

OCHLOCRACY IN THE PRACTICES OF CIVIL SOCIETY: A THREAT FOR DEMOCRACY?

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Any reference to *democracy* today is usually connected with the concept of *civil society*, as something natural, something that derives from it by itself. As such, civil society in its ideal-typical definitions is presented as the *protagonist of democracy*, or as a *shining example of democratic practice*. However, the question regarding which relation are democracy and civil society standing, both through theory and practice, will show whether civil society today contributes, or limits democracy. In this context, it can be seen how civil society — by using democratic principles and masking its democratic potential through ochlocratic practices — can easily turn into its opposite. In other words, whether is it democracy as such, or is it its lack that produces ochlocracy through the practices of civil society?

One of the challenges is simultaneously a question to be answered: can such produced *ochlocracy* lead to a new type of *totalitarianism*, or it just *maintains the existing order*. Is civil society capable of acting the role of a *shining example of democratic practice* and how can it misuse it?

Hence, it is necessary to compare *civil society* and *ochlocracy* as the phenomena of *democracy* to see how civil society can turn into ochlocracy as the direct rule of the mob or mass, and to demystify the role of ochlocracy in democratic societies. Finally, there is a question about the political consequences of possible ochlocracy dimensions of civil society.

Democracy and civil society

In order to clarify that the terms of *democracy*, *civil society* and *ochlocracy* are connected in a way that the lacks of democracy can turn civil society into ochlocracy, theoretical and conceptual interpretation of all three phenomena is need to be given.

As well as many other political terms, the origin of the term *democracy* (*δημοκρατία*) goes back to the ancient Greece. Thus, “the word democracy is derived from two ancient Greek words: *demos*¹ (the people) and *kratos* (strength).”² Therefore, taken democracy *means the rule of demos*. From this it is clear that democracy connects power with people, although this relationship can take many forms.

But, who makes *the people*? Haywood, for example, states that *people* can be considered as a “single body connected by common or collective interests.”³ Since divisions and disagreements exist in all communities, under the term '*people*' one may also mean *majority*. In that case, democracy means the strict use of the principle of *majority rule*, in which the will of majority is above the will of minorities. However, it is

¹ Although *demos* refers to „people“, the Greeks used this term to denote „the poor“ or „mob“.

² Robertson, David: *The Routledge Dictionary of Politics*. Routledge, London, 2004. p.136.

³ Hejvud, Endru [Haywood, Andrew]: *Politika* [Politics]. Clio, Beograd, 2004. p.134.



clear that most conceptions of democracy are based on the principle of *the rule of people*. Therefore, democracy can only exist by people who are actively participating in political and social activities.⁴ This participation appears in many forms.

Affirmative political maxims like *Voluntas populi suprema lex esto* (Let the will of people be the highest law), or *Vox populi, vox dei* (Voice of the people is the voice of God) originated from Roman times show the importance of people in political decision-making. However, later, with the emergence of *European citizenship* as a new and carrying actor of social shaping of history, the rule of the will of people becomes the *highest political idea*. From the sovereign will of people “*originates and relies (...) the government, so the regime and (...) the state.*”⁵ With this will people are on the highest throne of political values.

The people and their will, hence, are inseparable from *politics* as “*an activity through which people create, maintain and change the rules by which they live.*”⁶ Therefore, as Gabriel Almond and Sidney Verba identified, *political culture* in a democratic order is vital. In order to be so, the connection is clear between people and their will, democracy and politics in *civil society*, as they can be regarded as a fuel for democratic practice. But, what is the will of the people, or in other words, out of what is the will of the people made? Here, I would like to emphasize what theories usually miss to identify; i.e. that the will of people in a particular community primarily depends on the political culture of the same community, and often represents its reflection – sometimes confirming it, sometimes referring to problems that the society and the government don’t deal with.

It is not easy to have a discussion on *civil society* as a political or social term. As a vision and wish of all democratic societies, civil society today is a concept of establishing and fulfilling individual freedoms, but also a tool reflecting the will of people.

A modern discussion about civil society can be started from Jürgen Habermas, who emphasized the change of the Hegelian concept of *civilian society* into *civil society*. Starting from the dichotomy of civilian society and the state, Habermas showed that the *public sphere* is being establishing between the state and civilian society, in which private people, members of educated citizens leave their privacy to discuss *public issues*.⁷ Public sphere appears as a link between society and the state as separate spheres, in fact showing that the *common interest* is the connective tissue.

In the late eighties, the concept of civil society has experienced an *impressive renaissance*, becoming a critical concept in socialist societies. Civil society, conceived this way, is seen as “*the opposite of a totalitarian state, where the request for the establishment of civil society becomes a program of liberal and democratic transformation of these countries.*”⁸ Therefore, in

⁴ Abraham Lincoln determined the democracy as *government of the people, by the people, for the people*. However it seemed clear, this implies different types of *government of the people*. *Government by the people* includes the idea of popular participation in government, while *government for the people* implies that the government must act in the public interest.

⁵ Zgodić, Esad: *Multiverzum vlasti* [Multiverse of the government]. Fakultet političkih nauka Univerziteta u Sarajevu, Sarajevo, 2009. p.371.

⁶ *Ibid.* 12.

⁷ See: Habermas, Jürgen: *Javno mnenje* [Public opinion]. Kultura, Beograd, 1969.

⁸ Ravlić, Slaven and Čepo, Dario: *Uvod u političku znanost* [Introduction to Political Science]. Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2014. p.194.

post-socialist societies, civil society means a special sphere of life in which “*various associations operate autonomously and beyond the reach of the state trying to raise civic awareness and activity of citizens, and to influence on the government.*”⁹

Finally, how can civil society be defined? Habermas argues that the institutional core of civil society consists of „more or less spontaneously formed associations, organizations and movements that take the echo of problematic social conditions found in private life areas, condensing it and with increased emphasis forwarding to the political public.”¹⁰ Hence, civil society is considered as “set of various registered humanitarian, educational, cultural intellectual-political and other associations which constitute a separate sector (civil sector) out of the state.”¹¹ More specifically, civil society is consisted of non-profit, non-governmental and non-political organizations which were founded by citizens or legal persons, whose wish to act derived by the same interests, motives and aims.

According to current political theories where civil society is defined as a *social space* (including institutions and interaction in the field of culture, science, education, economy and civic initiatives), civil society is in contrast with the classical definitions. It is also an area where “there are new ideas, interests, institutions and initiatives for the overall development and progress of society.”¹² As such, civil society nowadays became a vision and wish of all democratic societies, as a concept of establishing and fulfilling individual freedoms, which core is now not only made up by a system of associations, but also *interest groups*.¹³ In this context, I want to introduce the dual concept of relations based on the model of bad state vs. good civic. Therefore, it is necessary to deal with this phenomenon and show that in practice civil society is not always the good and ideal-type of democratic segment. Liberal democracy, which will be discussed in the next chapter, failed to solve some problems, throwing them on the shoulders of civil society, which currently has too much power and responsibilities. Civil society began to get another, anti-democratic reflection which is not a nice, social movement, but its complete opposite.

The other side of the coin

⁹ Ibid.

¹⁰ Habermas, Jürgen: *Faktizität und Geltung* [Facts and Norms]. VS Verlan für Sozialwissenschaften, Frankfurt am Main, 1992. p.443.

¹¹ Ibid.

¹² <http://www.enciklopedija.hr/Natuknica.aspx?ID=12023> (26 April 2015.)

¹³ Before it comes to the formation of organizations of civil society, it is necessary that there is a specific common interest in the public sphere, which society share about a certain problem. Therefore, that individuals could raise civic awareness and activities to influence on the government, it is necessary that the aforementioned interest is specified through informal movements and groups, which can later the form of formal and registered organizations of civil society later. So, there is no objection that *interest groups* and *social movements* are seen as a part of civil society. In modern societies, *interest groups* are the most important connection between those who rule and those being ruled, becoming the most important in the mediation between the state and divided society.

However, this kind of citizen participation in civil society raises another question; when does civil become political again? In other words, “how are we to distinguish between political associations per se and the political activities of groups in civil society, from interest groups to religious bodies, which are intermittently mobilized in pursuit of political goals?”¹⁴ Here, we have to deal with two challenges; first, with the lack of democracy, secondly, with the abuse of the role of civil society. Therefore, it seems that these two challenges are closely connected, one deriving from the other.

If we briefly return to Habermas and his concept of the importance of public sphere between society and the state, through which the *common interest is summarized* as a connective tissue, on basis of civil society, economic and structural changes today are leading to the fact that the public sphere is weakening. What does it mean? A key element of the public – *rational discussion of interested individuals* is being replaced by the world of mass media that support *leisure* and *political apathy*, striving to create public where it does not exist. The public sphere begins to serve as the ‘hidden politics of interest groups’.

On the other hand, today’s democracy, theoretically understood as *liberal democracy*,¹⁵ beginning to develop again after the end of World War II, following the period of sustained expansion throughout the 20th century after the fall of communism, became the *predominant* political system of the world. The current crisis of democracy as liberal democracy, led by the ideological matrix of *neoliberalism*, is the crisis of its conceptual determination in the practical realization. Democracy and liberalism are not synonymous at all.¹⁶

Therefore, democracies need civil societies that use their democratic right to act *as the corrective of democratic system* and, in that way, show the flaws of the system. At the end of 1989, with the emergence of postmodernity, “*the arrival of the democracy of human rights indicated the rising influence of liberalism over democracy.*”¹⁷ Greater role and presence of civil society in fact demonstrates the inability of democratic institutions to deal with the spectrum of civil needs. As De Benoist alleges, the nation-state turned out to be increasingly ineffective in facing contemporary challenges, progressively losing all its *majestic values*, while a massive launch of a process of *individualization* in all arenas took

¹⁴ Foley, Michael W. and Edwards, Bob: The Paradox of Civil Society. *Journal of Democracy*, Vol. 7 (1996), No 3., 38-52.

¹⁵ Andrew Haywood in *Politics* outlined three main characteristics in the understanding of liberal democracy as the predominant political system of the world. *The first* one is that the liberal democracy is direct and representative form of democracy, because the political positions are gained through success at the regular elections based on formal political equality. *The second* bases of liberal democracy are the competition and ability to choose. They are achieved by political pluralism, tolerance to a wide range of different beliefs and by the actions of conflicting social philosophies and opposed political movements and parties. *Third*, in a liberal democracy the distinction between the state and civil society is set clear. It maintains by the existence of autonomous groups and interests, so on the market, or the capitalist organization of economic life.

¹⁶ For example, in relation to ancient democracy, modern liberal democracy is based not so much on citizen participation in public affairs than on the universal rights of individuals and, in addition, that is no longer foreign, in its historical manifestation, to the ideology of progress. Democracy remains classically defined as consecrating the power of the people, but in reality, it is nothing more than the political regime since it became liberal and purely representative, consecrating the rise of the modern individual and the primacy of civil society over political authority.

¹⁷ De Benoist, Alain: The Current Crisis of Democracy. *Telos*, Vol. 2011 (2011), No.156., 7-23.

place. The touchstone is no longer the sovereignty of people, but the sovereignty of the individual, defined by the ultimate possibility to cancel, collective power if necessary. This phenomenon corresponds to what Marchel Gauchet calls *the turn of democracy against itself*.

The state's inability is now being blamed by the very regime that actually led to the limitation of its role. Namely, the (post)modern era as the era of globalization now queries everything what is national, including sovereignty, making the economy transnational. *On the one hand*, the political sphere, together with all other dimensions of contemporary life is now a subject of economic rationality. Therefore, not only man is exclusively defined as *homo economicus*, but also all dimensions of human life are defined through market rationality, where the state openly responds to the needs of the market. Neoliberal rationality is extended to the state, and reflects the success of the state towards its ability to maintain and feed the market, binding the legitimacy of the state to the success of the market. *On the other hand*, the neoconservative rhetoric seeks to limit the role of the state and suppress it, where the crisis of the nation-state is evident, and whose role of providing protection to the citizens is now neglected through its primary engagement in the economy. Democracy is therefore limited by harsh economic logic and calculations, where great role and responsibility now lies in the hands of *civil society* being able to contribute, as a space where individuals act by the same interests, motives and aims.

Civil society, privileged as never before, became the motor of a new phase of the autonomous organization of social life. Paradoxically, the sovereignty of the people as a *collective body*, redirects to civil society as a *set of individuals*, which is nothing but an undefined form of collective body, although its nature is defined as “*a mobilized participant citizenry juxtaposed to dominant economic and state power.*”¹⁸

However, can civil society really deal with such challenges and responsibilities? Is not civil society *a shining example of democratic practice* and only a collective body that can easily turn into its *opposite*? In practice, civil society can also limit democracy because of its flaws. Civil society can act extremely undemocratic, referring to the failed democratic practices, also reflecting discontent against problems arising due to the consequences on the global market such as migrants, economic crisis, debt crisis, unemployment, poverty, etc., which can lead to the re-awakening of the ideals of racism, nationalism, chauvinism and radicalism. The accumulated problems of society that nobody cares about can go in two directions: either they can be directly linked to the will of the masses, or, through the will of the populists, it will become their will as well.

Therefore, on the following pages, the ways and circumstances will be identified under which civil society can be shaped by ochlocratic practices, and *vice versa*, when the practices of civil society become ochlocratic. Greater role and presence of civil society in fact demonstrates the inability of democratic institutions to deal with the spectrum of civil needs, which gives to the civil society greater powers, but also, greater impact of masses and the will of people on their activities.

Between demos and ochlos

¹⁸ Cox, Robert W: Civil society and the turn of the millenium: prospects for an alternative world order. *Review of International studies*, Vol.25 (1999), No.1., 3-28.

There are also figuring other determinants of the *role of the people* and its will in their participation in decision-making process. The people are being looked upon with disdain, understood as unreasonable *Vulgus*.¹⁹ Therefore, a special term was coined “to express contempt for the rule of *vulgus*: ochlocracy.”²⁰ Ochlocracy is the term to describe “the direct rule of the mob or mass, or, perhaps, its effective ability to indirectly – but crucial – influences on the government.”²¹

In the absence of democracy and the engagement of its actors, ochlocracy mimics itself in a willingness to appear as a democracy. Relying on demagogues and dictators, ochlocracy contains *democratic illusion*, where the *ochlos* (scum) is trying to show up like *demos* (political people). The notorious and homogeneous *people's will* between *demos* and *ochlos* is now put into question. The problem lies in the essence of democracy itself. Government by the people is an abstraction that basically means that the government is created by the will of the majority of people. But, does the will of the people really exist, or do only individuals have the will? In the discussion about ochlocracy, Zgodić states that “*there is no such thing as the will of the people: since only individuals, persons, personalities, individuals, or human beings do, think, feel, dream*”²² and therefore there is “no such thing as a social individual, as a real social person which would possess the will and the collective prospective will, and produce a common spirit manifested, among other things, in the people's will.”²³ Therefore, there is a thin line between the will of people as a democratic postulate, and unreasonable *Vulgus*, defined through ochlocracy, where his will is despicable.

Democracy or better said its lack therefore can produce ochlocracy and ochlocratic practices which exists at the same time with democracy. It must be noted that ochlocracy is not democracy. Demagogues use the democracy, and its lack to mobilize masses. Therefore, it is necessary here to examine two cases in which ochlocratic principles can be implemented and find their basis through civil society, and whether this phenomenon represents a threat for democracy. In the first case, the lack of democracy produces ochlocracy as civil society and civil society as ochlocracy. In the second case, lack of democracy leads to a new form of totalitarianism in the context of civil society and ochlocratic practices.

Ochlocracy as civil society

Since ancient time, wise people have said that the threat of democracy is *mob ruled*, or in other words, *ochlocracy*. Because of *the mass* that makes civil society, it should therefore not be seen as a *complete, clean, innocent* and *perfect* example of democracy, but with caution of influence of demagogues. It is especially convenient due to the fact that in liberal democracies civil society has big competencies and responsibilities. As an area where citizens are actively and free involved in all spheres of social actions, civil society can be closely related to ochlocracy, the direct rule of the mob or mass, or, perhaps, its

¹⁹ Latin word for „the masses“

²⁰ Zgodić, 2009. p.371.

²¹ Ibid.

²² Ibid. 372.

²³ Zgodić, 2009. p.372.

effective ability to indirectly – but crucial – influences on the government. This is especially supported by the fact that the civil society is usually taken as a “political space where voluntary associations explicitly seek to shape the rules (...) that govern one or other aspect of social life”²⁴ seeking “radical transformations of the prevailing order.”²⁵ Through democratic deficits, it is understandable that increasing number of citizens have considered civil society as a way to enhance public participation, consultation, transparency and accountability in global governance. As mentioned before, can civil society that uses its democratic right to act as the corrective of democratic system deal with such challenges and responsibilities?

Viewed as *a fuel for democratic practice*, civil society uses the power of mass media to create *the public* where it does not exist. A key element of the public – *the rational discussion of interested individuals* is being so replaced by *leisure* and *political apathy*. The inability of democratic institution to solve various problems of society, and mass media creating the public where it does not exist is beginning to serve to *the hidden politics of civil society*, and not as a link between society and the state where the *common interest* is the connective tissue. Here is a danger of civil society not only *becoming political*, but also *suited to ochlocratic practices*.

Civil society as such, in its practices, has space for *undemocratic actions*, through which ochlocratic tendencies can find fertile ground for their realization. After all, why civil society that experiences success in the implementation of their goals in some areas by civil self-organization would not spread further their requests? The *will of people*, through civil society understood in this way, is now somewhat *infamous*; it is a *totalitarian fetish*, “*a demagogic excuse for autocracy and tyranny*.”²⁶ Unlike *populous like demos* – the political community, *vulgus* is an illiterate political mass liable to demagogues.²⁷ Hence, ochlocracy as the rule of the general populace is democracy as the rule of the people spoiled by demagoguery, tyranny of the majority, and the rule of passion over reason. Ochlocracy is therefore a type of tyranny, held by crypto-practices, corruption, mediocrities etc.

Using the forms and methods of civil society, the mass as an *angry crowd* is trying to *deceive democracy*, using their principles to act undemocratically. On the other hand, the lack of democracy does not only make it impossible to *prevent the undemocratic practices*, but also allows demagogues and populists to *use civil society* that in the absence of democracy masquerade as democrats, speaking *in the name of people* what the people want to hear, but is overridden by arrogant elites or corrupt politicians.

Civil society as ochlocracy

Therefore, although various theoretical schools and courses tend to see the good side and the power on the side of democracy and freedom in civil society, researchers such

²⁴ Scholte, Ian Aart: “Civil Society and Democracy in Global Governance” CSGR Working Paper No. 65/01. January, 2001., p.6.

²⁵ Ibid.

²⁶ Zgodić, 2009. p.371.

²⁷ The term *vulgus*, as a pejorative for *majoritarianism*, is akin to the Latin phrase *mobile vulgus* meaning *the fickle crowd*, from which the English term *mob* was originally derived.

as Simon Chambers warns that “a large part of contemporary theory, however, fails to see the dangers that civil society can put to democracy.”²⁸ Indeed, if civil society is an enough safe bridgehead to combat again nondemocratic regimes, what prevents it from being used for undermining democracy? Voluntary associations of civil society do not *ipso facto* have the promotion of democracy on their agenda. For example, some civic associations can employ underhanded tactics in the pursuit of special privileges of *private interests*. Other destructive groups such as racists, ultra-nationalist and religious fundamentalists can seek to suppress the democratic rights of others. But, that are not the only threats of civil society that can easily turn into its opposite.

Returning back to the discussion regarding the existence of *the will of the people*, in the context of civil society, democracy provides space and its lack the realization of “many civic initiatives which are motivated by some levels of intolerance, mistrust, xenophobia, hatred and readiness to use violence.”²⁹ Therefore, a reference to civil society as a “basic element of the health of democracy, certainly cannot be used if there is no social consensus about basic values in order to harmonize the conflicting individual and group interests.”³⁰ Well-ordered and successful democratic order depends not only on social relations established through civil society, but also by the *constitutional engagement* and activities of political and legal institutions. Keith Whittington therefore argues that “*civil society can for democratic institutions represent a threat as same as support.*”³¹

The absence of social consensus about basic values civil society can act ochlocratic, misused and guided by unarticulated masses or demagogues and populists. Reese-Schäfer critically objects civil society, believing that the concept of civil society is in any case not unproblematic, making it in such circumstances possible to “*achieve full civil-social blockage of necessary reforms.*”³² With this comes the authoritarian internal structure of their actors. Therefore, excessive antistatic can certainly lead to “alienation from the political system, and thus, of political activity at all – in favour of a short-termed (...) engagement.”³³

Civil society activists are always the spokespersons *of the people*. With such practices of civil society, as a vision and wish of all democratic societies, their leaders masquerade as democrats speaking in the name of the will of people, although “*true democrats never use the term will of the people*”.³⁴ By the will of the people, as a *totalitarian fetish*, demagogues use democracy and its lack to mobilize the masses: “populists see themselves as true

²⁸ Chambers, Simone and Kymlicka, Will: *Alternative Conceptions of Civil Society*. Princeton University Press, Princeton, 2002., p.101.

²⁹ Pavlović, Vukašin: *Civilno društvo i demokratija* [Civil Society and Democracy]. Udruženje za političke nauke Srbije i Crne Gore, Čigoja štampa, Beograd (2004) p.139.

³⁰ Ibid. 140.

³¹ Whittington, Keith: Revisiting Tocqueville’s America: Society, Politics, and Association in the Nineteenth Century. 21-32. In: Edwards, Bob – Foley, Michael W. – Diani, Mario (eds.): *Civil Society and the Social Capital Debate*. Tufts University, Hanover and London, 2001. p.23.

³² Windfuhr, Michael: Der Einfluß der NGOs auf die Demokratie [The Influence of NGOs on Democracy]. 520-548. In: Merkel, Wolfgang – Busch Andreas (eds.): *Demokratie in Ost und West. Für Klaus von Beyme* [Democracy in East and West. For Klaus von Beyme]. Suhrkamp, 1999. p.542.

³³ Reese-Schäfer, Walter: *Civilno društvo i demokratija* [Civil Society and Democracy]. *Politička misao*, Vol. 41 (2004.), No.3, 65-79.

³⁴ Zgodić, 2009. p.371.

democrats, voicing popular grievances and opinions systematically ignored by the governments, mainstream parties and the media. Many of them favour direct democracy – political decision making by referendum and popular initiative.”³⁵ Therefore, civil society through democratic system becomes ochlocratic, and subject to the *demagogues* and *populists*. Mobilizing the masses ochlocracy through civil society makes civil society ochlocratic.

A new type of totalitarianism?

Through civil society, ochlocracy as a form of tyranny “in the arrangements of its actors always mimics (...) to appear as a democracy.”³⁶ Podunavac claims that it is in such nature “to ochlos (scum) represents as demos, and ochlocracy as democracy.”³⁷ Manipulated civil society most likely “found in those transitional states that have previously functioned under centralized state bureaucratic rule but are currently taking steps to join the global community of democracies and are expected to demonstrate an active commitment to developing civil society.”³⁸ Further, this means that civil society is losing their democratic potential; it is mimicked by particular interests, which are represented as common.

In modern democratic societies, populism is best seen as an appeal to *the people* against both the established structure of power and the dominant ideas and values of the society. This structural feature in turn dictates populism’s characteristic legitimating framework, political style and mood. But, “anti-system mobilization is not enough by itself to identify populist politics, for that description would also take in the new social movements.”³⁹

Therefore, populists through the actors of civil society claim legitimacy on the grounds that they speak for the people, for the silent majority of ordinary, decent people, claiming to represent the democratic sovereign and not a sectional interest, “whose interests and opinions are (they claim) regular overridden by arrogant elites, corrupt politicians and strident minorities.”⁴⁰ They appeals to the people in a style that is democratic in the sense of being aimed at ordinary people priding themselves on simplicity and directness. Such an ochlocratic phenomenon is seen through vulgus who “does not hide, is always displayed and shows the way it is (...) wants to be obvious and available to anyone.”⁴¹ And knowing that the power of the crowd is fickle and destructive, ochlocracy is therefore forced to operate and maintain through demagoguery and populist actions.

³⁵ Canovan, Margaret: Trust the People! Populism and the Two Faces of Democracy. *Political studies*, Vol.42 (1999), No.1, 2-16 p.2.

³⁶ Zgodić, 2009. p.376.

³⁷ Ibid.

³⁸ Miller, Chris, Howard, Joanna, Mateeva, Antoaneta, Petrov, Rumen, Serra, Luis and Marilyn, Taylor: Toward a Typology of Civil Society. 71-103. In: Enjolaras, Bernard – Sivesind, Karl Henik (eds.): *Civil Society in Comparative Perspective*. Emerald Group, Bingley, 2009. p.87.

³⁹ Canovan, 1999. p.3.

⁴⁰ Ibid. 5.

⁴¹ Zgodić, 2009. p.372.

The experience of totalitarianism in the period between the two world wars affected the mass society theorists like Erich Fromm and Hannah Arendt look extremely negative towards the social movements. According to their view, “social movements reflect an escape from freedom and the attempt of alienated individuals to achieve security and identity by fanatical commitment to a target and obedience to the leader (mostly fascist).”⁴² However, the mass through civil society can not only be mobilized towards undemocratic and dangerous ideologies, but it can focus its attention to other, irrelevant things for the common interests, actually legitimizing the existing order. Making some phenomena in society popular and attractive, masses through civil society and vice versa are creating attitudes and values, and the impact on public opinion. Ochlocracy is so omnipresent by the fact that the views of the masses are generally accepted as the dominant values of the society. Civil society therefore, through the ochlocratic practice is leading to the tyranny of majority as another type of totalitarianism.

Although there are such tendencies, ideologies of liberal democracies see *no threat in ochlocracy*, ignoring the threats of the rule of mindless masses, mobs, crowds, vulgus, comparing ochlocracy with political apathy, claiming that it is impossible that “citizens undergo large mobilizations and be transformed into a destructive power and rule of vulgus, mass, crowd etc.”⁴³ What happens when the political apathy gets face in the form of a party, or political movement, or the ochlocratic aspirations subsume civil society? It is supported by the rise of populism in the Europe in the last few years, which has its final outcome in brining radical right-wing parties to power in several European countries. Here we also must not forget the indisputable fact that their support, among others came by local civil society.

Therefore, it is important to recognize *ochlocratic moments* in the society, preventing that civil society becomes an ochlocratic, populist apparatus, when democracy can very easily turn into its opposite.

Conclusion

After all, it can be concluded how the challenges that arise due *the lack of democracy* and *the abuse of the role of civil society* are not only closely connected, but also deriving one from the other. With the emergence of postmodernity, democracy is reduced and limited through *technocracy*, *bureaucracy* and *neoliberal rationality* in favor of harsh economic logic and calculations. Such an order, in which all dimensions of contemporary life are subject of economical rationality, is unquestionably *totalitarian by itself*. The total dominance of economic interests over the interests of the people is more and more evident. Thus, the democratic role of the people has been reduced mainly to the electoral process, where they are no longer able to discuss and make important political decisions in accordance to the common interest as before. In an order where liberal democracies failed to solve some problems of the postmodern era, they were now thrown on the shoulders of *civil society* which role is to contribute democracy. But although the great role and responsibility that now lies in his hands, there is often the

⁴² Hejvud, 2004. p.533.

⁴³ Zgodić, 2009. p.378.

case where civil society by itself replaces the political activity of the people by passivity, leisure and political apathy, using the power of mass media to create *the public* where it does not exist, focusing the attention of the people to other, irrelevant things.

On the other hand, there is the challenge in which the will of the people is the reflection of a certain political atmosphere, confirming or negating it, while the civil society is understood as a tool which reflects the will of the people. Observed in this way, the role of civil society is to return the democratic role to the people, while on the other hand it can act extremely undemocratic, referring to the failed democratic practices. Because of *the mass* that makes civil society, it should therefore not be seen as a *complete, clean, innocent and perfect* example of democracy, but an anti-democratic reflection in which civil society is not anymore this nice, social movement, but the opposite, with caution of influence of demagogues. Civil society can now be closely related to ochlocracy, the direct rule of the mob or mass, where the accumulated problems of society that nobody cares about can go in two directions: either they can be *directly linked* to the will of the masses, or, *through the will of the populists*, which will become their will as well. The lack of democracy now does not only lead to totalitarian elements by itself, but it provides a space for demagogues and populists to masquerade as the promoters of democracy, this way carrying out undemocratic, ochlocratic practices. Civil society therefore, can also limit democracy because of its lacks, through the ochlocratic practice leading to the tyranny of majority as *another type of totalitarianism*.

Hence, political apathy together with ochlocratic aspirations can in the end have three outcomes. In the first one, it just *maintains the existing order*. In the second one, while pointing out that they are against arrogant elites and corrupt politicians, manipulated civil society through ochlocratic practices also helps *bringing populist elites to the power*. In the third one, ochlocratic practices through civil society can *bring radical right-wing parties to power*. In a such vicious circle, ochlocracy in democratic practices through civil society, is not as insignificant as liberal democracies says, seeing there no threat and comparing ochlocracy with political apathy, claiming that a mass mobilization of the mob is not possible.

Between two of those totaliratianisms, the one that occurs through the lack of democracy in the existing order, and the other that can arise as a consequence of the ochlocratic practices of civil society, the only solution is *true struggle for democracy*. But, one should be very careful at this point. To begin, we must underline the importance of recognizing ochlocratic moments and its forms, together with demagoguery and populism in the society, hence preventing that civil society becomes an ochlocratic, populist apparatus, where democracy can very easily turn into its opposite. Thereby, one should work on the return of civil decision-making in public social and political processes of the common interest by democratizing the existing order. Its mere democratization will actually restore the democratic role of the civil society, reducing its role and the possibility of its ochlocratic practices.

OVERVIEW OF THE CHANGES IN THE NEW CZECH CIVIL CODE CONCERNING THE DEPRIVATION OF LEGAL CAPACITY

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Historical development of civil law in the Czech Republic

The new Czech Civil Code 89/2012 Sb.¹ (“CC”) which is strongly influenced by the ABGB (Austrian Civil Code),² went into effect in the Czech Republic on 1st January 2014. This codex has been used in the Austrian part of the Austro-Hungarian Empire since 1812 and in Austria it is still (but with many amendments) in force. In the Kingdom of Hungary the ABGB was prevailed only indirectly and just near the Austrian border. However, in 1853 it came into effect in the whole country for almost 10 years.³ In the Czech Republic this codex was invalidated and replaced by “the Middle Code of Civil Law”⁴ in 1950. This followed the political change in Czechoslovakia in 1948, when the Communists’ party became the main political power. In addition to social, political and cultural changes, the law was also created in compliance with the Communists’ regime.

After the revolution of 1989, the main principles in civil law were changed.⁵ The most important amendment No. 509/1991 Sb. claimed in § 1 paragraph 1 that “regulation of civil legal relationships shall contribute to the realisation of civil rights and freedoms, in particular to the protection of personhood and inviolability of ownership.”⁶ This principle gives an aim to civil law and makes it a tool to achieve higher purposes, thus, regulations of civil law cannot be self-serving any more.

If you take a look at civil laws in eastern post-socialist countries, you can see that there are still a lot of similarities resulting from socialism which controlled peoples’ daily lives and limited their personal privacy. This is the reason why the Communists’ government made a lot of changes in this field of law to support its power.

Deprivation of people of their legal capacity in the past

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¹ Act No. 89/2012 Sb., Civil Code as amended. Accessible at: <http://www.zakonyprolidi.cz/cs/2012-89>

² Act No. 946/1811 JGS., Allgemeines bürgerliches Gesetzbuch (Austrian Civil Code)

³ NESCHWARA, Christian. Geltung und Ausstrahlung des österreichischen ABGB im CEE-Raum. *Jus-alumni Magazin – 200 Jahre ABGB* [online]. 2011, no. 1, p. 15 [cit. 26. 8. 2015]. Accessible at: http://www.jus-alumni.at/media/jusa_1300084433.pdf

⁴ Act No. 141/1950 Sb., Civil Code

⁵ HURDÍK, Jan et al. *Občanské Právo Hmotné, Obecná část, Absolutní Majetková Práva*. 1st ed. Plzeň: Vydavatelství a Nakladatelství Aleš Čeněk, 2013.p. 26. 308 p. ISBN 978-80-7380-377-3.

⁶ § 1para 1 Act No. 509/1991 Sb.



First of all, I would like to mention that during the Communists' era it was very often used to deprive people of their legal capacity. It means that all legal acts of people were invalid. Even buying an ice-cream or a loaf of bread was a legally wrongful act. § 10 paragraph 1 of the previous Civil Code said: "If an individual is completely unable to perform legal acts due to a permanent mental illness, the court shall deprive him or her of the capacity to act legally."⁷ All legal acts were performed by the guardian instead of being performed by disabled people.⁸ If the person performed a legal act, it was absolutely invalid and permission from the guardian afterwards was impossible. The Highest Court in decision R 7/1979 claimed that the person whose legal capacity was limited was able to enter into everyday contracts because those contracts did not endanger him and his rights and it was impossible for these contracts to be performed by other people (e. g. guardian).⁹ The new Civil Code confirmed it. According to § 65 of the CC, such a legal act is only invalid if it causes harm to a person. The Czech organization League of Human Rights, which protects rights of people, estimates that before 2014 there were over 35 thousand people deprived of their legal capacity.¹⁰

The official reason was due to mental disease and to the desire to protect those disabled people from con artists. This mental disease does not have to be only temporary caused for example by drug or alcohol abuse.¹¹ In many cases the judge's decision was based on correct expert opinions because these people were really ill. But there were also some people who were unwanted or who fought against the regime. The deprivation of their legal capacity was the best way to punish them. It actually means that the civil law was politically abused.¹² After the fall of the Communists' regime we have had rule of law again, so nobody is deprived of his legal capacity for political reasons. Nevertheless, we also have to consider the rights of mentally disabled people. They are still people living in our society who have the right to a peaceful life. To be independent in basic contract law, in my opinion, is part of this right. It is incredible that this is still possible in many eastern countries, for example in Slovakia.¹³ The Czech Republic and Slovakia used to be one country (Czechoslovakia) with a common legislative body. After the break-up in 1993 many laws have remained in force but both countries have had the right to modify them. The Civil Code from 1964 was in fact the same codex in both countries also containing mostly the same socialist principles. In Slovakia this Civil Code No. 40/1964 Z. z. is still in force.

The new legal adjustment

⁷ § 10 para 1 Act No. 40/1964 Sb., Civil Code

⁸ SVETKA, Jiří et al. *Občanský Zákoník, Komentář*. 10th ed. Prague: C. H. Beck, 2006. p. 91. 1465 p.

⁹ LAVICKÝ, Petr et al. *Občanský zákoník: komentář*. 1st ed. Prague: C.H. Beck, 2014, p. 290, 2380 p. ISBN 9788074005299.

¹⁰ Soudy musí vyřešit více než 35 tisíc případů lidí, kteří v minulosti přišli o svéprávnost. In: *llp.cz* [online]. [cit. 27. 4. 2015]. Accessible at: <http://llp.cz/2014/01/soudy-musi-vyresit-vice-nez-35-tisic-pripadu-lidi-kteri-v-minulosti-prisli-o-svepravnost/>

¹¹ Lavicky et al.: op. cit. p. 289.

¹² Svestka et al.: op. cit. p. 91.

¹³ § 10 para 1 Act No. 40/1964 Z. z., Civil Code.

Nowadays, according to § 55 paragraph 1 of the CC, only the limitation of legal capacity is possible and the explanatory memorandum highlights the temporariness of this legal restriction (no more than 3 years but extension is possible).¹⁴ When something changes, i.e. the seriousness of the illness, the judge must revise his decision immediately.¹⁵ It must only be made in the interests of the concerned person and with full recognition of his personal rights. It is an extraordinary provision and it can only be used when milder and less restrictive measure would not be enough. The milder measure could be for example assistance with decision making (§ 45 CC) or representation by a household member (§ 49 CC). However, this instrument should only be used in cases concerning the ordinary daily matters of the concerned person (for example utility payments). In more difficult cases the guardian named by the court must act.¹⁶

The guardian should be a person, who is a close relative or someone who is interested in the well-being of the disabled person.¹⁷ The court cannot issue the decision regarding to the limitation of the legal capacity before naming the guardian for this person. The Communists' regime did not do this because it was a very useful instrument for restraining political opponents.¹⁸ The guardian has the duty to inform the disabled person in due time of intended important measures relating to himself or his assets and also has to comment in relation to such measures as well as to other measures within a reasonable period of time.¹⁹

Only courts are authorized to limit the legal capacity of people considering their opinion. The CC also changed that the expert's opinion is not enough and the judge should "see the person", for example via interrogation. Although the expert's opinion is really important evidence in legal proceedings regarding the limitation of a person's legal capacity, it cannot be the only evidence and shall not replace facts.²⁰ In addition, it is also necessary to become familiar with the behaviour of the person in question regarding how he lives, how he cares for his property, etc.²¹

The judge can decide about the limitation of legal capacity using negative enumeration. In this case the judge may specify which legal acts performed by this person are legally invalid. The performance of other legal acts by this person is not limited. It means that if the court does not specify anything concerning the entering into marriage, the person has full freedom to use this right.²² It is forbidden to respect the so called *lucidum intervallum*, which is the situation, when the person is temporarily given the capacity to decide sensibly because his mental disease has some gap.²³

¹⁴Důvodová zpráva k zákonu č. 89/2012 Sb. p. 59, 598 p. Accessible at:

<http://obcanskyzakonik.justice.cz/fileadmin/Duvodova-zprava-NOZ-konsolidovana-verze.pdf>

¹⁵ § 60 Act No. 89/2012 Sb., Civil Code

¹⁶ Lavicky et al.: op. cit. p. 277.

¹⁷ Svestka et al.: op. cit. p. 250.

¹⁸Judgement of the Czech Constitutional Court from 7. 12. 2005 Nr. IV. ÚS 412/04. Accessible at:

<http://nalus.usoud.cz/Search/ResultDetail.aspx?id=48373&pos=1&cnt=1&typ=result>.

¹⁹ § 466 Act No. 89/2012 Sb., Civil Code

²⁰Judgement of the Czech Constitutional Court from 18. 8. 2009 Nr. I. ÚS 557/09. Accessible at:

<http://nalus.usoud.cz/Search/ResultDetail.aspx?id=63411&pos=1&cnt=1&typ=result>.

²¹ Svestka et al.: op. cit. p. 90.

²² Lavicky et al.: op. cit. p. 291.

²³ Svestka et al.: op. cit. p. 238.

Because of the Communists' legal history of abusing limitation of legal capacity and human rights, the limitation of personal legal capacity is a very controversial encroachment on human integrity. Fundamentally, the aim of this legal institution is to help people, not to limit them. It is created for people with deficiencies, in comparison with healthy people. Therefore, the law compliments this deficiency with guardianship in order to safely take part in civil law relations, instead of leaving them alone and vulnerable.

The Czech Constitutional Court ("CCC") declared that it can only be used considering human rights, especially Article 1 of the Universal Declaration of Human Rights: "All human beings are born free and equal in dignity and rights."²⁴ The CCC highlighted that the focus of the Czech legal system is the individual and the state should protect his rights and especially his dignity. The Czech Republic was founded on respect for human rights and on principles of civil society.²⁵ According to Art. 10 paragraph 2 of the Charter of fundamental rights and freedoms, everyone has the right to be protected from any unauthorized intrusion into her private and family life.²⁶ The most important thing, which has influence on the decision, is the interest of the person.²⁷

Legal acts which can be made with or without guardians, with the example of judgments in courts of the Czech Republic

Decision No. IV.ÚS 1499/13 (The Constitutional Court)²⁸ – avoiding material and financial harm

The limitation of legal capacity is allowed if the main purpose is to avoid material and financial harm caused to a disabled person. Ms. Landštofová was a pensioner with mild cognitive impairment. She spent a lot of money and although her pension was about 12.000 CZK (≈ 444 EUR), her debts were more than 230.000 CZK (≈ 8.518 EUR). Because of these reasons the court limited her legal capacity with the specified amount of 1.500 CZK (55 EUR) a week. However, her other private and public rights were not affected by this decision. Therefore, she could for example take part in the elections or get married without permission issued by a guardian.

Decision No. IV. ÚS 3102/08 (The Constitutional Court)²⁹- suffrage of people deprived of their legal capacity

²⁴Article 1 of the Universal Declaration of Human Rights. Accessible at: <http://www.un.org/en/documents/udhr/#atop>

²⁵ Judgement of the Czech Constitutional Court from 7. 12. 2005 No. IV. ÚS 412/04. Accessible at: <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=48373&pos=1&cnt=1&typ=result>.

²⁶ Art. 10 paragraph 2 RESOLUTION of the Presidium of the Czech National Council of 16 December 1992 on the declaration of the CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOMS as a part of the constitutional order of the Czech Republic No. 2/1993 Coll. Accessible at: <http://www.usoud.cz/en/charter-of-fundamental-rights-and-freedoms/>

²⁷ Lavicky et al.: op. cit. p. 275.

²⁸ Judgement of the Czech Constitutional Court from 23. 7. 2013 No. IV. ÚS 1499/13. Accessible at: <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=80046&pos=1&cnt=1&typ=result>.

A plaintiff deprived of his legal capacity was complaining that all people in his position did not have suffrage. It is the basic human right to vote for our representatives and to be voted for. According to his opinion, it is unjust when all people deprived of their legal capacity are in general unable to take part in elections, although the plaintiff has been interested in politics for a long time and he regularly reads newspapers.

The Constitutional Court claimed that it is necessary to guarantee electors with the ability to understand the meaning, purpose and impact of elections and the capacity to make an intellectual decision. On the other hand, there were over 23 000 people deprived of their legal capacity in 2007 but only 3 900 were limited. It shows the sweeping decision making by courts. The Constitutional Court summarized that the deprivation of legal capacity is still a legal reason for deprivation of suffrage, however, courts should use this instrument less frequently and the limitation of legal capacity should be preferred.

Decision No. 9 Ads 23/2014 (The Supreme Administrative Court)³⁰- obligatory legal guardianship for doing some procedural acts

According to § 3032 CC, all people who were deprived of their legal capacity before 2014, now have, without any judicial decision, i.e. ex lege, the capacity of doing everyday legal acts. However, the old age pension is mostly the only source of money that pensioners have, although, it is not a large amount of money. Dealing with that is not an everyday legal act and disabled people need to have legal guardian to do procedural acts and start the proceeding against the provider of their old age pension.

Conclusion

To ensure rights of disabled people and avoid nonsense in legal theory, § 64 of the CC was adopted, claiming that the decision to limit the legal capacity of a person does not relate to doing everyday legal acts.³¹ They can have for example some pocket money which they can spend on whatever they want.³²

This is basically the same as in the Austrian Civil Code (ABGB). If a disabled person in Austria enters into a legal transaction within the scope of the guardian's sphere of influence, but it is relating to a minor matter of daily life, such a legal transaction is effective.³³

I personally believe that the new regulation of depriving people of their legal capacity reflects individuality of a person and supports his rights against abuse or the

²⁹ Judgement of the Czech Constitutional Court from 12. 7. 2010 No. IV. ÚS 3102/08. Accessible at: <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=66800&pos=1&cnt=1&typ=result>

³⁰ Judgement of the Czech Supreme Administrative Court from 26. 3. 2014 No. 9 Ads 23/2014.

Accessible at:

http://www.nssoud.cz/files/SOUDNI_VYKON/2014/0023_9Ads_14_20140327110106_prevedeno.pdf.

³¹ § 64 Act No. 89/2012 Sb., Civil Code

³² Judgement of the Czech Constitutional Court from 23. 7. 2013 No. IV. ÚS 1499/13. Accessible at: <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=80046&pos=1&cnt=1&typ=result>.

³³ § 280 para 2 Act No. 946/1811 JGS., Allgemeines bürgerliches Gesetzbuch (Austrian Civil Code)

sweeping decision adopting by courts more. However, the Czech non-governmental organisation “League of Human Rights” criticizes the decision making of courts, when they limit the legal capacity of people in the way of using some form. In consequence of that form the disabled people are not allowed to do almost any kind of legal act, which is the same situation as before.³⁴ I suppose that the courts should get used to new legal regulation and take more account of individual need of legal protection.

³⁴ Komplexní úprava opatrovnictví a podpůrcovství pořád chybí. In: *llp.cz* [online]. [cit. 11. 9. 2015]. Accessible at: <http://llp.cz/2015/03/komplexni-uprava-opatrovnictvi-a-podpurcovstvi-poradchybi/>

