

ON CARL SCHMITT'S READING OF HOBBS: LESSONS FOR CONSTITUTIONALISM IN INTERNATIONAL LAW?

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*'Roma era caduta quando il suo diritto si fece universale'*¹

The constitutional principles of the liberal parliamentary state, commonly called the state under the rule of law, need the precondition of a normal situation.² This claim made by the controversial German lawyer Carl Schmitt might be arguably helpful when the translation of those same principles to an international level is concerned. Clearly, the challenges presented by the nowadays fragmented legal and political world, the nature of which is well known, calls for various measures to be taken. Among other transnational threats, the necessity to combat terrorism seems to occupy a predominant place in the list of demands (Slaughter & Burke-White 2006). On both sides of the Atlantic proposals are being made: sometimes openly 'constitutional', like those coming from Germany (von Bogdandy 2006); and sometimes carefully avoiding the word 'constitutionalism' but with a content that very much reflects the idea of introducing liberal constitutional principles as the 'official' international law (Slaughter & Burke-White 2006). The trend comes close to a dialogue in which, on the European side of the Atlantic, a serious project of constitutional international liberal law is conceived. Christian Tomuschat's brilliant insight 'that international law plays a constitutional role in *any* exercise of public authority' (von Bogdandy 2006, 237) invites to consider the

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¹ 'Rome had fallen when its law became universal.' Brugi 1885.

² It is its 'existential question'. See *Legality and Legitimacy* by Schmitt 2004 [1932], 73. The German edition with untitled comments by Schmitt has been also used for the article: Schmitt 1958. The recent literature on Schmitt is immense. See, for example, Meier 1998; Ojakangas 2004; Koskenniemi 2002; Dyzenhaus 2003. For an overview of the brilliant reading that Dyzenhaus makes of Schmitt, see particularly 38–101.

genesis of the fragmenting forces in the liberal constitutional state. It also raises the question whether something can or should be done against them.

Carl Schmitt manifestly recognized the geniality of Hobbes who had conceived from the chaos of the pre-modern world a theoretically united commonwealth.³ Nevertheless, Schmitt judged that the Hobbesian promise fell short, and that the famous Leviathan was not to rise to the challenge of seeking the yearned-for unity of the secular and spiritual.⁴ This, in Schmitt's view, was revealed by the legal positivism which for him foreshadowed the end of modernity. It became apparent especially in the developed stage of the 'mechanical state'.⁵ The English philosopher's system was not able to deter its targeted enemy: the indirect powers that impeded the unity.⁶

Hobbes was promising, tempting, but failing.

Nevertheless, the fact that Hobbes could define his enemy – the indirect powers – was already a lesson for Schmitt:⁷ *Non jam frustra doces, Thomas Hobbes!* You no longer teach in vain, he cries, across the chasm of years, to Hobbes (Schmitt 1938, 88).

³ This lack of unity of the ethical and political community in modernity, the fragmentation or Entzweiung, i.e. its differentiation into autonomous spheres which do not perceive themselves as belonging to the ethical totality, was for Hegel the 'distinctive and pervasive quality of modernity'. See Kotkavirta 1993, 22.

⁴ Schmitt 1996 and 2003. For the sake of clarity I will refer to the book in the text by an abbreviated version of the English edition's name: *The Leviathan: Meaning and Failure*. The German edition has been used as well; it includes the article-review, *Die vollendete Reformation* by Schmitt and the article *Zum 'Leviathan' von Carl Schmitt*, by Günter Maschke.

⁵ By the concept of the mechanical state, Schmitt means the exact working and the inner technical precision, independent of political, religious, metaphysical or legal considerations of a state, whose value is precisely the fact that it works as a good machine, cleanly and exactly. Schmitt 1996, 42. Thus the unity proposed by Hobbes, seeks only a formal unity and not an order. Order is for Schmitt, as is well known, a comprehensive reality, it is a *nomos*. For a theoretically mature concept of *nomos* or order, see Schmitt 1997 [1950]. The concept of *nomos* has a noticeable spectrum of variant meanings that with time acquire new nuances without losing the old senses in which it is used. A core definition that might be extracted from them is *nomos* as 'Order of the Polis' with its own law or its constitution, in which the *nomos* of the Polis is derived from the *nomos* of the gods. So, for example, in Heraclitus. See Hölkeskamp 2002, 120.

⁶ There is nonetheless an evolution in the work of Schmitt on Hobbes in the sense that in a later stage of his studies of the English philosopher he seems to think that the indirect powers were not quite so clearly enemies of Hobbes. See generally, Schmitt 2003, 137–178.

⁷ On the argument as to the essential character for political life of the ability to define own's enemy, see Schmitt 1979 [1932].

From a strictly legal-theoretical perspective, Hobbes' main contribution, as highlighted by Schmitt, is the fact that he is the intellectual ancestor of modern constitutionalism and of the rule of law state that gained dominion over the European continent from the 19th century onwards (Schmitt 1938, 67–68). Not a humble contribution.

In consideration of the points made by Schmitt, and in order to gain an important tool for the critical assessment of international constitutionalism, I propose in this paper to engage with Schmitt's reading of Hobbes. Although Hobbes is traditionally known for his contribution to the internal perspective of the law of the state,⁸ Schmitt importantly makes use of both the internal public law and the international law perspective in his legal-theoretical reasoning (Haggenmacher 2001, 4).

A combined study of one of Schmitt's seminal constitutional works, *Legality and Legitimacy* (Schmitt 2004 [1932]), and his main study of Hobbes, *The Leviathan: Meaning and Failure* (Schmitt 1996 [1938]), sheds light on the line of constitutional law argumentation common to both. The former book, which is at first glance 'only' a critical positioning towards the Weimar Constitution, advances, on a deeper level, a rectification of the Hobbesian mechanical liberal state, whose theoretical origin, principles and failure Schmitt described in the latter work. *Legality and Legitimacy* proposes a new theory about the concept of law and about the parliamentary constitution in a modern democracy and it is almost entirely devoted to this purpose. On the other hand, the main argument of *The Leviathan: Meaning and Failure* depicts Hobbes as engaged in a struggle against the indirect powers – the very same struggle in which we find Schmitt involved in *Legality and Legitimacy*.

Thus, we might very well draw a parallel between Hobbes and Schmitt, and look at the similarity of the challenge they faced: to overcome the chaos of a politically split (European/German) society. Arguably, the essential difference between them lies in the fact that Hobbes created anew a legal and political system, whereas Schmitt intended 'only' a rectification. A rectification was needed, according to *Legality and Legitimacy* because of the then prevailing fact that the liberal constitutional project of Weimar was not able, *without modifications*, to unify a state at the limits of heterogeneity. Heterogeneity is an evil for Schmitt who has always in mind a legal order which requires an ethos, or a basis of confidence in its reasonableness by the people.

⁸ For a brilliant argument as to Hobbes's internationalism, see Malcolm 2002, 432–457. See also Tuck 1999; Armitage 2006, 219–235; Akashi 2000, 199–216. See also the short, but remarkable article by Koskenniemi 1989, 168–178.

We know that Carl Schmitt very soon gave up his attempt at rectification of liberal constitutionalism.⁹ It had been only a desperate attempt to save the constitution, he wrote later, in 1958 (Schmitt 1958, 345), while his political preference was for a substantive constitution with a form and principles very different from the (liberal) Weimarian entity (Schmitt 2004 [1932], 75–95).

In spite of that abandonment, the lessons on liberal constitutional theory that Schmitt almost reluctantly gave in *Legality and Legitimacy* may today be useful also for international constitutionalism. They might contribute to a deliberation as to the ability of the same liberal project to produce a unity of sorts in a heterogeneous environment, such as the international one. Schmitt in fact put forward the argument that the liberal rule of law might prompt rather than restrain the appearance of divisive indirect powers. Undoubtedly, some of the current international constitutionalist projects draw from the Weimar lessons by Schmitt (von Bogdandy 2006). The linkages with the Schmittian texts of the Weimar period could well have led these projects to pose the question of the indirect powers when developing the idea of a unifying constitutional order. This, however, as I shall argue in the final part of the article, has not been the case.

In the following lines I will first sketch the relationship between the Hobbesian mechanical state and modern liberal constitutionalism as understood by Schmitt, and explain the position of the indirect powers in both systems. After that, the critique made by Schmitt of the liberal constitutionalism and his proposed rectifications in *Legality and Legitimacy* will be described against the background of the international analogy.¹⁰ The conclusions will follow with a comment on a current proposal from Germany as to international constitutionalism.

1. The failure of the Leviathan

1.1 The meaning of the Leviathan

In a sense, in *The Leviathan: Meaning and Failure* Schmitt explains how Hobbes prescribed a medicine that both cured the patient and at the same time infected it with new diseases. Hobbes detected what for him was a distressing division – typically

⁹ See Schmitt 1978, where he describes the legal international environment in a way that seems to accept the hopelessness of the reforms that he proposed in *Legality and Legitimacy*.

¹⁰ On uses of the domestic/international analogy for international constitutionalism, see for example, Habermas 2004, 121.

Judeo-Christian – in the original political unity,¹¹ and suffered with his contemporaries the wars and other difficulties experienced in 17th century Europe. According to Hobbes, the struggles were caused by that very disunity. In his political project for overcoming this division, Hobbes' great insight was, for Schmitt, that he recognized, probably with the help of his philosophical nominalism,¹² how concepts and distinctions are political weapons; in a special manner Hobbes viewed them as weapons of the indirect powers.¹³ In his main work, *Leviathan*, Hobbes himself exhibits impeccable control of that weapon. Exemplary of this is his definition of good and evil:

For these words of good, evil, and contemptible, are ever used with relation to the person that useth them: there being nothing simply and absolutely so; nor any common rule of good and evil, to be taken from the objects themselves. (Hobbes 1946 [1651], 32; Koskenniemi 2005a, 74–82.)

Apparently, the reasoning he made was the following: once we use the same arms of the indirect powers, localized according to Hobbes in the 'power thirsty Presbyterian churches', the 'Roman papal church' and other interest organisations (Schmitt 1996 [1938], 10), they will become confused and lose their political strength. Then the time of the Leviathan, in which everyone will 'submit their wills [...] to his will, and their judgements, to his judgement' (Hobbes 1946 [1951], 112), shall come. The author of *The Concept of the Political* (Schmitt 1996 [1932]) considers this to be, at the same time, a promising and an atrocious prediction. It will bring peace, but has to kill the political man in the process, for the Leviathan is 'the oppressor of irrepressible chaos', namely, the chaos inherent in the individual (Schmitt 1996

¹¹ Schmitt 1996 [1938], 10. See also generally Strauss 1952. For the argument that the spiritual and secular in England were united until the tyrant William, Duke of Normandy (1027–1087), started his absolutist rule, see Taswell-Langmead & Pitt 1946, generally chapter II.

¹² On the nominalism of Hobbes, see for example Schelsky 1981. Schelsky was a former student of Schmitt, later a visible member of the Nazi party, as he himself states in the introduction of the book. He criticized polemically Schmitt's interpretation of Hobbes. See Schmitt 1937, 158–168; and Schelsky's response, Schelsky 1937–38, 176–193. Schelsky particularly highlights the fact that Hobbes battled against every form of political theology (at 191). Obviously, Schmitt disagreed on that point: see generally, Schmitt 2003 [1938/1965/2003] (Die vollendete Reformation). For an appraisal of Hobbes' nominalism, see for example chapter 4, 5 and 6 of his *Leviathan*, 1946. On the pre-eminence of the will and the renunciation to trust in the reason by nominalist philosophy, see Garcia-Salmones 2007.

¹³ On the relationship of Hobbes with scholasticism and generally with Aristotelianism, see Strauss 1952, 30–43; Brandt 1927; Oakeshott 1946 [1651]; Schneider 1986; Leijenhorst 2002.

[1938], 22). Its result is ‘the peculiarly non-political character of the liberal argument’ (Koskeniemi 2005a, 80).

1.2 *The liberal legal structure of the Leviathan*

As is well known, in comparison to the juridical science of the Middle Ages, Hobbes’s philosophical system contains highly original political and legal premises (Villey 1975, 636–646).

On the one hand, the monarch was, for Hobbes, not only absolute in a Bodinian sense (Bodin 1962 [1576]), but also and specifically an aesthetical ruler, who did not carry an ethos.¹⁴ Despite the fact that Hobbes considered the sovereign to be the soul of the great man Leviathan, his sovereign was a human creation, *homo artificialis*. The body and soul of the sovereign were thus another component of the state-machine. Moreover, in Schmitt’s interpretation, the gist of the state construction by Hobbes was that he transferred the Cartesian notion of man as a mechanism-with-a-soul into the Great man – the State. Therefore the state becomes a machine embodied in the person of the sovereign representative. (Schmitt 1996 [1938], 32; Gilson 1974) In the battle for the absolute power of the state between the nobility and the Church (Schmitt, 1996 [1938], 20), Hobbes’s proposal was, according to Schmitt, to program a machine alien to decision (*der entscheidungsfremden Apparat*) (Schmitt 2003 [1965], 174). The German lawyer considered that the mechanization process envisaged by Hobbes’s system digested its *representative* monarch, which was ultimately not necessary for the apparatus to continue working.¹⁵

On the other hand, there is the fundamental significance of Hobbes in the question of sources of law. He makes written law the supreme source and therefore juridical positivism the predominant doctrine for the centuries to come (Villey 1975, 649; Schmitt 2004[1932], 17–26).

¹⁴ For a general view of the originally Kierkegaardian description of the division between the Aesthetical and the Ethical that occurs in modernity, see Kierkegaard 1987a, 1987b and 1984. For the celebration, puzzlingly in my view, of Hobbes, because his concept of sovereign is aesthetical and the critique of Schmitt, because he conceives a ruler with an ethos, see Kahn 2003.

¹⁵ Schmitt 1996 [1938], 34–35. For an interesting account of the genesis of the liberal rule of law and a description of its core element its formal calculability, which however fails to trace its origin down to Hobbes, see Neumann 1996. Compare with Hobbes’ *Leviathan* 1945 [1651], 192: ‘No law, made after a fact done, can make it a crime: because if the fact be against the law of nature, the law was before the Fact; and a positive law cannot be taken notice of, before it be made; and therefore cannot be obligatory.’ See also Schmitt 1996 [1938], 72–73.

Those two elements combined explain why the dominion of the Hobbesian ruler is assimilated by Schmitt with the late-modern sovereignty of the rule of law.¹⁶ They are also consonant with Hobbes's notion of law as a command, depending on the will of the Commander,¹⁷ and not on the reasonableness of the norm. As Schmitt states, a norm that rules because it is right, develops spontaneously a system of natural law; when the norm rules due to its positive arrangement it does so due to an existent will (Schmitt 2003 [1928], 9).

Having in mind the latter Hobbesian political and legal structure, the main argument used by Schmitt when discussing the failure of the Leviathan in the struggle against the indirect powers is Hobbes's individualistic standpoint on the question of faith. In chapter 37 of *Leviathan*, Hobbes makes a clear distinction between the public affair of the confession of the belief in miracles, and the private conscience or reason to believe in one's heart in such miracles (Hobbes 1946 [1651], 297). Although Hobbes writes that the private reason must submit to the public when it comes to confession, Schmitt considers that this small fissure between public *confessio* and private *fides* had in time become an abyss, with the consequence of producing liberal law and liberal constitutionalism in the centuries that followed. This point may be regarded as won by agnosticism, in terms of its refusal to recognise substantive truth, and it forms the foundation of the modern neutral state (Schmitt 1996 [1938], 56–57).

Schmitt considers that the next step in the liberal conquest was made by Spinoza, who knew how to reverse the relationship between public and private, as established by Hobbes, in such a manner that the private sphere took precedence and the public sphere was at its service (Schmitt 1996 [1938], 58). To be overly schematic, in the *Theologico-Political Treatise* (Spinoza 1976, [1670]), Spinoza reasons as follows: the law of nature is determined by the appetites, not by reason, because many do not have sufficient reason, or only acquire it after a whole lifetime has passed. It is, however, more useful for the human being who lives in society to follow reason. If every contract is valid on the basis only of its usefulness, this is so particularly where

¹⁶ This is one of Schmitt's underlying arguments in *The Leviathan in the State Theory of Thomas Hobbes*, 1996 [1938]. For an interesting description of a middle stage of the process as depicted by Schmitt based on Kant, that sees the origin of the liberal (verburgende) legislation's legitimacy in the two republics inaugurated by the American and French revolution, see Habermas 2004, 122.

¹⁷ So for example, Hobbes writes: 'COMMAND is, where a man saith, *do this*, or *do not this*, without expecting other reason than the will of him that says it. From this it followeth manifestly, that he that commandeth, pretendeth thereby his own benefit: for the reason of his command is his own will only, and the proper object of every man's will, is some good to himself.' Hobbes 1946 [1651], 166.

the founding of a state is concerned, where the sovereign can demand obedience in respect of behaviour in order to preserve the integrity of the state – though not obedience in respect of thought or expression. The citizen will comply because it is of more benefit to do so. But the truly free individual is the one who may live according to his or her own individual reason, although he or she must obey the sovereign for the sake of safety and security. Moreover the ultimate aim of the civil society is the liberty of the subject.¹⁸

Hobbes's construction of the state was thus built upon incompatible principles. While the front door was kept firmly shut and fiercely guarded by the Leviathan that becomes as a state 'essentially police' (Schmitt 1996 [1938], 59), the back door was left open, according to Schmitt, for any sort of indirect powers 'the secret societies and secret orders, rosicrucians, freemasons, illuminates, mystics, pietists and sects of any kind'.¹⁹

That this development of the Hobbesian state in the Europe of the 18th century was not compatible with the great unity of the Leviathan, or indeed that it achieved the opposite of the intended result, was shown by Schmitt as he exposed its failure.²⁰

In *The Leviathan: Meaning and Failure*, Carl Schmitt outlines the history of the disjunction between unity and divisive indirect powers, which took place until the 19th century. Eventually the indirect powers, the old enemy of the Hobbesian state

¹⁸ Spinoza, 1976 [1670], particularly chapters 16 and 20. For an appraisal of how the renowned international lawyer Lauterpacht oscillated between admiration and frustration towards Spinoza, see Lauterpacht 1927.

¹⁹ Schmitt, 1996 [1938], 60. Schmitt includes in the list 'the unresting spirit of the Jews', which I omit for obvious reasons. He refers in the book specifically to liberal Jews. The question of the intellectual relationship of Schmitt to some Jewish thinkers, and of his opinion about the role played by some prominent Jews in the intellectual history of Europe deserves a study to itself and cannot be covered in a footnote. Admittedly, the timing of his comments on those Jewish thinkers, in 1938, was altogether unfortunate, to say the least. For a description of the intellectual and political life of Schmitt in the so called 'Nazi years' of his life, see the in-depth study of Koenen, 1995. According to Koenen, the title of the book, 'Der Fall Carl Schmitt', 'Carl Schmitt's case' refers, to the way the Secret service internal to the Nazi party (SD) used to call in its circles the plan in order to get rid of the outcasted Schmitt, already by the end of 1935. So, 660–662. See generally 651–764. (The SD was created in 1931 by the SS and since 1934 established by Himmler as the only political defence-service of the Gestapo, Geheimes Staatspolizeiamt – Secret State Police Office). Compare also the comment on the conference 'Judentum in der Rechtswissenschaft' organized by Schmitt, in Mehring 2006. See also Balakrishnan 2000. My access to Gross's study on the topic is still pending: Gross 2000.

²⁰ Moreover, as he points out, another of the paradoxes of modernity shows that the more intensely Hobbes pitches his conception of the state, absorbing in it all rationality and all legality, the less are the interstate relations capable of having a statal character: 'There is no state between states.' Schmitt 1996 [1938], 48–49.

unity, started appearing in the 19th century, the century of the positivistic legislative state, in the new forms of political parties, trade unions, and social alliances (Schmitt 1996 [1938], 72–74). From the dualism of state and state-free society emerged a social pluralism which resulted in effortless triumphs for the indirect powers.

Schmitt's definition of the indirect powers of modernity explains how such powers enjoy, as a consequence of basic irresponsibility, all the benefits but none of the dangers of political power. This explains his enmity shared with Hobbes, against them: it is important to notice here the possibility of an underlying critique by Schmitt of the Nazi party in power when he wrote, in 1938, *The Leviathan: Meaning and Failure*.²¹ These indirect powers resist any distinct binary structure of command and political danger, of power and responsibility, of protection and obedience. Moreover, their own action may be characterized as being always something different from politics: such as culture, economy, religion, or private matters (Schmitt 1996 [1938], 72–74).

We recognize a logical connection between those indirect powers whose constant expansion was simultaneously combated and favoured by Hobbes' system, and the fragmentation of current legal orders, national and international alike. Following Schmitt's explanation, we may conclude that the liberal constitutional state, having the same Hobbesian premises and structure, might have the same sensitivity to the indirect powers. In late modernity those indirect powers might be signs either of a reasonable pluralism or of an unfortunate and irresponsible abuse of political power (International Law Commission 2006, paras 493).

It is a further step to suppose that the internationalization of the liberal constitutional project might as well suffer or enjoy, like the Leviathan, the apparently inevitable structural biases of the indirect powers, but in this case on a global level.²²

²¹ The following passage might be an example of Schmitt's intellectual resistance in 1938. Arguably he is referring to the totalitarian Nazi state: 'But, when public power wants to be only public, when state and confession drive inner belief into the private domain, then the soul of a people betakes itself on the "secret road" that leads inward. Then grows the counterforce of silence and stillness. At precisely the moment when the distinction between the inner and outer is recognized, the superiority of the inner over the outer and thereby that of the private over the public is resolved is decided. Public power and force may be ever so completely and emphatically recognized and ever so loyally respected, but only as a public and only an external power, it is hollow and already dead from within. Such an earthly god has only the appearance and the *simulacra* of divinity on his side. Nothing divine lets itself be externally enforced. *Non externa cogunt Deos*, said in the presence of a Nero the stoic philosopher in the political situation of a Seneca.' Schmitt 1996 [1938], 61. For the same appraisal of the ambiguity and underlying critique to the Nazis in the book, see Maschke 2003 [1938/1965].

²² A practical example of global structural biases might be found in the description of market reforms and globalization connected to greater social stratification and economic inequality described in Rittich 2003.

Let us first observe closer how the liberal system of the rule of law deals with the inherent tensions provoked by the indirect powers. One of the most telling examples of constitutional attempts to deal with both pluralism and the indirect powers is the Weimar Constitution and as such it is frequently invoked by legal theorists (Dyzenhaus, 1997). Its subsequent collapse might shed some light upon questions concerning the detachment of a constitutional project from the real powers operating in its context.

2. Legality and legitimacy: a proposal for reforms of the Leviathan

Only six years before *The Leviathan: Meaning and Failure*, but with a radically different political situation in the country, Schmitt had written his seminal work on constitutional legal theory under the title *Legality and Legitimacy*. In it he gave an urgent description of the problems and confusions around the concept of legality, of the legislative state belonging to it in modernity, and of the legal positivism inherited from the pre-war period in Germany. We know today that his anxiety for the collapsing *Legalitätssystem* was regrettably justified: only a few months later, after persistent political and legal manoeuvring, Hitler gained power over Germany, ironically by a ‘legal revolution’. (Schmitt 1978, 332–334.)

Thus *Legality and Legitimacy* is a doctrinal work that is historically situated and prompted by the reality in which Schmitt was living. This fact lends it an existential interest, which in general characterizes Schmitt’s writings.²³ The chaotic situation of the Weimar constitutional state at the beginning of the 1930s provided a strong impetus for Schmitt to rethink the formal concept of law, with his customary rigour, through the principles of parliamentary democracy and its core concept, the written law, *das Gesetz* (Schmitt 2004 [1932], 17–26). His own political project, as he clearly stated in the conclusions of the book was for substantive law and a substantive constitution. Nevertheless, in the historical circumstances in which he lived, Schmitt suspended his own opinion – *hebt sich auf* – only to leave us a series of remarkable intellectual insights on the topic.

The main outcome of *Legality and Legitimacy* is a bold attempt at correction of the political system of late modernity, liberal constitutionalism, and of what already by that point in history had become a settled legislative state, so as to create order in a chaotic postmodern Germany. Schmitt intended ‘only’ a rectification. An

²³ In Schmitt’s thinking, the theory usually relates to a question which has arisen in judicial practice. So Herrero 1997, 44.

alternative to the rectification was, for Schmitt, the revolution, which he later described as the reverse of the same Hobbesian system.²⁴

Interestingly enough, Schmitt's suggested reforms for Weimar seemed to imply that there was the possibility of *another normativism*, not only in the national or reduced sphere of Weimar, but also on an international level. This aspect was not developed further by Schmitt, who, as noted above, had another political project involving substantive law in the realm of constitutional law. In international law he defended his well-known theory of greater spaces (*Großraum theorie*), which is arguably not consonant with universal normativism.²⁵

There are several explanations for the use of the international analogy in Schmitt's engagement with the legality of Weimar, apart from the fact that the parliamentarism of Weimar was coincident with the liberal kind of internationalism espoused by the League of Nations (Haggenmacher 2001, 6). Also the exposition of the Weimar Constitution questions as problems of international law had a deeper legal meaning in an already expanding rule of law on an international level.²⁶

2.1 *The legal system as a guardian of justice*

At the beginning of *Legality and Legitimacy* a conceptual clarification of liberal constitutionalism seemed necessary to Schmitt. He begins with a description of what *the* legislative state is. Its characteristic expression is the giving of norms, *Normierung*, which are predetermined, enduring, general norms, 'substantively definable and determinable' (Schmitt 2004 [1932], 5). Like other state forms, the legislative state appears in historical reality mixed with governmental, jurisdictional and administrative elements of other types of states. However, there is always a decisive moment that makes it possible to perceive the presence of a legislative state. In that moment the particular 'focal point of the deciding will' in the organization of the state becomes apparent. (Schmitt 2004 [1932], 6.)

²⁴ A flipside that Hitler's political instinct famously detected, see Schmitt 1996 [1938], 21. For an argument that revolution is an outcome of secularization, see Arendt 1974, 30.

²⁵ See, for example, Schmitt 1991 [1941]. See further the point of Habermas on a possible political constitution of a decentralized world society based on *kontinentale Regimes* that very much resembles Schmittian notions in this regard. Habermas 2004, 134–135.

²⁶ This seems to have been the trend among the most prominent German internationalists of the time. So for example in the case of Hans Morgenthau: Koskenniemi 2002, generally chapter 6. The title of another publication of Schmitt, *Im Kampf mit Weimar-Genf und Versailles*, highlights the way in which the German lawyer positions the constitution of Weimar in the same line of international reasoning, with the League in Geneva and the Versailles treaties, despite its being in principle a national constitution. Schmitt 1988 [1940].

Schmitt outlines several key questions in this regard. In the legislative state the written law (*das Gesetz*) is essentially the specific manifestation of all substantive law and justice (*Recht*), and it has a *monopoly* over them.²⁷ Moreover, based on the fact that every exercise of power by the state is *legal*, every right of resistance is suspended (Schmitt 2004 [1932], 4). In order to consider such a renunciation of resistance rational, the possibility of a misuse of legislative power should therefore be practically out of the question. ‘The lawmaker, and the legislative process under its guidance, is the guardian of all law, ultimate guarantor of the existing order, conclusive source of all legality and the last security and protection against injustice’ (Schmitt 2004 [1932], 19–20). If this is not the case, Schmitt tells us, then a state of a different nature appears and it would be necessary to create the structure of the state anew.

The relevant question here, when talking about international constitutionalism, is whether one might transfer this reasoning to the international plane. In other words, could such abandonment of the right of resistance be demanded within the international legal system?²⁸

In principle, the right to resist is conceived as a part of a legal system that allows for insecurity and occasional bouts of violent attacks, such as the legal systems of the Middle Ages.²⁹ In contradistinction, in a system where the sole right to use (or to authorize the use of) force against threats to peace and security is conferred upon one actor (the Security Council!),³⁰ the right of resistance has no *topos* (Schmitt 1996 [1938], 71).

²⁷ Schmitt 2004 [1932], 19. See the critique by Schmitt of the fact that the Weimarian parliament denied, from 1925 onwards, the empowerment law of article 48 of the Weimar Constitution to the government, which in principle counted on its confidence, so that it had to rule by dictatorial measures, but the same parliament bestowed Hitler with the huge empowerment law of 24.3.1933. Schmitt 1991, 223. For a detailed legal-historical account of those anxious days, see Revermann 1959; see pages 108–139 on the issue of the empowerment law of 1933.

²⁸ Schmitt makes the point that Kant rejects every right of resistance. Schmitt 2003 [1938/1965], 91. Moreover, he also refers to the fact that there is nothing new in the overcoming by Kant of the pre-Kantian natural law that was not known to Hobbes; thus Kant makes the depth of Hobbes’ philosophy apparent. Schmitt 2003 [1938/1965/2003], 170.

²⁹ For an example of one type of right of resistance, *die Fehde*, against the unjust king as it appeared in the late Middle Ages in central Europe, see generally Brunner 1984.

³⁰ See for example the Security Council Resolution, SC Res. 678 (1990), at para 2, in which the Security Council authorizes all the member states cooperating with the government of Kuwait to ‘use all necessary means [...] to restore international peace and security in the area’. This may be found at: <www.un.org/Docs/scres/1990/scres90.htm> (visited 5 July 2007).

In the latter case, it is the inevitable consequence of the rule-of-law reasoning that such a system – the international legal system – must be the mirror into which justice looks: such a system must be able to justify the abandonment of the right of resistance.³¹

Let us consider at this point briefly the conceptual distinction between indirect powers and powers that claim to exercise the suspended right of resistance. According to a Schmittian reading of Hobbes, indirect powers are not only those whose aim is the destruction of the system itself (like Hitler in Weimar), but also those that in an indirect manner try to prevent the creation of ‘desirable conditions from peace, to health, to prosperity’³² for all the participants in the international system. That is to say: those that try to prevent the system from working properly. Thus, it should not be assumed that the indirect powers exist outside the system; they may very well use the system for their own purposes. These purposes may be contrary to, or simply different from the system’s goals.

2.2 The ethos of a formal concept of law and the grounding rationality of the national and international legal system

In his discussion of the legislative state of Weimar, Carl Schmitt is aware that he deals with a purely formal concept of law. At that time, the doctrine had already abandoned earlier notions of law as a formal expression of a material legal rule or as a means to an invasion on freedom or property. According to Schmitt, formal (albeit in content undetermined) law may still exist only if the specific preconditions of the legislative state are present: that is, the legislative state survives, and creates as a state, through purely formal law, the promised *nomos*, which, for Schmitt, conferred upon it its good reputation.³³

³¹ In the specific case of economic sanctions against private individuals the pre-eminent position of the Security Council has been recently criticised as producer of a ‘legal protection limbo’ that however requires the abandonment of the right of resistance. For the description of the lack of legal redress in the process of the SC’s economic sanctions against private individuals and the claim for the need to adapt the sanctions regime, see Wessel 2006.

³² Slaughter & Burke-White 2006, 328. Despite the exceptionism of Armin von Bogdandy, who requires ‘proof’ of the unjust distribution of material and spiritual values in the global order, this is apparently the case. For example, for the whole African continent. See von Bogdandy 2006, note 85, 241–242.

³³ Schmitt 2004 [1932], 11–12. Moreover, according to him in Hobbes’s famous conception of the state, Leviathan is the seed for the ‘transformation of legitimacy into legality and the divine, natural or other pre-state right into positive state law’ (Schmitt 1996 [1938], 67). For a positive appraisal of the process by which law (and politics) becomes an instrument of ethics, see the thought-provoking article by Habermas, 1987.

Those preconditions of the legal system, its ethos, are based on a determined trust and confidence in the rationality and justness of the lawmaker and of the legislative process. They rely on a rational, parliamentary assembly that the people trust, or on the identification of the majority of the parliament with the homogeneity of the people (Schmitt 2004 [1932], 17–26).

The absence of those premises in theory, and here Schmitt refers specifically to positivism, has very clear political purposes, which include a demand for the surrender and renunciation of the right of resistance by the holder of state power without the necessary foundational authority (Schmitt 2004 [1932], 22). This involves demanding that one passively and unreflectively accepts the dictates of the power that dominates the legal mechanisms. Put another way, it amounts to a sacrificial offering of one's own human political condition in the name of the law (*Gesetz*) to the gods who rule, simply because they rule; political power thus becoming a legal technique instead of ethico-political matter. No doubt, this is the Hobbesian dream. (Hobbes 1946 [1651], 112; Koskenniemi 2005a, 82)

From a practical point of view, if those pre-conditions are abandoned, the legislative process becomes a surface for all imaginable tendencies also for the most radical, rebellious, and eventually divisive forces. The formally neutral (*wertfreies*) law would, for a time, create the illusion that it could be the legal vehicle of every possible political goal. However, without an ethos, the peculiar rationality of the legality system would capsize and produce the opposite result, a singular irrationality.³⁴

Nevertheless, we may conclude from Schmitt's exposition that he sees the possibility of a purely formal law. This does not mean that he would renounce the ethos of the legislative state, the wise and incorruptible legislator pronouncing the always good and just *volonté générale*. (Schmitt 2004 [1932], 11) In other words, while law could be formal, the legislative state could not. The latter had to be structured by a rational parliament or on the identification of parliament and people. Putting it bluntly, if the concept of law is formal, then reason and justice must come from somewhere else. Even if elections grant mathematical-statistical representation, there must still be the necessary further ethos, a substantive principle of justice, in order for the legislative state not to collapse into absurdity. If this would not be the

³⁴ Schmitt 2004 [1932], 11. Less than ten years later Germany would face inside the strict sphere of legality the most striking example of a peculiar unreasonableness: the Holocaust. Being originally of four years, the period of the empowerment law of 1933 for the Nazi government had been extended by the Nazi Parliament in 1937 and 1939. Finally, in 1943, Hitler decided to extend the empowerment law all by himself indefinitely, see Revermann 1959, 114–115.

case, it may happen that the one who first obtains the majority, then establishes itself 'legally' as permanent legal power, as Hitler did in Weimar (Schmitt 2004 [1932], 28).

According to Schmitt, this pre-conditional principle of justice is the principle of equal chance for any conceivable opinion, trend, and movement to obtain the majority of political power. This is the only context in the minority may be demanded to abandon its right of resistance. Otherwise, the suspension of the right of resistance of the minority towards a legal but unjust majority would be nonsense and would lead, sooner or later, to the suspension of the very same legality on which the state is based. The frequently possible jurisdictional process of reviewing the legality of the behaviour of the majority in power is, as reality shows, not sufficiently rapid where the executive is concerned. Nevertheless, the requirement of equal chance is more than a matter of winning in the race for legality.

The principle of equal chance assumes both the loyal attitude of the political opponent and the public visibility of that opponent. This involves the assumption that he or she will maintain the principle of equal chance once in power. The fact that only the one in power may be the judge of this possibility is, according to Schmitt, right. Nevertheless, the minority not in power has also the inalienable right to judge whether the legal power is giving a legal or illegal judgement in this case. This is why Schmitt concludes that the principle is in itself empty, since it does not on its own premises render an answer as to who decides, when there are different opinions over legality and illegality between the majority and the minority. (Schmitt 2004 [1932], 34–35.) Whether Schmitt believed that the principle of equal chance in the legislative state could exist in political reality – let alone in international political reality – remains unclear.

3. The international analogy and the critical lesson of Schmitt for international constitutionalism

I want to underline a crucial element in Schmitt's theorising in *The Leviathan: Meaning and Failure*. The point Schmitt was trying to make about Hobbes, no doubt polemically, is that the English philosopher was the first theorist of the liberal state under the rule of law. He is not interested in the question whether Hobbes himself concentrated on the internal dimension of the sovereignty of the state or on its international implications. Schmitt's focus is on the liberal rule of law. Therefore his theses on indirect powers are inevitably applicable to the realms national and international alike. The two basic issues dealt with by Schmitt may indeed be part of legal reasoning both in domestic and international theory. The first issue is that the

fragmented (inter)national reality is just another instance of an inherent quality of the rule of law system, which, in non-Hobbesian eyes, might even free us from the terrible unity of the Leviathan;³⁵ the second issue considers the importance of localizing the powers that cause disunity, so as to attribute to them the political responsibility they might wish to avoid.

In the text on Weimar Schmitt concluded that the rational and the ethical must go hand in hand with the law in order to design a political community, and that every participant in that community, including the elusive indirect powers, must accept the consequences of that. Finally – and this is for me the substance, or the point on legitimacy, of Schmitt's reforms of liberal constitutionalism – we appreciate the concern for substituting the ruler-machine, law or sovereign, by human rulers.

For the last argument in this paper I will draw attention to the existential attitude of Carl Schmitt during Weimar, which in my view deserves the attention of constitutionalists. I shall comment on an essential methodical attribute from which the current international constitutional project, especially the so-called proposals from Germany, would greatly benefit, and which I believe the project currently lacks.

Christian Tomuschat's proposal for international constitutionalism, which is representative of a common understanding held by many scholars in the German-speaking world (von Bogdandy 2006, 224–225), was presented by Armin von Bogdandy as a 'proposal from Germany' in a recent article for the *Harvard International Law Journal*.³⁶ Von Bogdandy's article focuses mainly in the General Course at The Hague Academy taught by Tomuschat in 1999. Although von Bogdandy does not expressly states so in his text, his own appraisal of the 'practical proposals by constitutionalist authors' as being 'preferable' in many instances to other theoretical approaches (von Bogdandy 2006, 242), apparently triggers his task of messenger for the German proposal. As described by von Bogdandy, the project pertains to a vision of a global legal community directing and framing political power in the light of common values and a common good (von Bogdandy 2006, 223). This vision searches not only peace and security, but also justice (von Bogdandy 2006, 226). If only for the inclusion of the word 'justice' in the Hobbesian doublet 'peace and security', the German proposal appears worth taking into account as a very significant project for constitutional international law.

Upon closer examination, some of the core points made in the proposal made by Tomuschat resemble arguments given by Schmitt in his proposal for a constitution

³⁵ See for a similar argument in Koskenniemi 2005b.

³⁶ Also the title of the article evidences that: *Constitutionalism in International Law: Comment on a Proposal of Germany*.

that works efficiently. Thus, he defends legal formalism as being founded on an ethical premise (von Bogdandy 2006, 227); and he explores the question of whether or not there exists an international community that gives legitimacy to international law (von Bogdandy 2006, 233–237) – or, if we use Schmitt’s language in *Legality and Legitimacy*, whether international law has currently an ethos or not. Like Schmitt, Tomuschat also states that the global community of values can be asserted only in a world that is ‘at peace with itself’ (von Bogdandy 2006, 236). It is only when Tomuschat following Habermas (and thus Kant), defines the *telos* of all law as ‘the assurance of peace and freedom under the rule of law’ (von Bogdandy 2006, 238), that the voice of Schmitt almost disappears. This link with Schmittian arguments should not be altogether surprising, since in *Legality and Legitimacy*, as previously noted, Schmitt played the role not of a guardian of the liberal constitution, but of its saviour.³⁷

But puzzlingly the proposal of liberal international constitutionalism leaves aside the critical appraisal of international reality necessary to accomplish such a project. The *Sollen* of the constitutionalist project is very well sketched out while the actual study of the *Sein* of the concrete needs and deviations in the international order under the rule of law is carefully avoided. One does not learn about the individual and concrete indirect powers currently acting in the international sphere; and consequently one also learns nothing about the measures to be taken to reform current international institutions or the current international legal system. Moreover, from the nature of the proposal one would imagine a smooth movement of world politics advancing towards the project. One does not even know of the existence of such a thing as indirect powers. Hence, the proposal looks utopian. Furthermore, without a realistic critique, the possible political choice for international constitutionalism might turn out to be, perhaps despite one’s unwillingness to do so, a mere surrender to an empire that does not exert effort into reigning, save through the extending its net of rules.

Without regard from the success of his project, there is a lesson in Schmitt’s approach to the reforms necessary in Weimar that is worth consideration in discussing international constitutionalism. The lesson is as simple as that reforms are necessary if the system does not work as it should (*soll*). The ‘reforms approach’ is liberating if we are to reject the Hobbesian state of nature (von Bogdandy 2006, 239), and to consider the already existing constitutional international order – an order that lacks the contours of a homogeneous hierarchical meta-system, but nonetheless has a systemic legal nature (International Law Commission 2007, paras 324; 409; 489;

³⁷ For a classical use of the concept of ‘guardian of the constitution’ see the description by Schmitt of the role of the president as the guardian of the constitution. Schmitt 1931.

493). Where the Hobbesian fears a fragmentative return to the state of nature and demands unification, a non-Hobbesian, perhaps (not) a liberal international constitutionalist, relies on the potential sources of legality of the system in order to demand peace and justice where they are lacking.

There is perhaps a mythical space³⁸ between the idealism of *als-ob* (as-if) in the German project, and the existentialism of *entweder/oder* (either/or) in Schmitt.³⁹ The true challenge for the future of the international constitutional project is to find that mythical space.

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³⁸ The concept myth understood as an authentic way, neither rational nor irrational, of expressing truths that transcend the capacity of reason or are difficult to reach by it. *Apuntes de Filosofía de la religión*. Anonymous, on file with the author, at 19.

³⁹ So Schmitt formulates the disjunction, on several occasions, between either a neutral, mainly procedural constitution, or a substantive constitution. See Schmitt 2004 [1932], 43–44 and 51. On the other hand von Bogdandy makes the point that ‘the core issue of legitimate and effective international law and institutions is not an either/or question’. See von Bogdandy 2006, 238.

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