Democracy, Law, and Administration. After Weber and Kelsen: A Critical Reading

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I. PREFATORY REMARK

I should like my contribution to be understood as a critical epilogue or addendum to the impressive book by Stephen Turner and George Mazur. If I am on the right track, the ensuing account shows what we stand to learn if we read their book in the light of pertinent German scholarship on the territory it explores. I consider the role of four thinkers who are especially prominent in their analysis: Max Weber, Hans Kelsen, Woodrow Wilson, and Carl Schmitt. On the grounds of brevity and parsimony, as well as my own competence, I have most to say regarding two relationships: Weber and Kelsen; and Weber and Schmitt.

II. WEBER AND KELSEN ON THE RULE OF LAW AND THE LIMITS OF ADMINISTRATIVE DISCRETION: THE AMERICAN AND GERMAN MECHANISMS OF COUNTERPOISE

Lengthier remarks are needed on Hans Kelsen, who must be viewed as an avowed legal positivist. Among the authors in question, he is the only one whose pure theory of law is connected with a particular theory of democracy.[1] This theory recognises one formal principle: the participation of the ruled in the exercise of rule, without that participation being tied to any particular content or values. For Kelsen, the fact that the pure theory of law and democratic theory can be related (are related) to one another owes itself to a relativism of values which finds its expression, above all, in the idea that political decisions are not tied to a respect for particular values, but rather come into being through a majority will. This gives expression to a "metamorphosis" acknowledged by Kelsen, a regulative idea in the Kantian sense, which assumes that the libertarian ideal of an absence of rule (Herrschaft), distinctive to democracy, must be striven for, but cannot be achieved. Kelsen makes provision to detach the principle of unanimity from the principle of the majority. In turn, this only works if like-minded individuals group together into parties, if the basic tenet of representation is recognised through a proportional voting system, and if compromise is a principle that upholds democracy. In this way, the minority is granted the chance to be heard among the majority, especially since the minority can also become the majority. Kelsen's notion of democracy recognises the principles of both equality and freedom; in applying this formal principle together with the neutrality of values demanded by Kelsen, the greatest possible freedom should be granted to everyone subjected to rule

(Herrschaft). This is closely connected to Kelsen's two debates with Schmitt about parliamentarianism and who the "custodian of the constitution" is. While Kelsen lends his weight to parliamentarianism in the sense outlined above, Schmitt sees its end as having arrived. While Kelsen argues for legal jurisdiction over the constitution, Schmitt rejects the idea that a court can take on this function and ascribes this important function to the President of the Constitution of Weimar (Olechowski 2021, p. 507 ff). Kelsen held to the distinction between *Sein* (be) and *Sollen* (ought), but replaced his original orientation to neo-Kantianism with aligning himself with Cohen.[2] Studies on Kelsen rightly point to his discovery, through Cohen, of the "principle of pure obligation" ("das Prinzip des reinen Sollens"), even they assert that his interpretation of Kant extended "consciously beyond Kant".[3] However, two points are overlooked: first, that Cohen was here picking up the Fischer-Trendelenburg debate; and second, that although he was "seeking to create *proximity* to Kant terminologically and through abundant citation, in reality he succeeded in establishing the greatest conceivable distance to him: 1. by choosing to perceive in the 'Critique of Pure Reason' its opposite, a 'critique of experience' (Erfahrung), whereby 2. he pursued—and had to pursue—a completely independent line of argument against the 'Critique of Pure Reason'. In the process, 3. he selected his quotations solely according to their usefulness for his own theory, without paying any attention whatsoever to their respective value in the 'Critique of Pure Reason'. 4. He uses these quotations and even whole passages dogmatically as entirely objective, autonomous formulations irrespective of their original argumentative function, claiming a terminological and semantic identity of their own in his work and that of Kant" (Köhnke 1986, p. 273 and footnote 2).[4] Cohen's reception made it easier for Kelsen to detach himself from Jellinek's "two-sided doctrine" ("Zwei-Seiten-Lehre"), which he now decisively rejected (Olechowski 2021, p. 331),[5] even though he had initially oriented himself towards Jellinek and had come to Heidelberg because of him.[6] In his theory of the state, Jellinek advocated the "two-sided doctrine". Originally this is not a neo-Kantian "invention", but can be traced back to the example of the symphony found at the beginning of Jellinek's *System der subjektiven öffentlichen Rechte* (Jellinek 1963, p. 147). The distinction drawn there between a "psychological" and a "physiological" view seems to have its origins in Hermann von Helmholtz's 1870 study, *Lehre von den Tonempfindungen als physiologische Grundlage für die Theorie der Musik*.[7]

Stephen Turner's suggestion that "Max Weber and Hans Kelsen may seem unexpected sources for a discussion of the normative concept of the rule of law" (chapter 9) allows me to suggest a comparative consideration of administrative oversight (control) in the American and German contexts, oversight that ought to guarantee everything the "constitutional state" stands for. At the same time, this affords the opportunity, first, to relativize the criticism of the American administrative control (p. XXIIff.), and second to reassess the application of "agency theory … against misrule". An obvious starting-point for this is provided by Scharpf (1970, p. 13) in which he limits himself to "the question of the interaction between democratic and constitutional governance and the oversight of public administration and the comparison between the US and Germany".

In comparison with American administrative control (Verwaltungskontrolle), the German equivalent is distinguished by the fact that it presupposes laws that do not relate to individual cases and that are formulated as generally, but also as precisely, as possible. This implies a "pressure to formulate laws proleptically" (Scharpf 1970, p. ?),[8] which both "reduces the quality and quantity of information that can be used for decisions" and also "favours organised, conflict-ready interests which (can) exercise political influence". If the laws are not formulated precisely enough, their review reaches the administrative courts because in Germany "legal relief for the administration is formulated in the first place as protection through administrative courts, while in the United States the emphasis lies on the legal processes employed by the administration itself" (Scharpf 1970, p. 14). To put it in a more pointed way, "German administrative law (is) primarily substantive law, while the American equivalent is predominantly procedural law; as a rule, German judges check the factual 'correctness' of a contested administrative decision, while their American counterparts check the 'fairness' of the process through which the administration reached its decision" (Ibid). The model in America was the creation of regulatory commissions, the procedure of which became the standard procedure for American administration with its three maxims: notice, hearing, and decision on the

record (Scharpf 1970, p. 17f). "Notice" means that the person affected has the right to be informed "about the subject of the process and the issues of fact and of the law that are relevant to the decision", something which is not the case in Germany. The German model leads to an "expansion of the legal sphere at the cost of the political and administrative spheres", because there it is a question of establishing the "substantively correct decision", which the judge reaches independent of political or administrative considerations and which, thus, cannot be criticised (or set down) (Scharpf 1970, p. 38). As a rule, correctness means "complying exactly with precise regulations". As long as the regulations are expressed precisely, "constitutional legal relief is functionally an instrument of hierarchical administration and discipline for the authorities carrying it out" (Scharpf 1970, p. 40). As soon as administrative regulations are expressed less precisely and require further specification, checking their correctness leads to "displacement in judgement on the matter (...) to the jurisdiction of an administrative court" (Verwaltungsgerichtsbarkeit) (Scharpf 1970, p. 41). This leads to a situation where the lawyerly art (Juristenkunst) is granted primacy over democratic political decisions, i.e. "in Germany adopted laws seem to be freed from the political process that produced them, becoming raw material for juristic work on correct law" (Scharpf 1970, p. 49). Above all, this is the case when general rules or discretionary guidelines (Ermessensrichtlinien) become norms in laws or ordinances and when information is not available in advance. If the German administrative system or parliament wishes to avoid the threat posed by this "review of correctness", then both are compelled to achieve a "legal-technical 'perfectionism'". It is different in the American model (in our simplified presentation). "Purposive programmes" (Luhmann) are imposed on the American administrative system: "here is the problem, deal with it." Here, the emphasis lies not on checking the substance of administrative judgements, but rather on the strict monitoring of the administrative process and on the further development and refinement of its rules (Scharpf 1970, p. 25). Because the influence of organised and conflict-ready interests is smaller in the American administrative system, the administration has:

> the chance in the American model to tackle a task assigned to it in an autonomous way and to seek satisfactory regulations in a pragmatic way. However, the price of this freedom is the risk of possible political intervention at any time. As such, it is (...) compelled to orient itself continuously to the political process when developing its programme or decisions. As a result, Congress and the executive are able to concentrate in their law-making on those decisions that are most important politically, because they also hold the key positions in the administrative system and so maintain the option to intervene at any time in the light of events to correct the administrative course (Scharpf 1970, p. 69f).

In this way, democratically elected politicians strengthen their opportunities to oversee or control the bureaucracy. In simplified terms, the comparison shows a politically oriented system opposing a legally oriented system, "in which key positions are no longer occupied by democratically accountable politicians, but by the jurisdiction of administrative courts, by jurisprudence, and not least by a legally qualified executive bureaucracy" (Scharpf 1970, p. 77).

Through this comparison, Scharpf's discussion relativises Turner's and Mazur's critique of the American model and at the same time reveals that the latter is more prone to manage the "fundamental contradiction between rule and human self-realisation (...) by connecting the programme of the rulers democratically with the demands and interests of the ruled and by structuring, limiting, and monitoring through legal means the power to exercise rule" (Scharpf 1970, p. 9) than the „perfecting of the German constitutional state" would make possible (Scharpf 1970, p. 56). At the very least, it seems to me that Scharpf's comparison is better suited than agency theory to reveal the problems that exist and their possible solutions.

III. WEBER AND WILSON AND THE THIRD PARTY THAT LINKS THEM

1. Preliminary remark on Weber

Even though emphasis is always placed on hierarchy and power of authority (Weisungsrecht), especially in legal publications, empirical studies on "the development of programmes or laws in ministerial organisation" have demonstrated that use is extremely rarely made of the power of authority and that hierarchy is replaced by a process that must be characterised as dialogue between ministers and their departmental specialists (*Fachreferenten*) (Mayntz 1975, pp. 100 ff). The "neutral civil servant" [of Max Weber] has also taken their leave from ministerial organisation (Putnam 1973), pp. 257-290; Steinkemper 1974; Aberbach. Putnam, and Rockman 1981). Jurisprudence holds onto the idea of hierarchy because this should ensure that the "will of the law-maker" (i.e. parliament) is followed without deviation, something that previously applied to the "will of the ruler". That is, it would have to distinguish what it is that particular statements refer to: normative rules or empirically observed practice. Weber is unable to conceive of a "negotiating administration" in the manner that has been proven by numerous implementation studies.[9]

When considering Weber, the following also applies: he did not see that conceptual jurisprudence (*Begriffsjurisprudenz*) was a polemical term introduced by Jhering against pandect science (*Pandektenwissenschaft*) and applied above all to G. F. Puchta—this has been demonstrated only by recent research.[10] Puchta's servitude theory (Servitutenlehre) appeals here because some of Puchta's formulations could be construed as a "conceptual pyramid". Weber conceived his ideal-type of modern bureaucracy with the help of so-called conceptual jurisprudence, which led to an overemphasis of logic.[11] Weber neglected, for example to "measure" Puchta's system against his ideal-typical standard.[12]

Turner and Factor's chapter 8 has to have a question mark applied to it because of Jhering. That question mark derives initially from Joachim Rückert's article "Der Geist des Rechts in Jhering's 'Geist' und Jhering's 'Zweck'" (Rückert 2004, pp. 128-149; 2005, pp. 122-142).[13] As a legal historian, Rückert reveals which particular cognitive interest Jhering was pursuing in these two publications. For Jhering, "Zweck" (purpose) is a shorthand for his book's cognitive interest, namely "to seek out the driving forces and illustrate which of them generate and maintain movement in society (the theory of social mechanics)".[14] In this way, Turner and Factor's reflections in chapter 8 place "Jhering's the law as a means to an end" in a different context, which certainly make sense and is convincing, but which does not match Jhering's own interest. In addition, the reference to Jhering in this chapter makes me realise that there is no evidence that Weber read Jhering's "Zweck im Recht" in the relevant context; Weber was familiar with Jhering's "Zweck im Recht", as his remarks in, among others, *Wirtschaft und Gesellschaft (*WuG*)*: pp. 15, 17; *Economy and Society* (ES): pp. 29, 34, demonstrate: however, these passages relate to Jhering's use of the terms *Brauch*, *Sitte*, and *Konvention*; the mention of Jhering in WuG, p. 464; ES: p. 796, relates to his "Geist des römischen Rechts". This question mark should remind us that even such an outstanding expert on Weber's sources as Marra mentions Jhering in the context claimed by Turner and Factor neither in his preliminary study (Marra 1989, pp. 355-404) nor in his book (1992). Furthermore, we can point to the following notable observation made by G. Dilcher and S. Lepsius (both of whom are renowned legal historians) in their edition of Weber's *Zur Geschichte der Handelsgesellschaften* (*MWG I/1* v. 2018): "The extent to which Weber is influenced here by the critical legal theory of Rudolph von Jhering has hitherto hardly been clarified; only Stephen P. Turner insists strongly on this point" (*MWG I/1*, Einleitung, p. 69 f.). That is to say, the discussion in the section "Jhering's the law as a means to an end" neither matches the latter's cognitive interest, nor is it certain that Weber also shared these ideas.

III.2 On the marginal role of parliament in Weber's Anstalt state—with proof that Weber and Wilson draw on Hegel

It might well seem unusual to put Weber and Wilson together. Let me justify this in what follows. Before that, it must be pointed out that democracy, i.e. parliament, scarcely plays any role in the first of the relevant publications of the two authors. Weber either speaks of rule (*Herrschaft*) or, when he uses the term state, which he actually sought to avoid, of the *Anstalt* state (WuG: 6; ES: 14). In doing so, he turns the legal term *Anstalt* into a sociological one, following the approach set out in his Categories essay.[15] However, as Hermes has shown, Weber remains a prisoner of the legal concept of *Anstalt* in this attempt (Hermes 2006, pp. 184-216; 2007, pp. 81-101). When it comes to democracy or parliament, the evidence presented by Schönberger that parliament played an extremely marginal role in the *Anstalt* state, mirroring the situation in the Bismarckian state is significant (Schönberger 1997).[16] Otto Mayer already stresses the marginal role of parliament when he states: "The monarch made arrangements by organising and planning material and personal resources so that he could rule the country. That is an *Anstalt*. The people, the population, is the object of its influence: privileged members of this mass constituting the bourgeoisie may be able to express their constraining voice in the functioning of this *Anstalt*, but this changes nothing" (Mayer 1908, vol 1, pp. 1-94).[17] Here, Schönberger's additional explanation should not be neglected: "This alignment of monarch, the bureaucratic apparatus, and parliament corresponds entirely to Laband's state law. The monarch is the 'head of this large *Anstalt*' (Mayer), and the representation of the people is able only 'to express their constraining voice' in the operation of the *Anstalt*, without shaping it in any fundamental way. However, in Laband's system, it is the juristic personality of the state with the monarchic bearer of state authority that corresponds exactly to this *Anstalt* apparatus dominated by the monarch. For Laband, it does not represent the constitutional state, but rather the monarchic-bureaucratic apparatus. The identification of the state with the bureaucracy which is so obvious in Wilhelmine Germany becomes particularly vivid in Mayer's description of the "*Anstalt* 'state'" (Mayer 1908, p. 54). It originated in the particular dominance of bureaucracy under the Prussian-German constitutional monarch and was strengthened by the general increase in bureaucratisation analysed by contemporaries such as Otto Hinze and Max Weber" (Schönberger 1997, p. 315).[18]

Although he is not mentioned by a Kelsen expert like Horst Dreier, Hintze analysed Kelsen's 1925 *Allgemeine Staatslehre* thoroughly and engaged with it critically (Hintze 1927, pp. 66-75).[19] Hintze's discussion relies on a broad knowledge of the literature and is characterised by its clear and precise line of thought. According to Hintze, the state is for Kelsen "nothing less (…) than the legal order itself, i.e. a system of norms for the behaviour of people who live together" (Hintze 1927, p. 66). In this sense, Kelsen's "representation of the state [is limited] to a purely juristic standpoint" (Ibid.) and is "guided by the attempt to develop the object from a single basic principle, namely from the idea of the state as a normative coercive order of human behaviour" (Hintze1927, p. 67). Hintze acknowledges that Kelsen sees "democracy as actually the normal and appropriate state form of the present" (Hintze 1927, p. 70). Hintze sees the "identification of the state and the legal order" as "the dogma which underpins the author's entire line of argumentation," (Hintze 1927, p. 73) which has "lost all touch with real life" (Ibid.). This is also demonstrated by the fact that "the concept of revolution has in fact completely disappeared from this system" (Hintze 1927, p. 73). Hintze summarises his critique in the following sentence: "The state is, thus, inconceivable without the law and the law ineffective without the state;[20] but it is an arbitrary assumption that the legal order is therefore simply identical with the state and that the state is nothing other than the legal order itself. The author has not substantiated that claim, not even in his debate with M[ax] Weber (p. 191f)" (Hintze 1927, p. 72). According to Hintze, Weber also drew the logical corollary in his discussion of the development of the state, which led to Kelsen's critique: that we have to distinguish between "different degrees of stateliness" in the "different historically concrete formations known as 'states'" (Ibid.). In the sentence above, Hintze emphasises that "the law is not effective without the state", and he reinforces this, first, by pointing out that "individual will, which is directed towards specific purposes, consistently puts into question the

realisation of the normative collective will" and, second, by emphasising that, "in order to carry out and secure" this collective will, a power is necessary that "is authorised to use violence for this purpose" (Hintze 1927, p. 71). He adds that this "power that secures the legal order, and which is at the same time also rooted in the basic life purpose (Lebenszweck) of protection and defence, came to be designated as the 'state'" (Ibid.).[21] Hintze acknowledges in Kelsen an approach which he refers to as "basically dogmatic and scholarly" because, (Ibid.) out of "the two forms of thought represented by *Sein* (being) and *Sollen* (what ought to be)" Kelsen makes "objective poles of reality and the ideal world of norms, and all connection between the two is lost" (Ibid.). Hintze sees one such example in the "social sphere" and reminds us in this context of Jhering's purposive thinking (Zweckgedanken) with the observation that "the immanent purpose of naturally given groups of people who live together (is) to fulfil the conditions on which this communal living depends" (Ibid.). Insofar as "the norms on which the legal order is based" (Ibid.) belong to these conditions, the latter exist "in a living relationship with reality" (Ibid.). For Hintze, this reality is "nothing other than the objectivised will of collectivised individuals as long as it is directed towards the purposes of the collective" (Ibid.). Kelsen's theory of the state, "which completely excludes the concept of power and which recognises no relationship between states other than the legal," (Hintze 1927, p. 74) is compared by Hintze with "the opposite tendency of radical one-sidedness", which "only wants to recognise power" and through this irreconcilable opposition thereby creates a contemporary reference that applies exclusively to Germany of that time. For Hintze, this contradiction is, "with its harsh, now apparent irreconcilability, a symptom of a dangerous sickness in political life and thought" illustrated nowadays by no people other than the Germans and by them only since the great collapse of the state" (Hintze 1927, p. 75).

Weber and Wilson can be brought together because they both draw on Hegel in their presentation of (modern?) bureaucracy. Schluchter had already seen that "institutional and psychological preconditions for an officialdom that was loyal to the state, aware of the law, and oriented towards service" could be found in Hegel's *Grundlinien der Philosophie des Rechts* (1821):[22] more specifically, "the hierarchical organisation of authorities, the formalised differentiation of competences, the selection of personnel and promotion from above, alimentation by the state, the acquisition of particular skills, and the development of a 'professional ethos', which resulted in 'dispassionate, lawful, and meek behaviour' and conceived service for the state as 'a value in and of itself'" (Schluchter 1972, p. 38). Sager and Rosser (2009) prove that Wilson, who was able to read Hegel in the original, drew on Hegel, for example, in "The Study of Administration",[23] so that this common source (for all their differences, which are also apparent) brings into being a congruence between them. Of course, it is astonishing that an author like Hegel should come into question as the source of an ideal-typical construction of modern bureaucracy for Weber or of proposals for reform for Wilson.

III.3 On Weber's "discovery" of parliament and his often criticised attempt to use a plebiscitary Reichspräsident to create a "counterweight" to mass democracy and increasing bureaucratisation

Already in the (First World) War, Weber published his often cited essay "Parlament und Regierung im Neugeordneten Deutschland" ("Parliament and Government in A Reconstructed Germany"), which, as the title indicates, set government and parliament in opposition to one another.[24] The essay assigned to parliament primarily the following tasks: it was to serve in the selection of individual leaders or politicians;[25] it was to turn parliament into one that was fit to function by introducing the right to decide on the budget (Budgetrecht) and the right of enquiry (Enquêterecht). Through his autonomous legitimacy which was founded in charisma, the plebiscitary President was to constitute a counterweight to the bureaucratisation that could be seen everywhere. These ideas of Weber's were realised in the Weimar constitution because of the influence he was able to exercise through Hugo Preuß.[26] The first demand to select political leaders goes back to the observation that, after Bismarck's resignation, it was not politically aware politicians who stepped forward as his successors but officials, who do not embody the "will to power" and do not have to prove themselves in political struggles. This contradiction goes back to the opposition presented by Weber in his lecture "Politik als Beruf" ("Politics as vocation"): "according to his actual profession (the) real of-

ficial (…) should not undertake politics, but should 'administer'".[27] By contrast, the real politician has to "fight", because: "partisanship, fight, passion—ira et studium—these are the elements of the politician." The right of enquiry, first proposed by Weber in 1908 (Mommsen 1974, pp. 164, 183ff) and adopted in the Weimar constitution, represents a parliament that is fit to function. As can easily be demonstrated, Weber's advocacy of a plebiscitary Reichspräsident has elicited varied reactions. The advantages and disadvantages resulting from a plebiscitary, parliamentary, or federalist head of state played a very important role in this suggestion.[28] What also needs to be considered is that an authority based on "charisma" is relatively unstable, especially as "recognition by the ruled is the cause not the consequence of this legitimacy". Thus, it proceeds from an "anti-authoritarian inversion of charisma" which enables Weber to talk of a "democratic legitimacy".[29] In his standard work *Max Weber und die deutsche Politik*, Mommsen devotes a whole section to the "after-effects of Max Weber's theory of the Reichspresident as a political leader" (Mommsen 1974, pp. 407-415). (With knowledge of the rise of Hitler).[30] Mommsen criticises Weber for having allowed a "power-obsessed politician onto the Presidential seat", "who used charismatic and demagogic means to escape the formal and constitutional limits of his office as leader and exercised his influence outside of those same limits". He brings Weber together with Carl Schmitt by describing Schmitt "as a docile pupil of Max Weber", even if he qualifies this as follows: Weber "never intended in any way to turn the idea of plebiscitary leadership against the party state, let alone its further development into the total rule of Hitler the charismatic politician and his party of followers, the NSDAP, which identified itself with the state, or he considered it possible only in the course of all conceivable passage of time" (Mommsen 1974, pp. S. 407f, 414). Correctly, Mommsen states that the "plebiscitary-charismatic conception of leadership (was) already formulated in 1917, and (…) at first remained predominantly tied to the constitutional parliamentary system. Only in 1919, as a result of the failure of the post-revolution parliaments, did the anti-parliamentary version of this idea fully make its breakthrough, an idea for which Weber coined the term 'plebiscitary Führer democracy'" Mommsen 1974, p. XIV). Clearly Weber could see what he acknowledged in "Parlament und Regierung", namely that "any form of popular election of the highest bearer of authority" in which the confidence of parliament is not requested stands "on the path to those 'pure' forms of Caesarist acclamation."[31] Yet, in the first edition of *Max Weber und die deutsche Politik* in 1959, Mommsen still wrote that Weber had contributed by making "the German people inwardly willing participants in the acclamation of a leader, and in this respect also of Hitler" (Mommsen 1959, p. 410). At the Heidelberg sociologists' conference of 1964, which was supposed to honour Weber and his work in the presence of prominent American and French scholars, papers were instead given and discussions conducted which, according to Adorno, declared Weber to be "at best a turn-of-the-century thinker"[32] accusing him of positivism and his postulate of being value-free (the problematic consequence of positivism). Moreover, Weber was dragged closer to the Third Reich, insofar as he was connected to Carl Schmitt's decisionism or Mommsen's claim was repeated that "Schmitt had been a legitimate pupil of Max Weber" (Stammer 1965, p. 81). In the publication on the sociologists' conference, this formulation was softened, in that Schmitt was now described as "a 'natural' son of Max Weber" (Ibid.). Furthermore, the election of Hitler by the masses was no longer attributed to Weber's advocacy of a plebiscitary presidential election, but rather it was now explained that Weber's "militant late liberalism" had "consequences in the Weimar period that we must ascribe not to Weber but to ourselves when we read Weber here and today" (Ibid.).

Mommsen, whose standard work from 1959 was repeatedly referred to by participants, corrected his claim that "Weber's theory of charismatic Führer rule" contributed "to making the German people inwardly willing participants in the acclamation of Hitler as Führer" (Mommsen 1959, p. 410): in a contribution published in 2001 on "Politik im Vorfeld der 'Hörigkeit der Zukunft': Politische Aspekte der Herrschaftssoziologie Max Webers" ("Politics approaching its 'enslavement to the future': Political aspects of Max Weber's sociology of rule") (Hanke and Mommsen 2001, pp. 301-319). He now conceded that "behind the one-sided and in some respects rash construction of 'plebiscitary Führer democracy' (there stood) equally the motive to try to maintain a system of freedom in a world tending to oppose petrification" (Mommsen 2001, pp. 303-319, here p. 318). Mommsen thereby moved closer to Stefan Breuer's posi-

tion, if not entirely adopting it. As a renowned expert on Weber's sociology of rule (Breuer1994a), the latter sees the "concept of plebiscitary Führer democracy not in a continuity with National Socialism (…), but, by contrast, as illustrating the always problematic attempt to domesticate the charismatic tendencies of modern mass democracy" (Breuer 1994b, pp. 145, 176-187, 202-206).

IV. ON SCHMITT AND WEBER AND HIS CRITIQUE OF PARLIAMENTARIANISM

At this point it is necessary to explore in more detail the contact and meetings between Weber and Carl Schmitt.[33] Schmitt was in the audience when Weber gave his lecture on "Wissenschaft als Beruf" (science as vocation) in November 1917 and on "Politik als Beruf" (politics as vocation) in January 1919, and in the winter semester of 1919/20 he attended Weber's lecture on "Economic and Social history". Accepting an offer from the Handelshochschule in Munich on 1 September 1919, where Melchior Palyi also taught, enabled him to participate in Weber's private seminar every Saturday in the winter of 1919/20 at the latter's invitation.[34] A letter from Weber to his former colleague at Heidelberg, Karl Vossler, who had moved to Munich, attests to this: "We (Rothenbücher, Palyi, Cosack, Landauer, Janetzky, Geiger, v. Aster, Schmitt, Clausing, occasionally Kroyer) [form] a kind of "Eranos" here, a small circle[35] where one of us speaks every fortnight and then we discuss it—possibly many times, one after another. Always Saturday 9-11 at the Staatswirtschaftliche Seminar in my office" (MWG II/10: 924). In short: Carl Schmitt was very familiar with Weber's works and Weber expressed his appreciation for him, as is shown by his invitation to the private seminar and also by the inclusion of Schmitt's political theology.[36]

Schmitt's critique of parliamentarianism discussed in chapters 5 and 8 of the book by Turner and Mazur acquires a different significance if we consider Schmitt's publication "Nationalsozialistisches Rechtsdenken" ("National Socialist Legal Thought") in the journal *Deutsches Recht* in 1934. Here, Schmitt cites the statement by a "world famous, widely travelled, experienced legal scholar over 70 years of age from the United States of America", who told him in a conversation in 1932: "We are experiencing the bankruptcy of the *idées générales*." This statement is said to have prompted Schmitt's turn to National Socialism (Schmitt 1934, p. 225). Or Bassok has proven that the "world famous legal scholar" was Josef Redlich (1869-1936) (Bassok 2021), pp. 694-722). In 1931, Redlich was the Fairchild Professor of Comparative Public Law at Harvard Law School; he was a renowned jurist at Vienna University; and he was Austria's final k.u.k Finance Minister. As such, our attention turns towards Vienna, which means the lecture Max Weber gave on 25.10. 1917 to the Sociological Society on "Probleme der Staatssoziologie" ("Problems of State Sociology"). Redlich was also among the audience and called Weber's lecture "brilliant" (Ehrle 1991). Redlich knew Max Weber from the general assembly of the Verein für Sozialpolitik in Vienna in 1909, but his acquaintance with Alfred Weber went further back. When Weber was living in Vienna in 1917 and 1918, he also met privately with Redlich. A.v. Rosthorn also attended one of these meetings with his wife on 9.5.1918. He had given a talk at the "Eranos" circle in Heidelberg on the origins of Chinese religion and also contributed a piece to the commemorative volume for Weber (Treiber 2021, p. 111ff). In his dissertation written under Wilhelm Hennis, *Max Weber in Wien* (1991), Ehrle reports for the first time on Weber's lecture, which received attention solely because Weber introduced in it a fourth type of legitimacy, the "will of the ruled", which deviates from the three types of legitimacy presented in his sociology of rule. Contrary to the legal theory of the state which was widespread at the time, this type of legitimacy did not proceed from the will of the ruler. Ehrle draws on the report carried by the *Neue Freie Presse* on 26.10.1917, the text of which is now accessible in the sociology of rule in Weber's complete works (MWG I/22-4: 752-755). The *Freie Presse* wrote about this fourth type of legitimacy as follows: "Finally, he [Weber] turned to how the modern development of the western state was characterised by a fourth notion of legitimation, that form of rule which derives its legitimacy, at least officially, from the will of the ruled." There followed a qualification: "In its initial stages, it is far removed from all modern ideas of democracy. However, its specific bearer is the sociological formation of the western city, which differs from all other urban formations of other

periods and peoples in the manner of its development and its sociological purpose in antiquity and the Middle Ages" (MWG I/22-4: 755).

Weber's mention of the "sociological formation of the western city" and the fact that he "discusses non-legitimate rule most frequently in his study on *Die Stadt* (*The City*)" (Breuer 2006, pp. 149-167, here p. 158) immediately suggest that we look in more detail at how Weber characterises the non-legitimate rule of the western city. This has been undertaken by Stefan Breuer, who demonstrates that the examples that Weber once invoked to illustrate non-legitimate rule in the western city[37] are in fact repeated in the final version of the sociology of rule, but they are given "a new interpretation".[38] This new interpretation can apparently be traced back to the fact that Weber was, "from about 1917", observing a "Caesarist element" in mass democracy.[39] For Breuer, this permits the conclusion that "non-legitimate rule [is not] identical with city rule"; non-legitimate rule encompasses "a substantially wider field than city rule" (Breuer 2006, p. 153). This new interpretation recurs in the "anti-authoritarian reinterpretation of charisma".[40] E. Hanke drew a provisional line under this discussion by asserting that Weber had discarded the idea of a fourth type of legitimation "because it could not be incorporated into the strict conceptual logic of his sociology of rule" (Hanke 2022, p. 28).

Carl Schmitt's critique of parliamentarianism acquires a different meaning[41] if we invoke Redlich's statement cited by Schmitt, rather than connecting it, as Bassok does, with the charge of positivism (Positivismusvorwurf) with which German jurists previously "excused" their involvement with National Socialism. For example, since the work of Manfred Walther (1989, pp. 323-354) and Bernd Rüthers, who pointed to the "art of exegesis" practised by jurists in relation to civil law (Rüthers 1988), the critique of positivism can no longer be applied. In his essay "Die Rechtswissenschaften in Deutschland zwischen Grundgesetz 1949 und Stammhein/ Mogadischu 1977—ihre Zielsetzungen, Werkgestaltungen und Rechtswerte" (Rückert 2022, p. 214f?) the legal historian Joachim Rückert? writes of the "positivism legend" in connection with the Radbruch thesis which he criticises. This "legend" shifted "guilt in relation to state injustice, especially in statutory form, onto the intellectual and moral defencelessness of liberal victims". Rüthers distinguishes himself by considering the techniques of conformity developed by jurists in their reinterpretation of civil law under National Socialism in the context of the techniques of conformity which could be "observed in the conformity of legal norms to transformed economic and social circumstances". That is to say, the "interpretative techniques of conformity developed during the collapse of the value of money proved to be suitable also, to a considerable degree, for accommodating civil law to the new basis of political values" (Rüthers 1988, p. 4).

Helpful, by contrast, is Hasso Hofmann, a renowned critic of Schmitt. In his 2002 book *Legitimität gegen Legalität* we can find this additional point: "For Schmitt, the respective concrete situation of the 'existing thinker' is not by nature necessary or self-evident, but rather historical, i.e. ultimately contingent, and furthermore political, which means that the situation that is to be dealt with juristically and the types and forms of human co-existence are constituted, structured, and ruled by particular ideas" (Hofmann 2002, p. 79). According to Schmitt, in Hofmann's argument, "a jurist, in general, and a teacher of state law, in particular," has to practise political theology if he wants to move "beyond simply superficial 'observations' (and) come closer to the 'ideal structure' of juristic concepts". That is, "he has to explore the juristic concept for its political substance and relate the emerging structurally determinative political idea with the 'metaphysical centre' of the intellectual movement that rules the situation" (Ibid.). In Redlich's statement, Schmitt sees his own view confirmed that parliamentarianism is nothing less than the fulfilment of his perception of the requirement to practise political theology. Furthermore, Hofmann establishes a direct connection between the "factive normality" (a phrase coined by Schmitt) assumed by Schmitt in the given of the "historically concrete situation determined and ruled by particular ideas" and Max Weber, who advocated the view that "ideals and values cannot be proven, only believed, and that the object loses its normative character in the empirical examination of what is valid normatively, being necessarily treated as 'being' and no longer as 'valid'." Seen in this way, "the question of normative validity" is transformed into "the question of fundamental beliefs" (Hofmann 2002, p. 80). According to Hofmann, Schmitt thus had to

"always be 'at the forefront of the times'" (Hofmann 2002, p. 82) which made him prone to adopting "the political terminology of his time" (Hofmann 2002, p. 85).[42] It is not by chance that Schmitt concludes his 1934 essay, "Nationalsozialistisches Rechtsdenken", with the sentence: "We are on the side of what is coming!"

Schmitt's critique of parliamentarianism is not only situated "at the forefront of the times" (being prone to borrow from the predominant political terminology) but also asserts the "death of bourgeois-liberal parliamentarianism" with the "loss of the ideal preconditions" (Redlich: "We are experiencing the bankruptcy of the *idées générales*") (Hofmann 2002, pp. 89, 87). The "ideal preconditions" refer to the principles that carry parliamentarianism, such as the public sphere, discussion, and representation" (Hofmann 1986, p.250ff) which Schmitt sees no longer being fulfilled in the actual practice of the parliamentary democracy of his time, because he "measures" them against a standard which did not apply in the 19th century either; and he does not ask himself to what extent these principles could still even have validity in a mass democracy (people's democracy). Kelsen's conception of this "metamorphosis" and the meaning he ascribed to it were presumably not familiar to him. According to Schmitt, if these "ideal preconditions" no longer exist, the institution (parliament) that once rested on them is no longer capable of discharging its function to *create order*." What remains after a profound change of circumstances is only a façade, behind which are hiding completely different political currents and forces, enemies of the constitution even" (Hofmann 2002, p. 91). For Schmitt, the "loss of the ideal preconditions of parliamentarianism" is accompanied by the loss of the principle of legality that legitimises the legislative state, and positivist legality has to be replaced by the "principle of plebiscitary legitimation" which is the only one which remains possible (Hofmann 2002, p. 92f).

When the "idées générales" have become impossible to believe, then the general abstract concepts associated with them have also become meaningless: "The general concepts have then exhausted their role as a means to deal with a *concrete* historical situation; they are no longer the expression of a one-time reality, and in this way namely historically—they are no longer true. They now appear to be dissimulations and obfuscations of reality and thus, as a result of the totality of politics, they appear as particularly infamous political weapons" (Hofmann 2002, p. 158f). This compels to some extent "the necessity of a new political myth that can create order, because it is believed to be unquestionable" (Hofmann 2002, p. 159), through which the conceptual pair "friend—foe" proceeds as the basic category of the political (Ibid.).[43] This then requires a personal confession of faith, i.e. a personal decision.

Seen in this way, Schmitt's critique of parliamentarianism is more than simply a critique of the parliamentarianism of the Weimar period. Rather, Redlich's statement appears to Schmitt as a kind of summary symbol of his "foundational thought", so that he sees himself vindicated and, in view of the friend-foe dichotomy, he sees himself required to make a decision in favour of National Socialism, which gives him the certainty that he is at the "forefront of the times" or, as he formulates it in the final sentence of his publication in *Deutsches Recht*: "We are on the side of what is coming!"

Thus, we can establish the following: Schmitt's critique of parliamentarianism is not simply a critique of the parliamentarianism of the Weimar period, which indicates "the discrepancy between the idea and reality of modern parliamentarianism" (Hoffmann 2002, p. 90) but rather, by "proving" the absence of an idea that provides order, it only serves the purpose of abolishing bourgeois-liberal parliamentarianism in favour of the "'type' of concrete order" that the concrete reality created by National Socialism suggests.[44]

V. A SHORT AFTERWORD WHICH CAN ALSO BE READ AS A FOREWORD

My contribution is understood as an attempt to provide supplementary remarks, where appropriate, to the impressive book *Democracy, Law, and Administration. After Weber and Kelsen*, published by Stephen Turner and George Mazur, which might also make readers aware of relevant German publications.[45]

SIGLEN:

WuG = Wirtschaft und Gesellschaft. *Grundriss der verstehenden Soziologie*. 5. Aufl., hg. v. Johannes Winckelmann. Tübingen: Mohr (Paul Siebeck), 1976 2 Halbbände.

ES = Max Weber, *Economy and Society. An Outline of Interpretive Sociology*, ed. Guenther Roth and Claus Wittich. Berkeley, Los Angeles, London: University of California Press 1978.

WL = Max Weber, *Gesammelte Aufsätze zur Wissenschaftslehre*, hg. v. Johannes Winckelmann, 7. Aufl. Tübingen: Mohr (Paul Siebeck), 1988.

Weber 2012 = Max Weber. *Collected methodological writings*, ed. Hans Henrik Bruun and Sam Whimster. London, New York: Routledge 2012.

MWG I/1 = Max Weber, *Zur Geschichte der Handelsgesellschaften im Mittelalter. Schriften 1889-1894*, hg. v. Gerhard Dilcher und Susanne Lepsius. Tübingen: Mohr (Paul Siebeck), 2008

MWG I/17 = Max Weber, *Wissenschaft als Beruf (1917/1919)*; *Politik als Beruf (1919)*, hg. v. Wolfgang J. Mommsen und Wolfgang Schluchter, in Zusammenarbeit mit Birgitt Morgenbrod. Tübingen: Mohr (Paul Siebeck) 1992.

MWG II/10-2: Max Weber, *Briefe 1918-1920*, hg. v. Gerd Krumeich und M. Rainer Lepsius, in Zusammenarbeit mit Uta Hinz, Sybille Oßwald-Bargende und Manfred Schön. 2 Halbbände. Tübingen: Mohr (Paul Siebeck), 2012.

NOTES

1 See Dreier 1986. The following observation in Olechoswski 2021, p. 10 also supports Dreier's view: Horst Dreier has "rediscovered the connection between Kelsen's theory of democracy and his theory of law".

2 The key terms here are "pure thought" ("das reine Denken") or the "logic of pure knowledge" ("Logik der reinen Erkenntnis"). On this, see, for example, Bauer 1968, p. 81.

3 On this, see Dreier 1986, p. 76f.

4 See also the entire section pp. 273-301, where the "core concept of construction", which is founded "on a misunderstanding and a false interpretation of Kant" is discussed, as well as the close proximity of Cohen's "interpretation of Kant" to Plato (ibid., pp. 284, 293). In his published lecture, Carrino 2011, p. 9, footnote 1, mentions Köhnke, but does not elaborate further.

5 The prevailing two-sided doctrine of the time is already rejected in Kelsen's *Allgemeine(r) Staatslehre* of 1925 (ibid., p. 6f.), where he takes the following view: "Only law (can) be the subject of a legal theory, [so] the state (would have to be) legal in nature and only legal, in order to be made the subject of a legal theory". See also Kelsen 1925, pp. 15, 17: "If the state is a system of norms, it can only be the positive legal order, because the validity of another order alongside it must be impossible."

6 In Heidelberg Kelsen only came into close contact with Emil Lederer, who was not an assistant to Weber as Olechowski believes (2021, p. 110), but instead worked at the "archive". On Lederer, see Eßlinger and Lederer 1995, pp. 422-444. Another piece published in this volume (Köhnke 1995, pp. 32-69), illustrates in exemplary fashion the difficulties associated with establishing the philosophy seminar and creating the post of an assistant. See ibid., p. 44f. and footnote 47, where Windelband's collaborator Ruge is shown to have adopted the title "assistant" for himself from 1905 without any justification.

7 On this, see Treiber 2016, pp. 145-260, here p. 147ff.

8 „Zwang zur vorwegnehmenden Formulierung von Gesetzen"

9 For example, Bohne 1981.

10 For example, Haferkamp 2004; Mecke 2009. Knowledge of 19th-century German legal history is essential for understanding Weber. This is shown above all by interpretations of Weber's typology of law, which is often represented as a two-by-two table. The correct interpretation of Weber's typology of law can be found in Treiber 2020, pp. 31-37; 2023, pp. 353-367, 354.

11 See Treiber 2019, pp. 196-224.

12 See Treiber 2020, p. 147ff.

13 I cite it according to the manuscript which is identical to the two publications.

14 Rückert, Manuskript, p. 16, in Jhering Zweck II, p. 1. Jhering held the view that "purpose" was to be seen as the "creator of all law". See the text on the title page of his book: "Motto: Purpose is the creator of all law".

15 WL: 440/ ES: 281, also the definition of "Anstalt", see Wissenschaftslehre (WL): 466/ Weber 2012, p. 296, the translation of "Anstalt" as "institution" does not render the intended meaning. See Treiber 2016b, pp. 62-96, 71f.

16 Where Schönberger (1997, p. 342ff) compares *Anstalt* with *Körperschaft* ("corporation", v. Gierke) and also explores how the church also has the character of an *Anstalt*, something with which Weber agrees. This assertion demonstrates clearly that the faithful (can) claim no right to have their say.

17 Cited according to Schönberger 1997, p. 315. Literal: "Möglicherweise haben die bevorrechtigten Mitglieder dieser Masse, die Bürgerschaft bildend, bei dem Betriebe dieser Anstalt ein hemmendes Wort drein reden zu lassen; das ändert nichts."

18 We must remember that Weber's definition of the state exclusively through the specific method of violence (see WuG: § 17 and p. 30; ES: 54 f.) was adopted from Laband 1911, vol 1, p. 71.

19 I am grateful to my colleague Hinnerk Bruhns (EHESS/ Paris) for the reference to Hintze.

20 See Popitz 1980 and Geiger 1964.

21 In addition to its reference to reality, Weber's concept of the state has an element of validity. See Treiber 2016, pp. 61-97.

22 See Hegel 1821, §§ 278, 283, 294, 295, 297, 205.

23 *Political Science Quarterly* 2(2), 1887.

24 At the beginning, Weber admits of himself that he "voted conservative almost three decades ago and later democrat". See Parlament und Regierung, 1958, p. 309, also ES, vol. 2, appendix II: p. 1381f.

25 For this, Art. 9 of the Reich constitution had to be changed, since it did not allow "someone to be able to be simultaneously a member of Bundesrat and Reichstag". See Parlament und Regierung, 1958, p. 342.

26 My colleague Jörg-Detlef Kühne (2018) wrote the standard work on the Weimar constitution. Kühne also produced the standard work on the *Paulskirchenverfassung* (1985). The expression "Parliament of Professors" is a colloquial description intended to express the fact that the educated middle classes were over-represented in this parliament. The description "Parliament of Officials" would be an accurate one. Cf. Kühne 1985, p. 571, Anlage 1: Plenum: 649 (later 655); academics: 81.7 %; jurists: 60.4 %; civil servants and teachers with that status: 54 %.

27 All quotations in *MWG I/17*: 189f.

28 Weber, *Gesammelte Politische Schriften*, p. 468ff.

29 WuG: p. 156/ ES: p. 268; See Whimster 2004, pp. 133-145, here p. 144.

30 On Hitlers seizure of power see, Lepsius 1986, pp. 53-66.

31 Weber, *Gesammelte Politische Schriften*, p. 394. See also Weber's following formulation: "The meaning of active mass democratisation is that the political leader (…) gains the trust and belief of the masses for himself and so gains power through mass demagogic means. According to the nature of the situation, this represents a Caesarist turning-point in the choice of leader" (p. 393).

32 Adorno according to Gerhardt 2003, pp. 232-266, here p. 244.

33 On this, see Breuer 2012, the chapter on: "Begriffe des Politischen. Carl Schmitt und Max Weber". Also recommended is Breuer 1984, pp. 248-267.

34 Schmitt's esteem for Weber can be seen in the fact that he "proudly pasted in his invitation to the private seminar in 1919/20 (…) into his own copy of *Wirtschaft und Gesellschaft* (Tielke 2015, p. 253, Nachwort). As Breuer (2015, pp. 89-104) has shown, Johannes Winckelmann consulted Schmitt on his edition of *Wirtschaft und Gesellschaft*. See Breuer 2015, pp. 89-104.

35 On the Heidelberg "Eranos", see Treiber 2021.

36 Under the title *Soziologie des Souveränitätsbegriffs und politische Theologie: I. Definition der Souveränität, II, Das Problem der Souveränität als Rechtsform der Entscheidung, III. Politische Theologie) in the Erinnerungsgabe für Max Weber: Hauptprobleme der Soziologie*, ed. Melchior Palyi (Munich, Leipzig: Duncker & Humblot 1923, vol. 2:3-35).

37 He wrote: "The dictators of antiquity and the modern revolutions; the Hellenic *aisymnetai*, tyrants, and demagogues; in Rome Gracchus and his successors, in the Italian city-states the *Capitani del populo* and mayors ant certain types of political leaders in the German cities such as emerges in the democratic dictatorship of Zurich, In modern states the best examples are the dictatorship of Cromwell, and the leaders of the French revolution and of the First and Second Empire," with the addendum "Wherever (…) legitimacy is pursued for this form of rule, it is sought in plebiscitary recognition by the sovereign people " (WuG: 156; ES: 268).

38 On this and as a whole, see Breuer 2006, p. 166.

39 WuG: 862f./ES: 1451; Breuer 2006, p. 166; Hofmann 1986, pp. 181-205.

40 WL: 475-488, p. 487 = Whimster 2004.

41 Kelsen (1925, p. 359) also considers Schmitt's critique of parliamentarianism. According to him "this institution [had] lost its foundation 'in the history of ideas' and [was] standing only as an empty apparatus by virtue of a simple mechanical inertia (…)! (Schmitt)." For Kelsen, this line of argumentation extended to "insinuating that liberal democracy was a metaphysical and, thereby, an absolutist world view". Kelsen orients himself towards neo-Kantianism (see e.g. §§ 2-5), Weber's *Wirtschaft und Gesellschaft* is repeatedly invoked, and particular attention given to Georg Jellinek's *Allgemeine Staatslehre* (1900). On this, see Kersten 2000.

42 Hofmann refers to Hartung 1934/35, p. 543.

43 Hofmann referring to Heller 1929, pp. 321-354, here p. 338.

44 That is, with the seizure of power, National Socialism created a concrete order that the National Socialist state has to secure or, if necessary, to establish.

See also Schmitt, Nationalsozialistischen Rechtsdenken. In*: Deutsches Recht* 4 (1934), p. 228. On this, see also Hofmann, *Legitimität gegen Legalität*, 2002, p. 87: "Schmitt's turn took place against the background of historical relativism. However, in contrast to Kelsen, he recognised the fruitlessness of fleeing into pure methodology and abstract normativism, into the construction of a purely 'social technicalism'. He was determined to position himself in relation to the reality that had been left behind by neo-Kantianism as simple facticity and *to construct reality as a legal reality*" (my emphasis). On Schmitt's concrete thinking on social order, see also Rüthers, *Die unbegrenzte Auslegung*, 1988, pp. 293-302.

45 I am profoundly grateful to Guy Oakes (Monmouth University) for his critical reading of a draft of this piece and to Matthew Philpotts for completing the challenging task of translating it. I owe Hinnerk Bruhns, EHESS, Paris, the reference to Hintze's review of Kelsen's book.

REFERENCES

Aberbach, Joel D., Robert D. Putnam, Bert A. Rockman. 1981. *Bureaucrats and Politicians in Western Democracies*. Cambridge MA: Harvard University Press.

Bassok, Or. 2021. The mysterious meeting between Carl Schmitt and Josef Redlich. *International Journal of Constitutional Law* 19:694-722.

Bauer, Wolfram. 1968. *Wertrelativismus und Wertbestimmtheit im Kampf um die Weimarer Demokratie. Zur Politologie des Methodenstreits der Staatsrechtslehrer*. Berlin: Duncker & Humblot.

Breuer, Stefan. 1984. Spaziergänge mit Carl Schmitt. In: *Nicolaus Sombart, Jugend in Berlin 1933-1943. Ein Bericht*. München, Wien: Carl Hanser.

_____. 1994a. *Max Webers Herrschaftssoziologie*. Frankfurt/Main, New York: Campus.

_____. 1994b. *Bürokratie und Charisma. Zur Politischen Soziologie Max Webers*. Darmstadt: Wissenschaftliche Buchgesellschaft.

_____. 2006. Nichtlegitime Herrschaft. In: *Stefan Breuer, Max Webers tragische Soziologie. Aspekte und Perspektiven*. Tübingen: Mohr.

_____. 2012. *Carl Schmitt im Kontext: Intellektuellenpolitik in der Weimarer Republik*. Berlin: Akad Verlag.

_____. 2015. Klassiker der Karlsruher Republik. Johannes Winckelmann etabliert nach 1945 Max Weber. *Zeitschrift für Ideengeschichte* 9:89-104.

Bohne, Eberhard. 1981. *Der informale Rechtsstaat. Eine empirische Untersuchung zum Gesetzesvollzug unter besonderer Berücksichtigung des Immissionsschutzes*. Berlin: Duncker & Humblot.

Carrino, Agostino. 2011. *Das Recht zwischen Reinheit und Realität. Hermann Cohen und die philosophischen Grundlagen der Rechtslehre Kelsens*. Baden-Baden: Nomos.

Dreier, H. 1986. *Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen*. Frankfurt/Main: Suhrkamp.
Ehrle, F-J. 1991. Max Weber in Wien. Diss. phil. Universität Freiburg.
Eßlinger, Hans Ulrich and Emil Lederer. 1995. Ein Plädoyer für die politische Verwertung der wissenschaftlichen Erkenntnis. In: Hubert Treiber, Karol Sauerland (eds.), *Heidelberg im Schnittpunkt intellektueller Kreise. Zur Topographie der „geistigen Geselligkeit" eines „Weltdorfes": 1850-1950*. Opladen: Westdeutscher Verlag.
Geiger, Theodor. 1964. *Vorstudien zu einer Soziologie des Rechts*. Neuwied, Berlin: Luchterhand.
Gerhardt, Uta (ed.). 2003. *Zeitperspektiven. Studien zu Kultur und Gesellschaft. Beiträge aus der Geschichte, Soziologie, Philosophie und Literaturwissenschaft*. Stuttgart: Steiner.
Haferkamp, Hans-Peter. 2004.*Georg Friedrich Puchta und die ‚Begriffsjurisprudenz'*. Frankfurt/Main: Vittorio Klostermann.
Hanke, Edith. 2022. *Max Webers Sprache. Neue Einblicke in das* Gesamtwerk. Wiesbaden: Harrassowitz.
Hanke, Edith and Wolfgang J. Mommsen (eds.). 2001. *Max Webers Herrschaftssoziologie. Studien zu Entstehung und Wirkung*. Tübingen: Mohr.
Hartung, F. 1934/35. Staatsgefüge und Zusammenbruch des Zweiten Reiches. *Historische Zeitschrift* 152:543.
Hegel, G. W. F. 1821. *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse*. Mit Hegels eigenhändigen Notizen und mündlichen Zusätzen. Frankfurt/Main: Suhrkamp.
Heller, Hermann. 1929. Bemerkungen zur staats- und rechtstheoretischen Problematik der Gegenwart. *Archiv des Öffentlichen Rechts* N.F.
Helmholtz, Hermann von. 1870. *Lehre von den Tonempfindungen als physiologische Grundlage für die Theorie der Musik*
Hermes, Siegfried. 2006. Der Staat als „Anstalt". Max Webers soziologische Begriffsbildung im Kontext der Rechts- und Staatswissenschaften. In: Klaus Lichtblau (ed.), *Max Webers ‚Grundbegriffe'. Kategorien der kultur- und sozialwissenschaftlichen Forschung*. Wiesbaden: VS. Verlag.
_____. 2007. Staatsbildung durch Rechtsbildung—Überlegungen zu Max Webers soziologischer Verbandstheorie. In: Andreas Anter, Stefan Breuer (eds.), *Max Webers Staatssoziologie. Positionen und Perspektiven*. Baden-Baden: Nomos.
Hintze, O. 1927a. Max Webers Soziologie. *Schmollers Jahrbuch* 50:83ff.
_____. 1927b. Otto Hintze, Kelsens Staatslehre. *Historische Zeitschrift* 135:66-75.
Hofmann, Hasso. 1986. Das Problem der cäsaristischen Legitimität im Bismarckreich. In: Hasso Hofmann, *Recht—Politik—Verfassung. Studien zur Geschichte der politischen Philosophie*. Frankfurt/Main: A. Metzner.
_____. 2002/2000?. Parlamentarische Repräsentation in der parteienstaatlichen Demokratie. In: *Legitimität gegen Legalität. Der Weg der politischen Philosophie Carl Schmitts*, 4th ed. mit einer neuen Einleitung. Berlin: Duncker & Humblot.
Jellinek, Georg. 1963 [1905/1892]. *System der subjektiven öffentlichen Rechte*. Darmstadt: Wissenschaftliche Buchgesellschaft.
Kelsen, H. 1925. *Allgemeine Staatslehre*. Berlin: Springer.
Köhnke, Klaus Christian. 1986. *Entstehung und Aufstieg des Neukantianismus. Die deutsche Universitätsphilosophie zwischen Idealismus und Positivismus*. Frankfurt/Main: Suhrkamp.
_____. 1995. *Sinn für Institutionen. Mitteilungen aus Wilhelm Windelbands Heidelberger Zeit (1903-1915).* Wiesbaden: Westdeutscher Verlag.
Kühne, Jörg-Detlef. 1985. *Paulskirchenverfassung*: *Die Reichsverfassung der Paulskirche*. Frankfurt/Main: Metzner.
_____. 2018. *Die Entstehung der Weimarer Reichsverfassung. Grundlagen und anfängliche Geltung.* Düsseldorf: Droste Verlag.
Laband, P. 1911. *Das Staatsrecht des Deutschen Reiches*, 5. (4 vols). Tübingen: Mohr.
Lepsius, Maria Rainer. 1986. The Model of Charismatic Leadership and its Applicability on the Rule of Adolf Hitler. In: Carl F. Graumann, Serge Moscovici (eds.), *Changing Conceptions of Leadership*. New York, Berlin, Heidelberg: Springer.
Kersten, Jens. 2000. *Georg Jellinek und die klassische Staatslehre*. Tübingen: Mohr.
Marra, Realino. 1989. Gli Studi Giuridici nella Formazione di Max Weber (Heidelberg 1882- Berlino 1892. *Materiali per una storia della cultura giuridica* XIX:355-404.
_____. 1992. Dalla communità al diritto moderno. La formazione giuridica di Max Weber 1882-1889. *Droit et Société* 22:711.
Mayer, Otto. 1908. Die juristische Person und ihre Verwertbarkeit im öffentlichen Recht. In: *Staatsrechtliche Abhandlungen. Festgabe für Paul Laband*. Tübingen: Mohr.
Mayntz, Renate. 1975. *Fritz W. Scharpf, Policy Making in the German Federal Bureaucracy.* Amsterdam, Oxford, New York: Elsevier.
Mecke, Christoph-Eric. 2009. *Begriff und System des Rechts bei Georg Friedrich Puchta*. Göttingen: Vandenhoeck & Ruprecht.
Mommsen, Wolfgang J. 1974/1959?. *Max Weber und die Deutsche Politik 1890-1920*, 2nd ed. Tübingen: Mohr.
_____. 2001. Politik im Vorfeld der „Hörigkeit der Zukunft". Politische Aspekte der Herrschaftssoziologie Max Webers. In: Hanke and Mommsen 2001.
Olechoswski, T. 2021. *Hans Kelsen. Biographie eines Rechtswissenschaftlers*. 2nd ed. Tübingen: Mohr Siebeck.
Popitz, Heinrich. 1980. *Die normative Konstruktion von Gesellschaft*. Tübingen: Mohr.
Putnam, Robert D. 1973. The Political Attitudes of Senior Civil Servants in Western Europe: A Preliminary Report. *British Journal of Political Science* 3:257-290.

Rückert, Joachim. 2004. Rechtsgeschichte/Legal History [Zeitschrift des Max Planck-Instituts für Europäische Rechtsgeschichte], 5:128-149.
_____. 2005. Rechtsgeschichte/Legal History [Zeitschrift des Max Planck-Instituts für Europäische Rechtsgeschichte], 6:122-142.
_____. 2022. *Storici del diritto allo specchio. Sei raconti contemporani, a cura di Italo Birocchi, Pio Caroni*. Pisa: Edizioni.
Rüthers, Bernd. 1988. *Die unbegrenzte Auslegung. Zum Wandel der Privatrechtsordnung im Nationalsozialismus*, 3rd ed. Heidelberg: Müller Juristischer Verlag.
Sager, Fritz and Christian Rosser. 2009. Weber, Wilson, and Hegel: Theories of Modern Bureaucracy. *Public Administration Review*, November/December:1136-1147.
Scharpf, F. W. 1970. *Die politischen Kosten des Rechtsstaats. Eine vergleichende Studie der deutschen und amerikanischen Verwaltungskontrolle.* Tübingen: J. C. B. Mohr (Paul Siebeck).
Schluchter, Wolfgang. 1972. *Aspekte bürokratischer Herrschaft. Studien zur Interpretation der fortschreitenden Industriegesellschaft*. München: List.
Schmitt, Carl. 1934. Nationalsozialistisches Rechtsdenken. *Deutsches Recht*. Zentral-Organ des Bundes Nationalsozialistischer Deutscher Juristen 4: 225-229.
Schönberger, Christoph. 1997. *Das Parlament im Anstaltsstaat. Zur Theorie parlamentarischer Repräsentation in der Staatsrechtslehre des Kaiserreichs (1871-1918)*. Frankfurt/Main: Vittorio Klostermann.
Stammer, Otto. (ed.). 1965. *Max Weber und die Soziologie heute. Verhandlungen des 15. Deutschen Soziologentages 1964*. Tübingen: Mohr.
Steinkemper, Bärbel. 1974. *Klassische und politische Bürokraten in der Ministerialbürokratie der Bundesrepublik Deutschland. Eine Darstellung sozialstruktureller Merkmale unter dem Aspekt politischer Funktionen der Verwaltung*. Köln, München: Heymanns.
Tielke, Martin. (ed.). 2015. *Schmitt und Sombart. Der Briefwechsel von Carl Schmitt mit Nicolaus, Corina und Werner Sombart*. Berlin: Duncker & Humblot.
Treiber, H. H. 2016a. Zur Frage nach der Vorbildfunktion von Georg Jellinek für Max Webers Idealtypus. In: Gerhard Wagner, Claudius Härpfer (eds.), Max Webers vergessene Zeitgenossen. Beiträge zur Genese der *Wissenschaftslehre*. Wiesbaden: Harrassowitz.
_____. 2016b. Max Weber's conception of the state: the State as Anstalt and as validated conception with special reference to Kelsen's critique of Weber. In: Ian Bryan, Peter Langford and John McGarry (eds.), *The Reconstruction of the Juridico-Political. Affinity and Divergence in Hans Kelsen and Max Weber.* Abingdon, New York: Routledge.
_____. 2019. On Weber's Partiality to Logic. *Max Weber Studies* 19(2):196-224.
_____. 2020. *Reading Max Weber's Sociology of Law*. Oxford: Oxford University Press.
_____. 2021. *Max Weber unter Anhängern des Altphilologen Hermann Usener. Religionswissenschaft auf philologischer Basis im Heidelberger Gelehrtenkränzchen „Eranos" 1904-1909*. Wiesbaden: Harrassowitz.
_____. 2023. *A Critical Reading of Max Weber on Law and its Rationalisation*. In: Alan Sica (ed.), *The Routledge International Handbook on Max Weber*. London, New York: Routledge.
Turner, Stephen and Regis A. Factor. 1994. *Max Weber: The Lawyer as Social Thinker.* London: Routledge.
Walther, Manfred. 1989. Hat der juristische Positivismus die deutschen Juristen im ‚Dritten Reich' wehrlos gemacht? Zur Analyse und Kritik der Radbruch-These. In: Ralf Dreier, Wolfgang Sellert (eds.), *Recht und Justiz im Dritten Reich*. Frankfurt/Main: Suhrkamp.
Whimster, Sam. ed. 2004. The three pure types of legitimate rule. In: *The Essential Weber. A Reader*. London, New York: Routledge.