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**SCHMITT V. (?) KELSEN:
THE TOTAL STATE OF EXCEPTION POSITED
FOR THE TOTAL REGULATION OF LIFE**

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ABSTRACT

Firstly, the article focuses on the ideologies of Hans Kelsen and Carl Schmitt, which are, as a matter of stereotype, considered as being in opposition to each other. By revealing the logics of Kelsenian normativism and the conception of law presupposed therein, the paper aims at re-constructing the opposition into a generative affinity of two ideologies and showing that these two great ideological adversaries of the first half of the twentieth century could be considered co-authors of the same ideological construct. The construct could be called the *total state of exception*, with the inherent political holism and legal nihilism.

The second main aim of the article is to widen the scope of this insight by relating it to the applied ideas that frame our modern political world. The ideas are those of democracy and human rights, the former appearing as the form of the total state, the latter as the one possible de-former of the total state. However, the foundation – i.e. natural law – of the de-former appears to be inconceivable and, therefore, lost to the modern mind. In the end, the article attempts to show that Schmitt might have reflected on this much more fundamental aspect of legal nihilism. This reflection provides for the possibility of dissonances in his basically anthropocentric decisionism and the centralization of the problem of natural law.

KEYWORDS

Carl Schmitt, Hans Kelsen, state of exception, positivism, normativism, political holism, natural law

NOTE

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INTRODUCTION: WHO IS SCHMITT AS A LEGAL PHILOSOPHER?

First of all, Carl Schmitt is a legal philosopher – he certainly presents some philosophical conception of law. But in what, so-called, philosophical school of law should his ideas be classified? Schmitt is characterized as a political holist and, therefore, a legal nihilist – for him law is as politics, or, rather, there is only politics. In this case we can classify him as a representative of Critical Legal Studies; but this is the post-war school essentially ascribed to one region – the USA. Schmitt, as we know, was not an American dweller, and he wrote many of his fundamental works prior to WWII or, more precisely, during the inter-war period. This period may also be considered as the one where the school of legal philosophy, generally called *Positivism*, culminated, and that is especially related to the works or, more exactly, one *magnum opus* by Hans Kelsen: *Pure Theory of Law*. Also, as it usually appears, Schmitt was rather critical of what Kelsen wrote. In this relationship Schmitt should appear as an anti-positivist and Kelsen's ideological adversary; but is this really true? What kind of critique do we have here – is it a negative critique or more a critique of a (neo-)Kantian style?

In the paper I will try to approach those issues and, by that, to reveal that Schmitt's ideology could be conceived as perfecting positivism and, thus, providing a coherent supplement to Kelsen's ideology. In other words, the relationship between two ideologies – that of Kelsen and that of Schmitt – is more of a generative kind: Kelsen's approach programs Schmitt's approach, and the latter is founded on the former through the critique as the elucidation of what positivism is about (Parts 1 and 2). That will allow generalization of the function of legal positivism, which is still the dominant *applied* ideology in the sphere of public and constitutional law; it is the function to put the world and our lives into the form/shape of the total state of exception. Also that will allow generalization of the consequences of this application and the alternative perspective, possibly derivable from the ideas of Schmitt (Parts 3 and 4).

1. EXCLUSIONARY INCLUSION OF LIFE INTO THE DOMAIN OF LAW IN KELSEN'S NORMATIVISM

We could start from the general settled/stereotypical understandings of the conceptions of Schmitt and Kelsen putting those conceptions in opposition to each other. While Schmitt's conception is often called *decisionism*, Kelsen's is almost universally known as *normativism*. Normativism concentrates not only on normative structure of law, but also on the presupposition of the norm (i.e.

Grundnorm) as the foundation of the legal condition which is called *Rechtsstaat*, and which, as legal condition, has nothing in common with the political condition. On the other hand, decisionism concentrates on the presupposition of the decision as the foundation of the legal condition which is *initially* called a *state of exception*. In the latter case, this initial legal condition essentially coincides with the political condition; or it even may be called solely the political condition from which the legal condition emanates, thus instituting the so-called primacy of the politics over law. But is this stereotype correct and is it the real opposition? Firstly, we should consider the Kelsenian apparatus, used to institute the legal condition.

This institution is, at a very fundamental level, processed/conceptualized through the total exclusion of life (i.e. pure sensing/*physis*/nature) from the domain of law/normativity.¹ However, as it will be shown, this exclusion empowers the thus formed legal system to *totally* include life therein. One of the tools used in the process of exclusion is the instrument of differentiation between something external/internal (or, in Derridian terms, inside/outside). The empirical world, the world of facts and senses, the world of our life as bare life, the world of an *is* as opposed to an *ought*, the world as constituted a-posteriori – all this is the external/outside world. This world is completely empty/pure of law/legality; in this world we are pure sensing, physically existing beings. As Kelsen writes,

The external fact whose objective meaning is legal or illegal act is always an event that can be perceived by senses (because it occurs in time and space) and therefore a natural phenomenon determined by causality. However, this event as such, as an element of nature, is not an object of legal cognition. What turns this event into a legal or illegal act is not its physical existence, determined by the laws of causality prevailing in nature, but the objective meaning resulting from its interpretation. The specifically legal meaning of this act is derived from a “norm” whose content refers to the act; this norm confers legal meaning to the act, so that it may be interpreted according to this norm.²

Here we are confronted with two parallel worlds existing beside each other, very strictly separated, with no possibilities of any overlap, but strangely reciprocal; the existence of a norm as parallelism in the internal world changes the quality of what is paralleled in the external world. What is also important here is that in this

¹ In this respect, it is hard to agree with the rather common statements – however persuasive – that Kelsen’s goal is a pure science of law: it is not a theory of pure law. He envisages no such chimera as a “pure norm” (see M.D.A. Freeman, ed., *Lloyd’s Introduction to Jurisprudence*, 6th edition (London: Sweet & Maxwell Ltd., 1994), p. 273; therein multiple other authors are referred to). Not only *his norm is pure of physis* (see also *infra* note 12), his *goal*, especially as related to the first edition of *Reine Rechtslehre*, was also to purify norm (make it autonomous) of *physis*, the latter especially taking the form of all what is related to politics and ethics/morality (see David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford & New York: Oxford University Press, 1997), p. 102; there Dyzenhaus cites the Introduction of the first edition of *Reine Rechtslehre*).

² Hans Kelsen, *Pure Theory of Law*, trans. Max Knight (Berkeley: University of California Press, 1967), p. 3–4.

external world we also find an act of will/violence – clearly a Scmittean concept: “the norm, as the specific meaning of an act directed toward the behavior of someone else, is to be carefully differentiated from the act of will those meaning the norm is: the norms is an *ought*, but the act of will is an *is*”.³ Taken in context, this pure act of will is something like the sole act of sensing. It is as sensed. In other words, if “the act of will is an *is*” and an *is* is constituted by/made of physical existence/senses, when this act of will is just as sensed and in no other way; it is, simply put, pure sensed violence or, in other words, force.

But there “is” this other parallel internal world, which, for now just by “existing”, transforms the external world. The existence of a norm as parallelism in the internal world changes the quality of what is paralleled in the external world. The parallel world of pure normativity transforms pure violence into legal violence, for now just by “existing” beside/to the side. How else can this rather strange reciprocity be conceptualized? Possible wordings are as follows: a norm *confers upon* an act the meaning of legality or illegality; a norm *turns* some event into a legal or illegal act; the legal meaning of an act *is derived* from the norm; a “norm” *is* the meaning of an act.⁴ A noticeable articulation is conducted by the differentiation of *equality* and *identity*: “the behavior that is the content of the norm ... and actual behavior are not identical, though the one may be *equal* to the other”.⁵ The exclusion of the possibility of identity clearly functions as an exclusion of the possibility of the overlap of two separated worlds; but what is *equality* between them? This articulation hardly adds to the clarification of the margin between the two worlds – they remain two pure self-exclusive co-existing worlds.

The agenda of the exclusion of the world of facts/nature/senses from the world of law is implemented even in the world of reason itself to which the world of law belongs. This is initiated by the differentiation of natural (or causal) science and social (or normative) sciences.⁶ In other words, even in the world of reason, law/normativity has to be distanced from nature as far as possible. As Kelsen states,

By limiting the science of law to the cognition and description of legal norms and to the norm-constituted relations between the norm-determined facts, the law is delimited against nature, and the science of law as a science of norms is delimited against all other sciences that are directed toward causal cognition of actual happenings. Thereby a criterion has been ascertained according to which

³ *Ibid.*, p. 5.

⁴ *Ibid.*, p. 3–4.

⁵ *Ibid.*, p. 6 [italics in original].

⁶ *Ibid.*, p. 75–81.

society can be clearly differentiated from nature, and social science from natural science.⁷

This differentiation is accomplished by the exchange of the principles, as being in our thinking, by which we know two different objects of cognition. Using Kantian metaphors, the glasses through which we know society have to be different from the glasses through which we know nature; but both of them are found in the domain of reason. The principle which stands as a tool of cognition for the natural sciences is causality. On the other hand, according to Kelsen, social science together with the science of law, which have as their object society (not nature) as a normative order of human behavior and which aims at being different from natural sciences, has to know this object

According to a principle entirely different from that of causality. ... If we succeed in proving that such *principle exists in our thinking* and is applied by the sciences that have as their object mutual human behavior as determined by norms ... then we are entitled to consider society as an order or system different from that of nature and the sciences concerned with society as different from natural sciences.⁸

According to Kelsen, "the principle, different from causality that we apply when describing normative order of human behavior, may be called *imputation*."⁹ However, how Kelsen explains what imputation as different from causality is, brings to light the importance of the human act of a will as final authority and sounds rather Schmittean:

The rule of law does not say, as the law of nature does: when A is, "is" B; but when A is, B "ought" to be The reason for the different meaning of the connection of elements in the rule of law and in the rule of nature is that the connection described in the rule of law is brought about by a *legal authority* (that is, by a legal norm created by an *act of will*), whereas the connection of cause and effect is independent from such human interference.¹⁰

This anthropocentric mode of thinking is followed by the further rejection of natural law:

Metaphysical theory of law pretends to discover a natural law immanent to nature. From the point of view of a scientific view of the world, however, within which only a positivistic theory of law can be established, the difference between

⁷ *Ibid.*, p. 75.

⁸ *Ibid.*, p. 76 [italics – TB].

⁹ *Ibid.*

¹⁰ *Ibid.*, p. 77.

the (causal) law of nature and the rule of law must be maintained with all emphasis.¹¹

What is lost from sight here is that scientific thinking in the Kantian (or Humean and Popperian) view is itself, as deductive, metaphysical. On the other hand, the thesis that the *metaphysical* theory of law has something to do with the natural law *immanent to nature* is also very debatable. Everything here looks as if Kelsen humiliates science (natural causality should be rejected, especially for the purpose to reject metaphysics in law), but afterwards hides under its allegedly non-metaphysical prestige. Also – he pretends to escape metaphysics, but becomes even more metaphysical than the “metaphysics” that he states to be escaping.

But the anthropocentric paradigm is perfected and the mechanism of exclusionary *inclusion* of life into the realm of law finally accomplished by the concept of the *Grundnorm*, which appears as the essential margin (or, speaking more metaphorically, the gate) between two worlds. After the exclusion of life from the realm of law through the aforementioned mechanisms, it is included back therein through the “gate” of the *Grundnorm*, which has the empowering of the omni-potent sovereign as its sole and only purpose.

Before concentrating on the peak/marginal conception of *Grundnorm*, first of all, we have to keep in mind that in this pure¹² a-priori world of normativity (law as a system of norms or as a normative order)¹³ there is some hierarchy of an analytical character. Any norm (apart from the one – *Grundnorm*) receives its legal character from another norm, which, using spatial metaphorical employed by Kelsen, is “higher” (quotation marks are used by Kelsen himself).¹⁴ This formulation/approach signifies that this legal character is already contained in another norm as some kind of analytical predicate. But it is not exactly that some norm is contained in some other higher norm as a predicate of some specific substantial content. The Kelsenian static system of norms is not about the contents of norms, but about their validity/power. In other words, what is exactly contained in the higher norm as a predicate is not the specific content of some norm, but only the pure validity/power/authority of the norm. Norms, and that which concerns their substantial contents/meaning, are *empty variables*, and exactly this aspect

¹¹ *Ibid.*, p. 77.

¹² The concept *purity* (or *pure*) is essentially relational. It is hard either to articulate or to conceive so-called „absolute purity”, probably unless we start speaking about *Nothingness*. Purity is always purity of *something*, i.e. something purified of *something*; purity presupposes maneuver of exclusion and even articulation of what is excluded. In other words, purity is delimited/described by impurity/what is impure; it is founded on impurity.

¹³ Hans Kelsen, *supra* note 2, p. 75.

¹⁴ *Ibid.*, p. 4, 8.

makes the Kelsenian system, as Schmitt would call it, the system of pure legality, without legitimacy.¹⁵

The only norm which is not empty variable is the *Grundnorm*. For the *Grundnorm*, having power has a substantial meaning. In some sense, all norms are contained in the *Grundnorm* as its predicates (i.e. Kelsenian system of norms is essentially one construct of analytical a-priori relations), but only as concerns their validity/power, which for the *Grundnorm* is a substantial element (that of contents), but for the other norms, only that of a form. We could say metaphorically that the *Grundnorm* contains all of the legal validity/power which is distributed to the "lower" norms formalizing/positing them in the system of law. That is how the static system – the Kelsenian pyramid – is formed/posited, which is the system of the distribution of legal power/validity and nothing more. But because of some specific and substantial character of the *Grundnorm*, making all norms that are "lower" to *Grundnorm* empty variables, the whole system becomes dynamic. This specific character of the *Grundnorm* is explained by its main definition, being also the most important sentence of the *Pure Theory of Law*: "the presupposed basic norm contains nothing but the determination of a norm creating fact, the authorization of a norm-creating authority ...".¹⁶ The content of *Grundnorm* is only the authorization of a norm-creating authority (who *should* appear as the omni-potent law-giver sovereign), who may create norms of any content whatsoever, thus making the system of norms dynamic.

We may conceive this Kelsenian power-full content-less normativity¹⁷ as the framework and foundation for the total state of exception; i.e., the Kelsenian system of law is founded on the total exclusion of *physis* in order to include it into

¹⁵ Cf. Carl Schmitt, *Legality and Legitimacy*, trans. ed. Jeffrey Seitzer (Durham & London: Duke University Press, 2004), p. 23 ("[there is] purely political concept of statute detached from every relation to law and justice. The statute no longer needs to be ... a general ..., lasting regulation with a definable and certain content. The lawmaker creates what he wants in the lawmaking process Through this change, the way was open to an absolutely "neutral," value- and quality-free, formal-functional concept of legality without content"). Also cf. Hans Kelsen, *supra* note 2, p. 198 ("a legal norm is not valid because it has a certain content, that is, because its content is logically deducible from a presupposed basic norm, but because it is created in a certain way – ultimately in a way determined by a presupposed basic norm").

¹⁶ *Ibid.*, p. 196.

¹⁷ It might be contended that Kelsen's idea was, exactly, that "legal science has no contribution to make in answering questions about how the content of law should be shaped" (David Dyzenhaus, *supra* note 1, p. 106 [italics – TB]). I.e. the content-less-ness of law is allegedly the matter/problem of legal science, not law; however, it appears to be the clear subterfuge. This science, which in itself is just a theory/vision of law, presents normativity/law as content-less – it states that law, as a matter of *fact*, is content-less. What is camouflaged here is that by having no contribution in answering the question of the content of law, this vision of law already programs political holism, legal nihilism, completely other vision of law and might be related to what Schmitt calls "the degeneration of the concept of law" (Carl Schmitt, *supra* note 15, p. 79; see further this paper, especially Part 4); as a consequence, in our vision, the law is changed and, thus, it is the matter of law, not only legal science. On the other hand, what is contrasted with legal science is not so much *law*, but *politics*, what in itself presupposes that, even in Kelsenian view, *law is as politics*, also, as a consequence, making the opposition itself (i.e. legal science v. politics) the political one; see David Dyzenhaus, *supra* note 1, p. 109 ("Kelsen ... never properly dealt with the obvious counterclaim which Schmitt and others might make – ... that the presupposition that there is a distinction between politics and a science of law is itself political").

its domain as any possible content, and, therefore, may be conceived as representing the mechanism analogous to the one of the state of exception.¹⁸ But this assembled mechanism in Kelsen's theory appears to be somewhat *un-engineed*, or *engineed* in a very mysterious way. The power/validity of all Kelsenian norms is totally interpretative (rational), however, without any concrete interpreter discernible. First of all, any norm in this static system "functions as a scheme of interpretation"¹⁹; in other words, the qualification of some act as a legal act (not an act of pure violence) "results from a thinking process"²⁰. Secondly, *Grundnorm* finds its place solely in thinking. Finally, Kelsen attempts to "plunge into" thinking even the one who should take the place of the concrete sovereign:

Just as we can imagine things which do not really exist but "exist" only in our thinking, we can imagine a norm which is not the meaning of a real act of will but which exists only in our thinking. Then, it is not a positive norm. But since there is a correlation between the ought of a norm and a will whose meaning it is, there must be in our thinking also an imaginary will whose meaning is the norm which is only presupposed in our thinking – as is the basic norms of a positive legal order.²¹

As we also see from this passage, the *Grundnorm* does not belong to the positive legal order and is not a positive norm – it is something outside that order as some act of will. But it is also not some concrete/factual willing/deciding sovereign and does not presuppose one. The Kelsenian sovereign is virtual/imagined and still "exists" in the internal world – the one of *logos*. That could be the place to draw more attention to the ideas of Schmitt.

2. SCHMITT'S THEORY OF SOVEREIGNTY AS SUPPLEMENTING KELSEN'S THEORY OF LAW TO ITS POSITIVISTIC PERFECTION

Schmitt's theory of sovereignty²² and Kelsen's theory of law present essentially identical models of exclusionary-inclusion of life into the domain of law. On the other hand, through Kelsen's ideas we can better understand Schmitt's theory of sovereignty as the model of exclusionary-inclusion of life into the legal-

¹⁸ In a Schmittian context, it is impossible to regulate state of exception, to give it the concrete contents; i.e. state of exception is of any possible contents and, this way, theoretically, it is without any concrete contents. Cf. Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago & London: The University of Chicago Press, 2005), p. 6 ("[the exception] cannot be circumscribed factually and made to conform to a performed law. ... The precise details of an emergency cannot be anticipated, not can one spell out what may take in such a case, especially when it is truly a matter of an extreme emergency and of how it is to be eliminated").

¹⁹ Hans Kelsen, *supra* note 1, p. 4.

²⁰ *Ibid.*

²¹ *Ibid.*, p. 9–10.

²² Giorgio Agamben calls Schmitt's ideology, especially as developed in *Political Theology*, the theory of sovereignty (for example, see Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago & London: The University of Chicago Press, 2005), p. 54).

political domain, as also the possibility of the still-logo-centric (and, also, still-anthropocentric) meaning of his decisionism. The dynamics/dialectics presupposed in this model are much more evident when we are confronted with such a clear separation and exclusion of the one world (i.e. *physis*) from another²³ and the only followed-up inclusion of the former by the articulation of the conception of *Grundnorm* as it is done in Kelsen's ideology.

But there is one practical difference between the two ideologies and their authors. Firstly, because of the known circumstances,²⁴ Schmitt was ignored as a theorist. On the other hand, Kelsen, as also all of legal positivism, made a tremendous impact on the theory and practice of law.²⁵ But precisely Schmitt, with his elucidative, Kantian style critique of positivism, could be considered the positivist *par excellence*,²⁶ not Kelsen and his other (former or later) allies. First of all, Schmitt's elucidation of the conception of positivism as being the dominant political-legal ideology of modernity could explain precisely why we could conceive the contemporary political condition as the total state of exception and a camp on a world scale. Secondly, Schmitt's critique of positivism is, at least in part, a Kantian kind of critique, i.e. an elucidation of what positivism is about.²⁷ By showing the "real face" of positivism, because of which we may even give it the title of *legal nihilism*,²⁸ Schmitt articulates this ideology to its completion. Precisely in the Schmittian perspective it becomes very clear that "there is no such thing as law in positivist sense"²⁹ (i.e. all is politics; positivism is political holism), and that "the positivist conception says that legal order is just the instrument of the powerful"³⁰. Schmitt explains how this instrumentality appears, and that is completed in his theory of sovereignty.

²³ More precisely, the factual/external world is excluded from the normative/internal world; i.e. the vector of exclusion, at least initially, is one-directional, not both-directional.

²⁴ Here the well known affiliation of Schmitt with Nazi regime is had in mind.

²⁵ We can talk about the still flourishing Kelsenism in some regions and impact (direct or indirect) of Kelsen's ideas to other positivists. For example, H.L.A. Hart still employs the logocentric machine to articulate what takes place of the conception of *Grundnorm* in his theory, i.e. internal aspect of law and the rule of recognition (generally see H.L.A. Hart, *The Concept of Law*, 2nd Edition (Oxford: Oxford University Press, 1994), especially p. 82–110).

²⁶ To continue: if Hobbes – who allegedly justified authoritarian/absolute government/sovereign (for example, see M.D.A. Freeman, *supra* note 1, p. 102) – is considered to be the founding father of positivism (see David Dyzenhaus, *supra* note 1, p. 9), then Schmitt is clearly the positivist *par excellence*. And we should disregard some apparently anti-positivistic statements in the Part 3 of the *Political Theology*, as they concern not the specific theoretical conceptualization, but are applied in more general contexts. Although one instance, where Schmitt uses word *positive* in quotation marks while speaking about contemporary theory of public law (see Carl Schmitt, *supra* note 18, p. 51), in itself shows that Schmitt himself probably did not consider as *positive* some aspects of then developed legal theory that was called *positive*.

²⁷ It is not Kelsen's *Pure Theory of Law* that may be, to make the parallelism with Kantian ideology, renamed as the *Critique of Pure Law*; it is Schmitt's *Theory of Sovereignty* which deserves this title.

²⁸ David Dyzenhaus, *supra* note 1, p. 8.

²⁹ *Ibid.*, p. 7.

³⁰ *Ibid.*, p. 8.

We know well the famous first sentence of *Political Theology* – “sovereign is he who decides on the exception”³¹, and Giorgio Agamben rather elaborately demonstrated how this situation/condition of sovereignty transforms into the mechanism of exclusionary-inclusion of bare life into the legal-political domain.³² But what makes Schmitt a clear positivist – and even the one who defends it – are some theses in the second part of *Political Theology*. There he not only states that “Kelsen solved the problem of the concept of sovereignty by negating it”³³, but also tries to explain that maybe positivism has to be understood differently, i.e. more precisely, and that Kelsen, perhaps, is not even a positivist, if a positivist is one who seeks to posit (or present as posited) law as having some real/existential status, and not only as some net of empty variables. In this respect Schmitt differentiates between *objectivity* and *positivity*, the latter not being the feature of Kelsenian “law”.³⁴ In other words, Kelsen presents law as some objectively identifiable set of legal norms, but this objectivity should itself rest/be based on positivity, which is something Kelsen did not arrive at/approach in his theory by the repression of the concept of sovereignty: “on what does the intellectual necessity and objectivity of the various ascriptions [i.e. imputations] with the various points of ascription rest if it does not rest on a *positive* determination, on a command?”.³⁵ It follows that the decision/decisionism should be an integral part of the positivist theory of law. We could even say that normativism should be supplemented with decisionism in order to complete the *positivist* theory of law.³⁶

At a fundamental level, what this means in relation to Kelsen’s approach is that the *Grundnorm*, as transformed into the decision, should be made the integral part of the domain of law, or, the positive norm (as we’ve seen, for Kelsen *Grundnorm* is not this kind of norm)³⁷. For Schmitt, the decision of the sovereign (which is the decision on and in exception) is not the element of pure world/state of nature, and it is not some kind of pure violence/power.³⁸ It is more a kind of Derridian interpretative violence and still a part of the logocentric and

³¹ Carl Schmitt, *supra* note 18, p. 5.

³² Generally see Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998).

³³ Carl Schmitt, *supra* note 18, p. 21.

³⁴ Generally see *ibid.*, p. 20-21.

³⁵ *Ibid.*, p. 20 [italics – TB].

³⁶ Cf. *ibid.*, p. 13 (“both elements, the norm as well as the decision, remain within the framework of the juristic”).

³⁷ Hans Kelsen, *supra* note 2, p. 9.

³⁸ Cf. Carl Schmitt, *supra* note 18, p. 13 (monopoly to coerce and to rule is not monopoly to decide), 17 (“power proves nothing in law”). It may also be stated that this anthropocentric paradigm of the world of politics and law is also to be founded, as applied, in Kelsen’s approach. For example, see David Dyzenhaus, *supra* note 1, p. 104 (“Kelsen wanted to emphasize above all that law is a product or creation of earth-bound human beings who have the power to determine the content of positive law”). The problem is that the stemming of this thesis from his *Pure Theory of Law* is far from being evident. The paradigm of this work is rather strange – it is logocentric, but *very arguably* it is anthropocentric. The reason here is, in some sense, pure of a human, especially as a physical being.

anthropocentric machine. For Schmitt, decision is really something like this "imaginary will" as *Grundnorm*.³⁹ But not only that – for Schmitt it is clear that without this decision the position of the law would be impossible. To make everything completely positive: sovereign decision is *the position of the state of exception as suspension (or decision to suspend) of all existing law to make possible the position of a new law therein*.

This approach also means that for the theory of law it matters who the sovereign⁴⁰ is and, by that, what kind of a state we have.⁴¹ This issue/problem and, by that, Schmitt's theory of sovereignty is analyzed and developed in his other book – *Legality and Legitimacy*⁴². In this book it becomes much more evident that we are confronted with the exclusionary-inclusion mechanism of the total scale in the contemporary political framework, being the modern democratic/parliamentary state. As it is alleged in end of this book, "the cause of the contemporary 'total state,' more precisely the total politicization of all human existence, is to be sought in democracy."⁴³

3. MODERN DEMOCRACY AS THE FORM OF A TOTAL STATE

The pronoun "he" in Schmitt's statement "sovereign is he who decides on exception"⁴⁴ is used clearly to refer to the Donoso Cortesian aspect of personalized decisionism. But if it is de-personalized (for example, instead of "he" we write "the one"), then the formula perfectly fits the modern democratic/elected-by-people legislator (law-giver). In some sense, there is no theoretical difference here, and this modern/contemporary form of government (i.e. representative democracy) still may be called *dictatorship*, as it is done in one regular book on the public law,⁴⁵ which is not without Schmittian resonances. What matters here is, firstly, that

³⁹ Hans Kelsen, *supra* note 2, p. 9.

⁴⁰ Or, as he names it in *Legality and Legitimacy*, the *law-giver*.

⁴¹ For Schmitt, Kelsen with his negation of the problem of the concept of sovereignty appears as a liberal negating "state vis-à-vis law" (Carl Schmitt, *supra* note 18, p. 21).

⁴² Generally see Carl Schmitt, *supra* note 15. *Legality and Legitimacy* could be considered as a specialized supplement of *Political Theology*. To speak in juridical terms of codification – *Political Theology* (especially 1 and 2 parts) functions as a basic part, and *Legality and Legitimacy* – as a specialized part of one and the same code. In the first book Schmitt describes generally who the sovereign (law-giver) is, as, for example, in criminal code's general part we have general description of crime and criminality. In *Legality and Legitimacy* he speaks about concrete sovereigns/law-givers, as, for example, in specialized part of criminal code specific crimes are described. The exceptions from this scheme could be found in the 3 part of the *Political Theology* which contains some specialized explanations of the modes of the sovereign (law-giver).

⁴³ *Ibid.*, p. 90.

⁴⁴ Carl Schmitt, *supra* note 18, p. 5.

⁴⁵ For example, see Gabriele Ganz, *Understanding Public Law*, 3rd Edition (London: Sweet & Maxwell, 2001), p. 3 *et seq.* There the form of British Government and State is called *Elective Dictatorship*, presupposing that the dictator is not exactly the people, and even not the majority of people, but only those, who succeed in winning the elections; and that factually may be (and usually is) a minority of people. It should also be stated that the fact that United Kingdom has very specific relation with constitution, which is still allegedly unwritten, here it is probably more evident that the *dictatorship* is still more proper word to generalize the form of government.

there is the identified *human*⁴⁶ dictator of law, and, secondly, that the dictation of law has the essential characteristics of activity being done in the state of exception, which attempts to mitigate, but is in no way mitigated, by the positivist Kelsenian-type apparatus (otherwise known as formal/procedural constitutionalism).

It is the essential function of contemporary parliaments to be involved in the so-called *original* law-making, i.e. to create *new* general legal norms. The norm has to be new and, by that, exceptional in relationship to the already existing totality of norms. In other words, *new* means exceptional to what already exists as the totality of valid norms tied into the Kelsenian net of validity/power. All our life, all what was excluded (or emptied from norms as variables), is at the disposal of the contemporary human law-giver. Through this total exclusion and putting at the disposal for the contemporary law-giver of what is excluded, our life is more and more totally included in the so-called state of the rule-of-law and, therefore, regulated. Total regulation of life is accomplished when it is regulated as much as it is necessary for the sovereign and when sovereign may regulate anything,⁴⁷ i.e. where the norm is an empty variable at its discretion, when the state of exception is total. On the other hand, for the totality of the regulation to be realized it is sufficient that what is unregulated should be regulatable at any time (or should linger in the potentiality of regulation). The contemporary democratic sovereign's acting in a total state of exception, where anything could be regulated, leads to a total regulation of life and the contemporary state (regional juris-diction) and even the whole world (global juris-diction) more and more takes the form of a total state or camp in Agambenian terms.⁴⁸

This total state has two coin-sides as its characteristics: (1) one is related to the total un-regulated-ness of life as the lingering of regulated-ness in potentiality: our life is more and more similar to the life of the main personage of Kafka's *Der Process*; it is left more and more bare in relationship to the unpredictability of law

⁴⁶ On the other hand, in modern democracy, the dictator of law is, theoretically, human as such / abstract human in the form of People. In some sense, there is the opposition between the anthropocentric/modern law and the law, given by the saint sovereign ("he"), who, as it is/was conceived, does not give law, but just pronounces it, which exists in itself as some eternal, natural, independent, substantive, concrete law (i.e. still not degenerated law). In this respect, Schmitt's decisionism presupposes fundamental inner oscillation between (1) *juspositivism*, which, at the same time, presupposes anthropocentrism and logocentrism (here we should have in mind the notion that decision *probably* is not the element of pure state of nature and it is not some kind of pure violence/power; it is more Derridian interpretative violence, something like "imaginary will") and (2) *jusnaturalism* (here we should start from the question what Schmitt has in mind when he speaks about the degeneration of law? What is the opposite of the degenerated law?).

⁴⁷ In this context it should be noted that procedural/formal constitution (i.e. providing with the scheme of government) puts no limits in this respect, and that this [part of] constitution is its main / essential part (Giovanni Sartori, *Lyginamoji konstitucinė inžinerija: struktūrų, paskatų ir rezultatų tyrimas (Comparative constitutional engineering: an inquiry into structures, incentives and outcomes)*, trans. Egidijus Kūris (Kaunas: Poligrafija ir informatika, 2001), p. 191). The limits may come only from the substantial/material constitution (i.e., essentially, human rights); on this aspect see Part 4 of this paper. On this distinction between formal and substantial [parts of] constitution generally see *ibid.*, p. 190-195.

⁴⁸ For example, see Giorgio Agamben, *supra* note 32, p. 176 ("the camp ... is the new biopolitical *nomos* of the planet").

and the dreadful potentiality of un-regulated-ness; law can be changed in any direction at any time and legal officials can knock at your door at any time;⁴⁹ (2) the other side is related to the total actual regulated-ness of life: it was never so regulated as it is today, and the zone of its un-regulated-ness essentially narrowed to a zero point, especially during the last one hundred years:

At the beginning of the nineteenth century, government was mainly concerned with law and order, external affairs and defence, and raising revenue to finance these activities. By the end of the twentieth century, there were few areas not only of public but also of personal life in which government performed no role.⁵⁰

But although an elected legislative body for Schmitt is central, it definitely is not the only one form/facet of contemporary law-giver/sovereign. He differentiates three more – (1) people when they legislate (“give law”) directly; (2) so-called substantial/material part of constitution (human rights) together with third branch of government essentially involved not only in their implementation, but still in its creative process, rather seldom hidden under the cliché of interpretation; (3) President as, firstly, the personal law-giver and, also very importantly, the main organ of the second branch of government.⁵¹

Concerning the first above-mentioned law-giver – people’s direct legislature through plebiscitary procedure – this is the form of so-called direct democracy which is rather crucially criticized and neglected in contemporary theory of public law as an ineffective and even, in some sense, wrong form of government/rule.⁵² Schmitt is also critical about that;⁵³ therefore, we leave it aside here. What is important for us here is the second above-mentioned law-giver and some aspects related to the third. We should concentrate now not on the issue *that* Schmitt prefers a President (a Donoso Cortesian dictator) instead of Parliament as the ultimate law-giver,⁵⁴ but we should emphasize one important reason *why* he does so. This reason could be summarized by his phrase “the degeneration of the concept of law”⁵⁵. This *degeneration* is up till now the main concern for all of us.

⁴⁹ That is reinforced by the general principle of the contemporary law – “ignorance of law does not release from legal responsibility”.

⁵⁰ Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2005), p. 11 *et seq.*

⁵¹ Generally see Carl Schmitt, *supra* note 15.

⁵² For example, see Martin Loughlin, *supra* note 50, p. 63. See also note below.

⁵³ And here not only the 4th Chapter of *Legality and Legitimacy* is relevant (see Carl Schmitt, *supra* note 15, p. 59-66); some statements in other parts of the book are even more interesting from the critical perspective; for example, see *ibid.*, p. 89 (“... The people can only respond yes or no. They cannot advise, deliberate, or discuss. They cannot govern or administer. They also cannot set norms, but can only answer with yes or no to a question placed before them. ...”)

⁵⁴ *Ibid.*, p. 83. That is usually followed up by the negative critique of Schmitt.

⁵⁵ *Ibid.*, p. 79.

4. RIGHTS AND/OR (?) NATURAL LAW

As put into the context, the problem of the degeneration of law is presented, firstly, as one of constitutional theory, constitutional law and public law.⁵⁶ Secondly, it is the issue/problem because

There are rarely today any parliamentary majorities that still seriously believe that their statutory decisions will be valid 'in perpetuity.' The situation is so incalculable and so abnormal that the statutory norm is losing its former character and becoming a mere measure.⁵⁷

In other words, here we are confronted with the erosion of the fundamentality of law. And not only at the parliamentary level is the situation this way abnormal. That is valid also at the constitutional level by the recognition of the constitutional legalism as an error. For example, it may be stated that constitutional arrangements have the provisional character, as "the object of [constitutional] regulation – the activity of governing – is interminable", therefore, ever changing and requiring constitutional adaptation.⁵⁸ Of course, this sudden awakening in the light of an error was already programmed by the previously discussed Kelsenian normativism: there is nothing perpetual in the positive/posited pyramid of norms, apart from the *Grundnorm*, which only perpetually empowers/authorizes law-giver (or norm-creating authority) by containing all power.⁵⁹

But there is one Last Bastion which apparently still disallows this degeneration of law and the domination of the total state. These are so-called universal/natural/inalienable human rights.⁶⁰ It was conceived from the very start⁶¹ that "the great problem of politics, which [is comparable] to the problem of squaring the circle in geometry ... [is]: How to find a form of government which

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, p. 82-83.

⁵⁸ Martin Loughlin, *supra* note 50, p. 49.

⁵⁹ Sometimes Kelsenian approach in *Pure Theory of Law* is being defended by the argument that the critique of that approach is like blaming of the stick, because you can use it to beat someone (Egidijus Kūris, "Grynoji teisės teorija, teisės sistema ir vertybės: normatyvizmo paradigmos iššūkis ..." ("Pure theory of law, system and values of law: the challenge of the paradigm of normativism ..."): 37; introduction to: Hans Kelsen, *Grynoji teisės teorija (Pure theory of law)*, trans. Algirdas Degutis, Egidijus Kūris (Vilnius: Eugrimas, 2002)). But theoretically we may say the same about any gun or, for example, bomb – there is nothing wrong with them when they lay in peace. This argument completely misconceives what is *expected* from law at the very fundamental level. The function of law (or *right* in a more archaic sense) is to protect from evil/wrong by always being right; in a more analytical sense, right is not (and may be not) wrong; otherwise it is a misuse of language. There can be no *potentiality* of evilness in law/right, and exactly this potentiality was implanted therein (especially, as theoretically coherent/acceptable potentiality) by legal positivism together with all its concern for only procedure of law-giving and the form, but not substance, of law.

⁶⁰ The error of constitutional legalism should be more associated with the so called formal/procedural part of constitution, not the substantial/material one.

⁶¹ It is the dawn of modernity, especially as related to the formulation of the social contract theories.

puts the law above man⁶²; and at the end we cannot see anything, apart from human rights, at least potentially capable of fulfilling this mission impossible.⁶³

Human rights are generally considered the fundamental/essential part of the so-called substantial/material constitution. For Schmitt, this part of the constitution is considered to be one of the facets of sovereignty; theoretically they may be considered the form of sovereign (extraordinary law-giver) or just the sovereign itself.⁶⁴ Also, it is understood that they define "a zone of individual autonomy which government must not invade"⁶⁵. In such a context, this sovereign is very special – it is opposed to government (other sovereigns), it is anti-governmental. However, it is rather obvious that this zone today is speedily contracting. We can separate two main reasons (or domains of reasons) of this process.

Firstly, this Last Bastion appears to be more and more controlled by the other sovereigns – metaphorically speaking, human rights are drawn into the dependence-swirl, initiated by the other sovereigns. Firstly (this reason is emphasized at a very fundamental level by Schmitt), there is still the democratic procedure to change the rights' regulating norms, and the fact that it is harder to do that definitely does not eliminate their dependence on another sovereign, essentially being the parliamentary/plebiscitary majority.⁶⁶ Secondly, various states of exception of a more or less natural germ more and more pave the way for the inclusion of the rights' protected spheres/zones into the rule of the outside sovereigns.⁶⁷ Finally, human rights (or what they are and mean) more and more depend on courts, *creating* constitutional doctrine (as it is called in Lithuania – the *official* constitutional doctrine).⁶⁸ Of course, there may be "sound practical reasons" to give the power to implement human rights to lawyers and judges,⁶⁹ but these are only practical reasons, definitely not neutralizing the fundamental and dreadful

⁶² Martin Loughlin, *supra* note 50, p. 115 [quoting the letter of Jean-Jacques Rousseau to Marquis de Mirabeau].

⁶³ This idea of Rousseau's is definitely not accidentally provided at the beginning of the section, devoted to [human] rights in Loughlin's *The Idea of Public Law*.

⁶⁴ This is what Schmitt calls *The Second Principal Part of Weimar Constitution* and devotes for that Chapter 3 of *Legality and Legitimacy*.

⁶⁵ Martin Loughlin, *supra* note 50, p. 127.

⁶⁶ In Schmitt's words, it still remains the matter of "purely mathematical-quantitative calculation" (Carl Schmitt, *supra* note 15, p. 43).

⁶⁷ We are still going to witness how the economic crisis of our times will transform the right to property, as, for example, essentially happened in Iceland (i.e. may I today live my life peacefully with my property as fishermen, without knowing anything about what is going on in my country's banks?); we already witnessed how the events of September 11 affected the right to privacy.

⁶⁸ Also, as it is noticed and repeated at-length, courts do not have the democratic mandate, causing the so-called counter-majoritarian effect or, in other opinion, causing the effect of the collision of majorities.

⁶⁹ See Martin Loughlin, *supra* note 50, p. 129. There Loughlin also cites Tocqueville, for whom "in the modern era lawyers provide 'the most powerful existing security against the excesses of democracy'. Lawyers acquire 'certain habits of order, a taste of formalities, and a kind of instinctive regard for the regular connection of ideas, which naturally render them very hostile to the revolutionary spirit and the unreflecting passions of the multitude'". The problem is that this is, firstly, very poetical – not scientific and theoretical – statement and can be easily opposed by such statements: what about the instances when courts become too active, when they change their decisions, when they adjudicate irregularly, arbitrary and at will?

theoretical problem, which is the second aforementioned main reason (or domain of reasons).

Human rights more and more appear as substantial rights without any substantial foundation – any whatsoever, apart from the rhetorical one[s]. This foundation is/was natural law. Sometimes human rights are called *natural* [human] rights – i.e., they should have been based/founded on *natural law*. In this respect, human rights *and* natural law usually come together, even as some kind of interchangeable phrases; in this view, there should be no possibility of a separating “or” between them.

However, the foundation eventually eroded under the new building. The entirety of modernity and what initiated it (i.e. the Middle Ages) is exactly the epoch of this erosion, when, what finally happened, was the replacement instead of the generative and foundation-sustaining development. That might be one of the reasons why Schmitt sees no rationality in the so-called liberalistic heterogeneity, based on the abstract – i.e., empty, meaningless, non-existent – equality (or homogeneity) of human beings.⁷⁰ In other words, for him, as the coherent modern man, the foundation is empty – this equality has no substantial meaning.

In a more stereotypical view and interpretation of Schmitt’s ideas, the conclusions that Schmitt made from this insight as related to liberalism turned his ideology into an anthropocentric political holism, which is equally adaptable to democracy – democratic/elective⁷¹ *Diktatur* of law/normativity leads to the substantive homogeneity of/as People. Kelsenian legal *normativism*, enlarged in scale by Schmitt, turns into political *normalisation*. In this respect, Kelsen’s ideas form the foundation of Schmitt’s ideas, and Schmitt remains on the same foundation/plane/contour with his political holism. By destroying the Kelsenian strict separation between two worlds – that of facts/senses/pure will and that of law and condemning positivism to its nihilistic perfection and doom, Schmitt nevertheless took over the conceptions of these worlds and then only prioritized one (*physis* and politics) to the extreme, but still within the anthropocentric cliché⁷².

Nevertheless, we should ask, what is missing from the Schmitt perspective, despite his gaze resting so frequently in close proximity? It might be the lost

⁷⁰ See Carl Schmitt, *The Crisis of Parliamentary Democracy*, trans. Ellen Kennedy (Cambridge, Massachusetts & London: The MIT Press, 1988), p. 8 *et seq.* On the good exposition and critique of Schmitt’s approach to the contradiction between democracy and liberalism and, consequently, substantive homogeneity and abstract heterogeneity (as also the prioritization of the former) see Chantal Mouffe, “Carl Schmitt and the Paradox of Liberal Democracy”: 159-175; in: David Dyzenhaus ed., *Law as Politics: Carl Schmitt’s Critique of Liberalism* (Durham & London: Duke University Press, 1998)).

⁷¹ See note 45.

⁷² See Carl Schmitt, *supra* note 18, p. 13 (“sovereign produces and guarantees the situation in its totality”).

natural law, of which he has rarely spoken explicitly. And it is not only likely that the degeneration of law, of which he speaks, is related to this loss. When Agamben alleges that the Schmittian “state of necessity is ... a space without law [,] ... even though it is not the state of nature ...”⁷³, the only possible conceptualization of this space is the conceptualization of *natural law*, the aporetic quality of which is discussed in Agamben’s book *Homo Sacer*.⁷⁴ If for Kelsen there were two radically separated worlds/states – the state of *nature* and the state of *law*, Schmitt tries to articulate/catch some space on the margin between those states, and this is the space not only of the state of exception, but also, as a matter of logic, that of the *natural law*, which, for him, is still “accessible to jurisprudence”, still “within the framework of the juristic”⁷⁵. The whole of Schmitt’s conceptualization of the state of exception might be interpreted as, at least in part, an attempt to reconstruct the lost conception of natural law; however, in a broader view, in Schmitt’s ideology we are confronted with the fundamental oscillation between *juspositivism* and *jusnaturalism*.⁷⁶

But the conclusion that we should draw from all of this is that our crucial interest should be in the fate of natural law, and not that of rights. That is the *first* question to be answered: what happened to natural law? The other(s) is (are) merely derivative. To answer it we have to consider the *general* history of *law*, and by that to *precisely* articulate the planes of transcendence and immanence and their political significance, as also to start to un-differentiate political-legal philosophy and epistemology (which both, in some sense, speak about how our state/world/life is conceived/constructed) in order to give birth to the ontology of a new state/world/life and to the other life of mind.⁷⁷

Schmitt clearly approached this margin of the other life and world, but, as discussed, in a more stereotypical understanding of his ideas, stepped back.⁷⁸ The

⁷³ Giorgio Agamben, *supra* note 22, p. 51.

⁷⁴ Giorgio Agamben, *supra* note 32, p. 35-38.

⁷⁵ Carl Schmitt, *supra* note 18, p. 12-13.

⁷⁶ For example, the statement “all law is ‘situational law’” is more favorable to *jusnaturalism*, the follow-up statement “the sovereign produces and guarantees the situation in its totality” is already more favorable to *juspositivism* (Carl Schmitt, *supra* note 18, p. 13).

⁷⁷ Cf. Giorgio Agamben, *Potentialities: Collected Essays in Philosophy* (Stanford: Stanford University Press, 1999), p. 239 (“*Theōria* and the contemplative life, which the philosophical tradition has identified as its highest goal for centuries, will have to be dislocated onto a new plane of immanence. It is not certain that, in the process, political philosophy and epistemology will be able to maintain their present physiognomy and difference with respect to ontology”). Restitution of the natural law to its proper “political” place presupposes the reconsideration of the whole plane of being as located (or, more exactly, locatable) on the plane of immanence.

⁷⁸ It is as though being confronted with the *apparently* stalemate/aporetic theoretical situation (and the insight of this aporia in itself is correct) – i.e. that of the state of exception – Schmitt made rather arbitrary decision[s] and used it to fit into the context of the concrete historical situation (which in itself is an irony as Schmitt here, in some sense, could be conceived as a sovereign; aporia in theory is also some kind of the state of exception). Essentially, there are two Schmitt’s decisions involved here – firstly, he has chosen human/sovereign dictation of law (law-giving) instead of its natural origination in the state of exception (and thus remained within the anthropocentric paradigm); secondly, he has chosen President’s law-giving (authoritarian dictatorship) instead of the Parliament’s law-giving (elective

reasons for this retreat might be the difficulty to articulate the situation/space of natural law by escaping the positivist/anthropocentric/logocentric allures and the practicality of its being completely lost/forgotten in modernity. Thus the attempts to articulate it only proliferate the undecidabilities/aporias, which may be elegantly transformed into the definitions of the state of exception, as has been done by Agamben (and this aporetic quality clearly was not missed by Schmitt). First of all, the understanding of this subtle situation/space every word/phrasing (even if poetic) is important,⁷⁹ as there may be a great difference between a fact's *converting* into law and a law's *arising* from fact⁸⁰. Secondly, to understand this space it is necessary, as already mentioned, to unseal the closed gate between political-legal philosophy and epistemology in order to reconstruct what happened in modernity, and especially its dawn, with the fundamental fracture in law – natural law's (initially being the one or dominant conception of law) fracture into the so-called scientific law and humanitarian law, the latter eventually taking the form of the political law, and the former receding into the political exile. Only there rests the one path back/forth – which in the end should take the form of ontology – to a-modernity and another state/world/life, and until it is not done/gone, the total state of exception remains posited for the total regulation of life.

CONCLUSIONS

1. Kelsenian norms, what concerns their substantial contents/meaning, are empty variables (or, interpretables), and this aspect makes the Kelsenian system of norms that of pure legality, without legitimacy. The only norm, which is not empty variable, is *Grundnorm*. For *Grundnorm*, having of the power has a substantial meaning. However, the holder of this power (the primary interpreter) is indiscernible.

2. Kelsenian system of law is founded on the total exclusion of *physis* in order to include it into its domain as any possible content, and, therefore, may be conceived as representing the mechanism analogous to the one of the state of exception.

dictatorship) or other forms of law-giving. In the latter case, the last paragraph of the Chapter 5 of *Legality and Legitimacy* is crucial. There the main idea is simple – if there is no distinction between statute and measure and essentially all legal norms are mere measures, i.e. if the substantiality of law is washed-up, then lets choose the measure-making (that is the correct title of the law-making in this context) of the President ("dictator") as better conforming "to the essence of the administrative state" (Carl Schmitt, *supra* note 15, p. 82-83). On the other hand, his second decision remains, in some sense, dependent on the first decision or, more exactly, apparently remaining undecidability in that instance; at least some places in *Legality and Legitimacy* suggest that his second decision would have been more well-founded if the first decision would have been another, i.e. more favorable to *jusnaturalism*.

⁷⁹ Cf. *ibid.*, p. 14 ("how the systematic unity and order can suspend itself in a concrete case *is difficult to construe*, and yet it remains a juristic problem as long as the exception is distinguishable from a juristic chaos, from any kind of anarchy" [italics – TB])

⁸⁰ Giorgio Agamben, *supra* note 22, p. 29.

3. Schmitt, with his elucidative critique of positivism, could be considered as a positivist *par excellence*. His decisionism supplements normativism thus providing with the completed *positivist* theory of law. In his theory of sovereignty, sovereign decision could be considered as the position of the state of exception being the suspension (or decision to suspend) of all existing law to make possible the position of a new law therein.

4. Modern law-giver – representative/democratic legislator – is the dictator of law, acting in the state of exception, as any other dictator within the anthropocentric legal-political paradigm. This state of affairs leads to a total regulation (total actual regulated-ness) and total regulate-ability (total potential unregulated-ness) of life; in sum – the total state and the total politization of all human existence.

5. The meaning of Schmitt's phrase "the degeneration of the concept of law" in the context of his overall ideology is the issue in itself, providing with the possibility of the other (i.e. not anthropocentric) perspective therein. It is possible that the degeneration of law is related to the loss of foundation of [human] rights, it (i.e. the foundation) being the natural law.

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