Change of Paradigms in Legal Reconstruction
(Carl Schmitt and the Temptation to Finally Reach a Synthesis)*

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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 understanding or just to escape to mainstream-driven mediocrity, to assume the fate of one's community or to long for exile in isolation is equally dangerous.

What should an Anna Akhmatova, a Hendrik Höfgen or even a Carl Schmitt do if destined to come to being just there and then and not elsewhere at another time? Should the individual become resigned to swimming with the stream, with own personality suppressed as assimilated to the surrounding average? Or should he/she opt for becoming 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 this one to manifest itself. Of course, this may be coloured by the context of the age, endowing it

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* I affectionately dedicate this paper in felicitation of Professor *Jes Bjarup* whose motivation to debate, critical view and professional rigour have certainly not decreased since we got to know each other during my visit at Århus a quarter of a century ago. It is only the immense body of his arguments and the scholarly experience of his life spent in personal reflection of theories that have become richer and ever growingly profound, undertaking also the exploration of ultimate questions. I have learnt a lot from him in understanding and respect to Scandinavian realism as a fertilising ground of complexity, in which raising questions may itself point to trends and diversify theoretical issues. Our interest in researching the nature of legal processes developed in parallel by chance, be it the testing of either Kripke's or Luhmann's conceptualisation or problem-centred re-consideration. It has ever been exemplary for me how he started already at an earlier time combining legal sensitivity with readiness to philosophical generalisation, preserving the law's irreplaceably specific place and compound (con)texture, not necessarily traceable back to one single principle in the vast domain of the humanities. It is due to exceptional professorial merits owing to which he may have attained a genuinely unique role as a thinker not only in his Nordic homelands but in the profession of our entire global village as well.

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 problemlessness, comprehend others' hunger for truth, who may struggle just for personal or community survival in dramatic situations, desperately balancing on a razor's edge? Or, can my irresponsibility, switching over to libertinist indifferentism or even anarchism (when childishly surfeited with the 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 thumbs down primitively, as an act of stamping 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 resolution for 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 *demiurge*s to make all the choices? To select from truths, thoughts, moreover, the ways of expressing them as well? 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 had – whether they crop up far away or just in ourselves. Or, as the judgement goes, he who heralds about them will also be held responsible for them.

When gifts of human intellect and the ability of cognising the world were profaned by communists in Hungary half a century long, we still had some ground to believe that George Lukács, making a mock of a thinker's talent in his *The Destruction of Reason*, might scarcely survive his comrades' self-closing bolshevism. For it was a work directly to translate all ideas and values to the language of a dogmatically relentless Messianism, founded on the belief in the proletarian world-revolution, only to banish anything they could not make use of as '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 in 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

1 With reference to Lukács', George *Die Zerstörung der Vernunft* [1945] (Neuwied am Rhein & Berlin-Spandau: Luchterhand 1962), Tibor Löffler – 'Carl Schmitt konzervatív állam- és jogbölcselete' [Carl Schmitt's conservative philosophy of state and law] *Valóság* XXXVII (1994) 11, 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, 1998), para. 3.1, p. 59 et seq.

2 *Cf*., e.g., from the author – upon reviewing P. F. Campos' *Jurismania: The Madness of American Law* (New York & Oxford: Oxford University Press 1998) xi + 198 p., '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, p. 1–10.

sinfulness of) perceptions, thoughts and conceptualisations, quite harmless in themselves, is raised again – this time by the overseas flagship of the scarcely ended cold war as a dogmatic consequence of doctrinarian liberalism, cultivated almost in a way substituting to old-time religion.[3]

It is usually 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 intellectual, official and financial circles, significant there and then. Neither his origin, 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 for one and a half decades, with 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 far not purposed or attractive, yet momentarily suitable to break the standstill. The period while he was close to the new power lasted not more than just a few years, which furnished a basis for accusations, often overshadowing everything else.[5] Having lived ninety-seven years, paradoxically, from 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, from which it is, all in all, three years upon which his stigmatisation as a *Kronjurist*[6] was founded, retaliated by American and then allied Nuremberg arrest for two years.

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3 E.g., at the closing session of the 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, author awarded the Grand Prize by the International Academy for Comparative Law, of *Legal Traditions of the World* Sustainable Diversity in Law [Oxford: Oxford University Press 2000]) claimed in his conclusion that legal 'culture' is not only derived 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 told 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 an argumentation cut short in an American way can hold, either we accept traditions in mutuality without cultural exclusivity or Bosnia and Lebanon will come out as a consequence.

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

5 *Cf*., e.g., Caldwell, Peter *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 (December 1994) 2, p. 399–427 as well as, from Rüthers, Bernd *Entartetes Recht*: *Rechtslehren und Kronjuristen im Dritten Reich*, 2., verbesserte Aufl. (München: Beck 1988) 230 p. and *Carl Schmitt im Dritten Reich* 2., erweiterte Aufl. (München: Beck 1990) 162 p.

6 Gurian, Waldemar *Carl Schmitt, Kronjurist des dritten Reich* Deutsche Briefe [ed. Otto Knab for emigree German Catholics in Switzerland] I (October 26, 1934), p. 52–54, quoted by

Given such a sinister background, may we embark on 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 known, legal positivism and the liberal conception of the state were to become problematic already then and there. Taking into consideration their historical development and outcome in 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 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 in 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 determined may probably be found in Schmitt's personal comprehension of the present with polarising tendencies ("friend vs. enemy") in it.[11]

Dominique Séglard '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., Guillén Kalle, Gabriel *Carl Schmitt en España La frontera entre lo Político y lo Jurídico* (Madrid: n.p. 1996), p. 213 – prefers to report rather on "deficiencies".

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

9 The *Enzyklopädie Brockhaus* (1942) characterises Schmitt's theory in a reserved tone as "situational [*situationsgemäß*] jurisprudence". See Müller, Ingo *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), 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), p. 1.

11 E.g., Schmitt, Carl *Der Begriff des Politischen* mit einer Rede über das Zeitalter der Neutralisierungen und Entpolitisierungen (München: Duncker & Humblot 1932) 81 p. [Wissenschaftliche Abhandlungen und Reden zur Philosophie, Politik und Geistesgeschiche 10]. For the background, *Cf*. Pethő, Sándor *Norma és kivétel Carl Schmitt útja a totális állam*

The Kelsenian path leading through a dozen of books from 1911 on to the synthesis undertaken in his Pure Theory of Law in 1934[12] might have been interpreted by Schmitt 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, repugn him. Likewise, rejecting from the outset any social-historical responsibility to be taken by anyone 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 to total indifference) and the moment of discretion he found to have yet been concealed by the apparent logicality of normative inference in any legal decision (by far not encountering or generating any kind of existential responsibility in real life) could rightly compel him to formulate his own point of view with sharp rigour.

He might well feel 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 in real-life processes as an artificial objectification, can scarcely be anything 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 by 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 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, also depriving the state of its role to define the once unchallengeable frameworks of social existence, reducing it to serve as a mere scene to the fights waged by any rivalling groups for controlling the power within the boundaries of any given state.

For such a purist approach, any material aim, that is, any goal and substantive purpose for the realisation of which state and law have at all emerged in human history, becomes completely irrelevant and utterly incidental. As if in the association of people, 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 interprets the exclusive formalism of Kelsen's normativism to have been born out of the widespread admiration to the Enlightenment and the myth of rationalism[13] which, while relying on some structural elements of the

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felé [Norm and exception: Schmitt's road towards the total state] (Budapest: MTA Filozófiai Intézete 1993) 256 p. [Doxa könyvek].

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

13 Schmitt criticises Kelsen's normativism as the embodiment of "rule-of-law rationalism" in the debate on Heller's, Hermann *Der Begriff des Gesetzes in der Reichsverfassung* in Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer 4: Verhandlungen der

theological thought of Catholicism (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 material laws and operational regulations given. Schmitt traces the predisposition of liberalism to "conversationalism" back to similar roots – that is, its tendency to substitute discussion for decision-making[14] and, thereby, also to resign from any materiality, proper aim or mission (by fulfilling any genuine duty), beyond the observance of the game's rules, setting the limits of discussibility.

However, realising the significance of the historical moment and the responsibility to be borne for its shaping then and there, he considers this intellectuality to be deliberate destruction, moreover, sheer treason, when times are peripeteic, critical for the nation, only disguised by the unbiased methodological cover of *formalisms*. Or, if order conforming to the Weimar Constitution (born itself from the forced conditions following the defeat in the war) results only in nothing but political confrontation without any prospect of advance (blocking the state machinery in effective functioning) – he argues in opposition to Kelsen at the state court – , then the exceptional situation, brought about by such a total impasse, invests the executive with sovereign power to decide. Or, at last a *decision* has to be made 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 debate[15] also helps him to formulate a personal stand,[16] with his theoretical recognition marking a turning point.[17]

Tagung der deutschen Staatsrechtslehrer zu München am 24. und 25. März 1927 (Berlin & Leipzig: de Gruyter 1928), Diskussionsreden, p. 168–189.

14 Its social agent was called by Donoso Cortès, Juan *la clasa discutidora.* Tradition traces it back to the commentaries by Xenophon, in which – aware of the destructive nature of both public disorder [*taraxè*] and irresolution [*akrisia*] – the wisdom of statesmen is identified with the ability of discernment between *polemikon* and *presbeia* [i.e., the knowledge of distinguishing when to fight against and when to mediate in-between].

15 See Schmitt, Carl *Der Hüter der Verfassung* (Berlin: Duncker & Humblot 1931), on the one hand, and, from Kelsen, Hans *Wer soll der Hüter der Verfassung sein?* Die Justiz 6 (1930–31), p. 576–628 as well as *Das Urteil des Staatsgerichtshof vom 25. Oktober 1932* Die Justiz 8 (1932–33), p. 65–91, on the other. *Cf.* also Herrera, C. M. *La polémica Schmitt–Kelsen sobre el guardián de la Constitución* R.E.P. (Octubre–diciembre 1994), No. 86, p. 195–227 as well as, by Dyzenhaus, David *Legal Theory in the Collapse of Weimar: Contemporary Lessons?* American Political Science Review 91 (March 1997) 1, p. 121–134 and *Legality and Legitimacy* Carl Schmitt, Hans Kelsen and Herman Heller in Weimar (Oxford: Clarendon Press 1997) xiv + 283 p., furthermore MacCormick, John P. *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), p. 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

Well, I shall raise a preliminary question: *borderline situations* may, though, end dramatically – with the fall of a republic or anyone having an 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 bordering situations? *What* is our partnership *like* in fact? Is this to be deemed in our honeymoons and the luckily problemless everydays? Or, rather, *in the way how* we have preserved our affection towards one another despite the tearing test of our most difficult conflicts? Well, in the circumstance that Kelsen sees no problem here, Schmitt seems to find the routine of normality (not reflected on any longer, because established practices do not call for particular justification), that is, the inertia and self-propelling of logism, conventionalised in and by practice. For Schmitt's understanding, Kelsen's position is acceptable as a status-description but by far not 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 problemless everyday operation. And providing that the limits, potentialities and final criteria can only be defined by testing through exceptions, then this very limiting testing will be the one to finally define also the operation 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 hardly earned responses we give to 'hard cases'.[19] The attention focussing on borderline situations in *exceptionality* and the discretion involved

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choose between the dictatorship of the dagger and the sword, then I shall prefer the dictatorship of the sword.'" ["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.'"] Sombart, Nicolaus *Jugend in Berlin* 1933–1943, Ein Bericht (Frankfurt am Main: Fischer Taschenbuch Verlag 1991), p. 258 [Fischer Taschenbücher 10526].

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

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

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

in such a decision are marking a border in the sense of and with the effect by which John Rawls confronted principles with 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 on the final account.[20]

As far as the law's operation is concerned, speaking metaphorically, law can be characterised to function smoothly (by the force of its given linguistic-logical context as driven by the inertia of a motion once set), (re)generating itself by performing the necessary applications – as long as it does not encounter any obstacle, i.e., any situation diverted from 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 exhausts 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 in and ability to regeneration. 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 so 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, gained by a slightly mechanical cumulation of the partial results, the only thinkable answer? Obviously not. Moreover, not even Schmitt was of such a simplistic opinion.

The conclusion as reached to this point which can be figured as follows below

operation of law (I) = **KELSEN** + **SCHMITT**

can indeed be synthesised in the synoptic formula

operation of law (II) = KELSEN = **SCHMITT**
SCHMITT

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

Or, to sum up, that what 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] forecasts 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 by also qualifying 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 a growingly coherent jurisprudence. Yet, despite the official terms of the play, instead of making my judgement (in declaration of what "the law" is) determined by 'law' and 'facts' as concluding from them, I can only transform the multi-faceted complexity and ambivalence of real-life situations (with contradictions which may emerge in 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 the decades passed since the personal controversy between Kelsen and Schmitt in Weimar, it has no genuine relevance for the posterity to investigate whether or not the two one-time companions with differing family backgrounds and traditions, differing historical aspirations, values and commitments (with Schmitt having personally contributed to the dismissal of Kelsen as a university professor, impending in the Nazi era anyway), referred actually to each other from the time of the Hitlerian takeover on, and if they did, in what depth and extent. Their paths and emphases, their sensitivities and inspirations divided finally, depending on the way they understood and theorised the crisis of Weimar democracy. True, they went on on their paths separately but without having left everything behind. Just to the contrary. Though they may have went on, but only with oeuvres unchangedly 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.

This is all the more remarkable if we consider that the most significant theoretical rectification was made by Kelsen, whose course of 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] about which he stated less than a decade before to be "a great

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21 *Cf*. Perelman, Chaïm *Avoir un sens et donner un sens* Logique et Analyse (1962), No. 5, p. 235–250.

22 *Cf*., from the author, *Theory of the Judicial Process*, passim and *What is to Come after Legal Positivisms 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), p. 657–676.

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

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, according to the new realisation that "Application 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] Another decade later, (3) in the re-formulation of the Pure Theory of Law in 1946 and, then, in 1960,[26] more and more definitely and by inverting the logic of his early investigations, he qualifies the *constitutivity* of the official (i.e., exclusive and unsubstitutably 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 emphasises the unchallengeability of the *legal force* of the procedurally last ascertainment, which, by the way, reverses his entire reconstructive play of normative derivation and conclusion.[27] Well – aware of the fact that (5) Kelsen remained at fault until his death with a theory of meaning and a proper legal logic supporting the claim of his Pure Theory of Law (with the admission that all his repeated attempts at formulating either of them were eventually accompanied by the realisation of failure as they only reached contradictions)[28] – , on the final account all this manoeuvring is in fact nothing else than the inclusion, as a final criterion channelling legal motion to its proper track, of the backgrounding moment of a *decisio* into his world built upon the

24 "[J]uristically, it is a mystery. […] This is the great mystery of the law and State […]." Kelsen, Hans *Hauptprobleme der Staatrechtslehre* entwickelt aus der Lehre vom Rechtssatze (Tübingen: Mohr 1911), p. 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), p. 47–64 [The Society of Finnish Lawyers Publications, Group D, No. 6] and *Formalism, Rule-scepticism and Juristic Operationism* [manuscript] – , *Cf.*, from the author, *Theory of the Judicial Process*, paras 3.4–5.

25 Kelsen, Hans *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), 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." Kelsen, Hans *Reine Rechtslehre* Einleitung in die rechtswissenschaftliche Problematik (Leipzig & Wien: Deuticke 1934), ch. VI, para. 33, p. 91.

26 Kelsen, Hans *General Theory of Law and State* trans. Anders Wedberg (Cambridge, Mass.: Harvard University Press 1946) xxxiii + 516 p. [20th Century Legal Philosophy Series 1] and *Reine Rechtslehre* Zweite, vollständig neu bearbeitete und erweiterte Auflage (Wien: Deuticke Verlag 1960) xii + 498 p.

27 For the context, *Cf.*, from the author, 'Kelsen's Theory of Law-application: Evolution, Ambiguities, Open Questions' [1986] in his *Theory of the Judicial Process*, Appendix I, p. 165–202 and 'A bécsi iskola' [The Vienna School] in Chertes – Frivaldszky – Győrfi – H. Szilágyi – Varga *Jogbölcselet* XIX–XX. század: Előadások [Lectures on 19th to 20th century legal philosophy] ed. Csaba Varga (Budapest 2002), ch. VII, p. 60 et seq. [Bibliotheca Cathedrae Philosophiae Iuris et Rerum Politicarum Universitatis Catholicae de Petro Pázmány nominatae, Budapest].

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

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 gets included into is no longer normativism either, at least in its earlier Kelsenian sense.

Eventually, the question of what is what exactly may in its original meaning only be relevant for the history of ideas, in search for a solution. Namely, it is only in a synthesis formed by *'counter-concepts'*[30] that the sublation of the constituting concepts is accomplished, gaining additional meaning by the duality inherent in the act of *Aufhebung*, in which there is no longer room for exclusivities; for the *synthesis* is born out just of the confrontation of counter-concepts, resulting in an entity not given either partially or totally in the original components. As known, counter-concepts are by far not 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 appear as 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 either be of the opinion that *subsumption* or *subordination* is the case – the fact notwithstanding that I have also to be aware of the circumstance that these two are only valid as complemented by one another. In any case, the recognition resulting from their confrontation is not gained by them either separately or in unity but through their being resolved (and, thereby, also dissolved) in a hermeneutical synthesis.[32] Or, in other words, they do not *mean* in and by themselves but they *express* a culture through their aggregate, which provides an exclusive medium for them to be construed at all.

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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) – 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, *op. cit.* (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), p. 72 [Philosophy, Social Theory, and the Rule of Law].

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 p. [Heidelberger Forum 12] and *Beiträge zur juristischen Hermeneutik* sowie weitere rechtsphilosophische Abhandlungen (Köln, etc.: Heymanns 1984) xii + 260 p. {debated by Peschka, Vilmos *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 p. [Jog és jogtudomány 1]} – see, from the author, *Theory of the Judicial Process*, ch. 3, especially paras 3.6.1 and 3.9.

This, in turn, leads us to conclude that, properly speaking, perpetual questions of legal philosophising 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 this is exactly that gives additional meaning to our present-day interest in the ways their views were formed.[34] And as far as the humanisability of society through

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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." Schmitt, Carl *Gesetz und Urteil: Eine Untersuchung zum Problem der Rechtspraxis* (Berlin: Otto Liebmann 1912), 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 (Spring 1997) 1, p. 165–188 and *Why Carl Schmitt? Introduction* in Law as Politics (note 15), p. 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 Lyonel 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 inserted into 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), p. 571 et seq.], 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, which were only arrived at by Kelsen 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-facedness 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 in respect of the separability of *Sein* and *Sollen* (in which Schmitt's inherent anti-formalism resulted in a deeper contentual sensitivity already from the beginning).

34 The present paper is to focus on one single aspect of Schmitt's oeuvre all through 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 in explanation of the operation of law – although that what Schmitt finally provided was by far not an elaborated theory in counter-conceptualisation. Or, my concern has been just fragmentary to test some methodological insights from his oeuvre, without touching upon comprehensive evaluations. For these latter, *Cf*., e.g., Sterling, Eleonore *Studie über Hans Kelsen und Carl Schmitt* Archiv für Rechts- und Sozialphilosophie XLVII (1961), p. 569–586; Rottleuthner, Hubert *Substantieller Dezisionismus: Zur Funktion der Rechtsphilosophie im Nationalsozialismus*, p. 20–35 & Neumann, Volker *Vom Entscheidungs- zum Ordnungdenken: Carl Schmitts Rechts- und Staatstheorie in der nationalsozialistischen Herausforderung*, p. 153–162, both in Recht, Rechtsphilosophie und Nationalsozialismus, hrsg. Hubert Rottleuthner (Wiesbaden: Steiner 1983) [ARSP Beiheft, 18]; Dorémus, André

scholarship is still a programme for us, we have to ponder over such debates, bearing in mind the lessons derived from the disputable pieces of the past as well.[35]

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), p. 302–314 and especially p. 308, with a view also to "legal personalism [*potesta directa*]".

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