

**STATE AND LAW – CHALLENGING AND CHALLENGED
(BUILDING IN A CHANGING WORLD AS DEBATED
BY SCHMITT AND KELSEN)**

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ABSTRACT: *(Dangers of Intellectualism) In a dangerous age, all that one does or fails to do, all that one says or leaves unpronounced, is dangerous. To live or to die in a dangerous age, to try to understand or just to escape to mainstream-driven mediocrity, to assume the fate of one's community or to long for exile in isolation, all are equally dangerous.*

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(Dangers of Intellectualism) In a dangerous age, all that one does or fails to do, all that one says or leaves unpronounced, is dangerous. To live or to die in a dangerous age, to try to understand or just to escape to mainstream-driven mediocrity, to assume the fate of one's community or to long for exile in isolation, all are equally dangerous.

What is an ANNA AKHMATOVA, a HENDRIK HÖFGEN or even a CARL SCHMITT to do if destined to come into being just then and there and not elsewhere at another time? Should the individual become resigned to swimming with the current, personality suppressed as assimilated to the surrounding average? Or should he/she opt to become hopelessly destroyed by the pressure to fight the extremities, even if alone, even if marching thereby to senseless martyrdom?

If there is only one truth, it is always and everywhere the one to manifest itself. Of course, it may be coloured by the context of the age, which endows it with additional moments and overtones. But, providing that such a colouring can transform anything into something else, is comprehension available at all? Can I understand you? Can my culture understand yours? Can my sheer intellectualism, cultivated as a substitute for life and pampered in everyday repletion and impunity, comprehend others' hunger for truth, who may struggle solely for personal or community survival in dramatic situations, desperately balancing on a razor's edge? Or, can my irresponsibility, switching over to the indifference

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of a libertine or even to anarchism (when childishly surfeited with guaranteed comfort and order), understand others who may spasmodically seek the way out from national humiliation and helplessness? Well, in our postmodern age of almost unlimited freedom, we are free to pass judgements on others. However, giving a primitive thumbs-down, as an act to put others down, is still not more demanding in manners and human quality than the defeats we may eventually have to face, provided that the latter results from a resolution to expend good and strenuous efforts. The truth is one, yet it may appear in a variety of forms. Which is the one we ought to fight for? Are we inevitably bound to act as self-generated *demiurges* to make all possible choices? To select from truths, thoughts and, moreover, the ways of expressing them? These may, though, be our own creatures; yet any of them can turn to be seen by others as dangerous, worthy of liquidation, as if nothing had happened. After all, we are expected to take all the troubles of the world on our shoulders as Atlas did—whether they crop up far away or just within ourselves. Or, as the judgement goes, he who heralds them will also be held responsible for them.

When gifts of human intellect and the ability to cognise the world were profaned by communists in Hungary for half a century, we still had some grounds to believe that GEORGE LUKÁCS, making a mockery of a thinker's talent in his *The Destruction of Reason*, would scarcely survive his comrades' self-closing Bolshevism. For it was a work that directly translated all ideas and values to the language of a dogmatically relentless Messianism, founded on belief in the proletarian world-revolution, only to banish anything they could not make use of as an 'irrationalistic' perversion, a monster.¹ And here emerges a rather paradoxical thought: encumbered with the twofold burden of the common European past, that is, the painful experience of the red and the brown dictatorships of the 20th century, we now seem to be heading straight towards an age once again suspiciously controlled by ideologies,² when responsibility for (and even the sinfulness of) perceptions, thoughts and conceptualisations, quite harmless in themselves, is again raised—this time by the overseas flagship of the scarcely ended Cold War as a dogmatic consequence of doctrinarian liberalism, cultivated almost in a way that substitutes for old-time religion.³

¹ With reference to Georg Lukács' *Die Zerstörung der Vernunft* (Berlin: Aufbau-Verlag 1954) 692 pp., Tibor Löffler—'Carl Schmitt konzervatív állam- és jogbölcselete' [Carl Schmitt's conservative philosophy of state and law] *Valóság* XXXVII (1994) 11, pp. 99–104 at p. 99—mentions a kind of "calvary in the history of ideas" encountered. See also, for the treatment of Schmitt in *Die Zerstörung* by Lukács, the present author's *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985, 21998) 193 pp., para. 3.1 at pp. 59 et seq.

² Cf., e.g., by the author—upon reviewing Paul F. Campos' *Jurismania The Madness of American Law* (New York & Oxford: Oxford University Press 1998) xi + 198 pp. —, 'Joguralom? Jogmánia? Ésszerűség s anarchia határmezsgyéjén Amerikában' [Rule of law? Mania of law? On the boundary between rationality and anarchy in America] *Valóság* XLIV (2002) 9, pp. 1–10.

³ E.g., at the closing session of Workshop I on 26 October, 2002, discussing the dilemma of "Legal Culture vs. Legal Tradition" within the Conference on Epistemology and Methodology of Comparative Law in the Light of European Integration organised by the European Academy of Legal Theory in Brussels, Chairman H. Patrick Glenn (of McGill University, Montreal, awarded the Grand Prize by the International Academy for Comparative Law, for his *Legal Traditions of the World Sustainable Diversity in Law* [Oxford: Oxford University Press 2000] xxiv + 371 pp.) claimed in his conclusion that legal 'culture' is not only derived as a concept but may turn to be "dangerous" as well. Both expressive of the particularism of German Romanticism in resistance to the universalism of the French Enlightenment and exclusive, it was said to be mostly preoccupied only with what differs. This is why he claimed he opted for 'tradition' in law as a contextualising term instead of anything burdened with a negative charge. Or, as argumentation cut short in an American way can hold, either we accept traditions in mutuality without cultural exclusivity or Bosnia and Lebanon will be the consequence.

(*SCHMITT in Facts*) It is generally known about CARL SCHMITT that he experienced the national socialist takeover at the age of 45, the peak of his professorial career.⁴ With rather limited possibilities to choose, if at all, from basically bad alternatives, his reaction was typical of the intellectual, official and financial circles that were significant then and there. Neither his origins, nor his values, nor his commitment to the advance of his nation pre-destined him to an immediate, principled and uncompromising confrontation. He belonged to those driven to deep reflection upon, and thorough consideration of, the meaning of the developments of the first few decades of the 20th century—namely, the shame of the German war defeat, followed by the widespread feeling of total helplessness that lasted one and a half decades, with the loss of direction of the Weimar democracy offering no sensible perspective—, experiencing the brutal events of the moment as one of the possible ways out of the continued crisis, that is, as a choice by no means desirable or attractive, yet momentarily suitable to break the standstill. The period during which he was close to the new power lasted no more than a few years, but furnished a basis for accusations that often overshadowed everything else.⁵ Having lived ninety-seven years, paradoxically, during the overall time spanning from his professorial appointment to his human collapse at a late age (following the loss of his wife and then of his only child) he could devote scarcely three decades to regular and intensive scholarly work. Of this period it is, all in all, three years upon which his stigmatisation as a *Kronjurist*⁶ was founded, which led to retaliation by the Americans and then the Nuremberg arrest by the allies for two years.

(*SCHMITT and KELSEN*) Given such a sinister background, may we embark upon theorising at all? When we cannot even be sure whether or not SCHMITT should be considered a satanic embodiment of totalitarian immorality or simply the herald of the imminent bankruptcy of legal positivism and political liberalism?⁷ As is well known, legal positivism and the liberal conception of the state were already becoming problematic then and there. Taking into consideration their historical development and outcome at the time, SCHMITT may have rightly challenged their theoretical defensibility by inquiring into their very social foundations and, especially, cultural, psychological and anthropological presuppositions. However, what is really at stake here is not simply scepticism as a scholarly stand painstakingly asserted by SCHMITT but the nature of SCHMITT's dilemma itself. For, whether I understand SCHMITT's theoretical interest either as a posterior foundation and

⁴ As a description by a contemporary émigré, see Karl Loewenstein 'Dictatorship and the German Constitution: 1933–1937' *The University of Chicago Law Review* 4 (1936) 1, pp. 537–574.

⁵ Cf., e.g., Peter Caldwell 'National Socialism and Constitutional Law: Carl Schmitt, Otto Koellreutter, and the Debate over the Nature of the Nazi State, 1933–1937' *Cardozo Law Review* 16 (1994) 2, pp. 399–427 as well as, by Bernd Rüthers, *Entartetes Recht Rechtslehren und Kronjuristen im Dritten Reich*, 2., verbesserte Aufl. (München: Beck 1988) 230 pp. and Carl Schmitt *im Dritten Reich* 2., erweiterte Aufl. (München: Beck 1990) 162 pp.

⁶ Waldemar Gurian 'Carl Schmitt, Kronjurist des dritten Reich' *Deutsche Briefe* [ed. Otto Knab for emigree German Catholics in Switzerland] I (October 26, 1934), pp. 52–54, quoted by Dominique Ségald 'Présentation' in Carl Schmitt *Les trois types de pensée juridique* (Paris: Presses Universitaires de France 1995), p. 27 [Droit, éthique, société].

⁷ Instead of crisis or bankruptcy, today's literature—e.g., Gabriel Guillén Kalle *Carl Schmitt en España La frontera entre lo Político y lo Jurídico* (Madrid: G. Guillén 1996) 228 pp. in p. 213—prefers to report rather on "deficiencies".

justification of his *a limine* rejection of legal positivism and constitutional liberalism or as a search for correction having experienced their failure, I see here political accusation rather than genuine theorising aimed at responding on the merits to the scholarly demands and historico-philosophical perspective of SCHMITT's systematic oeuvre.

Limiting the immense domain of issues he raised to mere legal philosophising alone, perceiving a kind of reaction - that is, a powerful *polemical counterweight*-in SCHMITT's oeuvre may offer an opportunity to start theorising *in medias res*. Expressed in words of a conciseness classical by now: "Would SCHMITT have been a »decisionist« had KELSEN not been »normativist«? Nobody shall ever know; but it is clearly the case that SCHMITT did counter KELSEN at every point [...]."⁸ Well, obviously, the situation and its context are certainly not irrelevant to the way debates are conducted;⁹ moreover, they may downright encourage conceptualisation in artificially contrasted *counter-notions* as well,¹⁰ while the reasons for the interest having emerged and its direction been determined may probably be found in SCHMITT's personal comprehension of the present as having polarising tendencies ("friend vs. enemy") within it.¹¹

SCHMITT might have interpreted the KELSENian path leading through a dozen books from 1911 on to the synthesis undertaken in his *Pure Theory of Law* in 1934¹² as a call to strike just an opposite path in counterbalance, clearly marking out the confines and limits of the KELSENian response. After all, KELSEN's self-closing in the exclusivity of legal positivism and in the logical perfection achieved in his *Pure Theory* (excluding any objection to his inferring and conferring validity through a mostly linguistico-logical derivation) could, not without any justification, abhor him. Likewise, his rejection from the outset of the idea that anyone should take any social-historical responsibility under the aegis of the rule of the formal homogeneity of law and of the deontology of the lawyers' profession, as well as the value-relativism (equalling total indifference) and the moment of discretion he found to have yet been concealed by the apparent logicity of normative inference in any legal decision (by no means encountering or generating any kind of existential responsibility in real life), could have rightly compelled him to formulate his own point of view with sharp rigour.

He might well have felt that the KELSENian path of tearing law as a rule out of the law's very social contexture by elevating it into a linguistically constructed imperative, wedged into real-life processes as an artificial objectification, could scarcely be anything

⁸ Giovanni Sartori 'The Essence of the Political in Carl Schmitt' *Journal of Theoretical Politics* I (1989) 1, pp. 63–75.

⁹ The *Enzyklopädie Brockhaus* (1942) characterises Schmitt's theory in a reserved tone as "situational [situationsgemäß] jurisprudence". See Ingo Müller *Hitler's Justice The Courts of the Third Reich* [Furchtbare Juristen: Die unbewältigte Vergangenheit unserer Justiz (München: Kindler Verlag 1987)] trans. Deborah Lucas Schneider (London: I. B. Tauris & Co 1991) xviii + 349 pp. at p. 42.

¹⁰ Schmitt himself refers to the significance of *Gegenbegriffsbildung* in polemic situations as a "counter-concept" suitable for the contrasted exposition of one's own stand in his Hugo Preuß *Sein Staatsbegriff und seine Stellung in der deutschen Staatslehre* (Tübingen: Mohr 1930) 34 pp. [Recht und Staat in Geschichte und Gegenwart 72], p. 1.

¹¹ E.g., Carl Schmitt *Der Begriff des Politischen mit einer Rede über das Zeitalter der Neutralisierungen und Entpolitisierungen* (München: Duncker & Humblot 1932) 81 pp. [Wissenschaftliche Abhandlungen und Reden zur Philosophie, Politik und Geistesgeschichte 10]. For the background, cf. Sándor Pethő *Norma és kivétel Carl Schmitt útja a totális állam felé* [Norm and exception: Schmitt's road towards the total state] (Budapest: MTA Filozófiai Intézete 1993) 256 pp. [Doxa könyvek].

¹² Rudolf Aladár Métall 'Bibliographie der Reinen Rechtslehre' in [Separatabdruck aus] Hans Kelsen *Reine Rechtslehre Einleitung in die rechtswissenschaftliche Problematik* (Leipzig & Wien: Franz Deuticke 1934), pp. 1–8.

more than the self-deceit of a heathen act of setting up a substitute to God, leading nowhere. For law cannot be, either as a mere rule or as a linguistic-logical reference through an aggregate of rules, the source of its own justification, sense and aim, foundation and limitation, at the same time. In his view, taking law simply as a rule of the game purports only to endow the individualism of liberalism, disruptive to any kind of organic community, with a latent ideological justification, which rules out authority as such from man's life, while also depriving the state of its role to define the once unchallengeable frameworks of social existence, and reducing it to serve merely as a scene for the fights waged by rivaling groups to control the power within the boundaries of any given state.

Under such a purist approach, any material aim, that is, any goal and substantive purpose that state and law have emerged at all in human history in order to realise, becomes completely irrelevant and utterly incidental. It would be as if, when people associate, establishing institutions once and now, it were not the survival (re-production and re-generation) of (first, familial, then, tribal or national, etc.) communities that is at stake but the mere replacement of disorganised violence by organised compulsion amongst individuals and their incidental groupings.

SCHMITT interpreted the exclusive formalism of KELSEN's normativism to have been born out of the widespread admiration of the Enlightenment and the myth of rationalism¹³ that, while relying on some of the structural elements of Catholic theology (starting out from the presupposition of a basic norm, to be broken down hierarchically upon reckoning with an omnipotent legislator who predetermines the available space by filling it discretionarily), avails itself of an intellectual scheme, characteristic of some Deist worldviews, namely, reproduction of some totality with the required balance, through its own spontaneous – autopoietical - operation, upon the basis of given material laws and operational regulations. SCHMITT traced the predisposition of liberalism to “conversationalism” back to similar roots - that is, its tendency to substitute discussion for decision-making¹⁴ and, thereby, also to resign from any materiality, proper aim or mission (by fulfilling any genuine duty), beyond observing the game's rules, and setting the limits of what can be discussed.

However, realising the significance of the historical moment and the responsibility to be borne for its shaping then and there, he considered this intellectuality to be deliberate destruction, moreover, pure treason, when times are peripeteic and critical for the nation, only disguised by the unbiased methodological cover of *formalism*. Or, if order conforming to the Weimar Constitution (born itself from the forced conditions following defeat in war) results in nothing but political confrontation without any prospect of advancement (blocking the state machinery from effective functioning)—he argued in opposition to KELSEN at the state court—, then this exceptional situation, brought about by such a total

¹³ Schmitt criticises Kelsen's normativism as the embodiment of “rule-of-law rationalism” in the debate on Hermann Heller's ‘Der Begriff des Gesetzes in der Reichsverfassung’ in *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer* 4: *Verhandlungen der Tagung der deutschen Staatsrechtslehrer zu München am 24. und 25. März 1927* (Berlin & Leipzig: de Gruyter 1928), *Diskussionsreden*, pp. 168–189.

¹⁴ Juan Donoso Cortés called its social agent *la clase discutidora*. Tradition traces it back to the commentaries by Xenophon, in which—aware of the destructive nature of both public disorder [*taraxē*] and irresolution [*akrisia*]—the wisdom of statesmen is identified with the ability to discern between *polemikon* and *presbeia* [i.e., the knowledge of distinguishing when to fight against and when to mediate between].

impasse, invests the executive with sovereign power to decide. Or, a *decision* has to be made at last to avoid *chaos*, and this is the very moment in which the political comes openly to the fore, as law is emptied with no further reserve, for it cannot offer any specific guidance any longer. SCHMITT's participation in the debate¹⁵ also helped him to formulate a personal stand,¹⁶ with his theoretical recognition marking a turning point.¹⁷

(*On Bordering Conditions*) Well, I shall raise a preliminary question: *borderline situations* may, though, end dramatically - with the fall of a republic or someone having apoplexy or heart failure -, but where and when does it become visible how our social organisation or human organism functions? In everyday life? Or in exceptional borderline situations? What is our partnership like in fact? Is this to be deemed during our honeymoons and the luckily problem-free everyday? Or, rather, in the way we have preserved our affection towards one another despite the tearing test of our most difficult conflicts? Well, in the circumstance that KELSEN saw no problem here, SCHMITT seemed to find the routine of normality (no longer reflected upon because established practices do not call for particular justification), that is, the inertia and self-propelling of logism, conventionalised in and by practice. In SCHMITT's understanding, KELSEN's position was acceptable as a status-description but by no means as an explanation and even less as a specification of final principles. Therefore, the question of what potential can be mobilised in one's organism does manifest itself in the latter's ability to respond differentiatedly to varying crisis situations, and not in its problem-free everyday operation. And, providing that the limits, potentialities and final criteria can only be defined by testing through exceptions, this very limiting testing will also be the factor to finally define the operation

¹⁵ See Carl Schmitt *Der Hüter der Verfassung* (Berlin: Duncker & Humblot 1931) vi + 159 pp. [Beiträge zum öffentlichen Recht der Gegenwart 1], on the one hand, and, from Hans Kelsen, 'Wer soll der Hüter der Verfassung sein?' *Die Justiz* 6 (1930–31), pp. 576–628 {& (Berlin-Grunewald: B. Rotschild 1931) 56 pp.} as well as 'Das Urteil des Staatsgerichtshof vom 25. Oktober 1932' *Die Justiz* 8 (1932–33), pp. 65–91, on the other. Cf. also C. M. Herrera 'La polémica Schmitt–Kelsen sobre el guardián de la Constitución' R.E.P. (Octubre–diciembre 1994), No. 86, pp. 195–227 as well as, by David Dyzenhaus, 'Legal Theory in the Collapse of Weimar: Contemporary Lessons?' *American Political Science Review* 91 (1997) 1, pp. 121–134 and *Legality and Legitimacy* Carl Schmitt, Hans Kelsen and Herman Heller in Weimar (Oxford: Clarendon Press 1997) xiv + 283 pp., furthermore John P. MacCormick 'The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers' in *Law as Politics* Carl Schmitt's Critique of Liberalism, ed. David Dyzenhaus (Durham & London: Duke University Press 1998), pp. 217–251.

¹⁶ "The stab with a dagger in 1918, the knife with which Leviathan is being cut to tiny pieces, the poisoned weapon of legality used by parties to stab each other in the back, the knife of those controlling power and law in his day, into which he wanted to avoid running—as their one-time dialogue is recalled by his conversation partner[...]. The dagger as a metaphor of civil war! This was the occasion for him to cite his beloved Donoso Cortes: »If I have to choose between the dictatorship of the dagger and the sword, then I shall prefer the dictatorship of the sword.«" Nicolaus Sombart *Jugend in Berlin 1933–1943, Ein Bericht, erw. und überarb. Aufl.* (Frankfurt am Main: Fischer Taschenbuch Verlag 1991) 301 pp. [Fischer Taschenbücher 10526] on p. 258. ["Der Dolchstoß von 1918, das Messer, mit dem der Leviathan in kleine Stücke geschnitten wird, die vergiftete Waffe der Legalität, die eine Partei der anderen in den Rücken stößt, das Messer der Macht- und Rechthaber seines Zeitalters, in das er nicht laufen wollte [...]. Der Dolch als Metapher des Bürgerkrieges! Das war der Moment, um seinen geliebten Donoso Cortes zu zitieren: »Vor die Wahl gestellt, zwischen der Diktatur des Dolches und der Diktatur des Säbels zu wählen, wähle ich die Diktatur des Säbels.«"]

¹⁷ Carl Schmitt *Politische Theologie Vier Kapitel zur Lehre von der Souveränität* (München & Leipzig: Duncker & Humblot 1922) 56 pp.

in question.¹⁸ Or, advancing one step further in the store of examples (arriving on a terrain more familiar to us), the question of what in fact is an ‘easy case’ within everyday routine can only be answered by the responses we have hardly earned, yet give to ‘hard cases’.¹⁹ The attention focussing on borderline situations in exceptionality and the discretion involved in such a decision mark a border in the sense in which and with the effect by which JOHN RAWLS confronted principles in borderline situations (to ascertain whether or not principles may cover them), in order to describe principles in reflective equilibrium, that is, to define what these principles exactly denote in the final account.²⁰

As far as the law’s operation is concerned, speaking metaphorically, law can be characterised as functioning smoothly (by the force of its given linguistic-logical context as driven by the inertia of a motion once set in play), (re)generating itself by performing the necessary applications—as long as it does not encounter any obstacle, i.e., any situation diverted from the routine to require a particular, individual decision. Well, according to SCHMITT, this is the sense in which KELSEN’s allegation is correct. However, once the source of the motive force is exhausted or any unforeseen obstacle emerges, a new impulse is needed. Or, otherwise speaking, once the original conditions are changed or a new situation arises, a specific decision has to be taken. Methodologically, this is to say that the very nature of law unfolds itself in its continuity and ability to regenerate. And, in this more comprehensive respect, SCHMITT’s position seems to transcend KELSEN’s, moreover, to complement it. Accordingly, the operation of law is a self-(re)generating automatism of the formalism described by normativism, supplemented at times, if necessary, by the autonomy of a sovereign (and, in as much, also political) decision to be made in a space free of law formalistically, setting by such an actualisation new boundaries for the law (and thereby re-conventionalising its meaning) in an environment altered, as compared to the one originally conceived.

The question arises: is this formula, based on a slightly mechanical cumulation of the partial results, the only thinkable answer? Obviously not. Moreover, not even SCHMITT was of such a simplistic opinion.

¹⁸ All this laid the foundations of a separate topic of interest especially in continental scholarship. See, e.g., Ernst Forsthoff ‘Über Maßnahmegesetze’ in *Forschungen und Berichte aus dem öffentlichen Recht Gedächtnisschrift für Walter Jellinek*, 12. Juli 1855 – 9. Juni 1955, hrsg. Otto Bachof (München: Izog 1955), pp. 221–236 {reprinted in his *Rechtsstaat im Wandel Verfassungsrechtliche Abhandlungen, 1950–1964* (Stuttgart: Kohlhammer 1964), pp. 78–98 [Veröffentlichungen des Instituts für Staatslehre und Politik e.V. Mainz, 6]}; Peter Schneider *Ausnahmestand und Norm Eine Studie zur Rechtslehre von Carl Schmitt* (Stuttgart: Deutsche Verlags-Anstalt 1957) 295 pp. [Quellen und Darstellungen zur Zeitgeschichte 1]; Christian-Friedrich Menger ‘Das Gesetz als Norm und Maßnahme’ in *Das Gesetz als Norm und Maßnahme* hrsg. Christian-Friedrich Menger (Berlin: de Gruyter 1957), pp. 3–34 [Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 15]; Konrad Huber *Maßnahmegesetz und Rechtsgesetz Eine Studie zum rechtsstaatlichen Gesetzesbegriff* (Berlin: Duncker & Humblot 1963) 182 pp.; German Gomez Orfanel *Exception y normalidad en el pensamiento de Carl Schmitt* (Madrid: Centro de Estudios Constitucionales 1986) xv + 307 pp. [El derecho y el justicia 5], especially part II, pp. 153–188.

¹⁹ Cf., by the author, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris], para. 5.1.2, pp. 162–171.

²⁰ To the methodological proposal of reflective equilibrium—by John Rawls *A Theory of Justice* (Cambridge, Mass.: The Belknap Press of the Harvard University Press 1971) xv + 607 pp. at pp. 20–21, 48–51 and 120, with reference to Nelson Goodman’s *Fact, Fiction, and Forecast* (Cambridge, Mass.: Harvard University Press 1955) 126 pp. at pp. 65–68—, cf., by the author, *Theory of the Judicial Process The Establishment of Facts* (Budapest: Akadémiai Kiadó 1995) vii + 249 pp., p. 110. As a case-study applied to the topic of social care, cf. Norman Daniels *Justice and Justification Reflective Equilibrium in Theory and Practice* (Cambridge: Cambridge University Press 1996) xiii + 365 pp. [Cambridge Studies in Philosophy and Public Policy].

The conclusion as reached to this point can be depicted as follows below:

operation of law = KELSEN + SCHMITT

which can be synthesised in the synoptic formula

operation of law = KELSEN = SCHMITT
SCHMITT

Or, to sum up, that which determines in the final analysis will be the agent determining under limiting conditions. Hermeneutics, including the dilemma of either ‘determination of meaning’ or ‘meaning getting determined’,²¹ predicts that I may reasonably endeavour to channel legal problem-solving by filtering it through given paths of reasoning as ascribed to facts (generalised and re-conceptualised from brute facts) that may constitute a case in law and then also qualify the latter as one of the linguistico-logically generated cases of some conceptually established institution, so that eventually legal problem-solving (as conceptualised by principles, rules and other standards of practice, implementing values and policies) may build into an increasingly coherent jurisprudence. Yet, despite the official terms of the play, instead of making my judgement (as a declaration of what “the law” is), determined by ‘law’ and ‘facts’, as a conclusion from them, I can only transform the multifaceted complexity and ambivalence of real-life situations (with contradictions that may emerge as a function of equally feasible varying conceptualisations and through a number of inevitable logical jumps) into a conclusion in the law’s binary and dichotomic language, asserted with no conditionality and no dialectics of sublation available any longer.²²

(With KELSEN in Transubstantiation) As decades have passed since the personal controversy between KELSEN and SCHMITT in Weimar, it is not genuinely relevant for posterity to investigate whether or not the two one-time companions, with differing family backgrounds and traditions, and differing historical aspirations, values and commitments (with SCHMITT having personally contributed to the dismissal of KELSEN as a university professor, although this was impending in the Nazi era anyway), actually referred to each other in their respective oeuvre from the time of the HITLERian takeover on, and if they did, in what depth and to what extent. Their paths and emphases, their sensitivities and inspirations divided finally, depending on the way they understood and theorised about the crisis of Weimar democracy. True, they went on their paths separately but without having left everything behind. Just to the contrary. True, they may have gone on, but only with oeuvres unchangingly defined by the survival of the original dilemma, of the search for the latter’s consequent theoretical solution, with a kind of continued attention to their one-time selves and subsequent reactions.

²¹ Cf. Chad’m Perelman ‘Avoir un sens et donner un sens’ *Logique et Analyse* (1962), No. 5, pp. 235–250.

²² Cf., by the author, *Theory of the Judicial Process* [note 20], passim and ‘What is to Come after Legal Positivism are over?’ in *Theorie des Rechts und der Gesellschaft Festschrift für Werner Krawietz zum 70. Geburtstag*, hrsg. Manuel Atienza, Enrico Pattaro, Martin Schulte, Boris Topornin, Dieter Wyduckel (Berlin: Duncker & Humblot 2003), pp. 657–676.

This is all the more remarkable if we consider that the most significant theoretical rectification was made by KELSEN, whose course in life was not burdened with political dramas and radical turning points and who in person had not been forced to do penance. For (1) in 1925, he declared that “the act of law-application is just as much a legal enactment, law-making, establishment of law, as is the legislative act; either of them is just one of the two steps in the process of creating law”,²³ although he had stated less than a decade before this was “a great mystery” in theoretical law-explanation, underivable from and untraceable to practically anything.²⁴ Then, (2) in 1934, he re-formulated the theory of gradation adopted from ADOLF MERKL in 1925, in accordance with the new realisation that “[a]pplication of law is at the same time creation of law. [...] [E]very legal act is at the same time the application of a higher norm and the creation of a lower norm” - that is, by realising that law-making and law-applying do actually overlap at any step of gradation, as seen from opposite directions.²⁵ A decade later, (3) in the re-formulation of the Pure Theory of Law in 1946 and, then, in 1960,²⁶ more and more definitely through inverting the logic of his early investigations, he qualified the constitutivity of the official (i.e., exclusive and irreplaceably unique) ‘ascertainment’ of fact and norm as the exclusive product of the competent judicial organ to be a criterion of what is from within the law; moreover, (4) he even emphasised the unchallengeability of the legal force of the procedurally final ascertainment, which, by the way, reversed his entire reconstructive play of normative derivation and conclusion.²⁷ Well - while remaining aware of the fact that (5) KELSEN remained at fault until his death for holding a theory of meaning and a proper legal logic that supported the claim of his Pure Theory of Law (with the admission that all his repeated attempts at formulating either of them were eventually accompanied

²³ Hans Kelsen *Allgemeine Staatslehre* (Berlin: J. Springer 1925) xvi + 433 pp. [Enzyklopädie der Rechts- und Staatswissenschaften 23], pp. 233–234.

²⁴ “[J]uristically, it is a mystery. [...] This is the great mystery of the law and State [...]” Hans Kelsen *Hauptprobleme der Staatrechtslehre entwickelt aus der Lehre vom Rechtsatz* (Tübingen: Mohr 1911) xxvii + 709 pp. in pp. 334 and, especially, 441. The question of conceptual functions is raised here, whether or not “exceptionality” at Schmitt is what “mystery” has once been with Kelsen, namely, that what is termed today as irreducible “logical jump” and “conceptual transformation”. For the last terms as introduced by Aleksander Peczenik—‘Non-equivalent Transformations and the Law’ in *Reasoning on Legal Reasoning* ed. Aleksander Peczenik & Jyrki Uusitalo (Vammala: Vammalan Kirjapaino Oy 1979), pp. 47–64 [The Society of Finnish Lawyers Publications, Group D, No. 6] and ‘Formalism, Rule-scepticism and Juristic Operationism’ [manuscript]—, cf., by the author, *Theory of the Judicial Process* [note 20], paras 3.4–5.

²⁵ Hans Kelsen *Pure Theory of Law* [Reine Rechtslehre, 1934, ch. V, para. 31/f] trans. from the 2nd ed. [1960] Max Knight (Berkeley: University of California Press 1967) x + 356 pp. at p. 234. “This definition, however, can never be complete. [...] [T]he higher-grade norm, in relation to the act executing it [...], has always the character of a framework to be filled in by the former.” Hans Kelsen *Reine Rechtslehre Einleitung in die rechtswissenschaftliche Problematik* (Leipzig & Wien: Deuticke 1934) xiv + 236 pp., ch. VI, para. 33, p. 91.

²⁶ Hans Kelsen, *General Theory of Law and State* trans. Anders Wedberg (Cambridge, Mass.: Harvard University Press 1946) xxxiii + 516 pp. [20th Century Legal Philosophy Series 1] and *Reine Rechtslehre Zweite, vollständig neu bearbeitete und erweiterte Auflage* (Wien: Deuticke Verlag 1960) 534 pp.

²⁷ For the context, cf., by the author, ‘Kelsen’s Theory of Law-application: Evolution, Ambiguities, Open Questions’ *Acta Juridica Hungarica* 36 (1994) 1–2, pp. 3–27 {& ‘Hans Kelsens Rechtsanwendungslehre: Entwicklung, Mehrdeutigkeiten, offene Probleme, Perspektiven’ *Archiv für Rechts- und Sozialphilosophie* LXXVI (1990) 3, pp. 348–366} and ‘A bécsi iskola’ [The Vienna School] in Chertes – Frivaldszky – Györfi – H. Szilágyi – Varga *Jogbölcselet XIX–XX. század: Előadások* [Lectures on 19th to 20th century legal philosophy] ed. Csaba Varga (Budapest 2002), ch. VII, pp. 60 et seq. [Bibliotheca Cathedrae Philosophiae Iuris et Rerum Politicarum Universitatis Catholicae de Petro Pázmány nominatae, Budapest].

by the realisation of failure as they only reached contradictions)²⁸ -, in the final account all this manoeuvring is in fact nothing else than the inclusion, as a final criterion channelling legal motion onto its proper track, of the underlying moment of a *decisio* into his world built upon the culture of norms. Of course, we may rightly regard the theoretical contents of such a factual act of the moment of *decisio* as pointing beyond pure decisionism, at least in a SCHMITTian sense.²⁹ On the other hand, certainly, what it becomes included in is no longer normativism either, at least in its earlier KELSENIAN sense.

(*Polarisation as the Path of Theoretical Development*) Eventually, the question of exactly what is may in its original meaning only be relevant to the history of ideas, in search of a solution. That is, it is only in a synthesis formed by ‘counter-concepts’³⁰ that the sublation of the constituting concepts is accomplished, gaining additional meaning through the duality inherent in the act of *Aufhebung*, in which there is no longer room for exclusivities; for the synthesis is born out of precisely the confrontation of counter-concepts, resulting in an entity not found either partially or totally in the original components. As is well known, counter-concepts are by no means simply various conceptual variables of an analytical idea but indications of the variety of the diverging paths of problem-solving, proper to different cultures of thinking.³¹ From now on, therefore, what may have been or appeared the same may truly be different, as having transcended their original notional context and exclusivity - they may have become indeed something else. Recalling the debate on legal inference in Germany a quarter of a century ago, I may be of the opinion that either subsumption or subordination is the case - notwithstanding the fact that I also have to be aware of the circumstance that these two are only valid as complemented by one another. In any case, they do not gain the recognition resulting from their confrontation either separately or in unity but through their being resolved (and, thereby, also dissolved) in a hermeneutical synthesis.³²

²⁸ First of all, Hans Kelsen *Allgemeine Theorie der Normen* hrsg. Kurt Ringhofer & Robert Walter (Wien: Manz 1979) xii + 362 pp.

²⁹ Legal sociology, cultural sociology and anthropology—with moral philosophy and social psychology in the background—may, of course, specify which kinds of normativity enter the space, freed of any positive (officially applicable) law.

³⁰ It is primarily Alf Ross—*Towards a Realistic Jurisprudence A Criticism of the Dualism in Law* (Copenhagen: Munksgaard 1945) 304 pp.—who founded a theory on this assumption.

³¹ Such a consciousness is reflected in the warning by Schmitt as early as in 1927, saying that once Kelsen wants to prevent jurisprudence from being controlled by rightist/leftist political forces, this at last only strengthens “the hope that the theory of the law of the state will become aware of its factual presuppositions and consciousness, and that it will therefore be better protected against one-sided party politics and leave behind its unfruitful and arbitrary logism.” Schmitt in Heller ‘Der Begriff des Gesetzes...’ [note 13], quoted by Clemens Jabloner ‘Hans Kelsen’ in *Weimar A Jurisprudence of Crisis*, ed. Arthur J. Jacobson & Bernhard Schlink (Berkeley, Los Angeles, London: University of California Press 2000), pp. 67–76 [Philosophy, Social Theory, and the Rule of Law], p. 72.

³² For the line of thought of Arthur Kaufmann—*Analogie und »Natur der Sache«* *Zugleich ein Beitrag zur Lehre vom Typus*, 2. verbesserte Aufl. (Heidelberg: Decker & Müller 1982) xiii + 88 pp. [Heidelberger Forum 12] and *Beiträge zur juristischen Hermeneutik sowie weitere rechtsphilosophische Abhandlungen* (Köln, etc.: Heymanns 1984) xii + 260 pp. {debated by Vilmos Peschka Appendix »A jog sajátosságához « *Tanulmányok* [Papers in appendix to the specificity of law] (Budapest: Közgazdasági és Jogi Könyvkiadó & MTA Állam- és Jogtudományi Intézete 1992) 170 pp. [Jog és jogtudomány 1]}—see, by the author, *Theory of the Judicial Process* [note 20], ch. 3, especially paras 3.6.1 and 3.9.

Or, in other words, they do not have meaning in and by themselves but they express a culture through their aggregate, which provides an exclusive medium for them to be construed at all.

This, in turn, leads us to conclude that, properly speaking, perpetual questions of legal philosophy are at stake here, in which neither Kelsen's one-sidedness, nor Schmitt's trans-polarising rectification (under dramatic conditions in a de-humanising environment) is the first or the last response.

Their conflict is just a humble moment in the long course of human pondering, a memorably fine piece of scholarly reflection.³³

For these two thinkers confronted each other with exceptional theoretical strength and determination amidst historical tragedies of peoples, and it is exactly this that gives additional meaning to our present-day interest in the ways their views were formed.³⁴

³³ "A judicial decision is correct today if it may be assumed that another judge would have decided in the same way. Here »another judge« refers to the empirical type of the modern, legally learned lawyer. [...] The fact that a decision's »conformity to statute« is no longer identified with its correctness, does not mean abandoning any objective standard and leaving everything up to the subjectivity of the judge. Thus a judge [...] must strive to ensure that his decision corresponds to what is actually practiced. [...] A judicial decision is correct if it is foreseeable and predictable." Carl Schmitt *Gesetz und Urteil Eine Untersuchung zum Problem der Rechtspraxis* (Berlin: Otto Liebmann 1912) vi + 129 pp. on p. 64. Rediscovering similar methodological insights in other cultures under differing circumstances, David Dyzenhaus — 'Holmes and Carl Schmitt: An Unlikely Pair?' *Brooklyn Law Review* 63 (1997) 1, pp. 165–188 and 'Why Carl Schmitt? Introduction' in *Law as Politics* [note 15], pp. 1–20— inquires into both its early and late replica—spanning from the debates between Jeremy Bentham and John Austin, via the ones between Oliver Wendell Holmes and Karl Llewellyn half a century later, up to the ones between Herbert Lionel Adolphus Hart and Ronald M. Dworkin another half a century later—, having resulted in a confrontation in Anglo–American jurisprudence only comparable to Schmitt's criticism upon Kelsen. Moreover, all such widely known Civil Law and Common Law presuppositions can also be fully embedded in the dual allegation summarised by Schmitt's present-day critic [William E. Scheuerman 'Legal Indeterminacy and the Origins of Nazi Legal Thought: The Case of Carl Schmitt' *History of Political Thought* 17 (1996) 4, pp. 571–590]; namely that (1) discretion inevitably results from the eventual indeterminacy of the law and that (2) only homogeneity of judicial practice can guarantee foreseeability and security. Therefore, it is worthwhile to notice that Schmitt had arrived at such ultimate conclusions as early as in his very first book, while Kelsen only arrived at them half a century later, towards the end of his life. The permanence of practice (ad 2 above) is, however, a normative and factual concept at the same time, displaying the same Janus-faced quality in the law's definition (ad 1 above) as the moment of *decisio* does in Kelsen's norm-logism as transcended by Schmitt. Or, further parallels can also be searched for between the two thinkers, first of all with respect to the separability of *Sein* and *Sollen* (in which Schmitt's inherent anti-formalism resulted in a deeper contentual sensitivity from the beginning).

³⁴ The present paper is intended to focus on one single aspect of Schmitt's oeuvre that has been throughly intensely debated, namely the promise of a correction of (as a 'counter-challenge' to the challenge posed by) Kelsen's Pure Theory of Law with its internal consequentiality as an explanation of the operation of law—although that which Schmitt finally provided was by no means an elaborated theory in counter-conceptualisation. Or, my concern has been just a fragmentary attempt to test some methodological insights from his oeuvre, without touching upon comprehensive evaluations. For these latter, cf., e.g., Eleonore Sterling 'Studie über Hans Kelsen und Carl Schmitt' *Archiv für Rechts- und Sozialphilosophie* XLVII (1961), pp. 569–586; Hubert Rottleuthner 'Substantieller Deizisionismus: Zur Funktion der Rechtsphilosophie im Nationalsozialismus', pp. 20–35 & Volker Neumann 'Vom Entscheidungs- zum Ordnungdenken: Carl Schmitts Rechts- und Staatstheorie in der nationalsozialistischen Herausforderung', pp. 153–162, both in *Recht, Rechtsphilosophie und Nationalsozialismus* hrsg. Hubert Rottleuthner (Wiesbaden: Steiner 1983) [ARSP Beiheft, 18]; André Dorémus 'Esquisse pour une mise en perspective des rapports entre Carl Schmitt et le régime hitlérien' in *La »révolution conservatrice« dans l'Allemagne de Weimar* dir. Louis Dupeux (Paris: Kimé 1992), pp. 302–314 and especially p. 308, with a view also to "legal personalism [potesta directa]".

And as far as society's ability to be humanised through scholarship is still an issue for us, we have to ponder over such debates, bearing in mind as well the lessons derived from the disputable pieces of the past.³⁵

For what is composed of and termed - when described by MAX WEBER - as modern state and modern formal law is a historical continuum since the birth of our modern world,³⁶ and we have to face its specific (even if instrumental) problems as standing ones calling for renewed formulation both in its domestic areas and internationalised extensions as well.³⁷

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³⁵ Cf. also Paul Gottfried Carl Schmitt (London: The Claridge Press 1990) 72 pp. [Thinkers of our Time]; Ian Ward Law, Philosophy and National Socialism Heidegger, Schmitt and Radbruch in Context (Bern, etc.: Peter Lang 1992) 267 pp., especially Section C, chs. 7 and 8; *Estudios sobre Carl Schmitt* coord. Dalmacio Negro Pavón (Madrid: Veintiuno 1996) 486 pp.

³⁶ Cf., by the author, 'Moderne Staatlichkeit und modernes formales Rechts' *Acta Juridica Academiae Scientiarum Hungaricae* 26 (1984) 1–2, pp. 235–241 and 'Varieties of Law and the Rule of Law' *Archiv für Rechts- und Sozialphilosophie* 82 (1996) 1, pp. 61–72 {reprinted as 'The Basic Settings of Modern Formal Law' in *European Legal Cultures* ed. Volkmar Gessner, Armin Hoeland & Csaba Varga (Aldershot, Brookfield USA, Singapore, Sydney: Dartmouth 1996), pp. 89–103 [Tempus Textbook Series on European Law and European Legal Cultures 1]}.

³⁷ Cf., by the author, 'Legal Theorising – An Unrecognised Need for Practicing the European Law' *Acta Juridica Hungarica* 50 (2009) 4, pp. 415–458.

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