

**Legality And Legitimacy Carl Schmitt
Hans Kelsen And Hermann Heller In
Weimar**

**Legality and Legitimacy: Carl Schmitt,
Hans Kelsen, and Hermann Heller in
Weimar Germany**

The tumultuous Weimar Republic (1918-1933) provided a fertile ground for intense jurisprudential debates, particularly regarding the crucial distinction between legality and legitimacy. This period witnessed a clash of titans in legal theory: Carl Schmitt, Hans Kelsen, and Hermann Heller, each offering profoundly different perspectives on the foundations of law and the authority of the state. Understanding their contrasting viewpoints is crucial to grasping the political and legal complexities of Weimar Germany and its eventual downfall. This article explores their competing theories on legality and legitimacy, examining their key arguments and the enduring influence of their ideas. We'll delve into their differing concepts of sovereignty, the role of the constitution, and the relationship between law and politics, considering keywords like *Weimar constitutionalism*, *legal positivism*, *decisionism*, and *sociological jurisprudence*.

The Contested Terrain: Defining Legality and Legitimacy

Before diving into the individual perspectives of Schmitt, Kelsen, and Heller, it's crucial to define our terms. *Legality* refers to the conformity of actions to established legal rules and procedures. It's a procedural concept, focused on adherence to the letter of the law. *Legitimacy*, on the other hand, is a more substantive concept. It concerns the moral and political justification for the authority of the state and its laws. A legal act might be perfectly legal but lack legitimacy in the eyes of the public or a significant portion of the population. This distinction became critically important in Weimar, a republic struggling with both internal instability and external threats.

Carl Schmitt: Decisionism and the Sovereign's Power

Carl Schmitt, a controversial figure even in his own time, championed *decisionism*. He argued that the essence of sovereignty lies in the power to decide on the *exception*, the situation where the normal legal order breaks down. For Schmitt, the sovereign wasn't

bound by existing legal rules in such extraordinary circumstances; rather, the sovereign *created* the law through its decision. This perspective directly challenged the rule of law, prioritizing the will of the sovereign over established legal norms. His work, especially *Political Theology*, profoundly influenced the Nazi regime, albeit not necessarily in the way he intended. For Schmitt, legitimacy derived from the sovereign's capacity to effectively maintain order and security, even if it meant overriding legal procedures. This focus on *effective* power, rather than *legal* constraints, proved to be a dangerous precedent.

Hans Kelsen: Pure Theory of Law and the Basic Norm

In stark contrast to Schmitt, Hans Kelsen developed a *pure theory of law*, a system of legal positivism that rigorously separated law from morality and politics. Kelsen's theory centered on the *Grundnorm* (basic norm), a hypothetical presupposition that provides the

ultimate foundation for the legal system. The Grundnorm isn't a positive law but a transcendental condition for the validity of all other laws. It's the foundational assumption upon which the entire legal order rests, providing a framework for understanding legality. For Kelsen, legitimacy stemmed from the formal validity of laws, tracing back to the Grundnorm, thereby emphasizing the importance of a structured, hierarchically ordered legal system. This contrasts sharply with Schmitt's emphasis on the sovereign's decision-making power. Kelsen believed that a stable and predictable legal order was essential for legitimacy, even if individual laws were unpopular.

Hermann Heller: Sociological Jurisprudence and the Social Function of Law

Hermann Heller represented a middle ground between Schmitt's decisionism and Kelsen's positivism. He advocated for *sociological jurisprudence*, emphasizing the social context

and consequences of law. Heller stressed the importance of law's social function: to serve the interests of the community and promote justice. Legitimacy for Heller arose from the law's ability to effectively respond to the needs and demands of society. Unlike Kelsen's abstract focus on the Grundnorm, Heller grounded the legitimacy of law in its social efficacy and its capacity to create a just and equitable society. He believed that a purely formalistic approach to law (like Kelsen's) risked neglecting its substantive ethical and social responsibilities, particularly in a society as volatile as Weimar Germany. This approach emphasized the importance of *Weimar constitutionalism* in achieving social harmony and upholding democratic values.

The Enduring Legacy: Legality and Legitimacy in the 21st Century

The debates between Schmitt, Kelsen, and Heller remain highly relevant today. Their contrasting approaches to legality and legitimacy continue to inform contemporary discussions about the rule of law, the limits of state power, and the nature of political authority. Schmitt's emphasis on the exception reminds us of the potential for extraordinary circumstances to challenge established legal norms, while Kelsen's focus on formal validity highlights the importance of procedural justice. Heller's sociological perspective underscores the vital role of law in shaping social reality and promoting justice. Understanding these different perspectives provides a richer understanding of the complexities of law and its relationship to politics and society. Their intellectual legacy continues to shape the discourse on the challenges of balancing effective governance with the preservation of fundamental rights and freedoms.

FAQ

Q1: How did the political climate of Weimar Germany influence the legal theories of Schmitt, Kelsen, and Heller?

A1: The instability and polarization of Weimar Germany deeply affected their theories. Schmitt's decisionism reflected the anxieties surrounding political violence and the perceived fragility of the Republic. Kelsen's pursuit of a pure theory of law aimed to provide a framework for order and stability amidst chaos. Heller's sociological jurisprudence sought to connect law to the realities of social life and address the pressing social and economic issues that fueled political instability.

Q2: What are the main differences between Schmitt's decisionism and Kelsen's pure theory of law?

A2: Schmitt prioritized the sovereign's decision-making power in exceptional circumstances, effectively placing the sovereign above the law. Kelsen, conversely, sought to ground legal authority in a hierarchical system of norms culminating in the Grundnorm,

emphasizing the rule of law and limiting the sovereign's power.

Q3: How did Heller's sociological jurisprudence bridge the gap between Schmitt and Kelsen?

A3: Heller's approach recognized the limitations of both a purely formalistic approach (Kelsen) and an overly focused emphasis on sovereign power (Schmitt). He argued that law must be grounded both in formal validity and in its social function, considering its impact on society and promoting justice.

Q4: What is the relevance of these theories today?

A4: Their ideas continue to be debated and applied in contemporary legal and political philosophy. Questions about the limits of state power, the rule of law in times of crisis, and the relationship between law and morality remain central, making their analyses timeless.

Q5: Did any of these theorists successfully predict the rise of Nazism?

A5: While Schmitt's work was later used to justify certain aspects of the Nazi regime, none of the three theorists accurately predicted the specific trajectory of Nazi power. Their theories, however, provide frameworks for understanding the vulnerabilities of Weimar's constitutional order and the factors that contributed to its collapse.

Q6: How did the Weimar Constitution itself influence the debates on legality and legitimacy?

A6: The Weimar Constitution itself became a subject of these debates. Its innovative aspects, like proportional representation, contributed to political instability, raising questions about the balance between majority rule and minority rights, deeply informing the discussions of Schmitt, Kelsen, and Heller.

Q7: What are some criticisms of Schmitt's decisionism?

A7: Critics argue that Schmitt's decisionism undermines the rule of law and could lead to arbitrary and unjust exercise of power. Its potential for abuse was tragically realized under the Nazi regime.

Q8: What are some criticisms of Kelsen's pure theory of law?

A8: Critics argue that Kelsen's theory is overly formalistic and detached from social reality, failing to account for the moral and political dimensions of law. Its purely procedural focus neglects the substantive aspects of justice.

Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar

The volatile Weimar Republic, a period of dramatic political and social upheaval in Germany, provided fertile soil for a ferocious debate on the nature of law and its link to political power. Three towering figures – Carl Schmitt, Hans Kelsen, and Hermann Heller – dominated this discourse, each offering a distinct viewpoint on the intricate relationship

between legality and legitimacy. Their clashes not only shaped legal philosophy in Germany but also offered valuable lessons for understanding the fragile balance between law and politics in any democratic framework.

This article will examine the contrasting views of Schmitt, Kelsen, and Heller on the concepts of legality and legitimacy within the Weimar context, highlighting their main arguments and their implications for the period's political environment. We will see how their differing approaches to legal theory reflected the broader ideological splits within Weimar society and contributed to the eventual downfall of the Republic.

Kelsen's Pure Theory of Law: A Formalist Approach

Hans Kelsen, a prominent figure in legal positivism, championed a "pure theory of law" that strived to detach law from morality and politics. He argued that the validity of a legal norm derived solely from its position within a hierarchical system of legal rules, ultimately tracing back to a fundamental norm – the "Grundnorm" – which was not itself a positive

legal rule but a presupposition for the entire legal order. For Kelsen, legality was paramount; the legitimacy of the law was an independent question, largely irrelevant to its legal power. This strictly formalist approach, while aiming for objective legal analysis, was criticized for its inability to address the moral and political concerns inherent in a legal system, particularly during a time of turmoil like Weimar.

Schmitt's Decisionism: Sovereignty and the Exception

In stark contrast to Kelsen's formalism, Carl Schmitt's decisionism placed political sovereignty at the heart of the legal order. He argued that the true nature of law resided not in abstract rules but in the sovereign's ability to make decisive judgments, particularly in "exceptional" circumstances that threatened the societal order. For Schmitt, legitimacy stemmed from the sovereign's power to act decisively, even if it meant suspending or violating existing laws. This emphasis on the sovereign's "decision" made legitimacy contingent on political power rather than on adherence to pre-defined legal norms. Schmitt's theory, often perceived as authoritarian, provided a framework that was later

readily embraced by the Nazi regime. His concepts, though controversial, highlighted the limitations of a purely formalistic approach to law in addressing extreme political situations.

Heller's Democratic Constitutionalism: Bridging Legality and Legitimacy

Hermann Heller sought a middle ground between Kelsen's formalism and Schmitt's decisionism. He advocated for a democratic constitutionalism that emphasized both legality and legitimacy. Heller's approach emphasized the significance of fundamental rights and the rule of law, but also recognized the necessity of a dynamic interpretation of the constitution that could adapt to shifting social and political situations. He argued that legitimacy derived not just from formal adherence to legal procedures but also from the substance of the law's impact on the lives of citizens, particularly the protection of fundamental rights and democratic engagement. This approach attempted to reconcile legality and legitimacy by incorporating political considerations within a robust legal framework.

Conclusion

The intellectual battle between Schmitt, Kelsen, and Heller in Weimar Germany offers a captivating study in the complex interplay between legality and legitimacy. While Kelsen prioritized the formal structure of law, and Schmitt emphasized the political sovereign's decisive role, Heller attempted to bridge the gap between these two extremes by developing a theory of democratic constitutionalism that valued both formal legality and substantive legitimacy. Their differing approaches reflected the broader political tensions of the Weimar Republic, underscoring the significance of considering both the formal and substantive aspects of law in any endeavor to establish a just and stable political order. Their legacies continue to shape debates about the relationship between law, politics, and liberty today.

Frequently Asked Questions (FAQs):

Q1: How did the differing views of Schmitt, Kelsen, and Heller contribute to the downfall of the Weimar Republic?

A1: While not directly causative, their differing viewpoints reflected the broader political fragmentation of Weimar. Schmitt's emphasis on sovereign decisionism, though not explicitly advocating for Nazism, inadvertently provided a theoretical framework that legitimized authoritarian rule. Kelsen's purely formal approach struggled to address the profound moral and political crises of the era. Heller's attempt at a compromise, while insightful, lacked the widespread influence needed to counter the rising tide of extremism.

Q2: Is Schmitt's concept of the "exception" still relevant today?

A2: Schmitt's concept of the "exception" remains a point of debate. While it highlights the challenges faced by legal systems in times of crisis, its potential for abuse in justifying authoritarian actions makes it a controversial concept in contemporary discussions of emergency powers and national security.

Q3: How does Kelsen's "Grundnorm" function in a legal system?

A3: The "Grundnorm" isn't a written law but a hypothetical presupposition that allows us to understand the validity of a legal system. It's the ultimate source of validity, even if it's not itself a positive legal rule. It essentially explains why we obey the laws – because they are part of a system stemming from this foundational norm.

Q4: What is the practical significance of Heller's democratic constitutionalism?

A4: Heller's work emphasizes the importance of both formal legal processes and the substantive protection of rights and democratic participation in creating a legitimate legal order. His ideas remain relevant in contemporary discussions about constitutional interpretation and the ongoing struggle to balance individual rights with the needs of the state.

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