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Het spook van Weimar: een democratie in crisis

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English summary: The ghost of Weimar. A democracy in crisis

The Weimar Republic, founded in November 1918, was the first real democracy on German territory. It came about directly after Germany's loss of the First World War – which fed conspiracy theories claiming the democratic parties who supported the new democracy wanted Germany to lose the war for their own benefit. Although the claims were false, these conspiracy theories (several versions of the so-called *Dolchstoßlegende*) gained a broad following which grew after the Versailles Treaty was signed. The Versailles Treaty played a part in several crises the Weimar Republic faced and after signing this Treaty, the democratic parties supporting the Republic never acquired a majority in the *Reichstag* again.

The collapse of the Wall Street stock market in November 1929, followed by the world wide Great Depression, marked the beginning of the end of Germany's first democracy. The economic crisis, that hid Germany particularly hard, came with a political crisis – of which Adolf Hitler and his NSDAP greatly profited. From 1932 onwards, a hostile majority was formed in the *Reichstag* and the only way to still govern in a semi-democratic way was through emergency laws. At the beginning of 1933, it became clear that the only way to form a government backed by a majority in parliament was to appoint Hitler as chancellor. This turned out to be a capital mistake: on 23 of March, Hitler took power and abolished democracy to start building his totalitarian *Third Reich*.

Since then, Weimar became famous – or rather infamous – for being a 'failed democracy'. In this research, the downfall of Weimar's democracy is of central interest. After broadly stating the historical reality of the first Germany democracy, this thesis focusses on the juridical and philosophical concepts underlying the Weimar democracy to answer the question to what extent they offered real possibilities to defend the democratic state.

First, this question will be answered for the dominant philosophical school in Germany when the Weimar Constitution was drafted: legal positivism. The German legal positivism, the so-called statutory positivism, came about during the Second Empire and was mostly advocated by Paul Laband and Carl Friedrich von Gerber. It not only separated law from morality but, most importantly, stressed the idea of the state as a bastion of power [*Machtsstaat*] in order for unity to come about. Therefore, this research argues that statutory positivism contributed to the well-known '*Befehl ist Befehl*' that, according to Gustav Radbruch, corrupted the judiciary in Germany and left it empty handed against the totalitarian *Third Reich*. Consequently, this research argues that instead of defending the democratic state that was associated with distribution of power, statutory positivism strengthened antidemocratic tendencies within the Weimar state.

Second, the central question stated above will be answered for the Weimar Constitution. Drafting this democratic Constitution was a challenge on its own whereas Germany lacked a democratic tradition. In leading literature, the Weimar Constitution is mostly criticized for the system

of proportional representation that made it necessary for a coalition of parties to govern and for the position of the head of state, the Reich's President, that was too powerful in comparison with the parliament. This research argues that the latter is true. Although the Reich's President only acquired that much power for defending the democracy against parliament – in order to prevent *Parliamentsabsolutismus* – the founders of the Weimar Republic did not reckon with the possibility that it could be the President himself that would misuse his power. And that was exactly what happened during the final days of the Weimar Republic. Max Weber was the architect of the President's position within the Constitution. Despite Weber himself surely not being in favor of a *Führer* state, it cannot be denied that his theory did contribute to the President's position of power. Moreover, German legal positivism was not really challenged with the introduction of the Weimar Constitution. The question arises whether opponents of the statutory positivism would have been able to offer possibilities to defend Weimar's democracy. This question is answered with regard to the theories of Hans Kelsen, Carl Schmitt, Rudolf Smend and Hermann Heller.

Kelsen's theory, on the one hand, criticizes statutory positivism but is, on the other hand, a positivist theory in and of itself. Kelsen argues that legal theory should be regarded as a science: it therefore has its own methods and should not be dependent upon both other sciences and morality. Kelsen's legal theory, the pure theory of law [*Reine Rechtslehre*], is closely intertwined with his democratic theory. According to Kelsen, democracy is an ongoing compromise between the minority and the majority with respect to the fact that the current minority should have the chance to become the majority during the next elections. However, Kelsen argues against denying antidemocratic forces to partake in the elections whereas democracy is, like science, non-normative and relative: it provides the rules to the democratic game but does not judge its participants. This leads to the conclusion that Kelsen's theory, although different from statutory positivism, is also unable to offer possibilities to defend the Weimar democracy. On the contrary, his relative stance on democracy without any fundamental or principal foundations more likely paves the way for a democratic suicide than for it to be prevented.

One of the main critics of both Kelsen's pure theory of law and statutory legal positivism, is Carl Schmitt. The question arises whether his theory offers possibilities to defend the Weimar democracy. Schmitt argues that Weimar's democracy was inherently weak because of the combination of liberalism and democracy. While liberalism stresses individual rights, political parties, separation of powers and secret ballots, democracy is about substantial unity that can be represented in a direct manner by the head of state: the Reich's president. The Reich's president should be able to determine who are the friends and who are the enemies of the democratic state. Liberalism does not provide any means to do so and, therefore, weakens democracy. Schmitt's theory aims to bring back the power element within the Weimar Republic. Especially after declaring the state of emergency, the Reich's president should be able to take any decision necessary to eliminate the current danger to the state. Therefore, his theory, indeed offers possibilities to defend the democratic state. However, although it

provides a clear diagnosis of the problem the Weimar Republic faced, is his theory really able to formulate an answer to the threat the antidemocratic enemies posed? The answer to his question is no: his theory is in a way an extension of Weber's and it presents a picture of *Führerdemokratie* as well. After all, who makes sure that after declaring the state of emergency, the Reich's president will give up the acquired power again? Schmitt's theory does not answer this question and therefore lacks a real solution to Weimar's crisis.

Could other theories offer that solution? This research discusses both Rudolf Smend's and Hermann Heller's stance. They both argue against Kelsen's and Schmitt's positions but are also critics of the statutory positivism. Their theories can, in a way, be regarded as complementary and therefore this research discusses them together. Smend mainly stresses the mutual relationship between citizen and state; a process which he calls 'integration'. By political participation, this integration can come about. Therefore, Smend argues that parliament is the most important democratic institute; parliament should create unity between the citizens. According to Smend, the Weimar parliament was unable to play this important part: instead of the aforementioned unity to come about, it only provided a picture of the political proportions – and therefore divisions – within the country. In order for this unity to come about, Smend emphasizes the role of integrating symbols: leaders, collective forms of life such as national holidays and, for instance, the flag.

It could be argued that Smend's theory offers important leads for the foundation of the democratic form of state – supported by its citizens – to come about. However, his theory is unsatisfactory in the sense that it begs the question which values are *so* important that they cannot be changed during the integrative practice. Considering the situation within the Weimar Republic, where an increasing number of citizens turned their back against the democratic state, an answer to this question is inevitable. In this regard, Heller's theory is promising.

Heller stresses the common will that underpins a democratic state – a common will that is reflected in the founding principles of law, the *Rechtsgrundsätze*. According to Heller, the state is a social process based on the unity of decisions that citizens regard as legitimate. This is only possible when a common point of departure of the discussion exists and this common point of departure is to be formed by the *Rechtsgrundsätze*. If citizens acknowledge these founding principles and feel represented by them, a feeling of togetherness and solidarity – both with each other and with the state – can come about (the so-called *Wir-Bewußtsein*). According to Heller, this is the ultimate base of democracy and the legitimacy of the state's power.

This research argues that a combination of Smend's and Heller's views offer important leads for a philosophical defense of the democratic state. Heller's *Rechtsgrundsätze* can be regarded as the foundation of the democratic state upon which every citizen agrees. However, these principles should also be 'carried' by the citizens and, therefore, it is important that citizens keep involved with the democratic state, especially after its founding. With regard to the latter, Smend's concept of integration offers stimulating possibilities: he states that on the one hand being involved in the

democratic process by, for instance, participation in its institutions and voting and on the other hand feeling represented by the democratic leader and partaking in national festivities bring about this involvement.

Finally, this leaves us with the question whether Smend's and Heller's theory could have offered *real* possibilities to defend the Weimar democracy against its enemies. In the beginning days of the Weimar Republic, the democratic parties that founded the state (the Weimar Coalition) were broadly supported – which changed rapidly after signing the Versailles Treaty that fueled the already existing conspiracy theories and played a part in several economic and political crises the Republic faced. Even during Weimar's relative stable years, the support of the Weimar Coalition was not restored. The philosophical theories that are discussed in this research, especially Smend's and Heller's, might have been a departing point of defending Weimar's democracy if the Weimar Constitution would have provided a clearer picture of the nature of its form of state. As it was Germany's first democracy, the Constitution can be regarded as experimental. Also, the position of the Reich's President was too strong, creating a democracy from *above* instead of from *below*.

In addition, the Weimar democracy lacked an inspiring story while, on the other hand, its enemies – especially communism and Nazism – did provide a 'better' view of where society should be heading. Under the influence of several crises, citizens turned their backs against the democratic state. The state could not defend itself, not by using a philosophical line of defense stressing democratic legitimacy (instead of providing the Reich's President with the means of declaring a state of emergency) and not by using force: increasing violence threatened the essential monopoly on violence.

Concluding, the ghost of Weimar is a multi-headed monster fueled by the statutory positivist tradition that could not be contradicted by Kelsen and Schmitt: Kelsen strengthens democratic weakness by presenting democracy as a suicide pact and Schmitt resorts to an increasing power of the head of state. Heller's and Smend's theory, although interesting, could not offer a way out of the grimly reality of the Weimar Republic either. The Weimar Republic was born out of crisis and violence and ended in crisis and violence. This research, therefore, concludes that the juridical and philosophical concepts underlying the Weimar Republic did not offer real possibilities to defend itself against its enemies.