

Review

Hermann Heller. Life, Work, and Legacy

Hermann Hellers Demokratischer Konstitutionalismus
edited by Verena Frick
and Oliver W. Lembcke

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HERMANN HELLER: AN INTRODUCTION

During the Weimar Republic (1919-1933) there were two professors whose names stood out in the protracted legal and political conflicts: Carl Schmitt and Hans Kelsen. While these two were among the most well-known at the time, they were not the only legal scholars who were engaged in disputes about Weimar's legal powers. The other names include Gerhard Anschütz, Richard Thoma, Rudolf Smend, Hugo Preuß, and Heinrich Triepel. But there is another professor who also took part in these legal battles—Hermann Heller. If his name is not as recognizable as some of the others, it is because of several things: Since he was Jewish and a member of the left-wing Sozialdemokratische Partei Deutschlands (SPD), he was not even appointed to an "extraordinary" (associate) professorship until 1927 and to an "ordinary" (full) professorship until 1932. The following year he was in London when he was warned by some friends back in Germany that he would be arrested if he returned home. As a result, he moved to Spain where he died at the age of 42. In 1935, the Nazi's systematically destroyed his works and it was not until the 1950s that his name began to reappear. In 1971, several of his former students collected his works and the three volumes were published by a small but well-respected Dutch publishing firm. By the 1980s several scholars began writing on Heller's thinking and in 1992 the Tübingen publisher Mohr Siebeck reissued the *Gesammelte Schriften*. Heller's works are continuing to draw more interest and the three books under review here are testimonies to the enduring legacy of Herman Heller's political and legal thinking. This review essay is divided into three main sections correspond to the three books: life, work, and his legacy. The review essay concludes with a brief evaluation of Heller's thought and its continuing relevance for democratic thinking today.

HERMANN HELLER: LIFE

There is still no full biography of Hermann Heller but Thilo Scholle's *Hermann Heller. Begründer des Rechtsstaats* provides a compact account of Heller's life and ideas. Although it is in the series "Jüdische Miniaturen" Scholle does not emphasize Heller's Jewishness but does stress his political ideas and activities. Scholle briefly discusses Heller's family, his birth, and the years up to the time of his dissertation. He spends little time discussing Heller's early works but concentrates on his private and political life. Scholle admits that there is little known about his private life but notes that in December 1920, Heller married Gertrud Falke who was

a dancer. They had three children: two daughters—Hilde 1923 and Monika 1927—and one son Lukas 1930. Heller was active in political circles and Scholle emphasizes his participation in a group of young socialists. But he also stresses that Heller's rejection of Marxist doctrine caused friction between Heller and other members and those disagreements prompted Heller to leave that group in 1926. That was the same year that he was offered a professorship at the "Kaiser-Wilhelm-Institut für ausländisches öffentliches Recht und Völkerrecht" in Berlin (Scholle 2023, p. 37). Scholle does spend some time discussing Heller's disagreements with Hans Kelsen. Both were committed democrats and defenders of the Weimar Republic, but Heller criticized Kelsen's formal neo-Kantianism and insisted that law necessarily had a sociological aspect. Both Heller and Kelsen were preoccupied with the concept of sovereignty and in 1927 the former published a book with the title *The Sovereignty (Die Souveränität)*.¹ In October the following year he became a professor of law at the University of Berlin. It was around this time that he had an affair with the writer Elisabeth Langgässer who gave birth to a daughter on Jan. 1, 1929. Although Langgässer moved to Berlin to write, Heller never established contact with her or their joint daughter Cordelia (Scholle 2023, pp. 46-38).

Scholle suggests that Heller had major disagreements with Carl Schmitt but unlike with Kelsen, he was on friendly terms with Schmitt. After a several months-long stay in Italy, Heller wrote a book warning about dictatorship. *Europa und Fascismus* (1929) is about Mussolini and Italy but it was also directed towards Germans regarding Hitler. Scholle notes that Heller used various means to warn about the dangers of a strong leader: in print, in lectures, and on the radio (Scholle 2023, pp. 64-66). The strain of this debate caused a resurgence of heart problems that first arose during the war and as a result he was relieved from teaching during 1931/1932. He recovered and was finally appointed full professor at the University in Frankfurt am Main. Scholle points out that some of the faculty were against his professorship because of his Jewish background.

Scholle devotes eight pages to Heller's engagement in the so-called Preussenschlag. Briefly, this was President Hindenburg's appeal to Art. 48 of the Weimar Reichsverfassung which he claimed gave him authority to replace the Prussian government with the Reich officials to restore "Public Security and Order" ("Öffentliche Sicherheit und Ordnung"). This occurred on July 20, 1932 but the Prussian government appealed. The court case was heard in October the same year and the decision was mixed. But despite Prussia's partial success, the Reich was still in charge. Scholle hints that Heller had ambivalent feelings about the verdict but that he took the danger of the Nazis far more seriously than he did the alleged threat from the Communists (Scholle 2023, pp. 67-75). The penultimate chapter is devoted to Heller's final months—he was in England visiting the London School of Economics and was inquiring about a position when he was warned by some friends in Germany that he should not return because of the danger to his life. He moved to Spain where he taught for a short while. The Frankfurt faculty withdrew his license to teach and on November 5, 1933 he suffered another and this time fatal heart attack. The final chapter details the Nazi measures taken to destroy Heller's works and reputation. Unfortunately, Carl Schmitt played an important role in discrediting the "Jew" Hermann Heller (Scholle 2023, pp. 91-92). The final pages are an assessment of Heller's later work and how his insistence on homogeneity would not likely be accepted by too many political thinkers today. But there is no question that Theo Scholle's miniature biography is a compelling account. One hopes that he might be engaged in writing a full-scale biography of Hermann Heller.

HERMANN HELLER: WORK

The collection *Hermann Heller Kämpfen für die Demokratie* contains ten smaller works and an extensive afterword. The editors Hubertus Buchstein and Dirk Jörke provide a brief account of Heller's life and then focus on the main themes of some of Heller's essays. All ten are worth reading but there are three that stand out. The first one is one of Heller's attempts to explain his idea of social homogeneity. Entitled "Politische Demokratie und soziale Homogenität" Heller does not so much make a plea for social homogeneity as he does make an attempt to clarify what it is and why it is important in a political democracy.² He draws on Machiavelli's insistence that a state is a "unity in multiplicity" ("Einheit in der Vielheit") (Heller 2023, pp.

45, 48, 50). In this, Heller agrees with Carl Schmitt that unity is necessary in order to make decisions, but he disagrees that unity can be gained by utilizing the “Friend and Foe” (“Freund und Feind”) distinction. Furthermore, Heller complained that the Catholic Church’s attempt at unity failed because it was too idealistic but he also contends that the belief that a “strong man” will be able to instill unity. Both conceptions fail because they ignore the various differences in the “Volk” whether these are differences in age, gender, education, or property-ownership (Heller 2023, pp. 49). Heller is more realistic than the Church or Schmitt and he notes that there can only be degrees of homogeneity (Heller 2023, p. 51). Heller maintained that the notion of “super structure” (“Überbau”), ideology, and fictions are philosophically useable but are unrealistic in confronting genuine social, political, and economic problems. But he insisted that a democracy cannot function for long if it is plagued by major economic disparity (Heller 2023, pp. 52, 55-57). Heller returned to the notion of religion as the means of unification. He referred to Dostoevsky’s insistence in the *Devils* that he who has no “Volk,” also does not have God (“Wer kein Volk hat, der hat auch keinen Gott.”). But Heller insisted that one cannot create a “Volk” or a God out of the “myth of the nation” (“Mythos der Nation”) (Heller 2023, p. 58).

The second essay well-worth examining is “Rechtsstaat oder Diktatur?” and in it, Heller makes the case for the legal state over a dictatorship. “Rechtsstaat oder Diktatur?” was published as an essay in 1929 and as a booklet in 1930.³ This booklet was published by J. C. B. Mohr (Paul Siebeck), Max Weber’s publisher and the publisher of the *Archiv für Sozialwissenschaft und Sozialpolitik*. Mohr Siebeck also published some of Hans Kelsen’s essays as well as one or two of Schmitt’s writings.⁴

Anyone who is familiar with Heller’s thinking might be surprised by the question in the title “Rechtsstaat oder Diktatur?” because they would know that he was firmly on the side of the “Rechtsstaat.” The term is a relatively modern German term and is somewhat resistant to translation. It means a state based upon the rule of law which is another way of saying a “constitutional state.” This essay is one of Heller’s more famous essays and for good reason. It contains not only one of Heller’s best short explanations for what a “Rechtsstaat” is but it also includes one of his best brief denunciations of dictatorship. A “Rechtsstaat” is important for politics and for economics because it possesses stability and promotes calculation. Because a “Rechtsstaat” is based upon the rule of law (“Gesetzesherrschaft”), citizens and businesses are able to plan. A dictatorship lacks such predictability because it is ruled by the “unpredictable arbitrary will” (“unberechenbare Willkür”) of the dictator (Heller 2023, pp. 60-62).

During the last several decades of the Eighteenth century the notion of the “Rechtsstaat” seemed unstoppable. However, during the middle of the Nineteenth century doubts about the efficacy of the “Rechtsstaat” began to surface. The fundamental notion of equality before the law began to be questioned: it is a noble ideal but is unrealistic. Heller believed that these doubts about the rule of law were augmented by the Kantian idea of eternal peace and by the Neo-Kantian conception of pure law. What had been taking its place was the Nietzschean notion of the “Herrenmenschen”—the masters of the herd (Heller 2023, pp. 63, 66-67). Previously, rulers relied on religion for their authority; the “Herrenmenschen” have a new religion: “nationalism.” Heller maintained that the “Herrenmenschen” ideologized their own “arbitrariness” (“Willkür”) for themselves and the ideologization of the law for the herd (Heller 2023, pp. 68-69). After discussing how the dictator praises himself for pointing out corruption in the “Rechtsstaat”, Heller pointed out that there is no myth that is more untrue than the myth of the “corruption-killing dictatorship” (“Korruptionstöter Diktatur”) (Heller 2023, p. 71). There are other myths: that dictatorship is order when it is the political form of social anarchy and that dictatorship is the “true” democracy. All of today’s dictators and all those who want to assure us that they have realized democracy or will be realizing it. Heller adds “What else could they say?” (Heller 2023, p. 73).

Towards the end of “Rechtsstaat oder Diktatur?” Heller returns to the notion of the dictator. He defined dictatorship as having the centralized force in the hands of the dictator and that means control over everything, even the economy. Heller argued that dictatorship eliminates not only economic independence but also all of the basic rights which are guaranteed in a “Rechtsstaat”: freedom of expression, freedom of religion, freedom of the press, and the independence of art and science (Heller 2023, pp. 76-77). Rather than

providing freedom as well as order, the dictator wants to curb liberties in the service of his idea of order. Heller concludes with the claim that neither the “bloodless rationalists” (“blutloser Rationalisten”) nor the “blood-lusty irrationalists” (“blutgieriger Irrationalisten”) offer a real future; instead, the genuine future is secured by choosing the social “Rechtsstaat” (Heller 2023, p. 79).

The third essay “Autoritärer Liberalismus” (“Authoritarian Liberalism”) may seem to be an essay bound by its time. The two major figures are Carl Schmitt and Walther Schotte. Schotte began his academic life as a liberal but by 1932 he was the ideological confidant of the German Kanzler Franz von Papen. In 1932 Schotte published *Der neue Staat* and it was one of the two books that Heller criticizes in “Autoritärer Liberalismus.”⁵ However, this essay is much more than a critical book review; it is a brilliant account of the tension between law and power (“Recht und Macht”) and between democracy and autocracy. Heller makes fun of the idea of “authoritarian state” by asking what is the state other than a government that has authority? The question is only, to what degree should a state have authority; that is, power? That seems to be an “eternal question” which Heller does not answer. But at the time there was a similar question: should the state allow economic freedom and many people (then and many now) subscribe to the dictum “Freiheit der Wirtschaft vom Staat!” (“Freedom of the economy from the state!”) (Heller 2023, p. 144). It is noteworthy that Carl Schmitt was one of these who insisted in the early thirties that the state should stay out of economics, but that Germany needed a “Starke Staat” (“Strong state”) if not a “total state.” But as Heller argued that the time, the “total state” was an impossibility (Heller 2023, p. 145). Heller was rarely mistaken, but the events after his death proved that there could indeed be a “total state”—Nazi Germany. But he was not mistaken with his repeated warnings about the increasing threat of a German dictatorship.

HERMAN HELLER: LEGACY

The book *Hermann Heller's demokratischer Konstitutionalismus* is a collection of ten essays written on Heller's ideas regarding the state, democracy, and social order. Some essays, like the one on bureaucrats may appeal to a limited readership, but all of these essays are worth careful reading. Because of space, examinations will be limited to six of the essays. The first one to be considered is Anthoula Malkopoulou's essay: it is chosen first because it is in English, is closely connected to the notions of liberalism and anti-democratic forces, and because it is very good. Malkopoulou's main thesis is that Heller recognized the threats that anti-democratic forces meant for Weimar's government. She examines one of the means that democracy can use to defend itself and that is the notion of “militant democracy.” She notes that that is often connected to the writings of Karl Loewenstein and Carl Schmitt but her focus is on Heller's notion (Frick und Lembcke 2022, pp. 186-187). Malkopoulou also maintains that the notion of “militant democracy” is current so an analysis of it is not just valuable historically but has contemporary implications. After criticizing Schmitt's legal thinking and Mussolini's fascist philosophy, she turns to Heller's conception of the state. Heller contended that many of his fellow legal theorists focused too much on economic independence whereas the focus should be on culture. What was needed was the integration of all social classes and that could be accomplished by adhering to social values. This would provide the legitimacy that democracy needs and would be a sufficient defense against illiberal attacks. While lacking the sense of “militancy” that other theories have, Malkopoulou contends that it promotes “social justice and cultural integration” (Frick und Lembcke 2022, pp. 196-197, 200-201).

The second essay is by David Dyzenhaus and it is also in English. It is not entirely dedicated to understanding Heller's thinking; indeed, much of it is devoted to a discussion of Hobbes' notion of sovereignty and much of it is devoted to Hans Kelsen's and Carl Schmitt's responses to the three “puzzles” that Hobbes has regarding the sovereign: how can the absolute authority of the sovereign be constrained by law; how can rationalism be applicable to the sovereign when he is regarded as a machine; and how does the sovereign reign during states of exception (Frick und Lembcke 2022, p. 167). Dyzenhaus' examination of these three issues is well-worth considering; here the comments are restricted to his discussion of Heller's response to Hobbes' puzzles. Dyzenhaus is not only an authority on Heller's thinking; he is also an expert on that of

Schmitt as well as those by Kelsen. A discussion of the merits of Dyzenhaus' "Deus in Machina" would require a far more detailed analysis than can be offered here. Instead, I want to emphasize two critically important points that Dyzenhaus addresses: the tension between the individual and the state where one needs to adopt Martin Luther's "Here I stand, I can do no other" and where neither the normative nor the positive legal theories are ultimately workable; there must be a combination. Neither Schmitt's nor Kelsen's theories recognize, as Heller's does, that humans are not just political animals or legal constructs but are both (Frick und Lembcke 2022, pp. 180-182).

The third essay may not seem to warrant much attention here but that is not the case. Ernst-Wolfgang Böckenförde's reputation is based upon three things: he was a judge on the German Constitutional Court, a noted legal professor, and a follower of Carl Schmitt. As such, he was expected to be a staunch critic of Heller since Heller and Schmitt were regarded as antipodes. That helps explain part of Lembcke's title "On the Other Side of the Moon" and it is indicated by the other part of the title "Böckenförde's Heller-Rezeption." Lembcke acknowledges that Böckenförde had insisted that *Begriff des Politischen* was the key text to understanding Carl Schmitt's thinking (Frick und Lembcke 2022, pp. 43-47). But Lembcke pointed out that even Böckenförde realized that Schmitt's focus on the exclusivity of the political as means, meant that there was no place in Schmitt's thought for ends. It was Böckenförde's realization that Heller, who accepted Schmitt's primacy of the political, also insisted that politics and governments are interested in achieving goals (Frick und Lembcke 2022, pp. 49-50). Lembcke argued that Böckenförde believed in democracy and constitutionalism (hence "demokratischer Konstitutionalismus") which he shared with Heller in contrast to Schmitt (Frick und Lembcke 2022, pp. 52-53, 56-57). Lembcke concludes with the claim that Böckenförde recognized that Schmitt's concept of the political was the starting point and not the end. Böckenförde's adaptation of Heller's ideas about "Volk" and "Volksouveränität" means that he could be considered a "liberal Schmittianer", if not Heller's student ("Schüler Hellers") (Frick und Lembcke 2022, p. 65).

The fourth essay is by Katrin Groh. As with Dyzenhaus, Groh is knowledgeable about Heller, Kelsen, Thoma, Anschütz, and Hugo Preuß as indicated by her magisterial *Demokratische Staatsrechtslehrer in der Weimarer Republik* (Groh 2010). Here, in "Antipositivismus und demokratischer Etatismus" Groh addresses two issues: was Heller against positivism and how much emphasis did he place on the state. She makes it abundantly clear that Heller was an anti-positivist and that Kelsen was his opponent. Heller maintained that Kelsen's positivism robbed law of its reality and its substance and that Kelsen's legal theory was empty and ineffective because it refused to acknowledge that law is about power and that the legal order rests with society (Frick und Lembcke 2022, pp. 22-26, 29). Groh is less insistent about the importance of the state and she modifies Heller's "statism" by adding that it was "democratic." In this sense, Heller's opponent was the Austro-Marxist Max Adler (Frick und Lembcke 2022, pp. 24-25, 35-36).

The fifth essay is by Rüdiger Voigt and it is one of the shortest essays in this collection but it is also one of those which is the most wide-ranging as his topic is Heller and German political science ("Hermann Heller und die deutsche Politikwissenschaft"). Voigt explains that Heller rejected legal positivism because a theory of state is not possible without considering the state, power, and political practice (Frick und Lembcke 2022, p. 70). It is Heller's concern with all three that lends justification to the claim that Heller is the "father of universal political science" (Frick und Lembcke 2022: p. 76; Groh 2010, p. 143). Unlike the legal positivists, from Laband, through Jellinek, to Kelsen, Heller placed the notion of "power" ("Macht") at the center of his doctrine of the state—hence contributing to the discussion of politics today (Frick und Lembcke 2022, p. 78).

The final essay under review consists of two: the introduction and the concluding essay, both written by the editors Verena Frick and Oliver W. Lembcke. The two essays can be read as one not only because the authors are the same but that Frick and Lembcke cover some of the same ground in both essays. For Frick and Lembcke, the core of Heller's political science is the notion that it is practical and that it is not so much a theory but an "art" ("Kunst"). A theory of the state cannot be something formal and universal because it must also include material and specific factors (Frick und Lembcke 2022, pp. 6-8). Later, they maintained that Heller's political science and his theory of state are dynamic (Frick und Lembcke 2022, p. 208). Frick

and Lembcke conclude the final essay of the collection with comments about Heller's possible view of the European Union and with the observation that for Heller there needs to an appropriate combination of political autonomy and social-state security (Frick und Lembcke 2022, p. 220).

Hermann Heller's demokratischer Konstitutionalismus helps establish Heller's legacy in several ways. Malkopoulou's essay is a convincing account of Heller's philosophy of social justice and cultural integration that has resonance for today's political and cultural polarization. Dyzenhaus brings an astonishing amount of knowledge in order to compare and contrast various answers to the concept of sovereignty and the problem of the state of exception. Hobbes was one of the first philosophers to have tried to address it but it is Heller who appears to provide the most compelling answer. That is one part of his legacy. Lembcke showed that as much as Böckenförde has been regarded as one of Schmitt's disciples, that he had realized the deficiencies in his master's teaching. It was Heller's insistence on the importance of the peoples' will that prompted Böckenförde to reevaluate his dependency on Schmitt's concept of the political and to understand the importance of democratic consensus—thus extending Heller's legacy. Katrin Groh argues persuasively that Heller's legal thinking is well-worth considering today and that his concerns about the lack of non-legal thinking in law harms law in theory and certainly in practice. She emphasizes Heller's critique of legal positivism and, like other scholars in this collection, suggests that law and society are necessarily bound together—something we need to remind ourselves of today. Voigt's contribution to Heller's legacy is historical but he reminds us how much Heller's ideas influenced German political science after the Second World War and how much their realism contributed to present day German political science. It is this theme that Frick and Lembcke take up both in their introduction and in their concluding essay.

HERMANN HELLER: AN EVALUATION

Hermann Heller is not as well-known as Carl Schmitt or Hans Kelsen, but he should be. He countered Schmitt's politically-charged authoritarianism and he vigorously opposed Kelsen's lifeless legal formalism. He may not have been as politically challenging as Schmitt nor as intellectually accomplished as Kelsen, but he did hold his own in his confrontations with his more famous opponents. Heller could be positioned somewhere between Schmitt's Right and Kelsen's Left but that makes Heller appear as either a "middle of the roader" or as a Hegelian "synthesis." But Heller was too outspoken to be a "middle of the roader." He rejected Hegelian metaphysics and he regarded Hegel as the first of the German thinkers to promote "Machtpolitik."⁶ But he agreed with Schmitt that law must be connected to politics and he shared Kelsen's belief in freedom. One wonders what Heller could have achieved if he had lived and worked as long as Schmitt (95) or Kelsen (92). These three books provide a sufficient basis for understanding what Heller believed in and fought for; and they offer a compelling reason to study Hermann Heller's life, work, and legacy.

NOTES

1 *Die Souveränität* is found in Band 2 of Heller's *Gesammelte Schriften*. See Heller 1992b, pp. 31-202.

2 "Politische Demokratie und soziale Homogenität" is included in Heller 1992b, pp. 421-433.

3 "Rechtsstaat oder Diktatur?" is also included in Heller 1992b, pp. 443-462.

4 *Rechtsstaat oder Diktatur?* was published in the Mohr Siebeck series "Rechts und Staat in Geschichte und Gegenwart" in 1930 as Number 68. Carl Schmitt's *Hugo Preuss. Sein Staatsbegriff und seine Stellung in der deutschen Staatslehre* was published the same year as Number 72.

5 "Autoritärer Liberalismus" is also included in Heller 1992b, pp. 643-653.

6 For Heller's dislike of Hegelian dialectics see "Einleitung in G. W. H., *Die Verfassung Deutschlands*" and for his claim that Hegel was the first of the thinkers promoting "Machtpolitik" see *Hegel und der nationale Machstaatsgedanken in Deutschland*. Both are in Heller 1992a, pp. 13-20 and 20-240.

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