

CONSTITUTION IN TIME OF EMERGENCY – SCHMITT AND KELSEN

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‘The strike against Prussia’ (*Preussenschlag*) was part of the failure of the Weimar Republic (WR) and it started ten days after Schmitt had published *Legalität und Legitimität*. On July 20, 1932 the president Von Pappen used an emergency decree and authorized the *Reich* chancellor to depose the government of Prussia based upon the Article 48 of the Weimar Constitution, which consequently put the biggest German state under martial law. At that time, the liberal democratic government in Prussia was giving a lot of trouble to the executive powers that were losing control over their political decisions. Little before 1932, by another emergency decree, the president Paul von Hindenburg will forbid any extremist political and paramilitary parties, such as were considered the communist party and SA (*Sturmabteilung* – the paramilitary organization of the Nazi-party), and just before *Preussenschlag*, he will lift that ban that had previously provoked violent conflicts between communists, Nazis and police in some towns of Prussia. This violence was officially a call for an emergency decree, which was supposed to protect the public security and maintain the whole Germany under the peaceful Weimar Constitution. However, Schmitt was of the opinion that ‘the real goal of *Preussenschlag* was to wrest control over Germany’s largest state from the social democrats and to make Prussia’s executive power available to the conservative federal government.’²⁴⁴

During the course of events, Prussia addressed the *Staatsgerichtshof*²⁵ with the claim that the president Hindenburg went over his powers gained by the Weimar Constitution when issuing the emergency decree. Regarding the court’s decision, Schmitt will write that the court:

[R]uled that the federal government did not have the power permanently to depose the Prussian ministers or to take over all competences of a Prussian government. At the same time, the court held that the Reich’s assumption of Prussia’s executive power was justified as a measure to protect public security, and thus refused to interfere with the federal government’s momentary control over Prussia’s administrative apparatus.²

According to Hans Kelsen, this court decision was obviously violating basic principles of constitutional democracy. On the other hand, Schmitt was of the opinion that the sovereignty

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2 See Vinx, ‘Introduction’ to *TGC*, p. 7.

of the state should be in the hands of the governing political party, and that the state of Prussia was not the guardian of the constitution because it is not a carrier of political decision, which is the head of the executive power.

Kelsen and Schmitt's debate about the judgment on the *Preussenschlag* was only a part of a lengthy discussion on the problem of constitutional guardianship. In 1929, Kelsen published a paper entitled *Wesen und Entwicklung der Staatsgerichtsbarkeit (On the Nature and Development of Constitutional Adjudication)* where the theory of legal hierarchy was employed to claim that the Constitutional Court is a true guardian of the Constitution.³ Schmitt, on the other hand, entered into this academic exchange with Kelsen through the number of articles published in the monography in 1931 under the title *Der Hüter der Verfassung*.⁴ Kelsen's sharp answer to Schmitt's book was the essay *Wer soll der Hüter der Verfassung sein? (Who ought to be the guardian of the Constitution?)*⁵ in which we can find one of the most intense criticisms of Schmitt's constitutional theory.

Both authors ask the same question – who is and who should be the protector of the Weimar Constitution? Kelsen's approach to this question starts from the neo-Kantian legal evolution where every legal norm moves forward with the approval of a higher-level legal norm. This theory gives the basis for the *Stufenbaulehre*, the theory of the legal hierarchy that Kelsen adopts from his student Adolf Julius Merkl⁶, and used lengthy for his thesis about constitutional adjudication. The theory of legal hierarchy corresponds to the principle of legal evolution according to which whether some law becomes more or less concrete depends on the fluency of the processes of reproduction and production of law and whether some legal process starts from above or from bottom. Correspondingly, the legislative process does not end with the statute, on the level of a constitution, but rather continues to the bottom, to the level of the individual act of administration. "If one takes the view that the law is exhausted by the statute, the meaning of the idea of legality will be reduced to conformity with the statute. And in that case, the extension of the concept of legality will hardly be self-evident".⁷ Kelsen finds the extension to the concept of legality in the constitutional adjudication, in what he calls "a limb of the system of legal-technical measures".⁸ This means when the court is performing the act of cassation (annulment) of norms that are legally defective, it is making a legislative activity, in addition to the juridical one. Moreover, the symbiosis between the legislative and juridical activity, seen in the institution of the constitutional adjudication, based on the statute itself. Furthermore, he finds that the state parliament is always the object of a legal paradox because it is very "politically naïve" to expect this state organ to annul the statute that it had enacted before. Therefore, the cassation of legally defective acts is possible by an administrative organ that is independent and distinctive from the legislative one. This gives the court the power to be a preventive or repressive organ against legally defective acts, as it is independent of any individual power and individual norms,

3 This translation is available in Vinx (ed.), *TGC*, 'Kelsen on the nature and development of constitutional adjudication', pp. 22-78.

4 Translations in Vinx (ed.), *TGC*, 'The guardian of the Constitution: Schmitt's argument against constitutional review', and 'The guardian of the Constitution: Schmitt on pluralism and the president as the guardian of the constitution', pp. 79-173.

5 Available in Vinx (ed.), *TGC*, pp. 174-221.

6 See Vinx, 'Introduction' to *TGC*, p. 7.

7 Kelsen, 'On the nature and development of constitutional adjudication', p. 23.

8 Kelsen, 'On the nature and development of constitutional adjudication', p. 25.

and has a specific autonomous form that is responsible only to the general norm, to the statute itself.

The second role of the court as a guarantee of legality is of personal and material nature. In this case, the courts perform the annulment of a legally defective act in their individual appearance. In order to understand this argument, we must bear in mind Kelsen's distinction between the acts of annulling and nulling of a legal act. The latter means the cancellation of legality of an act from its very beginning and its replacement by another legal act. The cassation or annulment of the general norm by the court is possible only in an individual case, and in these cases, the general norm continues to exist, while its legal effects are being annulled. If one the power of review is transferred to a single public authority, it becomes possible to extend the cassation beyond the individual case and "then we would be faced with the annulment of the general norm as a whole, i.e. for all possible cases to which the norm, according to its meaning, would have to be applied."⁹ Kelsen's argument clearly prescribes to the courts the ability to support the stability of the legal system by maintaining the general norm, and in that sense goes against the logic of separation of powers.

When considering the guarantees of constitutionality, he finds the annulment of the unconstitutional act to be the most effective protector of the constitution. Thus, the Constitutional Court of the WR was necessary for the Republic's protection of legality. Kelsen, who was one of the authors of the Austrian Constitution, wants to follow the Austrian model in the new project of a proper constitutional court that will replace the *Staatsgerichtshof*. Only with this kind of court is it possible to have a protected constitution as the highest legal norm of the state, and once for all to finish with the constitutional monarchy of the First Reich. In defending his thesis, he firstly focuses on the legislative power of the courts, taking into a consideration that "all legal decision-taking is partly discretionary"¹⁰, thus, political. The cancelation of the strict separation of powers gives Kelsen an argument to justify a constitutional adjudication as the protector of legality, and not just as an apparatus of judges whose job is limited on finding the already existing norm in the statute and apply it, as some sort of "legal automata". Consequently, every political conflict is a legal conflict, and the difference between the political character of the legislation and the adjudication is only quantitative, not qualitative. In other words, "the view that only legislation is political, and that "real" adjudication is not, is just as wrong as the belief that legislation alone is productive creation and adjudication nothing but the reproductive application of the law."¹¹

In his book-length essays on the protector of the constitution, Schmitt gave his contribution to the constitutional theory of the WR, and as the time will show, he put the last nail in the coffin of the dying Weimar Constitution.¹² Even though there are more than few contradictory positions in Schmitt's constitutional theory, his main statement remains clear: no parliament and no court of any kind can be the guardian of the highest legal document in the

9 Kelsen, 'On the nature and development of constitutional adjudication', p. 40.

10 Kelsen, 'On the nature and development of constitutional adjudication', p. 40.

11 Kelsen, 'Who ought to be the guardian of the Constitution?', p. 184.

12 Schmitt was called more than a few times the "Weimar gravedigger". Once when they referred to him as a gravedigger of the Weimar Republic and the Weimar Constitution, he replied that even if that was the case, somebody had to kill it first. See Molnar, *Sunce mita i dugačka senka Karla Smita. Ustavno zlopačenje Srbije u prvoj dekadi 21. veka, (Sunce mita) [The sun of the Myth and the long shadow of Carl Schmitt. The constitutional abuse of Serbia in the first decade of the 21st century]*.

country. In ‘The guardian of the Constitution’, after a long discussion on the differences between the Supreme Court of the United States of America and *Der Staatsgerichtshof*, Schmitt reflects on the argument that having a court as the guardian of the constitution is a violation of the order established by that constitution. By performing its legislative role, constitutional adjudication exceeds the legitimate powers of the court, and these actions can jeopardize the system of norms that the state is based on. Courts have the right to review only ordinary statutes, but not general norms that can change the constitution, with the exception of the parts of the Constitution that consider the basis and position of the courts, and of the provisions about the independence of the judiciary.¹³

This, however, does not mean that Schmitt was against an independent and strong judiciary. On the contrary, he was of the opinion that a true democratic state must have independent and free courts, with judges protected from political pressure. The main reason for his critical position towards constitutional adjudication, that also refers to his critique of parliamentary democracy, was the argument that judges are bound by the constitution to obey and serve the general norm, without given power or task to change it. He writes:

There is no rule of law in the liberal bourgeois sense without independent courts, that there are no independent courts without subjection to the content of statute, and that there can be no subjection to the content of statute without a distinction in kind between statute and court judgment.¹⁴

Therefore, under normative criteria, courts are empowered by the statute to be independent and protected in their revision activity and deciding upon the individual cases. However, their link to the general norm disables them from changing that norm which corresponds to his reading of the Article 102 of the Weimar Constitution. Consequently, according to Schmitt, the moment when the judge abandons the basis that gave him or her facts to decide upon the matters in the first place - which is the content of statute, that judge is no longer independent.

Why was Schmitt against any project where the constitutional adjudication would be given the power to control legality of the general norms? In *Verfassungslehre* (1928), published before the crisis in Prussia, he was rather critical of the Weimar Constitution, especially of the Art. 48.¹⁵ Later his position will be far less critical, especially in the parts in which he defends Art. 48 and gives the President of the Republic the title “guardian of the constitution”. For this German conservative, what follows from the possibility of a judiciary having a political (legislative) role is not “a juridification of politics but rather a politicization of adjudication.”¹⁶ There is a material difference between the adjudication and the legislation, because there is no adjudication that

13 Schmitt, ‘The guardian of the Constitution’, p. 85.

14 Schmitt, ‘The guardian of the Constitution’, p. 107.

15 The full text of Article 48 of the Weimar Constitution states: ‘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. 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 forces. For this purpose, he may provisionally suspend, in whole or in part, the basic rights established in Articles 114, 115, 117, 118, 124, 153. The President must inform the Reichstag immediately of all the measures instituted according to paragraph 1 or paragraph 2 of this article. The measures must be set aside at the request of the Reichstag. 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. The measures are to be set at the demand of the President or the Reichstag. A Reich statute determines the details of these provisions’. The Weimar constitution, ‘Appendix’ in Schmitt, *CT*, pp. 409-441.

16 Schmitt, ‘The guardian of the Constitution’, p. 91.

is not bound to the statute. The tendency, as he calls it, towards constitutional adjudication, is one of the consequences of the liberal confusion between liberalism and democracy, and the tendency to transform the institution of the constitution into a kind of compromise or contract. Schmitt gradually reaches the point where the enemy number one of the Weimar Constitution can be found in the constitutional adjudication. Confronting the idea of a “too big” constitutional court, and putting himself in the public eye, is the best way that Schmitt could offer in his defense of the Weimar Republic.

The influence that was coming from actual political events and Schmitt’s personal background produced the first image of an obvious enemy for the project of stability, something that he was ultimately searching for. In his opinion, the only thing that was maintaining the country together were written articles that were supposed to articulate the public will, as any political discussion became impossible. The last years of the WR can be seen as a sort of a political theater where one scene was played repeatedly: in the case of *Reichstag* – the constant suspension of the enacted decrees which the President would previously enact in accordance with the provisions of the Article 48, followed by the scene - the presidential decision to dissolve the *Reichstag*. The political activities did not resemble a normal state, which is a precondition for legal validity. However, there was the statute, and there was a legitimate power of the president to use this statute on behalf of the people who gave him in order to defend the cancellation of the concept of power division, that right. In a situation where a parliament is unable to form a majority to decide, and when the president uses emergency decrees to create laws, or a power to dissolve the parliament in order to implement those decrees, judiciary performing of more than the administrative role of interpreting the statute seemed like additional risk for the stability of the republic. That is why Schmitt returned to his political theory to find justified argumentation to put the president as the only one who can be the guardian of the constitution, and who, considering the situation in the last years of the WR, should perhaps be called the saver of the constitution.

Schmitt gives two arguments for justification of the institution of the president. The first refers to the separation of the society and the state that during the monarchy was evident in the dualistic system of the prince and people, the crown and the chamber. In this system, the representative body, the Parliament, was the point where a society could meet with the state and confront it in a search for its rights and interests. This dual existence of what we call a state is the starting point in his criticism of parliamentary democracy, and his presentation of the state types according to a dialectical movement from the 17th to the 20th century. When society stands separated from the state, social integration through different types of antagonisms (economic, religious etc.) remains in the “state-free” zone. The state, on the other hand, neutralizes these antagonisms in a way that does not hinder integration processes. One of the main ways of taking this position is through the non-intervention principle. Schmitt criticized this logic in terms of many political and legal aspects. In *Der Hüter der Verfassung* he sees the adoption of the policy of non-intervention as an absolute mistake. Failing to intervene would mean giving the power to certain social groups and “under such circumstances, non-intervention is nothing more than an intervention in favour of the party that is stronger and more ruthless.”¹⁷

¹⁷ Schmitt, ‘The guardian of the Constitution’, p. 135.

The way of overpassing this division comes in the 20th century constitutional republic that can count on a society which “shares” its integration processes with the state. However, the political-legal conflict between the branches of power continues to exist, especially in the Weimar Republic that had a chancellor and president as two main executive powers. In a case of a conflict between two sides that hold the power of political deciding, the one who decides is not a judiciary, but rather either “a higher third that stands above the different options – a sovereign ruler of the state”¹⁸; or an authority that stands alongside the state, not superior to the constitution, but neutral towards both options, a *pouvoir neutre et intermédiaire*.¹⁹ Such neutral power does not have superiority over other powers and is not protected from any kind of control; hence, in that case we would speak of the ruler, and not of the guardian of the constitution. The president has a neutral and mediating role and he acts as the political head of the state and by means of his position and power, represents the guardian of the constitution. When “the President is not the leader, but instead the “objective” man as a nonpartisan, neutral arbiter, then he is this as bearer of a neutral authority, of a *pouvoir neutre* (...) a referee, who does not decide.”²⁰

The neutral power is not active all the time, but it is also not only a *re gne*, since the real political leader needs to govern in order to be able to protect the state of law. Although it is a kind of material existence of special powers, the president of a country actively uses those absolute powers only in the state of the emergency. For Schmitt “the neutral power is present and indispensable, at least in the system of a rule-of-law state with the separation of powers.”²¹ However, in order to be the true holder of *pouvoir neutre*, the political leader needs to be elected by the majority of people, because only this political entity can provide a necessary condition that separates him or her from the dictator. Therefore, in his understanding of the concept of the political system, which is the cornerstone of Schmitt’s political theory, we can find his understanding of the legitimacy as well.

Three main points of a linear separability between Schmitt and Kelsen

Reading essays that are part of the exchange between these two authors, is at some point (especially in Kelsen’s answer to Schmitt’s “The guardian of the Constitution”) dealing with the “thesis-antithesis” situation, fulfilled with the opposing arguments that even get to a point of a minor academic offensive tone.²² The most important arguments considering the constitutional theory in the Weimar Republic, given by these two authors, are explained above. Here I will focus on three main points of difference that put Kelsen and Schmitt at the opposite ends of the legal and constitutional theory, and which absolutely leave no chance for a crossing point.

The first is **the concept of sovereignty**. For Schmitt, sovereignty, simply put, is the center and the basis, the air that each political unit must have in order to survive. It is a very complex approach that he has when he talks about the theoretical significance of sovereignty, and it can be

18 Schmitt, ‘The guardian of the Constitution’, p. 151.

19 Schmitt takes the concept of *pouvoir neutre, intermédiaire et régulateur* from the French author Benjamin Constant, an early 19th century political writer who was supporting a change towards a constitutional monarchy in France. Schmitt often referred to very conservative writers (such as, for example, his writings and his admiration for the Spanish long-forgotten conservative, catholic monarchist Donoso Cortés). Schmitt’s usage of Constant’s concept Kelsen interpreted as another proof of his tentative attempt to bring constitutional monarchy to Germany.

20 Schmitt, *CT*, p. 370.

21 Schmitt, ‘The guardian of the Constitution’, p. 156.

22 For example, Kelsen will use euphemistic structure to point out how Schmitt ‘is simply the victim of an equivocation’, in: Kelsen, ‘Who ought to be the guardian of the Constitution?’, in: Vinx (ed.), *TGC*, p. 189.

further discussed about Hobbesian or Machiavellian influences his theory has, but the principal and strongest pillar remains obvious – the concept of sovereignty is impossible to separate from the concept of the state. In *Political theology* Schmitt famously defines the sovereign as the one who decides on the state of the emergency (a *pouvoir neutre*), which left the door opened for the legal definition of sovereignty. What should be kept in mind is that even though we can talk about legal concepts that define a purely political notion, there is no point in Schmitt's oeuvre at which the legal sphere gets to be above the political. Therefore, his reading of history will always be political, although the notion of law is placed at the heart of those interpretations. The political, as in the case of Hegel, can become theological, better said, it could develop into an ideology that precedes further argumentation.

Kelsen, on the other hand, in the spirit of positivism, develops the opposite vision of the sovereignty – “if it exists at all”²³ – as not a priori concept of the state, but as a characteristic of the legal order of the state. For this author a sovereignty is “a property of normative order, namely as the normative independence of a legal order. If the state is identical to its legal order, it follows that sovereignty can also be described as an attribute of the state, but never as a power that originally inheres in a particular organ of state.”²⁴ This is related to the theoretical influence of neo-Kantianism that Schmitt must have had after the WWI. “Discipline and the German sense of order”²⁵ for Schmitt were the main reasons why there was no civil war during the last years of the WR. For positivist thinkers, the legal order not only prevents violence, but also is justifiable and powerful enough to be placed above the political sphere that remains the strongest tie to the social categories.

The question of sovereignty is furthermore connected to their vision of **the general will**. When Schmitt defends the president of the republic as the only justified guardian of the constitution, he calls for the general will of people that is through the processes of representation embraced in its full extent. No parliament and no court can represent a general will except one person who carries a legitimate right to protect the constitution, from both – the executive power and the people. The “unified will of the people exists as long as a people is willing to take (or rather to support) genuinely political decisions.”²⁶ The general will is born and defended in the personality of the elected president, who is the only one capable of protecting it in true democracy by having the right to decide upon the extra-legal space, which is the state of the emergency.

Kelsen, on the other hand, calls the general will as “false and fictional” which can bring upon autocratic implications. In his view, the mere existence of some sort of popular will that can exist outside the constitution provides the possibility only for autocratic implications. This critique is connected to his critique of neutral power²⁷ that observes the president as being able to keep more neutral positions in the execution of his power, the claim that Kelsen sees

23 Kelsen, ‘On the nature and development of constitutional adjudication’, in: Vinx (ed.), *TGC*, p. 45.

24 See note 1504 in Vinx (ed.), *TGC*, p. 255.

25 Schmitt, *State, movement, people*, p. 7.

26 Vinx, *TGC*, p. 15.

27 In the essay ‘Who ought to be the guardian of the Constitution?’, when talking about the neutral power, Kelsen, instead of using the word president for a highest executive power, prefers to use the word monarch. Even in his choice of vocabulary, implicitly he wants to connect Schmitt's legal and political theory during the Weimar period with the renovation of the constitutional monarchy.

as “an unbearable contradiction.”²⁸ The executive power understood according to the *pouvoir neutre* can only lead to a complete state of autocracy. Therefore, an extra-legal space where the protection of the supposedly existing unified will of the people is absurd for Kelsen, since there cannot be a will or politics outside of the constitution.

Finally yet importantly is the concept of the emergency decree. The use of Article 48 marked the last years of the WR and opened a legal discussion that prevails until today. In “Legality and legitimacy”, Schmitt criticized this constitutional article and pointed out the absurdness of the state that is governed only through the emergency decrees, which was a reality in the period from 1930 to 1932. However, his opinion will change in the *Verfassungslehre*, and in “The Guardian of the Constitution”, the use of the power to decide on the state of exception becomes a key point in the process of transformation of a simple leader into a true political leader. That is why the *Preussenschlag* was an important event in understanding Schmitt’s political-legal standpoints. In his closing statement in the case *Prussia contra Reich* in Leipzig, he will conclude that “the president of the Reich, who has several competences by virtue of article 48, **can and must** [emphasis added], if necessary, also exercise these competences in the interest of the autonomy of the Land.”²⁹ In this statement, he acknowledges the power of the guardian of the constitution to the *Staatsgerichtshof*, but reiterates that this court cannot make a political decision and that its jurisprudence remains in the domain of justice. Since the parliament had no chance of making political decisions either, due to its inability to reach a consensus, the president was left as the only one that can create politics.

The reason for putting the president in the center of his political and legal perspective can be seen as the consequence of the combination of the given circumstances when the government was able to function only by the emergency decrees on the one side, and his political theology on the other. Many critical voices observe Schmitt’s involvement in the case of the *Preussenschlag* as his political and personal support of Hitler’s government. However, there are too many facts, which, at least, put this claim in a serious doubt. On the contrary, we can observe Schmitt as the protector of the Weimar Constitution, as one of the few who still believed that the constitution can be changed in order to correspond the changed reality of the WR. At that time, his opinion was similar to that of General Kurt von Schleicher, the advisor to President Paul von Hindenburg, who thought that the Weimar Government needs to be changed or civil war would arise. Although, in the last years of the WR, by defending the use of Article 48, Schmitt had halted talks on changing the constitution. However, all of this can be interpreted as a fear from a civil war that was indeed in the air in Germany before 1932. Moreover, we cannot forget the personal level of this catholic jurist who had suffered greatly after the fall of the first *Reich*, which brings us back to the opening arguments presented at the beginning of this chapter.

The insecurity of being forever remembered as a mild-minded theoretician had influenced Schmitt to renounce his distancing from the political system after the fall of the general Schleicher. On May 1, 1933, he received his NSDAP membership card with the number 2.098.860. From this moment on, he finally got the chance to have an important role in the political system of the new Germany, of the third Reich, that will result in bringing nothing but destruction, and that

28 Kelsen, ‘Who ought to be the guardian of the Constitution?’, in: Vinx (ed.), *TGC*, p. 177.

29 Schmitt, ‘Prussia contra Reich: Schmitt’s closing statement in Leipzig’, in: Vinx (ed.), *TGC*, p. 224.

will definitely fail to bring upon the system professor Schmitt was talking about so much. One cannot stay blind to his involvement in the party, and moreover, to his statements on the Jewish people. One example of this is Schmitt's speech at a conference held in Berlin, on October 3 and 4, 1936, titled *Das Judentum in der Rechtswissenschaft*. In this speech, like all anti-Semitists of that time, he showed the fear of the Jewish intelligence, fear of their anarchic and chaotic legal theory, which can, if not removed from the libraries and bibliographies, mislead young German students. In order to protect the German mind, he called for a clarification of who is Jewish and who is not, so that the censorship of Jewish books and authors could be done properly. The main idea he shared in this speech was "that Jewish opinions, with their intellectual content, cannot be put on the same level with the opinions of German or other non-Jewish authors."³⁰ In another text, he showed the same fear and urged to destroy Jewish science in general.³¹

Even though after WWII he did not talk much about his participation in the party, Schmitt did continue to publish writings, and his house in Plettenburg became a certain stopover for young, critical minds. Many of them tried to make a connection between Schmitt's political theology and Marxist critical theory, as was the case with Franz Neumann and Otto Kirchheimer, who were focused on Schmitt's critique of liberalism. Little by little, this "renaissance" casted the light on the reformist potential of his ideas, and put him into the scope of the critical theory. Despite that, working with his political-legal theory remains controversial in the academic field, even though many political analyses of contemporary political events can be analyzed according to his concepts. However, the enormous critical potential of his theory, and very clever and clear questions that Schmitt set in modern law and the modern state, still do not have satisfactory answers.

Bibliography

KELSEN, Hans. 'On the nature and development of constitutional adjudication'. Translation in Vinx (ed.), **The guardian of the Constitution: Hans Kelsen and Carl Schmitt on the limits of constitutional law**, pp. 22-78, Cambridge: Cambridge University Press, 2015.

KELSEN, Hans. 'Who ought to be guardian of the Constitution?'. Translation in Vinx (ed.), **The guardian of the Constitution: Hans Kelsen and Carl Schmitt on the limits of constitutional law**, pp. 174-221, Cambridge University Press, 2015.

SCHMITT, Carl. The guardian of the Constitution. Translation in Vinx (ed.), **The guardian of the Constitution: Hans Kelsen and Carl Schmitt on the limits of constitutional law**, pp. 79-173, Cambridge: Cambridge University Press, 2015.

30 Schmitt, *Jews in Jurisprudence*, English translation by Tomislav Sunić is available on https://archive.org/stream/CarlSchmittsJewsInJurisprudence/CarlSchmittsJewsInJurisprudence_djvu.txt

31 [last accessed o 30/07/2017] For a good insight about anti-Semitism in Schmitt's writings, see Raphael Gross, *Carl Schmitt and the Jews. The "Jewish question", the Holocaust, and German legal theory*, University of Wisconsin Press.