

Carl Schmitt and his legal support for Nazism

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ABSTRACT

This study will look at the life and work of Carl Schmitt, highlighting his legal theory, his relationship with the Nazi regime and the impact of his ideas on the Nazification of German law. Schmitt was a controversial 20th century thinker whose legal thinking was intertwined with his political ideas and the historical context of his time. His theory of decisionism established a direct correlation between law and sovereignty, questioning formal normativism and liberalism. Although criticized for his affiliation with the Nazi party in 1933, his legal work is considered profound and coherent, deserving scientific study regardless of ideology. During the Weimar Republic, Schmitt feared the crisis and fragmentation of the German state and advocated exceptional powers for the Reich President. The Nazis' rise to power surprised him, but he tried to put into practice his constitutional theory of the "Total State", which ended up influencing the Nazification of law. The use of general clauses and vague concepts allowed rules to be interpreted according to the Nazi worldview. Schmitt argued that judges should fill in the content of the clauses according to the Führer's vision, aligning the actions of the courts with the interests of the German people. Schmitt's relationship with the Nazi regime was ambiguous, oscillating between moments of support and distrust of Hitler. The work highlights the importance of historical context to understand Schmitt's reflections and the impact of his ideas on the application of law during the Nazi period. The research seeks to offer a critical and independent analysis, aiming to deepen the understanding of the thinker and his legacy, which still echoes in contemporary debates on law and politics.

Keywords: Theory of law, Nazism, Decisionism, Carl Schmitt, Constitution.

INTRODUCTION

The work of Carl Schmitt, a prominent figure in 20th century legal and political thought, is marked by deep controversy and polarized opinions. His legal theory, intricately intertwined with his political ideas and the historical context of his time, has been the subject of critical analysis and heated academic debate. While his thinking on law is considered profound and coherent by some scholars, his affiliation with the Nazi party in 1933 is the subject of severe criticism and questions about his intellectual independence.

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Throughout this research, we will examine Carl Schmitt's life, his influences and his intellectual trajectory in detail. We will analyze his legal theory, with a special focus on the decisionist conception, which seeks to directly correlate the concepts of Law and Sovereignty. We will explore the political context of Germany during the Weimar Republic, the period in which Schmitt developed most of his works, and the tensions that culminated in the rise of Nazism to power.

In the course of this work, we will delve into his relationship with the Nazi regime, investigating his motivations and positions amid a scenario of political opportunism and ideological ambiguity. We will address the controversy surrounding his support for the totalitarian state, the texts he wrote in defense of Nazism and the complexities of his political positions.

In addition, we will deepen the analysis of Carl Schmitt's constitutional theory and its relationship with the process of Nazification of German law. We will examine how his ideas influenced the interpretation and application of legal norms during the Nazi regime, especially through the use of general clauses and vague concepts that allowed Nazi ideology to be incorporated into judicial decisions.

The research is justified by the need to take a critical and independent approach, contextualizing Carl Schmitt's reflections in the historical and political panorama of the time. While some consider him a brilliant thinker whose ideas deserve to be studied scientifically, others see him as a political opportunist who contributed to the ideological foundation of a totalitarian regime.

By exploring Carl Schmitt's ideas and trajectory, this work aims to shed light on one of the most controversial thinkers of the 20th century and encourage a deeper and more thoughtful analysis of his contributions to the legal and political fields. Only through a critical and well-founded analysis will we be able to fully understand the legacy and complexities of this thinker that still resonate in our time.

THE LIFE OF CARL SCHMITT

Carl Schmitt is undoubtedly one of the most controversial thinkers of the 20th century. His legal work is often intertwined with his political ideas and the events of his time. Despite the criticism he received for his affiliation with the Nazi party in 1930, his legal thinking is profound and coherent, constituting a vast body of work that deserves to be studied scientifically and independently of ideologies.

In his work, we find scientific texts on the theory of law, some of which contain ideological and pamphleteering speeches. This personal paradox generated conflict between his intellectual independence and political opportunism, even resulting in death threats from the Nazi regime, due to his past in which he maintained contact with Jews, such as his friend Dr. Fritz Eisler, to whom he dedicated the work "Theory of the Constitution" and who died in 1914. His thinking ended up upsetting the Nazi regime itself, despite the fact that he modified his discourse to favor it, presenting anti-Semitic content in some texts.



The core of his theory is based on decisionist legal thinking. Schmitt debated not only the formal normativism represented by Kelsen, but also liberalism and the parliamentary regime. Unlike Kelsen, he establishes a direct correlation between the concepts of Law and Sovereignty, not separating them completely.

His parents' Catholic religious upbringing had a strong influence on his intellectual career. The political situation in Germany after the First World War, the Bolshevik Revolution, the German communist uprisings and the effects of the Treaty of Versailles on the country had a profound impact on his generation. The Weimar Republic, established in 1919, and the beginning of parliamentarianism to replace an authoritarian regime were subjects of great concern in his intellectual reflection.

Schmitt deeply feared a crisis and fragmentation of the German state, which was marked by a strong division of parties in parliament. He saw free debate, which he called "political romanticism", as incapable of reaching effective decisions. For this reason, he embraced a conservative position, defending the guarantee of exceptional powers to the President of the Reich.

Ronaldo Porto Macedo Jr (2001) points out that, like other German intellectuals, Schmitt underestimated the power of the Nazis in 1930 and didn't trust Adolf Hitler, believing that he wouldn't be able to carry out the necessary reforms and avoid the crisis that was plaguing the country, which was hampered by a pluralist parliament. Even after the Nazis came to power, Schmitt still believed that his conservative and traditional ideas could contain the dangers of the dictatorship announced by the new Führer.

On May 1, 1933, after the Nazi party purged socialist, Jewish, liberal and anti-Nazi professors from German universities, Schmitt joined the National Socialist party. During this period, he wrote many texts on the totalitarian state, including anti-Semitic remarks in his works. However, it is important to note that, even though he wrote in support of Nazism, he constantly had to prove his ideological adherence to the Nazis, and was considered by them to be an "opportunist".

His opportunism reached a point where his positions were not accepted as authentic by either the Nazis or the anti-Nazis. He faced a difficult situation both internally and externally. From 1936, Schmitt remained silent until the end of the Second World War. After this period, he resumed his writing activities.

In this work, we will focus on Schmitt's works produced during the Weimar Republic, in the period between the wars. Some argue that his real intention in supporting the Nazi regime was to try to realize his constitutional theory of the "Total State", not the dictatorial state that was established in the way it was. In order to analyze his decisionist theory in contrast to Kelsen's formal normativism, it is essential to contextualize it in his time, since his reflections were influenced by the historical events that surrounded him.



CARL SCHMITT AND THE LAW

The work by Ronaldo Porto Macedo Jr (2001), already mentioned above, was originally a master's dissertation defended at USP, in the Philosophy Department. Its focus is on a little explored area in understanding Carl Schmitt's thought, which is his legal theory. Generally, Schmitt is known for his political thought or is considered for his studies in constitutional law. However, the general theory of law, which is an intermediate field between political philosophy and specific legal technique, is the subject explored by Porto Macedo Jr (2001).

The analysis of Schmitt's legal theory highlights a number of perspectives, the main one being decisionism. Schmitt's approach to decisionism is linked to a tradition that goes back as far as Hobbes and Donoso Cortés. In the specifically legal sphere, his first works situate the legal phenomenon not in the norm and its imperative commands, but in the decision, attributing to the sentence a much more relevant importance for the law than legislation. In the political context, decisionism reveals the realism of European political organization, which experienced moments of bourgeois neutralization in the 19th century, but saw the emergence of non-liberal thinking in the 20th century through Nazism, Fascism and the Soviet Union.

Schmitt's decisionism ranges from moments of complete disengagement from ethical precepts to extremes of religious conservatism with a Catholic background. In his initial phase of thought (the 1920s), he did not find a metaphysical, theological or humanitarian moral basis for his decisions. In this sense, his position is close to Nietzschean-inspired moral relativism or even moral skepticism in the Hobbesian mold. Later, Schmitt admits that social institutions act as a "foundation" or parameter for moral decisions, thus making explicit the Christian and conservative foundations of his thinking. However, society as a point of reference for moral decision does not meet all the requirements of an immutable metaphysical foundation, remaining a mutable reference subject to constant re-evaluation.

For Schmitt, as for Hobbes, the authority that decides and creates law has no clear and transparent metaphysical foundation. "Auctoritas non veritas, facit legem" - authority, not truth, makes the law. This lack of a clear and absolute foundation for authority is a characteristic of Schmittian decisionism in the moral and legal spheres.

In addition to the perspective of decisionism, other issues are intrinsically linked to it, such as sovereignty and exception. Schmitt's famous phrase that "the sovereign is the one who decides on the state of exception" cannot simply be understood as praise for dictatorship or the exception itself. According to Porto Macedo Jr (2001), Schmitt weaves a network in which these concepts necessarily refer to each other. These connections make Schmitt an extremely complex and refined thinker on law and politics, dealing simultaneously with the exception within institutions and institutions within the exception. The clear and precise definition of the limits of the state of exception is a difficult task for Schmitt, even if a



constitution provides for the competence of the ruler during this period. The sovereign decides both on the order that subsists in the extreme case of emergency and on the actions that must be taken to overcome the chaos and restore normality. He is outside the existing legal order, but at the same time belongs to it, as he is competent to decide whether the Constitution as a whole can be suspended.

All of Schmitt's polemics on exception and normality are added to the issues of his personal trajectory, analyzed in the initial part of Porto Macedo Jr.'s work. Thus, the epithet "jurist of Nazism" is insufficient to end all the controversial debates about Schmitt.

CARL SCHMITT'S CONSTITUTIONAL THEORY AND ITS LEGAL SUPPORT FOR NAZISM

In the famous 1934 article "National Socialism and the Rule of Law", the renowned German publicist Carl Schmitt openly called for all general clauses and undetermined legal concepts to be interpreted in an unrestrictedly National Socialist sense. These general clauses, seen as "entry points", came to be celebrated as mechanisms for flooding old legal thinking with the ideas of the new regime (LANGE, 1933).

In the context of Nazi-fascism, the most important general clauses of the German Civil Code, such as the objective good faith of §242 and the provision of §138, I, referring to good customs, were associated with "healthy popular sentiment" and the "ethnic community", filling their content with the racist and authoritarian worldview of Nazism. Nazi doctrine emphasized the Germanic origin of these clauses, highlighting their supposed genuinely German value (LARENZ, 1936).

The new doctrinal understanding of general clauses, which emerged in the years 1933-1945, strongly penetrated jurisprudence, making them mechanisms for the Nazification of German law, without the need for legislative changes (SCHMITT, 1934). Heinrich Lange, another jurist associated with Nazism, argued that these clauses would make it possible to insert Nazi "cuckoo's eggs" into German law, in other words, to adapt existing laws to the principles of the Nazi regime (SCHMITT, 1934).

Various branches of law, such as criminal law and tax law, underwent significant changes with the introduction of open principles and concepts, susceptible to interpretations in line with Nazi conceptions. The generic principles made it possible to interpret the rules according to the reality of the concrete orders, impregnated with the ideas of National Socialism (SCHMITT, 1934).

In the "new Public Law and Administrative Law", principles such as leadership were incorporated, along with concepts such as loyalty, obedience, discipline and honor, which could only be understood in the context of a concrete order and community, according to the Nazi perspective (SCHMITT, 1934).

These changes in the interpretation and application of the law made judges and courts essential to the realization of legal Nazification. Nazi doctrine emphasized the role of judges in filling in the content



of general clauses according to the Führer's worldview, thus aligning the actions of the courts with the interests of the German people (STOLLEIS, 2007).

The process of Nazification of German law during the Nazi regime highlights the importance of general clauses as instruments for reinterpreting the legal system in the light of National Socialism. A critical analysis of this period and of Carl Schmitt's ideas allows us to understand the profound impact of his legal and political reflections, as well as the consequences for the German legal system under Nazi rule.

The legislator of the National Socialist regime also made changes to labor legislation in order to break with a perspective based on private and individualistic rights in the field of labor law. The very terminology adopted reflects this change: instead of mentioning a "collective labor contract", the law now referred to the "wage order"; instead of mentioning employers and employees, it now referred to the "leaders and followers" of the company, working together to promote the company's objectives and the common welfare of the people and the state (SCHMITT, 1934).

Other examples of general clauses have also been identified in the field of civil law. According to Curran's reflections on the work of Bernd Rüthers, some contractual clauses were used to deprive Jews of their rights, based on the supposed violation of "good customs" or "good faith", simply because they were of Jewish origin (CURRAN, 2001-2002).

By associating broad and vague concepts with the concrete reality of the German people and state, Schmitt provided a loophole for the infiltration of Nazi ideology into the interpretation of norms, both pre-existing and newly created. The "Nazification" of law mainly took place at the time of the application of laws, where the specific situation was taken into account to determine the interpretation of norms. In this context, the role of judges and courts was crucial, not limited to the mere mechanical application of laws. On the contrary, these judicial institutions had to shape the content of the clauses and principles according to the Nazi perspective (STOLLEIS, 2007).

This approach is evidenced by the way Schmitt referred to the Führer as the "supreme judge", justifying the legality of Hitler's action that resulted in the elimination and execution of several members of the Nazi party, an event known as the "Night of the Long Knives". In the text entitled "The Führer Protects the Law", Schmitt legitimizes this action as a "legitimate exercise of judicature", which was beyond the scrutiny of justice, since Hitler was the highest judicial authority.

The use of general clauses and principles facilitated the assimilation of the National Socialist vision in order to align the actions of the courts with the will of the Führer, who was considered the ultimate interpreter and personification of the "interests of the German people" and the "national spirit" (KAUFMANN, 1988). From this perspective, Schmitt endorsed the statement by the Secretary of State, "Dr." Freisler, that the consolidation of Nazi law did not require a reform of the judicial system, but rather



a reformulation of the legal profession. As Michel Stolleis points out, "the distortion of the original legislative intention by ideologically oriented judges became more significant in the daily legal practice of National Socialism than the injustice directly prescribed by the legislator" (STOLLEIS, 2007). In the context of interpreting and applying German law, Schmitt argued that judges should demonstrate adherence to the principle of ethnic identity, which underpinned Nazi dogmas of racial superiority (SCHMITT, 1933).

More broadly, with regard to the formation of legal careers according to National Socialist ideology, Karl Loewenstein points out in a 1936 writing on law in the Third Reich that the training of young jurists was centralized and standardized. Admission to the judicial services was not granted to any candidate without them passing a specific course of education in a "training camp", covering not only legal subjects, but also the principles of National Socialism. Before admission, a thorough investigation was carried out to ensure proper loyalty and submission (LOEWENSTEIN, 1936).

Therefore, general clauses provided an opening to determine the content of concrete norms in a decidedly interpretative way, in line with the precepts of National Socialism. For Schmitt, this openness in the field of the application of the law allowed for the elaboration of specific responses to concrete situations. At the same time, as emphasized by Ingeborg Maus, terms such as "good faith" or "good customs" no longer referred to the individual bourgeois legal structure, but were reinterpreted within the new Nazi order (MAUS, 1997).

CONCLUSIONS

A more detailed analysis of Carl Schmitt's work reveals deeply controversial legal thinking, especially because of his association with the Nazi regime. The relationship between his political and legal ideas is undeniable, and the historical context in which he lived played a crucial role in his reflections.

One of the main points of criticism is Schmitt's political opportunism. He joined the Nazi party in 1933, but his ideological adherence was not fully accepted by the Nazis, who saw him as an "opportunist" and doubted his loyalty. This ambiguity in his political position is remarkable and calls into question his intellectual independence. His past, in which he maintained friendships with Jews, such as Dr. Fritz Eisler, to whom he dedicated one of his works, raises questions about his motivations and attitudes towards the Nazi regime.

Schmitt's decisionist theory is also subject to criticism. His understanding that authority, not truth, makes the law raises concerns about the legitimacy and justice of legal decisions. His vision of sovereignty and exception, especially his famous phrase that "the sovereign is the one who decides on the state of exception", can be interpreted as a justification for authoritarianism and totalitarianism. This lack



of clear and transparent grounds for decision-making authority leaves room for arbitrariness and the political manipulation of law.

Schmitt's relationship with Nazism is complex. He may have initially believed that his conservative and traditional ideas could contain the dangers of the Nazi dictatorship, but when he joined the party in 1933, he ended up writing texts in support of the totalitarian state. Although his works were considered relevant to the ideological foundation of the regime, the inconstancy of his positions generated distrust among both Nazis and anti-Nazis.

The interpretation of Schmitt's legal theory in the light of Nazism raises concerns about how general clauses and vague concepts can be instrumentalized to promote a totalitarian ideology. The incorporation of principles and open concepts into German law allowed the reinterpretation of laws according to the precepts of National Socialism, which facilitated the Nazification of law without the need for radical legislative changes. This approach highlights the role of judges and courts in interpreting and applying the law, highlighting the relevance of their values and worldviews in the process.

It is important to note that Schmitt's work must be analyzed carefully and critically. His legal thought is complex and sophisticated, but it also carries the shadow of political opportunism and support for the Nazi regime. The use of his legal theory by the Nazis raises ethical and moral questions about the instrumentalization of law for the sake of a totalitarian and discriminatory ideology.

Although Bernd Rüthers' work, "Interpretation Unlimited", was a pioneer in highlighting the importance of reinterpreting existing law in the light of National Socialism for the Nazification of the German legal order, it is also essential to critically analyze Schmitt's participation in this process. The study of his personal trajectory, his motivations and the consequences of his ideas in the historical context are fundamental for a complete understanding of his legacy in the legal and political field.

In summary, a critical and detailed analysis of Carl Schmitt's work reveals a legal thought marked by contradictions and controversies. His association with the Nazi regime, his decisionist theory and the instrumentalization of general clauses for the Nazification of German law raise ethical and moral questions that must be carefully considered. It is important to study his works in a contextualized and ideology-independent way in order to understand the role of this controversial thinker in the legal and political landscape of the 20th century.



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