Chapter 5: Escalating Antagonisms (1932)

The year 1932 was ill-fated for the Weimar Republic, marking the beginning of the end. Since 1930, parliamentary democracy had been replaced by a government that had introduced a presidential emergency decree. Almost two years later, Chancellors Franz von Papen and Kurt von Schleicher took over the reins of politicians who had planned to give the republic a different constitution and, consequently, a different form of government in the long term. In the course of 1931, Chancellor Heinrich Brüning had increasingly lost support for his policies in the Reich President's Office. July 1931 saw a serious bank crash. Brüning tried in vain to stabilize the situation by issuing a third emergency decree on 6 October and a fourth one on 8 December 1931. There were 5.66 million unemployed by December with no sign of an economic turnaround. Brüning's policy resulted in mass misery and a rise in right-wing extremism. On 30 May 1932, he was forced to resign, and Hindenburg appointed Franz von Papen as the new Chancellor. Papen had ambitious plans for a constitutional reform that would result in the re-establishment of the monarchy. In the course of the escalating economic and social crisis in the republic, Papen also resigned on 17 November 1932, with Kurt von Schleicher replacing him as Chancellor on 3 December. He attempted to find a compromise to assemble a majority tolerating his policy across the parties, relying on the NSDAP splitting. His plan failed and so he considered establishing a military dictatorship. Since he lacked the President's support for this plan, he finally resigned, too. On 30 January 1933, Hindenburg installed the leader of the Nazi party, Adolf Hitler, as the new Chancellor of a coalition government with the DNVP.

During these turbulent political events, Schmitt and Kirchheimer were among those who took an active part in the constitutional and political discussions about the changes proposed by Papen and Schleicher. In the case of Schmitt, another factor was that he no longer restricted himself to the role of a legal commentator. 1932 was the year he had managed to gain direct contact with the political leaders in the Reich. He rushed to the government's aid as a legal representative, providing informal advice and legal opinions. His restless activities in 1932 earned him the sarcastic title of "crown jurist of the Presidential Regime" (Gerlach 1932, 343) from the leftist magazine *Die Weltbühne*. Ultimately, however, Schmitt's excursions into practical politics failed. In this respect, at least, there was very little difference between him and Kirchheimer.

Kirchheimer continued to fight for a professional existence in 1932. He was admitted to the Berlin bar as a lawyer in January. Like many lawyers at the time, he ran his law firm from his private apartment. His father-in-law Kurt Rosenfeld helped him with the difficult task of acquiring clients as a young professional during the economic crisis and assigned him some criminal law cases. He was also asked to take on some labor law cases in the Berlin law firm of Franz L. Neumann and Ernst Fraenkel, who were on a retainer for the Deutsche Metallarbeiter-Verband (DMV, German Metalworkers' Union) and the Deutsche Baugewerksbund (DBB, German Union of Building Trades). Kirchheimer regularly came to their representative offices on Alte Jakobstraße in the Berlin district of Kreuzberg. Other visitors and participants in the group that met there were Otto Kahn-Freund and Otto and Susanne Suhr. Kahn-Freund worked in a labor court in Berlin; Kirchheimer had spent six months of his *Referendariat* with him in 1929. Otto Suhr had a position at the economic policy department at the headquarters of the Allgemeine freie Angestelltenbund (General Free Employees Association). As early as 1932, he predicted in a newspaper article that the Nazis would take power and that their regime would last twelve years; Kirchheimer, Fraenkel, and other participants in the discussions took him for a pessimist.[1] These political discussions turned into a kind of seminar on constitutional law for the younger generation of Social Democratic lawyers.

Referred by Kahn-Freund, Kirchheimer gave courses at union schools and lectured at events organized by the Republikanische Richterbund (Republican Judges' Association), a small association of lawyers loyal to the republic. In these circles, Kirchheimer enjoyed the reputation of being extremely open to discussion. Looking back, Susanne Suhr described him as follows: "He was a brilliant young intellectual, but ultimately incapable of practical politics."[2] Kirchheimer continued to keep in touch with his comrades of the magazine *Klassenkampf*, who had migrated from the SPD to the new left-wing party SAP, the Socialist Workers' Party of Germany, and with dissidents of the KPD, who, like the young legal scholar Wolfgang Abendroth, found themselves in the KPO, the Communist Party of Germany (Opposition). What the two new small parties SAP, which Kurt Rosenfeld had joined, and KPO had in common was that they wanted to overcome the schism of the labor movement and to unite the SPD and the KPD in their fight against Nazism. Although Kirchheimer remained in the SPD, he sympathized with these unification efforts. Like Neumann and Fraenkel, Kirchheimer began to publish several essays on current constitutional issues in addition to his legal work after a one-year hiatus. He also started to prepare his *habilitation* with Rudolf Smend at the Law Faculty at Berlin University. However, his professional dreams were shattered with the handover of power to Hitler's government.

1 See Fraenkel (1957, 380).

2 Susanne Suhr in an interview with Alfons Söllner, quoted in Erd (1985, 42).

1. Legality and legitimacy

In 1931, Schmitt had contributed an article called "Grundrechte und Grundpflichten" [Fundamental rights and fundamental duties] for a commentary on the Weimar Constitution. He again vehemently rejected the idea of an "integrative function of the judiciary" (see Schmitt 1932d, 192), which Kirchheimer had claimed in his dissertation, taking up Smend's work. Schmitt added:

> The general hypothesis formulated by O. Kirchheimer in my constitutional-theory seminar in the summer of 1931, namely that a state founded on the supremacy of the judicial branch (instead of the supremacy of the legislative and executive branch) is the only one that could have fundamental rights, should at least be mentioned here. (Schmitt 1932d, 192)

Schmitt disagreed with Kirchheimer but was fair-minded enough (and also proud) to quote his former doctoral student in this contribution to his outstanding commentary on the Weimar Constitution.

If we strive to understand exactly what the constitutional thrusts of the articles published by Schmitt and Kirchheimer in 1932 were, we must be aware of their precise dates because events unfolded at breakneck speed during that last year of the Weimar Republic. Kirchheimer continued to attend Schmitt's seminar, and soon they were both debating another subject: legality and legitimacy. After he settled into his new job as a lawyer, Kirchheimer published his first major article in the July 1932 issue of *Die Gesellschaft* [Society]. The title was "Legality and Legitimacy". The genesis of this article is closely linked to his discussions with Schmitt and his supporters. These led to Schmitt publishing an article with the same title shortly afterwards. This in turn prompted Kirchheimer to refute this new contribution by Schmitt point by point in even more detail. This next article was completed in November 1932. Its publication in February 1933 was, however, overshadowed by the new political balance of power after Chancellor Adolf Hitler took office.

The idea of writing an article about the relationship between legality and legitimacy had first arisen in discussions in Carl Schmitt's seminar. Kirchheimer started to work on the subject in November 1931. He may have been prompted to do so by a radio lecture by Schmitt in early November 1931 in which he opposed "formalizing the alternative of legality or legitimacy in the sense of subaltern, formalistic disputes about words" (Schmitt 1931e, 15). Schmitt went ahead with discussing the concepts of legality and illegality in his seminar on constitutional theory in late January 1932 (see Mehring 2014a, 254). He gave a radio lecture titled "Was ist legal?" [What is legal?] in February, but without referring to the opposite concept of legitimacy.[3] Among the group of younger jurists in Schmitt's circle, it was Ernst Forsthoff who also started to reflect on this subject. In a January 1932 letter to Schmitt, Forsthoff used what was to become Schmitt's constitutional policy credo: "To my mind, what matters is not legality, but only legitimacy, the

3 See Schmitt (1932d) and letter from Ernst Forsthoff to Carl Schmitt dated 8 April 1932 (Schmitt and Forsthoff 2007, 41).

political stance toward the fundamental constitution."[4] Schmitt championed this idea of a kind of superlegality of certain elements of the constitution, too. Kirchheimer's article also grappled with this idea, albeit with a sociological approach and a different political thrust. He completed a first draft in early April 1932 and sent it to Schmitt. A few days later, Schmitt forwarded the manuscript to Forsthoff to keep the discussion going. The published version of the article includes additional details and references, which leads to the conclusion that Kirchheimer submitted the final manuscript to the editors of *Die Gesellschaft* in late May 1932.

Schmitt sent Kirchheimer's text to Forsthoff in Freiburg on 14 April 1932.[5] A comparison of this version of the manuscript, including revisions in Kirchheimer's hand, and the published version yields a total of thirty-four modifications in wording, none of which are major substantive changes. The only significant change is in the references to Schmitt's works. Only one of the four references to texts by Carl Schmitt is to be found in the manuscript of the first draft (Footnote 5 in the printed text). Kirchheimer added another reference to Schmitt (Footnote 3) later by hand, and two references to him (Footnotes 15 and 25) were not yet included; Kirchheimer obviously added them later after discussions with Schmitt, shortly before the article went to press.[6]

While writing his article "Legality and Legitimacy,"[7] Kirchheimer was still unaware of the clandestine preparations to remove Chancellor Brüning from power, which were to bring about his resignation on 30 May 1932. Nonetheless, the piece reads like a conclusive record of the changes in the republic made during the Brüning era. The central hypothesis of Kirchheimer's diagnosis of the current constitutional policy was that "the concept of legality is undergoing a structural transformation" (48) in Germany, whereby the changes to the constitution were profound but not formal. The period of the parliamentary democratic legal order of the republic had been replaced by a new order of legitimacy. The "new form of legitimate power" (45) in the state was the *Berufsbeamtentum* (professional civil service) in collaboration with and supported by the Reichswehr (the armed forces) and the judiciary. Kirchheimer supported his transformation hypothesis using texts by three authors whom he identified as major legal scholars promoting this development: Carl Schmitt, Ernst Rudolf Huber, and Otto Koellreutter, who had been openly sympathizing with the NSDAP as early as 1930.

A key characteristic of legal orders that had become rational was that they applied the law equally, irrespective of the person concerned, formally guaranteeing equal treatment to the opponents of the social system prevailing at the time. And in order to guarantee this opportunity in practical terms, legislative and executive powers had to be separated. If this separation were to be suspended by a "government which now fuses legislative and executive authority" (44), as Kirchheimer stated Brüning's regime of emergency decrees was effectively doing, then this would mean no more equal treatment in formal terms.

4 See letter from Ernst Forsthoff to Carl Schmitt dated 23 January 1932 (Schmitt and Forsthoff 2007, 40).

5 See the editors' explanations in Schmitt and Forsthoff (2007, 359).

6 I would like to thank Jürgen Tröger for generously making a copy of this manuscript from Ernst Forsthoff's papers available.

7 See Kirchheimer (1932a). The following pages numbers refer to this article.

Such a regime would then have to endeavor to compensate the loss of the indisputable legal basis of its action due to a parliamentary decision by seeking legitimatory authority going beyond that legal basis. Appointing a person to the authority of the office of the President of the Reich served to fulfill this function. In fact, however, Kirchheimer continued, the large number of presidential authorizations of government action on the basis of Article 48 had created a situation whereby the professional civil service could take on the function of the new legitimate power in the republic. The Brüning government's practice of emergency decrees was characterized by vague norms, unclear wording, frequently changing rules, and giving carte blanche to the executive branch. This allowed officials to execute the regulations as they liked and claim that all measures taken were legitimized.

Kirchheimer's key analytical concept for this constellation was "dual legality" (46) (in the German original: *zweistufige Legalität*; "two-stage legality" or "two-tier legality" would be closer translations). The idea for this concept dates back to French legal theoretician Maurice Hauriou, who saw a *superlégalité constitutionelle* inscribed in the French constitution (see Hauriou 1932, 297). Kirchheimer thought that this problem was particularly salient in Germany because a large number of substantive legal provisions in the second part of the constitution essentially had to be understood as an invitation for the executive branch, i.e., the President, to confront the legislature with the claim that it was violating the constitution every time it took a decision that was not to its liking. Yet in contrast to what Carl Schmitt claimed a few months earlier in *Der Hüter der Verfassung* [The guardian of the constitution] (see Schmitt 1931b, 91), the large number of provisions in the second main part made it more difficult to systematically formalize and legally engineer the concept of laws in Germany but did not make it completely impossible. However: "no 'pluralism of conceptions of legality,' as Carl Schmitt describes it, has emerged yet" (47). Even before Brüning's regime of emergency decrees was installed, the bureaucracy in Germany occasionally became the keeper of the seal of this dual legality as a result but it was usually kept in check by functioning parliamentarism.

In his article, Kirchheimer showed how the republic's basis of legitimacy had successively shifted in four areas: the Reich government, the *Länder* governments, the political parties, and the system of labor courts. Expanding the application of Article 48 for emergency decrees with an undefined or unlimited period of validity destroyed any opportunity to review the executive branch using the law as the yardstick. Any criticism of the obvious illegality of a measure decreed under Article 48 or its interpretation by the officials was deflected by reference to the legitimacy of the government and the indisputable validity of its goals and actions. This meant that all legal barriers to government action had disappeared; the government was legitimizing itself. Kirchheimer detected a transformation occurring in parallel in the increasing number of acting governments installed at the *Länder* level. If acting governments were replaced by Reich commissioners as recommended by Ernst Rudolf Huber in the spring of 1932 (see Huber 1932), this would be a further step in the transformation process he had diagnosed.

Kirchheimer saw a similar development in the way political parties were being dealt with. Following the letter of the Weimar Constitution, all political parties had to be treated equally in principle. The Reichstag had rightly always rejected placing individual political parties and groupings under special criminal statutes. The social ideas expressed in a party's goals had no bearing on their status of legality; limitations arose at most from the two *Republikschutzgesetze* (Laws to Protect the Republic) of 1921 and 1930. Their provisions, however, referred to specific punishable offenses committed with the aim of undermining the republic. Kirchheimer saw the fundamental equal political treatment of the political parties, unaffected by this, eroded by Otto Koellreutter's construction of a legal concept of a "revolutionary party." Kirchheimer explained this transformation in the policy of legitimation as he grappled with a contemporary essay by Koellreutter which ultimately argued for an end to all legal limitations on the NSDAP and its combat units as well as a ban on the KPD (see Koellreutter 1932). Kirchheimer countered the construct of the legal concept of a "revolutionary party" (53) by arguing against any positive assessment of the NSDAP, speculating that "the question of the transformation of private property is really what is of concern to Koellreutter" (53) when determining what was revolutionary, and that the latter was in fact concerned with rejecting that transformation.

Kirchheimer also raised fundamental concerns against developing the law in such a way that it differentiated between legitimate and illegitimate parties. The Weimar Constitution, he claimed, did not provide for superlegality of selected elements of its system of norms. Consequently, no additional material criterion besides the concept of legality could exist for legally assessing a political party. Yet this was exactly what was already the case in Germany. Kirchheimer referred to a January 1932 decree by Minister of the Reichswehr Wilhelm Groener permitting members of the NSDAP and its combat units to apply for positions in the Reichswehr, while continuing to ban supporters of the KPD from doing so, as an example of this practice.

In another section of his article, Kirchheimer briefly discussed changes in labor law, largely following the criticism by Otto Kahn-Freund and Ernst Fraenkel of the more recent decisions of the *Reichsarbeitsgericht* (see List of German Courts).[8] For one thing, the *Reichsarbeitsgericht* had presumed the right to limit the legitimacy of parties to collective bargaining in its rulings on not recognizing *Betriebsräte* (works councils) and trade unions. For another, the court essentially limited the freedom to form and join trade unions by claiming sole authority to define whether a labor conflict had a legitimate economic goal or an illegitimate political one.

The result of Kirchheimer's four-part analysis was that "both the origins and the significance of the concept of legality […] presently appear[ed] to be undergoing a process of decay, emptying it of its original meaning" (46). In retrospect, the parliamentary democratic system of the republic from 1919 to 1930 had proven to be an intermediary stage on the way to rule by the professional civil service in collaboration with the Reichswehr and the judiciary. The officials legitimated themselves as the government, limited the freedom of their enemies through the concept of the legitimate party, and governed labor law with the concepts of the legitimate party to address collective bargaining and the legitimate labor conflict.

With this diagnosis, Kirchheimer had evolved and radicalized deliberations from the previous three years. In his 1929 essay "Verfassungswirklichkeit und politische Zukunft der Arbeiterklasse" [The Constitutional Reality and the Political Future of the Working

8 See Fraenkel (1932) and Kahn-Freund (1932).

Class], he had condemned the tendency of the bureaucracy to take on a life of its own, and in 1930, in *Weimar—and What Then?*, he had criticized the legitimating function of the President of the Reich and the judiciary. He now synthesized these distinct tendencies into a single foundational tendency of transformation with his formula "dual legality." As fundamental as it was by design, he doubted that the contemporary system of rule by the bureaucratic aristocracy could stay in power long term. He considered the current situation to be merely a further "intermediate stage" (45) in terms of constitutional policy.

In contrast to Huber's plea for an authoritarian regime for economic purposes (see Huber 1931), Kirchheimer argued, "the social basis of this system is too weak to permit the bureaucracy to function as a truly independent mediating force" (58) in dealing with large industrial and business companies. The bureaucrats would only be able to remain in power for any length of time if they relied on extremely conservative societal groups from agrarian, small business, and military circles attempting to turn back the current process of capitalist development. Yet a countervailing societal force still existed. He recognized it in the "progressive will of the democratic populace" (59) but without making a prognosis about the outcome of this situation of conflict. In the weeks following the publication of his article, Kirchheimer gave a number of public lectures and talks in Berlin and Leipzig. He also put his hypotheses on legality and legitimacy up for discussion at a meeting of the Association of Social Democratic Jurists in Berlin.[9]

However, the reception of Kirchheimer's work was overshadowed by Schmitt's public appearances. In *Der Hüter der Verfassung*, Schmitt had still supported the separation of powers between the parliament, the government, and the judicial branch, but had considered this to be largely eroded in practice. He then revoked his essential agreement with the principle of the separation of powers in a number of lectures and shorter written contributions in the first half of 1932. The ascendancy of the President of the Reich to a new legislator had brought about a fundamental transformation from a legislative to an administrative state. Only a few days after Papen took office, Schmitt offered his publisher a manuscript compiled from lectures he had held during the previous weeks and borrowing the title of Kirchheimer's article. To Schmitt, the title of this pamphlet *Legality and Legitimacy* signaled the transition to a new political order, the transition from the previous order of legality to one of a higher legitimacy. Whereas to Kirchheimer the problem was the state becoming independent of society, to Schmitt it was exactly the opposite: the root cause of the crisis was a pluralist society encroaching upon the state.

Schmitt's *Legality and Legitimacy* was published a month after Kirchheimer's in mid-August 1932. He added a prefatory statement to the book that "this essay was completed on 10 July 1932" (Schmitt 1932e, 6).[10] This was important because immediately upon its publication, the work was viewed as a legal justification of the coup by the Reich against

9 According to an announcement of the event in the main social democratic newspaper, *Vorwärts*, Kirchheimer put his hypotheses on legality and legitimacy up for discussion at a meeting of the Vereinigung Sozialdemokratischer Juristen (Association of Social Democratic Jurists) in Berlin on 2 October 1932. See *Vorwärts* (Berlin edition), 1 October 1932, page 12. I am grateful to Detlef Lehnert for calling this reference to my attention.

10 This statement is not included in the English translation.

the *Land* of Prussia on 20 July.[11] Schmitt's book[12] is a continuation of his earlier one on the crisis of parliamentary democracy. In his new book, he discussed the practical consequences of parliamentarism, which he regarded as a foregone conclusion. Schmitt's *Legality and Legitimacy* has been described as characterized by "rhetorical magnificence accompanying snide *Schadenfreude*" (McCormick 2004, xxiii).

The book is divided into two parts corresponding to its distinction between liberalism and democracy. Liberalism had created the bourgeois state of the *Rechtsstaat* and the parliament had a monopoly on legislation. Majority rule required a legal disposition and the refusal of a governing majority to capitalize politically on its "premium on the possession of power" (35) by excluding the minority from power in the future. This political premium was relatively predictable in calm and normal times. In troubled times, as in Germany at the time, however, it was very unpredictable. Parliamentary democracy had a wide door through which its enemies could gain power and then close the door behind them. Schmitt warned of the possibility of a "legal revolution" (36).

In the second part of the book, Schmitt sought to show that the creators of the Weimar Constitution had designed a political order that was doomed from the start. He played the separate parts of the constitutional system off against each other in "Mephistophelean fashion" (McCormick 2004, xxxiv). The constitution, he asserted, provided for three "extraordinary lawgivers" (39) whose effects, if combined with one another, would lead to a dissolution of the system. These were not lawgivers in the sense of parliaments yet the impacts of their decisions were just as binding as laws adopted by the parliament. First, there were the courts, which could rule in favor of basic rights and were thus open to interpretation to serve any and all ideological purposes. Second, there were referenda, which were in plebiscitary competition with the parliament. And third, there were the extraordinary competencies of the President to decree measures.

The parliamentary system of lawmaking was crushed by these contradictions. Schmitt even went so far as to claim the existence of two constitutions within the Weimar Constitution. He referred to a contradiction between the value neutrality in the first, organizational, part of the constitution and a number of value commitments in the second part. According to Schmitt, "the decision must fall for the principle of the second constitution and its attempt to establish a substantive order" (94). This meant that the parliamentary, democratic, and federal organizational principles of the constitution codified in the first part were at the disposition of the political decision-maker on the implementation of the substantive order. In other words, Schmitt gave the President of the Reich the power to liquidate not only the democratic parliamentarism of the republic but also the federal structure of the Reich. In so doing, he emphatically abandoned the organizational part of the Reich's constitution *in toto*. This was the "sensational outcome" (Muth 1971, 111) of Schmitt's considerations on legality and legitimacy, an outcome that provided a justification for the Reich government's coup against the state of Prussia.

In light of the enormous power to make constitutional changes on the organizational level assigned to the President of the Reich, it was all the more astonishing that Schmitt

11 See the next section of this chapter.

12 Schmitt (1932c). The following page numbers refer to this text.

did not make it clear which articles of the salvageable substantive "core" (92) from the second part of the constitution he considered to be crucial. Since he had regularly mocked the dilatory formulaic compromise in this second part of the constitution in his writings of previous years, he could only have been concerned with a few of these articles. But which ones? His book reveals nothing about this question apart from the vague formulations "to liberate it [the constitution] from self-contradictions and compromise deficiencies" (94) and "recognition of the substantive characteristics and capacities of the German people" (93). This could mean everything or anything—and, in any case, it was the sole responsibility of a President elected by plebiscite to decide. The "substantive values" (93) harbored by conservatives and authoritarians such as Hindenburg and his camarilla were undoubtedly the preservation of the privileges of sociopolitical elites.

Schmitt explicitly referred to Kirchheimer's analysis in his book. He acknowledges he "accept[s]" (9) Kirchheimer's pointed wording about the legitimacy of parliamentary democracy now consisting solely in its legality. However, Schmitt changed the wording of Kirchheimer's finding significantly to support his own argument. The English translations disregard this subtle modification. Kirchheimer had written that the legitimacy of the legislative state was "*allein in ihrer Legalität*" (in its legality alone) (Kirchheimer 1932g, 382).[13] Schmitt misquoted him in the original German version as writing that "*nur noch in ihrer Legalität*" (all that remained [of the legislative state was] its legality) (Schmitt 1932h, 14), thus changing the meaning of Kirchheimer's statement. Schmitt had added a general diagnosis in line with a theory of decline to Kirchheimer's statement about a trend that could still be corrected; there was no such diagnosis in Kirchheimer's text, but it fitted well with Schmitt's own legal theory.[14]

Relating Schmitt's *Legality and Legitimacy* to the dramatic course of events in the summer of 1932 reveals his political intentions. In playing off the presidential system against the legality system of parliamentary democracy and federalism, he was not only motivated by gloomy forecasts about political developments. The tension that runs through the text reflects how anxious its author was about the future. In 1932, the state of Prussia was the last democratic "stronghold of the republic" (Winkler 2001, 413). Schmitt was concerned with dismantling this Prussian bulwark and not primarily with building a wall against the Nazis (Blasius 2001, 29–31). As clear as Schmitt was in his deconstruction of the system of the Weimar Constitution in *Legality and Legitimacy*, he remained vague about the alternative he preferred. In retrospect, Schmitt stated that his piece was part of his genuinely desperate attempt to rescue the Weimar Constitution.[15] However, there are also indications supporting the hypothesis that he was aiming at nothing less than a fundamental alternative to the system of the Weimar Republic at this time, in the name of the "recognition of the substantive characteristics and capacities" (93) of the German *Volk*.

13 The wording is identical to the manuscript version of his essay that Kirchheimer had sent Schmitt in advance.

14 On this "additional twist" (Andreas Anter) by Schmitt when citing Kirchheimer, see Neumann (2015, 236–239), Anter (2016, 106), and Buchstein (2017a, 89–91).

15 See Chapters 14 and 15.

Opinions in the secondary literature differ concerning Schmitt's political intentions in this book.[16] The question is whether Schmitt wanted to warn against an outcome—the collapse of the Weimar Republic—or whether he actually encouraged this outcome (see McCormick 2004, xxii). To Kirchheimer, the answer was obvious. Schmitt's book could not be seen as a purely analytical diagnosis of Weimar democracy that lacked a political agenda of its own. His arguments did not conform with a temporary suspension of parliamentary democracy. The logic of his reasoning pointed toward eliminating parliamentary democracy for good because it was becoming obsolete. Viewed from a purely formal point of view, Schmitt still made the case for a commissarial dictatorship. Within the logic of his criticism of the Weimar Constitution, however, it amounted to a sovereign dictatorship. A few weeks after Schmitt's book had been published, Ernst Fraenkel bluntly called it a blueprint for the permanent supersession of parliamentary democracy and the establishment of a permanent fascist dictatorship (see Fraenkel 1932, 507).[17]

Following the publication of Schmitt's *Legality and Legitimacy*, the conversations between Schmitt and Kirchheimer became fierce political arguments. Schmitt, who was known for taking criticism as a personal insult, now changed his personal opinion of Kirchheimer, too. After the two of them went for a walk together in Berlin's Tiergarten park in late August 1932, he no longer called him "nice" or "intelligent," but a "*scheußlicher Kerl*," a "vile fellow."[18] This was the first time since January 1928 that Schmitt commented negatively on Kirchheimer in his diaries.

2. The coup against Prussia

Carl Schmitt's political role in the final year of the Weimar Republic is still the subject of scholarly disputes to this day. In 1957, when assembling some of his essays on constitutional law from the final days of the Weimar Republic, Schmitt himself promoted the interpretation that it had been an "outcry in an emergency," a desperate attempt to safeguard the republic from the onslaught of both the communists and the Nazis.[19] A number of authors sympathizing with Schmitt have followed this self-interpretation. Among independent authors, the debate has focused on answering two questions.[20] First, whether the emergency decrees planned with Schmitt's involvement, had they been successful, would have stabilized the republic or transformed it long-term into a different state order. And second, the extent to which Schmitt (willingly or unwillingly) had promoted the transfer of political power to the Nazis through his activities. The first question can be answered unequivocally but not the second.

16 On the political ambiguity of this piece, see Hofmann (1995, 99–104), McCormick (2004), and Mehring (2014a, 253–258).

17 John McCormick draws similar conclusions in his interpretation that Schmitt's line of argument ended at a "military junta" (McCormick 2004, xxxix).

18 Carl Schmitt, diary entry of 25 August 1932 (Schmitt 2010, 210).

19 See Chapter 15.

20 See Muth (1971), Berthold (1999), Pyta and Seiberth (1999), Seiberth (2002), Blasius (2001, 15–70), and Neumann (2015, 169–302).

In the summer of 1932, the *Land* of Prussia was at the center of the political power struggles. It was by far the largest *Land* in the Reich with two-thirds of the land area and three-fifths of the population and had been governed by coalitions led by the Social Democrats since 1920. After the elections of 24 April 1932, the government under the social democratic Prime Minister Otto Braun no longer had a majority in the Prussian parliament. More than 50 percent of the seats had been won by the NSDAP and the KPD, both of them extremist parties. The Prussian government of Social Democrats, the Center Party, and leftist Liberals remained in office only in an acting capacity. The governing coalition had changed the procedural rules of the Prussian parliament just before the elections. The Braun government could not be voted out by the Nazis after the elections because the new rules required an absolute majority of votes for the office of Prime Minister of Prussia.

Shortly after the elections in Prussia, there was momentum for change in the governing constellation in the Reich. Support for Chancellor Brüning from the office of the President waned because of his policies and his distancing himself from the NSDAP, and he finally had to submit his resignation on 30 May 1932. There was no compelling reason to remove Brüning from power; this can only be interpreted as an attempt by the President's circles to install a right-wing government. General Kurt von Schleicher had already conducted confidential talks with Adolf Hitler in the office of the President and had been able to gain his support for the NSDAP tolerating a different presidential cabinet. Therefore, the presidential cabinet was no longer dependent on toleration by the SPD, as von Hindenburg had demanded of his staff as an ultimatum. In return for his policy of toleration, Hitler was promised, among other things, that the President of the Reich would dissolve the Reichstag once the new government had been appointed, thus bringing about new elections. Hitler's rationale in these confidential agreements was that his party would form a government by legal means after these elections. The new presidential cabinet headed by Chancellor Franz von Papen had moved even further to the right because of its members' political stance. Papen was a member of the rightist wing of the Center Party. His government had virtually no parliamentary support at the time. When he took office, the first and moderate phase of the presidential regime, which the parliament still tolerated, came to an end. Now a second phase began, the openly anti-parliamentarian and authoritarian phase.

The new Chancellor took office on 1 June 1932 and then on 4 June, the President fulfilled one of Hitler's conditions for tolerating the new government, namely dissolving the Reichstag. Schmitt supported the decision to dissolve the parliament on the basis of Article 25 of the Weimar Constitution. The President scheduled new elections for 31 July. Papen sought to transform the Weimar Republic into an authoritarian state; he personally even preferred re-establishing the state in the form of a monarchy. It was for this reason that Prussia came into the sights of the government of the *Reich*. What is commonly known as the Weimar Coalition of the SPD, Center Party, and DDP had lost its governing majority in the Prussian *Landtag* in the elections of late April 1932, remaining in office only in an acting capacity. The same was true of the governments of some other *Länder*. Papen's cabinet had been taking concrete steps to prepare the abolition of the Prussian government, which had been demanded by various German nationalist politicians and publicists since early July. The only thing lacking was a sufficient reason for such a massive intervention in the *Länder* rights, which were guaranteed by the constitution.

The summer of 1932 saw fierce, violent political conflicts with many casualties across the entire Reich. Comparable to civil war, the riots culminated on 17 July 1932 in what is now known as "Altona Bloody Sunday" when the police massively intervened in street fighting between Nazis and communists in Altona, then in the Prussian province of Schleswig-Holstein and now part of Hamburg. The police were completely overwhelmed and responsible for the deaths of a number of uninvolved civilians. The Prussian government was ousted three days later on 20 July 1932; the reason given was that after the catastrophe in Altona, public order and safety in Prussia could only be maintained by the Reich government. Justified in formal legal terms by Article 48 of the Weimar Constitution, this act was a "scarcely concealed coup" (Bracher 1955, 513). A Reich commissioner installed by the Reich government took over political power in place of the Prussian government. Public safety and order were certainly disrupted considerably in the summer of 1932, and not only in Prussia but across almost all of the Reich. The reason why the Reich authorities intervened only against Prussia was that they wanted to put an end to this Social Democratic stronghold. The Braun government, which was caught unawares by the coup, did not even attempt to put up any resistance. Instead, it chose the path of legal appeal before the *Staatsgerichtshof* in Leipzig.

Schmitt was not involved in preparing the coup against Prussia on 20 July 1932. He only found out about it from reading the newspapers. But he had been informed through his close contacts to officials in the Ministry of the Reichswehr that a coup like this would soon take place (see Pyta and Seiberth 1999, 435). He noted in his diary on 20 July: "sad that I wasn't part of it."[21] Back at the university, he immediately spoke with his colleagues, defending the course of action that had been taken, and contacted General von Schleicher's circle. Two days later, the government commissioned Schmitt as one of three attorneys to represent the Reich in the upcoming proceedings before the *Staatsgerichtshof* (see Seiberth 2002, 146–148). As early as 1 August, he published the article "Die Verfassungsgemäßheit der Bestellung eines Reichskommissars für das Land Preußen" [The constitutionality of the appointment of a Commissar of the Reich for the *Land* of Prussia].

Schmitt invoked three arguments in favor of the coup. First, he denied the legality of the provisional Braun government. He called the changes to the procedural rules mentioned above an "event similar to a coup." (Schmitt 1932f, 954) Second, he granted the President unlimited discretion concerning the question of whether public safety and order in Prussia were considerably disrupted or not. Third, the *Land* of Prussia and the government of the Reich had to apply the same political assessment to all parties that were to be combated for being inimical to the Reich. The Prussian government had fought against both the KPD and the NSDAP as enemies of the republic. Not so Papen's Reich government, which at this point in time persecuted only the communists as enemies of the republic. Schmitt granted the right to determine who was an enemy of the republic exclusively to the government of the Reich. Thus, he defined the communists as the "parties truly inimical to the state" and saw the NSDAP as having been deprived of the "legal

21 Carl Schmitt, diary entry of 20 July 1932 (Schmitt 2010, 201).

opportunities for state will formation" (Schmitt 1932f, 258) by the measures taken by the Prussian government. From the perspective of the deposed Braun government, this rationale was sheer mockery. It had tried with all its might to combat the extremists from the right and the left, and its attempt to ban the Nazis' militant mass organizations had been thwarted by a dictatorial government of rightist politicians.

Kirchheimer reacted to this turn of political events with a number of articles and public speeches. The first article "Die staatsrechtlichen Probleme der Reichstagsauflösung" [The constitutional problems of dissolving the Reichstag] appeared in the August issue of *Die Gesellschaft*.[22] He claimed that the last semblance of formal neutrality of the President of the Reich had passed with Papen and his cabinet. This had also changed the situation in Germany in terms of constitutional policy to such an extent that he described it as politically illegitimate. In the new situation, he believed that "every group [had to] itself review under its own responsibility which government actions deserve[d] obedience as required by the constitution" (396). As long as the parliament remained a place of political decision-making, there was a duty to obey. As far as he was concerned, however, it ceased to be a source of legitimacy for the "confessors of democratic socialism" (396) like himself if a government attempted "to annihilate" (397) the institution of the parliament itself on the basis of unconstitutional interpretations of Article 25 of the Weimar Constitution, which governed the President's right to dissolve parliament. Kirchheimer saw the 4 June declaration by the President to dissolve parliament as constituting precisely such a case of illegitimacy.

In his argument, Kirchheimer differentiated between the right to dissolve parliament in a constitutional monarchy and the same right in parliamentary democracies. In British constitutional practice, the rules for dissolution of parliament had evolved in a continuous process. Referring to Schmitt's *Constitutional Theory*, Kirchheimer pointed to various cases that the right to dissolve parliament provided for (400–402).[23] He considered that none of these legally permissible cases existed in the event of the dissolution of the Reichstag, which was based on what Hindenburg and Papen had promised Hitler. It was not permissible under constitutional law, neither in formal terms nor with the reasons given. The fact that a President of the Reich did not want certain parties to be involved in a government coalition or that he sought to "help [certain parties in parliament] attain a better position" (406) was not a reason for dissolving the parliament covered by Article 25 of the constitution.

After the Presidential government's overthrow of the Prussian government, the SPD felt, presumably justifiably, that the chances of successful resistance against this coup were not promising. Instead, trusting that the law would prevail, the party leaders opted for a course of strict legality in a lawsuit against this breach of the constitution before the *Staatsgerichtshof*. The spectacular trial took place from 10 to 17 October 1932. Two of Kirchheimer's mentors—Schmitt versus Heller—were at the center of this decisive court battle about the future of the Weimar Republic with Schmitt representing the Reich government and Hermann Heller representing Braun's former Prussian government.

22 See Kirchheimer (1932c). The following page numbers refer to this text.

23 See Schmitt (1928b, 373–378)

Kirchheimer voiced his opinion in his article "Die Verfassungslehre des Preußen-Konflikts" [The constitutional theory of the Prussia conflict] while the case was being prepared. This was published in the September issue of *Die Gesellschaft*.[24] Kirchheimer called the Prussian coup an obvious breach of the constitution which was simultaneously of eminent political significance. He again embedded his argument in a historical course of events that developed as a result of socioeconomic changes. The successive dissolution of the parliamentary legislative state of the Weimar Republic, he stated, could be divided into three phases retrospectively. In an initial phase from 1919 to 1922, it was based on coalitions of the social forces which were represented by the Social Democratic Party, the Catholic Center Party, and the liberal bourgeois parties. The chancellorship of Gustav Stresemann (1923) had made a first step to reduce the bourgeois attitude to its core economic interests, which was reflected politically in the fact that the purely parliamentarian government was replaced by a balance of the social forces according to their social positions of power. This enabled the state bureaucracy to ascend to the role of an arbitrator in a second phase between 1924 and 1930. Since Brüning was appointed Chancellor in March 1930, the republic had mutated in the third phase to an authoritarian form of government that had suspended important material provisions of the second part of the constitution. Because of the "20 July coup" (423), parts of the first, organizational part of the constitution had also become the focus of the driving social forces, which were progressively eroding the constitution.

Kirchheimer accused the supporters of this "process of shrinking the Weimar Constitution" (410) from the ranks of German constitutional law of having long ceased using the Weimar Constitution as their point of reference. Instead, they were practicing a "science of concrete circumstances" (410), which was beyond the constitution. It is clear from the wording quoted that Kirchheimer was addressing Schmitt directly in this article. He insisted that every constitutional question had to be answered exclusively on the basis of the Weimar Constitution. He also reminded Schmitt of a dictum from his own *Constitutional Theory* according to which there were fundamental institutions of established constitutional law which were immune to parliamentary decisions to change the constitution and "thus also to interventions by the President of the Reich" (411) (see Schmitt 1928b, 77–82). Kirchheimer considered federalism one of these fundamental institutions. The major importance of federalism in constitutional law, he claimed, was evident not least because the Weimar Constitution, unlike the constitution of the former German *Kaiserreich*, had specifically installed the *Staatsgerichtshof* as the decision-making body for disputes between the Reich and the *Länder*.

Again, Kirchheimer directly addressed Schmitt. Of course, in his book *Der Hüter der Verfassung*, Schmitt was right in principle to urge restraint in decisions regarding conflicts between the Reich and the *Länder* (see Schmitt 1931b, 4). In this particular case, however, when the court had been brought in as the legislative body deciding the dispute, those doing so were "fully aware of the highly political nature of such differences" (413). For that reason, it was "impermissible to demand of the court a degree of abstinence which would in reality put the internal organization of the Reich completely at the disposal of the President of the Reich" (413). Kirchheimer attacked Schmitt about a third

24 See Kirchheimer (1932d). The following page numbers refer to this text.

point, too. His decisive objection was that the purpose of the changes to the procedural rules of the Prussian parliament in the run-up to the April elections could not be viewed as preventing a takeover of power. These changes had "only fully brought the parliamentary principle of Article 17 of the Constitution of the Reich to bear" (416). For it was not until after these changes had been introduced that a prime minister elected merely with a relative majority would not be deposed immediately by a vote of no confidence.

Kirchheimer concluded that the events of 20 July "amounted to such a serious case of abuse of discretion that in the face of this, a presumption of subjective good faith on the part of the Reich government could no longer apply" (421). The conflict between Prussia and the Reich showed that the Reich government no longer placed any value at all in sustaining the legal bonds between the German federal states and the national government. Not only the significant social fundamental rights of the constitution, but now also the foundational provisions of the constitution relating to the internal organization of the state were subject to a "systematic process of annihilation by the current Reich government" (421). The "postdemocratic state" (423) thus created was an "authoritarian state" (423). To Kirchheimer, the prospect arising from this diagnosis was not completely pessimistic. At least the new situation had the advantage of being unmistakably clear, and it "forced the working class to adopt new forms of struggle" (423). He cited a famous quote from Alexis de Tocqueville's book *Democracy in America* (1835) to illustrate the political *Lage* after the Prussian coup:

> Le législateur resemble à l'homme qui trace sa route au milieu des mers. Il peut aussi diriger le vaisseau qui le porte, mais il ne saurait en changer la structure, crée les vents, ni empêcher l'Océan de se soulever sous ses pieds.[25]

With this comment, Kirchheimer demonstrated his keen sense of the strategy with which Schmitt was to argue the Reich's case before the *Staatsgerichtshof* one month later. In his argument relating to constitutional law, which he then unfolded meticulously, Kirchheimer adhered closely to the wording of the constitution, referring to relevant constitutional commentaries and providing details of police law which would also have to be taken into account when the *Staatsgerichtshof* heard evidence. He named Smend as a key supporter of the rule-of-law principle according to which the bounds of discretion were subject to review by the *Staatsgerichtshof*, also in the case of individual acts of government (see Smend 1931).

The lawsuit about the legality of the coup against Prussia was brought before the *Staatsgerichtshof* in Leipzig in October 1932. In the words of historian Hagen Schulze, "it was the democratic *Rechtsstaat* and the authoritarian power state that were litigating" (Schulze 1977, 761). Schmitt was the leading attorney for the Reich in what was the most important political case in the Weimar Republic. It was his remarks that gained the most attention from the press at the time (see Blasius 2005, 115).

25 "The law-maker resembles a man who plots his route in the middle of the sea. He too can navigate the ship that carries him, but he cannot change its structure, raise the wind, or prevent the ocean from heaving under his feet." (Tocqueville 1835, Volume I, 264).

Schmitt's performance in Leipzig was the apex of his public political impact prior to 1933. In his plea, he followed the lines of argument from his article published on 1 August about the constitutionality of the appointment of a Commissar of the Reich for the *Land* of Prussia and accused the Braun government of violations of duty and lack of loyalty to the Reich.[26] Once again, he attempted to liberate the Nazis from the odium of being enemies of the constitution. He accused the old Prussian government of having been a "partisan government" that had arrogated the right to declare parties illegal for the sole reason that this served to preserve its own power. In contrast, the Papen government of the Reich had "finally" attempted to rule on this question independently of party interests. The Papen government had taken the decision solely on the basis of being "just and objective" and had therefore resolved "to repeal the equation with the Communist Party of a movement with which millions of Germans were not only sympathetic, but which they had voted for; such an equation was insulting to that movement."[27] These words of Schmitt's in Leipzig essentially endorsed the legality of the NSDAP.[28] Hermann Heller and Arnold Brecht, as attorneys for Prussia, countered Schmitt's remarks by pointing out that the government of the Reich was by no means politically independent because its course of action had been founded on prior agreements with the Nazis (see *Preußen contra Reich* 1933, 76–77).

The ruling of the *Staatsgerichtshof* on October 23 was to the satisfaction of the Reich government; the court divided power in Prussia between the Reich and the old government but left the Reich with most of its competencies. It confirmed Papen's position as *Reichskommissar* for the *Land* of Prussia during the state of emergency, reporting only to President Hindenburg. Schmitt was dissatisfied with the ruling even though the Reich had prevailed. In his view, the greatest flaw was that the *Staatsgerichtshof* had exceeded its competencies in parts of the ruling and had thus excessively limited the President's absolute authority of dictatorship (see Neumann 2015, 282–286).

The losers of the case in Leipzig were not only the *Land* of Prussia but also the SPD. After the coup against Prussia, the party leadership had not even attempted to put up resistance and—similarly to the situation after the Kapp Putsch in 1920—call for a general strike to defend the democratic republic. The young socialists in the SPD were outraged by the decision against active resistance, which they viewed as a capitulation in the face of violence. More than 40 years later, Kirchheimer's fellow attorney Ernst Fraenkel spoke about his and his colleagues' deep disappointment when it became clear in July 1932 that the party leadership and the trade unions were not willing to call for active mass protests by the working class to defend the republic.[29] Historian Karl Dietrich Bracher viewed the coup against Prussia in retrospect as the last opportunity for legitimate and promising resistance before the parties and the trade unions were dissolved in 1933 (see Bracher 1955, 523). The ambivalent and apparently mediating ruling of the court ultimately ca-

26 For a summary of Schmitt's oral pleadings, see Schuller (2008).

27 Schmitt's oral pleading in *Preußen contra Reich* (1933, 39).

28 See Blasius (2001, 44–50), Blasius (2005, 75–77, 114–117).

29 Letter from Ernst Fraenkel to Karl-Dietrich Erdmann dated 31 January 1973, Fraenkel (1999, 675–677).

pitulated before the facts on the ground put in place by the Reich government, thereby becoming a "milestone in the demise of the republic." (Stolleis 1999, 121)

3. Constitutional reform?

The new elections to the Reichstag on 31 July 1932 had disastrous results both for supporters of parliamentary democracy and for the previous presidential dictatorship. The NSDAP doubled its seats and replaced the SPD as the largest party. Once again, no parliamentary majority was in sight. Even a coalition of SPD and KPD, which many leftists desired although it was entirely unrealistic, would not have had a majority in parliament. The political basis for the previous regime of the presidential dictatorship had also dwindled.

Although Schmitt was aware of the precarious situation of the presidential dictatorship, he continued to rely solely on this political option in order to stabilize the existing state. There was the danger that the Reichstag, unable to form a government, would be dissolved once more, and that new elections would have to be held yet again. In late August 1932, Schmitt was involved in deliberations by the Papen government to prepare an emergency plan.[30] The constitutionally problematic core of this "September plan" consisted of again dissolving the Reichstag and then postponing new elections indefinitely; this was based on reasoning contravening the wording of Article 25 of the constitution. Schmitt formulated several possible ways to argue for the president to dissolve parliament and had his student Ernst Rudolf Huber work out additional legal details. It was mentioned explicitly in the minutes of the ministers' discussion of the plan that Schmitt would appear in public "certainly in accordance with the wishes of the current cabinet."[31] Hindenburg agreed with the plan, too. Yet, ultimately, it was not implemented because the majority of the Reichstag preempted it by deciding to dissolve itself. After this disaster, Papen made a new attempt to install an authoritarian solution. He summoned Schmitt to the Chancellery in late September and asked him to prepare a draft for a completely new constitution for the Reich (see Mehring 2014a, 260–262). Schmitt noted his great pleasure about this assignment in his diary, as well as his "alarm" in light of the magnitude of the task.[32] The project was called off shortly afterwards when new elections to the Reichstag had been scheduled again, for 6 November 1932.

The election results, however, were surprising. The parties openly supporting Papen's presidential cabinet achieved a slight increase in votes. But the SPD's opposition to Papen had not paid off, either: it lost a few votes, whereas the KPD became stronger yet again. The most notable and surprising outcome of the election was the fact that the NSDAP's apparently inexorable success of the two previous years seemed to have been halted. Hitler's Nazi party had lost more than four percentage points. Nazism had lost its mystique of an invariably burgeoning movement. All of a sudden, the party was faced with financial bankruptcy. It was rife with internal divisions, its relationship to the

30 See Berthold (1999, 32–36) and Blasius (2001, 51–70).

31 Minutes of the meeting of the ministers of 14 September 1932. Printed in *Akten Papen* (1989, 587).

32 Carl Schmitt, diary entry of 25 September 1932 (Schmitt 2010, 219).

Sturmabteilung (SA, the uniformed and armed political storm troops of the NSDAP; see Glossary) was extremely tense, and many observers thought the collapse of the movement was looming. Under these circumstances, it no longer seemed out of the question to return to parliamentary democracy before long.

Yet Papen did not undertake any efforts to this end. Instead, he considered a new emergency plan which Schmitt was to be involved in again. Schmitt spoke openly about these plans with Huber; it is hardly surprising that he did not inform Kirchheimer of them. In his memoirs fifty-six years later, Huber recounted an evening walk with Schmitt and Kirchheimer along Unter den Linden and through the Brandenburg Gate. The three of them had talked about politics and in particular about the strike at Berlin's municipal railroad company which was started by the communist party in collaboration with the Nazi party on 3 November 1932, but neither Huber nor Schmitt mentioned their activities to prepare a new emergency decree: "In Kirchheimer's presence we did not speak of the emergency plan." (Huber 1988, 46)[33] Schmitt concealed from Kirchheimer how much he was involved in the current political events. In late November, Papen invited Schmitt for breakfast and spoke with him about the constitutional side of his emergency decree (see Mehring 2014a, 269). But Papen no longer had the support of the Reichswehr for his project. He resigned and was replaced by General Kurt von Schleicher on 3 December.

The debates about the purpose, the direction, and the potential for revising the constitution, as well as the plans for a permanent emergency regime, were eclipsed by the turbulences of the final days of Franz von Papen's chancellorship. Kirchheimer contributed three articles to the debates about constitutional reform. He also gave a talk to the Sozialistische Studentenverband (Socialist Students' Association) on the topic in Berlin on 15 November 1932.[34] The title of his article "Constitutional Reaction in 1932" in the November issue of *Die Gesellschaft*[35] already made it clear that this was an analysis of reform proposals from the rightist political camp. He accused the office of the President and Papen's government, which was still in power at the time, of presumably no longer considering legality important at all when introducing their preferred constitutional reform. He then took up Schmitt's work *Legality and Legitimacy* again, this time to call attention to the marked change in the reform plans circulating in the President's office and among his advisors. If it had been deliberations within the framework of the Weimar constitutional order after Hindenburg's election in 1925, now it was a "constitutional revolution" (77).

Kirchheimer's criticism zeroed in on two authors from different schools of political thought. First, he again took on Schmitt and his sympathies for a presidential dictatorship to be established through a coup. His prognosis was: "When a later epoch takes inventory of the intellectual content of this one, Carl Schmitt's book *Legality and Legitimacy* will prove itself a work superior to others because it bases itself on the foundations of political theory" (77). He also pointed out that Schmitt exercised restraint in his conclusions rather than presenting clear political solutions. Nevertheless, he strongly rejected as contradictory Schmitt's attempt to underscore the legitimacy of the President of the

33 The walk probably took place on 9 November 1932 (see Schmitt 2010, 232).

34 See the announcement in *Vorwärts* of 13 November 1932.

35 See Kirchheimer (1932e). The following page numbers refer to this text.

Reich by conducting a plebiscite in order to provide an approach of constitutional revolution from his side with the distinction of enhanced democratic legitimacy. He stated that Schmitt's plea for a constitution that was "postdemocratic" (78) at its core rested on a "predemocratic" (79) political anthropology; he alluded to the passive role of the populace in the conduct of plebiscites, which Schmitt had repeatedly described (see Schmitt 1932e, 93–95).

Kirchheimer countered Schmitt's opting for the presidential dictatorship with the political self-understanding of "modern democracy" (79). This form of democracy was possible because in a long and painful process in the course of industrialization, the mass of the population had developed from being solely passive supporters of political affairs to people actively participating in organizations. This sociological fact had to be borne in mind with respect to all reform considerations because he fundamentally questioned the option favored by Schmitt. The authoritarian state only shifted the problem of unifying the political will in a heterogeneous society; it did not solve it. The advocates of a permanent presidential dictatorship would have to be able to answer the question of how to deal with the problem of the "constitutional dynamic" (79) that would necessarily arise from the social basis of politics, which was constantly changing. Despite all its shortcomings, modern democracy "is after all the sole form of government which constitutionally makes possible the cooperation or the alternation of different groups at a time of increasing social and national heterogeneity" (80).

To counter Schmitt's position, Kirchheimer quoted an argument from Smend's theory of integration stating that the social conditions for institutionalizing the personal charisma of a political leadership figure on a permanent basis were no longer given in Germany at the time (see Smend 1928, 142–148). Economic crises, lost battles, or the sudden death of an incumbent were notorious for exposing such a regime to the danger of political instability because of the unceasing social dynamics. He simultaneously made use of Schmitt when he attacked the conservative reform agenda for constitutional reform. Papen's idea to turn Germany into a corporate state would not solve the problem of the unification of the political will; it would merely serve to postpone it. Schmitt's "all is sinecure, nothing lives," which he applied to parliamentary democracy, "applies more adequately to a political system in which all dynamism is suppressed in favor of an illusory static condition" (85–86). He concludes his articles with a quote from Marx in his *Poverty of Philosophy*: "Only in an order of things where classes and class contrasts have ceased to exist will social evolutions cease to be political revolutions."

A month later, Kirchheimer published his second contribution to this debate, his article "Die Verfassungsreform" [The constitutional reform], in the December issue of the monthly *Die Arbeit*, which was published by the Allgemeine Deutsche Gewerkschaftsbund (General German Trade Union Federation).[36] He began by reiterating his criticism of the Papen government's plans for an "authoritarian constitutional reform" (443), placing them in the same context as similar plans in Austria. And again, he targeted Carl Schmitt. This time he did so by aligning himself with Herman Heller's criticism of Schmitt that he was wrong to state that the origin of the problems of the current state order was only,

36 See Kirchheimer (1932f). The following page numbers refer to this text.

or even mostly, to be found in the constitutional norms specific to the Weimar Constitution (see Heller 1932b, 413). Instead, he and Heller insisted that the cause of the current constitutional crisis was an unsound strategy for overcoming the economic and social crisis. They believed Schmitt's notorious criticism of the text of the constitution was misguided because he simply ignored the deeper causes of the crisis. Kirchheimer devoted his attention in this article to proposals for constitutional reform from social democratic circles. He thought they had very limited room for maneuver if the goal was to maintain the major lines of a democratic constitution—sovereignty of the people, the parliament, personal liberties, and basic social rights. All that remained was to change constitutional provisions in an attempt to help political parties and social associations collaborate. Kirchheimer discussed various ideas that had been put forward: to permit votes of no confidence only once a year in the course of budget debates and with a simple majority; to establish a new Chamber of Commerce; to change electoral law to resemble the model practiced in England; and to limit the options for ballot measures and referenda.

Kirchheimer focused in particular on Ernst Fraenkel's proposals in his essay "Verfassungsreform und Sozialdemokratie" [Constitutional reform and social democracy] (see Fraenkel 1932b), which had been published the same month. Fraenkel, who had invited Kirchheimer into the law firm he shared with Franz L. Neumann the same year, became the subject of uncompromising objections from his younger colleague. In his article, Fraenkel had sought to create a new balance between the Reichstag, the Reich government, and the President of the Reich. His three-part proposal included introducing a constructive vote of no confidence, making it more difficult for the President of the Reich to dissolve the Reichstag and enabling him to turn directly to the populace with a plebiscite if the parliament rejected an emergency decree. Kirchheimer weighed the individual components of Fraenkel's proposals one by one. He did not arrive at his ultimately skeptical rejection because he considered some of the individual proposals wrong but, rather, because of a fundamental consideration. Fraenkel's proposals, he claimed, would not make any decisive changes to the "political and social structural relationships" (452) of the republic. If a constitutional order risked at every turn that its current or future organizational positions could be abused in order to destroy democracy itself, then it did not suffer from problems that a constitutional reform could remedy, but from structural problems in the realm of its social basis. The path promoted by Fraenkel was a "futile race" (452) against the proponents of dictatorship.

At the end of his article, Kirchheimer restated his commitment to defending the foundational institutions of the Weimar Constitution. However, he also expressed that he was perplexed and had become more skeptical. If society was to be ripe for democracy again, then that did not require a well-intentioned constitutional policy, but a "rapprochement of the two labor parties" (454), a "new order of the societal relationships themselves" (457), and a "breakthrough to new social forms" (457). Kirchheimer obviously thought that the only choice for the Weimar Republic in this situation was between a presidential dictatorship and a socialist democracy.[37] Since at the time, in 1932, there was no question of unifying the two labor parties, the conclusion of his article remained

37 On 18 December, Kirchheimer also gave a lecture on the subject in the Arbeitskreis Abraham, a discussion club of Jewish Social Democrats, in Berlin (see *Vorwärts* of 17 December 1932).

a helpless appeal. Even if the KPD adopted a milder tone toward the SPD from May 1932 on, the conflicts between the two parties in fact intensified because the KPD repeatedly voted with the Nazis for strategic reasons.

Despite their political differences, Schmitt adopted a stance similar to Kirchheimer's on the issue of constitutional reform. He, too, considered such projects unrealistic. He had argued in a lecture back in 1930 that the call for fundamental constitutional reform meant that the alternative "capitalism or socialism" would have to be decided; that, however, would bring about the catastrophe of a civil war (see Neumann 2015, 301). He took up the subject again in November 1932 in two lectures, the so-called Langnamverein addresses, speaking in front of industrialists from the coal, iron, chemical, and textile industries in the Rhineland and Westphalia, who were organized in the eponymous trade association.[38] He referred to the "egregious mistakes in the construction" of the Weimar Constitution and the fact that, in any case, it was only to be considered as an "emergency construct" and a "provisional solution" from the outset (Schmitt 1932g, 55). Moreover, all the constitution's key elements were "entirely denatured" (Schmitt 1932g, 56). A "strong state in a free economy" (Schmitt 1932g, 60) was needed for the future. In such a system, the state was not to interfere in the market.

Schmitt did not opt for "authoritarian liberalism," as Renato Christi called it (see Christi 1998) but, rather, for authoritarian capitalism. He believed that orderly constitutional reform would not be able to yield the strong state it required, so he inverted the order of the actions to be taken: "First of all, we need a strong state up to its tasks and able to act. Once we have it, we can create new organizations, new institutions, new constitutions." (Schmitt 1932e, 83) In other words, Schmitt certainly did express his support for a new and different constitution—but he felt that because of the existing political blockades, such a transformation would not take the orderly path of changing the constitution under Article 76 of the Weimar Constitution; instead, a new constitution would have to be brought about by strong political action. For those who would still like to see Schmitt as a friend of the Weimar Constitution in this phase, he revealed his "precarious friendship with the constitution" (Roth 2005, 155) at this point. What he had in mind was similar to an idealized image of Italian fascism.

Despite all their differences, Kirchheimer and Schmitt did have one thing in common when it came to constitutional reform: a realistic understanding that such a reform would be impossible under the prevailing conditions. Their views were also similar about the implications of this even if they had opposite strategic goals: a new, more stable order could only be achieved through a successful political struggle.

The new Chancellor Schleicher wanted to continue to govern on the basis of Article 48. In contrast to his predecessor, he did not call on Schmitt to provide the legal legitimation of his actions. The reasons for ousting Schmitt were personal; President Hindenburg also disapproved of Schmitt's draft for Papen's emergency decree (see Mehring 2014a, 269–271). Schmitt's response to this dismissal was depression and "political withdrawal

38 On Schmitt's two Langnamverein addresses, see Hermann Heller's early critique (Heller 1933a) as well as Maus (1976, 152–159), Christi (1998, 193–204 and 212–232), and Scheuerman (2020, 250–253).

symptoms" (see Pyta and Seiberth 1999, 607). In December 1932, his standing had suddenly been diminished, from the "crown jurist of the Presidential Regime," as the journalist Hellmut von Gerlach had called him, to just one among several Weimar constitutional scholars.

4. Conclusion: Defending or destroying the republic

At the end of the Weimar Republic, Kirchheimer and Schmitt were astonishingly similar in their opinions on constitutional reform. Both rejected the idea. Instead, they opted for a political solution to the constitutional crisis, albeit with diametrically opposed goals and strategies. Kirchheimer trusted in the labor movement's parties and unions, Schmitt in the Reichswehr and the civil service. In retrospect, it is clear that neither Kirchheimer's urging for socialism nor Schmitt's opting for the presidential dictatorship were successful prescriptions for safeguarding the Weimar Republic from being handed over to the Nazis. The labor movement was already too weak and divided, and the conservative bourgeois elites had long abandoned their rejection of the Nazis. Schmitt and Kirchheimer viewed themselves as political opponents for whom there was no longer any common ground. Schmitt wanted to prevent the transition to a trade union state or even a socialist republic at all costs; Kirchheimer saw that Schmitt had drifted toward an authoritarian economic liberalism seeking to eliminate key elements of the Weimar Constitution. They each framed the other's arguments on constitutional law and political positions in opposite ways. Schmitt saw Kirchheimer's analyses and calls to fight as further confirmation of both the vitality of the socialism he feared and of his own civil war scenarios. To Kirchheimer, the constitution was a principle of societal organization whose flaws were to be eliminated through political struggle. Although he wanted to defend the existing republic, he pressed for transcending the private capitalist order and for substantially expanding the socialist elements that were also part of the constitution.

In the final year of the Weimar Republic, Kirchheimer, alongside Neumann, Fraenkel, and Kahn-Freund, belonged to the circle of younger Social Democratic legal experts who had followed in the footsteps of Hermann Heller and Hugo Sinzheimer and had specialized wholly or in part on constitutional matters. Despite their differences of opinion—for example, between Fraenkel and Kirchheimer on questions of constitutional reform—, they shared multiple fundamental positions. Their common starting point was pronounced support for the republic, for parliamentary democracy, and for the Weimar Constitution. Whereas Kirchheimer, in his 1930 *Weimar—and What Then?*, still saw the root of the constitution's failure in its lack of decision regarding social policy, he switched to a more optimistic and constructive position in light of the presidential dictatorship, of all things. Although he did not view the constitution as fulfilling all his political desires, he defended it in 1932 as the relevant regulatory framework for the path to its fulfillment; he defended it as a political form open to positive changes. This was not a merely tactical relationship to the Weimar Constitution. Certain flaws notwithstanding, Kirchheimer viewed it as the best possible alternative at the time for introducing the interests of the labor movement into the political process and realizing them. What had not been accomplished in the constituent National Assembly was now to be achieved through political struggle conforming to the constitution. This required political mobilization. Thus, Kirchheimer undertook a marked correction of his original euphoria regarding decision and a cautious convergence with Franz L. Neumann's model of social compromise. In his comments on the crisis events, morale-boosting slogans such as "wait and tough it out" alternated with calls for active mobilization of the labor movement. After the bourgeoisie had rejected the fundamental principles of bourgeois democracy, Kirchheimer viewed the labor movement in the role of guardian of the democratic substance of the republic.

Schmitt had long begun to seek ways to overcome the Weimar Constitution. It is indisputable that he was not a member of the Nazi party in the final phase of the Weimar Republic; incidentally, virtually no German professor of constitutional law had joined it before 1933. But that did not make Schmitt a defender of the Weimar Constitution and its parliamentary democracy by any means. The combination of his interpretations of Article 25 (parliamentary dissolution), Article 48 (presidential powers), and Article 76 (constitutional reform) would have allowed constitutional changes to secure the Weimar Constitution only in principle (see Kennedy 2004, 168). Schmitt himself, however, aimed at a political system that would end parliamentary democracy in favor of an authoritarian regime. In his defense of the coup against Prussia, as already in *Legality and Legitimacy*, his concern was not to erect a defensive wall against the Nazis, as he claimed after 1945 in his interpretation of his behavior at the time, but to smash the last major bulwark of a political system which he regarded with contempt. By justifying the coup against Prussia before the *Staatsgerichtshof* in Leipzig, Schmitt de facto supported the political movement that ruthlessly eliminated the presidential system a few months later in the spring of 1933.

Enlisting support for an authoritarian capitalist order in his two Langnamverein addresses was the "bridge over the Rubicon" (Christi 1998, 179) that allowed Schmitt to join the Nazi party a few months later. Then, in view of these later events, it was quite accurate for Schmitt to praise the coup against Prussia and his own writings on questions of constitutional law as important preparations for the Third Reich.[39] In the spring of 1933, Kirchheimer did not make these connections in his writings. Only in his later exile did he agree with Fraenkel's *Dual State*, where he stated in retrospect that "in view of this speech [the two Langnamverein addresses] it cannot be said that Schmitt's conversion to National Socialism a few weeks later represented any significant inconsistency." (Fraenkel 1941, 61)

39 See Chapter 7.