

THE SOVEREIGN EXCEPTION: NOTES ON SCHMITT'S WORD THAT SOVEREIGN IS HE WHO DECIDES ON THE EXCEPTION

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“Sovereign is he who decides on the exception”—this is how *Political Theology* famously starts (2005: 5). For Carl Schmitt, who follows Hobbes, the concept of sovereignty, as used in political philosophy and in juridical theory, is the secularization of a theological concept—but of a decisionist rather than rational theology. Sovereignty is decision and domination. It is not simply a technical concept in state theory (which could be understood according to its internal and external aspects)¹ but rather the personal privilege of the ruler. But what is it, precisely, to decide on the exception? In a sense, the answer is contained in the paradoxical figure of the sovereign, in sovereignty as a “borderline concept,” “one pertaining to the outermost sphere” (*ibid.*) Schmitt says that although the sovereign “stands outside the normally valid legal system, he nevertheless belongs to it” (p.7). He belongs to it precisely in virtue of his capacity to decide on the exception. As Tracy B. Strong notes in his foreword to the 2005 edition of *Political Theology* from Chicago University Press, for Schmitt “it is the essence of sovereignty *both* to decide what is an exception *and* to make the decisions appropriate to that exception” (p.xii). Here one sees the complexity of this apparently simple and straightforward truth. The question is: What enables the sovereign to decide on the exception and thus be sovereign? The answer is found not in Schmitt, but in Walter Benjamin: violence, and the violence always “implicated in the problematic nature of the law itself” (1978: 287). But let us pursue this more slowly. The question I just posed can also be rephrased as follows: What gives the sovereign that special capacity to see that there is an exception, a state of emergency, and consequently decide on it? Does the sovereign become sovereign because he can decide on the exception, or is it rather the case that he can decide on it because he is already sovereign? Depending on the answer, the hyperbolic truth enunciated by Schmitt acquires a different meaning. In the first case, any person with special powers (or even simply a special sensibility) could be recognized as sovereign. This would be an honorary status conferred on him. The implication here would be that there actually is, objectively speaking, an exception and the sovereign is he who can recognize and handle it. But of course Schmitt does not speak of any sense of recognition, understanding, and judgment, but only of decision—though one would think that a decision can only come after a judgment is made on rational grounds, or, as Aristotle says in *Nicomachean Ethics*, after deliberation. It is perhaps the concept of “genuine decision,” of which Schmitt speaks in the Preface to the second edition of *Political Theology* (p.3), which comes close to this first sense of the statement. A genuine

¹ As David Held says, “The doctrine of sovereignty has . . . two distinct dimensions: the first concerned with the ‘internal’ aspect of sovereignty; the second concerned with the external . . . The former involves the belief that a political body established as sovereign rightly exercises the ‘supreme command’ over a particular society. . . . The latter, external, dimension involves the claim that here is no final and absolute authority above and beyond the sovereign state” (1995: 100).

decision is not necessarily that which is made by those who have the legal, constitutional power to decide. In fact, they can be, and most of the times are, completely mistaken in their decisions. A genuine decision requires some inherent and special powers. In this case, the decision would decide of the sovereign. In making the decision, X would rise to the status of sovereign.

In the second case, the sovereign is he who has the power (in the strictly political, institutional sense—a power always grounded in violence) to decide on the exception. This is, for instance, the case of G. W. Bush rebuking the UN before attacking Iraq: “We don’t need permission,” or his decision to open the detention camp at Guantanamo. As I write (June 12, 2008) a divided US Supreme Court has ruled that the Guantanamo “enemy combatants” have the right to challenge their detention. The Associated Press reports that Justice Anthony Kennedy, writing for the court, said: “The laws and constitution are designed to survive, and remain in force, in *extraordinary* times” (emphasis added). This is a blow to Bush’s sovereignty and a challenge to the Schmittian notion of sovereignty. To be sure, it would challenge only the second of the two meanings of Schmitt’s truth given by Strong, that is, the sovereign may very well decide on what constitutes an exception, but he has to listen to other institutional voices and sites of power before deciding on the appropriate measures – he can disagree, but he has to abide. Thus, the sovereign is sovereign only to an extent. Probably, Schmitt would blame this state of affairs on constitutional liberalism and the rule of democracy. In any case, it would be difficult to prove here that (and if) the decision made by the sovereign is a genuine one. In fact, the exception itself can be a mere fabrication of the sovereign, which acquires dubious legitimacy on the basis neither of ethics nor of a violence travestied as force of law, but of mere and raw violence. In this case, it is not the exception, the state of emergency, which calls forth the sovereign decision, but the other way around, the sovereign decision creates the exception, or state of emergency. Then, the state of emergency is not, in Benjamin’s sense, a *real* one. In Strong’s important explication of Schmitt’s truth, it is the first meaning of “decide” (which is also the least apparent), which lends Schmitt’s theory of sovereignty an ontological, rather than simply technical (i.e., juridical), dimension. Although, contrary to Strong, I doubt that Schmitt’s decisionism can be weakened on that account.

The assumption in Schmitt (both on a logical and on an existential level) is that the exception is an essential part of the order of things. However, there are philosophies that have no use for the concept of the exception. For instance, in Leibniz’s philosophy of individuality there is no exception, and this is so because every individual being is complete, unique, and thus exceptional. But when the exception can be so generalized, it also loses its meaning and reason to be. It is no coincidence that Leibniz offers one of the earliest critiques of the concept of sovereignty and of Hobbes’s philosophy in general. In Schmitt, on the contrary, the concept of the exception makes sense because it is contained in the concept of the sovereign; it *is* the sovereign. Using Leibniz’s language, one could say that the exception is the predicate of the sovereign subject. Thus, it is not the case that the sovereign realizes that there is an objective state of need and thereupon he acts decisively. Instead, the sovereign chooses which state is to be raised to the level of the exception, or simply fabricates it. An illustration would be the war on terror, and particularly the war against Iraq. One would think that there are many other more urgent situations in the world that require attention and perhaps intervention, for instance, poverty, child labor, inadequate education. Yet, none of these are raised to the status of the exception, and the reason for this neglect must be sought precisely in the fact that they are not contained in the concept of

the person of the sovereign, as a predicate in a subject. They are other than the sovereign; in fact, they are instances of bare life.²

It is easy to see that, despite its brilliance³ and internal logical coherence, Schmitt's doctrine is also deeply flawed. It says that the decision on the exception is a privilege of the sovereign, that the sovereign is a sovereign precisely in virtue of his capacity to decide; yet, it does not say how he receives this capacity nor why is this capacity not generalized to become a privilege of each and every individual, the dignity of individuation,⁴ which is probably the only *real* exception. Ultimately, the justification for Schmitt's theory is the fear determined by the supposedly evil character of human nature. In the last chapter of *Political Theology*, he says:

Every political idea in one way or another takes a position on the "nature" of man and presupposes that he is either "by nature good" or "by nature evil." (p.56)

However, this is not correct, and not only today when the question of human nature has ceased to have the importance it did have in the 17th, 18th, and 19th centuries. Long before, even Aristotle's political science was built on the idea that the human being is by nature endowed with the twofold capacity of being good or evil, and that this capacity changed into a state depending on the decision one made and on the habit built thereafter. But by nature, one is neither good nor evil, as this would eliminate the possibility for change and freedom, because what is by nature in one condition cannot be brought into another condition:

A stone, for instance, by nature moves downwards, and habituation could not make it move upwards, not even if you threw it up ten thousand times to habituate it. (Aristotle 1999: 1103a 21-23)

It is true that Schmitt intends to meet this objection when he adds:

The issue [of human nature] can only be clouded by pedagogic and economic explanations, but not evaded. (p.56; brackets added)

Yet, I think that the objection still stands. In the case of Aristotle, for instance, the importance of education does not simply explain away the issue of human nature; more fundamentally, it provides a structure for the practice of human freedom (and of the responsibility that comes with it), which Schmitt of course intends to dispense with. We have already seen Schmitt's concept of "genuine decision" (p.3). This is to be found in the context of the notion that "the political is the total" (p.2) and of the description of the three types of legal thinking: normativist, institutional, and decisionist. The first emphasizes impersonal rules and leads to the bureaucratization of society; the second "leads to the pluralism characteristic of a feudal-corporate growth that

² On the relationship between sovereign power and bare life, see Agamben (1998).

³ See Schwab's introduction to *Political Theology*.

⁴ I have been studying the concept of dignity of individuation in relation to Leibniz's writings on political philosophy and ethics. I should be able to present the results of this study in a forthcoming book on labor and sovereignty.

is devoid of sovereignty” (p.3); the third, which relies on personal decision and which Schmitt opts for, needs to be able to determine what a *genuine* decision is. For Schmitt, “genuine” does not have anything to do with an ethical or politico-ontological situation, or with existential authenticity. It is political in the Schmittian sense of the distinction of friend and enemy. However, despite Schmitt’s assertion to the contrary, this is not the only possible sense of the political. I do not disagree with Schmitt’s critique of liberalism. Yet, “political” should not be seen as an either/or between Schmitt’s totalistic conception (which in principle is not incorrect) and liberalism. In fact, besides this either/or (and one could say: at the level of neither/nor, i.e., of potentiality), “political” also addresses the capacity for social transformation. This can be utopian, anarchist, yet it is the modality of the political that has no use of sovereignty. It is not that which calls forth a normativist or institutional legal theory, both of which risk trampling the individual, nor is it individualistic; rather, it highlights the tension between what-is and what-could-be, the moment of non-law, that is, a world devoid of any law which is not the one of the dignity of individuation. Of course, Schmitt would find the idea of a radical transformation of the social completely unrealistic. Yet, his defense of sovereignty is, realistically, unable to bring about security for all—given that this is ultimately its main aim. Thus, in *The Concept of the Political*, starting from the premise of an irreducible antagonism between friend and enemy, Schmitt very logically shows the impossibility of perpetual peace (though he is not addressing Kant’s concept here). The fact is that for Schmitt the permanent regime of war, which seems to be a natural foundation of the social and the political, could only be ended by “a war against war” (1996: 36)—in other words, a paradox. That would be a war of the pacifists against the nonpacifists, but still a war, and, as such, a political position and a political act. Interestingly, the end of war is also the end of the political, and the situation becomes really paradoxical: “the last absolute war of humanity.” Schmitt continues:

Such a war is necessarily unusually intense and inhuman because, by transcending the limits of the political framework, it simultaneously degrades the enemy into moral and other categories and is forced to make him a monster that must not only be defeated but also utterly destroyed.
(p.36)

Thus, there is no exit from war. A regime of war, understood as the antagonism of friend and enemy, is preferable to the end of war with the utter destruction of the enemy. Schmitt does not see any alternative for humanity to emerge from the logic of violence and domination that is apparently connatural to it. As a consequence, he chooses to give a theoretical justification for this fact. To an extent, this might be understandable, as Schmitt was writing *The Concept of the Political* and *Political Theology* in the aftermath of World War I. However, with World War II the notion of the utter destruction of the enemy became tragically concrete,⁵ both with the Nazi final solution and with the American (sovereign) decision to use the atomic bomb against Japan.⁶ What Schmitt had articulated as the paradox of pacifism became the utmost degree of the total war. This makes Schmitt’s partisan philosophy of the political prophetic and realistic on the one hand, yet also difficult to accept on the other. The state of the exception, from Auschwitz and Hiroshima to Guantanamo and

⁵ The notion of the utter destruction of the enemy is of course not completely novel in history. Schmitt himself mentions, in this context, the extermination of the Indians of North America (1996: 54).

⁶ The initial name of “Operation Infinite Justice” for the war on terror started in 2001, soon changed to “Operation Enduring Freedom,” evidently belongs to the same logic of the utter destruction of the enemy.

Abu Ghraib, proves to be outside of the political, in the realm that belongs to violence, cruelty, gangsterism, and criminal justice.

There is no alternative for humanity because, as Schmitt says, “Humanity is not a political concept” (p.55). Humanity “has no enemy” (p.54). But what if humanity’s enemy is precisely something like this logic of sovereignty that seems to be unassailable and necessary? From Schmitt’s position, it follows logically (again) that humanity “as such cannot wage a war” and this “because the enemy does not cease to be a human being” (*ibid.*). But what if humanity’s war is not simply political in the Schmittian sense, but politico-philosophical, that is, ontological, in the sense of aiming at reconstituting the essence of humanity itself? In other words, what if the enemy is not a group of particular, concrete human beings, but the conditions of possibility of violence, domination, and the very antagonism of friend and enemy? Indeed, physically eliminating human beings perceived and conceived as enemies is what gangsters and the various mafias do very well. One does not need a theory of the political for that. Certainly, there is more than this in what Schmitt says. He says that the word humanity is confiscated, invoked and monopolized by one state or an alliance of states to wage war against an enemy who is denied “the quality of being human” (p.54). He is correct in saying:

When a state fights its political enemy in the name of humanity, it is not a war for the sake of humanity, but a war wherein a particular state seeks to usurp a universal concept against its military opponent. (*ibid.*)

It is in this context that he refers to the extermination of the Native Americans—and it is evident how relevant this type of rhetoric is today with the notion of humanitarian war. But again, against Schmitt’s extreme realism, or cynicism, one can hold on to the idea, advanced by many, that, with an incredible amount of work and commitment, there is hope for humanity to exit the logic of war, of politics in the Schmittian sense, of violence and domination. For this to happen, however, the concept of sovereignty must be discarded, or even utterly destroyed.

If politics is antagonism and war, or the ever-present possibility of war, if this antagonism cannot be eradicated, and if “justice does not belong to the concept of war” (p.49), then the possibility of a world of social justice is ruled out *a priori*. As I have said, I agree with the critique of liberalism, but not necessarily for the reasons given by Schmitt (e.g., liberalism entails the end of the political)—or perhaps I would not characterize liberalism in exactly the same way. I agree with this critique insofar as it presents a clear exposition of the limits and flaws of individualism. Yet, individualism should not be confused with the theory of individuality, grounded in singularity and the dignity of individuation, which makes possible the full development of the individual. Under liberalism, for Schmitt, the “state turns into society” (p.72) and politics (the politics of antagonism) is abandoned. Yet, precisely, he says, “State and politics cannot be exterminated” (p.78). True, Schmitt points out the hypocrisy of liberal rhetoric, and of pacifism in particular:

War is condemned but executions, sanctions, punitive expeditions, pacifications, protection of treaties, international police, and measures to assure peace remain. (p.79)

This is indeed an accurate description of the new world order of the last two decades. Schmitt continues:

The adversary is thus no longer called an enemy but a disturber of peace and is thereby designated to be an outlaw of humanity. (*ibid.*)

The consequence is the notion of the last war of humanity, which I have discussed above. In sum, there is no exit from the friend/enemy distinction, and an

allegedly non-political and apparently even antipolitical system serves existing or newly emerging friend-and-enemy groupings and cannot escape the logic of the political. (p.79)

Schmitt is criticizing in particular the attempt at dissolving the political into the ethical on the one hand and the economic on the other. For him, this would be an impossible task. But let us consider what might be the most fundamental friend-and-enemy relation, that between labor and capital. First of all, it must be noted that there is here no reduction of the political to the economic, as is often understood and Schmitt himself seems to understand. The antagonism of labor and capital is in fact fully political, even in the narrow sense given to the word by Schmitt. Capital tries to assert its sovereignty over labor, and labor, in its most radical expression, tries to free itself from the yoke of capital. But labor has two enemies: capital and the productive form of labor, that is, the form of labor that produces and increases capital. For Marx, the struggle of the proletariat is the struggle for the dissolution of all classes, including the dissolution of the proletariat itself as a class. From the point of view of labor, the enemy is certainly not a group of people that must be physically eliminated, but rather practical categories and structures of domination equal to the very form of the political antagonism. This should say clearly that the aim of the political struggle is the overcoming of the political, or perhaps its redefinition along lines that are neither those of the friend-and-enemy split, nor those of the split between economic competition on the one hand and the (legal) construction of ethical and cultural patterns of discourse on the other. Rather, the aim of the political struggle is to open up the potential by enduring the tension between what-is and what-could-be. The real enemy is this what-is, which Schmitt sees as unavoidable and necessary, the apparently unsurpassable structure of the empirically given. But Schmitt does not consider the moment of contingency.

At the end of his critique of the state of exception, Giorgio Agamben addresses the question of contingency, which is very important in all of his work, when, with a reference to Benjamin, he speaks of “the urgency of the state of exception ‘in which we live’” (2005: 86).⁷ This is also to be understood as the restricted sense of *the real* imposed on life as “an empty space, in which a human action with no relation to law stands before a norm with no relation to life” (*ibid.*). It is the paradox of a state of exception become permanent. The exit for Agamben is a redefinition, or recuperation, of politics, that is, a *space for human action* without regard to the law. He says:

Politics has suffered a lasting eclipse because it has been contaminated by law, seeing itself, at best, as constituent power (that is, violence that makes the law), when it is not reduced to merely the power to negotiate with the law. The only truly political action, however, is that which severs the nexus between violence and law. (p.88)

⁷ I have dealt more fully with Agamben’s study of the state of exception in another work (Gulli, 2007).

In his eighth thesis on the philosophy of history, Walter Benjamin says:

The tradition of the oppressed teaches us that the ‘state of emergency’ in which we live is not the exception but the rule. We must attain to a conception of history that is in keeping with this insight. Then we shall clearly realize that it is our task to bring about *a real state of emergency*. (1968: 257; emphasis added)

Both Agamben and Benjamin challenge the logic of sovereignty that Schmitt defends. Benjamin’s *real emergency*, which conceptually also pertains to Agamben, is the exit from the exception that has become a rule. This real emergency is not what suspends the law, but what destroys it, what opens a space for existence other than the law. For Benjamin, what destroys the law is divine violence, or (still) sovereign violence (Benjamin 1978: 300). As William Rasch says in his concise and clear exposition of the main distinction in the work of Schmitt, Benjamin, and Agamben:

Whereas Schmitt locates himself firmly within the political as defined by the sovereign exception, both Benjamin and Agamben imagine the possibility of a politics that exceeds the political. (2007: 99)

Rasch continues saying that, however, neither Benjamin nor Agamben can say what this post-sovereign politics really is. They only say, according to Rasch, that “if and when it comes, it will come with an all consuming but bloodless violence that, in Benjamin’s terms, will be divine . . . neither law-making nor law-preserving” (*ibid.*), but precisely law-destroying (Benjamin 1978: 297).

The paradoxical regime of a permanent state of exception, more evident in our time, is a general feature of the logic of sovereignty and domination, of the antagonism that for Schmitt characterizes the political. As Machiavelli says, the fundamental antagonism is between those who want to dominate and those who do not want to be dominated.⁸ The aim of the latter group, which is called *more honest*⁹ by Machiavelli, evidently points toward the end of domination as such, that is, of a world in which the law is not necessary because “good habit” (*buona consuetudine*) suffices.¹⁰ But this would amount to *deciding against the decision*, which at the end of *Political Theology* Schmitt derides Bakunin for doing. Thus he says:

the odd paradox whereby Bakunin, the greatest anarchist of the nineteenth century, had to become in theory the theologian of the antitheological and in practice the dictator of an antidictatorship. (2005: 66)

⁸ See Machiavelli’s *Discourses* (I, V) and *The Prince* (IX).

⁹ *The Prince* (IX).

¹⁰ See *Discourses* (I, III). Of course, Machiavelli is not saying that this is the actual state of affairs, and, he starts this chapter of the *Discourses* with the notion that the sovereign should consider all subjects bad or guilty (“è necessario a chi dispone una repubblica ed ordina leggi in quella, presupporre tutti gli uomini rei”). Consequently, he says that the law is usually necessary. But then, relying on common knowledge (“Però si dice : Yet people say”), he adds that “where things work well without the law, the law itself is not necessary. But when such good habit (*buona consuetudine*) is lacking, then the law immediately becomes necessary” (p.118).

However, leaving Bakunin aside, there is no real paradox in deciding against the decision, provided that the one who decides is not sovereign, but *anyone* who chooses freedom and dignity over domination.

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