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Hermann Heller's critique of liberalism

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ABSTRACT

Hermann Heller's critique of liberalism was both theoretical and conjunctural. He derided liberalism's erosion of the concept of sovereignty and lamented liberalism's complicity with the substantive inequality of his time. In its place, he argued for a restoration of the concept of popular sovereignty, as a dialectical formation of political unity and material equality through the democratic process. As a matter of political practice and strategy, however, Heller equivocated in his stance on the constitutional politics of the Weimar Republic. He initially tolerated the abrogation of parliamentary democracy due to his faith in the neutrality of the state, before diagnosing the regime as a form of authoritarian liberalism determined by the capitalist economy. This article examines Heller's theoretical and political critique of liberalism. It outlines Heller's conception of popular sovereignty against both Kelsen's legal rationalism and Schmitt's political decisionism. It also examines the significance of the interwar conjuncture, highlighting that the turn of the bourgeoisie to authoritarianism and ultimately to fascism represented a continuity of the liberal elision of the principle of popular sovereignty.

KEYWORDS

Hermann Heller; sovereignty; constitutional theory; authoritarianism; liberalism

1. Introduction

Hermann Heller's interwar polemic against the authoritarian liberals governing late Weimar just before the Nazi seizure of power has recently received significant attention.¹ This should come as no surprise. The decade following the financial crisis of 2008 offered many echoes of the 1930s, notably with the exercise of executive and emergency powers in defence of economic liberalism and market rationality.² And, as in the 1930s, there has

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¹This was given impetus by a special issue of the *European Law Journal*, see Agustin Menendez, 'Hermann Heller NOW' (2015) *European Law Journal* 285–94. The special issue included a translation of the article in which Heller coined the term 'authoritarian liberalism', Hermann Heller 'Autoritärer Liberalismus' (1933) 44 *Die Neue Rundschau* 289–98, (H Heller (trans S Paulson), 'Authoritarian Liberalism?' (2015) 21 *European Law Journal* 295–301. This revival of interest in Heller's ideas extends across disciplines, see e.g., Anthee Malkopoulou, 'Hermann Heller on Politics: Discipline, Sphere and Activity' (2020) 46 *History of European Ideas* 393–404; Gregoire Chamayou, *The Ungovernable Society: A Genealogy of Authoritarian Liberalism* (Polity Press 2021); Michael A Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (OUP 2021).

²See e.g. Jeremy Rayner and others (eds), *Back to the 1930's? Recurring Crises of Capitalism, Liberalism and Democracy* (Palgrave MacMillan 2020).

also been a backlash against austerity and against liberalism itself, just as Heller had predicted in his own time.

Heller's critique of liberalism may seem intriguing, but essentially conjunctural, limited to an exceptional period, and from which we should be reluctant to draw more general conclusions. Similarly, it might be argued, the current doubts over *neoliberalism* should not call into question the broader commitment to liberal constitutionalism, but can and should be bracketed, so as not to throw out the baby of 'political liberalism' with the 'neoliberal' bathwater. The reluctance to draw general conclusions from Heller's critique of authoritarian liberalism might be reinforced when it is noted that the target of his polemic was not only the Presidential Cabinets ruling Weimar by diktat and decree, but also the jurist who was advising them, Carl Schmitt.³ If this appears to call into doubt the orthodox view of Carl Schmitt as a thoroughgoing anti-liberal, Schmitt's embrace of the 'feudalist clique' that effectively 'put Hitler into power' might be thought to have been entirely opportunistic.⁴

Schmitt's attitude towards liberalism was more complicated than commonly presented. As a matter of political conviction, he viewed liberal relativism with disdain. But as a matter of economic orientation, he was ambivalent and even defensive of it. His attachment to the practice and ideology of economic liberalism – particularly the belief in protecting private property by a strong state – predated the turbulence of late Weimar. It was driven, and accentuated, by a fear of democracy and the parliamentary (as well as revolutionary) route to socialism. Schmitt was initially drawn to the liberal aspects of Weimar constitutionalism to the extent they might obstruct this route and help to preserve the status quo.⁵

Does Heller's critique of liberalism mirror this view of Schmitt's embrace; was it entirely conjunctural, shallow, and bracketed to the economic variety? The publication in English translation of Heller's 1927 book *Sovereignty: A Contribution to the Theory of Public and International Law* ('*Sovereignty*'), provided a renewed opportunity to tackle this question, as it presented a fuller account of Heller's views on liberalism.⁶ In

³Before his turn towards National Socialism in 1933–1934, Schmitt was an 'implacable conservative opponent of the enemies of the Weimar state', especially those on the Left. See Keith Tribe, *Strategies of Economic Order: German Economic Discourse 1750–1950* (Cambridge University Press 1995) 175. It has been noted that the formation of authoritarian liberalism was 'closer to Schmitt's heart than any other', see Chris Thornhill, 'Carl Schmitt After the Deluge' (2000) 26 *History of European Ideas* 225, 237.

⁴On the argument that authoritarian liberalism led to fascism, see Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press 2001 [1944]) 246.

⁵Benjamin Schupman, *Carl Schmitt's State and Constitutional Theory: A Critical Analysis* (OUP 2017) 180: 'Schmitt repeatedly argued that the Weimar Constitution contains a political decision to be a bourgeois *Rechtsstaat*, which was above all oriented by its commitment to individual liberty.' See also Renato Cristi, *Carl Schmitt and Authoritarian Liberalism* (Cardiff 1998): according to Cristi, making the distinction between liberalism and democracy enabled Schmitt's rapprochement with liberalism as early as 1923. It allowed him 'to identify what he feared most: the increased pace of the democratic revolution' (p 17).

⁶H Heller, *Sovereignty: A Contribution to the Theory of Public and International Law* (Oxford University Press 2019 [1927]). This is accompanied by a lengthy introduction by David Dyzenhaus, who, it should be stated, offers a different interpretation of Heller, based on a reading of Heller's position as 'closer to the spirit of Kelsen's enterprise than to Schmitt's' (at 14). But it should be clear from any reading of the text of *Sovereignty* (see e.g. note 10 *infra*) that Heller's main jurisprudential target is Kelsen, more so than Schmitt, whose approach, despite faults, is described as a 'model for the study at hand' (at 101). As Martin Loughlin argues, Kelsen's (and Dyzenhaus's) legal normativism in fact stands resolutely in opposition to Heller's dialectical and political jurisprudence. See further Martin Loughlin's 'Review of *Sovereignty*' (2020) 83(3) *Modern Law Review* 686–90 which notes that Dyzenhaus's attempt to portray Heller as pursuing some 'ineffable idea of legality' cannot be justified by the 'preponderance of evidence'. Lars Vinx also notes that Heller, despite important differences with Schmitt, was, like Schmitt, 'a proponent of political jurisprudence', Lars Vinx, 'Review of *Sovereignty*' (2020) 11(1) *Jurisprudence* 131. Vinx goes on to note that neither the view of Heller as Schmittian nor as anti-Schmittian (as Dyzenhaus proffers) 'does full justice to Heller's thinking on sovereignty' (at 132). Heller's *political* opposition to Schmitt – clarified in his later Weimar writing, particularly in targeting Schmitt as an 'authoritarian liberal', see (n 1) above – is equally important as his methodological opposition to Kelsen, as will be

Sovereignty, the closest Heller comes to a decisive claim – in what is a short, abstract, and not always entirely lucid text –, is that, ultimately, sovereignty is an expression of the collective will, the ‘general will’ of the people.⁷ In defending a resolutely political conception of sovereignty, Heller tried to restore a conception of the state explicitly traced back to Rousseau via Hegel, and which he thought was in danger of being eroded, particularly by liberal legal theorists such as Hans Kelsen.⁸

But Heller was also keenly aware, if less explicit, about the knot in this Rousseauian conception, that is, the difficulty in forming a ‘general will’ in conditions of social heterogeneity, extreme levels of inequality and, in Heller’s own terms, the presence of class conflict. If it is the Rousseau of *The Social Contract* that Heller tried to retrieve in *Sovereignty*, it is the Rousseau of the *Second Discourse*, the *Discourse on the Origins of Inequality*, that captures the tension in Heller’s comprehensive worldview.⁹ Both ‘Rousseaus’ can be used to target liberalism, but in distinct ways, *the Social Contract* by insisting on a conception of the common good that transcends individual interest and the *Second Discourse* by critiquing the egoism of modern man and his inflamed sense of *amour propre* in commercial society. It is only in combination that we can make full sense of Heller’s constitutional theory, integrating his abstract reflections on sovereignty with his situational commentary on the fate of the Weimar Republic, where his substantive views on the need for social equality – alluded to but underdeveloped in *Sovereignty* – are clearly expressed.

Just as Rousseau’s two discourses sit uneasily with one another, Heller faces a bind. On the one hand, Heller argues that social homogeneity is required for popular sovereignty to channel a genuinely democratic expression of the general will. Unlike some of the radicals on his left, Heller defended the possibility of achieving this goal in the constitutional circumstances of the Weimar Republic. As such, he belonged to a socialist tradition that is often labelled ‘reformist’ rather than revolutionary, heir to figures such as Ferdinand Lassalle and Eduard Bernstein, founding fathers of German social democracy. But Heller also notes that such a formation of a general will was practically improbable in the society of his day due to its social condition.

If this all suggests that Heller’s critique of liberalism was situational and contingent, a close reading of *Sovereignty* shows that Heller was an unforgiving critic of liberalism in general. In that work, Heller offers a complete rejection of the liberal worldview, from a philosophical and historical perspective as well as a political and economic one. This is clear not only by how much he seeks to retrieve Rousseau and Hegel, but how often he takes aim at Kelsen – at Kelsen’s rationalism, legalism, normativism, at his basic errors of jurisprudential methodology, and, above all, at his liberalism.¹⁰

made clear below. The aim in this article is to do justice both to Heller’s dialectical constitutional method and to his substantive political commitments.

⁷This is described as a will ‘whose existence and power is unimaginable ... without a universally binding political idea that can be attributed to all and which unites individual wills’ ((n 6) 66).

⁸See further Martin Loughlin, *Foundations of Public Law* (OUP 2012) 234–37. Heller’s theory fits with Martin Loughlin’s reconstruction of the tradition of *droit politique* or ‘political jurisprudence’, see Martin Loughlin, *Political Jurisprudence* (OUP 2018). It should be noted, however, that Heller places more emphasis than many in that tradition on the political and constitutional importance of the ‘social question’.

⁹Jean-Jacques Rousseau, *Of the Social Contract and Other Political Writings* tr Quentin Hoare (Penguin 2012); Jean-Jacques Rousseau, *A Discourse on Inequality* tr Maurice Cranston (Penguin 1984).

¹⁰Kelsen’s ‘idea of the unity of the legal system as a logical whole is wrong from top to bottom’ (ibid 118), containing ‘all the fatal errors of logistical (sic) positivism’ (ibid 119).

Even though fragile in the concrete political order of the Weimar Republic, Heller viewed liberalism as intellectually strong in Germany, and as responsible for the erosion of the idea of popular sovereignty. This loss mattered not because it buried an interesting relic in the history of ideas but because it unsettled the ground on which any legitimate polity rests. In contemporary vernacular, liberalism had ‘hollowed out’ the state, undermining the relationship between rulers and ruled in its insistence on individualism and private rights.¹¹

Although defending the Weimar Republic at every step until the last, Heller equivocated in his prognosis of the likely consequences of its deteriorating social situation. In the conjunctural politics of late Weimar, Heller had initially advocated a ‘policy of toleration’ towards Chancellor Brüning’s authoritarian regime, neglecting his own democratic convictions for fear of the greater evil of National Socialism. It was only at the end point of the Weimar Republic, in one of his final publications, that Heller changed his position, identifying the regime as based on a capitalist economy, and predicting the bourgeoisie would turn to increasingly authoritarian solutions to maintain order. Heller went into exile after the Nazi seizure of power in January 1933 and died in Madrid in November of that year. But he had already predicted that the bourgeoisie would turn to a cult of violence and an irrational appeal to a strong leader, reducing the masses to a ‘radical nothing’. With the Nazi seizure of power, authoritarian liberalism would be replaced by a movement of totalitarian dictatorship that superseded ideas of the state and of sovereignty altogether.

This fuller overview enables us to bring together into one arc Heller’s critique of liberalism in the immediate conjuncture and over the long durée. For Heller, liberalism’s tendency to move towards authoritarianism was not contingent, it was profound: both warp and weft of the erosion and ultimate breakdown of the democratic project of popular sovereignty across the preceding century.

The paper proceeds as follows. First, Heller’s attempt to recover the concept of popular sovereignty is laid out, with Heller arguing for its juristic significance against both Kelsen’s legal normativism and Schmitt’s political decisionism. Heller insists on sovereignty’s connection to the ‘general will’ of the people, in the fashion of Rousseau and Hegel, and argues that in a democracy this must involve a dialectical formation of political unity and material equality. In a second part, we turn to the concrete political and constitutional context, with Heller refusing the revolutionary path to socialism urged by those on his left, contending that equality could be achieved in the ‘neutral state’ of the Weimar Republic, and even advocating a policy of toleration to the suspension of parliamentary democracy. In part three, we then examine a shift in Heller’s diagnosis. Towards the end of the Republic (and of his own life), Heller identifies Weimar as a capitalist state and predicts that the bourgeoisie will increasingly turn to authoritarianism and ultimately to the fascist movement to protect its material interests, a transition that would bring an end to the Rousseau-Hegel tradition of state theory and sovereignty.

¹¹This phrase is associated with the work of Irish political scientist, Peter Mair, see *Ruling the Void: The Hollowing of Western Democracy* (Verso 2013).

2. Heller's recovery of the concept of popular sovereignty

2.1. Against Kelsen's liberal abstraction of sovereignty

The concept of the 'general will' had been eroded over the course of the 19th and early 20th centuries by the emergence of the classical liberal *Rechtsstaat*. In Heller's view, this emerged not only through liberalism's identification of legal reason with the protection of substantive bourgeois rights and freedoms; it also reflected a formal transition in the concept of sovereignty. As sovereignty was attributed to *norms* and no longer to the *will*, it became increasingly depersonalised and emptied of concrete political meaning. This 'degradation' of the concept of sovereignty, the liberal 'dematerialisation' of the *Rechtsstaat*, would be taken to its logical conclusion in the work of Hans Kelsen. As one of 'the last remnants of the moral pathos of Enlightenment's universalist natural law', Kelsen's pure theory of law led, in Heller's view, to an 'empty nomocracy'.¹²

According to Heller, Kelsen's theory, which rendered the state as a mere fiction, as a representation of a system of norms, elided the concrete reality of the 'general will'. The *Staat* of the *Rechtsstaat* effectively disappears once law is elevated above the state. This liberal occlusion of the state and of sovereignty was partly a legacy of monarchism in Germany. What followed from the monarchical principle was the conflation of the *state* and the *government*, leading to the complete abstraction of the idea of sovereignty. In other words, once the sovereign as a viable entity is identified with monarchical government, the principle of sovereignty disappears. Instead, Heller says, sovereignty should have been identified with the people, with the idea of *popular sovereignty*: 'State power emanates from the people', as the first article of the Weimar constitution proclaimed.

Kelsen is identified as the major culprit in this occlusion by offering only a hollow, formal account of authority, insensitive to social conditions and to the representation of political unity.¹³ After the crisis of the monarchical principle, Kelsen's work contributed to the dominance of an abstraction, which Heller calls 'liberal rule of law rationalism', instead of a concrete sociological understanding of popular sovereignty. Heller's alternative was to call for the true meaning of state sovereignty to be recovered, as a 'unity of will resulting from a multiplicity of wills'.¹⁴ The successor to the autocratic princely sovereign should not have been the 'rule of law' but the 'rule of the people', which requires the self-identification of the people as 'the sovereign person' through devices of political majoritarianism and representative government.¹⁵

Heller dismisses the idea that we live under the rule of law and not of men as a 'foolish' bourgeois illusion.¹⁶ There is 'no rule without a ruler, that is, without a decision-making unit that is always formed by ... historical processes of will'.¹⁷ But Kelsen's doctrine of 'legal sovereignty', was not only a reflection of intellectual decline or a harmless illusion;

¹²Heller (n 6) 67–68. For a robust defence of Kelsen's jurisprudential approach to democracy, see Lars Vinx, 'Hans Kelsen and the Material Constitution of Democracy' (2019) 12(4) *Jurisprudence* 466–90.

¹³This occlusion of popular sovereignty effected by Kelsen's theory had, in Heller's view, contributed, 'in no small measure to the support of dictatorship among a youth that looks for moral justification and is hungry for reality', Hermann Heller, 'Rechtsstaat or Dictatorship?' (Ellen Kennedy tr, 1987) 16 *Economy and Society* 127, 132 (first published as *Rechtsstaat oder Diktatur?* in *Die Neue Rundschau* (S Fischer Verlag 1929) 721–35) ('*Rechtsstaat or Dictatorship?*').

¹⁴Heller (n 6) 107.

¹⁵Heller (n 6) 108.

¹⁶*ibid.*

¹⁷Heller (n 6) 83.

it was a *reaction*, in the traditional political sense of the word, based on middle class concern for its own personal security in an age of mass democracy.¹⁸ In society rendered by class divisions, even a formally democratic *Rechtsstaat*, if it is no longer materially representative, turns into the *ideology* of an objective rule of law in a way that conceals class dominance.¹⁹

In a final, dense, chapter of *Sovereignty*, Heller draws out the political implications of Kelsen's 'liberal rule of law rationalism'. He tersely notes that Kelsen's pure theory is not only the 'methodological absolutisation' of liberalism's attempt to free itself from the state, it is also 'the juristic mask' of liberal opposition to the exercise of state sovereignty.²⁰ Kelsen's pure theory, in other words, is the methodological complement to a liberal politics of anti-statism, a position which is not only theoretically false but, in Heller's view, politically misguided: limitations on the exercise of sovereign powers lead neither to more democracy nor to greater individual freedom.²¹

Liberalism is unable to realise the principle of popular sovereignty, Heller argues, in another echo of Rousseau, since it can understand the people's will only as a sum of individual preferences (the *volonté de tous* that Rousseau counterposed to the *volonté générale*). 'The collective will', Heller says, 'cannot be understood as an I-consciousness', but as a 'we-consciousness'.²² Heller is emphatic that the general will must be considered both real in its existence *and* normative in its orientation. It must express an effective decision-making unit, 'individuated' not only 'by state organs' but 'by the entirety of the natural and social order'.²³ The formation of the general will must be viewed as a historical process, looking backward to a pre-existing unity and forward to a prospective one. It cannot be a mere product of the legal order.

Heller is less clear, however, about how in practice a multitude of individual wills are unified into an active and effective decision-making unit. What are the substantive prerequisites? As a matter of political sociology, Heller paints with a broad brush. The most important natural fact is the 'neighbourhood', the 'community of destiny of a territory'. But Heller also suggests the significance of consolidated ties of ethnicity.²⁴ As a political matter, a common will is individuated by common institutions, specifically by a plurality of state institutions. But if this determines how a common will is individuated, it does not explain where it originates. Ultimately, Heller says, only history will determine whether a multitude becomes an effective unity, concluding laconically that the 'bed of the subjective river of experience dug by history and society defines the most important individuation of the collective will, which ... [is] rightly termed "the ultimate sovereign"'.²⁵

¹⁸In Heller's words, 'once the bourgeoisie believed neither in a binding political task, nor in itself ... little was left of the classical bourgeoisie theory of the *Rechtsstaat* but bourgeoisie security – the formal positivist legality intended merely to provide a bulwark against the onslaught of proletarian demands', (n 6) 66.

¹⁹As Heller puts it, 'A formal democracy that has lost the substantive idea of the *Rechtsstaat* ... has an understandable interest in countering the idea of class dominance by propagating the ideology of a completely objective rule of law', (n 6) 82.

²⁰Heller (n 6) 183.

²¹Heller (n 6) 183–85.

²²Heller (n 6) 116–17.

²³Heller (n 6) 114.

²⁴*ibid.*

²⁵Heller (n 6) 115.

2.2. Against Schmitt's personalisation of sovereignty

Although his dismissal of Kelsen is blunt and forceful, Heller ends up defending a position that appears equally elusive, substituting sheer historical contingency for Kelsen's transcendental presupposition. Have we just ended up with a conclusion as abstract as the one Kelsen offered, even a new 'basic norm', only now as material condition rather than a transcendental presupposition, namely the will of the people as it is historically formed through a combination of accident and experience? Can anything more be said about the principle of popular sovereignty as it emerges in concrete historical practice?

To progress beyond Heller's critique of Kelsen, we need to turn to his other major protagonist in Weimar jurisprudence, Carl Schmitt. Schmitt makes little more than a cameo appearance in *Sovereignty*, but it is an important one. In Heller's view, the work of Carl Schmitt provides the 'sole' and 'highly significant' exception to the legal tradition's degradation of sovereignty, offering a crucial corrective to Kelsen's rationalism.²⁶ Instead of a mere legal fiction, Schmitt offers the notion of sovereignty as based in a state *organ*, replacing the idea of the separation of powers in the *Rechtsstaat* with a form of dictatorship.

Heller argues that Schmitt's turn to the theory of dictatorship is a mirror-image of the liberal turn to rule of law ideology. If legal rationalists stipulate the depersonalisation of the concept of sovereignty, Schmitt offers the diametrically opposite response, a completely personalised sovereign dictator. In opposing the rationalist belief in law with a form of decisionism, Schmitt's turn is, in Heller's view, 'definitive' and 'a model for the study at hand'.²⁷ And yet, Heller continues, Schmitt remains 'full of internal contradictions', his conclusions on sovereignty in the debates on the meaning of the Weimar Constitution and its Article 48 on Presidential emergency powers undermined by his own 'excellent' theoretical distinction between commissarial and sovereign dictatorship.²⁸

To understand Heller's critique of Schmitt on this point, we need to add some concrete constitutional context. To the extent that conservatives like Schmitt supported Weimar parliamentary democracy, it was not out of political conviction in the Republic, but out of tactical considerations, to avoid the 'dictatorship of the proletariat' that they feared as the alternative, following the Bolshevik revolution of 1917.²⁹ Schmitt adopted this defensive posture, and, after flirting with the possibility of using the judiciary to thwart social change through legislation, offered a dictatorial solution to the problem of constitutional self-protection, initially from within the Weimar regime.³⁰ On the basis of a 'commissarial' form of dictatorship, the President, using Article 48 of the Constitution, should exercise emergency powers to defend the constitution, by invoking the exception and setting its norms aside if necessary.³¹ This was a power that had been used

²⁶Heller (n 6) 101.

²⁷*Ibid.*

²⁸Heller (n 6) 102.

²⁹See Michael Stolleis, *A History of Public Law in Germany 1914–1945* (OUP 2004) 45–53.

³⁰As late as 1932, Schmitt was arguing that if the core of the second, substantial part of the Weimar constitution could be stripped of its contradictions and developed in accordance with its inner logic, 'the idea of a German constitution will be saved' (Schmitt C, *Legality and Legitimacy* (Duke University Press 2004 [1932]) 91).

³¹For an exploration of the difference between commissarial and sovereign dictatorship, in the move from Schmitt's *Die Diktatur* to *Political Theology*, and in the difference between the crises in early and late Weimar, see John P McCormick, 'The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers' (1997) *Canadian Journal of Law and Jurisprudence* 163.

in the early stages of the Republic by Social Democratic President Friedrich Ebert, before its continued and widespread use by the authoritarian liberals after the suspension of parliament in 1930. In 1932–33, Article 48 was then instrumentalised in the transition to totalitarian dictatorship (it was used for Chancellor von Papen's forceful deposition of the SPD government in Prussia in July 1932 and to pass the infamous Reichstag Fire Decree on 28th February 1933, nullifying key civil liberties after the Nazi seizure of power).

Schmitt's position on the location of sovereignty in 1927 – during a brief period of relative stability in mid-Weimar – was ambiguous. Although the content of the Weimar constitution had been the result of a compromise, it was far from a sheer contingency; Weimar represented the prevailing bourgeoisie bloc (*Bürgertum*), which an authoritarian state apparatus should defend if necessary.³² But whether the power to suspend the provisions of the constitution meant the President of the Republic could perform 'acts of sovereignty' was a question which until then Schmitt had avoided answering, as Heller was quick to point out.

Based on Schmitt's own distinction between commissarial and sovereign dictatorship, the President was merely a commissarial dictator, able to set aside some of the rules in order to preserve the constitutional whole, on the legal basis of Article 48 itself. In other words, the President was *not* a sovereign lawgiver, he was not able to establish a new constitution or modify it in the exercise of constituent power, only to protect the existing one through the exercise of constituted powers. But Heller notes that this conclusion contradicts Schmitt's own earlier claim that sovereign is whoever decides on the exception. In that case, as Schmitt had famously declared in *Political Theology*, the President should be considered legally sovereign.³³ After noting Schmitt's confusion on this point, Heller offers a much clearer position on the question of whether the President of the Republic was sovereign. Heller emphatically rules out *any* type of 'organ sovereignty' since no single organ or institution can represent the 'general will'.³⁴

2.3. Heller's dialectical conception of popular sovereignty

Heller's critique of Schmitt is the mirror image of his critique of Kelsen. The 'general will' can be replaced neither by an abstract moral or legal conscience, nor by the personal will of a dictator. In order to have juristic significance, and be adequate to the will of the people, sovereignty must represent something 'ethically and politically concrete'.³⁵ Heller is vague about what precisely this means. He offers no detailed account of any legal or constitutional principles that bind the sovereign. Although sociology is said to loom large on the horizon of sovereignty, its object remains nebulous in outline: sovereignty can be viewed as having a social function,³⁶ as symbolic,³⁷ and as the bearer of

³²Schmitt's preference for a dictatorship allied with the Catholic Church was identified by Richard Thoma in 1925 in an early review of Schmitt's *Crisis of Parliamentary Democracy*, see Ellen Kennedy, 'Introduction' in Carl Schmitt (ed), *The Crisis of Parliamentary Democracy* (Ellen Kennedy tr, MIT Press 1988) xiv.

³³Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press 2006).

³⁴Heller (n 6) 109.

³⁵*ibid.*

³⁶Heller (n 6) 127.

³⁷Heller (n 6) 130. He cites Hegel here and suggests that Hegel learned this from Rousseau.

political judgment.³⁸ The unity of sovereignty is multifaceted. It is, Heller concludes, 'teleological, historical and sociological, based on the unity of a judging sovereign will.'³⁹

To elaborate this claim, and to move beyond Schmitt's internal inconsistencies, Heller draws a conceptual distinction between sovereignty in autocratic as opposed to democratic states. Although autocratic states may pay lip service to the principle of popular sovereignty, it is only in democratic states that the relation between rulers and ruled, and hence the issue of *representation*, is a crucial and 'juristically significant factor'.⁴⁰ It is through the concept of representation, Heller argues, that we should make sense of democratic practices 'such as elections, countersigning, parliamentarism, referendums, initiatives, and so on', namely, to guarantee that 'power emanates from the people'.⁴¹ Heller adds that these various devices of political representation must be understood on the basis of the majority principle. It is majority rule, Heller later proclaims, that distinguishes democracy from authoritarianism.⁴²

The majority principle is not, however, to be confused with a sheer or crude majoritarianism. To function legitimately, the majority principle requires the *substantive existence* of a 'general will'. As Heller puts it, the juristic concept of sovereignty, as with all valid juristic concepts, is a 'silhouette of real social processes'.⁴³ There are, in other words, certain preconditions for the majority principle to constitute a legitimate expression of the 'general will'. These preclude the exercise of sovereign power by an organ or institution in way that is juristically disconnected from the people or determined in an entirely arbitrary manner. In a different vernacular, it suggests that the autonomy of the political, as a matter of institutional determination of the general will, is only *relative*.

Heller insists that popular sovereignty is relative to deeply engrained cultural principles, such as principles of family and property. Attempts to change these will occasion strong resistance, from various political constituencies: just as Bismarck had to deal with socialist principles embedded in society, Heller notes, Lenin had to deal with capitalist ones. There is no political *creatio ex nihilo*: the representative of the 'general will' is neither 'omnipotent' nor unrestrained. Even if formally legislatively supreme, the political representative must work with existing social and cultural material. We might say that this material is at the very least *juris-obstructive*, if not directly *juris-generative* or *juris-pathic*.⁴⁴

³⁸Heller (n 6) 118.

³⁹ibid.

⁴⁰Heller (n 6) 108.

⁴¹ibid.

⁴²Heller (n 1) 296.

⁴³Heller (n 6) 124.

⁴⁴Although there remains some ambiguity about the nature of these substantive cultural principles, Heller rejects a moralistic version of natural law or legality: the principles that function as a guarantee of law (or an obstruction to legal change) are political, ethical and sociological in nature. To construct his argument Heller draws on the foundations of modern state theory, from Bodin and Hobbes, through to Rousseau and Hegel. It is Hegel who offers the dialectical reading of sovereignty and of the state that Heller most insistently builds on: 'Any theory that posits the alternatives of 'law or power, norm or will, objectivity or subjectivity', Heller concludes, 'fails to recognize the dialectical construction of the reality of the state and it goes wrong in its very starting point', Hermann Heller, 'The Nature and Structure of the State' (1996) 18 Cardozo Law Review 1139, 1214 (translated by David Dyzenhaus). Heller's principles are fruitfully reconstructed as principles of *droit politique*, or 'political jurisprudence' as Martin Loughlin argues, see *Foundations of Public Law* (OUP 2012) 234–37.

But Heller's conception of popular sovereignty is not only backward-looking. For the representative function to operate legitimately, Heller underscores the need for a complex synthesis of symbolic identification and material equality.⁴⁵ These make an uneasy combination, as Heller himself concedes. To appeal to a symbolic unity was frequently a way to legitimise *inequality*, a device employed opportunistically by the ruling class to conceal class conflict, the bourgeoisie resurrecting any ideology, including nationalism and monarchism, in order to maintain its own position of power amid the eternal 'cycle of elites'.⁴⁶ Heller rejects as 'naïve self-deception', the hope that the working class's share in this ideology would prove sufficient to keep it loyal to the process of democracy in the presence of widening economic disparities, which transform *summum jus* [supreme right] into *summa injuria* [supreme wrong].⁴⁷

The dynamic of material interests and political ideas is cast by Heller not only as a sociological but as a *constitutional question*: the constitutional order must be able to accommodate material conflict and channel man's 'unsocial sociability'. For a polity to constitute itself democratically as a unity, there must be some prospect of *substantive* equality between rulers and ruled. Although this can never be truly and finally achieved because the social structure is 'necessarily antagonistic',⁴⁸ it is for political democracy to work through this tension. *Contra* Schmitt, there can be no assumption of a concrete political order, nor a substantive unity that can be determined decisionistically on the existential logic of 'friend and enemy'. On the contrary, constitutional politics must be understood in dynamic and relational terms.⁴⁹

For Heller, political unity is not a bare fact of existential recognition of 'us' and 'them'; these positions and therefore political unity itself, is formed, constructed, and mediated through the democratic process, channelling competing claims over the common good. 'Democracy', says Heller, is a 'conscious process of the formation of political unity from bottom to top ... The people as a plurality is consciously to form itself into the people as unity.'⁵⁰ Political parties are essential to serve this function of unifying the multitude of wills of the citizenry into a coherent whole and parliamentary politics necessary to permit the sense of 'fair play' with one's opponents.

What is essential for a constitutional order, in other words, is a dialectical formation of political unity out of material conflict.⁵¹ The essence of a collective order remains elusive, resistant to any straightforward empirical analysis or resolution, let alone any extraordinary, or extra-constitutional decision: 'One cannot say definitively how this 'we-consciousness' is produced and destroyed. All attempts to find the impulse for this consciousness in a single sphere of life have failed and must fail. All that we can rightly know is that in each epoch a correspondence between social being and

⁴⁵See Herman Heller, 'Political Democracy and Social Homogeneity', in B Schlink and A Jacobson (eds), *Weimar: A Jurisprudence of Crisis* (University of California Press 2002) 261.

⁴⁶Heller (n 45) 261.

⁴⁷Heller (n 45) 264.

⁴⁸Heller (n 45) 257. The dialectic of fact and norm is, in a democracy more than any other political form, dependent on and shaped by 'social equalisation', *ibid* 261

⁴⁹Claiming that Schmitt's 'friend-enemy' distinction ignored the dynamics of political will-formation, Heller argues that 'homogeneity' is something that daily must be formed anew, approving Ernest Renan's metaphorical formulation of nationalism as '*un plebiscite de toujours*' Heller (n 45) 260.

⁵⁰Heller (n 45) 260. Heller concurs with Schmitt in rejecting the liberal justification of parliamentarism as based on a search for truth.

⁵¹Heller extends this dialectical approach to the concept of constituent power (n 45) 277–78.

consciousness – in other words a societal form – emerges'.⁵² But crucial is that this social form is democratically constituted through functioning and representative political institutions.

3. From theory to practice: concrete constitutional struggles in Weimar

3.1. *The limits of Heller's critique of liberalism*

Can Heller's claims about the dialectic of popular sovereignty be demystified by considering the stakes in the constitutional struggles faced in Weimar? More than merely intellectual exercises, Heller saw both Kelsen's and Schmitt's accounts of sovereignty as reactions to the disturbances caused by increasingly intense class conflict. In their different ways, both sought to neutralise the social conflicts of the day. But these disturbances and divisions created a major difficulty for Heller too, namely, how to achieve a democratic formation of a 'general will' in a state which is, and is identified as, a 'class state' – a state riven by class division.

For Heller, democracy is the means through which the relationship between rulers and ruled can be maintained in such a way as to respect and give effect to the principle of popular sovereignty. Democracy must be understood as an expression of self-legislation, not as a limit to self-legislation imposed either through a 'rule of law rationalism' or by a 'commissarial dictatorship'. But democracy can only successfully perform this role in material conditions of relative social equality.

We can now begin to see Heller's dilemma in more detail. Equality is a precondition of democracy but must itself be brought about democratically. This doesn't pose a problem so long as equality and democracy appear to be on the same constitutional path, or at least on the same constitutional horizon. As Heller himself puts it, democracy requires the *prospect* of social equality. What was less clear, however, was what would happen if these paths began to diverge.

It is crucial to note that in Weimar, the 'social question' – the question of how to respond to growing social inequality –, was highly polarised, driving competing political factions in opposing directions and often accompanied by police and paramilitary violence. It also frequently took the form of constitutional argument. Social inequality had become a *constitutional question* and even a question of *constituent power*, at least for those who proposed a revolutionary overturning of the existing order in the manner of the Bolshevik revolution. In *Sovereignty* itself, Heller pays hardly any attention to the substantive constitutional questions raised in the Weimar conflicts between economic liberalism and socialism and between capital and labour. But elsewhere in his writings, as we will see, they appear with full force.

The Weimar Constitution, in its second substantive part, protected both economic liberalism (a qualified right to private property, Article 153) and social justice (Article 151). It even acknowledged the role of Workers' Councils as organs of economic democracy (Article 165), and the socialisation of the means of production (Article 156).⁵³ Although the positive content of this part of the Weimar Constitution could, for many left-leaning Weimar lawyers, be brought to fruition as a 'labour constitution' through institutional

⁵²Heller (n 45) 261.

⁵³See Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (OUP 2014) 18.

means, containing ‘the fundamentals necessary for the construction of a social *Rechtsstaat* whose objective is the realization of social freedom’, the actual jurisprudence of the courts would gradually subvert this prospect.⁵⁴ In particular, Article 153 and the protection of private property would be utilised by liberals and conservatives in an attempt to frustrate the goals of socialism and prevent the materialisation of the ‘labour constitution’.⁵⁵ Through the juridical application of principles of economic freedom by conservative judges, Franz Neumann eventually lamented, the meaning of the Weimar Constitution was ‘converted into its exact opposite’.⁵⁶

This brief excursion into Weimar constitutionalism takes us to the *limit* of Heller’s critique of liberalism and to a tension in his belief in the democratic and constitutional pursuit of popular sovereignty. To pursue this point, we need to examine where Heller was positioned in the discussions on the reformist and revolutionary Marxist left on achieving the goals of democratic socialism, whose aim was not just to critique but to transcend liberalism and overcome the capitalist state that Weimar liberalism was embedded in.

As a biographical matter, Heller, who was a member of the Social Democratic Party of Germany (the SPD), represented a left-Hegelian tradition in constitutional theory, placing his faith in the *soziale Rechtsstaat*, in the capacity of the Weimar state and its constitution to deal with the social question.⁵⁷ Continuing the legacy of the nineteenth century state theory of Hegel, Heller advanced a tradition of German idealism that took the state to be *autonomous* from capitalist social relations, standing over and above civil society, as a transcendental mediator of competing interests. Belief in the gradual reform (rather than revolution) of the state, on the basis of the Weimar constitutional compromise and an ‘equilibrium of class strengths’ had become a dominant position in the SPD by the interwar era. It brought together those who followed the founder of German socialism in the late nineteenth century, Ferdinand Lassalle, the followers of Eduard Bernstein’s ‘evolutionary path to socialism’ and Austro-Marxists such as Karl Renner and Otto Bauer.⁵⁸

In Heller’s worldview, socialism was assumed to be the ‘legitimate heir’ to the liberal order of the nineteenth century.⁵⁹ This revisionist position – against the orthodoxy of

⁵⁴Franz Neumann, ‘The Social Significance of the Basic Laws in the Weimar Constitution’ in Keith Tribe (ed), *Social Democracy and the Rule of Law: Otto Kirchheimer and Franz Neumann* (Allen & Unwin 1987) 37.

⁵⁵Neumann saw that monopolization threatened even economic liberty, see Franz Neumann, ‘On the Preconditions and Legal Concept of an Economic Constitution’ in Keith Tribe (ed), *Social Democracy and the Rule of Law: Otto Kirchheimer and Franz Neumann* (Allen & Unwin 1987).

⁵⁶Ibid 56–57. Heller also describes the 1925 decision of the *Reichsgerichtshof*, when judges claimed a general power of constitutional review, as not only ‘undoubtedly wrong’ from a legal perspective, but a violation of the fundamental principle of the division of powers and an eccentric reading of equality based on private property. This ‘degeneration’ of the *Rechtsstaat* idea would be an ‘effective security’ for the bourgeoisie against the possibility that the popular legislature might transform the liberal *Rechtsstaat* into a social *Rechtsstaat* since the ‘overwhelming majority of judges’ were from the ‘ruling class’ Heller (n 13) 131.

⁵⁷Heller is identified as a ‘conservative social democrat’, Caldwell, *Popular Sovereignty*, above, 9. See also Chris Thornhill, *Political Theory in Modern Germany* (Polity 2000) 112: Heller’s thought ‘reflects the very heart of SPD-orthodoxy in the 1920’s’.

⁵⁸See e.g. Otto Bauer, ‘The Equilibrium of Class Strengths’ in Mark E Blum and William Smaldone (eds), *Austro-Marxism: The Ideology of Unity: Austro-Marxist Theory and Strategy*, vol 1 (Historical Materialism Book Series, Brill 2015 [1924]) 323–33.

⁵⁹The SPD grew out of the Socialist Worker’s Party of Germany, established when Lassalle, Bebel, Liebknecht and others came together at Gotha in 1875, but was soon banned under Bismarck’s anti-socialist laws until 1890 (later splitting with the Independent Socialists in 1917). On Heller’s relation with the tradition of Lassalle, see Hermann Heller, ‘The Nature and Structure of the State’ (1996) 18 *Cardozo Law Review* 1139 (translated by David Dyzenhaus). On Bernstein’s

Marxist revolutionary socialism – set Heller firmly in opposition to many political currents in Weimar, both inside and outside his party. Unlike Neumann, for example, Heller remained faithful to the possibility of achieving socialism through the provisions of the Weimar constitution itself. As Marcus Llanque recently put it, in claiming Heller as a ‘republican of the left’, Heller favoured emancipation, ‘not from the state but through the state’.⁶⁰

On more than one occasion in *Sovereignty*, Heller considers Marxism (as well as syndicalism and anarchism) to be guilty of the same sin as liberalism, fundamentally misguided in its anti-statism (promoting the ‘withering away’ of the state in classical Marxist terminology). The issue, Heller argues, is not Marxism’s focus on class struggle – where there is struggle there will also be sovereignty, – but on the promise of its future elimination, looking forward to a period in which sovereignty is transcended. The fundamental problem here, as Heller sees it, is that ‘Marxism shares with bourgeois rule of law liberalism the ideal of an impersonal, authority-free natural order’ even if the Marxist projects this into the future rather than idealising the present.⁶¹

But in agreement with the Marxism of his era, Heller notes that the liberal *Rechtsstaat* is ideological precisely because it conceals the material reality of a class state, a condition of social conflict and pervasive hierarchy. As Heller warns, ‘without social homogeneity’, ‘the most radical formal equality becomes the most radical inequality, and formal democracy becomes the dictatorship of the ruling class.’⁶² The merely formal equality of the liberal *Rechtsstaat* was not only entirely consistent with substantive inequality, it could also aggravate inequality and frustrate social change.⁶³ The problem was so severe in Weimar that it was becoming increasingly difficult to reconcile the formation of a ‘general will’ with a ‘class state’, a version of the same difficulty that Rousseau and Hegel had identified in an earlier age.⁶⁴

Equality is essential for democracy but, in the material reality of Heller’s time, it looked at most to be an aspiration – and one that was thwarted by capitalism’s own dynamic as well as by Weimar’s constitutional provisions, including the protection of private property. The Weimar Republic was caught in the Rousseau-Hegel bind, but with a heightened tension between social demands made through parliamentary and extra-parliamentary means on the one hand, and the autonomy of the privately regulated economy and demands of capitalist interests on the other.⁶⁵ In such extreme conditions of class conflict, inequality was utilised by the ruling class to maintain its own position of power. Heller notes how this occurred through the political process due to the influence

‘decisive’ influence on the SPD, see Peter Gay, *The Dilemma of Democratic Socialism: Eduard Bernstein’s Challenge to Marx* (2nd edn, Collier Books 1970 [1952]) 252.

⁶⁰Marcus Llanque, ‘Hermann Heller and the Republicanism of the Left in the Weimar Republic’ (2019) *Jus Politicum*.

⁶¹Heller (n 6) 72.

⁶²Heller (n 45) 262.

⁶³Heller (n 45) 264.

⁶⁴On Rousseau’s struggle with liberal political economy see e.g. Marco Goldoni, ‘Rousseau’s Radical Constitutionalism and its Legacy’ in Michael W Dowdle and Michael A Wilkinson (eds), *Constitutionalism Beyond Liberalism* (CUP 2017). On Hegel, see Frank Ruda, *Hegel’s Rabble: An Investigation into Hegel’s Philosophy of Right* (Bloomsbury 2011). Hegel uses the figure of the ‘rabble’ to capture the tendency of bourgeoisie society and industrial capitalism to lead to extremes of inequality and instability.

⁶⁵As Rousseau put the paradox in *The Social Contract* (n 9) 42: ‘In order for a people to appreciate the healthy maxims of politics ... the effect would have to become the cause; the social spirit, which should be the result of the institution, would have to preside over the founding of the institution itself; and men would have to be prior to laws what they ought to become by means of laws.’

the bourgeoisie could exert over public opinion, media, and education, as well as juridical institutions. In these conditions, doubts might emerge ‘from below’ as to whether liberal democracy is even capable of delivering the *minimal* conditions for a tolerable degree of social harmony. With strong political reactions likely to ensue, electoral democracy itself might come under threat, deemed inadequate or even an obstacle to the necessary solidarity for society to politically reconstitute itself.

For the dialectic of popular sovereignty to be resolved democratically, in other words, required certain material conditions. And in the absence of political-democratic channels to respond to economic disparities, not only opposition within but also, ultimately, *alternatives to* the constitutional process become alluring – not only on the left, but also, as Heller increasingly saw, on the right. Heller seems unsure of how to respond politically to this predicament. His commitment to the Weimar Republic remained unwavering, even to the point, as we shall now examine, of temporarily sacrificing a commitment to its parliamentary democracy, precisely the means outlined in *Sovereignty* as central to the formation of political unity.

3.2. Heller’s persistent statism and the historical conjuncture of late Weimar

When writing *Sovereignty*, in the mid 1920s, Heller still imagines the Weimar state as a *neutral* state, equally open to different governmental regimes, socialist as well as capitalist. Even as late as 1931, during Brüning’s reign as Chancellor, Heller considered the authoritarian state necessary to ensure the primacy of political authority *over* private economic power and to *preserve* the institutions of the Republic against threats from left and right. He thus continued to advocate a strong state standing above class conflict, asserting its autonomy from the economy and from civil society, and using its governing institutions to maintain stability. This commitment extended to the point of tolerating the cabinets of authoritarian liberalism, when Chancellors Brüning and then von Papen and von Schleicher ruled through decrees under the authority of President Hindenburg, bypassing parliament entirely, and pursuing a series of deflationary measures of severe austerity.⁶⁶

As the political centre increasingly struggled to hold, it was not the dictatorship of the proletariat urged by those on the left that would emerge, but the consolidation of a dictatorship *over* the proletariat. Authoritarianism beckoned in the first place not as means of overturning the existing order but as justification for maintaining, or attempting to maintain, *normality*; to preserve the status quo. What beckoned initially was, in other words, a version of Schmitt’s ‘commissarial dictatorship’. The ‘fateful transition to authoritarianism’ in the interregnum between the resignation of Hermann Müller in March 1930 and the Nazi seizure of power in January 1933, was coolly planned ‘and with the intention of drastically altering the constitutional system and the balance of social forces’, but its aim was to preserve the power ‘of old elites of the army, bureaucracy and big business’.⁶⁷ The defection from parliamentarism, which would pave the way for the later Nazi seizure of power, was thus launched in the first instance by an

⁶⁶For historical analysis see Eberhard Kolb, *The Weimar Republic* (2nd edn, Routledge 2005) 116–35.

⁶⁷Kolb (n 66) 117–18. According to Kolb, General von Schleicher had been pushing for such a government of the bourgeois right wing since as early as spring 1929 (ibid 282).

‘anti-democratic and embittered ruling class’; political and economic elites, refusing to countenance ‘the inroads that democracy had made into their privileged position’, were determined to destroy ‘the political order and the social welfare provisions on which it rested’.⁶⁸

In the words of historian Hans Mommsen, the cabinets of authoritarian liberalism reduced the ‘parliamentary constitution’ to ‘an empty shell whose only function was to conceal the gradual transition to authoritarian government’.⁶⁹ Although presidential decrees had been used regularly since the early days of the Republic – first under Social Democrat president Ebert in response to violent insurrectionary uprisings in the 1920s – emergency politics would no longer be time-limited nor restricted to non-budgetary matters. This manner of governing without the *Reichstag*, backed by coalitions of centrist, conservative, and nationalist forces, would take the violation of the principle of parliamentary democracy to the very limit. By 1931, state secretary Hans Schaffer had declared, ‘from the budgetary point of view, we are already living in a military dictatorship’.⁷⁰

Heller’s commitment to the Weimar republic was such that he was initially willing, in effect, to accept this commissarial dictatorship so the state could maintain its authority. The centrist parties in the *Reichstag*, including the Social Democrats, thus did little to thwart Brüning’s authoritarian turn; on the contrary, they attempted to bloc ‘no confidence votes’ coming from the radical fringes on the left and right, which would have prompted fresh elections. The SPD policy of ‘toleration’ towards Brüning’s government, its *Tolerierungspolitik*, was based, at least in part, on Heller’s own counsel.⁷¹ The formation of authoritarian liberalism and the obstruction of representative democracy was thus facilitated by the SPD’s own position.⁷²

Heller’s stance reflected a broader position in the SPD. Social democrats centred around Rudolph Hilferding, who had served as Finance Minister from 1928–1929, had seen the concentration of capital and heavy industry in the late 1920s as potentially of instrumental value, more easily taken over and controlled by the class-neutral state than a multitude of smaller enterprises.⁷³ The danger in the authoritarian liberal state, from their perspective, thus lay less in its authoritarianism than in its economic liberalism. They believed that political authoritarianism and even private concentration of capital could be turned to their advantage. Heller’s ‘faith in the state as the expression of community’, as Chris Thornhill puts it, ‘continued long after the German state had abandoned all interest in protecting the citizen from the economy’.⁷⁴

To explain Heller’s faith in the Weimar regime, even as its ruling elites were defecting from its democratic institutions, we have to consider an additional factor, namely the SPD’s fear of the radical right. The NSDAP (the Nazi Party) was gaining electoral

⁶⁸Ian Kershaw, ‘Introduction: Perspectives of Weimar’s Failure’ in Ian Kershaw (ed), *Weimar: Why did German Democracy Fail?* (Wiedenfeld and Nicholson 1990) 1–19, 16.

⁶⁹Hans Mommsen, *The Rise and Fall of Weimar Democracy* (University of North Carolina Press 2007) 317.

⁷⁰Mommsen (n69) 396.

⁷¹Ellen Kennedy, ‘The Politics of Toleration in Late Weimar: Hermann Heller’s Analysis of Fascism and Political Culture’ (1984) 5 *History of Political Thought* 109. According to Kennedy, this was justified by the SPD’s parliamentary leader Breitscheid, on the basis of Heller’s arguments in *Europa und der Faschismus*, published in 1929.

⁷²Although the dominant position in the SPD had become reformist, there were some, like Kirchheimer, who had maintained a more radical approach and rejected the ‘toleration policy’. Thornhill describes Kirchheimer’s position as a ‘theoretical fusion of Marx and Schmitt’, *Political Theory* (n 57) 120.

⁷³Thornhill (n 57) 110.

⁷⁴Thornhill (n 57) 112.

ground in the early 1930s, and had dramatically increased its seats in the *Reichstag* in elections in September 1930.⁷⁵ Rudolph Breitscheid, leader of the SPD, was, like Heller, concerned about further dividing the opposition to the Nazis; so long as there was a threat to Weimar from the NSDAP, ‘nothing should be done to weaken Brüning and open the door to the fascists’.⁷⁶ On this interpretation, the SPD was ‘forced to choose the lesser evil’, in light of the Nazi party’s growing threat.⁷⁷ Even if authoritarian liberalism was a defective regime, it was better than the alternative, which, as far as the majority of social democrats could see, was either fascist dictatorship or communist revolution.⁷⁸

Far from protecting the Weimar Republic from the ‘greater evil’, the authoritarian government of the interregnum laid the path for the Nazi seizure of power.⁷⁹ The toleration strategy fatally weakened the Social Democrats, severing their link with the working class, as the harsh austerity which the governing regime pushed through with the passive acceptance of the SPD generated high levels of unemployment. Soaring unemployment, in turn, contributed to weakening of the (already weakened) unions, which were further damaged by the direct undermining of the system of collective bargaining, as the government ordered reductions in wages and increases in working hours in the early 1930s.⁸⁰

The SPD’s policy of tolerating the authoritarian liberals added an acute crisis of *political representation* to the economic crises preceding Weimar’s collapse. In one respect, this was the final chapter of a longer story in the left’s abandonment of a democratic ethos. Despite the initial promise of extending political freedom into the economic realm, ‘the economic constitution’ advanced by the Weimar left after the birth of the Republic in 1918 came to perform merely a ‘service function’ for the capitalist state, becoming ‘co-extensive with the employer’s aim of maximising production and profit’.⁸¹ The worker’s councils had gradually been hollowed out, hampered by a lack of legislative action, subsumed by the highly bureaucratic unions, and lacking in support from radical left parties (including the KPD, which pursued its own disastrous strategy of subservience to Moscow). They were also constitutionally weakened by the interpretation by the *Reichsgericht* of Article 165 as merely programmatic and not legally binding (as opposed to Article 153 defending the right to private property).⁸²

⁷⁵This made it the second largest party in the *Reichstag* with 107 seats.

⁷⁶Kennedy (n 71) 111.

⁷⁷Kennedy (n 71) 126.

⁷⁸For the view that the policy of Brüning’s was not without alternatives, see Carl-Ludwig Holtfrerich, ‘Economic Policy Options and the End of the Weimar Republic’ in Ian Kershaw (ed), *Weimar: Why did German Democracy Fail?* (Wiedenfeld and Nicholson 1990). Holtfrerich notes that although there were significant constraints on Brüning – including those posed internationally to Germany’s foreign policy, and those placed by its domestic bank, excluded from devaluation in principle by the Young agreement of 1929/30, as well as fears of inflation from the early 1920s – there remained political alternatives even after the summer of 1931.

⁷⁹Peter C Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Duke University Press 1997) (Caldwell, ‘Popular Sovereignty’) 11–12. Caldwell notes that the conception of constitutional democracy associated with von Papen and Schmitt ‘laid the groundwork for the Nazi takeover’ and is ‘obscured’ by a conservative historiography that argues Weimar’s republic was ‘defenceless’ and ‘gave itself up’. Ellen Kennedy argues that the toleration strategy of the SDP was not only tactically wrong but politically wrong, because it was not a policy *for* anything, and ‘it was practised by a party that was not any longer in a position to tolerate anything. Its power, rights, and equality had already stripped away because the foundation for parliamentary democracy was gone’ (above 126–27). The Communist Party also increased its parliamentary representation in the early 1930’s. On the political economy of authoritarian liberalism, and its hollowing out of democracy, see Polanyi (n 4).

⁸⁰Dukes (n 53) 40.

⁸¹Dukes (n 53) 21–22.

⁸²Dukes (n 53) 20 (examining the Decision of the *Reichsgericht* of 11 February 1926. This left the 1920 work councils Act as the main legislative frame).

Toleration of Brüning's defection from parliamentary democracy was the final abandonment of 'the constitutional platform for the emancipation of labour'.⁸³ By this point, the unions themselves were depoliticised, refusing political strikes and underestimating the importance of political struggle, overwhelmed in their pursuit of economic strategies in pursuit of higher wages. Other prominent Social Democrats associated with the labour law movement made similar assessments to Heller, critical of the ends to which public power was being deployed more than the means of its deployment.⁸⁴ The allegiance felt by social democrats and trade unions to the Weimar Republic appeared to trump concerns about the increasingly undemocratic nature of its government.⁸⁵ In other words, in the political conjuncture of late Weimar, Heller put his faith in the constitutional state above his belief in the democratic process.

4. Heller's reckoning: from the neutral state to the capitalist state, to the Nazi movement

4.1. Weimar as a capitalist state

By the end of 1932, Heller appears to have changed position. Contrary to his earlier predictions, the turn to dictatorship had been led in the first instance by the bourgeoisie rather than the proletariat, fearful not only of revolution but of the instability of parliamentary democracy. The idea of the Weimar Republic as a 'neutral state' is then presented by Heller as an illusion, one which he tries desperately to dispel; this is the purpose of his polemic against authoritarian liberalism. By that stage, Weimar appears to him not only as a liberal state but as a class state based on the *capitalist form of the economy*, one entrenched against democracy as much as against socialism.

The social democrats had contributed to this predicament by their strategy of toleration and the abandonment of their democratic convictions, a failure acknowledged by Heller to be a failure of his own camp, indicting social democracy in Germany for its longer-term failure to unite its values with concrete political power.⁸⁶ It had made 'the cardinal error' of thinking that the dialectic of fact and norm could be severed, detaching normative values of social equality from the concrete practice of democratic politics.⁸⁷

⁸³Neumann, 'The Decay of German Democracy' in Scheuerman WE (ed), *The Rule of Law under Siege: Selected Essays of Franz L Neumann and Otto Kirchheimer* (University of California Press 1996) 34–37. Any 'thought of cooperation on the left', which had been divided since the First World War, evaporated after the SPD-controlled police had violently put down unarmed communist demonstrators at a May Day celebration in 1929 in Berlin. Moreover, under direction from the Party in Moscow, the KPD repudiated any united front with the 'social fascists' and insisted on immediate insurrection, a strategy that had hopelessly failed in the early 1920s (Martin Jay, 'The Weimar Left' in PE Jordan and JP McCormick (eds), *Weimar Thought: A Contested Legacy* (Princeton University Press 2013)).

⁸⁴Ruth Dukes, 'Authoritarian Liberalism: A Labour Law Perspective' (2022) *European Law Open* 150–57: Labour lawyer Hugo Sinzheimer's last publication in Germany, *Die Krisis des Arbeitsrechts* in 1932, Ruth Dukes notes, 'was rather more condemnatory of the economic liberalism of the Brüning and von Papen governments than of their authoritarianism.' Dukes notes that 'Sinzheimer's thinking on the role of the state quite clearly followed a strikingly similar trajectory to Heller's', 152.

⁸⁵According to Dukes, compliance by the Trade Unions after 1929, even when it was apparent that the labour constitution had failed, 'was due to the unions' and the workers' allegiance to the Weimar state as a hard fought for and won social democracy', *ibid* 153.

⁸⁶Heller traces this fundamental error back to Kant, in a way which strikingly mirrors the reflections of John Dewey: John Dewey, *German Philosophy and Politics* (rev edn, GP Putnam's Sons 1942).

⁸⁷Heller Otto Kahn-Freund also suggested that the distance between the fine rhetoric of social democracy in constitutional texts such as the Weimar Constitution and the reality on the ground creates a severe problem of legitimacy; see Otto Kahn-Freund, 'The Weimar Constitution' (1944) 15 *The Political Quarterly* 229.

Substituting formal agency for real autonomy, social democracy had neglected the necessity of acting *politically* and had failed to foster a democratic consciousness among the working class.

On the cusp of Weimar's collapse, there is another reversal of note in Heller's intellectual stance. It becomes clear by then that it is Schmitt rather than Kelsen that is his chief adversary. Schmitt was then advising the cabinets of authoritarian liberals (before turning his attention to the Nazi party).⁸⁸ The techniques of government used in this period 'perfectly consummated the triumph of technocratic principles of bureaucratic-capitalist domination over political substance.'⁸⁹ In practice, the apparatus of political rule 'fell into line behind powerful economic lobbies' and the state bureaucracy, 'became 'the primary location of decision-making power'.⁹⁰ The aim of depoliticising the economy reflected the concept of 'the political' that Schmitt had theorised in his famous work of the same name, in the sense that the state had finally grasped 'the enemy': the threat from the left to reconstitute the relation between the political and the economic realms and erode the bourgeois *Rechtsstaat*. According to Ulrich Preuss, the regime (as late as 1932) 'was not an inescapable choice for an interim arrangement in an extraordinary time of emergency, but rather a blueprint for the kind of constitutional framework [Schmitt] had, right from the outset, regarded as appropriate constitutional setup to govern the political life of the German people even in ordinary times'.⁹¹

In taking stock of the regime, even at this late moment, Heller was also targeting Schmitt's constitutional theory. In Heller's view, the Presidential cabinets represented a new form of government; standing against the principles of democracy, parliamentarism, and majoritarianism, and appealing instead to a power that 'bears responsibility only before God', and to the 'miracles wrought by a dictatorship'.⁹² Schmitt, Heller notes, had essentially offered a formal answer to the social question in terms analogous to the miracle in theology: to restore order, he had turned to the state of exception.

In *Sovereignty*, recall, Heller had considered Schmitt's turn away from legal positivism and liberal rationalism to be an 'essential corrective', even if full of 'internal contradictions' on the question of sovereignty itself. Yet in his later polemic, Heller clarifies that Schmitt had no substantial answer to the social question, certainly none that would be satisfactory in a democratic society. The authoritarian solution Schmitt proffered would only deepen the social problem. It offered no antidote to the underlying material issues, instead substituting a national-cultural homogeneity which could only conceal and not resolve class conflict.

Schmitt declared his political position in November 1932 when he delivered an address to the German industrialists, the *Langnamverein*, entitled 'Strong State, Sound

⁸⁸Chris J Thornhill, *Political Theory in Modern Germany: An Introduction* (Blackwell 2000) 88–89 (Thornhill, 'Political Theory'): 'Between 1930 and 1933, Schmitt was intimately connected with the authoritarian, but non-Nazi, presidential cabinets which both temporarily checked and ultimately supported Hitler's rise to power'.

On Schmitt's various twists and turns throughout the interwar period, see Jens Meierhenrich, 'Fearing the Disorder of Things: The Development of Carl Schmitt's Institutional Theory, 1919–1942' in Meierhenrich and Simons (eds) *The Oxford Handbook of Carl Schmitt* (OUP 2016).

⁸⁹Thornhill (n 3) 225, 237

⁹⁰*ibid.* 237.

⁹¹Ulrich K Preuss, 'Carl Schmitt and the Weimar Constitution' in Jens Meierhenrich and Oliver Simons (eds), *The Oxford Handbook of Carl Schmitt* (OUP 2016) 473.

⁹²Heller (n 1) 296.

Economy’.⁹³ Although Schmitt distanced himself from *laissez-faire*, he also differentiated his position from the Social Democrats by explicitly distinguishing between the ‘quantitatively’ and ‘qualitatively’ total state. The *quantitatively* total state, advocated by those on the left, was a weak state in Schmitt’s view, interfering in the economy under the pressure of a plurality of interest groups, by which it would eventually be captured. The *qualitatively* total state, on the other hand, maintained its distance from the ‘free economy’, advocating a form of autonomous economic management and upholding the separation of the political and the economic spheres.

Heller underscores the hypocritical nature of Schmitt’s preferred state form, retreating from interference in the sphere of redistribution but ruling ‘with the strongest military means and the means of mass manipulation’ in culture and the media.⁹⁴ The state that promised non-interference in the economy dismantled social policy with a ‘heavy hand’, feigned ideological neutrality while strongly inculcating a moral economy in the form of a duty to work necessary for the ‘psychological happiness of the people’, and retreated from interfering in cultural and educational policy whilst ‘tripling’ the costs of education. Its claim to maintain distance from the economy was thus in practice a matter of political ideology of the worst sort, fighting against the welfare state with one hand ‘whilst subsidising large banks, large industry, and large agricultural enterprise’ with the other.⁹⁵ It turned to forms of cultural and military conservatism in order to maintain support, even acting with doses of ‘authoritarian socialism’ but in a way that foreclosed the route of parliamentary or extra-parliamentary legitimisation of redistribution from the bottom up. What is ‘decisive’ for the political and social character of the authoritarian liberal state, Heller concluded, is the ‘*capitalist form of the economy*’.⁹⁶

4.2. The Nazi movement and the end of the political state

The ‘qualitatively total state’ advocated by Schmitt was not, of course, destined to last. it was a counter-revolutionary formation that lacked a coherent political strategy and a sufficiently wide political base, without which ‘it was unable to effect any lasting transformation to an authoritarian state system’.⁹⁷ The bourgeois bloc represented by the authoritarian liberals would soon turn to the Nazi party, seeking a broader mass base for support once it became clear that authoritarian liberalism did not hold any long-term answers to the economic and political crises of the day.⁹⁸

⁹³Carl Schmitt, ‘Strong State, Sound Economy’, translated in the appendix to Renato Cristi, *Carl Schmitt and Authoritarian Liberalism: Strong State, Free Economy* (Cardiff, University of Wales Press 1998). Schmitt permitted the reprinting of this address twice in his lifetime, indicating it was a piece of some importance to him (see William E Scheuerman, *Carl Schmitt: The End of Law* (Rowman & Littlefield 1999) 288.

⁹⁴Heller (n 1) 299.

⁹⁵Heller (n 1) 300.

⁹⁶Heller (n 1) 298.

⁹⁷Ian Kershaw, ‘The Nazi State: An Exceptional State?’ (1989) *New Left Review* 47–67

⁹⁸Mommsen (n 69) 307. See also Dick Geary, ‘Employers, Workers, and the Collapse of the Weimar Republic’ in Ian Kershaw (ed), *Weimar: Why Did German Democracy Fail?* (Weidenfeld and Nicholson 1990) 92, 104–05: ‘a point had been reached whereby a bourgeois bloc including the Nazis could be envisaged as the road by which the hated welfare legislation and constraining labour law could be removed. Such a coalition may not have been the first preference of most industrialists. Many believed Hitler would prove malleable, especially after the Nazis lost two million votes in the second (November) Reichstag elections of 1932 and when an internal crisis began to grip the NSDAP. Yet the important point is that by 1933 industry wanted rid of the Weimar Republic.’

The move away from authoritarian liberalism was in an important respect presciently outlined by Heller himself. In *‘Rechtsstaat oder Diktatur?’* published in 1929 Heller predicted that a non-parliamentary *Rechtsstaat* (Heller comparing this to the model of the United States of America) could not resolve the political and economic problems faced by the ruling class.⁹⁹ Neither would it be able to ‘conform to the religion of violence’ that was emanating from conservatives on the right. In a second move, he emphasised, the bourgeoisie would likely ‘throw itself into the arms of an irrational feudalism’, partly inspired by Nietzsche and based on a resentment of its own principles of legality. It would then turn to embrace a mythology of ‘individualism without law’, lured by a system which valued ‘adventure and danger’.¹⁰⁰

In Heller’s view, the supreme article of faith of the bourgeoisie, ‘unable to master the sociological situation either intellectually or morally and politically’ would become ‘force’ itself, ‘force as an end in itself’.¹⁰¹ The bourgeoisie would be overwhelmed by the appeal of an ‘aestheticizing religion of violence’, which was only ‘bearable for the strong soul of the superior man’. For Heller this turn to force and to violence was represented by Oswald Spengler’s *Decline of the West*, and the evolution from a belief in the nobility as the ‘genuine estate’ into a willingness to turn to a leader of ‘Caesaristic dimensions’. It was not a movement of mass political mobilisation based on sovereignty that would ultimately overturn liberal democracy. It was a new conservative movement based on nationalism and military expansion, and for whom the masses themselves were ‘a radical nothing’.¹⁰²

After the humiliating military defeat of the First World War and the punishment imposed by the Versailles Treaty, the narrative of national redemption no doubt contributed to the collapse of liberal democracy in Germany. The cult of violence and a desire for violent imperialist expansion associated with such redemption would clearly play a significant role.¹⁰³ But this narrative of violence was not based on a politicisation of the state. To borrow Hannah Arendt’s conceptual distinction between power and violence, violence is an *anti-political* concept and closely bound up with bureaucracy: ‘rule by nobody’, where no one takes political responsibility.¹⁰⁴

Rather than bringing forth the truly political ‘total’ state, National Socialism in fact undermined the real source of legal and political power, namely the principle of ‘sovereignty’ itself.¹⁰⁵ The unified constituent will of the people, ‘which stood at the root of the democratic state’ would, in the formulation of Nazi ideology, be forgotten. ‘The people’,

⁹⁹Heller (n 13) 137.

¹⁰⁰*ibid.*

¹⁰¹Heller (n 13) 133.

¹⁰²Heller (n 13) 137. Heller also compares this to a corporate state, where ‘professional estates’ rule and the masses are reduced to political apathy (*ibid* 139).

¹⁰³On the significance of the cult of violence, and the ‘trenchocracy’, as a remnant of the First World War, see Bernd Weisbrod ‘Violence and Sacrifice: Imagining the Nation in Weimar Germany’ in Hans Mommsen (ed), *The Third Reich Between Vision and Reality: New Perspectives on German History 1918–1945* (Berg 2001).

¹⁰⁴The conceptual distinction between power and violence is outlined by Hannah Arendt in *On Violence* (Allen Lane 1970). According to Arendt, ‘the greater the bureaucratization of public life, the greater will be the attraction of violence. In a fully developed bureaucracy, there is nobody left with whom one could argue, to whom one could present grievances, on whom the pressures of power could be exerted. Bureaucracy is the form of government in which everybody is deprived of political freedom, of the power to act; for the rule by Nobody is not no-rule, and where all are equally powerless we have a tyranny without a tyrant’ (at 81).

¹⁰⁵Duncan Kelly, *The State of the Political. Conceptions of Politics and the State in the Thought of Max Weber, Carl Schmitt, and Franz Neumann* (OUP 2003) 291.

in the Nazi regime, ‘existed simply to be ruled’.¹⁰⁶ It was, in other words, a further, and decisive erosion of the concept of popular sovereignty that signalled the end of the Weimar Republic.¹⁰⁷

‘On the 30 January, one can say accordingly, Hegel died’, Schmitt proclaimed in 1933, after Hitler’s seizure of power.¹⁰⁸ One can add that Rousseau and Heller died too, taking with them the concepts of sovereignty and of the state, buried by the Nazi movement and its authoritarian leadership principle. Schmitt himself quickly pivoted, leaving behind his theory of the ‘qualitatively total state’ with the publication of *State, Movement, Nation (Staat, Bewegung, Volk)* in 1933.¹⁰⁹ If the ‘state’ remained present in Schmitt’s scheme, it was now a kind of ‘anachronism’, narrowly defined as a bureaucratic apparatus; it was a static entity which carried out the political demands of the *Führer*, set into motion by the ‘movement’ of National Socialism. The movement, in turn, was the organised element of the ‘unpolitical’ *Volk*, based on a new ideology of racial identity.¹¹⁰ With the Nazi movement destroying the realm of the political, the notion of the state would soon disappear from Nazi constitutional thought altogether.¹¹¹ In that sense, the Nazi transition could be viewed as the final step in an erosion of state theory that, in Heller’s view, had begun with the advent of liberalism itself.

This point is reinforced when we consider Ernst Fraenkel’s later account of the ‘dual state’ of National Socialism, which suggests that Heller was only partly right in offering a juxtaposition between ‘Dictatorship or *Rechtsstaat*?’.¹¹² What had eluded Heller was the possible combination of a legal *and* a prerogative state; the combination of law in the private sphere in order to maintain some degree of commercial predictability and its discontinuation as a matter of public value: *Rechtsstaat und Diktator!*

Heller thought that the bourgeoisie would be unable to cry ‘in one breath’ for the ‘rationalisation of the economy’ *and* for an ‘arbitrary dictatorship’.¹¹³ But in Fraenkel’s account, a version of such a duality did in fact prevail: the normative state provided for a continuation of legal-technical rationality in the economy and the prerogative state provided for the irrational ends of violent military expansion. This would be a boon to the armaments industry, which was able to profit from the Nazi’s aggressive

¹⁰⁶ibid 293

¹⁰⁷Franz Neumann also notes that in National Socialism the state disappears in a form of totalitarian monopoly capitalism (rather than ‘state capitalism’, as theorised by fellow Frankfurt Schooler Friedrich Pollock). Neumann’s account suggested that National Socialism, although in some ways continuous with the Weimar era was in other ways fundamentally transformative, combining monopoly capital control with a command economy. The Nazi governing apparatus supported by a broad hegemonic bloc combined four distinct groups: ‘big industry, the party, the bureaucracy and the armed forces.’ Its new regime of capital accumulation, with fewer fetters on capital than in liberal democratic form, gave rise to a ‘self-reinforcing dictatorship’. Franz L. Neumann, *Behemoth: The Structure and Practice of National Socialism, 1933–1944* (Ivan R Dee 2009) 361.

¹⁰⁸Carl Schmitt, *Staat, Bewegung, Volk* (Hanseatischer Verlaganstalt 1933) 32.

¹⁰⁹ibid.

¹¹⁰Peter Carl Caldwell, ‘National Socialism and Constitutional Law: Carl Schmitt, Otto Koellreutter and the Debate over the Nature of the Nazi State, 1933–1937’ (1994) 16 *Cardozo Law Review* 399, 416–17.

¹¹¹Reinhard Hohn, a young Nazi jurist and SS member who succeeded Schmitt (and Nazi jurist Otto Koellreutter) offered a ‘total rethinking of legal scholarship on the basis of the *Führer* principle and racial equality’, *ibid* 427.

¹¹²Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (Edward Shils tr, OUP 2017). Although diverging from Fraenkel’s account of National Socialism, in that for Neumann, totalitarian monopoly capitalism entirely destroyed the rule of law, what is perhaps more significant is that for Neumann this was based on its destruction of the *political state* and its undermining of the principle of sovereignty. See Thornhill (n 57) 126–27.

¹¹³Heller (n 13) 140

creation of new markets for the weapons of war. There remained, in other words, ‘a rational core in an otherwise highly “irrational shell”’.¹¹⁴

In an important sense, Heller had captured Fraenkel’s point without making it explicit. He had seen the turn to authoritarianism and then to dictatorship as a turn away from law primarily in the sense of an abandonment of democratic and social legislation, rather than as a turn away from legality as such; this is what he had meant by critiquing the defection of the liberal bourgeoisie from a material understanding of the *Rechtsstaat*.

5. Conclusion

The Weimar state, it transpired, was not a neutral state; in the moment of crisis, a strong state apparatus would defend bourgeois interests of private ownership in the economy. It would interfere ruthlessly to maintain existing positions of power. This was not a democratic state; it turned out, on the contrary, to be an authoritarian state in defence of the capitalist economy. It was, in Heller’s words, the ‘authoritarian liberal’ state. It would soon be superseded by a totalitarian fascist movement, but by then Heller had gone into exile; less than a year after the Nazi seizure of power in January 1933, Heller died in Madrid, at the age of forty-two.

The liberal bourgeois, Heller argued, saw the *Rechtsstaat* as a way of achieving legal freedom in the commercial realm and protecting the economic security that came with it, a goal it had maintained since the nineteenth century, particularly in response to the Revolutions of 1848 and in fear of the political awakening of the working class.¹¹⁵ In the Weimar Republic, this goal was clearly threatened in a parliamentary democracy with a mass social democratic party and relatively open-ended constitutional provisions. ‘Through the round-about way of politics’, specifically through legislation, a ‘proletariat with equal civil and political rights’ could become ‘economically dangerous for the bourgeoisie’.¹¹⁶

There were two quite distinct liberal positions which emerged in response, a formal-liberal account associated with Hans Kelsen, and a conservative-liberal account associated with Carl Schmitt. Although they offered different, and in some respects opposing visions, both Kelsen’s *nomocratic* and Schmitt’s *autocratic* response sought, in Heller’s view, to disarm mass democracy, abandon popular sovereignty, and de-materialise the *Rechtsstaat*. The ‘dematerialisation’ of the *Rechtsstaat* would achieve its purest form in Kelsen’s pure theory of law, offering a hollow, formal account of authority, insensitive to social inequality and the representation of a plausible political unity.¹¹⁷ Conservative jurists, such as Schmitt, offered a more concrete account of sovereignty, but in an overly personalistic manner, presenting sovereignty as belonging to an ‘organ’ of the state or to a dictator able to declare the exception, similarly neglecting the democratic relationship between rulers and ruled.

¹¹⁴Jens Meierhenrich, *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law* (OUP 2018) 200 (adopting Fraenkel’s own language). On the Nazi economy in the late thirties and into the Second World War, see Adam Tooze, *Wages of Destruction: The Making and Breaking of the Nazi Economy* (Penguin 2008) (emphasizing Hitler’s turn to the threat of US imperialism and to anti-Semitism); cf Dylan Riley, ‘The Third Reich as Rogue Regime: Adam Tooze’s *Wages of Destruction*’ (2014) 22(3–4) *Historical Materialism* 346.

¹¹⁵Heller (n 13).

¹¹⁶*ibid* 130. Heller notes the irony that with the development of capitalism, democracy had come to threaten the very class which had created it.

¹¹⁷Kelsen’s theory had, in Heller’s view, contributed, ‘in no small measure to the support of dictatorship among a youth that looks for moral justification and is hungry for reality’ (Heller (n 13) 132).

Heller views both Kelsen's turn to legality and Schmitt's turn to dictatorship as reactions to the emergence of class consciousness and the disturbances caused by increasingly intense class conflict. Whereas Kelsen's position leads to an unstable political relativism, Schmitt's leads to an objectionable – and ultimately also unstable – political conservatism. Both theoretical frameworks were equally insensitive to the socio-economic conditions for the successful formation of political unity through the democratic process. Neither Kelsen nor Schmitt, in other words, had any answer to the social question.

Heller's own answer, however, was ambiguous. In 1927, Heller clarified that the true meaning of state sovereignty had to be recovered, namely as popular sovereignty, demanding the democratic formation of the people as a unity through political representation and the majority principle. But he later appears to depart from his own counsel, advocating the 'toleration' of the authoritarian Presidential cabinets, until it was too late. Whereas, in 1927, Heller had speculated that extreme inequality, a failure attributable to economic liberalism, could open the path to dictatorship, the working class finding its allure too strong in the presence of severe socio-economic disparities, in 1933 he noted it was the ruling class that had first defected from the liberal democratic regime, fearful not only of revolution but of democracy itself. Social democrats, including Heller, had neglected political democracy and abandoned commitment to the parliamentary regime.

We can now summarise the problem that Heller confronted: in contrast to the objective legality of the *Rechtsstaat* (the sovereignty of law) and the subjective will of a sovereign organ (a sovereign dictatorship), the democratic formation of the general will of the people (popular sovereignty) was a more challenging prospect. This was becoming acute in conditions of deepening inequality; the substantive existence of a general will was not only in doubt as a matter of existing conditions, but as matter of future reconciliation within the terms of the constitutional settlement. The repression of popular sovereignty and parliamentary democracy, however, signalled not merely a crisis of liberalism in the conjuncture, but the culmination of a liberal response to the crisis over the long durée. With the march of the masses onto the stage of history, liberalism had turned to authoritarian solutions in an attempt to defend the status quo.

In his constitutional theory, Heller makes a strong case for retrieving the Rousseauvian 'general will' and associated concepts in opposition to liberalism's erosion of these foundational ideas. But when it came to the concrete political struggle over popular sovereignty, it is tempting to conclude that Heller made the mistake of placing his faith in the state and its constitution above his faith in the principle and practice of democracy itself. This was a mistake Heller came to realise only at the last.

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