Introduction

Carl Schmitt and the Problem of the Realization of Law

From Political Theory to Jurisprudence

The famous pithy aphorisms that Carl Schmitt used to open his major works – 'the sovereign is he who decides on the exception', 'the concept of the state presupposes the concept of the political', etc. – have become a part of the common discourse of contemporary scholarship on politics and the law. The theoretical framework that animates these slogans, however, has remained somewhat opaque. It has often been argued that there is no such framework – that Schmitt was a situational thinker whose works are best understood as interventions in concrete political debates that do not add up to a grand theoretical vision.[1]

This apparent lack of unity has encouraged a great variety of rather different appropriations. From the left, Schmitt is portrayed as a radical theorist of popular sovereignty, of constituent power and agonistic democracy who aimed to defend popular rule against liberal elitism.[2] Some commentators, by contrast, see Schmitt as a defender of a form of constitutional democracy,[3] even while others interpret him as the prophet of a politically authoritarian neoliberal capitalism.[4] It has been argued that Schmitt's views form the template for populist authoritarianism and that his ideas were, from the beginning, congenial to Nazism.[5] Other scholars have categorized Schmitt as an opponent of

[1] Löwith (1995).
[2] Kalyvas (2008); Mouffe (1997); Balakrishnan (2000); Rasch (2016).
[3] Schwab (1989); Bendersky (1983); Schupmann (2017).
[4] Cristi (1998).
[5] Scheuerman (2020); Dyzenhaus (1997), 38–101.

legal positivism who rightly objected to a reduction of political legitimacy to mere positive legality.[6]

One reason why it has been so difficult to make sense of the structure and content of Schmitt's overall intellectual project is that its reception and interpretation has tended to focus on Schmitt's political theory and, to a lesser extent, on his constitutional ideas. As a result, the scholarly discussion of Schmitt's work, with some notable exceptions,[7] has lost sight of the fact that Schmitt's key political-theoretical and constitutional ideas grew out of a legal theory – one that forms the implicit background of the political and constitutional arguments one finds in well-known works such as *Dictatorship*, *Political Theology*, *Constitutional Theory* or *The Concept of the Political*.

Schmitt first expounded his legal-theoretical ideas in two early works published before the onset of the Great War – *Statute and Judgment* (1912)[8] and *The Value of the State and the Significance of the Individual* (1914)[9] – which are presented here, for the first time, in full English translation.[10] These texts show, we shall argue, that there is a degree of underlying thematic unity to Schmitt's oeuvre. This is not to say that all of Schmitt's central publications do, in the end, add up to one coherent theoretical edifice or that there is no significant development in Schmitt's thought; rather, Schmitt's early legal-philosophical writings introduce a jurisprudential problem that continued to drive Schmitt's later work, while giving rise to varying responses in different stages of Schmitt's career. To grasp the inner logic of the development of Schmitt's thought, it is necessary to understand how the young Schmitt conceived of that jurisprudential problem.

The problem Schmitt's early legal-theoretical works lay out and engage with is, to adopt Schmitt's own terminology, the problem of *Rechtsverwirklichung*, or of the realization of law. Our aim in this introduction is to

[6] Loughlin (2010); Loughlin (2018).

[7] The importance of Schmitt's legal theory is highlighted in some of the German literature on Schmitt. See Hofmann (2002), 34–77; Maus (1980); Kaufmann (1988). Important English-language discussion of Schmitt's legal theory includes Scheuerman (2020); McCormick (1997), 206–248; Croce and Salvatore (2013). On Schmitt's legal theory in the aftermath of the Second World War, see Maier (2019).

[8] Schmitt (1912).

[9] Schmitt (2015).

[10] For commentary on these two texts, see Scheuerman (2020), 19–44; Scheuerman (1996); Neumann (2015), 16–29; Kiefer (1990). There is valuable discussion of Schmitt (2015) in Baume (2003) and Galli (2013). For the biographical context of these two works, see Mehring (2009), 37–40 and 59–65.

lay out the contours of the problem of the realization of law, as Schmitt presented it in his early legal-theoretical works, and to illustrate how these texts can inform interpretation of Schmitt's mature legal, political and constitutional theory.

The Problem of Legal Indeterminacy

We commonly take it that one can meaningfully distinguish between the rule of law and arbitrary, legally unrestrained governance. It is true, of course, that rules of law are made and applied by specific human beings. There is nevertheless a difference between the rule of law and what a contemporary legal philosopher has called a 'system of pure discretion'[11] in which decision-takers are legally free to decide however they see fit. Where there are rules of law and where officials can be counted upon to be guided by those rules, individual subjects of the law will typically be in a position to anticipate how they will be treated by public authorities in the event that they engage in a certain course of action.

One can hold on to the claim that there is a meaningful distinction between the rule of law and a system of mere discretion without denying that general legal rules sometimes fail to determine outcomes in particular cases, whether because legal rules are bound to be confronted with unanticipated factual situations or as a result of the open texture of the terms of natural language that are used to formulate them. The view that general legal rules always allow for determinate solutions to particular cases by way of mechanical application – a view often referred to as 'formalism' – is almost universally rejected as inaccurate in contemporary jurisprudential debate.[12] The prevailing view nowadays is that law is limitedly indeterminate. According to H. L. A. Hart, legal indeterminacy, while undoubtedly real, is peripheral to legal practice. The phenomenon, Hart argued, should not 'blind us to the fact' that the operations of courts are 'unquestionably rule-governed [. . .] over the vast, central areas of the law'.[13]

The young Schmitt found himself in the midst of a heated debate concerning the problem of legal determinacy – one in which formalist

[11] See Raz (1999), 137–141.
[12] See Shapiro (2011), 234–258.
[13] Hart (1994), 154. On Hart's theory of adjudication, see Kramer (2018), 110–147. Further to the problem of indeterminacy, see Endicott (2000) and Leiter (2007).

accounts of adjudication still had significant purchase. The orthodox jurisprudential approach in Wilhelmine Germany (scholars usually refer to it as 'statutory positivism') was premised on the assumption of the perfect determinacy of statutory law. Statutory positivists argued that all law is the product of the sovereign will of the state, typically expressed in the form of statutory enactments.[14] What is more, they held that there are techniques of legal interpretation that will enable any trained jurist to decide any possible legal case without resort to teleological considerations that might import potentially contentious judgments of value into legal reasoning. The implications of this view for a theory of adjudication were vividly captured, and wittily satirized, by Hermann Ulrich Kantorowicz, a prominent critic of statutory positivism:

> The prevalent ideal conception of the jurist is the following: A higher officer of state with academic training, he sits in his cubicle, armed only with a thought-machine, but one of the very finest sort. The room's only furniture consists in a green table, on which we find the statute book lying in front of the official. One hands him some random case, an actual or perhaps an invented one. In accordance with his duty, the official is able to prove the decision that is predetermined by the legislator with absolute exactitude, with the help of purely logical operations and by the use of a secret technique which is comprehensible to him alone.[15]

By the time Schmitt started his career as a legal scholar, in the first and second decades of the twentieth century, this formalist account of adjudication had come under sustained criticism at the hands of the members of a loose group of legal scholars who referred to themselves as the *Freirechtsbewegung* (the 'free law movement').[16] Kantorowicz published a short monograph in 1906 (under the pseudonym 'Gnaeus Flavius') that was intended to be a manifesto of the free law movement. *Der Kampf um die Rechtswissenschaft* (*The Struggle for Legal Science*) both attacks the assumption of the perfect determinacy of statutory law as descriptively inaccurate and makes suggestions for how judges who have

[14] See Wieacker (1952), 430–468. For the political background of statutory positivism, see Caldwell (1997), 13–39. The standard understanding of statutory positivism is challenged by Paulson (2007), who argues that the view is neither wedded to the notion that all law is statutory nor to the claim that law is perfectly determinate, but only to the weaker thesis that statutory law is supreme.

[15] Kantorowicz (1906), 7.

[16] Other notable exponents of the free law school include Eugen Ehrlich and Theodor Sternberg. See Foulkes (1969); Herget and Wallace (1987). For Kantorowicz's theory of adjudication, see Paulson (2019).

abandoned it should go about their business if faced with problems of indeterminacy.

Although the free law movement was perceived as a radical assault on the self-understanding of legal officials, its views have a lot in common with the moderate-indeterminacy thesis espoused by Hart. Statutory rules, Kantorowicz points out, invariably contain terms that are affected by the vagueness of natural language.[17] The application of statute will, at times, have to deal with cases that Hart later described as 'penumbral'[18] – that is, with cases in which the established use of a term that has been employed in the formulation of a legal rule fails to determine whether some state of affairs is to be subsumed under the legal rule. Statutory positivists claimed that there are juristic techniques of interpretation that will enable a judge to deal with indeterminacies in statutory law arising from this problem of the open texture of natural language – but there are no objective criteria, Kantorowicz argues, for deciding which of the available techniques of interpretation (analogy, extensive interpretation, *argumentum e contrario*, etc.) ought to be used in a concrete case so as to remedy the problem.[19] The appeal to such techniques merely serves to rationalize judicial decisions that are driven, however unconsciously, by the will of the interpreter. The belief that decisions are always determined by statutory norms, Kantorowicz concludes, amounts to a kind of false consciousness among legal decision-takers – one that may engender bad decisions that are insensitive to the interests of society and its members.[20]

What would a more defensible approach to adjudication look like? Judges who are faced with statutory norms that fail to clearly determine decisional outcomes, Kantorowicz argues, must resort to normative standards that are not contained in statutory law and which cannot be sourced to the will of the state. Kantorowicz refers to these subsidiary standards as norms of the 'free law'.[21] What endows norms of the free law with legal status, according to Kantorowicz, is their factual acceptance among the members of a legal community.[22] It is here that jurisprudence connects with legal sociology: social-scientific research is needed to determine which expectations of proper conduct and appropriate

[17] See Kantorowicz (1906), 15.
[18] See Hart (1958), 606–615.
[19] See Kantorowicz (1906), 23–30.
[20] See ibid., 19–22 and 38–47.
[21] See ibid., 10.
[22] See ibid., 12.

ordering are in fact shared among the members of society.[23] It is to these that a judge is to refer, if possible, when statutory law fails to provide guidance. Even the free law, however, will at times fail to provide sufficient decisional guidance. In such cases, Kantorowicz admits, there is no legal solution to the case at hand[24] and a judge will consequently have to take a decision based on their individual moral opinion, although such opinions are not, in Kantorowicz's view, open to rational justification.[25]

The young Schmitt was clearly impressed by this challenge to statutory positivism. His own theory of adjudication, as developed in *Statute and Judgment*, concurs with the critical conclusions of Kantorowicz's attack.[26] Schmitt refrains, however, from fully endorsing Kantorowicz's response to the problem of the partial indeterminacy of statutory law. In particular, Schmitt rejects the view that there are cases in which the law fails to provide direction, as well as the corollary of this view that judges in such cases are free to make law rather than to apply it.[27] His reaction to the free law movement's challenge to statutory positivism, as a result, takes the form of an attempt to identify an alternative ground of legal determinacy.

A Turn to Legal Practice

Consider again the description of the process of adjudication that Kantorowicz attributes to the statutory positivist: it implies that all legal questions that might arise in a concrete case have a correct answer and that this answer is fully contained in statutory law, assuming that the latter is correctly interpreted. What a judge does, in deciding a specific case, is apply a general decision already taken by the legislator to the concrete situation at hand. This is a purely cognitive process – one that is guided by value-neutral logical techniques of statutory interpretation and which therefore does not require the judge to rely on their own practical judgment. Statutory law, in turn, is portrayed as an instruction or command to the judge – issued by the sovereign – that is binding on judges. The judge, in view of their subjection to the will of the sovereign legislator, is bound by

[23] See Kantorowicz (1911), 13–15.
[24] See Kantorowicz (1906), 16.
[25] See ibid., 40–41.
[26] See Schmitt (1912), 11–16, and compare Kantorowicz (1906), 23–32. Schmitt's critique of statutory positivism is also indebted to Sternberg (1904), 123–142.
[27] See Kantorowicz (1906), 42.

statute to decide in a particular way. Accordingly, a judicial decision is to be regarded as correct if and only if it exhibits conformity to statute (*Gesetzmäßigkeit*).[28]

Like the proponents of free law, Schmitt rejects this account of the correctness of judicial decisions as a misdescription of legal practice. His adaptation of the free law movement's critique of statutory positivism, however, emphasizes the question of where this critique leaves our understanding of judicial role. If we abandon the criterion of conformity to statute, how can judges still be said to be subject to the law – to be duty-bound to apply it? It might appear, Schmitt points out, that judges are free to decide for themselves whether to use a statutory norm to decide a particular case, as well as how to use it:

> According to the prevailing opinion, the judge, at each stage of his activity, is to pay obedience to a command whose content he has, in most cases, to determine for himself. This compels the conclusion that the evaluation of this determination, the question of its correctness, cannot be answered by appeal to the command itself. The content of the latter must first be identified through that determination. A 'will' that hovers above the judge is, in all cases, the result of an interpretation, one that therefore cannot, in turn, legitimize itself by appeal to its result.[29]

Note that Schmitt's claim in this passage is not that statutory norms do not bear, often significantly, on how particular cases ought to be decided; rather, the claim is that the process of the application of a statutory norm to a particular case must turn on factors that are not contained in statute itself – which do not themselves derive from a legislative instruction that binds judges. The statute itself, Schmitt points out, does not contain anything more than its 'manifest content'[30] and how the latter is to be understood is what is at issue in difficult cases. It would be futile, Schmitt observes, for a sovereign legislator to try to address this question by issuing a general command to the judiciary to decide in conformity with statute. Such a command would not obviate the need for the interpretation of statutory rules and it could not tell a judge what makes an interpretation correct. But if judges must decide that question for themselves, what difference is there between legislation and adjudication?

Although Schmitt endorses Kantorowicz's rejection of the traditional doctrine of statutory interpretation, he claims that theorists of free law

[28] Schmitt (1912), 5–6 and 21.
[29] Ibid., 31.
[30] Ibid.

fail to address the question. Kantorowicz, for one, argues that judges ought to follow statute for as long as it provides clear, unambiguous guidance, that they should plug gaps or resolve ambiguities in statutory law by appeal to the moral opinions factually prevalent among members of society, wherever possible, and that they ought to decide in accordance with their own moral views where conventional morality gives out. But he does not explain why a judge should be seen to be obligated to go down this precise decision tree.[31] The theory of free law, Schmitt argues, remains wedded to the idea that a legal decision, to be legally correct, must be determined by norms that judges can be assumed to have a duty to apply. It merely aims to widen the range of such norms, by attributing subsidiary legal force to conventional morality. But the doctrine of free law, much like the statutory positivist position that it attacks, fails to explain what accounts for the fact that judges and other legal officials are bound to apply the norms in question or to rank them in the suggested way.[32] Unless the question can be answered, even judicial decision-taking that follows the strictures outlined by Kantorowicz must remain a mere exercise of the will of the decision-taker.

To overcome this shortcoming, Schmitt goes on to suggest, we need a conception of the correctness of judicial decisions that lets go of the idea that correct judicial decisions are programmed by legal norms (of whichever kind). To arrive at an alternative, Schmitt turns his attention to the way in which legal practice in fact deals with problems of application. An analysis of legal practice shows, Schmitt claims, that judges approach difficult cases under the guidance of a 'postulate of legal determinacy', which demands of judges that they decide in the way that best fosters and preserves legal determinacy, understood as the 'calculability' and 'predictability' of judicial decisions.[33] As we have seen, Schmitt, like Kantorowicz, rejects the view that judicial decisions do nothing more than implement statutory law and he agrees that legal officials, insofar as they take themselves to be doing nothing more than implementing statutory law, are labouring under a form of false consciousness. But Schmitt also claims, in contrast to the proponents of free law, that existing legal practice is fundamentally sound. Although practitioners often adopt a mistaken self-description, their decision-taking is given sufficient orientation, however unconsciously, by the postulate of legal

[31] See Kantorowicz (1906), 41.
[32] Schmitt (1912), 19–20 and 38–40.
[33] See ibid., 44–67.

determinacy. 'Happily, the method of practice', Schmitt avers, 'is better than what practice takes to be its method.'[34]

Schmitt presents two major lines of argument to sustain the claim that legal practice is in fact governed by a postulate of legal determinacy. The first of these is a general reflection on the function of positive law, which introduces the problem of the realization of law. Schmitt observes that a statute is typically dependent upon established social practices and mores. It usually 'leans against existing orders of life and habits of intercourse', and 'makes use of the moral opinions of the time and the people, of cultural ideas'.[35] The contribution the positive law makes to social order, Schmitt goes on to argue, is to give legal specificity to a society's accustomed form of life. This explains, Schmitt claims, why many positive legal provisions are characterized by an element of indifference of content – why it is often more important that there be some determinate legal regulation, whatever its content may be, rather than none.[36] A society's form of life – the sense of justice shared by its members – may determine, for instance, that there ought to be punishment for murder, but it is unlikely to give an answer to the question of precisely what punishments are to be imposed in the particular circumstances of an individual case. At the limit, it matters more that legal order be capable of settling such questions than how exactly it settles them. This line of thought shows, Schmitt argues, that an appeal to substantive moral standards cannot, by itself, provide a criterion of the correctness of judicial decision. Such standards would fail to tell a judge how to decide in cases in which there are several possible ways of specifying or concretizing those standards.

The main reason why statutory law has gained prominence in modern societies, Schmitt claims, is that it typically (although not invariably) turns out to be a very efficient way of dealing with decisional problems of this sort.[37] As we have seen, Schmitt rejects the view that statutory law can by itself achieve the goal of complete legal determinacy. The claim that statutory law does not always provide clear guidance, however, does not entail that it never does: not all cases are hard. The reason, then, why a judge normally ought to decide in accordance with statute, in cases where statutory law does give clear guidance, is that doing so serves the

[34] Ibid., 43.
[35] Ibid., 44–45.
[36] See ibid., 45–53. The theme is likewise discussed in Schmitt (2015), 78–80, and it reappears in Schmitt (1922), 30–31.
[37] Schmitt (1912), 84–85.

aim of achieving legal determinacy. This interpretation of the point and purpose of statute, Schmitt holds, can be extended into a general account of the way in which legal officials deal with difficult problems of interpretation and application.

In this vein, Schmitt's second line of argument is to point out that many features of legal practice that would otherwise be difficult to account for – that judges are required to provide reasons for their decisions; that important cases are decided not by a single judge, but rather by a collegium of several judges; that there is usually a possibility of appeal to a higher instance; that judges are more likely to invoke conventional morality than their own ideas of justice as a subsidiary standard; that they show anticipatory deference to the judicature of higher courts – can plausibly be understood to serve the purpose of legal determinacy.[38] All of these practices enhance the predictability of judicial decision and thus serve to realize legal determinacy.

The claim that legal practice is governed by a postulate of legal determinacy is introduced as a descriptive claim about 'contemporary legal practice'. Schmitt's interpretation of legal practice is nevertheless intended to yield normative conclusions and practical effects. If judges were to self-consciously adopt the description of legal practice offered in *Statute and Judgment* and let go of the myth that they do nothing more than to implement decisions already contained in statute, their decision-taking would be more likely to achieve legal determinacy.[39] And that practice is, as a matter of fact, committed to the achievement of legal determinacy entails, Schmitt suggests, that an individual judge is duty-bound to decide in the way most conformable to the postulate of legal determinacy.

Schmitt's Criterion of Correctness

That assumption finds expression in Schmitt's aim to provide an alternative criterion of the correctness of judicial decision, which is intended to replace the criterion of conformity to statute (or of norm-conformity more generally). Schmitt formulates his practice-based criterion of the correctness of a judicial decision as follows: 'A judicial decision is correct, today, if it is to be assumed that another judge would have decided in the same way. "Another judge", in this context, refers to the empirical type of the modern,

[38] See ibid., 68–79.
[39] See ibid., 73.