

This is the accepted version of the following book chapter:
Jacques, J. (2016), Law, Decision, Necessity: Shifting the
Burden of Responsibility, in *The Contemporary Relevance of
Carl Schmitt: Law, Politics, Theology*, Abingdon, Oxon:
Routledge: 107-119, which is available at
<http://www.routledge.com/9781138822931>. This chapter
may be used for non-commercial purposes in accordance the
publisher's terms and conditions.

Law, Decision, Necessity: Shifting the Burden of Responsibility

Johanna Jacques

Abstract: What does it mean to act politically? This paper contributes an answer to this question by looking at the role that necessity plays in the political theory of Carl Schmitt. It argues that necessity, whether in the form of existential danger or absolute values, does not affect the sovereign decision, which must be free from normative determinations if it is to be a decision in Schmitt's sense at all. The paper then provides a reading of Schmitt in line with Weber's ethics of responsibility, according to which the political actor decides not arbitrarily and irresponsibly, but actively assumes responsibility for the decisions he takes.

Keywords: Schmitt; decisionism; necessity; Weber; political action

Introduction

If Carl Schmitt's concept of the political is to contribute still today to the question that 'never ceases to reverberate in the history of Western politics', namely, 'what does it mean to act politically?' (Agamben 2005: 2), it is essential to clarify the relation of the political decision to necessity. For regardless of how one may frame the primacy of the political in theoretical terms, i.e., how one explains why it is necessary to take a political decision at all (rather than, for example, follow a moral

code), once practical necessity is thought to apply, the decision loses all meaning: Action becomes *re*-action, and the sovereign decision maker falls victim to necessity's force.

An example of a reading that has this practical effect is that of Leo Strauss. Strauss wonders how Schmitt can defend the primacy of the political without recourse to moral reasons, and concludes that Schmitt's theory of the political represents a 'liberalism with the opposite polarity' (Strauss 1995: 117). According to this liberal stance, Strauss explains, all political decisions are equally valid as long as they are based on "'serious" convictions,' i.e., are 'decisions oriented towards the real possibility of war' (Strauss 1995: 117). Having confirmed the freedom of the political decision, Strauss thus immediately qualifies this freedom by reference to war – qualifies, because war is only too easily associated with necessity, and necessity negates the freedom to decide. Harvey Lomax, for example, finds that the serious situation or '*Ernstfall*' (Schmitt 1963: 30) on which Schmitt premises war as a state of exception 'refers to a state of emergency in which everything important is at stake, a matter of life and death' (Meier 1995: 132). Accordingly, the term is rendered 'dire emergency' by Lomax himself (Meier 1995: 132), 'exigency' by Gary Steiner (Löwith 1995: 147), and 'the extreme case' by George Schwab (Schmitt 1996: 30). Whether intended or not, the suggestion in each of these cases is that there is a situation that *necessitates* war.

Schmitt's own choice of words appears to confirm this finding of necessity. For example, in *Political Theology*, Schmitt links the state of exception to an existential danger threatening the state: 'The exception can . . . be characterized as a case of extreme peril, a danger to the existence of the state, or the like' (Schmitt 2005: 6). Schmitt also refers to Jean Bodin as justifying the sovereign's breach of duty to the people only 'under conditions of urgent necessity' (Schmitt 2005: 8), calls the exception '*extremus necessitatis casus*' (Schmitt 2005: 10), and bases the state of exception on the state's 'right of self-preservation' (Schmitt 2005: 12). In *The Concept of the Political*, Schmitt then defines the political in such a way as to seemingly equate politics with self-defence; the political is the recognition of the enemy, and the enemy is he who attacks (Meier 1995: 18-19).

These references to necessity – *existential* necessity – are surprising given that the latter is incompatible with the notion of the decision, being neither based on a decision nor allowing for a decision to be made. This incompatibility could be resolved by claiming, as Agamben does, that an objective state of necessity is a 'naive conception', and that 'obviously the only circumstances that are necessary and objective are those that are declared to be so' (Agamben 2005: 30). However, this view can only lead to two possible conclusions, and neither is helpful in drawing out a constructive meaning of political action. If one were to adopt Agamben's stance, the whole problematic of the state of exception would either reveal itself as a *legal* phenomenon in the first place, i.e., law's attempt to establish a fictitious state of

nature as its own presupposition (Agamben 2005: 33), leaving no independent role for the sovereign to play. Or, if the sovereign *were* recognised as independent of the legal order and free to decide on its suspension, an Agamben-inspired critique would merely focus on the sovereign's false claim of existential necessity, leaving the underlying assumption of the sovereign's *absolute* freedom to decide intact. Between these two poles of system and absolute freedom, a constructive role for the sovereign actor could hardly be made out.

In contrast, this essay takes the possibility of objective necessity seriously, even if only to show that it has no place in Schmitt's theory of the political. This raises the question of what Schmitt means by the term 'existential' if not existential *necessity*. The ensuing analysis discovers the creative role of the sovereign in giving meaning to the state's existence, a role in which the sovereign stands not only 'outside' the legal system, but also 'belongs' to it (Schmitt 2005: 7). This belonging, it is argued, is comprised of two active aspects: the sovereign's orientation towards the legal order, and his responsibility in taking the decision – responsibility not as a *response* (to law, to God, to the Other, to necessity) and thus as *subsumption* and potential accountability (see e.g. Kahn 2011: 89), but as a unilateral *assumption* of the work the decision sets itself.

Necessity and the decision on the exception

Necessity, conceived as a *force* that determines action (rather than as a particularly compelling *reason* for an action aimed at a certain outcome), is incompatible with the notion of the decision. When something is necessary in the absolute sense, it is more than merely possible or persuasive or the only option for achieving a certain aim. It simply must be done. As such, necessity leaves no scope for deliberation and decision on the part of the subject. It is for this reason that necessity is said to 'have no law' (*necessitas legem non habet*), i.e., that no legal responsibility is said to attach to necessary action. Law's self-distinction from force is premised on the subject's capacity to decide, i.e., to choose between lawful and unlawful action. Law takes into consideration 'the contrary will of the legal subject [*den entgegenstehenden Willen eines Rechtssubjekts*]', as Schmitt would say (Schmitt 1978: XVII¹). As soon as this

¹ This phrase is cited from the German edition because it has not been captured by the English translation. The following is the German original: '*Grade aus dem, was sie rechtfertigen soll, wird die Diktatur zu einer Aufhebung des Rechtszustandes überhaupt, denn sie bedeutet die Herrschaft eines ausschließlich an der Bewirkung eines konkreten Erfolgs interessierten Verfahrens, die Beseitigung der dem Recht wesentlichen Rücksicht auf den entgegenstehenden Willen eines Rechtssubjekts, wenn dieser Wille dem Erfolg hinderlich im Wege steht; demnach die Entfesselung des Zweckes vom Recht*' (Schmitt 1978: XVI-XVII). Compare this to the English translation: 'Paradoxically, dictatorship becomes an exception to the state of law by doing what it needs to justify; because dictatorship means a form of government that is genuinely designed to resolve a very particular problem. That problem is the

capacity is removed by the force of necessity, law can no longer hold the actor responsible without losing its claim to right. Necessity, on the other hand, is not premised on the possible acquiescence of the subject. On the contrary, as force, necessity acts directly on the subject, leaving it no choice how to act.

However, the absence of choice *on the part of the subject* is not the only way in which necessity excludes the decision. This absence of choice also applies to necessity itself, which is not made, but simply arises. As a source of right, necessity thus has no alternatives, no outside. Not only does it not allow for a decision, it is not based on one. Schmitt explicitly contrasts law to such a natural theory of right by claiming that 'every legal order is based on a decision' (Schmitt 2005: 10). His main point here is not to show that sometimes law needs to create an exception to its own processes of apportioning responsibility because necessity has removed the subject's capacity to decide (in which case law would end where necessity begins, with no role for the decision to play), but that there is a point of view outside and independent of law from which law's borders are established by a decision. This decision must evade all normative determination, whether by law, morality, or necessity, if it is to be an origin rather than a subject of right. To claim that necessity governs such a decision therefore makes no sense.

successful defence of a case to which the opponent's will is diametrically opposed.

Thus there is an unfettering of the means from the law itself' (Schmitt 2014: xlii).

And indeed, Schmitt leaves no doubt that it is a decision that establishes when the legal order 'needs' to be suspended: 'By his own discretion, the extraordinary lawmaker determines the presupposition of his extraordinary powers (danger for public security and order) and the content of the "necessary" measures' (Schmitt 2004: 69). Here, the need for a decision should be distinguished from the need to make a *certain* decision. While circumstances may be such as to create a perceived need for a decision, it does not follow that the content of the decision itself is therefore governed by necessity. 'Necessity, Bernard Williams (1981: 126) writes, 'is not the same as decisiveness'. War, on this view, is not something that is triggered, something into which one is forced, but is decided upon: 'What always matters is the possibility of the extreme case taking place, the real war, and the decision whether this situation has or has not arrived' (Schmitt 1996: 35).

Political existence

If this is the case, then why does Schmitt nevertheless write about the political decision in terms that appear to imply existential necessity? For example, in *The Concept of the Political*, Schmitt explains that the political sphere is set apart from other spheres by its distinction between friend and enemy (Schmitt 1996: 26). He then stipulates two criteria for the enemy, namely that 'he is, in a specially intense way, *existentially* something different and alien', and that this existential difference is such 'that in the extreme case conflicts with him are possible' (Schmitt 1996: 27,

emphasis added). Such conflicts, to the extent that they entail the right of the sovereign to suspend the normal legal order and demand the 'sacrifice of life' from citizens (Schmitt 1996: 35), are furthermore justified only by *existential* threats:

There exists no rational purpose, no norm no matter how true ... which could justify men in killing each other for this reason. If such physical destruction of human life is not motivated by an existential threat to one's own way of life, then it cannot be justified. (Schmitt 1996: 48-49)

One might want to conclude from this that war, and its associated state of exception, is a matter of existential necessity, of 'encounter[ing] an objective, external force ... that makes a life-and-death claim' (Meier 1995: 15). However, as Schmitt himself warns in *The Age of Neutralizations and Depoliticizations*, care must be taken when interpreting concepts whose meaning will depend on their specific use at the time: 'All essential concepts are not normative but existential. If the center of intellectual life has shifted in the last four centuries, so have all concepts and words' (Schmitt, 1996b: 85).

For the meaning of 'existential' itself, it is significant that in this context Schmitt opposes norms *to existence*, given his opposition of norms *to decisions* elsewhere in his work. Indeed, in *Constitutional Theory* Schmitt not only links political existence

to a decision ('political will'), but finds this will itself to have an 'existential character':

The constitution-making power is the political will, whose power or authority is capable of making the concrete, comprehensive decision over the type and form of its own political existence. The decision, therefore, defines the existence of the political unity in toto. ... In contrast to any dependence on a normative or abstract justice, the word 'will' denotes the essentially existential character of this ground of validity. (Schmitt 2008: 125, footnote and emphasis omitted)

Accordingly, what justifies war is not a threat to bare existence, but to the *type and form* of existence, i.e. one's political organisation. 'Each participant is in a position to judge whether the adversary intends to negate his opponent's *way of life* and therefore must be repulsed or fought in order to preserve one's own *form* of existence' (Schmitt 1996: 27, emphasis added).

Such a threat may still lead to a situation of necessity, albeit now artificially construed in terms of the 'life or death' of the political form. However, even this necessity does not adequately capture Schmitt's understanding of the decision on the exception. After all, it is not the case that a decision about the form of political

existence is taken and then defended in war, but that the decision that determines the form of political existence is *itself* the decision to go to war.

Perhaps one therefore ought to begin one's inquiry elsewhere, and ask what role the claim of necessity plays in relation to the decision on the exception. In this respect, Williams' observations on necessity are again helpful:

To arrive at the conclusion that one must do a certain thing is, typically, to make a discovery – a discovery which is, always minimally and sometimes substantially, a discovery about oneself ... The incapacities [that limit the field of options for actions] are ones that help to constitute character, and if one acknowledges responsibility for anything, one must acknowledge responsibility for decisions and action which are expressions of character – to be an expression of character is perhaps the most substantial way in which an action can be one's own. (Williams 1981: 130)

Thus, the declaration of enmity is part of the ongoing struggle to define one's own character, a struggle that, *because* it involves claims of necessity, is thereby not defensive but *productive* of meaning. This struggle is an active process for which one cannot but assume responsibility. Therefore, when Schmitt writes that the exception 'confirms not only the rule but also its existence' (Schmitt 2005: 15), 'existence' here should be understood as the meaning conveyed by having been chosen amongst a

number of possibilities – in this case, by having been chosen as the rule that one is ready to defend with one's life – and not just as the bare fact of existence. In war, one struggles against an enemy identified as representing the antithesis to what one aspires to be. This makes the enemy valuable for the process of self-constitution. 'Do not speak lightly of the enemy', Schmitt (Schmitt 1950: 90) warns: 'One classifies oneself through one's enemy. One rates oneself through that which one recognises as enmity.'

Paradoxically, therefore, the 'defence of one's existence' through war is what makes life into something 'serious', something more than mere existence. In risking one's life in war, one takes control, *works* on one's identity, and therefore *lives* in an enriched sense. As Karl Löwith writes, in Schmitt 'a real state of mutual enmity gets portrayed not as a naturally given reality but rather as an essential possibility of political existence, as a capacity-for-Being rather than as a naturally determined Being-thus' (Löwith 1995: 148).

From this perspective, it is unsurprising that Schmitt finds that it is with real wars of existence that this possibility of *political* existence ends. When war is conducted as self-defence, one is no longer struggling for meaning, but merely defending one's life against forces beyond one's control: 'A life which has only death as its antithesis is no longer life but powerlessness and helplessness' (Schmitt 1996b: 95). Similarly, when war is conducted in the name of universal values, i.e., values thought to be

necessary, it requires the eradication of the enemy (Rasch 2004:12), and thus destroys any future possibility of struggle.

Necessity as a force that determines action therefore has no place in Schmitt's theory of the political, not only because it would negate the notion of the decision, but also because it would spell an end to political existence. What is necessary is neither war nor values, both of which are chosen and thus subject to a decision, but the ongoing *possibility* of contestation, of struggle for meaning. This possibility is represented by a plural order in which differences co-exist, as only such an order can contain the ongoing possibility for enemies to be made, meaning to be worked out, and for life to be something more than mere existence: '[L]ife struggles not with death, spirit not with spiritlessness; spirit struggles with spirit, life with life, and out of the power of an integral understanding of this arises the order of human things' (Schmitt 1996b: 96). Political existence therefore cannot be governed by necessity. On the contrary, in such an order it is necessary that nothing becomes necessary.

Orientation

Once the 'facade of necessity' (Rasch 1999-2000: 1682) has been removed from the political decision, the question once again returns to its freedom. Is it true, as Slavoj Žižek writes, that the decision is a merely arbitrary instance of the sovereign's will?:

The concrete content of the imposed order is arbitrary, dependent on the Sovereign's will, left to historical contingency ... modern conservatism, even more than liberalism, assumes the lesson of the dissolution of the traditional set of values and / or authorities – there is no longer any positive content which could be presupposed as the universally accepted frame of reference. (Žižek 1999: 18-19; see however Brännström 2015)

Žižek may be right in saying that Schmitt's theory of the political is no longer dependent on a universally accepted frame of reference, but it does not follow that the decision is therefore arbitrary. Just because it is free in the sense that it is not predetermined by norms – '[e]very concrete juristic decision contains a moment of indifference *from the perspective of content*' (Schmitt 2005: 30, emphasis added) – it does not mean that the decision is also indifferent *to* its content. After all, Schmitt characterises the decision not only as the 'pure decision not based on reason and discussion and not justifying itself, ... an absolute decision created out of nothingness' (Schmitt 2005: 66), but also as 'the exacting moral decision' (Schmitt 2005: 65). Arbitrariness suggests whim or the throwing of dice, a lack of interest on the part of the decision maker. The sovereign, however, seeks to establish meaning; he seeks to do the 'right' thing, whatever that may be. This becomes clear when one considers that already in 1919, Schmitt criticises political romanticism for its lack of political commitment (Schmitt 1986). In *The Concept of the Political*, he then contrasts the 'meaningful antithesis' of the friend-enemy distinction with merely

‘interesting antitheses and contrasts, competitions and intrigues of every kind’ (Schmitt 1996: 35). The political, in other words, requires a commitment from the decision maker that the expression of a merely private preference does not.

In her foreword to *Political Theology*, Tracy Strong remarks that the concept of sovereignty ‘looks in two directions, marking the line between that which is subject to law ... and that which is not’ (Strong 2005: xxi). To situate the sovereign as *oriented* in a certain way is helpful, as orientation entails neither the passivity of subordination (to law, to God, to the Other, to necessity) nor a potentially arbitrary freedom. When one is oriented, one assumes an active, directed stance.

The active aspect of orientation also manages to avoid that other passivity Schmitt has sometimes been accused of, namely occasionalism. Löwith, for example, sees the sovereign decision as merely caused by a particular set of factual circumstances (the concrete order), and concludes that this causation removes the need for a separate concept of the decision altogether: ‘For it is simply a consequence of decision, which in itself is empty, if from what occurs *de facto* politically, decision happens to derive the sort of content which deprives decisionism as such of an object’ (Löwith 1995: 158). To counter this argument, one needs to show that the ‘genuine’ (Schmitt 2005: 3) decision serves neither merely as an order’s means to establish *itself*, nor as the means for the realisation of an independent and *arbitrary* will.

In this respect, one could enlist the help of Schmitt's 1912 work *Gesetz und Urteil*, in which he first attempts to situate judicial decisions between the immanence of legal order and an arbitrary transcendence. Looking back over his work in 1968, Schmitt explains in the preface to the second edition of *Gesetz und Urteil* how his 'thought of the independence of the decision ... lead to a definition of state sovereignty as political decision' (Schmitt 1969). He then expresses his hopes that the new edition of *Gesetz und Urteil* may help clear the misunderstanding of the decision [*Dezision*] as 'a fantastic act of arbitrariness' and of decisionism [*Dezisionismus*] as a 'dangerous world view' (Schmitt 1969).

In *Gesetz und Urteil*, Schmitt claims that the rightness of a decision arises not from the subsumption of an individual case under a general rule, but from the production of this rule through the individual, exceptional case. In this production, the judge orients himself towards a prevailing conception of normality. This normality, however, is not normality as it arises from a common practice of judging (which would once more entail a subsumption of the judge to this practice), but as the common *expectation* inherent in such a practice. Schmitt thus writes: 'A judicial decision is correct today when it can be assumed that another judge would have decided the same' (Schmitt 1969: 71). The judge's decision is therefore neither a norm-governed nor a potentially arbitrary decision. It is normatively constitutive, but makes a claim to contribute to an existing project that it could not make had it been arrived at by a throw of dice:

[T]he system reproduces itself by way of the decisions of its judges. Judges are forced to make particular and singular judgments, yet they do not judge willfully or arbitrarily. They are not viewed as psychologically distinct, free agents, but as members of a community (*sensus communis*) of agents who claim a regulative universality for their particular judgments. In this way, the legal system 'bootstraps' its way into existence, much as the aesthetic sphere does, by virtue of exemplary decisions. (Rasch 2004b: 102)

Returning to the decision on the exception, one could argue that here, too, the decision contains an active impulse towards correctness that can only be understood as motivated by an existing context. This context does not govern or regulate the decision's content, but determines the sovereign's orientation, i.e., the decision's direction towards an existing order whose meaning or 'sense' (Schmitt 2005: 13) it (re-)establishes. The serious situation or *Ernstfall* arises when the contestation of meaning requires that one take a position, that one commit oneself to a 'definite' (Schmitt 2005: 9) point of view. This view is never arbitrary, but a view on the possibilities that arise as part of an existing legal order.

Responsibility

Even if the sovereign's decision cannot be regarded as arbitrary, the absence of a normative framework to which it can be held up means that its ultimate correctness must remain uncertain. It is this uncertainty that impacts the sovereign's ability to disburden himself of responsibility for the decision's consequences:

We do decide that *this* war was fought for the right reasons, *that* one for the wrong ones, and that *this* ideal is worth fighting and dying for, while *that* one is not . . . , but we do not really *know* whether we are correct or not. Barring revelation, which remains incommunicable, we have no ultimate or transcendental assurance that our decisions are valid for all times and all places. We make them without the assurance that their structure, that their 'form of validity,' absolves us from all responsibility of their having been made. (Rasch 1999-2000: 1682)

In the political context, such responsibility is thematised by Max Weber, whose lecture *Politics as a Vocation* (Weber 2004) Schmitt attended in 1919, having already on number of occasions referred to Weber's writings in his own (Ulmen 1985: 5). Like Schmitt would do later, Weber situates the politician outside of immanent order, in this case the bureaucratic hierarchy in which each action may be reviewed on the basis of rules, the compliance with which disburdens the actor from responsibility for the action's consequences. In this respect, Weber contrasts the role of the politician with that of an official amongst the ranks of civil servants:

When an official receives an order, his honor lies in his ability to carry it out, on his superior's *responsibility*, conscientiously and exactly as if it corresponded to his own convictions. This remains the case even if the order seems wrong to him and if, despite his protests, his superior insists on his compliance. ... In contrast, the point of honor of the political leader, that is, the leading statesman, is that he acts exclusively on his own responsibility, a responsibility that he may not and cannot refuse or shuffle off onto someone else. (Weber 2004: 54)

At the same time, Weber distinguishes what he calls an 'ethics of responsibility' from an 'ethics of conviction' (Weber 2004: 83). The latter refers to a belief in truth as the guiding principle for action whereby the actor, as if under orders, acts not on his own, but on another's responsibility. Weber explains that when a Christian acts in accordance with his belief regardless of the concrete circumstances, he is able to do so without burdening his conscience, because he can refer the outcome of his actions either to the grace of God or the wickedness of the people. In either case, he does not need to assume responsibility himself. Not so for the politician, who must be aware that he himself 'holds in his hands a strand of some important historical process' (Weber 2004: 76), and that no one can answer in his place for the consequences of his actions. The politician, in other words, must adopt an ethics of responsibility.

For Weber, this responsibility arises in the absence of any guarantee of the decision's correctness. It is the assumption of one's own position in relation to a specific problem. The actor feels himself burdened, he 'takes on' or 'carries' this burden of the decision: 'What matters is the trained ability to scrutinize the realities of life ruthlessly, to withstand them and to measure up to them inwardly' (Weber 2004: 91). In contrast, those acting under an ethics of conviction lack this 'inner gravity'. They are 'windbags who do not genuinely feel what they are taking on themselves but who are making themselves drunk on romantic sensations' (Weber 2004: 92).

Schmitt describes a similar distinction in relation to the state, where religious and social associations pursue their own particular objectives without regard to the wider effects of their actions. In contrast, the sovereign has in mind the stability of the legal order as a whole, for which he takes responsibility (Schmitt 1938: 116-117). Both Weber and Schmitt also juxtapose political action in this sense (which may include the entering into war) with religious or just wars. For Weber, actors in religious wars justify what they do by the absolute value of the ends they intend to achieve in principle, and are therefore able to exhibit a disregard for the concrete circumstances and likely consequences of their actions in the present. In phrases that Schmitt repeats almost identically (Schmitt 1996: 36), Weber writes: 'It is

always the very *last* use of force that will then bring about a situation in which *all* violence will have been destroyed ...' (Weber 2004: 85).

This leaves one to consider as a final point whether the responsibility Schmitt has in mind may perhaps, as Heinrich Meier thinks, be the responsibility of the religious believer to do the right thing in the expectation of a final judgement. According to Meier, in the absence of knowledge what such a decision would entail, '*probitas* has to carry the whole burden' of making the right decision (Meier 1995: 80-81), while at the same time 'the certainty that the course of fate is always *in order* already and that *salvation* is the meaning of all world history' offers 'relief' (Meier 1995: 81). Although Meier's reading highlights the unilateral assumption of responsibility, the closure of meaning that the notion a final judgement entails does not accord with Schmitt's own emphasis on ongoing struggle that may never find an endpoint. Schmitt is not a thinker of the 'always-already' but of the 'not-yet'. For him, the task is not to respond and conform, but to struggle and create. Within this creative process, the decision's correctness cannot be known nor anticipated. Therefore, the sovereign cannot but assume himself the burden of responsibility for its consequences.

Conclusion

In *Politics of Friendship*, Derrida writes that '[w]ithout the possibility of radical evil, of perjury, and of absolute crime, there is no responsibility, no freedom, no decision. And this possibility, as such, if there is one, must be neither living nor dead' (Derrida 1997: 218-19; on Derrida and Schmitt, see de Ville 2015). Schmitt's theory of the political, with its notion of the free decision not subordinated to norms, cannot rule out this possibility of radical evil. However, because of this possibility, the decision *can* be a decision and *can* be responsible.

This essay has argued that the 'juristic' space between legal order and the state of nature (Schmitt 2005: 13) in which the decision is taken can be construed as a space between law, necessity, and arbitrary freedom (on the 'in-between', see however Falk 2015). It began by explaining why necessity, whether in its guise as a situation of self-defence or as action determined by absolute values, is incompatible with the notion of the decision. The political, according to Schmitt, takes precedence over the moral because it represents the ongoing and open struggle for meaning that makes life worth living. Necessity would negate the agency needed for this struggle, and would end its process.

This essay has then shown that the sovereign, rather than deciding arbitrarily, ought to be imagined as oriented towards the legal order on which he decides. However, the decision nonetheless remains uncertain, and the sovereign therefore cannot avail himself of the burden of responsibility for its consequences. On the contrary,

his is a responsibility for the order as a whole, and he actively assumes this burden in the struggle for a life more than mere existence.

This reading has been proposed to counteract the critical association of Schmitt with a practical tendency to present all political decisions in the light of existential necessity, enabling those in charge both to act outside of law *and* claim that their decisions were forced upon them by necessity (as if it went without saying that outside law, there existed only the state of nature). It has endeavoured to show that Schmitt ought not to be associated with this tendency, as necessity plays no part in his theory of the political. Furthermore, by restoring to Schmitt's decision its aspects of freedom and independence, one is able to highlight not only the implications of choice, but also establish a positive role for the political decision maker beyond the role of law-abiding subject, arbitrary dictator, or the helpless victim of higher forces.

Bibliography

Brännström, L. (2015) 'Sovereign Order? Taking Stock of Carl Schmitt's Definition of Sovereignty in Light of Concrete Order Thinking', p. xx-xx, in M. Arvidsson, L. Brännström and P. Minkinen (eds), *The Contemporary Relevance of Carl Schmitt. Law, Politics, Religion*. Abingdon: Routledge.

Derrida, J. (1997) *Politics of Friendship* [1994]. Trans. G. Collins. London and New York: Verso.

De Ville, J. (2015) 'Rethinking the Concept of the Political: Derrida's reading of Schmitt's Theory of the Partisan', p. xx-xx, in M. Arvidsson, L. Brännström and P. Minkinen (eds), *The Contemporary Relevance of Carl Schmitt. Law, Politics, Religion*. Abingdon: Routledge.

Falk, H. (2015) "'Im Kampf um Rom". Carl Schmitt's Critique of Rudolph Sohm and the Post-Secular Turn', p. xx-xx, in M. Arvidsson, L. Brännström and P. Minkinen (eds), *The Contemporary Relevance of Carl Schmitt. Law, Politics, Religion*. Abingdon: Routledge.

Kahn, P.W. (2011) *Political Theology: Four New Chapters on the Concept of Sovereignty*. New York: Columbia University Press.

Löwith, K. (1995) *Martin Heidegger and European Nihilism* [1983]. Trans. G. Steiner. New York: Columbia University Press.

Meier, H. (1995) *Carl Schmitt & Leo Strauss: The Hidden Dialogue* [1988]. Trans. J.H. Lomax. Chicago and London: The University of Chicago Press.

Rasch, W. (1999-2000) 'A Just War? Or Just War? Schmitt, Habermas, and the Cosmopolitan Orthodoxy', *Cardozo Law Review*, Vol. 21, 5-6 (May 2000): 1665-1684.

Rasch, W. (2004) *Sovereignty and its Discontents*. London: Birkbeck Law Press.

Rasch, W. (2004b) 'Judgment: The Emergence of Legal Norms', *Cultural Critique*, Vol. 57: 93-103.

Schmitt, C. (1922) *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität*. München und Leipzig: Duncker & Humblot.

Schmitt, C. (1938) *Der Leviathan in der Staatslehre des Thomas Hobbes: Sinn und Fehlschlag eines politischen Symbols*. Hamburg: Hanseatische Verlagsanstalt.

Schmitt, C. (1950) *Ex Captivitate Salus: Erfahrungen aus der Zeit 1945/47*. Köln: Greven Verlag.

Schmitt, C. (1963) *Der Begriff des Politischen [1927]. Text von 1932 mit einem Vorwort und drei Corollarien*. Berlin: Duncker & Humblot.

Schmitt, C. (1969) *Gesetz und Urteil: Eine Untersuchung zum Problem der Rechtspraxis [1912]*. München: C.H. Beck'sche Verlagsbuchhandlung.

Schmitt, C. (1978) *Die Diktatur: Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf* [1921]. Berlin: Duncker & Humblot.

Schmitt, C. (1986) *Political Romanticism* [1919]. Trans. G. Oakes. Cambridge and London: The MIT Press.

Schmitt, C. (1995) 'Die Raumrevolution' [1940], p. 388-391, in C. Schmitt, *Staat, Großraum, Nomos: Arbeiten aus den Jahren 1916-1969*. Berlin: Duncker & Humblot.

Schmitt, C. (1996) *The Concept of the Political* [1927]. Trans. G. Schwab. Chicago and London: The University of Chicago Press.

Schmitt, C. (1996b) 'The Age of Neutralizations and Depoliticizations' [1929], p. 80-96, in C. Schmitt, *The Concept of the Political* [1927]. Trans. G. Schwab. Chicago and London: The University of Chicago Press.

Schmitt, C. (2004) *Legality and Legitimacy* [1932]. Trans. J. Seitzer. Durham and London: Duke University Press.

Schmitt, C. (2005) *Political Theology: Four Chapters on the Concept of Sovereignty* [1922]. Trans. G. Schwab. Chicago and London: The University of Chicago Press.

Schmitt, C. (2008) *Constitutional Theory* [1928]. Trans. J. Seitzer. Durham and London: Duke University Press.

Schmitt, C. (2014) *Dictatorship: From the Origin of the Modern Concept of Sovereignty to Proletarian Class Struggle* [1921]. Trans. M. Hoelzl and G. Ward. Cambridge: Polity.

Strauss, L. (1995) 'Notes on Carl Schmitt, The Concept of the Political' [1932], in H. Meier, *Carl Schmitt & Leo Straus: The Hidden Dialogue* [1988]. Trans. J.H. Lomax. Chicago and London: The University of Chicago Press.

Ulmen, G. L. (1985) 'The Sociology of the State: Carl Schmitt and Max Weber', *State, Culture, and Society*, Vol. 1, No. 2: 3-57.

Weber, M. (2004) 'Politics as a Vocation', in M. Weber, *The Vocation Lectures* [1919]. Trans. R. Livingstone. Indianapolis: Hackett Publishing Company.

Williams, B. A. O. (1981) *Moral Luck: Philosophical Papers 1973-1980*. Cambridge: Cambridge University Press.

Žižek, S. (1999) 'Carl Schmitt in the Age of Post-Politics', in C. Mouffe (ed.) *The Challenge of Carl Schmitt*. London and New York: Verso.