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Hermann Heller on politics: discipline, sphere and activity

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ABSTRACT



Most students of politics are familiar with Carl Schmitt's definition of politics as a friend–enemy distinction. Yet, only few know of alternative conceptions of politics in interwar Germany that emphasize cooperation and legality over confrontation and decisionism. To unlock such views, this article examines the work of Hermann Heller, a social-democratic constitutional theorist, and takes a close look at his conceptualization of politics as a sphere, activity and discipline. For Heller, 'the political' consists in turning human conflict into social cooperation. For him, the political may be conflictual, but is also conditioned by shared norms and agreed rules. By consequence, to act politically means to order the antagonistic social relations that are typical of every human society. In this sense, politics is a purposeful activity, but one which leaves the content of every decision unconfined and the potentialities that follow endless. Like politicians, politics scholars must reflect on ethical and legal principles, while remaining focused on context-specific political problems. The study of politics cannot be disconnected from the study of law, ethics and social reality. Heller's work showed that the way we conceive of politics is directly related to the way we study politics and vice-versa.

KEYWORDS

Hermann Heller; politics; the political; German political thought; political theory; social cooperation

1. Introduction

Herman Heller, the leading German-Jewish constitutional theorist, Weimar-era social democrat and precursor of German political science, has so far attracted the interest of only a small number of scholars in the Anglophone world. His theory of the 'sozialer Rechtsstaat', a rule of law that incorporates social policy, first appealed to a handful of scholars in the 1980s and 1990s, who were distressed about the consequences of neoliberal politics.¹ If it wasn't for the dedicated attention of Ellen Kennedy and especially David Dyzenhaus, this brilliant mind would have been hardly known to non-German speakers.² In more recent years, however, this has changed. Heller's sharp insights into the way rising threats to democratic power can be explained by looking at their socio-legal context launched him to the centre of international legal debates surrounding the Eurozone crisis. A 2015 special issue of the *European Law Journal*, in addition to recent articles in French and Spanish, and a 2019 translation of his work on sovereignty³ have offered fresh perspectives on Heller's unique contribution to structural, cultural and socio-legal analyses of political crises.

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¹Rainer Wolf, 'Hermann Heller', *Kritische Justiz* 26, no. 4 (1993): 500–7, at 502.

²Ellen Kennedy, 'Introduction to Hermann Heller', *Economy and Society* 16, no. 1 (1987): 120–6; David Dyzenhaus, *Legality & Legitimacy: Carl Schmitt, Hans Kelsen & Hermann Heller in Weimar* (Oxford: Oxford University Press, 1997).

³Agustín José Menéndez, ed., 'Special Section: Hermann Heller's Authoritarian Liberalism', *European Law Journal* 21, no. 3 (2015): 285–383; Olivier Jouanjan, 'Hermann Heller: penser l'Etat de droit démocratique et social en situation de crise', *Civitas Europa* 37,

This renewed interest in Heller had its starting point in the German-speaking world. Marcus Llanque's 2010 edited volume was followed by a Habilitation thesis in 2011 by Michael Henkel and other works,⁴ all of which had the advantage of building on the three-volume publication of Heller's entire oeuvre in 1971 (revised in 1992).⁵ The most recent publications in German have focused on topics in Heller's work that are relevant today: political representation, the fight against extremism, constitutional socialism. Thus, while German scholars have rediscovered German political science's debt to Heller about a decade ago, the Anglophone world is only now catching up and approaching him with the genuine intellectual curiosity that he deserves. This paper is part of the latter turn in Hermann Heller studies.

My aim is to contribute to Heller's political theory by shedding light on his conception of politics. This is relevant for two reasons. On one hand, my intention is to dispel the long shadow cast on Weimar political thought by Carl Schmitt's infamous definition of politics as an existential struggle to annihilate one's opponent.⁶ A different, and in my mind more attractive, view on the topic may underline the problems with Schmitt's concept as pointed out by a contemporary (rival) of Schmitt and expand our understanding of what politics meant in those critical years between the wars. On the other hand, I am driven by a genuine interest in Heller himself. Exploring the meaning of politics that permeates both the descriptive and normative dimensions of his theory is key for gaining insight into his other ideas that are of interest to an increasing number of scholars today.

Absent a separate long treatise on the concept of politics, Heller's view has to be mined and assembled from different parts of his work. In order to pull these fragmentary pieces together, in the section that follows I suggest an analytical framework, which helps to highlight the different dimensions of the concept of politics. I then set out to explore how Heller conceptualizes each of the three ideas of politics: as a discipline, as a sphere, and as an activity. At the end of that trail, I hope to have demonstrated to the reader an alternative view of politics in the Weimar years, which offers ground-breaking new vistas of our current political predicament.

2. Three concepts of politics

In his Inaugural Lecture at the *Collège de France* in 2002, Pierre Rosanvallon made a very useful analytical distinction between two concepts of politics. The term 'politics' (*la politique*), he argued, describes the everyday form of politics, partisan disagreements, acts of public administration, government decisions. By contrast, 'the political' (*le politique*) signifies the entire constitution of political life, all things that fall beyond the immediate domain of everyday politics.⁷ Mouffe offered a more particular aspect to this reading. For her, 'the political' is – in her famous left-Schmittian view – the dimension of antagonism, which constitutes society, while 'politics' is the set of practices and institutions through which order is created and human coexistence organized.⁸ Both in Rosanvallon's and Mouffe's case, however, politics is conceptualized in spatial terms, that is, political action is configured within a particular *sphere*, a field, a stage or arena. It is, for example, distinguishable from the sphere of the economy or law which follow their own principles and logic. Visualized as a natural or abstract spatial phenomenon, politics is, therefore, a priori confined and clearly

no. 2 (2016): 11–26; Sebastián Martín, 'Los fundamentos sociales, políticos y jurídicos del 'soziale Rechtsstaat': Una relectura de Hermann Heller (1891–1933)', *Res Publica. Revista de Filosofía Política* 25 (2011): 151–75; Hermann Heller, *Sovereignty: A Contribution to the Theory of Public and International Law*, ed. David Dyzenhaus, transl. Belinda Cooper (Oxford: Oxford University Press, 2019).

⁴Marcus Llanque, ed., *Souveräne Demokratie und Soziale Homogenität: Das Politische Denken Hermann Hellers* (Baden-Baden: Nomos, 2010); Michael Henkel, *Hermann Hellers Theorie der Politik und des Staates: Die Geburt der Politikwissenschaft aus dem Geist der Soziologie* (Tübingen: Mohr Siebeck, 2011).

⁵Hermann Heller, *Gesammelte Schriften*, ed. Martin Drath and Christoph Müller (Tübingen: Mohr Siebeck, 1992). For the narrow extent of Heller's reception in Germany and elsewhere, see Dian Scheffold, 'Notizen vom Hermann-Heller-Symposium in Berlin', *Kritische Justiz* 17, no. 1 (1984): 95–103.

⁶Carl Schmitt, *The Concept of the Political: Expanded Edition*, transl. George Schwab (Chicago: University of Chicago Press, 2007), 19–79.

⁷Pierre Rosanvallon, *Democracy: Past and Future*, ed. Samuel Moyn (New York: Columbia University Press, 2006), 36.

⁸Chantal Mouffe, *On the Political* (London: Routledge, 2005), 8–9.

demarcated.⁹ The consequences of such a spatial understanding are that they conceal an attempt to stabilize and regulate the contingent and unpredictable character of politics. They also preclude any attempt at qualifying the meaning of politics as an activity.

A way to conceptualize politics differently is to emphasize not its spatial, but its temporal features. In this case, our attention goes to politics as an *activity*, that is, what one does when she acts politically. An activity is not visible 'by the bare eye'; it is fluid and contingent. As a result, politics-as-an-activity becomes a matter of dealing with contingencies.¹⁰ One dimension of this 'performative' understanding of politics is that, like every activity, politics takes up time; in other words, it becomes a temporal phenomenon. From here on, the precise content of the activity of politics can vary extensively. A well-known example of politics conceptualized as activity is that of political judgment. From this perspective, politics is not simply a sphere juxtaposed to economics or ethics, but the act of formulating and casting a particular type of judgment on matters of common interest that pertain to a future course of action. Other proposals for conceptualizing the activity of politics, mostly from the twentieth century, have described it: as the coordination of different proposals into a single future-oriented line of action; as a mode of speaking that can alter another person's standpoint; as a commitment to realizing an individual or collective will; as an act of contestation; as chance to demand the possible (or impossible); as seizing opportunities, situations and moments; and as a strategic game and play with adversaries.¹¹ In all these conceptions, politics is a way of dealing with contingent situations.

The German tradition is replete with both temporal and spatial metaphors of politics. Each of these two dimensions further influences a third meaning of politics, namely how it is viewed as a *discipline*. Indeed, in addition to denoting a sphere or an activity, the term 'politics', its antecedents or derivatives have been used since Aristotle to denote the scholarly interest in questions of the *polis*, or later the state, and in any case the subject matter of an academic discipline.¹² The form that politics as a science can take is not pre-given, it is itself a highly contested intellectual question. Is it a theoretical or practical field of study, or both? Does it relate to other arts and sciences, and which? And how, that is, through which methods, should we go about studying it? I will start by first focusing on this aspect of Heller's concept of politics – as a scientific discipline – before moving on to exploring his views on politics-as-a-sphere and politics-as-an-activity.

3. Heller's discipline-concept: 'political science' cum *Staatslehre*

Perhaps the easiest of the three quests is to examine how Heller conceived of politics as a discipline. This is because he dedicated enough attention to the question himself, not least in the opening chapters of his posthumously published *Staatslehre*¹³ – the same chapters were published earlier in English in the article on 'Political Science' of the *Encyclopedia of Social Sciences*.¹⁴

In there, Heller first clarifies the idea of *Staatslehre*, the 'theory of the state', and its relation to political science. For him, *Staatslehre* is not a matter of historicizing or interpreting legal concepts. This could only be the case if the state was reduced into a synonym of legal order.¹⁵ Instead, it is more

⁹Kari Palonen, 'Two Concepts of Politics: Conceptual History and Present Controversies', *Distinktion: Scandinavian Journal of Social Theory* 12 (2006): 11–25.

¹⁰*Ibid.*, 17.

¹¹*Ibid.*, 127–30.

¹²*Ibid.*, 122–3. In the past, the term 'politics' alone connoted 'the study of political phenomena'. Today, the discipline-concept 'politics' has been replaced by 'political science'.

¹³Hermann Heller, *Staatslehre*, ed. Gerhart Niemeyer (Leiden: A. W. Sijthoff's Uitgeversmaatschappij, 1934). See also Heller, *Gesammelte Schriften*, 79–412.

¹⁴Hermann Heller, 'Political Science', in *Encyclopaedia of the Social Sciences*, ed. Edward Seligman, Vol. 11 (New York: The Macmillan Company, 1933), 207–24. It seems that Heller wrote this entry directly in English drawing on relevant German passages from his *Staatslehre* on which he was working since the early 1930s. See Michael Henkel and Oliver W. Lembcke, 'Politikwissenschaft als Theorie der Politik: Hermann Hellers theoretische Grundlegung der Politikwissenschaft', *Politisches Denken. Jahrbuch* (2003): 30–54, 2–3.

¹⁵Heller, 'Political Science', 209.

correct to see *Staatslehre* as a political-theoretical study of the state, which makes it almost a synonym of political science.¹⁶ To be sure, thus far, he observes, *Staatslehre* has attracted the juridical mind, whereas political science the historical-sociological mind. But in reality, they both have a basis in political philosophy. Thus, he concludes, it is equally wrong to assume that political science is a practical, normative science and *Staatslehre* a theoretical, normless one. In reality, both of them require theoretical inquiry and both are concerned with values.¹⁷

Further, Heller rejects the distinction between static and dynamic state processes that supposedly corresponded to *Staatslehre* and political science respectively. To suggest that *Staatslehre* deals with institutions, as opposed to action, and therefore focuses on static ‘phases of the state’ is for Heller misleading. It creates a false perception that institutions are immobile constructs removed from human action. On the contrary, Heller sees in them a reflection of human creativity, exemplified by the ability to transform and create them anew.¹⁸ For him, human activity is not only the ingenious drive of politics; it is also the main methodological principle for explaining political phenomena. It is ‘political life itself’ that steers the field of political science,¹⁹ and more specifically political activity that effectuates change. Conversely, political or ‘state activity which creates nothing new, which offers no creative direction of the affairs of state ... is of minor interest to the political scientist’.²⁰ As a result, institutions, activities and ideas must be interpreted as political realities that result from nothing else than the activity of man. ‘Politics is political history in the making’.²¹ The political scientist can neither draw on superhuman or subhuman forces, nor engage in over-abstraction and indifference to political realities. Political reality is always and only a human product. He explains:

This activity of man is, at least as far as human comprehension goes, distinguished from all processes in nature in that its end-products may be understood and explained as actual creations possessed of meaning; in other words, as culture. The entire political world presents itself to man only as a concrete work, forged by man and imbued with meaning and significance to man; thus and thus only may it offer itself to human perception.²²

By describing the political world as a human product, Heller offers a very humanistic understanding of political science, and politics itself. All is driven by human activity, the ability of humans to act in a meaningful and creative manner. The political world is a reflection of this activity; therefore, it should be perceived and analysed as such. Political science then becomes a study of human creativity, hence a *Kulturwissenschaft*.²³ Politics is a domain of culture, which broadly understood encompasses all attempts to realize human ends.²⁴ Culture is constituted by both the intended and unintended consequences of normative human action in this respect. Besides, practical politics should be understood as an art, ‘not easily reducible to rationalized precepts’; one can never anticipate the decision that must be taken because this relies on ‘a certain tact’ of considering unforeseeable facts and factors that must be weighed in and balanced against each other.²⁵ In other words, because politics involves unpredictable human action, students of politics should shy away from rationalistic interpretations of that action and accept its contingent and creative nature. I will return to these ideas in the section where I discuss Heller’s understanding of politics as activity.

¹⁶Heller, *Staatslehre*, 4; Heller, ‘Political Science’, 218.

¹⁷Heller, ‘Political Science’, 209–10. Heller’s understanding of politics-as-a-discipline is influenced, he admits, by old classics, especially Friedrich Christoph Dahlmann’s *Politik* (1835), which had re-appeared in 1924, a study that lay the grounds for German constitutionalism.

¹⁸Heller, ‘Political Science’, 210.

¹⁹Heller, ‘Political Science’, 208. Heller, *Staatslehre*, 22; For a similar approach to political theory, see Kari Palonen, ‘Political Theorizing as a Dimension of Political Life’, *European Journal of Political Theory* 4, no. 4 (2005): 351–66.

²⁰Heller, ‘Political Science’, 209. To be sure, Heller does not underestimate state activity as such – by contrast he is a champion of the state as explained in the next sections.

²¹Heller, ‘Political Science’, 211.

²²*Ibid.*, 213. Later in the text, Heller draws on these ideas about human nature to explain why certain political theory texts remain valuable even out of their context, see note 30.

²³Gerhard Robbers, *Hermann Heller: Staat und Kultur* (Baden-Baden: Nomos, 1983), 18, 92.

²⁴Heller, ‘Staatslehre’, in *Gesammelte Schriften*, 126–7.

²⁵Heller, ‘Political Science’, 211.

How does Heller arrive to such an understanding of political science? In broaching the subject, he readily pays tribute to his Marxist heritage by admitting that our political knowledge and norms are sociologically and historically conditioned.²⁶ At the same time, however, he takes distance from Marxist ideas and rejects the view that political theories are always and only a deceitful propaganda-move. Neither is political theorizing the sum of ideological propositions of groups that struggle with each other at a particular place and time. The political theorist stands above (or between) such struggles. Political science, understood as a theoretical, critical and normative enterprise, is called to set 'critical standards' against which to examine all events, norms and claims. It recognizes a meaning that undercuts all political interests and struggles, that can be binding for all political groups. Its principal task is to provide 'a correct and authentic description, explanation and criticism of political phenomena'.²⁷ No precise guidelines about putting this definition to practice are presented. Instead, Heller extrapolates this positive goal for 'political science' from a list of negative assertions about what the science of politics should *not* be.

He first takes aim at eschatological and utopian interpretations of politics. These included respectively the medieval belief in God and Enlightenment certainties about natural law, both of which were seen as undisputable bases that transcend political differences. In the nineteenth century, however, this absolutism is turned around: metaphysical values are replaced by a manipulation of (political) science; a tendency to formulate as scientific and true ideas that are merely ideological. Corresponding to these changes, Heller sees a transformation of the discipline's content from a critique of naïve dogmatism to an objective analysis of ideological presumptions, and an attempt to mediate or reconcile political differences on intellectual grounds.²⁸ All these changes dramatically at the turn of the century, with the advent of radical relativists.

Heller's second and largest target are indeed the relativist philosophers of his age. Influenced by Nietzsche and expressed by the likes of Vilfredo Pareto and his contemporary Carl Schmitt, twentieth-century theorists, Heller argues, have radically relativized thought and denounced any shared ground of discussion. Absent a universally valid moral compass, politics is reduced (by the likes of Georges Sorel, Oswald Spengler and ultimately Carl Schmitt himself) to a bare power struggle where ideas turn into ideological coverings or weapons aimed to violently subject or annihilate the opponent.²⁹ The result of 'ceaselessly enmeshing the mind into opportunistic struggles' is anarchy, despotism and the impossibility of political science. But political thought must remain independent from political praxis; living proof is the timeless validity of classic works, Heller argues. If Aristotle or Bodin only aimed at narrowly servicing the political powers that be, how come their insights are still valuable today? True, their ideas played a certain function within a specific social, political and historical context. But writing within this context may have led them to discover and elucidate 'certain enduring truths of political life'.³⁰

There is always a timeless, unchanging constant, Heller concludes, and that timeless constant is human nature itself. He grounds this on an anthropological appreciation and principled defence of human agency. Compared to animals, only humans have the ability to transform their surrounding world 'in the light of his [*sic*] understanding and aspirations', to effect change on the material world, but also to imagine, to develop ideals and to turn a purpose into reality. Even as they remain limited by environmental influences, which are practically unchanged through time, humans retain the ability to alter a given reality. In his own words:

Man is the product and at the same time the molder of his history, a comparatively constant element, which evolves through living. ... While all thought is necessarily a reflection of a particular intellectual and social climate, it may, consciously or unconsciously, free itself from the immediate set of conditioning forces and acquire validity for basically different situations. So that, wherever the essential features of a political system have found

²⁶Heller, *Staatslehre*, 6; Heller, 'Political Science', 219.

²⁷Heller, *Staatslehre*, 4; Heller, 'Political Science', 218.

²⁸Heller, *Staatslehre*, 6–7; Heller, 'Political Science', 220.

²⁹Heller, *Staatslehre*, 9; Heller, 'Political Science', 221.

³⁰Heller, *Staatslehre*, 10; Heller, 'Political Science', 222.

adequate intellectual expression and where social continuity has been unbroken, political opinion becomes elevated to the plane of real political understanding which may preserve its inner validity in the midst of all political transformations and shifts of power.³¹

The consequence of seeing humans as on one hand embedded in socio-historical contexts but on the other capable of transforming them is profound for the discipline. We should study politics, Heller says, by preserving the intellectual independence of thought vis-à-vis political phenomena. In other words, political science should not be hostage to political praxis, but retain a certain degree of normativity. Political science must produce norms and political 'laws' that determine theory and praxis in the future.

By no means, however, must this be confused with legal positivism, a school of thought represented by Hans Kelsen that Heller strongly polemicizes against. Positivist legal theory rests on a false analogy of the mathematical-logical method to law and thus creates for itself a deceptive sense of security and objectivity.³² Inasmuch as it is a value-neutral method of interpretation without reference to socio-historical conditions, Kelsen's pure theory is an 'empty' theory; and as long as it lacks a historical political telos, it is a 'blind' theory.³³ It eschews what all intellectual disciplines require: ontological positioning, subjective decision-making and personal responsibility. Positivists' 'fear of decision', as Heller calls it, cannot live up to these standards.

But in distancing himself from Kelsen's positivism, Heller finds himself closer to the anti-positivist Schmitt. Like him, Heller argues that all conceptions of law are constituted politically under the influence of society and culture. He also agrees with Schmitt on the importance of a sovereign decision. But Heller vehemently opposes Schmitt's rejection of a *Rechtsstaat*, as well as his anti-pluralist and anti-liberal ideas that led him down the path of dictatorship. Whereas Kelsen is respectfully accused for promoting a theory of 'will-less norm' – a depoliticized liberalism – Schmitt is passionately denounced as a theorist of 'norm-less willpower' – an anti-state totalitarianism which is fundamentally apolitical.³⁴ Thus, in the words of David Dyzenhaus, while Kelsen is Heller's principal legal target, Schmitt remains his principal political target.³⁵

His reserve towards both is also methodological. Heller is at once a substantivist – like Schmitt – since he accepts that the content of law and politics generates from ethical principles, but also a relativist – like Kelsen – since he considers these principles to be immanent, grounded in social and cultural life.³⁶ But he draws on very different sources compared to his two peers. While the foundations for Kelsen's theory is science and for Schmitt 'concrete order' thought, Heller grounds his ideas for law and politics on socio-culturally conditioned ethical practices. To the extent that he is critically borrowing elements both from relativism and from moral-political conceptions of law, Heller constitutes a unique voice in German political science. This distinctiveness is key for comprehending his concept of politics, as well as his entire political and legal philosophy.

4. Heller's sphere-concept of politics

Surely, the most notorious and influential conception of politics in Heller's time (and beyond) was the one furnished by his political rival, Carl Schmitt. In his *Der Begriff des Politischen*, Schmitt described politics as an existential distinction between friend and enemy, where the categories 'friend' and 'enemy' are always collective units and the enmity always public and mutual.³⁷ In

³¹Heller, *Staatslehre*, 11; Heller, 'Political Science', 222–3.

³²Hermann Heller, 'Bemerkungen zur Staats- und rechtstheoretischen Problematik der Gegenwart', *Archiv des öffentlichen Rechts* 55, no. 3 (1929): 321–54, at 321–3.

³³Klaus Hornung, 'Hermann Heller: Die Begründung der Staatslehre durch die politische Soziologie', *Archiv für Rechts- und Sozialphilosophie* 72, no. 4 (1986): 531–8, at 532.

³⁴Hornung, 'Hermann Heller', 534. For Heller, will and norm must be mediated, in order to produce a state of 'social democracy'.

³⁵David Dyzenhaus, 'Hermann Heller – An Introduction', *Cardozo Law Review* 18, no. 3 (1996): 1129–37, at 1131 (my italics).

³⁶*Ibid.*, 1134.

³⁷Schmitt, 'Concept of the Political', 28–9; Lars Vinx, 'Carl Schmitt', in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Spring 2016). <https://plato.stanford.edu/archives/spr2016/entries/schmitt/> (accessed July 24, 2019).

deciding to face off an enemy to the point of extinction, Schmitt argues, members of a group associate themselves politically; and conversely, in deciding to exterminate members of another group for the reason that they belong to that group, they produce an ultimate form of dissociation. Thus, whenever a group draws a friend–enemy distinction against another group, it gets established as a political community.³⁸ Heller profoundly disagrees with this view.

Heller's critique of Schmitt's concept of 'the political' is an internal critique. He argues that Schmitt's idea betrays a certain degree of 'psychologism', an uncritical application of a psycho-analytical understanding of relationships on matters of politics and the state.³⁹ As an example, he indicates how much the friend–enemy distinction reverberates the aggression involved in an intensive erotic affair or a regular fight for that matter. To escape such a reduction, Schmitt builds into his conception a logical element that Heller finds crucially misleading: the identification of politics and the state. No justification or explanation for collapsing all political decisions into state decisions is offered, he complains. Such an arbitrary move must have Hegelean origin. In an earlier work, Heller had pointed at Hegel's philosophy of the state as the springboard for the power state ideology that ensued.⁴⁰ The principle of absolute State supremacy had since dominated all formulations of the concept of politics, and had limited the possibility to imagine other standards of political existence (a tendency from which Heller himself cannot escape.⁴¹ In this sense, Schmitt inherits a long-established tradition of attributing all political power to the state, but does so in an unforgivably uncritical fashion.

But Schmitt's concept has more problems. In Heller's mind, it fails to offer a justification of how a state is established and maintained and, thus, how the entire domain of internal politics is regulated. It ignores the dynamic process through which the state turns the plurality into unity.⁴² Worse yet, Schmitt limits all politics to external politics and all of that to war; he conflates the word 'politics' with the Greek word for war, *polemos*.⁴³ By contrast, Heller finds that politics is characteristically about the use of other means, and precisely about striving to avoid an existential friend-or-enemy confrontation.⁴⁴ Unlike political power, military power is only a technical form of power, without a goal or legitimacy of its own.⁴⁵ At best, Schmitt's 'contentless' activism offers a confirmation of the trivial idea that all life is a struggle. At worst, it tries to emulate the aggressive logic of economic power in capitalism, or the psychology of a scuffle, to describe the substance of 'the political'.

In Heller's mind, we cannot fully grasp 'the political' unless we conceptualize it as part of social life, but a part whose significance extends to the whole.⁴⁶ Politics, he argues, is 'the effort to develop and utilize organized social power'. His definition of social power, which is the core object of politics, is rather complex.

Organized social power may be defined as that type of power which is engendered and maintained by joint human activity guided by a more or less explicitly agreed upon set of rules, and which is converted into action by special organs deciding upon and determining those rules.⁴⁷

³⁸Schmitt, 'Concept of the Political', 38, 43–4.

³⁹Heller, *Staatslehre*, 206–7. For a translation, see Hermann Heller, 'The Nature and Structure of the State', [1934], transl. David Dyzenhaus, *Cardozo Law Review* 18, no. 3 (1996–1997): 1139–216, at 1147.

⁴⁰Hermann Heller, *Hegel und der nationale Machtstaatsgedanke in Deutschland: Ein Beitrag zur politischen Geistesgeschichte* (Leipzig: Teubner, 1921), https://reader.digitale-sammlungen.de/de/fs1/object/display/bsb1128105_00005.html (accessed July 24, 2019).

⁴¹Jeffrey Andrew Barash, 'Political Mythologies of the Twentieth Century in the Perspective of Hermann Heller, Ernst Cassirer, and Karl Löwith', *Bulletin du Centre de recherche français à Jérusalem* 6, no. 1 (2000): 121–33, at 123. <http://journals.openedition.org/bcrfj/2882> (accessed July 24, 2019).

⁴²Hermann Heller, 'Political Democracy and Social Homogeneity', [1928], in *Weimar: A Jurisprudence of Crisis*, ed. Arthur J. Jacobson and Bernhard Schlink, transl. David Dyzenhaus (Berkeley: University of California Press, 2000), 256–65, at 258.

⁴³*Ibid.* For Heller himself, '[t]he word "politics" derives from *polis*, not from *polemos* [war], even though the common root of these terms remains significant.' Heller, 'Political Democracy', 258.

⁴⁴Heller, *Staatslehre*, 206–7.

⁴⁵*Ibid.*, 208.

⁴⁶Dyzenhaus, 'Hermann Heller', 1136.

⁴⁷Hermann Heller, 'Power, Political', *Encyclopaedia of the Social Sciences*, ed. Edward Seligman, vol. 11 (New York: The Macmillan Company, 1933), 300–5, at 301.

In other words, social power comes about by collaborating under a certain internal set of rules. Likewise, 'the political' is 'an efficacious structure which comes into being and maintains itself in accordance with laws which are relatively peculiar to it'.⁴⁸ But not all development and application of organized social power is political. Other units direct and organize social power, for example, the church, the military, business, workers' unions and so on. In all these instances, a cooperation between people establishes a common set of rules and activates a unitary form of power.

What other organs of organized social power lack, however, is the territorial concentration of that power. This logic sets the stage for Heller's concise definition of 'the political' as 'the independent organization and activation of social cooperation within a territory'.⁴⁹ In a distinctly Hobbesian style, he explains that political power exists due to the fact that people within a certain territory need to agree on a *status vivendi* in order to avoid civil war and invasion; institutional mechanisms are then set up to apply this concentrated power.⁵⁰ Because of the territorial and other criteria that the political adds to social power, the state is the optimal expression of the former, 'the political optimum'. Having at its disposal a legal order, which is forged and perpetuated through the organs of the state, it towers above all other forms of political power within its territory. As 'the most powerful, the most highly developed, and the most efficient' form of regulating and guiding political activity, it is the political organization *par excellence*.⁵¹

Political power both resembles and distinguishes itself from social power. Like social power, it consists of an 'objective function'. This means that the exercise of political power does not depend on the subjective will and action of an individual (the politician); it is embedded in structures of cause and effect. Hence, in order to qualify as political, the exercise of power must follow the laws that are peculiar to politics. Here, Heller's theoretical advances radically depart from those of Schmitt. Unlike his pro-fascist rival, Heller strives to avoid a definition of 'the political' as an unrestricted, irrational power struggle, where activism and the use of bare force are unbound by any laws except the will to predominate. Instead, Heller offers a conception of 'the political' that contains 'the legal'. For an act to fall within the domain of 'the political', it has to satisfy a number of criteria, and most importantly to obey the laws that constitute 'the political'. State power is always 'legally organized political power'.⁵²

To understand this point better, it is worth pausing in order to consider Heller's ideas regarding state power. Heller accepts that human societies, and therefore the nature of politics, is inherently conflictual. But unlike Schmitt, who takes conflict to be constitutive of politics, he thinks that the precondition for *political* conflict is to reject the use of physical force as a way for resolving disagreements.⁵³ In its place, he argues, should be means that justify the state's mission: to secure co-operation between humans.⁵⁴ In Dyzenhaus' words, for Heller '[the] political is the struggle between conflicting parties to influence or determine the terms of social co-operation'.⁵⁵

Cooperation is the key to unlock Heller's concept of 'the political'. He explicitly contrasts cooperation to coordination. If the state only aimed at coordinating human activity, he argues, coercing dissenters to obey laws would suffice. But the state, in Heller's mind, requires dissenters to *willingly* accept state decisions. A corollary of such a requirement is that state decisions must be based on a fundamental distinction between just and unjust, a distinction that runs through the entire structure of law. Making and remaking this distinction is precisely what constitutes 'the political' in Heller's terms; negotiating a society's ethical thresholds is the prerequisite of social cooperation that in turn justifies the existence of the state.

⁴⁸Heller, *Staatslehre*, 203; for English, see Heller, 'Nature and Structure', 1144.

⁴⁹Heller, *Staatslehre*, 204; Heller, 'Nature and Structure', 1144.

⁵⁰Heller, 'Power, Political', 301.

⁵¹*Ibid.*, 302; Heller, *Staatslehre*, 205; Heller, 'Nature and Structure', 1146.

⁵²Heller, 'Power, Political', 304.

⁵³David Dyzenhaus, 'Hermann Heller and the Legitimacy of Legality', *Oxford Journal of Legal Studies* 16, no. 4 (1996): 641–66, at 653.

⁵⁴Heller, *Staatslehre*, 313–4.

⁵⁵Dyzenhaus, 'Heller and the Legitimacy', 653.

As a result, state power – and all types of political power for that matter – is never unidirectional. It is ‘a relational resource’, constituted by the relations between different groups and the deliberate activities of their members. Thus, in his scheme, not only is it impossible to monopolize power and bring it under the exclusive control of the powerful; it is also unrealistic to claim political power *over* the state, because political power exists and is exercised in its highest form *within* the state.⁵⁶ Because successfully organized political power requires the deliberate cooperation of individuals, it is always undercut by a normative basis of justification. To be effective and enduring, it endeavours to win acceptance for the ethical norms that animate the laws it abides to, so that it can never lapse into unbound amorality.⁵⁷

One last prerequisite for the successful organization of political power for Heller is social ‘homogeneity’. To regulate and effectively control social co-activities and ease socio-economic tensions, the people of a given territory must be ‘relatively’ homogenous.⁵⁸ This concept is controversial, to say the least. It is the portal to Heller’s espousal of a sort of nationalism based on shared cultural norms, a so-called social nationalism that was conceived as a response to Nazism.⁵⁹ Nevertheless, if we contrast Heller’s homogeneity with equivalent notions of the time, it soon loses much of its essentialist dimension. Heller himself usefully contrasts his concept of homogeneity with two others. On one hand is ‘formal-legal’ or ‘civil homogeneity’, the formal equality of all persons before the law; the problem with this type is that, under conditions of social and economic inequality, it becomes subverted and turns into a most radical form of inequality.⁶⁰ On the other hand is Schmitt’s ‘absolute’ or ‘substantive homogeneity’, a primordial natural or cultural unity of the people, a community of blood. This form has no normative significance, it cannot by itself produce organized political unity, which is always a product of conscious human activity, according to Heller.⁶¹ In contrast to these,

[s]ocial homogeneity is always a social-psychological state in which the inevitably present oppositions and conflicts of interest appear constrained by a consciousness and sense of the ‘we,’ by a community will that actualizes itself.⁶²

This social consciousness of togetherness contains the will and power to overcome huge differences, tensions and antagonisms. An exemplary manifestation of this commonness are the shared principles for discussion in parliamentary systems, and the possibility of *fair play* that makes it possible for political rivals to come to agreement.⁶³ Produced in multiple, overlapping spheres, this consciousness consists in people recognizing as their own the economic, ethical and intellectual foundations of the laws and state decisions. Neither religious, nor economic, cultural or convergence through shared conventions can replace it. Hence, albeit a community of norms does undergird homogeneity à la Heller, this community is not founded on primordial bonds, but is entirely socially constructed. Social homogeneity conceived in these terms, as a shared ownership of pre-legal principles, is indispensable for political unity.

In sum, Heller’s concept of politics as a sphere is very distinct from Schmitt’s. By polemicizing the friend/enemy distinction, Heller creates his own substantive notion of ‘the political’ that is also conflictual, but conditioned by agreed rules and shared norms that enable social cooperation. Thus, he situates the political squarely between the legal and social sphere. From this carefully carved out place for politics he then extracts an implicit yet distinguishable understanding of politics as an activity.

⁵⁶Ibid., 654.

⁵⁷Heller, ‘Power, Political’, 303; Klaus Hornung, ‘Hermann Heller: Die Begründung der Staatslehre durch die politische Soziologie’, *Archiv für Rechts- und Sozialphilosophie* 72, no. 4 (1986): 531–8, at 534.

⁵⁸Heller, ‘Power, Political’, 302; For the use of the term ‘relative homogeneity’, see Heller, ‘Nature and Structure’, 1165.

⁵⁹See Heller’s essay *Sozialismus und Nation* (Berlin: Arbeiterjugend Verlag, 1925), https://reader.digitale-sammlungen.de/de/fs1/object/display/bsb11128325_00005.html (accessed July 24, 2019). This support for nationalism was shared by others who, like Heller, belonged to the right wing of the *Sozialdemokratische Partei Deutschlands* in the mid-1920s, the so-called *Hofheimarer Kreis*.

⁶⁰Heller, ‘Political Democracy’, 262.

⁶¹Heller, ‘Nature and Structure’, 1165–6.

⁶²Heller, ‘Political Democracy’, 261.

⁶³Ibid., 260.

5. Heller's activity-concept of politics

What does acting politically mean for Heller? Is there a certain quality that attached to certain behaviours can turn them into typical political behaviours? We have earlier described how he defines the political power exercised by various units or associations. That their power can be recognized as political stems from the fact that they try to organize social power according to rules and through structures that maintain these rules. This close reliance of political power on rules and rule-enhancing structures points in the direction of the state.

Heller's sphere-concept of politics is explicitly and undoubtedly state-oriented.⁶⁴ Without a *polis*, or a state, there is no politics. Because the organization and activation of social cooperation within a territory is best achieved by the state, which disposes of a legal system and permanent organs, the state is the optimal form of political organization. All other political associations wish to be as efficient and powerful as the state. Although, if they succeed, these smaller units – the church or workers' unions – risk losing their special social function,⁶⁵ both the aim and the means of all types of politics is to become state politics. This is because they strive to secure their interests by influencing state law, and the means to do so is through the state's power apparatus.⁶⁶

An important insight that surfaces from this realization is Heller's concept of politics as an activity. He describes it here as 'the art of "transforming social tendencies into legal form"'.⁶⁷ This is what the state does in an exemplary fashion. 'Legal form' is not simply the technical laws that help sustain political unity; it is not even the legal system as such. It reflects the distinction between just and unjust, or otherwise the ethical and normative principles that structure the terms of social cooperation. Put differently, to act politically is to strive for the institutionalization and legalization of one's ethical principles that concern how social relations should be organized.

In addition to that, political power is independent and intentional, it struggles to change power dynamics and basic policies.⁶⁸ As a result, it only applies to groups which initiate and steer policy and not to those who implement and execute it. In this sense, politics is typical of governments and legislatures, rather than bureaucracies and judiciaries. But even these are not inherently political; their political nature simply predominates over their social nature. Its non-intrinsic quality implies that politics does not mark a position, office or status by definition, but depends on the activity associated to the office or carried out by the holder of that office.

But what do humans actually do when they act politically? According to Heller, 'one rules politically when one makes the final decisions in regard to those acts that pertain to the unity of cooperation'.⁶⁹ Decisions become political when they order the antagonistic plurality of social acts and the unending perplexity of reciprocal human relations, for the sake of cooperation. The endpoint of political activity is to achieve a unity of territorial decision. The purpose of politics, is, after all, the ordering of social relations. Wherever the unity of social cooperation is not self-evident or does not emerge easily and voluntarily, then the need for ordering and thereby politics comes in.⁷⁰ Therefore,

any question that pertains to the order uniting the social life of that territory is potentially subject to political decision. The judgment about the relevance of this or that social act for the unity of cooperation changes with the historical and social situation and location.⁷¹

A crucial aspect that emerges from this passage is the situational and unbound character of Heller's activity-concept of politics. In Heller's mind, political action is a purposeful 'disposition', an 'art' of

⁶⁴Henkel, *Hermann Hellers Theorie*, 276.

⁶⁵Heller, 'Nature and Structure', 1146.

⁶⁶Heller, *Sozialismus und Nation*, 69–70.

⁶⁷Heller, 'Nature and Structure', 1145–6; Heller, *Staatslehre*, 205. Heller borrows this definition of politics from Ludo Moritz Hartmann (1865–1924), a lesser-known Austrian historian and social-democratic activist.

⁶⁸Heller, 'Power, Political', 301. See also Heller, 'Nature and Structure', 1145.

⁶⁹Heller, 'Political Democracy', 256–7.

⁷⁰Hermann Heller, 'Der Sinn der Politik', [1924], in Hermann Heller, *Gesammelte Schriften*, ed. Martin Drath and Christoph Müller, vol. 1 (Tübingen: Mohr Siebeck, 1992), 431–5.

⁷¹*Ibid.*

weighing in and balancing out various elements that pertain to a particular, politically relevant, situation. It is a disposition to make a decision with respect to that situation, one that does not preclude or in any way foresee the content of this decision. In this sense, this disposition is a free act.⁷² It is not conditioned by any pre-given meaning or direction and is only defined by the requirement to deal with the political situation at hand. The same idea is echoed in Heller's discipline-concept, and specifically in his commitment to a socio-historical understanding of political reality. It is important to distinguish, he says, between natural and historico-political causation. For example, the battle of Waterloo may have been the cause for Napoleon's later conduct, but in no way did it determine the exact form of that conduct, i.e. whether he fled, committed suicide or something else. Unlike the causes of physical events, the causes of political events create 'a new complex of potentialities'.⁷³ This view reflects the idea that politics is to act upon contingent situations.

When is a political act successful? Or, put differently, what makes a great politician? For once, Heller thinks that the art of politics is an 'inborn aptitude', since one can only dispose of the 'tact' of making correct decisions and cannot learn anything about the content of decisions in advance.⁷⁴ But this aptitude can be developed. Heller thinks that, since political reality is defined by human drives, feelings and ideas, as well as the complexity of social relations, a politician must first and foremost have a good grip of reality. This includes, for example, the reality in which workers, the people and international actors find themselves. Politicians should have knowledge and experience in order 'to know what is', and then be competent 'to do what is correct'.

For Heller, politicians should only obey one moral rule, namely to successfully work for the others. Because politics is the effective organization of society, a politician who does not understand people and does not know social relations, cannot choose the right means and ends for fulfilling their task. They cannot set clear goals and make tough decisions. Heller paints here the profile of a good politician as one that does not get carried away by sentiments or passions but remains a cold calculator in moments of decision-making. True, they should remain human and have a feeling for others; it is those others after all who evaluate the morality of politicians' choices. Yet, the politician alone is responsible to put society in order. To do this, they should be attentive to every moment, for social reality is in constant flux.⁷⁵ Heller's emphasis on responsibility and a good sense of the moment echoes to some respect the qualities of a good politician outlined by Max Weber five years earlier: a passion for politics, personal responsibility and a sense of proportionality.⁷⁶

Despite agreeing with Weber on some key aspects of political ethics, Heller, however, seems to reject Weber's views on authority: traditional, charismatic and legal. He is especially opposed to the concept of charismatic leadership, which he wisely criticizes for its potential authoritarian connotations. The cult of geniuses and leaders, he says, conceives of political unity not as a matter of common values or laws, but as an expression of the rule of a hero, who stands above all of society's material and normative necessities.⁷⁷ For Heller, all authority must be legal, that is, the constitutional state should regulate not only state power but also political responsibility. This is the basis for citizens' trust towards those who possess positions of state power. Responsibility must be made concrete: the constitution should explain who is responsible to whom.⁷⁸ But responsibility of politicians should not only be personal, so that only citizens who have 'the guts for decision and responsibility' and are ready to take over respective duties are attracted to politics and held responsible.⁷⁹ It is much more crucial that citizens without political positions and tasks are ready not only to

⁷²Henkel, *Hermann Hellers Theorie*, 274–5.

⁷³Heller, 'Political Science', 214.

⁷⁴*Ibid.*, 211.

⁷⁵Heller, *Sozialismus und Nation*, 70–2.

⁷⁶Max Weber, *Politik als Beruf*, [1919] (Munich: Duncker & Humblot, 1926), 51, <https://nbn-resolving.org/urn:nbn:de:0168-ssaoar-59888-1> (accessed July 24, 2019).

⁷⁷Hermann Heller, 'Genie und Funktionär in der Politik', [1930], in *Gesammelte Schriften*, ed. Martin Drath and Christoph Müller, vol. 2 (Tübingen: Mohr Siebeck, 1992), 611–23, at 616; Henkel, *Hermann Hellers Theorie*, 390–1.

⁷⁸Henkel, *Hermann Hellers Theorie*, 556.

⁷⁹Heller, 'Genie und Funktionär', 618.

hold politicians into account (through elections), but also to cast their own political judgment and publicly take a position – and thereby exercise their own responsibility. For Heller, a political ethic must be culturally and socially embedded, lest it only contributes to distancing the rulers from the ruled and turn the constitutional into a coercive state.

Because political behaviour should not result from subjective dispositions, Heller thinks that the representative constitution should structure and regulate it. In particular, it should regulate not only power, but also responsibility. Its failure to do so creates unfavourable conditions that forge, for example, weak governments without parliamentary support such as under the Weimar constitution.⁸⁰ Hence, the qualities of a good politician are inherently linked with the qualities of a constitutional order. Political power cannot exist unless it is bound by law. By letting the logic of politics-as-sphere to weigh in and explain politics-as-activity, Heller's theory of politics and 'the political' thus comes full circle.

6. Concluding remarks

Albeit primarily a constitutional theorist, Heller's views on the centrality of politics as the connecting thread between legal and social order turned him into a key figure for German political science. Unlike Kelsen and other legal positivists of the time, he thought that politics precedes law; that it constitutes, forms and gives meaning to law. Yet, contrary to Schmitt who also prioritizes political sovereignty over positive law, Heller conceptualizes 'the political' as a law-bound sphere, not as subjective political decisionism that stands above and beyond the law. The sovereign is for Heller a democratic society with a collective will, rather than an authoritative dictator.

Opposed to Schmitt's is also Heller's understanding of political conflict. He agrees on the unavoidable and inherently conflictual nature of human societies. But, for him, humans' conflictual nature is not constitutive of 'the political' as a sphere. Distinguishing between friend and enemy offers just as little a justification for the existence of the state, as it fails to explain the role of conflict in society. For Heller, the telos of political conflict is not the one-sided victory over one's existential enemy; it is the overcoming of differences and disputes for the sake of social cooperation, a process that produces territorial unity. Therefore, to act politically means to order the antagonistic social relations that are typical of every human society. In this sense, politics is a purposeful activity, but one which leaves the content of every decision unconfined and the potentialities that follow endless.

Heller offered an approach to understanding and studying politics that connects it meaningfully to ethics, society and law. He underlined the centrality of political action but added that neither is this action conceivable outside the law and beyond morality, nor can it be disconnected from social reality. Politics is both theory and praxis. Like politicians, political theorists must reflect on ethical and legal principles, while remaining focused on context-specific political problems. Heller's work showcased that the way we conceive of politics is directly related to the way we study politics and vice-versa. As such, it can guide the science of politics in both its conceptual as well as methodological quandaries.

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⁸⁰*Ibid.*, 619; Henkel, *Hermann Hellers Theorie*, 558.