

## SCHMITT'S REALIST APPROACH TO LAW AND THE PIVOTAL SIGNIFICANCE OF THE NOTION OF LEGITIMACY FOR AN ORDER OF LAW

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### **Abstract**

*Focusing on certain of Carl Schmitt's arguments employed in his books *The Nomos of the Earth, On the Three Types of the Juristic Thought, and Legality and Legitimacy*, this article analyzes Schmitt's general approach to the idea of law. The basic suggestion to be elaborated is that Carl Schmitt provides a realist perspective according to which law is foremost a "concrete order" integrating elements of decisions and norms. Besides other substantial insights concerning the nature of law, this article contends that the most fundamental upshot arising out of Schmitt's approach is an original conception of the notion of legitimacy as fundamental (supra-legal) decisions concerning the basic form and ends of a state, and his attribution of a pivotal significance to this notion for the establishment and maintenance of a political-legal order.*

### **Öz**

*Bu çalışma Carl Schmitt'in *The Nomos of the Earth, On the Three Types of the Juristic Thought* ve *Legality and Legitimacy* başlıklı kitaplarını temel alarak, ünlü düşünürün hukuk fikrine genel yaklaşımını ortaya koymayı amaçlamaktadır. Carl Schmitt'in hukukun hem karar hem de norm öğelerini içeren bir "somut düzen" olduğu fikri çerçevesinde gerçekçi bir yaklaşım geliştirdiğinin altı çizilecektir. Yazarın gerçekçi yaklaşımının en esaslı katkısının ise özgün bir meşruluk kavrayışı sunması ve de bu kavrayışı hukuk anlayışının göbeğine yerleştirmesi olduğu vurgulanacaktır. Öyle ki, Schmitt için, hukuksal-siyasal düzenin kuruluşu ve idamesinde hayati bir rol oynayan "meşruluk" belirli bir hukuksal ve siyasi düzenin temel biçimi ve amacına dair alınan öncel (hukuksallık-üstü) kararları ifade eder.*

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**Keywords:** *Carl Schmitt, concrete order theory, normativism, decisionalism, legitimacy.*

**Anahtar Kelimeler:** *Carl Schmitt, somut düzen kuramı, kural temelli yaklaşım, karar temelli yaklaşım, meşruiyet.*

## I. INTRODUCTION

This article examines Carl Schmitt's general approach to the idea of law. It suggests that Carl Schmitt presents a realist perspective according to which law is foremost a "concrete order" integrating elements of decisions and norms. Besides other substantial insights concerning the nature of law, this article contends that the most fundamental upshot arising out of Schmitt's approach is an original conception of the notion of legitimacy as fundamental (supra-legal) decisions concerning the basic form and ends of a state, and his attribution of a pivotal significance to this notion for the establishment and maintenance of a political-legal order.

In the second section, I will focus upon Carl Schmitt's account of the concept of *nomos*, which he elaborated in his book *The Nomos of the Earth*. We will see that Schmitt interprets this ancient concept in such a way that it provides a basis for his realist conception of law as a "concrete order." The third section will draw upon Schmitt's book *On the Three Types of the Juristic Thought*, whereby he articulates his "concrete order thinking" through a critique of alternative theories of law. In the fourth section, I will examine his criticisms against the schools he calls "normativism" and "decisionalism." The upshot of such criticisms will be an idea of law as a compound entity not reducible to a single element like decisions or norms. The fourth section will also deal with his arguments against legal positivism, which he sees as a peculiar synthesis of normativism and decisionalism. These criticisms highlight that legal positivism is indeed an untenable position foreclosing the notion of legitimacy as a set of supra-legal criteria. In the fifth section, I will draw upon Schmitt's contentions concerning the dissolution of the notion of legitimacy in the Weimar Republic, as they were presented in his book *Legality and Legitimacy*. I will then end up by concluding that the most essential tenet of Schmitt's realist approach to law lies in his emphasis on the pivotal significance of the notion of legitimacy understood as a set of supra-legal standards of validity determined and protected by the sovereign authority of a state.

## II. NOMOS AS THE ORDER OF ORDERING: THE MIGHT CONSTITUTING THE RIGHT

In his book *The Nomos of the Earth*, which came out in 1950, Carl Schmitt introduced the concept of *nomos* to account for developments in

international law and international politics.<sup>1</sup> Challenging the modern translation of this ancient term simply as law, he elaborates a very specific conception of *nomos* as a fundamental standard posited by the founding power of a politico-legal order. I think that Schmitt indeed translated his ideas on the origin and the nature of the politico-legal order into the ancient concept of *nomos* rather than providing an accurate account of how the ancient Greeks (including pre-Socratics) understood the concept. Hence, Schmitt's elaboration of the concept of *nomos* has a significance going far beyond an analysis of the developments in the international politico-legal domain of his era. Rather, Schmitt's conception of *nomos* stands as a good point of entry for an examination of his general approach to law.

In discussing the meaning of the ancient concept, Schmitt first points out that the word *nomos* was the noun form of the Greek verb *nemein*.<sup>2</sup> Thus, it signified an action or process whose content is indicated by this verb. The verb *nemein*, in turn, had a complex meaning combining three forms of actions or processes, which we are used to differentiate. It meant first 'to appropriate' (to grab/to grasp) or 'to take;' second, 'to divide' or 'to distribute;' and third, 'to pasturage' or 'to use' or 'to produce.'<sup>3</sup> Notice that all these verbs are concerned with activities on land or within a space. *Nomos* as an action or process indicated, first of all, the appropriation of the land, or more precisely, of a piece of land. This was "a first measure," i.e. "a first order," upon which all other measures are subsequent. It is a "constitutive act of spatial ordering" in the sense that men "fence," "enclosure" or "build a wall around" a particular land and claim<sup>4</sup> it as their own, and then "dwell" there.<sup>5</sup> This sentence already establishes the link between 'to appropriate' and subsequent meanings of the word *nomos* since terms like fencing or enclosure indicate an initial division or distribution and the verb 'dwell' is almost synonymous with the verb 'pasturage,' particularly for a non-industrial society like the ancient Greeks.

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<sup>1</sup> The precise title is "The *Nomos* of the Earth in the International Law of the Jus Publicum Europaeum." In the following explication of Schmitt's conception of *nomos*, I will draw upon only its fourth chapter and two articles titled "Appropriation/Distribution/Production: An Attempt to Determine from *Nomos* the Basic Question of Every Social and Economic Order" and "*Nomos* –*Nahme*– Name", which were published as appendices in the same book.

<sup>2</sup> Carl Schmitt, *THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM* 326 (Gary L. Ulmen, trans., Telos Press, 2003) [hereinafter "*Nomos*"].

<sup>3</sup> *Id.*, at 326-327.

<sup>4</sup> By pointing out the proximity between the German word *Nahme* (the noun form of *nehmen*, which means 'to take' or 'to appropriate') with *Name* (name in English too), Schmitt suggests that there is a unity or, at least, a strong relationship between these two activities (*Nomos*, at 348). Here, Schmitt's suggestion that the act of constituting order is closely relevant or even identical to the act of naming things indicates that his argument in question have nominalist underpinnings.

<sup>5</sup> *Nomos*, *supra* note 3 at 74-75.

On the basis of such an etymological inquiry into the roots of a Greek word, Schmitt arrives at a definition of *nomos* as “the first measure of all subsequent measures, the first land-appropriation understood as the first partition and classification of space, [and thus] the primeval division and distribution.”<sup>6</sup> This means nothing other than a “fundamental law as a concrete order and orientation.”<sup>7</sup> This was clearly not a law in the modern popular sense of an ‘ought,’ since it designated a concrete action to be the foundation of a concrete order. Also, *nomos* as the law founding a *politeia* was fully different from “all the sundry acts, statutes, orders, measures, and degrees entailed in the management and control of a commonwealth.”<sup>8</sup> Indeed, the latter fell under the categories of either *thesmos* (positive law or legislation) or *rhema* (command).<sup>9</sup> As the words of Heraclitus and Pindar indicate, “all [these] subsequent regulations of a written or unwritten kind derive their power from the inner measure of an original, constitutive act of spatial ordering, [which is called *nomos*].”<sup>10</sup> *Nomos* as such was “a constitutive historical event – an act of *legitimacy*, whereby the legality of a mere law is made meaningful.”<sup>11</sup> It was a power not mediated by laws but revealing itself in the form of complete immediacy by the act of an ordering of a legal order. This power thus expressed a measure, *i.e.* a standard, which established a political, social and religious order with a definitive form.

In line with all these, Schmitt suggests, there is “no basic norm, but a basic appropriation [in the form of the immediacy of a power]” at the beginning of any legal order.<sup>12</sup> Yet this insight, which a true understanding of the concept of *nomos* provides, has been lost for long.<sup>13</sup> This naiveté concerning *nomos* reached its peak among the modern philosophers. To the same degree that modern political ideologies and social theories believe in the possibility of a

<sup>6</sup> *Id.* at 67.

<sup>7</sup> *Id.* at 69.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 69.

<sup>10</sup> *Id.* at 78.

<sup>11</sup> *Id.* at 73.

<sup>12</sup> *Id.* at 345.

<sup>13</sup> Schmitt argues that, after pre-Socratics, only Aristotle remembered this true meaning of *nomos*: Aristotle called Solon, but not Draco, the *Nomothet*, since only the former founded a *Politeia* and made a primeval division and distribution, not simply revisions of the existing order. *Id.* at 68.

Among the modern philosophers, he seems to give some credit only to Kant:

Even Kant’s legal theory takes as a principle of legal philosophy and of natural law that the first substantive acquisition must be land. This land, the foundation of all productivity, at some time must have been appropriated by the legal predecessors of present owners. Thus, in the beginning, there is the ‘distributive law of mine and thine in terms of land for everyone’ (Kant), *i.e.* *nomos* in the sense of *Nahme*. Concretely speaking, this is land-appropriation. Only in this connection can there be any distribution and, beyond that, any subsequent cultivation. *Id.* at 328.

human co-existence without antagonisms, they either forget *nomos* as appropriation by force or dismiss it as atavistic, reactionary or inhuman, and thus reduce law to “legal norms.”<sup>14</sup> In the paragraph below, Schmitt sums up what he considered to be the ancient insight encapsulated within the word *nomos* but lost in the modern-phrase “legal order”:

In no way is the *nomos* limited to the stable and lasting order established by land-appropriation. On the contrary, it demonstrates its constitutive power in the strongest way possible in the processes that establish order in the original division, the *division primaeva*, as noted legal thinkers call it. However, after the land-appropriation and land-division have been completed, when the problems of founding anew and of transition have been surpassed, and some degree of calculability and security have been achieved, the word *nomos* acquires another meaning. The epoch of constituting quickly is forgotten or, more often, becomes semi-conscious matter. The *situation établie* of those constituted dominates all customs, as well as all thought and speech. Normativism and positivism then become the most plausible and self-evident matters in the world, especially where there is no longer any horizon other than *status quo*.<sup>15</sup>

The paragraph quoted above, whereby Schmitt somehow romantically recalls the “ancient conception of *nomos*” in the face of the dominant approaches of modern legal theory, indicates the basic objective underlying his juristic project: a general theory of law which can account for the reality of the Might lying at the constituting core of the Right (*Recht*). Now, it is time to consider his general theory of law, or his framework for the juristic thought, which he develops as a critique of normativism and decisionism.

### III. CONCRETE ORDER THINKING: A FRAMEWORK FOR THE JURISTIC THOUGHT BEYOND NORMATIVISM AND DECISIONISM

As he expounds in his book *On the Three Types of the Juristic Thought*, Schmitt develops his general approach to law through a critique of two schools

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<sup>14</sup> For Schmitt's argument that liberalism and socialism come together at the point of veiling the necessity of a primeval appropriation for all subsequent distribution and production (or cultivation), see *id* at 331. There, Schmitt argues that, by reversing the true order of things, both of these ideologies mistakenly suggest the possibility of solving the question of distribution and appropriation by production.

<sup>15</sup> *Id.* at 341.

of jurisprudence: “normativism” and “decisionism.”<sup>16</sup> A realist standpoint, which he himself calls “concrete order thinking,” is both the starting point and ending point of his criticisms. Yet, as we will see, Schmitt’s adherence to the “concrete order thinking” is not without qualification either. Particularly, he distinguishes his understanding from Hegelian theories of law, which also expressly defend a standpoint of “concrete order thinking.”

At the very beginning of this book, Schmitt distinguishes three meanings of law (*Recht*): a rule, a decision, and a concrete order or a formation.<sup>17</sup> He then argues that any theory of law operates necessarily within these three meanings of law. Yet, every particular theory of law recognizes a primary status for one of these meanings and thus places in a secondary, *i.e.* derivative, status the other two meanings. In line with this, a normivist theory is the one that holds law primordially as a norm; a decisionist theory is the one that holds law primordially as a decision; and a concrete order thinking theory is one that holds law primordially as a concrete order or an ordering. As we will see later in the case of Schmitt’s arguments concerning legal positivism of 19<sup>th</sup> century, however, this is a categorization in the sense of Weber’s ideal types; and there is always place for specific syntheses of these ideal types in the real world.

The most basic tenet of normativism was already mentioned above: the idea of law as a norm. For pure normativism, Schmitt argues, it is characteristic that

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<sup>16</sup> Some authors, like Leo Strauss, think that Schmitt’s critique of decisionism in his post-Weimar works, including *On the Three Types of the Juristic Thought*, marks a shift from his pure-decisionism of the Weimar Period. See Joseph Bendersky, *Introduction: The Three Types of Juristic Thought in German and Intellectual Context*, in Carl Schmitt, *ON THE THREE TYPES OF THE JURISTIC THOUGHT* 27 (J. W. Bendersky, trans., Praeger Publishers, 2004)[hereinafter “Juristic Thought”]. I approach the matter in a quite different manner; it is true that Schmitt seems to be much closer to a pure decisionism in the Weimar period. However, it is only because his major treaties on “the political”, *i.e.* both *The Concept of Political* and *Political Theology*, were written during this period. In my view, Schmitt thinks that “the political” in its purest form concerns the situation of abnormal, *i.e.* the state of exception, and this situation falls under the need of taking a decision *ex nihilo*. Yet, for Schmitt, thinking about law should reflect on the normal situation as well as the abnormal situation; and, a pure-decisionism does not suffice to take into consideration the normal situations. Therefore, I think, Schmitt’s all works on law, no matter written in the pre-Weimar, the Weimar, or the post-Weimar periods, reflected an understanding of law which cannot be reduced to a pure-decisionism. This is why he remarks in his own preface to the second edition of *Political Theology* that “the decisionist, focusing on the moment, always runs the risk of missing the stable content inherent in every great political moment [this stable content being law itself].” Carl Schmitt, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 3 (G. Schwab, trans., University of Chicago Press, 2005). To state it explicitly, I read Schmitt’s conception of “the legal” as the domestication of the “the pure political”, *i.e.* of the moment of the decision *ex nihilo*. In line with this, I also think that Schmitt’s self-presentation as a legal theorist who is critical of pure decisionism as well as of normativism holds true for all periods of his intellectual career.

<sup>17</sup> *Juristic Thought*, *supra* note 16, at 43.

it isolates the element of norm in law and makes it absolute to the point of the negation of elements of decision and concrete order.<sup>18</sup> The norm as such is an abstract, general rule regulating many particular cases. A norm is thus assumed to be swaying over reality without the need to take into account of the factual nature of the concrete individual case, the changing situation and the changing will of men. From the standpoint of normativism, the legal order is, in turn, explained as a smooth functioning of an aggregate of such general norms. In my view, Schmitt underlines three features of the normativist conception of law and exposes all them to criticism from the standpoint of his “concrete order thinking”: 1) the idea of self-enforcing norm; 2) the idea of a legal order as a mechanical regulation; and 3) the idea of two distinct spheres of human existence as that of normativity (ought) and that of factuality (is).

The normativist conception of law as a norm presupposes, above else, a distinction between *ratio* (reason) and *voluntas* (will), or *veritas* (truth) and *autoritas* (personal authority), and identifies law with the former.<sup>19</sup> In this view, law is an objective, impartial and general standard differing from a particular command of someone. This identification underlines the normativist inspiration for the ‘rule of law’ whereby reason as an impersonal and objective standard, not the arbitrary will of some particular individuals, rules over things and events. In line with this, legal order itself is conceived of as a system of norms in which norms are derived from other norms, a highest or utmost norm, i.e. a norm of norms, standing at the peak of the whole architecture of this aggregate of norms. Yet, Schmitt contends that since the very nature of law is that it is to be enforced, such a normativist conception either cannot account for this essential character of law or goes to the absurd in fantasizing the self-enforcement of norms by norms themselves. He thus insists that “a law [i.e. a norm] cannot apply, administer, or enforce itself. It can neither interpret, nor define, nor sanction itself; it cannot – without ceasing to be a norm – even designate or appoint the concrete men who are supposed to interpret and administer it.”<sup>20</sup> The very enforcement of a law as a norm presupposes both the order founded by a decision of a personal authority and the institutionalization

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<sup>18</sup> *Id.* at 49.

<sup>19</sup> As Schmitt remarks in his book *Legality and Legitimacy*, the normativist distinction between *nomos* and mere *thesmos* expands to the following dualities: *ratio* (intelligence) vs. *voluntas* (blind will); rationalism vs. pragmatism and emotionalism; idealism and just law vs. utilitarianism; validity and moral command vs. coercion and the force of circumstances. Carl Schmitt, LEGALITY AND LEGITIMACY 11 (Jeffrey Seitzer, trans., Duke University Press, 2007)[hereinafter “Legality and Legitimacy”]. As we will see in the main text, Schmitt thinks that all such dualities which are prevalent in the modern legal consciousness are problematic. One may also note, in passing, that the rejection of such distinctions is typical for a thinker influenced by nominalism because nominalism is marked by the tendency to refute any idea of a standard which precedes and thus limits the founding will.

<sup>20</sup> *Juristic Thought*, *supra* note 16, at 51.

of that order. Likewise, even the idea of a judge as a pure authority for the applications of norms presupposes a concrete order and its institutionalization along the line of a hierarchical sequence of authorities. Schmitt then offers a realistic correction to the idea of 'rule of law,' *i.e. Rechtsstaat*, by referring to Pindar's famous formulation: *nomos basileus*, *i.e. law as king*, or *lex as rex*.<sup>21</sup> In Schmitt's view, Pindar's formulation meant two things at once. First, as opposed to the normativist idea of law, it emphasized that the element of norm in law cannot be separated from the element of authority. Second, as opposed to tyranny, the rule of law emphasizes that an authority claiming legitimacy requires institutionalization in the form of a continuous and stable order.

A second defect Schmitt detects in normativism is a confusion of a mechanical regulation and a concrete order in human affairs. He argues that normativism demands a rational functioning of human relations through predetermined, calculable and general rules.<sup>22</sup> It thus imagines a traffic-like regulation for human societies: a smooth, standardized running like the traffic on metropolitan highways where the traffic policeman is replaced by "precisely functioning, automatic traffic lights."<sup>23</sup> In Schmitt's view, there may be areas of human life which can be exposed to such traffic-like regulations. For instance, the perfect calculability that such a sure regulation brings about is very desirable for the economic affairs of a commercial society. Yet, it does certainly not hold for all societies and all spheres of life. Schmitt's examples for the spheres of life which defy a complete standardization and regulation are very rich: "the cohabitation of spouses in a marriage, family members in a family, kin in a clan, peers in a *Stand* [*i.e. Estate*], officials in a state, clergy in a church, comrades in a work camp, and soldiers in an army."<sup>24</sup> In all these instances of institutionalized spheres of human life, there is a particular substance of order articulated in legal terms. Also, each of these concrete orders consists of general rules and regularities, but these rules are subservient to the substance (*i.e. to the substantial end*), not *vice versa*. They are open-ended principles rather than exact precepts, like the principle of the *bonus pater familias* (*i.e. the benevolent head of a family*). They are thus usually instructions for the end to be attained by the institution, not exact prescriptions of actions. The general norms are thus generated by and bound to the specific order and its conception of the 'normal.' Despite its length, I find quoting the following paragraph necessary, since Schmitt summarizes there his criticism directed against the conception of the norm as a mechanistic regulation:

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<sup>21</sup> *Id.* at 53.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 54.

<sup>24</sup> *Id.*

A general rule should certainly be independent from the concrete individual case and elevate itself above the individual case, because it must regulate many cases and not only one individual case; but it elevates itself over the concrete situation only to a very limited extent, only in a completely defined sphere, and only to a certain modest level. If it exceeds this limit, it no longer affects or concerns the case which it is supposed to regulate. It becomes senseless and unconnected. The rule follows the changing situation for which it is determined. Even if a norm is as inviolable as one wants to make it, it controls a situation only so far as the situation has not become completely abnormal and so long as the normal presupposed concrete type has not disappeared. The normalcy of the concrete situation regulated by the norm and the concrete type presupposed by it are therefore not merely an external, jurisprudentially disregarded presupposition of the norm, but an inherent, characteristic juristic feature of the norm's effectiveness and a normative determination of the norm itself. A pure, situationless, and typeless norm would be a juristic absurdity.<sup>25</sup>

The third point that Schmitt particularly criticizes in normativism is the distinction between the 'is' and the 'ought.' This distinction follows necessarily from normativism because once legal order is conceived of an aggregate of predetermined, general rules or statutes, its correspondence to real life becomes very problematic. More precisely, since normativism demands a sure regulation on the basis of abstract and general rules, and since the real life necessarily defies such a sure regulation, it dismisses thoroughly any consideration of the real life, lamenting it as sphere of irregularity to which the legal theorist should be indifferent. In this sense, nothing factual can prove or defy the legal order. For Schmitt, such an understanding of legal order that is radically separated from the factual reality is not simply meaningless. Much more crucially, it is also "an order-destroying and order-dissolving juristic absurdity" in its disregard of the operational logic of human institutions as concrete orders.<sup>26</sup> Having examined his objections to normativism, let me now present his criticisms of decisionism.

Regarding decisionism in its pure sense, Schmitt's criticisms take a less straight-forward character. Indeed, he says nothing against decisionism beyond indicating that it is an insufficient view of law to emphasize the element of decision to the point of ignoring the element of stability of concrete legal order and its institutions. He first notes that in opposition to normativism, decisionism takes seriously the problem of the 'force of law.' The decisionists think that the 'force of law' can stem only from *voluntas* (*i.e.* will). That is, every order of law consists of "norm-contradicting decisions," which then provides the newly

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<sup>25</sup> *Id.* at 57.

<sup>26</sup> *Id.* at 53.

created laws with the ‘force of law;’ these decisions themselves derive their ‘force of law’ only from themselves.<sup>27</sup> Thus, for the jurists of the decisionist mindset, the authority or sovereignty of the decision becomes the sole source of all norms and orders. Schmitt points out an affinity between the decisionist conception of law and a particular conception of God, which reached its peak with the Calvinistic strand of Christianity. According to the latter, God’s omnipotence means that his power is even not bound by the good: God is not fettered by any law but an absolutely free lawgiver. The believers, therefore, obey a law not because it is good, but because it is willed or commanded by God. This conception of God and his law was transported to legal and political theory by Bodin in a more secularly recasted discourse. Yet, it still lacked a pure decisionist standpoint as a result of the Christian belief that this world as God’s own creation was not a complete disorder or chaos, and thus that decisions taken were not out of nothingness but presupposed the concrete order of God.

In the view of Schmitt, only with Hobbes does one encounter the first case of decisionism in a pure form.<sup>28</sup> Hobbes conceives of all laws (all norms, all statutes, all orders and all interpretations of laws) as instances of decisions of sovereigns, with the sovereigns being not legitimate rulers but merely ones who factually decide in a sovereign manner.<sup>29</sup> Regarding the source of all laws, he claims famously that *auctoritas non veritas facit legem*, i.e. the power, not the truth (i.e. correctness) makes law. For Schmitt, in opposing authority to rightness, Hobbes’s decisionism goes far to the point of negating the age-lasting distinction between *potestas* (mere power) and *auctoritas* (legitimate power). Therefore, in the view of Hobbes, whoever establishes peace, security, and order is then sovereign and legitimate.<sup>30</sup> The sovereign’s way of acquiring power and making laws, together with the content of those laws, can in no way be exposed to criticism, in the same sense that the believer cannot judge the ways of God. Schmitt suggests that Hobbes culminates with such an extreme

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<sup>27</sup> *Id.* at 59-60.

<sup>28</sup> At this point, I feel obliged to note that Schmitt’s mode of reading of Hobbes as purely a thinker of the nominalist-decisionist strand is challenged by other interpreters in contemporary political theory. For instance, I may cite Dieter Hüning’s work as a compact and lucid account of the rationalist core underlying Hobbesian theory. See Dieter Hüning, *From the Virtue of Justice to the Concept of Legal Order: The Significance of the *sum cuique tribuere* in Hobbes’ Political Philosophy*, in *NATURAL LAW AND CIVIL SOVEREIGNTY: MORAL RIGHT AND STATE AUTHORITY IN EARLY MODERN POLITICAL THOUGHT* 139-152 (Ian Hunter and Davis Saunders, eds., New York: Palgrave- Macmillan, 2002); also, Otfried Höffe’s *Political Justice* includes a similar interpretation of Hobbesian idea of law and justice. See Otfried Höffe, *POLITICAL JUSTICE: FOUNDATIONS FOR A CRITICAL PHILOSOPHY OF LAW AND THE STATE* 80-86 (Jeffrey C. Cohen, trans., Polity Press, 1995).

<sup>29</sup> *Juristic Thought*, *supra* note 16, at 61.

<sup>30</sup> *Id.*

point of purity in decisionism, because, unlike Calvin and Bodin, he presupposes a normative nothingness and complete disorder before the sovereign decision. This is evident in his conception of the state of nature as the ruthless struggle of all against all, in which man becomes a wolf to man.<sup>31</sup> In this anarchistic situation of insecurity, it suffices that a particular man (whoever he is) makes a decision (however and whatever it is), so as to call him the sovereign authority and his command as law.

Through some extrapolation, by taking into account Schmitt's arguments in his other works such as *The Concept of the Political* and *Political Theology*, I can argue that Schmitt does not have much disagreement with decisionism as regards to the moments of the foundation of a political entity. His point is that the presupposition of a normative vacuum ceases as an aftereffect of this constitutive decision. Law acquires, then, a settled-on or sediment existence in the lifeform of the people as its concrete order; decisionism cannot account for this subsequent stage insofar as it remains as an account from an individualistic standpoint of original arbitrariness. To understand the sedimentation of law within the lifeform of a people, one should go beyond the individualistic notion of contract or pact (*Vertrag*) to 'agreement' (*Vereinbarung*: coming together or unison) in which there is the identification between all with all on the matter of common form of existence.

In this way, Schmitt seems to come close to Hegel's communitarian understanding of law. This becomes evident when he cites the latter's legal and political theory as the "summation" of the concrete order thinking in modern era.<sup>32</sup> As for Hegel's credentials, Schmitt points out Hegel's idea that law should be cultivated, in the consciousness of people, as custom and habit; that the truly divine is not the individual but the institutions like family, the Estates and the State; that the State is a form which is the complete realization of the Spirit in being; and that the State as *Reich* representing objective reason and morality.<sup>33</sup> For Schmitt, such insights enabled Hegel to present a vision that avoids the dilemmas of the state as conceived by "western-liberal rational law or positivism":

This latter concept of the state is suspended between the Decisionism of the dictatorial state construction of Hobbes and the normativism of the latter rational-law thinking, between dictatorship and bourgeois *Rechtsstaat*. Hegel's state, in contrast, is not the civil peace, security, and order of a calculable and enforceable legal functionalism. It is neither mere sovereign

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<sup>31</sup> *Id.* at 62.

<sup>32</sup> *Id.* at 77.

<sup>33</sup> *Id.* at 77-78.

decision nor a “norm of norms”, nor a changing combination of both notions of the state, alternating between the state-of-exception and legality. It is the concrete order of orders, the institution of institutions.<sup>34</sup>

Yet, Schmitt’s appreciation of Hegelian philosophy of state should not be exaggerated. Schmitt agrees with only Hegel’s insight that the law should be embedded and cultivated within the consciousness of the people. On the other hand, Schmitt is not at ease with the general proposition of Hegelian theories of law – namely that law does not emanate from the state, but arises from within society itself. Relevantly, Schmitt’s adherence to the ‘concrete order thinking’ is not without qualification but argues that “*Recht* is norm, as well as decision, and, above all, order.”<sup>35</sup> That is, law is not exclusively concrete order, but also decision and norm. This means that a pure version of concrete order thinking would not suffice for a true understanding of law either. Indeed, there is a warning in the “Preface” to *Political Theology* stating that whereas the normativist in his distortion makes of law a mere mode of operation of a state bureaucracy, and the decisionist, focusing on the moment, always risk of missing the stable content inherent in every great political movement, an isolated institutional thinking leads to the pluralism characteristic of a feudal-corporate growth that is devoid of sovereignty.<sup>36</sup>

For Schmitt, sovereignty is a notion marking the constitutive role of the political entity over the society; thus the idea that law emanates from society but not from the state negates this notion. Thus, it would lead to a crucial inconsistency in Schmitt if he had advocated a mode of juristic thinking that negated the notion of sovereignty while this notion was most essential for his political thought.

#### **IV. THE DILEMMA OF LEGAL POSITIVISM: MISCONCEIVING THE SOURCE OF JURISTIC SECURITY**

I have already underlined above that Schmitt conceives of normativism, decisionism and concrete order thinking as ideal types in the Weberian sense. Thus, he thinks, one always encounters factual orders of law that are specific syntheses of these ideal types. One such factual and thus synthetic order of law that Schmitt examines particularly is the legal-positivist order. In his view, legal positivism marked the factual systems of law of 19<sup>th</sup> century Continental Europe, particularly that of France and Germany. As a mode of juristic thought, it was closely related to the ages-lasting movement of the codification of all

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 50.

<sup>36</sup> Legality and Legitimacy, *supra* note 19, at 3.

legal norms under the written law. The most remarkable characteristic of this mode was that it identified the whole idea of law with “statutory governing.”<sup>37</sup> That is to mean, law was reduced to the “normative fixed legality” and thus any distinction between law as *Recht* and law in the sense of a posited norm (i.e. *Gesetz*) was foreclosed.<sup>38</sup>

Under this fixation of law, along with the legality of posited norms lies a search for firmness, stability, calculability and objectivity, i.e. a search for legal security. Here it becomes clear that there is a kinship between legal positivism and the positivism in the natural sciences: the rejection of any meta-physicality so as to achieve precision in thought. Hence, legal positivism refutes everything “extra-legal” or “meta-juristic,” i.e. “all *Recht* not created through human statutes, whether it appears as Divine, natural, or rational law.”<sup>39</sup> The domain of ‘extra-legality’ or ‘meta-juristic’ comprises ‘the ideological,’ ‘the moral,’ ‘the economic,’ and ‘the technical.’ What counts as legal consideration is only that which is exclusively based on the contents of norms. The norms, the archetype of which is statutes, are the sole authority in the tribune of the juristic thought as the positivist conceives of it.

The positivist assertion that the statute is (or should be) the sole authority in legal considerations reflects the peculiar syncretism inherent in legal positivism. As Schmitt argues with fervor, this assertion reveals that legal positivism is indeed a synthesis of decisionism and normativism; the statute is, first of all, nothing but the decision or the will of a legislator. In subjecting himself exclusively to the content of a statute, a positivist jurist indeed subjects himself to a decision of a legislator. Moreover, given that there is no place for any meta-juristic consideration in jurisprudence, it also becomes clear that the positivist jurist attributes to the legislator an unbounded competence to decide. This is the decisionist aspect of legal positivism. Yet, this decisionist view concerning the foundation of a norm gives way to a normativism at the very point that the positivist jurist takes the substance of the decision as the ‘objective law,’ and thus demands that the legislator himself is bound by his own decision too. Once the statute is posited, it reigns without regard to anything else, even without regard to the original intention of the legislator. This is what he means when a positivist refers to the ideal of *Rechtsstaat*.<sup>40</sup>

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<sup>37</sup> Juristic Thought, *supra* note 16, at 64.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> In line with this, the positivist understanding of *Rechtsstaat* should be distinguished from the rationalist understanding of *Rechtsstaat*. As Schmitt himself indicates, the positivist conception means a *legislative-state* where mere legality reigns, while the rationalist conception is based on the “metaphysical” idea of objective justice as the grounding and regulative principle of law. Juristic Thought, *supra* note 16, at 67.

In this way, the positivist proceeds “from will to norm, from decision to regulation, from Decisionism to Normativism.”<sup>41</sup> The peculiar nature of this proceeding is, as Schmitt notes, well expressed in the idiom which legal-positivist authors feel obliged to repeat frequently: “normative power of the factual.”<sup>42</sup> In the view of Schmitt, this idiom is evidently an empty tautology, and thus shows the inconsistency inherent in legal positivism. Indeed, it would have meaning if it is revised as “the positive power of the factual.” However, a positivist would not employ this formula because it would mean to accept that legal positivism is in fact not an original type of juristic thought but a diluted decisionism (i.e. a decisionism window-dressed by normativism), at least in regard to the crucial issue of the source of law.

The key to a true understanding of legal positivism will be gained, Schmitt implies, only if one takes into account its objective: certainty and calculability. To achieve this objective, the legal positivist may appear in more decisionist or more normativist guises, depending on the historical-factual circumstances:

In appealing to the will of the state legislator or state laws, to an actually existing “supreme power” as an expressed and prevailing decision of the state legislator, he [i.e. the legal-positivist] is, in terms of legal history, bound to the decisionist state theory that developed in the seventeenth century and must fall with it. However, in appealing to law as norm, he binds its certainty and firmness only to the certainty and firmness of the legality of the legislative state which achieved domination in the nineteenth century.<sup>43</sup>

To put this in exact terms, Schmitt considers legal positivism as the modern form of the “universal-human striving for protection against risk and responsibility.”<sup>44</sup> The peculiarity of the modern philosophers (i.e. of legal positivism), in this regard, lies in that they assume that juristic security is possible on the basis of mere legality (i.e. an aggregate of norms). Yet, as Schmitt contends, any juristic security cannot be attained by norms, but by a concrete order within which these norms acquire existence.<sup>45</sup> Any concrete

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<sup>41</sup> *Id.* at 68.

<sup>42</sup> *Id.* at 69.

<sup>43</sup> *Id.* at 70.

<sup>44</sup> *Id.*

<sup>45</sup> When Schmitt argues for the insufficiency of norms in sustaining juristic security, the resemblance between his theory and American legal realism becomes particularly evident:

Even the simplest problem of interpretation and proof had to teach one that the firmness and security of even the most painstakingly and carefully written legal texts remain in themselves entirely questionable. Wording and literal meaning, historical development, sense of justice, and communication requirements operate confusingly in the most varied manner in establishing the ‘unquestionable’ contents of legal texts and regarding questions of proof and qualification of the ‘facts’ in the ‘pure juristic’ establishment of evidence

order depends upon what the positivist dismissed as ideological, moral, cultural, economic, or political considerations. Indeed, such considerations provide for the criteria of legitimacy. Thus, to clean law of all these considerations means to clean off the notion of legitimacy from law. The inevitable consequence of such a cleaning off is to dissolve any substantial content for 'the right,' 'the objective' and 'the normal' in opposition to 'the wrong,' 'the subjective' and 'the abnormal.' This reveals the paradox of legal positivism: in demanding complete precision on the basis of norms, it risks losing the kind of security attainable for human beings – the security that a concrete order provides, thanks to the substantial criteria it depends upon.

In the last part of this paper, I will draw upon Schmitt's arguments on the notion of legitimacy which he developed in his book *Legality and Legitimacy* so as to show that the fundamental insight arising out of his general theory of law is the pivotal significance of the notion of legitimacy within a political-legal order.

## V. THE PIVOTAL SIGNIFICANCE OF THE NOTION OF LEGITIMACY

Schmitt elaborates on his conception of legitimacy in his book *Legality and Legitimacy* through a critique of the positivist interpretation of the German Weimar Republic that stands as a model for bourgeois *Rechtsstaat*. On the basis of a completely legal-technical understanding of the Weimar constitutional order as merely a parliamentary legislative state, legal positivism suggests that the whole Weimar order of law was a completely value-neutral procedure in which "one can open legal channels and legal process to all conceivable aspirations, goals and movements."<sup>46</sup> From such a perspective, legitimacy has no meaning other than legality in the sense of abiding the established

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Juristic Thought, *supra* note 16, at 66. This passage whereby Schmitt emphasizes that legal norms, however well written they are, require juridical decisions to be applied in any concrete case is an expression of the thesis of legal indeterminacy of norms. This thesis constitutes the core claim of the American legal realist school represented by the authors like Jerome Frank, Oliver Wendell Holmes and Karl Llewellyn. The *Philosophy of Law*, edited by Joel Feinberg and Jules Coleman in 2008, includes the representative texts for American legal realism, namely Frank's "Legal-realism", Holmes's "The Path of the Law" and Llewellyn's "Ships and Shoes and Sealing Wax." See Joel Feinberg and Jules Coleman, *Philosophy of Law* (California: Wadsworth, 2008.). For a short and clear overview of this school, see also Brian Leiter, *American Legal Realism*, in *PHILOSOPHY OF LAW AND LEGAL THEORY* 50-66 (M. P. Golding and W. A. Edmundson, eds., Blackwell Publishing, 2006).

<sup>46</sup> *Legality and Legitimacy*, *supra* note 19, at 10.

procedures.<sup>47</sup> Legal positivism as such indicates that to the extent that you have achieved a position of significant majority in the parliament and acted there in accordance with the established procedures, there was nothing you could not change in the order of law of the Weimar state. You could even transform the Weimar Republic into a monarchy or a socialist state while still remaining within the boundaries of legality.

Schmitt maintains that such a relativization of the constitution and functionalization of the concept of law is unacceptable. As is the case in every state, the Weimar Republic depended upon a particular ethos. In so far as it is a bourgeois *Rechtsstaat*, this ethos lies in the principle of individual freedom and the liberty rights that rise out of this principle. This principle and rights, thus, define the basic end, to the maintenance of which the state and all laws should serve.<sup>48</sup> He cites the second principal part of the Weimar constitution as explicitly expressing “a value assertion” for the sake of personal liberty as the substantial principle of the unity of the Weimar constitution.<sup>49</sup> This stands in an irreconcilable opposition to the alleged “value neutrality” and the functionalist view of law proposed by the legal positivist. In this way, the principle of liberty and the rights of liberty designate the standard of legitimacy in the Weimar Republic as a *Rechtsstaat* and thus no elimination of them can be brought about through legal procedures and norms. In other words, if basic rights have been decided to be the fundamental principle of the construction of a complete state form – as was the case in the Weimar Republic – they have thus been made “always superior” to any legal procedure and regulation, “so long as another system is not being established.”<sup>50</sup>

In line with this, Schmitt maintains that legality has, in a *Rechtsstaat*, a place which is subordinate to its principle of legitimacy. That is, a *Rechtsstaat* aspires to exercise as much power as possible on the basis of pre-established procedures, regulations and norms only because that such an exercise of power is considered advantageous to personal freedom. Thus, the principle of personal freedom, *i.e.* the basic rights, conditions/limits the very principle of legality. When the established procedures and norms culminate in a consequence which is inimical to this principle of legitimacy, they should be subjected to an intrusion by the supra-legal authority of the sovereign who is the representative of the substantial unity of the political form. Here, it becomes clear that the question of legitimacy is inseparately connected to the question of the political

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<sup>47</sup> In the view of Schmitt, legal positivism is the expression of liberalism in the sphere of law, precisely because its purely legal-technical conception of law negates the transcendent moment of sovereign power.

<sup>48</sup> Legality and Legitimacy, *supra* note 19, at 57.

<sup>49</sup> *Id.* at 46.

<sup>50</sup> *Id.* at 85.

component of the constitution and thus that of sovereignty. In other words, it becomes clear that the order of law is not a closed system in which higher and lower norms interpret, apply, protect and guard themselves in accordance with a hierarchical normative order; rather, any such order is essentially a hierarchy of concrete persons, at the peak of which stand a sovereign who is “the source of legality and the ultimate foundation of legitimacy.”<sup>51</sup> Without a sovereign guarding the substantial content of unity, the constitution would disintegrate into a meaningless aggregate of procedures and regulations with which individual parties seem to be in accordance only so long as to win over other parties. In such a situation of cynical obedience to ‘formalities,’ there remain, of course, neither the basic rights nor any other substantive principle which can be taken as the collective values/ends of the political community. Hence, in the view of Schmitt, the loss of the insight into the substantial decisions of the sovereign and thus into the criteria of legitimacy runs the risk of paralyzing the unity that is called political society. In line with all these, the basic message that Schmitt’s constitutional theory as a whole suggests may be stated as follows: any constitutional order, even a *Rechtsstaat* of the basic rights should, at first, be considered as a form having supra-legal standards called legitimacy, which should be ever maintained lest the order in question comes by paralysis or dissolution.

## VI. CONCLUSION

We have examined the basic tenets of Schmitt’s approach to the idea of law and have found out that Schmitt’s theory of law belongs to the realist strands of legal-political thought. His idea of law saliently betrays a kinship to the conceptions of law developed by the schools known as legal-realist in its emphases on the essential indeterminacy of the general rules vis-à-vis particular cases, the importance of the category of decision and of the role of the men authorized to decide on the maintenance of the legal-political process, and the inevitable interference (or entanglement) of moral, political, cultural, and economic considerations in the domain of law.<sup>52</sup>

However, what is most essential in Schmitt’s approach to law is his insistence on the pivotal significance of the notion of legitimacy as a supra-legal standard associated with the will of the sovereign power constituting and maintaining the political-legal order. Indeed, as we have seen in this paper, all the aforementioned tenets derive from and recall his conception of legitimacy. I

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<sup>51</sup> *Id.* at 5.

<sup>52</sup> In emphasizing all these points, Schmitt comes particularly close to the school of legal thought known as American legal realism. Indeed, Schmitt may be considered as providing a philosophical reconstruction and defense of the realist premises, of which, Brian Leiter thinks, American legal-realism is in need. Leiter, *supra* note 45, at 50.

think that whatever objection one might have against Carl Schmitt's legal-political thought, such an insistence on the pivotal significance of the notion of legitimacy makes his approach still noteworthy for our contemporary contexts whereby the question of legitimacy in the sense of supra-legal and extra-procedural criteria is fading away with the potential result of eroding a genuine respect and trust for the rule of law on the part of citizens.

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