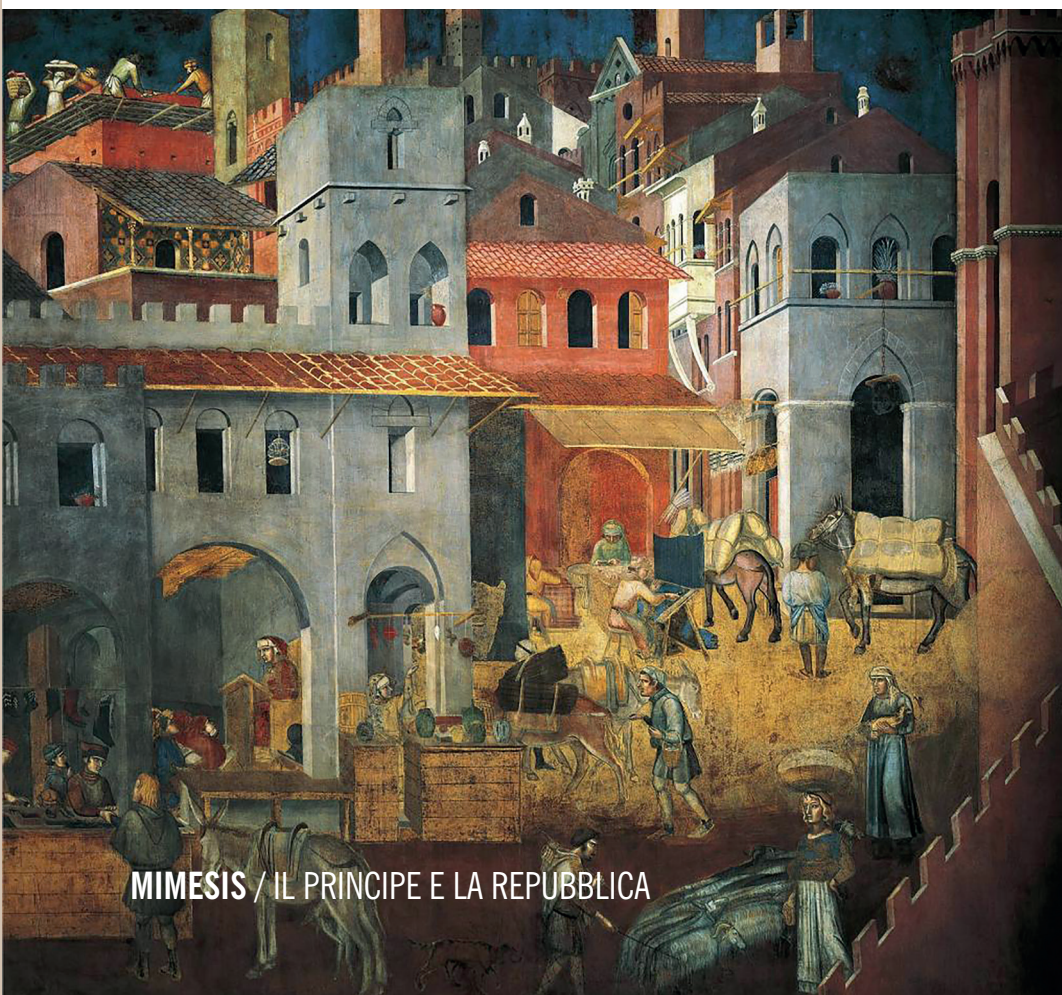


# Πολιτεία LIBER AMICORUM AGOSTINO CARRINO

A CURA DI  
CARMINE DE ANGELIS E ANTONINO SCALONE



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## WHAT ARE DEMOCRATIC VALUES? A 21<sup>ST</sup> CENTURY KELSENIAN APPROACH

“Democratic theory” is the core subject in the large area of social and political thought today. Why, one might wonder, is there a problem of democratic theory at this point in history at all? Democratic practices are enshrined in the constitutions of all the major countries of the world. The justifications of democracy have been around for centuries. What else is there to say? This is the question that Robert Dahl himself asked, in the book that marked the beginning of the rebirth of this topic, *A Preface to Democratic Theory* ([1956] 2006). The question is closely connected to Kelsen, or rather to Kelsen’s reception or lack of reception in the United States during this same period (Scheuerman 2014).

There is a simple, reductive, answer to this question. Most of what passes for democratic theory is, implicitly or explicitly, concerned with justifying, expounding, or elaborating the conditions for democracy of a particular kind. The kind of democracy being justified is “social” democracy. This ‘democratic theory’ is disillusioned about natural rights, skeptical of the ability of democracy as presently embodied in actual constitutional orders to deliver social justice or even democracy itself without a strong state assuring welfare and mediating class conflict, and generally regards actual liberal democracies of the past as inadequate and failures because they did not do so (e.g., della Porta 2013; Ringen 2007).

Social democracy needs a theory because it contains elements that liberal democracy and its theory neither countenanced nor was, in some important respects, consistent with. Moreover, as an ideal as yet unrealized, social democracy has elements which may not be consistent with one another. The task of ironing out these potential inconsistencies, and replacing the elements of classical conceptions of liberal democracy that are not reconcilable with

the “social” of social democracy, provided a forum for saying what did remain to be said.

The demand for such a theory, or the interest in having one, came at a particular moment. The end of the Second World War ushered in the age of the welfare state understood as a democratic welfare state. The vogue for general planning in the thirties, the New Deal in the US, were responses to and alternatives to the ideal of socialism. But the ideal of socialism substituted “fraternity” or solidarity for notions of democratic process, and specifically for “liberal” notions of democratic process. The new model, after the war “for democracy,” was a hybrid, neither a natural extension of socialism, nor of liberal democracy. Nevertheless these regimes proved to be popular. They were thus democratic in a particular sense: they grew out of actual compromises between people with different views and attained majority support through established procedures.

Democratic theory was a means of making it an extension of liberal democracy in theory as well as in fact, and also to legitimate the compromise intellectually, in the hope of providing a new ideological basis that would resist the ideologies of Left and Right of the past. Dahl’s own thinking grew out of one might call the “problems of liberalism” tradition, which was concerned with the many internal and practical contradictions and anomalies of the liberal idea.

Most of these arose from the conflict between freedom and the need to protect the liberal order from the consequences of the exercise of freedom, from Voltaire’s “no freedom for the enemies of freedom,” to Kant’s denial that there was a conflict between genuine freedom and obedience to the state. But on the Left, the largest strand of this tradition was the conflict between the ideal of political equality and the reality of economic inequality, which was taken to undermine and nullify the claims of liberal democracies to be genuinely democratic or even to provide for genuinely liberal discussion.

The issues here defy easy summary, but are epitomized by the conflict between the means necessary to produce the conditions for liberal democracy and the limitation on state power that is

central to liberalism. Liberalism is characterized by its preference for indirect means, and therefore for law that structures interests and opportunities rather than commands actions. The primal form of equality for liberalism is equal treatment under the law. The stance of the liberal state with respect to interests, opinions, moral stances, and religion, is neutral. The idea of the Rule of Law is underpinned by this idea of neutrality. Social democracy regards this preference as an obstacle to achieving the substantive reality of equal political participation, which is held to require substantial rather than nominal equality—the equal right of rich and poor to sleep under bridges.

The Left was faced with the practical problem of the inability of the proletariat to bring about a full socialist revolution. The Left had little interest in or patience with the dogmas of liberalism, most of which involve freedom. They were ambivalent at best about the “rule of law,” seeing property rights in particular as a serious constraint on the powers of the social democratic state to bring about the reforms that socialist parties desired. Constitutionalism was regarded similarly. The language of rights was treated with suspicion, and only used when it could be extended to cover rights to human well-being, as it was in the negotiated language of the UN Charter, which transformed “rights” into a Leftist usage. This set the stage for the project of “democratic theory,” to which we now turn. But before examining this project, it is necessary to consider the thinker that Agostino Carrino has spent much of his career explicating: Hans Kelsen.

### 1. – *Kelsen’s Response.*

These accounts face a basic issue—they are contrary to democracy itself. They express ideals that their advocates wish were the ideals of the electorate, but which are not: the electorate agreed to a bargain when they accepted the welfare state, but have failed, for the most part, to accept the theory. The rise of populism, both the envy populism of the Left, and the freedom and accountability populism of the Right, are better indicators of the underlying beliefs of the voters. The center finds ever-shifting compromises

between Left and Right. The democracies we have are democracies that have been democratically arrived at, or ratified, or accepted through the acceptance of revisions over long periods. They represent the “will of the people” through the legal means that have been democratically established for doing so. But they nevertheless have a basis in the idea of democracy itself.

The root meaning of democracy, as Kelsen pointed out, was the rule of the people. And one can ask whether the procedures that have been democratically adopted have become inimical to the rule of the people. But this is not normally how these critiques have been constructed. Rather, they assume something like a theory of false consciousness in which the voters fail to understand their own interests, and thus accept both a system of voting and a set of rulers that amounts to a failure of “democracy” in the theoretically preferred sense. With this we come to a key metaphilosophical distinction: between teleological and non-teleological accounts of democracy, with some roots in neo-Kantianism, in the distinction between constitutive and regulative. If one defines democracy in such a way that it does not fully exist, one has a “critical” basis for evaluating actual regimes, and a guideline for achieving democracy. The signs of such a conception are in terms like “genuine,” “substantive,” and “real.” The model for this line of argument is Babeuf: democracy means equality, genuine equality is equality of incomes, and therefore only a regime that enforces this is genuinely democratic. But one can translate the same thinking in dozens of similar ways, merely by substituting the defining terms for democracy, for example, by defining it in terms of undistorted communication, or service to the people, or non-domination, or a long list of welfare state goods, as in the writings of Stein Ringen, or for that matter in terms of human rights. Each of these concepts places the concept outside the process of political decision.

What was Kelsen’s response to this line of thinking? His account of democracy was an attempt to distinguish the essentials from the incidentals. And there was a good reason for doing so. The construction of “democratic theory” also purported to identify “essentials” or “fulfillments of the concept of democracy” that were lacking in actual democratic regimes. So the issue turns into a metaphilosophical one: how does one determine essentials or

fulfillments, and more importantly, from the perspective of the problem of authority, of who determines them. Kelsen provides a non-teleological, minimalist alternative definition, nicely summarized in the introduction to the English translation of *The Essence and Value of Democracy* ([1929] 2013). The fundamental principle—the genuinely essential one—was this:

democracies are predicated on the idea that coercive legal norms are only legitimate to the extent that those who are subjected to them have contributed to making them, while all other political regimes are predicated on a principle of ‘authority’. (Urbinati and Invernizzi Accetti 2013: 5-6)

“Contributed” is a minimal concept, but it has an important implication. To “contribute,” there must be means of contributing. And Kelsen adds to this by defining this further by the requirement that those who are subject to coercive legal norms are also able to contribute to their revision.

If we take this minimal definition as a starting point, we can then inquire into the status of other aspects of democracy. We can ask what is essential, what is contingent, and what are conditions of different forms of democracy, such as liberal democracy, and ask, especially, what the relation between liberalism and democracy is, and where freedom in general has a place in democracy. Kelsen has a concept for the features of democracy that are practical requirements or necessities for democracy. Some of them are universal. Others are requirements for particular ends chosen politically. Thus “For Kelsen, on the other hand, ‘formal’ and ‘substantive’ democracy are ‘inseparable from one another’, inasmuch as the former constitutes the only available means for realizing the latter” (Urbinati and Invernizzi Accetti 2013: 7). This is a universal consideration. The necessity is causal: there is no other way to cause contributions to the revision of coercive norms without a procedure.

Freedom, however, is a different matter, but there are important parallels. If one believes in natural rights, rights outside of any political order, which limit the validity of the claims of law or of the people, one must also consider that the actualization of such rights is inseparable—not conceptually, but practically—from a legal order. The same goes, as Kelsen was at pains to explain, for

natural law: the term does not describe a coercive order, but must be implemented by one, at which it is no longer “natural,” but artificial and human. The slogans of natural rights and natural law are nevertheless important. They can be implemented by legislation into a coercive order, at which point they become rights and law, but in the sense of civil rights and law, the rights and law of the particular coercive order in question. So one can have a democratic commitment to such rights, but not as part of democratic theory itself, because the idea of such rights is contrary to the basic principle of democracy, for reasons that will become apparent.

What counts as “free” is a matter of political choice. In this respect, Phillip Pettit’s principle of non-domination, his substitute for freedom as non-intervention (Pettit 1997), is a valuable pointer: what different groups consider to be inappropriate state action regardless of how they are supported by law produced by democratic procedures will vary from society to society, and from group to group. They will also vary from individual to individual. Pettit assumes that we can always refer the question of what counts as domination to the common knowledge of a group, though he acknowledges that this creates a problem of minority groups within a political order whose common knowledge differs from that of other groups. It is of course a contingent fact that there is such “common knowledge” or that particular groups possess it. If they did, it would be democratic for the coercive legal order to abide by it. But as a practical matter, this too requires a procedure, and there is no procedure for converting common knowledge, or even recognizing it, apart from the ordinary procedures of voting and representation, delegation of authority, and so forth. Thus this consideration returns us to procedures.

Procedures, however, involve the same dilemma: they can be justified on higher principles, or justified as democratic choices. To justify them on higher principles is by definition to justify them on other than as democratic choices, unless these “principles” are converted into democratic choices by being chosen through democratic procedures by those who contribute to the making of the coercive rules under which they live.

Majority rule, and procedures that enact it, have some important advantages: it “ensures that more individuals are in favor of the exi-

sting social order than opposed to it at any given time” (Urbinati and Invernizzi Accetti 2013: 11). And there are two constraints that favor it:

Anything less would mean that the will of the state could from its very inception conflict with more wills than it agrees with. Anything more would make it possible for a minority, rather than the majority, to determine the will of the state by preventing an alteration of that will. (Kelsen [1929] 2013: 31)

Why does this matter? It is difficult to see how either alternative could be regarded as “democratic.” Both alternatives imply minority rule: the first by beginning with minority rule; the second by allowing a minority to prevent change. But if these constraints are temporary and revocable by procedures that are agreed on through other temporary and revocable procedures, we can approximate a situation in which “more individuals are in favor of the existing social order than opposed to it” over the long run, rather than at any given time, and generate consent for a legal order that involves constraints on the revision and enactment of laws—perhaps greater consent than any order which submits to a procedure of immediate majority rule.

We can begin with the term of the day: “democratic values.” This is a sufficiently confused concept that it requires a ground up analysis. We can start with the minimal definition of democracy given by Kelsen. To live in a democracy requires one to submit—to give up one’s freedoms—to with one’s peers, for example under legislative authority. Acceptance of this condition is the central, and perhaps the only specifically democratic value. But the burdens of this value are so great that it is not, in pure form, a value that anyone will accept without reservations. So democracies invariably seek a compromise that limits the power of peers. And typically this takes the legal form of constitutional limits on democratic power: democracy in chains. “Democratic values,” in short, in their extreme form, are always in tension with individual wills, as Kelsen would put it. So another value is implied by the first value: to place oneself under the control of one’s peers requires an abandonment, or at least the subordination, of those values which conflict with this value, meaning those values that exclude, as a matter of principle, submission to the will of particular peers.

To put this in positive terms, it requires what Kelsen explicitly calls relativism. Kelsen says that Relativism is the only philosophy consistent with democracy. This relativism has seemed by many to be a bizarre conclusion. By itself it appears not only to undermine the idea of a philosophy aiming at one or another form of genuine democracy—*Babouism* or its variants—as anti-democratic, which is already implied by the argument that democracy requires that the people choose the ends of the state, but to undermine any value commitments. But relativism is a meta-philosophical doctrine about the rational equality of ultimate value choices. It does not preclude any ultimate value choice, as long as it accepts this, combined with the acceptance of the relativity, or the equal rationality, of all such choices.

Relativism about *ultimate* values, however, is not the same as relativism about all values. There are many *intermediate* values—and politics for the most part is about such values (Turner and Factor 1987). These might include such things as national greatness or government efficiency, both of which have an effect on the achievement of the ultimate values of individuals but are not themselves such values—though they might be for some very unusual people or people in unusual circumstances, such as the battlefield. And with intermediate values there are non-relativistic considerations, of causal possibility, of achievability, and of conflicts with other values. This is the domain Kelsen treats as “sociotechnical” considerations.

If we add the sociotechnical consideration that the achievement of democratic rule in the sense of contribution to the revision of the legal order requires its own procedures, we can add some other values, notably the value of adhering to the procedures themselves. The first and most obvious is the value of acting in accordance with the procedures—obedience to the rule of law, in short. So the appropriate “democratic values” for a given political order will be one that respects, at least as a starting point for revision, the particular compromise that occurs in particular legal orders: a respect for procedures, and for the procedures that have been democratically chosen. We can call this “constitutional consent.” And although it falls short of immediate “democratic con-

sent” to revisions of the law, there are many other practical obstacles to a pure system of democratic consent which produce more serious problems which this kind of consent may protect against.

Most of these problems become evident in a complex social order, with mass participation, and a powerful state. And with this complexity comes a more complex division of political labor, and the need for values that correspond to this division of labor. Kelsen assumes the existence of a judicial function, and an executive or administrative function. And these involve distinctive values and expectations: a judicial ethic, and an administrative one. The actual values of the holders of particular positions may vary significantly from one regime to another, and within ministries, according to the position in question.

## 2. – *Socio-Technical Means.*

Kelsen’s category of socio-technical means carries much of the burden of his argument, but it needs both scrutiny and revision, and also extension beyond its main object, the defense of the party system, to the administrative part of the state. The key to his discussion of these “means” is that they are on the fact side of the fact-value distinction, following Weber on value neutrality. A few of Kelsen’s arguments in this category can serve as examples:

It is a well-known fact that, because he is unable to achieve any appreciable influence on government, the isolated individual lacks any real political existence. Democracy is only feasible if, in order to influence the will of society, individuals integrate themselves into associations based on their various political goals. Collective bodies, which unite the common interests of their individual members as political parties, must come to mediate between the individual and the state. (Kelsen [1929] 2013: 39)

Several things need to be said about the form of this argument. In the first place, it is a factual argument that depends on context, not a direct implication of the notion of democracy itself. There might be a technological or organizational means better than parties for individuals to achieve influence on governments. One

obvious one is through lawsuits—a means so powerful that governments find ways to restrict them, through such doctrines as sovereign immunity or, in the United States, judicial conventions about “standing” that allow bureaucracies to avoid accountability, or the doctrine of qualified immunity, that allows criminal acts by persons acting for the state to be subject to lower legal standards than persons acting privately. But another is through the claim of expertise—which has its own complex implications for the concept of democracy. These turn out to be closely related.

What is *directly* implied by the concept of democracy, as distinct from being a socio-technical means? Consider the following more or less standard view of the necessity of certain kinds of liberal discourse for democracy, expressed as a democratic value:

freely forming one’s convictions (often by confrontation with the reasoning and convictions of others) and knowingly bringing those convictions to bear on political decisions (often by trying to get others to change their convictions) (Cohen 2001: 72–3; Dworkin 2002: 202–3). (Kolodny 2016: 9)

and

it isn’t enough to cite the value of *forming* convictions about policy. One can have ample, fully resourced opportunity for forming convictions about policy without any opportunity to *influence* policy in light of those convictions. (Kolodny 2016: 9n15)

This freedom to form convictions and affiliations can be taken as a condition of political participation, and therefore an implication of the core democratic value. And this condition implies its own values, which can be added to the list of “democratic values.” It is the condition of being open to persuasion, and therefore to self-skepticism and self-doubt. We can call this value “epistemic humility.” Without it there is no point to government by discussion, the kind of opinion formation discussed earlier, because there would be no point to discussion. Democracies can of course survive fundamental disagreements about values, if they are not comprehensive, i.e., ideological. Thus particular values—the

right to abortion, for example—can be subject to democratic decision, as long as the participants accept the fundamental democratic value of acceptance of the authority of the people and place it above these values, even if they do not accept the values themselves as “relatively” valid. But more commonly there is an agreement to limit political decision-making—to restrict the state so as to prevent it from making such choices—so that these value conflicts do not become “political.”

### 3. – *Accountability.*

What democracies also require, which Kelsen may have assumed would simply follow from the procedures by which the will of the people would be expressed, is accountability: the coercive power to enforce this will over officials as well as representatives. This must be said to be as essential to the concept of democracy as a condition of meaningful political participation. Without it there is no point to persuasion or the making of policy: the state could do as it pleased. It is this value that is at the core of the “democratic deficit” of the EU and the rage against the regulatory state in the US.

Where does accountability fit into the scheme of democratic values? Is it derivable from, or an extension of, a fundamental essential value, or is it part of a socio-technical means? If the fundamental value here is acceptance of subordination to one’s peers, and majority voting according to rules, through parties and representation, is a socio-technical means, or a procedure to implement the value which is optional, in the sense that there may be others that also work, it seems as though there is a natural division. The essential principle of subordination to one’s peers applies universally within a democracy—to officials, experts, citizens, children, and so forth. We may agree to exemptions from this principle, as we do when we establish rights, but to do so is a political act.

Making this distinction sheds some light on recent writing on democracy, and also on the role of democratic procedures in relation to officials and official discretion. Consider this statement from the conclusion of Donatella della Porta’s *Can Democracy be Saved?*

If really existing democracies suffer from a “vast underutilization of political resources” (Offe 2011, 461), an increase in the participatory and deliberative qualities of democracy can help to overcome it. To the question, then, “Can democracy be saved?,” the answer could therefore be optimistic, but the (ever-mutable) solutions require changes in conceptions and practices of democracy as much as in our ways of looking at them. Delegation and majority voting no longer work in the face of more and more defiant citizens and complex, global problems, which require local as well as specialized knowledge. An image of democracy as a market perniciously pushes for individual egoism when collective commitment is called for instead. Conceptions and practices of democracy as participation and deliberation can help to address democracy in this “era of defiance” (Rosanvallon 2006). (della Porta 2013: 189).

This is to say that the older arguments for parties and representation no longer work, and that in the face of popular resistance and problem complexity, the solution is a different socio-technical means, using “participation and deliberation.”

Do “complex, global problems, which require local as well as specialized knowledge,” get resolved by “participation and deliberation”? This is a socio-technical problem, and the bias of the literature, including Kelsen’s writings, has been on the democratic character of policy making. But the kind of problems della Porta mentions are precisely the kind which involve experts—with local as well as specialized knowledge. And the relation participants have and can have with these experts violates core democratic values. The relations involve deference to, and trust of, people recognized as superior: an aristocratic rather than democratic set of values. “Deliberation” with superiors is inherently unequal. Yet complex problems normally are addressed by experts, groups of stakeholders assembled to negotiate solutions, experts interacting with locals, and so forth. These efforts typically seek legitimation—for their superior knowledge—rather than “collective commitment.” The goal is acquiescence, and treating the results of the experts’ proceedings as matters of fact to be dealt with. They fall into the category of “authority.” Collective commitment, in contrast, is something else.

How does this kind of policy making structure, which is the norm in modern states, relate to democracy? This is a crucial question for democratic theory. In the first place, it renders most of the discussion of the public sphere irrelevant: these discussions are between people who are insulated from democratic accountability as Civil Servants, experts from universities or corporations, who further insulate themselves by acting collectively, through internal bodies that distribute responsibility in such a way as to void individual responsibility. Where do “democratic values” fit in here? Kelsen remarks that “[h]e who in his political desires and actions is able to lay claim to divine inspiration or otherworldly enlightenment may well be right to be deaf to the voices of his fellows” (Kelsen [1929] 2013: 104). Experts assert authority—epistemic authority, on the basis of this-worldly enlightenment, but are equally deaf to the voices of their fellows who lack expertise. If democratic values are the condition of democracy, claims of expertise are themselves in conflict with them: epistemic humility is the opposite of claims to the kind of expertise that relates to policy or to implementation.

One might think that the fact-value distinction would help here: to be an expert is to be on the side of fact alone. But of course not only policies, but also socio-technical means of governance come with values—to go from facts to a policy requires values. So these discussions can never be on the side of fact alone, and in practice, are shot through with valuative considerations, including considerations about how much risk to take in accepting given knowledge claims.

The apparent attraction of deliberation is this: it achieves both commitment and a result, without reference to agreement on procedures, like majority rule voting, which seems like an arbitrary convention when related to truth or wisdom, and which legitimates a policy indirectly, by reference to the convention, while deliberation seems to hold the promise of providing both rational justification and commitment without reference to a convention and thus without submission to the wishes of others. But collective commitment is a fantasy, or a horror. The point of democracy is the convention of submission to the majority in the face of disagreement.

There is a reason that deliberation does not actually happen in the real world in the way that participatory democracy envisions. People are not competent to participate in deliberation and do not wish to. And the phrasing by della Porta contains its own explanation: complexity. Complexity can be dealt with by deliberators in think tanks coming up with proposals that politicians can adopt. But parties and individual politicians no longer can serve this purpose, precisely because mastering a variety of complex issues is beyond their capacities.

So what kind of democracy is possible in the face of complexity and expert knowledge? A more plausible model, involving accountability, would be this: experts, stakeholders, and so forth do the work of generating policy proposals, which are then ratified by representatives. The role of democracy in this process is to hold the representatives accountable. To put this in terms established by Jon Elster, the role of democratic procedures in these cases is as a “security against misrule.” Elster focuses on juries and other secondary bodies that oversee and correct for decision makers (2013). This is an indication not of the decision-free character of these processes, but rather the reverse—that they are so clearly discretionary that protection against misrule is necessary.

How do these processes relate to the core value of democracy? “Contributing” to the creation of the coercive order under which one lives, and submission to one’s peers, is an ongoing process, for Kelsen. So the processes of accountability are part of this as much as policy formation or what Habermas calls collective will formation. And in the face of complexity, they are the most important part: it is only when the unintended consequences of policies made to deal with complex problems are revealed and apparent to non-experts that the public can make a meaningful contribution. And it is routinely the case that policies affect different groups differentially, and in unanticipated ways. Thus the mechanisms of correction—protests, removal from office, and prosecution for abuses of discretion—become more important than the mechanisms of policy creation, from the point of view of democracy and democratic values.

The urgent problem for modern democracies is with the excesses of the administrative state—a practical socio-technical neces-

sity—and the expert or the bureaucrat who is part of this apparatus who lays claim to a this-worldly enlightenment of a kind that entitles him to be deaf to the voices of his fellows. And this may be the best argument for democracy—as the ultimate security against misrule. It is only this role of democracy that can address the problems that arise when an insulated organ, such as the judiciary, subject to an indirect and weak form of democratic accountability, declines to serve the purpose it was designed for, namely to curb administrative overreach. But the threat of ultimate accountability mitigates the necessary delegation of authority to courts or regulatory agencies. To strengthen democracy it is this power that needs to be enhanced. The phenomenon of populism and protests are intelligible precisely because they reflect the failures of multiple bodies—parliamentary parties, courts, ministries, and so forth—in the face of complexity. Rather than “threats to democracy,” they are ways of giving voice to a demand for accountability, which is a part of the core or essence of “democratic values.” The idea that the “norms of democracy” require deference to these bodies is, as Kelsen would say, as he did of the criticisms of political parties, “an ideologically veiled resistance to the realization of democracy itself.” (Kelsen [1929] 2013: 39)

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