Pluralism, Democracy and Constitutional Politics: A Schmittian Analysis

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Abstract

Can a country that is so polarized in two fundamental issues – ethno-national and religious identity – be reconciled? Is there a way to get passed the polarization and to constitute a functioning, democratic political unity? Or, given that democracy is sustained by the homogeneity of identity of the ruler and the ruled, will political unity be always exclusionary? More precisely, is democracy inherently incapable of sustaining pluralism? Theoretical and practical concern of this paper lay exactly here. Through a Schmittian analysis of democracy, rule of law and constitutions, the paper discusses institutional components of the current liberal, parliamentarian, constitutional democracies with the aim of finding a politically uniting factor for different identities. In juxtaposition with the theoretical discussions, Turkey is referred as a case-study.

Introduction

When in 2007, Justice and Development Party (AKP) came to power for the second time, the secular cadres in Turkey felt the blow stronger than before. They had assumed that AKP's initial victory was coincidental. The voters had chosen AKP not because they believed in AKP's political agenda, but rather because the seculars had not produced anything new. The second time, however, proved the seculars' interpretation of the 2002 elections was drastically off. AKP, which advertised itself as a Muslim – democrat party, waspreferred by the Turkish electorate, exactly because of its political agenda. Election results were not simply a punishment for the seculars. On the other hand, for the groups that AKP represented, the 2007 election results meant another electoral term of learning to live with the seculars. This has not always been so easy for either groups, and it continues to constitute the primary dynamic of Turkish politics. However, what many seculars feared has not happened: Although in both elections AKP came to power as a majority, it did not attempt to dismantle the secular establishment.

The struggle between AKP and the seculars over the role of religion in politics, education and law have strongly polarized the political rhetoric. Especially when it comes to issues like the military, the constitutional court, the headscarf and the veil, or the religious education classes in middle and high schools, political discussions often rotate around the Schmittian friend-enemy lines, making any reconciliation or negotiation between different demands impossible. Both groups, however, seem to agree on one issue: the Kurdish conflict which has been inflicting violence on the country for the last 80 years. Whatever differences seculars and AKP have dissolves when it comes to how to deal with the PKK; and that is because there is an even more fierce polarization in the country with regards to the Kurdish conflict than the division between the seculars and the AKP.Can a country that is so polarized in two fundamental issues – ethno-national and religious identity – be reconciled? Is there a way to get past the polarization and to constitute a functioning, democratic political unity? Or, given that democracy is sustained by the homogeneity of identity between the ruler and the ruled[1], will political unity always be exclusionary? More precisely, is democracy inherently incapable of sustaining pluralism? The theoretical *and* practical concern of this paper lay exactly here.

Political Unity and Democracy: Identity, Representation and Homogeneity

Carl Schmitt in his Constitutional Theory argues that any form of state emanates from different articulations of identity and representation.[2] However, in no state form can they be found purely and singularly. They always coexistwith political unity being produced organically through their performance.[3] That is to say, the relationship between them and political unity is reciprocal; identity and representation feed from political unity and political unity comes to existence through them. Then, as long as there is a political unity, identity and representation will have to be re-articulated and reproduced. Democracy makes use of this organic, dynamic character of political unity by opening up various channels to enable the manifestation of changes amidst people.

[1](Schmitt, Constitutional Theory, 2008, p. 264)
[2](Schmitt, Constitutional Theory, 2008, p. 239)
[3](Schmitt, Constitutional Theory, 2008, p. 239)

Although parliamentarism is probably the best way to absorb and reflect the ever-occurring and ever-continuing changes, as Schmitt discusses in The Crisis of Parliamentary Democracy, it has major theoretical and practical shortcomings.[4] Most importantly, the parliamentary system subjects representation to the interests of different factions, rather than 'making present' the true essence of political unity.[5] Like sovereignty, once in the parliament, representation is also eroded and eventually lost. To prevent this weakening, identity – more precisely, homogeneity of identity between the represented and the representative - acts as the key element that locks the political unity together. Through homogeneity, any potential misrepresentations – whether in the form of reflecting the already established unity, or making present and hence creating the unity itself – are smoothed out. That is to say, a complete homogeneity would guarantee a total political unity in the body of the represented as, for example, in *L'Etatc'estmoi*. At the same time, homogeneity is now applicable to a parliamentary system: If someone from 'us' represents 'us,'our political unity will be actualized within him/her; and because there is total homogeneity between 'us' and our representative, full political unity will be achieved. As long as this is fulfilled, the political form of the state will not really matter because, according to Schmitt, "where the people as the subject of the constitution-making power appear, the political form of the state defines itself by the idea of identity. The nation is there."[6]

Nevertheless, identity and representation are often contextual and are expressed in diverse ways. As such, pure homogeneity of any kind becomes an unrealistic concept. In addition, conceptualizing democracy as requiring "first homogeneity and second – if the need arises – elimination or eradication of heterogeneity" is also dangerous.[7] Schmitt's political evolution testifies to the historical consequences of that slippery slope. However, before jumping to any conclusions, we have to ask what kind of homogeneity Schmitt might be talking about here. Is this the so-called ethnic homogeneity, the myth of blood based kinship? Or, is it linguistics? Culinary?Religious?Ideological? Or, perhaps it is based on a dress-code (those who cover their hair versus those who do not)?

Undoubtedly, there have been attempts to create an ethnically homogeneous 'People' out of heterogeneous societies. The consequences are usually very dire. Aside from the physical violence people experience, there is also the socio-psychological trauma which may last for generations.[8] Gradually it becomes a part of the culture and is reproduced through practices, rituals and memory.[9] In this age of nation-states I don't think it is possible to find a group that has not gone through similar violations. However, what we very often forget is the fact that, whether we have gained self-determination or not, violence continues. If there is a state we claim to be 'our own' than we keep telling the same stories of revolution and independence from the powerful 'enemy' (or 'enemies') to the next generations. If self-determination is not at hand, then the story becomes a myth, a prophecy which will be fulfilled one day. 'Us vs. them' is at the core of the nation-state; and in case, due to heterogeneity, any cultural element comes short to create a nation, 'the other' is always there to help people unite against it.

Then, the question of homogeneity is not one of quantity, but rather, one of quality. The conflict is not solely between majority and minority. Although that too is very important and can at times prove very fatal,it leads to the articulation of apolitical unity through the toleration of heterogeneity. The question, then, inevitably comes down to the demarcation of minority: How small is a minority? Is 51% enough to claim majority and act accordingly in the name of democracy but at the expense of the remaining 49%? Does minority veto cause conflict by giving minorities too much power or is it a genuine way to protect their rights and well-being?[10]Moreover, the rhetoric of toleration, even though it may help prevent violence at times, does not address the structural roots of the problem.I am not saying minority rights are useless and hence should be abolished. On certain occasion, they could be a temporary solution. However, in the long term, political unity remains fragmented. As such, the aim here should not merely be protecting minorities or tolerating differences by *givingthem* rights.In addition, conditions that have created the discrepancies between groups are not always reflected accurately in the law. Hence, minority right may not alter the conditions sufficiently. In fact, depending on the internal dynamics of these groups, minority rights may make the conditions worse by amplifying the effects of these conditions. Let me illustrate my point with an example: In no society, there is only one minority. Depending on the context, any identity could become a minority. During the early Republican era, Kurds were not considered a minority.

[4](Schmitt, The Crisis of Parliamentary Democracy, 1988)
[5](Kelly, 2004, p. 115)
[6](Schmitt, Constitutional Theory, 2008, p. 239)
[7](Schmitt, The Crisis of Parliamentary Democracy, 1988, p. 9)
[8](Slyomovics, 1998)
[9](Slyomovics, 1998)
[10](Schmitt, Legality and Legitimacy, 2007, pp. 27-36)

They were part of the Muslim *tebaa* (people, subjects, community) that had gained independence from both the Ottoman Empire and the Allied Powers. In the Lausanne Treaty (1923), they were recognized alongside the Turks as the constitutive element of the Republic. In the Treaty, only non-Muslims were recognized as minorities. Soon after the Treaty, when centralization and absolution of the Republican state had been completed, a major Turkification movement started. The official language was Turkish, and through campaigns (ex. *Citizen, Speak Turkish!*), media and educational institutions speaking of any language other than Turkish were banned. Not only Kurdish, but also Greek, Ladino, Armenian, Laz, Arabic, Georgian, and Circassian were exiled to the private sphere. Although non-Muslims had a right to have schools in which 'their' language could be spoken, Muslims had to integrate themselves. Hence, in these early days of the Republic, all non-Turkish identities had become minorities.

The picture started to blur with multi-party elections. The nation, which was assumed to be a single, indivisible entity started to shatter along religious and class lines. Starting from the mid-1940s, headscarf made a comeback after its strict removal at the early years of the Republic. Treated by the dominant Kemalist identity (and state structures) as dangerous, reactionary, fundamentalist and contrary to the values of the Republic, the headscarf divided 'The Nation' from the middle. But, as leftists of the day argued, 'The Nation' was already divided. Still, it took the labour struggle through the 1960s and '70s to raise the consciousness of the workers and to make left into a semi-dominant force in society and politics. Of course both movements (headscarf and workers) had a lot to say about women. However, feminism as a political player had to wait until 1980s to make its voice heard, along with environmentalists, anti-militarists and LGBTs. As fractures continued, they also deepened. Identities that were not recognized previously started to push for rights. The most brutal push came from Kurds, as the movement turned to mass-scale violence with the PKK. The story got even bloodier during turbulent coalition governments of the 1990s. Theconservative right divided among itself, again mostly due to the headscarf issue. Minorities increased as the public sphere divided. Violence by the PKK paralyzed everyone, strengthening only the hands of the military and the racist right.

The challenge now is how to accommodate all the different identities. Each time the government attempts to make a constitutional change giving some rights to one or two groups, others rightfully ask for theirs. If someone with a headscarf gets the right to enter into the university, then the pacifists should also have a right to not to serve in the army. If Kurds are recognized as a distinct identity, so should Romanians, Arabs, Circassians and others. If workers are given unemployment security against ruthless privatization, then homosexuals should also have the right to marriage benefits. Obviously these just demands could not be fulfilled by granting rights to groups one by one. Such a solution would be trying to cover up too many holes with too few patches. The problem was caused by a misconception of the constituent power. Only a certain segment of the society is assumed to be The People. Political unity is exclusive and hence the constitution, whether in absolute or in relative sense, does not belong to everyone – simply because in both positive and ideal terms it does not include everyone.[11]

The People andthe Constitution

In the complex relationship of modernity with sovereignty, two points are specifically of interest to this paper: First is the eradication of the divine rights of kings from the political rhetoric and hence the secularization of political theology. This process goes as far back as the early debates about taxation of church lands between the newly established Catholic Church and the Holy Roman Emperor.[12] It is beyond the scope of this paper to cover this extended debate, except to say that it caused a major rupture within the political philosophy of the Medieval Era. Between the Papists and the Monarchists, relinquishment of sovereignty from the Pope to the king and the secularization of political theology had begun.[13]

Ruptures would continue later on especially when power struggles between aristocracy and kings started to occupy the political agenda. Monarchists were divided among themselves, into absolutists and constitutionalists.[14]What I call the First generation Constitutions, Magna Carta of 1215 and the Dutch Constitution of 1579 for example, are outcomes of these struggles. In this respect, First Generation could be seen as first concessions of kings to their parliaments in the form of rights and liberties. They are also the first steps of secularization of law, and the establishment of secular sources for legality. Controversies were to continue until sovereignty eventually descended from the king down to the parliament. Moreover, in addition to secularization, sovereignty became disembodied from the king and depersonalized.

[11](Schmitt, Constitutional Theory, 2008)
[12](Sabine, 1980)
[13](Sabine, 1980)
[14](Sabine, 1980)

The Glorious Revolution is atypical example of what was eventually to happen in many parts of the world.[15]When the king yielded to the parliament, the cracks between the state, the subjects-citizens and the body of the king finally split away from each other. The state continued to serve *for each and all*, but the parliament - not the king - came to represent the commonwealth. Although it (physically) was composed of people, in and of itself the Parliament was an abstract entity. Unlike the king, it had neither a specific body nor was it embodied in any specific person. Translocation of sovereignty to the parliament thus meant its disembodiment and depersonification. When state power resonated within the parliament, which had become the sovereign body, it was necessary to protect the parliament against its own draconian powers. This led to the second wave of constitution writing. Constitutions became proscriptive and were set against particular enemies. They focused on division and balance of state powers. By specifying and limiting the state powers, constitutionsenabled the nurturing of parliaments. At the same time, all these struggles between the state as the executive and the parliament as the legitimate sovereign got carried over to and within the constitutions.

But, is the parliament a distinct entity from the state or is it inevitably a part of the state structures? Is the relation between the state and the parliament hierarchical or horizontal? If hierarchical, who is higher than the other? If horizontal, what mechanisms keep them simultaneously going? Most importantly, what role did constitutions play in this relationship between the state and the parliament?If the primary tension is between the state (which is the executive or the administrator) and parliament (which is the legitimate sovereign), the constitution becomes a regulatory document that governs the relationship between the two. That is to say, parliament legislates in light of rules, procedures and mechanisms stated in the constitution, and state administers these laws as, again, stated in the constitution. However, if the tension is situated between the legislative and the executive, then parliament by definitionbecomes a part of the state structure. Sovereignty shifts to the state, and constitution, as the document that regulates and contains these branches of power, inherits the tension between them. Further, if the constitution is also given the task of protecting the rights and liberties of citizens (that is to say if the constitution is intrinsically liberal), then we have a case of inherently conflicting constitution standing against a godlike, omnipotent and omnipresent state power as a mechanism of checks and balances.

Distinct or complementary, even if the parliament is the sole sovereign, it cannot *execute*the sovereignty on its own. Parliament needs the state as the *administrator* of sovereignty on the people, and when need arises, to protect sovereignty from external and internal threats. Third Generation Constitutions reflect this relationship. They are not only the products of secular willpower,[16] but are also the children of parliaments as rules, norms and procedures that govern and guide the mechanisms of administration. As such, constitutions embody the sovereignty of the parliament; they are the foundations of states' legitimacy.

Rule of Law, Role of Law

If both sovereignty and legitimacy are now embedded in the constitution, does this mean there is no need for the homogeneity of the ruler and the ruled? Unfortunately even the legal declaration of people's sovereignty in the constitution, as well as supplementary laws regulating constitutional amendments and judicial review boards, do not guarantee that each and every identity within the people will be included in the political unity and/or will have a say in matters pertaining to sovereignty. Political unity could still be exclusionary. One approach to counter this problem has been to apply the law equally to everyone and hence to protect every citizen against the arbitrary execution of state powers. Legally, this means universal coverage of law both to persons and to territories, as well as singular redefinition of the individuals as legal subjects devoid of any other specification (gender, ethnicity, title, etc.) that might –positively or negatively- distinguish them. Needless to say, these two qualities have grown somewhat simultaneously and are interrelated with each other. Moreover, both required "the omnipotence or undisputed supremacy throughout the whole country of the central government."[17]

In his Introduction to the Study of the Law of the Constitution, Dicey proposes three requirements for rule of law: first, "no man is made punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land."[18] Second, "every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."[19]

[15](Moore, 1993)
[16](Preuss, 1993, p. 645)
[17](Dicey, 2005, p. 179)
[18](Dicey, 2005, pp. 183-4)
[19](Dicey, 2005, p. 189)

Lastly, "the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts."[20] In other words, law, by law, is the highest power. Adoption of the rule of law as a system of government bestows upon law characteristics other than being the rule book for functioning of the state. Law is no longer a simple set of rules describing how the state works;it has become a code of conduct.[21] Neither any action, nor any individual or entity can exist outside the law. Extra-legality is simply unthinkable. Everything must be inscribed in or allowed by the law. As such, "the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint."[22] That is to say, in a rule of law state, might does not make right. Individuals and entities are protected by law against the draconian powers of others, so that social order becomes possible.[23]With rule of law becoming the common denominator, disenchantment brought by modernity has taken a significant turn. Firstly, the road leading to the iron cage of bureaucratic rationalism has been clearly opened. Law has become a major player in our lives; it governs everything we do and don't do, it determines our past, present and future. Undeniably, our lives have become increasingly bureaucratized, more closely regulated via law, more subtly scrutinized by the modern state.

Second, although such day-to-day contact has earned us some familiarity with law, it has not totally obliterated its myths. For example, law has its own lexicon, its own space (courts) and its own agents (lawyers, judges, prosecutors); it requires a certain dress code and welcomes only certain type of behavior. We have to strip off our individualities in order to enter into the legal domain, and once there, retain the status of undifferentiated legal subjects. This second criterion mentioned by Dicey, seems to promise equality before and by law, regardless of background (ethnicity, gender, class). Yet, enclosures created by the above characteristics of law make law inaccessible to the majority. Entering into the legal domain is in the monopoly of its agents, because they speak its language, they know how it operates, and only they know who can enter.[24] Moreover, the immense inequalities of material conditions entrenched in our societies makes the law a tool of those who have access to it and those who can use it to exploit and repress those who cannot.[25] Consequently, law can be neither objective nor neutral; rather, it helps the current status quo – economic, international, and/or social - to stay intact, grow and reproduce.

Third, law is converted into a social signifier. In a society, where homogeneity of any sort is missing, three qualities Dicey attributes to rule of law may be significant enough stakes for the majority to participate in the social order. In many cases, universal equality promised by rule of law supplies the population with the necessary social glue. It provides the myth of accountability of the system against injustices, repression and inequality. However, as Schmitt also points out, this liberal myth assumes a "deluded notion of the law as a closed, highly formal, vaguely machine-like system"[26] and ignores "the reality of jurisprudence by denying the existence of gaps within the law – namely the fact that the formal rules of statutory law cannot possibly cover all instances of concrete reality."[27] This gap is both unbridgeable and unavoidable.[28] Schmitt's solution is to recognize the decisionist aspect of law, namely to recognize that at some point judges make decisions, and hence, make laws.[29] Specifically:

> decisionism emphasizes the ultimately ungrounded nature of human choice such that all action is rendered irredeemably arbitrary and divorced from reason. The moment or fact of decisions to act takes precedence over their justification or quality. At its most alarming, enabling of decisions to exert power without rational explanation to or interaction with those over whom power is exercised facilitates naked arbitrary force.[30]

Schmitt's solution may not be appealing. After all, he seems to be legitimizing exercise of unchecked unlimited power. Yet, his criticism is valid. Schmitt is pointing out the arbitrariness in law and is trying to create a legitimate space for it within the (rule of) law.[31]

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[20](Dicey, 2005, p. 191)
[21](Schmitt, Legality and Legitimacy, 2007)
[22](Dicey, 2005, p. 184)
[23](Schmitt, Legality and Legitimacy, 2007)
[24](Kafka, 1992)
[25](Marx, 1842)
[26](McCormick, Schmittian Positions in Law and Politics?: CLS and Derrida, 2000, p. 1695)
[27](McCormick, Schmittian Positions in Law and Politics?: CLS and Derrida, 2000, p. 1695)
[28](McCormick, Schmittian Positions in Law and Politics?: CLS and Derrida, 2000, p. 1696)
[29](McCormick, Schmittian Positions in Law and Politics?: CLS and Derrida, 2000, p. 1696)
[30](McCormick, Derrida on Law; or, Poststructuralism Gets Serious, 2001, p. 396)
[31] At the crux of it, his criticism is actually extending to another myth of liberalism: separation between law and politics. As opposed to the liberal conceptions, for Schmitt, "there is no sharp distinction between objective law and subjective politics."(McCormick,

His solution raises additional questions, of which the most important is how to orient and regulate this arbitrariness within law. Schmitt's answer is even odder than the extreme decisionism he proposed before. According to McCormick:

> Conventionalism is often considered to be a way of avoiding the naked prejudices of individual judges constituting the law. As a solution, whatever a community of judges in particular culture could be expected to agree upon in a similar case ought to be adopted as a guideline for a judge's particular opinion in a given case. Indeed, in his early work, Schmitt ([1912] 1969, 71-9, 86) offers this as a solution to the problem of judicial subjectivism.[32]

This is I think the most important expression of Schmitt's discussion of identity and homogeneity. Schmitt might not be talking specifically about a racial homogeneity[33], nonetheless, such an interpretation of culture, and more importantly its inscription into a guideline would formalize the hegemonic interpretations of culture. It prevents the law and rule of law from acting as channels of peaceful change, recognition and acceptance for marginalized identities. At the expense of xenophobia, repression and exclusion of non-hegemonic identities, Schmitt's solutions profess conservatism:

> The 'common sense' on which judgments are based are neither psychologically nor anthropologically predetermined, but rather retrospectively posited as the supplement of judgment. A judgment is made and with it comes a challenge that others should make the same judgment. What emerges is a community, and not just one community, but a plurality of communities, each legitimizing its own decisions on the basis of a universality that can only be performed and never grounded. What emerges is the world as if it has always already existed.[34]

Conclusion and Further Discussions

Schmittian solution is certainly out of consideration. But, then, do we have to settle with a concept of law that assumes an overarching, neutral position and is blind to the inequalities, injustices and repression in its source, making and application?The answer is no. The picture should not solely be black and white. The problems Schmitt identified with the rule of law are vital. However, we shouldn't throw away the baby with the bath water. The universal equality treatmentrule of law promises, for example,is not undesirable; on the contrary, in many contexts, it has brought emancipation to many oppressed groups. If certain groups still feel that they are treated unequally, we should push for the broadening of the treatment of universal equality in law, rather than getting rid of the principal of equality. Another critique may argue that the problems Schmitt identified are actually problems of liberalism, not of rule of law. Although this criticism has validity, these problems still mightnot be resolved even if we do away with liberalism. It could be the case that the root of these problems is the particular interplay of rule of law with liberal, parliamentary, constitutional democratic systems. As such, changing one or the other might not produce the consequences we want. Inside, it could be necessary for us to intervene at the conjunctions in which the two help constitute one another.

What are the implications for Turkey? As we are speeding head on to the next general elections with a public impetus for a new constitution, questions of political unity gains all the more significance. Many think that AKP will win the elections the third time. But, to change the constitution it needs to be the true majority in the parliament. Even if that happens, this means, first, for opposition as well as for AKP, that the uncomfortable tensions of being have to live together in the political arena has to continue for some more years. The more important consequence is yet a societal one. If the constitution changes, and I believe it should – since it is the constitution that inherently carries the legacy of 1980 coup, then this change will be a major chance for peoples of Turkey to reconstitute the political unity with significant gains made for all those who has felt excluded for the last 30 years.

The next elections and hopefully the constitutional change afterwards will be a true test for Turkish democracy. As it is now, AKP stands for a group who has been sometimes covertly but mostly overtly excluded from political unity. If the prospective constitutional changes nurture the inclusion of only those that AKP stands for, as opposed to all (or at least the most of all) the different identities in Turkey, then the new political unity is bound to fail due to reasons not very different than the ones I have discussed in this paper.There are many identities that rightfully demand inclusion into the political unity on equal footing. The most important and so far the most vocal two groups are the Kurds and the Shiites of Turkey. However, quantitatively speaking, it is the women who need the most of everything the new political unity might give.

Schmittian Positions in Law and Politics?: CLS and Derrida, 2000, p. 1696) It can be argued that he further extends this erase the boundaries between politics and religion, law and culture, etc.

[32](McCormick, Three Ways of Thinking "Critically" about the Law, 1999, p. 414)

[33](Mouffe, 1997, p. 23)(Kennedy, 1988, p. xxxii)

[34](Rasch, 2004, pp. 102-3)

Women's rights cross-cut any ethnic, religious and/or class boundaries and as such, I think more than the Kurds and the Shiites, women make up the most significant group. That being said, the other half of the challenge of democracy lies in wait for the peoples of Turkey. They have the potential to turn the constitution making into a process of democratic change for a more inclusive, freer and more equal society or conversely into a bloody civil war in which various sides attack each other until each are spent either physically, economically and politically. Time will tell which way Turkish politics will fall. Let's hope Turkey passes this test of democracy. More importantly, let's work so that Turkey will pass the test of democracy.

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