

Book Review: *Hermann
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Konstitutionalismus* edited
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REDESCRIPTIONS

Political Thought, Conceptual History and Feminist Theory

BOOK REVIEW

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The Weimar constitutional lawyer Hermann Heller is not one of the great figures of political thought, at least not if one goes by the relevant introductory works and handbooks, where he is usually absent. Unlike his counterpart Carl Schmitt, he was for a long time mainly received in jurisprudence—and here mostly as a critic of the pure legal theory of Hans Kelsen. But Heller was not only a lawyer; he was also one of the forefathers of political science in Germany, and he had little understanding of the formalism of constitutional law. Instead, following the Leipzig School around Hans Freyer, he called for a realist foundation ('wirklichkeitswissenschaftliche') of constitutional law, i.e., a localization of legal categories in concrete social conflicts. At the same time, in contrast to the circle around Freyer as well as to Schmitt, he was a passionate defender of Weimar democracy and a social democrat. He formulated the concept of a 'social democracy' ('soziale Demokratie') and a 'social constitutional state' ('sozialer Rechtsstaat'). These concepts were influential in the founding of the Federal Republic of Germany after World War II, even though Heller, who died in exile in Spain in 1933, was neither directly involved in the drafting of Bonn's Basic Law nor did he have any direct discipleship. Nevertheless, Heller never completely disappeared from German legal and political scholarship; Wolfgang Abendroth, for example, based his elaboration of the principles of the democratic and social constitutional state largely on Heller, and Ingeborg Maus also makes occasional references to him, but a more intensive examination of his work has only taken place in the last 15 years (Groh 2010; Henkel 2011; Llanque 2010; Volkmann 2015), now also on an international level (Dyzenhaus 2015; Malkopoulou 2020; Malkopoulou and Norman 2018; Menéndez 2015).

The anthology edited by Verena Frick and Oliver W. Lembcke joins this current wave of reception and ought to be examined with respect to what new accents it may add. If one follows the program formulated in the introduction, it is primarily a matter of demonstrating Heller's 'continuing topicality' (5). They credit him

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with having drafted the ‘program of a modern political science’ (5), at the center of which is the idea of a decidedly ‘democratic constitutionalism’ (‘demokratischen Konstitutionalismus’) (8), of whose ‘fruitfulness’ (11) the two editors are convinced. Against the background of the various crises of democracy, namely the question of the shape of the ‘state of exception,’ which has recently been debated more intensively again with multiple references to Carl Schmitt in the context of the COVID-19 pandemic, the question of democratic defense in the face of the current wave of authoritarianism, and finally the European financial and monetary crisis, which has cooled down somewhat in the meantime but is still latent, Frick and Lembcke are convinced that Heller’s work is ‘perhaps more topical than ever’ (16).

These are full-bodied announcements. But already in the first contribution by Karin Groh, doubts arise as to whether they can be realized. Groh first presents Heller as a contentious constitutional lawyer who sharpened his arguments in controversies with Hans Kelsen and Max Adler. While he criticized Kelsen for his legal positivism that rendered the state meaningless and merely served ‘the securitarian thinking of the bourgeoisie’ (24), he accuses Adler, an Austro-Marxist, of empty utopianism, especially with regard to his doctrine of the withering away of the state. Heller, in contrast—according to Groh—was a convinced statist, for whom there could be no democracy without a social constitutional state. His demand for a social constitutional state, however, went far beyond what is considered a welfare state today. Heller called for social homogeneity because the ‘most radical formal equality becomes the most radical inequality without social homogeneity, and formal democracy becomes the dictatorship of the ruling class,’ as Heller wrote in 1928 in *Political Democracy and Social Homogeneity (Politische Demokratie und soziale Homogenität)* (Heller 1971 [1928]). Social homogeneity is admittedly an unwieldy concept, especially at a time when a paean to diversity is being sung. However, as Groh and other contributions in the volume make clear, Heller’s talk of ‘social homogeneity’ is not to be understood in identitarian or even Schmittian terms; rather, Heller understands it to mean a kind of cultural identity that must ‘lie across all classes and interests’ (29). It is especially the integrating power of the social constitutional state that has to establish this unity in heterogeneity. Heller thus resolutely opposes a liberal economic policy and, as Groh continues, argues for a ‘democratic socialism’ that provides, among other things, for the ‘socialization of the large enterprises in agriculture, mining, industry and banking’ (Heller 1971 [1928], 416–17) as well as for a monopoly on foreign trade. Meanwhile, Groh assesses the synthesis of parliamentarism and socialism propagated by Heller following Franz Neumann as illusionary (36); elsewhere she speaks of ‘wishful thinking’ (29).

Groh’s contribution thus sketches the requirements for proving the topicality of Heller’s work. It would have to be shown that it is not an illusionary synthesis of parliamentarism or political pluralism and socialism, or at least that a program that proved to be unrealistic at the end of the Weimar Republic is less illusionary at the beginning of the 21st century. This proof, however, is only partially provided in the following contributions.

Oliver W. Lembcke shows the connection of the influential German constitutional lawyer Ernst-Wolfgang Böckenförde, who is considered a student of Schmitt, to Heller’s work. This is indeed a new and interesting perspective on the work of one of the most influential legal scholars in the Federal Republic of Germany. Roland Lhotta endeavors to show the closeness of Heller’s institutional theory with the neo-institutionalism of James G. March and Johan P. Olsen. Even though Lhotta repeatedly

emphasizes their ‘similarity’ (‘Ähnlichkeit’), yet, he then, completely committed to the spirit of our times, gives preference to neo-institutionalism because these ‘leave more room for difference in the political system/state effected by the majority’ (103). Thus, no actuality to Heller’s homogeneity claim.

Marcus Llanque’s essay on Heller and the professional civil service, whereby he refers to a forgotten talk by Heller, seems at least between the lines to recognize an actuality, namely in his demand for a ‘clear separation of political elective office and civil servant (“etatistischem Dienstamt”)’ (139) on the one hand and Heller’s repeated warning against an “‘excess of freedom” as a real threat to democracy’ (138) on the other. At the end of the Weimar Republic, Heller saw this ‘excess of freedom’ not only in an unrestricted economic freedom but also in the ‘the scolding freedom of the press’ (‘Schimpffreiheit der Presse’) (Heller 1971 [1931], 417). In view of the much-discussed disinhibitions in online social networks, one can certainly see a topicality in this criticism. However, Llanque shies away from transferring Heller’s warning against the two excesses of liberalism to today’s conditions.

Nathalie Le Bouëdec’s subsequent contribution is somewhat similarly restrained. Le Bouëdec gives an insightful overview of Heller’s ‘idea of democratic socialism’ in a short space of time and concedes a certain ‘relevance’ to his ‘reflections,’ but in the end she does not really want to commit herself to Heller’s program and takes refuge in the trivial statement that the reader should decide for himself how Heller’s demand for ‘social homogeneity in the context of a globalized world and the ecological challenge should be (re)established’ (161).

This question points to the concluding and very readable essay by Verena Frick and Oliver W. Lembcke, on ‘Hermann Heller and the European Permanent Crisis’ (‘Hermann Heller und die europäische Dauerkrise’). Authors such as Wolfgang Streeck and Alexander Somek have applied Heller’s critique of the Papen government’s economic policy, which was as authoritarian as it was neoliberal, and its legitimation by Schmitt to European financial and monetary policy (Somek 2015; Streeck 2015). Following this debate, Frick and Lembcke identify ‘three deformations of democratic constitutionalism,’ namely political-economic, ideological, and political-ethical, in the context of the EU and thereby endorse Streeck’s and Somek’s critique of the EU. In particular, they complain about the colonization of national economic policies by the European Semester, for example, as well as the depoliticization of essential areas of monetary, financial, and economic policy. Remarkably, they also criticize the ‘mostly all too reflexive rejection of the concept of homogeneity’ (220). In the end, Frick and Lembcke plead for a strengthening of ‘nation-state democracy as a site of effective self-determination’ (220). From the reviewer’s point of view, this can only be agreed with. However, their concluding reference to the concept of *demoicracy* (Bellamy 2019; Nikolaidis 2012) does not provide an answer to the question raised by Le Bouëdec, how Heller’s concept of social homogeneity can be realized in the context of a globalized world. Frick and Lembcke seem particularly wary to take the step toward Heller’s ‘authoritarian state,’ understood as ‘the authoritarian superordination of the state over society, namely over the economy’ (Heller 1971 [1931], 413).

This hesitation to adopt Heller’s program in its more anti-liberal features also characterizes Anthoula Malkopoulou’s contribution to his concept of democratic self-defense. Malkopoulou is convinced that both Kelsen’s value-neutral liberalism and the concept of a democratic defense, which was essentially formed by Karl Loewenstein, cannot provide a convincing answer to the current authoritarian

wave. In contrast, she argues following Heller that the answer must be a social one. According to Malkopoulou, fascist and authoritarian movements express a longing for community that has been destroyed by capitalism: ‘The best way to resist fascist and authoritarian solutions to the quests for community was thus to endorse democracy and socialism. Heller’s democratic socialism would not only guarantee the validity of law by having all social classes represented in law-making; it would also produce loyal citizens through an economy that catered for the needs of the many’ (196). This is, of course, an equally accurate and abstract statement. If one asks how this program could be spelled out at the beginning of the 21st century, however, one finds only very tentative demands in Malkopoulou’s contribution, which stick to the programs of current social democratic parties: a ‘robust welfare system’ and ‘free education’ (200). This is rather soft compared to Heller’s original demand for far-reaching state intervention in the economy, including socialization and the questioning of private property. The same applies to the statement ‘Heller would have loved mini-publics’ (201) as places of political education. This could be the case. But in fact, Heller’s demands went far beyond this social pedagogical reform agenda. At the end of the Weimar Republic, Heller advocated referenda, which were to provide a democratic counterweight to the parties. And such referenda should certainly have far-reaching powers, not least in transforming the economic order.

If one summarizes the contributions to the anthology, it can be said, on the one hand, that they provide a good introduction to Hermann Heller’s political thinking. Yet, in view of earlier anthologies and monographs on the German book market (Groh 2010; Henkel 2011; Llanque 2010; Volkmann 2015), this is not a unique selling point, therefore, it is to be asked why only 2 of the 11 contributions are written in English. Here, unfortunately, an opportunity has been missed to have a greater impact on the currently emerging international reception of Heller’s work. On the other hand, most of the contributions are characterized either by skepticism or at least a clear reticence towards Heller’s democratic-authoritarian socialism. This is regrettable, because it is precisely in the program of a clear restriction of economic freedoms of action by a strong state where the topicality of Heller’s political thinking lies.

COMPETING INTERESTS

The author has no competing interests to declare.

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