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Critique of Legal Positivism in German Political Thought (Carl Schmitt and Leo Strauss)¹

Ph.D. Dissertation Summary

Today law is not a common theme of political science. Since the separation of disciplines has been commonly established political scientists focus mainly on the political in party politics and international relations. They assume an idea of politics that disconnects the political from law. This phenomenon may be seen particularly in theory of law or philosophy of law. With the exception of legal historians interested in political and legal doctrines philosophical investigation of law is a matter of interest mostly for analytical jurisprudence. Since the latter has no direct relation to political science the history of law seems to be standing alone as the point of departure for reinvigorated political reflection on law and its foundations.

Carl Schmitt (1888-1895) and Leo Strauss (1899-1973) offer a good opportunity for that. They both belong to the most influential German thinkers of the last century. Despite their seemingly disparate discipline identity they share a holistic view of reality stemming from a primary assumption on the political nature of man. Their reflection either in form of legal polemics or in form of (re)writing of history of political philosophy deals with the foundations of political order and law. Moreover the question of political order is strictly connected with a challenge of revelation. Undoubtedly Schmitt and Strauss belong to those thinkers who acknowledge the connection between religion and politics as completely normal and perceive any attempt to negate this social fact as the direct way to the deep misunderstanding of reality. While Schmitt has influenced 20th century political science by his contribution to the discussion on political theology, Strauss introduces us to the theologico-political problem. A major premise of this thesis is that the nexus of religion, politics and law in Schmitt's and Strauss's thought may be seen explicitly in case of their critique of legal positivism. Legal positivism appears to be something more than a legal doctrine. The kind of critique, moral and political zeal of their quite different critiques reveal theologico-political context.

The dissertation deals with critique of legal positivism in Schmitt's and Strauss's thought. The aim of this work is to reconstruct two kinds of critique of legal positivism. As legal theorist and political philosopher, Schmitt and Strauss were naturally concerned with problems of politics, state and law. But their relation to legal positivism is neither strictly legal nor philosophical. It is equally political scientific as theological and literary (Schmitt) or philosophical and hermeneutical (Strauss). They were both interested in legal positivism and conceived it from a wider than historical perspective, willing to gain a general notion of its genesis, perversions and consequences.

The interpretation of Schmitt's and Strauss's thought goes with several basic premises: (1) every problem dealt by Schmitt and Strauss is, if not openly political, then at least potentially political, (2) concepts and opinions of both thinkers develop polemically, (3) their way of writing requires strenuous attention from a reader because it is not difficult to take their views for views of their enemies and it is easy to misconceive their diagnosis as a normative appeal, (4) readers of their works need to be very attentive because at least partially

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Schmitt and Strauss were esoteric writers: the most obvious mistakes may denote hidden communication.

The main goal of their critiques is liberalism. Legal positivism is only a symptom of it. Schmitt's and Strauss's critique of legal positivism proves that there is no single, coherent doctrine of legal positivism. Their arguments against it assume a whole philosophical or metaphysical system of liberal legal positivism. The political thinkers characterize legal positivism by attributing to it some relatively constant features: (1) positivism presupposes impersonal rule of law, (2) law is a work of man (even if it presents itself as divine), (3) law may be apolitical, (4) law is grounded in formal, methodical and value-free approach to reality, (5) possession of power/existence of power is a sufficient reason to claim obedience to (positive) law.

Schmitt's literal discussion of legal positivism is an obvious fact in comparison to more philosophical attitude of Strauss. One can even call it a kind of legal (in terms of discipline) supremacy of Schmitt. The author of *Political theology* was a legal theorist but his specific method, research approach and topics define his affect towards legal positivism. The roots of his critique are more political and theological than strictly legal or political scientific. His answer to positivistic and liberal normativism of Hans Kelsen is decisionism, a theory developed from theological and political roots. In Schmitt's view legal positivism negates the political and thus becomes a utopian vision of history. It is also closed in its own formalized language and the way of thinking that excludes exceptions and influences of other disciplines. From Schmitt's political and existential point of view legal positivism weakens state's power in the moment of danger. But decisionism is not the last systematical proposition of Schmitt against legal positivism. In this dissertation we propose an interpretation that decisionism from its beginning presupposed an idea of order. Decision then comes not from nothingness but from an order that needs to be reestablished. The proposition finds confirmation in his late theory of concrete order which is for us a developed version of Schmitt's anti-positivistic thought.

Strauss was not a lawyer and the problem of legal positivism is not explicit in his writings. Moreover Strauss is not a famous thinker among legal historians. The reason for such a lack of interest in Strauss's thought may be his natural law inclination. The main critique of legal positivism is present in rather late Strauss's writings best example of which is his most popular book *Natural Right and History*. Strauss's critique of legal positivism is grounded in his realization of the crisis of political philosophy. Positivism and historicism are two phenomena that negates the importance and need of political philosophy. Legal positivism with its positivistic and historicist tendencies is only an example of a general crisis of our time. Strauss postulates re-affirmation of political philosophy by means of resourcement in ancient Greek and partly in medieval non-Christian philosophy. He wants to restore a sense of political community organized by law of divine origins. Philosophers of the past teach us, says Strauss, that society needs law in its divine form to survive. The project of modernity seemingly gave a promise that could not be fulfilled – to destroy religion while preserving a homogenous society. In Strauss's view since law has been stripped of any non-human reference it became a positive human law. Without an eternal foundation law can be arbitrarily changed with no reference to the good of society and/or human individual.

Keywords: Carl Schmitt, Leo Strauss, legal positivism, political theology, political philosophy, liberalism, politics and religion

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