SUMMARY OF THE DOCTORAL DISSERTATION

Carl Schmitt and the Constitutional Reality of the Federal Republic of Germany: Between the Theory of Sovereignty and the Practice of Protecting the Basic Law

Karolina Kozłowska, Cardinal Stefan Wyszyński University in Warsaw

Research Problem

This dissertation seeks to answer the question to what extent post-war German constitutionalism—despite its declared and dogmatically entrenched distance from the intellectual legacy of Carl Schmitt—maintains direct, structural, functional, and parallel connections with his thought. The aim of the research is to determine whether these relations can be considered a lasting element of German constitutional culture and to identify the forms in which they manifest, particularly in post-war reflections on constitutional law, the concept of sovereignty, and the process of European integration.

Addressing this issue is fully justified from both a scholarly and institutional perspective. Despite growing international academic interest in Carl Schmitt's thought, no comprehensive and systematic study has yet been produced that analyzes the influence of his concepts on the shape of German constitutionalism after 1945—both in normative and institutional dimensions. This gap is all the more surprising given that many key categories present in the German constitutional order—such as sovereignty, constitutional identity, militant democracy, or the eternity clause—exhibit structural similarities to concepts developed by Schmitt during his decisionist phase.

The lack of a holistic approach to this issue results in fragmented analyses and insufficient recognition of the mechanisms through which Schmitt's thought—despite its controversial nature—penetrates contemporary constitutional debates. This dissertation attempts to fill that gap by employing an interdisciplinary research framework that combines hermeneutic, historical-legal, and comparative legal methods.

Structure of the Dissertation

The dissertation consists of six chapters.

Chapter I is methodological in nature—it outlines the main interpretative difficulties associated with analysing Schmitt's work, discusses the principal methodological approaches found in the literature, and presents the heuristic framework adopted in this study.

Chapter II provides an ideological and contextual introduction to the legal-political theory of the Rhineland jurist. It includes a synthetic presentation of his intellectual biography and an analysis of the cultural, political, and historical conditions shaping his thought. This analysis is not merely illustrative—fully understanding the structure of Schmitt's argumentation requires situating it within both the author's life experiences and the historical-cultural atmosphere of the era. Particular attention is given to the interdisciplinary character of Schmitt's reflections, as his second scholarly existence is often found in adjacent disciplines.

Chapters III and IV are devoted to reconstructing the fundamental categories constituting Schmitt's legal-political thought during the Weimar Republic, i.e., the decisionist phase. Among his numerous works, those selected for analysis present a relatively coherent system of ideas, including: *Political Romanticism*, *Dictatorship*, *Political Theology*, *The Crisis of Parliamentary Democracy*, *Roman Catholicism and Political Form*, *The Concept of the Political*, and *Legality and Legitimacy*.

Decisionism is a concept according to which the foundation of legal order is not an abstract norm but a sovereign decision made in an exceptional situation. In this view, the decision precedes the norm—it constitutes the original act that establishes the framework within which legal and moral rules can operate. Decisionism does not reject ethics but shifts it beyond the horizon of liberal law, directing

attention toward existential responsibility and the burden of the founding act. On the one hand, it may be seen as an expression of radical political realism; on the other, it reveals a potential openness to violence and arbitrariness of power. Both aspects, however, remain inseparable and constitutive of Schmitt's reflection.

In Schmitt's thought, sovereignty appears as a potential for decision-making, the realization of which does not guarantee that it will not be turned against the very order it was meant to protect. In *Legality and Legitimacy*, which develops earlier intuitions found in *Political Theology*, Schmitt distances himself from assigning sovereignty to any specific state organ. Instead, he presents it as a dynamic category—an analytical tool rather than a normative one—whose center may shift depending on the actual configuration of political forces. When the capacity to make decisions moves from parliament to the executive (*Regierungsstaat*), the judiciary (*Jurisdiktioneller Rechtsstaat*), or the technocratic administrative apparatus (*Verwaltungsstaat*), these institutions become the temporary bearers of sovereignty.

According to Schmitt, shifts in the center of sovereignty are institutional consequences of the breakdown of identity between legality and legitimacy. In the ideal model of the rule of law, these categories are identical—what is legal is simultaneously legitimized. In practice, however, under conditions of mass democracy, this unity is disrupted: legality becomes the result of impersonal procedure, while legitimacy is displaced by technical law-making mechanisms. Here emerges Schmitt's key thesis—the crisis of the legislative state (*Gesetzgebungsstaat*) stems from the fact that the normative facade no longer corresponds to the actual decision-making center. The state begins to function as a normative machine, in which the rule of law is illusory, and decisions are made within opaque structures of the executive, judiciary, or administration. The decision does not disappear—it becomes invisible—hidden beneath the layer of formal legality, yet remains the actual source of action and order maintenance.

Schmitt thus transforms his earlier concept of the state of exception into a critique of the "state of normalcy," in which institutional stability masks the fact that every order is based on decision, not norm. Legality, understood as procedural compliance, loses its value if not linked to the original moment of legitimation. Therefore, Schmitt calls for a return to thinking about politicality as the source of law.

In this context, Schmitt's mature decisionism reveals its paradoxical nature—it is not a celebration of arbitrariness but a reminder that the political-legal order requires a decision that transcends procedure. *Legality and Legitimacy* is a text in which Schmitt combines a critique of formalism with an ontology of political will, restoring the primacy of decision as a condition for the possibility of law.

Chapter V offers an in-depth analysis of Carl Schmitt's theory of the constitution, situated within the context of a methodological turning point in German constitutional scholarship (*Staatsrechtslehre*). In *Constitutional Theory*, Schmitt presents a fourfold typology of constitutions: absolute, relative, positive, and ideal. Of particular importance are the first two—absolute and relative constitutions—which define the poles of his reflection on the relationship between the unity of the political community and the formal-legal structure of the state. The absolute constitution expresses the original political decision that constitutes the community and its identity, whereas the relative constitution is reduced to a set of provisions regulating the functioning of state institutions, detached from that foundational decision.

Schmitt rejects the possibility of a constitution that is axiologically neutral—each constitution is a concrete political choice, and its meaning cannot be reduced to a collection of formal rules. As an act of sovereign decision, the constitution cannot be based on contradictory assumptions: one cannot simultaneously declare the protection of absolute values and allow procedures that enable their repeal. Such a performative contradiction leads to the erosion of the constitution's authority and the disintegration of its normative force.

For Schmitt, the constitution is an expression of the sovereign will of the people (*pouvoir constituant*) and must therefore contain mechanisms that protect it from arbitrary change by parliament. Otherwise, it loses its exceptional status and becomes merely a higher-ranking statute, vulnerable to manipulation by parliamentary majorities. In this sense, Schmitt advocates for the existence of an inviolable core of the constitution, which cannot be altered even through legal procedures. A constitution devoid of mechanisms to safeguard its axiological nucleus becomes defenseless against attempts at internal destruction—through procedures that may be used to dismantle it.

Consequently, the liberal model of the constitution, based on neutrality and proceduralism, proves—according to Schmitt—incapable of defending itself against forces that reject its foundational values. Hence, Schmitt formulates a clear alternative: either the state understands the constitution as a political act establishing an inviolable order of values, or it accepts procedural variability and the loss of sovereignty.

The chapter also explores Schmitt's dispute with Hans Kelsen, the creator of the pure theory of law. Schmitt criticizes the formalist conception of the constitution as a hierarchical system of norms, arguing that without a constitutive decision of the community, law loses its legitimacy. In his view, constitutional adjudication—the central element of Kelsen's model—is not a suitable guardian of the constitution. In *The Guardian of the Constitution*, Schmitt argues that constitutional disputes are inherently political, and their resolution by courts leads to the juridification of politics and the distortion of the judicial ethos. The constitutional court thus becomes a political actor—lacking democratic mandate, yet deciding the direction of state development.

In *Legality and Legitimacy*, Schmitt develops earlier intuitions from *Political Theology* and *The Guardian of the Constitution*, transforming decisionism into a dogmatic legal construction. He critiques the formalist understanding of legality as procedural compliance, pointing to its detachment from the original act of legitimation. Legality, devoid of grounding in the political decision of the community, becomes an empty form—susceptible to instrumentalization and technocratization.

Schmitt emphasizes that sovereignty does not lie in the content of the decision but in the capacity to effectively make it: it is the act of decision that constitutes the norm, not the other way around. In this sense, *Legality and Legitimacy* serves as a warning against the "normalization" of the state of exception and against conflating legality with legitimacy. Even direct democracy—if not embedded in a stable structure of legitimation—can, according to Schmitt, lead to systemic destabilization by fragmenting the legislative process and dispersing sovereignty among competing decision-making centers. Mechanisms of direct democracy were instrumentally used by the National Socialist regime to dismantle the Weimar Republic. Contemporary German constitutional doctrine, aware of these historical experiences, maintains a clear distance from nationwide referenda, viewing them as potentially destabilizing for the parliamentary-representative system.

Chapter VI is devoted to the reception of Carl Schmitt's constitutional theory in the Federal Republic of Germany. The core focus of the analysis is the set of challenges facing contemporary German constitutionalism—particularly the tensions between state sovereignty and processes of supranational integration. This analysis is based on three fundamental pillars.

First, it examines the normative structure of the Basic Law, with particular attention to provisions that are crucial from the perspective of:

(i) **sovereignty**: Article 1(1) (human dignity as the source of fundamental rights), Article 20 (foundations of the democratic order and the right to resistance), Article 23 (protection of fundamental rights within European integration and the principle of subsidiarity), Article 24 (transfer of sovereign rights within a collective security system), and Article 79(3) (the eternity clause);

(ii) **the doctrine of militant democracy**: Article 9 (ban on associations that violate the constitution), Article 18 (loss of fundamental rights in case of their abuse), Article 21(2) (ban on unconstitutional political parties), and Article 20(4) (right to resist attempts to overthrow the constitutional order).

Second, it analyzes the jurisprudence of the Federal Constitutional Court, which—through the development of institutions such as constitutional identity review (*Identitätskontrolle*) and the doctrine of the "masters of the treaties" (*Herren der Verträge*)—acts as an active guardian of the constitutional order. The Court claims the competence to assess the admissibility of integration processes, referring to the axiological foundations of the German constitution.

Third, it explores the environmental and ideological dependencies as well as the reinterpretation of Schmittian categories within German constitutional scholarship.

This research framework allows for an examination of the extent to which Schmitt's thought—despite its historical context and controversial legacy—remains a living point of reference in reflections on the relationship between sovereignty and constitutionalism in the contemporary German political and legal order.

The conclusion presented in Chapter VI also serves as a summary of the entire dissertation. The work is complemented by a bibliography.

Conclusion

The author concludes that Carl Schmitt's philosophy of law does not constitute a coherent system but rather a dispersed intellectual project which—despite its controversies—has exerted a lasting influence on German constitutional debate. Schmittian categories of sovereignty, politicality, and the inviolable core of the constitution, although officially rejected, remain present within the structure of German constitutionalism—often in a reformed, institutionalized form.

The Federal Constitutional Court, operating within a legalist paradigm, does not entirely reject the logic of decision. Instead, it transforms it into a logic of constitutional responsibility, in which decision does not negate law but constitutes and protects it. Mechanisms such as constitutional identity review (*Identitätskontrolle*), the eternity clause (Article 79(3) GG), and the doctrine of militant democracy (*streitbare Demokratie*) exhibit structural similarities to Schmitt's vision of the constitution as a political act.

Schmitt's legacy appears ambivalent: on the one hand, it serves as a warning against the abuse of power and the instrumentalization of law; on the other, it inspires reflection on the limits of normativism in times of crisis. In this sense, his thought remains relevant—not as a doctrine, but as a tool for critical analysis of contemporary tensions between law, politics, and sovereignty.