Piratical transgressions, political transgressions

Re-reading Carl Schmitt's "Theory of the partisan"

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13 July 2012

Recent historiography emphasizing the egalitarian-democratic character of eighteenth-century piracy undermines Carl Schmitt's quasi-legal distinction between the partisan and the pirate and reinstates the pirate as political actor within the emergent maritime state order, argues Dominique Weber.

Writing in 1950, Carl Schmitt described the English freebooters of the sixteenth and seventeenth centuries not only as “pioneers of the new freedom of the seas, a freedom that was essentially not state-based”, but also as “maritime partisans in an age of transition in the worldwide rivalry between Catholic and Protestant powers”. [1] In 1963, however, Schmitt changed his mind:

Whereas, in the past, [...] I said that pirates and freebooters at the beginning of the capitalist era were maritime partisans, today I must correct that inexact terminology. The partisan has an enemy and is endangered by something quite different from someone who runs a blockade or transports contraband arms. [2]

Is this correction merely anecdotal or does it have important historical, conceptual, political or juridical implications? Why should Schmitt find it necessary, in 1963, to make a distinction between the kind of struggle carried out by the “partisan” and one fought by the pirate? Why is a partisan war not just the terrestrial version of the war waged by pirates?

For Schmitt, the first thing was to prevent any “confusion between the concepts” of the pirate and partisan. [3] Certainly, both are dissidents and non-conformists. However, it needs to be asked precisely how the two terms are being used. By re-establishing the essential features that distinguish the partisan and the pirate, it is possible to better understand the historical departures and theoretical innovations implied by these transgressive figures. Let us begin with Carl Schmitt, who in his Theory of the Partisan offers four “criteria” that identify the figure of the partisan: “lawlessness, a high degree
of mobility, intensity of political engagement and a telluric nature”. [4]

**Lawlessness**

It would seem that the partisan and the pirate share the fact of being irregular combatants: “The partisan fights as an irregular,” [5] Schmitt writes, while “the irregular nature of the pirate makes no reference to any particular system of regulation”. [6] However, Schmitt continues, whereas a pirate is situated outside any form of regulation, the partisan in some way presupposes one. [7]

For Schmitt, the figure of the partisan constitutes a typical aspect of the political and juridical system that arose as a result of the disintegration of the European public law (*jus publicum europaeum*) that first appeared in the sixteenth century and became fixed in the eighteenth and nineteenth centuries. In Schmitt’s view, the meaning of war took a new turn after the signature of the Treaty of Versailles (28 June 1919), the creation of the League of Nations (14 February 1919) and the acceptance of the Briand-Kellog Pact (27 August 1928). Enemy combatants were henceforth no longer regarded as equally waging a just war: under the terms of the moral exclusivism now appropriated by the international organizations, one of the two had to be considered as criminal. War, argued Schmitt, would thenceforth become total because it would be waged in terms of a hostility that was no longer relative but truly absolute. [8]

The phenomenon of the partisan is, in every sense, a feature of this new direction in international relations. A partisan war removes the distinction between civilian and military, between combatant and non-combatant; indeed, it is a war that is quite distinct from that fought between states, as conceived by European public law. What is at stake does not involve the movement of borders or the conquest of new seaports, but rather the revolutionary construction of a new society. European public law regarded every sovereign state as the equal of every other, so that the notion of a just or unjust enemy was meaningless, inasmuch as even a state that waged a war without *justa causa* was nevertheless a *justus hostis*. [9] The appearance and development of revolutionary ideology, bringing with it the figure of the partisan, changed the problem in a fundamental way. The partisan re-introduced the notion of a just and an unjust enemy, reserving for the revolutionary combatant alone the status of *justus hostis* (regardless of the methods), while systematically refusing to grant this status to his adversary, even if the adversary’s cause was morally or juridically a just one. [10]

Yet the partisan’s status is fated not to remain irregular. Victorious, partisans form either the cadres of a new, regular army, or else those of a new government, with partisan leaders becoming the leaders of a new, legitimate state. [11] The partisan is a factor that splits juridical and institutional authority away from the state’s regular status, in order to give free rein – provisionally – to a policy that accentuates the friend-enemy relationship. Nevertheless, the partisan’s actions are aimed at bringing about a new political and juridical order.

By contrast, if we follow the thinking of Schmitt in 1963, the pirate appears as nothing more than a criminal in terms of criminal law: his activities are carried out for the purposes of “theft and personal gain”. [12] The pirate belongs exclusively to the “domain of criminality”. [13] From this point of view, the figure of the pirate is at the same time
more and less disturbing than that of the partisan: less disturbing because the pirate’s lawlessness is not the expression of absolute hostility; more disturbing because the violence of this lawlessness appears not to be the vehicle for any institutional project. [14]

**Mobility**

The second distinguishing feature of the partisan proposed by Schmitt is mobility. Though he does not say so explicitly in *Theory of the Partisan*, both the partisan and the pirate have in common a technical concern with rapidity, flexibility and efficacy in combat. Just as “the partisan plays a part in development and progress in modern techniques and the science behind them”, [15] the pirate likewise makes a contribution to scientific and technological progress. In *Land and Sea* (1942), Schmitt stressed that the “epic” of the English buccaneers in the sixteenth and seventeenth centuries was maritime as well as technological: developments in English shipbuilding moved towards greater manoeuvrability (involving a reduction in tonnage and the emergence of large sailing ships equipped with yards) and increased fire-power (including the use of cannon), in turn opening up a new age in navigation and naval combat. [16]

**Engagement**

The distinction between the partisan and the pirate becomes clearer when political engagement is taken into account. “There is in the pirate what jurists call the *animus furandi*, the intention to steal,” writes Schmitt. The partisan, on the other hand, “fights in support of a policy”. [17] If, for Schmitt, the partisan is basically a political figure, then his criteria for the political are based on the friend-enemy distinction. Unlike the pirate, the partisan is operating in a way that raises hostility to the level of an absolute, thus radically re-actualizing this distinction, one that tended to have been removed during “the era of neutralization and depoliticization” resulting from the decline of the *jus publicum europaeum*.

The lawlessness of the pirate, like that of Heinrich von Kleist’s character Michael Kohlhaas, is “apolitical”, on the other hand: it “becomes criminality pure and simple because it has lost any positive relationship with any existing system of law”. [18] With this in mind, it may be that Julien Freund, following Carl Schmitt, is right to identify the pirate with the terrorist:

> Just as the pirate was simultaneously a criminal, a brigand, a buccaneer and a freebooter, exerting a political control, in the name of his own arbitrary intentions, over coasts and islands, so the modern-day terrorist is simultaneously a malefactor, or indeed a criminal, who does not shrink from committing armed robberies involving murder, and a being who claims to represent a political ideal. In the case of the terrorist, where does the boundary lie between the villainous crime and the political assassination attempt? [19]
In order to make as clear as possible the difference between the concept of the partisan and that of the pirate, it is the last of Schmitt’s four categories, the “telluric” or “terrestrial” nature of the partisan, that is the most important. Borrowing the idea from the Spanish historian José María Jover Zamora, [20] Schmitt writes:

A close analogy, even a resemblance, is confirmed above all in the similarity of meaning of the two pronouncements: “You must operate as a partisan wherever there are partisans” and “a pirate calls for a greater pirate”. In spite of everything, today’s partisan is something other than a pirate in a terrestrial war. The elementary contrast between the sea and the land is too great for this to be so. [21]

In other words, it is these two “elementarily different spaces”, land and sea, that make it essential to differentiate between the partisan and the pirate. [22] The combat waged by partisans creates a new field of action, a space that has a complex structure. Because partisans are fighting not on an open battlefield nor on the front lines of open warfare, Schmitt refers to partisan action as “clandestine” and, especially, as “underground”. However, “the partisan still represents an area of real ground”. [23] One might raise the objection, however, that war at sea, as it progressively developed after “England’s change to a maritime existence” during the Elizabethan period, [24] shows striking similarities with partisan warfare:

War at sea […] is based on the idea that you have to attack the adversary’s trade and economy. Since this is so, the enemy is no longer simply the armed adversary but any person originating from the enemy nation and even, in the end, any individual or neutral state that trades with or maintains economic relations with the enemy […]. A blockade, for example, affects the entire population of a country indiscriminately: soldiers, civilians, men, women, children, the old. [25]

Nevertheless, Schmitt argues, piracy should be seen as a “pre-scientific stage” of war at sea than partisan warfare in its most effective form. [26] Yet there is one criteria of the partisan that his terrestrial nature demonstrates above all: the absolute hostility of his lawlessness, which compels us to reconsider the fundamental nature of our land-bound existence. In the light of the violence that partisan wars can trigger, we need a new politico-juridical concept of space, one that might again be able to limit wars. A concept, that is, that would be able us to overcome the breakdown of the regular order that emerged from European public law and the failures of the abstract politico-juridical universalism that succeeded it. [27]

Pirates, Hegel and the birth of capitalism

When defining the pirate’s transgression as a “non-political” or “apolitical” form of transgression, Schmitt is not trying to minimize the historical and theoretical importance of piracy. If this were the case, how would we be able to understand the major role granted by Schmitt to piracy in the development of an oceanic and global nomos of the Earth from the sixteenth century onwards – the development, in other words, of a true “planetary revolution relating to space”? [28] In Schmitt’s view, it was the English pirates
and freebooters – and no one else – that were responsible for initiating the “grandiose leap” achieved by Elizabethan England “from a terrestrial existence to a maritime one”. [29] The English sovereigns of the sixteenth and seventeenth centuries were scarcely aware of this historic turn: it was the privateers who originally encouraged England to decide in favour of the sea and it was they who, after contributing to the defeat of Spain, enabled England to outperform other maritime powers in the struggle to rule the waves. [30]

Nevertheless, as Schmitt suggests in *Theory of the Partisan*, such analyses mainly serve to explain the genesis of the “beginning of the capitalist era”. [31] England, a great maritime power, also became the great industrial power. If the Industrial Revolution was initiated in Britain, it was because it was allied to a maritime existence, and thus had a very different relationship with technology from that of a land-based nation. For Schmitt, mechanization was the consequence of the English decision to look towards the deep seas. Maritime England, he considered, was the source of the total “de-territorialization” of modern technology. The most convincing sign of this was, in Schmitt’s view, Thomas More’s *Utopia* (1516): in proclaiming “a new and fantastical conception of space”, [32] it heralded the possibility of abolition of all “territoriality”. Here, unlike in *Theory of the Partisan*, it is not a matter of “discriminating between friend and enemy” but rather of following Hegel’s *Elements of the Philosophy of Right*:

As the firm-set earth, or the soil, is the basis of family life, so the basis of industry is the sea, the natural element which stimulates intercourse with foreign lands. By the substitution for the tenacious grasp of the soil, and for the limited round of appetites and enjoyments embraced within the civic life, of the fluid element of danger and destruction, the passion for gain is transformed. By means of the sea, the greatest medium of communication, the desire for wealth brings distant lands into an intercourse, which leads to commercial exchange. In this intercourse is found one of the chief means of culture, and in it, too, trade receives world-historical significance. [33]

Nevertheless, a problem arises. By inserting the phenomenon of piracy into the genealogy of capitalism, and by turning freebooting into a form of “pure criminality”, Schmitt misses the fact that there were eras in which piracy went beyond plunder and seizure of ships and took on another dimension, becoming a political act that radically challenged established orders.

**Utopian transgression, political transgression, piratical transgression**

According to Marcus Rediker, the contemporary historian of piracy, “piracy amounts to large-scale criminality. It was also a way of life voluntarily adopted, in most cases, by a large number of men who openly defied the rules of a society from which they excluded themselves.” [34] The recent historical re-evaluation of piracy has raised the notion of the “pirate Utopia”, both in terms of religious practices, in particular freedom of religion and tolerance, [35] and in terms of economic and social matters, with egalitarianism being practiced in the sharing of resources and dividing up of spoils. According to Daniel Defoe, the “code” of Bartholomew Roberts’s crew, stipulated that “the captain and the
quartermaster shall each receive two shares of a prize; the master gunner and boatswain one and one half shares, all other officers one and one quarter". [36] The pirate utopia also involved mutual assistance and the acknowledgment of incapacity. This same “code” stated that “if [...] any man should lose a limb, or become a cripple in their service, he was to have eight hundred dollars, out of the public stock, and for lesser hurts, proportionately.” [37]

The pirate utopia extended to behaviour and morals, particularly with regard to the status of women. We might recall the colourful portraits, in Chapter VIII of Defoe’s General History of the Pyrates, of Mary Read and Anne Bonny. [38] It even touched on the political, particularly with regard to the abolition of slavery. For Captain Misson, a semi-fictional character created by Defoe who possesses an egalitarian and universalist conception of human nature, slavery is incompatible with natural justice and religion. [39] Above all, however, the pirate utopia entailed democratic ideals, questioning authority as well as discipline. Article I of Roberts’s ship’s charter stated that “Every man has a vote in affairs of moment” and “has equal title to the fresh provisions, or strong liquors”. [40] Of course, we must not forget Defoe’s account in his General History, of “Libertalia”, the utopian republic established in Madagascar by Misson [41] and, in particular, the speech by the monk Caraccioli on “political matters”:

[Caraccioli] shewed that every Man was born free, and had as much Right to what would support him, as to the Air he respired. A contrary Way of arguing would be accusing the Deity with Cruelty and Injustice, for he brought into the World no Man to pass a Life of Penury. [42]

It is necessary, then, to take issue with Schmitt’s view and suggest that piracy is certainly a political phenomenon and can, moreover, be defined as such in terms of Schmitt’s own criterion for what is political, namely the distinction between friend and enemy. This would likewise be suggested by a retort made by Captain Samuel Bellamy in Chapter XXVIII of Defoe’s General History:

D***n ye, I am a free Prince, and I have as much Authority to make War on the whole World, as he who has a Hundred Sail of Ships at Sea, and an Army of 100,000 Men in the Field: and this my Conscience tells me. [43]

The crucial point is that pirates do not go to sea in the same way as other sailors. If they have resolved to take leave of the terrestrial world, they have done so in a more profound sense than merely as a form of exile. They have left behind the world on which Man has imposed his rule, his compass, his plumb-line, his land-registry, his lists, his civil laws. When they sail the seas, their aim is to proclaim the existence of the yawning gulf that separates the continents, the victory of water over land, of geography over civilization, of primordial order over the order imposed by engineers.

This is what Thomas Hobbes, the philosopher of the absolute nature of the sovereign state, saw in that very age of piracy and freebooting. It was no mistake on Hobbes’s part to entitle his 1651 treatise on “the continental state” Leviathan, the name of the biblical
sea monster (pace Schmitt, who thought that “Behemoth”, the biblical land monster, would have been a more appropriate title). [44] By representing the absolute state as the sea monster, Hobbes was attempting to conceive of an extension of state sovereignty to the sea itself. To call his book on “the continental state” Leviathan was to demonstrate that the sea cannot, and must not, have any kind of political and juridical autonomy of its own. In this sense, the Hobbesian sea can, of course, only be the complete opposite of the pirate sea: what Hobbes may have dreamt of was turning the sea into a domain of the state. Once this is understood, it is easy to grasp the precise sense of the only reference to piracy in Leviathan:

Also amongst men, until there were constituted great Common-wealths, it was thought no dishonour to be a Pyrate or a High-way Theefe. [45]

It is remarkable that Hobbes makes absolutely no distinction between the land-based thief and the maritime thief: this is because, in his view, the definition of the political does not alter when the maritime situation is taken into account. Once state sovereignty is constituted, piracy necessarily becomes a private, illicit fellowship just like any confederacy of highwaymen. Hobbes realized the extent to which pirate transgression had a political nature and implied a radical overturning of the well-constituted human order. This is why he made it his business to ensure that piracy should be suppressed. [46] Like La Rochefoucauld, Hobbes sees in the idea of the sea in general and the idea of a pirate sea in particular a dangerous element that is mobile, floating, fluctuating, fleeting:

Those who have tried to explain to us love and its caprices have compared it to the sea in so many ways that it is difficult to add anything to what they have said about it. They have shown us that the inconstancy and infidelity of both are equal; that their benefits and evils are innumerable; that the happiest of voyages expose one to a thousand perils; that tempests and reefs are ever to be feared and that the ship may be wrecked even as it reaches its port. ronnback [47]

In other words, the question – the political question – that piracy poses is whether the extreme “fluidification” of the world that it engenders is truly capable of constituting a habitable human society.

Footnotes


6. Ibid. 278. In this sense the pirate is not the same as the corsair; the latter obeys at sea a land-based law since he has the backing of a territorial government.

7. Ibid. 298.


9. Ibid. 212.

10. See, for example, Mao Zedong, *Problèmes stratégiques de la guerre révolutionnaire en Chine* (December 1936) [Problems of Strategy in China's Revolutionary War], 1, 2, in *Oeuvres choisies de Mao Tsé-toung*, Beijing, Editions in foreign languages, 1967, vol. 1, 203: "History has only known two kinds of wars: just wars and unjust wars. We stand for just wars and against unjust wars. All counter-revolutionary wars are unjust, all revolutionary wars are just."


12. Ibid. 218.

13. Ibid. 284.


15. Id. *Théorie du partisan*, 284.


17. Id. *Théorie du partisan*, 218.


20. José María Jover Zamora, "La Guerra de la Independencia española y los Sitios de Zaragoza" [The Spanish War of Independence and the Sieges of Zaragoza], Zaragoza,

22. Ibid. 223-224.

23. Ibid. 278.


25. Id. *Terre et mer*, 16, 75.


28. Id. "La Mer contre la terre" [The Sea against the land], in *Du politique. "Légalité et légitimité" et autres essais* [Concerning the political. "Legality and legitimacy" and other essays], Alain de Benoist (ed.), Puiseaux, Pardès, 1990, 139.


37. Ibid. 261 (art. IX).

38. Ibid. 202-214.


40. Ibid. vol. I, Chapter X, 259.

41. Ibid. vol. 2, Chapter XX and XXIII, 15-57 and 88-112.

42. Ibid. vol. 2, Chapter XX, 23 (ed. cit., 389).

43. Ibid. vol. 2, Chapter XXVIII, 189.


**Published 13 July 2012**

Original in **English**
Translation by **Mike Routledge**
First published in **Esprit 7/2009 (French version); Eurozine (English version)**
Downloaded from eurozine.com (https://www.eurozine.com/piratical-transgressions-political-transgressions/)
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