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Law in "Times of Crisis" and Social Justice – General Remarks in the Era of COVID-19

Keywords: law, Constitution of the Republic of Poland, social justice, protection of order and public security, acquired rights
Słowa kluczowe: prawo, Konstytucja RP, sprawiedliwość społeczna, ochrona porządku i bezpieczeństwa publicznego, prawa nabyte

Abstract

The purpose of the article is to signal that actions aimed at implementing the principle of social justice (in the context of Article 2 of the Polish Constitution) require the legislator to consider a number of variables. It is particularly about the principle of equality and guaranteeing an appropriate level of security (including social security), as well as respect for acquired rights and trust in the state and law. Legislative actions that result in legitimate securitization of the law may of course lead to the limitation of the principle of social justice, as long as they take into account the objective needs of safety and health protection. The use of inadequate measures by the legislator or the creation of apparent threats and the related fear by the power apparatus will evoke a deep sense of injustice and lead to violent opposition from society.

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Streszczenie

Prawo w „czasach kryzysu" a sprawiedliwość społeczna – uwagi ogólne w dobie COVID-19

Celem artykułu jest zasygnalizowanie, że działania zmierzające do realizacji zasady sprawiedliwości społecznej (w kontekście art. 2 Konstytucji RP) wymaga od prawodawcy uwzględnienia szeregu zmiennych. Chodzi zwłaszcza o zasadę równości i gwarantowanie odpowiedniego stopnia bezpieczeństwa (w tym socjalnego) oraz poszanowanie praw nabytych i zaufania do państwa i prawa. Działania legislacyjne owocujące uzasadnioną sekurytyzacją prawa mogą oczywiście prowadzić do ograniczenia zasady sprawiedliwości społecznej o ile uwzględniać będą obiektywnie występujące potrzeby bezpieczeństwa i ochrony zdrowia. Użycie przez prawodawcę środków nieadekwatnych lub kreowanie przez aparat władzy zagrożeń pozornych i związanego z tym strachu, będzie wywoływać głębokie poczucie niesprawiedliwości i prowadzić do gwałtownych sprzeciwów społeczeństwa.

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I.

Current social behavior manifested, quite impulsively, on the streets of Polish cities by individuals and more or less organized groups (masses[3]), can be perceived as the result of social dissatisfaction with the legal regulations introduced by the legislator (as part of the fight against the COVID-19 virus) society's response to the way of moderating the right, social, cultural, ideological and economic status of individuals. This thesis rises a reflection on the necessity to ask the question: is the Republic of Poland currently a country recognized as a democratic state of law, in which the basic ideas of social justice are implemented?[4] Or, under the banner of the fight against

[3] In terms of the impulsiveness of the crowd and its leaders through the prism of the inertia of the crowd. Le Bon, *Psychologia tłumu*, Kęty 2007.

[4] See more about social justice concept in A. Domańska, *Zasady sprawiedliwości społecznej we współczesnym polskim prawie konstytucyjnym*, Łódź, 2001; A. Pułło, *Sprawiedliwość społeczna w systemie zasad naczelnych Konstytucji RP*, "Państwo i Prawo" 2003, No. 4; P. Tuleja, *Commen-*

COVID-19, was there an imbalance in social relations resulting from the creation of unjustified, not supported by objective requirements and criteria, regulations, infringing the rule of law and the principle of equality, which resulted in not only an individual sense of injustice, but even breaking the social justice principle?

II.

There is no doubt that in the paradigm of legal positivism[5] statutory law is equated with an appropriately established normative act[6], which enables the legislator to implement social justice referred to in the Art. 2 of the Polish Constitution[7]. Moreover, it can be considered a fact that such a model of using the law can be found in all countries, especially in democratic countries, the circle of which would undoubtedly include the Republic of Poland, as indicated by the content of the cited provision of the Polish Constitution.

It can therefore be assumed that the law in the "hands" of every power in a democratic state should be considered as a tool implementing social justice through which the legislator strives to maintain a balance in social relations and prevents its subliminal aspirations from creating unjustified, not supported by objective requirements and criteria of privileges for selected groups of citizens. In such circumstances, social justice should be the constant goal of empathically profiled power, which will be exercised in the operation of a democratic state ruled by law. Therefore, if it is proved that the law established in a country with a democratic structure which does not objectively take into account social values, brings the assumption that it should be con-

tary to art. 2, [in:] *Konstytucja RP tom 1. Komentarz*, eds. M. Safjan, L. Bosek, Warsaw 2016, pp. 240–252; J. Blicharz, *Związek między zasadą równości a zasadą sprawiedliwości społecznej w polskiej Konstytucji i orzecznictwie Trybunału Konstytucyjnego: próba spojrzenia ogólnego*, "Przegląd Prawa i Administracji" 2018, vol. 114, pp. 59–69.

[5] L. Morawski, *Pozytywizm „twardy", pozytywizm „miękki" i pozytywizm martwy*, "Ius et Lex" 2003, No. 1.

[6] D. Wasiak, *Argument z porządku publicznego jako uzasadnienie technik panoptycznych w dyskursie prawnym*, Lublin 2016.

[7] Dz.U. No. 18 item 483 with changes.

sidered that the Republic of Poland cannot be considered a democratic state ruled by law, as it does not implement the idea of social justice[8]. The mere existence of a constitutional guarantee for the existence of social justice in the legal order is not sufficient, and thus does not constitute a real reflection of its respect by the legislator.

Therefore, these social expectations and the normatively positively externalized model of influencing society through the law established in the name of a democratically concluded "social contract"[9] cannot be disturbed even by the current state of knowledge that "one matter is the existence of law; separate – its value or worthlessness"[10]. For the efficiency and instrumentality of the impact of this tool – a law that can significantly affect the level of socially expected justice – depend on the intention of the legislator.

Nevertheless, the determination of whether the legislator implements social justice directives, and thus whether social justice has not been violated, belongs, according to the Polish Constitution, to the Constitutional Tribunal, and not to society "on the streets". In other words, it is the Constitutional Tribunal that may recognize and rule that there has been a violation of social justice, if it does not raise doubts in its, and not in social, assessment[11]. Moreover, in this particular case of mutual interaction and assessment of possible violations of constitutional ideas, it is also important that "no reference to justice or other moral values is included in the definition of law"[12]. The existing relationship between social justice and law is shaped by determinants influencing the law. As a result, they can effectively reduce the need to include the social justice clause, as they limit the scope of acquired rights (protected in the rule of law paradigm) by referring to the necessity to protect safety and health (which can be seen as a component of broadly understood security within social justice).

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[8] Constitutional Tribunal, 12.04.2000, K 8/98.

[9] As understood by the idea of a social contract by Jean-Jacques Rousseau.

[10] T. Barankiewicz, *Inkluzywny pozytywizm prawniczy (geneza, rozwój, główne idee)*, "Państwo i Prawo" 2010, No. 1.

[11] Constitutional Tribunal, 25.02.1996, K 21/95.

[12] H.L.A. Hart, *Legal Positivism*, [in:] *The Encyclopedia of Philosophy*, vol. IV, ed. P. Edwards, New York 1972.

III.

Bearing this in mind, it should be assumed that a democratic state implementing the principle of social justice should function on the basis of normatively established legal principles and legally protected values. Thanks to them, each machinery of power, which not only has the ability to tailor the law to meet social expectations, but also manages the machinery of coercion constantly ready for active actions, will be able to objectively catalogue, considering the principles of their limitation, freedoms and rights underlying human rights, as well as values and directives that serve society as a whole.

Therefore, the actual political, economic and legal ideals should be included in the values that must reflect the expected, and not only normatively tailored, actual state of affairs. On the other hand, in the scope of the determined directives addressed to law-making and implementing bodies, which are important especially in the process of interpreting the law, it should be emphasized without a doubt that they must be closely related to each other formally, as well as materially, so that it can be concluded that they do not constitute they are a kind of trap for the masses of society. With other assumptions or intentions that are an element influencing trust in the state and the law, they (individuals) could be exposed to negative legal effects that they could not foresee at the time of making their decisions and actions.

Therefore, it should be assumed that the legislator acting according with the principle of social justice will always create a legal state in which individuals drive in the belief that they trust the rule of law, and that the decisions made by them will be consistent with the applicable law also in the future, and thus, they will also be recognized in case of a change in the perception of the legal order, even after the lawmakers are changed.

In other words, the new legal regulations adopted by the legislator in a short time must not offend with the lack of predictability and unannounced or unconstitutional changes. Hence, the change of any legal order, as well as only a short-term view of the actions of the government machinery for the purpose of protecting order and public security, must not shock the addressees. Addressees of new norms and directional, albeit short-lived, changes in the operation of the government machinery should have time to adapt to the changed regulations and calmly decide on their further actions. Which means that

an unacceptable instrument for mitigating drastic or unexpected violations of acquired rights (which are part of the rule of law) are the current selective and highly non-equivalent forms of financial support proposed by the legislator, which are to constitute a specific safety valve under the principle of social justice (as a guarantee of).

Hence, the principles of the protection of acquired rights as an element shaping the principles of legal security and the implementation of the postulate of legal certainty should be integrated with the entire system of law – autopoietic, and thus be mutually complementary, transparent, specific and permanent, because the "stability of law over time may be in a particular way achieved by the application of the principle of inviolability (protection) of acquired rights"[13]. However, this does not change the fact that acquired rights do not last forever, as they are gradually replaced by evolutionary laws or abolished as a result of revolutions[14]. At the same time, "the principle of protection of acquired rights ensures the protection of subjective rights – both public and private. On the other hand, outside the scope of application of this principle are legal situations that do not have the nature of subjective rights or the expense of these rights"[15]. It does not make sense to consider the problem of whether the right ones were acquired "rightly" or they are originally undue – in the current situation there is no dispute that the rights of entrepreneurs or employees subject to violation fall under the category of rightly acquired rights.

IV.

In the Art. 2 of the Constitution of the Republic of Poland, we also find two fundamental priorities of a democratic state ruled by law, which are: respect for civil rights and freedoms and respect for the primacy of law, which mean that legal rules take precedence over other rules of procedure. Thus, moral and ethical rules affecting social justice may have an impact on the shaping of statutory law, as long as they do not conflict with legal rules, in particular due to the possibility of limiting the causative power of law. At the same

[13] T. Zieliński, *Pewność prawa w stosunkach pracy,* "Studia prawnicze" 1998, No. 3.

[14] T. Zieliński, *Prawo do pracy, Zarys systemu. Część I. Ogólna,* Warsaw–Kraków 1986.

[15] Constitutional Tribunal, 22.06.1999, K 5/99.

time, it should not be forgotten that the law, in the opinion of every infringer, always is just law, although the process of its application is assessed as inconsistent with the requirements of justice[16].

V.

Although the principle of a democratic state ruled by law is also the source of the principle of proportionality in this respect, which is beyond the scope of the Art. 31 sec. 3 of the Polish Constitution, however, it is precisely a given regulation that allows social justice to be effectively limited by the legislator. By raising the issue of security protection normatively, it is possible to effectively limit not only the general principle of social justice, but also to modify the scope of protection of acquired rights, in line with other constitutional principles, as it is not of an absolute nature as it has already been mentioned. In other words, acquired rights may be limited or abolished in case of a conflict of underlying values with other constitutional values, which should be given priority protection in a given situation. Such a value is undoubtedly the necessity to protect the safety of the masses (e.g. as a result of civil disobedience), as well as the necessity to ensure budget balance (as a result of the deterioration of the economic situation of the state[17]).

In the context of the equilibrium test and, at the same time, the admissibility of the restriction of acquired rights, the verification variables that should be taken into account are, first of all, four fundamental questions that every legislator should ask himself before imposing restrictions. And so he should determine:

1. "whether the introduced restrictions are based on other norms, principles or constitutional values,
2. whether it is not possible to implement a given constitutional norm, principle or value without violating acquired rights,
3. whether the constitutional values, for the implementation of which the legislator restricts acquired rights, may be granted in a given, specific

[16] W. Lang, J. Wróblewski, *Sprawiedliwość społeczna i nieposłuszeństwo obywatelskie w doktrynie politycznej USA*, Warsaw 1984.

[17] Constitutional Tribunal, 22.08.1990, K 7/90.

situation priority over the values underlying the principle of the protection of acquired rights, and

4. whether the legislator has taken the necessary steps to provide the individual with conditions to adapt to the new regulation"[18].

In the assessment of the current situation, a general doubt is not without significance, including the usefulness of the selectively introduced restrictions to achieve the intended/declared goal – the problem may be the difference between the actual and declared goals (subject to communication) – which in itself excludes the sense and necessity of research proportionality *sensu scricto*.

Moreover, it is worth noting that the very high nuisance of the adopted solutions will not be decisive in the context of questioning their admissibility – however, it should be shown (which is the essence of this problem) that other less onerous legal measures do not guarantee an acceptable effect. In the absence of alternative proposals and a "blind" (e.g. not based on scientific analysis) selection of solutions, also at this level there is the problem of operating within the rule of law and ensuring social justice.

The principle of citizens' trust in the state and law, as well as other principles resulting from it, such as the principle of protection of acquired rights or the protection of goods, do not prohibit the legislator from changing the law, even in a manner unfavorable to citizens. However, these rules require that their trust in the law that is already in force be respected. Consequently, the legislator should take into account the situation of persons whose trust in the state and the law requires protection through appropriate solutions adopted in the transitional provisions, and should each time establish appropriate vacatio legis enabling the masses to adapt to the new legal regulation[19]. Compliance with the standard of the rule of law would largely prevent the emergence of the need to save the principle of social justice requiring state activity in case of the emergence of security threats (here, social security) in which, through no fault (but through the fault of the legislator), citizens[20].

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[18] Constitutional Tribunal, 7.05.2014, K 43/12.

[19] Constitutional Tribunal, 15.12.1997, K 13/97.

[20] J. Marszałek-Kawa, D. Plecka, *Social Security as a Factor Contributing to the Evolution of the Political System in Poland after the Parliamentary Elections of 2015*, "Środkowoeuropejskie Studia Polityczne", No. 4, pp. 79–94.

VI.

The most important determinants influencing the law and, at the same time, the possibility of selectively shaping social justice by the legislator by means of statutory law include securitization, fear and the necessity to control criminal behavior, i.e. the necessity to protect the safety of the masses against forbidden-penalized behaviors influencing civil disobedience.

Securitization is a subjectively and range-profiled form of communication, resulting from a subjectively assessed reality and the recognition of the necessity to ensure security, and thus positioning the importance of protecting constitutional principles, including social justice. Therefore, the safeguard clause should be considered as a determinant that allows the legislator to organize the hierarchy of rules applied in a specific situation and to legitimize his further actions in the legal arena. In these circumstances, it should be considered that the law and the general safety clause are elementary instruments of securitization that connect and influence the domination of the power machinery over groups formed to incite and maintain social resistance through the *ad hoc* formed informal civil disobedience groups expressing their own demands. In other words, law is the possibility for the legislator to influence and shape scenarios of behavior inconsistent with the optics of the power machinery. Which is also currently used by the legislator. It does not change this state of affairs or the position of the actors of these scenarios by what level of disobedience it causes, because fear is pinned in this process of creating scenarios.

The level of threats or even fear sometimes is shaped in the legal arena, which is also a place of competition for the monopoly of articulating legislative needs and legislating. The power apparatus assumes a dominant position in confrontation with the camp of social disobedience. Hence, a kind of "threat juggler", which affects the level of social fear, and thus the possibility of shaping the necessity in terms of the significance or importance of taking actions to preserve the principle of social justice in the process of fighting threats, is not the society, but the person concerned, that is, the apparatus of power. Therefore, it is reasonable to assume that the distribution of fear, as well as its form, can (and probably does) have a significant impact on the position of social views on the actions of the legislator, and thus on the lev-

el of social dissatisfaction, which declines with time. Protection of security, including life, always is a priority for the masses who, in the process of their creation, agree, in the name of a social contract, to further strip away from the possibility of shaping the law, and thus the principles, which undoubtedly include social justice, which usually is only decoded. in the face of the lack of substitutes causing the concentration of citizens.

VII.

Civil disobedience has not yet received one more binding definition. Hence, for the purposes of this study, we assume that civil disobedience is a structure of behavior of a complex and not entirely homogeneous nature, aimed at promoting by individuals (supported by a group of people that is not defined in terms of scope and subjectivity) their own postulates standing in opposition to the dictates of the legislator or law enforcement agencies. We are talking about proclaiming postulates, which often are shaped by selective media messages[21] (mainly the so-called social media). Civil disobedience can be compared with public speech, which is a form of conscientiously conscientious expression of political conviction[22]. Hence, both the postulates and direct behaviors of individuals (and groups) are perceived by the power apparatus as an element of actions with a coloration of unlawful behavior, which only in certain circumstances could be considered as behavior in the cover of a counter-type. Thus, their specific unlawfulness could be justified on the basis of weighing the material aspect of the circumstances excluding the unlawfulness, i.e. the value of the infringed and protected goods. Of course, assuming the conceptual assumption that the law itself, or at least its enactment and application, is socially unfair. However, it should be assumed that this is only a de lege ferenda postulate about the negligible possibility of its inclusion in the applicable legal system, despite the fact that the current perspective of subjective rights, in particular in the

[21] M. Jabłoński, S. Jarosz-Żukowska, *Prawa człowieka i system ich ochrony. Zarys wykładu*, Wrocław 2004.

[22] R. Skrzypiec, *W poszukiwaniu sprawiedliwości. Obywatelskie nieposłuszeństwo-filozofia i działanie*, Kraków 1999.

field of the right to life and health protection, raises many questions as to the nature of the adopted solutions in terms of their compliance with the Constitution of the Republic of Poland.

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