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THE EXILE OF THE *NOMOS*: CARL SCHMITT AND THE *GLOBALE ZEIT*

A Jurist on the Fringes of the Law

One of the most extraordinary anticipations of the themes of the global epoch is to be found, as we have already seen, in the work of Carl Schmitt. He represents one of the most significant and controversial figures in European political and legal philosophy in the twentieth century. His name and work have long been associated, from the standpoint of political ideology, with his compromise with the Nazi regime and, from a strictly doctrinal aspect, with the alternating fortunes of 'decisionism' – a theoretical position in which the foundation of the state's sovereignty would not rest on the impersonality of the law or on a norm, but rather on a primal decision. Schmitt's assumption expressed, principally, in his controversy with the 'normativism' of Hans Kelsen – but more generally with all the 'proceduralistic' and 'pluralistic' ways of viewing the state, whether liberal-conflictive or associative-corporative – has caused some interpreters to consider Schmitt's thought equivalent to a realistic political science outside legal science. Or, according to the polemical judgement of Massimo Severo Giannini,[1] it is a 'degeneration' of the great thread of German legal positivism that begins with von Gerber and Laband through to Jellinek and Kelsen.

However, such a judgement clashed with the understanding of his own work that Schmitt offered on several occasions. Until the end, he identified himself as a jurist. In spite of his documented 'ignorance' of private law and his 'particularly polemical attitude toward any pandectistic[2] and neopandectistic view of

1 See Massimo Severo Giannini, 'La concezione giuridica di Carl Schmitt: un politologo datato?'.

2 The Pandectic School was the offshoot of the Historical School of Law of

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public law from Laband to Kelsen',[3] Schmitt – according to his autobiographical testimony in *Ex Captivitate Salus*,[4] which he wrote while in prison from 1945 to 1947 – was familiar with 'two areas of legal science, constitutional law and international law'.[5] These two disciplines, both of which include a grasp of public law, are exposed to 'danger from "the political"'.[6] From this danger, Schmitt noted, obviously arguing against any form of legal 'purism':

> [N]o jurist in these disciplines can escape, not even by disappearing into the nirvana of pure positivism. The most he can do is mitigate the danger either by settling into remote neighbouring areas, disguising himself as a historian or a philosopher, or by carrying to extreme perfection the art of caution and camouflage.[7]

The trail of Schmitt's theoretical reflection should begin, ideally, in 1919 with *Politische Romantik*,[8] his first important work, then continue with his celebrated *Die Diktatur*.[9] *Die Diktatur* had considerable effect on the so-called 'conservative revolution' but also on Marxists. The volume's subtitle – 'From the Origins of the Modern Idea of Sovereignty to the Struggle of the Proletarian Class' – is a sign of Schmitt's broad and complex approach to the problem, which aimed at an unbiased confrontation between historical-ideological components that are different, or even opposed (this was recognised at the time by intellectuals coming from different camps, from Walter Benjamin

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Friedrich Carl von Savigny. Indeed, it was founded by a student of Savigny's, Georg Friedrich Puchta (a line of thought later developed by Immanuel Bekker and Bernhard Windscheid). The school takes its name from the study of Justinian's *Corpus iuris civilis* (in particular from the section entitled the 'Pandects'). Using the logico-systematic method of Roman law, the 'Pandectic paradigm' brought changes to a number of different areas of German law in the nineteenth century, from civil to public law. In particular, it led to a deepening of the divide between the dogmatic legal framework of civil law countries and the case-based law of common law countries (which rested on the concrete rather than abstract formalism).

3 Ibid., p. 447.

4 Carl Schmitt, *Ex Captivitate Salus: Erfahrungen der Zeit 1945/47*.

5 Ibid., p. 55.

6 Ibid.

7 Ibid.

8 See Carl Schmitt, *Politische Romantik* and *Political Romanticism*.

9 Carl Schmitt, *Die Diktatur: Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf*.

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to Ernst Robert Curtius). It is, in fact, in this text that he first introduced the distinction between 'commissioned' or transitional dictatorship (contemplated in the Roman legal system) and an 'institutional' or 'sovereign' dictatorship, which Schmitt would take up again later in the framework of his pitiless diagnosis of the constitutional dispositions of the Weimar Republic, a work he had begun in his *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*.[10] Other key texts of Schmitt's in the 1920s include *Politische Theologie*,[11] *Der Begriff des Politischen* – which appeared for the first time in 1927 in the *Archiv für Sozialwissenschaft und Sozialpolitik*[12] – and *Verfassungslehre*,[13] in which he proposes the themes of the antiformalist polemics of the preceding years. His works from the early thirties, *Der Hüter der Verfassung*, *Legalität und Legitimität*,[14] and *Staat, Bewegung, Volk*, continue along the same course as those of the preceding decade. A further systematisation of his thinking is attested to by *Über die drei Arten des Rechtswissenschaftlichen Denkens*[15] and by his 1940 collection of essays *Positionen und Begriffe*. It should not be forgotten, however, that Schmitt, again during the thirties, assiduously confronted the work of Thomas Hobbes, most notably in his 1937 essay 'Der Staat als Mechanismus bei Hobbes und Descartes', and with the volume he published the following year, *Der Leviathan in der Staatslehre des Thomas Hobbes*.[16]

Beginning with the years of World War II, Schmitt's approach to the problem undergoes a significant shift. The themes related to the genesis-structure and to the parabolic path of the modern state are increasingly absorbed within a cosmic-historical circumstance, hinged on the earth/sea binomial, whose alternating circumstance would mark the destinies of the *Nomos*, understood as the countersign of a universal law of 'appropriation' and, for that reason, the point of origin of every law. This phase of his thought, which began in 1942 with the slim book *Land und Meer*, culminated in 1950 with what represents Schmitt's *magnum opus* and one of the

10 See also Carl Schmitt, *The Crisis of Parliamentary Democracy*.
11 See also Carl Schmitt, *Political Theology*.
12 See also Carl Schmitt, *The Concept of the Political*.
13 See also Carl Schmitt, *Constitutional Theory*.
14 See also Carl Schmitt, *Legality and Legitimacy*.
15 See also Carl Schmitt, *On the Three Types of Juristic Thought*.
16 See also Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes*.

great books of the century, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europæum*.[17]

In the subsequent thirty-five years of his life, Schmitt dedicated himself to a deeper understanding and a precise definition of the important categories of his thinking, rather than to a true development – not, therefore, with the aim of systematisation (since his thought is characterised by a conspicuously anti-systematic attitude), but as if wanting to fix its cardinal points. Of this final phase, it is enough to mention some of the salient passages: the 1953 essay 'Nehmen/Teilen/Weiden',[18] conceived as a corollary to a theory of the *Nomos*; the 1960 article 'Die Tyrannei der Werte'; the slim 1963 volume *Theorie des Partisanen*,[19] which presented a kind of intertextual integration of *The Concept of the Political*; and, finally, *Politische Theologie II* of 1970,[20] which constituted a significant defence of the category of 'secularisation', engaging in a controversy with the thesis of the 'legitimacy' or 'self-affirmation' of the modern advanced by Hans Blumenberg. To put this controversy in context, I take the liberty of referring to my works *Die Säkularisierung der westlichen Welt* and *Potere e secolarizzazione*.

To provide a methodological compass suited to orientating oneself in the vast and tight weave of these works – today the subject of a significant, though ambiguous, revival in various countries – it is necessary to use as reference points the three fundamental nuclei that articulate Schmitt's thought: 1) political theology; 2) the concept of the 'political'; and 3) the theory of the *Nomos* as concrete order. These three items are simultaneously gathered, both in their specificity and distinctiveness, and in their interactive coexistence [*compresenza*], into an 'epochal' vision of the modern state and its parabolic path. They will be addressed, albeit separately, to bring about their confluence into a large diagnostic framework that assumes the 'crisis of the state' within the more general development of what Schmitt defines – following Max Weber – as 'Western rationalism' (*okzidentaler Rationalismus*).

17 See also Carl Schmitt, *The Nomos of the Earth*.

18 Carl Schmitt, 'Nehmen/Teilen/Weiden: ein Versuch der Grundfrage jeder Sozial- und Wirtschaftsordnung vom Nomos her richtig zu stellen', *Gemeinschaft und Politik* 3 (1953).

19 See also Carl Schmitt, *Theory of the Partisan*.

20 See also Carl Schmitt, *Political Theology II*.

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Political Theology

'The Sovereign is he who decides on the state of exception'.[21] *Political Theology* of 1922 begins with this peremptory statement. The text has as its central theme the concept of sovereignty. For this reason, many jurists have wondered why the title was chosen. The reason for their surprise is to be found, evidently, in their failure to note the category to which Schmitt gave the task of interconnecting the problem of sovereignty as a 'decision' (*Entscheidung*) about the 'state of exception' (*Ausnahmezustand*) with the context of political theology: the 'secularisation' category. This connecting function is made explicit only in the *incipit* of the third chapter of the book, with the statement that all 'significant concepts of the modern theory of the state are secularised theological concepts'.[22] Thus, the secularisation category provides the key to accessing not only the historical development of those concepts, passing from theology into public law – '[F]or example, the omnipotent God became the omnipotent legislator'[23] – but also their 'systematic structure'. The 'constructive' analogy running between theology and jurisprudence allows Schmitt to read the entire development of the doctrine of the state over the last four centuries from the point of view of the antithesis between 'deism' and 'theism'. Here, Schmitt neatly outlined his opposition – which will remain, from this point on, a constant in his thought – to the 'deistic' theological-metaphysical presupposition of the 'modern constitutional state', which 'rejected not only the transgression of the laws of nature through an exception by direct intervention, as is found in the idea of a miracle, but also the sovereign's direct intervention in a valid legal order'.[24] The case of an exception, repudiated by the 'rationalism of the Enlightenment'[25] in any form whatsoever, 'in jurisprudence is analogous to that of the miracle in theology'.[26]

The bridge between *political theology* and the *theory of sovereignty* has thus been cast. Schmitt did not, in fact, limit himself to declaring *sovereignty* a limit-concept to be applied in a limit-case.

21 Schmitt, *Political Theology*, p. 5.
22 Ibid., p. 36.
23 Ibid.
24 Ibid., pp. 36–37.
25 Ibid., p. 37.
26 Ibid., p. 36.

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He above all underlined its 'systematic, legal logic foundation',[27] which makes the state of exception 'truly appropriate for the juristic definition of sovereignty'.[28] The non-rhetorical and non-occasional attitude of this insistence on the properly legal character of the definition of sovereignty is newly and exactly verified by Schmitt's refusal to adopt the sociological equivalents of the concept:[29] 'It would be a distortion of the schematic disjunction between sociology and jurisprudence if one were to say that the exception has no juristic significance and is, therefore, "sociology"'.[30] Sovereignty is, for Schmitt, a *conceptus terminator*. It is precisely the *terminus* of every normative system, in the double sense of the 'border' and 'line' that defines it. But precisely as the line that defines it, that delimits it, sovereignty cannot be expressed in normative language, but must instead be correlated to what the *decision* requires: sovereignty, therefore, as the power to decide *about* the state of exception.

However, it is necessary to pay attention to an essential detail of this defining formula if one does not want to run the risk of misunderstanding the meaning of the entire discourse. The dimension of *Entscheidung* is certainly 'extra-normative' but *not* extra-legal. Thus, the function of the case of exception is precisely that of making manifest the 'specifically juristic element – the decision in absolute purity'.[31] For Schmitt, it is precisely Enlightenment rationalism that does not take into account the crucial nature of the distinction between 'legal' and 'normative': it 'assumes that a decision in the legal sense must be derived entirely from the content of a norm'.[32] If, on the one hand, only the limit-case 'makes relevant the subject of sovereignty, that is, the whole question of sovereignty',[33] on the other hand, such a subject is qualified by its limit-position, which places it, paradoxically, both outside and within the legal system that is in force. It is *outside* it, because otherwise it would not be the subject of a decision. But *within*, because it has the 'competence' of deciding to suspend the constitution *in toto*.

27 Ibid., pp. 5–6.
28 Ibid., p. 6.
29 I am thinking, for example, of Weber's *Herrschaft*, or dominion in the sense of 'legitimate power', countered by *Macht*, or 'de facto power'.
30 Schmitt, *Political Theology*, p. 13.
31 Ibid.
32 Ibid., p. 6.
33 Ibid.

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Access to the paradoxical ambivalence of sovereignty would be inexorably precluded for the 'deistic' mechanicism, which is a presupposition of the doctrine of the state of law: from Locke through Kant up to its 'normativistic' dissolution accomplished in the theories of Krabbe and Kelsen. Schmitt countered this 'degenerative' process with his own decisionistic definition of sovereignty, tracing it back to an alternative line which, beginning with Jean Bodin (whose merit consists precisely in having 'incorporated the decision into the concept of sovereignty'[34]), would reach the 'theistic conviction' of Catholic philosophy in the Counter-Revolution, represented by the classic names of de Maistre, de Bonald, and Donoso Cortés.

It is hardly necessary to point out the enormous interpretive forcing undertaken by Schmitt in his attempt to fabricate a genealogical tree for 'decisionism'. First, with respect to Bodin: if it is true that, in fact, we are in debt to the *Les six livres de la République* (1576) for the first legally accomplished definition of the *summa legibusque soluta potestas* as an 'irreducible unit' of the prerogatives of absoluteness, perpetuity and indivisibility, and as a *puissance de donner et casser la loi* (the power to make and to abrogate the law), it is at least as true that such a *puissance absolue* is anything but 'unlimited', as Schmitt maintains,[35] since it must be exercised both in keeping with the natural laws imprinted on the world by the supreme authority of God, and in observance of the fundamental (today we would say constitutional) laws of the state – for example, the law of the crown – which exist to safeguard the continuity of the bureaucratic and administrative apparatus upon which sovereignty stands. Second, with regard to the thought of the Counter-Revolution: if it is in fact true that it supports the 'personal sovereignty of the monarch'[36] theologically, it is at least as true that such support cannot be arbitrarily expunged, setting aside the controversial legitimist call for tradition, the ethical-religious appeal to providence and to ecclesiastical authority, which for these theoreticians always represents – as Schmitt himself is forced to admit – 'the last decision that could not be appealed'.[37] For these aspects, and

34 Ibid., p. 8.

35 See Giacomo Marramao, *La passione del presente. Breve lessico della modernità-mondo,* pp. 300–310.

36 Schmitt, *Political Theology*, p. 37.

37 Ibid., p. 55.

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more generally for Schmitt's 'Catholic' positions, one could see his reflections on 'representation' and on the *complexio oppositorum* contained in a work that appears marginal and stands alone in his production during these years.[38]

Beyond this historico-philological forcing of the interpretation (which incidentally also affects an early attempt by Schmitt to give a decisionistic interpretation of Hobbes), what matters in this context is his isolation of the fundamental theoretical nucleus of 'political theology'. It lies in defining sovereignty *legally*, not as a monopoly to 'coerce' or merely to 'rule' but as 'a monopoly over [the] last decision'.[39] The decision is freed 'from all normative ties and becomes in the true sense absolute'.[40] Therefore, Schmitt's wager rests on the chance that the case of exception, too, will remain 'accessible to jurisprudence because *both elements, the norm as well as the decision, remain within the framework of the juristic*'.[41]

As we have said, the character of the decision is paradoxical: it transcends the norm while it is, at the same time, the presupposition of every norm. Through decision 'authority proves that to produce law it need not be based on law'.[42] The paradox now seems to reverberate on the very category of exception, conferring on it an ambivalent status. The exception stands in relation to 'normality' exactly as the decision stood in relation to the norm. Its status would seem, therefore, eminently methodological. Only by carrying problems to their extreme, to a limit-concept, is it possible to manifest the truth or essence of the 'normal situation',[43] made routine by procedure, and neutralised by the automatic order of norms. This would seem to be the tone in which Schmitt's proposition must be understood, where the exception is 'more interesting' than the 'normal case'. While the latter 'proves nothing', the former 'proves everything'.[44] This is why the exception proves the rule, and not vice versa. However, Schmitt does not limit himself to that. Instead, he tends to hook the 'primality' of the *Ausnahmezustand* (or of the *Ernstfall*, or of the *Grenzfall*) to a metaphysical *lebensphilosophisch* assumption – derived, that is

38 See Carl Schmitt, *Roman Catholicism and Political Form*.
39 Schmitt, *Political Theology*, p. 13.
40 Ibid., p. 12.
41 Ibid., pp. 12–13. Emphasis added.
42 Ibid., p. 13.
43 Ibid., p. 12.
44 Ibid., p. 15.

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from a 'philosophy of . . . life': 'Precisely a philosophy of concrete life must not withdraw from the exception and the extreme case, but must be interested in it to the highest degree'.[45] And again: 'In the exception the power of real life breaks through the crust of the mechanism that has become torpid by repetition'.[46]

The ambivalence of status mentioned above now seems to be translated into an indelible ambiguity of Schmitt's entire theoretical construction. The existential and anti-normative dimension assigned to the decision – with Nietzsche and, perhaps, even Stirner as guides – tends, on the one hand, to assume a 'negativity' and 'groundlessness' that breaks with all the traditional substantialist views of order. On the other hand, Schmitt's 'positive' radicalness aimed at reaffirming the supremacy of the state's existence and of its 'right to self-preservation'.

From the first perspective – in contrast to those interpretations that aim to reduce him to the stereotype of reactionary statism that emphasise the problem of order and institutional stability – Schmitt seemed to emphasise the innovative aspect, the beneficially 'catastrophic' break of the decision with respect to the constitutional equilibrium in force; and, from a general theoretical standpoint, to share with Max Weber (the author who is closer to Nietzsche in this than is commonly believed) an element of substantive discontinuity with the European political tradition: namely, the crisis of foundations which supported the classical subject of sovereignty. Moreover, the German term *Entscheidung* indicates the same act of cutting, of breaking-away, expressed by the Latin *de-caedere* and, of distinguishing, in order to make a choice, expressed by the Greek term *krísis*, from *krínein*, 'to separate', 'to discern', the meaning which underlies its derivatives 'criticism' and 'criterion'. This is the root of the 'caesura' that separates Schmitt from the reactionary German statism of the nineteenth and twentieth centuries, in which he perceives a return to the regressive utopia where conflicts are resolved, reposing on the pretext of refounding the state's identity in an organicist-corporative mode. Here also lies the reason for his constant polemic with the different variants of corporativism, from the Romantic-reactionary version of an Othmar Spann to the very differently formulated one of Otto von Gierke, and up to the 'pluralism' of G. D. H. Cole and H. J. Laski. But at the same time,

45 Ibid.
46 Ibid.

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the decision's character as break, founded on nothing (*auf Nichts gestellt*), tends to sharply distinguish itself from aestheticising and Romantic 'occasionalism', with which Schmitt – in any event – had settled his accounts almost as a preliminary to his political-theological treatment of sovereignty in *Political Romanticism*. The decision is not a *coup de théâtre* – a mere arbitrary gesture for its own ends, a sort of *art pour l'art* – but the cut, the innovative schism, which is the origin of every concrete, actually existing legal system. But the *Entscheidung* cannot be deduced from the form of the legal system, since it never is the effect or the result of a process of formation or constitution. It is, however, *constitutive* of it. Conversely, the fact that the decision always gives way to a new constitution (*Verfassung*) in no way means that it depends on it. In fact, it is precisely the point at which the constitution itself takes place. Upon this scheme rests the formulation Schmitt gives to a classic problem of constitutional law, that of the relationship between *legality* and *legitimacy* – which is confronted in an important text from 1932.[47] From this viewpoint, there is no radical difference between Schmitt's and Weber's positions. Schmitt's criticism of Weber – that Weber reduced legitimacy to legality, as does normativism – is largely imputable to Kelsen's forced assimilation of Weber's theses in 1922, in *Der soziologische und der juristische Staatsbegriff*.[48] If it is true that, for Weber, the legitimisation of power cannot descend mechanically – as in Kelsen's 'pure theory of law',[49] which in this respect falls prey to the 'naturalistic fallacy' that reduces law to fact – from the simple empirical encounter with *effectiveness* (with the continuity of the coercive legal system that obtains obedience), it is equally true that, for Weber as for Schmitt, legality and the legal system are not the *cause* of legitimacy but only its *necessary form*.

However, beyond the threshold of this statement of the non-self-sufficiency of the criterion of legality, Schmitt's thought seemed to run into an aporia even greater than Weber's. Indeed, from the 'positive' perspective mentioned above, the decision seems to be constituted in its 'absolute' – and, therefore, *unrelated* – autonomy as the symmetrical reverse side of the general and intermediate nature of the liberal scheme.

47 See Schmitt, *Legality and Legitimacy*.
48 Hans Kelsen, *General Theory of Law and State*.
49 Hans Kelsen, *Pure Theory of Law*.

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> The decision frees itself from all normative ties and becomes in the true sense absolute. The state suspends the law in the exception on the basis of its right of self-preservation, as one would say. The two elements of the concept *legal order* are then dissolved into independent notions and thereby testify to their conceptual independence. Unlike the normal situation, when the autonomous moment of the decision recedes to a minimum, the norm is destroyed in the exception. The exception remains, nevertheless, accessible to jurisprudence because both elements, the norm as well as the decision, remain within the framework of the juristic.[50]

So where does the reason lie for the theoretical *preference* for the *decision* instead of the *norm*? Schmitt answered that it is to be sought in the existential priority of the state: 'The existence of the state is undoubted proof of its superiority over the validity of the legal norm'.[51] Therefore, it is the appearance of the *existential* dimension that interrupts the vicious circle of norm and decision, in which one of the most representative figures of the 'public philosophy' of Weimar had felt it necessary to see a sterile game of mirrors ensnared in formalism. In *Die Souveränität*, Herman Heller wrote, 'Schmitt's will without norm [*normloser Wille*] resolves the problem as little as Kelsen's norm without will [*willenlose Norm*]'.[52]

But through the folds of the existential dimension, we now glimpse the emergence of the other conceptual pole of Schmitt's thought: the 'political'.

The Concept of the 'Political'

For Schmitt, the concept of the 'political' constitutes the *presupposition* for the concept of the state, understood – according to the tradition of civil law, rooted in Roman law – as the *status* 'of a people organised on a closed territory'.[53] All the possible characterisations of the definition of the state (machine or organism, person or institution, society or community) take on meaning only in light of the 'political' and, conversely, are incomprehensible if the essence of this term is misunderstood. For Schmitt, this essence is to be found in its irreducible autonomy by breaking the *circulus vitiosus* of 'political' and 'of-the-state'. The fact that the

50 Schmitt, *Political Theology*, pp. 12–13.
51 Ibid., p. 12.
52 Herman Heller, *Die Souveränität*, p. 62.
53 Ibid.

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'political' is the inescapable presupposition for what is 'of-the-state' does not mean in any way that it is to be identified with it (as the modern mythology and jurisprudence of the state would have it). The 'political' cannot be circumscribed, confined or topologically delimited, even if the spatial dimension constitutes, as we will see, one of its chief correlates. It can only be temporarily 'located' in those set of dimensions or forms in which, from time to time, it manifests itself historically. It is, in fact, a 'criterion' *stricto sensu*, an attitude that is explained – like the decision that, inasmuch as it forms the far limit of the 'legal', bears its countermark – not by refounding or recomposing but by *settling*, by *dividing*. This criterion is to be taken in its peculiar specificity and 'distinction', with respect to other 'various relatively independent endeavours of human thought and action, particularly the moral, aesthetic and economic'.[54] This is an extremely important point, in which some have found – not without the complicity of Schmitt himself – analogies to Benedetto Croce's 'philosophy of the distincts'.[55] Once it is assumed that the distinctive criterion of the moral is provided by the opposites good/bad, that of the aesthetic by the pair beautiful/ugly and that of the economic by the pair useful/harmful, or profitable/non-profitable, the problem of the *essential definition* of the 'political' coincides with the identification of a set pair that is irreducible to the preceding couples.

The 'specific political distinction' consists, for Schmitt, of the 'distinction of friend [*Freund*] and enemy [*Feind*]'. It represents the autonomous, irreducible 'criterion' to which 'all actions with a specifically political meaning can be traced'.[56] The two indispensable correlatives of this specific distinction are its *existentiality* and its *public nature*. Two unavoidable consequences follow. First, the concepts of friend and enemy must be assumed, not as metaphors or symbols but in their concrete, 'existential' meaning. Second, not only must they not be confused with other criteria (according to which, for example, the enemy would be morally bad, aesthetically ugly or economically disadvantageous), but neither must they be understood 'in a private-individualistic sense as a psychological expression of private emotions and

54 Schmitt, *The Concept of the Political*, pp. 25–26.

55 See Schmitt's lecture 'Das Zeitalter der Neutralisierungen und Entpolitisierungen' from 1929, where he cites Croce, in *Der Begriff des Politischen: Text von 1932 mit einem Vorwort und drei Corollarien*.

56 Schmitt, *The Concept of the Political*, p. 26.

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tendencies'.[57] Friendship and enmity, therefore, must be conceived exclusively *in a public sense*: 'The enemy is solely the public enemy . . . The enemy is *hostis*, not *inimicus* in the broad sense'.[58]

For the aspect of the 'political' as well, as was already the case with that of the decision, Schmitt employs the methodical criterion of the 'extreme' as the truth for normal cases: the closer a grouping comes to the extremity and purity of the friend/enemy antithesis, the more political it is. This produces the definitive detachment of political acting from any topological referent, which has led some to see in Schmitt a definition of politics that mirrors and is the opposite of, the relational, functionalist, or systematic models of *power-influence*. 'The political . . . does not describe its own substance, but only the intensity of an association or dissociation of human beings'.[59] Since 'purity' and 'autonomy' are part of the criterion, not the realm in which it is made explicit, it follows that any aggregation of intensity near the friend/enemy antithesis itself assumes a perfectly political character whether it is manifested in religious (confessional civil wars), national (interethnic conflicts) or economic (class) conflicts.

Given this state of affairs, how is the concept of the 'political' related to the 'political-theological' dimension of state sovereignty? Due to the two sets of consequences that it brings to the development of Schmitt's thought, this is a crucially important question. The question a) *directly* affects Schmitt's polemic with regard to the constitutional arrangements of the Weimar Republic,[60] and also b) *indirectly* affects the way in which his diagnosis of the parabolic path of the modern state is inserted into the framework of a general vision of the alternating succession of law and power, order and conflict, earth and sea, which spans the development of 'Western rationalism' from its beginnings in classical Greece up to its current expansion on a planetary scale. Let us proceed to an examination of these aspects, treating them in the order we have just stated them.

57 Ibid., p. 28.

58 Ibid.

59 Ibid., p. 38.

60 For a historical and conceptual appraisal of the Weimar political and constitutional debate, see Giacomo Marramao, *Il politico e le trasformazioni*.

Against Weimar: Depoliticisation and the Ascendency of Technique

If one looks closely, Schmitt's definition of the criterion for the 'political' is characterised by an unmistakeable trait: it institutes a drastic caesura between *the essence of the 'political'* and *the form of the exchange-contract*. However, a caesura of this type involves – for the years in which it was formulated (between 1927 and 1932) – an implied violent polemic towards the Weimar Constitution. It was a 'Constitution without decision'[61] (*Verfassung ohne Entscheidung*, as Otto Kirchheimer, a militant pupil of Schmitt in the ranks of the Social Democrats, would define it), since it had passively accepted the euthanasia of the 'political' in the contracting and translating of the enemy into the competitor. For Schmitt, the effects of such passiveness were deadly in their inexorable automatism. The 'pluralistic' dynamics of conflicts and transactions between various pressure groups and institutional 'bodies' appeared, to his eyes, as the re-emergence from a long state of dormancy of those *potestas indirectae* which had once been 'neutralised' by the affirmation of the modern state and that now threatened to take their revenge by undermining the sovereign unit at its root. The legal and constitutional literature generally has dwelt on the 'therapeutic' aspects of Schmitt's contributions in the years bridging the 1920s and 1930s, beginning with his tendentious exegesis of Article 48[62] where – in explicit disagreement with Kelsen – Schmitt identified the guardian of the 'true' Constitution with the President of the *Reich*, 'legislator in the case of extreme necessity',[63] and not with a jurisdictional collegial body such as the Constitutional Court, which, in his opinion, remained an eminent expression of the pluralist fracturing. Beyond these technical-juridical aspects, the background for the Schmitt-Kelsen polemic consisted of a genuine axiological and political-ideal antithesis – which emerges clearly from the confrontation between these two figures assembled in Hans Mayer's memoirs[64] – between a position that considered political parties a

61 Otto Kirchheimer, 'Weimar – and What Then? An Analysis of a Constitution', p. 71.

62 See Schmitt, *Legality and Legitimacy*.

63 Carl Schmitt, 'Der Hüter der Verfassung'.

64 See specifically Hans Mayer, *Ein Deutscher auf Widerruf: Erinnerungen*, pp. 140–51.

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disintegrative element of the political system and one that aimed, instead, at fully legitimising them as constitutive factors in modern democracy. The theoretical indicator of the stakes was, in the final analysis, represented by the diametrically opposed assessments that the two authors supplied for the concept of 'the people'. For Kelsen, this was nothing more than a totemic mask, a metapolitical illusion concealing or dissimulating a pluriverse of interests, ethnic groups and cultures. For Schmitt, on the other hand, the self-identification of the *Volk* constituted the existential presupposition for every political unit.[65] Hence, the singular pastiche represented by Schmitt's *Verfassungslehre* was his attempt – paradoxical, to say the least – to bring Rousseau's democracy of identity together with the doctrine of *pouvoir neutre* from Benjamin Constant, Rousseau's philosophical adversary.

Beyond these technical-juridical and constitutionalist aspects, it is important to underscore the philosophical outlines of Schmitt's reflection. They concern, at this point, the relation that is instituted between the concept of the 'political' and 'political theology', which hinges on the concept of sovereignty. The text in which the interconnection between these two fundamental coordinates is most coherently and suggestively expressed is his 1929 lecture 'Das Zeitalter der Neutralisierungen und Entpolitisierungen'.[66] Here, the historical-ideal succession in modern Western civilisation is described as a sequence of stages in which the political essence of the will to power becomes secularised. The stations along this path – that Schmitt cautions us not to confuse with the traditional schemes of an ascending philosophy of history – go from the 'theological' to the 'metaphysical', from the 'moral' to the 'economic', up to the current 'era of technology'. Therefore, the process of secularisation unfolds by means of a gradual shift in the centre of gravity, in which, from time to time, the 'political' settles and is 'normalised'. Modern secularisation is thus characterised by an alteration between contrasts that are determined by the actualisation of the friend/enemy antithesis and its successive 'neutralising' arrangements. The *eruption* that renews the 'political' and *neutralisation* represent a non-modular polarity of the process of secularisation. 'European humanity is constantly migrating from a field of

65 On this point see Giacomo Marramao, *Dopo il Leviatano. Individuo e comunità*.

66 Schmitt, *Begriff des Politischen*, pp. 78–95.

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conflict to neutral ground and the neutral ground, as soon as it is conquered, is immediately transformed, once again, into a battlefield. It then becomes necessary to seek new neutral spheres'.[67] The contemporary epoch, marked by the ascendency of technology, is nothing more than the landing place of 'a series of progressive neutralisations'[68] of areas where, in the course of modern history, the centre has successively shifted from the 'theological' (the theatre of the wars of religion in the sixteenth and seventeenth centuries), to the 'metaphysical' (the space of scientific-political conflicts in the fifteenth century), to the 'moral' (the ground for cultivating the rationalism of the Age of Enlightenment and its revolutionary outlet), to the 'economic' (the pedestal for the doctrine of the 'neutral and agnostic state' of the nineteenth century and its overturning in the Marxist theory of classes). But, technique, as the final derivative of the process of neutralisation, does not permit further depoliticising shifts. In fact, it is 'culturally blind'. It does not, in itself, possess the criterion for its possible uses: 'it can be revolutionary and reactionary. It can serve freedom and oppression, centralisation and decentralisation'.[69]

Technique always awaits a legitimate subject to use it. Yet this cannot be an impersonal, abstract subject, such as the 'state of law' that, since it reduces politics to a bureaucratic-administrative machine, is itself technical, a neutralising and depoliticising form. It must be a subject capable of reviving the specifically political criterion for identification. In this way, Schmitt links the concept of the 'political' to the theme of the decision, which – even if, as we have seen, it leads to the attribution of every innovative dynamic to the extra-normative sphere of existence and concrete life[70] – in no way should be confused with a romantic refusal of technology. Technology is accepted not only because it represents, at this point, an irrevocable destiny, but also because it is precisely to the process of disintegrative secularisation of the metaphysical, culminating in the ascendency of a technical-conventional order, that the decision owes its character of *groundlessness*. The 'bottomless abyss' of a freedom capable of producing the state of exception suspends the norm

67 Ibid., p. 89.
68 Ibid., p. 88.
69 Ibid., p. 91.
70 Schmitt, *Political Theology*.

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and is able to determine a new friend/enemy grouping in complete autonomy.

Setting aside the burning controversies raised by Schmitt's category of 'decision' – which would later be related, in the framework of a comparative conceptual analysis, to the concepts of Jünger and Heidegger[71] – here it must be underscored once more that the thesis of successive secularising neutralisations is detached from the framework of traditional philosophies of history because of two decisive aspects. First, it reduces progress, as does Weber's thesis of the continuum of Western rationalism, to the progressive rationalisation of means that gives rise to formalism *without foundations*, to a purely conventional order. Second, the succession of *Zentralgebeite* in no way fits into a new doctrine of 'stages' (if anything, later Schmitt appears to lean towards Arnold Toynbee's 'rhythmic' theory of cultures based on the *challenge/answer* scheme), since, far from denoting a rising motion, it is limited to underlining the points of crystallisation for the 'pluralist' dynamics of Western *Kultur*, whose presuppositions are 'existential and not normative'. In other words, the 'centres of reference' never subsume the multiplicity of phenomena in each epoch, but only polarise the dynamic contexts with which the neutralisation and control of conflictive tensions is determined. Therefore, the passages do not occur in the dialectical form of *Aufhebung* (in which the final step sublates and includes within itself all those that preceded it), rather in terms of a lateral shift from one context to another. It should not be surprising, therefore, that this paradoxical status of the 'political' as an *atopical* criterion – but one mysteriously capable, at the same time, of giving way each time to very concrete topographies of order – could appear to some as a veritable philosophical aporia. In a celebrated essay from 1935, Karl Löwith noted that Schmitt cannot in reality say where the 'political' is located, if not in a totality that goes beyond every determinate area of reality, *neutralising them all in the same way, even if in a direction inverse to that of depoliticisation*.[72]

However, the philosophical kernel of Löwith's severe judgement – in which the concept of the 'political' would only specularly restore the empty formalism of neutralisation, leading

71 Christian von Krockow, *Die Entscheidung: Eine Untersuchung über Ernst Jünger, Carl Schmitt, Martin Heidegger*.

72 Karl Löwith, 'The Occasional Decisionism of Carl Schmitt'.

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to an indeterminateness that is fungible on occasion in every content and purpose – would hit the target only on one condition: that of ignoring the overall design in which Schmitt inscribes all these moments, including the concepts of politics and the state.

The theoretical scheme presupposed in this picture is represented by his conception of the *Nomos* as a concrete order.

The Theory of the Nomos *as 'Concrete Order'*

The parabolic path of the modern state, born out of the civil wars of religion in the sixteenth and seventeenth centuries, takes place, for Schmitt, in perfect parallelism with that of its doctrinal framework: the *ius publicum europæum*. As a 'specifically European phenomenon,' jurisprudence is 'deeply involved in the adventure of Western rationalism'.[73] The authority that it assigned to the sovereign functions of the new secular state retraced at the beginning, with a near obsessive faithfulness, the entire range of theocratic attributes. The absolute nature of the appropriation of those attributes on the part of the secular sovereign was thus guaranteed precisely by this perfect formal correspondence with the source. As a translation – as rigorous as Hobbes could want – of theological prerogatives into 'mortal' and 'worldly' prerogatives, the secularisation originally performed by public law still was not a profanation. Instead, it neutralised religious conflict by installing a new order, no longer based on creed but wholly civil and political. Here lies the key to Alberico Gentili's warning, taken by Schmitt as the inaugural formula of the modern state: '*Silete, theologi, in munere alieno!*' Except that, in the course of secularisation, the structure of the state has become ever greater, transforming itself into an inanimate machine and neutral apparatus from which the 'representative-sovereign person' was first relegated to the background and then definitively removed. With the age of technology, this profanation has reached its natural conclusion and, in the presence of the 'new objectivity of pure technicality', it now is the jurists' turn 'to receive the injunction to be silent'. Thus, *Silete, theologi!* is replaced by *Silete, iuriconsulti!*

73 For these questions, see Schmitt, *Ex Captivitate Salus* and *Der Nomos der Erde im Völkerrecht des Jus Publicum Europæum*.

> Behold two singular orders to be silent, at the beginning and at the end of an epoch. At the beginning there is an injunction to be silent that comes from the jurists and is addressed to the Just War theologians. At the end there is the injunction, aimed at the jurists, to follow a pure, that is totally profane, technicalness.[74]

The pessimistic tone of *Ex Captivitate Salus* echoes in many of the motifs of Schmitt's thought after the Second World War. 'The epoch of the great philosophical systems has now been left behind', we read in the preface to the 1963 reissue of *Der Begriff des Politischen*.[75] Today only two styles of thought are possible: a retrospective historical glance (which reflects the great epoch of Continental public law) and the aphoristic style. Since it is impossible for a jurist to make the 'leap into the aphorism', the first 'way out' becomes obligatory.[76] This is what Schmitt attempts in *The Nomos of the Earth*, which can be considered his greatest work.

The fundamental concepts of Western jurisprudence – the 'political' and the state – are framed and related to the development of the *Nomos*. With his theory of the *Nomos*, Schmitt offers to delineate the primary prerequisites of all law. It is no longer, however, a matter of the positive law of modern jurisprudence but of a kind of primitive law, which is accessible from a metalegal and tendentially anthropological viewpoint. The essential coordinates of this primordial are those of the pair *Ordnung/Ortung* (order/location). In other words, there is no law without land (the *iustissima tellus*), since all law rests on the cardinal presuppositions of territorial acquisition and spatial order. Based on a radical etymological hypothesis stated in his 1959 essay 'Nomos Nahme Name', Schmitt has the Greek noun *nómos* derive from the verb *némein*, in its triple meaning: to take/conquer, to partition/divide and to cultivate/produce. These three meanings are said to correspond to as many primary modes of acting and social existence as can be encountered in all the phases and all the orders of history. In this way the existential motif of the concrete ordering presents itself once more. In the course of the development of Schmitt's thought, this problematic takes a form that is yet more primary and profound than the 'polemological' one (centred on the concept of the 'political') and the nihilistic one (turning on the category of 'decision'). In his 1934 essay on the three kinds of legal thought,

74 Schmitt, *Ex Captivitate Salus*, p. 75.
75 Schmitt, *Theorie des Partisanen*, p. 11.
76 Schmitt, *Ex Captivitate Salus*, p. 81.

Schmitt had already forcefully relativised the 'decisionist' kind, seeing it as an interface of the 'normative' kind and tracing it back to the seabed of an institutional and 'orderly' vision. It is interesting to note how, anticipating a *leitmotiv* of anti-decisionist criticism, he lucidly stated in this text that 'pure decisionism presupposes *disorder* that is transmuted into *order* due simply to the fact *that* a decision is made (it does not reveal *how* the decision is formed)'.[77]

Looking at the results of Schmitt's complex – and not always consistent – itinerary, the theme that must be emphasised here, is that concerning the conceptual pair that supports the diagnosis of the *globale Zeit*, or 'planetary era', in *The Nomos of the Earth*; namely, 'earth' and 'sea'. In the light of the eternal affair of earth and sea, we can find an explanation not only for the point of arrival of the *ius publicum* but, also, for the course of the modern itself and for its most unequivocal manifestation, the industrial revolution. The *ius publicum* runs aground on the ascertainment of the technical-neutral euthanasia of the 'mortal God', the Leviathan state, and with the underlining of its specific consequences, such as the dissemination of the friend/enemy polarity and the emergence of new figures of 'the political', such as the 'partisan'. The global framework produced by this revolution – the unification of the world under the domination of a planetary technology – is, for Schmitt, understandable only through the opposition between land and sea. The true cosmic-historical turn to Modernity took place when, at the end of the sixteenth century, Britain detached itself not only strategically but culturally from the destinies of the continent to undertake its own adventure on the seas. The effect of this detachment is that the 'ancient, purely terrestrial *nomos*'[78] was replaced by a 'new *nomos* that included the oceans in its own order'.[79] From then onward, all 'further pushes towards the cosmos by an unstoppable technique' – wrote Schmitt in an important dispute with Ernst Jünger in 1955 – have only 'meant turning the star where we live, the Earth, into a spaceship'.[80]

It is certainly true that, despite its ostentatious and, at times, self-satisfied radicalness, this diagnosis is anything but resigned

77 Carl Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens*, §2.

78 Carl Schmitt, 'Die geschichtliche Struktur des heutigen Welt-Gegensatzes von Ost und West'.

79 Ibid., pp. 165–67.

80 Schmitt, *Ex Captivatate Salus*, p. 75.

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about the possibilities of relaunching the classical themes of the 'political' and of Order in the heart of the *globale Zeit*, perhaps in the form of a new historical-dialectical synthesis of earth and sea. Such a possibility becomes real by the fact that technology has definitively saturated space. For that reason, today's 'appeal from history' is no longer 'identical to that of the epoch in which the oceans were opened'.[81] All this is true.

Yet, in the final analysis, the underlying tone of Schmitt's thought remains pessimistic. It is basically no different from the psychological attitude that had taken shape thanks to the wisdom from his years in prison. This attitude, lying between pride and nostalgia, was dictated by his acute recognition that he was the 'last' in a great tradition; the final witness and spokesman for a greatness that was inexorably nailed to the past:

> Every situation has its secret and every science bears in itself its own *Arcanum*. I am the last conscious representative of the *ius publicum Europæum*. The last to have taught and investigated in an existential sense and be living out the end just as Benito Cereno lived out his voyage on the pirate ship. Here it is well and it is time to be silent. We must not be frightened of it. By being silent, we remember ourselves and our divine origin.[82]

81 Schmitt, 'Die geschichtliche Struktur des heutigen Welt-Gegensatzes von Ost und West', pp. 165–67.

82 Schmitt, *Ex Captivatate Salus*, p. 75.

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