

BETWEEN DEMOCRACY AND THE RULE OF LAW

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Summary. This article discusses two basic concepts in scientific legal discourse – the concept of democracy and the concept of the rule of law. Obviously, both concepts are inextricably linked to the concept of the state of law (legal state). The necessary condition for the rule of law is the existence of the legal order, but it should be emphasised that one may link the idea of the rule of law to either the theory of the separation of powers or the theory of the sovereignty of the people. The author’s analysis concerns vertical and horizontal relationships between, in particular, the concept of the rule of law and the concept of the state and law. The author also considers the question of the binding force of legal norms. The thesis that the author makes is that, although there is a relationship between these concepts, one should also point out that both democracy without parliamentarianism and parliamentarianism without democracy are possible. Likewise, dictatorship does not essentially contradict democracy, which was emphasised especially by Jean--Jacques Rousseau, just like democracy does not necessarily rule out dictatorship.

Key words: democracy, rule of law, state of law, legitimacy of governments, parliament

The legal and political order which formed in the 19th century led to the implementation of the socio-political proposal described by Konstanty Grzybowski – the proposal that among “the bodies of the nation” (the Legislature, the Head of State with ministers, Courts) only one, namely the legislature, is the representative of the nation and the other bodies are its “commissars” with specific functions. The separation of powers thus means assigning a separate function to each body in the interest of the freedom of the individual. However it does not mean the equality of powers because only the people are above all the bodies and, in the representation-based systems, a representative of the people is identical to the people¹. What K. Grzybowski emphasises, and what should, as it were, constitute the first principle of legislation is the assumption that the process of creating statutes is the discussion of wise people. They establish statutes – the truth in a conversation and exchange of opinions. Each argument is valuable so each argument should be presented freely, that is to say irresponsibly. A statute is more likely to be the truth, the more individual viewpoints exist, that is to say the more independent opinions and the larger number of people, the stronger majority, agrees with one opinion. That is the reason why an opinion of the majority rather than the minority is more likely to be the truth – virtue; and

¹ See K. Grzybowski, *Demokracja francuska*, Kraków 1947, p. 51.

even more likely an opinion of the qualified majority, most likely – an unanimous opinion². To know what the majority opinion is, it is necessary that everyone presents opinions freely, that he or she expresses an actual opinion, rather than its caricature, deformed by the fear of repression if the freedom is limited³:

The scope of political decisions made by a parliament may be specified by identifying its functions as an entity making parliamentary decisions. These functions are the following: decisions related to parliamentary control (the control function); decision whose subject is the complex, multisequential process of a statute coming into effect (the law-making function); the group of decisions related to the staffing of the personal element of individual state bodies (the creative function)⁴. The decision-making function of the parliament, despite a specified inventory of entities which participate in the decision-making process, is dispersed and one may talk about a multiplicity of entities which perform this function. Particular attention should be given to informal entities “which – even when they do not have *ex lege* decision-making capability – influence in some way the decisions which are a prerogative of a parliament, and sometimes even made these decisions”⁵. Apart from formal decision-makers there is a group of informal entities which largely decide about the final shape of the decisions made at the parliamentary level. Although these entities do not have legal decision-making capability, they *de facto* (in a political sense) influence the decisions “animating and, occasionally, determining them”⁶. As Jarosław Szymanek emphasises, before a statute is enacted, a law-making initiative, which different entities have, must be performed. The initiative is preceded by the so-called law-making inspiration which may also be complex and not homogenous and, most importantly, entities which formally do not have the right to initiate legislation may stand behind this inspiration. At the draft preparation stage, a multiplicity of decisions is also visible, decisions which ultimately reflect the essence of the proposed statute and its entire political, ideological, axiological, cultural or economic environment⁷.

It should be noted that parliamentary decisions, concerning the need for and the shape of a statute are most often the decisions whose source are deci-

² Jean-Jacques Rousseau drew attention to the concept of virtue as the principle of the republic, see idem, *Umowa społeczna*, Warszawa 2010, s. 73. The concept of virtue became an inherent element in the rhetoric of the Jacobins during the French Revolution, see J.M. Thompson, *Przywódcy Wielkiej Rewolucji Francuskiej*, transl. by S. Pomian, Warszawa 1938, p. 221; J.M. Thompson, *Robespierre. Volume II. Od śmierci Ludwika XVI do śmierci Robespierre’a*, transl. by A. Dobrot, Warszawa 1937, p. 289–290; L. Saint-Just, *Wybór pism*, transl. by I. Bibrowska, Warszawa 1954, pp. 223–226.

³ K. Grzybowski, *op. cit.*, p. 42.

⁴ See J. Szymanek, *Decydowanie parlamentarne*, in: ed. G. Rydlewski, *Decydowanie publiczne. Polska na tle innych państw członkowskich Unii Europejskiej*, Warszawa 2011, p. 74.

⁵ *Ibidem*, p. 82.

⁶ *Ibidem*.

⁷ *Ibidem*, p. 94.

sions made by entities outside the group of entities entitled by legal norms, entities whose actions initiate the legislative work of a parliament⁸. One example is the relationship between statutes and ordinances, i.e. the relationship between constitutional executive actions and legislation. For Lorentz von Stein, a statute was the highest manifestation of the will of the state, through which the self-determination of state personality is expressed. According to him it would be an abstract ideal to limit the law-creation activity to the legislation process only and to determine the entire state activity by statutes⁹. A tendency to delegate normative activity to administrative authorities is increasingly frequent at present. E.R. Huber, many years ago, noticed the risks involved, concluding that “the professional coterie of senior ministry officials, connected with the traditions of the pre-war monarchic governments and hostile to the influence of the parliament and political parties, aimed to reduce political problems to technical and administrative issues, transform statutes, through excessive specialisation, into »legal logarithmic tables« and therefore make their contents independent from the legislative control; in short, shape the functioning of the state through ordinances”¹⁰.

This thought seems extremely timely in modern times, when ordinances constitute the largest number of universally binding normative acts introduced into the Polish legal system. The state activity is organised by this type of sources of the law, which, taking into account the political nature of law-making leads to the limitation of the role of the representative body, contrary to the concepts which make up the principles of the sovereignty of the people and the democratic state of law as well as the principle of the triple separation of powers. Although the dynamically developing civilisation sometimes necessitates making fast key decisions in the field of state security, such law-making activity of the executive authorities should be considered to be a degeneration of the legislative activity. As pointed out by Carl Schmitt the task of a parliament is to enact only general norms that are intended to remain in force permanently, shaped independently of specific circumstances. He opposed them with variable rules, dependent on specific circumstances, “specifying the way of the necessary or intentional action in accordance with the actual situations. The former specify the adequacy of social relations. The latter are only justified by the specific aspects of material appropriateness”¹¹. The experience of totalitarian states makes it possible to imagine the results of such approach to the statute-ordinance relationship, even more so, that one may definitely conclude that ordinances may be used to limit the managerial role of the representative body in relation to the administration, and also limit the freedom of the legislative body to make, through legislation, the changes that would, through the reorganisation

⁸ *Ibidem*, p. 95.

⁹ W. Zakrzewski, *Działalność prawotwórcza w świetle teorii niemieckiej*, Kraków 1959, pp. 25–26.

¹⁰ *Ibidem*, p. 48

¹¹ *Ibidem*, p. 53–54.

of social relations, limit liberty and property¹². In modern times – as Friedrich A. von Hayek, among others, wrote – nobody should have doubts that democracy may, to the same extent as authoritarian governments, use the totalitarian methods of government¹³.

The creation of the law should always assume and specify values of axiological nature; if they are not universally approved it is not possible to imagine obeying the orders of the sovereign authority because these orders definitely must not be based on the imaginary Kelsen's basic norm¹⁴. An interesting approach is that of John R. Lucas. He concludes that a state that would be truly morally neutral, that would be indifferent towards all values other than maintaining law and order, would not be obeyed enough to survive. A soldier may sacrifice his life for the queen and his homeland but not necessarily for a minimal state. A police officer who believes in the natural law may throw himself at a desperate armed person but will not do it if he considers himself to be an employee of some sort of protection and mutual insurance society, a society created as a result of agreements between prudent individuals. Certain ideals are indispensable so as to inspire those whose free cooperation is necessary for the survival of the state¹⁵. A minimal state, understood as a "night watchman" is equivalent to an ultra-minimal state which maintains monopoly for all types of the use of force except in cases of legitimate self-defence, that is to say rules out private revenge for the damage suffered and private enforcement of compensation; protection and enforcement is only offered to those who bought an insurance policy ensuring protection and the enforcement of their rights. People who do not buy a protection contract from such a monopoly are not protected¹⁶. Obviously the views mentioned above, which are in contrast with the assumptions of the legal positivism¹⁷, are not the subject of the analysis in this article. However one should realise that, in the process of law-making, the guarantees for the rule of law in the material sense, discussed by Zygmunt Ziemiński, should assume that the authorities respon-

¹² *Ibidem*, p. 63.

¹³ See F. A. von Hayek, *Konstytucja wolności*, Warszawa 2011, p. 112; compare C. Schmitt, *Teologia polityczna i inne pisma*, Warszawa 2012, p. 175, where this author writes that democracy without parliamentarism in the modern meaning of the word is possible and parliamentarism without democracy is possible. Likewise dictatorship does not essentially possible contradict democracy, just like democracy does not possible necessarily exclude dictatorship", *ibidem*, p. 175; compare J.J. Rousseau, *O dyktaturze*, in: idem, *Umowa społeczna*, pp. 126–129.

¹⁴ Czesław Martyniak presents an interesting critical opinion on the work of Kelsen, see idem, *Moc obowiązująca prawa a teoria Kelsena*, in: R. Charzyński, M. Wójcik (eds.), *Czesław Martyniak. Dzieła*, Lublin 2006, p. 176 ff.

¹⁵ J.R. Lucas, *The Principles of Politics*, Clarendon Press, Oxford 1966, p. 292.

¹⁶ R. Nozick, *Anarchia, państwo i utopia*, Warszawa 2010, p. 43.

¹⁷ Legal positivism is treated as a consequence of the pure theory of law, stating that a sufficient condition to recognise a statute as binding is enacting it according to procedural requirements which means that a recognise statute (lex) in a law (ius), compare S. Delacroix, *Making Law Bind: Legal Normativity as a Dynamic Concept*, in: (ed.) M. Del Mar, *New Waves in Philosophy of Law*, Palgrave Macmillan, London 2011, p. 147 ff.

sible for the enactment of universally binding legal norms must refer to the criteria of axiological nature, conditioned by a universally approved universal will¹⁸.

For the purposes of this article, I adopted the definition of the concept of the rule of that had been proposed many years ago by a renowned Polish constitutional specialist Andrzej Burda. He emphasised that

the concept of the rule of law, from both the theoretical and practical points of view, is inherently connected with certain characteristics and methods of the state apparatus. If the concept of the rule of law is understood is also as the not only formal and legal but also political and moral characteristics of the authorities creating the law on behalf of the people, then the concept of the reign of law in the social and state order will be inherently connected with the concept of democracy. The state apparatus will act lawfully if: a) the laws match the will of the current sovereign b) the administrative apparatus strictly implements tasks specified by the existing legal order; c) if all state bodies work under the procedures provided by the law and using the means provided by the law d) all state bodies, in all their actions, strictly respects the interests of the citizen recognised by the law¹⁹.

What A. Burda understood as the guarantees of the rule of law were all means protecting the effective implementation of the systemic and political principles of the state (including the principles of the rule of law) in the public life²⁰. On the basis of their nature and effectiveness level of the guarantees of the rule of law, the author divided them into major groups:

a) material guarantees that are inherent in the factors of social and economic nature, decisive for the general level of the culture of society and the nature of its political and legal institutions; b) formal guarantees, i.e., the means within the relevant political and legal organisations, intentionally and purposefully established to safeguard that the state apparatus follows the binding legal regulations aimed to strengthen the social discipline²¹.

Zygmunt Ziemiński wrote many years ago that “the postulate of the rule of law is of great political significance. Citizens’ subordination loses the character of personal dependence on other people and takes on the character of the subordination to a specific legal system, with a certain ideological justification”²². Z. Ziemiński made a clear distinction between the political postulate of the rule of law and the principle of the rule or the state of the rule of law. The first meaning is a postulate that state bodies act on the basis of the law, i.e. that they act on the basis of the competences, performing actions prescribed to them, and refraining from actions prohibited by norms. The second meaning emphasises the significance of the principle of the rule of law as a legal norm in force in a state, ordering state bodies to act only on the basis of the law. The third meaning high-

¹⁸ Janusz Grygieńc synthetically reviews the evolution of the theory of the universal will, see idem, *Wola powszechna w filozofii politycznej*, Toruń 2012, p. 23 ff.

¹⁹ A. Burda, *Demokracja i praworządność*, Wrocław 1965, pp. 211–212.

²⁰ *Ibidem*, p. 212.

²¹ *Ibidem*, p. 213.

²² Z. Ziemiński, *Praworządność*, in: A. Redelbach, S. Wronkowska, Z. Ziemiński, *Zarys teorii państwa i prawa*, Warszawa 1992, p. 278.

lights that we talk about a situation in which all state bodies actually act on the basis of the law²³.

In addition Z. Ziemiński distinguishes between the formal and material meanings the concept of the rule of law. The first meaning refers to the rule of law considered in isolation from the values that actions of a body would serve. The second meaning refers to the activities of the bodies in a way that certain values are implemented, which makes it possible to distinguish the material rule of law related to different social and political systems, depending on the indicated system of social values which are served by the enactment and application of the law²⁴. Z. Ziemiński also concludes:

The concept of the material rule of law is relative and reduced to a certain set of socially-recognised values (moral, political and cultural) adopted the social groups and classes which decide on the content of the legal norms of given state or subject the political system to criticism²⁵.

In addition, Z. Ziemiński isolates the rule of law related to the law-making and the rule of law related to the application of the law but we are only interested in the former. The rule of law related to the law-making may be reduced to the question if “such actions of authorities are performed on basis of the competences of these authorities and if these authorities follow the orders and prohibitions binding them when they use their law-making competences”²⁶. It is also important to isolate the formal and the material rule of law. The formal rule of law in the process of law-making requires that “the provisions containing binding legal norms are issued by a body entitled to do so, acting in the applicable manner and enact norms in the applicable field and the formal norms must comply, in terms of the contents, with the binding higher-ranking norms”²⁷. In the case of the material rule of law of the law-making process, properly enacted norms are axiologically justified in relation to the adopted system of values²⁸. Therefore, the concept of the rule of law may have a number of aspects. Nonetheless, it is always understood a type of the assessment of public activity²⁹.

As Andrzej Burda pointed out “one can say that public life develops on the basis of the principle of the rule of law if 1) the scope and boundaries of the state power are specified by the law; 2) legal provisions are strictly and faithfully obeyed”³⁰. These statements do not only refer to the methods of exercising state authority but also to the relationships between state bodies and citizens and

²³ *Ibidem*, p. 278.

²⁴ *Ibidem*, p. 279.

²⁵ *Ibidem*, p. 280.

²⁶ *Ibidem*, p. 281.

²⁷ *Ibidem*, p. 282.

²⁸ *Ibidem*, p. 282.

²⁹ See *inter alia* M. Wielec, *Udział prokuratora w postępowaniu administracyjnym jako wyraz ochrony praworządności*, in: M. Konarski, M. Woch (eds.), *Z zagadnień nadzoru i kontroli organów władzy publicznej w Polsce*, vol. 1, Warszawa 2012, p. 89 ff.

³⁰ A. Burda, *Polskie prawo państwowe*, Warszawa 1962, p. 134.

relationships between citizens³¹. One of the basis means to protect the rule of law – as A. Burda wrote when analysing Montesquieu’s constitutional doctrine – in particular to prevent those in power from breaking it and therefore to protect citizens’ freedom is the proper organisation of public authority, based on the principle of separation of power³².

In the theory of the state and law, as Z. Rybicki pointed out, guarantees of the rule of law are usually discussed in the following way: 1) the socio-political system, the principles of the political system of the state, the level of social awareness, etc.; 2) the legal order based on constitutional norms other legal acts subordinate to the Constitution and constructed hierarchically; 3) the principle of the supremacy of representative bodies and their exclusive right to legislate in the form of statutes; 4) the principle of the independence of courts; 5) a system controlling and supervising legal enactment of general implementing legal acts and individual legal acts³³.

The fulfilment of the rule of law on grounds of a given legal order should, in the first place, be commenced by adopting some legislation model whose theoretical assumptions match the adopted concept of implementing the model. However, when assuming a legislation model, one should remember that theory of this model, apart from the legislation theory “must contain a theory of legitimisation, describing the conditions on which a certain person or group is entitled to enact the law a theory of law-making justice, specifying what law it may or should create³⁴. A feature of democracy, expressed by the diversification of power and multiplicity of centres of power, is certainly pluralism understood as an attitude aiming at the limitation of centralism, not justified in given areas and in a given historical period³⁵. In Harold J. Laski’s opinion that the state is only one of many social organisations and state sovereignty does not in fact differ the power of the Church or a trade union. His views were clearly influenced by the concepts put forward by Otto von Gierke, who claimed that “sovereignty is not an attribute of some part of the state (a certain state body) but the entire organised community”³⁶. Society – according to Gierke – is the sum and entirety of different groups and the state is

³¹ *Ibidem*, s. 136.

³² See A. Burda, *Doktryna konstytucyjna Monteskiusza*, in: J. Bardach, K. Grzybowski (eds.), *Monteskiusz i jego dzieło*. Sesja naukowa Komitetu Nauk Prawnych Polskiej Akademii Nauk w dwusetną rocznicę śmierci, Warszawa 27–28 października 1955 r., PAN, Wrocław 1956, p. 215.

³³ See Z. Rybicki, *Gwarancje praworządności w procesie tworzenia prawa*, in: Z. Rybicki, M. Gromadzka-Grzegorzewska, M. Wyrzykowski (eds.), *Zbiór studiów z zakresu nauk administracyjnych poświęcony pamięci Profesora Jerzego Starościaka*, Wrocław 1978, p. 45.

³⁴ R. Dworkin, *Biorąc prawa poważnie*, Warszawa 1998, p. 4. According to Joe Mandle „legitimation requires an effective mechanism enabling citizens to publicly express opinions concerning the common good and it also requires that political decisions made in society reflect public debates. It is only once the conditions are fulfilled they may conclude that the law constitutes the common achievement of the entire society”, idem, *Globalna sprawiedliwość*, Warszawa 2009, p. 105.

³⁵ See S. Ehrlich, *Oblicza pluralizmów*, Warszawa 1980, p. 10.

³⁶ *Ibidem*, p. 124.

a community whose unity is not imposed by a superior power as its unity is created by the members of the community themselves³⁷.

The legal science assumes that a valuable relationship between the state and the law is only possible in the state of law. The renowned Polish law philosopher Antoni Kość wrote a long time ago that the essence of this relationship is the self-subjugation of the state to the law or self-dissolution of the state by the law, or voluntary limitation of state power by means of the law³⁸. According to this author, the element shaping the principle of the state of law is located in the control and limitation of state power in such a way that it is not the executive but a legal regulation that decides to what extent the intervention of the state is acceptable because only the law may specify the range of the state bodies activity. The intervention of the state in the legal sphere of individuals requires statutory authorisation³⁹.

Robert von Mohl is considered to be the first author who introduced the concept of the rule of law in the state science. He presented the concept and legal characteristics of an anti-absolutist legal state⁴⁰. The aim of the state of law is that the supreme power enables each individual, each social group and the community as a whole to develop all their potential and capabilities, and protects and supports the achievements of their reasonable aims⁴¹. According to this concept the boundaries of liberty are determined by the law and it is the law that is inherent good, the law legitimises and limits the authority⁴². R. von Gneist thought that state (its departments) must act on the basis of the law but the state of law must fulfil certain postulates. The state of law must consistently fulfil the

³⁷ *Ibidem*, p. 127.

³⁸ A. Kość, *Historyczne modele relacji prawa, państwa i religii w niemieckiej filozofii prawa*, Lublin 1995, p. 190

³⁹ *Ibidem*, p. 190.

⁴⁰ Zob. R. v. Mohl, *op. cit.*, p. 278 ff R. von Mohl contrasted the legal state with all other categories of state, i.e. the despotic, patriarchal, patrimonial, theocratic and autocratic states. According to R. von Mohl the role of the state power is not only to enact and apply statutes but it is also authorised to take administrative actions supporting citizens in their justified aspirations, A. Dziadzio, *Koncepcja państwa prawa w XIX wieku – idea i rzeczywistość*, „Czasopismo Prawno-Historyczne” 2005, vol. 1, p. 181 This author emphasises the importance of the concept of the rule of law as early as in the constitutionalism of the Spring of Nations, where this idea was based on the following principles: 1) the supremacy of the constitution and statutes 2) binding the state apparatus by statutes enacted by the parliament 3) abstract judicial and constitutional protection of statutes 4) the sovereignty of the nation 5) the separation of powers 6) the independence of the judiciary 7) the independence of judges 8) a catalogue of the rights and liberties of citizens 9) judicial and constitutional protection of the basic rights of citizens 10) civil law responsibility of the state for unlawful actions of its officers 11) secular character of the state 12) local government structure of the state, *ibidem*, p. 186. The presented concept lacked however the institution of administrative courts, whose introduction was the achievement of O. Bahr and R. Gneist. The first of them “assumed that the essence of the state of law is fulfilled in applying public law by state authorities”, *ibidem*, p. 186.

⁴¹ See J. Nowacki, *Studia z teorii prawa*, Kraków 2003, p. 34.

⁴² *Ibidem*, p. 35; compare A. Kość, *Historyczne modele...*, pp. 190–192.

postulates of constitutionalism, separation of the legislative, judiciary and executive; the judiciary should act impartially and according to defined procedures". It is Gneist who originally proposed the introduction of separate administrative jurisdiction in the state of law with a properly regulated procedure, based on the adversarial principle. Separate administrative courts, rather than common courts should hear complaints against decisions issued by the administration. L von Stein also considered judicial control over the administration as a condition for the existence of the state of law⁴³. O. Mayer discussed the essence of the state of law as well. His interpretation of this concept included the postulate of the constitutional regulation of the political system, separation of powers, the supremacy of statutes, independence of courts and judicial action in administration⁴⁴.

In Bohdan Wasiutyński's opinion, constitutions of "modern states" attempted to prevent aberrations of the police state through the implementation of the postulate of the rule of law, using a number of institutions. The author writes:

Constitution is only a programme, its implementation depends on the legal sense of society, The struggle for the law is a manifestation of the maturity of citizens. A person with a slave-like disposition humbly and passively accepts harm and injustice. The defence of the law, aspirations for the fulfilment of the requirements of justice is a quality of people with an independent character, appreciating their dignity. The modern state that must fiercely compete with other states must not base its existence on a passive mass of subjects, yielding to all orders of the government⁴⁵.

The first condition of the rule of law is obviously "the reign of a statute" understood in the first place as the subordination of the executive to the binding law. Statutes should comply not only with the constitution but also but also with unwritten legal principles defined as "the bases of human coexistence"⁴⁶. The first condition of the state of law is obviously "the reign of a statute" understood in the first place as the subordination of the executive to the binding law. Statutes should comply not only with the constitution but also but also with unwritten legal principles defined as "the bases of human coexistence". Currently, it is emphasised, e.g. by Antoni Pieniążek that "the very idea of the state of law appeared as an intellectual weapon of the radical bourgeoisie in their political struggle with the unlimited monarchical power"⁴⁷. Jan Boć in turn believes that the doctrine of the state of law did not "explode" in the firmament of the political thought and the political system. It had been forming slowly and not uni-

⁴³ J. Nowacki, *op. cit.*, pp. 18–19. The rule of law providing that public authorities act on the basis of and within the boundaries of the law was established in the currently binding Constitution of Poland of 1997.

⁴⁴ *Ibidem*, p. 19; compare the sentence of the Supreme Administrative Court of 10 June 1983, I SA 217/83, (ONSA 1983, Nr 1, poz. 41).

⁴⁵ B. Wasiutyński, *Praworządność*, Warszawa 1927, pp. 3–4.

⁴⁶ *Ibidem*, p. 6.

⁴⁷ A. Pieniążek, *Otwarty czy zamknięty porządek prawny*, in: *Prawo – administracja – gospodarka w procesie transformacji ustrojowej Rzeczypospolitej Polskiej*, (ed.) J. Buczkowski, J. Połuszny, „Zeszyty Naukowe Wyższej Szkoły Administracji i Zarządzania w Przemyślu” 2001, no. 7, p. 667.

formly and even unclearly⁴⁸. Józef Krukowski identifies two concept of the state of law or the legal state. In the formal sense the state of law means a state organisation independent of the material aim, based on statutes and more precisely connected with legal provisions, based on the principles in the constitution; in particular on the principle of the separation of powers and the checks and balances⁴⁹. In the material sense, the legal state means that the activity of the state is based not only on legal norms but also values (objectives), which are supreme to legal provisions⁵⁰.

The modern democratic state of law – according to J. Krukowski –

covers, from the formal point of view, three assumptions 1) that every individual is the subject of basic human rights and liberties, guaranteed by the state; 2) adopting the principle of the separation of state power consisting in the isolation of three sovereign authorities – law-making, executive and judiciary – which should control one another and cooperate for the common good of the individual; 3) obeying the principle of the rule of law⁵¹.

Differences between the material and formal concepts of the state of law result from – according to Ewa Kustra – from different decision related to three basic issues: 1) the concept of the sources of the law assumed in the processes of applying the law, i.e. to the answer to the question whether the sources of the law are only legal texts or perhaps also not-codified rules such as the principles of political ethics, which Ronald Dworkin classifies as the background of the law; 2) the concept of derogation, assumed in the same processes, with the key question related to the possibility of derogative functions of certain not codified rules, such as the principles of fairness which were recognised by Gustaw Radbruch; 3) the assumed concept of the obedience of the law, with a question whether the obligation to obey the law is absolute and may only be repealed by legal norms or whether it may also be repealed by non-codified rule, such as the principles of fairness, which, according to R. Dworkin justify acts of civil disobedience⁵². One may consider to be a special case of civil disobedience, recog-

⁴⁸ J. Boć, *Uwarunkowania rozwoju administracji publicznej*, in: J. Boć (ed.), *Administracja publiczna*, Wrocław 2003, p. 94. Hagen Schulze presents a synthetic analysis of the formation of constitutional states, see *idem*, *Państwo i naród w dziejach Europy*, Warszawa 2012, p. 78 ff.

⁴⁹ Zob. J. Krukowski, *Wstęp do nauki o państwie i prawie*, Lublin 2002, p. 17; see also Cz. Znamierowski, *Szkola prawa. Rozważania o państwie*, Warszawa 1988, pp. 98–101, where the author analyses the notion of the „state”.

⁵⁰ See J. Krukowski, *op.cit.*, p. 17.

⁵¹ *Ibidem*, pp. 17–18. The formal rule of law means obeying the law as such, regardless of its contents and the objective that the law serves, while the material aspect of the rule of law indicates the obedience of the law which conveys appropriate contents, the system of values approved by society and citizens, establishing at least the basis aims that the evolution of the state tries to achieve, see A. Sylwestrzak, *Historia doktryn politycznych i prawnych*, Warszawa 1995, p. 453.

⁵² E. Kustra, *Polityczne zagadnienia tworzenia prawa*, Toruń 1994, p. 55; see also *Władczy oraz negocjacyjny typ tworzenia prawa. Szanse i zagrożenia*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 1994, vol. 4, p. 23 ff. For G. Radbruch, „there are legal rules that are stronger than each legal provision and consequently a statute which contrary to them is not binding”.

nised in the constitution as the sacred right of the people and the most immediate obligation, the norm provided in article 35 of the constitution act (so called Jacobin Constitution) of 24 June 1793, related to the right of resistance in the event that the government violates the rights of the people⁵³.

The Constitution of the Republic of Poland, constituting the highest legal act in the system of the sources of the law, provides in article 2 that the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice. As Jerzy Jaskiernia noticed from the principle of the democratic state ruled by law it follows that legal acts, especially statutes should have a clear wording, in order to allow a citizen to independently create his or her own image of the legal situation in the state and society⁵⁴. Polish constitutional court defined a basic catalogue of formal and material conditions constituting the standard of a democratic state of law and this provision became the basic axiological formula for the assessment of the law for the Polish Constitutional Tribunal⁵⁵. One should emphasise the extreme importance of assessing the constitutionality of acts subordinate to the constitution; in modern states, such assessment is the prerogative of constitutional courts and takes place in the preventive (anterior) procedure and in the repressive (posterior) procedure⁵⁶. Anterior control refers to acts which have yet not become part of the binding law, i.e. when the legislative procedure related to these acts has not been completed⁵⁷. In the case of the preventive control a statute is controlled under the abstract proceedings procedure because it must not cause legal dispute of individual and concrete

G. Radbruch, *Rechtsphilosophie*, Stuttgart 1973, p. 347 ff., in: A. Kość, *Podstawy filozofii prawa*, Lublin 1998, p. 95; see also R. Dworkin, *op. cit.*, p. 336, 346 and 353–355, 625–626; compare L. Morawski, *Spór o pojęcie państwa prawnego*, „Państwo i Prawo” 1994, vol. 4, p. 3–12. L.L. Fuller lists eight postulates of the so-called internal morality of the law which a system of legal provisions should fulfil, see idem, *Moralność prawa*, Warszawa 2004; also compare H.L.A. Harts’ polemics with the assumptions presented L.L. Fullera. For H.L.A. Hart these postulates are only indications of good craftsmanship see H.L.A. Hart, *op. cit.*, pp. 350–371.

⁵³ M. Konarski, *Challenging the legitimacy of the law*, „Teki Komisji Prawniczej Polskiej Akademii Nauk Oddział w Lublinie” 2015, pp. 53–62.

⁵⁴ J. Jaskiernia, *Regulacja prawna procedur parlamentarnych*, „Państwo i Prawo” 1994, vol. 12, pp. 18–19; see also M. Wyrzykowski, *Legislacja – demokratyczne państwo prawa – radykalne reformy polityczne i gospodarcze*, „Państwo i Prawo” 1991, vol. 5, p. 25.

⁵⁵ In its decisions, the Constitutional Tribunal referred frequently to “the principle of correct legislation”, whose sense may be reduced to indicating to the legislator the constitutional canons of the correctness of its actions, determined from the point of view of citizens’ trust for the state and legal certainty. “Correct legislation” means creating the law, procedurally and materially, which complies the principle of the rule of law, citizens’ trust for the state but is not entitlement to assess the decency of this law, see more in K. Działocha, T. Zalański, *Zasada prawidłowej legislacji jako podstawa kontroli konstytucyjności prawa*, „Przegląd Legislacyjny” 2006, no. 3, p. 5 ff.

⁵⁶ See M. Woch, *Procedury kontrolne stosowane przed Trybunałem Konstytucyjnym*, in: (ed.) M. Konarski, M. Woch (eds.), *op. cit.*, p. 11 ff.

⁵⁷ See B. Banaszak, *Regulacja prawna procedury legislacyjnej w Austrii*, „Państwo i Prawo” 1997, vol. 5, pp. 81–82.

nature before it becomes part of the binding law⁵⁸. The procedure of the preventive control of the constitutionality is in a sense included in the legislation procedure and it is sometimes thought that this procedure breaches the position of the parliament as the political representation of the sovereign⁵⁹ with the judiciary included at the same time included in the process of making political decisions⁶⁰.

Interesting remarks concerning differences between parliamentarism and democracy were made by a renowned German law and politics philosopher – Carl Schmitt. He stresses the fact that in the 19th century the development of parliamentarism was linked to the dissemination of democracy. Parliamentarism treated as government through discussion – according to Carl Schmitt – has little to do with democracy. In his opinion “every real democracy means that not only those that are equal are treated equally but also everyone not considered equal is consistently subject to different forms of inequality”⁶¹. The postulate put forward by Carl Schmitt assumes a definite distinction between democracy and liberalism⁶². In his opinion the political substance in democracy must not only be of economic nature because economic equality does not result in political homogeneity⁶³.

⁵⁸ See Z. Czeszejko-Sochacki, *Sądownictwo konstytucyjne w Polsce na tle porównawczym*, Warszawa 2003, p. 204.

⁵⁹ According to K. Grzybowki, the creators of the first declaration of rights in France (1798) were first to define a statute, although the supremacy of the legislature, from the positive and systemic point of view, was not a new issue, as it was known in the British political system. Thus a statute was an expression of the will of the public and all citizens had the right, in person or through their representatives, to cooperate in the creation. The law-making itself, identified with a statute, was a significant expression of the will of the sovereign, see idem, *op.cit.*, p. 50.

⁶⁰ See T. Diemer-Benedict, *Prewencyjna kontrola konstytucyjności w Europie Środkowo-Wschodniej*, „Przegląd Sejmowy” 1997, no. 2, p. 49; M. Mistygacz, *Prewencyjna kontrola konstytucyjności ustaw*, „Kontrola Państwowa” 2011, no. 3, pp. 30–31. A detailed analysis of the notion of “decision” was made by S. Ehrlich. From the point of view of the subject of a decision he highlighted the significance of inter alia the division adopted in the military science, which then penetrated economics and management. The division concerns strategical operational and tactical decisions with the relevant aims see idem, *Dynamika norm*, Warszawa 1994, p. 27 ff.; compare. J. Zieleniewski, *Organizacja i zarządzanie*, Warszawa 1981, p. 480 ff.

⁶¹ C. Schmitt, *op. cit.*, p. 150.

⁶² Compare F. A. von Hayek, *Konstytucja wolności*, Warszawa 2011, p. 112, where the author concludes that “liberalism is a doctrine stating what the law should be like and democracy should be a doctrine of the way of determining what shall be the law idem, p. 112. For Roman Tokarczyk “political liberalism determines the way of exercising state authority, in particular its attitude towards civic liberties, e.g. of conscience, printed word, gatherings. According to political liberalism the political system of a state should be, republican or monarchical should be democratic. It should be a system governed by constitutional principles in order to protect the freedom of citizens. Economic liberalism consists in the freedom of labour, manufacturing and trade in the conditions of full competitiveness on the free market, enabling unrestricted development of private ownership. The essence of both branches of liberalism is the approval of the freedom of citizens. idem, *Elementy składowe myśli politycznej współczesnego liberalizmu*, in: E. Olszewski, Z. Tymoszczyk (eds.), *Ideologia, doktryny i ruch polityczny współczesnego liberalizmu*, Lublin 2004, p. 20.

⁶³ To see if national unity may be such an element compare *inter alia* R. Dmowski, *Wybór pism*, Warszawa 1990, p. 62 ff. In their draft of the constitution members of the National Democracy

C. Schmitt highlights that liberalism should be seen as a consistent, entire metaphysical system which results in free competition in the economy between individuals closed in their privacy, the freedom of trade and craftsmanship a social harmony of interests and continually increasing wealth⁶⁴. The essence of democracy is that all decisions should concern only those who made them. Referring to Rousseau and Lock's argument, he stresses that

in a democracy citizens yield also to laws contrary to their will. The law is a manifestation of the universal will which originates in the will of free citizens. The obedience of a citizen does not refer to some specific law but results from the universal will, understood *in abstracto*, expressed in elections. Due to the fact that citizens take place in elections, one may determine what the popular will is, on the basis of the votes. If election results do not match the expectations of certain people, it means that those lost votes did not correctly assessed the universal will⁶⁵.

Of key significance is the very notion of parliamentarism which was subject to a very detailed analysis by C. Schmitt, who refers to an F. Guizot's remark. He wrote that

parliamentarism is, in the first place, a system, which does accept the legitimisation of absolute power, which forces citizens to continuously, in every situation, look for the truth, which the actual authority should obey. A representative system is based on: firstly, discussion which forces the authorities to look for the truth together, secondly on openness meaning that authorities perform this search publicly, and thirdly the freedom of the press, which makes citizen look for the truth independently and tell the authority about the truth⁶⁶.

However, C. Schmitt remarks that the freedom of the press, even though an important and useful achievement of liberalism, is only a means to fulfil the first two postulates and an independent phenomenon⁶⁷.

proposed that the upper house of the parliament should have decisive rights and also that executive authorities should have a high position., see R. Wapiński, *Narodowa Demokracja 1893–1939*, Wrocław 1980, p. 211. In national publications, the dominant view was that the political system should be adjusted to the current needs of a given nation, see T. Banach, *Rzymska tradycja prawna w myśli politycznej Narodowej Demokracji (1918–1939)*, Warszawa 2010, p. 222, footnote 517. For the National Democracy, the ideal was the legal and political system of the republican Rome which “was an inspiration to build a legal system based on harmonised relationship of society, the state and the individual. According to the National Democracy, the superior position of an organised nations, with the state as the body expressing its will, was the best guarantee of legal certainty and the durability of the law. Roman authority of the law should be expressed by the postulates of the state based on the rule of law which constituted the main objective and, at the same time, a means to ensure long lasting political system, based on institutional guarantees, T. Banach, *op. cit.*, p. 231.

⁶⁴ See C. Schmitt, *op. cit.*, p. 180.

⁶⁵ *Ibidem*, p. 168.

⁶⁶ *Ibidem*, p. 178.

⁶⁷ *Ibidem*, pp. 180–181. A remark by Herbert Spencer, written in 1886, seems interesting “the aim of liberalism in the past was to define the boundaries of the power of kings. The task of real liberalism in the future shall be to limit the power of parliaments”, H. Spencer, *Jednostka wobec państwa*, Warszawa 2002, p. 182.

For the discussion related the concept of democracy and the relationship between the rule of law and constitutionality, the very concept of representation seems significant. Certainly, may be perceived at different levels, *inter alia* as picture representation, according to which representatives should be similar to those whom they represent and act instead of them; as theatrical representation, according to which representatives should interpret those whom they represent and speak and act on their behalf, in this enlivening the expectations the characters they represent; as legal representation according to which representatives should act on behalf those whom they represent, with their consent or on behalf of their interests⁶⁸. C. Schmitt stresses the fact that those who are represented, representatives themselves, and those before whom representatives stand, are connected by a special understanding of the dignity of a person, separate from representing interests or running an enterprise. However, the notion of a person was gradually losing its significance because it was increasingly often treated like an object and in late 19th century the number of citizens taking part in elections was identified with the entire nation or people as one person and “in this way the sense of the representation of the people and the very idea of representation was lost⁶⁹. Carl Schmitt correctly remarks that political parties do not represent conflicting views but are, in practice, interest groups organised around social and economic interests and arguments characteristic for a real discussion disappear, replaced by the culture of negotiations and an intentional calculation of interests and chances of expanding the scope of authority⁷⁰.

REFERENCES

- Banach, Tomasz. 2010. *Rzymska tradycja prawna w myśli politycznej Narodowej Demokracji (1918–1939)*, Wydawnictwo Prasy Lokalnej, Warszawa.
- Banaszak, Bogusław. 1997. „Regulacja prawna procedury legislacyjnej w Austrii”. *Państwo i Prawo* 5:75–83.
- Boć, Jan. 2003. „Uwarunkowania rozwoju administracji publicznej.” In J. Boć (ed.), „Administracja publiczna”, Wrocław.
- Burda, Andrzej. 1956. „Doktryna konstytucyjna Monteskiusza.” In J. Bardach, K. Grzybowski (eds.), „Monteskiusz i jego dzieło”. Sesja naukowa Komitetu Nauk Prawnych Polskiej Akademii Nauk w dwusetną rocznicę śmierci, Warszawa 27–28 październik 1955 r., Zakład im. Ossolińskich – Wydawnictwo PAN, Wrocław.
- Burda, Andrzej. 1962. *Polskie prawo państwowe*, Ossolineum, Warszawa.
- Burda, Andrzej. 1965. *Demokracja i praworządność*, Ossolineum, Wrocław.
- Czeszejko-Sochacki Z. 2003. *Sądownictwo konstytucyjne w Polsce na tle porównawczym*, Trybunał Konstytucyjny, Warszawa.

⁶⁸ See D. Runciman, M.B. Vieira, *Reprezentacja*, Warszawa 2011, p. 18 ff.

⁶⁹ C. Shmitt, *op. cit.*, p. 179.

⁷⁰ *Ibidem*, p. 147.

- Delacroix, Sylvie. 2011. "Making Law Bind: Legal Normativity as a Dynamic Concept." In M. Del Mar (ed.), "New Waves in Philosophy of Law", London: Palgrave Macmillan.
- Diemer-Benedict T. 1997. „Prewencyjna kontrola konstytucyjności w Europie Środkowo-Wschodniej”. *Przegląd Sejmowy* 2:39–50.
- Dmowski, Roman. 1990. *Wybór pism*, Państwowy Instytut Wydawniczy, Warszawa.
- Dworkin, Ronald. 1998. *Biorąc prawa poważnie*, Wydawnictwo Naukowe PWN, Warszawa.
- Dziadzio, Andrzej. 2005. „Koncepcja państwa prawa w XIX wieku – idea i rzeczywistość”. *Czasopismo Prawno-Historyczne* 1:177–201.
- Działocha, Kazimierz, Zalasiński, Tomasz, 2006. „Zasada prawidłowej legislacji jako podstawa kontroli konstytucyjności prawa”. *Przegląd Legislacyjny* 3:5–20.
- Ehrlich, Stanisław. 1994. *Dynamika norm*, Wydawnictwa Szkolne i Pedagogiczne, Warszawa.
- Fuller, Lon Louvius. 2004. *Moralność prawa*, Oficyna a Wolters Kluwer business, Warszawa.
- Grzybowski, Konstanty. 1947. *Demokracja francuska*, Czytelnik, Kraków.
- Hayek, Friedrich A. 2011. *Konstytucja wolności*, Wydawnictwo Naukowe PWN, Warszawa.
- Jaskiernia, Jerzy. 1994. „Regulacja prawna procedur parlamentarnych”. *Państwo i Prawo* 12.
- Konarski, Marcin, 2015. „Challenging the legitimacy of the law”. *Teka Komisji Prawniczej Polskiej Akademii Nauk Oddział w Lublinie* 8:53–62.
- Kość, Antoni. 1995. *Historyczne modele relacji prawa, państwa i religii w niemieckiej filozofii prawa*, Wydawnictwo Polihymnia, Lublin.
- Kość, Antoni. 1998. *Podstawy filozofii prawa*, Lublin.
- Krukowski, Józef. 2002. *Wstęp do nauki o państwie i prawie*, TN KUL, Lublin.
- Kustra, Ewa. 1994. *Polityczne zagadnienia tworzenia prawa*, Wydawnictwo UMK, Toruń.
- Kustra, Ewa. 1994. „Władczy oraz negocjacyjny typ tworzenia prawa. Szanse i zagrożenia.” *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 4:23–30.
- Lucas, John Randolph. 1966. *The Principles of Politics*, Clarendon Press, Oxford.
- Mandle, Joe. 2009. *Globalna sprawiedliwość*, Wydawnictwo Sic! Warszawa.
- Martyniak, Czesław, 2006. „Moc obowiązująca prawa a teoria Kelsena.” In R. Charzyński R., M. Wójcik, Cz. Martyniak(ed.). „Dzieła”, Wydawnictwo KUL, Lublin.
- Mistygacz, Michał. 2011. „Prewencyjna kontrola konstytucyjności ustaw.” *Kontrola Państwowa* 3:27–39.
- Morawski, Lech. 1994. „Spór o pojęcie państwa prawnego.” *Państwo i Prawo* 4:3–12.
- Nowacki, Józef. 2003. *Studia z teorii prawa*, Zakamycze, Kraków.
- Nozick, Robert. 2010. *Anarchia, państwo i utopia*, Wydawnictwo Aletheia, Warszawa.
- Pieniążek, Antoni. 2001. „Otwarty czy zamknięty porządek prawny.” In „Prawo – administracja – gospodarka w procesie transformacji ustrojowej Rzeczypospolitej Polskiej”, J. Buczkowski, J. Pośluszny (eds.), *Zeszyty Naukowe Wyższej Szkoły Administracji i Zarządzania w Przemysłu* 7:667–674.
- Rousseau, Jan Jakub. 2010. *Umowa społeczna*, Wydawnictwo Naukowe PWN, Warszawa.
- Runciman, David, Vieira, Mónica Brito. 2011. *Reprezentacja*, Wydawnictwo Sic!, Warszawa.
- Rybicki, Zygmunt. 1978. „Gwarancje praworządności w procesie tworzenia prawa.” In Z. Rybicki, M. Gromadzka-Grzegorzewska, M. Wyrzykowski (ed.), „Zbiór studiów z zakresu nauk administracyjnych poświęcony pamięci Profesora Jerzego Starościaka”, Ossolineum, Wrocław.
- Saint-Just, Louis. 1954. *Wybór pism*. Tłum. I. Bibrowska. Książka i Wiedza, Warszawa.
- Schmitt, Carl. 2012. *Teologia polityczna i inne pisma*, Wydawnictwo Aletheia, Warszawa.

- Schulze, Hagen, 2012. *Państwo i naród w dziejach Europy*, Wydawnictwo UW, Warszawa.
- Spencer, Herbert, 2002. *Jednostka wobec państwa*, Warszawa: LIBER.
- Sylwestrzak, Andrzej, 1995. *Historia doktryn politycznych i prawnych*, Warszawa: Wydawnictwa Prawnicze PWN.
- Szymanek, Jarosław. 2011. „Decydowanie parlamentarne.” In G. Rydlewski (ed.), *Decydowanie publiczne. Polska na tle innych państw członkowskich Unii Europejskiej*. Dom Wydawniczy ELIPSA, Warszawa.
- Thompson, James Matthew. 1937. *Robespierre*. Tom II. *Od śmierci Ludwika XVI do śmierci Robespierre’a*. Tłum. A. Dobrot, Wydawnictwo J. Przeworskiego, Warszawa.
- Thompson, James Matthew. 1938. *Przywódca Wielkiej Rewolucji Francuskiej*. Tłum. S. Pomian, Towarzystwo Wydawnicze „Rój”, Warszawa.
- Tokarczyk, Roman. 2004. „Elementy składowe myśli politycznej współczesnego liberalizmu.” In E. Olszewski, Z. Tymoszczuk (ed.) „Ideologia, doktryny i ruch polityczny współczesnego liberalizmu”, Wydawnictwo UMCS, Lublin.
- Wapiński, Roman, 1980. *Narodowa Demokracja 1893–1939*, Zakład Narodowy im. Ossolińskich, Wrocław.
- Wasiutyński, Bohdan, 1927. *Praworządność, Obóz Wielkiej Polski*, Warszawa.
- Wielec, Marcin. 2012. „Udział prokuratora w postępowaniu administracyjnym jako wyraz ochrony praworządności.” In M. Konarski, M. Woch (eds.), „Z zagadnień nadzoru i kontroli organów władzy publicznej w Polsce”, t. 1, Wydawnictwo Marek Woch, Warszawa.
- Wyrykowski, Mirosław. 1991. „Legislacja – demokratyczne państwo prawa – radykalne reformy polityczne i gospodarcze.” *Państwo i Prawo* 5:17–28.
- Zakrzewski, Witold. 1959. *Działalność prawotwórcza w świetle teorii niemieckiej*, Państwowe Wydawnictwo Naukowe, Kraków.
- Zieleniewski, Jan. 1981. *Organizacja i zarządzanie*, Państwowe Wydawnictwo Naukowe, Warszawa.
- Ziemiński, Zygmunt. 1992. „Praworządność.” In A. Redelbach, S. Wronkowska, Z. Ziemiński, „Zarys teorii państwa i prawa,” Wydawnictwo Naukowe PWN, Warszawa.
- Znamierowski, Czesław. 1988. *Szkola prawa. Rozważania o państwie*, Instytut Wydawniczy PAX, Warszawa.

POMIĘDZY DEMOKRACJĄ A PRAWORZĄDNOŚCIĄ

Streszczenie. Niniejszy artykuł dotyczy dwóch podstawowych pojęć występujących w naukowym dyskursie prawniczym, a mianowicie pojęcia demokracji i pojęcia praworządności. Oba pojęcia nieodłącznie związane są oczywiście z pojęciem państwa prawa. Niezbędnym warunkiem praworządności jest istnienie samego porządku prawnego, ale należy podkreślić, że ideę praworządności można wiązać bądź z teorią podziału władzy, bądź z teorią suwerenności ludu. Analiza, jaką podejmuje autor na łamach niniejszych rozważań, ma związek z relacjami wertykalnymi i horyzontalnymi pomiędzy przede wszystkim pojęciem praworządności a pojęciem prawa i państwa oraz odpowiedzią na pytanie o moc wiążącą norm prawnych. Teza, jaką stawia autor, zakłada, że mimo istnienia związku pomiędzy tymi pojęciami, należy wskazać, że możliwa jest demokracja bez parlamentaryzmu oraz możliwy jest parlamentaryzm bez demokracji. Podobnie dyktatura nie jest wcale z gruntu sprzeczna z demokracją, co podkreślał przede wszystkim Jan Jakub Rousseau, tak jak demokracja wcale nie musi wykluczać dyktatury.

Słowa kluczowe: demokracja, praworządność, państwo prawa, legitymizacja władzy, parlament