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CARL SCHMITT
LAW AS POLITICS, IDEOLOGY AND STRATEGIC MYTH

MICHAEL G. SALTER

NOMIKOI
CRITICAL LEGAL THINKERS

ROUTLEDGE

Carl Schmitt

Law as Politics, Ideology and Strategic Myth

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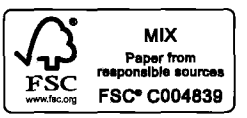

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For reasons of polemic, but also in a genuine effort to understand, Europeans now often view American policies and attitudes through Carl Schmitt's writings during the interwar era and above all in his 1950 *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum.* Whatever Schmitt's political choices, readers have been struck by the expressive force of his critiques when applied to contemporary events: the war on terrorism as a morally-inspired and unlimited 'total war,' in which the adversary is not treated as a 'just enemy'; the obsoleteness of traditional rules of warfare and recourse to novel technologies – especially air power – so as to conduct discriminatory wars against adversaries viewed as outlaws and enemies of humanity; Camp Delta in the Guantánamo naval base with its still over 500 prisoners from the Afghanistan war as a normless exception that reveals the nature of the new international political order.

Martti Koskenniemi
'International Law as Political Theology:
How to Read *Nomos der Erde?*'
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Preface

Many people have assisted me with this project. In particular, I would like to thank my colleagues Susan Twist, Bogusia Puchalska, Ian Turner, Jo Helsby and Barbara Korth for regular and stimulating discussions of matters Schmittian. Anthony Carty, David Pan and Peter Stirk have provided valuable insights. I would also like to thank Colin Perrin from Routledge for his patience and support over many years in relation to both this work and also my earlier book *US Intelligence, Nazi War Crimes and Selective Prosecution at Nuremberg*, 2007. It is, however, dedicated with love to Jona Jocson, who – by being herself – has shown me what really matters.

Contents

Introduction

Up against Carl Schmitt

Unsurprisingly, this book addresses the five topics included in its title and the relationship between them: Carl Schmitt, law, politics, ideology and strategic myth, with the latter forming a major theme. It does so in relation to a number of issues relevant to both domestic and international law. This introduction provides provisional clarifications of key terms and expressions. It then discusses the rationale for my approach to Schmitt's writings, partly through a confrontation with the difficult and vexing issues concerning this legal academic's deplorable political choices, particularly but not only, during the first three years of the Nazi era (Koenen, 1995).

The idea of '*strategic* myth', the central theme of the second part of this study, requires preliminary explanation, discussion and illustration. The inclusion of this term in the title refers to the manner in which aspects of modern legal thinking and scholarship, still largely dominated within the West by a combination of 'liberal' constitutional ideologies and divergent varieties of 'legal positivism', rely for much of their continued legitimacy upon widespread belief in a series of 'strategic myths'. This category, itself a subset of legally relevant myths more generally, signifies, amongst other things, deliberately created images, symbols and legends promoting specific beliefs and orientations held, in some sense, to be true. Typically, these are linked to the realisation of a particular agenda already deemed, or implicitly assumed, to be desirable. So, at this stage and for present purposes, the idea of myth can be defined initially as a story or legendary fable or, in Greek *muthos*, one that a cultural tradition widely recognises as exhibiting a validity and instructive normative force whose rhetorical power does not rest of demonstrations of its factual accuracy or inaccuracy (Stirk 2006: 8–13, 16).

There are two main examples of 'strategic myth' alluded to in the title of this book. First, the highly influential legal positivist's belief – exemplified most intensely by the majority of Hans Kelsen's jurisprudential writings – in the non-political and strictly scientific nature of legal analysis. The second is the 'liberal cosmopolitan' belief in the validity and supremacy of a universalistic and abstract conception of 'humanity', together with its

various offshoots, such as 'humanitarian' law, 'human' rights, 'humanitarian' intervention, and crimes against 'humanity'. These elements will be discussed later (Zolo 1997; 2002).

The inclusion of myth as a central theme of this book runs counter to aspects of modern jurisprudence, especially legal positivism and positivist varieties of socio-legal studies that consider themselves to be applying a strictly 'scientific', and hence objective and evidence-based, form of legal analysis. For many centuries, the latter has largely identified with a secular-rationalist movement towards scientific enlightenment and modernity seeking to break the hold of traditional myths, the dominance of theology within natural law debates, and other 'superstitions' of various kinds, including those that underpin aspects of so-called 'customary law' (Fitzpatrick 1992). The burden of developing and illustrating a sustained and fleshed out conception of law as strategic myth, and thus a deliberately formulated jurisprudence of myth more generally, will be taken up in Part Two of the book as its central theme.

As already mentioned, one target of this work's criticism is those claims and strategic myths concerning law often made by the current liberal legal positivist axis. In this context, 'legal positivism' can be provisionally defined in Kelsenian terms as the belief that the study of law should take the form of a formal (as distinct from material) science of abstract norms; that is, the rules and principles of legal doctrine, considered purely as such. Here, the focus of, say, a legal analysis of burglary falls not on the questions of which groups tend to commit this behaviour against which groups of victims, why and under what circumstances. In order to keep the focus purely upon norms considered as such, and as abstractions from real-life instances of the application of law, such questions are expelled to the non-legal fields of criminology or sociology. Instead, the positivist research question is confined to clarifying, in an exhaustive and comprehensive manner, the precise meaning of the legal category of burglary, the express and perhaps implied rules, together with any 'exceptions', that determine which situations generally fall inside or outside its scope, and how this category both relates to, but also differs from, related legal norms, such as theft. We can trace this positivist approach back to the writings of Carl von Gerber and Paul Laband in Germany, and Thomas Hobbes and Jeremy Bentham in Britain. Hans Kelsen later 'radicalised' elements of this tradition, in the sense of developing aspects to their logical (if sometimes absurd) conclusions (Caldwell 1997: 13–16; 36–9).

One distinctly liberal element of the liberal-positivist axis under scrutiny belongs to a universalistic ideological movement within international law and international relations scholarship, which will be characterised as 'liberal cosmopolitanism' (Zolo 1997). Taken together, and in comparison with any single rival approach, these variants of liberalism have clearly achieved considerable entrenchment and ideological domination within

Anglo-American legal education, scholarship and judicial culture more generally.

In setting out and generally supporting a series of Schmittian criticisms of these dominant positions, this work also seeks to challenge such domination by assisting with the task of opening up alternative approaches for coming to terms with our encounters with law. These need to demonstrate that they now embody key lessons learned from the instructive gaps, blind spots and contradictions of the liberal-positivist axis, such that they represent a cognitive advance. Through a close, but of course ultimately critical interpretation and application of Schmitt's writings, I aim to uncover and discuss a number of mythic beliefs underpinning the ideological projects of liberal cosmopolitanism, including the latter's reliance upon abstract universal concepts such as 'humanity' – together with its offshoots and concrete specifications (Zolo 1997; 2002). The general problem is that historically and socially specific content flows into the form of legal rights, but that liberalism treats this as a given, not as an ongoing interpretative construct. One result is the dubious idea of 'inalienable' human rights. As Chandler's critical summary of contemporary forms of liberal cosmopolitanism subjected to Schmittian critique recognises, mythic fictions underpin this approach:

> Cosmopolitan frameworks inverse the grounding of liberal relationship between rights and their subjects in their construction of rights independently of their subjects ... These rights are fictitious – in the same way as animal rights or the rights of the environment or of future generations would be – because there is a separation between the subjects of these rights and the political or social agency giving content to them. The proposed framework of cosmopolitan regulation is based on the fictitious rights of the 'global citizen' or of the 'human' not the expression of rights through the formal framework of political and legal equality of citizen-subjects.
>
> (Chandler 2008: 59)

Scholarly, and thus necessarily self-critical, analysis of the myths and ideological positions of liberalism must, however, both reflect upon and then take seriously, the conditions for gaining insight into these themes. It must explore any identifiable connections with tendencies towards the suppression and displacement of such insights stemming from the depoliticising transformation of ideological myths into their very opposites. That is, their mutation into apparently non-political, purely technical and supposedly 'objective' characterisations of the nature of law, legality, legal rights and constitutional legitimacy taken purely as such (Schmitt 1993). Some of the most deeply entrenched ideological myths concerning law both disguise and protect themselves in various ingenious ways – akin to

how computer viruses frustrate the very methods deployed by leading anti-virus software programmes to both identify and remove them.

At the start, it is necessary to emphasise that this work cannot take for granted the validity of simple either/or distinctions between myth and non-myth, and between 'ideology' and social 'science'; and then pretend to be conducting academic analysis on behalf of only the second term of these (and associated) conceptual oppositions. My study does not engage in a social scientific 'debunking' of myth and the critique of the 'ideology of humanity' in the name of some supposedly emerging 'higher truths' (or 'enlightenment' in the service of 'emancipation') that have supposedly overcome and liberated themselves from all mythic and ideological contaminants. There is no comparison with how, for example, Darwin's scientific theory of evolution partially displaced religious creationist myths, at least within the field of biology.

If it were ever possible for legal researchers to attain such an elevated position of pure social scientific objectivity free from both ideological influences and those mythic assumptions associated with the one-sided rationalism of classic enlightenment approaches to their research field, then its acquisition might indeed be tempting. But, and for reasons addressed below, there are good reasons to doubt the possibility of such researchers ever being able to entirely 'liberate' their analysis from entanglement in either myth or ideology by obtaining a God-like view above the specific and localised contexts that their reflections seek to make sense of. And yet reflexive recognition of the sobering possibility that a critical analysis of myth and ideology necessarily operates, to some measure, with its own – and at least partly unacknowledged – ideological myths, could still yield up an important insight. Perhaps, it can operate as a partial, if far from irresponsible, form of 'liberation' from classic enlightenment prejudices against cultural prejudices, mythic beliefs and ideologically loaded interpretations. In short, the primary concern is not to debunk the myths that, according to Schmitt, permeate various constitutional doctrines, including parliamentarism, and liberal constitutionalist interpretations of the rule of law, sovereignty and democracy, in the name of a higher strictly scientific mode of legal analysis, but rather understand their sources, political workings and implications.

A book that critically addresses ideological and mythic elements of law as conventionally understood, researched and taught, needs to acknowledge that, in various opaque ways, its own claims may serve as another instance of that which it addresses. Our acts of reflection upon the preconditions for those interpretative acts that we carry out when making sense of law face considerable internal resistance. Such reflective self-consciousness confronts perennial limits to seeing around its own corner, as it were, by identifying and describing its own entrenched pre-judices (mythic beliefs prior to, and determinative of, acts of legal judgement) in a totally

'unprejudiced' way. Hence, the potential dangers of the proposed reflexive study of how interpretations of law are themselves often shaped by specific political myths culminating in a downward spiral of infinite regress, are probably more logical than actual. In this field, truth and error are questions of degree, and permanently fallible and provisional to contexts and available evidence. They are not – as a once dominant metaphor and myth suggests – a sudden revelatory movement from a condition of cave-like darkness to the bright light of pure reason and enlightenment.

The remaining grounds left for my critical analysis of the ideological and mythic beliefs underpinning 'liberal cosmopolitanism' conducted through the lens of a reconstructed Schmittian agenda, relate primarily to the actual and potential counterproductive consequences and other contradictions of their concrete application (Zolo 1997). Seen in this light, and combined with my semi-theological commitment to the optimisation and fulfilment of democratic values, it may be possible to distinguish 'dangerous' from 'positive' political myths, and coherent from self-contradictory ideological positions and movements. Whether these scaled-down criteria for critical evaluation are adequate to the intended task, or themselves require supplementation or replacement, can perhaps only be ascertained during the course of their deployment.

There is also the unavoidable question of why address the central topics just discussed through a perspective stemming from a highly selective reconstruction of works written by the until recently taboo figure of Carl Schmitt? This is a question that the next chapter addresses directly.

Part I

Law as ideology and politics

Chapter 1

An afterlife for Carl Schmitt?

There is inevitably controversy over how best to 'come to terms with' Carl Schmitt (11 July 1888–7 April 1985), particularly in terms of various claims concerning his contemporary relevance. The present chapter addresses these two themes. This book takes as its primary guide *the writings* (as distinct from the biography) of this ever-controversial German jurist and professor of public law at the Universalities of Cologne, Bonn and Berlin. Can these provide us with a potentially useful tool-kit of claims, techniques and, perhaps, a combination of relevant insights and dreadful – if still instructive – warnings?

But which particular version of Carl Schmitt can claim topical relevance for present purposes? Thalin Zarmanian has recently argued that:

> Probably no political thinker, and certainly no jurist, has given rise to such conflicting views as Carl Schmitt. As Carlo Galli has noted, Schmitt has been called the worst man in the world and the only German of his time with whom it was worthwhile conducting a conversation. He has been called a sceptic and a dogmatist, a romantic and an anti-romantic, a modernist and an anti-modernist, the thinker who did away with the state and the one who most regretted its death. To some, Schmitt is the thinker who saw disorder and conflict as the source of the political. To others, Schmitt is the last person to point to order as its constitutive element. Schmitt defined himself as 'the last bearer of the European juridical civilization'. Schmitt ended up being ignored by jurists; many political scientists and philosophers, in contrast, regard his work as a milestone.
>
> (Zarmanian 2006: 41)

The recent, that is post-1985, explosion in mainly leftist scholarly literature on Schmitt, the famed 'Schmitt renaissance', has generated multiple images, most of which claim to be offering up the single correct key for unlocking the 'true meaning' of this figure (Rust and Lupton 2009: xv–xx). These images can be loosely divided into five clusters: theology,