

legality and legitimacy carl schmitt hans kelsen and hermann heller in weimar

legality and legitimacy carl schmitt hans kelsen and hermann heller in weimar represent a crucial debate in the legal and political theory of the Weimar Republic, reflecting differing views on the foundation and authority of law in a turbulent period of German history. This article explores the contrasting perspectives of Carl Schmitt, Hans Kelsen, and Hermann Heller on legality and legitimacy, emphasizing their intellectual contributions during the Weimar era. Each thinker grappled with questions surrounding constitutional order, the rule of law, and political authority, which remain influential in contemporary legal philosophy. By examining their theories, this article sheds light on the complexities of state sovereignty, democratic legitimacy, and the challenges faced by Weimar Germany. The discussion will cover the historical context, Schmitt's concept of sovereignty and legitimacy, Kelsen's legal positivism, and Heller's integration of legality and democracy. The analysis concludes by highlighting the enduring relevance of their ideas in understanding legality and legitimacy in constitutional democracies.

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Historical Context of Legality and Legitimacy in Weimar Germany

The Weimar Republic, established in 1919 after Germany's defeat in World War I, was marked by political instability, economic crisis, and social upheaval. The legitimacy of the new democratic order was continually contested by various political forces, including monarchists, communists, and emerging fascists. Within this volatile environment, legality and legitimacy became central issues as the state sought to maintain constitutional order while facing challenges from both left and right-wing extremists. The Weimar Constitution itself embodied progressive democratic ideals but faced difficulties in practical enforcement and acceptance. Intellectuals like Carl

Schmitt, Hans Kelsen, and Hermann Heller engaged deeply with these challenges, offering distinct theories on how law and legitimacy could be understood and sustained in such a fragile democracy.

Carl Schmitt: Sovereignty, Legality, and Political Theology

Carl Schmitt's contributions to the discourse on legality and legitimacy in Weimar Germany revolve around his concept of sovereignty and the political decision. He argued that legal norms alone could not guarantee political order without the decisive authority of a sovereign capable of suspending legality in times of crisis. Schmitt famously stated, "Sovereign is he who decides on the exception," emphasizing the primacy of political authority over abstract legal norms. His theory challenges the notion that legality is sufficient for legitimacy, positing instead that political legitimacy derives from the capacity to preserve the state through concrete decisions, especially in emergencies.

Sovereignty and the State of Exception

Schmitt's theory highlights the tension between legality and legitimacy by introducing the concept of the state of exception, where normal legal frameworks are temporarily suspended. This doctrine critiques liberal legalism's inability to address existential political threats, asserting that a sovereign must hold the power to decide when laws do not apply. Schmitt's political theology further underlines the quasi-religious authority of sovereignty, linking legitimacy to the decision-making power that transcends legal norms.

Critique of Parliamentary Democracy

In Schmitt's view, parliamentary democracy often leads to indecisiveness and political paralysis, undermining the legitimacy of the legal order. He contended that the Weimar Republic's legal framework was vulnerable precisely because it lacked a strong sovereign capable of decisive action. For Schmitt, legitimacy was not derived from procedural legality or popular consent alone but from the capacity of the sovereign to maintain order and unity.

Hans Kelsen: Legal Positivism and the Pure Theory of Law

Hans Kelsen, in contrast to Schmitt, developed a rigorous legal positivist framework emphasizing the autonomy of law from politics. His Pure Theory of Law sought to establish a normative system grounded in a hierarchical

structure of legal norms, culminating in a fundamental “Grundnorm” or basic norm. For Kelsen, legality and legitimacy were closely linked to the validity of legal norms within this system, independent of political considerations or moral judgments.

Grundnorm and Legal Validity

Kelsen’s concept of the Grundnorm serves as the foundational legal norm from which all other norms derive their validity. This theoretical construct allowed him to separate legal science from political ideology, focusing on the internal coherence and systemic validity of law. Legality, in Kelsen’s framework, is defined by conformity to the Grundnorm and the legal hierarchy, thus providing a stable basis for legitimacy grounded in law itself.

Democracy and Legal Order

Kelsen also defended the democratic order of the Weimar Republic through his legal positivism. He argued that democracy was the legitimate form of government as long as it adhered to the constitutional norms established by the Grundnorm. The legitimacy of law, therefore, derives from its procedural correctness and its place in the legal hierarchy, rather than from any extralegal political authority.

Hermann Heller: Democracy, Legality, and Social Legitimacy

Hermann Heller offered a critical synthesis that emphasized the interplay between legality and political legitimacy within a democratic framework. Unlike Schmitt’s focus on sovereign decision and Kelsen’s formal legalism, Heller stressed the importance of social and political factors in legitimizing law. He argued that law must not only be legally valid but also rooted in democratic participation and social justice to achieve true legitimacy.

Integration of Legality and Democracy

Heller’s theory posits that legality without democratic legitimacy is insufficient for political order. He emphasized the role of the state as an organizer of social interests and the need for the legal system to reflect the democratic will of the people. For Heller, legitimacy arises from the law’s capacity to mediate social conflicts and to express collective self-determination within the framework of democratic institutions.

Critique of Formalism

Heller criticized both Schmitt's authoritarianism and Kelsen's formalism for neglecting the social and political dimensions of law. He argued that legal norms must be connected to the lived realities and democratic aspirations of society. Thus, the legitimacy of legal order depends on its responsiveness to social needs and its ability to foster political inclusion.

Comparative Analysis of Schmitt, Kelsen, and Heller

The theories of Carl Schmitt, Hans Kelsen, and Hermann Heller present fundamentally different approaches to understanding legality and legitimacy in the Weimar Republic. Schmitt prioritizes sovereign authority and political decision as the source of legitimacy, especially in crises. Kelsen emphasizes a formal, hierarchical legal system where legitimacy is derived from adherence to the Grundnorm and legal procedures. Heller bridges these perspectives by advocating a democratic legitimacy that integrates legality with social and political realities.

- **Authority vs. Normativity:** Schmitt champions decisive authority; Kelsen emphasizes normative legality; Heller stresses democratic legitimacy.
- **Role of the Constitution:** Schmitt views it as subordinate to sovereign decisions; Kelsen sees it as the ultimate legal norm; Heller regards it as a democratic social contract.
- **Democracy:** Schmitt is skeptical of parliamentary democracy's effectiveness; Kelsen supports democracy as a legal order; Heller advocates for democracy as a legitimizing force.
- **Law and Politics:** Schmitt blurs law and politics through decisionism; Kelsen separates law from politics; Heller integrates them within democratic social processes.

These contrasting theories reflect the profound legal and political challenges faced by the Weimar Republic and continue to influence contemporary debates on the legitimacy of legal and political authority in constitutional democracies.

Frequently Asked Questions

What were the main differences between Carl Schmitt's and Hans Kelsen's views on legality and legitimacy during the Weimar Republic?

Carl Schmitt emphasized the importance of political decisionism and the sovereign's authority to determine the exception, focusing on legitimacy through decisive power. In contrast, Hans Kelsen advocated a normative legal positivism, emphasizing a hierarchical legal order where legality is grounded in a basic norm (Grundnorm), stressing the legitimacy of law through its formal validity and adherence to legal procedures.

How did Hermann Heller's perspective on legality and legitimacy differ from that of Schmitt and Kelsen in the Weimar context?

Hermann Heller combined legal positivism with a strong emphasis on social democracy and the role of law in achieving social justice. Unlike Schmitt's focus on sovereign power or Kelsen's pure legal normativity, Heller argued that legitimacy also requires addressing social realities and democratic principles, advocating for a legal order that supports social welfare and political democracy during the Weimar Republic.

Why is Carl Schmitt's concept of the 'state of exception' important for understanding legality and legitimacy in Weimar Germany?

Schmitt's concept of the 'state of exception' is crucial because it challenges the strict separation between legality and legitimacy by arguing that in times of crisis, the sovereign must have the power to suspend the law to preserve the state. This idea reflected the unstable political environment of Weimar Germany, where emergencies often justified extraordinary measures that raised questions about the rule of law and democratic legitimacy.

How did Hans Kelsen's theory of the 'Grundnorm' contribute to discussions on legality and legitimacy in the Weimar Republic?

Kelsen's theory of the 'Grundnorm' or basic norm provided a foundation for the legal system's legitimacy by positing an underlying fundamental norm from which all legal norms derive their validity. This helped clarify the separation of law and politics and aimed to ensure that laws enacted during the Weimar Republic were legally valid, thereby promoting a stable and legitimate legal order despite political turmoil.

In what ways did the debates on legality and legitimacy among Schmitt, Kelsen, and Heller reflect the broader political challenges of the Weimar Republic?

The debates mirrored the Weimar Republic's struggle to balance democratic legitimacy, legal order, and political stability. Schmitt's focus on sovereign decisionism responded to fears of political paralysis, Kelsen's legal positivism sought to maintain a neutral, stable legal framework, and Heller emphasized social justice and democratic participation. These competing ideas highlighted tensions between authority, law, and democracy during a period marked by crises, political extremism, and constitutional challenges.

Additional Resources

1. *Legality and Legitimacy in Weimar: The Theories of Carl Schmitt*

This book explores Carl Schmitt's influential ideas on the nature of legality and political legitimacy during the tumultuous Weimar Republic era. It examines his critique of liberal democracy and his concept of the sovereign decision as central to legal authority. The text situates Schmitt's work within the broader political and legal crises of Weimar Germany.

2. *Hans Kelsen and the Pure Theory of Law in Weimar Germany*

Focusing on Hans Kelsen's groundbreaking Pure Theory of Law, this volume delves into his efforts to separate law from politics and morality during the Weimar period. It highlights Kelsen's influence on constitutional theory and his vision of a normative legal system grounded in a basic norm or Grundnorm. The book contrasts Kelsen's legal positivism with other contemporary theorists.

3. *Hermann Heller: Law, Democracy, and Social Justice in the Weimar Republic*

This work offers an in-depth analysis of Hermann Heller's contributions to legal and political theory in Weimar Germany. Emphasizing his commitment to democracy and social justice, the book explores Heller's attempts to reconcile legality with political legitimacy. It also discusses his critique of both Schmitt's authoritarianism and Kelsen's formalism.

4. *Contested Legitimacies: Legal Thought in Weimar Germany Between Schmitt, Kelsen, and Heller*

This comparative study investigates the competing legal philosophies of Schmitt, Kelsen, and Heller during the Weimar Republic. It considers how each theorist conceptualized the relationship between law, state authority, and legitimacy amidst political instability. The book provides a critical overview of their enduring impact on legal and political theory.

5. *State, Sovereignty, and Law: Carl Schmitt's Influence on Weimar Jurisprudence*

Examining Carl Schmitt's notion of sovereignty, this book analyzes his impact on Weimar legal doctrine and political thought. It discusses Schmitt's assertion that legal order depends on the sovereign's power to decide exceptions and the implications for democratic governance. The text also addresses controversies surrounding Schmitt's legacy.

6. The Pure Theory and Political Reality: Hans Kelsen's Legal Philosophy in Context

This volume situates Hans Kelsen's Pure Theory of Law within the political realities of Weimar Germany, exploring tensions between his normative approach and the era's political upheavals. It evaluates Kelsen's efforts to maintain legal stability and constitutional order amid democratic challenges. The book also reflects on Kelsen's influence on later legal positivism.

7. Hermann Heller and the Crisis of Weimar Democracy: Law as a Tool for Social Change

Focusing on Heller's vision of law as an instrument for democratic renewal and social transformation, this book addresses his responses to the Weimar Republic's constitutional crises. It highlights Heller's belief in law's role to mediate social conflicts and promote political legitimacy. The analysis includes his critiques of authoritarian and formalist legal theories.

8. Legal Norms and Political Power: The Dialectic of Legality and Legitimacy in Weimar Thought

This collection of essays investigates the dynamic interplay between legal norms and political authority in Weimar Germany, drawing on the works of Schmitt, Kelsen, and Heller. It explores how each theorist addressed the challenges of legal legitimacy amid political fragmentation and institutional instability. The book illuminates ongoing debates about law's function in democratic societies.

9. From Weimar to Contemporary Legal Theory: The Legacy of Schmitt, Kelsen, and Heller

This book traces the enduring influence of Weimar-era legal theorists Carl Schmitt, Hans Kelsen, and Hermann Heller on modern legal and political thought. It considers how their ideas about legality, sovereignty, and legitimacy continue to shape discussions on constitutionalism and democracy today. The volume assesses both the historical context and contemporary relevance of their work.

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