

José Luis Monereo Pérez, *La defensa del Estado social de Derecho. La Teoría política de Hermann Heller*, El viejo topo, Barcelona, 2009, 255 pp.

Hermann Heller (Teschen, Austria, 1891-Madrid, 1933) is considered as one of the most outstanding legal scholars and constitutionalists in the XXth century. He lectured in Kiel (1920-1922), Leipzig (1922-1926) and, a few years later, in Berlin (1926-1933). As a result of Nazi repression, which was due to his strong defense of the Weimar Republic after having joined the Social Democratic Party (SDP) at a critical time for the political system designed in Weimar, he took refuge in Spain where he lectured in Madrid. H. Heller believed that a Democratic State and Law were based upon power relationships (p. 12). In fact, he defended parliamentary democracy as a means to peacefully establish social democracy. On the other hand, his concept of the socialist *Rechtsstaat* [State of Law] is a material *Rechtsstaat* which respects a democratically established constitution. In Heller's last period, he criticized positivism from a moderate secular Natural Law or weak relativism perspective.

José Luis Monereo, Labour Law professor in the University of Granada, emphasizes that Heller's thought «falls within social democratic ideology but adding some singularities such as his marked nationalist and moderate decisionist orientation, since Heller flatly rejected considering Law as a means of totalitarian domination» (p. 18). He always intended to prevent the Weimar Republic Constitution from becoming legally neutralized by a decision imposed by the dominant forces regarding the *de facto* establishing of a type of factual Constitution. In fact, this Social Democratic Constitution originated in a fragmented and pluralistic society, and for this reason it provided legal and collective action channels to reach a pluralistic consensus.

He was inspired by Thomas Hobbes and Carl Schmitt regarding other issues such as the conception of sovereignty and the nature of political power. According to Heller, a sovereign would be someone who can effectively make a resolute decision in emergency situations even if it contradicts the provisions and procedures specifically provided for in the legal system. For this author, there is a political decision according to Law behind every rule, since both decisions and rules are considered as two sides of the same coin when it comes to solving legal phenomena. His intention was never to replace the *Rechtsstaat* but, instead, reorient it towards a "material" or "social" *Rechtsstaat*, thus going beyond the formality of guarantees, and, then, carrying out social reforms with the ultimate aim of establishing a Social Democratic State. He also considered the Weimar democratic Constitution to be dominated by interest and value conflicts. According to Heller, sovereignty was a property of universal action and decision unity over the territory, which was deemed as absolute even if it contradicted the Law in force (p.87). Indeed, the State displayed an organized action and decision unity; a unity which really existed and was deployed in social reality. On the other hand, Law and State were interdependent necessary conditions for their own existence in society. As far as Heller was concerned, political dominance was exercised by either those who made decisions regarding the relevant acts to achieve collective action unity within a defined territory or those who participated decisively towards this territorial decision unity. The sovereign would be, according to Heller, the one who decides under ordinary legal conditions; and, precisely because of this, the only one who has standing, in case of emergency, to eventually decide even above the written Law.

The State was normally considered as the most powerful organization within a territory and, therefore, sovereignty was the property of an action and decision unity

within a territory. Furthermore, the way the State's power was distributed determined its very form: democracy and autarchy (p. 37).

Monereo points out that «there is certain proximity regarding the spatial dimension of power between Carl Schmit's thought and the characterization of sovereignty in Hermann Heller's thought» (p. 44). Moreover, he states that, to a large extent, sovereignty theory is developed in the framework of the events which took place during the Weimar Republic period (p. 49). Heller not only defended this Republic and its formal legality at all times but also the pluralistic democratic State set up in the Weimar Republic. He also kept an anti-fascist stance, which is reflected in his work *Europa und der Faschismus [Europe and Fascism]* (1931), which referred to Benito Mussolini's fascist regime. He always rejected fascism as an effective third way between capitalism and socialism, which was capable of overcoming the traditional class struggle. In other respect, Monereo states that «fascism springs from the heart of a liberal regime and does not question the pillars of capitalism's mode of production and legal and institutional organization» (p. 66).

Hermann Heller, following the footsteps of other social democrats such as Radbruch, Kirchheimer, Neumann or Korsch, deemed it necessary to establish a real socio-legal constitution. He was in favour of a democratic State and a *Rechtsstaat* based upon real power relationships. On the other hand, Monereo declares that «the establishment of a social *Rechtsstaat* in the Weimar period is due to the influence of Heller's thought» (p. 83).

Heller noticed a weakness in the internal foundation of fascism since it lacked faith in any particular regulations. As a matter of fact, Nazi Law adopted an authoritarian attitude when trying to dismantle the *Rechtsstaat* guarantees and absorb Private Law into Public Law thus preventing individual and collective autonomy. Fascism, Heller argued, introduced an order and alignment ideology, which emerged from social contradictions and conflicts. In fact, fascism was based upon the destabilization caused by the loss of control on "social issues" and by the reins of the Establishment in a liberal *Rechtsstaat* which was in crisis because it was unable adapt to mass democracy.

He did not criticize fascism for the mere fact of being a dictatorship since he believed dictatorships could not be classified as either positive or negative. Considering any particular dictatorship and its contents, in a particular historical situation, would be decisive to determine whether it was valuable or not. On the other hand, fascism is defined as a State with a single political party thus a fascist dictatorship would replace a State with several political parties for a single-party State. An essential feature of fascism is its apparent anticapitalist and antibourgeois nature. In fact, it criticized the materialism prevailing in capitalism and searched for new ways of organizing it. But the truth was that fascism, when in power, was especially radical against socialism and tried to reallocate social, political and economic power.

His most important works include: *Die Souveränität [Sovereignty]* (1929), *Die politischen Ideenkreise der Gegenwart* (1930), *Sozialismus und Nation* (1931), and his posthumous work, *Staatslehre* (1934). In the present publication, Monereo provides the biographical sketch and theoretical-political thought of another classical figure as is the case of Hermann Heller. He does so with his characteristic mastery which enables significant diversification as he has previously done when examining Carl Schmitt's thought –who was, first, a defender of Weimar and, then, a State jurist in the National Socialist regime–, with extremely suggestive digressions and remarks. [Recibida el 10 de octubre de 2010].

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