„Krytyka Prawa", tom 11, nr 1/2019, s. 150–163, ISSN 2080-1084, e-ISSN 2450-7938, Copyright by Akademia Leona Koźmińskiego

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Does a Democratic Rule of Law Create Opportunity for Civic Engagement?[2]

Abstract

The aim of the article is to outline the relationship between the rule of law and civic engagement in the public sphere and to attempt to answer the question whether the rule of law can be an effective tool in preventing the transformation of democracy in a tyranny of the majority; whether it can also create optimal conditions for democracy to develop. In other words, does the rule of law serve democracy and political engagement or does it rather limit the spontaneity of civic activity because stability cannot be reconciled with the freedom of citizens? The current "juridification" of the public domain (the expansion of law into various areas of social existence) marginalises the validity and scope of civic presence in the decision-making process in the name of law-abidingness and the neutrality of instruments of control and of choices made by the ruling power. Can the effective solution to this situation be the opening of the concept of the rule of law to the idea of political nature and the expansion of the domain of grassroots participation?

Keywords: civic engagement, participation, rule of law, democracy, conflict

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[2] The article has been developed as part of the National Science Centre's grant (Preludium 12), registration no. 0209/2847/17.

Ministry of Science and Higher Education Republic of Poland

English-language translation and editing of that article was financed under Agreement No. 645/P-DUN/2018 with funds from the Ministry of Science and Higher Education allocated to the popularization of science.

The history of humankind of the 20th century, abounding with different forms of absurd violence and pointless cruelty of totalitarian systems, makes one think of words spoken by Barbara Skarga, who once observed that the "human is not a beautiful animal". Despite all the evil of the time, which she eye-witnessed herself, the Polish philosopher managed to remain rationally optimistic, but the experience of European societies questioned the legitimacy of this anthropological optimism present in the earlier political culture. As communities, we are capable of doing anything to another human. What we need is a legitimisation of our action and a common fear and disinformation. The past does not cease to provoke reflection. This time, this reflection concerns the way in which we can keep the public sphere (understood broadly as the domain of communities, various relationships and group political-economic-legal interests, free of bias or privilege, open to opinions on important public matters, to the needs and activity of citizens) safe from similar disasters. The way in which we can protect democracy from its natural inclination to self-destruction, from pathologies inherent to its structure.[3] As a result of the search for an answer to the said question, law has become the main point of concern as a guarantee of harmony, peace, and security. And although the history of the idea of the rule of law is long and multifaceted, the experience with totalitarianism has caused a great interest in this concept and in its relationship with democracy.

[3] It seems reasonable to quote Jacques Derrida's concept of *la démocratie à venir* here, which is a concept of a democracy that never is, one that is always to come, postponed by its own inherent and irremovable flaw in the form of an autoimmune logic that governs it, as the French deconstructions puts it. What it means is that it has been known since the very beginning of democracy that the system contradicts itself, in fact. On the one hand, it becomes a promise, and on the other – a threat; a Janus nature of democracy makes it both an opportunity and a risk at the same time. This element of autoimmunity makes it impossible to define or specify the nature of democracy, and to protect it effectively against various treats such as arbitrariness or usurpation of power. But thanks to this flaw, this imperfection, democracy becomes a live system, one that develops, collaborates in the spirit of "unity of differences", a system open to change. The question is whether given such assumptions and understanding of democracy, the rule of law could prevent its self-destructive processes or whether the same rule of law would be identified as a pathogen posing a threat to this fluidity and indeterminacy of democracy. And lastly – would the rule of law require civic engagement in order to retain its stability, or perhaps the political involvement of individuals would be interpreted as a source of destruction and chaos? Cf. J. Derrida, *Rogues: Two Essays on Reason*, Stanford University Press 2005, pp. 78–94.

 DOI: 10.7206/kp.2080-1084.280

The idea of the rule of law[4], like democracy, causes much difficulty when it comes to both defining and practising it. But despite these two types of aporia one can get the impression that the rule of law has been supplanting the idea of democracy more and more effectively because of the growing level of dissatisfaction with the latter (especially with its liberal variant)[5]. On the other hand, though, we can now witness a decline of the rule of law, manifested in the broadly defined "juridification" of the social-political life or, as the examples of Poland and other post-Communist states clearly show, in the problems concerning the Constitutional Tribunal, related mainly to the undermining of the legitimacy of the existence of this institution in its current form.

In his classical work entitled *Introduction to the Study of Law of the Constitution,* Albert Venn Dicey described the main characteristics of the rule of law. These are: the supremacy and predominance of law over arbitrary power, equality of rights and before the law, and respecting and practicing the principles under the constitution.[6] The rule of law means thus subordinating power to law and governing according to its provisions. Law as the foundation of community life defines the scope and the content of civil liberties, of the relationships between authorities and society, and determines the nature and range of the institution of control of law-abidingness in the form of independent courts. This is one possible definition, of course. There are more of them.[7] But it is not so much about the history of the rule of law as about the principles at the foundation of the idea, about the objectives set to be achieved as part of it. And about whether we are able to supplement or extend the notion of civic political engagement thanks to this concept.

The rule of law is understood generally as a pattern, a structure (a political idea) whose aim is to grant stability and predictability, individual freedom, and justice and protection against the arbitrariness of power exactly through law, effected and enforced by setting the limits between what is permitted and what is forbidden. It is a rationalistic and universalistic construct that wants to use law to make community, political, and economic life balanced, harmonious, consistent; it strives to place this multifaceted and multilayered life outside the domain of conflict. Such a model of the rule of law, especially dominant in contemporary analyses, is based on a liberal understanding of freedom, which is of a negative nature, which there-

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4 See: M. Krygier, *Rule of Law (and Rechtsstaat)*, [in:] *International Encyclopedia of the Social Behavioral Sciences*, 2nd ed., ed. by J.J.D. Wright, Vol. 20, Oxford 2015, pp. 780–787.

5 Cf. idem, *Four Puzzles about the Rule of Law: Why, What, Where? And Who Cares?*, [in:] J.E. Fleming (ed.), *Getting to the Rule of Law*, New York 2011, pp. 64–104.

6 See: A.V. Dicey, *Introduction to the Study of Law of the Constitution*, Indianapolis 1982, pp. 107–122.

7 See: Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge 2004, pp. 91–113.

fore makes it a "freedom from". The limit of individual autonomy is demarcated by the *non-harm principle*, put forward by John Stuart Mill, described in his *Utilitarianism*, and very well grounded in political thought. But "non-harm" and "freedom from" are just one side of the coin. If we content ourselves with the above and consider them a superior value, one that lays the foundation for a legal and political system, what guarantee do we have that pluralism, so much appreciated and universally valued, does not become a particularism? The "democratic rule of law" is a syntagma which in reality holds two different systems, two different ways of understanding political power within itself. Democracy is not afraid of political passion. It actually draws its energy from this passion (quite often paying a high price for it). Meanwhile, the rule of law is governed by a postulate of neutrality (this neutrality being superficial and unfeasible in conditions typical of humankind), and especially of rationality. Emotions cause chaos. Pluralism and sensitivity of a democratic state emerge and disappear in conditions that are never obvious, never correctly predicted. The rule of law, in turn, emphasises the significance of individualism and perceives individuals in separation from the social context and its impact.

The rule of law being an attempt to make the dreams of classical liberalism come true in the form of a state being a "watchman" is actually an attempt to beguile the social reality. Even if the concept's foundation is based on an assumption of kind, well-meaning authority, which protects the fundamental liberties of individuals and maintains the right balance using universal rules and well-designed law (as if law was not a product of human minds), how can a civic community be guaranteed such kindness? The protection of liberty, maintaining balance, redistribution, and control in the name of law-abidingness, of this very liberty and balance, are the main sources of the abuse of power.[8] The "law above all" is insensitive to political tensions and people's emotions. In a democracy, the transparency and clarity of the rules governing the community are important as well, of course. But it is impossible to foresee everything, all the disputes and conflicts that may take a yet unknown course and form, and concern completely new issues. In other words, an assumption that political power will regulate citizens' actions and behaviour using the law justifies a concern that a democratic rule of law will be/is democratic only by name rather than raising hopes for civic engagement and a real political choice. In such circumstances, what provokes a discussion is not "a model of living in compliance with the law", but rather a model of living "not in compliance with the law". So what to do with different, alternative ways of life within a society? What about ethnic, religious, sexual minorities, various professional groups – meaning not individuals but communities, who can also claim their rights? Will they

[8] Cf. M. Walzer, *Polityka i namiętności. O bardziej egalitarny liberalizm*, Warszawa 2006, pp. 126–133.

 DOI: 10.7206/kp.2080-1084.280

find a place for themselves and a way to function freely under the rule of law, or will they be treated as illegitimate and irrational underclass forms of life? In private disputes, each citizen is equal in their rights and before the law. But what about public disputes, where the parties thereto are not individuals but collective entities...

A liberal rule of law is based on fundamental human rights, which means that they do not concern the social, civic – i.e. community – rights. It seems that the republican definition of liberty is more in favour of political engagement.[9] Such a liberty is understood as the ability to participate in the public domain. "Freedom from", which implicitly assumes another important aspect – the absence of domination. What does this absence of domination mean? In simplest terms, it means the absence of **sources** of domination, that is the absence of arbitrariness which is the cause of domination. And for this reason, the liberty in the republican terms is fuller as it clearly stresses that an individual "freedom from" as an absence of external interference with the choices made is an essential – but not sufficient – condition for the protection of liberty against the arbitrariness of power. Besides, "freedom from" gives only one choice – that of non-participation, and closes an individual in a world defined by law-abidingness and individual needs and preferences. Alone, such an individual stands no chance of defending oneself against the said arbitrariness. Such a defence is possible only when acting collectively, that is having the "freedom to", which involves much more choice and engagement. The reason for the existence of political engagement is liberty, and we experience liberty because we act together – not alone. Individual, internal freedom is politically insignificant, as Hannah Arendt rightly notices[10]; it is not manifested externally, it is only a state of mind, inaccessible to anyone from the outside. Freedom in the public domain, in turn, becomes an element of the real world, it materialises itself, gains in decision-making power. "Freedom to" is the basis of political engagement, which the concept of the rule of law seems to overlook.[11] Can a republican rule of law be an alternative to the democratic rule of law? Taking only the view on freedom into account here, one could actually propose such a hypothesis. Elements of republicanism implanted into the rule of law could produce a civic rule of law. The risk of such a rule becoming a domain of the elite will not arise out of the limited access to the public domain (by e.g. defining the category of citizens, establishing various kinds of qualifications) but only out of the fact that a man as a political subject can choose

9 See: Ph. Pettit, *Republicanism. A Theory of Freedom and Government*, Oxford 2002, pp. 27–41.

10 See: H. Arendt, *Kondycja ludzka*, Warszawa 2000, pp. 33–39.

11 Cf. A. Czarnota, *Republikańska koncepcja rządów prawa, albo co historyk idei może dać filozofowi prawa*, [in:] M. Maciejewski, M. Marszał, M. Sadowski (eds.), *Tendencje rozwojowe myśli politycznej i prawnej*, Wrocław 2014, pp. 177–188.

between a "freedom from" and a "freedom to" when it comes to engaging oneself in the public domain.

There is no doubt that the rule of law – combined with the principle of respecting and granting civil liberties – supports democracy. But is support the same as civic engagement? On the theoretical level we could, of course, consider the rule of law as conditions in favour or against civic engagement. But the issue is much more complex if looked at from a practical perspective. Who, then, should eventually decide on what the rule of law actually is? Apart from this, liberalism puts a great emphasis on institutions. Courts, tribunals, and many other elements of administrative apparatus in the service of the impartiality of law and the adopted solutions tend to institutionalise the rule of law and, in consequence, to create space for experts – not for citizens. The problem with experts is that they have thorough knowledge about a given part of community life, but they are not able to describe and interpret this part in a broader context; also, expert groups tend to become hermetic, which makes them an element of threat instead of support. In other words, while the rule of law is to provide for a guarantee and protection of freedom, equality, and order for the sake of citizens, doesn't it involve restricting civil liberties for the sake of this very order in practice? What is order within the framework of the rule of law then? The rule of law, like any other rule, needs first to take control of – or simply control – the freedom of people in order to distribute it justly later on, which means offering enough freedom for a citizen to become obedient voluntarily – not under compulsion. But freedom in the public sphere, in politics does not go hand in hand with order construed in such a way. Where there is civic engagement and freedom there is no predictability and certainty. Political involvement is building the tower of Babel, not an ivory tower. The rule of law intends to arrange for a public domain that is resistant to the changeability of the needs and demands of the citizens. "The rule of law" shall not be understood as an antithesis of "the rule of man". But sometimes there is a point in such an interpretation. It actually reveals a very important difference. In both cases we are dealing with an outcome of human activity – negotiation, compromise, arrangements, interpretations, decisions regarding what becomes the indicator of behaviour and action, encompassing all members of a given community. But in the case of *the rule of law,* this human aspect is ignored and hidden behind a veil of objectivity, of the "neutrality of values" it is to serve. As part of the rule of law, the order upon which a state is to be founded is viewed not as an achievement of mankind but as an outcome of law and procedures independent of and insensitive to the changeability and subjectivity of individuals; resistant to political, economic, and social factors. The rule of law has been arranged, approved, and set in motion. Like in a deistic vision

 DOI: 10.7206/kp.2080-1084.280

of the world, the rule of law has become a clockwork mechanism independent of the Creator, responsible for the efficient and collision-free functioning of other elements. The rule of law in its liberal variant – as an impersonal political ideal – is to guard the order, safety, and liberty, protect its subjects from the arbitrariness of power. A perfect concrete foundation where neither public sphere nor political engagement have a real chance to emerge and develop.

The rule of law is a set of formal and procedural principles. Such a rule guarantees: generality, universality, clarity, transparency, stability, and predictability of norms governing the society. In other words, *the rule of law* concerns the manner of managing a community. **Managing**, not co-ruling. This is a significant difference which proves that *the rule of law* is more of a guardian than a lodestar. Managing requires subordination and obedience. Co-ruling – independence and involvement. If the rule of citizens starts and ends with the phenomenon of common electoral law, we are dealing with a mere illusion of civic freedom and decision-making power, meaning a causative power within the framework of *the rule of law*. Elections reduce citizens to turnout and statistics. Their participation in the decision-making process is minimal – if not entirely insignificant. A democracy involving voting in reality only means that citizens act mainly as voters, not as a co-ruling collective entity. But some theoreticians claim that a common electoral right and participation in elections are enough to make a democracy really democratic and citizens actively engaged. They explain this by saying that eventually there is no certainty that civic engagement in the political everyday between elections will actually mean a greater or significant impact on the decisions made. In his book entitled *Political Man*, sociologist Seymour Lipset argues that a continued civic engagement, especially at a high level, is nothing good, and that the claim that an active attitude of citizens in the area of political or economic decision-making is not always desired can have disastrous effects. By referring to the example of Germany of the 1930s, Lipset shows the possible negative consequences resulting from civic engagement, taking the form of a decrease in the level of social cohesion, translating into a collapse of the democratic process. He believes that elections and a universal electoral right are enough to participate in the decisions made by a democratic power and to keep the system stable. Whether these measures are effective and have an impact on the actual rule does not depend on the form of the electoral right but on the conditions in which this right is exercised.[12] The scepticism of the political engagement

[12] "Participation by the members of an organization or the citizens of a society in political affairs is neither a necessary nor a sufficient condition for rank-and-file influence on organizational or government policy. On the one hand, members may show a low level of political participation in an organization or society, but still affect policy by their ability to withdraw or contribute election support to one or another of the different bureaucracies competing for power. On the other hand,

of citizens is also fuelled by the range of anecdotes about the competence of citizens, like the telling one quoted here (and rather mistakenly attributed to Churchill as there is no source to prove that the British Prime Minister actually said so): "the best argument against democracy is a five-minute conversation with the average voter" or "whenever you're right, you're in the minority". A large number of scientific publications on the creation and manipulation of public opinion according to the authorities' interest[13] could convince the unconvinced that the majority of citizens are political, social, and economic ignoramuses[14], unable to express their opinions in a clear and understandable manner, supporting them with arguments[15]. Therefore, calling for increased civic participation seems to be a kind of irrationality, or an aspiration for political self-destruction. But a just and open participation in the decision-making process is important in the context of the legitimisation of democracy (legitimisation of power), and this is why it requires citizens' presence. Apart from this, taking different social groups and their arguments into consideration works in favour of transparency of the public sphere. Decisions concerning matters of significance to an entire society may not be made behind closed doors of expert-run offices. The justification for the adopted policy must go hand in hand with its universal approval. And this is one of the differences between democracy and authoritarianism. Decisions made by experts are not rooted in society, and thus have no support in society. Although the decision-making competence of citizens may be questionable and give rise to scepticism, this should not be a reason to limit their participation in the decision-making processes. Refusing citizens the right to participate in political life on the grounds of the lack of the said competence leads to effects opposite to those intended since this causes a crisis of legitimisation and a loss of motivation to search for information and exchange views between

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a membership or citizenry may regularly attend meetings, belong in large numbers to various political organizations, and even have a high rate of voting turnout, and yet have little or no influence on policy". S.M. Lipset, *Homo politicus. Społeczne podstawy polityki*, Warszawa 1995, p. 190.

13 See: C. Sunstein, *Infotopia: How Many Minds Produce Knowledge*, Oxford 2006.

14 There is an interesting book discussing the issue of political ignorance entitled: *Democracy and Political Ignorance: Why Smaller Government is Smarter.* It describes and analyses the political ignorance in the United States (but ignorance is rarely bound by state borders, so the conclusions presented in the book can be applied to other countries as well), becoming an interesting supplement to and perspective on the issue of civic competence and ignorance-bred threats to democracy. The book tries to give an answer to a very important question: whether the electorate of today is able to comply with the requirements set by democracy theoreticians. See: I. Somin, *Democracy and Political Ignorance: Why Smaller Government is Smarter*, Stanford 2016.

15 See: H. Landemore, *Democratic Reason. The Mechanism of Collective Intelligence in Politics*, [in:] H. Landemore, J. Elster (eds.), *Collective Wisdom. Principles and Mechanisms*, Cambridge 2012, pp. 251–289; eadem, *Democratic Reason. Politics, Collective Intelligence, and the Rule of the Many*, Princeton–Oxford 2013, pp. 27–52.

 DOI: 10.7206/kp.2080-1084.280

citizens and authorities. The public sphere is dominated by expert opinions that often have nothing to do with genuine care for the future of communities and democracy, but endorse the interest of those who order them. Making do with settling disputable issues only by way of elections or procedures eliminates the dialogue between the rulers and the ruled from the public domain. Another thing is the question of whether acting for extending the margin for civic activity is actually in the authorities' interest. A greater civic awareness and a broader scope of opportunities to act only lead to threats in the form of defiance and resistance to the authority of those in power and of experts' knowledge. This is why a more important task for rulers is to create legal regulations that would curb democracy but leave its form and emblematicity "intact" rather than to extend the space for civic activity.

Still in the 1990s, right after the political transformation of the central and eastern part of Europe, citizens would live their lives in a very positive ideological mood, in an atmosphere of optimism and faith that after the fall of communism democracies and societies entered the right path of development, a path to a promising better world with a more authentic democracy. The free market was considered a cure-all, and liberal democracy – a universal system. Plus, the famous – but naive – catchphrase on the end of history, on reaching the promised land by the supporters of a free market and liberal democracy seemed to justify and sustain the said optimism. At present it turns out, however, that all the assurances, hopes, and slogans have suddenly disappeared or lost their *raison d'être*. The optimism about the future appeared to be a pipe dream of the intellectually blind. According to various surveys, half of Europeans are afraid that the lives of their children will be more difficult than theirs. Globalisation, of course, may be considered one of the reasons behind this. The era of globalisation has seen many changes taking place and social bonds becoming undermined. The civic society has no way to emerge and develop on an international level – let alone worldwide.[16] Therefore, decisions that have an impact on the everyday life of citizens are made outside

[16] In the context of market globalisation, a question that arises instantly is one about the future of law itself and about state sovereignty. Where should the line between global and state law run? If such a line is maintained at all, that is. The difficulty in integrating various legal norms, the challenges in the globalisation of law do not therefore merely stem from cultural differences or different understandings of the function of law but, more importantly, from different economic interests. While global commercial law would be to support and facilitate transactions, one cannot ignore the other side of the coin in the form of restrictions and bans, which are always strongly opposed to, and even trigger international conflicts. Besides, we should not forget about simple rules that have always governed the world. Applicable regardless of the level of development of law, culture, politics or technology. Well-being and power are always strictly connected with one another. In an international arena, even one like the European Union, those more affluent are the more important players. Wealth is necessary to accumulate power, and power is essential to exercising authority. See: R. Appelbaum, W. Felstiner, V. Gessner, *The Legal Culture of Global Business*

national structures, even outside the framework of the European Union. In other words, such decisions take place outside of democracy, which makes the faith in the rationality of democracy considerably undermined, and citizens feel helpless and frustrated. Globalisation has made the world so much more crowded and multiplied it, so to speak. Therefore, it is perceived not only as an opportunity for development but as a process that got out of hand and it has become difficult – if at all possible – to curb and balance it. There is no doubt that globalisation has caused a crisis of the past ideas and definitions.[17] It is increasingly harder for individuals to find one's place in today's reality and to understand the modern world. The crisis of democracy, representation, authority, truth, the migration of centres of political decision-making outside the level of a democratically chosen representation is not just an economic, legal, and political challenge. It is also an existential and mental challenge. The vision of the idea of democracy is gone and has been lost. Instead, we are left with only democratic guarantees. While they give citizens certainty that they will not be locked in prison without a reason and a trial, or that they can travel freely, they fail to encourage citizens to expect anything more of democracy; and this is also because citizens are even unable to expect more of it. Power has become dispersed. It is no longer where it usually used to be. Thus, it is very easy to bring about political apathy and a sense that democracy has become fiction, an empty structure of law. Without any influence on the decisions made in the public sphere, how can one speak of an authentic democracy, sensitive to the presence of citizens? Nowadays citizens are convinced that little can be done even at the state level because they believe that everything is dominated by a supranational interest, by global capital forces with the power to exert real impact. Such a diagnosis is by

Transactions, [in:] iidem, *Rules and Networks. The Legal Culture of Global Business Transactions*, Oñati International Series in Law and Society 2001, pp. 1–36.

17 Creating and developing a global legal order is strictly correlated to the question about the possibility for a global democracy to be established and exist. Institutional trust, clarity, and legal certainty are the foundation for stable democracies and citizen security. Is there then a real chance to achieve the above in the case of a formula that only deals with regulations and legal mechanisms instead of relying on entities taking responsibility for the decisions made? Is unification through law a sufficient guarantee for global justice or the political activity of citizens? For their autonomy in making political decisions? It seems that the future will give as the answers we need soon. Meanwhile, Dani Rodrik believes that a combination of democracy, globalisation, and sovereignty is doomed to failure. He has dubbed it as "the globalisation paradox" or "the globalisation trilemma". The reason behind this view is a belief that it would be a project difficult to carry out, but most of all, a project very harmful to political communities, to their safety and self-organisation, to the quality of governance and legal regulations. The only entities that will gain from this "hyperglobalisation" are supranational enterprises, the largest banks, and the investment industry. The tremendous scale inequality caused by globalisation can already be seen today. Cf. D. Rodrik, *The Globalization Paradox. Democracy and the Future of the World Economy*, New York 2011.

 DOI: 10.7206/kp.2080-1084.280

no means about fuelling conspiracy theories or blaming it on globalism but rather about highlighting the behaviour that is tolerated although it clearly and openly violates fundamental rights. One such example is the activity of Monsanto – an international corporation that is destroying the natural environment, restricting access to drinking water, and does not care about democratic standards and human rights. And so far, no institution has been able to influence the management of Monsanto and change the situation.[18]

Given its universality, the rule of law is a kind of soft hegemony, which can transform, of course, into a hard hegemony. Hegemony, which is the dominance of law in the public sphere; law that given its central position determines the correct – or lawful – model of the relationships, effects, form, and content of intra-social processes. Whether the said transformation occurs depends on the content of law and on the shape of the mechanism of control of compliance of the public domain with the law in question. Turning to the letter of the law, to the content of the constitution, and a search for sources of legal decisions independent of politics may both protect from and lead to the arbitrariness of power to the same extent. Overseeing the compliance of the political sphere with the law may turn into a hard hegemony if the law stops defining and starts determining the permitted forms of relationships and collaboration, imposing a certain content – relevant to its assumptions and objectives – upon them. The question that comes to mind here is one about the meaning of "the arbitrariness of power" which the rule of law is to offer protection from. Is it arbitrariness of the ruling or of the ruled? Is the protection from arbitrariness of power a safeguard against usurpation as well?

The rule of law may actually work in favour of the liberal, correct, textbook version of democracy, where political passion does not occur. But what about the rule of law as a prerequisite for civic engagement from the perspective of democracy as a space of conflict? The view of democracy put forward by Claude Lefort here seems to be a fully justified choice because on the one hand, the author is aware of the irremovability of the threat inherent to democracy, meaning that there is an ever-present risk of democracy turning into totalitarianism.[19] On the other hand, he defines democracy as a prerequisite for civic engagement and liberty and political pluralism, so important in the context of real (not abstract or theoretical) equality and freedom. In a democracy, diversification and conflict are something

[18] See: M.-M. Robin, *The World According to Monsanto. Pollution, Politics and Power*, North Geelong, VIC 2010.

[19] See: C. Lefort, *The Question of Democracy*, [in:] idem, *Democracy and Political Theory*, Minnesota, MN 1989, pp. 16–17.

natural and desired.[20] But this makes it lack a solid foundation and representation. It is determined, defined by temporariness and uncertainty. Totalitarianism – an irremovable threat underlying democracy – takes its root precisely in the said lack of a well-defined basis. On the one hand, this absence of stability lays the ground for freedom and activity, but on the other, it carries a risk of this ground becoming populated by unity produced for the needs of the current rule, with no divisions or diversity.[21] Lefort claims that if the public domain is to act in favour of democracy and political involvement, it should be not amputated of conflict and have a pattern of correct (desired) conduct, behaviour, or thinking transplanted instead. Citizens may not be treated as an identified and defined specific homogeneous mass. Conflicts may also be about the matter of the exercise of power (who does or will exercise it; using what measures), which in practice means that political involvement involves questioning the status quo. Rights, compromises, and other arrangements worked out within the framework of so understood democracy do not have unquestionable sources or content. Treating the public sphere as a domain established once and for all and free of any differences is a contradiction – not an improvement – of democracy.[22]

According to Lefort, democracy is more of a revolution than a system. It surely is not a synonym of representation institutions, a common electoral right, but a domain of action, a sphere of various decision-making processes (concerning the form of the society, the content and the hierarchy of values) in which citizens should be involved to the same extent as those who are in power. Another question to be asked in the context of the concept of governance is the following: in the light of the so understood democracy, who or what was to legitimise the said conflicts? Who or what will be competent enough to decide that some conflicts are good, legitimate, and beneficial to pluralism and liberty while other ones are not? And finally, is it possible to retain a participatory symmetry between the ruling and the ruled within the framework of a democratic rule of law? Is there no risk of transformation of the rule of law into what Foucault referred to as "governmentality"? After all, there is no guarantee that making law a force that governs the life of a community does not change civil obedience into an order (duty) enforced through measures of coercion. The rule of law, like any other ideology, comes with a vision of perfect coexistence, and therefore calls for reconstructing the community and "tuning" its activity according to the set objectives (in this case one can say that the objective

20 Ibidem, pp. 17–20.

21 See: idem, *Democracy and Totalitarianism*, [in:] J.B. Thompson (ed.), *The Political Forms of Modern Society. Bureaucracy, Democracy, Totalitarianism*, Cambridge 1986, pp. 237–245.

22 See: idem, *Image of the Body and Totalitarianism*, [in:] ibidem, pp. 297–299.

 DOI: 10.7206/kp.2080-1084.280

of the rule of law is mainly to maintain the status quo determined or arranged for by certain circles). Civic engagement in politics, in turn, is an activity sensitive to circumstances, and therefore flexible and often chaotic (there is no single source of it). An attempt to curb the nature of a social community may result in a new form of authoritarianism, a sort of deterministic automatism. Since the rule of law structures the public sphere around law, where can one look for the space for civic, political, and emancipation activity? Lefort's understanding of democracy, defined mainly by the category of "empty place" of power, shows that the rule of law rather does not provide for such a civic space in its idea because the central position is occupied by law. A king was the central figure in monarchy; in a democracy, this central place needs to be empty; under the rule of law, it is filled again. Keeping this central place empty is essential because it means that every political project is arranged each and every time, formed to address current needs or problems. Every political initiative has a chance. Can the law therefore be subject to such each-time arrangements and not lose any of its validity at the same time? Even if we were to accept that a possibility to interpret the law would be a search for a consensus, how to protect equality before the law? How to keep it impartial or objective in practice? The relationship between the rule of law and civic engagement thus requires a change of approach to the notion of political nature (politics). And so it should not ignore the creative aspect of politics, the fact that solutions are invented and choices are made not only in law but also in politics alike.

It needs to be stressed here that what is political should not be perceived only as disputatious, conflictual.[23] It should not be considered in simple – but very meaningful – terms of Schmitt's friend/enemy distinction. Aiming at reaching an understanding and a consensus at the communicative level is not the essence of what is political either, contrary to what Habermas claimed. What is political is not what can be fitted into some rational and universal models. The dimension of political nature is rather of a performative nature. Interpreting political nature in theological terms, meaning through the purpose of, for instance, reaching a consensus in communication, is also a kind of violence against and dominance over the future, and a suppression of spontaneity of action. The conflict in the bosom of democracy underlines the society's potential for emancipation. It shows that the public domain is open, diverse, and ready for citizens' authentic presence. According to Lefort, democracy abolishes an external establishment of power. The source of power is those who act, who take an active part in decision-making, in the dialogue on rights, values, knowledge. Expressing their involvement in the creation of a new order

[23] Cf. M. Paździora, M. Stambulski, *Co może dać nauce prawa polityczność? Przyczynek do przyszłych badań*, „Archiwum Filozofii Prawa i Filozofii Społecznej" 2014, 1, pp. 55–66.

this way, but not for ever. In other words, rights granted in a democracy do not come from unconditional, absolute, unquestionable sources. Their validity comes from declarations, not from any specific transcendental authority.

By implementing norms and standards, the rule of law defines a hierarchy (the law above all) which contradicts the claim for free and equal participation. Society is not involved in governance, but being bound by the law it has to adapt to the established forms and patterns of conduct. The principle of the rule of law offers protection from the arbitrariness of power – yet not through providing an opportunity to co-decide but through an obligation to adapt to the implemented legal regulations. Apart from this, the vision of politics pursued under the rule of law is depicted as a battle at the level of egoistic interests. The rule of law does not assume the good will of the citizens. The aim is to legally sanction the adopted rules while excluding any discussion. In a situation in which it is impossible to avoid such a discussion, the conflict and the accompanying debate are limited to procedures. Perhaps this is the weakness of liberal democracy within the framework of the rule of law. The tripartite separation of powers and procedures are often used by those in power as an excuse for situations where changes are necessary but do not occur.

Both democracy (regardless of its attribute) and political involvement need solidarity. The principle of the rule of law certainly works in favour of individual freedom, but it is not enough when it comes to the public domain. Individual freedom in the public sphere is like a single note. It needs other sounds in order to be able to unlock its full potential. As of now, the rule of law does not support pluralism but particularism based on pragmatism and consumption, where profit and loss are what matters most. Without political involvement, the public sphere will remain detached from reality and – consequently – from the actual problems of the society.

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