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Dispute over the essence of the rule of law in the historical and contemporary context

Contemporary constitutional democracy is distrustful of the legislator, who is subject to double control both by voters and the constitutional court. On the other hand, the constitutional judiciary is treated with unlimited trust, a neglect of Montesquieu's warning that any uncontrolled power tends to be abused. Nowadays, it is becoming increasingly clear that the rule of law is a kind of "magic wand" for constitutional courts, by means of which they create new legal rules, limiting the public will expressed in the law adopted by the representatives of a sovereign nation. Constitutional courts, through their creative interpretation of abstract and general principles of the constitution, transform from a "negative" legislator into a "positive" one. The question is therefore whether the constitutional courts attempt in this way to take over some of the competences of the legislature, even usurping the right to decide on the cultural destiny of a nation[1].

A dispute is being reopened as to whether the idea of the rule of law, with the extended function of constitutional courts, can be reconciled with the principle of democracy[2]. Democracy considers the people (the nation)

[1] P. Paczolay, *Definitions- und Entwicklungsprozesse der Menschenrechte außerhalb der Volkssouveränität: Gerichtliche Prüfung als Ersatz für politische Willensbildung,* in: G. Haller, U. Günther, U. Neumann (ed.), *Menschenrechte und Volkssouveränität in Europa. Gerichte als Vormund Demokratie?* Campus Verlag, 2011, p. 297ff. The author observes that the more powers the judges have, the less space is left for the *demos*. The judicial control of the constitutionality of the law does not limit the will of the general public but replaces it; it is judges who make decisions in place of politicians. Constitutional court rulings are "harbingers of future political decisions".

[2] The doctrinal basis for justifying the democratic legitimacy of the constitutional court was provided by H. Kelsen in his dispute with C. Schmitt. In the concept of the rule of law, the constitutional court is not seen as a threat to democracy, but on the contrary, as its unique expression. It is assumed after Kelsen that democracy is not based on the unrestricted rule of the political majority, but on a constant compromise between the larger and smaller groups represented in

to be sole sovereign of public authority. Lawmaking by the legislator is legitimized by the will of the nation as expressed in the electoral act. The rule of law, in turn, assumes that the law is the sovereign. The idea of the nation as the sovereignty in the rule of law gives way to the principle of the supremacy of the constitution, whose provisions legitimise the actions of all public authorities, including parliament. In constitutional democracy, as a modern form of the rule of law, the will of the nation is expressed not by the representatives in the parliament, but by the constitution as interpreted by the constitutional court[3]. In this way, there is a controversy over the most fundamental political issue of who in reality is the sovereign in a democratic state of law, i.e. the entity with the right to decide on the content of the law being enacted.

History may be the key to understanding a doctrinal dispute over the essence of the rule of law. Why? Because the construction of the rule of law is not the product of one particular ideology, but of European legal culture. The idea of the rule of law is the result of the historical development of European constitutionalism since the 18th century. The rule of law was not created in the conditions of a political *fiat* but developed in the process of political transformations that Europe has been going through for over 200 years. It can therefore be assumed that the rule of law, as a product of historical evolution, is still subject to change. The only question to be addressed concerns the direction its further development can take[4]. It is

parliament. From this point of view, constitutional judiciary serves as the realization of the idea of democracy. See R. Ch. van Ooyen, *Hans Kelsen und die offene Gesellschaft,* 2. edition, Springer VS, 2017, p. 44ff.

[3] See A. Jamróz, *Refleksje o suwerenności narodu. Od genezy do współczesnego jej rozumienia,* in: *Konstytucjonalizm – doktryny – partie polityczne. Księga dedykowana profesorowi Andrzejowi Ziębie,* Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2016, p. 309ff. The author presents such a position following the contemporary French doctrine, whose representatives proclaim, among other things, that "a sovereign nation is the one that has adopted the constitution. By conferring the primacy of the constitution over laws, the constitutional judge thus does the will of the nation of which he is also a representative".

[4] The tension between the legislative authority and the constitutional court is, as it were, part of the construction of the rule of law. This tension is particularly pronounced when the parliamentary majority proposes a programme of political and social change within a conservative canon of thinking about the state and law. The genesis of the political function of the constitutional court is inextricably linked with liberal ideology. I will talk about this further on. The leftist-liberal

therefore worth pointing out the turning points in the history of European constitutionalism and using them to reflect on the contemporary dilemmas of a democratic state of law.

It is well known that the sovereignty of the people (nation) was the driving force behind the birth of European constitutionalism at the turn of the 18th and 19th centuries. The idea of democracy was the ideological source of the first European constitutions. To quote one of the participants in the Spanish debate preceding the adoption of the Cadiz Constitution of 1812 "to proclaim the sovereignty of the nation and to introduce a republic or a democracy is in effect one and the same thing"[5]. The Cadiz Constitution stated that sovereignty rests with the people and therefore the nation enjoys the exclusive right to establish a constitution. The Spanish people, as a political community, were obliged "to preserve and defend civil liberties, property and other constitutional rights through just laws". I refer to the Spanish example because it very aptly shows the most important features of the early modern European constitutional model. It was based on a constitution written by a sovereign nation to safeguard the rights and freedoms of the individual. The rights of the individual were guaranteed by parliament and its laws. The first European constitutions, Polish and French, were of a similar nature. We find in them elements of the later liberal vision of the rule of law from the mid-19th century, i.e. the principle

parliamentary minority can therefore count more on an understanding of its political and legal reasons in the decisions of the constitutional court. In view of this informal "ideological alliance", the parliamentary majority may be forced to abandon the implementation of policies consistent with voters' expectations concerning, among others, the legal protection of the traditional family, the abandonment of gender policy and multiculturalism in favour of a return to its own national tradition and to the Christian roots of European culture (See e.g. *Konservatives Manifest der WerteUnion Deutschland. Zukunft gestalten-Werte erhalten*, Schwetzingen, der 7. April 2018). It can therefore be assumed that in the near future, Western Europe may be confronted with a debate on the position of constitutional courts in a democratic model of power, in which European societies will want to regain control over their fate and future. A democratic state governed by the rule of law will require systemic corrections, so that it can respond to the needs and expectations of the sovereign peoples of Europe. Attempts of this kind made in Poland or Hungary, so far, have been negatively evaluated by the European liberal elites.

[5] U. Müssig, *Juridification by Constitution. National Sovereignty in Eighteenth and Nineteenth Century Europe*, in: *Reconsidering Constitutional Formation I. National Sovereignty. A Comparative Analysis of the Juridification by Constitution*, Springer Open, 2015, p. 44.

of constitutionalism, binding power by law and a catalogue of individual rights. The constitution and parliament, as an emanation of the will of the nation, guaranteed that the public authorities will respect the civil rights and freedoms. The will of the nation was understood as the real and natural will, i.e. the will of the majority concerning common matters and the common good.

The concept of primacy and supremacy of the constitution also emerged in Europe for the first time in the era of early constitutionalism. The idea was put forth by Emanuel Sieyès, the main publicist of the French Revolution. He distinguished between constituent power and constituted power. For Sieyès, the nation and its will took precedence over the constitution in that the nation was not bound by it and could change the constitution. The established constituted powers were bound in the creation of the law by the provisions of the constitution. The legislative power was then unable to change the constitution. In this sense the constitution was the fundamental law. Still, Sieyès envisaged the possibility that an ordinary legislator might assume constituent powers since "the will of the people has always been the supreme law"[6]. The doctrine of legislative power bound by the normative content of the constitution was not reflected in the first French constitution, which was an expression of public will; it was legitimised by the sovereign's rather than by compliance with constitutional provisions. Here, J.J. Rousseau's view that a sovereign people "cannot impose on themselves a right which they could not break" prevailed. The challenge for the French doctrine was therefore to create a political concept that would be capable of reconciling the sovereignty of a nation with the subordination of the state to the norms of law. French theorists of the rule of law, on the one hand, were distrustful of unlimited democracy, but on the other hand, did not want to give up the concept of a nation as the sovereign[7].

[6] M. Starzewski, Ś*rodki zabezpieczenia prawnego konstytucyjności ustaw,* Wydawnictwo Sejmowe, Warszawa 2009, p. 24.

[7] M. Zmierczak, *Współczesna dyskusja nad pojęciem państwa prawa we Francji,* in: *Studia z historii państwa, prawa i idei. Prace dedykowane profesorowi Janowi Malarczykowi,* Lublin 1997, p. 505.

The idea of the primacy of the constitution in the legal order, put forth by Emanuel Sieyès, coincided with the Polish practice of the political system of the time. The Polish Constitution of May 3 of 1791, as the only one at that time, explicitly formulated the principle of the primacy of the constitution. The preamble to the constitution stipulated that "the laws of the Sejm are to apply to it". A legal mechanism was also introduced to examine whether the law of the Sejm was in line with the constitution as part of the self-monitoring procedure on the part of the parliament itself. This is because the Sejm was the representative of "the omnipotence of the nation and the temple of legislation". The law of the sovereign parliament could not, therefore, be subject to the control of any other body. Therefore, plans were made to appoint a parliamentary commission tasked with "ensuring that no draft legislation would seek to violate the constitution and the cardinal rights".

The principle of the supremacy of the constitution was not reintroduced in Europe until over 50 years later at the time of the Revolution of 1848. Once again, the principle of national sovereignty became the basis for the creation of new constitutional systems, which were already a modern projection of the rule of law. Democracy was therefore the essential criterion for the rule of law at the beginning of its creation. The principle of constitutional supremacy introduced in the German draft of the Frankfurt Constitution of 1849 related to the federal structure of the unified Reich. The control of the constitutionality of the laws passed by the parliament was aimed at protecting the federation. At the same time, however, the Reichsgericht envisaged at that time as a constitutional court, was to secure constitutional rights and freedoms by investigating citizens' complaints concerning violations of their fundamental rights[8]. Safeguards of the rights of the individual were included in the draft constitution for the Austrian Empire (so-called Kremsier Constitution of 1849). At that time the executive rather than the legislative authority was seen as potentially infringing the fundamental rights. The government, not the parlia-

[8] A. Dziadzio, *Koncepcja państwa prawa w XIX wieku – idea i rzeczywistość,* "Czasopismo Prawno-Historyczne" vol. LVII, 2005, 1, p. 184ff.

ment, was suspected of violating the constitution. The protection of civil rights was to be mainly a concrete protection of the constitutional rights of citizens from the executive. The collapse of the Spring of Nations created a need for a re-evaluation of the definition of the rule of law. A search began for certain rules, procedures or institutions, e.g. administrative judiciary, which was supposed to guarantee the rule of law in the activities of state bodies. The formal and legal side of the rule of law became important. A significant feature of the rule of law was the fact that the authorities were bound not by the subjective rights of citizens guaranteed by the constitution, but by the substantive (objective) law, which defined the limits of its operation. Positive law (acts and codes) determined the rights of the individual, which were only a directive for the authorities[9], and were not binding on them. A classic example of such a model of power will be, from 1871 onwards, the German Reich, whose constitution neither guaranteed the fundamental rights of citizens nor provided for their institutional security in the form of a constitutional court. In the German version, the rule of law in the second half of the 19th century will mean nothing more than the principle of legalism in the activities of the authorities[10]. The view that a law in violation of the constitution could not remain binding law, the essence of the juridical concept of the primacy of the constitution (*Vorrang der Verfassung*), was not accepted by the German jurisprudence. P. Laband's view, denying courts the right to examine the constitutionality of laws, placed a heavy burden on Germany's approach to the institution of

[9] J. Woleński, *O państwie prawa: uwagi filozofa,* „Czasopismo Prawno-Historyczne" vol. LXIV, 2012, 2, p. 18ff.

[10] In the Second Reich, elections to the Reichstag were democratic, but the system of power was undemocratic. It was a model of an authoritarian monarchy. The German liberals abandoned the liberal and democratic state in exchange for the secularisation of the law. They limited themselves to the rule of law in formal terms, which they valued more than democracy itself. This will be a characteristic feature of German legal culture, established after 1945, which explains the somewhat open attack of German legal and political elites on any attempt to modify the position of courts, including in particular the constitutional court, prompted by the ideas of democracy and national sovereignty. It is also worth mentioning here that the German constitution of 1949 had no democratic legitimacy and was not created by the nation (*Volksgesetz)*, but by lawyers (*Juristengesetz).* See J. Collings, *Democracy's Guardians. A History of the German Federal Constitutional Court 1951-2001,* Oxford University Press, 2015, XXXVff.

constitutional review of the law[11]. This modern mechanism of the rule of law waited a long time for acceptance by German constitutionalists.

The German positivist model of the rule of law differed from the more liberal version that the Austrian liberals managed to put into practice in the second half of the 19th century. The Austrian *Rechtsstaat* had a distinctly natural foundation, i.e. natural human rights implied the content of positive law. The Austrian model of the relationship between individual rights, freedom and equality on the one hand and positive law on the other was not adopted until after the Second World War. In the Austrian Empire, fundamental rights were given constitutional status, and the State Tribunal (*Reichsgericht*) was set up to uphold them. The main task of the State Tribunal was to hear citizens' complaints about infringement of rights guaranteed by the Basic Law. Moreover, the protection of public subjective rights was ensured by the Administrative Court (*Verwaltungsgerichtshof*). Austrian legislation differentiated between an ordinary constituted power and the constituent power. Nevertheless, the State Tribunal, as the court for the protection of fundamental rights, was not vested with the competence to review the constitutionality of laws. In Austria, the fact that the constitutions took precedence over parliamentary laws could potentially result in a situation where an ordinary legislator could have violated the basic law. This is precisely the case diagnosed by Georg Jellinek, who in 1885 demanded the establishment of a Constitutional Court to carry out an abstract preventive review of laws at the request of the parliamentary opposition as a measure against what he dubbed "parliamentary lawlessness" (*parlamentarisches Unrecht*)[12].

G. Jellinek linked the function of a Constitutional Court with the mechanism of the protection of parliamentary minority against the dictates of the majority, who were able to pass laws in violation of the constitution. Jellinek's idea of establishing a Constitutional Court supported

[11] Laband seems to have followed in his reflections the path taken by O. Bismarck in his address to the Prussian Parliament of 1863, where he observed that "if the courts were empowered to decide whether or not the Constitution has been violated, this would mean that a judge was vested with the powers of the legislator". See R. Ch. van Ooyen, *Hans Kelsen...*, p. 39.

[12] G. Jellinek, *Ein Verfassungsgerichtshof für Österreich,* Wien 1885.

Austrian liberals in their political struggle against the parliamentary conservative coalition. A Constitutional Court was to be the last resort for the liberals, thanks to which they were able to retain some of their political agenda after loss of power.

G. Jellinek feared, however, that parliamentary political struggle could be transferred to the constitutional court. He wondered whether in such a situation judges would be objective without yielding to their own political passions and the influence of public opinion. G. Jellinek noticed the threat of the Constitutional Tribunal being politicised. He predicted a situation in which the political will of the parliamentary majority could correspond to the convictions of the judges themselves. In such a case, control of the constitutionality of the law would be purely illusory. With time, G. Jellinek showed far-reaching scepticism about the idea of a constitutional court. Having analysed the judgments of the US Supreme Court, he concluded that its judges assumed the role of the legislator, becoming the third chamber of parliament. He noted that American judges interpreted the Constitution based on the political needs of the legislator. G. Jellinek became distrustful of a constitutional court which could influence legislation through a creative interpretation of the content of the constitution[13].

I drew attention to Jellinek's views on the Constitutional Court because his idea was the missing link in the German concept of the rule of law. He came up with an idea that came to life after his death. However, one particular element of Jellinek's constitutional court concept was firmly rooted in the system of contemporary tribunals – namely, that the constitutional court carries out an abstract review of the constitutionality of laws at the request of the opposition party. This solution was not known to the Kelsen Constitutional Court of 1920. In the current Polish constitutional order, extremely broad grounds for abstract control have been adopted, which is neither limited by any deadline for the opposition to submit an application nor narrowed down as to its material scope, e.g. to examine the constitu-

[13] G. Jellinek, *Verfassungsänderung und Verfassungswandlung,* Berlin 1906, Elibron Classic series 2005, Adamant Media Corporation, p.14ff.

tionality of provisions with selected constitutional norms (e.g. concerning the rights of the individual).

Such a review of the constitutionality of the law fosters the position of the Constitutional Court as the next parliamentary chamber; it may lead to a reduction in the rights of the parliament and hamper the implementation of government policy. The most recent experience of Polish political practice has clearly shown it[14]. No wonder, then, that one seeks the point of balance between the freedom of action of the parliamentary majority in reforming the state and the protection of citizens' rights. Although the opposition, using abstract control, may act for the benefit of citizens, it may also be tempted to misuse this measure for its own political ends. Limiting the grounds for exercising abstract control over the constitutionality of the law should not be seen as an attempt to free democracy from the ties of the rule of law. The introduction of the principle that in cases of this type of control all the judges of the Constitutional Court should adjudicate is not an attempt to curb the rule of law, either.

The universal assimilation in Europe of the very instrument of the constitution was not initially accompanied by a deeper reflection on its relation to the existing legal order and hierarchy of legal acts. It was not until the development of H. Kelsen's normativism in the late 19th century, that the issue of establishing a hierarchical order of norms in the legal system was put on the agenda. However, I would like to draw attention to the views on the power of the legal norm put forth by L. Duguit, the French representative of the new direction, who anticipated some of the ideas of the Viennese school. Duguit's theory is interesting in that he had to re-evaluate the French view of the principle of the sovereignty of the nation and the role of the law as a manifestation of public will. The development direction of constitutional law proposed by Duguit was embodied in the motto: "from the subjective right to the power of the legal norm". He con-

[14] A. Dziadzio, *Spór o Trybunał Konstytucyjny z perspektywy historyczno-prawnej,* in: *Konstytucja w państwie demokratycznym,* S. Patyra, M. Sadowski, K. Urbaniak (ed.), Poznań 2017, p. 273ff.

sidered the concept of rights, which, we might add, was the driving force behind European constitutionalism, to be a "metaphysical" concept[15].

Duguit negated the power of the will of one person or a group of people over others, by introducing the postulate of a legal norm, which should be followed by those who govern the state. In this way, the danger of public authority acting arbitrarily would be reduced to a minimum. For him, the sovereignty of the people was nothing more than a concept of rights transferred to the science of the state. At the same time, its rejection meant the collapse of the idea of sovereignty in the traditional sense. The legal order is becoming sovereign because it is sole, independent and excludes any other system of norms. What, then, about sovereignty identified with the will of the nation? The nation remains its subject, but the exercise of sovereignty is transferred to the legislature, which exercises it in the name of the people ("in practice, it is not the people who want and speak, but individuals who believe that they want and speak in their name"). Duguit thus questioned the principle of the sovereign parliament to justify binding the legislator with a "higher law" and to justify the right of the courts to refuse to apply an unconstitutional law. Thus, he overcame a peculiar "fetishism" of the law, which characterised French jurisprudence. Duguit considered the hierarchy of norms to be "a powerful weapon of the individual against the freedom of the legislature". At the same time, he stressed that this weapon would be effective if independent and impartial courts were granted the right to examine the constitutionality of the adopted law.

In this context, Duguit's opposition to the creation of constitutional tribunals separate from the ordinary courts may be surprising. His negative position was due to the fact that he did not see a good way to create an independent and impartial constitutional court. He therefore concluded that granting the right to appoint judges to government or parliament would raise legitimate concerns about judicial independence. The election of judges by the people would make the constitutional court a political body. The principle of cooptation by the judges themselves would make

[15] S. Rosmarin, *Uwagi o sądownictwie konstytucyjnym,* "Przegląd Prawa i Administracji" LVII, Lwów 1932, p. 200ff.

it an aristocratic body incompatible with democratic requirements. Nor did Duguit see a good solution for entities entitled to initiate proceedings before the constitutional court. If decisions were to be made at the request of the government, one should be afraid that it would not be interested in repealing a norm that was convenient for it. The court's *ex officio* action would, in turn, allow the constitutional court to obtain a status of a political body of enormous power. In any case, according to Duguit this institution would overshadow the legislator[16].

Normativism the French or Austrian way was a theory of law, which after the end of the First World War did not find a wider application. The only exception was Austria, which, due to previous political experience, was somehow predestined for it[17]. In the interwar period, only the Czechoslovak constitution introduced a constitutional court. After 1918 there was a general process of democratization of state systems. The motto "democracy for all" became a recipe for a new peaceful world. The principle of the sovereignty of the nation celebrated another triumph. However, the idea of the supremacy of the constitution was not alien to the systemic reforms that were carried out in newly created states. The Polish Constitution of March 1921 stated in its Article 38 that "no law can violate the constitution". However, it was a provision without sanctions – a *lex imperfecta*. The courts did not have the right to "review the validity of duly promulgated laws", either. The control of the legislator by courts and tribunals was ruled out precisely on the grounds that power belongs to the nation.

Poland's tradition of representative democracy was also reflected in the content of the modern constitution of 1997, even though in put the Constitutional Tribunal to guard the hierarchy of legal norms. Article 4 of the Constitution of the Republic of Poland recognises the nation as the source of supreme power and sets out that "The Nation shall exercise such power directly or through their representatives". Furthermore, Poland's Constitution did not make the Constitutional Court but the President of

[16] Ibidem.

[17] C. Jabloner, *Die Gerichtshöfe des öffentlichen Rechts im Zuge des Staatsumbaus 1918 bis 1920,* "Beiträge zur Rechtsgeschichte Österreichs" vol. 2, 2011, p. 213ff.

the Republic of Poland, an authority representative of the nation, the safeguard of the basic law. The adjective "democratic" appears six times in the Polish Constitution. Pointing to the "democratic" nature of the state or the rule of law, the Constitution in almost every case refers to the Nation as the depositary of supreme power[18]. This should be stressed because this "dual" nature of the Polish Constitution was the cause of the conflict in 2015 between the new parliamentary majority and the President of the Republic of Poland on the one hand and the Constitutional Court on the other.

It should moreover be noted here that the newly elected President of the Republic of Poland appealed for respect of the rules of democracy and asked the outgoing Sejm to refrain from adopting a new law on the Constitutional Tribunal, prepared entirely by its judges themselves. The President called for refraining from electing the new five judges of the Court, also bearing in mind the precedent of 1997, when the election of judges was left to the newly elected Sejm. However, the ruling parliamentary majority at the time ignored the President's appeal and elected judges on the basis of a unique provision that allowed the outgoing Sejm to elect five judges within 30 days of the entry into force of the law. Such a provision did not respect the provisions of the Constitution, which demands the election of an individual judge, linked to the expiry of the term of office of the incumbent judge. The constitutional deadline for the election of a judge to the court therefore is linked to the end of a judge's term of office, and not to the date of entry into force of the law. In this way, the outgoing Sejm could elect judges of the Constitutional Court for several years to come.

The unconstitutional election of judges of the Constitutional Court resulted in the President not taking the oath "from persons elected to the position of the Court's judge". The Sejm of the new term, having found that the election was procedurally flawed, adopted resolutions on the lack of legal force of resolutions of the previous Sejm on the election of candidates for the position of the Constitutional Court judge. At the same time, the Sejm elected new persons from whom the President of the Republic of

[18] Report of the Team of Experts on questions of the Constitutional Court of 15 July 2015. See "Przegląd Sejmowy" XXIV no. 4(135), 2016, p.169ff.

Poland took the oath. These activities were carried out by the Sejm and the President before the Constitutional Tribunal issued its verdict on 3 December 2015, in which it only stated that the deadline for proposing candidates for the judge of the Constitutional Tribunal for three persons elected by the outgoing Sejm was consistent with the Constitution. Under no circumstances did the Constitutional Tribunal, in its verdict, state that the election of persons by the outgoing Sejm was constitutional, nor did it state that the election of judges by the new Sejm was unconstitutional. Therefore, all statements about the so-called "replacement judges" do not have any legal justification. The composition of the Constitutional Tribunal by the Sejm of the new term of office was done in accordance with the rules of democracy and law[19].

This dispute is an excellent test of how strong the Constitutional Court has become in political confrontation with bodies with democratic legitimacy. Its opposition attitude has been recognised by the legal and liberal elites because, after the experience of German totalitarian Nazism, it is not democracy and its cornerstone – the sovereignty of the nation, but rather human rights that are the criterion of the rule of law. The state is seen in terms of a "normative order", of which the constitution is the ultimate authority. The hierarchical structure of legal norms has today been recognised as the only guarantee of individual rights. Parliament has lost its unquestionable role as the guardian of civil rights. All authorities, including the legislator, play the role of "bodies of legal order", of which the constitutional court has become the guardian. Any attempt to change the political position of the constitutional court is therefore considered a threat to democracy, the rule of law and individual rights. The place of "sovereign democracy", in which the people, as a political community, exercise the right to pursue their aims and interests, is now occupied by "non-sovereign constitutional democracy". The idea of traditional sovereignty, as the supreme character of power, is treated with distrust in liberal democracy because of fears about the inclination of an organised group of people to

[19] A. Dziadzio, *Quis custodiet ipsos custodes? Die Auseinandersetzung um den Verfassungsgerichtshof in Polen (2015-2016),* "Osteuroparecht" 1/2018, 64 issue, p. 21ff.

assume "superpowers". In a non-sovereign constitutional democracy, it is the constitution that establishes and creates the state. In a constitutional democracy, sovereignty can no longer be attributed to any individual or institution[20].

The Polish constitutional dispute is in fact a fundamental dispute for the future of the principle of a democratic state governed by the rule of law. Modern liberal democracies are experiencing a certain internal crisis, as they have lost the balance between individual freedom and public interest. An accusation is rightly formulated that the concept of an independent democratic constitutional state ignores political and social reality, promoting only "normative reductionism"[21]. A question therefore arises again as to whether the majority democracy, based on the principle of the sovereignty of the nation as the only source of legitimacy for public authorities, which is fundamental to European legal culture, is not in conflict with the institution of examining the constitutionality of the law passed by the representatives of the sovereign-nation? On the one hand, the parliament wants to retain the freedom and the ability to shape state policy in accordance with the objectives adopted, but on the other hand, the constitutional court can cancel the will of the majority by invoking the abstract and general norms of the basic law.

Today, Jeremy Waldron is the most significant representative of the view that constitutional courts run counter to the principle of democratic governance of the parliamentary majority[22]. In his view, the most appropriate mechanism for taking community decisions is a majority vote in parliament. He considers resolving political issues in this way as the essence of a democratic system. Waldron emphasises two advantages of a majority vote. First, in his view, this is the fairest way of resolving controversies in a permanent pluralism of opinions. Debate is a hallmark of

[20] A. Krzynówek-Arndt, *Suwerenność a prawomocność panowania: od demokracji suwerennej do postsuwerennych demokracji konstytucyjnych,* in: *Suwerenność. Wybrane aspekty,* A. Krzynówek-Arndt, B. Szlachta (ed.), Kraków 2016, p. 43ff.

[21] Ibidem.

[22] J. Waldron, *The core of the case against judicial review,* "The Yale Law Journal" vol. 115, 6/2006, p.1346ff.

democracy, which in turn is characterised by a plurality of views. There are many political or moral issues on which no compromise can be reached, such as abortion, euthanasia, the death penalty, affirmative action, limits of religious freedom or of the freedom of speech. A majority vote procedure in such cases is the fairest way of making decisions that would be binding on all citizens. Secondly, according to Waldron, the majority mechanism in decision-making is supported by its egalitarian nature. Every citizen has an equal say in the resolution of political issues. Waldron points out that the majority decision-making is based on two principles inherent in democracy: procedural justice and egalitarianism[23].

From this perspective, Waldron sees constitutional courts as a threat to democracy if they have the competence to assess the legality of the effects of the majority rule. He considers them to be anti-egalitarian institutions because judges are not elected by universal suffrage and are not accountable to society. They are overly competent in relation to their political mandate. By logically deconstructing the notion of "tyranny of the majority" as the most serious charge against the majority democracy, Waldron does not hesitate to express the view that sometimes the will of the constitutional court can be tyrannical. Uncontrolled power of judges (feared as early as 1885 by Jellinek, who asked: *Quis custodiet ipsos custodes*) – according to Waldron – runs the risk that judges of constitutional courts start to see themselves as the voice of the people who created the constitution, putting themselves above government policy. That is why Waldron claims that it would be better if the protection of fundamental rights were in the hands of parliament. Parliament makes decisions based on universal and equal voting rights, is accountable to the voters and can conduct a public, transparent and broad debate on public matters.

Waldron's contribution lies in his highlighting the forgotten truth that there is a conflict between democracy and the rule of law, which can be the source of a political crisis. He recalls the obvious fact that the objective of a nation is determined exclusively by responsible and courageous political

[23] W. Ciszewski, *Demokratyczny status sądowej kontroli konstytucyjności prawa,* "Filozofia Publiczna i Edukacja Demokratyczna" vol. V, 1/2016, p.150ff.

action of the parliament and not by court rulings. However, the diagnosis that it is impossible to reconcile the idea of democracy with the institution of a constitutional court seems too radical today. A compromise solution leading to the neutralisation of this conflict would be the concept of a constitutional court, which would protect the fundamental rights of citizens by examining the constitutionality of acts of law enforcement[24]. A constitutional court with such a limited mandate is virtually unimaginable today. Nevertheless, European law is faced with the task of re-examining the principle of a democratic state governed by the rule of law. This reflection is urgently needed; otherwise, Europe will soon face another Spring of Nations.

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[24] The hybrid model of protecting the constitutionality of law adopted in Finland may foreshadow new trends in European constitutionalism. According to the Finnish Constitution, the Constitutional Committee of the Parliament (§74 of the Constitution) carries out an abstract ex ante review of a draft law. On the other hand, the courts carry out a concrete ex post review of the constitutionality of individual acts (§106). They may, in a case reviewed in light of the Constitution, take precedence over a provision of the Constitution if the application of the law provisions were "manifestly contrary" to the Constitution. See T. Ehs, *Die neue Machtverteilung. Von der Demo- zur Juristokratie?* "Momentum Quartely. Zeitschrift für Sozialen Fortschrit" vol. 1, no. 4, p. 242.

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Abstract

The article presents the historical development of the European concept of the rule of law, which is being currently confronted with the political reality of certain member states of the European Union. The main intention is to present different versions of the rule of law created by the European legal science and systemic practice since the end of the 18th century. A controversy is being revived on whether the idea of the rule of law with a prominent role of constitutional courts can be reconciled with the principle of democracy, based on the sovereignty of the people (nation), a distinctive trait of the European constitutionalism since more than two hundred

years. Constitutional courts, through the creative interpretation of the abstract and general norms of the constitution, transform from a negative legislator into a positive one. A question arises therefore whether constitutional courts, as inherently anti-egalitarian institutions, are trying to appropriate parts of the competences of the legislative power, which has the democratic mandate. The essence of the dispute is therefore who is the actual sovereign in a democratic state of law, i.e. the entity legitimized to decide on the content of the law. The article presents the turning points in the history of European constitutionalism and uses them to analyse the dilemmas of the modern democratic state of law.

Streszczenie

W artykule został omówiony rozwój historyczny europejskiej koncepcji zasady państwa prawa, która obecnie jest przedmiotem konfrontacji politycznej w niektórych państwach członkowskich Unii Europejskiej. Głównym celem artykułu jest przedstawienie różnych wariantów zasady państwa prawa stworzonych przez europejską naukę prawa, a stosowanych od końca XVIII w. Przedmiotem artykułu jest również spór, prowadzony od ponad dwustu lat w europejskim konstytucjonalizmie, czy można pogodzić idę państwa prawa wraz ze znaczącą rolą sądów konstytucyjnych z zasadą demokracji, opartą na suwerenności narodu. Sądy konstytucyjne, poprzez twórczą interpretację norm konstytucji o charakterze abstrakcyjnym i generalnym, przekształcają się bowiem z ustawodawcy negatywnego w ustawodawcę pozytywnego. W związku z tym powstaje pytanie, czy sądy konstytucyjne, które ze swej natury są organami antyegalitarnymi, nie próbują zawłaszczyć części kompetencji władzy ustawodawczej, posiadającej mandat demokratyczny. Rdzeniem tego sporu jest wobec tego odpowiedź na pytanie, kto jest rzeczywistym suwerenem w demokratycznym państwie prawa, a więc kto jest podmiotem legitymizowanym do decydowania o treści prawa. W artykule zostały zaprezentowane kluczowe momenty zwrotne w historii europejskiego konstytucjonalizmu, również w celu dokonania analizy dylematów występujących we współczesnym demokratycznym państwie prawa.

Key words: rule of law, sovereigty of the people, non-sovereign constitutional democracy, Léon Duguit, Jeremy Waldron

Słowa kluczowe: zasada państwa prawa, suwerenność narodu, niesuwerenna demokracja konstytucyjna, Léon Duguit, Jeremy Waldron

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