

Some Remarks on Carl Schmitt's Notion of »Exception«

Jorge E. Dotti

If metaphysics constitutes itself from the question *Why is there being rather than nothing?*, Political Theology does it from the question *Why is there order rather than chaos?*

The notion that determinates the idea of sovereignty in Carl Schmitt, express subject of his *Politische Theologie*, is that of *exception*, which acquires a central significance in all his thought. This is evident already in the proposition which opens the famous text of 1922 and anticipates its logic and conclusions with the strength of an apothegm: »Sovereign is he who decides on the exception«¹. To act as a sovereign amounts to conceptualize as »exceptional« a state of affairs that is reluctant to be constrained by the normal rules and, simultaneously, to overrule it through measures which in turn end up being exceptional *vis à vis* the rules prescribed by the legal system under normal conditions.

Sovereignty indicates a specific form of *action*, that is, of the behaviour of the human being thought of as an ethical subject, free and responsible, in precise circumstances. »Sovereign« rather than a noun is an adjective that qualifies the agent, insofar her action is irreducible to, although not contradictory with, moral and economic behaviours. The Schmittian discourse, in terms which seem antimodern but that are significant only if contextualized from modernity, makes of the exception the condition of possibility for the sovereign action and seeks to found the primacy of the political over the abstractions of rationalistic ethics and the utilitarianism of liberal political economy.

Let us analyze some connotations of this concept.

1. The first explanation to be offered is that we ought not to justify the decision on the state of exception through the appeal to a cognitive procedure, as if the decision were dependent upon a proper empirical observation, compatible with value neutrality.

The sovereign decision belongs to the universe of practice, not to the universe

¹ All the quotations are from Schmitt; Carl, *Political Theology: Four Chapters on the Concept of Sovereignty*, Schwab, G., tr. from German, MIT Press, 1988.

of knowledge, and does not get its legitimacy from its submission to a scientific opinion, but from its political function. Independently from the fact that the parts in struggle for dominating the exception and thus founding a new order might agree in judging the situation as exceptional, the judgement that counts is the one of the sovereign, that is, the judgement of he who imposes his interpretation and his way of dealing with the exception, according to a criterion which doesn't rely ongnoseological requirements.

The »objectivity« of the political is a construction of the will, and it is based on conflict. Neutral observation and epistemological impartiality suppose, on the contrary, the absence of the political, the uncontested validity of universals which remain out of the range of the conflict of opinions. The exceptional case, then, finds its justification not in a cognitive procedure of verification and corroboration of different points of view, but in the displacement of the argument towards metaphysics, because it is from metaphysics that the political acquires its essential meaning. In a few words: the question of the exceptional presupposes a philosophical or metaphysical anthropology, an image of what the human being »is« in her deepest »nature«. This image is prior to any empirical observation, given that it determinates the interpretation of any data. The antagonists on the exception face one another over the power of creating an order, and this is a conflict concerning the criteria for interpreting reality. In this sense, Schmitt teaches that politics and hermeneutics are deeply intertwined.

The fact of assuming the »nature« of human being either as an objective truth or as a fiction does not alter the conceptual nerve of this reading. More over we should not pay great attention to Schmitt's innermost position regarding this matter. What really counts is that, for the sake of his argument, the judgement on human nature is a fundamental ethical assumption for any political attitude. In other words, Schmitt takes an a priori metaphysical stand on the intrinsic capacity or incapacity of human beings regarding the possibility of a peaceful living together with their neighbours, and therefore, on the necessity of submitting or not submitting themselves to a structure of command and obedience. To assume human nature as good or evil is a basic existential choice, which cannot be ignored or postponed invoking pedagogical motives (like the enlightened belief in the power of education for overwhelming evil, or at least for keeping it at bay), or economic grounds (like the liberal and marxist belief that the system of productive and distributive relations makes up the *locus* from which the progress of mankind is determined). It's rather a choice which comes out in the metaphysical dimension which provides the legal universe with its essential meaning.

Before the dilemma, Schmitt picks out its negative side. The unavoidability of evil is the fundamental premise of the political, and every notion of authority must presuppose it in order to provide the command/obedience link with a

strictly juridical meaning in lieu of a sheer force and violence relationship. His political theology is prompted by a negative view on »human nature«, thus his polemic not only against the liberal but also against the hegelian-marxist and anarchic belief in a final conciliation of conflicts, that is, in the worldly realization of a harmonic and conciliated sociability once the mechanisms of authoritarian intervention or of alienation (through which human nature has been harnessed and distorted) have been got rid of, be it by freeing the market, be it by tumbling down the old institutions.

To Schmitt, on the contrary, such harmony is impossible because the human being suffers from an ontological shortcoming, from a metaphysical lack which constrains her to surrender her actions to a vertical structure, that is, to the sovereign authority. This is the source of the decision to which the exception has conferred its promptness. Thus the content of the exceptional decision has become secondary: »a decision is inherent in the mere existence of a governmental authority« – writes Schmitt in illustrating and sharing in De Maistre's thought – »and the decision as such is in turn valuable precisely because, as far as the most essential issues are concerned, making a decision is more important than how a decision is made« (p. 47).

Some commentators hold that Schmitt's position matches up a reactionary traditionalism. But we think it is precisely the opposite. This Schmittian formalism is the rigorous conclusion to the emptying of legitimacy due to the secularizing and secularized reason; a conclusion – so modern in its antimodernity – that shows the magnitude of Schmitt's theoretical effort in re-reading metaphysics from a formal, that is, groundless, abysmal, (*abgründig*) conception of the political.

We will retake this issue later on. Let us emphasize now that if our interpretation is right, the conceptual genesis of the Schmittian idea of the political rests on that transcendental (in Kantian sense) judgement on human being as a being hopelessly suffering from an ontological imperfection, which in terms of practical philosophy means to suffer from an unchangeable inclination towards evil. In the »natural wickedness« of human being is the matrix of the everlasting attempts to undermine any normative structure or legal system, which men cannot help making. It is from this metaphysico-ethical deficit or shortcoming of »human nature« that both the *state of exception* and the *exceptional decision* spring. Both poles of the existentially conflicting condition of men refer to a common transcendental origin: the unavoidable irruption of the exceptional into what is normally and normatively ruled.

From this standpoint, we can find in the *Politische Theologie* two main features of Schmitt's thought. First, the fascination for vanguardism, his attraction/repulsion relationship with the moments of breakdown, precisely

because they represent the condition of possibility for the creation of an order *ex novo*. Secondly, evil as the ethical expression of the human imperfection or metaphysical finitude is the Schmittian reinsurance for human *freedom*, in so far as the exception and the consequent decision represent the outburst of what is new, of what is reluctant to any predetermination. In sustaining the absolute character of the exception (be it as a state of affairs, be it as a sovereign decision), Schmitt – without thematizing it *expressis verbis* in the terms of our description – calls for an idea of liberty that, although it has its roots in the Christian tradition of free will, it nevertheless incorporates the distinctively modern marks of formalism, vanguardism and even relativism. Thus his work remains rooted in the cultural atmosphere of Europe after the First World War, and increases the controversial function against the liberal neutralization of the political.

It is about time for us to sum up what we have said so far, in order to continue the mainstream of our thought.

By referring to the metaphysical dimension, Schmitt avoids the scientificist dismantling of an existential challenge and gives a political answer to evil. The dynamics of breakdown and building of order, that the state of exception brings along, has thus a metaphysical root: that ontological fault, which comes to the light in the unavoidable tension between the rebellion against rules and universal systems (which pretend to be definitely valid only because they ignore what puts them into question, that is, the exception), on the one hand; and the also unavoidable necessity of constantly attempting rebuildings of a legal order, on the other.

2. Let us analyze now more in detail the Schmittian category of »exception«. To take into account *evil* (a metaphysical fiction) as a transcendental apriori of the political, amounts to be unable to conceptualize the exception in terms other than negative ones, because if we did use positive terms we would fall into the contradiction of offering the regularity that explains the exceptional and makes it predictable. Thus Schmitt deals with the case of exception only arguing from what the exception is *not*, from its contrast to what is normal and regular. The Schmittian exception could not be explained in terms of any of the categories with which the positive legal system describes any situation that threatens its efficacy and which it hopes to put under control through the constitutional procedures.

Rationalism, according to Schmitt, is afraid of the exception and seeks to neutralize it; in doing so it both ignores the metaphysics of evil on which the exceptional rests (and this means that rationalism sets off from a different ethical approach: the »goodness of human nature«), and also fails to see the legal bearing or intrinsecal legal condition of the exception. In order to prevent

himself from loosing ground *vis à vis* the theoretical positions he is fighting against (Kelsen's particularly), Schmitt emphasizes expressly that the couple *exception/decision* belongs to the realm of Law. Of course, he is thinking of the Law not only as a mere system of legality, but as the fundamental structure of order which carries in itself the voluntarist element that warrants efficacy to all positive norms and, in this sense, is prior even to constitutional rules (*Verfassungsgesetze*), because it gives birth to the conditions under which any legal system fulfils its task.

This intrinsically juristic *apriori* is, thus, the sovereign decision, that guarantees peace and freedom, and grounds itself on a mixture of consent and coercion, which is constantly recreated from the political. As we will see, the Law, in this sense at a time transcendental and concrete, is identified by Schmitt with the »State«.

The feature of belonging to *Recht* of both the abnormal exceptional case and the extra-normative exceptional decision that puts an end to it, is stated in the following definition: »The exception is that which cannot be subsumed; it defies general codification, but it simultaneously reveals a specifically juristic element: the decision in absolute purity« (p. 13).

But what is Schmitt thinking of when he refers to this key expression: »that which cannot be subsumed«?

First of all he alludes to the impotence of the rule before what is radically new, or, rather, to the fight between the exceptional and the law in force, so that the exceptional might free itself from the rule and thus found from itself a new legality. The unforeseen (the vanguardist moment of the exception) brings the standards of normativeness to a crisis. The legal categories turn out to be unable to grasp the meaning of what is new, the specificity of the exceptional which bursts out in the system and puts into question the hegemony of the legal patterns in force up to this point, because these legal categories cannot go further than *conceptualizing through abstract statements and identifications* with what is already foreseen and ruled.

The whole Schmittian set-up is moved by his critique of liberal rationalism, which is in turn charged with pretending to legitimate the institutions of the rule of law (*Rechtsstaat*) through the presumed reason's capacity of self-foundation. The positive legal order is thus presented as the result of an act of self-realization that reason works within itself, making itself up through its own logic as an objective and self-sufficient structure. The liberal legal system, according to Schmitt, adjusts itself always without making any reference to anything alien to the dynamics of its own development in conditions of normality. From this absolutely abstract perspective, the law is a set of rules, which has no ontological debts to anything but its own logic, in a closed

completion. This allmighty system foresees, then, all type of cases, and predictability is its main feature. It is the empire of the instrumental logic (the means/end pattern), that makes it possible for the calculation of utilities to exist: *the economic neutralizes the political*. In the realm of law thus understood, what disobeys this paradigm is ejected from the normative universe, becomes juridically meaningless and is confined within the psycho-sociological, historical or »political« dimension and, as such, alien to any juridically scientific discourse.

The first step of this Schmittian rejection of the rationalistic pretension of legal self-sufficiency and completion, is the proposal of an alternative view, that he calls – along rather too general lines – »philosophy of the concrete life«. This proposal seems to be an appropriate theoretical position in order to make sense of »that which cannot be subsumed« (p. 13). We cannot analyze in this paper the heterogenous elements of an idea so rooted in its cultural milieu (Catholic *renouveau*, Kierkegaard's existentialism, Nietzsche's philosophy, French and German vitalism, dadaism). Let us simply bring out the common feature of them all: the dismissal of the abstract and, let us say, *imperial* nature of modern *ratio*. With his critical remarks on the procedure of subsuming what is new under abstract universals, Schmitt makes his idea of »exception« tantamount to what is unforeseenly threatening, to what crashes into the system of concepts and categories already set up, in order to work out a new interpretation of the leading principles of the legal order. We read, thus, in the *Politische Theologie* that: »The exception confounds the unity and order of the rationalist scheme« (p. 14), that is, it defies the stability based on the submission of what is given (the state of affairs) to an universal that is valid just for being too vague. The ordering function of the liberal legal categories cannot make sense of the exception in its specificity, in its refusal to fall under the sway of normal – and normalizing – typologies. The exception opens the political (*not warlike*) struggle for the hermeneutical hegemony, from which depends the meaning of legal principles and standards.

The issue of »that which cannot be subsumed« is the issue of the application of a principle to a reality marked out by antagonisms, by the lack of harmony. This application is always a creative political gesture, a decision. This does not mean irrationalism at all, but only the fact that all sort of predetermination or rationalist predictability becomes useless when the exceptional case breaks through. The exception unchains the crisis of the rule and of all mechanic inference of the particular case from the universal category through a syllogistic procedure.

Therefore, the key to the conflicting interhuman dynamics does not rest on the ruled and relatively stable functioning of the normal legal paradigm, but in the

moment of breakdown of this structure through the irruption of the exceptional and the consequent decisionist answer thereto.

Schmitt defines the exceptional moment as the extreme situation where the standards of interpretation become useless and the order is brought to a crisis. The decision as an answer to the conflict cannot be based in anything but itself *qua* self-founding free action. It is the imposition of a new semantic principle that is at issue, since the universals demand to be interpreted in order to be valid for the concrete cases, and the hermeneutic code, which has been valid so far, has been turned off precisely by the exception. Schmitt is aware that in the modern world, secularized and relativistic, the conflicts and disagreements about the interpretation of ethical and legal principles cannot be worked out by an objective criterion, acknowledged by everybody as unquestionably valid, but only in a political way. The collapse of such classical universality (that is, of the objective validity of ethical principles) has experienced a continuous acceleration since the religious civil wars of the sixteenth and seventeenth centuries. The Schmittian definition of sovereignty aims at, precisely, making clear the logic of the working out of the antagonisms in an age which has made of the individual conscience the »natural« and »rational« judge of the decisive practical criteria. Under such conditions, we must appeal to authority as pure form, as a function of order *tout court*, which carries in itself – according to Schmitt – the guarantee of applicability, rather than to focus on the legitimating contents, on which discussion is never ending and, thus, inappropriate for the *tempo* of the political.

3. This leads us towards a third aspect. The form »authority«, the decision as form or function of order as such, implies the *personalization* of sovereignty, against its reduction to an impersonal and bureaucratic administrative procedure under conditions of normality. Schmitt links the personal character of sovereignty with the peculiar formalism of decision, correspondingly to an exercise of the will in the age of modern secularization and relativism.

The focusing of the problem of sovereignty on the issue of the sovereign is the reverse of the impossibility of subsuming mechanically the exceptional case under predetermined universals. Neither the exception nor the decision, with which the sovereign tries to cope with the exception itself, can be categorized under any of the rules regularly in force, because they represent the creative moment of action, which stands out of the range of predictability. And what we have presented as the problematic ontology of the exceptional (which could be defined only negatively) has its correlative side in the ambiguous or dual subjectivity of the sovereign person.

On the one hand, it is defined by a certain external position in relation to the positive legal order: the sovereign is exempted from any check or control,

since it is the source of law and only in the absence of limits it can recreate the conditions proper to the rule of law. On the other, the Schmittian sovereign keeps on being a juridical figure, it belongs intrinsically to the realm of Law, though not to the positive legal system in conditions of normality.

In our opinion, the ground for saying that the sovereign decision belongs to the juristic universe rests on its goal: to recreate the situation in which a *new juridical system* may develop itself undisturbed. And this means that peace and protection of human rights are (or should be, according to this decisionist logic) the goals of the absolute monopoly of decision, when exception must be faced and overwhelmed.

The political is, precisely, this surplus that exceeds the rule, the free decision about the exceptional.

If the goal were not to mend the rule of law, the whole argument would fall outside the realm of the political itself, since the result would be necessarily chaos and/or despotism. Therewith, be it from the conceptual point of view or from the sociological perspective, we would have to face a situation of sheer force or violence. And this waterdown of politics to a conflict between – let us say – material forces struggling for rulership (something similar to what Arendt calls *Gewalt*) is expressly rejected by Schmitt.

4. We reach now a fourth aspect. The priority of Law (including decision as its creative moment) over positive and legal norms and constitutional regulations doesn't shift to a panegyric of mere force, in Schmitt's arguments, because of the distinction between »State« and »Law«. But in this way, this latter notion acquires, then, an ambivalent meaning, which we must try to clear up.

Until now, »law« meant the general juristic structure of life in common, including two inner moments or elements: norm and decision, being the latter the transcendental condition of the former. But now, with the same word (*Recht*), Schmitt means only the set of positive rules that are efficient only in so far the context of their applicability is a normal situation. Only under regular and predictable conditions can law be put into practice.

»State«, on the other side, takes – in this step of the reasoning – the place »decision« had before. It is the location of the necessarily personalized exercise of sovereignty that brings forth the normal and regular situation, which law needs in order to be applied in accordance to constitutional procedures. The State is the basis of law, the political and cultural context within which all kind of behaviours can be legally ruled and become, thus, predictable.

Before the incapacity of the normally functioning system of rules to face the exception, the suspension of it does not amount to leave the solution of the

crisis up to a sheer conflict of forces, as if the only element of the juristic universe were normal law. Schmitt expresses his thought with the – as usually, pregnant – proposition: »The State remains, whereas law recedes«. What he is aiming at is to emphasize the existential dependence of the rule upon the decision. The addressee of the critique is modern rationalism because it forgets this *origin* and believes in the completion and self-sufficiency of reason, be it in the form of logos that realizes itself (as in Hegel or in economic liberalism), be it in the form of a »pure« and »neutral« scientific discourse about the regular functioning of the rule, as in Kelsen. Once again, Schmitt criticizes both the denial of the juridical identity of the decision (that is, of the transcendently a priori moment of Law) and the belief that we can infer analytically our concrete actions from universal premises, as though they would carry in themselves the particular deontic indication, waiting for a syllogism that makes it explicit through an objective deduction.

The exception, on the contrary, carries the question back to the nothingness of the beginning and to the free act of creation of the State (I mean: to the Hobbesian moment of the political creation *ex nihilo*). Therefore, the exceptional represents the maximum of tension between a juristic order without further qualifications, that is, the State, and a system of positive laws, or regular order based on predictability.

»Legal order« is, then, the formula that expresses the tense conjunction between the terms that define the realm of Law. The Schmittian opposition to normativism, which he blames for taking for granted the solution to the problem of how is it possible to the first rule to be efficient, consists in denying the rule the ontological capacity of giving birth to itself. On the contrary, a vital act of liberty is necessary to mediate between ideality and efficacy, that is, a decision with the performative force that an abstract statement cannot have.

Schmitt links sovereign decision and law in a multiform way. a) From a transcendental or »genealogical« point of view, their relationship is that of the condition to the conditioned; b) from a structural perspective, both moments need each other, because decision, even though the a priori condition of law, acquires its proper sense from its juridical goal: to make possible the State of law; c) finally, in their specifically political synchronization, they are opposites in everlasting antagonism. They cannot coexist pacifically side by side and each of them obeys two different patterns: exception in one case, normality in the other.

Law in its most complex meaning, *das Juristische*, turns out to be a sort of compound of elements that both complete and repulse one another at a time. However, Schmittian decisionism does not match both moments. *Ex hypothesi*,

the logic and dynamics of exception and decision are prior to those of the regular functioning of the positive legal system. The guiding thread of decisionism comes to the light in the following reflexion: by making the decision on the exceptional prior to the rule, Schmitt holds tight his justification of the mastery of the political over the economic.

5. A last comment. The ground upon which this sphere of free and creative action is built is not an ontology, as it was the case in the classical thinkers. Modernity has brought the *via antiqua* to a close, and Schmitt is far indeed from ignoring this historical result or from trying to revive the traditional theory of legitimacy. His critique to the antipolitical inner nature of modern rationalism should not make us forget that he is conscious of – and thinks within the frame given by – the lack of an ontological fundament of the political. In a nutshell: Schmitt's thought bears the very epochal signs of the modernity he is fighting against.

Schmitt's way is the one open by (his) Hobbes: before the abyssal or groundless dimension of the political, given the breakdown of the universals and the *death of God*, and facing the fact that the *bellum omnium contra omnes* (which results from the symbiosis between relativism and natural wickedness) is always threatening us, he teaches that there is no other solution than to appeal to the formalism of decision as mere function of order. Decision as a *form*, then, that unlike the abstract formalism of the rule, penetrates in the concrete nature of the situation and is able thus to put an end to the existential conflict. Provisionally, at least.

Thus Schmitt plays in a decisionist key the dividing cut *vis à vis* the horizontal and immanent nature of legal normativism and economic utilitarianism, and so he appeals to a transcendental dimension. While liberal rationalism ignores the opening to the other, the constitutive remission to otherness, which any system needs in order to get efficacy (in so far it is neither self-founding nor self-sufficient), Schmitt opens his argument towards theology and in this way completes the dependence of the juridico-political on metaphysics, already stated with the premise that »human nature is evil«.

But at this point the paradoxical modernity of the antimodern Schmitt becomes clearer. The remission to theology counts less because of the kind of metaphysical, religious or axiological content that might be given to the transcendental itself (Schmitt knows that every individual conscience is sovereign in its beliefs), than because of the discursive function it performs as rejection of any immanentism and utilitarianism. If the decision is form of order, the theological invoked by Schmitt is form of transcendence, remission to an empty alterity, justified only as an alternative cultural pattern to that of the logic of the economical. His political theology does not provide dogmatic

contents; it is just the discipline that deals with the analogies and shiftings from one »central realm« (*Zentralgebiet*) to the other: from theology to metaphysics, to ethics, to economy.

As knowledge of the analogies and the intertwist between theology and politics all along secularization, the Schmittian discipline is a »sociology of juristic concepts« (p. 44). But this presupposes having already made metaphysics the founding dimension of every theoretical and practical challenge to the mercantile functioning of the rule, because absolute horizontality, self-regulation, predictability, these are the features of the exchange of commodities.

In other words: in order that political theology may be regarded as a most peculiar branch of sociology, it must have become before the discursive realm where the *decisionist mediation* is justified. That is, decision as a type of *Vermittlung* between the universal and the particular, in opposition to both the economical and the dialectical synthesis between the immanent (whose pretended completion and self-sufficiency have been eroded by the exception) and a transcendental that is nothing but a mere *ad quem*, an empty theological referent whose content is continuously provided by political decision.