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Hermann Heller Versus Carl Schmitt

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The struggle between supporters of liberal, participatory parliamentary democracy and those of totalitarian dictatorship was one of the major conflicts of the Weimar years in German history. Two of the major adversaries in this conflict were Hermann Heller and Carl Schmitt. These men presented their ideological and practical political points of view in periodical articles, pamphlets, and full-length manuscripts. Ultimately, these men, who were practicing lawyers, as well as intellectual historians and political theorists, met in the courtroom. There they battled over the question of the seizure of the Social Democratic state government of Prussia by the right wing national government of Franz von Papen in July 1932. In the course of the intellectual legal battles between Heller and Schmitt, the conflict between liberal and totalitarian ideology was clearly debated by two of the brightest and most articulate Weimar Germans.

Carl Schmitt and Hermann Heller were two of the best minds active in Germany during the Weimar period. Both of these men possessed penetrating analytical intellects and a broad range of interests extending from philosophy, through legal theory, to political issues of their own day. As practicing lawyers, they faced each other in the Leipzig courtroom where the crucial case of the seizure of the Prussian state government of Otto Braun and the Social Democrats by the central government of Franz von Papen was played out. The conflict between Schmitt and Heller crystallized many of the issues which characterized the debate between the advocates of parliamentary representative democracy and the growing ranks of those who supported totalitarian dictatorship during the Weimar years. This paper will highlight some of the major areas of disagreement between Schmitt and Heller from their conflict over the nature of the creation of a political general will to an evaluation of Italian fascism. Arguing as legal theorists, political theorists, and

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observers of their contemporary scene, these two men, in their perceptive ways, encapsulated many of the major issues of their day and raised questions which have continuing relevance today.

The very different conclusions to which these adversaries came often emerged out of areas of agreement. Both believed that bourgeois liberalism was not a viable set of principles on which to govern a mass society in the age of industrialized, literate populations who demanded a role in governing themselves. They concluded that liberalism had served as the philosophy which allowed the middle class to curb the power of monarchs and aristocrats while holding the mobs at bay and preserving the institution of private property. The rhetoric had been of constitutions, suffrage, individual rights, and government of the people, but the reality included domination by the classes of "*Bildung und Besitz*." Heller and Schmitt characterized the 20th century as a time when 19th-century liberalism would have to be rejected in favor of a form of mass democracy. Neither was sympathetic to the individualism championed by this outdated philosophy. Schmitt had declared in one of his earliest works: "Our age is not an individualistic age."¹ That observation was not a negative for Schmitt who claimed, "There have been great ages which were outspokenly non-individualistic [such as Rome]."² Heller also welcomed the mass nature of the 20th century and hoped that a more communitarian spirit of equality would check the unbridled individualism which had led to many of the abuses of the industrial age.³ Both men looked to fascist Italy as a society which had much to teach Germans in terms of how a society ought to be organized and governed. The areas of agreement between these two men reflected some shared criticism and shared judgment of important issues by two perceptive observers. Yet, their ultimate conclusions reflected the two very different sets of values which they brought to their theories.

The question of the creation of political unity, a vital issue to both Heller and Schmitt, provides a good starting point to discover the conflict between them. Heller acknowledged Schmitt's accuracy in perceiving the creation of political unity as the major goal of all politics.⁴ Schmitt focused on this goal when he formulated his friend-foe theory of politics. This idea, which he developed most clearly in *Der Begriff des Politischen*, was hinted at in his earliest works and was present in the significant intellectual histories that he wrote in the period immediately following the First World War.⁵ According to Schmitt, the political world was divided into friends and foes, and the most important decision that any political grouping makes is the division of their society into friends and foes.⁶ Political unity takes place when the friends combine to combat the foe. The ideal foe, from Schmitt's point of view, for the purpose of creating unity, is one that exists both within and outside the particular society, the function that the bourgeoisie served for the Bolsheviks. While Schmitt admired the use of the bourgeoisie by the Bolsheviks, he never placed much emphasis on the class and economic differences among groupings of individuals within society. For him, the key differences were theological. Overtly theological distinctions characterized many periods in Western history when friends were unified by faith and heretics were identified in conventional terms. In the 20th century, although the underlying predisposition to distinguish good and evil remained unchanged, theological conflict had been transposed into a framework of political ideologies. Schmitt considered politics to be secularized theology whereby conflict constituted the community of believers

being willing to fight and, if necessary, to kill the “heretics.”⁷ For Schmitt, a condition of permanent polarization and enmity was necessary to preserve unity within the group of friends.

Heller’s view of the unifying process was set against his perception that the major divisive forces were economic and that the major rivalry was class conflict. However, he did not believe that permanent polarization and perpetual conflict were necessary to preserve political unity. He argued that progress toward greater homogeneity and diminution of class conflict within a society were realizable goals. The proletarian masses would support a parliamentary system if they believed that there was obvious movement toward equalization of wealth and privilege. What was vital for the creation and maintenance of political unity was not the presence of the foe, but the perception of a growing sense of “fair play” within the society which offered the opportunity for, and movement in, the direction of equality.⁸ Schmitt did not envision the possibility of political unity in a peaceful framework, while Heller did.

For Heller and Schmitt, political unity had to be homogeneous in order to create a “general will.” They conceived of the general will as a creation of society rather than as a preexisting entity discovered in the Rousseauian sense. Schmitt argued that 20th-century mass society, through its mass education, communication, transit, and assembly line employment, contributed to the creation of the general will. These forces produced similar human units which, as they came closer together, permitted the creation of a general will by a process resembling integral calculus. While Schmitt referred to factory employment, he stressed the decisiveness of the educational and communication components pushing in the direction of homogeneity and concluded that it was possible to have a uniformity of *Weltanschauung* without any significant equalization of classes.

Heller defined two processes which were necessary to create the general will. One was the systematic elimination of economic differences among the classes through progressive reform legislation. The second was a process of discussion and open debate. Consensus would be created by honest dialogue in which the free exchange of ideas took place in an environment where each group was prepared to modify its ideas to bring about agreement. This honest dialogue was only possible in a political climate characterized by fair play and a willingness to change. When reasoned political debate did not occur, it was not because of the irrational nature of man, but because individuals or groups responded to their own interests exclusively and put aside their sense of fair play.

Schmitt argued that the creation and expression of the general will was not possible under a parliamentary system, which was based on a clash of groups, each reflecting narrow, partial interests and with little concern for the best interests of the whole.⁹ Debate, stalemate, and at best unsatisfactory compromise were the fruits of the parliamentary system. According to Schmitt, the parliament was the creation of 19th-century liberalism. It was designed to prevent the creation of the general will and to thwart the desires of the national masses, while maintaining and advancing the cause of narrow interest groups. Even when a compromise was arrived at, it was, in American terms, a “pork barrel” solution which included a collection of private interests, most or sometimes all of which were opposed to the real interests of the whole or general will. Representative government, as a form of leadership, was an unsatisfactory and undemocratic system because partial, usu-

ally economic, interests were represented instead of the political-theological interests of the community of friends.

The presidential or fascist dictator armed with the weapon of the plebiscite came much closer to an expression of the general will as conceived by Schmitt than did parliament. The dictator was also freer of the corruption endemic in a parliamentary system based on a concept of political pluralism which Schmitt had attacked throughout the 1920's, arguing that it was absolutely opposed to the real political unity of the general will. Schmitt substituted the concept of identity for that of representation as the only meaningful concept of leadership for a mass democracy intent on creating and maintaining unity. The leader who would be successful would embody in his being and in his program the hopes, aspirations, and goals of all the members of the community of friends and would not be the creature of narrow partial interests. Schmitt recognized in Mussolini the embodiment of the leader who could serve as a model for all Europeans.

Heller agreed with Schmitt that 19th-century parliamentary theory had been antidemocratic. He also feared that many elements of the bourgeoisie had not changed their ideas on the nature of the parliamentary system. They wanted to create the illusion of mass participation while promoting their own interests and thwarting the desires of the majority. They could realize their objectives because of their superior financial resources and their greater ability to manipulate the political system. Heller feared that these elements of the middle class might prefer to see the parliamentary system destroyed rather than surrender any of their power, wealth or privilege.¹⁰ He worried that if the masses began to see that the bourgeois goal in the parliamentary system was to sabotage the prospect of fair play and prevent the possibility of meaningful reform, they would destroy the system and create a state based on Marxist revolutionary or fascist principles.¹¹ Thus, for Heller, only the successful operation of the parliamentary system supported by the bourgeoisie and the proletariat could prevent dictatorship. That eventuality could be brought on by the bourgeoisie in its attempt to prevent full participatory democracy or by the masses in their belief that their needs were not being met. Heller argued that the parliamentary system was a much better vehicle for the creation of the general will because it could be a forum to resolve differences honestly without the necessity of crushing the opposition. He believed that groups could see the larger picture and would act in the interests of the whole if they thought that the sacrifice was fair and shared and that their conditions were being improved.

In contrast to the democratic concept of the general will, the liberals had posited the parliamentary state based on the concept of the *Herrschaft des Gesetzes*. This concept declared that everyone would be treated equally by the state and that the potentially arbitrary rule of men had been replaced by the impartial rule of impersonal laws. Schmitt and Heller saw this concept of the *Rechtsstaat* crystallized in the theories of Hans Kelsen and his school of normative law.¹² For Schmitt and Heller, this goal was neither viable nor desirable. Schmitt argued that rule by law was always rule by men and that interpretation and decision-making were always more important than the law itself. Heller's criticism was less extreme, but he, too, argued that the human element could not be eliminated, although the idea of rule by law as a goal would contribute to an attitude of fair play on the part of the various groups within the society. Thus inspired, parliamentary representatives

would be far less corrupt than the leader and his inner circle in a dictatorship.¹³ He argued that multiple competing political parties would point out each other's abuses whereby each would act as a public watchdog to check on the activities of other groups. The many publications, particularly newspapers and periodicals, of these groups would also contribute to the oversight function. However, under a dictatorship, where there would be no competing interests to act as monitor and watchdog, the possibilities of unchecked corruption would be far greater.

Both Schmitt and Heller looked to fascist Italy which they visited and studied to bolster their arguments for and against a dictatorship or a parliamentary regime. Schmitt was enthusiastic about the Italian state, and for him it offered a model which could serve Germany well. In his search for an alternative to parliamentary democracy, he had rejected the reactionary or extreme conservative position which looked for a return to the monarchy. Having defined the 20th century as the age of mass democracy, Schmitt cheered that phenomenon and all its concomitant developments, such as urbanism and industrialization, and had no desire to return Germany to earlier patterns. He rejected Bolshevism as a basis for German national unity because of its emphasis on economic factors and its tie to the Soviet Union. Fascism, however, seemed to answer Schmitt's needs by stressing nationalism and viewing economic policy as only a means to national ends.

Most important for Schmitt, Mussolini and the fascists recognized the friend-foe principle and the overriding need for the creation of political unity and a general will. Schmitt was enormously impressed with Mussolini's use of myth as a tool for the creation of political unity. He quoted Mussolini's famous speech of October 1922 delivered in Naples: "We have created a myth, the myth is a belief, a noble enthusiasm; it requires no reality in order to exist, it is a drive and a hope, belief and courage."¹⁴ Only a leader not wedded to group interests or overwhelmed by economic statistics could recognize such an abstract tool. Mussolini seemed to share Schmitt's belief that mass man was not the rational creature described by 18th-century Enlightenment philosophers, but was a creature of emotion, capable of faith. He understood politics as secularized theology. Schmitt quoted Mussolini's remark made to Emil Ludwig: "Today people have not much time to think as they used to. The capacity of the modern man for faith is illimitable."¹⁵ Fascism provided a leader based on the identity principle who, armed with the mass-democratic weapon of the plebiscite, could make quick and clear-cut decisions when necessary and yet poll the people on basic questions without their interest groups getting in the way. It was a national movement which recognized its enemy, communism, and was prepared to kill that enemy when and if necessary.

Heller looked at the same state and saw Italian fascism as evidence of the bankruptcy of dictatorship and the advantageousness of parliamentary democracy. He characterized fascism as the interests of the few posing as the general will. He labeled it the most serious form of corruption possible.¹⁶ Anyone who suggested that Mussolini's will was not synonymous with that of the nation met the same fate as Matteotti—death. Heller concluded that the violence, repression, imprisonments, censorship, exiles all belied Mussolini's regime as the embodiment of the general will of the Italian people.

Economic corruption in fascist Italy unchecked by rival political parties or an opposition press was a further indictment of the regime in Heller's judgment. Economic policy was not of secondary importance to him, and he was particularly

critical of the corporate organization of the Italian state. He argued that the corporate organization of the society petrified and permanently enshrined the class conflict (“*Klassenkampf in Permanenz*”), preventing the bridging of gaps and the coming together of the classes.¹⁷ Whereas fascism and a genuine national community were incompatible for Heller, he argued that nationalism and socialism were not only compatible, but that the only truly national community was a socialist one. The myth of Italian fascism and the racial ideology of the National Socialist movement were only shams which allowed for a society based on class differences entirely too heterogeneous to comprise a national community.

Heller’s national community was nationalist in the sense of Herder and Mazzini rather than Treitschke or Rocco. Each community, proud of its heritage and conscious of its unique identity, could live in peace with other national communities whose uniqueness could also be respected. He believed that the socialists were losing their battles with right-wing forces because they failed to recognize the powerful appeal of nationalism and were leaving it to the right wing to advocate.¹⁸ Heller thought that the socialists were in a better position to capitalize on the appeal of the creation of a national community if they would only realize it, and he perceived himself to be far more a national socialist than any of Hitler’s followers.

While Heller’s nationalism posited an atmosphere of peace, Schmitt’s nationalism was cast in the perspective of a world in which conflict was a perpetual reality. Wars among national or religious groups had been part of the history of mankind since biblical times, and Schmitt saw the crisis-ridden 20th century as no exception to that rule. While Schmitt did not see warfare as a Hegelian test of ethical purity or as Treitschke’s revelation of the noblest sentiments of man, he did see its everpresent possibility as necessary to the creation and perpetuation of political unity.

Both Schmitt and Heller recognized that the Weimar period was a time of substantial and frequent crisis, and this realization colored their judgments on questions of decision-making and the nature of government. It also intensified their concern about the identification of the decision-maker with the people. Certainly the origin of power for Schmitt and Heller was the people, and that conviction was the basis for each considering himself to be a democrat. Therefore, they sought a system which would manifest the will of the people at the most crucial moment of crisis decision-making. They rejected the normativism of Hans Kelsen, which based government on the enactment and enforcement of impersonal laws based on normative situations. Since the rules and guidelines were clearly laid out, the normative system came as close to government without leaders as was possible. Heller and Schmitt concluded that this system which made no provision for decision-making in emergency situations might have been viable in a 19th-century setting, although even that was not clear but was doomed in the fast-moving and chaotic 20th century.

For Schmitt, decision-making in a crisis situation had always been the key issue in any discussion of sovereignty.¹⁹ It was not possible for the decision-maker in the emergency situation to be a parliamentary body, and this key factor invalidated the viability of rule by parliament in the 20th century. For Schmitt, the leader who based his leadership on the identity principle was ideally suited for making the emergency decision in the crisis situation. He had traced the concept of the democratic dictator back to Rome where a dictator would be named by the Senate

to deal with an immediate crisis which required decisive action and fast decision-making.²⁰ In the chaotic world of the 1920's, when crisis was endemic, the need for the decision-maker was even more important. The Roman dictator was sovereign on a contractual basis and for a limited time. The decision-maker in the 20th century would rule by a process of identity with the people of the "spiritually homogeneous community of friends." Thus, the leader would be sovereign while, at the same time, the people would retain their sovereignty. While the leader was in touch with the people because he was in a real sense the embodiment of the general will, he would also keep his finger on the pulse of his community through the institution of the daily plebiscite.

Heller wrestled long and hard with the sovereignty question staking out a different position from that of Kelsen or Schmitt. He rejected the Kelsen idea of a leaderless normative state as an intellectual fiction invented by the bourgeoisie in the 19th century to limit government and preserve its own position of power.²¹ Quoting from *The British Yearbook of International Law*, Heller attacked the liberal position which stated that, "The limitations of sovereign power in any one state characterize the conditions of its political development. The greater the limitations, the more democratic the government."²² The question for Heller was not the limitation of the role of government which in a modern industrial society, particularly one characterized by substantial inequalities, was not only not feasible, but also not desirable. While Kelsen and the liberals put unrealistic and undesirable limits on power, the problem with Schmitt's approach was that it was based on a lie and allowed for an enormous abuse of power. Heller had argued in his critique of Italian fascism that the notion of the identity of the will of the dictator and the will of the people or the general will was the ultimate form of political corruption.²³ He concluded that until a society based on economic equality and social justice could be created, a pluralistic political system was the best defense against oppression and the abuse of power. He could not dismiss the need for quick decision-making in a time of crisis and judged that a system which combined both an executive branch with a legislative and judicial branch was the best hope. Sovereignty rested with the representatives of the people in the legislature and in the presidency. The legislature was the major ruling body, but the executive could make emergency decisions subject to review and reversal by the legislature. He charged that holding a plebiscite everyday was a practical impossibility and that the Italian experience had demonstrated that plebiscites provided a more fertile soil for demagoguery and manipulation than did parliamentary decision-making.²⁴ While accusing the normativists of deception in denying the importance of the individual in decision-making and emphasizing only a limited role for government, Heller called for moderation through checks and balances and an awareness of the dangers inherent in the concentration of power in the hands of one man or a small group.

In many ways, the real commitments of Schmitt and Heller can be seen in their roles in the court battle following the seizure of the Prussian state government of the socialists Otto Braun and Carl Severing in July 1932 by the national government of Franz von Papen. Prussia had been the bulwark of democratic parliamentary government from 1920 to 1932, and the Social Democrats who dominated Prussia during that period had presented the best example of popular government during the Weimar era. The von Papen government, which carried out the seizure,

was incapable of generating legislative majorities, had little popular support, and ruled under edicts promulgated by the aged President von Hindenburg. Many historians have viewed the seizure of Prussia as the real end of Weimar democracy and the elimination of a major obstacle to the creation of totalitarian dictatorship by the National Socialists. Seeing the handwriting on the wall, Schmitt worked to destroy the Weimar Republic and to create the totalitarian state that would replace it. He appeared in the Leipzig court as the chief lawyer for the von Papen government defending the seizure, while Heller represented the civil servants and elected officials who were members of the Prussian Social Democratic Party and had lost their positions in the coup.

During the course of the trial, Schmitt charged the Social Democratic government of Prussia with thwarting the creation of political unity, nationalism, and the general will. He characterized them as being out of step with a growing consensus based on the friend-foe principle within Germany and defended the president as the needed crisis decision-maker. Heller defended the Prussian parliamentary system as the best German effort at creating a community based on equality and fair play. He charged the von Papen government with duplicity in that a few narrow interests were masquerading as the representatives of the people. He accused the nationalist right personified by von Papen of destroying the chance for a homogeneous community which could develop a meaningful general will. He argued that the central government had greatly exaggerated the nature of the crisis situation which precipitated the take-over and decried the abuse of presidential power which was designed to function within a dominant legislative system of checks and balances.

By the time a decision was reached in this case, the National Socialists were moving into power. Carl Schmitt served them on the Prussian State Council and as the editor of *Deutsche Juristen-Zeitung*, which provided the legal theory for totalitarian dictatorship. Hermann Heller went into exile, where he died at the end of 1933.

NOTES

¹Carl Schmitt, *The Value of the State and the Significance of the Individual*, Tübingen: Mohr, 1916, p. 6.

²*Ibid.*

³Herman Heller, "Sovereignty," in *Complete Works*, Leiden: Sitjhoff, 1971, Volume 2, p. 41.

⁴Heller, "Democracy and Social Homogeneity," *ibid.*, p. 424.

⁵Carl Schmitt, *The Concept of the Political*, Munich: Duncker and Humblot, 1932; *Dictatorship*, Munich: Duncker and Humblot, 1921.

⁶Schmitt, *The Concept of the Political*, *op. cit.*, p. 32.

⁷Schmitt, *Political Theology*, Munich: Duncker and Humblot, 1924, p. 12.

⁸Hermann Heller, "The Conceptual Crisis of the Present," in *Complete Works*, *op. cit.*, Volume 1, p. 291.

⁹Carl Schmitt, *The Intellectual-Historical Basis of Contemporary Parliamentarism*, Munich: Duncker and Humblot, 1927, p. 126.

¹⁰Hermann Heller, "The Conceptual Crisis of the Present," *op. cit.*, p. 301.

¹¹Hans Kelsen, *Sociology and the Juridical Concept of the State*, Berlin: Rothschild, 1925, p. 27.

¹²Hermann Heller, "Democracy and Social Homogeneity," *op. cit.*, p. 430.

¹³Heller, "Europe and Fascism," in *Complete Works, op. cit.*, Volume 2, p. 604.

¹⁴Carl Schmitt, "The Political Theory of Myth," in *Positions and Concepts in the Struggle with Weimar*, Hamburg: Hanseatic Press, 1940, p. 17.

¹⁵*Ibid.*

¹⁶Hermann Heller, "What Consequences Will Dictatorship Have for Us?" in *Complete Works, op. cit.*, Volume 3, p. 441.

¹⁷Heller, "Constitutional State or Dictatorship," *ibid.*, Volume 2, p. 458.

¹⁸Heller, "Socialism and the Nation," *ibid.*, Volume 1, p. 461.

¹⁹Schmitt, *Dictatorship, op. cit.*, p. 222.

²⁰*Ibid.*, p. 31.

²¹Heller, "The Concept of Legality," in *Complete Works, op. cit.*, Volume 2, p. 215.

²²Heller, "Sovereignty," *op. cit.*, p. 240.

²³Heller, "Constitutional State or Dictatorship," *op. cit.*, p. 455.

²⁴Heller, "The Concept of Legality," *op. cit.*, pp. 210-211.