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Articles

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Does *la bouche de la loi* Have Anything to Say in Democracy? An Exercise in Legal Imagination

Czy la bouche de la loi mają coś do powiedzenia w demokracji? Ćwiczenie w wyobraźni prawniczej

ABSTRACT

The article uses the potential of spatial imagination to discuss challenges judicial power and judges face nowadays, due to fierce philosophical and theoretical debates over the future of democracy and various "democratic innovations". To identify and discuss possible reactions to these new challenges, we refer to the three-level concept of the political universe. It is argued that the "modern" legal and political imagination has neglected the importance of the most basic of these levels, namely the level of commonly shared cultural values. In effect, as Montesquieu famously summarized, judges became "no more than the mouth that pronounces the words of the law". This traditional view is still persistent in legal debates but proves to be more and more insufficient, as it does not allow lawyers to take an active part in contemporary political and constitutional debates. Unfortunately, the attempts to overcome it are often far from being satisfactory, as they focus on justifying or criticising allegedly inevitable "politicization" of the judiciary. In effect, both images encourage competition rather than a dialogue, which may in fact hinder understanding and responding to new political processes. In the

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conclusions of the article, we suggest that the history of European political and legal traditions offers a possibility to go beyond such neutral-political opposition towards a more complicated view, which is at the same time more attuned to unending struggles for and with democracy.

Keywords: democracy; legal imagination; political universe; judiciary

INTRODUCTION

T.J. Peretti starts her book *In Defence of a Political Court* by quoting the words of C.E. Hughes, the 11th Chief Justice of the United States (1930–1941): "We are under the Constitution, but the Constitution is what the judges say it is". As she comments, this candid remark "has been frequently cited, often accepted, but never endorsed", and the main reason for this lack of endorsement is "the fear of politics (…) which leads (…) to the failure of contemporary constitutional theory".[1] Peretti's diagnosis is valid not only in respect to constitutional theory. The fear of politics seems to be one of the most significant latent themes in the modern European political tradition, especially the one which accepts the principle of individualism.[2] From an individualistic perspective, politics is rooted in partial judgments (opinions) and partial interests of individuals or particular groups, and so it always goes hand in hand with power. Both introduce imbalance and asymmetry in interpersonal relationships, and so they threaten basic liberal and democratic values of freedom and equality. Therefore, politics cannot be trusted, because it can as easily serve to extend freedom and equality (when it is used to empower those who are for some reason weaker) as to violate them (when it is used by the strong). Problem is, that in contemporary democratic states it turns out to be absolutely impossible to conclusively judge which of these two is the case.

Three centuries ago the situation was much clearer, as the fear of politics was in fact the fear of Hobbesian Leviathan: the absolutist state. T. Hobbes himself thought this fear to be indispensable for the sovereign to discourage citizens from disobeying laws. And so, as he expected, in a well ruled commonwealth this fear would be more a potential than a real threat. In a modern democracy, however, where the relationships between citizens and the government got complicated, it is not possible to point to some concrete source of this fear. As a result, what once was the fear, now seems to have become generalised, undefined and dispersed anxiety of growing "politicization" of different areas of the public or even private life. This anxiety is reflected in serious extensions in terms like "politics" and "power", which are no longer limited to the effective management of behaviours of others,

[1] T.J. Peretti, *In Defense of a Political Court*, Princeton 1999, p. 3.

[2] A.B. Seligman, *Individualism as Principle: Its Emergence, Institutionalization, and Contradictions, Political Philosophy*, "Indiana Law Journal" 1997, vol. 72(2), pp. 503–527.

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but suggest the manipulation of our beliefs[3] or even personalities, as M. Foucault's concept of *assujettissement* assumes.[4]

The question arises, how to deal with the fear or anxiety of this kind. There seem to be two prevailing answers to this question. The first one still relies on what can be named "modern" imagination that finds it crucial to find ways to keep politics under control in order to correct eventual political bias, and so to restore mutual trust and cooperation. This way of thinking may as well be named liberal, as originally it was liberalism that imbued modernity with a non-political ideal.[5] The second answer, facilitated by the "postmodern turn"[6] that made concepts such as rationality, objectivity, neutrality and alike irrevocably lost or at least questionable, takes the anxiety to be the sign of "the return of the political".[7] It is argued that anxiety should in fact be welcomed and treated analogously to electricity, which is dangerous in itself, but under certain conditions may be used to the common advantage.

It is worth noticing that the recent interest in politics and power goes far beyond political and legal theory. And it would not be much of an exaggeration to say that polemic between the two answers mentioned above is perceived as a chance for social scientists to regain self-confidence and to let social science stand on its own fit instead of futilely emulating natural science. What is interesting, many scholars who would gladly see their disciplines invigorated by "the return of the political", refer to legal science and jurisprudence, as natural allies. Due to the very term "jurisprudence", legal science is viewed as a repository of concepts that would be able to reject "modern" scientific imagination, hostile not only to power and politics but also to subjectivity and particularity. After all, "prudence" refers to the old Aristotelian concept of *phronesis* (prudence) – practical wisdom, with its overtly political potential.[8] Nevertheless, what seems to be obvious for scholars from other disciplines,[9] causes many objections at law faculties, which are still attuned to "modern" standards and focus on the *juris*-part of their academic practice. Not that we try to criticize it, but we think that legal science could indeed offer some important contribution to contemporary debates on politics and the political, without simply taking for granted the "postmodern" direction.

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[3] S. Lukes, *Power: A Radical View*, London 2004.

[4] M. Foucault, *Discipline and Punish: The Birth of the Prison*, London 2019.

[5] C. Schmitt, *The Concept of the Political*, Chicago 1996.

[6] More on the term, see S. Susen, *The 'Postmodern Turn' in the Social Sciences*, Basingstoke 2015.

[7] C. Mouffe, *Return of the Political*, London 1993.

[8] O. Marquard, *In Defense of the Accidental: Philosophical Studies*, New York–Oxford 1991, p. 105; F.S. Ellett, *Practical Rationality and a Recovery of Aristotle's "Phronesis" for the Professions*, [in:] *Phronesis as Professional Knowledge: Practical Wisdom in the Professions*, eds. E.A. Kinsella, A. Pitman, Rotterdam 2012, pp. 13–33.

[9] See B. Flyvbjerg, *Making Social Science Matter*, New York 2001.

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Our opinion is similar to the opinion of A.G. Amsterdam and J. Bruner, who wrote in their *Minding the Law*: "To be sure, results in the law are achieved by the application of specialized legal reasoning – reasoning within and about doctrinal rules, procedural requirements, constitutional and other jurisprudential theories – and are typically articulated almost wholly in those terms. But final results are underdetermined by such rules, requirements, and theories. They are influenced as well by how people think, categorize, tell stories, deploy rhetoric, and make cultural sense as they go about interpreting and applying rules, requirements, and theories".[10] It is this second stage, the stage of the "undetermined final results" opens a possibility to look at politics as something deserving a response different from the "modern" fear or "postmodern" anxiety.

Bruner and Amsterdam addressed their book to those who were still devoted to the neutral, non-political image of the judiciary, to convince them that it was time to "make familiar strange again". Many of the "strange" aspects of "lawyering"[11] they were pointing at, deserve to be called "political". And so, we believe that it makes sense to reflect upon the word itself. What could it mean for lawyers to accept their "political" status? Is it the time to abandon the modern "myth of judicial neutrality"?[12] If so, should it be replaced by a new "postmodern" imagination, which seems to inspire proponents of various brands of "political jurisprudence"?[13] Questions like these motivated us to write this article. Not that we decided to simply answer them, but we find it necessary to look for some wider and more general perspective. To construct such a perspective, we decided to refer to a model of a society which makes use of a kind of spatial imagination.

METHOD

Trying to understand the place which is designated for the judiciary in the society in general, and within political relations in particular, it is beneficial to make use of the proposals of D. Easton and C. Offe. According to Easton, political life is a system of interrelated activities, which "derive their (…) systemic ties from the fact that they all more or less influence the way in which authoritative decisions are formulated and executed for a society".[14] Since this system is, as Easton claims, distinguishable enough from other aspects of social life, it can be discussed separately,

[10] A.G. Amsterdam, J. Bruner, *Minding the Law*, Cambridge–London 2002, pp. 287–288.

[11] *Ibidem*, p. 289.

[12] A. Sachs, *The Myth of Judicial Neutrality: The Male Monopoly Cases*, "The Sociological Review" 1975, vol. 23(1), pp. 104–133.

[13] S.R. Letwin, *On the History of the Idea of Law*, New York 2005.

[14] D. Easton, *An Approach to the Analysis of Political Systems*, "World Politics" 1957, vol. 9(3), pp. 384.

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just as the solar system (the part of the universe) is discussed by astronomers.[15] Referring to Easton, Offe distinguishes between three levels of the so perceived political system. The first and the deepest is the level (I) of "boundaries" (territorial, social, cultural). The second is the "constitutional" level (II), at which the whole institutional framework of the community is established (rules, procedures, rights, etc.). Finally, the third and the highest is the level (III) which encompasses everyday decisions on "who gets what, when and how – both in terms of political power and economic resources".[16] It is this level (III) we tend to equate with "the essence of politics" – mistakenly, as Offe notices. As he continues, "Arguably, each of the three levels stands in close affinity to and invokes one of the three human capabilities that early modern political philosophers distinguished. The first relates to passions, virtue, honour and patriotism, the second to reason and the third to interest. This three-tiered model clearly suggests links of upward determination: 'normal politics' that is going on at the third level is embedded in identities and constitutions. In most political systems this determination is unilateral and causal rather than intentional. By 'unilateral' I mean the asymmetrical relationship whereby the lowest of the three levels determines the higher ones, and the causal arrow only rarely, if ever, points in the opposite direction".[17]

The model suggested by Offe is a convenient tool to discuss the roots of the modern fear of politics. The post-war history of the modern democracy in the West can be viewed as an attempt to extend the highest level of the political system (III) while diminishing the importance of the deepest level of boundaries (I) as not to let them impede the enhancing of individual freedom of every citizen. Such political choice was facilitated by the bipolar post-war order, in which the West was to put an end to ideological discourse[18] and focus on economic progress, guided by the achievements of science. The language of "passions, virtue, honour and patriotism", which is for Easton and Offe crucial to make particular societies conscious of the significance of their boundaries, was viewed as secondary to "solid" and measurable interests and preferences. In effect, the level (I) was predicted to weaken, or rather to be absorbed and merged into the second, constitutional level to become a set of commonly accepted constitutional values. Apart from flattening the political system, such a choice had additional benefits. It was meant to integrate and solidify the constitutional level (II), so that it would be able to support the development of the highest level (III), but could not be destroyed under the pressures of the private

[15] *Ibidem*.

[16] C. Offe, *Varieties of Transition: The East European and East German Experience*, Cambridge 1996, p. 33.

[17] *Ibidem*.

[18] See R. Aron, *The end of the ideological age?*, [in:] *The End of Ideology Debate*, ed. C.I. Waxman, New York 1968, pp. 27–48.

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(individual or group) ever-changing and redefined interests, which could dominate it thanks to democratic political procedures. One of the most radical theoretical models for this kind of political community was the proposal of J. Schumpeter, which was canonical in post-war political science.[19]

For this kind of political imagination, politics is born at the highest level of interest and competition (III). Once the democratic method (voting) could grant power to some of such interests, it is important to treat them as they are: partial and biased, which means they can be played upon, but not necessarily fulfilled by the government, which as a whole operates on a deeper constitutional level (II) and its task is to stabilize the institutional and legal order of the state. All that makes politics both a dirty job of manipulation (as far as its democratic element is concerned) and a "neutral" technical enterprise (if it is the liberal one). It is enough to peruse A. Downs' *An Economic Theory of Democracy*[20] to understand how much effort is required for the "modern" mind (liberal, individualistic – we use these terms loosely, as it is used by those who show J.-F. Lyotard's "incredulity" towards metanarratives) to overcome the fear of democratic politics. It was done at the expense of democracy, but at the same time to the benefit of the judiciary. Unlike legislative and executive powers – both to some extent suspicious due to the fact that their members are professional politicians who have to do politics – judicial power was expected to remain untainted by strictly political conflicts and struggles. Democratic procedures could still be viewed as a tool (a method) of creating bonds between both levels of the political community (I and II), but since these bonds were power-oriented political games and as such could not be trusted, it was the task of judiciary to protect more durable: legal and institutional bonds, and so to act on behalf of the common, not particular, interests. This common interest was best expressed by N.R. Pound: "(…) all thinking about law has struggled to reconcile the conflicting demands of the need of stability and of the need of change. Law must be stable and yet it cannot stand still".[21]

ARGUMENT

In a certain sense, "modern" political imagination with its concept of liberal democracy, encouraged to see "judicial power" as "power", but not tainted by "politics". No wonder in his book entitled *The Judge in a Democracy*, A. Barak writes: "Judicial protection of democracy in general and of human rights in particular is a characteristic of most developing democracies. (…) Legal scholars often explain this phenomenon

[19] J. Medearis, *Joseph Schumpeter's Two Theories of Democracy*, Cambridge 2001, pp. 1–3.
[20] A. Downs, *An Economic Theory of Democracy*, New York 1957.
[21] N.R. Pound, *Interpretations of Legal History*, Cambridge 1923, p. 1.

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as an increase in judicial power relative to other powers in society. This change, however, is merely a side effect. The purpose of this modern development is not to increase the power of the court in a democracy but rather to increase the protection of democracy and human rights. An increase in judicial power is an inevitable result, because judicial power is one of many factors in the democratic balance".[22]

There is, however, a price to pay for occupying such an important position in the political universe. In a famous passage of his *Spirit of Laws* Montesquieu describes national judges as "no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour".[23] A few pages earlier, one may read that the judicial power, "so terrible to mankind", should become "invisible" so that the people "fear the office, but not the magistrate".[24] A lot has changed since the publication of Montesquieu's book, one of the major changes being the professionalisation of judges, but the opinion that they should do their job in silence, in courts, away from the public life, seems to prevail with minor changes only.

The passive attitude Montesquieu had in mind is "non-political". And being non-political judges is equated with being objective and impartial, which is, in turn, the argument for claiming the independence of the judiciary. Consequently, "non-political", "independent", or "impartial" work often as synonyms meant to strengthen the belief that the judiciary can really be trusted on matters of justice as such, uncontaminated by any group or individual interests.[25] This way the judiciary, occupying level (II) of Easton's and Offe's model, can indeed be counted as an element that represents the common good in respect to sustaining fair and just conditions for individual actions. There is more to it: since the judiciary is part of thus perceived "common good" (the constitutional level, which now includes the rudiments of the "boundary" level [I]), it is entitled to settle all conflicts born at level (I). Such judgments are objective as long as they respect what Aristotle named commutative justice, which means that they are passed on the matter of the issue, with no regard for the persons involved. To quote Barak again: "I feel much more comfortable holding that one economic plan is discriminatory compared to another than I do holding that one economic plan falls within the range of reasonableness while another does not".[26] In short, to fulfil the requirements of justice, the judge must remain blind for not to examine and eventually sympathize with any particular political agenda.

In effect, the "modern" legal imagination forces legal education to produce judges and lawyers who are, to put it simply, gravely impaired. They are obliged to leave the dynamic social and political life to inhabit the second level of the

[22] A. Barak, *The Judge in a Democracy*, Princeton–Oxford 2008, pp. 22–23.
[23] C. de Montesquieu, *Spirit of Laws*, Kitchener 2001, p. 180.
[24] *Ibidem*, p. 175.
[25] L. Gardocki, *Naprawdę jesteśmy trzecią władzą*, Warszawa 2008, p. 4.
[26] A. Barak, *op. cit.*, p. 15.

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community, and that means they have to be mute and blind to what is happening around them. It is disputable, whether such an attitude has ever been possible, but even assuming it is a kind of a judicial ideal, this ideal is no longer tenable. For even if we, lawyers, wanted to stay non-political, it so happens that politics has recently come to us. If legal theory and philosophy refuse to acknowledge that, they will lose the connection with legal practice, as it will be unable to provide any theoretical support for those who are appointed as lawyers and who have to react to the recent return of the political. It would be a mistake to limit these challenges to strictly political pressures, which in many countries put "democracy under threat".[27] To refer to Montesquieu's language, it looks like a new, "postmodern" spirit permeates our societies and demands a positive response from legal scholars as well as from other representatives of social sciences.

In fact, this new "spirit of laws" is no longer that new, although it still remains much debatable. It originated in longstanding American disputes on the role of the Supreme Court and the dangers coming from sustaining the illusion of its non-political character. The illusion which could result – or even have resulted – in judicial supremacy or imperialism[28]. Though the important feature of "postmodern" imagination is the affirmation of diversity, it seems to be possible to identify two main directions towards which the new thinking about the role of the judiciary was heading. The first was suggested by legal realists and found its extension in the movement of Critical Legal Studies (CLS),[29] while the second is advocated by "theories of provisional review".[30] Both abandon many liberal premises and question the possibility for judges to remain true only to some internal coherence and the substance of law in their eventual interpretative activity of the constitutional order. Both admit that like all other members of the society, lawyers are full-fledged human beings: varying in competences, feelings, opinions. And what is more important, they, like anyone else, have taste for politics and power.

For proponents of CLS, the last statement is rather pessimistic, as the failure to avoid politics with its embedded partiality must be treated as an impediment in creating a just political community. So, if it is impossible to have mute and blind judges, all that is left for legal theory to do, is to encourage them to see and to speak first of all in favour of those groups and individuals who are by nature weaker.[31] This way the assumed partiality of legal practitioners and theorists can, in fact, facilitate the balance at the third level of the political system, and consequently,

[27] *Democracy Under Threat*, ed. U. van Beek, Cham 2019.

[28] P. Schlafly, *The Supremacists: The Tyranny of Judges and How to Stop It*, Dallas 2004.

[29] C. Douzinas, C. Perrin, *Critical Legal Theory*, vol. 1–4, London 2011.

[30] T.J. Peretti, *op. cit.*, p. 62.

[31] A. Facio, *The Law: An Art or a Science?*, "Journal of Gender, Social Policy & the Law" 2011, vol. 7(2), pp. 355–372.

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work for the benefit of democracy. The only condition is that legal theory would remain flexible enough to follow the dynamics of social life, and to adapt to it critically, as the relations of power would change, and new areas of imbalance are identified. A different solution to the same sceptical view of judicial political fallibility was put forward by theorists like J. Agresto, for whom judges should engage in a "continuing colloquy with the political institutions and with society at large",[32] referring to their expertise. As Peretti rightly observes, though such a position accepts the possibility of judicial error and judicial overreaching, and even allows the legislature to correct them, it still does not permit "justices to be who they are", but rather transforms them "into Learned Hand's bevy of Platonic Guardians".[33] One could see here a belief similar to that taken in political theory by thinkers such as J. Habermas and J. Rawls – that it is possible to outsmart the inevitable political struggles and pressures by entwining them in some institutional dialogue in which errors (too partial judgments) would get embarrassing enough to either negotiate or resign. Only here not the politicians, but the judges are expected to satisfy better the demands of the rational discourse.

These two options mentioned above have contributed significantly to replacing "the fear of politics" Peretti mentioned with constant vigilance and anxiety[34] in legal theory and philosophy. Seminal is also their different outlook of the political system, according to which it is impossible to draw lines like those suggested by Easton and Offe. Rather, what Easton and Offe saw as "levels" becomes more like "layers". The layers, which do not only overlap but should be perceived as one complicated and interrelated medium we live in – a "liquid" reality, to paraphrase the term of Z. Bauman[35]. What has to be underlined here, however, is the fact that such a "postmodern" imagination has something important in common with the "modern" one. Both in fact overlook level (I) (the boundaries), which means they both treat the society as an artificial enterprise in which there is nothing common enough to encourage cooperation between individuals and groups not out of necessity, but out of freedom. And so, replacing the term "politics" with "the political", as those who promote the new "postmodern" imagination often do, is far less innovative than it may look at first sight. It does extend the phenomenon of power and power relationships, convincingly exposing their various manifestations at level (III), but on the whole, it is still haunted by the shadow of Hobbesian Leviathan that was, and still is, the source of all our modern political fears. It is doubtful, whether repeating after T. Mann, M. Foucault, or J. Painter and A. Jeffrey that

[32] J. Agresto, *The Supreme Court and Constitutional Democracy*, Ithaca 1984, p. 166.

[33] T.J. Peretti, *op. cit.*, pp. 72–73.

[34] C. Douzinas, A. Gearey, *Critical Jurisprudence: The Political Philosophy of Justice*, Oxford–Oregon 2005, pp. 229–258.

[35] Z. Bauman, *The Liquid Modernity*, Cambridge 2000.

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"politics really is everywhere"[36] suffices to invent truly new ways to face those fears, and not only to dilute them. The problem is that anxiety is for many reasons worse than fear because generalizing possible dangers paves the way to constant suspicion and criticism. Such suspicion and criticism can be (and are! – enough to scan trends in political jurisprudence or feminist jurisprudence) refreshing and motivating as far as legal theory is concerned. Nevertheless, it is not what could help the judiciary to regain the trust of democratic societies. Though caution is needed whenever sociological data measuring public opinion is discussed, the confidence in the justice system has been declining since the start of most internationally comparable measurements,[37] which is a bothering symptom; the more that such a distrust accompanies more serious distrust towards modern democracy, which is a fuel of political extremism.[38]

CONCLUSIONS

The discovery that Montesquieu's *la bouche de la loi* do not (and cannot) stand on any solid ground which would allow the judicial decisions, opinions and verdicts to be perfectly objective, was revolutionary. Especially if one realises that this revolution was not specific to legal science, but reflected much broader, paradigmatic changes in social sciences, known as postmodernism. It is, however, questionable whether it is a right choice to build upon legal imagination which one way or another implies politicization of all legal issues, and conclusively, judicial activity as such. As S.R. Letwin comments, political jurisprudence claims that "the courts serve as a political battleground, and the judge is a politician acting upon and being acted upon by other political forces".[39] It means that judges admittedly regain their voice and sight, but there is no hope they could use them to restore the ideal of neutrality of the legal order they represent.

Big discoveries stimulate and discipline our understanding, so they deserve to be appreciated. But it is not always necessary to use them to destroy all former images and metaphors. It would be as much premature, as methodologically incorrect because it does produce what L. Petrażycki named "jumping" theories – too broad

[36] J. Painter, A. Jeffrey, *Political Geography: An Introduction to Space and Power*, London 2009, p. 8.

[37] S. Van de Valle, *Trust in the Justice System: A Comparative View Across Europe*, "Prison Service Journal" 2009, no. 183, p. 23.

[38] Y. Algan, S. Guriev, E. Papaioannou, E. Passari, *The European trust crisis and the rise of populism*, 2018, https://bg.uek.krakow.pl//e-zasoby/siec_lokalna/Ebor/w208.pdf (access: 13.3.2021); R. Eatwell, M. Goodwin, *National Populism: The Revolt against Liberal Democracy*, London 2018, pp. 14–16.

[39] S.R. Letwin, *op. cit.*, p. 247.

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in respect to their actual scope.[40] An analogous attitude could be advocated in the case of legal theory. After having made "the familiar strange again", as Bruner and Amsterdam suggested, there comes the time to familiarize the strange, before the newly acquired sensitivity to politics and power proves to be too strange to handle. In other words, perhaps we should try to turn anxiety caused by ubiquitous power relationships back into fear again.[41] No matter how odd it may sound, fears are much easier to be dealt with (or at least lived with) than anxiety. The latter, unlike fear, is an emotional response to an imprecise or unknown threat. And admitting that a theory is unable to specify sources of possible dangers is a cognitive failure rather than justified vigilance. Spatial imagination with some kind of political geometry may still be instructive here. So, in spite of all the above criticism, we would want to conclude this article with some positive remarks.

In the vast literature from the field of contemporary political philosophy and history of political and legal thought, there is – and always has been – yet another notion of politics, which is quite different from its "modern" and "postmodern" understanding. It draws heavily on Aristotle, and his concept of *politeia*, which is a form of government focused on engaging different interests and groups in a common undertaking of sustaining the common order. B. Crick writes: "(…) politics arises from accepting the fact of the simultaneous existence of different groups, hence different interests and different traditions, within a territorial unit under a common rule", and so "politics are the public actions of free men". To quote Crick again: "The political method of rule is to listen to these other groups so as to conciliate them as far as possible, and to give them a legal position, a sense of security, some clear and reasonably safe means of articulation, by which these other groups can and will speak freely. Ideally politics draws all these groups into each other so that they each and together can make a positive contribution towards the general business of government, the maintaining of order. The different ways in which this can be done are obviously many, even in any one particular circumstance of competing social interests; and in view of the many different states and changes of circumstance there have been, are and will be, possible variations on the theme of political rule appear to be infinite. But, however imperfectly this process of deliberate conciliation works, it is nevertheless radically different from tyranny, oligarchy, kingship, dictatorship, despotism and – what is probably the only distinctively modern type of rule totalitarianism".[42]

[40] L. Petrażycki, *Law and Morality*, Cambridge 1955, p. 19.

[41] It is the direction more and more popular, as for instance the debates on judicial discretion show. See L. Leszczyński, *Open Axiology in Judicial Interpretation of Law and Possible Misuse of Discretion*, "Studia Iuridica Lublinensia" 2020, vol. 29(3), pp. 39–54.

[42] B. Crick, *In Defence of Politics*, Chicago 1962, pp. 14–15.

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What may be inferred from Crick's description, politics is not something which is derived from any individual or group interests that compete at the surface of the political system ("ordinary" politics), neither is it some tacit version of group identity (the political) that seized power at level (II) and managed to spread its cultural domination within level (III). Politics, understood as the political rule, belongs to the level of boundaries. It is one of the possible answers to the problem of establishing order in complex and diverse societies. And once this answer is chosen, it becomes the foundation of the higher levels of the political universe. It is important to understand properly the nature of such foundations. They do not prescribe any particular arrangements and solutions to be introduced. Their role is to set limits to eventual innovativeness and creativity. As far as the political rule is concerned, it is nothing more than the common source of power (political energy) for all individuals and all groups that emerge at the higher levels as partial and pursuing their own goals. Political rule does not forejudge any of them, but it does provide criteria of judgment that allow questioning the partial interests which would want to appropriate too much power. If they succeed, the common source of power expires and the political rule is annihilated.

Crick's "defence of politics" is the defence of the political rule, and the political rule deserves to be seen as one of the greatest political achievements of the European political and legal culture. The idea gave birth to many proposals. In spite of many differences (as they were always born under specific historical circumstances), they all agree that human beings should be treated as more than beasts and less than gods. From the fact that none of us is the god, stems the conclusion that it would be futile to expect any individual or any group to ever possess the reason and the will so perfect that they could exercise power on behalf of the common, not their partial interests. To put it simply, there is no hope of finding or educating Platonian sages in human societies, and so granting power to any group (the experts in law included) is dangerous and justifies the permanent "fear of politics". From the fact that we are more than beasts stems the conclusion that we are individuals who have a right to be partial and to use power first of all to our own advantage, for which we need freedom. Nonetheless, since living with others is also to our advantage, we have a right to enjoy living in political communities so designed as to make sure that every partial interest would respect other, just as partial, interests.

We believe that it is beneficial to distinguish politics/political rule from more popular concepts that equate politics/the political with various struggles for power. Referring to it directly could perhaps produce some new basis for the legal imagination that would allow lawyers to contribute to contemporary debates on the possible future of democracy. It is all the more important if one realises that what Easton and Offe took for a deeply hidden and seldom being reflected upon the level of boundaries, gets more and more attention of strictly political interests which compete at the level (III) and get access to the level (II) due to democratic procedures. It would

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be wrong to claim that boundary-narrative is no more than rhetoric of conservative or populist parties. It goes far beyond that, as it gets support from social sciences such as historiography or sociology, with their growing in popularity concepts of "heritage" or "collective memory".[43] The level of boundaries deserves to be seen as a separate level of the political universe, as indicated by Easton and Offe. It is not just a set of some universal constitutional premises, as liberalism would want it, but it has a substantive and developing content (as it includes cultural values, historical experiences, etc.).[44] Not without significance is the fact that symbolic images of boundaries work to strengthen social cohesion by encouraging, and at least symbolically rewarding actions undertaken on behalf of the common good. Successively, they influence level (III), as they are internalised by individuals and shape their attitudes towards themselves and other members of their community. This cultural transmission, or „politicization", can be a source of great political energy, and discharging this energy may turn out to be the worst outcome of the mainstream of modern political thinking.

Law as such is an important tool of protecting the balance between all the three levels of any political community. And so, the role of the judicial power and the judiciary is also contributing to protecting its boundaries. As far as the political rule is counted among them (and there are reasons why it should be preferred to all others) judges are indeed political in the sense that they should do their best to work "in defence of politics". The accusation that any such defence masks their partial interests and power aspirations miss the point. Of course, judges are not different from other members of the society – they have their individual and group interests, and they are entangled in politics and the political at levels (II) and (III). Still, as far as the discourse on the political rule is concerned, we still have the means to remain neutral and impartial. It is not some idealistic, ethical obligation, nor a rhetorical figure of speech. Lawyers have the expertise that allows specifying conditions that facilitate the protection of the political rule by introducing solutions that could encourage or even force all partial interests, whether minoritarian or majoritarian, to respect it. These solutions are constantly being discussed in legal theory and philosophy, while the history of law provides examples that allow to verify their usefulness and practical outcomes. It is exactly the "prudent" part of jurisprudence.

[43] B. Graham, G. Ashworth, J. Tunbridge, *A Geography of Heritage*, London–New York 2016; P. Nora, *Realms of Memory*, New York 1996.

[44] In a way, an analogy to myth and its reception (or reinterpretation) in the field of law and political sciences can be drawn here. See A. Ceglarska, *Law as a Fable: The Issue of Myth in the Interpretation of Law*, "Studia Iuridica Lublinensia" 2021, vol. 30(2), pp. 49–61.

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ABSTRAKT

W artykule wykorzystano potencjał wyobraźni przestrzennej do przedstawienia wyzwań stojących przed sędziami oraz władzą sądowniczą w dzisiejszych czasach, wynikający z intensywnych debat filozoficznych i teoretycznych na temat przyszłości demokracji oraz różnych „demokratycznych innowacji". Aby zidentyfikować i omówić możliwe reakcje na te nowe wyzwania, odwołujemy się do trójpoziomowej koncepcji uniwersum politycznego. Twierdzi się, że „nowoczesna" wyobraźnia prawno-polityczna zaniedbała znaczenie najbardziej podstawowego z tych poziomów, czyli poziomu wspólnie podzielanych wartości kulturowych. W efekcie, jak podsumował Monteskiusz, sędziowie to „jedynie usta, które wygłaszają brzmienie praw". Ten tradycyjny pogląd wciąż utrzymuje się w debatach prawnych, ale staje się coraz bardziej niewystarczający, ponieważ nie pozwala prawnikom na czynny udział we współczesnych debatach politycznych i ustrojowych. Niestety, próby jego przezwyciężenia są często dalekie od satysfakcjonujących, gdyż koncentrują się na usprawiedliwieniu lub krytyce rzekomo nieuniknionego „upolitycznienia" wymiaru sprawiedliwości. W efekcie oba wyobrażenia zachęcają raczej do rywalizacji niż do dialogu, co może rzeczywiście utrudniać zrozumienie nowych procesów politycznych i reagowanie na nie. W podsumowaniu artykułu sugerujemy, że historia europejskich tradycji polityczno-prawnych daje możliwość wyjścia poza taką neutralno-polityczną opozycję w kierunku bardziej skomplikowanego poglądu, który jednocześnie jest bardziej nastawiony na niekończące się walki o demokrację i z demokracją.

Słowa kluczowe: demokracja; wyobraźnia prawnicza; uniwersum polityczne; wymiar sprawiedliwości