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SEPARATION OF POWERS, CHECKS AND BALANCES, AND THE LIMITS OF POPULAR SOVEREIGNTY: RETHINKING THE POLISH EXPERIENCE

1.

The principle of checks and balances counts among the most fundamental constitutional values¹, as it is connected with the recognition and guaranteeing of human rights – in other words, with the very essence of the Constitution, an act that limits the majority rule to allow for the rights and freedoms of the individual².

Also of key importance is the connection of this precept with the essence of the democratic system, understood as one where the majority rule is constrained by human rights³.

The principle of checks and balances could function in full only in correspondence with a culture of respect for human rights. In the case law of the Polish Constitutional Tribunal we can find the assertion that the purpose of checks and balances is, *inter alia*, “to protect human rights by preventing abuse of power by any organ of government”⁴. Nevertheless, even where a given system of government embraces this principle, human rights will not necessarily come under protection unless they are backed by constitutional culture.

The status of the sovereign needs legitimacy, which derives from the sovereign’s subordination to the Constitution. The Constitution limits the authority of the sovereign and lays down the guarantees that these limitations will be respected. Where the sovereign, or those citing the sovereign’s will, fail to respect

¹ Cf. D. Davis, A. Richter, Ch. Saunders (eds.), *An Inquiry into the Existence of Global Values through the Lens of Comparative Constitutional Law*, Oxford 2015, p. 11 *et seqq.*

² Cf. W. F. Murphy, *Constitutional Democracy. Creating and Maintaining a Just Political Order*, Baltimore 2007, p. 7 *et seqq.*

³ Cf. R. Piotrowski, *Demokracja nieliberalna czyli oksymoron konstytucyjny*, (in:) M. Serwaniec, A. Bień-Kacała, A. Kustra-Rogatka (eds.) *Potentia non est nisi ad bonum*. Księga Jubileuszowa dedykowana Profesorowi Zbigniewowi Witkowskiemu, Toruń 2018, p. 609 *et seqq.*

⁴ The judgement of the Constitutional Tribunal in the case K 11/93.

human rights, their authority is illegitimate. Being sovereign means being unsubordinated to anybody. It is thus fair to conclude that the attribute of sovereignty actually belongs to the values that have been shaped by culture and linked to the timeless moral rules and principles corresponding to humanity's eternal dilemmas – the values that create constitutional culture, i.e. a community's set of values. The sovereign does not exercise the supreme authority over values, and the values are embodied in the Constitution, which is inseparably linked with the people and their sovereignty⁵.

The Constitution of the Republic of Poland reflects the precepts of liberal democracy, or such kind of democracy where the sources of human rights do not stem from the will of the majority. The model of governance adopted in the Constitution could be described as consensual democracy⁶, where the rights – according to the Preamble to the Polish Constitution – are “based on respect for freedom and justice, cooperation between the public powers, social dialogue as well as on the principle of subsidiarity in the strengthening the powers of citizens and their communities”.

The constitutional practice however, has taken a course where the system of consensus democracy – as laid down in the Constitution of Poland, with the power of the majority being constrained by rights of the minority – is turning into a system of majoritarian democracy, based not on a dialogue between the majority and the opposition, but on the power of a parliamentary majority that disregards the systemic role of the opposition.

The constant tension between the majority and the opposition results in a continuous rivalry by parties for results of public opinion polls. The majority parties and the opposition parties alike have all the time to provoke interest of the media and draw their attention as well as to discredit the opponents in a race for opinion-poll support. All this feeds negative cooperation between majority and minority, and makes it more difficult to engage in a rational collaboration.

2.

In specifying the notion of the constitutional democracy, the Constitutional Tribunal emphasised that in such a system there is no supreme organ of state authority, and the state is founded on the principle of supremacy of the Constitution. “One reason why this design is adopted is to avoid what has already

⁵ Cf. R. Piotrowski, *Konstytucja i granice władzy suwerena w państwie demokratycznym*, (in:) J. Jaskiernia, K. Spryszak (eds.), *Dwadzieścia lat obowiązywania Konstytucji RP. Polska myśl konstytucyjna a międzynarodowe standardy demokratyczne*, Toruń 2017, p. 702 *et seqq.*

⁶ Cf. A. Lijphart, *Democracies*, New Haven and London 1984, p. 21 *et seqq.*

been experienced in the past, namely the risk and the real threat of a simplified interpretation of democracy, where it is largely or wholly confined to a domination and omnipotence of the parliamentary majority. To prevent this threat from materialising, the system of constitutional democracy was created, as laid down in the Constitution of 1997⁷. In the opinion of the Constitutional Tribunal, it stems from the checks-and-balances principle “that the legislative, executive and judicial branches of government are separated, and also that they must be balanced and cooperate among themselves”⁸.

Specifying the precept of checks and balances in greater detail, the system of government established under the Polish Constitution conforms with the model of consensus democracy, where fundamental importance is placed on a compromise between majority and minority – or, in fact, between diverse minorities.

Constitutional democracy is described in modern literature as a liberal democracy, founded on constitutionalism with its focus on guaranteeing the natural rights of the individual. It is the exact opposite of a system referred to as illiberal democracy, where the majority supports the subordination of independent institutions to the executive branch of government and where the rights of unaccepted minorities are restricted⁹.

A salient feature of liberal democracy is the potential identity of the public functions of constitutions and universities, where the authority is limited by values that are independent of it. Such limitation, in fact, defines both the role of universities and the role of the basic law in a constitutional democracy.

Capacity to think independently is crucial to the exercise of voting rights and – after an election victory – the rights of the majority¹⁰. This capacity is considerably constrained by an information barrier and by the impact of electronic media: “in a world of ubiquitous social networks”, it is a demanding task, indeed, to “find the space to develop the fortitude to make decisions”¹¹. Electoral campaigns, conducted in order to distinguish majority from minority, “are on the verge of turning into media contests between master operators of the internet”¹². This has the effect of replacing a rational debate, while “the candidates’ main role may become fundraising rather than the elaboration of issues”¹³.

Universities, being centres of free thinking, independent of current political authority, are of particular significance for the separation of powers, that is, for such manner of state organisation where the law-making process – while

⁷ The judgement of the Constitutional Tribunal in the case U 4/06.

⁸ The judgement of the Constitutional Tribunal in the case K 11/93.

⁹ Cf. M. Tushnet, *Advanced Introduction to Comparative Constitutional Law*, Cheltenham, Northampton 2014, p. 114 *et seqq.*

¹⁰ Cf. G. Sartori, *Democrazia. Cosa e'*, Milano 1993, p. 327.

¹¹ Cf. H. Kissinger, *World Order*, London 2014, p. 350 *et seqq.*

¹² *Ibidem*, p. 351.

¹³ *Ibidem*.

respecting society's current needs, economic and political interests, and recommendations from experts – enables above all respect for values. The separation of powers provides an answer to the question about such a form of government that would uphold the idea of human dignity. The separation would not be possible without citizens' capacity to think freely, which is also a necessary condition for the sovereign people to exercise their constitutional rights. And it is the universities – if only they are independent of banks, multinational corporations, owners of electronic media, political parties and governments – that enable citizens to maintain this capacity of free thinking. Therefore, the activity of universities undermines the domination of official propaganda, which uses all possible channels to tell people how they should think and how they should vote. Universities provide a forum for debate about values – a debate which helps to balance values in the course of both the legislative process and judicial review¹⁴. This is of particular importance when public debate is brutalised, trivialised and when it turns formulaic. As matters stand, however, the autonomy of universities is being effectively constrained. University organisation and research are micromanaged by government and, in addition, university autonomy is in fact constrained by banks, to whom students have to turn for credit, to finance the high costs of university education. Meanwhile, the independence of universities provides a foundation of liberal democracy, in the same way as judicial autonomy does.

The independence of the judiciary and its separation from other branches of government is of paramount importance for the system of integral democracy. Judicial autonomy provides the guarantee of individual rights and liberties, and a promise of respect for the common good, exposed as it is to threats from multiple interests.

A non-authoritarian state cannot exist without independent courts and independent judges, who play a special role in the process of legitimisation of the authorities.

Judicial independence and impartiality underpins the rule of law, and is the keystone of modern constitutional democracies. These democracies have embraced the principle of the separation of powers, and also the principle of representation, which is coessential with the former¹⁵.

The autonomy of the judiciary and academe poses a threat to political parties' monopoly to define the common good and, as such, has been increasingly subjected to regulations restricting the role of courts and universities in matters of state.

¹⁴ Cf. R. Piotrowski, *Konstytucja i uniwersytety*, (in:) S. Bożyk (ed.), *Prawo, parlament i egzekutywa. Księga poświęcona pamięci Profesora Jerzego Siembrowicza*, Białystok 2009, p. 152 *et seqq.*

¹⁵ Cf. R. Piotrowski, *The Issue of the Legitimation of the Judicial Power in a Democratic State Ruled by Law*, (in:) A. Machnikowska (ed.), *The Legitimation of Judicial Power*, Gdańsk 2017, p. 11 *et seqq.*

In particular, a state that “cannot bear the truth” is an “enemy of the university, concealing this enmity and proceeding slowly to destroy universities behind a veil of support”¹⁶.

3.

The key function of the checks and balances in a liberal democracy is to restrict the majority rule, thus preventing the will of the sovereign from turning into an electoral dictatorship¹⁷, and also helping to keep a balance between freedom and democracy.

The Polish Constitution follows the tenets of liberal democracy, where the majority’s will does not constitute a source of human rights. On the contrary, it is the human rights that limit public authority. By the same token the Constitution expresses the rules of a democracy where human rights are developed through a dialogue and where the awareness of these rights is steadily growing.

The extraconstitutional creator of the Constitution, proclaimed as such in the Constitution itself, i.e. the People – also referred to in the official translation of the Polish Constitution as the Nation – acquire their identity and empowerment through the Constitution, whose provisions both restrict and confirm the sovereignty of the sovereign. The very existence of the Constitution, imposing constraints on the authorities via human rights, takes away the full authority over these rights from the sovereign and reduces the sovereign’s special status¹⁸.

Under a democratic system, the limits to the constitutional change are contained in the Constitution itself, and they reflect the rejection – in the very concept of democracy – of the proposition that the sovereign’s will is boundless. In Europe, since the times when the state became the subject of appraisal and reflection, values have been positioned above the highest authority, and beyond the reach of the sovereign’s will.

From the viewpoint of constitutionalism, which is seen today as the most important safeguard against tyranny¹⁹, not all changes to the Constitution are feasible – because of both the external limitations laid down in the European law, and the constraints embedded in the Constitution itself.

Under the current constitutional practice, however, the constitutionally established system of consensus democracy, where the limits to the majority rule are defined by minority rights, has been turning into a system of majoritarian democ-

¹⁶ K. Jaspers, *Idea uniwersytetu*, Warszawa 2017, p. 176.

¹⁷ See F. P. Miller, A. F. Vandome, J. McBrewster (eds.), *Q. Hogg: Elective Dictatorship*, Beau Bassin 2010.

¹⁸ Cf. R. Piotrowski, *Konstytucja i granice władzy...*, p. 702 *et seqq.*

¹⁹ Cf. T. Snyder, *On Tyranny*, New York 2017.

racy, which rests not on a dialogue between the majority and the opposition, but on the preponderance of the parliamentary majority that disregards the systemic role of the opposition.

The Republic of Poland is “the common good of all citizens”, as reads Article 1 of the Constitution. It is therefore the common good of – both – the majority and the minority. The Constitution rules out a situation where the minority – that is, the opposition – is barred from participation in defining the common good and the public interest, which should be formulated by the majority and the minority in a dialogue and in a process of mutual interactions.

“The supreme power in the Republic of Poland shall be vested in the Nation, [and] the Nation shall exercise such power directly or through their representatives”, reads the Constitution in its Article 4. The notion of representatives of the Nation also includes those who lost the elections, but who at the same time won, having being elected Members of Parliament – even if they are not in the majority. The Constitution does not differentiate between different statuses of the representatives. Each majority – even if backed by just 19% of those eligible to vote – considers itself to be the only legitimate representative of the Nation. Nevertheless, nothing in the Constitution says that the citizens who voted for the election losers do not belong to the Nation and cannot exercise their sovereignty.

Pursuant to Article 11 of the Constitution, “1. The Republic of Poland shall ensure freedom for the creation and functioning of political parties. Political parties shall be founded on the principle of voluntariness and upon the equality of Polish citizens, and their purpose shall be to influence the formulation of the policy of the State by democratic means. 2. The financing of political parties shall be open to public inspection”.

This passage is of key importance for mutual relations between the majority and the opposition. It lays down the principle of political pluralism, based on the freedom of political parties. It allows political parties to use only democratic methods, where the Constitution is respected even in the course of rivalry for power. This requires that political parties respect each other, disallow hate speech, and rule out infringement of the law and use of state agencies for particular political purposes. The transparency of the financing of political parties is meant to prevent infringements of regulations governing this field, especially where such infringement puts the opposition at a disadvantage.

4.

Political pluralism – a core element of the separation of powers - may be limited also in another way, by algorithms which in modern democracies influence electoral results. This threat of algorithms influencing the will of vacillating

voters who are active in social networks is already making itself felt in modern democracies. In step with the development of information and communication technology, independent thinking skills are seen as being on the decline, reflecting individual's growing dependence on technology as a tool to facilitate and intermediate in the thought process²⁰. *Homo sapiens* is also said to be turning into *homo videns* – a tractable man exposed to media manipulation and increasingly defenceless against TV and online messaging²¹.

In the time of Thucydides, democracy was described by Pericles as respecting the differences among individuals and their privacy – and he saw the democratic system as one where citizens do not exercise “a jealous surveillance over each other”²². Going back in time, we find in Homer the belief that the law cannot rule unless created by all those to be governed by it, those whom in today's parlance we would call autonomous lawmakers, whose opinions are neither subject to control nor to formatting. In Homer's words, the barbarians “have no assemblies for political discussion, nor laws”²³ – and it is precisely in assemblies that the law is made by all members of the community, free in their decisions from fear of being controlled by those capable to exercise control. The less of privacy, the greater the risk that an individual's position in society and his or her requirements will be ignored, to satisfy the real or only declared interests of the majority, as represented – and possibly influenced – by those holding power in a democracy.

The development of information and communication technology poses a threat to the privacy of the individuals, which is of paramount consequence for the operation of the democratic system²⁴. Information and communication technology deprives people from privacy. Privacy is the core value in liberal democracy. Without privacy you are not able to think independently and you are not able to be a real partner for the actual state power. In actual practice though the right to privacy is among the rights that have increasingly been growing illusory. Privacy is a value for citizens nor for public authorities. And we are at the tipping point because if the process continues unabated, the liberal democracy will be in decline every year.

Democracy, understood as a debate to seek truth and collaboration, can only be practiced if its participants are free agents whose identity is respected, meaning that they are empowered to define the limits of access to their thoughts and

²⁰ Cf. H. Kissinger, *World Order...*, p. 350 *et seqq.*

²¹ Cf. G. Sartori, *Homo videns. Televisione e post-pensiero*, Roma-Bari 1997, p. 104 *et seqq.*

²² Cf. Tukidydes, *Wojna peloponeska* (Thucydides, *The History of the Peloponnesian War*), Warszawa 1988, p. 107.

²³ Homer, *Odyssey*, Book IX, lines 112 *et seqq.*

²⁴ Cf. T. Garton Ash, *Free Speech: Ten Principles for a Connected World*, New Haven-London 2016, p. 283 *et seqq.* See also Y. N. Harari, *Homo Deus. A Brief History of Tomorrow*, London 2016, p. 307 *et seqq.*

to information that denotes human existence in the world²⁵. Human dignity in a modern information society is defined by a person's ability to control data about themselves.

The right to possess all the information about a given individual – adding up to his or her informational identity – may only be vested in that very person. Taking over control of data that are key to a person's distinctness and separateness paves the way to taking over control of his or her identity, which results in identity being no longer a determinant of that person's free agency. In this sense, the informational identity of the individual comes as his or her inherent and inalienable feature, coessential with his or her dignity.

The very survival of the democratic system, with its roots in the dignity of the person, requires that the right to privacy and protection of personal data be guaranteed²⁶.

In actual practice, though, the right to privacy is among the rights most threatened and most illusory²⁷. Privacy is valued neither by citizens nor by the public authorities. At a time of widespread digitalisation, using new technology is a prerequisite of not only getting skills and jobs but also of participating in culture. With this use, however, often comes uncritical and unreflective abdication of one's own privacy. Incessant use of electronic communication being necessary in public and social life, the abandonment of privacy – stimulated by fashions that make new technology solutions highly coveted and sought after – becomes a characteristic feature of an emerging new culture²⁸. This new culture, determining an individual's existence in the digital community, is founded on more or less conscious relinquishment of informational autonomy and of the related right of the individual to decide which information about himself or herself he or she is willing to disclose to others, and especially to government and business.

The very *raison d'être* of the state, after all, lies in its protecting the human rights. But as matters stand, the state's ineffectiveness in endorsing privacy, and its infidelity to this constitutional value, is met in practice with public acquiescence. No one can be forced to care about privacy in the name of his or her dignity or to fight for a freedom, which he or she does not need and does not understand – such attitudes being additionally reinforced by national governments and by the global digital order. The tools used by people not only change the world, they also change the people themselves – thus changing the hierarchy of values, which lasts only as long as people manage to distinguish between freedom and

²⁵ Cf. R. Piotrowski, *New Technologies or New Human Rights: The Right to a Government by Humans and the Right to One's Own Thoughts?*, "Studia Iuridica" 2018, issue LXXVI, p. 283 *et seq.*

²⁶ *Ibidem.*

²⁷ Cf. B. Schneier, *Data and Goliath. The Hidden Battles to Collect Your Data and Control Your World*, New York – London 2015, p. 125 *et seq.*

²⁸ Cf. M. Ainis, *Il regno dell'Uroboro*, Milano 2018, p. 59 *et seq.*

such phenomena as “voluntary servitude” or “instinctive, suicidal ineffectiveness of systems of power”²⁹.

In many countries around the world democracy no longer appears to be perceived as the only and perfect solution. There are citizens who have negative views about democracy or who disregard the importance of democracy or even accept the authoritarian concept of state power. Respect for democratic norms and rules has declined. Even in countries viewed as “old democracies”, the most basic rules of democratic politics are being ignored. In June 2014 only 30% of Americans reported having confidence in the Supreme Court, 29% expressed confidence in the Presidency, and 7% had confidence in the Congress (as against over 40% confidence in the Congress in the 1970s)³⁰; this level of dissatisfaction with the political system is “stratospheric”³¹.

In Poland, after the parliamentary and presidential elections in 2015, the new government majority began to subvert basic rules of democracy. The independence of the Constitutional Tribunal and the judiciary (ordinary courts and the Supreme Court) has been seriously undermined³².

It is possible under the constitutional rule that a parliamentary election may produce an absolute majority in both houses of parliament. It may also happen that a representative of yesterday’s opposition (and today’s ruling party) wins the presidential election. This is precisely what happened in Poland³³. However, in such circumstances, the Polish parliamentary system – which involves the separation of powers – begins to operate as a presidential system. Actually, it may also happen that the formally separate legislative and executive branches of government will act as if they formed a single branch, reflecting their political fusion. The Sejm, the Senate, the Cabinet and the President would then be in the hands of a single centre of political power. Given the independence of judges, only courts would then stay outside the reach of the actual legislative/executive authority. It must be noted here that the Law and Justice party won 5,711,687 votes (37.58%), translating into some 20% of the eligible electorate of 30,629,150,000.

Following the recent parliamentary and presidential elections, the political significance of the Constitutional Tribunal has increased enormously. Only the Constitutional Tribunal is capable of preventing the centre of political power (which governs over the legislative and executive branches) from pursuing its plans – should the Constitutional Tribunal choose to interpret the Constitution in a way the present opposition does.

²⁹ Cf. J. Baudrillard, *Le pacte de lucidité ou l’intelligence du mal*, Paris 2004, p. 136.

³⁰ See Y. Mounk, *The People Versus Democracy: The Rise of Undemocratic Liberalism and the Threat of Illiberal Democracy*, Boston 2018, p. 100.

³¹ *Ibidem*.

³² *Ibidem*, p. 125 *et seqq.*

³³ Cf. R. Piotrowski, *Remarks on the Dispute over the Constitutional Tribunal in Poland*, “*Studia Iuridica*” 2016, issue LXVIII, p. 279 *et seqq.*

Previously, the Constitutional Tribunal played a very special role in the building of a democratic state ruled by law in Poland. After the 2015 elections, the new parliamentary majority embarked on a multi-stage process of taking over the political control of the Constitutional Tribunal, which provoked ineffective criticism from various European institutions and protests from the opposition. The process began with two amendments to the 2015 law, which were followed by a new Constitutional Tribunal Act, passed in 2016, and – in the same year – by three new statutes in force till today, regulating the Tribunal’s organisation and procedure, the status of its judges, and the implementation of these new laws.

The ongoing changes have the effect of restricting independence and credibility of the Constitutional Tribunal and the Supreme Court, impairing their effectiveness, subordinating the National Council of the Judiciary to the parliamentary majority, and subordinating courts of law and public prosecutor offices to the minister of justice.

5.

Why is liberal democracy in decline? The price of inequality is the rejection of liberal values³⁴. Big changes in the world economy, caused by globalisation, are dismantling the social consensus that made liberal democracies stable and promising. Citizens of numerous countries, the so called “old democracies” included, are dissatisfied with their living conditions and social standing, and consequently they switch support to authoritarian politicians and their agendas. Inequality distorts liberal democracies. It gives a decisive voice to the few who can afford high-priced lobbyists and unlimited campaign contributions, thus selling out democracy to the highest bidder because representatives are not looking out for the interests of most of the electors³⁵.

The decomposition of the rule of law in Poland has been made possible due to the lack of solid traditions of democratic government. After the restoration of independence in the early 20th century, the parliamentary rule was relatively short-lived – from 1919 to 1926. Under the subsequent authoritarian government, opposition rights were severely restricted. Members of parliament and activists of the extra-parliamentary and anti-establishment opposition were either thrown into prison or forced to emigrate. After World War II, under a system of gov-

³⁴ Cf. J. E. Stiglitz, *The Price of Inequality: How Today’s Divided Society Endangers Our Future*, New York 2012.

³⁵ Cf. Remarks by the President Obama on the Economy in Osawatomie, Kansas, <https://obamawhitehouse.archives.gov/the-press-office/2011/12/06/remarks-president-economy-osawatomie-kansas> (visited February 20, 2019).

ernment that was imposed on Poland by decisions of the victorious coalition, the opposition was shut out of political life. Imprisonment and emigration were again the lot of opponents of the authorities – but this time the power was held by those who themselves were in prison or in emigration before the war. People kept democratic values alive, however, and finally, in 1989, a round-table accord was reached by the Solidarity opposition and the government. Power was taken over by the previous oppositionists, including political prisoners of the previous government. As a consequence of the round-table agreement, on 2 April 1997 the National Assembly passed the Constitution of the Republic of Poland, which was later endorsed in a national referendum.

The decomposition of the liberal democracy in Poland also has to do with the specific course of the country's systemic transformations that have not been sanctioned by a referendum, and carried out as a hasty, top-down process, with no alternative offered. Run by an elitist group of reformers, who were backed by foreign experts³⁶, this process squeezed out a considerable portion of the industrial sector and was conducive to what is commonly known as „crony capitalism”³⁷.

The negative consequences that excessive social inequality has for the rule of law have not been lost by the Constitutional Tribunal. It said in its judgment that “implementation of the principle of social justice rules out an excessive (drastic) differentiation of living conditions for members of society belonging to different social groups; it calls for a proportional (adequate) pay for service/work done; it requires that all citizens have similar chances for their development; and it necessitates that the public authorities provide assistance in the meeting of basic needs to those who are unable to satisfy such needs themselves. In implementing these principles, the state may intervene in socio-economic relations in the interests of the weaker parties”³⁸.

How to preserve the rule of law in such circumstances? One option – rather unrealistic – is to make the democracy great again by fixing the economy and creating a modern welfare state. Another one – rather dangerous – comes down to replacing popular sovereignty with the sovereignty of algorithms.

The constitutions of democratic states lay down the principles of government by sovereign people, not by sovereign algorithms. Sovereignty is founded on the freedom of choice, which involves dialogue, persuasion and deliberative decision-making³⁹. The current forms of artificial intelligence are not capable of a

³⁶ Cf. A. Smolar, *Przygody społeczeństwa obywatelskiego*, (in:) E. Nowicka, M. Chałubiński (eds.), *Idee a urządzanie świata społecznego. Księga jubileuszowa dla Jerzego Szackiego*, Warszawa 1999, s. 392.

³⁷ A quintessential example of “crony capitalism” practices was provided by the process of pension-system privatisation in Poland, forced by the World Bank, which ended in a failure and considerable losses.

³⁸ The judgement of the Constitutional Tribunal in the case K 17/11.

³⁹ Cf. R. Piotrowski, *New Technologies...*, p. 283 *et seq.*

knowledge- and culture-based reasoning, nor can they engage in a dialogue that could persuade them to change opinion and switch to a particular solution. No such tool has yet been developed that would cultivate human-specific spiritual culture. No way has yet been found to produce what makes us human, which cannot be counted, measured or weighed. It is highly unlikely for values to be instilled in a machine during a process of learning, remembering how difficult it is to instil them in so many people.

The democratic system is inseparably linked with human agency, not with even the most sophisticated man-made tools. The right to be governed by humans is among the basic human rights. Lack of human control over the tools may well be a harbinger of catastrophe – a dire prospect that, however, can be defused under the democratic system, which limits popular sovereignty through separation of powers and checks and balances.

From the perspective of historical experience there is nothing eternal in particular forms of government – including democracy based on the rule of law and the separation of powers – because these forms are in a process of permanent transformation. As John Robinson Jeffers noticed: “Then what is the answer? – Not to be deluded by dreams. To know the great civilizations have broken into violence, and their tyrants come”⁴⁰. However, the constitutions are also about dreams, and it is on the dreams that their social impact is based.

Summary

The principle of checks and balances counts among the most fundamental constitutional values, as it is connected with the recognition and guaranteeing of human rights – in other words is the very essence of the Constitution, an act that limits the majority rule to allow for the rights and freedoms of the individual. Also of key importance is the connection of this precept with the essence of the democratic system, understood as one where the majority rule is constrained by human rights. The principle of checks and balances could function in full only in correspondence with culture of respect for human rights.

The status of the sovereign needs legitimacy, which derives from the sovereign’s subordination to the Constitution. Being sovereign means being unsubordinated to anybody. It is thus fair to conclude that the attribute of sovereignty actually belongs to the values that have been shaped by culture and linked to the timeless moral rules and principles corresponding to humanity’s eternal dilemmas – the values that create the constitutional culture, i.e. a community’s set of values. The sovereign does not exercise

⁴⁰ Cf. J. R. Jeffers, *The Answer*, (in:) *The Beginning & the End, and Other Poems*, New York 1963.

the supreme authority over values, and the values are embodied in the Constitution, which is inseparably linked with the people and their sovereignty.

The Constitution of the Republic of Poland reflects the precepts of liberal democracy, or such kind of democracy where the sources of human rights do not stem from the will of the majority. The model of governance adopted in the Constitution could be described as consensual democracy.

Constitutional practice has taken a course where the system of consensual democracy – as laid down in the Constitution of Poland, with the power of the majority being constrained by rights of the minority – is turning into a system of a majority democracy, based not on a dialogue between the majority and the opposition, but on the power of a parliamentary majority who disregards the systemic role of the opposition.

KEYWORDS

separation of powers, checks and balances, rule of law, democracy, the Constitution, human rights, values, sovereign, privacy, new technologies

Streszczenie

Zasada równowagi i trójpodziału władz zalicza się do najbardziej fundamentalnych wartości konstytucyjnych, ponieważ wiąże się z uznaniem i zagwarantowaniem praw człowieka. Innymi słowy jest istotą Konstytucji, czyli aktu ograniczającego prawa większości w celu umożliwienia realizacji prawa i wolności jednostki. Kluczowe znaczenie ma również powiązanie tej gwarancji z istotą systemu demokratycznego, w którym zasada większości jest ograniczona przez prawa człowieka. Zasada kontroli i równowagi może w pełni funkcjonować tylko w odniesieniu do kultury poszanowania praw człowieka.

Status suwerena wymaga legitymizacji, która wynika z podporządkowania się suwerena Konstytucji. Można zatem wnioskować, że atrybut suwerenności w rzeczywistości należy do wartości ukształtowanych przez kulturę i powiązanych z ponadczasowymi zasadami i zasadami moralnymi odpowiadającymi wiecznym dylematom ludzkości – wartościom, które tworzą kulturę konstytucyjną, tj. wspólnotowym zbiorem wartości. Władca nie sprawuje najwyższej władzy nad wartościami, a wartości są zawarte w Konstytucji, która jest nierozzerwalnie związana z narodem i jego suwerennością.

Konstytucja Rzeczypospolitej Polskiej odzwierciedla zasady liberalnej demokracji lub tego rodzaju demokracji, w której źródła praw człowieka nie wynikają z woli większości. Model rządzenia przyjęty w Konstytucji można określić, jako demokrację konsensualną.

Praktyka konstytucyjna przeszła drogę, w której system demokracji konsensualnej – określony w Konstytucji RP, z siłą większości ograniczanej przez prawa mniejszości

– zamienia się w system większościowej demokracji, oparty nie na dialogu między większością a opozycją, ale na mocy parlamentarnej większości, która lekceważy systemową rolę opozycji.

SŁOWA KLUCZOWE

podział władzy, kontrola i równowaga, praworządność, demokracja, Konstytucja, prawa człowieka, wartości, suwerenność, prywatność, nowe technologie