

Chapter 16: Juridification and Political Justice (1957-1961)

Kirchheimer and Schmitt worked on different subjects during the second half of the 1950s. Schmitt continued to dabble in interpreting Shakespeare (see Schmitt 1956) but also spoke out sporadically on other matters. He again challenged the *Bundesverfassungsgericht* and the juridification of politics that he alleged resulted from its establishment. In his short polemic piece “The Tyranny of Values,” he frontally attacked the supposed “value-philosophical foundation” (Schmitt 1960, 4) of the court’s jurisprudence, which was influenced by Smend’s theory of integration.¹ He also focused on compiling a selection of his essays on constitutional law from the previous three decades. When commenting on his older works, he repeatedly referred to Kirchheimer. At the same time, Kirchheimer published several book reviews and articles providing overviews of the state of West German political science, initially for a US readership. After that, he authored essays on political parties, elections, parliamentarism, and opposition in Germany, France, Italy, and the US. Yet working on his book *Political Justice* was his top priority.

Kirchheimer briefly mentioned his view of Shakespeare in this book, too, which was completely different from Schmitt’s ideas in *Hamlet or Hecuba*.² Kirchheimer was interested most in Shakespeare’s concept of mercy. Concerning the mercy granted to protagonist Angelo, he quoted from *Measure for Measure*: “the quality of mercy is not strain’d; it droppeth as the gentle rain from heaven” and contrasted it with *The Merchant of Venice* (see Kirchheimer 1961a, 392–395). He argued that punishment and mercy followed different principles. Whereas the punishment meted out by a court complied with the law and balanced the public interest, culpability, and remorse, the act of mercy appeared to be arbitrary. Mercy seemed to be the positive version of decisionism for a delinquent, so to speak.

After Kirchheimer and Schmitt stopped corresponding in July 1953, their only direct contact over the next five years consisted of sending each other copies of a few of their essays. In 1955, Kirchheimer sent Schmitt a reprint of his essay “Politische Justiz” [Political justice] (see Kirchheimer 1955b), Schmitt sent a copy of his 1956 book *Hamlet or Hecuba*,

¹ See Zeitlin (2020).

² See Chapter 15, p. 396–397.

and Kirchheimer replied by sending reprints of his essay on the vanishing of political opposition (see Kirchheimer 1957c).³ In 1957, Kirchheimer briefly returned to directly attacking Schmitt himself, not only his students, in his publications. At the same time, Schmitt, too, began to quote his former doctoral student again; he did so with exquisite politeness and purported to agree with him. Their disagreements subsequently deepened in their correspondence in 1958.

1. Debating each other in public again

In 1957, Kirchheimer seized the opportunity to once again grapple explicitly with Schmitt. His essay “The Political Scene in West Germany,”⁴ an omnibus review of thirteen new scholarly publications on politics and the law in Germany, was published in the fall issue of *World Politics*. One key topic was the appropriate interpretation of Article 20 of the Basic Law, which mandated the welfare state. As he presented the controversy between the protagonists of the day, Werner Weber, a student of Schmitt’s, and Wolfgang Abendroth, a disciple of Heller’s, Kirchheimer clearly sympathized with Abendroth’s concept of the “social *Rechtsstaat*.⁵ He used the controversy to find fault with Schmitt’s multiple criticisms of the *Bundesverfassungsgericht* in the Federal Republic. Kirchheimer considered the establishment of the *Bundesverfassungsgericht* one of the most important “postwar innovation[s] that enhances popular acceptance of the new order” (354). He praised the court for its jurisdiction to date because it was guided by considerations strictly based on the legal framework “instead of concealing political reasoning behind legal exegesis” (355). Kirchheimer placed his hopes for the foreseeable future in an expansion of the court’s jurisdiction concerning fundamental rights as well as its judicious actions being “habit-forming” (355) in a positive sense for the political culture of the Federal Republic of Germany.

However, Kirchheimer also used the review to attack Schmitt more profoundly and by name. He did so indirectly, by commenting on a *habilitation* dissertation by young Swiss legal scholar Peter Schneider on Carl Schmitt titled *Ausnahmezustand und Norm* [State of emergency and norm], which had not yet been published as a book (see Schneider 1957). There was a backstory to Peter Schneider’s study that played out in the midst of the convoluted struggles between the two competing schools of constitutional law in the Federal Republic of Germany around Smend and Schmitt mentioned in the previous chapter. From his base in Plettenberg, Schmitt was in frequent contact with his former students who held professorships in law. Smend, too, remained active once he was emeritus, continuing to teach his seminar in Göttingen from 1952 until 1964. He regularly invited leading legal experts and political scientists, including Kirchheimer, to speak as guests. Kirchheimer, in turn, tried to familiarize his students with Smend’s theory of

3 The books and reprints can be found in the papers of Kirchheimer and Schmitt, with no notes or letters attached.

4 Kirchheimer (1957b). The following page numbers refer to this text.

5 On the controversy at the time, see Stolleis (2012, 281–285).

integration.⁶ He intensified his contacts with legal experts of his generation such as Ulrich Scheuner, a former student of Smend's in the late 1920s and a law professor in Bonn from 1951 on, and Ernst Friesenhahn, formerly an assistant of Schmitt's. Both Scheuner and Friesenhahn were part of the growing Smend school of constitutional theory. Smend also introduced Kirchheimer to a new and young generation of German students. Among them were Wilhelm Hennis, Konrad Hesse, Horst Ehmke, and Peter von Oertzen, who were all close to the Social Democratic Party and soon enjoyed successful careers as legal scholars, political scientists, and politicians. In 1962, Kirchheimer wrote a piece for Smend's *Festschrift*, an honor granted "only to the closest circle of students and friends" (Günther 2004, 162).

Peter Schneider, who was Swiss, had originally intended to complete his *habilitation* dissertation under Carlo Schmid at the University of Tübingen. When Schmid could no longer exercise this function because he had been elected to the Bundestag, Ernst Friesenhahn, who was at the University of Bonn, stepped in. One of his colleagues in Bonn was Hans Schneider, a close friend of Schmitt's, who informed Schmitt in detail about the work and the ongoing *habilitation* procedure. Friesenhahn reported in a letter to Kirchheimer that "Hans Schneider [...] had caused him [Peter Schneider] difficulties because of the *habilitation* dissertation."⁷ It was only in 1955, after some complications, that the procedure could be completed successfully. Schneider's book was the first detailed and systematic study of Schmitt's theories in Germany.

To this day, the book stands out because not only does it interpret Schmitt's various changes of positions as opportunistic, but it also reconstructs a fundamental position throughout his works. Schneider identified this fundamental position as the "total negation" (Schneider 1957, 121) of the principles of the bourgeois *Rechtsstaat*, that is, a state order whose goal was to secure its citizens' personal liberties. Liberty in Schmitt's sense did not exist for the individual, only for the collective. All his criticisms notwithstanding, Schneider acknowledged the abundant food for thought that Schmitt, the "admirable storyteller" and "first-rate jurist" (Schneider 1957, 20), offered. Critics at the time praised Schneider's book as a great success because he had attempted to follow and understand every aspect of Schmitt's multifaceted theories.⁸ It was not until 1964 that constitutional theorist Hasso Hofmann achieved the same high level of critical examination in *Legitimität gegen Legalität* [Legitimacy against legality].

Schmitt was far from amused by the publication of Schneider's monograph. He thanked its author for sending him the, in his words, "vivisection or more precisely (if I may coin such a term): arcanoscopy."⁹ He used stronger words in a letter to Ernst Jünger: "The Swiss Peter Schneider, who had published a big fat book about my legal theory (a youth, from Zurich, lacking destiny like a sleeping infant, about me, an old

6 For example, the reading list for his seminar "The Political Institutions of Divided Germany" (1962/63) at Columbia University included Smend's *Verfassung und Verfassungsrecht* from 1928, recommended by Kirchheimer with the comment "creative theory of meaning of constitution." Minutes of the Faculty of Political Science 1957–62. Special Collection, Columbia University Archives.

7 Letter from Ernst Friesenhahn to Otto Kirchheimer dated 4 February 1955. Otto Kirchheimer Papers, Series 2, Box 1, Folder 55.

8 See Sontheimer (1957) and Ehmke (1959).

9 Quoted in Schneider and Gremmels (1994, 227).

man laden with destiny) claims that I am a ‘storyteller,’ which is all wrong.”¹⁰ From 1955 on, Schmitt noted in his *Glossarium* his thoughts on “dogcatcher” Schneider and the risk that he would “actually snatch [him],” on his opponents’ goal of “de-Schmittianizing” German legal scholarship, and on the fact that a book written by an author from neutral Switzerland necessarily “lack[ed] [...] destiny.” He was also outraged that the book by a Swiss national could even be published in Germany,¹¹ and he wrote to Forsthoff that he could “hardly believe”¹² Schneider was appointed to a chair in law in Mainz.

After the book had been published, Kirchheimer received a copy of the proofs from Schneider, at Friesenhahn’s recommendation. After he had finished reading, he wrote Friesenhahn that the book “stuck too closely to the material” initially, but that after a good sixty pages, “the book becomes first-rate.”¹³ He hoped it would be widely read in Germany. Kirchheimer was full of praise for Schneider’s book in his essay “The Political Scene in West Germany.”¹⁴ He saw it as indication that the culture in the legal sciences in Germany was finally changing for the better. Schneider’s book was “one of the most encouraging signs on the German intellectual horizon” (348). “In its long-range literary impact,” Kirchheimer continued, “it may be presumed to overshadow much of present-day writing” (348). With admirable energy, Schneider had dared to draw a coherent and comprehensive picture of Schmitt’s theory based on his many works, thus providing the background for a detailed analysis of discrepancies in Schmitt’s theories and imprecisions in his concepts. Kirchheimer agreed with Schneider’s basic interpretive hypothesis that in Schmitt’s theory, the bourgeois *Rechtsstaat* was the “eternal enemy” (349).

Kirchheimer’s review of Schneider’s book included almost the entire list of his own key criticisms of Schmitt in compact form:

The lack of any clear-cut criteria for differentiating between *nomos* and violence; the discrepancy between the traditional liberal concepts of classical international law and the decisive rejection of an *artfremd*¹⁵ and disintegrating liberalism as part of the domestic constitutional order; the brooding omnipresence of the people’s constituent power and its incapacity to act as a constituted organ; the indeterminate character of the values underlying concrete decisions; and the conjunction of a relativistic openness to a variety of historical interpretations with an ever-present negation of the rule of law (348).

Schneider was delighted with Kirchheimer’s praise. He had been afraid that his harsh criticism of Schmitt had jeopardized his opportunities for any academic job in law in

¹⁰ Letter from Carl Schmitt to Ernst Jünger dated 7 May 1957 (Schmitt and Jünger 1999, 330).

¹¹ *Glossarium* entries of 11 November 1955; 17 March 1957; 30 March 1957 (Schmitt 2015, 329, 357, 358).

¹² Letter from Carl Schmitt to Ernst Forsthoff dated 1 August 1956 (Schmitt and Forsthoff 2007, 127).

¹³ Letter from Otto Kirchheimer to Ernst Friesenhahn dated 10 March 1957. Otto Kirchheimer Papers, Series 2, Box 1, Folder 61.

¹⁴ Kirchheimer (1957b). The following page numbers refer to this text.

¹⁵ Here, Kirchheimer used the German word *artfremd* specifically as a term from Schmitt’s vocabulary, meaning foreign/alien to the *Volk*, in an exclusionary and antisemitic sense; see Translator’s Preface.

Germany.¹⁶ Horst Ehmke was less enthusiastic about the impact of Schneider's book. He had also read and praised Schneider's interpretation of Schmitt. But he expressed his fear to Kirchheimer as follows: "I am not at all sure whether in our situation, the book might have the effect of being propaganda for Carl Schmitt."¹⁷

Kirchheimer's writing about the political changes in France amounted to a second public confrontation with Schmitt.¹⁸ In his article "France from the Fourth to the Fifth Republic,"¹⁹ Kirchheimer studied the reasons for the collapse of the constitution of the Fourth Republic, which he had criticized back in 1947. At the same time, he attempted to provide an explanation why and how Charles de Gaulle had succeeded so easily in having a new constitution enter into force with him as president. Kirchheimer considered the deeper causes to be general social factors "transcending the French scene" (396). He interpreted France's transition to the Fifth Republic as the expression of a general social transition in which the citizens' desire for political participation was being eroded and the position of the executive branch within the political system was becoming stronger. After World War II, France experienced an industrial modernization that undermined the parliament and the political parties. In the course of this development, the French bureaucracy gradually increased its independence from both legislative control and the leadership of the executive. So Kirchheimer interpreted the malaise in French domestic politics not as a fundamental structural weakness of parliamentarism but, rather, as the result of a modernization process of industrial society unfolding in all Western democracies.

Kirchheimer called de Gaulle a "representative of authoritarian technocracy, rather than of plebeian totalitarianism" (401). He criticized the constitution of the Fifth Republic, which had been drafted under de Gaulle's direction and accepted by referendum in September 1958. The president's power was not sufficiently limited, he asserted, and the prime minister, the cabinet, and the National Assembly were too weak. Yet he stopped short of calling the new French system a presidential dictatorship. Despite its anti-parliamentarian thrust, there was in the constitution "little evidence that the presidency has been intentionally construed to serve as a springboard for the assumption of Cæsarean-Napoleonic or modern totalitarian dictatorship" (405). If de Gaulle had wanted that, he would have codified that the president would be elected directly, not indirectly by an electoral college of parliamentarians and municipal leaders—there is no indication in Kirchheimer's text that he had anticipated the direct election of the president introduced by de Gaulle in a referendum in 1962. Kirchheimer was skeptical whether switching course toward a stronger presidential constitution would solve France's social and political problems in the future. He claimed the new constitutional model was "construed from the viewpoint of administrative efficiency rather than from a careful consideration of the supporting political structure" (425). Kirchheimer was of the opinion that the unclear allocation of competencies between the president and the prime minister was

¹⁶ Letter from Peter Schneider to Otto Kirchheimer dated 9 February 1957. Otto Kirchheimer Papers, Series 2, Box 2, Folder 1.

¹⁷ Letter from Horst Ehmke to Otto Kirchheimer dated 19 May 1957. Horst Ehmke Papers, No. 504.

¹⁸ On Kirchheimer's writings on France, see Schale (2011).

¹⁹ See Kirchheimer (1958a). The following page numbers refer to this text.

symptomatic of this weakness and provoked the conflicts that erupted later in the era of “cohabitation.”

A revised version of the above-mentioned article was published a year later in the German journal *Außenpolitik* [Foreign policy] under the title *In Frankreich regiert ein einziger Mann* [France is ruled by just a single man]. Even the somewhat pointed wording of the title indicated that it was not only an abridged translation into German, but that Kirchheimer expressed his criticism of the political events in France more explicitly. He interpreted de Gaulle's constitutional policy as a kind of incarnation of Carl Schmitt's theory of the presidential dictatorship: “Constituted and constituting authorities to exert power were unified in the same transitional government, embodied in the person of General de Gaulle” (430). Kirchheimer knew that Schmitt had praised the new French constitution as France's authoritarian salvation and considered himself to be one of the sources of inspiration for de Gaulle's constitution. He also knew that it was West German confidants of Schmitt's such as Armin Mohler who welcomed France's transition to a state led by a “strong man” who did not have to have much regard for the parliament, in the sense of a “commissarial dictatorship.” In his 1963 *Theory of the Partisan*, Schmitt once again expressed his sympathy for how General de Gaulle had trumped republican legitimacy by means of the traditional and national legitimacy that de Gaulle had claimed (see Schmitt 1963a, 83–84).

Whereas Kirchheimer had again begun attacking Schmitt in his publications, Schmitt took the opposite strategy. He remained exceptionally friendly and quoted Kirchheimer exclusively in positive ways. In so doing, he cherry-picked hypotheses or wording of Kirchheimer's that he believed he could use to support his own position. The platform for reintroducing Kirchheimer to the circle of authors Schmitt considered worthy of being quoted was the edition of his *Verfassungsrechtliche Aufsätze aus den Jahren 1924–54* [Essays on constitutional law from the years 1924–54], which was Schmitt's seventieth birthday present to himself. Schmitt added appendices, some of them extensive, to his old essays. In the comments on his Weimar essays, he was keen to present his justifications of the presidential system as a defense of the republic and to assert his loyalty to the constitution (see Schmitt 1958b, 345–350 and 449–451). Schmitt even turned the tables, accusing the Social Democrats of the Weimar period of having destabilized the republic with what he called their dogmatic actions. The Weimar Social Democrats had succumbed to the “chimera of the 51% majority” according to which “the social order [could be] transformed *uni actu*, as if with a magic wand” (Schmitt 1958b, 346) by a law, Schmitt asserted, quoting Kirchheimer. The SPD, Schmitt claimed, “must have had to recognize the chimera as such as early as 1932” (Schmitt 1958b, 346). Schmitt quoted Kirchheimer's words from the modified German version of the 1957 essay “The Waning of Opposition in Parliamentary Regimes” correctly. But he put them in the wrong context; in contrast to what Schmitt suggested, Kirchheimer's comment had referred to a socialist opposition of principle and not to a social democratic party like the Weimar SPD which had been prepared to form coalitions with the bourgeois parties even to the point of self-denial (see Kirchheimer 1957c, 369).

Schmitt made pointed comments on the Federal Republic of Germany. He criticized a tendency toward juridification in a state founded on the supremacy of the judiciary, the dissolution of the bourgeois concept of property, and the welfare state. In his critique of

the Federal Republic of Germany, he again referred to Kirchheimer's essay on the wanting of opposition. He used Kirchheimer's phrase of the "chimera" once more, this time to present the article on expropriation of property in the Hessian Constitution of 1946 as absurd (see Schmitt 1958b, 488). He contrasted the Federal Republic of Germany with the Weimar Republic, and his assessment of both political systems was dismal. In the Weimar Republic, German society had been torn apart by radical political alternatives in every election in 1932/33. Now, in 1958, it was the opposite scenario: Schmitt believed there was a lack of real alternatives and, consequently, a lack of real opposition—above all, however, a lack of real politics. He quoted Kirchheimer's wording, the "desiccation" of opposition, multiple times (see Schmitt 1958b, 262, 346, and 366). However, he drew a different conclusion to Kirchheimer, who was concerned that in the absence of a hard-hitting political opposition, citizens would be alienated from politics, and this would result in the disintegration of society over time. To Schmitt, in contrast, Kirchheimer's hypothesis served as evidence of his own diagnosis that the German state had become incapable of acting. In his view, there was no longer any state at all in Germany in the true meaning of the term. Instead, "party cartels and a system of a limited opposition" (Schmitt 1958b, 366) had taken over. Schmitt recommended that Rüdiger Altmann, a publicist of the rightist authoritarian wing of the CDU and subsequently an advisor to Chancellor Ludwig Erhardt, should read Kirchheimer's article on opposition as a forward-looking warning of a flaccid and apolitical Federal Republic of Germany.²⁰

2. Resuming correspondence in 1958

Between the summer of 1953 and the summer of 1958, Kirchheimer and Schmitt occasionally sent each other reprints of some of their publications, but no correspondence from that time has survived. The three letters they exchanged in 1958 provide evidence of some of their disagreements.

The first of these three letters is dated more than five years after the last one Kirchheimer had written to Schmitt. He wrote him a few hurried lines on the letterhead of a Copenhagen hotel on the occasion of his seventieth birthday on 11 July 1958, but two weeks late, with belated birthday greetings to Schmitt and congratulations on his daughter's fairly recent wedding, which he had found out about from Werner Weber in Göttingen while he was visiting Smend. He closed his letter with the words: "I would have liked to express my wishes to you in person [...]. I hope to be able to be in Europe again on your 75th; simply to make good on what I missed this time."²¹

A few months before Kirchheimer wrote the above letter, he had again refused to contribute to a *Festschrift* for Schmitt.²² Schmitt was aware of Kirchheimer's refusal. Nevertheless, he immediately picked up the ball after returning from a trip to Spain to visit his daughter. He responded by sending Kirchheimer a long letter on 6 August 1958 in which

²⁰ Letter from Carl Schmitt to Rüdiger Altmann dated 31 March 1961; quoted in Burckhardt (2013, 155).

²¹ Letter from Otto Kirchheimer to Carl Schmitt dated 25 July 1958. Carl Schmitt Papers, RW 265–7603.

²² As reported by Kirchheimer in a letter to Arvid Brødersen dated 2 March 1958. Otto Kirchheimer Papers, Series 2, Box 1, Folder 25.

he expressed how pleased he was to be in touch again. He reported in detail about his work from the previous year on the edition of his anthology *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954* and informed Kirchheimer that he had “been reminded of [him] a lot”²³ while commenting on his own articles from the years 1929 to 1932. He emphasized to Kirchheimer that his writing from the Weimar period was as topical as ever: “[b]ecause of the events in recent months (de Gaulle in France—do you still remember René Capitant? [...]—and the referendum in the Federal Republic) the old essays from 1932 have become more current than my new remarks from 1957.”²⁴ He thus hinted to Kirchheimer in passing that the new presidential constitution in France was—via Capitant—inspired by his Weimar book *Der Hüter der Verfassung* [The Guardian of the Constitution].²⁵ He encouraged Kirchheimer to comment on his (Schmitt’s) remarks and referred to the index of names that Kirchheimer could use to easily find “the passages that [he] may be most interested in personally.” Schmitt also mentioned that he had a visitor from New York in his hometown Plettenberg:

I had a visit for some months in the summer from a young student from New York, George Schwab, Columbia University, with whom I had very good conversations and whom I found very friendly. If you ever have the opportunity to speak to him—his teacher is Herbert A. Deane—Public Law and Government, Columbia Univ.—the author of the book on H. J. Laski—I would be interested in your impression of him.

Schmitt closed the letter with his hope for “good conversations about our old topics.”

Kirchheimer answered this letter, but only briefly, one month later on 4 September. He brusquely rejected the claim that Schmitt’s writing from the Weimar period was still as topical as ever: “I do not believe in the repetition of similar situations; too many qualitative changes have taken place.”²⁶ In a slightly ironic tone, he conveyed to Schmitt his “anticipating thanks for enriching the treasures in my library.” And he also told him: “Too bad I didn’t see you, but I’m sure we can make good on that later.” Three months later, Schmitt sent him a copy of his *Verfassungsrechtliche Aufsätze* with the handwritten dedication: “For Otto Kirchheimer as a Christmas greeting from Carl Schmitt, 20/12/58.”²⁷ This time, Kirchheimer did not comment on the book to Schmitt. Instead, he responded by sending him a Christmas letter with a reprint of his essay “France from the Fourth

²³ This and the following quotes are from a letter from Carl Schmitt to Otto Kirchheimer dated 6 August 1958. Otto Kirchheimer Papers, Series 2, Box 2, Folder 12.

²⁴ In his letters to Ernst Jünger (Jünger and Schmitt 1999, 353) and Reinhart Koselleck (Schmitt and Koselleck 2019, 164), Schmitt sought to impress the hypothesis on them that his writing from 1930 to 1932 was even more topical in 1958 than at the time.

²⁵ Schmitt stated as much in his letter to Ernst Jünger dated 26 August 1958 (Schmitt and Jünger 1958, 353). Schmitt disseminated this version very widely until it was taken up in a journal, in a 1961 article by Arnulf Baring (see Baring 1961, 103). On the construction and rebuttal of this legend, see Neumann (2015, 539–545).

²⁶ This and the following quotes are from a letter from Otto Kirchheimer to Carl Schmitt dated 4 September 1958. Carl Schmitt Papers, RW 265–7604.

²⁷ Carl Schmitt, *Verfassungsrechtliche Aufsätze*. Otto Kirchheimer Papers, Series 8–9, Box 5.

to the Fifth Republic" (see Kirchheimer 1958a).²⁸ This was an assessment of the events in France diametrically opposed to Schmitt's praise of the strong presidential system. Schmitt was not amused by what he received from Kirchheimer for another reason, too. He complained in his *Glossarium* that Kirchheimer had penned his Christmas greetings on the back of a print by Renaissance artist Hans Baldung Grien showing two wild horses attacking each other. Schmitt found it "ghastly as a Christmas greeting." And he continued: "Kirchheimer surely does not know what he is doing; nor does he know what he is inflicting on me with this. Nonetheless, I prefer him to *Nathan der Weise* (Nathan the Wise) and *Satan der Leise* (Satan the Quiet)."²⁹

Even though Kirchheimer did not share his views on *Verfassungsrechtliche Aufsätze* with Schmitt, he had read the book even before he received the copy from Schmitt. He expressed his sharp criticism in a letter to Ernst Friesenhahn:

I have Schmitt's essays here. The man is intransigent and the relation between the reality of the concept and responsibility is as unclear to him today as it was 30 years ago. But I fear that the evil lies deeper than the harm that the most brilliant German political thinker since Max Weber could cause. It lies in the entire German attitude that is never willing to take stock of how political and conceptual formulations correspond to reality—I know, it resulted in my having the opposite tendency of not asking deeply enough about the values and going home reassured when I established what the political-sociological equation of a concept and [a] legal construct look like, but the former deplorable custom is simply much more at home in Germany.³⁰

He did not mention in the letter how Schmitt had used his (Kirchheimer's) work on political opposition to suit his own purposes and how he had misquoted him about the Weimar Social Democratic Party.

It is striking that from then on, Kirchheimer no longer invested his time and energy in grappling with Schmitt and his students. When the sociologist Otto Stammer asked him in January 1959 whether he could review Jürgen Fijalkowski's book on Schmitt, which had just been published at Stammer's Institute for Political Research at Freie Universität Berlin,³¹ he declined to do so: "Please forgive me, but there are many reasons why I would not like to deal with Carl Schmitt academically."³² He did not write any more reviews on new works by Forsthoff, Weber, Huber, or Kaiser, either. In the meantime, in February

28 With the dedication "With best wishes and thanks for the book! Your OK." On the first page, Schmitt underlined the wording "friends and foes" in his copy. Carl Schmitt Papers, RW 265–25656.

29 *Glossarium* entry of 30 December 1958 (Schmitt 2015, 378–379). The play *Nathan the Wise* by Gotthold Ephraim Lessing, written in 1779, is the most famous plea of eighteenth-century Germany for religious tolerance between Christians, Muslims, and Jews.

30 Letter from Otto Kirchheimer to Ernst Friesenhahn dated 15 December 1958. Otto Kirchheimer Papers, Series 2, Box 2, Folder 61.

31 See Fijalkowski (1958). Otto Stammer was the founder of political sociology in Germany in the 1950s, see Buchstein (1992, 296–313).

32 Letter from Otto Kirchheimer to Otto Stammer dated 29 December 1959. Otto Kirchheimer Papers, Series 2, Box 2, Folder 24.

1959, Schmitt advised young leftist scholar Jürgen Seifert, who had contacted him, to read Kirchheimer's *Weimar—and What Then?*³³

Nonetheless, correspondence between Kirchheimer and Schmitt did not break off entirely. It did, however, take on the nature of smaller jabs, as the subjects of the works they exchanged reveal. In May 1959, Kirchheimer sent Schmitt a reprint of his essay "The Administration of Justice and the Concept of Legality in East Germany," which includes a defense of the *Rechtsstaat* in the face of those condemning it as a solely bourgeois institution (Kirchheimer 1959b).³⁴ Shortly afterwards, Schmitt recommended the "exciting article about the concept of legality in East Germany" by Kirchheimer to his young admirer Ernst-Wolfgang Böckenförde.³⁵ In turn, Schmitt mailed Kirchheimer a copy of the brochure *The Tyranny of Values* (see Schmitt 1960), which had been published with a small print run of 200 private copies, in March 1960. He added the dedication "for Otto Kirchheimer, C.S.—20/3/60."³⁶ Schmitt placed a very particular greeting to Kirchheimer on page 15 of the booklet. It reads: "Back then, in 1920, it was possible [...] to suppress writings." In the copy with the dedication, Schmitt wrote by hand "especially *Fest-Schriften*" beside the word *Schriften* (writings). Schmitt was alluding to the fact that the publisher Kohlhammer had decided against publishing the *Festschrift* on the occasion of Schmitt's seventieth birthday, which was already being printed, at the last minute. The publishing house Duncker & Humblot, which generally published Schmitt's work, then produced an opulent volume with the support of affluent backers. With his handwritten addition for Kirchheimer, Schmitt once again stylized himself as the victim of malicious persecutors.

Kirchheimer's riposte could not be found wanting. In the spring of 1961, he sent him "with best compliments" a reprint of his article "German Democracy in the 1950's" (Kirchheimer 1961b). If Schmitt read it, then he surely stumbled over the passages where Kirchheimer used sharp words to criticize what the West Germans "elegantly call[ed] the *unbewältigte Vergangenheit*" (the past with which they have not come to terms) as "little demand for self-criticism" and "collective lack of memory" (Kirchheimer 1961b, 486).³⁷

3. Schmitt on political justice

Kirchheimer's main intellectual project in the 1950s was his book on political justice. The backstory to the book and its subject goes back to the Weimar Republic and is closely linked to ideas from Schmitt's *Constitutional Theory*. Schmitt had devoted an entire section to the subject of political justice in his 1928 magnum opus as part of his criticism of the bourgeois *Rechtsstaat*. Schmitt defined "political justice" as the result of the impossible attempt to settle all political conflicts "via a formal judicial procedure" (Schmitt 1928b, 176). Thus, the term "political justice" in this context has nothing to do with the normative

33 As reported by Jürgen Seifert, see Seifert (1996, 118).

34 Carl Schmitt Papers, RW 265–25663.

35 Letter from Carl Schmitt to Ernst-Wolfgang Böckenförde dated 8 May 1959 (Schmitt and Böckenförde 2022, 199).

36 Carl Schmitt, *Die Tyrannie der Werte*. Otto Kirchheimer Papers, Series 8–9, Box 5.

37 The reprint is in Landesarchiv Nordrhein-Westfalen, Papers of Carl Schmitt, RW 265–25657.

question of the moral quality of judicial decisions, but is rather focused solely on the procedural administration of justice.

In his book, Schmitt first described the historical conditions for the emergence of the liberal *Rechtsstaat*, then its key substantive components and institutional organizational principles. He asserted that the fully realized ideal of the *Rechtsstaat* “culminates in the conformity of the entire state life to general judicial forms” (Schmitt 1928b, 176). The *Rechtsstaat* must provide for a procedure for every type of disagreement and dispute between citizens and the state as well as between the various state institutions. The main prerequisite for these procedures to succeed was valid general norms. Some of the disagreements and disputes, however, lacked such a norm laid down in advance. Schmitt recognized a systematic gap in the theory of the bourgeois *Rechtsstaat* at this point. Some disagreements and disputes were so strong “that the political distinctiveness of such cases” (Schmitt 1928b, 176) was inevitable, and it was also inevitable that judges’ decisions in these cases were political decisions. That, he thought, constituted “the actual problem of political justice” (Schmitt 1928b, 176) as a component of the *Rechtsstaat* that was as necessary as it was contrary to the system.

Schmitt’s concept of political justice was not a negative polemical one. He did not consider political justice to be the abuse of judicial procedures out of political calculus or the camouflaging of political purposes by means of a judicial facade. Quite the contrary. The political was already inherent to the matter in dispute. Because of its political character, “a special procedure or order is provided for special types of genuine legal disputes” (Schmitt 1928b, 177). This occurred less in realms of private law but more often in criminal matters or in disagreements under public law.

Schmitt lists the six most important examples of political justice in his book (see Schmitt 1928b, 176–180). The list begins with high treason and treason against a home country. The second example is ministerial and presidential indictments. Next comes genuine constitutional disputes decided by constitutional courts; in other words: Schmitt thought that all decisions made by constitutional courts were a form of political justice. The fourth example is doubts and differences of opinion over the constitutionality of statutes and decrees by special courts. The fifth example is taken from France and the United States and their special treatment of governmental acts in the area of adjudication. Schmitt’s last example is judicial reviews of important elections by constitutional courts or special electoral review commissions (see Schmitt 1928b, 180).

Schmitt claimed that in all the examples listed, purely judicial decisions following the ideal of the *Rechtsstaat* were not possible. The actions of the courts always took place in a political decision-making arena whose sphere of influence therefore had to be, and was indeed, the subject of political decisions in advance. According to Schmitt, the ideal of the bourgeois *Rechtsstaat* was a chimera; and political justice was a symptom of the fact that the perfect *Rechtsstaat* could never be attained. It is clear that the intent behind this hypothesis from his *Constitutional Theory* was critical: Schmitt considered it to be a devastating blow right to the heart of the liberal theory of the *Rechtsstaat*.

Schmitt remained true to this line of criticism throughout the next five years. In 1929, he had criticized proposals to confer the final decision concerning disputes in constitutional law to special courts, which would make them guardians of the Weimar Constitution. He believed that giving this role to a supreme court would ultimately bring about

“unrestrained expansion of the justice system” and would transform the courts into political authorities: “Politics would not be juridified; instead, the justice system would be politicized” (Schmitt 1929a, 98). Schmitt thought the judicial institutions should not even attempt to adjudicate social conflicts but should leave this to a strong government and the President of the Reich. In his 1931 book *The Guardian of the Constitution*, in which he promoted the presidential dictatorship, he quoted the well-known statement by Guizot that in the event of such juridifications, “politics had nothing to gain and the justice system had everything to lose” (Schmitt 1931b, 35).

When Hitler’s government took power in 1933, Schmitt abandoned his position that the justice system should exercise political restraint. It should suffice here to mention his *Fünf Leitsätze für die Rechtspraxis* [Five guiding principles for legal practice] from the summer of 1933, analyzed in more detail in Chapter 7, in which he supported an openly political justice system not bound by any laws (see Schmitt 1933h, 54–56). After 1945, he again made a complete about-face, complaining bitterly in his prison notebooks that the victors were exercising political justice over the Third Reich actors. In *Ex captivitate salus*, he condemned what he alleged was a transformation of “the means and methods of the judiciary into means and methods of annihilation” (Schmitt 1950a, 48) by the victorious powers. To his mind, the Nuremberg Trials were a prime example of “political trials.”³⁸ In his *Glossarium*, Schmitt packaged his fundamental rejection of political trials in a mythological narrative. Each of the three peoples with a formative influence on current-day European thought had had just a single truly great man: the Greeks Socrates, the Jews Jesus Christ, and the Romans Julius Caesar. “Each of these three people killed its greatest man; but only the people with the strongest sense of law and legal procedure, the Romans, did not kill their Julius Caesar by judicial means, but murdered him.”³⁹ In other words, respect for the integrity of the law dictated the act of murder.

After the founding of the Federal Republic of Germany, Schmitt continued his line of criticism of the juridification of politics from the Weimar era. He was the major voice operating behind the scenes against a constitutional court and an alleged “judiciality” of politics.⁴⁰ In the spring of 1961, Schmitt used pseudonyms for a number of letters to the editor as part of a campaign against the *Bundesverfassungsgericht*, which he accused of “political justice” because it had put an end to the efforts of Chancellor Konrad Adenauer to create a government television station. He accused the court of grossly overstepping its authority with this ruling. The consequence, according to Schmitt, was that the decision whether or not to establish a television station for government propaganda was to be left exclusively to the political leadership. Taking up “Bonn is not Weimar,” a common saying at the time, he stated, “Bonn is Karlsruhe,” Karlsruhe being the seat of the *Bundesverfassungsgericht*.⁴¹

An astounding parallel to what Kirchheimer wrote in his book *Political Justice* is to be found in one of Schmitt’s comments on his own Weimar writing in *Verfassungsrechtliche*

38 *Glossarium* entry of 6 May 1948 (Schmitt 2015, 110).

39 *Glossarium* entry of 10 April 1957 (Schmitt 2015, 359).

40 See Chapter 15, p. 386.

41 Carl Schmitt, letters to the editor of *Deutsche Zeitung*, 17 April and 8 May 1961; quoted in Giesler (2016, 33 and 34).

Aufsätze. About the political role of the Weimar *Reichsgericht* (see List of German Courts), he wrote in retrospect in 1958: “The extent to which the means and methods of the judicial process change its object would require a fundamental scholarly examination” (Schmitt 1958b, 109). Elsewhere, he discussed the concern of President of the Reich Hindenburg in 1932 about the “newly established weapon, the threat of political proceedings before the *Staatsgerichtshof*” (Schmitt 1958b, 350)⁴² against him in the event that the state of emergency would be extended. It was only this threat, Schmitt claimed, that had convinced Hindenburg to appoint Hitler Chancellor of the Reich. Regardless of the historical soundness of Schmitt’s comments on his own work—the questions he raised were right at the center of Kirchheimer’s studies on political justice. Kirchheimer had been working on the subject from 1952 on, and he published his first programmatic essay on it in a German publication in 1955 (see Kirchheimer 1955b). There is no doubt that Schmitt was aware of this essay when he wrote the comments on his own work mentioned above in 1958.

4. The backstory to Kirchheimer’s book

Of course, Kirchheimer could not have known about Schmitt’s notes in his *Glossarium*, but he was familiar with his *Constitutional Theory* and his *Guardian of the Constitution*. He had also addressed political justice in his Weimar writing himself, albeit in a different way to Schmitt. Back in 1929, in one of his earliest comments on judicial policy,⁴³ Kirchheimer had criticized the decisions of the *Reichsgericht* on the occasion of the 50th anniversary of its establishment in Leipzig as a faithful reflection of the ideas and views of Germany’s ruling classes. He had faulted both a politically one-sided practice of ruling against the left and the court’s defense against the law of expropriation codified in the constitution as politically motivated perversion of justice. Kirchheimer’s understanding of political justice during the Weimar Republic was synonymous with the accusation of class justice going back to socialist Karl Liebknecht during the German Empire; this was also raised by authors during the Weimar Republic, for instance, his fellow lawyer Ernst Fraenkel.⁴⁴

Kirchheimer had also used the term “political justice” in his 1935 article “State Structure and Law in the Third Reich” in connection with his attacks against Schmitt legitimizing the changes in Nazi criminal law. Kirchheimer saw this as the construction of “political cases” (Kirchheimer 1935a, 153)⁴⁵ of criminal law for the purpose of persecuting political opponents. The procedural guarantees and the independence of the judiciary in Nazi criminal law had already been replaced by executive orders, with Schmitt’s blessing, in the fight against political opponents: “It is thus perfectly legitimate to conclude that political justice in Germany is primarily administered by policemen who punish” (Kirchheimer 1935a, 153). Only if it happened to be opportune for the police or the Gestapo did they bother to hand their cases to the courts.

42 He made the same argument on page 450 of his book.

43 Discussed in Chapter 3, p. 72–74.

44 See Fraenkel (1927) and Deutsche Liga (1927).

45 Emphasis by Otto Kirchheimer.

It is striking against this background that Schmitt and Kirchheimer evaluated political justice in very different ways in the postwar period. Both agreed on the terminological level that political justice was understood as making political use of the opportunities given by judicial proceedings. Unlike the English term, the German term “*Politische Justiz*” does not allow any other meaning. However, Schmitt and Kirchheimer strongly disagreed in their evaluation of the phenomenon of political justice. Schmitt had switched to the mode of complaining about a political justice system he claimed was hostile to him. In contrast, Kirchheimer’s usage of the term took two steps in the opposite direction: changing course from the mode of exposing to one of soberly describing, and in the context of his theory of liberal democracy, he even took on a normative, potentially positive understanding of the term. He developed this concept extensively in his 1961 book *Political Justice*.

The editorial backstory of the book dates back to 1952,⁴⁶ when the Rockefeller Foundation, under the direction of Franz L. Neumann, established a program to support Legal and Political Philosophy (LAPP). The program was to provide a response to positivism, which was dominant in US political science. Alternatives to analytical philosophy, which was also dominant in the US, were to be strengthened as well. The Rockefeller Foundation devoted 1.7 million US dollars to political theory and the history of political ideas as part of LAPP over ten years. Neumann encouraged Kirchheimer to apply for funding for his book project on political justice, and after Kirchheimer had done so a number of times, it was the eighteenth project to be funded. Book projects by Herbert Marcuse, Henry A. Kissinger, Leo Strauss, Eric Voegelin, and Hannah Arendt received funding, too.

Kirchheimer first applied to the Rockefeller Foundation for support for the book in February 1954. He stated that the research goal was to develop the “legal and socio-political aspects of political justice.”⁴⁷ In the first project proposal, he envisaged that the book would have six chapters; the English version of the book later had eleven, the German one twelve. He did not yet plan for a theoretical chapter on the concept of political justice or for chapters on political justice in the GDR, asylum law, or the Nuremberg Trials. In his first proposal, he structured the book according to the actors in court proceedings; the analysis was to be centered around the roles of prosecutors, defense attorneys, defendants, and judges in political proceedings. Even in this initial phase of his considerations, Kirchheimer circumscribed the term in two ways. For one thing, in contrast to his previous use of the term, he no longer considered it to have a purely exposing function. And for another, like Schmitt in his *Constitutional Theory*, he distinguished it from an understanding of the justice system as a neutral instance free of politics, following legal positivism.

According to his project proposal, Kirchheimer’s conceptualization of his work was to go beyond existing individual studies examining the question of individual guilt in the cases against Ethel and Julius Rosenberg as well as Nicola Sacco and Bartolomeo Vanzetti. By contrast, he intended to analyze the social and political causes of initiating court proceedings in political controversies: “Most of the studies on these subjects

46 On its editorial history, see also Klingsporn and Wilke (2019, 33–40 and 2020, 704–726).

47 Project proposal for “Political Justice” of 23 February 1954, Archive of the Rockefeller Foundation, RF RG1.2 Series 200, U.S.-Social Science Box 539, Folder 4614.

have been written by either Nazis or Communists. Law reviews, as a rule, have not dealt with the subject as a whole.”⁴⁸ In the interview with the foundation, Kirchheimer praised the study *Ritual of Liquidation: The Case of the Moscow Trials* (see Bernaut and Leites 1954) by Elsa Bernaut and his former Weimar co-author Nathan Leites, which had just been published, as the work going farthest in this direction at that point in time. Seeking to make statements about the values, attitudes, and relationships within the party leadership under Stalin, Leites and Bernaut had used a literary and psychoanalytical approach in their analysis in order to determine the feelings and the attitudes of the accused and their defense lawyers toward Bolshevism.⁴⁹

Kirchheimer’s approach to his research was more comprehensive. He wanted to study both the commonalities and the differences in the practice of political justice in the USSR, the GDR, under the Nazi regime, and in democratic *Rechtsstaaten*. His starting point was a concept of political justice that could be used equally in all political systems. Only comparative legal research and an analysis of the roles of those involved in the proceedings would be able to demonstrate the functional differences between political justice in the various forms of regimes.

In April 1954, the Rockefeller Foundation informed Kirchheimer that it could not fund the project because he did not have a professional position at a university.⁵⁰ He undertook another attempt to finance his project in November 1954.⁵¹ His application was supported by a peer-reviewed report by Herbert Marcuse. In this report, Marcuse praised Kirchheimer as “one of the most gifted and original scholars in the field of political science and political philosophy.”⁵² In 1955, Kirchheimer’s first programmatic essay “Politische Justiz” [Political justice] was published in the *Festschrift* on the occasion of Max Horkheimer’s sixtieth birthday (see Kirchheimer 1955b).

Once the New School for Social Research had formally offered Kirchheimer a full-time position, he had fulfilled the prerequisites for the grant. But now it was the New School that foiled his plans. It was not willing to give him a leave of absence right at the beginning of his employment there.⁵³ After some back and forth, Kirchheimer finally received the research grant he had desired for so long covering the period from June 1957 to December 1958.⁵⁴ Kirchheimer prepared the English-language text of *Political Justice* in

48 Project proposal for “Political Justice” of 23 February 1954, Archive of the Rockefeller Foundation, RF RG1.2 Series 200, U.S.-Social Science, Box 539, Folder 4614.

49 Minutes of the interview with Otto Kirchheimer by Kenneth W. Thompson of 23 February 1954, Archive of the Rockefeller Foundation, RF RG1.2 Series 200, U.S.-Social Sciences, Box 539, Folder 4614.

50 Letter from Kenneth Thompson to Otto Kirchheimer dated 8 April 1954. Archive of the Rockefeller Foundation, RF RG1.2 Series 200, U.S.-Social Sciences, Box 539, Folder 4615.

51 Minutes of the interview with Otto Kirchheimer by Kenneth W. Thompson of 18 November 1954, Archive of the Rockefeller Foundation, RF RG1.2 Series 200, U.S.-Social Sciences, Box 539, Folder 4614.

52 Letter from Herbert Marcuse to John Stewart dated 20 December 1954. Archive of the Rockefeller Foundation, RF RG1.2 Series 200, U.S.-Social Sciences, Box 539, Folder 4614.

53 Letter from Hans Simons to John Stewart dated 14 July 1955. Archive of the Rockefeller Foundation, RF RG1.2 Series 200, U.S.-Social Sciences, Box 539, Folder 4615.

54 Letter from Hans Simons to Flora Rhind dated 15 January 1957. Archive of the Rockefeller Foundation, RF RG1.2 Series 200, U.S.-Social Sciences, Box 539, Folder 4615.

close cooperation with Arkadij Gurland. After spending three years in Germany, which were a professional failure, Gurland was living in New York again and needed to find paid work.⁵⁵ His first letters with comments on the manuscript date back to December 1957. He criticized using the word “justice” in English for the German word “Justiz” and, even at this early stage, pointed out that the term could be confused with the normative moral quality of being just. He advised Kirchheimer to use “administration of justice” when writing for an English-language readership,⁵⁶ but Kirchheimer did not follow this advice. Had he done so, readers would not have misunderstood what the main subject of his book was, and he would not have had to deal with the fallout.

In late 1958, Kirchheimer's grant was extended through September 1960.⁵⁷ Besides Gurland, who worked with Kirchheimer on an ongoing basis, Karl Loewenstein now also influenced the book. In an expert review of the manuscript for Princeton University Press in May 1960, he praised the chapters on the Nuremberg Trials and on the current-day problems of granting asylum but also criticized the book for still being too unsystematic.⁵⁸ At Loewenstein's suggestion, Kirchheimer explained and theoretically developed his use of the term “political justice” in an introductory chapter. Kirchheimer finalized the manuscript before beginning a semester as a Fulbright Visiting Professor at the University of Freiburg in May 1961 at the invitation of Konrad Hesse and Horst Ehmke, who had both been students of Smend's.⁵⁹ A preprint of one chapter was published in German in the *Festschrift* for Rudolf Smend on the occasion of his eightieth birthday. The editors apparently paid such meticulous attention to ensure that no traces of Schmitt could be found in the *Festschrift* that they even made suggestions regarding the language used. Co-editor Ulrich Scheuner wrote a concerned letter on this matter to Kirchheimer. He asked him to replace “Freund-Feind-Beziehung” (“friend-enemy relationship”), which he had used once, with “Kontrastbeziehung” (“contrasting relationship”).⁶⁰ Kirchheimer claimed this request was “for reasons of academic politics”⁶¹ in a letter to his translator Gurland. He honored the request. He was apparently able to do so easily not least because six years previously, he had made the same linguistic change in the German-language version of his essay “Politische Justiz” for the *Festschrift* for Max Horkheimer. Whereas in the English version of *Politics and Justice* published in 1955, the term “enemies” was used most of the time and “adversaries” occasionally (see Kirchheimer 1955a, 410, 411, 412, and 413), they were both translated as “Gegner” (adversaries or opponents) in the German-language version (see Kirchheimer 1955b, 106, 107, and 109).

55 On Gurland's postwar biography, see Buchstein (2010).

56 Letter from Arkadij Gurland to Otto Kirchheimer dated 31 December 1957. Otto Kirchheimer Papers, Series 2, Box 1, Folder 68.

57 Letter from Kenneth Thompson to Otto Kirchheimer dated 19 February 1959, Archive of the Rockefeller Foundation, RF RG1.2 Series 200, U.S.-Social Sciences, Box 539, Folder 4615.

58 Review Reader B [Karl Loewenstein] for Princeton University Press. Otto Kirchheimer Papers, Series 3, Box 2, Folder 64.

59 Letter from Otto Kirchheimer to Horst Ehmke dated 26 January 1961, Horst Ehmke Papers, No. 504.

60 Letter from Ulrich Scheuner to Otto Kirchheimer dated 25 August 1961. Otto Kirchheimer Papers, Series 2, Box 2, Folder 7.

61 Letter from Otto Kirchheimer to Arkadij Gurland dated 30 August 1961. Arkadij Gurland Papers, NA 5.

Such considerations were irrelevant for the English version of the book. Gurland suggested using “foe” instead of “enemy” in the opening sentence “for reasons of style.”⁶² This time, Kirchheimer followed his advice (see Kirchheimer 1961a, 3). That he considered “enemy” and “foe” interchangeable in their semantic meaning⁶³ is evident from the fact that he used “foe” in some places in the book and “enemy” in others without any systematic order.⁶⁴ How little the English version followed Schmitt’s vocabulary is also apparent from Kirchheimer’s use of alternate terms such as “hostile groups,” “opponents,” and “adversaries” in other places.

5. The ambivalences of political justice

Kirchheimer’s book *Political Justice* has the subtitle *The Use of Legal Procedures for Political Ends*. This was suggested by editor Judy Walton of Princeton University Press,⁶⁵ who wanted to add it to indicate to American readers what the book was about. Kirchheimer dedicated the book “To the Past, Present, and Future Victims of Political Justice” (Kirchheimer 1961a, v). There were more than two decades between his use of the term “political justice” for criminal justice against political opponents and his understanding of “political justice” as a broader term for any use of the judicial process for the purpose of gaining (or upholding, or enlarging) or limiting (or destroying) political power. The political justice he referred to now pointed well beyond political criminal justice. His book⁶⁶ uses examples dating back to European antiquity and right up to the time of writing to provide a seemingly encyclopedic overview of all kinds of political proceedings. Most of the examples are from the US, France, the UK, Russia/the Soviet Union or from Germany during the Weimar Republic, the Third Reich, the GDR, and the Federal Republic of Germany at the time.

The book consists of three main sections with a total of twelve chapters. In the first section, Kirchheimer portrays the emergence of the category of a specifically political offense and devotes a chapter each to the basic forms of political proceedings against individuals and the measures that could be used against political organizations. In the second section, three chapters look at the institutions and actors of political justice: the

62 Letter from Arkadij Gurland to Otto Kirchheimer dated 5 May 1960. Otto Kirchheimer Papers, Series 2, Box 1, Folder 68.

63 “Foe” is of Germanic origin, related to the word “feud.” “Enemy” has a Latin source (*inimicus* = not friend). To some native speakers, “foe” sounds more old-fashioned and literary. In their translations of Schmitt’s late work, George Schwab and Gary L. Ulmen later created the semantic distinction between enemy, i.e., a legitimate opponent whom one fights according to recognized rules and whom one does not discriminate against as a criminal, and foe, i.e., a lawless opponent whom one must fight to the death (see Schwab 1987 and Ulmen 1987). However, this distinction has not prevailed, even among Schmitt scholars.

64 See, for example, Kirchheimer (1961a, 16, 234, 421).

65 Letter from Judy Walton to Otto Kirchheimer dated 17 January 1961. Otto Kirchheimer Papers, Series 2, Box 2, Folder 65.

66 See Kirchheimer (1961a). The following page numbers refer to this book.

public prosecutor's office, the courts, the judges, the defense attorneys, and the defendants. The next two chapters examine specific constellations of political justice: justice in the GDR in the 1950s and the problem of proceedings against former political and military elites by successor regimes, such as with the Nuremberg Trials. In the third and final part of the book, Kirchheimer explores two phenomena he considered to be closely linked to political proceedings, first, asylum law, understood as an opportunity to escape from politically motivated criminal prosecution by fleeing and emigrating and, second, the institution of mercy, understood as lessening or erasing the punishment for political offenses *ex post*.

Kirchheimer begins his initial clarifications of terms in the first chapter with the words "Every political regime has its foes or in due time creates them" (3). He then goes on to define politics as a degree of intensity, as did Schmitt. Something was deemed to be political "if it [was] thought to relate in a particularly intensive way to the interests of the community" (25). Political justice was just one area among many in the political struggle for power. Consequently, he commented on political events and the impacts of political justice using categories such as victory and defeat. At the same time, his understanding of politics included an appeal to the public—whose support was essential for victory in political competitions. Kirchheimer understood political proceedings conducted in the public eye to be events with a theatrical dimension and used vocabulary from the sphere of the theater: stage, audience, director, drama, and script. Political proceedings conducted in public, he asserted, had the primary function of legitimization but also to restrict the scope for political action. They could serve as a resource for the production of political legitimacy—or not, as the case may be. Thus, political trials were "marked by a creative element of risk and unpredictability, which distinguishe[d] them from an administrative command performance" (Kirchheimer 1968b, 98).

Viewed against the background of Kirchheimer's political biography and his lifelong debate with Schmitt, four topics in the book stand out: first, Kirchheimer's cursory retrospect of the Weimar Republic; second, the subjects of fleeing, asylum, and amnesty; third, his integration of political justice into a theory of the democratic *Rechtsstaat*; and fourth, his assessment of the Nuremberg Trials in retrospect, which is the subject of the next section of this chapter.

Various examples from the Weimar Republic are presented in multiple chapters of *Political Justice*, yet they do not provide many surprises. Kirchheimer devotes a considerable amount of space to the unsuccessful libel suits that President of the Reich Friedrich Ebert brought against the right-wing press and reminds readers of the right-wing leanings of most of the Weimar judges. The only new addition is a detailed description of the failure of the Weimar courts in combating Nazi and other right-wing extremist perpetrators of violence and insurgents.

In Chapters IX and X, Kirchheimer gives new weight to the subjects of fleeing, asylum, and amnesty. He addresses intent in the context of amnesties, namely that amnesties were "intended to efface the memory and possible consequences" (418). However, Kirchheimer first poses the question of the legitimacy of such intentions before coming to an affirmative answer. After all, the victims might consider amnesties to be illegitimate at times. For the case of Germany after 1945, he saw mostly "former rightists and former National Socialists" (414) rallying around the battle cry for a comprehensive

amnesty. In particular, he praised the Bundestag for successfully resisting manifold pressures, and for how it had done so (see 412–415). Schmitt, of course, had the opposite view, calling amnesty the “most foundational position of that which one can call justice”⁶⁷ in his *Glossarium*.

Concerning the problem of asylum, Kirchheimer saw a fundamental difference between the nineteenth and twentieth centuries, as had Hannah Arendt before him (see Arendt 1951, 267–271). Whereas a few vulnerable political rebels had become political refugees in the nineteenth century, fleeing from persecution that targeted certain groups grew into a mass phenomenon in the twentieth century. The majority of reasons for fleeing no longer had any connection to political justice. The refugees were not persecuted because they were accused of breaking the law but because they belonged to an unwelcome social, ethnic, or religious group. The prototype of the asylum seeker in the twentieth century was “just one of hundreds of thousands or millions threatened by a policy directed against a social stratum or an ethnic group” (354). Against this background, Kirchheimer advocated expanding the category of political refugee in asylum law to include all actual or suspected victims of racist, national, religious, or political persecution. At the same time, however, he was against a legally binding obligation of states to admit victims of political persecution. He accepted the right of every state to grant or refuse political asylum. His rationale referred to Hugo Grotius, who claimed a state “would come to an end if the right to emigrate were given to every man” (365).

Kirchheimer’s examples of political refugees from the Nazi regime being denied asylum in France and Switzerland make for sobering reading. The Soviet Union comes off even worse in historical comparison. It granted asylum solely according to the criterion “how serviceable an individual was to the party machine” (358). Its practice flagrantly contradicted the conferences on asylum law—propaganda events masterminded by communists—which Kirchheimer and his wife had attended in their Paris exile in 1936. He described the US as an ambiguous case whose practice “the lucky winners extol and the losers vilipend” (360). Kirchheimer highly praises the “generous provisions” of the Basic Law of the Federal Republic of Germany that “go beyond the established practice of international law” (356). Such an article of the Basic Law had been possible only under the immediate impression of the relentless persecution of political opponents in the Nazi regime.

Examining how Kirchheimer embedded the phenomenon of political justice in his theory of the democratic *Rechtsstaat*, the third topic in the book, is certainly fruitful. Like Schmitt—but without mentioning his name—Kirchheimer contradicted how Western democracies officially presented themselves, namely that political justice could not exist there. He argued that political justice was unavoidable even in well-functioning *Rechtsstaaten*—and that this was not necessarily all negative. He had formulated this hypothesis in his first project proposal to the Rockefeller Foundation back in 1954. He understood political justice as one of multiple modalities for dealing with the real or imagined principal opponents of a political regime. In *Rechtsstaaten*, an internal contradiction resulted from this, namely between the legal means and the political goal to be achieved. This fusion of politics and opposition is reminiscent of Schmitt at first glance.

67 *Glossarium* entry of 5 December 1947 (Schmitt 2015, 43).

As described above, Schmitt had in fact devoted an entire section to political justice in the *Rechtsstaat* in his *Constitutional Theory*. However, Kirchheimer only addressed two of Schmitt's six main examples of political justice: high treason and indictments of ministers or other high officials, and unlike Schmitt, he wrote about asylum law and amnesty law.

Kirchheimer viewed politics and justice as placed along a continuum. Political actors made use of the opportunities afforded by judicial proceedings—be it at the initiative of state agencies or of members of the opposition who wanted to publicly put the state in a bad light. Yet in liberal *Rechtsstaaten*, those in power could not prevent members of the opposition from gaining control over the justice apparatus, too. They could contrive suits concerning libel or perjury. Groups excluded from political power could thus influence their fellow citizens' political views. Political proceedings were fraught with risk for both sides. If those in power took control of the justice apparatus, this created uncertainties in liberal democracies. Since the development of policies had to take a "detour" (421) via legal procedures and their inflexible rules, it was impossible for political intentions to prevail unchanged. That meant wasting time and limiting the methods that could be used, which implied risks for both sides. This was the specific judicial space, the uncertainty of the outcomes of political trials, in liberal democracies. Consequently, political justice in democratic *Rechtsstaaten* might even have "benefits" (429) by taking on a positive function civilizing the conflict. Then, following Smend, it performed the function of integrating society via conflicts.

Kirchheimer supported his deliberations with the historical hypothesis that using legal procedures politically only made sense with the emergence of the bourgeois *Rechtsstaat*. Limiting state action in procedural terms, or juridification, did not mean the end of political justice but was, rather, its prerequisite. He identified the Federal Republic of Germany and the US as being at opposite ends of the spectrum, Germany as a militant democracy able to repress principal political opposition by banning political parties or depriving citizens of fundamental rights and the US as a country with virtually no legal restrictions to principal political opposition. Kirchheimer's ideal was a liberal practice like what he saw in the UK. There, the government strictly limited itself to repressing unlawful acts while granting generous freedom to propaganda and political organization. He placed France and Italy in between, too, with their administrative discrimination against the communists. Seeking to depoliticize political justice, Kirchheimer believed, was in the best case an optical illusion, in the worst self-deception. In a democratic *Rechtsstaat*, what mattered was not to abolish political justice, but to reduce it to a tolerable level. The alternative to political justice could be worse, for example, if a regime acted more arbitrarily and perhaps violently if it had no recourse to the courts. Like Schmitt, Kirchheimer held the view that political justice could not be overcome. Unlike Schmitt, however, he did not think that this fact was an absolute breach with the system of the principles of the *Rechtsstaat* but an opportunity for its recognition by society.

Nonetheless, the tone of Kirchheimer's book is melancholy in many places. He was of the opinion that political justice united both a repressive and a civilizing element within itself, and the two were inextricably linked to one another. This tension could not be un-

made; at best it could be recognized in its ambiguity. Political justice could never bring about complete justice.

6. In dialogue with Hannah Arendt

A fourth key topic of Kirchheimer's *Political Justice* is the Nuremberg War Crimes Trials addressed in Chapter VIII, titled "Trial by Fiat of the Successor Regime." Looking back twenty years later, Kirchheimer considered these trials to be proceedings without any prior models or precedents. Whatever pressure there was did not come from external organized groups but from the situation itself: It was the pressure of "the charnel houses, the millions who had lost their families, husbands, or homes" (340). Kirchheimer was analytically correct in calling these proceedings "successor trial[s]" (324) in hindsight. But he did not conclude from this that they had been illegitimate. On the contrary. He praised them as an achievement of civilization and an example of how transitional justice could succeed. The paradigmatic significance and accomplishment of the trials had been undermined by the dissensions among the wartime partners. The wartime coalition had broken apart "before the ink on the Nuremberg judgement had time to dry" (324) and the opportunity to lay a firm foundation for a new world order was wasted.

Kirchheimer reviewed four main objections of the defense attorneys against the Nuremberg prosecution, rejecting one after the other. Incidentally, Schmitt, too, had independently put forward these four objections, using identical or similar wording, in his letters, anonymous articles, or diary notes,⁶⁸ most of which Kirchheimer could not have been aware of. The first objection was that the defendants could plead that they had simply followed the law. Using a line of argument following the philosophers of natural law, Gustav Radbruch and Lon L. Fuller, Kirchheimer countered that the defendants "in those patently exceptional cases" (328) such as the mass murder of Jews and Poles were not permitted to plead that they had implemented existing laws or that their behavior had been legal. He argued that the value of legal certainty "is not strong enough" against the principle that "intentional violation of minimum standards deprives an enactment of the claim to legal validity" (328).

A second objection was following superior orders: the perpetrators had been bound to specific and binding orders. Kirchheimer responded that there had indeed often been superior orders at the lower levels of the military, and that refusing to follow orders had cost soldiers their lives. "[I]n every case, there will come a point when the illusion that one's own influence can arrest more general developments will be dispelled. At this moment there arises the conflict of open resistance or silent withdrawal" (331). Kirchheimer explains that "active resistance will always remain a highly personal decision" (331) and concludes that "active resistance to the oppressor is [...] an illusory yardstick" (331). In his view, the "legitimate yardstick" is "withdrawing" from "significant participation" (331) in the regime. Kirchheimer states that this kind of behavior was possible in Nazi Germany, citing the example that some judges avoided appointments to *Sondergerichte* (see List of

68 See Chapters 13 and 14.

German Courts) without facing reprisals. At the higher level of military command, relations were in fact “more like relations within what might be described as a power elite, and should be judged in these terms” (330). The defendants in Nuremberg belonged to this power elite who had decided not to withdraw from their positions.

The third objection of the defense concerned the alleged bias of the court because it had been appointed by the victorious powers. Kirchheimer did not consider this a special feature. In all political trials conducted by the judges of the successor’s regime, “the judges are in a certain sense the victor’s judges.” (352). He forcefully contradicted the assertion that a German court would have arrived at different rulings in the first postwar years. German judges—provided they had not been Nazis—may have emphasized different points and selected different procedures, yet they would by no means have arrived at rulings more beneficial to the defendants.

A fourth objection concerned the accusation of *tu quoque*: judgment was passed on acts that the Allies had also committed themselves. Kirchheimer stated that this accusation made clear that political proceedings like these concerned not only the past but that they always also concerned the future: “In laying bare the roots of iniquity in the previous regime’s conduct, it simultaneously seizes the opportunity to convert the trial into a cornerstone of the new order” (336). In the case of the Nuremberg Trials, the accusation of *tu quoque* was absurd and merely showed to what small degree those who propounded it had understood the Nazi regime’s crimes: “Of those misdeeds which we call offenses against the human condition, no comparable practices of any state of the world, whether represented on the bench or not, could serve in exculpation or mitigation” (338).

This last question marked the point at which Kirchheimer again clearly acknowledges his commitment to universal norms. Elsewhere in his oeuvre, he usually refers to the historical variability of norms or to the political instrumentalization of moral norms. But confronted with the evidence of mass annihilation and mass enslavement presented in the Nuremberg Trials, he reverts to a position akin to natural law:

And in wading through the evidence on mass annihilation and mass enslavement, those fact situations which we have since come to describe as genocide have established signs, imprecise as they might be, that the most atrocious offenses against the human condition lie beyond the pale of what may be considered contingent and fortuitous political action, judgment on which may change from regime to regime (341).

The “lasting contribution” of the Nuremberg Trials was their transformation into “the concerns of the human condition, the survival of mankind in both its universality and diversity” (341). Kirchheimer thought this also raised the question of how to deal with the principle of “individual responsibility” (319) if the entire state had become an *état criminel*.

It is precisely these questions about the link between social norms, the law, and personal responsibility that Hannah Arendt poses in her coverage of the trial against Adolf Eichmann published in *The New Yorker* in 1961. Arendt had read *Political Justice* immediately after its publication and had included it in the later version of her reporting, which was published as a book in 1963. Arendt and Kirchheimer were acquainted from their time in exile in Paris but had never developed a closer personal relationship. This remained the

case even though they met privately a few times in New York.⁶⁹ Academically, however, they highly respected each other. Arendt, too, was particularly interested in the eighth chapter, as evidenced by what she underlined in her copy of Kirchheimer's book.⁷⁰

In her own book, *Eichmann in Jerusalem*, Arendt built on Kirchheimer's deliberations on the theatrical dimension of political justice and the "irreducible risk" (Arendt 1963, 208) of political trials. Moreover, she referred explicitly to his analyses of the political context of the Nuremberg Trials (see Arendt 1963, 127, 256, 257, and 266). She also quoted a key idea from his work for her book about distinguishing between guilt and innocence. She followed Kirchheimer both in her argument that active resistance to a totalitarian regime was an illusory and wrongful normative standard and in her definition of the appropriate yardstick:

[T]he only possible way to live in the Third Reich and not act as a Nazi was not to appear at all; 'Withdrawal from significant participation in public life' was indeed the only criterion by which one might have measured individual guilt, as Otto Kirchheimer recently remarked in his *Political Justice* (Arendt 1963, 127).⁷¹

Kirchheimer had added the following in his book to the parts Arendt had quoted:

A large body of experience teaches us that many men show a fatal proclivity toward pushing themselves, or allowing themselves to be pushed, into positions where they know in advance the honors and rewards will entail corresponding entanglement and responsibility (Kirchheimer 1961a, 331).

Although he did not mention Schmitt by name in this passage, readers in the know were certainly aware that he was referring not only to jurists in general but to *Preußischer Staatsrat* Carl Schmitt too.

Kirchheimer, for his part, was just as keen to read Arendt's book. Referring also to his wife Anne and his son Peter, he wrote to her after reading the first edition of 1963: "my family of non-professionals is reading it also with great interest and seem to share my enthusiasm." He told her he agreed with her analysis on the whole: "I agreed with about two thirds of what you said and my disagreements are minor and on the legal rather than a political or moral level."⁷² His affirmative statement is remarkable considering the vehement criticism Arendt's book received after its publication in the US, in particular with regard to her discussion of the role of the *Judenräte* (Jewish Councils) in the concentration camps. Kirchheimer's former superior at the OSS, Robert M. W. Kempner, was among the first harsh critics in *Aufbau* (see Kempner 1963), followed by the vast majority of Jewish readers (see Renz 2021, 50–131). Along with Arendt's friend sociologist Joseph Maier

69 As reported by Peter Kirchheimer in a conversation with the author on 4 May 2023.

70 See Arendt's copy of Otto Kirchheimer, *Political Justice*. Bard College, Hannah Arendt Collection, Call #: KF310.P65 K56.

71 See Kirchheimer (1961a, 331).

72 Letter from Otto Kirchheimer to Hannah Arendt dated 15 May 1963. Otto Kirchheimer Papers, Series 2, Box 1, Folder 11.

(see Maier 1963), who had shared an office with Kirchheimer at the Institute of Social Research in New York, Kirchheimer was among the few Jewish authors who mostly agreed with her view of the Eichmann trial. In his letter to her, he added a list with a number of corrections concerning technical legal aspects of her book. Arendt took them on board in the revised second edition of her book in 1964. Later, in the German edition of his book *Political Justice*, Kirchheimer shared the main point of her criticism of the Israeli government, that it had turned the trial into a “courtroom drama” in order to instrumentalize it “as a pivotal point of demonstrative affirmation of the national state idea in the face of the ongoing external threat to the state’s existence” (Kirchheimer 1965c, 44).

Carl Schmitt’s readings of Hannah Arendt are worth mentioning in this context, too. He had read and commented extensively on Arendt’s books from the 1950s to the 1970s. After the publication of Arendt’s *Origins of Totalitarianism* (see Arendt 1951), he enthusiastically called it an interesting and important book.⁷³ He cited it in private letters and in his *Glossarium* in support of his own retrospective theory concerning the difference between a total state and a totalitarian movement like the Nazis. In particular, her distinction between “real Nazis” and “outstanding intellectuals” fitted into his retrospective self-description. He liked her account of the limited role intellectuals could play within totalitarian Nazi Germany. He also read her book as an indirect justification for his retrospective pose as a victim of the Nazi system. Moreover, he read it as an explanation as to why his career was interrupted in 1936: the more totalitarian a political system becomes, the less space it leaves open for truly original and independent intellectuals like himself.

Schmitt read Arendt’s report *Eichmann in Jerusalem* shortly after its publication, and this time, he reacted quite differently. He wrote to legal scholars Roman Schnur and Ernst Forsthoff in October and November 1963, respectively, that reading her book had been an “upsetting” experience that had left him “sick for several weeks.”⁷⁴ He explained his emotional reaction to Forsthoff as follows: “because once again my legal opinion from August 1945 came to my mind, especially its conclusion.”⁷⁵ The legal opinion he was referring to was the one for Friedrich Flick.⁷⁶ In this, he had argued that Flick could not be held responsible for any significant crime. In Schmitt’s view, the same applied to those who served as legal scholars for the Nazi system. Only a very small number of elite Nazis were to be held responsible. Arendt argued from a diametrically opposing point of view when she explained that those who lacked specific influence, such as the Nazi intellectuals, had a “greater realm of freedom” (Suuronen 2022, 19) in their decision whether or not to support the regime. Instead of choosing silence or emigration, all Nazi intellectuals had willingly chosen to support the regime with their writing: “For politics is not like the nursery; in politics obedience and support are the same” (Arendt 1963, 279). Her argument was an echo of her reception of Kirchheimer’s criteria to distinguish between guilt

73 On Schmitt’s apologetic reading of Arendt’s *Origins*, see Herberg-Rothe (2004) and Suuronen (2022).

74 Letter from Carl Schmitt to Roman Schnur dated 24 October 1963 (Schmitt and Schnur 2023, 542) and letter from Carl Schmitt to Ernst Forsthoff dated 18 November 1963 (Schmitt and Forsthoff 2007, 198).

75 Letter from Carl Schmitt to Ernst Forsthoff dated 18 November 1963 (Schmitt and Forsthoff 2007, 199).

76 See Chapter 13, p. 337–339.

and innocence mentioned above. After having read Arendt's book on Eichmann, Schmitt finally realized that Arendt's work could not be utilized in an apologetic manner as he had previously thought.⁷⁷

In his letter to Roman Schnur, Schmitt also mentioned Kirchheimer. He told Schnur: "It is interesting that she seeks advice from O. Kirchheimer, who is truly anything but a lawyer."⁷⁸ He went so far as to suspect that Kirchheimer was the source of a "squit of poison" against him, namely Arendt's note that Dieter Wechtenbruch, the assistant of Robert Servatius, Eichmann's lawyer in the Jerusalem trial, was "a disciple of Carl Schmitt" (Arendt 1963, 145), which Schmitt correctly denied. Arendt did not indicate in any of her publications that she got advice from Kirchheimer for her book about the Eichmann trial and, to this day, there is no mention of his supportive role in the secondary literature on Arendt. Nevertheless, Schmitt knew about it. The source of his information is unknown to me. His knowledge about this is a remarkable example of Schmitt's interest in Kirchheimer's activities.

Kirchheimer's book *Political Justice* was published in November 1961. One of its first reviews was by Robert M. W. Kempner, Kirchheimer's superior as they prepared for the Nuremberg Trials.⁷⁹ It was published in the February issue of *Aufbau*, the German-Jewish monthly published in New York. Kempner paid particular attention to the chapter about the Nuremberg Trials. He praised Kirchheimer's "scholarly analysis of the Nazi objections against the Nuremberg Trials" as a "necessary [...] clarification." Kempner placed the study in the tradition of the Deutsche Liga für Menschenrechte (German League for Human Rights) he had co-founded in Weimar. *Political Justice* was the scholarly continuation of the position paper of the Deutsche Liga für Menschenrechte titled *Acht Jahre Politische Justiz* [Eight years of political justice], (see Deutsche Liga 1927) which had demonstrated how "anti-democratic forces within the justice system can undermine democracy, let political murderers go free, and defame supporters of democracy by means of 'rulings'" (Kempner 1962, 8). As much as this praise may have pleased Kirchheimer, it also contributed to superficial readers believing more firmly that Kirchheimer's intent was to use the term "political justice" solely in a pejorative sense. The chapter on the Nuremberg Trials has had the most favorable response in the further debate in the English-speaking world to this day. Kirchheimer is credited with having conceptualized "transitional trials" for the first time in this chapter, and his work in this field of research is still seen as groundbreaking today.⁸⁰

Kirchheimer sent Schmitt a copy of the book immediately upon its publication. He added a brief formal dedication "With compliments, your OK."⁸¹ Schmitt is known to add handwritten comments in the books he read; they are very few and far between in this one. He apparently did not read the sections on the legal proceedings relating to the

⁷⁷ On Schmitt's reading of *Eichmann in Jerusalem*, see Graf (2021), Suuronen (2022), and Plaetzer (2022).

⁷⁸ Letter from Carl Schmitt to Roman Schnur dated 24 October 1963 (Schmitt and Schnur 2023, 542).

⁷⁹ See Chapter 13, p. 358–360.

⁸⁰ "The credit for conceptualizing transitional trials [...] must go to Otto Kirchheimer" (Priemel 2016, 7).

⁸¹ Schmitt's copy of Otto Kirchheimer, *Political Justice*. Carl Schmitt Papers, RW 0265–25665.

Nazi crimes at all. But he did read the two-page appendix on the Roman Empire and the Christians, underlining some parts. Schmitt left his few marks in the parts of the book that he believed pointed to his own concept of politics as the friend-enemy distinction. Most of his markings are in the three-page section headed “The Informer: Enemy from Within” in Chapter VI “The Defendant, His Lawyer, and the Court.” Moreover, Schmitt could not suppress his urge to add a comment underneath Kirchheimer’s dedication “To the Past, Present, and Future Victims of Political Justice”: he added a handwritten note: “I do not compare the victims (to whom I—past, present and future—belong), I only compare the judges, C.S.”⁸² Schmitt did not respond directly to Kirchheimer. As we shall see, his reaction to the book the following year was overshadowed by a new conflict between them.⁸³

7. Kirchheimer as a professor at the New School for Social Research

By publishing *Political Justice*, Kirchheimer had fulfilled the formal prerequisites for a tenured position as a professor at Columbia University. Moreover, sales of the book were good; Princeton University Press had already sold 1,100 copies by October 1962, in just under a year.⁸⁴ The book was reviewed in all the important journals and major newspapers and received wide praise. A number of reviewers criticized it, however, as “heavy of language” and “too long and meandering,” and its title as “misunderstandable.”⁸⁵ All the same, Kirchheimer was disappointed by this resonance because of some critical voices. His anger was due most of all to the misunderstanding in some reviews that he had used the term “political justice” in a pejorative sense in his book.⁸⁶ Four months after its publication, he wrote to Gurland: “As my reviews except for one isolated leftwinger show complete lack of understanding and often bad will to match—I am somehow *angewiesen* [dependent] on the German translation.”⁸⁷ The “leftwinger” was Henry (Heinz) Paechter (see Paechter 1962). He and Kirchheimer knew each other as activists of the left wing of the Weimar SPD. Paechter was able to escape from Nazi Germany to New York. He was a socialist intellectual and frequently taught German history classes at the New School for Social Research. In 1944, he co-authored the dictionary *Nazi-Deutsch. A Glossary of Contemporary German Usage*, which has been used for this book.

When appointing Kirchheimer, the New School for Social Research had high expectations. Hoping he could draw on his work at the State Department, the President of the

⁸² Schmitt’s copy of Otto Kirchheimer, *Political Justice* (page 5). Carl Schmitt Papers, RW 0265–25665. Schmitt used exactly the same wording once again in a letter to Ingeborg Maus in May 1982; see Mehring (2013, 443).

⁸³ See Chapter 17.

⁸⁴ Letter from Herbert Bailey to Otto Kirchheimer dated 26 October 1962. Otto Kirchheimer Papers, Series 3, Box 2, Folder 51.

⁸⁵ On the book’s reception in the US, see Klingsporn and Wilke (2020, 750–754).

⁸⁶ On this misunderstanding in the book’s reception, see Klingsporn and Wilke (2020, 755–758).

⁸⁷ Letter from Otto Kirchheimer to Arkadij Gurland dated 5 March 1962. Otto Kirchheimer Papers, Series 2, Box 1, Folder 68.

Graduate Faculty immediately appointed him Chairman of the Committee for Coordinating Research.⁸⁸ However, Kirchheimer had not become a successful academic manager. On the contrary. Besides his university teaching, he was primarily interested in continuing to work on his book on political justice. His modest activities to obtain financing were limited to funds from the State of New York for research at the New School on a subject close to his heart ever since he taught classes as Visiting Professor at Howard University in Washington in 1952 and 1953, namely “discrimination against Puerto Ricans and Negroes.”⁸⁹ Among his colleagues at the New School, he particularly liked to talk to faculty members of the younger generation.⁹⁰

Kirchheimer continued to try to obtain a position at a university in West Germany. He rejected Fritz Bauer’s offer in the summer of 1957 to accept a full position as editor-in-chief of the social democratic theory journal *Die Neue Gesellschaft*.⁹¹ Instead, he relied on his good contacts to Carlo Schmid, Hermann Heller’s former assistant. In the spring of 1953, immediately after assuming his position as professor of political science at the University of Frankfurt, Schmid had begun his efforts to establish a second chair, to which he wanted to appoint Kirchheimer. Apparently, he received no support at all from Horkheimer or Adorno (see Weber 1996, 511–522). When it seemed that the efforts in Frankfurt would not bear fruit, Schmid interceded for Kirchheimer to be appointed at the universities in Cologne and Bonn but was unsuccessful because of the resistance of the relevant departments there.⁹² In a letter to Fritz Bauer, Kirchheimer spoke with resignation of the “fata morgana of a German professorship.”⁹³ In 1960, Gert von Eynern informed him that Kirchheimer—as well as Ossip K. Flechtheim—was under discussion for a chair for domestic policy at the Otto-Suhr-Institut, the political science department at the Freie Universität Berlin.⁹⁴ Eynern was a social democrat who had been active in the resistance movement against Hitler and became director of the Otto-Suhr-Institut in 1959. Yet this plan petered out, too. In a letter to Horst Ehmke, Kirchheimer confided he felt that German universities viewed him as “a kind of straying dog that people permit to wander in their front yards if need be.”⁹⁵

The situation in the US was different. He received tenure at the New School for Social Research in 1957. Kirchheimer’s way of dealing with people changed during his time

88 Minutes, Executive Faculty Meeting of 9 May 1956. New School for Social Research: New School Institutional Collections. Graduate Faculty, Minutes. NS.02.17.02, Box 1, unprocessed collection.

89 Minutes, Executive Faculty Meeting of 16 January 1957. New School for Social Research: New School Institutional Collections. Graduate Faculty, Minutes. NS.02.17.02, Box 1, unprocessed collection.

90 Arthur J. Vidich, who had joined the New School in 1960, in a conversation with the author on April 4, 1995.

91 The reason he gave was: “working with a party is possible; living off a party is not very desirable.” Letter from Otto Kirchheimer to Fritz Bauer dated 22 August 1957. Otto Kirchheimer Papers, Series 2, Box 1, Folder 17. Bauer later played a prominent role in the capture of Adolf Eichmann.

92 See letter from Carlo Schmid to Paul Luchtenberg dated 11 June 1958. Carlo Schmid Papers, Reg. Nr. 678.

93 Letter from Otto Kirchheimer to Fritz Bauer dated 22 August 1957. Otto Kirchheimer Papers, Series 2, Box 1, Folder 17.

94 Letter from Gert von Eynern to Otto Kirchheimer dated 31 January 1960. Otto Kirchheimer Papers, Series 2, Box 2, Folder 38.

95 Letter from Otto Kirchheimer to Horst Ehmke dated 26 January 1961. Horst Ehmke Papers, No. 504.

at the New School. Herbert Marcuse wrote in a confidential letter of recommendation for Kirchheimer to the Rockefeller Foundation: "I felt that he was hampered by linguistic difficulties and a psychological failure to adjust to the American scene." Yet Marcuse saw improvement in his newer works: "His recent work shows that this is no longer the case: the last two or three articles I have seen are well written and presented in a fashion fully comprehensible to an American audience."⁹⁶ Erich Hula wrote the same, almost verbatim, to the foundation, and added: "I think that he has finally arrived at the rare combination of American empirical method and German sociological learning and theory."⁹⁷ In John H. Herz's view, Kirchheimer had changed in a positive way in terms of everyday things as well during his time at the New School. Although he still was no friend of the American way of life, he became more open when dealing with his fellow human beings and more sympathetic to everyday political matters in the US (see Herz 1989, 16).

The years at the Graduate Faculty of the New School for Social Research had been a productive period for Kirchheimer. He completed his book *Political Justice*, and he published a number of essays and book reviews placed prominently in renowned journals as well as regular book reviews in the *Washington Post*. His position at Columbia University further enhanced his reputation in the field of political science in the US. One indicator of this was his co-optation as the successor of Leo Strauss on the editorial board of the *American Political Science Review* (APSR) (see Kettler 2006, 535), the journal published by the American Political Science Association (APSA). Kirchheimer had arrived at a new and prestigious high point of his academic career.

8. Conclusion: A Smendian solution to a Schmittian problem

The front lines between Kirchheimer and Schmitt remained the same in the years 1957 to 1961. At most, the range of main subjects and the means of discussion had changed. In addition to the renewed discussion about the end of the Weimar Republic, subjects now included the new presidential regime in France, the role of the opposition in the Federal Republic of Germany, the welfare state, constitutional jurisdiction, and political justice. Schmitt stuck to his old positions. He taught his young follower Ernst-Wolfgang Böckenförde the following historical lesson about 1933 and the years that followed: "*Jeder anständige Deutsche* (every decent German) who wasn't a communist or a Marxist joined in at the time."⁹⁸ Not only did this mean that Schmitt still felt that resistance had not been a viable option, but also that he excluded liberals and social democrats as well as conservatives who had in fact resisted from the circle of those he considered "decent Germans."

Although Kirchheimer and Schmitt corresponded sporadically in 1958, they never met again in person after their encounter in Cologne in 1953. Schmitt proposed that

96 Letter from Herbert Marcuse to Kenneth Thompson dated 26 November 1958. Archive of the Rockefeller Foundation, RF RG1.2 Series 200, U.S.-Social Sciences, Box 539, Folder 4615.

97 Letter from Erich Hula to Kenneth Thompson dated 24 December 1958, quoted in Müller (2010, 395).

98 Letter from Carl Schmitt to Ernst-Wolfgang Böckenförde dated 13 April 1961 (Schmitt and Böckenförde 2022, 276).

they engage in more in-depth debates but did not receive the response he desired. Kirchheimer brusquely rejected Schmitt's claim that his (Schmitt's) writing from the Weimar period was still as topical as ever. He informed him that he did not believe in the repetition of similar situations because too many qualitative changes had taken place since then. After 1958, Kirchheimer stopped publicly commenting on Schmitt's work altogether. Their correspondence also petered out and was limited to taunting each other by sending offprints of their new works.

In his public confrontation with Schmitt, Kirchheimer revived his penchant to go on the offense, repeatedly attacking Schmitt head-on again in his publications. In his review of Schneider's book in 1957, he once again summarized all of his substantive and methodological objections to Schmitt in a succinct form: the ever-present negation of *Rechtsstaat*; the discrepancy between the traditional liberal concept of classical international law and the rejection of liberalism as part of the domestic constitutional order; the omnipresence of the people's constituent power and its incapacity to act as a constituted organ; the indeterminate character of the values underlying specific decisions; and the lack of any clear-cut criteria for differentiating between violence and nomos. In a letter to Friesenhahn a year later, Kirchheimer called Schmitt intransigent and repeated his methodological critique of conceptual realism.⁹⁹ Kirchheimer thought that Schmitt was still not willing to take stock of how political and conceptual formulations corresponded to social reality.

In contrast, Schmitt chose a different strategy in his public debate with Kirchheimer. He remained friendly and quoted Kirchheimer several times and only positively. He selected short sentences or formulations from Kirchheimer and used them to support his own position. As with Schmitt's "art of quoting" during the Weimar Republic in his *Legality and Legitimacy*,¹⁰⁰ these benevolently worded citations were taken out of context, thus distorting their meaning and conveying inaccuracies.

Kirchheimer had dedicated the book *Political Justice* to the past, present, and future victims of political justice. Schmitt saw himself as a victim of Jewish-American political justice and responded to Kirchheimer's dedication sarcastically that he did not compare the victims but only the judges. The chapter on the Nuremberg Trials can be seen as a full rebuttal of Schmitt's objections from his letters, anonymous newspaper articles, and his *Glossarium*, although it is not possible that Kirchheimer could not have read these.

Nonetheless, Schmitt's influence on Kirchheimer's understanding of political justice, inspiring the subject of the book *Political Justice*, is unmistakable. Just like Schmitt in his *Constitutional Theory*, Kirchheimer stated that political justice was a phenomenon that had never been and could never be abolished even in the best *Rechtsstaat*. But unlike Schmitt, this statement did not mean that Kirchheimer believed that the idea of the *Rechtsstaat* was flawed from the outset and should be rejected. Neither Schmitt nor Kirchheimer considered "political justice" to be a negative concept. The term did not mean the camouflage of political purposes with a judicial facade and the misuse of judicial procedures for political reasons. The political was always inherent in a dispute. The two of them agreed up to

⁹⁹ Letter from Otto Kirchheimer to Ernst Friesenhahn dated 15 December 1958. Otto Kirchheimer Papers, Series 2, Box 2, Folder 61.

¹⁰⁰ See Chapter 5, p. 129.

this point. The divergences began with the adaptation of political justice in the theory of the bourgeois *Rechtsstaat*.

According to Schmitt, the existence of political justice proved that the theory of the bourgeois *Rechtsstaat* widened a systematic gap. The *Rechtsstaat* had to provide a procedure for any kind of disagreement and dispute between citizens and the state and between the various state organs. The prerequisite for the success of these procedures was valid and general standards. However, some of the disagreements and disputes lacked such a predetermined norm. In such cases, the judicial decision inevitably became a political decision. Schmitt saw the systematic gap in the theory of the bourgeois *Rechtsstaat* at this point. Some disagreements and disputes were so prominent that the political specificity of such cases was inescapable. That, according to Schmitt, created the actual problem of political justice as an element that went against the systematic logic of the *Rechtsstaat*.

In contrast, in his theory of *Rechtsstaat*, Kirchheimer conceptualized political and judicial processes as being located on a continuum. Again and again, politics made use of the judicial institutions—and not only on the initiative of state authorities, but often also by oppositional citizens who wanted to publicly criticize the state in such a trial. Political trials were risky for both sides. If those in government wanted to make use of the judiciary, this resulted in imponderables. The detour via the law meant wasting time and limiting the methods that could be used against the political opponent. Political trials in a *Rechtsstaat* created a specific judicial space, namely the fact that results were not predetermined. Political opponents of the government could be acquitted and members of the opposition could attract the attention of the public for their political concerns in political trials. In modern democracies, political justice could even have some benefits. It might take on a positive function that curbed social conflicts.

Ultimately, Kirchheimer countered the problem of political justice, which Schmitt had exaggerated into an insoluble contradiction, with Smend's basic idea about the function of the judiciary in a democratic *Rechtsstaat*. At the time when Kirchheimer had finished his book, Smend was completely unknown in the English-speaking world, which is why Kirchheimer omitted any reference to him in the English version of his book. He added a reference to the German version from 1965:

More than three decades ago, Rudolf Smend argued insistently that the constitution made the courts independent of the state leadership and thus expressly freed them from the obligation to serve the state to provide integration; in practice, however, he said subsequently, it could be that the courts serve not only to integrate the legal community, but also to integrate the state (Kirchheimer 1965c, 23).

And he added in a footnote: "In an effort to trace the courts on the tortuous paths of their dual role, I seek to penetrate the perils of the courts' liberation from state leadership, which Smend had emphasized" (Kirchheimer 1965c, 23). In the passage from Smend's *Verfassung und Verfassungsrecht* (see Smend 1928, 207–209) quoted by Kirchheimer, Smend described how the role of the judiciary had changed since the transition from the medieval jurisdictional state to the modern *Rechtsstaat*. Even if the constitution had freed the judicial institutions from the explicit task of integrating the unity of the state, both

the legislature and the judiciary functioned as political institutions of social integration. According to Kirchheimer, the value of legal procedures in conveying the legitimacy of a political system depends largely on the degree to which such procedures respect the limitations on political prosecution. That is the freedom of defense, the organizational and intellectual distance between the prosecution and the court, the untrammeled introduction and challenge of testimony, and the degree of insistence upon evidence of concrete past action. Performed in such a way, political justice could even contribute to the integration of society through conflict. In a nutshell, Kirchheimer's *Political Justice* provides a Smendian answer to a Schmittian formulation of the problem.

