

Martin Welsch. *Anfangsgründe der Volkssouveränität. Immanuel Kants Staatsrecht in der Metaphysik der Sitten*, Frankfurt am Main: Klostermann, 2021, Pp. 476. ISBN 9783465045755 (hbk) €32.00

This book is a close reading of Kant's theory of constitutional law (*Staatsrecht*), §§43-52 from the 'Doctrine of Right' of *The Metaphysics of Morals*, proceeding sentence by sentence, syllogism by syllogism. Kant's text has nine paragraphs, most of which are subdivided into sets of syllogisms, which are almost always three-part sets of sentences separated by dashes, semicolons, or corresponding indents.

Martin Welsch is not only the first to work out the complex structure of the syllogisms, which is repeated in most of the paragraphs centered around the will of the people, coordinated through the three powers (208f, 236-9, and 250-4). He is also the first who shows that there are three sets of syllogisms, the *first* (MM §§43-45) representing the then hegemonial, pre-democratic doctrine, and after the justification of popular sovereignty (radical democracy) in the *center* (§46); the *second* (§§47-49) and *third* (§§50-52) developing Kant's own, radical democratic alternative which is not obvious on the surface but rhetorically concealed (*kaschiert*). Welsch's ingenious analysis of Kant's rhetoric is meant to motivate the reader to use his own mind and unfold the critique himself. However, this has not only the *pedagogical* aim of teaching him what Kant is already capable of, to make use of his own mind without the guidance of another, but also the epistemological meaning that the *truth* of Kant's radical democratic critique of pre- and post-revolutionary constitutional law can only be discovered and generated through real public discourse, including its revolutionary (or counter-revolutionary) consequences (133f, 390f, 432f).

Welsch's unprecedented and pathbreaking interpretation of this fundamental part of Kant's entire philosophy of law and politics is nothing less than a paradigm shift in Kantian political philosophy, completing Ingeborg Maus's pioneering work on Kant's theory of democracy (1992) in a highly original and innovative way. Thereby, he constitutes a new paradigm of understanding Kant's theory of constitutional law as *participation* in a constitutional *practice* that posits the relationship between law and politics in the way that all law can be changed politically, but only from within the legal code (legally or illegally).

For re-interpreting Kant, Welsch has developed a *new kind of critical-hermeneutic method* that combines Leo Strauss' exoteric-esoteric distinction with Paul de Man's deconstructive method of reading the rhetoric of literature as a series of strategies in a procedure of *reading* and *counter-reading* (33-8). On the surface, Kant's text seems to suggest a *reading* that has been consolidated for more than two centuries, appearing to the vast majority of the reading public and to the philosophers as the legitimation of the hegemonic political culture of liberalism and representative government on the basis of written constitutions that has prevailed, at least in the West, since the great revolutionary upheavals of the 18th century.

However, and this is important for understanding Kant rightly in the context of the French Revolution concerning which he took sides from the beginning, the liberal representative system became democratic *nowhere* before the middle of the 20th century - if democracy means: the egalitarian and participatory inclusion of

all social classes, all genders (and sexual orientations) and all nationalities (colors, races, cultures, religions, etc.). This kind of representative *democracy* only emerged reluctantly in close co-evolution with the *rise of world law* after WWII (Thornhill 2019, 2020), anticipated by Kant normatively in his writings on international law (TPP; MM §53–62) together with the idea that revolutionary reforms or – if not possible – the ‘repetition’ of the ‘same kind’ of revolution as in France (*Wiederholung neuer Versuche dieser Art*) have to be made by ‘all peoples on earth’ (CF 7: 88).

The *exoteric* reading of the *Staatsrecht*, suggested by Kant on the surface, coincides with the post-revolutionary, early liberal, pre- or anti-democratic understanding of representative government (Sieyès, Constant etc.). It appears to be backed by the clear reference in MM §52 to Sieyès’ *système représentatif* from 1793 that already anticipated the end of the Jacobean revolution of radical democracy which ‘failed’ in 1794 (CF 7: 88). What I will identify as clause (1) is the first sentence of the third paragraph of MM §52, which reads:

All true republics, however, are and can be nothing else than a representative system of the people, in order to take care of their rights in the name of the same, united by all citizens, by means of their deputies. (MM 6: 341—emphasis mine)

Without doubt, Kant himself suggests such a reading to a certain extent (392), and it fits nicely to bourgeois class rule that was established in the course of the 19th century. From this (affirmative) point of view, the next sentence (2) is regularly read as a confirmation of Sieyès’ *système représentatif* because it quotes the two basic ideas of John Locke on representative government which Sieyès used to justify his thesis (1). However, as Welsch shows, this is true only for the *exoteric* reading:

But as soon as a person who is head of state (whether it be a king, nobility, or the whole of the population, the democratic union) also lets itself be represented, then the *united people does not merely represent the sovereign: it is the sovereign itself*. For in it (the people) is originally the supreme power from which all rights of individuals as mere subjects (at most as a civil service) must be derived; and a republic, once established, no longer has to let the reins of government out of its hands and give them over again to those who previously held them and could again nullify all new institutions by absolute arbitrariness’. (MM 6: 341—emphasis mine)

The first sentence of (2) in the English translation (in the German original there is no period after ‘itself’ but a semicolon) seems to use the same justification of thesis (1) as Sieyès did in his *système*, repeating Locke’s famous argument that, *first*, the people can only use their supreme power by delegating it to a legal person who holds it then as fiduciary. However, *second*, if the fiduciary himself (as the French king did when he convened the *Estates General*) delegates his delegated power to another agent, then it *automatically* reverts to the true sovereign, namely the people.

But Welsch’s close reading illustrates that Kant introduces a new, crucial point revealed by the *counter-reading*: This reversion is not restricted only to a *king* or a *nobility*, it is the same if the *democratic people* delegate their own sovereignty (what

Locke and Sieyès are postulating), for example, to the Parliament of the *système représentatif* that was established after the Jacobean revolution. Then likewise, this power falls back to the people because once they get it back, they are *once and forever* the sovereign, who are no longer as before 1789 just the victim of a usurpation that deprived them of their power and reduced popular sovereignty to a counterfactual status, a mere idea in heaven (where the hegemonic liberal interpreters want to keep it forever). Therefore, even if the people of 1794 delegate their sovereignty, they *normatively cannot delegate it again* because they are now *permanently responsible for the performance of their own public freedom*; even if they negate it and threw it away.

Therefore, in MM §52 we find a complete rejection of the – according to Kant – anti-democratic theories of republican freedom qua *representative government*. However, it is in accordance not only with the Jeffersonian and Trotzkiian idea of permanent revolution but also with the constitutional theory of the German jurist Ernst-Wolfgang Böckenförde, claiming that the *pouvoir constituant* is permanent; or that of Jürgen Habermas that democracy can be democratic only if the people – everybody affected by law – acts as a fluid, wild and anarchic agency of a permanent legal revolution, a revolution of the law from within the legal code. A similar theory in the American context is Bruce Ackerman's theory of unconventional popular legislation; the same position we can find in the famous Brokdorf judgment of the German constitutional court; more recently, in *Aufhebungsrechte*, the brilliant book of the young jurist Tim Wihl (2019) develops a theory of rights transformed by public conflict and social movements from subjective rights of possessive individualists into rights of sublating societal relations of domination. Finally, in the 19th century, one of the few sympathetic voices is Karl Marx with the thesis that the legislative power brought about the French and all the great organic universal revolutions, and all real progress that the working class has reached so far (e.g., in the struggle for a *legally* limited work day).

Therefore, instead of a traditional representative system Welsch calls with Kant for a genuine democratic representation: a system of *self-representation*. It stands in a double front against the hopelessly under-complex direct democracy and the alienated representation (*Fremdrepräsentation*) found in our present façade democracy. Democratic self-representation is utopian experimentalism (cf. Welsch 2022, 4). It is not a fixed political *status*, a *status quo*, a *Staat*, but a variable political *method* of 'experimentation with ever new forms of individual and social life' through which 'individual life could become unimaginably diverse and social life unimaginably free' (Rorty 1998: 23). As soon as democracy ceases to be a utopian project and is only there to defend the status quo, it is the end of democracy.

But how can we adopt this experimentalism in order to achieve democratic utopia, if the citizens do not want that? For Kant such wanting is evil *par excellence* as it amounts to throwing away the dignity of one's own freedom (302f, 443), the use of freedom contrary to freedom (53, 143f, 156, 450-3), or even a self-inflicted immaturity (WIE 8: 35). But this is exactly what happened with the people's acceptance of the *système représentatif* in 1794. Undoing it and making the revolution repeatable was the goal of Kant's rhetoric. It conceives of the esoteric reading not as a mysterious (Rylean) specter dwelling invisible in the 'machinery of the constitution of the state' (MM §52; 6: 340). Rather, Kant understands the critical esoteric counter-reading as one that pervades the same surface as the affirmative exoteric reading. But the praxis

of critical writing can only be the *beginning* of immanent criticism precisely because there is only surface and nothing behind it. The ‘passively suffering’ citizens do not read it because they turn away from it, not wanting to hear and see what they, *with some courage*, could see, hear and then do, if only they wanted to. To open their eyes to the esoteric reading is Kant’s ‘democratic pedagogical’ intention (238).

Hence, whether Kant is right in doing so can no longer be decided by a ‘subverting, sweeping the lowest to the top’ in the freedom of his pen (156), which he performs in his writings on constitutional theory, but through practice alone. The ‘contradiction existing’ (Hegel 1975: 59) throughout the societal reality can only be resolved by his readers in practical action, and this, following Welsch, is also the final intention of the postulate of public law (MM §42): the audience of all citizens of this world, that is, mankind, which discusses far beyond the reading audience and perhaps still revolutionizes ‘when the opportunity presents itself’ (CF 7: 88), finishing the job of immanent criticism.

Hauke Brunkhorst
European University Flensburg
Email: brunkhorst@uni-flensburg.de

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