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REVERSING CARL SCHMITT: THE STATE OF EXEMPTION IN UKRAINE, AFTER THE 24TH OF FEBRUARY 2022

*Carl Schmitt first talked about the idea of a state of exception, or *Ausnahmezustand*, in the 1920s. It takes the form of a state of emergency, but it is built on the sovereign's power to suspend the rule of law for the common good. Ukraine is going through the hardest test of its survival since it has been a unitary republic, which it is now, since 1991. This study is a way to set the stage for a discussion about its future once rule of law is in place.»The Concept of the Political» and «Political Theology» are two of Carl Schmitt's most important works. Based on 3 sentences of pivotal importance from the 2 aforementioned works which can be used as postulates, we set up a framework for an analysis.*

Keywords: *Carl Schmitt, Russian-Ukrainian war, state of exemption, law and politics*

Problem setting. The military aggression of Russia against Ukraine, launched on February 24, 2022, once again drew the attention of all mankind to the problems of international law, state sovereignty, and its actions in a wartime emergency. Ukraine and its armed forces have done everything possible to repel military aggression and continue to fight for their freedom and independence. Upon their conditions, it makes sense to turn to the work of the rather controversial, but at the same time very influential political philosopher of the twentieth century, Carl Schmitt, to look at the situation in Ukraine through his legacy.

Recent research and publications analysis. The personality and creative heritage of C. Schmitt is in the field of view of scientists all over the world; only in recent years dozens of scientists from all over the world (Josh Booth and Patrick Baert [1], Mariano Croce and Andrea Salvatore [2], Federico Finchelstein [3], Hugo E. Herrera [4], Peter Uwe Hohendahl [5], Jan-Paul Klünder [6], Peter Langford and Saul Newman [7], Ted H. Miller [8], Andrea Mossa [9], von Seyed Alireza Mousavi [10], Roberto Navarrete Alonso [11], Benjamin A. Schupmann [12] et al.), including Ukrainian ones (Viktor Burlachuk [15, p. 269–270], Oleksandr Vysotskyi [14, p. 724–725], Ivan Homza [13, vol. 2, p. 38–40], Borys Demianenko [16, p. 786], Svitlana Dmytrashko [13, vol. 2, p. 364–366], Nataliia Lepska [13,

vol. 2, p. 538–540] et al.), have turned to understanding his teachings. But at the same time, the current critical situation in Ukraine requires one more look at the events through the prism of the political legacy of Carl Schmitt.

The purpose of the article is to comprehend the positive and negative trends of the ongoing events in Ukraine through the political, philosophical and legal legacy of C. Schmitt.

Paper main body.

1. Who is Carl Schmitt?

Carl Schmitt was a German lawyer and political thinker. Schmitt wrote a lot about using political power effectively, but rather in a Machiavellian way. His work has had a significant impact on subsequent political theory, legal theory, continental philosophy, and political theology, but its value and significance are debatable, largely because of his intellectual support for and active involvement with Nazism and his isolation already since 1937 for criticizing the state of exemption in the Third Reich as well as subsequently after the World War II. He is a conservative theorist who is known for being a critic of parliamentary democracy, liberalism, and cosmopolitanism.

2. The Political and the Friend-Enemy Dichotomy

«The concept of the political is a presupposition of the concept of the state». That is Schmitt's well-known introduction to his work *The Concept of the Political* [17]. Schmitt sets fundamental definitions before continuing his work: What are politics and the political? What state is it in? Schmitt, following Max Weber, believes that the state has a monopoly on force and violence. Concerning the notion of state, the state «has the definitive case of ultimate power» and «the state is actually a clear and unmistakable eminent entity – in other words, for as long as the state has the monopoly on politics». Schmitt famously came to the conclusion that the state and politics are intertwined and could not be destroyed.

According to his famous quote in the same work, «The precise political distinction to which political actions and intentions can be reduced is that between friend and enemy», politics is rooted in the friend-enemy dichotomy. To moderns who have been force-fed the 'antipolitical' panacea known as liberalism, Schmitt's bare simplicity is frightening. According to Schmitt, the divide between friend and enemy is the essence of politics. This divide results from the reality that people are diverse; identities and practices, beliefs and ways of life may, in theory or in practice, clash.

Schmitt criticizes the utopian ideas that conflict can be eliminated from politics, stating that it is a natural part of anthropological human nature and that conflict is a part of existence itself.

He makes reference to the «realistic» Catholic (and Christian) theology's stated anthropological pessimism in an effort to support his arguments. Schmitt believes

that the anti-perfectibilist pessimism of Traditional Catholic theology is esoterically pertinent to the underlying ontological nature of politics and political activity in the modern world, as well as the unconscious secularization of theological intellectual conceptions by modern people.

Schmitt, who intertwines his own ideas of metapolitics with a reformulated «metaphysics of evil», criticizes political «radicals» as being primarily ignorant, deluded, pseudo-messianic in mentality, and unaware of the stark, hard knowledge of revealed human nature, its essence encoded in ancient theology, wherein Original Sin held central, axial place. According to Schmitt, «important theological conceptions are secularized in the modern theory of the state».

3. The Sovereign and the Decisionism

«Sovereign is he who decides on the status of exception», Carl Schmitt wrote in the introduction to his book *Political Theology* in 1922 [18]. He claims that although the sovereign stands outside the generally legitimate legal system, he yet belongs to it and that the sovereign decides on the exception. More than just a legal concept, sovereignty refers to the ruler's exclusive right to rule. So, he is also laying the fundamentals of the idea of decisionism. The foundation of decisionism as a political philosophy is the idea that an individual – the ruler or the sovereign – can legitimately break the law by making choices in specific situations. And it is exactly at this moment that the state of exception gets its shape.

4. State of Emergency vs State of Exception

During a natural disaster, civil unrest, armed war, medical pandemic or epidemic, or any other biosecurity concern (see the recent Covid19 disease), a government may declare such a state of emergency. It is a circumstance in which a government is given the authority to implement measures for the safety and protection of its inhabitants that it would ordinarily be prohibited from taking. Roman law had a notion called «justitium» that allowed the Senate to propose a final decision (*senatus consultum ultimum*) that is not subject to disagreement but aids in saving lives during times of conflict or disasters.

A state of exception, or *Ausnahmezustand* in German, is a notion that Carl Schmitt first proposed in the 1920s. It is similar to a state of emergency (in some cases in the form of martial law), but it is based on the sovereign's power to suspend the rule of law in the interest of the common good. Constitutions did not specifically identify a state of emergency until the 20th century. In the United States, for example, the suspension of habeas corpus is permitted by the Constitution, but only with the consent of Congress; the executive branch does not have this authority. A legislation specifying a state of exception should be passed, according to the French Constitution of 1848, although it did not define one. The Weimar Constitution included Article 48, enabling emergency powers, given the challenging conditions of post-World War I Germany; nevertheless, these were never formally defined, and this gave the

ground for Carl Schmitt to rise via his involvement in the 1932 Prussian coup d'état or Preußenschlag.

Schmitt, who believed that the Weimar Constitution was weak and that a strong leader was required, popularized the phrase «state of exception» in his essay «Dictatorship» in 1921 [19].

He later defined political sovereignty as, essentially, the capacity to disregard the law in his book with the title Political Theology. He argued that this was important given the unpredictable nature of emergencies. In his book State of Exception in 2005, Giorgio Agamben expands on this idea. Agamben looks at the extension of the state of exception, looking at, for instance, how the US handled captives it had taken during the «War on Terror» [20]. The Authorization for Employment of Military Force of 2001, the legal foundation for its military retaliations, gave to the US President the authority to use «appropriate force» against a list of those accused of carrying out the attacks and their allies. The state of emergency allowed for the treatment of prisoners as if they had no legal standing and were not either criminals or enemy fighters. Although he is too critical for several issues at various social and political contexts, his main contribution is that he raises concerns about an eventual instrumentalization as a long-term condition that would validate a «state of exception» as the predominant paradigm for governing in modern politics [21]. The main challenge is that whenever the state of exception is getting in action there is a two-fold problem to get tackled: firstly, the duration of it is and secondly, irrespective of its duration the return to the previous 'normality' is not possible.

5. What is happening in Ukraine after the Russian Invasion?

Following the Russian invasion of Ukraine on the 24th of February 2022, President Volodymyr Zelenskyy announced martial rule, unique circumstances, and general mobilization, which instantly thrust the idea of a state of exception into the political spotlight. In the past, as in 2015, but never to this extent, presidential decrees and the law «On the legal regime of martial law» [22] have been used to declare a similar status [21].

The current situation also made the distinction between constitutional law and international law quite vague as the vast majority of the so-called western, parliamentary, liberal democracies got involved in the current conflict for supporting militarily and politically Ukraine and international emerging powers like China and India kept initially a neutral, if not corroborating position, towards the actions of Russia.

Carl Schmitt repeatedly asserted that because both international and constitutional law are subsets of political law, courts or the judicial system in general cannot fully apply or guarantee them. Schmitt contends that the assumption of normalcy, which is the foundation of both constitutional law and international law, can only be achieved and ensured through purely political action. According to this

perspective, the legal system and its institutions are helpless to actively advance justice, peace, and order or to help resolve social or intercommunal conflict.

Only in situations where all non-trivial disagreements have been resolved by other means (and in this case it is war) can the rule of law begin to take root. Under ambiguous circumstances, Decisionism prevails [21], even by necessity.

Politics is a set of activities that are related to group decision-making or other types of power dynamics between people, such as the allocation of resources or status. One of the paradoxes that somebody is realizing by studying the work of Carl Schmitt is the reversibility of the main notions he is praising, if they are getting used out of an historical context, as an effort to frame a context for explaining a series of actions within politics [23].

From the 2 major works of Carl Schmitt («The Concept of the Political» and «Political Theology») we referred to, practically we can use the following 3 phrases as postulates in order to set a framework for an analysis, despite the fluidity of the situation:

- «Sovereign is he who decides on the state of exception».
- «The concept of the political is a presupposition of the concept of the state».
- «The precise political distinction to which political actions and intentions can be reduced is that between friend and enemy».

5.1 «Sovereign is he who decides on the state of exception»

As long as the state is under crisis, basic laws and conventions may be breached since the sovereign (in this case, the executive power of Ukraine) has precedence over all other powers.

The important thing to remember is that a return to the pre-crisis normality is never possible because, depending on how long and severe the crisis lasts, the state of exception will eventually shape the law and have an impact on how the state is formed. The rule of law as it is embodied in liberal, secular democracies can be derailed by decisionism since it holds that the decision's content is unimportant [24]. Decisionism and the rule of law represent the two poles of a continuum.

As war and not diplomacy is actually the main mean of this state of exemption, Russian troops exhibited no flexibility in the field of battle. This is partly due to an army made up of generals who are loyal to the current dictatorship and without intermediate officers who could actually assume tactical command in war. Ukraine has weathered the assault despite being outnumbered in terms of both troops and equipment, in part because it has given command to field-level operations, under the active support of the USA and NATO, but not only countries. A democratically elected government is less likely to be challenged or even overthrown by the same empowered junior officers, thanks to a positive feedback loop that permits governmental legitimacy to be devolved to the military. The relationship between an elected government and numerous military commanders will stress the equilibrium, particularly if the war lasts a long time. But it's crucial to remember

the significance of democratic legitimacy in allowing this kind of warfare and its current track record of success [25]. The state of exemption called under the 'special operation' wordplay and the years long effort to build legitimacy for it by President Vladimir Putin, with all the characteristics of an extreme decisionism and historical revisionism, is becoming an obvious threat for Russia and its current government system.

5.2 «The concept of the political is a presupposition of the concept of the state»

According to Carl Schmitt, the political action is the one and only condition which at the end forms a state.

While the Russian invasion of Ukraine continues to draw attention internationally, the crisis also raises concerns about longer-term tendencies. One aspect of the conflict narrative suggests a heightened struggle between democratic ideals and authoritarian political regimes outside of Ukraine. Many see Russia's aggression as a new, more serious threat to democratic principles [26].

Others think that the terrible war might actually reinvigorate the democratic community of states. The international community's support of Ukraine in its fight against Vladimir Putin, even personally somebody could assume, represents for many the best chance for democracy in Russia – and all of Eurasia. A struggle between liberal democracy and authoritarianism, combined with revisionism is being fought on Ukrainian soil. The Russian offensive in Ukraine could alter the course of events. Armed invasion of a democracy by a superpower serves as a warning to all democracies that autocracies pose a threat to international harmony and should not be trusted.

5.3 «The precise political distinction to which political actions and intentions can be reduced is that between friend and enemy»

This distinction is being observed in the present for the executive power of the Ukrainian State as it is also being claimed by the Russian Federation. Friends are those who abide by the executive power's actions when the country is in the state of exception.

For Ukraine, the distinction between friend and enemy is becoming necessary for defending its Homeland. The struggle to withstand a brutal assault on civilians and every aspect of social life and lifestyle transcends all other issues. Ukraine may have democratic flaws, but it is still a democracy by choice, with people progressing and fighting the post-soviet era problems of corruption, mismanagement, social cohesion and unemployment.

Russia distinguishes between two sorts of sovereignty in its cultural realm. It believes it has full Westphalian sovereignty, although Ukraine does not. Therefore, to 'defend' Ukraine or 'liberate the whole or a part of it' is to fully uphold its sovereignty. Schmitt's influence on geopolitical theorists like Aleksandr Dugin and Vadym Tsymbursky – the former toward aggressive expansionism and the latter

toward a conglomeration of regions and eventual retreat into «Island Russia» – has been the greatest of all. The core of Russian «political arsenal» is Schmitt's reduction of all politics to a friend-enemy division and the concept of the Großraum returns at the world stage [26; 27]. President Putin has praised his own regime as a «state of exception» and its continuation started already suffering. The friend-enemy dichotomy after Russian's first (partial) mobilization after World War II is also taking new dimensions as the «internal enemy» is getting defined as this part of its citizens who deny following.

Conclusion. Ukraine is undergoing the severest trial for its existence, since its existence in the current form of a unitary republic since 1991. This analysis is an effort to set a frame for a debate on its eventual future under the establishment of rule of law. The assumptions and concepts developed here are based on research, interaction and discussions with academics and policymakers.

Although from a first view, Carl Schmitt's work has many facets and is quite scattered and there is not a codification from his part of a main structure for his ideas running all the treatises we referred to, he has offered some unique, simple but not simplified and powerful notions. They have been elaborated from his part and used by others, as mentioned extensively, for a critique of parliamentary democracy and liberalism.

But, exactly because of this reason these same ideas can be used a framework for analyzing the limits of liberal democracies and make a stress test, under the state of exception. Carl Schmitt subordinates the law under the concept of the political (action) and acts as a geometrician making an intellectual construct with many degrees of freedom. Law is becoming a variable tool, beyond the settings we know for natural or positive law, via the intellectual challenges he is presenting to his interlocutors at every level. Nevertheless, the question which remains always open is if, when and why we choose to organize the politics around the friend-enemy dichotomy.

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РЕВЕРСІЯ КАРЛА ШМІТТА: НАДЗВИЧАЙНИЙ СТАН В УКРАЇНІ ПІСЛЯ 24 ЛЮТОГО 2022 Р.

Карл Шмітт вперше заговорив про ідею надзвичайного стану, або Ausnahmezustand, у 1920-х рр. Він має форму надзвичайного стану, але він побудований на повноваженнях суверена призупиняти верховенство права для загального блага. Україна проходить найважче випробування на своє виживання з тих пір, як вона стала унітарною республікою, якою вона є зараз, з 1991 р. Це дослідження є способом підготувати основу для дискусії про її майбутнє, коли буде встановлено верховенство права. «Концепція політичного» та «Політична теологія» є двома найважливішими роботами Карла Шмітта. Базуючись на трьох ключових реченнях із двох вищезазначених робіт, які можна використовувати як постулати, ми встановили основу для майбутнього аналізу України.

Ключові слова: Карл Шмітт, російсько-українська війна, надзвичайний стан, право і політика.

