

THE STATE AND CONSTITUTIONALISM: A CRITICAL ANALYSIS OF CARL SCHMITT'S CONCEPT OF THE STATE'S UNITY AND ITS POLITICAL IMPLICATIONS TO CONTEMPORARY PROBLEMS OF SOCIETY BUILDING.

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Abstract:

Carl Schmitt conceptualizes the State as a political unity of the people. This conceptual interpretation of the state is fundamental in his legal theory, particularly his ideas on constitutionalism. This paper provides a critical analysis of Schmitt's conceptual understanding and interpretation of the state as political unity of people, and discusses potential implications Schmitt's notion of the State as political unity would have to contemporary legal and political theorizing. In my analysis, I contextualize Schmitt's conceptualization of the state and his proposed foundational state value of political unity and argue that Schmitt's conceptualization and interpretation of the state as political unity involves some internal weaknesses and tensions to constitute a relevant normative guide for conceptualizing political strategies which would solve some among contemporary political issues related to society building and legal ordering.

Key words: State, political unity, constitutionalism, state form, legal ordering.

Résumé:

Selon Carl Schmitt, un Etat est une unité politique d'un peuple. Cette conception de l'Etat est une notion fondamentale dans la théorie de la loi, spécialement les idées sur le constitutionalisme. Cet article cherche à porter une analyse critique sur l'interprétation et la compréhension conceptuelle de l'Etat comme une unité politique d'un peuple, et explore les répercussions éventuelles de la notion de l'Etat comme unité politique sur la théorie politico-légal contemporaine. Dans mon analyse, je contextualise la conception de l'Etat par Schmitt et sa proposition sur la valeur étatique de l'unité politique. Mon point de vue est que cette conception et cette interprétation de l'Etat comme unité politique présentent des tensions et faiblesses internes, ce qui est une limite pour servir de guide normatif dans la conception des stratégies politiques qui pourraient résoudre certains des problèmes politiques actuels relatives à la stabilisation de la société et le règne de la loi.

Mots clés: Etat, Unité politique, Constitutionalisme, Forme de l'Etat, Règne de la loi.

0. Introduction

In his politico-legal thoughts, Carl Schmitt gives priority to political unity as a key defining element of the State. Political unity is not only the quintessential element which is at the centre of the political identity of the people within the State, it is also the essential component for any definition of the State and its form. This paper scrutinizes Schmitt's defended political order which takes the State as the political unity of the people, substantiated and endowed with a political form via the constitution. The aim of the analysis is to evaluate the strengths and the weaknesses of Schmitt's preferred politico-legal order, its

possible political implications and relevance to contemporary political and legal theorizing. The paper has three parts. The first part defines and explores Schmitt's notion of the State as a political expression of the existing political unity of the people. A particular focus is made in analyzing the potential of a political unity-based State to create a politically stable State form. Examples from the socio-political situation of Burundi are used as concrete illustrations along my analysis. The second part examines the constitution as a tool shaping the political unity of the people. An emphasis will be put on examining how the people relates to the constitution, and how the principles of identity and representation are crucial to understanding how Schmitt's preferred political order would practically work. In the third part, I offer my critic on the implications of Schmitt's defended political order and its relevance to contemporary political and legal theorizing, before concluding the analysis.

1. The State as the political unity of the people.

Schmitt's notion of the State is fundamentally based on political unity. Political unity as the key defining characteristic of the State is understood as the people's oneness which bounds them together as a shared political identity. Political unity is a binding force which holds together a specific people and gives them the capability of making conscious political action (C.T. 239). Political unity, in this regard, is a self-identity of a people; and the State is the materialization the existing political unity of a specific people. In other terms, the State is the political form of expressing the existing political unity of the people. According to Schmitt, however, the terminology 'the people' does not only connote a multitude of individuals within a distinct territorial boundary. But it essentially connotes the political mark or oneness which holds a specific people together as a united whole. This oneness is held as a shared political identity. The shared political identity allows individual members of the political community to identify who belongs to the people (as a member of the political unity) and who is an outsider to the political unity of the people. In this perspective, the oneness of the people allows them to define otherness in regard to individuals' belonging or non-belonging to the political unity. In Schmitt's view, the preservation of such a distinctive property or oneness is the main goal of the State.

Schmitt argues that the collective unity of the people is facilitated and rests on some sort of 'substantial homogeneity' (C.T. 228). In fact, there are two conditions for people to achieve and to hold political unity. On the one hand, people can achieve political unity in virtue of their strong and conscious similarity. On the other hand, people can achieve political unity by any other reason which is able to bind them together as a mark of a shared identity (C.T.239). When Schmitt argues that political unity of the people rests on substantial homogeneity, the terminology 'homogeneity' stands for any medium through which a people can distinguish itself from other peoples. In other words, it is a distinctive political mark which defines a people as exclusively sharing a specific political identity. In this perspective, substantial homogeneity as the essence of political unity of the people can be expressed through various elements such as, common tradition, ethnic origin, language, race, political ideology, etc.

Yet, the element, around which substantial homogeneity is based, is crucial in evaluating the strength of a people's political unity. In fact, political unity as an essential element of the State must be based on people oneness. The State itself is the political unity of the people. If

political unity does not exist, argues Schmitt, it necessarily follows that there is no State because any existing political unity must be substantiated by the oneness of the people, and the State is born when the people decides to give form to the existing political unity by establishing a constitution (C.T. 79). Consequently, when political unity does not exist, it becomes impossible for the people to identify themselves as sharing any political identity. Nonetheless, Schmitt insists that political unity must have a basis which gives substance to people's conscious similarity or oneness. Nevertheless, when people's political unity is based on some natural boundaries, such as ethnicity, race or others, this can generate some political problems related to the strength, stability and the political form of the State as the political unity of the people.

In fact, when political unity is based on people's conscious similarity which is grounded, for instance, on ethnicity or race, this may lead to political and social discrimination. In Schmitt's own words, "the State is the unity of the people" (C.T.75). If then such unity is based on ethnicity, one's belonging to that specific ethnic group would be a precondition for one's participation to the political unity. In such circumstances, the existence of the State would exclusively allow a particular homogeneity based on a single ethnic group. A person who belongs to a different ethnic group would hardly be accepted as belonging to the political unity of the people even though the person would be legally recognized as a citizen of the State. One's legal recognition as a citizen might not necessarily be a sufficient qualifying condition for the individual to truly share the political identity of the people in Schmitt's sense. For example, suppose UN-HCR (United Nations High Commission for Refugees) takes a family of refugees of A nationality for resettlement in an Asian nation K country where the State is truly based on the political unity of the people with an expressed substantial homogeneity based on ethnicity and cultural values. One may wonder whether it is possible for those A nationals can be fully integrated and be part on the political unity of the K people in Schmitt's sense. Given the fact that ethnicity is a natural condition which cannot be changed, it would not be possible to for those individuals to truly be part of the political unity of K people based on substantial homogeneity in Schmitt's sense. In this regard, Schmitt's political theory proposes a State's form which is susceptible of generating a situation in which some members of the State, even though legally recognized as citizens of the State, might still be considered as foreigners within their own political society. This would simply connote a form of political discrimination.

Moreover, Schmitt defended State's form based on political unity is a highly venerable State form. In fact, in Schmitt's view, any existing political unity is dynamic and evolving (CT 257). This means that what is valued and taken as the shared value which is at the centre of any existing political unity can change. In fact, Schmitt asserts that any State is always in process of formation (ibid). In this perspective, the people can always redefine the form of their own political existence as they wish. For instance, suppose that we have a case a multi-ethnic State where people's political unity is defined according to some political ideals. After a certain period, members of one or more ethnic groups discover that the ethnic grounded political unity would define more appropriately their own political existence than defining themselves as a group for sharing some political ideals. From Schmitt's conception of political unity, if a group of people who reside within a certain territorial boundary manage to find a stronger bound of political self-definition, they can give themselves a political form of

existence by way of the constitution and become a State. A sound and recent example here would be the case of the recent independence of Southern Sudan where black dominated South was separated from the northern part dominated by Arabs and became independent as the Southern Sudan Republic. In this regard, the stability of Schmitt's defended political unity-based State may largely depend on how far individual members of the State are convinced and satisfied with the way the political unity is constitutionally defined and practically applied to social, economic and political levels of the society. Yet, the State as an entity endowed with a "formless formative capacity" is always open to potential adjustments of the State form. Consequently, basing the State form on political unity may not necessarily guaranty any political stability of the State's existence in its actual form, but this may render the State vulnerable to scissions.

The case of ethnic based political struggle in Burundi is an eloquent illustration of how what a people values as the basis of political self-definition evolves and changes. In Burundi, the country has three ethnic groups, namely Hutu, Tutsi and Twa. In the pre-independence period, Burundi was a monarchy ruled by succession of Kings. Burundians would define themselves as sharing a certain identity based on language and some similar cultural practices. In this regard, the ethnic divisions were not the basis of people's self political definition even though kings were only from the Tutsi ethnic group. After independence in 1962, ethnic based political consciousness was rising as the Tutsis (ethnic minority) remained the ruling ethnic group of the independent 'State' of Burundi. After few years, the country adopted a democratic political system in which people began choosing their own political leaders. The introduction of multiparty system in the country came in parallel with an apparent redefinition of people's self political identification which was largely ethnic based. This contributed to exacerbating ethnic tensions between two main ethnic groups in the country namely, Hutu and Tutsi¹. The ethnic tensions, however, have been contained by the Arusha treaty which provided guidelines for power sharing between the two key ethnic groups in Burundi.

Yet, Schmitt's might argue that, in view of the aforementioned political situation, Burundi does not qualify as a political unity based 'State'. There is no substantial homogeneity which grounds the oneness of Burundians as shared political unity and binds the "people" of Burundi as a shared political identity in the Schmitt's sense. Burundi may, in Schmitt's view, be considered as an 'artificial State'. An authentic State would only be formed by either of these two ethnic groups taken separately. The dissolution of the actual 'State' of Burundi in two States, one for Hutus another for Tutsis, would be in Schmitt's politico-legal thoughts the most advisable alternative to fully resolve Burundian political issues associated with state building. Yet, such a solution may not guarantee the political stability of the form of any of those two formed States. In fact, some people may create another ground for defining their political unity within any of these two states, for instance, on regional basis and eventually request for further State scission. Consequently, Schmitt's notion of the State which is based on political unity does not necessarily guaranty political

¹ For more information about the socio-political crisis in Burundi, see Lemarchand, Rene'. *Burundi: Ethnic Conflict and Genocide*. New York: Cambridge University Press, 1994.

stability of the State either in its political boundaries or in the political form of the State's existence.

Political stability, in Schmitt's defended State's form might only to be guaranteed, not by political unity, but by the dictatorship of a sovereign. In fact, Schmitt argues that in any State of emergency (when the political unity of the people is at stake), there must be an authority who can act beyond any administrative and judicially channels to impose an effective action to bring order (PT 29-35). In this perspective, it is only by the dictatorship of a sovereign authority from an individual or any governing body, which can act beyond constitutional borders to try and hold together existing political unity of a people. Yet, this would not be a remedy to the permanent vulnerability of the Schmitt's defended State's form. As will be shown below, political unity as the political identity of the people is usually assumed rather than a pragmatic value for state building or legal ordering.

2. The Constitution: A Tool Shaping the Form of Political Unity of the people.

Schmitt's understanding of the constitution is fundamentally based on his conceptualization of the State as the political unity of the people. He argues that the term 'constitution' designates the State itself as a concrete, collective conditions of political unity and social order, and the state's form is this unity's particular type of formation (C. T. 59). An example can clarify this point. If one takes the state as a human body, the constitution can then be conceptualized, in Schmitt's view, as the status of the metabolism (what defines livelihood) of a specific human body. In this regards, one can argue that a distinct body has a strong constitution as it is endowed with a strong immune system which holds together the whole body as healthy organism. If the body is not sufficiently healthy, one may also argue that it has a weak constitution. In this perspective, the constitution is central to any definition of the State in a similar way the body's metabolism is central to any definition of the status of someone's health.

Consequently, political unity and constitution are interlinked as essential defining elements of the State and its form. In Schmitt's own words, "the State is a certain status of the people, specifically, the status of political unity" (C.T. 239). The constitution as a quintessential element substantiating peace and order and defining the political existence of the State finds its full significance through political unity. Concretely, the State being essentially defined from political unity and the constitution being the status of such political unity and order, the constitution becomes the essential element of the State. Without political unity, the State would not exist and without the constitution, the State would not have any possible form of political existence. Consequently, political unity and the constitution are closely interlinked and they all are, in Schmitt's view, essentially important for the State existence and its form.

Schmitt argues that it is the owner of the constituent power who decides the political form the State should take. In case of democracy, the people are the owner of the constituent power. In case of monarchy, it is the monarch. The constituent power, according to Schmitt, is a political will whose authority and power takes the concrete and complete decision concerning the type and the form of political existence of the State (C. T. 75). For him, the "positive" constitution is pure constituent power. In this regard, the political will which determines the nature and the form of the constitution is understood in the positive sense. In

addition, political will or constitution-making power cannot be justified through abstract or normative arguments. Instead, it is understood as signifying the essentially 'existential' ground on which the validity of any constitution is necessarily based (Duncan Kelly 120).

Schmitt insists that a democratic constitution is the product a united people's exercise of their constituent power (C. T. 75-77). The birth of a democratic constitution, however, must not be thought in the line of a social contract. A democratic constitution, argues Schmitt, presupposes the existence of a politically united people (ibid 125). If a united people did not exist, it would not be possible for such a people to establish a constitution, and if the constitution is not generated from the people themselves, it would not be a democratic constitution. Consequently, by giving themselves a constitution, the people give themselves a political form to their own existence as a State or a nation. In this perspective, any democratic constitution, in Schmitt's view, is a unilateral decision of an existing and politically united people to give themselves a concrete form of their own political existence.

Schmitt's attribution of the constituent power to the people was inspired by the French Revolution. In fact, the modern mixed constitution, endowed with liberal and democratic elements was introduced with the French Revolution. Parallel to this new form of the constitution was the idea of the people as bearers of the constitution-making power. From the French Revolution, the people are seen as capable of acting with a self-conscious political unity through the medium of the nation-state. The concept of nation argues Schmitt, is understood as "individual people characterized by its specific political consciousness" (C. T. 231). It is important to note, however, that for Schmitt, the "people" is a concept which only exists in the public sphere. In his view, the people appear only in a public, and "the people and the public are established together" (ibid, 243).

Moreover, Schmitt understanding of the people and their political role is closely linked to his understanding of democracy. In fact, the sovereignty of the people as articulated in the article 1 of the Weimar constitution can be understood as "the rule of the people" as opposed to "the rule of law". In Schmitt's view, the political nature of democratic political order is to be characterized not by its good rules but by the presence of good rulers; where the adjective "good" stands for the pre-normative existential quality of the people (K. Preuss, 1999, 162). The people, however, is not simply understood as a multitude of individuals within a certain bounded territory but they are seen as an entity with a shared political identity expressed through existing political unity. Such political unity constitutes their oneness which allows them to distinguish friends from enemies and also to maintain their distinctive property which is their political identity. Consequently, the essence of the political in a democratic order is the will of such a people to preserve the distinctive property or its oneness, and to impose it on political, social, cultural, economic levels of the society (ibid).

Therefore, in Schmitt's view, the people is the politically united entity. It is through one's participation in political unity where people can be treated as equals in exercising their democratic rights (such as the right to vote, the right to freedom of assembly, etc.) (C. T. 228). The oneness of the people which expresses the existing political unity is, in Schmitt's view, the foundation of Democracy which consists in the identity between the rulers and the ruled. It is also grounded on the rule of the people's will whose foundational essence is a collective authentic homogeneity. Yet, if the people are to rule, it becomes imperative to determine who belongs to the people. In this regard, political unity becomes a criterion for determining one's

belonging to the people as united whole. In this perspective, political unity helps to determine who is the bearer of democratic rights, and gives shape to the political will of the people. Nonetheless, authentic homogeneity which gives form to political unity cannot be achieved from any form of aggregation of private wills as assumed in elections in liberal democracies. But as will be argued later, the authenticity of people's will is achieved through the principle of representation.

It is important to note how Schmitt defines people's will and how it is related to the State's political form. He argues that the constitution-making power is the political will, whose power and authority is capable of making the concrete, comprehensive decision over the type and the form of its own political existence (C. T. 125). Yet, according to Schmitt, the political decision regarding the type and the form of the State's existence, which makes the substance of the constitution, is valid when the political unity whose constitution is at issue exists and the subject of the constitution-making power can determine the type and the form of this existence (ibid 136).

Nonetheless, in making the constitution of a country, individuals' participation in the political unity of the State is assumed rather than concretized. In fact, the *WE* which is usually used to express the existing political unity of the people takes for granted that the political unity of the people exists and every member of the political community is willing to participate in deciding over the political form the State should take. In view of the already mentioned example of Burundi, the constitution mentions in the preamble "*Nous peuple Burundais ...*"² This assumes an already existing political unity for which the constitution is to provide a political form as a Burundian State. Yet, such political unity is not necessarily existent in the form of substantial homogeneity on which Schmitt grounds his political unity. Apparently, Schmitt's notion of political unity based on substantial homogeneity might exclusively work for a "nation" (in its formal political definition) and may not successfully work in any heterogeneous State³.

Moreover, people's will is not directly exercised in political decision making over the form of the State's existence. But it is transformed through political representation into an acclamatory political decision in which people express their approval or disapproval of the proposed political form of the State through a YES or a NO in a referendum. Nonetheless, Schmitt asserts that the State has a formless formative capacity. He argues that "the nation can change its form and give itself continually new forms of political existence. It has complete freedom of self-determination" (C. T. 129). This means that there is no concrete form of the State which is to be decided upon. The State is always in a permanent and evolving status of State formation. In this regard, the State's form is fluid and can only be accessed in its actual status. As a consequence, it is arguable that the State's form is the actual decision of the constitution making will, and is able of being transformed into any other possible forms as the constituent power wills. In this perspective, the constitution is permanently subordinate to people's will; and this partly supersedes to the reduction of people's will to a simple agreement or disagreement of a referendum.

² See "Constitution post-transition de la Republique du Burundi, 2005" :

http://democratie.francophonie.org/IMG/pdf/Constitution_post-transition_du_Burundi.pdf

³ The terminology "heterogeneous State" stands for any form of political, racial, linguistic, cultural pluralism within a State.

Schmitt defends the view that, in a modern democratic constitution or State, there are three ways of conceiving the relationship between the people and the constitution. Firstly, the people could exist prior and above the constitution as pure constituent power. Secondly, the people could exist within the constitution as participant members of the electorate. Thirdly, they could take a space beside the constitution as bearers of constituent power who act out intermediary moment of spontaneous forms of popular mobilization within the normal political order (Quoted in Duncan Kelly 121). These ways of understanding people's relationship to the constitution, argues Schmitt, go along with two principles of political form, namely, identity and representation. In his view, different State forms mostly correspond to one or the other of these two political forms (C. T. 437). Concretely, identity presupposes an unmediated unity of the people, and representation assumes a structural identity between the rulers and the ruled, but such an identity is never totally actualized in practice because there is no pure system of representation (Kelly 121).

Schmitt argues that the two principles, namely, identity and representation are opposed, but they both express the centrality of political unity in any political form of the State. He asserts that,

The State rests, as a political unity, on the combination of (these) two opposed transformative principles –the principle of identity (people's own political consciousness and national will, allowing them to distinguish friends from enemies)– and the principle of representation, the power of which is constituted as political unity by the government (C. T. 239)⁴.

It is, however, important to note that, by the principle representation, Schmitt does not imply any complex and constitutional aggregative and integrative form of divergent political opinions and interests channeled through rights, institutions and any other political procedures as it is seen in most of contemporary constitutional democracies. But, representation for him implies the presence of symbolic reappearance of the essential qualities of the people and their incarnation in a political figure whose power expresses the 'real' self of the people. In fact, representation in Schmitt's view is not understood in the form of a normative event, a procedure or a process. But it is, rather, something existential. In his view, to represent means "to make an invisible being visible through a publicly present one" (ibid 243). What is invisible is presupposed to be absent, but it is ipso facto made present through representation.

In other terms, the principle of representation is linked to both "production" and "reproduction". For instance, when a painter is to make a painting which portrays a village, all the details do not necessarily have to reappear in the painting. There are some important elements which are essential to any portray of the painted place. The presence of those elements in the painting constitutes the essential image of the village. In this view, the painting produces a reproduction of the essentials of the village and this gives to the viewer not only the idea of how this village looks like, but more importantly a meaningful production which contains essential elements of the village which may not be perceived through a

⁴ Added parentheses are mine.

general view of that village. In this regard, such a painting present through image the essential elements of that village which might not be otherwise clearly perceived.

In addition, representation is fundamentally anthropological. In fact, going back to the image of the painting, there are some elements in the village that people would like to see in the painting. The absence of such elements would make such painting less representative of the painted village. Consequently, such a painting would only be accepted as genuinely representing the painted village only when it presents what is commonly valued as essential elements of that place. Yet, the choice of those essential elements mostly rests on a shared and common view of what people would like to see or what they want to see. In other words, representation has to do with what is essentially shared as values. In case of political representation, the shared value which is represented is the political unity of the people. In Schmitt's own words, "the idea of presentation rests on a people existing as a political unity, as having a type of being that is higher, further enhanced, and more intense in comparison to the natural existence of some human group living together" (C.T. 243). In this regard, representation has political unity of the people as its essential value which must be made present. Therefore, as a concept related to the political and whose power applies to the body which governs, representation, in Schmitt's view, can be interpreted as a concrete expression of the political unity of a people.

Having discussed how the people relate to the constitution and the centrality of the principles of identity and representation to Schmitt defended politico-legal order; we may now analyze the practical role of the constitution. Schmitt's thoughts on the constitution raise some fundamental questions which are relevant to any constitutional intervention to solving any potential political crisis. One of such questions is what is the essence of the social order which the constitution is to safeguard and who can be held responsible for the preservation of such order? In contrary to the liberals' understanding of political order as emanating from a stabilized harmony of individuals' freedom and social order, Schmitt understands the relation between freedom and order as always marked with a permanent tension. In fact, in his view, human being is dynamic and is always prone through his personal freedom to threaten order (K. Preuss, 1999, 160). In this regard, Schmitt supports the view that individual liberty should not override the maintaining of public order. In other words, individual members of the political society should not be allowed to resort to individual liberty to challenge the political form of the State and jeopardize social order. One may then wonder why Schmitt gives priority to political unity over individuals' liberties.

According to Schmitt, people have and enjoy political rights because they belong to the political unity which is the State. One's belonging to the State does not only mean an abstract claim of being a citizen of a given country or nation, but it implies active participation in the political unity which is expressed, in Schmitt's own words, in a "substantial homogeneity" of the people (CT 228). Consequently, it may not be allowed for individuals to belong to the political unity or the State and behave as an "enemy" to the same political unity.

It is, however, important to note that Schmitt does not base his proposed possibility of restricting individual liberty to any anthropological presupposition on human being as inherently "good" or 'bad'. But his argument in favor of the possibility of restricting people's liberty to ensure the preservation of political unity and order is based on the nature of the

relations between people and the State. According to Schmitt, people enjoy democratic rights because they belong to the political society whose main character is political unity. In his view, it is inadmissible to any individual person to challenge the political unity which entitles him/her all the political rights one enjoys. Putting this analogy in the form of image, one's challenge to the political unity of the political community to which he/she belongs is similar to cutting a branch-tree on which one is sitting. In this regard, from its insistence on preserving order and unity over individuals' political rights, the State can also be seen as a self-preserving political unity.

Schmitt's preferred priority of political unity over individual liberties has some political consequences. One of such consequences is that prioritizing political unity over individuals' liberties gives room to dictatorship. In fact, in Schmitt's view, one's belonging and participation to the political unity of the State is not necessarily a matter of individual political choice. Once an individual is a member of a political society, one must live in harmony with and participate in the political unity of the people. In this regard, one's participation in the political unity can be interpreted in the form of an image as being part of a singing choir in which members exclusively sing a commonly known song with a distinctive and acknowledged tune. Any individual deviation from the common harmony of the singing distances such a person from "us" (harmonized and united singers or "the people"), and then becomes part of "other" (deviants: "foes"). In this regard, dictatorship, in Schmitt's view, can be useful as a political tool which helps to maintain political unity and social order in the State.

Schmitt exclusively accepts the revolution as the only possible tool which can bring change. Going back to the above analogy, it is only through the introduction of a new song and a new rhythm by all the members of the choir which, in Schmitt's view, can make change. In this perspective, any change to the existing State form requires a revolution which would change and provide a new State form by introducing a new constitution. Therefore, Schmitt's proposed preservation of political unity does not exclude dictatorship among possible political tools safeguarding his defended political order. This is against democratic values.

3. Implications of Karl Schmitt's defended political order to contemporary political and legal theorizing.

The political order that Schmitt defends is clearly stated in the critique he offered for liberal democracy. In fact, his conception of politics seems to distance democracy, as a political system, from liberalism. In other terms, Schmitt's defended political order dissociates democracy from the constituted and rule-bounded practices of popular election and parliamentary legislation which are fundamental to the workings of modern democracy.

In his view, the notion of "homogeneity" is a condition for the possibility of democracy. In the introductory part of *The Crisis of Parliamentary Democracy* (1926), Schmitt argues that "every actual democracy rests on the principles that not only are equals equal, but unequal's will not be treated equally. Democracy requires, therefore, first homogeneity and second –if need arises– elimination or eradication of heterogeneity" (CPD 9). This quote adumbrates Schmitt basic position which distances him from any liberal perspective to his understanding of democracy. As already explained, these notions of homogeneity and equality

are not only basic to Schmitt's own understanding of democracy but they are primordial to his political thoughts. One may then wonder what is the meaning of homogeneity according to Schmitt, and how it relates to people's equality and democratic rule.

Schmitt defines homogeneity as a substantive equality (CPD, 9). He asserts that homogeneity must be inherent to any democratic conception of equality and democracy requires a conception of equality as a substance. In his view, equality is politically invaluable only when it has a substance (ibid). Consequently, in order to treat people as equals, they must partake a common substance. Such a common substance which makes people equal within democratic political society is, in Schmitt's view, political unity.

Political unity substantiates one's belonging to the State as a citizen and allows the individual to enjoy the rights entitled to him by the State without any predetermined political barrier. Yet, substantive equality, in Schmitt's view, is different from the general understanding of equality which is grounded on the liberal notion of equality of human beings *qua* human beings. In his view, the general equality of human being cannot serve as the basis of the State or any form of the government (Chantal Mouffe, 1999, 40). General equality of humankind is, according to Schmitt, a non-political equality because it does not give room to a possible inequality from which the political equality receives its specific meaning. Concretely, Schmitt's notion of political equality is based on the notion of belonging and non-belonging, or inclusion and exclusion with reference to the State (the political unity of the people) as a locus. One's belonging to the polis and one's involvement to the political unity determines one's status as either an insider or an outsider to the political community. Political equality or "substantial homogeneity" is thus a political value which, in Schmitt's view can only be enjoyed by the people (a group of individuals sharing a specific political identity).

In concrete terms, Schmitt argues that, for a democratic community, legitimate political rule must appeal to the rule of the people. The rule of the people in return must be based on political equality (C. T. 255-267). From the perspective of political equality, no citizen has a right over others to hold political power. In this regard, every citizen has right to participate in the political rule. Yet, the political equality is not based on non-exclusive equality of all individuals in the State. But it refers to a notion of inclusion and exclusion within the political community (ibid). In fact, within the political community, argues Schmitt, the people are characterized with a shared political identity which allows them to distinguish friends from enemies (CP 46). Though Schmitt agrees that it is possible for people who are not willing to participate in the political unity to be legally recognized as citizens and to live law-abidingly under some norms of positive constitution, it is outstandingly clear that political equality only applies only to those who belong to the political unity and whose identity expresses the oneness of the people (CP 26-37). Any individual whose identity does not go along with the shared identity of the people is highly susceptible of being excluded from participatory equality as one's belonging and active participation to the political unity of the people is a precondition to individuals' enjoyment of political rights (CT 208). Consequently, Schmitt's defended State's form fails to avoid political discrimination, and this would contribute to the already mentioned weakness of political instability of Schmitt's defended State form.

Schmitt argues against the liberal conception of equality that "the equality of all persons as persons is not democracy but a certain kind of liberalism, and not a state form but an individualistic-humanitarian ethic" (CDP.13). He adds that "modern massive democracy rests

on the confused combination of both” (ibid). He asserts that there is an obvious opposition between liberal individualism in its moral focus on individuals with the democratic ideal which, in his view, is essentially political and aims at establishing the people’s identity based on homogeneity (ibid). Schmitt claims that democracy negates liberalism and liberalism negates democracy; and as parliamentary democracy consists in the articulation between democracy and liberalism, it can only generate a non-viable regime (ibid).

Therefore, Schmitt’s understanding of equality requires a necessary distinction between two divergent ideas, namely, the liberal one and the democratic one. On the one hand, from the liberal perspective, all human beings are equal just because they are human beings. On the other hand, democratic conception of equality requires the possibility of distinguishing who belongs to the demos and who does not. In this regard, political equality cannot exist without its necessary correlate of inequality (Mouffe 1999: 40).

One may agree with Schmitt when he insists that democratic concept of equality is fundamentally political and necessarily entails the possibility of distinguishing insiders from outsiders. It is indeed defensible that democracy cannot be grounded on a simple generality of humankind, but must be expressed through its belonging to a specific people. In fact, in any State, a foreigner does not enjoy equal political rights as other citizens of the State. There is always a distinction of insiders/outsideers which is considered in any attribution of the benefits of political rights. For instance, as a foreigner residing in the Netherlands cannot claim to benefit from the monthly “out caring” financial facility provided by the Dutch government to the Dutch people; neither can one claim the right to vote unless one has citizenship. Similar political restrictions are common in almost every state. Nevertheless, states’ attribution of political rights to their members may not cause much concern. Nevertheless, the problem which can be raised in Schmitt’s notion of insider/outsider is how to understand democracy’s belonging to the people and how his claimed homogeneity is to be achieved as a political form of a democratic State.

It is important to note that, contrary to some of interpretations which have been attributed to Schmitt’s notion of homogeneity as essentially discriminatory, he does not necessarily postulate that the belonging of democracy to the people and its pre-conditional political mark of homogeneity are to be exclusively envisaged in racial or ethnic or any naturally conditioned characteristics. But he emphasized that there are several other ways in which homogeneity as the mark of the political unity of the demos could be manifested. He asserts that homogeneity can also be manifested through certain moral qualities such as civic virtues, in arête, the classical democracy of virtue, etc. (CDP. 9).

In this perspective, it can be argued that what is important in Schmitt’s notion of people’s homogeneity is not the similarity on which homogeneity is based, but the capacity it generates which allows the distinction between those who belong to the demos and those who do not, and its subsequent reference in attributing political rights to individuals. Therefore, it can be supported that Schmitt was right in arguing that, by basing political equality to the notion of the people and not on the abstract idea of humanity, democracy becomes a notion whose existence is linked with a specific people and not a general notion attributed to humankind as a whole.

Schmitt strongly argues against liberal democracy that it is fundamentally non-democratic because, in his view, liberal democracy fails to draw a distinctive line between those who

belong to the demos and the State, and those who do not. Such distinction, in Schmitt's view, is impossible for liberalism just because liberal democracy focuses on a notion of equality which is based on the abstract idea of equality grounded on humanity than individuals' participation to the political unity or the State. Schmitt concludes that liberal democracy advocates a non-viable political form and is self-destructive (CDP 57). One might not help mentioning the radical form of Schmitt's conclusive criticism against liberal democracy. Yet, liberalism offers some values of toleration, political pluralism and acceptance of heterogeneity within the political society by considering human person *qua* human as a fundamental value worthy of some political rights. Yet, for Schmitt, any viable political form of the State must allow the political moment of discriminating between "us" and "them". Nonetheless, Schmitt's proposed homogeneity and its political implications can generate some negative consequences to the political society.

In fact, Schmitt argues that the State is political unity which is characterized by people's oneness substantiated by political homogeneity. In his view, the preservation of political unity and its homogeneity envisages, if needed, the eradication of heterogeneity (CDP 9). If one postulates that homogeneity, in Schmitt's understanding of it, involves political oneness in terms of cultural or political ideals of a people, Schmitt's defended political order may allow discrimination within the political society. Indeed, Schmitt's advocated political unity concretizes itself in the oneness of the people. Yet, people's oneness leads to the establishment of a political characterization of otherness which allows the distinction of those who belong to the political unity of the people and who are subsequently entitled to the enjoyment of the political rights the State provides, and those who are out of the margins of political unity who, in Schmitt's view might not enjoy the political rights the State provides. Such a distinction becomes a political danger whenever it takes place within the political boundaries of a pluralistic political community.

Analogically, political unity of the people must be a concrete unity, existing and stable. Similarly, the identity of the people which gives substance to their political homogeneity must also exist as a given. Consequently, the distinction between those who belong to the political unity and those who do not is not necessarily a political construction, but it can be a simple recognition of already-existing cultural and ethnic distinctions which can even take social or political discriminative form. Concretely, the political unity of the people allows them to distinguish friends from enemies (C.T. 231). Yet, for Schmitt, one's belonging to the political unity determines his possibility of enjoying political rights offered by the State. Consequently, the friend-enemy distinction can take place within the boundaries of any heterogeneous political community. In fact, Schmitt argues that whenever a group of individuals construct an political identity which is strong enough, and when the specific group is willing to go to war to defend such a political identity, those individuals have achieved the level of establishing a friend-enemy distinction; an enemy being anyone who is a threat to the group's own political existence (CP 46). Consequently, the friend-enemy distinction is possible within any bounded political society. The possibility of disintegration of political unity can be interpreted as one of the possible and permanent threats to the subsistence of the political unity or the State in Schmitt's sense.

As already defended, political unity, as defined by Schmitt, is not necessarily the result of any form of political creation. It can also be the consequence of a natural bond of an ethnic

group of individuals who came to establish political bounds within a territorial boundary. If such a group establishes a constitution to give itself a political form, Schmitt would argue that this is indeed a concrete case of political unity based on his notion of “homogeneity”. Nonetheless, if there is any political faction within such a political society, in Schmitt’s view, this would be an attempt to political unity and the creation of heterogeneity and otherness within the State, and may consequently be inadmissible. This might lead to marginalization of some individuals as one’s belonging to political unity is a pre-condition to any enjoyment of political equality and other rights-based entitlements within the State.

Moreover, Schmitt’s defended notion of political unity has some problematic political implications. Political unity is understood as a shared political identity of a people. Yet, political unity, in Schmitt’s own terminology, hardly gives room to the possibility of any form of political integration. For instance, if the political unity is based on ethnicity, one’s belonging to the ethnic group concerned is a precondition to one’s participation to the political unity. In this perspective, political unity allows the people to identify who is a member of the political community and who is not. This particular form of political unity does not allow any form of integration of outsiders (individuals who belong to other ethnic groups, cultures, or ideologies). In this regard, political unity is based to the fundamental political differentiation of ‘**US**’ (as a people bounded with political unity), and ‘**THEM**’ (outsiders to the existing political unity). This form of inclusion and exclusion of individuals within the bounds of political unity can be applied with any political society. As has been demonstrated, whenever this distinction is applied within the boundaries of the political community, it may work as a hindrance to political equality, and it is, in this regard, highly susceptible of generating political discrimination and civil unrest.

Schmitt’s notions of political unity and homogeneity do not give room to heterogeneity or any form of political pluralism. One may then wonder how, in Schmitt’s advocated State’s form, the State would deal with some issues such as cultural pluralism, religious pluralism, political factions, or any similar pluralistic and social or political divisions. Such divisions, in Schmitt’s view, may be a ground for political discrimination as they are distinctive marks of otherness. Consequently, Schmitt’s advocated homogeneity within the State is susceptible of generating discrimination towards some members of the political society because his defended political order is radically intolerant to any form of political pluralism.

However, Schmitt’s defended politico-legal order challenges some of the contemporary politico-legal ideas. In fact, Schmitt argues that democracy belongs to a specific and unified people. In this perspective, democracy cannot be a notion which is generally attributed to humankind. Though this argument may sound unpleasant to the liberals, it offers a sound warning to those who defend that the processes of globalization are progressively setting basis for worldwide democratization and at the same time laying basis for cosmopolitan citizenship. If it can be defended that democracy belongs to a determined people (the demos), it may consequently follow that cosmopolitan pilgrims would have lost the possibility of exercising their democratic rights of law-making. This would require the transnational courts to defend the rights of those people whenever their individual rights are violated.

Yet, as any enjoyment of political rights is, in Schmitt’s view, determined by one’s belonging to the State, it may also be challenging to ensure the rights of individuals in some particular conditions such as in case of irregular migrants. In Schmitt’s view individuals are

not citizens of the world, but citizens of specific States. Any entitlement of political rights must be determined by individuals' belonging to a specific State. In this perspective, irregular migrants do not have any specified State to which they belong. Such people, in Schmitt's view, may not reclaim their rights just in their quality of human beings. They may then run a danger of not benefiting political protection if their rights are exclusively depending on individuals' belonging to political unity or the State. Consequently, in the light Schmitt's politico-legal thoughts, if cosmopolitan democracy is possible, it may probably connote an empty terminology disguising the disappearance of democratic forms of government; but global political unity based on his notion of substantial homogeneity would most probably be an unrealizable dream.

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