The Social « *Rechtsstaat* » Through the Lens of the Mixed Constitution of the Moderns. The Schmitt-Heller Debate Revisited

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Regarding the institutions of Welfare State established in European countries after 1945, Étienne Balibar writes: "The idea that there is national *solidarity* is undeniably linked to the idea that there is a *boundary*, both territorial and human." (Balibar E 1998, 104). Hence the slightly provocative expression "social national State" ("*Etat national social*") that he uses in various texts to describe the tension inherent in these institutions between solidarity, nationality, and citizenship (Balibar E 1992, 116; 2001, 282; 2010, 145). As the quote indicates, this tension raises the classic question of the *territorial* boundaries of solidarity, which logically leads to the question of the rights of migrants and immigrants, at the heart of Balibar's militant commitments, or that of European federalism, another constant subject of his reflections (Balibar 2025). But the question of the boundaries of solidarity also raises the question of *conflicts* and *struggles*, of which these boundaries are always contingent outcomes. For there can be no solidarity without struggle, nor institutions of solidarity without the institutionalization of class conflict aimed at promoting equality and solidarity. "Class struggles, writes Balibar, are both what threatens to break up national unity and what ultimately gives it substance, in the form of a historical compromise or a social pact" (Balibar E, 1998, 107).

After four decades of "neoliberal" policies, the institutions of solidarity that emerged from the "1945 pact" (social security, public services, and labor law) are now on their last legs (Supiot A 2010; Delruelle E, 2018; Ramaux C 2012). In recent years, we have entered a new historical phase in which the dismantling of the Rule of Law is prolonging that of the Welfare State. The very form of our political systems is shifting from representative government to authoritarian Caesarism. There is undoubtedly a link between the two phenomena: between neoliberalism, seeking to dismantle the Welfare State, and neo-fascism, causing the Rule of Law to implode. But what is this link? To answer this question, it is useful to look at the legal and political debates that took place in Germany around 1930-32, during the last convulsions of the Weimar Republic, in particular the debate between the jurists Carl Schmitt and Hermann Heller about the constitution currently in force: the latter argued that it contained the idea of a *Sozialer Rechtsstaat* (we translate "social *Rechtsstaat*") while the former argued, on the contrary, for orienting the regime toward a plebiscitary dictatorship.

This debate has been studied many times (often through the prism of a third and famous protagonist, Hans Kelsen) (Dyzenhaus D 2015; Jouanjean 2012; Chamayou G 2020). On my part, I would like to shed light on this debate by drawing on the Aristotelian-Polybian

concept of “mixed constitution,” which considers the question of political regimes in terms of the relative distribution of power between *the one* (monarchy), *the few* (aristocracy), and *the many* (democracy). This framework, prevalent in political thought from Antiquity to the Renaissance, was abandoned in the 16th and 17th centuries by the “canon” of modern political philosophy. However, as we shall see, the “mixed constitution” is at the heart of the debate between Schmitt and Heller, sometimes explicitly, sometimes implicitly. The fundamental issue at stake in the controversy between the two jurists is the direction in which the Weimar mixed constitution, centered on the parliamentary aristocracy (*few*), should evolve: should it be expanded to give more power to intermediary bodies (unions, associations) representing the *many*, as Heller believes, or should this power instead be concentrated in the hands of the President, the *one* whose mission is to embody the Nation, as Schmitt advocates? This alternative, I believe, can shed light on the “choice” of civilization that we ourselves face today.

I will proceed in three stages: in the **first part**, I will show that the concept of “mixed constitution,” despite the fading of its signifier, has continued to influence modern political thought, allowing us to speak of a “mixed constitution of the Moderns”; in the **second part**, the most substantial, I will revisit the Schmitt-Heller debate through the prism of this “mixed constitution of the Moderns”; in the **third and final part**, drawing on Wolfgang Abendroth's “red Polybian theory” (which extends on H. Heller's thinking), I will attempt to show the challenges and relevance of the social *Rechtsstaat* in the face of the neo-fascism emerging today.

1. The Mixed Constitution of the Moderns

The two most influential theories of the “mixed constitution” are those of Aristotle (1999) and Polybius (2010), in which it plays both a *normative* role (as the most desirable regime from a realistic perspective) and a *descriptive* role (since all political constitutions actually combine the three basic forms of power in varying ways). I will not discuss here the substantial differences between the two theories (Hansen M.G 2010), nor the rich history of the concept of “mixed constitution” in Antiquity and the Middle Ages (Blythe 1992; Gaille 2005; Nippel 2010; Spinelli 2016; Kefallonitis S, 2026), nor the materialistic ontological grounds of this concept (Delruelle 2024). The most important is to emphasize the centrality of “mixed constitution” in the pre-modern political *episteme* of the 15th and 16th centuries, related to the question of the intrinsic plurality of the “body politic” (which is not a simple metaphor in this *episteme*, but a genuine political thought pattern). The idea of a “mixed constitution” of the body politic, for example in Francesco Guicciardini (1994), is often a way of promoting a policy of the golden mean, of moderation, which naturally leads to the legitimization of rather aristocratic institutions, as found in the Republic of Venice, which for a long time was the archetypal “model” of a mixed constitution (Fournel J-L, 1997).

But at a more underground “archaeological” level of this *episteme* (to adopt Foucauldian terminology), we see that the mixed constitution is also the theoretical vehicle for the irreducible *conflictuality* of the political sphere. I identify two inaugural agonistic patterns: on the one hand, an “anti-oligarchic” pattern in Machiavelli, who makes the conflict between the “people” and the “Great” the generating principle of any good constitution, following the example of the Roman Republic, a mixed constitution “which only reached perfection, writes Machiavelli, through the *desunione* of the Senate and the plebs “ (Machiavelli N 2009); on the other hand, an ”anti-tyrannical“ pattern activated by Calvinist ”Monarchomachs" struggling against Catholic absolutism, such as F. Hotman, T. de Bèze, Ph. Duplessis-Mornay, but above all J. Althusius, who emphasized the conflict between the monarch and the “ephors” (guardians, censors, overseers), representatives of the “consociations” forming the basis of the Republic (Althusius 1995). Both of these agonistic models lead to a true institutionalization of conflict: the “neo-Roman” model enshrines the institution of the *tribunate*, whose function is to relay the demands of the plebs (Del Lucchese F 2015); the “Calvinist” model establishes the institution of the *ephorate*, whose function is to control the supreme ruler and, if necessary, exercise the right to resist oppression (Duso 2005; Skinner 2012).

I would argue that modern political *episteme* was built fundamentally *against* these agonistic models, aiming to neutralize them. Jean Bodin and Thomas Hobbes were the pioneers of this epistemic and political break. Hobbes, in particular, by positing that men, in the state of nature, are free and equal, shattered the pre-modern conception of the body politic as plurality. As the product of a contract between individuals, the body politic is now conceived (under the influence of the biological mechanistic principles of his friend W. Harvey) as an artificial entity that realizes the unity of the co-contractors by representing them. Based on these premises, Hobbes cannot tolerate the idea of a shared sovereignty: it can be held by one man or by an assembly, but in no case divided between the two, and even less so between one man and two assemblies, as in the England of his time, torn between the King, the Lords, and the Commons. In this case, it is the inevitable dissolution of the body politic: “*for what is to divide the power of a Commonwealth, but to dissolve it?*”. This is a fierce accusation, presenting the mixed constitution as a monster comparable to Siamese twins, a “*crazy building*” that generates civil war (*Leviathan*, chap. 29). A people can only have one will, and it is the artifice of a sovereign authority that, by representing it, gives it its being and unity (Crignon Ph 2012).

The entire modern political *episteme* will be reorganized around this Hobbesian turning point. On the one hand, the signifier “mixed constitution” will almost disappear, becoming ontologically obsolete. On the other hand, Hobbes' Leviathan State will be a foil for opponents to monarchical absolutism. To paraphrase the title of H. Mansfield's famous book (*Taming the Prince*), the challenge for successive thinkers (Locke above all) was that of “taming the Leviathan”, by combining the inevitable sovereignty of the State

with the plurality of its governmental exercise. From this perspective, Locke and Montesquieu advocated the functional separation of powers, and that Spinoza and Rousseau tried to prevent the oligarchic narrowing of the exercise of power. The mixed constitution, foreclosed by Bodin and Hobbes' theories of sovereignty, resurfaces, like a "Return of the Repressed," not to designate a specific political regime, but rather to serve, in this *episteme*, a function of *problematization* (again in Foucault's sense), namely, a function of identifying the relevant *questions* that can be asked within a certain order of discourse (Balibar 2022). "Mixed constitution" is the name of a *problem*, not a solution.

In this sense, the civic-bourgeois constitution that emerged in Europe and the United States from the end of the 18th century onwards, in all its diversity and plasticity, can be described as a "mixed constitution of the Moderns." This is also argued by various authors, such as B. Manin (2010) on representative government, L. Canfora (2006) on universal suffrage, or M.H. Hansen (2010) on separation of powers. According to the latter, it would be more accurate to call it a "balance of powers," since the three powers—executive, legislative, and judicial—are in fact intertwined, according to the logic of "checks and balances." M.H. Hansen therefore argues that it is more relevant to describe our systems as "mixed constitutions," whose monarchical component resides in the head of State or government; the aristocratic component in parliamentarians, judges, and the staff of ministerial offices and high government officials; and the democratic component in the exercise of civil and political rights by citizens. Polybian's framework reveals that the exercise of the three powers—executive, legislative, and judicial—is essentially divided between the "one" and the 'few' and only incidentally concerns the "many." In this sense, it helps us to take a demystifying and therefore *critical* look at the civic-bourgeois constitution.

A more positive use of the concept can be found with the political philosopher Richard Bellamy, who seeks to demonstrate the *genealogical continuity* between the idea of "mixed constitution" and the most valuable aspects of our political institutions (Bellamy R 2020). Bellamy is (along with J. Waldron and M. Loughlin) one of the leading figures of English "political constitutionalism," (Goldoni M & McCorkindale C 2018) which opposes "legal constitutionalism" on the question of what is (and what should be) the ultimate foundation of our constitutions: either the political majority (not the majority of the moment, but that which emerges from long-term hegemony) (political constitutionalism), or constitutionality control based on fundamental rights deemed superior to any political will, even that of the majority (legal constitutionalism) (Bellamy R 2007; 1996). According to Bellamy, "the idea of a political constitution has its origins in the classical conception of mixed government found in Greek and Roman political thought" (Bellamy R 2020, 6). His genealogical approach brings him back to King Charles I's famous "Response to the Nineteen Propositions of Parliament" in 1642, which describes the English monarchy as a mixed constitution where power is equally divided

between the King, the Lords, and the Commons—representing the poles of the *one*, the *few*, and the *many*, respectively. It matters little here that this was a last-ditch attempt by the monarchist camp, both futile and clumsy, to avoid defeat. What is most important for Bellamy is the fact that the mixed constitution here refers to a *political* balance between social powers—the State apparatus (around the King); the landed nobility (the Lords); and the merchant bourgeoisie (the Commons) – rather than a *legal* differentiation of governmental functions between legislative, executive, and judicial powers, as would become the case with the theories of Locke and, above all, Montesquieu. With the American Constituents, there was a decisive shift from a *political* to a *legal* conception of the constitution. Even though this conception (that of the separation of powers and the Rule of Law) has become widely dominant, Bellamy takes pride in the fact that the organic, political conception has endured in Great Britain (which, it should be remembered, has no written constitution). He shows how the English mixed constitution, originally structured around the supporters of the King (Tories) and those of the House of Commons (Whigs),evolved in the 19th and 20th centuries, under the influence of the "Social Question", towards a two-party system (*Tory vs. Labour)* reflecting new social divisions and new demands for rights: in this "competition between parties," he writes, we must indeed see "a dynamic form of balance favoring certain constitutional values such as equality and minority rights" (Bellamy R, 2020, 37). In this sense, Bellamy traces a line of evolution from the mixed "civic-bourgeois" constitution of the 18th and 19th centuries to a mixed constitution that can be called "social-democratic" in the 20th century, exemplified by the social compromise of "45" between the proprietary power of the *few* and the social power of the *many*.

Bellamy's genealogical perspective is therefore a plea for *political* constitutionalism, in which the constitution reflects a balance between political forces, as opposed to *legal* constitutionalism, which tends to make it a transcendent framework that judges are the exclusive interpreters and guardians of. The term "mixed constitution" is thus used here for the purpose of a "republican defense of the constitutionality of democracy" (subtitle of his great book *Political Constitutionalism*). While broadly following Bellamy in his theoretical approach, I would like to return to the "Hobbesian moment" of foreclosure and erasure of the mixed constitution in favor of a sovereign power concentrated in the figure of the "one". I wish to hypothesize that this is not merely a *theoretical* erasure, but a *practical* possibility inherent in the mixed constitution of the Moderns. Hobbes developed his theory of sovereignty a few years after the beheading of Charles I, whom he supported but who, let us not forget, professed the mixed constitution. Hobbes' stated aim was to transform England's mixed constitution into an absolute monarchy. To this end, he substituted the plural representation of the body politic with a form of representation where, as seen on the frontispiece of *Leviathan*, the sovereign *incorporates* or *embodies* the fearful multitude. The "Hobbesian moment" thus reveals that the mixed constitution of the Moderns is not only torn between the three constituent

poles of the one, the few, and the many, but that it is also constantly on the edge of falling apart, of slipping into the fantasy of an undivided body politic, identical to itself—a unitary or totalitarian fantasy that is only the reverse image of the "disincorporation of power" that French political philosopher Claude Lefort saw as the hallmark of "wild democracy" (Lefort, 1986). Thus, in the hollow of modern political *episteme*, emerges what Foucault (him again) would have called a "point of heresy," a point of rupture, of destabilization of the most fundamental coordinates of political thought (Balibar 2022).

2. The "Social *Rechtsstaat*": Hermann Heller versus Carl Schmitt

However, this "point of heresy" seems to me to be precisely at the heart of the controversy between C. Schmitt and H. Heller regarding the Weimar Constitution. This constitution can indeed be defined as a mixed constitution always oscillating between an "authoritarian-monarchical" pole and a "social-democratic" pole. From this perspective, we can see that the swing towards fascism began even *before* Hitler came to power, through a presidentialization of the regime of which Schmitt was the consistent theorist; but this shift could perhaps have been avoided if, as H. Heller recommended, the mechanisms of solidarity and social democracy that this mixed constitution contained had been activated.

2.1 Carl Schmitt: from mixed constitution to Caesarist dictatorship

Before joining the Nazi party upon Hitler's rise to power, Schmitt was a conservative jurist who sought to steer the Weimar Republic in an authoritarian direction in order to cure it of the two evils that, in his view, were corroding it: Rule of Law and parliamentarianism (Baumert 2008). It is remarkable that the term he used to describe the Weimar regime was precisely "mixed constitution". His line of argument stems from the distinction he made between *Konstitution* ("formal constitution") and *Verfassung* ("real constitution"). In opposition to H. Kelsen, who equates a constitution with a self-referential *normative* pyramid, Schmitt argues that a constitution derives its existence, and therefore its validity, entirely from the sovereign *will* of an original constituent power. In the case of the Weimar Republic, the bearer of this power is presumed to be the people himself. Schmitt's rhetoric is therefore entirely focused on demonstrating that this democratic constituent power can only manifest its will to exist as a political unit in the form of a Caesarist dictatorship, and not in the form of a parliamentary regime, which he considers degenerate.

According to Schmitt, the Weimar Republic is a "mixed constitution" in two respects. Firstly, because this constitution combined two elements he considers heterogeneous: a "democratic" political form through which sovereign will is exercised, and a "liberal" component (separation of powers and fundamental rights) whose aim is to limit this will and prevent it from becoming absolutist. Opposing democracy and liberalism is at the

core of Schmitt's argument. On the other hand, the Weimar regime can be said to be “mixed” in the classical Polybian sense, since it is easy to recognize the monarchical element of the regime in the Reich Presidency, its aristocratic element in the Parliament, and its democratic element in direct popular consultation (Schmitt 2008, 235 ff.).

In Schmitt's view, the mixed nature of the Weimar constitution undermines the unity of the State in two ways. On the one hand, the “liberal component” (“the Rule of Law”) obstructs what he sees as the very essence of politics, namely the exercise of sovereign will (whether that of a king or a people). On the other hand, the heterogeneous mixture of monarchy, aristocracy, and democracy hinders any real political unity. According to C. Schmitt, such unity is only possible in two ways: either there is *identity* between the rulers and the ruled, as in Rousseau, or the ruler is the sole and exclusive *representative* of the ruled, as in Hobbes. In a rather devious way (as pointed out by Beaud O 1995), Schmittian rhetoric establishes a connivance between direct democracy and absolute monarchy, presented as the only two authentically political regimes. In contrast, the parliamentary institutions are exhausted by the parasitic activity of an elected aristocracy, whose falsely balanced and moderate character Schmitt seeks to denounce:

> “The rule of parliament is an instance of aristocracy (or, in the degenerate form, oligarchy). Aristocracy is a mixed state form in a certain sense. Under the theory of the mixed State form, it is always treated as a form especially worthy of recommendation because it stands in the middle between monarchy and democracy and, consequently, already intrinsically contains a mixture » (Schmitt, 2008, 250)

Schmitt fundamentally criticizes the parliamentary system for failing to fulfill the promise that the bourgeoisie had placed in it: to establish a rational decision-making process equally distant from absolutist arbitrariness and popular demagoguery, a process based on *public debate* by an independent and enlightened elite. It is from the quality of such public discussion, even more than from its election, that parliament would derive its legitimacy to *represent* the nation. But the promise was not fulfilled because rational discussion to identify the general interest, he regrets, pointing in particular to the German *Reichstag*, gave way to mediocre negotiations between competing interests. Parliamentarians had become mere clerks of political parties, charged by them with defending the interests of their electoral clientele. The center of gravity of parliamentary activity would lie in political agreements most often sealed in secret between party leaders. The parliamentary aristocracy would have degenerated into an oligarchy devoid of any popular legitimacy.

It is easy to guess who, in Schmitt's view, are most responsible for this state of affairs: mass parties such as the SPD, which, thanks to the extension of suffrage, bring class interests to their peak and make parliamentary representation a forum for expressing

divisions in society rather than the unity of the "people." The Weimar *Parteienstaat* led to what Schmitt called the "*quantitative* total State," that is, a "weak State" overwhelmed by demands from a wide array of social groups. To satisfy these demands, the State became interventionist in all areas of social and economic life. Under pressure from lobbies, and in particular trade unions, the separation between State and civil society vanished in favor of a State monster as tentacular as it was impotent (Baumert, 2008, 21).

Against the parliamentary oligarchy dominating the mixed German constitution, Schmitt then advocates a "Caesarist" solution that seems to fit within the Weimar mixed constitutional framework, since it is based on one of its three constituent pillars: the Reich Presidency. Schmitt argues that the head of the executive branch should be given full emergency powers, allowing him to rise above party politics and thus safeguard the sovereignty of the State. He justifies this "monarchical" solution with a democratically-seeming argument, since he places the constituent power of the German Reich in "the people," whose sovereign will, in his view, validates the entire constitutional edifice. But Schmitt actually conflates *equality* among citizens with *identity* among nationals. He thus makes the "substantial homogeneity" of the people the very condition for the possibility of the Reich. The unity of the State stems from the "distinction between friends and enemies, "us" and "them," a distinction that he equates purely with that between nationals and foreigners. It is in this existential element of life or death for the nation State that lies the essence of politics. It is also here that the decisive choice between Caesarism and parliamentarianism takes place. For in a pluralistic parliamentary system, the central conflict is not between the citizens of the State and an external enemy, but an internal conflict within the State between parties, factions, or classes. This conflict can either degenerate into civil war or lead to unstable social compromises, but in any case, it is doomed to divide and fracture the State.

The only alternative (since hereditary monarchy has become obsolete) is *dictatorship*. At first glance, this alternative seems not to require a abrupt departure from the Weimar mixed constitution, given that it is grounded in existing provisions therein, which stipulate that the President is elected by universal suffrage (Art. 41), can dissolve the Reichstag (Art. 25), and is vested with broad powers in case of emergency (Art. 48). Schmitt hopes that the full exercise of the prerogatives of the head of the executive will lead to the reversal of the social-democratic parliamentary "*quantitative* total State" into a Caesarist "*qualitative* total State" that must exercise "stable authority to depoliticize and conquer free spheres of life," as he says in his lecture "Strong State, Sound Economy" in November 1932 (Schmitt 1998). It is a fundamental point: total control of political and cultural institutions by the State goes hand in hand with its deliberate disengagement from the socio-economic sphere. For while Schmitt cannot find words harsh enough to denounce the elected aristocracy in the *Reichstag*, he willingly grants the oligarchy of employers and landowners what they demand, namely protection from any political contestation.

Although Schmitt appears to advocate a “simple” adjustment to the Weimar mixed constitution, we can nevertheless detect in his work a “Hobbesian moment” that in fact marks a decisive shift outside of it. This breaking point lies in the nature of the link between the rulers and the ruled, which, as R. Baumert (2008, 29) has rightly observed, is no longer a link of *representation* but of *incarnation*. Whereas parliamentary representation is based on a secret ballot which, in Schmitt’s eyes, fragments the people in a myriad of private individuals and categorical interests, the President should, in his view, be appointed by plebiscites or mass demonstrations, such as those organized by Mussolini's regime at the time to establish a public and “direct” link between the leader and the people. Schmitt draws here on the model of the Roman *acclamatio*, a ritual used to celebrate emperors (and later church leaders) but also to publicly anathematize heretics—that is, to activate the friend/enemy boundary (Beaud, 1995, 55-56). Through the popular acclamation of the Caesarist leader, “the people would, in a sense, always be present in his person and in his actions,” writes R. Baumert (2008, 21) – that is, present to himself, homogeneous and identical to himself. This is why Schmitt, fond of this kind of paradox, goes so far as to write that “dictatorial and Caesarist methods driven by the *acclamatio* of the people” can be “immediate expressions of democratic substance and energy” (Schmitt 2008, 273).

However, this shift from a logic of representation to a logic of incarnation is a crucial issue in Hobbes's thinking, and in Schmitt's reading of it. Commentators disagree on whether, as H.G. Gadamer believes, Hobbes extends the ontology of the incarnation of the King's “two bodies " (Kantorowicz 1957) (which was still the official ideology of the Stuart monarchy in his time) or whether his theory of representation, as Ph. Crignon (2012) argues, breaks decisively with this ontology. I am inclined to follow the latter, who invites us not to confuse Hobbes's *theory* of the State, in which the people is the author of the will, of which the representative sovereign is the unifying actor, and the *myth* of the State, figured by the famous frontispiece, where we see the sovereign-Leviathan rising from the oceans and literally incorporating a multitude both terrified by danger and fascinated by his protector. There is therefore a sort of excess of image over text, as if the Leviathan were not the State but “its transfiguration into a mythical idol” (Crignon, 451). This gap between the State and its myth sheds light on Schmitt's relationship to Hobbes. Initially, following the logic of the frontispiece, Schmitt sees Hobbes as a thinker of incarnation in politics, of sovereign decisionism that resists the liberal disenchantment of politics (Schmitt 1996). Later, on the contrary, Hobbes becomes, in Schmitt's eyes, the pioneer of the liberal and mechanistic conception of the State as a vast normative machinery. But are the two readings necessarily exclusive? What if Hobbes were both the thinker of the liberal mechanization of power and that of sovereignty as incorporation, both the theorist of a State-machine where the one represents the many while remaining ontologically distinct, and that of a State-Leviathan where the many is incorporated into the one by identifying fully with it? I think this subtle yet decisive shift is the precise tipping point that

unhinges the mixed constitution, transforming the monarchical pole into an identifying idol. At this moment, as H. Arendt writes in describing totalitarian terror, “plurality disappears into One Man of gigantic dimensions.” (Arendt H, 466). I hypothesize that this breaking point in Hobbes resonates with the political positioning of Schmitt around 1932, a liberal-conservative who sought to make the Reich President the center of gravity of the Weimar constitution, becoming a Nazi thinker who fused the State, the people, and the Führer (I follow on this point Séglard 2015).

We should therefore dismiss the idea that C. Schmitt honestly sought, until the very last moment, to “save” the Weimar Republic. His immediate and enthusiastic support for Nazism in the weeks following Hitler's rise to power is proof to the contrary. But it is significant that he formulated his criticism of the Weimar Republic in terms of a “mixed constitution” and sought to develop a “Caesarist” alternative that still reproduced its constitutional coordinates. In my view, this suggests that the concentration of power in the hands of a “Caesarist” sovereign is not a factor *external* to the mixed constitution, but rather a possible outcome of it, as the “one” seeks to embody the (fantasized) unity of the “us” against “them,” thereby neutralizing the plurality and conflict inherent to the “many”. Instead of the boundaries of solidarity defined through institutionalized social struggles immanent in the social body, these are conflated by C. Schmitt into those of the nation understood as a “concrete order,” in other words, as an exclusive ethnic and even racial identity (see again Séglard 2015).

2.2. Hermann Heller: the « Social *Rechtsstaat* » as a Mixed Constitution

The key moments in Hermann Heller's political and intellectual career are now well documented, in particular his direct clash with C. Schmitt during the “Prussian Coup” (*Preußenschalg*) of July 1932[i]: H. Heller defended the social-democratic Prussian government before the Constitutional Court against C. Schmitt, defender of the Reich (Hindenburg and von Pappen) in the midst of forging an alliance with the Nazi party. A few months later, in March 1933, Heller reacted vigorously to Schmitt's lecture “Strong State, Sound Economy” given to an audience of German businessmen (Schmitt 1998). Heller denounced the “authoritarian liberalism” of Schmitt’s (Heller 2015; Chamayou G 2020; Baumert 2019; Llanque 2019). The lucidity of H. Heller is striking, as he clearly saw that the Nazis' rise to power was by no means inevitable and could not have taken place without the cynical (and suicidal), indeed “irresponsible,” calculations of the liberal right and the patrimonial elites (Chapoutot Y, 2026).

Together with Kelsen, the two protagonists form an “intellectual triangle” that has become paradigmatic in legal theory (Dyzenhaus 2015). Heller rejects both Kelsen's purely *normative* theory, in which, he says, the constitution “derives its validity from a norm without effective power,” and Schmitt's *decisionist* theory, which, conversely, suspends it on the “decision of a power free from any norm” (Jouanjean 2012). Both,

Heller deplores, ignore “the dialectical structure of State reality” that inextricably links effectivity and validity, norm and will. Kelsen fails to see that the normativity of the State requires the effectivity of political will; Schmitt, in turn, seems to ignore that effective power is only sustainable if the order it establishes is recognized as a valid set of norms. Each is blind to what the other sees.

By defining the State as a dialectical unity of norms and decisions, Heller is taking a path more difficult than it appears. Indeed, since he refrains from having any ultimate foundation (fundamental norm or sovereign decision), he cannot make the State a higher third party above intrinsically pluralistic and agonistic social reality. He rather has to consider it as a framework for action that is inherent to this social reality. Every legal order is a construct, and the challenge for every State is precisely to create “a common will capable of integrating the endlessly antagonistic social *plurality* into State *unity*” (Heller, 2001, 181). The creation of such “Unity (*Einheit*) in plurality (*Vielheit*)” therefore always presupposes, according to Heller, the dialectical articulation of two political forms: an ‘*organic’* form that proceeds from the social itself, from the capacity of individuals to produce common values by cooperating “from below”; and a form “*organized*” vertically by the legal system and the coercive apparatus of the State. As R. Baumert explains clearly, a State functions well “when the *organic* part of the community of values promotes the *organized* production of that same community and *vice versa*” (Baumert 2019, 29).

Although Heller never uses the term “mixed constitution,” he describes a dynamic constitutional field where the poles of power “from below” and “from above” interact, and where different forms of government reflect which pole prevails. In regimes tending towards autocracy or monarchy, the community is essentially *organized*, i.e., constructed vertically by the State apparatus, while in regimes tending towards democracy, it is above all *organic*, self-organized, and created horizontally. But most regimes are mixed, in the sense that they differ only in the relative importance they attach to either the “organic” or the “organized”. The unity of the State is therefore neither the *formal* unity of Kelsen's normative pyramid nor the *substantive* unity of Schmitt's mythical people, but, let us repeat, a “unity in plurality.”

On this basis, Heller suggests an explanation of the “crisis of the bourgeois Rule of Law” that is diametrically opposed to that of Schmitt. According to Schmitt, this crisis stems, as we have seen, from the fact that the State is overwhelmed by demands from civil society and by the harmful sectoral negotiations engaged in by the parliamentary oligarchy to satisfy these demands. The only solution would be a leader embodying the national community and assuming the power to *organize* the State vertically (and neutralizing, by force if necessary, all internal divisions and pluralism). For Heller, on the contrary, the crisis lies in the lack of organic will coming from below—a deficit that itself results from the inequalities and class antagonisms inherent in capitalist society. It is

therefore not by silencing these antagonisms that we will overcome this crisis, but on the contrary by institutionalizing them. A legal and political space must be created that enables *adversaries* to confront each other around a common set of values, rather than considering each other as irreconcilable *enemies*. Hence a complete divergence of views on parliamentarianism: where Schmitt deplores the degeneration of public debate into political bargaining, Heller praises this capacity for negotiation, in which he sees the possibility "of dealing fairly with a political opponent with whom one believes one can agree, by silencing pure violence" (quoted in Baumert, 2019, 63).

"Unity in plurality": as Céline Jouin (2023; 2024) has shown, this idea is largely influenced by the jurist O. Gierke (1841-1921), the leading theorist of the *Genossenschaft* ("corporation-association"), who himself traces it back to Althusius. According to Gierke, modern legal and political thought has always been torn between two models: the sovereignty model of the centralized State derived from Roman law, and an organicist model derived from Germanic law, in which the political community is the result of the dynamics of associations (Gierke 2023). No doubt Schmitt is a follower of the first "major" Roman-canonical line (in the lineage of Bodin and Hobbes), while Heller is a follower of the 'minor' line, which might be called 'corporative', initiated by Althusius (Jouin 2021). From O.Gierke, Heller takes the view that any "democratic" material constitution is developed "from below and from within" ("*von unten und innen heraus*"). However, he disagrees with Gierke's "pluralist" interpretations, such as in H. Laski's or G.D.H. Cole's *Guild Socialism*, which tend to undermine the State's unifying power. Similarly, in his pamphlet against Schmitt's "authoritarian liberalism," he does not attack the concept of *authority* as such, but rather the idea (paradoxically shared by a certain libertarian Left) that democracy and authority are incompatible (Lacroix 2024). As C. Jouin writes, Heller has consistently "articulated the plurality of group self-administration and the unity of the State, the democratic and monarchical elements of State theory" (Jouin 2019b 101), given that these elements are articulated through the "aristocratic" intermediation of representative institutions. In this respect, Heller also views, albeit implicitly, the Weimar Constitution through the prism of the "mixed constitution," seeking to revitalize its *democratic* ("corporate-associative") pole, which is the target of Schmitt's criticism.

It is precisely the "*Sozialer Rechtsstaat*" that, according to Heller, is the agent of this revitalization. As the term suggests, we are at the heart of the dialectic between norm and decision, between formal *law* and *social* power, the structure of Heller's entire theory of the State. According to this dialectic, the Rule of Law is not, as Kelsen believes, a legal-logical form independent of the changing political content it may accommodate, but a concrete historical process initiated by the bourgeoisie in the 18th century to break free from the shackles of the Ancien Régime. The "material," ethical core of the Rule of Law is the principle of *equality*. The democratic content of this principle was fully expressed during the "Springtime of Peoples" in 1848, when the labor movement reversed this

principle against the bourgeoisie itself. For with the industrial revolution and the development of capitalism, “the most radical formal equality,” writes Heller, “was converted into the most radical inequality,” and “what was initially a blessing became a disaster for the weakest” (quoted in Le Bouëdec 2019, 76). Faced with the proletariat's demands for equality, the bourgeoisie realized that this ideal of Rule of Law threatened what was most important to them: private property. It therefore hastened to reduce the Rule of Law to a formal concept empty of any ethical content. To block the progress of real equality conquered in the name of equal rights, the German parliament was placed under constitutional control as early as 1925 (Heller quoted in Jouanjean 2012, 47). But since this "did not definitively eliminate the danger of the social *Rechtsstaat* “ (Jouanjean 2012, 48), the only option for the bourgeoisie (in 1932) was “authoritarian liberalism” – that is, the liquidation of the Rule of Law itself in favor of dictatorial power allied with the property class. Once the *liberal* Rule of Law had been “emptied of its substance” by its historical promoters, the alternative facing the protagonists of the Weimar Republic was simple: *social Rechtsstaat* or market dictatorship.

Heller is acknowledged as the pioneer of the concept of “Social *Rechtsstaat* (“*Sozialer Rechtsstaat*”), which gained considerable prominence in constitutional doctrine during the second half of the 20th century [ii]. I will not consider here whether the uses that have been made of it are faithful to his thinking, nor whether this concept is central or marginal to it (Jouanjean 2016). The most important is that by “Social *Rechtsstaat",* Heller means “the extension of the material idea of the *Rechtsstaat* to the order of work and property”, which implies the emergence of a new type of law: social law (*Sozialrecht*), based no longer on “the formally equal (to others) subject of law”, but on “man as a physical and psychological entity,” on “the socialized individual” (Le Bouëdec 2019, 78). This “realistic turn” in law drives a decisive political shift from political democracy to social democracy. The “*Sozialer Rechtsstaat*” is both a *normative* concept, in that it points to a historical horizon to be achieved, and a *descriptive* one, insofar as, according to Heller, the Weimar Constitution bears the possibility of transforming the liberal constitutional State into a social constitutional State. This possibility is opened up by three provisions highlighted by the social-democratic jurist: 1) collective agreements negotiated between trade unions and employers, which remove the employment contract from the sphere of private law to bring it under the rule of social law; 2) workers' councils at the three levels of the firm, the Landen, and the Reich, councils which were expected to be involved in the organization of production and work; 3) openness to the socialization or regulation of the economy by the State with a view to “guaranteeing a decent existence for all” (Le Bouëdec 2019, 80). As we can see, what makes the Weimar Constitution democratic, in Heller's view, lies less in the electoral and parliamentary process (“political democracy”) than in the institutionalization of conflict between social classes (“social democracy”).

A critical reader will no doubt consider that Heller was rather naive in seeing the Weimar Constitution as the legal and political vehicle for the social *Rechtsstaat* —a naivety he

shared with many progressive intellectuals of his generation. This is not surprising, one might say, coming from a reformist social democrat who always opposed the revolutionary fringe of the SPD [iii]. But there is perhaps a more relevant interpretation of Heller's conception of the social *Rechtsstaat*. In the context of the severe political crisis of the years 1930-1933, this concept was not just a sign of naive optimism about the possibilities for social transformation offered by the Weimar regime, but rather a "*Kampfbegriff*," a "'fighting concept'" against fascism, which at the time threatened to simply liquidate the regime (Le Bouëdec, 2019, 86). As O.Jouanjean (2016, 21) writes, "the democratic and social *Rechtsstaat* is no longer a mere idea, it is the urgent answer to the movement pushing towards dictatorship." In a situation where the Weimar mixed constitution was about to collapse, the last chance to save it was to activate its "democratic" social pole, before the "monarchical" Caesarist solution advocated by Schmitt would win. Promoting the social *Rechtsstaat*, to use the terms I proposed above, means calling on both the "tribunes" of the plebs (primarily the trade unions) to relay "social" demands, and the "ephors" (the Judiciary, the independent press, academics, etc.) to defend civil liberties guaranteed by the law at all costs ("with weapons in hand if necessary," as H. Heller proclaims) (Jouin, 2019b). The social *Rechtsstaat* is both "anti-oligarchic," insofar as it opens the way for an extension of political democracy to social democracy, and "anti-tyrannical," insofar as it prevents any concentration of power in the hands of a dictatorial executive. As C. Jouin writes, "the social State does not add a paternalistic function of redistribution to the Rule of Law. It is sovereignty that turns toward society and forces groups to form themselves differently. The Social State is the *Rechtsstaat* (Rule of Law)" (Jouin, 2019b, 108).

3. Wolfgang Abendroth's: "Red Polybiism" and the Crisis of the Mixed Constitution

Does my interpretation not unduly draw Heller's theory toward *agonistic* models of mixed constitution? Heller has been criticized as not having been interested in the action of social forces in the production of social law, as theorized at the time by Hugo Sinzheimer (also in the wake of Gierke's work[iv]) or Ernst Fraenkel (Le Bouëdec 2019, 81). But besides the fact that we do not know how Heller's thinking would have evolved since he died prematurely in 1933 at the age of 42, I firmly believe that there is real potential for constitutional agonism in his thinking. In conclusion to this article, I would like to show how this potential was exploited by a German jurist of the post-war generation: Wolfgang Abendroth [v].

Drawing on Heller's dialectical conception of law, W. Abendroth never separates constitutional forms from social structures. On this basis, he proposed interpreting the German *Grundgesetz* of 1949 as an open social compromise, i.e., both as a *framework* institutionalizing and channeling social conflict, and as a *dynamic* fueling it and thus preserving the ability of workers to fight for solidarity and equality. This interpretation was fiercely opposed by E. Forsthoff, a disciple of Schmitt opportunistically converted to

liberalism, who saw the *Grundgesetz* as a formal liberal constitution “without specific social content.” It is significant that for decades the German judicial and academic establishment agreed with E. Forsthoff (allied for the occasion with Kelsenian normativists), as if they had all seen the threat posed by W. Abendroth's revival of Heller's idea of the “social *Rechtsstaat*”.

K. Möller created the suggestive term “red Polybius” to describe a whole doctrinal chain linking theorists from the Frankfurt School such as F. Neumann and O. Kirchheimer with others closer to Marxism, such as W. Abendroth, O. Bauer, and even F. Engels (Möller 2018; 2023). The distinctive feature of this “red Polybian” theory is that the constitution is viewed as a “balance of conflicting social forces". On this basis, a “dual strategy” is outlined, combining “purely reformist-institutional politics” with “radical extra-institutional politics”. The aim is to initiate “a peaceful, long-term transformation of society without risking potentially self-destructive civil war scenarios” (Möller 2023). For W. Abendroth, such a Neopolybian strategy articulates two processes of constitutionalization: one lies in the “normative compromise” sealed in the written constitution around the three constituted powers (legislative, executive, and judicial); the second takes place in the “social sphere” and consists of the “self-constitutionalization” of actors such as parties and trade unions, defined by W. Abendroth as the “natural guardians of democracy.” I am not misrepresenting the views of Abendroth and K. Möller by identifying, through this dual strategy, the complementary figures of the *ephors*, guarantors of the rule of law and political democracy, and the *tribunes*, relays “of the social energy that drives social transformation” (Möller 2023).

Isn't this exactly the dilemma and challenge we face today? Comparing our current historical situation to the rise of fascism in the 1920s and 1930s is undoubtedly both misleading and inevitable (Chapoutot Y 2026). My point in this article is that it is wrong to view fascist or Caesarist authoritarian regimes as being *external* to so-called “democracy.” In this light, speaking of a “mixed constitution” is more appropriate, as it brings to light the *dynamics* that run through the modern constitutional field, whose center of gravity is the property-owning oligarchy—dynamics that can either extend the social power of the *many* or narrow it in the Caesarist figure of the *one*.

For the most damning aspect of Schmitt's case is not so much his conversion to Nazism, but the fact that *before* this conversion, he saw Germany's salvation in the alliance of a pure market economy with the authoritarian exercise of executive power by a Caesarist leader. The tipping point away from the mixed constitution lies precisely here, in what Heller called “authoritarian liberalism.” This will resurface whenever the aim is to neutralize or even eradicate any project of a “social *Rechtsstaat*.” It should be remembered that the father of neoliberalism, Friedrich Hayek, supported Pinochet's coup against Allende's socialist government: “I prefer a liberal dictator to a democratic government without liberalism” (*El Mercurio*, April 12, 1981).

Conversely, this also means that defending democracy cannot be reduced to safeguarding the institutions of the Rule of Law but must include preserving and even extending those of the Welfare State. This is not a question of idealizing the “social Rechtsstaat” championed by Heller; on the contrary, we must recognize, as E. Balibar writes, that it is "a third way or a mixed constitution (*sic*) between the unchallenged domination of the capitalists and the revolutionary alternative of overthrowing that domination " (Balibar 2010, 123). But through this mixed constitution, it is possible to lucidly problematize the boundaries of solidarity as the result of an institutionalized conflict between social groups. This is the meaning of the “agonistic” approach to the mixed constitution of the Moderns I outlined based both on Machiavelli’s *anti-oligarchic* agonistic schema around the tribunate of the plebs and Althusius’s *anti-tyrannical* schema around the ephorate. This approach follows in the vein of the fruitful theoretical and political reinvestments that these schemes are currently undergoing, tracing a dual alternative to the dominant political paradigm centered on State sovereignty and private property: a “plebeian” path of institutionalizing class conflict, based on Machiavelli (McCormick 2011; Vergara 2020); and a “corporative” path of institutionalizing the right to resist oppression and defend civil liberties, based on Althusius (Jouin 2021). There is no need to demonstrate the relevance of such an issue today. To counter the rise of neo-fascism, which is unfortunately becoming clearer by the day, we will need both *tribunes* to relay the voice of the subalterns and *ephors* to guarantee the exercise of subjective rights for all. The boundaries of solidarity will follow the lines of these struggles in favor of the social *Rechtsstaat*.

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[i] In July 1932, President Hindenburg issued an “emergency decree” placing the State of Prussia, then ruled by the Social Democrats, under his control and appointing von Papen as “Reich Commissioner.” Von Papen immediately revoked the Prussian government’s ban on SA and SS demonstrations. In doing so, von Papen paved the way for a future alliance with Hitler. The question of the constitutionality of the presidential decree was brought to the German Constitutional Court. C. Schmitt defended the Reich; H. Heller defended the Prussian government. The Court upheld the decree, arguing that it was a state of emergency, but without endorsing the transfer of State power from the Land to the Commissioner. This episode was a major step in the collapse of the Weimar Republic and Hitler's rise to power (see: Jouanjean 2012).

[ii] The idea of the social *Rechtsstaat* is explicitly mentioned in the Greek Constitution (Art. 25) and implicitly in many others, not least the *Grundgesetz* of 1949 (which characterizes the Federal Republic of Germany as a “democratic and social federal State”), but also the French Constitution of 1958 (which describes France as an “indivisible, laic, democratic, and social Republic”) and the Italian Constitution of 1949 (which refers to a “democratic Republic based on labor”), not to mention numerous “Bolivarian” States in Latin America.

[iii] At the Young Socialists' congress in Jena in 1925, he openly confronted the Austro-Marxist jurist Max Adler. And in his book *Sozialismus und Nation* (*Socialism and Nation*), he challenged the postulates of historical materialism and internationalism that form the backbone of Marxist orthodoxy. However, it should be remembered that during the revolutionary period of 1919-20, H. Heller resolutely sided with the workers' councils of the Kiel shipyards, providing them with legal

defense alongside Radbruch, which led to their arrest and death sentence during Knapp's brief coup d'état (see Jouanjean 2012).

[iv] There is not enough space here to discuss the critical dialogue between H. Sinzheimer and G. Gurvitch, who at the same time was developing a comprehensive theory of social law, also based on the thinking of O. Gierke (Gurvitch 1972). This debate, as well as the importance of G. Gurvitch's theoretical contribution, has been thoroughly explored in the work of M-C. Herrera, which I have not been able to cover here as I should have.

[v] The fascinating (and in many ways tragic) life story of W. Abendroth is movingly recounted by his former student Lothar Peter (Peter 2020). It is worth remembering that W. Abendroth was the promoter of J. Habermas' thesis, *The Structural Transformation of the Public Sphere* (1962).

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