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# LIBERAL-CONSTITUTIONAL BACKSLIDING OF DEMOCRACY AND THE THREAT OF THE PANDEMIC

## THEORETICAL AND EMPIRICAL CONSIDERATIONS

**ABSTRACT** In this article we argue that what is called today a ‘democratic backsliding’ or de-consolidation should be analysed, at least in some cases, as a liberal-constitutional backsliding for which the pandemic of Covid-19 adds a new impetus and creates the situation where violation of constitutionality of law might become a norm. In our theoretical considerations, we propose to examine this problem from two interconnected perspectives: the tension between the liberal and the democratic components of liberal democracy, often overlooked by the dominant democratic theory, and constitutionalism as the major safeguard of individual rights and liberties that limits democratic sovereignty, or the will of the people expressed by democratic representation. To better understand the nature of the current crisis of liberal-constitutional backsliding, we refer to Carl Schmitt’s concept of ‘the administrative state’ where the dominant legal act is an administrative decree which does not require constitutional legitimacy or even the guarantee that it expresses the will of the majority. Our empirical con-

siderations focus on the case of the liberal-constitutional backsliding in Poland exacerbated by the pandemic, which provides a good illustration of how the tensions within the liberal-democratic model itself can be used to justify democratic sovereignty as the only source of political legitimacy.

**Keywords:** liberal-constitutional backsliding, liberal democracy, Covid-19 pandemic, Carl Schmitt, Poland

## 1. INTRODUCTION

The current crisis of democracy has been presented in numerous ways in recent literature.<sup>1</sup> The dominant picture is one in which the symptoms of the crisis, the way it manifests in electronic and social media, opinion polls, and election results are caused by, first, a general decline of confidence in politicians, parties, parliaments, and governments and, second, the polarization of views and preferences among the citizens.<sup>2</sup> It seems that citizens have suddenly stopped behaving according to the pattern that is expected in a 'good' democracy; so, the puzzle which needs to be solved is why this is happening, and, importantly, why it needs to be resolved within the democratic order itself. The crisis is thus associated with the crisis of political representation and politics: *Most elected representatives do not really represent us and politics has deteriorated into a spectacle the average citizen merely watches, but no longer controls.*<sup>3</sup> Alienation from politics and disillusionment with political elites are at the core of today's crisis. More and more political scientists try to explain how this has happened, but not many recognize that certain aspects of what we call liberal democracy are inherently problematic and can explain why this crisis occurs in the first place. The two crucial issues addressed here are the problem of normativity of a liberal democracy on the one hand,<sup>4</sup> and the inherent tension between its liberal and democratic components on the other hand. These two problematic aspects of the liberal-democratic order have not been dealt with adequately in democratic theory that developed in the twentieth century starting with Schumpeter's<sup>5</sup> account of democracy as a method to select the government as the result of competition for political leadership.

<sup>1</sup> D. Runciman, *How Democracy Ends*, London 2018; W. Sadurski, *Poland's Constitutional Breakdown*, Oxford 2019; I. Krastev, *Is It Tomorrow Yet? Paradoxes of the Pandemic*, London 2020.

<sup>2</sup> A. Przeworski, *Crises of Democracy*, Cambridge 2019, p. 1; S. Levitsky, D. Ziblatt, *How Democracies Die*, New York 2018; B. Reiter, *The Crisis of Liberal Democracy and the Path Ahead: Alternatives to Political Representation and Capitalism*, Lanham 2017.

<sup>3</sup> B. Reiter, *The Crisis of Liberal...*, p. 9.

<sup>4</sup> This normativity is usually understood formally as a majority rule which is the key to the electoral process and to the solutions within democratically legitimised legislature, and the protection of individual rights and freedoms (the liberal component) as well as the rule of law complementing the other two.

<sup>5</sup> J. Schumpeter, *Capitalism, Socialism and Democracy*, New York 1942.

We argue that it is not the threat of populism or the crisis of political representation that best explain the current crisis, but a much deeper problem of the primacy of constitutional law and, generally, of constitutionalism over democratic will expressed by democratically elected representatives. In the West, the liberal democratic project assumed that the democratic component – the will and sovereignty of the people – must be tamed by the liberal component, i.e., the constitutional protection of the fundamental rights of citizens and the rule of law. When we reverse this primacy under certain circumstances, for example, the recent Covid-19 pandemic, we risk that the liberal-democratic order becomes unstable, and its liberal components can easily be undermined by the will and decisions of a government that claims democratic legitimacy. Covid-19 legislation in Poland which will be discussed here as a case study and similar legislation elsewhere show that certain democratic mechanisms within the system itself, such as effective parliamentary opposition, might not work if both the governing majority and the opposition (or most segments of it) agree on certain measures even though they appear to be openly unconstitutional. We argue that what is now conventionally called ‘democratic backsliding’,<sup>6</sup> especially in the case of Poland and Hungary, fuelled by the global reaction to the pandemic, is indeed a liberal-constitutional backsliding which creates the situation where violation of constitutionality might become a norm. The crisis of democracy and the crisis of liberal democracy can thus be two entirely different things.

Our analysis in this article focuses on two research questions. The first question is theoretical and concerns the foundations of the legal system in a liberal democracy: Is it the factual sphere or the normative sphere that we should look to? The second question that helps to illustrate the theoretical puzzle is empirical and concerns our case study: What is the relationship between the ‘democratic’ nature of the state ruled by law, including the Constitution which stipulates that the Nation has supreme power, and the constitutional power of judges who can declare positive law unconstitutional? The focus on the case of Poland in the empirical part of the paper is justified by the country’s already existing track record of anti-constitutional liberal backsliding in the pre-Covid time. As we argue, those tendencies have only been strengthened by the outbreak of the pandemic and the corresponding government’s efforts to tackle it regardless of the liberal-constitutional limitations. To address the challenges caused by the pandemic, the Polish government adopted a measure by which the executive had the right to declare a ‘state of epidemic threat’ and a ‘state of epidemic.’ Despite Poland’s constitution having clear provisions to declare “a state of emergency,” including provision for declaring a “state of natural disaster,” the government has refrained from enacting it. Instead, the government introduced both a state of epidemic threat and a state of epidemic through ordinances issued by the Minister of Health, thereby bypassing normal constitutional requirements. This raised questions about both legality and motivation behind such decision.<sup>7</sup>

<sup>6</sup> A. Przeworski, *Crises...*, p. 15.

<sup>7</sup> European Union Agency for Fundamental Rights, *Coronavirus COVID-19 Outbreak in the EU Fundamental Rights Implications*, 2020, at [https://fra.europa.eu/sites/default/files/fra\\_uploads/poland-report-covid-19-april-2020\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/poland-report-covid-19-april-2020_en.pdf), 12 January 2022.

The problem, pointed out a century and a half ago by Alexis de Tocqueville, who argued that judges constituted a higher political class with power fostered by the rule of democracy,<sup>8</sup> can be summarised as follows: If the content of the law is freely shaped by bodies which possess democratic legitimacy, should the courts of a 'democratic state ruled by law' have the right to challenge the rules which they see unconstitutional?<sup>9</sup> In what follows, we first discuss the tensions within the liberal democratic order caused by its two components, liberal and democratic, looking especially at the normative and legal perspective. We refer to both Hans Kelsen and Carl Schmitt, whose analysis and critique of the tensions between liberalism and democracy can help to understand certain limitations of democratic theory and its inability to explain the current crisis. In the last part of the article, we illustrate the nature of the liberal-constitutional backsliding looking at Covid-19 legislation in Poland. We choose the case of Poland as providing a valid context for the research problem under discussion.

## 2. PROBLEMS WITH 'LIBERAL DEMOCRACY'

The notion of liberal democracy combines the ideas of freedom and equality, and their synthesis is what characterizes democracy in the first place. The first idea is the liberal conception of individual liberty defined as a protected sphere of individual inalienable rights called 'natural rights' by John Locke. The second idea is democratic equality or equal liberty, which is understood as equal participation in self-government or popular sovereignty. The balance between these two components, as many historical examples demonstrate, is difficult to achieve unless there is a strong third unifying principle, which, according to the liberal theory, lies in the norm and institution of constitutionalism. However, since this unifying principle belongs to the liberal component, the democratic component can still be at odds with it. In some liberal democracies, this particular tension has become more visible than any other. The possibility of detaching democracy from liberalism was discussed by Kelsen in the midst of the interwar crisis. As he observed, in democracy, *Since the demand for democracy is satisfied insofar as those subject to the order participate in its creation, the*

<sup>8</sup> A. de Tocqueville, *Democracy in America*, transl. by H. Mansfield, D. Winthrop (eds), Chicago 2000.

<sup>9</sup> At the end of the 19<sup>th</sup> century, Adhemar Esmein observed that the American republican constitution gave the courts the power to declare normative acts adopted by the legislature unconstitutional and, consequently, to protect the rights guaranteed to citizens by the Constitution. In particular, thanks to Justice Marshall, the United States has a 'system' in which the court is the authorised, decisive interpreter of the Constitution. Contrary to this, European states did not assign the same political importance to their courts since their role was only to apply and interpret ordinary laws. The Constitution could not limit the legislature; in accordance with the principle of the separation of powers, the ultimate sanction was the conscience of those in power and their moral responsibility before the nation. As Esmein wrote, this was required by a 'democratic spirit' that did not allow the existence of an authority that could 'block' the unconstitutional acts of the legislature and did not allow judges to become a kind of demiurges of a 'just' society, even against the will of societies. A. Esmein, *Éléments de droit constitutionnel français et comparé*, Paris 2001, pp. 463-467.

*democratic ideal becomes independent of the extent to which that order seizes upon them and interferes with their 'freedom.' Even with the limitless expansion of state power and, consequently, the complete loss of individual 'freedom' and the negation of the liberal ideal, democracy is still possible as long as the state power is constituted by its subjects. Indeed, history demonstrates that democratic state power tends toward expansion no less than its autocratic counterpart.*<sup>10</sup>

Today's crisis, which on the one hand was caused by the process of constitutional (and not democratic) backsliding and, on the other hand, by the reactions of democratic governments to the Covid-19 pandemic, proves that this is one of the central problems of the liberal-democratic order.

So-called realist accounts of democracy try to avoid the obvious antagonism between the idea of democracy and the reality of democracy. For Schumpeter<sup>11</sup> the idea of democracy is tied up with 'the classical doctrine of democracy' that must be abandoned altogether by any true account of democracy as a real phenomenon. If the classical ideas of the will of the people and the common good are completely unrealistic, what is realistic is the democratic method by which the sovereign people select their representatives or choose a governing elite. Schumpeter understands democracy (unqualified) as the method or procedure that allows free and open 'competition for political leadership' that operates in democratic regimes. On this positivist view, all normativity of democracy is abandoned as illusory. The 'minimalist,' 'proceduralist,' or 'electoralist' views assume that democracy is a political arrangement in which people select governments through elections and have a reasonable possibility of removing incumbent governments they are not satisfied with.<sup>12</sup> Although these authors recognize the importance of institutional restraints over the outcome of democratic elections, they do not treat constitutionalism as a defining characteristic of democracy, but rather as one of many conditions that make the democratic mechanism possible.<sup>13</sup>

Procedural or minimalist accounts of democracy are clearly sceptical about political normativity which assumes certain ethical principles. As Geuss stresses, *[t]o think politically is to think about agency, power, and interests, and the relations among these (...) politics is not about doing what is good or rational or beneficial simpliciter – it is not even obvious that that is an internally coherent thought at all – but about the pursuit of what is good in a particular concrete case by agents with limited powers and resources, where choice of one thing to pursue means failure to choose and pursue another.*<sup>14</sup> A realistic theory of democracy is confined to mechanisms that can be verified empirically and does not

<sup>10</sup> H. Kelsen, *On the Essence and Value of Democracy*, in N. Urbinati, C. Invernizzi Accetti (eds), transl. by B. Graf, Lanham 2013 [1929], p. 32.

<sup>11</sup> J. Schumpeter, *Capitalism...*

<sup>12</sup> *Ibid.*; N. Bobbio, *The Future of Democracy: A Defence of the Rules of the Game*, in R. Bellamy (ed.), transl. by R. Griffin, Minneapolis 1987; A. Przeworski, "Minimalist Conception of Democracy: A Defense," in I. Shapiro, C. Hacker-Cordon (eds), *Democracy's Value*, Cambridge 1999; A. Przeworski, *Crises...*

<sup>13</sup> A. Przeworski, *Crises...*, p. 6.

<sup>14</sup> R. Geuss, *Philosophy and Real Politics*, Princeton 2008, p. 25, 30.

provide any robust justification beyond the pragmatic notion that it is better to secure the alteration of a government without the use of force and domination.<sup>15</sup>

Contrary to the minimalist account, the Western practice of postwar democracy was driven by the expectation that democracy must be liberal. Political developments have tended to place the protection of individual (and group) liberties in an increasingly important position within the hierarchy of constitutional norms in need of institutional protection. This in a way followed Kelsen, who saw the necessity of 'a hierarchical' system of norms whereby enacting ordinary legislation is always constrained by the requirement that it is consistent with the higher norms inscribed in the constitution as the main advantage of a democratic order or indeed as its major condition. Similarly to Kant's objective moral law (the categorical imperative), he understood the law of the constitution as the objective norm which would qualify any other, lower norm or decision as lawful or not.<sup>16</sup> On this account, popular sovereignty is limited and constrained by its own logic.

The core of the problem of contemporary democratic theory of the Schumpeterian kind is that it is a theory of democracy but not necessarily a theory of liberal democracy. The democratic procedure of regular and fair elections does not guarantee liberal outcomes nor allows for taking the liberal component of democracy, which constitutionalism is, for granted. As Przeworski openly says, on this scenario, *politicians do not obey judges because otherwise they would lose elections – the majority do not want politicians to listen to what judges tell them they can or cannot do. The rule of law is violated, but as long as politician's actions are motivated by the fear of losing elections, the system is still democratic by the minimalist criterion.*<sup>17</sup> There is no need to worry about Kelsen's hierarchy of norms. If the governing coalition is re-elected despite unconstitutional legislation and an open battle with judges, this proves, as Przeworski wants, that the democratic procedure is still in place but democracy is now 'illiberal.' The minimalist view is not concerned with the retreat from liberal constitutionalism as long as the majoritarian electoral mechanism (which expresses popular sovereignty) works and voters can choose the leaders they want and can change them at the next election. However, this approach leaves no room for Kelsen's normativity as the decisions governments make are of secondary concern so long as they guarantee continued support of the voting majority.

The minimalist view cannot adequately address the many problems or crises of a 'liberal' democracy. Once the adjective 'liberal' is abandoned, as is the case in many democratic regimes around the world, we no longer have a reason to talk about democratic backsliding since what is at stake is liberal backsliding, which does not have to be a problem for the minimalist account of democracy. An electoral democracy might become especially hostile to minority rights, freedom of assembly, or even freedom of speech, or it might become hostile to legislative oversight by a constitutional tribunal while still remaining a democracy in the eyes of both leaders and voters. When democracy becomes unconstitutional and thus illiberal, it can still function as long as it is

<sup>15</sup> I. Shapiro, *The State of Democratic Theory*, Princeton 2006.

<sup>16</sup> H. Kelsen, *On the Essence...*

<sup>17</sup> A. Przeworski, *Crises...*, p. 7.



supported by the citizens, who might simply be deceived by the apparatus of manipulation (e.g., public and social media), propaganda, and electoral corruption whereby certain groups of voters, such as parents or pensioners, are given financial incentives to remain loyal supporters. The major conflict that emerges here is the conflict between democracy and legality.

Some scholars described the practice of constitutional primacy or constitutional adjudication supported by the notion that sovereign authority should be tightly bound by legal restraints as the judicialization of politics. Before we discuss this problem from an empirical perspective, we need to clarify the meaning of liberal democracy that is not minimalist or simply procedural. It can be claimed, following, e.g., Habermas, that democracy is a combination of two principles: popular sovereignty and constitutionalism.<sup>18</sup> More recently, Ginsburg and Huq<sup>19</sup> listed competitive elections, the liberal rights of speech and association, as well as the rule of law, as the ‘basic predicates of democracy.’ On both accounts, the democratic component, defined as either popular sovereignty or competitive elections, is combined with the liberal component, defined as liberal rights, the rule of law, or simply constitutionalism. For Habermas, constitutionalism (the rule of law and human rights) and popular sovereignty are not only essential and mutually supportive but also internally related and ‘equi-primordial’ or ‘co-original,’ as they reciprocally presuppose each other.<sup>20</sup> They are also two indispensable sources of legitimacy: *the co-implication of popular sovereignty and constitutionalism is reflected in the relation between the autonomy of the citizen and the autonomy of the private individual; one cannot be realized without the other.*<sup>21</sup>

However, Habermas’ proposition of the ‘co-originality’ or ‘equi-primordality’ of democracy (sovereignty) and liberalism (constitutionalism defined as the rule of law and human rights) seems historically problematic. Liberalism cannot be reasonably detached from methodological individualism, but the belief that individual freedom (expressed in the form of basic or fundamental rights) is prior to the state (either ontologically or at least on a normative level) contrasts with core democratic theory. For instance, there is no place for any kind of basic rights or fundamental laws that are binding for the whole society in the democratic theory of J. J. Rousseau. As Georg Jellinek put it, *the principles of the Contrat Social are accordingly at enmity with every declaration of rights.*<sup>22</sup> The historical paths of democracy and liberalism may have intersected on

<sup>18</sup> J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, transl. by W. Rehg, Cambridge 1996.

<sup>19</sup> T. Ginsburg, A.Z. Huq, “Defining and Tracking the Trajectory of Liberal Constitutional Democracy,” in M.A. Graber, S. Levinson, M. Tushnet (eds), *Constitutional Democracy in Crisis?*, Oxford 2018, pp. 36-37.

<sup>20</sup> J. Habermas, *Between Facts and Norms...*; J. Habermas, “Remarks on Legitimation through Human Rights,” *Philosophy & Social Criticism*, vol. 24, no. 2-3 (1998).

<sup>21</sup> J. Habermas, “Constitutional Democracy: A Paradoxical Union of Contradictory Principles?,” *Political Theory*, vol. 29, no. 6 (2001), p. 779.

<sup>22</sup> G. Jellinek, *The Declaration of the Rights of Man and of Citizens: A Contribution to Modern Constitutional History*, transl. by M. Farrand, New York 1901, p. 11.

numerous occasions but their conceptual separateness should not be overlooked. For example, liberal constitutionalism and the democratic theory were closely allied over the nineteenth century as they shared efforts to limit the discretionary powers of the monarchical head of the state. The successes of constitutionalism were at the same time perceived as victories of democracy, however, the triumph of mass democracy in the twentieth century reopened the gulf dividing the two. This tension is reflected in what José Ortega y Gasset described as the contradiction between traditional democracy and hyperdemocracy. As he put it, *under the shelter of liberal principles and the rule of law, minorities could live and act. Democracy and law (...) were synonymous. Today we are witnessing the triumphs of a hyperdemocracy in which the mass acts directly, outside the law, imposing its aspirations and its desires by means of material pressure.*<sup>23</sup>

### 3. CARL SCHMITT'S CRITIQUE

The tension between democracy and liberalism may be also explained in terms of the discrepancy between the political component of the modern constitution and the principles of the liberal *Rechtsstaat*. In his *Constitutional Theory*, Schmitt juxtaposes democracy – as one of the three historically received basic political forms alongside monarchy and aristocracy – with the principles of the bourgeois-originated concept of the rule of law. As a result, the principles of the liberal *Rechtsstaat* are not on a par with the political form of democracy.<sup>24</sup> On this approach, democracy (broadly defined as an identity between the rulers and the ruled) is seen as more fundamental or substantial than the *Rechtsstaat*. This perspective enables the contextualization of current tensions between those who claim to support democracy as a fundamental political form and those who consider the rule of law and basic rights to be the cornerstone of the modern polity.

There is something profoundly apolitical in Schmitt's reconstruction of the principles of the *Rechtsstaat*. The modern constitutional state is defined in terms of safeguarding individual freedoms against the abuse of power by the government. Historically, there was an identifiable equation between the existence of a constitution and the recognition of the basic tenets of a liberal concept of freedom. The primary goal of any modern constitutional state is not the building of a state's glory but the protection of its citizens from unacceptable incursions of government into the protected individual sphere of freedom. *Rechtsstaat* is based on the liberal concept of freedom which presupposes that individual freedom takes precedent over the state and is unlimited while the right of the state to interfere with this sphere is limited and permissible only to the extent specified in statutes. Schmitt sees *Rechtsstaat* as containing two basic principles: 'the principle of distribution' and 'the organizational principle.' The former recognizes that the assumed unlimited sphere of individual freedom translates into the necessity to distribute limited power of the state, which in principle is limited, through a system

<sup>23</sup> J. Ortega y Gasset, *The Revolt of the Masses*, New York 1957, pp. 17-18.

<sup>24</sup> C. Schmitt, *Constitutional Theory*, transl. and ed. by J. Seitzer, Durham-London 2008.



of defined competencies, while the latter secures this distribution of power in the form of the separation of powers. As Schmitt concludes, the basic rights are the prime expression of the idea that deems individual freedom to be unlimited in principle, and the state's authority to be limited in principle.

Such a concept of the rule of law, however, is basically a system of checks, separations of power, or guarantees of basic rights (with particular emphasis on the independence of the judiciary) and does not produce any particular political form of a state (a form of political regime). Schmitt avers that *considered on its own, the Rechtsstaat component with both principles, basic rights (as a distributional principle) and the division of powers (as an organizational principle), contains no state form.*<sup>25</sup> Democracy which includes the rule of law is a mixture of a truly political form of democracy and the historically received principles or ideals of the bourgeois (liberal) *Rechtsstaat* concept.

Since the nineteenth century, the state model that has become recognized as a typical *Rechtsstaat* has been the parliamentary legislative state. In such a state, the idea that 'laws govern' means that the government acts on the basis of law. Governing, understood as the application of valid and impersonal norms, is premised on the existence of a closed system of legality. Schmitt emphasises that such a system of legality is not presuppositionless. First, it is premised on confidence in the lawgiver. What the parliamentary legislative state inherited from the absolute monarchy are the elimination of any right to resistance and the requirement of unconditional obedience. Justification of such a state lies in the congruity of law and statute, justice and legality. Obedience to law assumes that parliament, as a representative of the people, upholds freedom and prevents injustice. A purely functional approach to legality – law deprived of any substantial relation to reason and justice – would be incompatible with the *Rechtsstaat*.<sup>26</sup> The second premise is the concept of law in which law is equated with statute. The substantive concept of law is thus twofold; on the one hand, law is a legal norm which determines what is right for everyone and is clearly distinguishable from a command; on the other hand, law requires participation of parliament in the process of law-making and any interference with freedom and the property of citizens is allowed only in the form of statutes. Also, legality in a parliamentary legislative state recognizes the principle of 'equal chance' in the electoral process. It serves as a necessary material principle of justice that sustains the system of legality, especially in a pluralist parliamentary state. The loyalty on the side of the outvoted minority to the governing majority depends on the principle of equal chances of gaining power through future elections and on the assumption that the majority will not use their power to deprive their opponents of this chance. In this way, Schmitt shows the absurd consequences of the purely formalistic ('51% cannot do any wrong') understanding of law produced by the legal majority.<sup>27</sup> It can be argued that the contemporary constitutional crises and tensions in several Central European states derive from this narrow and purely formalistic understanding of legality. However, as

<sup>25</sup> C. Schmitt, *Constitutional...*, p. 235.

<sup>26</sup> C. Schmitt, *Legality and Legitimacy*, transl. and ed. by J. Seitzer, Durham–London 2004, p. 21.

<sup>27</sup> *Ibid.*, p. 22.

Schmitt argues, the concept of legality is a delicate one and is far from being presuppositionless. He goes as far as to remind us that the legality of the liberal democracy (in his terms ‘parliamentary legislative state’) depends on a rational normativity.

Paradoxically, it is the very triumph of democracy, or rather mass democracy, which accounts for the evolution of the notion of legality towards a neutral and functional understanding. Schmitt asserts that the crisis of parliamentarism and the crisis of democracy are distinct but also one can aggravate the other. First, in the interwar period, which was the time of increasing social and ideological differences, parliaments lost much of their characteristic nineteenth-century appeal. Amid party rivalries and petty politics, the belief in parliament as a forum for rational debate seemed outdated to Schmitt.<sup>28</sup> Second, mass democracy exerted huge pressure on the principle of parliamentarism. The process of democratization of the state and the elimination of the strong monarchical executive resulted in blurring of the distinction between society and the state. Parliamentarism worked very well under the dualistic structure of the nineteenth century, which distinguished between society and the state, and when the parliament, which represented the people, faced strong monarchical executives.<sup>29</sup> One of the most important consequence of this democratic logic of congruence between the state and society – between the state’s will and the people’s will – brings the return to a formal concept of law. In democracy, law is the law of the transient majority and the distinctions between norm and command, *ratio* and *voluntas*, lose their validity.<sup>30</sup> According to Schmitt,<sup>31</sup> constitutions came to define law and statute in purely functional ways, as in the Weimar constitution of 1919, which stipulated that ‘Reich statutes are concluded by Reichstag.’ This tendency was in tune with Labandian legal positivism<sup>32</sup> and seems to be widely accepted today.

The triumph of democracy and the accompanying process of turning the liberal *Rechtsstaat* into a *Sozialrechtsstat*<sup>33</sup> in post-war Europe might be interpreted as an incentive to embark on a different kind of liberalism. The birth of new liberalism results in undermining the normative rationality presupposed by the nineteenth-century model of the *Rechtsstaat*. Because of the increasing role of biopolitics and the securitization of political relations, we may be witnessing another turn towards a ‘prevention-state’ (*Präventionstaat*).<sup>34</sup> Additionally, since the late 1960s, ‘negative liberalism’ has been replaced by ‘progressive liberalism.’ Thomas Hill Green, a proponent of the latter, and his

<sup>28</sup> C. Schmitt, *The Crisis of Parliamentary Democracy*, transl. by E. Kennedy, Cambridge 1988, p. 7.

<sup>29</sup> A. Peretiatkowicz, “Kryzys parlamentaryzmu i konstytucja polska z 1935 r.,” in A. Peretiatkowicz, *Studia prawnicze*, Poznań 1938, p. 129.

<sup>30</sup> C. Schmitt, *Legality...*, p. 24.

<sup>31</sup> *Ibid.*, p. 104.

<sup>32</sup> P.C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism*, Durham–London 1997, p. 4.

<sup>33</sup> O. Kirchheimer, “The *Rechtsstaat* as Magic Wall,” in W.E. Scheuermann (ed.), *The Rule of Law under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer*, Berkeley 1996.

<sup>34</sup> J. Kersten, S. Rixen, *Der Verfassungsstaat in der Corona-Krise*, München 2021.

followers believed that 'the private is political,' that equal rights should apply not only in the public sphere but also in the private sphere, and that the 'moment of equality' should be strengthened at the expense of the 'moment of freedom' understood as non-interference of the state into the private sphere of the individual. In legislative activity, it was now less important to establish guarantees of the inviolable rights of the individual and more important to abolish the causes of inequality between individuals who, in the shelter of privacy, could hold positions that were different from those held by other individuals. That is to say, legislative activity was no longer associated so much with the protection of freedom and the private sphere as with eliminating the causes of inequality. In liberalism and liberal constitutionalism, equality took precedence over liberty. This has resulted in a change in the meaning assigned to the term 'dignity,' which was no longer associated with the privacy of the individual (which is crucial for, among other things, the survival of the human being, for the protection of human life) but with the individual's equality with others.

It is often argued that in time of dire emergency, decisions, rather than mere deliberations, are required. Every crisis opens the space for more discretionary and obtrusive governmental power and the sidelining of parliaments (the so-called 'hour of the executive'). To better understand the nature of the current crisis we refer to the concept of 'the administrative state' (*Verwaltungsstaat*) introduced by Schmitt, who distinguished four basic types of the modern state (the legislative state, governmental or executive state, jurisdiction state, and the administrative state). He claimed that in the administrative state neither men openly exercise power nor laws are obeyed but rather *things administer themselves*.<sup>35</sup> In administrative state, the concrete situation and ever-changing circumstances determine the content of the decisions that take on the form of the administrative decrees.<sup>36</sup>

This tendency of empowering 'the administrative state' was clearly visible in reactions to the Covid-19 crisis in many European democracies in 2020-2021. Two basic ways of dealing with the crisis emerged: either an outright declaration of a state of emergency or the use of emergency powers provided by special Covid-related statutes passed by legislative bodies at the outbreak of the pandemic. In both cases, we witnessed a significant shift towards the rule by decree and administrative measures that were continually adapted to the changing pandemic circumstances. Some of these measures clearly stretched constitutional boundaries.

Against the backdrop of tensions between some member states and the EU institutions in current debates on the rule of law and European values, there has been a re-emergence of the dominant post-war concept of liberal democracy as a democracy that is somehow afraid of the people but also distrusts traditional parliamentary sovereignty.<sup>37</sup> The question of whether any shared European model of democracy exists is

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<sup>35</sup> C. Schmitt, *Legality...*, p. 5.

<sup>36</sup> *Ibid.*

<sup>37</sup> J.-W. Müller, "Defending Democracy within the EU," *Journal of Democracy*, vol. 24, no. 2 (2013), p. 128.

answered in the affirmative by Jan-Werner Müller. In his opinion, the essential components of post-war liberal democracy ('constitutionalist ethos') derive from authoritarian and totalitarian experiences and display distrust towards the majoritarian principle or, in other words, the principle of unlimited popular sovereignty. As he points out, *distrust of unrestrained popular sovereignty – and even the unconstrained parliamentary sovereignty that a German constitutional lawyer once called “parliamentary absolutism” – is in the very DNA of post-war European politics.*<sup>38</sup> The institution of judicial review (predominately in the form of constitutional courts) is the institutional embodiment of this reservation towards popular sovereignty and the need to safeguard individual rights effectively. Additionally, with the burgeoning of the European integration, more and more tasks were transferred to unelected institutions in order to solidify liberal democratic arrangements and prevent any backsliding towards authoritarianism.<sup>39</sup> This limited or constrained form of democracy is the genuine European model that remains valid to this day.

#### 4. EMPIRICAL CONSIDERATIONS: THE CASE OF POLAND

The Polish case is one of the best illustrations of the liberal-constitutional backsliding in recent years. For better contextualization, we briefly outline the basic elements of the constitutional crisis in Poland before the outbreak of the pandemic. Though the aim of the paper is to focus on the Covid stage and its outcome, the contextualization of our analysis requires mentioning the major constitutional changes that occurred in the preceding time. The liberal backsliding has become particularly visible in the following policies adopted by the ruling party PiS (Law and Justice) after their double electoral victories (presidential and parliamentary) in 2015:

1. Weakening the system of constitutional checks and balances through the political takeover of the Constitutional Tribunal to be filled with predominantly PiS loyalists, which at some stage involved constitutional violations (e.g., the President's refusal to nominate three judges duly selected by the previous Sejm). The numerous bills reforming the institution adopted in a short period of time only contributed to the legal chaos and effectively paralyzed Constitutional Tribunal's ability to play a significant role in guarding the constitution and alleviating the dangers posed to the rights and liberties by the emphatic majoritarian rule (e.g., the so called *Repair Bill* of 22 December 2015 introduced changes in the court proceedings which states that the Tribunal should rule based on the order of filed cases and not on their constitutional urgency or gravity). The reforms not only eroded Tribunal's legitimacy and public trust in it, but also transformed it into a useful tool of the ruling party in dealing with the troubling legislation. The second instalment involved the

<sup>38</sup> J.-W. Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe*, New Haven–London 2011, p. 143.

<sup>39</sup> J.-W. Müller, *Contesting Democracy...*, p. 147.

reform of the KRS (National Council of the Judiciary), which oversees the court nominations, by changing its composition and replacing the constitutional custom of judges electing their part of the body themselves, which resulted in the solution that *politicians elect twenty-three out of twenty five members*.<sup>40</sup>

2. Introduction of the bills in the parliament *de facto* amending the constitution without achieving the constitutionally required threshold for such a change ('super-majority'), e.g., the change of the constitutionally fixed term of office of the chief justice of the Supreme Court. Unlike in Hungary where the first step to introduce an illiberal democracy by Fidesz was adopting a new constitution, in Poland it has acquired much less constitutionally entrenched form and the return to the 'default' option of constitutional-liberal standards of governing introduced by the PiS government.
3. Transformation of the public media outlets into propaganda tools of the ruling party and further (though failed) attempts to curb media pluralism in Poland (e.g., an attempt to introduce legislation forcing one of the American companies to sell its shares in the leading opposition-friendly broadcaster TVN).

These major anti-liberal developments introduced in Poland in the recent years require a theoretical framework to better understand the type of crisis that has been unfolding. The post-war views on constrained democracy correspond well with the primacy of constitutional law identified by Kelsen in *The Essence and Value of Democracy* (2013 [1929]) where he argued that *[t]he protection of the minority is the essential function of so-called freedoms and fundamental rights or human and civil rights, which are guaranteed by all modern parliamentary-democratic constitutions. (...) No conventional law, but only one produced in a qualified process can produce the basis for an infringement by the executive power upon the sphere that freedoms and fundamental rights build up around the individual. The typical way of qualifying constitutional laws vis-à-vis conventional laws is the requirement of a higher quorum and of a special – possibly two-thirds or three-quarters – majority*.<sup>41</sup> The democratic constitution imposes certain limits on the elected no matter how strong their mandate and support in society might be. More importantly, its goal is to protect citizens and their rights by imposing clear limits on what representatives in parliament can do. These so-called fundamental freedoms and rights cannot be violated by public authorities, i.e., the legislature, the executive, or the judiciary, the latter having the special task of protecting them through the establishment of constitutional courts. The appearance of such courts in European liberal democracies after the Second World War triggered major changes in the existing structure of public authorities since these courts gained the right to repeal new statutes immediately after they were passed by Parliament (as was the case with the German court system in 1949). The constitutional court was still treated – also in the Polish Constitution of 1997 – as an element of judicial power and strengthened its position to become the main element of a specific form of rule, sometimes referred to as juristocracy. This problematized the principle of the separation of powers in the face of a constitutional

<sup>40</sup> W. Sadurski, *Poland's Constitutional...*, p. 101.

<sup>41</sup> H. Kelsen, *On the Essence...*, p. 67.

court's claims to have the right to judge the fairness or expediency of the decisions adopted by the democratic representation of a political nation that was regarded as sovereign. The constitutional court was supposed to defend 'the rule of law' against politicians – to become a 'court of law' and even a kind of 'surrogate of the legislature' without democratic legitimacy. According to the Vice-President of the German Federal Constitutional Court, Andreas Voßkuhle, the 'judicial-constitutional jurisdictional state' has become problematic for a democratic constitutional state because it was inserting 'sovereign law' in place of the sovereign, i.e., the people perceived politically and not ethnically.<sup>42</sup>

The way Polish liberal democracy has been understood in recent years illustrates how a certain ideological propensity could justify giving priority to the democratic element, and more precisely to a particular understanding of the priority of popular sovereignty over constitutionalism. After 2015, when the coalition government led by Law and Justice (PiS) was formed, two perspectives emerged in Poland that were directly connected with the dispute related to the Constitutional Tribunal, whose task was to protect the law from unconstitutional attempts by the legislature and the executive. The first perspective required the recognition of the state as a collective of citizens with a shared identity, which should be the source of all decisions of the legislature. The 'political people', i.e., the sovereign indicated in the Constitution, should decide, through their representatives in Parliament and the executive elected by them, on the content of the law (which they adapt to their view of the collective identity) and a changing 'public interest.' The second perspective associates the state with the legal order perceived as a system of hierarchical norms crowned by the Constitution. The legal order binds the community and the bodies of public authorities and defines the fields of activity of both the community and its bodies. The PiS government, which came to power in 2015, adopted the first perspective, often described as a 'representative democracy', whereas their critics refer to a 'constitutional democracy', treating the basic law as a self-contained and closed 'politically unmarked' whole, instead of something that is derived from a politically defined legislature. The former exposes the source from which the law springs, while the latter make what is already in force an unchangeable field that defines the competences of public authorities and the scope of citizens' rights and freedoms. The former refers to the Article 4 of the Constitution of the Republic of Poland which states that the supreme power is vested in the Nation, while the latter suggest that the foundation of 'power' is rooted in the Constitution, i.e., in the legal order rather than in a 'collective subject' which expresses its will in democratic procedures. However, as stated in Article 2 of the Constitution, 'the Republic of Poland shall be a democratic state ruled by law,' not merely 'the state ruled by law,' thus the key role of democracy within the activity of the 'collective sovereign' or its representatives is emphasized.

The crisis of liberal constitutionalism in Poland was exacerbated by the Covid-19 pandemic and the legislation adopted in reaction to it, which was not backed up by

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<sup>42</sup> A. Voßkuhle, *Europa, Demokratie, Verfassungsgerichte*, Berlin 2021, p. 221.



the implementation of any form of the state of emergency regulated by the Constitution.<sup>43</sup> The Polish government decided not to introduce any extraordinary measures and took steps to counteract the development of the pandemic under the Act on Preventing and Combating Infections and Infectious Diseases in Humans of 5 December 2008.<sup>44</sup> Based on the provisions of this Act, the Council of Ministers and the Minister of Health issued regulations<sup>45</sup> limiting individual rights and freedoms secured by the Constitution which in Article 31 warrants that such rights and freedoms may only be limited by legislative acts.<sup>46</sup>

As early as 2020, it was noticed that the state of epidemic that had been introduced under regulations based on the Act of 2008,<sup>47</sup> and then the state of epidemic<sup>48</sup> were unconstitutional, in particular in terms of limitations of the right to assembly.<sup>49</sup> A similar position was expressed in the case law in which it was emphasised that *in order to introduce limitations on human freedoms and rights, one may not invoke extraordinary circumstances that justify specific legal solutions, and such circumstances may not justify*

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<sup>43</sup> According to the Article 228 of the Constitution, *[i]n situations of particular danger, if ordinary constitutional measures are inadequate, any of the following appropriate extraordinary measures may be introduced: martial law, a state of emergency or a state of natural disaster. An extraordinary measure which may be introduced only by regulation, issued upon the basis of statute, requires the statute to establish the principles for activity undertaken by public authorities and the degree to which the freedoms and rights of persons and citizens may be subject to limitation for the duration of a period in which extraordinary measures are required. "The Constitution of the Republic of Poland of 2<sup>nd</sup> April, 1997," sejm.gov.pl, at <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>, 12 May 2021.*

<sup>44</sup> Journal of Laws of 2019, item 1239, as amended.

<sup>45</sup> Among others, the Regulation of the Council of Ministers on the establishment of certain restrictions, orders and prohibitions in connection with the occurrence of the epidemic state of 10 April 2020: Journal of Laws of 2020, item 658, which was repealed and replaced by many subsequent regulations with the same title, and the Regulation of the Minister of Health on infectious diseases giving rise to the obligation of hospitalisation, isolation, or home isolation and the obligation of quarantine or epidemiological surveillance of 6 April 2020: Journal of Laws of 2020, item 607.

<sup>46</sup> *Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.* "The Constitution...", art. 31, para. 3.

<sup>47</sup> Regulation of the Minister of Health on the declaration of the state of epidemic emergency in the territory of the Republic of Poland of 13 March 2020: Journal of Laws of 2020, item 433.

<sup>48</sup> Regulation of the Minister of Health on the declaration of the epidemic state in the territory of the Republic of Poland of 20 March 2020: Journal of Laws of 2020, item 491.

<sup>49</sup> Following the introduction of the state of epidemic emergency, assemblies with more than 50 participants were prohibited under the Regulation of 13 March 2020. At the time of the entry into force of the Regulation of the Council of Ministers of 10 April 2020, under the epidemic state, a total prohibition against assembly was already in place, which, in the opinion of the Court of Appeal in Warsaw, raised *significant doubts from the perspective of the constitutional right of citizens to assembly under Article 57 of the Constitution of the Republic of Poland, in particular in the context of constitutionally permissible limitations of subjective rights and the principle of proportionality expressed in Article 31 Section 3 of the Constitution of the Republic of Poland* – the decision of the Supreme Court in Warsaw of 15 May 2020, file number VI ACz 339/20.

*far-reaching limitations of civil freedoms introduced in the form of regulations.*<sup>50</sup> In some cases, attention was drawn explicitly to the unconstitutionality (and, thus, the lack of legal grounds) of the prohibitions introduced in the regulations, without questioning the unconstitutionality of the Act of 2008 on the basis of which the regulations were issued.<sup>51</sup>

In the judgment of the Supreme Court of 16 March 2021,<sup>52</sup> it was indicated that the Act of 2008 did not contain norms defining the possibility and conditions of limiting constitutional freedom of movement within the territory of the Republic of Poland. It was observed that legal acts of a rank lower than a legislative act may not limit rights and freedoms guaranteed by the Constitution and therefore the government regulation of 31 March 2020 violates the provisions of the Constitution to the extent that it limits freedom of movement of citizens within the state. Although the case decided by the Supreme Court concerned only limitations to freedom of movement, its judgment was regarded as a breakthrough for Polish case law that also concerned the legality of limitations of other rights and freedoms under regulations issued by the Council of Ministers during the pandemic such as freedom of assembly or freedom to conduct business activities. It was also considered a breakthrough for 'the future,' in particular in relation to concerns regarding further limitations of the rights and freedoms of the individual.

Every crisis opens up the space for a more discretionary and obtrusive governmental power and side-lining of the parliaments. In consequence, the model of the state that seems particularly helpful to understand the recent legal and political tendencies is the 'administrative state' (*Verwaltungsstaat*) in which 'command and will do not appear authoritarian and personal and which, nevertheless, does not seek the mere application of higher norms, but rather only objective directives. In the administrative state, men do not rule, nor are norms valid as something higher. Instead, the famous formula *things administer themselves*' holds true.<sup>53</sup> Schmitt comments that it is conceivable that in such a state the dominant legal expression is the administrative decree *determined only in accordance with circumstances, in reference to the concrete situation, and motivated entirely by considerations of factual-practical purposefulness.*<sup>54</sup> The administrative state is particularly prone to justify its actions in terms of *factual necessity, condition of things, the necessity of the moment* or the *force of circumstances.*<sup>55</sup>

The rapidly changing epidemic situation and the governmental attempts to tackle it resulted in the multiple curbs on rights and liberties without the proper legal basis. Epidemic 'circumstances' and 'factual-practical purposefulness,' often ascertained not

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<sup>50</sup> Judgement of the Regional Administrative Court in Opole of 27 October 2020, file number II SA/Op 219/20.

<sup>51</sup> E.g., Judgement of the District Court for Warszawa-Śródmieście of 16 October 2020, file number V W 2757/20.

<sup>52</sup> The decision of the Supreme Court in Warsaw of 25 March 2021, file number II KK 74/21.

<sup>53</sup> C. Schmitt, *Legality...*, p. 5.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*, p. 8.

by the clearly expressed will of political leaders but through officials or lower-rank ministers invoking the authority of expert bodies or even science itself seemed to be the driving force behind the introduced measures without the proper respect for the constitutional rights or limitations on curbing individual freedoms. In this we could see the confirmation of the particular discrepancy between the legislative state with its own system of legality (regarded as the highest form of legitimacy), which stands or falls by the belief in the normative rationality of the legislator, and the administrative state. Thus, the Polish legislation during the Covid-19 pandemic might serve as an empirical example of the burgeoning of the administrative state.

The case law of the courts deprived of similar democratic powers to those vested in the Parliament reveals not so much opposition to the arbitrariness of the legislature as opposition to unlawful regulations formulated by the executive which are either contrary to the norms of a higher rank or not derived from them. The executive, which more and more relies on the opinions of expert bodies rather than on the 'will of the sovereign,' shapes the content of the law and, in particular, limits constitutionally mandated rights and freedoms due to the necessity to contain the spread of the pandemic. In their rulings, the courts refer not so much to rights and freedoms 'as such' (i.e., possessing an 'inherent character' as in Locke's liberal project) but to the rights and freedoms listed in the Constitution. They observe that these rights and freedoms may not be limited by acts of a lower rank than legislative acts, and this prohibition is expressed also in the Constitution. The court rulings are evidence of a commitment to the 'liberal constitutionalism' which emphasises not only the hierarchy of normative acts but also the separation of powers. The last element is the source of the most interesting problem. It appears that even when the nation which exercises supreme authority has empowered its representatives to take care of its health, the courts, which ensure consistency of the law that constitutes the normative system, may challenge the legitimacy (legality) of the solutions adopted by the democratically legitimised representation and its executive body or bodies. The liberal component, the rule of law, seems to be protected by the courts to some extent despite or independently from the democratic component (the primacy of 'sovereign law' in relation to the 'sovereign nation') which was used by the PiS government to significantly weaken the role and powers of the Constitutional Tribunal.

## 5. CONCLUSION

Schmitt had no doubt that the executive that holds the power to declare emergencies and dictate policy during emergencies could use that same power to undermine electoral institutions, free press, and other constitutional mechanisms. Such temptation has been visible in Hungary under Victor Orbán and in Poland under Jarosław Kaczyński, who did not attack democratic institutions but instead undermined the role of constitutional courts, independent public media and civil society groups that defend liberal values, including human rights. The pandemic has added to this process

of liberal-constitutional backsliding yet another dimension of emergency legislation and ruling by administrative measures. During a declared emergency it is the executive rather than the courts that takes primary responsibility for interpreting rules (in our case, e.g., the emergency law of 2008) and issuing new regulations without ever checking upon their constitutionality. In this scenario, the administration of things replaces proper parliamentary legislation based on higher norms and principles and thus the administrative state replaces the legislative (democratic) state ruled by law based on a clear hierarchy of norms. Schmitt saw the proliferation of administrative commands as a threat which undermines both governmental (based on personal authority or will) or legislative (based on norms) types of state. The current liberal-constitutional backsliding and the spread of governmental regulations to deal with the emergency situation indicate that the liberal-democratic order might be much more fragile even in old democracies than democratic theory of recent decades assumed. Threats that have the quality of being objective ('natural') pose a serious challenge to civil rights and liberties in liberal democracy as result of the creation of a broad consensus on the suprapolitical (or even non-political), or at any rate 'objective,' nature of the threat. The endemization of these threats leads to a systemic weakening of the liberal components of contemporary democracies. Moreover, the legal solutions introduced for a limited period of time in relation to identified emergencies tend to be implemented into the legal order and thus become relatively permanent. The increase in the problematic nature of the relationship between the state of emergency and the situation of emergency through the selective use of measures has blurred the distinction between normal and exceptional situations. Finally, the securitization of politics exacerbated by the Covid-19 crisis reveals the evolution of the liberal-democratic model of statehood towards the weakening of the ideological justifications of the legal and political order (liberal-democratic values and human rights) in favour of the exposition of its purely material and biological justifications, something already predicted at the dawn of the post-Cold War era.<sup>56</sup>

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<sup>56</sup> P. Kondylis, *Planetarische Politik nach dem Kalten Krieg*, Berlin 1992.

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