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Hermann Heller and the Republicanism of the Left in the Weimar Republic

HERMANN HELLER AND HIS REPUBLICAN WAY OF POLITICAL THINKING

Hermann Heller is mostly known as a prominent figure in the disputes among public lawyers in the Weimar Republic, debating Hans Kelsen and Carl Schmitt regarding questions of sovereignty and the relation between law and politics.¹ What is of interest here – rather than this debate – is Heller’s political theory that formed the background of his legal thinking and covered many other topics as well, among them questions of militant democracy, the reconciliation of socialism and the state, the concept of the citizen and the role of a public education that would enable especially workers to act as citizens. Although we will touch upon Hellerian legal concepts such as “legal provision”, “legal fundamental principle” or “*sozialer Rechtsstaat*”, the general purpose of this article is to demonstrate that his political views could be analyzed best as coming close to what we nowadays call “civic republicanism”.

Heller was born in Austria in 1891, fought during the World War on the Eastern front where he suffered a heart disease that caused later on his death in 1934.² When he joined the Social Democratic Party in 1920, he expressly rejected the internationalist elements of the party’s program. Heller was no social democrat by socialization or tradition but motivated by the wish to help build the polity that the Weimar Republic had begun. He found himself on the right wing of the party’s youth organization opposing Max Adler (also from Austria) in the struggle where the party’s major responsibility should be directed to: towards the emancipation of mankind or the welfare of the labourer in one’s own country. In this sense Heller approved of the concept of the nation, but he defined “nation” in terms of culture, not race or ethnicity, and saw culture as the inevitable background for any self-governing regime. In the case of Weimar, if it were to take over government, the proletariat would have to join the underlying culture of the nation it is to govern.

¹ From J. BLAU, *Sozialdemokratische Staatslehre in der Weimarer Republik. Darstellung und Untersuchung der staatsrechtlichen Konzeptionen von Hermann Heller, Ernst Fraenkel und Otto Kirchheimer*, Marburg, Verlag Arbeiterbewegung und Gesellschaftswissenschaften, 1980 to D. DYZENHAUS, *Legality and Legitimacy. Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, Oxford, Clarendon, 1997 and K. GROH, *Demokratische Staatsrechtslehre in der Weimarer Republik. Von der konstitutionellen Staatslehre zur Theorie des modernen demokratischen Verfassungsstaats*, Tübingen, Mohr Siebeck, 2010.

² Still the best introduction into the life of Heller is K. MEYER, “Hermann Heller. Eine biographische Skizze (1967)”, in C. MÜLLER and I. STAFF (ed.), *Der soziale Rechtsstaat. Gedächtnisschrift für Hermann Heller 1891-1933*, Baden-Baden, Nomos, 1984, pp. 65-87.

In a way Heller took a path Antonio Gramsci established in Italy later on, both laying the groundwork for a concept of political culture long before it became a research discipline. In order to enable the proletariat to govern, Heller believed that education was needed. In those days higher education had to be financed privately and therefore we find very few children of working families at universities. Heller engaged in the establishment and organization of adult education (“*Erwachsenenbildung*”) by founding and running adult education centers (“*Volkshochschulen*”) that gave people the opportunity to learn how to be a citizen. In the crisis of the parliamentary system Heller criticised the bourgeoisie for its failing attempts to engage in defending democracy. Instead the bourgeoisie was seeking protection by accepting what Heller labeled “authoritarian liberalism”, a phrase most recently rediscovered.³ Heller invented the term “*sozialer Rechtsstaat*” to indicate a platform on which socialists as well as liberals could work together. This term was taken up in the founding period of West Germany and formed an important part of the constitution of 1949. Among others, it was promoted by Carlo Schmid, a leading social-democratic constitutional lawyer not to be confused with Carl Schmitt. Schmid worked for a time with Heller at the same institution in Berlin and always admired his work and attitude towards the republic. In the last months of the Weimar Republic, Heller represented the social-democratic led cabinet of the state of Prussia against the right wing national government (opposing counsel was Carl Schmitt). Some time prior, Heller had appealed openly to his students to defend the constitution of the republic, if necessary by taking up arms against the fascists.

Reviewing Heller’s short life, we instantly find many components of his thought and work that are compatible with core concerns of republicanism. He was aware that men are born as nationals but not born as citizens and that the task remained to transform them into citizens with public education needed to support that transformation. At the same time, Heller despised all those fellow countrymen who were seeking protection of their private lives by supporting non-republican parties. He believed that the republic was the major instrument in implementing ideas of justice and dignity for everyone, and this conviction was the reason for his militant attitude in defending the republic. All these components can be derived from republicanism, but Heller did not consider his political thinking as “republican”, because this terminology was not available to him or his contemporaries in German-speaking countries at the time. So in order to illustrate the confluence of his thinking and republicanism, we have first to turn to the question of terminology.

REPUBLICANISM TODAY AND IN THE WEIMAR REPUBLIC

In his study of the current political traditions of his time, Heller differentiated between monarchical, national, democratic, liberal and socialist traditions, but he did not mention a “republican” tradition as well.⁴ The term “*Republikanismus*” was not prominent in the Weimar period. We find the expression “*Vernunftrepublikanismus*”, used by contemporaries to describe their difficulties in switching from being supporters of the monarchy to defenders of the republic, among others the

³ *European Law Journal*, 21/3, 2015.

⁴ H. HELLER, *Die politischen Ideenkreise der Gegenwart*, Breslau, Ferdinand Hirt, 1926.

journalist and publisher Theodor Wolff and the historian Friedrich Meinecke.⁵ There is a significant amount of research on “*Vernunftrepublikanismus*” based on the assumption that it provides an additional explanation for the republic’s downfall.⁶ The term “*Vernunftrepublikaner*” is now often used to identify those Weimarians who did not wholeheartedly support the Weimar Republic. These republicans were defending Weimar not because they were convinced that this was the best political order, but because they dreaded the alternatives on the left (Bolshevism) and on the right (all kinds of Fascism).

On the other side, we find small groups that tried to make a point by calling themselves “republicans”. The most important of these groups was the *Republikanische Richterbund*, the association of republican judges, founded in 1921 and dissolved in March 1933 by the Nazis.⁷ In this association, judges as well as lawyers who felt not only loyal to the republic but who were convinced of its intrinsic value wanted to counter-balance what they believed to be the attitude of the majority of the judges who remained in office after 1918: judges as “*Vernunftrepublikaner*” at best but most of them defending the values of the Wilhelmine state regardless of the new political order’s founding. The *Republikanische Richterbund* published the journal *Die Justiz*, a major platform for progressive opinions in the judicial field.⁸ Among the most prominent members of the *Republikanische Richterbund* were Gustav Radbruch, Heller’s mentor in Kiel, and Hugo Sinzheimer, the professor of public law in Frankfurt who supported Heller’s appointment to the post of an extraordinary professorship at that university.

One has to mention also other efforts to defend the republic, from the *Republikenschutzgesetz* in the early 1920s to the *Reichsbanner Schwarz-Rot-Gold* in the last decade of the republic. The *Reichsbanner* was a para-military organization that tried to protect political parties loyal to the republic against violent disturbances by extremist groups like the SA.

But even the *Republikanische Richterbund* did not set out to form a coherent republican view on law and politics to support their efforts. It seems odd that there are republics such as the Weimar Republic that did not look for a republican interpretation of politics. The republican tradition was very much present in France and the United States, but what remained alive from the republican tradition in Germany was only the remembrance of 1848. The failed attempt of establishing a liberal political order itself did not establish anything comparable to the republican traditions that France or the United States were debating in their respective founding periods. Additionally, republican terminology was overlaid by other political languages in the 19th century: the republic as a polity was overlaid by the liberal concept of the nation-state, the common good was overlaid by socialist concepts of socialization, political self-rule was overlaid by democratic ideas.

⁵ T. WOLFF, “Die Große demokratische Partei”, *Berliner Tageblatt*, November 16, 1918; F. MEINECKE, “Verfassung und Verwaltung der neuen Republik (1919)”, in F. MEINECKE (ed.), *Politische Schriften und Reden*, vol. 2, *Werke*, Darmstadt, Toeche-Mittler, 1979, pp. 280-298, here: p. 281.

⁶ A. WIRSCHING and J. EDERS (ed.), *Vernunftrepublikanismus in der Weimarer Republik. Politik, Literatur*, Wissenschaft. Stuttgart, Franz Steiner, 2008.

⁷ B. SCHULZ, *Der Republikanische Richterbund (1921-1933)*. Frankfurt/Main, Lang, 1982.

⁸ A valuable sample of the articles of the section named “chronicle” in *Die Justiz* was published in 1968: H. SINZHEIMER and E. FRAENKEL, *Die Justiz in der Weimarer Republik. Eine Chronik*, ed. T. Ramm, introd. O. Kirchheimer, Neuwied/Berlin, Luchterhand, 1968.

Also, the terminology regarding self-government was less than clear. Not only in Weimar Germany but also in other countries concepts of liberalism, democracy, the republic, the state or the nation were not clearly distinguished in the interwar period. To speak of “republicanism” as a distinct way of political thinking different from liberalism started only after 1945. Among others, it were German *émigrés* to the United States who made important contributions to the rediscovery of the Renaissance roots of a coherent political argumentation that focused on the citizen and its virtues and interactions within the framework of collective liberty.⁹ Current debates on republicanism center on the question, which parts of classical republicanism – to be found in texts from the early modern period to the late Enlightenment – are appropriate for modern political thinking and to what extent. Civic republicanism emphasizes those parts of classical republicanism that formed the basis for critique of modern liberalism in terms of liberalism’s individualistic egoism, economic and market orientation of behaviour, and its reduction of the concept of the citizen to a selfish bearer of rights oblivious of necessary contributions to the common good. In opposition to this critique, Neo-republicanism sets out to reconcile the concept of liberty taken from classical republicanism with modern individualistic liberalism, the concept of negative liberty and the language of individual rights.¹⁰ If Neo-republicanism operates within a perspective that juxtaposes individual and state, that regards the state as the addressee of demands the fulfillment of which is the prerequisite for the individual to accept the legitimacy of the state, civic republicanism, in contrast, is focused on problems of political actions, the citizens’ ability to act collectively, the possibility of self-government and its conditions concerning the proper arrangement of institutions and the attitude of citizens. Civic republicanism reflects a polity where the citizens “are” the state.

What is suggested here is that Heller combined aspects of democratic, liberal, national, and socialist political thinking in a way that is very much in line with civic republicanism without having the terminology of modern republicanism at hand. With regard to liberalism Heller declared that individual liberty was only to be achieved in the framework of the republic (which he calls more general the “state”) rather than being an abstract legal order. In terms of democracy Heller favoured the political inclusion of everybody participating in self-government. In terms of the nation Heller saw the political culture of a specific country and its population as the irreplaceable background of all the interactions of concrete individuals. In terms of socialism Heller was convinced that in order to achieve the emancipation of the proletariat it was better to use the institutions of the state rather than abandoning them.

REPUBLICAN SOCIALISM

Like other Weimarian intellectuals Heller differentiated two branches of socialist thought within Social Democracy, the Marxian heritage on the one side and the

⁹ D. SCHULZ, “Ideengeschichte als Krisengeschichte? Die politische Theorie republikanischer Selbsthistorisierung von der Weimarer Renaissance-Forschung zur Cambridge School”, in G. RAULET and M. LLANQUE (ed.), *Die Geschichte der Politischen Ideengeschichte*, Baden-Baden, Nomos, 2018, pp. 435-460.

¹⁰ The literature on that topic is endless, the best account seems to be C. LABORDE, “Republicanism”, in M. FREEDEN, L.T. SARGENT and M. STEARS (ed.), *Oxford Handbook Political Ideologies*, Oxford, Oxford University Press, 2013, pp. 513-535.

Lassallean on the other.¹¹ While Marx stood for the socialist world view in terms of a specific understanding of social history and its basic structure written in the language of political economics, Lassalle was the founder of the party, the political strategist and the hero of the worker's movement without ever belonging to the proletariat (just like Marx). In the official festivities of the party one could mostly see three portraits on the wall: August Bebel, the beloved father figure of the Wilhelmine history of the party, Marx as the admired philosopher, and Lassalle as the adored party founder.

Heller chose the Lassallean branch as his reference point for adapting socialism to modern democracy. The main difference between these two founding fathers of the German Social democratic movement according to Heller was their attitude towards the state. Karl Marx rejected the state, denouncing it as a mere tool for oppressing the working classes, the "proletariat", and declared the state to be entirely dependent on the socio-economic structure of a given society. Ferdinand Lassalle believed in the state having the potential to solve the problem which had been the starting point of the socialist movement in the first place. It was the experience of unjust social structures in modern society that initiated the goal of emancipating the people in general and the working classes in particular from any kind of oppression suffered by the state as well as a small elite holding economic and social power through private property.

Heller believed that the late Marx and especially his thought passed on in the dogmatic interpretation that Friedrich Engels established in his *Anti-Dühring*, had deepened a misunderstanding of the idea of the state. What might have been understandable before 1914 turned out to be unfortunate in the current situation of the 1920s after the democratization of the state since 1918. Heller stated in *Staatslehre*, his fragmentary book on the idea of the state, that even the socialist stage in social history will be in need of a state to settle all kinds of conflicts.¹² Heller conceded that the perfect socialist state might be able to replace the class struggle with the administration of economic goods. But in Heller's view, it was a gross overestimation of materialistic thinking to believe that conflicts between persons are only based on material structures and that therefore all conflicts would perish with the satisfaction of material needs. Instead, as Heller reminded his readers, the very debate between socialist thinkers about the political course of the future indicated that there would remain enough conflicts left to be resolved after taking over power.

Heller thus rejected the merely materialistic and internationalist interpretation of socialism. The position of dogmatic Marxism with which Heller took issue was to some extent hegemonic within the ranks of the leading intellectuals and theorists of socialism in the early Weimarian years. But Heller believed that the working classes themselves were much more akin to the nation-state understood as the environment in which and not against which they were trying to improve the conditions of their lives. Heller criticized those socialists who thought their only responsibility lay with mankind and its improvement rather than prioritizing the

¹¹ M. LLANQUE, "Linke Juristen in Weimar und das Erbe Lassalles", in M. GANGL (ed.), *Linke Juristen in der Weimar Republik*, Frankfurt/Main, Peter Lang, 2003, pp. 146-168.

¹² H. HELLER, "Staatslehre (1934)", in H. HELLER, *Collected works*, ed. M. Draht et al., vol. 3., Leiden, Sijthoff, 1971, 2, pp. 79-395, especially the sections "class struggle", pp. 268-276 and "state and economy", pp. 319-325.

particular people they belonged to. Mankind is an abstraction, Heller stated,¹³ more or less a regulative political idea, that should not be taken as a fetish. Socialist thought was dialectic, Heller emphasised, so the abstract had to be seen in context of the concrete manifestation in which there existed people sharing a language, history and situational problems rather than abstract configurations of class, race, or mankind as such. For Heller, to think dialectically meant taking into account the interplay between ideas and the material structure of society, between objective interests and subjective needs.

Without denying the importance of the materialistic basic structure of society Heller insisted that other domains such as the polity or culture had their own impact and that the lesson from the Hegelian foundations of socialism was the dialectical mutual interactions between those domains. For Heller the starting point of Marx' materialistic approach to society had been of an idealistic nature itself: justice and the outrage about the violations of dignity of the proletariat as a significant part of the population.¹⁴ Heller saw the aim of emancipation implemented in the language of political economy initiated by idealistic principles that could not be reduced to a mere reflection of the material situation. Heller detected here a contradiction in the materialistic argumentation: if the given class struggle is caused by objective social laws, on what grounds could anybody complain about reality other than idealistic motives? The background for ideas is formed by culture and not by material structures. Although Heller emphasised that in a concrete situation cultural valuations are in a dialectical relation with materialistic factors they are not entirely dependent on them. The meaning of language, values, ideas change with the change of the geographical or historical circumstances of its practice. It is a dialectical and not a causal relationship that is at work between social ideas and social structures.

Thus Heller tried to reconcile the idea of the nation-state with the socialist movement by insisting that it be undialectical to identify the nation-state with its bourgeois interpretation. Instead, the nation-state could be a powerful tool towards the emancipation of the working classes. Therefore Heller strongly proposed to take over the nation-state, to "sublate" it in the Hegelian way (to use the usual but controversial translation of Hegel's term "*Aufhebung*"): to see it as a heritage that is preserved and at the same time changed by those who take over the tradition.

It was Lassalle rather than Marx who implanted a sense for the state in the workers' movement. With the emancipation of mankind in mind it was the nation-state that formed the battle ground for the first step towards progress. Heller saw the impact of Lassalle strengthened during the Great War when many socialists discovered the appeal of the state. Heller wanted to bring together the political and the social branches of socialist thought by reminding his fellow socialists that for both, Marx and Lassalle, Hegel had been the decisive reference point. The task would be to revitalize Hegelian thought and that way to reunify both sides of socialism separated in the 19th century, the socio-economic side and the political.

¹³ H. HELLER, "Sozialismus und Nation (1925)", in H. HELLER, *Collected works*, ed. M. Draht *et al.*, vol. 1, Leiden, Sijthoff, 1971, pp. 437-526, here: p. 483.

¹⁴ H. HELLER, "Hegel und die deutsche Politik (1924)", in H. HELLER, *Collected works*, ed. M. Draht *et al.*, vol. 1, Leiden, Sijthoff, 1971, pp. 250-251.

Heller's first book addressed the concept of the "*Machtsstaat*" within Hegel's political theory.¹⁵ In Heller's view, the fulfillment of Lassalle's vision was eminent now that the imperial Wilhelmine state had been replaced by the Weimar republic. Therefore Heller criticized the staunch internationalist wing of Social Democracy for still rejecting the state as if they were living in the same institution as it had been in the middle of the 19th century.

The state as an institutional setting needs no revolutionary change when the guiding principles of its actions have fundamentally changed. By changing the "ethical fundamental principles" the whole direction of the legal order could be changed. Heller used a quote of Lassalle to demonstrate his idea:¹⁶

Revolution means transmutation, and a revolution is, accordingly, accomplished whenever, by whatever means, with or without shock or violence, an entirely new principle is substituted for what is already in effect. A reform, on the other hand, is effected in case the existing situation is maintained in point of principle, but with a more humane, more consequent or just working out of this principle. Here, again, it is not a question of the means. A reform may be effected by means of insurrection and bloodshed, and a revolution may be carried out in piping times of peace!

Heller's conclusions drawn from Lassalle were to think of class struggle in a much more foundational way: rather than taking over power by mere violence, it was more about the establishment of a new principle, a new attitude of dealing with vital questions, both economical and non-economical, from a different mental perspective which was dominant in the capitalist era.¹⁷

The experience of the World War had given proof that it was possible to organize all matters essential for the war effort, be they social or economic. The massive state-intervention into all aspects of society, both social and economic, was called "*Kriegssozialismus*". It also inspired Lenin in believing that it was possible to establish socialism in just one country. Heller saw the revolutions in Germany, Austria, and Russia as the next step in the direction of socialism. Germany and Austria were able to establish modern and democratically controlled socialist politics while avoiding single party rule. To Heller the republican way of socialism was much more modern than the crude revolutionary way of Bolshevism that sought to change society by force, a regime that prevented the democratic control of the state and refused to accept the guarantees of responsible government.

Heller's understanding of the relation between socialism and the state was denounced by fellow socialists such as Max Adler in the 1920s¹⁸ and even after 1933

¹⁵ H. HELLER, *Hegel und der nationale Machtstaatsgedanke in Deutschland. Ein Beitrag zur politischen Geistesgeschichte*, Leipzig/Berlin, Teubner, 1921.

¹⁶ F. LASSALLE, "Science and the Workingmen (1863)", transl. T. Veblen, in K. FRANCKE (ed.), *The German Classics of 19th and 20th Centuries. Masterpieces of German Literature translated into English*, Albany, 1913, pp. 433-489, here: p. 483.

¹⁷ "Der Klassenkampf geht also, friedlich, oder aber auch gewaltsam, um ein neues Prinzip, eine neue Haltung, die alle die ökonomischen wie nichtökonomischen Lebensfragen aus einem anderen Geiste und Seelentum heraus beantwortet als der kapitalistische Mensch" (H. HELLER, « Sozialismus und Nation (1925) », in H. HELLER, *Collected works*, ed. M. Draht et al., vol. 1, Leiden, Sijthoff, 1971, p. 471).

¹⁸ M. ADLER, "Paper given at the 3rd National Conference of Young Socialist (1925)", in M. ADLER, *Dritte Reichskonferenz der Jungsozialisten*, Berlin, Arbeiterjugend, 1925, pp. 12-22, immediately responding to a paper given by Hermann Heller on the relation between state and socialism.

by Franz Neumann as merely “reformist” or “conformist” as opposed to a revolutionary class struggle¹⁹. Otto Kirchheimer had difficulties grasping what Heller meant when he contrasted the “*Rechtsstaat*” and dictatorship, and he regarded the attitude of opposing these concepts as “problematic”.²⁰ Adler, Kirchheimer, and Neumann viewed Heller as belonging to the right wing of Weimar socialism by embracing the state as acceptable and even worth defending. Heller believed himself still to belong to the core socialist tradition.

HELLER’S “SOZIALER RECHTSSTAAT”

Heller favoured emancipation, but not from the state but through the state. If the chief aim of socialism was to fight capitalism and all features of political power that emerge from economic inequality and monopolistic domination, then the main problem with capitalism and the bourgeois era of social history was not the fetish of money or the class struggle but power. When Heller proposed the “*sozialer Rechtsstaat*” he not only had in mind that type of state that recognizes the rule of law and establishes some features of the welfare state. His idea of the *Rechtsstaat* was much more concerned with power politics, not only in foreign affairs but first of all in domestic politics in order to gain control of the economy.

There are major difficulties in properly translating the concept of “*sozialer Rechtsstaat*” into English. For a long time the reception of Heller in the English speaking scholarly world was hindered by the absence of appropriate translations, although there are some important exceptions.²¹ A problem not to be underestimated is the translation of key concepts from one political tradition to another. Some translators are hesitant to translate key concepts at all. Ellen Kennedy translates Heller’s article “*Rechtsstaat oder Diktatur*” as “*Rechtsstaat or dictatorship*”.²² Others follow the tradition in discussions of public law from the Anglo-Saxon perspective that *Rechtsstaat* is more or less the same as the “rule of law”, so that we find also a translation of the same article of Heller’s mentioned above as “Rule of law or dictatorship”.²³

Rechtstaat cannot be properly translated into “rule of law” if it is intended to cover all usages to be found in German public law discourse, at least in the Weimar

¹⁹ F.L. NEUMANN, “Zur marxistischen Staatstheorie (1935)”, in F.L. NEUMANN, *Wirtschaft, Staat, Demokratie. Aufsätze 1930-1954*, ed. A. Söllner, Frankfurt/Main., Suhrkamp, 1978, pp. 134-143. Neumann states that a Marxist party owes no loyalty to the state, clearly spoken out of frustration with the Nazis having taken power over the same state Heller wanted to defend.

²⁰ O. KIRCHHEIMER, “Weimar und was dann? (1930)”, in O. KIRCHHEIMER, *Politik und Verfassung*, Frankfurt/Main, Suhrkamp, 1981, pp. 9-56 and 153-155, here: p. 155.

²¹ Dyzenhaus is providing the English public with more and more translations of major works of Heller, among others H. HELLER, “The Nature and structure of the state (being Staatslehre, part 3)”, transl. D. Dyzenhaus, *Cardozo Law Review*, vol 18, 1996-1997, pp. 1139-1216 and H. HELLER, *Sovereignty. A Contribution to the Theory of Public and International Law*, ed. D. Dyzenhaus, Oxford, Oxford University Press, 2019. Other efforts in translating Heller are: H. HELLER, “Rechtsstaat or dictatorship”, transl. E. Kennedy, *Economy and Society*, 16/1, 1987, pp. 127-142; H. HELLER, “Authoritarian Liberalism?”, *European Law Journal*, 21/3, 2015, pp. 295-301.

²² H. HELLER, “Rechtsstaat or dictatorship”, transl. E. Kennedy, *Economy and Society*, 16/1, 1987, pp. 127-142.

²³ W.E. SCHEUERMANN, “Hermann Heller and the European Crisis. Authoritarian Liberalism Redux?”, *European Law Journal*, 21/3, 2015, pp. 302-312, here p. 304.

period. It is an ongoing debate²⁴ whether or not both phrases express the same idea within their semantic-cultural traditions.²⁵ In Anglo-Saxon juridical thinking, “rule of law” emphasizes merely procedural aspects. In contrast, *Rechtsstaat* in German juridical thinking has at least two sides, a formal one and a material one, with the latter including claims for social security and main public goods. In modern constitutional thinking Heller is renowned for coining the phrase “*sozialer Rechtsstaat*”, taken up in the German Basic Law (Article 28, § 1: “*sozialer Rechtsstaat*”).²⁶ Although it is correct to think that Heller was seen by the constitutional assembly as having coined that phrase, it is also true that the founders of West Germany had been overlooking several aspects Heller wanted to express.

Heller’s term “*sozialer Rechtsstaat*” should be translated as “socially orientated legal state”, but only if we bear in mind that the legal side of the state was to be reconciled with the aspect of power, that is, the “*Machtstaat*”. A state that is not based on law is tyranny, but a *Rechtsstaat* that is not at the same time a *Machtstaat* is a mere abstraction, bound to fail especially when challenged by fundamentalist enemies. It was the growing threat of fascism analyzed by Heller in the late 1920s which forced him to emphasize the aspect of power that should accompany all aspirations toward establishing a *Rechtsstaat*. Heller’s argument was aimed against both, Hans Kelsen and Carl Schmitt at the same time, but for different reasons.

Heller opposed what he called “the *pure Rechtsstaat*”,²⁷ an argument pointed against the notion of “*Rechtsstaat*” in the work of Hans Kelsen. Heller insisted that to think of the state merely in terms of norms was to forget the problem of power. It takes power to intervene into the conditions of modern society, gaining control of the power that causes inequalities, and it takes power to break the entrenched interests of an old power elite which was not entirely replaced by the Weimar republic. The “*soziale Rechtsstaat*” was Heller’s model for the reconciliation of modern socialism and the modern state.

His sense for concreteness brought Heller close to some aspects of Carl Schmitt’s legal theory: when analyzing legal aspects one cannot isolate norms from the social and political context, since norms are meant to legitimize or to change such contexts. At the same time, Heller distances himself from Schmitt by arguing that there is no decision as pure form and therefore decisionism cannot claim to be a political principle. To favour decisions regardless of their content reflects the apolitical submission under dictatorship in a desperate longing for order instead of shouldering the task of self-government by engaging in politics. Engaging in politics means for Heller: to try to implement ideas of justice into every day politics.

²⁴ P. COSTA and D. ZOLO (ed.), *The Rule of Law History, Theory and Criticism*, Dordrecht, Springer, 2007; M. LOUGHLIN, *Foundations of Public Law*, Oxford, Oxford University Press, 2010, chap. “Rechtsstaat, rule of law, L’État de droit”, pp. 312-341.

²⁵ Neil MacCormick among many others believes that in principle *Rechtsstaat* and rule of law are meaning the same thing: N. MACCORMICK, “Der Rechtsstaat und die rule of law”, *Juristen Zeitung*, 39, January 20, 1984, pp. 65-70, here p. 65.

²⁶ Translated officially into English as “social state governed by the rule of law”: a translation made by Christian Tomuschat and David P. Currie in cooperation with the Language Service of the German Bundestag [https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf].

²⁷ H. HELLER, “Grundrechte und Grundpflichten”, in H. HELLER, *Collected Works*, ed. M. Draht et al., vol. 2, Leiden, Sijthoff, 1971, p. 291.

In order to include matters of justice and political principles into legal analysis, Heller distinguishes²⁸ legal propositions (*Rechtssätze*) from “legal fundamental principles”²⁹ (*Rechtsgrundsätze*). The legal order does not only consist of legal rights and norms. Legal propositions are merely the judicial surface of political actors who try to translate political and ethical principles into the language of the law. What Kelsen wanted to separate in order to purify legal analysis from politics was the very essence of the law to Heller, to realize political and social principles by transforming them into legal provisions. The law is based on power, but power is not the opposite of the law; both are connected by political and social principles that concrete groups of individuals want to realize.

When Heller identifies his program to reconcile socialism with the idea of the state he sometimes speaks of the idea of “social democracy”³⁰ without having primarily his own party in mind. If Heller thinks of that concept of state which outspokenly rejects the “*pure Rechtsstaat*” he speaks of the “*Machtstaat*”, the state characterized by his ability to accumulate and wield power. He could have used the term “republic” also if he would have had republicanism as an established tradition of political argumentation at hand, indicating its etatistic as well as its democratic elements.

Heller was convinced that – since democracy was not only by the people but also for the people – the modern state had the task to improve the standard of living in order to allow individuals, especially workers, to act as citizens. Heller himself was engaged in organizing adult education primarily targeting workers.

SELF-GOVERNMENT AND THE TRANSFORMATION OF MEN INTO CITIZENS: THE IDEA OF REPUBLICAN EDUCATION

Heller’s intentions concerning the “*sozialer Rechtsstaat*” did not stop at the aim of providing food, housing or security standards at the work place. Heller aimed at a polity that would provide support for the transformation of the poorest part of the population, the proletariat, into citizens, thereby enabling them to engage political conflict as equals.

Citizens in republicanism are not merely nationals in the sense of belonging to a nation-state, of having a legal claim of protection by that state. Citizens in republicanism are actors in self-government.³¹ Heller was convinced that in modern society the “self” of self-government could not be taken for granted but should be the concern of the state. In a modern democracy with its plurality of social, religious and political views the only way of self-government was what Heller called the

²⁸ H. HELLER, “Bemerkungen zur staats- und rechtstheoretischen Problematik der Gegenwart (1929)”, in H. HELLER, *Collected works*, ed. M. Draht *et al.*, vol. 2, Leiden, Sijthoff, 1971, p. 249-278, here: p. 275; H. HELLER, “Staatslehre”, in H. HELLER, *Collected Works*, ed. M. Draht *et al.*, vol. 3, Leiden, Sijthoff, 1971, pp. 297, 332.

²⁹ Dyzenhaus’s translates “*Rechtsgrundsatz*” with “ethical fundamental principles” by which he detaches the ethical from the legal aspect: D. DYZENHAUS, “Kelsen, Heller and Schmitt: Paradigms of Sovereignty Thought”, *Theoretical Inquiries in Law*, 16/2, 2015, pp. 337-366, here: p. 345.

³⁰ H. HELLER, “Die politischen Ideenkreise der Gegenwart (1926)”, in H. HELLER, *Collected works*, ed. M. Draht *et al.*, vol. 1, Leiden, Sijthoff, 1971, pp. 267-412, here: p. 375.

³¹ M. LLANQUE, “Der republikanische Bürgerbegriff. Das Band der Bürger und ihre kollektive Handlungsfähigkeit”, in T. THIEL and C. VOLK (ed.), *Die Aktualität des Republikanismus*, Baden-Baden, Nomos, 2016, pp. 95-123.

government of the people as a unity, expressing itself by general laws, over the people as a plurality.³² The unity of the people does not simply exist and then finds its expression in a representative body; rather, it needs the process of organization. The institutions where this process takes place are called the “state” by Heller. Thus Heller defines the state as the centre of actions which organizes the unity of decision making and implementation, a real unifying centre of action among the plurality of other actors, both individual and collective.³³ Unity is the task of politics in every given moment. In the act of self-government the demos undergoes a transformation from a plural populace (defined by its many roots in society and economy) into a unified people (able to act in concert if only temporarily, most importantly by giving a general law), at least for the moment of legislation. Only as citizens can individuals from different backgrounds engage each other as equals.

Citizens are not born to govern themselves, they need education, be it the instruction in schools and academia or be it the educative process of political participation itself. Education as the prerequisite for transforming men into citizens is a core aspect of classical republicanism.³⁴ James Harrington called education the “plastic art of government”.³⁵ Its purpose is to form a people, to transform a mere multitude into a populus. The application of neo-republicanism to pedagogy and to the institutional organization of education has only begun in the recent past.³⁶ For civic republicanism, education has always been a core feature of that way of political thinking.³⁷

Heller helped to launch and to run local schools for adult education, especially for workers, including women. The aim was to teach workers in order to prepare them for political practice and running for office. He was director of the *Volksbildungsamt* in Leipzig from 1922 to 1924.³⁸ Before the first great inflation in Germany in 1923, the German states and municipalities had some financial means at hand for

³² H. HELLER, “Die Souveränität. Ein Beitrag zur Theorie des Staats- und Völkerrechts (1927)”, in H. HELLER, *Collected Works*, ed. M. Draht *et al.*, vol. 2, Leiden, Sijthoff, 1971, pp. 31-202, here: p. 97 and H. HELLER, “Europa und der Fascismus (2nd. ed. 1931)”, in H. HELLER, *Collected Works*, ed. M. Draht *et al.*, vol. 2, Leiden, Sijthoff, 1971, pp. 463-609, here: p. 469.

³³ H. HELLER, section “Staat als organisierte Entscheidungs- und Wirkungseinheit”, in *Staatslehre*, in H. HELLER, *Collected Works*, ed. M. Draht *et al.*, vol. 3, Leiden, Sijthoff, 1971, pp. 339-349.

³⁴ M. LLANQUE, “Der republikanische Bürgerbegriff. Das Band der Bürger und ihre kollektive Handlungsfähigkeit”, in T. THIEL and C. VOLK (ed.), *Die Aktualität des Republikanismus*, Baden-Baden, Nomos, 2016, pp. 95-123, here: pp. 102-103.

³⁵ J. HARRINGTON, *The Commonwealth of Oceana. A System of Politics*, ed. J.G.A. Pocock, Cambridge, Cambridge University Press, 1992, p. 189.

³⁶ I. SNIR and Y. EYLON, “Pedagogy of Non-Domination: Neo-Republican Political Theory and Critical Education”, *Policy Futures in Education*, 14, 2016, pp. 759-774.

³⁷ For the French Revolution, cf. R.R. PALMER, *The improvement of humanity. Education and the French Revolution*, Princeton, Princeton University Press, 1985; for civic republicanism in general see A. PETERSON, *Civic Republicanism and Civic Education: The Education of Citizens*, Houndmills, Palgrave, 2011.

³⁸ K. MEYER, *Arbeiterbildung in der Volkshochschule. Die ‚Leipziger Richtung‘. Ein Beitrag zur Geschichte der deutschen Volksbildung in den Jahren 1922-1933*, Stuttgart, Klett, 1969; N. REICHLING, “Arbeiter in der Volkshochschule. ‚Bewegung oder Zielgruppe‘? Das Beispiel Leipzig 1922-1933”, in P. CIUPE and F.-J. JELICH (ed.), *Soziale Bewegung, Gemeinschaftsbildung und pädagogische Institutionalisierung. Erwachsenenbildungsprojekte in der Weimarer Republik*, Essen, Klartext, 1996, pp. 81-96.

different political objectives, for instance to improve adult education. The municipal government of Leipzig in the state of Saxony made a major contribution to adult education by establishing the *Volksbildungsamt*. Not only Heller believed that the new republic was in desperate need of new citizens, but that it was only right to improve the *Bildung* of workers in order to bridge the gap between the classes which was in no domain clearer visible than in the domain of education.³⁹

Regardless all efforts the access to higher education in Weimar remained very much exclusive. In 1931 the share of students who had a worker as a father was 3,2 %.⁴⁰ The institution of *Volkshochschule* wanted to provide access to higher education for people who had no means to go to university. Among those enrolled at the *Volkshochschule* in Leipzig approximately 57 % had a working background, only 2 % were higher civil servants.⁴¹

Heller not only helped organizing institutions for adult education, he was also acting as a teacher and he also advocated the idea by publishing on that topic.⁴² One of his earliest speeches regarding adult education was published together with a similar speech by Gustav Radbruch in a shared brochure in 1919.⁴³ In his view, the principle of adult education aimed at making all citizens familiar with the cultural traditions of “mankind in general” and of the German nation in particular, linking both dimensions of culture.⁴⁴ One can see here very clearly that Heller’s idea of the nation was not parochial or nationalistic but looked at nations as a family belonging together. In the same way, Heller advocated ten years later the sense of the European family of nations as an antidote to Fascist nationalism.⁴⁵ In 1919 Heller declared himself in favour of the principle of democratic self-government for adult education. He stated that it should be founded on the principle of democratic equality between teachers and students and that students should practice in codetermination.⁴⁶ Heller was also keen to distance himself from any notion of education as a means for propaganda. In his view, the emancipation of the proletariat was not a program to be grafted onto individuals so that they would believe what the educator has in mind. By education Heller meant to ensure that individuals were able to judge matters of politics and society on their own. After all, for Heller emancipation was not a state to be achieved on the collective level, but first and foremost on the level of individuals. The task of socialist parties was not to define what the objective interest of the workers class might be but to organize workers in formulating their interests.

³⁹ About the idea of adult education after 1918 in general cf. J. OLBRICH, *Geschichte der Erwachsenenbildung in Deutschland*, Opladen, Leske + Budrich, 2001.

⁴⁰ V. MÜLLER-BENEDICT, “Bildung und Wissenschaft”, in T. RAHLF (ed.), *Deutschland in Daten. Zeitreihen zur Historischen Statistik*, Bonn, Bundeszentrale für politische Bildung, 2015, p. 68.

⁴¹ J. OLBRICH, *Geschichte der Erwachsenenbildung in Deutschland*, *op. cit.*, 2001, p. 157.

⁴² H. HELLER, *Freie Volksbildungsarbeit*, Leipzig, Werkgemeinschaft, 1924. See also H. RÄDLE, “Erwachsenenbildung und staatsbürgerliche Erziehung. Die volksbildnerischen Schriften Hermann Hellers”, *Paedagogica Historica*, 9, 1969, pp. 425-451.

⁴³ G. RADBRUCH and H. HELLER, *Volkshochschule und Weltanschauung*, Kiel, Haase, 1919.

⁴⁴ H. HELLER, “Gestalt und Ziel der deutschen Volkshochschule”, in G. RADBRUCH and H. HELLER, *Volkshochschule und Weltanschauung*, Kiel, Haase, 1919, p. 4.

⁴⁵ H. HELLER, “Europa und der Fascismus (2nd ed. 1931)”, in H. HELLER, *Collected Works*, ed. M. Draht *et al.*, vol. 2, Leiden, Sijthoff, 1971, pp. 463-609.

⁴⁶ H. HELLER, « Gestalt und Ziel der deutschen Volkshochschule », *op. cit.*, p. 8.

REPUBLICAN MILITANCY

Civic republicanism holds the willingness to defend the republic in high esteem. After all the concept of *virtus* cannot deny its militant origins. Citizens of the republic are supposed to fight for it. To be ready to accept making sacrifices for the republic was seen as a central characteristic of true citizens,⁴⁷ the “supreme proof of virtue”.⁴⁸ No doubt this concept has its disadvantages, especially in modern times shaped by liberal inspiration. How to prevent self-declared defenders of the republic from zealotry? In this context, it is remarkable to find Heller declaring his willingness to defend the republic against its enemies from within and to do so by taking arms if necessary.

The defense of the republic was one of the few occasions in which the term “republic” gained a significant meaning in Weimar Germany. When a series of political assassinations terrified Weimar Germany the cabinet was able to push a major law through parliament called *Republikschutzgesetz*. It aimed against what republicans called “enemies of the republic” (*Republikfeinde*) rather than enemies of the state. It was not long ago that socialists had been called enemies of the state or even traitors of the fatherland. The Wilhelmine state had made many efforts to keep the rise of the Social Democratic party at bay. Members of the party had been arrested for being a threat to order and peace. In the Weimar republic to speak of the “enemies of the republic” and to identify them mainly on the right wing of the political spectrum that justified the assassinations as an attempt to defend the nation and the state, was a major shift in viewing the state. For a short period, the republic was considered worth fighting for. By the end of the 1920s this fight seemed to have been successful. In 1929 the author of the column called “chronicle” of *Die Justiz* in the August issue of 1929, either Hugo Sinzheimer or Ernst Fraenkel, reflected on the 10th anniversary of the Weimar constitution and discussed the contemporary usefulness of the *Republikschutzgesetz*.⁴⁹ The article stated that a violent attack on the republic was no longer imminent.

A year later Heller was not that sure. He prepared his student audience for a situation in which it was no longer sufficient to defend the republic with the “ballot paper”. Facing those who preached the ideology of violence and possibly prepared a new attempt of a violent *coup d'état*, Heller called for taking arms if necessary to defend the republic effectively.⁵⁰ Heller was convinced that in the end words might be deeds, but that some deeds such as physical violence could only be responded to effectively with deeds of the same kind. He was not alone in this view.

Militancy was a common feature of the Weimar years. Not only political parties on both extremist wings of the spectrum established paramilitary associations that engaged in street fights, such as the SA or the *Rotfrontkämpferbund*; there was also

⁴⁷ CICERO, *De Officiis*, bk. I, ch. 57 “De officiis”, ed. W. Miller, London, Heinemann, 1928, p. 61.

⁴⁸ J.G.A. POCOCK, *The Machiavellian Moment. Florentine Political Thought and the Atlantic Republican Tradition*, Princeton, Princeton University Press, 1975, p. 293.

⁴⁹ H. SINZHEIMER and E. FRAENKEL, *Die Justiz in der Weimarer Republik. Eine Chronik*, ed. T. Ramm, introd. O. Kirchheimer, Neuwied/Berlin, Luchterhand, 1968, p. 188.

⁵⁰ H. HELLER, “Freiheit und Form in der Reichsverfassung”, speech delivered before the German Association of Students on the occasion of celebrating the anniversary of the Weimar constitution in 1930”, in H. HELLER, *Collected Works*, ed. M. Draht *et al.*, vol. 2, Leiden, Sijthoff, p. 377.

a paramilitary association that had vowed to defend the republic against extremists, the *Reichsbanner Schwarz-Rot-Gold*.⁵¹ The purpose of these paramilitary formations was to demonstrate power, but it was also to dominate public space, especially the streets. Among the hundreds of dead during street fights, especially in 1932, the *Reichsbanner* alone suffered more than 40 deaths. Civil war seemed imminent.

Between advocating the “ballot” and “taking up arms” Heller was practicing other ways of defending the republic. When in the state of Prussia the National Socialists appealed to a court because they saw their right to equality violated by the way of allocation of seats in parliament according to the voting results, Heller provided a judicial statement for the Prussian government in order to justify the current allocation practice.⁵² His argument was based on an interpretation of the principle of equality in the field of election law. Heller rejected the idea that equality meant a purely “arithmetical” process of straightforward deduction from the number of votes to the number of seats in parliament. Instead, Heller claimed that the logic of parliamentarianism was to aim at forming majority governments and in allowing this to happen it was legitimate to avoid small factions in parliament. The court accepted Heller’s argumentation.

In 1932 Heller served as counselor to the Prussian government. The national state had been taken over the executive of the Prussian state in the famous *Preußenschlag* when the right leaning national government declared Prussia to be under their control because it was unable to keep the peace. The justification for using a constitutional provision to take control of the executive in a particular state in the situation of a crisis of the legal order was made up, because it had been the actions of the national government which had caused violent street fighting between paramilitary formations of different political parties mentioned above in the first place. Heller was mandated by the Prussian government to defend its case at court and there he engaged with Carl Schmitt who pleaded for the national government.⁵³ The court did not find the actions of the national government entirely illegal and thus did not stop the further erosion of power held by the political actors who still remained loyal to the republic. With taking over the executive power from the Prussian state – governed until then by a coalition of Social Democrats and liberal parties – one cornerstone of the republic was destroyed and the fall of the whole republic accelerated.

For Heller, defending the republic meant a defense by all means necessary. Unlike others he realized that defending the republic was not just a legal matter but a political effort which took place on different arenas. In this sense Heller was not only a republican socialist who tried to support the Social democratic party in its struggle against other parties, he was a militant republican as well who took sides in the fight for the republic as a whole.

⁵¹ C. VOIGT, *Kampfbünde der Arbeiterbewegung. Das Reichsbanner Schwarz-Rot-Gold und der Rote Frontkämpferbund in Sachsen, 1924-1933*, Köln, Böhlau, 2009; E. BRYDEN, “Heroes and Martyrs of the Republic. Reichsbanner ‚Geschichtspolitik‘ in Weimar Germany”, *Central European History*, 43, 2010, pp. 639-665.

⁵² H. HELLER, *Die Gleichheit in der Verhältniswahl nach der Weimarer Reichsverfassung. Ein Rechtsgutachten*, Berlin, Leipzig, De Gruyter, 1929.

⁵³ A. KAISER, “Preußen contra Reich. Hermann Heller als Prozessgegner Carl Schmitts vor dem Staatsgerichtshof 1932”, in C. MÜLLER and I. STAFF (ed.), *Der soziale Rechtsstaat. Gedächtnisschrift für Hermann Heller 1891-1933*, Baden-Baden, Nomos, 1984, pp. 287-311.

The lessons of Weimar resulted in the theory of militant democracy, which began with articles published by Karl Löwenstein in the late 1930s.⁵⁴ He saw different legal provisions already implemented in different countries, among others the *Republikschutzgesetz* mentioned earlier. With the concept of militant democracy Löwenstein provided a theory for these and other practices and regulations that tried to restrict liberties granted by the constitution in order to defend democratic liberty against those who used democratic rights with the aim to replace democracy with dictatorship. In the end, Löwenstein in exile and before him Heller in the last years of the Weimar republic faced the ultimate paradox of political liberty, namely, that it is essential for self-government to discipline one's own liberties. This problem had found its expression at the end of the period of classical republicanism when George Washington gave his first Annual Message to Congress stating that the connexion between governing and being governed required "to distinguish between oppression and the necessary exercise of lawful authority".⁵⁵

In conclusion we find in Heller a political theorist whose argumentation resembles core aspects of what is today called civic republicanism. What seems to be a paradox for democrats, that is, to restrict the openness of democracy in order to prevent this openness from being abused, bears no difficulties for republicanism. The same can be said for the argument that it is necessary to restrict individual liberties in order to prevent political liberty from becoming anarchy or to ground abstract demands of internationalist socialism in order to identify the common good in a concrete situation for a concrete group of individuals. Finally, we find in Heller an advocate of the political seen as prior to the intricacies of juridical thought.

Among contemporary socialist theorists Heller was regarded as belonging to the right wing of socialist thought. Heller criticized the left wing of socialism for overestimating social history and for underestimating the potential of the state as an instrument in shaping society the way socialist were looking for. It took the Nazis, the Second World War and the experience of Stalinism before the war and after to change the general attitude of many German socialists towards the state. Instead of hoping for a future which seemed more and more distant and more and more illusory they learned to concentrate on the given state as the framework in which society could be changed on a daily basis. For all his republican militancy, in his historical views Heller proved to be much more patient than his fellow revolutionary socialist.

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⁵⁴ K. LÖWENSTEIN, "Militant Democracy and Fundamental Rights", *American Political Science Review*, 31, 1937, pp. 591-622 and 725-774. For the context, see M. LLANQUE, "The Edges of Democracy: German, British and American Debates on The Dictatorial Challenges to Democracy in The Interwar Years", in J. KURUNMÄKI, J. NEVERS and H. VAN DER VELDE (ed.), *Democracy in Modern Europe. A Conceptual History*, Oxford, New York, Berghahn, 2018, pp. 182-207.

⁵⁵ G. WASHINGTON, "First Annual Message to Congress, January 8, 1796", in J.D. RICHARDSON (ed.), *A Compilation of the Messages and Papers of the Presidents, 1789-1897*, vol. 1, Washington D.C., pp. 65-67, here: p. 66.

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