



Carl Schmitt
Dictatorship



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*From the origin of the modern concept of sovereignty
to proletarian class struggle*

Carl Schmitt

Translated by Michael Hoelzl and Graham Ward

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Love dictates

For
Thilda and Iriyana

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Introduction

Michael Hoelzl and Graham Ward

It's 1919. The Great War is over, Europe is exhausted and monarchy in tatters. Wilhelmine Germany, the epitome of the authoritarian state, lies in ruins. The Weimar Republic, declared on 9 November 1918, is assessing just how great the challenge that it faces is; how volatile the predicament. The young Carl Schmitt (born in 1888), author already of four books and six articles (two of which will be important precursors to *Die Diktatur*), is in Munich. With brief excursions to Strasbourg, he has been in Munich since March 1915, when he joined the general staff of those who were in charge of implementing the Bavarian state of law of 1912 and administering martial law.¹ With the war over the administration becomes increasingly difficult. In particular, the communists (inspired by the revolution in Russia) are posing a radical threat, such that civil war is looming. They take to arms in the streets in Berlin throughout the winter of 1918–19, battling for control against the Reich Defence (Reichswehr), of which Schmitt's administration is a part. In March 1919 Hungary is established as a communist regime; this leads to a bloody conflict in Berlin, with noted atrocities committed by the Free Corps to suppress the uprising. In Munich, closer to home, on 6 April, the socialist radicals proclaim a soviet republic, throwing public order and tranquillity to the winds. Schmitt's office² is at the centre of the army and Reichswehr resistance; and, although the revolt is quashed, it is not until the beginning of July 1919 that Schmitt is released from his official duties. Even then, he remains in Munich, finding work eventually as a lecturer in the School of Business Administration, after he successfully finished his postdoctoral thesis

(Habilitationsschrift) in 1916: *Der Wert des Staates und die Bedeutung des Einzelnen*. On 11 August the Weimar Constitution comes into effect. This is the immediate background against which Schmitt starts his groundbreaking *Dictatorship*.

Munich and the Aftermath of the Great War

To some extent, even during the war, Schmitt had found time to reflect upon what was happening around him and upon the work his own office was concerned with. This gave rise, in his mind, to an important distinction between 'law' (*Gesetz*) and the necessary 'measures' (*Maßnahmen*) that had to be taken in times of crisis. In 1916 he published a long essay entitled 'Dikatur und Belagerungszustand: Eine staatsrechtliche Studie',³ and in 1917 he followed it with another essay: 'Die Einwirkungen des Kriegszustandes auf das ordentliche strafprozessuale Verfahren'.⁴ Both essays dealt with the legality of the state of siege in Germany – a topic at the forefront of the final chapter of his book, which was based on the Prussian law of 1851. Both essays discussed the suspension of constitutional law in a time of danger to the security, stability and unity of the nation. The state of exception, if not a political reality, always remained a political possibility in Schmitt's conception of constitutional law. Both essays endorsed a strong notion of the state, distinct from a liberal emphasis upon the individual; and both advocated the need for a strong commander: a commissary dictatorship or a power delegated by a constituted sovereignty. This dictatorship must institute temporary measures that are unconstitutional during normal life and would not lead to its reestablishment. To understand why these essays appeared when they did is to understand how dictatorship was an issue in Germany even before the end of the First World War – and hence to understand why the issue could come to prominence once again with the Weimar Republic.

Under Kaiser Wilhelm II, to all intents and purposes, Germany was governed by an absolute monarch, but the monarchy had increasingly withdrawn from political life, making Wilhelm's position a matter of decoration. The power lay in the hands of the military. Hence, at the end of 1916, the army had appointed the generals Hindenburg and Ludendorff to offices of supreme command. Although the Kaiser

did not formally abdicate until 9 November 1918, his acceptance of the two appointments was in effect an abdication. Hindenburg and Ludendorff were in charge of the war effort, of foreign and domestic policy, and even of the appointment and dismissal of the chancellor. As Helmut Heiber (1993: 3) puts it: 'In this way constitutional monarchy, against which the demand for parliamentary reform was bound to be directed, had turned into a military dictatorship that was virtually unassailable – at least in wartime.' Schmitt, then, as a fledgling constitutional lawyer and a member of the armed forces, was already aware of contemporary forms of commissary dictatorship. Ludendorff, considered the real political intelligence behind the military command, did not step down from office until 26 October 1918, 'resigning as if he were just another general and not the virtual dictator of the Reich' (Heiber 1993: 6; see also Ludendorff 1919). It was only with this resignation that the army capitulated to the Reichstag (making the pursuit of an armistice more possible), so that a parliamentary government could be announced on 28 October, through an amendment to the existing constitution. Dictatorship was not, then, a new idea or practice.

At this point Schmitt was technically still employed by the army; but Munich was the scene of immense chaos. Ludwig III, the king of Bavaria, abdicated even before the Kaiser, on 7 November; and three different governments were wrestling for control. Kurt Eisner, an independent socialist, declared a Bavarian republic and parliament, winning over the majority of the socialists – people who would have been called members of 'Soviets', that is, the bolshevick units of government. Schmitt was certainly part of one – the soldier's council; but he would certainly have opposed the other two – a Bavarian workers' council and a Bavarian peasants' council. In the chaos, the administration was still in the hands of the military, now under the auspices of the soldiers' council. Three modes of government were at loggerheads: the social democracy under Eisner; the old regime of the army, which was strongly anti-democratic and on the whole indifferent to parliament; and a faction seeking a German republic based on the power of the proletariat rather than any parliamentary democracy. Bavaria quickly became not the exception but the rule, particularly because, after the amendment to the constitution made

in the Reichstag and the very announcement of a parliamentary government, the session of the Reichstag was adjourned, leaving a power vacuum in its wake. How much of this chaos Schmitt saw is conjectural, but from 1917 on and throughout this whole period he was feverishly doing research for a book on political romanticism (*Politische Romantik*), which was published early in 1919 and became the immediately predecessor of *Dictatorship*.

Political Romanticism

This book is often seen as the sign of Schmitt's new political viewpoint. As his French biographer David Cumin (2005: 41) puts it, 'the erstwhile aesthete and disputant of the literary café-life society became a political jurist'. Given Schmitt's earlier essays and the fact that the 1919 edition of the new book is very much indebted to his appreciation of literature, this 'conversion' can be overplayed. But the book is important for the way in which certain Schmittian themes are developed. Most notably, *Political Romanticism* marks a turning point in method. Schmitt may reflect more fully upon this method later on, in his *Concept of the Political*, where he frames it in terms of a necessary distinction between friend and foe (as analysed by Schwab 1987 – an influential essay); but the genre of writing correlative with this distinction, the polemic, announces itself here. The enemy is clear: it consists in a certain aesthetic understanding of romanticism, from which both Roman Catholicism and the political counter-revolutionary voices of the French nineteenth century (de Maistre and de Bonald) – and indeed the English eighteenth-century Whig Edmund Burke – must definitely be distinguished. The understanding of romanticism at stake here was centred upon the individual who endlessly composed narratives about the self (*roman*); and this was the main target of Schmitt's critique. The romantic individual, he believed, was incapable of making decisions. This theme was then taken up and developed into a theory of 'decisionism' in *Dictatorship*. The Catholicism that emerges in *Political Romanticism* is quite different from that espoused by the early German romantics, in particular Friedrich Schlegel and Adam Müller, both Catholic converts, or Novalis. Schmitt draws this distinction deftly, by dismissing Schlegel

in a couple of pages as more of an opportunist than political activist; by concentrating on Müller's public career rather than on his private and hidden Catholic beliefs; and by scattering his observations on Novalis, 'who died early'. Thus 'Catholicism is not something that is romantic [. . .] the Church itself was never the subject and the bearer of a romanticism' (Schmitt 1986: 50). Indeed in Germany romanticism is rather a Protestant affair, because it is profoundly associated with the belief in the absolutism of the individual.

But method is not the only point of interest in *Political Romanticism*. There are also Schmitt's concerns with the 'metaphysics' that inescapably informs cultural movements, bourgeois liberalism, Roman Catholic political conservatism, and what, in his 1924 Preface to the second and much amplified edition of *Political Romanticism*, is described as 'a phenomenon that is intrinsically and radically self-contradictory, namely, liberal bourgeois democracy' (Schmitt 1986: 13). Why are these themes important for this Introduction? Principally because *Dictatorship* is not a polemical text: it is historical, sociological and genealogical, but it is unclear whether it has a particular political viewpoint to expound or excoriate (and this is true even of the last and quite scrappy chapter, which deals with the early formation of the Weimar Constitution). We will discuss the complex structure of the book below. Even when the long Appendix detailing the difficulties of Article 48 of the Weimar Constitution was added to *Dictatorship*, the book only implicitly provided its own political opinion. *Political Romanticism* was not a creation of the same genre; nor were the two volumes that followed the publication of *Dictatorship*. Both *Political Theology* (1922) and *The Crisis of Parliamentary Democracy* (1923) are explicitly polemical. In the former, the enemy is the classical liberal tradition of the eighteenth century (so the metaphysics of what might be called the sovereignty of the self prior to romanticism is now extended backwards), and in the latter the enemy is the endless chattering of parliamentarism itself, which emanates both from the self-contradictory nature of liberal democracy and from the romantic aestheticising of the political. It is this chattering that renders political decision making impossible. There is therefore no political position that Schmitt adhered to throughout these early years of the Weimar Republic. But did a political position emerge as he wrote

Dictatorship? If *Political Romanticism*, *Political Theology* and *The Crisis of Parliamentary Democracy* define the enemy, then who is the friend – or who are the friends?

For a moment we need to return to who the enemies are, particularly on the eve of a highly contested and contestable National Assembly, voted in to deal with two most prominent issues: the constitution and the finalisation of the peace treaty. The Assembly began its work on 6 February 1919, when *Political Romanticism* was in press. What is politically interesting about this book is neither Schmitt's dismissal of romanticism as politically feckless and rootless nor his rescue efforts on behalf of a political engaged Catholic conservatism, but rather the way romanticism installed a metaphysics of absolutist individualism. For Schmitt, the engagement with romanticism and the implicitly apolitical nature of its aesthetics raised the issue of sovereignty. He contrasted the concept of divine sovereignty in Malebranche's metaphysics (which, on his interpretation, overplayed God's pre-eminence in worldly matters)⁵ with the imperialism of the romantic ego. In his view, this same metaphysics governs German bourgeois liberalism. The 'endless conversation' that characterises the aestheticised politics of romanticism is then institutionalised by parliament. Schmitt comes to see this ever more clearly in *The Crisis of Parliamentary Democracy*, as he explores the metaphysics of liberalism beyond its economic commitment to capitalist *laissez-faire* (this was rather an English concern of the political scientist Harold Laski).⁶ In that book he claims that liberalism's 'consistent, comprehensive system' is founded upon 'discussion and openness' (Schmitt 1985: 34–5). He calls this state of affairs 'a new evaluation of rational thought, a new belief in instinct and intuition that lays to rest every belief in discussion' (ibid., p. 66). Nevertheless, the Weimar Reichstag staggered on from day to day and, for Schmitt, its endless discussions must have seemed a more modern manifestation of romanticism's apolitical commitment to 'conversation'. Furthermore, as Schmitt observed, the fact that both election to the Reichstag and election to the office of president of the Reich (*Reichspräsident*) lay in the hands of the people only raised questions as to what the sovereignty of the people actually consisted of and how this 'sovereignty' was to be accessed and assessed so as to avoid private interests. Such problems, and the endless discussions

that followed from them, were fundamental to Schmitt's perception, expressed in *Political Romanticism*, that liberal democracy was a self-contradictory notion.⁷

As *Political Romanticism* appeared and Schmitt was pursuing the concept of sovereignty in terms of the evolving nature of political dictatorship, nowhere was sovereignty a matter of the moment more than in Munich. In reconceiving the Reich and the new constitution, the National Assembly had to tackle the older political battles between unitarianism (should the Reich remain a single unit, as it had been created by Bismarck?) and federalism (Bavaria was always most insistent upon its differences from Prussia).⁸ In the National Assembly Kurt Eisner proclaimed Bavaria's rights to federal sovereignty most vociferously, and on 21 February 1919 he was murdered by a German nationalist. If this destabilised the situation in that state, where Schmitt was working, it most particularly galvanised the communists with thoughts of revolution. At the beginning of April the new Soviet Republic of Hungary had been declared and, in rapid succession, the Munich Central Council proclaimed and established the Soviet Republic of Munich and Southern Bavaria, which was then taken over by the Munich communists. The Free Corps forces under Johannes Hoffmann (the elected Bavarian minister) and Gustav Noske (the German minister of defence) descended quickly upon Bavaria, and Munich in particular. Munich was only taken in the early days of May. The Soviet Republic had murdered ten Free Corps hostages; the Free Corps retaliated with the summary execution of hundreds of communists. Schmitt was caught up in these struggles and he makes fleeting references to them in *Dictatorship*.⁹ Perhaps it is also interesting that, throughout the Bavarian uprising and its suppression, the National Assembly was debating the controversial clauses of the Peace Treaty. These discussions were protracted throughout June, and there was some possibility of their being rejected by the generals. The generals were considering the idea of establishing a military dictatorship with Noske at its head. Would this have been along the lines of Schmitt's commissary dictatorship? The question can be legitimately raised, given the awkward prominence in *Dictatorship* of the long Excursus on Wallenstein as an example of such a dictatorship.

One further theme in *Political Romanticism* needs to be addressed here, in view of both *Dictatorship* and *Political Theology* that will follow it; and that is Schmitt's conception of the relationship between Roman Catholicism and political conservatism. Schmitt was coming from a family committed to the Catholic Centre Party. Whatever his actual position on the Catholic church, there is no doubt that Schmitt's Catholic background, his exposure to the tensions of being part of a Catholic community within the larger Prussian state, whose official religion was Protestantism, and his respect for the Catholic exercise of spiritual authority lie behind his total rejection of a soulless politics rooted in materialism: bourgeois liberalism on the one hand, socialism on the other. Both movements were profoundly anti-clerical. The Weimar Republic put an end to the 'throne and altar' alliance of Wilhelmine Germany; in fact Roman Catholicism underwent a pastoral and liturgical renaissance during the Weimar period, although there are few traces of this within Schmitt's own writings.¹⁰ Although he contributed articles to the newly established Catholic journal *Hochland*, he nowhere embraces the enthusiasm of this Roman Catholic revival. Nevertheless, his interest in political theology is important for his understanding of secularism. We will say more on this subject later. *Political Romanticism*, while rejecting the sovereignty of Malebranche's eighteenth-century God, points to a crisis of sovereignty that this rejection announces – along with the rejection of absolute monarchy, the romantic imperialism of the individual, and even democracy's sovereignty of the people. But the older state religion had forged a very powerful nationalism – an arrogant one, which had sent millions to their death. While only the ardent monarchists wanted to see a return to that old-style nationalism, what the Weimar Republic desperately needed was a sense of German identity and self-esteem after the trauma of defeat – albeit one achieved under republican and democratic rule.¹¹

Politically, the Catholic Centre Party did remarkably well in the elections to the National Assembly, sending ninety-one members and forming the coalition government with the social democrats. In the first elections to the Reichstag in June 1920 the Centre Party lost seats, returning only sixty-one members. But this was partly due to events that, once more, Schmitt witnessed – because they took place

in Bavaria. If the problems from the left could be bloodily squashed with the help of the police, the Free Corps, and the newly formed military – the Reichswehr – the problems from the right were socially and culturally more ingrained. In March 1920 came the infamous Kapp Putsch that, for four days, established a military government in Berlin that was recognised in Silesia, Pomerania and East Prussia. Unfortunately Kapp was unable to get the backing of the leadership of the Reichswehr, in particular from General von Seeckt, and it collapsed under troubles in the form of a general strike and a communist revolt in the Ruhr area, which was staged by a Red Army of 50,000 men. The revolt was ruthlessly dealt with, but both actions demonstrated a remarkable rejection of liberal democratic politics; they also demonstrated that the continuing stability of the republic relied upon the conservative *ancien régime* embodied in the Reichswehr, which paid at least lip-service to the idea of a republic. But not so back in Munich, where Hoffmann (who had quelled the Red Army revolt) was now brought down by a coalition of the People's Party in opposition to the Reich. The Bavarian People's Party was an off-shoot of the Centre Party and gained twenty-one seats in the elections to the Reichstag. The Catholic political wing remained strong – in fact it remained one of the stabilising forces through the Weimar period.

Schmitt's restoration, in *Political Romanticism*, *Dictatorship* and *Political Theology*, of the conservative Catholic voices opposed to the French Revolution – de Bonald, de Maistre and Cortés – was then timely, to say the very least.

These contemporary events increasingly led Schmitt to embrace political realism and to appreciate the importance of the concrete situation (*Lage der Sache*) through a sociological rather than a positivist or pure conception of law.¹²

Dictatorship

Carl Schmitt's *Dictatorship* is rather complex in its structure. It comprises an historical analysis of the legal concept of dictatorship, which in turn includes a long Excursus on Wallenstein – also called *der Friedländer*, 'the man from Friedland' (in Bohemia) – and an Appendix with a detailed examination of Article 48 of the Weimar

Constitution (as noted already, the Appendix appeared only from the second edition on). Initially, in 1921, *Dictatorship* was published as a book whose author aimed to demonstrate how the concept of dictatorship has changed from its ancient Roman origins to its modern meaning, through integration into a theory of the constitutional state. The main thesis throughout this historical analysis of the transformation of dictatorship is that what was a *commissary* dictatorship has become a *sovereign* dictatorship. As Schmitt writes:

The contradiction between commissary and sovereign dictatorship, which will be developed in what follows as the fundamental deciding criterion, is here already indicated by the political development itself, and it resides in the nature of the matter. But, because historical judgement is always dependent on the experience of its contemporary context, the sixteenth and seventeenth centuries were less interested in the development that led from democracy to Caesarism: the absolute monarchy that emerged at that time did not find its legitimation in any consensus of the people; it saw itself as legitimised through God's grace, and it placed itself against the estates – which means, in this context, against the people. The linguistic importance of the word 'dictatorship' – which led to its extension to all those cases in which one could say that an order is 'dictated' (*dictator est qui dictat*, 'dictator is the one who dictates') and to a use of language that undoubtedly contributed to the dissemination of the concept – was not evident then.

In this summary of the content of the historical part of the book we can already identify some of the key elements of Schmitt's later theory of law, and in particular of his decisionism. First, a mandate given by a single ruler – commissary dictatorship – has turned into a mandate given by the people (*pouvoir constituant*), becoming sovereign dictatorship (as he calls it). Secondly, this transformation from commissary to sovereign dictatorship is the result of the process of dictatorship itself; thirdly, it is a political matter; and, in the fourth place, Schmitt seems to indicate a process of secularisation that accompanies the new concept of dictatorship. The last feature – the indication of secularisation as an historical process – was famously formulated by Schmitt in his *Political Theology* of 1922, where he

writes: 'All the significant concepts of the modern theory of state are *secularised* theological concepts' (1996: 43). In *Dictatorship* his theory of secularisation is less general; it is in fact narrowed to a very specific area, delimited by the concept of exercising dictatorial power and having two opposite types of legitimation for it: the divine right of kings and the people's right. Nevertheless, in note 23 to Chapter 3 (see p. 271), Schmitt briefly mentions Leibniz within the context of a theory of secularisation that will be outlined later – and, to a certain extent, in his *Political Theology*. In *Political Theology* he also refers to Leibniz, quoting his observation that there is a similarity between jurisprudence and theology (Leibniz 1748: 27–30): they both rely on reason on the one hand, on Scripture on the other. In his comparison, Leibniz creates a number of correlations to indicate how theological ideas became juridical concepts. For example, there is a correspondence between the verdict of excommunication by the church and the legal concept of being outlawed; between infidels in the religious sense and rebels against the state; between doctrines of the holy Scripture and the word of God on the one hand and the law and its interpretation on the other; between eternal damnation and capital punishment (the same concept, secularised in a legal framework); and between the forgiveness of sins and the right to pardon. Leibniz concludes: '*Breviter tota fere theologia magnam partem ex iurisprudentia pendet*' ('In short, almost the whole of theology depends to a large extent on jurisprudence'). For Schmitt, the most significant similarity between jurisprudence and theology is that of the 'double principle', which he takes over from Leibniz. Both disciplines are based (1) on reason – as there is a 'natural' jurisprudence, so too there is a 'natural' theology¹³ – and (2) on tradition, which Schmitt limits to Scripture – 'a book containing revelations and instructions'.¹⁴ From that point on, secularisation means for Schmitt the dominance of reason over the authority of Scripture – or, as he will later say in *Political Theology*, divine authority, the position of God, has been replaced by other, mundane and secular principles like humanity, history, life, economy, technology and so on.¹⁵

Returning now to the list we started – features of Schmitt's later legal conception that surface in the historical part of *Dictatorship* – we can add to them next a subtle critique of legal positivism in the

assertion that legal concepts are always dependent on the experience of contemporaries and therefore are always in flux. Finally, Schmitt finds that the term 'dictatorship' is used very loosely and appears in a wide variety of contexts. The book reflects a certain amount of anger about this from a scholar well versed in the classical tradition (Schmitt came close to studying philology). In this respect *Dictatorship* must also be considered the first systematic, historically based treatise on the concept of dictatorship. In it Schmitt seeks to clarify the very nature of the concept as a legal and constitutional instrument.

The Appendix has a different style and methodology and appeals to a different audience. The analysis of Article 48 of the Weimar Constitution—which regulated the state of emergency and subsequently helped to define extraordinary powers for the president of the Reich in exceptional situations, so as to enable him to take extraordinary measures to restore public security and order in those unpredictable and idiosyncratic situations – is developed from a keynote address given in 1924 at the conference of German Constitutional Jurists, held on 14–15 April in Jena.¹⁶ Here it is sufficient to point out that the historical analysis, in combination with the Appendix of *Dictatorship*, can be seen as the first step towards decisionism as a legal and political theory, as Schmitt advocated and developed it.

In terms of its scholarship and erudition, *Dictatorship* is the key witness for an early phase in the development of decisionism. Schmitt derived decisionism as a legal and political theory from a reading of Machiavelli's *The Prince* and Thomas Hobbes' *Leviathan*. But in that context the origins of his understanding of this notion can be traced back to his book *Gesetz und Urteil (Law and Verdict)* of 1912, as Schmitt himself reflected in the Foreword to the 1986 edition of that book (see Reinhard 2009: 39; *Gesetz und Urteil* had also been republished in 1968). The question posed by *Dictatorship* is this: How can Schmitt's decisionism be understood within a juridical and also political context?

In fact decisionism, construed as a coherent legal and political theory, does not exist. Schmitt never published a manifesto that outlined the principles of decisionism, and none of his books contain the word 'decisionism' in its title. Nevertheless, decisionism can be reconstructed if Schmitt's *Law and Verdict*, *Political Romanticism*,

Dictatorship, Political Theology, Concept of the Political – and even his *Political Theology II*, published in 1970 – can be seen as fragments or building blocks (*Bausteine*) of a decisionist theory.

Schmitt's conception is both legal and political. The legal aspect of decisionism must be understood as a response to the so-called *Methodenstreit* ('conflict of methods') in jurisprudence, which began in the first years of the twentieth century (Stolleis 1999: 52). Essentially, in that opening decade legal theory in Germany struggled with its neo-Kantian heritage;¹⁷ this struggle can be summarised as a debate around the question whether the system of law guarantees justice or not. In other words, can a system of law cover all concrete circumstances sufficiently? For example, does a judge need to issue a decision that creates a new law so as to cover gaps in the legal system, because a similar case has not occurred before – and therefore no legal norms can be applied in *this* specific situation?

Two answers were formulated. The first answer granted the judge a certain autonomy: if no legal prescriptions were available, the judge should arrive at his decision on the basis of his own understanding and in accordance with existing law *and* custom. This view was advocated by members of the *Freirechtsbewegung* ('free law movement'), whose central figures were Ehrlich, Stampe, Kantorowicz and Fuchs (see Rickert 2008: 1772–7).¹⁸ In an essay based on a series of lectures, Ernst Stampe (1911) outlines this movement's understanding of the law. In general the *Freirechtsbewegung* took place within private law, as a reaction to the problem that a system of norms and regulations can never fully cover all the situations – and also in answer to this problem. It centred around the question of the judge's freedom in passing a judgement. Schmitt's *Dictatorship* can be viewed as taking this question and applying it in particular to public and constitutional law.

The second answer was formulated by Hans Kelsen in his Habilitationsschrift of 1911 (Kelsen 1923): there Kelsen advocated, along neo-Kantian lines, a pure theory of law, where judgements are given following existing laws. He wanted to purify legal practice from all the political, sociological and arbitrary elements that might distort it.

Similarly, the political aspect of decisionism was directed against

legal positivism and against Kelsen's theory of a pure law.¹⁹ The debate culminated in a direct confrontation between Schmitt and Kelsen on the question of the relationship between the sovereign and the constitution. Who should be the guardian of the constitution in times of crisis? Who should be given extra-legal powers to save the constitution and to restore public order and security when the welfare of the people is under threat? In other words, who is the sovereign? For Schmitt, the answer is clear: 'Sovereign is the one who decides on the state of exception' (1996: 13). Here, in the opening sentence of *Political Theology*, it becomes clear that sovereignty is essentially inseparable from the state of emergency.

The best summary of *Dictatorship* was given by Schmitt himself:

Dictatorship is the exercise of state power freed from any legal restrictions, for the purpose of resolving an abnormal situation – in particular, a situation of war and rebellion. Hence two decisive elements for the concept of dictatorship are on one hand the idea of a normal situation that a dictatorship restores or establishes, and on the other the idea that, in the event of an abnormal situation, certain legal barriers are suspended in favour of resolving this situation through dictatorship. The concept of dictatorship has emerged during the last few centuries in state theory and in politics, but the term has been generally used with great imprecision, in situations where an order is followed or a rule is being exercised. The concept develops from a legal Roman institution called dictatorship. (Schmitt 1926: 1448; see also Schmitt 1995: 33–7 and the comments made by Maschke, his editor, at p. 37)

In the 1926 article Schmitt distinguishes six stages in the historical development of the meaning of the concept of dictatorship. The starting point is Roman law (Part 1); this is followed by a very brief examination of dictatorship during the Renaissance (Part 2); then Schmitt discusses the two main aspects of his own theory of dictatorship: 'dictatorship of the state of emergency' (Part 3) and the transition 'from commissary to sovereign dictatorship' (Part 4). The summary concludes with two further short analyses: the dictatorship of the Reich's president (Part 5) and the dictatorship of the proletariat (Part 6).

As far as the historical analysis of the modern concept of dictatorship is concerned, only Parts 3 and 4 are relevant. In Part 3, which deals with the 'dictatorship of the state of emergency', Schmitt writes: 'During the nineteenth century there emerged a typical institution for a state of emergency as a legally organised instrument. And this instrument was frequently called *dictatorship*' (p. 34). One resorted to this legal instrument for emergency cases in times of war and under siege (*ibid.*). In Part 4, 'Commissary and Sovereign Dictatorship', Schmitt condenses the principles of decisionism:

From the historical development of the regulation concerning the state of emergency it is obvious that essentially two types of dictatorship exist: namely a dictatorship that, despite all its extra-legal authorisation, remains within the prescriptions of a constitutional order and in which the dictator is constitutionally mandated (commissary dictatorship); and on the other hand a dictatorship in which the whole existing legal order is rendered obsolete and a completely new order is intended (sovereign dictatorship). This sovereign dictatorship is exercised by a national assembly that has at its disposal state power without legal limitations when the existing constitutional order has been abolished – say, after a revolution – and the new constitution has not yet been implemented. (*Ibid.*, p. 35)

Parts 3 and 4 summarise the main thesis of the historical analysis provided in *Dictatorship*. On the one hand, there is an historical analysis of the development of the transition from commissary to sovereign dictatorship, and, on the other, the preconditions for such a transition. In his summary Schmitt also incorporates the discussions about the difficulty in interpreting Article 48 of the Weimar Constitution. In Part 5 (which deals with the dictatorial powers of the president of the Reich) he outlines his singular interpretation of decisionism, according to which in times of crisis or emergency sovereign power must be bestowed upon one individual and not derived from an abstract and depersonalised set of norms and rules. In Part 6 Schmitt elaborates to a certain extent what was not presented in *Dictatorship*, which does not contain what it promised in its subtitle: a discussion of the 'proletarian class struggle'. In fact Schmitt's own comments on the dictatorship of the proletariat are limited, especially given the

historical context of the communist threat (as mentioned above). Even Part 6 of the summary, which bears the heading 'Dictatorship of the Proletariat', makes only a weak allusion to a link between the French Revolution and the Bolshevik Revolution of 1917.²⁰

As we discussed above, in the reconstruction of Schmitt's theory of decisionism, we can distinguish two main influences on him – one positive and one negative. The positive influence comes from the *Freirechtsbewegung*; the negative one from legal positivism and Schmitt's opposition to neo-Kantianism.²¹ As we saw, there will always be a gap between a *theoretical* system of norms covering, prescribing and regulating social behaviour and the concrete situation. Schmitt refers to this 'lacuna' in his Appendix by citing Graf Dohna (p. 201) on the question of when a person should be given extra-legal powers to redeem a dangerous situation for the sake of the common good. According to Stampe (1911: 25),

The *basic conviction* is that the theory of the complete sufficiency of the law is wrong; and that therefore, in states which dictate to the judge an unconditional duty to pass judgement, Montesquieu's doctrine of the separation of powers is not possible, so the judge is entitled to the *autonomous creation of law* by his judgement.

The abolition of Montesquieu's separation of powers – that is, the judicial, legislative and executive – is called into question. This questioning of the strict separation, in particular between the judicial and legislative powers, is central to Schmitt's argument in the Appendix.

Why is it that a legal theory of decisionism can lead to a political situation in which the sovereign has unlimited power and becomes a totalitarian ruler?²² In the Appendix of 1928 (first published separately in 1924, see above) attention was drawn to this danger with respect to the amalgamation of the legislative and the judicial. Such an amalgamation would mean that the judge, facing a set of unique actual circumstances (*Tatbestand*), would be forced either to extend the law or to act against it. This is captured in legal terminology by saying that the judge is acting *contra legem* or *preter legem* (Stampe 1911: 25–6). Schmitt extends a problem of private law into

constitutional law and transposes it, to find it in the fact that the constitution cannot cover all the concrete circumstances sufficiently, so as to provide rules and guide decisions concerning the public. Any constitution, especially in times of crisis, will disclose a gap similar to the one identified in private law by the *Freirechtsbewegung*: a situation in which a single person has to decide and to suppress guaranteed fundamental rights in order to protect the constitution itself. By so acting, that person combines the legislative and the judicial powers and trespasses Montesquieu's doctrine of their necessary separation.

When does this dictatorial intervention turn into totalitarianism? Answer: whenever the dissolution of the separation of legislative, judicial and executive powers leads to their being taken by a single agent and the duration of a clearly defined period of dictatorship becomes unlimited. The Appendix warns about this possibility by insisting that to postpone formulating a law for the implementation of the state of emergency (Article 48, §2.5) opens the space for it.

The Translation

The translation of this book was a considerable challenge; in all, it has taken just over five years. We found it necessary sometimes to simplify Schmitt's overelaborate syntax, in which the reader can get lost in a forest of sub-clauses. We have preserved numerous German words and expressions in editorial brackets in the main text, because many of the terms Schmitt uses are highly technical (military positions, legal instruments, or names of political offices and units) or just words (especially compounds) for which there are no easy English equivalents. It is obvious that certain words and phrases have a variety of connotations, which we have attempted to render faithfully in the contexts in which they are used. We have also, as far as possible, standardised political and legal terms that were clearly still being forged as Schmitt was writing the book. One of the main difficulties of *Dictatorship* is that it spans a period of over 2,500 years and, in doing so, it covers very different legal systems. These include Roman law, canon law, the legal systems during the Thirty Years War and the French Revolution, and law in the Prussian state and in the Weimar Republic. In preparing an English translation, we needed not only to

standardise – or emphasise – the use of expressions specific to each historical period, but also to relate such expressions intelligibly to the current English and American legal systems (which differ from each other). On the whole, the legal terminology we adopted follows the English legal system. Finally, Schmitt moved with considerable dexterity across Latin, Greek, French and Italian. We have translated all the passages in these languages (extremely few are paraphrased by Schmitt himself).

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References

- Bonald, Louis 1854. *Théorie du pouvoir politique et religieux dans la société civile* [1796]. Paris: Librairie d'Adrien Le Clere.
- Cumin, David 2005. *Carl Schmitt: Biographie politique et intellectuelle*. Paris: Les Éditions du Cerf.
- Deissmann, Adolf 1914–21. *Evangelische Wochenbriefe / Protestant Weekly Letters*.
- Gerber, Albrecht 2010. *Deissmann the Philologist*. Berlin: Walter de Gruyter.
- Heiber, Helmut 1993. *The Weimar Republic*, trans. by W. E. Yuill. Oxford: Blackwell.
- Kelsen, Hans 1923. *Hauptprobleme der Staatsrechtslehre. Entwickelt aus der Lehre vom Rechtssatze*, 2nd ed. Tübingen: J. C. B. Mohr (Paul Siebeck).
- Kelsen, Hans 1931. *Wer soll Hüter der Verfassung sein?* Berlin-Grünwald: Dr. Walther Rothschild.

- Koenen, Andreas 1995. *Der Fall Carl Schmitt. Sein Aufstieg zum 'Kronjuristen des Dritten Reiches'*. Darmstadt: Wissenschaftliche Buchgesellschaft.
- Landois, Leonard 2008. *Konterrevolution von links*. Baden-Baden: Nomos.
- Larenz, Karl 2001. *Methodenlehre der Rechtswissenschaft*. Berlin: Springer.
- Leibniz, Gottfried Wilhelm 1748. *Nova methodus discendae docendaeque iurisprudentiae*. Leipzig and Halle: Krug.
- Ludendorff, Erich 1919. *Meine Kriegserinnerungen*. Berlin: Mittler und Sohn.
- Reinhard, Mehring 2009. *Carl Schmitt: Aufstieg und Fall: Eine Biographie*. Munich: C. H. Beck.
- Rickert, Joachim 2008. 'Freirechtsbewegung'. In Albrecht Cordes, Hans-Peter Haferkamp, Heiner Lück, Dieter Werkmüller, and Ruth Schmidt-Wiegand, eds., *Handwörterbuch zur deutschen Rechtsgeschichte (HRG)*, 2nd ed. Berlin, pp. 1772–7.
- Rousseau, Jean 1649. *Le Théologien politique: Pièce curieuse sur les affaires du temps, pour la défense des bons français*. Paris: Guillaume Loyson & Jean Baptiste Loyson.
- Schmitt, Carl 1917. 'Die Sichtbarkeit der Kirche. Eine scholastische Erwägung'. *Summa: Eine Vierteljahresschrift*, 2, 71–80.
- Schmitt, Carl 1923. *Römischer Katholizismus und politische Form*. Hellerau: Klett & Cotta.
- Schmitt, Carl 1926. 'Diktatur'. In *Staatslexikon im Auftrage der Görresgesellschaft*. Freiburg: Herder, vol. 1, pp. 1448–53.
- Schmitt, Carl 1931. *Der Hüter der Verfassung*. Berlin: Duncker & Humblot.
- Schmitt, Carl 1973. *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954*. Berlin: Duncker & Humblot.
- Schmitt, Carl 1985. *Crisis of Parliamentary Democracy*, trans. by Ellen Kennedy. Cambridge, MA: MIT Press.
- Schmitt, Carl 1986. *Political Romanticism*, trans. Guy Oakes. Cambridge, MA: MIT Press.
- Schmitt, Carl 1995. *Staat, Großraum, Nomos: Arbeiten aus den Jahren 1916–1969*, ed. by Günter Maschke. Berlin: Duncker & Humblot.
- Schmitt, Carl 1996. *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität*. Berlin: Duncker & Humblot.
- Schmitt, Carl 2005. *Tagebuch Februar bis Dezember 1915. Die Militärzeit 1915 bis 1919. Aufsätze und Materialien*, ed. by Ernst Hüsmert and Gerd Giesler. Berlin: Akademie Verlag.
- Schmitt, Carl 2008. *Constitutional Theory*, ed. and trans. by Jeffrey Seitzer. Durham and London: Duke University Press.
- Schwab, George 1987. 'Carl Schmitt: Enemy or foe? A conflict of modern politics'. *Telos* 72, 192–201. (Reprinted from *Epirrhosis: Festgabe für Carl Schmitt*. Berlin: Duncker & Humblot, 1959, pp. 665–82.)