

ad Hans Kelsen. Rechtpositivist und Demokrat

Horst Dreier

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Horst Dreier does not hesitate to acknowledge that Hans Kelsen was one of the greatest legal theorists of the twentieth century, if not *the* greatest. However, he does want many more people to think about Kelsen and he wants more of them to think about Kelsen as a forceful proponent of democracy. Each of these two challenges is legitimate and Dreier more than succeeds in achieving both of them.

ad Hans Kelsen has three essays – the first one is a biographical sketch whereas the other two are devoted to different versions of what Dreier calls “Demokratiethorie.” The first essay also contains a section on “Demokratiethorie” which Dreier maintains is fundamental for Kelsen’s thinking. Dreier points to Kelsen’s “Wesen und Wert der Demokratie” as one of the most fundamental documents in which democracy is defended and he points out that he was mostly alone in promoting democracy during the Weimar era (32). But in this section Dreier concentrates primarily on Kelsen’s life and reminds us that Kelsen’s citizenship changed three times – when he moved to Cologne, then when he went to Prague, and finally, when he emigrated to the United States. Dreier suggests that he never really felt at home in any country and that Kelsen’s real “Heimat” was “Wissenschaft” (38).

The second essay is “Kelsens Demokratiethorie: Grundlegung, Strukturelemente, Probleme” and there Dreier focuses on “Wesen und Wert der Demokratie.” He points out that it first appeared in 1920 and was reworked and expanded in 1929. Dreier suggests that it has become a classic, not just because of Kelsen’s fame, but because of its clarity and elegance in his defense of democracy (39). He also reminds us that Kelsen

reworked this article again and published it in English in 1955. Thus, democracy was a central theme in most of Kelsen’s life. Dreier indicates that Kelsen contended that the core of democracy was freedom and that this was connected to his championing of the freedom of the individual. The difficulty is then resolving the tension between the individual’s desire for freedom and society’s need for order – the tension between “Ich” and “Wir” (39-42). Full freedom can never be achieved for any individual; however, the state can allow a fair amount of freedom to flourish through majority rule, pluralism, and representative democracy. That is because it is a government *for* the people and even more because it is *by* the people (51). Dreier believes that Kelsen was Carl Schmitt’s antipode, and he spends considerable effort to debunk Schmitt’s notion of “Volk” and his claim that democracy and parliamentarianism are incompatible. In contrast, Kelsen defended parliament as the place where compromises can be reached, and he believed in genuine public opinion and not Schmitt’s fantasies about referendums and dictators (53-57). In other words, Dreier does not see any real opposition between the “democratic collective” and “individual freedom” and he emphasizes Kelsen’s role as the “defender of democracy” (67, 71).

The third essay has a three-fold purpose. It was a lecture that Dreier gave in honor of Clemens Jabloner’s sixtieth birthday so it begins and ends with references to Jabloner. It is also a defense of Kelsen’s “value relativism” against Joseph Ratzinger’s criticism. What had prompted Ratzinger’s critique was Kelsen’s rejection of natural law. But as Dreier points out, value relativism is not the same as value nihilism (84-85). Finally, this

essay is an attempt to answer the Biblical question “what is truth” by looking at Kelsen’s comments on John 18 (75). Dreier concluded his first essay by quoting Kelsen’s final lecture in California. There, Kelsen admitted that he did not know what “absolute justice” was and he referred to it as “the beautiful dream of humanity” (38). What he did know was, for him, justice was the justice of freedom, peace, democracy, and tolerance (ibid.). Just as he rejected the notion of absolute justice, Kelsen also refused to believe in an absolute truth. Nonetheless, he believed in the shared wisdom that makes up scholarship (101). Compared to the first essay with its focus on Kelsen’s life and the second one which is centered on his conception of democracy, the third essay is the least focused; thus, is less satisfactory. However, like the others, it contains a wealth of information and has many critical insights.

Those who are unfamiliar with the life and work of Hans Kelsen will learn much from the first essay. Those who are interested in understanding Kelsen’s defense of democracy will be rewarded by the second essay. And those in search of a clear explanation of his legal relativism will appreciate the third essay. But everyone will appreciate the cost of this book as it is just under 15 Euro. Hans Dreier set out to draw more attention to Kelsen, the man, and his conceptions of democracy and freedom, and he has done an admirable job in doing so.