

The guardian of the constitution: Hans Kelsen, the weary traveler

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Abstract: This research examines the debate that took place in 1933 between the jurists Hans Kelsen and Carl Schmitt regarding who should serve as the guardian of the Constitution. From a normativist perspective, Kelsen argues that this function ought to be entrusted to Constitutional Courts; conversely, Schmitt, grounded in decisionism, assigns such prerogative to the head of the political power. The methodology is based on an analytical bibliographical review, encompassing the works of both authors and engaging with contemporary theoretical frameworks. The study concludes that constitutional guardianship should be exercised by Constitutional Courts, thereby ensuring institutional stability and the preservation of legal pluralism.

Keywords: Hans Kelsen; Carl Schmitt; legal debate; guardian of the Constitution.

1. INTRODUCTION

This study examines the legal debate established in 1933 between Hans Kelsen and Carl Schmitt, whose core lies in the controversial definition of constitutional guardianship. While the Kelsenian normativist perspective advocates the jurisdiction of Constitutional Courts as the institutional guarantors of the legal order, Schmitt's decisionism maintains that such prerogative must be centralized in the figure of the head of political power. This constitutes a timeless issue, as the confrontation between these authors ultimately revolves around a fundamental question for legal theory: who should be the guardian of the Constitution—the Courts or the head of political power?

Such antagonism is situated at the intersection of constitutionalism and democracy, enabling reflection on the role of Constitutional Courts in safeguarding society against dictatorial and authoritarian political maneuvers. The historical context of this debate refers to the interwar period, when the world was still grappling with the consequences of the First World War (1914–1918), and Germany was on the verge of witnessing the rise of Adolf Hitler to political power. In order to elucidate the complexities of this dispute, the present article examines the theoretical foundations of both jurists, confronting Kelsen’s normativism with Schmitt’s decisionism. Thus, this theoretical inquiry is not limited to historical reconstruction, but also seeks to understand how such foundations shape modern institutions.

To achieve this objective, an analytical methodology grounded in bibliographical review is employed. The study draws upon books, scholarly articles, reviews, journalistic texts, and audiovisual materials available on online platforms, enabling a comprehensive examination of the two competing perspectives. This approach allows for reflection on the plurality of authors who engage with the theme, highlighting its academic relevance for understanding contemporary institutional tensions.

The relevance of this legal debate for the scientific community is thus evident, extending from its original context of production to present-day discussions. The intellectual influence of Kelsen and Schmitt on legal thought ensures the contemporaneity of this research, as it advances reflections that transcend the interwar scenario. It thereby contributes to the analysis of issues that traverse different historical periods, given the enduring significance of this dichotomy for legal science and for understanding the persistent tensions between legal normativity and political will.

2. ANALYZING HANS KELSEN

Kelsen's trajectory, marked by successive exiles and ideological persecutions, transcends mere biographical narrative and becomes the very foundation of his intellectual production. The figure of the "weary traveler," an expression employed by the jurist himself in his autobiography upon contemplating the Pacific Ocean in his final refuge, encapsulates his theoretical project: the Pure Theory of Law emerges as a bulwark against arbitrariness. For Kelsen, the exile imposed by political contingencies revealed the vulnerability of the legal order whenever it becomes subordinated to ideological forces, thereby justifying the need for an autonomous Science of Law, immune to instrumentalizations of power.

Beyond his personal history, Kelsen is recognized for the technical refinement of his theory, widely acclaimed for its contributions to legal science. The scientific rigor of his work constitutes a landmark in legal thought, as noted by Simioni (2014):

[...] it was with Kelsen and his Pure Theory of Law that the autonomy of the legal phenomenon attained its most refined scientific foundation. For Kelsen, law could not be conceived either as social interests or as a psychic motivation. His analytical unit became the legal norm, understood as the result of a syntactic-linguistic interpretation of legal texts. [...] Thus, Kelsen endowed law not only with operational autonomy, but above all constructed a scientific autonomy of the legal phenomenon grounded in a specifically legal linguistic analysis.

This approach represented a significant advancement for the Theory of Law and for studies on interpretation and judicial decision-making, demonstrating that Kelsenian thought surpassed the prevailing research paradigms of its time. On this theoretical development, Streck (2017) observes:

It is necessary to understand, in summary, that while other positivist theories dealt directly with the law, Kelsen made a decisive leap by focusing on the scientific discourse about law. This was only possible through neopositivist assumptions, as recognized by authors such as Luiz Alberto Warat and Norberto Bobbio. In this

construction of science as a metalanguage lies the crucial difference between his theory and other forms of positivism.

By establishing a distinction between law and the Science of Law, Kelsen structures his theory around the Grundnorm (basic norm) as the point of departure for the communication between the legal order and society. Streck (2019) emphasizes that this advancement is central to legal hermeneutics. From this perspective, “law is the object-language, whereas the Science of Law is the metalanguage: two distinct and non-communicating planes,” thereby ensuring the analytical rigor of the discipline and the autonomy of legal thought.

It is precisely this methodological rigor—grounded in the distinction between metalanguage and object-language—that enables one to address the enduring dispute over who should effectively exercise constitutional guardianship. To unveil how this structure redefines the role of the interpreter, Streck (2017) demonstrates that the purity of Kelsenian theory does not apply to the legal phenomenon itself, but to the scientific perspective that examines it:

[...] in Kelsen, there is a division between law and the Science of Law that decisively shapes his concept of interpretation. “Purity,” in Kelsen, pertains to the Science of Law, not to law itself. Hence, interpretation, in Kelsen, results from this division: interpretation as an act of will and interpretation as an act of cognition.

This distinction is fundamental for understanding Kelsen’s thought, as it highlights the relationship between interpretative acts and the protection of constitutional principles. Legal interpretation occurs precisely within this duality. Thus, what guarantees systemic security is not the absence of will, but rather the fact that such will is exercised within the limits of the normative framework.

In Pure Theory of Law, Hans Kelsen addresses methods of interpretation, clarifying that positive law does not yield a single correct answer. According to the author, multiple valid interpretations may coexist, provided they remain within the bounds

of the legal order. It is in this context that Kelsen introduces the metaphor of the “frame” (Rahmen), establishing that within these normative limits there exist various possibilities for the formation of legal decisions. It is precisely at this juncture that the Kelsenian framework stands in tension with Schmitt’s view: whereas for Carl Schmitt the decision is an act of pure will that constitutes the order itself, for Kelsen such will is constrained by the normative structure. The decision is thus not a sovereign impulse, but a technical choice bounded by legal limits.

From this articulation, it follows that interpretation operates within a space of mobility defined by the metaphor of the frame. Within these normative limits, the interpreter encounters multiple possible meanings, selecting one at the moment of applying the law. It is worth noting that this theoretical sophistication is further developed in the second edition of *Pure Theory of Law*, which presents greater analytical density by detailing the functioning of this interpretative space and the role of the Science of Law.

Based on the premises of the *Pure Theory of Law*, Kelsen sought to achieve greater legal certainty in judicial decisions, reducing the influence of political power over interpretative possibilities within the legal order. The core of this process lies in normative language, a tool that ensures the autonomy of the Science of Law and allows for the technical and objective application of norms, preserving the independence of the legal system from external interests.

Regarding the hierarchical structure of norms in Kelsenian theory, the stratified organization of the legal system proves essential for maintaining its unity. In this regard, Simioni (2014) clarifies that interpretation must accompany the process of legal application as it moves from higher to lower normative levels:

Kelsen defines interpretation as “a mental operation that accompanies the process of applying the law as it progresses from a higher level to a lower one.” Thus, interpretation is reduced to a logical operation of deducing the meaning of a legal

norm, proceeding from hierarchically superior norms to inferior ones. Interpretation is both an act of knowledge and of legal application.

The application of law therefore presupposes a comprehensive understanding of the legal system, ensuring that the various normative possibilities are considered without neglecting any hypothesis contained within the legal order. As Simioni (2014) emphasizes, “to interpret is to comprehend the possibilities of meaning, not a single meaning,” thereby overcoming the search for a unique answer and revealing the analytical sophistication of Kelsen’s thought. In this context, the author highlights the enduring contribution of Kelsenian theory to contemporary law:

[...] Kelsen’s Pure Theory, although grounded in a scientific requirement, also proved adequate to satisfy three important demands of a modern conception of law: (a) the autonomy of law in relation to both social interests and psychological recognition of duty; (b) a higher degree of abstraction, expanding its applicability beyond conflicts of interest, as in the case of technological accidents; and (c) the possibility of connecting law to the idea of an instrument of public policies within the Welfare State, thus detaching it from the interests of the State itself, especially in light of the then-prevailing liberal political semantics opposing State and society.

This perspective establishes a new “interpretative attitude” toward law, grounded in principles internal to the normativity of the legal system, ensuring that the construction of normative meaning occurs within the limits imposed by legal structure. Such an approach reinforces the autonomy of the legal phenomenon and guarantees that the application of norms remains anchored in systemic rigor, even amid the complexities of contemporary politics.

In order to ensure that this juridical architecture would not remain confined to the abstract plane, Kelsen designed a specific institutional model for constitutional guardianship: the Constitutional Court. In contrast to Schmitt’s personalist vision, Kelsen maintained that the protection of the legal order should be entrusted to a technical and independent body. In this role, the Court would not possess the

authority to create law based on political will, but would hold the technical competence to annul acts that violate normative hierarchy. This institutional design secures the “guardian” as a control mechanism within the Rule of Law, ensuring the supremacy of the Constitution through procedural rigor.

In contrast to the personalist character of Schmittian decisionism, Kelsen emphasized the democratic dimensions of political decision-making. For him, the legitimacy of the legal system must be grounded in procedures that ensure institutional balance, distancing the application of norms from the arbitrary will of individual rulers. This emphasis on democratic procedure as a guarantee of freedom is reflected in the following passage:

As aptly noted by João Batista Marques in a recent article, democracy for Kelsen is procedural; that is, [...] it must be exercised by representatives within an institutional framework for political decision-making, through a formal method based on transaction and negotiation between majority and minority, with the necessary respect for the latter.

The analysis of this passage reveals the democratic essence of Kelsen’s theory, which already emphasized the importance of minority participation in the legislative process. For Kelsen, democracy is not reducible to the imposition of majority will, but presupposes an environment of dialogue, negotiation, and respect for minority groups within governmental dynamics. This commitment to the protection of pluralism and institutional guarantees constitutes one of the enduring legacies of Kelsenian thought for contemporary law.

3. ANALYZING CARL SCHMITT

Carl Schmitt stands out as one of the most significant and controversial scholars of Constitutional and International Law in the twentieth century. His academic relevance derives from the density of his intellectual production, whereas the controversy surrounding his trajectory is associated with his role as a jurist of the

Crown of the Third Reich and of the Nazi Party. Among the main Schmittian theoretical references, Benjamin Constant's theory of neutral power is particularly noteworthy, conceiving the existence of a fourth state function designed to regulate the balance among the three powers and to guarantee individual liberties.

The transposition of this concept into Schmitt's thought is essential to justify the attribution of constitutional guardianship to the head of State. Regarding this influence and the nuances surrounding such a proposition, Pereira and Baracho Jr. (2019) state:

According to Constant's theory of neutral power, Schmitt's theoretical framework in proposing the head of State as the guardian of the Constitution, there would be no violation of the principle of separation of powers in conferring extensive attributions and competences upon the highest representative of the Executive Branch. On the contrary, the assumption of such power by the head of State, who occupies a neutral position, becomes necessary for maintaining the balance among the Powers, thereby legitimizing his role as defender of the Constitution.

A question nevertheless arises: would it be possible for the head of the Executive Branch to occupy an effectively neutral position? Critical analysis suggests that prior adherence to political-partisan ideologies renders impartiality difficult to attain, making possible the manipulation of the interpretation of the legal order for the satisfaction of particular interests. Such a scenario compromises the integrity of institutions and opens space for authoritarianism, contrary to the fundamental principles of democracy.

Thus, decisionism is grounded in the sovereign will that precedes and sustains the legal order. In order to deepen the understanding of the foundations of this existential perspective on law and its reaction against normativist rationalism, Baracho (1978) observes:

[T]he existential-decisionist concept, based on Carl Schmitt, whose view of the juridical world is animated by a reaction against normativism and rationalism, such that the idea of state legal creation is dominated by volitional action, which comes to be known as “political decision.” At the beginning and at the end of the juridico-political process there exists, for Schmitt, a voluntarist element: the decision, the fiat lux, creator of norms, which accompanies them throughout their existence and application.

To respond to the criticisms of his opponents, Schmitt (2009) deepens the foundations of his theory, assuming that constitutional guardianship requires a capacity for decision that transcends legal technique, as may be observed in the following passage:

Carl Schmitt maintains that the essence of the Constitution is the set of fundamental political decisions of the constituent power. Referring to the Weimar Constitution, he notes that it embodies:

- a) the decision in favor of democracy;
- b) the decision in favor of a federal structure;
- c) the decision in favor of fundamental rights;
- d) the decision in favor of the division of powers.

In opposition to Kelsen, Schmitt’s perspective concentrates on the primacy of political decision, in which sovereignty is linked to the capacity to decide and to defend the nation against the enemy, a concept of strictly public and political nature. In Schmitt, the specific character of political action does not derive from moral, aesthetic, or economic criteria, but from the capacity to identify the hostile other that endangers the existence of the group. According to Schmitt: “The specifically political distinction to which political actions and motives can be reduced is the distinction between friend and enemy.” This existential boundary is what ultimately defines political unity and sovereign authority.

Alongside this distinction, Schmitt's critique of liberalism also stands out. For the jurist, the liberal model neutralizes the State and undermines the sovereignty of the head of political power, diluting the decisional capacity necessary for the maintenance of order and social peace. As he emphasizes: "In a completely systematic manner, liberal thought circumvents or ignores the State and politics." It is within this scenario of the need for unquestionable authority that Schmitt proposes his most famous definition: "Sovereign is he who decides on the state of exception," establishing that supreme power manifests itself precisely at the moment when legal normality is ruptured. From this perspective, sovereignty appears in the capacity to act in critical situations in which the legal order proves insufficient. Regarding this debate and the contrast between decision and Kelsenian formalism, Godoy (2010) explains:

In this prologue, Legaz y Lacambra highlights the importance of Carl Schmitt within the cultural landscape between 1918 and 1939. The intellectuals of that period were drawn to German high culture and, for that reason, had to study two important figures: Hans Kelsen and Carl Schmitt. While Kelsen sought in formalism a refuge for possible legal truths, Schmitt examined the concrete situation through reason and affirmed the personalist power of decision.

The prerogative to decide on the state of exception, among other juridico-political measures, entails holding supreme power to deliberate on existential questions of the State, such as war and peace. This perspective stems from an expansive interpretation of Article 48 of the Weimar Constitution, a provision that granted the President of the Reich authority to adopt extraordinary measures in moments of crisis, such as the state of exception.

Such powers included the capacity to intervene directly in the legal order and suspend civil rights, under the justification of restoring security and public order. By emphasizing this competence, Schmitt consolidates the figure of the head of political power as the guardian of political unity, whose power manifests itself in the capacity to act beyond normative limitations when the survival of the State is at risk.

Art. 48 — If a state fails to fulfill the duties incumbent upon it under the Constitution or the laws of the Reich, the President of the Reich may use military force to compel it to do so. In the event that public security is seriously threatened or disturbed, the President of the Reich may take the necessary measures to restore law and order, if necessary by using armed force. In pursuit of this objective, he may suspend, in whole or in part, the civil rights described in Articles 114, 115, 117, 118, 123, 124, and 153.

The President of the Reich must immediately inform the Reichstag of all measures taken on the basis of paragraphs 1 and 2 of this Article. Such measures must be immediately suspended if the Reichstag so demands.

If danger is imminent, the state government may, for its specific territory, implement measures as described in paragraph 2. These measures must be suspended if so required by the President of the Reich or by the Reichstag.

Further details shall be established by Reich legislation.

Even in light of this construction of sovereign power, however, a theoretical gap may be identified in Schmitt's thought insofar as it suggests that judicial decision would be a purely mechanical act of applying a pre-existing political will. This view is opposed by the Kelsenian perspective, which demonstrates the productive and constitutive character of adjudication. In contemporary law, the activity of the judge is not limited to passive subsumption; on the contrary, it involves the interpretation of the legal order as a complex system, allowing the decision to be constructed from the multiple normative possibilities offered by the system, and not merely as a reflection of external political decisions. Nevertheless, the persistence of this antagonism between norm and exception prevents the 1933 debate from remaining confined to the past, allowing it to find new developments in contemporary attempts to understand political conflict within democracy.

An example of this theoretical updating is the work of Mouffe (2015), who, in analyzing Schmitt's thought, proposes the transposition of the concept of antagonism into that of agonism. From this perspective, the author seeks to resignify the Schmittian figure of the enemy, converting it into the category of the political adversary. Unlike the enemy—whose existence in Schmitt presupposes an existential threat and the possibility of elimination—the adversary is understood as a legitimate opponent who participates in democratic dispute.

This conflict occurs under previously established institutional rules, in which disagreement is not suppressed but channeled through procedures that confer legitimacy upon the winner without disqualifying the existence of the defeated. Such reformulation proves necessary for the maintenance of democracy, for it allows political divergence to persist without degenerating into violence or the absolute negation of the other, transforming the struggle for hegemony into an institutionalized competition. Regarding the nature of this agonistic relation, Mouffe (2015) clarifies:

[...] by “the political” I understand the dimension of antagonism that I consider constitutive of human societies, whereas by “politics” I understand the set of practices and institutions through which an order is created, organizing human coexistence within the conflictual context produced by the political.

The author continues: “If, on the one hand, we want to acknowledge the permanence of the antagonistic dimension of conflict, and, on the other, allow for the possibility that it may be ‘domesticated,’ it is necessary to consider a third type of relation. It is this type of relation that I have suggested calling ‘agonism.’” For the author, this second stage of modernity—known as reflexive modernity—requires a transformation of the old concepts concerning politics and the political.

Thus, agonism offers a response to the dilemma of the Guardian of the Constitution. By shifting the focus away from the dispute between courts and heads of State, the agonistic perspective suggests that the true guardianship of the constituent order

resides in the democratic procedure itself. In this sense, the Guardian would cease to be an absolute and isolated authority and would instead become a commitment to the rules that make conflict possible.

Along the same line of analysis concerning Schmitt, Rodrigues (2005) highlights the dictatorial character attributed to Schmitt's theory. Such an allusion, however, was contested by Schmitt during his debate with Kelsen, on the grounds that democracy could be present in different regimes of government. This perspective seeks to redefine democracy on the basis of the political unity of the people, as may be observed in the following passage:

For him, democracy is the identity of the political unity of the people with its ruler; that is, the identity between rulers and ruled, dominators and dominated. For this reason, democracy is not necessarily opposed to dictatorship. There may be a pacifist or militarist democracy, a liberal or absolutist democracy.

In view of the controversies set forth above, the relevance and contemporaneity of the theme are reaffirmed, especially for research in constitutionalism and democracy. The confrontation between Hans Kelsen and Carl Schmitt remains necessary for fostering academic reflection on the foundations of Constitutional Theory, Democracy, Law, and Legal Hermeneutics. Given the depth of the issues presented, the debate transcends the legal field and establishes an interdisciplinary dialogue with Political Science, History, Sociology, and Psychoanalysis, consolidating itself as a reference point for studies on decision and legal interpretation.

4. FINAL CONSIDERATIONS

It is important to emphasize the argumentative quality of the debate under examination, in which both strands present arguments of considerable theoretical density and analytical resilience. Nevertheless, with a view to establishing an institutional position, this study aligns itself with the perspective that identifies

Constitutional Courts as the appropriate forum for the exercise of constitutional guardianship.

In this regard, Barroso (2023) highlights the role of constitutional jurisdiction within the architecture of the Democratic Rule of Law, noting that:

Such courts and tribunals may declare the unconstitutionality of acts of the Legislative and Executive branches, with one of their principal roles being to arbitrate the tensions that often arise between constitutionalism and democracy—that is, between fundamental rights and popular sovereignty. It is incumbent upon these courts and tribunals to protect the rules of the democratic game and the rights of all against potential abuses of power by the majority, as well as to resolve impasses among the branches of government. In many parts of the world, they have served as an important antidote to authoritarianism.

It is thus understood that Constitutional Courts, in exercising the guardianship of the Constitution, embody the requirements of technical expertise, impartiality, and impersonality necessary for the preservation of the legal system. Such institutional performance enhances the guarantees of success of the democratic rule of law, while simultaneously establishing barriers against arbitrariness and abuses of power. In this manner, it ensures that the protection of norms is not rendered vulnerable by immediate political interests, thereby consolidating institutional stability and balance.

Legal hermeneutics has likewise incorporated the legacy left by Hans Kelsen, recognizing the depth of the transformations introduced by his theory for the evolution of legal thought. Kelsenian thought enabled the application of law to transcend the strict formalism of classical schools, as illustrated below: “However, it is with Kelsen that a significant transformation occurred in the understanding of law, and one that was accepted by legal academia: the judge may now interpret, and even create law, almost entirely departing from the assumptions of the Exegetical School.”

The linguistic turn represented a significant advancement for the Science of Law, consolidating the application of syntactic-analytical meaning in legal interpretation. Although Kelsen's work delimited the scientific field to the description of the norm, such an approach laid the groundwork for argumentation theories to subsequently deepen the analysis of the rationality of judicial decisions.

The recognition of this legacy is further reinforced in the investigations of Simioni, who underscores the enduring relevance of Kelsen's methodological rigor for understanding the legal phenomenon in contemporary contexts. Simioni's analysis (2014) reiterates the idea that the author's theoretical sophistication remains a reference point for the study of the norm:

More than a mere engagement with already well-known concepts, more than reconstructing the pieces of an already built edifice, Hans Kelsen's theory of interpretation remains an important effort—albeit purely formal—to justify the autonomy of law and of judicial decision-making.

Despite the analysis elucidating the limitations of the boundaries of this political confrontation, it is concluded that the core of the issue transcends the mere identification of the guardian of the Constitution. The true imperative lies in the effectiveness of constitutional norms, ensuring that their provisions are genuinely respected and realized within the societies they govern. Ultimately, the preservation of the Democratic Rule of Law depends less on the dispute over titular guardianship and more on the capacity of the legal order to project its normative force onto social reality. By moving beyond the dichotomy between Hans Kelsen and Carl Schmitt, one may perceive that the true guardian of the Constitution is democracy itself in operation, ensuring that the constitutional text is not merely a sheet of paper, but an effective guarantee of rights for all citizens.

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Recebido em: 22/04/2026

Aprovado em: 05/05/2026