

## A STATE OF FREE RIDERS ?

### Abstract:

This article is an essay on the question, whether contemporary state (at least contemporary state in Central and Eastern Europe) is not changing its own nature as a consequence of changing nature of its citizens – what happens with our state if its citizens start to behave like free riders? The first part presents the free rider's "moral" attitude (in contrast with liberal, libertarian, Kantian and utilitarian attitudes) and speculates on why this attitude could be dominant nowadays. The second part tries to describe implications of free rider's attitude for a state- a new metaphor of state as an authoritarian "insurance company" is offered – and for the behavior of politicians and bureaucrats. The third part offers a comparison of these implications with some ideas of public choice theory. The fourth part discusses the role of judges (as guardians of the rule of law and legal principles) in a state of free riders. The fifth part in a form of a conclusion speculates about broader philosophical implication of the presented thesis, especially for the field of communication and language.

### Key words:

state; free rider; Central and Eastern Europe; judicial power; public choice theory

### 1.

Should we talk here about the changes in the law that were made in the last twenty years (metamorphosis or metastasis?), we are unlikely to avoid addressing the role of the state and the change this role has undergone. This change is very often discussed in conceptual interactions, which we all know: e.g. state and the globalization, state and the EU, state and sovereignty, disappearing of the state and its comeback etc.<sup>1)</sup> I do not want to deal with certain specific legal issues (and most certainly not positively-legal); I would like to touch the changing role of the state from a more general, even political point of view. I do not claim to be saying something profoundly new; I merely want to offer a new metaphor – metaphor of a state of free riders.

Because the state is in fact a community of people (a certain form of political organization of the society if you will), I will start by contemplating about the change of the relationship between the individual and the society. The following quote of a French historian Marcel Gauchet will serve this purpose well: "Forming in front of us is a new ideological pathology – pathology of non-affilia-

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<sup>1)</sup> For a brief summary of these issues and approaches to these issues see e.g. Hay, C., Lister, M., Marsh, D. (eds.): *The State. Theories and Issues*, New York 2006.

tion. It is the opposite of the non-normality of totalitarian period, when the individual was suppressed in the name of the collective, which was there to fully define an individual; be it class, nation or a race. We are now sliding towards the other extreme. The notion of a pure individual appears; one, who owes nothing to the society, but claims everything from it. Duties towards the collective and historical sense of belonging are slowly becoming something unthinkable... The collective is rejected, as soon as affiliation to it brings problems, but, at the same time, it is very sought after. We are looking at individuals, who want to manage their affairs themselves, exist for themselves, belong nowhere, but in fact demand guarantees of their existence from this elusive entity.”<sup>2)</sup>

How should we call this new role of the individual? It can hardly be called liberal, because a liberal prefers freedom of the individual over anything else (no matter what is his understanding of this freedom<sup>3)</sup>), but at the same time emphasizes that exactly because a man is free he is also responsible for his actions. Gauchet's individual does not want to be free in the true sense of the word, because he would also have to be responsible: he wants to have the choices, act freely, but without responsibility. He demands guarantees for his arbitrary choices from the society or its political organization, which we call the state. Maybe an apt name for this new role of an individual could be a “free rider”. This name obviously not only describes those, who use a mass transport system without paying for the ticket, but mainly those, who wish to benefit from some public goods without being willing to repay these benefits (e.g. a person, who enjoys the benefits of the social system, but is not willing to contribute to it). A free rider is therefore rational in pursuing his interests inside a society, but is not willing to do something for the society in return. A free rider is not a Kantian subject, who has self-designed his moral standpoints using the “test” of categorical imperative (its first version to be precise). The free rider asks: “Why should it be rational to act in such a way that the principle of my actions could become a general law, when it is more beneficial for me to act as I please? Why to pay for the ticket when I can be a free rider?” A free rider probably knows that his attitude is short-sighted in the sense that if all behaved like him, soon the public goods, which the free rider wants, but is not willing to pay for, would become scarce. However, the free rider relies on others (rationally?) not to behave this way. He works with a short-term profit, because the long-term point of view is of no interest to him - “in the long run, we are all dead”, he might say. The free rider is not a moral pluralist, because this attitude

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<sup>2)</sup> Gauchet, M.: [La condition historique, entretiens avec François Azouvi et Sylvain Piron] (orig. published Paris 2003) Dějinný úděl. Hovory s Françoisem Azouvim a Sylvainem Pironem, Brno 2005, pgs. 180 and 191.

<sup>3)</sup> For different current concepts of liberalism see e.g. Gaus, G.F.: Contemporary Theories of Liberalism, London 2003.

in fact requires tolerance towards those, who have a different concept of morality – the free rider has no concept of morality and therefore he cannot tolerate others. Other moral standpoints interest him only to the extent, to which it is expedient to parasite on them. The free rider does not consider others to be goals (according to the second version of Kant's categorical imperative), he is not an utilitarian (who would be interested in maximizing “happiness” or “welfare” for as many people as possible), because for him other people are just tools to achieve his own goals (his employees are perceived as tools to achieve his profit, his partners as tools of own satisfaction etc.) and the “public good” is a value for him only as far as he can make his living out of it. The free rider will gladly use various social contexts (which is not necessarily something immoral), but as soon as certain social context demands something from him, he will immediately leave it and replace it with a different one – in this sense this is a victory of the “pathology of non-affiliation”.

How could have this (im)moral attitude become dominant?<sup>4)</sup> Firstly, we do not know and we cannot find out whether it is in fact dominant. Secondly, any attempts to explain it would be mere speculations, which can be made nonetheless. I believe that due to the complexity of today's societies many of their members realize that their attitude cannot bring a substantial change. For example, democratic voting procedures will only be effective if the state can pursue effective independent policy. However, an independent policy in, say, economic area is becoming a mere illusion – how can a Czech voter influence Chinese campaign that promotes drinking of milk by children, which lead to surge in the prices of dairy products? The economic policy of the state (and the media continue convincing us every day that economic policy is the only policy) is therefore dictated by factors, which a single government can hardly change and it is therefore being dragged behind by the circumstances. If therefore a member of a society perceives himself as insignificant within the whole, why should he be responsible towards the whole and not behave like a free rider? This could be related to something else still: Modernity (which most certainly produced today's societies) can be perceived as a process of emancipation, during which also previously excluded members of societies (such as slaves, women, racial, ethnic and sexual minorities) won personal and political freedoms.<sup>5)</sup> However, even if this idealized view would be true, we must not forget that modern societies also brought various techniques for controlling people, which made the freedom we feel possible – this might include techniques, which lead

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<sup>4)</sup> An attempt to capture the “morality” of a free rider in the context of moral theories since around the 17<sup>th</sup> century can be found in Šejvl, M.: *The Changing Role of the State: The State as a Mirror of the Individual?*, in *Acta Juridica Hungarica*, volume 52, No. 2, June 2011, pg. 157-165.

<sup>5)</sup> About the mistrust towards “big narrations” about emancipation, see e.g. Lyotard, J.-F.: *O postmodernism*, Praha 1993 (originally published 1979 and 1986). [On Postmodernism]

“lower” levels of the society to assume “civilization habits” of the “higher” class; “banalities”, such as good manners and decorum in general,<sup>6)</sup> but it could also include techniques influencing the modern societies much deeper. A late work by Michel Foucault attempts to describe such techniques – disciplination only becomes a dominant technique in prisons and psychiatric hospitals in the 17<sup>th</sup> century,<sup>7)</sup> but soon became a universal technique (applied also in schools and factories), which prepares the members of the society for the fact, that their freedom will not be in the future dangerous for the society as a whole. A technique, which Foucault calls security (*securité*) already assumes individual choices of people, whose knowledge is predictable and therefore also calculable (e. g. 18<sup>th</sup> century physiocrats)<sup>8)</sup> – this also opens the door to the modern model of individual freedom, which can then be linked to the technique of liberalism.<sup>9)</sup> We might not necessarily agree with these Foucault's descriptions and classifications of techniques (e.g. for many it will be unacceptable that liberalism is introduced as a technique for controlling people), however we cannot deny the fact that they are in fact ideologically neutral and often notice phenomena, which seem to us normal or even marginal. However, if they hold a bit of truth we can understand well why and how our times could on one hand seem to maximize freedom and on the other hand bring helplessness, to which the free rider reacts as described above. In the early 90s Keller said: “The same process of power centralization, which disciplined, civilized and cultivated our actions, lead also to a situation, in which decisions concerning us are made regardless of the degree, to which our behavior is disciplined and cultivated... Civilization is at a crossroads, when decent behavior does not lead to a reward, but direct brutality, which is a result of the arrogance of state bureaucracies, easily asserts itself... The modern society came to a situation, when common indecency is still often punished; but decency is not rewarded anymore.”<sup>10)</sup> Can anyone wonder that the free rider strategy is considered to be efficient if not outright rational? In the Visegrad Group countries there might be one more influential factor stemming from the region's past: After many years, during which the state and the public approach was preferred and private initiative suppressed, since the early

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<sup>6)</sup> As described by, for example, Norbert Elias. *Viz Elias, N.: [Über der Prozeß der Zivilisation: sozlogenetische und psychogenetische Untersuchungen] O procesu civilizace. Sociogenetické a psychogenetické studie. Proměny chování světských horních vrstev na Západě, Praha 2006 (original issue 1939).*

<sup>7)</sup> Foucault, M.: *Dohlížet a trestat. [Surveiller et punir] Kniha o zrodu vězení, Praha 2000 (orig. published 1975).*

<sup>8)</sup> Foucault, M.: *Security, Territory, Population, Lectures at the Collège de France 1977-78, Palgrave Macmillan 2007 (first published in 2004).*

<sup>9)</sup> Foucault, M.: *Zrození biopolitiky. Kurs na College de France 1978-1979, Brno 2009 (first published in 2004). [Naissance de la biopolitique: Cours au Collège de France 1978–1979]*

<sup>10)</sup> Keller, J.: *[Ill-conceived society] Nedomyšlená společnost, Brno 1992, pg. 42.*

90s we see the exact opposite trend – private became positive and the state and public negative. However, the habits of the past remained; the easiest way to make a living was to disobey the law and profit from the state and public sector. And free riding remained as well.

The question is, whether such free riding does not also mean that the free rider, already used to being a political subject (“zoon politikon”) understands this obvious thing as a limiting burden and therefore wishes to return to the purely animal life? Let us recall Aristotle's “Politics”: Who does not want to live in a polis is either a god or an animal. Or expressed using terms of Hannah Arendt, such person wants to be a man, no longer participating in *zoé* – qualified form of life characterized by speech and action, but returning to the sphere called *bios*, which is characterized by creating and satisfying needs, albeit needs more sophisticated than the needs of animals.<sup>11)</sup> I do not wish to analyze general philosophical questions, which could make the “morality” of the free rider dominant in modern societies. What I wish to examine are “only” the consequences of this “pathology of non-affiliation” and “morality” of the free rider for the state. I will try to describe some of them, although it will be again mostly speculations.

## 2.

The state could stop acting like an economic entity (business), however, it cannot stop acting like an insurance company – if the enterprises of private persons fail (either intentionally or by accident) the state is here to help. If in recent financial (and other) turmoil some states nationalized certain companies it was only with the notion in mind that the state has to pay the debts of private business, for which the state does not bear responsibility. At the right time the state will sell them back to private sector for a price favorable for them, i.e. the privatization that we all are used to will continue. Therefore the state is still a relic of a state enterprise, an insurance company if you will, which does not make profit by its business activities. It merely provides services to the citizens, seen as private persons, who pursue their individual interests (paying their debts), using the means the state controls thanks to its power position – collecting taxes and other levies (masked as insurance, fees or anything else). The state is thus potentially fully privatized, but this potentiality can never be realized, because the state would then lose its *raison d'être* (that would not be so bad), which would lead to a situation, in which the state would stop functioning as an insurance company and thus it would force private persons

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<sup>11)</sup> Arendtová, H.: [The Human Condition] *Vita activa neboli O činném životě*, Praha 2009 (orig. published Chicago 1958). More on the modern state as an entity trying to control person's life to the tiniest detail and on the transition from *zoé*, as a qualified form of life, to the sphere called *bios* see Agamben, G.: *Homo Sacer. Sovereign Power and Bare Life*, Stanford 1998 (orig. published Torino 1995).

in the position of free riders to be responsible and that is exactly what they do not want. The free rider wants to use the state as an insurance company and is therefore very far from a libertarian (e.g. Nozick-type) or anarchist.

Potentially all citizens might get to a position of a free rider, which means that the bonds of belonging and solidarity are disappearing. This makes the insurance company odd – it is not solidarity with the excluded, marginalized groups (workers, poor, race minority etc.), only a certain form of institutionalized compassion for the individual. Pierre Rosanvallon told us in his contemplations about the social state that the big narration about emancipation of man, for example by means of the social state, is in trouble, because we lack a group (race, class etc.) that could be emancipated. Instead, we stand face to face with individuals, who failed in their lives because of their own mistakes and tiny injustices (combination of which is unbearable). And exactly because of this such people are the group most threatened by social exclusion, which will become permanent, because no program can be adjusted for each individual specifically.<sup>12)</sup> In this sense we all are potential victims, who request compassion – preferably broadcasted live and on-line so that all know that we mean our television and internet emotions “seriously”. However, if we can no longer think in a category of higher units, where will universality and the public, which was always served by the state and its public law, end? And if it is not generality, it is “only” compassion, which is to large extent fake, because it is institutional, and it is immoral, because it is demanded by free riders, who themselves do not want to show any non-institutionalized compassion. The social state is therefore in crisis not primarily because it is expensive (there are of course ways to make money for it, albeit economists would probably not like them<sup>13)</sup>, or because it suppresses personal initiative of the individual (which could be the case), but because these bonds of togetherness and belonging between the members of the society, which social state implicitly assumes and which legitimize the social state, are missing. These bonds of togetherness are missing on the side of the successful (who view their unsuccessful fellow citizens as parasites), as well as on the side of the unsuccessful (who view success as something undeserved and envy the more successful fellow citizens – as Zygmunt Baumann aptly said, “the poor would like to play with better cards, they have no intention to play differently”<sup>14)</sup>). It is a society, whose

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<sup>12)</sup> Rosanvallon, P.: *The New Social Question. Rethinking the Welfare State*, Princeton 2000 (first published in Paris in 1995).

<sup>13)</sup> See e.g. the last chapter in KELLER, J., *Soumrak sociálního státu*, Praha 2006 [The Twilight of the Social State]

<sup>14)</sup> Baumann, Z.: [Freedom] *Svoboda*, Praha 2003 (first published by Buckingham 1988), pg. 112

members imagine as socially just and acceptable only that, which suits them – e.g. those, who do not want to pay taxes often demand social benefits etc. State as an insurance company must help those, who act as free riders. And exactly because of this it must use coercion towards them.

If the state is only some sort of insurance company equipped with power functions, the most important parts of the state are just these power functions (having resigned on being an economic entity and social state). In this sense the state is not dead and we can show that it is in fact gaining new strength – e.g. DNA database of not just criminals but also suspects, tighter control over citizens using various security and information systems etc. The threat of terrorism, which has become an obsession for our society, is getting a bit different interpretation: if the legislation in the area of human rights, security etc. is in fact dictated by the threat of terrorism, then it is not the democratic parliament, who dictates the contents of our legal and other regulations (because the worst violations of people's freedoms are not implemented in legal regulations, but in non-legal regulations, which are followed more strictly), but the terrorist, and so it is no longer deliberation and discussion that governs our society, but fear. While the state built on the solidarity bonds between the citizens is disappearing, the state as a power element thrives. It is therefore the power apparatus what makes the state something declaratively public (Michel Foucault said “the law always refers to an ax”), but it is combined with the above mentioned counter movement towards potential privatization of this power sphere. After all, what can we think about the fact that the administration of most of databases with our private data is outsourced to private companies? What can we think about private security services or about (e.g. American) practice of private prisons? Again, as before, the power sphere is being privatized, but it must never be privatized completely – why should private security services take care of public safety, if it does not bring them profit?

If citizens of a state act like free riders then it is clear that those, who manage the state, let's call them politicians and bureaucrats, pursue primarily their own interest, which is quite understandable from the point of view of the public choice theory – why should I pursue other interests than my own? From this it follows that the state is an insurance company equipped with power functions, which is used by politician and bureaucrats for their own aims and it may easily happen that they too will behave like free riders, i.e. they prefer their short-term interest before the interests of the state.

When it comes to politicians the system of a single nomenclature was in fact replaced by a system of several nomenclatures – instead of providing “living” for a single party the state sustains more parties. Legitimacy of such situation is to create the image of democracy, while in fact the parties simple take turns in using the state. This democracy is perceived as a randomizer; because the nomenclatures are in fact not fundamentally different (they all pursue self-interest), the decision of the electorate is in fact rational to a very limited extent: besides personal benefits voters follow mainly sympathy, media image and

charisma. Elections usually lead to coalitions, depending always on a few votes. Who and how wins this small majority and how the coalition is built is in fact random. This randomness is positive, because it means that political parties take turn in being in power and none of them knows, what will be the outcome. For this reason there is no such thing as public interest, which would unite us all – there is no “us, the people”, held together by the bounds of solidarity. Politics is therefore at first glance polarized, but all govern predictably, led by circumstances, and exactly because of this the polarization must appear as distinct as possible. The death of an ideology means that the right wing, left wing, center are just labels for different nomenclatures. For example, Hungarian left was implementing right-wing liberalization and privatization, the Hungarian right-wing, claiming to be conservative, proved to be nationalistic etc. The political spectrum therefore needs to be perceived as polarized. The political parties do not create elites (which can be identified by permeability from below, by upfront criteria for entry and long-term development – i.e. open elite), but mafias (closed, impervious, short-term and therefore ever-changing groups). For this reason the state can never die – political parties would not survive otherwise. And the fact that politics is business is, again, quite understandable considering the individuals pursuing their own private interests.

When it comes to bureaucrats; they run the state machinery and therefore the politicians, as well as private businessmen, need them – the power insurance company must continue to operate. The bureaucracy is no longer a class representing the rational and depersonalized rule of law as imagined by Max Weber<sup>15</sup>); on the contrary – it pursues own interests, such as the well-known notions of Michel Crozier about bureaucratic organization, which is always full of power struggle and game for controlling the “areas of uncertainties”, while those, who are being controlled are not of much interest.<sup>16</sup>) The law was transformed into a tool of bureaucratic control, which is also a well-known fact. Bureaucrats are also aided by assuming the role of experts – any time democratic ethos about the power of people fails these experts come to justify even intolerable measures, grounded in the power of rationality (whatever they mean by that).

If therefore the politicians and bureaucrats control this power insurance company they must necessarily control it in an authoritarian way. Because the parties take turns it must be authoritarian democracy – whoever is currently governing can almost anything. In fact, it does not matter whether it is authoritarian president, government or parliament – Hungary today could be a sad

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<sup>15</sup>) WEBER, M., *Economy and Society*. An Outline of Interpretive Sociology, 2 volumes, Berkeley 1978 (first published in 1925)

<sup>16</sup>) For these and other theories of bureaucracies see e.g. KELLER, J.: *Sociologie byrokracie a organizace*, [Sociology of Bureaucracy and Organization], Praha 2001.

example of a state, where one, formerly liberal, political party won constitutional majority and uses it for changing constitutional basis of the country (e.g. limiting the powers of the constitutional court and destroys some guarantees of a Rule of Law. The neighboring countries and the EU showed no signs of concern over anything more than the independence of the central bank. This brings me to the role of parliament democracy: while for a liberal it is normal that my sovereign self assigns to me moral values and I also respect to a large extent the moral values of the others, the “morality” of a free rider shows no understanding of the sovereign self of the others. This does not need to be approval or tolerance, simply understanding and willingness to discuss, which could lead to a change in opinions, would suffice. A big critic of the parliamentary democracy, Carl Schmitt, was right when he said that the parliament should be a place, where deliberation and discussion leads to shifts in political views of MPs, not a place, where the opposing camps stubbornly stick to their positions, deaf to the arguments of others. Because this second attitude prevails (and in this way today’s practice is similar to that of the Weimar Republic), parliamentary democracy is in crisis, Schmitt claims.<sup>17)</sup> (It is perhaps not necessary to emphasize that although Schmitt’s diagnosis might be accurate, his therapy, based on a sovereign leader declaring the state of emergency, is not.) Therefore the conflicts between different positions of sovereign selves are in fact instances of power struggle for dominance (economic, informational, status etc.). The moral standpoints of the sovereign self constantly change to reflect the interests of the sovereign self – e.g. when my children do not attend a public university I do not want to contribute to students, who are in fact “just slacking”; on the other hand, when they do, I want others to contribute to the studies of my diligent children. If discussion and deliberation cannot be pursued only those can succeed in the public political sphere, who are admired by others for their strength or cunningness – “babble as you want, what counts is the number of votes behind you”. And let’s hear Carl Schmitt’s view again; in his opinion the state is the decisive political subject – state decides who is a friend and who is the enemy. Therefore the state is primarily a power subject, which is a goal in itself.<sup>18)</sup> If the state turns into a power insurance company, which pursues the goals of politicians, bureaucrats and private businessmen it is no longer the

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<sup>17)</sup> SCHMITT, C., *The Crisis of Parliamentary Democracy*, Cambridge 1985 (first issued in 1926).

<sup>18)</sup> SCHMITT, C., *Pojem politična* [The Concept of the Political]: text from 1932 with foreword and three corollaries, Brno-Praha, 2007.

decisive political subject. Schmitt tells us therefore that the current political situation is a civil war. It is a war no longer waged with weapons, but rather with the media, which are used by political subjects to discredit competitors, etc.

### 3.

Of course, these speculations regarding the behavior of politicians and bureaucrats are nothing new; around the 1960s economists started thinking in this way about politics and government interventions in the economy, which eventually lead to the public choice theory.<sup>19)</sup> According to this theory the behavior of politicians can be explained by their effort to maximize their chances of being elected; bureaucrats, on the other hand, intend to preserve their privileges in controlling the “uncertain areas”, and both groups together pursue state-level politics only in accordance with these interests, not checked by the imperative of effectiveness (which allegedly guide the behavior of private enterprises), and therefore they have the tendency to increase the size of the state beyond proportion. Because this theory perceives the state and the public sector negatively it is no surprise that it has been called “science about political failure” by one of the main protagonist of this theory, James Buchanan. If in the 1960s it was believed that market failures can be, according to Keynesians, “fixed” by the state then in the 1970s, after the onset of the public choice theory, it was believed that also the state can fail (“state” or “political” failure). The proposed explanation for these failures was the above mentioned private interests of politicians and bureaucrats. The administration of Margaret Thatcher in Great Britain and Reagan’s administration in the USA, inspired by these views, decided to radically change state politics, which was, by the way, one of the main sources of inspiration for the governments in the Central and Eastern Europe in the after the 1990, at least in the rhetorical way. In consequence, inspired by their angloamerican counterparts, Central and Eastern Europe privatized first those sectors, which formerly belonged to the state, starting with the sphere of state-controlled economy. Since this moment privatization in Central and Eastern Europe (certainly in case of the Czech Republic) continues on towards other spheres, such as education, health care and pension scheme (as was already mentioned above) and it will certainly not stop there. At the same time we can observe the efforts to copy and “simulate” the criteria of effectiveness, native in the free market environment, into the criteria used in the public sector – e.g. system of “points” in judicial sphere (number of effectively concluded cases) or in science (number of published articles).

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<sup>19)</sup> For easily available overview of this theory see e.g. HINDMOOR, A., *Public Choice*, in Hay, C., Lister, M., Marsh, D. (eds.): quoted work, pg. 79 and following.

From the perspective of the public choice theory, privatization is appropriate wherever “political failures” are most emphasized in economic terms, i.e. in state regulation of the economy. As I wrote above, privatization of the state functions can never be carried out completely, because the free riders would no longer be able to rely on the state as a power insurance company. Instead of such complete privatization, the countries of the Central and Eastern Europe saw privatization, which would not be approved by advocates of the public choice theory – privatization of former state monopolies without de-monopolization and establishment of competition. Classic examples include state-owned companies, such as ČEZ, where it is in fact not clear, whether they are owned and controlled by the state or they control the state and its politics. This seems to be indicating that privatization is not a good solution for the growing negative influence of the state and bureaucracy.

The efforts to increase the effectiveness in the sphere, which still remained public (i.e. those efforts to “simulate” the efficiency of the market in the public sphere) leads to many well-known dysfunctions – because criteria of efficiency in the public sphere are, of course, not perfect, those, who are being evaluated using these criteria quickly understand how to cope with them – e.g. policemen split continuing crimes to recurring to get more “points”, scientists and university employees “recycle” their articles (or resort to plagiarism, which is the “menace” of today’s higher education) etc. Many spheres of public activities in efforts to increase the effectiveness change from general financing to targeted financing using concrete projects, which in the best case pay for what would be anyway paid for in the general financing scheme, and in worse case less, because much of the time is wasted by filling up tables, forms and other tools, creating dense “bureaucratic fog”. Because the criteria must be quantifiable and measurable they cannot deal with quality. And because evaluation based on these criteria must be as objective as possible, it must be also formalized to maximum extent. In the name of effectiveness, the “bureaucratic fog” thrives...

Such situation was certainly not intended by the public choice theorists (which only shows, how dangerous it is to draw practical recommendations from theories). I do not want to join the critics who are to be found (at least in the west) in large numbers these days. But I want to point out one thing: while in the 1960s the conflicting requirements of the markets and employees were addressed at the level of the governments by means of inflation, at the end of the 1970s, as a result of an economic crisis, inflation was under attack and this conflict was addressed by increasing the public debt (as was aptly described also by public choice theorists). Since the early 1990s this public debt is replaced by private debt, which grew out of proportion and in 2008 created another financial crisis.<sup>20)</sup> Since then the governments, at least in Europe, are

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<sup>20)</sup> More about this development can be found e.g. in Streeck, W.: *La crise de 2008 a commencé il y quarante ans*, in *Le monde diplomatique*, January 2012, pg. 10 and following.

forced to carry out measures favored by the financial markets, because if they fail to do so (which is probably currently the case in the EU) the crisis continues. Whose interests are then actually protected by the politicians and bureaucrats? While the public choice theorists worked with the premise that politicians strive to appeal to the voters and bureaucrats strive to defend the “big state” positions, today it seems that both these groups must follow the interests of the big finance.

Why then should we be surprised that the other members of the society behave like free riders when the politicians and bureaucrats fail to defend the public interest and even their own interest, protecting instead the interests of someone else?

#### 4.

If then the negative consequences of the actions of the state and its bureaucrats are unlikely to be fixed by privatization, maybe the postulates of the rule of law could wage this “battle” instead. In recent years we have grown to be accustomed to the fact that if the parliament democracy is failing, In recent years we have grown to be accustomed to the fact, that if the parliament democracy is failing, the rule of law or its “material core”, which even democracy cannot change, could “save us”. What could “save us” is the rule of law and its “material core”, which even democracy cannot change. The idea of the rule of law can be in the simplest (and least accurate) way defined as the idea of minimizing any arbitrariness, which means that the state is perfect once everything in the state is subject to the rule of law. At first sight it seems that the idea of the rule of law can to some extent merge with that “mentality of non-affiliation”, which aims for the opposite – maximize arbitrariness of the individual. And this maximization of the arbitrariness of the individual leads to minimization of the arbitrariness of the state.

However, as long as the state still has its enforcement power system doesn't its growth lead to increased arbitrariness, similar as in the case of an individual? The lawyers seem to be particularly sensitive to this maximization of state's arbitrariness. But the problem is somewhere else: It should be the judges who protect the rule of law. But why should we see a judge any differently than any other bureaucrat; more dangerous than other bureaucrats in fact, because he has been given (almost miraculous) independence, for which he fights like a lion (sometimes not willing to fight for anything else)? I do not want to join here those, who (maybe justly) express their fear of the “judicial activism”, because also these critics work towards the victory of the authoritarian democracy paradigm. If judges manifested their independence too often by courageous decisions (as many of them still continue to do – something we should be thankful for), it would be only a question of time before politicians and other bureaucrats would get them under control using political and other means (see problems with appointing and dismissing judges). It is therefore sufficient that the judi-

ciary becomes completely bureaucratized and/or politicized and the rule of law proclamations will be in fact used to eradicate it. Finally, there is something to be said about the last and maybe the most optimistic face of the law – the principles of law. I do not want to criticize or defend some theory behind the principles of law, whether it was developed by Alexy or Dworkin or somebody else. I want to address the principles of law as they are exhibited in the judicial practice. Previously I tried to show that a principle has in practice the tendency to become a label for almost anything according to the following logic: “if I do not know how to make a decision I will say that it is based on a principle”. This is why the “principle” label is used more and more frequently, regardless of what the theorists say, and it is also the reason why these labels become inconsistent over time. The effort to solve this inconsistency leads to increased particularization and concretization in the use of the label “principle”<sup>21)</sup> We can easily imagine that what we call “principles” will become more common than what we call “rules” and judges preferring “principles” over “rules” will be in their name destroying the idea of the rule of law.

## 5.

The disappearing public sphere is reflected also in the disappearance of the symbolic (which I already wrote about in a different place and do not want to repeat it here<sup>22)</sup> but also in changes in the communication function: if the sphere of the public is in question also the language itself is potentially in question, because by definition it cannot be private language. But we do not need to be so radical: communication as such is currently threatened not by disappearance of common language (which may happen after people start communicating with machines more than with other people and gradually lose – to say it with Wittgenstein – common life form and become not semantic but syntactic, just like their machines<sup>23)</sup>), but by the fact that any person trying to talk in the name of the general or public becomes potentially non-trustworthy; his speech is still comprehensible, but few expect that what he says has no hidden meaning, that he does not speak in the name of some private or group interest, that his speech has no special purpose, that his gesture is not false etc. Indeed, if the mentality

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<sup>21)</sup> ŠEJVL, M., *Principy v rozhodování Evropského soudního dvora* [Principles of Decision-Making at the European Court of Justice], in *Právní obzor*, volume 86, No. 4 (2003), pg. 377 – 385; the same: *Právní argumentace Evropským soudním dvorem* [Legal Argumentation by the European Court of Justice], in *České právní myšlení a logika- minulost a perspektivy* [Czech Legal Thinking and Logic – The Past and Perspectives], Brno 2003, pg. 102- 112.

<sup>22)</sup> ŠEJVL, M., *Proměny symbolického života práva a média* [Changes in the Symbolic Life of the Law and Media], in Knoll, V., Bednář, V.(red.): *Naděje právní vědy* [The Hopes of the Jurisprudence]. Býkov 2006, Plzeň 2006, pg. 483 – 492; the same: (Not Only) State Symbols in Danger?, in *International Journal of Public Administration in Central and Eastern Europe* No. 1/2010.

<sup>23)</sup> For this possibility as a next phase of the development of sign function see LOHISSE, J., [Systèmes de communication] *Komunikační systémy. Socioantropologický pohled*, Praha 2003 (orig. published Paris 1998).

of non-affiliation characteristic for the free rider, was complete, hardly anyone would put any importance on speeches/actions by journalists, politicians or even judges, who speak “in the name of the republic”. And the more we distrust these speeches/actions the more we are convinced that this mentality is winning. Umberto Eco expressed it well; it is “heresy of the world of information, today accustomed to plots, coded phrases, half-empty words, once promised, later renounced alliances, divorces murmured and dismissed, searching for secret message in every situation, in every expression... Because we lost God we could use as reference, we look for allegories everywhere,[...] shining short circuits in the blunt web of everyday[...]. Where everything has a second meaning, everything is irredeemably flat and stupid...”<sup>24)</sup>

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<sup>24)</sup> ECO, U., [Sulla letteratura] *O literatuře*, Praha 2004 (pův. vydání Milano 2002), str. 150 a násl