

POLITICAL ORDER, EMERGENCY POWERS AND LAW IN MACHIAVELLI AND SCHMITT

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This article critically examines Machiavelli's and Schmitt's views on emergencies. Both philosophers are known for their emphasis on the unpredictable nature of politics, which cannot be fully captured by legal norms. Thus, they both state that every political order requires an extraordinary figure who could act beyond laws during emergencies. For Machiavelli, this figure is called a dictator; for Schmitt, it is the sovereign. The author aims to show that, despite this apparent similarity, Machiavelli and Schmitt conceptualize the extraordinary figure in a significantly different manner. Machiavelli regards dictatorship merely as a legal instrument bound by the constitution. A dictator only acts to protect the existing order, which he cannot alter. On the contrary, Schmitt's conceptualization of exception suggests that the sovereign is not bound by any legal norm. Sovereignty implies that this extraordinary figure can suspend and even alter the existing legal order. The author concludes that the difference between Machiavelli's and Schmitt's diverse attitudes towards law stems from their different views on the nature of political unity. While Machiavelli perceives polity as composed of two distinct groups with incompatible interests, Schmitt defines polity as a homogenous one. For Machiavelli the survival of political unity depends on a mixed constitution and respect for laws that hold society together. On the other hand, for Schmitt, it depends on the preservation of its homogeneity.

Keywords: Machiavelli – Schmitt – Emergency – Exception – The rule of law

Introduction

The preservation of political order is one of the main concerns of political theory (Pasquino 1996). Its unpredictable nature, open to accidents and emergencies, means it requires constant re-establishment. It is essential to understand the variable, unpredictable nature of this sphere and preserve the existing political order. Thus, the preservation of political order necessitates the recognition of exceptions. Machiavelli and Schmitt are two important philosophical figures infamous for their arguments on the necessity of extraordinary figures who could act outside of laws for the survival

of the political order. Thus, they are usually depicted as notorious figures who undermined the rule of law and defended the use of extra-legal means by rulers. This paper problematizes this presupposition by making two inter-related arguments: (i) their different attitudes towards emergency powers lead to different strategies for preserving political order and (ii) this difference is closely linked with their views on the nature of political unity.

Machiavelli and Schmitt agree that the contingent, unpredictable nature of politics makes even the most powerful states vulnerable. In emergencies, states need to re-establish political order via extraordinary figures; the dictator in Machiavelli and the sovereign in Schmitt. While both rely on extraordinary leaders acting outside of ordinary laws in response to emergencies, a closer look reveals dissimilar ideas on the role of law. Machiavelli believes the best solution for creating stable order is introducing a specific institutional structure: a mixed republic that integrates different groups within society. Even if a need exists for a dictator that could act beyond law, his power is not absolute and he is bound by the constitution. By contrast, Schmitt argues that protection of order cannot be maintained within the boundaries of law which presuppose normalcy. State of exception requires an actor (a sovereign) whose power is unlimited. During the emergency, the sovereign can suspend and change laws.

As Pasquino (1996) points out in *Political Theory, Order and Threat*, different conceptualizations of political community lead to different notions of threats toward political order. In parallel with this opinion, the article demonstrates that the differences between Machiavelli and Schmitt stem from their conceptualizations of polity. Since their perceptions of the nature of political collectivity differ, their responses to threats against political order also differ. Machiavelli believes there are two constitutive parts in every polity: nobility and people. Schmitt claims polity could only be homogenous. This difference also explains how they perceive the relation between political order and the rule of law. For Machiavelli, law is the main instrument connecting different groups within society and limits the ambitions of men. Thus, adherence to law is the main course of action for securing stable political order. Conversely, Schmitt believes the survival of political unity depends on its homogeneity, its ability to differentiate between them and us. The law is not a mechanism upon which the existence of polity rests; rather, the will of this homogenous unity creates legal order. Thus, what matters is to comply with this will. The sovereign can act outside of law and even change this order if he represents the constitutive will of the homogenous people. Hence, the difference between Machiavelli and Schmitt is greater than it first seems.

1. Machiavelli and the Dictator as a Constitutional Instrument

Machiavelli's concern for having a stable government is captured in his most well-known and authoritative texts; *Prince* and *Discourses on Livy* which will be the main sources discussed in this article. At first glance these two texts seem to contradict with each other as the first one praises the immoral actions of the Prince, the latter welcomes mixed republics. However, a closer look reveals that in both texts the primary motivation of Machiavelli remained unchanged: to establish stable, long-lasting political order.¹ Yet, he recognizes every political order is destined to corrupt. Corruption is cyclical; as time passes, everything degenerates, dissolves, and falls apart. Although human affairs are always in change, "as a whole the world remains the very much of the same condition" (Machiavelli 1950, 272). In other words, "change contain(s) no principle of growth and produce(s) nothing new" (Pocock 2003, 78). Change means moving in two directions: to the end of the cycle or its beginning. *Ceteris paribus*, the tendency to move towards the end is always stronger. Thus, instability and corruption are characteristic of all states. Nothing can be done to prevent corruption; it can only be slowed by intervening in the cycle. Nobody can foresee the future or control each event, yet human beings have an effect on the order of things and, on some occasions, may even give form to it (Machiavelli 1950, 91). This requires emergency preparedness.

Emergency preparedness in Machiavelli is not only related to decisiveness, but also thinking of different possibilities, making plans in response, and being flexible with these plans. Stable political order demands flexibility and a solid institutional structure. According to Machiavelli, mixed republics meet these conditions. They are more flexible than principedoms, meaning more adaptable to various conditions (Machiavelli 1950, 442). Human beings tend to be rigid. A prince may succeed by chance if his character is needed, "(B)ut if time and circumstances change, he will be ruined because he does not change his mode of procedure" (Machiavelli 1950, 93). A republic, by contrast, includes diverse individuals with various personalities, making it more flexible. Diversity is necessary for survival; purity eventually leads to instability. For this reason, a mixed republic has the longest lifetime. Second, by integrating different groups within a polity, it provides a solid institutional structure which makes it the best-constituted polity.

Machiavelli perceives political community as an unstable structure built by two different groups: nobility and people. These two groups have different humors and desires incompatible with each other. "People desire neither to be commanded nor oppressed by the great [nobility], and the great desire to command and oppress the people" (Machiavelli 1998, 39). A good constitution should satisfy the desires of both

¹ For a similar argument, see Ingersoll (1970).

groups to a certain extent (Machiavelli 1970 16). Nobility should be given an office to command and people should acquire power to protect their freedom. However, nobility tends to extend their power in politics and undermine the law.² A good constitution, while partially satisfying the humors of both groups, should also contain this tendency of nobility. Thus, Machiavelli argues that without built-in checks against nobles and people's involvement in government, a constitution would be faulty (1970, 15 – 16). Mixed regimes which incorporate people in the government remain stable and are more advantageous for the protection of liberty because

(W)hen the people are entrusted with the care of any privilege or liberty, being less disposed to encroach upon it, they will of necessity take better care of it; and being unable to take away themselves, will prevent others from doing so (Machiavelli 1950, 122).

Inclusion of both groups provides the enactment of laws that protect liberty, yet disunion also makes republics vulnerable.

The rivalry between these groups leads to continuous, inevitable conflict that cannot allow any middle course. "This conflict can assume different forms- virtuous or degenerative" (Baccelli 2007, 395). Only in mixed constitutions can disunion take a virtuous form. Constitutions determine the allocation of power, method of recruitment to office, and procedure in law-making (Machiavelli 1950, 168). A mixed constitution combines three different powers—prince, nobility, and people—which are dominant in three good forms of government: monarchy, aristocracy, and popular government (Machiavelli 1950, 115). Through integrating these groups and giving each a share in the government, mixed republics provide an institutional structure where the ambition is checked and balanced. They provide the cooperation of all groups and secure the stability of political order. As Machiavelli explains, a mixed constitution "always stand(s) firm when everyone has a hand in it [...], when fear or ambition is not prompting any class of citizens to look for changes" (1970, 28). It does not matter how each group feels toward others; political order remains stable if each group/social class wishes to retain the constitution (McCormick 1993, 894). A mixed constitution organizes politics in such a way that, by enabling class compromise, it prevents conflict destroying political order itself. This is "neither a negation nor a mere acceptance of conflicts, but its *disciplining* and *institutionalization*" (Pasquino 1996, 27). Political conflict is inevitable. To avoid chaos, conflict must be managed

² As McCormick explains "(b)y constantly attempting to translate their economic largesse into political power, the nobles inevitably undermine equality before the law, the fair distribution of political offices and public policy conforming to the common good" (2015, 252). This is one of the main causes of corruption in a republic.

by laws and a well-established constitution. The constitutional management of conflict holds different groups together and secures political order. A mixed constitution, in this sense, forms coherence from incoherence. Thus, contrary to Schmitt's theory, as examined later, political unity does not precede the constitution. In fact, the mixed constitution sustains political unity and order. So, to survive polity needs a well-established constitution and respect for the law.

Respect for the law is essential for various reasons. First, law functions as a mechanism to control the ambitions of men and suppress their nature. "All men are bad and ever ready to display their vicious nature, whenever they may find occasion for it" (Machiavelli 1950, 117). Men act right only by force: law is the best way to ensure this. By restraining their greedy, violent instincts, "law makes men good" (Machiavelli 1950, 118). Second, law provides the predictability desperately desired by men. While time always opens new possibilities and unforeseen accidents, people still require reasonable expectations of the future. If unsatisfied, the need for security may lead to acts of violence and disorder. "For men who are kept in doubt and uncertainty as to their lives will resort to every kind of measure to secure themselves against danger and will necessarily become more audacious and inclined to violent changes" (Machiavelli 1950, 231). Law and its procedures provide that kind of certainty. Third, law conveys an opportunity to solve the conflict between different groups in a peaceful manner. For it is generally the nobility who tends to disregard the laws and cause the corruption of polity, there should be some legal measures within political order that can be used by the people to discourage these instances. One of these measures is the tribunate that will represent the people and control the insolence of nobility in their name. Another measure is fair trials and a mechanism of legal accusation which enable masses to express their grievances (Holmes 2003, 35–36). Without such legal means, "people will resort to illegal ones" (Machiavelli 1950, 131). Hence, for Machiavelli, procedures defined by law are essential to create a disciplined and well-organized republic.

Despite its positive effects, laws may be too rigid for emergencies caused by many accidents. "The possibility of emergency meant that the republic required flexibility. [...] There must be a crack in the rule of law wide enough for an extraordinary figure to step through, when the circumstances call for it" (Lazar 2006, 255). For Machiavelli, this extraordinary figure is the dictator. The dictatorship is a constitutional remedy for emergencies that delivers a legal/constitutional avenue to regulate extraordinary powers. As he argues, "in a well-ordered republic it should never be necessary to resort to extra-constitutional measures. [...] No republic will ever be perfect if she has not by law provided for everything, having a remedy for every emergency, and fixed rules for applying it" (Machiavelli 1950, 203). Hence, dictatorship

is not the negation of the rule of law. This is a critical distinction between he and Schmitt. While exception cannot be regulated by any legal norm for Schmitt, emergencies must be managed by legal means for Machiavelli. Dictatorship must be organized legally, and dictators must comply with the laws. Machiavelli states, “if the practice is once established of disregarding the laws for good objects, they will in a little while be disregarded under that pretext for evil purposes” (1950, 203). Even if suspending law by a decisive, authoritative person is compelling, Machiavelli opposes this idea in contrast to Schmitt.

Machiavelli takes the Roman dictatorship as a model, rejecting the idea that the creation of dictators led to despotism in Rome. Dictatorship is not equal to despotism and never harmful to the republic, if regulated by law (Machiavelli 1950, 202). Pre-determined rules govern the dictatorship, so he does not usurp his powers. First, as it was in Rome, the declaration of emergency and the appointment of a dictator must be made by a separate body. To avoid arbitrariness, the decision on exception cannot be left to the discretion of the dictator. Second, there should be a time limitation: “(d)ictators (must be) appointed for a limited term, and not in perpetuity” (Machiavelli 1950, 202). Third, the power of a dictator must be determined constitutionally. The dictator may suspend laws but cannot change the constitution. Machiavelli gives the Roman model as an example:

[T]heir power [...] was consisted in being able to decide alone upon the measures to be adopted for averting the pressing danger, to do whatever he deemed proper without consultation, and to inflict punishment upon anyone without appeal. But the dictator could do nothing to alter the form of government (Machiavelli 1950, 202).

In this sense, dictatorial power is always conservative and aimed at the re-establishment of the previous legal order. It cannot alter the mixed constitution or make long-lasting legal changes. These procedures prevent the abuse of dictatorial powers. Without them, unlimited power eventually corrupts individuals (Machiavelli 1950, 206). Thus, even wise and virtuous men must be controlled by law.

A well-organized republic still has a limited existence, as it is not exempt from decay. “It is impossible to establish a perpetual republic because in a thousand unforeseen ways its ruins may be accomplished” (Machiavelli 1950, 466). As explained previously, laws suppress the insolence of men and force them to be good. Yet, their influence is still limited. Laws remain useless if men are severely corrupted (Machiavelli 1950, 166). In a corrupted republic, strict obedience to law brings no good. In such a case, an exceptional figure must take the initiative to restore order.

This figure is exempted from legal order; he may act contrary to the law just to bring the government to its first principles (Lazar 2006, 252 – 253). Machiavelli recognizes that restoration of order may necessitate a tyrannical figure³ who does not hesitate to use violence and destroy existing corrupted institutions. In this sense, Machiavelli does not dismiss the possibility of using extra-legal means by one person in a dire emergency; when a state is corrupted to such a degree that no laws and institutions can contain it. This usually happens when there emerges a great inequality within society (Machiavelli 1950, 167 – 168). In such a case, the only way to restore order is to have an exceptional prudent man who with “full and absolute powers may curb upon the excessive ambition and corruption of the powerful” (Machiavelli 1950, 255). To reintroduce liberty and equality, this figure should not be bounded by the existing constitutional order, and he may even create a new one.

Machiavelli’s exceptional man to a certain extent, resembles Schmitt’s sovereign⁴. He appears during an emergency that threatens the stability of the polity. Like Schmitt’s sovereign, he acts on his own discretion without relying on any pre-existing legal norm and his power is not conservative one limited by the protection of the status quo. It is transformative as he can create a new legal/constitutional order. Despite this resemblance, a significant difference exists between Machiavelli and Schmitt. As will be explained, Schmitt praises the unlimited authority of the sovereign as the only solution for exception. In contrast, Machiavelli takes the exceptional man as only a last option. Modifying the constitution must be necessary for a corrupt state, yet it is almost impossible to achieve the desired end. As Machiavelli states, “(t)he constitution of state, when once it has been discovered to be no longer suitable, should be amended, either at all once, or by degrees each defect becomes known. [...] Both of these courses are equally impossible” (1950, 170). The first course requires a wise man who can see the defects in the early stages. If such a man exists, it will be tough for him to persuade others. In the second course when the defects become manifest to everyone, ordinary means will be insufficient; the reformation will require “extraordinary measures, such as violence and arms, and above all things to make one’s self absolute master of the state. [...] As the reformation of the political condition of a state presupposes a good man, whilst the making of himself prince of a republic by violence

³ It should be noted that Machiavelli does not use the word tyrant in a consistent manner throughout his writings. On the one hand tyrant is used to describe a ruler who exploits factional strife within polity in order to gain power and use this power to eliminate liberty, on the other hand tyrant can describe a prudent man, resembling Ancient Greek tyrants, who hold supreme power unbounded by law and use this power to restore order in a corrupt city, even if this requires violence and arm. Here, the exceptional man who employs tyrannical means stands for the latter. For more information on Machiavelli’s description of tyrants see Giorgini (2008), McCormick (2015b, 2015a).

⁴ For a similar view, see Moudarres (2015).

naturally presupposes bad one” (Machiavelli 1950, 170 – 171). So, reaching desired ends through a new constitution that is established by a tyrannical figure is almost impossible. In fact, it may be more injurious to political order. Thus, the prudent man who employs tyrannical means is only a last resort for Machiavelli which most probably will fail.

2.Schmitt and legally unbounded sovereign

Carl Schmitt, like Machiavelli, perceives the maintenance of political order as a substantial task requiring continuous effort. He is concerned with unforeseen and unexpected threats that can imperil polity. Similarly, he believes “extraordinary conditions require extraordinary measures” and argues emergencies cannot be regulated by legal norms (Schmitt 2014, 4). Thus, he adamantly criticizes liberalism for failing to preserve a stable political order. Liberalism’s deficiency relates to its inability to grasp the nature of “political” and its disregard for emergencies for the sake of law. His theory could be read as a reaction to the hegemony of liberalism and a desire to formulate an alternative prioritizing the preservation of political unity and its modern form- the national state.

The concept of “political” is the keystone of Schmitt’s theory. The boundaries of political unity and state’s role are determined with respect to the political. Schmitt assumes an autonomous sphere for the political distinguished from other domains; economics, morality, and aesthetics (Schmitt 2007, 26). Each sphere has its own defining criterion; for the political, this is the distinction between “friend and enemy” which “denotes the utmost degree of intensity of union or separation, of an association or dissociation” (Schmitt 2007, 26) The enemy is not necessarily an immoral or economic adversary; he is simply the absolute *other* (Schmitt 2007, 27). Meanwhile political unity, which is basically the collectivity of friends, is founded upon the sharing of a common feature. Hence, political unity is always a homogenous unity and “(p)eo- ple’s existence is based on its homogeneity” (Schmitt 2008, 265). The essence of this homogeneity – a religious, ethnic, or moral value – is unimportant for Schmitt. What matters is having homogeneity related to the political. This emphasis on the homogeneity of people is one of the most crucial differences between Machiavelli and Schmitt. While Machiavelli perceives polity as composed of two distinct parts with conflicting goals, Schmitt regards it as homogenous, based on commonality.

Schmitt argues that understanding the political creates a more stable polity. Only a homogenous political unity devoid of existential conflicts may survive in the long-run. Contrary to Machiavelli, who underlines the significance of cooperation of different parts, he emphasizes the preservation of homogeneity as a prerequisite for stable

polity. This distinction leads to another disparity. As stated earlier, Machiavelli perceives law as a tool to restrain vicious human nature and to build a compromise between two components of the polity. Thus, he welcomes disciplining and organizing aspects of law and formulates a theory of emergency powers within the boundaries of law. Dictatorship is a remedy to respond to an emergency by overcoming the rigidity of law, but still a legal remedy. In Machiavelli's theory, exception should not reign over legal order; it is the respect for law that sustains the survival of polity in the long-run. By contrast, in Schmitt's theory, legal order is not so pivotal since the idea of homogeneity dismisses such a role for law. When examining Schmitt's writings, we notice the centrality of the state of exception over legal norms and a pessimistic attitude towards the principle of law. As Wolin states "his interest in the exception over and against the norm results necessarily in a pronounced devaluation of normal conditions of constitutionality / legality and a corresponding overvaluation of 'emergency powers'" (1990, 397). Hence, Schmitt's understanding of exception and sovereignty is very different from Machiavelli's rule-bound dictatorship.

In *Dictatorship*, 1921, differences between Schmitt and Machiavelli seem less profound as Schmitt studies the Concept of Dictatorship through two forms: commissarial and sovereign. As an institution originating in the Roman Republic, a commissarial dictator refers to an extraordinary figure who is "able to issue orders and to execute them immediately, that is, without having to obey other legal remedies" (Schmitt 2014, 4). He may act against laws to reach that aim, yet cannot amend them. He is merely a "constitutional instrument" for the survival of political order (Schmitt 2014, 4). Thus, commissarial dictatorship is akin to the classical dictatorship advocated by Machiavelli. While praising this institution, Schmitt criticizes liberalism for lacking such an instrument. On the other hand, sovereign dictatorship is a modern phenomenon that emerged during the French Revolution. It denotes to sovereign power of the people to write a new constitution. It aims not to restore the existing legal order, but create a new one. Hence, it "does not appeal to the existing constitution, but to one that is still to come" (Schmitt 2014, 119). In this article, Schmitt remains diligent on the distinction between two forms of dictatorship: one is a constitutional instrument for emergencies, the other is the creation of a new constitutional order in the people's name. In Schmitt's later writings, the differentiation between commissarial and sovereign dictatorship disappears⁵. This can be observed in *Political Theology*, written a year after *Dictatorship*. In this book, the primacy of exception over normal legal

⁵ According to McCormick (1998) the core of this tendency can be traced back to *Dictatorship*, yet it became apparent in *Political Theology*. For Schuerman (2014, 554) the fusion between commissarial and sovereign dictatorship is seen in Schmitt's discussion of Article 48 of Weimar Constitution.

order is persistently underlined and the discussion on emergency is merged with sovereign power. Schmitt defines the state of exception as “extreme peril, a danger to the state’s existence” that cannot be resolved within legal order. By definition, exception “cannot be circumscribed factually and made to conform to a preformed law” (2005, 6). Norms presuppose a normal situation; when this situation no longer exists, adhering to laws becomes meaningless (Schwab 1989, 49). Law not only remains incapable of fully administering this situation, but also slows the process when decisive, immediate action is needed. For Schmitt, a difference exists between political order and legal order. In exception, “two elements of the concept legal order are [...] dissolved into independent notions and thereby testify to their conceptual independence” (Schmitt 2005, 12). Law is suspended, but order still exists. Exception requires the suspension of law to protect unity. Since exception lies outside of normalcy, it requires an extraordinary figure: the sovereign. Thus, Schmitt’s views on exception, to a certain extent, resemble Machiavelli’s views on emergencies. However, examining the sovereign and his powers reveals their differences.

Political Theology defines this extraordinary figure: “Sovereign is the one who decides on exception” (Schmitt 2005, 5) showing. This definition shows one of the critical distinctions between Schmitt’s sovereign and Machiavelli’s dictator. Schmitt’s sovereign not only decides how to manage the exception, but its existence. No predetermined authority decides on the exception and selects the dictator who could suspend the law, as it is in Machiavelli. For Schmitt, denoting such an authority would be futile as “a general norm [...] can never encompass a total exception” (2005, 6). Thus, the declaration of exception is left to the discretion of the sovereign. As a result, the sovereign can define the boundary between normalcy and exception with no prerequisite, implying there is no longer an ontological difference between normal and exception. The difference is epistemological; the line between them is drawn by an epistemic authority declaring the exception (Ferejohn & Pasquino 2004, 226). Thus, contrary to Machiavelli, the line between exception and normalcy is blurred. This leaves legal order under constant threat of being encroached by the sovereign, as he can suspend law whenever he deems necessary (McCormick 1998, 227). When the sovereign decides on exception, ordinary legislation is suspended; the sovereign can break free from legal constraints and take precautions to eliminate threats.

The idea of an extraordinary figure who suspends/acts outside the law during an emergency is not unique to Schmitt. As explained previously, Machiavelli’s dictator is not bound by ordinary norms; he can act outside the law once an emergency is declared. However, his competence is strictly limited to the containment of emergencies: he cannot alter the existing legal order. The competence of extraordinary figures constitutes another difference between Schmitt and Machiavelli. In Schmitt’s theory,

emergency powers and sovereign powers become identical. During exception, “the content of the jurisdictional competence [...] must necessarily be unlimited” (Schmitt 2005, 7). This suggests the sovereign can even alter the existing legal order to eliminate existential threats posed by exception. As McCormick maintains Schmitt’s “use of the term sovereign and sovereignty implies some kind of law-making and law-giving power that could change the previous order or even create a new one” (1998, 224). Alteration of legal order by the sovereign is a drastic, transformative act with enduring consequences. Leaving this competence to one person who could use his powers without any precondition and limitation leads to what McCormick calls an “exceptional absolutism,” which undermines legal and political order (1998, 227). So how does Schmitt justify his position? In *Political Theology*, the only justification is presented as the exigency of the situation. Exception requires decisive, immediate action that can only be carried out by the sovereign. However, Schmitt revises this “personalist and hard decisionist conception of sovereignty” in later writings and relies on the people’s constituent power as a substitute for sovereignty (Cristi 1998, 184). This modification provides Schmitt another strategy to defend exceptional absolutism. To comprehend this strategy, we must examine Schmitt’s constitutional theory and understanding of democracy.

In *Constitutional Theory*, Schmitt defines the constitution as a complete decision over the type and form of political unity (2008, 75). This decision precedes all legal norms; in fact, it is this decision that created the system of legality. The constitution and every legal norm become “valid by the virtue of the existing political will of that which establishes it” (Schmitt 2008, 76). Any legal norm will be invalid if it conflicts this will. Schmitt differentiates between constitutional norms and constitution, and also constitutional text and constitution-making power. The former is trivial in comparison to the latter. The validity of the constitution lies neither in any constitutional norm nor in constitutional text, but within constituent power. So who holds constituent power? In this book, acknowledging the hegemony of popular sovereignty since the French Revolution, Schmitt recognizes the people as legitimate actors holding sovereign constituent power. In a democracy, the people’s collective will establishes the constitution (Schmitt 2008, 77). If so, on what grounds can an exceptional figure (the sovereign) suspend/violate the constitution or even create new legal order during exception? The answer lies in Schmitt’s understanding of democracy.

In *Constitutional Theory*, Schmitt establishes a theory of democracy alternative to liberal democracy. For him, “democracy is a state form that corresponds to the principle of identity (in particular the self-identity of concretely present people as a political unity)” (2008, 255). Thus, democracy requires first the self-identity of people as a collective unity capable of distinguishing between friend and enemy. The

people must perceive themselves as a homogenous collectivity sharing a substantial similarity. Second, democracy necessitates identity between the ruler and the ruled. In a democratic state, the ruler does not rule because of any distinct qualities but because of authorization by the people. Thus, “those who govern are rendered distinct *by* the people, not *from* the people” (Schmitt 2008, 266). There is no qualitative difference between the ruler and the ruled, as both share a substantial similarity.

In a democracy, sovereignty or constituent power belongs to the people that precede any constitution (Schmitt 2008, 268). Yet people are incapable of directly using this power. Constitutive power “could only be unified and given active form [...] through the substantial unity of a representative sovereign figure” (Kelly 2016, 237). To actualize this power, people must authorize an agent to use this power in their name. So, Schmitt relates popular sovereignty with the representation of collective will of homogenous people.⁶ Thus, the question “who represents the collective will of people?” becomes irrelevant. The critical issue is the representation of political unity’s will, not the determination of representatives. As Schmitt states:

If for practical and technical reasons the representatives of the people can decide instead of the people themselves, then certainly a single trusted representative could also decide in the name of the same people. Without ceasing to be democratic, the argument would justify an antiparliamentary Caesarism (1988, 34).

In other words, if he represents people’s collective will, the existence of a popularly elected dictator is compatible with democracy. Indeed, it might be more fitting as he can act more decisively during exception. While using this power in the people’s name, he is not bound by any constitutional norm but the people’s constitutive will. Thus, Schmitt justifies “dictatorial action on basis of pre-constitutional sovereign will of the (homogenous) people” (McCormick 1998, 232). Without impinging the people’s constitutive will, the sovereign can create or alter constitutional norms. Contrary to Machiavelli, who regards the creation of legal order by an exceptional man as futile and likely to undermine political unity, Schmitt has no such concerns. “The constitution may in fact be changed as long as the preconstitutional will is not” (McCormick 1998, 232). This is not a problem for Schmitt since the constitution does not “in itself bear the continuity of the political unity” (2008, 141). The continuity of political unity lies in the people’s homogenous identity. This unity must be protected during the state of exception, even if it means violating the constitution and transforming legal order.

⁶ For a similar view see Cristi (1998, 192).

Conclusion

Machiavelli and Schmitt both acknowledge that the preservation of political order requires continuous effort. Every political order faces unforeseen threats undermining this order; the recognition of this unpredictable nature is the first step in dealing with emergencies. Both writers agree that strict adherence to norms in such cases leads to the destruction of the polity. Both claim a need for a political actor that could suspend the law and re-establish order. However, they have different opinions on the nature and limits of emergency powers and the role of laws in protecting political order.

For Schmitt, exception involves an existential threat for the polity which is impossible to foresee. It cannot be managed in advance by any legal or constitutional means and requires decisive, urgent action. The sovereign, by declaring exception, suspends the law to protect political unity and re-establish order. His power is unlimited. To avert existential threats, he not only acts outside the law, but creates laws and transforms legal order. Conversely, Machiavelli's approach to emergencies is quite different. Even though he recognizes that in a deeply corrupted state transformative and legally unbounded actions of a prudent man could be the only solution to restore the political order, he regards this as a last resort that most probably fail. Hence his first and foremost solution for handling emergencies is a dictatorship. As a constitutional mechanism, the power of the dictator is strictly regulated by laws. The decision on exception does not belong to him. Although he might act outside laws to control the emergency, he cannot alter the existing legal order. His power is conservative, not transformative. It is a temporary, legal solution, not an alternative to legal order.

This article shows that the fundamental divergence between the two thinkers lies in their conception of political unity. Indeed, the questions "What should be done when political order is in danger" and "How should law be applied when political order is in danger" are closely related to questions about the nature of political unity. For Machiavelli, a polity is composed of two constitutive parts with incompatible goals. Disunion, if not handled via laws, eventually imperils its survival. By creating a class compromise, only a mixed constitution can slow this trend. The constitutional management of conflicts holds different groups together. Mere force can only provide stability for a limited time; the endurance of any polity depends on compromise secured by law. *Only* when laws remain too rigid to manage emergencies appropriately, the appointment of a dictator who can suspend laws is necessary. However, this does not mean that disregarding laws to protect order can be a recurrent practice. Disregarding laws eventually engenders violence and disorder. This inevitably leads to a deeply corrupted state that is unlikely to be restored even with a prudent man having tyrannical powers. Conversely, Schmitt disregards the role of laws in the stability of polit-

ical order as, for him, the survival of a political community does not depend on cohesion sustained by laws. The homogenous essence, the identity of people, holds political unity together. Political unity precedes any legal norm; the constitution presupposes the existence of political unity since it is created by the constitutive will of homogenous people. Although the constituent power belongs to them, “the people is not an organized subject of decision” (Cristi 1998, 191). This power can be actualized through a political actor authorized by the people. As long as there is an identity between this actor and the people, it may act on their behalf and change the legal order in their name.

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