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DISPUTE OVER THE GUARDIAN OF THE CONSTITUTION

HANS Kelsen, CARL SCHMITT AND THE WEIMAR CASE¹

ABSTRACT The paper discusses one of the most important debates on the meaning of constitutional adjudication in the 20th century that engaged two eminent legal and political thinkers Hans Kelsen and Carl Schmitt. The paper focuses on the constitutional dispute over the guardianship of the constitution in the final years of Weimar's Germany and reconstructs the arguments of the two major protagonists in this dispute concerning the Weimar constitution and the fundamental question whether the guardian of the constitution is (or should be) the constitutional court or the president of the Reich. The debate highlights the complexity of the political problems of a democratic state, as well as the intricate relationship between law and state and has retained high level of topicality. The paper also pays attention to the philosophical-political premises that underlined the distinctly different views on the relationship between law and politics in the thought of Hans Kelsen and Carl Schmitt.

Keywords: guardian of the constitution, law and politics, Weimar constitutionalism, Hans Kelsen, Carl Schmitt

¹ This paper is based on the article originally published in Polish (*Przegląd Polityczny*, no. 138 [2016]) and it contains modifications and additions.

A STRANGE REVOLUTION

The photographic album *Das Gesicht der Demokratie* (The Face of Democracy), published in 1931 by Edmund Schultz and Friedrich Georg Jünger, provides an eloquent visual testimony of the turbulent fortunes of the then 12-year-old Weimar Republic. Dozens of photographs create the image of Weimar Germany which also seems to be preserved in the collective memory of the time.² In addition to the portraits of the main political actors, we get the sense of Weimar democracy in terms of a political mobilization of the masses, a scene of bitter rivalry of various hostile groups which takes place not only in the offices and halls of parliament, but also on the streets of German cities, as evidenced by photos of broken shop windows, damaged facades of buildings or clashes with the police or paramilitary units. The distinctive feature of the modern state – in the form of effective control and monopolization of the use of violence – seemed to be absent in the Weimar Republic. Unquestionably, this had significantly contributed to the final demise of the republic.³

Apart from these photographs and the accompanying commentary representing an expression of a specific political (clearly anti-democratic) position, they also make us reflect both on the political history of interwar Germany and on democracy and the state as such. I would like to focus for a moment on two particularly expressive pictures in this context. The first photograph of the album shows social democrat Philip Scheidemann standing in the window of the chancellor's office demanding the establishment of a republic, as the caption says. Below we see a crowd of people with several banners clinging tightly to the fence and walls of the building. Scheidemann's proclamation of the republic on 9 November 1919 provoked the fury of his more moderate colleague, the chancellor (and later the first president of the republic) Friedrich Ebert, who believed that the official political settlement should not be reached before the planned constitutional assembly.⁴ Another photograph, entitled 'Sovereign nation,' documents a scene from the opening session of the Reichstag in October 1930: people gathered to celebrate the inauguration are surrounded by a tight police cordon. The two photographs share a striking theme of the relationship between a nation that European history has rendered the source of political legitimacy and its 'representatives.' In other words, it is a complex problem of the state as a particular order, a certain constitutional order (constitutional form), and a sovereign people, understood by democratic theory as a substrate of the state, a permanently present and inexhaustible source of political forms (constituent power). In a democracy, as the history of the Weimar Republic also

² E. Schultz, F.G. Jünger, *Das Gesicht der Demokratie. Ein Bilderwerk mit Texten zur Geschichte der deutschen Demokratie nach dem Ersten Weltkrieg*, Viöl-Nordfriesland 2005 (1st ed. Leipzig 1931).

³ Cf. N. Elias, "The Decay of the State Monopoly of Violence in the Weimar Republic", in M. Schröter (ed.), *Germans. Power Struggles and the Development of Habitus in the Nineteenth and Twentieth Centuries*, transl. by E. Dunning, S. Mennell, New York 1996, pp. 214-223.

⁴ H. Mommsen, *The Rise and Fall of Weimar Democracy*, transl. by E. Forster, L.E. Jones, Chapel Hill-London 1996, p. 21.

shows, the tension between these elements is inevitable and determines the fundamental sphere of political and legal conflicts that the democratic system must face. They involve the vital duality of democratic politics, which reflects the abovementioned fundamental duality, since the constitutional form of the state is not able to fully absorb all the practices of democratic politics. Christoph Möllers labels this encroachment of democratic politics on the constitutional framework (in a non-pejorative, purely descriptive sense) ‘constitutional populism,’ which is a consequence of the fundamental assertion of the democratic theory that after the establishment of a particular order, the constituent power of the people does not disappear, but is permanently present (precisely as that populist aspect of politics referring to the ‘sovereign’).⁵ Since the constituent power of the people cannot be fully absorbed by the constitutional order, politics escapes its total constitutionalization and full juridical ‘objectification.’⁶

In this paper I propose to look at the dispute over the guardian of the constitution in Weimar Germany, which particularly highlights the complexity of the political problems of a democratic state. I focus mainly on the debate between two prominent lawyers and political theorists: the representative of the normative version of legal positivism, Hans Kelsen, and the eluding an unequivocal intellectual classification Carl Schmitt, that regards the Weimar Constitution and the fundamental question whether the guardian of the constitution is (or should be) constitutional court or president of the Reich. In this study I deal with legal-political argumentation and less with the historical details of the constitutional situation after the so-called ‘strike against Prussia’ (*Preußenschlag*) in 1932. Evaluating the arguments of these thinkers makes it clear that the reasons of their specific statements are deeply embedded in different concepts of the state and in a significantly different attitudes towards political metaphysics (political theology). However, before I delve into the details of the debate, it seems indispensable to present a brief outline of the historical and political context that makes it easier to understand.

Looking at the situation of Germany after World War I from a near-time perspective, Konstanty Grzybowski emphasized the specific nature of the German Revolution of 1918, noting that the accompanying ambiguity of the assessments (from the ‘stab in the back’ narrative by Oswald Spengler to the communist allegation that it was a ‘pseudo-revolution’) is a consequence of the programmatic indefiniteness of the revolution itself. It was primarily a result of the military defeat suffered on the frontlines of World War I, not a result of widespread resistance to the still popular monarchical regime. It is worth remembering that in 1914 the Social Democrats of the SPD and the future President Ebert also supported the war. Initially, therefore, it was a ‘negative’ revolution,

⁵ Ch. Möllers, “We Are (Afraid of) the People: Constituent Power in German Constitutionalism”, in M. Loughlin, N. Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford–New York 2007, pp. 87–88. Constitutional populism is defined as *democratic practice that is specifically orientated towards constitutional procedures and institutions without formally being part of them* (p. 87).

⁶ A. Kalyvas, “Constituent Power”, in *Political Concepts: A Critical Lexicon* 3.1 (2013), p. 13, at <<http://www.politicalconcepts.org/constituentpower>>, 1 July 2021.

indeterminate, only seeking justifications and a proper program *post factum* as it were: *In a sense, the German Revolution began only when, in another sense, it was already over.*⁷ Since autumn 1918 events had gained their momentum. Chancellor Maximilian Baden, appointed by the Emperor in October, led a majority government with the SPD and launched a series of political reforms aimed at establishing a constitutional monarchy with parliamentary responsibility of the government. The plans to maintain monarchy also encountered difficulties arising from the attitude of the emperor Wilhelm II himself, who under the influence of military circles, refused to give up his dominant constitutional position.⁸ The Kiel seamen's rebellion of 29 October 1918 quickly spilled over to the rest of Germany, and numerous councils of workers, soldiers and other professional groups began to be formed. In the face of mass strikes and tens of thousands of people in the streets of Berlin, the Prince of Baden announced the abdication of the emperor (despite the initial refusal of the monarch) and on November 9 he handed over the office of chancellor to the SPD President Friedrich Ebert. From the balcony of the Reichstag, the already mentioned Scheidemann proclaimed a republic, while from the balcony of the royal palace Karl Liebknecht announced a socialist republic.⁹ On November 10, the emperor emigrated to the Netherlands. At the general congress of workers' and soldiers' councils in mid-December, the moderate proposal of the Social Democrats to call elections to the National Assembly on 19 January 1919, which would draft a new constitution, was finally won. The work on the project was carried out in Weimar, which had a symbolic overtone. As historian Eric Weitz notes, the government hoped *that the 'spirit of Weimar' – the symbol of classical, humanistic German culture – would help the republic win the acceptance of more conservative Germans and Allies.*¹⁰ Overcoming the immediate threat of a communist revolution paved the way for the establishment of a liberal-democratic constitution.¹¹

POLITICAL SPECIFICITY OF THE WEIMAR REPUBLIC

The constitution adopted on August 11, 1919 affirmed the change that had taken place a year earlier and had established the entire nation a source of political authority in place of German sovereign princes, while maintaining the federal system of the state. German theory of the state has mostly been based on the theory of continuity of the state. Although the constitution has changed, the continuity of the state has been preserved. Both Kelsen and Schmitt agreed with this, albeit on a completely different theoretical grounds.¹²

⁷ K. Grzybowski, *Powstanie republiki niemieckiej. Szkic polityczno-prawny*, Kraków 1929, p. 13.

⁸ H. Mommsen, *The Rise and Fall...*, p. 20.

⁹ E.D. Weitz, *Weimar Germany. Hopes and Tragedy*, Princeton–Oxford 2007, p. 237.

¹⁰ *Ibid.*, p. 32.

¹¹ K. Sontheimer, *Antidemokratisches Denken in der Weimarer Republik*, München 1978, p. 21.

¹² Kelsen reconciles the concept of revolution and legal continuity by placing them on two different

Of utmost importance is the fact that dualism which appeared in the political regime of the German empire after 1871 was replicated in the Weimar constitution. The monarchical executive and quasi-democratic parliament are two key elements in determining the political dynamics of the empire, whose specific nature was also associated with the traditional self-interpretation of parliament as a representation of the nation in relation to the state/monarch. The coexistence of both political principles and sources of legitimacy (monarchical and democratic) has caused a number of complications, including theoretical ones. Therefore, in order to avoid a clear decision as to whether the sovereign is the monarch or the nation, the German theory of the state had adopted the position of the sovereignty of the state.¹³

The Weimar constitution, as Möllers points out, *replicated the structure of double legitimacy of the Kaiserreich. On the one hand, it established formal democratic institutions, especially parliament and the parliamentary responsibility of the government. But on the other hand, it was evident for the designers of the Weimar Constitution, namely for Hugo Preuß, that the general anti-parliamentarian sentiment required an institutional response. This is the reason for the democratic dualism of the Weimar constitution, which both established the directly-elected office of the Reichspräsident and introduced plebiscites and quasi-populist institutions.*¹⁴

The reasoning of one of the most important authors of the constitution, Hugo Preuß, subtly suggested the distinctness of German socio-political development (a view also embraced by György Lukács and Helmuth Plessner, among others), pointing to a certain passivity towards political power of the German society and proposing concrete institutional solutions.¹⁵ And although Plessner's view of the 'belated nation' of Germany due to the preservation of the medieval-spirited structure of the Holy Roman Empire of the German People (formally abolished only by Napoleon in 1806), which had blocked the process of modernization and the creation of a unified nation, has been criticized as an instance of linear thinking in history (the concept of belatedness presupposes some proper model of historical development, a kind of *ex post* teleology,¹⁶ as pointed out by Reinhart Koselleck), the fact remains that in Germany – unlike England, France or Spain – modern centralized state had not developed for a considerable time.¹⁷

levels – the revolution is 'legal' from the point of view of the law of nations, 'illegal' from the point of view of state law. Schmitt, in turn, especially in his *Verfassungslehre*, refers to the French constitutional theory (Adhemar Esmein) and its concept of the nation's political power as a factor linking pre- and post-revolution order. See. K. Grzybowski, *Powstanie republiki niemieckiej*, p. 7.

¹³ C. Schmitt, "Hugo Preuß. Sein Staatsbegriff und seine Stellung in der deutschen Staatslehre", in C. Schmitt (ed.), *Der Hüter der Verfassung*, Berlin 2016, p. 168.

¹⁴ Ch. Möllers, "We Are (Afraid of) the People...", p. 91.

¹⁵ A. Gniazdowski, *Antynomie radykalizmu. Fenomenologia polityczna w Niemczech 1914-1933*, Warszawa 2015, p. 29.

¹⁶ R. Koselleck, "Deutschland – ein verspätete Nation?", in idem, *Europäische Umrisse deutscher Geschichte*, Heidelberg 1999, p. 44.

¹⁷ Cf. T. Naumowicz, "Naród niemiecki – wspólnota ontycznie niewyobrażalna", in idem (ed.), *Państwo a społeczeństwo. Wizje wspólnot niemieckich od oświecenia do okresu restauracji*, Poznań 2001, pp. 7-65.

The president's strong position in the Weimar constitution, supported primarily by direct election and a range of options for acting in emergencies (the famous Article 48), is seen as seeking a political balance between parliamentary and plebiscite democracy and an attempt to deal with the lack of German experience with a parliamentary responsible government – as well as some kind of compensation for the 'orphaned' nation that has lost its emperor. It was not by chance that the president was called *Ersatzkaiser* (substitute emperor); it was difficult to resist the suggestiveness of this term, especially after the election for president of the imperial field marshal Paul von Hindenburg in 1925, who throughout his term never seemed fully comfortable in his civilian clothes.

The Weimar constitution also established the State Court, or more precisely the 'Court of Justice in Matters of State' (*Staatsgerichtshoff*) in Leipzig to settle constitutional disputes arising from the federal structure of the state according to the Article 19 of the Weimar constitution. However, its power to review the constitutionality of the activities of the parliament and the government was not taken for granted.¹⁸ In fact, *Staatsgerichtshoff* was not a fully empowered constitutional court comparable to that established by the Austrian constitution of 1920 as its competence was clearly narrowed. *Staatsgerichtshoff* was not an institutionally separate entity because it constituted part of the *Reichsgericht* (the Supreme Court of Germany), it convened when necessary and was presided by the President of the *Reichsgericht*.

HANS Kelsen ON THE IMPORTANCE OF CONSTITUTIONAL ADJUDICATION

In 1929, a year before his transfer to the University of Cologne, Hans Kelsen published *Wesen und Entwicklung der Staatsgerichtsbarkeit* based on a paper delivered at a meeting of the Society of German Professors of State Law in Vienna. Kelsen, acting as one of the founders of the Austrian Constitutional Court and its active judge,¹⁹ pointed out that the problem of verifying the constitutionality of law is of particular importance for the democratic rule of law. However, the thought of law's conformity with law may seem at first glance perplexing: *Does it not amount to a petitio principii*, Kelsen asked, *to want to measure the creation of law by the use of a standard that is only produced together with the object to be measured?*²⁰ That doubt is dismissed when one realizes that the legal order of the state is, after all, of a hierarchical nature and that every act of

¹⁸ D. Dyzenhaus, *Legality and Legitimacy. Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, Oxford 2003, p. 20.

¹⁹ Some information on Kelsen's work as a Judge of the Constitutional Court can be found in Kelsen's biography by R. Métall, *Hans Kelsen. Leben und Werk*, Wien 1969, pp. 47-57.

²⁰ H. Kelsen, "The Nature and Development of Constitutional Adjudication", in L. Vinx (ed.), *The Guardian of the Constitution. Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, transl. by L. Vinx, Cambridge 2015, p. 22 [H. Kelsen, „Wesen und Entwicklung der Verfassungsgerichtsbarkeit“, in idem, *Wer soll der Hüter der Verfassung sein?*, ed. R.Ch. van Oyen, Tübingen 2019, p. 1. In the following footnotes page numbers in square brackets refer to the German original].

law-making is at the same time an act of application of law. It is a process, he says, of the state's continuous creation. Since the constitution defines the legislative procedure, therefore legislative activity in relation to the constitution is an application of law, in relation to the lower acts, it is creation of law. And further, decree is application of law in relation to statute, and creation of law in relation to a judicial or administrative decisions issued on its basis. Thus, the path of law from the constitution 'down' is a path of concretization.²¹ If creation of law is also its application, according to Kelsen, the idea of conformity with the law must apply to that 'reproduction' of law. *Guarantees of the conformity of a decree with statute and of the conformity of a statute with the constitution are therefore as possible as guarantees of the legality of individual legal acts. A guarantee of the constitution, hence, is a guarantee of the legality of the levels of law that stand immediately below the constitution. That is, first and foremost, a guarantee of the constitutionality of statutes.*²² According to Kelsen, only the idea of hierarchical law-building makes it possible to understand the concept of the constitution – already present in the ancient political thought – as the most important principle defining the political regime of the state. In order to ensure that this supreme principle actually sets the framework for the law, Kelsen proposes an institutional solution in the form of a constitutional court as a state body independent of other authorities, equipped with the possibility of reviewing constitutionality of laws and having the possibility of invalidating those which are found to be inconsistent with the constitution. Otherwise, and this seems to be his central argument, the absence of a guarantee of the annulment of a law inconsistent with the constitution must lead to the paradoxical conclusion that the highest act in the state is not a fully binding act.²³ On the other hand, the rationale behind the existence of such a central institution for the control of ordinary courts in individual cases consists in increasing legal certainty in the eyes of the citizens (and therefore a repeal of general norm should rather have a *pro futuro* effect²⁴). The expectation that parliament itself will repeal law it has established is an expression of political naivety for Kelsen, because parliament always feels more like an unconstrained law-maker than simply an authority for a mere application of the law.

Among the reasons why the political doctrines of many states are reluctant to address the idea of judicial review of the constitutionality of law, Kelsen points to the historical impact of a solution known from the constitutional monarchy, which he believes still has a strong influence on democratic systems, according to which the very requirement of the monarch's consent to law passed in parliament is the guarantee of its constitutionality. In many modern democracies, the belief that promulgation of law by the head of state is such a safeguard is sustained.²⁵ The most serious objections that Kelsen seeks to challenge are that the constitutional court will infringe on the sovereignty of

²¹ Ibid., p. 24 [p. 3].

²² Ibid., p. 25 [p. 3].

²³ Ibid., p. 69 [p. 48].

²⁴ Ibid., p. 40 [p. 19].

²⁵ Ibid., p. 27 [p. 6].

parliament and even the people, and that it is irreconcilable with the concept of separation of powers, since the court, as a negative legislator, capable of invalidating laws, interferes with the legislative authority. Kelsen challenges the first of these arguments by pointing out that the demand for constitutionality is no different from the demand for compliance with the law of the administration's actions and no one claims that it is a violation of sovereignty. Here he finds an element of the ambition of the parliament to overcome constitutional limitations. In response to the second argument, the Austrian lawyer points out that, historically, the Enlightenment doctrines of the separation of powers are not about their complete isolation, but rather about creating a mechanism of control and balancing, which is so important in a democratic state in order to prevent an excessive concentration of power in one hand. From this point of view, the constitutional court supports rather than contradicts the intentions behind the doctrine of separation of powers. There we encounter Kelsen's view of democracy as primarily a compromise-based system with a strong liberal component of protecting minorities from the possibility of majority tyranny. Thus, *if one does not take the essence of democracy to consist in unfettered majority rule, but rather in the continuing compromise between the different parts of the people that are represented in parliament by the majority and the minority, then one should acknowledge that constitutional adjudication is a particularly suitable means to realize that idea.*²⁶

Contrary to the claims sometimes made, Kelsen recognizes that constitutional judges are human beings instead of law-applying automatons. He is fully aware of how difficult it is to avoid the constitutional court's entangling in politics, which is why he is proposing a rather surprising institutional solution. He suggests that the composition of the court should reflect to some extent the distribution of political power in parliament. It cannot be overlooked that experts, too, are consciously or unconsciously motivated by political motives: *Whenever this danger is especially large, it is almost better to accept the legitimate participation of political parties in the formation of the court, instead of having to deal with non-official and uncontrollable party-political influence. This could take place, for instance, by filling a part of the seats on the court through election in parliament, and to organize this election in a way that takes into account of the relative strength of the parties. If the other positions are filled with experts, the latter will have much greater freedom to give consideration to purely juristic matters, since their political conscience will then be relieved by the participation of those who are appointed to protect political interests.*²⁷

Kelsen is also aware that the proper functioning of the constitutional tribunal largely depends on the quality of the constitution itself. The more the constitution in question contains general terms, not filled with specific content principles, such as justice or morality, referred to by Kelsen as the *political adornment of the constitution* (*politischen Schmuck der Verfassung*), the greater the risk of conceding to a constitutional court a fullness of power: *such a shift of power from parliament to an extra-parliamentary*

²⁶ Ibid., p. 72 [p. 51].

²⁷ Ibid., p. 48 [p. 27].

*institution, one that may turn into the exponent of political forces completely different from those that express themselves in parliament, is certainly not intended by the constitution and highly inappropriate politically.*²⁸ It is evident here that Kelsen, when designing certain specific systemic solutions, is much more pragmatic than one might assume based on his methodological attempt to strictly separate law and politics pursued by his pure theory of law.

CARL SCHMITT ON PRESIDENT AS THE GUARDIAN OF THE CONSTITUTION

In 1929, one year after Kelsen's publication, Schmitt released his paper *Der Hüter der Verfassung* (The Guardian of the Constitution), later developed into a book of the same title, which was published in 1931.

Constructing the rationale for his own decision on the constitutional guardianship, Schmitt seeks to systematically refute Kelsen's claim of the constitutional court being the best guarantee of the constitutionality of the law. The sources of popularity of the idea of the constitutional adjudication, especially after the war, have been traced to an abstract and misleading notion of the rule of law according to which it is considered possible to resolve all issues of the state in legal terms, as well as in the influence exerted by the American political system with a pronounced role of the Supreme Court. However, this extension of the matter subject to judicial review leads not so much to the *juridization of politics but rather a politicization of adjudication*.²⁹ Schmitt seeks to demonstrate the reality of this threat and avers that the constitutional court will have to step out of its role as a court and become a judicial legislator when deciding constitutional issues.

Schmitt disputes Kelsen's fundamental argument that the hierarchical construction of the law establishes a coherent system in which a simple subsumption is made, that is to say, a specific fact is subsumed under a general norm. In order to maintain the distinction between legislation and adjudication, it is impossible – contrary to Kelsen – to construct an uninterrupted chain of different levels of law (*durchgängige Stufenfolge*), running from the constitution to the court judgment in an individual case.³⁰ Kelsen's mistake, in his view, involves mixing different kinds of norms, using the homogeneous concept of norm that blurs fundamental differences between different manifestations of law. A judge adjudicating on the basis of a statute, a parliament creating a law or a president exercising his prerogatives cannot be classified as part of a uniform concept of application of law. A fundamental difference must be acknowledged between the actions of

²⁸ Ibid., p. 61 [pp. 39-40].

²⁹ C. Schmitt, "The Guardian of the Constitution", in L. Vinx (ed.), *The Guardian of the Constitution...*, p. 91 [C. Schmitt, *Der Hüter der Verfassung*, Berlin 2016, p. 22. In the following footnotes the page numbers in square brackets refer to the German original].

³⁰ Ibid., p. 109, footnote 2 [p. 38, footnote 2].

an executive or legislative body and a judge adjudicating on a criminal case: in this case, the penal code in a sense precedes the content of the judgment, and the role of the judge is to bring the facts into line with the existing norm. However, it cannot be said that the actions of the President of the Reich on the basis of the Article 48 of the Weimar constitution (on state of emergency) are analogous to the aforementioned action of the court. In the latter case, there is no straight subsumption and the room for maneuvers is not, as in the penal code, delineated in advance.³¹ Kelsen's approach turns into a *metaphor full of fantasy* when he introduces a category of a *general hierarchy of norms* and *mixes together, in this picture, three or four different kinds of superiority and subordination* – the 'superiority' of the constitution over all the life of the state, the 'superiority' of a stronger statute over the weaker, the 'superiority' of the statute over the court judgement and other acts of the application of statute, the superiority of the superior over the subordinate. Strictly speaking, there is only the hierarchy of concretely existing beings, the superiority of and subordination of concrete authorities. A 'hierarchy of norms' is an uncritical and un-methodological anthropomorphization of the 'norm' and an improvised allegory.³² It is hard to make a stronger charge from the point of view of Kelsen, who has devoted much intellectual effort to debunk various personification fictions in the theory of state and law.

Schmitt's argument is intended to show that, in constitutional cases, especially controversial ones, there can be no question of a simple and unequivocal application of the law on a subsumption basis. Since the constitution most often results from of a compromise between conflicting forces, it is predictably unclear. The constitution may also leave some issues unresolved, masking its own vagueness. This original lack of decision certainly encourages constitutional disputes. This is probably an inescapable feature of the constitutions of societies which in themselves carry many lines of ideological, political and religious divisions. A resolution which of the two conflicting rules applies is not an act of subsumption, but of decision. The argument from the hierarchy of norms is helpless in a situation of conflict between the provisions of the constitution itself.³³

It can therefore be claimed that Schmitt's particularly strong argument about the inevitability of the politicization of the constitutional court stems not from the flawed institution of the constitutional tribunal (or a wrong method of electing its members) but from the very nature of the constitutional matters to be decided. Schmitt's key argument, therefore, states that, in the case of a constitutional dispute, there can often be no question of a simple application of the law. In his view, it reveals the inevitable decisionistic nature of constitutional adjudication. Schmitt argues that even in subsumption-based lawsuits, we discover the elements of a pure decision that cannot be *derived from the content of the norm*.³⁴ Therefore, a decisionistic nature of the body which resolves issues of much greater complexity and ambiguity must be proportionally larger.³⁵ Thus, when the ambiguity of

³¹ Ibid., p.109 [p. 39].

³² Ibid., p. 111, footnote [p. 40, footnote].

³³ Ibid., p.113 [p. 44].

³⁴ Ibid., p.117 [pp. 45-46].

³⁵ Ibid., p.118 [p. 46].

the content of a constitutional statute is removed, then the content of the norm is determined and *hence, it is legislation, or even constitutional legislation, and not adjudication*.³⁶

Schmitt mentions the arguments of opponents of a centralized constitutional control, noting that a fragmented system of judicial review avoids situation in which a central body could become the subject of political rivalry and could be politically influenced.³⁷ He points out that *the problem of the guardian of the constitution is the problem of the protection of the strongest norm against a weaker norm. This problem does not even exist for a normativist or formalist logic because, in its view, the stronger validity cannot be threatened or endangered by a weaker validity. Formalist constitutional law, here as everywhere else, stops where the real problem begins*.³⁸ No norm exercises control over another norm and *a statute cannot be the guardian of another statute*.³⁹ So Schmitt's argument is to show president's superiority as the guardian of the constitution. He points out that the judicial review is almost always subsequent, it is predominately conducted 'belatedly.' Since the changing and dynamic reality is apt to create emergencies, it demands an immediate response to prevent the threat. While the constitutional court gathers and debates, it takes time for it to decide, however, the president is constantly present and vigilant, able to react at any time.

Schmitt's attitude to the systemic solutions of the Weimar constitution can be better understood if we take into account the consequences of democratization process culminating in the birth of mass politics. The 19th century's dominant theory of the state is marked by the fundamental duality of state and society. The state is not simply an expression of society, but is somehow above society. It is an objective spirit juxtaposed by Hegel with the system of needs which constitutes civil society. The 19th century theory of the state considered constitution a contract between society and the state personified by the monarch. All this changes with the ultimate triumph of the democratic principle and creation of a democratic state, in which it is no longer possible to distinguish clearly between state and society. It can be said that society 'took over' the state, which resulted in the immediate politicization of those areas that had remained in relative independence from the state (such as economy, religion, morality, etc.). Since the state is a manifestation of the society, its form of self-organization, then every socially momentous issue becomes a matter of political significance for the politicians and the organs of the state. Schmitt describes this process as an element of transition to a total state, which therefore appears not so much the polar opposite as the effect of democracy. If we use the typology developed in more detail in his 1932 book *Legalität und Legitimität* (Legality and Legitimacy),⁴⁰ the history of the European statehood sets the

³⁶ Ibid., p.116 [p. 45].

³⁷ Ibid., p. 91 [p. 23].

³⁸ Ibid., p. 112 [p. 40].

³⁹ Ibid., p. 110 [p. 40].

⁴⁰ C. Schmitt, *Legalität und Legitimität*, Berlin 2012, p. 7 and ff. These notions were already mentioned in the paper "Die Wendung zum totalen Staat", in C. Schmitt, *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles 1923-1939*, Berlin 2014, pp. 168-169.

rhythm of the transition from an absolutist state, known as a sovereign or governmental state, through a 19th-century neutral state, which is a combination of a governmental and legislative state, to a total state that abolishes the 19th-century dualism (this term should not be confused with a later concept of totalitarianism, though).⁴¹

It is worth drawing attention to Schmitt's characteristic curiosity about who, and for what purpose, demands a guarantee of constitutionality. It highlights the change that has taken place with the progressive democratization of the political regime. While the abuse of the executive power, the monarchic discretion, was previously feared, it currently concerns primarily the guaranteeing the rights of minorities against possible abuses by the democratic majority. Here we encounter another point of contention with Kelsen, whom Schmitt accuses of falling victim to the common confusion between democracy and liberalism. He notes sarcastically that the phrase 'true democracy' leads to a miraculous transformation of terms, giving them a completely different meaning.⁴² Schmitt apparently considers democracy to be what the classic Enlightenment concept of democracy proclaims it: democracy is the rule of majority, and the outvoted minority simply erred as to the content of the general will, and therefore also of its own volition. Schmitt points out that modern democracies are based on the principle of the bourgeois rule of law, which has a built-in tendency to ignore the people, because *a distinctive feature of the bourgeois Rechtsstaat constitution is to ignore the sovereign, whether this sovereign is the monarch or the people*.⁴³ Schmitt therefore uses an argument that today can be regarded as a kind of mortal blow. He stresses that the constitutional court, which is a body made up of professionals that cannot be easily dismissed and which has a powerful political influence (*aristocracy of the robe*) is difficult to reconcile with the democratic principle.⁴⁴

For Schmitt, the constitution is not simply a positive constitutional law, but a political decision of the people regarding its political shape, of which the constitution is an expression. It must therefore be assumed that there is a link between that decision and the institutional form of the guardian of the constitution. This is also the case in Schmitt's argument. When examining the Weimar constitution, Schmitt acknowledges that this fundamental (=concerning the kind of political regime) decision involves the rejection of parliamentary democracy and the institution of a directly elected president attests to it. The president, unlike the partisan parliament, embodies the constitutionally embedded unity of the German people, and therefore deserves to be called its guardian.

The idea of a neutral or moderate president is becoming more important when we consider that the 20th century democratic state is primarily a multi-party parliamentary

⁴¹ C. Schmitt, "The Guardian of the Constitution...", p. 132 [p. 79].

⁴² Ibid., p. 94 [p. 25]. According to Schmitt, this confusing view on democracy which he finds in Kelsen's writings means that 'true democracy' can also be defined as the protection of minority. *A continuing compromise between the majority and minority, then, is supposed to be democracy's real and true essence. (...) Even the traditional view that, in a democracy, the majority decides, and that the outvoted minority has made a mistake concerning its own true will, can thus be turned into its opposite* (ibid., p. 94 [p. 25]).

⁴³ C. Schmitt, *Constitutional Theory*, transl. by J. Seitzer, Durham–London 2008, p. 273.

⁴⁴ Idem, "The Guardian of the Constitution...", p. 168 [pp. 155-156].

state. Referring to the 19th-century theory of the monarchical head of state as a neutral power, Schmitt sought to save the state from the threatening party-pluralist fragmentation. Schmitt is, therefore, looking for a stable unit within the state. In his thinking, the president appears to be the 'eye of a cyclone,' an unshakeable point of the political structure, essential for the unity of the state. This image is undermined by the threats posed by the party-pluralistic democratic state, which seems to have not lost its contemporary relevance. Its negative consequences go beyond the impossibility of maintaining of a non-partisan civil service to the emergence of pluralistic notions of legality, which *destroys any respect for the constitution and turns the ground of the constitution into an insecure terrain contested from several directions, whereas it is the point of any constitution to express a political decision which puts the shared basis of the unity of the state that is constituted by the constitution beyond doubt. The group or coalition that is presently ruling, with the very best conscience, refers to the employment of all legal opportunities and to the protection of its own position of power, to the utilization of all its public and constitutional competences in legislation, administration, appointment, disciplinary action, and communal self-government, as legality, from which it follows that it perceives all serious critique or even endangerment of its position as illegality, as a coup, and as a violation of the spirit of the constitution; while every opposing organization that is affected by such methods of government appeals to the idea that the restriction of the equal chance [to gain power in the future – AG] guaranteed by the constitution signifies the worst violation against the spirit and the foundations of a democratic constitution, and thus returns the charge of illegality and unconstitutionality, again with the very best conscience.*⁴⁵

KELSEN RESPONDS TO SCHMITT

Schmitt did not have to wait long for Kelsen's response. As early as 1931 Kelsen released a polemic entitled *Wer soll der Hüter der Verfassung sein?*

Kelsen begins by reminding him that constitutional guarantees are about ensuring that political power does not exceed the limits of the law. There is a fundamental consensus that no body is less suited to the task of reviewing the constitutionality of the activities of power than that which the constitution has already granted the authority to create law. There is an obvious principle that *no person ought to be judge in his own cause*.⁴⁶ Kelsen is surprised that Schmitt uses the old prop, the 19th-century power of the monarch as a neutral power (*pouvoir neutre*), for a wholly new purpose. Schmitt makes Benjamin Constant's formula an essential tool for interpreting the Weimar Constitution and *it is*

⁴⁵ Ibid., p. 145 [p. 90].

⁴⁶ H. Kelsen, "Who Ought to Be the Guardian of the Constitution?", in L. Vinx (ed.), *The Guardian of the Constitution...*, p. 175 [H. Kelsen, *Wer soll der Hüter der Verfassung sein?*, in H. Klecatsky, R. Marčić, H. Schambeck (eds.), *Die Wiener rechtstheoretische Schule. Schriften von Hans Kelsen, Adolf Merkl, Alfred Verdross*, vol. 2, Wien 2010, p. 1534. Page numbers in square brackets below refer to this German edition].

only with its help that he can arrive at the conclusion that the 'guardian of the constitution' is not, as one should expect on the basis of article 19, the *Staatsgerichtshoff* or some other court, but only the president of the Reich; and this according to the constitution now in force, not according to a constitutional reform that is yet to take place.⁴⁷ Transplanting the idea of neutral power from a constitutional monarchy into a republic appears to Kelsen difficult to defend. Schmitt claims that the main source of the constitutional threat has changed: while it was the executive in the 19th century, today it comes mainly from the parliament. Thus, Kelsen argues, Schmitt downplays or even masks the possibility of violations of the constitution by the president and the government, while the constitutional dispute in Weimer itself concerns above all the constitutionality of the actions of the executive under Article 48 of the constitution.⁴⁸ The case of the Austrian Constitutional Court also shows that it had entered into a conflict not with parliament but with the government.⁴⁹ The neutrality of the head of state and its mediating role are, according to Kelsen, much more plausible in a constitutional hereditary monarchy, whereas it is difficult to assume it in a democratic republic with an elected head of state. For Schmitt, the special dignity of the presidential office derives from its being elected by the whole nation directly, not through a party-divided parliament. But how do you guarantee that the elected president will act as a moderator and neutral force? It is much more likely, Kelsen points out, that the president will not cease to be influenced by the party that supported him and led to his election. So the attribution of neutrality (achievable at best by monarch) to the elected head of state and the claim that he has been chosen by *the whole nation* (while, in fact, always by a majority or even the biggest minority) is a misrepresentation of reality.⁵⁰ *But where is the guarantee*, Kelsen asks, *that a 'party-comrade' will not be elected president?*⁵¹ Schmitt's argument merely proves that the constitutional court is by no means in a losing position when comparing its independence with that of the president.

Kelsen also accuses Schmitt of making both constitutional bodies a friend and enemy of the state in his bid to strengthen the authority of the president at the expense of parliament. One saves and preserves unity (the president), while the other constantly upsets it (parliament). As Kelsen argues, *all this no longer has anything to do with an interpretation of the constitution based on positive right. It is nothing but the mythology of Ormuzd and Ahriman, dressed up in a jurisprudential garb.*⁵² Kelsen – known for his reluctance to accept any legal fiction – also considers Schmitt's arguments invoking the unity of the German nation (which would be particularly upheld by the president) insufficient. This is not a formal matter but a material, sociological analysis that Schmitt's theory is missing.⁵³ In the absence of this, it appears as an ideological aspect of Schmitt's theory.

⁴⁷ Ibid., p. 179 [p. 1537].

⁴⁸ Ibid., p. 181 [p. 1539].

⁴⁹ Ibid., p. 216 [p. 1569].

⁵⁰ Ibid., p. 209 [pp. 1563-1564].

⁵¹ Ibid., p. 210 [p. 1564].

⁵² Ibid., p. 220 [p. 1572].

⁵³ Ibid., p. 218 [p. 1571].

Kelsen also responds to Schmitt's charge of the undemocratic nature of the constitutional court. Such an authority can be appointed democratically (this is not excluded), and it is difficult to regard the election of its members by parliament or president as *undemocratic*, since these bodies have democratic legitimacy.⁵⁴ First of all, he seeks to bring out the contradictions in which Schmitt's theory is entangled and defend the constitutional court against the misleading or inadmissible characterization of its functions. First, it is difficult to call into question the importance of the constitutional court from the position of the prevailing definition of the judiciary, considering that its activities go beyond the defined framework. For Kelsen, it is of secondary importance that the constitutional court is referred to as a court; what is essential is the fact of its members' independence, which is the consequence of the fact that modern constitutions tend to grant courts such an independence from government and parliament.⁵⁵ In that sense, it can be said that the independence of a constitutional court is a substantive feature and its judicial form only a historical accidental feature. Second, Schmitt misunderstood the nature of the judiciary. If one assumes that political activity is primarily a 'decision' or a 'resolution,' it is impossible to oppose the exercise of power and the actions of the judiciary on that basis. As Schmitt has convincingly demonstrated (in his work *Gesetz und Urteil* [Statute and Judgement] published in 1912), there is also a moment of pure decision in the court ruling. Why, Kelsen asks, does Schmitt take the false image of adjudication as purely automatic application of law and the image of judge as a legal automaton since his own findings allow the opposite view? A 'political' moment therefore includes not only legislation, the exercise of power, but also adjudication: *The view that only legislation is political, and that 'real' adjudication is not, is just as wrong as the belief that legislation alone is productive and adjudication nothing but reproductive application of the law. At bottom, these are only two variants of one and the same mistake. In authorizing the judge, within certain limits, to weigh conflicting interests against each other, and to decide conflicts in favour of one or the other interest, the legislator confers upon the judge a power to create law and hence a power that endows the judicial function with the same 'political' character that inheres, though to a higher degree, in legislation. There is only a quantitative but not qualitative difference between the political character of legislation and adjudication.*⁵⁶ Unquestionably, the political nature of the constitutional court is greater than any other court, but no one hides the political significance of its decisions. It is a serious mistake to assume – like Schmitt – that all political conflicts are conflicts that could not be settled on the basis of law.⁵⁷ To claim that the activities of the court end where a clear and equivocal norm ends or a conflict over its meaning begins is difficult to accept. According to Kelsen, rather the opposite is true: it is at this point that adjudication enters its proper territory. *Otherwise, he claims, there simply would be no disputes concerning 'questions of right' (Rechtsstreitigkeiten* [partly

⁵⁴ Ibid., p. 215 [p. 1568].

⁵⁵ Ibid., p. 182 [p. 1539].

⁵⁶ Ibid., p. 184 [p. 1541].

⁵⁷ Ibid., p. 185 [p. 1542].

italicized in the original – AG] *but only disputes about questions of fact*.⁵⁸ It cannot be claimed that a doubt as to the content of a constitutional norm is fundamentally different from a doubt which may arise in settlement of cases based on ordinary laws.

Kelsen sees here a contradiction – one of many that he ascribes to Schmitt's theory – between his concept of pluralism and the diagnosis of the transition towards a total state. If the state has become 'total,' if it has been taken over by the society, why should institutional safeguards be sought against one of the state bodies expressing this totality, which is parliament? However, if pluralism still exists and the state is torn apart, then we are not yet dealing with a total state. Kelsen identifies this ambiguity in Schmitt's view of a pluralist total state, which for Kelsen is *contradictio in adjectio*.⁵⁹ In Schmitt's thought, Kelsen apparently detected a tension between the democratic logic and the desire to preserve the state as something separate from the society. This tension was also well identified by Gopal Balakrishnan, who commented that as early as the 1920s Schmitt was considering at least three possible positions in the face of the momentous changes. The first was an ultra-authoritarian counter-revolution against the revolution that haunted Europe. The second saw the Catholic Church as a stabilizing factor in politics, one of the last bastions of classical political civilization in Europe. The third way to solve the crisis of legitimacy of a post-liberal state, instead of stopping the masses, involved plebiscite-integration of the masses into a homogenous national democracy.⁶⁰ One may get the impression that in the final years of the Weimar Republic Schmitt's ambiguity is reflected in his hesitation between the first and the third option.

Finally, it is worth noting that Kelsen – which may come as surprising – politically supported Schmitt's efforts to strengthen the president's position, seeing in it as we can guess the hope of halting Nazism or civil war. However, in the spirit of his pure theory of law, he advocates separating political and strictly scientific dimensions and not mixing ideology, politics, and science. Thus, he opts for a problematic distinction between the matters of the state and law, in feasibility of which Schmitt apparently does not believe since all political concepts grow out of specific historical opposites and without them would only be contentless abstractions.⁶¹

PRUBENSCHLAG AND THE LAST CRISIS OF THE REPUBLIC

The discussion about the guardian of the constitution in the last period of the Weimar Republic was not limited to the academy, but gained a special political significance. Schmitt's argument, in particular, was met with a lively interest from circles that preferred the introduction of the presidential system, and Schmitt himself refined and

⁵⁸ Ibid., p. 187 [p. 1543].

⁵⁹ Ibid., p. 198 [p. 1555].

⁶⁰ G. Balakrishnan, *The Enemy. An Intellectual Portrait of Carl Schmitt*, London–New York 2000, p. 41.

⁶¹ C. Schmitt, "Hugo Preuß...", p. 164.

developed his arguments to support the political camp he found himself in after moving from Bonn to Berlin in 1928. The mere fact that he took over the academic chair named after Hugo Preuß (one of the fathers of the constitution) in the Handelshochschule in Berlin indicates that he was not considered an enemy of the republic.⁶² By befriending the secretary of state in the Prussian Ministry of Finance Johannes Popitz and Hindenburg's confidant General Kurt von Schleicher, Schmitt gained access to the 'antechambers of power.' The conservative camp, on the other hand, found in Schmitt one of the major and most ingenious advocates of consolidating presidential rule, bypassing the increasingly divided Reichstag and supporting broad interpretation of the presidential emergency powers based on Article 48 of the constitution and the concept of presidential guardianship of the constitution. It is worth remembering that the expanding interpretation of this article was facilitated by the fact that the implementing laws announced in the constitution were not enacted by the Reichstag.⁶³

The Great Depression put an end to a few years of relative stability of the political system which, in the face of the deteriorating economic situation of large segments of the society, triggered an additional mechanism for the polarization of the political scene and augmented the popularity of the two largest anti-system parties: the Nazis and Communists. After the elections of September 1930, parliament became virtually incapable of action.⁶⁴ The final stage of Weimar Germany's political crisis begins with the so-called *Preußenschlag*. Referring to the emergency situation (Article 48) in Prussia, which was the largest federal state (ruled by the Social Democrats), and currently was almost in a state of civil war between Nazi and Communist militias, the federal government established a federal commissioner and removed the Social Democratic Prussian Government from power. The Prussian Government appealed against this decision to the Staatsgerichtshoff. In the trial, Schmitt was a counsel to the federal government.⁶⁵ The court's judgment of 25 October, 1932 satisfied neither side and proved that no final decision was actually made, since, on the one hand, the suspended Prussian government was reinstated and, on the other hand, the commissioners of the Reich were allowed to remain in office.⁶⁶

Whereas a detailed discussion of the Staatsgerichtshoff judgement goes outside the scope of this paper, it is nonetheless worth taking a look at Schmitt's and Kelsen's reactions to it. In Schmitt's view the court should not have adjudicated on the constitutionality of the presidential decree in the first place. He also claims that the court has the duty to act as the guardian of the constitution but at the same time this action is limited to the judicial and legal protection of the constitution, while the President of

⁶² J. Bendersky, *Carl Schmitt. Theorist for the Reich*, Princeton 1983, p. 107.

⁶³ H. Möller, *Weimar. Niespełniona demokracja*, transl. by A. Marcinek, Warszawa 1997, p. 200.

⁶⁴ D.J.K. Peukert, *Republika Weimarska. Lata kryzysu klasycznego modernizmu*, transl. by B. Ostrowska, Warszawa 2005, p. 273.

⁶⁵ Cf. C. Schmitt, "Schlußrede vor dem Staatsgerichtshoff in Leipzig in dem Prozess Preußen contra Reich (1932)", in C. Schmitt, *Positionen und Begriffe in Kampf mit Weimar-Genf-Versailles*, pp. 204-210.

⁶⁶ H. Möller, *Weimar. Niespełniona demokracja...*, p. 202.

the Reich is tasked with genuinely political guardianship of the constitution *since a constitution is a political entity, there is a need, in addition, for essentially political decisions*.⁶⁷ In turn, Kelsen was also dissatisfied with the judgement, though on different grounds. His thorough and minute analysis of the decision reveals its inner weaknesses or even contradictions.⁶⁸ But in conclusion Kelsen did not fully blame the court for its inability to resolve the constitutional dispute. According to him the root of the problem is to be found in the Weimar constitution and particularly in its neglect to create a *purposefully constructed system of constitutional adjudication*.⁶⁹ The limited competence of the Staatsgerichtshoff was amplified by the German jurisprudence's distaste towards *judicial control of the 'political' sphere, a sphere that it takes to be outside of the law*.⁷⁰ Kelsen thus suggested that the existence of a genuine and robust constitutional adjudication might have facilitated a different and better way to deal with Weimar's constitutional crisis of 1932.

As David Dyzenhaus noted, if the Staatsgerichtshoff ruled the *blow to Prussia* to be unconstitutional, it would have meant tearing apart the cloak of legality *under which Papen and Schleicher had attempted to establish government by decree in Germany, to be torn apart*. (...) *In turn, the legality of Hitler's seizure of power would have appeared even more dubious*.⁷¹ In this context, the political scientist Karl Loewenstein wrote *about suicidal legalism* and developed a theory of *militant democracy* capable of resisting enemies who use legal means to overthrow the existing political regime.⁷²

One can get an impression that the desire to preserve the legality and resistance of President Hindenburg to consistent government by decree with the complete omission of parliament, as well as undoubtedly the mistakes and illusions of the conservative camp (Franz von Papen and Kurt von Schleicher), made it easier for Hitler to rise to power. The enemies of the republic simply made use of legality and democracy where it suited them. After the November 1932 elections, the Nazi Party remained the largest party, and Hitler demanded that he be entrusted with the office of Chancellor, in accordance with the constitution. He finally got it, as we all know, on January 30, 1933. Most likely, president Hindenburg's full presidential dictatorship, which

⁶⁷ C. Schmitt, *Closing Statement before the Staatsgerichtshoff*, in L. Vinx (ed.), *The Guardian of the Constitution...*, p. 226.

⁶⁸ H. Kelsen, *On the Judgement of October 25, 1932*, in L. Vinx (ed.), *The Guardian of the Constitution...* [German original: "Das Urteil des Staatsgerichtshoff vom 25. Oktober 1932", *Die Justiz*, no. 8 (1932), pp. 65-91]. Kelsen claims that "Article 19 of the constitution of the Reich confers on the Staatsgerichtshoff the right to decide the entire constitutional dispute at hand, without adding any restrictions. And in a constitutional dispute, the question of fact can have even larger significance than the question of law; or, put more accurately, the question of law can consist in a question of fact, since even the so-called question of fact is a question of law" (ibid., pp. 233-234).

⁶⁹ Ibid., p. 251.

⁷⁰ Ibid., p. 252.

⁷¹ D. Dyzenhaus, *Legality and Legitimacy...*, p. 32.

⁷² K. Loewenstein, "Militant Democracy and Fundamental Rights (I)", *The American Political Science Review*, vol. 31, no. 3 (1937), p. 427.

did not happen, although it probably could not have saved democracy, gave a shred of a chance to save Germany and Europe. In the end, neither the president nor the court succeeded in guarding Weimar democracy.

SUMMARY

The outlined debate about the guardian of the constitution as well as the history of ideas or political history is full of paradoxes. A simple dichotomy of authoritarianism and democracy does not work at all. On the one hand, we have Hans Kelsen, whose pure theory of law grows on the basis of a typically Austrian distrust of the state and the people – as Eric Voegelin convincingly demonstrated⁷³ – and thus suspends the final resolution of the question of sovereignty and even seeks to dismiss it. Kelsen himself, while advocating democracy in his texts, is rather a Democrat in terms of his subjective political beliefs. In his pure theory of the law it is difficult to find a distinctly democratic component. On the contrary. It can be said that he is rather a democrat of the heart than of the reason, especially if one considers how much intellectual effort he has put into combating various fictions in the field of theory of the state, including fiction of representation, fiction of the will of the state or fiction of justice. The negative consequences of these considerations for the theory of democracy should not be overlooked. However, there is – as analyzed by Sandrine Baume – a Kelsenian democratic theory that is inspired by the ideal of autonomy and makes it, rather surprisingly, the primary principle of democracy in place of the principle of equality.⁷⁴ Kelsen's democratic theory lacks democratic pathos and underlines the contemporary inseparability of democracy and liberalism, seeing anti-parliamentary movements as an expression of anti-democratic tendencies.⁷⁵ He emphasizes the pluralistic and even relativistic nature of democracy (particularly in his *Essence and Value of Democracy*⁷⁶) as a positive aspect of democracy, pointing out that this system is fostered by antimetaphysical attitude, since in fact “all the great metaphysicians have declared themselves against democracy and in favour of autocracy; and the philosophers who have stood for democracy have almost always been inclined to an empiricist and relativist point of view.”⁷⁷

On the other hand, Schmitt, who bears (not quite rightly) the label of the ‘crown jurist of the Third Reich,’ also escapes simple clichés. He is primarily an anti-liberal, not an anti-democratic, thinker. A democratic component of Schmitt's thought should

⁷³ E. Voegelin, “The Authoritarian State. An Essay on the Problem of the Austrian State”, in G. Weiss (ed.), *The Collected Works*, vol. 4, Columbia–London 1999 (see especially p. 163 and 190).

⁷⁴ S. Baume, *Hans Kelsen and the Case for Democracy*, transl. by J. Zvesper, Colchester 2012, p. 19.

⁷⁵ H. Kelsen, “Demokratie”, in *Die Wiener Rechtstheoretische Schule...*, p. 1434.

⁷⁶ Cf. H. Kelsen, *The Essence and Value of Democracy*, N. Urbinati, C. Accetti (eds.), transl. by B. Graf, Lanham–Plymouth 2013.

⁷⁷ H. Kelsen, “State-Form and World-Outlook”, in idem, *Essays in Legal and Moral Philosophy*, O. Weinberger (ed.), transl. by P. Heath, Dordrecht–Boston 1973, p. 110.

not raise any doubts, though it contains a heavy emphasis on, to a large extent fictional, homogeneity and unity of a democratic people (at the expense of liberal-democratic emphasis on pluralism). Democracy can also be an absolutism, as Schmitt knew, and as some Polish interwar conservatives also knew (and warned against it).⁷⁸ Could Schmitt's decision to support Hitler's regime in 1933 be seen not as mere opportunism, but an expression of radical democratic logic underlying his several key works (e.g. *Verfassungslehre*)? Schmitt only supported the revolution when it had already taken place. Is the recognition of the transition from the old to the new order not an inevitable consequence of a radically democratic thinking that establishes the people as the constituent power and the last resort?

Finally, there always remains a daunting question: Once the guardians are set-up, who will guard the guardians? A lesson that can be learned from Weimar's experience is rather pessimistic: in the wake of the politically awakened people with its nebulousness, once it finds a release of the accumulated forces in the form of an uncompromising political organization, no institutional safeguards are likely to be sufficient. For all those who would like to find a definitive solution to the problems of democracy, to find the most perfect institutional guardian, the words of the Psalm 127, reminded at the beginning of Bertrand de Jouvenel's book *On power*, remain a cautionary tale: *Unless the Lord watches over the city, the guards stand watch in vain* (Ps 127,1).

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⁷⁸ Cf. B. Szlachta, *Polscy konserwatyści wobec ustroju politycznego do 1939 r.*, Kraków 2000, p. 278. Cf. also J.M. Majchrowski, B. Szlachta, T. Wiecech, M. Zakrzewski, *O praworządność i zdrowy ustrój państwa. Zagadnienia zabezpieczenia konstytucyjności ustaw w polskiej myśli politycznej i prawniczej okresu międzywojennego*, Kraków 2006.

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