore allows an approximation of a democratic ideal. Consequently, the notion of compromise can be understood as embodying the principle of self-determination, which Kelsen considered a crucial element for distinguishing democratic from non-democratic regimes. In fact, compromise pragmatically guarantees the autonomy of the formation of the state's will by the necessarily fragmented public body.

F) Tool for expressing (and not repressing) political emotions in the public sphere

For Kelsen, compromise is related to democracy in another way: through the field of psychoanalysis. Actually, Kelsen emphasised the democratic virtues of compromise based on the recognition, expression and reconciliation of conflicts. Compromises appear to be agents of stability in democratic regimes because they allow the expression of political emotions in the public sphere, which, if they are

23. "[Yet] in practice, compromise constitutes a real approximation to the unanimity that the idea of freedom demands in the development of the social order by its subjects, and, hence, the majority principle, in accordance with the idea of political freedom, proves valuable in this regard as well" (Kelsen 2013: 76)

driven back to the private sphere—or the unconscious mind—might eventually lead to violent reactions, rebellions or even revolutions. In autocratic regimes, political stability rests on the repression of political emotions into a sphere that is comparable to the individuals' unconscious (Kelsen 2006: 139). The psycho-emotional situation (“seelisch-politische Situation”) constitutes a distinctive criterion for differentiating democracy from autocracy. If democracy is able to strongly regulate political emotions through compromise—for which the expression of affects is a necessary precondition—then autocracy must be characterised by the repression of political affects²⁴.

After having exposed the different dimensions of Kelsen's notion of compromise, I would like to consider another theoretical issue: Did he consider this notion as a process or an outcome? In confronting the different occurrences where he introduced the notion of compromise, it seems that it is extremely speculative to affirm that he would prefer one or the other option. Actually, both perspectives are merged. In *The Essence and Value of Democracy*, Kelsen qualified compromise as “favouring that which binds over that which divides” (Kelsen 2013: 70). This could give the impression that the kelsenian perspective is more process-oriented, but immediately after, he affirmed that “every exchange and every contract represents a compromise” (Kelsen 2013: 70), which is more outcome-oriented. Finally, he said that “to compromise means to get along [vertragen]” (Kelsen 2013: 70), which is more related to the process itself. The same ambivalence can be noticed in *Allgemeine Staatslehre*²⁵. Note that in his *General Theory of Law and State*, compromise is clearly presented as a solution to a conflict more than as an outcome (Kelsen 2007: 288). The confrontation of the different occurrences in *Allgemeine Staatslehre*, *The Essence and Value of Democracy* and *General Theory of Law and State* does not give a clear answer regarding the status of his notion of compromise: Both elements of process and outcome are present. My understanding is that Kelsen did not think of compromise through these kinds of categories.

3. WAS KELSEN RIGHT?

In Kelsen's view, compromise is one of the means by which parliamentary regimes reduce the risk that majoritarian parties will abuse their power. In our day, comparative political science—notably, the work of Arend Lijphart—has confirmed Kelsen's intuition: “Consensus democracies” characterised by power sharing are

24. “The mechanics of democratic institutions are directly aimed at raising the political emotions of the masses to the level of social consciousness, so that they can dissipate. Conversely, the social equilibrium in an autocracy rests on the repression of these political emotions into a sphere, which may be compared to the subconscious on the individual psychological level. This easily leads—if one wants to use the modern psychoanalytic theory of repression—to a heightened disputation towards revolution” (Kelsen 2013: 74).

25. This is more process-oriented: “Kompromiss aber bedeutet: Zurückstellen dessen, was die zu Verbindenden trennt, zugunsten dessen, was sie verbindet” (Kelsen 1925: 324), but this is more outcome-oriented: “Jeder Tausch, jeder Vertrag ist ein Kompromiss; denn Kompromiss bedeutet: sich vertragen” (Kelsen 1925: 324).

more widely considered by their citizens to be “kinder and gentler” regimes than majoritarian democracies of the Westminster type, which are sometimes seen as elective dictatorships (Lijphart 1999: 300). Kelsen expressed great confidence in the self-limiting capabilities of majorities. He saw the relationship between majorities and minorities as being almost necessarily inclined towards compromise, especially in parliamentary arenas. However, the prominent place that Kelsen gave to compromise in the relations between parties raises some questions:

First, can every political conflict be regulated by a compromise, as Kelsen suggested? We can object by arguing that not every conflict is compromisable. According to Golding, “The compromisable conflict situation is one in which there is a partial coincidence of interests and which, therefore, contains the seeds of competition and cooperation” (Golding 1979: 10). Mutual concessions are feasible only if there is a “coincidence of interests or values”, as each has to “gain something from a compromise” (Gaus 1990: 343). Also, as Schumpeter expressed, if compromises are related to contradictory and ultimate values, they are tendentially more difficult to realize, because the differences can be irreducible²⁶. Kelsen clearly underestimated the conflictual situations in which the protagonists have no latitude and no interface to compromise.

Second, are self-limitations by the parties that hold the majority and, therefore, the practise of compromise really natural in representative democracies? In Kelsen’s account, the majority never seems to exclude the minority from the formation of the will of the state, out of fear of endangering the democratic process. For him, the application of the majority rule is accompanied almost naturally by self-limitation. In the interwar period, Hermann Heller had already been less optimistic about this when he emphasised the need to ensure that democracies contain integration mechanisms. Thus, Heller suggested that relations between majorities and minorities are not necessarily inclined towards moderation and can sink into violent power relations (Heller 2000: 261). Moreover, if the minority has no realistic prospect of ever ending up in power, especially if its minority status includes structural characteristics that are linked to religion or language, the majority certainly has fewer incentives to include the minority’s preferences. In 1993, Fritz Scharpf, in “Versuch über Demokratie im verhandelnden Staat”, reformulated Heller’s concerns by recalling that the restrictions that the majority imposed on itself do not stand on their own because they require certain conditions, to which Kelsen perhaps paid too little attention. Indeed, accepting that the majority party (or coalition) will limit itself, for example, by not imposing on the minority either unsustainable costs or norms that violate its identity, presupposes some degree of identification of the majority with the minority. To refer to the necessary identification of the different parts of the community with each other, Scharpf talked about a “Wir-Identität” that makes it possible for the majority not to abuse its power, and

26. “They may be bridged by compromise in some cases but not in others. Americans who say, ‘We want this country to arm to its teeth and then to fight for what we conceive to be right all over the globe’ and Americans who say, ‘We want this country to work out its own problems, which is the only way it can serve humanity’ are facing irreducible differences of ultimate values which compromise could only maim and degrade” (Schumpeter 2012: 427-428).

it is also possible for the minority not to perceive the vote of the majority to which it is subjected as an external domination but rather as a mechanism for collective decision-making. A deficit of “Wir-Identität” would expose the minority to risks that Scharpf very clearly understood. When societies lack a feeling of sameness (Wir-Identität), mutual empathy and trust, there is a risk that majoritarian mechanisms will be used to pursue narrow utilitarian, individualistic or particularistic ends²⁷.

Third, if majority decision-making is so naturally self-limiting, notably through compromises, why do we have to think so much about ways to limit it? Kelsen seems remarkably contradictory when, on the one hand, he paid so much attention to political-legal devices for moderating majority decisions, such as constitutional courts, while, on the other hand, he displayed excessive confidence in the majority’s self-restraint. I think this paradox can be explained partly by the discursive context from which these Kelsenian propositions emerged. Kelsen’s optimism acted as a kind of counterweight to an intellectual climate that was suspicious of, or even hostile to, parliamentary systems. At the same time, in his attempt to rescue the reputation of parliaments, he was not blind to their potential abuses. Therefore, he recognised the need to constrain parliaments (i.e., to moderate them).

Fourth, is it reasonable to build a theory of democracy based on compromise without considering their moral limits or their legitimate bounds? If this can be perceived as a weakness or as a mistake, as Kuflik defended it—without considering the specific case of Kelsen²⁸—then it is perfectly coherent with Kelsen’s positivist perspective. Accepting the assumptions of legal positivism means renouncing the claim of producing just solutions to social conflicts. To use Kuflik’s words, Kelsen’s theory of democracy could be synthesised as a “morality of pure compromise” that excludes substantial limitations²⁹. Actually, Kelsen’s defence of compromise contains no elements regarding the substantial “end-state”³⁰ of compromise and nothing about the quality of the output. In Kelsen’s work, compromise has to respect, first of all, the principle of self-determination. Note that although Kelsen did not accept any *jusnaturalist* bounds in the process of compromise formation, he would have been perfectly in favour of constitutional constraints or limits.

Moreover, is it sensitive to consider that rules in democracy can rest on compromise if citizens follow only their personal (or group) interests, as Kelsen suggested? On the contrary, does compromise in democracy require some elements of personality or of temperament that would not be oriented just towards the pursuit of self-interest? This is what Kuflik suggested:

If the willingness to compromise is only a manifestation of the desire to advance one’s own (individual or group) interests – albeit within the limitations imposed

27. See (Scharpf 1993: 26).

28. When Kuflik elaborated the relations between morality and compromise, he considered, notably, that “from a moral standpoint, some claims are non-negotiable” (Kuflik 1979: 38).

29. “Here, suspicion arises that a true democrat is a person without any sense of the limits of legitimate compromise and that a morality of ‘pure compromise’ is at the foundation of democratic theory” (Kuflik 1979: 41).

30. I took this expression from (Kuflik, 1979: 39).

by constitutional democracy – then democratically enacted laws and policies will typically serve an amalgam of private interests at the long-term *expense* of the public interest (Kuflik 1979: 43-44).

Fifth, wouldn't compromise—which seemed to Kelsen to be so necessary for the proper functioning of democracy for pacifying the relationship between the majority and minority—be endangered by the revival of the imperative mandate that he so greatly endorsed? Kelsen's support for the imperative mandate, which was aimed at bringing the will of elected officials closer to that of the voters, seems to contradict his concept of democracy that was understood as a space for negotiation and compromise—among party leaders, for example. In fact, negotiation can occur only between agents who have some leeway with their principals—the people being represented—which undermines the imperative mandate. It must be concluded that Kelsen was not aware of this contradiction; the processes of compromise are not compatible with strict injunctions from the members of political parties. To understand this blindness, it is useful to remember the reasons why Kelsen supported the imperative mandate. His support can be explained only by his consistent desire to strengthen the links between elected officials and their electorates. This relationship is inconceivable without political parties acting as intermediaries. In his view, political parties are best able to aggregate and represent voters.

Sixth, is the art of compromise really typical of democratic regimes? Current research questions whether compromise is a distinguishing feature of democratic life. In the light of studies on dictatorial regimes, is it really true that they do not regularly engage in compromise themselves? For example, Jennifer Gandhi and Adam Przeworski questioned this idea and noted that dictatorships do resort to compromise, especially when confronted with a high risk of rebellion. If, in line with these writers, we accept that observation, then the Kelsenian characterisation of democracy—broadly associated with the idea of compromise—will be weakened:

When the opposition is strong, the dictator makes more extensive policy compromises and shares some rents, just enough to prevent the opposition from rebelling. Finally, when the opposition has little chance of overthrowing the dictator but the dictator cannot inflict much damage on the opposition, the dictator offers few compromises and the opposition does rebel (Gandhi, Przeworski 2006: 2).

Of course, it could be argued that although compromise may be necessary in autocracies when rebellion threatens, it is not the rule. Compromise is not even a natural response in such regimes, in contrast to democracies, as understood by Kelsen and others, such as Norberto Bobbio (Przeworski 2010: 116).

4. CONCLUSION

In this contribution to the existing research, I scrutinized the specific and characteristic places that compromise holds in Kelsen's theory of democracy. On the one hand, compromise is, for him, a pragmatic instrument of the principle of self-

determination. On the other hand, compromise is perfectly compatible with his positivist perspective because it requires no preconception of the good or the just. The regulation of political conflict can occur only through compromise. He treated social and political harmony as dangerous fictions or ideologies. Kelsen's positive attitude towards compromise is strongly correlated with the awareness that integrating an idea of truth into the public debate is impossible and unachievable³¹. As Edmund Burke suggested, considering compromise as a cardinal virtue goes together with the belief that "man acts from motives relative to his interests, and not on metaphysical speculations" (Burke 1987: 126). John Morley's epigraph at the beginning of his book *On Compromise* confirms this idea: "It makes all the difference in the world whether we put Truth in the first place or in the second place" (Morley 1908). In these specific considerations, Kelsen is in line with these authors in describing the political task of parliaments, whose purpose is not to reach absolute truth or an absolute state's will but to reach the midpoint between the interests of the majority and the minority, which means compromise (Kelsen 1925: 359). If there is no common good and there are no absolute values that can be proclaimed and imposed in democracies, then the only way to overcome differences in a political community is to encourage compromise. Compromise is intimately associated with democracy because, according to Aumann's expression, every group and each political party "agr[ees] to disagree" (1976: 1236-1239).

However, and as noticed in the second part of this article, Kelsen's reflection on compromise entails some weaknesses I would like to sum up briefly. First, Kelsen had a very optimistic approach to the notion of compromise, which he viewed as a panacea to regulate political divergences in democracy. This leads to excessive confidence in the political potentialities of compromise. It means that he did not pay any attention to the minimal conditions in which compromise would be possible. Not every political conflict can be regulated by compromise, especially the ones that involve strong values. Moreover, Kelsen did not ask about the (moral) limits of compromise. Finally, Kelsen remained very optimistic about the majority's willingness to make accommodations in the direction of the will of the minority. Second, Kelsen's defence of compromise contains contradictions: On the one hand, why is it so necessary to think of institutions of moderation to counterbalance the majoritarian will, if the majority is so self-limiting? On the other hand, how is it possible to support the imperative mandate and simultaneously to encourage compromise among representatives, knowing that the compromise requires a certain amount of leeway regarding their electors? Third, Kelsen is wrong in creating such an exclusive link between democracy and compromise, taking into account that

31. This is in opposition to Mill, who assumed that the opposition to opinions and measures among politicians contains elements of truth according to his "fallibility argument" (Thompson 2007: 172, n. 15). This caused Mill to say that: "In politics, again, it is almost a commonplace, that a party of order or stability, and a party of progress or reform, are both necessary elements of a healthy state of political life; until the one or the other shall have so enlarged its mental grasp as to be a party equally of order and of progress, knowing and distinguishing what is fit to be preserved from what ought to be swept away. Each of these modes of thinking derives its utility from the deficiencies of the other; but it is in a great measure the opposition of the other that keeps each within the limits of reason and sanity" (Mill 2015: 47).

autocracy can also proceed to making compromises. To conclude, Kelsen's explicit and excessive optimism regarding political compromise, above all to regulate majority-minority relations as a counterpart, in that sense, prevented Kelsen from reflecting in depth on the feasibility and fallibility of compromise.

Apart from these criticisms, the great merit of Kelsen's perspective was certainly to find justifications for compromise in democratic regimes and to stress the significant place that compromise must occupy in the theory of democracy. His contribution was not only significant in that regard but also audacious knowing that, in the interwar period, Kelsen was one of the rare theorists of democracy who considered compromise to be a positively desirable practice and not a second-best option.

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