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CARL SCHMITT AND THE LIMITS OF THE MODERN LIBERAL STATE

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INTRODUCTION

Carl Schmitt is a controversial figure in the history of twentieth century political thought not only because of the reactionary authoritarian and anti-liberal critique of the liberal trajectory of the modern state but also his opportunistic joining and serving the Nazi regime in 1933 after the passing of the Enabling Act by the Reichstag, as well his rejection of all attempts of denazification after his release from detention for possible crimes in 1946 which prevented Schmitt's return to academic life in post-War West Germany. Yet even in 'exile' Schmitt had very close contacts with some of the leading European intellectuals concerned with politics and international affairs such as Ernst Jünger, Alexander Kojève, Hans Morgenthau, and Raymond Aron, not to mention philosophic and religious thinkers like Jacob Taubes (who never ended pointing out the role that Schmitt played in the intellectual development of neo-Marxist Jewish thinker Walter Benjamin). Yet it remains a fact that he is perhaps one of the most important political theorists of the twentieth century.

The purpose of this paper is to show that Schmitt's critique of the modern liberal state is not so much a rejection of the modern liberal state, but a rejection of the radicalisation of the liberal state by later modern political theorists. Thus, to call Carl Schmitt the twentieth century Thomas Hobbes

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is not far off the mark, in that Schmitt's project attempts to force a defence of the modern state *via* a return to the political thought of Hobbes (Schwab 1989, Bendersky 1983).

The limited scope of this paper prevents a much needed correction of an inaccurate and historically uninformed interpretation of not only Schmitt's political thought but how his political thought informed the politics of the Weimar Republic (Holmes 1988: 31–34). Rather, in the confined scope of this presentation, I hope to show how those who hold such a view of Schmitt's thought fail to understand the main thrust of his argument – that if the liberal state is to defend itself it must not tie its own hands and thus prevent its own defence. Such a fate can be avoided only, Schmitt believes, by returning to the political thought that originates the theory of the Modern state – the political thought of Thomas Hobbes.

I believe Schmitt to be wrongly accused of causing policies which led to (or abetted) the downfall of the Weimar Republic – the downfall of the Republic was found in a combination of incoherence of the Constitutional structure, that is a product of later and more radical tradition of liberal legalism, and the unwillingness of the President to use his powers to eliminate political parties that were enemies of the Constitution. Also, I do not believe that his thought is fascistic, although it definitely shared authoritarian traits of Political Catholicism that opposed the forces of the French Revolutionary tradition in European politics, and thus has some sympathy for the Italian and Austrian schools of fascism. However, I nevertheless hope to point to a problem in Schmitt's understanding of the Hobbesian foundations of state. A problem which does not allow him to notice that his return to Hobbes does not offer an actual alternative to the liberal politics he is critiquing¹.

There is a tendency in certain critics of Schmitt to overstate the extent to which he is an anti-liberal. This view of Schmitt arises because these critics tend to see his criticism of neo-Kantian legal-political thought as a thorough-

¹ This paper with its focus on the way Carl Schmitt engages with the tradition of liberal political thought does not seek to address the question of Schmitt as a political theologian as does the work by Heinrich Meier. I agree with Meier that Schmitt embraces theological concepts as the means to comprehend the core principles that shape modern political thought and in doing so correctly sees the connection between certain Christian theological concepts and the concepts of the modern state. See Meier, H. (1988) *The Lesson of Carl Schmitt: Four Chapters on the Distinction Between Political Theology and Political Philosophy*. Chicago: University of Chicago Press and Meier, H. (1995) *Carl Schmitt & Leo Strauss-The Hidden Dialogue: Including Strauss's Notes on Schmitt's Concept of the Political & Three Letters from Strauss to Schmitt*. Chicago: University of Chicago Press.

going and complete criticism, and hence a rejection, of liberalism. However, this view is not necessarily the truth. Rather it is an appearance that one must go beyond if one is to truly learn from his political thought. Schmitt is taken to be an anti-liberal because of the tone he takes towards liberals and their policies. He seems to be very critical of liberalism and its effects upon politics, especially on Weimar politics. On a certain level this perception is true. He does reject the liberalism (of Kelsen et al) which underlies Weimar politics. He thinks that such liberalism is politically naive and therefore very dangerous. Yet, does this rejection of the liberalism inherent in the Weimar Republic imply a wholehearted rejection of liberalism? Most critics of Schmitt argue that it does. They usually point not only to his criticism of Weimar liberals, but also to his membership in the Nazi party in 1933. I will not address the Nazi issue; others have done well to rescue Schmitt from an opportunistic mistake (Schwab 1989, Bendersky 1983). Rather, I will suggest that his criticism and rejection of the liberalism inherent in Weimar is not a wholehearted rejection of liberalism².

The reason why the critics see Schmitt's criticism of Weimar liberalism as a complete rejection of liberalism is that they collapse liberalism into one approach. Thus, to reject the liberal advocates of the Weimar Republic (e.g. Kelsen et al) is to reject all liberalism. One of the reasons they read him in the above way is that they fail to deal with the rhetorical-historical character of his work. Because they fail to take into account: 1) the rhetorical character of his work – i.e. its polemical tone – and 2) the specific historical context in which Schmitt is writing (i.e. the political crises of the Weimar Republic of the mid 1920s to early 1930s), they only receive a distorted and polemical picture of Schmitt's arguments and hence of his political thought in general. Because his critics tend to see any criticism of any form of liberalism as an attack upon all of liberalism, they tend not to go beyond the polemical rhetoric of his work.

There are also several reasons as to why Schmitt's critics fail to address the historical context of his writings: 1) although the majority of his work has increasingly been available in English translation (with three available in the 80s, approximately 7 in the 90s, and now by 2015 most of his major works are available in English) they are still less read by students unless they run into an instructor who uses Schmitt; 2) many political theorist do not like history and

² For the typical view of Schmitt as a fundamental opponent of liberalism see McCormick, J.P. (1999) *Carl Schmitt's Critique of Liberalism: Against Politics as Technology*. Cambridge: Cambridge University Press.

avoid addressing the historical context of any thinker (this is usually done to avoid the charge of historicism); and 3) most scholars in political thought do not have a good understanding of European legal traditions and this prevents them from fully understanding what Schmitt and those whom he is addressing are exactly arguing about.

The failure to address the substance of Schmitt's work and being caught up with the polemic character of his style is a constant problem with most critics. They constantly depict him, as Paul Gottfried notes, as 'perpetually predisposed toward the totalitarian Right', because he failed to give constant evidence of his own personal faith in Enlightenment liberalism (Gottfried 1990). Thus, because Schmitt is not a 'cheerleader for liberal democracy' and because he champions executive prerogative, these critics interpret all his work in light of his choice in 1933 – regardless of the fact that his work does not support such a conclusion (Schwab 1989, Bendersky 1983).

Also Schmitt has for the past 20 years been increasingly important and popular for those on the political left who still seek to critique liberalism yet lost faith in the Marxist doctrine. With the final collapse of the Soviet sphere in 1988–92, increasingly voices on the left have turned to Schmitt and his critique of liberalism as a weapon in their attacks on it. Those radical intellectuals have come to believe not only that Marxism failed to offer an effective answer why liberalism not only seemed to survive and by the mid 90s was triumphant, but also seemed to be fined to a repressive and unattractive alternative to liberalism. For these leftist critics of liberalism found in Schmitt's thought a radical critique of the anti-political character of the liberal state, one that allowed for a recovery of politics in its classical understanding. These leftist critics also turned to Schmitt because his historical approach echoed most of theirs (most of them being either followers of the post-structuralists like Michael Foucault and Gilles Deleuze and Slavoj Žižek; or Heideggerian influenced deconstructionists like Jacques Derrida and Paul deMannjust to name a few). And following the European left's intellectual response to the actions and policies of the Bush administration after the events of 11 September 2001, many of them saw in the writing of Schmitt's *Diktatur* and his treatment of the use of sovereign power in the state of emergency a useful tool to critique the actions of America (Agamben 2005)³.

³ Yet the use of Schmitt's concept of 'exception' to understand the necessity to use the executive, presidential power in times of crisis has also been utilised by adherents of the Neo-Liberal law and economics school such as Adrian Vermeule and Eric Posner (2011) *The Executive Unbound: After the Madisonian Republic*. New York: Oxford University Press. See Harvey C. Mansfield, Jr's criticism of Vermeule's and Posner's

SCHMITT AS NATIONALIST?

Some may interpret Schmitt's attack upon liberalism and his defence of the nation-state structure of Europe as the beginnings of a political thought of nationalism (Frisch 1993). Such an interpretation is critical misreading of Schmitt's thought. He does not develop a theory of nationalism. Rather, he presents a defence of the liberal nation-state as a state. Thus, Schmitt is working within a particular framework established by Hobbes and Bodin, which treats the state as a conceptual (or intellectual) construct and not an organic construct. For Schmitt to have developed a theory of nationalism, he would have to have addressed the issues of race and ethnicity (as does Herder and other theorist of nationalism). Yet he never does this. A theory of race and ethnicity is wholly absent from his scholarship. This fact is also what prevents him from ever being a true Nazi and what leads actual Nazi scholars to attack both him and his work (See Bendersky 1988: 219–242 and 256–262).

Schmitt speaks of the nation in its historical context as of the source from which the Modern state emerged within European politics. In Schmitt's thought, the nation is thus not a co-current social-political structure but rather the means from which the liberal state emerges. Thus, Schmitt's attempt to bolster the state is not an attempt to bolster nationalist sentiment. Rather, his project is an endeavour to save the liberal state from the attempt by the later stages of liberalism to make it irrelevant or eliminate it. Schmitt claims that extreme liberal normativism tends to forget that to achieve the goods it desires, the existence of the state is a necessary precondition (Schmitt 1976: 22–25 and 69–79). It is a failure to admit the very political character of the liberal project, which underlies Schmitt's main objection to the liberal normativism.

NORMATIVISM

Schmitt's critique of the liberal state is an attempt to rescue politics from what he considers non-political a-priori assumptions; these assumptions are called normativistic. These assumptions ultimately place a radical precondition on human political activity and when those a-priori assumptions

use of Schmitt to understand the role of Executive Power in the American model in 'Is the Imperial Presidency Inevitable?' *The New York Times: The Sunday Book Review*. 13 March 2011.

are respected politically, at all costs, one ends up ‘tying the hands of’ or restraining the state. Restraining the state is especially dangerous when the survival of the state is at stake. Thus, to save the state in a time of political crisis, Schmitt advocates a return to the origins of modern politics, and the origins of the Modern theory of the state starts with the political thought of Hobbes. In order to understand the need to return to Hobbes and the origins of the Modern theory of the state, we must address the particular crisis which the Modern state faces because of liberal normativism. The *foci* of Schmitt’s critique of the Modern liberal state, expressed in the particular terms of it being a liberal parliamentary state, is its excessively normativistic assumptions.

Where does the term ‘normative’ come from? Why does not Schmitt define this term? Ellen Kennedy points out that the term ‘normative’ was a central intellectual concept within the German legal positivist tradition. She says that German legal scholars, such as Georg Meyer and Gerhard Anschutz, coined the particular flavour, with which the term ‘normative’ was used within the legal scholarship (Kennedy 1985: xxv). Thus, Schmitt did not coin this term as a term. Rather, he found it within the vocabulary of neo-Kantian political-legal terminology, which dominated German jurisprudence early in this century. However, Schmitt made use of this term to critique how liberal normativism dangerously constrains state action and in doing this he made the term famous (or perhaps, infamous).

What Schmitt and the Neo-Kantian legal tradition (which Schmitt is working within) call normativism is the placing of normative preconditions upon political actors. The concept of the normative is a derivative of the fact/value distinction and its central role within German legal positivist thought (Schmitt 1985a: 18). Thus, the normative is the realm of values and values are the preconditions for any set of legal and political norms. Now these preconditions can vary in either their nature (or character) and how they are applied. Thus, the legal positive thought claims that these normative preconditions are logically prior to the political.

These normative preconditions become, in reality, restrictions on state action. Thus, norms are that which structures the political activity within a given political system. Thus, normativism is the binding set of rules or values that restrain political action. Schmitt argues that the normative function is primarily legislative and deliberative (Schmitt 1985a: 45). The example Schmitt gives of normativist frameworks are legal structures, constitutional institutions, and administrative principles. Yet, he argues, the tendency of stressing the importance of the legislative and hence the normativistic element

of the state usually results in down-playing or underrating the importance of the executive element. In doing so, the normativistic tendency usually places excessive restraints upon how the executive can act and therefore what it can do to address political problems. This becomes especially dangerous in times of political or constitutional crisis.

Schmitt contrasts normativism with decisionism. Normativism deals with restraints of and/or the structural set up of political behaviour. Thus, the emphasis of normative structures is the normal and typical behaviour of political action and not of times of political crisis. Thus, normativism at best deals with the ordinary and not extreme (or exceptional) occurrences. The part of the state best suited to act in these exceptional circumstances is not the legislature, but the executive. Therefore, during times of crisis, where decisive state action is called for, action outside the scope of the normal restraint placed upon the state by legal and constitutional norms, is sometimes called for. Yet, the tendency of a liberal normativist is to excessively restrain the executive, forcing it to be restrained by legal and constitutional norms (Schmitt 1985a: 13–14).

The preconditions of liberal normativism (one of neo-Kantian philosophical assumptions) are a-priori in character. Thus, its assumptions must be agreed to before the application within the system. These liberal a-priori norms are assumptions about the human goods or values (Schmitt 1976: 69–79). These goods or values are trumps which limit or restrain political actors. The modern liberal claim that rights trump state action is the most striking example of what Schmitt is talking about as the political tendency of normativist principles.

Now these norms which trump politics are usually viewed as pre-political or non-political. They become a legal and constitutional norm that limits and/or restrains the state from acting. Thus, Schmitt's critique of normativism arises out of the particular use of legal norms (or values) within German neo-Kantian legal-political thought, especially the thought of Hans Kelsen. A neo-Kantian understanding of the 'norms' which restrain political behaviour is the politicalisation of the 'Categorical Imperative', where all political actions must be guided by norms or laws, if those actions are to be considered legal. Such normativism is one which undermines the ability of the executive to act decisively during times of constitutional crisis, because the actions needed in times of crisis are rarely specifiable by law. Also, such normativism weakens the defence of the state, especially the liberal state, making it vulnerable to internal forces intent upon its destruction. The demise of the Weimar Republic seems to validate Schmitt's claim.

Schmitt's berating of liberal normativism is not so much a rejection of normativism but a critique of how a particular form of liberal normativism tends to place extreme a-priori constitutional or legal assumptions upon the executive and its actions. Schmitt argues that these particular a-priori assumptions arise from the liberal legal-political understanding (of Kelsen et al) and their radically normativistic conception of politics and law. These legal theorists attempt to categorically limit and restrain state (i.e. executive) action *via* law. Politics, in the liberals' view, is therefore relegated to a separate and/or inferior position in relation to other goods. Although it becomes merely the one who delivers social goodies, its political role, as defender and protector, tends to be forgotten or underrated. Here is the crisis of the liberal state. When confronted by internal (or even external) forces hostile to its liberal principles, it finds itself unable, and sometimes unwilling, to defend itself. This inability arises because the state is constrained to strictly follow legal and constitutional norms which tend to proscribe all executive action.

Schmitt's critique of normativism is not to be understood as a dogmatic rejection of normativism or the rule of law, as some critics charge (Scheuerman 1996: 299). Rather, as I have been attempting to suggest, Schmitt is criticising a particular conception of normativism, one that dogmatically excludes any room for executive leeway (or prerogative) by the sovereign during exceptional times of crisis. Schmitt has no objection to normativistic restrictions or the rule of law during normal or typical times. However, excessive and dogmatic normativism, Schmitt argues, denies the state the necessary means of surviving times of political or constitutional crisis. Thus, Schmitt's critics, who point to his criticism of normativism, fail to read his arguments within the rhetorical-historical context of the Weimar Republic. These critics would object to this claim by saying that they do indeed put Schmitt in his historical context (Scheuerman 1993: 265–280). Yet, if they do bring up the Weimar context, they only bring it up to ignore it.

HOBBS AND THE ORIGINS OF THE STATE

Schmitt believes that to understand the proper role of state action and the assumptions which frame politics, we must return to the political thought of Hobbes (Schmitt 1976: 3, 6, 7–8n14, 52, 59, 61, 65, 67, 89–92, 92n2, 93, 97, 99–100, 103, 107, Schmitt 2013: 16–18, 98, 99, 100, Schmitt 1985: 33–37, 47–48– 52, Schmitt 1985a: 43, 100–101, 114, Schmitt 2008b). The return to Hobbes is a needed rejection of excessively normativistic liberal politics.

This critique is often taken to be a rejection of liberalism in favour of the state. If this is true, we must come to terms with the state and its origins. It is my belief that when we do this, we will have a different understanding of Schmitt's critique.

The state is a product of modern political philosophy (Strauss 1988, Viroli 1992, Skinner 1989: 90–131, Skinner 2002: 368–413, Skinner 2009: 325–370). The state, as a political unit, did not exist until the 15th century (Viroli 1992, Skinner 2009: 325–370). Even the term, the state, is a creation of Machiavelli (Strauss 1936: xv, de Alvarez 1989: xii–xvii and xxxii–xxxiii, Mansfield 1988: 849–57, Hexter 1956: 113–138, Strauss 1988: 40–55). The modern state – and its contemporary embodiment, the modern liberal state – although conceived by Machiavelli, is the child of Thomas Hobbes (Strauss 1988). It is true that Hobbes does not explicitly define the state, yet it is nevertheless a product of his understanding of a political community (Strauss 1936: xv).

The term Hobbes uses to specify the political community is The Commonwealth (Hobbes 1991: 117–121, Schmitt 2008b). It is the social construction that Humans will into existence. In Machiavelli, the state is the articulated will of the prince – an actual person. It is true that Hobbes's use of the term sovereign leads readers to think he is speaking as though the sovereign is a single human ruler, like a king or a monarch. However, Hobbes's argument does not require the sovereign to be an actual human person. Rather, Hobbes also uses the term as a metaphor to describe not a person but the embodied will of that which authorises the body politic. He calls the sovereign an artificial person (Hobbes 1991: 9, 121–129). Thus, the sovereign is no longer the body of the sovereign, i.e. the king or prince, but the abstracted will of the whole body politic (Hobbes 1991: 9, 121–129, and 155–165, Schmitt 1985a: 6–12)⁴.

To repeat: Hobbes's creation of the state is derived from Machiavelli. Hobbes turned the will of the prince into the will of the body politic. Thus, Hobbes goes one step further than Machiavelli. In doing so, Hobbes creates a body politics where the sovereign's will is the collected representation of a people's will. The sovereign is not necessarily, strictly speaking, a person. Rather, it is in Hobbes's thought the collected will of a people when they

⁴ In this sense Foucault is the radical outcome of Hobbes's line of argument concerning the abstraction of will and its relation to the body politic. Also Foucault's comment about the body of the sovereign indicates how liberal politics fail to understand how the underpinning of liberal politics depends upon a certain understanding of how to perceive the body politic. See Foucault, M. (1979) *Discipline and Punish: The Birth of the Prison*. New York: Vintage Press, 3–31.

are contracted into a civil society with each other (Hobbes 1991: 94–95, 117–129, and 155–165). The contract, therefore, is the source from which the sovereign’s will emanates. Therefore, the state is the temporal embodiment of the sovereign’s will. It is not only an agent that embodies the sovereign’s will but it also enforces the contract (Hobbes 1991: 29–137). It keeps all within it in line with the guidelines established by the originating agreement.

Thus, the modern state is no longer the articulated will of any specific ruler, but an abstracted will of the whole body politic. The concept of the modern state reaches its intellectual peak with Hegel’s articulation of it. Yet Hegel’s conception of the state did not address the issue of legitimacy in terms favourable to liberalism, in that it restrained the scope of liberalism within the social framework⁵. Given this, supporters of Hegel generally tend to be either left-socialists or authoritarian conservatives, not liberals (Hegel 1991). Rather, liberals tend to prefer a modified Kantian or neo-Kantian framework (Kelsen 1971).

In modern political thought, the person of the executive is understood to be an embodiment of the sovereign (Schmitt 2013, Mansfield 1989). This is to say that the executive is the part of the state that can best seemingly embody the sovereign and its will. This is because the executive is the part of the state that tends to be a person – as the sovereign originally was. As such, he is the part of the state that can take action most effectively and in doing so act as though he is the state.

In classical and medieval political thought, a king or a monarch solely possessed the executive power. He also embodied all the other functions of the political as well – i.e. the judicial and the legislative. Although in feudal times, some of these functions were exercised by other institutions (i.e. courts, parliaments, etc.), their authority and thus their power emanated

⁵ Regarding Hegel’s *Philosophy of Right* in Schmitt (2007a) *Theory of the Partisan: Intermediate Commentary on the Concept of the Political*. New York: Telos Press Publishing, 21, note 32 writes ‘I would like to develop fully and hermeneutically sections 247–248 of Hegel’s “Philosophy of Right” as a historico-intellectual nucleus for understanding the contemporary techno-industrial world, just as the Marxist interpretation developed the preceding sections 243–46 for an understanding of bourgeois society’. It is important to note that these sections mentioned by Schmitt are about Civil Society: Sections 241–245 are about ‘Poverty in Civil Society’, sections 246–248 are about ‘Civil Society’s Tendency to Colonial Expansion’ (see Hegel, G.W.F. (1991) *The Elements in the Philosophy of Right*. Cambridge: Cambridge University Press). Marx himself once did a reading of Hegel in the ‘Critique of Hegel’s “Philosophy of Right”’; Marx concentrates on sections 261–313 regarding Constitutional Law.

from the king and their possession of those powers were a gift or dispensation from him.

As republican and democratic regimes began to dominate political reality, ministers and presidents replaced kings and monarchs as the chief executive. As this occurred, the other political functions were likewise distributed. Kings became little more than figureheads. Also, other institutions were invested with those other (i.e. legislative and judicial) powers. Also the institutions to whom those powers (legislative and judicial) were given, tended to be different from the ones which possessed the executive power of the state. Liberalism took pride in this separation of functions and called it 'separation of powers' (Schmitt 1985b, Schmitt 2008a). It was claimed that when the powers of the state were separated into different and perhaps opposing institutions, political freedom became possible.

However, liberalism, especially after Kant, had the tendency to grant too much power to the legislative (i.e. parliament) (Kant 1991). This occurred because the legislative powers were seen as the law making part of the state and as such it was understood to be the part best suited to provide the goods liberals claimed humans sought. Legislatures rule by instituting norms and laws, which thus frame how societies are to be governed (Schmitt 1985b, Schmitt 2008a). Thus, the crisis of liberal politics arises from the excessive taming of executive power by legal and constitutional norms (Mansfield 1989, Schmitt 2013). Although it is true that if the executive is too strong, the state will likely turn into a dictatorship or a tyranny, it is equally true that if the executive is too tame or too restricted by norms and legal restraints, the state will be open to predators – as was the way the Nazis used the law and parliamentary procedure to see control. In his writings of the 20s Schmitt pointed out that such problems could happen given the character of parliamentary systems (Schmitt 1985b, Schmitt 1976, Kennedy 2004). This is Schmitt's problem with the trend of liberal normativism in the Weimar Republic (Schmitt 2013, Schmitt 1985a, Schmitt 1976).

Although Hobbes is one of the intellectual fathers of the modern state, it could also be said that Hobbes is the father of liberalism; the very liberalism of the modern state which Schmitt sees as dangerously restraining the state. One could argue that the particular liberalism Schmitt is objecting to arises not so much from Hobbes but from Kant's, or even more correctly the neo-Kantian, radicalisation of Hobbesian politics. Yet, perhaps a better explanation is that the Hobbes of the state and the Hobbes of liberalism are one-and-the-same. This view argues that liberalism necessitates the creation of the state, because it is the state which will allow the securing of the goods liberalism seeks to bring forth.

Also, the state is that body which secures the goods which liberalism seeks and as such there is a necessary interconnection between the two. Because liberalism and the state are coequal, it should make sense that this tradition has dealt with the issues of the scope and limits of state power more than any other tradition of political power. The tradition of liberalism to this very day debates how much or little power the state should exercise in securing goods for individuals.

THE KANTIAN TURN AND THE MODERN STATE

Kant is the radicalisation of Hobbes (Kant 1991: 73–87, 137–140, and 141–154, Hobbes 1991). Kant takes Hobbes’s social contract as a model for his ethical system. For Hobbes, the social contract is a product of the human will and is merely a political construct used to create a political community by establishing peace and security (Hobbes 1991: 111–128). Although politics and the political community became a product of the human will, Hobbes left morality alone – it was still left in the realm of nature (Hobbes 1991: 111–130). Now Kant treats morality as Hobbes treated the political community, by turning it into a construct of the human will. What is Categorical Imperative but an individualised social contract. It is a willed framework, which sets up a criterion for all moral and ethical action (or judgement). Thus, when Kantian and neo-Kantian political thought subjects the state to the categorical imperative, this system forces an abstraction upon an abstraction. This act by Kant is only taking Hobbes’s position to its logical extreme. Contra Kant’s protestation, he is nonetheless a child of Hobbes – if not one of his best interpreters.

However, one might object to this argument by claiming that Kant’s position differs from Hobbes’s in that Kant radically subjects the state to moral and value restraints, whereas Hobbesian political thought does not (Kant 1991: 73–87). Thus, when liberals seek to restrain the state from interfering with social and economic rights or goods, they impose preconditions upon the state. Granted that Hobbes does not subject the state to the various preconditions Kant and the other liberals do, he nonetheless establishes that there are indeed preconditions upon the state. Thus, Hobbes establishes a framework that will only be radicalised by Kant and those who follow his line of thought. This is to say that the state is the means by which one brings about specific human goods. Thus, the state is merely a means to an end. The end, for Hobbes, is peace and security within The Commonwealth (Hobbes 1991: 91–127). For Kant, many additional goods are included (Kant 1991: 73–87).

The ends of the state – i.e. peace and security – are more important than the means used to obtain those ends. Thus, the Hobbesian state is understood to be merely instrumental. Although Hobbes' understanding of the human goods – i.e. peace and security – which the state secures is more restrained and limited than what later liberal thinkers claim, his framework nevertheless admits the inclusion of those additional human goods (Hobbes 1991: 91–142). In this light, the followers of Kant, such as Kelsen et al, follow Hobbes in seeing politics as both instrumental and artificial. They differ from Hobbes by their demand that the state and its actors be obliged to be restrained by absolute moral principles. An important question is how these moral principles are arrived at, since God and Natural Law are precluded as sources of moral principles. They are to be rejected because the Moderns do not believe in such systems, because they are teleological in character and thus rely upon metaphysical assumptions which Modern philosophers categorically reject. Now a deontological approach, one that will not be open to metaphysical assault, is demanded as the basis of all moral principles. Kant's thought offers such an approach, one that will provide principles (or values) that will be categorical and a-priori in their make-up.

Politically, these principles (or values) are to be the law which governs the state. All state action is now to be governed by law or legal norms derived from categorical statements about justice. These legal norms are seen as restrictions and restraints placed upon state action. Now any action that does not obey or adhere to the law (or the absolute norms) is not a legal action of the state. Thus, legitimate state actions are lawful actions and illegitimate actions are unlawful ones. Neo-Kantian political thought, thus, ties legitimacy to legality.

Legality implies an emphasis upon the legislative aspect of the state, in that it is the legislative part of the state that makes the laws. This emphasis on the legislative is, as was said earlier, generally done at the expense of the executive. This is seen in the fact that most legal norms are aimed at restraining and limiting (or even defining and expanding) the scope of executive power (or prerogative). This tends to systematise and constrain the executive into formal and excessively legalistic roles. Such an understanding radically bans the state from acting, far more than Hobbes or his political thought ever desired. Because of 1) the general character of law and legal norms and 2) the specific character of constitutional crises, an excessive liberal normativistic view of the state, where all the power is in the hands of the legislature (i.e. parliament or congress) and very little independence is given or even granted to the executive, ensures that no decisive action will be taken in times of constitutional crisis.

As a product of neo-Kantian political thought, liberalism, which Schmitt is subjecting to intense criticism, attempts to normalise and restrain all politics and in the process of doing so places restraints upon state action. This is seen in the fact that the normativistic legalism of Kelsen and neo-Kantians demand that the state act only how the law permits. For Kelsen and neo-Kantians, it is law and legality that legitimises the state and any act done in its name. Because of this view, the state (and those who act in its name) must be bound by the law. Schmitt does not object to this claim, what he does object to is the view, which arises from Kant, that Emergency law is no law (Schmitt 1985a: 14).

Such an understanding of politics and law makes decisive state action by the executive in times of crisis impossible. As such, these conditions condemn the liberal state to destruction. Contrary to this trend, Schmitt desires to give the state more leeway (or prerogative) to act in times of crisis, hence his stress upon ‘decisionism’ (Schmitt 1985a: 5–6). Yet, contra his critics, Schmitt’s embrace of decisionism and ‘the challenge of the exception’ is not a rejection of the rule of law⁶. Rather it is a realistic understanding of the limits of law and the rule of law, one that is handed down from Aristotle’s *Politics* 3.15 (Mansfield 1989).

Any examination of Schmitt executive power in states must address his *Die Diktatur* (Schmitt 2014). When examining the interconnection between sovereign power and crisis and how that effects the behaviour of the state, readers and commentators tend to point to and deal with much earlier translated works like *Politische Theologie* or *Der Begriff des Politischen* (*Concept of the Political*). Yet, not to look at it in this issue would not do justice to Schmitt’s thinking in these areas. *Die Diktatur* presents a very extensive historical examination of how the modern state in its European context attempts to institutionalise, through executive power, the use of emergency power of what was found in the Roman political institution called the ‘dictator’, one that echoes what he wrote in his *Verfassungslehre*, which is translated as *Constitutional Theory* in the English translation of this classic of German constitutional law scholarship (Schmitt 2008a).

Schmitt clearly tries to show that the intellectual founders of the modern state (Machiavelli, Bodin, Hobbes, Rousseau, etc.) all tried to find means to bring into the concept of the state the power and effectiveness that the

⁶ Contrast Scheuerman, W.E. (1993) ‘The Rule of Law Under Siege’. *History of Political Thought* 14 (2), 265–280, also see Scheuerman, W.E. (1996) ‘Carl Schmitt’s Critique of Liberal Constitutionalism’. *The Review of Politics* 58 (2), 299–322.

Roman dictator had in dealing with a crisis that normal powers of executive offices restrained by law seem unable to resolve, but without the dangers and threats to political liberty the abuse of it posed. The reasons why they sought to constrain such power can be found in the origins of the concept of the state which sought to overcome the conflict and strife that prevailed in the political world that often prevented a peaceful and prosperous development of European nations. Thus the rise of the modern state in the sixteenth and seventeenth century was a move to make routine the power of the Roman ‘dictator’ but constrained through the institutional framework of the modern state. Yet the reality of crisis and the need to often have more power than many legalistic formalists who often shaped Constitutional executives and thus Schmitt saw how examining the concept of the power within ‘the commissarial dictator’ within certain constitutional arrangements (in Schmitt’s case when he is writing the Weimar Constitution) could address this problem.

Also Schmitt examines the evolution from the Roman model of ‘commissarial dictator’, which often acted extra-constitutionally or above the law for a specified period of time and in times where normal political means were either unavailable or not powerful enough (due to the laws restraint on those offices) to deal with the crisis, to the way the major thinkers of Western political tradition attempt to harness for the modern state a means to utilise the pure power of the sovereign in order to effectively resolve crises that are irresolvable by ordinary political and legislative means (Schmitt 2013). Hence Schmitt’s examination of the role of the executive in crisis hits directly on his criticism which says that most liberal models rely too heavily on law and the legislative procedure to secure and protect the state – which does include for him the people and their rights (Schmitt 1985b, Schmitt 1976, Schmitt 2008a). He explicitly worries that all too often parliamentary bodies are composed of many members and parties, and as a collective it lacks the ability to act uniformly and decisively (Schmitt 1985b, Schmitt 1976, Schmitt 2008a, Schmitt 2013). Also legislative forms tend to the normativism – which is to say the application of legal norms and universal rules that often cannot speak to particular circumstances. Schmitt sees this tendency to normativism as undermining effective and often necessary state action in times of crisis (Schmitt 1985b, Schmitt 1976, Schmitt 2013). And it is exactly this concern in the world following America’s response to the events of 11 September 2001 that drives so many contemporary political thinkers to Schmitt’s work and especially this work (i.e., Agamben and Vermeule and Posner) (Agamben 2005, and Vermeule, and Posner 2011).

CONCLUSION

Given the understanding of Hobbes as a founder of liberal politics and the liberal polity, Schmitt's apparent hostility to liberalism would seem to require him to abandon Hobbes as the recourse against the normativist liberal state. However, he never does this. This failure to abandon Hobbes is either due to 1) a failure on Schmitt's part to understand Hobbes as also the father of liberalism or 2) Schmitt does not wish to merely reject liberalism wholesale, but only the radicalised form of liberalism that arises after Kant. Of these two options, the latter is the one that I believe to be the reason why Schmitt insists upon a return to Hobbes. The return to Hobbes is the means by which one can rescue the liberal state from excessive liberal normativism, like that which dominated the Weimar Republic (i.e. the legal and political positivism of both Max Weber and Hans Kelsen).

The view that Schmitt failed to see Hobbes as the father of liberalism would be an error of such a magnitude on his part as a reader of Hobbes as suggesting that Schmitt is a poor or sloppy reader of one of the key texts that shape modern intellectual history and political thought. Yet, if anything is shown in reading Schmitt's works it is that he is far from a sloppy reader of the thing. On the contrary, he is rather an extremely careful and thoughtful reader and scholar, even though he writes with a very polemical tone. Given this, he would not have missed that Hobbes's thought is the foundation of liberal thought. Given we are forced to accept 1) that Hobbes is a liberal and 2) that Schmitt is a perceived to be an anti-liberal, we must come to a understanding why he nevertheless endorses a return to Hobbes. Schmitt's desire to return to Hobbes, who is the father of liberalism, would make no sense if Schmitt was an anti-liberal as the critics assert. Rather the critics must be incorrect in their assertion of Schmitt's anti-liberalism. His argument for the return to Hobbes makes sense only if we take him as a liberal, who desires to save liberalism from its more radical and self-destructive stages.

In this attempt to understand Schmitt we could learn from one of his students, Leo Strauss. Strauss said, 'Schmitt is undertaking the critique of liberalism in a liberal world. We [mean] by this that his critique of liberalism takes place within the horizon of liberalism; his illiberal tendencies are arrested by the as yet undefeated "systematic of liberal thinking". The critique of liberalism that Schmitt has initiated can therefore be completed only when we succeed in gaining a horizon beyond liberalism. Within such a horizon Hobbes achieved the foundations of liberalism. A radical critique of liberalism is therefore possible only on the basis of an adequate understanding

of Hobbes' (Strauss 1976: 104–05). Thus, Schmitt's radical critique of liberalism is nevertheless a critique within the tradition of liberalism. His embracing of Hobbesian politics would force the careful student to see his work as consistent with the original tradition of liberalism and not the radical rejection of liberalism as the critics claim.

Even Schmitt's greatest failing, his membership in the Nazi party in May 1933, can be justified within the Hobbesian framework, in that after the Enabling Act of March 1933 the Nazis, under the absolute leadership of Hitler, were then the Sovereign of Germany. And as we know, any good student of Hobbes obeys the sovereign (Schwab 1989: 148). Thus, if there is a flaw in Schmitt, it is that he was not sufficiently anti-liberal to overcome his attachment to Hobbes and the Hobbesian framework of politics – in that within the logic of Hobbes there is no means to overturn the unjust or wicked ruler once the sovereign body consented to it.

After March 1933, although there was no longer a liberal state in Germany, there was still a state and Schmitt's behaviour can be interpreted as an attempt to preserve it within a Nazi framework, perhaps as a last vestige of liberalism. Thus, the best one can say about his Nazi period and how it relates to his earlier work is that he attempted to frame (or more correctly re-frame) the Nazi movement within the last vestige of the old liberal state. He attempts to place the Hitlerian regime in some (albeit very vague and loose) form of the state with very implicit norms which could guide Nazism into a more benign political system (i.e. make it more liberal, or at least more founded in the framework of law and the constitutional framework of the law-state (*Rechtsstaat*)). But such a programme was not to be allowed in the totalitarian regime envisioned by true Nazis. Like radical liberals and communists, the Nazis had no room for the state, which they perceived to be something which could or would limit the power of the party. Thus, true Nazis saw this aspect of Schmitt's thought and attacked him because they understood what his project entailed (Schwab 1989, Benderski 1983).

Although such an attempt cannot justify his obedience to the Nazi regime, it does allow one to understand his actions⁷. Perhaps in other circumstances, Schmitt's attempt to preserve the liberal state from the extreme consequences

⁷ Another and perhaps better explanation for Schmitt's behavior between 1933–1936 is that he became disillusioned with liberalism and its unwillingness to confront and prevent the Nazi takeover of the government. His disillusion with liberalism led to an acceptance of the current reality and thus self-preservation guided the rest of his actions, which can be understood as an attempt to save not only his person but his position within the new Germany.

of liberal policy is something noble and justifiable. This is why contemporary liberals must turn to Schmitt now to learn not only from his warning but also his failure, else they better be prepared to suffer the same fate.

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CARL SCHMITT AND THE LIMITS OF THE MODERN LIBERAL STATE

Summary

This paper looks at Schmitt and his critique of liberalism in terms of the question of how the constitutional structure of the modern state can lead to certain contradictions and problems that arise out of the radicalism of the liberal doctrine advanced by the neo-Kantian legal tradition that dominated in Germany in the early twentieth century. I argue that according to Schmitt a return to Hobbes, as well as other modern political thinkers such as Machiavelli and Bodin, was the only means to correct this radicalisation of liberalism to allow for the survival of politics.

Key words: Carl Schmitt, Liberalism, State, Executive Power, Decisionsism, Sovereignty

CARL SCHMITT I OGRANICZENIA WSPÓŁCZESNEGO PAŃSTWA LIBERALNEGO

Streszczenie

W tym artykule przyglądamy się Schmittowi i jego krytyce liberalizmu pod kątem pytania o to, w jaki sposób konstytucyjna struktura współczesnego państwa może prowadzić do pewnych sprzeczności i problemów wynikających z radykalizacji liberalnej doktryny promowanej przez neokantowską tradycję prawną, która dominowała w Niemczech na początku XX wieku. Autor twierdzi, że według Schmitta powrót do Hobbesa, a także innych współczesnych myślicieli politycznych, takich jak Machiavelli i Bodin, był jedynym sposobem na naprawienie tej radykalizacji liberalizmu, aby umożliwić przetrwanie polityki.

Słowa kluczowe: Carl Schmitt, liberalizm, państwo, władza wykonawcza, decyzyjizm, suwerenność

КАРЛ ШМИТТ И ОГРАНИЧЕНИЯ СОВРЕМЕННОГО ЛИБЕРАЛЬНОГО ГОСУДАРСТВА

Резюме

В центре внимания этой статьи находится Шмитт, а также его критика либерализма в аспекте того, как конституционная структура современного государства может привести к некоторым противоречиям и проблемам, возникающим в результате либеральной радикализации доктрины, пропагандируемой неокантианской правовой традицией, которая доминировала в Германии в начале 20-го века. Мы согласны с утверждением Шмитта, что возвращение к Гоббсу, а также к другим современным политическим мыслителям, таким, как Макиавелли и Бодин, представляло собой единственный способ исправления этой радикализации либерализма с целью обеспечения дальнейшего существования политики.

Ключевые слова: Карл Шмитт, либерализм, государство, исполнительная власть, решенничество, суверенитет

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