

THE ROLE AND NATURE OF FREEDOM IN TWO NORMATIVE THEORIES OF DEMOCRACY

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Abstract: The article examines the role and the nature of freedom in two normative concepts of democracy, in the work of Hans Kelsen and of Emanuel Rádl. Both authors wrote their work on democracy between the two world wars. Kelsen formulated his concept of democracy in *On the Substance and Value of Democracy* (1920), a book which has clearly been influenced by the political thinking of Kant and Rousseau. Kelsen shares Rousseau's idea of general will and on this basis the principle of majority. Rádl outlines his theory of freedom and democracy in *The War between the Czechs and the Germans* (1928), *Nationality as a Scientific Problem* (1929) and *On German Revolution* (1933). Rádl distinguishes between three types of freedom and democracy: natural, majority and contractual. Rádl asserts that only in the third type of freedom, in which freedom is connected with responsibility and the law is freedom true. He considers the first type of freedom to be anarchical freedom, which can easily be misused. The second type of freedom is better than the first, but worse than the third. The author compares these concepts of freedom and democracy then and today and shows how they are linked to the questions of justice and solidarity at national and cosmopolitan levels.

Keywords: Freedom; norms; democracy; Rádl; Kelsen.

Introduction

In this paper I will examine the role and nature of freedom in two normative theories of democracy from the period between the two World Wars, namely the theories of Hans Kelsen (1881-1973) and Emanuel Rádl (1873-1942). Some aspects of these theories may bring forth new insights into contemporary democratic discourse. In contemporary democratic discourse, three theoretical strands (or models) can be identified: the liberal, the republican and the deliberative (Habermas 1996, 277-292). These strands obtained their particular characteristics during the debates that followed Rawls's *A Theory of Justice* (Rawls 1999). These three strands can be understood as an alternative to the empirical theory of democracy, which is present in contemporary political science. The main inspiration came from Schumpeter's concept of "procedural" democracy (democracy as a method of competing for power) (Schumpeter 2000), which does not discuss normative assumptions nor the consequences (which are implicitly present) of their conceptions. Liberals place emphasis on individual lives with individual freedom, which is so-called negative freedom. The first kind of economic liberalism (a somewhat extreme version), known as neo-liberalism, was outlined by Friedrich von Hayek, and more recently in the Czech Republic by Václav Klaus. In political terms this actually refers only to economic freedom. Another branch of

liberalism is ethical liberalism that associated with Locke, Kant, Mill, and later Rawls and Dworkin, where the key norm is political freedom. The republicans, drawing on thinkers such as Aristoteles, Hegel, Tocqueville, Arendt and the communitarians, such as Sandel, Charles Taylor and Walzer, value the political community in which we live and the potential to participate in turning democracy into positive freedom. Deliberative thinkers, for instance Habermas and Ferrara, seek a third way between liberal and republican conceptions—they use elements of both theories. Individual freedoms and the rights of the liberals are connected with the positive freedom of participation in their creation, through public, legal, common, civil and institutional (political and legal-constitutional) communication and decisions. The issue of freedom in contemporary debates is concerned with questions of justice and solidarity. Similarly democracy does not only refer to democracy today in a Western national state but it is also a question of trans-national or cosmopolitan democracy. In the conclusion, I will attempt to question whether Kelsen's and Rádl's conception can contribute anything to contemporary discussions about cosmopolitan democracy, justice and solidarity.

The main theme of Kelsen's theoretical work was the normative theory of law. Kelsen was one of the first thinkers (Popper came later on) who started to consider a normative theory of democracy, even if he did not use this combination of words. The word normative comes from the word norm. A norm and a value together form the key concepts contained within the neo-Kantian philosophy of human sciences associated with its Baden school. Rádl was originally a biologist then later a theoretical biologist and at the peak of his philosophical career, in the period between the Two World Wars, he was a philosopher of religion (Rádl 1921), science (Rádl 1926), history (Rádl 1925; Rádl 1929; Rádl 1932-3) and democracy. Rádl's normative theory of democracy advocated individual freedom and the concept of a just democracy which aimed to improve constrained Czech-German inter-war relations.

The Role of Freedom in Kelsen's Theory of Democracy

Kelsen was a theoretician of law who was born in Prague and later studied and taught in Austria, Germany, Switzerland, Czechoslovakia and from 1939 in the United States of America. Kelsen worked on the concept of norms. His last work was called *General Theory of Norms* (*Allgemeine Theorie der Normen*) (Kelsen 1979). Kelsen is considered to be a legal positivist, the author of "pure legal theory," and some views even posit him as a founder of this theoretical school. He had a significant influence on the inter-war Austrian and Czechoslovak constitutions (*Philosophisches Wörterbuch* 1965). We will look at his early work devoted to the theory of democracy and entitled *On the Substance and Value of Democracy* (Kelsen 1920). In this book Kelsen considers democracy from a normative perspective. From his noetical point of view, society is possible only as a system of connections. Kelsen concludes that there are not only natural laws but social laws as well. A norm as the foundation of a social norm stands up against a causal law. The norm in Kelsen's conception has a similar role to that found in Kant's philosophy. The norm is connected with the concept of freedom, meaning the negation of natural and therefore causal laws.

Freedom is both the title and the topic of the first chapter in Kelsen's theory of democracy. He distinguishes the idea of freedom from the political reality of freedom. Freedom is a kind of protest against an alien will, against the torment of heteronomy—this

part of the argument originates in Kant's philosophy. Kelsen understands alien will to be a burden. He asserts that another man is equally human as the first, so he concludes that the other man has no right to rule over the second. We are all equal. So, in Kelsen's concept, the idea of equality represents the inevitable condition of freedom.

Kelsen reminds us that there is a tradition of positing the ancient notion of freedom against the German idea of freedom. The ancient notion of freedom means the political self-determination of a citizen, whereas the German idea of freedom means a natural, state-free being. In Kelsen's conception the difference is not a historical-ethnographic antagonism, but it is a matter of scale. It is part of the process of transforming natural freedom into social or political freedom. But Kelsen believes that political freedom still contains the remnants of original, natural and anarchic freedom, within which the individual is located against society. He sees this original natural freedom as important for the position of the individual in society. Freedom of anarchy turns into freedom of democracy.

Kelsen, like Rousseau (whom Kelsen considers to be the most significant theoretician of democracy), poses a fundamental question: How can we find a social form which protects every member and where every individual is connected to all the other members and yet remains as free as before. Kelsen does not believe, as Rousseau does, that only direct democracy is real democracy, but he does conform to Rousseau's view that the individual is free only at the moment of voting and, especially where voting is successful. Kelsen values Rousseau's claim to vote as unanimously as possible, but he adds that Rousseau's claim is valid only for the founding agreement. Kelsen proposes that an inverse option should be added, making it possible to leave society, to cancel the validity of a social order and to refuse to acknowledge it. In my opinion this second option indicates that Kelsen goes beyond Rousseau's social agreement and offers a voluntary, truly free civil loyalty.

In this respect Kelsen sees an irresolvable conflict between the idea of individual freedom and the idea of a social order which needs an objective validity. Kelsen proposes arguments for the existence of society and state. Kelsen states that the decisions of the majority create order, realized in accordance with the idea of freedom. He also argues that a person who votes with the majority is not subordinate only to his own will. He very quickly realises that when he changes his opinion. The last and strongest argument supports the majority principle at the same time. Kelsen argues for the majority principle not from the point of view of the idea of equality as is usually the case but from the perspective that when voting, fewer people go against the general will of the social order.

This grounding means that the concept of freedom is transformed, leading us from liberalism to democratism. In adhering to Rousseau's style of democratism, Kelsen goes so far as to assert that when individuals participate in creating democracy, in making state order, the ideal of democracy becomes independent of the individuals who create it. Democracy can exist even if individual freedom is destroyed and liberal ideals are negated. Kelsen asserts that it is feasible because it is constructed by the anonymous persons of a state. Only the citizen of a free state can be free. In this respect Kelsen defends the consequences in the spirit of Rousseau: a citizen who is in contradiction to the general will can be coerced into freedom (Kelsen 1920, 17).

In this paragraph we will see that Kelsen, like Rousseau, places democracy and its general will higher than individual freedom. In comparison to Rousseau, Kelsen is a defender

of constitutional, representative and parliamentary democracy. He prefers Rousseau's intentional positive freedom to negative freedom. Kelsen is familiar with the institution of human and civil rights but these rights do not play such a strong role in his conception as does creating democracy through general will. Kelsen understands democracy to be an expression of political relativism, which he posits against political absolutism. He ends his book with a rather sceptical outlook using the example of Jesus, who was condemned as a result of the way in which people voted. The unfortunate vote for the criminal Barabas against Jesus was a vote against democracy, not in its favour (Kelsen 1920, 90).

Rádl's Normative Concept of Freedom and Democracy

Rádl was originally a theoretical biologist and author of the successful *History of biological theories* (Rádl 1930).¹ He was a pupil of the theoretical biologist and metaphysical thinker Hans Driesch and of the philosopher and sociologist T. G. Masaryk. Before World War I his theoretical interests included biology, the philosophy of biology, the philosophy of the natural sciences, the philosophy of life and Masaryk's philosophical realism. After WWI he discussed the relationship between politics and religion and between East and West, the theory of science, the philosophy of history, ethics and political philosophy, in general. One of Rádl's main theses was a critique of nationalism, especially Czech nationalism and a critique of the democratic practice of that period. We can find Rádl's concept of freedom within democracy in *Válka Čechů s Němci* (*The War between the Czechs and the Germans*) (Rádl 1928),² *Národnost jako vědecký problém* (*Nationality as a Scientific Problem*) (Rádl 1929) and in *O německé revoluci* (*On the German Revolution*) (Rádl 1933).

Rádl's theoretical approach is hermeneutical and normative. The hermeneutical approach is mainly found in his philosophy of history. With the help of the neo-Kantian thinkers Windelband and Rickert and the neo-Hegelian Dilthey, he outlines a sense of life, history, poems, democracy and our actions, which is determined through our understanding and interpretation. Sense, justice, freedom and democracy are kinds of programmed and planned norms, which will be found in the future and which can be approached through our thoughts, speech, and actions (Rádl 1932). They are not what it is, but what it should be. The truth as a kind of meta-norm, no-norm is any fact or any reality; the truth is a criterion of norms, the norm of every norms. The truth is weaponless but at the same time it is the strongest thing; the paradigm of Rádl's concept of truth is Jesus (Rádl 1946).

Rádl distinguishes three models of democracy: organic, majority and contractual. These are also known as German, French, and Anglo-Saxon democracy. These three types did not refer to fate or a strong determination, but simply reflected the prevailing tendency of his times. Before Rádl began researching the various types of democracy, he asserted that

¹ This vitalistic history of biology in modern times was originally published in German (1905, 1913), then the first volume in Czech (1909), in Spanish (1931) and the complete works in Czech (2006).

² The title, *The War between the Czechs and the Germans* was a kind of provocation from Rádl. He did not want war, but peace. At the end of the prologue he wrote explicitly: "Nationalism means the philosophy of war between Czechs and Germans. My book offers peace between these old neighbours, often friends" (p. 14).

human life and its meaning is more important than a state; that public life is only a poor and pale reflexion of human life. Rádl is convinced that people are not (and certainly should not be) products of society but that they create society (Rádl 1928, 114-117). On the other hand, he was an irreconcilable critic of democracy as it was commonly understood and practiced during his life-time.

Rádl referred to the organic type of democracy as the *mythos* of nation and state and its foundation. He sees the concept of nation/peoples as referring to an organic unity, something like a tribe of people who are all related. This concept has its roots in German and Czech romanticism. Rádl shows that the Czech national revival is philosophically rooted in the romantic philosophy of nation and state as conceived of by Hegel, Herder and Fichte. Rádl asserts that even the Czechoslovak constitution contains features of organic theory. Rádl shows that Masaryk is the single exception: he offers a rational argument for political action, for resistance against the Austro-Hungarian monarchy and for a Czechoslovak democratic republic. Rádl was glad that we gained national and state freedom but he questions where the freedom of individuals resides and why people do not care about it.

Rádl has doubts as to whether it is possible to consider an organic theory of nation and state as democracy. Unfortunately, he thinks that a great number of people in this country consider their "national instinct" to be democracy. Majority democracy is in Rádl's conception more advanced than instinctive democracy. Majority democracy counts votes and the majority appears to be an absolute authority. Majority democracy has the advantage of offering individual free choice with the decisions of individuals. It lacks a concept of justice, which is present only in the concept of power. There is no criterion as to how to distinguish the will and despotism of the majority. The end statement on majority democracy is: "the majority wins". In Rádl's concept the end statement should be: "truth wins". Rádl sees another anomaly in democracy where there are laws without exception and without privileges. Majority democracy cannot consequently be realized. Rádl identifies a special case of majority democracy in Marxism and in the social democracy which derives from Marxism. The main weakness of this conception lies in the argument that violence rules the world together with a weak faith in freedom, moral authority and conscience responsibility before God.

Rádl believes that another value that his country lacks is loyalty, by which he means loyalty to family, school, political party, the church, government and the state. We can protest, refuse to obey a bad government and state, but we must be able to justify it. Every reasonable Czech had to realise that with resistance to the Austrian monarchy the obligations of loyalty were broken so it was necessary to bring good individual moral arguments. Rádl envisaged that the task for people in education was to show loyalty to the state, which represented a higher obligation than tribal feelings.

The contractual concept of society, state, democracy and the foundation of Anglo-Saxon public life has its roots in the beliefs of the Middle Ages in terms of the privileges which Rádl attributed to universities in the Middle Ages. It was apparent in Europe, especially in France, that the privileges of the king and the aristocracy were in effect a negation of freedom, but in England society kept a sense of privilege. Since the Magna Carta Libertatum, the privileges of aristocracy had been instrumental in defending the country and people against the king's errors. The rights of individuals are the basis of democracy

in England. A similar contractual concept can be seen in Switzerland and in America. In a contractual state, justice has priority over the state and the law. Laws are not for the state nor for the people, but for protecting order. Rádl sees the origin of this concept in the views of the first Christians. They organised themselves on the basis of Roman legislation. They were not anarchists, but they had no interest in having an emperor, a state or an army. They were persecuted because they represented a danger to the state, but not because of their fight against it. It was because they had found another state where individual conscience and its relation to God were the foundation of life. Also, during the time of the Reformation, the idea of the optimum relationship between the freedom of the individual and the state represented an unending quest. Rádl believes that the 17th and 18th centuries lost their sense for a spiritual concept of life and that their main interests became economic, which in turn became the root of economic liberalism. The state did not have to stand in the way of the economic freedom of the individual. Marx fought against materialism, egoism and the violence of individuals through materialism, which is egoism and the violence of the masses. In Rádl's theory, economic liberalism and Marxism committed similar mistakes. Besides economic liberalism there was spiritual liberalism in England and in America.

Rádl believes that human rights are the document of the sovereignty of the individual over the state. They are the criteria upon which the democratic character of states is based and represent a typical case of contractual democracy. Rádl sees their role where individuals protect a region in which they are sovereign. For example when an individual is not able to serve in the army on the grounds of conscience, the state has no right to coerce that individual. The conscience of the individual is in this case a higher authority than the state. Rádl introduces the question of collective rights. He remembers that for example in Hungary, Slovaks had good liberal individual rights before World War I, but no collective cultural rights. In this sense Rádl recommends that collective workers' rights and nationality rights be recognized (the first as a consequence of the social situation in Czechoslovakia in the 1920s and the second due to the status of German and other national minorities). Rádl believed that in order to ensure the stability and justice of Czechoslovak democracy, German and Hungarian inhabitants should have the same access to and be able to participate in political, cultural and social life as did the Czechs and Slovaks. Rádl saw human rights as the main guarantee of individual freedom and at the same time he supported their enlargement by collective (workers, nationality) rights. Rádl recommended that we should understand a nation in a conceptual and a political sense and not as a natural, original phenomenon.

Rádl initiated a provocative and interesting discussion with his assertion that people can choose their own nationality, because nationality is not a natural given, but a concept and a planned human construct. This issue appeared in connection with the national census of the inhabitants of Czechoslovakia in 1921. Census officials altered some of the details given by German inhabitants. Where those inhabitants had given their nationality as German and one of their parents was Czech, the officials altered that to read Czech nationality. Rádl asserted that the officials should have respected the expressions of free choice made by the citizens. This choice is down to the individual and is not necessarily dependent on the parents, the time, the place, and other conditions. This free choice is associated with thinking, deciding and responsibility. In other cases, when we think of the nation as a determined object, something like a fate that we cannot influence, we remain passive, we do not decide anything

and we do not bear any responsibility. Rádl turned his critique against the Czech nationalism which was apparent in this census. This nationalism was the conceptual child of German romantic nationalism. The paradox was that this nationalism had been created by German thinkers—Herder and Fichte—and at the same time it was targeted mainly against the Germans (Rádl 1929).

Rádl's relatively short, but sharp and witty pamphlet *On the German Revolution* (Rádl 1933) concerned the question of freedom in western society in 1933 and related to Hitler's seizing power in Germany in an almost legal democratic way, I would like to discuss one of the chapters, "On double freedom", here. Rádl compares natural freedom, freedom as a natural state with no restrictions, and freedom connected to the law. When we enter into a particular association we do it voluntarily but we must respect the rules of this association. Similarly when we choose marriage we are free in our choice but we are bound by the promise that we made. We can go to another country or break the promise only if we can provide good reason, for example a higher mission. Rádl was convinced that a great number of events occurring in western history over the last 200 years were made under the influence of natural freedom. Rádl argued that this kind of freedom is apparent in economic freedom and in the conception of human rights, where we suppose that we are born free; in the doctrine on the self-determination of nations; in radical pacifism; in the freedom of literary writers; in democracies where the principle of the majority decides and where people are the highest authority. He calls Rousseau the false prophet of modern democracy for his rule of *volonté generale*. The crisis of democracy from Rádl's perspective consists in the crisis of atomistic, liberal democracy, which knows only natural freedom. Rádl concluded: "As it is not possible to organise a state from a flock of monkeys so it is not possible to create a state from people who are only natural phenomena" (Rádl 1933, 20-26).

The Contribution of these Concepts of Freedom to a Contemporary Democratic Discourse

Both our authors presuppose that Kant's concept of freedom is the unconditional condition of practical philosophy to a certain degree, which means the concept of autonomy of the individual in the fields of ethics and law and partly politics. The Kantian way of practical thinking is very noticeable in the political philosophy of both Rawls and Habermas. Like Rousseau, Kelsen prefers positive freedom in the case of democracy but he does not think that we should decide the matter of state once and for all. On the contrary he recommends opening up the possibility of cancelling the contract, of leaving a society for another contract, providing that there is good reason for it. Kelsen stresses that this is to introduce the notion of democracy as an unfinished project, which must be decided again and again. I consider Kelsen's view of this one aspect of Rousseau's positive freedom to be highly controversial. The implications are the negation of negative freedom and the negation of individual rights and freedoms. Kelsen is aware of the conception of negative freedom and human as well as citizens' freedoms and rights but the concept of positive freedom has priority for him.

Rádl's main contribution to democratic discourse can be viewed in the distinction between natural and contracting (also called conventional, spiritual or political) freedom.

I would like to call it a normative freedom because for Rádl this concept of freedom is something which “should be”. That what should be is originally Kantian and later a neo-Kantian determination of norms. In Rádl’s eyes, natural freedom is simply anarchic, apolitical freedom, arbitrariness or even wilfulness and in this concept of freedom he saw the root of the crisis of democracy that occurred at that time. In Kelsen’s conception, natural freedom is hidden in political freedom. Kelsen’s thoughts are similar to Rousseau’s in that natural freedom is transformed onto a higher level in political freedom. Rádl emphasizes as do Masaryk (1925)³ or Popper (1945) that political freedom is freedom under the law, freedom connected with responsibility and in the case of natural freedom he sees no law or responsibility. Rádl observes the sharp opposition of these two types of freedom. I disagree with the important institutions of political freedom that Rádl outlined in *On the German revolution* as examples of natural freedom (Rádl 1933). Some of these examples are distorted.

I will mention just one institution as an example and that is the institution of human rights. Rádl argues against the “natural” origin of human rights. It is said: “People are born free.” This assertion is reasonable because people historically and even in the 20th century under totalitarian systems needed an authority which could protect them. This form of status did not automatically protect them, but by the end of the 1970s and 1980s communist states had to acknowledge the appeal of human rights to people, as for example the civil initiative called *Charter 77*, which had a specific political meaning. One can agree with Rádl that human rights are not of natural origin, but they have a spiritual, social, historical, legal origin, so one can accept them as important normative norms. Rádl’s solution that human rights are a kind of privilege and that for their other form of existence it is necessary to have faith in freedom under the law sounds rather conservative today but at that time it was based on a very sound reasoning.

I also believe that Rádl’s critique of the methods used in the nationality census was very significant. In his critique he defended the right of citizens to vote for their own nationality freely. He rejected nationally motivated endeavours to determine nationality through so-called “objective” features. Some census officials used this to try to “gain” more Czechs on the borderland where the German minority formed a majority. Rádl’s criticism was methodological, concerning problems and chaos within the census; moral, since the autonomy of the individual was not respected; and political, treating minorities in this way had negative consequences at the time and especially later. Unfortunately this quickly became an issue.

From the cosmopolitan point of view, I see Kelsen’s recommendation to acknowledge the right to leave one’s country or to reject the validity of the social (democratic) order as very significant. I think that democracy requires ongoing open and free discussion on not only practical issues but also on democracy as such and, it may even become a kind of referendum. This discussion is just one legitimate way of establishing and preserving democracy. The discussion on the international scene about the possibilities and boundaries of democratic freedom makes good sense. Cosmopolitan freedom should be connected with cosmopolitan responsibility, justice and solidarity. Cosmopolitan freedom and justice strikes

³ See the last part “Democracy and Humanity”, pp. 499-608. Masaryk meant by world revolution the struggle between democracy and theocracy.

an accord with different religions and cultures. The question of cosmopolitan freedom and justice considers the value of life and freedom of every individual (men, women and children of all races, cultures and religions). Kelsen did not discuss this question. Rádl brings up the issue with the theme of nationality rights. Rádl considered it simply in terms of a problem facing our state, but equal access to discussion and inclusion of all nationalities represents a good proposition for global justice as well. In a similar way these problems were discussed with the concept of multiculturalism (Taylor 1994). The problem of collective rights highlights the problem of individual rights which are not sufficiently recognised by cultural minorities who alone claim their own rights.

Political freedom is a necessary condition for establishing and preserving democracy, but political freedom as such is not enough. Political freedom must be connected with responsibility, with a certain concept of justice and citizens' solidarity. The other condition is not just democracy and justice within a nation state but we should also seek ways to enable a free, just and good life at the cosmopolitan level as well. However, we as citizens of the Western world do not have *a priori* solutions and so we should not coerce non-Western inhabitants to accept our solutions. Instead, we should seek these solutions in a common trans-cultural dialogue.

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