Conflict as a basis of law – towards the depoliticization

3.1 Introduction to the chapter

German word Reich in literal translation means “realm”, a territory of regent, or generally, a politically organised state. However, this term is mostly used in connotation to the Empire, as the English translation of Deutsches Reich would most commonly be the “German Empire”. After the fall of the monarchy, the first attempt for a liberal democratic-constitutional reform was called the Weimar Republic, and it was based on the Weimar Constitution. Article 1 of this constitution states: ‘The German Reich is a republic. State authority derives from the people’. During the time of the WR is when the second period in Schmitt’s work begins, the so-called Weimer period, and this was marked by three capital works: Politische Romantik (1919), Die Diktatur. Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf (1921), and Politische Theologie. Vier Kapitel zur Lehre von der Souveränität (1922). Political romanticism represents the very beginning of Schmitt’s more straightforward critical approach to liberalism that marks his Weimar period. This book is focused on a critique of the romantic culture in which Schmitt starts to define and protect his concept of the political, and more importantly, it is the point when he begins his fight with the liberalism.

Schmitt defines romanticism that is based upon the ‘natural goodness of the human beings’ that for him ‘is not a historical knowledge’, and that it ‘has nothing to say about the social character of the persons who were the bearers of the movement’. For historicism, however, this is what really matters. The second claim about romanticism in politics, considers the universal, meaning that everything can be a subject of romanticism. With the universal art, political is simply put under aesthetical, and the artistic ego becomes the “new God”. Furthermore, romanticism with its ‘principle of unclarity’ meant the loss of its revolutionary

239 Schmitt, Political romanticism, p. 2.
240 Schmitt, Political romanticism, p. 10.
241 Schmitt, Political romanticism, p. 7.
character, and surpassed to the sphere of restoration, it had kept only one feature that can define it – as an antithesis of classicism. Observed as a political concept that hides itself in aesthetical dimension, and plurality of definitions, romanticism enters in the sphere of political parties, using a simple vocabulary change, for example, the word “liberal”. Therefore, Schmitt considered that the “German revolution” after WWI (as it was before, i.e. *Sturm und Drang* revolution) was the “liberal revolution” that was advancing hidden under ideas of natural goodness of humans, embracing all matters as its subject, and neutralizing the historical-political moments with its aesthetic approach that was above the religious one.

*Political Romanticism* put Schmitt’s theory on the side where he chooses to stay for the rest of his career. It is also a sort of preface to his book on dictatorship, which on the other hand represents a more explicit introduction to his theory of sovereignty. In *Dictatorship* he makes a distinction between commissarial and sovereign dictatorship where the former is a temporary form, focused on restoring the current legal order, while the latter comes as a revolutionary transformation of the status quo and offers a true alternative to the new legal order. ‘For Schmitt, the concept of dictatorship constitutes the “missing link” of modern jurisprudence. The dictatorship represents a paradigmatic attempt to grapple seriously with the exigencies of legal indeterminacy’. One year after *Die Diktatur*, in *Political theology*, he focuses again on the theory of sovereignty that gets its final definitions.

Understanding Schmitt’s works from the Weimar period, is impossible without employing the history and nature of the WR. Officially, the Weimar Republic existed until the NSDAP took over the power in the German parliament, or more precisely, until January 30, 1933, when Hitler was appointed to become the Chancellor of Germany by the President of the Weimar Republic, Paul von Hindenburg. After Hindenburg’s death the following year, Hitler merged institutions of chancellor and president, and became the sole ruler. Shortly after, on August 19, 1934, a federal referendum was held, after which Hitler becomes *Führer*, the leader of what remains to be called the *Drittes Reich*. This period of the disappearing coun-

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244 NSDAP stand for *Nationalsozialistische Deutsche Arbeiterpartie*. English translation: National-Socialist German Worker’s Party; in the WR period was led by Adolf Hitler.
try is also important in order to answer on the question: why did liberal Germany decide to accept a radical national-socialist model that led to a devastating war and, more importantly, what inspired Schmitt and other intellectuals of that time to support that new German politics? In addition, this was the period when Schmitt became more politically active and when the fame around his name started to grow.

In addition to the political and economic despair of the lost war, the political scene in the WR was very complex from its very constitutional birth. There was a very short democratic tradition in Germany, and just before the Weimar Constitution was adopted, there were attempts of more Marxist revolutions in Munich and Berlin. This shows that the liberal and democratic constitution was made under conditions that were far from those coming from political hegemony. Many political parties that were sitting in the Republic’s Reichstag were forming very strong anti-liberal ties that had simply prevailed in the last years of the WR, and were eventually adopted by the last government. Additionally, the existence of many paramilitary groups that were connected to the political parties was pushing the situation increasingly into a one-way street: to the rejection of the Versailles Treaty and to the idea of unconditional recovery of German sovereignty. In such turbulent times, as it seems now, it was quite easy to find an enemy who was flying above German land. The grand premiere of Schmitt’s political theory took place in those last years of this republic.

This historical background seems to correspond to Schmitt’s definition of the political as the reciprocal struggle and recognition between friend and enemy to define the concept of the political. Moreover, the political struggle is not the objective of the political, but rather a condition for its most universal definition. It is only within the recognition of human and political aspects of the enemy that we can trigger an open political process. Thus, ‘[r]ecognition in Schmitt requires abstracting from a whole series of substantial (ethical, religious, economic, etc.) characteristics of the enemy, in order to relate to him in a purely political way’.245 This is just one of the reasons for observing Schmitt’s ‘logic’ in the period before and after the War in Bosnia, since during the war time, no logic can be applied. Moreover, the potentiality of putting the national and ethnical question of ex-Yugoslavian countries only as the part of the political process is possible only if that process shows openness for political antagonisms.

Schmitt’s political and legal ideas are oriented towards enemy’s recognition, and not its demonization and neutralization. The goal of this chapter is to highlight this potential, without ignoring other aspects of his theory.

Therefore, it can be summarized that the first phase of Schmitt’s oeuvre can be placed before and during the WWI, and many of his “older” ideas found their grounding in this period. Reflecting upon certain historical moments of Schmitt’s oeuvre is crucial for grasping his theoretical approach. Therefore, the two main strengths of his critique – rejection of legal positivism and liberalism, can be traced back to this period. The political situation of his country had immense influence on his constitutional thesis, moving it towards more juridical and political interpretations. For that reason, this chapter will start by presenting main academic influences, debates and events that were guiding Schmitt, before moving forward understanding of his political ontology grasped in the concepts of the political, antagonisms and the state. These vital parts of his system, finally find their essence in the critique of the institutions of liberal democracy and their law. Even though some authors might object Schmitt for the lack of systematic thinking, the organization of this chapter tends to present otherwise.

3.2 Schmitt’s main academic influences

Political instability in the country was reflecting also in the academic circles, where the focus was put on thinking about alternatives since the existing system was rapidly failing. During his first academic steps, Schmitt did not belong to any particular string of thought, and although he had a strong catholic influence, he knew that his work would depend on going to Berlin (where he would not come before 1928), and on pursuing more incognito academic and political career. In the course of time he moved towards a central political wave, in which, after the fall of the Weimar Republic (WR), there was, for example, the rising Italian fascism that he had admired greatly, while in Germany the so-called “political Catholicism”\textsuperscript{246} was criticizing liberalism and parliamentary democracy. In the introduction to Carl Schmitt’s \textit{Constitutional theory}, Seitzer and Thornhill, devel-

\textsuperscript{246} See for example Brian J. Fox, ‘Carl Schmitt and political Catholicism: friend or foe?’, in \textit{CUNY Academic Works}.

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op the early academic influences that Schmitt must had had, grouping them in the ones coming from neo-Kantianism, and others from positivism.

3.2.1 Neo-Kantianism

Neo-Kantianism was the most influential school in the first decades of the 20th century in Germany and neighboring countries, such as Austria. There were many schools that were focused on using the practical philosophy of Kant in political, theological, epistemological or legal theory. The theory itself is represented the best in the works of Hermann Cohen, a German philosopher and one of the founders of the Marburg School of neo-Kantianism. Cohen departs from Kant’s philosophy, searching for ‘the conditions under which human reason, in the form of the pure will, can independently deduce universally binding moral or even natural-legal principles to justify and explain its actions’. 247 According to this statement, autonomous citizens can reach the level of ideal deduction that recognizes universal principles, and become able to build the rest of principles on that. Cohen, like some other neo-Kantians, had strong connections with the SPD (Sozialdemokratische Partei Deutschlands, in English: German Social Democratic Party), and he had influenced the political course and philosophy of the party, on its moving towards a common economy. Furthermore, the neo-Kantian influence on the legal theory of the beginning of the 20th century was very important in than actual and subsequent debates in Germany, especially in the definition of the state as a universal moral person. Moreover, the adoption of the theory of evolution as the doctrine of universality, meant that ‘[t]he unity of the highest principle is not a “creative unity, but merely an ideal unity, namely the unity of the law”’. 248 This philosophy has served to provide full justification for the rising Rechtsstaat that, through its inner logic and system of norms that provide human rights and liberties, is able to create the conditions for realization of people’s rational capacities.

During the decline of neo-Kantianism, its influence continued during the Weimar Republic mainly through the works of Hans Kelsen. His draft

of the first democratic Constitution in Austria, ‘was guided (…) by the quasi-Kantian claim that the state cannot be defined as a state if it does not act as a bearer of legal order, or as a “system of norms”’.²⁴⁹ Simply put, following neo-Kantian logic, the state can be seen as a legal norm whose depoliticization is necessary in order to reach a neutral legal order, a Rechtsstaat. Moreover, by using Kant’s idea of universalism, Kelsen was of the opinion that the state, as a normative order, is derived from the ideal realm of norms, and its legitimacy comes from that realm of pure, objective, universal norms that justify its existence and the use of its powers. Finally, what is most interesting here, by using Kantian arguments, he rejected any definition of sovereignty based upon collective or particular will. Sovereignty belongs only to the legal order, as its property, and when a state is identical to its legal order, sovereignty becomes the attribute of the state.²⁵⁰ This is a crucial conjunction where Kelsen and Schmitt make opposite turns, and the point upon which one of the greatest legal debates of the 20th century legal theory was focused.

3.2.2 Positivism

Before the outbreak of the WWI in Germany, positivism was mainly used in legal debates which moved from economic to more political and legal discussions. It was used as a method to provide solutions and explanations for the rising capitalist modes of economy within the Rechtsstaat, basically of establishing and defining the legal conditions for economic autonomy outside the state. Many authors of this period were focused on connecting the legal theory with naturalistic theories, observing the legal evolution according to positive patterns, and therefore, as Carl Friedrich von Gerber, trying to make the link between positivist and organic theories of law.²⁵¹ Legal positivism didn’t recognize any extra-legal principles, and this is very important for understanding the legal discussion in the 20th century

Germany when liberalism started to develop. According to this argument, ‘the validity of law depended on its status as an internally consistent set of rules, and it could not be reconstructed or interpreted on the basis of moral prescriptions’. The relation between politics and law is not very important for legal evolution itself, since the evolution of law is independent of political control. That creates another feature of the positivist legal theory, according to which the state is under the law, and its legitimacy does not depend on political activity, but on the nature of its legal personality. This is the so-called paradox of the early positivism, marked by ‘paradoxical conviction that the law exists as a formal system of constitutional rules and procedures independent of the state yet that the state is the ultimate origin of the law’. When confronted with this line of legal interpretation, which was marked by its internal paradoxes, Schmitt opposed it, but kept some connection to it. We can talk about at least four main counter-arguments coming from Schmitt’s rejection of the early positivism: (a) Due to his opposing to neo-Kantian philosophy of law, in the realm of positivist critique, Schmitt rejects the ‘idea of law as a neutral sequence of norms’. (b) Claim that the state makes the law and at the same time its authority is limited by this law is rather absurd for him. (c) The positivist focus on private law is not sufficient to embrace the essence of the political, and therefore of the notion of legitimacy. (d) In his methodological plan, with his social examination of the origin of law, Schmitt was far from purely positivist ideas of legal evolution. However, Schmitt kept certain ties with a positivist doctrine, which is not very surprising, since early positivist authors were mostly conservative political thinkers, despite their focus on social and economic progress. For instance, the focus on a strong state that is in the centre of the legal order, as its only origin, is what he shares with the positivist legal theory. Nevertheless, during his work, Schmitt remained faithful to the project of purifying legal and political theory from positivist ideas, and one of the best ways to present his critical view is through his discussion with Kelsen, which provides us with another important insight into the understanding of time during the weak liberal republic, and the consequent collapse of the Weimar idea that stifled itself and left room for the Nazis to write a new page in German history.

3.3 Sovereignty of law

“The strike against Prussia” (*Preussenschlag*) was the situation in the WR which started ten days after Schmitt had published *Legalität und Legitimität*. On July 20, 1932, President Von Pappen used an emergency decree and authorizes the *Reich* chancellor to depose the government of Prussia based on Article 48 of the Weimar Constitution, which consequently put the biggest German state under the martial law. At that time, the liberal democratic government in Prussia was causing major problems to the executive powers which were losing control over their political decisions. Shortly before 1932, with another emergency decree, President Paul von Hindenburg will ban all extremist political and paramilitary parties, such as the communists and the SA (*Sturmabteilung* – a paramilitary organisation of the Nazi-party). Immediately before *Preussenschlag*, he will lift that ban that had provoked violent conflicts between the communists, Nazis, and the police in some of the towns of Prussia. This violence was officially a call for an emergency decree, which was supposed to protect public security and maintain whole Germany under the peaceful Weimar Constitution. However, Schmitt was of the opinion that ‘[t]he real goal of *Preussenschlag* was to wrest control over Germany’s largest state from the social democrats and to make Prussia’s executive power available to the conservative federal government’.

During the course of events, Prussia addressed the *Staatsgerichtshof* with the claim that President Hindenburg exceeded his powers acquired by the Weimar Constitution when issuing the emergency decree. In regard to the court’s decision, Schmitt will write that the court:

[R]uled that the federal government did not have the power permanently to depose the Prussian ministers or to take over all competences of a Prussian government. At the same time, the court held that the Reich’s assumption of Prussia’s executive power was justified as a measure to protect public security, and thus refused to interfere with the federal government’s momentary control over Prussia’s administrative apparatus.

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257 *Staatsgerichtshof* was a special tribunal convened by *Reichsgericht* – the Weimar’s Republic highest civil and criminal Court, and empowered by Article 19 of the Weimar Constitution, in order to judge in the matters of the German states, and to arbitrate in conflicts between the *Reich* and *Länder*.
258 Vinx, ‘Introduction’ to *TGC*, p. 4.
This court decision flagrantly violated the constitutional democracy, according to Hans Kelsen. On the other hand, Schmitt considered that the sovereignty of the state is within the governing political party and its policy, and that Prussia with its social democracy was not the guardian of the constitution. For him, the guardian of the constitution must always be in the hands of the carrier of political decision who is the head of the executive power. In order to understand why Schmitt grounded his theory of sovereignty in the state of exception, in what follows, the main points on one of the most important constitutional discussions of the 20th century shall be presented.

3.3.1 Guardian of the Constitution

Kelsen and Schmitt’s debate about the judgment on the Preussenschlag was only a part of a lengthy discussion on the problem of the constitutional guardianship. In 1929, Kelsen published a paper entitled *Wesen und Entwicklung der Staatsgerichtsbarkeit* (*On the Nature and Development of Constitutional Adjudication*) where the theory of legal hierarchy is used on the way toward the claim that the constitutional court is a true guardian of the constitution.259 Schmitt, on the other hand, entered into this academic exchange with Kelsen through the number of articles published in monography in 1931 under the title *Der Hüter der Verfassung*.260 Kelsen’s sharp answer to Schmitt’s book was the essay *Wer soll der Hüter der Verfassung sein?* (*Who ought to be the guardian of the Constitution?*)261 in which we can find one of the most intense criticism of Schmitt’s constitutional theory.

Both authors ask the same question – who is and who should be the protector of the Weimar Constitution? Kelsen’s approach to this question starts from the neo-Kantian legal evolution where every legal norm moves forward with the approval of a higher level legal norm. This theory gives

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259 This translation is available in Vinx (ed.), *TGC*, ‘Kelsen on the nature and development of constitutional adjudication’, pp. 22-78.
261 Available in Vinx (ed.), *TGC*, pp. 174-221.
the basis for the *Stufenbaulehre*, the theory of the legal hierarchy that Kelsen adopts from his student Adolf Julius Merkl,²⁶² and it is used in a great deal for his thesis about constitutional adjudication. The theory of legal hierarchy corresponds to legal evolution. According to it, whether law becomes more or less concrete, depends on the fluency of the processes of reproduction and production of law and whether some legal process starts from above or from bottom. The main idea at this point is that the legislative process does not end with the statute, on the level of a constitution, but rather continues to the bottom, to the level of the individual act of administration. ‘If one takes the view that the law is exhausted by the statute, the meaning of the idea of legality will be reduced to conformity with the statute. And in that case, the extension of the concept of legality will hardly be self-evident’ .²⁶³ Kelsen finds this extension of the concept of legality in the constitutional adjudication, in what he calls ‘a limb of the system of legal-technical measures’.²⁶⁴ Basically, this means that when a court is performing the act of cassation (annulation) of norms which are legally defective, it is making a legislative activity, in addition to the juridical one. Moreover, the symbiosis between the legislative and juridical activity, seen in the institution of the constitutional adjudication, is based on the statute itself. Furthermore, he finds that the state parliament is always the object of a legal paradox because it is very “politically naïve” to except this state organ to annul the statute that it had enacted before. Therefore, the cassation of legally defective acts is possible by an administrative organ that is independent and distinctive from the legislative one. This gives the court the power to be a preventive or repressive organ against legally defective acts, as it is independent of any individual power and individual norms, and has a specific autonomous form which is responsible only to the general norm, to the statute itself.

The second role of the court as a guarantee of legality is of personal and material nature. In this case, the courts perform the annulation of a legally defective act in their individual appearance. In order to understand this argument of Kelsen, we must bear in mind his distinction between the act of annulling and the nulling of a legal act. The latter means the cancellation of legality of an act from its very beginning and its replacement by another legal act. The cassation or annulation of the general norm by the court is

possible only in an individual case, and in these cases the general norm continues to exist, while its legal effects are being annulled. If one decides to transfer the power of review to a single public authority, it will also become possible to extend the cassation beyond the individual case. ‘Then we would be faced with the annulment of the general norm as a whole, i.e. for all possible cases to which the norm, according to its meaning, would have to be applied’.

Kelsen’s argument is quite clear in this matter. In order to defend the cancelation of the concept of the division of powers, he prescribes to the courts the ability to support the stability of the legal system by maintaining the general norm.

When considering the guarantees of constitutionality, he recognizes the annulment of the unconstitutional act as the most effective guardianship of the constitution. Therefore, the constitutional court of the WR was necessary for the Republic’s protection of legality. Kelsen, who was one of the authors of the Austrian Constitution, wants to follow the Austrian model in the new project of proper constitutional court that will replace the Staatsgerichtshof. Only with this kind of court it is possible to have a protected constitution as the highest legal norm of the state, and once for all to finish with the constitutional monarchy of the First Reich. In defending his thesis, he will first focus on the legislative power of the courts, ‘as in-holding that all legal decision-taking is partly discretionary’, thus political. This cancelation of the clear separation of powers gives Kelsen an argument to justify a constitutional adjudication as the protector of legality, and not just as an apparatus of judges whose job is simply to find the already existing norm in the statute and apply it, as some sort of “legal automata”.

Consequently, every political conflict is a legal conflict, and the difference between the political character of the legislation and the adjudication is only quantitative, not qualitative. In other words, ‘[t]he view that only legislation is political, and that “real” adjudication is not, is just as wrong as the belief that legislation alone is productive creation and adjudication nothing but reproductive application of the law’.

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267 See Kelsen, ‘Who ought to be the guardian of the Constitution?’, p. 189.
268 Kelsen, ‘Who ought to be the guardian of the Constitution?’, p. 184.
3.3.2 Authority in the constitutionalism

At that time, the professor at the Handelshochschule in his book-length essays on the protector of the constitution, gave his contribution to the constitutional theory of the WR, and as the time will show, he put the last nail in the coffin of the dying Weimar Constitution. Even though there are more than a few contradictory positions in Schmitt’s constitutional theory, his main statement remains clear: no parliament and no court of any kind can be the guardian of the highest legal document in the country. In ‘The guardian of the Constitution’, after a long discussion on the differences between the Supreme Court of the United States of America and Der Staatsgerichtshof, Schmitt reflects on the idea of having a court as the guardian of the constitution as a violation of the order established by that constitution. By performing its legislative role, constitutional adjudication exceeds the legitimate powers of the court, and these actions can jeopardize the system of norms that the state is based on. Courts have the right to review only ordinary statutes, but not general norms that can change the constitution, with the exception of the parts of the Constitution that consider the basis and position of the courts, and ‘of the provisions about the independence of the judiciary’.

It is not that Schmitt was against an independent and strong judiciary. On the contrary, he was of the opinion that a true democratic state must have independent and free courts, with judges protected from political pressure. The main reason for his critical position towards constitutional adjudication, that he equally shared in the critique of parliamentary democracy, was the argument that judges are bound by the constitution to obey and serve the general norm, without given power or task to change it. In other words:

269 This was the school with no particular high prestige, where Schmitt started working in 1928, during his process of moving to Berlin.

270 Schmitt was called more than few times a “Weimar gravedigger”. Once, when someone referred to him as a gravedigger of the Weimar Republic and the Weimar Constitution, he replied that even if that was the case, somebody had to kill it first. See Molnar, Sunce mita i dugačka senka Karla Šmita. Ustavno zlopačenje Srbiye u prvoj dekadi 21. veka, (Sunce mita) [The sun of the Myth and the long shadow of Carl Schmitt. The constitutional abuse of Serbia in the first decade of the 21st century].

[T]here is no rule of law in the liberal bourgeois sense without independent courts, that there are no independent courts without subjection to the content of statute, and that there can be no subjection to the content of statute without a distinction in kind between statute and court judgment.\textsuperscript{272}

Therefore, under normative criteria, courts are empowered by statute to be independent and protected in their revision activity and deciding upon the individual cases. However, their link to the general norm disables them from changing that norm which corresponds to his reading of the Article 102 of the Weimar Constitution.\textsuperscript{273} Consequently, according to Schmitt, the moment when the judge abandons the ground that gave him or her facts to decide upon the matters, which are the content of statute, that judge is no longer independent.

Why was Schmitt against any project where the constitutional adjudication would be given the power to control legality of the general norms? Related to this question, in \textit{Verfassungslehre} (1928), published before the crisis in Prussia, he held a criticising position towards the Weimar Constitution, especially towards the Article 48.\textsuperscript{274} However, in \textit{Der Hüter der Verfassung} his position towards this constitution will be far less critical, especially in the parts in which he defends Article 48 and gives the President of the Republic the title of the guardian of the constitution. First of all, what follows from the possibility of a judiciary having a political (legislative) role is not ‘a juridification of politics but rather a politicization of politics’.

\begin{itemize}
    \item \textsuperscript{272} Schmitt, ‘The guardian of the Constitution’, p. 107.
    \item \textsuperscript{273} Article 102 of the WR says: ‘Judges are independent and subject only to the law’.
    \item \textsuperscript{274} The full text of Article 48 of the Weimar Constitution states:
      ‘If a Land does not fulfil its duties according to the Reich Constitution or Reich statutes, the President can compel it to do so with the aid of armed forces.
      If in the German Reich the public security and order are significantly disturbed or endangered, the President can utilize the necessary measures to restore public security and order, if necessary with the aid of armed force. For this purpose, he may provisionally suspend, in whole or in part, the basic rights established in Articles 114, 115, 117, 118, 124, 153.
      The President must inform the Reichstag without delay of all the measures instituted according to paragraph 1 or paragraph 2 of this article. The measures must be set aside at the request of the Reichstag.
      In the case of immediate danger, the Land government can institute for its territory the type of measures designated in paragraph 2 on an interim basis. The measures are to be set at the demand of the President or the Reichstag.
      A Reich statute determines the details of these provisions’.
\end{itemize}
There is a material difference between the adjudication and the legislation, because there is no adjudication that is not bounded to the statute. The tendency, as he calls it, towards constitutional adjudication, is one of the consequences of the liberal confusion between liberalism and democracy, and the tendency to transform the institution of the constitution into a kind of compromise or contract. Schmitt gradually comes to the point where the enemy number one of the Weimar Constitution can be found in the constitutional adjudication. By deciding to confront the idea of a “too big” constitutional court, and by putting himself in the public eye, is exactly the best way that Schmitt could offer to defend the Weimar Republic.

The influence that was coming from actual political events and Schmitt’s personal background derived the first image of a clear enemy of the project of stability, something that Schmitt was ultimately searching for. In his opinion, the only thing that was maintaining the country together were written articles that were supposed to articulate the public will, as political discussion became impossible. The last years of the WR can be compared with a political theatre where one scene was repeating: in the case of Reichstag – the constant suspension of the enacted decrees which the President had enacted in accordance with the provisions of the Article 48, and then the presidential decision to dissolve the Reichstag. The political scene did not resemble a normal state, which is a precondition for the legal validity. However, there was the statute, and there was a legitimate power of the president to use this statute on behalf of the people who gave him that right. In a situation where a parliament is unable to form a majority to decide on state and social matters, and when the president uses emergency decrees to create laws, or a power to dissolve the parliament in order to implement those decrees, judiciary performing of more than the administrative role of interpreting the statute seems like additional risk for the stability of the republic. That is why Schmitt will return to his political theory and find justified argumentation to put the president as the only one who can be the guardian of the constitution, and who, considering the situation in the last years of the WR, should perhaps better be called the saver of the constitution.

In a part where he talks about pluralism and the president as the guardian of the constitution, Schmitt gives his two arguments for justifica-

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tion of the institution of President. The first one refers to the separation of
the society and the state that during the German monarchy was evident in
the dualistic system of the prince and people, the crown and the chamber.
In this system, the representative body, the Parliament, was the point
where a society could meet with the state and confront it in a search for its
rights and interests. This dualistic existence of what we call a state is the
starting point in his criticism of parliamentary democracy, and his presen-
tation of the state types according to a dialectical movement from the 17th
to the 20th century. When society stands separated from the state, social in-
tegration through different types of antagonisms (economic, religious etc.)
remains in the “state-free” zone. The state, on the other hand, neutralizes
these antagonisms in a way that does not hinder integration processes. One
of the main ways of taking this position is through the non-intervention
principle. Schmitt criticized this logic in terms of many political and legal
aspects. In Der Hüter der Verfassung he sees the adoption of the policy of
non-intervention as an absolute mistake. Non-intervening would mean
giving the power to certain social groups and ‘[u]nder such circumstances,
non-intervention is nothing more than an intervention in favour of the par-
ty that is stronger and more ruthless’.276

The way of overpassing this division comes in the 20th century constituti-
tional republic that can count on a society which “shares” its integration
processes with the state. However, the political-legal conflict between the
branches of power continues to exist, especially in the Weimar Republic
which had a chancellor and a president as two main executive powers.
When there is a conflict between the two sides that have the power of po-
litical decisions, the one who decides is not a judiciary, but rather (1) ‘a
higher third that stands above the different options – a sovereign ruler of
the state’;277 or (2) an authority that stands alongside the state, not superior
to the constitution, but neutral towards both options, a pouvoir neutre et
intermédiaire.278 This neutral power does not have superiority over other

278 Schmitt takes the concept of pouvoir neuter, intermédiaire et régulateur from the
French author Benjamin Constant, an early 19th century political writer who was
supporting a change towards a constitutional monarchy in France. Schmitt often
referred to very conservative writers (such as, for example, his writings and his
admiration for the Spanish long-forgotten conservative, catholic monarchist
Donoso Cortés). Schmitt’s usage of this Constant’s concept Kelsen interpreted as
another proof of his tentative to bring constitutional monarchy to Germany.
powers and is not protected from any kind of control; hence in that case we would speak of the ruler, and not of the guardian of the constitution. The president has a neutral and mediating role and he acts as the political head of the state and by means of his position and power, represents the guardian of the constitution. When ‘the President is not the leader, but instead the “objective” man as a nonpartisan, neutral arbiter, then he is this as bearer of a neutral authority, of a *pouvoir neutre* (...) a referee, who does not decide’.

The neutral power is not, so to say, active all the time, but it is not only a *règne*, since the real political leader needs to govern in order to be able to protect the state of law. Although it is a kind of material existence of special powers, the president of a country actively uses those absolute powers only in the state of the emergency. ‘Nevertheless, the neutral power is present and indispensable, at least in the system of a rule-of-law state with a separation of powers’. However, in order to be the true holder of *pouvoir neuter*, the political leader needs to be elected by the majority of people, because only this political entity can provide him or her with the necessary feature that separates him or her from the dictator. Therefore, in the concept of the political we can find the cornerstone of Schmitt’s political theory – his concept of the legitimacy.

### 3.3.3 Schmitt’s main arguments regarding legal sovereignty

There are at least three arguments that define Schmitt’s political theory and that are deducible from the above presented discussion about the Weimar Constitution. The first is the *concept of sovereignty*. In *Political theology* Schmitt famously defines the sovereign as the one who decides on the state of the emergency, which brings us closer to the legal definition of sovereignty. What should be kept in mind is that even though we can talk about legal concepts that define a purely political notion, there is no point in Schmitt’s oeuvre at which the legal sphere rises above the political. Therefore, his reading of history will always be political, although the notion of law has been placed at the heart of those interpretations. The political, as in the case of Hegel, can become theological, better said, it can

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develop into an ideology that precedes further argumentation. Later in this paper, a critique of Schmitt’s theory from this perspective will be provided. However, at this point, the important thing to understand is the position of Schmitt versus the positivist theory, based precisely on the legal separation from the state, and from the political unit that is the bad omen of modernity.

Kelsen, on the other hand, in the spirit of positivism, develops the opposite vision of the sovereignty – ‘if it exists at all’ – as not a priori concept of the state, but as a characteristic of the legal order of the state. He sees a ‘sovereignty as a property of normative order, namely as the normative independence of a legal order. If the state is identical to its legal order, it follows that sovereignty can also be described as an attribute of the state, but never as a power that originally inheres in a particular organ of state’. Considering the legal and political situation in Germany before the WWII, Schmitt concludes that ‘discipline and the German sense of order’ were the main reasons why there was no civil war during the last years of the WR. For positivist thinkers, the legal order not only prevents violence, but is justifiable and powerful enough to be placed above the political sphere that still continues to be the strongest tie to the social realm.

The question of sovereignty is, thus, strongly connected to the general will. When Schmitt defends the president of the republic as the only reasonable guardian of the constitution, he calls for the general will of people that through the processes of representation is embraced in its full extent. No parliament and no court can represent a general will except one person who carries a legitimate right to protect the constitution, from both – the executive power and the people. The ‘unified will of the people exists as long as a people is willing to take (or rather to support) genuinely political decisions’. This will is born and defended in the personality of the elected president, who is the only one capable of protecting it in true democracy by having the right to decide upon the extra-legal space, which is the state of the emergency.

283 Schmitt, State, movement, people, p. 7.
284 Vinx, TGC, p. 15.
For positivists, on the contrary, the general will is ‘false and fictional’ which can bring upon ‘autocratic implications’. According to this, the mere existence of some kind of a popular will that can exist outside the constitution provides the possibility only for autocratic implications. This critique is connected to the critique of neutral power that observes president’s power to keep more neutral positions in the execution of his power, the claim that Kelsen sees as ‘an unbearable contradiction’. The executive power understood according to the *pouvoir neutre* can only lead to a complete state of autocracy. Therefore, an extra-legal space where the protection of the supposedly existing unified will of the people is absurd for positivists such as Kelsen, since there cannot be a will or politics outside of the constitution.

Last but not least is the concept of the *emergency decree*. Several times the significance and controversy of the Article 48 of the Weimar Constitution was mentioned. The use of this article marked the last years of the WR and opened a legal discussion that prevails until today. In *Legality and legitimacy* (LL), Schmitt criticized this constitutional article and pointed out the absurdness of the state that is governed only through the emergency decrees, which was a reality in the period from 1930 to 1932. However, in *Verfassungslehre*, and in ‘The Guardian of the Constitution’, the use of the power to decide on the state of exception is considered a key point in the process of transformation of a simple leader into a true political leader. That is why the *Preussneshlag* was an important event in understanding Schmitt’s political-legal standpoints, and later in this chapter his understanding of the state of exception will be closely examined.

Another event that is worth of mentioning is the closing statement in the case *Prussia v Reich* in Leipzig, in which Schmitt will conclude that ‘the president of the Reich, who has several competences by virtue of article 48, can and must’ [emphasis added], if necessary, also exercise these

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286 In the essay ‘Who ought to be the guardian of the Constitution?’, when talking about the neutral power, Kelsen, instead of using the word president for a highest executive power, prefers to use the word monarch. Even in his choice of general vocabulary, he implicitly wants to connect Schmitt’s legal and political theory during the Weimar period with the renovation of the constitutional monarchy.
287 Kelsen, ‘Who ought to be the guardian of the Constitution?’, in Vinx (ed.), *TGC*, p. 177.
competences in the interest of the autonomy of the Land’. Additionally, in this statement, he acknowledges the power of the guardian of the constitution to the Staatsgerichtshof, but reiterates that this court cannot make a political decision and that its jurisprudence remains in the domain of justice. Since the parliament had no chance of making political decisions either, due to its inability to reach a general consensus, the president was left as the only one that can create politics. Finally, due to his role in this important trail for the WR, Schmitt was finally defined as the ultra-conservative jurist who wanted to destroy the Weimar Constitution in the name of the legal dictatorship. However, at least at this historical point, there were some facts which can question these conclusions. At that time, for example, Schmitt was sharing opinion was similar to that of General Kurt von Schleicher (the advisor to President Paul von Hindenburg) who thought that the Weimar Government needs to be changed or civil war would arise. In these discussions Schmitt could be seen as the conservative protector of the Weimar Constitution, one of the few who still believed that the constitution can be changed in order to correspond to the changed reality of the WR. However, in the last years of the WR, his protection of the Article 48 clearly shows in which direction this jurist will go.

On May 1, 1933, Schmitt received his NSDAP membership card with the number 2.098.860. From this moment on, he finally got the chance to have an important role in the political system of the new Germany, of the third Reich, that will result in bringing nothing but destruction, and that will definitely fail to bring upon the system professor Schmitt was talking about so much. However, as stated at the beginning of this chapter, one cannot stay blind to his involvement in the party, and moreover, to his statements on the Jewish people. One example of this is Schmitt’s speech at a conference held in Berlin, on October 3 and 4, 1936, titled Das Judentum in der Rechtswissenschaft. In this speech, like all anti-Semists of that time, he showed the fear of the Jewish intelligence, fear of their anarchic and chaotic legal theory which can, if not removed from the libraries and bibliographies, mislead young German students. In order to protect the German mind, he called for a clarification of who is Jewish and who is not, so that the censorship of Jewish books and authors could be done properly. The main idea he shared in this speech was ‘that Jewish opin-

ions, with their intellectual content, cannot be put on the same level with the opinions of German or other non-Jewish authors’.  

In another text, he showed the same fear and urge to destroy Jewish science in general. Even though after WWII Schmitt did not talk much about his participation in the party, he had continued publishing, and his house in Plettenburg became a certain stopover for young critical minds. Many of them tried to make a connection between Schmitt’s political theology and Marxist critical theory, as was the case with Franz Neumann and Otto Kirchheimer, who were focused on Schmitt’s critique of liberalism. Little by little, this “renaissance” casted the light on the reformist potential of his ideas, and put him into the scope of the critical theory. Despite this, working with his political and legal theory remains controversial in the academic field, even though many political analyses of contemporary political events can be analyzed according to his concepts. I am of the opinion that the enormous critical potential, and very clever and clear questions that Schmitt set in modern law and the modern state, still do not have satisfactory answers. More importantly, his political diagnosis about the WR found its logic in the pre-war time in the Western Balkans, where the shadow of friend-foe politics is still omnipresent. In the second part of this chapter, I will envisage deeper into the “politics of conflict” that is obverse of “politics of consensus”.

3.4 From the zoon politikon to the friend-foe relationship

In order to be distinguished from other animals and gods, human nature and destiny are a priori concepts connected to their states that is seen as the consequence of a “natural growth”. Growth always means progress, as the ideas of the theory of evolution had penetrated into the social, political, and legal discourses. Observed in this way, the state as a production of social growth, due to natural laws of progress and evolution, represents the increased levels of rationality that in turn create its basis. This basis was examined in the previous two chapters, where the connection between the rationality and modernity was shown.

289 Schmitt, Jews in Jurisprudence, np.
On the other hand, Schmitt finds this progress in the concept of the political, which cannot survive outside a certain social structure that allows it to exist. When he talked about Hamlet, he said that ‘[t]he tragic thing does not lie in the play, but outside it, in reality’. There is no tragedy in the world of gods. The protagonists of the Greek tragedy were always human-like, and the main conflict always occurs between people who always have their own moral and ethical definitions. Therefore, we can talk about the conflict between two pathos where the outcome always contains a “rational injustice”. Reality is seen only in the social, in the city, in the political structure; reality was in the conflict which Hamlet felt on his skin. Finally, a man is not human when he ceases to be political, which is the first philosophical pillar of his political theory.

Schmitt also sees the political inseparable from the human nature, and as ‘a basic characteristic of a human life; politics in this sense is destiny; therefore man cannot escape politics’. Habermas is of the opinion that people have to communicate in order to agree that they disagree. For Schmitt, one cannot escape the political even when he or she wants to cancel it. The political is the only “we-reality”, something we share between us and that we are able to comprehend with our thoughts. It is both the speculative and empirical reason. Hence, the political has complete supremacy because every activity can be political as there is no social or individual activity that is able to exclude conflicts by its nature. Therefore, every religious, moral, economic, ethnic or other opposition can be defined by its political opposition.

That is why he will never liberate himself from the state, as the only concept that can universally grasp the truth about the political and unleash its development. However, even though at some points one might think his idealization of the state came to a certain dogmatic level, in my opinion, even in his writings during Nazi Germany, Schmitt was clear that the state was only one element in the triadic concept of German society, and that ‘the political cannot any longer be determined by the State, rather the State must be determined by the political [italics removed]’. Therefore, if we have to choose one concept that Schmitt glorified most, it would certainly

293 Schmitt, State, movement, people, p. 15.
be the political. For Kervégan, there are three main characteristics of Schmitt’s concept of the political: (a) the political does not have the substance, it reflects the conflictual potential of human practices; (b) the political is omnipresent, it is the substance itself; and (c) one of its possible expressions is war, but not its purest manifestation that is found in the irreducible decision. Following the arguments of this French professor, what is left to embrace while deconstructing the notion of the political, is its central position in history where it always stands as the fundamental domain.

3.4 From the zoon politikon to the friend-foe relationship

3.4.1 The political as a central and supreme domain – historical changes of the central domain

For Schmitt there are four changes in central domains of intellectual life in European history. In each age definitions of main concepts, ideas and state are shaped by the central domain whose feature is to shift in history according to its internal logic. This logic is not progressive, and therefore does not provide acceptance of historical rationality as a basis for further legitimacy of thoughts. The first shift happened in the 16th and 17th century, and it was represented by the transition from theology to metaphysics, with authors such as Galileo, Kepler, Descartes, Hobbes etc. This change was followed in the 18th century by the project of the Enlightenment that was actually shunted metaphysics for Schmitt, and it literally meant the appropriation of great accomplishments of the 17th century. Typical expressions of this period are Rousseau’s theory of social contract and Kant’s concept of God. The third shift had happened in the 19th century with the secularization, and with the ‘hybrid and impossible combination of aesthetic-romantic and economic-technical tendencies’. This century was at its core economic, and Marxism was its great expression. The last change in the central domain that Schmitt had the opportunity to witness occurred in the 20th century when the “religion of the technical progress” arose. In this period, people start to create religious feelings for technology and progress.

295 Schmitt, ‘The age of neutralizations and depoliticizations’, p. 84.
What is important to understand about the changes in the central domain, observed as historical changes, is that for Schmitt they are ‘erroneous transfer of a concept at home in one domain (e.g., only in the metaphysical, the moral, or the economic) to the other domains of intellectual life’. Each shift was actually a change towards further neutralization, where the former central domain is substituted by a more neutral domain, as a part of historical human hope for a neutral and conflict-free environment. However, actual neutral domain after some time (which in his timetable would be one century) ceases to be neutral, becomes politicized and therefore causes a new change.

In the 18th century, when the central domain was a humanitarian-moral belief, according to Schmitt, we can trace back the concept of progress that, beyond improvements in many social areas, acquired the second meaning: moral perfection. A word that has previously been clearly linked to economic and technical development, with the 18th century’s central domain, becomes a byproduct of economic progress, and questions of moral become the biggest problems. The same stands for the shift in the definitions of other concepts, for example, the shift in the meaning of the clerk.

According to Schmitt, the biggest change had happened in the sphere of theology that got suppressed to the individual level, losing its role of public debate. Further shifting to economy was just the herald of moving towards technology as a central domain, which once again showed a tendency towards neutrality, because there cannot be anything more neutral than technology. The latter shows no means to be politicized, and therefore cannot be changed as the central domain. Schmitt criticizes this “apparent” feature of technology and believes that it is ‘always only an instrument and weapon; precisely because it serves all, it is not neutral’. In addition to the obvious critique of modern technology as a possible weapon that can be used in wars and conflicts by those powers that have access to it, technology as a central domain can be criticized from the social perspective because it always remains culturally blind. Therefore, technology remains incapable of providing definitions for social concepts and roles, a role that central domain has.

Schmitt uses changes in the central domain as part of his critique of the European liberal democratic state that remarkably maintains the search for the neutrality, for a neutral domain in which there will be no conflict, which for our author means without politics. He says that ‘the European liberal state of the nineteenth century could portray itself as a *statuo neutrale ed agnostico* and could see its existential legitimation precisely in its neutrality’.\(^{299}\) This tendency towards neutrality continues to exist in the acceptance of the positive law, which, in maintaining the order, constitutes the “concept of truth”. When the pre-defined truth, through the transfer of domains, is presented in the modern state as a priori rational structure, theology penetrates into the sphere of norms, and brings irrationality to the rational structure. That is why, he will conclude that what has never been in the center domain, is the domain of thought. Schmitt writes: ‘If a domain of thought becomes central, then the problems of other domains (…) are considered secondary problems’.\(^{300}\) Even though he never focuses on the historical possibility of this idea and roots it in a collective thought plausible in a rational society, it is important to emphasize the imperative of thought that Schmitt manages to develop. However, the call for a rational he will ultimately place in politics, which is the only possible central domain.

### 3.4.2 A political unity as a supreme unity

‘Political unity is the supreme unity (…) because it decides and can, within it, prevent all other conflicting groupings from converging to extreme hostility (the civil war)’.\(^{301}\) The possibility to exert pure force and decide on the lives of citizens is in the hands of a political leader, and it can be found in sovereignty. This power is preserved in the state of exception, and it is practiced by the sovereign decision, and is one of the reasons why Schmitt never showed any respect for revolutionary attempts, even though for him the rise of the national-socialist state was based on the “German revolution” that was legal, because of its ‘keeping with the former constitution’.\(^{302}\) Intertwining of the political sphere with the social sphere, with-

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300 Schmitt, ‘The age of neutralizations and depoliticizations’, p. 86.
301 Kervégan, *Hegel, Carl Schmitt*, p. 54.
out using the given legal order and constitutional order, for this author is unacceptable, even for a greater cause. There is an obvious monopoly of political power, and any kind of extra-political or extra-legal space is not legitimate for Schmitt.

3.5 Homo homini lupus – war and decision in Schmitt’s theory

War does not serve as the main idea for this paper, although it is a big part of its beginning and its end, grasped in the War in Bosnia. Also, as it was shown, war represents an important argument for that will finally lead Schmitt to his definition of the nomos. However, earlier, in time before and during the WWI, it is possible to observe the feelings of sadness, fear and disgust with the world that was at that time driven by war and violence. When reading his diaries, one can easily feel the fear and sadness that Schmitt felt on the outbreak of the WWI, in which he lost some of his best friends. His experiences during this war greatly affected his attitude towards the war from the point of view of a citizen, and not of a theoretician who hides behind his pen. For example, after the liquidation of Russian military imprisoners, Schmitt wrote in his diary: ‘The warfare is a pure genocide. It simply destroys. Thousands of Russians have been forced into the sea and killed with machine guns’.

After the WWI, apart from the bitterness of the past war, what created even more chaos in the already chaotic Germany of the 20th century was a constant possibility of a major civil war. During the Weimar Republic, at some point, almost every political party had the power over some paramilitary group, with the possibility of providing numbers of soldiers with weapons and personnel to operate with. It was a time when the enemies were clearly defined, and in order to maintain the Reich, those enemies

303 Even though this is the most recognized and surely the most devastating conflict in the region in that time, War in Bosnia is one of the several military clashes which took place in the Balkans in the last decade of 20th century and very beginning of the 21st century. Therefore, if we talk about “Yugoslav wars” we should include all armed conflicts on territory of the ex-Yugoslavia from 1991 to 2001. There were four wars (War in Slovenia, Croatian War of Independence, Bosnian War, Kosovo War including the NATO bombing of Yugoslavia), and Insurgencies in the Preševo Valley and in the Republic of Macedonia.

had to be placed outside the state. This conflictual period for Schmitt existed both on a personal and professional level, making impossible for him to imagine peace as a final solution that could maintain political dynamics. In his diaries during the WWI he notes: ‘I wouldn’t know what to do if the peace suddenly emerged. I really don’t know. I live aimlessly from day to day. It is unbearable’. \(^{305}\) In addition to a certain “fear” of peace that can be found in the first diary notation, it can be also notices the “fear” coming from the lost human and citizen who had never asked for the constant and latent violence. Moreover, Schmitt tried to experience the WWI by serving the army. With the help of a university professor, physically unsuitable for the army, Schmitt was contributing to the defense of the Empire as a military censor.\(^{306}\) This “job” made him despise the law, which was the one thing that this jurist knew best. For him the act of opening soldiers’ private letters which was the biggest violation of their privacy. According to Molnar, if Schmitt had the hope of good prevailing over bad, as the part of catholic spiritualism, after experiencing the war and working as a censor, his Catholicism was replaced with militarism.\(^{307}\)

Therefore, from his relation to war, Schmitt will articulate two ideas that will be a part of his work until the end. Firstly, he defines global peace as a depoliticized world. This statement makes a strong link between the war and the political. But, as it will be shown in the last chapter, it is deeply rooted in his critique of liberalism and politics of cosmopolitan human rights. Finally, the political ‘neither favors war nor militarism, neither imperialism nor pacifism. (…) since neither war nor revolution is something social or something ideal’.\(^{308}\) Secondly, from the beginning, the search for the meaning Schmitt finds in the antagonistic political relation and authority of the state, where the violence and norm find their logic in the decision. In what it follows, this relation will closely examined.

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\(^{306}\) It is interesting to note that both Schmitt and Heidegger were physically unfit to serve as soldiers in the WWI, so they worked as military censors, filtering and censoring letters.

\(^{307}\) Molnar describes this possible “shift” due to the given circumstances in his book *Sunce mita*, under the title ‘War experience of a lawyer’, pp. 90-96.

\(^{308}\) Schmitt, *The concept of the political*, p.33.
3.5.1 Speculation in the “friend-foe” relation

In order to understand his political theory, it is necessary to reflect upon the state of nature that Schmitt illustrated with the “friend-foe” relation. First of all, beyond the semantic meaning of the given words, a friend does not have to be good, nice and fair, just like an enemy is not a priori its exact opposite. Their relationship is conflictual, however it is not necessary to have an ongoing quarrel or an open conflict in order to obtain a political relation. Just the possibility of a quarrel that stems from a “friend-enemy” relation is sufficient to define the relation as a political one. Therefore, existence of this relation does not necessarily mean war or conflict. This “positive” interpretation of the antagonistic relation is what will be in the next chapter seen through the national strivings between some Balkan states.

The enemy, who is always in the sphere of the political ‘need not be morally evil or aesthetically ugly (...) But he is, nevertheless, the other, the stranger’. The adjective “stranger” is put in the centre of this definition. It is the “other in its otherness” since it is alienated from its subject. However, it is not different from the subject; it is just a distorted reflection of the same. ‘Enemy is our own question in form’. Enemy and friend share the same form, and if we suppose that the basis of the “original” are rationality and freedom, then the “other” – the “alienated”, would mean irrationality and unfreedom. That is why Schmitt asked Kojève ‘whether there can be an enemy in Hegel at all’, to which Kojève answered: ‘yes and no’. The affirmative answer he found in the world history, which is a struggle for recognition and is ‘the history of enmity between peoples’. The negative answer is grasped in the limitation of the history which is being subordinated to the absolute spirit. Similarly, Schmitt describes the enemy in Hegel’s philosophy:

The enemy is a negated otherness. But this negation is mutual and this mutuality of negations has its own concrete existence, as a relation between ene-
The dualism and the sameness of enemy and friend are at the core of the political, and only there we can find the opportunity to observe its manifestation. Following the nature of their relationship, we can conclude that a friend relates to an enemy as to his dialectical twin, and vice versa, leaving a door open for both conflict and reconciliation.

Furthermore, the “friend-foe” relation is not static, it demands to be dynamic, and thus, it is found between one another in their originality and otherness on the one hand, and in the process of their definition on the other hand. This corresponds to what Hegel called a caprice of the will ‘in which are contained both a reflection, which is free and abstracted from everything, and a dependence upon a content or matter’. In the spirit we are represented simultaneously in our singularity and in our universality and the definition of some matter needs to contain its negation, its caprice. Observed this way, the definition of the political in Schmitt’s works may be related to the process of achieving freedom. Hegel says: ‘Liberty is possible only for the people that have one state as the juridical unity’. This is a statement that Schmitt’s political realism shares. However, Schmitt goes far enough to say that ‘[a]ll concepts of the spiritual sphere, including the concept of spirit, are pluralistic in themselves and can only be understood in terms of concrete political existence’.

3.5.2 The Dezisionismus

Schmitt finds political authority in the specificity of political decision. If we talk about the doctrine of decisionism (German Dezisionismus), we can

312 Schmitt, The concept of the political, p. 63.
313 Hegel, PR, p. 38. Translated by S.W. Dyde (Kitchner, Ontario: Batoche Books), 2001. In Hegel, Elements of the Philosophy of Right, Allen W. Wood (ed.) and trans. H. B. Nislet (Cambridge: Cambridge University Press), p. 48, the translation is slightly different: ‘The freedom of the will, according to this determination, is arbitrariness, in which the following two factors are contained: free reflection, which abstracts from everything, and dependence on an inwardly or given content and material’.
first refer to it as a concept that uses the political, ethical, and jurisprudence means in the way of defining the legal precepts as products of decisions made by the legislative organs. Therefore, the link between the law and the political is grasped best in the decision of the political authority. For Schmitt, at the core of the political is the right and power to decide which brings both legitimacy and legality within the process of decision making. In the other direction, decision defines the political and shows the authority in it.

To start with, we have to understand that for Schmitt the idea of a legislative state is rooted in the notion of legal, particularly in the process of legal deciding. These decisions are being made by the following and famous Hobbsian formula: *auctoritas, non veritas facit legem*. This is the easiest path to follow in order to track down the authoritative argument in Schmitt’s writings. Who makes the law? Who has the ultimate authority? Perhaps somebody will find the answer in the Article 48 of the Weimer Constitution, and if that is the case, it all comes back to his definition of the state of exception and sovereignty. However, by doing so, the attempt to reach an objective and purposive value that can be retracted from Schmitt’s work would fail. Hence, I will try to incorporate authority argument into the critique of decisionism and cast a light on the relation between the law and the political, between a legal and political decision.

The power of decision making that is in the hands of the highest political authority of the state, is the main guardian of the constitution and the strongest link between the state, movement, and people, or what Schmitt calls “the triadic structure of the political unity”. The highest political decision defines even what is outside the political: ‘It is one of the fundamental notions of the politically upodate German generation that to determine whether a matter or a field are apolitical is precisely the political decision in a specific way’. In this sentence, and in the book *State, movement, people*, Schmitt clearly explains how a ‘good state’ (in this specific case, he refers to the national-socialist state) should be organized, and who can get the right over the political. By defining the apolitical sphere, or rather, by giving the adjective of apolitical to some of the state and social structures, the sphere of political is concentrated in a few hands of the political authority. The courts, people and civil servants in this formula get depoliticized, and they are carried by the leading political body which is

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made up by the party and the movement. It is in State, movement, people, perhaps more noticeably than in any other book, where we can observe that the notion of political, viewed as a form of the zoon politikon, gets substituted by the political authority, more precisely, by the political decision.

Although the main purpose of the claims presented in that book was to provide a theoretical support for the rising National-socialist party, and that the terrible outcomes of this “political project” are well known, what prevails in his demagogic writings is that in ‘the legislative state there cannot be numerous sources of the law. The lawmaker of a logically consistent legislative state must retain its “monopoly” of legality’. 317 And this monopoly is grasped in the concept of sovereign who has the right to decide upon the exception. In parliamentary democracy, in which on one side there is a parliament with its legislative power, on the other side there is the head of the state with the power of the highest decision that puts him or her above and outside the law – the decision upon the state of exception. This situation, according to Schmitt, does not guarantee the state of normality, which is a necessary condition for the legal effectiveness. This is precisely the situation that he witnessed during the last years of the Weimar Republic when the President and the Parliament entered in an open conflict, and the state had to function on the basis of emergency decrees and decisions of the political authority. A sovereign decision thus can be described as a window through which we can observe what liberalism always finds ways to avoid – the authority, more precisely, the decision. On the way of defending it, Schmitt refers to the critique of the liberal depoliticized state. For him, in this state even the notion of justice is part of a particular administrative power of some state organ, and therefore, every law is a state law and vice versa – every state activity is a law which he sees, in the liberal state, as a simple implementation of the norms by state administrative machinery. In the last chapter, this paper will return to his critique of liberalism, but with the aim of showing the ‘missing’ antagonistic nature of the political in modern times, and the way to bring it back to life.

The main question posed at this point is how does the sovereign decision build the link between the political and legal according to Schmitt? By making a political decision, the highest political authority that has the

legal power of deciding is dissolving its legitimate power to other apolitical bodies, giving them the necessary legitimacy for their functioning. By the same token, ‘[o]nly on the basis of uncontested political decisions (…) may the law then spread to all the sectors of the public life in a free and autonomous expansion’.318 The solution for the modern tendency of “uncoupling” between the social sphere and the state, between political and legal, Schmitt finds in the legitimacy and legality of a political decision. Therefore, a specific political decision is what makes the difference between legal and illegal order. Furthermore, decision capable of creating politics from any form because it does not depend on the norm, and it precedes it.

On the other hand, the validity of this decision is enabled by the legal body, not by its content. Thus, a statute depends on a “total existential decision”, and law essentially becomes only a statutory law that obtains its validity by the political authority’s decision. Schmitt said that ‘[t]he state is law in statutory form; law in statutory form is the state’.319 For him the principle of any law or legal system is not a norm, but ‘the condition of any proclamation of standards [is]: the decision’.320 The decision of this kind is carrying in its essence the negation of some other, opposed decision. This relation puts two opposing decisions in a new conflictual relation, where one will start belonging to the past, and the other will become a legal norm, and thus belong to the future. This is all happening on the plan of the political, where sovereign decision will start the dialectical circle, separating the past from the future with the highest decision coming to life.

In the centre of Karl Löwith’s critique of Schmitt is his theory of decisionism. In the article ‘The Occasional Decisionism of Carl Schmitt’321 Löwith firstly argues that what he calls the occasional decisionism in

318 Schmitt, State, movement, people, p. 15.
319 Schmitt, LL, p. 18.
320 Kervégan, Hegel, Carl Schmitt, p. 350.
Schmitt’s works is the so-called “active nihilism”. ‘This nihilism is described as a form of thought that tries to affirm the meaningless emptiness of the modern world, to face up to the challenges of nihilism by resolutely locating itself in this emptied-out world’. On the other hand, the nothingness as the beginning of the sovereign decision can be traced in at least couple Schmitt’s works. For example, in *Political theology* he says that ‘[l]ooked at normatively, the decision emanates from nothingness.’ Moreover, in *On the three types of juristic thought* he will write in the similar tone: ‘The sovereign decision is absolute beginning, and the beginning (...) is nothing but sovereign decision. It arises from a normative nothingness and from a concrete disorder.’

However, in the last chapter of *Political theology*, Schmitt demonstrates the difference between dictatorship and legitimacy, and how decision can dissolve legitimacy, something that many of his critics seem to forget. Donoso Cortés in his last endeavours to save the monarchy before the “last battle” ends in defending the political dictatorship. Similarly, Joseph de Maistre had reduced ‘the state to the moment of the decision, to a pure decision not based on reason and discussion and not justifying itself, that is, to an absolute decision created out of nothingness’. Like this, Schmitt continues, the decisionism ‘is essentially dictatorship, not legitimacy’.

The decisionism, thus, cannot go beyond the state, or jeopardize the political meaning of the state independent from the situation. In other words, it cannot reject political and historical rationality. Its task is to point out the absolute or relative rationality and to reveal when rationality becomes impossible, like in the situation of ‘[t]he either/or of moral decision, the decisive and deciding disjunction’ typical of liberalism. In other words, the decision cannot be reduced to the logic of normativism, and Schmitt’s decisionism ‘would be not so much a rejection of rationality, but the option that would allow it to escape from the bad infinity of normativism’.

More precisely, from the liberal normativism that imposes ‘the “dominion

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327 Kervégan, *Hegel, Carl Schmitt*, pp. 119-120.
of the legal norm”, which in reality is only the dominion of a system of legality over the administrative machine’.  

The second Löwith’s argument is criticizing Schmitt’s decisionism as solely focused on criticizing liberalism and protecting the Nazi ascension to power. He interprets this relation through the existing distinction between the decision and occasion. When, for example, Schmitt cites and thinks about authors like Donoso Cortés or Friedrich Gogarten, according to Löwith, he does that with the aim of protecting his anti-romanticism, anti-liberalism and anti-positivism standpoint. In other words, Schmitt chose to use theological arguments with utilitarian goals without truly sharing them or understanding them. Therefore, ‘Schmitt’s decisionism is ultimately to be regarded as a profane one, since he believes ‘only in the power of decision’ – not in theology, nor metaphysics, nor humanitarian morality’.  

This is another shortcoming of Löwith’s critique, since it is almost impossible to detach Schmitt’s teleological arguments from the ones he makes in his theory of the modern state.

Contrary to the “anti-theological” character of Schmitt’s theory that Löwith speaks of, it is precisely in the metaphor of the divine creation where Kervégan places his critique of Schmitt’s decisionism. The political theology, says Kervégan, leads Schmitt into ‘one metaphysics of the decision, inasmuch as it constitutes the founding moment, “the political”, of any order’.  

This is one of the major conclusions of Kervégan’s book Hegel, Carl Schmitt that shows how metaphysics of decisionism ended with rationality in Schmitt’s legal theory due to the first decision of the creation that is irrational. Besides irrationality of the decision, especially observed in the political-legal exchange that rejects rational possibilities for the law, with decisionism Schmitt also cancels the speculative possibilities of his politics. This argument ‘consists in liberating the space of positive rationality from its philosophical ties (...), making the decision, an essentially irrational component of every juridical and political order, the unthinkable prerequisite of law itself’. Therefore, we could say that Schmitt’s decisionism closes the circle of speculative dialectics, and sees no possibility of reconciliation of the mind and the history in the law.

328 Schmitt, State, movement, people, p. 16.  
330 Kervégan, Hegel, Carl Schmitt, p. 351.  
331 Kervégan, Hegel, Carl Schmitt, p. xxxii.
Kervégan’s image of Schmitt’s decisionism resembles the “deforming mirror”\textsuperscript{332} that in its distorting nature manages to unwillingly grasp some of the notions that can be traced back to Hegel, such as the total state, standing firmy in relation to the metaphysics of the decision. Both Hegel’s and Schmitt’s major critique is focused on their concepts of the strong state, but, according to Kervégan, the concave mirror of Schmitt’s decisionism defines his concept of the total state as the ‘Aufhebung [annihilation] of Hegel’s universal-rational State’.\textsuperscript{333}

3.5.3 Ausnahmzustand as the definition of sovereignty

The moment when a sovereign decision reveals itself absolutely is the moment when the normal state is separated from the exceptional state, the so-called state of exception. Political Theology starts with the examination of the situation when the “no-law” gets inserted in the space of “law” – the state of exception (German Ausnahmezustand). For Schmitt, the most important legal and historical situation of exception was the Article 48 of the Weimer Constitution, and as Agamben points out, without reflecting upon the meaning of this article, remains impossible to understand Hitler’s rise in the 20\textsuperscript{th} century Germany. Schmitt correctly deconstructs the state of exception, staying focused on its normative claim because the definition of the “normal” legal situation is defined in regard to exception. If the state of exception is included in the body of constitution, conditions that allow that situation are listed by the law. However, at the same time they are outside of law in the sense that they don’t belong to the normal situation, and hence, cannot be treated by “normal” legal instruments. To be more precise, they cannot be treated by any legal instruments. A distinction between normal and non-normal situation is what Walter Benjamin also de-

\textsuperscript{332} The image of deforming mirror served for Ramón María del Valle-Inclán, in Luces de Bohemia (1920), to present a critique of the reality of Spanish society using the term el esperpento as a method of observing the political relations of his time. Distorted mathematics of concave mirrors speaks more than perfect mathematics that does not correspond to the “esthetical” dimension of Spain. A grotesque image is necessary to observe a reality that is part of a corrupt human nature, far from any perfection, in esthetical or ethical sense.

\textsuperscript{333} Kervégan, Hegel, Carl Schmitt, p. xxxiv.
scribed when writing about police, and it is linked with the difference between false and true state of exception.334

Another characteristic of exception that Schmitt observes, is that besides its normative claim, the state of exception remains outside of norm, but simultaneously defining it. Agamben names this paradox as a ‘zone of indifference’335 that can also be seen as a type of resistance. In this “zone” constitution represents the legal sphere, and act of resistance represents the political-social sphere. The relation between those spheres is a game of exclusion and inclusion. Moreover, a jurisprudence cannot understand extreme cases because there is no rule to govern a chaos. However, the state of exception, as Schmitt points it out, is not equal to chaos or anarchy, and that is why in that case ‘order in the juristic sense still prevails even if it is not of the ordinary kind’.336 The way he defines the state of emergency (that can be seen also as a product of political crises) and the exceptional measures (that are product of political activity), enters into the core of modern politico-legal paradox. Therefore, exceptional measures become ‘juridical measures that cannot be understood in legal terms, and the state of exception appears as the legal form of what cannot have legal form’.337

In other words, Schmitt’s definition of the normative character of the state of exception reveals the paradox of sovereignty where the law can be outside of itself.

What exception also brings out, is the essence of authority grasped in the sovereign decision. ‘The decision parts here from the legal norm, and (to formulate it paradoxically) authority proves that to produce law it needs not be based on law’.338 This is very interesting collocation, because it adds something to the absolute particularity of law in its relation to justice. If law doesn’t have to be law or to even be inside of law in order to add something to itself, it is keeping itself without keeping itself. It is revealing the emptiness of its meaning that can be filled with the sovereign decision, and this characteristic of law – its impotentiality, is preserved in the juridical order. This way, exception ‘defies general codification, but it

334 See Benjamin, ‘Critique of Violence’ in Bullock and Jennings (eds.), Selected writings Volume 1 (1913-1926).
335 Agamben, State of exception, p. 23.
336 Schmitt, Political theology, p. 12.
simultaneously reveals a specifically juristic element – the decision in absolute purity.\textsuperscript{339}

The exception is at the core of Schmitt’s political writings, not only for showing the rule, but also because it aims at the heart of sovereignty in a situation when the norm gets suspended but the state continues to exist. For Schmitt, the state is seen as the condition for politics. That is why ‘Schmitt talks about the politics that defines the State, and about a new relation between legitimacy and legality’.\textsuperscript{340}

Agamben finds in the state of exception what he call Schmitt’s imperfect nihilism ‘that nullifies the law but maintains the Nothing in a perpetual and infinitely deferred state of validity’.\textsuperscript{341} For Paul Hirst, on the other hand, ‘Schmitt’s concept of the exception is neither nihilistic nor anarchistic; it is concerned with the preservation of the state and the defense of legitimately constituted government and the stable institutions of society’.\textsuperscript{342} The essence of exception is that it can never be a rule. If it becomes one, then it is grasped completely in the legal order. That is why, according to Hirst, Schmitt highlights and criticize the law being depended on politics. Even more, Hirst continues, ‘[t]he ruthless logic in his analysis of the political, the nature of sovereignty, and the exception demonstrates the irrationality of fascism and Nazism’.\textsuperscript{343}

\section*{3.6 State as the political structure}

According to Aristotle, a good life cannot be found outside the state where there is only a possibility for bare life, a form of life that had no importance whatsoever for this Greek philosopher. Therefore, a person ‘that is by nature and not merely by fortune citiless is either low in the scale of humanity or above it (…)’.\textsuperscript{344} In the classical Greek philosophy, the concept of state is the reflection of the social life as its highest organization. Polis was a public place, where equality and freedom were reachable, and

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most importantly, it represented political unity. From the knowledge and experience derived from it, it was possible to reach a “good life”, a category that goes beyond the satisfaction of necessities that are features of the bare life.

If people had no place to live in, no economy to organize their private life and private property, polis would not be possible. According to Hannah Arendt, “the fact that without owning a house a man could not participate in the affairs of the world because he had no location in it which was properly his own” explains why the oikos was a prepolitical structure that was only a necessary condition for the polis. Therefore, needs are connected to the oikos, while in the polis one is capable to understand and develop the freedom. In private household, force and violence can be used in order to maintain the hierarchy of the household, while in the polis we can find the concept of equality that one can reach only outside of the household.

Schmitt refers to oikos as a step in the development of the polis, but only with the understanding of its connection with the nomos, and the connection between these two terms was essential for the creation of the polis. According to Schmitt, we cannot understand nature of oikos and polis without employing another word – nomos. In the development of the term nomos, Schmitt describes three stages: (a) moving from nomadic life to the household; (b) the age of big migration – nomos was firstly established due to customs and traditions, and only after as laws and statutes; and (c) the connection between nomos and logos ‘meant that the logos, as something lacking passion and thus reason, was placed above the instinc-
tive and emotional character of the human individual’. Additionally, when defining the origin of the word nomos, Schmitt refers to linguistic theory and shows that it is derived from the old German verb nemein. This word can be translated as ‘to divide, to distribute, to pasture’, and it corresponds to the modern German verb nehmen which means ‘to take’. From this linguistic deconstruction, Schmitt concludes that the beginning of the polis creation was in the acts of division and appropriation. ‘[J]ust as division precedes production, so appropriation precedes division; it opens the way to appropriation: It is not division (…) but appropriation that comes first’. Consequently, there was no basic norm, but a basic appropriation. ‘No man can give, divide, and distribute without taking’, only God can do that.

Therefore, ‘translation of nomos with lex is one of the heaviest burdens that the conceptual and linguistic culture of the Occident has had to bear’. This translation originates from the Roman understanding of every political action as an action of law. However, '[t]he Roman word for law, lex, has an entirely different meaning; it indicates a formal relationship between people rather than the wall that separates them from others'. For Arendt, as well as for Schmitt, nomos precedes the politics as its condition. Arendt saw nomos as a wall between the private and public realm that in ancient Greece was defined by space and belonged to no one. Similarly, Schmitt has put the accent on the connection between nomos and oikos, between law and place, fighting against positivist image of law seen only in norms or oughts. In this privileging the form, according to Schmitt, ‘Europeans lost the sight of “the material significance of law, i.e., the political, social and economic meaning of concrete orders and institutions”.

Although Schmitt is, without a doubt, at some points equalizing concepts of the state and the political, he also writes that the political precedes the state as the latter seeks only for a present truth, for a present po-

litical truth. For him, a world without states would be a depoliticized world where the connection with the political, seen as a social expression of our tendencies and conflictual relations, would disappear. Therefore, there is no political outside of the state. However, Kervégan questions and negates this strong relation between the political and state which is immediately attributed to Schmitt. He writes that ‘the usual confusion between the political and the state can be understood in a historical perspective’. Contrary to this, he is focused on the following Schmitt’s statement:

It really existed a time when the identification of the state and political was justified because the classical European state had achieved this completely unlikely thing that was to install the peace inside, and to exclude hostility as the legal concept.

In this respect, the political is above the state, but can be observed only in the state, and Schmitt will not leave doubts about it.

3.6.1 Main types of the state

One of the main motives for Schmitt to write Legalität und Legitimität, in his own opinion, was the obvious collapse of the parliamentary legislative state in the dusk of the parliamentarian democratic state of the WR. Consequently, this book was one of the main reasons for calling Schmitt “a gravedigger of the Weimar Republic”. In the Introduction of LL, Schmitt abandons the classic typology of states, dated from Aristotle, which recognizes three forms of state, monarchy, aristocracy (oligarchy), and democracy. Not because this classic Greek division is pre-modern, but because today the ‘normative fiction of a closed (...) system of legality emerges in a striking and undeniable opposition to the legitimacy of an instance of will that is actually present and in conformity with law’. He does not base the new state regimes according to the class that forms a state, as it was the case with previous classification, but due to the process of formulation and applying the law, thus, choosing to talk about jurisdiction, governmental/administrative and legislative state. More importantly, with the novel state types, he wants to consider the legitimacy capacities of each of

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353 Kervégan, Hegel, Carl Schmitt, pp. 60-61.
354 Schmitt, La notion de Politique, pp. 44-45, as cited in Kervégan, Hegel, Carl Schmitt.
these, and in relation to them, he searches for the connection between the state form and the legitimacy capacities in those states, as the main goal of his criticism.

3.6.1.1 Jurisdiction state

In the medieval period, the state power was concentrated in the adjudication where the free courts were making legal norms, and that is historical form of jurisdiction state (German: Jurisdiktionsstaat). This state was based on decisions in concrete cases ‘in which the correct law, justice, and reason reveal themselves directly’, and thus, there was no need for a general norm. Laws were made by judges who ruled on specific cases. Therefore, this type of state was very actual, since it dealt with real cases in real time, without a pre-ordered norm waiting to be applied. Actually, it cannot be said that there was no norm or idea that judges needed to follow. All their decisions were supposedly made in the name of justice and law, but ‘[t]he ethos of the jurisdiction state is that the judge renders judgment directly (…) without mediation of norms of justice from other, nonjudicial, political powers’. This principle means that the notions of justice and law are self-sufficient to exist, and are not only ideas or tools. Therefore, in a very loose definition of the Rechtsstaat, jurisdiction state can be a type of the Rechtsstaat as long as the judge generates general ideas and applies his decisions as laws. However, for Schmitt this type of state is more a historical phenomenon, ‘yet, he still identified resemblances to it in contemporary Anglo-Saxon legal and political thinking’.

3.6.1.2 Governmental/administrative state

In the governmental-administrative states, men do not rule, and norms are not valid as something higher. Instead, the famous formula of “things administer themselves” holds true. The executive power or bureaucracy administrates the state by issuing special decrees that take the function of

356 Schmitt, LL, p. 4.  
357 Schmitt, LL, p. 8.  
358 Tuori, Ration and Voluntas: The tension between reason and will in law, p. 242.  
359 Schmitt, LL, p. 5.
norms. In governmental states there is not much of the ethos, but rather a strong pathos, which was in the case of the Prussian administrative state of Friedrich Wilhelm I and Frederick the Great, composed of honor and glory. This was the state of absolute princes of the 17th and 18th centuries, and when the public saturation of their pathos occurred in the 19th century, the need for the administrative state emerged. Furthermore, the beginnings of the administrative state were justified also by its usefulness, and, as was the case with jurisdiction state, factuality of its concrete measures.

Consequently, the administrative state for Schmitt represents a full depoliticization guided by the concepts of liberalism and democracy. It stands on the other end of the spectrum of what Schmitt defines as a legislative state. In his opinion, this type of state was the WR in its last stages. Therefore, he uses the administrative state to support his critique of liberalism that can be incorporated into critique of modernity and modern law. In this state, the ‘legal norms appear free-floating, almost spectral, certainly unconnected with real human beings. Law disconnected from both those who make it and those over whom it is applied might easily identifies as illegitimate’. 360 In this regard, the concept of legitimacy is completely disconnected from legality. For Schmitt, legality is not a sufficient condition for legitimacy, and since the legitimacy characteristics of the administrative state are very poor, one of the consequences can be complete depoliticization. Therefore, approximation to this kind of state is actually moving closer to the total state, which Schmitt not only criticizes from the perspective of his political and legal theory, but also tries to provide certain remedies to avoid it.

3.6.1.3 Legislative state

In order to separate the legislative from the administrative state, according to Schmitt, one needs to find a decisive moment where it is possible to perceive the presence of a legislative state. ‘At that moment the particular ‘focal point of the deciding will’ in the organization of the state becomes apparent’. 361 That is why one of his main conclusions is that in the modern

liberal state there is only legality without legitimacy, and that only a true legislative state will manage to equate legitimacy and legality.

During the last years of the WR Schmitt saw a continuing transformation of the German *Rechtsstaat* which was moving towards the total state, more specifically towards the administrative state. In order to embrace this process scientifically, he had to observe it using some different categories. At the centre of these “new” political categories is the legal state. The *Rechtsstaat* of the 19th century Europe was the parliamentary legislative state that Schmitt criticized as a jurist, and as a theoretician of law and politics. The first part of *LL* is relying on the conclusions made in the *Verfassungslehre*, and one of its goals was to present the *Rechtsstaat* separated from other types of state, and accordingly, to observe the the law and statute of the bourgeois legal state. In what it follows, the focus will be put on the main characteristics of this state.

3.6.2 Principles of legality in the legislative state

The legislative state is based on the so-called principles of legality that are vital and final norms for a state to be legislative, and in the Introduction of the *LL*, Schmitt lists those as following:

Firstly, in a legislative state norms are the highest and most important form of expressing public will. Since they express a community will, the supreme will in democracy, they are above other areas that are subordinated to them.

Secondly, the separation of legislative and executive power is of a vital importance in a legislative state ‘in which not men and persons rule, but rather where norms are valid’.362 This is a very important criterion for distinguishing the *Rechtsstaat* from the jurisdiction, governmental and administrative state.

Thirdly, in a legislative state there is no ‘government or obedience in general because only impersonal, valid norms are being applied’.363 This means that legality is establishing the political system, which justifies the suspension of right to resistance. ‘In this regard, the statute is a specific

manifestation of the law, while legality is the particular justification of state coercion’.364

These principles define a legislative state as a state which is focused on the general norm that is above society, putting every aspect of people’s lives under its structure. In a state that functions only according to legality, there is no personal will or laws that can rule. Every aspect of power gets its validation only in the general norm, and therefore, the whole state is reflected in the law in its statutory form, since state knows to exist only as the statutory state. In order to create a stable state, we need to build it according to the principles of “normality” that are necessary for legal norms to work properly. The impersonal and pre-established norms are, thus, ‘meant to be lasting and that have a definable, determinable content’.365

Moreover, the first condition of the legislative state is the state statute. For Schmitt, the bourgeois Rechtsstaat, is a statutory state, and is based on a formal concept of law. ‘If the “rule of law” should retain its connection with the concept of the Rechtsstaat, it is necessary (…) to distinguish a legal norm from a command based on a mere will or a measure.’366 Schmitt sees these qualities mainly in bourgeois freedom and in the concept of individuality that need to be embraced by the statute.

However, that is not enough, and at this point Schmitt thinks about a certain opposition as a necessary condition for the legislative state in its formal meaning. This opposition is seen in the popular assembly, a parliament, that is ‘bound by its law and its authority becomes legislation, not the means of an arbitrary rule’.367 Seen like this, the general norm in the bourgeois Rechtsstaat needs to have an opposition represented by a personal or collective body that is qualified to speak in the name of personal or collective will. Posner and Vermeule in their paper ‘Demystifying Schmitt’ find this condition in a separation of state and society (in this legal situation it refers to the separation between constitution and certain political actors) as two parts of constitutionalism. They present this in the following way:

The “closed system of legality” in the legislative state cannot, by itself, secure the political conditions for its own enforcement; obedience to or compliance with the law needs microfoundations in the incentives and beliefs of political

364 Schmitt, LL, p. 4.
365 Schmitt, LL, p. 4.
366 Schmitt, CT, p. 181.
367 Schmitt, CT, p. 181.
actors, including voters, officials, political parties, interest groups, and social movements. In the terms of legal theory, Schmitt anticipates the point that compliance with the large-c Constitution is shaped and constrained by small-c constitutionalism.\textsuperscript{368}

In other words, even in a legislative state there is a need for a political basis of the constitutionalism that is mostly achieved in a democratic environment with the representative system. The following chapter will reflect more on Schmitt’s critique of democracy. At this point, definition of the legislative state that we must keep on our minds in order to understand the legal theory of Schmitt, is that the “political actors” that are used as the “opposition” are, in his opinion, the way in which legality puts legitimacy under the constitutional legality. In other words, in liberal state, legality becomes a “dead word” without legitimacy. However, constitutionalism that can grasp this legality, is a necessary condition for the true Rechtsstaat, and Schmitt will never base his ideas of the state on something other than on the constitution.

3.7 \textit{Legality as the concept that comes after legitimacy in the theory of democracy}

It was shown above how the concepts of political and legal, under the rules of decisionism, can meet in the theory of the state, and after this merging only one concept is left to be saved – the political. By defining the political as the meta-concept of his legal theory, Schmitt bases his solution for the relation between the private and social realm in the theory of the state. Only political actions can refer to the structures of rationality among complicated social relations where everything is being defined and negated. Therefore, social capacity to create a rational basis through political action is the foundation for the legal norm. Without this process, the law loses its claim over rationality, and without the knowledge of these bases, irrationality enters into the rational structure of law.

Schmitt’s definition of the political concept of law brings conflict into the legal definition that in certain situation reveals the true holders of power, the sovereigns. This conception can be briefly described as the conflictual basis of law that is best seen in the relation between legality and legiti-

macy. While discussing about the concept of the modern law, we have seen how Habermas talks about the possibility of “reconciliation” between legality and legitimacy, while Schmitt sees only an obvious “divorce” between them, which brings serious consequences for our democracies. As McCormick says:

Habermas would go to great lengths to show that the substance of rational-legal legitimacy consists in the participation of citizens in the formulation of legal and constitutional norms, and not in, as Weber suggested, their “belief in” such norms or, as Schmitt averred, their collective acclamation or rejection of them.\(^{369}\)

For Schmitt everything starts within the political, but its outflows mostly lead through the law into democracy, or more precisely, into the critique of the parliamentary democratic system. This critique is in its essence based a critique of the formal concept of law which due to the lack of substantive criteria is incapable to bring upon the legitimacy of the regime. Therefore, the last argument of this chapter will consider certain readings of Schmitt’s work which can cast light on his understanding of the relation between legitimacy and legality in a democratically organized state.

3.8 The instrumental type of democracy

If one is to conclude that Schmitt is an author who rejects democracy as a “proper” system, then one is to be considered mistaken. On the contrary, Schmitt never offers us a possible future outside of democratic frames, although often can be discussed how democratic is his democracy. Democracy for him, has at certain point become capable of self-justifying its own existence, and of placing its goals inside itself. The realization of these goals is the product of its instrumental rationality which is internally defended by its legality. Laws are repeatedly being legitimized by the liberal concept of legality, and the potential of rationality as a universal standard, is being relativized ‘into a mere opinion or cultural disposition characteristic if a particular time and place’.\(^{370}\) Schmitt’s critique of parliamentary democracy is essentially based on the relation between legitimacy and le-


gality, and is focused on some important argumentative points that will be briefly examined.

### 3.8.1 Homogeneous societies

For Schmitt, democracy is only possible in homogeneous societies. Accordingly,

> the homogeneous people have all the characteristics that a guarantee of the justice and reasonableness of the people’s expressed will cannot renounce. No democracy exists without the presupposition (...) that the people are good and, consequently, that their will is sufficient.\(^{371}\)

The need for homogeneous will of a certain demos is a *conditio sine qua non* for a just and legitimate society. This will is what was called before the substantive will, and it pre-exists the constitutional norm. If we look at Habermas’s theory of democracy explained at the end of the previous chapter, we can see how the substantive will that Schmitt employs, stands opposite to the active will formation in Habermas’s model of democracy because of its very static nature that is based on the unification of people in one society. Thus, the homogenous will goes against obvious social pluralism that modern theories of democracy usually embrace through network of political parties. For example, according to McCormick, by trying to make a disconnection between heterogeneity and theory of democracy, Schmitt shows his fascist aspirations that allow the ‘right-wing, elitist, nostalgic monarchists like Schmitt [to] present themselves as “democrats” or “populists”’.\(^{372}\)

Therefore, constitutional norms in democratic systems should prevent thinkers such as Schmitt from promoting ideas of the homogeneous will. This argument, however, has shown its shortcoming in modern history, where we can witness the search for the social groundings in modern democracies that are, through the programmes of legal political parties, many times found exactly in the interpretations of the homogeneous will of one nation or state. This is exactly the main characteristic of almost all governing parties in the countries of the Western Balkans. The constitutions of many liberal democracies that are suffering from the rise of right-
wing populism, following the argument of McCormick, have failed to protect democracy from fascist ideas. Mouffe, on the other hand, approaches this problem differently. She does not observe constitution as a protector from the “wrong” social aspirations. In her view, ‘the right-wing populism is the consequence of the post-political consensus. It is the lack of an effective democratic debate about possible alternatives that has led in many countries to the success of political parties claiming to be the “voice of the people”’.\textsuperscript{373} Therefore, the recent moving toward right-wing policy that promotes in many ways the idea of homogeneous will as the only legitimate source of political decisions is a consequence of democratic deficit. The latter, according to Mouffe, is based on the main tenets of liberalism that placed its principles above democratic and public sovereignty principles, and by doing so, sets itself as the only interpreter of democracy in the modern world. All of this brought the so-called “the end of politics”, instead of so well advocated “the end of history”. By taking the conflictual part of the politics, which happens through the law, the ‘[p]olitics in its conflictual dimension is deemed to be something of the past and the type of democracy which is commended is a consensual, completely depoliticized democracy’.\textsuperscript{374}

### 3.8.2 Politics of equal chances

This marriage between liberalism and democracy is what has left us with many wrongheaded interpretations and prescribed features of what we tend to call modern democracy. From the reading of Schmitt’s \textit{LL}, Kirchheimer notes that democracy cannot be justified by the principle of equality. He argues this statement by defining the equal chance as: (a) an equal treatment of all persons, parties and legislative proposals at certain stages in the creation of democratic laws; (b) an equal chance to form a political majority that can be achieved when the right of every party to gain this status is left undisturbed by legal standards.\textsuperscript{375}

\textsuperscript{375} Kirchheimer, ‘Remarks on \textit{Legality and legitimacy}’, in Scheuerman (ed.), \textit{The Rule of Law under Siege}, p. 77.
The unconditional equal opportunity to obtain a political majority is the legal principle of democratic constitutions, and it has become the principle of justice in liberal democracies. For Schmitt, due to the existence of a legal state that is based on the legality of any expression of state authority, the equal chance is already impossible. Furthermore, the general definition of the equal chance as a legal principle goes against its indeterminate nature of the equal chance that always depends on a specific situation that is being defined by the ruling political party. Kirchheimer summarizes these objections to: (a) the “political premium resulting from the legal position of power”, as in the case of a ruling party that always has more legal-based power; and (b) the absence of specific norms that truly promote and protect this principle.376 These arguments again lead to Schmitt’s conclusion that constitutions in parliamentary democracies cannot guarantee freedom and equality, two principles that are essential for the justification of democracy. Finally, according to Kirchheimer:

Schmitt is right to argue that parliamentary democracy cannot establish full “equal chances” for all parties, but he is wrong to claim that this failing results chiefly from parliamentary democracy’s basic organisational structure. Instead, such failures can be traced back to the concrete content of specified private rights and certain other material-legal standards.377

Therefore, we are left with one conclusion: ‘[d]emocracy is (...) confronted with a choice: it is either unrealised or unjustified’.378

3.8.3 Politics of majorities

Schmitt’s next observation is that parliamentary democracy cannot recognize or deal with the nature of the political, and therefore can only strive to neutralize it. Reduction of the will formation to a simple majority vote and “yes or no” decisions are two main procedural characteristics of parliamentary democracies that obscure the true meaning of politics. If, according to the previous point, the principle of equal chance is the pillar of democracy, it reveals another feature of democracy – its obsession with finding the majorities. Schmitt, who deviates from the idea of the homogeneous will of demos, concludes that the importance of the democratic pro-

376 Kirchheimer, ‘Remarks on Legality and legitimacy’, p. 78.
378 Kirchheimer, ‘Remarks on Legality and legitimacy’, p. 79.
cess is not the finding of minorities, but the focus on obtaining the support of majority. This brings the political game to a more mathematical relation, where the argument of a quantitative majority ceases with the nature of ‘[t]he democratic identity of governing and governed, those commanding and those obeying. (...) The majority commands, and the minority must obey’. Consequently, a party or group of parties receiving 51 percent of the votes will get the power to make and enforce valid statutes. Their legality is immediately translated to legitimacy. In the words of Schmitt, ‘[t]here is no need for a social validity, the modern law is itself the beginning and the end.’

3.8.4 Politics of consensus

We have seen how Habermas puts the deliberation at the center of his democratic theory, following the idea that the communicative processes are capable of illuminating and reaching people’s rational capacities. This premise in democratic theory is used to make decisions that will form a rational political society. Schmitt, on the other hand, argues against this scenario which in his opinion remains impossible until democratically organized society manages to embrace all aspects of political processes together with all antagonisms that they bring, institutionalizing and using them to shift negative energy into decision-making energy. There is no deliberation in referendums and public discussions that democracy offers in the name of radicalization of democratic processes. Regarding the public referendum, Schmitt writes:

> The people can only respond yes or no. They cannot advice, deliberate, or discuss. They cannot govern or administer. They also cannot set norms, but can only sanction norms by consenting to a draft set of norms laid before them. Above all, they also cannot pose a question, but can only answer with yes or no to a question placed before them.

This is one of the arguments that still makes Schmitt a good reference for criticism and ideas that can move us from simply maintaining the status quo, and motivate us to search for alternatives in our social systems. The same critical voice can be heard in Habermas’s arguments that are focused

379 Schmitt, LL, p. 28.
380 Schmitt, LL, p. 31.
381 Schmitt, LL, p. 93.
on creating the conditions for strengthening the public voice and motivating people to have greater participation in democratic processes. The difference is that Habermas finds the principle of intersubjectivity as a possible remedy, while Schmitt decides to focus on the principle of nationality that he derives from the homogeneous will of the history of demos, as a source of law.

3.8.5 Politics of depoliticization

While for Weber legality is a thin form of legitimacy, Schmitt argues that legality does not have either procedural-formal or moral-practical rationality. Moreover, words legitimacy and legality, in what can be defined as parliamentary democracy, are standing one opposed to the other. Therefore, Schmitt would agree more with Kirchheimer’s conclusions that ‘the legitimation of the given system of social power is achieved through the forms of the existing legal order’.\(^ {382}\) The only foundation parliamentary democracy is left with lies in its principles of legality that reside in the authority and presupposed rationality of the general norm. Additionally, ‘[t]he distinctive rationalism of the system of legality is obviously recast into its opposite’,\(^ {383}\) carried by the winds of neutralization and depoliticization. This state regime cancels the possibility of legitimacy outside the state, because everything needs to be based on legality which becomes the only way for the legitimacy of the formal law.

Furthermore, what Kirchheimer observes in parliamentary democracies is the tendency towards a greater legal control over the administration where the rationalized concept of law is being substituted with the right to resistance, and it ‘corresponds to the formalization of the concept of legality’.\(^ {384}\) Degradation of the right to resistance to a catalogue of constitutional rights – it was like this that Kirchheimer saw the situation in the Weimer Republic. Together with the democratic ideology, they produce a ‘social order that had not yet been fully rationalized’.\(^ {385}\) Therefore, Kirchheimer, like Schmitt, maintains the faith in political action as a realm where social rationality and freedom can be expressed. Consequently,

\(^{382}\) Kirchheimer, ‘Remarks on Carl Schmitt’s \textit{Legality and legitimacy}’, p. 44.


\(^{384}\) Kirchheimer, ‘Remarks on Carl Schmitt’s \textit{Legality and legitimacy}’, p. 46.

\(^{385}\) Kirchheimer, ‘Remarks on Carl Schmitt’s \textit{Legality and legitimacy}’, p. 46.
derogation of parliamentary democracies they find in the derogation of modern law that by equalizing legality with legitimacy reduces the political space to a minimum.

3.8.6 The bureaucracy

Both Kirchheimer and Schmitt have witnessed the failure of the Weimer Republic, and they had clearly seen that the new liberalism, incorporated in the theory of democracy through the conditions of a legislative state, explored the ways to gain more democracy and re-justify its governing. In this period, the bureaucracy will also claim its power and help the system to maintain the class-divided democracy. ‘The bureaucracy strives to make its supposed position “beyond class” independent of the interplay of class relations and to establish itself as the unmediated representative of the national order, independent of all social and political constellations’. In addition, what Kirckheimer sees in the nature of the bureaucracy is that, like any other system that wants to rule, bureaucracy also needs to seek its legitimacy. This type of social approval is found in special relations between the civil service and the state. If the growth of administrative power is not followed nor controlled by some social powers, and if it is left to control the state apparatus, we can easily end up with having what Kirchheimer calls “bureaucratic aristocracy”. Even though for him this phenomenon is not capable to change the concept of public sovereignty, he stresses out that the bureaucracy as the neutral mediator ‘is the champion of a new system of legitimacy-based rule that is suspending the epoch of legality based parliamentary democracy (…) [and that it] takes itself to be the “final end goal of the state”’. For him, as for Schmitt, the pathology of bureaucracy is an evident sign of the decay of the legislative state, in the same way that Schmitt described the administrative state.

3.9 Conclusion to the chapter

Examined critiques of Schmitt’s legal and political theory in this chapter were chosen to the extent that I believe they actually provoke Schmitt’s
standpoints. Many other critiques didn’t find their place here, because of the lack of relevance or space on the one hand, or because of the too obvious and thus limited subject of their critical arguments, on the other hand. However, no matter how systematic and clear his political and legal analyses were, anyone who tends to use late Schmitt’s political “suggestions” and ideas cannot ignore that “rotten” in Schmitt that came out in his personal political choices.

The focus of the chapter was put on his earlier academic phase and on the ideas coming from that period, with the strong confidence in the necessity of discussing upon those “old” definitions, which in their clarity remain very firm to this day. Does Schmitt reappear in modern societies within the state of exceptions and executive decrees? Or in the protection of national identity and national ideas when the walls are rising on our borders? Perhaps even more important inquiry is whether Schmitt’s political realism has ever disappeared from modern law and democracy? Finally, the most important question for this paper is – can Schmitt’s idea give additional rationality to the violent disintegration of Yugoslavia and maybe even respond to the actual Serbian politics? According to Aleksandar Molnar, present-day Republic of Serbia is based on Schmitt’s ideas and it is a historical product of, what he calls, ‘the constitutional path of Serbia – from Karl Marx to Carl Schmitt’. Even though the foregoing text doesn’t develop a Yugoslavian or Serbian argument in Schmitt’s context, the following chapter will precisely be focused on that task. More importantly, in that examination, it will be possible to observe the limits of both Habermas and Schmitt in the context of modernity.

When Schmitt said that: ‘[t]he certainty that we are dealing only with a passing phenomenon still does not free us from the duty of analyzing the ongoing decay of the legislative state’, he was right. It was not an ongoing phenomenon that had passed then, as it did not pass until today. Habermas describes continuous modern pathologies as a byproduct of the uncoupling process between the system and the lifeworld, supported by the rise of steering media of money and power. However, in order for any system to be stable in the long run, the principles of legitimacy need to meet with the social and legal reason. For this to happen, according to Milović,

388 See Molnar, Sunce mita, pp. 19-35.
we need the break with modern metaphysics, which Schmitt searches for in:

the perspective of the reinvention of politics that is the perspective of the articulation of people. It is the political subjectivity that the system forgot. It is the constitutional subjectivity (...) that is the possibility for the direct democracy and thus the possibility for a democracy itself.\textsuperscript{390}

\textsuperscript{390} Milović, \textit{Política e metafísica}, p. 90.