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Hans Kelsen's Judicial Decisionism versus Carl Schmitt's Concept of the One 'Right' Judicial Decision: Comments on Stanley L Paulson, 'Metamorphosis in Hans Kelsen's Legal Philosophy' (2017) 80(5) MLR 860-894

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Stanley Paulson's intriguing tracing of the developments of Hans Kelsen's work seems to maintain that Kelsen's decisionist stance of judicial decision-making was tamed by his constructivist 'Kantian' approach to law. While agreeing with Paulson's jurisprudential analysis, a denial of the radicalism of Kelsen's decisionism often is the basis for the classic juxtaposition between his and Carl Schmitt's decisionist theory. But the opposite view is more appropriate: Schmitt's judge has much less room for individual political views than Kelsen's.

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In a recent contribution to this journal Stanley Paulson has intriguingly traced the developments and ruptures in Hans Kelsen's concept of the legal ought in line with his earlier periodizations of Kelsen's oeuvre. He rightly refers to the fact that Kelsen in his Pure Theory sharply distinguishes between the role of scholars and legal practitioners. While legal scholars according to Kelsen have to refrain from opening 'legal science' for political ideologies and value statements, judges are entitled to inject politics and values into their individual decisions by way of interpreting legal norms. This rather peculiar differentiation in Kelsen's Pure Theory is indeed remarkable and has for quite some time attracted the attention if not the bewilderment of commentators on the Pure Theory. Kelsen experts in turn have often tried to explain and emasculate the radical position Kelsen takes throughout his oeuvre on the political nature of judicial decision-making.[1] Stanley Paulson in his contribution to the *MLR*, for instance, seems to maintain that Kelsen's decisionist

stance on judicial decision-making is during a certain period being tamed by his constructivist 'Kantian' approach to law in general (the 'Kantian filter'). Besides, only through somehow denying that Kelsen worked on the basis of a radical decisionist concept of judicial decision-making, the alleged and at the same time almost classic difference between Carl Schmitt's decisionist theory of law and Kelsen's legal formalism could be maintained. As I will argue in this contribution, the opposite view is indeed more appropriate. On closer inspection Schmitt's theory of judicial decision-making leaves much less room for the judge to inject political views into his or her judicial work than Kelsen's judge. For Schmitt there is only one 'right' legal answer as to the fundamental question how a judge should decide a legal dispute, even though this 'rightness' is argued by Schmitt in a highly idiosyncratic (non-Dworkinian) fashion. Most of the secondary literature on the two scholars underestimates the radical nature of Kelsen's theory of interpretation and fails to recognise that Schmitt actually had a sophisticated concept of judicial decision-making, which gave only very little room – if any – for individual judicial politics. Let me explain the two theories in more detail.

I. The Judicial Decision in Kelsen's Pure Theory as a Contingent Concretisation of Legal 'Frames'

For Kelsen, the decision of the court served to concretize abstract general norms. It thus had by no means only a declaratory character, in the sense of merely pronouncing already existing law. Rather, it had a constitutive, law-creating function: 'That there is held to be a concrete material fact at all, which is to be linked with a specific legal consequence, and that this concrete material fact is indeed linked with concrete legal consequences – this entire connection is created by the judicial decision.'[2] As Kelsen saw it, the decision by the court created an individual legal norm by concretizing a more general constitutional or statutory norm. According to the previously described hierarchical structure of the law (*Stufenbau*), the application of a higher-ranking norm within the hierarchy of norms was simultaneously the creation of a lower-ranking norm by the authorized legal organ. In this way, following Kelsen, the application could be seen as the dynamic process of concretizing norms.

Lawmaking was always an empirical act, the performance of which created a norm by having the act satisfy the conditions for the creation of a norm as laid down in a higher norm. For Kelsen there was, however, no guarantee that the concrete decision by a court was still in accord with the general norm that was being applied. Yet in such a case this individual norm still had the force of law. This was the institution of the *res iudicata*, which was central to every legal system. The theory of the hierarchical structure adopted from Adolf Julius Merkl allowed Kelsen to see the application of the law by the courts simultaneously as lawmaking. Moreover, because this was lawmaking at the last level of concretization, the court decided in the final analysis what was law.[3] Only the application of the law to the individual case, which laid claim to being valid even if it departed from the abstract rule, formed the concrete corpus of law: 'One should not overlook the important fact that in the last analysis the law is not what the legislator more or less clearly sets forth or what the

rule of custom more or less comprehensibly implies. The law is what the court finally decides.'[4]

If one sees the courts as the central organ of the legal system, as Kelsen did, the question of the nature and method of the judge's act of decision takes on special relevance. I shall therefore take a closer look at Kelsen's theory of interpretation and what it has to say about the boundaries or guiding principles of individual law making by the person who applies the law. According to Kelsen, the process of law making as it moves from a higher to a lower norm is guided by the mental procedure of legal interpretation. In addition to this mental process, the higher norm – to a certain extent – also predetermines the content of the lower norm. But this higher norm formed only the frame, within which the lower norm had to be established. Because the content of the lower norm was thus never completely 'determined', the interpretation of the norm served to choose one possible concretization of the more general framework provided by the higher norm. In addition, for Kelsen there was no method according to which only one of the several interpretations of a norm could be distinguished as correct. As he saw it, all methods of interpretation developed by the traditional doctrine lead to a possible, but never to the only, correct result. The possibility of interpretation arose precisely from the semantic openness of any norm to various inferable meanings. It was futile to try to establish 'legally' one single correct concretization by excluding other interpretations. For Kelsen, herewith distancing himself from the Free Law movement, objectively 'right' results of interpretation could not be arrived at either from judicial interpretive techniques such as analogy, or from the *argumentum e contrario*, or from the so-called weighing of interests.

In his Pure Theory of Law, Kelsen thus demystified the 'objectivity' of these methods of interpretation along with other classic techniques of legal argumentation. From a scholarly perspective, the only remaining purpose of interpretation was to determine an external semantic framework; one could speak here of the '*Wortlautgrenze*' (semantic frame) that circumscribed the subjective act of the judge's decision. In the second edition of his *Pure Theory*, Kelsen considered interpretation by legally authorized organs of 'authentic interpretation.'[5] With this, he demarcated this form of interpretation sharply from scholarly interpretation. Neither the judge, as the one applying the law, nor the legal scholar could claim that he or she alone was able to determine the only correct way of applying the norm. But in the case of the subjective decision of the judge, we are dealing with an act of application authorized by the legal system, whereas for Kelsen the legal scholar was not embedded within such a functional context. He had to limit himself to demonstrating the various decision options of the one applying the law and place them side by side as equals.[6]

In this way, the application of the norm was largely disconnected from the problem of jurisprudential cognition: 'For if there can be an interpretation of a norm, then the question as to which is the "correct" choice from among the possibilities given within the frame of the norm is hardly a question of cognition directed to the positive law; it is a problem not of legal theory but of legal policy.' The individual creation of a norm thus becomes a subjective act of will on the part of the judge: 'In applying a statute, there may well be room for cognitive activity beyond discovering the frame within which the act of application is to be confined; this is not cognition of the positive law,

however, but cognition of other norms, which can now make their way into the law-creating process, the norms, namely, of morality, of justice – social value-judgments customarily characterized with the catch-phrases "welfare of the people", "public interest", "progress", and so on. From the standpoint of the positive law, nothing can be said about their validity and whether or not they can be identified.'[7] The judge, unlike the legal scholar, was thus free to incorporate personal value-judgments, political maxims, and ideas of justice into his decision – according to Kelsen, he could not avoid doing so.

In order to get a better grasp of how far-reaching Kelsen's concept of judicial lawmaking is, a comparison with H.L.A. Hart's theory of adjudication may be helpful. Hart seems to follow Kelsen in accepting that norms can be indeterminate or 'open textured' which leads to a relatively wide judicial discretion when applying such norms. Instead of a 'frame' provided by the higher law Hart speaks of a 'core of certainty' and a 'penumbra of doubt'.[8] In Hart's view, when being confronted with indeterminacy and lacunae, judges must perform an act of 'interstitial' legislation, which, however, compared to parliamentary legislation, operates under various (unspecified) institutional constraints. Despite a slight divergence in metaphors, Hart seems to follow Kelsen's move to destabilize the boundary between adjudication and lawmaking without, however, endorsing Kelsen's strong (continental) notions of hierarchical ordering of the legal system. At first sight, both theories seem to uphold the distinction between 'cognition' and 'decisionism' by reducing judicial discretion to deciding within the 'frame' or the 'penumbra' of the applicable law. A closer look at Kelsen's somewhat ambiguous statements on judicial interpretation, however, reveals that the determination of the meaning of the frame itself for Kelsen also cannot be fully objectified and is a willful und ultimately subjective act of the judge.[9] While Kelsen assumes that the text of the norm provides a frame, from which the process of interpretation has to start, his radical skepticism towards human ability to infer an objective meaning of such a frame relativizes this practical point of departure for any judicial reasoning. Determining the meaning of the frame inevitably also goes beyond objective 'cognition'. Thus the 'frame' for Kelsen is not more than the textual elements of a norm, which serve as a praxeological reference point for judges. In that sense, he even seems to go beyond Hart's explanation that reduces *decisionism* or the political dimension to a limited area of indeterminacy within the law.

This brings us to a critical point of the Pure Theory, one to which the secondary literature about the now 'classic' 1931 Weimar dispute over the limits of constitutional adjudication has called attention.[10] Critics see in the possibility granted by Kelsen of a largely free constitutional court with the ability to engage in political lawmaking as a contradiction to the rule-of-law-limitation on politics, which he actually desired. What Kelsen asked the enlightened jurist to confront through his view of the court decision, however, was not so much a contradiction in the theoretical approach of the Pure Theory, as one of the central paradoxes of the law. The legal sociologist Kelsen was aware of the central role that binding decisions by courts have for the ability of the legal system to function, but he was realistic enough not to resolve the paradox of the 'undecidability of the decision' (Luhmann). Instead, the Pure Theory of Law sought to constructively capture the objectively uncontrollable and in the final

analysis irrational character of the court decision through the dynamic view of the creation of law. That was also the reason why Kelsen did not need to restrict the subjectivity of the court decision through a purified theory of interpretation. The intrusion of the judge's subjective value-judgments into decisions of the court should *not* be glossed over by the seeming objectivity of the theories of interpretation. Instead, Kelsen construed the scientifically uncontrollable factor as an act of lawmaking of the judge that was authorized by the legal system.

In fact, for Kelsen, considerations of fairness – in the sense of the adjustment of the abstract norm to the specific circumstances of the case – by a court rendering compulsory decisions were unavoidable: 'A court which really has compulsory jurisdiction, that is to say, which is competent to decide finally all disputes without any exception, inevitably will adapt positive law in its concrete decisions gradually and imperceptively to actual needs; in other words, will decide on the basis of equity, even if it is not expressly empowered to apply principles other than those of law.'[11]

II. Carl Schmitt's Concept of the One Legally 'Right' Judicial Decision

Carl Schmitt is commonly known for his theory of *decisionism* (Dezisionismus), which he developed in his book *Politische Theologie* (1922) and for his associated concept of the 'state of exception' (*Ausnahmezustand*). Most of the secondary literature focuses on these Interwar publications of Schmitt in which he tried to construct a theoretical explanation for legal decisions of the strongest political power or institution in situations of existential crisis and confrontation. Famously according to Schmitt, a legal decision in such a moment of existential crisis of a political community is 'from a normative perspective, something which emerges out of nothingness.' ('*normativ betrachtet*, *aus dem Nichts geboren*').[12] On the basis of these Interwar publications, Schmittian 'decisionism' has long been portrayed as a deeply apologetic and power-centred theory that – in contradistinction to Kelsenian normativism – accords no autonomous role for law as a constraining element in a situation of crisis and political upheavals. Schmitt's strong support of Hitler's dictatorial rule and his personal involvement in early Nazi-rule in Germany add a biographical dimension to this interpretation. This in many ways is a helpful critique of Schmitt's *Politische Theologie*, to which I generally would and actually did subscribe. Interestingly, Schmitt himself in a conscious paradoxical move always insisted that these normatively unfounded decisions remained *legal* decisions and as such an issue of *legal* theory. His relatively short, ambivalent and provocative Weimar statements in *Politische Theologie* have for a long time absorbed most of the scholarly attention and coined the reception of Schmittian *decisionism*.

His pre-World War I writings on *judicial* decision-making, however, which include the monograph *Gesetz und Urteil* (*Law and Judgment*) (1911) have received less attention in the post-World War II secondary literature, even though they constitute a comprehensive and original theory of the role and function of the judiciary. In *Gesetz und Urteil* Schmitt develops a whole theory of judicial decision-making, which reacted to the Free Law movement with an elaborate and idiosyncratic answer. Like Kelsen, Schmitt dismisses not only the 19th century old hermeneutic canon of methods of

interpretation but also newer theories, which sought to explain judicial decision-making through the weighing of interests or 'logical' reasoning, such as *analogy*, *argumentum e contrario.* An objective theory of the 'right' judicial decision for him could not be derived from these approaches. All these theories operated on the flawed assumption that the judge in a concrete case could in a methodologically controlled way determine the will of the law ('Wille des Gesetzes') and subsequently bring it to bear in the decision. All these methods may for Schmitt have a legitimate function for legal scholarship for an *abstract* scholarly interpretation of the law, but they cannot control or regulate the *concrete* (judicial) application of the norm to a particular case (subsumption).[13] It is important to note that Schmitt aims at developing an immanent theory of the practice of judicial decision-making, explaining law's 'practical validity' and not a theory of scholarly interpretation of the law.

The basis for Schmitt's theory of judicial decision-making is the 'principle of legal determination' ('Prinzip der Rechtsbestimmtheit') which has the following materially purified theoretical content: legal practice in all its dimensions works on the basis of a compulsion or force to decide or to generate 'eine Entscheidung an sich' (the legislative decision as such). His explanation of this principle of substantively 'indifferent' legal decisions starts with the decisions taken by the legislator. Assumed moral or political purposes of an abstract law or norm for Schmitt can neither theoretically determine its content nor its subsequent application. Schmitt provides examples from domestic legislation that many norms do not follow a specific moral or political purpose but are being enacted for the *sole* reason that a certain question needs to be regulated or decided. The existence of most laws reflects the societal necessity 'that decisions must ultimately be made' ('*dass überhaupt eine Entscheidung gegeben werden muss*'). Thus it is the legislative decision as such, reflecting the wish to have a binding legal regulation of a societal issue, and not any supposed pre-legal moral, political or economic motive, which constitutes the primary purpose of legislation. As a consequence, legal decisions from the perspective of the 'principle of legal determination' must be conceptualised as being 'indifferent' towards any pre-legal purposes and in that sense legal decisions on all levels must be conceptualized as inherently free from normative constraints ('*normfrei*'). It is a purely formal principle, the content of which is reduced to the compulsion to decide and the formalized factual product of the decision, the publicised law, judgment, etc.; a principle that cannot be equated with a much more demanding substantive principle of 'legal certainty' ('*Rechtssicherheit*') of the liberal rule of law tradition. Compared to Kelsen's realistic approach to interpretation, Schmitt even more radically denies the existence of a semantic 'frame' provided by the higher norm that at least prima facie controls and limits the range of defensible results of the process of judicial norm application.

But how can Schmitt on that rather minimalist and unorthodox basis develop the promised theoretical yardstick for the 'right' judicial decision? Schmitt now introduces a theoretical axiom, which is derived and argued from an institutional perspective on judicial practice and which is compatible with his 'principle of legal determination'. For him 'a judicial decision is correct today when it can be assumed that another judge would have decided in the same way' ('*eine richterliche Entscheidung ist heute dann*

richtig, wenn anzunehmen ist, dass ein anderer Richter so entschieden hätte'). Schmitt herewith further shifts the theoretical perspective into institutionalised legal practice. Judges in modern legal systems do not derive their decisions from the applicable legal norms but from judicial practice. To think Schmitt propagated a sophisticated theory of judicial precedents, however, underestimates the unorthodox manner in which Schmitt approaches his topic. For him judicial precedents are only being used strategically and instrumentally by judges to demonstrate that their decision would have been taken by every other expertly trained judge – they do not control or predetermine the decision as such. Equally, all other recognized methods of interpretation, both the classic canon as well as balancing of interests and references to societal and moral values are being employed by judges for this particular purpose. Even the act of a 'smooth subsumption' ('*glatte Subsumption*') is only supposed to give the decision a justification. This increases the likelihood that another normal judge called 'the empirical type of the modern expertly trained jurist' would have come to the same decision, for Schmitt 'subsumption' is, however, a particularly safe option to generate a 'right' decision.[14]

Schmitt has two central arguments as to why the professional acceptability of a decision is the best scholarly explanation for the 'right' judicial decision. Modern legal systems do operate with collegial judicial bodies for the very reason that the presence of three or more judges is supposed to guarantee that a decision will be taken that is in line with the general expectations of judicial practice. These collegial bodies are used to avoid mistakes, which for Schmitt means that they attempt to avoid unorthodox decisions – to avoid idiosyncratic decisions not in line with such professional expectations. The second argument is the institutionalisation of appeal structures in 'modern' legal systems. In line with Schmitt's explanation of collegial judicial bodies, he sees appeal structures established by a hierarchical court system as an instrument to produce judicial decisions which avoid subjectivity and instead increase the likelihood that the final decision conforms to general expectations of a 'normal' professionally trained judge. Very coherently, Schmitt also explains the function of judicial reasoning from his initial axiom. The reasoning is an integral part of the decision not because it produces transparency or as an act of methodological self-control by the judge. Instead for Schmitt it has the function of convincing other judges, in particular those sitting in the appeal body, that the decision is correct. Using precedents is a particularly effective way of achieving this result.

Carl Schmitt would not be Carl Schmitt if he at this point missed out on the occasion to push his axiom to the extremes. According to his judicial 'categorical imperative' the decision is 'right' if another normal judge in the same situation would have decided likewise. Hence, professional peer expectations take precedence over both the moral inclinations of the judge and even the wording of applicable norms. If this requires deciding *contra legem* or outside of accepted moral standards, then judges, according to Schmitt, usually will and must do so. With this internally coherent theoretical justification of *contra legem* decisions as potentially 'right' judgments Schmitt ends his treatise on a provocative stance dissolving the notion of the judge being bound by the applicable law ('Gesetzesbindung'). It is important to note that Schmitt's judge in contradistinction to Kelsen's approach is less free to inject

subjective moral values into his decisions. Schmitt insists that the judge must justify her decision before the entire body of judicial practice. That is why *contra legem* decisions can never be decisions of individual judges only but will be taken and maintained by collective judicial practice. In deciding a case the individual judge executes an institutional practice and not a subjective feeling. This overall institutional practice for Schmitt helps to realize the idea of justice, which from a legal perspective essentially relies on the notion of predictability. And with the judge merely executing the will of an institutionalised practice, controlled by colleagues and appeal judges, judicial decisions become more predictable.[15]

A comparison between these two approaches and the one developed by Duncan Kennedy at the end of the twentieth century can help to clarify their differences and commonalities.[16] Kennedy criticizes Kelsen and Hart for the idea that the place of subjectivity and ideology in judicial decision-making is reduced to the act of choosing between alternative interpretations within the frame or penumbra provided by the higher applicable norm. While Kelsen and Hart did understand that judicial decisions are individualised 'legislation' or lawmaking they still contained the ideological dimension of this act through the notions of semantic 'frames' (Kelsen) and 'cores/penumbras' (Hart). Subjectivity is reduced to deciding how to fill or concretize the 'frame' or 'penumbra'. While this is a correct description of Hart's theory of adjudication, Kennedy seems to overlook that if one takes Kelsen's interpretative scepticism seriously already at the level of the determination of the 'frame' no objective method of 'cognition' was available. Be that as it may, for Kennedy those approaches working with a boundary between indeterminate and determinate areas of law overlook – and here he is quite close to Schmitt – that even these containments can be undone by what he calls 'legal work'. Judicial interpretation involving the whole set of doctrinal and judicial materials available ('legal work') can realign 'frames' and the boundaries between 'cores' and 'penumbras'. Judges are thus in an even more powerful position to strategically manipulate decisions in order to pursue their own ideological agendas. Like Schmitt (and arguably Kelsen) and unlike Hart, Kennedy sees no insurmountable limitations imposed by the norm itself for subjective and ideological judicial decision-making. But in contradistinction to Schmitt's position this leaves the judge free to inject subjectivity into judicial practice. Kennedy only in a limited way acknowledges the institutional constraints imposed by judicial practice, which are the very basis of Schmitt's perspective on judicial decision-making.

III. Conclusion

What can be inferred from all of this for contemporary judicial decision-making? To start with, the common view of Kelsen the formalist and Schmitt the decisionist must be reversed when it comes to their concept of judicial decision-making. Moreover, the two 'realist' approaches to judicial law-making address very important aspects of any judicial practice that deserve closer scrutiny. If taken seriously both Kelsen's and Schmitt's theory of adjudication can provide two principal insights into the function and nature of judicial decision-making.

The first is that courts have a central lawmaking function for any legal system. Secondly, judges in their decision-making are only in a very limited way controlled by internal 'legal' constraints, such as doctrinal methods of interpretation, the content of applicable norms or any other 'objective' principles, values or norms arguably contained in the legal system. For Kelsen this leaves ample room for the individual judges to incorporate personal value-judgments and political maxims into their decisions. For Schmitt this space of discretion is filled by constraints imposed by a collective judicial practice. In short, courts are powerful institutions primarily controlled by non-legal constraints or guidance, be they individual beliefs and values of the judge (Kelsen) or a collective professional practice (Schmitt). Hence, asking who the judges are becomes a very important, if not the central question. How have judges been trained, what is their cultural, economic and political background and how have judges been selected and socialised into practice? Who were the first judges who coined the self-understanding of the court or tribunal? And how does the institutional set-up in which judges operate function? All these questions from a scholarly perspective thus seem infinitely more worthwhile to pursue than the numerous scholarly arguments as to where, why and how courts allegedly have 'inadequately' or even 'incorrectly' applied the law.

References

[1] I have dealt elsewhere with the significance of both Kelsen's and Schmitt's theory of judicial decision-making for international law today: J. von Bernstorff, 'Specialized Courts and Tribunals as Guardians of International Law?' in G. Ulfstein and A. Follesdal (eds), *Judicialization of International Law: A Mixed Blessing?* (Oxford: OUP 2018) 9.

[2] H. Kelsen, *Introduction to the Problems of Legal Theory* (Oxford: Clarendon Press, 1997) 68.

[3] H. Kelsen, 'International Peace – by Court or by Government?' (1941) 46 *American Journal of Sociology* 575.

[4] Ibid.

[5] H. Kelsen, *Reine Rechtslehre* (Wien: Deuticke, 2nd ed, 1960) 350 et seq.

[6] It was in this way that Kelsen was trying to write his commentary on the Charter of the United Nations: J. von Bernstorff, *The Public International Law Theory of Hans Kelsen, Believing in Universal Law* (Cambridge: CUP, 2010) ch 7.

[7] The quotations in this paragraph are to be found in Kelsen, *Reine Rechtslehre*, n 2 above, 82–83.

[8] H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1st ed, 1961) 119–120, 123–128, 131–135, 143.

[9] Kelsen, *Reine Rechtslehre*, n 2 above, 350–352; cf V. Neumann, *Carl Schmitt als Jurist* (Tübingen: Mohr Siebeck, 2015) 20.

[10] See the critical approaches by M. Troper and D. Dyzenhaus: M. Troper, 'Kelsen und die Kontrolle der Verfassungsmäßigkeit' in A. Carrino and G. Winkler (eds), *Rechtserfahrung und Reine Rechtslehre* (Wien: Springer, 1995) 15; M. Troper,

'The Guardian of the Constitution – Hans Kelsen's Evaluation of a Legal Concept' in D. Diner and M. Stolleis (eds), *Hans Kelsen and Carl Schmitt: A Juxtaposition* (Gerlingen: Bleicher, 1999) 81; D. Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford: OUP, 1997) 102–160.

[11] H. Kelsen, 'Compulsory Adjudication of International Disputes' (1943) 37 AJIL 406.

[12] C. Schmitt, *Politische Theologie* (Berlin: Dunker & Humblot, 8th ed, 2004) 42.

[13] The quotations in the followings section are from C. Schmitt, *Gesetz und Urteil* (München: Beck, 1969) 37 et seq.

[14] Ibid 87. For Scheuermann this axiom cannot 'work' in practice because of usually missing homogeneity among judges: W. E. Scheuermann, *Carl Schmitt: The End of Law* (Lanham, MD: Roman & Littlefield, 1999) 23. However, this might be a misunderstanding of the theoretical status of the axiom, which has the status of an (hypothetical) 'as-if' assumption in line with the then highly influential *Philosophie als Ob* by Vaihinger. Schmitt gives this explanation himself in 'Selbstanzeige von Gesetz und Urteil' (1913) 18 *Kant-Studien* 165; cf R. Mehring, *Pathetisches Denken* (Berlin: Duncker & Humblot, 1989) 25 et seq and U. Habfast, *Das Normative Nichts der Entscheidung*, (Goethe University Frankfurt, Doctoral Thesis 2010), 29 at https://publikationen.ub.uni-frankfurt.de/frontdoor/index/index/year/2010/docId/7732 (last accessed 21 March 2018).

[15] *Gesetz und Urteil* (1969) 75.

[16] D. Kennedy, 'A Left/Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation' in *Legal Reasoning: Collected Essays* (Davies Group, 2008) 153.

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