LUND UNIVERSITY

Carl Schmitt's definition of sovereignty as authorized leadership

Brännström, Leila

Chapter 1

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Leila Brännström

Introduction

Political Theology, from 1922, begins with Carl Schmitt's definition of the sovereign as the one 'who decides on the [state of] exception' (Schmitt 1996a: 13/2005: 5). This definition is usually read as an attempt to point out the essential predicate of sovereignty and is made use of for identifying sovereignty's historical instantiations and discussing its contemporary resurgence, waning or displacement (cf., for example, Butler 2004: 59; Bartelson 2014: 49–57). In such readings, 'decisionism' is taken as the 'signature characteristic of sovereignty' in the sense of a political act unrestrained by any legal considerations, which, owing to its concrete effectiveness, 'renders a political subject into a legitimate sovereign' (Brown 2010 a: 22–3; Kahn 2004: 263; Kahn 2011: 32; Croce and Salvatore 2013: 5, 17–18; cf. also, for example, Bartelson 2014: 41–49, Gross 2000: 1851; Bates 2006: 415–16).

The tendency to emphasize the a- or extra-legality of Schmitt's sovereign decision, influential though it is, appears not to sit well with the fact that Schmitt characterizes his definition of sovereignty *juristic* and opens *Political Theology* with a criticism of approaches to law which are unable to offer legal answers in the face of 'decisive' questions of state and constitution, such as whether a state of emergency is at hand (Schmitt 1996a: 9, 13/2005: 4, 6). Schmitt also insists that the 'fundamental problem of the concept of sovereignty' is 'the connection of actual power with the legally highest power' and that 'power proves nothing in law' (Schmitt 1996a: 26/2005: 17–18). In fact, a key argument in *Political Theology* is that the decision on the state of exception is a legal decision if made by the authorized subject. Schmitt maintains that it is only from the point of view of 'constitutional liberalism [*rechtsstaatlichen Liberalismus*]', which assumes that 'a decision in the legal sense' must be 'derived entirely from the content of a norm', that the test of whether an emergency exists appears as a non-juristic one (Schmitt 1996a: 13–14/2005: 5–6).

One of the purposes of this chapter is to bring into view that a major

concern in *Political Theology* is to suggest a conceptualization of law, which is not only capable of giving answers concerning extremely exceptional circumstances but also of accurately describing the way in which the legal order operates. Rather than pitching sovereignty against law, *Political Theology* advances a particular understanding of law. However, while Schmitt devotes much effort to highlight the shortcomings and inconsistencies of the 'liberal constitutional' conception of law, he only gestures towards a different understanding which does not equate law with what can be derived from the body of legal norms and which can account for sovereign decisions. Instead of a fully fleshed-out alternative notion, Schmitt speaks of what is not derived from legal norms but is 'accessible to jurisprudence [*im Rahmen des Juristischen*]' (Schmitt 1996a: 19/2005: 12) or is to be understood 'in the juristic or the legal sense [*im Rechtssinne, im juristischen Sinne, im rechtlichen Sinne*]' (Schmitt 1996a; 14, 18, 38/2005: 6, 12, 32). Despite the lack of conceptual clarity, it is only by distinguishing the different conceptions of law concurrently at work in the text that an apparent paradox in *Political Theology* can be resolved: a decision can be within and beyond the bounds of law simultaneously because what is a- or extra-legal from a liberal constitutional point of view can be anchored in the legal order from a different understanding of law.

Schmitt is only able to offer a clear alternative to the liberal constitutional conception in his *On the Three Types of Juristic Thought* (hereinafter *Three Types*; Schmitt 2004) published more than a decade later, in 1934. In *Three Types*, Schmitt advances a 'concrete-order approach [*konkretes Ordnungsdenken*]' to law, which places its ultimate foundation and legitimacy in a given form of life in a community, in 'a set of standards and models that are produced by social institutions in everyday life' (Croce and Salvatore 2013: 158).

Although the understanding of law, politics and sovereignty that we find in *Three Types* is often seen as a turn away from the decisionism expressed in *Political Theology* (cf., for example, Croce and Salvatore 2013: 1, 13–29; Bates 2006: 415; Ungureanu 2008: 295), this chapter suggests that it is rather a clarification and development of it and that Schmitt's notion of sovereignty in *Political Theology* is already inflected by concrete-order thinking.[1] This

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1   Croce and Salvatore (2013) have convincingly demonstrated that Schmitt's concrete-order perspective retains strong elements of decisionism. This chapter, in reverse, is drawing attention to the way in which concrete-order thinking infuses Schmitt's decisionism in *Political Theology*. Despite our different readings of *Political Theology*, I completely agree with Croce and Salvatore's proposition that Schmitt's work on politics, law and the relation between these two spheres should in general be read through the lens of *Three Types*. Croce and Salvatore themselves pointed out the presence of concrete-order thinking in *Constitutional Theory* (Schmitt 2008; Croce and Salvatore 2013: 25–9) and David Bates (2006) has done that in relation to *Roman Catholicism and Political Form* (Schmitt 1996b).

mode of thinking is implicit in the text and the structure of the argument and it is only by taking this approach into account that an apparent conundrum in *Political Theology* can be resolved.[2] For Schmitt, it is only when the authorized subject of sovereignty makes an effective decision on the state of exception that 'actual power' and 'the legally highest power' come together. This, however, presupposes that the authorized subject can be identified prior to the decision. Even if Schmitt suggests that the question about the proper subject of sovereignty is 'the whole question of sovereignty', he does not clarify how this subject is to be localized (Schmitt 1996a: 14/2005: 6–7). The concrete-order approach gives us the key to this puzzle.

The aim of this chapter is, however, not only to highlight that Schmitt's sovereign decision is underpinned by concrete-order thinking and is not an, a-legal, extra-legal or illegal, law-and-order-creating decision *ex nihilo*. The purpose is also to read Schmitt's definition as an intervention in a dispute about the future of the political rather than as an attempt to identify the essential attribute of sovereignty.[3] Looked at from this angle, Schmitt is offering us the conceptual resources for a particular way of arranging political life and community, which, if influential enough, would constitute sovereignty in the way defined. Two questions that are addressed in this chapter are therefore the following: which way of approaching and ordering the political world is Schmitt promoting when offering his definition of sovereignty? What might be useful or appealing in Schmitt's offering from a contemporary point of view?

This chapter proceeds with a short exposition of Schmitt's notion of concrete-order thinking, after which *Political Theology* is read in light of this viewpoint, to clarify how Schmitt can present the sovereign as simultaneously standing inside and outside the legal order. Following this, Schmitt's account of the decision on the state of exception is analyzed to shed light on how, and in what sense, sovereign decisions are claimed to be legal. Next, the chapter moves on to explore the particular way of ordering the political community, which Schmitt's notion of sovereignty advances. And finally, Schmitt's agenda is critically examined and its contemporary relevance is briefly discussed. It is suggested that the truly problematic feature of Schmitt's notion of sovereignty is not its purported a-, extra- or illegality but the hierarchical structure of authority presupposed by it, the function of which is to control who can speak in the name of the people and negotiate the character of the socio-legal order.

2   In addition, the preface to the second edition of *Political Theology* indicates that concrete-order thinking should be taken into account when reading the book (cf. Schmitt 1996a: 8–9; 2005: 2–4).

3   Such a reading also seems in line with Schmitt's claim in *The Concept of the Political* that political concepts such as sovereignty 'have a political meaning' (Schmitt 1963: 31; 2007: 30–1; on Schmitt's definitions more generally, see Croce and Salvatore 2013: 64).

Concrete-order thought

Despite the centrality of the concept, 'concrete order' remains underdeveloped and under-theorized in *Three Types*. What can be gathered is that it is an institution that is not constituted by legal fiat but is established through repetitions of standardized conduct that the members of a social group *de facto* maintain or are, at least, expected to maintain (see further Croce and Salvatore 2013: 30–45; Böckenförde 1984). Marriage, family, office, state bureaucracy and the army are some of the concrete orders mentioned in *Three Types*.

The most important feature of a concrete order is the sustaining of a 'normal situation'. Concrete orders maintain stable normal situations by providing sedimented norms of conduct, which are usually complied with (cf. Schmitt 1934: 10–11, 19–24, 56/2004: 45–6, 53–7, 88). If a public servant, for instance, wants to be a normal and good public servant, she needs to do what is customary for her role (for the 'normal figure'), which means that she has to act in accordance with established praxis in various 'normal situations' (cf., for example, Schmitt 1934 42–3/2004: 75–76). Normality, according to Schmitt, makes up the 'legal substance [*rechtliche Substanz*]' of the concrete order and offers an answer to the legal question of what should be considered fair, reasonable or required in various contexts (Schmitt 1934: 20, 50/2004: 54, 81). The function of the legal order is to crystallize, stabilize and protect the legal substance of concrete orders. Thus, the concrete-order perspective takes the norms of conduct in concrete orders as *legally normative* guidelines for legislative and judicial decision making.

The legal substance of concrete orders cannot be anything but underdetermined, however. Such legal content can no more establish its own practical meaning in concrete historical situations than can a legal norm. To avoid or solve conflicts about the meaning of socio-legal normative content, a leadership principle [*Führergedanken, Führergrundsatz*] must be in place. Every concrete order has or is tied to a hierarchy of authority that ascends to a personal leader to whom the members of the order are meant to show loyalty and obedience (cf. Schmitt 1934: 50–2, 63–4/2004: 81–3, 94–5). In a concrete order, there is no strict separation between norm-based jurisdiction and actual leadership (cf. Schmitt 1934: 50–2/2004: 81–3). The role of the leader is to maintain and develop the legal substance of the concrete order. The decision making of the authority figure is legitimized and guided, although never completely, by the legal substance, at the same time as the concrete orders and their normality are renewed through the decisions. The decision rests on the order at the same time as the decision (re)creates the order: order and decision are thus the two intertwined poles within the concrete-order framework (cf. Schmitt 1934: 15–16/2004: 50–1).

The state is, in Schmitt's words, 'the institution of institutions' and 'the concrete order of orders' (Schmitt 1934: 45–8, 57/2004: 78–9, 88). The state is an overarching institution, standing above and incorporating the civil society of concrete orders, under the auspices of which other institutions can be given protection and uphold their own order (cf. Schmitt 1934 45–8, 57/2004: 76–80, 88). The state is neither engendered through a sovereign decision nor constructed by legal norms. Like other institutions, the state is a concrete social and historical formation. And the authority to decide in the name of the state, in the form of law, cannot simply be derived from legal norms but must stem from concrete, personal nominations (Schmitt 1934: 15–17/2004: 50–1). We will come back to the role cut out in this scheme for the leader heading the concrete order of the state, the sovereign.

Law in *Political Theology*

The primary target of *Political Theology*, as well as that of *Three Types*, is the conception of law that Schmitt labelled 'liberal constitutionalism' in the first book and '19th century juristic positivism' in the second, and which nowadays often travels under the rubric of 'statutory positivism' (cf., for example, Vinx 2016, Chapter 2 in this volume; Caldwell 1994). Schmitt's criticism of this conception centres on the idea that law is a system of positively given norms, which can be interpreted and applied to concrete cases without taking the real organization of social life or law's conditions of realization into account (cf. Schmitt 1934: 29–40/2004: 63–71). Schmitt argues that liberal constitutionalism denies the protean quality of social and political life and is undergirded by faith in the possibility of control by means of systems of abstract propositions (cf., for example, Schmitt 1996a: 14/2005: 7; cf. Prozorov 2005: 87). Liberal constitutionalism replicates a 'pattern of thinking characteristic of the natural sciences', presents the legal order as a 'machine [that] runs itself', 'attempts to banish from the realm of the human mind every exception' and, as a consequence, fails to apprehend 'the independent meaning of the decision' (Schmitt 1996a: 13, 52/2005: 5, 41–2, 48).

For Schmitt, the juridical decision has an independent meaning for logical and ontological reasons. Legal norms cannot identify the concrete events to which they are applicable, nor can they pass judgments on whether or not they have been correctly applied in concrete cases.[4] Norms are mediated by judgement in their transition to social reality and

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4 Schmitt was certainly not he first one to call attention to this fact (cf., for example, Kant 1998: 267–70 [A 131–6/B 169–75]).

mediation adds something to the general idea or norm (cf. Schmitt 1996a: 36–7/2005: 30–1). Even though the question of how 'correct' legal decisions are arrived at is not dealt with in depth in *Political Theology*,[5] Schmitt makes two things clear: norms gain their actual meaning from a 'normal everyday frame of life' and the correct decision is the one made by the responsible jurisdictional authority (Schmitt 1996a: 19/2005: 13).

In *Political Theology*, as well as in *Three Types*, Schmitt emphasizes that the validity of a norm depends on the existence of a normal situation presupposed by it (Schmitt 1996a: 19/2005: 13; 1934: 23, 33–4/2004: 56–7, 66). The dependency of legal norms on normality is, however, elaborated more fully in *Three Types*. Here, Schmitt suggests that outside 'functionalistic' areas of life such as the traffic or the market, the generally formulated conditions of applicability that a norm provides (the factual requisites), that is the description of the factual situation in which the norm is applicable, are implicitly tied to socially established normal situations (Schmitt 1934: 10–24/2004: 46–57). If the normal situation presupposed by the norm becomes abnormal or disappears, the norm loses its field of application and becomes obsolete and invalid (Schmitt 1934: 23/2004: 56).

In routine cases, when the circumstances in a case match both the factual requisites provided by the legal norm and the social normal situation presupposed by the norm, legal decision making approaches the limit of pure repetition and it appears *as if* norm application can dispense with judgment and mediation. In the atypical case, however, a rift opens up between the factual requisites (taken in their literal meaning) and the normality prescribed in the type situation presupposed by the norm; that is to say, circumstances correspond to the factual requisites but deviate relevantly from the normal situation presupposed by the norm (or vice versa). In such exceptional cases, 'the power of real life breaks through the crust of a mechanism that has become torpid by repetition' (Schmitt 1996a: 21/2005: 15). The decision on the exception, 'suspends', to use Schmitt's vocabulary, the norm in relation to the atypical case and reconstitutes the proper field of application of the norm, and thus its *raison d'être* and

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5   Schmitt's early work, *Gesetz und Urteil* (Schmitt 1969) from 1912, is devoted to the question of how to distinguish the correct legal decision. Schmitt's rather abstract answer is that a judicial decision is correct if it can be assumed that another judge would have decided in the same way. The correct judicial decision is thus not distinguished by being derived from the body of established positive norm but neither is it an arbitrary decision. In a legal order adhering to the rule of law, the correct judicial decision is the one that satisfies the expectations placed on the legal order (see, further, Jacques 2016, Chapter 7 in this volume).

meaning.[6] Schmitt argues that, from the perspective of the legal norms regulating a situation and thus from the perspective of liberal constitutionalism, the constitutive legal dimension of the decision on the exception is 'new and alien' and appears as if it 'emanates from nothingness' (Schmitt 1996a: 37–8/2005: 31–2). However, from the concrete-order perspective, the decision is not 'new and alien' but guided by the normative parameters, behavioural patterns and expectations that are attached to the relevant normal situation. In other words, the decision is faithful to the legal substance of the concrete order in which the case unfolds. For Schmitt, both judicial decisions and legal norms are intrinsically related to the social fabric within which they have emerged and in which they operate.

As already mentioned, the legal substance of concrete orders cannot be anything but underdetermined, which means that the question of faithfulness in concrete cases can be open to reasonable disagreement. At this point, the leadership principle enters the scene. Schmitt stresses that differences in judgment are ultimately settled by jurisdictional competence (Schmitt 1996a: 38–40/2005: 33–4). A decision made by the authoritative body has a legal significance that surpasses the substantive reasons given for the correctness of the decision, which might not be more convincing than alternative reasons pointing to a different solution. In contrast to other bids on correct judgment, however, the decision of the jurisdictionally competent body takes the form of law and enters into force (Schmitt 1996a: 37, 40/2005: 31, 34; cf. also Gehring 2003). For Schmitt, taking on the form of law means that an actually effective formation such as the state, bridges the gap between normative content and its realization (Schmitt 1996a: 35/2005: 28).

The sovereign decision and the state of exception

In *Political Theology*, Schmitt speaks of 'the exception [*der Ausnahme*]' in four different senses and no consistent terminology is used to distinguish them. The exception signifies the 'atypical case', as well as the suspension of a legal norm in response to it. The 'exception' in these two senses, which are by no means exceptional in the ordinary workings of a legal order, have

6   The legislator can anticipate the atypical case and suspend the norm in relation to it in advance. The examples that Schmitt offers relate to the anticipation of states of occupation and emergency in constitutions and the attribution of extraordinary powers. A simple example would be a norm stating the prohibition of motorized traffic on a specific road but allowing such traffic in cases of medical emergency, as expectations of normal behaviour are different in this atypical case (cf. Schmitt 1996a: 20; 2005: 14). Schmitt does not always describe the relation between suspension of a norm and an exception from it in this way (cf. Vinx 2016, Chapter 2 in this volume).

been discussed above. In addition, 'exception' also signifies the 'state of exception'; that is, the suspension of all legal norms and their normal application and, finally, also the factual situation, 'the extreme emergency', which triggers a decision on the state of exception.[7]

According to *Political Theology*, the defining characteristic of sovereignty is the authority [*der Kompetenz, die Befugnis*] to decide on the state of exception; that is, the monopoly to decide if the extreme emergency is at hand and, if so, to do whatever is required to secure a normal situation in which legal norms can be effective (Schmitt 1996a; 13, 18–19/2005: 5, 12–13). Quite consistent with the concrete-order approach, Schmitt establishes in *Political Theology* that order must be present for 'a legal order to make sense' (Schmitt 1996a; 19/2005: 13). In the same way that the validity of a single norm depends on the presence of a presupposed normal type situation, Schmitt suggests that the body of legal norms as such; that is, the legal order in the liberal constitutional sense, loses its field of application if the normal kind of social order presupposed by this body is unsettled. Because the decision on the state of exception involves a judgment on whether the factual condition of applicability of the ordinary legal order is present, this state is 'a general concept in the theory of the state' and not a 'construct applied to any emergency decree or state of siege' or any 'extraordinary measure' (Schmitt 1996a: 13, 18/2005: 5, 12).

Schmitt contends that the whole question of sovereignty is about the proper subject of sovereignty (Schmitt 1996a: 14/2005: 6). As a general norm can neither conclusively settle whether the prevailing normal order is sufficiently threatened nor what should be done if that is the case, the key question is who has the authority to judge. As already mentioned, *Political Theology* consistently presents the sovereign as somebody already invested with supreme authority (cf., for example, Schmitt 1996a: 14, 18/2005: 7, 18). Just like any ordinary (limited) jurisdictional competence, the authority to suspend the entire body of laws is ultimately anchored in the actual hierarchy of the concrete order of the state and cannot necessarily be derived from legal norms. The authority of the sovereign subject therefore remains intact even when 'law recedes' in the state of exception (Schmitt 1996a: 18/2005: 12). The state also retains its legal substance after the suspension of the normally valid legal order. Schmitt insists that the state of exception is something different than anarchy and chaos and that 'order in the juristic sense still prevails' even if it is not a *Rechtsordnung*; that is to say, not a legal order of the kind liberal constitutionalism imagines (Schmitt 1996a: 18, 20/2005: 12, 14). As long as the organization of the

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7   Schmitt indicates, although inconsistently, the exception in the third sense by using the expressions 'the state of exception [*der Ausnahmezustand*]' or 'the total exception [*der absolute Ausnahme*]' and in the fourth sense by using the expressions 'the real exception [*der echte Ausnahmefall*]' or 'the extreme emergency [*der extreme Notfall*]'.

state continues to be effective, and as long as social order has not turned 'abnormal', sovereign authority is valid and in force, even if legal norms are not.

Does the lingering order, in Schmitt's structure, limit the field of possible actions that the sovereign can take? Whereas it is clear in Schmitt's construction of sovereignty that legal norms in their normal meaning put no restrictions on the sovereign, the relation of order and decision, remains undecided in *Political Theology*. On the one hand, Schmitt claims that every order ultimately rests on a decision, which gestures towards a decision unrestricted by order; on the other hand, he insists that the sovereign 'belongs' to the normally valid legal order (Schmitt 1996a: 14, 16, 18–19, 26/2005: 7, 10, 12–13, 18). What are the implications of the sovereign's attachment to the normally valid legal order? *Three Types*, presenting, as we have seen, order and decision as standing in a relation of induction to each other, sheds light on this.

In the preface to the second edition of *Political Theology*, published shortly before *Three Types*, Schmitt argues that isolated concrete-order thinking can lead to a feudal type of pluralism without sovereignty (Schmitt 1996a: 8/2005: 3). Under historically volatile conditions, an overarching order, the state, with a supreme leader, needs to uphold/re-establish normal living conditions, in which the concrete orders of a community can subsist and co-exist. The state is to guarantee the stability and coordination of the social order in its totality. This is the legal substance of the institution of the state. Schmitt's reference to Fichte in *Three Types*, in a statement that is reminiscent of his own way of defining the state in *The Concept of the Political* (Schmitt 1963: 20, 26–7/2007: 19, 26), that is, that the state is a concrete-historical political unit that can tell apart friend and foe, summarizes the role of the state as the steward and developer of a political community's order as a whole (Schmitt 1934: 44; 2004: 77). The telling apart of the friend and foe is not only a matter of the survival of a community as an entity but is also an assurance that the character of the community, its way of life, is cultivated (cf. Schmitt 1963: 27/2007: 27; also Schmitt 1970: 3–11/2008: 59–66; Jacques 2015).

The sovereign is the ultimate guarantor of the overarching condition of normality – the one who is to ensure that the separate elements of the community form a body (cf. Gunneflo 2016, Chapter 3 in this volume). In its capacity as the leader of the political community, the sovereign ultimately judges which concrete orders and which notion of normality deserve the support and protection of the law and the state, which can be tolerated and which should be eliminated (cf. Schmitt 1934: 8–13, 43–4/2004: 44–9, 76; cf. also Vinx 2016, Chapter 2 in this volume). Because the sovereign embodies the 'concrete qualities of an order', its decisions are not capricious or subjective but a construal of the legal substance of the concrete social order of the community (Schmitt 1934: 15/2004: 50). 'The

core of the political idea', Schmitt writes, 'is the exacting moral decision' and the sovereign make such decisions against the background of the way of life already prevalent in a community (Schmitt 1996a: 69/2005: 65).

The objective to re/establish the specific normal order of a particular political community, which is the product of time and history, guides the decisions of the sovereign on and in the state of exception. The decision is thus not arbitrary or subjective, even if it is not conditioned by positive legal norms or control mechanisms (cf. Schmitt 1969: v). From the concrete-order perspective, the decision is also legal, even if its 'ultimate' correctness, just like decisions on exceptions in ordinary legal decision making, could be called into question and is in the last instance given by the authority of the decision maker. The sovereign decision is the exercise of authorized leadership in a concrete order and cannot abolish the existing social order and constitute a wholly new one but, like the ordinary exercise of jurisdictional authority, the decision will *re*constitute law and order. For this reason, the relationship between decision and order unavoidably remains unstable in Schmitt's definition of sovereignty. The sovereign of *Political Theology* is neither the commissarial dictator (an extraordinary magistrate who is authorized to temporarily suspend certain legal barriers to be able to efficiently protect the constitutional order) nor the sovereign dictator (who establishes a completely new legal and political order) of *Dictatorship* (Schmitt 1994a, 1994b, 2014a). S/he is the leader who revitalizes an existing concrete order by re/interpreting its legal substance.

The agenda implied by Schmitt's notion of sovereignty

Three Types presents the Germany of 1934 as on its way to being reshaped by concrete-order thinking and as already recognizing a supreme *Führer*.[8] Be it as it may with Germany in 1934, *Political Theology* is set in a context in which no one is entrusted with unrestricted authority.[9] The book speaks to, or against, what Schmitt took to be the current of the jurisprudential thought of the time, which did not see any need for legal recognition of unlimited final authority. *Political Theology* stressed that a community

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8   It is noteworthy that the passages in *Three Types* that praise National Socialism and how it establishes a new concrete social order are more characterized by pure decisionism than by concrete-order thinking (cf. Schmitt 1934: 52, 63–4; 2004: 82–3, 94–5). This shows that establishing concrete-order thinking in a society not already recognizing hierarchies of authority and the leadership principle cannot be achieved by concrete-order thinking: it will require revolutionary decisionism.

9   Schmitt was, however, also engaged in convincing others that the Weimar constitution in actual fact did invest the president with unlimited authority (see Vinx 2016, Chapter 2 in this volume; also Schmitt 2014b).

committed to surviving and cultivating its way of life must recognize the need for an 'exacting moral decision' and a supreme leader because irresolvable conflicts about how life in common should be ordered, that is the possibility of an extreme emergency, cannot be eliminated through optimistic 'philosophical … convictions' (Schmitt 1996a: 14, 69/2005: 7, 65).

There is, however, a difference between the need for an 'exacting moral decision' and the need for an authorized 'master' of that decision. In *Political Theology*, Schmitt merges the two together and argues that the people, apart from the constituent power of which no ultimate authority is acknowledged in modern democracies, is not the kind of subject who is able to decide conclusively between opposing interests and coalitions (Schmitt 1996a: 53–5/2005: 49–51). Only if personified in a leader will the people be able to take legitimate and effective decisions in cases of conflict. By identifying the people with a leader, a move that will disqualify some members of the community from belonging to the 'people', and by placing an effective state organization at the disposal of the leader, Schmitt is able to reconcile the 'fundamental problem of the concept of sovereignty' that is 'the connection of actual power with the legally highest power' (Schmitt 1996a: 26/2005: 18).

The ultimate authority of the people does not, however, have to be represented by someone embodying the substantive identity of the people, as Schmitt suggests, but could rather be understood as a 'symbolic empty place' testifying to society's and the people's non-identity with itself (cf. Vinx 2016, Chapter 2 in this volume; also Lefort 1986a, 1986b). As Paul Kahn has argued, in a society in which no political actor can make an uncontested claim to be sovereign, speaking in the sovereign register (that is to say, representing the people) takes the form of a competition between different political actors, the result of which cannot be settled beforehand (Kahn 2011: 15). In such a non-identitarian order, the ultimate authority to speak in the name of the *demos* can be momentarily occupied by a political actor, but not exhaustively localized in a person or a body (Lefort 1986a, 1986b). The distance between 'the people' as the symbolic ultimate source of power and any temporary wielder of that power would necessarily remain open. The authority entrusted to the head of state or government would not exclude the possibility of another subject – the leader of the political opposition, the representative of a popular movement, the chairman of the supreme court or somebody outside the field of institutionalized politics – taking on the role of the spokesperson for the *demos*, trying to win support for its position and, if successful, putting its decision through. Casting the ultimate authority of the people as a symbolic empty place undermines stable hierarchies of authority and allows the question about a community's way of life to be kept in abeyance and subject to political struggle and contestation for hegemony.

The function of the leadership principle, which underpins both

Schmitt's notion of sovereignty and his concrete-order approach, is exactly to suppress society's non-identity with itself and the legitimacy of political struggle. Besides an inability to see the dependence of legal norms on social reality, Schmitt's criticism of liberal constitutionalism concerns its inclination to accept the initiation of legitimate social and legal change by whoever gains enough support. Schmitt, derogatorily, calls such an attitude 'political relativism' and suggests that it is grounded in an unjustified belief in the human capacity to use reason and critical doubt (Schmitt 1996a: 47/2005: 42). Against 'political relativism', Schmitt promotes the idea of a society in which societal development is controlled by a clear hierarchy of authority and respectful of existing social order and the vested interests that go with it. The leadership principle is in place to banish political contestation and struggle and Schmitt's favouring of this principle seems connected to the belief that the human being is a dangerous, potentially evil, creature who needs to be kept in check as to not destroy itself and others (cf., for example, Schmitt 1996a: 59–70/2005: 53–66).

What are we to make of Schmitt's claim that a society without an authorized supreme leader is unable to decide in favour of itself and defend its way of life in face of serious threats? No doubt, commitment to the rules of the game constitutes an outer limit to what can be allowed to prosper in a community devoted to non-identitarian democracy (cf. Mouffe 2000). If forces opposing such an order grow to such an extent that they pose a serious threat to it, the rest of the community will have to 'decide' against it and take action to preserve its way of life. There is, however, no reason to believe that the multi-headed subject 'the people' would not be able to make such a decision, except if too many people lose faith in the non-identitarian order. There is no difference between this possibility and the 'risk' that many people in a community with a recognized leader might turn against the one personifying the people and overthrow him/her. The idea that the risk of irresolvable political conflict can be eliminated by putting in place stable hierarchical relations that suppress disagreement appears as a 'philosophical conviction' of the kind that Schmitt accused the arguments of his adversaries of being based on.

It could, of course, be argued that there are situations that require immediate action and leave no time for the people to arrive at a decision through political struggles for hegemony, and that is why an order dispensing with a supreme leader is not a viable alternative. There is no denying that such situations do arise but Schmitt's theory of sovereignty is not about decision making under time pressure but about *who* is entitled to speak for the community in cases of foundational disagreement (Schmitt 1996a: 13–14, 16–17/2005: 6, 9–10). Schmitt is clear that the accuracy of the sovereign decision is not to be questioned *ex post facto* (Schmitt 1996a: 18/2005: 12). It is final and infallible (cf. Schmitt 1996a: 59–70/2005: 53–66).

What use for Schmitt's concept of sovereignty today?

Schmitt's notion of sovereignty is an effort to justify an authoritarian, conservative, leadership principle, which forecloses the space in which political contestation and questioning of the prevalent order can take place. It proposes that a hierarchical structure of authority be put in place, the function of which is to control who can speak in the name of the people and negotiate the character of the socio-legal order. However, Schmitt's notion of sovereignty can be purged of the preference for hierarchy and leadership and reformulated as: sovereign is the social formation speaking in the name of the people and proposing a frame of normality, which gains enough support as to make its decisions effective and trump its alternatives (cf. Kahn 2011).

One of the merits of Schmitt's reformulated notion of sovereignty is that it redirects our attention from legal norms to the foundational qualities of the prevailing normal order animating the norms. Given Schmitt's analysis of the relation of law and social reality, the question at stake in the decision on the state of exception is not whether legal norms should be bypassed or violated but through which frame of normality they should be seen. The extreme emergency is a factual situation in which the overarching inclinations of the socio-legal order, its structural biases as Koskenniemi (2009) puts it, are put into question by a political force strong enough to demand a response. The sovereign decision is the capacity and the claimed authority to bring the meaning of legal norms together with social reality, either by adapting the norms to a new reality or by reversing the 'changes on the ground' and warding off the proponents of change. Thus, the sovereign decision determines whether the prevailing hegemonic sense of normality is to be reinforced or transformed. When the character of the legal order is at stake, it is unproductive to speak the language of legal restrictions and transgressions since the question of legality is contingent upon the chosen frame of normality.

In addition, Schmitt's reformulated notion of sovereignty also implies a particular way of organizing the sociopolitical world, which appears appealing in a historical juncture distinguished by the incapacity of the *demos* to control social powers and, in particular, the strongest social force of our time, capital (see, for example, Brown 2010a, 2010b). When purged of the leadership principle, Schmitt's notion is still decisionist, in the sense that it implies that the character of the socio-legal order is in the last instance to be settled by wilful political decision-making re/acting on social forces. This, in turn, requires a kind of social organization that enables the transformation of the decisions made by the *demos*, through deliberation or struggles for hegemony, into reality. In other words, in an order of non-identitarian democracy, the decisionism of the political sovereign stand for the potency of the *demos* to set the conditions of its life in common. Given

that, it is perhaps timely to follow Schmitt, although with different motives and objectives, and to call for a stronger element of decisionism on the part of the subject of sovereignty at this moment in history.

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