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Author(s): Merkel, Wolfgang

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DEFECTIVE DEMOCRACIES

Wolfgang Merkel

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Wolfgang Merkel is Professor of Political Science at the Institut für Politische Wissenschaft, Universität Heidelberg. This paper is based on a seminar he presented at the *Center for Advanced Study in the Social Sciences*, Juan March Institute, Madrid, on 4 June 1998, entitled “The fall of dictatorships and the rise of illiberal democracies at the end of the 20th century”.

I. Introduction¹

The final quarter of the 20th century has been distinguished by the unparalleled advance of democracy. By 1996, 114 of 191 countries in the world had established the procedural minimum for a democratic regime through the introduction of free, secret, equal and general elections (Diamond 1996: 28). From the beginning of the “third wave of democratization” (Huntington 1991) in 1974 to 1996, 89 autocratic regimes were transformed into democracies. Given these figures and the almost unchallenged implosion of socialist systems, Francis Fukuyama (1992) captured public attention with his writings about the “end of history”. He argued that the Western values of economic and political liberalism had finally triumphed over competing political and economic systems and were now the sole alternative. However, eight years after Fukuyama’s historical-philosophical speculation, empirical evidence suggests that it is not so much political liberalism as illiberal-or, more broadly, defective-varieties of democracy that have become widespread.

In relation to this, the following occurred in 1994 on the eastern fringe of Europe: in a generally fair democratic election Aleksander Lukashenko was elected as President of Belarus with 81% of the votes, defeating the old communist nomenclatura. Two years after he assumed office he instigated a referendum which proposed considerable restrictions on parliamentary prerogatives, a reduction in the competencies of the constitutional court and an *extraordinary* strengthening of presidential authority at the disposal of the demos, that is, the ultimate sovereign of democratic power. The Belarussian citizens voted overwhelmingly (70.5%) in favour of the President’s proposal and so paradoxically began to use direct-democratic means to dismantle their own democracy before it could be consolidated.² Lukashenko is not a unique case. Four years prior to Lukashenko the democratically elected

¹ I wish to thank my colleagues Hans-Jürgen Puhle, Aurel Croissant, Claudia Eicher and Peter Thierry of our joint research project on “Democratic Consolidation and Defective Democracies”, funded by the Volkswagen Foundation for their support and critical comments. I am also grateful to my colleagues and students at the Juan March Institute, where I first presented a preliminary version of this paper.

² The most common “explanation” of the referendum manipulation among journalists and East European specialists served to further cloud, rather than explain, the issue of the paradoxical use of democratic procedures and the rule of law in panthoritarian political cultures.

Peruvian President Fujimori dissolved Congress by means of an “autogolpe”, yet continued to enjoy a high level of approval among the Peruvian population and was three years later re-elected as President. Since entering office the Russian President Yeltsin has routinely circumvented parliament by way of a flood of decrees (Brie 1996). Similarly, “decretismo” has been characteristic of the governing style of Carlos Menem, the President of Argentina. Between 1994 and 1998 the Slovak Republic was ruled by a nationalist-populist Prime Minister who, with the help of his tightly led party, the HZDS, dominated parliament, discriminated against political and ethnic minorities, deceived the political executive, colonised the bureaucracy and ignored the constitutional court. In the Democratic Republic of Taiwan the old authoritarian Kuomintang regime-party continues to govern. It has in fact managed to legitimize itself through absolute voter majorities, but the executive – colonized by the Kuomintang - has frequently acted without regard for the boundaries drawn by the constitution between the executive, legislature and judiciary.

The list of young democracies with defects in the rule of law and the checks on executive power could go on. This therefore begs the question of whether Huntington’s and Diamond’s figures with respect to the number of new democracies, referred to earlier, are incorrect. The answer must be “yes and no”. The numbers themselves are statistically valid but, as is often the case in comparative studies, are based on considerable definitional weaknesses, arising out of an insufficient development of the concept of democracy. I see four significant shortcomings in the definition of “democracy” in theory and research on the transition to democracy:

1. The use of a one-dimensional definition of democracy, which essentially considers only the vertical legitimacy between governing and governed and does not reflect on the considerable tensions between liberal constitutionalism and democracy.³

³ It was only Guillermo O’Donnell (1998a; 1998b) who very recently brought the topic of “horizontal” accountability back into the discussion of democratic consolidation.

2. The use of an undifferentiated definition of democracy which only allows for a distinction between democratic and autocratic systems of government.

3. The failure to determine more closely the relationship between democracy and the rule of law.

4. The failure to conceive of new democracies as “democracy with adjectives” (Collier/Levitsky 1997) which would facilitate greater clarification of the grey areas between democratic and autocratic forms of government.

Because of these deficits, mainstream “consolidology” is unable to establish either conceptually or empirically the scope, meaning and dynamics of what influences the young democracies of the third wave: defects that come in the form of illiberalism, disregard for the rule of law, circumvention of the checks on power or tolerance of authoritarian domains, which damage important functions of constitutional democracy (see, for example, O’Donnell 1996; Brie 1996; Diamond 1996; Zakaria 1997; Merkel 1999) yet do not violate the democratic core principle of free, equal and general elections. Thus, I would like to offer some thoughts that resolve the above-mentioned theoretical deficits in comparative empirical research on democratic consolidation to the extent that a more appropriate conceptual and analytical account of the new “defective democracies” is facilitated. This will be done in steps. First, I (re-)introduce a multidimensional concept of democracy that allows statements about specific defects of democracies. Second, I conceptualize three different types of defective democracies. Third, the specific relation between democracy and liberal constitutionalism is elaborated. Fourth, I analyze the causes for the emergence of illiberal regime elements in young democracies.

II. Three dimensions of democracy

When speaking of “defective democracies” it is necessary to first clarify what is understood by “democracy”. This is especially important because a distinct democratic theoretical debate exists,⁴ yet has until now remained of little significance for comparative research on democratization and the consolidation of democracy.⁵ The latter has produced remarkably little discussion of the suggestions raised by Dahl’s slim polyarchy concept⁶. According to Dahl’s concise definition, polyarchy is “contestation open to participation” (Dahl 1971: 5). Polyarchy is thus defined by the two dimensions of political competition and political participation. However, contrary to the implication of Dahl’s diagrams (1971: 6, 7) the elements form not two, but just one, dimension of democracy; namely, the vertical legitimacy dimension between electors and elected, governed and governors.⁷ Dahl’s definition based on Schumpeter (1950) is concise and elegant, but is not sufficient to differentiate between liberal and illiberal, defective and functioning, consolidated and unstable democracies. I would therefore advocate the readoption of a second dimension, discussed since the times of John Locke, Montesquieu and the Federalists, yet neglected by Dahl and in empirical democracy and transition research-the dimension of the rule of law and the constitutional guarantee of civil rights. The importance of this second dimension of horizontal accountability of liberal constitutionalism⁸ for the maintenance of the vertical legitimacy dimension’s institutional guarantees remains to be shown.

⁴ See, for example, the overviews in Held 1993; Dahl 1989; Schmidt 1995; Sartori 1997; see also: Habermas 1992; Elster/Slagstad 1988; Fishkin 1991.

⁵ Klaus von Beyme (1997: 23) himself noted this; see also Offe 1994; Schmitter 1995; Merkel 1998.

⁶ Again the exception is O’Donnell 1998a; 1998b.

⁷ This is also clarified by Dahl’s eight (1971: 3) or seven (1989: 221) institutional requirements for a democracy: 1. freedom to form and join organisations; 2. freedom of expression; 3. right to vote; 4. right to run for office; 5. right of political leaders to compete for votes; 6. alternative sources of information; 7. free and fair elections; 8. institutions for making government policies depend on votes and other expressions of preference. In the context of the 1989 definition of polyarchy, Dahl further “trims” his concept of polyarchy by omitting the eighth institutional guarantee, which could have been discussed in the context of a horizontal check on power.

⁸ In anglo-saxon, and particularly in US-American political philosophy, this is incorporated within the term *liberal constitutionalism* (see, for example, Holmes 1993a, 1993b; Ackerman 1991; Dworkin 1995).

Yet, as Philippe Schmitter and Terry Karl (1991: 8) recently noted, even both of these dimensions are not sufficient to comprehensively define (especially new liberal) democracies and to distinguish them from defective democratic forms of government. This is because the exercise of political power-the authoritative distribution of goods and values (Easton 1965) -must lie exclusively in the hands of the democratically elected representatives. There can be no toleration of domains ruled or controlled by (veto)actors, such as the military or guerilla groups, not legitimated through democratic elections.

Through consideration of these three dimensions, six control criteria emerge that help to distinguish between not just the autocratic and democratic, but also the defective and the liberal-constitutional democracies. These criteria are: legitimization of power;⁹ access to power; monopoly on power; structure of power; exercise of power; and claim to power (cf. Merkel 1999). The following questions arise in relation to the criteria:

1. *Legitimization of political power:* How and to what degree is political power legitimized? A characteristic of democracies is that its basic principle of legitimacy must be that of the sovereignty of the people.

2. *Access to political power:* How is access to political power regulated? In non-defective democracies universal suffrage (in general, equal, free and secret elections) must be guaranteed. The right to vote must not be restricted because of the desire for power or for ideological, racial, ethnic or gender reasons.

3. *Monopoly on political power:* Who has the mandate to make authoritative and binding political decisions? In non-defective democracies this power of authoritative decision-making for the entire territory of the state must be accorded solely to the democratically elected representatives of the people. Non-democratically elected veto actors may not lay claim to or control any public decision-making arenas.

⁹ The term of political power is used here in the sense of Max Weber's term "domination" (cf. Weber 1972: 122 pp.).

4. *Structure of political power*: Is political and state power divided among several branches of government, thus facilitating the mutual demarcation and control of political power? In non-defective democracies the system of checks and balances must be both constitutionally anchored and effective in practice.

5. *Claim to political power*: Is the state's claim to power over its citizens clearly limited by the basic rights and freedoms safeguarded in the constitution or is it potentially unlimited? In non-defective democracies the negative freedoms enjoyed by citizens vis-à-vis the state must be unambiguously defined and secured. These rights must clearly limit the state's capacity to intervene in civil society and to control the individual civic sphere of liberty.

6. *Exercise of political power*: Is the exercise of power in line with principles of liberal constitutionalism or is it carried out unconstitutionally, repressively, arbitrarily or even through terrorism? In non-defective democracies the state must exercise its monopoly on political power in a manner which, via binding and legitimate norms, is accountable and which guarantees freedoms.

According to these criteria, liberal democracies base their claim to authority on the principle of the sovereignty of the people; on universal suffrage; on a pluralistic structure of government; on the rule of law; on the limited claim to power; and on its legal exercise. The monopoly on political power is the exclusive preserve of the democratically legitimated representatives of the sovereign, the demos. If just one of these criteria is violated, liberal constitutional democracy cannot be seen as remaining intact. I deliberately use the term "constitutional liberal democracy", providing the notion "democracy" with a double adjective. Liberalism and rule of law (criteria 4-6) are not automatically or necessarily components of every democracy. On the contrary, they place a restriction on the central democratic principle of "sovereignty of the people". However, I will later argue that this constraint paradoxically serves to stabilize democracies; that is, it facilitates the long-term "survival" of democratic principles 1-3. With the three dimensions of democracy, I have limited myself to a more demanding and less lean, but at the same time less deficient, definition of democracy. However, the definition remains "procedural" and as such is distinct

from the “substantialist” democratic conceptions of “social democracy” such as the German constitutionalist Hermann Heller (1934) and Latin American social scientists outlined.

III. Three types of defective democracies

The six criteria developed with respect to the central concept of political power can be subsumed under three dimensions:

1. Universal suffrage (criteria 1 and 2)
2. Effective monopoly on government by democratically-legitimated representatives (criteria 3 and 4)
3. Liberal constitutionalism and rule of law (criteria 5 and 6)

Table 1. *Criteria of political regime types*

	AUTOCRACY		DEMOCRACY	
	Totalitarian Regime	Authoritarian Regime	Defective Democracy	Liberal Democracy
Legitimization of Political Power	Ideology / Religion	Mentalities	Sovereignty of the People	Sovereignty of the People
Access to Political Power	Closed: instead of competitive elections plebiscitary acclamation	Restricted: semipluralist elections possible, but no fully competitive and fair elections	Open: fully competitive elections ¹⁰	Open: fully competitive elections
Monopoly on Political Power	Dictator / Party: not legitimated by democratic elections	Dictator/Party/Oligarchy: not or only partially legitimated by democratic elections	Government and Parliament are legitimated by democratic elections, but they might be restricted by veto powers	Government and Parliament are legitimated by democratic elections; no interference of non legitimated veto power
Structure of Political Power	Monistic	Semipluralistic	Pluralistic	Pluralistic
Claim to Political Power	Total	Varying and arbitrarily determined by the authoritarian rules	Constitutionally defined limits but sometimes violated	Constitutionally defined and guaranteed limits
Use of Political Power	Systematic and terroristic repression	Arbitrary and (mostly) limited repression	Rule of law not guaranteed and partially violated	Rule of law guaranteed

¹⁰ sole exception: “exclusive democracies”.

These three dimensions enable us to make two conceptual distinctions. First, if one of the six criteria is breached, we can no longer refer to an intact democracy based on the rule of law. Second, depending on which of the three fundamental dimensions of democracy and rule of law is damaged, we may be dealing with a particular kind of “defective democracy”. The use of the term “defective democracy” does not imply that we assume the existence of a “perfect democracy”. Neither “ideal”, “functioning” nor “perfect” democracy constitutes the opposite to “defective democracy”. Rather, the counterpart to a “defective democracy” is a liberal democracy based on the rule of law; that is, a democratic system which in all three dimensions exhibits the institutional minima necessary to fulfil the criteria described above. The adjective “defective” thus relates to the absence of, or restriction on, these institutional guarantees and indicates the violation of one of the six criteria that distinguish liberal democracies based on the rule of law.

1. *Exclusive democracy*: The sovereignty of the people, guaranteed through universal suffrage and its fair practice, must be a basic dimension of liberal democracies (criteria 1 and 2). The democracy is defective if any group of the adult citizenry is excluded from the right to vote on the grounds of race, ethnicity, gender, ideology or financial status or if the state unfairly hampers any group’s exercise of this right. I label this defective type *exclusive democracy*. Typical examples are Switzerland prior to 1971 (gender), South Africa until 1990 (race), Latvia since 1991 (ethnicity), as well as the historical census vote in Europe during the 19th century.

However, the question of who belongs to the *demos* is even at the end of the 20th century a disputed issue. The *demos*, as the ultimate source of democratic legitimacy, comprises those people which are defined by the criterion of citizenship. In liberal democracies based on the rule of law the constitution must contain regulations giving people the fair option of claiming citizenship if they have lived a long time in the country without political status as a citizen and if they accept the principles of democracy and the rule of law laid down in the constitution.

Against this background, an exclusive democracy is shown to exist only when those groups excluded from the *demos* are denied the option of acquiring citizenship even in the

long term. Second, a democracy is exclusive only when the active and passive voting rights of sections of the populace are suspended in elections on the base of social circumstances or administrative shortcomings (whether intended or not). In turn, the threshold between defective democracy and autocracy is crossed if the formal exclusion of groups from the demos occurs not according to impersonally, legitimately, democratically and legally established criteria, but as a result of the arbitrary decisions of political authorities.

2. *Domain democracy*: In constitutional liberal democracies governmental power must be the exclusive preserve of the elected representatives of the people (criteria 1, 3, 5). Where veto-powers such as the military, militias or guerillas can effectively make demands on autonomous domains (for example, in foreign policy, internal security, justice), or can dictate to elected representatives the limits of political action, this type is called *domain democracy*. Typical current examples are Chile, Thailand or Paraguay.¹¹

3. *Illiberal Democracies*: Where freely, universally and fairly elected governments violate basic, human and civil rights and liberal freedoms, by-pass parliament, unlawfully influence the justice system, damage the principle of legality or undermine the checks on its power-that is, either do not respect or do not maintain the state based on the rule of law-I call the regime type, in accordance with Zakaria, *illiberal democracy* (cf. Zakaria 1997). The mutual control of state power and the guarantee of fundamental civil rights and individual liberties are of particular relevance here (criteria 5 and 6). While a clear separation of the executive and the judges within the judiciary must exist, a strict separation of executive and legislative powers is not required. If representatives elected in free, general and competitive elections breach these fundamental rules, if the mutual checks on power are removed by the circumvention of parliament and justice respectively, or if the rule of law is deliberately and chronically violated, then the democracy is “illiberal”. Current examples would be Russia

¹¹ The control of such political domains by other powers can occur constitutionally as in the case of Chile or “only” factually as in the case of Thailand and Paraguay.

under Yeltsin, Slovakia under Meciar, Argentina under Menem or the Philippines since 1986.¹²

Delegative democracy, a notion earlier and creatively coined by Guillermo O'Donnell (1994; 1996; 1998) and now established in the literature on democratic consolidation, resembles the illiberal democracy type. However, O'Donnell does not fully develop the defining characteristics of this hybrid regime and so he fails to convincingly separate it systematically from other types of defective democracies. Moreover, despite its prominence, the term "delegative democracy" is problematic, for all modern democracies are delegative. In fact, in a significant sense delegation is one of the central principles constituting modern representative democracy. However, the term "illiberal democracy" (Zakaria 1997) also needs further explanation, as, according to our definition above, it is the injuries to the rule of law and the checks on power that distinguish the particular illiberal democracies. Of course it could be, and has been, argued by German constitutionalists (Böckenförde 1991: 365ff; Grimm 1991: 161ff) that the state and a strong (constitutional) judiciary are among the institutions restricting the core democratic principle of sovereignty of the people. Thus, the paradoxes and complementarities of *liberal constitutionalism* (Holmes 1993b) and democracy will now be more closely examined.

IV. Liberal constitutionalism and democracy: complementary or paradoxical?

Constitutionalism, liberalism and democracy can be distinguished from one another both historically and logically (Böckenförde 1991: 365ff; Grimm 1991: 33). Historically, the constitutional state emerged primarily from the rejection of the privileges of monarchy and, later, nobility. At the end of the 19th century, constitutionalism and the state mostly

¹² Belarus is a borderline case between illiberal democracy and plebiscitary autocracy. While the president was freely and fairly elected with an overwhelming majority (1994) and is undisputed in his position among the majority of citizens, he succeeded in preventing a fair parliamentary election (1995) (Sahm 1995) thereby violating criteria 1 (sovereignty of the people) and 2 (universal and fair elections).

functioned to secure the legal rights of those already economically and politically privileged, while democracy aided the emancipation of the politically and economically underprivileged. Constitutionalism was first and foremost a logical development in the attempt to limit the power of the state vis-à-vis society, while democracy sought to mobilise society to exercise state power (Sejersted 1993: 132). The former was to secure “negative freedom”, while the latter was supposed to enable positive freedom. Thus, while the core democratic principle answers the question of “who governs”, liberalism answers the question of “how and to what extent” a society should be ruled. Finally, constitutionalism seeks to answer the question of “who, when, in what form and through what processes” the parameters of and limits on government can be established. The German constitutionalist Böckenförde wrote that democracy addresses the issue of who is to hold state power, rather than considering its substance. In contrast, the constitutional state addresses the question of the substance, extent and procedure of state activities and focuses on limiting and controlling state power in the interests of protecting individual and societal freedoms (Böckenförde 1991: 365).

The liberal constitutionalism in the tradition of John Locke and the Federalists through to Immanuel Kant contained much reflection upon constitutional arguments that were to protect citizens’ freedom from the threat and experiments of the “continually lurking danger of the abuse of power” (Preuß 1994: 27). Through the constitution, certain values and institutions, such as basic rights, the state under the rule of law and the control of power, should be removed not only from the disposal of the *pouvoirs constitués*, but also from that of the *pouvoir constituant*. However, such a “constitutionally-based protection” of individual liberties was by no means meaningful only when used in relation to democratically legitimized monarchs. Indeed, the traditional constitutionalism that had developed in an attempt to defend citizens against the absolute or constitutional power of the monarch in no way lost its utility with respect to the democratically-elected executive or legislature. This was noted by no less than John Stuart Mill in “On Liberty”. He was critical of the fact that in the transition from a constitutional monarchy to a parliamentary democracy the belief had spread among the democrats that:

“some persons began to think that too much importance had been attached to the limitation of the power itself. That (it might seem) was a resource against rulers whose interests were habitually opposed to those of the people. What

was now wanted was that the rulers should be identified with the people, that their interest and will should be the interest and will of the nation. The nation did not need to be protected against its own will.” (Mill 1956: 5).

In contrast to this, with naivete in the radical guise of his conception of democracy, Mill made the clear, ironic and far-sighted assertion that:

“[t]he notion that the people have no need to limit their power over themselves might seem axiomatic, when popular government was a thing only dreamed about, or read of as having existed at some distant period of the past” (Mill 1956: 6).

Sceptics like Isaiah Berlin¹³ worked on the assumption that the positive guarantee of freedom (democracy) was not completely reconcilable with the negative guarantee (liberal constitutionalism). However, as neither guarantee of freedom could be relinquished, compromises must be found. Without at this point dispensing with the argued tension between liberal constitutionalism and democracy, it is important to emphasize: liberal constitutionalists do not contest the fact that liberal democracy rationally limits itself through a restrictive constitution and-like Odysseus who autonomously decided to bind himself to the mast-in so doing saves itself from self-destruction. It is possible to take advantage of the full virtues of this type of government only through this self-restriction. Such different thinkers as Friedrich August Hayek (1971) and Jürgen Habermas (1992) agree with this contention.¹⁴ It is the constitutional protection of basic and human rights as well as the institutional guarantees of the checks and balances on power that restrict both the abuse of power by the elected elites and the unbridled exercise of power by the sovereign legitimated by the people. Both must be considered as unavoidable securities against the tyranny of the majority¹⁵ and for the freedom of the individual citizen.

¹³ The reference to Berlin's scepticism is attributable to Francis Sejersted (1993: 131).

¹⁴ On the other hand is the line of argument from Rousseau (1991) to C. Schmitt (1928) that considers it a contradiction that the sovereign power restricts itself and disputes that there can be a basic law in a state that is not able to be revoked. (Rousseau 1991, Book 1, Chapter 1, p. 20).

¹⁵ This has been a predominant issue for liberal theorists from Madison through to Tocqueville and John Stuart Mill.

Even if constitutionalism, liberalism and democracy are historically and theoretically different concepts, they are so logically related to each other by way of a compromise that their mutual connection becomes plainly apparent. I want to spell this out by way of an argument each from John Stuart Mill and Jürgen Habermas. Mill argues that the limitation on the power of the demos over itself (with respect to the majority over the minority) should come into play where citizens exercising their political autonomy transgress the system of rights that constitutes the autonomy in the first place. This is made clear in Mill's liberally justified prohibition of self-slavery. Mill writes that if a free person sells himself:

“for a slave, he abdicates his liberty; he forgoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself. ... The principle of freedom cannot require that he should be free not to be free. It is not freedom to be allowed to alienate his freedom.” (Mill 1956: 125).

How can the above-mentioned case of Belarus be interpreted against the backdrop of the arguments of liberal constitutionalism in general and of John Stuart Mill in particular? A radical interpretation of the democratic principle of sovereignty of the people would in no way restrict the freedom of the citizens of Belarus to determine their own form of government. The core democratic principle of sovereignty of the people is not damaged if the people, as sovereign, at some point decide to delegate, suspend or give up their sovereignty-at least not at the time of the decision. This would have been the view that could be based on the justification of C. Schmitt.

However, if one reformulates Mill's prohibition on slavery and applies it to democracy, the apparent paradox of the democratic renunciation of democratic sovereignty is not completely resolved. Instead, it is greatly reinforced. Such a reformulation could be as follows:

“If the citizens of a democracy decide to give up their democratic rights, they thereby renounce democracy and remove themselves from any future use of it except this final one. ... The principle of democracy cannot require that citizens have the right to rid themselves of democracy.”

The democratic legitimacy of the Belarussian people's decision to get rid of its own democracy can thereby be questioned. In any case, the tension between the two principles-that the absolute democratic sovereignty of the present is restricted by the argument that this sovereignty must be able to be exercised in the future-is also unable to be fully resolved by such a prohibition of "self-autocratization". Based on similar reasoning Jürgen Habermas justifies the protection of minorities in places where their essential rights are restricted. This applies not only to ethnic or religious minorities but also to political minorities where their essential rights as democratic citizens are under threat. A majority can therefore not decide for itself and for the subordinate minorities that basic democratic rights of participation and representation are to be limited, "for in exercising their political autonomy citizens may not attack the system of rights that first constituted this autonomy" (Habermas 1992: 221). However, Habermas does not restrict himself to this typical "negative" liberal argument. Rather, with republican intentions he further develops it "positively". According to Habermas' expanded argument, citizens can make meaningful use of their public autonomy only "if they are at the same time sufficiently independent based on secure autonomy" (Habermas 1994: 91). However, in this case they can also "turn their private autonomy into a consensual rule only if as citizens they make appropriate use of their political autonomy" (ibid.).

Habermas goes further than Mill here. For him there is an unresolvable internal link between a state based on the rule of law and democracy. The state based on the rule of law, inalienable basic rights and checks and balances are not only essential for the protection of individual freedoms and autonomy, but can only begin to perform their planned legitimate function if they arise from, and are legitimized through, citizens' participation. The mutual legitimation of law and democracy also contains deliberative structural elements that would fall by the wayside in the case of too great a concentration of political power in the executive. To this extent a governmental structure with *checks and balances* does not only guarantee negative freedom, but also provides positive opportunity structures for deliberative politics.¹⁶

¹⁶ From the discernible similarities in the arguments of Mill and Habermas it is clear that the frequently postulated dichotomy of the "liberal" and "republican" democratic tradition is exaggerated. The liberals' negative guarantee of freedoms is continually "preserved" by "neo-republican" thinkers such as Habermas.

V. Illiberal democracies: the dominance of electoral democracy over liberal constitutionalism

Illiberal democracies dissolve the internal interdependence of private and public autonomy, rule of law, checks on power and democracy. If one considers many of the new (illiberal) democracies in Eastern Europe, East Asia and Latin America, it is precisely the violation of the principles of the rule of law and the partial elimination of the constraints on power through democratically elected governments (and particularly presidents) which characterizes these countries. Supported by their explicit claim to direct democratic legitimacy through free elections, the (mostly presidential) executives have by-passed elected parliaments, repressed minorities, restricted individual rights, manipulated the media and “colonized” the judiciary or hindered it in its work. The partial removal of the checks and balances within a democratic system leads to a widening of the claim to power and to a softening of the principle of legality. The ascendancy of the insufficiently restricted majoritarian democracy with its frequently intact vertical legitimization (criteria 1 and 2) over the precautions aimed at limiting power in liberal constitutionalism (criteria 4-6) is the defining element of illiberal democracies (cf. also O’Donnell 1998).

According to the statistics of Freedom House (1996), 56 countries can be considered to be in the gray area between consolidated democracy and open autocracy (Merkel/Puhle 1999: 17). These states can be described as defective democracies. In only 10 of these countries are *political rights* violated more than *civil rights*, while in 33 countries individual rights are restricted to a greater degree than are political rights of participation. In 13 countries civil and political rights are restricted to the same extent. The most common defects of the young democracies are therefore not the violation of the democratic principle of sovereignty of the people, but rather occur in relation to the liberal constitutional state based on the rule of law. These figures suggest empirically that democratic elections alone can in no way produce or guarantee a liberal constitutional state. However, the figures do not reveal anything about the causes of illiberal democracies. These will therefore now be briefly outlined.

VI. Causes of the rise of illiberal democracies

The causes for the rise of illiberal democracies are in no way concentrated in one particular area of the political system; they arise much more at different levels of the socio-political system. In order to be able to systematically categorise these causes, I divide the socio-political system into three levels:

1. The institutions of political power such as government, parliament and judiciary: in other words, the system of government in a narrow sense.
2. The socio-political system of mediation between state and society, especially through parties and interest groups.
3. The dimension of civil society and culture.

On these three levels, which factors encourage the formation of illiberal democracies? Particularly in young, not yet consolidated, systems, presidential systems of government tend to lead to conflicts between parliament and the executive (cf. Linz/Valenzuela 1994; Merkel 1998). In most cases the presidential constitutions of the new democracies give the head of state special decision-making powers for diffusely defined emergency situations. In this situation decisions will not be transparent and will be made outside the formal institutions in an informal circle of people-advisory staff, “camerillas” and presidential cliques not designated by the constitution. This applies to the non-transparent decision-making mechanisms in the Kremlin under Yeltsin and is also true of the so-called *cronies* of Presidents Aquino and Ramos in the Philippines, the advisors to Menem and the clique that surrounded President Hindenburg in the Weimar Republic. Presidential systems thus provide fertile institutional opportunity structures for the emergence of illiberal democracies. This is because in precarious “emergency situations” they place more emphasis on the democratic *virtù* of the president rather than on the preservation of the institutional *checks and balances* that are “normally” characteristic of presidential systems of government.

Two caveats need to be mentioned here, however. First, the particular susceptibility of presidential systems does not exclude the possibility of illiberal majoritarian democracies emerging in parliamentary systems of government, as the example of Slovakia under Vladimir Meciar shows. Second, a lot depends on the extent to which the conditions that reinforce the creation of illiberal democracies exist at the other two levels of the system. In the dimension of intermediary organizations between state and society, weak parties and under-developed interest groups foster the executive's attempts at dominance (Merkel 1997: 360). Thus, in contrast to the many democracies of the inter-war period, it is less the ideological polarization of the parties and more the fragmentation and lack of social roots that brings into question their representative function as intermediaries. Through this process political parties can become both "statized" and "privatized". In the first case they function as statist transmission belts, while in the latter case as particularistic interest groups used to maximise the commercial and political benefits for small oligarchies. Academic research speaks in the East European case of "hovering party systems" or "elitist cartel parties" (Agh 1996) and with respect to East Asia of "clientalist transmission belts of local interests" (Croissant 1997). When this insufficient fulfilment of the territorial representative function coincides with weak interest groups which have often been paternalized by the state, as is often the case in post-autocratic systems, an intermediary void arises, facilitating the direct populist and plebiscitary appeal by elected presidents to the people.

How these largely illiberal appeals are received by the population depends upon the nature of the respective society. Where societies possess stable forms of civil self-organization—that is, when the values, attitudes and behaviour of a civic culture have developed and are self-organized in an active civil society, presidential appeals for more executive power and for the suspension of supposedly "efficiency-preventing" constitutional controls may find only limited support. However, due to the nature of the previous regime, civil societies in post-autocratic systems are usually anything but vigorous (Merkel/Lauth 1998). Rather, they tend to be weakly organized, to have only weak or no liberal traditions and are frequently characterized by mutual mistrust, low levels of co-operation and by individual violence and organized crime. This means that the appeals of presidents who project themselves as "strong" and decisive find immense support in such societies, especially as there are strong traditions of populism, caesarism and plebiscitary practices in

many societies of the third wave. This thereby brings full circle the socio-political argument, which Guillermo O'Donnell (1994; 1998) described as “delegative code”.

In the light of the arguments set out above the argument can be reconstructed as follows: with the introduction of democracy, free elections bring into power a government that has the right and duty to guard the public good. The pursuit of the public good, however it may be defined by those in government, is especially difficult to achieve in post-autocratic societies, as it is confronted with an extremely large number of economic, social and political problems that have accumulated over time. Institutions that restrict executive power at the level of horizontal institutions or intermediary organizations that come between governors and governed on the vertical dimension disturb the efficiency of decision-making. This is at least the predominant perception held by many decision-making elites as well as large sections of the population that are more attached to the parochial patterns of authoritarian political culture than to the democratic ideal of a civic culture. The elected executive can then justify the circumvention or even suspension of intermediary vertical and constitutional horizontal checks and balances with reference to the direct implementation of the sovereignty resp. the will of the people. In underdeveloped civil societies without constitutional traditions, the “mutual reinforcement” of democracy and the rule of law is in practice often not able to be constructed. In contrast, the result is not infrequently a collision of both principles, meaning that the plebiscitary form of an illiberal democracy prevails.

VII. Conclusion

In his work on constitutionalism, Carl Schmitt (1928) distinguished between two concepts of the law: one in terms of the rule of law and another with a more general political meaning. In terms of the rule of law, law is an essential universal norm. The political definition of law is, however, “a matter concrete of will and command, an act of sovereignty. The law in a democracy is thus the will of the people: *lex est quod populus iussit*. The goal of a state committed to the rule of law is to restrain the political law in order to replace a concrete existing sovereignty with a general sovereignty of law; that is, not to answer the

question of sovereignty” (Schmitt 1928: 146ff). Schmitt’s words clearly summarize the problem under discussion: two sovereignties, one of the rule of law or, more broadly, liberal constitutionalism, and the other the “real sovereignty” of the people, which especially in times of crisis is unrestricted and is thus determined by a political leader with the direct plebiscitary support of the people. Schmitt was known to have advocated this latter type of political sovereignty, and many of the current illiberal democracies of Eastern Europe, Latin America and the Far East are now distinguished by a form of public sovereignty with powerful leaders and lacking sufficient constitutional constraints, in particular horizontal and intermediary checks and balances.

Sustainable and “functioning democracies” (Putnam 1993) can ensure their continuance as constitutionally constrained liberal democracies only through their own efforts. Generally little-considered, yet supposedly politically -correct cultural and value- relativistic criticisms of the “claim to preeminence of the Western liberal democratic model” deny liberal freedom as a value in their “Western” conception of democracy. Thus, it is more than just a linguistic nuance to say, with respect to the creeping advance of illiberal democracies, that the necessary synthesis between democracy and liberal constitutionalism in the current phase of many “electoral democracies” cannot be the unrestricted political sovereignty of the demos. Not even the “constitutional democracy”, now commonly used to characterize Western democracies, adequately reflects the present needs. Rather, adjective and noun have to be switched in this usage in order to clarify the necessary sequence and emphasis: it must be “democratic constitutionality”.

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