

HERMANN HELLER ON AUTHORITARIAN LIBERALISM AND THE FORM OF THE DEMOCRATIC STATE*

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Abstract

This study examines Hermann Heller's ideas on authoritarian liberalism and the form of the democratic state, which continue to be relevant for current discussions on the rise of authoritarian neoliberal regimes. Heller conceives democracy as popular sovereignty. Accordingly, the principle of popular sovereignty imposes a certain form to a state, which is nothing other than the constitutional state. He inseparably binds the organizational features of constitutional state (such as the rule of statutory law and separation of powers) to popular sovereignty, so that one side cannot be effectively realized in the absence of the other. On the other hand, he makes a sound and theoretically backed examination of what the authoritarian state actually is. In this way, Heller develops solid arguments against the efforts to reconcile authoritarian form of the state with popular sovereignty. Heller addresses conventional concepts such as parliamentarism, democratic authority, and the constitutional state, which are often considered outmoded or obsolete. While he clarifies the meaning of these concepts and analyzes their connection with the state organs, he defends and graces them as well.

Keywords: Hermann Heller, authoritarian liberalism, popular sovereignty, constitutional state, parliamentary democracy

Hermann Heller'de Otoriter Liberalizm ve Demokratik Devlet Biçimi

Öz

Bu çalışma, Hermann Heller'in otoriter liberalizm ve demokratik devletin biçimine dair düşüncelerini ele almaktadır. Heller'in konuyla ilgili düşünceleri, günümüzde otoriter neoliberal rejimlerin yaygınlaşmasını inceleyen bilimsel tartışmalar bağlamında faydalı ve yol gösterici olmaya devam etmektedir. Heller'in demokrasi kavramından anladığı halk egemenliğidir. Buna göre, halk egemenliği ilkesi devlete belli bir biçim dayatmaktadır. Bu biçim anayasal devleti ortaya çıkarır. Heller, kuvvetler ayrılığı ve yasaların üstünlüğü gibi anayasal devletin örgütlenmesine dair unsurları halk egemenliği kavramıyla ayrılmayacak şekilde ilişkilendirir; öyle ki, biri olmadan diğ erinin hayata geçmesi mümkün olmaz. Öte yandan, Heller otoriter devlete dair serin kanlı ve kuramsal yönü güçlü bir yaklaşım geliştirir. Bu sayede, otoriter devlet biçimi ile halk egemenliğini uzlaştırmaya dönük çabalara son derece sağlam gerekçelerle karşı çıkar. Heller parlamenterizm, demokratik otorite ve de anayasal devlet gibi zaman zaman eskimiş, bayağı ve hatta işlerliğini yitirmiş olarak görülen kavramları ele almaktadır. Bu kavramların anlamlarına ve de devlet organları ile ilişkilerine netlik kazandırırken, aynı zamanda söz konusu kavramlara itibarlarını da iade etmektedir.

Anahtar Sözcükler: Hermann Heller, otoriter liberalizm, halk egemenliği, anayasal devlet, parlamenter demokrasi

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Hermann Heller on Authoritarian Liberalism and the Form of the Democratic State

Introduction

This study examines Hermann Heller's (1891-1933) ideas on authoritarian liberalism and the form of the democratic state. Heller is considered as one of the most eminent German jurists of the Weimar Republic. He developed his own theory of constitutional law and state, just like his contemporaries Hans Kelsen (1881-1973) and Carl Schmitt (1888-1985). However, his political and legal theory is less known compared to those of the others. Actually, until the early 1990s, he remained as a forgotten figure. Stayed in the background of political and legal theory for almost half a century, interest to Heller revitalized in the context of the European Union. Immediately after the Maastricht Treaty was signed on February 7, 1992, controversy arose between member states of the then European Communities regarding whether the final word on the validity of European legislative or administrative acts lay with national courts or the Court of Justice of the European Communities. The Federal Constitutional Court of Germany discussed this point; and in its pronouncement on October 12, 1993, known as *the Maastricht judgment*,¹ ruled that national constitutional court of Germany had reserved its right of final review (Meessen, 1993: 512). What is significant for our purpose here is that in its eighty-five-page long opinion, the court referred to Heller's ideas on nationhood and social homogeneity expressed in his paper, "Political Democracy and Social Homogeneity", which shifted attention to this work first published in 1928.²

1 Bundesverfassungsgericht, Judgment of October 12, 1993 (Maastricht), 89 Entscheidungen des Bundesverfassungsgerichts 155.

2 In its judgment, the Federal Constitutional Court commented that homogeneity was required for a people to constitute a nation. As there was no homogeneity among Europe's population, there was not yet a European *demos* and a proper European political entity. Therefore, the court ruled that the European Communities lacked democratic legitimacy. For more on the "no-demos" thesis see Jolly, 2005.

The other reason for the increasing interest in Heller is current discussions on the rise of authoritarian neoliberal³ regimes. In the recent literature, authoritarian neoliberalism denotes the corrosion of liberal democratic institutions and the spread of authoritarian policies in democratic states worldwide, but especially in entrenched Western parliamentary democracies. On the one hand, formal democratic procedures and institutions such as periodical elections and multi-party systems are being maintained; on the other, they are galvanized for authoritarian purposes. It is widely claimed that authoritarian neoliberalism is strengthening executive organs (be it councils of ministers or presidencies) by allowing them to bypass parliaments on various grounds. Consequently, authoritarian neoliberal regimes change the allocation of state power to the detriment of the separation of powers principle, and replace it with a top down governance. This trend consolidates “rule by decree” as opposed to the rule of law, removes decision-making authority from judicial and legislative control, and damages constitutional rights and liberties (Somek, 2015: 358).

In the context of Western democracies, the trend towards authoritarian neoliberalism is linked to counter-terrorism measures and neo-conservative policies to tackle migration problems. More frequently, however, it is associated with Eurozone’s economic crisis, and austerity policies applied since 2008 (Bloom, 2016: 3). As part of their crisis management strategies, Western democracies have made constitutional and legal changes in the name of economic necessity. The constitutional limits of executive power and individual rights and liberties are being either distorted or ignored. As Michael Wilkinson (2013: 542) notes, this is not the first time that nation states have acted as to meet the needs of capitalist markets. Then, what is peculiar to authoritarian neoliberalism is that firstly, economic stability is maintained from above in the absence of any search for social consent or a hegemonic project. Secondly, the main instrument of crisis management is criminal law and other legal mechanisms. Hence, authoritarian neoliberal states are strengthening their juridical power substantially as opposed to their economic administrative units (Hickel, 2016: 142; Bruff, 2016: 115).

Amid these discussions, one may surprise to see references to Hermann Heller. These references are mainly because the term authoritarian liberalism was coined by Heller in his paper “Authoritarian Liberalism?” of 1933, with a similar

3 In the literature, the terms “authoritarian liberalism” and “authoritarian neoliberalism” are both used to define the same phenomenon of the authoritarian transformation of democratic regimes in line with neo-conservative politics and stringent neoliberal economic policies. Throughout the paper, “authoritarian neoliberalism” is used. For the use of the term “authoritarian liberalism” see Brunkhorst, 2017 and Jayasuriya, 2000. For the use of the term “authoritarian neoliberalism” see Tansel, 2017.

purpose: to highlight the impairment of parliamentarism and separation of powers in European democracies.⁴ Heller's conceptualization of authoritarian liberalism was deeply enmeshed in the social and economic policies implemented by the German government to manage the effects of the Great Depression (1929), such as wage cuts, reductions in unemployment benefits, and tax increases. Additionally, it focused on how the constitutional order was bypassed through the decrees of the presidential cabinet, predicated on a belief that representative democracy and parliamentary mechanisms had to be curtailed to protect the national economy (Wilkinson, 2015: 313). This belief was particularly defended by Schmitt in his paper "Strong State and Sound Economy" (1932),⁵ which legitimized the authoritarian turn of the liberal constitutional states. Actually, Heller penned "Authoritarian Liberalism?" to refute Schmitt's arguments, and disclosed that he was actually defending a dictatorship.

Heller's thoughts on the relationship between constitutional state, authoritarianism and economy seem highly relevant in understanding and explaining the degeneration of today's democratic regimes. Alexander Somek (2015a:73) asserts that in effect, the current situation is reminiscent of what Heller discussed in the 1930s. Parallelisms can be drawn between economic neoliberalism of today and discussions on state-controlled national markets in Heller's life time. Starting from 1990s, neoliberalism broke its ties with *laissez faire* capitalism of classical liberalism, which assumed that forces of demand and supply would balance each other effectively, and regulate market relations without any state intervention. Since the global financial crisis of 2008, on the other hand, the state made an indisputable come back. Currently, neoliberalism is appealing to statist policies, according to which states should not shun from market intervention with all their authority, capacity, institutions and means, when they feel it is necessary for the protection and strengthening the markets.

Neoliberal change in politics, however, is not as apparent as its fluctuant economic preferences. To comprehend the differences between liberalism and neoliberalism in the political sphere, Wendy Brown's writings are fecund. Accordingly, individual liberty is the touchstone of liberalism. Actually, state exists to secure and enhance the freedom of individuals on a formal basis which praises neutrality of state power and equality of all individuals (Brown, 2009: 39). Basic institutions of representative democracy such as universal suffrage and free elections are designed to achieve this goal. It is common knowledge that for

4 The paper appeared in *Die Neue Rundschau*, volume 44, p. 289- 298.

5 On November 23, 1932, Schmitt made a speech in a conference in Dusseldorf titled "Sound Economy in a Strong State". In 1933, he published the text of his speech under the title "Strong State and Sound Economy: An Adress to Business Leaders". For this text see Cristi, 1998: 212-233.

almost two centuries liberalism's political goals have contradicted the necessities of capitalist market, which favored private property, capital accumulation, exploitation, and hence promoted authoritarian policies. Neoliberalism closes the gap between liberal political aspiration of equality and liberty, and actual inequality and slavery of individuals in the market by subsuming political sphere into economic considerations of profitability, calculus of utility, supply and demand, as a result of which political sphere loses its autonomy and distinctive rationality (Brown, 2009: 41). Neoliberal constitutional state no longer has a vision of realizing individual freedom through sovereignty of the people. Rather, efficacy or profitability of constitutionalism is being debated. As Brown states, neoliberalism converts the meaning and operation of democracy's constituent elements into economic ones (Brown, 2015: 17).

What distinguishes neoliberalism's link to authoritarianism and that of liberalism can be understood within this context. Brown underlines that although classical liberalism draws a line between political and economic lives, and does not hesitate to apply authoritarian practices on occasions, it neither reduces one to the other nor envisions that economics could or should devour and remake other fields of human existence (Brown, 2015: 33). However, neoliberalism *economizes* political subjects, and submits every aspect of political and social life to economic calculation. On the one hand, neoliberalism does not abolish liberal political institutions and work with them. On the other, these basic institutions as well as democratic principles are made nothing other than "ideological shells concealing their opposite" (Brown, 2009: 52).

Today's neoliberal authoritarian states have not yet been satisfactorily studied from a theoretical perspective. Basically, two approaches to the issue can be identified. The first approach associates democratic institutions of the constitutional state with authoritarian rule, and groups these emerging state forms under the general rubric of hybrid regimes. Following this first approach, hybrid regimes are variably named as "electoral authoritarianism" (Schedler, 2002: 47), "competitive authoritarianism" (Levitsky and Way, 2002: 52-53) or "democratic authoritarianism" (Brancati, 2014).

The second approach contradistinguishes democracy and constitutionalism, and argues that the rise of authoritarian states is an inevitable consequence of the fall of constitutionalism. According to this approach, Western-type democracies are actually a combination of two distinct traditions. One is democracy, meaning universal suffrage, free and fair elections, and majority rule. The other is constitutional liberalism, meaning the rule of law, separation of powers, and the protection of basic individual rights and liberties. The pioneer of this view Fareed Zakaria underlines that it is constitutionalism that gives democracy its liberal essence. These two traditions have always been at odds with each other so what we see today is that the forced company of

democracy with constitutional liberalism is breaking apart. While democracy is flourishing, constitutional liberalism is regressing, giving way to what Zakaria denominates “illiberal democracies” (Zakaria, 1997: 22-23; Bakiner, 2017: 22).

If Heller were to join in today’s discussions, the author believes he would reject both of these approaches. He would argue that the first approach is incoherent as it attempts to associate contradictory concepts and institutions in a patchwork style, while the second approach fails to bring out an accurate perspective because it attempts to break apart historically conjoined concepts and institutions forcefully. At that point, Heller’s meticulous approach to political and legal concepts and institutions is precisely what is needed today. His analytical method which unveils the immanent bond between concepts and institutions provides object lessons about the nature of the constitutional state and democracy. It goes without saying that social and economic contexts of the 1930s and 21st century are not the same. However, as Agustin Jose Menendez (2015: 287) puts it, learning from Heller does not mean going back to his time, but understanding Heller.

Heller analyzed the relationship between the constitutional state, democracy, and authoritarianism not only in “Authoritarian Liberalism?” but also in “Rechtsstaat or Dictatorship?” and “The Essence and Structure of the State”, which this study addresses. In these works, Heller conceives of popular sovereignty as the substance of democracy. This substance imposes a certain form to a state, which spawns nothing other than constitutional state. For Heller, the constitutional state is the state form that is compatible with democratic authority and enlivens popular sovereignty. In this respect, he highlights the immanent ties between the form and the substance of the democratic state. Moreover, he construes the democratic state as the polar opposite of authoritarian state, which actualizes the principle of ruler’s sovereignty and relies on autocratic authority. Heller inseparably binds popular sovereignty and the constitutional state to each other so that one component cannot be effectively realized in the absence of the other. He also provides a sound and theoretically based examination of what the authoritarian state actually is. This enables Heller to develop sound arguments against efforts to reconcile the authoritarian form of state with popular sovereignty.

Because of the conceived immanence among these concepts, it is highly difficult to sever the ties between Heller’s sociological view of popular sovereignty, legality, and the constitutional state, and separate discussions on authoritarianism and organization of the democratic state. Therefore, in order to stay focused on the subject of this study, some of the very important topics in Heller’s thought must be bracketed, including the social rule of law state, social

homogeneity, legitimacy of legal order, and Heller's debate with Kelsen.⁶ Heller's famous polemic with Schmitt, on the other hand, is touched only very briefly and in a very limited context. Within this framework, the first part of this study clarifies the differences between autocratic and democratic authority to explicate authoritarian liberal form of state. The second part investigates the bond between the sovereignty principle and the state form alongside the liaison of popular sovereignty with autocratic and democratic state authorities. The last part dwells on the rule of law and how the democratic state is intrinsically a rule of law state. Heller's polemic with Schmitt on who the guardian of the constitutional state is, can also be found in this part.

1. The Authoritarian Liberal State and Democracy

Heller starts his investigation of authoritarian liberalism by splitting it into its components and examining their meanings one at a time. The authoritarian liberal state describes itself as a version of liberal rule. Its insistence that it is liberal originates from bourgeois capitalism and economic freedom of enterprise. Accordingly, regarding the economy, an authoritarian liberal state waives its authority and becomes completely liberal in the sense that it enforces market freedom and tries to sustain depoliticized economic relations. The motto of authoritarian liberalism is thus "freedom of economy from the state" (Heller, 1933: 298-299), meaning that the state and the economy must be kept strictly separate. Furthermore, it is the responsibility of state to liberalize the economy by retreating from the market. For Heller, therefore, the capitalist form of economy gives this type of state its political and social character: the authoritarian liberal state represents the development level of capitalist markets (Bonefeld, 2016: 748).

However, the authoritarian liberal state's liberal appearance is completely illusory because the state actually constantly intervenes in the economy by subsidizing banks, industry, and agricultural enterprises while resisting to the demands of labor, solving economic crisis, and restoring entrepreneurship whenever needed (Somek, 2015a: 73). As William Scheuerman purports, the authoritarian liberal state pursues to engage economic liberalism to an authoritarian state whenever necessary to evade road blocks to big business

⁶ Heller often debated with Kelsen and Schmitt on the relationship between law and sovereignty, the social state, state of emergency, and the legitimacy of law. Regarding the political basis of legal concepts, he sides with Schmitt against Kelsen. Yet when it comes to democratic governance and the provision of social justice, Heller sides with Kelsen against Schmitt (Güngören, 2017: 70). Beyond any doubt, Heller's ideas should be evaluated within these debates in order to grasp their true significance and distinctiveness.

(Scheuerman, 2015: 305). Moreover, to sever the connections between politics and the economy as well as sustain depoliticized economic relations, the authoritarian liberal state must be strong. Therefore, the authoritarian liberal state-this version of liberal rule-is an organized force, a concentrated power, a strong state (Heller, 1933: 300).

Heller then focuses on decoding the real meaning of the authoritarian component of authoritarian liberal state. For him, the true nature of authoritarianism is not self-revealing because of the fact that every state is an authoritarian organization: there has not been a non-authoritarian state. For instance, a democratic state also enjoys authority, so it is a type of authoritarian state as well. In this case, Heller clearly states what the authoritarianism of authoritarian state proposes. Authoritarianism particularly means autocratic authority; the true nature of the authoritarian liberal state is an autocratic state. Moreover, the autocratic state is the opposite of the democratic state. By invoking the authoritarian liberal state, one is actually arguing for an autocratic state, against a democratic state or constitutional state (Heller, 1933: 295-297). This turns the examination of the authoritarian liberal state into the examination of autocratic state authority.

The main feature of autocratic authority is its dislike for parliaments. In an authoritarian state, autocratic decision making replaces the parliament as the key state institution. In general, the power of such a state rests with the president elected by the people (Heller, 1933: 297). The party that dictates power, on the other hand, organizes the pillar of power that supports the president (Heller, 1934: 274). Moreover, autocratic authority dislikes legal restrictions so the president is gradually freed from legal constraints, which might exist already in a primitive form. It also means that the president accepts no responsibility before the law, but only to *the people*, which is not a legal but a social entity. The authoritarian state fears being subject to the law because initially light legal constraints could gradually develop into a proper constitutional state with democratic accountability (Dyzenhaus, 1996: 655-656). Therefore, Werner Bonefeld (2016: 750-751) calls the authoritarian state that Heller criticizes an “authoritarian executive state” (*Regierungsstaat*), which curtails the “legal state” (*Gesetzgebungsstaat*).

For Heller, autocratic authority is not only the antithesis of democratic authority; it is an assault on democracy. The authoritarian state justifies itself with the deficiencies of democracy. The basis of this attack is that democracies are majoritarian, and the democratic state represents the tyranny of majority. Ironically, therefore, autocratic authority accuses democratic authority of not being democratic enough. It then alleges that a more democratic rule can be instituted by abolishing the parliamentary and electoral mechanisms through which the majority exercises its power. Indeed, authoritarian states have a clear

preference for open plebiscites over secret ballots. Such plebiscites are designated as the correct means of democratic acclamation (Heller, 1933: 297; Heller, 1929: 138). For sure, this is not an innocent choice. Authoritarian states can only let the popular will function through plebiscites as they are afraid of majorities. They hold plebiscites simply because they cannot hold elections, which depend on secret ballots and universal suffrage.

Heller repeatedly states that autocratic authority assaults democratic authority in the name of democracy, and legitimizes itself on this ground. He thereby draws attention to the relationship between autocratic authority and the principle of popular sovereignty. Autocratic authority claims to remain faithful to popular sovereignty; and be good for those who are subject to it (Somek, 2015: 357). Accordingly, all contemporary dictators and all the supporters of dictators assure us that they have done nothing but to realize true democracy. For Heller, the reason why autocratic authority espouses rather than rejects popular sovereignty lies completely within the objective development of history. Heller propounds that a historical threshold has already been crossed. In the age of capitalism, the divine right of the monarch is *passee*; there is hardly anyone who believes in hereditary aristocracy any longer (Heller, 1929: 137-138). As transcendental justifications for political authority disappear, popular sovereignty becomes the only practical principle, to which immanent political justifications can appeal (Dyzenhaus, 2000: 40-41). Therefore, the principle of popular sovereignty is *de facto* a historical necessity in that, reference to the will of the people is required for almost any type of rule. As such, one cannot openly attack democracy (Heller, 1929: 137-138). Even dictators adopt the methods designed for democratic legitimation for their own purposes; even dictators strive to be presented democratically and legitimated through the authority of the popular will.

Nevertheless, autocratic authority's legitimization of itself with popular sovereignty is a delusion. Heller describes the autocratic authority's relationship with popular sovereignty in plain terms as *corruption* (Heller, 1929: 138). For instance, a preference for plebiscites over open general elections is a corruption of the principle of popular sovereignty, which he regards a specific kind of corruption characteristics of West European dictatorships. In this corruption, the will of the people is said to be identical with the will of a single person, namely the dictator or the autocrat. In other words, the people's voluntary decisions, who always exist as plurality for Heller, are said to match those of the autocrat in all matters. In order to create this identity, the people are kept under permanent political, military, and economic pressure. The results of this corruption are substantial, and cannot be reduced to the inference that the autocrats are using the people's will as a cloak for their autocratic rule. Instead, much more than this, the corruption of popular sovereignty in the hands of autocrats creates a corrupt

society, as the state forces the people into political hypocrisy and lies (Heller, 1929: 135-136).

On the difference between autocratic and democratic authorities, and the corrupt nature of autocracy's faith in popular sovereignty, Heller touches on one more point. Accordingly, every type of state is a form of domination. To execute this domination, states must develop a system for unifying the wills of the ruler and the ruled (Heller, 1928: 259). In autocratic states, plebiscites spawn a special kind of unity called identity; identity of the wills of a single ruler and the ruled masses. The democratic state also differs from autocratic state in terms of unity formation. In the democratic form of domination, it is homogeneity, not identity that ensures the unity of wills. As Heller states, for the formation of political unity to be possible in a democratic state, there must exist a certain degree of social homogeneity (Heller, 1928: 260).

Very briefly, social homogeneity is provided when different segments of the people can recognize themselves equally in the ruling authority. That is, in a homogeneous political unity, politically relevant sections of the people can identify themselves with the symbols and representatives of the state in some way (Dyzenhaus, 1996: 656). To achieve social homogeneity, the state must incorporate the representatives of politically relevant sections of the people. Additionally, these representatives should bear collegial responsibility towards the people. In this way, the people in their plurality are equally represented while the representatives are equally positioned vis-à-vis the people. Then, social homogeneity is a state of equalization⁷ within the political unity of the state. For Heller, the concept of social homogeneity does not imply standardization or assimilation of differences; neither does he base it on national identity or blood ties. Instead, what Heller describes as homogeneity is, in real terms, plurality within unity.⁸

⁷ For Heller, social homogeneity depends on social and economic equality. Accordingly, democracies that can not provide social equality are unable to sustain unity, and eventually live self-destruction. Hence, Heller insists that the formal constitutional state of liberalism (*Rechtsstaat*) must be completed by the material and social state, and transform itself into *Socialsstaat* (Dyzenhaus, 1996: 656). In fact, the social rule of law state is one of the guiding notions of Heller's theory of state. With this idea, Heller extends democratic influence and control over the relations of production (Krell, 2016: 148). It is also worth noting that the term "social rule of law state" was first used in Heller's paper "Rechtsstaat or Dictatorship?" (1929) (Özenç, 2016: 209).

⁸ It is widely accepted that Heller's homogeneity is predominantly a social and economic category rather than a spiritual, cultural, or ethnic one. For instance, Christian Krell (2016: 147) notes that Heller marked himself off from a *volkisch*

To sum up, according to Heller, two incompatible forms of state bear within themselves two contradictory types of authority. The authoritarian state bears autocratic authority while the constitutional state bears democratic authority. Democratic authority, based on the majority will, establishes parliaments and free elections as the basic mechanisms for reflecting the majority will in the state. In contrast, autocratic authority does not rely on the majority will; indeed, the autocratic state fears the majority and tries to suppress it (Heller, 1933: 295). The motto of autocratic authority is thus “authority, not majority”. Autocratic state restricts the influence of the majority will on the political unity of state by weakening parliaments and instituting plebiscites instead of elections. The attitude of the autocratic state towards the majority is also reflected in the character of unity formation. Authoritarian unity formation, which is identity, requires the elimination of political differences. Unity is imposed on a pluralist society and sweeps away pluralism (Dyzenhaus, 2000: 250). Within this framework, Heller shows himself to be an ardent supporter of majority rule. As a matter of fact, in the late 1920s and early 1930s, the critique of majority rule was a rightist reaction to the Weimar Republic (Bonefeld, 2016: 748). Therefore, Heller’s support for majority rule is a defense of democratic authority against the rightist push for an autocratic state.

2. The Principle of Sovereignty and the Form of the State

Heller’s designation of the autocratic state’s relation to popular sovereignty as corruption was not based on simple or frivolous justifications. On the contrary, it is well substantiated by a comprehensive discussion on the principle of sovereignty, to which Heller ascribes constructive power. Accordingly, the principle of sovereignty that he embraces is directly reflected in the form of the state and the type of authority that it bears. This is because; sovereignty is both a substantive principle indicating who the supreme political power is, and an organizational principle determining who uses what sort of and

conception of the notion as primarily a cultural community. Then, what is decisive for the availability of homogeneity is not the intellectual or ideological superstructure, but the reality of economic disparities (Wilkinson, 2013: 555 and Scheuerman, 2015: 302). In this respect, Meessen (1993: 526) argues that the Federal Constitutional Court of Germany wrongly embraced Heller’s opinions in its *Maastricht judgment* of October 1993. Nevertheless, there are opposing views on the issue as well. For instance, Peter Caldwell (1997: 129) argues that Heller tries to connect conservative and socialist politics. In his concept of social homogeneity, he saliently turns to the nation as the source of state’s will. Caldwell reasons that Heller’s social community is actually defined by national characteristics.

how much political power. In other words, the principle of sovereignty is not only a discursive principle of the legitimization of political power, but also a principle of defining how political power is practically used and distributed (Heller, 1934: 274). For Heller, this distribution determines the proper form of the state. In this manner, Heller establishes an immanent relationship between the principle of sovereignty and the state form, whereby the substance actualizes itself in the form while the form reflects the substance. One can thus infer the embraced principle of sovereignty from the organization of power within a state. Starting from this point, Heller claims that autocratic state form signifies a rupture with popular sovereignty.

In the autocratic state form, power acts downward from above, with the autocrat gathering all state authority and uniting all state power in order to take all politically relevant decisions. This top-to-bottom organization of the state actualizes the principle of *ruler's sovereignty*. Additionally, the autocrat is not limited by law since in an autocratic state, there are no legal limits to state power (Dyzenhaus, 2000: 38). However, this situation does not connote an omnipotent power. Rather, it means that the power of the autocrat is not limited by legal, yet actual power relations in society. In practice, not even the most powerful autocrats can unite all power in their hands. On the contrary, they share power with the bureaucracy, the leadership of the dictating party, economic power groups, and privileged classes (Dyzenhaus, 1997: 185). While sharing power, the autocrat organizes a pillar of power that supports him or her. Therefore, in an autocratic state, the limits of the ruler's power reflect the actual conglomeration of power in the society. (Heller, 1934: 273-274).

In the democratic state form, which is peculiarly named as constitutional state, power is constructed from the bottom up with all the state's power coming from the people (Dyzenhaus, 2000: 38). This bottom-to-top organization of the state actualizes the principle of popular sovereignty. The most important phase of this construction is the appointment of representatives by the people. Heller proposes two principles that the representative system should follow in order to be characterized as democratic. First, representatives should be appointed collegially. Second, they should have a magisterial not a sovereign position (Heller, 1928: 259). In this direction, representatives are both to be selected and dismissed by the people. Thus, the point that the people has effective political power becomes practical in the appointment, recall, and the control of representatives and political leaders (Heller, 1934: 274).

The methods for the appointment, recall, and control of representatives by the sovereign people as well as the status of representatives in a democratic state form, however, vary considerably, and does not necessarily bring forth parliamentarism or the institution of the state's central organs through direct elections, as developed in liberal democracies. For instance, an election mediated

by a council system can also be democratic (Heller, 1928: 259). Nevertheless, this should not lead to the rejection of parliamentarism. Parliaments assume a very special function for democracies pertaining to the dialogue between political opponents. According to Heller, parliamentarism relies on a belief that political opponents can arrive at an agreement through discussion, and that there can be common ground for their discussion (Heller, 1928: 260). The critical feature of this discussion between opponents is the absence of naked force. The renunciation of suppression by physical force by both sides creates the possibility of *fair play*. Heller thus calls this function of parliaments *social equalization*, as it equalizes the strong and the weak (Heller, 1928: 261).

For Heller, inadequate realization of the principle of popular sovereignty in the form of the state does not break the rule. Actually, it may well be the case that the people allowed to vote make up only a small part of the population (Heller, 1928: 259). Similarly, a very small circle of individuals may dominate elections because of their superior economic power. However, these deviations from the rule do not make the principle of popular sovereignty a mere fiction. In fact, the contingencies of history determine who is to be excluded from voting for reasons of age, race, sex, etc., and who enjoys more electoral power for reasons of property, education, class, etc. Even in the worst case, Heller says, the principle of popular sovereignty maintains its importance as a *polemical principle* (Heller, 1934: 274). David Dyzenhaus elucidates that Heller attributes polemical force to two features of popular sovereignty. First, popular sovereignty is a polemic about the distribution of political power that is directly opposed to autocracy. That is, popular sovereignty is the polemical anti-thesis of the unification of power in the hands of a single person (Dyzenhaus, 2000: 38). Secondly, the polemic on popular sovereignty points to the gap between ideal and reality, which can be very large in some instances. However, once institutionalized, popular sovereignty as a polemical principle encourages an attempt to narrow this gap (Dyzenhaus, 1996: 655) by functioning as a principle that motivates people, and gives social movements a direction and aim. In this context, as Heller succinctly phrases, the lack of any pure realization of the principle of popular sovereignty in real political life, disappoints “only the doctrinaire” (Heller, 1934: 274).

3. Legality and the Guardian of the Constitutional State

One of the important features of the democratic form of the state is the separation of powers between legislative, executive, and judiciary. This division prevents excessive concentration of power and excludes the hierarchical or traditional privilege of the ruler. For Heller, the principle of separation of powers,

which protects political rights and liberties, is the backbone of modern constitutional states.⁹ This non-hierarchical state form is established through the mediation of laws that stipulate the legal limits of all state actions. This means that all three of the state powers must comply with and implement these laws. The law must be implemented and interpreted by officials and judges, who must also be bound by the same laws (Dyzenhaus, 2015: 350). In simple terms, this is what is meant by the rule of law.

In the same way that he interrelates the substance and form of the state, Heller binds the rule of law and the popular sovereignty to each other through immanent ties. It is the specific character of law that establishes these ties. In a rule of law order, law is accepted as statutory law. That is, acts of parliament formed by the representatives of the people are given the power of law. For Heller, the concept of *statute as law* is the distinctive part of the legal order that democratic states institute. The emergence of this concept is inseparable from the historical transformation of the state from monarchy to democracy or the replacement of the ruler's sovereignty with popular sovereignty (Dyzenhaus, 2000: 24).

On the one hand, *statute as law* actualizes the substance of popular sovereignty. As the law is made by the representatives of the people, it reflects the will of the sovereign people. Therefore, while it appears to be the law that circumscribes the leadership's political power, it is actually the sovereign people who do this (Heller, 1934: 274). On the other hand, actualization of the substance of popular sovereignty strictly depends on the form of the state. First, the concept of *statute as law* is inextricable from the bottom-to-top organization of the state and aforementioned appointment, recall, and control of the people's representatives. Second, this concept is the direct outcome of the formal relationship between the sovereign and the law. Invariably, the law is accepted as the decision of the sovereign; and invariably, the law is believed to reflect the will of the sovereign, whoever the sovereign is. Thus, whether the state is autocratic or democratic, its legislature is always constituted in such a way that it represents the will of the sovereign (Dyzenhaus, 2000: 25). Then, *statute as law* is nothing more than the concretization of the abstract sovereign as "the people" in the proposition "the sovereign makes the law". Therefore, this formal criteria constitutes law as statute under popular sovereignty, as opposed to law as command (of the autocrat).

9 While criticizing Hegel's conception of the state, Heller views Hegel as the pioneer of power state, who broke away from the rule of law. The main reason for Heller's criticism is that Hegel rejects the separation of powers (Güngören, 2017: 67).

In order to understand the importance of statutory law for democracies, one may briefly consider the discussions on state of emergency, an issue that Heller actually faced in his time. Article 48 of the Weimar Constitution, which regulated the state of emergency rule, empowered the president to disable the parliament and issue decrees with the force of law. Heller was very cautious about the state of emergency rule, which he regarded as a decree order.¹⁰ Under state of emergency, the president was no longer answerable to the parliament. Therefore, presidential decrees were completely disconnected from the parliament. In this situation, such decrees did not have the validity force of a norm enacted by the representatives of the people, meaning that having the force of law, they were in fact commands. For Heller, this makes the state of emergency into an illegitimate initiative to replace the rule of law order by a system of command. First, it amounts to illegality in a democratic state (Dyzenhaus, 2000: 41). Second, the erosion of the statutory concept of law undermines the connection between popular sovereignty and state power. In fact, it signifies a change in the embraced principle of sovereignty in line with the shift of law making authority. In short, a state of emergency that suspends parliamentary mechanisms and the rule of statutory law, also suspends popular sovereignty.

Heller views popular sovereignty, separation of powers, and the rule of law as interconnected elements of a democratic form of state. As long as the legislative organ is constituted by the representatives of the people and statutes are given the power of law, this form ensures that the state is run by the will of the people and that all actors exercising state power are accountable to the people. Actually, it provides insurance that the power of the ruler is *legally* limited by the ruled. Heller highlights that this legal bond between the ruler and the ruled is peculiar to a state established on the basis of popular sovereignty. Only bottom-to-top state formations ensure the accountability of the ruler to the ruled through effective legal sanctions (Dyzenhaus, 1996: 655). In autocratic states, the bond between the ruler and ruled has no legal expression -it is merely a social-ethical one. Whereas in democratic states, it is not merely sociological but also a juristic one (Heller, 1928: 259).

Additionally, Heller conceives of the separation of powers as a functional separation, without envisioning a hierarchical system among the organs that exercise state powers. That is to say, Heller does not give precedence to the legislative organ over the executive and judiciary just because it enacts the laws that limit the rulers. This is because Heller appraises the interpretation of law as a part of law making. On his view, statutes do not determine the judicial

¹⁰ Heller is referring to the use of Article 48 by federal cabinets throughout the late 1920s and 1930s on the grounds of economic necessity.

interpretation of law and executive action under the law; instead, a judge or administrator interprets the law while applying it. Only through this interpretation can one tell what the law says or what the law requires. Thus, interpretation of the law by judges or administrators has constructive and constitutive quality (Dyzenhaus, 1997: 210), meaning that law making continues outside the legislative organ. Moreover, the interpretation of a judge or an administrator is one made by a competent authority. Therefore, Heller reckons, there is no substantive distinction between legislation, execution and judicial interpretation; rather, all of the legislative, executive and judiciary participate in the process of law making (Dyzenhaus, 2000: 27). Indeed, Heller claims that legislation is distinguished from other legal norms only by virtue of its *enhanced* validity force (Dyzenhaus, 1997: 162). This point requires the judicial and executive organs to observe the substantive criteria of popular sovereignty while issuing ordinances, because the validity force of their actions relies on this principle *almost* as much as that of the legislative's actions.

The significance of Heller's views on legal interpretation can be better assessed in the context of his polemic with Schmitt. Briefly stated, in his paper "The Guardian of the Constitution" (1931), Schmitt discusses which authority of the constitutional state is entitled to the protection of constitutional order. Firstly, Schmitt refutes the argument that the constitutional court or judiciary in general can be the guardian of the constitutional order. The reason he shows is that judicial decisions are not independent, but highly influenced by the will of the political power. A dependent authority can still be a sovereign ruler of the state; however, it cannot be deemed the protector of the constitution. Schmitt claims that, for an institution or authority to secure the constitution, it must not rely on other authorities; rather, it must be an independent and neutral power. In addition, its role is to connect and balance other powers, and to arbitrate and regulate them when necessary. In order for this authority to fulfill its duties, it must also have special competences (Schmitt, 1931: 151). Schmitt asserts that this authority, meaning the guardian of the constitutional order, is the head of the state, the president. Only the president can attain complete unity within the state given the multitude of interests and agendas (Schmitt, 1931: 158). Therefore, he continues, empowerment of the president by emergency decrees is not against the constitution. On the contrary, it is necessary for the protection of the constitutional order.

For Heller, however, there is no single guardian of the constitutional order as he strongly rejects the idea that the popular will can be identified with a single post or organ within a state. In a democratic state, popular sovereignty is not concentrated in a particular state representative (Dyzenhaus, 1997: 195-198). The elements of the democratic state form (its bottom-to-top structure, separation of powers, and the rule of law) distribute state power (including law making power)

in such a way as to prevent the localization of sovereignty in any single post. In this direction, Heller concludes that all the state's legislative, executive, and judicial organs are collegially responsible to the people, and all of them collegially authorized to the protection of the constitutional order. That is, all state powers, organs, and representatives are guardians of the constitution. Therefore, in a democratic state, one can not single out and empower a particular office, just like Schmitt attempts to do. Rather, it is better to look to the democratic system as a whole to fulfill this guardianship function.

Conclusion

Hermann Heller's investigation of authoritarianism, the democratic state form and its relation with popular sovereignty continues to be relevant, although almost ninety years have passed since its first appearance. This study aims to present Heller's comprehensive and complex thoughts as an introduction to the subject. Heller addresses conventional concepts such as parliamentarism, democratic authority, and the rule of law, which were considered obsolete and outmoded in Germany during his lifetime. He clarifies the meaning of these concepts, and analyzes their connection with state organs and institutions. He thereby rehabilitates and defends them after they fell from grace during the 1930s in the hands of strong presidents who ruled through emergency decrees.

The study demonstrates that Heller's defense is still valid today. Democratic parliamentary institutions are coming under fire and increasingly declared ungainly and even dysfunctional on the grounds that they serve to the rise of authoritarian neoliberal regimes. Neoliberalism is not a new version of liberalism either economically or politically. Economically, neoliberalism favors strong states and state's intervention to markets for the benefit of markets, which contradicts liberalism's motto of maximum free trade and competition via minimum political interference. When it comes to politics, neoliberalism signifies erosion of liberal democratic values and principles. It perverts equality, freedom, and popular sovereignty through their submission to economic rationality. Therefore, neoliberalism cloaks itself in liberal democratic institutions and practices rather than bringing new ones.

Contributions of Heller to the analysis of neoliberal authoritarianism are many. Heller highlights that autocratic authority, which is the essence of authoritarian states, is not only the antithesis of democratic authority, but it is an assault on democracy. Moreover, the fact that authoritarian neoliberal regimes do not completely abolish democratic institutions, yet distort and operationalize them to consolidate their autocratic authority, does nothing to increase the democratic legitimacy of such regimes from a Hellerian perspective. Authoritarian regimes' efforts to legitimize themselves through popular

sovereignty is futile since plebiscitary instruments can in no way be described as democratic. On the contrary, such regimes blatantly corrupt and abuse democratic mechanisms. Consequently, authoritarianism is incompatible with both democratic authority and popular sovereignty. Authoritarian states should more accurately be called autocratic states, which constitute the exact opposite of constitutional states and democratic authority.

Particularity of Heller is that he does not attempt to reconcile or integrate democratic institutions with autocratic authority. Instead, he draws a sharp contrast between them by linking the substance and form of a state with immanent ties. Heller rejects the separation of the formal and substantive aspects of a state, suggesting that the substance of democratic authority, namely popular sovereignty, necessitates a particular form of state. Accordingly, popular will is actualized through constitutional state. In return, the formal organization of the constitutional state contains substantive values (Caldwell, 1997: 141), which is why the principle of popular sovereignty cannot be preserved, once the form of constitutional state is impaired. In this respect, Heller claims that regimes that disempower those institutions, which are constituted by the representatives of the people, undermine the rule of law; and reorganize the distribution of state power in a top-to-bottom fashion are actually ceasing their ties with popular sovereignty.

Heller's support of parliamentarism can be understood within this context. The people is always a plurality, and a plurality cannot be reduced to a single person or post within the state. If it is reduced to a single post, the unity between the ruler and the ruled turns into a totalitarian unity. Therefore, the popular will can only be effectively expressed through the medium of a political organization consisting of the representatives of all the people (Dyzenhaus, 2000: 41). As one of many methods of democratic representation, parliamentarism is characterized by the elimination of physical force from political dialogue between opponents. Whenever parliamentarism is corroded, naked force comes into play again. Heller acknowledges that parliamentarism often means majoritarianism. However, he sees a reliance on the majority will as the best antidote to autocratic rule, which suppresses the majority and favors authority in its place.

Heller's conceptualization of sovereign power differs from mainstream views, which predominantly consider the sovereign as the constituent power who plays a role during the establishment stage of a state before giving way to the constituted power right after. Not only localization of sovereignty enjoys polemical power for the masses; but also Heller attributes active constitutive power to the sovereign in daily political life. In this regard, localization of sovereignty within the state is a political reality. This localization directly determines the organization of state power and the legal relationship between the ruler and the ruled.

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