Carl Schmitt: The Ultimate Illiberal?

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Benjamin SCHUPMANN, *Carl Schmitt's State and Constitutional Theory. A Critical Analysis* (Oxford University Press 2017), pp. 232.

INTRODUCTION

Carl Schmitt never got rid of his bad reputation. Although his writings enjoy popularity worldwide at present, he still counts as one of the most controversial philosophers in twentieth-century political and legal philosophy. Understandably, Schmitt is treated with caution, due to his affiliation with the Nazi's and his position as a high legal official in *das Dritte Reich*.

Many scholars have thus claimed that Schmitt and his writings are inseparably linked to their historical and political context: the Weimar crisis and the origination of Nazi Germany. Schmitt's theories on dictatorship, sovereignty and the state of exception are regarded as having legitimated the Nazi regime and the position of Hitler. Needless to say, Schmitt is not commonly counted among the ranks of liberals or democrats.

However, some scholars have interpreted Schmitt's vigorous and apocalyptic writings in a different way. Without denying Schmitt's problematic political record, they try to reach beyond Schmitt 'the man' and read Schmitt 'the theorist', in order to discover the value and importance his work can have nowadays for liberal democratic theory.

Benjamin Schupmann sets out to do precisely this. To Schupmann, Schmitt is not profoundly illiberal. On the contrary, Schupmann argues that Schmitt was not only more liberal than is frequently asserted; he also has something to offer to liberal democrats today. In his new book, *Carl Schmitt's State and Constitutional Theory*, Schupmann reinterprets Schmitt's key concepts – the political, the state, the

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sovereign, the dictator and the constitution – by engaging with Schmitt's pre- and post-Weimar writings, arguing that a coherent theoretical core can be extrapolated from them. In doing so, Schupmann wants to show that Schmitt's theory, which was aimed at addressing the deficiencies of the Weimar Republic, can serve as a foundation for a legitimate theory of constrained democracy where current efforts to justify such a conception of democracy fail.

Schmitt's critique of mass democracy

At the core of Schmitt's state and constitutional theory lies his critique of statutory positivism. Positivism reduced the liberal democratic state to its procedures, ultimately making mass democracy the basis for political legitimacy. According to Schupmann, Schmitt's criticism of Weimar democracy was aimed at mass democracy rather than at liberalism. In 1933, President von Hindenburg had to choose between Kurt von Schleicher and Adolf Hitler. This was a choice between two evils. The choice for the former meant overriding democratic elections, thus allowing Schleicher to institute a crisis government; a choice for the latter meant acknowledging mass democracy, as Hitler led the largest democratically elected party. Yet the Nazi Party explicitly planned to abrogate Weimar's liberal democratic institutions democratically. Hindenburg is alleged to have asked his nearest advisers several times: 'What is constitutional?' [*Was ist verfassungsmäßig?*]. Hindenburg chose in favour of Hitler and thus for mass democracy. To Schmitt, Hindenburg's choice for Hitler rested on a theoretical misunderstanding of what the constitution was or should be.

Schmitt's position was formed in the context of the German debate on the nature of valid law. Schupmann extensively discusses the background of these debates by considering several 19th-century schools of thought. Situating Schmitt within the anti-positivism camp, Schupmann describes his clash with Weimar positivists such as Hans Kelsen, Gerhard Anschütz, Richard Thoma, Karl Loewenstein and Walter Jellinek. At the core of this conflict lay diverging attitudes toward democracy, the people, and the constitution. Positivists argued that the will of the people was expressed formally by means of democratic voting and procedures. To positivists, statutory positivism [*Gesetzpositivismus*] formed the normative foundation of the law and therefore the state: law was the sum of the statutes posited by the state. Equally, positivists denied that law originated from a transcendent, 'natural' source. In the eyes of statutory positivists, even the constitution was open to all kinds of amendments, if the people so desired. Not even basic rights were excluded from adjustment or abrogation.

Anti-positivists rejected the idea that the validity of law was based entirely on the people's will as expressed through democratic procedures. Anti-positivists

defended the idea that there was a source of law beyond statute, will, and procedure. To the anti-positivists, the validity of law depended on foundational principles that preceded the people's will. These principles provided a constitution or state with a substantive core that required protection and, as such, imposed limits to constitutional change. Anti-positivists understood democratic procedures as potentially an obstacle to valid law. To Schmitt, the Weimar crisis stemmed from the combination of statutory positivism and democracy, leading to disregard for any limits.

For Schmitt, politics was impossible without theology and metaphysics. The process of 'disenchantment' (Weber) had led to the disappearance of objective values from human life and society. Belief was forced inwards and pluralised democratically, resulting in radical subjectivity. This process undermined objective and natural reason; objective values disappeared. The will of the majority was all that remained to provide political legitimacy, in other words, a political will defined in procedural terms.

But according to Schmitt, procedures alone cannot provide an enduring basis for public order. When the law becomes merely a reflection of procedurally defined political will, rational justification is absent. And without such a rational justification, a political community can no longer agree on a state's political status or existential core. The objective foundation of the rule of law thus gives way to subjective interests and the contradictory and shifting motives of egoistic parties and factions. Mass democracy thus affected not only the rational-legal legitimacy of the laws it produced but also the constitutional limits on legislation and the separation of powers. Together, statutory positivism and mass democracy had corroded the stability and meaning of Schmitt's ideal of a representative state.

Reinterpreting Schmitt's concepts: the political and the sovereign

Schupmann supports his general argument with a reinterpretation of Schmitt's core concepts. According to Schupmann, Schmitt's conceptions of the political, the state, and the constitution form an integrated whole that reflects his ideal of the representative state. As far as the concept of 'the political' is concerned, Schupmann argues that Schmitt defined it in terms of Friendship and Enmity so as to analyse the politicised situation in Weimar. In his terminology (political) Friendship consists of the conditions necessary for a people to peacefully coexist in a state. Schmitt stressed the absence of Friendship within Weimar and wanted to depoliticise the antagonisms within Weimar's parliament and society.

Schupmann consequently interprets the political as a neutralising status. Enmity ensues when rival conceptions of public order compete for realisation

in the same territory or space. Political Friendship, on the other hand, exists when people share the same values and associate to realise them publicly, thus creating a political identity. In society, there will always be disagreement among individuals, but a political identity has to neutralise social conflicts by preventing them from escalating to the point of violence. 'The political' consequently relativises or neutralises the violent antagonisms among other forms of identity. When a certain common political commitment is shared, differences between Friends and Enemies will remain civil. As a relativising status, the political unites a people.

Whatever the content of 'the political', it must be politically homogeneous. Schmitt thought political homogeneity would enable stable social heterogeneity. A stable state presupposes a stable political community, which in turn presupposes an enduring political identity. This political identity consists of the shared conditions under which a people can live together peacefully (Friendship). This political continuity can be filled by any particular normative order. That is, a political identity can have different normative substance in a different state.

Schupmann acknowledges that the condition of political homogeneity has raised concerns among Schmitt interpreters. Did Schmitt pursue a society based on (violent) exclusion? Is the exclusion of difference compatible with the values of liberal democracy? Schupmann takes these concerns expressed by, for example, Scheuerman, Preuss, and Dyzenhaus seriously and acknowledges that Schmitt's concept of 'the political' has been used normatively. Schmitt adapted his theory to the political goals of Nazi Germany. But Schupmann argues that it is actually a heuristic concept and should be regarded as an analytical tool. Schmitt wanted to understand what makes a public order stable. As Schupmann articulates it: 'The political adds a concept to our vocabulary that identifies when domestic relations among movements threaten to undermine public order itself, because the violent commitments of those movements become the basis for violent exclusion' (p. 88).

Schupmann continues by discussing Schmitt's concept of 'the sovereign', which is linked to the concept of the political. The sovereign decides what the basis of political unity is and whether there is some immediate existential threat to it. Schmitt wanted to emphasise that the sovereign's interpretive authority is not arbitrary. His political authority is bound by both a factual and a normative component: the need to guarantee material security and the need to represent a neutralising status (the political). The sovereign's interpretative authority is therefore subordinated to those two objectives.

State and constitutional theory

Schupmann further expands on Schmitt's systematic thinking by discussing his criticism of the 'mechanical state' (p. 111). He acknowledges that Schmitt never

wrote a general theory of the state, but that he did develop a framework for such a general theory. This framework emphasises the need for a 'political status' as the foundation of stable order, i.e. of the need for an absolute commitment to certain substantive values, some political commitment, if the state is to overcome individual will and egoism. Schmitt calls such a state an absolute state. In contrast, what he calls a mechanical state only guarantees physical or material security for its constituents. Statutory positivists conceived of the state as mechanical, a 'soulless' and rationalised instrument. Although in the short run the mechanical state may guarantee its subjects material survival, by not providing a political status, society, in the long run, will 'politicise', making it impossible to guarantee its subjects material survival.

In Schmitt's view, the Weimar Republic had lost its connection to substantive or philosophical commitments. Schmitt argued that the world is ethically irrational, that commitments and worldviews are not objectively verifiable facts. Without an authoritative interpretation of what is right, therefore, no meaningful and lasting existential commitments could be made and value pluralism would prevail. In Schupmann's words:

> State authority overcomes the chaos naturally resulting from human nature (conviction, perspectivism, right to interpret) because its political decisions bind its subjects by imputing them to its subjects, the legal authors of its decision. Peace cannot be without a shared commitment to a political status, which requires an authoritative representation of the community's political status. (p. 121-122)

Schmitt understood the absolute state as both a neutral force intended to depoliticise social antagonisms and as a neutralising force intended to sustain its political status. The absolute state should act as a neutral third party, agnostic toward the content of the values and goals of actors in civil society, as long as they are peaceful. But at the same time, the state should also serve as a neutralising force by limiting value pluralism. The state cannot be totally value-neutral or adopt an agnostic stance toward all commitments. Otherwise, society will self-organise politically. When the state fails to generate any political status, political movements will emerge to fill that void.

Schupmann explains how Schmitt's constitutional theory complements his state theory. To Schmitt, state and constitution were deeply intertwined. Parallel to his Mechanical and Absolute State, Schmitt proposes a Relative and an Absolute Constitution. The Relative Constitution concerns the positivist conception of the constitution. Just like the state, the constitution had become 'disenchanted', had lost its super-legal, substantive and normative qualities.

The Relative Constitution eroded the concept of the constitution in two ways. First, by conferring equal status on all articles of the constitution: each

constitutional norm was subject to the same procedure for change without hierarchy. Second, the status of the constitution is equalised with non-constitutional law. Underlying the Relative Constitution, Schmitt finds the commitment to equal chance: the equal opportunity for anyone to compete to have his or her beliefs and worldviews enacted in public law. To Schmitt, this was the only normative principle of the Weimar Constitution. It implied that the underlying status of the public order was the will of the majority. Each value or commitment that is wanted by a majority of people could become legitimate, thus making the Constitution an arbitrary collection of positive statutes that are alterable at will. Although the Weimar constitution required a two-thirds majority for constitutional amendments, Schmitt argued that the commitment to equal chance could not produce definitive stability over time. A party hostile to the constitution could, in theory, obtain a supermajority in the legislative branch.

The Absolute Constitution, on the contrary, like Schmitt's Absolute State, connects the ideal of public order with concrete reality: the constitution is the soul of a political community, generating political unity by determining a basic normative structure and harmony within the legal system. The constitution should express the 'political status', the public existential identity willed by a constituting power. Equally, it should define the state form, i.e. the type of government constituted. Although the written constitution is an indispensable aspect of the Absolute Constitution, it does not exhaust the meaning and purpose of the constitution, as the statutory positivists thought.

In this context, Schmitt also theorised the institution of the dictator. The dictator could become necessary for a state to survive an onslaught from internal enemies. Contrary to other interpretations that regard Schmitt's dictator as a means to a permanent state of exception, Schupmann argues that Schmitt conceived of dictatorship as a phenomenon closely connected to the Absolute State and Absolute Constitution: the dictator would have to respond to emergencies threatening the underlying commitments of the constitution when positive law could not do so. Statutory positivists tried to circumscribe the acts of a dictator within positive law but were in effect normalising constitutional emergencies by formalising them. Schmitt's claim was that dictatorship transgressed positive law and was only bound by the super-legal status of the Absolute State and the Absolute Constitution.

WEIMAR AND SCHMITT'S CONSTRAINED DEMOCRACY

Schupmann ultimately juxtaposes Schmitt's formal and abstract concepts with the concrete reality of Weimar. What *was* the political status of Weimar? Schmitt argued that the Weimar Constitution rested on two basic decisions: for

democracy and for basic rights (liberalism). There was no inescapable relation between the two and even though they could coexist under normal circumstances, they were fundamentally opposed and could be at odds in exceptional times. Schmitt, therefore, defined them as constitution (democracy) and counter-constitution (liberalism). The First Principal Part of the Weimar Constitution rested on the principle of equal chance (democracy). The commitment to equal chance was actualised legally through the provision governing constitutional amendment. Any value could become part of the constitution through this procedure. The Second Principal Part spelt out several individual rights (liberalism). The contradiction between democratic and liberal values in the constitution led to Weimar's instability and to the misunderstanding of the spirit of the Weimar Constitution. It explained Hindenburg's fatal choice for Hitler, after having repeatedly asked himself: what is constitutional?

Schmitt rejected the first part of the Weimar Constitution, arguing that mass democracy could not lead to a political identity necessary for stability. Only its commitment to basic rights and individual liberty was capable of generating Weimar's political status. Schmitt found this commitment in the Second Principal Part of the Weimar Constitution, which fitted his theory of the Absolute State and Absolute Constitution. However, to make the Second Principal Part fit his theory and to determine which rights formed the 'political status' of the Weimar Republic, Schmitt had to break down the enormous number of rights the Weimar Constitution contained into a typology. Schmitt argued that rights should only be considered basic rights if they defined the underlying status of that order. These individual rights should guarantee a 'negative status' for the individual, meaning that no individual should be subject to another's will. To Schmitt, basic rights are claims *against* the state (instead of claims *on* the state). Basic rights and the separation of powers were two constitutional mechanisms that the state employed to better guarantee individuals' negative status. Because political identity is fundamental to order and stability and certain basic rights formed Weimar's political status, those who opposed these rights should be identified as enemies of Weimar. Preserving and guarding the constitution meant ensuring the continuity of this political status, including taking any action necessary to prevent parties and movements from undermining them. Schmitt theorised several protection-mechanisms to guarantee basic rights, such as dictatorship, civic education, the entrenchment of political status, party bans, constraints on negative majorities[1]

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[1]The Nazis and Communists formed a negative majority, for example, after the election of 31 July 1932. The Nazis became the biggest party, although they held no majority. They paired with the communists and other anti-republican parties to secure a majority, thus making a (majority) government by any union of pro-republican parties impossible. This was dubbed a negative majority since the parties involved would never normally have been allies.

and a more rigid federation of the state. These mechanisms all served only one goal: to preserve the spirit, rather than the letter, of the constitution.

Schmitt tried to provide an answer to the problem of democratic states committing constitutional and legal suicide. Schmitt used the basic status of Weimar, consisting of commitments to individual liberty, to justify limits to the decisions reached through democratic procedures, thus protecting the constitution from being abolished.

Schmitt and liberal democracy today

This leads Schupmann to unravel what Schmitt has to offer to contemporary liberal democrats. He uses Schmitt to analyse what is known as constrained or militant democracy. Jan-Werner Müller has defined militant democracy as a 'democratic regime which is willing to adopt pre-emptive, prima facie illiberal measures to prevent those aiming at subverting democracy with democratic means from destroying the democratic regime'.[2] Many democratic constitutions today include mechanisms of militant democracy in their design, but according to Schupmann, a proper normative theory is absent.

Militant democracy theory faces a 'democratic paradox', formulated by Müller as 'the possibility of a democracy destroying itself in the process of defending itself' (p. 205). Although militant democracy is based on a commitment to political participation and democratic proceduralism, it contradicts this commitment to prevent the subversion of democracy: 'militant democracy undermines democracy in the process of defending it, delegitimating itself' (p. 208). Schupmann contends that current theories of militant democracy fail to solve this problem.[3] These theories leave militant democrats with no other choice than to 'go down with the ship' when the popular will is to revolutionise the constitution.

According to Schupmann, a reinterpretation of militant democracy in the light of Schmitt's theories of the state and the constitution provides the foundation for a comprehensive normative theory of what he empathically defines as 'constrained democracy'. Democracy is not the only way to conceive of the legitimacy of liberal

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[2] J.-W. Müller, 'Militant Democracy', in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) p. 1253.

[3] A.S. Kirshner, *A Theory of Militant Democracy: The Ethics of Combatting Political Extremism* (Yale University Press 2014); S. Rummens and K. Abts, 'Defending Democracy: The Concentric Containment of Political Extremism' 58(4) *Political Studies* (2010) p. 649; C. Invernizzi Accetti and I. Zuckerman, 'What's Wrong with Militant Democracy?' 65(1_supp) *Political Studies* (2017) p. 182; S. Sottiaux and S. Rummens, 'Concentric Democracy: Resolving the Incoherence in the European Court of Human Rights' 10(1) *International Journal of Constitutional Law* (2012) p. 106.

democratic states. Protecting basic rights – the embodiment of the political status – from value-neutral democratic proceduralism legitimises constraining democracy by enabling it to confront the democratic paradox. The restriction of participatory rights is not undertaken for the sake of democracy. Democracy is constrained to protect the substantive value of liberty. Basic liberty rights prevail over democratic participatory rights because they embody the political identity of the state. Schmitt-like constrained democracy, based as it is on a clear political identity, consequently makes it possible to identify the enemies of this political identity – i.e. those opposing the basic liberties of the state – and to decide what actions should be taken against them. When liberal democracy faces a threat, guaranteeing individual liberty can justify and legitimise constraining majority will.

In the final paragraph of his book (para. 3, 'Beyond Schmitt'), Schupmann argues for a combination of Schmitt's formal analysis of the state and the constitution with a philosophical commitment to liberalism. Schupmann claims that the protection of basic liberty rights *is* in effect the criterion for political legitimacy, 'because there are good reasons to commit to liberalism' (p. 216). Schupmann consequently fills Schmitt's formal theory with specific normative content. With Rawls, Schupmann claims that 'liberal basic rights are the best foundation for an enduring peace and an overlapping consensus within societies characterized by the fact of pluralism'.

But there is a weakness in Schupmann's concept of constrained democracy. His main point seems to be that current theories on militant democracy seem to lack normative or substantive content due to the emphasis on democratic proceduralism. Participation is regarded as a primary fundamental right, leaving liberal democrats no other choice than to watch the people revolutionise the constitution if they want to. But even though Schupmann's constrained democracy might solve the 'democratic paradox', as democracy is then no longer restricted for democracy's sake, the struggle within current militant democracy theories addresses exactly this point: how to determine which substantive values require protection? In other words, a clear political identity could be the answer to non-substantive theories of militant democracy, but what does this political identity consist of? In Schupmann's view, following Schmitt, this can be found in the protection of basic liberal rights. He thus pleads for a commitment to liberalism, making the protection of liberal rights the most important criterion for political legitimacy. The weak point lies in the fact that, whereas Schmitt makes an analysis of the Weimar Constitution and deduces basic rights from the constitutional laws, Schupmann translates this into the normative idea that a constitution embodies basic rights which should be protected from democracy without being able to specify these rights. Other scholars of militant democracy examine how to protect basic liberal rights against threats, for example through the judiciary (an aspect

absent in Schmitt's theory). Therefore, what Schupmann means by this commitment to liberalism (i.e. abstract liberal rights) and what, precisely, the novelty is of this approach in comparison with current authors on militant democracy, remains unclear.

Schupmann's claim that political legitimacy should be conceived in terms of the protection of liberal rights, and not in terms of participatory rights, is nevertheless interesting due to his emphasis on liberal rights and the rule of law (instead of focusing on democratic aspects, as is common in current democratic discourse). But even though new insight into the problem of democratic suicide is proffered, the value which needs to be protected from democracy remains unspecified.

Schupmann's book is, consequently, most important because of its refreshing and innovative interpretation of Schmitt's writings as a whole. By tracing and reconstructing arguments spanning his pre-war writings to later in his life, Schupmann shows that there is continuity and a coherent core to Schmitt's thought, thus convincingly challenging Schmitt's reputation of opportunism and illiberalism. This book is highly recommended for anyone interested in Schmitt, in particular, those willing to look beyond Schmitt the man and get to know Schmitt the theorist.

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