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Hans Kelsen and Carl Schmitt in Weimar: A riddle of political constitutionalism

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for the Degree of PhD

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May, 2018

Abstract

This thesis approaches the Weimar constitutional debate by focusing on its most significant participants, Hans Kelsen and Carl Schmitt. It reveals that this debate concerned the constitutional question in the context of the contradiction between the democratic modern state and the capitalist economy. It was in that sense a debate on the 'riddle' that was identified by the young Marx concerning the problem of the political form through which modern societies are regulated, caught between the political question, namely that of political power, and by the social question, namely that of the socio-economic structures of power. In effect the term “political constitutionalism” captures this tension through which Hans Kelsen and Carl Schmitt approached the constitutional question.

The historical context of the Weimar Republic is important in order to bring into the light the theories of Kelsen and Schmitt (and, secondarily, of other Weimar theorists who also approached the constitutional question through similar problématiques). Regarding this context, it is, firstly, demonstrated that the Weimar Constitution was a post-traditional constitution that dealt both with the political question (the introduction of parliamentary democracy) and with the “social question” through its “economic constitution”. It is, secondly, demonstrated how the relationship between political and socio-economic power affected, in turn, the constitutional order throughout Weimar by leading ultimately to its structural transformation.

This thesis argues, firstly, that Schmitt’s solution to Marx’s riddle dissociated the constitution from its democratic promise in order to protect a concept of constitutionalism that would maintain the 19th century liberal political-economic divide. Hence, it ended up as a theory of “authoritarian liberalism” that legitimized the “structural transformation” of the Weimar constitutional order between 1930-32; secondly, that Kelsen’s solution, while placing emphasis on the association of the constitution with the democratic promise, underplayed the power of the capitalist mode of production to affect both the State and the constitutional order itself. As a result, and although he defended the Republic and the Weimar Constitution, he could not see that the constitution itself was traversed by the power of capital in its entanglement with the mode of production.

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Acknowledgements

I would like to express my sincere gratitude to everyone who has supported, encouraged and made it possible for me to complete this thesis. I would especially like to thank:

The main supervisor of my dissertation, Professor Emilios Christodoulidis for his constructive supervision, advice and support during these years.

The second supervisor, Professor Hans Lindahl for his insightful comments.

Dr Marco Goldoni for his generous encouragement during the difficult periods of my studies and for his splendid friendship.

The rest of the colleagues at the Legal Theory reading group and especially Dr Su Bian and Dr Pablo Marshall.

My friend and colleague Dr Alexandros Kessopoulos for his genuine interest in my research and kind inspiration.

My parents for their generous support and love, and certainly my sisters Georgia and Triantafyllia for their encouragement and thoughtfulness.

Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Printed name: VAGDOUTIS NIKOLAOS

Signature:

List of Abbreviations

(All abbreviations refer to associations and parties during the Weimar period unless written otherwise)

ADB	General German Union of Officials
ADGB	General Federation of Unions
AfA	Cooperative Union of Free Salaried Employees' Associations
BdI	Union of Industrialists (pre-WWI)
BdL	Agrarian League (pre-WWI and until 1920)
BVP	Bavarian People's Party
DDP	German Democratic Party
DGB	Federation of German Unions
DNVP	German Nationalist People's Party
DVP	German People's Party
FVP	Progressive People's party (pre-WWI)
KPD	Communist Party of Germany
MSPD	Majority Social Democratic Party of Germany (This was the official title of the SPD since the split with the USPD in 1917 until the reunification with what had remained from the USDP in September 1922. Given that most authors refer to the MSPD as SPD I will stick to the SPD title during this dissertation).
NSDAP	National Socialist German Workers' Party
RDI	League of German Industry
RLB	Agrarian League
SPD	Social Democratic Party of Germany
SDAPDÖ	Social Democratic Workers' Party of German Austria (Sozialdemokratische Arbeiterpartei Deutschösterreichs)
USPD	Independent Social Democratic Party of Germany
ZDI	Central League of German Industrialists (pre-WWI)

Introduction

The “debate” between two of the greatest jurists of the 20th century, Hans Kelsen (1881-1973) and Carl Schmitt (1888-1985), takes place mostly in the historical context of the Weimar Republic (1918-1933), the “*most democratic democracy in the world*” as it was once called¹ or -as the historian Peter Gay wrote- a Republic that “*was born in defeat, lived in turmoil and died in disaster*”².

This historical context of the Weimar Republic cannot be identified merely with the modernist architecture of the Bauhaus movement³, Brecht’s epic theatre, Thomas Mann’s “Magic Mountain” and Joseph Roth’s feuilletons regarding the outcasts and the underdogs⁴. The great political and cultural scene of 1920’s Berlin - that was “...*the aspiration of the composer, the journalist, the actor; with its superb orchestras, its hundred and twenty newspapers, its forty theaters...*”⁵- is not the only picture of the Weimar Republic.

¹This phrase was used by Eduard David (the SPD Minister of the Interior) on July 31, 1919 as a hailing to the approval of the Weimar Constitution by the National Assembly on that day. David was primarily referring to its provisions on universal suffrage, economic-social democracy and direct democracy.

See David’s speech in Fowkes, Ben (2014). *The German Left and the Weimar Republic. A Selection of Documents*, The Netherlands: Brill Academic Publishers, 36-37, 37

Winkler, Heinrich A. ([2000] 2006). *Germany: The Long Road West: 1798-1933*, vol. 1, Oxford: Oxford University Press. This is the 7th chapter of the book and is entitled ‘The Impaired Republic 1918-1933’, 339-491, 364

² Gay, Peter ([1968]2001). *Weimar Culture: The Outsider as Insider*, New York, London: W.W. Norton, 2

³Interestingly, Peter Gay argues that the “*three lives of the Bauhaus- venturesome trials at the beginning, secure accomplishment in the middle years and frantic pessimism at the end- are expressive of the three periods of the Republic itself*”. Ibid. 120

⁴ See Roth, Joseph (2013). *What I saw: Reports from Berlin 1920-33*, Granta Books.

⁵ Gay ([1968] 2001) 123

On the contrary, both this city and, even more, the newborn Republic comprised a mosaic of political and theoretical conceptions since its birth. This was evident even by the fact that the cultural advances that defined “Weimar culture” were not seen by everyone through a positive lens⁶. In terms of the political dimension, which crucially concerns us here, there was a “tug of war” between two different concepts of political representation of the German people, both claiming a different inscription of the revolutionary event of November 1918: on the one hand as rupture and a new beginning, on the other as continuous to the Kaiserreich.

Continuity was envisaged predominantly through the categories of constitutional monarchy. Rupture was based on a conception of a reflexive political identity that found expression in the “*Republik*” and was also responsive to the opening of the “social question”, which was omnipresent as the end of the Great War was approaching. Alongside the “tug of war” between these two main understandings of the constitutional question stood a third one (of less impact) that was deployed in the name of the “dictatorship of the proletariat” aspiring to a “substantive” council democracy on the model of the newly born Bolshevik regime in Russia.

In the text of the 1919 Weimar Constitution, one finds articulated clearly *rupture* given that the Constitution established parliamentary democracy for the first time in Germany. Moreover, for the first time and in contrast with nineteenth-century liberal constitutionalism the Weimar Constitution dealt also with the “social question”⁷.

However, this Constitution included also some elements of *continuity* with the imperial constitutional order of the 1871 Constitution such as the well-known article 48, which gave significant powers to the President of the Weimar Republic. Moreover, despite that the Weimar Constitution dealt with the “social” question by addressing also the democratic organization of the workplace in its “economic constitution”, it did not introduce a clear rupture with the capitalist mode of production.

⁶ E.g. the Bauhaus movement. Ibid. 100-101

⁷ The 1848/1849 revolutionary German Constitution also ignored the “social question”.

See the 1848/1849 Constitution in Hucko, Elmar ([1984] 1987). *The Democratic Tradition: Four German Constitutions*, New York: Berg Publishers Limited, 79-117. See also the *Introduction* of Hucko ([1984]1987)

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The Weimar constitutional order was transformed during the Weimar Republic and especially between 1930 and 1933 through these elements of continuity, namely both parliamentary democracy was substituted by the rise of the presidential state and the approach of the Weimar Constitution to the social question was subsumed under the logic of capitalist accumulation. So, the (originally dominant) direction of rupture in the Weimar Constitution was bypassed.

This could be seen both at the political level and, especially regarding the “political question”, also among the Teachers of State Law in the “*Quarrel over methods and aims*” (Methoden-und Richtungsstreit) during the early 1930s. This structural transformation of the Weimar constitutional order played an important role in Weimar’s fall.

My *thesis* will shed light on this historical process through its focus on the Weimar constitutional discussion and on its impact on the constitutional development of the Weimar Constitution. This discussion is significant given that, as Stolleis wrote, “*what is called the ‘quarrel over methods and aims’ was thus essentially a general discussion over the position of the field in a politically unsettled decade. The participants ...quarrelled over the political form under which they wanted to live and at the same time defined the elementary methodological preconditions of their own discipline*”⁸.

Hans Kelsen and Carl Schmitt were the two most significant theorists in terms of depth in this methodological “quarrel” during Weimar and their debate played a crucial role in the direction that public law took during the Republic and, in this way, in the fate of the Republic itself (from the perspective of constitutional theory). Hence, I dig deeply into their debate, which dealt with both legal theory and state theory or- to put it in German- with both *Staatsrechtslehre* and *Staatslehre*.

However, this dissertation will also deal *secondarily* with other significant theorists and mainly with Max Weber, Hugo Sinzheimer, Franz Neumann and to an extent with Hugo Preuss and Herman Heller⁹. These theorists are crucial in order to understand both the

⁸ Stolleis, Michael (2004). *A History of Public Law in Germany: 1914-1945*, Oxford: Oxford University Press, 142

⁹This dissertation will not deal, nevertheless, with Rudolf Smend’s spiritualist *Integrationslehre* theory. This approach is not relevant for the way in which I approach and explain the constitutional question in Weimar in this dissertation. That’s because, in contrast with all the other theories with which I am dealing in this dissertation, Smend’s theory does not delve both into the political and into the social question as I define them in this dissertation.

Weimar Constitution and Weimar constitutionalism as I approach it. The way in which I will delve into Weimar constitutionalism in this dissertation is by showing that all these theorists dealt- in the historical context of the Weimar Republic- implicitly with the *riddle* that was described by the 25-year-old Marx in his “Critique of Hegel’s Doctrine of the State”. This riddle concerned the role of the constitution in the context of the modern state and of the capitalist economy.

The solutions given to this riddle by Schmitt and Kelsen and, secondarily, by the other theorists had an impact on the Weimar Constitution and, in this way, on the historical process of the “most democratic democracy in the world” as will be seen by the end of this dissertation.

Marx’s “*riddle of all constitutions*”

I will start from the analysis of the modern state in order to grasp Marx’s riddle. The modern state was defined through its separation from civil society. As Marx argued, “*the abstraction of the state as such was not born until the modern world because the abstraction of private life was not created until modern times. The abstraction of the political state is a modern product*”¹⁰. It was Hegel, according to Marx, who “*experiences the separation of the state [Locke’s ‘civil government’] from civil society as a contradiction*”¹¹.

This contradiction can be already traced, nevertheless, since Rousseau’s distinction between *homme* and *citoyen* and it was ultimately resolved in Rousseau through the general will (as a “*civil religion*”¹²), which is oriented to the collective common good (rather than to an aggregation of interests) and is based on a conception of property that is just serving subsistence (as opposed to the corruptive effects of the arising capitalist

¹⁰ Marx, Karl ([1843] 1992). ‘Critique of Hegel’s Doctrine of the State’ in Marx, Karl. *Early Writings*, Penguin Books, 57-198, 90

¹¹ Ibid. 141

See also Colletti, Lucio ([1974] 1992). ‘Introduction’ in Marx, Karl, *Early Writings*, Penguin Books, 7-56, 31

¹² See Rousseau, Jean-Jacques ([1762] 2008). ‘The Social Contract’ in *Discourse on Political Economy and The Social Contract*, Oxford World’s Classics, 43-168, particularly 158-168

exchange economy of accumulation)¹³. So, Rousseau solves this split of “dual life” without *pactum subjectionis* and through a concept of freedom *in* the state and *not* a liberal freedom from the state¹⁴.

Hegel’s solution to this contradiction comes through the state. He presents the state as embodying the “ethical idea”¹⁵ by having three main internal moments¹⁶: “(a) *the power to determine and establish the universal — the Legislature; (b) the power to subsume single cases and the spheres of particularity under the universal — the Executive; (c) the power of subjectivity, as the will with the power of ultimate decision — the Crown. In the crown, the different powers are bound into an individual unity which is thus at once the apex and basis of the whole, i.e. of constitutional monarchy*”¹⁷.

It should be clarified here that, in the legislature “as a whole”, monarchy is the first moment “as that to which ultimate decisions belong; ... the executive [is the second moment] as the advisory body since it is the moment possessed of [a] a concrete knowledge and oversight of the whole state in its numerous facets and the actual principles firmly established within it, and [b] a knowledge in particular of what the state's power needs”¹⁸. The Estates are the last moment in the legislature and they play a mediating role between civil society and the state by being the “*empirical universal*” of the “*thoughts and opinions of the Many*”¹⁹ (the “*deputation of civil society to the state*” as Marx calls it²⁰) whereas the bureaucracy is the universal class in the Estates (the “*state formalism of civil society*” that protects the

¹³ See Rousseau, Jean-Jacques ([1755] 1984). *A Discourse of Inequality*, London: Penguin.

¹⁴ See Colleti, Lucio (1972). *From Rousseau to Lenin*, New York, London: Monthly Review Press, 143-194, especially 151

See also Goldoni, Marco (May 22, 2017). ‘Rousseau's Radical Constitutionalism and Its Legacy’ in Dowdle, M. W. & Wilkinson, M. A. (eds.) *Constitutionalism Beyond Liberalism*, Cambridge University Press: Cambridge. ISBN 9781107112759 . Available at SSRN: <https://ssrn.com/abstract=2971995>

¹⁵ Hegel, Friedrich (1820). *Hegel's Philosophy of Right*, available at: <https://www.marxists.org/reference/archive/hegel/works/pr/prstate.htm> (last accessed on 02/02/2018)

¹⁶ Colleti ([1974] 1992) 32

¹⁷ Hegel (1820)

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Marx ([1843] 1992) 124

“imaginary universality of particular interests” as Marx writes²¹). The crown *“is the abstract person that contains the state in himself”* through this edifice²².

Hegel’s solution is criticized by Marx both for its dialectical logic, which Marx calls *“logical mysticism”*²³, and for his ideas on the state. Regarding these ideas, Marx does not focus too much on the feudal elements of Hegel’s theoretical construction, which are inspired by the Prussian state, but *“[Hegel] is seen [by Marx], rather, as the theorist of the modern representative state”*²⁴.

In this vein, Marx’s critique to the Hegelian solution to this contradiction is that the “double” life of the people (civil and political life) is not dismantled by Hegel given that *“the only form in which... [man] can exist as a citizen is the form of pure, unadorned individuality. For the existence of the state is complete without him and his existence in civil society is complete without the state”*²⁵. Based on this, he argues that Hegel’s “political” state is directly dependent on private property (given also that Hegel defended landed property through primogeniture as essential to the state²⁶).

As Marx wrote, *“if ‘independent private property’ acquires in the political state and in the legislature the meaning of political independence, then it is the political independence of the state. In that case ‘independent private property’ or ‘real private property’ is not only the ‘pillar of the constitution’ but also the ‘constitution itself’”*²⁷. Hence, Hegel’s theory turns the constitution into *“the constitution of private property”*²⁸.

In this direction, Marx suggested the dissolution of this split between civil and political life in his “Critique of Hegel’s Doctrine of the State” and in his writing “On the Jewish Question”²⁹ around the same period. He argued that this could be done through the

²¹ Ibid. 106-107

²² Ibid. 100

²³ Colleti ([1974] 1992) 19

²⁴ See Ibid. 29

²⁵ Marx ([1843] 1992) 143

²⁶ Ibid. 140. Colleti ([1974] 1992) 36. Hegel (1820)

²⁷ Marx ([1843] 1992) 176

²⁸ Ibid. 177

²⁹ The main difference between these two writings is that, whereas in his ‘Critique of Hegel’s Doctrine of the State’ Marx referred to Hegel’s landed property via primogeniture, in his writing ‘On the Jewish Question’ he makes reference to private property in general.

universal suffrage and the concentration of power in the legislature by writing that the “*electoral reform in the abstract political state is the equivalent to a demand for its dissolution [Auflösung] and this in turn implies the dissolution of civil society*”³⁰.

In this direction, he traced also the solution to the *riddle* by writing that “*democracy is the solution to the riddle of every constitution. In it we find the constitution founded on its true ground: real human beings and real people... The constitution is thus posited as the people’s own creation*”³¹. So, Marx suggested an approach that resolved this contradiction of the split life, namely of the political life in the “political” state and the civil life in the capitalist civil society, through a democratic *constitution* that starts from the “*real people*”, reversing in this way the “*uncritical idealism*” (that stands alongside the “*equally uncritical positivism*”) of Hegel³².

There are *two ways* of conceiving Marx’s account. The *first* one is to see the problematic aspects of young Marx’s theory. In this direction, we can see that the young Marx has not referred (yet) to the social relations of production (labor) but he seems to refer to an exchange civil society of property owners- namely not to a picture of advanced capitalism (that we will see in Weimar)- that is reflected in the “political” state through the maintenance of the split life. This is related to the fact that, as Poulantzas wrote, the term of civil society (bürgerliche Gesellschaft) that is criticized by Marx does not have the meaning of the developed capitalist social formation of the “*mature Marx*”³³. His theory of the capitalist state is, therefore, not that developed at that time³⁴.

That’s why Marx’s *solution* to the contradiction between the political state and the capitalist economy seems to stand between a bourgeois democratic and an anarchist logic in the sense that it stands between a concept of the state of ‘all the people’- visible in his expression that “*the vote expresses the real relation of real civil society to the civil society of the legislature...*”³⁵- and the dissolution of the state in order to get rid of the alienation³⁶.

See Colleti ([1974] 1992) 36

³⁰ Marx ([1843] 1992) 191

³¹ Ibid. 87

³² In Colleti ([1974] 1992) 35

³³ Poulantzas, Nicos ([1965] 2006). *Issues of the Marxist conception of the State* [in Greek “Θέματα της μαρξιστικής αντίληψης περί κράτους”], Nicos Poulantzas Institute, 7

³⁴ Ibid. 12

³⁵ Marx ([1843] 1992) 191

³⁶ See Poulantzas ([1965] 2006) 14-19

So, it is not yet the relatively autonomous class state of the mature Marx, which we can trace for instance in his state analysis in “The Eighteenth Brumaire of Louis Bonaparte” (in 1852).

We can see, therefore, that the main problem of Marx’s account at that time (that is not that different from Rousseau’s account³⁷) is that he does not analyze in depth the relationship between the democratic political state and the capitalist economy (possibly also because both the element of advanced capitalism and of the modern democratic state are still mostly lacking in Germany at that time). This can be seen also as a result of his quite idealistic logic (under the influence of Hegel³⁸), which is visible in his real/unreal discourse.

As a consequence of this, the “political” dimension seems underrated both in –what he calls- the “*political*” state and in his description of the future situation after the prospective dissolution of the state and of civil society. This is evident in the way in which he describes political representation in this future situation: “*the legislature is representative only in the sense that every function is representative. For example, a cobbler is my representative in so far as he satisfies a social need, just as every definite form of social activity...he is a representative not by virtue of another thing but by virtue of what he is and what he does*”³⁹. So, it seems as if there is going to be a homogeneous society without any form of social conflict after the introduction of universal suffrage, given also Marx’s conclusion that democracy is the definite solution to the riddle of all constitutions.

There can be, nevertheless, a *second*- more productive- way of conceiving Marx’s account without necessarily sharing the ultimate suggestions of the young Marx. In this direction, we can see that the *significant element* that Marx introduces is the specific contradiction that traverses modernity between the political state and capitalist civil society. More than this, he shows also how this contradiction affects- what Marx calls- the “*political constitution*”⁴⁰ in this context. So, deviating from the paradigm of liberal

³⁷For the affinities between Rousseau and Marx see Colletti (1972) 183-193

³⁸Poulantzas ([1965] 2006) 12-19

³⁹Marx ([1843] 1992) 189-190

⁴⁰As Marx wrote, “*In monarchy the whole, the people, is subsumed under one of its forms of existence, the political constitution; in democracy, the constitution itself appears only as one determining characteristic of the people, and indeed as its self-determination. In monarchy we have the people of the constitution, in democracy, the constitution of the people*”.

Marx ([1843] 1992) 87

constitutionalism⁴¹, Marx focuses on the socio-economic context and on its relationship with the constitution.

Through his analysis, *firstly*, he grasps the specificity of the modern state in contrast with other historical forms of the state. *Secondly*, he raises the question about the role of the constitution in this socio-economic context and he shows that its role cannot be seen unless it is related to an account of the contradiction between the modern political state and the capitalist economy. Hence, he approaches the constitutional question not only with regards to the “political question”, namely to the organization of political power, but also to the “social question”, namely to socio-economic power. It is by answering to both questions that he resolves his riddle by tying the constitution to the democratic promise.

Political constitutionalism in historical context: the question of methodology

It will be seen in this dissertation that all the aforementioned Weimar theorists dealt implicitly and from various perspectives with Marx’s *riddle* of *what* is the role of the constitution between the modern state and the capitalist economy. It is also for this reason that their theories regarding the constitutional question involve both legal theory and political-state theory.

I use therefore, the term *political constitutionalism* in the title of this dissertation in order to have an overview of the Weimar theorists and primarily of Kelsen and Schmitt in both their state and in their legal theories, namely how they theorized in their state theories the contradiction between the modern democratic state and the capitalist economy and how they conceived the effects of this relationship on the constitutional question in their legal theories. Hence, the term “political constitutionalism” will be used here in order to analyze both parts of their theories not only with regards to the *stricto sensu* “political” question, namely on the question of political power, but also with regards to the “social question”, namely with regards to how they conceived socio-economic power in capitalist times and its effect on the constitutional question.

⁴¹ This is also argued by Colleti ([1974] 1992) 41

So, my method distances itself, *firstly*, from the anachronism of a deliberative perspective of constitutionalism that has substituted state theory in a number of influential recent analyses of Weimar constitutional thought⁴². This perspective, ‘measures’ the Weimar constitutional theorists with regards to the question of whether they are deploying a “non-coercive” and “rational” concept of political power (the criterion being the model of deliberative democracy), based on the model of Rawls and Habermas’ project⁴³.

My approach also distances itself, from the perspective that conceives public law as “*droit politique*” (political jurisprudence). Whereas this approach does indeed introduce state theory analysis into constitutional thinking, this concept of a “*pure*” theory of public law is driven by the assumption of the modern state as marked by its clear differentiation from private power⁴⁴. When read back into Weimar constitutionalism this perspective tends to interpret Kelsen’s, Schmitt’s and Heller’s thinking through the lens of the “political question” without addressing seriously their approach to the “social question”⁴⁵.

The difference from these *two approaches* of Weimar constitutionalism will be seen more thoroughly in the analysis of Schmitt and Kelsen in chapters 5 and 6 respectively, and especially in the introduction to these chapters. Moreover, in the introduction to these chapters my analysis distances itself, *thirdly*, from Kalyvas’ approach to Kelsen’s and Schmitt’s theory, which is much closer to Loughlin’s account (compared to deliberative constitutionalism) given that it also starts from the assumption of the autonomy of the

⁴²For two indicative examples of such an approach see Dyzenhaus, David (1997). *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, Oxford: Clarendon Press.

See Scheuerman, William E. (1994). *Between the Norm and the Exception: The Frankfurt School and the Rule of Law*, Cambridge, MA: MIT Press.

⁴³This is precisely what Dyzenhaus does by drawing a “*fascinating parallel between Kelsen's Pure Theory of law and the recent account of public reason offered by John Rawls in Political Liberalism*”. Dyzenhaus (1997) 158-160

This deliberative approach is also evident in Scheuerman’s account of Weimar constitutionalism. Scheuerman’s deliberative assumption becomes evident in his argument that “*...democracy provides the preconditions for a genuinely rational exercise of power...widespread and unrestricted popular debate and interchange, in which all voices can be heard and taken into consideration and in which the exercise of power might come to rest on a set of reasonable, broadly shared grounds and thus lose its coercive character*”.

Scheuerman (1994) 55, 113, 181

⁴⁴ Loughlin, Martin (2003). *The Idea of Public Law*, Oxford University Press, 76-80

⁴⁵Loughlin, Martin (2017). ‘On Constituent Power’ in Dowdle, Michael W & Wilkinson, Michael A. (eds.) *Constitutionalism beyond Liberalism*, Cambridge: Cambridge University Press.

political. This third approach focuses on the potential for a constitutionalism to embody the “*politics of the extraordinary*”, namely a constitutionalism seen in the interplay between institutionalized and non-institutionalized forms. However, it will be seen that, due to this perspective (and to the lack of historical contextualization), it too underplays Kelsen’s and Schmitt’s approach with regards to the “social question” in their constitutional thinking⁴⁶.

The *droit politique* approach of public law reminds us, nevertheless, correctly of the danger of “*socio-economic reductionism*” in the theorization of the constitutional question⁴⁷. Hence, I use the term “political” in my description of Weimar constitutionalism to capture that dimension in the thought of Kelsen and Schmitt (but also of the other Staatslehre theorists that will be seen in the context of the analysis of the Weimar Constitution in part A, see below) that while attentive to the socio-economic power structures relate these to the “political question” and its ultimate prioritization. My use of the term “political constitutionalism” is also clearly distinguished from the concept of “political constitutionalism” as it is used in the current Anglo-Saxon debate in contradistinction with “legal constitutionalism”⁴⁸.

The title of the thesis “riddle of political constitutionalism” concerns, therefore, the *question* whether primarily Schmitt and Kelsen developed a sufficiently *political* concept

⁴⁶ Kalyvas, Andreas (2008). *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt and Hannah Arendt*, Cambridge: Cambridge University Press.

⁴⁷ Loughlin (2003) 77

⁴⁸ Adam Tomkins, who represents an influential position within this current defined the political constitution as “*one in which those who exercise political power (let us say the government) are held to constitutional account through political means and through political institutions) for example, Parliament*”. In contrast with this, he defined the “*legal constitution*” as “*one which imagines that the principal means, and the principal institution, through which the government is held to account is the law and the court-room*”. Tomkins, Adam (2003). *Public Law*, Oxford, New York: Oxford University Press, 18-19

Another model is Bellamy’s model of political constitutionalism, which focuses more on the legislature’s law making function. He identifies political constitution with “*something like the doctrine of Parliamentary sovereignty... a system of representative democracy, where all citizens can participate as equals in public processes that select and can hold accountable the prime power holders. As a result, the key decision makers have incentives to treat the views and concerns of those who elect them with equal concern and respect*”. Bellamy, Richard (2011). ‘Political Constitutionalism and the Human Rights Act’, *ICON* 9(1), 86–111, 93–94

However, both currents of political constitutionalism focus mainly on the “political question”- drawing “*upon republican theory*” as Gee and Webber note- whereas my concept of political constitutionalism focuses both on the political question and on the social question in order to analyze Weimar constitutionalism with a view to Marx’s riddle.

of constitutionalism in the context of the Weimar Republic that would be able to answer to the riddle that Marx traced.

This *methodological lens* through which we can understand their theories cannot be seen unless we first put these theories into a historical context. The affirmation of this significance for the historical contextualization is based on the assumption that the texts and the concepts cannot speak fully for themselves but their meaning is interpreted/mediated through a discourse that addresses the social reality outside the texts (*“aussertextuelle Realität”*⁴⁹). This assumption is based on the fact that a text or a concept is not a “timeless element” that is self-standing, but it is expressed through language that “always-already” carries a web of social meanings in a social reality. As Michael Stolleis wrote, *“the history of the consideration, teaching, and writing about public law cannot be separated from the social conditions and the general situation in which the intellectual processes took place”*⁵⁰.

My analysis identifies *three* periods in the history of the Weimar Republic: the early “tumultuous” period (1918-1923), the era of stability (1924-1929) and the last period which was marked by economic crisis and governance by decrees (1930-1933). The main focus of this dissertation will be on the first Weimar period, in which the Weimar Constitution was enacted (in part A), and on the last Weimar period that shows Weimar’s fall through the structural transformation of the Weimar state and of the Weimar constitutional order (in part B and to an extent in chapter 4.2. and 4.3.). This “staggering” of Weimar history in the dissertation will provide the “pivot” for the whole historical trajectory of the Weimar Republic and of the Weimar constitutional order along with the analysis of Weimar constitutionalism. That’s because it is impossible to grasp the meaning of the Weimar Constitution unless we analyze simultaneously the theories of the *Staatslehre* scholars who introduced parts of the Weimar Constitution or were very closely attached to them (in part A). Conversely, it is not possible to grasp the significance of the Kelsen-Schmitt debate during the early 1930s unless we analyze simultaneously the concrete historical context of late Weimar (part B).

⁴⁹See Stolleis, Michael ([1997] 2002). *Rechtsgeschichte als Kunstprodukt- Zur Entbehrlichkeit von ‘Begriff’ und ‘Tatsache’* trans. “Legal history as poetics- Towards the expendability of ‘concept’ and of the ‘fact’” (in Greek trans.), Athens: Erasmios Editions

⁵⁰Stolleis, Michael (2001). *Public Law in Germany: 1800-1914*. New York: Berghan Books, 1

The perspective I adopt to analyse the historical context to the Weimar constitution is, that of *political constitutionalism* as I have already defined it. This means that, through the historical context, I will look at the way in which the Weimar constitution answered both to the *political question* and to the *social question*, namely how it dealt both with the issue of *political power* and with the issue of the *socio-economic power structures*. Moreover, it will be seen how the relationship between these two powers affected, in turn, the constitutional order with regards to the *political* and to the *social question* during the historical process of the Weimar Republic. Finally, I will explore how the Weimar constitutional theorists made sense of this context with regards to both questions in their constitutional and state thinking.

The structure of the dissertation

The dissertation is divided in *two main parts* in terms of structure. The main emphasis of Part A (chapters 1-4) is on the analysis of the Weimar Constitution and, more specifically, on its response to the political and to the social question. This analysis will be made in the light of the historical context mainly of the first period of the Weimar Republic (except for the fourth chapter, which covers part of the whole Weimar period, see below) of the enactment of the Weimar Constitution

In part A, there is also a critical examination of the Weimar theorists that introduced parts of the Weimar Constitution that concerned the political question (Preuss, Weber) and the social question (Sinzheimer). I extend the analysis to cover the political-theoretical writings of Franz Neumann and, to an extent, of Herman Heller.

Part B (chapters 5 and 6) deals with Schmitt's and Kelsen's theories. Moreover, in this part there will also be a section on the historical context of the Weimar Republic, mainly of its last period. This historical section is necessary in order to grasp their crucial debate on the question of the "Guardian of the Constitution" during the early 1930s, which takes place in the context of late Weimar. This historical section is located in chapter 5 (the chapter on Schmitt) because Schmitt intervened in this historical context of late Weimar not only at a theoretical level (through his writings) but also at a political level as an advisor of the last Weimar governments.

More specifically, part A is divided into four chapters. The *first* brief chapter is devoted to the historical context and covers the very first period of the *Weimar* Republic, namely from the November Revolution to the Constituent Assembly. This revolutionary, ‘hot’ period is crucial in order to understand the way in which the November Revolution was legally inscribed and the basis on which the Weimar state was created. This *first* chapter shows that the element of rupture was more visible than the element of continuity in the Weimar state given the foundation of parliamentary democracy (elections were set for a National Assembly that would draft the Weimar Constitution) and the approach to the social question. *At the same time*, I will analyze the extent to which this early Weimar Republic endorsed also the element of continuity by avoiding the rupture with the capitalist mode of production due to the “needs” of the impoverished post-war economy. In this direction, I will explore the relation of this continuity logic with the *evolutionary* thinking of the SPD, and whether this element of continuity could be also seen in the state apparatuses of the new Weimar state.

In the *second chapter*, I deal extensively with this evolutionary thinking through the analysis of the evolutionary-reformist theorizations of Eduard Bernstein whose thought exerted a significant influence on the Social Democrats. I explore the assumptions regarding the concept of the state that lay behind Bernstein’s faith in the evolutionary transformation of society. The effects of this evolutionary-reformist thinking will be revealed in this chapter by Rosa Luxemburg who gave some glimpses of an anti-evolutionary and at the same time democratic thinking during this first “hot” period.

Chapters 3 and 4 deal are longer (compared to the first two chapters) because they deal with the founding process of the Weimar Constitution *stricto sensu*. *Chapter 3* shows how the Constitution dealt with the political question. It shows that the Constitution, on the one hand, introduced parliamentary democracy but, on the other hand extended the element of *continuity* through the power attributed to the President of the Republic. The main focus will be on *article 48* that gave extensive powers to the President.

Regarding the powers of the President, I will, firstly, analyze the historical context in which they were incorporated in the Weimar Constitution, at the political level, by the “Weimar coalition” (SPD, DDP, Zentrum). *Secondly*, in this chapter I will also focus on the theorists who introduced these presidential powers, namely Hugo Preuss and Max Weber. Hugo Preuss was chosen to draft the Weimar Constitution by the Council of

People's Commissars (mainly by the SPD) on November 15, 1918⁵¹, whereas Weber participated also in these discussions for the drafting of the Weimar Constitution.

Regarding the analysis of these theorists, I will look, firstly, at the theory of Hugo Preuss in order to bring into light the theoretical logic of his constitutional proposals. More specifically, I will show that his more moderate presidentialism (compared to Weber's initial proposals) was ultimately incorporated in the Constitution and derived from his response both to the political question but also to the question of social justice. Moreover, it will be seen that this response was also related to his analysis of the German historical context.

Secondly, I will delve more deeply into Weber's theory in order to reveal the theoretical origins of his constitutional proposals given also that his (more radical compared to Preuss') concept of charismatic President became hegemonic during the Weimar Republic both at the political level and at the level of constitutional theory (further radicalized in the theory of Schmitt).

I will show that Weber's constitutional suggestions for a charismatic concept of President derived at a theoretical level from his effort to find a "political" counterweight against the bureaucratic tendencies of capitalism (what he called the "instrumental" rationality) that endangered both the national state and individual autonomy. In this sense, it will be explored how Weber, while addressing both the political and the social question, found the solution mostly through the former (as Preuss did) and, more specifically, in the charismatic concept of the President. Finally, the origins of his ultimate solution to Marx's riddle will be also traced in his theorization of the German political and social context.

In *chapter 4*, I will show that the Weimar Constitution included also a response to the "social" question- against Weber's insights and Preuss' suggestions. This response can be seen mainly in the Second Principal Part of the Weimar Constitution (articles Articles 109-165). This Part was the basis of the Weimar's welfare state. The most crucial section of this Second Principal Part was the "economic constitution" (articles 151-165). Hence, in this chapter I will focus mainly on the "economic constitution", which was introduced in

⁵¹ Winkler ([2000]2006) 361

See also Mommsen, Wolfgang ([1959]1990). *Max Weber and German Politics, 1890-1929*, Chicago: The University of Chicago Press, 355

the Weimar period primarily by the Social Democrat theorist of labour law Hugo Sinzheimer. As Kaarlo and Klaus Tuori write “*the very term ‘economic constitution’ stems from one particular legal culture- the German one-... general agreement prevails on the crucial age. This was the Weimar period.*”⁵²

The main focus will be on Article 165, which regulated the role of the councils as the “*organs of economic democracy*”⁵³, and on Sinzheimer’s theory that introduced it. I will present the initial assumptions that lay behind the economic constitution and article 165, how this constitution was partially implemented at the level of legislation during the 1920s and how it was “highjacked” since 1930 and it turned into an instrument of the state that suppressed the rights of workers.

Given how the economic constitution ended up, I will also discuss this process through a theoretical juxtaposition. On the one side of this juxtaposition there will be *two critiques* of the Weimar economic constitution that were exerted after the fall of the Weimar Republic, one deriving from a Weber-inspired theoretical framework and one deriving from a Marxist theoretical framework. On the other side, there will be the social democratic *Staatslehre* theorists that used this constitution as part of their political-theoretical strategy during Weimar (mainly Neumann and Heller to an extent) in order to achieve –what Neumann called- the “democratic market” control.

The main emphasis will be given in this chapter in Franz Neumann’s theory because his post-1933 theoretical critique revealed well the assumptions of the social democratic *Staatslehre* theorists during Weimar (that he held also himself during that era) both at the level of their state theory and at the level of their legal theory. Moreover, he revealed also that these assumptions were mostly shared by the SPD and the unions and that, through these assumptions, they could not oppose efficiently the ‘hijacking’ of the economic constitution and the capital’s attack both on the Sozialstaat and on political democracy during the last period of the Weimar Republic.

Through this juxtaposition the solutions to Marx’s riddle by the aforementioned Weimar *Staatslehre* theories will become visible given that all these theorists addressed both the

⁵²Tuori, Kaarlo & Tuori, Klaus (2014). *The Eurozone crisis: a constitutional analysis*. Cambridge: Cambridge University Press, 14

⁵³ Dukes, Ruth, (2014). *The Labour Constitution: The Enduring Idea of Labour Law*, Oxford: Oxford University Press, 18

social and the political question during Weimar. They delved deeply into the relationship between the Weimar constitution and capitalism.

After part A, I will make the transition *to part B* (chapters 5 and 6), namely to the debate between Schmitt and Kelsen. I will analyze their theories from the perspective of political constitutionalism (defined earlier), in distinction with the other approaches of Schmitt and Kelsen (seen earlier).

In *chapter 5*, I will analyze Schmitt's theory throughout Weimar by presenting both his state-political theory and his legal theory. Regarding his political theory, I will explore his theorization regarding the democratic parliamentary state of 20th century in the context of the capitalist economy with a view to his account of the Weimar state. Through this perspective, I will question how he conceived the staging of the social question through the 20th century parliament in contrast with the 19th century state and parliamentarism. Moreover, I will explore the extent of Weber's influence on Schmitt's concept of the political and of the social and, more than that, I will also question to what extent Schmitt was influenced by the liberal theorists of the 19th century and their concept of parliamentarism.

At the level of his legal theory, I will bring into the light the relation between Schmitt's state and legal theory in view also of Schmitt's account of the Weimar state. In this vein, I will show how Schmitt's Weimar methodology (that will be divided into two periods: his pre-1928 and post-1928 period) answers both to the social and to the political question through his interpretation of the Weimar Constitution and how this theorization is related to the different periods of the Weimar Republic. In this analysis, Schmitt's concept of article 48 will be thoroughly analyzed. However, at the same time I will also explore his analysis with regards to the welfare state and to the economic constitution by examining its relation to Schmitt's concept of the President.

Finally, I will analyze the extent to which Schmitt's theorizations played a role in the structural transformation of the Weimar constitutional order during the early 1930s. This will be explored through his writings but also through the presentation of his active role as an advisor of the last Weimar governments. At this point of *chapter 5* (chapter 5.5.) there will be also an analysis of the last period of the Weimar Republic. This historical section should be read in combination with chapter 4.2 and 4.3. and shows the transformation of the Weimar state, *firstly*, under the pressure of the economic elites that wanted a harsher

attitude against labor and were expressing their fear for a continuation of the “*successful social-democratic reformism*” that had been developed during the first “hot” period and between 1925 and 1930⁵⁴. *Secondly*, it explores the role of the political parties by dealing more extensively with the stance of Social Democracy (both at the political level and at the unions level) with regards to the rise of the authoritarian state and in the subsequent crisis of representation that led to the collapse of Weimar. *Thirdly*, it looks at Schmitt’s active role in this context.

In *chapter 6* I analyze Hans Kelsen’s theory. Firstly, I explore Kelsen’s conception of the 20th century mass democratic state in the context of capitalist economy by tracing the origins of his state-political theorization in the way in which he grasps the Weimar and the Austrian context. Then I analyze the extent to which his concept of the state is also influenced by the multi-ethnic context of the Austro-Hungarian Empire and by the analyses of the German Social Democracy and of the Austro-Marxists (that are not unrelated to the German Social Democratic tradition as it will be seen). I will look at the role that these influences play in Kelsen’s relational concept of the state and how they are associated with the way in which he conceived the State-civil society relationship. Finally, I will show how his concept of the state is related to the central role that parliament plays in his political theory and to what extent his different approach with regards to the political and to the social question makes his concept of an autonomous-relational State *different* from Weber’s and Schmitt’s concept of autonomous state.

At the level of Kelsen’s legal theory, I will show that his theory shares the same assumptions with his 1920s political theory. In this direction, I will delve into his critique of the dominant dualisms of traditional legal theory, namely of the *State-law*, *subjective right-objective law* and *public-private law* dualisms. I will explore how his critique to these dualisms and his conception of law as a “technique” are inspired by his concept of the state, namely (at a deeper level) by the way in which he understands the Weimar and the Austrian state through his social democratic assumptions.

⁵⁴ Abraham, David ([1981] 1986). *The Collapse of the Weimar Republic: Political Economy and Crisis*. 2nd ed. New York, London: Holmes and Meier Publishers, xix

This is argued along similar lines by Polanyi, who writes that “*the peril was not Bolshevism, but disregard of the rules of market economy on the part of the trade unions and working-class parties, in an emergency*”.

Polanyi, Karl ([1944] 2001). *The Great Transformation: the political and economic origins of our time*, Boston: Beacon Press, 197

At this point, I will discuss whether Kelsen's theory of legal interpretation, which became visible in his debate with Schmitt on the "Guardian" of the Constitution, could provide a robust defence of the Weimar Constitution and, in this sense, of the Weimar Republic. Was Kelsen's legal theory able to oppose Schmitt's concept of the Weimar Constitution and his concept of the President?

Secondly, I will question whether the assumptions of Kelsen's state theory based on which he conceived both the Weimar state and the Weimar constitutional order made him grasp the origins of rise of the authoritarian state and of the structural transformation of the constitutional order. At this point, I will associate Kelsen's theoretical assumptions with his analysis during the early 1930s also through the comparison of his theory with other social democratic accounts of this period. I will bring again to the fore the theories that were discussed in chapter 4.3. (Franz Neumann's pre-1933 theory, Herman Heller's theory) and I will show the extent to which, through their social democratic state theory assumptions, they had affinities with the way in which Kelsen conceived the 1930s historical context (despite the differences between their theories).

Based on this analysis I will conclude on whether the way in which Kelsen resolved Marx's riddle in the context of late Weimar provides a better defence of the Weimar Constitution and the Weimar Republic than Schmitt's solution to the riddle.

Part A: The founding of the Weimar Constitution

Chapter 1: From the councils to the Constituent Assembly: the first conflict towards a new concept of a “we”

This chapter analyses mostly the historical context of the first period of the Weimar Republic, namely from the Revolution of November 1918 to the elections to the constituent National Assembly on January 19, 1919. It aims to show the foundations on which the new Weimar state was built and the way in which the revolutionary event was legally inscribed, paving the way for its later constitutional inscription.

The structure of this chapter is the following. I will present, *firstly*, the answer of the Workers’ and Soldiers’ Councils to the political question, namely regarding the organization of political power, and to the social question that concerns the organization of socio-economic relationships. The answer to these two questions will show the hegemony of the Left, which is visible by the acceptance of parliamentarism even by the conservative bourgeoisie during this period⁵⁵, but also some signs of *continuity* due to the evolutionary thinking of the SPD⁵⁶.

Secondly, I will focus on these signs of continuity and I will question whether this

⁵⁵Stolleis (2004) 65

⁵⁶The SPD had been founded in Gotha in May 1875 by Ferdinand Lassalle, August Bebel, Wilhelm Liebknecht and others with the name “Socialist Workers’ Party of Germany”. After the split of 1917 and the birth of USPD the official title of the Party was MSPD until September 1922.

revolution remained unfinished and whether this made the Weimar Republic intrinsically vulnerable.

Founding Weimar

The narration of the historical context starts from the devastating picture of late October 1918 in Germany. By the end of the Great War, there were two and a half million deaths, more than three million surviving dependents and disabled veterans, and an impoverished German economy and society⁵⁷. As a consequence of this situation (along with some other factors⁵⁸) the revolution “from below” sparked on October 29, 1918 with the occasion of the mutiny of the Germany sailors in Kiel. They refused to obey the orders of the naval leadership to instigate a North Sea battle against the British⁵⁹.

This mutiny turned quickly into a series of protests in various cities demanding “bread” and “peace” against the will of the military leadership that wanted the continuation of the war. In a few days, it turned into a movement, organized in the form of soldiers’ and workers’ councils, that demanded the overthrow of the monarch Wilhelm II⁶⁰ who was deemed mainly responsible both for the “catastrophic” outcome and length of the war and for the devastating material conditions. It should be also added here that, albeit this revolution was sparked spontaneously, the SPD members and unions dominated the majority of the councils. However, it was also the USDP and the revolutionary Shop Stewards, which played a leading role in the minority of the councils (especially in Berlin⁶¹) and they were gaining even more ground during this period⁶².

⁵⁷According to Stolleis, “*the relatively contained strata of the “poor” from before the war had become a menacingly broad stratum, which was filled not only by victims of the war, but also by a middle class stripped of their assets*”.

Stolleis, Michael (2014). *History of Social Law in Germany*, Berlin, Heidelberg: Springer-Verlag, 95

See also Feldman, Gerard D. (1997). *The Great Disorder: Politics, Economics, and Society in the German Inflation 1914-1924*, New York, Oxford: Oxford University Press, 77

⁵⁸ There was also a feeling by large parts of the German society that the burden of the war economy was unfairly distributed. See Feldman (1997) 73-74

⁵⁹Winkler ([2000] 2006) 330-332. Braunthal (1978) 34

⁶⁰Winkler ([2000] 2006) 330

⁶¹ Fowkes (2014) 44

After the mutiny had already turned into revolution on November 7, 1918 in various cities⁶³, the leader of the SPD Friedrich Ebert met the chancellor Prince Maximilian of Baden on November 9, 1918, and the latter announced to him the abdication of the (hesitant until that time) Kaiser Wilhelm II and of himself, and the transfer of the “*pursuance of the duties of imperial chancellor with the approval of all the ministerial secretaries*” to Ebert⁶⁴. This happened after the SPD had already sent a public ultimatum demanding it and had threatened with a strike.

Two hours later, under the “pressure” of the November revolution, the *Staatssekretär* Social Democrat Philipp Scheidemann took the initiative and proclaimed the new order of “democratic republic” outside the dining-room of the Reichstag at a time that the revolution had already reached Berlin. Scheidemann’s proclamation of the new order of “democratic republic” aimed at aligning with the masses that expected a “*demonstrative break*” with the previous regime and at the same time to gain control over the revolutionary tendencies. The latter tendencies would appear two hours later in Liebknecht’s proclamation of a “*free socialist Republic of Germany*” on the balcony of the *Berliner Stadtschloss* (royal palace)⁶⁵.

So, this was the point of the *first democratic rupture*. This detailed description is important so as to see thoroughly the unstable interplay between constituent and constituted power during these times, namely before the revolutionary event was legally inscribed in the following days and months.

Moving now to the institutional inscription of this revolutionary event, one day after Scheidemann’s proclamation 3.000 representatives of the soldiers’ and workers’ councils confirmed the new transitional government that was called “Council of People’s Commissars” (3 members from the SPD and 3 from the USPD)⁶⁶. However, both the

⁶² Braunthal (1978) 36

⁶³ e.g. The Independent Social Democrat Kurt Eisner “*seized power in Munich as the head of that city’s workers’ and soldiers’ councils*”. Winkler ([2000] 2006) 330

⁶⁴ This is how Ebert put it in his first proclamation to the German people. In Winkler ([2000] 2006) 333

⁶⁵ Ibid. 334

⁶⁶ Ibid. 335-336

particular role and the duration of this government was unclear at that time. The only issue that could be seen was the government's clearly leftist declaration on 12 November, 1918, according to which it "*has itself the task of putting into effect the socialist program*". In this direction, it proclaimed some measures that would "*enter into immediate legal effect*"⁶⁷.

The role and the duration of this government was clarified in the first Congress of the Workers' and Soldiers' Councils in Berlin (16-21 December 1918). The *main question* both towards the Congress and during the Congress was whether the Weimar Republic would follow a pure council system like the Soviet model or there would be a Constituent Assembly that would decide about the "political question".

A not insignificant part affiliated with the USPD was arguing for the former line following the paradigm of the dissolution of the Constituent Assembly by Lenin in Soviet Russia, which is a line that was also "confirmed" in the first congress of the newly born KPD in the beginnings of January 1919. Based on this, the KPD (that had split from the USPD) decided the boycotting of the elections for the Constituent Assembly in a hugely debated decision objected to both by Rosa Luxemburg and by Paul Levi (among others)⁶⁸.

The SPD, on the contrary, argued for the latter line by suggesting parliamentary representation as the form of political representation. Notwithstanding its stance of accepting parliamentary monarchy until the first days of November 1918⁶⁹, the SPD argued clearly in favor of parliamentary democracy after 7 November 1918 (as a way also

⁶⁷Among the measures that the new government declared that it would enter into immediate legal effect were the following ones:

The right of association and assembly is no longer subject to any restriction, even for officials and those who work for the state.

The expression of opinion in speech and writing is free of restriction.

The provisions to protect labor, which were suspended at the beginning of war, are hereby brought into effect once again...".

See Fowkes (2014) 17

⁶⁸In this founding Congress of the KPD, 62 delegates voted for the non-participation in the elections, 23 against.

Winkler ([2000] 2006) 348

⁶⁹Hence, Heinrich Winkler writes that the SPD "*though republicans in principle, had long since become reasoned or practical monarchists 'Vernunftmonarchisten'*". Ibid. 330

to avoid a revolution) and during the post-revolutionary days⁷⁰.

The “moderate” part of the USPD was also not opposed to the Constituent Assembly but did not want to hold general elections until April or May 1919 in order to “*take precautionary measures securing democracy and socialism*” (albeit Winkler sensibly argues that the democratic legitimacy of a Constituent Assembly would “secure” more the Republic⁷¹).

Ultimately, the decision for a Constituent Assembly was the one to win (344 against 98 votes)⁷² and it showed a broad consensus for a deepening of democracy instead of a “dictatorship of the proletariat”, which they “*foresaw that it would quickly become a dictatorship over the proletariat*” especially after the route that the Russian Revolution started taking⁷³. This deepening of democracy and the (overall) leftist tendency during this period can be also seen through the significant reforms that were proclaimed.

Firstly, the Congress decided unanimously to make significant reforms in the (replete with monarchist officers) army, which is well-known as the “Hamburg points” (e.g. the elimination of the insignia of ranks, the elections of the leaders from the soldiers etc.), and to submit the military under the control of Council of People’s Commissars by creating also a volunteer people’s militia for the protection of the Republic⁷⁴.

Secondly, the Congress dealt with the economy and with labour law. Regarding the *former*, it voted with a large majority to call the Council of People’s Commissars to start immediately the nationalization process of qualified branches of industry, especially mining (for the first socialization commission see chapter 4.2.)⁷⁵. Regarding the *latter*, it issued the decree on “Collective Agreements, Workers’ and Employees’ Committees, and the Settlement of Labor Disputes” (23 December 1918).

⁷⁰ Ibid. 331. See Fowkes (2014) 15

⁷¹ Winkler ([2000] 2006) 342, 344

⁷² Ibid. 348

⁷³ Ibid, p.346

⁷⁴ See more in Ibid.

⁷⁵ Ibid.

This decree recognized the unions, regulated collective bargaining and the binding normative effect of collective agreements. As the theorist of labor law Hugo Sinzheimer wrote, the “*fundamental ideas on which the law rests are: first, that the specifications of a wage agreement cannot be changed by individual contracts between employer and employee; second, that by special decree of the Minister of Labor they may be applied to such employers and employees as did not participate in the drawing up of the wage agreement*”⁷⁶.

So, this decree “*boosted the legal effectiveness of collective bargaining contracts*”⁷⁷. In this direction, the Reich Labor office (established since October 1918) was given the authority to declare upon request as binding, collective agreements to all the relevant workplaces, including those in which the workers were not union members and where employers were not members of the employers’ associations⁷⁸. Moreover, it also regulated the establishment of works councils in workplaces with more than twenty workers (including the public sector)⁷⁹.

This decree partially superseded the *Stinnes-Legien* agreement. The latter agreement (15 November 1918), named in this way due to its most well-known signatories, will be further analyzed here because it plays a significant role in the discussion about Weimar’s “economic constitution” both for its *content* but also due to the *way* that it was conducted. Starting from the latter, this agreement was signed immediately after the November Revolution by employers and labor leaders amidst a common climate of fear about a potential unfolding of the November revolution in an analogous direction with the Russian one.

The union leaders (affiliated with the SPD) and industrialists had already held a series of secret meetings since October 1918 because the employers could foresee that the war would be lost and they “*were willing to form an alliance with the strong unions as a way of preserving the capitalist system*”⁸⁰. After the November Revolution, they were ready to

⁷⁶ Sinzheimer, Hugo (1920). ‘The Development of Labor Legislation in Germany’, (trans. Shumway, D.) *The Annals of the American Academy of Political and Social Science*, 92, Social and Industrial Conditions in the Germany of Today, 35-40, 38

⁷⁷ Stolleis (2014) 123

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Braunthal (1978) 34-35

make bigger concessions to the unions because they conceived them “... as a bulwark against the threat of anarchy, bolshevism, and the socialization of industry”⁸¹. On the other side, labor leaders were willing to sign such an agreement not only for its important gains but because they feared the revolutionary situation both for their own organization and for a potential economic collapse “unless employers helped to shore up the economy”⁸².

The Stinnes-Legien agreement was approved by all the federations (socialists and non-socialists) and was also approved unanimously and publicized by the Council of the People’s Deputies, acquiring in this way a “semi-official character”⁸³. Although this “*did not grant the agreement the character of a formal law*”, its consequence was also that “*it assumed the binding character of an administrative order for the public-sector enterprises*”⁸⁴.

This agreement recognized the eight-hour working day, trade unions, collective bargaining and pledged the prohibition of discrimination based on sex⁸⁵. In addition, it also regulated the works committees in all workplaces with more than fifty workers (whereas the December Decree changed it into demanding more than twenty workers) and a Central Commission, which would be formed at a national level with equal representation by the employers’ and workers’ organisations and would be responsible for the peaceful settlement of disputes⁸⁶. On December 4, the Central Commission was created and it was also charged with the role of advising the government on issues of economic and social legislation⁸⁷.

It should be added here that the effect of the Stinnes-Legien agreement and of the December Decree is not insignificant given that (along with article 159 of the Constitution

⁸¹Ibid.

⁸² Ibid. 35

⁸³Dukes, Ruth (2005). ‘Origins of the German System of Worker Representation’, *Historical Studies in Industrial Relations*, 19, 31-62, 42

⁸⁴ Stolleis (2014) 123

⁸⁵ For the whole content of the agreement see Fowkes (2014) 18-20

See also Sinzheimer (1920) 35-40, 38

⁸⁶For the role of this Commission see “The Agreement for Co-Operation Made on 15 November 1918 Between 21 Employers’ Associations and 7 Trade Unions” in Fowkes (2014) 18-20

⁸⁷ Brauntal (1978) 35

that established the “freedom of association”⁸⁸) it led to a huge rise in the number of workers organized in unions from 3.9 million in 1918 to 13.3 million in 1922⁸⁹. Moreover, there was during the first years of the Weimar Republic a “*triumphal march of the collective bargaining contract in all areas of labor law*”, which was visible in that the year 1922 saw 10,768 collective agreements that applied to 890,000 businesses with 14.3 million employees (that is 75 % of all workers)⁹⁰.

However, the *crucial* point here is that the December Decree and the Stinnes-Legien agreement did not define the concrete role of the councils and their relationship with the unions, given also that there was a political dichotomy: the “revolutionary” left wanted a purely political role for the councils⁹¹ whereas the SPD did not want a substitution of the Reichstag⁹². Moreover, both the SPD and the General Commission of Trade Unions (precursor of the ADGB, see chapter 4) were still torn and undecided about the concrete role of the councils (see chapter 4 on this).

It was ultimately left for the Constituent Assembly to decide, which voted for the inclusion of the famous article 165. This article incorporated many aspects of the aforementioned agreements and was included along with other provisions in the “economic constitution” (see chapter 4). This article and the overall Weimar “economic constitution” has sparked a theoretical discussion about whether it constituted ultimately a rupture in the direction of “democracy in the workplace” or a continuity with the pre-war regime of a (now) more leftist corporatism.

I will suspend judgment on this discussion here (see chapter 4). The only issue that needs to be stressed here, is that the role of the councils during the “hot” period was still left open. In this sense, I deem problematic the argumentation of Franz Neumann, which draws a direct line from the Stinnes-Legien agreement to the drafting of the Weimar Constitution, by writing that the Weimar Constitution endorsed *ab initio* a class collaborationist logic and that it consisted mainly in the codification of prior agreements of the new actors of the

⁸⁸Weimar Constitution ([1919] 2008) in ‘Appendix’ of Carl Schmitt, *Constitutional Theory*, Durham: Duke University Press, 409-440, 435

⁸⁹ Stolleis (2014) 96

⁹⁰Ibid. 123

⁹¹See Winkler ([2000] 2006) 340

⁹² Brauntal (1978) 37

political system (see also chapter 4.3.)⁹³. The examples that he gave in this direction were the alleged Ebert–Groener secret pact (10 November 1918)⁹⁴ and the negotiations between labor leaders and the employers during the war that culminated in the Stinnes-Legien agreement.

However, I have tried to show here that both the labor legislation and the overall historical context of this “hot” period was more open than what is often presented by the “prior agreements” argumentation.

The rise of enmity and the turning point: The “unfinished” revolution”⁹⁵?

This -politically dense- very first period, ended with the withdrawal of the USPD members from the transitional government (27 December 1918) mainly because they thought that the “achievements of the revolution” were in danger in a series of areas (regarding the non-implementation of reforms in the military, in the administration and the socialization of industries that the Council had voted for) and because of the actions of the SPD government members⁹⁶ during the soldier mutiny in the so-called “Berlin Christmas

⁹³Neumann, Franz L. ([1942, 1944] 2009). *Behemoth: The Structure and Practice of National Socialism* (eds. Rowman & Littlefield), London: Victor Gollancz, 10-12

⁹⁴This is the alleged telephone conversation between Ebert and Groener, who was the First Quartermaster-General. In this conversation Groener offered to Ebert the support of the army in a united fight against Bolshevism and the establishment of an orderly government. Although this is not certain (Groener admitted it), Ebert –with Winkler’s words- “*supposedly accepted*” this agreement.

Winkler ([2000]2006) 337

See also Neumann who argues that this conversation was a historical fact.

Neumann, Franz L. ([1933] 1996). ‘The Decay of German Democracy’ in Scheuerman, W.E. (ed.) *The Rule of Law under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer*, Berkeley: University of California Press, 30

⁹⁵This is argued by Bracher, Karl Dietrich (1971). *The German dictatorship: the origins, structure and effects of National Socialism*, London: Weidenfeld and Nicolson, 71-72

⁹⁶This is the fact that the SPD members of the government (Ebert, Scheidemann, Landsberg) gave “*carte blanche*” to the Prussian War Minister to apply military “force” in order to “free” (the Berlin Commandant) Otto Wels. Wels had been taken as a ‘hostage’ by the sailors during their occupation of the royal palace due to a conflict “*over the payment of the ‘people’s naval division’*”.

See Winkler ([2000] 2006) 347

Battles”⁹⁷. The final step of this enmity was the “January” uprising, which broke out on the occasion of the dismissal of the president of the Berlin police (Emil Eichhorn) because he had joined the rebellious “people’s naval division” during the “Berlin Christmas Battles”⁹⁸.

This protest against the dismissal of Eichhorn, who was also a prominent member of the left-wing of the USPD, turned into a spontaneous uprising that substantively acquired the aim of blocking the elections for the Constituent Assembly and establishing a “dictatorship of the proletariat”. It was ultimately crushed by the far-right paramilitary Freikorps, which had been hired by (the newcomer to the transitional government) Gustav Noske⁹⁹ and their motivation was not the protection of democracy but their “*hatred of everything on the left*”¹⁰⁰. These paramilitary bodies acted in a very violent way in retaliation for the uprising by killing, among others, Karl Liebknecht and Rosa Luxemburg on January 15, 1919.

This is a turning point for the birth of the new Republic and, therefore, for the inscription of the new “we”. That’s because, albeit the SPD and a large portion of the German population did not want a council Republic, especially in view of how things started unfolding in Russia at that time, it seems that the old-antidemocratic establishment had acquired again an almost official role from January onwards. As the historian Isaac Deutscher wrote, regarding Luxemburg’s assassination by the Freikorps, “*in her assassination Hohenzollern Germany celebrated its last triumph, and Nazi Germany its first*”¹⁰¹.

This collaboration of the Freikorps with the SPD became visible also later in a series of other left-wing workers’ uprisings between 1919-1920 and most notably in the series of great strikes in spring 1919 and in the Ruhr uprising (1920) that, according to Winkler’s periodization, constituted the *second* and the *third* phase of the November Revolution respectively¹⁰². These minority uprisings- that indicated the dissatisfaction of workers with

⁹⁷ See the whole declaration of the USPD in Fowkes (2014) 56-57

⁹⁸ Winkler ([2000] 2006) 348

⁹⁹ Ibid. 348-350

¹⁰⁰ Ibid. 350. See also Traverso, Enzo ([2007] 2013). *A feu et à sang : De la guerre civile européenne 1914-1945*, Stock (in Greek trans.), Athens: Twenty First Century Editions, 69-70

¹⁰¹ In Dowling, Siobhán (2009). ‘Remembering Rosa Luxemburg: Still popular 90 years after assassination’, *Der Spiegel*, available at <http://www.spiegel.de/international/germany/remembering-rosa-luxemburg-still-popular-90-years-after-assassination-a-601475.html> (last accessed on 20/03/2017)

¹⁰² Winkler ([2000] 2006) 354-355, 371. See also Braunthal (1978) 37

the SPD, regarding the lack of reforms (among others) on the issue of industrial relations and of socializations- acquired ultimately the target to establish council republics and were suppressed with the help of the *Freikorps*.

The case of Ruhr uprising is indicative given that many members of the Freikorps that suppressed it were participants in the Kapp Putsch that aimed at overthrowing the government¹⁰³, whereas the Ruhr uprising had initially started from a general strike so as to save the Republic from the Kapp Putsch¹⁰⁴. Moreover, the participants in the Kapp Putsch were treated very leniently by the judiciary in contradistinction with the way in which the labor uprisings were treated by the judiciary¹⁰⁵. As Neumann writes “*it is impossible to escape the conclusion that political justice is the blackest page in the life of the German Republic*”.¹⁰⁶

In this direction, I should elaborate on several issues that show this overall continuity, which puts limits on the further democratization of state and society, especially from January onwards¹⁰⁷. More specifically, there was ultimately a lack of substantive reforms in the army, in the judiciary and in the public administration¹⁰⁸. Significant parts of these institutions, which were staffed by people with noble origins, especially at the elite level (albeit less than before 1918), were very conservative and openly anti-democratic and they had mostly the attitude of being “*above the society*”¹⁰⁹.

¹⁰³ This was an attempted coup d’etat on March 13, 1920. It was orchestrated by Wolfgang Kapp, who was a monarchist and a founder of the wartime Fatherland party, and by Reichswehr General Walter von Lüttwitz. As Braunthal writes “*they secretly organized 6,000 Marine Brigade troops in Prussia and marched on Berlin to overthrow the governments and install themselves in power*”. However, the ADGB executive “*after hearing reports from the SPD executive*” proclaimed a general strike on March 13. This strike managed to ‘save’ the Republic in the sense that it became effective and had as a consequence that Kapp “*ordered his troops to withdraw from Berlin on March 17*”. See Braunthal (1978), p. 40-46

¹⁰⁴ Ibid, 41.

¹⁰⁵ Franz Neumann wrote that “*every adherent*” of the 1919 Munich Soviet Republic “*who had the slightest connection with the unsuccessful coup was sentenced*” whereas the participants both in the right-wing Kapp Putsch and in the Munich Putsch of 1923 were treated in a much more lenient way (e.g. no one was punished for the Kapp Putsch).

Neumann, Franz ([1942] 1944 2009). *Behemoth*, pp.21-23

¹⁰⁶ Neumann ([1942 1944] 2009) 23

¹⁰⁷ Bracher (1971) 70-71

¹⁰⁸ Stolleis (2004) 51

¹⁰⁹ Blackbourn, David in Blackbourn David & Eley Geoff (1984). *The Peculiarities of German History*, Oxford: Oxford University Press, 243, 245

This continuity is due to the fact that during the first post-revolutionary period a lot of issues were deferred for the democratically elected Constituent Assembly, with the -not unwarranted- justification by the SPD of the need for greater legitimacy¹¹⁰. It was the triad “*preservation of the empire’s unity, public order, restoration of the economy*” that was prioritized also due to Germany’s bad economic condition¹¹¹. However, these issues remained ultimately quite untouched later through a “realistic” argumentation by the SPD.

To go into more detail, the SPD ultimately adopted the old imperial *bureaucracy* as “necessary” by “...*claiming they did not have personnel qualified to replace the current officials*”¹¹². However, there was not a serious reform even at a future point. This is also the picture regarding the *army*. Despite the (earlier seen) Hamburg points and the more modest reform proposals by the “*moderate workers’ councils*” that could have created an army that would adhere to the new Republic¹¹³, Ebert caved in “*almost immediately*” to Groener’s and Hindenburg’s protests¹¹⁴. The law that passed by the National Assembly on March 6, 1919 and regulated a provisional army (*Reichswehr*), did not include “...*any trace of the Hamburg points*”¹¹⁵.

The criticism about the lack of these reforms came from the SPD itself, with the “Prague Manifesto” of the SPD in exile, according to which “*the grave and historic error committed by the German labor movement, disoriented during the war, was to have taken over almost unchanged the old state apparatus*”¹¹⁶.

Further than the issues related to the state apparatus, this continuity logic was also evident in issues of economy, such as the land issue (for the lack of socializations see chapter 4.2). That’s because the SPD did not carry out any significant reforms in agriculture, given also the food scarcity that existed after the war. As Winkler wrote “*at no time in 1918-1919 was*

¹¹⁰ Winkler ([2000] 2006) 345

¹¹¹ Ibid. 344-345

¹¹² Ibid. 344

¹¹³ Ibid 342, 344, 347

¹¹⁴ Ibid 343

¹¹⁵ Ibid. 347

¹¹⁶ Drafted in January 1934 by Rudolf Hilferding.

*the social dominance of the East Elbian manorial lords seriously threatened- an elite that had resisted all efforts at democratic and parliamentary reform during the imperial era, perhaps even more tenaciously than the heavy industrialists*¹¹⁷. The Land Settlement laws (Siedlung) of 1919 were more an attempt to enlarge “*subsistence possibilities*” mainly for the war veterans rather than a significant reform¹¹⁸. Any significant reform would have, nevertheless, weakened the power of the rural elites and could have possibly managed to avert the radicalization of poorer peasants in a right-wing direction, during Weimar (see chapter 5.5.)

Finally, it should be also written here that the far-right started regaining ground on the occasion of the Versailles Treaty, in June 1919. This Treaty (voted for by the USPD, SPD, Zentrum majority and DDP minority) contained not only an important amount of “*harsh...simply impossible*”¹¹⁹ economic reparations, but it included also other prohibitions (of unification with Austria, territorial cessions such as Alsace-Lorraine, etc.) and the significant (in psychological terms) “war-guilt” clause¹²⁰.

The far-right deployed a hate campaign against this treaty and the policy of “fulfillment” that had started since the “Versailles Treaty”¹²¹. The rising power of the far-right became more evident during the 1920s with the Kapp *Putsch* (supported openly by parts of heavy industry and the Bdl¹²²) and by the several political assassinations of democratic politicians and ministers that took place in 1921-1922, by far-right organizations, in a climate of non-negligible hate campaigns by the far-right press¹²³. However, even after these assassinations and the reaction of the ADGB¹²⁴ (that was generally more hesitant to

¹¹⁷Winkler ([2000] 2006) 343

¹¹⁸ Abraham ([1981] 1986) 56-58

¹¹⁹ This is the phrase used by Eduard Bernstein who, nevertheless, argued for the need to accept the Versailles Treaty (at least in the nine-tenths of its conditions). His stance derived from his opinion about the guilt of the (pre-war) German government regarding the outbreak of the Great War.

See Bernstein’s speech “On the need to Accept the Versailles Treaty, June 1919” in Fowkes (2014) 207-208.

¹²⁰ For the rest see Winkler ([2000] 2006) 358

¹²¹ See Ibid. 359-361

¹²² Abraham ([1981] 1986) 58, 116

¹²³ Winkler ([2000] 2006) 377-380

¹²⁴ Fowkes (2014) 149-150

support political actions and strikes particularly with no economic dimension¹²⁵) and of the Left, through massive demonstrations, the enacted reforms by the government were not seriously enforced by the “*authoritarian-minded judiciary*” and did not arrive at a deeper level¹²⁶.

Concluding this chapter, we have seen that there was clearly a hegemony of the Left during this ‘hot period’. The most important indication was the actual establishment of parliamentary democracy for the first time in Germany, given the decision to proceed to a democratically elected National Assembly. Another indication was also that there was a response to the “social question” despite that there was not a clean break with the capitalist mode of production.

However, it seems that there was also a gradual compromise of the SPD with the old structure at the economic, bureaucratic and social level¹²⁷ (see more about this also in chapter 3) and that the Radical Right regained some ground. This does not imply a linear-predestined process of nazification until 1933, but it aims to show the intrinsic defects of the Weimar Republic that made it more “vulnerable”.

¹²⁵ Brauntal (1978) 38-39

¹²⁶ See Winkler ([2000] 2006) 382

¹²⁷ Bracher (1971) 71-72

On the other hand, Winkler argues that this is a controversial issue and that a “bolder” policy during the first ‘hot’ period could have led to a civil war.

Chapter 2: Rosa Luxemburg: glimpses of a democratic “we” between Bernstein’s evolutionism and the Leninist strategy.

Remaining within this first “hot” period, I will focus here on the thought of Rosa Luxemburg (1871-1919). That’s because, notwithstanding that she was not elected as representative in the Congress of Councils (December 1918) and was not allowed to speak therein, the dilemmas about the “we” during this turbulent period can be mirrored in her critique that had “*the perceptivity of the eagle's eye*”¹²⁸ as Poulantzas wrote. Evidently, this approach will be antithetical to her posthumous reception as a romantic figure, which is a take that “co-opts” her figure while evacuating her political critique.

Her critique was directed at *two* different positions. *Firstly*, to the strategy of “evolutionary socialism” that conceived the political in terms of a natural evolution through the representative institutions. This strategy was expressed mainly by Eduard Bernstein and was one of the basic theoretical inspirations of the SPD’s strategy on the eve of the November Revolution. Hence, I will start this chapter, *firstly*, with the analysis of Bernstein’s theory, which is a conception that influenced German Social Democracy¹²⁹.

Secondly, the presentation of Luxemburg’s critique to this conception will follow and, at the same time, her critique of the pure council system that Lenin (and the KPD later¹³⁰)

¹²⁸ Poulantzas, Nicos ([1978] 1980). *State, Power, Socialism*, London: Verso, 253

¹²⁹ Peter Gay argued that Bernstein’s “*impact upon German Social Democracy was decisive*”. Gay, Peter ([1952]1970). *The Dilemma of Democratic Socialism: Eduard Bernstein's Challenge to Marx*, 2nd edition, New York, Collier Books, 252

¹³⁰The KPD was born in the beginnings of January 1919 by the left-wing split of the USPD, namely by the

adopted will also be seen. *Finally*, both sections will start by analyzing the theories of Bernstein and Luxemburg respectively and will end by associating their theories with their Weimar stance.

Through Luxemburg's "eagle's eye" we will be able to see to an extent both the conceptions that lay behind the stance of the political parties of the Left, in Weimar, and the bases on which the Weimar state was built after the November Revolution. Taking this into consideration, I will mostly show that Luxemburg's defeated voice could be seen as an early warning to the evolutionism of German Social Democracy.

2.1. Eduard Bernstein: evolutionary road to socialism

The origins of Bernstein's revisionist thinking can be traced in the introduction that Engels wrote, just a few months before he died, for the first reprint of the "Class Struggles in France" (March 1895)¹³¹. Through his picture of an expansive industrial capitalism at that time, the political conclusion that Engels draws is that the model of "*revolutions carried through by small conscious minorities at the head of unconscious masses, is past*"¹³², especially in Germany.

Engels provides *three* reasons for this. *Firstly*, the capitalist reorganization has brought to the fore a rising middle class, that would not side with the proletariat in a revolutionary process (this point is deployed later by Bernstein). *Secondly*, there are very powerful modern armies that make the possibility of a revolution very difficult and, *thirdly*, that there is now universal male suffrage that is a powerful "weapon" for the proletariat and its allies. So, the revolutionary model was to be replaced by parliamentary struggles with the participation of the majority, which were facilitated by universal suffrage and would end "*tranquilly as a natural process*" in socialism at the end of the century through the "*slow*

"Spartacus League" and by trade-union militants from the Shop Stewards movement.

Rosenhaft, Eve (1983). *Beating the Fascists?: the German Communists and political violence 1929-1933*, Cambridge, New York: Cambridge University Press, 2

¹³¹Engels, Friederick (1895). *Introduction to the Class Struggles in France*. Available at: <https://www.marxists.org/archive/marx/works/1850/class-struggles-france/intro.htm> (last accessed on 08/03/2016)

¹³² Ibid.

propaganda” of the Social Democratic Party¹³³.

Regarding the empirical background of this theorization, it should be reminded here, *firstly*, that universal male suffrage had existed in unified Germany since 1871 (despite the parliament’s subservient political role during the Kaiserreich). *Secondly*, Germany was, during this period, in the midst of a great effort to turn from an agrarian economy into an industrialized one, which proved to be “efficient”. There was, especially after 1895 until the outbreak of the Great War, a boom in German prosperity, with a significant increase in German trade and a growth of heavy industry¹³⁴. *Thirdly*, there was the enlargement of the German Social Democratic Party, both in terms of membership and of influence (given also that after 1890 there had been an abolition of Bismarck’s anti-socialist law).

So, Engels’ evolutionary road towards socialism was showing a “revision of tactics”. This path was developed further by Eduard Bernstein (1850-1932), who was seen together with Kautsky as the heirs of Marx and Engels (Bernstein was Engels’s executor along with Bebel)¹³⁵. Bernstein, after his 1896 revisionist shift¹³⁶, argued that Engels’ “*tactical revision necessarily implied a revision of strategy, a revision of the premises of theoretical Marxism*”¹³⁷. According to Bernstein, the revision is due to the fact that the “*social conditions have not developed to such an acute opposition of things and classes as is depicted in the Manifesto*”¹³⁸.

This is also evident from the title of his main book “The premises of socialism and the tasks of Social Democracy” (1899), where he distinguishes between the premises of theoretical Marxism and the tasks of Social Democracy, in times of the new economic

¹³³ As Engels wrote about the German Social Democracy “*the two million voters, whom it sends to the ballot box, together with the young men and women, who stand behind them as non-voters, form the most numerous, most compact mass, the decisive “shock force” of the international proletarian army. ...Its growth proceeds as spontaneously, as steadily, as irresistibly, and at the same time as tranquilly as a natural process... If it continues in this fashion, by the end of the century we shall conquer the greater part of the middle section of society, petty bourgeois and small peasants, and grow into the decisive power in the land...*”. Engels, Ibid.

¹³⁴ Gay ([1952]1970) 125-127, 132-133

¹³⁵ McLellan, David (2006). *Marxism after Marx*. 4th ed. Basingstoke: Palgrave Macmillan, 25

¹³⁶ See Gay ([1952]1970, 68.

¹³⁷ This phrase is deployed by Lucio Colletti in order to sum up Bernstein’s position. Colletti (1972) 49

¹³⁸ Bernstein, Eduard (1899). *Evolutionary Socialism*. Available at:

<https://www.marxists.org/reference/archive/bernstein/works/1899/evsoc/preface.htm> (last accessed on 08/03/2016)

situation¹³⁹. Here, the object of Bernstein's critique is the “theory of the breakdown” (*Zusammensbruchstheorie*), which was part of German thinking¹⁴⁰ not only during this period but recurring during the Weimar period for the KPD¹⁴¹.

This latter theory prefigured, in a fatalistic way, the imminent and inevitable catastrophe of capitalism, as a result of the over-concentration of social wealth “in few hands”, that would create a huge immiseration and would, consequently, augment revolutionary tension. According to Bernstein, this theory was an outcome of a (Hegel-inspired) *apriorism* that conceives historical development “in terms of dialectical antithesis”¹⁴². That’s why the theory failed to grasp the evolutionary and harmonious situation that the capitalist re-organization brought, which could be seen in that “*the enormous increase of social wealth is not accompanied by a decreasing number of large capitalists but by an increasing number of capitalists of all degrees*”¹⁴³. In a similar way, Bernstein wrote, in 1902, that there existed a collectivization of property due to the growth of shareholders, limited liability companies and similar partnerships¹⁴⁴.

The political outcome that Bernstein drew from his picture was that, through the empirical observation of the new reality that rules out the Hegelian *apriorism*, there can be an evolutionary transition from capitalism to socialism. Hence, the title of his book “*Die Voraussetzungen des Sozialismus und die Aufgaben der Sozialdemokratie*” had two English translations: the first one “The premises of Socialism and the Tasks of Social Democracy”, but also translated in English as “Evolutionary Socialism”, in 1907 (a title that shows the

¹³⁹It is also indicative that this book was full of references to Engels's introduction (1895).

See the preface to this work. Ibid.

¹⁴⁰ This was particularly evident in Kautsky's commentary to the Erfurt Programme of the SPD (1891).

Kautsky argued that “*we consider the breakdown of existing society as inevitable, since we know that economic development creates with natural necessity conditions which force the exploited to strive against private property, that it increases the number and power of the exploited while it reduces the number and power of the exploiters, whose interest is to maintain the existing order*”.

In Colleti (1972) 55

¹⁴¹KPD’s policy combined “*economic catastrophism*” with “*electoral illusions*” as Poulantzas writes with emphasis to the last period of the Weimar Republic. Poulantzas, Nicos ([1970] 2006). *Fascism and Dictatorship: The Third International and the Problem of Fascism* (in Greek), Athens: Themelio Editions, 210-211

¹⁴² Colleti (1972) 50

¹⁴³ Bernstein (1899) ‘Preface’

¹⁴⁴ Gay ([1952] 1970] 174

influence of Darwin's theory)¹⁴⁵.

In this direction, Bernstein argued that there should be a gradual political struggle, through the representative institutions, for the further establishment and expansion of democracy, that would overcome the liberal night-watchman concept of the state. This is how socialism was going to be achieved as an inheritor of capitalism. As he wrote, *“in all advanced countries we see the privileges of the capitalist bourgeoisie yielding step by step to democratic organizations. Under the influence of this, and driven by the movement of the working classes which is daily becoming stronger, a social reaction has set in against the exploiting tendencies of capital, a counteraction which...is always drawing more departments of economic life under its influence. Factory legislation, the democratizing of local government, and the extension of its area of work, the freeing of trade unions and systems of co-operative trading from legal restrictions, the consideration of standard conditions of labour in the work undertaken by public authorities – all these characterize this phase of the evolution”*¹⁴⁶.

Taking this analysis into account, we can see that Bernstein seems to endorse a concept of the state not as a class state but as an autonomous (from the capitalist social relations) site through which socialism can be achieved in an evolutionary manner. This direction shows an affinity with Lassalle's theory. This is significant to the analysis here because Lassalle is a common point of reference, both for Kelsen and for Heller, who oppose Lassalle's theory to the (supposed) economic determinism of Marxism (see chapter 6).

Analyzing this affinity, it should be written, as an aside, that Bernstein was the editor of the complete works of Lassalle (1825-1864) for the Social Democratic Party. Whereas, in his preface for the 1891 edition of Lassalle's works he was *“highly critical”* of Lassalle's work, his attitude changed after his 1896 revisionist shift. In 1904 he wrote explicitly that he had changed his mind and that he was much closer to Lassalle's theory¹⁴⁷.

This means practically that he was *“sympathetic”* to Lassalle's primacy of political democracy through universal suffrage, as a way to proceed to economic reforms without, nevertheless, sharing Lassalle's *“lyricism”* of the state and Lassalle's idiosyncratic

¹⁴⁵ McLellan (2006) 35

¹⁴⁶ Bernstein (1899) ‘Preface’

¹⁴⁷ Gay ([1952] 1970) 68

nationalism¹⁴⁸. On the contrary, Bernstein argued that “*with respect to liberalism as a great historical movement* [namely not as identified with capitalism], *socialism is its legitimate heir...*”¹⁴⁹.

Focusing on the common elements between Lassalle’s and Bernstein’s theoretical frameworks, the basic *common point* is the possibility of transition from the political to the economic (capitalist dominated) level through the “expression” of the social via the state. So, while neither of them was sharing the liberal conception of the state, and both of them understood that the working class is “always-already” on the terrain of the state, there is a common neglect of the “*differentia specifica*” of the capitalist state and of capitalist production, which is constitutively based on the political-economic disjunction.

Regarding Lassalle, this is evident in his speech on the Constitution, which is based on this concept of the state. Despite the fact that he clearly evades a conception of liberal constitutionalism through his focus on the social, Lassalle argues that the actual relation of social forces is directly imprinted in what he calls the “*real constitution*”¹⁵⁰. Evidently, Lassalle does not consider how the constitutive capitalist disjunction between the political and the economic affects the constitution.

Going back to Bernstein, his theory of the state is not that dissimilar from Lassalle’s theorizations (without delving himself into constitutional theory). That’s because it is based on an “*adulteration*” of Marx’s concept of economy in the sense that economy is conceived as “*an antecedent sphere prior to human mediation...social production is thus transformed into 'production techniques', the object of political economy becomes the object of technology*”¹⁵¹. This means that the concept of economy that Bernstein deploys, rules out the political aspect of the socio-economic relations and views the political as autonomous¹⁵² (whereas at the same time this autonomy derives from an economic

¹⁴⁸ Ibid. 92-93

¹⁴⁹ Bernstein (1899) Chapter 3-2

¹⁵⁰ Lassalle, Ferdinand (1862). *On the Essence of Constitutions*, available at: <https://www.marxists.org/history/etol/newspape/fi/vol03/no01/lassalle.htm> (last accessed 04/04/2016).

¹⁵¹ Colleti (1972) 65

¹⁵² In this effort, he was also “helped” by another famous self-criticism by Engels (1890), who argued that “*Marx and I are ourselves partly to blame for the fact that the younger people sometimes lay more stress on the economic side than is due to it*”

Engels, Friederick (1890). *Engels to J. Bloch in Königsberg*, available at: https://www.marxists.org/archive/marx/works/1890/letters/90_09_21.htm (last accessed on 08/03/2016).

analysis, as seen with his earlier point about organized capitalism).

Bernstein's overall thesis can also be seen in his *Weimar stance*. In one of his final texts in 1921, Bernstein argued that the Weimar regime should be seen in continuity with the previous regime and not as a rupture with it¹⁵³. He justified this concretely by arguing that the developed level of industrial capitalism (e.g. the developed level of the division of labor) and of democracy already existing in Germany before the November Revolution (e.g. the prior existence of the Reichstag and of universal male suffrage) indicated that the German Revolution could not stand a revolution like the Soviet or the French ones. That's because- as Winkler summarized Bernstein's thesis- "*the less developed societies are, the better they are able to cope with measures aimed at their radical restructuring*"¹⁵⁴. So, a further democratization of the *Kaiserreich* regime, through the introduction of parliamentary democracy, was already a very important step towards the "evolutionary road" to socialism¹⁵⁵.

In line with his theorization, Bernstein had already become, again, a member of the SPD, in December 1918 (or in January 1919) by being, until March 1919, a member of the SPD and the USPD, at the same time¹⁵⁶. He chose ultimately the SPD, given also his critique of the resignation of the USPD members from the government, in December 1918. He remained as an SPD deputy in the Reichstag from 1920 until he retired in 1928.

¹⁵³ In Ibid. 341

¹⁵⁴ Ibid.

¹⁵⁵ Bernstein argued that Germany "... had nonetheless achieved a stage of development at which simple democratization of the existing institutions meant a great step towards socialism. The first signs of this were already in evidence even before the revolution. Under the influence of the workers' representatives, who had gained access to the legislative and administrative bodies of the Reich, the states and the communities, the measure of democracy present at those levels has proved itself an effective lever to promote laws and policies endorsed by the socialist movement, so that even imperial Germany could rival politically progressive countries in those areas".

However, there is also an exception in Bernstein's evolutionism, which can be seen in a text that he co-authored. This is the "Görlitz platform" of the SPD in 1921, where it was written that "*the MSPD is a party of the working people in the city and country' that aspired to fundamental social reforms, was open to the middle classes, and no longer considered socialism the result of a natural and ineluctable economic development, but as a question of political will*".

Bernstein, Eduard (1921), "*Die Deutsche Revolution, ihr Ursprung, ihr Verlauf und ihr Werk*" in Winkler ([2000] 2006) 341, 385

¹⁵⁶ Bernstein left the USPD and remained member of the SPD when the USPD prohibited the double membership. Winkler ([2000] 2006) Ibid.

Although he was not very influential at a personal level during this period- due to the fact that the party was “*too busy with Realpolitik*”¹⁵⁷- his whole theory had practically exerted already significant influence in the Weimar SPD. It was the “*pacifist and petty bourgeois outlook of Eduard Bernstein*” that triumphed in Weimar, according to Franz Neumann. Neumann justified this by writing that “*it was English Fabianism that, under the Weimar Republic, triumphed over orthodoxy, although the orthodox formulas and slogans were retained*”¹⁵⁸. Moreover, Bernstein’s influence can also be seen, to an extent, in the SPD-affiliated trade unions that “*felt a deep affinity for the gradualist tactics of Revisionism*” and that “*from about 1905 on...were the key element in Social Democracy which helped to keep the party on its reformist path...But this marriage was strictly a marriage de convenance based on coincidence of interests*”¹⁵⁹. That’s because of the more economic logic of the unions (see chapter 4.3.)

Finally, Bernstein’s assumption was not proven right in Weimar in the sense that, *firstly*, the level of concentration of capital, especially after 1924, would debunk his observation about the rising number of middle-sized enterprises¹⁶⁰ and, *secondly*, the fact that democracy was sacrificed for the sake of organized capitalism (also due to the evolutionary political line of the SPD) would put into question his optimism about the transition to a socialist economy, in a gradual manner, given the power of concentrated capital (see chapters 4.3. and 5.5.).

2.2. Rosa Luxemburg's critique: representative democracy as a “shelter” of public life.

Before starting with the analysis of Luxemburg’s thought, I should write as an introductory (methodological) remark that I will focus mainly on her works “The Mass Strike, the Political Party and the Trade Unions” (1906) and “The Russian Revolution” (1918) because it is in these works that her conception of democracy becomes more visible and it can be associated with her stance during the early Weimar period (that will be seen at the end of this section).

¹⁵⁷Gay [1952, 1970] 296

¹⁵⁸ Neumann, Franz ([1942 1944] 2009) 213

¹⁵⁹ Ibid. 138, 140, 243-244

¹⁶⁰ See also Gay ([1952]1970) 171-173

Starting the analysis of Luxemburg's thought, the *basic argument* that she develops in her book on "The Mass Strike, the Political Party and the Trade Unions" is that the political struggle cannot be totally distinguished from the economic one. This hard distinction serves only the reproduction of the capitalist system, given that it naturalizes both the concept of economy and the conception of the political. In this sense, she disagreed fiercely with any form of gradualist theories that tried to orient the mass strike, either on strictly economic grounds, or on strictly political grounds (in the narrow sense). The *former* is entailed in an economistic-corporatist logic that expresses only economic demands (see chapter 4.3. about the stance of the unions). The *latter* was deployed by Bernstein, who argued that there should be a political strike only on "negative" political grounds, namely "as a last recourse of the working class", when the right to vote and parliamentarianism is put into question and not "*for romantic reasons*" (for which Bernstein accused the group around Luxemburg)¹⁶¹.

On the contrary, according to Luxemburg, every struggle puts into question the whole socio-political edifice. As she argued "*the economic struggle is that which leads the political struggle from one nodal point to another; the political struggle is that which periodically fertilizes the soil for the economic struggle. Cause and effect here continually change places*"¹⁶².

This excerpt shows *two* issues. The *first* is the logic of "spontaneity" of the mass strike, as the extraordinary moment that cannot be grasped by any sort of evolutionary "calculations", such as the discourse based on the level of the "productive forces" and on "slow propaganda". However, as Laclau and Mouffe remark, her point of spontaneity is not only an anti-evolutionary point¹⁶³ in the sense that (a certain level of) contingency can possibly exist even based on a given, "externally" defined concept of class identity (and alliances based on that) that has certain "literal" demands.

What is crucial, *secondly*, here is the reference to the "*nodal point*", even though Luxemburg does not develop this term further. The significance is based on the fact that this term, along with the overall analysis, shows that every struggle is necessarily split, in the sense that "*aside from its specific literal demands, each mobilization represents the*

¹⁶¹ In Gay ([1952]1970) 243

¹⁶² Luxemburg, Rosa (1906) in McLellan (2006) 50-51

¹⁶³ Laclau & Mouffe ([1985] 2000) 10

revolutionary process as a whole” as Laclau and Mouffe write¹⁶⁴. So, the point of the struggle is not only a concrete, literal demand, with reference to a given picture of socio-political edifice and subjectivity, but what is at stake is that a political struggle can put into question the whole *representation* of the distinction between the economic and the political.

So, based on this analysis of Luxemburg’s work, the issue that is revealed is that (hegemonic) socio-political identities are questioned through political action. This is particularly evident when Luxemburg argues that “*the mass strike has now become the centre of the lively interest of the German and the international working-class because it is a new form of struggle, and as such is the sure symptom of a thoroughgoing internal revolution in the relations of the classes and in the conditions of the class struggle*”¹⁶⁵. The unity of the class exceeds, therefore, its prior economic determination through the political struggle or, as Laclau and Mouffe write, “*the unity of the class is therefore a symbolic unity*”¹⁶⁶.

Although Luxemburg refers, therefore, continuously to a particular subject (the proletariat) using also the Marxist lexicon, she does not seem to endorse a concept of a class struggle and identity as a football game, in which there are two pre-constituted antagonistic camps (to use the famous example of Althusser’s response to John Lewis¹⁶⁷) but as a *political* concept, where subjectification takes place within the political struggle, contrary to the pre-given identities. In this sense, she seems to endorse a concept of political representation that questions the relations of inclusion and exclusion that a given ideological picture of the socio-political presents as “non-political” and as “political”.

This is the background analysis through which we can start unpacking Luxemburg’s stance towards representative democracy, which was not without contradictions. She continuously vacillated about this and more concretely during the period of the revolutionary turmoil in Germany¹⁶⁸ when she proceeded to a dubious endorsement of the concept of “civil war” as

¹⁶⁴Ibid. 11-13

¹⁶⁵Luxemburg (1906), chapter 2

¹⁶⁶ Laclau & Mouffe ([1985] 2000) 11

¹⁶⁷ Althusser, Louis (1972). ‘Louis Althusser Replies to John Lewis’, *Australian Left Review*, 1(38), 23-36.

¹⁶⁸ See her article, “Order Prevails in Berlin” (January 14, 1919) written when Gustav Noske was marching in Berlin along with the far-right *Freikorps*.

equivalent to the “political”¹⁶⁹.

However, she had explicitly argued that the extraordinary mass strike should not be thought of as antithetical to representative democracy. That’s because of *two* aspects, which derive ultimately out of her concept of the *political subjectivity* that was analyzed. The *first* aspect is her insistent argument, throughout her work, that the political struggle should be *majoritarian* and not *minoritarian*. This explains her opposition to Lenin's “blanquism” and to his concept of *minoritarian* revolution driven by a centralized party. It should be reminded that this is the *second* main *target* of her critique (along with her critique of Bernstein’s revisionism).

Without entering here into the historical context of Lenin’s theory and practice in Tsarist Russia, it is interesting to notice Luxemburg's argument that Lenin's concept of socialist organisation is “*mechanistic*”, in the sense that his concept of political praxis follows the instrumental logic of industrial capitalism. As she writes, Lenin “*is convinced that all the conditions necessary for the formation of a powerful and centralized party already exist in Russia... He glorifies the educative influence of the factory, which, he says, accustoms the*

As she wrote “*The revolutionary struggle is the very antithesis of the parliamentary struggle. In Germany, for four decades we had nothing but parliamentary ‘victories’. We practically walked from victory to victory. And when faced with the great historical test of August 4, 1914, the result was the devastating political and moral defeat, an outrageous debacle and rot without parallel. To date, revolutions have given us nothing but defeats. Yet these unavoidable defeats pile up guarantee upon guarantee of the future final victory*”.

Luxemburg, Rosa (1919). *Order Prevails in Berlin*, available at:
<https://www.marxists.org/archive/luxemburg/1919/01/14.htm> (last accessed on 30/05/2016)

¹⁶⁹ There are some writings during this period in which Luxemburg seems influenced by the Leninist strategy. As an indicative example of this “attraction”, she had argued in consecutive articles during this period (20 November 1918 and then 23 December 1918) that “*the ‘civil war’ which some have anxiously tried to banish from the revolution cannot be dispelled. For civil war is only another name for class struggle, and the notion of implementing socialism without a class struggle, by means of a majority parliamentary decision, is a ridiculous petit-bourgeois illusion...all power to the councils – this is our participation in the National Assembly*”.

See Luxemburg, Rosa (1918). ‘The National Assembly’, *Die Rohte Fahne*, available at:
<https://www.marxists.org/archive/luxemburg/1918/11/20.htm>, (last accessed on 08/03/2016)

Mc Lellan (2006) wrote that it is a “*matter of dispute*” to what extent Luxemburg modified her views during these months of the revolutionary turmoil. 57

Luxemburg, Rosa (1918). “What does the Spartacus League want”, *Die Rohte Fahne*, available at:
<https://www.marxists.org/archive/luxemburg/1918/12/14.htm>, (last accessed on 08/03/2016)

Luxemburg, Rosa (1918). *The elections to the National Assembly*, available at:
<https://www.marxists.org/archive/luxemburg/1918/12/23.htm> (last accessed on 08/03/2016)

*proletariat to 'discipline and organization'...Saying all this, Lenin seems to demonstrate again that his conception of socialist organization is quite mechanistic. The discipline Lenin has in mind is being implanted in the working class not only by the factory but also by the military and the existing state bureaucracy – by the entire mechanism of the centralized bourgeois state”*¹⁷⁰.

As an outcome of this logic, Lenin considered formal democracy as a “bourgeois” element¹⁷¹. Ernesto Laclau and Chantal Mouffe write that “*All the terminological innovations which Leninism and the Comintern introduce to Marxism belong to military vocabulary (tactical alliance, strategic line, so many steps forward and so many back); none refers to the very restructuring of the social relations, which Gramsci would later address with his concepts of historical bloc, integral State, and so forth...*”¹⁷².

This could also explain, to an extent, the dissolution of the Constituent Assembly by the Bolsheviks and the gradual shrinking and prohibition of institutions and actors in public life (press, political parties) during the Leninist regime¹⁷³.

Against this strategy, Rosa Luxemburg stresses the need for a *public space* that will denote the possibility of a continuous political-democratic contestation (as seen before). This is the *second* aspect (the first one was that political action should be majoritarian). That’s how we could “rescue” her defense of formal democracy (representative democracy, rights) albeit her ambivalences. This defense is visible in her famous critique against the dissolution of the Constituent Assembly by the Bolsheviks.

Her critique was that “*the remedy which Trotsky and Lenin have found, the elimination of democracy as such, is worse than the disease it is supposed to cure: for it stops the very living source from which alone can come the correction of all the innate shortcomings of*

¹⁷⁰ Luxemburg, Rosa (1904). *Organization Questions of Social Democracy*, available at: <https://www.marxists.org/archive/luxemburg/1904/questions-rsd/index.htm> (last accessed on 08/03/2016).

¹⁷¹ Lenin, Vladimir I. ([1918] 2001). ‘The Proletarian Revolution and the Renegade Kautsky’ in Lorimer, Doug (ed.) *Democracy and Revolution*, Resistance Marxists Library, Sidney: Resistance Books, 69.

¹⁷² Laclau & Mouffe ([1985]2000) 56-57

¹⁷³ As Lenin admitted in 1921 (also after the Russian civil war, which played a role in the militarization of the regime) “*not even the simplest question...is settled by any of our republican institutions without instructions from the Central Committee of our Party, that is to say from one of the two all-powerful bureaus, from this “real oligarchy”*”.

social institutions...In place of the representative bodies created by general, popular elections, Lenin and Trotsky have laid down the soviets as the only true representation of political life in the land as a whole, life in the soviets must also become more and more crippled. Without general elections, without unrestricted freedom of press and assembly, without a free struggle of opinion, life dies out in every public institution, becomes a mere semblance of life, in which only the bureaucracy remains as the active element. Public life gradually falls asleep, a few dozen party leaders of inexhaustible energy and boundless experience direct and rule. Among them, in reality only a dozen outstanding heads do the leading and an elite of the working class is invited from time to time to meetings where they are to applaud the speeches of the leaders, and to approve proposed resolutions unanimously – at bottom, then, a clique affair – a dictatorship, to be sure, not the dictatorship of the proletariat but only the dictatorship of a handful of politicians, that is a dictatorship in the bourgeois sense...’’¹⁷⁴.

Taking this critique into consideration, Nicos Poulantzas argues that Luxemburg reproaches Lenin for “...exclusive reliance on council democracy and complete elimination of representative democracy (through, among other things, dissolution of the Constituent Assembly... in favour of the soviets alone)”¹⁷⁵. In line with this, her main argument seems to be that the neglect of formal democracy goes hand in hand with anti-democratic outcomes, given that it is tied to a conception of political representation that is reduced to an economic-technical domain and, in this way, loses its political character. So, the space for a disagreement to register as political is totally missing.

Luxemburg’s insight is important because democracy presupposes a public space where the social can be thought otherwise and the political subjectification can be reflexive. This approach is expressed by her not only in 1918, but also much earlier when Luxemburg argued that “to give a speech in parliament, essentially, is always to ‘talk through the window’. From the standpoint of the string-pullers in the back-rooms – whose method is the normal way of setting conflicts of interest on the basis of the bourgeois-feudal compromise – speech-making is futile, indeed it only defeats their purpose. Hence the bourgeois parties’ indignation at ‘too much talking’ in Reichstag...If parliamentarism has lost all significance for capitalist society, it is for the rising working class one of the most

¹⁷⁴ Luxemburg, Rosa (1918). *The Russian Revolution*, in Chapter 4 and Chapter 6, available at: <https://www.marxists.org/archive/luxemburg/1918/russian-revolution/index.htm> (last accessed on 29/03/2016)

¹⁷⁵ Poulantzas ([1978] 1980) 253

powerful and indispensable means of carrying on the class struggle. To save bourgeois parliamentarism from the bourgeoisie and use it against the bourgeoisie is one of Social Democracy's most urgent political tasks"¹⁷⁶.

Luxemburg's "talking through the window" argumentation, which was also the "classic slogan" of the pre-war SPD"¹⁷⁷, shows that parliament can be for her the place that makes visible an alternative configuration of the socio-political "we". This is precisely the reason for which the bourgeois parties tried to avoid its public and political role by reducing, in this way, civil society to its representation by the bourgeoisie.

In this vein, her defense of representative democracy is in line with Marx's phrase that the parliamentary regime is the "regime of unrest", it *"lives by discussion...Every interest, every social institution, is here transformed into general ideas, debated as ideas...The struggle of the orators on the platform evokes the struggle of the scribblers of the press; the debating club in parliament is necessarily supplemented by debating clubs in the salons and the bistros; the representatives, who constantly appeal to public opinion, give public opinion the right to speak its real mind in petitions. The parliamentary regime leaves everything to the decision of majorities; how shall the great majorities outside parliament not want to decide? When you play the fiddle at the top of the state, what else is to be expected but that those down below dance?"*¹⁷⁸.

So, according to this excerpt, those who dance are sustained by the parliamentary form. The destruction of the legal form leads to the end of the dance. It is this space that it is safeguarded by so-called "formal" democracy in contradistinction with a purely council democracy, where this public space is lost and the political is negated by turning into an administrative-technical discussion.

Making the transition to Luxemburg's stance in the Weimar Republic, she was on the antipode of *two* main positions (in line with her theoretical critique). She was, *firstly*, critical of the evolutionary logic of the SPD, which followed in many issues the logic of

¹⁷⁶ Luxemburg (1904). *Social Democracy and Parliamentarism*

¹⁷⁷ Interview of Eley, Geoff (2014). 'The Committee Room and the Streets: An Interview with Geoff Eley' in *Viewpoint Magazine*, available at: <https://viewpointmag.com/2014/09/02/the-committee-room-and-the-streets-an-interview-with-geoff-eley/> (last accessed on 18/07/2016)

¹⁷⁸ Marx, Karl (1852). *The 18th Brumaire of Louis Bonaparte*, chapter 4, available at:

<https://www.marxists.org/archive/marx/works/1852/18th-brumaire/> (last accessed 01/12/2016)

“*reconstruction first*” and declared that the more radical policies would follow later in a gradual way¹⁷⁹. She also foresaw that this continuity logic would also be seen at the political level, due to the proposal for an elected president with extensive powers¹⁸⁰.

She was, *secondly*, against the decision to boycott the elections for the National Assembly in the First Congress of the KPD, in January 1919. As the historian, Arthur Rosenberg wrote, this decision of the KPD “...*was indirectly an incitement to rioting and coups d'état. It had nothing in common with Rosa Luxemburg's program*”¹⁸¹. That's true and, despite her ultimate alignment with the Spartacist uprising, Luxemburg was among the dissenters in this Congress that decided to boycott the elections¹⁸².

Regarding what Luxemburg's stance would be during the whole historical process of Weimar Republic, we can only hypothesize. Based on Luxemburg's thinking, David Fernbach's not totally unjustified hypothesis is that “*it is certain, at least, that her politics would have taken a different course from the line that led from the March Action, through the 'German October' of 1923, to the suicidal policies of 'class against class'. And as the threat of fascism intensified, Spartakists would have had less difficulty than Leninists in joining hands with Social Democrats and liberals in a 'historic compromise' that might well have averted the plunge into the abyss*”¹⁸³.

Fernbach actually refers, in this excerpt, to the KPD's strategy during the early Weimar period and the late Weimar period. Although the political line of the KPD, during the early Weimar era and the late Weimar era are not the same (even in terms of political efficiency), they present a *salient conceptual affinity*: they both underestimate the distinction between a “democratic” and an “autocratic” form of the State by sharing an

¹⁷⁹ About this motto see Winkler ([2000] 2006) 344

¹⁸⁰ Luxemburg Rosa (1918). *Our Program and our Political Situation*, available at: <https://www.marxists.org/archive/luxemburg/1918/12/31.htm> (last accessed on 08/03/2016)

¹⁸¹ Rosenberg, Arthur (1936). *A History of the German Republic*. In chapter 3 entitled “Spartacus and Noske”, available at: <https://www.marxists.org/archive/rosenberg/history-weimar/ch03.htm> (last accessed on 4/02/2016)

¹⁸² Winkler ([2000] 2006) 348

¹⁸³ Fernbach, David (1999). ‘Rosa Luxemburg's Political Heir: An Appreciation of Paul Levi’, *New Left Review*, 238, 3-25, 25

instrumental conception of it, according to which the State serves *a priori* the interests of the ruling class¹⁸⁴.

During early Weimar, this was seen in the “ultra-leftist” minoritarian uprisings such as the “March Action” in Ruhr¹⁸⁵ (the last attempt was in October 1923 after the “Cuno strikes”¹⁸⁶). During late Weimar, this was seen in the “ultra-leftist” position of “social-fascism”, which was introduced officially by the Third International at the Sixth Congress (July-September 1928) and was followed closely by the KPD during the last period of the Weimar Republic¹⁸⁷. This line of social-fascism (supplemented with a nationalist discourse in 1930¹⁸⁸) came after a period that had entailed some moments of cooperation between the SPD and the KPD (mainly after the end of 1923 hyperinflation). The most notable example was their campaign, in 1926, for a referendum for the expropriation, without compensation, of the former princely houses based on article 153 of the Constitution¹⁸⁹ (an expropriation that, as we will see in chapter 5, Carl Schmitt deemed illegal).

The practical outcome of KPD’s “social-fascism” line was catastrophic for the Weimar Republic. That’s because, through this line, the KPD theorized the absence of a “united front” between the democratic powers of the Republic and with the SPD. In this way, it relativized the Nazi danger. As Hobsbawm summarizes the strategy of the KPD during Weimar, *“the political left, shaped largely by revulsion against the Great War, shocked at the failed revolution of 1918, and hatred of the old ruling class that survived it so well, was no less rejectionist than the right... Large enough to block the fashioning of a lasting non-*

¹⁸⁴ This functionalist view of the State as undergirding the “social-fascism” line was stressed by Rosenhaft (1983) 211

¹⁸⁵The “March Action” was an “insurrectionary” general strike in March 1921, which was “*instigated by Moscow’s emissaries*” according to Fernbach. It did not have mass support and it led to several hundred workers dead and many imprisoned.

Fernbach (1999) 3-25, 3

¹⁸⁶ For details see Winkler ([2000] 2006) 393-394. Pryce, Donald B. (1977). ‘The Reich Government versus Saxony, 1923: The Decision to Intervene’, *Central European History*, 10(2), 112-147.

¹⁸⁷As Nicos Poulantzas wrote, the KPD was very much in line with the Comintern and it was the “laboratory” of its strategy.

Poulantzas ([1970] 2006) 182

¹⁸⁸ See the declaration of the Central Committee of the KPD (24 August 1930) in Winkler (1990) 216

¹⁸⁹ See the Joint SPD-KPD proposal for the Expropriation of the Former German Princes (28 April 1926) in Fowkes (2014) 158

*right Weimar regime, this left did not wish to contribute anything to its practical politics except disgust*¹⁹⁰.

Going back to Luxemburg, Fernbach's hypothesis is not totally unjustified given that Luxemburg gave interesting insights in the direction of a modern democratic "we", in opposition both to the Leninist neglect of formal democracy and to Bernstein's evolutionary concept of the political, that underplayed the concrete problems that capitalism posed for democracy. She does not dismiss representative democracy, on the one hand, but on the other hand she argues that the "fate" of the political constellation of powers depends as well on ideological hegemony in the social domain, which means that there is not an evolutionary path that leads necessarily to progress.

This is how we can make sense of her argument that "*we have never been idol-worshippers of formal democracy*". All that really means is: *We have always distinguished the social kernel from the political form of bourgeois democracy; we have always revealed the hard kernel of social inequality and lack of freedom hidden under the sweet shell of formal equality and freedom – not in order to reject the latter but to spur the working class into not being satisfied with the shell, but rather, by conquering political power, to create a socialist democracy to replace bourgeois democracy – not to eliminate democracy altogether*¹⁹¹.

¹⁹⁰Hobsbawm, Eric (2008). 'Diary' *London Review of Books*, 34, available at: <http://www.lrb.co.uk/v30/n02/eric-hobsbawm/diary>
See also Poulantzas ([1970] 2006) 183, 209

¹⁹¹Luxemburg (1918). *The Russian Revolution*, chapter 8

Chapter 3: The “political question” in the Weimar Constitution

Whereas during the first months after the declaration of the new Republic “the dominant trend” seemed to be leaning toward the Left, within a few months there was a different regressive movement that “...*restored old power relations*”¹⁹². It is crucial to see how this affected the formation of the new Weimar Constitution.

More specifically, in this chapter I will focus on the answer of the Weimar Constitution to the “political question”, namely to the organization of political power, along with the historical context of the Constituent Assembly period so as to analyze the context in which the Weimar Constitution was designed and enacted. This period starts from the elections of the members of the Constituent Assembly on January 19, 1919¹⁹³ and ends with the approval of the Weimar Constitution on July 31, 1919¹⁹⁴ by the “Weimar coalition”¹⁹⁵ - the SPD, the liberal DDP¹⁹⁶ and the Catholic *Zentrum*¹⁹⁷ - that designed this Constitution.

¹⁹²Bracher (1971) 73

¹⁹³The results of the elections that took place on January 19, 1919 were the following: SPD-37,9%, Zentrum Party-19,7%, DDP-18,5%, DNVP-10,3%, USPD-7,6%, DVP-4,4%. Winkler ([2000] 2006) 352

¹⁹⁴The parties who voted for the Weimar Constitution (262 deputies) were the SPD, the Zentrum and the DDP. The USPD, the DNVP, and the DVP voted against it (75 deputies). There was also one abstention.

On August 11, the President of the Reich Friedrich Ebert signed the new Constitution, which came into force on August 14, 1919.

¹⁹⁵This coalition was a common governmental coalition in Weimar, namely for almost 5 years out of 14 years of the Weimar Republic.

See Fowkes (2014) 13

¹⁹⁶The DDP was “*founded, financed and controlled*” by representatives of the dynamic fraction of industry, commerce, banking and small manufacturing. It was “*staffed*” by liberal intellectuals and its constituency comprised also of various anti-monopoly middle class elements, middle class Jews and some peasants. There were continuous tensions between peasants and urban commercial interests in the party.

This focus both on the Weimar Constitution and on the context in which it was designed and enacted will help us to approach later a crucial question, which is significant not only at the level of history but also at the level of constitutionalism: was the Weimar Constitution (at the level of the political question) inherently “defective” since its birth or was its (later) interpretation that made it “vulnerable”?

The structure of the chapter will be the following. I will start with an introductory note about the “political question” in the Weimar Constitution. After this introductory note, the rest of this chapter will be divided in *two* parts. The *first* part will deal concretely with presidential powers and article 48 by presenting the authors that introduced it (Hugo Preuss, Max Weber), the logic under which it was proposed and the socio-political context. In this first part, I will show that the Weimar Constitution ultimately incorporated Preuss’ more moderate presidentialism, which entailed also elements of continuity with the 1871 Constitution, rather than Weber’s Caesaristic concept of president. However, Weber’s concept became, nevertheless, more hegemonic during the historical process of the Weimar Republic.

Hence, I will delve deeply into Weber’s constitutional theory along with his whole theoretical framework in the *second part* of this chapter. I will show that Weber’s constitutional suggestions derive from his overall theory, which delves into the contradiction between the modern state and the capitalist economy. I will demonstrate that he finds an idiosyncratic liberal solution to this contradiction in the sense that his theory aims at keeping the political-economic distinction and, at the same time, turns politics mostly into a struggle among “charismatic” elites.

3.0. Discontinuities and Continuities in the Weimar Constitution: An Introductory Note on the “political question”

However, by 1930, the DDP was very weakened given that a lot of its voters were moving mainly to the right.

Abraham ([1981] 1986) 297. See also Winkler ([2000] 2006) 352

¹⁹⁷ It was after 1930 that the Zentrum leaned more clearly to the right.

The Weimar Constitution signified a moment of rupture in the sense that it introduced parliamentary democracy providing also with women's right to vote for the first time (article 22). This element of rupture is also evident from the preamble, which indicates that the people is the constituent power and not the princes or the monarch (in contrast with the 1871 Constitution)¹⁹⁸. Moreover, it is inscribed in the very first article of the Weimar Constitution, according to which “*the German Reich is a republic. State authority derives from the people*”¹⁹⁹.

This element of rupture is practically seen in that the Constitution regulated the ministerial accountability before the Reichstag (articles 54, 56, 59) and it gave to the Reichstag enlarged legislative competences compared to its previous role (article 68). On the contrary, in the past the monarchic government did not require the confidence of the Reichstag. In this sense, there was in the past a duality between the State, which was represented by the monarchic government, and the Reichstag, which constituted merely the informal “*...societal counterpart of the government of the state...the informal irritant to the formal constitutional system*”²⁰⁰.

This shift to parliamentary democracy became almost a commonplace in the political spectrum after the November Revolution and it was accepted even by the two right-wing parties, the right-wing liberal (with a monarchist tendency) DVP²⁰¹ and the far-right wing DNVP²⁰². As the right-wing constitutional theorist Erich Kaufmann remarked, “*after the fall of the monarchy and in the maelstroms of the revolution, which left us with a choice only between a parliamentary majority rule and the 'dictatorship of the proletariat',*

¹⁹⁸ Hucko ([1984] 1987) 149

¹⁹⁹ Weimar Constitution ([1919] 2008) 409-440, 409

²⁰⁰ Möllers, Christoph (2007). ‘We are (afraid of) the people: Constituent Power in German Constitutionalism’, in Loughlin, M, Walker, N. (eds.) *The Paradox of Constitutionalism*. Oxford: Oxford University Press, 87-105, 90-92

²⁰¹ This party was representing mainly the higher sections of the middle class, the heavy industrialists and farmers, albeit in the elections of 1920 it was also voted by most small businessmen that had “migrated” from the DDP (later they moved to DNVP and, then, to NSDAP).

See Winkler, Heinrich A. (1976). ‘From Social Protectionism to National Socialism: The German Small-Business Movement in Comparative Perspective’, *The Journal of Modern History*, 48(1), 1-18, 8-10

See also Winkler ([2000] 2006) 351

²⁰² This party was representing mainly the far-right wing sections of heavy industry, the Junkers (namely the large east Elbian landowners), monarchist academics, pastors and higher government officials, farmers, small merchants and nationalist white-collar and blue-collar workers. Winkler (1976), 8-10. Winkler ([2000] 2006) 352

*parliamentarism was the only tactical ground we could seek unless we wished to embrace, at least temporarily the system of soviets after the Russian model. All political parties, from the German National to the majority social democrats, accepted the parliamentary system as such a tactical foundation, as a mere political “rule of the game”*²⁰³.

However, the other side of the coin of the “tactical” moves by the Right in the direction of “rupture” was the move made by the SPD and by the other parties of the “Weimar coalition” towards the continuity logic. In symbolic terms, it was shown even by the choice of the Weimar as the city of Constitutional Assembly. The choice to assemble in the small city (around 40.000 people) “of Goethe and Schiller” instead of the Reichstag in Berlin symbolized the distance from the influences of the insurrectionary social strata that lived in the metropolis of Berlin²⁰⁴.

This *symbolic* dimension of continuity is more evident from *three* other important issues and *one* absence (apart from the issue of presidential powers that will be seen extensively in 3.1.). *Firstly*, by the way the leader of the SPD (and first President of the Weimar Republic from 1919 to 1925) Friedrich Ebert “represented” the transition from the *Kaiserreich* to the Weimar Republic. In his opening speech to the Constituent Assembly (6 February 1919) he interpreted the transitional government more as “*the trustees in bankruptcy of the old Regime*”²⁰⁵ and less as the founders of a new, democratic regime. Although it is true that, as Ebert presents, there were dramatic problems in the economy after the lost war and a weak state in terms of administration, his speech showed signs of continuity by following an *evolutionary thinking* (e.g. first reconstruction of economy, and socialization when the economic development has made the time “*ripe*” for that²⁰⁶).

²⁰³Kaufmann, Erich, (1921) “Die Regierungsbildung in Preußen und im Reiche und die Rolle der Parteien” In Stolleis (2004) 65

²⁰⁴Hadjiosif, Christos (2012). ‘The Weimar Republic and the threat of the “extremes”. The incompatibility of the historical analogies’ in the collective edition *The Weimar Republic and its contemporary revivals* (in Greek), Athens: Nicos Poulantzas Institute, 17-18

On the contrary, according to Winkler, the choice of Weimar “*would provide the parliament and government with... security and peace that Berlin, for the time being, was unable to guarantee*”. Moreover, it would indicate the symbolism of another Germany “*apart from the Germany of militarism*”.

See also Winkler ([2000] 2006) 354

²⁰⁵See excerpt of his speech “Friedrich Ebert’s Address to the Opening Session of the Constituent Assembly, 6 February 1919”, in Fowkes (2014) 25-28

²⁰⁶*Ibid.* 26

Secondly, the left-liberal constitutional theorist and member of the DDP Hugo Preuss who was chosen to draft the new Constitution by the Council of People's Commissars (mainly by the SPD) on November 15, 1918²⁰⁷, declared before the constitutional committee that “*we are only undertaking a constitutional change occasioned by special circumstances and unusual events*”²⁰⁸. This “*striking statement*”- as Carl Schmitt characterizes it in the sense that it does not denote a change of the constitution-making power²⁰⁹- seems to be not that far from Ebert's statement. This is also argued by Peter Caldwell, who wrote that Preuss before the National Assembly “*...stressed continuity: despite deep changes in the constitution, ‘the German Staatsvolk as such remained’*”²¹⁰. It was only some years later that Preuss celebrated this Constitution as “*the legal expression of the Revolution*”²¹¹.

The continuity leanings were also revealed in Preuss' influence by the categories of constitutional monarchy notwithstanding his left-liberal ideological orientation and that he was a defender of 1848 revolution and of a self-administered municipal socialism²¹². This influence is visible through the powers that he ultimately drafted for the President (see 3.1 about this).

It should be remarked, as an aside, that- with the exception of Hugo Preuss and of some other scholars (mainly *Anschütz*, Thoma, Stier-Somlo²¹³)- the vast majority of public law scholars that had been already active in 1919 were “*Vernunftrepublikaner*”. These are what Stolleis calls as the “*older scholars*”, distinguishing them from the new generation of Kelsen, Schmitt, Heller etc.²¹⁴. So, this older generation of scholars constituted basically a

²⁰⁷ Schoenberger, Christoph (2000). ‘Introduction’ in Hugo Preuss section in Jacobson, A. & Schlink, B.(eds.) *Weimar. A Jurisprudence of Crisis*. Berkeley, London: University of California Press, 110-115, 110

²⁰⁸In Schmitt, Carl ([1928] 2008). *Constitutional Theory*, Durham: Duke University Press, 141

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ In a 1923 pamphlet, which celebrated the Weimar Constitution, Preuss “*...stated, without ambiguity, that ‘the constitution of the German Republic of August 11, 1919, is the legal expression of the Revolution of November 9, 1918’*”.

In Caldwell, Peter (2013). ‘Hugo Preuss’s Concept of the Volk: Critical confusion or sophisticated conception?’ *University of Toronto Law Journal*, 63(3), 347-384, 359

²¹²Ibid. 361

²¹³Stolleis (2004) 51-52, 71-72.

See also Caldwell about *Anschütz* and Thoma in Caldwell, Peter (1997). *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism*, Durham N C: Duke University Press, 65

²¹⁴ Stolleis (2004) 24

“*bridge function*” between the two constitutions in the sense that they were still thinking in terms of the categories of constitutional monarchy²¹⁵. This makes sense considering that, as Möllers writes, “*there was virtually no discussion of a democratic constituent power as a contemporary issue and radical conceptions of democratic self-government did not form any part of the German Staatsrechtslehre before 1919...*”²¹⁶.

After this short digression, there is, *thirdly*, the title of the Weimar Constitution. The concept of the “*Reich*” plays here the primary role both in the title of the Constitution that was chosen (“*Die Verfassung des Deutschen Reichs*”) and in its first article. In this first article of the Weimar Constitution, the “*Republik*” constitutes its integral part (“*The German Reich is a Republic*”). Regarding the issue of the title, there was a united front of all the bourgeois parties against the title “Constitution of the German Republic”, which was initially proposed by the USPD and the SPD²¹⁷.

This symbolic issue²¹⁸, negligible as it may seem at a first glance, prefigures a “people” that is equally identified with an a-historical, homogeneous “*Reich*” and with a democratic “*Republik*”. That’s because it concerns the reference to a higher, a-historical value (*Wert*) of the traditional German *Kultur*, which is reproduced through these symbolic acts and especially through the reference to the new Republic as “*Reich*”. Moreover, this constitutional inclusion of the term “*Reich*” would be, among others, an argument of Carl Schmitt for the continuity of the Weimar Constitution with the 1871 one (*see chapter 5*).

This conception of the “people” is imprinted further at the *constitutional level* through an *absence*. This is the fact that political parties were not regulated by the Constitution. On the contrary, political parties were mentioned only once in the Constitution and even that in a negative manner (article 130²¹⁹) and not in the first part of the Constitution that regulated

²¹⁵ Ibid. 51-52

²¹⁶ Möllers (2007) 90

²¹⁷ Winkler ([2000] 2006) 363

²¹⁸ A similar compromise was also reached in the Constituent Assembly with regards to the colors of the flag (“*Flaggenstreit*”), which is visible in article 3 of the Constitution. It became visible even regarding this issue that “...clearly, not only the political right, but also elements within the ‘Weimar’ parties mourned the loss of the old Reich” as Winkler writes. Ibid. 363, 419

See also Herrera, Carlos Miguel (1997). *Theorie Juridique et Politique chez Hans Kelsen*, Paris: Editions Kime, 189

²¹⁹ According to article 130: “Public officials are servants of the collective not of a party...”.

the main institutional framework²²⁰. In this way, the constitutional position of political parties in Weimar remained the same with the *Kaiserreich*, namely they are considered as creations of civic law that play the role of informal societal influence to the state. Hence, they are deemed as interest groups and not as public bodies that play a role in the formation of the democratic general will.

So, although the Weimar Constitution established for the first time both the legislative power of the Reichstag (article 68) and the parliamentary responsibility of the government (article 54), this non-regulation of political parties as public bodies along with the significant power attributed to the President left the space for the reproduction of a dualism, which was in continuity with the *Kaiserreich*. This is the *dualism* of an elected “*Ersatzkaiser*”²²¹ who represents the homogeneous governing will of the State versus a pluralistic parliament, which constitutes its societal counterpart and represents fractionary preferences²²².

As a *final* point (before analyzing presidential powers) it should be written that the dimension of continuity could be also seen at the level of policies during this period. More specifically, there was a lack of substantive reforms in the army, in the judiciary and in the public administration²²³ (see also chapter 1, and about the economic policies see chapter 4).

3.1. The President of the Reich: The par excellence concept of continuity?

The *one* of the *two* main issues that has sparked a huge debate about its “responsibility” for Weimar’s fall- from the perspective of constitutional theory- is the issue of presidential powers (the other main issue is the “economic constitution”, see chapter 4).

Weimar Constitution ([1919] 2008) 409-440, 430

²²⁰ Stolleis (2004) 82-83

²²¹ Möllers (2007) 93-94

²²² Stolleis (2004) 83

²²³ Stolleis (2004) 51

The *crucial* question regarding this issue is whether it was the initial architecture of the Constitution that was “responsible” or its later political and legal interpretation. Approaching this question, I will present here, *firstly*, the debates between the architects of presidential powers (H. Preuss, M. Weber) and *secondly*, the stance of the Weimar political parties in the Constituent Assembly. Both kinds of debates will allow us to see the concept of president that was adopted in the Weimar Constitution and to compare it, at a later stage (mainly in chapter 5), with the interpretation of president’s powers throughout the historical process of the Weimar Republic.

The deliberations and the constitutional framework: the difference between Preuss and Weber

To begin with the *first*, the deliberations about this issue took place in the department of the Interior (9-12 December 1918) in an unofficial debate of experts (Hugo Preuss, Max Weber and others) and representatives (of SPD and USPD) regarding the general outlines of the constitutional draft that would be submitted in the imminent Constituent Assembly²²⁴.

Starting from Hugo Preuss (1860-1925), it should be reminded that the left-liberal constitutional theorist was already the state secretary of the Reich Office of the Interior- namely the “*chief official*” in this process of drafting the Weimar Constitution- given also that he had supported the new *Volksstaat* of the Weimar Republic²²⁵. Preuss proposed a concept of an elected President that would be a counterweight to parliamentary “absolutism” based mainly on a liberal balance-of-power theory. As he had declared in an interview in 1925, the President “...*is needed as a kind of balance to the Reichstag; if he is*

²²⁴ Stolleis (2004) 56

²²⁵ Ibid. 55

Heinrich Winkler argued that the choice of the SPD to assign to Hugo Preuss the drafting of the new constitution had also a symbolic dimension. On the one hand, it showed that the Social Democrats were uncertain about their ability in issues of public law and, on the other hand, it symbolized their will to cooperate with the bourgeois parties.

Winkler ([2000]2006) 361

See also Mommsen ([1959]1990) 355

*to function in this capacity he must have the strength that comes from his being the choice of the people...The president acts as a sort of regulator - another popular organ over against the Reichstag, yet always under it, in the sense that all his acts must be countersigned by a minister acceptable to it ...*²²⁶.

Preuss' plan for a President-counterweight against "parliamentary absolutism" should be seen in the context of his overall theoretical framework and of the entirety of his main constitutional suggestions. Regarding the rest of his main suggestions, *firstly*, he had also suggested (unsuccessfully) a decentralized state that mainly aimed at breaking Prussia into smaller units. In this vein, Preuss was also hoping that a powerful President would "*dampen the egotism of the Länder*"²²⁷. *Secondly*, as it is evident from the 1925 excerpt (see above) he argued also for the centrality of parliament. That's because Preuss believed that social justice, which he identified "*not...by a deepening of class oppositions*" but with the "*integration*" of classes, could be attained gradually through parliamentary democracy²²⁸ - as opposed to the prospect of "*...councils or boards other than the parliament*"²²⁹. Based on this, he argued for a republican form that holds together the "*democratic*" and the "*social*" principle and he identified the parliamentary state with the "*cooperative structure of the state*"²³⁰. This is opposed not only to the prospect of council democracy but also to the "*anti-democratic, anti-social monopoly capitalism*" that he saw in 1925 as becoming more and more powerful²³¹.

Through this answer both to the "political" and to the "social" question, we can understand also the fact that the original constitutional draft of Preuss regulated merely the "political question" without including a section on rights or on councils²³². On this issue Preuss was

²²⁶In Blachley, Frederick F. & Oatman, Miriam (1925). 'Hugo Preuss talks on the Weimar Constitution', *The Southwestern Political and Social Science Quarterly*, 6(3) 252-255, 253-254

²²⁷Stolleis (2004) 59

²²⁸Preuss, Hugo ([1925] 2000). 'The significance of the democratic republic for the idea of social justice' in Jacobson, A. & Schlink, B. (eds.) *Weimar. A Jurisprudence of Crisis*, Berkeley, London: University of California Press, 122

²²⁹Collin, Peter (2017). 'The Legitimation of Self-Regulation and Co-Regulation in Corporatist Concepts of Legal Scholars in the Weimar Republic', *Politics and Governance* 5(1) 15-25, 17, available at: <https://www.cogitatiopress.com/politicsandgovernance/article/viewFile/784/784> (last accessed on 25/1/2018)

²³⁰Preuss ([1925] 2000) 122

²³¹Ibid. 126

²³²This draft entailed 68 paragraphs in three sections: the Reich and the Free German States, the Reichstag and the Reich President and the Government. Tribe, Keith, (1987). 'Introduction' in *Social Democracy and the Rule of Law: Otto Kirchheimer and Franz Neumann*, London: Allen and Unwin, 7

in agreement with Weber, albeit from different theoretical perspectives (see chapter 3.2. about Weber).

Regarding the theoretical framework, Preuss's constitutional suggestions derived from his effort to give a left-liberal spin to the organic theory of Gierke and should be seen in the context of renouncing the logic of sovereignty and of endorsing a cooperative-decentralized logic²³³. For Preuss- as later for Kelsen but from a different theoretical perspective- the logic of sovereignty was “*a relic of the monarchic bureaucratic-absolutist tradition*”²³⁴.

It is, therefore, important to make a short digression to Gierke's theory (1841-1921) so as to grasp better Preuss' constitutional suggestions. Gierke criticized the concept of sovereignty as such and was the antipode of the a-political statutory positivism of Laband during the Kaiserreich. On the contrary, Gierke's theory, deviating from the *Herrschaft* (domination) tradition, reduced the state to a plurality of groups at the societal level and the constitution to an indistinct sphere between *Staatslehre* and *Korporationslehre* through the concept of “social law”, which gave emphasis on an organic concept of solidarity. That's because his model was “*underpinned by a Hegelian and romantic account of history*”²³⁵ of the medieval logic of fellowships in the German towns. In this way, he assumed an organicistic concept of society.

However, the political is, in this way, dissolved entirely into the social. Hence, Gierke's theory had roughly the same outcome with Laband's theory: the mutation of conflict and the underestimation of parliamentarism²³⁶. This fits with his practical political stance given that he was “out of sympathy” for the labor unions and the SPD during the Imperial period and in 1920 he became a member of the conservative German National Party²³⁷.

Going back to Preuss, as it was seen in the previous paragraphs, he did not accept Gierke's

²³³See Preuss ([1925] 2000) 122

²³⁴Schoenberger (2000) 112

²³⁵Kelly, Duncan (2003). *The State of the Political. Conceptions of Politics and the State in the Thought of Max Weber, Carl Schmitt, and Franz Neumann*, Oxford: Oxford University Press, 89

²³⁶Gierke, Otto Friedrich von ([1868] 1990). *Community in historical perspective: a translation of selections from Das deutsche Genossenschaftsrecht*. (trans. Fischer, M., ed. Black, A.) Cambridge: Cambridge University Press, 156

²³⁷Black, Antony (1990). ‘Introduction’ in Gierke, Otto von *Community in historical perspective*, xiv-xxx, xxiii

logic in its entirety in his constitutional suggestions. However, the influence is evident by the fact that he “*conceived of democracy more as an organic unity of the people rather than as a system for the orderly resolution of conflict*”²³⁸. This could be visibly seen in the excerpt regarding the “cooperative structure of the state”. Hence - to trace also the connection with the previous debate on political parties- he was also not that interested to establish constitutionally the institutional role of the parties although he affirmed them as means of organizing public opinion²³⁹. Regarding this issue, albeit he had written that “*parliamentarianism is rule by parties*”, he had the fear that the parties would be dominated by interests (also due to their past in Imperial Germany). As Caldwell writes, Preuss’ suspicion was due to the fact that “*the parties had a history of irresponsible politics in the German Empire, where they had compensated for a lack of real power by engaging in negative power, the power to veto budgets or get special interests represented. He – like Weber and other liberals – feared that the parties would continue to be dominated by interests; he feared that their specific history in Imperial Germany would hinder their ability to take on the political responsibility for the whole polity demanded by a democracy*”²⁴⁰ ..

So, the role that he ascribed to the President should be also seen under this light, namely that he is the one to express the national consciousness of the state. We should see, therefore, his concept of the President in the context of his overall constitutional suggestions that, as Schoenberger writes, “*proved to be far more influenced by the legacy of constitutional monarchy than he himself realized*”²⁴¹. This is visible in his approach to the political question but also to the social question given that, through his cooperative logic, he could not see that the “cooperative” integration of classes towards the social justice is a contradiction in terms as long as the economy is run on a capitalist basis. In this vein, he could also not grasp (despite his aversion towards monopoly capitalism) how the power of capital could turn against political democracy- in contrast with the logic of “cooperation”- especially if the economy is not constitutionally regulated.

Going back to the deliberations *stricto sensu*, Hugo Preuss invited Max Weber who had

²³⁸Schoenberger (2000) 114

²³⁹Preuss (1921) “Unser Parlamentarismus und unsere auswärtige Lage” in Caldwell (2013) 372-373, 381

²⁴⁰ Caldwell (2013) 373

²⁴¹ Schoenberger (2000) 114

“*impressed*”²⁴² him with his famous articles on constitutional theory. Preuss’ invitation comes despite that Weber is influenced by a different theoretical tradition: whereas Preuss conceived the state as a cooperative structure due to his influence by Gierke and the Germanic tradition of *Genossenschaft*, Weber conceived the state as the monopoly of domination and, therefore, the tradition of *Genossenschaft* was “anathema” to him²⁴³.

However, they shared two common fears during the post-revolutionary “hot” period: *firstly*, of an imminent revolutionary “authoritarianism” in case the councils acquired political role and, *secondly*, of a “parliamentary absolutism”²⁴⁴. The second fear was also related to their framing of the experience of Imperial Germany and to the weak role of the parties therein that, according to both, could lead in the lack of national leadership (see chapter 3.2 for Weber).

These common fears found expression in their commonality regarding the role of the President. Weber agreed with Preuss’ proposal for a directly elected President for seven years (time needed almost for two Reichstag elections) in contrast with the French “*impure parliamentary system*” of indirect election²⁴⁵. However, Weber departed also from Preuss’ constitutional suggestions of a President-counterweight because he gave more emphasis to a Caesaristic- independent concept of President than Preuss (e.g. appealing directly to the people in the legislative process without the countersignature of ministers²⁴⁶).

This was closer to the American model but also not identical because Weber was advocating for parliamentary ministers responsible to the Reichstag that would assist the

²⁴² Mommsen ([1959] 1990) 351

²⁴³ He argued that “...*the rational law of the modern occidental state, on the basis of which the trained official renders his decisions, arose on its formal side, though not as to its content, out of Roman law*”.

Max Weber, *General Economic History* in Kelly (2003) 90

²⁴⁴ Hugo Preuss had already written in his famous article “Republic or False Authoritarian State?” on November 14, 1918 (namely one day before his appointment in the Ministry of the Interior) that a council republic would be the “*authoritarian state in reverse*”. In Schoenberger (2000) 110-115, 110

About Weber see Mommsen ([1959] 1990) 351

²⁴⁵ Preuss, Hugo in the “Notes about the discussions in the Reich Office of the Interior about the main features of the constitutional draft of 9-12 December 1918 to be laid before the Constituent Assembly” in Mommsen ([1959] 1990) 351

²⁴⁶ Mommsen had written that “*Weber wished to give him the classic rights of the constitutional monarch: [participation in patronage, appointment and dismissal of ministers, a suspensive veto, and above all the authority to dissolve the Reichstag or as a substitute for this, the possibility of appealing over the Reichstag to the people through a referendum]*”. Mommsen ([1959] 1990) 343

President's work²⁴⁷. So, although Weber and Preuss agreed fully neither with the American nor with the French model, Weber was closer to the American model than Preuss given that the latter argued for a less independent (from the Reichstag) President and for a bigger role of the Reichstag.

Eschewing here the more detailed discussions in the committee, the ultimate agreement-compromise that was reached in the committee was following more Preuss's line and decided that the President's role ought to be "*designed in a form similar to that of a monarch in a parliamentarily governed state*"²⁴⁸. Weber recognized this formulation "*as a compromise*" but he also "*counted on the fact that the impact of a presidential authority would make itself felt even without explicit institutional authorization*"²⁴⁹.

The *concrete content* of this agreement, which was ultimately decided by the Constituent Assembly, provided the President with the power of dissolution of the Reichstag in case of conflict so as to "*lodge an appeal against the people's representative with the people themselves*"²⁵⁰ (article 25²⁵¹), the recourse to referendum in case of disagreement about a law (article 73, paragraph 1), and the discretion in the selection of chancellor even without the necessity of a formal proposal by the Reichstag (article 53)²⁵². However, "*the chancellor and the ministers require the confidence of the Reichstag for the execution of their office. Each of them must resign if the Reichstag withdraws its confidence through an explicit decision*" (article 54)²⁵³.

The most *crucial* provision, nevertheless, is article 48, which concerned the president's emergency powers. It reads as follows:

²⁴⁷Ibid. 341

²⁴⁸In Ibid. 366

²⁴⁹Ibid.

²⁵⁰Preuss (1919), "Denkschrift zum Entwurf des allgemeinen Teils der Reichsverfassung vom 3. Januar 1919" in Schoenberger (2000), 110-115, 113

²⁵¹Article 25 reads as follows: "*The Reich President can dissolve the Reichstag, but only once for the same reason. The new election takes place on the seventeenth day after the dissolution*".

Weimar Constitution ([1919] 2008) 409-440, 413

²⁵²Article 53 reads as follows: "*The chancellor and, at his suggestion, the ministers are appointed and dismissed by the President*". Ibid. 417

²⁵³Ibid. 418

[paragraph 1] *“If a Land does not fulfill its duties according to the Reich Constitution or Reich statutes, the President can compel it to do so with the aid of armed forces.*

[paragraph 2] *If in the German Reich the public security and order are significantly disturbed or endangered, the President can utilize the necessary measures to restore public security and order, if necessary with the aid of armed force. For this purpose, he may provisionally suspend, in whole or in part, the basic rights established in Articles 114, 115, 117, 118, 123, 124 and 153.*

[paragraph 3] *The President must inform the Reichstag without delay of all measures instituted according to paragraph 1 or paragraph 2 of this article. The measures must be set aside at the request of the Reichstag.*

[paragraph 4] *In the case of immediate danger, the Land government can institute for its territory the type of measures designated in paragraph 2 on an interim basis. These measures are to be set aside at the demand of the President or of the Reichstag.*

[paragraph 5] *A Reich statute determines the details of these provisions [this was never implemented]”²⁵⁴.*

This overall constitutional framework and especially the triad “*dissolution of the Reichstag-discretion in the selection of the chancellor- article 48*” along with the unmediated election of the President made the President a powerful political actor. However, there were also some *safety valves* against the power of the President that were mainly *three*.

Firstly, there was the necessity of ministerial countersignatures in the emergency actions and generally in all the presidential actions (including the dissolution of the Reichstag) according to article 50²⁵⁵. *Secondly*, there was the possibility of removal of the President with a referendum after the Reichstag instigated such a procedure with a two-thirds majority (article 43 paragraph 2²⁵⁶). This was never actually used in Weimar given that in case the President remained in power after the referendum, this would mean the direct

²⁵⁴ Ibid. 417

²⁵⁵ Ibid.

²⁵⁶ Ibid. 416

dissolution of the Reichstag and the renewal of President's time for seven years. *Thirdly*, there was also the third paragraph of article 48, according to which the Reichstag could revoke the emergency measures of the President.

So, on the one hand, the powers given to the President revealed the dimension of Caesarism. This showed a level of continuity with the Kaiserreich given that the President was directly elected and could play the "card" of dissolving the Reichstag. However, on the other hand, this is not exactly the case in terms of actual powers given by the whole constitutional framework. That's because the Reichstag kept more safety valves than Weber wanted (e.g. the President needs a countersignature of the chancellor, who is dependent on the confidence of the Reichstag based on article 54).

As Mommsen wrote "*Weber's ideal of a genuine leadership of the Reich fell through, at least in the formal constitutional sense*"²⁵⁷. So, the whole constitutional framework that regulated the president's powers was closer to Preuss' model and theoretical framework²⁵⁸.

The Constituent Assembly and the shift

Regarding the stance of the Weimar political parties in the Constituent Assembly, the SPD was opposing this conception of the President at the beginning, the USPD was against the institution altogether²⁵⁹ and all the other parties supported a "strong" President (DDP, conservative parties) following mainly Weber's concept of the President (especially those from the DDP)²⁶⁰.

Regarding particularly the Majority Social Democrats, there was initially a strong opposition to Preuss' concept of the president except for the proposal regarding its direct election because it seemed to them as democratic and they also believed that the first

²⁵⁷ Mommsen([1959] 1990) 379

²⁵⁸ Ibid. 366

²⁵⁹ Ibid. 375

²⁶⁰ Ibid. 374-375

President would come from the SPD²⁶¹. The reservations by the SPD against the strong presidency lasted, nevertheless, until the third reading of the Constitution (30 July 1919) and it seems that they proposed in this last moment a joint election of the president by the Reichstag and the Reichsrat. However, they ultimately withdrew this proposal and conceded to the concept of President that we have already seen²⁶². This happened because (among other reasons) the civil-war conflicts during 1919 (e.g. Munich) convinced more people in the SPD to ally with the demand of bourgeois parties for a strong president²⁶³.

So, the issue of presidential powers in the Weimar Republic ratified the convergence between the conservative, the so-called “moderate” parties and of the SPD to the continuity conception of the Republic.

Finally, this is connected with another issue that is important, which is the interpretation of the concept of president during the Weimar Republic. Although this issue will be developed in the *fifth* chapter through the analysis of Schmitt’s theory, it suffices to write here that Weber’s concept of president gained more in influence already during the early 1920s both at a political level through the expansive interpretation of article 48 by the Social Democrat Ebert (see chapter 5.2.) and *in the field of constitutional theory* primarily through Carl Schmitt’s theory (see chapter 5.2).

However, it will be seen that the *big shift* took place during the early 1930s. This is the time that Schmitt’s conceptualization (that radicalized Weber’s concept of president²⁶⁴), became hegemonic both *politically* and in the “*Staatsrechtslehre*” community (see chapter 5.5 and 6.5). So, given that this “*genuine and thus daring gamble*”²⁶⁵ of the president’s power was ‘resolved’ ultimately in the direction of a radical version of Weber’s concept of president, it is important to focus deeper on Max Weber’s constitutional theory, which we have already touched upon at the level of his concrete proposal regarding the concept of president. This will be important also in order to understand Schmitt’s theory and his

²⁶¹Ibid. 375

²⁶²Ibid.

²⁶³Winkler ([2000] 2006) 362

²⁶⁴Mommsen ([1959] 1990), 384

²⁶⁵ These are the words of Thoma, Richard ([1930] 2000). ‘The Reich as a Democracy’ in Jacobson, A. & Schlink, B. (eds.) *Weimar. A Jurisprudence of Crisis*. Berkeley, London: University of California Press, 157-170, 166

interpretation of article 48 (see chapter 5).

3.2. Max Weber's constitutional theory

Max Weber (1864-1920) is one of the most famous sociologists of modernity. However, the writings of this “*deeply committed political personality*”²⁶⁶ on constitutional theory are often downplayed. This will be the topic of this section so as to shed light on the constitutional thinking that undergirds his concept of president. I will focus more on his later writings that delve deeper into constitutional theory through the association with his overall theory.

Starting from some biographical details, Weber was coming from a legal background as a student but he was mostly teaching *Nationalökonomie* during his short career at the level of academic teaching²⁶⁷. At the same time, he argued in his inaugural lecture in Freiburg in May 1895- after he had accepted the chair of *Nationalökonomie at this university*²⁶⁸- that “*the science of political economy is a political science. It is a servant of politics, not the day-to-day politics of the persons and the classes who happen to be ruling at any given time, but the enduring power-political interests of the nation*”²⁶⁹. Moreover, the course that Weber would have delivered at the University of Vienna in the summer semester of 1920, had he lived, would be *Allgemeine Staatslehre*²⁷⁰.

The fact that Weber dealt with law, political economy and state theory can be also explained by the “*direct connection between German Staatswissenschaft- which included public law, public state economics, public administration and various sub-fields of political science- and political economy*”²⁷¹. Taking this into account, I will show that Weber's theory dealt with the modern national state under conditions of capitalist

²⁶⁶Mommsen, Wolfgang (1989). *The Political and social theory of Max Weber: collected essays*, Cambridge: Polity Press

²⁶⁷ For the whole academic career of Max Weber see Tribe (1995) 80-94

²⁶⁸Lassman, Peter & Speirs, Ronald (1994). ‘Introduction’ in *Weber: Political Writings*, Cambridge: Cambridge University Press, viii

²⁶⁹Weber, Max ([1895] 1994). ‘The Nation State and Economic Policy’ in Lassman, Peter & Speirs, Ronald (eds.) *Weber Political Writings*, 16

²⁷⁰Kelly (2003) 75

²⁷¹Ibid. 78

modernity. Through this lens I will analyze Weber's constitutional suggestions and, therefore, his concept of president.

My approach of Weber distances itself, firstly, from Dyzenhaus' approach. Although he argues that the radicalization of Weber's thinking came from Schmitt (in the sense that Weber's thinking entailed also the "ethics of responsibility"), he wrote that "*...for Weber, there are no criteria for success beyond success itself...because Weber denied that there is a morality beyond the law by which it can be judged, he holds that a de facto legal order is also legitimate*"²⁷².

In a not dissimilar way, Scheuerman -albeit arguing cautiously that Weber had a "*moderate decisionism*"²⁷³ - writes that for the "*late liberal [Weber] 'politics means conflict' he dramatically announces...doomed to suffer and enjoy the ambivalent freedoms of modernity, we are necessarily left without verifiable universal certainties about our most basic values*"²⁷⁴.

This picture of Weber, which depicts him as the proponent of sheer power politics (Machtstaat), underplays the overall theoretical framework in which Weber's thinking and his constitutional suggestions are developed. I will demonstrate that the issue of rationality and legitimacy, which are central to Weber's thought, should be viewed in the context of his theorization about the contradiction between the modern state and capitalist modernity. Regarding this contradiction, I will argue in this section that his theory illuminated a *bourgeois solution* to the Marxist framing of the contradiction of modernity. As he himself had argued, "*...I am a member of the bourgeois (bürgerlich) classes. I feel myself to be a bourgeois...*"²⁷⁵.. This will be evident primarily from his response to the political question but it will be also revealed from the way in which he responds to the social question. In order to see these responses I will associate his constitutional suggestions with his overall theory.

The origins of Weber's constitutional proposals

²⁷² Dyzenhaus (1997) 239, 12, 14

²⁷³ Scheuerman (1994) 20

²⁷⁴ Ibid. 16

²⁷⁵ Weber ([1895] 1994) 23

Max Weber had endorsed a “*genuine parliamentary system*” since the first decade of 20th century²⁷⁶. This should be seen also in the context of his left-liberal position since the 1900s and more clearly since 1905, which was evident by the fact that he acted “indirectly” as a political adviser from 1906-07 onwards for the “*Freisinnige Vereinnige*” (Liberal Union- later turned into the FVP)²⁷⁷. Moreover, his left-liberal position became more visible with his participation in the foundation of the left-liberal DDP in December 1918²⁷⁸. He was at that time close to those liberals that wanted coalition with the SPD as it is evident from his statement that “*all honest, unreservedly pacifist and radical bourgeois democrats and Social Democrats could work side by side for decades to come until their ways eventually might have to part again*”²⁷⁹.

Unraveling this orientation of Weber at the level of his theory, his defense of parliamentarism is related to his critique of Bismarck’s heritage. Weber argued in 1917 that “*for the last forty years all parties have worked on the assumption that the task of the Reichstag is merely to practice ‘negative politics’. It became frighteningly obvious that the effect of Bismarck’s legacy was the ‘will to powerlessness’ to which the parties had been condemned by his actions*”²⁸⁰.

With the term “negative politics”, Weber mentioned the fact that, according to the 1871 Constitution, the Reichstag had merely the right of veto to the budget²⁸¹. In view of this situation, he wrote, the impotent parliament worked merely as a “*petty-bourgeois guild*” organization in the sense that there were not politicians to accept “*full personal responsibility*”²⁸². That’s because the political parties were only aiming at creating coalitions so as to act in a “negative” way in the Reichstag and they lacked broader

²⁷⁶ Ibid. 4

²⁷⁷ He was an advisor “*through the intercession of Friedrich Naumann and Ernst Mueller-Mueningen*”. Mommsen (1989) 3-23, 4. See also Thornhill (2000) 24

²⁷⁸ Weber was elected at the party executive of the DDP in 1918 and he was also nominated for a candidature at the constituency of Hessen/Nassau. However, this candidature failed because of the way “*in which he had spoken out too openly in the initial stages of the electoral campaign in favor of the cooperation with the social democrats and for a partial nationalization of the economy*”. Mommsen (1989) 6, 7

²⁷⁹ In Mommsen (1989) 74-86, 85

²⁸⁰ Weber ([1918] 1994) 130-271, 187

²⁸¹ See the 1871 Constitution in Hucko ([1984] 1987) 119-145

²⁸² Ibid. 161, 188

“integrative function” by being still rooted in private associations. This is important, according to Weber, because the responsible political leaders of the future that would make the German nation more powerful could not be born²⁸³.

So, due to the fact that parliamentarism did not work, the heritage of Bismarck’s policy created only -what Weber calls- “officials”, namely politicians that did not take responsibility for the nation but were working only behind the scenes “*in the form of the patronage for minor prebends*”²⁸⁴. Hence, Weber argues here that the lack of parliamentarism reproduces the lack of national leadership and the fusion between public and private interests. On the contrary, it is only through the parliamentary procedures that there could be leaders.

He associated, therefore, his demand for parliamentary democracy with the necessity of leadership so as to achieve national integration. It is from this perspective that he opposes all those who conceived parliament merely as a “*talking shop*”²⁸⁵ and that he drew a connection between “parliamentarization and “national integration” (against Bismarck’s heritage).

However, his concept of leadership through the lens of national integration was also related to his defense of imperialism. Hence (along with Friedrich Naumann²⁸⁶) they did not oppose the “necessity” of an “*overseas expansion*”²⁸⁷ and of an “aggressive” foreign policy²⁸⁸. This changed only during the Great War, where he publicly opposed any annexation plans²⁸⁹.

²⁸³ Ibid. 188

²⁸⁴ Ibid. 167

²⁸⁵ Ibid. 170-171

²⁸⁶ For more about this see Winkler ([2000] 2006) 255-256 (about the 1900s) and p.278 (about 1910).

See also Thornhill (2000) 20, 23

²⁸⁷ Weber ([1895] 1994) 25

²⁸⁸ This is particularly evident in Friedrich Naumann, who was one of the important leaders of this left-liberal current since the last decade of 19th century.

Thornhill (2000) 23

²⁸⁹ Although he probably did not oppose annexations on principle.

See Mommsen ([1959] 1990) 264

See also Mommsen (1989) 83

This stance is the reason for which Abraham writes that Max Weber and Friedrich Naumann were seen as “exponents” of the export-oriented industry “...when they hoped ...to link imperialism to political and social democratization”²⁹⁰. That’s also because this capital fraction was even more imperialist than the hegemonic, anti-labor “*Sammlung*” social coalition of heavy industry and agriculture²⁹¹.

Although we cannot analyze Weber’s whole oeuvre through this lens (namely that Weber was a spokesman for this fraction) because it would be quite reductive, we can already see that his theory is permeated by the key aspect in the ideological orientation of late-nineteenth century German liberalism, which “can be most accurately assessed as a problem of integration”²⁹². In line with this, the *orientation* of Weber’s political theory is explicitly the national integration and the way in which such a democratic concept of the political could enhance the international standing of Germany. This is evident in the excerpt that Mommsen quotes from Weber’s collected lectures and essays dating from the period 1914-1918: “for me democracy has never been an end in itself. My only interest has been and remains the possibility of implementing a realistic national policy of a strong, externally oriented Germany”²⁹³.

Making a short digression here, this overall orientation of liberalism became particularly visible in the outbreak of the Great War not only through the fact that many liberals were enthusiastic nationalists (nevertheless not only in Germany²⁹⁴), but mainly from the theoretical “justification” of this enthusiasm that consists in the defense of “*Kultur*” against “*Zivilization*”. The latter was a distinction initially deployed by “*völkisch*” conservative thinkers, which counterposed a romantic homogeneous identity of the German Reich based on rural life (*Kultur*) to the “soulless” life of the big cities and the instrumental logic of the industrial capitalism (*Zivilization*).

The adoption of this distinction by many liberals is visible from the manifesto that the

²⁹⁰ Abraham ([1981] 1986) 114

²⁹¹ Ibid.

²⁹² Thornhill (2000) 21. Kelly (2003) 129

²⁹³ In Mommsen (1989) 25 from Max Weber-Gesamtausgabe, vol 1/15: *Zur Politik im Weltkrieg: Schriften und Reden 1914-1918*, ed. Wolfgang J. Mommsen in collaboration with Gangolf Hübinger (Tübingen 1984) 234

²⁹⁴ See Traverso ([2007] 2013), 214-220

liberal newspaper “*Berliner Tageblatt*” published in October 1914, in which 93 worldwide known scientists- some of them Nobel Laureates and Friedrich Naumann- defended the German case as a case of “*Kultur*”²⁹⁵. Max Weber had also a feeling of enthusiasm, writing on August 28, 1914 that “*whatever this outcome, this war is great and wonderful*”²⁹⁶.

After the Great War and the “*Fronterlebnis*” (front experience) this distinction between *Kultur* and *Zivilization* changed meaning for many conservative thinkers and they proceeded in a synthesis of *Kultur's* anti-modern ideas of political representation (namely they were opposed to the principles of 1789) with the technical powers of *Zivilization*. Hence the term “*reactionary modernists*” coined by Jeffrey Herf²⁹⁷. The political outcome of this combination was a prevalence of anti-modern political ideas along with the power of the “dark side” of modernity²⁹⁸.

However, it should be clear that this term of “reactionary modernism” is different from the kind of national integration that Weber espoused (despite that he was not totally impervious to this direction as seen above with colonialism), which was associated with his defense of parliament. This was revealed clearly in his 1917 articles (seen earlier)²⁹⁹ that conceived parliament as the platform for the revelation of leaders (against Bismarck’s legacy). Moreover, it was also seen in his famous address “Politics as a Vocation” to the student body at the University of Munich on January 28, 1919 (also attended by Carl Schmitt³⁰⁰). In this speech Weber continued the line that he had formulated in his articles during 1917.

²⁹⁵ Ibid. 215-217

²⁹⁶ Weber, Max, Letter of 28 August 1914, *Lebensbild*, p.530 in Mommsen ([1959]1990) 190-191

²⁹⁷ Herf includes Oswald Spengler, Ernst Junger, Werner Sombart and, to an extent, Schmitt in this “family” of reactionary modernists.

Herf, Jeffrey (1984). *Reactionary Modernism: Technology, culture, and politics in Weimar and the Third Reich*, Cambridge: Cambridge University Press.

²⁹⁸ It is in this sense that Jeffrey Herf wrote that “*the reactionary modernists were modernists in two ways. First...they were technological modernizers; that is, they wanted Germany to be more than less industrialized, to have more than fewer radios, trains, highways, cars and planes. They viewed themselves as liberators of technology’s slumbering powers, which were being repressed and misused by a capitalist economy linked to parliamentary democracy. Second, they articulated themes associated with the modernist vanguard: Junger and Gotfried Benn in Germany, Gide and Malraux in France, Marinetti in Italy, Yeats, Pound, and Wyndham Lewis in England.... [the reactionary modernists] removed technology from the world of Enlightenment reason, that is, of Zivilization, and placed it into the language of German nationalism, that is, of Kultur...*”. Ibid. 12, 224

²⁹⁹ Weber ([1918] 1994) 130-270

³⁰⁰ Mehring, Reinhard ([2009] 2014). *Carl Schmitt: A biography*, Cambridge/Malden: Polity Press, 101

However, there was now a *difference*. The important difference is that he argued clearly also for a charismatic presidential authority that was “*the only remaining outlet for the desire for leadership...if the President were to be elected in plebiscitary rather than parliamentary means*”³⁰¹. This is where we can see his defence of a strong President that would stand above the “*leaderless*” proportionally elected parliament.

This is an important difference from his 1917 writings despite that he had not excluded the possibility of a co-habitation between a directly elected president and a parliament in his 1917 writings³⁰². Weber’s shift can be explained by taking into account the Weimar system of proportional representation that, as he argued, could lead to the defeat of leadership and to the capturing of parties by interests³⁰³. Moreover, his concept of President is also a solution against the Weimar role of the Bundesrat that will “*necessarily limit the power of the Reichstag and hence the importance of the Reichstag as the place where leaders are selected*”³⁰⁴.

However, his constitutional suggestion for a “charismatic” President does not change his overall theoretical perspective of the political, which is related to the logic of leadership and to national integration. This *continuity* with his 1917 writings derives from this overall theoretical construction of what does political and “leadership” mean for him in the context of capitalist modernity.

In order to see this, we need to dig deeper into Weber’s analysis of capitalist modernity. Weber starts from the assumption that the modern “disenchanted” world is contradictory in the sense that, on the one hand, capitalist modernity relieves the individual from “*recourse to magical means*”, and, on the other hand, it introduces a concept of technical-instrumental rationality (*Zweckrationalität*) that permeates the social actions. As Weber had put it in his lecture “Science as a vocation” (also attended by Schmitt³⁰⁵), “*...the world is disenchanted. One need no longer have recourse to magical means in order to master or implore the spirits, as did the savage, for whom such mysterious powers existed. Technical means and calculations perform the service. This above all is what intellectualization*

³⁰¹Weber, Max ([1919] 1994). ‘The Profession and Vocation of Politics’ in Lassman Peter & Speirs, Ronald (eds.) *Weber: Political Writings*, Cambridge: Cambridge University Press, 309-369, 351

³⁰²See Weber ([1918] 1994) 221-222

³⁰³Weber ([1919] 1994) 351

³⁰⁴*Ibid.*

³⁰⁵Mehring ([2009] 2014) 101

means”³⁰⁶.

The excerpt above reveals this *Janus*-face dimension of modernity, where, on the one hand, it is liberating through the “demystification” of the world and, on the other hand, it determines the social actions given that “*technical means and calculations perform the service*”. The origins of this rationality can be traced in the capitalist economy, which has now pervaded the whole social sphere (law, politics, culture).

This demystified “capitalist rationality”, which endangers both the individual autonomy and the national integration, is analyzed further in his sociological work “The Protestant Ethic and the Spirit of Capitalism” (1905). In this work, he argued that “.... *this order is now bound to the technical and economic conditions of machine production which today determine the lives of all the individuals who are born into this mechanism, not only those directly concerned with economic acquisition, with irresistible force. Perhaps it will so determine them until the last ton of fossilized coal is burnt. In Baxter’s view the care for external goods should only lie on the shoulders of the ‘saint like a light cloak, which can be thrown aside at any moment’. But fate decreed that the cloak should become an iron cage*”³⁰⁷.

In this excerpt, the metaphor of the “*iron cage*” (*stahlhartes Gehäuse*) and the reference to the machine production makes clear that Weber alludes to the taylorist mode of work of industrial capitalism when he analyzes the capitalist rationality. Moreover, his phrase “...*determines the life of all individuals...with irresistible force*” shows that capitalist rationality is not limited to the factory, but that, *crucially*, society turns into a big factory in which human subjectivity is guided and (possibly even) constituted by this rationality. This process of the expansion of capitalist rationality on human subjectivity is also seen emphatically in Weber's lament for the loss of the “*Faustian multi-dimensionality of the human species*”, which is lost since there is a shift into “*specialists without spirit, sensualists without heart*”³⁰⁸.

At this point, Weber’s critique to capitalist rationality and on its impact on subjectivity is

³⁰⁶Weber, Max ([1917] 1958). ‘Science as a Vocation’, *Daedalus*, 87(1) 111-134, 117

³⁰⁷Weber, Max ([1905] 1992). *The Protestant Ethic and the Spirit of Capitalism*. London: Routledge, 123,124

³⁰⁸*Ibid.* 124

clear. In this framework, he had written in the editorial - co-written with Werner Sombart and Edgar Jaffé in 1904- of the journal *Archiv für Sozialwissenschaft und Sozialpolitik* that the journal was to explore “*the cultural significance of capitalist development*”³⁰⁹. The *question* that interests us here is *how* this capitalist rationality penetrates politics and *why* does Weber identify the political with the figure of a strong President as opposed to this rationality (which is also the point that I will go back to his constitutional suggestions).

Regarding the former question, the German thinker presented the political dimension in modernity as a “*process... parallel to the development of the capitalist enterprise (Betrieb) through the gradual expropriation of independent producers...in today’s ‘state’...the ‘separation’ of the material means of administration from the administrative staff, the officials and the employees of the administration, has been rigorously implemented*”³¹⁰.

Through this explicit analogy of modern politics with the instrumental rationality of the capitalist firm, he reveals the *ossified, formal* side of politics that functions based on a mechanic and depersonalized manner. However, as Weber argues, the logic of “calculability” -that is the basis of this rationality- cannot be conceived as analogous to “a way to God” and cannot provide us with the ultimate meaning of the social universe. That's because such a meaning does not exist in modern “polytheistic” societies and, therefore, “*it is necessary to make a decisive choice*”³¹¹. So, the only way to make sense of the social actions is through a *decision* that *bypasses* the instrumental-calculated rationality.

Hence, the concept of the political is, *crucially*, identified with a “non-technical praxis”. This identification does not exclude, nevertheless, the bureaucratic side of capitalist modernity and of politics as well. Weber argues that this bureaucratic element is inescapable but he is critical of the over-expansion of the technical rationality in all the spheres of social life because it endangers both the individual autonomy (by enclosing it in the “iron cage”) and the national integration in the sense that it is impossible to sustain a collective “we”.

This *combination* of bureaucratic and political action and his ultimate solution (that shows

³⁰⁹Weber Max, Sombart Werner, Jaffé Edgar (1904) “Geleitwort”, *Archiv für Sozialwissenschaft und Sozialpolitik*, Bd. 19, p.v in Lassman & Speirs (1994) ‘Introduction’, ix. See also Kelly (2003) 25

³¹⁰Weber, Max ([1919] 2009). ‘Politics as a vocation’ in Gerth, Hans & Mills, Wright C (eds.) *From Max Weber: Essays in sociology*, New York: Routledge, 81

³¹¹ Weber ([1917] 1958) 111-134, 120-121, 126, 130

also his Weimar constitutional suggestions) can be seen through his distinction between *three* inner justifications that provide *legitimacy* to the political domination in societies. The first justification “*was the authority of the 'eternal yesterday,' i.e. of the mores sanctified through the unimaginably ancient recognition and habitual orientation to conform. This is 'traditional' domination exercised by the patriarch and the patrimonial prince of yore. There is the authority of the extraordinary and personal gift of grace (charisma), the absolutely personal devotion and personal confidence in revelation, heroism, or other qualities of individual leadership. This is 'charismatic' domination, as exercised by the prophet or in the field of politics by the elected war lord, the plebiscitarian ruler, the great demagogue, or the political party leader. Finally, there is domination by virtue of 'legality,' by virtue of the belief in the validity of legal statute and functional 'competence' based on rationally created rules. In this case, obedience is expected in discharging statutory obligations. This is domination as exercised by the modern 'servant of the state' and by all those bearers of power who in this respect resemble him*”³¹².

In this excerpt, the “patriarchal legitimacy” signifies the pre-modern and pre-capitalist concept of political power that Weber renounces already through his depiction of the social as “polytheistic”. The “formal legality” is the adherence of politics to the competent legal norm that has a general-impersonal applicability³¹³. To put it in a nutshell, this is the main side of bureaucracy with regards to the state. However, the “legal legitimacy” is not adequate, according to Weber, to sustain a legitimate system by itself because this would lead to its ossification.

It should be noted, as an aside, that this *ossified*-mechanic picture of constitutionalism (depicted as “formal” legality) is the object of Schmitt's critique in “Political Theology” (that was initially planned as a commemorative publication of Max Weber)³¹⁴. Schmitt explicitly mentioned Weber against the danger of the transformation of politics in a “*huge industrial plant*” that “*runs by itself*” through its cooption by the instrumental rationality. The danger, for Schmitt, is that “*the decisionist and personalist element in the concept of*

³¹²Weber ([1919] 2009) 78-79

³¹³ Ibid.

³¹⁴The three chapters out of four of “Political Theology” were published as Schmitt's contribution in the second volume of the *Erinnerungsgabe für Max Weber* in December 1922 with the title “Sociology of the concept of sovereignty and political theology”. The fourth chapter, which was about counterrevolutionary philosophy, was added in summer 1922 in the edition of the monograph “Political Theology”. Mehring ([2009] 2014) 106

sovereignty is lost”³¹⁵ and that’s why he developed his concept of exception as “*the power of real life [that] breaks through the crust of a mechanics paralyzed by repetition...*”³¹⁶.

However, one of the main differences of Weber’s account with Schmitt’s is that, for Weber, the formal legal element is *also necessary* because a system based merely on the “charismatic” rationality would not be sustainable- even though the instantiation of politics is clearly the “*charismatic*” rationality because it embodies the non-reduction of the political to the technical approach.

Analyzing now this “charismatic” rationality, which expresses the “essence” of the political for Weber, it is taking a clearly *elitist* direction in Weber’s analysis. That’s because, whereas he tried to disentangle the political from the economic and technical considerations that a crude materialism proposed, he finally ascribed this political quality only to people that have “*the inner charismatic qualities that make a leader*”³¹⁷. These are the elites that live “*for politics*” and not “*of politics*”, in the sense that they don’t think about their personal gains and about party machinations (here he has also in mind the paid officials of the bureaucracy of the parties)³¹⁸. This is a point that Weber had repeated in his 1917 writings³¹⁹.

Now we can see better that the knot between his 1917 and his 1919 writings is, *significantly*, that politics is not the place of conflict and deliberation but only a place for the “preparation” of charismatic leaders that live “for politics”³²⁰. This is the *key* common point that shows Weber’s effort to avoid the economic-instrumental logic of “interest” through an *elitist* conception of democracy.

This way out is, *firstly*, due to Weber’s “anthropological pessimism”, according to which the vast majority of people are depicted as not able to think in a deeper political way because they think about their own, personal gains or they think emotionally and,

³¹⁵ Ibid. 65, 48

³¹⁶ Schmitt, Carl ([1922 1934] 1985). *Political Theology, Four Chapters on the Concept of Sovereignty*. Cambridge MA: MIT Press, 13,15

³¹⁷ Weber ([1919] 1994) 309-369, 351

³¹⁸ Ibid. 318-320

³¹⁹ Weber ([1918] 1994) 190

³²⁰ Ibid. 191

therefore, “*only as far as the day after tomorrow...*”³²¹. So, his conception of human subjectivity denotes an identity that cannot be changed by means of the political process. In this context, Weber is clear: the political conflict, if it remains, is (at best) between “heroic” elites. As he argued, every democracy has inescapably a Caesaristic tendency³²².

So, the solitary figure of President that takes decisions through his “inner ability” comes as a *consequence* of Weber’s elitism. This is Weber’s solution also to the emergent phenomenon of the bureaucratic dimension within mass political parties (e.g. party functionaries etc.)³²³. As Weber writes, “...*the only choice lies between a leadership democracy with a 'machine' and democracy without leader, which means rule by the professional politician who has no vocation, the type of man who lacks precisely those inner, charismatic qualities which make a leader. Usually this means what the rebels within any given party call 'rule by the clique'*”³²⁴.

This except shows that Weber ends up in an elitist concept of the political that regulates in detail the “parts” that have a say in politics and the parts that have the “depersonalized” role of the “machine”. So, this Weberian system of the modern state, which derives from his assumptions of a “disenchanted”-“polytheistic” world that does not offer any historical teleology, is ultimately sustained *only* with the emergence of leaders that are those to embody the “purely” political.

This ultimately drives Weber’s suggestion for a powerful-Caesaristic President that will maintain both a collective “we” and the individual autonomy as opposed to the bureaucratic logic that permeates also the political parties. In this vein, he suggested that “*a popularly elected President, as the head of the executive, of official patronage, and as the possessor of a delaying veto and the power to dissolve parliament and to consult the people, is the palladium of genuine democracy, which does not mean impotent self-abandonment to cliques but subordination to leaders one has chosen for oneself*”³²⁵.

³²¹Ibid. 230

³²² Ibid. 221

³²³Weber ([1919] 1994) 338-339

³²⁴ Ibid. 351

³²⁵Weber, Max ([1919] 1994). ‘The President of the Reich’ in Lassman, Peter & Speirs, Ronald (eds.) *Weber Political Writings*, Cambridge: Cambridge University Press, 308

Weber's elitist conception of democracy is related not only to his anthropological pessimism (seen above). It is also related, *secondly*, to the way in which Weber conceives the social question. That's because Weber's elitist conception of the political goes along with a naturalization of the capitalist division of labor whose "bureaucratic" element is deemed as essential and, therefore, as non-political. This is evident in his Vienna lecture on "socialism" in which he argued that *"everywhere we find the same thing: the means of operation within the factory, the state administration, the army and university departments are concentrated by means of a bureaucratically structured human apparatus in the hands of person who has command (beherrscht) over this human apparatus...it is a serious mistake to think that this separation of the worker from the means of operation is something peculiar to industry and, moreover, to private industry"*³²⁶.

It can be seen in this excerpt that the capitalist division of labor is deemed as an inescapable bureaucratic (and, therefore, non-political) element of modernity. On the contrary, Weber's concept of the political-non-technical action should be seen as expressed by an elite that keeps the ability of purely political action as opposed to the instrumental logic that pervades civil society- namely the "people" (as seen also in the analysis above).

From this perspective, Weber answered also to the "social question" by opposing both the socializations and socialism. Regarding the former, he argued that this would necessarily lead to further bureaucratization (even though he seemed to concede to some socializations in view of the prospect of the SPD-DDP coalition³²⁷). So, when the DDP asked Weber to represent them on the second Commission on socializations (in 1920) he argued that *"at all meetings, everywhere, both private and public, I have declared 'socialization', in the sense now understood to be nonsense. We are in need of entrepreneurs..."*³²⁸. Regarding the former, Weber had written in 1917 (in the context of a discussion about the future of German economy and the possibility of a socialist transformation of the economy) that *"a progressive elimination of private property is theoretically conceivable...What would be the practical result? The destruction of the iron cage of modern industrial labour? No! The abolition of private capitalism would simply mean that the top management of nationalized or socialized enterprises would become bureaucratic as well"*³²⁹.

³²⁶ Ibid. 281

³²⁷ See Weber ([1919] 1994) 304 -308,305

³²⁸ Weber, Max, Letter to Karl Pettersen (14 April 1920) in Mommsen (1989) 86

³²⁹ Here I have preferred the translation from Mommsen (1989) 60-61. This excerpt can be found in different English translation in Weber ([1918] 1994) 157

We can see from the excerpt above that the rationality of the capitalist system is the only horizon that we have at our disposal since anything else is doomed to bring even more bureaucracy. So, despite that he was in favor of some measures of progressive social legislation³³⁰, it is clear that Weber opposed the welfare state to the extent that it intervened with formal rationality. This formal rationality, as is visible in the excerpts above, is identified with the capitalist division of labor.

Taking this into our account, the *crucial point* is the one pinpointed by Mommsen when he argued that “*Weber was convinced that neither private appropriation nor the uneven distribution of property can be regarded as the essential causes of the alienation and deprivation of the working classes...Weber saw the roots of alienation, not in property relations [namely in the capitalist division of labor] but in omnipotent structures of bureaucratic domination, which modern industrial capitalism produced in ever-increasing numbers*”.³³¹ So, alienation comes from bureaucratic domination.

Opposed to this bureaucratic domination was solely the “leader” as opposed to the “official”. The “leader” can be seen, according to Weber, not only at the political but also at the economic level. This derives from the analogy that he drew between the state and the enterprise in the sense that both contain both an inescapable bureaucratic component and a non-technical (leadership) component³³². At the *economic level* the figure of the leader is identified with the dynamic entrepreneur as opposed to the static capitalist model -such as the “*parasitic ideals of a stratum of prebendaries and rentiers*”³³³. So, his ideal, at the level of the “social question”, is a reinforcement of the capitalist economy with measures that strengthen social mobility and “productive capital” instead of socialist, interventionary measures that create further bureaucracy. From this perspective, he had argued in 1917 that a concept of a “communal economy” would be unable to produce dynamic entrepreneurs and would create further bureaucratic monopolization³³⁴.

Through this lens we can also see Weber’s argument that the continuous demands for

³³⁰ Mommsen (1989) 118

³³¹ Ibid. 60

³³² As Weber wrote, “*looked at from a social-scientific point of view, the modern state is an ‘organisation’ (Betrieb) in exactly the same way as a factory*”.

Weber ([1918] 1994) 146

³³³ Weber, Max ([1917] 1994). ‘Suffrage and Democracy in Germany’ in Lassman, Peter & Speirs, Ronald (eds.) *Weber Political Writings*, Cambridge: Cambridge University Press, 84

³³⁴ Weber ([1918] 1994)) 155, 223, 270

equality by the “*excitable majority*” would “*further the influence of informal law*”³³⁵. So, modern law- namely the main bureaucratic element in politics- is deemed to go hand in hand only with the capitalist rationality or it runs the danger of being disintegrated³³⁶. That’s why deviating from the capitalist rationality means- what Weber calls- a “*cadi justice*”, namely a premodern logic³³⁷.

In a similar vein, Weber “*pleaded strongly for a liberal system of industrial relations in which the trade unions would be free to fight for the economic and social interests of the workers...*”³³⁸. So, as Mommsen argues, Weber’s theory is not a “*throwback to Manchester liberalism*” but “*in a way it anticipated the neo-liberalism of the 1950s... he influenced its leading exponents (e.g. Friedrich Hayek, Hannah Arendt, Alfred Müller-Armack) to a considerable extent*”³³⁹.

Weber’s insights have been the lens through which the Weimar economic constitution was criticized in similar terms by other liberal approaches (see chapter 4). This makes sense given that the deeper assumption of Weber’s logic is a liberal concept of an autonomous state through its distinction with the economic (that is deemed to be non-political as seen), which makes it incompatible with a constitution that puts into question the political-economic divide (as the Weimar economic constitution did, albeit it did not make a rupture with the capitalist mode of production).

Concluding, it is evident through this analysis of Weber, that his answer to the political and to the social question is close to liberal thought despite his aversion to the usual liberal conception of politics as a utopia of “perpetual peace”³⁴⁰. That’s because, notwithstanding Weber’s Kulturkritik regarding the effects of capitalist rationality on subjectivity, his critique is not against the capitalist social relations but against the confounding between the political and the economic and the capturing of the leaders-elites by the bureaucratic logic. Hence, his theory and his constitutional suggestions endorsed a framework of *democracy* as “*competitive leadership antagonism*”³⁴¹.

³³⁵ Kelly (2003) 110

³³⁶ See also Veitch, Scott, Christodoulidis, Emiliós & Farmer, Lindsay (2007). *Jurisprudence: Themes and Concepts*, London, New York: Routledge, 234

³³⁷ Weber ([1918] 1994) 148

³³⁸ Weber ([1917] 1994) 80-129, 81

³³⁹ Mommsen (1989) 70

³⁴⁰ Lassman & Speirs (1994) xxiv

³⁴¹ This is a term used by George Oster but I have seen it in Kelly (2003) 115

This architecture shows also his main, not negligible, difference with Marxism³⁴². Whereas Marxism takes the promises of modernity seriously as inscriptions for a generalized non-technical praxis that could transform the social relations, Weber's concept of a non-technical praxis goes in the direction of maintaining the political-economic divide.

As a very last point, it should be also noted that Weber's theory was influential not only regarding the political and the social question but also with his remarks about the bureaucratization of political parties. As we will see in chapter 5, Schmitt took this critique into account but in a more radical anti-parliamentary tone, whereas Weber was not against political parties as such but against "parliamentary absolutism". Kelsen also took Weber's critique into account by suggesting the constitutional recognition of political parties as public bodies in order to enhance their democratic accountability (also in terms of their internal organization), giving in this way a democratic twist to Weber's insights without resorting either to charismatic leaders or to a political-economic distinction (see chapter 6). Finally, Franz Neumann was also influenced by Weber's theorizations by showing clearly the bureaucratization not only of political parties (SPD) but also of the social organizations (unions). However, his critique is not exerted in a Weberian liberal direction but he conceived this bureaucratization as related to the advanced capitalist state³⁴³ and as a result of the problematic trade unions' strategy (see chapter 4.3 and chapter 6.5).

³⁴²Lowy traces similarities by arguing that this is due to the fact that both Marxism and Weber perceive capitalism as a system where "*the individuals are ruled by abstractions (Marx), where the impersonal and "thing-like" (Versachlicht) relations replace the personal relations of dependence, and where the accumulation of capital becomes an end in itself, largely irrational*".

Lowy, Michael (2007). 'Marx and Weber: Critics of Capitalism', *New Politics*, vol. XI-2, 42. Available at: <http://newpol.org/content/marx-and-weber-critics-capitalism> (accessed on 20/06/2015)

³⁴³ Neumann ([1942 1944] 2009) 412-413

Chapter 4. The “social question” in the Weimar Constitution

The Weimar Constitution was not a typical liberal constitution but a “post-traditional” constitution³⁴⁴. Hence it dealt also with the “social question” in contrast with Preuss’ original draft (see chapter 3.1) and with nineteenth-century constitutions.

Social policy was very important for the Weimar Republic. Its necessity for the Weimar state lies, *firstly*, on the specific post-war German conditions. Under these conditions, social policy was necessary for the relief and the integration of war veterans (and of their families) and for the impoverished post-war German society³⁴⁵. *Secondly*, Weimar social policy “...also reflected the long-term trend in the development of the western and central European states since the nineteenth century. The industrial revolution had gotten under way in these states through the unleashing of capitalism and with the enormous human sacrifices that constituted the ‘social question’. But the political pressure emanating from the ‘social question’ and the rising productivity of industrialization also allowed for the creation of large collective system of security, the expansion of worker protections, and the legal regulation of the clash of interests in collective labor law. In all areas, the state abandoned its paltry role as merely a ‘night watchman’.... It became a ‘welfare state’, initially still in the sense of fighting off threats that could arise for the body politic from mass poverty and class warfare, but then increasingly as an agency for the distribution of the national income that was intertwined in multifarious ways with the societal forces. Those forces were now organized into associations, and in cooperation and competition

³⁴⁴ Scheuerman, William (1996). ‘Introduction’ in *The Rule of Law under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer* (ed.), Berkeley: University of California Press, pp. 1-25, 5

³⁴⁵ Ibid. 97

*with the other parties and the ministerial bureaucracies, they were especially intent on getting their hands on the rudder of legislative activity. Everything now depended on the viability of this changed state: the ability for political action, on the one hand, and the productivity of the economy, on the other”*³⁴⁶.

The *significant* point here is that social policy is associated with this “changed state” as Stolleis named it. It is a state of democratic capitalism, which is a centralized state but also a state where the social forces and the associations play a significant role. Given the centrality of labor especially in Weimar (as seen already from the central role of the Stinnes-Legien agreement), the most powerful Weimar social associations were those related with the issue of labor.

The main labor organization during the Weimar Republic was the ADGB³⁴⁷. The ADGB was established in 1919 and was an evolution of the General Commission, which had been established in early 1890³⁴⁸. It was the most significant blue-collar workers’ federation and from 1924 on it had between 4 and 5 million members³⁴⁹. Moreover, the ADGB along with the other two socialist federations (Afa and ADB), which represented salaried employees and civil servants respectively, had a combined membership of 8 million in 1920 (less later)³⁵⁰. This gave them the possibility of significant influence in national politics when they acted together³⁵¹. Moreover, the ADGB continued the line of official independence from the SPD, which was held by the unions since the 1906 Mannheim agreement³⁵²—notwithstanding that it was affiliated with the party at many levels. The orientation was clearly close to the reformist side of the SPD at the level of the top ADGB decision makers (see section 3 of this chapter and chapter 2)³⁵³.

On the opposite side of the spectrum, there was the League of German Industry (RDI) whose intensity of opposition to the unions was contingent on the struggle between fractions of capital and on the economic conditions. The RDI was created in February 1919

³⁴⁶ Ibid.

³⁴⁷ There existed also the Christian Unions (DGB) and the liberal Hirsch-Dunker federations but they had a much smaller membership compared with the socialist federations and were more powerful in the representation of white-collar workers and civil servants. See Braunthal (1978) 109-113

³⁴⁸ Ibid. 21

³⁴⁹ Ibid. 21, 39, 88

³⁵⁰ Ibid. 106-107

³⁵¹ Ibid. 108

³⁵² Ibid. 105

³⁵³ The ADGB leadership was challenged by a radical fraction (especially during early Weimar) and by a communist fraction. However, none of these fractions managed to get enough power. Ibid. 102-106

with “one thousand trades organization subdivided into twenty-seven trades groups”³⁵⁴.

In this mosaic of interests and associations we could also add the differences between various fractions of capital (e.g. export-oriented and heavy industry, see chapter chapter 5.5.) and of labor (e.g. between white-collars and blue-collars workers) along with the domain of agriculture (see chapter 1 and chapter 5.5.). Social policy plays, therefore, a crucial role in-between these contradictions of the democratic advanced capitalist state by ensuring both the “loyalty” of the citizens and the economic “efficiency” of the capitalist state.

The Weimar Constitution provided the basis for social policy on the *Second Principal Part* of the Constitution (Articles 109-165) given that the majority of representatives in the National Assembly decided the addition of a section on the *Sozialer Rechtsstaat*³⁵⁵. In this *first section* I will analyze the Weimar welfare state, which is based on the Second Principal Part of the Weimar Constitution. I will show that it is not divested from the capitalist logic. In the *second section*, I will focus on the Weimar “economic constitution”, which is a crucial section of this second part of the Weimar Constitution, and on Hugo Sinzheimer who introduced it. Moreover, I will analyze the economic constitution in parallel with the political and the social traction in the historical context of the Weimar Republic and I will show how it remained to a large extent a “dead letter” during the 1920s and how it was “highjacked” mainly during the last period of the Weimar Republic (with the rise of the authoritarian state) and turned into a tool for the suppression of the workers’ rights. In the *third section*, I will analyze this process by juxtaposing the theories of the scholars that argued for the economic constitution during the Weimar period (mainly Neumann, Sinzheimer and Heller to an extent) with the post-1933 critiques of this constitution. This juxtaposition will allow us to see, *firstly*, how the economic constitution was deployed by the aforementioned Weimar theorists of Staatslehre as part of their social democratic political strategy. I will show that this strategy is, in a way, the Marxian-social democratic answer to the Weberian solution to Marx’s riddle. *Secondly*, it will allow us to see two entirely different ways of conceiving both this strategy and the “economic constitution” through the post-1933 Marxist critique of Franz Neumann and the contemporary liberal critique (that has Weberian overtones) of the Weimar economic constitution. Finally, it will be asked in this third section what lessons can we draw from the way in which this “economic constitution” ended up and to what extent these latter

³⁵⁴ Abraham ([1981] 1986) 115

³⁵⁵ Tribe (1987) 7

critiques are valuable.

As a final methodological note, it should be noted that the reason for the inclusion of this chapter in this dissertation is to show, *firstly*, the strong relation of the Weimar Republic to social policy. As Stolleis wrote, the capacity of the social policy “...to defuse social conflicts would decide the fate of the state”³⁵⁶. In this sense, it is also not accidental that there was a structural transformation of the constitutional order during the early 1930s in Weimar regarding both the constitutional provisions that regulated the political question and the social question, as it will be seen.

Secondly, it wants to show the depth of the Weimar constitutional debate that delved deeply not only into the political but also into the social question. The debate in this chapter will also prepare the ground for the Kelsen-Schmitt debate to come in part B.

In this sense, the inclusion of this chapter in the dissertation will reveal also the differentiation of this dissertation from other methods of analyzing the Weimar Republic and Weimar constitutionalism, which focused mainly on the “political question”³⁵⁷.

4.1. The Weimar welfare state

The Weimar welfare state was different from the Kaiserreich welfare state. This change is described well by Stolleis. He writes that, whereas the welfare state during the Empire “*aimed primarily at industrial workers and had simultaneously sought to pacify them politically by providing material security, the consistent expansion of social insurance was already pointing in the direction of a slowly emerging national insurance. However, that trend asserted itself fully only when entirely new segments of the population became involuntarily dependent upon the state in the in the postwar period*”³⁵⁸.

As seen before, this was both due to the specific post-war German conditions but also due to the ‘risks’ of the industrial society in which “*those who had jobs gained a relatively secure place, thanks to guarantees and protections from associations, while the*

³⁵⁶ Stolleis (2014) 113

³⁵⁷ An indicative example is the approach of Dyzenhaus (1997)

³⁵⁸ Stolleis (2014) 97

unemployed and many other groups gradually turned into the 'poor', without being able to fight against it in any organized form. These groups, which were now also voters, could not be pacified by pointing to traditional welfare"³⁵⁹.

So, there was the necessity of inclusion of all these groups that were exposed to insecurity. It is indicative that the number of those who were in need of welfare aid between 1913 and 1924 was much larger (quadrupled) and the need for state support per capital grew eightfold³⁶⁰.

These social policies were based on the constitutional provisions of the *Second Principal Part* of the Constitution (Articles 109-165). This Part of the Constitution was the constitutional basis of the legislative regulation of various dimensions of the social life (e.g. youth welfare in art. 122, housing policy in art. 155, social insurance in art. 161) at a Reich level (article 9).

The Weimar welfare system both at the level of this Second Part of the Constitution and at the level of the legislation that followed was marked by the *centrality of labor*. That's because this "social state" originated from and was driven by a strong workers' movement that "*...was largely moderate, and it was eventually undone by rampant unemployment*"³⁶¹.

This centrality of labor, which is visible since the Stinnes-Legien agreement, explains why the domain of welfare issues was transferred from the Reich Ministry of the Interior to the newly founded Reich Labor Ministry in October 1918³⁶² (except for the part of the welfare that remained in the competence of the *Länder* with guidelines provided by the Reich³⁶³, see below).

However, on the other side of this centrality of labor is the consideration that the concept of labor and the concept of welfare state that was adopted by the Weimar Constitution is also part of a compromise between the various parties of the coalition government (SPD, Zentrum, DDP). So, on the one hand, the Weimar welfare state was driven by a strong

³⁵⁹ Ibid.

³⁶⁰ Ibid.

³⁶¹ Ibid. 113

³⁶² Ibid. 99

³⁶³ Ibid. 101

workers' movement but, on the other hand, the Second Principal Part of the Constitution was also a compromise at a more concrete level. This is a contradiction only if we forget, firstly, the reformist character of the ADGB and of the SPD leadership and, secondly, the overall societal pressure after the November Revolution for a welfare state.

This compromise is evident by the fact that this Part was drafted primarily by Friedrich Naumann (DDP) along with Hugo Sinzheimer (SPD) and with the involvement also of Konrad Beyerle who was the constitutional expert of the Zentrum party³⁶⁴. The *knot* of this compromise can be traced in the category of the "social" that was adopted by the Constitution³⁶⁵. This was a concept of the social that, whereas it entailed the element of solidarity (that was shared also by Catholicism as seen in article 151 and the articles regarding private property, see below), was still identified with capitalist logic. This is primarily seen in that, whereas "*labor power*" is constitutionally protected (art. 157, 161), labor is not clearly disentangled from its subjection to the capitalist logic of productivity and profitability and, more than this, it is also conceived as a "*moral duty*" (article 163)³⁶⁶.

Regarding the legislation, it followed the same logic by turning, on the one hand, the welfare system into a more national and centralized form but, on the other hand, this system was based on the availability of the people to follow the logic of work as identified by the capitalist system. Moreover, this welfare system was based on the principle of individualization³⁶⁷ (see below about the "public welfare assistance" and the three-tiered structure of the national insurance).

This overall logic is also evident in Stolleis' summary of the principles of social assistance as imprinted in the legislation. As he writes, "*what is presupposed is an image of the person that is focused on earning a living through work. ...In case of 'uneconomical conduct', social assistance should 'test in the strictest way and restrict the kind and measure of social assistance to what is indispensable for getting by.'* Persons 'who stubbornly act against the legitimate directives from the relevant authorities' were

³⁶⁴Thornhill (2000) 105

³⁶⁵Stolleis (2014) 112

³⁶⁶According to article 163 "*without detriment to his personal freedom, every German has the moral duty to activate his spiritual and bodily forces such that it advances the well-being of the whole society. Every German should be granted the opportunity to earn his living through productive labor. To the extent that an appropriate opportunity for work cannot be found for him, his necessary living needs will be provided for...*".

Weimar Constitution ([1919] 2008) 409-440, 436

³⁶⁷ Stolleis (2014) 102

disciplined in this way and stood under the threat of being committed to a 'work house'...Thus, the work ethic and repression thus lay closely side by side— as they already had throughout the entire modern period and continue to do so to this day”³⁶⁸.

Unravelling Stolleis’ remark through the analysis of the Weimar welfare legislation, this logic can be seen, *firstly*, by the “public welfare assistance”. Analyzing gradually this form of assistance, the “public welfare assistance” was “the catch-all for those who dropped out of their special systems of social protection and now found themselves in the company of those who became welfare recipients solely because of their poverty”³⁶⁹. After the 1923/1924 legislation, various areas of social care were transferred from the Reich to the regional states and the “Reich reserved for itself the right to issue ‘fundamental principles’, which then came into force in 1924/1925”³⁷⁰. These fundamental principles issued by the Reich (1924/1925) indicate clearly the compromise between the aforementioned political conceptions, by suggesting the individualized form of “public welfare assistance”³⁷¹ and that it “must not paralyze the self-responsible work”³⁷².

This logic is also evident, *secondly*, from the “Law on Job Placement and Unemployment Insurance” (July 7, 1927) that “now assigned protection against the risk of unemployment to the state’s sphere of responsibility”³⁷³. This was the most significant indication of the closeness of the Weimar Republic to the category of the “social” and to the aforementioned specific conception of the social.

This can be seen through the focus on the structure of this system. Regarding the financing

³⁶⁸Ibid.

³⁶⁹As Stolleis concretizes this second category of welfare, “public welfare assistance now comprised the following: social assistance for disabled veterans and surviving dependents, assistance for the disabled and for salaried employees who had no insurance protection, assistance for recipients of small pensions, assistance for the severely disabled and those seriously impaired in their ability to work through job procurement, assistance for needy minors, maternity benefits, and—listed only at the very end—assistance for the poor”. Ibid. 100-101

³⁷⁰ Ibid. 101

³⁷¹Ibid. 102

³⁷²These fundamental principles were the following: “Welfare should create values instead of merely preserving them. Its noblest goal must be to strengthen the will and power of the need person such that he can hold his own through his own skill, effort, and productivity. It must not paralyze the self-responsible work, especially not the fulfillment of one’s obligations towards one’s own family. It must take effect in time and adequately, and, where the need exists, also intervene preemptively. Formally it must respect human dignity. It must not help in a uniform manner, but must probe into the peculiarity of the emergencies and on that basis select the means to remedy them. It should no longer put the giving of cash in the center, but help from one human being to another”.

In *ibid.*

³⁷³ Ibid. 119-120

of this system, the employers and employees each paid half of the contributions³⁷⁴. In terms of benefits, the structure of the insurance system was three-tiered and was the following one. The *first* category could claim assistance from the state unemployment insurance scheme (*Arbeitslosenunterstützung*) for 6 months provided that the worker was working full time for a certain amount of years. The *second* category provided a lower “emergency assistance” for another 6 months (*Krisenunterstützung*) to those that had exhausted the first category and to those that were ineligible (at a first place) because they had not completed the essential contributions to the insurance system or they were working in a more precarious situation (fluctuation between employment and unemployment). The *third* category (*Wohlfahrtsunterstützung*) corresponded to those that had exhausted or did not fit into the other two forms of assistance and it was provided as an assistance to the poor by the municipalities “according to their ability and discretion”³⁷⁵. Moreover, this third form of assistance took the form of a loan, which means that it had also to be repaid.

The *crucial* assumption that lay behind this system is that “*only jobs brought contributions to the insurance funds, which could in turn benefit others. Conversely, unemployment meant a financial burden and political extremism*”³⁷⁶. So, the rise of unemployment after the outbreak of the Great Depression in the fall of 1929 (around 6,2 million in 1932³⁷⁷), had a twofold consequence.

Firstly, the insurance system was less efficient in the maintenance of social cohesion. That’s because the first insurance scheme was given only to a minority of the unemployed and the vast majority of the unemployed belonged to the third category (apart from the “invisible” unemployment³⁷⁸). Especially regarding the third category, given the individualized character of this assistance, the unemployed people were dependent on the “mercy” of the local authorities. As Bologna writes, “*the result of driving the unemployed onto the system of municipal welfare was to create an army of people obliged to go asking for charity from a bureaucrat, who very often judged their needs solely on the basis of subjective impressions. The unemployed could receive social security only if they succeeded in convincing the benefits officer in a face-to-face interview. This led to the*

³⁷⁴ The contributions that were very small were borne only by employers. Ibid. 120.

³⁷⁵ Bologna, Sergio ([1993] 2013). *Nazism and the Working Class* (in Greek, from “Nazismo e Classe Operaia 1933-1993), Athens: Antifa Scripta, 77, 79-84, 90-91

³⁷⁶ Stolleis (2014) 113

³⁷⁷ Ibid. 121

³⁷⁸ Bologna ([1993] 2013) 83-84

creation of a mass of millions of people who were open to blackmail”³⁷⁹.

Secondly, the state resources were depleted due to the lack of contributions and, therefore, *“the Reich office was presiding over an enormous deficit”*³⁸⁰. Moreover, the expenditures for public assistance also *“weighed heavily on local budgets [as was also the third form of assistance in the national insurance] and thus closed the fateful circle of political hopelessness”*³⁸¹. That makes sense considering that the vast majority of the unemployed people “belonged” to the third category of assistance.

The conclusion to be drawn from this is that the Weimar welfare system was intrinsically connected with labor but without disconnecting labor from the capitalist logic of “work”. Hence the sustainability of the Weimar welfare system was directly associated with the “success” of the capitalist system, i.e. the workers’ contributions to the system were dependent on the employment rate, which was related mostly to the profitability of enterprises.

4.2. The “economic constitution”: its architecture and its “hijacking”

The biggest indication of the centrality of labor in the Weimar Constitution is the “economic constitution” (articles 151-165). The economic constitution shows that the power of labor during the early Weimar period- that was evident in that even the RDI recognized the unions, their bargaining rights, the 8-hour day, the factory councils and the joint working committees³⁸²- was imprinted in the constitutional document.

The “economic constitution” consisted of a series of guarantees of labour protection but in the spirit of the aforementioned ‘accommodation’ within the logic of capitalism. This

³⁷⁹Moreover, Bologna writes that this welfare mechanism was administered by the last governments of Weimar as an “information” mechanism so as to fragment/atomize and, therefore, “discipline” the unemployed people efficiently. Finally, this personal information was used later by the Nazi regime in the context of its “physical extermination” policy.

Ibid. 83. The English translation here is from Ed Emery. Available at <https://libcom.org/library/nazism-and-working-class-sergio-bologna> (last accessed on 23/12/2017)

³⁸⁰Stolleis (2014) 121

³⁸¹ Ibid. 104

³⁸² See Abraham ([1981]1986) 116

direction is visible from the very first article of this constitutional section (article 151 paragraph 1), according to which “*the regulation of economic life must correspond to the principles of justice, with the aim of guaranteeing to all a humane existence. Individual economic freedom is secured under these limitations*”³⁸³. Moreover, it is also visible from article 153 paragraph 3, according to which “*property creates obligations. Its use should at the same time serve the general good*”³⁸⁴. So, individual economic freedom and property are enshrined but with restrictions (see also articles 152 and 153³⁸⁵).

Apart from the aforementioned general limitations, these restrictions are concretized in a number of other provisions: the established protection of workers (articles 157, 160-161), the recognition of the unions (article 159, 165), the rights of co-determination at work through article 165, and the “optional” socialization of key industries (article 153 paragraph 2, article 156).

Regarding the issue of socializations, a “socialization law” had already been approved by the National Assembly (23 March 1919) under the pressure of wildcat strikes that broke out in spring 1919 (without the participation of the General Commission). This law did not socialize anything particular but it established a framework for future socializations³⁸⁶. Moreover, two short-lived “socialization” commissions had been set up by the government. The first commission was created after the November Revolution (between November 1918 and April 1919) and a second one was set up after the Kapp Putsch (between March 1920 and February 1921) at the urging of the ADGB, which was trying to “*dampen the strong Left forces*”³⁸⁷.

However, both commissions ultimately failed to achieve anything and the aforementioned constitutional articles remained a dead letter. This was partly due to the fear that, in case of socializations, something akin to state property would be created that could be demanded as reparation by the Allies³⁸⁸. Moreover, it was partly because of the fear of the SPD and of

³⁸³ Weimar Constitution ([1919] 2008) 409-440, 434

³⁸⁴ Ibid.

³⁸⁵ Ibid.

³⁸⁶ See the “Socialization law” in Fowkes (2014), 30-32

See also Braunthal (1978) 162-166

³⁸⁷ Braunthal (1978) 165. See also Fowkes (2014) 32

³⁸⁸ Winkler ([2000] 2006) 355

the union leaders that there would be a further deterioration of the impoverished post-war economy and a Left-minority take over of the country³⁸⁹, and “*partly because of the fierce resistance of the mine owners*”³⁹⁰ (given the focus of the commissions on the mining industry).

The stance of the SPD and of the unions could be seen in their response to the first socialization commission. This commission under Kautsky had proposed in February 1919 a “German Coal Community” for the socialization of mines with equal representation from various social actors³⁹¹. The SPD and the Free Trade Unions followed, on the contrary, the evolutionary slogan “*reconstruction, and, where it makes sense, nationalization*”³⁹². Hence, the coal mines “*remained an antidemocratic bulwark after 1918*”, as Winkler writes³⁹³. Kautsky had, nevertheless, warned in April 1919 that “*the most dangerous experiment of all, however, would be a return to the old capitalism*”³⁹⁴.

Going back to other parts of the “economic constitution”, the constitutional article that shows more clearly the centrality of labor and its proximity to the “social” is article 165. Article 165 was established after the Stinnes-Legien agreement and the Collective Agreements Decree had already given an impetus to the unions and to the collective bargaining (see chapter 1).

This article was introduced with the insistence of the SPD parliamentary representative and theorist of labor law Hugo Sinzheimer (1875-1945). Sinzheimer was the central figure of the special committee of National Assembly for the drafting of labor law³⁹⁵. He was influenced from a “humanist” interpretation of Marx and from Gierke’s theory³⁹⁶, based on which he adopted a concept of “labor law” close or even indistinguishable from “social law” (*soziales Recht*). This concept of law would redress the hard distinction between private and public law and would substantively orient itself towards a concept of labor as a

³⁸⁹ Braunthal (1978) 166

³⁹⁰ Fowkes (2014) 32

³⁹¹ Winkler ([2000] 2006) 344

³⁹² Ibid.

³⁹³ Ibid.

³⁹⁴ See Kautsky’s speech on “The Socialisation of Economic Life” at the Second Congress of Councils, April 1919. In Fowkes (2014) 33-34

³⁹⁵ Dukes (2005) 31-62, 44. Tribe (1987) 1-26, 5

³⁹⁶ Zachert, Ulrich (2002). ‘Hugo Sinzheimer : Juriste praticien et pionnier du droit moderne. Autonomie collective, liberté individuelle et démocratie sociale’ in Herrera, Carlos Miguel (ed.) *Les Juristes de Gauche sous la République de Weimar*, Paris : Editions Kimé, 49-67, 54

“human activity” against its identification merely with property and capital³⁹⁷. On the contrary, this concept of labor would fulfill a social role³⁹⁸ through which it could also fulfill an individual role of autonomy and dignity³⁹⁹.

The role of councils would be crucial in this process. Whereas the SPD was initially torn⁴⁰⁰ and the leadership of the General Commission of Trade Unions conceived the councils initially as antagonistic to the unions⁴⁰¹, Hugo Sinzheimer convinced the SPD conference in March 1919 to adopt a constitutional provision that would incorporate the councils. His proposal suggested the establishment of workplace councils, which would “*participate on an equal footing with the employers in the regulation of labour conditions as a whole*”, of district labour councils and of a Reich labour council “*with a political role, advising on all new laws on economic or social questions*”⁴⁰².

This constitutional provision was article 165. It reads as follows:

[paragraph 1] “*Workers and employees are entitled to determine in common with entrepreneurs and as their equals in the regulation of wages and working conditions as well as in the entire economic development of productive forces. The reciprocal*

³⁹⁷Dukes (2014) 15

³⁹⁸Ruth Dukes stresses that Sinzheimer uses the words “social law” and “labor law” interchangeably in his writings. Ibid. 15

³⁹⁹As Sinzheimer had argued “*Les personnes sont egales. Les etres humaines sont inegaux dans les situations concretes*”.

In Zachert (2002) 49-67, 54

⁴⁰⁰ This can be seen in chancellor Scheidemann’s statement in February 1919 that “*no member of the Cabinet contemplates the incorporation, in any form, of the council system into the constitution*”. In Dukes (2005) 44

⁴⁰¹The leader of the General Commission Carl Legien described at the SPD conference in March 1919 as “*‘an unhappy notion’ the idea that workers’ councils should be given a role in industry: ‘if the workers’ councils are given governmental consent to regulate pay and working conditions, the unions will no longer have any raison d’être’*”.

However, as Dukes writes, the majority of the union leaders accepted the following strategy: “*it was agreed that the unions would advocate the permanent re-establishment of works councils with purely economic functions, on the understanding that the unions would be able to dominate the councils*”.

Dukes (2005) 43-44

See also Fowkes (2014) 43

⁴⁰²Dukes (2005) 45

organizations and their agreements are recognized.

[paragraph 2] *Workers and employees must be legally represented in the enterprises' labor councils as well as in district labor councils and in a Reich workers' council in order to protect their economic and social interests.*

[paragraph 3] *In conjunction with representative employers' organizations and other related popular participant associations, the district and Reich councils cooperate in the fulfillment of comprehensive economic tasks and in the joint execution of socialization statutes. The Reich and district councils are composed such that all significant occupational groups are represented commensurate with their economic and social importance.*

[paragraph 4] *The Reich government should submit fundamentally significant draft statutes on social and economic policy to the Reich Economic Council for its advice before their introduction to the Reichstag. The Reich Economic Council itself has the right to submit such draft statutes. If the Reich government is not in agreement with such submissions, it must nevertheless present them to the Reichstag together with an account of its view of the issue. The Reich Economic Council has the authority to appoint one of its members to represent its submission to the Reichstag...*⁴⁰³.

So, this article went further than the aforementioned agreements (e.g. Stinnes-Legien) by opening the way to a more decisive role of the councils. However, it is *crucial* that, according to article 165, the councils are neither conceived as an alternative to the Reichstag nor do they have a legislative function with respect to economic affairs as it was demanded by the Second Congress of the Workers', Farmers', and Soldiers' Councils of Germany in Berlin in April 1919 and (from a right-wing perspective) by the German nationalists⁴⁰⁴.

In this direction, Franz Neumann -who was close to Sinzheimer during the Weimar Republic given that he was also his *Assistent* between 1923 and 1927⁴⁰⁵- argued that Sinzheimer's theory opposed the suggestions for the establishment of a corporate

⁴⁰³Weimar Constitution ([1919] 2008) 409-440, 436

⁴⁰⁴Winkler ([2000] 2006) 363. See also Sinzheimer (1920) 40. See also Tribe (1987) 6

⁴⁰⁵Tribe (1987) 17

economic parliament that would be “*equal to the political parliament*” and did not aim at the “*complete freedom of the economic constitution from the state constitution*”⁴⁰⁶.

As Brunkhorst wrote “*Sinzheimer and Neumann followed the Kantian presupposition that the parliamentary legislator should maintain absolute supremacy over the economic constitution. The economic constitution should have a mere service function: it should improve the possibilities of the democratic legislator, to get the markets, and in particular the private sphere of domination within the capitalist firm under democratic control*”⁴⁰⁷. So, the political is not dissolved into the social as in Gierke’s logic despite his influence on Sinzheimer.

In this sense, article 165 constitutionalized the extension of democracy to the workplace and included labor to a general social/national strategy that would concern the whole production through the district and the national bodies. To put it in a different way, the economy would be transformed, according to Sinzheimer’s vision, from an affair that is run through the “*anarchy of so-called economic freedom*” into a public affair that would give workers a voice and would “*ensure that the economy was run so as to fulfill social ends*”⁴⁰⁸. As Sinzheimer wrote, “*... the private economy more and more according to social economic points of view has been propitiously begun in special legal forms upon the soil of the new political democracy*”⁴⁰⁹.

However, article 165 required further legislative implementation. The most important Act concerning this implementation was the Works Councils Act (February 4, 1920). This Act was voted amidst the fierce opposition from the radical Left and the National Association of German Industry. As far as the latter is concerned, it argued that this Act would give too many management prerogatives to the council members and it would lead to a fall of the national industrial activity⁴¹⁰. Regarding the former, it was both the KPD and the USPD that opposed this Act through a joint appeal. They argued that this Act “*...completely*

⁴⁰⁶Neumann cited an excerpt of Sinzheimer’s “*Das Räte-system*” (1919), which was in this direction. In Neumann, Franz L. ([1931] 1987). ‘On the preconditions and Legal Concept of an Economic Constitution’ in Tribe, Keith (ed.) *Social Democracy and the Rule of Law: Otto Kirchheimer and Franz Neumann* (trans. Tanner, L. & Tribe, K.), London: Allen and Unwin, 54

⁴⁰⁷Brunkhorst, Hauke (2014). ‘The European Crisis-Paradoxes of Constitutionalizing Democratic Capitalism’, in Fischera, Massimo, Hänninen Sakari, Tuori, Kaarlo (eds.) *Polity and Crisis: Reflections on the European Odyssey*. Surrey, Burlington: Ashgate, 41-67, 47-48

⁴⁰⁸Dukes (2014) 18

⁴⁰⁹Sinzheimer (1920) 35-40, 40

⁴¹⁰ Braunthal (1978) 168

*excludes the workers and office employees from exerting any supervision over the management and running of the enterprise. It makes the Factory Councils mere foremen in the service of the capitalist entrepreneurs. The confusion in the economy is now worse... Only a transformation of the mode of production from the ground up can prevent a further collapse and make possible a reconstruction of the economy”*⁴¹¹.

Analyzing more thoroughly this 1920 Act before we can conclude whether the latter critique was valid, this Act regulated the works councils “*in all factories which employ at least 20 employees*”⁴¹². The role of the councils would be twofold. There is, *firstly*, the representation of workers by the works councils on the issues that “*have to do with labor conditions*”- what Sinzheimer calls “*the socio-political duties*”⁴¹³ As Sinzheimer writes, “*in all these questions the industrial representatives have a deciding vote*”⁴¹⁴.

At this point, the relationship between the unions and the works councils should be further clarified because they had different functions. The works councils, according to the 1920 Act, had a dual role. They were representing the demands of workers but they had also “*to co-operate with and support the employer in the fulfilment of the ‘works objective’ and the attainment of the highest possible productivity levels. The works councils were under a duty ‘to protect the workplace from disturbances’ and so were prohibited from organizing strikes or calling workers out on strike*”⁴¹⁵. On the contrary, the trade unions “*...functioned on the basis of a conflictual model*”, which meant that they could strike or use the threat of strike⁴¹⁶.

Regarding this relationship between the unions and the councils, this issue was decided by the Works Councils Act. As stipulated in the Works Councils Act, there was “*the overall*

⁴¹¹ “The Communists and Independents (KPD and USPD) Oppose the Passing of the Factory Council Law”, (12 January 1920) in Fowkes (2014) 65-67, 66

The joint appeal by the USPD and the KPD led to a mobilization against the proposed Works Councils Act on January 13, 1920 in Berlin, where their peaceful demonstration got “out of hand” and there were attempts of storming the Reichstag building. The police resorted to violent methods of controlling the situation.

The outcome was 42 deaths and 105 injured and the bill passed on February 4, after its third reading.

See Dukes (2005) 46. See also Fowkes (2014) 67

⁴¹² Fowkes (2014) 67

⁴¹³ Sinzheimer (1920) 35-40, 39. See also Fowkes (2014) 67

⁴¹⁴ Sinzheimer (1920) 39

⁴¹⁵ Dukes (2005) 50-51

⁴¹⁶ Ibid. 54

*priority, in law, of trade-union policy and organization over the decisions and activities of the works councils....that one very important role of the works council would be the execution of collective agreements reached by the employers' association and the unions; and that only in the absence of a collective agreement would the works council have rights to negotiate – in consultation with the relevant unions – in respect of pay and working conditions*⁴¹⁷.

The councils had also the right “to participate in a preliminary capacity in the appeal procedure in cases where workers were dismissed”⁴¹⁸. In case an agreement with the employer could not be reached the Works Council and the dismissed worker “could take the case to court, initially to the Commercial Court...after 1927 the Labor Court”⁴¹⁹. It was the Labor Court that could make the Works Council rights enforceable⁴²⁰.

Regarding, *secondly*, what Hugo Sinzheimer calls as the “*economic-political duties*”⁴²¹ of the councils, this was planned to be the *par excellence* role of the councils in Sinzheimer’s theory through the cooperation between the workplace and the objectives posed by the district and national industrial councils (after a dialogue with the government) with the orientation ‘to limit the freedom of the employer to control the use of the means of production’⁴²². In this direction, there was also the creation of a temporary Reich Economic Council (*Reichswirtschaftsrat*) with a decree in May 1920⁴²³. However, “in practice...[it] never developed into a body of significant power or influence, and no permanent council was set up”⁴²⁴.

Regarding this second kind of duties the Works Councils Act gave the power of co-determination to the works councils at company level in paragraph 70⁴²⁵. Under this

⁴¹⁷ Ibid. 55

⁴¹⁸ See Stolleis (2014) 124.

See also Sinzheimer (1920) 39

⁴¹⁹ Stolleis (2014) 124

⁴²⁰ Dukes (2005) 54

⁴²¹ Sinzheimer (1920) 35-40, 39

⁴²² Kahn-Freund, Otto (1931) ‘The Social Ideal of the Reich Labor Court’, 113 in Dukes (2014) 21

⁴²³ Dukes (2014) 21

⁴²⁴ Ibid.

⁴²⁵ Stolleis (2014) 124

legislation, “one or two members of the works council have the right to represent in the board the interests and demands of the workers and also present their views with respect to the organization of the plant”⁴²⁶ and that these representatives had also “... equal voting and other rights with the existing members”⁴²⁷. However, in practice the employers allocated the significant decisions “...from the supervisory boards to committees to which no works councilors were admitted”⁴²⁸.

In effect, the original plan behind article 165 was ultimately implemented in a limited way regarding the councils, taking also into account that the district economic councils and the workers’ representative councils at district and national levels were never legislated. As Dukes writes, “the only part of Article 165 to be effectively implemented – in the Works Councils Act of 1920 – was that which referred to the formation of worker representative councils at works level”⁴²⁹. The reasons for this are multidimensional: the violent crushing of the councils during 1919-1920 that led to their fragmentation and weakening⁴³⁰, the “strengthening position of employers”⁴³¹, the defeat of the “Weimar coalition” in the 1920 general election⁴³².

This architecture started, therefore, resembling the pre-revolutionary era, in which works councils were established and were ‘offered’ to the working class as positive rewards in order to mobilize them for the war⁴³³. This continuity can be seen not only in the lack of further legislative acts in Weimar but also in the gradual interpretative hollowing of the councils’ role throughout the Weimar Republic. In this vein, the *Reichsgericht* (Reich Court) wrote in a 1926 decision that Article 165 was ruled to have only “*programmatic effect*”⁴³⁴, which actually meant that it was not legally binding and that the main legislative

⁴²⁶ Sinzheimer (1920) 39

⁴²⁷ Dukes (2005) 51

In accordance with the Law Concerning the Delegation of Employees to the Supervisory Board of (February 15, 1922). See also Stolleis (2014) 124

⁴²⁸ Dukes (2005) 51

⁴²⁹ Ibid. 45

⁴³⁰ Ibid. 40

⁴³¹ Stolleis (2014) 124, footnote 55

⁴³² Ibid.

⁴³³ See the analysis of the Auxiliary Service Law (1916) by Sinzheimer in Sinzheimer (1920) 40

See Braunthal (1978) 29

⁴³⁴ In Dukes (2014) 20 from the Decision of the *Reichsgericht* of 11 February 1926.

framework that remained, therefore, was the Works Council Act of 1920.

The ‘hijacking’ of the economic constitution

The most *significant* issue is that article 165 became gradually (and more clearly since the Depression) one of the “Trojan horses” of the suppression of workers’ rights through its interpretation.

This was, *firstly*, done, through the labor courts. Analyzing this gradually, a separate system of labor courts was created through the Labor Court Act (it took effect on July 1, 1927⁴³⁵) due to the demand of the unions because they were “*wary of the conservative judges and the ordinary courts lacking a uniformity of law*”⁴³⁶. The structure of the labor courts was the following: a judge, who was appointed by the government to be independent, and two assessors (one was nominated by the unions and the other by the employers’ associations)⁴³⁷. The ADGB had “*delegated*” 10.000 personnel to the courts⁴³⁸.

The interesting is that, whereas the employers before the Depression argued that the labor courts were “*too social minded to apply justice*”, it was the unions that fiercely criticized them during the Depression by arguing that their decisions were made by “*conservative judges*”⁴³⁹. That’s because, as Otto Kahn-Freund writes in 1931, the labor courts were interpreting the objective of the works councils as “*...co-extensive with the employer’s aim of maximizing production and profit*”⁴⁴⁰.

In this direction of “etatization” of the unions, it was, *secondly*, the mechanism of compulsory state arbitration that significantly “contributed”. Putting state arbitration into context, it was already regulated under the Collective Agreements Decree (in part 3) and was used in the cases of industrial disputes⁴⁴¹. However, the problem with this system under the Collective Agreements Decree was that “*the boards’ decisions could not be*

⁴³⁵Stolleis (2014) 126

⁴³⁶Braunthal (1978) 153-154

⁴³⁷Ibid. 153

⁴³⁸Ibid.

⁴³⁹Ibid. 153-154

⁴⁴⁰Kahn-Freund, Otto (1931) ‘The Social Ideal of the Reich Labor Court’, 116, 135 in Dukes (2014) 21-22

⁴⁴¹Dukes (2014) 40

legally enforced unless recognized by both parties”⁴⁴².

This changed with the emergency decree of 30 October 1923, which passed during the hyperinflation period and was based on article 48 of the Weimar Constitution⁴⁴³. This decree (along with the Second Mediation Decree of December 29, 1923) “*reorganized the state’s mediation system that had been regulated until then by the collective bargaining code*”⁴⁴⁴. The main point of the new arbitration system is that when the parties could not reach an agreement, the government-appointed arbitrator would intervene, at first, “*as a voluntary mediator*”⁴⁴⁵ and, when this failed, the arbitrator could “*declare the board’s award binding upon an entire trade or industry*” even against the will of one of the parties⁴⁴⁶. The range of the jurisdiction concerned disputes “*from individual shop to national collective agreements*”⁴⁴⁷.

The *significant* point is that the government could intervene decisively through the right of the Ministry of Labor to “*formulate general principles for arbitration officials to follow*”⁴⁴⁸ and directly given that the Reich Labor Minister was at the highest level of this state arbitration (depending on the nature of the dispute in collective bargaining)⁴⁴⁹. So, the state became the “*final arbiter of industrial actions*”⁴⁵⁰.

This system was hailed by Rudolf Hilferding in 1927 as a step towards “*higher ‘organized capitalism’, indeed as a step towards socialism: the veritable abolition of wage autonomy and market forces*”⁴⁵¹. Moreover, the labor leaders also favored a system of compulsory arbitration by 1920. They conceived it as “*a way of politicizing wages...of avowing strikes, and as a useful tool of a socially-oriented state*”⁴⁵². On the contrary, the employers particularly of heavy industry were very hostile to compulsory arbitration given its very

⁴⁴² Braunthal (1978) 150. See also Dukes (2014) 40

⁴⁴³ According to Feldman, the initial idea behind this decree and the most interventionary role of the Labour Ministry was to “pave the way” for the compulsory introduction of lower wages and longer working hours during this period. Feldman (1997) 800

⁴⁴⁴ Stolleis ((2014) 124

⁴⁴⁵ Braunthal (1978) 151

⁴⁴⁶ Ibid.

⁴⁴⁷ Ibid.

⁴⁴⁸ Ibid.

⁴⁴⁹ Stolleis (2014) 124-125. Braunthal (1978) 151

⁴⁵⁰ Winkler ([2000] 2006) 393

⁴⁵¹ Ibid.

⁴⁵² Braunthal (1978) 150. See also Abraham ([1981] 1986) 232-233

positive for labor outcomes and its role of undermining “free” negotiations. This hostility is one of the two reasons that the Ruhr steel and iron industrialists resorted to a lockout for two months in October 1928 so as to attack the state arbitration “*and the accelerated wage demands*”⁴⁵³.

State mediation became the norm after 1928⁴⁵⁴ (since the beginning of the economic crisis) and this was done “*at the urging of the unions, who would have been at a disadvantage in their dealings with employers without the support of government mediation*”⁴⁵⁵. The transformation of the state in 1930 brought, nevertheless, the hijacking of this mechanism, which became practically visible when there was a political shift by the Ministers of Labor (who were more favorably inclined to labor until 1930)⁴⁵⁶.

The authoritarian governments during the early 1930s used this mechanism in order to “*undermine the system of collective bargaining more directly*”, to order wage cuts and longer working hours⁴⁵⁷ (despite the fact that wage cuts were ordered during this period also through emergency decrees, see chapter 5.5.). This took place through the freedom of the state organs “*to impose their own view of what was ‘equitable on a fair balancing of interests’*. *Instead of a true compromise reached in the furtherance by the collective parties of their interests, collective agreements increasingly gave legally binding effect to the ‘aims of state social policy’*”⁴⁵⁸.

This shift can be seen in the Oyenhausen arbitration ruling in May 1930, which is a ruling that “*mandated a wage (and price) reduction for nearly 800.000 iron-and steelworkers (and producers) and signaled Brüning’s deep commitment to deflationary politics*”⁴⁵⁹. After this, a series of more positive (for capital) decisions followed during the Depression⁴⁶⁰. Hence, some employers now wanted the binding awards in contrast with the

⁴⁵³ Abraham ([1981] 1986) 246

⁴⁵⁴ As Dukes notes, “*in the period to 1927, the wages of around 50 per cent of workers were set by arbitration orders*”. However, she writes that there is no official record if it was with the agreement of the parties or not.

Dukes (2014) 40

⁴⁵⁵ Stolleis (2014) 125

⁴⁵⁶ Braunthal (1978) 151-152

⁴⁵⁷ Dukes (2014) 40. See also Braunthal (1978) 152

⁴⁵⁸ Dukes (2014) 26

⁴⁵⁹ Abraham ([1981] 1986) 232

⁴⁶⁰ See also Braunthal’s description of the Berlin metal workers case in October 1930. Braunthal (1978) 152

past⁴⁶¹ whereas the unions by 1930 “*in a volte-face, opted for nonbinding awards in the hope of stemming dangerous wage cuts*”⁴⁶². However, it should also be written that industrialists from heavy industry (that started becoming again hegemonic around 1931 in the RDI) were mostly until the end of the Weimar Republic arguing for its abolition and were blaming chancellor Brüning for not doing so⁴⁶³.

So, the *overall picture* showed a suppression of the class conflict after 1929 through the counter-intentional “etatization” of the unions (they had already taken over the councils practically throughout the 1920s)⁴⁶⁴. This “etatization” was due to the fact that the achievement of “national economy” became a common “neutral” target (under the auspices of the neutral state organs) for all the parts. In a capitalist economy under crisis and with a simultaneous transformation of the state, this meant that the interests of workers became identified with the “*aims of state social policy*” and those with the interests of the capitalist economy.

Finally, it should be added, that the government and the courts often proscribed industrial action given the “peace obligation”, which was written into every collective agreement. This was also based on an important *absence* in the Weimar Constitution. Whereas it regulated the freedom of association (article 159), it did not regulate the right to strike. This had as a consequence that this right was difficult to be exercised both at the level of individuals (e.g. participation could bring breach of contract, which could mean dismissal and suit in tort for losses⁴⁶⁵) and at the level of unions (e.g. it could involve a breach of contract) given the “‘*peace obligation*’ implied into all collective agreement, including arbitration orders”⁴⁶⁶. Effectively, then, the right to strike could be lawfully exercised only during the negotiation of the terms of a new collective agreement or about something that

⁴⁶¹ Ibid.

⁴⁶² Ibid.

⁴⁶³ About these demands see Abraham ([1981] 1986) 160-161, 255, 262, 282

⁴⁶⁴ As Dukes writes “*the majority of free unions secured direct control over the new works councils: by 1922, 75–80% of works councillors were members of socialist unions.*”.

This process of “unionization” of the councils went hand in hand with the suppression of the councils’ movement.

Dukes (2005) 58

⁴⁶⁵ See more in Dukes (2014) 41

⁴⁶⁶ However, there was the highest level of industrial action (throughout German history) during Weimar. Ibid.

had not been part of a collective agreement⁴⁶⁷. However, Dukes shows that even if the strike was compatible with the “peace obligation”, it could be “*declared unlawful if the courts regarded it as sittenwidrig or ‘immoral’—a term defined remarkably widely by the Weimar judiciary*”, based on the Civil Code⁴⁶⁸.

Concluding this section, the overall picture that emerges is that labor law had been transformed from a powerful tool of the popular classes into an instrument of the state that suppressed them. The main question that remains to be answered is to what extent the architecture of the “economic constitution” was “responsible” for this.

4.3. The economic constitution as a question of strategy: advocates and critics

There has an explicit critique of the initial architecture of the Weimar constitution given how the economic constitution ended up and due to the fall of the Weimar Republic. Such a critique came, *firstly*, from a Marxist perspective by Franz Neumann (1900-1954) in his post-Weimar period (mainly in his writings between 1933-1945), namely after his shift from the “*lawyers socialism*”⁴⁶⁹ stance in Weimar. The second main critique is a contemporary critique from a liberal perspective, which follows in the footsteps of Weber’s insights.

The method that I will follow in the section is that I will analyze these post-1933 critiques after I present the theories of the Weimar scholars who used the economic constitution in the framework of their political strategy during the historical process of Weimar. So, I will analyze firstly, the latter Weimar approaches (pre-1933 Neumann, Sinzheimer, Heller) and, then, I will contrast them with these post-1933 critiques in view also of the Weimar

⁴⁶⁷Ibid. footnote 52

⁴⁶⁸As she writes, “ ‘Immoral’ industrial action was unlawful by reason of para 826 of the Civil Code: *Grundzüge*, 294–8. In respect of industrial action, the paragraph was interpreted so widely that any instance of industrial action could be declared unlawful if the courts so wished”.

Ibid. 42, footnote 59

⁴⁶⁹This is a phrase of Claus Offe for Neumann’s Weimar period.

About the three phases of Neumann’s thinking and especially about his post-Weimar shift see Offe, Claus (2003) ‘The Problem of Social Power in Franz L. Neumann’s Thought’, *Constellations*, 10(2), 211-227, particularly, 219-221

historical context. This will allow me to see better the extent to which each of these post-1933 critiques is valuable. The main figure in this section will be Franz Neumann because his complete *theoretical shift* after 1933 will allow us to see both sides (except for the liberal critique that will be seen by itself).

Neumann's pre-1933 thought

In his pre-1933 writings Neumann was very positive about Sinzheimer's theory (see also section 2) and argued that the Weimar constitution "*is the creation of the working class*". For Neumann, the economic constitution "*contain[ed] the fundamentals necessary for the construction of a social Rechtsstaat whose objective is the realization of social freedom...Social freedom means that workers will determine their own working life; the alien power of the owners to command labour through their control of the means of production must give way to self-determination*"⁴⁷⁰.

In his effort of identifying "social freedom" he invoked Rousseau and especially the emphasis of Rousseau's concept of freedom upon the "*compulsion on the part of the state*" as opposed to a liberal, pre-political and individualistic concept of freedom⁴⁷¹. In this direction, he argued that the Weimar Constitution is "*positively endorsing the basic idea of the social Rechtsstaat, which, while recognizing private property, removes from the private owner the administration of his property*"⁴⁷².

However, Neumann recognized that state theory and jurisprudence ("*particularly in the...Reichsgericht*") have "*turned on their head*" the constitutional principles of the economic constitution during the post-revolutionary period in Weimar⁴⁷³. As he argued "*...in particular the protection of property secured by article 153 has expanded immensely*"⁴⁷⁴. Hence, his injunction that "*it is the main task of socialist state theory to develop and concretely present the positive social content of the second part of the Weimar Constitution. Apart from the lesser writings of Herman Heller, socialist theory of the state*

⁴⁷⁰ Neumann, Franz L. ([1930] 1987). 'The Social Significance of the Basic Laws in the Weimar Constitution' in Tribe, Keith (ed.) *Social Democracy and the Rule of Law: Otto Kirchheimer and Franz Neumann*, London: Allen and Unwin, 37,39

⁴⁷¹ Neumann ([1930] 1987) 29

⁴⁷² Ibid. 42

⁴⁷³ Ibid.

⁴⁷⁴ Neumann ([1931] 1987) 57

has, up until now, done nothing to substantiate the concrete legal content of the second part of the Weimar Constitution”⁴⁷⁵.

Keeping this analysis in mind, Neumann justified further his support for the economic constitution through the analysis of the state of monopoly capitalism. He argued that the preconditions for free competition are suspended in this state and that “*non-intervention has the same meaning as intervention*” because if the state guarantees economic liberty “*...it actually endows them with the liberty to limit the liberty of others*”⁴⁷⁶. This is visible, according to Neumann, in the difficulty to set up a competitive enterprise in a monopolist economy but also in that the freedom of contract actually “*disguises the fact that the monopolist dictates the conditions for the non monopolist*”.⁴⁷⁷ At this point, “*liberty becomes a privilege*”⁴⁷⁸. Hence, “*given that non-intervention means the same as intervention*” in this state, the necessity of a “*systematic order of state intervention arises, that is, of an economic constitution*”⁴⁷⁹.

The necessity of the economic constitution arises, therefore, from the “*discrepancy between legal norm and substratum in the field of economic law [namely how the economic liberty turns into privilege]*”⁴⁸⁰. However, this necessity follows also “*from an equal contradiction between the norms of constitutional law and the concrete contemporary situation of the constitution*”⁴⁸¹. Elaborating on this last point, Neumann draws out the contradiction between the wording of the Weimar Constitution, which established parliamentary democracy, and the constitutional reality in which “*free social associations (parties, trade unions, employer’s and industrial associations, Land federations and church unions, in short social power groups) have appropriated themselves control of the decision-making process. Referring to English constitutional theory, Carl Schmitt calls this ‘pluralism’*”⁴⁸².

Neumann complements this descriptive account with other factors that for him contributed to this “*infringement of the parliamentary-democratic system*”: the upgraded role of

⁴⁷⁵ Neumann ([1930] 1987) 42

⁴⁷⁶ Offe (2003) 213

⁴⁷⁷ Neumann ([1931] 1987) 48

⁴⁷⁸ Ibid.

⁴⁷⁹ Ibid. 49

⁴⁸⁰ Ibid.

⁴⁸¹ Ibid.

⁴⁸² Ibid.

ministerial bureaucracy⁴⁸³, the assumption of a right of review by the judiciary, federalism and *Polykratie*⁴⁸⁴.

Regarding this descriptive account of Neumann, it is clearly influenced by Schmitt's analysis of the Weimar state. The dangers of pluralism, polycracy⁴⁸⁵ and federalism were used by Schmitt extensively in his "Guardian of the Constitution" (see chapter 5). This description is deployed by Schmitt in order to show that the state and society become indistinguishable as opposed to the 19th century state, and that this was mostly due to the intervention of the state in the economy through the political parties. Hence, his main emphasis is on –what he calls– "pluralism"⁴⁸⁶ that is defined as "*a majority of strictly organized power complexes penetrating the state...which take hold of state decision-making without ceasing to be solely social (non-public) entities*"⁴⁸⁷. As Kelsen writes, "*in talking about 'social complexes of power', [Schmitt] ...refers, first and foremost, to the political parties*"⁴⁸⁸.

Whereas Neumann's analysis takes Schmitt's descriptive account he turns it against Schmitt's assumptions in the sense that he does not follow Schmitt's direction of an "authoritarian liberal" resolution (as we will see in chapter 5). A substantial similarity with

⁴⁸³That was "because parliament conceded to government far-reaching authority, because the position of bureaucracy is independent and constant, and because, technically, government is constantly becoming more complicated". Ibid. 51

⁴⁸⁴Neumann ([1931] 1987) 50

⁴⁸⁵As McCormick explains this term, "*polycracy refers to a large number of organizations that are relatively autonomous from the state in a formal legal sense and yet are responsible for important public functions. The most obvious example is the large number of firms implementing social policy for the state, such as health insurance organizations. But polycracy also includes firms granted autonomy from the state in varying degrees, because they play a role in fulfilling states responsibilities, such as reparation payments. Finally, polycracy includes firms that are taken over by and/or organized by governments but function otherwise like private companies. The common element among these diverse forms of economic organization and public/private partnership is the fact that they retain a degree of independence from the state. The dependence of the state on autonomous private organizations to provide an expanding array of governmental services, in Schmitt's view, contributed significantly to the Weimar governing problems, particularly because of the concessions the private organizations were able to extract from the state in return for providing state services*". Mc Cormick (2004) 142

⁴⁸⁶Kelsen's view is also that the main emphasis of Schmitt's analysis is on 'pluralism'. Kelsen, Hans ([1931] 2015). 'Who ought to be the Guardian of the Constitution? Kelsen's reply to Schmitt', in Vinx, Lars (ed. and trans.) *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, Cambridge: Cambridge University Press, 196

⁴⁸⁷ In the translation of Neumann ([1931] 1987) 49. From Schmitt, Carl. *Der Hüter der Verfassung* (1931), Mohr 71

⁴⁸⁸ Kelsen ([1931] 2015) 196

Schmitt cannot, therefore, be traced⁴⁸⁹. On the contrary, Neumann finds the solution to Marx's riddle in the economic constitution that, despite being "...no longer purely capitalist or socialist"⁴⁹⁰, it can be the basis for "*the democratic market control*" that "*is exercised together with the state by the market parties and the trade unions. The latter have to send representatives into the management of the market parties, that is the cartels, the monopolistic concerns and the monopolistic retail companies, that is into those economic agencies which control and manage these economic subjects*"⁴⁹¹. So, Neumann actually refers to a cooperation of the "*cartels, companies, employer's associations, and labor unions*" with the state as Offe writes⁴⁹².

The basic principles of the economic constitution are identified, according to Neumann, in articles 159 (freedom of association) and 165 par. 2, which do not abolish the function of the trade unions as "*private associations*"⁴⁹³. Here there is also a disagreement with Sinzheimer given Neumann's argument that the works councils represent only the "*socio-political interests of the workers against the employer*" and "*accordingly they provide only representation in private law*"- as opposed to Sinzheimer who treated councils as public entities⁴⁹⁴. Neumann justified this by arguing that they are not "*production councils*" but only "*enterprise councils*". So "*the transfer of economic control and administrative tasks would therefore require the transformation and promotion of councils from the level of the enterprise to that of the company or even to the group, since economic decision are often made within the concern or the cartel*"⁴⁹⁵. To put it simply, Neumann puts more emphasis on the councils' role of "*representation in private law*" and on the overall "*relative autonomy*" of the unions from the state⁴⁹⁶.

However, despite this (not insignificant) disagreement, there is a *common strategy* that is shared by Sinzheimer and Neumann: they both endorse state intervention aiming at social freedom through the economic constitution (without undermining the 'political' legislator).

⁴⁸⁹ On the contrary, Scheuerman argues for such a similarity by writing that Schmitt and Neumann have in common an "*extremely privatistic interpretation of political rights, precisely so that it can minimize the importance of basic civil liberties for contemporary mass democratic politics*". Scheuerman (1994)56

⁴⁹⁰ Neumann ([1931] 1987) 64

⁴⁹¹ Ibid. 64-65

⁴⁹² Offe (2003) 213. See also Kelly (2003) 276

⁴⁹³ Neumann ([1931] 1987) 64-65

⁴⁹⁴ Ibid. 58

⁴⁹⁵ Ibid. 59

⁴⁹⁶ Ibid. 55, 58-59

As Neumann put it, “*the economic constitution is intended to provide the possibility of some form of state and social intervention into the natural course of economic activity*”⁴⁹⁷.

The family of social democratic theories

Neumann’s analysis has affinities not only with Sinzheimer but also with other theorists and primarily with Herman Heller (1891-1933)⁴⁹⁸. They are both self-described as “social Rechtsstaat” theorists⁴⁹⁹ and they both substantively argue that a concept of social freedom can be reached through this Weimar state in the context of the Weimar economic constitution (without undermining the Weimar ‘political’ constitution) so as to subordinate “*the means of life to the purposes of life*”⁵⁰⁰ (Heller) and to open a new concept of “*economic freedom*”⁵⁰¹. This is opposed to the liberal concept of freedom that leads to “*privilege*” in Neumann’s terminology or to “*economic compulsion*” in Heller’s terminology⁵⁰² (albeit Heller deviated from the Marxist discourse and stressed also that the element of power and domination cannot be eliminated in any society⁵⁰³).

Moreover, Neumann’s theory is close to the Austro-Marxist Karl Renner who is also explicitly invoked by him⁵⁰⁴. As Karl Renner argued “*fundamental changes in society are possible without accompanying alterations in the legal system...development by leaps and bounds is unknown in the social substratum, which knows only evolution, not revolution*”⁵⁰⁵ (see more in chapter 6 about the Austro-Marxists). This does not differ much from Neumann’s earliest injunction that the socialist state theory can play a decisive role in “capturing” the economic constitution in its direction. Through this logic, Neumann believes that, albeit the Weimar “economic constitution” imprinted a compromise between

⁴⁹⁷ Ibid. 56

⁴⁹⁸ For the commonality between Neumann, Renner and Heller see also Kelly (2003) 276
See also Scheuerman (1994) 44, 46.

⁴⁹⁹ Heller, Herman ([1930] 1987). ‘Rechtsstaat oder Diktatur’ (trans. Kennedy, E), *Economy and Society*, 16(1), 141.
Neumann ([1930] 1987) 39

⁵⁰⁰ Ibid. 141

⁵⁰¹ Ibid. 37, 39

⁵⁰² Heller, Herman ([1934] 1996) 1173

⁵⁰³ Heller, Herman ([1928] 2000). ‘Political Democracy and Social Homogeneity’ in Jacobson, Arthur & Schlink, Bernhard (eds.) *Weimar: A Jurisprudence of Crisis*, Berkeley, London: University of California Press, 261

⁵⁰⁴ Neumann ([1930] 1987) 42

⁵⁰⁵ In Kelly (2003) 276

socialism and capitalism (between workers and capitalists)⁵⁰⁶, socialism can be reached through the Weimar state and its intervention in the economy.

This strategy of Neumann is based on the state and on a concept of the state as instrument through which the socialist transformation can take place, which is an assumption that he would reject few years later with his theory about the relative autonomy of the state in capitalism (see below). This analysis of Neumann draws on the state theories of other social democrat theorists.

He refers to the analysis of the Austro-Marxist Otto Bauer⁵⁰⁷ and to his concept of the state as an “*equilibrium of class strengths*”⁵⁰⁸. This actually means that the modern democratic state could be used in the direction of proletarian interests and that it was not a class state (see chapter 6.2.). Whereas Bauer’s analysis concerned the new Austrian state (mostly for the period between 1919-1923 but not exclusively, see chapter 6.2.), it became also “*the seminal ideological position of the Weimar SPD*” as Thornhill writes⁵⁰⁹. This assumption of the Weimar state as being a “class equilibrium” state is evident in Neumann’s argument against corporatism with the justification that it “*requires.... domination by one class*”⁵¹⁰ - the assumption being that the current Weimar state did not embody class domination.

This concept of the state is also evident in Herman Heller, whose theory was also invoked by Neumann (as seen earlier). Heller argued that “*in an age of developed and organized capitalism...a continuously increasing proletariat awakened to consciousness and made the demands of bourgeois democracy into its own in the form of social democracy*” will be successful⁵¹¹.

Heller’s argumentation was similar to Rudolf Hilferding’s - the SPD economist and finance minister (in 1923 and from 1928-late 1929s) and one of the most influential figures in the German Social Democracy - who is also invoked by Neumann in his analysis of advanced capitalism⁵¹². Hilferding dealt persistently with the issue of organized capitalism⁵¹³ and

⁵⁰⁶ Neumann ([1931] 1987) 52

⁵⁰⁷ Ibid, footnote 29

⁵⁰⁸ I use here the English translation of the term “Das Gleichgewicht der Klassenkräfte” by Blum and Smaldone. See Bauer, Otto ([1924] 2015). ‘The Equilibrium of Class Strengths’ in Blum, Mark E. & Smaldone, William (eds.) *Austro-Marxism: The Ideology of Unity. Austro-Marxist Theory and Strategy* vol. 1, The Netherlands: Brill Academic Publishers, 323-338

⁵⁰⁹ Thornhill (2000) 108

⁵¹⁰ Neumann ([1931] 1987) 55

⁵¹¹ Heller ([1930] 1987) 130

⁵¹² Neumann ([1931] 1987) 45

argued optimistically in 1927 that “*this form of economy, planned and directed deliberately, is much more open to the possibility of conscious intervention by society, which is nothing other than the intervention of the sole conscious organization of the society with the power to compel, namely intervention by the state*”⁵¹⁴.

Finally, Sinzheimer advanced the not altogether different assumption of the existence of a social democratic state that would function “*in furtherance of the common good*”⁵¹⁵. Hence, this could possibly be that “*when the state acted contrary to his expectations, throughout the 1920s, he was slow to admit it, slow to acknowledge the failure of the social democratic project*”⁵¹⁶.

We can have now a better picture of the assumptions that lay behind the use of the Weimar economic constitution as part of a political strategy by the Weimar Staatslehre theorists. Opposed to this strategy was young Kirchheimer, who was criticized by Neumann for his objections⁵¹⁷.

A short excursus: The unions call for ‘economic democracy’ and its fate

Before I proceed to the post-1933 critiques, it is interesting to focus on how the ADGB made use of the similar concept of economic democracy in its political strategy.

⁵¹³Hilferding first used the term *organisierter Kapitalismus* in his 1915 article “Arbeitsgemeinschaft der Klassen?” that was published in the theoretical journal *Der Kampf* of the Austro-Marxists.

Bercovici, Gilberto (2010) (translated in Greek by Dimitris Dimoulis “Κράτος και Μαρξισμός στη Σοσιαλδημοκρατική Συζήτηση των Δεκαετιών 1920 και 1930”), Theseis Journal, vol. 111, available at: http://www.theseis.com/index.php?option=com_content&task=view&id=1109&Itemid=29

See this article Hilferding, Rudolf ([1915] 2015). ‘The Work Community of the Classes’ in Blum, Mark E. & Smaldone, William (eds.) *Austro-Marxism: The Ideology of Unity, Austro-Marxist Theory and Strategy*, vol. 1, The Netherlands: Brill Academic Publishers, 513-525

⁵¹⁴Rudolf Hilferding’s 1927 speech on ‘Organized Capitalism’. In Fowkes (2014) 298-300, 298

⁵¹⁵Dukes (2014) 32

⁵¹⁶Ibid.

⁵¹⁷Neumann ([1930] 1987) 43

As Offe writes, “Kirchheimer argued for a solution in the domain of constitutional politics: the Weimar Constitution needs to take a clear value decision in favor of a socialist property order”.

Offe (2003) 211

This can be seen in the ADGB's call for "economic democracy". Putting this into context, this was the time after the hyperinflation period where capital was more powerful⁵¹⁸ (some of the industrialists would even support the Kapp Putsch⁵¹⁹), there had been a collapse of the labor-management councils, there remained only the work councils at a local level⁵²⁰, and the rank and file had been totally defeated. Moreover, in mid-1923, with the SPD no longer in government, the real wages were down almost to half their prewar and 1921 levels and there was an extension of the eight working hours⁵²¹.

The union's response aiming to reclaim their gains would come in 1924 with their call for economic democracy, which was a sign that the unions remained in a "militant reformist path" (as it was the case throughout Weimar). This call started mainly as a defensive slogan in 1924 in the coal fields where the workers were treated badly though the re-establishment of the authority of the employers (lower wages, working hours etc.)⁵²². It was further discussed during the 1925 congress of the ADGB at Breslau in which the Congress majority rejected the concept of planned socialist economy for the near future and favored a "*pragmatic*" approach of economic democracy that was achievable under capitalism through a "*greater or equal share in the leadership of the national industrial sector*"⁵²³. However, the economist Fritz Naphtali was also commissioned by the labor leaders in 1925 to draft the program of economic democracy more clearly⁵²⁴.

His analysis was expressed at the 1928 ADGB Congress. He argued that "economic democracy" could severely bend the capitalist system⁵²⁵. This would take place, *firstly*, through the democratization of economy based on "*the expansion of the works councils, governmental self-governing bodies, trade-union sponsored enterprises, cooperatives and*

⁵¹⁸Moses, John A. (1978). 'The Concept of Economic Democracy within the German Socialist Trade Unions during the Weimar Republic: The Emergence of an Alternative Route to Socialism', *Labour History*, 34, 45-57, 52

⁵¹⁹As Abraham writes "*it is illustrative of the splits within industry...that while Albert Vögler, Hugo Stinnes, Emil Kindorf, and some others in the steel industry indulged Kapp, the chemical industry supported the general strike against the Putsch and chose to pay workers for the strike days*". Abraham ([1981] 1986) 116 (footnote 31)

⁵²⁰Braunthal (1978) 170

⁵²¹Abraham ([1981]1986) 116-117

⁵²²Ibid. 224

⁵²³Braunthal (1978) 170

⁵²⁴Ibid. 171

⁵²⁵Moses (1978) 45-57, 54

public firms, which would give the workers more power at the expense of management”⁵²⁶. Secondly, there was also a longer-term plan for a “planned economy” that would go hand in hand with the breaking of economic monopolies and socializations⁵²⁷.

However, the 1928 ADGB Congress embodied Naphtali’s short term program but it gave much less emphasis to his long term one⁵²⁸. So, it held a “militant reformism” strategy - more confident due to the gains of labor during 1925-1928 after the economy had recovered with the American loans- but was unable to understand and respond politically to the new situation.

This *new situation* was evident since the 1928 lock-outs (supported by heavy industry) that forced the state to take a middle approach⁵²⁹. However, this started taking a dramatic route after the repatriation of American capital. The various fractions of capital started demanding forcefully the dismantling of the welfare state⁵³⁰ in contrast with the prior consensus with labor (under the hegemony of export-oriented industry and of middle capital) that could be seen even when the SPD was not in government⁵³¹. Further than this, the unions were weakened during the 1930s mainly due to the huge unemployment but also to the fact that their main way of acting was through the state and that they had adopted an economistic strategy (struggling for the “everyday” working conditions) that was not efficient anymore (see also chapter 5.5).

As Abraham writes, “*a crucial weakness of this design for economic democracy was precisely its economism; economism just when the dominant classes were politicizing even the economic aspects of their struggle against organized labor, as heavy industry had in the Ruhr lockouts*”⁵³².

⁵²⁶ Braunthal (1978) 171

⁵²⁷ Moses (1978) 54

See Braunthal (1978) 171

⁵²⁸ Braunthal (1978) 171. Naphtali was not sharing the evolutionary optimism about the post-1924 capitalist rationalization. See Naphtali’s Speech “On the consequences of Capitalist Rationalization” (1928) in Fowkes (2014) 300-302

⁵²⁹ Abraham ([1981] 1986) 247-249

⁵³⁰ See the 1929 program of the RDI entitled “recovery or collapse”. In Ibid. 225

⁵³¹ Ibid. 154, 244-245

⁵³² Ibid. 250

Neumann's post-1933 critique and the liberal critique

Both the analysis regarding the Weimar theorists and the overview of the fate of the concept of “economic democracy” in late Weimar through a partial overview of the historical context (given that the full picture can be seen only after chapter 5.5), allows us to proceed now with the critique of the Weimar economic constitution and of the overall strategy of “economic democracy”.

In Neumann's post-1933 critique, we find a much more critical analysis of Weimar. He argued that the “*so-called revolution of November 1918 was no real revolution but only the collapse of the monarchy...*”⁵³³. Moreover, he describes his pre-1933 position of “social Rechtsstaat” as a failure but “*he refers to it in the third-not first person*” as Offe incisively notices⁵³⁴.

His critical analysis of Weimar was mainly related to the structural problem that he identified. The *structural problem* was capitalism and more particularly monopoly capitalism- especially after the 1924 “rationalization period”⁵³⁵ - that was providing the opportunity for the reactionary parties to orchestrate the destruction of “*parliamentary democracy [which was] the constitutional platform for the emancipation of labor*”⁵³⁶. The fact that the efforts of the reactionary parties were “successful” was attributed to the “*...the framework and the practice of the Constitution [that] facilitated it and because the Social Democratic Party and the Trade Unions, the sole defenders of the Weimar system, were weakened*”⁵³⁷.

Starting from the *latter*, he wrote that both the SPD and the trade unions did not take into account the danger of monopoly capitalism for democracy given that “*labor was not at all hostile to this process of trustification*”. He deems responsible for this underplaying- at a theoretical level- “*...their leading theorist, Rudolf Hilferding...*” and his thesis about organized capitalism (seen above)⁵³⁸. In this vein, he also criticized the “ambiguous position” of the SPD that, by not deciding between Marxist rhetoric and gradualist strategy,

⁵³³ Neumann ([1933] 1996) 30

⁵³⁴ Offe (2003) 220, See Neumann ([1942, 1944] 2009) 45-46

⁵³⁵ Neumann ([1933] 1996)29-43, 38. Neumann ([1942, 1944] 2009) 15

⁵³⁶Neumann ([1933] 2009) 34-37

⁵³⁷ Ibid. 34

⁵³⁸ Neumann ([1942, 1944] 2009) 15-16

“could not create a democratic consciousness”⁵³⁹ (see chapter 5.5. about the SPD’s toleration strategy to the presidential regime). By 1932, Neumann argued, the SPD “was socialist only in name”⁵⁴⁰. Moreover, he pinpointed the “disastrous role” of the KPD, which held the social-fascist line while looking forward to the dictatorship of the proletariat⁵⁴¹.

Regarding the ADGB, its major strategic mistake -apart from the underplaying of the danger of monopoly capitalism- was “to believe that economic democracy was possible without political democracy”⁵⁴². Moreover, Neumann argued that the unions were dissipated both due to the very high unemployment and because the “accompanying political tensions tended to make every strike a political strike, which the trade unions flatly opposed because of their theories of revisionism and ‘economic democracy’”⁵⁴³. Further, he criticized the fact that free collective agreements disappeared with the state fixing the wage levels⁵⁴⁴. Finally, he showed the significant bureaucratization of the unions by arguing that “the trade union bureaucracy was much more powerful than the corresponding party bureaucracy. Not only were there many jobs within the unions but there were jobs with the Labor Bank, the building corporations...and there were innumerable state jobs: in the labor courts...”⁵⁴⁵. Hence, he concluded that “bound so closely to the existing regime and having become so bureaucratic, the unions and the party lost their freedom of action”⁵⁴⁶.

In all this Neumann appears to have totally changed his mind from his pre-1933 positions. The difference is also seen in his argument regarding the Weimar Constitution. He writes that the problem with the Weimar Constitution was that it embodied the compromise between socialism and capitalism, which could work only as long as no economic crisis intervened (during the 1924-1928 “boom years”) given that capitalism is “the real owner of power in every non socialist state”⁵⁴⁷.

⁵³⁹ Ibid. 29

⁵⁴⁰ Ibid. 34

⁵⁴¹ Neumann ([1933] 1996) 39. Neumann ([1942, 1944] 2009) 32

⁵⁴² Neumann ([1933] 1996) 39

⁵⁴³ Neumann ([1942, 1944] 2009) 17

⁵⁴⁴ Neumann ([1933] 1996) 37

⁵⁴⁵ Neumann ([1942, 1944] 2009) 412-413

⁵⁴⁶ Neumann ([1933] 1996), 34

⁵⁴⁷ Ibid. 33-34

Moreover, at the level of legal theory, he argued now that this advanced capitalism led to a deformalization of the “rational” concept of law. That’s because, the “rational” concept of law was based on the assumption of a competitive economy of “*equality within the capitalist class*”, which was regulated by the political power of the sovereign through general legal norms. However, monopoly capitalism reverses the principle of free economy and makes “*pointless*” and “*absurd*” the regulation by general legal norms⁵⁴⁸.

This problem, according to Neumann, was missed by Sinzheimer who “*transposed*” Gierke’s “institutionalist” theory into the “*German labor law*”⁵⁴⁹. Neumann shows that, through this theory, business enterprise is transformed into a “*social organism*”⁵⁵⁰, property is not conceived as a “*subjective right*” of the possessor but as an “*institution*”, and the plant is transformed into a “*social work and factory community*” in which the worker is “*a living member of the community of entrepreneurs and workers*”⁵⁵¹. To put it in a nutshell, he shows that the socio-economic relationships are reified with this legal theory. Moreover, he argues that this theory was combined with decisionism (as seen in Schmitt’s writings) and they both helped monopoly capitalism in the sense that private property was preserved (through institutionalism) and general law disappeared and was replaced by “*individual measures on the part of the sovereign*”⁵⁵². All this is a direct critique of Sinzheimer, as opposed to his Weimar writings.

Regarding the *overall* argumentation of the post-1933 period, Neumann, I would argue, tends at times to see Weimar in an ex-post manner (as in the first excerpt in this subsection) by underplaying the fact that the fate of the economic constitution was strongly related to the political and social process during the 1920s and particularly after 1929. Because it is this context that determined both the legislation, which implemented Weimar’s economic constitution, and informed its application.

In effect his argument that the constitutional text is to be blamed is problematic to the extent that the main parts of the Weimar economic constitution either remained inapplicable or were interpretatively “perverted” after 1928 (to the extent that they

⁵⁴⁸ Neumann, Franz L. ([1936] 1996). ‘The Change in the Function of Law’ in Scheuerman, W.E.(ed.) *The Rule of Law under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer*, Berkeley: University of California Press, 101-141, 126

⁵⁴⁹ Ibid. 135

⁵⁵⁰ Ibid.

⁵⁵¹ Ibid.

⁵⁵² Ibid. 137-138

remained) as we saw in the second section. This argumentation of Neumann can be seen when he writes that “*class struggle turned into class collaboration- that was the aim of the constitution... the ideology of the Catholic Center Party was to become the ideology of Weimar*”⁵⁵³. I think that, although Neumann rightly captures the initial compromise of the Weimar Constitution, he underplays that the picture of post-1919 Weimar was not the same with the more “open” and more left-leaning picture of 1919 (see also chapter 1).

On the other hand, Neumann’s post-1933 account grasps better than his pre-1933 argumentation some significant issues. *Firstly*, he grasps the problem that organized capitalism poses for formal legality (as seen before). In this vein, he argues that “*if the state is confronted only by a monopoly...it is pointless to regulate the monopoly by general law...the individual measure is the only appropriate expression of the sovereign power*”⁵⁵⁴. He also traces here the essential difference with Rousseau’s concept of *volonté générale*, which was based on the presupposition of general laws. The difference is that “*the volonté générale could be expressed in general laws only in societies with equally distributed small property holding or with socialized property*”⁵⁵⁵. Neumann is right on this given that Rousseau’s general will was based on a model of political economy that rested on the subsistence economy⁵⁵⁶.

In this direction, he also criticizes Schmitt’s tactical revival of the general law necessity in the expropriation cases (see chapter 5) by arguing that it was used “*as a device to restrict the power of the Parliament which no longer represented exclusively the interests of the big landowners, of the capitalists, of the army, and of the bureaucracy*”⁵⁵⁷.

Neumann’s thinking is associated, *secondly*, with a different concept of the state that he adopts compared to his pre-1933 writings. Although it seems at times too instrumentalist (when it is implied that monopoly capitalism would lead necessarily to Weimar’s fall given Weimar’s constitutional architecture), he now turns away from his more autonomous concept of the state and recognizes the specificity of the capitalist state. This is evident in his argument about the “*relative independence*” of this state, which exists “*as long as capitalism is able to make certain concessions to the working class...if it cannot do so, the*

⁵⁵³ Neumann ([1942 1944] 2009) 9

⁵⁵⁴ Neumann ([1936] 1996) 126

⁵⁵⁵ Ibid.

⁵⁵⁶ Rousseau, Jean-Jacques ([1762] 2008). ‘Political Economy’ in *Discourse on Political Economy and the Social Contract* Oxford World’s Classics, Oxford University Press, 34-36. ‘Social Contract’, 62. See also Colleti (1972) 155, 193

⁵⁵⁷ Neumann ([1936] 1996) 127

*relative independence of the state ceases to exist and the state becomes again exclusively an instrument of domination on the part of the ruling class*⁵⁵⁸. Moreover, he now criticizes Heller for not seeing the “*class nature of the actual state*” and for his concept of the state “*which...sees in the state a structure independent of the class structure*”⁵⁵⁹.

What we can keep from this critique is that Neumann puts the issue of the relative (only) autonomy of the state in a capitalist social formation. To put it in a different way, when it is recognized that the capitalist state is relatively autonomous, it is also recognized that it is always-already relatively privatized in an analogous way. And this relative privatization has to do with the fact that- and I repeat Neumann’s words here- “*the real owner of power in every non-socialist state*” is capitalism⁵⁶⁰.

The extent, nevertheless, of this “privatization” both of the state and of law (that are inextricably linked in Neumann’s account) has to do also, *crucially*, with the ability and the will of the political powers and the unions to resist this process of privatization. On the contrary, the parliamentary state did not resist it given the toleration policy of the SPD and of the ADGB to the presidential regime and to the austerity program that was implemented (see chapter 5.5.).

The *crucial* point in this picture is that this austerity program was *altogether* based on the assumption that the capitalist economy under crisis must be “saved” and this assumption was not put into serious doubt even by the SPD and the unions (see also chapter 5.5). This is also evident by the fact that once the Depression kicked in and the unions faced the dilemma of either attempting to transform the capitalist economy or to save and enlarge their hard-earned benefits, the ADGB leaders and officers pointed towards the latter by influencing also the party in this direction (in the 1931 SPD convention) whereas at the same time they were still asserting the longer “aim” of socialism⁵⁶¹. This is not a surprise given that, as Braunthal writes, in the critical formative years of Weimar the labor leaders “*...rejected any plan to alter a system which left powerful archconservative industrial, army, police, judicial and bureaucratic forces intact. In effect, by not supporting political strikes or pressing for socialization, they helped entrench the increasingly bourgeois*

⁵⁵⁸ Neumann, Franz L. ([1935] 1987). ‘On the Marxist Theory of the State’ in Tribe, Keith (ed.) *Social Democracy and the rule of Law: Otto Kirchheimer and Franz L. Neumann*, London: Allen and Unwin, 83

⁵⁵⁹ Ibid. 77

⁵⁶⁰ Neumann ([1933] 1996) 34

⁵⁶¹ Braunthal (1978) 169-174

order”⁵⁶² (see chapter 1). At the same time, the “*narrow pressure-group mentality*” of the unions did not “allow” them to make further coalitions with other strata⁵⁶³.

So, the *main* problem with the strategy of the unions and of the SPD was their combined reformism-economism that did not allow them to see the significant public power that capital has in this form of state. In this way, they could not foresee how this power would transform the state and how this transformation would create (also due to the toleration stance of the SPD during the early 1930s) a huge crisis of representation.

While the historical context described in the precedent paragraphs is not ignored, it seems at times underplayed in Neumann’s argumentation about Weimar. However, it is true that, as seen before, he exerts a powerful and insightful critique both on the strategy of the political parties of the Left (KPD included) and on the political inability of the unions to respond to the strategy of capital due to their reformist-economistic logic and to their dependence on the State.

In concluding the chapter it is time to confront directly the question about the role played by the economic constitution in the fall of Weimar. It has been my argument that the economic constitution cannot be blamed *directly* for that. That’s because the more direct contact of the State with the direct interests of capital fractions was, *crucially*, not based on the economic constitution albeit this inhibited the power of labor through its “perversion”. The crucial *cause* of this contact lies in the structural contradictions of political democracy with capitalism along with the inability of the Weimar political parties and of the unions to respond efficiently to the political attack by capitalist fractions, also due to their assumption of the need to “save” capitalism from its own crisis (as seen before).

This is an answer both to “prior agreements” part of Neumann’s argumentation but also to the liberal (Weber-inspired) critique, which argues for the responsibility of the Weimar economic constitution in Weimar’s fall. It argued that the Weimar Constitution continued the corporatist tradition of “weak statehood” because of its pluralistic expansion of rights that attempted to “...*establish material/volitional identity between state and society after*

⁵⁶²Ibid. 38-39

⁵⁶³Abraham, David ([1981] 1986) 223

1914” and, therefore, “...destroyed the basic normative fabric of exclusionary abstraction and autonomy in political...”⁵⁶⁴.

Thornhill continues: “...the increasingly pluralistic inner structure of the state led to a depletion in society’s capacities for pluralism outside the state”⁵⁶⁵. To put it in other words, the loss of autonomous statehood came through the introduction of the hyper-political and pluralistic “economic constitution”, which involved the corporatist organizations in the policy-making process (labor, capital), and was ultimately deployed after 1930 by private economic actors that “...were able to utilize their position close to the executive to renege on their bilateral corporate commitments”⁵⁶⁶. This loss of autonomous statehood, according to this argumentation, led finally through this process to the collapse of Weimar. In an important recent work Poul Kjaer adds this: “the root cause of the crisis was therefore profoundly linked to the absence of a condensed and institutionally stabilized functionally delineated sphere of public power due to the continued resistance of societal countermovements. To the extent that modernity is defined as the primacy of functional differentiation vis-à-vis segmentary, territorial, and stratificatory differentiation, Germany at that time, might therefore be considered to be a country which had only partially arrived in modernity”⁵⁶⁷.

However, as has been argued, this “problem” of the privatization of the capitalist state cannot be “resolved” with a liberal strict distinction between a “purely” political and a distinct economic issue. On the contrary, this privatization is associated with the interdependence of the political state with the capitalist economy. So, the “*abstracted structure of the state*” was not eroded by the economic constitution (as this liberal critique argues⁵⁶⁸) but it is always-already eroded due to the “relative” autonomy of this state (without excluding the political factors in this process as well). This is demonstrated well by Neumann’s post-1933 argumentation, which shows that both the relative autonomy of the state due to the power of capital and the erosion of the general form of law do not come

⁵⁶⁴ Thornhill (2011) 326

⁵⁶⁵ Ibid.

⁵⁶⁶ Ibid. 322

⁵⁶⁷ Kjaer, F. Poul (2016). ‘From the Crisis of Corporatism to the Crisis of Governance’, in Kjaer, F. Poul & Olsen, Niklas (eds), *Critical Theories of Crisis in Europe. From Weimar to the Euro*, London, New York: Rowman & Littlefield International, 125-139, 128-129

⁵⁶⁸ Thornhill (2011) 311

from the expansion of social policy but, against Weberian assumptions, are related to the public power that capital acquires in times of advanced democratic capitalism.

However, although the “*economic constitution*” could not be blamed directly for Weimar’s fall, both this constitution (due to its initial logic of compromise and to the SPD’s evolutionary strategy) and even more visibly its implementing legislation during the 1920s did not focus on the issue of compatibility of the democratizing process at the level of economy with the capitalist mode of production. Moreover, the theories that endorsed the concept of the economic constitution as a political strategy (Sinzheimer, pre-1933 Neumann, Heller) could be blamed for their optimism towards the evolutionary transition to socialism through the state under conditions of a capitalist social formation without focusing on the tension between capitalism on the one hand and political democracy and the democratic state on the other. (see also chapter 6.5. about the stance of Neumann and Heller during late Weimar).

The insightful critique of the KPD and the USPD on this issue regarding the Works Councils Act of 1920 (see above), was not seriously taken into account both by the SPD and the unions and by the Weimar theorists (e.g. Sinzheimer dismisses it⁵⁶⁹). However, it is valuable in the sense that the room for state and unions intervention (via “democratic market control”) becomes more limited in a capitalist regime since it is constrained by the logic of accumulation. In this form of the advanced capitalist state, capital still has the public power to decide when and where to invest, the allocation of prices to an extent (especially in monopoly, cartels etc.), it employs people and it determines also to an extent the fiscal condition of the state (the example of the unemployment insurance is indicative, see section 1 of this chapter). In this sense, Abraham is right to argue that “...*Weimar labor movement’s search for economic rationality, social justice and political participation was inevitably constrained by the privileged status systematically accorded the logic of accumulation. It seems that the best can be accomplished is the worst that can be done: paralyzing capitalism without being able to transform it. The Weimar SPD and ADGB were highly effective but also terribly vulnerable*”⁵⁷⁰.

In the end, the contradiction between political democracy and the capitalist economy was resolved not in the direction of the extension of democracy- as it was aimed by the SPD,

⁵⁶⁹ Sinzheimer (1920)39

⁵⁷⁰ Abraham ([1981] 1986) xx-xxi

the ADGB and the abovementioned theorists of social democracy - but to the benefit of capital through the authoritarian transformation of the Weimar state.

Part B: Carl Schmitt and Hans Kelsen: Between state and legal theory

Chapter 5. Carl Schmitt in Weimar: An authoritarian liberal?

Carl Schmitt was born in Plettenberg on July 11, 1888 into a Catholic, petty-bourgeois and provincial background that was affiliated with the Zentrum party⁵⁷¹. Because of his “*modest*” Catholic origin, he felt an “outsider” among Berlin’s elites⁵⁷² when he joined Berlin University in 1907 as a student⁵⁷³. However, on his return to Berlin in 1928 he would be close to the elites and the most visible jurist of the Presidential regime during the last period of the Weimar Republic.

The work of the German jurist became very influential and exerted a “fascination” in a wide array of law students both on the right and the left of the political spectrum⁵⁷⁴ albeit he was not considered “...*a moral authority figure like Triepel, Anschütz or Thoma*”⁵⁷⁵. That’s also because he had an impressive array of influences (philosophy, literature, theology) and his writing was, according to Stolleis, “*brilliant...clearly superior to the average legal scholarship*”⁵⁷⁶. Hence, he was read by philosophers, theologians, historians, sociologists and political scientists⁵⁷⁷.

⁵⁷¹ Mehring ([2009] 2014) 574-575, footnote 47

⁵⁷² Balakrishnan, Gopal (2000). *The enemy. An intellectual portrait of Carl Schmitt*. London: Verso, 13

⁵⁷³ Mehring ([2009] 2014) 7-13

⁵⁷⁴ Indicatively, Ernst Forsthoff and Ernst Rudolf Huber on the right, Otto Kirchheimer and Franz Neumann on the left.

⁵⁷⁵ Stolleis (2004) 171

⁵⁷⁶ Ibid. 170

⁵⁷⁷ Ibid.

However, the fact that he was the “*Crown Jurist*” of the Nazi regime (between 1933-1936)⁵⁷⁸, for which he never explicitly apologized⁵⁷⁹, is the main reason for which the reception of Schmitt’s Weimar thought was so “*polarizing*”⁵⁸⁰. It is well-known that Carl Schmitt joined the Nazi party (on April 27, 1933). During this period, he received a chair of law at the University of Berlin (taking the vacant position of the exiled Herman Heller), he became the chairman of the Nazi league of German Jurists, editor of the leading law journal *Deutsche Juristen-Zeitung* and he was appointed as a Prussian State Councillor. His active political involvement ended in 1936, when he was publicly defamed by the SS organ *Das Schwarze Korps* and he was removed from party offices denounced “...*as a representative of a political Catholicism that was positively inclined toward the Jews*” as Mehring writes⁵⁸¹. Nevertheless, he retained his position as a professor of “*Staatslehre*” in Berlin⁵⁸².

So- apart from the often ambiguous way of writing- it was his political stance mainly during the Nazi regime but also during the end of the Weimar Republic that “*aroused suspicion*”⁵⁸³. Because of this, there was a frequent association of Schmitt’s works with the “*demonic*”⁵⁸⁴.

Carl Schmitt struggled in his post-war writings (even in his interrogation by Robert

⁵⁷⁸ This is a title accredited to Carl Schmitt (firstly) by a local Nazi newspaper on 11 May 1933.

See Mehring ([2009]2014) 281, 291-348, 347

See also Balakrishnan (2000) 181-182

⁵⁷⁹ During his 1947 interrogation in Nuremberg, Schmitt’s main line of defense (among others) was that he was just an “intellectual adventurer” and that he had no responsibility for how his concepts ended up by the Nazis.

See Kempner, Robert (1987). ‘Interrogation of Carl Schmitt’, *Telos*, 72, 97-129.

Schmitt, Carl ([1947] 2007). ‘The “Fourth” (Second) Interrogation of Carl Schmitt at Nuremberg’, *Telos*, 139, 35-43, 37

⁵⁸⁰ Stolleis (2004) 171

⁵⁸¹ Mehring ([2009]2014) 347

⁵⁸² Ibid. pp. 281, 291-348

⁵⁸³ The phrase “*aroused suspicion*” was expressed in 1932 by Ernst Niekisch, who was a former leader of the short-lived Bavarian Council Democracy in 1919 and later converted to nationalism but not to the NSDAP. According to Stolleis, Niekisch’s phrase expressed a “*widely shared sentiment*” at that time. In Stolleis (2004) 171

⁵⁸⁴ See Werner-Mueller, Jan (2010). *A Dangerous Mind: Carl Schmitt in Post-war European Thought* (in Greek trans.), Athens: Polis Editions, 170-179, 17

Kempner on April 11, 1947⁵⁸⁵) to distance himself from his Nazi past and to present his Weimar work as an effort to save the Republic. In this direction, he wrote that his concept of the constitution aimed at protecting the constitution against a “functionalist” formal concept given that the latter fell prey to a “broken down” pluralistic parliamentarism that opened the way to the NSDAP and to the KPD, namely to the “enemies” of the Constitution. In this vein, he wrote that the finest argument of how not “*to allow democracy to be attacked with the apparent means of democracy*” originated with him and, more particularly, with his writings during the last phase of the Weimar Republic that posed the “friend-enemy” issue in constitutional thinking⁵⁸⁶.

However, in the “*Westdeutscher Beobachter*” (23 July 1933) he gave an entirely different interpretation when he wrote a retrospective of the *coup* in Prussia, which was decisive in Weimar’s fall in the sense that Prussia was the last “bastion” of democracy. He argued that the German military and administrative state “*had put an end to the Berlin corruption of a liberal-democratic party state...But without the background of the powerful National Socialist movement, this coup would not have succeeded, and without, let alone against, this movement, the German state could no longer be held*”⁵⁸⁷.

In this chapter, I will show that both these interpretations include fragments of truth. Hence, we could conceive Schmitt’s Weimar theory both as a critique of a “functionalist” conception of the constitution, which was unable to respond to Weimar’s “enemies”, and as a theory that was a precursor to fascism due to his enmity towards parliamentarism.

However, none of these interpretations captures the entire historical picture of Schmitt’s

⁵⁸⁵ In this (second) interrogation, Schmitt particularly cited his work “Legality and Legitimacy” and his critique to the principle of “equal chance” as a proof of his effort to save the Republic. Moreover, during this interrogation he had also been questioned about his legal opinion before the Supreme Court in the Prussian trial (October 1932) and he answered that “*the Schleicher government offered the only option to stem the chaos*”.

Schmitt ([1947] 2007) 41,43

⁵⁸⁶ In the afterword of “Legality and Legitimacy”, which is written in 1958, Schmitt argued that his 1932 essay was “*a despairing attempt to safeguard the last hope of the Weimar Republic, the presidential system, from a form of jurisprudence that refused to pose the question of the friend and the enemy of the constitution*”.

Schmitt, Carl ([1958] 2004). ‘Afterword’ in Seitzer, J. (ed. and trans.) *Legality and Legitimacy*. Durham: Duke University Press, 95-101, 95

⁵⁸⁷ In Blasius, Dirk (2003). ‘Carl Schmitt: Relevance and Ambivalence’, *German Historical Institute London, Bulletin*, XXV(1) 55-63, 62

Weimar theory. Regarding his political theory, I will demonstrate in this chapter that it is hostile both to parliamentary democracy and to the NSDAP without being immune to fascism. In this direction, I will argue that Schmitt developed persistently a concept of a Presidential authoritarian regime that laments for the loss of 19th century liberalism, which maintained the political-economic divide, in contrast with 20th century mass democracy that enabled the politicization of economy. This is, *significantly*, the main knot that connects his whole Weimar oeuvre in political theory- at least since it gets clearly visible in 1923 with his book “The Crisis of Parliamentary Democracy”.

I will demonstrate that this political theory is reflected in his legal theory in which he develops a foundational *distinction* throughout his Weimar work between the “political” Constitution (represented by the President) and the “formal constitutional laws”. This distinction is associated with a concept of collective identity-normality that is situated in the gap between- what Schmitt calls- “law” and its “realization”. This gap, which is traced since 1914 as it will be seen in *section 1* of this chapter, denotes in Schmitt’s Weimar works the political moment within law, which is tied to a concept of collective identity as an “existential status”.

Based on this identity, Schmitt follows an “originalist” concept of representation within law: “*the reifying assumption that a legal order should merely replicate a pre-given political unity which is independent of its legal representation*”⁵⁸⁸. However, I will show that, in line with his political theory, this pre-given political unity is mostly not a pre-modern one. It corresponds to a 19th century concept of liberal constitutionalism but with the *crucial* difference that Weimar is a mass democratic regime of parliamentary democracy. This contradiction produces continuous shifts in Schmitt’s legal theory, which are also affected by Weimar’s political conjuncture.

Regarding the shifts in his legal theory throughout Weimar, the *significant shift* that I will develop in this chapter is between his pre-1928 works and his post-1928 works. During his *earlier* Weimar works up to 1928, which will be developed in *sections 2* and *3* of this chapter, his legal theory is based on a “purely political” identity. Based on this identity, which is expressed also in Schmitt’s political theory (mainly in the “Crisis of Parliamentary Democracy”), he adopts a political-substantive concept of constitution that

⁵⁸⁸ Lindahl, Hans (2015). ‘Law as Concrete Order: Schmitt and the Problem of Collective Freedom’, in Dyzenhaus, D. & Poole, T. (eds.) *Law, Liberty and the State: Oakeshott, Hayek and Schmitt on the Rule of Law*. Cambridge: Cambridge University Press, 38-64, 60

is tied to an expansive interpretation of article 48. I will demonstrate that this concept of constitution is opposing a formal concept of constitution, which enabled the staging of the social question through the parliament. However, I will also argue that, except for “Political Theology” (in 1922), his pre-1928 theory can be seen more as an effort of re-interpretation of Weimar legality in the direction of continuity with the 1871 Constitution rather than as a total rupture with that.

In the *fourth* section of this chapter, I will introduce Schmitt’s “Constitutional Theory” (1928), where his decisionism-exceptionalism is still visible but he also introduces hesitantly his own concept of institutionalism (Croce and Salvatore name it “*institutionalist decisionism*”⁵⁸⁹) through the discourse of “institutional guarantees”. This becomes very clearly introduced by 1932.

The development of his post-1928 legal theory will be seen in the *fifth section* of this chapter. I will show that this theory over-determines Schmitt’s distinction between the political constitution and the formal constitution laws by giving the power to the President to represent the Weimar Constitution as a meta-political “*pouvoir neutre*” (the element of decisionism) and to trace-what Schmitt calls- “spaces of depoliticization” against the functionalist use of the Weimar Constitution through the discourse of “institutional guarantees” (the element of institutionalism). I will show that, with this discourse, Schmitt juxtaposes (a liberal interpretation of) the Second Principal Part of the Constitution against the First Part that introduced parliamentary democracy, which is deemed to represent a functionalist use of legality that weakens the State.

This post-1928 legal theory of Schmitt cannot be understood unless associated with Schmitt’s account of the Weimar Republic. I will analyze, therefore, in the fifth section, his legal theory along with the historical context of late Weimar and Schmitt’s account of the Weimar context.

Regarding his account of Weimar, I will demonstrate Schmitt’s argument that the state was endangered by the political parties, which he relates with the parliament’s intervention in the economy- as opposed to 19th century parliamentarism. His answer is, therefore, for a strong Presidential State that will be able to depoliticize and to act also counter to the principle of “economic democracy”. I will argue that this analysis of Schmitt is visible also

⁵⁸⁹ Croce, Mariano & Salvatore, Andrea (2013). *The Legal Theory of Carl Schmitt*, Abington: Routledge

in his role as a legal advisor of the last Weimar governments. Schmitt's role as an advisor will be also seen extensively in section 5 of this chapter.

Given this analysis, I will argue that Schmitt's Weimar theory radicalized the Weberian insights with regards both to the political and to the social question, namely he theorized a very powerful President (by being more radical than Weber in his critique of parliamentarism) and a liberal political-economic distinction (by being even more assertive than Weber in favor of a "free economy").

As a consequence of this, I will use the term "authoritarian liberalism" in the description of Schmitt's theory. This is a term that was used firstly by Heller in 1933 regarding a speech of Schmitt in 1932. Heller defined this term as the "*retreat of the 'authoritarian' state from social policy, liberalisation (Entstaatlichung) of the economy and dictatorial control by the state of politico-intellectual functions*"⁵⁹⁰. My use of this notion in the title of this chapter describes, nevertheless, Schmitt's theory during the whole Weimar period (at least since his 1923 "Crisis of Parliamentary Democracy")⁵⁹¹. Moreover, it denotes- in a similar way with Heller's- a strong state that protects the 19th century political-economic distinction, which is endangered by the 20th century parliamentary state, by detaching economic liberalism from democracy (prioritizing the former) due to this endangerment.

In this vein, I also argue that, despite Schmitt's methodological changes in his legal theory, there is a clear *continuity* throughout Schmitt's Weimar period. This is an interpretation of the Weimar Constitution that dissociates it from the legislative supremacy through which the "social question" is addressed and associates it with a 19th century reified modality of the State-civil society relationship through a strong President.

In this sense, my analysis of Schmitt distances itself, *firstly*, from those approaches that conceive Schmitt's Weimar theory as a "*nihilistic, irrational and normless' decisionism*" from the perspective of deliberative constitutionalism⁵⁹². Indicatively, Dyzenhaus approach argues that Schmitt's Weimar theory follows Weber's "*...ethic of pure conviction and*

⁵⁹⁰Heller, Herman ([1933] 2015). 'Authoritarian Liberalism?', *European Law Journal*, 21(3), 295-301, 300

⁵⁹¹In a similar way, this term is used by Renato Cristi to describe Schmitt's theory throughout the Weimar period. Cristi, Renato (1998). *Carl Schmitt and Authoritarian Liberalism*, Cardiff: University of Wales Press, 6

⁵⁹² This is an apt characterization by Kalyvas for these theories. Kalyvas (2008) 101.

These theories, which are also analyzed in the Introduction, are the following: Dyzenhaus (1997) 38-122. Scheuerman, William (1999). *Carl Schmitt: The End Of Law*, Oxford: Rowman and Littlefield, 74-82

executive will unconstrained by any rules”⁵⁹³ and Scheuerman argues that Schmitt is blamed for “*having eliminated the most minimal ties between politics and morality*”⁵⁹⁴. These approaches, whereas they capture Schmitt’s anti-parliamentarism and decisionism, they cannot grasp what sort of anti-parliamentarism is this. On the contrary, I will show in this chapter, by focusing also on Schmitt’s answer to the social question and on his concept of civil society, that Schmitt’s anti-parliamentarism during Weimar is tied to an embrace of a 19th century parliamentarism. Moreover, it also escapes from their view that Schmitt’s decisionism is tied to concept of constitutionalism that detached liberalism from democracy by prioritizing the former⁵⁹⁵. I should also add, nevertheless, here that this approach captures well Schmitt’s conception of homogeneity as not unrelated to the ethnic element⁵⁹⁶.

My analysis of Schmitt’s Weimar theory distances itself, *secondly*, from those approaches that reconstruct through a positive lens Schmitt’s theory by tracing its potential for “*agonistic pluralism*”⁵⁹⁷ or for the “*politics of the extraordinary*”⁵⁹⁸ (the latter theory gives more emphasis to the non-institutionalized form of politics compared with the “agonistic pluralism” theory.) Despite that these theories do not succumb to the denunciation of Schmitt that comes from the perspective of deliberative democracy, they underplay that Schmitt’s approach to democracy is strongly related to his approach to the social question.

Indicatively, Mouffe writes that the problem of Schmitt is that he “*is no democrat in the liberal understanding of the term, and [that] he had nothing but contempt for the constraints imposed by liberal institutions on the democratic will of the people*”⁵⁹⁹. On the contrary, I will argue that the problem is that Schmitt was mostly an authoritarian liberal who could not accept mass parliamentary democracy *due* to the insertion of the “social question”. However, in order to have a view of this, it is crucial that Schmitt’s concept of

⁵⁹³Dyzenhaus (1997) 14

⁵⁹⁴ Scheuerman (1994) 20

⁵⁹⁵ This is visible in Scheuerman’s argument that “*Schmitt’s marriage to Nazism stems immanently from core elements of his jurisprudence...*”.

Scheuerman (1999) 115

⁵⁹⁶ Dyzenhaus (1997) 98-101.

⁵⁹⁷ Mouffe Chantal (2000). *The Democratic Paradox*, New York, NY: Verso, 36-59

⁵⁹⁸ Kalyvas (2008) 79-162

⁵⁹⁹ This is traced by Chantal Mouffe as Schmitt’s problem. She tries to resolve it by turning Schmitt’s concept of “*homogeneity*” into “*commonality*” so that it can accommodate pluralism. However, she does not delve into Schmitt’s concept of civil society and how is it related to his overall theory.

Mouffe, Chantal (2000) 36-59, especially, 43

civil society is seen, which is related to his concept of the political and of constitutionalism. This is how we can grasp the reason for which his writings attacked parliament, which was due to its mass democratic origins and to the latter's intervention in the economy- an issue that is underplayed in this analysis.

Hence, this theory underplays the liberal elements of Schmitt's theory and the role that these elements play in Schmitt's answer to the "political question"⁶⁰⁰. Moreover, it disregards the historical context in which Schmitt's analysis takes place and Schmitt's writings in this context.

My analysis distances itself, *thirdly*, from the approach of Schmitt's work by the theory of political constitutionalism as *droit politique*⁶⁰¹ (which is much closer to the latter category rather than the first). This approach argues that there is a political potential in Schmitt's shift to the "concrete-order" methodology, which makes it close to Heller's relational approach (namely the dialectical relationship of power with law)⁶⁰².

I think that, through this parallelism of Schmitt's theory with Heller, the liberal dimension of Schmitt's political theory and legal theory is underplayed. Given this, whereas this theory of *droit politique* captures well Schmitt's not anti-juristic logic, it overestimates the political potential that Schmitt's theory can deliver by underestimating the level of exclusion that is played out in both periods of Schmitt's legal theory (Loughlin insightfully captures this periodization). On the contrary, it will be evident in this chapter that this exclusion is not only due to the ethnic element (due to Schmitt's concept of "homogeneity") but also due to the deeper liberal element that is evident throughout Schmitt's Weimar writings and follows on the footsteps of Weber's thought (by radicalizing it). Hence, this reconstruction of Schmitt's theory underplays also Schmitt's approach to the social question in the context of the Weimar Republic.

The *common* element between all the aforementioned analyses is that, despite their clearly different orientation, they underplay mostly how Schmitt's analysis of the constitutional question is associated with his focus on the Weimar democratic welfare state in the context of the capitalist economy. So, they underplay how his constitutional thinking is related to

⁶⁰⁰Indicatively, Kalyvas argues that Schmitt's theory can be appropriated in the direction of a substantive model of radical democracy and for a theory of a democratic constitutionalism "*without, however, committing to his entire project*". Kalyvas (2008) 81

⁶⁰¹ Loughlin (2017)

⁶⁰² Ibid. 34

his answer both to political and to the social question in the context of this Weimar state.

Hence, I focused on Schmitt's approach on both questions so as to grasp how his theory solved Marx's riddle in the context of the Weimar Republic. That's why I deploy a concept of political constitutionalism that tries to encompass the whole range of this riddle- as indicated in the Introduction- in order to have a view on this.

Finally, given that I argued for the continuity of Schmitt's Weimar works, it is important in terms of method to deal with Schmitt's whole oeuvre during Weimar. So, I will introduce Schmitt's concepts gradually through a chronological trajectory, which goes also along with the Weimar historical context.

5.1. Young Schmitt's pre-Weimar influences: law and its realization

Before analyzing Schmitt's Weimar works, it is useful to see briefly a significant work of the young Carl Schmitt given that he introduces for the first time in this work both the distinction between law and its realization and the significant power of the State in realizing law.

This is his habilitation text "The value of the State and the significance of the Individual" (1914), which is his first foundational text in constitutional theory given that his doctorate was in criminal law⁶⁰³ (1910) and his second study was about the legal practice and its "inherent standards" as a matter also of his legal practice as a legal trainee⁶⁰⁴.

Unpacking this work gradually, Schmitt argues that the validity of law is not reduced to

⁶⁰³See more at Mehring ([2009] 2014) 17-21

⁶⁰⁴ In this book, which is called "Law and Judgment", Schmitt argued against the logic of the legal decision as a juridical automaton. However, he "resolved" the issue of legal indeterminacy by arguing that the correctness of a legal decision could be "measured" through the appeal to the opinion of the community of judges, who can even decide "*contra legem*" without violating the law. As he wrote, "*a judicial decision is correct today, where we can assume that another judge would have decided in a like manner*".

In Fischer-Lescano, Andreas & Cristensen, Ralph (2012). 'Auctoritatis Interpositio: How Systems Theory Deconstructs Decisionism', *Social Legal Studies*, 21(1) 93-119, 94,104

factual power but it has primacy over power and is based on the reason of the “*autonomous subject*”⁶⁰⁵. So, at that time, he opposes the hegemonic statutory legal positivism, according to which law is equated with factual power. Given this, he argues that the power-based theory of law constitutes a positive evaluation of power and that, in this sense, if law is derived out of facts it does not exist any more⁶⁰⁶.

So, under the Kantian influence during that time⁶⁰⁷, he suggests that Sein remains distinct from Sollen or -as he put it- “*the two universes oppose each other*”⁶⁰⁸. In this sense, Schmitt is closer to Kelsen as he admits⁶⁰⁹. However, he recognizes that there is a problem here in the transition from one sphere to the other, which is constituted by the “*heterogeneity of the two objects*”⁶¹⁰. So, the problem is that of “*bringing the two spheres together*”⁶¹¹ so as to make the legal imputation of acts possible.

Given, therefore, that the norm is “*never in a relation with reality*”, a solution should be found. Schmitt finds the solution in the State whose role is to “mediate” and “realize” the law⁶¹² in an analogous way that the Pope is “*servus servorum Dei*”⁶¹³ but now into the secular realm (as the Protestant Reformation had declared). So, the unity of the Catholic Church serves since 1914 as Schmitt’s paradigm of a State that “*gives effect to the link between this world of thought and the world of real empirical phenomena*”⁶¹⁴. Moreover, it is the State that does the work of realizing the law⁶¹⁵, which is a point to survive into his

⁶⁰⁵ Schmitt, Carl ([1914] 2003). *La valeur de l'État et la signification de l'individu*, Geneve: Librairie Droz S.A, 73

⁶⁰⁶ Ibid. 85

⁶⁰⁷ Ibid. 128

⁶⁰⁸ My own translation from Ibid. 85

⁶⁰⁹ Ibid. 118

⁶¹⁰ My own translation from Ibid. 91

⁶¹¹ From Paulson’s translation in Paulson, Stanley (2014 online). ‘Hans Kelsen and Carl Schmitt: Growing Discord, Culminating in the “Guardian” Controversy of 1931’ in Meierhenrich, J.& Simons, O.(eds.) *The Oxford Handbook of Carl Schmitt*. Oxford, New York: Oxford University Press, 6
DOI: 10.1093/oxfordhb/9780199916931.013.34

⁶¹² My own translation from Schmitt ([1914] 2003) 112

⁶¹³ Ibid. 95, 122-123, 133

⁶¹⁴ The translation is by Paulson (2014) 7. It corresponds to Schmitt ([1914] 2003) 62

⁶¹⁵ However, he argued that there are also the “*apocalyptic times*” of immediacy, in which there is no need of the state and “*the preeminence of the idea imposes itself on the individual*”. This is where the individual is connected with the idea of legality immediately outside the State and the Church.

Weimar works.

There is here also a prevalent methodological anti-individualism that will remain in his Weimar oeuvre to an extent. That's because the individual does not have a prior legal existence outside the state but acquires value mainly within a system of legal norms that are "mediated" by the State. This is visible already from Schmitt's opening citation taken from his expressionist friend Theodor Däubler ("*la norme d'abord, les hommes ensuite*")⁶¹⁶.

Simultaneously, there is a difference with his Weimar works in the sense that he based the presuppositions of a legitimate State in the rule of law that is not "...*a contingent conjunction of factual relations of an empirical state with a complex of juridical norms but it signifies the reunion of State and law, with the former being totally grasped and determined by the latter*"⁶¹⁷. In this sense, he is against an "ethical" conception of law but it is clear that his concept of law as embedding value (in the sense of reason) is not totally morally indifferent⁶¹⁸.

So, taking all these into consideration, Schmitt rejects the foundation of law in contractualism as well as in anthropocentric theories and in German idealism⁶¹⁹. These issues, which remained as *leitmotifs* throughout his work, formulated what Joseph Bendersky called "*Catholic neo-idealism*" and they went hand in hand with his anti-war sentiments (infrequent at that time⁶²⁰). Strangely enough regarding his future route, Schmitt's Catholic influences are "mingled" with Kantian influences, which are lost in Weimar.

Schmitt ([1914] 2003) 47, 143-144

Mehring ([2009] 2014) 47

⁶¹⁶Schmitt ([1914] 2003) 61

⁶¹⁷My own translation from Ibid. 99

⁶¹⁸On the contrary, according to Balakrishnan, despite Schmitt's sympathy towards "*Neo-Thomist natural-law*" theories, many conclusions of this book (such as the primacy of law over power) are "*stringently positivist*".

Balakrishnan (2000) 13

⁶¹⁹Mehring ([2009] 2014) 48

⁶²⁰Bendersky, Joseph (2009). 'Love, Law and War: Carl Schmitt's Angst', *Telos* 147, 171-191, 181-191, 184

See also Mehring ([2009] 2014) 61-62

However, what clearly remains is the power of the state in this space in-between law and its realization. This would drive his theory in Weimar and would be associated with the exception, especially from “On Dictatorship” onwards.

5.2. Schmitt in early Weimar: The conservative shift, decisionism and the exception

Although some of these foundational elements of Schmitt’s thinking remained, he took a different political direction after the experience of the “Great War” and after the revolutionary situation in Germany and in Munich (the two council Republics in 1919⁶²¹). This took place while Schmitt served his military duties and had, among other duties, the observance of the peace movement of the USPD and of the pan-German movement⁶²². It should be noted here that the Bavarian capital had turned into a “*bulwark of the extreme right*” after the defeat of the Second Councils movement (Spring of 1919)⁶²³. This environment has probably influenced Carl Schmitt⁶²⁴ although it should be stressed that his conservative shift had already begun⁶²⁵.

This stance of Schmitt lasted for the whole period of the Weimar Republic and was not antithetical to his political affiliation with the Catholic Zentrum party (that can be seen until the beginning of the 1930s)⁶²⁶. This conservative stance was clearly revealed in his first two books, which were written immediately after the establishment of the Weimar

⁶²¹ See Winkler ([2000] 2006) 355-356

⁶²² Mehring ([2009] 2014), 77

⁶²³ Winkler ([2000] 2006) 356

⁶²⁴ When Schmitt was a civil servant in Munich, revolutionaries intruded into his office and shot an officer beside his desk.

Wiegandt, Manfred H. (1994-1995). ‘The Alleged Unaccountability of the academic: A biographical sketch of Carl Schmitt’, *Cardozo Law Review*, 16, 1569-1598, 1576

⁶²⁵ It is controversial when exactly this shift started. Paulson argued that it started in 1916 with Schmitt’s paper “Dictatorship and the State of Siege”. Paulson (2014) 25

However, Mehring writes that his position is not very clear in this paper. Mehring ([2009]2014) 74-76

⁶²⁶ See Mehring ([2009] 2014) 162

Republic. In these books, he did not comment, nevertheless, in a direct way on the political issues of that era.

The *overall question* in these books is how/whether the liberal element and the rule of law can be maintained in the constitution without the self-destruction of the constitutional order itself, which is a question that will remain in Schmitt's thought throughout Weimar. In terms of structure of this section, I will refer briefly in the first book of this era ("Political Romanticism") in order to show the beginning of this problematization. The main focus of this section will be on Schmitt's book "On Dictatorship", which is Schmitt's main treatise on legal theory until "Constitutional Theory" (1928). I will show, then, how Schmitt's problematization on this issue of dictatorship was developed even more concretely in his speech in Jena (1924), which took place at a time that the early Weimar period would come to an end.

5.2.1. "Political Romanticism"

Schmitt started writing "Political Romanticism" in 1917 but it was published in early 1919 (that was probably before what happened in Munich after February 1919⁶²⁷).

In this book, Schmitt sympathized more with the Catholic counter-revolutionary thought (Edmund Burke, Joseph de Maistre, Louis Bonald) against -what he called- "*political romanticism*" that concerned mainly the liberals⁶²⁸. Moreover, he introduced clearly his metaphysical decisionism and problematized about whether the liberals have a conception of the legal order given that they cannot make sense of the "concrete reality" (a term that he also introduces here for the first time).

To unpack this more, according to Schmitt, political romanticism was embraced politically by the 19th century bourgeoisie and signified the depoliticization of the social order due to the fact that it had led to a romantic privatization of the experience⁶²⁹. Hence, he called

⁶²⁷ Ibid. 84-85

⁶²⁸ Oakes, Guy (1986). Translator's 'Introduction' in Carl Schmitt *Political Romanticism*, Cambridge MA: MIT press, ix-xxxv, xiii

⁶²⁹ Schmitt, Carl ([1919] 1986). *Political Romanticism*, Cambridge MA: MIT Press, 17

political romanticism a “*subjectified occasionalism*” in the sense that the romantic subject has taken the position of God and “...*treats the world as an occasion and an opportunity for his romantic productivity*”⁶³⁰.

Because of this, Schmitt traces an affinity between romanticism and 18th century rationalism (Descartes’ “*cogito ergo sum*”) in the sense that they both depend ultimately on an individualized liberalism and “poeticized” aestheticism. This can take place only in a bourgeois world that “...*isolates the individual in the domain of the intellectual, makes the individual its own point of reference, and imposes upon it the entire burden that otherwise was hierarchically distributed among different functions in a social order*”⁶³¹.

Against this, Schmitt describes a supra-personal Hegelian causality, which has replaced God with a reference either to the “revolutionary demiurge” of the people or to the “conservative” one of history. So, Schmitt recognizes in a positive way Hegel’s philosophy of history by writing that “*Hegel, with an unerring sense of genius, had already recognized that the connection with the rationalism of the previous century, and thus the historical inadequacy of the system, lay in the causal reference between the ego and the non-ego. The romantics were incapable of this sort of philosophical insight...if anything provides a complete definition of romanticism, it is the lack of any relationship to a causa*”⁶³².

He ultimately uses Hegel on the plane of the counterrevolutionary Catholics⁶³³ by writing that this Catholic-concrete way of thinking can lead into a normative political decision whereas the romantics are unable for any sort of “*ethical and legal valuation*”⁶³⁴ since they “*float from one reality to another*”⁶³⁵. So, romanticism abjures “concrete reality” and culminates in a “*fanciful*” privatized construction of the experience that turns into a “*state of eternal becoming and possibilities that are never consummated to the confines of*

⁶³⁰ Ibid.

⁶³¹ Ibid. 20

⁶³² Ibid. 82

⁶³³ See also Mehring ([2009] 2014) 86-87

⁶³⁴ Schmitt ([1919] 1986) 124-125

⁶³⁵ Ibid. 92-93

concrete reality”⁶³⁶. In this way “*forms without substance can be related to any content*”⁶³⁷, which is precisely the critique that Schmitt would later exert against Kelsen’s theory in “Constitutional Theory” arguing that this formalism ultimately legitimizes any power⁶³⁸.

So, for the first time, Schmitt gives emphasis here to the “concrete reality” as a presupposition of a legal order. Moreover, he identifies it with the Hegelian-Catholic thinking and with a world that should be based on a certain substance, functional cohesion and a fixed direction⁶³⁹. Hence, this is the concept that undergirds his idea of the legal order albeit Schmitt does not develop it further here⁶⁴⁰.

Concluding, “Political Romanticism” should be seen as an indirect attack both to the romantics of the “*turning point 1918-1919*”⁶⁴¹ and to the bourgeois-liberal state as it is expressed through romanticism in Germany (by Protestants)⁶⁴². So, it remains that his concept of the State is based on the unicity model of the Catholic Church, which he finds as essentially interrelated with the decision. In this way, Schmitt engages here for the first time with the “concrete” and with the metaphysical decision as a presupposition of the legal order.

5.2.2. Between “sovereign” and “commissary” dictatorship

⁶³⁶ Ibid. 66

⁶³⁷ Ibid. 76

⁶³⁸ Schmitt ([1928] 2008) 63-64

⁶³⁹ Schmitt ([1919] 1986) 19

⁶⁴⁰ The consequences that Schmitt stresses of political romanticism is that “*any relationship to a legal or moral judgment would be incongruous here, and every norm would seem to be an anti-romantic tyranny. A legal or a moral decision would be senseless and it would inevitably destroy romanticism. This is why the romantic is not in a position to deliberately take sides and make a decision. On romantic grounds, he cannot even decisively reject the theory of the state that proceeds from the view that man is "evil by nature."*

Ibid. 124-125

⁶⁴¹ Mehring adds also that Schmitt “...distanced himself from the older conservatism following 1789”.

Mehring ([2009] 2014) 87

⁶⁴² This becomes visible in his reproach of Adam Müller, the par excellence figure of political romanticism. Schmitt ([1919] 1986) 49

This element of decisionism and a clearer conservative political orientation emerges in Schmitt's foundational work "On Dictatorship" (1921) that was written during the civil war in Munich and the Kapp Putsch⁶⁴³. Although the normative orientation of this book remains contradictory, it should be seen in some continuity with his thoughts in "Political Romanticism" in the sense that his question concerns how/whether the liberal element and the rule of law can be maintained in the constitution without the self-destruction of the constitutional order itself, particularly in the face of modern revolutions and of the "organized proletariat" that constitutes a form of threat to the unicity of the State. His solution is traced through a historical analysis about the different meanings of the concept of "dictatorship" and demonstrates the transition from the ancient Roman "commissary" dictatorship to the modern "sovereign" dictatorship, namely from the older "*dictatorship of reformation*" to the "*dictatorship of revolutions*"⁶⁴⁴.

Schmitt shows how this transition goes hand in hand with the rise of the modern "sovereign" state and particularly of the "enlightened" rationalist philosophy and of the *pouvoir constituant*, which endangers the distinction between "law" and "measures" and makes more difficult (and even dangerous) the application of the rule of law for the survival of the legal order as a whole. This theoretical problematization is practically related to the question of how article 48 can be interpreted in view of the aforementioned transition.

In terms of structure, I will start in this subsection, *firstly*, from the "dictatorship of reformation", in its *second* part I will approach the transition to the "*dictatorship of revolutions*" and, *thirdly*, I will associate this analysis with Weimar and with Schmitt's interpretation of article 48.

Starting from the *first*, Schmitt describes the "dictatorship of reformation" in the context of the gradual transition from the medieval system of estates to the early modern state. He writes that the start of the discussion about the concept of dictatorship therein was Machiavelli's "*Discorsi sopra la prima deca di Titto Livio*"⁶⁴⁵. Machiavelli argues there for a Roman concept of dictatorship that could implement legal sanctions (but that is

⁶⁴³ Mehring ([2009] 2014) 93, 102

⁶⁴⁴ Schmitt, Carl ([1921] 2014). *On Dictatorship*, Cambridge: Polity Press, xlv

⁶⁴⁵ Ibid. 3

distinctive from the legislative activity of government) without consultation and for a concept of dictator as “*always-admittedly, by extraordinary appointment, yet constitutionally- a republican organ of the state*”⁶⁴⁶. This dictator is “*entitled to do everything that is appropriate in the actual circumstances (nach Lage der Sache) ...Therefore, especially in a dictatorship, only the goal governs, which is freed from restrictions imposed by the law and is only determined by the need to create a concrete situation*”⁶⁴⁷.

This is the concept of *commissary dictatorship*, which signifies that the dictator is appointed by the consul at the Senate’s request for a specific mandate and time by ignoring the existing law in order to save the Republic. From a legal perspective “*this means to permit a concrete exception whose content, by comparison with another instance of a concrete exception-amnesty-is outrageous*”⁶⁴⁸. So, there was a concrete mandate⁶⁴⁹.

However, Machiavelli’s thinking entails contradictions and- through his preoccupation with the “technical” problems of politics and with the advising of the absolutist monarch in the “Prince”⁶⁵⁰- he seems even to justify an indifferent in substantive terms “*raison d’etat*”. As Schmitt argues “*any political task- be it the absolute government of one single person or a democratic republic, the political power of a prince or the political freedom of the people- is just a task*”⁶⁵¹. So, while Machiavelli understands (according to Schmitt) a concept of dictatorship based on the need to act without *deliberare* and *consultare* in order to achieve the “concrete goal”, he does not engage seriously with the juridical thinking but only with the “*...rational technique of political absolutism*” that lies in the hands of the executive⁶⁵².

Against Machiavelli’s preoccupation with technicity stand the Protestant monarchomachs. Their views can be seen primarily in the “*Vindiciae contra tyrannos*”- the “*exemplary*

⁶⁴⁶ Ibid. 3-4

⁶⁴⁷ Ibid. 7-8

⁶⁴⁸ Ibid. 1

⁶⁴⁹ Ibid.

⁶⁵⁰ Ibid. 5

⁶⁵¹ Ibid. 6

⁶⁵² Ibid. 6, 8

piece of evidence of the literature of the monarchomachs”⁶⁵³. They were defenders of the rightful exercise of the office that “*consists in the fact that prince only obeys law sanctioned by the people- that is the estates*”⁶⁵⁴. The monarchomachs supported, therefore, a right of resistance against both the *tyrannus absque titulo* (tyrant by force or by machinations) and the *tyrannus ab exercitio* (tyrant by abuse of the “...legally transferred dominion by violating the law and his own promises, made under oath”)⁶⁵⁵.

Between the “*Machiavellian technicity*” and the “*monarchomachic lawful state*” it is the “*moderate figure*”- with Schmitt’s words- of Jean Bodin with whom Schmitt seems to side more⁶⁵⁶. This can be seen in his argumentation that “*the difficult problem for public law, which can be summarized as the problem of the concept of sovereignty and of its relationship to supreme right and supreme power, could not be resolved by means of a politico-legal theory. Nor can it be resolved by ignoring it, as the monarchomachs did*”⁶⁵⁷.

So, Bodin (to whom Schmitt returns in various books) while arguing for a modern concept of an “absolute” and indivisible sovereignty, he conceived the concept of the commissarial dictator in the framework of a constitutional order⁶⁵⁸. Schmitt argues that Bodin “*provided an extraordinary clear and detailed juridical foundation*”, which is associated with the overall fact that his notion of the state is “*...that of a lawful state (Rechtsstaat), whose laws are not just expressions of power that can be issued arbitrarily and cancelled arbitrarily, like other regulations (règlements)*”⁶⁵⁹. Although he was against the monarchomachs, Bodin conceived simultaneously “*...the technologisation of law undertaken by Machiavelli as something despicable- a ruthless and unworthy atheism from which he distances himself. Accordingly, he would never be able to admit that the will of the sovereign can turn any sentence into law. That, for him, would no longer characterize a state but a tyranny*”⁶⁶⁰.

⁶⁵³ Ibid. 14

⁶⁵⁴ Ibid. 12

⁶⁵⁵ Ibid. 14

⁶⁵⁶ Ibid. 19, 20, 30-32

⁶⁵⁷ Ibid. 20

⁶⁵⁸ Ibid. 24

⁶⁵⁹ Ibid. 27

⁶⁶⁰ Ibid.

This *distinction* that Schmitt draws here between *tyranny* and *dictatorship* is crucial and corresponds to the fact that his concept of “dictatorship” is still *norm-bound*. Keeping this distinction in mind, Schmitt traces two more references. *Firstly*, Montesquieu’s theory in the sense that Montesquieu argued for a balance between royal absolutism and state-destroying legalism or -to put it in different words- for a monarchic government that will respect the “*basic principles of law*”⁶⁶¹. The crucial for Schmitt is that Montesquieu’s theory is far from “*legal despotism*” such as the one demanded by the French rationalism of the 18th century⁶⁶² (see below).

Secondly, Schmitt also draws an analogy with the “Papal Revolution” by writing that the *plenitudo potestatis* “*became the base of a great reformation [reformatio], which restructured the entire organisation of the Church*”⁶⁶³ without a revolution since it was executed by an organ formed according to the law (Pope), and revealed modern concepts of sovereignty. Moreover, there was also the personal representation by the Pope, who is the “*Christ’s commissar*”⁶⁶⁴, and the whole lineage of personal commissars leading by proxy to the Pope.

Taking all these into account, the *significant* point for Schmitt is that in all these cases, namely in Bodin’s concept of dictator, in the canon law discussion and in this historical process that he describes, he traces the same concept of dictatorship: it is the achievement of the *concrete situation* (*Lage der Sache*) through the dictator. However, *crucially*, the dictator (who is a constituted organ) not only exercises the law but also creates it but without abandoning law at the same time. That’s because “*executio goes beyond the weighing of factual evidence*”⁶⁶⁵.

Hence, this is *not tyranny* but it is associated with the “gap” between “law” and “law’s realization”, which Schmitt had already traced in “The value of the State and the significance of the Individual” (1914). As he wrote, “*In terms of the philosophy of law, the essence of dictatorship consists in the general possibility of a separation of the norms of*

⁶⁶¹ Ibid. 83

⁶⁶² Ibid. 83, 89

⁶⁶³ Ibid. 34

⁶⁶⁴ In this vein, Schmitt wrote that “*the idea of Christ’s personhood is therefore the ultimate pinnacle of this conception of the law*”. Ibid. 39

⁶⁶⁵ Ibid. 37-38

law from the norms of the realization of law (*Rechtsverwirklichung*). A dictatorship which does not make itself dependent on the concrete realization of an outcome that corresponds to a normative idea- which, in other words, does not aim at making itself redundant- is an arbitrary despotism”⁶⁶⁶.

So, he traces here more clearly the distinction between *arbitrary despotism* (seen earlier as *tyranny*) and *dictatorship*. This analysis of Schmitt is not antithetical to the decisionist spin that his theory takes mainly in “Political Theology”⁶⁶⁷ but also in “Constitutional Theory” (albeit to a lesser extent)⁶⁶⁸. This is based on Schmitt’s reading of Bodin’s concept of sovereignty, according to which the sovereign can “*change and violate statutes*” in an emergency so as to advance the “*public good*” without abandoning law but only a normative concept of law⁶⁶⁹.

So, *crucially*, the way in which we can understand Schmitt’s concept of “commissary dictatorship” is that, whereas there are “measures” beyond (a normative conception of) law in an emergency, there is not a blurring between “laws” and “measures” given that these “measures” are taken in order to constitute the “normal” situation where the “law” can apply.

The *big break* that signified, nevertheless, the *transition* from the commissary dictatorship of reformation, which was initiated by a constituted organ, to the limitless “sovereign dictatorship” of revolution came with the establishment of the centralized modern state along with the revolutionary *pouvoir constituant*. Philosophically, this was seen mainly in Rousseau’s concept of “*volonté générale*” that is driven by the logic of the “*enlightened rationalist*” domination of “*legal despotism*”, which “*levels*” any association within the state, every party and every estate⁶⁷⁰ (against Montesquieu’s theory of balance).

As Schmitt writes “*when a relationship emerges that makes it possible to give the*

⁶⁶⁶ This is from Schmitt’s introduction in the 1921 edition of “On Dictatorship”.

In the translation of Ananiadis, Grigoris (1999). ‘Carl Schmitt and Max Adler: The irreconcilability of Politics and Democracy’, in Mouffe, Chantal (ed.) *The Challenge of Carl Schmitt*. London: Verso, 118-137, 122-123

⁶⁶⁷ Schmitt ([1922 1934] 1985) 7-10

⁶⁶⁸ Schmitt ([1928] 2008) 101

⁶⁶⁹ Ibid.

⁶⁷⁰ Schmitt [1921] 2014) 89, 100, 107

*legislator the power of a dictator, to create a dictatorial legislator and constitutional dictator, then the commissary dictatorship has become a sovereign dictatorship. This relationship will come about through an idea that is, in its substance, a consequence of Rousseau's Contral Social, although he does not name as a separate power: le pouvoir constituant*⁶⁷¹.

So, what interests Schmitt is that Rousseau's "legislator" becomes practically indistinguishable from the "dictator" if we put into the picture the factor of the *constituent power* given that there is no more the earlier stable reference point of the commissar's dependence (that was the prince)⁶⁷². *Crucially*, this brings the shift from the "commissary" to "sovereign dictatorship", namely to the unlimited commission that "*exists only quoad exercitium*" (in relation to what it does) through the shift from the executive to the legislative⁶⁷³. This was located by Schmitt historically in the French Revolution and particularly in the Jacobins. Therein we could see a suspension of the separation of powers by the National Convention⁶⁷⁴ and a handing of power to the revolutionary people's commissars and to the revolutionary tribunal.

At this point, there was, therefore, a *transition* to the new concept of dictatorship, which is against any logic of the constitution in the sense that any constituted organ is abolished (as the Convention did on October 10, 1793)⁶⁷⁵. This is something that Schmitt repeated also in his speech in Jena (1924) by arguing that "*a sovereign dictatorship is irreconcilable with a constitutional form of government... Either sovereign dictatorship or constitution; the one excludes the other*"⁶⁷⁶.

To sum up the argumentation until now, the *overall* point of this genealogy is that Schmitt seems to endorse the unitary modern state against the estates (as Bodin) but he is against Jacobinism in the sense that it leaves undistinguished the law and the command, the

⁶⁷¹ Ibid. 110

⁶⁷² Ibid. 120

⁶⁷³ Ibid. 126

See also Mehring ([2009] 2014) 104

⁶⁷⁴ Schmitt ([1921] 2014) 95

⁶⁷⁵ Ibid. 127

⁶⁷⁶ Schmitt, Carl ([1924] 2014). 'The Dictatorship of the President of the Reich according to Article 48 of the Weimar Constitution' in *On Dictatorship*, Cambridge: Polity press, appendix, 180-225, 204

“commissary” and “sovereign” dictatorship- as opposed to the previous era. Hence, his ambivalence regarding Rousseau’s theory and his siding more with Bodin and, to an extent, with Montesquieu.

Schmitt’s theory is inextricably associated with the *Weimar* context. Proceeding in the last chapter of this book to Weimar, the problem that Schmitt traces is the protection of the modern state against the heirs of Jacobinism, namely the organized proletariat that aspires to a continuous sovereign dictatorship. He argues that, whereas there was the illusion that there is a “uniform collectivity” in the modern State and that the “*powerful groups and classes within the state have disappeared*”, the political organization of the proletariat has changed this situation and, therefore, the concept of dictatorship has changed⁶⁷⁷.

Analyzing this, Schmitt argues that, after the “sovereign dictatorship” of the Weimar Constituent Assembly was over with the voting of the Constitution by the *pouvoir constituant*, the only concept that could be seen was a commissary dictatorship based on article 48. That’s because the Reichstag is a *pouvoir constitué* and it cannot give a different mandate. So, the *question* for Schmitt is what should be the response of the legal order against the Weimar communist uprisings that, through the concept of the “*dictatorship of the proletariat*”⁶⁷⁸, worked in practice as heirs of the 1793 Jacobinism aiming at establishing a continuous sovereign dictatorship.

He answered that the “dictatorship of the proletariat” does not leave much room for a “fictional” state of siege that will establish guarantees of civil liberty⁶⁷⁹. In this direction, he argued that liberalism and, therefore, the maintenance of a restrictive interpretation of article 48 presupposes just the isolated individual and the state without any social groupings. If this condition cannot be held (due to the proletarian organization), a liberal approach that views article 48 restrictively can endanger the legal order as a whole and lead to the collapse of the state⁶⁸⁰.

Explaining the latter point from a practical perspective, the *major issue* concerns the extent

⁶⁷⁷ Ibid.

⁶⁷⁸ Ibid. 179

⁶⁷⁹ Ibid. 178-179

⁶⁸⁰ Ibid.

of the power of the President. Schmitt argues that this commissary dictatorship of article 48 entails contradictions and these contradictions are between the first (general authorization) and the second sentence (concrete authorization) of the second paragraph of article 48⁶⁸¹. Reminding the second paragraph of article 48, it writes that “[sentence one] *If in the German Reich the public security and order are significantly disturbed or endangered, the President can utilize the necessary measures to restore public security and order, if necessary with the aid of armed force.* [sentence two] *For this purpose, he may provisionally suspend, in whole or in part, the basic rights established in Articles 114, 115, 117, 118, 123, 124 and 153*”.

Given that the second sentence entailed the suspension of certain enumerated articles in case of an emergency, Schmitt argued that these are the liberal elements of article 48 that are based on the assumption of a homogeneous state. However, if based on these liberal elements, the State is unable to answer effectively to the “sovereign” communist uprisings of the self-armed militias during the early Weimar period⁶⁸².

So, he developed a concept of commissary dictatorship that is based on the *independent* authorization of the first sentence and on the logic of self-defense in “*concrete circumstances*”. Schmitt concretized this concept of self-defense by arguing that “*it is in the essence of the right to self-defense that its conditions will be determined through the deed itself; hence, it is not possible to create an institution that could prove legally whether the conditions of self-defense obtain or not.*”⁶⁸³. Therein lies an “*authorization for a commission of action unlimited by law*” as soon as it is “*concrete measure*” (or, as he put it elsewhere “*concrete exception*”⁶⁸⁴). This means also that this authorization does not constitute unlimited legislative delegation because it could lead to the dissolution of the whole legal system and turn into a sovereign dictatorship⁶⁸⁵.

Schmitt’s concept of article 48 should be associated with the fact that the starting point of his analysis about dictatorship is not the legal norm as such but (as seen in his theoretical problematization) the question regarding the “normal condition” that should be created for

⁶⁸¹ Weimar Constitution ([1919], 2008) 409-440, 417

⁶⁸² Schmitt ([1921] 2014) 153, footnote 16

⁶⁸³ Ibid. 154

⁶⁸⁴ Ibid. 118

⁶⁸⁵ Ibid. 175-176

the legal norm to be realized. As he wrote the “*dictator’s actions should create a condition in which the law can be realized, because every legal norm presupposes a normal condition as a homogeneous medium in which it is valid. Therefore, dictatorship is a problem of concrete reality without ceasing to be a legal problem*”⁶⁸⁶.

This leads him to his famous phrase that “*the decision contained in a law is, from a normative perspective, borne out of nothing. It is by definition ‘dictated’*”⁶⁸⁷. This phrase signifies the continuous gap between the legal norm and the norm of its implementation (*Rechtsverwirklichung*) that cannot be “covered” through the reference to a rationalist-liberal approach. Hence, he adds to this that “*the final consequences of this idea were only discovered by de Maistre, when rationalism was shattered*”⁶⁸⁸. This is where we could see again that he needs the “help” from a powerful sovereign guided by the Catholic counter-revolutionary thinking so as to impose the order.

In this sense, Schmitt’s concept of “normality” as undergirding the legal order is from that time visible in his thinking and is associated with the concept of dictatorship through article 48. However, it is still not fully clear how he conceived article 48. That’s because it is not clear if it is used as “commissary” dictatorship, namely for the protection of democracy in times of extreme peril by being distinguished from totally unlimited authority.

In favor of this interpretation (namely that it is deployed for the protection of democracy) is the fact that his theory included constraints. This can be seen in his argumentation that the emergency decrees are “*measures*” (*Maßnahme*) without statutory import and not “*laws*” (*Gesetz*)⁶⁸⁹ and, therefore, the President does not have a legislative role.

However, against this interpretation of Schmitt’s theory, it is *crucially* the President that provides with normality on which the legal order can apply and Schmitt’s interpretation of article 48 is also expansive. Moreover, Schmitt wrote in a rather ambivalent way that article 48 of the Weimar Constitution is an outcome of both commissary and sovereign

⁶⁸⁶ Ibid. 118

⁶⁸⁷ Ibid. 17

⁶⁸⁸ Ibid.

⁶⁸⁹ Schmitt ([1921] 2014) 176

dictatorship⁶⁹⁰. On top of this, there is also his requirement that normality presupposes only the State and the civil society of individuals (along with his general attack on the proletariat⁶⁹¹), which shows a direction of a 19th century state-civil society relationship.

So, we can *conclude* here that this work, both in its theoretical part and in its more “applied” part regarding Weimar, is ambivalent⁶⁹². However, it indicates definitely a conservative stance that is in favour of a strong state. At the same time, it is mostly not anti-modern given his endorsement of the modern state. Its orientation seems to be mainly anti-democratic to the extent that democracy questions the liberal State-civil society configuration. It seems that Schmitt’s concept of normality is based on this configuration, which drives also his distinction between- what he calls- “law” and its realization.

The neglecting of this distinction, according to Schmitt, can be seen in Kelsen’s theory. He argues ironically that “*for Kelsen, dictatorship cannot be a problem of legislation any more than a brain operation can be a problem of logic. True to his relativistic formalism, Kelsen does not realise that we are dealing here with something different: the authority of the state cannot be separated from its value*”⁶⁹³.

We can see, therefore, the context in which Schmitt concept of the President is developed. I will continue with his talk in Jena in order to have a better overview of his thought regarding the concept of dictatorship.

⁶⁹⁰ Ibid. Schmitt ([1921] 2014) 177

⁶⁹¹ Ibid. 178-179

⁶⁹² On this Renato Cristi wrote that Schmitt’s “On Dictatorship” is among the “*revolutionary conservative*” works in the same way as “Political Theology”, whereas McCormick argues that there is a clear rupture between these two works in the sense that the former argued for a temporary dictatorship “*as an appropriate use of functional rationality*” whereas the latter endorsed conceived the exception as a “miracle”.

I think that, whereas in “On Dictatorship” Schmitt is more ambivalent with regards to the relationship between sovereignty and the concept of dictatorship and he often makes references to the distinction between law and command, in “Political Theology” he shifts clearly more into counterrevolutionary thinking and in conceiving the exception as a permanent methodological trait that is inseparable from sovereignty. So, the latter work is written in a more radical tone.

Cristi (1998) 70, 86

McCormick, John (1998). ‘The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers’, in Dyzenhaus, David (ed.) *Law as Politics: Carl Schmitt’s Critique of Liberalism*. Durham, London: Duke University Press, 217-251, 218, 224

⁶⁹³ Ibid. xlv

5.2.3. Schmitt in Jena: The economy in the “exception”? Theory and practice

Schmitt developed his concept of dictatorship at a more concrete level in his speech in Jena in April 1924 during the second meeting of the Association of Teachers of State Law. This meeting was taking place at a time that the period of stability was gradually coming in Weimar.

In this speech, Schmitt defined article 48 clearly as regulating *only* “commissary” dictatorship⁶⁹⁴ - as opposed to his ambivalence in “On Dictatorship”. Moreover, he still argued that the second sentence of the second paragraph of article 48 (“*for this purpose...153*”) should be seen as regulating only the legal suspension of these certain provisions and not the necessary “measures” taken for the restoration of “order”, which are unlimited. So, his point is that the whole second paragraph of article 48 cannot be reduced to its second sentence because “*the prevailing interpretation of Article 48 breaks down in front of any practical attempt to carry out the state of exception*”⁶⁹⁵ - a similar point with his 1921 argumentation.

It should be noted here that the prevailing interpretation- against which Schmitt’s theory is counterposed- was supported by the majority of Teachers of State Law (Anschütz, Stier-Somlo, Grau etc.) and was primarily expressed by Richard Grau two years earlier⁶⁹⁶. Grau had argued that the constitutional inclusion of the provision, which regulated that only certain articles could be suspended, and the inclusion of the limitation paragraph (5) after the constitutional debates in the National Assembly show that all articles of the Constitution except for articles 114, 115, 117, 118, 123, 124, and 153 are “*dictator-proof*” (*diktaturfest*)⁶⁹⁷. He justified this by arguing that the point of having a constitution at all is the limitation “*...on the government’s freedom to act, specifically on the executive*

⁶⁹⁴Schmitt ([1924] 2014) 180-226

⁶⁹⁵ Ibid. 183

⁶⁹⁶Grau, Richard (1922). *Die Diktaturgewalt des Reichspräsidenten und der Landesregierungen auf Grund des Artikels 48 der Reichsverfassung*. Berlin, Gunzel.
See Stolleis (2004) 181

prerogative”. So, “*enumeratio ergo limitatio*”⁶⁹⁸. Moreover, he wrote that there cannot be constitutional revisions but with the constitutional procedure that is regulated explicitly in article 76, namely there cannot be dictatorial revisions⁶⁹⁹.

On the contrary, Schmitt’s interpretation both in his speech in Jena and later in “Constitutional Theory” (more explicitly) follows a clever strategy. Starting from Schmitt’s latter work, this is, on the one hand, to accept Grau’s “*thoroughly correct idea that the Constitution even in regard to a wide-ranging commissarial dictatorship, must not be infringed*”, but to question “*what constitution means*”⁷⁰⁰. So, he argues that when Grau identifies the Constitution with the inviolability of every single constitutional provision, he sacrifices in this way article 48 that has constitutionally the role of protecting the whole “public security and order”. So, according to Schmitt, Grau “perverts” article 48 into its opposite and, in this way, turns it into an “obstacle” regarding the defense of the Constitution.

In the light of Schmitt’s analysis in “Constitutional Theory” we could see Schmitt’s argumentation in Jena, according to which “*the prevailing interpretation of Article 48 breaks down in front of any practical attempt to carry out the state of exception*”⁷⁰¹. In this direction, Schmitt cites also the governmental practice during the first period of the Republic, the decisions of the Courts and many governmental declarations.

The governmental practice is the main focus of Schmitt’s argumentation⁷⁰². That’s mainly because Ebert used article 48 extensively during his presidency (1919-1925). According to Rossiter, Ebert made use of this article for more than 130 times during the first years⁷⁰³. That was, *firstly*, for internal reasons of restoration of “order” against the far-right *putsches*, the communist uprisings (or the attempt of them) and after political

⁶⁹⁷ In Kennedy, Ellen (2011). ‘Emergency Government Within the Bounds of the Constitution: An Introduction to Carl Schmitt “The Dictatorship of the Reich president according to Article 48 R.V.”’, *Constellations*, 18(3) 284-297, 287

⁶⁹⁸ Ibid.

⁶⁹⁹ Ibid.

⁷⁰⁰ Schmitt ([1928] 2008) 158

⁷⁰¹ Schmitt([1924] 2014) 183

⁷⁰² Ibid. 183-185

⁷⁰³ Rossiter, Clinton (1948). *Constitutional Dictatorship*. Princeton: Princeton University Press, 38

assassinations⁷⁰⁴. This use of article 48 often suspended constitutional articles beyond the seven enumerated ones (e.g. the subordination of civil authorities in Saxony to a civil commissar of the Reich based on the presidential decree of 29 October 1923⁷⁰⁵).

Carl Schmitt justified his latitudinous interpretation of article 48 by citing precisely these various governmental practices such as the emergency intervention in 1923 by the Reich government through the *Reichswehr* in the federal governments (Thuringia, Saxony) and the removal of local officials of those states, the taking over of their police forces, and the interference in private property through confiscations etc.⁷⁰⁶- even though these interventions were often made through a formal appeal to article 48 par. 2⁷⁰⁷. In this direction, it is also important to mention Schmitt's reference to the decision of the Reichsgericht, which ruled the extraordinary courts permissible under article 48 and declared their compatibility with the third paragraph of article 105⁷⁰⁸. So, the authorization of martial courts and "drumhead trials" was deemed legal for the punishment of certain crimes, which was also practiced several times in order to suppress the communist outbreaks in 1920. These executive courts had broad powers to the extent that they could

⁷⁰⁴Ibid. 40

⁷⁰⁵According to this decree of 29 October 1923, the chancellor of the Reich "*has the authority to dismiss ministers from the federal government of Saxony as well as federal and municipal authorities in that state and to appoint other people to manage those jobs*" for the period that this decree was in effect.

In Schmitt ([1924] 2014) 184

This was after the chancellor Stresemann had sent an ultimatum to the chancellor of Saxony Zeigner demanding the formation of a government without communists because of their anticipated action in October 1923. After Zeigner denied it, the *Reichswehr* imposed a military state of emergency in Saxony based on article 48, "expelled" Saxon ministers from the government building and appointed the DVP Reichstag delegate Karl Rudolf Heinze as commissar for Saxony. After some days, there was a new government, which was voted by the Saxon parliament and belonged to the SPD (the DDP tolerated it).

Winkler ([2000] 2006) 394

See also Pryce (1977) 112-147.

⁷⁰⁶Schmitt ([1924], 2014) 184

⁷⁰⁷Ibid.

⁷⁰⁸According to article 105, "*exceptional courts are not permitted. No one may be removed from the jurisdiction of a judge established by law. The statutory provisions on wartime courts and status courts are not hereby affected. The military honor courts are eliminated*".

Weimar Constitution ([1919] 2008) 409-440, 426

However, Schmitt is reserved with regards to the Court's reference that the legal basis is on article 105 and not solely on article 48. Schmitt([1924] 2014) 182

even punish rebel violence with death⁷⁰⁹.

Even more *important* is, *secondly*, the application of article 48 for issues of *economic policy*, which became the *leitmotiv* of the 1930-33 period through Schmitt's invocation of a "financial emergency". This was already "practiced" extensively by Ebert during the "traumatic" hyperinflation period.

Making here a short digression on the *historical context*, inflation had started in the aftermath of the Great War (also) due to the fact that the financing of the Great War was not based on taxation of the propertied classes (as in Britain and France) but on borrowing⁷¹⁰. However, the situation got out of control after 1922 and particularly after the occupation of Ruhr by the French and the Belgian troops in January 1923 (that wanted to ensure their reparations through the iron and coal production)⁷¹¹. So, there was a point at the end of November 1923 that hyperinflation had reached a 1: 4.200.000.000.000 mark-dollar exchange rate with phenomena that could lead to chaos- what Feldman called the "*Great Disorder*"⁷¹². At the same time, there was an imminent communist uprising in October 1923 and the Beerhall putsch in Munich in November 1923.

Towards the resolution of this crisis, Ebert used a *twofold* governing method that substantively undermined the parliamentary debate. *Firstly*, there was a use of the Enabling Acts, which meant that the Reichstag authorized the government to issue legislative ordinances. These Acts (of limited time) were voted with a 2/3 majority since they were considered to be as constitutional revisions (article 76) and could be revoked upon the demand of the Reichstag. *Secondly*, he also used the governing by emergency decrees based on article 48.

This double method aimed at achieving the stabilization of the currency. *Crucially*, both the Enabling acts during the period 1922-1924 and the governing by decrees for economic reasons was the first time to be practiced in the Weimar Republic and was not among the intentions of the framers of the Weimar Constitution. Moreover, it is also true that during

⁷⁰⁹ See Rossiter (1948) 38

See also Kessopoulos, Alexandros (2016). *Crisis and Collapse of the Weimar Republic: Constitutional Theory and Practice*. Doctoral dissertation, School of Law, University of Athens, 96

⁷¹⁰ See Wehler ([1985]1997) 226

⁷¹¹ Winkler ([2000] 2006) 389

⁷¹² Feldman (1997) 631, 780

this time (especially during 1923) the economic elites and financial strategists were having direct access to power⁷¹³.

Going back to Schmitt after this short digression, the *main* reference that we can see from him in Jena about the subsumption of economy under the “restoration of order” concerns the Enabling Act of 13 October 1923. This Enabling Act entailed a very broad authorization since it empowered the cabinet to “*adopt those measures which it considers to be absolutely necessary in the financial, economic and social realms*”⁷¹⁴.

Schmitt’s interest is particularly in the *second* sentence of the *first* paragraph of this Enabling Act, which writes that “*fundamental rights guaranteed in the Weimar Constitution may be disregarded in this process*”. This excerpt of this Enabling Act is cited by Schmitt in order to demonstrate that a deviation of a constituted organ (the government) that is based on the first sentence of the second paragraph of article 48 is different from the suspension based on the second sentence of the second paragraph of article 48⁷¹⁵. As he argued “*this means something other than a suspension of the basic rights, because only the acting organ itself ...and no other body...is allowed to deviate. When one violates a legal regulation, one does not cancel or suspend it*”⁷¹⁶.

In other words, Schmitt used it so as to legitimize his concept of *latitudinous* presidential powers. However, what Schmitt also does not (want to) consider is that this Enabling Act was voted after Stresemann’s threat that he would dissolve the Reichstag and he would govern with article 48 until the new Reichstag convened after the elections (that’s 90 days)⁷¹⁷. The same method of “threat” to the deputies was followed by Ebert after Stresemann’s government had already fallen and he wanted to ensure the Enabling Act of 8

⁷¹³ Thornhill (2011) 304

See also Feldman (1997) 754-802

⁷¹⁴ This Enabling Act, which was voted with 2/3 majority, reads as follows:

“*The government of the Reich is authorized to adopt those measures which it considers to be absolutely necessary in the financial, economic and social realms. Fundamental rights guaranteed in the Weimar Constitution may be disregarded in this process...*”

In Rossiter (1948) 46

⁷¹⁵ Schmitt ([1924] 2014) 191

⁷¹⁶ Ibid.

⁷¹⁷ Feldman (1997) 746

December 1923⁷¹⁸. As Rossiter writes “*the twin threat of dissolution and a concomitant resort to Article 48 was sufficient to secure the necessary two-thirds majority in the Reichstag*”⁷¹⁹.

Crucially, these threats were *based* on an instrumental combination of articles 48, 25 (see chapter 3) and of this hybrid form of Enabling Act. This shows an anti-constitutional practice given that it was based on a different logic from the one endorsed by the Constituent Assembly. It was now closer to a Weberian concept of president (see chapter 3).

Regarding article 48 as a method of governing in the economy, Schmitt does not make any concrete reference in his Jena speech. His main reference concerns the Enabling Act as we have seen. In terms of the historical context, Article 48 was used mainly in the context of specifying the Enabling Acts. However, it was also used by itself concerning economic policies against hyperinflation such as the First Emergency Tax Decree (on December 7, 1923)⁷²⁰. All in all, from October 1923 until February 1924, there were around 150 legislative measures out of which 17 were based on article 48 and 110 on the two Enabling Acts⁷²¹.

So, going back to Schmitt, he starts from Jena to indicate that the exception extends as well to the economic organization. Through his analysis about the Enabling Act, he justified his interpretation of article 48. However, his concept of a “lawful” state of exception entails also *limitations* so as to avoid a sovereign dictatorship that would dissolve the constitution. Schmitt traces a *three-fold* limitation.

⁷¹⁸This Enabling Act reads as follows: “*the government of the Reich is authorized to adopt those measures which it considers to be absolutely necessary in view of the distressing circumstances of the people and the Reich. Fundamental rights guaranteed in the Constitution may not be disregarded in the process. Before their issuance all ordinances are to be discussed in secret session with committees chosen by the Reichstag and Reichsrat, each to consist of 15 members...*”.

In Rossiter (1948) 47

⁷¹⁹Ibid.

⁷²⁰See Kennedy (2011) 285

See also Feldman (1997) 815

⁷²¹This concerned a whole range of issues not only regarding the currency but generally about the economy (e.g. taxation, pensions, social insurance).

Rossiter (1948) 48-49

Firstly, Schmitt had asked in Jena for the implementation of the statute, which was based on paragraph 5 of article 48⁷²². However, this statute never arrived from the legislature notwithstanding that the whole community of Teachers of Staatslehre (Schmitt included) was also asking for that⁷²³.

Secondly, he argued for a limitation of the emergency measures both in terms of duration and mainly in terms of their content. He wrote clearly that a commissary dictatorship cannot change the “*organizational minimum*” of the regime (e.g. turn democracy into a monarchy) as the sovereign dictatorship of a constituent assembly can do. This “*inalienable organizational minimum*” comprises the President, the government and the Reichstag⁷²⁴. Hence, he argued that the measures taken against the Saxony government (based on article 48, par. 2) could not have been taken against the Reich government because it is part of the “*organizational minimum*”⁷²⁵.

This is related with a second constraint that Schmitt recognizes, which is that the enforcement of article 48 needs (according to the Constitution) the ministerial countersignature (article 50) and the non-revocation by the Reichstag (article 48 paragraph 3)⁷²⁶. The *third* related restriction is that the exceptional decrees are deemed to be “*measures*” (Maßnahme) and not “*laws*”, which meant that “*this organizational minimum should not be eliminated or obstructed by way of taking actual measures*”⁷²⁷. So, the point is that these emergency measures can breach constitutional provisions but not the “*organizational minimum*”. Moreover, they are not laws.

As a final remark regarding this historical context of the hyperinflation period in which Schmitt’s speech in Jena takes place, it should be written that this period (that lasted from the end of 1922 until mid-1924) left its mark both at the level of *constitutional theory* and at a *political* level. Regarding the latter, the socio-political effect of this period can be seen in those middle classes that experienced an unjust re-distribution of wealth as a result of

⁷²² The fifth paragraph reads as follows: “*A Reich statute determines the details of these provisions*”. Schmitt ([1924] 2014) 180-225, 180, 207-208, 225

⁷²³ Stolleis (2004) 182

⁷²⁴ Schmitt ([1924] 2014) 211

⁷²⁵ Ibid.

⁷²⁶ Ibid.

⁷²⁷ Ibid.

the policies that were followed so as to counter the hyperinflation problem given that these policies benefited the wealthier⁷²⁸. As a consequence, “*for much of the Mittlestand, the inflation permanently delegitimized the Republic while arousing hostility toward supposed speculators and representatives of international finance*”⁷²⁹. This can be also revealed- without adopting a monocausal explanation- in that the biggest electoral move between 1920 and 1932 was seen in the Mittlestand⁷³⁰. The various groups of the middle class “... (*petit bourgeois, peasant, ‘white collar’*) *who were or had become homeless in the process of economic and political changes...*” were mostly united ultimately by the NSDAP’s “*authoritarian populism*” by 1932 as Abraham writes⁷³¹.

Regarding industry, it “*emerged from the inflation strengthened*”, with more influence in the state and “*even freed from financial dependence on the banks...*”⁷³². Moreover, a deeper monopolization process would be seen in the post-1924 rationalization period also due to the foreign loans that flowed into the German economy because of the Dawes Plan⁷³³. On the contrary, the unions were weakened (e.g. the eight-hour day was “*non-existent*”) and

⁷²⁸Hyperinflation was ultimately resolved through various currency and tax reforms and with the introduction of the Rentenmark, whose market value was backed by the mortgaged assets of agriculture and business (3,2 billion goldmarks). On November 20, the Federal Bank set a ratio of 1 trillion paper Marks to 1 Rentenmark based on the pre-war analogy between the mark and the dollar (1 dollar equals 4,2 Rentenmark). Moreover, it was also the Dawes plan that “helped” because it eased the reparations.

The currency reforms and the introduction of a revalued currency ultimately favored, *firstly*, the big debtors and especially the bigger land owners (given that a lot of them were indebted) and, *secondly*, those who had large industrial properties. It destroyed significant parts of the middle class that had savings.

So, as Winkler writes “...*the distribution of wealth is significantly less equitable than before*”.

Winkler ([2000] 2006) 397-400

See also Feldman (1997)

See also Kennedy (2011) 284-297, 285

⁷²⁹ Abraham ([1981]1986) 118

⁷³⁰ Ibid. 19

⁷³¹ Ibid.

However, as Winkler writes, “*the political mobility of the Mittelstand was limited to the Protestants. The vote for the Roman Catholic ‘Center party’ stayed fairly constant during the Weimar Republic*”.

Winkler (1976) 1-18, 8-10

⁷³² Abraham ([1981] 1986) 118

⁷³³ Ibid. 119. Neumann ([1942, 1944] 2009).15

their treasuries were “*quickly emptied*”⁷³⁴. Their call for “economic democracy” was their response (see chapter 4.3).

Regarding the field of *constitutional theory*, the marginalization of the Reichstag set a bad precedent. Firstly, this practice became itself an argument in Schmitt’s latitudinous interpretation of article 48. Secondly, there was shift of state law theory into natural law thinking and into the questioning of the legitimacy of constitutional democracy⁷³⁵. That’s because one of the most debated issues was whether the revaluation that took place during 1923-24 and expropriated a significant part of the middle classes without compensation was unjust⁷³⁶.

This generated a discussion about article 109 (equality before the law) and article 153 (expropriation), which brought into the fore two trends: *firstly*, a resurgence of natural law “general principles” and, *secondly*, a tirade against the “party state” and parliamentarism that inflicted on fundamental rights. Moreover, there was the “*rise of the claim that there were institutional guarantees*” “*immune from parliament*” as Stolleis writes⁷³⁷. This claim was incorporated in Schmitt’s post-1928 theory (see chapter 5.5).

As Stolleis writes “*this was overwhelmingly the politics of bourgeois middle [class] afflicted by inflation and of the political right, which opposed the ‘party state’ in any case...*”⁷³⁸. On the contrary, Kelsen argued at the meeting of “Staatslehre” Teachers in 1926 (in Münster) that this trend in constitutional theory tended “*to denigrate the value of the authority of the positive legislator*”⁷³⁹.

Concluding, we can see that this overall period of early Weimar- that ended with the overcoming of hyperinflation- left its traces in Schmitt’s theory, in Staatslehre and in the socio-political field.

⁷³⁴ Abraham ([1981] 1986)118

⁷³⁵ in Stolleis (2004) 184

⁷³⁶ See Caldwell (1997) 148-160, 80

⁷³⁷ See Stolleis (2004), 183

⁷³⁸ Ibid.

⁷³⁹ In Ibid. 185

5.3. Schmitt's "exceptionalism" and his concept of political representation

Before developing how Schmitt introduced his conception of article 48 during the last period of the Weimar Republic, it is crucial to see Schmitt's *concept of political representation*. This will reveal better his concept of normality, which goes hand in hand with the exception since "On Dictatorship".

In this section I delve into Schmitt's writings between 1922 and 1928. In these writings, Schmitt's main adversary is Hans Kelsen, the latter's theory of legal formalism and democratic-philosophical relativism⁷⁴⁰. The adversary that Schmitt chooses is important in his theory in the sense that, as he argues, all his own concepts "*are focused on a specific conflict and are bound to a concrete situation*"⁷⁴¹.

Starting from "Political Theology", this work is published at the time that Schmitt had moved to Bonn and is possibly the most "edgy" text of Schmitt, at least during the 1920s. It is startling that his analysis begins with the "exception" without mentioning at all the distinction between "commissary" and "sovereign dictatorship" (and the "institutional minimum"). However, in continuity with "On Dictatorship", its aim is also to deliver the "*normal, everyday frame of life*" to which the norm can apply⁷⁴².

In this work, Schmitt criticizes Kelsen for a rationalist-"immanent" conception of public law that represses totally both the exception and the sovereignty given Kelsen's "*..old liberal negation of the state vis-a-vis law and the disregard of the independent problem of realization of law*"⁷⁴³. Kelsen's concept of public law derives, according to Schmitt, from an idea of the modern constitutional state that "*...triumphed together with deism, a theology and metaphysics that banished the miracle from the world*"⁷⁴⁴. This is ultimately based, according to Schmitt, on a totally immanent-rationalist philosophy of history of the nineteenth century, where "*everything is increasingly governed by conceptions of*

⁷⁴⁰Schmitt ([1922 1934] 1985) 42

⁷⁴¹Schmitt, Carl ([1932]1996). *The Concept of the Political*, Chicago: University of Chicago Press, 30

⁷⁴²Schmitt ([1922 1934] 1985) 13

⁷⁴³ Ibid. 21

⁷⁴⁴ Ibid. 36

immanence”⁷⁴⁵ and can be traced back to Hegel’s philosophy of history. Here, Schmitt is critical of Hegel’s “immanentism” in contrast with his “Political Romanticism”.

Based on this absolute immanence, Kelsen’s theory ultimately reduces the legal order to a causation that is “borrowed” from scientific-natural law concepts in the sense that his “pure” juristic unity is analogous to the “*worldwide unity of the entire system*”⁷⁴⁶ and is led to the identification of law with the state⁷⁴⁷. *Crucially*, the danger that Schmitt traces here through his critique of Kelsen’s “liberal negation” of the state is that Kelsen’s formulations could end into an immanence-pantheism that can accommodate anything⁷⁴⁸. From this perspective, Schmitt also criticizes Kelsen’s philosophical relativism⁷⁴⁹.

On the contrary, Schmitt’s move so as to “save” both the legal order and the political from this “pantheism” -that he deemed responsible for Weimar’s fall in the 1958 afterword of “Legality and Legitimacy”⁷⁵⁰- is to rescue the “concrete” political moment inside the legal order but outside its immanent-rationalist conceptualization. As Mika Ojakangas commented “*it is precisely the metaphysics of immanence- the metaphysics of natural sciences-that has paved the way for absolute rationalization and neutralization inasmuch as the concept of immanence entails, according to Schmitt, that everything is potentially under the control of human reason*”⁷⁵¹.

Against this immanence, this moment from the “outside” is the moment of “exception”, which Schmitt introduced as a “limit concept” here. The exception is identified with the fact that in every decision “*transformation takes place every time...in every transformation there is present an auctoritatis interpositio...that constitutive, specific element of decision is, from the perspective of the content of the underlying norm, new and alien. Looked at normatively, the decision emanates from nothingness*”⁷⁵².

⁷⁴⁵ Ibid. 49

⁷⁴⁶ Ibid. 20

⁷⁴⁷ Ibid. 50

⁷⁴⁸ Ibid.

⁷⁴⁹ Ibid. 42

⁷⁵⁰ He used the term “*value neutralization*” in order to describe it. Schmitt ([1958] 2004) 96

⁷⁵¹ Ojakangas, Mika (2005). ‘Philosophies of “Concrete” Life: From Carl Schmitt to Jean-Luc Nancy’, *Telos: Critical Theory of the Contemporary*, 132, 25-45, 28.

⁷⁵² Schmitt ([1922 1934] 1985) 30-31

This is something that Schmitt had repeated already in “On Dictatorship” albeit it is welcomed more emphatically here as a “miracle” and acquires a more structural critique against- what he calls- the “*torpid of repetition*” of a formalist legal order⁷⁵³. In other words, against the Weberian description of legality (see also chapter 3.2.). Moreover, it is evident here that the phrase “[out] of nothingness” should be read in conjunction with the phrase “looked at normatively” and not as endorsing a total step out of the legal order⁷⁵⁴. So, the *crucial* point is that the “exception” is viewed not as a step totally out of the juridical but as the pure political moment that is inscribed in its *purity* “as a miracle” from the outside in a totally self-closed legal order.

Schmitt relates this purity to the philosophy of “*concrete life*” that “... *must not withdraw from the exception and the extreme case, but must be interested in it to the highest degree*”⁷⁵⁵. He does not develop more his theory of “concrete life” in this text but the meaning of this move can be seen in his concept of political representation, which grounds this “political” concept of law (that is tied to the exception).

Analyzing this concept of representation, Schmitt’s critique is that enlightened rationalism erased both the decisionistic and the personalistic dimension of sovereignty after Rousseau’s *volonté générale*, which identified the will of the sovereign with the “*quantitative*” will of the people⁷⁵⁶. This erased the political in the sense that it surrendered it in the “*economic-technical thinking*” of the “*American financiers, industrial technicians, Marxist socialists and anarchist-syndicalist revolutionaries*”⁷⁵⁷. On this last point, Schmitt draws directly on Weber by arguing that the dominance of this logic shows that “*the modern state seems to have actually become what Max Weber envisioned: a huge industrial plant*”⁷⁵⁸.

Against this thinking, Schmitt tries to save the personal dimension of the concept of political representation. This is precisely what he keeps from the Catholic

⁷⁵³ Ibid. 15

⁷⁵⁴ This is also visible in Schmitt’s phrase that “*because the exception is different from anarchy and chaos, order in the juristic sense still prevails even if it is not of the ordinary kind...*”. Ibid. 12-13

⁷⁵⁵ Ibid. 15

⁷⁵⁶ Ibid. 48

⁷⁵⁷ Schmitt, Carl ([1922 1934] 1985) 65

⁷⁵⁸ Ibid.

counterrevolutionary thinkers that he mentions in “Political Theology”⁷⁵⁹. That’s because he wants to stress that the sovereign decides precisely if/when the normal conditions are present for the “realization” of law, which is something that cannot be legally regulated but it is also not totally out of the juridical.

Making the transition now to a more extensive analysis of Schmitt’s concept of political representation during the other works of this period, Schmitt identifies this concept with an access to the idea as a higher truth that evades rationalization. This is traced in Schmitt’s most Catholic book, which is “Roman Catholicism and Political Form” (1923)⁷⁶⁰. According to this book, the political representative “*in contradistinction to the modern official...is not impersonal because his office is part of an unbroken chain linked with personal mandate and concrete person of Christ...The ground of decisionism is always a political idea, be it theological or juridical... To the political belongs the idea, because there is no politics without authority and no authority without an ethos of belief*”⁷⁶¹.

In this vein, Schmitt wrote that the political representative resembles the figure of the Pope who is “*not the Prophet but the Vicar of Christ*” in the sense that, on the one hand, this figure “*precludes all the fanatical excesses of an unbridled fanaticism*” but, on the other hand, it is a personified figure and “*not the functionary and commissar of republican thinking*”⁷⁶².

Although Reinhard Mehring rightly argues that it is not clear whether Schmitt’s aim is to constitute the Church as the “*guarantor of stability for the entire order...*” or if he does “*...unmask it as a worldly power*”⁷⁶³, I think that his aim is mainly not to blur religion with politics and law. It is to distinguish between *two concepts* of political representation in a similar manner with “Political Theology”.

⁷⁵⁹See in *ibid.* 52-66, especially 65-66

⁷⁶⁰ According to G.L. Ulmen, these texts share an analytical resemblance. As he wrote, “*Roman Catholicism and Political Form was written in conjunction with Political Theology, which has been described as a ‘necessary complement to the Concept of the Political in explaining Schmitt’s understanding of state, sovereignty and politics.’*”.

Ulmen, G.L (1996). ‘Introduction’ in Carl Schmitt, *Roman Catholicism and Political Form*. Westport CT: Greenwood, vii-xxxvi, xiv

⁷⁶¹ Schmitt, Carl ([1923] 1996). *Roman Catholicism and Political Form*, 17

⁷⁶² *Ibid.* 14

⁷⁶³Mehring ([2009] 2014) 129

The *first* is a concept of representation that “suppresses sovereignty”, which is the model that falls prey to –what Schmitt calls– “the *“spread of economic thinking”*”⁷⁶⁴. The *second* form of representation is the “political form” of the Church that is tied to the “*invocation of the idea*”⁷⁶⁵– “*the political is considered immaterial, because it must be concerned with other than economic values...Catholicism is eminently political*”⁷⁶⁶.

As Kelly writes “...it has in fact been suggested that Schmitt’s essays can best be viewed as a ‘metacritical antitype’ to Weber’s own thought on the protestantic ethic, a ‘Catholic counterpart’ to these famous essays”⁷⁶⁷. In this sense, Schmitt’s distinction moves in an analogous way with Weber’s distinction between the charismatic politics and the ordinary-bureaucratic ones (see below about their differences). This is evident in that the bureaucratic politics are identified, in Schmitt’s theory, with the parliamentary form of representation to the extent that the representatives are permeated by the economic thinking, namely if they don’t represent the idea “*of the people as a whole*” and they deal with the “*material reality*” of the “*economic process*”⁷⁶⁸. This is a critique of the Weimar Parteienstaat along with an effort of a conservative capturing of the Weimar Constitution, which is evident in Schmitt’s reference to article 21 of the Constitution according to which “*deputies are representatives of the entire people*” (given also that the Constitution did not include a constitutional regulation of political parties, as seen in chapter 3)⁷⁶⁹.

It is in the light of this concept of political representation that we should analyze his “Crisis of Parliamentary Democracy” and “The Concept of the Political”. In these texts, the German jurist develops more clearly his critique to rationalism by arguing that, if the rationalist-liberal approach is followed, the political is reduced to an “arithmetical” concept of equality that is ensured through the Rechtsstaat.

However, as he writes, “*the question of equality is precisely not of abstract, logical-arithmetic games. It is about the substance of equality.... Finally one has to say that a democracy-because inequality always belongs to equality- can exclude one part of those*

⁷⁶⁴ Schmitt ([1923] 1996) 25

⁷⁶⁵ In Mehring ([2009] 2014) 128

⁷⁶⁶ Schmitt ([1923] 1996) 16

⁷⁶⁷ Kelly (2003) 187

⁷⁶⁸ Schmitt, Carl ([1923] 1996) 26-27

⁷⁶⁹ Ibid.

*governed without ceasing to be a democracy...*⁷⁷⁰.

In line with his “substantive” logic of democracy, which claims now to be following Rousseau’s “general will”⁷⁷¹ but without its reduction in the quantitative will of the people, Schmitt justified one of the most virulent critiques of mass democratic parliamentarism. He argued that democracy is defined through the identification of the rulers with the ruled and “*requires first homogeneity and second- if the need arises- elimination or eradication of heterogeneity*”⁷⁷².

So, the substantive logic of democracy is tied to exclusion. This is associated both with the logic of ethnicity⁷⁷³ but also with his idea of a purely political unity as opposed to a compromise of “liberal-arithmetic” aggregation of preferences. Analyzing this more thoroughly, Schmitt does not reject a priori parliamentarism but he ties parliamentarism to the 19th century parliament. As he writes, the fact that this parliament “*...assumes the role of the legislative in the division of powers and is limited to that role makes the rationalism which is at the heart of the theory of balance of powers rather relative and...it distinguishes this system from the absolute rationalism of the Enlightenment*”⁷⁷⁴. So, he argues for the theory of balance of powers, which reminds us his his reference on Montesquieu in “On Dictatorship”.

In contrast with this 19th century parliamentarism, the problem that he traces in Weimar is that “*small and exclusive committees of parties and party coalitions make their decisions behind closed doors, and what representatives of capitalist interests agree to in the smallest committees is more important for the fate of millions of people, perhaps than any political decision...If in the actual circumstances of parliamentary business, openness and discussion have become an empty and trivial formality, then parliament, as it developed in the nineteenth century, had also lost its previous foundation and its meaning*”⁷⁷⁵.

⁷⁷⁰Schmitt, Carl ([1926] 1988). *Crisis of Parliamentary Democracy* (trans. Kennedy, E.) 2nd edition, Cambridge MA, London: MIT Press, 9

⁷⁷¹Ibid. 26-27

⁷⁷²Ibid. 9

⁷⁷³He gives as an example the expulsion of Greeks in the Asia Minor and the “reckless Turkish nationalization of the country”. Ibid.

⁷⁷⁴ Ibid. 39

⁷⁷⁵ Ibid. 50

So, we can see that his stance is related not to a general rejection of parliamentarism but of a 20th century parliamentarism. This stance of Schmitt is evidently influenced by the Weimar context, as is visible in the excerpt above. Taking this context into account, Schmitt argues that “...*the crisis of parliamentary democracy in fact springs from the circumstances of modern mass democracy*”⁷⁷⁶. So, his orientation is mainly against political parties in times of mass democracy by radicalizing, in this way, Weber’s insights in the sense that Weber’s theory was clearly elitist but not against parties as such (see chapter 3.2.). In this sense, Schmitt’s later critique of the “*pluralistic party state*” (in the early 1930s) was “...*a concept already fully developed by the 1923 edition of his ‘Crisis of Parliamentary Democracy’*” as Caldwell argues⁷⁷⁷.

In his response to 20th century parliamentarism, Schmitt also finds a “strange” ally in Sorel’s concept of myth and his concept of unmediated real life. This move of Schmitt is again similar with his previous works, namely a move from rationalist immanence to the “irrationalist” immediacy of the idea/myth but in the name of rescuing the political from the technical logic⁷⁷⁸.

Taking this analysis into account, we can make *two* final remarks regarding Schmitt’s concept of political representation that undergirds his concept of constitutionalism. The *first* remark is that Schmitt’s effort to protect the autonomy of the political shows an affiliation with the theological element, which was seen both in “Political Theology” and in “Roman Catholicism and Political Form”. It is through this lens that we can make sense of the fact that his concept of the political is “accompanied” with the “*real possibility of physical killing*”⁷⁷⁹. So, he endorses a concept of a “sacrificial” substantive idea-truth, which is beyond any reflection and deliberation and is associated with the exception. In this sense, Schmitt’s thinking is permeated by a post-political effort to maintain the “purity” of the idea in a groundless modern society.

⁷⁷⁶ Schmitt ([1926] 1988) 15

⁷⁷⁷ Caldwell (1997) 113

⁷⁷⁸ In this direction Schmitt cites also *two* examples of the use of myth. Firstly, the speech of Mussolini in Naples in October 1922. Schmitt tried to show that Italian fascism managed to make “...*a stronger impact and has evoked more powerful emotions than the socialist image of the bourgeois*” because it “*depicted its communist enemy with a horrific face, the Mongolian face of Bolshevism...*”. The second one is the example of Trotsky, who “*as ... just reminded the democrat Kautsky, the awareness of relative truths never gives one the courage to use force and to spill blood*”.

Ibid. 75-76, 64

⁷⁷⁹ Schmitt, Carl ([1932]1996). *The Concept of the Political*, Chicago: University of Chicago Press, 33

This is also related to the fact that Schmitt avoids using the word representation when referring to the Reichstag in “Constitutional Theory”. He uses instead the “*bureaucratic* [word] ‘*Beauftragte*’ [that] *relates to Schmitt’s strong suggestion that parliamentary representation is not really representation since actual agreement is replaced by interest groups and lobbies*”⁷⁸⁰. The political understanding of representation (Repräsentation) remains tied to the Church as opposed to the technical-economic rationality of the Reichstag⁷⁸¹.

This leads us to the *second* remark, which is that the direction of Schmitt’s critique of 20th century parliamentarism is related to his conceptualization of the social issues as embedded in the instrumental-economic logic. In this way, Schmitt *de-politicizes* the issue of social relationships. So, his concept of the political, whereas it does not collapse into the social due to the irreducibility of its basic distinction (friend-enemy) to any other categories (e.g. in the economy, aesthetics etc.)⁷⁸², is based on a bourgeois assumption of the social that is beyond reflection and contestation.

So, Schmitt’s critique of parliamentarism is related to his approach to the social question. Moreover, it is also important to see what Schmitt suggests (apart from his lament for the loss of 19th century parliamentarism). His suggestion is seen in “Constitutional Theory” and is the acclamation of the leader (President) instead of the “fractionary” interests of the parties (see below). Moreover, he criticized the secret voting by arguing that it individualizes the political procedure and fragments the political unity⁷⁸³. Hence, Schmitt gave to the people the power to say merely “yes or no”.

To *conclude*, Schmitt argues for a strong state that would have the “homogenizing” role to choose who is “the people” in terms of ethnicity while it would also exclude the social question from the political. Because of this, Schmitt’s state is also not compatible with a 20th century parliamentary state that allows the staging of the social question. Hence, as Kelly writes (following Cristis’ analysis), the aim of Schmitt is “...*to separate liberalism from democracy for the purposes of halting the democratic avalanche, not to criticize Parliament as such, although his criticisms were none the less sharp. His assessment of*

⁷⁸⁰ Caldwell (1997) 225, footnote 76

⁷⁸¹ Kelly (2003) 189

⁷⁸² See Schmitt ([1932]1996).

⁷⁸³ Schmitt ([1928] 2008) 273

*Parliament suggested that it was initially a genuinely representative institution, though one that was now tainted by the logic of the democratic principle*⁷⁸⁴.

So, this is the concept of the political that undergirds Schmitt's "purely" political moment inside the legal order that will restore the "everyday frame of life", namely a conception that aims to bring back 19th century parliamentarism through a strong state. A deeper analysis about the association between his concept of the political and his concept of constitutionalism will be seen more clearly in the next section.

5.4. Schmitt's "Constitutional Theory"

Schmitt's "Constitutional Theory" takes into account the aforementioned concept of political representation but in a more "tamed" manner in the sense that personalism and "*hard decisionism*" (especially of "Political Theology") recede⁷⁸⁵. In this constitutional treatise, Schmitt seems to accept the Weimar Constitution albeit on his own terms.

This is visible already in his theoretical approach, according to which "*all democratic thinking centers on ideas of immanence...every departure from immanence would deny this identity...*"⁷⁸⁶. This is in contrast, therefore, with "Political Theology" where he had argued against- what he called- an immanent approach.

His own terms are evident since his argumentation that there is a "*continuity of the German Reich*"⁷⁸⁷ notwithstanding that he recognized the constitutional change from the 1871 Constitution. As he wrote "*...one must respond affirmatively to the question of continuity. With the Weimar Constitution, the German people do not intend to deny its identity with the German people of the 1871 Constitution. As it states in the preamble of*

⁷⁸⁴ Kelly (2003) 192. Cristi (1998) 80

⁷⁸⁵ Cristi (1998) 114, 116

See also Thornhill, Chris & Seitzer, Jeffrey (2008). 'Introduction' in Carl Schmitt *Constitutional Theory*, Durham: Duke University Press, 1-50, p.34

⁷⁸⁶ Schmitt ([1928] 2008) 266

⁷⁸⁷ This was also based on Preuss' statement (see chapter 3.0).

the Weimar Constitution, the German people intend to renew the Reich of 1871, but not found a new Reich”⁷⁸⁸.

This should be read also in the context that he recognizes as discontinuity mainly three historical examples, the 1789 and the 1793 French Constitutions and the 1917/1918 Soviet Constitution arguing that only in these cases there was a change of the constitution-making power⁷⁸⁹. This argument regarding continuity allowed him to declare that, despite the change from monarchy to democracy, the *political unity* remained the same. So, it allowed him to unfold his concept of the Weimar Constitution based on an “originalist”-substantive concept of identity.

Analyzing gradually this concept, Schmitt argues that there is a central contradiction in the Weimar Constitution, which is associated both with the Weimar Constitution itself but with every constitution of the modern “*bourgeois Rechtsstaat*” (as he deems also the Weimar one⁷⁹⁰). This is the contradiction between its *political* component, which is the component of a substantive collective identity, and its *Rechtsstaat* one, which is the liberal component. Based on this approach, he distinguishes between the substantive “Constitution” and the formal “constitutional laws”.

At a first glance, this distinction seems to concern merely the interpretation of article 76 of the Weimar Constitution, which defined the possibility to amend every single article of the Constitution by increased parliamentary majority (2/3). As an aside, every constitutional provision was amendable, according to the Weimar Constitution.

However, this distinction, transcends a constitutional proposal and is a conceptual methodology of conceiving the Constitution that is informed by the concept of political representation that we analyzed earlier, namely it is opposed to a normative-technical concept of legality. This is evident in Schmitt’s argument that “*for the Rechtsstaat understanding, law is a norm...alongside the Rechtsstaat concept of law, moreover, together with the juristic-technical aid of the so-called formal concept of law, there is still a political concept of law, which is not capable of eliminating the Rechtsstaat element*”⁷⁹¹.

⁷⁸⁸ Ibid. 145

⁷⁸⁹ Ibid. 142

⁷⁹⁰ Ibid. 87, 235

⁷⁹¹ Ibid. 187

So, the distinction between “Constitution” and “constitutional law” corresponds to the distinction between the founding “political decision” of the Constitution and the “formal” constitutional laws. This is the idea that there is an always-dual constitution, the political and the legal-normative. But it is *crucial* that both of them (as seen in the excerpt above) are inside the juristic.

This means that the constituent power or- as he calls it- “*the political element*” of the constitution is always “present” as such in the constitutional order, as a “*preestablished, unified will*”⁷⁹². As Schmitt wrote, “... *This political will remains alongside and above the constitution. Every genuine constitutional conflict, which involves the foundations of the comprehensive political decision itself, can, consequently, only be decided through the will of the constitution-making power itself. Also, every gap in the constitution, in contrast to the lack of clarity in terms of constitutional law and opinions in details, is filled only through an act of the constitution-making power*”⁷⁹³.

But the question is *how* does this will appear in its purity in the constitutional order? This contradiction emerges in *chapter 16* of his book in which Schmitt struggles between a concept of the Constitution that is based on an unmediated “*identity between rulers and ruled*” and representation. This contradiction appears when he faces the paradox of constitutionalism in the moment of the originary “constituent power”.

Regarding this paradox, whereas he had initially argued that there should be no representation “*because the nation...need not and cannot be represented...*”⁷⁹⁴, he admits the problem of his analysis by arguing that “*the weakness is that the people should decide on the basic questions of their political form and their organization without themselves being formed or organized*”⁷⁹⁵. Based on this, he seems to conclude that there is a need of some form of representation because there cannot be an “*...absolute self-identity of the then present people as political unity*”⁷⁹⁶. So, he writes that there should be some form of

⁷⁹² Ibid. 65

⁷⁹³ Ibid. 125-126

⁷⁹⁴ Ibid. 239

⁷⁹⁵ Ibid. 131

⁷⁹⁶ Ibid. 241

representation along with some form of an identity⁷⁹⁷.

It is important, nevertheless, to see how Schmitt concretized his definition of “representation” and the relationship between “identity” and “representation” in other parts of this book as well. Analyzing this, Schmitt allocated “identity” to democracy and parliamentary “representation” to “aristocracy”⁷⁹⁸. Regarding further the concretization of representation, Schmitt argued that a logic of political representation should be seen “...*in its public law and political peculiarity and be freed from any encumbrance from other concepts such as assignment, interest advocacy, business leadership, commission, trusteeship, etc. because otherwise ideas of a private law and economic-technical variety undermine its distinctiveness*”⁷⁹⁹. On the contrary, for Schmitt political representation can occur only in the “*public sphere*”⁸⁰⁰.

What, we might ask, does this mean exactly? In this concretization of the concept of representation there is a paradoxical passage in the sense that representation is identified with the process of making an invisible subject visible. It sounds, in this way, as an “*avant la lettre*” Rancierian concept. Viewing this passage more closely, Schmitt explains the presence of the “people” alongside the constituted order and argues that “the people” cannot be defined as a mere state organ but as those that “*are not honored or distinguished, everyone not privileged, everyone prominent not because of property, social position or education...In the French Revolution of 1789, the bourgeoisie as Third Estate could identify itself with the nation and the bourgeoisie was the people, because the bourgeoisie was the opposition to the aristocracy and the privileged. But as soon as the bourgeoisie itself appeared as a class that is marked by property and that dominates the state, this negation was extended. Now the proletariat became the people, because it becomes the bearer of this negativity*”⁸⁰¹.

This is the passage (among others) on which Andreas Kalyvas is based by arguing that Schmitt’s theory could be conceived as enabling an “*instituted constituent power*” of the

⁷⁹⁷ Ibid. 239-240

⁷⁹⁸ Ibid. 248-251

⁷⁹⁹ Ibid. 241

⁸⁰⁰ Ibid. 242

⁸⁰¹ Ibid. 271-272

extraordinary that could foster radical democratic politics⁸⁰². However, Kalyvas' interpretation seems to underplay the overall direction of Schmitt's concept of political representation, which is in line with his previous works.

This is evident in the German word (*Beauftragte*) that Schmitt uses in "Constitutional Theory" (as seen in the previous section) to refer to the Reichstag as opposed to the representation based on the model of the Catholic Church. Moreover, this direction can be seen also in Schmitt's argumentation that "*parliament...has lost its representative character... a genuine identity (itself a mere part of the people) is naturally superior to representation that is not genuine*"⁸⁰³. In this vein, Schmitt also argues that "*the Weimar Constitution recognizes no parties*"⁸⁰⁴ - a remark that was also in line with his reference to article 21 of the Weimar Constitution in his previous works.

This is even more clear in Schmitt's alternative to Weimar parliamentarism, which is the concept of acclamation, namely the possibility of the unmediated people to say merely a "yes" or "no" to the proposals of the leader (e.g. through referendum)⁸⁰⁵. That's because Schmitt conceived this concept of acclamation as a representation in "the public sphere"⁸⁰⁶, namely not as tied to liberal individualism and an economic-technical logic.

Schmitt's argumentation is, therefore, in continuity with his earlier writings. Moreover, Schmitt introduces for the first time in 1928 two terms that comprise his concept of President during his 1930s theory. There is, firstly, the concept of President as "*pouvoir neutre*" that he takes from Benjamin Constant notwithstanding that he is still torn between the concept of President as "*pouvoir neutre*" and the concept of President as political leader, namely as a political actor with partisan choices and "*not merely the neutral third*"⁸⁰⁷.

The second is the concept of President as the "Guardian" of the Constitution. This is not in "Constitutional Theory" but in a paper that he completed in August 1928 after Kelsen's lecture at the meeting of the Teachers of State Law in 1928 in Vienna. In this paper,

⁸⁰²Kalyvas (2008) 79-186, especially see 174-186

⁸⁰³Schmitt ([1928]2008) 276

⁸⁰⁴ Ibid.

⁸⁰⁵ Ibid. 272

⁸⁰⁶ Ibid. 272-273

⁸⁰⁷ Ibid. 370-371

Schmitt “*attempts, for the first time, to make the case on behalf of the Reich President as guardian of the constitution by showing that the alternative, Kelsen’s doctrine of constitutional review, is unworkable*”⁸⁰⁸. So, the central motif of the “Guardian of the Constitution”, which was developed and published in 1931, can be seen to an extent in this paper and is a response to Kelsen’s theory⁸⁰⁹ (see chapter 6 about this). However, as Paulson argues, “*Schmitt’s program in support of what became the Weimar ‘reserve constitution’ or Präsidialsystem, was in place long before Kelsen’s 1928 lecture in Vienna*”⁸¹⁰. This has been also seen through the continuity that I have traced in the previous sections regarding Schmitt’s critique of Weimar parliamentarism.

Carl Schmitt will develop more clearly his concept of president in 1931. At that time, he clearly conceived the President as the “Guardian of the Constitution” and as “... *a neutral power... which is put to the side and not above the other constitutional powers, but which is endowed with peculiar competences and opportunities of influence*”⁸¹¹.

It is crucial to see the background of this logic. This is that Schmitt laments the fact that economy has become a political issue in the 20th century democratic state and that the old liberal state of the 19th century has been lost. As Schmitt wrote, “*this [liberal] state, which was neutral in principle towards society and economy, in the liberal, non-interventionist sense, remained the presupposition of the constitution even where exceptions were made in the field of social and cultural politics. But it changed from the ground up, to the same extent that the dualistic construction of state and society, government and people, lost its tension and the legislative state came to completion. Now, the state becomes the ‘self-organization of society’. The distinction between state and society, between government and the people, which had hitherto always been presupposed, disappears...*”⁸¹².

He argues, therefore, that civil society takes over the state and that “...*it is no longer possible to distinguish between issues that are political, and as such concern the state, and issues that are social and thus non-political*”⁸¹³. His “solution” is to project a President

⁸⁰⁸ Schmitt’s paper was entitled “The High Court as Guardian of the Constitution”. Paulson (2014) 19

⁸⁰⁹ Stolleis (2004) 188

⁸¹⁰ Paulson (2014) 19

⁸¹¹ Schmitt, Carl ([1931] 2015). ‘The Guardian of the Constitution: Schmitt on Pluralism and the President as Guardian of the Constitution’, in Vinx, Lars (ed.) *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, Cambridge: Cambridge University Press, 125-173, 151

⁸¹² Ibid. 131

⁸¹³ Ibid. 132

who unites the people in a homogeneous way without the “fractional” divisions and interests that characterize the mass parties. Hence, the President was called by Schmitt as “*pouvoir neutre*”.

As Hans Kelsen comments, this concept of the non-political independence of the President prefigures “...a bourgeois ideology that is meant to veil the antagonism in which the proletariat, or at least a large part of the same, finds itself towards the contemporary legislative state, just like the bourgeoisie used to be in an antagonistic position, at the beginning of the 19th century, towards the ‘total’ police-state of absolute monarchy”⁸¹⁴.

In the light of Kelsen’s critique, we can see that Schmitt’s concept of political representation is based on a reification of the State-civil society relationship given that civil society is deemed unable for any political process and is presented as determined by sheer interests- namely by the “spread of economic thinking” as he had put it in his earlier texts (see above).

Going back in “Constitutional Theory” in the light of this account, we can see that --in his effort to maintain the “purity” of the political that had been lost due to the “economic thinking” through parliamentarism- Schmitt ultimately identified representation as “*something existential*”⁸¹⁵. This seems to be similar with his concept of representation that was endorsed in “Roman Catholicism and Political Form” (despite that the Church is not mentioned here).

This concept of political representation backs his argument that “*the concrete existence of the politically unified people is prior to every norm*”⁸¹⁶ and is always present inside the constituted order. So, this is the lens through which we can go back and understand the distinction between “Constitution” and “constitutional laws”, which is undergirded by this concept of political representation.

Given this, Schmitt’s “political concept” of the Constitution is expressed by a President who represents the general will (based on Schmitt’s concept of political representation seen

⁸¹⁴Kelsen, Hans ([1931] 2015). ‘Who ought to be the Guardian of the Constitution? Kelsen’s reply to Schmitt’, in Vinx, Lars (Ed.) *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, Cambridge University Press, 174-221, 199

⁸¹⁵ Schmitt ([1928] 2008) 243

⁸¹⁶ Ibid. 166

above) as opposed to the Constitution's reduction to a "*sum of private opinions*" (*volonté de tous*) that endangers the Constitution⁸¹⁷. Through this depiction of a "prior existing" unity represented by the President inside the legal order, Schmitt *reifies* the socio-political order. As Hans Lindahl comments, "*a state does not merely 'have' a constitution; it is a constitution (Verfassung)...Legal order as the unity of a manifold of legal norms is unintelligible unless it leads back to and is the expression of political unity – a concrete order*"⁸¹⁸.

So, we have an effort of re-interpretation of the Weimar Constitution along conservative (if not authoritarian) liberal lines that seems in line with his concept of political representation as seen also in Schmitt's previous works. That's in the sense that Schmitt does not criticize the political-economic liberal distinction for the Constitution's endangerment but mass democracy, which allows the politicization of the social-economic divide. In this direction, he also writes that "*...there cannot be a bourgeois Rechtsstaat without private property, and the Weimar Constitution is intended as a constitution of the bourgeois Rechtsstaat*"⁸¹⁹.

This overall direction can be also seen in Schmitt's legal advice in 1926⁸²⁰ with regards to the (not successful) proposal by the SPD and the KPD to the Reichstag about the expropriation without compensation of the dynastic properties of the former royal families⁸²¹. In this advice, Schmitt argued that the expropriation would violate the general and substantive concept of the legal norm and was deemed to be a measure⁸²². Moreover, it would breach the equality of law (art. 109) since it was deemed to be a personal command⁸²³. As a consequence, it would also breach the right to property since the expropriation was allowed only "‘*on the basis of a statute*’"⁸²⁴; "*that is according to a general rule*" as Caldwell explains Schmitt's position⁸²⁵. Finally, Schmitt argued that this

⁸¹⁷ Ibid. 274

⁸¹⁸ Lindahl (2015) 38-64, 42

⁸¹⁹ Schmitt ([1928] 2008) 210

⁸²⁰ Entitled "*Independence of the judges, equality before the law, and the guarantee of private property according to the Weimar Constitution*".

Mehring ([2009] 2014) 172, 585

⁸²¹ See also Maus, Ingeborg (1998). 'The 1933 "Break" in Carl Schmitt's theory' in Dyzenhaus, David (ed.) *Law as Politics: Carl Schmitt's Critique of Liberalism*. Durham, London: Duke University Press, 196-217, 204

⁸²² Cristi remarks that this advice influenced Hayek's thinking.

Cristi (1998) 152

⁸²³ Caldwell (1997) 104

⁸²⁴ In Ibid.

⁸²⁵ Ibid.

parliamentary absolutism turned the constitutional Republic into a “sovereign dictatorship”, which had ended with the end of the Constituent Assembly in 1919⁸²⁶. On the contrary, according to Schmitt, this distinction between law and measure along with the equality before the law constituted the “*proper foundation of the Rechtsstaat and the most effective warranty against all despotism*”⁸²⁷.

Caldwell argues that this case gave the occasion to Schmitt to develop his overall strategy, which was “*to limit parliamentary power, in direct contrast to the theories of parliamentary sovereignty developed by the statutory positivists*”⁸²⁸. Moreover, it indicates the embrace of the liberal Rechtsstaat principle in contrast with the parliamentary intervention in the economy, which erodes the generality of law according to Schmitt.

So, we can see that Schmitt’s substantive-political concept of law is identified with the liberal constitutionalism of 19th century as opposed to the “*despotism*” (reminding us also the distinction between despotism and dictatorship that had been traced “On Dictatorship”). Here we can see clearly how Schmitt’s concept of 19th century parliamentarism (seen also in the previous section) is tied to an effort to reach a 19th century constitutionalism.

This interpretation of Schmitt can be seen also in the light of Habermas’ argumentation about 19th century parliamentarism that went along with 19th century constitutionalism. Habermas argued that this constitutionalism managed to combine legislation as “will” and as “rule of law” because it was based on the public opinion⁸²⁹ of the “*critical public debate of private people...in the public competition of private arguments*” (through basic rights guaranteeing the public and the private, always as citizens and property-owners simultaneously)⁸³⁰. In other words, constitutionalism as ratio “...*was based on the fictitious identity of the two roles assumed by the privatized individuals who came together to form a public: the role of property owners and the role of human beings pure and simple*”⁸³¹.

⁸²⁶ Mehring ([2009] 2014) 172, 585

⁸²⁷ In Cristi (1998) 152

⁸²⁸ Caldwell (1997) 159

⁸²⁹ Habermas, Jürgen ([1962]1989). *The Structural Transformation of the Public Sphere*, Cambridge: Polity Press, 52–54

⁸³⁰ Ibid. 82-83

⁸³¹ Ibid. 56

They viewed the “market” as a private issue and the political as detached from the propertyless masses and the logic of “need”.

However, the *significant point* is that when parliamentary democracy and universal suffrage came into picture during late 19th- early 20th century, the politicization of the social question “threatened” to unbalance the steadfast state-civil society distinction and the dominant 19th century constitutionalism. Long before Schmitt, this fear was expressed since mid 19th century by liberal theorists in various countries (e.g. J.S. Mill, Constant, Tocqueville, Dicey⁸³² etc.), some of whom Schmitt explicitly invokes (Mill⁸³³, Constant)⁸³⁴.

Going back to Constitutional Theory, Schmitt’s approach can be seen better by focusing on his new methodology that emerges in “Constitutional Theory”. Analyzing this, Schmitt has already understood that the “normality” and the “unity” on which the legal order can apply cannot be held only through a powerful decisionist President that “*decides whether there is an extreme emergency as well as what must be done to eliminate it*”⁸³⁵. There is the danger (for Schmitt) that Strauss himself stresses: that the “friend” is not concretely defined and the “friend-enemy” distinction turns into an aestheticized concept⁸³⁶.

So, Schmitt had started already shifting to a new methodology due to his search for further political stability: this is institutionalism, which signifies his deeper focus on the social domain and practices as tied to his concept of “substantive” constitution. To be clear about this, the shift was officially declared in his Preface to the Second Edition of “Political Theology” (November 1933)⁸³⁷. However, this shift can be already seen since his

⁸³² See Loughlin, Martin (2013). *The British Constitution: A Very Short Introduction*, Oxford: Oxford University Press, 56, 96

As Polanyi writes “*inside and outside England, from Macaulay to Mises, from Spencer to Summer, there was not a militant liberal who did not express his views that popular democracy was a danger to capitalism*”.

Polanyi ([1944] 2001) 234

⁸³³ Schmitt, Carl (1923 1988). *The Crisis of Parliamentary Democracy*, Cambridge MA: MIT Press, 39

⁸³⁴ Habermas ([1962] 1989) 129-140

⁸³⁵ Schmitt, Carl ([1934] 1985). ‘Preface’ in *Political Theology, four chapters on the concept of Sovereignty*, Chicago: University of Chicago Press, 7

⁸³⁶ Meier, Heinrich (1995). *Carl Schmitt and Leo Strauss: The Hidden Dialogue*, Chicago: The University of Chicago Press.

⁸³⁷ Schmitt ([1934] 1985) 3

“Constitutional Theory” to an extent⁸³⁸. These elements can be found in his passages that he discusses the “*institutional guarantees*”. The “*institutional guarantees*”, which are traced by Schmitt in the Weimar Constitution, are indicatively the marriage, family, localities, civil servant issues related to article 130 (avoiding party politics), freedom of science etc.⁸³⁹.

He is not very clear about this concept in “Constitutional Theory” but he conceives the institutional guarantees not as rights in the sense that rights are linked to a logic of an unbounded freedom. Hence his hesitancy including property in this category at that time. Moreover, the “*institutional guarantees*” are internal to the State, which means part of the State as “*total status*”⁸⁴⁰.

Although he does not define institutionalism further in “Constitutional Theory”, he would do so in the next texts during 1930s. However, it should be also clear that the element of decisionism, which works on the gap between “law” and its “realization”, plays still a significant role in Schmitt’s theory. This is evident in that Schmitt continues tying his “political” concept of constitution (represented by the President) to the exception-notwithstanding that the role of the exception is not so central as in “Political Theology”. As Schmitt writes “*the Constitution in the actual sense, the fundamental political decisions over a people’s form of existence, obviously cannot be set aside temporarily, but certainly the general constitutional norms established for their execution can be precisely when it is in the interest of the preservation of these political decisions*”⁸⁴¹. In this direction, Schmitt cites also his speech in Jena and his disagreement with Richard Grau (see 5.2.)⁸⁴².

So, we can see the beginning of a methodological shift by Schmitt in terms of legal theory. This shift was further developed during the early 1930s in the Weimar context of crisis. So,

⁸³⁸ Croce & Salvatore (2013) argue that this is the beginning of Schmitt’s institutionalist shift. This is continued more clearly in his 1931 paper “The Liberty Rights and the Institutional Guarantees of the Reich Constitution”. In this paper, he states clearly that “*the essence of the constitution itself may be identified with the institutional guarantees*” (172), 26-29

Maus (1998) also argued that Schmitt “*first formulated*” in 1928 his doctrine of “*institutional guarantees*” and he “*further developed [it] in 1931, as a starting point for his theory of concrete order*”, 209

⁸³⁹ Schmitt ([1928] 2008) 208-212

⁸⁴⁰ Ibid. 211

⁸⁴¹ Schmitt ([1928] 2008) 156

⁸⁴² Ibid. 80-81

it is necessary to see both this context and Schmitt's writings in this context.

5.5. Schmitt's political engagement and theoretical shift: "Strong State-Free Economy", Institutionalism and article 48

After Schmitt moved from Bonn to Berlin's Handelshochschule (in Spring 1928) by accepting the position of the "*Staatsrecht*" professor⁸⁴³, his theoretical position goes hand in hand with his political engagement. So, it is crucial to analyze them in parallel.

Regarding Schmitt's political engagement, his move in Berlin and the fact that he was a "Staatsrecht" professor made it easier for him to be close to the corridors of power. His "new" friend and permanent state secretary in the Ministry of Economics (until 21 December 1929) Johannes Popitz helped him in this direction by introducing him to the political and economic elites⁸⁴⁴.

However, his closest and most substantive contacts were with the "circle" of General Kurt von Schleicher⁸⁴⁵ - but not that much with Schleicher himself - and particularly with high officials in the Ministry of Defense (Ott, Erich M. Marcks)⁸⁴⁶. He was introduced to them by a historian that was a visitor in his seminars (Michael Horst)⁸⁴⁷. As Mehring writes, these two officials "*remained Schmitt's most important connections to the later chancellors of the Reich Franz von Papen and Schleicher*"⁸⁴⁸.

⁸⁴³ Mehring ([2009] 2014) 181

⁸⁴⁴ Cristi (1998) 5

Balakrishnan (2000) 119

⁸⁴⁵ Kurt von Schleicher held a high official position in the Ministry of Defence since 1929 by being the closest advisor of the Minister of Defence (at that time) Groener. From the end of 1929, if not earlier, he was preparing the ground along with Groener and Otto Meisner, the head of the Office of the President of Reich, for a government without the Social Democrats.

Winkler ([2000] 2006) 432

⁸⁴⁶ Seiberth, Gabriel (2001). *Anwalt des Reiches: Carl Schmitt und der Prozess 'Preußen contra Reich' vor dem Staatsgerichtshof*, Berlin: Duncker und Humblot Verlag, 87-89

⁸⁴⁷ Ibid. 86-87

⁸⁴⁸ Mehring ([2009] 2014) 253

Schmitt's serious political engagement came only after the Prussian coup (20 July 1932), which took place during the serious economic and political crisis of the Weimar Republic⁸⁴⁹. He learnt it only through the press⁸⁵⁰. After this coup, he became the main legal representative of the Reich in the Leipzig trial (that concerned the Prussian coup case) and he participated in various emergency plans until the period of Schleicher's chancellorship.

In this section, I will explore, *firstly*, the historical transition to the authoritarian state during the last phase of the Weimar Republic. *Secondly*, I will analyze the very last period of Weimar along with Schmitt's political role. *Thirdly*, I will demonstrate Schmitt's theoretical position during this period.

I will start from the historical context because, as argued in the Introduction, the historical account of Schmitt and Kelsen and their theoretical positions are interrelated.

5.5.1. The transition to the authoritarian state

The narration about the transition from parliamentary democracy to the decree governance starts from the 1929 collapse of the American stock market and finance system. This was a severe blow to the German economy given that it was funded by American banks, which now wanted back the funds that they had placed in investments⁸⁵¹. This turned into a major problem since "*the Reich...found it increasingly difficult to obtain foreign credit*"⁸⁵², whereas at the same time it was still paying for reparations.

The state borrowed ultimately from a consortium of internal banks headed by the Federal

⁸⁴⁹ As Mehring writes, "*until the autumn of 1932 he had comparatively little influence as an advisor*". Ibid, p.252

⁸⁵⁰ Ibid. 260. On the contrary, Ellen Kennedy writes that Popitz and Schmitt were advising Hindenburg's counselors behind the scenes and "*were involved in the decision to remove the government of Prussia that summer*".

Kennedy, Ellen (2004). *Constitutional Failure: Carl Schmitt in Weimar*, Durham: Duke University Press, 13.

⁸⁵¹ Winkler ([2000] 2006) 431

⁸⁵² Ibid.

Bank, which demanded the imposition of an austerity reform program⁸⁵³. After some measures passed in this direction - amidst a tug of war between the president of the Federal Bank and the Coalition government- this process led to the political controversy over the question of who would bear the “burden” of financing the unemployment insurance system (labour or industrial capital)⁸⁵⁴. Unemployment marked a further fiscal problem for the state given that, as it was rising, there was a growing demand by the organized labor for its coverage by the unemployment insurance system whereas at the same time the revenues were in freefall and representatives of industry were demanding the “*release of the economy from such ‘political fetters’*”⁸⁵⁵ (see also chapter 4).

This turned into a political controversy, mostly between the SPD and the DVP, regarding the allocation of burden and led to the dissolution of the Grand Coalition due to the resignation of the chancellor Hermann Müller and of the other SPD members from the Cabinet (27 March of 1930)⁸⁵⁶. However, as Winkler wrote, the Grand Coalition “*did not in any event have long to live*”. The DVP was “*busy trying to extricate itself from its government alliance with the Social Democrats*” given also that since early 1930 “*... large sections of industry, the Reichslandbund [RLB], the political leadership of the Reichswehr General von Schleicher and the camarilla around President Hindenburg had all been agreed that the crisis-ridden parliamentary system ought to be replaced by a kind of presidential democracy - a government dependent less on the support of the Reichstag than on the confidence of the President.*”⁸⁵⁷. In these machinations, the name of the successor was also agreed: it was to be the chairman of the Zentrum party Heinrich Brüning.

So, the dissolution of the Grand Coalition was welcomed by the parliamentary and extra-parliamentary Right (and from the representatives of heavy industry and the RLB) because the issue was not that much the insignificant increase in the contributions to the insurance system but that they couldn’t find another way in order to overcome the crisis except for minimizing the welfare state. This could be done, nevertheless, only through a transition to a presidential regime governing by decrees given the power of labor.

In terms of constitutional law, it is *crucial* to see that this period initiated by President

⁸⁵³ Ibid.

⁸⁵⁴ Ibid. 436

⁸⁵⁵ For the statistical elements see Abraham ([1981]1986) 242

⁸⁵⁶ See Winkler ([2000] 2006) 434

⁸⁵⁷ Winkler (1990) 206

Hindenburg's decision to use his presidential power and to impose the minority Brüning government without a prior discussion with the Reichstag parties (28 March 1930) and with the biggest parliamentary fraction (the SPD)⁸⁵⁸. However, the Reichstag legitimized indirectly the new government by rejecting the motion of no-confidence by the SPD and the KPD given that the DNVP- despite its disagreement with governmental policies- had decided not to cooperate with the anti-governmental powers⁸⁵⁹.

This does not change the fact that there was a problematic interpretation of articles 53 and 54 in the sense that these articles gave the power to the President to choose the chancellor but they also imposed the necessity of parliamentary confidence (see chapter 3.0). Here, the parliamentary confidence did not exist at the time of the government's appointment by the President but followed merely in an indirect way through the rejection of the motion of no-confidence. However, it should be also written here that, according to the prevailing practice in Weimar, the government was not legally obliged to ask for a vote of confidence since it was deemed to have it *a priori*. Only 3 governments received a positive vote of confidence out of the 18 governments that were appointed since the adoption of the Weimar Constitution in August 1919⁸⁶⁰. It was only the visible loss of the confidence (through a vote of no confidence) that could be conceived as the loss of parliamentary confidence⁸⁶¹.

Continuing with the historical framework, the *second* significant step in this historical process can be seen in the Brüning decrees of July 1930. This marks the *first stage* of the transition to the openly presidential state. Analyzing gradually this context, Brüning tried to pass a budget bill, which comprised a series of draft laws. Only one of these laws was ultimately put into vote in the Reichstag and it was outvoted (16 July). It concerned a poll tax to the civil servants and an additional tax (5%) to the incomes above 8.000 marks⁸⁶².

While the government withdrew the rest of this bill, it passed at the same day certain measures of this bill through article 48 with two emergency decrees⁸⁶³. However, after the SPD (and the KPD) declared a motion for the revocation of these decrees, the Reichstag

⁸⁵⁸ Cristi (1998) 180

⁸⁵⁹ Kessopoulos (2016) 61

⁸⁶⁰ Ibid. 38-41

⁸⁶¹ Ibid.

⁸⁶² Ibid. 62

⁸⁶³ Winkler ([2000] 2006) 435-436. Caldwell (1997) 162

voted for their revocation (18 July). The Reichstag was, then, dissolved by Hindenburg and elections were declared.

Similar measures with those rejected by the Reichstag passed in the interim (26 July) through a presidential “*emergency measure to remedy financial, economic and social crises*” based on article 48⁸⁶⁴. There is an evident unconstitutional dimension here. As Rudolf Breitscheid, the SPD floor leader, argued when speaking for the SPD immediately after the emergency decrees of 16 July, the purpose of article 48 was “*to help the state and to protect the state when need arises, not to help a particular government out of its predicament when it cannot find the majority it is looking for*”⁸⁶⁵. It was, nevertheless, precisely what was happening since July 1930.

Crucially, two days later (28 July 1930), Carl Schmitt drafted an advisory opinion in which he justified the emergency decrees through a recourse to the second paragraph of article 48. He argued that they were “*regulations with statutory import*” (*gesetzvertretende Verordnungen*), namely he deemed them as “laws” and not “measures”⁸⁶⁶. In this way, he abandoned clearly his earlier theory (seen in “On Dictatorship” and in Jena speech), according to which decrees are not laws. More than this, he supported publicly with his writings during this period the governmental practice of the invocation of a “financial emergency” (due to the composition of the Reichstag)⁸⁶⁷ and he was conceived as an “*apologist of the government*”⁸⁶⁸.

It should be written here, as an aside, that the governing by decrees was deployed after a long period in the sense that between 29 January 1925 and 16 July 1930 article 48 was used only for the revocation of decrees that had been issued by Ebert⁸⁶⁹.

⁸⁶⁴ Winkler ([2000] 2006) 436

⁸⁶⁵ Ibid. 435-436

⁸⁶⁶ Schmitt, Carl (28 July 1930), “Verfassungsrechtliches Gutachten über die Frage, ob der Reichspräsident befugt ist, auf grund der Art.48 Abs.2 WRV finanzgesetzvertretende Verordnungen zu erlassen” in Paulson (2014) 25-26

⁸⁶⁷ In Mehring ([2009]2014) 195 from Carl Schmitt “*Die Einberufung des vertagten Reichstags*” (The recall of the adjourned Reichstag), Kolnische Volkszeitung, no.542 (23 October 1930); ‘*Einberufung und Vertagung des Reichstags nach Art. 24 Reichsverfassung*’ (Recall and adjournment of the Reichstag according to Art.24 of the Weimar Constitution), Deutsche Juristische Zeitung 35 (1930), col. 1285-9.

⁸⁶⁸ Seiberth (2001) 88

⁸⁶⁹ Rossiter (1948) 50

Going back to the historical framework, after the elections of 14 September 1930, there was a huge rise of the NSDAP and a smaller one of the KPD⁸⁷⁰. The SPD was in a great dilemma about its political stance and it was at that time that it ultimately chose the toleration policy. Although this line brought the party into a grave internal crisis, there were three main reasons for this “toleration” line.

Firstly, the 107 Nazi deputies and the 77 Communist deputies (following the line of social-fascism and avoiding cooperation with the SPD) made it difficult for the Reichstag to function and, due to this fact, any other option would lead to a more right-wing government that would depend on the power of the Nazis and would, therefore, endanger further the democratic regime⁸⁷¹.

This also leads us to the *second* main reason for this “toleration” line. This is that if the SPD opposed the Brüning government, this would endanger the SPD-led coalition government in Prussia (in which the party of Brüning, the *Zentrum*, participated) and the Prussian state was the most important institutional mechanism for the preservation of democracy⁸⁷².

The *third* reason was the substantive consent between the Brüning government and the Social Democrats, which was based on the agreement that the consequences of the post-1924 “debt economy” could be faced with an efficient austerity policy. There were disagreements regarding the social groups that would be more “hit” from the austerity but these constant differentiations did not cancel the consensus for “reforms”⁸⁷³.

I would also add a *fourth* reason at a more general level. This is the whole evolutionary-reformist stance of the SPD during Weimar. Hence, the Social Democrats did not grasp that the attack on the welfare state was essentially related to an attack on parliamentary-political democracy and that their toleration would make them part of the crisis of representation (see also chapter 4.3).

⁸⁷⁰The results in these elections (14 September 1930) were the following:

SPD 24,8%, NSDAP 18,5%, KPD 13,3%, Zentrum 11,8%, DNVP 7,1%, DVP 5,2%, German State Party (former DDP) 3,5%, Bavarian People's Party (BVP) 3,3%, Others 12,5%.

⁸⁷¹ Winkler ([2000] 2006) 441. Winkler (1990) 205-227, 210.

⁸⁷² Winkler ([2000] 2006) 441

⁸⁷³ Ibid.

Because of the SPD's "*lesser evil*" strategy a significant amount of austerity measures were introduced based on article 48 and concerned the entire range of policies (finances, taxes, customs, justice, commerce)⁸⁷⁴. Indicatively, the Reichstag sat only six times during this overall period of more than twenty months (until its dissolution in June 1932). Between 27 March 1931 and 8 May 1932 the Reichstag sat only twice (three days each session), merely in order to provide confidence to the government⁸⁷⁵. This worked ultimately in favor of the anti-parliamentary powers. As Rudolf Hilferding remarked in July 1931: "*The Reichstag is a parliament against parliamentary rule, its existence is a threat to democracy, to the working classes, to foreign policy...*"⁸⁷⁶.

The *second stage* in this openly presidential state (reminding that the first stage began in July 1930) is the transition from this more "moderate" presidential regime to an openly anti-parliamentarian stage of the presidential regime. We could see it arising since the appointment of von Papen's government (1 June 1932)⁸⁷⁷. This government was composed of right-wing aristocrats that none of them was member of the Reichstag⁸⁷⁸. It is significant that this appointment by the President Hindenburg took place while the government did not have the parliamentary majority. On June 4, Hindenburg dissolved the Reichstag so that the new government would not be "hurt" by a vote of no-confidence. So, we can see here the instrumental combination of articles 48, 25, 53 and 54, which were interpreted much closer to the categories of constitutional monarchy⁸⁷⁹.

What had preceded, nevertheless, von Papen's appointment was a twofold electoral process that revealed the huge crisis of political representation that was going on in a country that had around 6 million unemployed people at that time. The two electoral processes, which

⁸⁷⁴The proliferation of this methodology since 1930 is visible given that, as Kolb points out, "*the Reichstag sat on 94 days in 1930 ...42 in 1931 and only 13 in 1932. 98 laws were passed in 1930; 34 in 1931, only 5 in 1932. On the other hand the number of emergency decrees rose from 5 in 1930 to 44 in 1931 and 66 in 1932*".

In Dyzenhaus (1997) 24

See also Rossiter (1948) 50-60

⁸⁷⁵ Rossiter (1948) 52

⁸⁷⁶ Winkler ([2000]2006) 444

⁸⁷⁷ Ibid. 454

⁸⁷⁸ Ibid. 455

⁸⁷⁹ Kessopoulos (2016) 129

showed the weakening of the pro-republican forces and the huge rise of the NSDAP, were the presidential elections and the regional elections in five states. Regarding the former, Hitler acquired the 36,8% percent of the votes in the second round against Hindenburg (now supported by the SPD as well), which took place on April 10, 1932⁸⁸⁰. Regarding the latter (24 April 1932), the NSDAP was the first party in all the *Landtags* (in Prussia among others) except for Bavaria⁸⁸¹.

In the aftermath of these presidential elections (at least), the strategic orientation of Schleicher was an anti-parliamentary government that would not need even the toleration of the SPD but would aim at gaining the toleration of the Nazis (in the prospect of a more right-wing Cabinet)⁸⁸². The first step of this strategy, at the political level, was the agreement of Schleicher with Hitler (at a meeting in May 1932) about the removal of Chancellor Brüning, the lifting of the ban on the Nazi paramilitary organizations and the call for new elections⁸⁸³. All these conditions were fulfilled since Schleicher convinced president Hindenburg to abandon Brüning and to appoint the Catholic aristocrat and Center party defector von Papen.

A reason for Brüning's dismissal was that he did not manage to win something in the Geneva (disarmament) conference but, *mainly*, that he tried to ease slightly austerity and to enforce a policy of distributing heavily indebted land to unemployed workers either by private contract or in a compulsory way⁸⁸⁴. However, the Junkers reacted against this "Bolshevism", while a lot of peasants had already voted for the NSDAP given also that the overall policies during the crisis benefited mainly the bigger landowners⁸⁸⁵. Moreover, by the end of 1931 the export-oriented industry, which had cooperated with labor during 1925-1930 and that supported Brüning, was losing its power given the decline of international trade and the various bank crashes⁸⁸⁶. This meant a shift in the RDI towards the heavy industry fraction, which was more hostile against Brüning because he continued to be not so harsh against labor and he promoted more the interests of the export-oriented

⁸⁸⁰ Winkler (1990) 212-213

⁸⁸¹ Winkler ([2000] 2006) 449-450

⁸⁸² Ibid. 451

⁸⁸³ Balakrishnan (2000) 154

Winkler ([2000] 2006) 451-452

⁸⁸⁴ Winkler ([2000] (2006) 452

⁸⁸⁵ Abraham ([1981]1986) 94-97, 101, 282

⁸⁸⁶ Ibid. 159

industry (according to them)⁸⁸⁷.

So, Brüning was delegitimized both from “below” and from “above”, which was evident in the aforementioned electoral processes. The reasons can be also traced to his December 1931 emergency decree. With this decree, he reduced further the wages to their 1927 levels (regardless of the existing collective agreements) and he reduced also cartel prices by 10%⁸⁸⁸. This “infuriated” both the industrialists and the workers despite that the burden for the workers proved to be heavier given that “*the price-to wage ratio began rising again in late 1931*”⁸⁸⁹. Moreover, unemployment was rapidly rising due to the deflationary policies.

On top of this, the crisis of market economy was dealt by the state through the socialization of costs via *decrees*. Such a case was Brüning’s decision in the summer of 1931 to “save” with the state revenues (by quasi-nationalizing) two private banks: the bankrupt Darmstädter und National Bank (Danat) and the almost bankrupt Dresdner Bank⁸⁹⁰. It ensured also the deposits in these banks.

That was due to the fact that an inaction would cause a further loss of “confidence” in the German banking system and capital flight⁸⁹¹. So, this state intervention through decrees had two sides. On the one hand, it showed evidently the socialization of private costs while there was a cut on the welfare state at the same time. On the other hand, it revealed the potential effects of the loss of confidence in the German market economy, on which the whole economy and the state ultimately depended.

This clear public assumption of private risks was seen in various cases⁸⁹² and it culminated with the decrees of von Papen’s government in September 1932 that included wage cuts, tax-coupon credits to the capital and state bounty of 400 RM for every new worker employed every year⁸⁹³. As Abraham writes, “*besides the persistent efforts of the agrarians to ‘socialize’ agriculture’s losses, shipbuilders, railway-equipment,*

⁸⁸⁷ Ibid.

⁸⁸⁸ Ibid. 267. See also Braunthal (1978) 61

⁸⁸⁹ Abraham ([1981]1986) 267

⁸⁹⁰ Kessopoulos (2016) 79. See also Winkler ([2000] 2006) 444

⁸⁹¹ Kessopoulos (2016) 78-79

⁸⁹² For various examples see Abraham ([1981] 1986) 254

⁸⁹³ Ibid. 167

manufacturers, and automobile companies, among others, all succeeded in obtaining Reich and local grants, loans, and guarantees in the period after 1925 and especially after 1929”⁸⁹⁴.

Overall, Brüning's policy was summarized well by Abraham: introducing through decrees higher worker contributions to the insurance funds, higher indirect consumption taxes, lowering the benefits both in terms of duration and the amount, lowering wages and taxes on capital, introducing a shorter work week and lower civil-service salaries, state spending, housing subsidies, and cartel prices, and acting in the direction of revising reparations by “*encouraging German exports*”⁸⁹⁵.

Regarding von Papen’s government, he came in June 1932 as a blatant representative of heavy industry and of the big landowners in favor of an anti-parliamentary and anti-labor logic. This is evident by the aforementioned decree in September 1932 that actually funded the entrepreneurs for hiring workers and, more than this, “*allowed for payment of wages at below contract rates for new employees and ‘in case of need’*” (rescinded by Schleicher later)⁸⁹⁶.

However, von Papen’s ultimate problem was, on the one hand, that he went contrary to the export-oriented industry interests and, more crucially, that he did not have a popular base to support his plans given also the weakening of the bourgeois parties⁸⁹⁷ (they held around 10%) and their fragmentation. This is also the time that the NSDAP started acquiring the support of various fractions of capital in the prospect of its participation in the government (since early 1932). Until that point it had only few representatives of heavy industry that openly supported this prospect. This support augmented hugely in the autumn of 1932 notwithstanding that the Nazis’ “*demagogic populism*” remained a concern for the industrialists in the second half of 1932⁸⁹⁸ (see below about the Langnamverein meeting).

A *crucial* moment also in this second stage of the presidential system was the Prussian

⁸⁹⁴ Ibid.

⁸⁹⁵ Ibid. 266

⁸⁹⁶ Ibid. 268

⁸⁹⁷ Ibid. 290

⁸⁹⁸ Ibid. 311

coup, namely the takeover of the SPD-led coalition (care-taker) government in July 1932. Regarding the official way that this removal of the Prussian government took place, it was through a decree based on article 48 that was issued by President Hindenburg and declared that Chancellor von Papen would be the commissioner for Prussia due to the “...*alleged inability and unwillingness of Prussian’s government...to deal with the state of political unrest and violence in Prussia*”⁸⁹⁹. So, the official justification was the restoration of public security and order. Moreover, there was also the argumentation that it was the SPD-led government in Prussia that it could not ensure the order and that it was intending “*to conspire with the communists to act against the Nazis*”⁹⁰⁰.

Regarding this official narrative, it is true that the “*persistent*” conflict⁹⁰¹ during the stability period (1924-1929) - in a Republic that was marked by the militarization of political conflict from its birth given also that every party had its own “*auxiliaries*”⁹⁰² - had turned after the Depression and the rise of the NSDAP into a catastrophic conflict in the neighborhoods. The SA had an ever-growing power that “*rivaled the power of the Reichswehr (100.000)*” by the end of 1929, and the membership of the NSDAP had risen from 108.000 to almost 1,5 million between 1928-1932⁹⁰³. Moreover, it is also true that there was an atmosphere of civil-war in the summer of 1932 in Berlin.

However, this significant explosion of political violence in Prussia at that time was also associated with the lifting of the ban on the Nazi paramilitary organizations on June 14, 1932 (it remained on the communist ones) by the newly-appointed Minister of Defense Kurt von Schleicher. The lifting of this ban, the subsequent political handling of the escalation of violence through the *coup* and the attribution of responsibility in the SPD-led Prussian government⁹⁰⁴ should be conceived as steps of an overall strategy, which was already driven by Schleicher after the outcome of the second round of the 1932

⁸⁹⁹ Dyzenhaus, David (March 1997). ‘Legal Theory in the Collapse of Weimar: Contemporary Lessons?’, *The American Political Science Review*, 91(1), 121-134, 121

⁹⁰⁰ Ibid. 122, 123

⁹⁰¹ Rosenhaft (1983) 3

⁹⁰² Ibid. 1-4

⁹⁰³ Bracher (1971) 167, 233

⁹⁰⁴ The excuse that gave the chance to von Papen’s government to accuse the SPD and to impose the *coup* was the “bloody Sunday of Altona” (*Altonaer Blutsonntag*) that took place in this communist-dominated suburb of Hamburg (17 July 1932). See Winkler ([2000] 2006) 456-457

presidential elections (at least) and was also adopted by von Papen. This strategy was to get rid of parliamentary politics in general and of the SPD in particular (now in Prussia) in order to impose an authoritarian presidential regime that would gain the confidence of the Nazis⁹⁰⁵. As Bracher argues, it was the “*last ditch attempt [by von Papen] to strengthen the political base of his hopelessly isolated regime by a display of authoritarian self-confidence which he hoped would be greeted with admiration, applause or wholesome fear, and thus be instrumental in winning the respect and support of National Socialist circles*”⁹⁰⁶.

This coup was crucial for the future of the Weimar Republic because the Prussian government- despite that it was weakened after the regional elections and had a care-taker role⁹⁰⁷- was the “*most important base of institutional resistance to Nazi march of power*” in Dyzenhaus’ words⁹⁰⁸. That’s also because Prussia was comprising over 66 percent of the territory, 60 percent of the population and had a police force equivalent in size to the army of the Reich⁹⁰⁹.

Regarding the reaction of the care-taker Prussian government and of the SPD against this coup, it consisted in a “*hasty and peaceful capitulation*” that “*astonished even Papen himself*” in Bracher’s words. A statement was just made against the “Cabinet of Barons”

⁹⁰⁵As Dyzenhaus describes this strategy, “*they would then be able to crush the communists and simultaneously tame Hitler by drawing him within the control of an increasingly authoritarian cabinet. The strategy would be complete once Hitler was neutralized and the cabinet, having eliminated all internal opposition and obstacles (including the Reichstag) ruled Germany by decree*”.

Dyzenhaus (March 1997) 121-134, 123

⁹⁰⁶ Bracher (1971) 175

⁹⁰⁷The coalition in Prussia was comprised by the SPD, the Zentrum and the left-liberal Deutsche Staatspartei (the old DDP). However, in the Landtag elections of 24 April 1932 there was a rise of the Nazis, which controlled around 200 seats along with the German Nationalists, whereas the coalition between the SPD and the Centre party held 160 seats and the Communists 57.

The existing governing coalition had, nevertheless, changed the electoral law twelve days before the elections because it was expecting the rise of the Nazis and introduced the requirement of absolute parliamentary majority in order to have a change of the government. So, given the inability of forming a new government after the elections of April 1932, the old coalition government continued to operate as a caretaker government.

Dyzenhaus (1997) 30-31

Dyzenhaus (March 1997) 121-134, 124

⁹⁰⁸ Dyzenhaus (March 1997) 121-134, 122

⁹⁰⁹ Thornhill & Seitzer (2008) 1-50, 22

(writing that this Cabinet would be held accountable in the elections of 31 July 1932) and the constitutional validity of the decree was challenged before the Court (*Staatsgerichtshof*)⁹¹⁰.

The reason for the no-resistance decision was the commitment of the Social Democrats to the road of “legality”⁹¹¹ but *mainly* the estimation both of the SPD and of the ADGB that an active resistance in the form of a strike would be defeated in a civil war given their (already) weakened political powers and the great fragmentation of the working class due to the huge unemployment⁹¹². So, they feared that in a civil war, the Prussian police and the “democratic” paramilitary powers (*Reichsbanner*, *Iron Front*) would be weaker compared with the *Reichswehr* and the paramilitary far-right and Nazi organizations (*SA*, *SS*, *Stalhelm*), taking as well into consideration the lack of a united front between the communists and the Social Democrats⁹¹³.

So, on the one hand, there was a separatist stance by the KPD and, on the other hand, a “defeatist” strategy of Social Democracy and of the ADGB that aimed continuously to avoid the worst, namely the civil war, in an already weakened democracy. Regarding the latter, this can be seen also practically in the rejection of the KPD’s proposal for a general protest strike in the aftermath of the coup and in the declaration of the head of the ADGB (Legien) that what had to be done now was to ensure that “*the Reichstag elections scheduled for 31 July take place in a calm atmosphere*”⁹¹⁴. As an aside, this stance of the ADGB (that is also related to its economistic-reformist logic, see chapter 4.3.) could be also seen later by the fact it never called for a strike after Hitler’s seizure of power despite the pressure both from the KPD and by militant union cadres⁹¹⁵.

This overall picture showed an enfeebled democracy. This was also revealed in the

⁹¹⁰ Bracher (1971) 176

⁹¹¹ Dyzenhaus (March 1997) 121-134, 124

⁹¹² Winkler ([2000] 2006) 456-458

⁹¹³ Winkler ([2000] 2006) 457

Braunthal (1978) 67

⁹¹⁴ In Fowkes (2014) 112-113.

Winkler argues, nevertheless, that the KPD’s proposal was only a “*rhetorical question*”. Ibid. 457

⁹¹⁵ Braunthal (1978) 75-82

elections of 31 July given that the result showed the further weakening of the pro-republican forces⁹¹⁶. Moreover, this picture can be also seen in the decision of the Staatsgerichtshof (25 October) regarding the Prussian coup. This decision was Solomonic and would not be able to “save” the Weimar Constitution and the Republic as Kelsen wrote⁹¹⁷. Whereas it recognized Prussia’s constitutionally independent status, at the same time it gave to the Reich government the permission to intervene in the internal affairs of Prussia for the restoration of public order and security according to the discretion of the President⁹¹⁸.

We can agree, therefore, with Bracher’s conclusion that the no-resistance decision was ultimately “...*a sign of the rapidly dwindling strength of the forces of democracy and of the imminence of their defeat at the hands of authoritarianism and subsequently of totalitarianism...however one feels about the effectiveness of political strikes, this first 20th of July certainly encouraged the more ambitious plans of the National Socialists and the later policies of the Third Reich*”⁹¹⁹.

This conclusion of Bracher seems congruent with the bigger picture of this historical context, which is that there was a series of “no-return” points for the Republic in this process of authoritarian restructuring of the state by the elites among which the Prussian *coup* constituted an important step in an already weakened democracy. On the contrary, as we could see, what was never an option during this crisis was the parliamentary alternative⁹²⁰ (see also below about Schleicher’s effort). This fact played a role in this general crisis of representation.

5.5.2. Between dictatorship and Nazi’s ascent to power: Schmitt the advisor

⁹¹⁶The results of the general election were the following: NSDAP 37,4%, SPD 21,6%, KPD 14,3%, Zentrum 12,5%, DNVP 5,9%, Deutsche Staatspartei 1%, NVP 1,2%, Bayerische Volkspartei (BVP) 3,2 %.

⁹¹⁷Dyzenhaus (March 1997) 128

⁹¹⁸ Dyzenhaus (March 1997) 121-134, 124

⁹¹⁹ Bracher (1971) 176

⁹²⁰ Ibid.

The historical account, which depicts the aforementioned “no-return” points, shows the ever-growing crisis of representation in this restructuring process and that the political and ideological environment circumscribed the available potential ways out of the crisis. This is revealed in Winkler’s argument that “*the final alternative to a Hitler government would have been a more or less disguised military dictatorship...by 1932/1933 a return to parliamentary democracy was no longer an option: the majority of voters had decided against Weimar*”⁹²¹. Although Winkler slightly “smoothened” his argumentation in his book “The Long Road West”, the alternatives that were discussed during these times were very limited.

These alternatives, from the perspective of governing elites, were discussed often with the active participation of Carl Schmitt as an advisor. After the Prussian coup, Schmitt was the “Crown Jurist” of the regime⁹²². An anti-constitutional alternative, which was about to be enforced (at least) three times since late August 1932, was the declaration of a state of emergency along with the indefinite postponing of the elections⁹²³. This was actually what, according to Huber’s testimony (Schmitt’s student and colleague), was suggested by Carl Schmitt regarding the first time that this plan was about to be enforced in late August 1932⁹²⁴. However, this plan was never enforced given that, prior to its declaration and the

⁹²¹ Winkler (1990) 205-227, 215

⁹²² Mehring ([2009] 2014) 263

⁹²³ This plan was proposed for the *first time* during late August and was initially agreed at Hindenburg’s East Prussian estate (Neudeck) after von Papen and Wilhelm von Gayl (the Minister of Interior) convinced Hindenburg for its implementation. Hindenburg signed the dissolution of the Reichstag on August 30, 1932 with a blanket authorization, namely without mentioning a concrete date of elections. However this plan was never enforced (see in the main text about the reasons).

The *second attempt* took place after the November elections by Hindenburg himself after his talk with Hitler “convinced” him that there was no other option. However, he changed his mind after Schleicher (the Minister of Defence) warned the government that the Reichswehr would fight on two fronts at the same time in case of such an emergency plan: against the Nazi-affiliated paramilitary organization and against the communist ones. As a result, it would lose.

The *third* one was suggested on January 16, 1933 by the last chancellor (Schleicher) and was rejected by Hindenburg.

Winkler ([2000] 2006) 464, 469-489

⁹²⁴ As Mehring describes the details of this process, Schmitt “*summoned Huber and sent him to Berlin*” in order to meet in late August of 1932 three high-ranking officers (Ott, Böhme, Carlowitz) and “*agree with them the legal-technical formulation of presidential emergency decrees and the wording of a justificatory appeal to the nation*” - while Schmitt was in Plettenberg.
Mehring ([2009] 2014) 261-262.

subsequent dissolution of the Reichstag, the Reichstag immediately proceeded to a vote on a motion of no confidence with a humiliating result for the government because the Reichstag wanted to avoid its dissolution⁹²⁵ (12 September 1932). So, the government changed its mind and elections were scheduled on November, 6, 1932.

Although some months later Schmitt seemed to have considered this plan as already “hopeless” (6 November 1932)⁹²⁶, Schmitt and Huber had suggested in August 1932 that the elections could be postponed indefinitely since there was a “*genuine state of emergency*”⁹²⁷ due to the “*necessity of pacifying radical paramilitary forces and the overall condition of the nation*”⁹²⁸.

This was justified on the grounds that both article 48 and the presidential oath to defend the Constitution trumped article 25 of the Constitution: “*the substance of the constitution could only be defended if its electoral provision was sacrificed*”⁹²⁹. Moreover, this plan also concerned the possible prohibition of political parties and the centralization of police powers⁹³⁰.

Although Schmitt denies in the post-war period his involvement in any emergency scenario⁹³¹, the President of the Zentrum Kaas publicly accused Schmitt as “lying” behind this plan at the theoretical level. This is brought to light in the open letter that Kaas sent to the Chancellor Schleicher on January 26, 1933 in which he argued against the possibility of the unconstitutional indefinite postponing of elections and warned him against the “*basic tendency that Carl Schmitt and his followers have toward the relativization of the entire public law*”⁹³².

However, Kaas probably refers here to the “milder” emergency scenario (compared with the August one) that was suggested by Schmitt and was added as an excursus at the crucial

See also Kennedy (2004) 166

⁹²⁵ See Mehring ([2009] 2014) 262

⁹²⁶ In Kennedy (2004) 167

⁹²⁷ In Ibid. 166. See also Mehring ([2009] 2014), 261-262

⁹²⁸ Kennedy (2004) 166

⁹²⁹ In Ibid.

⁹³⁰ Mehring [2009] (2014) 262

⁹³¹ Schmitt ([1958] 2004) 100

⁹³² In Ibid.

Cabinet meeting of 16 January 1933 under Schleicher's chancellorship after the latter's "*Querfront*" plan had failed.

Before presenting Schmitt's advice, it is crucial to make a short digression to the presentation of the "*Querfront*" plan given that this was a plan through which Schleicher convinced Hindenburg to "give" him the chancellorship (on December 3, 1932) after the "negative majority" of the November elections⁹³³ and after he had convinced Hindenburg also about the dangerousness of the dictatorship.

Schleicher's *Querfront* plan aimed to win the "toleration" of the Reichstag based on a national "revolutionary" front (*Querfront*) extending from the left-wing of National Socialists under Strasser, to the Catholic parties, and to the Social Democrats and its unions behind an avant-la-lettre Keynesian program of public work projects. This plan would aim at reducing unemployment and would be also more "friendly" to labor (e.g. rescind of Papen emergency cuts of September 1932). However, this plan failed due to the lack of an independent social and political base.

Firstly, at the political level, the plan for the split of the NSDAP was not successful⁹³⁴. Moreover, at the social level, Schleicher's *Querfront* was opposed by the fractions of industry and agriculture. They "feared" that this would drive things back to parliamentarism, which they opposed by declaring that "*organized labor and political democracy were the culprits*"⁹³⁵. It was, *crucially*, this *political fear* of a return to parliamentarism and to the social-democratic reformism that also led to a more active endorsement of the NSDAP by industrialists in the autumn of 1932⁹³⁶. This is seen particularly in the Langnamverein convention of November 1932, which was the convention of heavy industry. It is indicative that this convention, whereas it was organized initially so as to show its support for von Papen and his program, it ended up by expressing "*...overwhelming support for the appointment of Hitler*"⁹³⁷. So, the NSDAP had already started to unify not only the various social strata that had abandoned the traditional

⁹³³ The results in these elections of 6 November 1932 were the following: NSDAP 33,1%, SPD 20,4%, KPD 16,9%, Zentrum 11,9%, DNVP 8,9%, BVP 3,1%, DVP 1,9%, Others 1%),

Winkler ([2000] 2006) 468

⁹³⁴ For details see Winkler ([2000] 2006) 476

⁹³⁵ Abraham ([1981]1986) 169

⁹³⁶ Ibid. 312

⁹³⁷ Ibid.

bourgeois parties⁹³⁸ (see also above about the Mittlestand and small peasants) but also the dominant social classes.

Secondly, despite that the President of the ADGB Theodor Leipart affirmed his agreement for a “ceasefire” in case Schleicher was appointed as a chancellor after the latter’s promise that he would revoke Papen’s September decree and that he would initiate an employment policy⁹³⁹, the SPD had now changed its mind from the toleration policy that kept during Brüning’s regime. This change of the SPD has to do with Schleicher’s overall machinations since the earlier times⁹⁴⁰.

After this digression and going back to the alternative emergency proposal after Schleicher’s “Querfront” plan had failed in December 1932, it should be reminded that this alternative proposal aimed at preventing Schleicher’s plan for a formal declaration of a state of emergency (namely the indefinite postponing of the elections and the dissolution of the Reichstag). The origin of the alternative emergency proposal, which was presented at the Cabinet meeting of 16 January 1933, is not entirely clear. It seems to have been drafted either by Horst Michael under Schmitt’s direct influence during mid-1932⁹⁴¹ or by Schmitt himself and sent indirectly through Michael and Bracht in Schmitt’s effort to gain direct influence during Schleicher’s chancellorship⁹⁴². This paper tried to answer to the question: *“how can an effective presidential government be protected from an incompetent and obstructionism Reichstag, with the goal of defending the Constitution”*⁹⁴³?

According to Mehring, Schmitt tried in this paper to advise Schleicher not to proceed to a formal declaration of emergency but in a *“juridically less controversial way of proceeding- i.e. non-acceptance of a vote of no confidence and confirmation of his government by the*

⁹³⁸ Ibid. 314

⁹³⁹ About the willing of the ADGB to cooperate during these times (some chiefs were even prepared to meet with Nazi officials in the context of Schleicher’s proposal) and the frictions with the SPD see Braunthal (1978) 71-74

See also Winkler [2000] (2006) 474

⁹⁴⁰ According to Winkler, the stance of the SPD and of the Zentrum at the end of January 1933 was as if they conceived Schleicher as a bigger threat than Hitler. Winkler ([2000]2006) 484

See also Braunthal (1978) 73-74

⁹⁴¹ Kennedy (2004) 168

⁹⁴² Mehring ([2009] 2014) 270

⁹⁴³ Kennedy (2004) 168

Reichspräsident”⁹⁴⁴. This would seem less a breach of the constitution than Schleicher’s state of emergency as Schmitt argued⁹⁴⁵.

We can see also that this was not very far from Schmitt’s theoretical proposal in “Constitutional Theory”, according to which the interpretation of article 54 of the Constitution demanded that a government should resign only “*if there is an express, so-called ‘positive’ parliamentary vote of no-confidence*” under this “*partisan composition of the parliament*”⁹⁴⁶. This should be seen in the light of his critique to Weimar parliamentarism (see 5.4).

However, Schleicher ignored Schmitt’s suggestion and proposed the formal declaration of emergency, which failed to convince Hindenburg after the democratic parties “*voiced their opposition*” (e.g. the Zentrum)⁹⁴⁷. The other option, which was not discussed seriously even as an alternative option at the political level but could also be deduced at a theoretical level from Schmitt’s “Legality and Legitimacy” (see the next section), was an emergency ban on the “extremist parties” (NSDAP, KPD). Schmitt’s explicit wording in this work was that the President should deny handing the government to parties that would use legal means to close the “*door of legality*” and would, therefore, violate the principle of “*equal chance*”⁹⁴⁸. This was based on a “substantive” concept of legality (as opposed to a “functionalist” one)⁹⁴⁹.

After the rejection of these options, the very old Hindenburg handed the chancellorship to Hitler on January, 30 1933. That was, among others, due to the fear of “civil strife”⁹⁵⁰ and of his indictment⁹⁵¹ (in case a state of emergency was enforced) along with the pressure from various political⁹⁵², powerful economic actors (see also above) and personal

⁹⁴⁴ Mehring ([2009] 2014) 270-271

⁹⁴⁵ Ibid. 271

⁹⁴⁶ Schmitt ([1928] 2008) 364-366

⁹⁴⁷ Kennedy (2004) 168

⁹⁴⁸ Schmitt, Carl ([1932] 2004). *Legally and Legitimacy*, Durham: Duke University Press, 30-31.

⁹⁴⁹ Schmitt ([1958] 2004) 95-101, 100

⁹⁵⁰ Winkler ([2000] 2006) 475

⁹⁵¹ Mehring ([2009] 2014) 271

⁹⁵² In the open letter to the Chancellor Schleicher on January 26, 1933, the Prelate Kaas argued for a government resulting from “*workable governmental combinations*”, namely the appointment of Hitler.

reasons⁹⁵³. It was also the naïve thought that Hitler could be neutralized by the predominance of conservative ministers in the Cabinet⁹⁵⁴.

This made as well a contrast with the context of August 1932, when Hindenburg had rejected rapidly Schleicher's and von Papen's proposal for a coalition government with Hitler as a chancellor⁹⁵⁵. Hence, Winkler argued that Hindenburg's decision was neither an "*inevitable result*" nor an "*accidental*"⁹⁵⁶ option.

Whereas the not "inevitable result" was seen in the previous paragraph, the "not accidental" option has to do with the (already presented) crisis of representation. This conclusion goes evidently against the conservative conclusion *that "constitutional democracy was defenseless and gave itself up"*⁹⁵⁷. As Caldwell critically adds, this "*hypostatizes what was an unstable entity and not a coherent subject...that historiography obscures the way one conception of constitutional democracy, associated with Carl Schmitt and Chancellor von Papen, undermined other aspects of the Weimar Constitution, and thus laid the groundwork for the Nazi takeover*"⁹⁵⁸.

Writing along similar conservative lines in his post-war analysis about the fall of the Weimar Republic, Carl Schmitt put the blame for the Nazi seizure of power on the adherence to – what he called- a "functionalist" and "value neutralized" conception of the

⁹⁵³ The personal reason was the revelation of the *Osthilfeskandal* (Eastern aid scandal), namely the scandal about the misappropriation of the financial support from public funds to heavily indebted estates in East Prussia, which was destined to the reprofiling of their debts.

The scandal was that these funds had been wasted by the Junkers in luxury cars, horses and vacations in Riviera. These investigations, which were perpetrated by the budget committee, implicated some of Hindenburg's close friends and fellow landowners. They also implicated Hindenburg himself because it was revealed that the Hindenburg estate in East Prussia at Neudeck had been bought and donated as a gift to him by German industrialists in 1927 and that it had been officially registered in his son's name in order to eschew death-duties.

Since these investigations were continued by the budget committee of the Reichstag, Hindenburg felt that Schleicher did not protect him and, more than that, Hindenburg's friends were also pushing for the fall of Schleicher and the handing of chancellorship to Hitler.

Winkler ([2000] (2006) 485-489

⁹⁵⁴ Ibid. 489

⁹⁵⁵ Ibid. 461

⁹⁵⁶ Ibid. 489

⁹⁵⁷ Caldwell (1997) 11

⁹⁵⁸ Ibid. 11-12

Weimar Constitution⁹⁵⁹. To put it briefly, Schmitt argued that the political system remained within the formalist parliamentary legality and that's why it gave the power to Hitler. On the contrary, according to Schmitt's post-war argumentation, there were still inexhaustible "*legal possibilities*" of the Weimar Constitution, one of which was the dissolution of the Reichstag joined with a (third) call for elections⁹⁶⁰.

Regardless of the fact that such a proposal cannot be traced during Schmitt's Weimar writings, I think that- despite that the handing of power to Hitler was not inevitable⁹⁶¹, the hyperbolic emphasis on the very last period and on the final decision loses the picture of the overall crisis of representation. That's because it obscures the picture of the "origins" of this weakening of the Weimar Republic especially during the period between 1930-1932, which was the time that the crisis of representation was created. This picture can be revealed only through the analysis of this whole period (the two "no-return" phases of the crisis etc.). However, this analysis is concealed by Schmitt.

Secondly, among those "responsible"- from the perspective of constitutional theory- for Weimar's fall Schmitt's constitutional theory figures in a prevalent position given that he legitimized the authoritarian restructuring of the state through the invocation of a "financial state of exception" (see above) and his political practice. The role of the President in overstepping the Reichstag was crucial in the inability of "political democracy" to resist the power of capital, which wanted to overcome the crisis on its own terms.

In this sense, although Schmitt's post-war narrative is not entirely "accurate" regarding his stance, it seems to be mostly consistent with his political "practice" in Weimar. That's because he conceived the origins of the crisis in "formal" constitutional democracy but without being pro the Nazis⁹⁶².

⁹⁵⁹ Schmitt ([1958] 2004) 93

⁹⁶⁰ Ibid.

⁹⁶¹ Winkler discusses some possible alternatives (e.g. the maintenance of Schleicher and/or the option of a (third) call for elections and/or for a "*Supra-Partes*" chancellor) by showing that it was also Hindenburg's political choice to hand the power to Hitler.

Winkler ([2000] 2006) 487-490

⁹⁶² Schmitt had argued that vote for the Nazis in the forthcoming elections was "*courting disaster...Anyone who allows the National Socialists to obtain the majority on 31 July...gives this ideologically and politically immature movement the possibility of changing the Constitution, introducing a state church, dissolving the unions etc...*".

I will explore now in more depth how Schmitt's theory during the crisis of the Weimar Republic is related to his political practice.

5.5.3. Schmitt's response to the Weimar crisis

After I have analyzed Schmitt's account of the "problems" of Weimar in his works during the 1920s and his "practical" suggestions during the last period of the crisis, I will analyze now Schmitt's theory during this whole period of the Weimar crisis (1931-1933).

Schmitt's theory can be seen mainly from his works published during that era and mainly from his "Guardian of the Constitution" (1931), "Legality and Legitimacy" (excerpts of which were published on July 10, 1932), and from the speech that he delivered before the industrialist conference in November 1932. A second source is his defense of the federal government's actions before the Court regarding the Prussian *coup* given that he was the main attorney of the Reich. The only period, for which there is less evidence about Schmitt's role and position was during Schleicher's chancellorship⁹⁶³ apart from the emergency plan that he proposed (as already seen) and his despair about Schleicher's resignation from chancellorship (27 January 1933) and the imminent handing of power to Hitler⁹⁶⁴.

Unraveling Schmitt's theoretical argumentation, albeit it entails contradictions and "grey zones", it moves mainly in a *two-fold* direction: anti-NSDAP and, simultaneously, authoritarian⁹⁶⁵. Starting from the *former direction*, this is deduced, *firstly*, from his practical stance during Weimar (seen above). *Secondly*, this can be also based theoretically on his critique in "Legality and Legitimacy" against the "equal chance" of every party to acquire the parliamentary majority through a "numerical"-functionalist concept of the

Carl Schmitt, "Der Missbrauch der Legalität", *Täglichen Rundschau*, 19 July 1932 in Balakrishnan (2000) 156

⁹⁶³Mehring argues that, at the level of political practice, Schmitt was de-activated during Schleicher's chancellorship since Schleicher had excluded him (whereas he was more active during von Papen's regime).

Mehring ([2009]2014) 269-271

⁹⁶⁴See Balakrishnan (2000) 174

⁹⁶⁵ This is also the opinion of Mehring ([2009] 2014) 271

Constitution. That would be, as he wrote, to “*use legal means to close the door to legality*”, *through which they themselves entered, and to treat partisan opponents like common criminals, who are then perhaps reduced to kicking their boots against the locked door...The majority is now suddenly no longer a party; it is the state itself*⁹⁶⁶.

This argumentation, which legitimized theoretically an executive ban on the parties that professed their enmity towards the Constitution (like the National Socialists and the Communists)⁹⁶⁷, is related to Schmitt’s conception since “Constitutional Theory” that there is an unalterable “higher” substantive constitution that is based not on any individual provision but on the constitutional system as a whole. This concept of the constitution prevents from such a “*National Socialist or Bolshevik, the godless or other*”⁹⁶⁸ transformation that could take place either through a simple parliamentary majority (51%) or through the augmented parliamentary majority (two thirds) based on a “neutral” reading of article 76 of the Weimar Constitution⁹⁶⁹. Such an interpretation of article 76 would fall again, according to Schmitt, into the logic of a quantitative-functionalist concept of the Constitution⁹⁷⁰ that gives an indiscriminate equal chance “*for all contents, goals and drives*”⁹⁷¹ and it could lead to a “*system suicide*”⁹⁷².

Against this “suicide”, the “substantive” constitution embodies “*fundamental principles*”, which are identified by Schmitt at a conceptual level with the concept of “*super-legality*” that the French institutionalist Maurice Hauriou used⁹⁷³. Here the theory of Hauriou - who would be called in the “Three Types of Juristic Thought” his “*elder brother*”⁹⁷⁴ - is not extensively developed but is a significant addition to Schmitt’s earlier distinction between the “political” constitution and the “formal” constitutional laws in “Constitutional

⁹⁶⁶ Schmitt ([1932] 2004) 30-31

⁹⁶⁷ McCormick, John (2004). ‘Introduction’ in Carl Schmitt *Legality and Legitimacy*, Durham: Duke University Press, xix

⁹⁶⁸ Schmitt ([1932] 2004) 48

⁹⁶⁹ See article 76 in the Weimar Constitution ([1919] 2008) 409-440, 421

⁹⁷⁰ Schmitt ([1932] 2004) 40

⁹⁷¹ Ibid. 93

⁹⁷² Ibid. 48

⁹⁷³ Ibid. 58

⁹⁷⁴ See Croce & Salvatore (2013) 55, 103-104

Theory”.

With the use of this concept of super-legality, Schmitt appears at a first glance almost as a precursor of “militant democracy”⁹⁷⁵ as it was legislated in the eternity clause of the Basic Law in 1949⁹⁷⁶ (article 79, paragraph 3). Without delving further into the “militant democracy” principle here, this anti-NSDAP direction is only *half* of the picture regarding Schmitt’s constitutional theory.

The other half of the truth is that, in line with his historical account, the German jurist conceives as a structural problem of constitutional democracy not only the “*equal chance*” that is provided to its enemies but also the *pluralist Parteienstaat*. This direction, which was a permanent Schmittian trait during the 1920s, can be seen in Schmitt’s defense of the federal government’s actions before the Staatsgerichtshof (in October 1932).

He argued that the intervention of the Reich government in Prussia through a presidential decree is justified because (among other reasons) only a President is independent from partisan politics and capable of dealing with the “enemies”. On the contrary, a government that enjoys a mandate from the regional parliament is problematic given that it is supported by political parties. This means, according to Schmitt, that it carries the danger of occupying the “state” and, therefore, of coming in conflict with the autonomy of the Land as well⁹⁷⁷.

In this vein, he declared that the biggest danger both for the federal system and for the autonomy of the Land is that “*tightly organized and centralized political parties that cross the boundaries of the several Länder may attempt to occupy a Land and to put its agents and servants into the government of a Land....and thus come to endanger the autonomy of the Land.... Now, if such a case occurs...and if the president of the Reich sees himself*

⁹⁷⁵This is a term coined by Karl Lowenstein. See Lowenstein, Karl (1937). ‘Militant Democracy and Fundamental Rights’ *American Political Science Review*, 31, 417-432.

⁹⁷⁶Olivier Jouanjan argues- by citing Maunz’s and Dürig’s commentary on article 79 of the Basic Law- that this provision was to an extent “*une réception de la théorie de Carl Schmitt*”.

Jouanjan, Olivier (1994). ‘Révision de la Constitution et Justice Constitutionnelle- République Fédérale d’Allemagne’, *Annuaire International de Justice Constitutionnelle*, X, 229-244, 232-233

⁹⁷⁷Schmitt, Carl ([1932] 2015). ‘Prussia contra Reich: Schmitt’s Closing Statement in Leipzig’ in Vinx, Lars (ed.) *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*. Cambridge: Cambridge University Press, 222-227

*forced to take action, then this is not at all in conflict with the autonomy of the Land...*⁹⁷⁸.

This attack on political parties is even more visible in Schmitt's purely theoretical writings, which declare the aim of protection of the Constitution from a "functionalist"-weakening conception. In line with his argumentation in the "Crisis of Parliamentarism", he argues now that the danger to Weimar's politics comes from the political parties, which are based on a solid organization, *"influential bureaucracies, a standing army of paid functionaries, and a whole system of organizations of held and support, that bind together an intellectually, socially and economically captive clientele. The extension to all spheres of human existence, the abolition of the liberal separations and neutralizations of different spheres like religion, economy, and education, with one word: what we previously referred to as the turn to the 'total', has already been realized, to some extent, for a part of the citizenry by several organizational complexes in society"*⁹⁷⁹.

So, here we have an obvious association of two issues. The *first* is a radicalized Weberian picture of the political system. This picture of the *Parteienstaat* is, crucially, related to a *second* issue: the tracing of the 20th century "*total state*" that finds expression mainly in this pluralistic *Parteienstaat* and hollows Schmitt's ideal conception of parliament.

As he put it, *"a pluralist Parteienstaat becomes 'total' out of weakness, not out of strength and power. The state intervenes in every area of life because it must fulfill the claims of all interested parties. It must especially become involved in the area of economy, which until now was free of state interference, even if it forgoes any leadership in and political influence in the economy"*⁹⁸⁰.

However, Schmitt argues that a backward move to the liberal-neutral state of the 19th century (in which there was a distinction between the state and civil society) is impossible mainly due to the change of the state-economy relationship⁹⁸¹. As he argues, *"what is*

⁹⁷⁸His "applied" example was the change of the electoral law in Prussia before the regional elections in April 1932 (see above). According to Schmitt, this is an example of a case where the principle of "equal chance" is not valid any more. So, this is not an objective, independent and, therefore legitimate, authority but a government "occupied" by a party that dominates another party.

Moreover, he argued that the care-taker government was not aligned with the political line of the Reich since it was indirectly dependent on the toleration of the Communists in the Prussian Landtag (in order to remain as care-taker), who constituted a threat to the public order and security in contrast with the Nazis.

Ibid. 225

⁹⁷⁹Schmitt ([1931] 2015) 137

⁹⁸⁰ Schmitt (1932 2004) 92

⁹⁸¹Schmitt ([1931] 2015) 133-135

decisive here for constitutional theory and the theory of the state is that the relation of the state to the economy is the real issue behind all contemporary problems in domestic politics, and that the accustomed formulas of the old state, which was based on the distinction between state and society serves only to conceal this fact...These can no longer be answered with the old liberal principle of unconditional non-interference, of absolute non-intervention”⁹⁸².

His solution in the contemporary condition of the “total state” is, therefore, *clear*: there is a need for a “*stable authority in order to move ahead the necessary depoliticizations and to reestablish free spheres and living spaces from within itself*”⁹⁸³.

This is Schmitt’s “*qualitative total state*”, namely a meta-political state, but at the same time, as Schmitt argued, “... *an especially strong state. It is total in the sense of quality and energy. The fascist state calls itself stato totalitario.....It does not contemplate surrendering new powers of coercion to its own enemies and destroyers, thus burying its power under such formulae as liberalism, rule of law, etc. It can discern between friends and enemies. In this sense, as has been said, every true state is, and always has been, a total state*”⁹⁸⁴.

Schmitt proceeded also to an association of his substantive concept of the constitution with the institutionalist method in order to defend more clearly his concept of the strong total state (as opposed to the “functionalist” conception of the Constitution and to the weak state). Analyzing this, Schmitt’s institutionalism is, *firstly*, state-centered and it goes along with his decisionism as it also evident in his 1932 phrase that the sovereign is the one that “*interprets, defines and applies the concepts*”⁹⁸⁵.

Secondly, it explicitly includes a concrete socio-economic organization through the discourse of “guarantees”. Based on this discourse (that was also seen to an extent in

⁹⁸²Ibid 134

⁹⁸³Schmitt ([1932] 2004) 90

⁹⁸⁴Schmitt, Carl ([1932] 1998). ‘Appendix: Strong State, Sound [or healthy] Economy: An Address to Business Leaders’ in Cristi, R.(ed.) *Carl Schmitt and Authoritarian Liberalism*, Cardiff: University of Wales Press, 212-232, 217

⁹⁸⁵See Loughlin, Martin (2014). ‘Politonomy’ in Meierhenrich, J. & Simons, O. (eds.) *The Oxford Handbook of Carl Schmitt*. Oxford: Oxford University Press, 6, from Schmitt ([1932]1988). “Völkerrechtliche Formen des modernen Imperialismus.” In *Positionen und Begriffe im Kampf mit Weimar—Genf—Versailles 1923–1939*, 2d ed., 162–180. Berlin: Duncker & Humblot.

“Constitutional Theory”) Schmitt counterposes the First Part of the Constitution⁹⁸⁶ (that he conceives as value “neutral”) with the “*inner logical consistency*” of the Second Part that embodies “fundamental values”. These values are identified with the “*substantive capacities and characteristics of the German people*”⁹⁸⁷. The focal point now is that this- with Schmitt’s words- “*inner logical consistency*” of the Second Part of the Constitution is mainly identified with *three*- as he calls them- “*substantive constitutional guarantees*”. It is property, family and religion⁹⁸⁸.

Based on this analysis, Schmitt traces a- with his words- “*structural contradiction*” between the “*value neutrality*” of the First Part of the Constitution (namely the parliamentary legislative state) and the “*substantive constitutional guarantees*”⁹⁸⁹. Hence, here we have a clear shift to institutionalism against the organizational part of the constitution through a mostly liberal reading of the Second Part of the Weimar Constitution.

This legitimizes the Presidential regime in the sense that, on the one hand, a series of “guarantees” cannot be abrogated by parliamentary laws and, secondly, the President can govern through “measures”. The point regarding measures was evident through his ultimate argumentation that “*in practice...the non-distinction of statute and measure will probably develop at the level of measure. The dictator better conforms to the essence of the administrative state, which manifests itself in the practice of measures, than a parliament that is separated from the executive and whose competence consists in making general, pre-established and enduring norms*”⁹⁹⁰.

So, it is visible that Schmitt’s decisionism and institutionalism go hand in hand in order to respond to the parliamentary “total” state that intervenes in the economy. The tasks of Schmitt’s “qualitative total state” become clear in Schmitt’s lecture before the Rhineland industrialists (23 November 1932) with the indicative title “Strong State, Sound [or

⁹⁸⁶ Schmitt ([1932] 2004) 46

⁹⁸⁷ Ibid. 94

⁹⁸⁸ Ibid. 46-47

⁹⁸⁹ Ibid. 45

⁹⁹⁰ Ibid. 82-83

healthy] economy”⁹⁹¹. In this lecture, he argues that the important question is “*how can one today render the distinction between state and economy effective?*” and he answers that “*only a strong state can depoliticize...depoliticization is a political act in an immense way*”⁹⁹².

So, viewing this speech in combination with “Legality and Legitimacy”, we can see that, whereas during his 1920s writings his argument for “general” laws was going along with a “purely” political State and constitution- against the effort of the Left to intervene through the Reichstag in the economy- he substantively argues now for a state that will depoliticize through “*measures*” and “*guarantees*”.

This leads us to a final remark before the conclusion, which is that in this speech Schmitt introduced also a new element in his analysis. He argues that “*today one can no longer oppose the state with the private individual, the private entrepreneur. In opposition to the collective image of the modern state it is necessary to insert an intermediate domain between the state and the singular individual...*”⁹⁹³. It is visible from this excerpt that the two-fold antithesis between the state and the individual should be replaced with a three-fold one, where the third is the “autonomous economic administration”, which is non-state “*but still public sphere*”. This economic autonomous administration is further defined as “*...completely different from the ‘economic democracy...that economic democracy explicitly espoused a mixture of economics and politics; By contrast when I refer here to economic autonomous administration...I mean something different, something that aims at a distinction and a separation...There is an economic sphere that belongs to the public interest and should be not seen as separate from it. Still this is non-state domain that can be organized and administered by the same business agents, as it happens in any genuine autonomous administration*”⁹⁹⁴.

So, it is clear that Schmitt here takes into account the Weimar state of organized capitalism and of associations⁹⁹⁵. Moreover, it is visible that Schmitt’s sphere of “autonomous

⁹⁹¹ According to Abraham, this had been the slogan of these industrialists already in 1928. Abraham ([1981] 1986) 133

⁹⁹² Schmitt ([1932] 1998) 212-232, 226-227

⁹⁹³ Ibid. 224

⁹⁹⁴ Ibid. 225-227

⁹⁹⁵ Indicatively, he refers to chambers, monopolies, mixed economic enterprises and the fact that the state appears as economic agent both in public law and in private law terms.

economic organization” is a countermove to the Weimar extension of political democracy into the workplace in the sense that suggests the extension of the economic logic into the political sphere but through the action of the State. This is the only way in which a “*new order*”⁹⁹⁶ can be born as he argued.

However, this third sphere is not further defined. On the one hand, Cristi argues that this sphere “*has affinities both to the professional order suggested by Pius XI in Quadragesimo Anno (1991) and to the fascist corporate order*”⁹⁹⁷. If this interpretation is correct, this is where we can trace the first clear fascist elements of Schmitt’s thought as solutions to the problems seen in Weimar organized capitalism. This is Cristi’s interpretation.

The alternative is that this authoritarian order corresponds to “*the letter [of] the German ordoliberal programme*”⁹⁹⁸. This is a big debate given, firstly, that Schmitt does not define further what he means with this term of “*autonomous economic administration*” and, secondly, it has also to do with what ordoliberalism means⁹⁹⁹. It suffices at this stage to be written that, whereas ordoliberalism was a theory that flourished in post-war Germany, the account of the founding ordoliberals is similar to Schmitt’s analysis regarding the problems of the Weimar state. As Bonefeld writes “*they perceived Nazis, as the consequence of the democratic character of late Weimar Republic...the distinctive character of their founding texts in 1932 is that they define the economic crisis as a crisis of democratic disorder and call for the strong state to curtail democracy as a precondition of liberal economy*”¹⁰⁰⁰. More than this, some of them make explicit reference to Schmitt (Eucken more clearly and

Ibid. 226

⁹⁹⁶ Ibid.

⁹⁹⁷ Cristi ((1998) 202

⁹⁹⁸ Kelly (2003) 253

⁹⁹⁹ Joerges objects to Schmitt’s identification with ordoliberalism. Regarding Schmitt’s speech “Strong State-Free Economy” he writes that “*What Heller describes is an economic emergency. This is why he discusses...Schmitt’s infamous talks on the “strong state and the healthy economy”. There are affinities in this talk with an interventionism establishing market mechanisms. But Schmitt’s proclamation of a strong state with unfettered powers, on the one hand, and a depoliticized economy which is obedient to authoritarian commands, on the other, can hardly be understood as a promotion of the ordoliberal agenda. Schmitt’s plea for political decisions which depoliticize the economy, and his polemics against ‘Wirtschaftsdemokratie’ (industrial democracy), form a tandem, although Schmitt’s ideas about the role of the strong state in the economy seem somewhat opaque*”.

Joerges, Christian (2016). ‘What is Left of the European Economic Constitution II? From Pyrrhic Victory to Cannae Defeat’ in Kjær, Poul F. & Olsen, Niklas (eds.) *Critical Theories of Crisis in Europe: From Weimar to the Euro*, Lanham MD: Rowman & Littlefield, 146-147

Rüstow)¹⁰⁰¹.

It should be clear that I am not identifying Schmitt's theory with ordoliberals given the different variants of this theory during the post-war period. This analysis brings, nevertheless, into light how Schmitt's legal theory is related to his analysis of the Weimar democratic state in the context of the capitalist economy.

This leads us to the *conclusion*, which is that Schmitt's theory throughout Weimar is permeated by a continuity. I have shown in this chapter, at the level of state theory, that Schmitt's theory is driven by his analysis that the problems of the Weimar Republic are related to mass democratic parliamentarism as opposed to a 19th century parliament that was based on a liberal State-civil society divide. This leads to his lament for the loss of 19th century constitutionalism but in a mass democracy of 20th century. Hence, he developed throughout Weimar a theory that would be able to respond to these 20th century conditions and redraw the distinction between the political and the economic through an authoritarian state.

This is in line with his overall continuity at the level of constitutional theory. Regarding this theory, he developed a concept of a reified social "normality" that enters the constitutional order, *firstly*, through a reference to a "purely" political constitution during his 1920s writings and, *then*, through the method of "substantive guarantees". Through these methods he interpreted the Weimar Constitution through a combination between the political categories of "constitutional monarchy" with the "values" of economic liberalism but in the democratic Weimar state. As a consequence of this contradiction, he developed an authoritarian liberal theory in the sense that he suggested a very powerful elected President that, through a strong state, would be able to maintain the liberal political-economic divide. I think that this is the best term to capture Schmitt's project without reference to other historical currents that would cause further confusion.

Schmitt's constitutionalism is, therefore, an answer to the contradiction between the

¹⁰⁰⁰ Bonefeld, Werner (2017). *The Strong state and the Free Economy*, London: Rowman, 8-10, 47-48.

¹⁰⁰¹ As Eucken writes in 1932 with explicit reference to Schmitt's "Guardian of the Constitution", "*democratisation grants political parties and the masses and the interest groups organized by them a massively increased influence on the government of the state and thus on economic policy as well... [As a result] the power of the state today no longer serves its own will but to a considerable degree the will of the interested parties*".

In Ibid. 47-48. See also p. 10. See also Tribe, Keith (1995). *Strategies of Economic Order: German Economic Discourse, 1750-1950*, Cambridge: Cambridge University Press, 211-212

political state and the capitalist economy not by suggesting the closure of the chasm between the “two lives” (the civil and the political). On the contrary, his solution to the riddle that Marx theorized was the reification of this chasm and the ultimate dissociation of the constitution from the democratic promise when the liberal political-economic divide is endangered.

This does not derive from a romantic anti-modernism but from his effort to protect what he conceives as modern, the liberal modality of the State-civil society relationship, against the danger “*of a new feudal system ...that was based on the proportional representation of individual or party estates*”¹⁰⁰². Hence, his affinity with Weber’s insights. Moreover, his use of the “irrational” thinkers during the 1920s (e.g. Catholic counter-revolutionary thinkers) should be seen in the light that it helps in the maintenance of this modality against the 20th century parliamentary state.

Finally, it was seen that through this authoritarian liberal theory he paved the way- from the perspective of constitutional theory- to the general crisis of representation and to the undermining of the Weimar State.

¹⁰⁰² Caldwell (1997) 113. From Schmitt, Carl, *Hüter der Verfassung*, 1931, p.82-84

Chapter 6. Hans Kelsen's Staatslehre: Back to the State?¹⁰⁰³

Hans Kelsen was the main enemy of Schmitt, as we have seen in the previous chapter. Starting from some biographical elements before proceeding with the analysis of his theory, Kelsen was born in Prague on October 11, 1881 and moved at the age of three to Vienna, which was at that time the capital of the Austro-Hungarian Empire. In 1911, he qualified as a university teacher to teach public law and philosophy in Vienna, and from 1919 to 1930 he held the position of “*ordentlicher Professor für Staats- und Verwaltungsrecht*” (full professor of state and administrative law) at the University of Vienna¹⁰⁰⁴. At the same time, he was invited by the (Austro-Marxist), Chancellor Karl Renner, to draft the constitution of the new Austrian Republic, which he tried to model on the Weimar Constitution, as we will see in *section 1* of this chapter.

Kelsen served also from 1921 until 1930 as a member of the Austrian Constitutional Court (Verfassungsgerichtshof). He had been elected unanimously by the political parties for this position in 1921¹⁰⁰⁵. However, he left Austria in 1930. The reason was a decision of the

¹⁰⁰³ The title is inspired by Kelsen's injunction “*back to Lassalle*”. Kelsen, Hans ([1925] 1967). ‘Marx oder Lassalle’ (reprinted from: *Archiv für die Geschichte des Sozialismus und der Arbeiterbewegung*, 11. 1925) Darmstadt: Wissenschaftliche Buchgesellschaft, 261-298, 298

¹⁰⁰⁴ Jabloner, Clemens (1998). ‘Kelsen and his Circle: The Viennese Years’, *European Journal of International Law*, 1(2), 368-385, 368. Urbinati, Nadia (2013). ‘Introduction’ in Hans Kelsen, *The essence and value of Democracy*, New York: Rowman and Littlefield Publishers, 20

¹⁰⁰⁵ Herrera, Carlos Miguel (1998). ‘La *théorie* politique de Kelsen et le socialisme *réformiste*’, *ARSP: Archiv für Rechts- Und Sozialphilosophie/ Archives for Philosophy of Law and Social Philosophy*, 84(2), 195-231, 197

Constitutional Court on the issue of divorce (“*Dispensehen-Kontroverse*”)¹⁰⁰⁶ for which he was severely attacked by the Catholic Church, the right-wing parties and the media¹⁰⁰⁷.

The most important issue, nevertheless, in this story is that there was also reform of the judicial system during the constitutional reform of 1929. According to this reform of the judicial system, all the existing judges were removed from the Constitutional Court (despite being elected for life) and the mode of appointment of judges changed “*so as to ensure a future conservative majority that was expected to overturn the decision in favour of the validity of administrative dispensations*”¹⁰⁰⁸. More concretely, the change was that the members of the Court would no longer be elected by the Nationalrat (Parliament) and the Bundesrat (Federal Council) but would be appointed by the administration¹⁰⁰⁹ (see section 1 about the appointment of judges).

Given this constitutional reform, Kelsen’s role ended on February 15, 1930. He rejected his re-appointment as a judge despite the proposal of Karl Seitz who was the mayor of “Red Vienna” and President of the *SDAPDÖ*¹⁰¹⁰. *His acceptance would have legitimized this reform, which actually left only two places in the Court for the Social Democrats and twelve for the Christian Social Party*¹⁰¹¹. Another reason is that he also wanted to maintain his independence from political parties¹⁰¹².

However, from this issue we can trace the direct links between Kelsen and the Austrian Social Democrats (taking into account Seitz’s proposal to Kelsen)¹⁰¹³. Leaving this last point aside for the time being, Kelsen left Austria and accepted a chair at the University of Cologne. He taught there until 1933 when he lost his position due to his Jewish origins, after the laws of the NSDAP regarding the “civil service” in 1933. It is also interesting

¹⁰⁰⁶See Vinx, Lars (2015). *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (ed. and trans.), Cambridge: Cambridge University Press, 262

¹⁰⁰⁷Ibid. Baume, Sandrine ([2007] 2012). *Hans Kelsen and the Case for Democracy*, Colchester: ECPR Press, 3

¹⁰⁰⁸ Vinx (2015) 262

¹⁰⁰⁹ Kelsen, Hans (1942). ‘Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution’, *The Journal of Politics*, 4(2), 183-200, 188

¹⁰¹⁰ Herrera (1998) 197-198

¹⁰¹¹ Ibid. 198

¹⁰¹² Ibid.

¹⁰¹³ Ibid.

that, whereas Kelsen had agreed with Schmitt's appointment at the University of Cologne, by also welcoming him in a "warm" manner in late 1932¹⁰¹⁴, Schmitt did not sign the declaration of solidarity initiated by Nipperdey¹⁰¹⁵. After he left Cologne, Kelsen moved to other countries and emigrated to the United States in 1940.

The *question* that arises after the presentation of these biographical elements is *why* Kelsen is seen as one of the "*most significant philosophers of the constitution during the years of the Weimar Republic*" as Caldwell argues, given his arrival in Weimar in 1930¹⁰¹⁶?

Regarding this question, it is indubitable that Kelsen's legal and political theory is influenced by the multiethnic context of the Austro-Hungarian Empire. As he himself had written in an autobiographical sketch regarding the 'Austrian aspect' of the Pure Theory of Law, "*considering the Austrian state which was made up of so many different racial, linguistic, religious and historical groups, theories that tried to found the unity of the state on some socio-psychological or socio-biological context of the persons legally belonging to a state clearly proved to be fictions. To the extent that this theory of state is an important part of the Pure Theory of Law, the Pure Theory of Law can be seen as a specifically Austrian theory*"¹⁰¹⁷.

This can also be seen in that some of the directions of his "Pure Theory", which have to do with the question of how to ground unity out of plurality, had been developed since 1911. At that time, he criticized the "*organic*" theories of the German-speaking "Staatslehre" that assumed a sociologically uniform will of the state based on –what he called - "*real psychic facts*"¹⁰¹⁸.

¹⁰¹⁴See Mehring ([2009] 2014) 264-267 (regarding Kelsen's "warm letters"), 294, 607, 613

Dyzenhaus (1997) 4

¹⁰¹⁵Dyzenhaus argues that Schmitt participated in the machinations that led to Kelsen's dismissal. Dyzenhaus (1997) 4

¹⁰¹⁶Caldwell (1997) 8

Dyzenhaus also includes Kelsen in his account of the Weimar constitutional debate. See Dyzenhaus (1997)

¹⁰¹⁷In Jabloner (1998) 373 (he takes all the biographical information from the biography of Rudolf Aladár Métall in 1969, "*Hans Kelsen. Leben und Werk*"). See also Paulson (2014) 3

¹⁰¹⁸Kelsen, Hans ([1911] 2000). 'On the borders between legal and sociological method' in Jacobson, Arthur & Schlink, Bernhard (eds.) *Weimar. A Jurisprudence of Crisis*. Berkeley, London: University of California Press, 57- 63, 61

He argued that the empirical assumptions of these theories are wrong. As he wrote, “*if one actually adheres to the real psychic facts, and especially to the congruence of wills, the people living within the borders of a state must disintegrate into a multiplicity of groups...*”. The second example-reason that he gives is that “*one not need to be a Marxist to consider a common will that psychically unites an entire people to be a phantom, given the deep class divisions that rend the people of a state who form a legal unity*”.

Based on these he concludes that “*The content of the will of the state is the legal order- that is, law is the will of the state...there can be no doubt as to how this whole theory, which sees the will of the state as a real psychic fact, as a common will, can be designated methodologically: It is a classic example of a fiction- the claim of a reality, in conscious contradiction to reality!*”¹⁰¹⁹.

So, notwithstanding the variations of Kelsen’s legal thinking during his life¹⁰²⁰, it is seen here that the concept of state unity as “fiction” and Kelsen’s identification of “law” with “state” can be traced from his 1911 publication. Moreover, it is from 1911 that an association of Kelsen’s legal and state theory can be traced through their common sociological presupposition of social plurality, as it is evident from the aforementioned examples. From those examples, it becomes evident that Kelsen’s assumptions are related to the context of the Austrian-Hungarian Empire.

However, I think that the Austrian origins of Kelsen’s theory should also be relativized in the sense that his 1920s theory also takes into account the German context. In order to see this, I need to make a longer detour to some biographical elements before introducing the theoretical analysis that I will follow in this chapter.

Starting this detour, it is, at first, evident in the aforementioned excerpts of Kelsen’s 1911 legal theory, that this theory is written in the context of the German-speaking community

¹⁰¹⁹ Ibid. 62-63

¹⁰²⁰ Paulson recognizes three stages in Kelsen’s legal thinking: 1) the early phase (up to 1920) during which a constructivist-“static” conception of legal order was developed 2) the middle period from about 1920 to 1960 during which a more “dynamic” conception of legal order was adopted 3) the period after 1960 during which a more voluntarist (will-based) theory of law was developed.

Paulson, Stanley (1996). ‘Hans Kelsen’s Earliest Legal Theory: Critical Constructivism’, *Modern Law Review*, 59(6), 797-812, 798

of Staatslehre. This becomes even more visible during the whole Weimar period, not only due to the fact that his theory was widely discussed by the Weimar theorists (primarily by Carl Schmitt), but also due to the fact that Kelsen was actively participating at the meetings of the Association of the German Teachers of State Law (1922-1932)¹⁰²¹, in which issues of the Weimar Constitution and Republic were discussed (e.g. see chapter 5 about Kelsen's thesis at the 1926 meeting). These meetings - one of which took place in Vienna in 1928¹⁰²² - were the main site of the "struggle over methods and aims" among the Weimar state law scholars (see section 4 about Kelsen's position at the 1928 meeting).

The overall point at this first level, is that there is a sense of community despite the origins also playing their role. This role of origins gets even more blurred when one views the general picture of the exchange of influences, such as Renner's and Bauer's influence on Neumann (as seen in chapter 4.3). Even outside the field of "pure" Staatsrechtslehre, this sense of community was clear. In this direction, we can also see that Hilferding is conceived as one of the Austro-Marxists, but also as one of the most influential theorists and politicians of the Weimar Republic (see also chapter 4.3).

At a more concrete level regarding Kelsen, he also conceived Germany as the homeland, which is also visible from the fact that he was opposed to the Treaty of Versailles and to the Treaty of St. Germain, that ultimately prohibited the unification of Austria with Germany¹⁰²³. In this direction, Hans Kelsen – while commenting on Lassalle's program of a "*Großdeutschland minus the dynasties*"- wrote that "*during Lassalle's period, the liberation from the dynasties appeared to many people as more difficult than the realization of Großdeutschland. Today we have that [namely liberation], but we are always still lacking this [namely the realization of Großdeutschland]*"¹⁰²⁴.

Kelsen goes even further in "Marx oder Lassalle", in which he comments on the invasion

¹⁰²¹ The foundation of this Association was an initiative of Heinrich Triepel, which attracted all the political currents of the profession from Germany, Austria, Swiss-Germans and from the German University of Prague. It also aimed to prevent the politicization of the profession during these turbulent times and the split of the professors in various groups given that at the same time, "*a republican association of state law teachers was imminent and with it the danger of a split*" as Michael Stolleis writes.

The membership during the Weimar period was in the range of 80-90 Teachers. Stolleis (2004) 178-180

¹⁰²² Ibid. 188

¹⁰²³ He had written this in 1920. Herrera (1998) 209

¹⁰²⁴ Kelsen ([1925]1967) 294. The translation from German is mine.

of Ruhr by French troops in January 1923. He writes that “...*Lassalle has perhaps felt more deeply than Marx and Engels that the national unification is a stage in the historical development of higher international forms, which we cannot skip, especially because today the disadvantages of the lack of national unity are clearly exemplified also for the working class, at a time that the German workers are at war with French imperialism for the whole German state and not only for their class interests, [but] in order to defend this State, their State, from the catastrophic effects of a military defeat that affects primarily these workers*”¹⁰²⁵. Kelsen concludes this paragraph by invoking the “German people”, with reference to Lassalle’s second essay on the essence of constitutions¹⁰²⁶.

This logic is also imprinted in Kelsen’s legal writings. As Herrera shows, *Kelsen writes a juridical article on the specific issue of the integration of the Austrian state into the German state in 1927. In this article, Kelsen uses lyrical phrases about the prospect of the union*¹⁰²⁷.

It should, nevertheless, be noted that Kelsen’s position is, *firstly*, not entirely unique because it is also shared by the leading Austro-Marxists (particularly Renner and Bauer), who had a similar position to Kelsen on the union with Germany. This is visible in the declaration of the German-Austrian provisional Assembly, which decided to form a union with Germany in 1918 (see section 1). Moreover, Bauer had renounced his position as Austrian Minister of Foreign Affairs on July 26, 1919, as a reaction against the refusal of the Allies to accept the union with Germany and he had argued some days earlier that “*our people are more than ever convinced that we cannot find a sustainable future but in the context of a great German Republic*”¹⁰²⁸.

Secondly, this general strategy had also a political objective: the tying of the young Austrian Republic to the great German working class movement and to the powerful German Social Democracy¹⁰²⁹. This is visible in Kelsen’s aforementioned excerpt regarding the Ruhr case in the Weimar Republic. This picture reveals, *firstly*, that the leading Austro-Marxists viewed themselves as part of (or at least familial with) German Social Democracy. *Secondly*, it shows the affinities between the leading Austro-Marxists

¹⁰²⁵ Ibid.

¹⁰²⁶ Ibid.

¹⁰²⁷ Herrera (1998) 210

¹⁰²⁸ Ibid. 210

¹⁰²⁹ Ibid.

(particularly of Renner and Bauer) with Kelsen.

After this biographical detour and making now the transition to what will be my central argumentation regarding Kelsen's theory in the chapter, I will show that Kelsen's state-political theory, during the 1920s, is influenced by the Austro-Marxists and particularly by their hegemonic "reformist" wing, namely by Renner's and Bauer's theories that are explicitly invoked by Kelsen during the 1920s. However, at an even deeper level, I will show that these state theories, and even more clearly Kelsen's state theory, are based on the theoretical analyses of German Social Democracy and primarily those of Bernstein and Lassalle (and Hilferding). This connects Kelsen's state theory with the Weimar context, if we also take into account that these analyses proved to be hegemonic in German Social Democracy during Weimar (as seen also in chapters 2.1 and 4.3).

Apart from this, I will also show Kelsen's explicit references during the 1920s both in the Austrian and in the Weimar historical contexts, which play the role of a practical anchorage of his reformist state theory and of his suggestion for an evolutionary strategy toward socialism. So, Kelsen's "empirical" account of the Weimar Republic is related to his theory, even before his arrival in Weimar. Hence, at the level of his state theory, it will be seen in this chapter (in section 2) that, along with his Austrian multi-ethnic "influences", Kelsen's theory is, to an extent, also German before his arrival in Weimar.

Regarding his legal theory, it will be seen that Kelsen can be considered as part of the Weimar context and constitutional debate, which is identifiable even by the fact that he takes into account the Weimar constitution when drafting the Austrian one (as it will be seen in section 1). *Secondly* and most importantly, Kelsen's legal theory is strongly associated with his 1920s political-state theory and, therefore, with the latter's assumptions. Thirdly, his theory is developed in the context of the German "struggle over methods" (see above and section 3 and 4 of this chapter).

Making now the transition to the detailed *structure* of the chapter, it *starts* with a *short section* on Kelsen's role in the drafting of the Austrian Constitution, which shows his general orientation, his inspiration from the Weimar Constitution, but also his own "innovations" (compared to the Weimar Constitution).

It will then proceed by considering his political-state theory, which will be developed in the *second section* of the chapter. In line with the aforementioned analysis, I will trace the

origins of Kelsen's political theory in his "Austrian"-inspired assumption of social pluralism and in his reformist logic, due to the fact that he was influenced by the leading Austro-Marxists and the German Social Democrats.

This political theory is reflected in the "enemies" that Kelsen chooses: Marxism-as anarchism, liberalism and conservatism. According to Kelsen, these theories, which are not necessarily incompatible (e.g. conservatism with liberalism in Schmitt), have a commonality: the reification of the State from different perspectives. I will demonstrate that Kelsen argues against this reification of the modern state on *three* grounds. The *first basis* is his concept of freedom, which is inspired, among others, by Rousseau and is explicitly detached from liberalism¹⁰³⁰. It signifies participation within the State, without presupposing, at the same time, any "substance" of the State. *Secondly*, this is based on a concept of a pluralistic society without foundations, that cannot become harmonious and, therefore, cannot get rid of the element of power. Hence, the necessity of the State, so as to pacify this conflict in a democratic way. *Thirdly*, it is based on his empirical argumentation that the modern democratic state, which was seen particularly in the Austrian and the Weimar Republic of the 1920s, is not a state that dominates over the proletariat, but a state of "equality of class strengths" through which social transformation can be peacefully achieved.

The institution that embodies this concept of the state is, according to Kelsen, parliament. The overall analysis of Kelsen's political theory will bring to light his relationalist approach of the social-political relationship through parliamentarism, which goes hand in hand with his assumption of an autonomous concept of the state. However, in line also with Kelsen's explicit detachment of democracy from liberalism, it will be seen that Kelsen's autonomous concept of the state is different from the Weberian-Schmittian position of autonomy. Kelsen's concept of the state aspires to express the social, whereas Weber's and Schmitt's concept of an autonomous state is distinguished from civil society (that is usually conceived in liberal terms see chapters 3.2 and 5). I will argue that Kelsen leaves open the modality of the political-social relationship but without collapsing the one into the other.

In the *third section*, I will make the transition to Kelsen's legal theory. I will argue that this

¹⁰³⁰ Kelsen, Hans ([1929] 2013). *The Essence and Value of Democracy* in Urbinati, N.&Accetti, C.I. (eds.), (trans. Graf, B.) New York: Rowman & Littlefield Publishers, 32

theory is driven by Kelsen's political theory and his enemies are, therefore, precisely the same as with his political theory: conservatism, liberalism and Marxism-as-anarchism. This is evident through Kelsen's critique of the dominant dualisms in legal theory (subjective right-objective law, public-private law, state-law), which allows him to dismantle the reifications of the social and to suggest a concept of constitutionalism that keeps open the modality of the State-civil society relationship. Moreover, it will be seen that Kelsen's state theory and legal theory are interrelated, in that Kelsen's concept of legality plays the role of keeping open the space for Kelsen's concept of the political to come - through the autonomy of these spheres instead of Schmitt's confounding of the two.

After the first three sections of the chapter, I will focus on *two difficult issues* that hang over Kelsen's thinking. The *first issue* is Kelsen's concept of constitutional review and it will be discussed in the *fourth section*. More specifically, I will try to identify in this section, *firstly*, whether Kelsen's theory regarding the political role of the Constitutional Court, fits with the primacy of parliament in his political theory. *Secondly*, I will discuss whether his theory regarding the political dimension of judicial decision-making leads to a conflation of the political and the legal boundaries in the process of constitutional interpretation and whether it is compatible with Kelsen's overall legal theory that aims to protect the autonomy of the legal. *Thirdly*, it will be asked whether Kelsen's theory of adjudication can defend effectively the Weimar Constitution against Schmitt's legal theory.

In the *fifth section* of this chapter I will discuss the second issue, which revolves around the question of how we can conceive Kelsen's overall theory, in view of the last Weimar period. Does Kelsen's theory deal adequately with the effect of organized capitalism on mass democracy and on constitutional legality? To put it differently, was Kelsen's solution to Marx's riddle sufficiently political in order to oppose Schmitt's theory and to defend the Weimar Republic from the perspective of constitutional theory?

My overall analysis distances itself, *firstly*, from the approach that criticizes Kelsen as being a "*little more than a distant cousin*" to Schmitt's theory¹⁰³¹. This perspective is also visible in Dyzenhaus' critique that Kelsen and Schmitt share "*the thought that ethics and politics are deeply irrational*"¹⁰³². This theory argues that the problem is in the "*value freedom*" of the Pure Theory that derives from Kelsen's "relativism" that "*seems...to be at*

¹⁰³¹ Scheuerman, William (1999). *Carl Schmitt: The End of Law*, Oxford: Rowman and Littlefield, 82

¹⁰³² Dyzenhaus (1997) 105

the root of all the tensions and difficulties in the Pure Theory of law”¹⁰³³.

However, this critique fails to recognize the overall normative aim that lies behind Kelsen’s political and legal theory. I think that this is because it does not focus on the aforementioned social democratic assumptions of Kelsen’s political-state theory¹⁰³⁴, and does not give emphasis to the latter’s relation to Kelsen’s legal theory. Another reason for this approach of Kelsen’s theory - apart from its initial liberal/deliberative assumptions- is that it analyzes Kelsen’s theory mainly from the perspective of his comment in the Prussian case and less in the context of the whole state and legal theory that Kelsen develops during the 1920s. However, it will be seen that this approach to Kelsen’s theory captures well some of problems of his theory with regards to his concept of adjudication (see section 4).

My approach to Kelsen’s theory distances itself, *secondly*, from the analysis that criticizes Kelsen for cutting “*the ties between the validity of a norm and its legitimacy*”. This is argued by Kalyvas, who also writes that “*by radicalizing Weber’s notion of legality, Kelsen introduced a procedural argument that reduced the validity of a legal norm to a mere legality...he concluded with the near fusion of norm and fact, ought and is, validity and efficacy*”¹⁰³⁵.

This approach is similar to the former critique of Kelsen (notwithstanding that it was opposed to its perspective regarding Schmitt’s theory) and they share the following commonality: they both underplay Kelsen’s critique of the liberal reification of the State-civil society relationship, at the level of state theory and of legal theory. To put it differently, they both underplay how Kelsen’s political and legal theory responds, not only to the political, but also to the social question, by aiming at keeping open the possibility of an evolutionary socialist transformation. That’s why this approach concludes by adopting Schmitt’s critique to Kelsen, according to which Kelsen legitimizes “*raw power*” (see chapter 5)¹⁰³⁶. However, it underplays that Kelsen’s critique of 19th century German

¹⁰³³ Ibid. 158-159. See also Dyzenhaus, David (2015). ‘Kelsen, Heller and Schmitt: Paradigms of Sovereignty Thought’ in *Theoretical Inquiries in Law*, 16(2), 364

¹⁰³⁴ Dyzenhaus parallelized Kelsen’s enterprise with Rawls and argued that the problems of Kelsen’s theory “*arise out of an unwillingness to make political values an explicit foundation of his theory of law*”.

Dyzenhaus (1997) 158

¹⁰³⁵ Kalyvas (2008) 107-108

¹⁰³⁶ Ibid.

constitutionalism had precisely the opposite aim: to avoid the legitimization of power with law that was taking place through the law-state dualism (that Schmitt endorsed, see chapter 5).

My approach distances itself, thirdly, from the *droit politique* theory, which criticizes Kelsen's theory for negating the (political) concept of sovereignty through the state-law identification thesis¹⁰³⁷. This theory misses the point that Kelsen's law-state identification is developed in the context of his critique of the "bourgeois" (as Kelsen calls them) dualisms, so as to open the way towards a de-reified concept of the legal order, which undergirds Kelsen's relational concept of the state, namely a concept of the state through which the social finds direct expression. However, this escaped Loughlin's notice possibly because the social democratic assumptions of Kelsen's 1920s theory are not taken into consideration.

Finally, I think that the term of "*left-leaning liberal*" that is attributed to Kelsen's theory¹⁰³⁸ is a quite confusing term. It suffices to note here that Kelsen's 1920s and early 1930s theory has little to share with economic liberalism and the liberal reification of the State-civil society relationship. This will be evident both in the social democratic origins of his state theory and in his critique of the "bourgeois" dualisms in his legal theory. Moreover, he apologized explicitly in 1929 for a 1911 passage, in which he had written that his theory in the "Main Problems in State Law" is liberalism¹⁰³⁹.

It should be, ultimately, noted that I will mainly analyze Kelsen's writings during the 1920s and early 1930s in this chapter.

6.1. Hans Kelsen and the Austrian Constitution

The 1920 Austrian Constitution (1 October 1920) was drafted by Hans Kelsen. It is

¹⁰³⁷ Loughlin (2003) 90-91

¹⁰³⁸ See Urbinati (2013) 2

¹⁰³⁹ Kelsen, Hans ([1929] 2000). 'Legal Formalism and the Pure Theory of Law' in Jacobson, Arthur & Schlink, Bernhard (eds.) *Weimar. A Jurisprudence of Crisis*, Berkeley, London: University of California Press, 76-83, 80

This 1911 passage is invoked by Urbinati as a proof that Kelsen's theory is left-liberal.
Urbinati (2013) 2

important to see this drafting process because it is a good indication of the influence that the Weimar Constitution had upon his constitutional suggestions.

Starting from the historical context, after the collapse of the Austro-Hungarian Empire, the members of the Imperial Diet (*Reichsrat*) that represented the German territories of the monarchy convened and formed a provisional National Assembly (21 October 1918)¹⁰⁴⁰. This provisional assembly declared the state of German-Austria (*Deutschösterreich*) in the German-speaking regions (30 October 1918) and, then, the republican form of government, under the chancellorship of Karl Renner, on November 12, 1918. However, given that the Allied powers prohibited a union with Germany (a prohibition formalized by the Versailles Treaty and the St. Germain Treaty)¹⁰⁴¹, the new Republic's name changed to Austria. It elected a new Constituent National Assembly (February 16, 1919) in which the SDAPDÖ was the first party and made a coalition with the Christian Social party.

Kelsen was invited to draft the new constitution by Chancellor Renner, given that he had been serving, since November 1918, as a legal consultant for him. In this process, he received instructions from Karl Renner, in May 1919. As Kelsen himself wrote about this experience, *“in May of 1919 I received instructions from the Chancellor to draft a federal constitution, following up on my earlier preparation of certain preliminary studies. During the summer of 1919, with the help of the constitutional department in the Chancellor's offices, I completed the draft, supplementing it throughout the fall with several other drafts that were intended to present variations of the basic draft and to take into account the various political options. My guideline was to retain everything usable from the previous constitution, to preserve to the greatest possible extent the continuity of the constitutional institutions, to incorporate the principle of federalism into the existing tried and true, and thereby to lean on the Swiss but even more on the new German [Weimar] Constitution as far as I could, considering the differences in historico-political presuppositions”*¹⁰⁴².

During this first period, Kelsen made five preliminary drafts of the constitution, the latter being much closer to the Weimar constitution¹⁰⁴³. A second period followed, in which there

¹⁰⁴⁰ Paulson (2014) 14

¹⁰⁴¹ Grote, Rainer (2013). *The Republic of Austria: Introductory Note* (ed. Max Planck Institute). Oxford University Press, 1-12, 1

¹⁰⁴² Kelsen, Hans (1922) “Die Verfassung Österreich”, *Jarbruch des öffentlichen Rechts der Gegenwart* 11, 236 and from Hans Kelsen (1923) “Österreichs Staatsrecht”. Tübingen, Mohr, 160-161

In Paulson (2014) 15

¹⁰⁴³ As Paulson writes, *“the initial sections on ‘the administration of the federal government’ and ‘basic*

were negotiations with representatives of the *Länder* and a (failed) attempt by them to “take control of the proceedings”¹⁰⁴⁴. During this period, which lasted until the spring of 1920, Kelsen worked on another draft. The third period concerned consultations before the constitutional committee of the National Assembly, which started on July 11, 1920¹⁰⁴⁵.

After several months and negotiations between the political parties - and several drafts by Kelsen that, at the end, tried to find a compromise between the Social Democrats and the Christian Social Party¹⁰⁴⁶ - the constitution was voted on by the National Assembly. It was voted by the coalition of the SDAPDÖ with the Christian Social Party (1 October 1920). This coalition ended after the parliamentary elections of October 1920. The Christian Social Party won these elections, whereas the Social Democrats continued to govern the city of Vienna until 1934.

Regarding the content of the new federal Austrian Constitution, the *crucial difference* with the Weimar Constitution was that it established the parliamentarian direction more clearly, given also that the President’s position was designed to be much weaker. The Austrian parliament (Nationalrat) was elected by proportional representation (article 26) and it had legislative authority along with the Federal Council (Bundesrat, article 24). The President’s role was ceremonial and he was elected, not directly by the people, but by the Federal Assembly, which was a body that included parliament and the federal council (article 38). Moreover, he did not have any powers to proclaim a state of emergency¹⁰⁴⁷.

This “ceremonial role” of the Austrian President changed only after the far-reaching constitutional reform of 1929, which was led by the Christian Social Party and fascist parties. This reform gave many powers to the President, such as the right to dissolve the National Assembly, but only once for the same reason, which seems identical with article 25 of the Weimar Constitution, and to appoint the federal government. Moreover, it

rights and obligations’ reflect the Weimar Constitution’s sections on ‘the Reich administration’ (Arts. 78–101) and ‘basic rights and obligations’ (Arts. 109–165)”. Paulson (2014) 47

¹⁰⁴⁴ Ibid, p.15

¹⁰⁴⁵ Grote (2013) 1

¹⁰⁴⁶ Paulson (2014) 15

¹⁰⁴⁷ See also Urbinati (2013) 1-24, 21

introduced provision for the direct election of the President by the people, every six years (Art. 60)¹⁰⁴⁸.

Another critical difference of the Austrian Constitution from the Weimar Constitution was that it established a Constitutional Court (articles 137-148). This centralized form of constitutional review was probably the first to be created at that time¹⁰⁴⁹. This Court was distinct from the ordinary judiciary and it had the competence to hear challenges to the legality of the ordinances of the regional or federal administration, on the application of a court of ordinary jurisdiction (article 139). Moreover, on the application from the federal or the regional governments, it had the competence to decide on the constitutionality of a Land or a federal statute (article 140). Finally, it was also empowered to decide on the Court's own initiative "*insofar as this is required in order to pass on the constitutionality of a statute in a case before the Court*" (article 140)¹⁰⁵⁰. Article 140 was thought by Kelsen, in 1922, to be "*the high point of the [Court's] function as the guarantor of the Constitution (Garant der Verfassung)*"¹⁰⁵¹.

The last issue that should be addressed here is the process of appointment of judges to the Constitutional Court, according to the Austrian Constitution (until the 1929 reform). The President, the Vice-President and half of the members of the Court were elected by the Nationalrat, and the other half by the Bundesrat¹⁰⁵² (article 147). This is also something that is, *crucially*, related to the "legislative" role of the Court. This association is stressed by Kelsen, in his debate with Carl Schmitt regarding the "Guardian of the Constitution" (see section 4).

Concluding this section, we have seen that Kelsen tries to develop a democratic concept of constitution, which is in line with his theoretical emphasis on parliament as the locus of political power (see the next section). He tries, along with the Austro-Marxist Renner, to formulate this Constitution closely to the Weimar Constitution, with two main differences: *without* the latter's concept of a president and *with* a Constitutional Court.

¹⁰⁴⁸ Grote (2013) 2

¹⁰⁴⁹ Another one was the Czechoslovak Constitutional Court, established by statute on March 9, 1920. However, as Paulson writes, "*it did not... hear cases at the outset*". Paulson (2003) 224

¹⁰⁵⁰ Paulson (2014) 16. See also Kelsen (1942) 194-197

¹⁰⁵¹ Kelsen (1922), "Die Vervassung Österreichs", *Jarbruch des öffentlichen Rechts der Gegenwart* 11, 232-274, 264 in Paulson (2014) 16

¹⁰⁵² Kelsen (1942) 187-188

We will move now to Kelsen's political theory, which developed his constitutional suggestions at a deeper theoretical level.

6.2. Kelsen's political theory: the "class equilibrium" State theory

Kelsen's political theory is associated with democracy, as evident in the title of his most significant book on political theory, "The Essence and Value of Democracy".

His account of democracy starts from the heritage of the 1789 and 1848 revolutions and is related to parliamentarism. Kelsen argued that the whole development of the late 18th and early 19th century was "*a battle for parliamentarism*" that would "...*put an end to the dictatorship of the absolute monarch and the privilege of the estates*"¹⁰⁵³. During the 19th and the 20th century, the emancipation of the bourgeoisie "*against the privileges of the aristocracy*" and, later, the political equality of the working class- that signified "*the beginning of its moral and economic emancipation against the propertied classes*"- was achieved through parliamentarism¹⁰⁵⁴.

The issue of universal suffrage was crucial here and played a role in the transformation of the State through parliamentarism. This state becomes "*not only the state of the 'possessors' but also of the propertyless*" as he argued¹⁰⁵⁵. The social legislation of the 20th and late 19th century made this evident¹⁰⁵⁶. In the direction of analyzing this concept of the state, Kelsen is also "helped" by a term that Otto Bauer- a centrist figure in the Austrian Social Democratic party- introduces. This is the conception of the state as "equilibrium of class strengths" (*Das Gleichgewicht der Klassenkräfte*). *This term is used by Bauer in order to characterize the second period of his periodization of the new Austrian Republic (with references to Marx's periodization of the 1848 French revolution and to Engels*¹⁰⁵⁷).

More concretely, the Austrian Republic can be divided, according to Bauer, into three periods. The *first* period was between 1918 and 1919, in which there was the ascendancy

¹⁰⁵³ Kelsen ([1929] 2013) 47

¹⁰⁵⁴ Ibid.

¹⁰⁵⁵ Kelsen ([1925] 1967), 268-269

¹⁰⁵⁶ Ibid. 267

¹⁰⁵⁷ Bauer ([1924] 2015) 323-339, 325, 327-328

of the working class. The *second* one was between 1919-1922, in which neither the bourgeoisie nor the working class could govern on its own. During this equilibrium period, there was not a class state but a *Volksstaat*¹⁰⁵⁸. The *third* period was after the fall of 1922 (since the Geneva accord) in which there was the restoration of the bourgeoisie. However, even during this *third period*, the “*restoration of the bourgeoisie did not last long. In fact, the proletariat are again in a position to reconstitute an equilibrium between the classes, as they fight for a ‘right of co-determination’, in order to realise an ‘organic democracy’, that is, the ending of the bourgeois class domination*”¹⁰⁵⁹.

Kelsen traces a contradiction in Bauer’s argumentation. This is that the equilibrium period does not seem to be confined merely to Bauer’s second period. That’s because if this was the case, Kelsen argues, the proletariat would not be able to reconstitute the equilibrium (as Bauer suggests in the last excerpt) because the state would dominate the proletariat¹⁰⁶⁰. This contradiction in Bauer’s argumentation is also evident, as Kelsen argues, in the fact that Bauer does not exclude the possibility of a new coalition, between the Social Democrats and the Christian Social party, during this third period¹⁰⁶¹.

Kelsen takes this contradiction of Bauer and, making productive use of it in his direction, argues that the state, as class domination, has not been the case during the whole 1918-1923 period¹⁰⁶². He also gives the example of the city of Vienna, that could still enforce social policies, despite the purely bourgeois central government of Austria after October 1920. This shows, according to Kelsen, that the state has been transformed¹⁰⁶³.

He goes on by stating that this transformed state, this *Volksstaat*, has been the case already since the second half of the 19th century¹⁰⁶⁴ (given the social systems of protection and general male suffrage) and that its difference with the post-1918 state is only *quantitative*¹⁰⁶⁵. Given this, the state of “equilibrium of class strengths” is, as he argues, “*by no means a direct product of military collapse, but the result of a slow process long before the war that began with the proletariat's strengthening*”¹⁰⁶⁶.

It is, therefore, evident that Kelsen’s appropriation of Bauer’s term allows his to argue for

¹⁰⁵⁸ Herrera (1998) 212

¹⁰⁵⁹ Bauer ([1924] 2015) 329-330

¹⁰⁶⁰ Kelsen ([1925] 1967) 284-285

¹⁰⁶¹ Ibid. 286

¹⁰⁶² Ibid. 288

¹⁰⁶³ Ibid. 276-277, 288

¹⁰⁶⁴ Ibid. 288

¹⁰⁶⁵ Ibid.

¹⁰⁶⁶ Ibid. 286

an autonomous concept of the state, which is not a class state. Moreover, Kelsen's theory has also affinities with Karl Renner's theory. Renner belonged to the right wing of the Austrian Social Democratic party, whose direction was based on Bernstein's theory¹⁰⁶⁷, and his theory is not that different from Bauer's¹⁰⁶⁸. He argued in 1917 that "*1. the economy serves the capitalist class more and more exclusively; on the other hand, the state serves increasingly the proletariat. 2. The germ of socialism is to be found today in all the institutions of the capitalist state*"¹⁰⁶⁹.

This analysis indicates that socialism is already an immanent tendency in the capitalist state, with the difference that the capitalist class is still dominant in the economy. Kelsen adopts this logic and Karl Renner's injunction, which is "*the state as the lever of socialism*"¹⁰⁷⁰. It is through the state, Kelsen argues, that the balance of forces can change.

Given this analysis, we can clearly grasp, *firstly*, Kelsen's commonality with the leading Austro-Marxists. *This commonality is visible especially after the Great War and is also admitted by Kelsen. As he wrote later about this period, "From the very beginning, I was in complete agreement with the democratic program of the Austrian Party, which did stand fundamentally on the ground of Marxism, but which had practically nothing to do with the anarchistic state theory of Marx and Engels. As an individualist, I was originally opposed to its economic program of nationalizing the economy. Later, especially under the impression of the economic upheavals that the war had brought with it, I became more and more inclined to acknowledge that the system of economic liberalism, the way it was being realized under the given circumstances, provided no guarantee for the economic security of the mass of the have-nots. [. . .] I was and am fully aware of the difficulty combining the nationalization of production with the political freedom of the individual; but I believe I must be objective enough to acknowledge that economic security for the great mass is more important than anything else..."*¹⁰⁷¹.

This commonality is also revealed by the fact that Kelsen signed a call for people to vote

¹⁰⁶⁷ Czerwińska-Schupp, Ewa & Zurowski, Maciej (2017). 'State, Democracy, Socialism' in *Otto Bauer (1881-1938): Thinker and Politician*, Leiden, Boston: Brill Academic Publishers, 249

¹⁰⁶⁸ Ibid.

¹⁰⁶⁹ In Lowy, Michael (March-April 1976). 'Marxists and the National Question', *New Left Review* 1/96, 92

¹⁰⁷⁰ Kelsen ([1925] 1967) 268-269, 272. Herrera (1998) 207

¹⁰⁷¹ Kelsen in: M. Jestaedt (ed.), *Hans Kelsen Werke* (Tübingen: Mohr Siebeck, 2007), 58-59 from Bernstorff, Jochen von (2010). *The Public International Law Theory of Hans Kelsen: Believing in Universal Law*, New York: Cambridge University Press, 277

for the Austrian Social Democrats, in 1927¹⁰⁷², that he was proposed as a member of the Constitutional Court and mainly by the fact that he was chosen by Renner to draft the Constitution of the new Austrian Republic (despite never having been a member of the SDAPDÖ because he wanted to maintain his independence from partisan politics)¹⁰⁷³.

The *second* issue to be revealed is that Kelsen delves into the debates of German Social Democracy during the 1920s, by siding with its reformist part, which is also theoretically close to the leading Austro-Marxists. In this direction, Kelsen cites Lassalle's question "*what is the state*" and his answer that the state is "*yours, [of] the big association of the poorer classes- that is the state*"¹⁰⁷⁴.

This is related also to the evolutionary perspective of Kelsen, which is evident in his phrase that "...from the insight that only existing tendencies need to be strengthened in the state legal order so as to approach the social ideal- perfect realization of which remains impossible-, there arises the justification of the evolutionary reform!"¹⁰⁷⁵. Kelsen's analysis, therefore, seems also close to Bernstein's evolutionary analysis (see chapter 2).

The affinity between Kelsen and all the aforementioned theorists is in their resolution of the contradiction between democratic state and capitalist economy, through the former. However, contrary to all these figures that he invokes, Kelsen conceives Marxism as inherently problematic,¹⁰⁷⁶ whereas all the aforementioned social democrat theorists argue from within the Marxist discourse, by trying to detach Marxism from Leninism"¹⁰⁷⁷.

Marxism is, therefore, Kelsen's *first enemy* in his political theory because it is hostile to the state. Kelsen argued that Marxism's hostility to the state derived from its economic reductionism, based on which the State is depicted as an authoritarian machine for the benefit of the bourgeoisie¹⁰⁷⁸. This is, according to Kelsen, mainly because Marxism is

¹⁰⁷² Herrera (1998) 199

¹⁰⁷³ He had written that "*my need for independence from partisan politics, in my profession, was and is stronger than this sympathy. What I do not allow the state-restriction on the right and freedom of research and expression of opinions- I cannot concede to a political party by voluntary submission to their discipline*".

In Baume (2012) 3, from Kelsen's autobiography quoted in Métall, "Hans Kelsen: Leben und Werk", 33

¹⁰⁷⁴ Kelsen ([1925] 1967) 293

¹⁰⁷⁵ Ibid. 267

¹⁰⁷⁶ Ibid 295

¹⁰⁷⁷ As Herrera writes, "*Leser translated the debates in the Austrian Social Democracy in 1926 with the formula 'between Kelsen and Lenin'*". Herrera (1998) 208

¹⁰⁷⁸ Kelsen ([1925] 1967) 263-264

based on a naturalistic-sociological method, which corresponded to the sociologies of the 19th century (Comte), and views as “*a causal result of a natural necessity*” the prospect of a society that will be totally “*stateless*”, “*solidarity-based*”, and equipped with “*free-will*”¹⁰⁷⁹. Towards this prospect of a harmonious society that will dissolve the state “*Marxist socialism is in complete agreement with the basic idea of anarchism*”¹⁰⁸⁰.

Kelsen also draws here an association between the Marxist concept of the State as domination and Marxism’s anti-democratic outcomes, which appear in the distinction between “formal” democracy, that is “*based on the principle of the majority*”, and “*social, proletarian*” democracy, that is based on the “*Bolshevist doctrine*”¹⁰⁸¹. As Kelsen argued (with reference to Hilferding’s analysis) Marxism’s anti-democratic tendency for a *coup* can be seen for two reasons: 1) due to the attitude of the (19th century) state, which excluded the proletariat from any participation in the political decisive formation of will, 2) due to the theory of the ruling class, which identified the historically concrete form of the (19th century) state with the state in general¹⁰⁸².

Kelsen argues that it is this concept of the state, which Marxism identified with the “state” in general. This is a consequence, according to Kelsen (following Hilferding), of the fact that “*in Germany, socialist politics had developed into a semi-absolutist, undemocratic state*”¹⁰⁸³. However, this changed radically after the war with the experience of democracy that was practiced by the workers.

Thus, Kelsen’s opposition to Marxism derives, *firstly*, from his concept of the state and his argumentation at an empirical level that there has been a transformation of the state during the 19th and 20th centuries, which means that the state has developed through an “*immanent tendency*” into a more autonomous role, even if it has been used initially by the bourgeoisie, as a means for its own ends¹⁰⁸⁴. With this analysis, he means, therefore, that the current (Weimar and Austrian) states were states of “class equilibrium” and did not

¹⁰⁷⁹ Ibid. 263

¹⁰⁸⁰ Ibid. 264

¹⁰⁸¹ Kelsen ([1929] 2013) 97-99

¹⁰⁸² Kelsen([1925] 1967) 289

¹⁰⁸³ Ibid.

¹⁰⁸⁴ Ibid. 268

exert any form of domination over the popular classes (an argumentation not that dissimilar from the one that we saw in pre-1933 Neumann's and Heller's account of the state in chapter 4.3.).

Given this analysis of Kelsen, it is not surprising that he criticizes, explicitly, the German SPD for having a contradictory attitude in that it still held to Marxist rhetoric¹⁰⁸⁵. On the contrary, he argues with Lassalle against the “*night watchman*” (*Nachtwächteridee*) concept of the state that is shared by liberalism and Marxism¹⁰⁸⁶.

However, there is also a *second reason* that Kelsen opposes Marxism (apart from his argument regarding the transformed state). This is the social harmony and the conflict-free society that Marxism suggests. That's because, as he argues, even if economic exploitation is abolished, there are still other conflicts that do not derive out of economic origins such as the “...*religious, artistic and above all erotic problems*”¹⁰⁸⁷.

I think that this critique of Kelsen can be seen as an outcome of two elements in Kelsen's thinking. *Firstly*, of his conception of the people. As Kelsen wrote, “...*there is nothing more problematic than this unity, which goes by the name, the People. Sociologically, it is riddled with national, religious and economic differences and thus represents more a bundle of groups than a coherent, homogeneous mass*”¹⁰⁸⁸. There is, therefore, an intrinsic social plurality that leads to various sorts of conflicts. Here we can evidently see the ‘Austrian influences’.

Secondly, it is due to his “*pessimistic anthropology*”¹⁰⁸⁹, which can be seen in his argument that “*no social order is possible without the coercion (Zwang) of man over man*”¹⁰⁹⁰. Therefore, the state is always necessary. Regarding Kelsen's point, it is interesting to look at Adler's incisive critique of Kelsen. Adler, who belonged to the left-wing of the Austrian Social democrats, argued that “*Marxists have never asserted that, with the dissolution of*

¹⁰⁸⁵ Ibid. 295

¹⁰⁸⁶ Ibid. 291

¹⁰⁸⁷ Kelsen Hans ([1920] 1965). *Sozialismus und Staat: Eine Untersuchung der politischen Theorie des Marxismus*, Wien: Wiener Volksbuchhandlung, 91

¹⁰⁸⁸ Kelsen ([1929] 2013) 36

¹⁰⁸⁹ Herrera (1997) 250

¹⁰⁹⁰ Kelsen, Hans ([1931]1967) ‘Allgemeine Rechtslehre im Lichte materialistischer Geschichtsauffassung’ in *Demokratie und Sozialismus: Ausgewählte Aufsätze*, Darmstadt: Wissenschaftliche Buchgesellschaft, 92

*the class-based state, development ceases, and that a condition of absolute harmony and a static equilibrium is achieved. Only the form of social development is changed*¹⁰⁹¹.

However, this remark is not taken into consideration by Kelsen who, *firstly*, considers Marxism in its most mechanical form and, *secondly* endorses a concept of an autonomous state by suggesting, as we have seen, that the Weimar and the Austrian state were not class states.

Liberalism as Kelsen's second 'enemy' and his defence of parliamentary representation

It's time now to make the transition to Kelsen's *second* "enemy", which is *liberalism*, given also that the origins of the political theory of Marxism can be traced, according to Kelsen, to the revolutionary liberalism of the 19th century¹⁰⁹².

Liberalism was, according to Kelsen, the political theory of the German bourgeoisie, at the time that Germany was governed by absolute monarchs and by the aristocracy. Hence, it was hostile to the state. However, despite this hostility, the state was tolerated because it secured a guarantee of private property to the bourgeoisie¹⁰⁹³. The liberal idea of the state- and here Kelsen cites again Lassalle- confined it to a "night-watchman" role, namely to the protection of private property and individual rights¹⁰⁹⁴.

According to Kelsen this liberal approach of the state derives from a "natural" concept of freedom, which has a negative meaning. On the contrary, Kelsen endorses a different concept of freedom, which goes hand in hand with his conceptualization of the State from the perspective of democracy and with his "equilibrium" state analysis¹⁰⁹⁵. This is a "denaturalized" freedom that "*is transformed into social or political freedom. To be politically free means to be subject to a will, which is not however, a foreign, but rather*

¹⁰⁹¹ Adler, Max ([1922] 2015) 'Excursus on Anarchism' in Blum, Mark E. & Smaldone, William (eds.) *Austro-Marxism: The Ideology of Unity, Austro-Marxist Theory and Strategy*, vol. 1, The Netherlands: Brill Academic Publishers, 219

¹⁰⁹² Kelsen ([1925] 1967) 263

¹⁰⁹³ Ibid, 262. See also Herrera (1997), 219

¹⁰⁹⁴ Kelsen ([1925] 1967) 291

¹⁰⁹⁵ As Kelsen argued, "*democracy is the only natural and adequate expression of the existing power relations*". Kelsen ([1929] 2013) 76

one's own will...Anarchical freedom becomes democratic freedom"¹⁰⁹⁶.

In this direction, Kelsen brings in Rousseau, whom he deems as "*possibly the most important theorist of democracy*"¹⁰⁹⁷. He takes into account Rousseau's theory in order to justify this- as he calls it- "*metamorphosis*"¹⁰⁹⁸ from the natural-individual concept of freedom to a positive-political concept of freedom. Based on this "*perceptual shift*", he argues that "*individual freedom is replaced by popular sovereignty, and a free state, or republic (Freisstaat), becomes the fundamental demand*"¹⁰⁹⁹.

Kelsen concludes that "*this transformation simultaneously requires that we detach democracy from liberalism*"¹¹⁰⁰. In this direction, his concept of freedom is actually an inversion of Benjamin Constant's distinction between the "liberties of ancients" and the "liberties of moderns" (that denotes an abstention from the state) to a logic of democracy that signifies a participation of the citizen in the state¹¹⁰¹. That's why Rousseau is "useful" to him.

Having described this "*perceptual shift*", Kelsen takes this further by arguing now against Rousseau's "identification" thesis (between representatives and represented) and direct democracy. The *main* reason that does not allow for a "*primitive*"-as he calls it- form of direct democracy is the reality of the "*complexity of social conditions that makes the advantages of labor division indispensable*"¹¹⁰². Given this, parliamentary democracy and the majority principle is a necessary compromise between the "*primitive*" idea of political freedom and the principle of the division of labor, as Kelsen argues¹¹⁰³.

Moreover, he writes that, historically, it is through the "*declaration of independence from the People*" that parliament asserted its transformation from the old estate assembly "*whose members were bound by and responsible to their mandates of their constituent*

¹⁰⁹⁶ Ibid. 28-29

¹⁰⁹⁷ Ibid. 29

¹⁰⁹⁸ Ibid. 35

¹⁰⁹⁹ Ibid. 33

¹¹⁰⁰ Ibid. 32

¹¹⁰¹ Ibid. 28-29. See also Herrera (1997) 121

¹¹⁰² Kelsen ([1929], 2013) 49

¹¹⁰³ Ibid. 51

groups”¹¹⁰⁴. This excerpt denotes a *second* crucial difference from Rousseau: a *distinction* between the political and the social as an outcome of modern representation, in contrast with the early modern concept of representation (estate assembly).

However, this distinction does not presuppose the bourgeois distinction between the political and the economic. As Kelsen, argues “such a clear separation of the political from the economic is impossible on most matters, as most economic matters have political, and most political matters economic, relevance...”¹¹⁰⁵. We can see, therefore, that Kelsen’s concept of parliamentary representation remains different from the concept of a liberal-individualistic freedom that would be pre-political and hostile to the state.

This concept of parliamentary representation is based not only on the division of labor but also on Kelsen’s concept of the “people” (see above). That’s because Kelsen justifies parliamentarism with reference to the lack of an “organic common will”¹¹⁰⁶. As he argued, due to social plurality, “*one can speak of unity only in a normative sense*”¹¹⁰⁷. So, according to Kelsen, the will of society can emerge only through the multi-party parliamentarism that represents the “*fiction*” of the people¹¹⁰⁸. As Kelsen wrote, “*the fiction of representation is meant to legitimate parliamentarism from the standpoint of popular sovereignty*”¹¹⁰⁹.

On the contrary, the forms of representation that dissolve the political-social distinction are based on a logic of a homogeneous will and lead to autocratic outcomes. This is also how we can understand Kelsen’s critique of Rousseau for autocratic tendencies, when he writes that “[Rousseau] *is not far from doing so, when he justifies the binding nature of majority decisions i.e the authority of the majority, on the basis that the minority has erred regarding the true content of the volonté générale*”¹¹¹⁰. He therefore understands Rousseau’s argument as being based on a common organic will.

Kelsen argues that this autocratic logic, which suppresses social plurality, belongs to

¹¹⁰⁴ Ibid. 50

¹¹⁰⁵ Ibid. 62

¹¹⁰⁶ Ibid. 40

¹¹⁰⁷ Ibid. 36

¹¹⁰⁸ Ibid. 40

¹¹⁰⁹ Ibid. 50

¹¹¹⁰ Ibid. 102

philosophical absolutism, which signifies the resort of the political to the logic of “*absolute truth*”¹¹¹¹. This philosophical absolutism “*transcends experience*”, since it is inaccessible to human cognition and, therefore, to its critical disposition¹¹¹². That’s why it is linked to autocracy and not to democracy.

On the contrary, democracy, according to Kelsen, presupposes a relativistic viewpoint. The institution that embodies both this relativism and self-determination when a division of labor and social plurality exist, is *parliament*. However, the embodiment of this philosophical relativism, by parliament, should be seen under specific conditions.

Firstly, parliament is expressing this relativism if it endorses proportional representation in the sense that “the true constellation of interests is reflected by this body in the first place... proportional representation actually amplifies the very tendency of freedom to prevent the will of majority from completely dominating the will of the minority”¹¹¹³.

There is also a second step, which is that the “entire parliamentary process, whose dialectical procedures based on speech, and counterspeech, argument and counterargumentation, aims for the achievement of compromise...”¹¹¹⁴. From this excerpt arises the issue of “compromise”. The word does not denote a “higher absolute truth or an absolute value standing above group interests”¹¹¹⁵ (given also his critique to Marxism precisely for this reason).

I think that we should view this concept of “compromise” in *two stages*. *Firstly*, as a precondition for the formation of a parliamentary majority, so as to prevent the danger of extensive party fragmentation, which could be caused by proportional representation¹¹¹⁶. The assumption here is the division of the people into political parties. As Kelsen argues “*if the will of society is not to be the expression of the interests of one group alone, that will must be the result of a compromise between opposing interests. The division of the People into political parties, in truth, establishes, the organizational preconditions for the achievement of such compromises and the possibility of steering the will of society in a*

¹¹¹¹ Ibid. 102-103

¹¹¹² Ibid.

¹¹¹³ Ibid. 72

¹¹¹⁴ Ibid. 69

¹¹¹⁵ Ibid. 70

¹¹¹⁶ Ibid. 73

moderate direction”¹¹¹⁷. It is through party compromises that social peace is provisionally ensured (as visible in the excerpt above).

The second stage concerns the compromise between the majority and the minority, which is evident in the following phrase: “if one disregards the fiction that the majority somehow represents the minority and that the will of the majority is the will of all, then the majority principle comes to be perceived as a principle of domination by the majority over the minority”¹¹¹⁸.

The consequence of this compromise logic is “practically” the protection of the minority, which means that “measures, which infringe upon the certain national, religious, economic or broadly intellectual spheres of interests, are possible only with the assent, and not against the will of a qualified minority; that is they require agreement between the majority and the minority”¹¹¹⁹.

This compromise logic should be seen as “*inscribed in the social-democratic strategy*”: it is the way in which a gradual and pacific transformation is preferred over a violent and revolutionary one¹¹²⁰. In this vein, it is not accidental that Kelsen makes an explicit reference to Bauer’s theory of “*equilibrium of class strengths*”¹¹²¹ in the section, in which he discusses the issue of compromise. As an aside, it should also be noted that this thematic of compromise was introduced much earlier by Bernstein (in 1899) who had argued that democracy is the “*high school of compromise*”¹¹²² in the sense that it “*teaches social classes to cooperate with one another*”¹¹²³.

Thirdly (reminding that the first is proportional representation and the second is protection of minority), Kelsen’s concept of parliamentarism presupposes also the essential inclusion of “*fundamental rights or human and civil rights*” in “*all modern parliamentary-democratic constitutions*”¹¹²⁴. Kelsen argued that these rights should be protected by the higher quorum of two-thirds or three quarters majority, which is enjoyed by the

¹¹¹⁷ Ibid, 40

¹¹¹⁸ Ibid.72, 68

¹¹¹⁹ Ibid, 68

¹¹²⁰ Herrera (1997) 230

¹¹²¹ Kelsen ([1929] 2013) 78

¹¹²² Bernstein (1899), Chapter 3(2)

¹¹²³ Gay (1952) 245. See also Herrera (1998) 217

¹¹²⁴ Kelsen ([1929] 2013) 67

constitutional laws¹¹²⁵. Moreover, he explicitly included them (“*equality before the law, of individual liberty, of freedom of conscience and so on*”) in his broader concept of the constitution that can be traced along with the narrower-“*substantive*” one in his “Pure Theory”¹¹²⁶ (see section 3).

Kelsen’s concept of rights should not be seen as detached from his overall state theory and social-democratic strategy. The identification of Kelsen’s theory as “left-liberal”- with reference also to an excerpt from Kelsen’s more liberal-leaning “American” period¹¹²⁷ that includes these rights in the category of “*political liberalism*”¹¹²⁸- misses the context in which Kelsen’s concept of rights was developed during the 1920s. That’s because Kelsen does not accept the liberal concept of the state¹¹²⁹ (as seen also above) and the liberal concept of freedom. To put it differently, Kelsen is as liberal as Bernstein is, who had argued that socialism is the legitimate heir of liberalism (as seen in chapter 2).

Fourthly, Kelsen’s concept of philosophical relativism (centered around parliament) presupposes the elements of “*publicity-criticism-accountability [and] the belief that the leader can be freely chosen*”¹¹³⁰. These elements differentiate “democracy” from “autocracy”, in that the latter is based on a concept of leadership that “transcends society” and keeps “secret” the actions of the leader¹¹³¹, which makes accountability impossible. So, Kelsen ties mass democracy to a logic of *publicity* and *accountability*, namely to a public sphere without associating this sphere to a 19th century model of parliamentarism (as Schmitt did, see chapter 5).

¹¹²⁵ Ibid. 68

¹¹²⁶ Kelsen, Hans ([1934] 1996). *Introduction to the problems of legal theory, a translation of the first edition of the Reine Rechtslehre or Pure theory of law* (trans. Litschewski Paulson, B. & Paulson, S. L.), Oxford: Clarendon Press, 65

¹¹²⁷ Herrera (1998) 202

¹¹²⁸ In this article Kelsen had also written that “*modern democracy cannot be separated from political liberalism*”. Kelsen, Hans (October 1955). ‘Foundations of Democracy’, *Ethics*, 65(1), part 2, 27

This article along with Kelsen’s passage in the 1911 text (for which he explicitly apologized in 1929, see the introduction of this chapter) is invoked by Urbinati in order to show the left-liberal orientation of Kelsen. Urbinati (2013) 24

¹¹²⁹ Herrera (1998) 202

¹¹³⁰ Kelsen ([1929] 2013) 93

¹¹³¹ Ibid. 45

Kelsen's third 'enemy': conservatism

We have now a better picture of Kelsen's concept of political representation. In this picture, parliamentary democracy plays a central role, which puts Kelsen on the antipode of the conservative critique during Weimar. This critique, which is Kelsen's *third 'enemy'*, argued that the people in a parliamentary democracy constitute a "*soulless mass*" and that democratic society is "*mechanized*"¹¹³².

Kelsen wrote that this critique derived from the logic of an organic "general will" and, therefore, of an organic society¹¹³³. This "organic society" is "*this illusory idea of a solidarity of interests among all of society's parts free from religious, ethnic, economic, and other differences which is then contrasted with the so-called multiparty state and with mechanical democracy*"¹¹³⁴.

Kelsen rejects this perspective because it presents the "state as the tool for the common interests of a unified community....it is simply an attempt to idealize, or rather justify, reality for political reasons"¹¹³⁵. Hence, he wrote that, due to the neglecting of social conflict, this logic of common interest was "above partisanship...metaphysical-or better, meta-political - illusion"¹¹³⁶.

With the same argumentation Kelsen renounced as well corporative representation, by writing that the conflict between employers and employees is "*exacerbated*" when they are in the same "*vocational group*"¹¹³⁷. Thus, he also viewed the dangers of the dissolution between the social and the political (endorsed by the "associational" theory of Gierke).

However, Kelsen's defense of the parties is also not uncritical in the sense that he

¹¹³²Here Kelsen refers to Triepel and he conceives him as a "typical *representative of this dogma*".

Ibid. 44-45

¹¹³³ Ibid. 40

¹¹³⁴ Ibid.

¹¹³⁵ Ibid.

¹¹³⁶ Ibid.

¹¹³⁷ Ibid. 64

recognizes Weber's insights (even without mentioning his name) into the bureaucratization of political parties. He argued that political parties take an "*aristocratic-autocratic form...* (even the parties "*pursuing a radical democratic program*"¹¹³⁸). Thus, he also makes a *counter-move* by suggesting the constitutional "*anchoring*" of political parties as public bodies (this was not the case in the Weimar Constitution)¹¹³⁹. This would help to make the parties more democratic internally. Moreover, he proposes also a series of reforms aimed at reinforcing parliament's democratic accountability (such as the abolition of legislative immunity) and closer contact between the people and parliament (e.g. petition by citizens, referendums)¹¹⁴⁰.

Kelsen's overall methodology is in the direction of reinforcing parliamentarism. In this sense, he moves to the opposite side of Schmitt's meta-political suggestions. Whereas Kelsen tried to reinforce parliamentarism so that social conflict can be better expressed, Schmitt's suggestions tried to depoliticize the conflict, through appeal to the President as *pouvoir neutre* (see chapter 5).

Concluding this second section of the chapter, we have seen that Kelsen's political theory is centered on the modern State and has *three* explicit enemies: marxism conceived as "anarchism", liberalism and conservatism. All these currents, according to Kelsen, share something crucial: they assume a given, sociologically-reified relationship between the State and society and, relatedly, a viewpoint of "philosophical absolutism" that is not a friend of democracy.

On the contrary, according to Kelsen, democracy presupposes a relativistic approach around the distinction between State and society. This is based both on the logic of an inescapable and irreducible social plurality and conflict but also on Kelsen's concrete analysis of the modern democratic state, which derives from his social democratic assumptions. So, the basic thread that permeated Kelsen's political theory, is a logic of the state as an *instrument* through which (and mainly through parliament) the social is expressed (notwithstanding that it always remains conflictual).

¹¹³⁸ Ibid. 41

¹¹³⁹ Ibid.

¹¹⁴⁰ Influenced by the Soviet constitution, he is also thinking about some form of imperative mandate. However, in his version, this could take place through political parties and with the assumption that they will be very democratic (internally) and that almost all the people will be organized in them.

As Kelsen had written in the framework of his analysis of James MacDonald's theory- whose writings were well known in Germany because they had been translated in 1912 and the preface was written by Bernstein¹¹⁴¹- the State is "*not a class instrument but an organ of the society*"¹¹⁴².

6.3. Kelsen's legal theory: Law as a "social technique" and his critique of ideological dualisms

It's time now to see how Kelsen's political-state theory is related to his legal theory.

This connection is explicitly traced in Kelsen's argument that "*the idea of legality, though it places constraints on democracy must nonetheless be upheld if democracy is to be realized*"¹¹⁴³. As Urbinati writes, Kelsen's concept of legal order "*does not need to be understood as an independent set of constraints, imposed 'externally' on the exercise of popular sovereignty but emerges instead as its background condition of possibility*"¹¹⁴⁴.

This association is also seen in that Kelsen's legal theory is permeated by the same logic as his political theory. As noted earlier, Kelsen conceived the democratic state as an instrument that can be used in various directions by society. In an analogous fashion, Kelsen argued, in 1931, that the law "*not seen through the lens of an ideology, is nothing but a social technique*"¹¹⁴⁵. This overall direction is more evident given that Kelsen's legal theory has the same 'enemies' as his political theory: liberalism, marxism, conservatism. His legal theory can be viewed closely through his critique of his "opponents".

Kelsen's critique starts from "*traditional*" 19th century legal theory, in which he includes both the *liberal* and the *conservative* conceptions of legal theory. Regarding the former, Kelsen distanced himself from the "*liberal-individualist*" theory that is "*hidden in some of*

¹¹⁴¹ Herrera (1997) 311

¹¹⁴² Kelsen ([1925] 1967) 297

¹¹⁴³ Kelsen ([1929] 2013) 83

¹¹⁴⁴ Urbinati (2013) 1-24, 17

¹¹⁴⁵ Kelsen ([1931] 1967) 92. The translation from German is mine.

the traditional thinking of the law of the state”¹¹⁴⁶. He argues that this legal theory adopts the “*ideological*” dualism between “subjective right” and “objective law”.

This dualism denotes “*the essence of legal personality [that] is declared to be precisely the negation of every bond, namely liberty in terms of self-determination or autonomy*” as opposed to the objective law of the democratic legal order, which “*is in fact coercion*”¹¹⁴⁷. This dualism is based on the “*concept of legal subject or ‘person’ qua bearer of the subjective right, a concept essentially modelled on the property owner*”¹¹⁴⁸. The ramification of this dualism is that a “*system that does not recognize the human being as a free personality in this sense, a system that does not guarantee subjective rights, should not be considered a legal system at all*”¹¹⁴⁹.

The most important aspect in this dualism between “subjective right” and “objective law” is its *ideological role*. This is seen through the correspondence of this dualism to the distinction between “*personal*” and “*material*” legal relations “*depending on whether the connection in question is, respectively, between legal subject and object- person and thing- or between subjects*”¹¹⁵⁰. This latter distinction between “personal” and “material” legal relations, which is important in the “*systematization of the civil law*”, is modeled on property that is presented as a relation between person and thing. This distinction is “*ideological*” in that “*...a definition of property as a relation between person and thing disguises the socio-economically decisive function of property, a function characterized in socialist theory (never mind whether correctly or incorrectly) as ‘exploitation’*”¹¹⁵¹. This process of disguise shows, therefore, precisely the ideological role of the dualism between “subjective right” and “objective law”.

This dualism between “subjective right” and “objective law” is essentially related to the dualism between “private” and “public” law. This latter dualism “*turns on a classification of legal relations, with private law representing a relation between coordinate subjects of equal standing legally, and public law representing a relation between a superordinate and*

¹¹⁴⁶ Kelsen, Hans ([1929] 2000). ‘Legal Formalism and the Pure Theory of Law’ in Jacobson, Arthur & Schlink, Bernhard (eds.) *Weimar. A Jurisprudence of Crisis*, Berkeley, London: University of California Press, 80

¹¹⁴⁷ Kelsen ([1934] 1996) 40

¹¹⁴⁸ Ibid. 39

¹¹⁴⁹ Ibid. 41

¹¹⁵⁰ Ibid.

¹¹⁵¹ Ibid. 42

a subordinate subject- between two subjects, then, one of which is of higher standing legally than the other”¹¹⁵².

As it is evident from this excerpt, this dualism juxtaposes the autocratic method of creation of norms by the state with the democratic method of creating law in the sphere of private autonomy¹¹⁵³. Moreover, this dualism, as Kelsen argues, “*creates the illusion that the field of public law alone -above all the fields of constitutional and administrative law- is the domain of public power, which is totally excluded from the field of private law*”¹¹⁵⁴.

This distinction is, therefore, *ideological* given that it “*obscure[s] the fact that the private law created in the contract is no less the arena of political power than the public law created in legislation and administration. What we call private law, seen from the standpoint of its function—qua part of the legal system—in the fabric of the law as a whole, is simply a particular form of law, the form corresponding to the capitalistic economic system of production and distribution; its function, then, is the eminently political function of exercising power*”¹¹⁵⁵.

Kelsen’s theory reveals, therefore, that these dualisms reify the legal order by concealing the *political* dimension of the socio-economic relationships. So, through this “ideological” role, they are tied to a concept of legality that reifies the State-civil society distinction, by detaching the socio-economic relationships from the democratic accountability of the “we”. It should be reminded here, as an aside, that this overall direction could also be seen in Schmitt’s presupposition of a general law and, then, in his theory of “institutional guarantees” as a method to avert parliamentary intervention in the economy (see chapter 5).

Against the reification caused by these dualisms, Kelsen suggests their dissolution and, while arguing that legislation is general¹¹⁵⁶, he did not insert any such restriction. So, as Brunkhorst writes, “*Kelsen and Heller are arguing in concern in this respect. They have always argued for the input theory of the generality of parliamentary statutes.*

¹¹⁵²Ibid. 92

¹¹⁵³ Ibid. 92

¹¹⁵⁴ Ibid. 95

¹¹⁵⁵ Ibid. 96

¹¹⁵⁶ Kelsen ([1929] 2013) 82

*Parliamentary statutes (laws, Gesetze) are practically (and not necessarily semantically) general because they are an expression of the general will that is realized through the procedural (equal, free and fair) regulated will of the majority...This legally enables the parliamentary transformation from capitalism to socialism and the socialization of the means of production”*¹¹⁵⁷.

Against liberal legal theory, Kelsen also counterposes his “dynamic” legal theory (in contrast with the earlier static version of his theory) during the post-Great War period¹¹⁵⁸. Making a short digression here into analyzing this theory, Kelsen indicates that “*while the presupposition of the basic norm has the character of pure norm creation, and the coercive act has the character of pure application, everything between these limiting cases is both law creation and law application. One should note in particular that even the private law transaction is both, and it cannot be contrasted, qua act of law application, with legislation qua act of law creation—a mistake made in traditional theory. For legislation, too, like the private law transaction, is both law creation and law application*”¹¹⁵⁹. Thus, the private law transaction entails also the element of law creation.

This theory is related to the fact that the “*...main emphasis of the constitution consists in governing the process whereby statutes are enacted, with little, if any, weight given to determining their content*” (for the broader concept of the constitution see the second section and the footnote¹¹⁶⁰). Given this, “*it is the task of legislation to determine in equal measure both the content and the creation of judicial and administrative acts*”¹¹⁶¹. The

¹¹⁵⁷ Brunkhorst (2014). *Critical Theory of Legal Revolutions: Evolutionary perspectives*, New York, London: Bloomsbury, 351

¹¹⁵⁸ Kelsen’s shift into dynamic theory, from about 1920 (to 1960), had been more evident since the mid-1920s. Paulson, Stanley (1996). ‘Hans Kelsen’s Earliest Legal Theory: Critical Constructivism’, *Modern Law Review*, 59(6), 797-812, 798

¹¹⁵⁹ Kelsen ([1934] 1996 70

¹¹⁶⁰ According to Kelsen, the “essential function” of the constitution “*consists in governing the organs and the process of general law creation, that is, of legislation. In addition, the constitution may determine the content of future statutes, a task not infrequently undertaken by positive-law constitutions, in that they prescribe or preclude certain content. In most cases, prescribing a certain content, simply amounts to a promise of future statutes to be enacted, since for reasons of legal technique alone it is not easy to attach a sanction to the failure to enact statutes having the prescribed content. Preventing statutes of certain content is more effectively accomplished by the constitution. The catalogue of civil rights and liberties, a typical component of modern constitution, is essentially a negative determination of this kind.*”. Ibid. 64-65

¹¹⁶¹ Ibid. 65

general legal norms are further concretized by the Courts, the administration but also at the level of private law transactions¹¹⁶².

Thus, the law-creation process- “*that is the dynamics of state decision-making (Staatliche Willensbildung)*”- can be seen at the level of legislation, of administration, in the Court rulings and “*it is continued in particular also in the acts of the legal-contractual law creation*”¹¹⁶³.

The effect of this theory, as he put in his 1931 argumentation, is that it “*makes...impossible to oppose the subjective and private sphere of the contractual legal creation as being unpolitical or politically indifferent to the political-public-legal [sphere] of legislation and administration. From its absolutely universalist point of view [the pure theory] ...recognizes the collective and thus the political function of a legal contract, which is precisely one of the specific legal forms, in which the capitalist legal system regulates economic production and especially the distribution of products*”¹¹⁶⁴.

To put it bluntly, this method shows that for Kelsen there is a political dimension in the legal contract through its law-creation dimension. In this vein, he argues that the “*pure theory*” has “*demolished the ideological wall*” of the traditional theory “*between the allegedly only law-applying legal transaction and the allegedly only law-creating legislation and administration*”¹¹⁶⁵. It is also crucial that in this direction he cites approvingly Karl Renner’s argumentation (an adherent of the “immanent” strategy as seen in chapters 4.3), according to which the capitalist's right is nothing but “*delegated public power, blindly delegated to the benefit of those who have power (Gewalthabers)*” and especially the employment relationship is “*indirect power relationship*” (Herrschaftsverhältnis)¹¹⁶⁶.

It can be seen, therefore, that Kelsen ties the political dimension to law-creation, which does not take place exclusively in the parliament. Leaving this last point aside for the time being (see the next section), another *issue* that is revealed through the private-public law dualism is that it paves the way for the state-law dualism. That’s due to the fact that public law is not conceived as *stricto sensu* law and private law is conceived as “*the proper realm*

¹¹⁶² Ibid. 63-70

¹¹⁶³ Kelsen ([1931] 1967) 112

¹¹⁶⁴ Ibid.

¹¹⁶⁵ Ibid.

¹¹⁶⁶ Ibid. 111-112

of law”.

Its effect is, as Kelsen wrote, that “...*the relation between a general norm and the organ applying it would be different in the private and public law fields; in private law, the application of statutes to concrete cases would be constrained, bound by the statute, while in public law, realization of the state purpose would be unhampered, constrained merely by the framework of the statute...in the case of a so-called national state of emergency, the realization of the state purpose could even go against the statute*”¹¹⁶⁷.

It is visible, therefore, especially in this last excerpt, that Kelsen refers to a connection of the private-public law distinction with the *third* significant dualism of traditional theory, which is the state-law dualism (that captures also conservative legal theory)¹¹⁶⁸. This state-law dualism “*is the result when traditional theory attributes to the state an existence independent of the legal system, while at the same time regarding the state as a subject of legal obligations and rights, that is, as a [legal] person*”¹¹⁶⁹.

This dualism plays a significant *ideological* role in the sense that “*from a naked fact of power, the state becomes the Rechtsstaat, which justifies itself by making law. To the extent that a metaphysico-religious legitimization of the state ceases to be effective, this theory of the Rechtsstaat inevitably becomes the sole possible justification of the state...But it emphasizes at the same time that the state cannot be comprehended legally because the state qua power is essentially different from the law*”¹¹⁷⁰.

In other words, both the law and the State are legitimized through their distinction but by being, at the same time, inside the juridical order. In this way, law is still there but the State can act beyond it while being legitimized by it. This has as a consequence the state’s “*independence from the statute, from the general norms created by the people’s representatives or with their substantial participation*”¹¹⁷¹.

On the contrary, Kelsen argues for the famous *identity thesis* between State and law in

¹¹⁶⁷ Kelsen ([1934] 1996) 94

¹¹⁶⁸ Kelsen ([1929] 2000) 79

¹¹⁶⁹ Kelsen ([1934] 1996) 97

¹¹⁷⁰ Ibid. 98

¹¹⁷¹ Ibid. 95

order to combat the “*political ideology*” of State-law dualism. If the identity thesis is adopted, “*then it is impossible to justify the state by way of the law*” as Kelsen writes¹¹⁷². Moreover, it is significant that Kelsen does not ascribe the aforementioned dualism only to conservative legal theory, but argues that this dualism is part of the “*bourgeois*” state and legal theory (*bürgerliche* Staats-und Rechtstheorie) because it performs “*an ideological function of extraordinary...importance*”¹¹⁷³. This can be seen already through the association that he traced between the state-law dualism and the liberal private-public law distinction.

In this way, Kelsen captures precisely, even without naming it, the two basic elements of Schmitt’s thought that are necessary in his theory of authoritarian liberalism. The *first* move, through the state-law dualism, is Schmitt’s hypostatization of a homogeneous unity represented by the State-“Constitution” (namely by the President) as opposed to the Weimar constitutional order but without stepping out of the juristic. The *second* move is the precondition of the semantic generality of “law” and, then, of the “institutional guarantees” in the direction of developing a bourgeois concept of legality that would obstruct parliament’s ability to enact legislation that would intervene in the economy.

Kelsen, therefore, reveals that these three “bourgeois” dualisms are “ideological”- in that they try to legitimize a certain political conception of the State and of law- and that they are also interconnected. However, these dualisms, which are suggested positively by the “bourgeois” theory of law and state, are also accepted by *Marxist legal theory* (with the notable exception of Karl Renner¹¹⁷⁴) and, more particularly, by the legal theory of Pashukanis¹¹⁷⁵.

Unravelling this gradually through the transition to Kelsen’s critique of Marxist legal theory, Kelsen argues that Pashukanis “*is in perfect agreement with the prevailing doctrine within bourgeois legal ideology...*”. His only difference is that, whereas “*one usually speaks of ‘pulsating life’ or of social reality in general, he turns into the ‘relations of production’ as a Marxist*”¹¹⁷⁶.

According to Kelsen, this is due to the fact that Pashukanis’ theory is the “*...consistent*

¹¹⁷² Ibid. 105

¹¹⁷³ Kelsen ([1931] 1967) 130

¹¹⁷⁴ Kelsen ([1931] 1967) 70-71

¹¹⁷⁵ Ibid. 131

¹¹⁷⁶ Ibid, 115

application of the Marx -Engels doctrine of anarchism to the problem of law”¹¹⁷⁷. In this vein, Pashukanis accepted the “*naïve utopianism*” of a future society in which there would be “*solidarity of interests*” and only “*technical*” rules, given that in this society there would be a “*unity of purpose*” and not opposing private interests¹¹⁷⁸. This is “*genuine ideology*”, according to Kelsen, in the sense that it “*conceals the coercion from man to man*” that exists in every social order, precisely in the same way that this is concealed when the “*bourgeois theoreticians*” present the state “*as an expression of the unity of an overall will (Gesamtwillens) or of a collective interest*”¹¹⁷⁹.

Moreover, Kelsen associated the fact that Pashukanis does not understand the “*ideological doubling*” of the state-law distinction with the formulations of Marx and Engels, who kept this distinction. According to Kelsen, this derived from their base-superstructure distinction, which signifies that “*...the totality of these relations of production constitutes the economic structure of society, the real foundation, on which arises a legal and political superstructure*”¹¹⁸⁰. The consequence of this base-superstructure distinction, Kelsen argues, is that the legal-political framework is conceived as distinct from society. Due to this fact, it corresponds to the state-law distinction¹¹⁸¹.

As we can see, Kelsen’s critique of Pashukanis is related to his critique of the Marxist theory of the State: by adopting the bourgeois methodological categories, Marxism falls into its trap. Against both the Marxist and the liberal theories, Kelsen’s dissolution of the dualisms is in line both with his concept of freedom, and with his relational conception of the State. In this way, whereas Pashukanis reduces the legal order to private law of commodity exchange, Kelsen’s move is the opposite. He argues explicitly that all law is “*public law*” in the sense that “*there is not a legal relationship to which the state is not-directly or indirectly- a party*”¹¹⁸².

Concluding this section, we have seen that Kelsen’s critique of the ideological dualisms at

¹¹⁷⁷ Kelsen, Hans (1955). *The Communist Theory of Law*. London: Stevens and Sons Limited, 89, 110

¹¹⁷⁸ Kelsen ([1931] 1967) 91-92

¹¹⁷⁹ Ibid. 92-93

¹¹⁸⁰ Ibid. 135.

Kelsen takes this from Marx, Karl (1859) ‘Preface’ to *A Contribution to the Critique of Political Economy*, available at: <https://www.marxists.org/archive/marx/works/1859/critique-pol-economy/preface.htm> (last accessed on 04/02/2018)

¹¹⁸¹ Kelsen ([1931] 1967) 135-136

¹¹⁸² Kelsen (1955) 95

the level of legal theory, is tied to a concept of law as a “social technique” (as he put it in his 1931 writing), which aims at keeping open the formulation of the State-civil society distinction, so that the social can be expressed in this legal order through Kelsen’s concept of the political. This undergirding from his state theory is also practically seen in his argument that “*a constitution expresses the political forces (politischen Kräfte) of the people, it’s a document that attests the situation of relative equilibrium in which the struggling, for the power (Macht), groups remain until further notice*”¹¹⁸³. Moreover, he had already defined the Constitution, when discussing the issue of constitutional review, as “*a principle where the current balance of political forces is expressed*”¹¹⁸⁴. As Herrera notes, this shows a certain “*lassallism*” in Kelsen’s legal theory¹¹⁸⁵. On the contrary, before 1918, namely before his “dynamic theory” of law, Kelsen had attacked Ferdinand Lassalle for arguing that the real constitution is based on power, not on norms¹¹⁸⁶ (see chapter 2 about Lassalle’s theory).

However, at the same time, this association of Kelsen’s legal and state-political theory is done through the maintenance of an autonomy of the law. As Caldwell wrote, “*Kelsen’s theory paradoxically tried to ground a purely normative science while at the same time denying the possibility of separating will and norms, society and state*”¹¹⁸⁷.

There are, nevertheless, *two* questions that arise out of this analysis of Kelsen’s theory. The *first* question is similar to a question posed in Kelsen’s state theory. Whereas Kelsen’s legal theory has a *critical* dimension because it unveils the ideological function of the above mentioned dualisms- that legitimized the Weimar presidential constitution (through the law-state dualism)- is it able to grasp the privatization process of the form of law that took place in Weimar?

¹¹⁸³Kelsen, Hans, “Der Drang zur Vervassungsreform” (6/10/1929), Neue Freie Presse in Herrera (1998) 224

Kelsen had also argued that “*the content of a positive juridical order is only the compromise between two conflicting interests (entre intérêts en lutte)*”. Kelsen, Hans “Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus”, Berlin: Rolf Heise, 1928, translated in French, Paris (1977). 68 In Herrera (1997) 270

¹¹⁸⁴In French “*un principe ou s’ exprime juridiquement l’équilibre des forces politiques au moment considere*”. Hans Kelsen, “La garantie de la Constitution” (1928), p. 204 in Herrera (1997) 314

¹¹⁸⁵ Herrera (1998) 223

¹¹⁸⁶Caldwell (1997) 90

¹¹⁸⁷Ibid.119

Secondly, whereas Kelsen's dynamic legal theory revealed that the whole spectrum of the State-civil society distinction is political (e.g. the legal contract), is the concept of the political that is seen in parliament the same as that seen in the Court decisions (or in the decisions of the administration)? Moreover, how can a judicial decision contain both a political and a legal component at the same time?

6. 4. Kelsen's constitutional review: the political in the legal

In this section, I will answer the second question by focusing on Kelsen's theory of constitutional review.

Kelsen endorsed the establishment of a centralized constitutional review, as seen also in his suggestions regarding the Austrian Constitution (see section 1). He justified this by arguing for the necessity of an independent body that would uphold the constitutional order against the logic of the earlier statutory positivism, which did not distinguish between laws and the constitution. As he wrote "*a constitution marked by the absence of a guarantee of the possibility to overturn unconstitutional legislation is not fully obligatory...a constitution in which institutional proceedings, and in particular unconstitutional laws, remain valid in such a manner...is virtually equal, from a truly legal perspective, to a wish lacking obligatory force*"¹¹⁸⁸.

Hence Kelsen argues that it is not only "individual administrative acts" that should be submitted to judicial review but also "general regulative norms and especially laws"- "the former with respect to their legality, the latter with respect to their constitutionality"¹¹⁸⁹. This is precisely the function of the Constitutional Court.

The political logic that lies behind the necessity of this Court is the protection of parliamentary democracy and, especially, of the minority's political existence "...*the more the rules regarding quorum, a qualified constitutional majority, etc.... serve to protect the minority*" (see also the second section)¹¹⁹⁰. As Kelsen argues, "...*if the minority's political*

¹¹⁸⁸Kelsen, Hans (1928). 'La garantie juridictionnelle de la constitution'. *Revue de Droit Public*, 197f in Troper, Michel (1999). " 'The Guardian of the Constitution' - Hans Kelsen's Evaluation of a Legal Concept" in Diner, D. & Stolleis, M (Eds.) *Hans Kelsen and Carl Schmitt: A juxtaposition*. Gerlingen: Bleicher Verlag, 81-100, 86

¹¹⁸⁹Kelsen ([1929] 2013) 83

¹¹⁹⁰*Ibid.*

*existence, which is so important for the very nature of democracy, is to be secure, that minority must have an opportunity to appeal, directly or indirectly, to the Constitutional Court. Otherwise, the minority would be subject to the arbitrary will of the majority and the constitution would be a lex imperfecta... Democracy without [such] controls is impossible in the long run; the abandonment of that very self-restraint, which the principle of legality represents, means the breakdown of democracy itself*¹¹⁹¹.

However, the picture becomes more puzzling once we trace the role that Kelsen ascribes to adjudication. Unfolding this gradually, Kelsen writes that the function of adjudication derives from the fact that *“the general norm, attaching an abstractly determined consequence to an equally abstractly determined material fact, requires individualization if it is to have normative meaning at all. A material fact, determined in abstracto by the general norm, must be established as actually existing in concreto; and for this concrete case, the coercive act, prescribed likewise in abstracto by the general norm, must be made concrete, that is, first ordered and then realized. This multiple task is accomplished by the judicial decision... the judicial decision is itself an individual legal norm...; it is the continuation of the process of creating law—out of the general, the individual”*¹¹⁹².

We can see from this excerpt that this is precisely where Kelsen’s dynamic theory is associated with adjudication given that, as Kelsen argues here, the judicial decision is a process of law-creation. The even more *crucial* point is that, according to Kelsen, this is a *political* judgement in the sense that *“after all, every conflict of right is also a conflict of interest or power, every legal dispute therefore a political dispute”*¹¹⁹³. The difference between legislation and adjudication turns into a matter of degree, into *“quantitative”* and not *“qualitative”* difference¹¹⁹⁴.

This is more visible in the Constitutional Court, whose function is *“political in character to a much higher degree than the function of other courts”*¹¹⁹⁵ due to its power to invalidate statutes for all cases (whereas the ordinary courts only for a concrete case) and to control the acts of government (such as decrees and executive orders). In this direction, Kelsen argued that the Constitutional Court, given its political role, can be seen not through the scheme of separation but of “division” of powers (or, as he latter calls it,

¹¹⁹¹ Ibid.

¹¹⁹² Kelsen ([1934]1996) 67-68

¹¹⁹³ Kelsen ([1931] 2015) 184

¹¹⁹⁴ Ibid. See also Kelsen ([1934] 1996) 68.

¹¹⁹⁵ Kelsen ([1931] 2015) 185

“distribution of powers”¹¹⁹⁶) along with the legislature¹¹⁹⁷. In other words, not as purely judicial.

This argumentation was developed during his Weimar debate with Carl Schmitt on the “Guardian of the Constitution”, in which Kelsen defended both the Constitutional Court as the “Guardian” of the Constitution and its political role- as opposed to Schmitt’s argument that political issues should not be driven by the Courts. This is a debate sparked after Kelsen’s defense of the Constitutional Court, at the meeting of the German Teachers of State Law, in Vienna, in 1928 and Schmitt’s response in 1929 (see also chapter 5)¹¹⁹⁸.

However, there is a *problem* here, which is that, whereas Kelsen ascribes the role of the embodiment of the political to parliament, he simultaneously gives this role also to the Constitutional Court. Does the Court “comply” with the requirements for such a political role or is it incompatible with Kelsen’s theory of democracy and with the judicial role of the Court? This question concerns not only the Court but, to an extent, all the levels of law-creation that were seen in the previous section, given that he ascribed to them a political role. However, the Court seems to be the most important in the sense that, for Kelsen, this is the “Guardian” of the Constitution. Hence, I will focus mainly on the Court in this section.

Kelsen’s response to this question is to recognize explicitly that “the full import of law creation threatens to shift from the general to the individual level, that is from the legislator to the law-applying authority”¹¹⁹⁹. However, he tries to cope with this on a somewhat contradictory basis. On the one hand, he has various suggestions, such as the election of the judges by parliament (as in Austria), or even directly by the people. In this vein, he argues that “[Carl Schmitt’s] objection that ‘from a democratic point of view, it will hardly be possible to transfer such powers to an aristocracy of the robe’ can easily be answered by pointing out that a constitutional court elected by the people or even a constitutional court elected by parliament, for example after the fashion of the Austrian constitutional court

¹¹⁹⁶Kelsen, Hans (1945). *General Theory of Law and State*. Cambridge: Harvard University Press, 272-273.

¹¹⁹⁷ Kelsen, Hans ([1929] 2015). ‘On the nature and development of Constitutional Adjudication’ in Vinx, Lars (ed. and trans.) *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, Cambridge: Cambridge University Press, 46

¹¹⁹⁸Kelsen’s talk in Vienna is in his paper “On the nature and development of constitutional adjudication”, ([1929] 2015) 22-78. See also Paulson (2014) 18, 48.

¹¹⁹⁹ Kelsen ([1934] 1996) 88.

according to the constitution of 1920, is anything but an ‘aristocracy of the robe’ ”¹²⁰⁰.

So, he suggests the Austrian process of appointment of judges (before the 1929 constitutional reform) because it attributes democratic legitimacy to the Court so as to play its political role. In this direction, he adds also that the adversarial procedure of the Court helps the various interests to participate in the decisions of the Court “*in much the same way they generally participate in the creation of law that concerns them*”¹²⁰¹.

However, on the other hand, Kelsen argues for the neutrality of the Constitutional Court and suggests a constrained role. In this vein, he advises that the legislator “*has to make sure that the sphere of free discretion that the statutes leave to those who apply them is narrowed down as far as possible. The norms to be applied by a constitutional court, especially those which determine the content of future statutes, like the provisions concerning the basic rights, must not be formulated too broadly and must not operate with vague slogans like ‘freedom’, ‘equality’, ‘justice’, and so forth. Otherwise there is a danger of a politically highly inappropriate shift of power, not intended by the constitution, from the parliament to some other institution external to it ‘that may turn into the exponent of political forces completely different from those that express themselves in parliament’*”¹²⁰².

In this direction, he also writes that the Court acts only as a “*negative legislator*”¹²⁰³. Hence, it is contrasted with the “*free creation*” of parliament that “*...is bound only in exceptional cases, and only by general principles, guidelines, and the like*” (see above about the constitution qua means of allocation of legal powers)¹²⁰⁴. However, he is ambiguous even on this, given his argument (in his Vienna talk) that the “*annulment of a statute has the same general character as the enactment of a statute. The annulment, after all, is nothing but the inverse of enactment. The annulment of statutes is therefore itself a legislative function, and a court empowered to annul statutes is itself an organ of legislative power*”¹²⁰⁵.

¹²⁰⁰ Ibid. 174-221, 215

¹²⁰¹ Ibid. 196

¹²⁰² Ibid. 193-194

¹²⁰³ Ibid. 194

¹²⁰⁴ Kelsen ([1929] 2015) 48

¹²⁰⁵ Ibid. 46

Thus, there is an overall conundrum. We need to see firstly what lies behind Kelsen's dynamic theory in order to approach it. As it is evident from the penultimate excerpt ("that may turn into...in parliament") there is an implicit assumption in Kelsen's thought that "change" inside the constitutional order should go hand in hand with the expression of the balance of political forces. This is also how we can connect this "dynamic" theory with the way in which it was used so as to criticize the liberal legal theory (as seen in the previous section), namely that it carves the space for his concept of the political to come.

Such an interpretation seems to fit also with Brunkhorst's take on Kelsen's dynamic theory. He argued that Kelsen's theory is revolutionary *"...because it transforms the dualism of legislative will and executive performance, of political generation and professional application of legal norms, of general law and specific judgment into a continuum of concretization that (and here we need to correct Kelsen a bit) never ends, but goes and on in a hermeneutic-dialectical circle. Therefore, if at all levels of the continuum of concretization, legal norms are (politically) created, the principle of democracy (that is egalitarian deliberation and decision-making) is only fulfilled if those who are affected by these norms are included in a (socially and economically) fair and equal manners at all levels of their creation (albeit in what, in all probability, will be very different ways). Again, Kelsen himself (and again because of his empiricism) did not draw these radical consequences, but they are simply an implication of his construction of legal theory"*¹²⁰⁶.

This sounds not far from Heller's dialectical relationship between law and power, notwithstanding that Kelsen himself does not go that far and Heller criticizes Kelsen's legal theory as *"logicism of norms"*¹²⁰⁷ (despite also the fact that their state theories are quite close, see section 5).

However, I am more skeptical about Kelsen's conflation of the "political" with the "legal" in all these processes of law-creation and, mainly, in the constitutional review that plays the most important role. I think that Kelsen's problem is that he does not explain in a sufficiently clear way the meaning of his references to the "political" in his political and legal theory. Indicatively, I would categorize Kelsen's references into four different meanings of the "political":

- 1) the political as it is expressed in parliament. This is the main basis of Kelsen's concept of the political (see section 2).

¹²⁰⁶Brunkhorst (2014) 256

¹²⁰⁷Heller ([1934] 1996) 1201.

- 2) the concept of the political as expressed not merely through parliament e.g. trade unions. Kelsen refers to it briefly because social conflict can be carried directly into parliament through Kelsen's concept of parliamentarism (e.g. proportional representation etc...) ¹²⁰⁸.
- 3) the political- "partisan" logic. This is related to the impartiality of the members of the Court. Kelsen refers to the necessity of independence of the Court as one of its main bases of justification ¹²⁰⁹.
- 4) the political as it is expressed in the legal decision-making process, given that "*every judicial sentence contains, to a higher or lesser degree, an element of decision, an element of an exercise of power*" ¹²¹⁰. Moreover, in this category, we can also add the "political" in every law-creation process as seen before (e.g. administration, private legal contracts).

Kelsen does not seem to differentiate on these grounds except for a distinction based on degree. In this way, nevertheless, he runs the danger of conflating these levels, given also that the constitutions do often contain vague clauses. This *danger* is twofold.

The *first* is the undermining of parliament, and along with that of the political. It is clear that a case in a court- even if this is a Constitutional Court with its greater publicity and justification- acquires necessarily an "always-already" legal discourse and institutionalization in contrast with the procedural institutionalization of parliament. As a result, the reflexivity of the political in a parliamentary procedure cannot be seen in a judicial procedure ¹²¹¹.

Moreover, the accountability of judges is of a different kind from the logic of democratic accountability that is embodied in parliament. This turns also against Kelsen's own assumptions of his political theory, since in this theory he argues fiercely against the logic of epistemic-technocratic decisions in a democracy, by calling them "*a donkey in a lion's skin*" ¹²¹². I am not certain that this technocratic character can change with an election of judges by parliament, given that judges still have to be independent and to stick to the legal

¹²⁰⁸Kelsen (1929 [2013]) 55

¹²⁰⁹Kelsen ([1931] 2015) 181

¹²¹⁰Ibid 184

¹²¹¹See also Christodoulidis, Emilios (1998). *Law and reflexive politics*. Dordrecht: Kluwer Academic Publishers.

¹²¹²See Kelsen, Hans ([1929] 2013). *The Essence and Value of Democracy*, in Urbinati, N.&Accetti, C.I.(Eds.), Graf, B.(transl.). New York: Rowman & Littlefield Publishers, 102.

This is also argued by Urbinati (2013) 1-24, 6

framing of the issues. As a result, we can see that the “adversarial procedure” of the Court has little to do with the parliamentary procedure.

The *second* danger is in the opposite direction: the danger of destabilizing the autonomy of the legal system. This is the danger at a methodological level (namely at the level of legal cognition) that there would be a legal “agnosticism” through the conflation between the political and the legal element. This leads, nevertheless, to the dissolution of the existing guarantees of legal certainty and of the formality of the legal system (that Kelsen’s concept of legality wanted to safeguard). Without adopting the language of natural-law morality that tries to identify law with a just legal order, it suffices to say that this formality is not always against the popular classes, but it can also ensure guarantees and procedures that protect the less powerful. It is not accidental that the authoritarian regimes act mostly in an anti-formalist manner¹²¹³, as we saw also in the case of late Weimar.

The effects of Kelsen’s methodological conflation are visible “practically” in the divergence between his theoretical critique and his comment regarding the judicial decision in the Prussian coup case. Regarding the former, he was very critical of the concept of Constitution that Schmitt developed in the “Guardian of the Constitution”. He argued that Schmitt’s interpretation of the constitution “*cannot stop itself from culminating in an apotheosis of article 48. It leads to the probably unintended but all the more paradoxical conclusion that the pluralistic system or, in plain German, parliament is that which ‘severely threatens or disturbs the public security and order in the German Reich’.* The true function of parliament, given that it is an essentially pluralistic institution, seems to consist in the permanent fulfilment of the conditions that the Weimar Constitution requires for a use of article 48 paragraph 2”¹²¹⁴ (see also other parts of Kelsen’s critique of Schmitt’s “Guardian of the Constitution in chapter 5.4).

This shows clearly that he opts for a restrictive interpretation of article 48. However, the picture gets more blurred in his comment regarding the judicial decision in the Prussian coup case (see chapter 5 about this Solomonic decision). Whereas in the first part of his comment Kelsen “*tended towards invalidation*” of the emergency decree in whole¹²¹⁵, he ultimately argued that it is not the Staatsgerichtshof that should be blamed for its decision

¹²¹³See Neumann ([1942 1944] 2009)

¹²¹⁴Kelsen ([1931] 2015) 219-220

¹²¹⁵Dyzenhaus (1997) 128

but the “*technical insufficiency of the Weimar Constitution itself*”¹²¹⁶. He justified this by writing that, *firstly*, the Constitution did not establish a Constitutional Court that would provide with “*effective guarantees*” for the preservation of the constitution. *Secondly*, he argued that, albeit the “*intention of the authors of the Weimar constitution must surely have been directed at restricting the measures to be taken under article 48 paragraph 2*”, the lack of the implementing statute of the fifth paragraph of article 48 made the authorization broad enough¹²¹⁷. Hence, he concluded that “*the interpretation that comes to expression in the decree of 20 July is no less plausible, within the wide frame of article 48 paragraph 2, than the interpretation put forward by the Staatsgerichtshof*”¹²¹⁸.

I think that Dyzenhaus is right to argue that Kelsen’s conclusion is driven by his legal theory, which left him unable to show in a clear way the unconstitutionality of the decree (as the Prussian government argued for), in the sense that this would be another political argument and not a legal-scientific argument¹²¹⁹. In this vein, Dyzenhaus writes that “*in the end Kelsen seems deprived by his own Pure Theory from making the very argument his polemic against Schmitt had promised, and so the Pure Theory fails to deliver on its apparent promise*”¹²²⁰.

I think that this is related to Kelsen’s aforementioned indistinction between the concepts of the political that he adopted, which led him also to exaggerate the political component of the judicial decision-making procedure. Regarding this procedure, whereas Kelsen is right that the political component is not totally absent therein, I think that it can be conceived solely as knowledge regarding the political-historical context, which gave meaning to the Constitution as a political text (by revealing the reasons for its introduction and political function). This political element could function as an “*objective cognitive presupposition of the correct interpretation*”, in the context of a realistic-systematic approach of law (that does not legitimize political choices), as Dimoulis argues¹²²¹. Thus, this political knowledge is a cognitive precondition and not something that acts as a free-standing

¹²¹⁶ Kelsen, Hans ([1932] 2015). ‘Kelsen on the judgment of the Staatsgerichtshof of the 25th of October 1932’ in Vinx, Lars (ed. and trans.) *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, Cambridge: Cambridge University Press, 251

¹²¹⁷ Ibid. 252

¹²¹⁸ Ibid 253-254

¹²¹⁹ Dyzenhaus (1997) 132

¹²²⁰ Ibid.

¹²²¹ On this see Dimoulis, Dimitris (2001). “The law of the political: An account of constitutional theory and constitutional interpretation”, (in Greek *To δίκαιο της πολιτικής. Μελέτες συνταγματικής θεωρίας και ερμηνείας*). Εκδόσεις Ελληνικά Γράμματα, 83-86

political decision,¹²²² given also that the wording of the constitution is not like a novel that can be interpreted in various ways, but is a *normative* text that aims to guide political and social practices.

An indicative example of this essential political-historical knowledge for a legal decision to be made, is that it would be impossible to make a legal analysis of the President's role in Weimar, unless we knew the historical context of the 1919 Weimar Constitution (see chapter 3). It is only by resorting to this context that we can grasp the meaning of article 48, in view of the whole Weimar constitutional order, namely we can see that the President's role was not the same as in the 1871 constitution, but was related to a counter-weight concept of president and not to Schmitt's concept of president (see chapter 3). It is this context that allows us to see how the meaning of article 48 changed throughout Weimar and, finally, led to the rise of the Presidential constitution through a series of unconstitutional emergency decrees (see chapter 5).

The insertion of this political dimension helps to avoid Kelsen's agnosticism in the interpretation of the constitutional order. However, it is true that this does not always make things clear, in the sense that there will also be cases that are not clear cut. This is especially when the Constitution might also embody a "dilatory compromise". The latter case, nevertheless, leaves discretion to the legislator to decide.

On the contrary, Kelsen's theory of adjudication runs the danger of 'achieving' what he criticizes, namely a legitimization of policies through legal interpretation. So, *to conclude*, Kelsen's analysis on this issue seems problematic from the perspective of Kelsen's political and legal theory and could not oppose efficiently Schmitt's theory at this level.

6.5. Kelsen's theory, the late Weimar Republic and the "family" of social democratic approaches

This section concerns the question regarding the feasibility of Kelsen's theory in the Weimar political context and especially in the context of late Weimar.

Before answering this question directly, it should be clarified that Weimar's fall, from the

¹²²² Ibid.

perspective of constitutional theory, came through the hegemony of Schmitt's theory and the "*apotheosis of article 48*". It came, therefore, through the defeat of Kelsen's theory. Schmitt's hegemony was apparent during the early 1930s, not only in the political terrain (as seen in chapter 5), but also among Teachers of State Law, even among those that had rejected Schmitt's expansive interpretation of article 48, at the conference of Professors of State Law, in Jena, in 1924 (e.g. Gerhard *Anschütz*, Richard Thoma)¹²²³. Indicatively, Gerhard *Anschütz*, Richard Thoma and Walter Jellinek, who were both positivists and advocates of parliamentary democracy (the former two were also members of the DDP¹²²⁴), argued during the early 1930s for an expansive interpretation of article 48, regarding the fiscal and budgetary issues by invoking the negative majority of the Weimar Reichstag.

Thoma wrote that "*in times of emergency...such decrees are necessary for the existence of the state*"¹²²⁵, in the sense that the collapse of the fiscal condition of the state and of the private economic sector would lead, sooner or later, to a serious disruption of public order¹²²⁶. *Anschütz* and Jellinek subsumed also the economic emergency, under article 48, on the occasion of a legal brief that was written for the *Brüning* government¹²²⁷. It is interesting that *Anschütz* justified the circumvention of the Reichstag by citing an excerpt from Schmitt's "Guardian of the Constitution", according to which "*If a parliament that has become a stage for the pluralistic system is no longer able to do this [namely to be the decisive factor in the formation of the will of the state], then it does not have the right to demand that all other responsible authorities become equally incapable of action*"¹²²⁸. Thus, the argumentation of these scholars was similar to Schmitt's argumentation, in Jena.

¹²²³About Jena see Kennedy (2004) 161. See also Mehring (2014) 576 (footnote 61)

¹²²⁴Caldwell (1997) 65

¹²²⁵Thoma, Richard, "Die Notstandsverordnung des Reichspräsidenten vom 26. Juli 1930" (1931), *Zeitschrift für öffentlichen Rechts* (11), 12-33, 17 in Kennedy (2011) 292

¹²²⁶Kessopoulos (2016) 105

¹²²⁷The brief was "*on whether Article 48 could be used instead of Article 87 to authorize credit*". Kennedy (2011). 291

See *Anschütz*, Gerhard, and Walter *Jellinek* (1932). "*Reichskredite und Diktatur: Zwei Rechtsgutachten*". Tübingen: J. C. B. Mohr

¹²²⁸In Kennedy (2011) 292

To be clear, there were also other voices in the positivist camp that maintained their opposition to an expansive interpretation of article 48. Such a case¹²²⁹ was the Staatsrechtslehrer, Fritz Stier-Somlo,¹²³⁰ who argued that article 48 concerned only public security and order, not an emergency in general, given that the Weimar Constitution did not adopt the much broader term of article 55 of the Prussian constitution, which was “*unusual emergency*”¹²³¹. Moreover, he argued that “*from a Staatsrecht standpoint*” it is “*absolutely inadmissible*” (unbedingt unzulässig) what happened in July 1930, namely the fact that parliament’s decision to rescind the decrees was followed by a presidential decree of a similar content¹²³². That’s because when a political program is rejected by the Reichstag, it is the program that should change and not parliament’s legislative role¹²³³.

Going back to Kelsen, he was firstly opposed to this “apotheosis” of article 48 (as seen in 6.4) and, more than that, he had also understood by 1932 that the ideal of democracy was waning and that dictatorship was becoming hegemonic, both at the political and at the theoretical level. As he wrote, “*The ideal of democracy is waning, and at the dark horizon of our time a new star is rising, one to which the hopes of the masses are directed with increasingly fervent faith the bloodier its radiance shines above them: dictatorship...In the realm of social theory... the judgment on the value of democracy has changed with quite remarkable rapidity during the last decade. The number of theoreticians who find anything positive in this form of government is shrinking continually... Within the circles of state law teachers and sociologists, it almost goes without saying today that one speaks of democracy only in contemptuous words, it is considered modern to welcome dictatorship-directly or indirectly- as the dawn of a new era*”¹²³⁴.

However, despite Kelsen’s defense of democracy, the question is what resources did Kelsen’s theory offer against this hegemonic tendency. On the one hand, I think that the emphasis of Kelsen’s political theory on parliament could have been very helpful in

¹²²⁹Hans Nawiasky was also in a similar direction and was influenced by Kelsen’s thinking. See Caldwell (1997) 172

¹²³⁰Stier-Somlo died in 1932 and it was his position that was offered to Schmitt in Cologne.

Stolleis (2004) 271

¹²³¹ Stier-Somlo, Fritz (1931). ‘Die Ausnahmeverordnung des Reichspräsidenten und die Notverordnung des österreichischen Bundespräsidenten’, *Zeitschrift für öffentliches Recht*. Band XI, 62-88, 73

¹²³² Ibid. 75

¹²³³ Kessopoulos(2016) 108.

¹²³⁴Kelsen, Hans ([1932] 1967). ‘Verteidigung der Demokratie’ in *Demokratie und Sozialismus: Ausgewählte Aufsätze*, Darmstadt: Wissenschaftliche Buchgesellschaft, 61. The English translation here is from Stolleis (2004) 174-175

efforts to maintain a space, so that another economic solution could be found, and to avoid the Presidential regime that contributed to this crisis of representation. In this direction, we can also see the “*critical impact and the debunking force*” of Kelsen’s legal theory, which made it impossible to “*cover political demands with the cloak of law*” as Neumann argued¹²³⁵. This was evident in Kelsen’s critique of the bourgeois dualisms. As we have seen, the aim of Kelsen’s overall legal theory (besides his theory of interpretation) was to open a space for his concept of the political to come, and to achieve social transformation in a peaceful way, without reifying the State-civil society distinction.

On the other hand, Kelsen’s state theory can also be deemed problematic in view of the late Weimar context. That’s because the inner assumption of this theory is the “equilibrium” logic that actually signifies a concept of the state as instrument. However, it escaped Kelsen’s notice that the capitalist state presupposes only a relative autonomy of the “political”-democratic state. In this sense, Kelsen focuses mostly on the *stricto sensu* political, as an expression of the social (through proportional representation), and loses the overview of the whole material condensation of relations of social forces that operate in a capitalist society. This can be seen in his underplaying of the public power of capital that was one of the crucial factors that led to the privatization of the Weimar state and to a subsequent crisis of representation.

To be clear about this, it is not that Kelsen does not grasp the move of the bourgeoisie towards dictatorship. As he argued, with reference to Schmitt’s argumentation in the “Guardian of the Constitution”: “*might such talk simply be an expression of the fact that the bourgeoisie will change its political ideal, and desert democracy for dictatorship, wherever parliament, as a result of the continuing struggle of the classes, has ceased to be a useful instrument of class-domination?*”¹²³⁶.

However, he does not grasp the process through which the bourgeoisie’s desertion of democracy had the power to lead to the rise of the authoritarian state, which is what created this huge crisis of representation. To put it otherwise, he could not grasp at the level of State theory whence the privatization of the state comes from and what the origins of the subsequent crisis of representation in Weimar are.

¹²³⁵ Neumann ([1942 1944] 2009) 46

¹²³⁶ Kelsen ([1931] 2015) 221

This can be seen in his 1932 analysis regarding the “two fronts” that fight against democracy. The first front is, as he wrote, “*From the far left, the ever-increasing Bolshevik movement, which continues to seize more and more circles of the working class; [the second front is] from the far right...from National Socialism, whose party has grown more stormy [stürmischer] than ever a political organization in Germany; and that today already unifies the largest part of the bourgeoisie ...This escape [Flucht] from democracy is just one proof that the political form of democracy is not suited to a class struggle that will end in the decisive victory of one party and the crushing defeat of the other party. For democracy is the political form of social peace, of the balance of opposites, of the mutual understanding on a middle line*”. He continues by writing that the way to achieve this peace is the path of democracy, which follows the logic of “compromise”.¹²³⁷

However, what escapes Kelsen’s notice here is that the crisis of representation arose precisely from the compromise logic of the SPD, and from its inability to grasp the transformed state. The defects of Kelsen’s theory can also be seen in other social-democratic theoretical accounts of this period, which have similar theoretical origins as Kelsen’s state theory (despite the divergences in their legal theories). Here I will refer to the so-called “Social Rechtsstaat” approaches (see also chapter 4.3.).

Starting from Neumann’s pre-1933 analysis, albeit he foresaw the public power of capital (see chapter 4.3.), it is only with the emergency of von Papen’s regime, in June 1932, that he views more clearly the dangers of the Presidential regime¹²³⁸. This can be seen, indicatively, in his 1931 argument that the limited parliamentary activity, since 14 September 1930, was due to the existing class equilibrium (by citing also Bauer’s “class equilibrium” theory¹²³⁹) and that “*it is even questionable whether a highly active and effective parliament is desirable in a situation of class equilibrium. Should it adopt such a posture, then parliament could have in its hands the means to alter decisively the balance of power at a moment in which there is a decline in the workers’ political influence...*”¹²⁴⁰. He seems to have underestimated the dangers of the transition to the Presidential regime (as visible in the excerpt above).

I think that this is *not* due to influence on Neumann of Schmitt’s “*brand of antiliberalism*”

¹²³⁷ Kelsen ([1932] 1967) 60-61, 64

¹²³⁸ Scheuerman (1994) 261

¹²³⁹ Neumann ([1931] 1987) 52

¹²⁴⁰ Ibid.

and to his “*classically Marxist assumptions*”, as Scheuerman argues (by calling Neumann’s stance “*authoritarian laborism*”¹²⁴¹). I have already demonstrated that a substantive similarity between Schmitt and Neumann cannot be argued, given also Neumann’s rejection of corporatism, which does not leave much room for an interpretation of his pre-1933 work as “authoritarian laborism” (see chapter 4.3.). On the contrary, his aim was the expansion of democracy, beyond the *stricto sensu* political level through the economic constitution.

Neumann’s Weimar stance can be seen better by taking into account the fact that he was influenced by the social democratic theories of the state (Bauer, Renner, see chapter 4.3.). I have already shown that his thinking was based on these theories, in order to develop his strategy of a State that could direct the economy, through a compromise with the various economic agencies (based on articles 159 and 165 of the “economic constitution”), while the final decision was “*reserved by the state*”¹²⁴² (see chapter 4.3.).

This was captured by Kelly, who wrote that “*Neumann’s integrationist vision was a common position within the SPD generally, and goes some way to explaining the policy of Tolerierungspolitik towards Weimar’s presidential regimes*”¹²⁴³. Through the scheme of an autonomous concept of the state that would regulate the economy, Neumann could not see early enough the reasons for the state’s privatization and, therefore, the structural transformation of the state and of the constitutional order could not be grasped. It was only in his post-1933 theory that he recognized (implicitly) his problematic assumptions (see chapter 4.3.).

In Heller’s case, whereas his post-1928 theory¹²⁴⁴ was clearly oriented towards the use of the parliamentary state¹²⁴⁵ for social policies against the “*anarchistic speed*” of the capitalist production and the fascist “dictatorship”¹²⁴⁶, he could not see that the state itself

¹²⁴¹Scheuerman (1994) 55, 57

¹²⁴²Neumann ([1931] 1987) 63

¹²⁴³Kelly (2003) 280-281

¹²⁴⁴The right-wing elements of Heller’s idealistic concept of the state faded since his visit to Fascist Italy in 1928. Menendez, Agustin, J. (2015). ‘Herman Heller NOW’, *European Law Journal*, 21(3), 286

¹²⁴⁵Heller conceived parliamentarism in a similar way to Kelsen. This can be seen in the following excerpt: “*intellectual history shows as the basis of parliamentarism the belief, not in public discussion as such [as Schmitt’s concept of parliamentarism] but in the existence of a common foundation for discussion and thus in the possibility of fair play...for one’s internal political opponent, in the relationship with whom one thinks one can exclude naked force and come to agreements*”. Heller ([1928] 2000) 260

For the affinities of Heller’s theory with Kelsen’s see also Herrera (1997) 319-322

¹²⁴⁶Heller ([1930] 1987) 140-141

was dependent on the capitalist economy. That's why he argued, in 1931, for the "*authoritarian primacy of the state over society*" as necessary, in order to ensure the primacy of the state over ~~the~~ private economic power¹²⁴⁷. As Thornhill wrote in a critical vein, "*his faith in the state as the expression of the community remained long after the German state had abandoned all interest in protecting the citizen from the economy...*"¹²⁴⁸.

This is due to the social democratic assumptions of Heller's theory, which can be seen also through the fact that he was influenced by Lassalle's concept of the state and constitution. Heller, who had reedited Lassalle's *Arbeiterprogramm* (1862)¹²⁴⁹ wrote that "*Lassalle, in his well-known lecture 'Über Verfassungswesen', said of the 'real' constitution which every state has at every time, that it is not the written constitution nor the piece of paper, but the 'established actual relationships of power in a country'...*"¹²⁵⁰. Moreover, it is interesting that the subtitle in this part of Heller's work is "*The Political Constitution as Social Reality*"¹²⁵¹, which shows precisely that his theory presupposes that the social can be transposed directly into the state and into the 'political' constitutional order. This looks not too dissimilar to Kelsen's theory as analyzed in this chapter.

Heller's concept of the state had been criticized by Neumann's post-1933 argumentation, when he argued that Heller neglected the class nature of the capitalist state¹²⁵². It is in 1933 that Heller views that the danger for political democracy comes from the bourgeoisie's power *through the state*. The authoritarian liberal state, as Heller called it, did not mean the "*abstinence on the part of the state where subsidizing large banks, large industry and large agricultural enterprises is concerned. Rather it means the authoritarian dismantling of social policy*"¹²⁵³.

The affinity between all these Weimar social democratic theorists (Kelsen included) is, therefore, that they could not see early enough the interrelationship between the *social power* of the bourgeoisie, which did not want to govern anymore with the SPD, in the late Weimar period, with its *political power* in this form of state. They conceived the state as an opposition to the economy, by underplaying its structural interrelationship with the capitalist economy. I think that it is this concept of the state that mostly explains Heller's

¹²⁴⁷ Heller, Herman (1931) "Ziele und Grenzen einer Deutschen Verfassungsreform", 576-580 in Menendez (2015) 287.

¹²⁴⁸ Thornhill (2000) 112

¹²⁴⁹ Herrera (1998) 228

¹²⁵⁰ Heller ([1934] 1996) 1184

¹²⁵¹ Ibid.

¹²⁵² Neumann ([1935] 1987) 83

¹²⁵³ Heller ([1933] 2015) 300

and Neumann's stance as being supporters of the SPD's policy of toleration¹²⁵⁴ (with the notable exception of Kirchheimer, who rejected the policy of toleration¹²⁵⁵).

Returning to Kelsen's theory *stricto sensu*, these assumptions of his state theory have to do with the way in which Marx's riddle was grasped. Kelsen actually conceived the "*political state*" in Marx's riddle as "*nonsense*" or as "*pleonasm*". That's because, as Adler argued, "*this profound critical argument of Marx concerning the double life lived by every citizen within the bourgeois state- of the public citizen and private person- leads to the necessary study of societal relations which Kelsen has left untouched...Kelsen completely loses the context in which the distinction between the political power on one side and private interest on the other are brought to bear in Marx's argument*"¹²⁵⁶.

Hence, Kelsen conceived the state as "*nothing other than an organization of societal powers*"¹²⁵⁷. This made him underrate the fact that the capitalist distinction between the political and the economic traverses the "political" State by making it structurally dependent on capital. This concept of the state also made him unable to see the origins of the privatization of the form of law, given that law was conceived only as a "social technique" in the context of his state theory. That's because, despite the fact that Kelsen did not focus on the social question through the economic constitution (as Neumann and Heller did), he answered Marx's riddle through his assumption that the social can be *directly* expressed in the legal order through the state (via his concept of parliamentarism).

Concluding, we can see after this analysis that Kelsen's theory is both ambitious and humble. It is *humble*, in the sense that his concept of the legal order tries to maintain an open space for the political to come and to make, in this way, social transformation possible in a peaceful way. In this sense, he seems to have low expectations of the law, at a *first glance*, given that it is politics that can deliver social reform. However, Kelsen's theory is also *ambitious*, in the sense that it shows a voluntarism, by underplaying the fact that a capitalist social formation traverses both the "political" State and the constitutional order.

In this sense, Kelsen's constitutionalism is *insufficiently political* because it doesn't grasp how the bourgeois constitutional orders are traversed by the power of capital in its

¹²⁵⁴ Thornhill (2000) 104. Kelly (2003) 280-281

¹²⁵⁵ Thornhill (2000) 121

¹²⁵⁶ Adler (1922) 191-192

¹²⁵⁷ Adler (1922) 190

entanglement with the mode of production, even if they are based on a post-traditional constitution (as the Weimar Constitution). Whereas he defends Weimar and the Weimar Constitution, Kelsen seems unable to offer a way out, firstly, due to his state theory that took into account the Weimar state through the lens of “class equilibrium” logic and, secondly, due to his related concept of law merely as a “*social technique*”. Hence, he could not effectively oppose Schmitt’s theory despite that his solution to Marx’s riddle is different from Schmitt’s.

In this direction, Neumann’s post-1933 critique of Kelsen was incisive (albeit hyperbolically in his tone): “[Kelsen’s theory] *by throwing out of account all relative problems of political and social power... paves the way for decisionism, for the acceptance of political decisions no matter where they originate or what their content, so long as sufficient power stands behind them*”¹²⁵⁸.

¹²⁵⁸Neumann ([1942 1944] 2009) 47

Conclusion

In this dissertation, I have demonstrated that the Weimar constitutional debate *illuminated* the contradiction between the democratic state and the capitalist economy and its effect on the constitutional question. It dealt substantively with Marx's riddle by taking into account the question of the political organization of powers (the 'political question') and of the socio-economic structures of power (the 'social question').

I have shown in this thesis that the solutions that were provided to this riddle cannot be traced without attention to the historical condition in which these theories were developed. That's why I have explored them along with the historical process of the Weimar Republic and its tragic fall. Although this is not a dissertation about history, this historical context allowed me to recover the concept of political constitutionalism that was endorsed by Kelsen and Schmitt primarily (and by the other Staatslehre theorists secondarily), namely how they delved into the aforementioned questions in their theorization of the constitution.

I divided this dissertation in two parts. With regards to this historical framework, I demonstrated in part A that the Weimar Constitution was a post-traditional constitution in the sense that it dealt both with the "political question" (by establishing parliamentary democracy for the first time in Germany) and with the social question mainly through its economic constitution. I argued that, regarding both questions, it incorporated a rupture with the 19th century constitutions.

However, I showed that it included also some elements of continuity with regards to both questions due the fact that it was a compromise between various political powers and because of the 'evolutionary logic' favoured by the Social Democrats, which could be seen to an extent since the birth of the Weimar state.

Regarding the *political question*, the logic of continuity was visible in the powers given to the President mostly through article 48. As far as the introduction of these powers is concerned, I have shown that it is justified at a theoretical level by Hugo Preuss and Max Weber, and for that reason, I have addressed their constitutional theories.

I have argued that it was Preuss' more moderate concept of a President-counterweight to the Reichstag that was ultimately incorporated to the Constitution. It derived from his suspicion toward political parties (as an outcome of their weak role during the Kaiserreich) and from his concept of democracy as an organic unity of the people (as influenced by Gierke). Moreover, I have demonstrated that his greater emphasis on the parliament (compared to Weber) derived from his belief that parliament can be the place for the "*cooperative structure of the state*" and "*the precondition for a rich and vigorous, though gradual, step-by-step unfolding of the social idea*"¹²⁵⁹.

On the contrary, Weber's constitutional suggestions were more radical notwithstanding his ultimate compromise with the formulation of article 48. He suggested a concept of a charismatic President, which became the hegemonic interpretation of article 48 during the Weimar Republic both at the political level (during the first period of the Weimar Republic and mainly after 1929) and at the level of constitutional theory (after 1929). I showed that Weber's constitutional suggestions derived from his theory, which dealt with the contradiction that Marx traced between the political state and the capitalist economy. Although his descriptive account had common starting points with Marx- given his emphasis on the instrumental rationality of capitalism- his solution was an idiosyncratic liberal one. That was mainly because he suggested the solution of a charismatic President that would be the one to resist the "bureaucratic" tendencies and maintain the typically bourgeois distinction between the political and the economic. Hence, I argued that he theorized an elitist concept of the political that went along with a defense of a liberal "pure" autonomy of the state. This was also seen in his defense of a liberal system of industrial relations so as to avert a "socialization" of law.

Regarding the social question, I have demonstrated that the Weimar Constitution dealt with it mainly through its economic constitution. I described how Sinzheimer introduced the economic constitution (and particularly article 165). He tried, in this way, to turn the "*economic affairs into public affairs*"¹²⁶⁰ and to give a voice to labour about the way in which the national economy was run through the central role of councils (while the parliamentary legislator would maintain its supremacy over the economic constitution given that the economic constitution was based "*upon the soil of the new political democracy*"¹²⁶¹). Sinzheimer's thought presupposed a "*satisfactory balance between the*

¹²⁵⁹Preuss [1925] 2000). 120, 122

¹²⁶⁰ Sinzheimer(1920) 140

¹²⁶¹ Ibid.

autonomous regulation of the economy by the economic actors themselves on the one hand, and state oversight or guardianship of the common interest on the other”¹²⁶².

I demonstrated that his thought has affinities with the strategy that was adopted during the late 1920s by other social democratic Staatslehre theorists- the so-called “Social Rechtsstaat” approaches”- that gave emphasis to the way in which the economic constitution could oppose the effects of organized capitalism. Such an approach was the Weimar theory of Franz Neumann who was Sinzheimer’s *Assistent* from 1923 to 1927 and was “*heavily influenced*” by him¹²⁶³.

I have shown how, according to Neumann, the economic constitution could facilitate “democratic market control” through the cooperation between the social associations (employers, workers) and the state. I argued that his thought also has affinities with Heller’s thought. Heller, through his Social Rechtsstaat approach, argued for the legal regulation of the economy, which would enable the state to control the “anarchistic speed” of the capitalist production.

However, I also demonstrated that these social democratic approaches (along with Sinzheimer’s) underplayed the incompatibility between this economic constitution and the capitalist mode of production. They underrated the extent to which the state and the constitution are structurally dependent on the success of the capitalist system and, therefore, on its power as long as it continues. To put it differently, they did not adequately recognize that the logic of accumulation traverses the State and the constitution by turning the state relatively autonomous in relation to the economic system. Hence, they could not grasp the origins of the ‘hijacking’ of the economic constitution during Weimar, which became evident during the 1930s in that the economic constitution turned into a tool for the suppression of the workers’ rights through the state.

I also demonstrated that these origins could not be grasped also by a contemporary Weber-inspired approach. According to this approach, the Weimar economic constitution was ab initio problematic because it blurred the boundaries between the political and the social by eroding the autonomy of the state, leading, in this way, to the privatization of the state, which ultimately benefited big capital.

¹²⁶² Dukes (2014) 13

¹²⁶³ Tribe (1995) 172

I have disagreed in this dissertation with this approach because I have argued that, due to its liberal concept of the state as autonomous, it is unable to make sense of the origins of Weimar's fall, which are to a great extent related with the always only *relative* autonomy of the state in capitalism (see below for the other two factors). In this direction, I found more convincing the post-1933 Marxist critique of Franz Neumann who changed totally his theoretical perspective after the Weimar period. He brought into light the power that capital has in a non-socialist state, which makes the state relatively autonomous. I showed that, from this perspective, he criticized both the earlier social democratic approaches, which underplayed the compatibility of the democratic organization of economy with the capitalist mode of production, and the similar assumptions that were shared by the German Social Democracy and its unions during the Weimar period.

Through this analysis I confronted directly the question regarding the responsibility of the constitutional architecture for the way in which the economic constitution ended up. I have argued that, albeit the economic constitution was not responsible for its hijacking (and less for Weimar's fall), its share of the burden was that, in not breaking the continuity between it and the capitalist mode of production, it left itself vulnerable to its subsumption under the logic of accumulation.

Picking up the thread of this discussion, I presented extensively in part B the historical context and the reasons of Weimar's fall (so as to answer also to the earlier question regarding the way in which the Weimar state was privatized). I have demonstrated that Weimar's fall can be seen as an outcome of *three* main interrelated factors. *Firstly*, of the crisis of the capitalist mode of production, which capital wanted to overcome through the attack on the social state in order to maintain the margins of profitability. However, given that Weimar was a mass democratic welfare state in which the working class had ab initio a significant role, the only way that this could be done was through the attack on political democracy. This was "achieved" through the transformation of the Weimar state due to the fact that the Weimar welfare capitalist state was itself dependent on the success of the capitalist economy in order to avoid its economic collapse.

This strategy was "successful", *secondly*, due to the inability of political powers and of the unions to resist the "privatization" of the Weimar state and its alignment with the direct social interests of capital fractions. This inability was demonstrated mostly with regards to the toleration shown by the SPD and the ADGB to the presidential regime (during 1930-

1932), which underrated the danger of this regime and shared practically the assumption that capitalism must be saved.

Thirdly, Weimar's fall was due to the structural transformation of the Weimar constitutional order, which overcame the contradiction between the democratic state and the capitalist economy in the direction of undermining the organizational-political part of the constitution (with regards to the political question) and of hijacking the Weimar economic constitution (with regards to the social question).

I have showed that this whole process led to a huge crisis of political representation between 1930-32 and, ultimately, to Weimar's fall.

The *main question* that was asked in this dissertation is how did Schmitt and Kelsen theorize the effect of the contradiction between the Weimar democratic state and the Weimar capitalist economy on the constitutional question? In other words, was their answer to Marx's riddle sufficiently *political* so as to grasp -from the perspective of constitutional theory- the privatization process of the Weimar state and of the Weimar constitution, which led to Weimar's fall?

I have found that Schmitt's line of constitutional thinking is what accounts for the transformation of the Weimar constitutional order (from the perspective of constitutional theory). That's because, according to Schmitt's constitutional theory, the main problem of Weimar was 20th century parliamentarism, which allowed the Reichstag's intervention in the economy. In this direction, I have demonstrated that his concept of the state tried to draw a 19th century State-civil society distinction in times of 20th century mass democracy and of organized capitalism. The understanding that this context is irreversible makes him develop an "authoritarian liberal" theory- as I called it- so as to restore the 19th century state-civil society relationship; in other words, he detached economic liberalism from democracy by prioritizing the former but with the "help" of a strong state.

I have argued that, albeit this authoritarian liberalism, was made more explicit during his 1930s account of the Weimar Republic (with his "Guardian of the Constitution" and his "Legality and Legitimacy"), this direction could be already traced at least from his "Crisis of parliamentary democracy" (1923). So, these assumptions drive Schmitt's 1932 suggestion for a "*strong state and free economy*", namely a strong state that would depoliticize the social and would weaken the institutions of democratic representation

through his appeal to the popularly elected President as the only way to reset the 19th century distinction between the political and the economic. To put it in a nutshell, his attack was both on the Weimar economic constitution and on parliamentary democracy through a radicalization of Weber's insights.

Regarding his constitutional theory, I have demonstrated that it is inseparably connected to his state theory and to his account of the Weimar Republic. In this vein, I have divided Schmitt's Weimar work into two periods: his pre-1928 and post-1928 period. His Weimar writings up to 1928 argue for a purely "political" constitution in contrast with the formal constitution, which enables the staging of the social question through the 20th century parliament. In this direction, he insists in 1926 on the semantic generality of law against law's confounding with the parliamentary "measures". So, I argued that both his 1920s critique to the legislature for confounding between "measures" (Maßnahme) and "statutes" (Gesetz) and his expansive interpretation of article 48 should be seen to a large extent as being against the parliament's intervention in the economy.

In his *second* phase after 1928, Schmitt adopted the method of "*decisionist institutionalism*"¹²⁶⁴ by over-determining his prior distinction between the "political"-substantive constitution and the "formal" one with the discourse of "institutional guarantees". I have showed that this method helped him to interpret the Weimar Constitution in the direction of a clearer defense of economic liberalism against the parliamentary legislator. From this perspective, Schmitt legitimized the 1930s "financial state of emergency" by interpreting article 48 even more expansively than during the early 1920s and by conceiving the President as the "Guardian" of the Constitution. That is because he traced the threat to the Constitution not in the power of capital but in the parliamentary mass democratic state that disturbs the 19th century political-economic distinction (on which he models the constitution).

The overall argument has therefore been that Schmitt's theory had, notwithstanding its variations, a *main persistent orientation* throughout his Weimar work: the critique against the Weimar breakthrough of the legislative supremacy that allowed the intervention of the parliamentary state in the economy. In this vein, both his political and his legal theory throughout his Weimar writings (and with bigger emphasis during the last period of the Weimar Republic) were attempts to detach the Weimar state and the Weimar Constitution

¹²⁶⁴This is a term borrowed from Croce & Salvatore (2013)

from the meaning of the 1919 departure (with regards both to the social and to political question) and to tie it back to a 19th century concept of constitutionalism but with a popularly elected President and a strong state. In this sense, it was seen that Schmitt dealt both with the political and the social questions by ultimately suggesting a radicalization of Weber's insights regarding them both.

In the above sense it was demonstrated that Schmitt solved Marx's riddle precisely in the opposite direction from the young Marx. Whereas the young Marx tied the constitution to the democratic promise in order to dissolve the split between civil and political life, Schmitt's Weimar thinking untied the constitution from the democratic promise- notwithstanding his reference to a political constitutionalism- in order to defend this split (namely the political-economic distinction).

Regarding Kelsen's theory, I showed that his state theory throughout the interwar period made the opposite move from Schmitt's. Whereas Schmitt located the problem in mass parliamentarism, Kelsen argued that there can be an evolutionary transformation to socialism and a peaceful handling of social conflict through parliamentarism. This is based mostly on his account of the Austrian and the Weimar Republic- drawn from the 1920s decade of these Republics- as states in which there is an "*equilibrium of class strengths*" (a term that he borrows from the Austro-Marxist Otto Bauer). His account of these two states is related to the social democratic assumptions of his theory and vice versa.

I have demonstrated that these assumptions have to do with the influence of the German Social Democracy and of the Austro-Marxists (that are to an extent part of the German Social Democracy) on his thinking. These social-democratic assumptions along with the influence of the multi-ethnic context of the Austro-Hungarian Empire on his theory played a crucial role in his relational concept of the state.

I found in the thesis that this relational concept of the state de-reified the relationship between the State and (the modalities of) civil society. So, whereas Schmitt's state theory reified the State-civil society relationship in a 19th century liberal direction, Kelsen argued that, through parliament, the social can be directly expressed in the state and, therefore, a socialist transformation through parliament is possible. Hence, I argued that Kelsen's autonomous-relational concept of the State under these assumptions was *different* from Weber's and Schmitt's liberal concept of autonomous state in the sense that it did not presuppose the political-economic distinction.

These assumptions were also seen in Kelsen's legal theory during the interwar period. I demonstrated that his legal theory was strongly related to his state theory and maintained the same 'enemies' (liberalism, conservatism, Marxism-as-anarchism). This becomes visible through the presentation of his critique to the dominant dualisms of traditional legal theory, namely of the State-law, subjective right-objective law and public-private law dualisms. I have shown that, through the critique to these dualisms, Kelsen brings the whole State-civil society under democratic accountability without succumbing to reification. In other words, I have argued that Kelsen's concept of law as "social technique" functions as the way through which the social can be directly expressed in Kelsen's relational concept of the state.

Moreover, I demonstrated two problematic aspects of Kelsen's theory. Firstly, I traced an internal contradiction in his theory. This is the political role that he ascribes to the Constitutional Court and to its decisions. Although he tried to square the circle in various ways with regards to this issue (e.g. judges elected by the people), I showed that his conflation between the legal and the political element had as a consequence both the undermining of his concept of parliamentarism and the granting of greater freedom to the courts to decide political issues under the veil of legal discourse. The effects of Kelsen's thinking became evident in his 1932 comment regarding the decision of the Staatsgerichtshof about the Prussian coup, which dealt with the expansive use of article 48. Regarding this comment, I demonstrated that Kelsen was unable to defend efficiently the original use of article 48 (based on Preuss' model) against its expansive interpretation due to his exaggeration of the political element in the judicial decision-making that led him to a legal agnosticism.

Secondly, at a more general level regarding his constitutional theory, I have demonstrated that Kelsen, having as a model the Weimar and the Austrian states and their constitutions before 1930, 'solved' Marx's riddle by endorsing a concept of the state and of constitution through which the social can be directly expressed (mostly through proportional representation). He did this, in effect, by tying the constitution to the democratic promise in the same way that the young Marx did. However, as seen in the introduction, young Marx's solution presupposed the dissolution of the split between civil and political life through the democratic constitution, whereas Kelsen argued that the social is directly expressed through the 'political' democratic state and the democratic constitution regardless of the fact that the constitution incorporated this split.

Through this solution, Kelsen underrated the tension between the democratic promise and the logic of accumulation, which traverses the modern bourgeois constitutions even if they are post-traditional (as was the Weimar one). In this direction, I have shown that, although he had clearly foreseen that the bourgeoisie was deserting democracy for dictatorship, he did not grasp the structural element that gave power to the bourgeoisie and was leading to the privatization of the Weimar state and to the structural transformation of the Weimar constitutional order. That's because of his autonomous concept of the state and of his concept of law as a "social technique".

I demonstrated this through Kelsen's analyses during the early 1930s and through the stance of other social democratic *Staatslehre* theories (the "Social Rechtsstaat theories") whose state theories had affinities with Kelsen (despite their divergent *legal* theories). I have shown that these theories were also based on a concept of an autonomous state (albeit different from the liberal one) through which the economy could be regulated and, therefore, they could not make sense of the origins of the state's transformation, which was leading to a grave crisis of representation. This could be seen also in their support of the SPD's toleration strategy.

In all, I have demonstrated that Kelsen did not articulate an adequately political constitutionalism because he could not grasp the power of capital to affect the state and the constitution despite dealing both with the political and the social question in his theory.

In conclusion, Marx's riddle brought into light the framework in which one of the most significant methodological debates in the history of constitutional theory took place. This framework could not have been revealed unless this debate was historically contextualized, namely unless seen in the context of the Weimar Republic that embodied the contradiction between a modern democratic state and a capitalist economy. It is through this historical context that Kelsen's and Schmitt's answers to the political question and to the social question with regards to the constitution were revealed. Hence, I have called this debate a riddle of political constitutionalism, that is, a riddle regarding the role of the 'political constitution' (in Marx's sense) between the contradiction of the democratic state and capitalist economy that was played out in Weimar.

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