

SUBSTANTIVE EQUALITY, POPULAR SOVEREIGNTY, AND ANTAGONISTIC POLITICS: AN INTRODUCTION TO CARL SCHMITT'S DEMOCRATIC THEORY

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Abstract:

This paper critically explores Carl Schmitt's theory of democracy. I present the emergence of the democratic principle of legitimacy as described by Schmitt, then elaborate on the people as sovereign qua constituent power and present its threefold relationship with the constitution. Later I formulate three lessons to be taken from Schmitt's theory and discuss its importance and implications for democratic theory in terms of the normative and formative principle of democracy, core subject and core mode of democratic politics, and conditions of possibility of constituent democratic politics. In concluding part I discuss the differences between liberal, republican and deliberative model of democracy and Schmitt-inspired theory.

Keywords: democracy, constituent power, the people, Carl Schmitt, sovereignty.

1. Introduction

For good reasons – partly stemming from his theoretical work, partly from his biography – Carl Schmitt never made it into the canon of the theorists of democracy: his grounding of politics in existential conflict between friends and enemies, definition of sovereignty as the capacity to breach the established law, and his antisemitism and active collaboration with the Nazi regime earned him an infamous (but at least partly deserved) title of the “‘Crown Jurist’ of the Third Reich.”¹ Nevertheless, the label should not be the excuse for disinterest in his thought. In this paper I intend to focus on Schmitt's theory of democracy which, I believe, provides not only important insights into the mechanisms and the functioning of democracy but also poses a challenge for the dominant liberal understanding of democracy, and helps us to understand recent developments in social contention. Let me briefly explain: variants of liberal theory usually trace democracy to effective protection of individual rights against the oppression of the state and society. Whether it is the well-ordered society of Rawls or the partnership conception of democracy of Dworkin, it is the individual and their rights that occupy the central place. Every challenge to that vision is either discredited as an illegitimate limitation of liberties, like in the case of communitarian critique,² or

1 Andreas Kalyvas, “Hegemonic sovereignty: Carl Schmitt, Antonio Gramsci and the constituent prince,” in: *Journal of Political Ideologies*, 5(3), 344.

2 See for example Kymlicka's refutation of communitarianism. Will Kymlicka, *Contemporary Political Philosophy: An Introduction*, second edition (Oxford, New York: Oxford University Press 2002), especially chapter on communitarianism (pages 208-283).

rejected as possibly totalitarian, as in the case of the conceptions of democracy labeled as 'majoritarian'³ (under which civic republicanism, for example, can be ascribed). One way or the other, the debate over democracy ends up in deadlock.

At first glance, Schmitt takes the communitarian/majoritarian side of this debate. I argue, however, that Schmitt's theory of democracy can help us find the way out of this deadlock and broaden the spectrum of the debate over democracy. The reading of Schmitt performed in this paper is by necessity selective, due to the volume of his work and the plethora of topics he considers and his intellectual development. The aim of this paper is therefore twofold: first I intend to familiarize readers with Schmitt's democratic theory; second, going beyond Schmitt, I intend to highlight the critical aspects of his theory of democracy that can contribute to and broaden democratic theory in general and improve its utility in responding to recent events.

I start my exposition of Schmitt's theory of democracy with the description of the emergence of the democratic principle of legitimacy: sovereignty of the people. This leads me to the question of the relation of the people as sovereign to democracy as the political form. I elaborate on this question by reflecting on the identity of the people and democratic principle of equality; I then proceed to the threefold relation of the people with democracy. Next, I claim that there are three lessons of to be drawn from Schmitt for democratic theory and democratic politics: about the normative and formative principle of democracy (substantive and concrete equality), the core subject and the core mode of democratic politics (the people as a constituent sovereign acting in public), and the condition of possibility of democratic constituent politics (a social strife). I argue that there are normative principles of democratic politics to be taken from Schmitt. I diagnose shortcomings of Schmitt-inspired democratic theory and point to ways of overcoming these deficiencies. As a matter of conclusion I briefly describe, how Schmitt-inspired democratic theory differs from three normative models of democracy as described by Habermas.

2. The emergence of the democratic principle of legitimacy

In *Political Theology*, Schmitt defines sovereignty as the capacity to make *the* decision on the exception.⁴ What he means in this peculiar definition is that the distinctive feature of sovereignty is the capacity to suspend the existing legal order and thus to question the normalcy of a concrete situation. An exception cannot be

3 Accusation of totalitarianism is made by Dworkin against communal vision of the people, that is the people which is not merely the sum of individuals. See: Ronald Dworkin, *Freedom's Law. The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1995), 20.

4 Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty*, trans. By George Schwab (Cambridge, Mass., London: The MIT Press, 1988), 5.

defined in legal terms, it is rather proclaimed by the decision, which is understood as a comprehensive act. In terms of the topology of power, the sovereign is external to the legal system defined by the norm, but at the same, he belongs to it.⁵ The flip side of the decision on the exception is the decision on normalcy: by abstaining from proclaiming the exceptional situation the sovereign sustains and confirms the normalcy.⁶ In other words, the legal system defined in terms of norms has its foundation in the singular exception that is external and prior to it: legal and political order is legitimate if it is grounded in the sovereign decision; at the same time, the exception does not disappear after creation of the order, but remains dormant.⁷ The decision on the exception is sovereign not by the virtue of its legitimation (it is the source of legitimacy), but by the virtue of the situation in which it is made: the decision is made in a normative void.⁸ It is ultimate, because there is no higher authority one can appeal to when challenging the decision.⁹ Thus sovereignty is *both* the creational force and ultimate power, but the feature of being ultimate stems from its creational character. In Chapter 8 of his 1928 *opus magnum*, *Constitutional Theory*, Schmitt calls this creational power a constitution-making power and defines it as “the political will, whose power or authority is capable of making the concrete, comprehensive decision over the type and form of its own political existence.”¹⁰ In other words, constituent power is defined by the capability to determine its own “type and form” of political existence in its entirety.¹¹ Such a decision makes sense only in terms of political existence.¹² This means that it is not simply a choice between accessible options, but to-be-or-not-to-be question with ontological consequences in the strong sense of the word. Put differently, the decision on the exception is the decision about existence. In this sense, the constituent power is “unified and indivisible” and is not exhausted by the act of constitution-making.¹³

Schmitt's definition of sovereignty is usually interpreted as a sign of a fascination with the strong authority and dictatorial tendencies. The last chapter of *Political Theology*, where Schmitt praises the decisionism of Donoso Cortes, and his political choice in 1933 to join the Nazi party gave him a label of the ideological enemy of democracy. It is true that Schmitt was interested in dictatorship; however, he introduces the distinction of the two types of dictatorship, namely between

5 *Ibid.*, 7.

6 *Ibid.*, 13

7 Carl Schmitt, *Constitutional Theory*, trans. and edited by Jeffrey Seitzer (Durham, London: Duke University Press, 2008), 149.

8 Schmitt, *Political Theology*, 32.

9 See: *ibid.*, 55.

10 Schmitt, *Constitutional Theory*, 125.

11 *Ibid.*, 126.

12 *Ibid.*, 136.

13 *Ibid.*, 125-126.

comissarial dictatorship and sovereign dictatorship. The first is a discretionary enforcement of exceptional measures employed to restore public order and it does correspond to conservative longing for secured order.¹⁴ It is by definition reactionary and not fully sovereign in the Schmittian sense, since it is designated by already existing order threatened with dissolution by the internal strife. Schmitt traces its origin to the Ancient Roman dictator, who in a time of unrest was granted discretionary power to restore peace. A similar understanding of supreme power can be found in Jean Bodin, where the sovereign is also bound by external requirements of natural and divine law.¹⁵ Sovereign dictatorship, on the other hand, is a provisional assembly acting on behalf of the people that abolishes the old constitution and creates a new one. It is revolutionary power, the embodiment of the popular sovereignty that determines the new political order¹⁶ and therefore cannot be judged as legal or illegal since there are no criteria to do that. In this sense, sovereign dictatorship is also a delegated power,¹⁷ but not responsible to old regime but to the people, who remains the ultimate sovereign.

While elaborating on his secularization theorem,¹⁸ Schmitt states that the sovereign plays the same structural role in political and legal theories as omnipotent God in theology. Due to this fact sovereignty was necessarily bound to the person of the prince as an incarnation of the divine power. Laws in the absolutist state were legitimate, because they were decided upon by the sovereign monarch. During the process of the secularization, however, the metaphysical view of the world changed,¹⁹ and J. J. Rousseau's theory and the French Revolution signified the birth of different principle of legitimacy – the democratic one.²⁰ Since then the people, understood as unitary political will, were considered to be the sovereign and every decision had to stem from the will of the people. According to the democratic principle of legitimacy, the laws are legitimate if they are created and authorized by the people. In metaphysical terms, democracy is based on the idea of immanence, while monarchy is based on the idea of transcendence.²¹ From this point of view, the prince is not truly the constituent power, because God is the creator of order, including political and legal order.²² The monarch enforces this order in the name of

14 Gopal Balakrishnan, *The Enemy: The Intellectual Portrait of Carl Schmitt* (London, New York: Verso 2000), 32.

15 *Ibid.*, 34.

16 *Ibid.*, 32, 36.

17 Andreas Kalyvas, "Carl Schmitt and Three Moments of Democracy" in *Cardozo Law Review* 21, p. 1533.

18 See: Schmitt, *Political Theology*, 36 and following pages.

19 *Ibid.*, 47

20 *Ibid.*, 48; Schmitt, *Constitutional Theory*, 127-128

21 Schmitt, *Political Theology*, 49; Schmitt, *Constitutional Theory*, 266.

22 Schmitt, *Constitutional Theory*, 127

God.²³ According to Schmitt, Bodin's, and later Machiavelli's, inability to theorize the truly sovereign – that is constituent – power results from the divine character of constituent power in pre-modern times.²⁴ *Potestas constitutens* is an attribute of omnipotent God, and a monarch is only God's servant since his power is based on delegation of supreme power from the divine source to an earthly representative. Secularization of the legitimacy of power and the secularization of the concept of sovereignty itself culminated in French Revolution, in which the people designated itself as the ultimate source of the legitimacy of power.²⁵ In this context it may be said that democratic legitimacy is the truly political one, because hereditary absolutist monarchy is justified simply in terms of family law while democratic legitimacy derives its power from the depth of the political existence of the people.²⁶ Democratic legitimacy stems from a sovereign decision, whereas the legitimacy of a monarch rests on the laws of inheritance.

3. Identity, equality, democracy

Every theory of democracy presupposes an already existing community of the people.²⁷ For example, contract theorists assume that the people *qua* sovereign constitutes itself in the act of mutual agreement of free and equal holders of rights on the collective life; the people, then, are no more than a collection of individuals who decide, each separately, that they agree to live in a collectivity under particular

23 Ibid, 49, 266-267.

24 Schmitt, *Constitutional Theory*, p. 126; see also: Balakrishnan, *The Enemy*, 34.

25 Different interpretation of the theological source of democratic sovereignty is proposed by Anne Norton. She argues that monarchical power was based on the incarnation, while democratic sovereignty has its origin in Pentecost. She claims also, that from this difference stems another one concerning the grounding of politics. Since for the incarnation the decisive moment is the death of the God-Son, (the ever present possibility of) death grounds politics of the monarchical sovereign in enmity. In the case of democratic sovereignty, however, the decisive moment is the new form of equality that surpasses old divisions: democratic politics is grounded in friendship. Although her argument is not entirely convincing, it points to important and in most cases neglected part of Schmitt's definition of the political as the friend-enemy distinction: friendship as equality and solidarity. See: Anne Norton, "Pentecost: Democratic Sovereignty in Carl Schmitt", in: *Constellations* Volume 18 Number 3 2011, 389-402.

26 Schmitt, *Constitutional Theory*, 130.

27 'The people' is an ambiguous notion. In the context relevant for this paper, that is the people as the political subject in democracy, can have two meanings. In the first one, the people are nothing more than the aggregate of individuals; in the other, the people are treated as one, unitary will. If the context permits, in order to maintain this difference I will refer to the people in the second sense as 'the people-as-one' and use verbs in singular. This will not be always possible, however.

conditions.²⁸ Contrary to the contractarian theories, Schmitt claims that the people cannot be reduced to aggregation of individuals; it is rather the collective but unitary political will. The unity and identity of the people stems from the truly political distinction, that is, the distinction between friend and enemy²⁹. The people-as-one is always already a collectivity of friends. For Schmitt, the friend-enemy distinction is not a normative one but factual, defining the core of political, collective existence. 'The political' is an existential relation, in which two groupings confront each other and the existence of one grouping is a threat to the existence of the other. The political enemy is a public enemy: what defines him as enemy are not moral or esthetic features, but the sole fact of belonging to other grouping.³⁰ *Per analogiam*, a political friend is always a public friend. It is not the person one personally knows or has positive feelings about; it is rather a member of the same grouping with whom one shares substantive commonality, i.e. has something substantive in common that distinguishes us from those who do not share this feature. Thus, the political relation on the one hand is the highest one, since it overrides all other distinctions (moral, aesthetic, etc.) and thus preserves the unity of the people, and on the other hand it is the most profound one, because it defines the identity of the people.³¹ Schmitt is not essentializing any feature as the basis for the friend-enemy distinction. Rather, the distinction appears whenever any difference – or in Schmitt's language, 'antithesis' – between groupings becomes so strong it turns into the conflict in which the war appears as possible, although ultimate, solution.³² In Ellen Kennedy's words: "the political delimits a sphere of conflict and potential conflict, but it has no substance. It can be about anything over which people disagree so strongly that war over it is possible."³³

On this political conception of identity rests Schmitt's concept of democracy. While in a monarchical state, political unity was represented by the person of the prince, in democracy the unity has to be present in the people, who are capable of identifying itself as one. The identity of the people has in this context a double meaning which corresponds to the double character of the political relation as the highest and the

28 See for example: Martin Loughlin, "The Social Contract," in: *Sword and Scales. An Examination of the Relation Between Law and Politics*, (Oxford, Portland: Hart Publishing 2000), 161-175. This individualism is present in as different authors as Thomas Hobbes and John Locke. In Hobbes, during the initial covenant, individuals give up their natural rights for protection by the sovereign who receives unrestrained power. In Locke, the contract is supposed to produce limited government to protect their welfare and rights. Nevertheless, in both cases we the people is still nothing more than an aggregation of individuals.

29 Carl Schmitt, *The Concept of the Political*, expanded edition (Chicago, London: Chicago University Press 2007), 26.

30 *Ibid.*, 28.

31 *Ibid.*, 30.

32 *Ibid.*, 37.

33 Ellen Kennedy, "*Hostis not inimicus*. Toward a theory of the public in the work of Carl Schmitt", in: *The Canadian Journal of Law & Jurisprudence*, January 1997, vol X, no 1, 43.

most profound at the same time. More generally, as a political concept, the identity means that the people have some distinctive feature that differentiates it from other peoples. At the same time, and more importantly, it means that the members of the people are substantively similar in a particular respect: the identity of the people means in fact homogeneity. The interplay of identity and democracy is mediated in Schmitt by the concept of equality:

Every actual democracy rests on the principle that not only are equals equal but unequals will not be treated equally. Democracy requires, therefore, first homogeneity and second – if the need arises – elimination or eradication of heterogeneity.³⁴

Schmitt equates equality with homogeneity, because he understands it substantively as “found in certain physical [sic!] and moral qualities, for example, in civic virtue, in arete”³⁵. Scary racist connotations aside, this idea of equality *qua* homogeneity is essentially political because it enables to make a distinction between the members of the community (friends) and non-members (potential enemies). It forms the people as politically conscious nation, aware of its distinctive common language, common history and “conscious willing of this commonality”.³⁶

One brief clarification is necessary here. It may seem that Schmitt contradicts himself when defining the friend-enemy distinction as purely formal and homogeneity as substantive. It is not the case. Democratic equality is substantive because it is not merely legal (defined by, for example, equal rights); it precedes this legal equality. Nonetheless, the content of this equality is not specified in the sense that Schmitt does not essentialize any particular feature or the set of features as the ultimate basis for the commonality. In this sense both the friend-enemy distinction and democratic equality/homogeneity are understood formally. Thus, it is the friend-enemy distinction that elevates some common features as the defining features of a grouping and the basis of equality.

Democracy as a political form is a realization of this principle of equality. This radical democratic idea of equality is the basis for the democratic notion of the people as nation and means that there can be no qualitative difference between those in power and those who are subject to that power; the ruler is not distinguished *from* the people, but *by* the people.³⁷ One can trace in this

34 Carl Schmitt, *The Crisis of Parliamentary Democracy*, 8.

35 *Ibid.*, 9.

36 Schmitt, *Constitutional Theory*, 262.

37 *Ibid.*, 266.

formulation elements of Emmanuel-Joseph Sieyès's theory of *pouvoir constituant*.³⁸ In his famous article 'What is Third Estate?' Sieyès claims that the third estate is the nation, because it performs all necessary duties for the nation to "survive and prosper".³⁹ Sieyès also claims, however, that the remaining two estates, the clergy and the aristocracy, do not belong to the nation, because they were legally privileged and their privileges undermine the equality that defines the nation. Schmitt regards this through his conception of politics *qua* the conflict between friends and enemies, and gives the substantive equality the status of the formative principle of democracy as political form. The democratic principle of identity assumes that there is a strong and conscious similarity among the (particular) individual people that overrides possible differences. Hence, democracy is the identity of the governing, the sovereign, and the governed, the subject.⁴⁰ In this context, identity means the lack of qualitative difference that would give the possible ground for political distinction. The political democratic equality of the people is the ground for every other form of equality. Only within the community of friends, defined in terms of substantive similarity, can individuals be equal before law, and be bearers of equal liberties or equal political rights.⁴¹ In other words, all these forms of equality are derived from democratic equality as its prerequisite. The principle of equality of the people *qua* homogeneity leads to the repression of heterogeneity inside the political community. The foreigners are aliens and on this ground they are treated as unequals, they are deprived of the equal rights that stem from political democratic equality. As Schmitt notes, the minorities' rights are protected not as rights of political communities against another, dominant, political community, but as rights of individual persons.⁴²

Given the fact that in democracy the people are the sovereign and the sovereign *qua* constitution-making power is indivisible and unified, the people are always present at hand.⁴³ This is the reason why, for Schmitt, the most proper way to express the will of the people is through acclamation in a public rally,⁴⁴ not through voting. In the voting procedure, although each person is considered as a citizen, not a private individual, the votes are cast in separation from each other, not in public,

38 See: Emmanuel Joseph Sieyès, "What Is the Third Estate?", in: *Political Writings In Political Writings Including the Debate between Sieyès and Tom Paine in 1791* (Indianapolis, Cambridge: Hackett Publishing Company, Inc. 2003): 92-162.

39 Ibid., 94-95. Although Sieyès claims that not all public offices are filled by the members of the Third Estate, he insists that the great majority of them ("nineteen out of twenty) is and the ones reserved for and occupied by other Estates are not essential for the well-being of the nation.

40 Schmitt, *The Crisis*, 26.

41 Schmitt, *Constitutional Theory*, 259.

42 Ibid., 262.

43 Schmitt, *Constitutional Theory*, 239.

44 Ibid., 131.

and only later are aggregated via a counting procedure. At a public rally the will of the people is expressed not as an aggregation of private opinions but as an opinion of the actually present collectivity.⁴⁵ This distinguishes Schmitt's conception of democracy from the liberal democratic one. In fact, Schmitt claims that liberalism and democracy are incompatible, because democracy rests on equality *qua* homogeneity, while central concepts of liberalism are individual and humanity. A secret voting procedure is liberal, because it reduces the will of the people to the aggregation of the individual opinions.

The principle of equality is radically democratic, as it assumes the actual existence of the unity of the nation that decides on its own existence without any mediation. The formative principle of monarchical state, the principle of representation, on the other hand, is based on the assumption that there is no actual unity of the people and it has to be represented in person by an individual.⁴⁶ In other words, the people are not united, thus the unity has to be represented, made existentially present.⁴⁷ These two principles signify also different kinds of unity: decision of the monarch representing the unity creates the unity of the state over divisions among different estates and other interest groups; unity of the democratic people *qua* nation is an existing, organic one. Precisely because it is constantly present, it cannot be represented. Although these two principles point in opposite directions, in the real world every constitutional state – the liberal bourgeois *Rechtsstaat* at the time of Schmitt and liberal democracy of today – is a combination of both.⁴⁸

In fact there is no state without representation. One obvious explanation for this is the fact that every state as a unity is confronted by other states. In other words, the ruler does not represent the people *for* the people,⁴⁹ but represents the unity of the people outside the boundaries of the state. This is the only ground for a differentiation between the government and the governed:⁵⁰ homogenous equality within political unity and heterogeneous inequality with the outside. There is, however, a deeper problem concerning the presence of the people in already established constitutional state: the actual assembly of the people is limited to particular time and place, but the unity of the state transcends it, although simple aggregate of citizens is not the political unity of the people itself.⁵¹ Moreover, the people are disaggregated by the liberal voting procedure and individualist basic rights into mere private individuals, who cast their votes in the privacy of the polling booth. Yet Schmitt still insists on the sovereignty of the people.

45 *Ibid.*, 273-273.

46 *Ibid.*, 239.

47 *Ibid.*, 243.

48 *Ibid.*, 239-240.

49 *Ibid.*, 264.

50 *Ibid.*, 265.

51 *Ibid.*, 240.

4. "Three bodies of the people"⁵²

In the concluding remarks of Chapter 18 of *Constitutional Theory*, Schmitt lists two main "meanings of the word 'people' for a modern constitutional theory."⁵³ First, it is the people as unformed by constitution; second, it is the people as constitutionally formed entity. In his text "Carl Schmitt and the Three Moments of Democracy," Andreas Kalyvas points out, that this typology in fact speaks of not a twofold but a *threefold* relation of the people to the constitution, which in turn corresponds to three moments of democratic politics.⁵⁴ The first one is the people before and above the constitution. It is the people as the democratic sovereign, the constituent power, the unified collective subject, unanimous general will that through comprehensive act establishes the type and form of its political existence. It is the people whose concrete decision is the source the constitution, the people whose power to create is not contained by any legal guidelines. This comprehensive act of foundation gives a ground for every other constituted power. It points to the normative grounds of a democratic polity and states that it has to be based on the will of the people. This formulation gives the normative criterion not only for distinguishing legitimate and non-legitimate constitutions,⁵⁵ but also – as one is tempted to add in the context of contemporary development in crisis-ridden states – to discriminate between legitimate and illegitimate actions of government.

However, this concept of the unrestrained creational power of the people poses a serious threat to the stability of the political order, and, contrary to the interpretations of Schmitt as the theorist of unrestrained decisionism, he was quite aware of this. The only way for the constituent power to achieve a concrete political existence is through institutional stabilization.⁵⁶ This is the second moment of democracy that relates to the people within the constitution. This reading contradicts the usual image of Schmitt as the theorist – and admirer – of discretionary power and introduces a new dimension into his political theory, dimension of normalcy. The distinction between the first and the second type of the relation between the people and the constitution gives a ground for distinguishing the constitution (*Verfassung*) from mere constitutional law (*Verfassungsgesetz*).⁵⁷ The constitution (*Verfassung*) is the concrete form of the collective existence, while the constitutional law (*Verfassungsgesetz*) are legal provisions that sum up to the

52 This subtitle is an expression taken directly and consciously from Kalyvas' text "Carl Schmitt and the Three Moments of Democracy", which this section heavily relies on.

53 Schmitt, *Constitutional Theory*, 279.

54 Kalyvas, "Three Moments", 1529-1530.

55 Kalyvas, "Three Moments", 1539.

56 Ibid., 1552.

57 Ulrich K. Preuss, "Political Order and Democracy: Carl Schmitt and His Influence", in: Chantal Mouffe, ed. *The Challenge of Carl Schmitt* (London, New York: Verso 1999), 158. See: *Constitutional Theory*, p. 125.

document called by liberals “a constitution”. Schmitt's notion of the constitution should be understood in the rather pre-modern sense, not as a document, but as a political correlate of physical condition, as an existential status of the collective unity, which can be only a political status.

This second moment of democracy is the moment of normalcy, which the people as sovereign affirm by abstaining from resorting to its extraordinary powers. It is the moment of legality (as opposed to legitimacy) in which the static rhythm of collective life is set by the legal procedures, not by the ruptures of the emergence of sovereign power; in this moment it is the formal normative rules that govern the polity, not normatively groundless decision.⁵⁸ The people within the constitution are legally defined subjects of rights, are citizens that are empowered by the constitutional provisions to take part in the collective life through elections. Although Schmitt calls this embodiment of the people as “constitutionally formed,” he admits that in fact the will of the people comes into being through the system of validations. “Then people = simple or qualified majority of the voters casting ballots or those entitled to vote.”⁵⁹ Without much sympathy Schmitt calls this embodiment a fiction,⁶⁰ which is nonetheless necessary for a stable existence of a polity.⁶¹ Paradoxically for the constituent will of the people to assume the concrete political form it is necessary to abstain from the execution of its will directly as constituent power and resort to constituted procedures. As Kalyvas puts it, “The omnipotence of the popular sovereign requires a partial repudiation of its omnipresence.”⁶² It is the moment, in which the principle of representation takes precedence over the principle of identity. Since the people qua sovereign is not present, the unity of the people qua nation is preserved in representative institutions like parliament, where each representative represents not its constituency but the unity of the nation as a whole.⁶³

This fiction is not, however, the only guise in which the people appear in the time of normalcy. The third relation of the people to constitution is the people compared with the constitution. This is the point of mediation between the two mutually exclusive moments of democracy – the revolutionary founding and procedural normalcy – between the people qua sovereign and the people qua the fiction.⁶⁴ It is

58 The core of the difference between legality and legitimacy lies in the distinction between what is allowed by the rules and what is approved by the rule-maker. In the context of parliamentary democracy anti-democratic forces can perfectly legally assume power and turn it (legally) against parliamentary democracy. This action is not legitimate, though.

59 Schmitt, *Constitutional Theory*, 279.

60 Ibid.

61 Kalyvas, “Three Moments”, 1553.

62 Ibid., 1554.

63 Schmitt, *Constitutional Theory*, 240.

64 Kalyvas, “Three Moments”, 1557.

the people qua the “bearer of public opinion and subject of acclamations”.⁶⁵ This embodiment of people is defined by Schmitt negatively, that is as opposed to administrative organs, that are constituted powers. Because democracy rests on the principle of the sovereignty of the people and the sovereign power is not exhausted after the establishment of political unity, any incorporation of the people into the constitution does not reduce it to mere constituted power. In other words, “even if one incorporated constitutional institutions of a so-called direct democracy into the state organization, the people are not excluded from all other relationships [with the constitution].”⁶⁶

In *Legality and Legitimacy*, the book published four years after *Constitutional Theory*, Schmitt calls the people an extraordinary lawgiver that competes with an ordinary lawgiver, that is the parliament. “[I]n the referendum ... the people appear as extraordinary lawmaker in opposition to and certainly also superior to the parliament. And their extraordinariness as well as their superior status produces *ratione supematitis* from their characteristic as sovereign.”⁶⁷ This sentence refers to the provisions concerning referendum in Weimar Constitution which in *Constitutional Theory* Schmitt ascribes to the second moment of democracy; this phrase, however, points to the importance ascribed to the people's will as lawgiving force. In the 1928 *opus magnum* the people *qua* public opinion or the subject of acclamations manifests its dormant constituent power in public assemblies, in which they directly express their preference. Unlike a referendum, these assemblies are not contained in the provisions of the constitution and therefore are not contained within the administrative system, but are spontaneous gatherings and in this spontaneity rests the contingency constitutive for every political act: they, like the sovereign power, are unpredictable. To put it bluntly, the referendum, although being a form of direct democracy, is just a procedure in which citizens secretly cast votes. The public assembly, on the other hand, is held by definition – and however tautologically it sounds – in public, therefore every participant is there not as a private person expressing private opinion, but as public citizen, as the people.

When indeed only the people are actually assembled for whatever purpose, to the extent that it does not only appear as an organized interest group, for example during the street demonstrations and public festivals, in theaters, on the running tracks, or in the stadium, this people engaged in acclamation is present, and it is, at least potentially, a political entity.⁶⁸

65 Schmitt, *Constitutional Theory*, 279.

66 *Ibid.*, 271.

67 Carl Schmitt, *Legality and Legitimacy*, trans. and edited by Jeffrey Seitzer (Durham, London: Duke University Press 2004), 60.

68 Schmitt, *Constitutional Theory*, 272.

Thus, every public gathering has the potential of transforming into an assembly and awaken the dormant constituent power of the people.

It is important to note that Schmitt's people is in fact inarticulate, capable only of expressing its preferences in shouts, but not in articulate speech, *logos*, and (interpretation of) their shouts is reduced to simple "yes" or "no". The people

can *acclaim* in that they express their consent or disapproval by a simple calling out, calling higher or lower, celebrating a leader or suggestion, honoring the king or some other person, or denying the acclamation by silence or complaining.⁶⁹

The people in fact do not express their *opinion*, but only react to the suggestions. That is why Schmitt advocated plebiscitarian democracy with the strong leader, who would be followed by the people. One might pose a legitimate question, whether Schmitt insists on democratic identity to make democracy fit his discretionary and decisionistic theory of sovereignty or the other way around. If it is the first case, then the claim about the identity of the ruler and the ruled would be a fallacious solution for a logical inconsistency between the democratic principle of legitimacy and the factual difference between the governing and the governed.

5. The three lessons of Carl Schmitt

The authoritarian core of this conclusion is the usual argument drawn by critics of Schmitt. This possibility is pointed out by Renato Cristi, who insists that Schmitt's theory of democracy is deeply rooted in monarchical principle developed in *Political Theology*.⁷⁰ In a similar spirit Ulrich Preuss denounces anti-democratic and dictatorial core of Schmitt's political theory.⁷¹ Even such a generous reader of Schmitt as Kalyvas points out to shortcomings of his democratic theory, one of them being the oversimplified opposition between democracy and liberalism. His juxtaposition of liberalism and democracy leads to simplistic identification of democracy with homogeneity and leaving the public freedom in the "intellectual world of liberalism", which in turn strips democracy of its emancipatory potential.⁷²

It is important not to be ignorant about these issues as well as Schmitt's personal involvement in Nazism regime, however, as I insist along with a few other authors, his insight into mechanisms of politics and of democracy should be incorporated into democratic theory. One of the authors who use Schmitt to theorize democratic politics (besides the already mentioned Kalyvas) is Chantal Mouffe. She mostly relies

69 Ibid., 272, emphasis original.

70 Renato Cristi, "Schmitt on Constituent Power and the Monarchical Prince", in: *Constellations* Vol. 18, No. 3/2011. 352-364.

71 See: Preuss, "Political Order and Democracy".

72 Kalyvas, "Three Moments", 1563.

on his writings on the political and on parliamentary democracy to develop and argue for her conception of agonistic pluralist democracy. She draws on his claim that parliamentary democracy is a self-defeating project since it rests on two contradictory traditions and hence principles – democracy identified with homogeneity and particularity on the one hand and liberalism identified with universalism, public deliberation and liberty on the other. In her interpretation it is not a contradiction but rather an articulation that installs in liberal democracy a tension that helps to avoid abstract universalism of human rights as well as oppressive homogeneity. This interpretation stems from her particular reading of Schmitt's friend-enemy distinction. According to her, this distinction is one of the many forms of the “us”-and-“them” division. Another possible version of this relation, and as Mouffe claims more suitable for modern democracy, is agonism in which opponents in political struggle do not even aim at agreement or compromise, but nonetheless recognize each other as legitimate; and it is the job of the institutions of liberal democracy to channel the “us”-and-“them” into agonistic relation, not antagonistic one, so that the democratic logic of homogeneity can create a demos (differentiate demos from non-demos, or citizens from non-citizens) whereas liberal logic of human rights can protect individuals' rights and minorities from the tyranny of majority.⁷³

However, as Kalyvas notes, it is not clear whether Mouffe attempts to argue for the importance of Schmitt for democratic thought or rather use some of his insight to argue for a more agonistic liberalism.⁷⁴ I argue that there are three major lessons for contemporary democratic theory to be taken from Schmitt. First, his reading of equality *qua* qualitative indifference of the people and of the rulers and the ruled in decisive aspects reminds us about the radically egalitarian character of democracy. Schmitt's democratic equality is not the abstract equality expressed in the language of natural or human rights; rather, it is a concrete equality of the concrete people. Neither is this conception of equality grounded in any essentialized feature; rather, this understanding of equality is anti-essentialist, it is a formal criterion of democracy. But most importantly and, in contrast to many conceptions of equality including liberal and communitarian ones which are grounded in pre-political qualities like human dignity or a particular feature, democratic equality for Schmitt is profoundly political because it stems directly from the political; it is the result of the constituent decision of the popular sovereign. Read in normative terms, the condition of the equality *qua* concrete qualitative indifference amounts to

73 Chantal Mouffe, “Carl Schmitt and the Paradox of Liberal Democracy”, in: *The Democratic Paradox*, (London, New York: Verso, 2000), 36-59; for a very brief description see also the Introduction. For a more elaborate account of differences between Mouffe and Schmitt and their potential implications, see mine: “Chantal Mouffe vs. Carl Schmitt: The Political, Democracy, and the Question of Sovereignty”, in: *Hybris* no 16 (2012), 63-81, <http://www.filozof.uni.lodz.pl/hybris/pdf/h16/05.Smolenski.pdf>, accessed on July 29, 2012.

74 Kalyvas, “Three Moments”, n2, 1525.

normative principle of democracy according to which democracy requires substantive equality agreed upon by the people. In other words, one cannot speak of democracy in the absence of substantive equality; existence of inequalities that ultimately result in political inequalities negates democracy. Thus, democracy is not merely a form of government but rather the form of collective life.

Second, Schmitt's insistence on the inalienability and inexhaustibility of the constituent power on the one hand and his conception of the people compared to the constitution on the other imply that even in the time of normalcy popular sovereignty can reveal itself. More importantly, however, it appoints the people as the only true subject of democratic politics. Consequently, democratic politics is in its root a constituent politics. It also describes the proper mode of democratic politics: democratic politics is manifested not in a procedure (of, say, aggregating individual opinions) but in action; this contrasts with the theories of democracy which perceive the people as purely legal concept. It is important in this context to remember Schmitt's qualitative distinction between the rule of majority and the rule of the people. This is why this action has to have public character, because it is only in the public that multiplicity of individual opinions can be transformed into a will of collective subject and not just an aggregation of individual opinions.

In normative terms, this lesson demands citizens to publicly state their minds in order to assert their opinion as the voice of the people; political opinions which are not expressed are simply irrelevant. It also requires the rulers to confront the 'demands of the street'. Consequently, it amounts to the criterion of legitimacy of both dissent and governmental actions. Political dissent of citizens is legitimate if it takes place in public. Actions of the government are delegitimized if they are confronted with the popular dissent; and when it comes to salient or controversial issues, they cannot be legitimized by the invocation of the 'silent majorities' of different kinds. From this perspective, acts of civil disobedience should be seen not as merely the expression of dissent against the particular move of the government but rather the delegitimation of the government's action. To put it clearly and relate to reality: democratic legitimacy is with the occupiers of Zuccotti Park in New York City, not with Mayor Bloomberg, who in the name of the right to property, evicted the protesters.⁷⁵ From this perspective, the execution of Troika-imposed austerity measure in Greece without popular consent and against mass protests resembles commissarial dictatorship rather than sovereign and – given the democratic principle of legitimacy – is illegitimate.

75 James Barron, Colin Moynihan, City Reopens Park After Protesters Are Evicted, in: New York Times, <http://www.nytimes.com/2011/11/16/nyregion/police-begin-clearing-zuccotti-park-of-protesters.html?pagewanted=all>, last accessed at January 5 2012.

The people-as-one in Schmitt's theory is inarticulate. It does not deliberate, it does not explicitly state an opinion, but only acclaims if it is given a chance by the leader. However, every public gathering has the potential to become politicized. From this perspective, the actions like riots in French suburbs in 2005, riots in Greece in 2008 (Kalyvas called it explicitly an anti-statist uprising⁷⁶), and looting in London in 2010 cease to be merely criminal acts and should be treated as having a political meaning. There is, however, a more radical reading of inarticulateness of the people-as-one in Schmitt. Looked at from a different angle, such an understanding of the people-as-one as inarticulate can be seen as a failure to theorize it as a coherent unanimous will. This radicalized third lesson is a negative one: instead of accepting Schmitt's conclusion (heavily influenced by his statism and preoccupation with the unity of the political entity, that is the state) that the only way of expressing the people's will is acclamation, we should embrace his failure and accept that in fact the coherent and unitary people-as-one does not exist, but rather the people is always already barred, divided by an internal conflict.⁷⁷ For Schmitt, such a conclusion was unacceptable because, for him, it amounted to civil war and hence to the negation of the unity of the state.⁷⁸ However, if one rejects Schmitt's statism, the internal conflict loses its negative connotation. Rather, stripped off of its statism, Schmitt's theory of constituent power, insists on the conflict, rupture, as the moment that by breaking up the existing political unity creates the normative void and gives space for the constituent decision. Thus (internal) conflict is a moment of politics, when the people-as-one re-constitutes itself and re-establishes the substantive equality democracy is based on: conflict understood as antagonism is a condition of possibility of constituent politics.

The three lessons of Schmitt beg for additional questions. An obvious question to the first lesson is about the criterion of desirability of the concrete type of substantive equality. Since it is just a formal requirement, it says nothing about the content of substantive equality. This, however, in the age of diverse societies, requires clarification. The question for the second and the third lesson is about the potential of the tyranny of majority or mob rule, an argument against democracy brought forth by both liberals and republicans: how to deal with public actions that are aimed against already oppressed minorities?⁷⁹ Related question is about the

76 Andreas Kalyvas, "An Anomaly? Some Reflections on the Greek December 2008", in: *Constellations* Volume 17, Number 2, 2010, 351-365.

77 Similar point, although in different context, is made by Slavoj Žižek, who argues that Schmitt's understanding of politics as a (potential) conflict between two separate groupings is in fact the externalization of the antagonism always already present within the society. For more details, see: Slavoj Žižek, "Carl Schmitt in the age of post-politics," in *The Challenge of Carl Schmitt*, ed. Chantal Mouffe (London, New York: Verso, 1999), 18-37.

78 See: Schmitt, *The Concept of the Political*, 32.

79 The standard liberal example is the ruling of the US Supreme Court in the case *Brown v. Board of Education* and the resulting from this abolition of the racial segregation in

tool for deciphering the (potentially) political meaning of riots. All these questions can be aggregated into one: how to prevent democratic politics from arbitrariness and how to ensure emancipatory character of politics within the framework set by the lessons taken from Schmitt? Since, if deprived of its statist underpinning of normative stability and order, Schmitt's democratic theory lacks firmly stated normative goal, such a normative element needs to be introduced from the outside.

A possible solution to this problem, suggested by Kalyvas, is a principled action.⁸⁰ In short, principled action is guided by immanent principles that also guide and inform the formation of the new order. "The very act of founding a new legal order, from which the constitution of a self-governing political community originates, contains ... implicit principles that are spelled out and substantiated during the historical framing and ordering of a new constitutional document."⁸¹ According to Kalyvas, the immanent principles necessary for democratic politics and preservation of the public realm as the sphere of free action are freedom and equality. The concept of principled action can be applied to democratic politics in the sense that these would be considered as immanent to any politics that is to be called democratic; in other words, the outcomes of politics not guided by these principles as well as the politics itself would be marked by repression and inequality.

If accepted, this solution would facilitate the requirement of substantive equality from the first lesson with the requirement of freedom – or better: autonomy *qua* self-government – and thus give the criterion to distinguish desirable type of equality from undesirable ones; similar criterion could be applied to judging the whether the public actions of citizens are aimed against already oppressed minorities. The principles of freedom and equality can also help to decipher the (potentially) political meaning of riots by seeking their roots in deprivation and relations of subalternity and reading them as the ways of expressing grievances. Another solution, of more Marxist flavoring, is possible as well: grounding the criterion in concrete, material social antagonism and deriving the desirable concrete form of substantive equality from this antagonism. The perspective of this privileged antagonism would be the criterion for preventing the assessing the demands of the people and deciphering the political meaning of the riots. It also can give the insight in which sites the antagonism over re-constitution of the substantive equality might occur.

the US which occurred against then dominant opinion of the white majority; in such a case non-discrimination is necessary for a meaningful private pursuit. Republican version of this charge would stress the importance of public autonomy as necessary for the meaningful self-governance.

80 Andreas Kalyvas, "Popular Sovereignty, Democracy, and the Constituent Power", *Constellations*, Vol. 12, No 2, 2005, 234 and following.

81 *Ibid.*, 236.

5. Conclusion

The first solution is attractive because it provides a formal criterion and introduces the aspect of freedom/autonomy to the theory that otherwise can be accused of lacking such. The other – because it relates the theory to a concrete struggle and embeds it in a real world as opposed to the world of values or principles. Possibly, the two solutions can be merged, but such a step is beyond the scope of this paper. The aim of this short detour was to give the reader the idea of the possibilities of filling in the void in democratic theory inspired by the three lessons taken from Schmitt. I claim, even without this externally introduced element, the three lessons of Schmitt brings an important insight into democratic theory. This normative model of democracy – radically egalitarian and participatory, anti-elitist and grounded in popular sovereignty – contributes to the body of conflictual theories of democracy which are becoming increasingly important in the field of democratic theory. As a matter of conclusion, let me briefly explain how in my view such a theory of democracy – based on normative requirement of substantive equality, on popular sovereignty as the criterion of legitimacy and action in public as a mode of democratic politics, and acknowledgment of conflict as *sine qua non* of democratic sovereignty *qua* constituent power – can contribute to debates in democratic theory, by comparing it with the three normative models of democracy presented by Jürgen Habermas.⁸²

According to Habermas, a liberal understanding of political process comes down to an aggregation of and mediation between competing interests, determined in the realm of civil society modeled on the market, and it itself resembles competition. The citizen is defined as the right-holder and the rights themselves are understood as protective tools against external interference of both the state/administration and other citizens. The legitimate function of the government is to protect the rights of individuals against abuses. The republican approach as described by Habermas understands political process as aimed at expression and creation of a common good. In its communitarian version, politics is supposed to promote ethical substance of the community. Citizenship is understood as a right to participate a common self-government, and freedom from coercion is understood not as a right of noninterference but as a right to live under self-made laws. Since establishment of solidarity presupposes inter-subjectivity, republican politics resembles dialogue. Theory inspired by Schmitt, by contrast, perceives political process as (re)constitution of a sociopolitical order in the political struggle. Citizens are those, who share the concrete and substantive equality. The role of the state is to realize the will of the people expressed in constituting act and public actions in the time of normalcy. In line with the republican view, the theory I present in this paper

82 Jürgen Habermas, "Three normative models of democracy", in ed. Seyla Benhabib, *Democracy and Difference. Contesting the Boundaries of the Political*, (Princeton: Princeton University Press, 1996), 21-30.

understands a political community as something more than a mere aggregation of individuals, but *contra* communitarian reading, it does essentialize any feature as privileged locus of identity.

In contrast with the liberal and republican models of democracy and in line with deliberative one advocated by Habermas, in a theory of democracy inspired by the lessons of Schmitt the state loses its privileged position as a site of politics. However, it departs from the proceduralist view supported by Habermas in that the proceduralist approach identifies the institutional sites of deliberation, whereas Schmitt-inspired democratic theory even more strongly stresses the extra-institutional character of popular sovereignty. It understands the subject of politics differently, as well: whereas in liberalism it is individuals and interest groups, in republicanism the people as a whole, in deliberative democracy deliberation is – as Habermas claims – subjectless, for Schmitt-inspired democracy the subject is the people which is always barred and in conflict with itself.

Theory inspired by the three lessons of Schmitt can also be distinguished from other views by its implied approach towards the divisive differences in a polity.⁸³ Political liberalism (or at least some variants of it) opts for a privatization of divisive differences in order to achieve some sort of overlapping consensus over basic institutions and rules of living together; in other words, these differences are translated into individual features and/or rights. Republicanism represses the conflicting differences (with the institutional devices like emergency powers modeled on an Ancient Roman dictator) to preserve existing order. And deliberative democracy *a-la* Habermas strives to achieve rationally motivated agreement over contested issue. The theory of democracy inspired by Schmitt, in contrast, brings the crisis-inducing difference to the fore and encourages citizens to publicly take sides in the strife.

In his analysis of parliamentary democracies and the chains of legitimation within these systems Peter Mair claims that in recent decades there has been a growing tension between the responsiveness of the governments to the demands of the people on the one hand and the responsibility of the government defined as predictability and responsiveness to demands that come from typical chain of delegation: corporations, expert bodies, supranational institutions.⁸⁴ Consequently, democracy *qua* government by the people has been losing its strong, emancipatory

83 This reflection is inspired by Andreas Kalyvas' remarks during Q&A session after his keynote address "Solonian Citizenship: Democracy, Conflict, Participation" at the SSIS Graduate Conference at the University of Exeter on May 3, 2012. I owe him my gratefulness for this inspiration.

84 For example, see: Peter Mair, "Bini Smaghie vs. the Parties: Representative Government and Institutional Constraints", European University Institute Working Paper, RSCAS 2011/22.

meaning. Democratic theory, informed by recent developments in governmental actions which were widely protested against, has to face this challenge. Theories of democracy inspired by the three lessons taken from Schmitt remind us that for democracy to retain its proper meaning we should rather challenge these developments rather than accommodate them and bring the very timely issues of non-responsiveness of governments, social protests and contentious politics into the heart of the debates within democratic theory.

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