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State and sovereignty: Some reflections on Hermann Heller as interpreter of the Weimar crisis

Abstract. — The present essay addresses the way one of the leading intellectuals of the Weimar period – the legal theorist Hermann Heller – analysed and interpreted the roots and causes of the Weimar crisis and the weaknesses of that particular system. I will argue that such an analysis implied a critical legal and political reflection on the meaning of sovereignty, State and democracy.

Keywords. — Sovereignty, State, democracy, political representation, general will, Sara Lagi, *Les Cahiers d'AGORA*.

État et souveraineté : quelques réflexions sur Hermann Heller comme interprète de la crise de Weimar

Résumé. — Le présent article traite de la façon dont l'un des principaux intellectuels de la période de Weimar – le théoricien du droit Hermann Heller – a analysé et interprété les origines et les causes de la crise de Weimar et les faiblesses de ce régime particulier. Je montrerai qu'une telle analyse impliquait une réflexion juridique et politique critique sur le sens de la souveraineté, de l'État et de la démocratie.

Mots clés. — Souveraineté, État, démocratie, représentation politique, volonté générale, Sara Lagi, *Les Cahiers d'AGORA*.

Introduction

The history of the Weimar Republic (1919-1933) was characterized by a head-on debate on the meaning of constitution, State and sovereignty. Such debate represents a relevant moment in the History of European political and juridical thought not only because it involved prominent scholars such as Carl Schmitt, Hans Kelsen, Gerhard Leibholz and Hermann Heller, but also because it can objectively be considered as an attempt to respond to the political and institutional crisis, which caused the collapse of the Weimar Republic¹.

The promulgation of the Weimar constitution was seen as a new start for Germany: the Wilhelmine Reich was replaced by a democratic Republic, with a parliamentary government, which had to be – according to the intentions of the constituents – counter-balanced by the democratic election of the President of the Republic. Also, mainly as a result of the pressure made by the Social-democrats within the Constituent Assembly, social rights were constitutionalized for the first time. In a few words, as scholars have correctly stressed,² the Weimar constitution seemed to be the most progressive ever adopted: it embodied the new era of the democratic constitutions, i.e. of those constitutions which were such not only because they included universal suffrage but chiefly because they assumed the sovereignty of the people, equipped with the constituent power³.

The principle of Constituent Power, which powerfully erupted for the first time during the French Revolution and which in the 19th century had always evoked the ghost of the Revolution and the Jacobin Terror with its radical purposes, re-emerged thanks to the Weimar constitution. Yet, the latter contained some controversial aspects, which might have negatively influenced the political life of the country and which soon became the object of the reflection of some of the leading German intellectuals of that time. In the first instance, the co-existence of the principle of the parliamentary government and the direct election of the President of the Republic: the democratic investiture of the latter was seen as an effective limit to the power of the Parliament, considered as suspect, because of its party pluralism. Since the very writing of the Constitution, the idea was that the President had to represent and

¹ PEUKERT Detlev, *The Weimar Republic: the Crisis of Classical Modernity*, Hill and Wang, New York, 1993; MOMMSEN Hans, *The Rise and Fall of Weimar Democracy*, North Carolina, North Carolina Press, 1996.

² GOZZI Gustavo, « Democrazia e pluralismo da Weimar alla Repubblica federale tedesca », in *Scienza & Politica*, n° 6, 1992, p. 85-106.

³ FIORAVANTI Maurizio, *La costituzione democratica. Modelli e itinerari del diritto pubblico del ventesimo secolo*, Milano, Giuffrè, 2018, p. 84.

embody the ultimate unity of the people. It was implicit that such unity ideally had to be juxtaposed to the intrinsic political pluralism and potential divisions within the legislative body.

The Weimar constitution was thus established upon a sort of inner contrast: between the President and Parliament, which inevitably assumed two different types of political legitimation. Such contrast has been analyzed in numerous and thorough studies⁴ and has been interpreted as the « original sin » of the Weimar Constitution, because over the years the Parliament and the President became two competing powers. It is however relevant to highlight that the idea of the President of the Republic as the bulwark of the unity of the German people revealed the profound mistrust that a large part of the nation had towards the legislative body and chiefly the principles of political and party pluralism⁵.

The latter were perceived by the conservative sectors of the German society and by distinguished political thinkers of that time, such as Carl Schmitt and Heinrich Triepel, as the source of dangerous political fragmentation and divisions threatening the unity of the State. The growing instability of the Weimar government, the inability of the Parliament to face the most urgent social and economic problems of the country seemed to prove the rightness of that critique.

In this respect, it is important to mention Carl Schmitt's work on the *Geistgeschichtliche Lage des heutigen Parlamentarismus (The Crisis of Parliamentary Democracy 1923)*, in which he violently attacked parliamentarism and party pluralism, where the creation and preservation of the « unitary will of the State » was unfeasible, in his opinion⁶.

Schmitt was proposing a clear-cut political solution: to transform the German Republic into a plebiscitary one. He advocated the democratic election of the President of the Republic

⁴ On this issue: LOUGHLIN Martin and WALKER Neil (ed.), *The Paradox of Constitutionalism: Constituent Power and Constituent Form*, Oxford, Oxford University Press, 2008.

⁵ STOLLEIS Michael, *Geschichte des öffentlichen Rechts in Deutschland. Dritter Band, Staats- und Verwaltungsgeschichte in Republik und Diktatur 1914-1945*, t° 3, München, Verlag C. B. J. Mohr, 1999, p. 153-186; WIEGANDT Manfred, *Die Weimarer Staatsrechtslehre aus dem Blickwinkel des 21. Jahrhunderts*, in M. Gangl (hrsg. von), *Die Weimarer Staatsrechtsdebatte. Diskurs und Rezeptionsstrategien*, Baden-Baden, Nomos Verlag, 2011, p. 443; BAUME Sandrine, « Rehabilitating Political Parties: an Examination of the Writings of Hans Kelsen », in *Intellectual History Review*, vol. 28, n° 3; GOZZI Gustavo, « Democrazia e pluralismo da Weimar alla Repubblica federale tedesca », in *Scienza & Politica*, n° 6, 1992, p. 85-106.

⁶ SCHMITT Carl, *The Crisis of Parliamentary Democracy* (Eng. trans.), ed. KENNEDY Ellen, Massachusetts, MIT Press, 1988, p. 84-91.

as an antidote against political pluralism and considered the President as the supreme guardian of the constitution and as the expression of the people's constituent power and its political unity⁷.

There is an extensive literature on how Schmitt's proposal conflicted with that of Hans Kelsen, who lived in Germany in the early 1930s: their dispute about *Wer soll der Hüter der Verfassung sein?* (*Who should be the Guardian of the Constitution?*) dates back to 1930-1931. If Schmitt was in favor of a plebiscitary democratic Republic, Kelsen – who was his colleague at the University of Cologne – instead supported a true parliamentary democracy. If Schmitt assumed the unity of the people as a pre-existing reality which had to be embodied (and protected) by the President of the republic, Kelsen believed that such unity took shape within the Parliament through a complex game of compromises between the political forces, which were plural because – as he stressed – the society and the people themselves were plural subjects⁸.

Pluralism and unity were thus at the very heart of the Weimar political debate: one of its leading characters was Hermann Heller who developed a political and juridical theory on the meaning of the State and sovereignty, which aimed at going beyond the head-on contraposition between Schmitt and Kelsen.

Heller: the State and Sovereignty

In 1927 Heller published a long essay, entitled *Die Souveränität (Sovereignty)*. He thought that the first step towards a systematic solution to the fragility of the Weimar democracy was to reflect on the significance of the State and sovereign power. In his opinion, the latter had been misinterpreted over centuries: the State was reduced to an impersonal subject, equipped with the sovereign power, which was conceived as similarly impersonal⁹.

Since the Modern Age – Heller observed – one of the main intellectual and political problems was to understand how to protect the individual from arbitrary power. The solution

⁷ *Ibid.*

⁸ KELSEN Hans, *Vom Wesen und Wert der Demokratie* (1920), now in Id., *Verteidigung der Demokratie*, hrsg. von M. Jestaedt und O. Lepsius, Tübingen, Mohr Siebeck, 2006; KELSEN Hans, *Vom Wesen und Wert der Demokratie* (1929), now in Id., *Verteidigung der Demokratie*, hrsg. von M. Jestaedt und O. Lepsius, Tübingen, Mohr Siebeck, 2006.

⁹ KELSEN Hans, *Die Souveränität. Ein Beitrag zur Theorie des Staats- und Völkerrechtes*, in Id., *Gesammelte Schriften*, Bd. 3, Leiden, A. W. Sijthoff, 1971, p. 39.

was, for Heller, to conceptualize more and more the State as a neutral, impersonal body and the sovereign power as « the will of the State » deprived of any « subjective components »¹⁰.

To Heller, Hans Kelsen's legal formalism represented the ultimate and the most radical outcome of a century-long process of de-substantialization of the State and sovereignty. In his *Das Problem der Souveränität (The Problem of Sovereignty)* (1920) Kelsen in fact theorized the complete parity between the State and the legal order: the State was the legal order and vice versa. Also, sovereignty was defined by the Austrian jurist as the « quality » of the legal order¹¹.

Assuming that Kelsen's definition of State and sovereignty as correct, one huge problem emerged, for Heller: who decided? Who was the concrete subject of the sovereign power? What kind of relationship existed between the State and society? Between the State and the people? Kelsen's legal doctrine was the final symptom of a whole civilization, which had lost the ability (and the courage) to see the State and sovereignty in their concrete, physical, tangible terms¹².

How to recover such an ability? Heller thought that it was necessary to look back to the past intellectual tradition, and chiefly to two thinkers: Jean Bodin and G. W. Hegel.

For Heller, the former had the merit of interpreting and defining the State as a « unitary entity » which made decisions and implemented them within a territory. It was Bodin who – as Heller emphasized – provided us with a similarly consistent definition of « sovereign ». The latter was a subject who had to the power to force all citizens to follow and respect his decisions¹³.

Heller's interpretation of Bodin's work was evidently influenced by Carl Schmitt's lesson on sovereign power as the power of making and imposing political decisions¹⁴. Yet, such an influence was in some respects mitigated by a similarly strong conviction: Heller recognized another crucial merit to Bodin only, i.e. that of identifying « superior principles »,

¹⁰ *Ibid.* p. 42-43.

¹¹ KELSEN Hans, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer Reinen Rechtslehre*, Tübingen, Mohr Siebeck, 1920, p. 9-47.

¹² HELLER Hermann, *Die Souveränität. Ein Beitrag zur Theorie des Staats- und Völkerrechtes*, in Id., *Gesammelte Schriften*, Bd. 3, Leiden, A. W. Sijthoff, 1971, p. 39.

¹³ *Ibid.* p. 42-45.

¹⁴ On this aspect see: PASQUINO Pasquale, *Hermann Heller: sovranità e rappresentanza. Introduzione a H. Heller, La sovranità e altri scritti sulla dottrina del diritto e dello Stato*, Milano, Giuffrè, 1987, p. 6.

which the State itself had to respect. With that, Heller did not want to embrace a jus-naturalistic view. He was a legal positivist: in my opinion, he rather wanted to stress how Bodin had treated the key problem of limiting State power.

Faced with Kelsen's legal formalism, Heller embraced a totally different concept of State and sovereignty: he highlighted the absolute centrality of decision, implemented within a territory. Yet, his recall to «superior principles» implied a clear refusal of any form of absolute sovereignty (*legibus soluta*). Hegel was a source of inspiration for Heller too. In a long essay published in 1921, entitled *Hegel und der nationale Machstaatsgedanke in Deutschland. Ein Beitrag zur politischen Geistesgeschichte (Hegel and the Problem of State in Germany)* Heller depicted Hegel as the one who had been able to break with liberal and century long tradition of contractualism, according to which the State had to be seen as the result of a contract subscribed by single individuals who, on the basis of a rational *calculus*, left the «state of nature» and established a government¹⁵.

With his work, Hegel went beyond this individualistic foundation of the State, by developing an «organic» concept of the State, according to which the State did not derive from single individuals, while admitting the existence of plurality¹⁶.

Bodin thus provided Heller with the idea that the State was a physical entity, connected with the territorial dimension, and exercising the sovereign power which was the power of making binding decisions for the people.

Hegel then provided Heller with another important conceptual tool: the idea that the State was something higher and more complex than the mere result of a contract and thus something more than an entity established to accomplish the (individualistic) needs and purposes of an (individualistic) society. Yet, as previously seen, the critique of contractualism did not imply the refusal of pluralism (social, ideal and political).

In the Weimar period, Heller thought that the main task of an intellectual was to go beyond any desubstantialized concept of the State and sovereignty, because it was vital and

¹⁵ HELLER Hermann, *Hegel und der nationale Machstaatsgedanke in Deutschland. Ein Beitrag zur politischen Geistesgeschichte* (1921), now in Id., *Gesammelte Schriften*, hrsg. Von C. Müller, M. Draht, O. Stammer und G. Niemeyer, Tübingen, Mohr Siebeck, 1992, p. 21-240.

¹⁶ *Ibid.* p. 135-140.

necessary, for him, to reflect on the meaning of a concrete form of State, the democratic one, which was that established in Germany and which was going through a serious crisis.

What did a democratic State mean ? How did it work ? And most importantly how was it possible to reconcile political unity and social plurality ? Starting from the presupposition that sovereignty meant making decisions, how could the people (the sovereign subject within a democratic State) make their political decisions? Finding a credible answer to such a question, for Heller meant defining a solution to the Weimar crisis, which was the crisis of a democratic State and community.

For Heller, the specific form of people's sovereignty was *political representation*: It was solely through the latter that « people as a unity » could rule over « the people as a plurality »¹⁷. The mechanism of political representation explained, for Heller, how concretely the people ruled within a democratic State but it did not explain what made that « ruling » legitimate. Even if his concept of political representation as the form of the people's sovereignty re-echoed Thomas Hobbes¹⁸, Heller seemed to take inspiration from Jean-Jacques Rousseau when he affirmed that the « link » between the representative and the represented, between the rulers and ruled was politically legitimated by the concrete and actual existence of a “general will”¹⁹ (*volonté générale*).

If that « general will » didn't actually exist the mechanism of political representation lost its most profound political sense. In other words, without the « general will » the democratic rule of the people through political representation was *legal* but not *legitimate*. For Heller, the discrepancy between « legality and legitimacy » was the core of the Weimar crisis. Such a discrepancy was partially imputable to that process of de-substantialization of State and sovereignty, which had put the problem of sovereign power as the power of making decisions aside. In this way, for Heller, sovereignty had changed into an impersonal power: the main focus thus became the legality of the power rather than its legitimacy, i.e. the main

¹⁷ HELLER Hermann, *Die Souveränität. Ein Beitrag zur Theorie des Staats- und Völkerrechtes*, in Id., *Gesammelte Schriften*, t° 3, cit., p. 68.

¹⁸ Pasquale Pasquino stresses how Heller adopted Hobbes' view of representation as a form of sovereignty. PASQUINO Pasquale, *Hermann Heller...*, *op. cit.*, p. 6.

¹⁹ HELLER Hermann, *Die Souveränität...*, *op. cit.*, p. 70-71.

focus had moved from *who* made decisions and *what* was decided to *how* such decisions are made²⁰.

Faced with the Weimar crisis, the main challenge was to reflect on the State and sovereignty in concrete terms, by understanding who decided within a democratic State and what conditions made such decisions democratically legitimate. For Heller, the answer was – as previously stated – the concept of the « *volonté générale* ».

Yet, once it was identified, Heller raised two more questions: how did the « *volonté générale* » take shape? And how could it be combined with the preservation of social, ideal and political pluralism which, for him, was an essential condition to the existence of a modern democracy, including the granting of fundamental rights to everyone? In 1928, he published what I personally think is his major contribution to 20th century political theory, *Politische Demokratie und Soziale Ömogenität* TRADURRE This was an essay characterized by a profound social-democratic idealism but we would make a mistake if we considered it as a mere expression of ideological motivations. Heller argued that “the general will” making the people’s rule legitimate could exist only on one precise condition, that is only if a true « *social homogeneity* » existed and worked. By « *social homogeneity* » Heller meant a consciousness of the « *we* », without which no true democratic State could survive and no political unity could survive either. He thought that the creation of social homogeneity concretely implied the integration of the working class – and not only the upper one – into the body State, into the political life of the State²¹.

Only on this condition could laws issued by the parliament be considered the true expression of the people’s sovereignty rather than the expression of an elite imposing its will unilaterally on the rest of society. The crucial political and stringent problem of the Weimar democratic Republic, Heller argued, was that no effective social homogeneity had ever existed. Social homogeneity did not imply the elimination of pluralism, more the ability to make it co-exist with the necessary political unity²².

²⁰ On the issue of legality versus legitimacy within Heller’s reflection see: fundamental DYZENHAUS David, *Legality and Legitimacy. Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, Oxford, Oxford University Press, 2003.

²¹ HELLER Hermann, *Politische Demokratie und Soziale Ömogenität*, in *Id.*, *Gesammelte Schriften*, t° 2, cit., p. 426-427.

²² *Ibid.* p. 427.

In this way, Heller was developing a political reflection on the State and sovereignty (democratic), which aimed at going beyond both Schmitt and Kelsen. He refused Schmitt's concept of political unity as neutralization of a supposedly dangerous pluralism just as he refused Kelsen's legal formalism, with its rejection of the decisional dimension of sovereignty.

Heller argued that once the more concrete meaning of State and sovereignty had been recovered, one should understand how both worked in democratic terms. For him, this implied to recognize that a democratic State was such because it was based on the principle of the people as true sovereign, making binding decisions within a territory. At the same time, Heller was far from being tempted to identify the people with a unitary entity, in which there was no room for diversity and plurality. He praised pluralism as a positive factor, for example party pluralism. In this sense, he was close to Kelsen's position²³.

Yet, looking at the Weimar crisis and the political fragmentation paralyzing the Parliament, he stressed the necessity of a true « social homogeneity ». As a Social-democrat, he thought that a large part of the Weimar crisis derived from the deliberate exclusion of the working class from political life. The *bourgeoise* was responsible for that²⁴. If the latter did not realize the vital importance of integrating the working class into the body State, the working class would be more and more radicalized, losing its trust and loyalty towards democratic institutions and embracing the ideal of a violent revolution. In fact, the 1920s were typified by a growing radicalization which regarded both Extreme Right and the Extreme Left²⁵.

Heller was very far from those advocating a Bolshevik Revolution in Europe. He was critical toward the concept of « proletarian dictatorship ». He firmly believed not only in the preservation of pluralism but also in the protection of fundamental rights and liberties, even though he remained critical toward capitalism.²⁶

²³ *Id.*

²⁴ Kelsen was always supportive of pluralism and party pluralism. See: VAN OUYEN Robert Christian, *Der Staat der Moderne: Hans Kelsens Pluralismustheorie*. Berlin, Duncker & Humblot, 2003.

²⁵ MASTELLONE Salvo, *Storia della democrazia in Europa. Da Montesquieu a Kelsen*, Torino, UTET, 1993; BARTH Boris, *Europa nach dem grossen Krieg: die Krise der Demokratie in der Zwischenkriegszeit 1918-1938*, Frankfurt am Main, Campus Verlag, 2016.

²⁶ LLANQUE Marcus, « Hermann Heller and the Republicanism of the Left in the Weimar Republic », in *Jus Politicum. Revue de droit politique*, 23, 2019, p. 18-30.

The point was to go beyond a formal, legalist concept of democracy, i.e. beyond the idea that once a parliament elected by all citizens had been established, democracy was carried out perfectly. The latter could exist and work if social homogeneity was accomplished, if the working class was politically integrated. In order to reach such an ambitious goal, Heller proposed to enact social reforms in favor of the working class itself and implement the social rights of the Constitution²⁷.

Heller's reflection on the meaning of State and sovereignty was his personal response to the Weimar crisis - a response emphasizing the necessity to find a durable compromise between political unity and social pluralism.

²⁷ DYZENHAUS David, « Legal Theory in the Collapse of Weimar: A Contemporary Lesson ? », in *The American Political Science Review*, 91, n° 1, 1997, p. 121-134.

Bibliography

- BARTH Boris, *Europa nach dem grossen Krieg: die Krise der Demokratie in der Zwischenkriegszeit 1918-1938*, Frankfurt am Main, Campus Verlag, 2016.
- BAUME Sandrine, « Rehabilitating Political Parties: an Examinations of the Writings of Hans Kelsen », in *Intellectual History Review*, vol. 28, n° 3, p. 427-430.
- DYZENHAUS David, « Legal Theory in the Collapse of Weimar: A Contemporary Lesson ? », in *The American Political Science Review*, 91, n° 1, 1997, p. 121-134.
- DYZENHAUS David, *Legality and Legitimacy. Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, Oxford, Oxford University Press, 2003.
- FIORAVANTI Maurizio, *La costituzione democratica. Modelli e itinerari del diritto pubblico del ventesimo secolo*, Milano, Giuffrè, 2018.
- GOZZI Gustavo, « Democrazia e pluralismo da Weimar alla Repubblica federale tedesca », in *Scienza & Politica*, n° 6, 1992, p. 85-106.
- HELLER Hermann, *Die Souveränität. Ein Beitrag zur Theorie des Staats- und Völkerrechtes*, in *Id., Gesammelte Schriften*, t° 3, Leiden, A. W. Sijthoff, 1971.
- HELLER Hermann, *Hegel und der nationale Machstaatsgedanke in Deutschland. Ein Beitrag zur politischen Geistesgeschichte*, now in *Id., Gesammelte Schriften*, hrsg. Von C. Müller, M. Draht, O. Stammer und G. Niemeyer, Tübingen, Mohr Siebeck, 1992.
- HELLER Hermann, *Politische Demokratie und Soziale Ömogenität*, in *Id., Gesammelte Schriften*, now in *Id., Gesammelte Schriften*, hrsg. Von C. Müller, M. Draht, O. Stammer und G. Niemeyer, Tübngen, Mohr Siebeck, 1992.
- KELSEN Hans, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer Reinen Rechtslehre*, Tübingen. Mohr Siebeck, 1920.
- KELSEN Hans, *Verteidigung der Demokratie*, hrsg. von M. Jestaedt und O. Lepsius, Tübingen, Mohr Siebeck, 2006.
- LLANQUE Marcus, « Hermann Heller and the Republicanism of the Left in the Weimar Republic », in *Jus Politicum. Revue de droit politique*, 23, 2019, p. 18-30.
- LOUGHLIN Martin and WALKER Neil (ed.), *The Paradox of Constitutionalism: Constituent Power and Constituent Form*, Oxford, Oxford University Press, 2008.
- MASTELLONE Salvo, *Storia della democrazia in Europa. Da Montesquieu a Kelsen*, Torino, UTET, 1993.

MOMMSEN Hans, *The Rise and Fall of Weimar Democracy*, (Eng. trans.) North Carolina, North Carolina Press, 1996.

PASQUINO Pasquale, *Hermann Heller: sovranità e rappresentanza. Introduzione a H. Heller, La sovranità e altri scritti sulla dottrina del diritto e dello Stato*, Milano, Giuffrè, 1987.

PEUKERT Detlev, *The Weimar Republic: the Crisis of Classical Modernity*, New York, Hill and Wang, 1993.

SCHMITT Carl, *The Crisis of Parliamentary Democracy* (Eng. trans.), ed. KENNEDY Ellen, Massachusetts, MIT Press, 1988.

STOLLEIS Michael, *Geschichte des öffentlichen Rechts in Deutschland. Dritter Band, Staats - und Verwaltungsgeschichte in Republik und Diktatur 1914-1945*, t° 3, München, Verlag C. B. J. Mohr, 1999.

VAN OUYEN Robert Christian, *Der Staat der Moderne: Hans Kelsens Pluralismustheorie*, Berlin, Duncker & Humblot, 2003.