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## CARL SCHMITT AND FRIEDRICH HAYEK ON DEMOCRACY: ELECTIVE AFFINITIES?

**Abstract:** The aim of the present paper is to disclose the structural affinities between Carl Schmitt and Friedrich Hayek regarding the concept of parliamentary democracy. Identifying Hayek's neoliberal thinking with Schmitt's theoretical justification of fascism would apparently be an a-historical overgeneralization. While Schmitt develops a model of absolute sovereignty relying on the sovereign's decision on the state of exception, Hayek envisages the historical realization of those conditions allowing the market competition to flourish. Schmitt's model subjugates market to an omnipotent state whereas Hayek views the latter as an engine abetting the free market competition.

A closer reading, however, could discern affinities behind the seemingly opposed models of the two thinkers.

Schmitt's model of an emergency dictatorship and Hayek's nomocracy are two different responses and attacks to the Left's attempt to construct a democratic welfare state in the Weimar Republic and postwar Europe. Schmitt advocates the concentration of political power in a totalitarian state as the sole "remedy" to the democratic contamination of liberalism induced by the politicization of civil society. Similarly, Hayek castigates any state intervention taking the form of the welfare state but endorses a powerful state entrusted with the role of securing the conditions of market competition.

**Keywords:** Liberalism, Neoliberalism, State of Exception, Democracy

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## INTRODUCTION

In contemporary political world the elective affinities between neoliberal economy and authoritarian politics have become so visible that the widely held view of the harmonious co-existence of neoliberalism and liberal democracy has been called into question. The aim of the present paper is to disclose the structural affinities between Carl Schmitt and Friedrich Hayek on the concept of parliamentary democracy. The significant ties between Schmitt and Hayek have not been effectively investigated, except for few works (Christi, 1984; Scheurman, 1997; Scheurman, 2020; Irving, 2017).

Identifying Hayek's neoliberal thinking with Schmitt's theoretical justification of fascism would apparently be an a-historical overgeneralization. While Schmitt develops a model of absolute sovereignty relying on the sovereign's decision on the state of exception, Hayek envisages the historical realization of those conditions allowing the market competition to flourish. Schmitt's model subjugates market to an omnipotent state whereas Hayek conceives of the latter as an engine abetting the free market competition.

A closer reading, however, would discern affinities behind the seemingly opposed models of the two thinkers. Both degrade democracy to a mere form devoid of content, and a technical procedure of the representatives' election via the majority principle. The preponderance Hayek attributes to the *a priori* and non-negotiable rules of a Constitution assigned with the task of securing the unhindered reproduction of market competition nullifies in fact the division of powers by weakening the legislature and reinforcing government.

I will try to argue that Hayek's forceful rejection of any form of state intervention in the economy and society, which, for him, is the hallmark both of fascism and socialism, results in its very opposite: Supporting the idea of the state as the guarantee of an unadulterated market competition, Hayek ironically abrogates his thesis on "non-intervention" in its own name. Paradoxically enough, the state itself incessantly mediates to ward off any possible intervention which takes the form of the social welfare state. If C. Schmitt's sovereignty model is

therefore, grounded upon a decisionism which gives flesh and blood to a visible and omnipotent Leviathan, F. Hayek's constitutionalization of the neoliberal principle of world market competition establishes the power of an "invisible" Leviathan, i.e., the global financial markets, which feed off the maximization of their profits, and as the pre-modern sovereign, may decide over the life and death of over-indebted and "superfluous" populations.

Taking my cue from W. Scheuerman's work on the "holy alliance" between Hayek and Schmitt, I will argue that Schmitt's model of an emergency dictatorship and Hayek's nomocracy are two different responses and attacks to the Left's attempt to construct a democratic welfare state in the Weimar Republic and postwar Europe. Schmitt advocates the concentration of political power in a totalitarian state as the sole "remedy" to the democratic contamination of liberalism induced by the politicization of civil society and the pressures from below for a historical compromise between capitalism and democracy (Christi, 1984, p. 526). Similarly, Hayek castigates any state intervention taking the form of the welfare state but endorses a powerful state entrusted with the role of securing the conditions of market competition.

I will develop my arguments in the following five sections: In the first section I will begin with Hayek's account of the market freedom as the presupposition of personal and political freedom, which is starkly juxtaposed to any form of collectivism – be it socialism or fascism. Hayek's ideal of market freedom derives its legitimacy from the ideological subterfuge of equating socialism with fascism.

The second section will focus on Hayek's view on the decline of parliamentarism in a state-planned economy outlined in his *Road to Serfdom*. The ultimate value of freedom Hayek defends can only be insured in a competitive free market which protects private property. Section three will endeavor to disclose Hayek's contradiction on the above issue. I will argue that Hayek is in fact liable to the very criticism he himself addresses to his opponents. Arguing for a plan or a legal framework of state's reconstruction upon the principles of the free market competition, Hayek distances himself from the context of

classical liberalism and at the same time, reduces the gap separating him from Schmitt.

In section 4, I examine Hayek's neoliberal reinterpretation of the rule of law, which serves as the bulwark to the fusion of state and society effected by the welfare state. For Hayek, that fusion results to a growing "para-government" consisting of "trade associations, trade unions and professionals' associations" (Hayek, 1982, p.13), which transform parties into the embodiments of narrow, particularistic interests and degenerate parliamentary deliberation into a sheer bargaining among competing interest groups. Hayek's rule of law, expressed by the abstract generality and pure rationality of rules which take no account of particular circumstances, seems at first glance to be the diametrically opposite of Schmitt's preponderance of *voluntas* over *ratio*. Yet the one-sided emphasis on the pure generality of law and the simultaneous repudiation of the democratic origins of the legislation Hayek's interpretation of the rule of law puts forward, brings Hayek closer to Schmitt. Delineating Schmitt's harsh criticism of classical liberalism which gives birth to his theory of exception, section 5 will seek to show that both Hayek's nomocracy relying on his re-interpretation of the rule of law and Schmitt's decisionism undermine democracy as the identity between rulers and ruled and serve as two seemingly oppose "remedies" to the "pathologies" of the welfare state.

#### HAYEK ON LIBERTY

In his *Road to Serfdom*, F. Hayek develops the idea of individual freedom as the freedom of the market with the aim of equating socialism, even the welfare state, with fascism, regarding both as aspects of totalitarianism. Any plan or state intervention to economic freedom as the *sine qua non* presupposition of individual and political freedom (Hayek, 2001, p. 13) paves the way to serfdom, according to the title of Hayek's famous work, which was destined to be the ideological manifesto of neoliberalism.

The two-headed 'monster' of totalitarianism, for Hayek, one head of which is socialism while the other is fascism, is devouring the

individual as the foundation of the Greek Roman world that revived in the North Italian commercial cities in Renaissance to become finally the hallmark of the Enlightenment (Hayek, 2001, p. 14-15). In totalitarianism dressed in the cloak of collectivism, the individual is no longer the final judge of the ends she sets herself but transforms herself in an appendage serving the whole (Hayek, 2001, p. 60).

Hayek resorts, on the one hand, to political liberalism's account of liberty mainly expressed by J. S. Mill, while on the other, to I. Kant's identity of freedom with morality. The concept of liberty the former propounds, encompasses not only the freedom of conscience, thought and expression but also that of "framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong" (Mill, 2003, p. 83). The Kantian tradition Hayek appropriates, refers, on the contrary, to a good will acting not by being enforced by the external law but by obeying to the internal law it itself legislates (Hayek 2001, p. 217).<sup>2</sup>

Apparently, Hayek resorts to the legacy of political liberalism and Kant for delineating the conflict of two radically different worlds: that of the "brave new world" mainly inspired by the British values of "independence, self-reliance, and the willingness to bear risks, the readiness to back one's own conviction against a majority," and that of "totalitarianism," which subjugates the individual to a thoughtless submission to what is regarded as "good" by the whole.

The main features of "totalitarianism," for Hayek, are the following: first, the omnipotence of the Party or the "leader" absorbing the private life of the citizens; second, the intense confrontation between the "we" and the "they," with the latter serving the role of a scapegoat;

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<sup>2</sup> "Responsibility, not to a superior, but to one's conscience, the awareness of a duty not exacted by compulsion, the necessity to decide which of the things one values are to be sacrificed to others, and to bear the consequences of one's own decision, are the very essence of any morals which deserve the name". (Hayek, 2001, p. 217).

third, the silencing of the minority views and the stifling of public criticism, and finally, the subjection of science not to the truth but to the interests of a class, community or the state (Hayek, 2001, p. 167).

Yet the most severe reproach Hayek throws on the so-called “architects” of the economy and the eulogists of the state as the earthly paradise is that of the end of democracy and the rule of law. The pressing question though at this point, concerns the very definition Hayek gives to democracy.

### HAYEK ON DEMOCRACY

Democracy, according to Hayek, “is essentially a means, a utilitarian device for safeguarding internal peace and individual freedom” (Hayek, 2001, p.73). If that is the case, so Hayek argues, then it is only possible in capitalism, i.e., in the competitive system based on “free disposal over private property” (Hayek, 2001, p. 73).

The centrally planned economy, by contrast, annuls freedom, abolishes democracy, and gives birth to totalitarian regimes. Hayek attempts to prove that any state intervention to the economy may lead to the decline of the parliament to a “discussion club,” a “useful safety-valve, and even more [as] a convenient medium through which the official answers to complaints are disseminated” (Hayek, 2001, p. 72). In the best case, the parliament could merely prevent some “flagrant abuses and successfully insist on particular shortcomings being remedied” (Hayek, 2001, p. 72).

The above link of a state-planned economy with the wane of democracy sounds at least paradoxical. The thesis Hayek puts forward is the following: Citizens’ consensus is merely confined in approving the control mechanism and the state intervention to the economy as the effective means of social prosperity. The agreement, in other words, concerns the very means, i.e., the state-planned economy, rather than the ends the latter is being asked to achieve. Hayek claims that the citizens’ consensus to a planned economy resembles to a commitment made by a group of people “to take a journey together without agreeing where they want to go” (Hayek, 2001, p. 65).

The problem, for Hayek, consists not in parliamentarism itself but in the contradictions inhering in the mission it is assigned with. “Every member of the legislative assembly”, Hayek writes, “might prefer some particular plan for the direction of economic activity to no plan, yet no one plan may appear preferable to a majority to no plan at all” (Hayek, 2001, p. 67).

That weakness to safeguard the parliamentary majority upon a plan in economy always seems to pave the way to dictatorships. In Hayek’s words: “Hitler did not have to destroy democracy; he merely took advantage of the decay of democracy and at the critical moment obtained the support of many to whom, though they detested Hitler, he yet seemed the only man strong enough to get things done.” (Hayek, 2001, p. 71).

If any policy based on planned economy is sustained only in the form of dictatorships, Hayek argues, then the sole guarantee of the ultimate value of freedom is private property and hence, the social inequality it brings about. To the dilemma Hayek poses between on the one hand, the priority of politics over the economy which takes the form of “totalitarianism,” giving each citizen access to goods irrespectively of her merit, and on the other, the priority of the economy over politics pertaining to parliamentary democracy and market freedom, Hayek unreservedly subscribes to the latter. Market freedom can no way be sacrificed for equality even if it gives birth to immense social inequalities. The dilemma in Hayek’s words is that between “a system where it is the will of a few persons that decides who is to get what, and one where it depends at least partly on the ability and enterprise of the people concerned and partly on unforeseeable circumstances” (Hayek, 2001, p. 106).

Inequality is paradoxically mitigated by what engenders it, i.e., by market freedom as its very birthplace. In a quote reminiscent of Kant’s assertion according to which, equality as isonomy is overcoming the privileges of pre-modern societies and allowing for the alleviation of material inequalities via “talent, industry and good fortune” (Kant, 1992, p. 75), Hayek claims that it is only within the context of a competitive system that class is no longer a fate. The risk taken in a competitive,

freemarket economy that realizes class mobility is preferred to the “tyranny” of a plan guaranteeing citizens’ security and a dignified level of subsistence. “. . . Who will deny,” Hayek asks, “that a world in which the wealthy are powerful is still a better world than one in which only the already powerful can acquire wealth?” (Hayek, 2001, p. 108)

The freedom of professional choices ensured by a competitive economy is to be preferred to the security of a stable income given to anyone (Hayek, 2001, p. 111).<sup>3</sup> After all, “while the last resort of a competitive economy is the bailiff, the ultimate sanction of a planned economy is the hangman” (Hayek, 2001, p.130).

Thus, the purpose of the neoliberal project endorsed by Hayek is to “create conditions favourable to progress rather than to ‘plan progress’” (Hayek, 2001, p. 246).

In what follows I will try to show that this is not really the case. Favoring a coherent plan with the purpose of implementing a competitive economy and society, Hayek is not only subject to the very criticism he addresses to his totalitarian opponents but seems to be closer to the principles of the authoritarian state sketched by Carl Schmitt. Finally, Hayek’s concept of a plan pertaining to the implementation of the neoliberal project becomes the breach between political liberalism and neoliberalism.

### PLANNING AGAINST PLANS AND FOR COMPETITION

In *The Road to Serfdom*, Hayek reproaches liberals for their wooden insistence on the principle of laissez-faire, which has been the hallmark of classical liberalism (Hayek, 2001, p.18). In stark opposition to liberalism, Hayek maintains that the strongest bulwark against any kind of totalitarianism would be the elaboration of a legal framework advancing the best possible development of the creative powers of competition as the “means of co-ordinating human efforts” (Hayek,

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<sup>3</sup> “It may be bad to be just a cog in an impersonal machine; but it is infinitely worse if we can no longer leave it, if we are tied to our place and to the superiors who have been chosen for us.” (Hayek, 2001, p. 111).



2001, p. 37). Paradoxically enough, planning is bound up with competition, in Hayek's words, "only by planning for competition, but not by planning against competition." (Hayek, 2001, p. 43).

Apparently, Hayek's above thesis becomes the break between classical and neo-liberalism insofar as it points to the urgent need to search for the legitimating grounds ensuring the unfettered exercise of the free market. Economy seems to generate political sovereignty. While the fundamental issue for the Physiocrats and the 18<sup>th</sup> century Political Economy was the strengthening of the state and the achievement of its ends, i.e., its growth, prosperity, and power, via government's selflimitation vis-a-vis economy, the question in the 20<sup>th</sup> century Europe concerned the very reconstruction of the state itself upon the foundation of the free market economy. If in classical liberalism the economy, albeit free and unfettered, serves the ends of the state, in neoliberalism the state serves the economy. If in classical liberalism the visible hand of the state lies behind the invisible hand of the economy to the extent that the former grants the latter a free domain for action, in neoliberalism, the market not only is supervising the state but moreover, is becoming the latter's organizing principle. If, finally, classical liberalism's regulative principle of the commercial society is the commodity exchange founded upon an ideal system of "natural liberty," the principle of neoliberal societies is that of the competition.<sup>4</sup>

Contrary to its sound declarations, the market economy is no longer conceived by Hayek's neoliberalism as the spontaneous order<sup>5</sup> but as the result of a legal order imposed by the state itself. The motivating

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<sup>4</sup> According to Hayek, the function of competition does not rely on any type of rationality; on the contrary, it is competition itself that generates rational behavior. (Hayek, 1982, p. 76).

<sup>5</sup> Hayek makes a special reference to B. Mandeville as the theorist *par excellence* of the evolution and the spontaneous genesis of the social order (Hayek, 1978b, p. 250). For some scholars, however, Hayek's spontaneous order thesis seems to serve as a value-free explanatory system, a methodological tool rather than a moral postulate (Gray, 1986, p. 119-120 and Gissurason, 1987, p. 42).

force of a fully emancipated market based on competition is paradoxically its very opposite: The constant surveillance and supervision of the state.

#### DELINEATING HAYEK'S NEOLIBERAL STATE: NOMOCRACY VERSUS DEMOCRACY

In his texts (Hayek 1978a, Hayek 2001), Hayek attempts a neoliberal translation of the principles governing the Rule of Law. The best practices and policies by which the economic legislation should be governed consist mainly in effecting the best possible knowledge and initiative of the individuals involved in the game of the market competition.

In August 1938, long before the famous Mont Pelerin meeting in 1947, a less known event, the Colloquium Walter Lippman, took place in Paris assigned with the task to formulate the main premises of neoliberalism.<sup>6</sup> According to them, the free market calls for an active surveillance policy and the state is rendered liable for the outcome of economic activity. While then, the classical liberalism had been focused on the quasi-natural function of the market, neoliberalism underlines and enforces the legal and institutional conditions of the latter. Neoliberalism seems to generate the law of a powerful – if not compulsive – state which undertakes to defend market freedom and property.

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<sup>6</sup> It was organized by the French philosopher and epistemologist Louis Rougier and among those who participated were the protagonists of the German Ordoliberalism, such as Roepke, Ruestow as well as Hayek and von Mises who would be the link between the German Ordoliberalism and the Chicago School the main representative of which was Milton Friedmann. Walter Lippman himself took also part whose book entitled *An Enquiry into the Principles of the Good Society*, Boston, Little Brown, 1937, published a year earlier, set the theoretical foundations of neoliberalism. For a detailed analysis of Walter Lippman Colloque as the birthplace of neoliberalism see Denord, 2001, pp. 9-34.

Returning to Hayek, it could be argued that the neoliberal instrumentalization of the rule of law he attempts, no longer refers to the commitment to respect human rights in general but to the establishment of an *a priori* framework imposed to the legislation of any government by the private law. Deriving its legitimacy from the sphere of private property and the principle of exchange taking place in the market, the Constitution is literally transformed into the Constitution of the market freedom (Hayek, 1978a, p. 338). That insistence on the ‘constitutionalization’ of the market freedom, i.e., on the Constitution of the economy, which would establish unnegotiable rules binding anyone in advance and resembling, for Hayek, to the Highway Code whose change on a regular basis would be unthinkable, on the one hand, indicates neoliberalism’s anti-naturalism while on the other, undermines democracy.

Regarding the former, as already noted, neoliberalism maintains that the “market order,” the orderly operation of free competition does not result spontaneously from the self-limitation of the state but from its exact opposite: from fundamental political choices aiming at protecting the market economy from abuses of power. The spontaneous order thesis of classical liberalism gives way to Hayek’s “nomocracy,” (Hayek, 1978b, p. 162) identified with the constitutionalization of the private law. Nomocracy though undermines in fact democracy. While democracy is government by the people and for the people, nomocracy refers actually to the power of the laws of the market which have been transformed into constitutional rules (Hayek, 1978a, p. 338).<sup>7</sup> While the domain democracy realizes itself is the Agora and the Parliament in modernity, that of nomocracy is the market where *homo economicus* exchanges, enters into contracts, acquires property and acts solely on the basis of competition. Nomocracy then transforms democracy into an “entrepreneurial democracy” (Dardot & Laval, 2019, p. 68), which no longer defines citizenship in terms of the legal relation to the state

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<sup>7</sup> “For [the market] to function properly, it is not sufficient that the rules of law under which it operates be general rules, but their content must be such that the market will work tolerably well” (F. A. Hayek, 1978a, p. 338).

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guaranteeing rights and enforcing obligations but as the capacity of the individual to manage her own existence. In neoliberalism the individual no longer seems to “possess” her labor power; on the contrary, she herself “is” an enterprise (Dardot & Laval, 2019, p. 68). The enterprise founded on competition is, therefore, indissolubly linked to the subject in neoliberal discourse. It is constitutive of its very identity (Foucault, 2008, p. 230). For the ordoliberal Alfred Mueller Armack, democracy as popular sovereignty is being replaced by democracy as “democracy of consumption” via competition. “From this angle”, as Dardot and Laval pointedly remark, “removing monetary policy from the government and entrusting it to an independent central bank, displays its full significance. In effect, it is a question of facilitating control of government action by citizen-consumers” (Dardot & Laval, 2019, p. 40-1, Dardot & Laval, 2014, p. 90).

Suffice it to go to the Aristotelian definition of democracy in *Politics* to realize that neoliberalism is tantamount to a process of “de-democratization.” (Brown, 2015). What characterizes democracy, Aristotle argues, is not the number of the rulers, i.e., whether the many or the few govern, but freedom and wealth. Democracy is the form of government in which the supreme power is exercised by the majority consisting in the poor and free citizens while oligarchy is the power of the rich, the nobility and the large property owners (Aristotle, 1901, p. 259).

By refusing stubbornly to view democracy as the exercise of the legislature by the people via its elected representatives, Hayek denudes democracy of its content, and reduces it to a mere technical procedure of the election of people’s representatives by the majority of the citizens. The emphasis on the form and the concomitant discrediting of the content of democracy are indicative of how Hayek views democracy: as the mere means of realizing ends – irrespectively of the content of the latter – rather than as an end in itself. To put in in Aristotelian terms, democracy for Hayek, is equivalent not to an absolute but to a relative good (Dostaler, 2001, p. 97).

In *Law, Legislation, and Liberty*, Hayek reproaches legal positivism and in particular, Hans Kelsen, for over-emphasizing the

democratic process of the formation of law to the detriment of its pure generality (Hayek, 1982, vol. 2, pp. 45-6). The interpretation of the rule of law Hayek puts forward is indicative of his intention to transcend both Schmitt's decisionism that views law as the command of the sovereign as well as legal positivism's interpretation of law as the outcome of the general will. Hayek's persistence on the generality of laws as the sole means of protecting individuals from abuses of power and guaranteeing formal equality could be viewed as a return to classical liberalism. However, Hayek takes a step forward. The rationality of the rule of law expressed in terms of abstract general rules gives birth to an order as "the product not of any rational design but of a process of evolution and natural selection, an unintended product whose function we can learn to understand, but whose present significance may be wholly different from the intention of its creators" (Hayek, 1982, vol. 2, p. 59). That "third way" as opposed to that leading to "serfdom" does overcome, in Hayek's view, "the interpretation of law as the construct of a supernatural force and its interpretation as the deliberate construct of any human mind" (Hayek, 1982, vol. 2, p. 60) but signifies the definite break both with classical liberalism and democracy by laying the ground to neoliberalism. What lies hidden behind his famous "spontaneous order argument" is Hayek's strong defense of a social hierarchy. As Cristi pointedly remarks: "Individuals are allocated places in that hierarchy by chance and circumstance, for instance by the accident of their natural birth. The sovereignty of the people can then be replaced by the sovereignty of nature" (Cristi, 1984, p. 534).

What, moreover, bears witness to the neoliberal undermining both of democracy as the rule by the people and for the people as well as the principle of the division of powers is Hayek's elaborate edifice on the exercise of government in his *Constitution of Liberty*. According to that, the three powers contained in any Constitution, i.e., the judicial, the legislative and the executive should correspond to three organs: a constitutional court, a governmental Assembly, and a legislative Assembly. The above correspondence, however, does not imply an equivalence. On the contrary, Hayek supports the superiority of the constitutional court which is not subject to any control by the

government or the legislature and yet it may judge the constitutionality of the laws. What lies apparently behind Hayek's edifice is the sound degradation of the "checks and balances" the division of power entails, and even more so, the undermining of the superiority of the legislature which should be sacrificed for the sake of the constitutionalization of the free market economy. In the end, Hayek's Constitution of Liberty is in fact fitted to the implementation of the neoliberal project signifying thereby the end of the Constitutions inherited by modernity's Revolutions and the "dethronement of politics" (Hayek, 1982, p. 128).

#### VISIBLE AND INVISIBLE LEVIATHAN: HAYEK AND SCHMITT

The identification of neoliberalism with fascism would be a rather gross overgeneralization. Neoliberalism's undermining of democracy, its discrediting of the majority principle, which is viewed as a threat to individual liberties and market freedom, and its will to assign government to the "experts" and the "technocrats" for the exercise of power brings it closer to fascism but does not make it identical with it. An examination, however, of the criticism C. Schmitt makes of parliamentarism reveals affinities between the jurist of the Third Reich and the representative of neoliberalism.

Schmitt is writing his major texts in an era marked by a legitimation crisis that is becoming the death rattle of representative democracy and the stalking horse of Nazism. In *The Crisis of Parliamentary Democracy* (Schmitt, 2000), Schmitt notes the failure of parliamentarism to fulfill its role and realize its three fundamental principles: First, that of publicity, i.e., the idea of the deliberation in the public sphere that became the Enlightenment's "light" that dissolved the "darkness" of superstition and fanaticism (Schmitt, 2000, p. 38); second, the principle of the division of powers as the effective means of checking each of them; third, the generality of law concerning its bindingness admitting of no exception. That generality as the quintessence of the Rule of Law (Schmitt, 2000, p. 42) is manifestly at variance with the arbitrary will of the person who rules.

From the first pages of his book, Schmitt presents the surrounding atmosphere of the historical conjuncture in which he is writing, which exudes wrath, indignation and disdain for the parliament's incapacity to take on the role assigned to it vis-à-vis the crucial moments of the time.<sup>8</sup> Endorsing the above views, Schmitt himself maintains that the political decisions taken are no longer the outcome of the parliamentary debate inspired by the principle of publicity; they are taken instead "behind closed doors, and what representatives of the big capitalist interest groups agree to in the smallest committees is more important for the fate of millions of people, perhaps, than any political decision" (Schmitt, 2000, p. 50).

Yet that degeneration of the parliament into an institution devoid of content is not due, according to Schmitt, to the historical conjuncture but, on the contrary, is intrinsic to its very core, the detection and conceptualization of which will be Schmitt's working hypothesis as well as the legitimation ground of his theory of exception.

Schmitt's definition of democracy as a mere organizational form without content (Schmitt, 2000, p. 24) implies its polysemy and, hence, its ambivalence. Democracy, Schmitt argues, is identified with an

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<sup>8</sup> Since 1919, Schmitt writes, «in numerous brochures and newspaper articles, the most prominent deficiencies and mistakes of the parliamentary enterprise have been pointed out: the dominance of parties, their unprofessional politics of personalities, "the government of amateurs," continuing governmental crises, the purposelessness and banality of parliamentary debate, the declining standard of parliamentary customs, the destructive methods of parliamentary obstruction, the misuse of parliamentary immunities and privileges by a radical opposition which is contemptuous of parliamentarism itself, the undignified daily order of business, the poor attendance in the House. The impression based on long familiar observations has gradually spread: that proportional representation and the list system destroy the relationship between voters and representatives, make fractions an indispensable means of government in parliament, and make the so-called representative principle (article 21 of the Reich constitution states that "the members are representatives of the whole people, they are only responsible to their own consciences and not bound to any instructions") meaningless;» (Schmitt, 2000, pp. 19-20).

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abstract general will referring to the political body's democratic self-organization. According to that, citizens are bound to obey those laws which they themselves enact or to which they consent. Schmitt turns against the general will as the theoretical cover hiding the reality of sociologically and psychologically heterogeneous masses (Schmitt, 2000, p. 25), which never give birth to a unanimous will (Schmitt, 2000, p. 26). Hence, in the historical forms of democracy, the general will is finally equivalent to the majority view, calculable by the votes of the citizens. As Schmitt writes:

“In democracy the citizen even agrees to the law that is against his own will, for the law is the General Will and, in turn, the will of the free citizen. Thus, a citizen never really gives his consent to a specific content but rather *in abstracto* to the result that evolves out of the general will, and he votes only so that the votes out of which one can know this general will can be calculated” (Schmitt, 2000, p. 26).

The dilemma in which democracy gets entrapped consists, for Schmitt, in the following: democracy is conceived of either as a form devoid of content, i.e., as the abstract identity with the general will or as an absolute good, which by being indifferent to the means of its realization, results in the oxymoron of its selfabrogation in its own name (Schmitt, 2000, pp. 28-9). In that case, democracy becomes identical with dictatorship.<sup>9</sup>

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<sup>9</sup> Schmitt's favorite example is the Bolshevik Government in Soviet Union. Viewing democracy as a “the trickery of capital's economic dominance over press and parties, that is, the lie of a falsely educated popular will” (Schmitt, 2000, p. 29), Bolshevism suspended democracy in the name of the “authentic” democracy. Moreover, Schmitt traces the theoretical legitimation of that realization of the “true” democracy via its opposite to the Enlightenment's legacy. Dictatorship, he argues, is fully justified by an unmediated and self-complacent Reason that gives birth to «the Enlightenment's educational dictatorship, philosophical Jacobinism, the tyranny of reason, a formal unity springing from the rationalist and classical spirit, the "alliance of philosophy and the sword"». (Schmitt, 2000, p. 52).



The impasses of democracy inherent in its very nature, the deep historical crisis of parliamentarism and the discredit of the idea of general will as the foundation of the 17<sup>th</sup> and the 18<sup>th</sup> century Rule of Law, which, in opposition to the particular, individual will, aimed at formulating the universality of law against the naked power of the arbitrary will of a person, paved the way to Schmitt's theory of exception. The liberal constitutional state, identified with the legal order rather than standing above it, and assigned with guarding its observance as a "nightwatchman" has been largely responsible, for Schmitt, for the chaos of the Weimar Republic. The equation of sovereignty with the normative validity of law and the concomitant rejection of the idea of the state as the source of the rightful order<sup>10</sup> gave rise to the "neutral" 19<sup>th</sup> century state, "which reigned but did not rule" up to Schmitt's contemporary state "which administers but does not rule" (Schmitt, 2005, pp. 1-2).

In opposition to Kelsen's interpretation of the personal right to command as "the intrinsic error in the theory of state sovereignty" (Schmitt, 2005, p. 29) that only the universal validity of law may correct, Schmitt defends a powerful, Hobbesian inspired Leviathan state as the sole remedy of the crisis of the Weimar Republic. To an "abstractly valid order" (Schmitt, 2005, p. 33) guaranteeing the predominance of right on the naked power, Schmitt juxtaposes the absolute sovereignty of the state epitomized in the classic formulation, *autoritas non veritas facit legem* (Schmitt, 2000, p. 43, Schmitt, 2003).

The idea of sovereignty in Hobbes and Bodin<sup>11</sup> anticipates Schmitt's famous definition in the very beginning of his *Political*

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<sup>10</sup> This is the stricture Schmitt addresses to Kelsen. Reducing the concept of sovereignty to the law rather than the state, Kelsen's normative philosophy of right, Schmitt argues, tried to resolve the problem of sovereignty by suspending it. (Schmitt, 2005, pp. 21-22).

<sup>11</sup> Schmitt's theory of sovereignty borrows both the concept of law as command Hobbes formulates in Chapter 26 of *Leviathan* for which the Legislator makes the Law without being subject to that, and Bodin's theory of the exception. According to that, the Sovereign may change or suspend the law when required

*Theology*: “Sovereign is he who decides on the exception” (Schmitt, 2005, p. 5). The power of the Sovereign to decide on the suspension of the Constitution implies his twofold position within, and at the same time, outside the legal order. That entails the integration of the state of exception into the domain of Right and consequently its identification with the model of the sovereignty of the state which is no longer assigned only with the monopoly of the legitimate use of violence – to recall Weber –but also with that of the decision. The state of exception as the suspension of law discloses the significance of the decision and the superiority of the Sovereign over the normative validity of Right. If for the Normative School, the state is identified with its Constitution, for Schmitt, the liberation of the decision from the normative yoke signifies a sovereignty model in which “to produce law it need not be based on law” (Schmitt, 2005, p. 13). Article 48 of the Weimar Constitution which grants the President of the Reich the authority to declare the state of exception is the translation of Schmitt’s theory of sovereignty in the historical context of his time. Unlike the interpretation of the Article, dictated by the principles of the liberal constitutional state, for which the state of exception is declared by the President but is still under the control of the Parliament which can demand its suspension, Schmitt supports the unlimited power the Article gives to the President of the Reich (Schmitt, 2005, pp. 11-12).

#### A PERMANENT STATE OF EXCEPTION? CONCLUDING REMARKS

To return to the central question of the present paper, it could be argued that neoliberalism’s undermining of democracy no way identifies it with fascism. The equation of neoliberalism with fascism would be an

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by a state of emergency, without a prior deliberation with the Estates or the Senate. Sovereign’s resort to the Estates or the people for taking a decision, Bodin argues, would be tantamount to the suspension of his sovereignty. (Hobbes, 1996, p. 184, Schmitt, 2005, pp. 8-9, and Schmitt, 2000, p. 43).

a-historical simplification. Yet the examination of Hayek's and Schmitt's texts reveals *loci communi*.

Schmitt and Hayek turn against Kelsen's and legal positivism's conception of the democratic origins of law formation through parliamentary procedures, and the emphasis on the compromise character of the democratic governments, both of which unavoidably result in the colonization of governments by powerful, antagonistic, strong interests that deprive the state of its political autonomy and decision-making capacity. Their target is, admittedly, the democratic welfare state. In a long endnote cited in the third volume of his *Law, Legislation, and Liberty*, Hayek admits that the "weakness of the government of an omnipotent democracy was very clearly seen by the extraordinary German student of politics, Carl Schmitt, who in the 1920s probably understood the character of the developing form of government better than most people and then regularly came down on what to me appears both morally and intellectually the wrong side" (Hayek, 1982, vol. 3., p. 194-195). Just as Schmitt characterizes the welfare state interventionist policies and commitments to protecting social rights as a "quantitative total state," Hayek similarly regards the fusion of state and society brought about by the social-democratic inspired state interventions to social spheres as the "road to serfdom."

The question that inevitably arises at this point, concerns whether a return and recovery of classical liberalism distinction between state and society could be a remedy to the "pathologies" of the interventionist policies both Schmitt and Hayek point out. That might sound at least paradoxical for a declared enemy of liberalism such as Schmitt. Yet, as Scheuerman pointedly remarks, Schmitt resorts to liberal jurisprudence's distinction between the generality of legal norms and "individual legal commands or measures explicitly directed at particular objects and persons" (Scheuerman, 2020, p. 248) in order to attack German Social democrats' and Communists' proposal of a referendum claiming the expropriation of royal property after Kaiser was forced to leave Germany during the Revolution of 1918. Apparently, Schmitt's use of the liberal account of the generality of law is purely strategic aiming solely at attacking the welfare state and the Left in the

Weimar Republic era. But when the Left is defeated at the polls, “Schmitt then can rely on his interpretation of the liberal legal statute in order to *justify* the establishment of an openly authoritarian, belligerently bourgeois interventionist state” (Scheuerman, 2020, p. 253). Ironically enough, Schmitt responds to what he diagnosed as an emergency situation and a revolutionary threat engendered by the democratic welfare state with exactly the same means: by proposing a dictatorship based on individual commands and measures he himself criticized severely when the referendum for the expropriation of the royal property was proposed. It seems then that for Schmitt, “the real question is *who* intervenes, and *whose* interests are to be served by intervention” (Scheuerman, 2020, p. 253).

Hayek also warns against the democratic adulteration of liberalism by the interventionist welfare state. Yet he does not opt for a return to the nineteenth century classical liberalism’s separation of state from society. Hayek’s institutional vision lies instead in the recovery of government’s decision making authority impeded by the pressure of the welfare state type interest blocks via the reconstruction of a state based on the free market competition model, and entrusted with the curtailment of social rights.

The priority Hayek gives to the *a priori* and non-negotiable rules of a Constitution entrusted with guarding the operation and reproduction of competition rules actually out the division of powers, by weakening the Legislature and reenforcing the Executive power. Hayek’s rejection of any state intervention to the fields of society and economy turns out into its very opposite: The conception of the state as the guarantee of the unadulterated competition of the market economy puts an end to the non-intervention thesis in its own name. Paradoxically enough, the state is incessantly intervening to avert any type of intervention dressed in the form of the welfare state. If Schmitt’s model of sovereignty is founded upon the omnipotence of the decision, reduced to an absolute, and gives birth to a visible and all-too-powerful Leviathan, the constitutionalization of the neoliberal principles by Hayek establishes the regime of the invisible, unnamable Leviathan of the global neoliberal

capitalism living off the maximization of profits, the incessant debt crises and deciding over the life and death of its disposable subjects.

The main thesis put forward by G. Agamben in his *State of Exception*, is the following: Since it is declared as a response to a crisis, the state of exception tends tacitly to become “one of the essential practices of contemporary states, including so-called democratic ones” (Agamben, 2005, p. 10). The actual suspension of the division of powers made apparent in the enfeeblement of the legislature at the cost of the over-extension of the executive power into the legislation by means of issuing decrees is today, for Agamben, the “normal” form of government. Though Agamben’s thesis may sound as an exaggeration, suffice it to go back to forms of government throughout the Structural Reforms Programs implementation period, which supposedly aimed at healing countries’ debt crises. They could be viewed as typical cases of a state of exception “decided” – to recall Schmitt – by the systemic discourse of global neoliberalism. These Programs as mechanisms of economic violence and techniques of “negotiating” the integration of national units to the imperatives of globalization brought about the unconditional surrender of the political authorities and the normative legacy of modernity. If then the Hayek-inspired neoliberalism “heals” the crisis it itself generates via crisis; if, in other words, crisis is its very condition of existence, would it be an exaggeration to claim that its political correlate may be a permanent state of exception? Polanyi argued in his *Great Transformation* that the neoliberal utopian vision could only be sustained in the form of the dystopia of authoritarianism. In his own words:

“With the liberal, the idea of freedom thus degenerates into a mere advocacy of a free enterprise – which is today reduced to a fiction by the hard reality of giant trusts and princely monopolies. This means the fullness of freedom for those whose income, leisure and security need no enhancing, and a mere pittance of liberty for the people, who may in vain attempt to make use of their democratic rights to gain shelter from the power of the owners of property. . . Planning, regulation and control, which they wanted to see banned as dangers to freedom, were then employed by the confessed enemies of freedom to abolish it altogether. Yet the victory of fascism was made

practically unavoidable by the liberals' obstruction of any reform involving planning, regulation or control" (Polanyi, 2001, p. 265).

Polanyi's conjecture may not have come true in 21<sup>st</sup> century but it should work as a warning.

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## KARL ŠMIT I FRIDRIH HAJEK O DEMOKRATIJI: IZBORNE SRODNOSTI?

**Sažetak:** Cilj ovog rada jeste da otkrije strukturalne srodnosti između Karla Šmita i Fridriha Hajeka povodom pojma parlamentarne demokratije. Poistovećivanje Hajekove neoliberalne misli sa Šmitovim teorijskim opravdavanjem fašizma očito bi predstavljalo aistorijsku preteranu generalizaciju. Dok Šmit razvija model apsolutnog suvereniteta oslanjajući se na odluku suverena o vanrednom stanju, Hajek predviđa istorijsko ostvarenje onih uslova koji dopuštaju cvetanje tržišne konkurencije. Šmitov model potčinjava tržište svemoćnoj državi, dok Hajek potonju vidi kao motor koji podržava slobodno tržišno takmičenje.

Pažljivijim čitanjem, međutim, iza naizgled suprotstavljenih modela dvojice mislilaca mogle bi se uočiti srodnosti.

Šmitov model vanredne diktature i Hajekova nomokratija jesu dva različita odgovora i napada na pokušaje levice da konstruiše demokratsku državu blagostanja u Vajmarskoj republici i posleratnoj Evropi. Šmit se zalaže za koncentraciju političke moći u totalitarnoj državi kao jedini „lek“ za demokratsku kontaminaciju liberalizma izazvanu politizacijom građanskog društva. Slično tome, Hajek prekoreva svaku državnu intervenciju prihvatajući formu države blagostanja, ali podržava moćnu državu kojoj se poverava uloga čuvara uslova tržišne konkurencije.

**Ključne reči:** liberalizam, neoliberalizam, vanredno stanje, demokratija

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