

LEVIATHAN E BEHEMOTH

Il buon uso degli spettri

Studi - Saggi - Agorà - Ziz

Collana della SIST – Società Internazionale di Studi sulla Statualità



*Società Internazionale
di Studi sulla Statualità*

Agorà 8

Fondatore e Direttore Francesco Di Donato

Condirettrice Sonia Scognamiglio

Comitato scientifico

Presidente

Michel Troper

Coordinamento e linee di indirizzo: Manuela Albertone, Torino; Francesco Di Donato, Napoli Federico II; François Quastana, Aix-en-Provence-Marsiglia; Diogo Sassetti Ramada Curto, Nova di Lisbona; Francesca Russo, Napoli Suor Orsola Benincasa; Sonia Scognamiglio, Napoli Federico II.

Componenti e rispettive sedi universitarie.

Mario Ascheri, emerito Roma 3; Giuseppe Astuto, Catania; Mamadou Badji, Dakar; Mauro Barberis, Trieste; Charles Baron, emerito Boston College; Boris Bernabé, Paris-Saclay; Pierre Birnbaum, Paris Sorbonne; Pierre Bonin, Paris Sorbonne; Gianfranco Borrelli, Napoli Federico II; Jacques Bouineau, La Rochelle; Josiane Boulad Ayoub, cattedra Unesco Montreal; Jean-François Brégi, emerito Anthipolis Nizza; Pierre Brunet, Paris Sorbonne; Christian Bruschi, emerito Aix-en-Provence-Marsiglia; Marcelo Campagno, UBA Buenos Aires; Stéphane Caporal, Saint-Étienne; Éric Carpano, Lyon III; Paolo Carta, Trento; Dario Castiglione, Exeter; Olivier Cayla, EHESS Paris; Jor-

ge Arturo Cerdio Herrán, Instituto Tecnológico Autónomo Città del México; Dino Cofrancesco, emerito Genova; Paolo Comanducci, emerito Genova; Maria Sofia Corciulo, emerita Sapienza Roma; Philippe Delaigue, Lyon III; Robert Descimon, EHESS Paris; Nicole Dockès, emerita Lyon III; Hugues Dumont, Bruxelles Saint-Louis; Silvio Gambino, emerito Calabria; José María García Marín, emerito Sevilla Pablo de Olavide; Éric Gasparini, Aix-en-Provence-Marsiglia; David Gilles, Sherbrooke; Claudia Giurintano, Palermo; Xavier Godin, Nantes; Éric Gojosso, Poitiers; Riccardo Guastini, emerito Genova; Johannes Helmrath, von Humboldt Berlino; Jérôme Henning, Tolosa; Ales-

sandro Isoni, Salento; Lucien Jaume, Cevipof, Paris; Jacques Krynen, emerito Tolo-
sa; Luigi Lacchè, Macerata e LUISS Roma;
Alberto Lucarelli, Napoli Federico II;
Roberto Martucci, emerito Salento; Fer-
dinand Mélin Soucramanien, Bordeaux;
Guido Melis, emerito Sapienza Roma; An-
tonella Meniconi, Sapienza Roma; Marco
Meriggi, Napoli Federico II; Marcel Mora-
bito, emerito Sciences-Po Paris; Tim Paul
Mulgan, Auckland; Séraphin Nene Bi,
Bouaké; Alfred Blaise Ngando, Yaoundé;
Pasquale Pasquino, NYU e LUISS Roma;
Risa Permanadeli, Jakarta; Alessandra
Petroni, Salerno; Rocco Pezzimenti, LU-
MSA; Otto Pfersmann, EHESS Paris; Ce-
sare Pinelli, Sapienza Roma; Jean-Pierre
Poly, emerito Paris-Nanterre; Gianfranco
Ragona, Torino; Laurent Reverso, To-

lone; Albert Rigaudière, emerito Paris
Panthéon-Assas; Andrea Romano, eme-
rito Messina; Michel Rosenfeld, Cardozo
New York; François Saint-Bonnet, Paris
Panthéon-Assas; Rodolfo Savelli, emerito
Genova; Yury Sayamov, Cattedra Unesco,
Lomonosov Mosca; Luca Scuccimarra, Sa-
pienza Roma; Antonio Serrano Gonzáles,
Autonoma di Barcellona; Francesco Sod-
du, Sassari; Sylvain Soleil, Rennes; Heikki
Solin, emerito Helsinki; Jacob Soll, South
California Los Angeles; Germán Sucar,
Instituto Tecnológico Autónomo Città del
México; Guillaume Tusseau, Sciences-Po
Paris; Giancarlo Vallone, Salento; Arnaud
Vergne, Paris-Descartes; Hajime Yamamo-
to, Keio Tokyo; Ortensio Zecchino, già
ministro dell'Università e della Ricerca
scientifica.

Hanno fatto parte del Comitato Scientifico: Michel Ganzin, emerito Aix-en-Provence-Marsiglia;
Dale Kenneth Van Kley, emerito Ohio; Leonardo Morlino, emerito LUISS Roma; *cari colleghi
e amici che non sono più tra noi.*

Comitato di Redazione:

Coordinamento: Alessandro Isoni (coordinatore), Salento; Lorenzo Coccoli, Catania; Rocco
Giurato, Foggia; Carlo Pontorieri, Vanvitelli Campania.

Componenti

Angelo Pio Buffo, Foggia; Stefania Ecchia, Salerno; Elena Gaetana Faraci, Catania; Valeria
Ferrari, Sapienza Roma; Chiara Giorgi, Sapienza Roma; Gianluca Luise, Salerno; Mamadi
Kourouma, Bouaké; Alessio Porrino, Salerno; Luca Rossetto, Venezia Ca' Foscari; Francesco
Domenico Vittoria, Napoli Federico II.

La collana “Leviathan & Behemoth – Il buon uso degli spettri” adotta il metodo del doppio
Peer reviewing anonimo per la scelta degli studi e dei saggi da pubblicare.

FROM KANT TO KELSEN

Democracy, Education, Peace

edited by

Sara Lagi Flavio Silvestrini Francesco Di Donato

EDITORIALE SCIENTIFICA

PRIN EADEM 20223N9FRS
DD N. 104-02-02-2022

Volume pubblicato dall'Unità di ricerca dell'Università degli Studi di Torino con fondi del Progetto "EDUCATING TO DEMOCRACY. Historical investigations on the crisis of political representation and on the evolution of the modes of participation in Early Modern and Modern societies [Acronym: EADEM] / EDUCARE ALLA DEMOCRAZIA. Indagini storiche sulla crisi della rappresentanza politica e sull'evoluzione delle pratiche di partecipazione nelle società moderne e contemporanee. [Acronimo: EADEM]; PI: Francesco Di Donato (Università degli Studi di Napoli Federico II); AI: Manuela Albertone / Gianluca Cuniberti (Università degli Studi di Torino), Claudia Giurintano (Università degli Studi di Palermo), Giovanni Giorgini (Università degli Studi di Bologna). Numero progetto: 20223N9FRS_002, finanziato nell'ambito del bando PRIN 2022 104 del 02-02-2022 – Progetti di Rilevante Interesse Nazionale. CUP: D53D23000420006.



Proprietà letteraria riservata

© Copyright 2026 Editoriale Scientifica s.r.l.
via San Biagio dei Librai, 39 - 80138 Napoli
www.editorialescientifica.it info@editorialescientifica.com
ISBN 979-12-235-0509-0

Index

Sara Lagi, Flavio Silvestrini, Francesco Di Donato, <i>From Kantianism to Kelsenism in Politics? Some Introductory Remarks</i>	VII
Francesca Russo, <i>International Arbitration or Universal Republic: the Formation and Consolidation of Peace in Grotius and Kant</i>	1
Flavio Silvestrini, "Against Hobbes"?: <i>Kant and the Historical Education to Republicanism</i>	19
Francesco Berti, <i>Rousseau and Kant's Republicanism: Questions About Liberty</i>	43
Dario Caroniti, <i>The Philosophy of History of Eric Voegelin: Critique of Kant and Weber</i>	63
Francesco Raschi, <i>Kant and the Liberal Tradition of International Relations</i>	89
Maria Chiara Pievatolo, <i>Faculty of Opposition. The University and the Public Use of Reason in "Der Streit der Fakultäten"</i>	113
Andrea Gentile, <i>The Kantian Concept of «Limit» in Relation to «Moralitas», «Legalitas», «Bildung» and «Democracy»</i>	135
Franco M. Di Sciullo, <i>Kant, Criticism and Publicity. A Few Doubts as to the Political Implications of the Public Use of Reason</i>	161

Francesco Maiolo, <i>Remarks on the Philosophical Dispositions of a Jurist: Hans Kelsen between Normativism and Voluntarism</i>	183
Annalisa Furia, <i>From Kant to Kelsen. Hannah Arendt and the Many Roads to Pluralism</i>	205
Pedro T. Magalhães, <i>The Method of Freedom: Kelsen, Schumpeter, and the Value of Democracy</i>	229
Sara Lagi, <i>Kelsen Unexpected: Education to Politics and the Making of his Democratic Theory</i>	251
Peter Langford, <i>Kelsen and Socialism</i>	275
Dario Elia Tosi, <i>Kelsen and International Law</i>	301
Robert Schuett, <i>Hans Kelsen and the English School in International Relations</i>	321
Or Bassok, <i>The Gods of the Constitution</i>	349
<i>Index of names</i>	373

Annalisa Furia

From Kant to Kelsen.

Hannah Arendt and the Many Roads to Pluralism

Introduction: An impossible triangle?

How useful is it to analyse together the intellectual relationships that exist between Arendt and Kant, on the one hand, and the similarities that might exist between Arendt and Kelsen, on the other? More specifically, is such an attempt fruitful in the context of a discussion on the crisis of democracy?

While clearly the insights that can be drawn respectively from Kant, Arendt and Kelsen's thought continue to be the subject of countless explorations in the debate on democracy and its many difficulties, the attempt to find a way to link the three of them by putting Arendt at the centre is at the same time challenging, hazardous and unusual.

It is known that Arendt maintained a privileged intellectual relationship with Kant in the development of her thinking – and she herself often highlighted the persistence of this continued ideal dialogue with the philosopher¹ –, while the methodological and theoretical assumptions dividing

¹ «So, let us return to Kant», said Arendt, for instance in Hannah Arendt, *Some Questions of Moral Philosophy*, in Hannah Arendt, *Responsibility and Judgment*, edited and with an introduction by J. Kohn, Schocken Books, New York 2003, 139.

Arendt and Kelsen's views are so pronounced as to make it prohibitive to attempt to somehow bridge their thoughts. This is also demonstrated by the fact that there are a good and growing number of contributions on the affinities between Arendt and Schmitt or Weber and yet very few on those, if any, between Arendt and Kelsen².

One way to find common ground among the three could be to investigate the impact Kant's critical philosophy and political reflections had on Arendt's and, also through Neo-Kantianism, on Kelsen's theorizing; but this would mean placing Kant, and not Arendt, at the centre³. Such a choice would surely add to the literature on the influence of Kant upon both Arendt and Kelsen – which is something that will emerge also from this attempt – but it does not represent the focus of this paper which aims to concentrate on one of the substantial, common concerns that emerge from the analysis.

² See, for instance, Andreas Kalyvas, *Democracy and the Politics of the Extraordinary, Max Weber, Carl Schmitt and Hannah Arendt*, Cambridge University Press, New York 2008. An interesting attempt, though it does not fully engage in any comparison between the two, is made by Alexandra Kemmerer, *Kelsen, Schmitt, Arendt, and the Possibilities of Constitutionalization in (International) Law: Introduction*, «Leiden Journal of International Law», XXIII, 2010, 717-22. An alternative way of trying to connect Arendt and Kelsen could be to concentrate on the figure of Hans Morgenthau, who was a close friend of Arendt (actually he would have loved to be something more than that) and one of Kelsen's most talented students.

³ Unsurprisingly Arendt, who had studied under Heidegger at the University of Marburg, disregarded Neo-Kantianism, which in her view had drowned philosophy «in a sea of boredom». Hannah Arendt quoted in Nicolas De Warren, Andrea Staiti, *Introduction: towards a reconsideration of Neo-Kantianism*, in Nicolas De Warren, Andrea Staiti (eds.), *New Approaches to Neo-Kantianism*, Cambridge University Press, Cambridge 2015, 1.

The preliminary and limited attempt explored here thus contends, by taking some liberties and downplaying the impact of their respective inconsistencies and of some methodological discrepancies, that the question of pluralism, albeit seen in different ways, can be usefully seen as a possible common thread linking Arendt with Kant and Kelsen and pointing to a crucial, even excruciating, problem for contemporary democracies.

Why Judging?

As already highlighted, Arendt maintained a continuous ideal dialogue with Kant and often ‘returns to Kant’, as she does in relation to the question of aesthetic judgment.

Arendt’s habit of reading and ruminating on Kantian texts however does not exempt her from neglect or forthright criticism by Kantian scholars, as her ‘treatment’ of Kantian writings has been variously defined as partial, inaccurate, pejorative, too creative or appropriative⁴.

Whereas it falls beyond the scope of this paper to analyse how closely her interpretation adheres to Kant’s text and perspective, it is worth noting that Arendt forestalled – and quickly liquidated – any criticism of her personal, presumably too free interpretation of Kantian texts by recalling that Kant himself in a passage of the *Critique of pure reason* high-

⁴ Nicholas Dunn has recently edited the first publication devoted exclusively to Arendt’s lectures on Kant in which the reception of Arendt’s interpretations by Kantians, as well as the need to take into consideration the other courses and published and unpublished works in which Arendt resorts to Kant’s thoughts are addressed and investigated. See *Hannah Arendt’s Lectures on Kant’s Political Philosophy*, edited by Nicolas Dunn, De Gruyter, Berlin 2024 («Works of Philosophy and their Reception Series»).

lighted how posterity is often better able to understand the true intentions of an author than the author himself⁵. In addition to that, she clarified that her intention was to develop a set of ideas which in her view Kant never fully explored, and therefore to go «beyond Kant»⁶.

The political value of aesthetic judgment is precisely, according to Arendt, one of the questions Kant underestimated, and one that she intends to bring to full light. But why does Arendt refer to aesthetic judgment in the first place?

The profound reasons for this choice are, as always with Arendt, linked with her personal experience as well as with her irresistible need to investigate and dissect reality in all directions, to understand historical events and contexts, to confront reality without discounts or consola-

⁵ Hannah Arendt, *Lectures on Kant's Political Philosophy*, edited and with an interpretative essay by R. Beiner, The University of Chicago Press, Chicago 1992, 33. For a sample of the criticisms of Arendt's interpretation, see: Ronald Beiner, *Hannah Arendt on Judging*, in Arendt, *Lectures on Kant's Political Philosophy*, cit. 89-156; Jean-François Lyotard, *Sensus communis*, «Cahier du Collège international de Philosophie», III, 1987, 67-88; Ronald Beiner, Jennifer Nedelsky (eds.), *Judgment, Imagination and Politics. Themes from Kant and Arendt*, Rowman & Littlefield, Lanham 2001; Robert J. Dostal, *Judging Human Action: Arendt's Appropriation of Kant*, «The Review of Metaphysics», IV, 1984, 725-55; Matthew C. Weidenfeld, *Visions of Judgment: Arendt, Kant, and the Misreading of Judgment*, «Political Research Quarterly», II, 2013, 254-66; Bryan Garsten, *The Elusiveness of Arendtian Judgment*, «Social Research», IV, 2007, 1071-108; Laura Bazzicalupo, *Il Kant di Hannah Arendt*, in Giulio M. Chiodi, Giuliano Marini, Roberto Gatti (eds.), *La filosofia politica di Kant*, Franco Angeli, Milano 2001, 153-7; Teresa Serra, *H. Arendt e I. Kant*, in Chiodi, Marini, Gatti, *La filosofia politica di Kant*, cit., 201-5.

⁶ Hannah Arendt, *The Promise of politics*, edited by and with an Introduction by J. Kohn, Schocken books, New York 2005, 169; Ead., *Lectures on Kant's Political Philosophy*, cit., 19, 30-1.

tion. Already in *Understanding and Politics* (1954) Arendt focuses her attention on possibly extending Kant's aesthetic judgment to politics when she investigates the unprecedented crisis produced by totalitarianism – though it had already started beforehand with the modern dynamics of atomization of individuals and the progressive erosion of common sense –, which had in her view «clearly exploded our categories of political thought and our standards of moral judgment»⁷. Another determining factor was the Eichmann trial. In *The Life of the Mind* (1978) – her last work published posthumously and incomplete due to her premature death, the third part of which should have been dedicated to judging – Arendt clarifies that her interest in «mental activities»⁸ stems from having witnessed the trial of Eichmann who – in spite of his proclaimed adherence to a Kantian ethic –, proved to be dramatically unable even to think⁹. Finally, the risks posed by conformism and alienation from the world fueled by mass society reinforced in her the urgent need to understand and counter the dramatic effects of the inability to think and the drying up of the public space.

It is thus under the pressure of these concerns that she decided to investigate what makes it possible to discriminate between right and wrong at moments of disruption, or ultimate dissolution, of the established norms and standards,

⁷ Hannah Arendt, *Understanding and politics*, in Ead., *Essays in Understanding: 1930-1954. Formation, Exile, and Totalitarianism*, edited by and with an Introduction by J. Kohn, Schocken Books, New York 1994, 310.

⁸ Hannah Arendt, *The Life of the Mind*, Harcourt Inc., New York 1978, I, 3.

⁹ Ivi, 4.

that is, without resorting to any outside authority; and so it was that she turned to the question of aesthetic judgment¹⁰.

Judging, or saving our dignity

Drawing on Kant's analysis of the different kinds of judgment, Arendt concentrates her attention on aesthetic judgment as the paradigmatic example of «reflecting judgments», that is, the kind of judgment of the particular that occurs in the absence of a universal, general standard or rule under which to subsume it. These judgments do not – according to Kant – have a cognitive nature; they are grounded in feeling but can claim a special form of «subjectively universal validity»¹¹ which, not being based on the

¹⁰ After the fatal break in tradition produced by totalitarianism, judgment for Arendt plays a crucial role also in allowing the recovery of a relationship with past, and therefore the possibility of culling meaning from it by judging, independently, what is worth remembering. On this see, Seyla Benhabib, *Hannah Arendt and the Redemptive Power of Narrative*, «Social Research», LVII, 1990, 181-90; Annalisa Furia, *Crisis and Vulnerability in Hannah Arendt's Political Thought: Political Action, Judgment and the Figure of the 'Conscious Pariah'*, in Cesare Cuttica and László Kontler with Clara Maier (eds.), *Crisis and Renewal in the History of European Political Thought*, Brill, Leiden-Boston 2021, 341-3. For the different interpretation of Kant's aesthetic judgment by Hans-Georg Gadamer, another disciple of Heidegger, see: Stefano Marino, *Giudizio estetico e Giudizio etico-politico. Gadamer e Arendt interpreti di Kant*, in Stefano Bacin, Alfredo Ferrarin, Claudio La Rocca and Margit Ruffing (Eds.), *Kant und die Philosophie in weltbürgerlicher Absicht*, Akten des XI. Kant-Kongresses 2010, De Gruyter, Berlin 2013, 131-40.

¹¹ Immanuel Kant, *Critique of the Power of Judgement*, edited by P. Guyer, translated by P. Guyer, E. Matthews, Cambridge University Press, New York 2000, 100.

«mediation of a concept»¹², is to be derived by the individual, through imagination and reflection, from the particular itself.

The peculiar nature of this form of judgment stems from what Kant called a «broad-minded way of thinking» or «enlarged thought», which Arendt would mostly call an «enlarged mentality», that is, the capability of comparing one's own subjective standpoint with the possible judgments of other judging individuals by abstracting from the limitations of one's subjective conditions and circumstances and by visiting other people's standpoints¹³.

The comparison of my judgment of taste with the possible judgments of others and its universal communicability are made possible by what Arendt calls «community sense» (that is, Kant's *sensus communis*), which she defines as «the political sense par excellence»¹⁴, that allows me to judge not merely subjectively but as «a member of a community»¹⁵, to be in «anticipated communication with others»¹⁶ who are absent but with whom I know I can communicate and come to a potential agreement because we all share the same sense.

In opposition to speculative thought which can claim a validity independent of the existence of the world and of

¹² Ivi, p. 175.

¹³ Arendt, *Lectures on Kant's Political Philosophy*, cit., 43. On the meaning and role of imagination and representation in Arendt's conception, see Hannah Arendt, *Imagination*, in Ead., *Lectures on Kant's Political Philosophy*, cit., 79-85, and Beiner, *Hannah Arendt on Judging*, cit., 175.

¹⁴ Arendt, *Understanding and politics*, cit., 318.

¹⁵ Arendt, *Lectures on Kant's Political Philosophy*, cit., 72.

¹⁶ Hannah Arendt, *Between Past and Future. Six Exercises in Political Thought*, The Viking Press, New York 1961, 220.

other people by merely resorting to abstract standards, aesthetic judgment for Arendt does not transcend the public realm but is entirely concerned with it and with the plurality of individuals who inhabit it. In this way, it attains to intersubjective validity, a validity whereby the more positions I imaginatively represent and visit, the more impartial and general it becomes¹⁷. The validity of such a form of judgment, as well as the potential agreement with others, is thus not based on objective evidence or the pursuit of truth, nor on coercion, but rather on the adoption of critical thinking as a way of thinking from the position of «Kant's world citizen»¹⁸, as a peculiar «method of rational argumentation»¹⁹ that allows the communicability, dialogue and mutual engagement that can preserve the public realm.

Judgment for Arendt is a political faculty because it is integrally connected with plurality and the 'public use of reason', which Kant praised and defended; not with the existence of man as an intelligible being who has to prove the solidity of his reasoning but of «men in the plural»²⁰ as its condition.

¹⁷ In this regard, Arendt translates Kant's '*allgemein*' with 'general' instead of 'universal' probably due to her hostility to (unattainable) cosmopolitan perspectives. See Jonathan P. Schwartz quoted in Nicholas Dunn, *Plurality and the Potential for Agreement: Arendt, Kant, and the 'Way of Thinking' of the World Citizen*, «Constellations», XXVII, 2020, 254.

¹⁸ Arendt, *Lectures on Kant's Political Philosophy*, cit., 43. In this regard, Arendt points out: «When one judges and when one acts in political matters, one is supposed to take one's bearings from the idea, not the actuality, of being a world citizen» (ivi, 75-6).

¹⁹ Dunn, *Plurality and the Potential for Agreement*, cit., 251.

²⁰ Arendt, *Lectures on Kant's Political Philosophy*, cit., 13.

It has been aptly noted that her conceptualization of judgment, which is unfinished, acquires divergent inclinations and problematically stands at the crossroads between the roles of actor and spectator, between ‘vita activa’ and ‘vita contemplativa’. Whereas in some passages Arendt seems to consider judgment as a faculty that enables the political actor to decide what to do in practice (like the Greek *phronesis*), in other writings judging seems no longer to be configured as a modality that connects thinking and acting but rather as the privilege of the impartial spectator, the historian or the poet²¹.

What remains is the fact that for Arendt judging – that is, engaging in critical thinking and being concerned with the particularities of reality ‘without a banister’, and not conforming to volatile moral norms or searching for the ultimate truth – is «the most political of man’s mental abilities»²² because it requires and preserves plurality and is the expression of the autonomy, dignity and responsibility of human beings; it is the only way to safeguard human

²¹ See, for instance, Arendt, *Between Past and Future*, cit., 221 and Ead., *The Life of the Mind*, cit., I, 192-13. On the many possible interpretations of the relationships between the so-called ‘historical’ and ‘political’ declinations of Arendt’s judgment, that are respectively embodied by the ‘spectator’ and the ‘actor’, see at least: Simona Forti, *Judging Between Politics and History*, «Finnish Yearbook of Political Thought», II, 1998, 15-36; Maurizio Passerin d’Entreves, ‘Hannah Arendt’, *Stanford Encyclopedia of Philosophy*, 2019: <https://plato.stanford.edu/entries/arendt/>; accessed on 13 March 2025; Pier Paolo Portinaro, *L’azione, lo spettatore e il giudizio. Una lettura dell’opus posthumum di Hannah Arendt*, «Teoria politica», V, 1989, 133-59.

²² Arendt, *The Life of the Mind*, cit., I, 192. The reference here is to Hannah Arendt, *Thinking without a Banister: Essays in Understanding, 1953-1975*, edited and with an introduction by Je. Kohn, Schocken Books, New York 2018.

self-legislation and capacity for action even in the most desperate circumstances²³.

Arendt and Kelsen: two distant universes

Between Arendt and Kelsen there are numerous biographical affinities. Their lives are representative of both the richness of the closely interconnected – yet very different – cultural milieus of Germany and Austria in the 1920s, and the tragic destiny of European Jewry at the time. They both passed through the nightmarish experiences of the Nazi persecution and moved across many countries in search of a sanctuary they found in the US²⁴. Again, they both witnessed the aberrant tragedies produced by totalitarianism and the early stages of the (national and international) process of reconfiguration of law and politics that took place afterwards. But they responded to these experiences in very different ways.

The biographical resemblances indeed exhaust the list of similarities for, apart from their apparent convergence on certain issues, their methodological, epistemological and theoretical background could hardly be more distant.

Where one is among the most brilliant and influential jurists of the 20th century, widely known for his pure theory of law, the other is likewise globally studied and appreciated, and continually cited, for her peculiar (and deliberately ‘impure’) theory of politics.

²³ Arendt, *Life of the Mind*, cit., vol. 1, 216.

²⁴ Kelsen lived in Vienna, Cologne, Geneva and Prague before being offered a post at the Universities of Harvard and Berkeley, while Arendt left Germany to go to Czechoslovakia, Switzerland, Paris and then held positions at the Universities of Berkeley, Princeton, Chicago and at the New School for Social Research of New York.

They share their reference to Kant, and more importantly Kant's rejection of any form of metaphysics; but while Kelsen's theorizing aspires to be scientific, systematic, positivist and monistic, and strongly opposes any form of methodological syncretism interfering with it, Arendt's method – if any – has been efficaciously described as anti-systematic, based on the constant confrontation with reality and history, and characterized by a hermeneutic and impressionistic stance as it mainly crystallizes around contingent events and intersubjective dynamics²⁵. Kelsen is a son of the Enlightenment, who believes in the possibility of adopting a scientific approach to society, while Arendt, who cannot be defined as a post-positivist, is closer to postmodern and critical approaches²⁶. Similarly, while Kelsen's approach is based on the distinction between *Sein* and *Sollen*, 'Is' and 'Ought', real and ideal, Arendt resists the «dichotomization between the real and the ideal via notions like natality and her radical intersubjectivity that stresses the elements of the ideal to be found in the real and especially in the interaction of human beings»²⁷.

If they thus share in criticizing some of the most important concepts of Western political thought like State,

²⁵ Pedro T. Magalhães, *Science, Relativism and Pluralism. Hans Kelsen's Conception of Modern Democracy*, in Id., *The Legitimacy of Modern Democracy. A study of the Political Thought of Max Weber, Carl Schmitt and Hans Kelsen*, Routledge, Abingdon (UK)/New York (NY) 2020, 153-4; John Williams, Anthony F. Lang Jr., *Introduction*, in John Williams, Anthony F. Lang Jr. (eds.), *Hannah Arendt and International Relations. Readings across the lines*, Palgrave Macmillan, New York-Basingstoke 2005, 9.

²⁶ Magalhães, *Science, Relativism and Pluralism*, cit., 153-4; Williams, Lang, *Introduction*, cit., 8-9.

²⁷ Williams, Lang, *Introduction*, cit., 8.

sovereignty or, as we will see, human rights, they get there starting from very different backgrounds and disciplinary perspectives. In this regard, however, be it noted that the centrality she assigns to politics does not mean that Arendt ignores the role of national or international law and institutions²⁸. Likewise, the fact that Kelsen was above all a jurist and that he draws a clear line between law and politics, does not mean, as highlighted in the literature, that his theory of democracy can be understood in isolation from his legal theory, that the two were meant to be kept separate or that the purity of his legal theory cannot be seen as a political strategy in itself; or, finally, that any such separation was consistently maintained throughout his writings²⁹.

Kelsen and Arendt on Human Rights

At the very inception of the belief in the ordering and civilizing mission of human rights, Kelsen and Arendt strike a blow at human rights as based on natural law, and likewise

²⁸ On Arendt's conception of international law, see Peg Birmingham, *Hannah Arendt's Philosophy of Law Approach to International Criminal Law*, «International Criminal Law Review», XIV, 2014, 695-716 and Deborah Whitehall, *Hannah Arendt and International Law*, in Anne Orford, Florian Hoffmann and Martin Clark (eds.), *The Oxford Handbook of the Theory of International Law*, Oxford University Press, Oxford 2016, 232-57.

²⁹ Nadia Urbinati, Carlo Invernizzi Accetti, *Editors' Introduction*, in Hans Kelsen, *The Essence and Value of Democracy*, edited by N. Urbinati and C. Invernizzi Accetti, translated by B. Graf, Rowman & Littlefield Publishers, Plymouth (UK) 2013, 2-4 (this is the translation of the 1929 German edition); Sara Lagi, *La democrazia secondo Hans Kelsen: alcuni temi e controversie*, «Isonomía. Revista de Teoría y Filosofía del Derecho», LIX, 2023, 160-1; Magalhães, *Science, Relativism and Pluralism*, cit., 140-2.

at the idea that human rights could effectively limit State sovereignty – convictions which were both at the heart of the 17th century Declarations of Rights and of the prevailing conception of their political function³⁰.

Kelsen's dismissive treatment of the notion of natural rights and justification of fundamental rights is to be analysed in the context of his (procedural) realist theory of a parliamentary, party-pluralist, liberal democracy as distinct from an 'ideal' conception and as opposed to autocracy.

If autocracy in his view is coordinated with 'philosophical absolutism', democracy for Kelsen presupposes philosophical relativism – that is, the assumption, based on the separation between reality and value, that in the moral domain the absolute is beyond human knowledge which has access only to relative truths and values – as the «background epistemic standpoint»³¹ and worldview. Relativism is thus what connects «Kelsen's conception of democracy with

³⁰ Arendt and Kelsen's approach to the international sphere and institutions was at once informed by political realism and coloured by the configuration of a, albeit very different, federalistic alternative. Arendt's view will be explored later in the chapter while for a convincing analysis of Kelsen's one, which was inspired by Kant's model, see Robert Schuett, *Hans Kelsen's Political Realism*, Edinburgh University Press, Edinburgh 2021, 153-97.

³¹ Urbinati, Invernizzi Accetti, *Editors' Introduction*, cit., 8. In his 1955 text *Foundations of democracy* Kelsen highlights the links that exist between political theory and epistemology by establishing a parallelism between the process of domination at the centre of political theory and the process of cognition (Hans Kelsen, *Foundations of Democracy*, «Ethics», LXVI, 1955, 15). For a broader analysis of Kelsen's conception of relativism, see Carlo Invernizzi Accetti, *Reconciling legal positivism and human rights: Hans Kelsen's argument from relativism*, «Journal of Human Rights», 17(2), 2018, 215-8.

his epistemology»³² and it is linked with his radical criticism of the 19th-century German legal doctrine and its main tenets including the mystified notion of a pre-existing unitary people (and popular will) to which he opposes the evidence of the intrinsically pluralistic articulation of society³³.

From a positivistic point of view rights can obviously be derived only from positive law, and in this sense Kelsen rejects natural law and natural rights by highlighting that: the fact that it is not possible to ascertain what natural law is demonstrates that natural rights have no advantage over positive law and cannot be a criterion or foundation for it; in the attempt to derive that which 'ought to be' from that which 'is' any natural law-doctrine falls into the trap of logical fallacy; nature cannot assign any right because it cannot prescribe any duty³⁴.

Human rights are thus normatively valid and legally binding only insofar as they are incorporated into a positive legal system – otherwise they are just religious or moral pretensions – and they are justified, in his view, on epistemological grounds³⁵. They ought to be granted, first of all, because the relativity of any moral assumption implies that no majority must limit the free expression of values and convictions by individuals and minorities; and, secondly, because in a democracy based on the principle of majoritarianism it must be granted that minorities «can become the majority at any time»³⁶, and to do so they must be protected «against

³² Magalhães, *Science, Relativism and Pluralism*, cit., 157.

³³ Lagi, *La democrazia secondo Hans Kelsen*, cit., 159-60.

³⁴ Kelsen, *Foundations of Democracy*, cit., 48,57; Hans Kelsen, *International Law*, Rinehart & Company, Inc., New York 1952, 149-50.

³⁵ Magalhães, *Science, Relativism and Pluralism*, cit., 149.

³⁶ Kelsen, *The Essence and Value of Democracy*, cit., 104.

arbitrary rule by majorities»³⁷. Constitutional basic rights and freedoms – namely, active and passive voting rights, freedom of speech, conscience and opinion, freedom of research and of the press³⁸ – are thus essential to democracy, not because their function is to protect individuals from the State, but because they protect minorities from majorities, they preserve pluralism and, beyond the traditional, mystified conception of the State and of a unitary people, allow it to be integrated into the democratic system³⁹. In Kelsen's view the need for giving a constitutional form and protection to these rights, however, does not imply that they have a substantive content or exert a substantive restriction upon legislative powers, but only that, in line with its procedural approach, they are protected for their instrumental role in the working and preservation of democracy intended as «a *method* to enact politic decisions»⁴⁰, and not as a content.

³⁷ Kelsen, *Foundations of Democracy*, cit., 27-8.

³⁸ Ivi, 28.

³⁹ On the constitutional protection of rights, see Véronique Champeil-Desplats, *Hans Kelsen's Works and the Modern Theories of Human Rights*, in Peter Langford, Ian Bryan and John McGarry (eds.), *Kelsenian Legal Science and the Nature of Law*, Springer, New York 2017, 188-90. Magalhães points out that the epistemologically grounded justification of rights explains why private property rights are not included in Kelsen's list of fundamental rights (Magalhães, *Science, Relativism and Pluralism*, cit., 149). On Kelsen's notion of integration and on the role he assigns in this regard to political parties, political representation, parliamentarism and law-making, see Lagi, *La democrazia secondo Hans Kelsen*, cit., 161-70.

⁴⁰ Sara Lagi, *Against Natural Law: The Political Implications of Kelsen's Legal Positivism*, in Langford, Bryan, McGarry, *Kelsenian Legal Science*, cit., 474; Christine Chwaszcza, *Kelsen on Democracy in Light of Contemporary Theories of Human Rights*, in Ivi, 199. For an interpretation that

For what concerns the internationalization of human rights, Kelsen recognizes, contrary to the predominant view in German legal thought at the time, that the individual can be considered in certain instances as a legal subject in international law but he specifies, applying the domestic analogy, that «without subjecting the state to the jurisdiction of an international tribunal, no “rights” of individuals in relation to the state are established»⁴¹.

Likewise, in analysing the possible role of international law in ensuring and protecting human rights, Arendt expresses her perplexities that the approval of new international declarations of human rights would not solve the problem because this idea «transcends the present sphere of international law which still operates in terms of reciprocal agreements and treaties between sovereign states; and for the time being, a sphere that is above nations does not exist»⁴². For Arendt in fact the main problem with human rights lies in their genealogical link with the history and dilemmas of the sovereign nation-state.

Unlike Kelsen, Arendt approaches the question of human rights from ‘outside’ the political system, that is, by looking at the hopeless condition – which she, Kelsen and many Jews personally experienced due to the Nazi persecution – of stateless, refugee people, of those who had become rightless because they had been deprived «of a place in the

partially diverges from the above, see Invernizzi Accetti, *Reconciling legal positivism and human rights*, cit., 225-6.

⁴¹ Kelsen, *Principles of International Law*, cit., 144.

⁴² Hannah Arendt, *The Origins of Totalitarianism*, Harcourt Brace & Company, New York 1973⁶, 298. She adds in this regard that the confusion created by these attempts demonstrates that «no one seems able to define with any assurance what these general human rights, as distinguished from the rights of citizens, really are» (ivi, 293).

world which makes opinions significant and actions effective»⁴³.

What makes this condition (especially evident after WWI) particularly symbolic and symptomatic of the dilemmas and dangers of the nation-state is, to Arendt, the fact that the loss of citizenship, the loss of a polity, means expulsion from humanity and condemnation to rightlessness; precisely for those who were reduced to the «abstract nakedness of being nothing but human»⁴⁴ and would have needed their protection most, it spelt the impossibility of enjoying those self-same 'human' rights.

This made it clear, according to Arendt, that to enjoy human rights one must be recognized as a citizen, one must enjoy «a right to belong to some kind of organized community»⁴⁵, a «right to have rights»⁴⁶.

This is so because, since the French revolution, even if they were predicated on the individual and presented as natural, inalienable and universal, human rights became «quickly and inextricably blended with the question of national emancipation»⁴⁷, and it became evident that «the people, and not the individual, was the image of man»⁴⁸. It is thus the sovereignty- and nationality-centred organization of the European state system that, by making the sovereign state an instrument of the nation and not the protector of

⁴³ Ivi, 296.

⁴⁴ Ivi 300, 296-7. Arendt compares the condition of rightless people to that of «barbarians» produced from within the global civilization, of individuals who are forced into «the conditions of savages» (ivi, 302).

⁴⁵ Ivi, 296-7.

⁴⁶ *Ibidem*.

⁴⁷ Ivi, 291.

⁴⁸ *Ibidem*.

the individual, produced the coincidence between human rights and citizen/national rights, the intangibility of the state's right to deny (and withdraw) citizenship, and would dramatically determine the fate of refugees and stateless people, as well as of minorities, as testified by the 1919 Minority Treaties that Arendt analyses⁴⁹.

The fact that in the contemporary era humanity has taken the place once played by nature (and history before it) as the new guarantee of human rights thus did not seem to provide for a more certain solution. Arendt was deeply sceptical about the misuse of the idea of humanity, which in her view should be used as a 'yardstick', as a regulative idea but not as a practical end because the fatal risk of cosmopolitan, universal, and even humanitarian perspectives is that they tend to de-emphasize the uniqueness and particularity of conditions, and in so doing they assimilate and abolish distance and difference, they abolish plurality. In the same vein, a world government cannot offer a viable alternative for her; for regardless of its form, by concentrating and projecting the sovereign logic over a global sphere, the risks of having mutual limitations cancelled and plurality abolished, that is, the destruction of the conditions for politics to take place, would actually be multiplied exponentially⁵⁰.

⁴⁹ For her analysis of the Minority Treaties, see Arendt, *The Origins of Totalitarianism*, cit., 269-90. For a short comparison between Kelsen and Arendt's criticism of the concept of sovereignty, see Andrew Arato, Jean L. Cohen, *Internal and External Sovereignty in Arendt*, in Seyla Benhabib, Roy T. Tsao and Peter Verovsek (eds.), *Politics in Dark Times: Encounters with Hannah Arendt*, Cambridge University Press, Cambridge 2010, 137-9.

⁵⁰ Hannah Arendt, *Men in Dark Times*, Harcourt, Brace & World, Inc., New York 1968, 81-2.

Arendt's conception of politics is indeed radically distant from Kelsen's, as she argues that politics is not equivalent to vertical ruling and it is not based, *pace* Kelsen, on the distinction between rulers and ruled, but unfolds horizontally, it takes place 'in-between' individuals who act and talk together, and it means unpredictability, contingency and uniqueness. Against this background, she thought that only law and territorial boundaries, that is, limited communities, could provide a possible solution and she tried to solve the contradiction between the need for human rights to be universally granted and her «politics of limits»⁵¹ by loosely arguing for a sort of Kantian federalism, «a world-wide federated structure»⁵² formed through mutual agreements between republics, to be based on a civic (not an ethnic) conception «of polity and belonging»⁵³.

Which pluralism?

Dunn has recently convincingly argued that Arendt's conception of plurality is at the basis of her theory of judgment and influenced by her reading of Kant's texts, in particular his *Anthropology*, as borne out by the fact that in *The*

⁵¹ Patricia Owens, *Between war and politics: international relations and the thought of Hannah Arendt*, Oxford University Press, Oxford 2007, 146.

⁵² Arendt, *Men in Dark Times*, cit., 84. For an analysis of Arendt's notion of federalism, its critical and contradictory points, see Shinkyu Lee, *Hannah Arendt and International Relations*, «Oxford Research Encyclopedia of International Studies», 29 November 2021, available at: <https://doi.org/10.1093/acrefore/9780190846626.013.665>.

⁵³ Seyla Benhabib, *The Rights of Others. Aliens, Residents and Citizens*, Cambridge University Press, Cambridge 2004, 60.

Life of the Mind she singles out Kant as being «more aware than any other philosopher of human plurality»⁵⁴.

In the first part of *Anthropology from a Pragmatic Point of View* Kant, after having analysed three forms of *egoism* (logical, aesthetic and moral), states that «the opposite of egoism can only be *pluralism*»⁵⁵. Whereas he defines egoism as the attitude in which one is concerned with oneself as the whole world, pluralism is its opposite because it is the way of thinking in which one «conducts oneself as a mere citizen of the world»⁵⁶. This pluralistic stance is related also to the three maxims of common understanding Kant identifies, – the second of which reads «Think from the standpoint of everyone else»⁵⁷ – and, according to Lenczewska, if analysed together with the public use of reason, the role of interpersonal communication and of education in Kant's thought, it would substantiate a peculiar Kantian, at the same time ethical and political, notion of pluralism that would pertain to both individuals and the human species as a whole⁵⁸.

To Arendt plurality is the fundamental feature of human existence and action, the condition of existence of the world and of humanity against the deadly threats posed by totalitarianism and mass society, and it is what we all share and what differentiates us, as she writes: «Plurality is the

⁵⁴ Arendt, *Life of the Mind*, cit., I, 96; Dunn, *Plurality and the Potential for Agreement*, cit., 247-8.

⁵⁵ Immanuel Kant, *Anthropology from a Pragmatic Point of View*, edited by R.B. Louden, with an introduction by M. Kuehn, Cambridge University Press, Cambridge 2006, 18.

⁵⁶ *Ibidem*.

⁵⁷ Ivi, 95. Kant describes these maxims in many texts, including the *Critique of the Power of Judgement*.

⁵⁸ Olga Lenczewska, *Becoming Pluralists: Kant on the Normative Features of Pluralistic Thinking*, «Kant Yearbook», XIII, 2021, 107-28.

condition of human action because we are all the same, that is, human, in such a way that nobody is ever the same as anyone else who ever lived, lives, or will live»⁵⁹. Unlike otherness, plurality does not exclude the possibility of mutual understanding and communication and is indeed the condition of politics – which takes place only when unique individuals speak and act together, when they bring their irreducible uniqueness to the fore –, as well as, as we have seen, of understanding and judging⁶⁰.

In her view plurality is thus not only ontological evidence or an epistemic requirement, nor only the opposite of egoism. It has clear political and normative implications «which require us to take up a particular stance in our thinking»⁶¹ and to actively resist egoism, alienation from the world and the destruction of the public realm⁶². Adopting an enlarged mentality, however, does not guarantee that agreement will be reached, for the dynamics of plurality remain unpredictable for her, but that agreement is possible and that the common world is preserved⁶³.

⁵⁹ Hannah Arendt, *The Human Condition*, The University of Chicago Press, Chicago (IL) 1998, 8. As she writes in *The Promise of Politics*: «human beings in the true sense of the term can exist only where there is a world, and there can be a world in the true sense of the term only where the plurality of the human race is more than a simple multiplication of a single species» (Arendt, *The Promise of Politics*, cit., 176).

⁶⁰ Williams, Lang, *Introduction*, cit., 11.

⁶¹ Dunn, *Plurality and the Potential for Agreement*, cit., 249.

⁶² Ivi, endnote 8, 255. It is to be noted that Arendt strongly criticizes Kant's notion of morality and refuses to establish any connection between morality and politics.

⁶³ Dunn, *Plurality and the Potential for Agreement*, cit., 251. See the same text by Dunn for the analysis of the critiques and divergent interpretations of Arendt's treatment of the question of adjudication

Kelsen rephrases Kant's distinction between egoism and pluralism by contending that philosophical relativism is capable of avoiding both the perils of what he calls 'solipsism', that is, «the assumption that the ego as the subject of knowledge is the only existent reality»⁶⁴ which leads to philosophical absolutism; and of 'pluralism', that is, the paradoxical situation in which «there are as many worlds as there are knowing subjects»⁶⁵. Relativism, which as we have seen is the philosophical stance that for Kelsen is 'congenial' to democracy, manages to avoid these epistemic perils and compensate for its inability to secure the objective existence of one and the same world for all by distinguishing between genuine value judgements and propositions about reality and assuming, with regard to the latter, that individuals, as the subjects of knowledge, are equal, that is, have the same «processes of rational cognition»⁶⁶ that allow cognition of reality to be shared, and thus the conciliation of «the relativity of knowledge with its objectivity»⁶⁷.

In relation to value judgements, Kelsen's positivistic relativism does not mean that there are no values at all, but actually that there are many moral orders that can claim validity and universal application, and thus committing to one or the other is merely a matter of choice. As he will say: «Positivistic relativism means: moral autonomy»⁶⁸, as it «imposes upon the individual the difficult task of deciding for himself

between competing political opinions, the most famous of which is the one expressed by Jürgen Habermas in Id., *Hannah Arendt's Communications Concept of Power*, «Social Research», XLIV, 1977, 3-23.

⁶⁴ Kelsen, *Foundations of Democracy*, cit., 17.

⁶⁵ *Ibidem*.

⁶⁶ Ivi, 18.

⁶⁷ Magalhães, *Science, Relativism and Pluralism*, cit., 160.

⁶⁸ Kelsen, *Foundations of Democracy*, cit., 97 (footnote no. 70).

what is right and what is wrong»⁶⁹, which implies a serious responsibility, «the most serious responsibility a man can assume»⁷⁰. And it is for these reasons that individuals ought to be granted the freedom of religion, opinion and press, the freedom of science and thus the freedom to adhere to their own normative beliefs. It is for these reasons that the unitary people is to be seen as the result of the process of integration, and not as its precondition, and the will of the State as the result of parliamentary discussion, of a compromise between majority and minority⁷¹.

That such a compromise and integration can be effectively achieved and secured in the political domain is, however – despite (or perhaps because of) his confidence in human rationality and scientific knowledge – by no means assured. If his notion of pluralism, as for Arendt, calls into question the responsibility, self-determination and autonomy of the individual, it also made it impossible for him, for the sake of methodological consistency, to defend democracy (and pluralism itself) from its enemies, to acknowledge that a democratic theory aimed at granting freedom needs more than the procedural guarantees and methods he identified⁷².

⁶⁹ *Ibidem*.

⁷⁰ *Ibidem*.

⁷¹ Kelsen, *Foundations of Democracy*, cit., 28. Lagi, *La democrazia secondo Hans Kelsen*, cit., 159.

⁷² Magalhães, *Science, Relativism and Pluralism*, cit., 163-4; Chwaszcza, *Kelsen on Democracy*, cit., 203; Lagi, *La democrazia secondo Hans Kelsen*, cit., 172-3. Kelsen in fact states: «The only consequence of a relativistic theory of values is: not to force democracy upon those who prefer another form of government, to remain aware in the struggle for one's own political ideal that the opponents, too, may be fighting for an ideal, and that this fight should be conducted in the

Arendt and Kelsen were both fully aware of the fragility, immanence and mutability of politics, of its intrinsically contentious nature, as opposed to any form of deterministic, teleological, idealistic or utopian reading of reality and history, but they tried to come to terms with the 'burden' of reality in very different ways.

When confronted with the indeterminacy of political life, Kelsen tried to govern it by embracing and relentlessly defending the need for a neutral-scientific approach to politics and law, and by defending political pluralism, albeit only in a formal, weak, and self-defeating way. Arendt, on the contrary, in line with her conception of politics and political action, embraced the contingency and openness of reality and attempted to fix some minimal 'boundaries' by developing a stronger defence of plurality.

In the end, for both of them, albeit with a different level of political intensity, defending pluralism was a way to defend responsibility and freedom as the conditions of politics.

spirit of tolerance» (Kelsen, *Foundations of Democracy*, cit., 97 (footnote no. 70)).