The trails of Hobbes and Schmitt: Current restrictions of political rights

MMag. Stephan Vesco, LL.M., stephan.vesco@univie.ac.at
(University of Vienna, Faculty of Law, Department of Legal Philosophy)

In this short study I will first give a brief outline of the Hobbesian and Schmittian doctrines of State and their compatibility with individual, mainly political, rights. In the next step I will outline recent restrictions of fundamental political rights in Turkey, France and Austria and inquire whether and to which extent Hobbesian and/or Schmittian concepts may stand behind them. I thus want to ask whether we can observe legalistic steps pointing towards the resurgence of such concepts. In the last step of my study I want to propose a reading of these developments which sees economics as the new sovereign.

The Hobbesian conception: Obedience for the purpose of protection

First, I want to refer to the Hobbesian idea of State sovereignty as outlined in his *Leviathan* (1651). To conceive of sovereignty Hobbes must conduct a thought experiment explaining and legitimating the State’s holistic powers. The first step of this experiment is his conception of a State of Nature, as a pre-state condition. In this natural condition people are driven by destructive forces of desire (*competition, glory*) and fear (*diffidence*)\(^1\). Everybody is his/her own lawmaker and enforcer. There are no boundaries to his/her desires. He or she has a right to everything. Because everyone else has a right of everything, it shortly collapses into a right to nothing. The war of everyone against everyone occurs (*bellum omnium contra omnes*).

This war necessitates the enactment of a social contract (*Covenant*). The social contract is the second step in Hobbes’ thought experiment. In this second step the people enter into an agreement with each other. The content of this agreement is the reciprocal renunciation to their rights and powers. All power is

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transferred to a third party: the sovereign ruler. Or rather, he/she is the only person (or collective) left in the State of Nature having the full rights connected with it. This ruler is not party of the agreement and thus not bound by law or any obligations. To be sure, his only obligation is to ensure peace and order. But there is no corresponding right of the people. They do not have a right of resistance, even if the State breaches their “rights”.

Protection by the State and absolute obedience to the State do go hand in hand. Protection necessitates obedience. Consequently, Hobbes is contrary to any associations or assemblies within the State. They are deemed unnecessary to ensure peace and tend to be against the law\(^2\). The front page of the *Leviathan* illustrates this: All people are equally united within one only union: the State as represented by its sovereign ruler. Hobbes invokes even harsher pictures when he compares associations within the State with “wormes in the entrayles of a naturall man”.\(^3\) Political speakers and activists are compared with a smaller of version of such worms.\(^4\)

However, there are certain caveats within the Hobbesian conception: First, men shall be allowed to act according to their own reason and for their own profit in all matters not regulated by the law (as long as they do not harm the State).\(^5\) Secondly, they ultimately cannot be stripped off their right to self-preservation, should they face death or starvation: “No man is obliged (when the Protection of the Law faileth) not to protect himself, by the best means he can”.\(^6\) Thirdly – and most importantly for the purpose of this study – whilst Hobbes allows for compelling subjects to a “lip service” with regards to a certain faith prescribed by the Sovereign, he puts inner convictions outside of the State’s coercive grasp.\(^7\) In a similar fashion, the mere imagination of a crime without the intent to actually commit it shall go unpunished.\(^8\)

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\(^3\) Thomas Hobbes, *Leviathan*, at 241.
\(^4\) Cf. Ibid.
The Schmittian conception: Obedience for the purpose of politics

Carl Schmitt wrote an interpretation of the Leviathan in 1938. For him, the mentioned caveats, in particular the third one, in which he sees the roots of freedoms of conscience and faith, do initiate the corrosion of the State from its inside. The reluctance to control the subjects’ inner minds would imply the segregation of the private and public. Such is the birth of the liberal State: It results from and is justified by abandoning the cognition of substantial truths.9 With the separation of the private from the public, the private begins to overcome the public, the “indirect forces” grab hold of the sovereign.10 Schmitt indeed compares the modern State to a wonderful machine which is hijacked by private forces.11 One cannot embezzle the anti-Semitic charging of such forces in Schmitt’s 1938 Der Leviathan.

In his 1932 essay Der Begriff des Politischen such references are less explicit. His thinking nonetheless points into the same direction: True Politics would require a unified entity of subjects, impenetrable for strangers.12 Such entity would necessitate the duality of friend and fiend. Accordingly, there is no politics without a fiend and without the possibility to fight him.13 For true politics, a domain which trumps all others and controls society is needed. It necessitates pluralism on its outside (with regards to other states as potentials fiends), while precluding it in its inside. This would suggest the penetration of all societal sectors by one direct force and exclude the segregation of private domains.

However, it is not needed that this force permanently shows itself. It only needs to have the means to eventually determine a fiend and initiate war. This becomes effective in the case of emergency.14 Such cases lead us to another notion of Schmitt’s thinking: The concept of exception developed in his Politische Theologie (1922). In the case of exception even the modern State is

10 Cf. Schmitt, Der Leviathan, at 94.
11 Cf. Schmitt, Der Leviathan, at 118.
12 Cf. Schmitt, Der Leviathan, at 47.
13 Cf. Schmitt, Der Leviathan, at 45.
14 Cf. Schmitt, Der Leviathan, at 39, 45.
furnished with boundless powers (Schmitt was specifically referring to the emergency powers of the Weimar Constitution). Accordingly, exceptionalism would only reveal what is the case all along: That behind the abstract Rechtsnorm there is always the controlling and deciding will of a political power which has the final say. The creation and definition of a normal order as such implies boundless political authority.\textsuperscript{15}

These notions display the Schmittian concept of decisionism. Accordingly, the significant criterion for the presence of a sovereign state would be the possibility for one force to determine and thereby control the order of society as a whole. The content of decision as such would not matter much. In his later Über die drei Arten des rechtswissenschaftlichen Denkens (1934) he seemed to abandon such position embracing instead the konkretes Ordnungsdenken. Correspondingly, legal thought and modelling should base itself on society’s concrete order and be guided by the values enshrined in its institutions (such as the family).\textsuperscript{16}

The case of Turkey

The Turkish Constitution of 1982 allows for the implementation of a State of Emergency under three different provisions. The pertinent provision for this study is Article 120. It allows for the implementation of a SoE in cases of widespread acts of violence aimed at the destruction of the democratic order or serious deterioration of public order by such violence. In July 2016, after the alleged coup d’état by parts of the Turkish military, the State of Emergency was declared.

With regards to political rights it most importantly implemented a curtailing of the right to assembly, banned the printing of newspapers and decreed the examination of all sorts of writing as well as the censorship of plays and movies. Furthermore, it allows for seizing control of businesses in certain “vital” sectors (foodstuff, energy, transportation, etc.).\textsuperscript{17}

\textsuperscript{15} Cf. Carl Schmitt, Politische Theologie (Duncker & Humblot, 2004), 19.
\textsuperscript{16} Cf. Carl Schmitt, Über die drei Arten des rechtswissenschaftlichen Denkens (Hanseatische Verlagsanstalt, 1934), 20.
Turkey is part of the European Convention of Human Rights guaranteeing, amongst other rights, the freedom of expression (Art 10) and the freedom of assembly and association (Art 11). Art 15 allows for the derogation from the ECHR’s obligations in cases of public emergencies. Its paragraph 1 reads as follows:

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

Thus, this paragraph establishes a double threshold: The SoE must exist; and the measures implemented must be proportionate. A third threshold is provided by the following paragraph 2 listing certain rights which can never be derogated. Amongst those are the right to life and the prohibition of torture, whereas political rights are not included. It is important to note that, even when Art 15 is invoked, the ECHR as such remains in force and that a State’s citizens can still file complaints at the European Court of Human Rights with regards to the violation of rights. The ECtHR will then examine whether the thresholds for derogations of rights are met.

Whilst a decision of the ECtHR is still outstanding, the Turkish SoE has been extended several times and remains yet in force. Meanwhile, its legal basis has changed. This April’s constitutional referendum, approving what is basically the implementation of a presidential republic, has, inter alia, led to a substantial amendment of Art 119. While the provision previously assigned the competence to the declaration of the SoE to the Council of Ministers, it now is relocated to the President. To be sure, his declaration needs the approval of the Parliament. However, once the SoE is in force, the President may issue decrees having the force of law extending to citizens’ private and political rights and duties.\textsuperscript{18}

\textsuperscript{18} Cf. https://politicsandlawinturkey.wordpress.com/publications/contributions-of-fellows/2017-amendment-proposal-to-the-turkish-constitution/
Interestingly, the Turkish referendum seems to have something in common with the Hobbesian notion of social contract: Essentially, Turkish citizens passed a resolution through which they transferred extensive powers to a sovereign ruler and allowed for the reciprocal curtailing of their rights. This, at least, would be in accordance with the understanding of the referendum by the Turkish government. However, the devolution of the formative power regarding private and political rights to the sole hands of the President in a SoE may point further, towards a Schmittian conception of sovereignty as permeating the whole of society, precluding the existence of private domains.

The course of action of the Turkish government in fact puts at display a further Schmittian notion: his idea of SoE as the domain where the true character of law as sheer political force reveals itself. This becomes uncompromisingly clear with regards to the first threshold of Art 15 ECHR: the factual existence of a SoE. Its definition is at the mere decision of the State sovereign. Even if remedy might be taken to the ECtHR, its decision will only arrive with a significant time lag and might in the end be ignored by the respective State. The same applies to the implementation of the proportionality criterion. While the law tries to grasp hold even of SoE situations through normative concepts, the rescindment and impuissance of the normative order when faced with brute power becomes evident.

The Case of France

On 13 November 2015, after terrorist attacks in the center of Paris, France declared a SoE. The legal basis was furnished by a 1955 law pursuant to SoEs decreed on the background of the Algerian war. The extraordinary powers assigned to the President thereby were embedded in France’s 1958 constitution (Art 16 and 36).

On 21 November 2015 France passed a bill extending the SoE and revising the 1955 law. Whilst parliamentary oversight was added and press control was removed, most provisions significantly enhanced the State’s counterterrorism
powers. Most importantly for this study, the freedom of association was restricted. The government may now disband groups and associations that “take part in committing acts that present serious harm to the public order or who facilitate such acts.” Furthermore, internet control powers were expanded.\(^{19}\)

Human rights groups expressed concerns that the new French SoE bill violates the freedom of expression (Art 10 ECHR) and the freedom of assembly and association (Art 11 ECHR) amongst others. However, France (as Turkey) referred to Art 15 ECHR to justify the restrictions to these rights.

There were further plans for constitutional amendments advanced by then President Hollande in the beginning of 2016. The first proposed amendment would enshrine the amended SoE bill in the Constitution to secure its constitutionality. The second would establish the possibility to revoke French citizenship for dual nationals born in France who have been convicted of terrorism (under Art 25 of the French civil code the State can already revoke French citizenship for naturalized Frenchmen benefitting from another nationality). Both amendments were not implemented since the required majority of three-fifths was not met.\(^{20}\)

While less severe than the Turkish developments, we can find Hobbesian notions also in the French SoE. Especially the Hobbesian refusal of groups and assemblies within the State can be retrieved. Accordingly, only a homogenous state, which is composed by atomistic individuals and denies any other form of association besides the state, can be kept under control to guarantee order and peace. If not yet leading to its full realization, the restriction of the freedom of association is nonetheless based on this notion.

The link to Schmitt can again be found in the SoE and the State’s exclusive authority with regards to its declaration and implementation, leading to the emergence of what is always at work behind the normative order: political power. This has already been elaborated with regards to Turkey. What is special here, is the French failure to put the new SoE bill on a solid constitutional footing. Even if


the pertinent constitutional amendments did fail, the SoE law remains in force. This further corroborates that while normative legality tries to include all thinkable situations within its realm, even crises and SoE’s, it does not matter much if it fails to do so. The State then plainly commands past the Constitution.

The possibility to revoke citizenship from born Frenchmen, were it implemented, would have made evident another fact: That behind legal subjectivity there is the right to have rights (Hannah Arendt). Without this right a legal subject does not exist. The disposing over such right again is at the mere discretion and decision of the Sovereign. With the stripping of such a person legally absconds and lives on as a homo sacer (Giorgio Agamben).

The Case of Austria

In Austria, there is no SoE implemented in present. However, there are some recent developments regarding the restriction to political rights.

For instance, the new Austrian assembly law allows for the prohibition of assemblies, should the competent authorities determine a mere conflict with State’s interests in foreign policy.\(^\text{21}\) Such restrictions are just a first step. The representatives of commerce and business call for further constraints to protect the interest in sales of city shops. While these developments so far may appear as mere pierces into still existing basic safeguards, they point into a certain direction: Whereas the ECHR allows for the weighing of the freedom of assembly with public interest, this weighing is qualified by the criterion of necessity in a democratic society (cf. Art 11 para 2). It is no coincidence, that in the new Austrian law such criterion is omitted. What’s more, the new provision will – regardless of the intentions of the legislator – develop an independent existence in the hands of the law-applying authorities and, by its general stipulation, lends itself for extensive application to the detriment of the freedom of assembly. In

such fashion, the pertinent restrictions might well result in a truly Hobbesian repression of the right of assembly ceded to the sovereign’s arbitrary discretion.

Furthermore, in Austria, a new penal provision will soon come into force, criminalizing the Founding of and the Participation in groups whose ideology fundamentally questions the state (“Staatsfeindliche Bewegung”). Again, this provision might have had an actual and understandable impetus in the so-called Reichsbürgerbewegung: “Reich Citizens’ movement”, sectarian networks of conspiracy theorists not recognizing the authority of the state. However, legal experts argued the existing laws might have sufficed to control and sanction the actual threats coming off such movements. The criminalization of ideology as such – in contrast to modern–liberal penal law just sanctioning acts – puts into effect the notion of so-called Gesinnungsstrafrecht: penal law sanctioning political and moral convictions. It gives considerable leeway to the courts which might be tempted to its extensive application (such had been the case with similar provisions in the past, cf. the so–called “mafia provision”). It might as such be a further push into a direction where unwelcome convictions as such are to be controlled and sanctioned by the State and point beyond Hobbes towards a Schmittian statist conception.

So what?

It could be argued that the Hobbesian/Schmittian grasp on the described phenomena might be correct, but it is justified by the actual situations. One could ask: What else should a State which finds himself under eminent threat do than defend himself by determined strength? And isn’t it to be expected that, once the threat recedes, the normative order will be restored again?

The first problem we face with such trivialization again is to be encountered in Schmitt’s thought: The definition of threats allowing for the implementation of a SoE is at the discretion of the State. An SoE might be at hand objectively or it might not. The fact that it can be determined and implemented puts at display

that we still are in the age of single sovereignty, i.e. *politics* in the Schmittian sense. This, at all events, seems to be evident in the case of Turkey.

But the resurgence of Schmittian politics goes beyond Turkey. Also in France the implementation of SoE is now in force for almost two years. It has not left the functioning of the legal system unaffected. According to Amnesty International, between November 2015 and 5 May 2015 there were 155 decrees issued prohibiting public assemblies. Amongst those were demonstrations at the COP21 meeting in Paris where the Paris Agreement was negotiated and protests against the flexibilization of the labour law. A couple in the Dordogne were subjected to a house warrant because they were suspected to have taken part in a demonstration against an airport project three years earlier. In Austria, as already pointed out, similar developments might set in on basis of the new provisions outlined.

Thus, we can witness an extension of SoE’s and Schmittian politics in three ways: *Temporally*, since the SoE’s in Turkey and France have been continuously prolonged. They are in force now for one (Turkey) or almost two years (France) respectively; *spatially*, since you can witness the invocation of SoE’s and the curtailing of political rights all around the globe; and *substantially*, since once you allow for the emergence of the State out of the normative order and the suspension of political rights, an intrinsic dynamic is unleashed which leads to the gradual penetration of society by a singular force. We are still however just at the surface of a political phenomenon. I now will attempt to take into account its present context and understand its deeper roots.

**Could it be economics?**

The reigning order of our times seems to be commerce. Could we combine such assumption with the concepts outlined? And to go further, could current restrictions be (partially) explained with the omnipotence of economics? An

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economic order that might be grasped with a Hobbesian/Schmittian notion of sovereignty?

For instance, it can be argued that in Hobbes’ thought experiment the actual hypothesis concerns the enactment of a social contract. By contrast the description of the human traits in the state of nature would not have been an experiment, but a description of the actual features of the English society of the 17th century: A basically fully fledged market society where both goods and labour are traded “freely” between their owners. The conflictuality of the Hobbesian nature state calling for a strong sovereign could thus be explained not only on the background of the religious wars, but also by the ascent of the market society.

While in Hobbes the starting point could be market penetration and its effects, in Schmittian thought it could potentially be the solution. Put Der Leviathan and its rabid condemnation of “indirect” economic forces aside and look at Der Begriff des Politischen. Schmitt states that what is needed for sovereignty (and true politics) is the factual decision-making in case of emergency by a singular force. He repeatedly elaborates that the substance of this force does not matter. The assertiveness of a singular power as such suffices, be it economical, cultural or religious. Towards the end of the essay he even states that economics has become politics and thereby our “destiny” (Schicksal).

A strong argument can be made that a “free” market society as such demands a strong state to regulate the conflicts emanating from it, suppress potential insurrections by those disadvantaged, and, most of all, enforce its ideology, justifying social inequality. However, after world war two, inequalities – at least in the western world – receded, affluency spread to the middle and parts of the working class. The Welfare State, as a historic compromise between the working class and the bourgeoisie, enabled these developments. Under such conditions the State as a domain of Schmittian politics could recede into a relative background and place itself at the side of economics, culture and religion. As

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26 Cf. Schmitt, Der Begriff des Politischen, at 77.
such it would have the role of a *primus inter pares* making sure the other systems kept running, but not showing itself as an omnipotent force. Modern legal positivism was the corresponding theoretical concept to understand law as an independent domain amongst others. An extensive theory conceiving of society as differentiated (*ausdifferenzierte*) conglomeration of independent subsystems was later presented by Niklas Luhman. The apparent Pluralism conceived by such theories meant a shift of the conflictual character of *politics* into the different societal domains. The notion of fight (against a fiend) transformed itself into *competition* in the economic domain and into *discussion* in the cultural domain.²⁷

However, might such a balance of different subsystems actually ever have been the case, it is definitely not anymore. Over the last decades, with the process of globalization, the economic system gradually established itself as the worldwide reigning power. To put it into Schmittian terminology, it became the new *politics*. As such it implicitly created its inside and outside, its subjects and fiends. Its subjects are those with enough material and symbolic capital to be addressed by its demands (“flexibility”, “mobility”, “innovation”) and fulfill them. Its fiends are the have-nots and want-nots. Competition pushed to its extremes under *laissez-faire* conditions transformed itself into hostility. It is no wonder that the Bataclan terrorists mostly were no sternly pious Qur’an fanatics, but societal outsiders, often living a rather hedonistic and passive lifestyle. Their radicalization occurred within a startlingly short timespan.

While the specter of Marx was haunting even the triumphal years of (neo)liberalism after 1989, it now seems to return in full flesh. The “end of history” (Fukuyama), which could be read as the end of politics in Schmittian notion, is definitely to be revoked. Politics return as economics. The political fiend returns as religious terrorist, *Reichsbürger* or military putschist. Its concrete *gestalt* does not matter so much. It is a disguise of what an all-pervading (“fateful”²⁸) force needs to create on its margins to ensure its omnipotence: a political fiend. A modern capitalist State needs its fiend, but would rather hide it.

²⁷ Cf. Schmitt, Der Begriff des Politischen, at 70 f.
²⁸ Cf. Carl Schmitt, Der Begriff des Politischen, at 76.
Thus, the fiends figure in an eminent role. They reveal the system as what it is: a market Stalinism or authoritarian (economic) liberalism (Herman Heller). Thus, the usage of emergency powers in France to suppress protests against neoliberal economics and the flexibilization of labour law. Thus, the possibility provided to the Austrian State by the new assembly law to prohibit assemblies should there be a mere conflict with the State’s interests in foreign policy (be it of pure monetary nature). Thus, the possibility furnished by the Turkish SoE bill to seize control of businesses.