Introduction

I The *Preussenschlag*

On 20 July 1932, the conservative chancellor of the Weimar Republic, Franz von Papen, made use of an emergency decree that the president, Paul von Hindenburg, had drawn up a few days before. This decree authorized the chancellor to depose the government of Prussia, the largest German *Land* or state, then under the leadership of the social democratic prime minister Otto Braun, and to appoint federal commissioners to take over the business of the Prussian ministers serving with Braun. The alleged goal of the so-called '*Preussenschlag*' (the 'strike against Prussia') was to restore public security and order in the state of Prussia. There had been serious unrest and violence in the streets of the Prussian town of Altona a few days before, as a result of clashes between communists, Nazis, and police. But von Papen's federal government was as responsible for this breakdown of public order as the Prussian government. It had recently lifted the ban on the SA[1] and thus helped to precipitate violent clashes between Nazis and communists. The real goal of the *Preussenschlag* was to wrest control of Germany's largest state from the social democrats and to make Prussia's executive power available to the conservative federal government.[2]

The emergency-decree that authorized the *Preussenschlag* was based on article 48 of the Weimar Constitution. That article gave the president the power, in its first paragraph, to compel the states of Germany, if need be by the use of armed force, to fulfil their obligations towards the *Reich* under the federal constitution and under federal laws. Moreover, it authorized the president, in its second paragraph, to take all necessary measures to restore order in case of a severe threat to public security. The president's decree appealed to both of these provisions. It claimed that the replacement of the Prussian government with a government

[1] The *Sturmabteilung*, i.e. the paramilitary organization of the Nazi-party.
[2] Clark (2007), 640–54; Mommsen (2009), 529–48; Kolb and Schumann (2013), 142–3, 264–7.

appointed by the chancellor of the *Reich* was necessary to restore public security and order in Prussia, and it also accused Prussia of having violated its legal obligations toward the *Reich*, though the decree itself did not specify this charge in any way.[3]

Article 48 of the Weimar Constitution, in its last paragraph, determined that the president was required to inform the federal parliament, the *Reichstag*, immediately of any measures taken under article 48. The president had an obligation to suspend emergency measures at the request of the *Reichstag*. This restriction of the president's powers under article 48, though, was no longer fully operative in July 1932, as the *Reichstag* had long ceased to function in the way intended by the constitution.

The parties in the *Reichstag* had been unable, since 1930, to form a legislative majority willing to support a parliamentary government. Germany had instead been governed on the basis of presidential emergency decrees issued by appeal to article 48 paragraph 2. The chancellor, as a result, came to depend more on the president's trust than on parliament.[4] The first of these presidential governments, that of Heinrich Brüning, in office from 1930 to 1932, had still enjoyed the toleration of parliament, or more precisely of the parties of the 'Weimar Coalition' that had formed the last pre-crisis government. While there was no majority willing to legislate for Brüning, there was no majority either, due to the tacit support of the democratic parties, for a vote of no confidence against him that would have forced new elections.

The centrist Brüning, however, had been dismissed by Hindenburg at the end of May 1932, for reasons unrelated to the lack of direct parliamentary support for his government. Hindenburg had then appointed the ultra-conservative Franz von Papen as chancellor. Von Papen and his supporters were keen to rid the presidential government of its dependence on the democratic parties, and in particular of its dependence on the social democrats. The new government dissolved the *Reichstag*, a move that triggered federal elections within sixty days. In the interim, von Papen tried to win the support of the NSDAP,[5] which was expected to make large gains in the coming elections, for his government. The plan – which eventually came to naught due to

[3] The decree is printed in Brecht (1933), 481.
[4] Mommsen (2009), 329–82, 431–82; Rossiter (1948), 31–73.
[5] The *Nationalsozialistische Deutsche Arbeiterpartei*, i.e. the National-Socialist German Worker's Party led by Adolf Hitler.

Hitler's stubborn insistence that he be appointed chancellor of the *Reich* – was not to return to parliamentary government, but rather to get the Nazis to tolerate von Papen's presidential government. The ban on the SA, which had been put in place under Brüning, at the demand of the interior ministers of the states, had been lifted to attract the support of the Nazis. The *Preussenschlag*, then, was also intended as a conciliatory move towards the NSDAP, as it promised to get Prussian police off the Nazi party's back.[6]

Though the legality of the *Preussenschlag* was very much in doubt, the Prussian government under Otto Braun chose not to actively resist von Papen's measures. The constitutional situation in Prussia did not look much better, in July 1932, than that in the *Reich*.[7] The governing coalition in Prussia, led by the social democrats, had lost its parliamentary majority in the elections to the Prussian legislature in April 1932. But the NSDAP, which had won the election and become the strongest party, as yet did not have enough votes in parliament to elect a new government. The old parliamentary majority had, in advance of the elections, changed the parliamentary rules of procedure for the election of a new government, by introducing the requirement that a new government could only be elected with an absolute (and not, as had previously been the case, with a relative) majority of votes. Since the communists were equally unwilling to support the election of a social democratic or a national socialist prime minister of Prussia, the new Prussian *Landtag* failed to elect a prime minister and Braun's government continued in office in a caretaker role.

There are indications that some members of the Prussian government were not in principle averse to the appointment of a federal commissioner to take control of Prussia's police force. Such a move had already been contemplated by Brüning, not least to ensure that it would not fall into the hands of the Nazis.[8] Von Papen's *Preussenschlag*, however, went much further. As we have seen, the decree of 20 July 1932 was justified not merely on the ground that federal intervention was necessary to restore public order. It accused the Prussian government of having violated its legal duties towards the *Reich*. Moreover, the decree did not only put Prussia's executive power temporarily into the hands of the *Reich*. It envisaged a complete transfer of all competences of the Prussian government to the *Reich*, and thus appeared to eliminate Prussia's independence as guaranteed by the federal system of the

[6] Mommsen (2009), 529–91. [7] Clark (2007), 640–54. [8] Seiberth (2001), 37–58.

Weimar Constitution. The decree, accordingly, also empowered von Papen to remove all Prussian ministers from their offices, a power that he used to the full on 20 July 1932.[9]

Though the Prussian government chose not to resist the *Preussenschlag* through violent means, it challenged the legality of the decree with an appeal to the *Staatsgerichtshof* (literally the 'court of justice in matters of state') in Leipzig. It was supported in this appeal by several other German states that feared that von Papen's *Preussenschlag* would turn out to be the first step in a general abolition of federalism.[10] The *Staatsgerichtshof* was not a full constitutional court, endowed with a non-incidental and exclusive authority to review and to annul unconstitutional legislation and acts of government. It was a special tribunal that was convened upon occasion at the *Reichsgericht* (the Weimar Republic's highest civil and criminal court) and empowered, by article 19 of the Weimar Constitution, to adjudicate conflicts between the federal government and the states.

In its decision of the case, which was issued on 25 October 1932,[11] the court rejected the claim that the Prussian government had violated any duties towards the *Reich* and it ruled that the federal government did not have the power permanently to depose the Prussian ministers or to take over all competences of a Prussian government. At the same time, the court held that the *Reich's* assumption of Prussia's executive power was justified as a measure to protect public security, and thus refused to interfere with the federal government's momentary control over Prussia's administrative apparatus.

This attempt to split the difference left all parties unsatisfied. Though the federal government kept control of the Prussian executive, the judgment blocked its suspected attempts to turn Germany into a politically centralized state, by making it clear that the powers of the president under article 48 could not be used to permanently infringe on the principle of federalism. Nevertheless, the *Preussenschlag* did succeed in wresting political control of the Prussian state from the hands of the social democrats and their coalition partners who supported the continuing existence of the Weimar Republic. When Hitler was appointed chancellor in January 1933, Hermann Göring took over the post of federal commissioner for Prussia. Goebbels quipped that von Papen had purged the Prussian state so carefully of republicans and democrats that there was nothing left for the Nazis to do.[12]

[9] Brecht (1933), 481–6. [10] Seiberth (2001), 111–79.
[11] Printed in Brecht (1933), 492–517. [12] Mommsen (2009), 543.

The *Preussenschlag* was not just a key event in the disintegration of the Weimar Republic and the rise to power of the Nazis. It also marked the culmination of two of the most important jurisprudential debates that took place in the Weimar era: the discussion on the nature and limits of executive powers of emergency under article 48 and the debate on the legitimacy and desirability of constitutional adjudication.[13] These two debates intersected in the context of the *Preussenschlag*.

There were those, on the one hand, who, like Carl Schmitt, advocated an extensive reading of the president's powers under article 48. In a situation of constitutional crisis, Schmitt believed, only a political power capable of taking a decision on the exception,[14] to suspend the law altogether, would be able to restore the situation of normality that, in Schmitt's view, must underpin all legal governance. The power of constitutional guardianship, therefore, must belong to the head of the executive and not to a court, as implicitly acknowledged, according to Schmitt, by article 48 of the Weimar Constitution.[15] Other influential constitutional theorists, among them Hans Kelsen, favoured the view that constitutional guardianship ought to be the preserve of a constitutional court, i.e. of a court empowered to control all acts of legislation and of high-level executive action for their conformity with the constitution, and explicitly endowed with the authority to invalidate acts deemed unconstitutional.[16]

Unsurprisingly, Kelsen and Schmitt came to different assessments concerning the role of the *Staatsgerichtshof* in the aftermath of the *Preussenschlag*. In Kelsen's view, the judgment of the *Staatsgerichtshof* had failed – out of undue deference to the president, who was constitutionally responsible for executing the judgments of the *Staatsgerichtshof* – to annul the legal effects of an emergency decree that the court itself appeared to regard as unconstitutional. This confusing outcome, Kelsen suggested, could have been avoided if the case had been decided by a proper constitutional court.[17] Schmitt, who acted as counsel for the federal government at the trial in Leipzig,[18] expressed the opinion, by contrast, that the president's decree ought not to have been subject to substantive judicial review in the first place.[19]

[13] Stolleis (2002), 114–18. [14] Schmitt (1922), 5–15.
[15] Schmitt (1924); Schmitt (1931a). [16] Stolleis (2002), 117–18.
[17] Kelsen (1932a), 65–91. Translation in ch. 6 of this volume.
[18] Seiberth (2001), 78–110; Mehring (2009), 281–302. See also Schmitt (1932c).
[19] See Schmitt (1931a), 59; Schmitt (1934b), 44–7; Schmitt (1932d), translated in ch. 5 of this volume.

These differing assessments of the judgment on the *Preussenschlag* were only the parting shots in a longer debate between Kelsen and Schmitt on the problem of constitutional guardianship.[20] In 1929, Kelsen had published a paper entitled *'Wesen und Entwicklung der Staatsgerichtsbarkeit'* ('On the Nature and Development of Constitutional Adjudication') that systematically laid out the case for a constitutional court as a guardian of the constitution.[21] Schmitt, in turn, had challenged Kelsen's advocacy of a constitutional court in a number of articles that were eventually integrated into a book-length treatment, which appeared in 1931 under the title *Der Hüter der Verfassung* (*The Guardian of the Constitution*).[22] Kelsen responded to Schmitt's book with a review – '*Wer soll der Hüter der Verfassung sein?*' ('Who Ought to be the Guardian of the Constitution?')[23] – that is one of the most incisive criticisms of Schmitt's constitutional theory ever written.

The aim of the present volume is to make these texts available, for the first time, in English translation.

II The Kelsen–Schmitt debate

As pointed out above, the constitution of the Weimar Republic did not provide for the institution of a constitutional court. But there was a lively debate as to whether the competences of the *Staatsgerichtshof*, created to arbitrate in conflicts between the *Reich* and the *Länder*, ought to be strengthened so as to turn it into a full-blown constitutional court. In particular, scholars and politicians debated the question whether the *Staatsgerichtshof* should be endowed with the power to annul unconstitutional legislation.[24]

The *Reichsgericht* in Leipzig, in a much noted decision in 1925, had claimed that the courts of the Weimar Republic possessed an incidental right of judicial review of legislation: a right not to apply statutes which they considered to be unconstitutional to a particular case at hand.[25] What is more, a highly developed system of constitutional adjudication

[20] See Dyzenhaus (1997); Diner and Stolleis (1999); Beaud and Pasquino (2007); Gümplová (2011). For the background of the debate in German public law theory see Caldwell (1997).
[21] Kelsen (1929a). Translation in ch. 1 of this volume.
[22] Schmitt (1931a). Chapters 2 and 3 of this volume offer a partial translation.
[23] Kelsen (1931). Translation in ch. 4 of this volume.
[24] See Schmitt (1931a), 3–7; von Hippel (1932); Stolleis (2003); Hartmann (2007).
[25] Schmitt (1929b).

had already been put in place in the Republic of Austria, where the constitutional court had been given the power, under the constitution of 1920, to strike down unconstitutional federal and local legislation, upon appeal by the federal or by regional governments.[26] The Weimar debate on a constitutional court, thus, was often phrased in terms of whether Germany should adopt the 'Austrian solution'.[27]

In 1928, two presentations at the annual meeting of the *Vereinigung der Deutschen Staatsrechtslehrer* (the Association of the German Teachers of Public Law) by Heinrich Triepel and by Hans Kelsen engaged with the topic of constitutional review.[28] Both authors affirmed the need for a constitutional court, though Triepel much more hesitantly than Kelsen. Kelsen's presentation is regarded as the classical plea for a special constitutional court endowed with an exclusive authority of abstract or non-incidental control of general legal norms issued by parliament or government. It has been extremely influential in the Continental European context,[29] while it has so far been largely neglected in Anglo-American debates on judicial review. Apart from offering arguments *de lege ferenda* for the introduction of a constitutional court, Kelsen's paper also put forward a host of 'legal-technical' reflections, i.e. of recommendations as to the best institutional design of a constitutional court. These recommendations were to some extent influenced by the model of the Austrian Constitutional Court. Kelsen served as a judge on that court from 1920 to 1929, and he had, through his involvement in the drafting of the Austrian Constitution of 1920, helped to create it.[30]

Kelsen's argument for the introduction of a constitutional court is based on the so-called *Stufenbaulehre*, the theory of legal hierarchy, which Kelsen adopted from his pupil Adolf Julius Merkl.[31] According to the theory of legal hierarchy, the process of the creation of law is to be understood as a step-wise sequence of enactments in which the creation of any legal norm is authorized by higher-level legal norms. A judicial decision, for instance, is seen as the enactment of a particular norm that is authorized by the statute which it applies. The enactment of a statute,

[26] Heller (2010), 139–234; Paulson (2003); Öhlinger (2003). See also Kelsen (1942).
[27] See Schmitt (1931a), 6. [28] Triepel (1929) and Kelsen (1929a).
[29] Stone-Sweet (2000), 32–8.
[30] See Schmitz (1981); Olechowsky (2009); Lagi (2012). For Kelsen as a judge see Walter (2005). Kelsen was removed from the court in the wake of the constitutional reform of 1929. See Neschwara (2005).
[31] Compare Kelsen (1934), 55–75. See also Koller (2005).

in turn, is understood as authorized by the constitutional norms that determine the proper procedure for the process of legislation and that perhaps lay down material limitations for the production of general legal norms.

According to Kelsen, any norm-enactment on any level of legal hierarchy is partly discretionary: the fulfilment of the constitutional conditions, procedural and substantive, for the enactment of a statute typically leaves the legislator with a wide range of legislative choices. Similarly, a judge deciding a particular case typically enjoys a certain degree of discretion in applying a statute. As we move down the legal hierarchy from constitutional norms towards particular judicial or administrative decisions the level of discretion enjoyed by the relevant decision-takers will tend to decrease. Kelsen argues, however, that there is no qualitative difference, only one of degree, between the activity of a legislator and that of a judge or an administrator. Just as a judge applies a statute in enacting a particular norm that will decide a particular case, legislators, though they have greater freedom of choice, apply constitutional norms in enacting statutes.[32]

If that is the case, Kelsen concludes, there is no good reason to hold that the activity of legislators cannot or should not be subject to constitutional review. No one would doubt that the actions of lower-level legal authorities, of subordinate executive agencies or judges of first instance, should be subject to review, in order to guarantee the legality of the relevant particular norm-enactments. But if legislation (or high-level executive action) is also a form of the application of law, it is as possible and as necessary to offer a guarantee that legislators or government will abide by the constitutional norms that authorize and limit their activity. If there are no guarantees of constitutional legality, Kelsen argues, then the constitution, as the highest and most important level of legal order, will remain a form of second-rate law that lacks full legal force. And a sufficient guarantee of constitutional legality, in Kelsen's view, can only be provided by a constitutional court endowed with the power to annul unconstitutional legislation as well as unconstitutional acts of government.[33]

A constitutional court, moreover, is of special importance in a democratic and federal state. Its guarantees of constitutional legality protect minorities against the potential excesses of the rule of a majority; a rule

[32] Kelsen (1929a), 1485–7.
[33] *Ibid.*, 1524–6. See Troper (1995); Nino (1996), 189–96; Vinx (2007), 145–75.

that will become tolerable, according to Kelsen, only if it is bound to the rule of law. A federal state is in need of a constitutional court, since it is to be understood as a system in which two mutually independent authorities are legally co-ordinated on the basis of a constitutional division of competences. Such co-ordination requires an impartial arbitration of conflicts of competence between the central and the local authorities that can only be offered by a constitutional court.[34]

Though Kelsen's argument was on the whole received favourably at the meeting of the *Vereinigung der Deutschen Staatsrechtslehrer*, his plea for the creation of a proper constitutional court in Weimar Germany also called forth strong opposition. Schmitt's 1931 monograph *Der Hüter der Verfassung* (*The Guardian of the Constitution*) is in large part a reply to Kelsen's arguments on constitutional adjudication.

Schmitt's argument against Kelsen builds on the claim that constitutional adjudication exceeds the legitimate powers of a court.[35] A judicial tribunal called upon to adjudicate on the constitutional legality of legislation or of acts of government would, Schmitt argues, typically have to take decisions that are contestable and subject to reasonable disagreement. Constitutional provisions, in contrast to ordinary statutes, are often too vague and open-textured to allow for uncontroversial application. As a result, a constitutional court would be forced to take political decisions, decisions that are no longer justifiable as applications of determinate legal norms. It would have to act as a constitutional legislator and thus violate the separation of powers. The introduction of a constitutional court, Schmitt concludes, would not de-politicize constitutional conflict but rather politicize the courts and thus undermine the legitimacy of judicial activity.

Schmitt, however, was as opposed to parliamentary sovereignty as he was to constitutional adjudication. Schmitt held that modern parliaments, as a result of pluralist division, are no longer capable of taking genuinely political decisions in the name of a people as a whole.[36] In the constitutional monarchies of the nineteenth century, Schmitt claims, parliament could claim to be a representative of the people as a whole because it opposed a monarchical executive the sovereignty of which was still, in principle, uncontested. Parliament acted as the defender of a non-

[34] Kelsen (1929a), 1526–9. See also Kelsen (1927), 162–7.
[35] Schmitt (1931a), 12–48; Schmitt (1967).
[36] Schmitt (1931a), 73–91. See also Schmitt (1938), 65–77.

political social sphere against the incursions of an administrative state that possessed an undoubted monopoly of political decision.

With the establishment of a parliamentary system of government, and due to the accelerating process of modernization, the legislature has, in Schmitt's view, come to occupy a very different position. The traditional distinction between state and society has disappeared, in modern society, together with the limitation of the state's sphere of activity that it implied. The state is now, at least potentially, a total state.[37] There can no longer be any principled limits to the state's interference with society and the economy. At the same time, the state has lost its transcendent position above the fray of party-political conflict. It is now controlled by parliamentary majorities that act in pursuit of their own sectional interest. The state, even while seemingly having grown more powerful, no longer expresses the political identity of the people as a whole. It has become an instrument in the hands of parliamentary leaders whose bickering has thrown it into political paralysis. Schmitt concludes that parliament cannot function as a guardian of the constitution.

Schmitt's reaction to the perceived threat of a pluralist disintegration of the state was twofold. On the one hand, Schmitt championed the claim, despite his hostility to constitutional review, that the Weimar Constitution put absolute limitations on the powers of parliamentary majorities.

In Schmitt's interpretation, the Weimar Constitution, as the expression of a constituent choice of the German people, contained an intangible core of fundamental political decisions that are legally immune to change by any constituted power, including parliament's power of constitutional amendment.[38] This view was not supported by the text of the Weimar Constitution, which does not mention any material limits of amendment. Schmitt tried to justify it, rather, on the basis of a general theory of what a constitution is. According to this theory, a constitution is not to be identified with the constitutional laws that are contained in the written constitutional text. Rather, a constitution, first and foremost, is a 'concrete' social order or 'positive constitution', which is put in place by an exercise of constituent power and which embeds a number of fundamental social values. The written constitution, in Schmitt's view, is no more than an attempt to codify this antecedent concrete social order endorsed by the popular sovereign. Its norms and procedures, therefore,

[37] See Scheuerman (1999), 85–112; Cristi (1998), 179–99.
[38] Schmitt (1928), 72–4, 79–81, 150–8; Schmitt (1932a).