Chapter 7
Schmitt's Spectre and Kelsen's Promise: The Polemics on the Guardian of the Constitution

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7.1 Introduction

Every reader who may be expected to stumble into these pages knows Hans Kelsen essentially as a legal, not political, theorist. Carl Schmitt, on the other hand, is perhaps the most politically minded theorist ever to have written about law. And yet, on the controversy between both thinkers on who should be the guardian of the Constitution the best way to cast Kelsen's argument is on the side of political theory, not legal science.[1] Conversely, in spite of the fact that Schmitt's defense of the President of the Reich as the best guardian of the Constitution remains politically unconvincing, some points of his argument are relevant from the point of view of legal science, even if his arguments are in essence political.

This can be explained in part by Kelsen's aim to turn the insights of Schmitt against him, ending up by turning them against himself. In fact, Kelsen attempted to turn against Schmitt the idea of the presence of a political element in every judicial decision, but in this attempt at domesticating the political decision he didn't make sense of the proper distinction between politics and justice. In the accurate synthesis of David Dyzenhaus, "Kelsen's strategy was an instance of liberal recognition of the reality of politics and the way that decision breaks through the normative, at the same time as it is a futile and purely formal attempt to contain that breakthrough".[2] Schmitt, on the other hand, runs the opposite risk: by trying to insulate the courts from any relevant role in the application of constitutional norms he risks turning the

[1] This is all the more perplexing if one recalls that Kelsen claimed to locate is analysis on the domain of legal science, see Kelsen (2008a, b: 104–105).
[2] See Dyzenhaus (1997: 122).

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Constitution into a kind of a “plébiscite de tous les jours” on the hands of politicians.[3] We see no place for pure politics in Kelsen’s view of the constitutional order, as we see no place for courts in constitutional conflicts for Schmitt.

There is anyway more to the debate between Schmitt and Kelsen on the guardian of the Constitution than the sheer presentation of their ideas on the subject, as profound and interesting as they undoubtedly are. In fact there are already plenty of excellent essays and scholarly articles on the subject. Any new text on this issue must try to answer the following questions: what is the point of this debate from the perspective of our present situation, namely regarding the so-called activism of constitutional courts? Why do we continue to read Schmitt and Kelsen on the guardian of the Constitution?

A possible answer to these questions runs, to my mind, along the following lines. On the one hand, there is a real risk of judicialization of politics in our constitutional democracies and we have to turn to Kelsen to understand that—even if this wasn’t his primary concern, it is nevertheless inherent in his conception of constitutional review. Schmitt’s critique of judicial review can help us understand this risk. On the other hand, we can say perhaps that there is a Schmittian spectre haunting European constitutionalism. This spectre manifests itself in two different directions: in one direction, some national courts (and not just, as alleged sometimes, the German Constitutional Court) continue to claim sovereignty along traditional lines; in another direction, the European Court of Justice accepts the “primacy of discretionary politics” in the management of the financial crisis.[4]

In what follows I shall begin by briefly stating the position of each author on the question of the guardian of the Constitution (7.2). Then I shall point out Kelsen’s and Schmitt’s conceptions of democracy, also showing how closely connected they are to the solution each author gives to the said question (7.3). In a third moment I shall focus on whether, according to Kelsen and Schmitt, a court’s position as the guardian of the Constitution conforms to the proper characteristics of judicial function (7.4). Subsequently, I shall briefly discuss whether judicial review of legislation, in Schmitt and Kelsen’s views, endangers the principle of separation of powers (7.5). Finally, I shall conclude by stressing the relevance of both thinkers to the current situation of constitutionalism in Europe (7.6).

[3]See Renan (1996: 241).

[4]See Everson and Joerges (2013: 22–23). The authors’ thesis is that the discrepancy between the German Constitutional Court’s commitment to the country’s Constitution and the European Court of Justice’s commitment to the integration project has been replaced by the converging attitudes of both courts to the primacy of the political in the handling of the financial crisis.

7.2 The President and the Court

The very structure of Schmitt's *The Guardian of the Constitution*, published in 1931, shows the author's two main aims[5]: first, in part one of the book, Schmitt wanted to demonstrate that the Court of Constitutional Justice foreseen in article 19 of the Weimar Constitution to adjudicate constitutional matters should not be considered as the guardian of the Constitution, as this would require it to act politically and so in violation of the limits of the judicial function; then, in part two, Schmitt claimed that the situation of the German state in the thirties was characterized by an extreme fragmentation of power, which ultimately demanded a strong intervention of the President of the Reich as the true guardian of the Constitution; this is Schmitt's proposal in part three of his book symptomatically presented in connection with Germany's financial crisis in the thirties.[6]

Schmitt concludes the book in a way that also summarizes the principal arguments of his legal and political works:

> [The Constitution] presupposes the whole German people as a unit which has an immediate capability for action, that is, it is not mediated by an organization of social groups. That is to say, it can give expression to its will and in the decisive moment it will be able to secure its wholeness and integrity in the face of the pluralistic divisions. The Constitution seeks in particular to give the President the potential to bind himself directly with the general political will of the German people and through that to act as protector and preserver of the constitutionally appropriate unity and wholeness of the German people. The continued and sustainable existence of the contemporary German state stands or falls on the process of this attempt.[7]

Contrarily to this strong intervention of the Reich's President, the Court of Constitutional Justice set up by article 19 of the Weimar Constitution only decided in cases of clear and manifest violations of the Constitution, which was precisely the opposite of what was expected from an institution called upon to settle doubts and uncertainties.[8]

Schmitt's book triggered a direct response by Kelsen on his text with the revealing title "Who Should Be the Guardian of the Constitution?"[9] Kelsen starts his essay by stating that the demand for guaranties of the Constitution, that is, of institutions able to control the constitutionality of certain acts of parliament and government, corresponds to the specific "rule of law" principle of the utmost legal conformity of state acts.[10]

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[5]See Schmitt (1996). The book is composed of three parts: "Justice as the guardian of the Constitution"; "The concrete constitutional situation of the present time"; "The Reich's President as the guardian of the Constitution".

[6]See Dyzenhaus (1997: 76).

[7]See Schmitt (1996: 159) [I use the translation set in Dyzenhaus (1997: 77)].

[8]See Schmitt (1996: 52–53).

[9]See Kelsen (2008a, b: 58–105).

[10]See Kelsen (2008a, b: 58).

Having said that, Kelsen notes that

> When it is generally the case that an institution should be created which will control the constitutionality of certain acts of state that directly implicate the constitution, this control may not be allocated to one of those very organs whose acts are to be controlled. The political function of the Constitution is to set legal limits on the exercise of power. Constitutional guarantees ensure that these legal limits are not transgressed. And if there is anything that is immune to doubt it is that no other body is less suited to such a function than the one to which the Constitution allocates the exercise of power, whether this be in whole or in part, and which is therefore best placed in virtue of legal opportunity and the political process to harm the Constitution. For there is no other fundamental legal-technical proposition that attracts so much consensus as that no one should be judge in his own cause.[11]

Only a court would enjoy the institutional conditions to settle constitutional conflicts. And the main reason behind the option for a special constitutional court—instead of common courts in a diffused system—was a concern on the lack of uniformity permitted by the American model, in which "different law-applying organs may have different opinions with regard to the constitutionality of a statute".[12]

Kelsen, who acted himself as a judge between 1920 and 1929—in the Austrian Constitutional Court he helped to put up[13]—, introduced the modern concept of constitutional review in a parliamentary, pluralistic democracy. His proposal of a centralized constitutional court with competences of abstract constitutional review of legislation served as a model to all major European constitutional courts that emerged after the Second World War, from Germany to Portugal.

In one important study on the controversy between Schmitt and Kelsen, Oliver Lepsius sustains that the texts of both authors on the guardian of the Constitution conceal, as a subtext, a dispute over the theory of democracy.[14] This dispute was not to be conducted on an abstract level, needing a legal hook so to speak, which was provided by the problem of constitutional review. According to Lepsius it is even doubtful whether Kelsen and Schmitt were themselves completely aware that the main difference between them concerned the concepts of people and democracy. If their dispute is really about the theory of democracy, its unraveling using as a pretext the problem of constitutional review inevitable involved a disagreement on the relationship between justice and politics and on the compatibility between constitutional justice and the separation of powers.[15]

[11]See Kelsen (2008a, b: 58–59, 88).

[12]See Kelsen (1942: 185); idem (2008: 19); see also Paulson (2003: 235–236).

[13]See Öhlinger (2003: 211–214); Lagi (2012: 283).

[14]See Lepsius (2007: 109).

[15]See van Ooyen (2008: VIII–IX).

7.3 Pluralistic Democracy Versus Identitarian Democracy

If one wants to summarize as briefly as possible the opposition between Kelsen and Schmitt on the concept of democracy, the most expedient way to do it is to say that Schmitt is an identitarian thinker on democracy, whereas Kelsen is a constructive one.

Schmitt sees fundamental rights, as well as parliamentarianism, as opposed to democracy, which he understands as the affirmation of the collective unity of a concrete people. This is why the President of the Reich can act as the guardian of the Constitution: he can secure the unity of the people even in times of crisis. Schmitt understands the state and the Constitution as the sovereign political unity of a homogeneous people. According to Schmitt, democracy refers to a collective identity and not to the experience of balancing competing pluralistic interests.

Schmitt's identitarian and plebiscitary conception of democracy lies at the root of his opposition to the "ancient belief, liberal rather than democratic, (…) that Parliament is the place where the party's egoism can be transformed, by force of an artifice of the idea or the institution, in a means to create a supra-egoist and supra-partisan will, a political will of the state".[16] Even if this transformation was still possible in the times of the constitutional monarchy—in which Parliament imagined itself as a stage where society appeared in the face of the state[17]—it would surely be no longer possible, so Schmitt claimed, after the Weimar Constitution. Weimar inaugurates in Germany a new function of the Constitution, in the sense that it no longer serves primarily as a limit to executive power, but as the basis of all power.[18] This structural transformation of the function of the Constitution entailed two main consequences. First, the separation between state and society gave way to a "total state"; second, and closely connected with the former, the parliamentary state was succeeded by a pluralistic state of strongly organized political parties.

As democracy became the only legitimating basis of political power in the Weimar Constitution, Schmitt considered that there was no more space for the separation between state and society. On the contrary, the situation that characterized Weimar's Germany was one in which "society, turned into state, transforms itself in an economic state, a cultural state, a caring state, a welfare-state, a provisioning state; the state resulting from society's self-organization cannot really become apart from it and comprehends everything that is social, that is, everything that has any relationship with human sociability".[19] This is what Schmitt calls the "turn to the total state": a state in which the traditional lines between the sphere in which the private law society governs itself and the sphere of state action, or the public domain, have been suppressed.[20] According to Schmitt there is a dialectic

[16]See Schmitt (1996: 88).

[17]See Schmitt (1996: 74).

[18]See Lepsius (2007: 107).

[19]See Schmitt (1996: 79).

[20]See Schmitt (1994: 166 ff.).

development "from the absolute state of the seventeenth and eighteenth century, through the neutral state of the nineteenth century, to the total state of the identity between state and society".[21]

In close connection with this development towards the "total state" Schmitt describes the transformation of the parliamentary state of the nineteenth century into the pluralist party state of the twentieth century. In a scenario in which the legislature has become a "stage and centre of the pluralist distribution of the state's unity in a majority of strongly organized social complexes, it doesn't help much to speak of 'parliamentary sovereignty', thus resorting to a formula coined for the situation of the nineteenth century constitutional monarchy, as an answer to the most difficult constitutional law's problem of our time".[22]

Schmitt's conception of democracy is the result of the confluence of at least three streams: first of all there is his view of democracy, developed under the influence of Rousseau and therefore opposed to the concept of political representation, centering, instead, in the unity of a concrete people in its immediate presence[23]; secondly, we have his view of the parliamentary system as essentially adequate to constitutional monarchy but growingly dysfunctional before the constitutionalization of the executive power,[24] and the existence of strongly organized political parties; finally, there is Schmitt's view of the "total state", as above mentioned. All these streams flowed together in a plebiscitary view of democracy in which the head of the executive power was envisaged as the privileged interlocutor of the people's will.

Kelsen's view of democracy directly opposes all this. He considers Schmitt's conception to be built on the fiction of a preexisting people: "the people that gives form to the state is a unitary homogeneous collective which has a unitary collective interest that expresses itself in a unitary collective will. Parliament is not able to produce this collective will that stands beyond all opposition of interests, and so beyond political parties; on the contrary, parliament is the arena of the opposition of interests, and of the fragmentation of—Carl Schmitt would say pluralistic—political parties".[25]

According to Kelsen the "people" is not an entity existing prior to the state or the constitution; it is an organ of the state built for purposes of legitimation and conceivable only in normative terms.[26] Furthermore, democracy is released from the fictions and myths of identity politics and connects to parliamentarianism as the only form compatible with modern complex societies.[27] In fact Kelsen presents

[21]See Schmitt (1996: 79).

[22]See Schmitt (1996: 91).

[23]See de Brito (2000: 131 ff.).

[24]On this development, see Lepsius (2007: 104–109).

[25]See Kelsen (2008a, b: 93).

[26]See Lepsius (2007: 116–117); idem (2010: 150–151); see also Kelsen (1949: 293).

[27]See Kelsen (2006: 174 ff.).

parliamentarianism as "the necessary compromise between the primitive idea of political freedom and the principle of differentiated division of labor".[28]

This is not the place to develop Kelsen's conception of democracy, but it can be summed up in the following main aspects:

(i) Democracy is connected to a double concept of freedom, that is, individual and collective freedom, in a way that attempts to preserve both.
(ii) Democracy is attached to real social-cultural communities.
(iii) Democracy is understood in a pluralistic way, in the sense that it gives space to what Rawls would call the "fact of reasonable pluralism".
(iv) Democracy sees the strengths of social integration that are inherent to the majority principle as resting in parliamentarianism and social compromise.
(v) Democracy is attuned to the choosing of political representatives by means of free elections.
(vi) Democratic legitimacy is understood in procedural, not substantial terms.[29]

Considering Kelsen's conception of democracy, the place given to constitutional justice in the state and the non-opposition between judicial review and popular sovereignty are consequential. Contrarily, Schmitt considered that envisaging the courts as guardians of the Constitution would be "directly opposed to the democratic principle considered in its political consequences". According to him:

> Judicial review could be political successful in the nineteenth century, in France as well as in the German constitutional monarchies, in the face of the king's power to enact decrees. On the twentieth century judicial power is no longer directed against the king, but against parliament. This signifies a momentous transformation of judicial independence. The old separation between state and society has also been suppressed in this case and the formulas and arguments that were proper to the nineteenth century must not be simply transferred to the completely different political and social situation of the twentieth century. (…). The concentration of all constitutional disputes in a sole court composed by professional judges that are independent and immovable would amount to the creation of a second house of parliament whose members would be career civil servants. (…). From a democratic point of view it would be almost impossible for an aristocracy in robes to assume such a function.[30]

Before this, Kelsen asks: why is Schmitt assuming that the Constitutional Court must confront only the Parliament and not also the executive power? In fact, according to Kelsen, Schmitt's text is, all of it, permeated with "the tendency to ignore the possibility of a violation of the Constitution by the Chief of State or the Government".[31] Schmitt's answer to this question, we already know it, was that Parliament in the twentieth century was undermined by party pluralism. In the face of a Parliament that is unable to function, submerged by the disintegrating methods

[28]See Kelsen (2006: 178).

[29]See Jestaedt and Lepsius (2006: XXV–XXVI).

[30]See Schmitt (1996: 155–156).

[31]See Kelsen (2008a, b: 101).

of the pluralist state of political parties, "the job of the Chief of State is to 'rescue' the state".[32] For Schmitt, according to Kelsen, the norms that regulate the organs and the legislative procedure are not the 'Constitution'; the 'Constitution' is, instead, "a situation that corresponds to the unity of the German people. The meaning of this 'unity'—which has a substantial, and not merely formal, character —is something not more precisely determined".[33] For Schmitt the deadly sin of Parliament is pluralism, as opposed to the unity of the German people represented by the President of the Reich.[34]

Whereas for Schmitt democracy exists before the Constitution, in any case before constitutional law, for Kelsen democracy is a product of constitutional law; in fact, democracy is constituted by the law and its procedures. In this light the incompatibility between constitutional justice and democracy disappears. As Kelsen says in his *On the Essence and Value of Democracy*, "the destiny of democracy depends in great measure on a systematic organization of all control institutions. Democracy without control is on the long term impossible".[35]

Even if one believes Kelsen's conception of democracy to be (mostly) right and Schmitt's to be (mostly) wrong, as I do, the two conceptions cannot stand alone and completely apart from each other. Paraphrasing Kant, perhaps we could say that Kelsen's democratic procedures without democratic identity are empty just as Schmitt's democratic identity without democratic procedures is blind. But what is important to point out is that the tension between both conceptions is not something of the past. For a confirmation of this one has simply to consider Bruce Ackerman's book *The Decline and Fall of the American Republic*. He thinks that the death of the republic does not necessarily mean the end of democracy. Even if the American constitutional tradition is overwhelmed by presidential power Ackerman maintains that the presidency may well remain an elective office, and he even alludes to Schmitt in connection with this. The problems posed by "executive constitutionalism" are as alive today as they were in Schmitt's time.[36]

In the end there was one common point to both Schmitt and Kelsen's conceptions of democracy: neither of them had the experience of the Demos as an empirical and social magnitude, as in the legal orders originated in the American and French Revolutions. But whereas Schmitt sought to compensate this absence with an existential idea of the people, Kelsen proposed to construct the people as a normative reality.[37]

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[32]See Kelsen (2008a, b: 103).

[33]See footnote 32.

[34]According to Schmitt's view of political representation this phenomenon amounts to a presentation of the people's invisible unity: cf. Schmitt (2010: 209).

[35]See Kelsen (2006: 209).

[36]See Ackerman (2010: 83–85).

[37]See Lepsius (2007: 123).

7.4 Judicial Review and the Proper Functions of a Court

In Carl Schmitt's view one must distinguish, first of all, between judicial control of a law on the basis of its conformity with the Constitution and the political protection of the Constitution. This distinction is a direct result of Schmitt's separation between the Constitution as the outcome of a collective decision on the political existence of a State, or as a substantial form of political unity, and constitutional law as its normative accomplishment.[38]

Judicial control is only possible, according to Schmitt, regarding norms with an uncontroversial determinable content which make possible a mere subsumption of the case: the judge applies the constitutional norm to the case at hand and refuses to apply the legal norm. However, when the constitutional norm has the nature of a principle this is no longer possible[39]: the judge must decide a conflict over the content of a wholly indeterminate norm. He must establish in an authoritative way a normative content that was previously in doubt. But when the judge decides over the content of an indeterminate constitutional norm he will be no longer acting as a judge but as a true legislator.[40] So, according to Schmitt, the judiciary has no legitimate role to play in such cases.

Schmitt admits that this had been precisely the case regarding the American Supreme Court resort to concepts such as property, liberty and equality. However, in that case, the Court had been legitimized by its appearance in front of the state as the protector of a natural social and economic order believed to be above discussion. In other words, in the American case, the separation between state and society still held, according to Schmitt, in the time of his writing. But that could not be adapted, in Schmitt's opinion, to a continental European state, given the diversity of its social and political situation.[41]

Schmitt's major premise appears then to be that there is a fundamental contradiction between the function of the judiciary and the political function: since the decision about constitutionality entails a political dimension, it can no longer be a judicial one. Kelsen, by contrast, held that there is a political element to every judicial decision, so that the political is always part of the judicial function.

According to Kelsen, if one sees a political dimension whenever one must decide a conflict—as Schmitt undoubtedly does—then there is a greater or lesser element of decision, that is, of exercise of power, in every judgment. The greater the degree of judicial discretion the stronger the political dimension of the decision, which may even approach legislation in character. As a consequence "there is only a quantitative, not a qualitative, difference between the political character of legislation and the one of the judicial function".[42] So Kelsen refuses the picture set by

[38]See Herrera (1994: 208).

[39]See Schmitt (1996: 15).

[40]See Schmitt (1996: 45).

[41]See Schmitt (1996: 12–14).

[42]See Kelsen (2008a, b: 67).

Montesquieu of the judge as automaton and claims that its adoption by Schmitt is strange given his own acceptance that there is in every judicial ruling an element of pure decision that cannot be derived from the norm.[43]

A second move of Kelsen against Schmitt concerns the claim made by the latter that no subsumption of the material facts under a norm is possible in a constitutional case.[44] This would be correct if one envisaged the subsumption of the facts of the case under a norm, but not with regard to the subsumption of the fact of the production of the norm under a (constitutional) norm that governs this fact and is therefore higher.[45]

Finally, Kelsen contends that although there are no natural law norms above the Constitution it is possible to positivize such norms in the Constitution, as in the case of liberty and equality. In this case it must be realized that such positivization is in fact a delegation of power to judges to decide the constitutionality of statutes in terms of concepts that have no determinate content.[46] But Kelsen strongly opposed such a wide delegation of discretion to a Constitutional Court, and said that could not be the meaning of the Constitution. In his own words (which inevitably bring to mind the arguments to be presented by Jeremy Waldron against judicial review[47]), with such a wide delegation of discretion,

> the Constitutional Court would be given an absolute power that in general must be felt as intolerable. What the majority of the justices see as just can be in complete disaccord to what stands as just for the majority of the population and certainly stands in opposition to what the majority in parliament, which has enacted the statute, holds as just. That this cannot be the meaning of the Constitution, that is, to make every law enacted by the parliament dependent upon the free discretion of a political council more or less arbitrarily assembled, like the Constitutional Court, only because of the use of so ambiguous words like 'justice' and others similar, is something self-evident.[48]

The remedy to this situation is not, however, as Kelsen candidly suggested, to avoid the use of vague terms in the Constitution, but to develop a theory of judicial review. It is not enough to assert, as Kelsen did, that the Constitutional Court only acts as a "negative legislator".[49] The idea of a "negative legislator" amounts to this: whereas civil, penal or administrative courts apply norms and generate more concrete norms that rule the cases brought before them, a Constitutional Court applies a constitutional norm and destroys a general legislative norm, that is, it enacts the *contrarius actus* to the one produced by the legislator.

As we know well enough, Schmitt's account of a quasi-legislative nature, and not only a negative one, of the Constitutional Court's development of constitutional

[43]See Kelsen (2008a, b: 67, 72).

[44]See Schmitt (1996: 31, 42).

[45]See Kelsen (2008a, b: 70–71); Dyzenhaus (1997: 113); La Torre (2013: 159–160).

[46]See Kelsen (2008a, b: 76).

[47]See Waldron (2006: 1348).

[48]See Kelsen (2008a, b: 40).

[49]See Kelsen (2008a, b: 78–79).

principles was right. No modern Constitution can avoid an extensive use of ambiguous concepts, in the words of Kelsen, and the restriction of that use is not surely a promising strategy if one wants to limit the activity of a Constitutional Court. It is not enough to affirm, as Kelsen did, that "if one wants to restrain the power of the courts, and therefore the political character of their function, (…) then one must limit as much as possible the space of free discretion conferred by laws to courts".[50] In a much more realistic way Schmitt praised the tendency of professional judges to exercise judicial self-restraint towards the executive and legislative powers, only striking down their acts when intrinsically unjustifiable in a manifest way. However he only extracted from that tendency a confirmation of his own thesis according to which the courts are not, given their mission, to solve doubts regarding the content of a constitutional norm.[51]

7.5 The Court and the Political Branches of Government

Schmitt's reason to condemn constitutional justice comes down to its consisting "not in a judicialization of politics, but in a politicization of justice".[52] Kelsen's defense of this indictment is well known: on the one hand there is an unavoidable political moment in every judicial decision; on the other hand, constitutional justice represents in fact a deepening of the principle of separation of powers, in the sense of a control of power by means of checks and balances.[53]

Once more we are confronted with the question of the political or judicial character of the defense of the Constitution. Schmitt's view is revealed by the place he assigns to the constitutional guardian in the structure of the constitutional state. According to Schmitt the search for a guardian of the Constitution is, in the majority of cases, a sign that something is wrong with the Constitution. This is in fact his main worry when discussing this issue: he aims at finding the institution—in his view the President of the Reich, to which article 48 of the Weimar Constitution conferred special powers of emergency—most fit to protect the Constitution in times of crisis.[54]

This is not of course Kelsen's point of view. His purpose is not to devise an institution specially attuned to times of crisis but an institution that can take part in the normal life of a constitutional democracy. Whereas Schmitt is after an institution able to protect his idea of the Constitution, if necessary against constitutional

[50]See Kelsen (2008a, b: 76).

[51]See Schmitt (1996: 22, see also pp. 50–52).

[52]See Schmitt (1996: 22, see also p. 35).

[53]See van Ooyen (2008: IX).

[54]See Schmitt (1996: 1).

law, Kelsen looks for an institution that can secure the normal enforcement of constitutional law.[55]

Kelsen was correct in the sense that there is no necessary incompatibility between constitutional review and democracy, from a political point of view. On the contrary, constitutional review is one of those controls that make democracy a real possibility. For Kelsen no such thing as the people in its concrete existence exists beyond the procedures that make its voice manifest in a constitutional democracy. But Schmitt was also correct in pointing out that, from a legal point of view, the development of constitutional principles by constitutional courts present a real danger of encroachment upon the proper dominion of the legislator.

Both authors acknowledged the presence of a decisionistic element in every judicial decision. How are we to deal with this inevitable presence? Surely not by simply saying, as Kelsen did, that the element of decisionism present in every judicial decision is merely the result of an element of discretion given to the judge by the norm. Nor is it acceptable to exclude courts from any effective role as guardians of the Constitution, as Schmitt did, only by saying that the application of a norm cannot be entirely controlled by another norm, even if the premise is true.

In the case of judicial decisions the type of normative indeterminacy that is inevitably present in constitutional norms is part of the judicial praxis itself and it is in this praxis that courts can produce their own legitimacy through coherence and transparence, securing the rule of law against singular case disappointments. Schmitt's earlier works admitted this reading,[56] but his mounting insistence on the importance of the exceptional case has left no place for the normal intervention of the judicial praxis.[57]

7.6 The Presence of Schmitt and Kelsen in the Current European Constitutionalism

It is now time to recover our initial question: why bother reading Schmitt and Kelsen today? What is their relevance to European constitutionalism? I'm afraid their relevance is rather admonitory: the weaknesses of their respective conceptions on the guardian of the Constitution are all too present in the present Euro crisis.

Kelsen admission of the presence of a political, decisionistic element, in all judicial decisions is no secure basis to construe a theory of constitutional review that respects the principle of separation of powers. And Kelsen's warning against a wide delegation of discretion to a Constitutional Court, by means of the use in

[55] See Lepsius (2007: 115, 121).

[56] See Schmitt (2009: 38–41). On this, see also Section III of Luís Pereira Coutinho's contribution to this volume.

[57] See Lembcke (2012: 76–77).

Constitutions of such concepts as "justice", "liberty" or "equality", is surely no promising way to construe such a theory.[58] In fact it amounts to no theory at all.

On the other hand, Schmitt's conception of the guardian of the Constitution, with its surrender of the Constitution before the executive power, is the main source of the "executive constitutionalism", as above mentioned. The executive power can, no doubt, enjoy democratic legitimacy. However, in this context, democracy will most probably assume a plebiscitary, not deliberative, nature.[59]

The weaknesses in the conceptions of the guardian of the Constitution of both Kelsen and Schmitt make it difficult for such a guardian to act as an "exemplar of public reason", in the words of Rawls.[60] More important, it can be argued that both weaknesses are presently at work in European constitutionalism, and particularly in the case of Portugal.

Damian Chalmers recently wrote an article putting the hypothesis of a Schmittian Europe in what regards the functioning of the European Stability Mechanism (ESM). According to him "the ESM and the government seeking support decide the measures necessary to restore stability, notably the level of financial support and the conditions to be attached. These are set out by a Memorandum of Understanding and not by any law".[61] As is shown by Chalmers the only substantive constraint imposed by the ESM Treaty on the Memorandum of Understanding—which governs a debtor state fiscal and welfare policy—is for its content to reflect "the severity of the weaknesses to be addressed and the financial assistance instrument chosen" (see article 13, paragraph 3 of ESM Treaty). The Memorandum of Understanding is a decision uncovered by the EU law and perhaps even by the internal law of the member state asking for financial assistance; yet it apparently generates law, as legal measures must be taken to implement it.[62]

[58]Curiously this warning is kept by modern positivists like Luigi Ferrajoli, when he says that "the only way that the legislator has to submit the judge to his will is to reduce as much as possible the discretionary powers and to execute well his own job, that is, to produce legal norms with the most univocal and precise meaning as possible". See Ferrajoli (2013: 54).

[59]See Posner and Vermeule (2010: 204–206).

[60]See Rawls (1996: 231).

[61]See Chalmers (2013: 26–27). It must not be forgotten at this point that Schmitt defended a development of an economic and financial state of exception beside an original military and police state of exception. According to Schmitt, each nucleus of the state has its own form of exception. The judicial state has its form of exception in the martial court, the executive power in the suspension of constitutional rights, and the legislative constitutional state in the executive decrees with force of law on matters of economy and finance: see Schmitt (1996: 131). This last one could perhaps be the ideal scenario for the development of a situation in which the guarding of the European constitution would increasingly belong to the political realm [this shift from a legalistic to a political constitution is the hypothesis suggested by Franz C. Mayer, although in a somewhat different, more institutional, context: see Mayer (2004: 411 ff.; 433–435)].

[62]See Chalmers (2013: 27). Chalmers also points out two other Schmittian features of Europe's response to the financial crisis, beside the power of decision viewed as a foundational power that precedes law and gives a prior power to the administration. On the one hand, the interests of the political order and of ensuring no threat to stability, rather than any broader justification, were assumed as the central aims of the ESM, as stated in Article 3 of the ESM Treaty; on the other

This is confirmed in the case of Portugal. On the 17th May of 2011, following Portugal's request of financial assistance to the European Commission, the IMF and the European Central Bank, a Memorandum of Understanding on Specific Economic Policy Conditionality and a Loan Agreement were signed, that including a joint financing package of €78 billion, covering the period from 2011 to mid-2014. Contrary to what happened in Greece and Ireland, these documents were not submitted to the Portuguese Parliament for approval—the Parliament was dissolved at the moment—and were only signed by the Government.[63]

The management of the crisis in Europe has taken place through a "primacy of the 'Political' in the Union sensu Schmitt". This statement is used to describe the attitude of the European Court of Justice, which has chosen not to question Europe's new modes of economic governance as embodied in the ESM.[64] In this respect, Portugal seems to be an exception: in a series of rulings from 2011 to 2014 the Portuguese Constitutional Court stroke down the pay and pension cuts for public employees introduced by the Government and approved by Parliament, grounding itself mainly on the violation of the principles of equality and reliance.

This is not the place to discuss these rulings,[65] but only to point out that the Court's approach is open to criticism with regard to the legitimacy of striking down decisions in matters of economic and financial policy democratically taken by the Parliament—and that on the ground of concepts as indeterminate as equality or reliance. In Kelsen's view the Court has certainly pushed to the limit the political dimension inherent in all judicial decisions. On the other hand, as noted by some commentators, the decisions of the Portuguese Court can be viewed precisely as the reaffirmation of the Portuguese "social sovereignty" by means of the law's judge and not the law's author.[66]

In the end Kelsen meets Schmitt: the political management of the crisis triggers a political management of the judicial activity. In this scenario it is not simply the case that politics has nothing to win while justice can lose it all, as the saying of François Guizot goes[67]; rather it may be the case that both justice and (deliberative) politics can lose it all.

(Footnote 62 continued)
hand, the crisis is presented as one of systemic risk whereby the whole European economy could collapse in a way that to refuse aid or to default can be viewed as an act of enmity not only towards the euro, but Europe itself.

[63]See Alexandrino (2014: 53).

[64]See Everson and Joerges (2013: 8, 22–24). See also the authors' analysis of the *Pringle* case, at pp. 19 ff.

[65]See Nogueira de Brito (2014: 73 ff.).

[66]See Cisotta and Gallo (2013: 480).

[67]Quoted in Schmitt (1996: 35).

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