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# Jurisprudence in the Crisis of Liberal Democracy<sup>2</sup>

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## Abstract

The article concerns real and potential reactions of jurisprudential discourses to the phenomenon of the crisis of liberal democracy. The author argues that liberal democracy has been a hegemonic structure – meaning that not only has it been dominant in the factual sense in the broadly understood Western legal and political culture but it has also effectively suppressed any competing discourses. Today, the hegemony of demoliberalism is being questioned. The new state of affairs causes a range of complications that jurisprudential discourses have to deal with. The author considers three possible scenarios of the reaction of these discourses to the said crisis. The first of them means a shift towards democratic authoritarianism. The second is about remaining in a collective hypocrisy, waiting for a change in the current intellectual climate. The third involves accepting the political nature of jurisprudence and making the concept of agonistic democracy a reality.

**Keywords:** jurisprudence, democracy, liberalism, authoritarianism, agonistic concept of politics, crisis of liberal democracy.

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# Prawoznawstwo wobec kryzysu demokracji liberalnej

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## Streszczenie

Artykuł dotyczy realnych i potencjalnych reakcji dyskursów prawoznawczych na zjawisko kryzysu demokracji liberalnej. Autor wychodzi z założenia, że demokracja liberalna była strukturą hegemoniczną – to znaczy, że nie tylko dominowała ona w sensie faktycznym w kręgu szeroko pojętej zachodniej kultury prawno-politycznej, lecz także skutecznie tłumiała dyskursy konkurencyjne. Aktualnie hegemonia demoliberalizmu jest kwestionowana. Nowy stan rzeczy powoduje liczne komplikacje dla dyskursów prawoznawczych. Autor rozważa trzy możliwe scenariusze reakcji tych dyskursów na kryzys. Pierwszy scenariusz oznacza dryf w kierunku demokratycznego autorytaryzmu. Drugi wiąże się z trwaniem w zbiorowej hipokryzji i czekaniem na zmianę aktualnego klimatu intelektualnego. Trzeci scenariusz związany jest z akceptacją polityczności prawoznawstwa oraz z realizacją koncepcji agonistycznej demokracji.

**Słowa kluczowe:** prawoznawstwo, demokracja, liberalizm, autorytaryzm, agonistyczna koncepcja polityki, kryzys demokracji liberalnej.

## Introduction

The thesis that liberal democracy is in the midst of a crisis is not particularly controversial. At the same time, however, there are significant disputes over what the effects of this crisis might turn out to be. There is no doubt that liberal democracy was a hegemonic structure, in the sense that it not only held sway, in real terms, over broadly understood Western legal-political culture, but it also effectively suppressed opposing discourses. Liberal democracy extended its dominance not so much by asserting that there is no alternative as by claiming to be the best possible option; and not just for here and now, but generally, for all time.

Today, Francis Fukuyama's *The End of History* is treated as an example of ungrounded historiosophical optimism, even though its author did not suggest that liberal democracy would prevail forever, but rather argued that humanity would not come up with a better set of political and legal solutions.<sup>3</sup> Reading Fukuyama's essay in the light of today's situation leads to the conclusion that the author allowed himself to be carried away by enthusiasm and seduced by cheap metaphysics, as he failed to consider whether there might be some gradation in the criteria for choosing the 'best option'.

An excerpt from Victor Orban's famous speech at Tusnádfürdő (Băile Tuşnad, Romania) from 26 July 2014 may serve as a critical comment on *The End of History*. Orban suggested 'that probably societies founded upon the principle of the liberal way to organize a state will not be able to sustain their world-competitiveness in the following years, and more likely they will suffer a setback, unless they will be able to substantially reform themselves.'<sup>4</sup> Obviously, it can be argued that Fukuyama's criteria of 'the best' are more exalted than the pragmatism of this Hungarian populist (today, populism is most frequently cast in opposition to demoliberalism), but such a dispute over criteria would amount to a typical Lyotardian *Différend*. In any case, the crisis can be considered a social fact. Since demoliberalism has strongly influenced professional legal and juridical discourses, and now it grounds their order – if one use other theory-laden terminology, one could speak of a paradigm

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<sup>3</sup> F. Fukuyama, *The End of History*, "The National Interest" 1989, 16(3), pp. 3–18.

<sup>4</sup> <https://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp> (access: 22.05.2020).

or even a legal-political metanarrative – the question arises as to how the crisis of hegemonic formation can affect jurisprudence.

This is the issue addressed in the current text, being an extended version of the paper delivered at the conference organised in Karpacz, Poland, in September 2019 by the Theory and Philosophy of Law Department at the University of Wrocław, under the motto 'The Political Nature of Legal Science and Practice'. I mention this not only to chronicle it, but also to explain the context of these considerations, which revolve around the underlying problem of 'the return of the political'. One of the basic assumptions of demoliberalism was the conviction that it is possible/necessary to keep law free from politics, and, consequently, to eliminate the influence of politics on legal science and practice. For critics of the liberal-democratic hegemonic formation, in terms of its impact on legal discourses, the utopian aspect of this dogma of the separation of law and politics is considered to be of fundamental and crucial importance.

This text is divided into three parts. In the first, I will present a specific vision of the genealogy of demoliberalism and the postulate of the elimination of politics. However, on this occasion I will not refer to post-theological themes, which I attempted to do in my other papers,<sup>5</sup> but I will focus on the themes of class and conflict instead. In the second part, I will refer to the theories which reveal that the sources of the crisis of demoliberalism reside in its internal contradictions. In the last part, I will discuss three theoretical scenarios of how jurisprudence could react to the crisis. For obvious reasons (After all, history is adventitious, and historiosophy contaminated with metaphysics is not a fashionable and convincing direction of philosophical research today.), these scenarios do not represent the full spectrum of possible options, but they can be considered as visions of change which are probable to some extent because they are based on views which can already be found in the discourse, and the arguments expressed in them can be convincing.

## Demoliberalism, Reason, Conflict

Contemporary analysts of the crisis of demoliberalism – both those who see the crisis as regrettable, or at least dangerous,<sup>6</sup> and those who see it as containing the seeds

<sup>5</sup> A. Sulikowski, *Apolityczność w prawnoznawstwie. Kryzys idei a zjawisko populizmu*, „Archiwum Filozofii Prawa i Filozofii Społecznej” 2018, 3, p. 74 ff.

<sup>6</sup> F. Zakaria, *The Future of Freedom. Illiberal Democracy at Home and Abroad*, New York 2008. Conclusion, *passim*.

of hope for positive changes<sup>7</sup> – frequently take the view that the final nail in the coffin of the hegemonic ideological vision was its attitude to social conflicts. Simply put, it can be said that demoliberalism (which, as Fukuyama argued, established quite similar practices and appealed to the same justifications in all its various specific instantiations) was based on the assumption that it was possible to develop a set of systemic solutions that would be acceptable to all rational participants in the political game.

The genealogy of such a conviction can be sought both in the Enlightenment belief in a rational world order which grounded the notion of progress, and in the concept of the universality of bourgeois reason which is built into capitalism. Alain de Benoist, one of the classic authors of the French *Nouvelle droite*, asserts that faith in progress was inherited from Christian theology by the bourgeoisie who saw its class dominance in progressive terms, and general optimism was also seen as a sign of progress for which reason is responsible:

On the political plane, the theory of progress was very quickly associated with an anti-political animus. Nevertheless, the theorists of progress have an ambiguous view of the state. On the one hand, the state limits the autonomy of the economy, regarded as the sphere of “freedom” and rational action par excellence: William Godwin says that governments by their nature create obstacles to the natural propensity of man to go forward. On the other hand, in the contractarian tradition inaugurated by Hobbes, the state allows man to escape the constraints specific to the “state of nature”. Thus the state is simultaneously an obstacle and an engine of progress. The most common view is that politics itself must become rational. Political action must cease being an art, governed by the principle of prudence, and become a science, governed by the principle of reason. As with the universe, society can be viewed as a machine, in which individuals are the cogs. Hence it must be managed rationally, according to principles as regular as those observed in physics. The sovereign must be a mechanic overseeing the evolution of “social physics” towards “the greatest public utility”. This conception inspired technocracy and the administrative and managerial conception of politics of a Saint-Simon or a Comte.<sup>8</sup>

At this point, the ‘right-wing’ Benoist is surprisingly on the same page as M. Foucault, who was associated with the philosophical left-wing, and who consi-

<sup>7</sup> Ch. Mouffe, *For a Left Populism*, London 2018, p. 79 ff.

<sup>8</sup> A. de Benoist, *A Brief History of the Idea of Progress*, “The Occidental Quarterly” 2008, 8(1), p. 12.

dered the link between power and rationality to be most fascinating aspect of the modern *épistémè*, on the basis of the question: 'How can one analyze the connection between ways of distinguishing true and false and ways of governing oneself and others?'<sup>9</sup>

The realisation of reason as a synonym for *logos* requires discovering its laws and forging them into a specific social order. This order cannot and must not be given as a finished project – the progress of reason requires the development of the concept of reason itself since certain unimaginable things become possible *a priori*, creating new problems and requiring new reinterpretations of reason. Thus rationality, in the sense of the strategy for the realisation of *logos*, sometimes requires rejecting, for tactical purposes, what seemed (and *de facto* was, in its time) rational. There is, in principle, no room for conflict or class differences. They can only result from cognitive errors which replaced the theological concept of sin. Just as a person who sins is not free (though they may be convinced that they are) and must be converted for their own sake and for common good, false social consciousness must be similarly overcome. Thus, governing does not consist in compelling obedience, but rather in converting individuals and entire populations to the idea of progress towards ever greater rationality. To this end, violence merges with the need to sacrifice one's own beliefs and habits, a certain (self-)deception in good faith (In this sense, modern power, according to such researchers as Foucault and Žižek, seduces rather than punishes.). Power in the subjective sense, that is, voluntary power as the rule of the privileged individuals, should be limited to the necessary minimum and subject to the most widely dispersed control possible.<sup>10</sup>

In French liberal-democratic theory, this approach is encapsulated in the concept of *pouvoir neutre*, which was developed two centuries ago by B. Constant,<sup>11</sup> and had previously been present even in the draft constitutional jury proposed by

<sup>9</sup> *Questions of Method. An Interview with Michel Foucault*, "Ideology and Consciousness" 1981, 8, p. 11.

<sup>10</sup> Zygmunt Bauman quite aptly expressed the creed of liberalism with regard to the relationship between power and freedom in one of his 'early' works: 'Man himself is the highest good, hence he should above all keep his own interests in mind; however, he must remember not to encroach upon the interests of other people, which are as sacred as his own. Hence it is necessary to strive for such a society in which people can look after their own interests without encroaching on those of others; in which agreement based on mutual understanding would reign, manifested in a community of values. Man can serve his own interests only if his social position is a confirmation of his own striving and effort, when nothing puts up barriers to his unlimited ascent. Thus, human initiative must be allowed its freedom, people must be able to get rich, among other things' – Z. Bauman, *Socjologia na co dzień*, Warszawa 1962, p. 132.

<sup>11</sup> P. Rolland, *Comment préserver les institutions politiques. La théorie du pouvoir neutre chez B. Constant*, "Revue Française d'Histoire des Idées Politiques" 2008, 27(1), pp. 45–46.

E.J. Sieyès.<sup>12</sup> The modern power of the 'last word' – i.e. of the judiciary – which should have a real advantage over traditionally representative powers – the legislature and the executive – actually has to be undemocratic, in the sense that it must be exempt from the obligation to persuade voters. Paradoxically, this is to ensure maximum democratisation, understood as the power of the nation (conceived of as an imaginary community). The concept of national sovereignty has displaced the traditionally democratic concept of the sovereignty of the people, as promoted by Jean-Jacques Rousseau at the threshold of the French Revolution. The sovereignty of the people entailed the actual power of the majority, necessarily personified by representative bodies. This sovereignty was to be achieved by means of all kinds of parliamentary instructions, a binding mandate, concentration of power in the legislative body, etc. In contrast, the sovereignty of the nation, as a rational community of past and future generations (always imagined as a community of individuals who accept the laws of bourgeois reason), presupposed a free mandate and purely formal representation, as well as maximum dispersion of power with the prevailing undemocratic *pouvoir neutre*.<sup>13</sup>

Obviously, to a large extent, contemporary demoliberalism is the product of American discourses. It was authors on the other side of the Atlantic, in the middle of the 19th century, who developed the notion that the courts and then (under the influence of pragmatism) expert bodies are cognitively privileged in the search for and realisation of reason, and that the ruling will of the majority must be strongly limited by liberal laws and the general principles of bourgeois reason. Nevertheless, the intertextual relations between such views and the thought of the Old Continent appear to be quite obvious. And here the issue is not so much the obvious inspirations from the writings of such thinkers as Plato or Machiavelli, as references to literature of the 18th and 19th centuries.<sup>14</sup> Interestingly, in continental Europe, philosophical-legal discourse did not see traditional judicial bodies as potential advocates of reason since they tended to be perceived as specific offices which rather passively participated in the processes of governance (obviously, oppositional ideas, e.g. the free law movement, appeared, but never entered the mainstream). However, in Anglo-Saxon culture, as a result of historical experience, the courts gained the status of potential defenders of liberal rights against the temptations of the traditional authorities quite early on, and thus seemed well prepared for the role of advocates of bourgeois rationality.

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<sup>12</sup> P. Bastid, *Sieyès et sa pensée*, Paris 1970, p. 585.

<sup>13</sup> M. Sobolewski, *Zasady demokracji burżuazyjnej i ich zastosowanie*, Warszawa 1969, pp. 21–23.

<sup>14</sup> As indicated by S.D. Smith, *Constitution and the Pride of Reason*, New York 1998, pp. 7–8, 13 ff.

The recognition of the principles of bourgeois reason (such as formal equality before the law, empowerment around the axis of freedom-responsibility, capitalist utility as the best means of evaluating all material and individual products, the domination over nature, and the achievement of goals at the cheapest cost as the basic determinant of rationality) as being the embodiment of reason *par excellence* was possible thanks to the elimination of traditional concepts of social stratification, which presuppose different reasons of state. As Foucault points out, modern liberalism was able to effectively point out the unjustified elements of coercion and violence in traditional 'reasons of state' arguing that although liberal 'regimes themselves' may appear to be oppressive when perceived 'from outside', in fact, they are not at all: they are appropriate and universal.<sup>15</sup> Only the individual can be free from the limitations of the state and the myths which underpin it, and can be transformed into a self-aware subject. If this subject feels oppressed, e.g. due to poverty, this does not change their level of freedom. Demoliberal discourses have not, obviously, denied the existence of social conflicts of various origins. After all, liberalism's attitude towards the individual-subject, described by Foucault as an *asujetissement*, presupposes the pluralism of attitudes, interests, and the right to choose one's views and way of life, but at the same time, it believes in the possibility of rational individuals being able to settle their disputes on the basis of the law produced in the public sphere.

This law is, obviously, established politically, and here the democratic component plays the most important role – parliamentary bodies, political forces institutionalised into parties, and the effects of their actions are legitimised by the will of the majority; however, their room for manoeuvre is reduced in proportion to the increasing rationalisation of social relations. The cognitively privileged expert bodies which develop a rational accumulation of legislation in the form of *acquis constitutionnel* reduce the space for political decision-making. The vision of the constitution – not as a finite political act, but as a non-political prosthesis of reason, an essentially unlimited source of 'norms, principles and values', as an excuse to inhibit the legal creations of political authorities which would be considered unreasonable by cognitively privileged judges – becomes a key element of a developed liberal democracy. The role of liberal principles, the catalogue of which is extended by jurisprudence, increases with the progress in building a reasonable society. In this context, the role of professional jurisprudential discourse is purely affirmative, in the sense attributed to this expression by M. Horkheimer's critical theory. The point here is to develop liberal constructs in the spirit of scientism, to propose directions for further rational evolution of the *acquis constitutionnel*, at the same

<sup>15</sup> L. Martin (ed.), *Technologies of the Self. A Seminar with Michel Foucault*, London 1988, p. 27 ff.



time legitimising them with the authority of science, and to discipline discourse participants, suppressing threads which delegitimise the assumptions underlying the system.<sup>16</sup> In the realisation of their tasks, legal discourses effectively combine purely rationalistic and pragmatic threads with ethical ones. The system is presented as being the best, both in terms of its technical effects (economic, social development, technological progress), ethical effects (freedom, emancipation) and scientific justification.

After the Second World War and the experiences of Fascism and Nazism (considered by many philosophers of politics and law to be the unintelligible effects of a disorderly people's power, as mistakes on the way to a modern paradigm of governance), the USA assumed the role of the hegemon of the West and demoliberalism became the basic determinant of the state systems on the bright side of the Iron Curtain. It is no accident that the first constitutional courts after the First World War were established in Germany and Italy. Although Kelsen's theory was used in the construction of the constitutional courts, the role of the courts was perceived somewhat differently than how this Viennese theorist saw them. The courts were supposed to prevent excesses of power, including, above all, abuses of democracy.<sup>17</sup> The activism of the constitutional judiciary was gradually installed wherever demoliberalism was successfully implanted, and this led liberal democracy to its mature form, as presented in Fukuyama's essay.

## Critical Reaction

Obviously, critiques of demoliberalism were not absent from various professional discourses. Nevertheless, they were usually effectively suppressed and did not break through into the mainstream. The first successful critique came with the appearance of a specific set of arguments whose symbolic founding father was Carl Schmitt. This German theorist attacked the founding of the Weimar Republic, the functioning of which was obviously far removed from the image of liberal democracy presented in Fukuyama's essay, but was undoubtedly influenced by demoliberalism. Schmitt developed two themes into a convincing account that later became the identifying feature of the 'political language of populism' – as the antithesis of demoliberalism. First, he laid great emphasis on the theme of conflict and the political, which had supposedly been eliminated from the rationalist

<sup>16</sup> M. Horkheimer, *Teoria tradycyjna a teoria krytyczna*, [in:] J. Łoziński (ed.), *Szkoła frankfurcka*, Warszawa 1987, p. 142 ff.

<sup>17</sup> Cf. L. Favoreu, *Les cours constitutionnels*, Paris 1986, p. 15 ff.

project. According to later exegetes, Schmitt went even further than Marx who considered political conflict to be a derivative of class struggle, i.e. a conflict arising from differences in access to means of production. Thus, in Marx's account, politics is theoretically eliminable. After the victory of communism, politics must, for obvious reasons, disappear. However, in Schmitt's concept, the political, i.e. the one which creates friends and enemies, is irremovable.<sup>18</sup> Furthermore, everything that is capable of generating the us/them dualism becomes political. In other words, nothing that generates oppositional identities is apolitical.

This leads to the second thread that is important for the later development of populism, which is the name usually given to the contemporary critique of demoliberalism. It boils down to a question of sovereignty. In Schmitt's opinion, sovereignty is something eminently subjective, real and causal. To put it another way, no primordial reason, no *a priori* law shapes sovereignty. On the contrary, the sovereign is the one who can – realistically and concretely – invoke *exceptio*, in order to exclude themselves from the old law and lay the foundations of a new one. In other words, no rule of reason or rule of law is possible. They can only be a sham; they hide real power and, in extreme cases, mask anarchy. The appearance of Schmitt's theories in Germany was timely, or, if causality is reversed, they effectively reflected public sentiment and the needs of institutional politics. In any case, they broke through to the mainstream. The refusal to accept the dogma that the government and professional discourses had been depoliticised led to a counter-reaction, that is, to their extreme politicisation – everything became dependent on political legitimacy. The principle of identifying the sovereign with the leader or, more broadly, the political movement, which produced the *Gemeinschaft* by defining the enemy and, consequently, by pointing out the truth, which is of obviously political because it cannot be otherwise, influenced various discourses, both professional and private ones.

Interestingly, very similar tendencies were in evidence in the Soviet Union, even though it was officially founded on Marxist thought. Stalin's thesis on the intensification of class struggle with the progress of revolution contradicted traditional Marxist thinking which was replaced with a specific version of Schmittism. Although on theoretical grounds the leader was partly devoid of subjectivity because he only directed the dictatorship of the proletariat, in real terms, he was compatible with the Schmittian narrative. Both Nazi Germany and the Soviet Union denied the possibility of professional discourses being apolitical, including legal discourses. The Soviet approach was adopted in the other Eastern Bloc states governed under

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<sup>18</sup> C. Schmitt, *Pojęcie polityczności*, [in:] idem, *Teologia polityczna i inne pisma*, Kraków–Warszawa 2000, p. 198.

people's democracy. This is well illustrated by a quote from a Polish legal textbook from those times:

[t]he legal science of the Polish People's Republic is a science that does not hide its class character; that is, it openly admits that it serves the interests of a particular social class (...) The bourgeois science (...) was and is also a class science – serving the interests of certain propertied classes. The only difference is that the bourgeois science hides its character under the guises of 'the apolitical', 'objectivity' and 'supraclass'.<sup>19</sup>

After 1989, the accession of the post-communist countries to the 'Western camp' was associated with the importation of liberal democracy. This triggered what I once described as affirmative amnesia.<sup>20</sup> The rules of jurisprudential discourses displaced and suppressed the once convincing threads of the inevitable ideological entanglement of legal science and practice. The discourses adopted scientific and liberal themes, assuming an unequivocally affirmative position with regard to demoliberal practice. This led to the depoliticisation of demoliberalism, in the sense that it was completely accepted in the media and political mainstream; it ceased to generate enemies and attained an unambiguously hegemonic status. A situation arose in which even the most activist decisions of constitutional courts were not treated as political, as they did not generate any criticism or opposition.

A significant change occurred only with the emergence of the phenomenon that came to be identified as an increase in populist tendencies. Interestingly, this phenomenon had been anticipated in the writings of Chantal Mouffe and Ernesto Laclau, which had appeared almost 30 years before the rise of populism. In the book *Hegemony and Socialist Strategy*, this pair of political philosophers recognised that the contradiction between the democratic and liberal components would inevitably lead to a crisis of liberal democracy.<sup>21</sup> The liberal element involves attempting to construct a 'law without politics', i.e. a certain *consensus* – a corpus of rules that, subject to petrification and neutralisation, would replace the law based on the will, emotions and the opposition between friend/enemy. In the process of consensus building, constitutional courts and other higher courts try to shut down discussion

<sup>19</sup> S. Gebethner, K. Gościński, [in:] J. Zakrzewska (ed.) *Prawo państwowe PRL*, Łódź–Warszawa 1964, p. 14.

<sup>20</sup> A. Sulikowski, *Afirmatywna amnezja i konserwatywni crits. Kilka uwag o kondycji krytycznej myśli prawniczej w Europie Środkowej i Wschodniej*, "Archiwum Filozofii Prawa i Filozofii Społecznej" 2014, 1(8), *passim*.

<sup>21</sup> E. Laclau, Ch. Mouffe, *Hegemony and Socialist Strategy. Towards a Radical Democratic Politics*, London 1985, *passim*.

and fill empty signifiers with concrete content 'once and for all'. As Laclau wrote, empty signifiers are words such as 'freedom', 'equality' or 'justice', which theoretically have wide registers of possible meanings and which 'surrender to power', i.e. can only be filled with content through hegemonic actions.<sup>22</sup> Constitutional judges, acting in accordance with the liberal logic of constructing a 'non-political' law, become the guardians of hegemonic power over the content of empty signifiers. The juridisation of this content strongly limits the possibilities of political struggle. The mainstream political parties and institutionalised political forces are forced to respect content whose originally ideological nature has seemingly been neutralised in the process of juridisation. As a result, these parties become similar to each other, professionalise themselves, and merge ideologically into an expert-professional complex whose main objective is to engage in a professional battle over positions for themselves and their colleagues.<sup>23</sup> Real political conflict seems to have been eliminated.

However, if one gives credence to the general diagnoses of Mouffe and Laclau, what is democratic, or rather what belongs to the political and difference, cannot be fully tamed. The political, as a primary antagonistic force, leads certain groups to create an enemy, and over time, it creates identities, which are not interested in consensus, and which stake a claim to validity. This is usually accompanied by a sense of disillusionment and a lack of true democracy – the juridicised 'constitutional acquis' ceases to appear to certain social groups as something pure, non-ideological and objective, and begins to be seen as dominated by enemies, or at best, as being too tolerant of those enemies. Such a mechanism is, according to Mouffe, the safety valve of a democracy, to which the liberal hegemony poses the greatest threat. According to Mouffe:

To negate the ineradicable character of antagonism and to aim at a universal rational consensus – this is the real threat to democracy. Indeed, this can lead to violence being unrecognized and hidden behind appeals to 'rationality', as is often the case in liberal thinking which disguises the necessary frontiers and forms of exclusion behind pretences of 'neutrality'.<sup>24</sup>

<sup>22</sup> E. Laclau, *Dlaczego puste znaczące mają znaczenie dla polityki?* [in:] idem, *Emancypacje*, Wrocław 2004, passim.

<sup>23</sup> In Poland, this process has long been recognized by political sociologists. Cf. M. Grabowska, *Formowanie się partii politycznych i ich elektoratów. Przypadek Polski*, [in:] A. Sułek, M. Szczepański (eds.), *Śląsk – Polska – Europa. Zmieniające się społeczeństwo w perspektywie lokalnej i globalnej*, Katowice 1998, p. 174 ff.

<sup>24</sup> Ch. Mouffe, *Demokracja, władza i „to, co polityczne”*, [in:] idem, *Paradoks demokracji*, Wrocław 2005, p. 42.

The crisis of liberal democracy is definitely the result of a populist reaction. It affects many spheres of the functioning of modern societies. It also affects professional legal discourses, effectively and convincingly attacking the dogma of their apolitical nature. Therefore, the question arises as to what the reaction of the legal discourses to this attack may be.

## Potential Directions of Change

Firstly, it has to be said that the consistent implementation of Schmitt's idea of democratic authoritarianism is eminently possible. Although today's populists tend to distance themselves from authoritarianism, which has been heavily discredited in the West as a result of the 'lesson learned' by Western societies, the road to authoritarianism seems likely. In order to 'empower the people', whose will is identified with the political agenda of the populist movement, effective disciplinary structures may be created which will induce the participants of legal discourses to 'actively support' the authorities. Staff changes (or just the promises of such changes) and making careers dependent on loyalty can ensure the acquiescence of those engaged in legal practice. Dogmatic discourse may develop new and effective ways of argumentation which legitimise the mechanisms of 'loyal jurisprudence', or adapt already developed solutions to new needs (e.g. the presumption of constitutionality, by ensuring the total loyalty of the constitutional court by the populist movement, may become an effective mechanism for protecting the implementation of the populist program from disturbances caused by invoking the argument of unconstitutionality). The probability of such a scenario being implemented seems to be greatest in the post-communist countries of Central and Eastern Europe, where the radical social changes of recent decades have not been conducive to the social institutionalisation of nomocratic solutions.<sup>25</sup>

Secondly, it is possible to cultivate a way of approaching the law which the eminent French critical sociologist Pierre Bourdieu dubbed 'collective legal hypocrisy'.<sup>26</sup> In short, the point is that, despite convincing arguments questioning the neutrality of the previous constructions of the demoliberal legal discourse based on scientism, one should try to maintain the dominance of this discourse in the name of a specific cultural ecology (maintaining the institutional world in a viable form).

<sup>25</sup> P. Blokker, *New Democracies in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia*, Routledge 2013, ch. 7.

<sup>26</sup> P. Bourdieu, *Les juristes, gardiens de l'hypocrisie collective*, [in:] F. Chazel, J. Commaille (eds.) *Normes juridiques et régulation sociale*, Paris 1991, pp. 95–99.

In other words, the power of lawyers over the law should be preserved, even though it has no justification that is compatible with the democratic myth, while its meritocratic justification has many weak points. The eminent philosopher from Wrocław, Artur Kozak, was a supporter of such an approach. In his justification, he referred to Rorty and neopragmatism, and to the theory of institutionalisation:

Institutionally generated semantics is an integral part of the law, understood as something really present in the everyday life of members of the social community. However, this thesis has political consequences. For if the law is only something socially present, something that affects our fellow citizens in social reality, then it must be admitted that the so-called legislature, the legislative authority, does not have the power to create law (in this particular sense). At most, it creates statutes, which then become law following the launch of a number of cultural conventions mediating between the act of establishing a law and the act of resolving a particular case. The law acquires real social existence on the road between the Parliament and the Court, which leads through the University.<sup>27</sup>

These three fundamental institutions have power over the law, but the power of each is different. In other words, it is a theoretical (and practical) mistake to reduce the power of a judge or the power of a dogmatist to political power. The social division of labour has given different institutions different logics, and although from the outside this can always be interpreted as ideological, within an institution the rules restrict the participants' activity to such an extent that their freedom, as a correlate of possibilities for political action, is strongly limited. From this point of view, the expert power of a lawyer is not political, but it is comparable to that of other expert authorities. While the power of, for instance, a doctor or an anthropologist is clearly a power and can generate violence, suffering, etc., acceptance of this risk is less dangerous than attempts to subordinate this power to traditionally conceived politics. Totalitarian systems tried to do just this: to legitimise 'people's' expertise by subjecting it to political control. The result was an eruption of violence on a previously unimaginable scale. However, the program of preserving the *status quo* in jurisprudence, when combined with awareness of the shaky theoretical foundations underlying the belief in the non-ideological nature of the rules of professional discourses, requires political legitimacy – paradoxical though this may seem. In other words, Schmitt's trend is strong and based on an appealing

<sup>27</sup> A. Kozak *Postponowoczesna filozofia prawa*, [in:] M. Błachut (ed.) *Z zagadnień teorii i filozofii prawa. Ponowoczesność*, Wrocław 2007, p. 71.

justification. In view of the relatively low esteem in which lawyers are held in society, it will be difficult to legitimise the maintenance of legal power. Kozak proposes a justification that may be convincing on theoretical grounds, but which is devoid of political appeal in the climate of populism:

For many people, the autonomy of the law, identified with the creation of a 'judges' state' is simply another stage in the process of the oligarchisation of democratic politics, resulting in the so-called 'democratic deficit'. However, this is a false explanation. In fact, the collective subject of sovereignty (the People/Nation) has been expropriated of influence on public power by democratic parliamentary policy itself. With the emergence of the construction of the free mandate and the entire network of intermediary bodies, the problem of the 'principal/representative' relationship *de facto* disappeared, and politics became a quasi-market for producers and consumers of political services. Thus, the autonomy of the law cannot continue an act of expropriation because this had already been accomplished when the process of law autonomisation began. Autonomous (autopoietic) law, on the other hand, to use the language of the revolution, expropriates the expropriators.<sup>28</sup>

The third possible theoretical solution is related to the concept of democratic agonism promoted today mainly by Mouffe. Generally speaking, this is a strongly relativistic and original reinterpretation of Schmitt, based on an even more realistic interpretation of politics. In Schmitt's view, politics is a sphere of conflict that cannot be inscribed in 'reason'. Conflict is inevitable and cannot be reduced to rationalistic categories. While there are many metaphysical elements in Schmitt's concepts which nonetheless provide a basis for political conflict (such as the nation, the state, their 'good' and 'reasons', etc., which are in a sense prior to 'friends' and 'enemies'), democratic agonism seeks to eliminate such factors. All identities based on the 'us vs them' pattern can be created in an adventitious, more or less instrumental or spontaneous way.

Agonistic democracy presupposes that politics is a struggle between opponents and that this struggle can and should concern all the spheres which can be considered political in practice, but this cannot concern the democratic framework in which social relations are organised.<sup>29</sup> Agonism posits that the proposal to preserve

<sup>28</sup> Ibidem, p. 76.

<sup>29</sup> Ch. Mouffe, *Introduction: Schmitt's Challenge*, [in:] eadem (ed.), *The Challenge of Carl Schmitt*, London–New York 1999, p. 4.

the myth of the legal neutrality of expert power is not only impossible, but also unworthy of implementation. Hence the pseudo-neutral *acquis constitutionnel* and the chains of reasoning behind it can and should be the focus of a political attack. Lawmaking can and should be an arena of political disputes, and competition for positions in scientific and judicial institutions is a part and parcel of agonistic democracy. In this context, the symbolic and disciplinary power embedded in jurisprudence is inscribed in the logic of political struggle. In other words, the rules of interpretation, juristic conclusions, and all the elements of legal knowledge can be used in political struggle because they have their political potential. From this perspective, the metaphysical defence of the demoliberal *status quo* (the condemnation of the 'political attack on apolitical institutions', the 'falsification of legal knowledge') is a form of normal political struggle, and thus it is not qualitatively different from the 'populist attack'. The difference between the traditionally Schmittian road to authoritarianism and agonism is that the latter requires a democratic mentality, safeguarding the fundamental framework of democracy, including the most important normative one – the right to only temporarily (in a term of office) fill the 'empty signifiers', i.e. the basic elements of a political dictionary at a given moment. To this end, it is necessary to establish a network of practices, institutions and policy channels for expressing dissent. In the long term, only the absence of hegemony can be hegemonic.<sup>30</sup>

Obviously, it is impossible to predict which direction the fundamental changes in jurisprudential discourse will follow. All the same, it is likely that changes will be necessary. Studying the trends and discussing the directions of change will undoubtedly prove worthwhile. We live in interesting times.

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<sup>30</sup> Eadem, *Polityczność. Przewodnik „Krytyki Politycznej”*, Warszawa 2008, p. 35 ff.



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