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MEMOIR

Ingeborg Maus (1937-2024)

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Abstract

Obituary Ingeborg Maus (1937-2024).

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Ingeborg Maus has passed away. She was one of the foremost post-war theorists of democracy, leaving behind a significant and important body of work. Firmly rooted in the political philosophy of the Enlightenment, she authored incisive analyses and scathing critiques of contemporary theories of the rule of law and democracy.

In 1992, she succeeded Iring Fetscher as professor of political theory and intellectual history in Frankfurt. There, she was also part of a productive working group on legal theory (*Arbeitsgruppe Rechtstheorie*) led by Jürgen Habermas. The same year, she published her most read and most important book: *Zur Aufklärung der Demokratietheorie*. Before that, she had written two important books on legal theory on, respectively, fascism and industrial capitalism.

My first encounter with her work was the Suhrkamp stw paperback edition of *Zur Aufklärung der Demokratietheorie*. I had just begun my master's thesis on Jürgen Habermas' legal philosophy, and my supervisor advised me to read her interpretation of Enlightenment theories of democracy and the rule of law: there might be something instructive in her understanding of Kant's concept of right and the relationship between law and morality.

I remember being taken aback by the opening line: 'We live in a century of Anti-Enlightenment.' From a theorist concerned with radical thinkers like Rousseau and Kant, one could perhaps have expected such a statement. Still, it seemed harsh. Since its heyday in the late 18th century, was the theory and practice of democratic rule of law primarily to be viewed as a story of decline?

According to Maus, we had regressed on several of the most essential points from the legal theories underpinning the American and French revolutions: the separation of powers, the relationship between law and morality, the relationship between individual rights and popular sovereignty, and the relationship between democracy and the rule of law.

These continued to be main themes in Maus' work. Her interpretation of these fundamental principles in Enlightenment political philosophy was groundbreaking

and differed in more than one respect from much of the standard literature in the field. However, her analyses were well-founded and stand firm in most aspects.

An important starting point for Maus is that Enlightenment political philosophy was *legal* philosophy. Her reading of Kant's concept of public right was full of important insights on this point. Contrary to what many still believe, Kant's political philosophy was never intended as a continuation of morality by other means. It is a normative theory of law formulated in relative independence from what we today commonly refer to as his moral theory or ethics. Rather, it was developed within a theoretical tradition of natural or rational law and was grounded in a non-empirical, purely relational concept of external freedom.

For Kant and Maus, normative legal theories could not be derived from a moral principle that would then have to delimit itself (or be limited by another moral principle?) in order not to invade the realm of morality again. Both recognized the utmost importance of the independence, legitimacy, and, not least, the freedom of legal entities so that a distinction between law and morality is maintained. The absence of such a distinction is to Maus rather the hallmark of a despotic, totalitarian state.

To her, Rousseau and Kant did not formulate legal theories that were merely proto-parliamentary precursors to the democratic rule of law. Maus was clear that, normatively speaking, they also *surpassed* today's theory and practice. Her understanding of legal principles and Kant's concept of public right was well received by Habermas, who developed it further from his philosophical position of discourse theory. Maus' and Klaus Günther's contributions to the working group were crucial for Habermas' major work on legal philosophy, *Faktizität und Geltung*. Without their impact, the legal theory of our era's most important philosopher would have faltered on crucial points.

For Maus (and Habermas), it is Kant who completes the procedural turn in Enlightenment legal theory. The natural law claims of all human beings are no longer a catalogue of rights that are simply to be posited and upheld, they are far more inherently linked to the procedures and structures of the legal system itself. Every person has not only rational legal claims to individual rights. As a citizen, one also has corresponding claims to political rights and a collective right to determine the laws and legal procedures to which one then is subjected as a legal entity.

This fundamental principle of popular sovereignty is, for Maus, an indispensable prerequisite for any democracy. In her reading, Kant's republic is a radical democracy under the rule of law: the people have *all* – but also *only* – legislative power.

This basic principle is again linked to a strict, principled concept of the separation of powers. Here too, Maus is clear about the vast difference between Kant's understanding of the concept and what is meant by the separation of state powers in other traditions before and after him.

In Montesquieu and much of the American legal tradition, the separation of powers has a completely different form and function than in the late Enlightenment. Montesquieu's separation of powers is, strictly speaking, not a principle at all, but an empirically based balance between different state powers, where the sovereign (the king) has a role in all three authorities. For Kant and Maus, this is despotism, simply due to the form of state rule: the sovereign reigns over both the universal laws and their application in individual cases.

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Kant argued for a completely different conception of the separation of powers, with a principled distinction between legislative, executive, and judicial authority. Based on this, ancient democracy was also a form of despotism, not due to a lack of conformity with a specific code of individual rights, but on purely formal, non-empirical grounds: the Athenian popular assembly did not only make the laws but also governed and judged individual cases.

Kant's republic, on the other hand, has this main characteristic: citizens are the authors of the laws to which they are then subject as legal entities. Maus (and Habermas) follow Kant in emphasising the relationship between popular sovereignty and individual rights, between public and private autonomy. These are not opposites, but rather concepts that mutually presuppose one another. To use an expression from Habermas, they are *co-original* (*gleichursprünglich*) and are linked to the universal, legislative function of the rule of law.

It is this understanding of Enlightenment democratic theory that Maus refers to when she critiques the legal developments of later times. Her position is as far removed as possible from theories of good governance or any value-based state justification. She particularly criticises the moralisation and de-formalisation of law, and how this has altered sovereignty. In her reading of Kant, the concept of sovereignty was solely linked to the legislative authority in the rule of law. It unfolded in the interplay and tension between institutionalised and non-institutionalised forms of popular sovereignty, i.e. between the people's legislative will in both parliament and the public sphere.

Whereas Habermas examined the structural transformation of the public sphere – cf. his first major work, *Strukturwandel der Öffentlichkeit* – Maus addressed the structural transformation of sovereignty. To her, post-Enlightenment constitutional theory and practice returned to Montesquieu's pre-modern understanding of sovereignty and the separation of powers. She describes a legal-historical development where the government and judiciary no longer merely apply legislation to individual cases. Like feudal kings, they once again take on *legislative* state functions. To use her expression: the state apparatus usurps popular sovereignty.

As a result, political decisions and sovereignty no longer take place in the tension between the institutionalised and non-institutionalised legislative power of the people. For Maus, law and sovereignty have increasingly moved into the state apparatus and play out there, in a balance of power between already authorised state powers that now also authorise themselves. Popular sovereignty has thus become state sovereignty, and political power has been 're-feudalised'.

Her examples of this include both presidential systems ('elective monarchy') and, not least, the German Federal Constitutional Court. As soon as a president or constitutional court not only exercises or judges according to the laws but can also override or assume a legislative function, they, and not the people, become sovereign. For Maus, both democracy and the rule of law are then suspended. The democratic problem is not that a president or constitutional court makes their own interpretation of the law in individual cases. They have the authority and duty to do so. The problem arises when a law is overridden *as law*. For Maus, the true sovereign is he who can rightfully resist the legislator.

Critics argue that Maus' argument here falls short and that her stance is democratic positivism: should there not be legal structures in place that prevent the

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legislator from making 'illegal' (or immoral, unjust, or illegitimate) laws? Egregious human rights violations can also be committed by the people, in the form of decisions by democratically elected legislators. Should not states construct legal barriers for the legislative authority as well, to prevent it from turning dictatorial?

Against this, Maus would not only argue that the separation of powers is precisely this barrier. She also believes that such objections confuse contingent questions with formal functions. There is nothing in the separation of powers as such that provides any guarantee against human rights violations; by introducing such barriers for the legislator, the only thing one has done is to shift formal decision-making authority from one state power to another. At the same time, one abolishes the Enlightenment's democratic republic.

And if one were to proceed empirically, there is little evidence to suggest that the executive or judicial authority should be more immune to making unjust decisions than the legislator, rather, the opposite. Another feature of totalitarian states is an anti-legislative concentration of power, especially in favour of the executive authority. The executive power thus not only possesses the monopoly on violence but also the competence to unilaterally make and abolish laws.

We are here back at Maus' early analysis of fascist legal theory: the contempt for the slow deliberations of the legislative parliament, and the corresponding transfer of authority to the monopolies on violence and judgement at the sharp ends of the state. The subtitle of her work *Bürgerliche Rechtstheorie und Faschismus* speaks volumes: 'On the Social Function and Current Impact of Carl Schmitt's Theory'.

Maus also intensely engaged in discussions about international law. As with the rule of law within states, she warned against the increasing moralisation and de-formalisation of the painstakingly built international legal order. Maus controversially spoke out against the NATO-led intervention in Kosovo, but several of her principled positions gained new relevance during the war on terror and the so-called humanitarian interventions in other parts of the world.

She pointed out obvious fallacies in attempts to defend war as a rightful course of international action. With Kant, Maus maintained that war will always be an extra-legal action and therefore also a clear violation of international law and state sovereignty. In this day and age, where sovereignty is almost exclusively invoked by dictators who want to commit their human rights violations free from any critique, Maus stood terribly alone with her understanding of the concept: sovereignty is not an obstacle to international law but rather stands at its core. It is a normative concept and a prerequisite for both the democratic rule of law and an international legal order of free and equal states.

Maus' reading of Kant on peace, international law, and cosmopolitan law has been an important and critical counter-voice in recent decades. Her warnings against welcoming international use of force to promote democracy and good causes were spot on. Such use of force would open the floodgates for the law of the strongest, with unilateral and arbitrary exercise of power at a global level. Any enforcement of universal rights would then be entirely dependent on the self-interest and moral benevolence of national and regional hegemons. In other words: no right at all.

She elaborates on this view in her books *Über Volkssouveränität* (2011) and *Menschenrechte, Demokratie und Frieden* (2015). Here too, we see the question that almost no one thought would become relevant at the end of the Cold War: Immanuel

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Kant or Carl Schmitt? Ingeborg Maus' great merit was to clarify both of these legal theories. Her texts provide an excellent analysis and defence of Enlightenment legal and democratic theory, and a critical look at our contemporary understanding of political power and legal structures. She deserves to be read and read anew.[1]

Note

1 An earlier and more extensive memorial for Ingeborg Maus has been published in the online journal *Salongen*: https://www.salongen.no/essay/carl-schmitt/demokrati/ingeborg-maus/215020.

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