THOMAS HOBBES AND CARL SCHMITT ON THE TENSION BETWEEN SOVEREIGN AND LAW

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ABSTRACT

THOMAS HOBBES AND CARL SCHMITT ON THE TENSION BETWEEN SOVEREIGN AND LAW

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This thesis aims at developing an understanding of the vital role that the political decision plays in the tension between sovereign and law through an examination of the constitutional theories of Thomas Hobbes and Carl Schmitt. In Schmitt's classic work *Dictatorship* of 1921, the sovereign decision derives its legitimacy from its norm-preserving power, whereas in *Political Theology* appeared in 1922, it legitimizes itself on basis of the norm-giving power. In *The Concept of the Political*, the decision on who the enemy is precedes the norm-giving power of decision in such a way that it has an existential value before being legally relevant. The core of Schmitt's theoretical transformation is already present in a precursory footnote of *Dictatorship* on Hobbes' three constitutional forms in *De Corpore Politico*, *De Cive* and *Leviathan*. Once the distinction between norm (law) and decision (sovereign) is made, the norm always risks incorporating what it excludes (the exception) into itself through the decision. In that regard, not only Schmitt's decisionist positions, but also Hobbes' constitutional forms become indistinguishable. It can be argued that Hobbes' liberal decisionism still takes this risk. First, the moment of

constitution is not totally a normless one in the sense that the decision entails a distributive content. Second, the sovereign decision must observe the content of the covenant because the first act of the sovereign is not voluntary. Thus, one can argue that Hobbes' legal order derives its legitimacy from the laws of nature as much as the decision.

Keywords: Sovereign, Law, Norm, Decision, Exception.

ÖZ

THOMAS HOBBES VE CARL SCHMITT: EGEMEN VE YASA ARASINDAKİ GERİLİM ÜZERİNE

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Bu tezin amacı, Thomas Hobbes (1588-1679) ve Carl Schmitt'in (1888-1985) anayasa kuramlarını inceleyerek, siyasi kararın, egemen ve yasa arasındaki gerilimde oynadığı hayati rolü konumlandırmaktır. Schmitt'in 1921 tarihli *Diktatörlük* incelemesinde, egemenin istisna konusundaki kararı, meşruiyetini varolan normların korumasından alırken, 1922 tarihli *Siyasi İlahiyat* metninde, kararın meşruiyeti, norm-verme gücünde yatar. 1932 tarihli *Siyasal Olan* kitabında ise, düşmanın belirlenmesi konusundaki siyasi karar, henüz yasal anlamını kazanmadan, yasa-yapıcı kararı önceleyecek biçimde varoluşsal bir değer kazanır. Schmitt'in kararcılığındaki bu kuramsal dönüşümün nüvesi *Diktatörlük* incelemesinde, Hobbes'un *De Corpore Politico*, *De Cive* ve *Leviathan*'da geliştirdiği üç anayasa kuramı üzerine verdiği bir dipnotta hâlihazırda mevcuttur. Norm (yasa) ve karar (egemen) arasında bir ayrıma gidildiği sürece, norm her zaman için normun dışladığı istisnayı kapsama alanına alma riskini taşır. Bunu yapacak olan karardır. Bu bakımdan, norm ve karar arasındaki ayrım, yalnızca Schmitt'in

kararcı pozisyonlarını değil, Hobbes'un siyasi oluşumlarını da ayırt edilemez kılar. Buna rağmen Hobbes'un liberal kararcılığına bu riski aldığını düşünerek yaklaşmak mümkündür. İlkin karar, dağıtıcı içeriğe sahip olduğu için kuruluş anı bütünüyle normdan yoksun değildir. İkinci olarak, egemenin kararı sözleşmenin içeriğini dikkate almak zorundadır çünkü egemenin ilk eylemi gönüllü değildir. Bu bakımdan, Hobbes'un yasal düzeni meşruiyetini, karardan aldığı kadar doğa yasalarından da almaktadır.

Anahtar Kelimeler: Egemen, Yasa, Norm, Karar, İstisna.

To

My Family

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS

D	*Dictatorship*
DC	*De Cive, or On the Citizen*
DCP	*De Corpore Politico, or the Elements of Law*
L	*Leviathan*
LST	*The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of A Political Symbol*

All references to these works will be given between brackets in the text; first is the abbreviation, and then page number.

CHAPTER 1

INTRODUCTION

Very few contemporary legal theorists have been willing to be bothered with the question of how the established order became what it is and how it came to the end. They generally write as if nothing had happened before the order in question was constituted or nothing will happen after it collapses, leaving the question of political beginnings/ends to the historian of politics or the political theorist. The same indifference goes with matters about the nature of law as long as the law as a system with its own technicalities allows its practitioners to solve particular legal problems.

While classical philosophers devoted chapters[1] to the political and legal issues on 'before-and-after sovereign order', no deep reflection on the origin of the order and law itself seems essential for modern jurisprudence as it rather tends to account for (or even influence) the legal practice in courtroom settings and legal institutions. This is so mostly because modern jurisprudence is a very young science dating only back to the nineteenth century. It owes its disciplinary developments mostly to the Anglo-American legal circle whose jurists, lawyers, judges and legal philosophers greatly contribute to each other's work and whose conceptual legal

[1] Both Thomas Hobbes and J. J. Rousseau were preoccupied with the political and legal issues on the origin of civil order and its dissolution as much as the nature of law. Chapter 29 of *Leviathan* is "Of those things that Weaken, or tend to the Dissolution of a Common-wealth" Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1996), 221. And *the Social Contract* has the chapter entitled "The Death of the Body Politic." J.J. Rousseau, "Of the Social Contract," in *The Social Contract and other later political writings*, ed. and trans. Victor Gourevitch (Cambridge: Cambridge University Press, 1997), 109.

reasoning and professional legal practice go together.[2] As every young science, modern jurisprudence tends to sanitise itself through a substantial withdrawal from other speculative fields such as morality and politics, from the question of system and order. Instead, it accepts the inclusion of a mass of formal technical rules which seems coherent and unified enough to explain and justify a particular legal process.

Viewed in this way, it is no surprising to witness the ongoing fascination with the German constitutional jurist Carl Schmitt's (1888-1985) decisionistic theory of the exception which put a realist spoke in this technical wheel of jurisprudence by reminding the political foundation of law, long before unexpectedly proliferating emergency situations all over the word. The state of emergency indicates that there is something purely political inside the system of the law. This idea could not be welcomed by any liberal conception of legalism according to which judicial and legislative supremacy are essential for constitutional order.

Having already become a cliché among scholarly debates, the 9/11 attacks in the US still arouse attention of many legal and political theorists as to how to deal with emergency situations inside and/or outside the law. This is not so just because the attacks took place in the US, but also because this event illuminates in an emergency situation how easy it is for one, perhaps the most important one, of the leading liberal democratic states to take such extreme measures which are regarded as illiberal by empowering the executive with legal authority to wage 'war on terror' just as evidenced in the Authorization for Use of Military Force (AUMF). It was the George W. Bush Administration which was granted the legal authority —the legislative authority as it was signed by the President as well as passed by Congress— through public law on the 18th of September, 2001

[2] Roger Cotterrell, *The Politics of Jurisprudence: A critical Introduction to Legal Philosophy* (University of Pennsylvania Press, 1989). Roger Cotterrell looks at ways of how different legal theories takes the social contexts out of which they have arisen. His valuable book provides us with a critical sociology of law the subject of whose is the environment of Anglo-American jurisprudence.

> to use all necessary and appropriate force against those nations, organizations, or persons he (the President) determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[3]

It is important to note that although the exception is not placed in the norm by the US Constitution, the lack of legal regulation has not prevented the US from appealing to emergency powers whenever needed. The legal-constitutional recognition of emergency does matter perhaps in principle, but does not really matter in fact, as the 9/11 case clearly indicates, because "its development is independent of its constitutional and legislative formalization."[4] In order to explain how the emergency declaration in the Western politico-legal tradition has become regular, in his *State of Exception* Agamben gives "a brief history of the state of exception" in a lengthy eleven pages note; its first appearance is embedded in the 1791 Constituent Assembly's decree in French Constitution right after the Revolution, and the last appeared in 2001 when George W. Bush's "presidential claim to sovereign powers" to wage 'war on terror'.[5]

What 9/11 reveals is that emergency administration seems to find its constitutional justification in the works of leading jurists of the period as seen in the case of John Choon Yoo, professor of law at University of California, Berkeley who is considered to be one of legal architects of the Bush administration's executive plan. He bases his far-reaching idea of the executive power on a particular interpretation of the Constitution with regard to foreign affairs. Yoo proposes an approach according to which "[t]he deepest questions of American foreign relations law remain open because the Constitution wants in that way," claiming that this

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[3] *Military Force Authorization resolution of September 18, 2001*, Public Law 107-40, *U.S. Statutes at Large* 115 (2001): 224.

[4] Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago: University of Chicago Press, 2005), 10.

[5] Ibid., 22.

reasoning "helps explain *practice* better than competing theories, which have generally criticized practice as inconsistent with the Constitution."[6]

Yoo's scholarly explanation of the post-attacks *practice* has still been controversial among legal theorists for the reason that it seems to function as the legitimization of how legal the authority of the executive is, that is, how the power of "the president's commander-in-chief" is legally authorized under the Constitution.[7] The fact that the political power of the executive is legally uncontrollable in times of emergency comes in sight; the executive is not only legally uncontrollable, but also puts the legislative in its service. The alleged legitimacy of the executive simply lies in legal authorization by interpretation – in this case by the interpretation of the constitution as it provides the legislative with the higher constitutional law needed for the authorization of the executive. Thus, in times of emergency the liberal idea of separation of powers may become optional.

The mighty executive draws our attention when it trumps the law.[8] In an emergency situation in which a threat is considered to be an existential one, the

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[6] John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11*, (Chicago: University of Chicago Press, 2005), 12; my emphasis. 9/11 left such a catastrophic debris behind it that the distinguished professors at the law schools widely considered to be preeminent could propose that "since torture would inevitably be deployed to combat terror, it should be brought within the law and regulated." David Dyzenhaus, "Emergency, Liberalism, and the State," *Perspectives on Politics* 9, no: 1 (2011), 71.

[7] William Scheuerman in his review of Yoo's book argues against Yoo's approach to the Congress's part in providing "proper constitutional guidance to the executive" and in this respect criticizes his scholarly support to "a demiurge-like president." William E. Scheuerman, review of *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11*, by John Yoo, *Perspectives on Politics* 4, no: 3 (2005), 606.

[8] In fact, not only in times of emergency, but in the general course of politics, the executive power has become increasingly mighty in the sense that it gets more and more released from legal checks and limitations. *The Presidentialization of Politics* offers a detailed examination of, on the basis of the European cases along with its extension to Middle East, Israel, how growing executive domination over the constitution has been felt all around the West, especially in the form of personification in the prominence of an individual leader in the contemporary leading democratic parliamentary system of governments. Having investigated the structural causes, as distinct from contingent ones, of the presidentialization of the executive, Paul Webb and Thomas Poguntke's empirical findings are remarkable for that political trend; a common tendency on the part of the governments towards deactivating the cabinet by cutting down the cabinet meetings, resulting in less "opportunities for collective decision-making within the executive" and more "bilateral decision-making processes involving the chief executive and individual ministers." Paul Webb and Thomas Poguntke, "The

tension reveals itself as the one between the executive and law. In fact, in the face of an existential threat "the constitutional choice is not between various institutions – the executive, the legislature and the judiciary – but between a vacuous or merely procedural account of legality and one that links procedure to substance."[9] Thus, one should not surmise that it is the executive, rather than legislative or judiciary power, before which legality is challenged. The emergency produces a moment which incorporates the main powers of the state authority whose separation proves the normative principle during normalcy.

This specific case brings us to question of the liberal legalism because it reveals the dark side of the liberal commitment to law. Concerning the measures taken in the wake of the attacks, it is highly unlikely that 'indefinite detention' upon any possible suspicion, for instance, would be counted among liberals as a promise of legal protection of civil liberties. This clash renders suspicious the principles of legality as they can easily and aptly be instrumentalized in the face of emergency.

Modern emergency situations, like 9/11 in US, which typically end up with the declaration of a state of emergency are situations generally unexpected and abrupt, in which some part of the nation or the nation as the whole is faced with a fatal catastrophe in the literal sense of the term. Accordingly, it *naturally* requires an immediate reaction on the part of the government, parliament, or even citizens themselves. The regular moral duties and the principles of justice lose their significance and practicability *in extremis* because doing the right thing or acting in legal official capacity may not help when it comes to matters of life-and-death. In the same way, the means evoked during, or after the emergency in order to minimize or to get rid of it altogether, becomes more negligible and excusable in

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Presidentialization of Contemporary Democratic Politics: Evidence, Causes and Consequences," in *The Presidentialization of Politics: A Comparative Study of Modern Democracies*, ed. Thomas Poguntke and Paul Webb (NewYork: Oxford University Press, 2005), 340.

[9] David Dyzenhaus, "The States of Emergency," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012), 446.

the eyes of the people, even if it is morally unacceptable and legally indefensible during the time of normality in the eyes of the same people.

Thus, the emergency situations have their own rules which are characterized mainly by their deviation from the rule of law inasmuch as they are the deviations from the ordinary course of life. The governmental acts in response to emergency falls under the category of necessity because it is 'necessary' to meet a deadly threat against the existence of a political entity. It is the demand of necessity that reveals the tension between sovereign and law as it blurs the alleged boundary between the sovereignty of the state and its laws which are supposed to regulate and check any possible arbitrary acts of the state. That is, this tension provides us with a challenging opportunity to put the idea of legalism (the rule of law) to the test.

Even though the legal process of 9/11 has retriggered the legal debate on the exception, the question of how sovereign is related to law is not a novel question and can be formulated in various ways; as to be one between sovereignty and legality, or sovereign and law, or politics and law, or fact and norm, or order and justice.[10] What is important here is that emergency plays a concrete role in uncovering this original dissonance, to put in Schmitt's words, between 'the political' and the (rule of) law.

Schmitt's formulation of the tension has occupied both political and legal philosophy since the early 1980's.[11] The more one examines the topic of the state of

[10] The same dichotomy has been formulated and developed in some other ways; Jürgen Habermas, for instance, calls it the one between fact and norm as seen in the title of his 1992 work. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg, (Massachusetts: MIT Press, 1996). The most recent distinctive formulation of the problem can be found in Nomi Claire Sazar's book. She prefers calling it "everyday struggles between these two values [order and justice]." Nomi Claire Sazar, *State of Emergency in Liberal Democracies* (Cambridge University Press, 2009), 1-2.

[11] Intellectuals of Turkey have not stayed out of this trend. A concise account of the reception of Carl Schmitt in Turkey as well as by some figures of the Western left-wing political thought, is given by Cem Deveci. Cem Deveci, "Faşizmin Yorumsanması ya da Carl Schmitt'in Saf Siyaset Kuramı," in *Liberalizm, Devlet, Hegemonya* (İstanbul: Everest Yayınları, 2002), 32-40.

emergency, the more one feels Schmitt's ever-presence. It is justifiably so since there is indeed hardly any other legal political theorist who is incessantly haunted by the question of the exception as Schmitt was. On Schmitt's account, the exception and sovereign are inseparably linked with one another – so linked that in his 1922 *Political Theology*, he describes the sovereign as one who holds two measures in her discretionary capacity and accordingly two positions (the legislative and the executive) in the office; (1) "who decides on the state of exception" and (2) "what must be done to eliminate it."[12] It is the decision that links the sovereign to the exception.

To remember Yoo's justification of American policy after the 9/11 attacks, it was the legal authorization of the executive by interpretation that fits *practice*. Within the Schmittian context, Yoo's approach can be put as follows; the sovereign decision precedes not only legal interpretation, but also 'practice'. That is to say, once the sovereign decides on the exception, all the rest can be considered as the perfunctory legal procedures followed to get rid of emergency.

Schmitt's approach to the question of the decision is not the same with his earlier position in his 1921 work *Dictatorship* appeared right after the collapse of Wilhelmine Germany and the declaration of the Republic in 1918. The German political transition from the constitutional monarchy to the constitutional democracy has usually been treated as a great watershed of the nation as well as of history as it was heading towards, perhaps, the most devastating experience within the European territory along with the long-term impact on global culture. Hence, Schmitt's reasoning was born into this politics of crisis which led him to theorize on the beginnings and ends of the constitutional crisis. He argues in the preliminary remarks of *Dictatorship* that the question of "how it became what it is" is crucial for the legal theory if the jurist would be able to avoid the banality of 'I told you!' after what's done is done from the perspective of "philosophico-

[12] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Stanford: University of Chicago Press, 2005), 5, 8.

historical horoscope" (D; xxxvii). *Dictatorship*'s political prospect of the constitutional rectification for the utterly sterile territory of legal science playing itself within the system of norms begins with this warning tone and signals a seemingly outdated solution for the political problems of the newly emerging republic.

Schmitt strategically follows two lines to demonstrate the figure of commissar and the institution of dictatorship in the Roman law as a technique for ruling running parallel to the intellectual history of politico-legal theory. It is a large-scale joint theoretical project that initiates an examination of various constitutional theories from different genres, including the English political philosopher Thomas Hobbes (1588-1679), while carrying out quite a detailed historical examination of the concrete critical moments of the Western politics through which the states exercised and appealed to emergency powers whenever necessary.

In *Dictatorship*, Schmitt finds a "legal value" in the decision on the exception "irrespective of its material content in justice and equity" (D; xlv). The sovereign decision on the exception derives its (legal) worth from the distinction between the right of law and the right of the implementation of law; the law as a system of norms is one thing, and the actualization of the law is another; if the latter constitutes an exception to the former, it cannot do so arbitrarily; the decision on the exception "ignores the existing law, it is only doing so in order to save it" (D; xliii). Thus, in *Dictatorship* the sovereign decision on the exception is made in order to protect the norm. This is what makes the decision on the exception legitimate.

In *Political Theology*, however, Schmitt's decisionism becomes more sharpened; the sovereign "stands outside the normally valid legal system," he asserts, "nevertheless belongs to it" because it is the sovereign who "must decide whether the constitution needs to be suspended in its entirety."[13] The sovereign decision both with and without reference to the legal order stands somewhere in between

[13] Ibid., 7.

order and chaos.[14] Thus, in *Political Theology*, the sovereign decision on the exception can be made to overthrow the existing constitution and to establish a new one. In this case, the decision derives its legitimacy from the coming order.

Beyond the historical context which urged Schmitt to remind the legal positivist of the traditional Roman institutional measures for the exceptional situations, a very convincing theoretical explanation for the reason why Schmitt's decisionism in *Dictatorship* collapses into a radical theory of sovereignty in *Political Theology* is given by Giorgio Agamben. Schmitt has first drawn on the possible traditional-institutional facilities and made concession to commissarial dictatorship in order to save the Weimar Republic. But he then rediscovers the distinction, even opposition between norm and decision. Hence, Schmitt's later rigorist decisionism is not coincidence, but a theoretical fate.

Schmitt's decisionism is best understood as refusing the subsuming of decision under norm. Classical dictatorship bases itself on the decision to suspend the present norm for a limited time, leaving what measures to be taken to the dictator. In this case, the dictator is endowed with the discretionary capacity as to the measures taken to eliminate the exception. That is, the dictator is left alone with the "*force of law*."[15] If the sovereign decides on the exception and authorizes the dictator to implement the decision, then the dictator has to decide how to exercise the decision on the exception (that is, the norm to the dictator). Schmitt's decisionism does not accommodate two decisions made by sovereign and dictator, separately.

Agamben's approach to Schmitt's decisionism not only provides me with a guiding principle to capture Schmitt's shift. It also enables me to explain how Schmitt had already converted the rule of commissar into sovereign dictatorship with Caesarist themes in *Dictatorship* even before *Political Theology*. Thanks to

[14] This is what Giorgio Agamben calls the topological paradox of sovereignty. Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford University Press, 1998), 15.

[15] Agamben, *State of Exception*, 38.

Agamben's original way of approaching to the question of the exception, I am able to do that by reframing Schmitt's hesitation in a footnote about Hobbes' three forms of constitution in *De Corpore Politico*, *De Cive* and *Leviathan*, respectively. The reason why Schmitt locates the Hobbesian constitution in two different constitutions (commissarial, sovereign dictatorship) is the very reason why Schmitt' two concepts of dictatorship in *Dictatorship* ends up with his theory of sovereignty in *Political Theology*.

My effort to reframe Hobbes' three constitutions for the purpose of capturing Schmitt's conceptual opposition between norm (law) and decision (sovereign) gives support to Agamben's thorough critique of the same distinction: Once the distinction between the right of law (sovereignty) and the right of the execution of the law (sovereign) is made, there is no such guarantee that the decision on the execution of the law becomes a new norm. The distinctions themselves are the very problem. Thus, the argument that Agamben makes about the distinction between norm and decision also challenges Hobbes's theory constitution simply because Hobbes also makes the same distinction in spite of his insistence on the indivisible sovereignty.

The main reason why Hobbes makes the same distinction is that Hobbes is a political decisionist, too. At the end of fourth chapter of his 1642 *De Cive*, Hobbes states that an artificial political constitution emerges from the 'decision [*constitutione*]'. It is no coincidence that Hobbes' decisionism has been best examined so far by Schmitt. One of the major arguments of Schmitt's *Dictatorship* about Hobbes is also the argument by which Schmitt detects Hobbes' unique place in the seventeenth century natural law tradition. Schmitt calls Hobbes' theory of law "the natural law of exact science" as opposed to what he identifies as "the natural law of justice" (D; 16). Schmitt proceeds to qualify the distance between two natural law conceptions of justice by stating that "one system takes its start from interest in certain understandings of justice, and therefore from a certain *content* of the decision, whereas for the other the interest only consists in the fact

that a *decision* as such has been made at all" (D; 17). On Schmitt's view, it is decision rather than norm (justice) which triggers the Hobbesian constitution; as opposed to the pro-monarchists who presuppose the pre-state quality of the law by which the institution of the state is backed, Hobbes' scientific theory of natural law rejects any pre-state features of the law.

It is important to notice Schmitt's rather odd phrase, 'the natural law of exact science'; the former part sees Hobbes as taking part in the natural law tradition, whereas the latter rejects what the former accepts. I think that Schmitt's phrase, 'the natural law of exact science' is not for no reason because Schmitt is aware that Hobbes' sovereignty rests on the "agreement with the convictions of the citizens, even if these convictions should be initiated by the state" (D; 18). What are these convictions about if not the sovereign's commitment to the laws of nature? But Schmitt's choice is to take 'convictions' as lacking any content and accordingly, to suggest that Hobbes' "decision contained in a law is, from a normative perspective, borne out of nothing" (D; 17).

Nevertheless, Schmitt's phrase is confirmed first in chapter 13 of *Leviathan*, where Hobbes makes a difficult claim that right and wrong, justice and injustice cannot exist unless there is a sovereign power, and second in chapter 26 in which Hobbes also asserts that "The Law of Nature, and the Civill Law, contain each other, and are of equall extent" (L; 185). Thus, Schmitt is right in inventing such a confusing status to Hobbes' relating justice (norm) to the law. However, he immediately resolves the tension between the natural and positive law in favour of the scientific part of Hobbes' account by claiming that for Hobbes "the law is not a norm of justice but a command, a mandate from the one who holds supreme power" (D; 16-7).

Before sketching out my thesis, I should first formulate the basic question that I ask: **how to conceive the political decision in its relation between sovereign and law in Hobbes and Schmitt**. Schmitt's decisionism has three steps; the sovereign decides on the exception (1), as well as the measures to eliminate it (2), on the basis

of the distinction between friend and enemy (3). The decision on the enemy is already made before the forthcoming decisions; it precedes other two in such a way that it has an existential value before being legally relevant. Thus, a legal order derives its legitimacy from the moment in which the sovereign decides on the exception. The decision keeps operating after the emergence of a new constitution; its continuity and longevity depends on the decision. Hobbes' decisionism is always concerned with the question of justice of new constitutional beginnings.[16] Even though Hobbes' constitution is constituted, or constitutes itself by the decision, the moment of constitution is not a normless one; (1) The decision has to do with distribution. At the distributive moment of constitution, property appears to be the unwavering element of justice. (2) The sovereign decision must observe the content of the covenant as the first act of the sovereign is not voluntary. To this effect, Hobbes' legal order derives its legitimacy from the laws of nature as much as from the decision.

In Second Chapter, first of all, I strive to give a substantive answer to the question of why Schmitt with reference to his powerful criticism of the rule of law. Schmitt picks up the most prominent exponent of the legal positivist tradition, Hans Kelsen, in order to points out Achilles' heel in the legal ground of the nineteenth century constitutionalism. As I argue, for Schmitt, "bourgeois *Rechtsstaat*" in the nineteenth century bases itself on the direct rejection of the people to be the owner of constituent power, and instead identifies itself with the sum total of its laws. The legal positivist purity-seeking attempt to sterilize the legal system by eliminating the political role of constituency is exposed to Schmitt's challenging question; who decides what to do if the state is caught off-guard in the face of a concrete threat.

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[16] One can hardly encounter the concept of justice in any works of Schmitt. But Schmitt was seeking for justice for German people as he expressed his concern on the very next day the fall of the Weimar Republic on January 30, 1933: "my work derives its true meaning from the fact that I am nothing other than the vehicle of the substantive law of the people of whom I am a part." Schmitt believed 'the substantive law' of constituent power rather than 'law' as such, and accordingly developed his theory of decision which requires a conception of sovereign unbounded by law. Giorgio Agamben, "A Jurist Confronting Himself: Carl Schmitt's Jurisprudential Thought," in *The Oxford Handbook of Carl Schmitt*, ed. Jens Meierhenrich and Oliver Simons (New York: Oxford University Press, 2016), 458.

As I elaborate in the following chapter, the debate between Kelsen and Schmitt on Article 48 clarifies Schmitt's challenging position on the guardian of the constitution. Kelsen's reduction of the law to a purely formal ground conveys, in Schmitt's view, a misleading conception that locates the exception within the norm. In Schmitt's understanding, the legal positivist efforts to tackle the problem of concrete threat within the system of the legal norms is not only theoretically futile, but practically dangerous for the life of the political entity; for if a concrete situation imposes itself on the order, then it must first be *decided* to be the exception. In other words, a concrete situation achieves its *legal* meaning only when it is decided to be an exception to the norms. This is the core of Schmitt's decisionism, before it takes the final form in *the Concept of the Political.* In the first subsection of Third Chapter, I examine the three steps in the formation of Schmitt's decisionism with a specific reference to the Kelsen-Schmitt debate on the implementation of Article 48.

The second subsection of Third Chapter turns to Schmitt's early decisionistic position in *Dictatorship* whose aim is to divide between two different modes of deciding on the exception from its classical Roman republican formulation to modern way of seizing power on the people's behalf. Modern revolutionary dictatorship comes up with something completely and qualitatively new to the governmental organization of the state; the execution is granted to the office of the people's representative in times of emergency; when emergency turns out to be revolution, ways of the governmental use of dictatorial/emergency powers dissolve the classical distinction between sovereign and dictator. The legitimacy of revolutionary seize of power is not present but on the way to the coming constitution. In *Dictatorship* this reminds Schmitt of Caesarism – a Caesar legitimized by the ex post facto *lex regia*, later in *Political Theology*, his decisionism embraces a Caesar-like sovereign whose decision on the exception not only determines what the norm is, but also what to do in the face of emergency in order to come back normalcy. In the lines that follow, in order to understand the shift in Schmitt' decisionism with respect to classical and modern conception of

dictatorship, I consult the explanatory power of Agamben's diagnosis according to which the concept of sovereignty in *Political Theology* cannot be understood without the division between two concepts of emergency rule in *Dictatorship*. On Agamben's critique, sovereign dictatorship is contained in the commissarial government and vice versa insofar as the decision defines itself in its opposition to the norm.

In the third section of Third Chapter, I demonstrate how intriguingly true Agamben's diagnosis proves by re-examining Schmitt's hesitation about Hobbes' constitutions expressed in a footnote of *Dictatorship*. In this section, my effort to reframe Schmitt's footnote for the purpose of capturing the indistinction between two concepts of dictatorship ends up with the indistinction between Hobbes' three ways of constituting sovereignty. Although Schmitt finds in *De Cive* classical decisionism, and in *Leviathan*, sovereign decisionism, what we witness is that Hobbes' effort is one and the same; not to create a dictator out of the sovereign either sending him to the bed in *De Cive* or holding him hostage in *Leviathan* at the cost of creating a sovereign out of a dictator.

In the last section of Third Chapter, I aim to examine Schmitt's criticism of the modern constitutional order. Interestingly enough, at the root of the problem with liberalism, there lies the Hobbesian sovereignty. To explore how Schmitt comes up with the proposal that finds Hobbes the founding father of liberalism, I turn to Schmitt's flipping Hobbes around decisionism and liberalism in his 1938 work, *The Leviathan in the State Theory of Thomas Hobbes*.[17] In contrast to his previous conviction in *Dictatorship* that Hobbes expels the private conscience from civil state,

[17] Schmitt's most detailed and sophisticated engagement with Hobbes, *The Leviathan* marks, according to George Schwab, a major turning point of Schmitt's intellectual periods as Weimar and post-Weimar writings. In his introduction to *The Leviathan in the State Theory of Thomas Hobbes* Schwab argues that the direction of Schmitt's work, written just before Schmitt's intellectual shift towards international law and right after he unofficially finished his involvement in the National Socialist Party which he actively served as a jurist for three years from 1933 to 1936, is to get to the theoretical roots of the failure of Nationalist order in Germany in accordance with the emerging uneasy political situation. George Schwab, introduction to *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, by Carl Schmitt (Chicago: University of Chicago Press, 2008), xxxi--ii.

Schmitt discovers the existence of the private discretionary capacity in Hobbes' constitution and calls it "bare visible crack" – a crack by which the elements of "indirect powers" infiltrating into the state institutions endanger the life of sovereignty. As opposed to the liberal concern of the politicization of the law, Schmitt is occupied with the question of sovereignty dominated by the interest groups under the guise of the rule of law and entrapped in the liberal conception of the state.

In developing Third Chapter devoted to Schmitt's decisionism, I engage with Schmitt's four basic works; *Dictatorship*, *Political Theology* and *the Concept of the Political* and *The Leviathan in The State Theory of Thomas Hobbes*. As I discuss, in the first three, Schmitt has developed his theory of decision by reformulating the relation of sovereign with law. First, Schmitt considers commissarial decisionism for the tension between sovereign and law by withholding the sovereign from being dictator. Later, his position embraces the sovereign as being endowed with the discretionary capacity to decide on the ways of employing dictatorial emergency power. Schmitt's sovereign trumps the law in such a way that the decision of sovereign, before being legally relevant, has an existential value and gains a purely political character. I conclude Third Chapter by reiterating what Schmitt aimed in *the Leviathan* was to reinvigorate the constituent power in the person of sovereign.

In Fourth Chapter, I take up Hobbes where Schmitt left; the question of Fourth Chapter that I allot to Hobbes' decisionism can be put as follows: how to think of Hobbes's constitution as resting on the laws of nature while being, at the same time, decisionistic. I offer a reading of Hobbes' decisionism on the basis of Hobbes' two main premises; (1) it is the sovereign authority, not truth that makes positive laws. (2) The laws of nature are contained in the positive laws. Schmitt focuses on the first but neglects the second. I first trace the steps of Schmitt's argument concerning the Hobbesian theory of scientific, but somehow natural law in

Dictatorship with a particular focus on Schmitt's way of placing Hobbes' understanding of justice.

In the first section of Fourth Chapter, I focus on the first premise that makes, in Schmitt's view, distinctive Hobbes' natural law theory among other nineteenth century natural law theories; before a sovereign power, there is no civil law and where there is no civil law, there is no justice. Hobbes' constitution, compared to other natural law theories of Hobbes' time, takes its start literally from nothing normative. This is also what makes it decisionistic. In order to see why there is no justice in the state of nature, I turn to Hobbes' natural right to everything.

In the second section of Fourth Chapter, I show the most promising way to understand the decisionistic genesis of Hobbes' constitution; the idea of the natural right to everything. As I discuss in detail, in the state of nature, each natural person is equally capable of willing and deciding what to do in a singular situation and what is her own; the former refers to 'right' and the latter 'property'. Both 'right' and 'property' are jointly invoked and melted into 'the natural *right* to *everything'* in order to innovate the theoretical structure of the state of nature and to embrace the artificiality of civil state. I conclude this section with Hobbes' argument that civil state is the consequent of the natural right of everything.

In the third section of Fourth Chapter, I initiate a discussion on Hobbes' axiom about the absence of justice; it is not truth, but authority that has the law making-capacity. There is no justice in the state of nature unless the sovereign authority makes it. But how is it possible that there is no justice in the state of nature in which everybody has the natural right to everything if Hobbes defines injustice as 'action *sine jure*, without right'? This question requires a detailed examination of the concept of justice in Hobbes' constitution. Justice is possible in three ways; justice either from the original covenant (justice of contractor) or from the valid covenant (still, justice of contractor) or from property (justice of arbitrator). First, Hobbes finds the origin of justice in the covenant; the parties would not be counted in if they violate it either by performing what the covenant forbids or by abstaining

what the covenant obliges. In both cases, mutually contracting parties would act without right as long as the natural right to everything is transferred through the covenant. Hence, according to the definition of the contractual justice, justice is identified with action with right, and injustice without right. This definition fails to meet Hobbes' axiom that the state of nature cannot accommodate justice (action with right) because the state of nature is where the natural right to everything has not yet transferred. In that state, as a result of the principle of self-preservation, whatever is done is done by right; no laws of nature may effectively bind the 'natural' action.

Second, as an extension of justice of contractor, there appears a valid covenant without a sovereign power; if there is a covenant, then there will certainly be actions with right and accordingly justice. Third, justice of arbitrator detaches the concept of justice from its contractual context and enacts it in a constitutional context. Contrary to Schmitt's argument about Hobbes' scientific theory of justice, there is a distributive *content* of decision at the moment of Hobbes' constitution. I conclude the third section of Fourth Chapter with the claim that only justice of arbitrator provides us with a constitutional context in which Hobbes' decisionism is placed.

Finally, I return to the discussion that I initiate at the beginning of Fourth Chapter about Hobbes' two seemingly contradictory arguments; it is not truth, but authority that has the law making-capacity and the laws of nature are contained in civil laws. I argue that Hobbes' sovereign may have the *power* to make any law that she pleases by virtue of its legislative supremacy. But the sovereign has the *authority* to make the laws in accordance with the laws of nature by virtue of its being authorized by the covenant. And, what makes law is the authority, not the naked power of sovereign. Thus, Hobbes' decisionism treats the constituting moment, first, as the decision of the people and then the decision of the sovereign; the constitutional decision of uniting parties to unite under the sovereign authority.

CHAPTER 2

WHY CARL SCHMITT?

Oren Gross closes his article on Schmitt with a personal closing note, titled "The Accountability of the Academic," reminding us that Schmitt neither publicly apologized for what he defended, nor changed his mind and position, though he lived long enough to do so, as clearly seen in the twenty-two years gap between the first and second edition of *Political Theology*. For this reason, Gross suggests that "[a]ll those who continue to debate his [Schmitt's] legacy must remember at all times that this is not some exercise conducted in the ivory towers of academia with which we are involved. It is a matter of life, and even more so, of death."[18]

In the same manner, David Dyzenhaus warns the reader about the obvious discrimination against the Jews in Schmitt's thought and stresses that this offence should not be passed by as theoretically altogether trivial.[19] For Dyzenhaus, 'Schmitt's apologists' have been satisfied with a brief statement that Schmitt's proposed theoretical framework is one thing, his anti-Semitism, which became undeniable after he was dismissed from the service of the national socialist regime, is other thing.[20]

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[18] Oren Gross, "The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy," *Cardozo Law Review* 21, no: 5-6 (2000): 1867--8.

[19] David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (New York: Oxford University Press, 1997), 83-5. See also, David Dyzenhaus, introduction to *Law As Politics: Carl Schmitt's Critique of Liberalism*, ed. David Dyzenhaus (Durham: Duke University Press, 1998), 3.

[20] William Scheuerman also argues that the reception of Schmitt's works by the Anglophone intellectual world, especially in the US has generally spoken in apologetic tone. Scheuerman's book is

There are also some scholarly figures who observe in Schmitt's works most of which were written in the midst of this or that political crisis, his attentiveness to both his own personal situation in particular and Germany's 'concrete situation' in general. George Schwab is one of them. On the basis of his personal acquaintance, he argues that Schmitt's position in essence was not a biological anti-Semitism as Schmitt never believed a race. For Schwab, Schmitt was rather filled with the rage of anxiety about the reintegration of decaying German society into a unified whole against its enemies.[21]

Against Schwab, Tracy B. Strong's emphasis is placed on the indistinction between biological anti-Semitism and anti-Judaism. Strong, however, goes one step further than others by obliging anyone who is reasoning on Schmitt's works "to give an account of what in his work is worth the effort."[22] For Strong, one cannot easily elude the scholarly obligation to explain 'why Schmitt' either by resorting to an empty formalism such as freedom of thought, or to the argument that keep friends close, but enemies closer; "[a]ny account here must be substantive."[23]

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written, so to speak, to smash this tone. He is particularly bothered with the more or less tacit acceptance of Schmitt's argument by liberals all over the world, including Hayek for whose Scheuerman spares a chapter to face with Hayek's "unholy alliance" with Schmitt. William E. Scheuerman, *Carl Schmitt: The End of Law Twentieth Century Political Thinkers* (Rowman & Littlefield Publishers, Inc, 1999), 209--25.

[21] Schwab, introduction, xxxv--vi.

[22] Tracy B. Strong, foreword to *The Leviathan in The State Theory of Thomas Hobbes: Meaning and Failure of A Political Symbol*, by Carl Schmitt (Chicago and London: University of Chicago Press, 2008), viii,ix.

[23] Ibid. Schmitt's tie to the Nazi regime is undeniable. But I have one thing to add to the general attitude of academia and in particular Strong's rigid moral stance about Schmitt; I do not and will never understand why some scholars have been so attentive to Schmitt's commitment to the Nazi Party that to prescribe the moral obligation to give the answer to the why-Schmitt question, while they are rather disposed to disregard, or at least rarely regard, Martin Heidegger's calls for voting for the same party. I could not find any obligation for why-Heidegger in Strong's 2012 work in which Heidegger's Nazism is certainly discussed without imposing any obligation; Tracy B. Strong, *Politics Without Vision: Thinking without Bannister in the Twentieth Century* (Chicago: University of Chicago Press, 2012), 263-325. Here the recent Turkish translation by Levent Kavas of Heidegger's 1933 call with Nazi salute at the end; Martin Heidegger, "Seçim Çağrısı," *Birikim*, May 29, 2018,

http://www.birikimdergisi.com/guncel-yazilar/8926/secim-cagrisi#.Ww0E1e6FPIV

Scholars have already a general tendency to explain 'Why study X?' But to give an answer to this question becomes a moral obligation when it comes to Schmitt, especially when the amount of Schmitt-inspired arguments since 80s have become alarming in the Anglophone World. I have to say that I have not been encountered with any single scholar who works on Schmitt without emphasizing his participation in Hitler's legal organization. Stating the obvious, however, seems not enough for the why-Schmitt question.

In agreement with Friedrich August Hayek who holds that what Schmitt was done during the Nazi regime "does not alter the fact that, of the modern German writings on the subject, his are still among the most learned and perceptive,"[24] I draw attention to Schmitt's most important challenge of the rule of law. I believe that this by itself provides us with the most substantial answer to why-Schmitt question.

In the section 13 of *Constitutional Theory*, Schmitt calls the rule of law, "bourgeois *Rechtsstaat*" and "statutory state"[25] The rule of law state is merely one form of statutory state, one form of ruling. What Schmitt claims is not something a defender of the rule of law may possibly accept as this would be, on a certain level, the qualitative equalization of, say, US constitution with North Korea's where the law is considered as to be the will of the president. That is to say, Schmitt seems to equalize a liberal state with an illiberal state if the rule of law turns out to be a state among other statutory states. But Schmitt does not leave it at that; a state is to be called the rule of law to the extent that the statute is tied not only with the principles of legality, but also "bourgeois freedom."[26] For Schmitt, the ideological

[24] In his 2016 article on Schmitt's *Constitutional Theory*, Dyzenhaus agrees with Hayek. David Dyzenhaus, "The Concept of the Rule-of-Law State in Carl Schmitt's *Verfassungslehre*," in *The Oxford Handbook of Carl Schmitt*, ed. Jens Meierhenrich and Oliver Simons (New York: Oxford University Press, 2016), 490.

[25] I would translate the term "the statutory state" into Turkish as 'kanun devleti'.

[26] Carl Schmitt, *Constitutional Theory*, trans. and ed. Jeffrey Seitzer (Durham: Duke University Press, 2008), 181.

struggle of bourgeois for freedom intensified in the form of the legal-institutional protection of rights and liberties.

Schmitt contends that liberalism was not always like this contemporary state. Otherwise, he would not allow Hobbes' strong formative influence on himself. Liberalism is an old ideology and before it took its final version in the nineteenth century, the bourgeois legality had an intellectual basis indeed, especially in the seventeenth and eighteenth centuries:

> …the bourgeoisie mustered the strength to establish an effective system, in particular the individualistic law of reason and of nature, and formed norms valid in themselves out of concepts such as private property and personal freedom… which should be valid prior to and above every political being, because they are *correct* and *reasonable* and can contain a genuine *command* without regard to the *actually* existing, that is, positive-legal reality. That was a logically consistent normative order. One was able to speak of system, order, and unity.[27]

That is, it was able to provide a mechanism of justification for the inside/outside distinction that are the core of a coercive legal apparatus. The modern constitutional state of the nineteenth century, however, needs to be understood in the light of two basic and mutually exclusive elements contained in it; the parliamentary politics and the legal limitations on politics for the purpose of the protection of individual rights and liberties. In this composition, for Schmitt, the parliament is the last place to engage the problem of the exception, such as revolution, crisis, chaos, anarchy, and to make a genuine decision; a parliamentarian rather knows how to talk and discuss. This is not so for no reason. The rule of law is grounded in its opposition to "the rule of *persons*" whether it be one person or an assembly of persons – a constructive opposition which draws a strict conceptual distinction between "a command based on mere will" and "a legal norm" before which everyone stands equally and whose publicity must be

[27] Ibid., 64.

made prior to its first execution.[28] The legislative body of the state is subject to its own laws. That is to say, the authority of legislative power lies in its legality.

Schmitt's criticism of the positivist conception of legality consists of reminding those, who think of the state as being made up of the constituted power and the rule of law only, of the existence of the constituent power and democracy; there is something purely political within what is thought of something as purely normative; "the concrete existence of the politically unified people is prior to every norm."[29]

Where we stand now with regard to the positivist ideology of rule of law, for Schmitt, is a tautology, formulated by Austrian jurist and legal philosopher Hans Kelsen (1882-1973). As seen in the following statements by Schmitt, Kelsen's legally constituted order renders the norms a huge tautology:

> With Kelsen, by contrast, only *positive* norms are valid, in other words, those which are actually valid. Norms are not valid because they *should* properly be valid. They are valid, rather, without regard to qualities like reasonableness, justice, etc., only, therefore, because they are *positive* norms. The imperative abruptly ends here, and the normative element breaks down. In its place appears the tautology of a raw factualness: something is valid when it is valid and because it is valid. That is "positivism." Whoever seriously insists that "the" constitution as "basic norm" is valid and that everything else that is valid should derive from it may not take any given, concrete provision as the foundation of a pure system of unadulterated norms, merely because it is set by a particular office, recognized, and designated as "positive." A normative unity or order is only derivable from

[28] In contemporary liberal legal theory, according to Scheuerman, a legal norm, if counted as legal, must meet at least the five requirements of legality; (1) generality, (2) clearness, (3) publicity, (4) prospectivity, and (5) stability. In this inclusive capacity, the legal norms, that is, the rules of the rule of law are expected to ensure, before anything else, the equality before law, the accountability of public officials. These are the basic preconditions for the very pillar upon which modern state rests; foreseeing the possible governmental acts, and accordingly preserving individual rights and freedom. The generality of legal norm, for instance, prevents the individual from being subject to arbitrary treatment and unpredictable penalties on the basis of the principle that 'treat like cases alike'. The publicity informs individuals any possible consequences of their actions beforehand, etc. Scheuerman, E, *Carl Schmitt*, 3-4. For Schmitt, the legal norm as such that meets equality (generality) and publicity is supposed to contain automatically some other normative features, "such as rectitude, reasonableness, justice, etc." Schmitt, *Constitutional Theory*, 181.

[29] Schmitt, *Constitutional Theory*, 166.

> systematic, correct principles, which are normatively consistent and, therefore, valid in themselves by virtue of reason and justice without regard for their "positive" validity.[30]

For Schmitt, Kelsen's pure theory has hardly anything to offer to an understanding of a political problem posed by a 'concrete situation' because of its self-referential nature. For Schmitt, a concrete situation, if it is *decided* to be the exception, cannot possibly be dealt with through the legal norms for the simple reason that the concrete situation is an exception to the norm. It is an outsider to the pure theory. In other words, the concrete situation achieves its legal meaning when it is decided to be the exception to the settled norms.

Thus, the exceptional situation is exactly what the pure theory promises to eliminate; "all foreign elements" are to be excluded from the law.[31] Indeed, Kelsen's strict positivist stance in jurisprudence can easily be explained; What if does one take an anarchist or sectarian position which disregards the established laws just because one thinks that this or that law should not have been the law at all? If every disobedience implies a new right claim which may not derive its validity from any existing legal system, what will be its foundation? What would happen if the commands of God were taken to be ultimate truths, and thus ultimately binding for all? All these questions arise from the Kelsenian positivistic concern that the formal equality before the law is danger in the face of the relativization of values of any kind, such as customary, religious, ethnic, cultural, political, national, social and religious values.

On the one hand, one may appreciate Kelsen's theory on the grounds that his down-to-earth style fully embraces a secular and humanly informed understanding of law. On the other hand, the theoretical capacity of Kelsen's legal

[30] Ibid., 64.

[31] Hans Kelsen, *Introduction to The Problems of Legal Theory*, trans. Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon Press, 1992), 7.

theory is questionable especially when it is subject to Schmitt's critique of the legal procedure after the Prussian coup in 1932.

In the next chapter, I discuss how Kelsen and Schmitt positioned themselves in the face of the exceptional situation of Germany in 1932. I turn to their discussion in order to bring to the light Schmitt's critique of Kelsen's legal theory for better understanding the limits of positivist legality (the rule of law) in the face of the exception. That is to say, Schmitt's critique of Kelsen provides us the limits of the positivist promises that the Weimar Constitution offers in the face of the crisis which ended up with the decree that allows the indefinite suspension of civil liberties.

Schmitt offers us a legally and politically informed analysis of the Weimar constitution oriented by Max Weber's account of the constitutional shift from the Empire with the Republic – a shift which brought about the identification of the state with society. In fact, that identification gave rise to a possibility of dictatorial democracy, as it could turn into Caesarism, which reveals itself in Article 48 of the Weimar Constitution which grants the emergency powers to the plebiscitary president who acted upon commission of the people. To develop this last point, before delving into the debate between Kelsen and Schmitt, the first section of Chapter Three centres on Weber's account of the pre-Weimar period of Germany.

CHAPTER 3

CARL SCHMITT'S CRITICISM OF LIBERALISM AND THE POLITICAL FOUNDATION OF LAW

3.1. The Political Order of Weimar Constitution

3.1.1. Before the Weimar

Anyone who wants to understand the recurrent constitutional problems of the Weimar Republic is destined to find herself to read, among the enormously vast literature, Max Weber's five journal articles from April to June 1917 on the highly complicated political conjuncture of Germany in the wake of the Empire.[32] As expected from a sociologist, Weber first wonders about the striking equality between the amount of hate and admiration that Otto von Bismarck got over what he has done for his last ten years in the office from 1880 to 1890 as the first Chancellor of the German Empire. Weber argues that Bismarck was outrageous to the centralists, social democrats and liberals, but legendary to the conservatives.

The political capacity that Bismarck had between 1867 and 1878 proved that he was intellectually superior and emotionally passionate more than any other representative all over the Empire – the qualities "demanded of representatives of '*the German spirit*'."[33] The Prussian conservatives were inept politicians who were

[32] Max Weber, "Parliament and Government in Germany under a New Political Order," in *Max Weber Political Writings*, ed. Peter Lassmann and Ronald Speirs (Cambridge: Cambridge University Press, 1994.), 131.

[33] Ibid., 138.

allowed to occupy an unobtrusive space full of "*unitarist* ideals."[34] For Weber, they became Bismarck's own creatures after 1866, especially after "The opposition between Bismarck's aim and the constitution… did not arise."[35] Liberals was no better in position than the conservatives. They were preoccupied with the longevity of the Reich including the parliament as its main institution, and waiting for their time to come, that is, waiting for the normality. For liberals, not only other parties, but "the politics of interest groups and the system of petty patronage" were needed.[36] The tactical position of liberals did not work.

On Weber's reading of the period, the political wings could not cooperate; they were passive on their own, as well as together, and passivated by Bismarck himself because "Bismarck was unable to tolerate any kind of at all independent power alongside himself, that is to say one that acted on its own responsibility."[37]

The ministers were made to keep in mind that they would never have come to power without him. The ministerial position was being offered to the members of the parliament, and ruthlessly eviscerated from his government with the same speed at any time upon of Bismarck's request, even by way of slander and defamation "on purely personal ground."[38] Moreover, Bismarck wanted to make the parliamentarians not to forget his position as being beyond them by "preventing the consolidation of any strong and yet independent constitutional party."[39] He legislated accordingly by keeping the more and more expanding military budget on agenda. Weber claims that Bismarck concocted a heated debate on whether the military budged be passed in every three or seven years, to entrap

[34] Ibid., 140. However, Weber accepted that the political objective of the conservatives proved right later.

[35] Ibid.

[36] Ibid., 139.

[37] Ibid., 140

[38] Ibid.

[39] Ibid.

the parties in the parliamentary into questioning "The Kaiser's army or Parliament's army?"[40] This was a profoundly outrageous slogan, for Weber, which ultimately led to the dissolution of the Reichstag in 1887 – the legislative parliamentary body of German Empire from 1871 to 1918.

Bismarck's foreign politics was predicated on bringing the question of army in Prussia into the politics of Reich, "so that the military question became linked to party political interest."[41] In this way, Bismarck continued to sow discord within the constitutional parties and the Kaiser of Prussia, leading to factions of both to declare themselves whether they are Bismarck-compatible or not. That ultimately incapacitated the actual parliamentary life.

As Weber states in detail, Bismarck's social policy was very generous to spread the state pension in return of "gratitude" and eager to disable the labour unions. What was left to the German nation from Bismarck is nothing but an incurable political damage; a mass of childish adults. Weber believes the people as a political unity is closer to the parliamentary life than to the politics of the statesmanship. That is why, for Weber, the German nation under the rule of Bismarck lost "the habit of sharing responsibility, through its elected representatives, for its own fate, which is the only way a nation can possibly be trained in the exercise of political judgment."[42]

Thus, for Weber, Bismarck left Germany in all in ruins and Germany stepped in the twentieth century with the socio-political requirement of "[a]ctive democratization of the masses."[43] Having delved into the several compartments of

[40] Ibid., 141.

[41] Ibid.

[42] Ibid., 144. Here in the line with Weber's understanding of the mass, we may consider the place of individual. As distinct from the traditional order before the wold was disenchanted, the modern economic order cannot offer any non-instrumental meaning to 'disenchanted' individuals of any orders in the West. What is more, the role of the law in that order, far from having any intrinsic value or legitimacy, is but to provide individual life with stability and predictability.

[43] Ibid., 220.

bureaucratisation[44] – of judicial system, economic life, parliamentary life and state administration, Weber resorts to the democratization of the masses in order to explain the most basic political problem of the Weimar Republic;

> Active democratisation of the masses means that the political leader is no longer declared a candidate because a circle of notables has recognised his proven ability, and then becomes leader because he comes to the fore in parliament, but rather because he uses the means of mass demagogy to gain the confidence of the masses and their belief in his person, and thereby gains power.[45]

Turning the masses into the one agitated by the demagogic use of rhetoric, according to Weber, the process of democratization of the population undermined any possibility of a meaningful politics centred on the political will and judgment of the German citizens. In that regard, for Weber, Bismarck was a "Caesarist figure"[46] owing to his unfair fight against the constitutional parties, though he was not a Caesarist representative as he was removed from the office by the Kaiser.

As every democracy does, the mass democracy has the tendency to adopt Caesarism, namely plebiscitary rule, as distinct from ordinary process of election, by means of which, for Weber, "the vocation for leadership of the person" is to be declared.[47] Here comes Weber's understanding of the nineteenth and the early

[44] Bureaucratization is the key for understanding the modern masses. For Weber, the way of ruling in the modern mass state is best understood as administrating everyday life of society by means of civil and military officials. Just as the paid officials of the administration, the paid officers of the mass army serve within the mass army. In that regard, Weber sees no difference between civil and military servant; both of them operates within "bureaucratic officialdom" in terms of the consequences of their action or inaction. Ibid., 145. For instance, although Russian soldiers refused to fight in World War I, they had to fight due to "the material means" for warring "under the control of men who used these things to force the soldiers" into the war. The same goes for "the means of production in the economy... the means of research in a university" and so on. In all cases, the gap between the soldier, the researcher or the worker and the material means is filled with "the bureaucratic apparatus" which immediately obeys the power that governs these means to whatever thing. Ibid., 147.

[45] Ibid., 220.

[46] Ibid., 221.

[47] Ibid.

twentieth century politics which revolves around Caesarism or Bonapartism as a way of describing the question of mass democracy.

Weber associates Caesarism with Bonapartism – a pattern of ruling for modern democracy which "rests on the trust of the masses rather than on that of parliaments," and, for this reason, risk always blurring the line between democracy and dictatorship.[48] This pattern owes its existence to French revolutionary politics. No one would predict 1789 would be the year that the great instability in the sequences of the revolutions and the coups one after another just began. The coup d'etat of the Eighteenth Brumaire by Napoleon Bonaparte succeeded in 1799 after the monarchical regime was toppled by the 1789 Revolution, and the first republic established in 1792. Nor is this all that the first republic is toppled just in ten years. The second republic one could also be overthrown by a Napoleon once again in 1851 two years after its constitution in 1848. At the end of this political dynamics, the monarchy is replaced, through some republican interruptions, with much more domineering regime in the form of empire.

On Weber's account of Caesarism, there is no difference between Napoleon I and Napoleon III in terms that both of them seized power in an imperial mode to react the political unrest; the former was a military dictator whose official leadership was confirmed by the ensuing plebiscite and the latter was a civil leader whose plebiscitary rule was confirmed by the military.

To periodize this revolutionary moment of history, the term Bonapartism, or Imperialism as the left-wing calls, has been produced. It signifies a new political phenomenon, and accordingly a new way of ruling, which has introduced a new relation between dictatorship and democracy. An undisputed strong leadership could be called democratic, though reducing the role of the people to plebiscite, and corollary to this, eliminating the parliamentary life by directly appealing to the

[48] Ibid. Here the term Caesarism is used as a modern concept approximating Bonapartism, with reference to Caesar himself who demolished the Republic, established the Empire and legitimized by the ex post facto *lex regia*. Both Caesar and the Bonaparte hold responsible the rise of Imperial Rome and Imperial Europe as well as the fall of the Republics, respectively.

people against the opponents. For Weber, following the Revolution, what the modern democratic experience shows us that in fact it prohibits the democratic involvement in politics by military interventions; "every kind of *direct election by the people* of the bearer of supreme power" ended up with the military dictatorships implicitly or explicitly.[49]

Weber was writing during years coincided with the near end World War I and the birth of Weimar Republic in 1919. Having witnessed the transition from the constitutional monarchy (1871) to the constitutional democracy and included in the constitutional commission which was responsible for drafting the Weimar Constitution, he played an "influential role in getting the idea accepted that the parliamentary democracy."[50] At first, Weber refused to accept the alleged antithesis between the Western Europe and Germany with respect to the form of the state; the parliamentary system of government is neither unfamiliar to Germany, nor specifically belongs to the Western Europe. He made public his support for the parliamentary system especially when the voice of diplomacy was beginning to be heard once again, he believed, at the near end of the World War I.

But Weber is also known for his underscoring the charismatic leader in the parliamentary democracy. Especially at the near end of his life in 1920, Weber defended the parliamentary system should be taken as a replacement of monarchy, and correspondingly "be counterbalanced by a president who would possess the charismatic authority evidenced in his ability to win a popular plebiscitary election."[51]

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[49] Ibid.

[50] Dyzenhaus, introduction, 9-10.

[51] Dyzenhaus argues that in fact, Weber knew very well that the president is given a higher ground by the constitution and proposed to reverse the relation between the president and the parliament, but he could not prevent this constitutional process which would end up with the complete disappearance of the parliamentary authority in the end. Dyzenhaus, introduction, 9-10.

Thus, the charismatic leader is once again given a (counterbalancing) role in the constitution by Weber himself who fearfully expressed his concern that the new emerging German nation could unite under a Caesarist figure like Bismarck, owing to the problem of mass democracy. But even Weber probably would not have imagined that "[d]uring the fourteen years of the Weimar period, no less than twenty cabinets held office, including sixteen parliamentary and four presidential governments."[52] But Schmitt did witness how Weimar Germany reached the point of crisis—a crisis arguably deeper than any wars in the world politics.[53]

3.1.2. Kelsen and Schmitt on Article 48

In July 1932, the president of the Republic, Paul von Hildenburg, issued an emergency decree that authorized the chancellor Franz von Papen to topple down the Prussian government and substituted the Prussian ministerial cabinet with the team of the German prime minister for the reasons of public safety. The concern of the public safety was not baseless; the Prussians had witnessed a violent clash between the Brownshirts and the pro-Bolsheviks in Altona just a few days before the presidential emergency decree. But it is also argued that since it unblocked the paramilitary force of the Brownshirts, while keeping the ban on the Red Front[54], the federal government of Germany furthered the process that eventually led to the bloody clash between these two parties.

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[52] Ulrich K Preuß, "Carl Schmitt and the Weimar Constitution," in *The Oxford Handbook of Carl Schmitt*, ed. by Jens Meierhenrich and Oliver Simons (New York: Oxford University Press, 2016), 472. Preuß also argues that the period of the Weimar Constitution between 1919 and 1933 could not deal with all problems of the aftermath of the War, including political and economic ones such as the residues of the martial law endemically implemented since 1912, the strong oppositions both from left and right against the new republican constitution, the street revolts and extreme poverty, high inflation as a result of the defeat of Germany.

[53] Note that what Schmitt witnessed throughout his life; "the heyday of the Kaiserreich (German Empire), the rise and fall of the Weimar Republic, Nazism, division of Germany by the Allies, the establishment and stabilization of the Federal Republic after 1945, as well as two world wars, the German Revolution (of 1918), the horrors of the Holocaust, the Cold War, and the construction of the Berlin Wall." Scheuerman, *Carl Schmitt*, 17.

[54] Dyzenhaus, "The Concept of the Rule-of-Law State in Carl Schmitt's *Verfassungslehre*," 500.

This act of the presidential degree is called *Preußenschlag* – the Prussian coup, which was legally based on Article 48 of the Weimar Constitution. This act was of crucial importance for Germany's federal integrity because Prussia was the largest among the German states not only in terms of both population and territory.[55] According to the first paragraph of the article, the president is granted by the statue to the power to compel any state of the German Reich, with armed force if necessary, to provide the public with safety and security. In the second paragraph, the president is also granted to the power to suspend the seven basic rights in the case of the disturbance of order. Moreover, the third paragraph of the article holds the president responsible to the *Reichstag* for informing it *immediately* about the intensity and duration of the measures, according to the first and the second paragraphs, taken for the restoration of order. More importantly perhaps, the fourth section obliges the president to render all the measures ineffective upon the request of the legislative organ. Finally, in the fifth and last section, the 'details' is left to a *Reich* statue.

Thus, the intention behind Article 48 was obviously to bring the balance to the power divided between the executive and the legislative; while the first two sections empower the former, the rest endows the latter with the authority to lift the measures taken by the president. At the end, the chancellor had the higher ground, as a result of the president's decrees based on article 48, because the *Reichstag* could not reach the required majority to deliver its decision on the emergency measures.

At this point, it is important to notice that scholars invariably mention how the *Reichstag* had been rendered ineffective at that time. For Dyzenhaus, for instance, the worst strategy of Prussian coup was to remove "at the stroke of a pen" the social democrat dominant government of Prussia because "it was the most important base of institutional resistance to the National Socialist march to

[55] Dyzenhaus underscores the ratio; almost two-thirds of territory and population of Reich were Prussian. Ibid., 507.

power."[56] Moreover, for Vinx, the "parties in the *Reichstag* had been unable, since 1930, to form a legislative majority willing to support a parliamentary government."[57] However, as Weber's analysis of the pre-Weimar period shows us, the weak parliament was not a new problem for German politics. Even though Bismarck's way of ruling was in on it, the executive-dominated ruling is apparent long before article 48 was appealed in 1932 against Prussia.

The old problem of the parliament, originating in the Imperial Germany, perpetuated itself by the parliamentary government of Prussia, which was a coalition. It did not, or perhaps, could not stand against von Papen's coup by force, but went to the Court[58] in Leipzig to bring the *Reich* to account for its appeal to Article 48. Vinx depicts the Prussian coalition as running parallel to the parliament of the *Reich* in 1932.[59] Although the *Lantag* of Prussia was the social democrat party dominated coalition, the social democrats had already lost the majority in the parliament and the Nazi Party, in line with the rest of Germany, had won the major share of the votes three months before the coup. But the parliament could not establish a new government as a result of the previous regulation according to which the right to form the government requires "an absolute... majority of votes."[60]

Thus, the picture of the Prussian parliament of April 1932 was this; while the social democrat with 21% share supposedly continued to govern, the Nazi with 36% share was expected to put the hands up during the parliamentary procedures. Of course, von Papen's coup was far from bringing democracy back to the disorder of

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[56] Ibid., 499.

[57] Lars Vinx, introduction to *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, by Hans Kelsen and Carl Schmitt (Cambridge: Cambridge University Press, 2015), 2.

[58] The court called the *Staatsgerichtshof* means "the 'court of justice in matters of state'." Vinx, introduction, 4.

[59] Ibid., 3.

[60] Ibid.

Prussia, but its strategy was even worse; the actualization of Article 48 rests on "the excuse for dealing first with the Left and then with the extreme Right."[61] After all, how the coup succeeded in keeping its federal prime minister in the office over the Prussian government becomes clearer. This may also be the reason why the Nazi took 43% of the Prussian votes, an unprecedented share in the history of the Weimar Republic, in 1933 a year after the coup.

The implementation of Article 48 in 1932 gains its full meaning in the context of *Preußenschlag* because it is a decisive step towards the dissolution of the Weimar Constitution. It also triggered the jurisprudential debate on employing emergency powers and more importantly perhaps, its legal occurrence in Leipzig. The tribunal in Leipzig was not a federal constitutional court whose judicial authority may "annul unconstitutional legislation and act of government"[62] based on Article 48 of the Constitution; it was rather a court whose adjudicative capacity is to make judgment in the face of conflicts between German states. In this case, the conflict was the one between the federal government of the *Reich* and the Prussian government and the judgment regarding the legality of the coup was to be made upon Prussia's appeal.

The court's judgment upon the Prussian is quite confusing; On the one hand, the court concluded that given the Prussian government accused of neglecting its duty towards the *Reich*, Prussia did not ignore its legal obligation to the *Reich* with respect to security and order. Thus, von Papen's government could not topple down the Prussian government permanently. On the other hand, it also concluded that given the disorder and insecurity problems faced by the Prussian government, the president's decree had the power to take "momentary control."[63] For

[61] Dyzenhaus, "The Concept of the Rule-of-Law State in Carl Schmitt's *Verfassungslehre*," 500.

[62] Vinx, introduction, 4.

[63] Ibid.

Dyzenhaus, the court's "reasoning wobbled precariously between saying that it could and could not enforce legal limits on action under Article 48."[64]

Thus, the court's judgment seems to Schmitt to be object of ridicule; if the court concluded that the Prussian government did not neglect the duty towards the *Reich*, as von Papen's government claimed, why was the Prussian administration interfered at all, let alone the question of the permanent or temporal implementation of Article 48? If the court delivered in its judgment that the federal government is right in its temporal interference, what was then the basis which made the court assume the existence of the conflict if not the very act of the federal government? For Schmitt, these are the questions that should show us that a court cannot protect a constitution through the legal norms in the face of existential threat.

In this case, from Schmitt's perspective, the court's decision is not a decision at all, rather a 'wobbling' or 'shuttling', under the guise of liberal impartiality, in between the permanent and temporal interference. It is generally believed that Schmitt is critical about liberal legal theories because they are not political enough or they are anti-political enough. It is not the case, however. Schmitt's criticism of liberalism is elegantly encapsulated by Dyzenhaus in the following passage:

> He [Schmitt] does not, for example, take it [liberalism] to be committed essentially either to global neutrality between ideologies or to a position that attempts to find some substantive basis for contesting ideologies that assert a global superiority for themselves. He does not claim that liberalism is either more naturally aligned with a positivist view about the nature of law or with a view that claims there is a higher law beyond the positive law to which the positive law is somehow subject. He does not claim that liberalism either presupposes its own truth or makes no claim to truth. And he does not claim that liberalism is either political or antipolitical or apolitical. Rather, what is distinctive about his position is its thesis that liberalism is doomed to shuttle back and forth between these various alternatives.[65]

[64] Dyzenhaus, "The Concept of the Rule-of-Law State in Carl Schmitt's *Verfassungslehre*," 500.

[65] Dyzenhaus, introduction, 14.

As Dyzenhaus argues, liberalism owes its success a dangerous understanding of politics peculiar to liberalism – a "politics of getting rid of politic."[66] This is the reason why Schmitt finds liberal ideology dangerous; politics is not something to get rid of, but to protect the regime in which collective life flourishes.

For Schmitt, such a constitutional crisis as Weimar, not the judgments of courts, but only a genuine political decision on the exception to suspend the existing law, is capable of recovering the situation into normality again. This decision must be presupposed by any legal operation both in times of emergency and normalcy. Otherwise, the constitution cannot be guarded.

Schmitt's position is best understood as accepting the view that "the parliamentary, liberal, and legalistic aspects of the 1919 constitution may have exacerbated Germany's problems, the presidential, democratic, and popularly legitimate component might actually solve them."[67] Hence, in his 1932 *Legality and Legitimacy*, he still hoped for the solution within the Weimar Constitution, but his hope originated in Article 48 by which "the guardian of the constitution"[68] can operate without the Constitution. The guardianship is, in Schmitt's view, satisfied by Article 48 of the Constitution in spite of the fact that the Constitution itself is indeed just another liberal attempt to tame the real source of political power.

In his 1928 essay *The Dictatorship of the President of the Reich according to Article 48 of the Weimar Constitution* based on his lecture delivered in Jena in 1924 – the lecture that he also owns his fame, Schmitt offers an unusual reinterpretation of Article 48. As is well known, the rule of law necessitates that when individual rights and liberties is be interfered, any action of the state must be deduced from the general norms of the constitution – the norms by which the act of sovereignty is restricted

[66] Ibid., 14.

[67] John P. McCormick, introduction to *Legality and Legitimacy*, by Carl Schmitt (Durham: Duke University Press, 2004), xiii.

[68] Carl Schmitt, *Legality and Legitimacy*, trans. and ed. Jeffrey Seitzer (Durham: Duke University Press, 2004), 34.

to the legal zone. As opposed to the conventional view at that time, for Schmitt, not just the seven basic rights, but almost all the articles of the Constitution can be suspended and accordingly, even declared invalid under Article 48, let alone the basic rights; "if no article of the constitution can be infringed apart from those seven basic rights, the president of the Reich is not authorised to make any legal provisions at all" (D; 183).

Kelsen's pure theory of law as a normative ideal is designed for an autonomous fulfilment of the rule of law, necessarily exhausting the political power of sovereignty such that it needs not to presuppose anything political beforehand for its validity. Kelsen's *Grundnorm* was "a *transcendental* presupposition, and not a *transcendental* unity; the legal system's unified foundation was a necessary principle for the legal theorist, but not necessarily a real, pre-existing will."[69]

In the Kelsenian system, the validity claim of the superior norm is assessed on its derivation of the existing superior norm – superior than the previous superior one. This stratified derivation process lasts until the legal system as an integral whole of plurality of norms is authorized on one basic norm (*Grundnorm*). The distinctive feature of a scientific legal system is its capability of being "traced back to a single norm as the ultimate basis of validity."[70] The pure theory takes the basic norm as its "hypothetical foundation," but at the same time hierarchically as the highest norm on the top from which all the rest is followed.[71] All scientific reasoning of jurisprudence disperse between the same bottom and the top end of the "closed system of legal norms."[72] This system amounts to the equation of the constitution with the sum total of its laws.

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[69] Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Durham: Duke University Press, 1997), 95.

[70] Hans Kelsen, *Introduction to The Problems of Legal Theory*, 55.

[71] Ibid., 58.

[72] Ibid., 62.

On Kelsen's account, a legal norm belongs to the normative system not because of what it tells us substantively, but because of the way of its derivation from a superior norm. This is one of the most basic promise of Kelsen's pure theory in particular and legal positivism in general; "The validity of a legal norm cannot be called into question on the ground that its content fails to correspond to some presupposed substantive value, say, a moral value."[73] For this reason, the law is called valid "only as positive law, that is, only as law that has been issued."[74]

In this case, however, for Kelsen's pure theory of law, any decision, whether it be on emergency or not, is valid and fully justified insofar as it taken on the grounds that the executive office is legally authorized by the constitution to make decision on the relevant matter. What is terribly wrong with Kelsen's theory is its assumption that if any authorized decision is counted as valid, it is possible to yield a normative response to emergency situation.

For Schmitt, it is ridiculous to suppose that the implementation of the norm can be derived from the norm itself. This is the reason why Schmitt asserts with reference to Kelsen that "dictatorship cannot be a problem of legislation any more than a brain operation can be a problem of logic" (D; xlv). This is also exactly the reason why neither judiciary nor legislation can be guardian of the constitution. Let alone legalistic derivation of the implementation of norm from the norm, in Schmitt's view, these are directly opposite to each other, just as the opposition in concept of the rule of law; ruling is something, law is another. For law to be ruling, that is, to be effective, there must be first and foremost a political order. Having stood at the intersection of law and politics, the implementation of law is not hygienic enough to become a topic of legal study for such a pure theorist of law as Kelsen for whom the order is the legal order.

[73] Ibid., 56.

[74] Ibid.

In fact, this is the question of *Dictatorship* in which he develops two concepts of dictatorship one of which justifies itself completely on the basis of the opposition between the norm and the implementation of norm. Schmitt's more sophisticated argument appeared in his 1931 essay written as a response Kelsen's naïve assumption that the implementation of a norm is contained within the norm itself. This opposition is also what Schmitt calls decisionism;

> …every decision, even that of a trial-deciding court that subsumes a concrete matter of fact, contains a moment of pure decision that cannot be derived from the content of the norm. I refer to this as 'decisionism'. This decisionist element is recognizable even where a court is exercising an accessory right of review only. If one is willing to make the effort, for instance, to read Warren's history of the Supreme Court of the United States, one will find that all important decisions of this court were characterized by vacillating arguments and by strong minorities of outvoted or dissenting judges.[75]

Had Kelsen's assumption justified, Schmitt argues, there would have been no need for the courts of justice or judges at all; a handful of technicians would have been enough to deliver justice. What is more in his decisionism, the decision must proceed to operate within that order as the legitimizing source of law. In fact, the routine operation of the law depends on the presupposition of a decision on normality; no legal norm is in the need of being approved by the sovereign if the sovereign decides the situation to be normal, whereas every legal norm can be suspended if the sovereign decides the situation to be exceptional. He states:

> The decisionist character of every judgment of an organ whose specific function it is to decide insecurities and disagreements, needless to say, is even stronger and more thoroughgoing. Here, the decisionist element is not merely a part of the decision, a part that has to supplement the norm in order to make a *res judicata* possible in the first place. Rather, the decision as such is the point and purpose of the sentence, and its value does not consist in an overwhelming argumentation, but in the authoritative removal of the

[75] The debate between Kelsen and Schmitt about the Prussian coup turned on a more extensive debate on the constitutional guardianship. Their articles are compilated and translated by Lars Vinx. Carl Schmitt, "The guardian of the constitution: Schmitt's argument against constitutional review," in *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, ed. Lars Vinx (Cambridge: Cambridge University Press, 2015), 117.

> doubt that arises from the many different and contradictory possible argumentations.[76]

Not only the guardian of the constitution, 'every judgment of an organ', as Schmitt specifies, carries within itself a deisionistic dimension. More importantly, it is not only the case that the decisionistic dimension of a judgment is a part of judgment in question. But the norm to which the judgment is attached is supplemented by decision. This is what makes decision capable of being inside and outside of the norm at once.

Since Kelsen's pure theory could not make the essential distinction between norm and decision, for Schmitt, it (or liberal legalism, in general) never recognized an original political existence independent from the legal norms. Quite the opposite, liberalism defines itself by ruling out 'the political' from the legal system. Here come the lines where Schmitt's aversion with liberalism as to its inherent incapacity to engage with the categories (friend-enemy) of the political towards the making of a decision on the exception.

The incurable weakness of this ideology is starkly brought to the light during these extraordinary times for the simple reason that liberalism has no basis (constituent power), to make decision on the exception, to be recalled from its origin whenever necessary. The efforts of the legal positivist to remain neutral and impartial between the distinct, even dissenting parties within society is also based on the so-called pluralistic society composed of, in fact, the liberal individuals. Having adapted neutrality and impartiality as the norms of legalistic stand, it is adamant about demonstrating the independence of law from the acts of sovereign and political ideologies, and equally adamant about denying that it is just one ideology among others.[77] In this respect, the liberal order also presupposes a substantive

[76] Ibid., 118.

[77] The first woman president of American Society for Political and Legal Philosophy, Judith Shklar's work exposes the reader to the ideology of legalism. The legalistic methodology of legal positivism proceeds from a scientific endeavour to distinguish law from what is not law. This is a jurisdictional procedure, Shklar argues, which "has served to isolate law completely from the social context within which it exists" for the sake of objectivity, neutrality and non-arbitrariness. Politics in the positivistic

homogeneity, too, just like Schmitt's political order does. But, in Schmitt's view, there is no such thing as liberal homogeneity unless liberal plurality provides the political with the required homogeneity.

Schmitt was drafting, during the last years of the Weimar Republic, one of the most powerful criticism of liberalism with a specific focus on the liberal stance of the Weimar Constitution. The court's judgment about the Prussian coup is no coincidence. To achieve the aims of neutrality and impartiality, that is, its own ideology, legal positivism has limited its framework to the sealed system of legal norms and avoided broader questions of politics that would necessitate a non-positivistic engagement with the underlying causes of conflict and dissension.

Schmitt contends that his sort of democratic constitution cannot protect itself against its enemies because no enemy can possibly be recognizable from liberal perspective. Before never missing any opportunity to express his disbelief in the existing order, *Legality and Legitimacy* in its concluding sentences was a reminder of the binary structure of the Weimar Constitution:

> Now, if in the knowledge that the Weimar Constitution is two constitutions, one chooses between them, then the decision must fall for the principle of the second constitution and its attempt to establish a substantive order. The core of the Second Principal Part of the Weimar Constitution deserves to be liberated from self-contradictions and compromise deficiencies and to be developed according to its inner logical consistency. Achieve this goal and the idea of a German constitutional work is saved. Otherwise, it will meet a quick end along with the fictions of neutral majority functionalism that is pitted against value and truth. Then, the truth will have its revenge.[78]

Schmitt believed that before 'the truth has its revenge', the political, which is as pure as the pure theory of law, must be understood and employed in order to eliminate the life-threatening neuralization and impartiality. *The Concept of the*

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legal theory, for sure, is included in what is not law, but not only that, it is ideologically something "inferior to law." Judith N. Shklar, *Legalism* (Cambridge: Harvard University Press, 1964), 2, 111.

[78] Schmitt, *Legality and Legitimacy*, 94.

Political, his most, though notoriously so, well-known treatise, aims to offer what it is to be 'political,' and to reach a new meaning and significance for what is to be a state.

What I argue in the next section is Schmitt's highly original concept of 'the political' by which the vitality of decision comes to the fore in the most evident manner. The decision of the constitutional guardian, as distinct from other decisions made by the organ operating within the state organization, is about the political entity at a concrete moment in which 'the people' will either be or die, depending on the decision. I argue that the conception of decision in *the Concept of the Political* is the final step of Schmitt's overall decisionistic trio along with *Dictatorship and Political Theology*. Thus, I turn to Schmitt's early distinctive conceptions of decision that paved the way for the final version of the trio.

3.1.3. 'The Political' Decision

Having published the same year with *Legality and Legitimacy*, *The Concept of the Political* proceeded to challenge liberal legalism whose impossible aim, in Schmitt view, is to neutralize what is de-neutral and partial in essence and to reduce what is inherently irreducible to the neutral sphere. Schmitt characteristically begins his treatise with a provocative opening; "The concept of the state presupposes the concept of the political."[79] That is, before being a state, the political has to be defined as the modern state is nothing but the contemporary nest for the political which once dwelled in other political entities such as the Greek polis or the empires.

Schmitt's conceptual search for its distinctive categories and criteria by which the political finds its peculiar meaning gives it to "the inherently objective nature and autonomy."[80] First, the political operates through its own distinction between

[79] Carl Schmitt, *The Concept of The Political*, trans. George Schwab (Chicago: University of Chicago Press, 2007), 19.

[80] Ibid., 27.

friend and enemy; anything political can properly be explained by, or be reducible to, and traced back to the irreducible categories of friend-enemy.[81] Second, the distinctiveness of the political is best captured as being contrasted with "relatively independent endeavors of human thought and action" such as the moral, the aesthetic or the economic one.[82] Economic, moral and ethical spheres have their own autonomy to a certain extent, but what distinguishes the political from the rest is that while the others remain reducible to the political, it cannot be reduced to other spheres. What is to be moral, for instance, is determined by bringing action or intention under the antipodes of good and evil, the original distinction of the moral cannot trump the political. Finally, the political is best understood in "existential sense;"[83] it is existential in collective, rather than individualistic manner.

But what is so objective and autonomous about the political that it is capable of rendering all the others as only relatively independent? Of course, such a strong concept as the political cannot actively be operative all the times; it finds its true actualization in a 'concrete situation':

> The political enemy need not be morally evil or aesthetically ugly; he need not appear as an economic competitor, and it may even be advantageous to engage with him in business transactions. But he is, nevertheless, the other, the stranger; and it is sufficient for his nature that he is, in a specially intense way, existentially something different and alien, so that in the extreme case conflicts with him are possible.[84]

The enemy, when it becomes the enemy, is no longer be considered as competitor, evil or ugly for economic, moral and aesthetical reasons, but for political reason. That is to say, in a concrete situation, the enemy becomes economically disadvantageous even if advantageous, morally evil, even if good and aesthetically

[81] Ibid.,26.

[82] Ibid., 25--6.

[83] Ibid., 27.

[84] Ibid.

ugly, even if beautiful. Just like those antitheses trumped by the antithesis of the political, the relations may also be subsumed under the friend-enemy. Not every relation is political, but the relations can potentially be political. It is a matter of "intensity of an association or disassociation of human beings whose motives can be religious, national (in the ethnic or cultural sense), economic."[85] By intensity, Schmitt understands this; if the enmity between two groups get intensified enough to the point that they start killing each other, then this enmity is no longer called ethnic, national or religious, but political.

This point, that is, "the most extreme possibility" is an existential moment in which the crystallization of the political is clearly observed within what Schmitt calls the decisive human grouping" or "the political entity."[86] The true meaning of friend-enemy lies in "the real possibility of physical killing."[87] At this point, Schmitt asserts, "it is sovereign in the sense that the decision about critical situation, even if it is the exception, must always necessarily reside there."[88] This statement amounts to saying that when a group of human being, depending on the intensity of association, carries within itself the risk of the political which is the risk of death in the face of enemy and act in accordance with the categories of the political, then this group comes to make a right claim to sovereignty, even if it fails to do so. Thus, the collectively adopted idea of dying together is a constituting moment of the political entity.

Schmitt has a clear preference, for his discussion of the political, of the state as 'the decisive political entity'.[89] This becomes evident as soon as we encounter his

[85] Ibid., 38.

[86] Ibid.

[87] Ibid., 33.

[88] Ibid., 38.

[89] Schmitt's concept of the political characterized as the distinction on friend and enemy is consistent with the tendency of his time to preserve the nation on the basis of national identity from annihilation. The decision is made on a substantive basis – a basis which can fill with the content whatsoever. We know, however, what the content cannot be; there is no such thing as liberal society.

attribution of the right of war to the state. War is a point in which "t*he political decision* has already been made as to who the enemy is."[90] Any political entity must keep in mind that war is an "ever present possibility."[91] The first presupposition of every state, if it is to be a state, is the idea of war which determines ways of thinking and action of its subjects in an existential manner. In that regard, the state may not be thought of an association among others, but as the one which is attentive to the demands of the political that must not be watered down with other categories as the liberal conception of the state does often – the demands that disregard moral, aesthetic and economic concerns, as well as the legal requirements and even render them irrelevant, when necessary, that is, when the situation happens to be a matter of life and death of the political entity.

In my view, *the Concept of the Political* is the third and final destination of Schmitt's overall theory of decision which is, first and foremost, characterised as accepting the view that the law is not only a totality of norms but decisions, as well. More importantly perhaps, his decisionism requires the rejection of norms in the face of the existential threat. The first stop of his decisionistic account of politics in its relation to life comes in *Dictatorship* in which he states the adherence of the legal norms would be "*in concreto* [in real life] a great obstacle" (D; 165). He was aware that "a *hostis* [enemy] declaration, outlawing, putting someone *hors la loi*, or treating someone as *felon* [traitor] led to the suspension of legal state… affected both the guilty and the innocent" (D; 165). But the fact that Schmitt disconnected the innocent part from his discourse and embraced the concept of 'concrete life' runs parallel with the political situation of German which was getting worse and worse. His attitude reflects the opposition between, among many other themes, individualism and collectivism; Individuals can be innocent and guilty, but life is always the life of a political existence. Schmitt defines his decisionism, in the second stop, as the 'philosophy of concrete life';

[90] Ibid., 34; my emphasis.

[91] Ibid.

> The exception can be more important to [a philosophy of concrete life] than the rule, not because of a romantic irony for the paradox, but because of the seriousness of an insight goes deeper than the clear generalization inferred from what ordinarily repeats itself. The exception is more interesting than the rule. The rule proves nothing; the exception proves everything: It confirms not only the rule but also its existence, which derives only from the exception. In the exception the power of real life breaks through the crust of a mechanism that has become torpid by repetition.[92]

In *Political Theology*, exception comes to be identified as the medium through which life reasserts itself over norm in the form of decision – the norms whose dysfunctionality becomes destructive to life. And, in this work, sovereign appears a swarm of all the central concepts; sovereign "decides whether there is an extreme emergency as well as what must be done to eliminate it."[93] In *the Concept of the Political*, the political is where life and exception is connected through decision. Having published eleven years after *Dictatorship* and ten years after *Political Theology*, *The Concept of the Political* defines the sovereign in a third way; sovereign is the one who decides, already before the exception, who the enemy is. The decision on the enemy has also a limiting effect on the decision on the exception as well as the measures to reinstitute the norm. In fact, the categories of the political is "the only constraint on a decision."[94]

As a final step of Schmitt's decisionism, a genuine political decision is made only on the basis of the political, if it is to be a "genuine decision" rather than a "degenerate" one made by a Caesarist ruler to pursue her own personal political passions."[95] *The Concept of the Political*'s theoretical effort is to offer the distinctive feature of what makes a crowd of people 'the people' against both those who think of politics as the monopoly of the state only, and what he calls the liberal "fictions of neutral majority" in *Legitimacy and Legality*.

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[92] Schmitt, *Political Theology*, 15.

[93] Ibid., 7.

[94] Dyzenhaus, "The Concept of the Rule-of-Law State in Carl Schmitt's *Verfassungslehre*," 502.

[95] Schmitt, *Political Theology*, 3.

Schmitt did not have an easy task of for the simple reason of his conception of sovereign unbound by law. As Dyzenhaus states, in Schmitt the "space beyond law is not so much produced by law."[96] In fact, his decisionistic position in *Dictatorship* is a theoretical attempt to rebalance the act of sovereign (decision) with the demand of law (norm). In *Dictatorship*, the decision on the exception is made in the two opposite senses; classical dictatorship is to suspend the existing law in order to preserve it, whereas modern dictatorship is to abolish the existing order altogether in order to constitute a new one.

The two kinds of dictatorial ruling are separated by a conceptual distinction between norm and decision. The legitimacy of classical dictatorship lies in the existing norms; however unlimited may be the power of dictator and however unbound by law may be the decision of dictator during the term of office, a commissar always aimed "to make itself redundant" upon achieving the "concrete result" in question; otherwise, it would be called "arbitrary despotism" rather than dictatorship (D; xlii). The legitimacy of modern sovereign dictatorship, on the other hand, lies in constituent power, that is, a "minimum of constitution" for a coming law on the way upon achieving the constituted power (D; 127). In this respect, in *Dictatorship*, constituent power also aims to make itself redundant as Schmitt underlines that *any* dictatorship, if not aiming at 'a concrete result', even if pursuing a "normative ideal," turns out to be "arbitrary despotism" (D; xlii). Thus, the act of sovereign is to make decision on the exception, while the demand of law is a 'concrete result' on basis of which law is to be constituted.

Even though commissar and constituent power prove two opposite types of legitimizing source, they share the same end. But Schmitt brings together what seems to be irreconcilable opposite in terms of the positions of norm-decision. Here comes a crucial point made by Agamben about how to understand the contrast between classical and modern dictatorships. The former refers to "a state of the law

[96] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006), 38--9.

in which the law is not applied, but remains in force," whereas the latter refers to "a state of the law in which the law is applied, but not formally in force."[97] Agamben's formulation can be put in the following manner:

(1) Classical dictatorship suspends, say, the right to assembly; to put the ban on assembly, but the right itself is still in operation and to be allowed when the exception constitutes the normalcy.

(2) Modern dictatorship suspends all the right, but, say, assembly itself is in full operation and to be formalized when the exception constitutes the normalcy.

Now, two concepts of dictatorship are completely to be at odds with each other. For Agamben, the reason why *Political Theology*'s "emphasis shifts… from a definition of the exception to a definition of sovereignty" cannot be properly evaluated without the opposition between two kinds of dictatorship.[98] Classical dictatorship bases itself on the decision to suspend the present norm for a limited time, leaving what measures to be taken to the dictator. In this case, as I noted that Schmitt's decisionism refuses subsuming of decision under norm, the dictator is endowed with the discretionary capacity as to the measures taken to eliminate the exception. That is, the dictator is left alone with the "*force of law*."[99] In classical dictatorship, we have two figures to decide separately; if the sovereign decides on the exception and authorizes the dictator to implement the decision, then the dictator has to decide how to exercise the decision. First, Schmitt's position with regard to classical dictatorship conceptually fails to confront how sovereign and dictatorship in the face of emergency differ from each other.[100] Second, this position

[97] Agamben, *State of Exception*, 36.

[98] Ibid., 32.

[99] Ibid., 38.

[100] In convergence with Agamben, in his brief review Fusco argues that Schmitt is unable to draw a conceptual distinction between the commissarial and the sovereign dictatorship; they are not "mutually exclusive" when it comes to their exercise of emergency power. Fusco claims that "there are no criteria or legal instruments able to limit the possibility" that commissary dictatorship can transform itself into sovereign one. Gian Giacomo Fusco, review of *Dictatorship: From the Origin of the*

also risks rendering commissar so powerful that the commissar can even make a right claim to sovereignty. Once a sovereign authorizes a dictator to take necessary precautions in an emergency situation, even if the intended authorization is to preserve the existing order, no body guarantees the authorized capacity of the dictator may constitute a new exception to the norm. In this way, a commissar may turn to a sovereign.

Hence, if there is an exception to the norm whatsoever, and if any decision is made about either the exception itself or the measures to eliminate it, then there is a sovereign. There is nothing surprising, Agamben argues, in that Schmitt's theory of dictatorship ends up with a theory of sovereignty in *Political Theology* in which Schmitt's decisionism be sharper and his conception of sovereign be more radical. Consider Schmitt's decisionistic concern of sovereignty in *Political Theology*:

> If measures undertaken in an exception could be circumscribed by mutual control, by imposing a time limit, or finally, as in the liberal constitutional procedure governing a state of siege, by enumerating extraordinary powers, the question of sovereignty would then be considered less significant, but certainly not be eliminated.[101]

Schmitt still seemed to be attentive to the demand of law (norm) in *Dictatorship* by insisting on 'concrete result'; if the law is to be suspended, then it must be worth doing it. *Political Theology*, however, locates the term concrete within the opposition between norm and decision.

> Every legal thought brings a legal idea, which in its purity can never become reality, into another aggregate condition and adds an element that cannot be derived either from the content of the legal idea or from the content of a general positive legal norm that is to be applied. Every *concrete* juristic decision contains a moment of indifference from the perspective of content, because the juristic deduction is not traceable in the last detail to its

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Modern Concept of Sovereignty to the Proletarian Class Struggle, by Carl Schmitt, trans. Michael Hoelzl and Graham Ward, *The Modern Law Review* 79, no: 4 (2016), 742.

[101] Schmitt, *Political Theology*, 12

> premises and because the circumstance that requires a decision remains an independently determining moment.[102]

The decision, not necessarily political, but juridical decision as well, is determined by its detaching itself from not only the norm from which it is supposedly to be derived, but also the moment in which it is made. Schmitt's decisionism, when it comes to the guardianship, requires the sovereign to decide promptly on the exception and to act in accordance with it on the basis of a political substance. *The Concept of the Political* recrafted this substance whose legitimacy, being the ultimate ground, not only trumps the legitimacy of law, but also provides the legitimacy for law. The decision beyond law derives its legitimacy from the concrete situation where the exception arises. Accordingly, the legal order derives its legitimacy from the exception, not from the norm. When it comes to normalcy, the decision and the enacted norms have no difficulty in existing side by side as no enacted norm needs the sovereign for its operation. This, however, should not nurture the liberal illusion about the legitimacy of legality; for Schmitt, liberalism seems to be nice only when the weather is nice.

Schmitt's position in *Dictatorship* differs from that of *Political Theology* not only in terms of decision, but the exception as well; it flows away from without and finds itself at the borderline between inside and outside – a line which no liberal theory of law can possibly reach out. In *Dictatorship*, the exception is an outsider that breaks of the routine. But *Political Theology* places the exception at the margin where the distinction between inside and outside is drawn by the sovereign. Hence, the more Schmitt marginalizes the exception, the more the decision becomes comprehensive.

In fact, Schmitt's decisionism became sharper as he believed that Germany's political stability was being threatened. He reconceptualized the exception as if he wanted to make it remain the Achilles' heel for liberal conception of the state. When *Dictatorship* appeared in 1921 a year before *Political Theology*, Germany was

[102] Ibid., 90; my emphasis.

far from being in a politically stable period. A civil war seemed to Schmitt to be a real possibility as the streets were faced with the conflict between the ultranationalists and the pro-Communists under the influence of Bolshevik Revolution in 1917. *Dictatorship* had rather a humble aim to revive the Roman institution of dictatorship as a possible solution for the Weimar crisis because he was believing that the Weimar Constitution had effective provisions to employ the emergency powers; the suspension of the existing law for a limited time for the sake of preserving it could have been a solution – a solution that liberals would have never embraced because of its inevitable exclusion of the law, and communists had already adopted as a "dictatorship of the proletariat" (D; xlii).

Schmitt attached great importance to the diagnosis of the crisis as the exception to the norm because its negligence was weakening the *Reich* especially when pro-communist revolutionaries adopted and even attempted to practice what he calls sovereign dictatorship during the formation of *Dictatorship*, as they were encouraged by the success of the Bolsheviks. For Schmitt, liberal insistence on the denial of the exceptional situation could provide a political vacuum to be filled with the communists. What is worse, the revolutionary understanding of the proletarian dictatorship always keeps sovereign dictatorship as a transit centre for resettling a political organization without a state:

> …from the perspective of a general theory of the state, the dictatorship of a proletariat identified with the people at large, in transition to an economic situation in which the state is 'withering away', presupposes the concept of a sovereign dictatorship, just in the form it stands at the root of the theory and practice of the National Convention. What Engels required for his 'praxis', in his address to the League of Communists in March 1850, also held for a political theory of the state of this transition to statelessness [*Staatlosigkeit*]: it was the same situation 'as in France 1793'. (D; 179)

Schmitt did not aim to revive sovereign dictatorship as its revolutionary idea had always been associated with Caesarist political practices in the aftermath of the Revolution; "in most cases no difference is made any more between dictatorship and Caesarism" (D; xxxix). But, in his view, dictatorship has also commissarial

character which had long been forgotten. It should have been remembered and put into practice before German people was to be deprived of their state either by the hand of liberals or communists. Correspondingly, having favoured a revival of the Roman understanding of commissar over revolutionary sovereign dictatorship, his hope was a reformist alternative solution.

In the next section, I delve into Schmitt's two forms of dictatorship. In light of Agamben's critique of the alleged difference between them, I discuss at length how they are rendered identical with reference to Schmitt's footnote on Hobbes' three forms of constitution. In this way, I concede that Agamben's conflating of reformist (commissarial) dictatorship with revolutionary (sovereign) dictatorship is inescapable given Schmitt's trajectory of the norm-decision antagonism. I argue that we do not need to wait *Political Theology* to see the indistinctiveness between Schmitt's two concepts of dictatorship; it is inescapable even before *Political Theology*.

3.2. Two Concepts of Dictatorship

Schmitt's *Dictatorship* is one of the seminal works of legal, as well as political philosophy. Almost a century undertaking, it not only presents a series of interconnected investigations of the foundation of the major Western institutions, but also the early formation of conceptual map for his later works.[103] *Dictatorship* is rather difficult to follow for the reader because it is a sweeping scholarly attempt to develop a jurisprudential theory of dictatorship spanning the history of legal thought by tracing the origin of the term back to its meaning in the Roman legal system, but particularly to its technical awakening in Machiavelli along with a number of Renaissance legal humanists, and to its modern constitutional integration. Besides, *Dictatorship* is understudied as the translators of the book,

[103] The translators of *Dictatorship*, Michael Hoelzl and Graham Ward have written an excellent nineteen pages overview which takes the reader to the key elements such as exception and decision in Schmitt's thinking from the early 1910's onward and carves out the special role it plays within his oeuvre. Michael Hoelzl and Graham Ward Hoelzl, introduction to *Dictatorship*, by Carl Schmitt (Cambridge: Polity Press, 2014), x-xxx.

Michael Hoelzl and Graham Ward recently introduced it to the Anglophone world in 2014.

Dictatorship is difficult to study for Schmitt as well, because, as he states, the term has basically proved "a political catchword, so confusing that its enormous attraction is as evident as the legal scholar's reluctance to discuss it" (D; xxxvii). Considering "a systematic contextualisation of dictatorship" necessary, he initiates the search for a historical, as well as conceptual examination into constitutional law (D; xxxvii). By constitution, Schmitt understands 'how it became what it is,' that is, what moments exactly bear significance for the political constitutions.

Schmitt contends that the dictatorial powers have constituted a necessary politico-legal institution rather than being, as generally misconceived and negatively connotated, the capricious rule of a single ruler, albeit that it has always been identified with its executive, that is, the dictator. Indeed, the possibility of dictatorial ruling lies within the possibility of a separate executive from the law. Schmitt formulates this possibility as "the essence of dictatorship" in several ways; "a difference between the rule of law in its making and the method of its exercise" or "a separation between the norms of justice and the implementation of law [*Rechtsverwirklichung*]" or "the opposition between right [*Recht*] and the exercise of right [*Rechtsverwirklichung*]," or "between the substance of sovereignty and its exercise" (D; xlii, 168). The idea of this separation lies in the belief that no legal regulation is fully able to regulate its own implementation. The law as a system of norms is one thing, the actualisation of the law is another.

From the distinction between the right of law and the right of the actualization of law, it follows Schmitt's paradoxical relation of politics to law in the form of dictatorship; "although it ignores the existing law, it is only doing so in order to save it" (D; xliii). Schmitt believes that the constitution of a legal order requires a normality which can only be formed by means of an external political hand. This is also what makes dictatorship possible throughout the Western legal reasoning and political practice.

On Schmitt's account, there are two sorts of dictatorship, and accordingly two sorts of dictator; one is commissarial dictatorship with its implementers, commissars; the other is sovereign dictatorship with its sovereign. The classical use of dictatorial power has to do with a managerial activity about ways of employing appropriate means to a certain goal in a given concrete situation (limited to here and now) where the state, as a whole, asserts its technical aspect on its constitutional restoration. The commissarial institution must turn its direction, for the sake of the constitution itself, from any "normative ideal" to "a concrete result" which would otherwise fall into "an arbitrary despotism" (D; xlii). For this reason, the classical dictatorship is based on the premise of reformation; any transformations needed for the political or administrative organization of the constitutional order are to be made, if decided to be made, for preventing the failure of existing mechanism, by organs or institutions within the constituted body "so that the source of the newly arising order is the same as that of the previous ones" (D; 112).

The commissarial dictatorship, for Schmitt, encompasses some concrete instances of the Roman Republic. A Roman dictator was a magistrate of the Republic who was exceptionally assigned to the office for six months only by the Senate, bestowed with absolute power and unbound by the law in order to keep the armed power intact either by putting down an alarming uprising or by taking action against the enemy. On Schmitt's reading, the Roman understanding of the concept of dictatorship finds some close parallel up to the nineteenth century (A. Lincoln's presidency, for instance), in its subsequent judicial construction in the early modern states. Not unlike the Roman dictator, the commissary dictators of the sixteenth and seventeenth centuries were not endangering figures to the existing order, albeit with the powers unbound by the law in issuing the executive orders; they were the temporal officials or magistrates at the end of the day with the commissarial duty of saving and liberating the order by dictating the order.

Schmitt takes Jean Bodin (1530-1596), the French jurist of the late sixteenth century, to be a very typical theorist of the commissarial government. Thanks to the distinction between sovereign (*summum imperium*) and government (*summa potestas*), even if "a new organisation of the state is being founded," Bodin's account of sovereignty "always assumes that [the function of] the sovereign is already formed" (D; 31).

Unlike commissary dictatorship, the modern sovereignty takes its start literally from nothing as far as law is concerned. Whereas a commissar of the classical constitution steps in in times of crises as the one endowed with exceptional powers beyond the law; but still there is law to be suspended, the modern sovereignty bases itself the presupposition that the previous constitution is previous, and it exists no more; its legitimacy lies in the coming constitution which is present in the form of constituent power before the constituted power.

On Schmitt's reading, the French revolution, being the first instance of modern sovereignty, with its declaration of the Rights of Man gave rise to the novel question of the origin of the political authority. The revolutionary answer came from an extra-legal foundation; constituent power – a concept which appeared for the first time in *What Is the Third Estate?* issued by Emmanuel-Joseph Sieyès on January of 1789. The pro-revolutionary pamphlet is strongly believed to further the demolition of the pre-Revolutionary State General, of Old Regime, and accordingly the advancement of the revolutionary National Assembly.

The State General, consisting of the representative assembly of three estates or three orders, — namely, the clergy, the noble privileged minority and a third estate of the unprivileged majority. This third part was summoned by the King for the last time in 1614[104] before the delegates of the Third Estate asserted themselves as

[104] According to the pre-revolutionary constitution, whenever a new system of taxation was introduced, the consent of the State General of the realm was needed. Given the fact that the last meeting of this representative body took place 175 years ago, any tax reformation throughout this period was promulgated without the approval of the State General. William H. Sewell, Jr., *A Rhetoric of Bourgeois Revolution: the Abbé Sieyès and What Is the Third Estate?* (Durham: Duke University Press, 1994), 147.

the representatives of the third and ultimate order of the people on June of 1789. As such, the Third Estate as the rightful bearer of the National Assembly denotes both the beginning of the French Revolution and the end of the traditional representation of the three orders. Sieyès' pamphlet clearly signals the total conviction that as the State General could no longer properly and adequately represent the social structure of France.

Initially, Sieyès made explicit what practically motivates him to write his pamphlet; the endurance as well as prosperity of a nation both of which can only be possible by no fewer representatives than the sum of the other two privileged orders' so that the Third Estate would takes its rightfully deserved place in the representative body of the country. Sieyès' pamphlet is of practical, political and strategical importance as clearly seen in its opening questions; What is Third Estate?, asks Sieyès; it is everything. What has been the room left for its political agency till now? No room at all. What does it want to become? It does want to be something.[105]

It seems that the pamphlet owes its widespread impact all over the country, and the continent thereof, to Sieyès' ability to open up a constitutional debate on the basis of 'usefulness' of then French (dis)order. While the current order in the kingdom, for Sieyès, was excluding the Third Estate, it, at the same, rejected the actual working capacity of the rest because "the absence of free competition in work of any kind means that it will be done badly and cost more."[106] It was this hierarchical order which made the two privileged estates more parasitical consumers than laborious producers of the state. Yet it was the same establishment which gave them an unfair opportunity to occupy all the distinguished offices as

[105] Emmanuel-Joseph Sieyès, "What is the Third Estate?," in *Political Writings*, ed. and trans. Michael Sonenscher (Indianapolis: Hackett Publishing Company, Inc., 2003), 94. Sieyès's pamphlet takes its powerful rhetoric from the concrete fact that not only the great majority (ninety-five percent) of the national population, but the wealth of the whole nation is guaranteed by the Third Estate despite the minimum participation in the State General with regard to the other two orders of the realm. Sewell, *A Rhetoric of Bourgeois Revolution*, 116.

[106] Sieyes, "What Is the Third Estate?," 95.

well as the positions with higher income, and thus made them have the monopoly over the state organization. Sieyès treats this layout as "an act of treason towards the state."[107] Having undone this treason, on his proposal, the Third Estate was the only capable candidate to constitute by itself a new order.

Sieyès goes further by claiming that the nobility is no part of the French society which has long been blocking its progress not only with respect to economy, but also morality. The nobility does not belong to the French political order if this order becomes a common one. Thus, Sieyès explicitly denounces the nobility as alien; "first by virtue of its *principle*, because its mandate did not come from the people, and second, by virtue of its object, because this consists in defending, not the general interest, but a particular one."[108] Sieyès' claims find their address on the basis of the initial declaration that the Third Estate is everything. If it is to be everything, then what remains outside of it would be foreign.

Sieyès, being radically anti-aristocratic and anti-noble in style and in strategy, identifies Third Estate with the undifferentiated, unprivileged and oppressed common people; the Third Estate is the French nation itself. It was the reinvention of the French people as a purely political entity.

What Schmitt calls the "dictatorship of the National Convention" of 1792 in its revolutionary mode was the "extraordinary organ of a *pouvoir constituent*" from which all the public powers originate, including the executive magistrates (D; 127). In fact, Schmitt distinguishes classical constitution from modern sovereignty on the basis of the growing hostility of French constituency against the executive – a hostility which can be observed in Sieyès' pamphlet, too; "every branch of the executive power has fallen into the hands of the caste from which the church, the magistracy, and the army are recruited... Usurpation has been consummated. They

[107] Ibid., 96.

[108] Ibid., 98.

really do reign."[109] Sieyès was perfectly aware the fact that whoever usurps the execution, then she really governs.

This hostility, in Schmitt's view, "towards the executive passed from Mably to the French Revolution" (D; 95).[110] For the theoretical exposition of the constituency of the people, Schmitt invokes de Gabiel Bonot de Mably (1709-1785) as a precursor of sovereign dictatorship with an emphasis on representation; "the representatives of the people must put themselves in charge of the executive" (D; 96). This meant no less than to abolish monarchy altogether by passing the constitution of the National Convention to the people, including the executive which would henceforth be acting on behalf of the people instead of monarch.

Schmitt highlights Mable's great influence on the formation of the new constitution of France by stating that in Constituent Assembly of 1790 Robespierre directly referred to Mably in defending the view that "the legislative was allowed to decide on matters of war and peace, because it had the least interest in abusing its power, whereas the king was inclined to such an abuse, as he was …[armed with a powerful dictatorship, which can attack freedom]" (D; 95). But, according to Schmitt, Mably, being more hostile than Robespierre, thinks of dictator as something more than king insofar as "the functions of all other magistrates were nullified through his function" (D; 96). Thanks to the spirit of the Revolution, the kind was defamed and even more so were the magistrates (commissars) appointed by the king. So, who would be the one handling hard cases during tough times?

For Mably, dictatorship is in essence the executive which is extra-legally empowered in times of crisis; on the brink of revolution "the representative of the people must be fully in charge of all business and must take up the executive function" (D; 96). In this way, the emerging regime is totally characterized by the

[109] Ibid., 102.

[110] In fact, Schmitt feared the same enmity would arises in Germany where the dictatorship was already a source of contention before the end of the First World War and continued to be so in the Weimar Republic.

state's representative function that "becomes an absolute power, overruling all existing authorities" (D; 96). For Schmitt, this was something completely new with respect to its justification:

> No longer can we talk now about supreme command over war, or about the crushing of uproar, which the standard concept of commissary dictatorship permitted. In order to justify this dictatorship, Mably claimed that it had to emerge because laws wear out over time and corruption becomes too widespread. Obviously, the dictator appeared to him as a kind of commissar of reformation with unlimited powers over the entire constitutional organisation of the state. If one combines Mably's concept of dictatorship with his aforementioned statement that during a revolution the representatives of the people must put themselves in charge of the executive, one arrives at the dictatorship that the National Convention exercised in the name of the people. This is no longer a commissary dictatorship of reformation, but a sovereign dictatorship of revolution. (D; 96)

In chronological order Schmitt finds the first practical instance of sovereign dictatorship in Sieyès' pamphlet and its theory in de Mably. Surprisingly enough, however, Schmitt finds the first modern type of dictatorship in Hobbes' theory of sovereignty as seen in the below passage from *Dictatorship*:

> The decision contained in a law is, from a normative perspective, borne out of nothing. It is, by definition, 'dictated'. But the final consequences of this idea were only discovered by de Maistre, when rationalism was shattered. For Hobbes, the power of the sovereign still rests on a more or less tacit– and hence sociological no less than real – agreement with the convictions of the citizens, even if these convictions should be initiated by the state. Sovereignty emerges from a constitutive act of absolute power, made through the people. This calls to mind the system of Caesar and of a sovereign dictatorship based on absolute delegation. (D; 17--8)

Apparently, there are three reasons that make the Hobbesian sovereignty essentially dictatorship; first it has its origin in "determination and decision [*a concilio* & *constitutione*] of uniting parties" (DC; 74). Second, the Hobbesian sovereignty is constituted by the constituency of the people.

Furthermore, for Schmitt, the concept of war, naturally considered to be exceptional situations that may require dictatorial solutions, gains much more

importance in the writings of Hobbes than those in the previous political philosophers. This was a theoretical transformation which also inverts the relation between the natural and civil state, or to put it in Schmitt's terminology, between exception and normality. In chapter 18 of *Leviathan*, Hobbes accepts the ever-potential presence of civil war within the city and defines the fifth right of the sovereign as finding necessary exceptional solutions for any unjust act – any act which violates the covenant made with fellows:

> …because the End of this Institution, is the Peace and Defence of them all: and whosoever has right to that End, has right to the Means; it belongeth of Right, to whatsoever Man or Assembly that hath the Soveraignty, to be Judge both the meanes of Peace and Defence; and also of the hindrances, and disturbances of the same; and to do whatsoever he shall think necessary to be done, both before hand, for preserving of Peace and Security, by prevention of Discord at home, and Hostility from abroad; and, when Peace and Security are lost, for the recovery of the same. (L; 124)

Thus, in Schmitt's view, the third reason why the Hobbesian "state is, by constitution, essentially a dictatorship" for the reason that the sovereign by right has to finalize the condition of war in which all are against all (D; 16). Accordingly, the disputes and conflicts between the subjects that may threaten the public safety must be suppressed; "no private conscience exists in a state" (D; 17). This makes Hobbes' constitution dependent on an end to be realized in a concrete situation.

Hobbes' position preserves its place in Schmitt's mind till the appearance of *The Leviathan in The State Theory of Thomas Hobbes* in 1938. Even in *The Concept of Political*, Schmitt refers to the aim of *Leviathan* which is to establish "the mutual Relation between Protection and Obedience" (L; 396). As every true political theory should, Hobbes' political theory provides us with the fundamental principle; "[t]he *protego ergo obligo* is the cogito ergo sum of the state." For "[n]o form of order, no reasonable legitimacy or legality can exist" unless the relation between protection and obedience is to be properly examined and established.[111]

[111] Schmitt, *The Concept of The Political*, 52.

However, it is equally surprising to find out a footnote of *Dictatorship* in which Schmitt seems hesitate to treat the three types of the Hobbesian sovereignty completely as a Caesarist sovereign dictatorship without distinction. Instead he places the two early forms within commissarial dictatorship. In the next section, I claim that given the three reasons that make, in Schmitt's view, Hobbes' sovereignty a sovereign dictatorship, there is no distinction between the three types of the Hobbesian sovereignty. To develop my point, I reframe Hobbes' three constitutions according to Schmitt's framework in order to highlight how they come to the same thing from Schmitt's perspective of dictatorship regardless of their being commissarial or revolutionary. I also argue that Schmitt's ambivalent attitude towards Hobbes' theory of the constitution follows from what Agamben calls "the fundamental aporia," that is, "the impossibility of defining and overcoming the *forces* that determine the transition from the first to the second form of dictatorship."[112]

3.3. Schmitt's Footnote on Hobbes' Constitutions

Throughout the main body of *Dictatorship*, the Hobbesian constitution, as depicted in *Leviathan*, is treated within the form of sovereign dictatorship. This form of government suggests that what is right and wrong, just and unjust, good and bad, beneficial and harmful for the state and accordingly, what behaviour of the subjects is to be allowed and forbidden, what idea is to be declared or silenced – in short, all norms and values, be it moral, political or legal, are related to, and more strikingly *decided* according to, the public interest (common good or common end)

[112] Agamben, *State of Exception*, 8; my emphasis. John McCormick also argues that as *Dictatorship* matured to the end, Schmitt "cryptically" embraces the sovereign dictatorship which comes closer to a right-wing Caesarism. John P McCormick, "From Constitutional Technique to Caesarist Ploy: Carl Schmitt on Dictatorship, Liberalism and Emergency Powers," in *Dictatorship in History and Theory: Bonapartism, Caesarism, and Totalitarianism*, ed. Peter Baehr and Melvin Richter (Cambridge: Cambridge University Press, 2004), 197. McCormick contends that this happens "cryptically" probably because in his previous article originally published in 1997, he was claiming that not until Schmitt's *Political Theology* had appeared, did the shift in Schmitt's understanding of sovereignty take place. John P McCormick, "The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers," in *Law as Politics: Carl Schmitt's Critique of Liberalism*, ed. David Dyzenhaus (Durham: Duke University Press, 1998).

by the absolute power of the sovereign "made through the people" (D; 18). For the sovereign decision to put an end to the brutal controversies over the meaning of right and wrong, just and unjust, beneficial and harmful, an order must be dictated. A highly prominent position is given to the sovereign decision on anything related to the public interest at the constitutional moment and afterwards.

Here Schmitt stresses that the content of the public interest at the moment of constitution is not substantial; dictating an order by itself consists of the public interest; "the public interest only comes into being through the fact that the order has been given" (D; 17). It is given in the form of the (constitutional) law without taking into consideration what was the norm before the constitution: "The decision contained in a law is, *from a normative perspective*, borne out of nothing" (D; 17). Only from a normative perspective, that is, from Hobbes' axiom about the absence of justice before the sovereign, it follows that the decision is *creatio ex nihilo*.

For a decisionistic perspective, however, the decision is not groundless (an order given *ex nihilo*). Schmitt accommodates *creatio ex materia* – a pre-existing matter with the force of stipulating a political order, that is, the people; "For Hobbes, the power of the sovereign still rests on… agreement with the convictions of the citizens, even if these convictions should be initiated by the state" (D; 17--8). Here Schmitt seems to accept the norm-giving power of the constituent because otherwise he should answer to the question the content of agreement (the covenant) on which the sovereign decision rests.

But Schmitt immediately takes Hobbes' constitution out of what he calls the natural law of justice which incorporates pre-existing norms and renders them decisive to the order. Drawing on Hobbes' depiction of individual of the multitude in the state of nature who barely agree on something among themselves, let alone the content of the public interest, Schmitt contends that for Hobbes, "no private conscience exists in a state" (D; 17). The moment of the constitution is also the moment in which the multitude is turned to be the people – an orderly artificial

gathering of individuals which decisively makes itself into a political unity through a representative person.

The idea of the unity in the representative person in *Leviathan* is not available in Hobbes' early political works *De Corpore Politico* (1640) and *De Cive* (1642). On what form and content each agrees her fellows to authorize the sovereign person differs in his works in two distinct ways; fulfilling covenant as the maxim for security and peace in *De Corpore Politico*, *De Cive* and as the origin of justice *Leviathan*. Again, the question of the content of the covenant echoes in Hobbes' two distinct forms of the constitution.

The question of the content of the covenant is not something that Schmitt was unaware of while he was still interested in the Hobbesian decisionistic form of constitution in *Dictatorship*, though only slightly to be touched in a footnote and discussed in the context of two sorts of dictatorship. Drawing on his distinction between sovereign and commissar, Schmitt argues:

> At this decisive point – in other words, when the question of the content of the contract arises – there is an ambiguity in Hobbes. According to *De corpore politico*, II, 1, §2 and §3 and to *De cive*, II, 5, 6, the contract entails a renunciation by all for the benefit of the sovereign. This is therefore a devolution, a delegation from the people to the sovereign, as is assumed in the *lex regia*. But in Hobbes' system it is more consequential not to assume devolution, but rather a constitution. In *Leviathan* (chp 16 and 17) the creation of a representative organ is the essential content of the contract: everyone acts as if the actions of the sovereign would be his own. That is, the contract constitutes an absolute representation, which every individual has to accept and grant as valid; and the state emerges from this as a unity. This is something different from delegation in a sovereign dictatorship, as it forms the basis for Caesarism and it is not a *lex regia*. (D; 240, fn38)

Following his identification of the Hobbesian constitution with modern sovereign Caesarism, Schmitt is hesitant to fully endorse his own suggestion. Having pointed out the ambiguity in the content of the covenant, Schmitt's footnote suggests that Hobbes' constitution may take part from each kind of dictatorship.

In order to develop a better understanding of Schmitt's classification of the Hobbesian constitutions in the quoted passage, what the *lex regia* should be explained. The *lex regia*, the Roman royal law has been thought of within the civil law as a legal means for transferring of the public authority from the people to the emperor after the overthrow of the Roman Kingdom in 509 BC. The conception of sovereignty of the classical constitution in its function during the Republican Rome from 509 BC to almost the birth of Christ, denoted the public authority over its citizens via the Roman people. For the jurisdiction of the Roman Empire, the power which was once exclusively at the hands of the Roman people during the Republican period, would from now on have executed by the Emperor in the name of the Roman people. Thus, the *lex regia* marks a jurisdictional turning point in the constitutional history of Rome, which legitimizes the legislative act of the Emperor (*princepts civitatis*) and the Senate (*princeps senatus*).

According to Danial Lee, the Roman popular sovereignty was simply non-existent just as a *lex* as such was. The Roman people as constituent power and the *lex regia* as a legal instrument to exercise such a power are just a fiction, an "ex post facto juristic construction" posited by the great jurist Ulpian in the third century "to legitimize the authority of the Roman Emperor by tracing the roots of Imperial power to a comital act of the Roman *populus* to invest imperium in Augustus."[113] But Lee also argues with the scholarly references, that the *lex regia*, regardless of its speculative essence, has an undeniable constitutive function; by the invention of the *lex regia*, not only the authority of the Emperor became viable, but the Romans made themselves into a political unit throughout the constitutional passage from democratic republic to republican monarchy.

On Lee's account of the Roman civil law tradition, thanks to the political figure of the medieval Italy, Cola di Rienzo (1313-1354) who passionately believed that "the sovereignty of the Roman people remained fully intact," the *lex regia* is able to be

[113] Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (Oxford: Oxford University Press, 2016), 28.

transposed into the early modern juristic reasoning.[114] Cola's belief is not completely baseless; it is reported that it was Cola who discovered the bronze tablet in the Church of St. John Lateran whose inscription reads "*lex de imperio Vespasiani*" which grants "the full public authority of the Roman People" to the Emperor Vespasian.[115] Despite the fact that whether the *lex de imperio* (the imperial sovereign law) can be a functional corresponding to the *lex regia* (the royal law) remained controversial among the legal humanists of the sixteenth century, the *lex regia*, at the end, was chosen for the primary subject-matter of the constitutional studies.

However, for Lee, there existed "no single act or *lex* in Roman constitutional history," but rather "an ex post facto rationalization or fiction postulated by later jurist to explain the legality of the constitutional transition from Republic to Principate in the first century B.C.E., in terms of popular sovereignty."[116] Thus, as the jurisdictional reception of the Roman constitutional principle, the *lex regia* denotes the complete alienation of the popular sovereignty from the Roman people to the Emperor. Thanks to the act of transfer through the *lex regia*, the sovereign emperor was able to legislate in the legitimate official capacity. On Schmitt's *a fortiori* analysis of classical dictatorship, thanks to the *lex regia* the Roman politics was a politics of constitution.

As for the jurisprudential theory of the *lex regia*, Benjamin Straumann elaborates on its intellectual reception by the humanist lawyer. Mario Salamonio (1450-1532) work, the leading jurists of Roman humanists, in his work, *Patritii Romani de principatu* offers us the most significant elaborated debate on the *lex regia*. It is Salamonio, though he was originally a jurist, who put the words into the mouth of the philosopher. His expedient attitude closes partially off what is historically meant when *lex regia* is referred to.

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[114] Ibid., 25.

[115] Ibid.

[116] Ibid., 26.

Salamonio was famous for his support to the Republican Rome rather than the Imperial, and accordingly wrote a book, in favour of republican arguments, upon the 1512-1514 conflict between the administrative institution of Roman papal curia and the Commune of Rome. In this conflict situation, the entrenched powers of the curia were challenged by the revolutionary powers of the Commune. Having penned in the form of the debate between a lawyer and philosopher, Salamonio's work draws on the philosopher who argues against the lawyer who takes the positivistic conception of law according to which law in essence is a command from a supreme commander. In that regard, for the lawyer, the Emperor as a supreme authority cannot command and bind himself by way of commanding. That is to say, the Emperor has directed the people to himself as "subjects, not equals."[117]

In the lawyer's account for the nature of the law, the philosopher finds no legitimate ground to distinguish between tyranny and empire. As the dialogue is matured to the end, it turns out that the only way of laying down the legislative right of the supreme lawgiver effectively within the empire as opposed to arbitrary ruling of tyrant, "the Emperor is bound by it [his own legislation] as the Roman People were bound by their own law-making before delegating this authority to the Emperor by means of the *lex regia*."[118]

In agreement with Lee, Straumann suggests that on Salamonio's republican reading, the ultimate legitimization of political authority lies in the body of the Roman people as a whole. Here republicanism is based on the natural law conception which suggests the presence of an authority beyond the supreme authority; the *lex regia* by means of which the delegative power of the Emperor is

[117] Benjamin Straumann, *Crisis and Constitutionalism: Roman Political Thought from the Fall of the Republic to the Age of Revolution* (New York: Oxford University Press, 2016), 256.

[118] Ibid.

established is "immune to his sovereignty."[119] Again, the *lex regia* is best approached through the republican constitutionalism.

Now turning back to Schmitt's footnote, it has three points to make; the first is that from the relevant passages from *De Corpore Politico* and *De Cive*, it is corollary to that the covenant consists in transferring the natural right to everything by delegation as a result of the war of all against all. This form of constitution clearly suggests the *lex regia*, that is, the commissarial dictatorship. The second is that the covenant is composed of transferring the natural right to everything by constituting an absolute representative authority. Therefore, for Schmitt, the difference between the sovereign by delegation and the sovereign by constitution differs as much as the commissarial and the sovereign dictatorship with Caesaristic themes.

For Schmitt, there is a vagueness in the passages of *De Corpore Politico*, *De Cive* and *Leviathan* to which he refers in order to detect whether the power of dictator comes from the delegative or the constituting act of the people; the former involves *lex regia* which accounts for the popular foundation of authority of Roman Emperor, while the latter implies the constitutive power as a preceding agreement to authorize one representative, that is, the sovereign. It is true that what Hobbes concludes as the sovereign in *Leviathan* is not the same in *De Corpore Politico* and *De Cive*, but whether they do differ as much as their formulations give way to two sorts of dictatorship with regard to the two distinct accounts of the content of the covenant is a question to be examined. In the next three subsections, I discuss Hobbes' three forms of constitution in a row with reference to Schmitt's reading of Hobbes' theory of sovereignty. In this way, I suggest that the reason given by Agamben why no distinction can be made between Schmitt's two concepts of dictatorship becomes more explicit.

[119] Ibid., 257.

3.3.1. The Constitution in *De Corpore Politico*

In *De Corpore Politico*, depending on both the knowledge and the end of the persons, on what sort of content they agree differs. Hobbes does not treat the renunciation and transferring of the natural right as defining the same declaration of the will. If one *relinquishes* one's natural right, this amounts to declaring that one is willing to give up the liberty on matters that the natural right allows before relinquishing it. If one *transfers* one's natural right with or without expectation of "reciprocal benefit" this, first and foremost, amounts to declaring that one is willing not to resist to whom the right is transferred (DCP; 90). As distinct from an *ex-parte* transaction, the transfer in a covenant is performed on the basis of mutual donation or benefit. In other words, the trust in performing on whatever they agreed is bilateral; they either fulfil the terms immediately, or one party immediately and the other promises to do later, or lastly, either party just trusts in the promise of one another to perform it later. After all, there are only three sorts of contract, only one of which is called covenant. The mutual trust builds upon the promise to perform the covenant in return of the transfer of the natural right to everything.

From the perspective of performance on the covenant, drawing on the promise given for the future, as well as on the natural disposition of human, Hobbes moves to the premise that the covenant understood this way has no effect at all; one party simply see no reason why one should first perform one's part instead of refraining from doing it, if one suspects that the performance of the other party. Given the picture of the natural state, Hobbes' individual has good reasons to suspect how effective the covenant will be in the future in the absence of a coercive power. Hobbes' premise may even render everyday commercial exchange impossible; what should come in the first place; the baker's food or the customer's payment? And, more importantly, who would assure the performance of latter?

At this point, Hobbes introduces the necessity of a coercive power to exercise over the parties in order to compel them to perform their parts and to "deprive them of

their private judgments" about the suspicion whether the other party does what is promised (DCP; 92). Thus, the covenant remains ineffective on the basis of trusting the promise only.

Individuals need to assemble together and to direct their actions to one and the same end in order to bolster mutual defence against the enemy. Hobbes calls this aim the consent reached by the great number of individuals (the multitude) either against "a present invader" or for "the hope of a present conquest" (DCP; 119). As opposed to the God-made natural concord among animals, the consent of the multitude is artificial, that is, the human-made by covenanting.

By consent Hobbes understands "the concurrence of many men's wills to one action." (DCP; 121) The content of agreement, however, is not something to exaggerate for politics; it ought to be minimized and restricted to transferring the natural right to everything. For Hobbes, we have witnessed that there are as many uprisings as false theories of sovereignty which declares that "it is up to *private* men to determine whether the commands of King are just or unjust, and that his commands may rightly be discussed they are carried out, and in fact ought to be discussed"[120] (DC; 9; my emphasis). Peaceful order is preserved "not by discussion, but the power of Government" (DC; 9). Even "the mere act of disagreement is offensive," let alone the content of the agreement, (DC; 26). Hobbes' individual is quite a self, indeed;

> Not to agree with someone on an issue is tacitly to accuse him of error on the issue, just as dissent from him in a large number of points is tantamount to calling him a fool… men cannot avoid sometimes showing hatred and contempt for each other, by laughter or words or a gesture or other sign. There is nothing more offensive than this, nothing that triggers a stronger impulse to hurt someone. (DC; 26--7)

[120] As to why the content of covenant must be limited to the transference of the natural right, *De Cive* is much more elaborated than *De Corpore Politico*. That is why I have quoted from *De Cive*, while still discussing the issue in *De Corpore Politico*.

One should treat fellows seriously, as well as the covenant one has made with them.[121] Moreover, on what all agree must be clear. Based on the first two laws of nature, Hobbes finds contradictory (covenanting and not covenanting at the same time) and absurd any covenant violating actions; what absurdity is to argumentation, injustice is to the covenant once made. The consent is necessary, but not sufficient condition for security and peace; "the erection of some common power" granted by the common consent for peace is needed in order to render peace perpetual. The constitutive principle of the political union in *De Corpore Politico* is:

> …every man by covenant oblige on himself to some one and the same man, or to someone and the same council, by them all named and determined, to do those actions, which the said man or council shall command them to do, and do no action, which he or they shall forbid, or command them not to do. (DCP; 121--2)

The multitude's consent to get out of the state of nature denotes "consent to something… which they may come near to their ends" (DCP; 126). Accordingly, depending on the quantity out of the multitude for the sovereign, the content of covenant differs, too. Hobbes here seems attentive to the quantity of the natural individual whose will is to be counted on the covenant, but that does not mean that the content of covenant must always lie in their will as the multitude as a whole concurs with unification, but not with the design of this unity, that is, the form of the constitution.[122]

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[121] Hobbes is far more susceptible than any other philosopher I have read so far. He despised, for instance, the scorn of the judicature towards the suspects because it is not a "part of the punishment for their crime, nor contained in their office" (DCP; 101). He despised the scornful and ruthless act not only because it does not help but contribute enmity, but because "life itself, with the condition of enduring scorn, is not esteemed worth the enjoying, much less peace" (Ibid.).

[122] Hobbes here implies that all the persons are supposed to agree by covenanting, but in fact, only assembled ones make the covenant. I think that there do exist politics in the Hobbesian state of nature, as assembling, but the power in that state is too fragmented and not intensified enough to form a political will in the person in which the supreme power of the sovereignty resides in order to make law. It is true that the state of nature and civil society are directly opposed to each other, but this opposition between two antithetical conditions is best understood in legal rather than political terms. In Hobbes' constitutional theory, assembling is of primary importance for politics. A commonwealth may be constituted in "a meeting [*conventus*]" where a crowd may make itself into a

Having been transmitted by and founded on the will of the people, the sovereign power is "no less than absolute in the commonwealth, than before commonwealth every man was absolute in himself, to do, or not to do, what he thought good." (DCP; 132) In that regard, the sovereign is so absolute that it is entitled to "the absolute use of the sword" of justice which is voluntarily entrusted, rather than forcibly taken by her, for "making and abrogating of laws, supreme judicature, and decision, in all debates judicial and deliberative" (DCP; 132).

In the same way, the sovereign power secures the nomination, appointment and removal of the ministerial cabinet for public affairs as well as "the sum of all judicature, and execution" (DCP; 131). The covenant thus is conditioned on the particular ends of individuals whose quantity causes something qualitative; if "they allow the wills of the major part of their whole number," they are united into a democratic body politic which allows so many of them to be assembled. If they grant "the wills of the major part of some certain number of men by them determined and named," they are united into an oligarchical or aristocratic body politic which locates the sovereign on this majority. Finally, if they concede "the will of some one man, to involve and be taken for the wills of every man," this would be a monarchic unification, the sovereignty of one person. (DCP; 126--8) Hence, in *De Corpore Politico* Hobbes concludes the relation of the covenant with the sovereign suggests that when the multitude comes to be made itself into the

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people. (DC; 77) On my view, Hobbes does not give the absolute power to the sovereign forever. There are some crucial experiences and times to test the power when the sovereign calls and compels the subjects to be assembled for the reason that the sovereign thinks necessary. The sovereignty remains absolute provided that the subjects are convinced to come together for a reason. In that regard, whether the commonwealth last longer or not, even whether a new commonwealth is constituted or not, depends implicitly on the choice of the subjects. Thus, it is a matter of time and place that the sovereign loses the absolute power. What is more, in *De Corpore Politico*, Hobbes makes clear that he does not categorically exclude the right to resist the established government. For Hobbes too, it is not easy to dispose individuals of a people to uproar against the sovereign. Three preconditions must be present; the meaningful and substantial discontentment with the government which causes the worsening condition of life and increasingly deepening disbelief in any changes for betterment; the "pretence of right" that one believes to have, though there cannot be "just cause" for rebelling and though one never make it public unless there is "hope of success" (DCP; 201). This hope is the third and the last precondition for igniting insurrection; one must hope for the achievement. Otherwise, one would rightly be called mad as the delicate line between being patriot and traitor is at stake. Thus, "discontent, pretence and hope" together may cause rebellion which is to be led by "a man of credit to set up the standard, and to blow the trumpet" (DCP; 201).

covenant, this is also simultaneously meant to be a decision on the form of sovereignty in the person of sovereign and on the regime of government in the subordinated cabinet; the covenant and the sovereign are established at once.

With regard to the constitutional forms, however, Hobbes holds that none of them really matters when it comes to the design of absolute sovereignty. He never thinks otherwise; in all three works, the same emphasis is placed on the futility of the idea of "mixed" forms of constitution (mixed democracy, oligarchy or monarchy) which gives the power of legislating to a democratic assembly, the judicial power to other, and the administrative power to another (DCP; 134). Regardless of the form of constitution, sovereignty must be designed as indivisible.[123] As long as the sovereignty is designed as indivisible, under what form the constitution is realized does not matter at all.

In Book II of *De Corpore Politico*, Hobbes makes his argument regarding the democratic monarchy or what Schmitt calls the *lex regia*. For a democracy, "the institution of a political monarch" is possible "by a decree of the sovereign people," transferring their sovereignty to the monarch "by plurality of suffrage"

[123] Hobbes maintains that the sovereignty already proves to be indivisible in practice. The compartmentalisation of the power as if it could be possible is our childish wishful thinking; "that seeming mixture of the things themselves, but confusion in our understandings, that cannot find out readily to whom we have subjected to ourselves." (DCP; 135)

In his lengthy introduction to *Leviathan*, Richard Tuck argues that what we saw at the end of the sixteenth century was an intellectual tendency to substitute the virtues of the republican citizen mainly depicted in Cicero's work for the constitutional crisis of the late Roman Republic analysed by Tacitus. What was at stake was the order itself due to the shaken Europe by civil war. Hence, the explanatory power of Tacitus' discussion on the constitutional transition of republic into empire was far more welcomed in the political life at that time, and the replacement of Cicero with Tacitus reveals itself in the emerging boom of 'reason of state'-inflected works all over Europe from 1590 to 1630. Richard Tuck, introduction to *Leviathan* by Thomas Hobbes, ed. R. Tuck. (Cambridge: Cambridge University Press, 1996) xiv--v. Hobbes obviously embraced this trending realism. Tuck's point may become more manifest in Hobbes' conception of indivisible sovereignty, which can be traced back to the opposition between Cicero and Tacitus with respect to their view of the Roman constitution. In his comparative passages, Straumann would give support to Tuck's point by arguing that whereas Cicero normatively appropriated the elements of popular, aristocratic and monarchical ruling into the republican constitution, Tacitus' constitutional theory was geared in the direction opposite to Cicero's and towards the idea of constitution which would be inevitably deteriorated into a corruption similar to the one which the Roman Republic underwent. For Tacitus, the separate legislation entrusted in the plebeian tribunes in the name of the people was responsible for the fall of the Republic. Benjamin Straumann, *Crisis and Constitutionalism*, *28*-30.

(DCP; 142). The absolute monarch with the absolute right to determine the succession may bring about the dissolution of popular sovereignty in the sense that the power of the people becomes unclaimed upon her death – so unclaimed that even a private individual may run a new election, if there is left no one who is resolute enough "to hold the multitude in peace and obedience" till the abandoned sovereignty find a political nest for itself (DCP; 143). On the second form of constitution by the *lex regia* (the second form of *De Corpore Politico* will be the third form of *De Cive*), the sovereignty of the people remains intact if the elected absolute monarch is thought of as an appointed minister in which case the sovereignty in total is reduced to the execution;

> …a great minister, but no otherwise for his time, than a dictator was at Rome. In this case, at the death of him that was chosen, they that meet for a new election, have no new, but their old authority for the same… when a man receiveth any thing from the authority of people, he receiveth it not from the people his subjects, but from the people his sovereign. (DCP; 143)

Thus, from the above passage it is inferred that the power constituted in this way may be recalled from its origin by the genuine owner of the power, namely, the people in spite of the fact that the elective monarch is appointed as dictator to the office for lifelong service as the longevity of the office is limited to the length of her life.

Hobbes resists the indistinction between dictator and sovereign.[124] On this topic, Hobbes agrees with Bodin (Schmitt's favourite representative for commissarial dictatorship) and refers to Book II of *On Commonwealth* in which Bodin clearly distinguishes sovereignty from the forms of government; what we think of monarchy as despotic, tyrannical and royal is in fact the forms of government rather than the forms of sovereignty.[125]

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[124] In his recent work, *The Sleeping Sovereign* whose title is inspired from Hobbes' metaphor for the *lex regia*, Tuck also stresses that Hobbes rejects "Grotius's view that the dictator – and *a fortiori* other elective rulers – was a sovereign." Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge: Cambridge University Press, 2015), 90.

[125] Jean Bodin, *Six Books of The Commonwealth*, trans M.J. Tooley (Oxford: Basil Blackwell Oxford), 56.

For Hobbes, the government distinct from the sovereign does not mean that the sovereignty could be divided. Quite the opposite, the division within the sovereign rights cannot accommodated within the commonwealth; a divided sovereignty means the new right claims over the right of sovereign, including the right of law-making, of making peace and war, of distributing taxes, of commanding the army. This would lead the commonwealth inevitably to the degeneration into arbitrariness, and thus corruption. It is also illogical; a separately designed organ, say, to legislate within the commonwealth is meant to be welcoming a default disobedience against the sovereign; by the very nature of politics, "the right of sovereignty… cannot…give away any part thereof, and retain the rest" (DCP; 206). Let suppose that

> …the people of Rome to have had the absolute sovereignty of the Roman state, and to have chosen them a council by the name of the senate, and that to this senate they had given the supreme power of making laws, reserving nevertheless to themselves, in direct and express terms, the whole right and title of the sovereignty; which may easily happen amongst them that see not the inseparable connexion between the sovereign power, and the power of making laws: I say, this grant of the people to the senate is of no effect, and the power of making laws is in the people still. For the senate understanding it to be the will and intention of the people, to retain the sovereignty, ought not to take that for granted, which was contradictory thereto, and passed by error. (DCP; 206--07)

As seen Hobbes' handling the most important right of the sovereign, that is, the legislative power, any organs of a political body cannot have a right claim to the sovereign right unless sovereignty empowers it with that right, in which case sovereignty decides the place and time of the next meeting.

3.3.2. The Constitution in *De Cive*

De Cive can be read as a progressive addition to *De Corpore Politico* with no significant change in the before-constitution content. In *De Cive*, exercising power over the parties, or more precisely, over warring parties is a decision out of which the sovereign emerges. But the ways of exercise may differ according to the position of the parties to the covenant; what Hobbes calls "commonwealth by

design" in *De Cive* or "commonwealth by institution" both in *De Cive* and *Leviathan* leads to the first desired mode of sovereignty, which provides the basis for Hobbes' whole politico-legal project. This mode of sovereignty has its origin in "determination and decision [*a concilio* & *constitutione*] of uniting parties, and that is the *origin by design* [*origo ex instituto*]." (DC; 74) In the political (artificial) constitution by decision, a number of the natural individual reproduces themselves into a political unity in a single person or an assembly of persons by way of covenanting each other as a result of mutual fear of each other.[126]

Like *De Corpore Politico*, *De Cive* formulates the natural right to everything as the primary as the first natural law; one follows peaceful ways up till the point that there is left no hope for truce. When there is no hope, one side attacks, the other defends; both sides are equally justified and whatever is done is done by right. In what logically follows, anyone who abstains from transferring this unlimited natural right to everything is counted as "acting contrary to the ways of peace, that is, the law of nature" (DC; 34). The abandoned natural right is transferred to an impartial power who in turn rightfully demands the transferors not to resist on the issue of what is agreed on beforehand. The covenant introduces no new right to the holder of the natural right to everything anyway. On the contrary, the content of the covenant reveals itself in the duty of non-resistance on the part of the transferor: "Justified resistance… on the part of the transferor... is now extinguished" (DC; 34).

Both parties to the covenant must be willing to be the party of the transference as the transferor, but not as the receiver. The receiver is not a party to the covenant. By covenanting the natural individuals agree, but not united yet because peace and "security is to assured not by *agreements* but by *penalties*" (DC; 78). Thus, the content of covenant can be put in the following statement; the parties agree among

[126] Hobbes already accepts that no one can give an actual guarantee for all "to secure people from harm from each other," but provide all of them with a theoretical stability that "there will be no reasonable ground for fear" (DC; 77).

themselves for the fear of each other to transfer the natural right to everything to the sovereign power.

Hobbes' articulation on the constitution on the basis of the *lex regia* comes to the fore in a pretty long paragraph of chapter 7 of *De Cive*. Hobbes delves more specifically into the forms of the political constitution by decision in which democracy is much praised, given a principal role even in monarchical constitution when the monarch "accepts power from a people" and for this reason, "when the power is transferred only for a limited time" (DC; 96, 98). Democracy, for Hobbes, always presuppose an assembly of people – an idea inherited from the Roman *lex regia*. A temporary monarch is democratically possible in four ways: (1) The people entrust the government to the monarch and their "the right of assembly" upon her death remains undetermined. (2) The people leave the government to the monarch by way of election and the 'decision' is made on the right of assembly "at a certain time and place after his death" (DC; 98). With this second case, Hobbes affirms that

> …the power resides firmly in the *people* is by their previous right, without any new act on the part of the citizens; for in the whole intervening period *sovereign power* (like Ownership) remained with the *people*; only its use or exercise was enjoyed by the time-limited *Monarch*, as a *usufructuary*. (DC; 98--9)

(3) The people leave the government to the monarch by way of election with "the 'understanding' that it would hold meetings at fixed times and places while the term set for the Monarch is still running" (DC; 99). In this case, the monarch rather resembles a prime minister of the commission than a monarch. More importantly, the people, whenever considered to be appropriate, takes the right of assembly back from the minister even before her term in the administrational office is expired. Here Hobbes gives the example of Marcus Minucius Rufus, the consul of the Roman Republic who was given equal power with his adversary Maximus during the dictatorship of Maximus. Since, for Hobbes, power means delivering commands in a concrete manner, "it is unthinkable that a man or assembly which has direct and immediate power of action should hold power in such a way that it

cannot actually give any commands" (DC; 99). When the Roman army was left by Maximus to the commandment of Minucius for whatever reason during a war, the people did what was necessary.

(4) The people leave the government to the monarch after appointing her by giving up the right to assembly till the second call of the appointee. This form of democratic monarchy is an absolute one in which the power of the people is dissolved into that of the monarch. The power "to revive the commonwealth" is definitely taken from the people and conferred to the monarch who will lawfully be indifferent to the promise "to summon the citizens at certain times, since the person to whom the promise was made no longer exists except at his discretion" (DC; 99).

After his classification of these four cases of constitution, Hobbes offers an interesting comparison between people and monarch or between democracy and monarchy. He asks us to think of the people as the elected temporal monarch without heir and of democracy as absolute monarchy. He offers three reasons for it. First of all, it is like the people conceived as "a Lord [*Dominus*] of the citizens in such a way that it cannot have an heir unless it nominates one itself" (DC; 99). Secondly, the absolute monarchy is even more like the people who gather together in a certain space and time, "when a *Monarch* is asleep" (DC; 99). That is to say, the time gap between the assemblies of the people coincides with the bedtime of the monarch. The power of the people is kept in times of "no acts of commanding" (DC; 99). Finally, the termination of assemblies such that they won't happen ever again corresponds to "the death of a people, just as sleeping without waking is the death of a man" (DC; 99-100).

Let me apply Hobbes' proposed reasons for the metaphor to the four forms of constitution: (1) If the monarch, who is about to die and without heir, passes the power to an executive till his supposedly wake-up, this would an outright assignment of the non-royal succession. Again, it reminds Hobbes of the people who indefinitely transfers the right of assembly to a temporary monarch. (2) In a

similar way, when the monarch is not necessarily about to die, but just going to take a nap, she would have to pass the power to an executive so as to keep non-stop commanding. The power is given her back after the rest. It is like the people who, after the election of a temporary monarch, does not give up the right of assembly at a certain space-time determined after the election. (3) When the monarch hands the power of government to an executive without going to sleep, she recalls it whenever she considers appropriate, just as a people of the third form. (4) The forth form of democratic monarchy reminds the reader of a political stillborn;

> Finally a king who gives the exercise of his power to another person while he sleeps, and can wake up again only with the consent of that person, has lost his life and his power together; just so a people which has committed power to a time-limited Monarch on the terms that it cannot meet again without his command, is radically dissolved, and its power rests with the person it has elected. (DC; 100)

What we see in his metaphor is that Hobbes restates and reformulates the same the distinction again and again; the distinction between sovereignty (the people) and its execution (the sovereign), between the sovereign (monarch) and the executive (minister/dictator), while at the same time overstating the indivisibility of sovereignty. In fact, Hobbes explicitly contends the non-existence of any sovereign monarch if it is elected. Otherwise, why would he send her to the bed?

Accordingly, Hobbes also suggests that the people can sleep once the transference of sovereignty is done. In the same way, although he does not accept to identify sovereign with dictator, from his logic of the *lex regia*, it follows that where the sovereignty lies in the people alone, Hobbes' insistence on the distinction between sovereign and dictator loses its political meaning as it does not matter who hold the sovereign right after the transfer; after the transfer of the sovereign right to the minister, the monarch goes to sleep. Here Tuck's criticism of Hobbes is important; imagine an elected monarch who is asleep throughout, what would happen to the commonwealth? Would not it be governed by the (commissar) dictator?

That is also the reason why Hobbes calls the sovereignty of the people the elected monarch with no heir; if the monarch had an heir to pass the sovereign right, she could not nominate the heir without appealing to the pre-existing norm which traditionally determines who is the next. But the monarch with no heir can appoint whoever she sees appropriate.

Eventually, an almost forty pages after the metaphor of the monarch asleep, Hobbes comes to the point that Schmitt makes in the justification of commissarial dictatorship in *Dictatorship*. Prescribing the duties of the sovereign in chapter 13 of *De Cive*, Hobbes introduces the necessity of the distinction "between the *right* and the *exercise* of sovereign power" (DC; 142). For Hobbes, we must distinguish it because otherwise there might be cases in which the duties ascribed to the sovereign by the right may not be fulfilled; the monarch might be aged enough or consider a minister to be more capable than herself on certain issues:

> Nor do the comparative advantages or disadvantages of different types of commonwealth result from the fact that government [*imperium*] itself or the administration of government business is better entrusted to one man rather than to more than one, or on the other hand to a larger rather than a smaller number. For sovereignty [*imperium*] is a *capacity* [*potentia*], administration of government is an act [*actus*]. *Power* is equal in every kind of commonwealth; what differs are the acts, i.e. the motions and actions of the commonwealth, depending on whether they originate from the deliberations of many or of a few, of the competent or of the incompetent. This implies that the advantages and disadvantages of a régime do not depend upon him in whom the authority of the commonwealth resides, but upon the ministers of government. Hence it is no obstacle to the good government of a commonwealth if the *Monarch* is a woman, a boy or an infant, provided that the holders of the ministries and public offices are competent to handle the business.[127] (DC; 125)

It seems that Hobbes' position in *De Corpore Politico* and *De Cive* that the executive is the sovereign unless the sovereign is awake because it is the executive which as a matter of fact exercises sovereignty in the bedtimes of the sovereign (in times of

[127] In *the Sleeping Sovereign*, Tuck warns the reader of the (mis)interpretations of *imperium* (sovereignty) as government and of *potentia* (power) as capacity, in his 1997 edition of *On the Citizen*. Tuck, *The Sleeping Sovereign*, 92.

emergency). Thus, with *De Cive*, Schmitt is right in calling Hobbes' constitution the *lex regia* or commissarial dictatorship, but he is wrong in assuming its ruling for a limited time. Hobbes' position in *De Cive* rather makes Agamben more justified regarding his claim that there is no ground to distinguish between commissarial and sovereign dictatorship; if Hobbes' sovereign remains sovereign without waking up, this would simply mean that Hobbes lets the dictatorial ruling become the norm.

3.3.3. The Constitution in *Leviathan*

In *Leviathan*, as distinct from his earlier works, Hobbes unprecedentedly distinguishes between the covenant and the sovereign. Consider the below passage from *Leviathan*:

> The only way to erect such a Common Power . . . is to conferre all their power and strength upon one Man, or Assembly of men, to beare their Person; and every one to owne, and acknowledge himselfe to be Author of whatsoever he that so beareth their Person, shall Act, or cause to be Acted, therein to submit their Wills, every one to his will, and their Judgements, to his Judgement. This is more than Consent, or Concord; it is a reall Unitie of them all, in one and the same Person, made by Covenant of every man with every man. (L; 120)

The people institute a commonwealth by agreeing on the authorization of the sovereign to represent the people. In *Leviathan*, the covenant is made by everyone with everyone else, not with the sovereign. The sovereign as distinct from the covenant to which it is not party is "the Essence of the Commonwealth" (L; 121). Even though it is somewhat established by covenanting, "there be somwhat else required (besides Covenant) to make their Agreement constant and lasting" (L; 120). Since one cannot comfortably derive this last point from *De Corpore Politico* and *De Cive*, the act of covenant in Hobbes' three works cannot be used interchangeably. *Leviathan* even renews the vow for the covenant, upholding a final version made by each with fellows: "I Authorise and give up my Right of Governing my selfe, to this Man, or to this assembly of men, on this condition, that

thou give up thy Right to him, and Authorise all his Actions in like manner" (L; 120).

Hobbes further stretches out the distance between the covenant and the sovereign. The act of covenanting is not a unification. The sovereign is required for the united power of the people; "a *real* Unitie of them all, in one and the same Person" (L; 120). In *Leviathan* the sovereign totally represents the *real* unification of particular wills in one person; regardless of the constitutional form under which they give mutual consent to unite, the unification happens to be realized in the sovereign, not in the people as the sum total of particular will. It must be this shift in the features of the unification and the vow that leads Schmitt to align the Hobbesian constitution with the sovereign dictatorship.

In spite of the distinctive character of *Leviathan*, Hobbes, interestingly enough, could make the same point in a very similar way when he supposes a sovereign who not awakening from her slumber. In chapter 21 of *Leviathan*, Hobbes suggests that if a monarch, in the case of an ultimate defeat, accepts the subjection to the defeater, then the defeater may rightfully oblige the former subjects of the monarch to herself. But if the monarch is hostage, the sovereign right is still with her to oblige the subjects to "Magistrates formerly placed, governing not in their own name, but in his" because "the question is only of the Administration" as long as the sovereign right is held (L; 154). This is the point at which we arrive in *De Cive* in the previous section.

At first, Schmitt seems to be right in distinguishing *De Corpore Politico* and *De Cive* from *Leviathan* in terms of the relation between the covenant and the sovereign. But Hobbes kicks out the sovereign whenever possible; in *Leviathan*, the sovereign is hostage, while in *De Cive* she is sleeping.

Obviously, there is no difference between an asleep sovereign and a captivated sovereign. For Hobbes, a monarch deprived of liberty may still hold the sovereign right, just like the sovereign of *De Cive*, retaining the right of sovereignty while

slumbering. Thus, we come back to the point to which Agamben takes us; the reason why Schmitt locates the Hobbessian constitution in two different constitutions (commissarial and sovereign dictatorship) is the very reason why Schmitt' two concepts of dictatorship in *Dictatorship* ends up with a radical theory of sovereignty in *Political Theology*.

In *Dictatorship*, Schmitt saw in the distinction between commissar and sovereign the fate of sovereign which is passivated; the sovereign right consists of a mere nomination. As s result, sovereignty dies out. If the sovereign decides on the exception and leaves the measures to get rid of the exception to the commissar (the executive or dictator), then the question of sovereignty turns out to be a mere question of 'administration'. So Agamben is right in claiming that it is not a coincidence that Schmitt endows the sovereign with an extra capacity of deciding on what is to be done to get rid of the exception in addition to the capacity of deciding on the question of whether the situation is exceptional.

Similar to his shift from *Dictatorship* to *Political Theology*, Schmitt's position about Hobbes' political philosophy did not remain stable throughout his intellectual life. As I discussed, in *Dictatorship* Hobbes' constitution is sovereign dictatorship with Caesarist themes. In *the Concept of the Political*, Hobbes is a serious political philosopher who is able to formulate a political theory which offers full protection and in return asks absolute obedience. But when we come to *The Leviathan in the State Theory of Thomas Hobbes* appeared in 1938, we see that the picture is completely different from the ones that Schmitt had previously drawn with respect to Hobbes' place. In the following section, I examine how Schmitt finally comes up with the idea of a liberal Hobbes. Schmitt's final position about Hobbes' political philosophy gives me the conceptual link by which Hobbes's decisionistic constitution is connected to his liberalism.

3.4. After the Weimar: Schmitt's Reappraisal of the Hobbesian Sovereignty

3.4.1. The Meaning of *Leviathan*

Schmitt's prolonged engagement with Hobbes can be understood in two ways. First, Schmitt's diagnosis of the twentieth century crisis of modern liberal constitutionalism draws heavily on Hobbes' theory of sovereignty. Secondly, even though Hobbes appears as the founding father of the joint theory of liberalism and legal formalism, Schmitt presents himself reviving his own theory of sovereignty in accordance with the Hobbesian one. This is clear in the expression of the intellectual debt of the autodidact Schmitt who notes "*Non jam frustra doces, Thomas Hobbes!* [Thomas Hobbes, now you do not teach in vain!]" as a response – three centuries after the fact – to Hobbes voicing his own fear by saying that "*Doceo, sed frustra* [I teach, but in vain] (LST; 86).

Hobbes' *Leviathan* bears a special meaning for Schmitt; the Hobbesian concept of sovereignty is absolute in two interrelated senses; first and foremost, the sovereign by no means can be held legally accountable by its subjects as it is no party to the covenant. The Hobbesian sovereign is beyond and above the covenant; "there can happen no breach of Covenant on the part of the Soveraigne" (L; 122). In the second sense, any sort of division of power poses both immediate and long-term danger to the unity of political order and eventually, as well as inevitably, brings distinct locus of powers into a bitter conflict with each other. The following lines, for instance, is one of the various historical analyses sprinkled into *Leviathan* about the history of the Long Parliament and the English civil war from 1640 to 1660;

> If there had not first been an opinion received of the greatest part of England, that these Powers were divided between the King, and the Lords, and the House of Commons, the people had never been divided, and fallen into this Civill Warre" (L; 127).

Hobbes' theory of the state as presented in *Leviathan* published in 1651, always pursues a political unity which is possible only, he believes, if the unity would be on the stage in every corner of the state organization including all institutions and

the public sphere; for Hobbes, whether it be between the crown and the parliament or between judiciary, legislation and execution or between the State and communities (regardless of their being religious or secular), or between church and the State, from top to bottom, any fragmentations are to be conceived of an invitation of behemoth into the leviathan. For Schmitt, the very concern of *Leviathan* unequivocally rules out the liberal principle of the separation of powers.

In the same way, Hobbes' analysis of the underlying causes of the civil war as expressed in *Behemoth* highlights the role of Presbyterian clerics in the church-state relation; "What needs so much preaching of faith to us that are no heathens, and that believe already all that Christ and his apostles have told us is necessary to salvation and more too?"[128] For Hobbes, if one is a devout believer, there is no point in preaching to her especially from a sectarian and dissenter ground. Hobbes' philosophical answer to the question *cui bono* comes in *Leviathan*. When the Anglican Church has given up the right to the "universall Power of the Pope," that is, when the "universal Monarchy over the all Christendome" has broken down from the Reformation onwards, Hobbes argues, the Presbyterian clergy acted as if it could have appropriated the civil power independently, if not supremely, of the sovereign power (L; 475). What benefit the Presbyterian clergy expected to gain is not a sincere reframing and exercising of its doctrine over the land, but rather to create an illegitimate political condition that can render void even the "Lawful Liberty" that one formally has by virtue of being subject to the sovereign power (L; 476). This is the "Darknesse in Religion," according to Hobbes, which was alarmingly surging in the dissenting Presbyterian ministers.[129]

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[128] Thomas Hobbes, "Behemoth: The History of the Causes of the Civil Wars of England," in *The Complete Works of Thomas Hobbes of Malmesbury*, Vol VI, ed. Sir William Molesworth (London: John Bohn, 1840), 242.

[129] By the term 'Presbyterian' to whom actually Hobbes referred is a question that A. P Martinich discusses in his article on Hobbes' evaluation of the role of the Presbyterian in the civil war. A. P. Martinich, "Presbyterians in Behemoth," in *Hobbes's Behemoth: Religion and Democracy*, ed. Thomaž Mastnak (Imprint Academic, 2009). But it is exactly clear what Hobbes means by Presbyterian; "all those Doctrines, that serve them to keep the possession of this spirituall Soveraignty," regardless of what church or sectarian order claim independency over civil power (L; 476).

Thus, the Hobbesian sovereignty is the sole and true guarantor of the political unity without which the unity of law would become impossible. Hobbes makes it clear with his famous axiom upon which the state is built; *Auctoritas, non veritas facit legem*, that is, not truth but authority makes laws (L; 184).[130]

In *Dictatorship* Schmitt traces the steps of this axiom of Hobbes within the natural law theory. Schmitt's way of placing Hobbes' axiom led him to conclude that the Hobbesian constitution is a decisionistic one. In *Political Theology* written a year later, Hobbes keeps his position in Schmitt's political thought. Through his 1932 *The Concept of Political*, Schmitt has deployed Hobbes into a prominent supporter to his cause of reestablishment of 'the political'. But in his 1938 *The Leviathan in the State Theory of Thomas Hobbes*, Schmitt's way of treating Hobbes turns one hundred and eighty degrees when he found Hobbes the father of liberal legalism.

Schmitt's reading of Hobbes begins with the Hobbesian sovereign illustrated in the famous frontispiece of *Leviathan*, "the strongest and the most powerful one" among various images of the history of political theories (LST; 5). Schmitt believes the cover page of *Leviathan* may give us a visually cryptic clue about Hobbes' political organization. Based on *the Book of Job* in Hebrew Bible, the image offers the reader "an entirely different vista" which needs to be deciphered (LST; 9). In this scene, as distinct from the past animal illustrations, the image, depicted as gigantic but somewhat human-like creature, mightily stands upright above the sea, faces toward the city so that nothing happening can possibly escape its notice, and holds a crosier in one hand and a sword in the other, which respectively represent *Ecclesiasticall and Civill* powers and authorities in one being.

Schmitt, referring to the passages where Hobbes in his *Leviathan* articulates what the leviathan is, points out that every time Hobbes uses the term we are encountered with divergent character of it; (1) the leviathan is artificial man, (2) artificial animal, (3) artificial machine, and finally (4) *deus mortalis*, mortal God

[130] In the English version of *Leviathan*, it reads "none can make Lawes but the Common-wealth."

which appears, according to Schmitt, that Hobbes attains his leviathan as "the mythical totality" (LST; 19).

On Schmitt's reading, in this scene, the image depicted as a gigantic being – being not exactly human, but human-like, not animal, but animal-like artefact, not totally machine, but machine into soul, and lastly not a mere God, but mortal one, a God-like creature – the leviathan seems to hold all those properties at once in one representative person. It is representative because tiny figures on the body are human faces; citizens in the city; they exist to the extent that they are represented in the body, not in the head of the leviathan. The Leviathan is designed to absorb power in all its forms until finally metabolizing it. That is the transformation of naked power to authority. And what makes laws is the authority, not the power of sovereign.

Schmitt's conclusion draws significantly on Hobbes' third use, yet first and sole explanation of the term leviathan in Chapter 28, *Of Punishment and Rewards* where it is called "Kingdom of Proud" to whom *Non est potestas Super Terram quæ Compaetur ei* (there is no power on earth to be compared) just as Latin inscription says on the tabula (L; 221 and LST; 29).

Notwithstanding the absence of the original frontispiece, on the opposite side of this political depiction and as oppose to the sea beast leviathan, according to Schmitt, Hobbes puts another creature, the land beast, the behemoth taken once again from *The Book of Job*. Schmitt refers to Hobbes' usage "Behemoth against Leviathan" in his reply to Dr. Bramhall, Bishop of Derry in the debate and to the appearance of the behemoth as the title of Hobbes' posthumous work, *Behemoth: the History of the Causes of the Civil Wars of England*.[131] Thus, Schmitt finds a contrast in the relation between the Hobbesian images of the leviathan and the behemoth; the leviathan denotes the life of sovereignty (the machine into soul), and accordingly the behemoth denotes the death of sovereignty (civil war is the death

[131] Hobbes, Thomas. "The Questions Concerning Liberty, Necessity and Chance", in *The English Works of Thomas Hobbes of Malmesbury*. Vol. VI, ed. Sir Barth William Molesworth, 1811, 27.

of the leviathan). Hobbes' theory of the state emerges from this politico-theological contrast between life and death.

For Schmitt, however, after Hobbes' promising introductory frontispiece, one is likely to be disappointed by the rest of *Leviathan* for the reason that what Hobbes did is no less than a fatal error in choosing "a mythical symbol fraught with inscrutable meaning" (LST; 5). The symbolic meaning of leviathan fails, in Schmitt's view, to meet the demands of the political.

3.4.2. The Failure of *Leviathan*

Schmitt changed his mind about Hobbes' decisionistic constitution after Leo Strauss's penetrating critique in his 1935 *The Political Philosophy of Hobbes* that Hobbes' originality lies not in the idea of "autonomous politics" as Schmitt defends in 1932 *The Concept of The Political*, but in the idea of "*liberal* politics."[132] Thus, not until Strauss made visible what was invisible for Schmitt, did he notice a "barely visible crack" in Hobbes' theory of sovereignty (LST; 57).

Schmitt's previous conviction in *Dictatorship* was that for Hobbes "no private conscience exists in a state" (D; 17). Now Schmitt detects in chapter 37 of *Leviathan*, *of Miracles and their Use* a strange passage that promises the inner freedom for private consciences:

> A private man has always the liberty (because his thought is free,) to beleeve, or not beleeve in his heart, those acts that have been given out for Miracles, according as he shall see, what benefit can accrew by mean of belief, to those that pretend, or countenance them, and thereby conjecture, whether they be Miracles, or Lies. But when it comes to confession of faith, the Private Reason must submit to the Publique; that is to say, to Gods Lieutenant. (L; 306)

Immediately after, Hobbes asks, "Who is this Lieutenant of God?" No one, but the sovereign power:

[132] Strong, foreword, x.

> He cannot oblige men to beleeve; though as a Civill Soveraign he may make Laws suitable to his Doctrine, which may oblige men to certain actions, and sometimes to such as they would not otherwise do, and which he ought not to command; and yet when they are commanded, they are Laws; and the externall actions done in obedience to them, without the inward approbation, are the actions of the Soveraign, and not of the Subject, which is in that case but as an instrument, without any motion of his owne at all. (L; 389)

In these passages, in Schmitt's view, Hobbes engages with the question of miracle as a question of public, but at the same time he leaves to it the private discretion (LST; 56). On Schmitt's reading, Hobbes' move was gratuitous. He puts his theory of sovereignty in danger by way of misplacing miracles within the political order. Having ignored the political power of symbols indispensable for politics, he deprived the Leviathan of its required mythical power. What is worse, he did not offer a substitution and left it a profane technical means – the so-called 'new God,' but in fact only a huge machine (LST; 81).

The Leviathan, holding the crosier and the sword at one, indicates the true political intention of closing the gap between state and religion. Schmitt appreciates the political aim of Hobbes' *Leviathan*, but at the same time addresses Hobbes' failure in this aim. Hobbes' first inconsistency lies with the idea that individuals are free in their conscience but bound with the laws in their public confession. Once Hobbes' constitution has made with the distinction between inner (the private belief) and outer (the public confession), then it has recreated the same gap between state and religion – a gap which has not destroyed but undermined his conception of the absolute sovereign. What Hobbes left undone would be later done by the next generation liberals. Hobbes' failure reveals itself in "the bare visible crack in the theoretical justification of the sovereign state" (LST; 57).

Schmitt argues that subsequent liberal philosophers enhanced Hobbes' move of internalisation of the private belief and externalisation of the confession against the state organization. The private belief has not remained private; those who privately wonder about the same or similar things and believe the same and similar miracles

have gathered together privately. While they have been recreating their own public domains, the state has failed to monitor their growing privacy into publicity. The private has externalized itself into the public in the form of the private societies. The liberal emphasis on the inner freedom has developed into the most characteristic liberal idea of universal freedom of conscience, which has ultimately lead to the limited constitutional state as opposed to the absolutist one because Hobbes' distinction of the inner-outer/public-private has significantly restricted the sovereignty to securing the public sphere, and accordingly made room for "secret societies and secret orders" (LST; 60).

What is worse is that the secrecy has not remained as they are, and as the privacy has grown stronger, there has inevitably appeared the contest between them whose exclusive concerns could be very well other than the public interest. On Schmitt's account, the crack has fleshed out the dangerous factionalizing idea of individual freedom of conscience within the state, and eventually led to liberal constitutionalism. Hence, by targeting Hobbes' theoretical reservation for the universal freedom of conscience which is the first significant concession to liberalism against the absolute sovereignty, Schmitt makes much more general claim that Hobbes' reservation leads to the modern liberal constitutionalism.

Hobbes' second inconsistency is about the omnipresence of the existential concern over self-preservation both in the state of nature and the civil order. On Schmitt's view, Hobbes' formulation of protection-obedience is destructive to the absolute power of the sovereign. For Hobbes, the subjects obey the commands of the sovereign power (civil laws) unless their lives are jeopardised. But, if the decision on whether a situation is a life-threating one is left to the discretion of individual, then it is not only the sovereign, but also the subjects besides sovereignty, who decide on the exception. Hobbes' liberal allowance of individual discretion, for Schmitt, endangers the sovereign monopoly on the exception from within.

Schmitt treats Hobbes' two inconsistency as the domestic enemies: "In the eighteenth century the leviathan as *magnus homo*, as the godlike sovereign person

of the state, was destroyed from within" (LST; 65). Hence, Schmitt sees both the inner-outer distinction and the right to resistance as the fatal errors of Hobbes' theory of sovereignty; ''the revolutionary, state-destroying distinction between politics and religion'' and between public and private reason (LST; 82).

Schmitt's reading of Hobbes' inconsistencies can be seen as making concession to the consent of each against constituent power. From the perspective of Schmitt's formulation of sovereign dictatorship, it can be argued that Hobbes elevates the sovereign power above the consent by giving the right to decide on what might pose a danger to its existence, but pulls the sovereign power back to the level of consent simply because he reintroduce the private discretionary power into the political order at the very moment constituent power is on the stage. This is the reason why Schmitt calls Hobbes' move his incomplete "overtures"; "he acted as people do who open a window only for a moment and close it quickly for fear of a storm" (LST; 26).

Schmitt concludes that despite the fact that Hobbes' *Leviathan*, in comparison to its contemporaries, is a genuine political project (offering full protection and asking absolute obedience), that is, the Leviathan's mythical power to subordinate all other opinions to the command of the sovereign, the myth that it offers is not firm enough to provide a substantive basis for the legitimacy of the state. From the Schmittian perspective, this missing basis of the Hobbesian sovereignty is the unifying power of political myths, and accordingly constituent power.

Schmitt does not leave his articulation of Hobbes' failure at two inconsistencies. Hobbes' project of *Leviathan* has further legal implication for the modern constitutional state. Indeed, for Schmitt, Hobbes' theory of the state has played a crucial role in the culmination, lasting for three-hundred years in the form of mechanization process in the Western institutionalization, of transforming "the state into a technically neutral instrument" whose competence is displayed in the appreciation of how well it functions (LST; 42). Schmitt sees its effective functioning as through its laws over, so to speak, a bargain between the state and

its subjects: “The state machine either function or does not function. In the first instance, it guarantees me the security of my physical existence; in return it demands unconditional obedience to the laws by which it functions” (LST; 45).

For Schmitt, Hobbes’ construction of the state of nature necessitates the commands of the sovereign power (civil laws) to demand an unconditional obedience from the subjects. Here “unconditional” amounts to the obedience without asking any further question about the content of the law in question. The formality of law should give sufficient reason to the subject to obey the laws. In that regard, Hobbes’ well-functioning leviathan completely owes its technical perfection to the normative ideal that legislation should always observe the most proper form in making laws. Thus, the pursuit for perfection has made the legislative act of the state become prominent in the state organization. This idea finds its repercussion in the nineteenth century constitutionalism in the form of “indirect rule” (LST; 74):

> In this fashion Hobbes' thought prevailed in the positivist law state of the nineteenth century, but only in a rather apocryphal manner. The old adversaries, the “indirect” powers of the church and of interest groups, reappeared in that century as modem political parties, trade unions, social organizations, in a word as “forces of society.” They seized the legislative arm of parliament and the law state and thought they had placed the leviathan in harness. Their ascendancy was facilitated by a constitutional system that enshrined a catalogue of individual rights. The “private” sphere was thus withdrawn from the state and handed over to the “free,” that is, uncontrolled and invisible forces of “society” (LST; 73).

The normative ideal of legal technical perfection obliges the legislation to observe only the formality of law, rather than the demands of constituency. Here is Schmitt’s insistence on constituent power that Hobbes futilely wanted to suffocate with the formalism of law, does not evaporate at all, but to be handed over ‘invisible’ and ‘indirect powers’ – they are politically invisible and indirect because they “enjoy all the advantages and suffer none of the risks entailed in the possession of political power” (LST; 74). Quite the opposite, they have adopted the “indirect method” which enables them to carry out their actions under the guise of something other than politics – namely, religion, culture, economy, or private

matter" (LST; 74). Those invisible powers have become invisible and their ruling have become indirect through legal means. In other words, those power groups in civil society comes to a preeminent position of imposing their conception of legitimacy on the political order by legal instruments.

Thus, for Schmitt, Hobbes' liberal attempt to get rid of the question of constituent power has catastrophically failed in terms that the nineteenth century extension of the Hobbesian sovereignty. In fact, Hobbes has achieved the direct opposite of what it aimed at; the disorder of the multitude in the state of nature is transposed into the legal order in the form of liberal pluralism with the prominent institution of liberal ideology, the parliament. After all, Schmitt finds the Hobbesian decisionism impossible under these premises. Hobbes' new place is among liberals, the leading one.

On the ground of Schmitt's observations on Hobbes' theory of sovereignty and its implications for modern contemporary constitutionalism, one may see Schmitt's constitutional theory as an attempt to reinvigorate constituent power through a theory of sovereignty. Schmitt thinks that Hobbes did "open a window only for a moment and close it quickly for fear of a storm" (LST; 26). The political moment which Hobbes opens the window is what Schmitt ascribes to the constitutional moment of the Hobbesian sovereign in *Dictatorship*; "the fact that a *decision* as such has been made at all" (D; 17). The later political moment that Hobbes closed the window is what Schmitt detects the moment that Hobbes' resolute decisionism in *Dictatorship* turns into a diffident one in *the Leviathan*. By way that Schmitt gripped Hobbes, Schmitt obviously saw himself brave enough to do what Hobbes left undone; to do the window wide open and to let constituent power in.

For Schmitt, it is futile to think that "a constitution can only be eliminated if the constitutionally regulated process for changing constitutional laws is observed."[133] Constituent power can completely be distinguishable from all constitutional norms

[133] Schmitt, *Constitutional Theory*, 140.

in the sense that there always exists "a constitutional minimum" to assert itself whenever necessary in the form of the sovereign. In this respect, constituent power is by no means "delegated, alienated, absorbed, or consumed."[134]

Against the modern liberal constitution which builds the legal order on "the impersonal validity of an impersonal norm"[135] by eliminating personal elements, and accordingly by avoiding to say anything about who really applies the legal rules, Schmitt argues the necessity of a representative authority to make the law effective by applying it to particular instances since the content of any legal rule by itself is unable to determine its own implementation; "A distinctive determination of which individual person or which concrete body can assume such an authority cannot be derived from the mere legal quality of a maxim."[136] What really matters is the capacity of 'individual person' or 'concrete body' to decide on how to apply the norm. Hence, Schmitt's sovereign is one who is composed of flesh and blood before being legally authorized institution or artificial person.

[134] Ibid.

[135] Schmitt, *Political Theology*, 29.

[136] Ibid., 31.

CHAPTER 4

THOMAS HOBBES' THEORY OF THE CONSTITUTION

4.1. Hobbes' Place in the Seventeenth Century Natural Law Theory

The idea of natural law is not peculiar to the seventeenth century. Depending on ways that distinguish between earthly and unearthly divine laws or moral laws and the laws of ruler, within the history of the European political thought one may go back, to enlarge the scope of the natural law conception, even to Sophocles' play, *Antigone* in which reader is convinced that an eternal immutable (natural) law inscribed, so to speak, in her conscience trumps the order of the King Creon.

Following the ancient Greek, we may skip to Christian theology, in order to see the medieval instance of the natural law, Thomas Aquinas' *Summa Theologica*. In the article 94 of *Summa*, he inquiries into the first natural law from which every other natural law as a practical judgment can be derived; "good ought to be done and pursued, and evil avoided."[137] St. Thomas argues that although the natural law is the same to anyone and is equally known by all, it is true that there exist some historical instances in which wicked actions are completely contrary to the natural law; robbery, for instance, could not be counted as legally unjust.[138] Again, in the same way, "some legislators have framed certain statutes which are unjust," that is, contrary to the natural law.[139] In the Thomistic conception of natural law, the

[137] Thomas Aquinas, *Aquinas: Political Writings*, trans. and ed. by R. W. Dyson (Cambridge, Cambridge University Press, 2004), 117.

[138] Ibid., 122.

[139] Ibid., 126.

natural justice is given superiority over legal justice in order to detect and to rectify legal holes and impurities in a given system of positive laws.

Following the Thomist scholastic account, there seems to be no possibility to give other instances within the political theorist of the Humanists who contented themselves with the ancients and the Roman law to the extent that it released itself from the Canon Law of the Catholic Church.[140] What the humanists did, however, was for the subsequent Renaissance philosophy to set the increasing trend to the flourishing autonomy of the individual, and the trend against the captivity of philosophy, politics and literature by the theologians.[141] Thus, it is no coincidence that the Renaissance conception of natural law opens up differently when Dutch lawyer Hugo Grotius (1583-1645) draws an 'impious' conclusion:

> …it [*ius*] consists in refraining from taking what belongs to another person, or in fulfilling some obligation to them. What I have just said would be relevant even if we were to suppose (what we cannot suppose without the greatest wickedness) that there is no God…[142]

The above passage from Grotius' magnum opus, *the Rights of War and Peace* (1625), heralds the secular side of the seventeenth century natural law.[143] Regardless of God's existence, one gets offended if one is dispossessed of what is one's own. The normative basis of the Grotiusian framework calls attention to the disclosure of a new secular political world in the seventeenth century as it signals the collapse of the idea of the natural law as a rule implemented by Christian princes or kings ordained by God, but still preserves its capacity for binding the human law to the law of nature.

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[140] Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius To Kant* (New York: Oxford University Press, 1999), 16-52.

[141] Richard Tuck, *Natural Right Theories* (Cambridge: Cambridge University Press, 1979), 32-58.

[142] Hugo Grotius, "Prolegomena to the First Edition of De Jure Belli ac Pacis," in *The Rights of War and Peace, 3 Vols*, 1741-1763, ed. Richard Tuck (Indianapolis: Liberty Fund, 2005), 1748.

[143] Gabriella Slomp, "Thomas Hobbes: theorist of the law," *Critical Review of International Social and Political Philosophy* 19, no: 1 (2016), 5.

Grotius is also widely recognized as a leading figure who changed the direction of the natural law theory towards the modern politics of emerging international configuration of the sovereign states in so far as he locates the problem in the context of war and peace by addressing the question as to what is to be allowed in times of war – a question which is answered by the natural right,[144] or to put it in Grotius' word, by the "Prerogative with which Nature has invested me, of defending myself."[145] Whenever one is threatened by whatever means, belonging to someone else, it may naturally be seized by natural right without doing injustice to the proprietor on the condition that one does not claim a property right on it till one's 'sufficient security' is ensured so that the act of seizing would not be called usurpation. Everyone has the prior and exclusive natural right by (natural) law. Thus, it is no wonder that this prerogative becomes much more operative among individuals when ordinary legal process is out of order, that is, when the condition of warfare persists.

Grotius evinces a theory of justice built on the notions of self-defence and property at once. In the modern natural law tradition Grotius has launched the idea of property as "the first and most essential element of justice" by which society and human nature are inseparably intertwined.[146] In his debate with Tuck about the reception of Grotius by subsequent theorists of natural law, Stephan Buckle argues that no conception of property arises from the so-called Grotiusian state absolutism to trigger a theory of the natural law, and that "the right of property and the right

[144] With reference to Grotius' early essay, *De Indis*, Richard Tuck's lengthy discussion of his argument by analogy between natural individual and sovereign state is particularly interesting. Tuck stresses that for Grotius "an individual in nature (that is, before transferring any rights to a civil society) was morally identical to a state" in terms that they both are allowed to use whatever means necessary to their end, namely to self-preservation. Tuck, *The Rights of War and Peace*, 82.

[145] Hugo Grotius, "Book III," in *The Rights of War and Peace, 3 Vols*, ed. Richard Tuck (Indianapolis: Liberty Fund, 2005), 1186.

[146] Stephen Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (Oxford: Clarendon Press, 1991), doi: 10.1093/acprof:oso/9780198240945.001.0001.

of resistance" originate from anti-absolutist Grotiusian heritage.[147] Thus, the Grotiusian theory of justice is more transposed to Locke than Hobbes.

It appears that Schmitt thinks in a very similar way. In *Dictatorship*, he carries out a modern analysis of the seventeenth century natural law tradition with a particular focus on the location of Hobbes' theory of the constitution on the map of Western political thought. For him, in the seventeenth century the natural law theory is decisively divided into two distinct ways of understanding justice as represented in the legal theories of the monarchomachs (Grotius) and the absolutists (Hobbes). Schmitt contends that the leading figure of the former, Grotius develops a theory whereby "a law with a certain *content* exists as a law prior to the state, whereas the scientific system of Hobbes is based, with absolute clarity, on the axiom that there is no law prior to the state and outside of it" (D; 16). According to Schmitt's reading of Hobbes' legal system, this is exactly where the state derives its worth, that is, its capacity to come up with the law "by settling the dispute over what right is" (D; 16).

On the basis of this sharp distinction, Schmitt refers to a forking of the main axis which he treats as "an opposition between the natural law of justice and the natural law of exact science" (D; 16). Schmitt sets two conceptions of the natural law in opposition to each other by drawing a clear boundary between them; the former presupposes and operates on the pre-state quality of the law by which the institution of the state is backed, whereas Hobbes' position rejects any pre-state conception of law and justice and remains all-closed within itself such that it allows no reference to law outside of the state despite Hobbes' explicit commitment to the laws of nature; the answer to the question of what is right and wrong, just and unjust comes from within the legal order.

Schmitt immediately proceeds to qualify the difference between these two conceptions of justice "by saying that one system takes its start from the interest in

[147] Ibid.

certain understandings of justice, and therefore from a certain *content* of the decision, whereas for the other the interest only consists in the fact that a *decision* as such has been made at all" (D; 17). What does Schmitt really mean by "certain understanding of justice" or "content of the decision" from which the Grotiusian order originates? Indeed, what Schmitt identifies here as underpinning the Grotiusian justice has to do with some rights prior and superior to positive laws.

In his *Rights of War and Peace* Grotius recognizes that "our Lives, Limbs, and Liberties, had still been properly our own, and could not have been, (without manifest *Injustice*) invaded."[148] This is the pre-legal idea of the natural *suum*; life, limbs and liberty are what is one's own by nature, whose intrusion is not possible without doing injustice. In support of his articulation on Grotius's account of the state, Buckle says "Private property… is the set of extensions to the *suum*."[149] Grotius extends the natural *suum* from the pre-state instance to the legal order. As clearly seen in *Leviathan*, Hobbes never commits to the Grotiusian idea of unjust offense in a bare state of nature, let alone its extension to civil order:

> To this warre of every man against every man, this also is consequent; that nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common Power, there is no Law: where no Law, no Injustice. (L; 90)

Again, for Grotius, it is allowed "under the natural law for a private person to inflict punishment upon another person without sinning."[150] Hobbes, in contrast, makes room for neither reward nor punishment in the state of nature; for "in the condition of Nature, where every man is Judge, there is no place for Accusation: and in the Civill State, the Accusation is followed with Punishment" (L; 98). Even if one were to accuse another on the basis of the natural laws, no action would bear

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[148] Grotius, "Book I", in *The Rights of War and Peace, 3 Vols*, ed. Richard Tuck (Indianapolis: Liberty Fund, 2005), 184; my emphasis.

[149] Buckle, *Natural Law and the Theory of Property*, doi: 10.1093/acprof:oso/9780198240945.001.0001.

[150] Hugo Grotius, *Commentary on the Law of Prize and Booty*, ed. Martine Julia van Ittersum (Indianapolis: Liberty Fund, Inc., 2006), 141.

the name of punishment because one can be "accused onely by his own Conscience, and cleared by the Uprightnesse of his own Intention" (L; 202). No one does and will never know what one's intention is.

Grotius's account of property right characteristically reminds us of John Locke's (1632-1704) theory of natural law. Just like Grotius, Locke sees some reasons in the state of nature "why one man may lawfully do harm to another, which is that we call *punishment*."[151] Hence, turning back to Schmitt's division, by "content of the decision" to trigger a legitimate political order, Schmitt refers to the transitional semantics of those concepts – crime, reward and punishment, sin, injury – which externally conditions and determines justice exercised by the sovereign by introducing 'content' into 'decision' from without. From this perspective, Locke can neatly be located at the anti-Hobbes camp, though he is not counted among monarchomachs in *Dictatorship* as, for Schmitt, English royal power and its commissions with prerogative power was diminished to a large extent at the end of the seventeenth century (D; 32--3).[152] Locke's liberalism, however, is obviously committed to what Schmitt calls 'the natural law of justice' to the extent that recognizing the right of private property ends up with individual resistance. For Schmitt, Locke's pre-legal idea of natural right is so unconditional that "all concrete powers are utterly irrelevant where right is concerned." (D; 19)

As Locke famously makes it the liberal motto in *Second Treatise of Government*, "where-ever laws ends tyranny begins" and individuals or the people by right of nature may resist tyranny either by getting out of it, or by preventing it to happen.[153] On Locke's account of natural law, the legitimate form of governing

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[151] John Locke, *Second Treatise of Government*, ed. C. B. Macpherson (Indianapolis: Hackett Publishing, 1980), 10; my emphasis.

[152] In order to support his claim, Schmitt gives an endnote explaining the last time when the royal commission of James II "violated parliamentarian principles" (D; 246). Schmitt also points out that when the Bill of Rights appeared, English absolutism was no longer a political question as it puts a series of limitations on governmental power to ensure constitutional protection for individual liberties.

[153] Locke, *Second Treatise*, 103, 111.

reveals itself in four distinct ways: (1) The lawful authority must stay and operate within the scope of the natural law. That is the principal for any governments, if it is to be legitimate, to protect the natural rights of individuals. (2) The lawful authority follows the public good, (3) acts according to the public trust and (4) observes the positive laws. None of the breaches of natural law, public good, public trust implies a legitimate use of governmental authority except for the breach of the positive law when it is necessary for the public good. Locke prescribes the prerogative "power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it."[154]

It is no surprising, in that regard, that it was Locke who came up with an extra-legal idea when a situation becomes ungovernable by an existing set of law. He develops an idea of the executive with prerogative power in a brief (five pages) discussion. Here Locke, heralding a new conception in liberal politics,[155] provides the executive power with superiority over and beyond, even sometimes against the legislative, but contends its political harmony with "settled standing rules" which are "indifferent, and the same to all parties."[156] Locke argues that there will be some instances uncontrollable, and accordingly ungovernable by "a strict and rigid observation of the laws."[157]

Locke's account of the legitimate prerogative appears to accept that it is specifically the executive capacity that can touch and regulate "many things there are, which the law can by no means provide for," and hence remain to be "left to the discretion of him that has the executive power in his hands" providing that these

[154] Ibid., 84.

[155] Dyzenhaus holds Locke responsible for introducing the idea of emergency into liberalism—an idea that "is ungovernable by the legal regime in place for regulating normal life since an effective response to an emergency may require that some state institutions respond quickly and effectively to threats either without legal authority or even against the law." Dyzenhaus, "State of Emergency," 443.

[156] Locke, *Second Treatise*, 46.

[157] Ibid., 84.

things the law has no access, are meticulously performed by the prerogative power with no arbitrariness and "according to discretion, for the public good."[158] There seems nothing wrong with the prerogative as long as both current and subsequent governors commit acting in accordance with the public good and the law of reason (that is "certain understandings of justice"), and unless they "set up his own arbitrary will as the law of the society."[159]

Despite the fact that Locke allows such prerogative power as to be breath-taking act for government, Schmitt never treats it as an exception; the "exception was something incommensurable to John Locke's doctrine of the constitutional state."[160] The liberal concern in such unexpected concrete situation is that the prerogative power is to navigates a balanced place between the public and private good. Given the credit for the prerogative power in conformity with the natural law, Locke's transitional system cannot be decisionistic insofar as it welcomes the natural elements external to the legal order.

In *Dictatorship* Schmitt's emphasis is placed on Hobbes' original as well as anomalistic position to the seventeenth century theory of natural law. As seen in the comparison so far, Schmitt is right in locating Hobbes' scientific conception of justice on the opposite side of Grotius' and Locke's. The moment when the great Leviathan is constituted, or perhaps more precisely, constitutes itself is in no need to make a reference either to the laws of nature or anything other than the decision.

Hobbes maintains that justice and injustice cannot exist in cases where there is no civil law, and "none can make Lawes but the Common-wealth" (L; 184). Hobbes' axiom seems to give support to Schmitt's point about his place in the division in the seventeenth century natural law theory; the moment of the constitution when

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[158] Ibid.

[159] Ibid., 112.

[160] Schmitt, *Political Theology*, 13--4.

the state of nature is abandoned, and civil state is established, is accompanied with no norm.

On Schmitt's reading, Hobbes' decisionistic argument for the constitution stands in tension with the norms of justice if it allows no entrance for the laws of nature in the legal order; "the law is not a norm of justice but a command, a mandate from the one who holds supreme power" (D; 16--7). That is, any order-giving direction of the sovereign becomes "law if the state makes it the content of an official [*staatlichen*] command, and not because it corresponds to any ideal understanding of justice" (D; 16).[161]

Following the steps of Schmitt's argument concerning the Hobbesian theory of scientific, but somehow natural law in *Dictatorship*, the unique place of Hobbes' constitution within the seventeenth century natural law theory becomes conceivable in terms of his understanding of justice. Hobbes' natural law of exact science suggests that there is no justice prior to a sovereign power as a result of the natural right to everything – a right which recognizes no boundary whatsoever. In the next section, I turn to the idea of the natural right as the most promising way to understand the decisionistic genesis of Hobbes' constitution from the state of nature to the constitution of civil state.

4.2. Natural Equality and Natural Right to Everything

Hobbes wrote at a time when the traditional concepts of philosophy and theology were gradually fading away, while a novel conception of modern science was emerging and detaching itself from the medieval baggage, rooted mainly in Aristotle. In the same way, he was writing at a time that the traditional concepts of politics were disintegrating, while a novel conception of political order as a matter of rationality was emerging. This becomes apparent in Hobbes' overbearing

[161] Not only Schmitt, but Leo Strauss also express the Hobbessian moment of constitution by stating that "the disputable justice or injustice of any particular action, or the current conception of justice in general, or the State itself, which as the primary condition of justice is the political fact *par excellence*." Leo Strauss, *The Political Philosophy of Thomas Hobbes: Its Basis and Its Genesis*, trans. Elsa M. Sinclair (Chicago & London: University of Chicago Press, 1963), 2.

depiction of natural philosophy as so immature that is, in his view, no older than Galileo's theory of motion, just as civil philosophy which is even more so, at the same age with his *De Cive*.[162] Thus, Hobbes makes explicit from the outset of *De Corpore* his intention, that is, "by putting into a clear method the true foundations of natural philosophy."[163]

Having been fairly influenced by the great contributions to early seventeenth century philosophy, Francis Bacon's *Novum Organum* (1620) and *René Descartes' Discourse on Method* (1637), Hobbes embraced the idea of a proper method for genuine knowledge. The strong belief in the method characterizes the seventeenth century philosophy, though they differ on which method is the right one. The preeminent role that the method plays in philosophy is premised on the assumption of the equality in reasoning. For Bacon, "the general human reason" should first and foremost founded on the right path; otherwise, "it is like a magnificent palace without a foundation."[164] Descartes was also sure that we differ in opinion not because some of us are better in reasoning than others, but because they follow distinct ways when reasoning. The capacity of reasoning "is naturally equal in all men," and for this reason the application of reason more important than having it for attaining truth. Otherwise, the existence of "the greatest souls" with "the greatest vices" would be inexplicable;[165] natural reason is not granted for the decent only and left the wicked behind. In the same manner, for Hobbes, everyone has the capacity to reason, "but where there is need of a long series of

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[162] Thomas, Hobbes, "Elements of Philosophy," in *The Complete Works of Thomas Hobbes of Malmesbury*, Vol I, edited by Sir William Molesworth (London: John Bohn, 1840), viii-ix.

[163] Ibid., xi. Hobbes' philosophical project consists in *De Corpore*, *De Homine* and *De Cive* (*Elements of Philosophy* as a whole) which deal with, as the Latin titles imply, body, human and citizen respectively. *De Cive* is the third and last section of *Elements of Philosophy*, published in 1642, right after finishing manuscript of *De Corpore Politico* (*Elements of Law*). As for *Leviathan*, it is a compact sum of the last two works of *Elements of Philosophy* and *Elements of Law*, plus a critical exegesis of Scripture.

[164] Francis Bacon, *the New Organon*, ed. Lisa Jardine, Michael Silverthorne (Cambridge: Cambridge University Press, 2000), 2.

[165] René Descartes, "Discourse on Method," in *Discourse on Method and Meditation on First Philosophy*, trans. Donald A. Cress, (Indianapolis: Hackett Publishing Company, Inc., 1998), 1-2.

reasons, there most men wander out of the way, and fall into error for want of method."[166] Hence, like Bacon and Descartes, Hobbes accepts the view that the derailment in reasoning is often due to our own ignorance of the right path.

What makes Hobbes distinctive among his contemporaries regarding the acceptance of method in the first place is his attempt to transpose the same method entailed in natural philosophy into what he calls civil philosophy.[167] Both philosophies are the same inasmuch as they adopt the same method, and their subject-matter is reducible to body and motion, that is, to bodily motion; each is different and autonomous in terms of the category of bodily motion which is either natural or political; the latter is designated to attain the causes of civil war.

Hobbes believes that civil philosophy proves overwhelming superiority over natural science with regard to their benefit;[168] for if the civil war reigns, then all acquired benefits by natural science get lost because sovereignty disappears where conflicting parties may get strong enough to start to kill each other. Hence, Hobbes' initiation of civil science can very well be called the rational regeneration of civil society according to the first principles in order to prevent the possible dissensions from reaching a point of no return.

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[166] Hobbes, "Elements of Philosophy," 1.

[167] Richard Peters' *Hobbes* is one of the oldest and most sophisticated work on Hobbes. He elaborates that it was not the invention, but the application of the method to both branches of philosophy in which Hobbes' originality lies. Richard Peters, *Hobbes* (London: Penguin Books, 1956), 44--6.

[168] It is true that Hobbes' natural philosophy and epistemology is not as sophisticated as his political philosophy and as his contemporaries, though Hobbes contributed to the *Objections* to Descartes's *Meditations*. While the general conviction among scholars is that Hobbes' objection to Descartes was an encounter between immature and fully developed mechanistic view of nature, Tuck argues against this common view by pointing out that Hobbes invented "the new philosophy" as clearly seen in his 1636 letter which reads "light and colour are but the effects of that motion in the brayne." Richard Tuck, "Hobbes and Descartes," in *Perspectives on Thomas Hobbes*, ed. G. A. J. Rogers and Alan Ryan (Oxford: Clarendon Press, 1989), 17, 28. Thus, Tuck claims that even before Descartes, Hobbes brought the modern argument to everlasting problem of philosophy, that is, whether the knowledge of appearances is based on external world or perception. Presumably, in order to avoid any accusation of plagiarism and as a philosopher who was a bit late in getting his works published, Hobbes wrote in the Epistle Dedicatory of 1640 *The Elements of Law*, and later reiterated in his letter to Mersenne in 1641 that his views on 'light' and 'ideas' had been explained to Sir Charles Cavendish and his brother the Earl of Newcastle as well in private tuitions in early 1630's long before the publication of Descartes's Discourse on Method in 1637. Ibid., 14--5.

Hobbes is famous for expressing, on almost every occasion, his extreme distaste, but more importantly his fear for civil war. In a civil war, one finds nothing but "slaughter, solitude, and the want of all things."[169] He believes that everyone knows the destructive "*effects* of war are evil" and nobody is willing to experience them because "the will has nothing for object but good, at least that which seemeth good."[170] Thus, the civil war follows from the ignorance of "the *cause* neither of war nor peace."[171] The knowledge of causes is made possible only by the geometrical method which is indispensable for the principles of civil life built on the axioms about human nature. Hobbes puts the method that he would follow in *De Cive*;

> As far as my Method is concerned, …I should begin with the matter of which a commonwealth is made and go on to how it comes into being and the form it takes, and to the first origin of justice. For a thing is best known from its constituents. (DC; 10)

The matter, or the building block of Hobbes' constitution is the people as distinct from the multitude. In Dedication of *De Cive*, Hobbes calls attention to how surprising it is to witness the systematic indifference to the popular brutality, and how ordinary it is to witness the continuous interest in the rulers. Having appealed to Marcus Cato's saying that kings are to be classified as "predatory animals," Hobbes asks the question "what sort of animals was the Roman People"? (DC; 3) For Hobbes, it was "the agency of citizens who took the names Africanus, Asiaticus, Macedonicus, Achaicus and so on from the nations they had robbed, that people plundered nearly all the world" (DC; 3). What is worse, by ways of inflicting suffering and bondage, some people become 'we, the people'.

Just as the discussion of the reality of constitutional moment, there also exists a discussion whether the state of nature is real or not.[172] Hobbes is not that much

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[169] Hobbes, "Elements of Philosophy," 8.

[170] Ibid.

[171] Ibid., 8; my emphasis.

[172] There has been going on an endless discussion as to whether the Hobbesian moment of the constitution is real or fictional. For Foucault, it is simply not the case that "this war of every man

ambivalent on its existence as seen in his straightforward instantiation of the state of nature in America in *Leviathan*;[173]

> It may peradventure be thought, there was never such a time, nor condition of warre as this; and I believe it was never generally so, over all the world: but there are many places, where they live so now. For the savage people in many places of *America*, except the government of small Families, the concord whereof dependeth on naturall lust, have no government at all; and live at this day in that brutish manner, as I said before. (L; 89)

The same instantiation of the natural human in the Native Americans is made in *De Cive*. In the absence of a sovereign power, there happens

> …a war which cannot be brought to an end by victory because of the equality of the contestants is by its nature perpetual; for the victors themselves are so constantly threatened by danger that it must be regarded as a miracle if even the strongest survives to die of years and old age. The present century presents an example of this in the Americans. (DC; 30)

Thus, Hobbes was not unaware that "there is scarce Common-wealth in the world, whose beginnings can in conscience be justified" (L; 486). Even so, it is both true,

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against every man gives birth to the State on the morning—which is both real and fictional—on which Leviathan is born." Michel Foucault, *"Society Must Be Defended" Lectures At Collège De France, 1975-76*, trans. David Macey and ed. Mauro Bertani and Alessandro Fontana (New York: Picador St. Martin's Press, 2003), 89-90. Dyzenhaus argues that "the constitutive moment is neither real—an actual consensus—nor a fiction—a hypothetical consensus." David Dyzenhaus, "The Politics of the Question of Constituent Power," in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. Martin Laughlin and Neil Walker (Oxford: Oxford University Press, 2007), 139. Kinch Hoekstra takes this Hobbesian moment as a regulative hypothetical ideal, suggesting that "if you *were* in this situation and you *would* therein covenant, then you *ought* to be guided… by the agreement you would there make." Kinch Hoekstra, "Hobbes on the Natural Condition of Mankind," in *The Cambridge Companion to Hobbes's Leviathan*, ed. Patricia Springborg (New York: Cambridge University Press, 2007), 117. And lastly, for Schmitt, the Hobbesian constitution by covenanting is sociologically "no less than real" (D; 17).

[173] The idea of natural state in early modern and modern political thought is inextricably linked with the alleged discovery of America in the very beginning of the fifteenth century. In that regard, I think that the state of nature is really real. Srinivas Aravamudan delves into the significance of the North American settlement for the "travel narratives" and "origin myths of seventeenth-century English political philosophy." Srinivas Aravamudan, "Hobbes and America," in *Postcolonial Enlightenment: Eighteen-Century Colonialism and Postcolonial Theory*, ed. Daniel Carey, Lynn Festa (Oxford: Oxford University Press, 2009), 39, 42. On Aravamudan's genealogical reading, the Hobbesian sovereignty did offer a modern legitimization of the nation state, but in doing so, he was providing a theoretical framework for imperial interventions in 'the New World'. With the help of the natural law discourse, equality and humanity were easily attached to the Native Americans, the structures of settlement and family were quickly overtaken by atomistic individualism. For Aravamudan, Hobbes is not alone in this theoretical justification of colonialism; Grotius and Locke are villains, too.

but not at once, that "Man is a God to Man, and Man is a wolf to Man"[174] (DC; 3). Hobbes delivers no idle talk about the so-called natural goodness of human, nor holds that human is evil by nature, but that human has the disposition for being rapacious and civilized. What is natural about this basic humanly disposition is the fact that "if they are not restrained by fear of a common power, they will distrust and fear each other" (DC; 10). In the absence of a sovereign power, "each man rightly may, and necessarily will, look out for himself from his own resources." (DC; 10). The fact that the good is more than wicked does not mean that the good ones need not for protection. If it were not true, everybody could "go to bed without barring their doors against their fellow citizens and even locking their chest and boxes against their servants in the house" (DC; 10).

Hobbes formulates this fact as a basic constitutional principle behind the constitution – a principle which is laid down on the basis of "two absolutely certain postulates of human nature": human greed for "private use of common property" and natural reason "to avoid violent death" (DC; 6). Human greed and

[174] Indeed, Hobbes' account of natural human includes reference not only to bestiality and divinity, but also to vegetative life – a life with no interaction with others; they are "as if they had just emerged from the earth like mushrooms and grown up without any obligation to each other" (DC; 102). Moreover, Hobbes' maxim, 'homo homini Deus & homo homini lupus' is not out of nothing; there must be an influence on Hobbes from Bacon who states that "[i]t is owing to justice that man is a god to man, and not a wolf." Francis Bacon, *The Works of Francis Bacon Vol. IX*, ed. James Spedding, Robert Leslie Ellis, Douglas Denon Heath (Boston: Houghton, Mifflin and Company; The Riverside Press, Cambridge, 1882), 166. Besides, Hobbes offers one more way to capture what human looks like in her natural condition. Referring to 'infant', by 'evil' Hobbes understands "a man of childish mind" – a childish surrender of reason to passions which prevents human being from growing up. Accordingly, to try to be good consists of suppressing the childish tendency; "But they are not to blame, and are not evil, first, because they cannot do any harm, and then because, not having the use of reason, they are totally exempt from duties." As for the passions, they are not evil, too, but "the actions that proceed from them sometimes are, namely, when they are harmful and contrary to duty" (DC; 11). Evil exists in Hobbes as category, not inherent in human nature. Hobbes invokes to the principle of *bonum sibi*, suggesting one's keeping oneself close to what one considers to be good and out of what is evil, namely, of death which is the worst possible evil. Hobbes is tended to leave what is to be good to the natural individual, albeit that well-being is given the content of the good, because the faculty of judgment recognizes no measure, but itself only to judge what is to be good. But as for the evil, it is inarguably death – so inarguably, indeed, as to be declared that even the good can be good to the extent that it keeps its distance from the evil. Just as his understanding of peace as the absence of war, Hobbes always takes *summun malum* more serious than *summun bonum* and makes the former the criterion for the latter. The human nature desires the latter, but the state of nature imposes the former.

natural reason are ever-present, but the factual proliferation of the second parts of two postulations signals the state of nature.

These methodological reflections in *De Cive* find their much more sophisticated formulation in *Leviathan*'s the terminology of right. Hobbes formulates the first postulation as the natural right to everything, and the second, as the natural right to self-preservation. Thus, Hobbes derives from two postulations of human nature the natural right to everything and to self-preservation by which the multitude is perpetually conditioned unless the sovereign power is constituted by the people.

The idea of the state of nature in Hobbes' constitution is – even though it may impose itself as an inescapable concrete fact within some other context in the form of civil war – no more than an unwelcoming atmosphere which invariably prevents every sorts of human flourishing. To give constant caution, and reaction by all possible means, to all possible life threating actions exhausts human being. Where the state of nature reigns, there is "no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society," but "continuall feare, and danger of violent death," and life becomes "solitary, poore, nasty, brutish, and short" (L; 89). The idea of war as such is identified with "human condition outside civil society" which remains as depicted unless there is a sovereign power (DC; 12).

Hobbes never denies that humans differ from one another sometimes immensely, some other times slightly in terms of natural "strength of body, experience, reason, and passion". (DCP, 81) But what rarely differs is their pursuit of vain glory, eagerness in competition and diffidence, no matter how superior or inferior position they hold with regard to power. In the state of nature, the difference among humans in terms of bodily power and mental capacity can be compensated either with "secret machination" or "confederacy with others" when it comes to annihilating each other in order to attain a certain end. In this respect, the difference between them can easily be dissolved into equality in bodily strength, and even into "greater equality" in mental capacity (L; 87). To put it Hobbes' own

words, "in the condition of meer Nature, the inequality of Power is not discerned," if not non-existent (L; 99).

Hobbes believes that the natural power of human beings brings them to seek the same end which are unfortunately never enjoyed by all at the same time in the natural state. More unfortunately perhaps, they get provoked when "seeing the same in others" and even the moderate ones, when being directed to the same end, get easily provoked and become predatory by words, gestures, mimics and body language, that is, either by verbal or non-verbal communication, passing dislike and hate from one to another (DCP; 82). Hence, the moderate (who seeks natural equality) can easily be dragged into the battlefield either by the stronger or by the weak. In fact, when the target becomes the same, the difference between those of the weak, the stronger and the moderate grows vague and eventually vanishes. The state of nature thus appears to be a condition according to which each one adjusts oneself accordingly; it may be the case that some are better adapted than the others, but that makes no difference to that all remain vulnerable to the power of others.

Schmitt calls Hobbes "the most modern philosopher" who theorizes on power.[175] For Schmitt, the crucial point that Hobbes made, for the first time in the history of Western thought, is that human beings are not unaware of their natural weakness and know very well how to cure and compensate it together with fellows. In the same way and for the same reason, human beings know very well too how quickly and suddenly they can suffer from weakness once they think to have got the power. The balance of power gets unbalanced at any time and "in the right moment anyone can kill anyone else" insofar as they are dependent to each other.[176] Hobbes draws attention to the power in the unity, namely, to the power

[175] Carl Schmitt. *Dialogues on Power and Space*, trans. Samuel Garrett Zeitlin, ed. Andreas Kalyvas and Frederico Finchelstein (Cambridge: Polity Press, 2015), 33.

[176] Ibid.

when they act upon the awareness of human dependency in the following statement:

> The Greatest of humane Powers, is that which is compounded of the Powers of most men, united by consent, in one person, Naturall, or Civill, that has the use of all Powers depending on his will; such as is the Power of Common-Wealth: Or depending on the wills of each particular; such as is the power of a Faction, or of divers factions leagued. Therefore to have servants, is Power; To have friends, is Power: for they are strengths united (L; 62).

Hobbes proceeds from his theory of power based on the consent of those who are willing to be subject to it, to identify the location of power; it, for instance, around the rich when being joined with generosity, or the power in reputation when offering protection, the power in popularity when scattering love or spreading terror, the power in success, or the power in the bodily form when inviting attraction. But even when one has got the power with the complete consent of all (that would make one the most powerful) who are subjected to it, power is never taken for granted; "Even the most absolute prince is reliant on reports and information and dependent on counsellors."[177] At certain point, "humans are really equal, insofar as they are all threatened and endangered."[178] Thus, for Schmitt, Hobbes offers an insuperable theory by calling attention to the challenges of "the objective autonomy of power."[179]

It is the autonomy of power on which Hobbes draws the natural equality in the state of nature. This equality is then resonated in the reasoning of each individual in the state of nature. Hobbes' reflection on human nature is basically shaped by the consideration of how people think and act in the condition of war. The more

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[177] Ibid., 34.

[178] Ibid.

[179] This is what Schmitt calls "the inescapable internal dialectic of power and impotence into which every human holder of power falls." Ibid. There is another famous scholar who theorized on Hobbes' theory of power. Michel Foucault rejects Hobbes relates the political power with war only. He reiterates his point not only in Hobbes' section, but throughout the semester. Michel Foucault, *"Society Must Be Defended" Lectures At Collège De France, 1975-76*, trans. David Macey and ed. Mauro Bertani and Alessandro Fontana (New York: Picador St. Martin's Press, 2003), 97.

natural equality prevails, the more uneasy life becomes in the natural state where "*one is oneself the judge* whether the means he is to use and the action he intends to take are necessary to the preservation of his life and limbs or not" (DC; 27).

Hobbes' idea of war is not a war which is internal or external, or takes place here or there, or lasts for five or ten years; rather it is a condition in which everyone against everyone else and everyone has the natural right to everything. Thus, the war necessitates a constitutive moment which turns the state of nature into civil state:

> To this warre of every man against every man, this also is *consequent*; that nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common Power, there is no Law: where no Law, no Injustice. Force and Fraud, are in warre the two cardinal vertues. Justice and Injustice are none of the Faculties neither of the Body, nor mind. If they were, they might be in a man that were alone in the world, as well as his Senses, and Passions. They are Qualities, that relate to men in Society, not in Solitude. It is *consequent* also to the same condition, that there be no Propriety, no Dominion, no *Mine* and *Thine* distinct; but onely that to be every mans, that he can get; and for so long, as he can keep it. (L; 90; my emphasis)

The above oft-quoted passage from chapter 13 of *Leviathan* gives support to Schmitt's identifying the unique place of Hobbes' constitution in the seventeenth century natural law theory, but not totally justifies it. As I will show, Hobbes' position is not capable of a simple justification at all. What is important in the passage is that the absence of right and wrong or justice and injustice is a *consequence* just as the sovereign power is. Briefly, civil state is a consequence of the natural right to everything.

4.3. Hobbes' Scientific Theory of Justice

From the axiom that it is not truth, but authority that has the law making-capacity, Hobbes follows that there is no justice in the state of nature unless the sovereign authority makes it. But how is it possible that there is no justice in the state of nature in which everybody has the natural right to everything if Hobbes defines injustice as 'action *sine jure*, without right'? Do the laws of nature have effective

binding force on individual in the state of nature? If they do, how would the laws of nature coexist with the natural right to everything? These are the questions that require a detailed examination of the concept of justice in Hobbes' constitution.

Even though Hobbes' fame does not rest on his theory of justice, he offers two definitions of it; justice of contractor (commutative justice) and justice of arbitrator (distributive justice). Justice is possible in three ways; either from the original covenant (justice of contractor) or from the valid covenant (justice of contractor) or from property (justice of arbitrator). In the following three sections, I undertake an analytical dissection of Hobbes' two definitions of justice which can be navigated in three different ways all of which, according to Hobbes' axiom, must exclude the presence of justice in the state of nature.

4.3.1. Justice of Contractor

In Hobbes, the concepts of justice and injustice are best approached as being realized in a contractual action. Hobbes's initial engagement with justice and injustice in *De Corpore Politico* suggests that

> The breach or violation of covenant, is that, which men call *injury*, consisting in some action or omission, which is therefore called *unjust*. For it is action or omission, without *jus*, or right, which was transferred or relinquished before. (DCP; 95--6)

Just like *De Corpore Politico*, *De Cive* makes the same equation:

> The breaking of an Agreement, like asking for the return of a gift… is called a WRONG [*INJURIA*]. Such an action or failure to act is said to be *unjust* [iniusta]; so that *wrong* and *unjust* action or failure to act have the same meaning, and both are the same as breaking an agreement or *breaking faith*. It seems that name *wrong* [*iniuria*] is applied to an action or a failure to act, because it is *without right* [*sine iure*], inasmuch as the party which acted or failed to act had already transferred the right to someone else. (DC; 44)

Hobbes makes a theoretical manoeuvre by equating wrong [*iniuria*] with unjust [*iniusta*], and accordingly injury with unjust action on the ground that both are

without right.[180] The parties cannot be counted in the covenant if they violate it either by performing what the covenant forbids or by abstaining what the covenant obliges. In both cases, mutually contracting parties would act without right as long as this right is transferred through the covenant. The right renounced or transferred in the covenant is the natural right to everything.

Hobbes' reconfiguration of injustice, injury, unjust and wrong brings to the light a corresponding reconfiguration of justice, no injury, just and right: "justice and injustice, when they be attributed to actions, signify the same thing with no *injury*, and *injury*, and denominate the act *just*, or *unjust*" (DC; 46 & DCP; 97). Just action entails no injury, whereas for an unjust action to become conceivable, at least three elements must be present; a covenant, an injuring and injured party because firstly, unjust action always "supposeth an individual person Injured; namely him to whom the Covenant is made." (L; 104) Second, an unjust action is always directed to someone else; "for since *the obligated and the obligating party* would be the same, and the obligating party may release the obligated, obligation to oneself would be meaningless" (DC; 84).

Thus, the duties of both parties in the covenant become clear by way of two reconfigurations. According to *De Cive* and *De Corpore Politico*, justice as agreeing and keeping what is promised in the covenant proves the condition for the second law of nature, instead of being a law of nature, which ensures peace among individuals (DC; 44). It keeps its posterior position till it is accorded with the third law of nature in *Leviathan*.

In chapter 14 of *Leviathan*, Hobbes sets out the first two principal laws of nature as "Precepts, or generall rule" and in chapter 15 expands them into an inclusive set of natural laws. Among twenty-one laws of nature, the third one presents "the Fountain and Originall of Justice" according to which "men performe their

[180] As D. D. Raphael's remark highlights, Hobbes aimed to reorient his argument about justice of contractor by equalizing injury with "action *sine jure*, without right." D. D. Raphael, *Concept of Justice* (Oxford: Oxford University Press, 2001), 67.

Covenants made" (L; 100). Injustice is by definition not to perform covenants. Similar to *De Cive*, the covenant and justice are realized at once for the sake of peace, but unlike them, *Leviathan* conditions justice on the covenant for their own sake as both are the law of nature.

In Hobbes' constitution, it will be remembered, it is consequential to assume no justice in the state of nature. Both justice and injustice are positioned as internal to the covenant and external to the state of nature. Hence, Hobbes' argumentation compels us to examine how and why the exclusion of justice from the state of war is resulted from this very primitive condition itself. The Hobbesian state of nature has characteristically two postulations (human greed and natural reason), two corresponding situations (all have the natural right to everything and everyone is against to everyone else), and finally two corresponding rights (the natural right to everything, and the natural right to self-defence):

> And because the condition of Man . . . is a condition of Warre of every one against every one; in which case every one is governed by his own Reason; and there is nothing he can make use of, that may not be a help unto him, in preserving his life against his enemyes; It followeth, that in such a condition, every man has a right to every thing; even to one another's body. (L; 91)

One may justifiably be attracted to the proposition that all have the natural right to all things is simply tautological equivalent to that nobody has right to anything in the state of nature – an indeterminable Hobbesian world which necessarily demands the right owners to renounce or transfer their right in the covenant because otherwise no right would become conceivable and every act be conceived as rightful and just or wrongful and unjust at the same time. Indeed, Hobbes makes this tautology in *De Corpore Politico*; the natural right to everything appears as being "no better than if no man had right to any thing" (DCP; 84). Again, in the natural condition, nothing belongs to anyone because "nature gave all things to all men" (DC; 158). In the same way, according to *De Cive*, "to have a common right…

is almost the same as if there were no right at all"[181] (DC; 29). In *Leviathan*, he, deliberately perhaps, retreats to the consistency with respect to his equation of justice with rightful action and injustice with wrongful action. Had not he done so, he could have accommodated any 'natural' action without right in the state of nature in which case the presence of injustice is confirmed in the state of nature.

Thus, we have the natural right to everything in the state of nature. In that state, may the laws of nature oblige anyone not to injure anyone else, even though it is not a contractual obligation? If one is obligated by the laws of nature, then this immediately implies some acts without right in the state of nature. Let me first clarify how Hobbes justifies the natural right to everything. Hobbes' justification of the natural right to everything is not uncontroversial. Textual evidence in Hobbes' political works supports the dominant reading in literature[182] that the justification of the natural right to everything comes from self-preservation in the natural condition where "every man has a right to every thing; even to one another's body" (L; 91).

Hobbes describes the state of nature as that "before men bound themselves by any agreements with each other, every man was permitted to do anything to anybody, and to possess, use and enjoy whatever he wanted and could get," thereby acting without right is impossible unless one either renounces or transfers one's natural right to everything (DC; 28 & L; 91). This is the reason why Hobbes at the outset of chapter 14 of *Leviathan*, introduces the original opposition between right and law even before giving the list of the natural laws: "RIGHT, consisteth in liberty to do,

[181] As regards this point, some of Hobbes' scholars also fall the same theoretical trap; for Karl Schuhmann, for instance, "it makes no difference whether one says that in this state everybody owns everything, or that nobody there owns anything at all." Karl Schuhmann, "Hobbes and the Political Thought of Plato and Aristotle," in *Karl Schuhmann: Selected papers on Renaissance philosophy and on Thomas Hobbes*, ed. Piet Steenbakkers and Cees Leijenhorst (New York: Springer Publishing Company, 2004), 204.

[182] According to Howard Warrender, for instance, the Hobbesian state of nature takes the natural right to self-preservation as the basis to come up with the natural right to everything. Howard Warrender, *The Political Philosophy of Hobbes* (Oxford: Clarendon Press, 1957).

or to forbeare; Whereas LAW, determineth, and bindeth to one of them: so that Law, and Right, differ as much, as Obligation, and Liberty" (L; 91).

Hobbes' notion of right is the linchpin for the Hobbesian politico-legal world, especially as presented in *Leviathan* in which all other concepts – liberty, obligation, covenant, justice – become meaningful in accordance with the concept of 'right'. It is true that Hobbes reserves less place for the natural right in his overall constitutional project than to the law of nature. But this does not change the fact that he starts from natural right as "an absolutely justified subjective claim which… is itself the origin of all law, order or, obligation."[183]

Hobbes keeps 'right' closer to freedom, even closer to freedom in action to do or not to do, rather than prescribing duty in return of the assigned right. For Hobbes, "irresistible might, in the state of nature, is right" as it operates on the assumption that no one can opt out of demanding for security and survival (DCP; 86). If I have the right of nature, I am completely free from any bondages, and in the same extent I am free to do anything, something or nothing that I see fit. The similar point is made by A. P. Martinich who argues that late scholastic legal philosophers and Hobbes fall apart with respect to their positions on right. While Francisco Suarez, for instance, attributes what Martinich calls "deontic force" to *ius* (right) by deriving it from *iustia* (justice) and *iussum* (ordered or commanded), Hobbes rejects it by depriving the natural right of any obligatory force. This denial amounts to the expulsion of obligation from the right of nature to the law of nature.[184]

> …when a man hath in either manner abandoned, or granted away his Right; then is he said to be OBLIGED, or BOUND, not to hinder those, to whom such Right is granted, or abandoned, from the benefit of it: and that he Ought, and it is his DUTY, not to make voyd that voluntary act of his own: and that such hindrance is INJUSTICE, and INJURY, as being Sine Jure; the Right being before renounced, or transferred. (L; 92--3)

[183] Strauss, *The Political Philosophy of Hobbes*, viii.

[184] A. P. Martinich, *The Two Gods of Leviathan: Thomas Hobbes on Religion and Politics* (Cambridge: Cambridge University Press, 1992), 102--3. Here Martinich probably argues against Michael Oakeshott who sees Hobbes as one of the late scholastic philosophers.

Hobbes' concept of individual as the holder of the natural right, even before the legal order becomes relevant, is as much liberating as it is dangerous when each happens to exercise the natural right to everything. What makes the natural state so natural is indeed this unfettered right which compels the holders to find the way out of the nature into the order. The need to move to politics by way of agreement makes itself strongly felt when property (including one's own body) ascends to a matter of concern.

On Hobbes' account, the order and obligation run parallel to the border of civil state; obligation is possible only after the transferring of the natural right to everything. The more we are liberated from the natural right, the more we are obliged to act upon the terms of its transfer; "where liberty ceaseth, there beginneth obligation" (DCP; 91). But before the transferring act, Hobbes indeed prescribes to the laws of nature obligatory force on individuals in the state of nature, even though he seems to restrict it to *in foro interno*, that is, to conscience.

On this topic, namely, Hobbes' theory of obligation, there has still been growing literature spanning for more than half century. According to Dyzenhaus, laws of nature obliges individuals in the state of nature, but "in conscience alone (*in foro interno*), not in action (*in foro externo*)."[185] Warrender, on the other hand, holds that "Hobbes does not say that the laws of nature do not oblige *in foro externo*, but that they do not always oblige in this way."[186] Both scholars refer to the relevant statements of *Leviathan*, which takes obviously Warrender's side: "The Lawes of nature oblige *in foro interno*; that is to say, they bind to a desire they should take place: but *in foro externo*; that is, to the putting them in act, not *always*" (L; 110; my emphasis). It is rather *De Corpore Politico* which seems to uphold Dyzenhaus' view on the distinction:

[185] David Dyzenhaus, "Hobbes's Constitutional Theory," in *Leviathan* by Thomas Hobbes, ed. Ian Shapiro (Yale University Press, 2010), 458.

[186] Warrender, *The Political Philosophy of Hobbes*, 58.

> The force therefore of the law of nature, is not *in foro externo*, till there be security for men to obey it, but is *always in foro interno*, wherein the action of obedience being unsafe, the will and readiness to perform, is taken for the performance. (DCP; 108; my emphasis)

My conviction is that both *De Corpore Politico* and *Leviathan* can be treated in favour of Warrender's reading for the simple reason that Hobbes' distinction proves utterly useless in the condition where everyone is against everyone else. First of all, Hobbes sees no reason to deny that one wants nothing but war if one does not follow the laws of nature where one has "Sufficient security" that other fellows have the natural law-friendly inclinations, too (L; 110). This strongly upholds the binding force of the first law of nature (pursuing peace) on the individual madcap action. But no such guarantee can be given as to the other's natural law-friendly inclinations. In this place, reciprocation is not guaranteed as none of them can be guardian.[187] Hobbes, thus, indicates the need of a power in common, namely a sovereign whose mandate it is to oblige both parties to keep the covenant valid.

According to Warrender's theory of "bona fides," it is not always sure that laws of nature motivate individuals into action due to the fact that the sincere judgment on the unique circumstance which may pose danger to one's self in the bare state of nature is left to individual conscience as the sole judge.[188] Particularly important, in this regard, is to note that an action in the natural state may always be justified insofar as it is done out of fear about self-preservation, even though one is still bound in conscience.

Warrender's extensive discussion revolves around the question whether this provision has the limiting effect on the natural right to everything which would risk cancelling the unlimited natural right to everything. Warrender sees the

[187] In Hobbes' system, reciprocation is generally negatively assumed. In other words, Hobbes' individual acts upon "any anticipation of future evil," rather than that of future favour. Indeed, not only in state of nature, but also in civil state, individual action is governed "distrust, suspicion, precaution and provision against fear" as long as mutually fear between individuals prevails. (DC; 25)

[188] In this respect, the binding force of natural law in the natural state is not "matters of principle, but of circumstance." Warrender, *The Political Philosophy of Hobbes*, 58.

diagnostic function of sincere judgment of conscience about 'sufficient security' as "a validating condition for obligations *in foro externo*," and accordingly an important limitation upon what Hobbes regards as something unlimited.[189] In this respect, for Warrender, Hobbes fails to sustain that in the state of nature everybody has a right to everything. Warrender's reading, however, implies that, when Hobbes brings the conflict of the natural right with the court of conscience into the state of nature, the natural individual may act without right; the act from the natural right should be subject to the filter of conscience by which God may or may not consider as culpable the action in question. Eventually, Warrender is right in claiming the superior position of conscience, but wrong in implying that this may cause unjust actions.

What is at stake here is the culpable acts of individual before God's mercy in the state of nature. It is true that although one is allowed to do anything that one judges sufficient for one's own safety and not allowed to do something that one truly judges insufficient for one's safety; one "may sin against the Natural Laws… if he claims that something contributes to his self-preservation but does not believe that it does so" (DC; 29). For Hobbes, "whatsoever Lawes bind *in foro interno*, may be broken, not onely by a fact contrary the Law, but also by a fact according to it, in case a man thinks it contrary" (L; 110). Yet again, Hobbes makes clear that one may ignore the law of nature, and render oneself culpable in the presence of God without doing injustice to anyone;

> This must be understood as meaning that nothing that one does in a purely natural state is a wrong against anyone, at least against any man. Not that it is impossible in such a state to sin against God or to violate the Natural Laws. For injustice against men presupposes Human Laws, and there are none in the natural state. (DC; 28)

Another scholarly contribution on the binding force of Hobbes' natural right to everything comes from David Gauthier. In his debate with Warrender on the alleged conflict between the right of nature and law of nature, he asks whether

[189] Ibid., 60--1.

Hobbes' "proviso limits the right of nature."[190] The natural right to everything is derived from the universally accepted right of self-preservation, which finds its formulation in the second law of nature (defending bodily integrity by any means at hand) in *Leviathan*. Any action contributing self-preservation is justified in the state of nature, *provided* that one truly and sincerely believes and judges it necessary for, or at least not contrary to one's own preservation; it is left to the individual's discretion what action is to be taken against those who are prone to break the laws of nature. But, for Gauthier, it is the same right which is very likely to lead to, or worse, to advance the war of all against all. Therefore, the laws of nature, occupying a balancing position, "show the extent to which the right of nature is *originally* limited, by advising us that certain actions are wrong, contrary to reason."[191] Gauthier ultimately endorses the view that the natural right to everything remains "strictly unlimited" and the laws of nature cannot be offended as long as they are understood to be demands of self-preservation.

The problem Gauthier would encounter here is not easy one; for firstly, he attempts to condition something 'strictly unlimited' by its compliance with self-preservation which can equally be unlimited if it is to be taken as individual reasoning with discretionary power on ways of survival. Secondly, Gauthier seems not to be bothered with making any mention of the idea of God which becomes all the more relevant in the state of nature given that, for Hobbes, the binding force of natural laws ultimately lies in God, and thus their observance will never be assured. Hobbes contends that whenever being motivated by "an inordinate desire for an immediate good, most men are disinclined to observe the laws" of nature (DC; 53). Thus, whereas Warrender holds that the natural right to everything is unsustainable, and thus allows unjust action (actions without right) in the state of nature, Gauthier contends that the natural right to everything is possible, but not always.

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[190] David P. Gauthier, *The Logic of Leviathan: The Moral and Political Theory of Thomas Hobbes* (Oxford: Clarendon Press, 2000), 49.

[191] Ibid., 50; my emphasis.

Indeed, chapter 14 of *De Cive* is allocated to the discussion on how humans are disposed to neglect the natural laws in multiple ways regardless of how familiar they are with them: "*the natural laws* do not guarantee their own observance as soon as they are known" (DC; 69). Hobbes even goes further in *Leviathan* by acknowledging the bitter fact that the natural laws to the natural right are at odds, and necessarily so at some point due to humanly passions, which are generally characterized as their being against the law of nature. Hobbes contends that without the 'terror of power' to enforce the observance of the natural law, human passions that go against the natural law will always win out. This is a fact which in turn would make the institution of the coercive power even more mandatory: "For the Laws of Nature… of themselves, without the terrour of some Power, to cause them to be observed, are contrary to our natural passions, that carry us to Partiality, Pride, Revenge, and the like" (L; 117). Briefly put, there cannot be such a condition wherein the compliance with reasoning on self-preservation is normatively and completely reconciled with the laws of nature.

The laws of nature that claims to be *in foro interno* binding upon individuals in the state of nature have no limiting effect on individual action (the natural right) for many possible reasons. Hobbes epitomizes "in a state of nature, Just and Unjust should be judged not from actions but from the intention and conscience of the agents" (DC; 54). That being the case, the natural right to everything prevails in the state of nature. But how could it be possible that there is no justice in the presence of this unlimited right, if justice is equal to action with right? Hobbes clearly accept the presence of rightful act (justice) by stating that "[w]hat is done of necessity, or in pursuit of peace, or for self-preservation is done *rightly*" (DC; 54; my emphasis).

4.3.2. Justice from a Valid Covenant

There are two distinct stages of Hobbes' constitution in the making; covenanting is one thing, fulfilling of covenant, and keeping the covenant valid is another; the first phase of the constitution requires the consent of the people and the second a sovereign power. Owing to the fact that fulfilling the covenant is originally aligned

with justice, Kinch Hoekstra rightly thinks there can be such things as justice in the state of nature, that is, before the constitution of sovereignty. There would have probably been less controversy if Hobbes were simply to offer the argument that there is no justice unless there are the positive laws to (dis)obey. If, however, justice and injustice are meant to be obedience and/or infringement of covenant as discussed in the previous section, the issue becomes vaguer because Hobbes acknowledges the presence of some valid covenants in the state of nature.

For Hoekstra, from the third law of nature of *Leviathan* it follows that "everything in the natural condition is just (unless there can be covenants therein, in which case there can also be injustices)."[192] In this way, Hoekstra's point shows that justice, as identified with carrying out covenants, can be located outside of the constitution insofar as "what is one's own is determined by covenants."[193] To Hoekstra's argument about Hobbes' so-called equation of justice and covenant within the third law of nature, Hobbes would already have counterargument, indeed. Hobbes finds the *origin* of justice, but not its realization, in this third law of nature. That fairly means that justice is originated in the state of nature, though, for Hobbes, there is no point in referring the fountain of justice if the sovereign does not hold "the sword of justice" (DCP; 130, DC; 78, L; 391). However, Hoekstra's argument becomes meaningful when Hobbes recognizes the existence of valid covenants before the sovereign, though it is "in vain to grant Soveraignty by way of precedent Covenant" (L; 123).

Hobbes shows the three possibilities of a valid covenant without a sovereign. Firstly, when wars here and there cause the disruptions of civil order that allocates persons or group of persons to a natural space – a space where "the temptation of Avarice, Ambition, Lust, or other strong desire" constantly endangers ways of reconstituting the civil state, or even before the appearance of civility (L; 99). In this

[192] Kinch Hoekstra, "Hobbes on the Natural Condition of Mankind," in *The Cambridge Companion to Hobbes's Leviathan*, ed. Patricia Springborg (New York: Cambridge University Press, 2007), 120.

[193] Ibid.

place, the fear of God imposes "a Covenant of Peace" (L; 99). This would a formal order, substituting God for the place of the sovereign in office. Secondly, Hobbes finds validity in a league of the commonwealth; a commonwealth is also called "a League of *all* the Subjects" without any exceptions (L; 163; my emphasis). There may also exist a league of some subjects, each of which is connected by covenant without the power of a single representative person or a representative body of persons which coerces the parties to keep and perform whatever is agreed in a covenant. A league of all the states, or some of them is counted among such unanimous agreement by a covenant with "no humane Power established" over them (L; 163). Such a league is not only as lawful as a commonwealth, but also avails very well with the members as long as they can keep it effective for the sake of peace and "there ariseth no just cause of distrust" (L; 163).

I am disposed to take Hobbes' first instance of the valid covenant as a pre-modern understanding of the political order, and the second as the modern precursor, as wells as modern understanding of the international constitutional order. In that regard, Hobbes' contractual validity conception for the first two particular occasions does not lie at the heart of his constitutional theory; they rather seem to inform the reader of the Hobbesian vision of the sovereign state. That is to say, the first two accounts for the valid covenant before and/or without a sovereign may be taken to clarify the political and legal limitations and exclusions of Hobbes' own theory of sovereignty; for the former case, Hobbes's secular position maintains that a true sovereign state can no more be brought about by the mediation of a divine lawgiver as it could be it the past. For the latter, Hobbes' constitution is autonomous within international order. But there is a third instance that does really highlight the challenge posed by Hoekstra.

Let me give Hobbes' own example; given that one has to make a deal with a bandit who promises to spare one's life in return of money, in this case, Hobbes asks, is the deal valid even if the bandit is arrested? Hobbes answers is both yes and no; the agreement can be counted as invalid not because it is made out of fear of death

(that would make the civil laws invalid, too), but only if the civil law put a ban on making promise in such a deal. If there is no law in which case no arrestment would happen, the act of making a deal with a bandit is definitely legitimate and introduces the obligation to the obligated parties in the deal. This is so in all three major political works of Hobbes, *De Corpore Politico*, *De Cive*, *Leviathan*, because the ransom paid has a life-saving effect. In the absence of the sovereign, the validity of covenant is conditioned on the principle according to which no law of nature forbids the action or obligation prescribed by the terms of the deal in question (DCP; 92--3, DC; 39-40, L; 97--8). The deal with the bandit turns out to be validated on the principle of self-preservation.

No doubt, Hobbes accepts that if there were the civil law of the state, it would render illegitimate what is promised in the deal with the bandit. He does not legitimize the act of ransoming. Even though by the example of ransom, Hobbes aims to show the valid agreement derives its legitimacy out of fear, it shows there can be valid agreements before civil life is brought in. In this way, justice is rendered more related to the idea of covenant for the sake of peace than to the civil laws itself. In other words, what is just and unjust can best be understood as the aptitude of individual actions for the first two laws of nature (pursuing peace and self-preservation).

The possibility of the valid covenant without a sovereign power endangers Hobbes' constitutional promise that there is no justice before the constitution; if there is a covenant, then there will certainly be just actions due to fact that the principle of self-preservation justifies the natural right to everything in the state of nature.

4.3.3. Justice of Arbitrator

It was D. D. Raphael's comprehensive survey on Hobbes' conception of justice which made me attentive to Hobbes' another concept of justice defined in its classical form as the constant will of giving to everyone one's own or one's due or

one's right. Interestingly enough, however, Raphael leaves it pretty much at only a one paragraph discussion without elaborating "whether justice be defined in terms of covenant… or in terms of property."[194]

In *De Corpore Politico*, Hobbes divides "the justice of action" in two distinct sorts; commutative justice has to with "buying, selling, and bartering," that is, an interaction between parties which can be the content of a covenant (DCP; 97--8). In commutative justice, justice is delivered on the basis of the fair distinction between the injured and injuring parties. Distributive justice, on the other hand, is defined as "giving to every man according to their deserts" (DCP; 98). When the individual's merits are not well distinguished, the injustice of distributive action would not be "the inequality of the things changed, or distributed," but rather be "the inequality that men, contrary to nature and reason, assume unto themselves above their fellows" (D; 98). Thus, distribution is performed according to the underlying assumption of the equality in reason, but inequality in merit.

In the epistle dedicatory of *De Cive*, distributive justice, as opposed to natural one, is originated in our agreements; "a constant will to give every man his right" (DC; 5). Distributive justice means the distribution of what nature makes common. In chapter 3 of *De Cive* he distinguishes it from commutative justice which regulates ordinary transactions between reciprocally covenanting parties – transactions which include whatever may be included in performing a covenant. Commutative justice is delivered "when equal is given for equal" (DC; 46). Distributive justice is the proportional "division of equality" (DC; 47); giving "more to the more worthy, less to the less worthy" (DC; 46).

When we come to *Leviathan*, it tells us more about both commutative and distributive justice. Although *Leviathan* agrees with *De Cive* with respect to the

[194] D. D. Raphael, "Hobbes on Justice," in *Perspectives on Thomas Hobbes*, ed. G. A. J. Rogers and Alan Ryan (Oxford: Clarendon Press, 1988), 154--55. Raphael had not mentioned this traditional definition of justice in his 1977 critique on Hobbes; D. D. Raphael, *Hobbes: Morals and Politics* (George Allen & Unwin, 1977). In his *Concept of Justice*, he leaves his argument about Hobbes' two concept of justice at three pages discussion. Raphael, *Concept of Justice*, 65--7.

nature and scope of commutative justice, it is clearly identified with the third law of nature (the origin of justice); "Commutative Justice, is the Justice of a Contractor; that is, a Performance of Covenant" (L; 105). As for distributive justice, in *De Cive* Hobbes still had not pushed his argument to the point where *Leviathan* converts distributive hand of justice to "the Justice of an Arbitrator; that is to say, the act of defining what is Just" (L; 105). While giving each one what is one's own, at the same time, what is just and unjust is defining;

> *Justice is the constant Will of giving to every man his own*. And therefore where there is no *Own*, that is, no Propriety, there is no Injustice; and where there is no coercive Power erected, that is, where there is no Common-wealth, there is no Propriety; all men having Right to all things: Therefore where there is no Common-wealth, there is nothing Unjust. (L; 101)

In *Leviathan*, property appears to be the unwavering element of justice. Hobbes, after stating the fact that there is no justice in the state of nature is a consequent, also takes in the same paragraph, as a consequent of the state of nature, the fact that there is "no *Mine* and *Thine* distinct" (L; 90). The distinctive feature of the state of nature is represented in absence of private property and, in the same way, the privacy of property is assumed to be the achievement of civil state. Before deciding and acting upon what is just and unjust (what is *mine* and *thine*), no act can be counted as just or unjust. As distinct from justice by covenant, Hobbes, with the definition of justice by arbitrator, relates justice with the constant will which ascribes to each the "right to exclude all other subjects from the use of them [lands]" (L; 172).

The efforts to justify why and how the transfer of the natural right to everything on the basis of self-preservation fail. This has been the case both with Warrender and Gauthier who base the transfer of the natural right to everything on the principle of self-preservation. In Hobbes' state of nature, before the constitution of sovereignty, we never know why one did this rather than that; we also never know for what reason one did this or that. The justification from the principle of self-preservation offers us nothing but infinitely many unhelpful articulations for why the natural

right to everything is abandoned. But, for the account of justice from property, a substitution of the appeal to self-preservation is needed for justifying why we transfer our natural right to everything to go out of the state of nature.

A completely new argument substituted for the justification from self-preservation is offered by Johan Olsthoorn. His remarkable effort to neologize Hobbes' position on justice as "Justicial Statism" focuses on Hobbes' barely quoted passage:[195]

> …in a commonwealth, if one harms anyone with whom he has no agreement, he causes *loss* to the person he maltreats, but does a *wrong* only to the holder of authority over the whole commonwealth. For if the victim of the harm should claim to have been wronged, the person who did the action would say, *What are you to me? Why should I act at your pleasure rather than my own, since I am not preventing you from acting at your discretion, not mine?* I do not see how one could fault that response, when no agreement had been made. (DC; 45)

The inference of justice from property is based on the natural right of everything, too and the institution of the commonwealth demands all to relinquish property rights without exception. One can encroach upon other's rights without doing injustice in the state of nature not necessarily because one enjoys complete discretion about self-preservation in the exercise of one's own power and means, but because one simply sees no reason why one should not get whatever one can where everything belongs to everyone.[196] In the same way, thanks to Olsthoom's what-are-you-to-me argument, any act of taking something by force or of settling down in some place, which would be deemed to be usurpation or occupation in civil state, imply no justice in the state of nature.

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[195] Johan Olsthoorn, "Why justice and injustice have no place outside the Hobbesian State," *European Journal of Political Theory* 14, no. 1 (2015): 25.

[196] Olsthoom's what-are-you-to-me argument leaves behind such self-preservation arguments as Dieter Hüning's, for instance; "all things can be acquired by everyone for the purpose of self-preservation." Dieter Hüning, "From the Virtue of Justice to the Concept of Legal Order: The Significance of the suum cuique tribuere in Hobbes's Political Philosophy," *Natural Law and Civil Sovereignty: Moral Right and State Authority in Early Modern Political Thought*, ed. I. Hunter and D. Saunders (New York: Palgrave Macmillan, 2002), 144.

Hobbes does not treat justice by covenant and justice by propriety as defining the same thing but coincides them on the basis of the constitution of sovereignty. Both are relevant to the constitution, but the latter has to do with the very moment of the constitution: "The word Injustice has meaning in relation to law," but distributive justice is law itself (DC; 45). Hence, the act of distribution is conceived of the decisive power of the sovereign. Consider the below passage from *Leviathan*:

> …the Introduction of Propriety is an effect of Common-wealth; which can do nothing but by person that Represents it, it is the act onely of the Soveraign; and consisteth in *the Lawes, which none can make that have not the Soveraign Power*. And this they well knew of old, who called that *Nomos*, (that is to say, *Distribution*,) which we call Law; and defined Justice, by distributing to every man *his own*. (L; 171; my emphasis)

Hobbes' decisionism can be displayed in this passage; there left no room for justice before the sovereign decision on distribution and accordingly because there is no law before the sovereign commands what is to be law; the sovereign act of defining what is just, of distributing the property rights and of deciding what the law is become one and the same thing. Distribution is constitution itself; "it is not a norm external and prior to the division of rights and goods; it is the division itself."[197]

In my view, Schmitt's understanding of Hobbes' scientific account of natural law ignores the normative implications of Hobbes' equation of distributive justice with law. It is true that Hobbes' constitutional moment is accompanied with more decision than norm, but I suspect that the distributive (constitutive) decision itself necessarily excludes any norms of justice because at least there is a distributive *content* of decision. What is more, distribution is made according to merit.

Let me remind the reader here where Schmitt locates Hobbes' constitution in *Dictatorship*; the pro-monarchist "takes its start from interest in certain understandings of justice, and therefore from a certain *content* of the decision" but in Hobbes' constitution "the interest only consists in the fact that a *decision* as such has been made at all" (D; 17). To the extent that distribution based on merit proves

[197] Olsthoorn, "Why justice and injustice have no place," 31--2.

'certain understanding of justice', we may demand a new normative reading of Hobbes' scientific justice. Moreover, to the extent that distributive justice ends up in the role of arbitrator, the sovereign can fairly be rendered as judge. Hence, Hobbes' equation may provide us with a normative vantage point from which the philosopher may consider dissolving the distinction between sovereign and judge. The sovereign is "Judge of what is necessary for Peace; and Judge of Doctrines: He Sole Legislator; and Supreme Judge of Controversies" (L; 139).

But, be that as is may, Hobbes' equation of (constitutive/distributive) justice with law may not be enough to prove that his constitutional theory finds its normative underpinning in the laws of nature contrary to what Schmitt's placement of Hobbes on the side of science. Since the decision itself can perfectly be expressed in a legal capacity, from Schmitt's perspective, there is no point in identifying justice, whether it be commutative or distributive, with law. As long as 'decision' and 'division' can be used interchangeably, Hobbes' equation may fail in the face of Schmitt's formidable challenge. There still remains the question whether Hobbes' constitution is located within the natural law tradition.

4.4. Hobbes' Constitutionalism

Hobbes' constitutional theory seems to accommodate two opposite positions within two subsequent pages; immediately after stating that *Auctoritas, non veritas facit legem*, that is, not truth but authority makes laws, Hobbes states that "The Law of Nature, and the Civill Law, contain each other, and are of equall extent" (L; 184--5). The former position has long been recognized as the basic characteristic of Hobbes' theory of sovereignty,[198] whereas the latter has very recently been

[198] Hobbes' *Leviathan* has long been treated as "a manual for leaders, like Machiavelli's *Prince*." Gabriella. Slomp, "The Liberal Slip of Thomas Hobbes's Authoritarian Pen," *Critical Review of International Social and Political Philosophy* 13, no: 2-3 (2010): 366. It is true that the initial reception of Hobbes' *Leviathan* was not sympathetic. In fact, it was scandalized; it shocked not only his contemporaries but also subsequent major philosophers. Kant, devoting a section to Hobbes' theory of right in his 1793 essay, *On the Common Saying: 'This May Be True in Theory, but it does not Apply in Practice'*, finds "quite terrifying" Hobbes' understanding of sovereign according to which a sovereign "can do no justice to a citizen, but may act towards him as he pleases," while the citizen is absolutely denied "coercive right" to do anything against the sovereign. The idea of citizen stripped from venturing to claim any right to resistance in the face of a possibly unjust sovereign is possible only

appreciated by some liberal scholars who attempt to replace a pure positivist or decisionistic reading of Hobbes with Hobbes the natural law theorist.[199]

Reading Hobbes in either way may be considered as legitimate because there are enough textual supports available in Hobbes' works for various readings. But if one wants to gain a Hobbesian vision for a modern constitutional order, Hobbes, the theorist of the natural law, would have much more to offer than Hobbes the pure decisionist. I think of *Leviathan* as sharp-setting out the rules for a novel understanding of civil life in which human reason, will and passion are reserved an equal place in human nature. More importantly, Hobbes holds this reservation both in the state of nature and civil life. This is the reason why two equally unfettered ideas dominate two distinct states of Hobbes' political world; the natural right to everything and the absolute power of the sovereign.

Since Hobbes' equation of justice with law may not be sufficient to conclude that Hobbes' theory of the constitution is not a decisionistic one as Schmitt understands it, I shall propose an alternative way of formulating Hobbes' constitutionalism in a non-Schmittian manner by countering Schmitt's arguments in *Dictatorship*. Then, I conclude that Hobbes' theory of the constitution is better understood as enhancing the natural law thanks to the act of authorization.

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when the sovereign is considered to be a divinity-inflicted one. Kant implies that the Hobbesian sovereign is human being no more. Immanuel Kant, "On the Common Saying: 'This May Be True in Theory, but it does not Apply in Practice'," in *Kant: Political Writtings*, ed. Hans Reiss and trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1991), 84. Paul Johann Anselm Feuerbach's 1798 work on Hobbes, *Anti-Hobbes*, as the title implies, is worded to demonstrate how despotism is justified in *Leviathan* in which, for Feuerbach, we ultimately find Hobbes as "entschiedener freund des despotismus" (the most beloved friend of despotism) because of his unacceptable understanding of the sovereign as "einer durch nichts beschränkten höchsten Gewalt" (the unlimited supreme power). Paul Johann Anselm Feuerbach, *Anti-Hobbes*; http://gallica.bnf.fr/ark:/12148/bpt6k95387r/f26.item

[199] Dyzenhaus is the leading liberal who defends Hobbes the natural law theorist. From a contemporary legal perspective, the reception of *Leviathan* with horror turns on acknowledging its legal positivist character. John Austin, for instance, has focused on the preposition that *Auctoritas, non veritas facit legem*, rather than the inclusive relation between the law of nature and positive law. John Austin, *The Province of Jurisprudence Determined*, ed. Wilfrid. E. Rumble (Cambridge: Cambridge University Press, 1995), 165.

Hobbes' constitution comes to be defined by Schmitt as "by constitution, essentially a dictatorship" for two reasons; (1) Hobbes' sovereignty assumes no pre-legal conception of justice for its constitution and (2) the pre-legal idea of the state of nature functions as motivating an ordering purpose. The first meets the condition of legal vacuum and the second coincides with the political plenum. The ultimate end of the state, that is, finalizing war of all against all because this end is something external to, but at the same time impending possibility for the constitution. Schmitt indeed strives to introduce the pre-state instance into the Hobbes' constitution in the form of decision, rather than norm, made according to the purpose of the sovereignty. In other words, Schmitt transposes the before-sovereign into the determining purpose for the after-sovereign. In this way, Schmitt reduces the constitutional purpose to the putting an end to war of all against all. He does that by referring to paragraph 11 in chapter VI of *De Cive*, stating that "the sovereign must also have the decisive power about the opinion of the people; otherwise there would be no cessation to the struggle of everyone against everyone else" (D; 17).[200]

Indeed, the paragraph Schmitt cited from *De Cive* has more to say about Hobbes' account of the right of the sovereign. Unlike Schmitt, Hobbes clarifies that war of all against all by itself cannot motivate its negation into the constitutional order. In the passage quoted by Schmitt, Hobbes states that

> There are certain doctrines which lead citizens imbued with them to the belief that they have the right and the duty to refuse obedience to the common-wealth, and to struggle against sovereign Princes and sovereign authorities. Such for instance are the doctrines which, directly and openly or more covertly and by implication, require obedience to other men than those who have been given sovereign power (DC; 81).

[200] In his article on Hobbes' reception in the Third Reich, Dyzenhaus argues "Schmitt thought of the state as created out of a normative vacuum, but for Hobbes the obstacle in the way of founding a state is too much normativity." David Dyzenhaus, "Leviathan in the 1930s: The Reception of Hobbes in the Third Reich," in *Confronting Mass Democracy and Industrial Technology: Political and Social Theory from Nietzsche to Habermas*, ed. John McCormick (Durham: Duke University Press, 2002), 174. I presume that Schmitt's alleged vacuum is not normative, but the legal one. Schmitt treats, too, the Hobbesian state of nature as full of normativity; otherwise he would not assert that the state "creates the law by settling the dispute over what right is" (D; 16).

The passage gives us the reason why the sovereign power is given the right "both to decide which opinions and doctrines are inimical to peace and to forbid their being thought" (DC; 80). In authorizing and recognizing the authority of the sovereign, what is rejected is the surrender to any other unauthorized or pseudo-authorized powers – including spiritual authorities such as the church or any religious sects which demands obedience without authority.[201] Were Schmitt's claim about the purpose of the Hobbesian sovereign to be true, there would be no need to discuss how to establish not only legitimate, but also legal order at all. The cruder implications are still possible with regard to Schmitt's interpretation; North Korea could be a Hobbesian sovereign, for instance.

Before coming to my point about Hobbes' constituting moment, I revisit Hobbes' account of justice of arbitrator and what exactly Hobbes understand by arbitrator. As I have discussed in the previous chapter, distributive justice ends up in the role of arbitrator, the sovereign can fairly be rendered as judge. By judge (arbitrating the conflicting property claims at the moment of constitution/division), Hobbes understands: (1) The sixteenth and seventeenth laws of nature requires that the judge is not involved in the controversy itself that she is supposed to finalize because this involvement would make the judge's position a party to the covenant. (2) Accordingly, the eighteenth law of nature suggests that for the very same reason, that is, for the sake of impartiality, a judge is supposed not to be covenanting with either of the parties because that would cause the judge to give sentence in favour of either of them. (3) One cannot declare oneself to be judge as the judge must be the one on whom the parties that claim to be a part on the

[201] My point is partly supported by Oakeshott's analytical reading of the Hobbesian association according to which there is nothing in Hobbes' political philosophy to accommodate any purposeful catalyst that governs the formation of the covenant on which the order is built: "There is in this association no concord of wills, no common will, no common good; its unity lies solely in the singleness of the Representative." Michael Oakeshott, *Hobbes on Civil Association* (Indianapolis: Liberty Fund, 1975), 65. David Boucher draws attention to Oakeshott's point in his comparative essay on the Oakeshottian and Schmittian Hobbes. David Boucher, "Schmitt, Oakeshott and the Hobbesian Legacy in the Crisis of Our Times," in *Law, Liberty and State: Oakeshott, Hayek and Schmitt on the Rule of Law*, ed. David Dyzenhaus and Thomas Pole (Cambridge: Cambridge University Press, 2015), 143--4.

controversy in question, agree. The consent and trust of the parties prominently features in the role of judge (L; 105).

Given these features of the judge, especially given the last point that Hobbes makes, I suggest linking it with Hobbes' argument about the constitutive moment; the will of one person, or of assembly is not voluntary, but determined by the constituency – something in between multitude and people which, to put in Schmitt's terms, is a minimum for the constitution. Yet, the subsequent actions of common power are voluntary when it became the constituted power; "though the will of man being not voluntary, but the beginning of voluntary actions" (DCP; 122). Hence, the constituting moment can be considered more as the decision of the people, less the decision of the sovereign. It is helpful to remember here Hobbes' decisionism; "determination and decision [*a concilio* & *constitutione*] of uniting parties" (DC; 74). Hobbes' constitutive decision is first made by the uniting parties in the person of sovereign – a unity which must not be sought in the multitude, but only in the sovereign. "For it is the *Unity* of the Representer, not the *Unity* of the Represented, that maketh the Person *One*" (L; 114).

When a multitude achieves a single will by way of covenanting, they also grant authority in "all the Actions and Judgement" of a sovereign person or assembly of persons (L; 124). Instead of treating the sovereign decision as life-giving moment of the constitution, we can think of covenanting as giving life to the sovereign person who has no previous existence in the natural state. Thus, Hobbes' constitution accommodates the covenant as a constitutive element. This also explains Hobbes' theory of authorization by which the people are rendered as author (volunteer) and the sovereign as actor (subsequently volunteer who acts upon what the author writes). Hobbes' manoeuvre at the beginning of *Leviathan* supports to this point. Before *Leviathan*, he did not see, or at least did not treat seriously, the difference between power and authority, but in *Leviathan* power differs from authority: "*just Power* or *Authority* of a *Soveraigne*" (L, 10).

In fact, what differs *Leviathan* from the rest of Hobbes' work is his theory of authorization. Authority is the legal way of exercising power. Hobbes puts in a nutshell what he means by constitution in the below passage which contains all the key terms such as institution, multitude, covenant, right, person, representation, voting and authorization:

> A *Common-wealth* is said to be *Instituted*, when a *Multitude* of men do Agree, and *Covenant*, *every one with every one*, that to whatsoever *Man*, or *Assembly of Men*, shall be given by the major part, the *Right* to *Present* the Person of them all, (that is to say, to be their *Representative*;) every one, as well he that *Voted for it*, as he that *Voted against it*, shall *Authorise* all the Actions and Judgements, of that Man, or Assembly of men, in the same manner, as if they were his own, to the end, to live peaceably amongst themselves, and be protected against other men. (L; 121)

The covenanting act of the people converts the naked power of the sovereign into the sovereign authority by granting authority to act in the name of the people. An authorized person or assembly of persons by the people are artificial, that is, representative.[202] The act of covenanting comes just before the sovereign starts to play its artificial role. That is to say, the Hobbesian sovereign can never have any higher artificial position than the authorized representative person who has to be careful to procure the observance of the natural laws. A sovereign cannot render the preceding covenant meaningless by neglecting the third law of nature which requires one to keep one's promise, that is, the very act of covenanting. Even if it were not a law of nature, the sovereign would not still render the covenant meaningless because the act of covenanting precedes the constitution; the transition from the state of nature to civil state is not a natural necessity but convention by consent.

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[202] I am led by Strong's article to think on the Hobbesian sovereign within the theatrical relation of author to actor. The public theatrical image of the sovereign brings about the political unity of the subjects. Besides acting and speaking, he claims that visibility is key to grasp the nature of the Hobbesian sovereign; "The sovereign must be seen, must hold himself on stage, must be a persona not in order to attract votes or approval – or to evoke fear – but because that is what makes him sovereign." Tracy B. Strong, "Seeing the Sovereign: Theatricality and Representation in Hobbes," in *Letting Be: Fred Dallmayry's Cosmopolitical Vision*, ed. Stephen F. Schneck (Indiana: University of Notre Dame, 2006), 41--2.

Thanks to the transformation of the naked power to authority (or, just power), Hobbes' sovereign may have the *power* to make any law it pleases by virtue of its legislative supremacy; the sovereign has the last word on what the law will be. But the sovereign has the *authority* to make the laws in accordance with the laws of nature by virtue of its being authorized by the covenant. In other words, Hobbes' constitution may fail to provide the ultimate guarantees for any arbitrary act of sovereign power, but not formal guarantees for any authorized act of sovereign power. And, what makes law is the authority, not the power of sovereign.

Hobbes' account of authorization not only enables us to find coherence for what *prima facie* appears contradictory; 'not truth but authority makes law', and 'the extension of the natural laws (truths) to positive laws. The act of authorization also provides the "link between the form of law and natural law substance."[203] Hobbes' sovereign is "the sole Legislator" who by legislates according to the laws of nature by filling the form of the legal norms with the substance of the natural law (L; 184).

Hobbes' understanding of natural law does not only offer a descriptive account of human nature, but also dispenses a prescription, on the artificial level, for both civil individuals to act in a proper manner and the sovereign to issue positive laws in compliance with the laws of nature so as to regulate legislation in a legitimate manner. A law of nature is best understood as right reason's dictating "ways of peace" (DCP; 87, DC; 34, L; 92). In *De Cive*, the natural law (*legis naturalis*/*lex naturalis*) is "the dictate of right reason" (*rectæ rationis*) on "what should be done or not done for the longest possible preservation of life and limb" (DC; 33), or, according to *Leviathan*, on what is forbidden for preserving life with the best means in the best way. Hobbes supports his definition by introducing a substantial content into the first law of nature; one follows peace when there is still hope for, one invokes the means of war when no hope for peace is left. A law of nature requires then a certain degree of reasoning, even reflection not only upon the possible results of action taken against the danger, or of inaction if it is believed to further peace, but also upon the possible results of others' actions. If an action

[203] Dyzenhaus, "Hobbes's Constitutional Theory," 460.

results in breaking peace, it is because "false reasoning or stupidity," that is, stupidity in neglecting "what duties towards other men are necessary to their own preservation" (DC; 33--4). Not only the most basic fact about human nature, but duty towards others does the law of nature contain in its expression.

CHAPTER 5

CONCLUSION

By the constitutional organization of the parliamentary state, that is, the continental bourgeois *Rechtsstaat* (the rule-of-law-state) of the nineteenth century, Schmitt understands the norms it produces that are supposed to be both just and the supreme will of the people (sovereignty). This is because the modern state emerges in the moment in which no further delegation is possible on the part of the people. In other words, the rule of law, in Schmitt's view, is premised on the exclusion of sovereignty from the constitution which is identified with the sum total of its laws. The rule of law conception identifies the state with its laws and accordingly, derives the legitimacy of the state from legality. In other words, the rule of law is only possible when legitimacy is absorbed by legality for the sake of non-arbitrariness.

Schmitt examines two contradictory implications of this modern conception. First and foremost, the rule of law does not mean ruling by law; the law is a system of the valid norms and whoever applies those norms to the case in question on the basis of the law is the ruler (the sovereign). Thus, for Schmitt, the ultimate principle of rule of law ('closed system of legality') lies in the application of impersonal valid norms only. Second, this type of constitution, by virtue of its own organizational nature, isolates law and its implementation on the one hand, the legislative and the state official, whether it be executive or judiciary, for the application of law, on the other. In every step of the state sovereignty, one observes a component of legislative, administrative and judicial decision. The state sovereignty contains the mini-sovereigns; the legislator, the judiciary, and the

executive; the legislator issues the laws in accordance of the supreme will of the people; the judge interprets the legislated statues in accordance with the principles of legality; the executive is commanded through the legislated status. The sovereignty cannot subvert the operation of the principles of legality. This is how the machine works.

Thus, Schmitt dissects the concept; the law as the sum total impersonal valid norms, and the rule as the implementation of those impersonal valid norms. But the application of the norms requires decision. This dissection would reveal that ruling is one thing, and law is another. This rule of law machine, in Schmitt's view, works as if there were no need of decision. In fact, legal positivism supposes that it owes its operation to the exclusion of anything 'concretely existent' as outsider – even the exclusion of what it constitutes the rule of law; constituent power. The legal positivism of the nineteenth century rejects to think the question of legitimacy of the legal order as the question of constituent power. While the rule of law, in compliance with its liberal ideology, is intended to protect individual rights and liberties from arbitrary treatment of the state, for Schmitt, a much more vital question of sovereignty risks being effaced if the people is denied the owner of constituent power.

This is where Schmitt's criticism of the modern rule of law conception takes its departure for a theory of decision and also where my work departs to capture the vital role of the political decision that plays in the tension between sovereign and law in the constitutional theories of Hobbes and Schmitt. Schmitt's decisionism is an attempt to repair this political groundlessness. The pre-legal idea of constituent power in the form of 'a minimum constitution' turns into the ground of the constitution. That is, it is constituent power, not legality that ultimately legitimizes the legal order – so ultimate that it can be recalled from where it is grounded whenever necessary. Schmitt's decisionism suggests this necessity decided by sovereign on the basis of the friend-enemy distinction. The sovereign decision is a reminder; it reminds the rule of law machine of constituent power, not always, but

in times of emergency. This, however does not mean that the decision stops functioning in times of normalcy; the normal course of the constitutional life always presupposes the political decision.

Schmitt has developed his theory of decision through three basic works; *Dictatorship* (1921), *Political Theology* (1922) and *The Concept of the Political* (1932), respectively. In *Dictatorship*, before rendering the sovereign the holder of two discretionary powers in *Political Theology* and offering a highly effective political actor who decides who the enemy is in *The Concept of the Political*, Schmitt focuses on the traditional Roman institutional measures for emergency situations and divides the institution of dictatorship into two distinct ways of ruling. In the classical understanding of dictatorship, sovereign is the one who suspends the existing order in order to preserve it. In revolutionary understanding of dictatorship, modern sovereign becomes the one who aims to replace the previous order with the new one. Whereas the former derives the legitimacy of the decision on the exception from the norm-preserving force, the latter from the norm-giving act. In other words, the commissar of classical dictatorship is a temporal executive figure who deals with the exception to the existing order (norm), but the modern sovereign comes up with a permanent right claim to the coming order on the way; its promise is to make the exception the subsequent norm.

Schmitt's conceptual distinction between two concepts of dictatorship lies in the distinction between the right of law and the right of the implementation of law. In *Dictatorship*, it is one thing (the right of law) to decide whether a concrete situation is exceptional or not, another (the right of the implementation of law) to decide what measures to take in order to meet the exception. In *Political Thelogy*, however, Schmitt endows sovereign with two discretionary powers; to make a decision on not only the exception, but also the necessary measures to get rid of it. At this point, Agamben's argument about the shift in Schmitt's decisionism. For Agamben, there is nothing surprising that Schmitt's two concepts of dictatorship ends up with a theory of sovereignty in his 1922 *Political Theology*. Any attempt to

allow the implementer of law (executive/dictator) to decide what to do in the face of the exception is doomed to activate the destructive capacity of the law in its implementation.

Schmitt's decisionism refuses subsuming of decision under norm. In fact, this is what decisionism means; the categorical distinction between norm and decision. Once the distinction is made between decision and norm, decision can always be made on the exception to the norm. The dictator may have the political capacity (the right of the implementation of law) to change the previous order into a new one, albeit being authorized by sovereign, instead of ameliorating the one at hand. From Agamben's perspective, this is the reason why Schmitt's decisionism could not accommodate two decisions made by sovereign and dictator separately; instead they are merged into one sovereign who deals with the exception neither from without nor from within, but somewhere in between. In *Political Theology*, it is not also by chance that Schmitt defines sovereign as a borderline concept – the one on the margin neither inside nor outside, but both at once. Having located on the margin, sovereign may decide both the temporal suspension or total suspension of the norm, depending on how sovereign conceives the existential threat against the order.

What is more, for Agamben, Schmitt's position in *Political Theology* has already been heralded in the indistinction in *Dictatorship* between commissar (be legitimized by the ex post facto *lex regia*) and sovereign (be legitimized by a soon-constituted law). Following Agamben's original way of approaching to Schmitt's decisionism, my effort to rethink Schmitt's hesitation in a footnote of *Dictatorship* as to Hobbes' three forms of constitution in *De Corpore Politico*, *De Cive* and *Leviathan*, respectively, gives support to Agamben's argument. Schmitt coincides the constitution of sovereignty in *De Corpore Politico* and *De Cive* with the classical *lex regia*, while the one in *Leviathan* with sovereign dictatorship with the Caesarist tendency.

Schmitt's indecisiveness as to Hobbes' constitutions is justified in one sense; Hobbes' theory of representation is absent in *De Corpore Politico* and *De Cive*. In *Leviathan*, a multitude goes out of the state of nature through the agreement of each to authorize a person or an assembly of persons (all judgments and actions of the person or assembly) to represent them *in toto* as a unified whole in the person of sovereign. In *Leviathan*, Hobbes commits to a genuine unification of the multitude realized in the artificial person of sovereign who transcends the consent of each and creates something other than what is consented. Thus, Hobbes' sovereign decision, in Schmitt's reading, clears up the multitude, replaces it with the people. But it is not justified in another sense; Hobbes' constitutions do not differ as much as Schmitt's commissarial and sovereign dictatorship not only because Schmitt offers no tenable ground for distinguishing between them, but also Hobbes renders them indifferent in terms of the position of sovereign.

Hobbes allots chapter 7 of *De Cive* to the *lex regia* by which democracy is given a principal role even in monarchical constitution when the monarch is empowered by the people for a limited duration. After his classification of the four cases in which a temporary monarch is democratically possible, Hobbes offers an interesting comparison between the people and the monarch or between democracy and monarchy. Let us to think of the people as the elected temporal monarch without heir, and accordingly, of democracy as absolute monarchy. In the metaphor, the power of the people is as absolute as an absolute monarch with no heir. It is even more like the assembling times of the people corresponding to the bedtime of the monarch. The people cannot keep commanding unless they transfer their natural right to everything to a sovereign just like an elected monarch who authorizes a number of ministers and magistrates to execute her commands. Hobbes indeed, as the metaphor of the dormant sovereign suggest, makes one and the same (in)distinction between sovereignty (the people) and its execution (the sovereign), between the sovereign (monarch) and the executive (minister/dictator) while at the same time overstating the indivisibility of sovereignty.

In fact, Hobbes explicitly contends the absence of any sovereign monarch if it is elected and the absence of the people once the natural right of everything is transferred. In spite of the distinctive character of *Leviathan*, in chapter 21 of *Leviathan* Hobbes in the same way trivializes the sovereign right to the norm; if the monarch is captured, but not defeated, the sovereign right is still with her to oblige the subjects to the administration of the commonwealth. That is, the people are subjected to the executive when the sovereign representative to whom they transfer the natural right to everything is hostage or asleep.

Agamben's perspective of the sovereign exception helps me find out not only the same logic behind *Dictatorship*'s impotent division between commissar and sovereign, but also behind Hobbes' persistent effort not to convert the sovereign into a dictator at the cost of annihilating the sovereign person for whom *Leviathan* is written, either by sending him to the bed as is the case with *De Cive* or by holding him hostage as is the case in *Leviathan*. Once the distinction between the right of the law (sovereignty) and the right of the execution of the law (sovereign) is made, there is no such guarantee that the decision on the execution of the law becomes a new norm.

Thus, Schmitt's decisionistic position in *Political Theology* demands the sovereign to hold both the right of the law and the right of implementation of law. Schmitt's demand was a political cure for the trivialization of the sovereign right as was the case, in his view, with the liberal constitutional state. Schmitt wanted to keep sovereignty alive which would otherwise be ruled indirectly. In his 1938 *The Leviathan in the State Theory of Thomas Hobbes*, Schmitt insists on constituent power that Hobbes futilely wanted to suffocate with the formalism of law, does not evaporate at all, but to be handed over 'indirect powers'. In the final version of his decisionism, Schmitt is mainly concerned with the identification of constituency; if the laws (of the rule of law state) are really to be considered as the supreme will of the people, the rule part must be attentive the demands of the political. *The Concept of the Political*, having published ten years after *Political Theology*, defines the

sovereign in a third way; sovereign is the one who decides, already before the exception and the measures to get rid of it, who the enemy is. In doing so, the sovereign identifies who the constituency is. The decision on the enemy gains its substantial character in *The Concept of the Political*. Thanks to its substance, the polical decision determines the decision on the exception as well as the measures to reinstitute the norm.

By the end of Third Chapter, I suggest that Schmitt's decisionism ends up with a theory of sovereignty according to which the political decision existentially connects sovereign to law. As a result of Schmitt's favour sovereign over law, the idea of rule of law gets lost; if sovereignty (represented in the decisions of the sovereign) dies, then the law cannot stay alive. Schmitt rejects to accept the liberal view that the constitution rests on the delicate balance between sovereignty and law. Hobbes' decisionism, on the other hand, seems to favour law over sovereign, either by sending her to the bed or by holding him hostage. From the perspective of Schmitt's decisionism, Hobbes' constitution can easily be challenged in an emergency that necessitates a decision; who decides the exception when the sovereign is sleeping? Hobbes obviously expects the one who decides to remain an ordinary executive/dictator as such. For Schmitt's decisionism, this is an impossible case; in fact, what Hobbes did is to uphold the sovereign right of the law at the cost of creating another sovereign out of a dictator.

In Fourth Chapter, I proceed on the underlying assumption that Hobbes left the tension between sovereign and law unresolved. That is, I take up Hobbes where Schmitt left; Hobbes' constitution is a liberal one. But Hobbes also maintains that the constitution is a decision. I formulate Hobbes' liberal decisionism with respect to his two basic claims as follows: (1) it is the sovereign authority, not truth that makes positive laws. (2) The laws of nature are contained in the positive laws. In *Dictatorship*, Schmitt calls Hobbes' constitution the natural law of exact science – a coin whose pitch and toss are traditionally considered as contradictory; the natural law theory and positivist theory of law (exact science). He, however, focuses on the

first but neglects the second, and accordingly locates Hobbes' constitution within the sovereign dictatorship which presupposes a legal vacuum (the state of nature) and a political plenum (a multitude as a minimum constitution) at once to justify itself. Following the steps of Schmitt's argument concerning the Hobbesian theory of scientific, but somehow natural law in *Dictatorship*, the unique place of Hobbes' constitution within the seventeenth century natural law theory becomes conceivable in terms of his understanding of justice.

Hobbes' natural law of exact science suggests that there is no justice prior to a sovereign power as a result of the natural right to everything – a right which recognizes no boundary whatsoever. The idea of the natural right proves the most promising way to understand the decisionistic genesis of Hobbes' constitution from the state of nature to the constitution of civil state. In the state of war of all against all, each individual is equally capable of willing and deciding what to do in a singular situation and what is her own; the former refers to 'right' and the latter 'property'. Both 'right' and 'property' are jointly invoked and melted into 'the natural *right* to *everything'* in order to innovate the theoretical structure of the state of nature and to embrace the artificiality of civil state. Hobbes takes the absence of justice as a consequent of the state of nature where everybody has the natural right to everything.

Hobbes' main promise of his theory of justice, that is, there is no justice in the state of nature unless the sovereign authority makes it requires an analytical dissection of the concept of justice in Hobbes' constitutional theory. Justice is possible in three ways; justice either from the original covenant (justice of contractor) or from the valid covenant (still, justice of contractor) or from property (justice of arbitrator).

First, he defines justice as action with right. In a contractual relation, the parties would not be counted in if they violate it either by performing what the covenant forbids or by abstaining what the covenant obliges. In both cases, mutually contracting parties would act without right as long as the natural right to everything is transferred through the covenant. Hence, according to the definition

of the contractual justice, justice is identified with action with right, and injustice without right. Where the natural right to everything reigns, every act can be rendered just. This definition fails to meet Hobbes' axiom that the state of nature cannot accommodate justice (action with right). In that state, as a result of the principle of self-preservation, whatever is done is done by right; no laws of nature may effectively bind the 'natural' action. Second, as an extension of justice of contractor, there appears a valid covenant without a sovereign power; if there is a covenant, then there will certainly be actions with right and accordingly justice. Third, justice of arbitrator detaches the concept of justice from its contractual context (the action of parties with right and without right) and enacts it in a constitutional context. On this third account, justice is defined as the distribution of the arbitrator. Before the decisive decision of the sovereign on distribution according to individual merits, everybody has the right to everything. Only Hobbes' account justice of arbitrator fulfils what Schmitt calls 'natural law of exact science'. But in this case, Hobbes' constitution is necessarily dismissed from Schmitt's decisionism because, contrary to Schmitt's argument, at the moment of Hobbes' constitution there appears a distributive *content* of decision.

To conclude, I return to the discussion that I initiate at the beginning of Fourth Chapter about Hobbes' two seemingly contradictory arguments; it is not truth, but authority that has the law making-capacity and the laws of nature are contained in civil laws. These are the basic exclusive axioms for the very pillar upon which Hobbes' liberal decisionism rests. Hobbes' theory of authorization comes in as a compromising move between two. Hobbes' sovereign may have the *power* to make any law that she pleases by virtue of its legislative supremacy. But the sovereign has the *authority* to make the laws in accordance with the laws of nature only by virtue of its being authorized by the covenant. And, what makes law is the authority, not the naked power of sovereign. Thus, Hobbes' decisionism treats the constituting moment, first, as the decision of the people and then the decision of the sovereign; the constitutional decision of uniting parties on the unity under the sovereign authority.

As for the final word for my study, I want to suggest that contrary to Schmitt's diagnosis of Achilles' heel in the legal ground of the nineteenth century constitutionalism, the problems of contemporary politics does not have to do with the liberal idea of separation powers between the legislation and the execution only, but with the original division, or even opposition, as Schmitt calls it, between the right of the law and the right of the implementation of the law. As we have seen in Hobbes' constitutions, even though Hobbes definitely excludes the liberal idea of separation of powers, he also ineluctably embraces the distinction between the right of law and the right of the implementation of law. In doing so, he embraces the idea of executive when the sovereign is sleeping or captivated. The liberal rule of law state, too, may easily push this division until the point where the legal principles are reduced to the perfunctorily authorised execution for the necessary actions – a point at which the liberal state is no more liberal. Thus, modern constitutional states seek to restrain the use of exceptional power and to keep the sovereign act in times of emergency within the legitimately acceptable boundaries by the normative ideal of the separation of power. But, once the distinction between norm (law) and decision (sovereign) is made, the norm always risks incorporating what it excludes (the exception) into itself through the decision. Be that as it may, I believe that it is worth taking this risk. This is the reason why I seek to develop Hobbes' liberal decisionism.

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APPENDICES

APPENDIX A CURRICULUM VITAE

PERSONAL INFORMATION

Surname, Name: Ünlü, Özlem
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EDUCATION

Degree	Institution	Year of Graduation
MS	METU Philosophy	2011
MS	Ankara University Secondary Education Branch Teaching Non-Thesis Master	2006
BS	Ankara University Philosophy	2004

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APPENDIX B TURKISH SUMMARY / TÜRKÇE ÖZET

THOMAS HOBBES VE CARL SCHMITT: EGEMEN VE YASA ARASINDAKİ GERİLİM ÜZERİNE

Bu tezin amacı, Thomas Hobbes (1588-1679) ve Carl Schmitt'in (1888-1985) kuramlarını çerçevesinde, siyasi kararın, egemen ve yasa arasındaki gerilimde oynadığı hayati rolü konumlandırmaktır. Schmitt'in 1921 tarihli *Diktatörlük* incelemesinde, egemenin istisna konusundaki kararı, meşruiyetini varolan normların korumasından alırken, 1922 tarihli *Siyasi İlahiyat* metninde, kararın meşruiyeti, norm-verme gücünde yatar. 1932 tarihli *Siyasal Olan* kitabında ise, düşmanın belirlenmesi konusundaki siyasi karar, henüz yasal anlamını kazanmadan, yasa-yapıcı kararı önceleyecek biçimde varoluşsal bir değer kazanır. Schmitt'in kararcılığındaki bu kuramsal dönüşümün nüvesi *Diktatörlük* incelemesinde, Hobbes'un *De Corpore Politico*, *De Cive* ve *Leviathan*'da geliştirdiği üç anayasa kuramı üzerine verdiği bir dipnotta hâlihazırda mevcuttur. Norm (yasa) ve karar (egemen) arasında bir ayrım gözetildiği sürece, norm her zaman için normun dışladığı istisnayı kapsama alanına alma riskini taşır. Bunu yapacak olan karardır. Bu bakımdan, norm ve karar arasındaki ayrım, yalnızca Schmitt'in kararcı pozisyonlarını değil, Hobbes'un siyasi oluşumlarını da ayırt edilemez kılar. Buna rağmen Hobbes'un liberal kararcılığına bu riski aldığını düşünerek yaklaşmak mümkündür çünkü siyasi başlangıçlarda adalet sorununa yer vardır. İlkin karar, dağıtıcı içeriğe sahip olduğu için kuruluş anı bütünüyle normdan yoksun değildir. İkinci olarak, egemenin kararı sözleşmenin içeriğini dikkate almak zorundadır çünkü egemenin ilk eylemi gönüllü değildir. Bu bakımdan, Hobbes'un yasal düzeni meşruiyetini, karardan aldığı kadar doğa yasalarından da almaktadır.

1918 yılının Kasım ayında kurulan Weimar Cumhuriyeti, Adolf Hitler'in Şansölyeliği liderliğinde Nazi Partisi'nin iktidara gelmesiyle 1933 yılının ilk ayında lağvedilmiş ve Üçüncü İmparatorluk dönemi başlamıştır. Toplam 14 yıl süren bu kısa Cumhuriyet, tarihine, parlamentonun kurduğu on altı, devlet başkanının kabinenin başında olduğu dört, toplamda yirmi adet hükümet sığdırmıştır. Bu dönem siyasi tarihi açısından Wiemar Cumhuriyeti anayasal krizi olarak geçer. Schmitt'in Weimar krizi için sunduğu öneriler, 1933'de Nasyonal Sosyalist Parti'ye dahil olmasından ve bunun ötürü hiçbir zaman özür dilememesinden dolayı, uzun süre literatürde yok sayılmış, ancak olağanüstü hâl ilanlarının dünya çapında artmasıyla birlikte eserlerine olan ilgi artmıştır. Bu akademik ilginin odağında Schmitt'in anayasal düzenlerde hukukun üstünlüğü ilkesinin, hukuk pozitivizminin en bilinen temsilcisi Hans Kelsen tarafından bir totoloji haline geldiği konusundaki güçlü eleştirisi vardır. Schmitt'in 1928 yılında yazdığı *Anayasa Kuramı* kitabındaki şu paragraf, Kelsen'in geliştirdiği saf hukuk kuramını hedefe alır;

> Kelsen'le birlikte yalnızca pozitif normlar geçerli olmuştur; diğer bir deyişle, gerçekten geçerli olanlar geçerlidir. Normlar, gerektiği biçimde geçerli olmaları *gerektiği* için geçerli değildir; daha ziyade, makul olma ve hakkaniyet gibi niteliklere bakılmaksızın, yalnızca *pozitif* oldukları için geçerlidir. Bu buyurtu burada aniden kesilir ve normatif unsur işlemez hâle gelir. Onun yerine, olgusallığa dair çığ bir totoloji belirir: Geçerli olduğu zaman geçerli olan, çünkü geçerli olan bir şey. İşte bu "pozitivizm"dir. Anayasanın "temel norm" olarak geçerli olduğu ve geçerli olan diğer normların bu temel normdan türetildiği konusunda ciddiyetle ısrar eden bir kimse, katışıksız saf bir normlar bütününe zemin olsun diye, verili ve somut bir provizyonu alamaz çünkü söz konusu saf normlar bütünü belirli bir merci tarafından koyulmuş ve 'pozitif' olarak tanınıp, belirlenmiştir. Normatif bir birlik ya da düzen ancak, "pozitif" geçerliliğine bakılmaksızın, normatif bakımdan tutarlı ve bundan ötürü, akıl ve adalete istinaden kendi içinde geçerli olan sistematik, doğru ilkelerden türetilebilir.[204]

[204] Çalışmamın Türkçe Özet bölümünde Schmitt'in eserlerinden yapılan alıntıların çevirileri bana aittir ve kaynakça bölümündeki eserlere atıf yapılmaktadır. Referanslar için verilen kısaltmalar, çalışmamın ana gövdesindeki kısaltmalarla aynıdır. Carl Schmitt, *Constitutional Theory*, trans. and ed. Jeffrey Seitzer (Durham: Duke University Press, 2008), 64.

Kelsen'in saf bir normlar bütünü olarak tasarladığı, kendi zemini için yine kendisini gösteren anayasa hem normatif hem de pozitif olduğunu varsaymaktadır; eğer normatif ise, bunun için gerekli olan belli başlı yasallık ilkelerine göre ve onlardan türetilmiş olmaları beklenir. Tam bu noktada Kelsen, normların pozitif olduğunu ileri sürerek, bunların geçerliliği için tek bir 'temel norm' (*Grundnorm*) zemininde yükselmiş pozitif normlar olmalarını yeterli görmüştür. Schmitt'in 1928 yılında pozitivizme koyduğu bu tanı, Weimar anayasal krizinin en keskinleştiği an olan Cumhuriyet'in son yılı 1932'de Prusya Darbesi'nin (*Preußenschlag*) meşruiyetine dair mahkeme kararı sonrası Schmitt ve Kelsen arasındaki tartışma da yeniden kendini göstermiştir. Bu tartışma 'anayasa muhafızı'nın (the guardian of the constitution) kim olması gerektiğine dair teorik bir tartışmadır.

1932 yazında Cumhurbaşkanı Paul von Hildenburg, artan sokak çatışmalarının kamu güvenliğine tehdit oluşturduğu kanaatiyle Prusya hükümetinin Weimar Cumhuriyeti'ne karşı sorumluluklarını yerine getiremediği kararına varmış ve Weimar Anayasası'nın 48. Maddesi'ne dayanarak dönemin Almanya'sının en büyük devleti olan Prusya'ya darbe kararnamesi çıkarmıştır. Bu kararname, Prusya hükümet kabinesinin boşaltılması, yerine merkezden atanan Şansölye Franz von Papen ve bakanların atanması emrini içermektedir. Prusya Darbesi kararnamesinin yasal dayanağı olan Weimar Anayasası, 48. Madde'nin içeriği aşağıdaki gibidir:[205]

1- Bir devlet Anayasa (the *Reich* Constitution) ve yasalara (*Reich* statutes) göre belirlenen görevlerini yerine getiremiyorsa, devlet başkanı bu görevlerin yerine getirilmesini silahlı kuvvetlerden destek alarak zorlayabilir.
2- Alman ulusunun kamu güvenliği ve kamu düzeni önemli ölçüde aksar ve tehlikeye girerse, devlet başkanı kamu güvenliği ve kamu düzenini eski haline getirmek üzere gerekirse silahlı kuvvetlerin de yardımıyla gerekli

[205] Carl Schmitt, *Legality and Legitimacy*, trans. and ed. Jeffrey Seitzer (Durham: Duke University Press, 2004), Appendix: Selected Articles of the Weimar Constitution.

önlemleri alabilir. Bu amaçla devlet başkanı, Anayasa'nın 114. (kişi özgürlüğü), 115. (mesken dokunulmazlığı), 117. (iletişim gizliliği), 118. (düşünce özgürlüğü), 123. (toplanma özgürlüğü) 124. (dernek kurma özgürlüğü) ve 153. (mülkiyet dokunulmazlığı) Maddeleri'nde belirtilen temel hakları kısmen ya da tamamen askıya alabilir.

3- Devlet başkanı, 48. maddenin 1. ve 2. Fıkrası'na göre yürürlüğe koyulan tüm önlemleri hiç gecikmeden parlamentoya (the *Reichstag*) bildirmelidir. Parlamentonun talep etmesi halinde bu önlemler geri çekilmek zorundadır.
4- Acil tehlike durumunda Hükümet (the Land Government) ikinci fıkrada belirtilen önlemleri geçici olarak yürürlüğe koyabilir. Bu önlemler devlet başkanının ya da parlamentonun isteğiyle geri çekilebilir.
5- Detaylar bir yasayla belirlenir.

Schmitt'e göre, 48. Madde'nin ilk fıkrası, Alman Devlet Başkanı'na olağanüstü zamanlarda olağanüstü yetkilerini kullanma yetkisi vermeden önce, olağanüstü durumun kendisini belirleme konusunda takdir yetkisi vermiştir. İkinci Fıkra, siyasi bir *düzen* olmadan, yedi temel vatandaşlık hakkın pratik olarak gerçekleşemeyeceğini söylemektedir. İlk iki kısım yürütmeyi güçlendirirken, üçüncü ve dördüncü kısım yürütmeyi denetleyecek mekanizmaları güçlendirmektedir. Ancak beşinci ve son kısımda görüldüğü üzere, 'detaylar' yine bir kararnamenin belirleme alanına bırakılmıştır. Aslında adından da anlaşılacağı üzere, 48. Madde bir '*karar*name' ile, yani bir karar ile etkinleşir. Schmitt'e göre karar, normun içinden çıkamayacak, onlardan türetilemeyecek bir doğaya sahiptir.

Weimar Anayasası 48. Madde'sinin etkinleştiği bu siyasi durak, bize Kelsen'in pozitivist tavrını kuramsal olarak değerlendirebileceğimiz bir bağlam sunar. Prusya siyasi iradesi, olağanüstü hâl kararnamesine direnmemiş, ancak durumu orijinal adı *Staatsgerichtshof* olan devletler arası meselelerde adalet merci olan üst mahkemeye taşımıştır. Mahkeme, Prusya hükümetinin, merkez yönetimine karşı sorumluluğunu ihlal etmediğine, bundan ötürü hükümetin kalıcı olarak devrilemeyeceğine, ancak diğer taraftan güvenlik nedenleriyle bir süreliğine

Prusya idaresinin merkezin kontrolünde olmasının yasal olduğuna karar vermiştir. Schmitt'e göre mahkeme kararı, berbat bir kafa karışıklığına dalalet etmektedir. Eğer Prusya idaresi, merkez yönetime karşı ödevlerini yerine getirdiyse, geçici ya da kalıcı olsun, Alman merkezi idaresinin müdahalesi yasal olarak hangi zeminde gerekçelendirilebilir? Eğer mahkeme, Prusya hükümetinin geçici olarak askıya alınmasında yasal bir sorun görmüyorsa, mahkeme tam da olağanüstü hâl durumuna karar veren merkezi hükümetin kararını kendine zemin yaparak bu karara varmış değil midir? O hâlde, 'bağımsız mahkemeler' deyişi bir retorikten mi ibarettir? Bu tartışmada Kelsen, mahkemeleri, anayasal düzenin muhafızı ilan ederken, Schmitt için somut bir durumun varoluşsal bir tehdit oluşturup oluşturmadığına, yani olağan üstü hâl ilan edilip edilmeyeceğine karar verecek olan bir mahkeme olamayacağı için, siyasi bir düzeni yasal yollardan muhafaza etme fikri, işte bu olağanüstü durumlarda imkansızdır. Kelsen'e göre egemen anayasal olarak yetkilendirildiği sürece, olağanüstü hâl ilan edebilir. Ancak Schmitt'e göre Kelsen'in anlamadığı şudur; bu yetkinin yasal olarak düzenlenmesi, olağanüstü durumun bir normla belirlenebileceği anlamına gelmez. Bu karar, normlardan türetilebilecek bir karar değildir. Aslında hiçbir karar normlardan türetilmez. Normlar her zaman bir karar ile etkinleşir. Schmitt'in, bu somut durumlarda, bizi safi olgusallıkla baş başa bırakan Kelsen'in pozitivizmini çiğ bulmasının nedeni de budur; pozitivizm, norm ile karar arasında bir ayrıma gidemediği için, normatif olarak karşı durması gereken yetkilendirmeleri dahi norm kapsamına alabilmektedir.

Başka bir şekilde ifade edecek olursak, Kelsen'in saf hukuk kuramının, normatif bir gönderme yapmadan her durumda geçerlilik değeri alabilen bir pozitiflik tasarımı ile sonuçlanmasının nedeni, herhangi bir hukuk sitemi için siyasi 'karar'ı tanımama konusundaki ısrarıdır. Ancak Schmitt'e göre, hukuk için norm ayrı, karar ayrı bir şeydir. Schmitt'in kararcılığı, hukuk normlarının geçerli olabilmesinin olanağını, anayasal başlangıçtaki kararın, başlangıçtan sonra dahi arka planda işlemesinde bulur. Bu nedenle, liberal-demokratik anayasal düzenlerde varsayılan meşruluk ve yasallık birlikteliği bir illüzyondur. Diğer bir

deyişle, anayasal düzen meşruiyetini yasallığından değil, başlangıçta verilen karardan alır. Schmitt'in Kelsen eleştirisiyle birlikte, hukuk devleti tasarımı eleştirisi daha açık olacaktır.

Schmitt'in Kıta Avrupası burjuva devleti olarak adlandırdığı, 19. yüzyıl'da nihai formunu kazanmış olan hukuk devletinin (the rule of law state) normları, nihai kaynağını halkın egemen istencinde bulur. Bu anayasal devlet tasarımında, devletin, halkın yetkilendirme kapasitesinin sonuna kadar kullanıldığı ve halkın daha fazla yetkilendirme yapamayacağı bir anda kurulduğu varsayılmaktadır. Schmitt için yetkilendirmenin tüketildiği varsayımına dayanan bu tasarım, egemenliğin dışlanmasıyla sonuçlanmıştır; bu, devletin yasalarından ibaret olduğu ve bundan fazlası olmadığı inancına dayalı, daha önce eşi benzeri görülmemiş tuhaf bir tezdir. On dokuzuncu yüzyılda, devletin meşruiyetinin yasallığından geldiği tezini geliştiren hukuk kuramı, hukuk pozitivizmi olarak belirir. Bu devlet tasarımında, devlet, tarafsız-nötr hukuk devleti; devletin eylemleri keyfiliğe yer bırakmayacak biçimde yasalarla belirlenmiş ve devletin normları gayrı şahsidir.

Schmitt, hukuk devleti tasarımında birbirleriyle çelişik olduğunu düşündüğü iki anlayışı, kendi eleştirisinin çıkış noktası yapar. Birincisi, hukuk devleti, hukukla yönetmek değil, hukukun üstünlüğü (the rule of law), yani hukukun egemenliği ya da hukukun yönetmesi demektir. Hukuk, başka hiçbir alana gönderme yapmadan ve bünyesinde taşıdığı yasal normları kimin uyguladığına bakmaksızın, bir yasalar bütünü olarak özerktir. Kelsen'in ifadesiyle hukuk, kapalı devre çalışan yasal normların bütünü ('the closed system of legal norms') olarak tasarlanmıştır. Dolayısıyla, hukuk devletinin nihai işleyiş ilkesi, yalnızca gayrı şahsi normların yasallık ilkesine göre uygulanmasıyla şekillenir. İkincisi, hukuk devleti tasarımı, kendi örgütlenmesi gereği, hukuk normlarıyla, bu normların uygulanmasını; yasalarla, yasaların uygulanmasını; yasayı yapanla yasayı uygulayan arasında bir ayrıma gider. Hukuk devleti tasarımında, bu ayrımı yapmakta bir sakınca görmez çünkü hukuk normunun uygulanmasının, söz konusu normun kendisinden türediğini düşünmektedir. Devlet egemenliğinin kapsadığı her noktada, yasama,

yürütme ve yargı kararlarının hepsinde, egemenliğin istencinin ya da bu istencin dile geldiği egemen yasaların uygulandığı varsayılmaktadır. Yasama, yürütme, yargı, idare, hükümet, anayasal kurumlar ve diğerleri aslında minyatür bir egemen olarak işlemektedir. Hukuk pozitivizmi, devlet teşkilatının adeta bir makine gibi işlediği varsayımıyla devlet tanımı yapmaktadır. Schmitt için bu tasarım, çelişik olduğu için yanlış ve tehlikelidir. Hukuk normunun gayri şahsi olması, bu normları uygulayan şahısların varlığını ve karar alma kapasitelerinin varlığını yadsımaz. Ancak bu tasarımda devlet, bu yadsımanın üzerine kurulmuştur.

Schmitt'in eleştirisini güçlü kılan unsur, modern anayasal düzenin varsaydığı hukukun egemenliği ilkesinin ne kadar özerk olduğunu yoklamayı vadetmesidir. Schmitt eleştirisine, Türkçeye bazen hukukun üstünlüğü, bazen hukuk devleti olarak çevirdiğimiz, *Reichsstaat* (the rule of law), terimini ikiye ayırarak başlar; hukuk pozitivizmi, hukukun egemenliği konusunda ciddi bir kafa karışıklığı yaşamaktadır; hukuk ile egemenlik arasında fark gözetmemek konusundaki kafa karışıklığı, hukukun egemenliği deyişini icat etmiştir. Schmitt'e göre bu farksızlık doğru olsaydı, istisna durumunda hukuk askıya alındığında ne egemenlik ne de egemenliğin kalemini tutan egemen kalırdı. Hukuk her zaman, normların uygulanması konusunda bir kararı varsayar. Daha da önemlisi, bu karar hukuk normlarından türetilebilecek ve onların kapsama alanına girebilen bir kapasite değildir. Modern anayasal devlet tasarımı, kendi iç işleyişinde kendine yeterli, dışarıda, normların henüz tanımlamadığı ya da tanımlayamadığı somut olarak gelişen varoluşsal tehditlere kayıtsız, hatta varlığını borçlu olduğu kuruluş anını dahi tanımayı reddeden bir tasarımdır. Schmitt için daha da kötüsü, bu tasarım tüm bunları yaparak varkaldığını düşünmektedir. Daha açık bir ifadeyle, hukukun egemenliği meşruluk ve yasallık arasındaki denklemi, ikisi arasındaki açıklığı kapatarak kurmuştur. Son olarak, en kötüsü, tüm ideolojilere eşit mesafede durduğunu söyleyen hukuk egemenliğinin de benimsediği bir ideolojisi vardır. Bu ideoloji, modern egemen devlet kuramının ilk nüvelerini gördüğümüz 17. yüzyıl siyasi düşüncesiyle filizlenmeye başlamış, bireyin hak ve özgürlüklerini temele alan liberal ideolojidir. Schmitt, modern hukuk devletiyle liberalizm arasındaki

ilişkinin, aslında herkesin bildiği bir sır olarak devam ettiğini düşünür çünkü özellikle hukuk pozitivizmi devletin tarafsız olduğunu iddia ederken sanki liberal değerleri taahhüt etmemiş gibi yapmaktadır. Schmitt'in siyasi kaygısı bir liberalinki gibi devletin keyfi uygulamalarıyla bireylerin uğrayacağı hak mahrumiyetleri ve özgürlük alanlarının daralması değil, hukukun üstüne yükseldiği, devlete hayat veren siyaset zemininin, yani egemenliğin artık temsil edilemeyecek kadar unutulmuş olmasıdır. Bunun örneği, Prusya müdahalesi esnasındaki siyasi tabloda görülebilir; Nasyonal Sosyalist Parti'nin oy oranı %36 olmasına rağmen, önceden yapılan yasal bir düzenleme sonucunda %21 payla Demokrat Parti iktidardadır. Schmitt için parlamenter demokrasi egemenliği temsil etme kapasitesini yitirmiştir.

Schmitt'in anayasal devlet tasarımına getirdiği eleştiri, onun kararcı siyaset kuramının ve bu tezin çıkış noktası oluşturmaktadır. Schmitt'in kararcılığı (decisionism), hukuka, üzerinde durduğu siyasi zemini, yani kurucu gücü (constituent power) hatırlatmak ve onu yeniden egemenin kararında etkin hale getirme konusundaki kuramsal ısrarı olarak anlaşılabilir. Kurucu güç, hukuku, ona dayanak oluşturacak şekilde 'asgari kurucu' (minimum constitution) içeriği oluşturmasıyla önceler. Siyasi karar gerektiğinde onu ait olduğu zeminden geri çağırır ve yasal düzene, hangi zeminde durduğunu hatırlatır. Schmitt, anayasal devletin meşruluk ve yasallık denkliğinin üzerinde durduğu gibi bir kurgunun terk edilmesi gerektiğini iddia ederek, kendi kararcı kuramını bu kurgunun tam karşında konumlandırır. Schmitt'in kararcılığında egemen, meşruiyetini yasallığından değil, kurucu gücü dayanarak alarak verdiği kararlardan alacaktır. Egemen, somut bir durumun, istisna hali olup olmadığına karar veren kişidir ve karar, siyasi birliğin sadece kurulma anında değil, devamında da bu kurulumun uzantısı olacak her anda ve her yerde işlemeye devam eder. Eğer somut bir durum, istisna dahilinde değerlendirilmiyorsa, bu egemenin söz konusu durumu norm dahilinde değerlendiriyor olmasından ileri gelir. Dolayısıyla, egemen istisna haline karar verirken, aslında normal duruma, yani normun ne olduğuna da karar verir. Bu noktada, bu çalışmanın başlığına gönderme yapmak yerinde olacaktır; egemen

ve yasa arasındaki gerilim, egemenin hem istisnanın hem de normun ne olduğuna karar vermesiyle, en nihayetinde onun kararında çözülür.

Schmitt'in siyasi kararcılık kuramı adım adım oluşmuş bir kuramdır ve üç temel eserinde gelişmiştir. Bunların ilki, 1921 tarihli klasik eseri *Diktatörlük*, Schmitt'in henüz anayasal düzenin içinden geliştirilebilecek çözümleri dikkate aldığı erken dönemine denk düşer. Aslında Schmitt'in 1932 tarihli *Yasallık ve Meşruiyet* metninden, Weimar Cumhuriyeti'ni 1933'teki yıkılışına kadar korumak istediğini anlıyoruz. Ancak kuramsal olarak, cumhuriyet fikrinden ziyade, Alman *Reich* fikrinin ve Alman halkı varlığının bir ideal olarak arka planda daha derin bir yer tuttuğu aşikârdır. *Diktatörlük* denemesinde, egemenin kararında hukuki bir değer görmekte ve düzenin korunması adına yasal düzeni geçici süreliğine askıya almanın çözüm olabileceğini ima etmektedir. *Diktatörlük*'ün amacı, Roma'nın siyasi yapısında, siyasi düzene istisna oluşturan durumlar için düzenlenmiş komiserlik kurumu ile ilk pratiğini Fransız Devrimi'nde gördüğümüz egemen diktatörlük arasında bir ayrım yaparak diktatoryal hükümet biçiminin, Weimar dönemi liberallerinin korktuğu türden bir dikta rejimi olmadığını göstermekti. Weimar parlamenterleri için Fransız Devrimi deneyimi, halkın temsilcileri olduğunu iddia edenlerin hem yasamayı hem de yürütmeyi ellerinde tuttukları, kapsamlı siyasi bir alanı egemenlik adına etkinleştiren tehlikeli bir rejim biçimini çağrıştırıyordu. Schmitt bu kaygıyı haklı bulmakla birlikte, anayasal düzenin korunmasının yalnızda hukuki yollardan mümkün olamayacağına inandığı için, acil durum önlemleri geliştirebilen bir hükümet biçimi geliştirebilmek adına klasik diktatörlük kurumunu ele alır. *Diktatörlük* denemesinde, egemen diktatörlük olarak nitelediği, yeni bir düzen kurmak için yasal düzenin tamamen askıya alındığı, aslında ortadan kaldırıldığı diktatörlükle, klasik reformist diktatörlük arasındaki ayırım ortaya koymaya çalışır.

Schmitt için klasik diktatörlük, egemen istisna durumuna karar verdiği ve bu istisna durumunu gidermesi için bir diktatörü yetkilendirdiği bir yönetim tekniğidir. Bu klasik rejim düşüncesinde, egemenin istisna konusundaki kararı,

meşruiyetini varolan normların korumasından alır. Klasik egemen, yerleşik düzeni korumayı vadeden kararlarla hükümdarlık eder. Modern diktatörlükte ise, egemenin kararı yerleşik düzeni alaşağı ederek, meşruiyetini, ileride kurulacak olan düzenden alır. Schmitt, bu iki yönetim biçiminin birbiriyle çelişik olduğunu şu cümlelerle ifade etmiştir;

> Çalışmanın devamında temel karar verme kriteri olarak geliştirilecek olan komiser ve egemen diktatörlük arasındaki çelişki, burada siyasi gelişiminin kendisi tarafından çoktan açık edilmiştir; bu çelişki meselenin doğası gereğidir. Ancak, tarihsel yargı her zaman çağın deneyimleri bağlamıyla sınırlı olduğu için, on altıncı ve on yedinci yüzyıllar, demokrasiden Sezarism doğru olan gelişmelere daha yabancıdır: bu zamanlarda ortaya çıkan mutlak monarşi meşruiyetini halkın uzlaşmasından almamıştı; kendini Tanrı'nın lütfuyla meşrulaşmış gördü ve kendisine bağlı devletlere (the estates) karşı konumlandırdı – ki bu, bu bağlamda halka karşı konumlandırdığı anlamına gelir. 'Diktatörlük' kelimesinin, bir düzenin dikte edilmesi anlamına gelen ve bu uzantısının söz konusu tüm durumları kapsayan dilbilimsel anlamı (*dictator est quit dictat*; 'diktatör dikte eden kişidir') o zamanlar açık değildi. Bu dilin kullanılması ise kavramın yayılmasına şüphesiz katkıda bulunmuştur. (D; 2)

Görüldüğü gibi, Schmitt'in Hobbes'un egemenlik kuramının çıkış tarihi olan on yedinci yüzyılda, demokrasi fikrinin henüz zayıf olmasından ötürü egemen diktatörlüğün henüz görülmediğini iddia eder. Zaten demokrasi geliştiğinde ise diktatörlükle birlikte kaynaşacak olan rejimin Sezarizme yaklaştığını iddia etmektedir. Schmitt'e göre, modern egemen rejimin, kendini gelecekteki bir düzene referansla meşru kılmasını bir çeşit modern Sezarism olarak adlandırır. Tıpkı Sezar'ın Roma'nın cumhuriyet dönemini kapatıp imparatorluk dönemini açarken yaptığı gibi, Napolyon da Cumhuriyet'in kurulmasından yedi yıl sonra, emperyalizm ilan etmiş ve bunu yaparken yasal meşruiyetini kurulduktan sonra, tıpkı Sezar'ın *lex regia* ile yasallaşması gibi, almıştır. Schmitt'in modern egemen diktatörlük tasarımında, askeri kuvvetlerin dikta rejimi öne çıkar. Aslında ne Sezar ne de Napolyon kuruluş anında yasal olarak imparatordu.

Schmitt'in Fransız Devrimi'yle birlikte demokrasinin, klasik bağlamından koparak Sezarismi andıran egemen diktatörlük rejimine dönüştüğünü düşünmesinin

nedeni, yasama ve yürütme güçlerinin ikisinin birden halkın eline geçmesi, yani yalnızca halkın istenciyle etkinleşme olanağına kavuşmasıdır. Bunun en iyi örneğini Gabriel Bonot de Mably'nin yürütme gücüne karşı düşmanlığında görür. Mably'e göre asıl güç yürütmededir ve kesinlikle halkın yeni temsilcilerinin eline geçmelidir. Schmitt'in *Diktatörlük* incelemesinde egemen diktatörlüğü Sezarizm olarak değerlendirmesinden anlıyoruz ki, yasama ve yürütme arasındaki ayrımın korunması gerektiğini düşünmektedir.

Schmitt'e göre diktatörlük, diktatörün her istediğini yapacağı sıradan bir despotizm değildir; düzenin kurtarılması için egemenin mutlak güçle donatarak yetkilendirdiği tek bir kişinin sadece yürütmeyi belli bir süreliğine üstlenmesidir. Schmitt bunun olanağını şu ayrımda bulur; yasanın egemenliği ve yasanın yürütülmesi arasındaki ya da adaletin normları ve yasanın uygulanması arasındaki ayrım. Diğer bir deyişle, yasa hakkı ve bu hakkın gerçekleştirilmesi arasındaki ayrım, diktatörlüğü mümkün kılan ayrımdır. Egemen diktatörlük ise, halk istencinin temsile indirgenmesiyle, yasama ve yürütmenin aynı potada eritilmesi ve farkın ortadan kalmasıdır.

Schmitt, 1922 tarihli *Siyasal İlahiyat* kitabında ise, *Diktatörlük*'te modern egemen dikta rejimlerine karşı geliştirdiği olumsuz tavrın tersine, tam da onlar gibi, yasamama ve yürütmenin egemen merciinde eridiği bir egemenlik tasarımı önerir. *Siyasi İlahiyat*'ın egemen tanımında, egemen yalnızca istisna haline karar vermez, istisna halinde ne yapılacağına da karar verir. Halbuki, bu ikinci karar, klasik diktatörlükte diktatörün takdir yetkisine bırakılmıştı. *Siyasal İlahiyat*'ın egemen tanımında egemen, *Diktatörlük*'te diktatörün idaresinde olan yetkileri de kendisinde toplamıştır. Bu nedenle, *Siyasi İlahiyat*'ın egemen tanımı daha ziyade, *Diktatörlük*'teki Sezarist temalarla açıkladığı modern egemen dikta rejimlerinin başındaki imparatorları hatırlatır.

Schmitt'in bu iki eserindeki fark, hukuk ve siyaset felsefecilerinin gözünden kaçmamış, ancak sadece bu farkın altını çizmekle yetinmişlerdir. 1921 tarihli *Diktatörlük* incelemesinden yalnızca bir yıl sonra yazdığı *Siyasi İlahiyat*'ta Schmitt'in

kuramsal dünyasındaki yön değişimini en iyi açıklayan yaklaşım kanımca Agamben'in yaklaşımıdır. Agamben'e göre, Schmitt'in *Siyasi İlahiyat*'ta radikal bir egemenlik kuramıyla karşımıza çıkması, *Diktatörlük*'teki iki diktatörlük arasındaki ayrıma, aslında ayırt edilemezliğe bakmadan anlaşılamaz. Yukarıda Diktatörlük eserinden alıntılanan paragrafta görüldüğü üzere, Schmitt aslında klasik diktatörlükle, modern devrimsel diktatörlük arasında sadece fark gözetmemiş, bunların birbirlerini dışlayan kavramlar olduğunu söylemiştir. Ancak Agamben, bu iki diktatörlük kavramının, birbirini dışlar gibi görünse de aslında birbirlerini içlediklerini öne sürmektedir. Yeniden hatırlayacak olursak, bu ayrım, ya da ayrımsızlık Schmitt'in diktatörlük idaresi içerisinde, yasa hakkı (the right of law) ve yasal normlarının uygulanması hakkı (the right of the implementation of law) arasındaki ayrımdır. Bu ayrımın ilk basamağında, egemenin, normun ve aynı zamanda istisnanın ne olduğuna karar verme hakkı; ikinci basamağında ise, egemenin ilk haktan gelen meşruiyetle bir diktatörü yetkilendirilmesi üzerine, diktatörün yasayı uygulama hakkı durmaktadır. İşte *Siyasi İlahiyat*'ya egemenin bünyesinde eritilen iki ayrı hak bun haklardır. Agamben bunun bir tesadüften ibaret olmadığını, tarihsel bağlamın da üstünde, kuramsal bir kader olduğunu iddia eder. Egemen, diktatörü istisna halini gidermesi için olağanüstü yetkilerle donattığında, aslında ona 'yasayı uygulama hakkı' vermiştir; bu yasanın nasıl uygulanacağı ise artık egemenin kontrolünde değildir. Diktatör, egemenin normunu nasıl uygulayacağına kendi karar verecektir. Öyleyse bu durumda, diktatörün karar verme kapasitesi, egemenin normuna istisna teşkil etme potansiyelini içinde barındırır. Agamben'e göre Schmitt bunu görmüş ve kuramsal bir manevra yapmıştır. Ona göre Schmitt, bir egemen ve iki karar merciinin, parlamenter liberal düzenden bir farkı olmadığını gördü ve *Siyasi İlahiyat* kitabında iki karar verme kapasitesini tek egemende topladı. Agamben'e göre bu, kararın her zaman için norma istisna teşkil edebilme kapasitesidir. Bu, norm ve karar arasında ayrıma giden her siyasi ya da hukuki kuramda veya pratikte görülebilecek bir yön değişmedir; kararın norma istisna teşkil edebilme kapasitesi, onun aynı zamanda yeteri kadar yoğunlaştığında, norm olma kapasitesine işaret

eder. Bu bakımdan, Schmitt, karar yıkıcı bir kapasitesini görmüş ve egemen ile diktatör arasındaki ayrımı ortadan kaldırmıştır.

Bu çalışmada, Schmitt'in *Diktatörlük*'te verdiği bir dipnotta, Hobbes'un üç anayasal düzeni arasında yaptığı ayrımda Agamben'in yaklaşımındaki açıklayıcı potansiyeli gösterdim. Schmitt'in egemen tasarımındaki dönüşümü, Agamben'in de söylediği gibi, aslında komiser ve egemen diktatörlük arasındaki farksızlıkta yatmaktadır. Schmitt'in kararcı kuramındaki bu dönüşümün çekirdeğinin *Diktatörlük*'te mevcut olduğunu göstermek için Schmitt'in *De Corpore Politico*, *De Cive* ve *Leviathan*'daki anayasa kuramları arasında gözettiği fark, tıpkı kendi klasik ve modern diktatörlük arasında gözettiği fark gibi bir noktada ortadan kalkacaktır. Hobbes'un *De Corpore Politico* ve *De Cive*'de geliştirdiği anayasal düzenin klasik komiser diktatörlük olduğunu, *Leviathan*'ın ise Sezarist ögeler içeren modern egemen diktatörlük olduğunu öne sürer. Schmitt'in bu sınıflandırmasının Hobbes'ta nasıl bir karşılık bulduğunu anlamak için Hobbes'un kendi eserlerine dönmek açıklayıcı olacaktır.

Hobbes, *De Cive* eserinin 7. Bölümü'nde, monarşinin hüküm sürdüğü düzenlerde dahi demokratik rejimlerin yaşayabileceğini ve halkın yetkilendirdiği bir monarkın sınırlı bir süreyle yetkilendirilebileceğini öne sürer. Hobbes burada, halk ve monark, demokrasi ve monarşi arasında ilginç bir benzetme yapar; eğer demokrasiyle monarşi, halk ile monark özdeşleştirilecek olsaydı, bunun en iyi özdeşliği halkın, 'varisi olmayan seçilmiş bir monark' olarak tasarlandığı bir özdeşlik olurdu. Bu durumda demokrasi, monarşiye denk düşerdi. Hobbes'un bu hızlı geçişi ilk bakışta çok şaşırtıcı görünür. Ancak metafor ilerledikçe, ne demek istediği daha açık olur. Demokrasilerde halk sürekli siyasi sahnede olmaz; belli yer ve zamanlarda toplanır ve yetkilendirme yapar. Bu toplanma vakitleri arasında geçen zamanı, varisi olmayan seçilmiş monarkın uyku zamanları olarak tasarlarsak, halk ile monark arasında kavramsal bir fark kalmaz çünkü önemli olan yetkilendirmekdir. Halk yetkilendirdikten sonra sahneden çekilebilir; monark da tıpkı bir halk gibi gerekli organları yetkilendirdikten sonra uyumaya gidebilir.

Böylelikle Hobbes için anayasal siyaset, tümden vekaleten yönetmeye indirgenebilir. Hobbes'un bu özdeşlikle yürüttüğü mantık, vekaletin geriye doğru gitmesi mümkündür; egemenlik (halk) ve egemenliğin yürütülmesi (egemen); egemen (monark) ve egemenin kararının yürütülmesi (diktatör). Hobbes bu vekalet zincirini gidebildiği yere kadar geriye doğru itmekte bir sakınca görmez. Son önerisi ise, monarkın uyumasıdır. Sonuç olarak tek bir kişi, yüksek bir memur ya da diktatör, en son yürütme merciinde kim kaldıysa, halk önceden belirlenmiş toplanma zamanına kadar, uyuyan egemenin adı altında idare edebilir. *Leviathan*'a geldiğimizde ise *De Cive*'deki metafora çok benzer bir akıl yürütmeyle, Hobbes egemenin kaçırılma durumunda egemenliğe ne olacağını sorar. Eğer egemen, mağlup olduysa, egemene bağlı halk yeni egemene bağlanmış sayılır. Ancak eğer mağlup olmadan kaçırıldıysa, egemenlik hakkı saklıdır ve yürütme, her ne kadar kendi adına değil de egemenin adına olsa da, yurttaşları kendine tabi kılabilir çünkü Hobbes'a göre buradaki siyasi sorun, sadece bir idare sorunudur (L; 154).

Schmitt'in *De Corpore Politico* ve *De Cive*'yi klasik diktatörlük olarak, *Leviathan*'ı ise modern devrimsel diktatörlük olarak değerlendirdiğini belirtmiştik. Schmitt'in gördüğü bu fark, uyuyan bir egemen ile kaçırılmış bir egemen arasındaki fark ne kadarsa o kadardır. Dolayısıyla, bu çalışmanın üçüncü bölümünün üçüncü kısmında ayrıntılı bir şekilde incelediğim üzere, Agamben'in klasik-modern diktatörlüğün farksız olduğu tezini, Hobbes'un uyuyan ve kaçırılan egemeni arasındaki farksızlık ile doğrulanmış olur.

Hobbes'un anayasal sitemlerinin hepsinde değişmez bir biçimde, egemenin tek yasa yapıcı olduğunu ve egemenliğin kesinlikle bölünmez olarak tasarlandığını düşünürsek, egemenin uykuya gönderilmesi ya da kaçırılmasındaki siyasi sorun apaçık olacaktır. Bu özellikle *Leviathan*'a geldiğimizde daha ciddi bir sorun teşkil eder çünkü *Leviathan*'da egemen temsil gücüne yaslanarak yasa yapmaktadır. Hobbes aslında, fırsatını bulduğunda egemeni ortadan kaldırmaya çalışmak ve işleri yürütmeye bırakma çabasındadır. Diğer bir deyişle, halkı temsil eden ve onun adına yasa yapan egemenin kaçırılması, sivil durumun idaresi için çok da

ciddi bir sorun oluşturmaması, Hobbes'un siyaseti, tıpkı bir liberal ya da pozitivist gibi, teknik bir mesele olarak görmesine işarettir. Schmitt, Hobbes'un liberalizmin ve pozitivizmin kurucu babası olduğuna kanaati, 1938 tarihli *Thomas Hobbes'un Devlet Kuramında Leviathan: Bir Siyasi Sembolün Anlamı ve Başarısızlığı* doktora adlı tezi formatında yazdığı eserinde görülür. Bundan önce Hobbes'un anayasal düzeninin, ilk pratik örneğini Fransız Devrimi'nde gördüğümüz egemen diktatörlük olduğunu iddia etmiştir. Schmitt'e göre Hobbes, modern diktatörlük daha deneyimlenmeden, onun kuramsal altyapısını hazırlayan filozoftur. Bu nedenle, Hobbes'u modern liberal düşüncenin ilk temsilcisi olarak belirlediğinde bile, "söylediklerin boşa gitmeyecek Thomas Hobbes!" (*Non jam frustra doces, Thomas Hobbes!*) diyerek hayranlığını dile getirmeye devam etmiştir.

Schmitt'in Hobbes eleştirisi, Hobbes'un *Leviathan*'da tasarladığı egemen anlayışıyla başlayan ve meşruluk-yasallık denkliğini benimseyen çağdaş hukuk pozitivistlerine kadar uzanan geniş bir aralığa yayılır. Weimar anayasal krizine kadar gelen egemen güç tasarımı *Leviathan*'la birlikte hayatımıza giren bu yeni güç tasarımıdır. Schmitt'e göre, egemen otoritenin geleneksel temellendirmesi Hobbes'la birlikte sona ermiştir. Bunun nedeni, Hobbes'un, siyasi krizlerin temeline koyduğu egemen gücün bölünmesi sorununa getirdiği çözümdür. *Leviathan*'a başlığını veren ve baş sayfasında yer alan mitik figür Leviathan'a daha yakından bakacak olursak, sayfanın en üstünde Latincesiyle *Non est potestas Super Terram quæ comparetur ei*, yani 'Bu dünyada onun gücüyle kıyaslanacak başka bir güç yoktur' deyişi, Eski Ahit, Eyüp 41'deki deniz canavarı Leviathan'ın tasvirinden alınmıştır. Leviathan, iki elinde tuttuğu iki farklı silahla denizden şehre karşı yükselmektedir. Levithan'ın bir elinde, dinden azade özerk siyasi otoriteyi temsil eden kılıç, diğer elinde ise siyasi otoriteden bağımsız kilise otoritesini temsilen piskopos asasını tutmaktadır. Kılıç altındaki sütun, beş bölümde kılıcın gücünü gösterdiği ve kılıcın gücüyle canlanan simgelere ayrılmıştır. Bunlar sırasıyla, (1) kale, (2) taç, (3) top, (4) tüfekler, mızraklar ve sancaklar ve son olarak bir savaş sahnesi. Piskopos asası altında ise, (1) kilise, (2) piskoposluk rütbesi olan mitre, (3) farklı yönlere çakan şimşekler, (4) Ortaçağ doktrinlerinin dilemmalar ve tasımları

temsilen çatallaşmalar ve (5) bir konsey toplantısı sahnesi. Bu resimde tüm bu sembollerle, egemen, hem siyasi hem de dinî otoriteyi bünyesinde eritmiştir. Bu nedenle, Schmitt'e göre siyasi otoritenin geleneksel temelledirmesi, Hobbes'un yeni egemen güç tasarımıyla birlikte bu açılış sayfasında sona ermiştir; Kadir-i mutlak egemenin ilahî olarak gerekçelendirilmesi geride kalmış, dini otorite (*auctoritas*) ile kralın gücü (*potestas*) arasında meşru bir ayrım yapmanın imkânı kalmamıştır çünkü Leviathan hem kılıcı hem de asayı ellerinde tutmaktadır.

Schmitt'in *Leviathan* okumasına göre, Hobbes'la birlikte gelen devlet tasarımının insan aklının ürünü olması belli hukuki sonuçları da beraberinde getirmiştir. (1) Herkesi bağlayan yasaların geçerliliği yani bir emir sistemi olarak hukukun meşruiyeti, inanç kaidelerinden değil, egemen gücün otoritesinden gelir. Diğer bir deyişle yasaları, hakikat iddiası değil, otorite yapar. (2) Yurttaşlar varolan yasaları doğa yasalarının doğru yorumu diye alır ve bağlayıcılığını kabul ederler. (3) Yasaları yapan egemendir ama egemenin kendisi 'yapay bir kişi', 'makinenin içindeki ruh' olarak yasanın dışındadır. Egemen çıkardığı yasalara tabii değildir. Schmitt'in *Leviathan*'dan çıkardığı bu üç sonuçla birlikte, *Leviathan*'da egemenin emirlerine (pozitif yasalar), içeriğini değerlendirerek itaat etmeyiz, öyle emredildiği için ederiz çünkü yurttaşların itaat nedeni yasanın içeriğinden bağımsızdır.

Bu çalışmada Schmitt'in liberal Hobbes yorumunun kısmen doğru olduğunu göstermeye çalıştım. Özellikle yukarıda belirttiğim üçüncü kısımda bir düzeltme gerekir; yurttaşlar egemene mekanik bir şekilde itaat ettiği doğrudur ancak burada yurttaşlar pozitif yasaların içeriğinin doğa yasalarına uygun olduğunu varsaydıkları için itaat ederler. Dolayısıyla, Schmitt'in dediği gibi, itaat nedeni yasaların içeriğinden tamamen bağımsız değildir; eğer yurttaşlar bu varsayımı derinden sarsacak siyasi uygulamalarla karşı karşıya kalırsa, bireysel olarak direnme, hatta *De Corpore Politico*'da daha cesurca açıkladığı üzere, borazanı çalacak güvenilir biri önderliğinde rahatsızlıklarını topluca dile getirebilirler. Yine de, sadece Schmitt'in değil, genel olarak Hobbes yorumcularının ikircikli bulduğu

doğa yasaları ve pozitif yasalar arasındaki belirsiz ilişki, Hobbes'un kararcılığının tam olarak nerede durduğu konusunda önemli bir rol oynar.

Aslında Hobbes yorumcularının ikilemde kalması temelsiz değildir çünkü Hobbes birbirini dışlayan şu iki aksiyomu aynı anda ileri sürmüştür; yasaları hakikat değil, otorite yapar (*Auctoritas, non veritas facit legem* (L; 184). İkincisi, doğa yasaları ve pozitif yasalar birbirini eşit ölçüde içerirler (L; 184—5). Hobbes bir yandan doğa yasalarını, doğru akıl yürütmeyle ulaşabileceğimiz değişmez evrensel hakikatler olarak ortaya koymuş, diğer yandan yasaları yapan hakikat değil, egemen otorite olduğunu söylemiştir. Bu çalışmada Hobbes'un çelişik görünen bu iki aksiyomunun, onun yetkilendirme (authorization) kuramıyla uzlaştırılabileceğini savundum. Hobbes'un yetkilendirme kuramı aynı zamanda bize onun kararcı pozisyonunu konumlandırmak için de bir çıkış noktası sağlayacaktır.

Hobbes'un siyasi başlangıçlar için kararcı bir noktada durduğu açıktır; bir siyasi birliği tetikleyen "kararlılık ve karardır [*a concilio* & *constitutione*]" (DC; 74). Hobbes'un kararcılığı, yine aynı şekilde, yasaları egemen otorite yapar iddiasında da görülebilir çünkü bu aynı zamanda egemenin yasama eylemiyle ortaya çıkan pozitif yasalardan önce adalet ve adaletsizlik yoktur iddiasıyla aynı şeydir. Schmitt Hobbes'un bu pozisyonunun, on yedinci yüzyılda emsalsiz olduğunu düşünür. Gerçekten de Hobbes'un çağdaşlarına baktığımızda, örneğin Hugo Grotius, doğa yasalarını yazılı yasaların içeriğine dahil etmiştir. Grotius'a göre adaletin temeli yazılı yasalardan önce doğa yasalarında mevcuttur. Yine John Locke, adaletin temelini yaşam, özgürlük ve mülkiyetten ibaret olmak üzere üç temel hakta bulmuştur. Locke için de adalet, toplumsal sözleşmeden önce sözleşmeyi belirleyecek şekilde bu üç hak biçiminde sivil toplumdan önce evrensel olarak durmaktadır. Hobbes'a geldiğimizde ise, egemenin kuruluşundan önce adalet yoktur; doğa yasalarının olduğu yerde adalet yoktur. Diğer bir deyişle, doğal durumda doğa yasalarının, doğal durumdaki eylemler üzerinde bağlayıcı gücü yoktur çünkü Hobbes için adaletin temini, yasaların kendisinden ziyade, yasaların yaptırım gücündedir; egemenin tuttuğu adaletin kılıcı ('the sword of justice')

olmaksızın, pozitif yasalar adaleti tesis edemez. Schmitt bunu göz önünde bulundurarak, Hobbes'un kararcı kuramına, bilimsel adalet kuramı (natural law of exact science) demiştir. Bu çalışma da Schmitt'in bu kısmen yerinde iddiasının nasıl mümkün olduğunu inceledim.

İlkin, Hobbes için üç farklı biçimde adalet mümkündür; sözleşmecinin adaleti (justice of contractor), geçerli sözleşmenin adaleti (justice from a valid covenant) ve son olarak hâkimin adaleti (justice of arbitrator). Bu üç adalet tanımı, doğal durumun esas belirleyicisi 'herkesin her şeye doğal hakkı'nı (the natural right to everything) devretmesiyle mümkündür. (1) Sözleşmecinin adaletinde, adaletin tanımı eylem üzerinden yapılmıştır; eğer bir sözleşme yapıldıysa, bu sözleşmeyi, sözleşmenin aksine eylemlerde bulunarak ya da sözleşmenin gerektirdiği eylemleri yapmayarak ihlal edenler, haksızlık yapmış olurlar; her şeye olan doğal haklarını sözleşmeyle birlikte devrettikleri için, artık bu hakkı kullanamazlar ve sözleşme neyi gerektiriyorsa onu yapmaları beklenir. Buraya kadar bir sorun görünmemektedir ancak adalet, 'haklı eylemler' ve adaletsizlik 'haksız eylemler' olarak tanımlandığında, doğal durumda haklı eylemlerin olabileceğini görürüz. Hobbes'a göre, doğal durumda kendini koruma ilkesi gereği, tüm yapıp ettiklerimiz haklı olabilir. Diğer bir deyişle, herkesin her şeye doğal hakkı, kendini koruma ilkesi uyarınca baki kaldığı için sözleşmeden önce adalet vardır. Dolayısıyla, sözleşmecinin adaletinden yola çıkarak, doğal durumda adaletin olmadığı aksiyomunu gerçekleştiremeyiz. (2) Geçerli sözleşmeden gelen adalet tanımında da aynı mantık işlemektedir; eğer sözleşme varsa adalet vardır. Ancak burada da adalet haklı eylemler olarak tanımlandığı sürece doğal durumda haklı eylemler kendini koruma ilkesi gereği her zaman olacaktır. O hâlde, geçerli sözleşmeden gelen adalet de Hobbes'un aksiyomunun tersine, doğal durumda adaleti mümkün kılar. (3) Son olarak Hobbes'un hâkimin adaleti dediği, dağıtıcı adaletin tanımı, sözleşmecinin adaletinden farklıdır; 'her bir kişiye hakkını vermek için sürekli bir istenç' olarak tanımladığı bu adalet, "adil olanın ne olduğunu tanımlamak" olarak belirir (L; 105). Burada önemli olan, Hobbes'un kendini koruma ilkesinden bağımsız bir ilkeyle, herkesin her şeye olan doğal hakkının

devrinin nasıl mümkün olabileceğini bulmaktır çünkü kendini koruma ilkesi doğal durumda her eylemi haklı kılmaktadır. Kendini koruma ilkesi, Hobbes'un bilimsel adalet kuramını en temel aksiyomunu tehlikeye sokmaktadır. Hobbes uzmanı Johan Olsthoorn, kendini koruma ilkesi yerine, doğal durumu belirleyen başka bir ilkeyi, Hobbes'un çok az alıntılanan bir paragrafına gönderme yaparak önermiştir;

> …bir milletler topluluğunda, bir kimse, kendisiyle hiçbir anlaşması olmayan başka bir kimseye zarar verirse, zarar verdiği kişide *kayba* neden olur ancak tüm bir milletler topluluğunun üzerinde otorite sahibi kimseye *haksızlık* etmiş olur. Çünkü eğer zarar gören mağdur haksızlığa uğradığını iddia etmesi gerekseydi, onu kayba uğratan kimse şunu söylerdi; *sen benim için kimsin? Ben seni, benimkiyle değil de kendi takdir yetkinle eylemenden alıkoymuyorsam eğer, neden kendi isteklerimden ziyade senin isteklerin doğrultusunda davranmalıyım?* Eğer ortada bir sözleşme yoksa, birinin bu cevapta nasıl bir kusur bulabileceğini bilmiyorum. (DC; 45)

Bu çalışmada, Hobbes'un kendini koruma ilkesi yerine ikame edilen bu argümana 'benim-için-sen-kimsin' argümanı olarak belirledim. Kendini koruma ilkesi gerçekten de bir eylemin doğal durumda ne kadar haklı olabileceğini açıklamaktan başka bir işlev görmüyor ve doğal durumdaki her eylemi haklı kılıyordu. Ancak benim-için-sen-kimsin argümanı, doğal durumda sözleşmeyle bağlanmayan eylemlerin, adil ya da haksız kategorisine sokmadan, herkesin her şeye hakkının neden devredilmesi gerektiğini ve doğal durumda neden adalet olamayacağını açıklayabilir.

Böylelikle, bu çalışmanın Hobbes'un kararcılığına ayırdığım dördüncü bölümün ilk sonucu, Hobbes'un kararcılığının en temek aksiyomu olan, yasaları hakikat değil, egemen otorite yapar aksiyomu, ancak ve ancak hâkimin bölüştürücü adaletiyle mümkün olduğudur. Hâkim, egemendir; egemenin siyasi kuruluş anındaki kararı, herkese hakkettiği şekilde hakkettiği kadarını veren bölüşüm üzerine yaptığı karardır. Egemenin bölüşüm üzerine verdiği kararla birlikte, adalet ve yasa aynı şey olacaktır (L; 171). Bu sonucun, Schmitt'in Hobbes'ta bulduğu kararcılık konusunda bir dizi imayı da beraberinde getirir. Hobbes'un kararcılığı, yeni anayasal başlangıçlardaki adalet sorununa her zaman duyarlıdır. İlkin, Schmitt'in iddia ettiği gibi, Hobbes'un egemeni kuruluş anında içeriksiz bir karar

vermez; karar bölüşüme dairdir. Egemenin karar dağıtıcı içeriğe sahip olduğu için, kurulum anı bütünüyle normdan yoksun değildir; herkese hakkettiği kadar vermek olarak beliren bu karar, bir tür meritokrasiyi ima etmektedir. İkinci olarak, egemenin kararı sözleşmenin içeriğini dikkate almak zorundadır çünkü egemenin ilk eylemi gönüllü değildir. Bu bakımdan, Hobbes'un yasal düzeni meşruiyetini, karardan aldığı kadar doğa yasalarından da almaktadır.

Bu çalışmanın son sözleri olarak, Schmitt'in modern anayasal düzenler için tehdit olarak gördüğü zayıf karnının, liberal normatif bir ideal olarak yasama-yürütme-yargı arasındaki güçler ayrımı olamadığını belirtmek isterim. Aslında Schmitt Diktatörlük eserinde, çağdaş anayasal düzenlerin de yaslandığı, kadim bir ayrımı, hatta karşıtlığı keşfetmiştir; yasa hakkı ile bu hakkın uygulanması arasındaki ayrım. Hobbes'un siyasi kuruluşlarında gördüğümüz gibi, Hobbes her ne kadar güçler ayrılığı ilkesini reddedecek kadar egemenliğin mutlak olarak bölünmez olduğuna inanmışsa da yasa hakkı ile bu hakkın uygulanması arasındaki ayrımı benimsemiştir. Hobbes için bile, egemen hüküm sürer; yürütme (idare/diktatör) yönetir. Böyle olmasaydı, tek yasa yapıcı olan egemen uyuduğunda ya da kaçırıldığında, yürütmenin yönetimi üstlenebileceğini düşünemezdi. Bu ayrımdan ötürüdür ki, hukukun egemenliği üzerinde yükselmiş olan liberal hukuk devleti de yasama ve yürütme organlarının iş birliğiyle, hukuk ilkelerini kolayca formalite icabı bir prosedüre tabi kılarak egemenin 'zaruri' eylemlerini yasal sınırlar içinde sunabilmektedir. Bunun nedeni, norm (yasa) ve karar (egemen) arasında bir ayrım gözetildiği sürece, norm her zaman için normun dışladığı istisnayı kapsama alanına alma riskini taşımasıdır. Bunu yapacak olan da karardır. Yine de bu riski almaya değer. Özellikle istisnai durumlarda egemen gücün zaruri eylemlerinin, meşru sınırların dışına taşma riski hep var olacağı gibi, bu eylemleri meşru sınırların içinde tutma çabası da aynı ölçüde var olacaktır. Hobbes'un liberal kararcılığına bu riski aldığını düşünerek yaklaşmak mümkündür.

APPENDIX C THESIS PERMISSION FORM / TEZ İZİN FORMU

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