

Edited by: Agnieszka Bień-Kacała, Lóránt Csink,
Tomasz Milej, Maciej Serowaniec

Wojciech Włoch*

Nicolaus Copernicus University in Toruń

The Democratic Paradox Revisited - how liberal constitutionalism supports democratic equality¹

1. Introduction

Modern democracy is not a simple and immediate realisation of an abstract idea of democracy². After the experiences of World War Two ‘what emerged instead might best be described as a new balance of democracy and liberal principles, and constitutionalism in particular, but with both liberalism and democracy redefined in the light of the totalitarian experience of midtwentieth-century Europe’³. The model of democracy functioning in the so-called western states can be defined after F. Fukuyama as a combination of the principle of democratic accountability and participation, and the liberal principles of the rule of law

* Wojciech Włoch – Assistant Professor, Nicolaus Copernicus University, Toruń, Poland, wloch.wojciech@gmail.com.

¹ The article has been prepared as part of the grant ‘Law-making delegation in representative democracy’ financed by the National Centre of Science, contest Opus 11, registration no. 2016/21/B/HS5/00197.

² Cf. R. A. Dahl, *On Democracy*, New Haven-London 1998, pp. 35-43, 84-99.

³ J.-W. Müller, *Contesting Democracy. Political Ideas in Twentieth-Century Europe*, New Haven-London 2011, p. 129.

and the guarantee of individual rights⁴. The combination of these principles would constitute a systemic optimum for which no other alternative is available, as it closely links both institutional rationality and political legitimisation. In other words, liberal democracy is interpreted as ‘the end of history’, i.e. an optimal combination of principles and institutions⁵. And although the development of political orders is neither linear nor completely determined when it comes to the direction it follows, at the level of ideas liberal democracy is seen as the culmination of humanity's search for ‘the ideal system of government’. Thus, it would offer a solution to the problem identified by I. Kant: ‘the highest task which nature has set for mankind must therefore be that of establishing a society in which *freedom under external laws* would be combined to the greatest possible extent with irresistible force, in other words of establishing a perfectly *just civil constitution*’⁶.

The purpose of this article is to attempt to answer the question whether the combination of liberal constitutionalism and democracy is accidental, or whether it is possible to observe an important connection between the two elements. In the first part I discuss the so-called democratic paradox resulting from the tension between the principle of democratic self-determination and liberal limitations connected with the rule of law and the guarantees of the rights of an individual. Indeed, modern democracy is

⁴ Cf. F. Fukuyama, *The End of History and the Last Man*, New York-Toronto 1992, p. 42 et seq.

⁵ *Ibid.*, p. xii.

⁶ I. Kant, *Idea for a Universal History with a Cosmopolitan Purpose*, [in:] I. Kant, *Political Writings*, trans. B. Nisbet, Cambridge-New York-Port Chester-Melbourne-Sydney 2003, pp. 45-46.

a mixed system consisting of democratic procedures contained in the constitutional framework of the representative system. Part two of the article deals with the tension between radically understood democracy and constitutionalism. From the point of view of democracy as such, any – also constitutional – limitation of the democratic will is seen as undemocratic. Is constitutionalism therefore irreconcilable with democracy? In the third part I point to such an understanding of constitutional liberalism as emphasises the role of civil rights as constitutive elements of the democratic system. In this approach, liberal constitutionalism is a form of reinforcement of civic subjectivity. Liberal constitutional rights are to facilitate democratic participation and the protection of pluralism. Thus, an affirmation of pluralism leads to perceiving liberal constitutionalism as being closely related to democracy.

2. The paradoxical nature of liberal democracy

The combination of the two traditions of liberalism and democracy does not need to be seen as indispensable or inevitable. ‘On one side we have the liberal tradition constituted by the rule of law, the defence of human rights, and the respect of individual liberty; on the other the democratic tradition whose main ideas are those of equality, identity between governing and governed, and popular sovereignty. There is no necessary relation between those two distinct traditions, but only a contingent historical articulation’.⁷ According to Ch. Mouffe, contemporary liberal democracies not so much as combine the above two principles as rather subject democracy to liberal principles.

⁷ Ch. Mouffe, *The Democratic Paradox*, London-New York 2000, p. 2-3.

They are characterised by a democratic deficit by accentuating the idea of the rule of law and the rights of the individual at the expense of the idea of sovereignty of the people. 'For people in the West – as F. Zakaria writes – democracy means 'liberal democracy': a political system marked not only by free and fair elections but also by the rule of law, a separation of powers, and the protection of basic liberties of speech, assembly, religion, and property'⁸. Here, on the other hand, democracy is understood in a narrow procedural sense as a process of selection of the 'governing'⁹. From such a point of view, the system opposite to liberal democracy, i.e. the so-called illiberal democracy, would also be affected by a deficit, only of a different kind. Illiberal democracy would constitute a political system allowing for free and fair elections, however exhibiting a deficit in the area of the rule of law and the division of powers, thus failing to ensure protection of the fundamental freedoms of speech, association, religion, and property. Assuming the position of Ch. Mouffe one may say that the choice of a particular model of liberal or illiberal democracy entails a deficit in the sphere of democracy or liberalism. Mouffe argues that the tension between liberalism and democracy is permanent and a full reconciliation of these elements is impossible¹⁰. Any interpretation of the above two components of modern democracy points to a specific hegemony that is not 'natural and alternativeless' and that can be questioned.

⁸ F. Zakaria, *The Future of Freedom*, New York-London 2007, p. 17.

⁹ Cf. *Ibid.*, pp. 18-19. Cf. the topic of procedural democracy D. Held, *Models of Democracy*, Cambridge 2008, pp. 125-157; cf. also A. Przeworski, *Democracy and the Limits of Self-Government*, New York 2010, pp. 111-112.

¹⁰ Ch. Mouffe, *The Democratic Paradox*, p. 5.

A specific threat to democracy is seen in such a form of hegemony as negates the dispute between liberal freedom and democratic equality¹¹ that is inscribed in the essence of democracy and presents itself as the 'ultimate and natural' form of democratic policy. Its negative effect rests in the fact that the possible claims against the current *status quo* are interpreted as anti-democratic, which allows anti-democratic forces to take them over and direct them not towards current hegemony, but against 'democracy in general'. From this perspective, the threat to democracy consists in the elimination of antagonisms from the forum of democratic policy and placing an exaggerated emphasis on the role of deliberation and agreement. Indeed, the nature of democratic policy in Mouffe's view is paradoxical and should be understood 'not as the search for an inaccessible consensus – to be reached through whatever procedure – but as an 'agonistic confrontation' between conflicting interpretations of the constitutive liberal-democratic values'¹². Assuming that Ch. Mouffe's observations are correct one may ask whether from the paradoxical nature of democratic policy it results that the perspective of a 'procedure-based consensus' should be abandoned in favour of 'agonistics', or whether what is meant is an establishment of a certain form of a balance between them?

¹¹ P. Rosanvallon also notes that the development of modern democracy involves an 'inversely proportional' development of the importance of political and social citizenship, the people in a political and social sense. 'The 'people', understood in a political sense as a collective entity that ever more powerfully imposes its will, is less and less a 'social body'. Political citizenship has progressed, while social citizenship has regressed', P. Rosanvallon, *The Society of Equals*, trans. A. Goldhammer, Cambridge–London 2013, p. 1. The process of extension of democratic rights would occur at the expense of democratic equality.

¹² Ch. Mouffe, *The Democratic Paradox*, p. 9.

Is such a balance at all possible? Does the antagonism that makes every agreement inconclusive and impermanent mean that any form of policy regulation through liberal principles threatens an expression of various positions and political postulates? In other words, does liberal constitutionalism suppress pluralism or rather establish the framework for its peaceful coexistence?

With respect to the objectives of governance (goals of political power) constitutional liberalism means the defence of individual autonomy and dignity against arbitrary coercion (e.g. social, public or ecclesiastical). It is therefore related to a limitation of political power. 'For to us 'constitution' means – as Sartori writes – a frame of political society, organised *through and by the law*, for the purpose of restraining arbitrary power'¹³. In Zakaria's interpretation, 'liberal constitutionalism' is liberal because it affirms the value of individual freedom, it is constitutional, as it 'places the rule of law in the centre of policy'¹⁴. In liberal constitutionalism, the division of powers, equal justice under law, independent judiciary, the separation of state and church are to serve the protection of fundamental freedoms of individuals (freedom of speech, assembly, religion, property rights...) which are treated as 'inborn and inalienable'. Contemporary western democracies are not 'pure democracies', but are rather an example of a 'mixed system' where non-elected institutions operate alongside democratic institutions. This results from the conviction that 'more democracy' does not automatically lead to 'more

¹³ G. Sartori, *Constitutionalism: A Preliminary Discussion*, The American Political Science Review, Vol. 56, No. 4, 1962, p. 860.

¹⁴ F. Zakaria, *The Future of Freedom*, p. 19.

freedom’¹⁵. Modern liberal democracy, in addition to the mechanisms and institutions that enable the implementation of the principle of self-government (or self-determination), introduces mechanisms and institutions that implement the principle of self-control, which has an inhibitory effect on the political power and secures the rights of individuals against their violation, as well as stabilising the political system by making its functioning independent of variable ‘social moods’, fluctuations of public opinion, or self-proclaimed ‘spokesmen of the people’¹⁶. Institutions resulting from the rule of law (e.g. independent courts, public services, supervisory institutions) are to have positive effects, not only on the stability, but also on the effectiveness of the political system, the quality of governance, and are to ensure protection against excessive informal influences of interest groups on the functioning of public institutions¹⁷.

The question arises whether the principle of self-control is not too restrictive for the democratic ideal of self-determination? ‘The ideal of self-determination – as H. Kelsen puts it – requires that the social order shall be created by the unanimous decision of all its subjects’¹⁸. In the original form the idea of self-determination does not permit diversity and conflict of opinion, and a lack of agreement

¹⁵ Cf. *Ibid.*, p. 26.

¹⁶ Cf. J.-W. Müller, *Contesting Democracy...*, pp. 146 et seq.

¹⁷ Cf. F. Fukuyama, *Political Order and Political Decay. From the Industrial Revolution to the Globalization of Democracy*, New York 2014, chapters 1, 13, 27, 36.

¹⁸ H. Kelsen, *General Theory of Law and State*, trans. A. Wedberg, Cambridge 1949, p. 285. On the transformation of the idea of self-determination into the idea of a representative government, cf. also A. Przeworski, *Democracy...*, pp. 17 et seq.

with a ‘unanimous decision’ would mean an exclusion from society. The principle of *a priori* unanimity excludes the possibility of disagreement. Any change of a unanimously established order would be impossible as the groups or individuals that defy a particular shape of social order would actually resign from being part of it. In practice this kind of idea is virtually unworkable if we take into account the many forms of social diversification. Attempts at its implementation may take a distorted form of obtaining unanimity with the use of insistent propaganda and coercion. However, this would be a ghastly caricature of unanimity as an expression of self-determination. In practice unanimity is unattainable. This does not mean that the principle of self-determination is impossible to implement. The possibility of its fulfilment involves a limitation of its applicability: not ‘everyone’, but the ‘majority’ should define the content of the legal order. The principle underlying majority rule is that ‘social order shall be in concordance with as many subjects as possible, and in discordance with as few as possible’¹⁹. Thus, the majority rule ensures political freedom to the maximum extent possible, i.e. self-determination, as the compliance of the will of the individual with the common will. ‘Theoretically, democracy is a political or social form in which the will of society or – less figuratively – the social order is generated by its subjects, the People. Democracy means that the leader and those who are led, that the Subject and Object of rule, are identical. It means the rule of the People over itself’.²⁰

¹⁹ H. Kelsen, *General Theory...*, p. 286.

²⁰ H. Kelsen, *The Essence and Value of Democracy*, trans. B. Graf, Lanham-Boulder-New York-Toronto-Plymouth 2013, p. 35.

However, the complexity of modern societies as well as their greatness causes that direct participation of citizens in law-making is practically impossible. Just as the division of labour has become indispensable in the economic reality, it has also proved necessary in the political sphere. Democratic self-determination is in fact implemented in the form of participation in the procedure of nominating individuals to legislative bodies, i.e. mainly through the participation in the elections. ‘The organ authorised to create or execute the legal norms is elected by those subjects whose behaviour is regulated by these norms’²¹. Contemporary democracy assumes the form of an indirect, representative democracy, where individuals selected for a particular assembly are treated as representatives of the voters²².

3. Constitutionalism versus strong democracy

The constitution of any institution, as E.-J. Sieyès claims, endows it with an organisational framework, forms, and laws allowing it to fulfil the functions it was established to perform. A representative institution cannot exist without a constitution, i.e. an establishment of a representative institution is possible only by its appointment in the constitution. ‘Thus the body of representatives entrusted with the legislative power, or the exercise of the common will, exists only by way of the mode of being which the

²¹ H. Kelsen, *General Theory...*, p. 289.

²² R. Dahl notes that the transformation of democracy from direct to representative has enabled the implementation of the idea of democracy in large and complex societies. Cf. R. Dahl, *Democracy and its Critics*, New Haven 1989, chapter 15. G. Sartori defines the principle of representation as an ‘intermediate principle’ between the political ideal and reality, G. Sartori, *Theory of Democracy Revisited*, Chatham 1987, chapter 4.5.

nation decided to give it. It is nothing without its constitutive forms; it acts, proceeds, or commands only by way of those forms'²³. The said 'constitutive forms' establish a representative institution, define its functions and the manner of conduct and scope of its activities. Without the above constitution, the institution has neither authority nor competence, and therefore no basis for being both a representative and a legislative institution. The 'constitutive forms' are to ensure protection against an arbitrary attribution of power and any exceeding of the entrusted competences. This way, the nation protects its 'common will' against an abuse of 'common representative will'. The nation is a 'constituent power' (*pouvoir constituant*) that defines the fundamental norms for the functioning of political institutions. The norms defining the organisations and functioning of the political institutions within a representative system (legislative and executive power) constitute positive constitutional law, which is fundamental with regard to 'constituted power' (*pouvoir constitué*) and is completely dependent on constituent power. 'The nation exists prior to everything; it is the origin of everything. Its will is always legal. It is the law itself'²⁴. Constituted power (representative system) is in fact an authority delegated by constituent power (nation). A delegated authority cannot change the terms of its delegation. The will of constituent power is unlimited, whereas constituted power is limited by the 'terms of delegation'. From the perspective of Sieyès' theory, the role

²³ E.-J. Sieyès, *What Is the Third Estate?* in E.-J. Sieyès, *Political Writings. Including the Debate between Sieyès and Tom Paine in 1791*, trans. M. Sonenscher, Indianapolis-Cambridge 2003, p. 135.

²⁴ *Ibid.*, p. 136.

of the constitution consists in defining the principles and rules of functioning of legislative and executive power. The nation itself is not subject to the constitution, as it is a natural being and a source of positive law, whilst the existence of political institutions depends on the fundamental positive law (norms of the constitutional law).

Sieyès' concept may constitute a kind of a model for the theory of the unlimited sovereignty of a nation: a nation (constituent power) ontologically precedes constituted political institutions and in that sense is independent of positive law. Positive law cannot constitute a nation, yet without a nation there is no positive law. Similarly, positive law cannot bestow on the nation rights that it no longer possesses (we may say that it may only declare them). Delegated power is fully dependent on the nation, and therefore it cannot award it with anything that it no longer possesses. Constituted power is subject to the constitution established by unlimited constituent power. The constituent power itself is not subject to the constitution, for it would thus cease to be unlimited and ontologically primary. Any limitation of constituent power would lead to contradictions, as by the imposition of such limitations it would no longer be a constituent power. The nation is in a way permanently embedded in the state of nature, for its will as a constituent power cannot be regulated and limited. In this sense, the will of the nation has an absolute primacy over the positive law, for it is its will that 'is the source and supreme master of all positive law'²⁵. Taking Sieyès' radical view, the limitation of constituent power of the nation would mean a loss of freedom by the nation and would open the way to

²⁵ Ibid., p. 138.

establishing a dictatorship. From the thus outlined perspective the principles of liberal democracy appear as a limitation of ‘true democracy,’ as they not only introduce the inviolable rights of individuals, but also define the constitutional principles and rules governing the functioning of the political system (e.g. principles of the rule of law, lawmaking and amendment of the constitution²⁶) which limit the freedom of the nation as a constituent power.

The limitations introduced by constitutionalism are evident in the example of ‘the Federalist Papers’, where the possibility of direct rule by the people is rejected thus differentiating the republican system (today’s representative democracy) from direct democracy. ‘We may define – J. Madison writes – a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour’²⁷. A republic differs from direct democracy particularly in two respects: ‘first, the delegation of the Government, in the latter, to a small number of citizens elected by the rest: secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended’²⁸. A representative system is to provide both political

²⁶ Liberal constitutionalism distinguishes ‘higher lawmaking’, i.e. the law established in a particular form whose change also requires maintenance of a specific mode of procedure, that is different and more demanding than ‘normal lawmaking’. Cf. B. Ackerman, *Constitutional Politics/Constitutional Law*, The Yale Law Journal, Vol. 99, No. 3, 1989, pp. 461 et seq., B. Ackerman, *We the People. Foundations*, Cambridge–London 1995, pp. 6 et seq. Cf. also J. Rawls, *Political Liberalism*, New York 1993, pp. 231-233.

²⁷ Alexander Hamilton, James Madison, John Jay, *The Federalist with The Letters of „Brutus”*, ed. T. Ball, Cambridge 2003, p. 182.

²⁸ *Ibid.*, p. 44.

legitimacy of the political authorities of choice, as well as a means of resolving conflicts between competing interests and views functioning in a complex society. Therefore it assumes pluralism as a fundamental characteristic of a society. 'As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves'²⁹. The formation of the so-called factions³⁰ is to a certain extent natural, with manifold causes behind it and the main one being the uneven distribution of property. Economic inequalities and the related conflicts of interest are one of the major sources of their emergence. 'The regulation of these various and interfering interests forms the principal task of modern Legislation, and involves the spirit of party and faction in the necessary and ordinary operations of Government'³¹. Legislation and the system of representation would constitute forms of conflict resolution, and thus a specific form of mediation between contradictory interests and the pursuit of possibly consensual legislative resolutions. In this context, a particularly important issue is connected with safeguarding against the dominance of a

²⁹ Ibid., p. 41. Cf. the so-called 'burdens of judgement', which cause a discord and diversity of opinions to be a cardinal property of a free democratic society, J. Rawls, *Political Liberalism*, pp. 54-58.

³⁰ 'By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community', Alexander Hamilton, James Madison, John Jay, *The Federalist...*, p. 41.

³¹ Ibid., p. 42.

single majority faction that could pursue its interests without greater restrictions. According to Madison, in a direct democracy it is practically impossible to safeguard the rights of the minority against the majority. The limitation of factional claims, on the other hand, may take place in a republican, i.e. a representative system. It is therefore necessary to protect both the rights of citizens as well as republican institutions and principles. 'It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure'³². The mechanisms of dividing and balancing the powers as well as the system of guarantee and protection of the rights of an individual, both resulting from assigning a special role and legal importance to the constitution, in a sense restrict the freedom of a democratic formation of political will, since it cannot violate constitutional principles and rights. Thus, the constitution forms a specific kind of a 'higher law', which can only be modified in a special mode³³. Assuming that the democratic 'will of the nation' is diverse, meeting of the legal requirements for an amendment or establishment of a new constitution is not simple. As a result, forms, procedures, and restrictions on the democratic decision-making process are more or less 'rigidly' normalised in the constitution as a 'higher law'. A question arises as to whether such a 'limitation' should be interpreted as the dominance of a

³² Ibid., p. 254.

³³ Cf. footnote 26.

liberal element over a democratic one³⁴, or whether the relation between them may be perceived through the category of interdependence?³⁵

From the perspective of the theory that democracy ‘simply’ means participation and self-determination, any regulation of their expression in the form of representative institutions will be associated with their ‘limitation’. Such an interpretation entails an irremovable conflict between democracy and liberalism (constitutionalism), as when the will of the nation is not absolute (unconditioned), it is impossible to speak of democracy. Constituent power, as A. Negri points out, is closely linked to democracy. ‘Constituent power has been considered not only as an all-powerful and expansive principle capable of producing the constitutional norms of any juridical system, but also as the subject of this production – an activity equally all-powerful and expansive’³⁶. Constituent power is not only a principle of political power adopted in the form of the principle of sovereignty of the nation, but also an actual entity – constituent power is a political entity that in a certain way, intrinsically and without intermediaries, ‘produces’ the democratic politics. Hence, it constitutes not only an entity that establishes a democratic constitution, but a democratic policy in general while itself it ‘resists being

³⁴ C. Schmitt points out that ‘a threefold division of powers, a substantial distinction between the legislative and the executive, the rejection of the idea that the plenitude of state power should be allowed to gather at any one point – all of this is in fact the antithesis of a democratic concept of identity. The two postulates are thus not simple equivalents’, C. Schmitt, *The Crisis of Parliamentary Democracy*, trans. E. Kennedy, Cambridge-London 2000, p. 36.

³⁵ Cf. J. Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, *Political Theory*, Vol. 29, No. 6, 2001, pp. 766-768.

³⁶ A. Negri, *Insurgencies. Constituent Power and the Modern State*, trans. M. Boscaqli, Minneapolis-London 1999, p. 1.

constitutionalised'. Democratic constitutions may only declare the existence of such an entity in their content. Similarly – as Negri further argues – democracy as the 'theory of an absolute government' (the sovereign will of the people) 'resists being constitutionalised', since 'constitutionalism is a theory of limited government and therefore a practice that limits democracy'³⁷. There is a conflict between constitutionalism and democracy (constituent power): 'constitutionalism poses itself as the theory and practice of limited government: limited by the jurisdictional control of administrative acts and, above all, limited through the organisation of constituent power by the law'³⁸. Liberal constitutionalism forms a limitation of a radically democratic will and in this sense is undemocratic. Constitutionalism is in a way oriented on the past and preserves the already established system, whereas democracy (constituent power) is a creative and forward-looking force, thus the conflict between them can be interpreted as a conflict between an unlimited creative power and a tendency to regulate and stabilise. '*Democracy* means the omnilateral expression of the multitude, the radical immanence of strength, and the exclusion of any sign of external definition, either transcendent or transcendental and in any case external to this radical, absolute terrain of immanence. This democracy is the opposite of constitutionalism. Or better, it is the negation itself of constitutionalism as constituted power – a power made impermeable to singular modalities of space and time, and a machine predisposed not so much to exercising strength but,

³⁷ Ibid., p. 2.

³⁸ Ibid., p. 10.

rather, to controlling its dynamics, its unchangeable dispositions of force. Constitutionalism is transcendence, but above all constitutionalism is the police that transcendence establishes over the wholeness of bodies in order to impose on them order and hierarchy. Constitutionalism is an apparatus that denies constituent power and democracy'³⁹. Assuming the above understanding of democracy, all forms of indirect democracy, the rule of law, and the guarantee of individual rights are merely a form of wielding control over the 'democratic dynamics'. Where does this particular preoccupation of liberal constitutionalism with the limitations of political power and stability of the political system come from? According to B. Barber, liberal democracy is a theory that focuses on a conflict within the society, which is the main problem of the policy⁴⁰, thus the fundamental postulates of liberalism stem from the attempts to deal with social and political discord. However, according to critics, because of it the hidden constructive forces of a society are underestimated, hence liberal democracy should be confronted with a different concept of democracy. 'Strong democracy is a distinctively modern form of participatory democracy. It rests on the idea of a self-governing community of citizens who are united less by homogeneous interests than by civic education and who are made capable of common purpose and mutual action by virtue of their civic attitudes and participatory institutions rather than their altruism or their good nature'⁴¹. One could

³⁹ Ibid., p. 322.

⁴⁰ B. R. Barber, *Strong Democracy. Participatory Politics for a New Age*, Berkeley-Los Angeles-London 2003, p. 5.

⁴¹ Ibid., p. 117.

ask here whether the ‘productive forces of democracy’ operating within ‘participatory democracy’ without stabilising and limiting institutions are not in fact going to turn into a permanent conflict? Will the perpetual revolution, that the constituent power indeed is to follow Negri's interpretation, lead to the dominance over that part of society which is best organised as a ‘productive movement’? Will a completely unrestricted democratic participation not lead to the hegemony of the majority, and thus (similarly as the principle of unanimity) deprive the minority of the right of participation and consequently eliminate pluralism?

4. Liberal ‘constitutional essentials’ of democratic constitution

The answer to these questions does not have to be affirmative to demonstrate that liberalism constitutes an indispensable element of modern democracy. Indeed, the aim of political liberalism is to establish the basic principles of a democratic system that would provide all citizens with equal political subjectivity and enable the maintenance of democratic disputes on equal terms. It aims towards the formulation of basic principles underlying the system of constitutional democracy that would be adequate for a

society characterised by (reasonable⁴²) pluralism⁴³. Ch. Larmore defines the problems faced by the theory of liberalism as follows: (a) formulation of moral conditions for limiting political power (defined by the idea of a common good); (b) formulation of conditions under which people with different concepts of good would be able to live together in a political association⁴⁴. The solution would consist in the formulation of a ‘minimal moral conception’ that expresses the idea of a common good that could be supported by a broad spectrum of doctrines and conceptions of a good life. Such an idea would be neutral in relation to various worldviews, which does not mean that it would be neutral in moral terms⁴⁵.

Therefore, what kind of an idea does liberalism propose as a ‘minimal moral conception’ for the democratic

⁴² ‘The diversity of reasonable comprehensive religious, philosophical, and moral doctrines found in modern democratic societies is not a mere historical condition that may soon pass away; it is a permanent feature of the public culture of democracy’, J. Rawls, *Political Liberalism*, p. 36. Reasonable pluralism does not only mean that people accept various holistic doctrines within the democratic system but that such doctrines are also reasonable, although individuals may perceive only their own ‘doctrines’ as ‘true or right’, cf. J. Cohen, *Moral Pluralism and Political Consensus*, [in:] J. Cohen, *Philosophy, Politics, Democracy: Selected Essays*, Cambridge Massachusetts 2009, p. 53.

⁴³ ‘Liberalism assumes that in a constitutional democratic state under modern conditions there are bound to exist conflicting and incommensurable conceptions of the good’. J. Rawls, *Justice as Fairness: Political not Metaphysical*, *Philosophy and Public Affairs*, Vol. 14, No. 3, 1985, p. 245. ‘Liberalism as a political doctrine supposes that there are many conflicting and incommensurable conceptions of the good, each compatible with the full rationality of human persons, so far as we can ascertain within a workable political conception of justice. As a consequence of this supposition, liberalism assumes that it is a characteristic feature of a free democratic culture that a plurality of conflicting and incommensurable conceptions of the good are affirmed by its citizens’. *Ibid.*, p. 248.

⁴⁴ Ch. Larmore, *Political Liberalism*, *Political Theory*, Vol. 18, No. 3, 1990, p. 340–341.

⁴⁵ Cf. *Ibid.*, p. 341.

system? As claimed by R. Dworkin, every coherent political programme contains two elements: ‘constitutive political positions that are valued for their own sake, and derivative positions that are valued as strategies, as means of achieving the constitutive positions’⁴⁶. It is possible to speak of a continuity of a political doctrine, if the transformations that it undergoes affect the derivative positions and not the constitutive ones. In other words, constitutive positions remain the same, whereas the means towards their achievement change along with social, economic or other changes. Liberalism shares numerous constitutive principles with other doctrines (such as the principle of freedom which is shared with conservatism), however it assigns them a different rank. The constitutive position of liberalism consists in the defined concept of equality⁴⁷. It is possible to distinguish between the principle of treating the citizens ‘as equals’ (in terms of being entitled to the same care and respect) and treating them ‘equally’ (in the same way), however ‘equally’ does not always mean the same as the expression ‘as equals’ (for instance, a tax can be imposed equally on all citizens, but it does not mean that they are treated as equals, as the cost incurred by citizens with the lowest income is relatively higher than the burden placed on high-income citizens), therefore the first meaning is constitutive whilst the other derivative⁴⁸. What really distinguishes liberalism from other political doctrines is the thesis that individuals should be treated ‘as equals’ (neutrally), and thus regardless of their understanding of

⁴⁶ R. Dworkin, *Liberalism*, [in:] R. Dworkin, *A Matter of Principle*, New York 1985, p. 184.

⁴⁷ Cf. *Ibid.*, p. 188.

⁴⁸ Cf. *Ibid.*, p. 190.

good (or life goals, what a good life is to them)⁴⁹. In order to ensure equal treatment of individuals with different concepts of the good, preferences, or aspirations, it is necessary to establish institutions ensuring the stable functioning of a diverse society (e.g. representative democratic institutions, free market, redistribution mechanisms), which on the one hand recognise the inequalities arising from the diversity of goals and concepts of the good, whilst on the other hand eliminate arbitrary and unjustified inequalities, thus treating citizens ‘as equals’.

A liberal protection of citizens' treatment ‘as equals’ by social and political institutions consists of a system of guaranteed rights and freedoms. From such a perspective, liberalism is associated with the recognition of diversity resulting from an equal treatment of persons pursuing different concepts of the good, different goals, and having varying interests. The existence of a universal system of rights and freedoms would guarantee the treatment of such persons as equals. Thus it is the equality that constitutes the ‘minimal moral concept’, which is the basic principle of a political system that affirms pluralism. B. Ackerman lists six elements of response of political liberalism to the fact of pluralism: (a) political principles should not be ‘hostage’ to one of the many ideas of a good life operating in a society; (b) political liberalism adopts such a strategy of justification of political principles as could be adopted by representatives of various comprehensive doctrines; (c) political liberalism strives to remain independent of holistic philosophical

⁴⁹ Cf. *Ibid.*, pp. 191–192. This would distinguish liberalism from conservatism, which connects equal treatment with a specific concept of the good, similarly to socialism.

doctrines and base itself on its own principles and ideas; (d) emphasises the primary commitment of maintaining public dialogue between the different parties; (e) introduces the principle of conversational constraint – until a citizen makes a specific argument publicly, it cannot be deemed convincing; (f) before particular institutions of the basic structure become legitimate, they must undergo a rigorous test of a public dialogue of free and equal citizens⁵⁰. From the thus outlined perspective, the basic principles of constitutional democracy and its basic institutions are not treated as ‘granted’, but as the subject of a consensus of free and equal citizens, reached as a result of a public deliberation of arguments in favour of them (an ideal representation of such a public debate is the idea of an initial situation). ‘Problem of political liberalism is: How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines? Put another way: How is it possible that deeply opposed though reasonable comprehensive doctrines may live together and all affirm the political conception of a constitutional regime?’⁵¹.

According to J. Raz, the essence of political liberalism, in relation to the fact of pluralism, is a specific ‘epistemic abstinence’: it should not refer to the question of the truth or falsehood of comprehensive doctrines professed by citizens⁵². If it were to be a true theory, it would have to

⁵⁰ B. Ackerman, *Political Liberalisms*, *The Journal of Philosophy*, Vol. 91, No. 7, 1994, pp. 365-368.

⁵¹ J. Rawls, *Political Liberalism*, p. xviii.

⁵² Cf. J. Raz, *Facing Diversity: The Case of Epistemic Abstinence*, *Philosophy & Public Affairs*, Vol. 19, No. 1, 1990, p. 4.

be based on a certain comprehensive doctrine accepting certain fundamental positions as justified, however then it would not be a theory formulating the ‘minimal concept of principles’, it could not serve as a theory adequate for the democratic system characterized by the fact of pluralism. Therefore, the main problem of political liberalism is seen in the principles which cause that democratic political power to be legitimised by virtue of such principles. ‘We ask: when is that power appropriately exercised? That is, in the light of what principles and ideals must we, as free and equal citizens, be able to view ourselves as exercising that power if our exercise of it is to be justifiable to other citizens and to respect their being reasonable and rational?’⁵³. In response to this question, J. Rawls formulates the ‘liberal principle of legitimacy’: ‘our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason’⁵⁴. Political liberalism points to the particular importance of a constitution in the democratic system. The legitimisation of political power occurs when it respects the ‘constitutional essentials’, i.e. the principles expressing the idea of democratic equality, which can be accepted by citizens in the conditions of pluralism. Rawls indicates that from the point of view of political liberalism, a democratic constitution should contain two elements that are understood as ‘constitutional essentials’:

⁵³ J. Rawls, *Political Liberalism*, p. 137.

⁵⁴ *Ibid.*, p. 137.

- a) fundamental principles that specify the general structure of government and the political process: the powers of the legislature, executive and the judiciary; the scope of majority rule; and
- b) equal basic rights and liberties of citizenship that legislative majorities are to respect: such as the right to vote and participate in politics, liberty of conscience, freedom of thought and of association, as well as the protections of the rule of law'⁵⁵.

These are not equivalent elements in the sense that their meaning is the same. The second important element of a constitution is contained in the very sense of a constitution of a democratic state, while the first is related to the pragmatism of exercising political power. If the rights and freedoms contained in the second constituent of the constitution are preserved, it can be presumed that the way of organising the power respects the principles of democracy, whereas even the most rational organisation of a system of political power cannot be considered democratic in the absence of political rights of participation and fundamental freedoms of the individual. Without ensuring fundamental subjectivity we cannot speak of free and equal citizens, and when this is the case we cannot speak of democracy either. Equal rights of participating in the democratic process constitute a sort of democratic 'rights of rights'⁵⁶. Liberal democracy defined by the above constitutional essentials would be a system functioning

⁵⁵ Ibid., p. 227.

⁵⁶ Cf. J. Waldron, *Law and Disagreement*, Oxford-New York 2004, p. 156, cf. also chapter 11.

according to the ‘logic of equality’⁵⁷. In other words, with the constitutionalisation of political rights, citizens acquire political subjectivity and are able to establish a real political entity. Regardless of whether the ontological primacy of constituent power is recognised before constituted power, it is only with the constitutionalisation of equal rights of participation in the democratic process that the civic subjectivity assumes a real and normative meaning. In such an interpretation the principle of liberalism is linked to democracy, as the liberal rights of political participation may only be realised in a democratic system, whilst democracy itself is based on these very rights⁵⁸.

⁵⁷ Cf. R. A. Dahl, *On Democracy*, p. 10. Rosanvallon points to equality as a constitutive idea for a democratic society: ‘I therefore propose to begin by reexamining the spirit of equality as it was forged in the American and French Revolutions. Equality was then understood primarily as a relation, as a way of making a society, of producing and living in common. It was seen as a democratic quality and not merely as a measure of the distribution of wealth. This relational idea of equality was articulated in connection with three other notions: similarity, independence, and citizenship. Similarity comes under the head of *equality as equivalence*: to be ‘alike’ is to have the same essential properties, such that remaining differences do not affect the character of the relationship. In dependence is *equality as autonomy*; it is defined negatively as the absence of subordination and positively as equilibrium in exchange. Citizenship involves *equality as participation*, which is constituted by community membership and civic activity. Consequently, the project of equality as relationship was interpreted in terms of a *world* of like human beings (or *semblables*, as Alexis de Tocqueville would say), a *society* of autonomous individuals, and a *community* of citizens’, P. Rosanvallon, *The Society of Equals*, p. 10.

⁵⁸ If we assumed the above stance ‘illiberal democracy’ would be internally contradictory, cf. also J. W. Müller, *What is Populism?*, Philadelphia 2016, chapter 2. Cf. Habermas’s attempt to combine democracy and liberalism, i.e. presentation of their relationship as ‘non-paradoxical’, J. Habermas, *Constitutional Democracy...*, pp. 776-778. ‘The sought-for internal relation between popular sovereignty and human rights consists in the fact that the system of rights states precisely the conditions under which the forms of communication necessary for the genesis of legitimate law can be legally institutionalized’, J. Habermas, *Between Facts and Norms. Contributions to a*

The close relationship between fundamental freedoms and the democratic political procedure causes fundamental rights and freedoms to be interpreted by Rawls as an expression of the principle of equal participation. It is to express the idea of civic equality with the condition for its realisation consisting in ensuring equal rights and freedoms to citizens. 'Since the constitution is the foundation of the social structure, the highest-order system of rules that regulates and controls other institutions, everyone has the same access to the political procedure that it sets up. When the principle of participation is satisfied, all have the common status of equal citizen'⁵⁹. An ideal form of demonstrating such an inclusive procedure of establishing the constitution is the social agreement: each party has an equal voice in the procedure for the establishment of the system. On the lower level of deliberation, i.e. the level of participation in a 'regular' political process, the principle of participation 'requires that all citizens have equal rights to take part in, and to determine the outcome of, the constitutional process that establishes the laws with which they are to comply with'⁶⁰. Of course, within the context of a modern democratic system this occurs in the form of representative democracy, which guarantees the citizens the right to participate in the form of specific electoral rights, parliamentary law, party system, expression of opinions, etc.

By emphasising the importance of constitutional rights of participation in the political process, political

Discourse Theory of Law and Democracy, trans. W. Rehg, Cambridge 1996, p. 104, cf. pp. 118-131.

⁵⁹ J. Rawls, *A Theory of Justice*, Cambridge 1999, p. 200.

⁶⁰ *Ibid.*, p. 194.

liberalism in a way refers to the republican affirmation of politics as an area in which the specific human nature is fulfilled⁶¹. H. Arendt divides fundamental human activities into labour, work, and action. In general, labour is linked to the biological side of humanity, work is an expression of the creative side (production of the ‘artificial’ world of things), action is a form of activity, which occurs exclusively ‘between people’ and therefore has a specifically social character (intersubjective)⁶². ‘Human plurality, the basic condition of both action and speech, has the twofold character of equality and distinction. If men were not equal, they could neither understand each other and those who came before them, nor plan for the future and foresee the needs of those who will come after them. If men were not distinct, each human being distinguished from any other who is, was, or will ever be, they would need neither speech nor action to make themselves understood’⁶³. The area of specifically human matters is situated in the ‘interpersonal’ sphere, where action constitutes the proper form of activity. It occurs in the public sphere and is concerned with public affairs. The rights of political participation allow for an occurrence of a specifically human form of activity, and the value of the constitution is that it organises a space in which various forms of human activity may be manifested. Thus, it allows fulfilment of this element of human nature that is specific for it (i.e. distinguishes humans from other beings),

⁶¹ Of course, it does not issue strong ethical claims concerning citizens' preferences of the public good, cf. Habermas's criticism of republicanism and narrowly understood liberalism (limited to private rights) in *Three Normative Models of Democracy*, [in:] *Democracy and Difference. Contesting the Boundaries of the Political*, ed. S. Benhabib, Princeton 1996, pp. 21-23, 26, 29.

⁶² Cf. H. Arendt, *The Human Condition*, Chicago-London 1998, pp. 7 et seq.

⁶³ *Ibid.*, pp. 175-176.

namely acting in a public forum and for public purposes. In such an interpretation liberal constitutionalism provides the principles by which a specific form of human activity may take place according to the principles of democratic citizenship and social co-operation.

5. Conclusion

According to Mouffe, a specific value of liberal democracy is that 'it creates a space in which this confrontation is kept open, power relations are always being put into question and no victory can be final'⁶⁴. For modern liberal democracy, the acceptance of pluralism is of a constitutive meaning. It relates not only to the very fact of diversity, but to the recognition of diversity as a desirable state and awarding equal rights to all persons. Properly understood political liberalism⁶⁵ should 'cherish' such pluralism, thus allowing for the widest possible discussion and public debate and questioning of both current affairs (e.g. ordinary legislation or government decisions) and the very bases of the political system⁶⁶. This means that liberalism indeed enters into a conflict with democracy when it limits pluralism by

⁶⁴ Ch. Mouffe, *The Democratic Paradox*, p. 15.

⁶⁵ This article is concerned with the theory of liberal constitutionalism and not with political practice, therefore this theory can also serve as a criticism of a practice that is called 'liberal' yet does not pursue fundamental liberal ideas.

⁶⁶ 'Within our tradition there has been a consensus that the discussion of general political, religious, and philosophical doctrines can never be censored. Thus the leading problem of the freedom of political speech has focused on the question of subversive advocacy, that is, on advocacy of political doctrines an essential part of which is the necessity of revolution, or the use of unlawful force, and the incitement thereto as a means of political change', J. Rawls, *Political Liberalism*, p. 343. 'To repress subversive advocacy is to suppress the discussion of these reasons, and to do this is to restrict the free and informed public use of our reason in judging the justice of the basic structure and its social policies. And thus the basic liberty of freedom of thought is violated', *Ibid.*, p. 346.

formal restrictions in the possibility of participating in public discourse⁶⁷. 'In a democratic policy, conflicts and confrontations, far from being a sign of imperfection, indicate that democracy is alive and inhabited by pluralism'⁶⁸. Rawls's 'constitutional essentials' should therefore allow citizens to participate equally in public discourse regardless of their political power. In other words, they should make the democratic system open to change and re-interpretation both in terms of common legislation as well as with regard to basic principles. However, such changes should take place while being embedded within the framework of democratic principles and not violating them, therefore an actual (and not only declared) refusal to recognise the civic equality of certain classes of citizens would breach both liberalism and democracy. Taking into account the pluralism of a democratic society, awarding all citizens with equal rights of political participation makes the content of democratic legislation variable or open to change. C. Lefort argues that democracy is connected with a process of calling things into question, which is endless and is a presumed part of social practice⁶⁹. If various aspirations and conflicts cannot be resolved within the framework of a symbolic practice of questioning things, movements seeking to 'define society', making it 'one' may occur, which on the

⁶⁷ In the above interpretation liberalism is not far from Mouffe's radical and pluralist democracy, i.e. the political project assuming the existence of conflict and violence, calling for the establishment of a group of institutions that would 'limit and contest' dominance and violence, yet would not eliminate conflict and diversity, Ch. Mouffe, *The Democratic Paradox*, p. 22. Cf. Ch. Mouffe, *Agonistics. Thinking the World Politically*, London-New York 2013, chapter 1.

⁶⁸ Ch. Mouffe, *The Democratic Paradox*, p. 34.

⁶⁹ C. Lefort, *Democracy and Political Theory*, trans. D. Macey, Cambridge 1988, p. 19.

other hand leads to totalitarianism. The functioning of a democracy depends on allowing an open ‘practice of questioning’ within the context of ‘an institutionalised conflict’. ‘The exercise of power is subject to the procedures of periodical redistributions. It represents the outcome of a controlled contest with permanent rules. This phenomenon implies an institutionalization of conflict. The locus of power is an empty place, it cannot be occupied - it is such that no individual and no group can be consubstantial with it – and it cannot be represented’⁷⁰. A democratic-liberal constitution does not fill the said ‘empty place of power,’ but maintains an ‘institutionalisation of conflict’, thus ensuring an open and inclusive way of operating of the system, i.e. giving citizens an opportunity to participate in the ‘practice of questioning’ of the existing *status quo* ‘as equals’. If the above interpretation is correct, the democratic paradox is that democracy indeed needs liberal constitutionalism in order to function as an open and pluralistic system.

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⁷⁰ Ibid., p. 17.