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Transitional Justice, the Dual State, and the Rule of Law[1]

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Słowa kluczowe: sprawiedliwość tranzycyjna, podwójne państwo, rządy prawa, Polska, Prawo i Sprawiedliwość, Trybunał Konstytucyjny, sądownictwo

Abstract

In this article, the author argues that the introduction of measures in Poland to remedy violations of the rule of law, particularly regarding the judicial system, does not require so far referring to the principles of transitional justice. The author loosely refers to Ernst Fraenkel's concept of a dual state which is sometimes used to describe the political reality in contemporary Poland. In a dual state, there are two parallel realities, and apart from politicized organs there may also exist institutions that have not yet been captured by the ruling party, i.e. institutions that do not recognise the current, unconstitutional legal order. Therefore, according to the author, the assessment of the legal legitimacy of certain institutions or persons (including judges), after the restoration of the rule of law

[1] The article is partly based on research funded by the Polish National Agency for Academic Exchange conducted at the University of Glasgow in 2022.

in the nearest future, may differ from the classic transition from a completely non-democratic to a democratic regime.

Streszczenie

Sprawiedliwość tranzycyjna, podwójne państwo i rządy prawa

W niniejszym artykule autor argumentuje, że wprowadzenie w Polsce środków mających na celu naprawę naruszeń praworządności, w szczególności dotyczących sądownictwa, nie wymaga jak na razie stosowania zasad transitional justice. Autor nawiązuje do koncepcji Ernsta Fraenkela dotyczącej państwa dualnego, która bywa wykorzystywana do opisu rzeczywistości politycznej współczesnej Polski. W państwie dualnym istnieją dwie równoległe rzeczywistości, bo oprócz upolitycznionych organów mogą istnieć instytucje, które nie zostały jeszcze przejęte przez partię rządzącą, czyli instytucje, które nie uznają obowiązującego, pozakonstytucyjnego porządku prawnego. Dlatego też, zdaniem autora, ocena legitymacji prawnej określonych instytucji czy osób (w tym sędziów), po przywróceniu w najbliższym czasie państwa prawa, może różnić się od klasycznego przejścia z reżimu całkowicie niedemokratycznego do demokratycznego.

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I.

In the paper, I will argue that the introduction of measures in Poland removing violations of the rule of law, especially referring to the judiciary does not require, at the present time, the application of the principle of transitional justice. However, the postulates of this principle may be useful in future considering the consolidation of the authoritarian system in Poland.

II.

Qualifying the currently functioning regime in Poland in a descriptive sense as a specific type of political regime is challenging. In this respect, authors use various terms. In Poland, as in many other states, there is a certain progressive, incremental reduction of the typical principles of constitutionalism and

a gradual appropriation of independent institutions by political power[2]. This is not surprising considering the development of modern authoritarianism, and has been noted by several authors, including Steven Levitsky, Daniel Ziblat, Wojciech Sadurski and Kim Lane Scheppele. They note that the current break with the democratic state is not violent but involves a gradual takeover rather than the destruction of the established institutions[3]. The dynamism of this process, therefore, manifests in the fact that, in gradually reasserting the authoritarian regime, certain areas of the state function as before, based on the framework of the Constitution, interpreted as it was in the period before the autocrats gained power. It is challenging to capture the hybridity of regimes in which the principle of the rule of law is significantly weakened. Hence, there is no consensus in constitutional law doctrine regarding a name that would reflect the characteristics of many contemporary states in which democratic decay is observed.

Despite the new trends in the ways of destroying the principles of democracy and the rule of law, the actions of autocrats in Poland and Hungary are also not new. Before an authoritarian system is built, there can be two dual realities: an old moribund state under the rule of law and a new state where the constraints on political power are completely removed. Ernst Fraenkel described such a phenomenon by relating it to the first stages of the building of the Nazi state after Hitler's election[4]. Some Polish legal scientists relate the concept of a dual state to political reality in Poland, such as Ewa Łętowska and Jerzy Zajadło[5]. The concept of the dual state is helpful in describing the evaluation of authoritarianism. A dual state can be in a transitional stage between democracy and authoritarianism or between the rule

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[2] W. Sadurski, *Poland's Constitutional Breakdown*, Oxford 2019; T. Drinóczi, A. Bień-Kacała *Illiberal Constitutionalism in Poland and Hungary: The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law*, Routledge 2020; A. Sajo, *Ruling by Cheating – Governance in Illiberal Democracy*, Cambridge 2021.

[3] S. Levitsky, D. Ziblatt, *How Democracies Die: What History Tells Us About Our Future*, London 2019, p. 177; W. Sadurski, *op.cit.*, p. 7; K.L. Scheppele, *Autocratic Legalism*, "The University of Chicago Law Review" 2018, p. 545 ff.

[4] E. Fraenkel, *Der Doppelstaat*, Europäische Verlagsanstalt, 1974.

[5] . E. Michalik, *Podwójne państwo, wywiad z Ewą Łętowską*, https://nno.pl/podwojne-panstwo-rozmowa-z-prof-ewa-letowska (1.11.2022); J. Zajadło, *Podwójne państwo,* https://konstytucyjny.pl/jerzy-zajadlo-podwojne-panstwo (1.11.2022).

of law and lawlessness. From this perspective, in a process spread over the years, the new state could devour the old state. Mark Tushnet[6] refers to such a transitional system as authoritarian constitutionalism, where liberal freedoms are protected at an intermediate level, and elections are reasonably free and fair. Tushnet points out that an authoritarian constitutionalist regime could lose its authoritarian character and become fully constitutionalist, or it could lose its constitutionalism and become purely authoritarian. Therefore, such a system can either move towards a full authoritarian regime or, as a result of various social processes, come to a peaceful change of power through free – although sometimes not entirely fair – elections. Thus, in the dual state, there are two orders that exist in parallel, as if two states are pulling the rope: on the one hand, the democratic and rule-of-law state (or its remnants), and on the other, the authoritarian state, which has not yet completely supplanted the democratic state, but it is on that path. If, for some reason, the socio-political transition occurs before the new (fully authoritarian) state has fully developed, the systemic transformation may, in my view, be based on certain settlements and assessments of authoritarian tendencies by the institutions of this first democratic state. Therefore, in such a situation, the principles of transitional justice will not necessarily be the key factor to consider when introducing the rule of law and democracy. This situation is different from the transition from the developed authoritarianism to democracy, as in the case of the collapse of many authoritarian regimes in the past. In the case of a dual state that has not entirely evolved towards authoritarianism, the assessment of the actions of autocrats or legitimisation of certain legal institutions, they have introduced, can be based on the legacy of institutions not captured by the autocrats.

III.

Essentially, therefore, transitional justice in states moving away from authoritarian rule is related to political negotiations on how to deal with past human rights violations as part of a country's journey from "no democracy" or "regime

[6] M. Tushnet, *Authoritarian constitutionalism*, "Cornell Law Review" 2015, vol. 100, iss. 2, p. 396.

illegality" to "democracy/legitimacy of the regime"[7]. This implies the enactment of legal solutions that also manage the institutional transition from the old to the new regime. The old legal solutions will be rejected for axiological reasons. The point here is that the solutions of the old regime will be judged as wrong after the rejection of the old regime. Thus, certain principles from the legal system of the old regime, for example, the principle of non-removability of judges, may not be respected. Therefore, the principles of tractable justice may allow the so-called zero option in the judiciary, which involves removing judges who served the condemned regime. The principles of transitional justice presuppose, inter alia, the retroactivity of the law, which reflects the values adopted after the overthrow of the previous regime and a certain selectivity in the application of axiological rules adopted after the fall of that regime[8]. Selectivity means that not all negatively assessed acts will be met with negative consequences due to the degree of guilt or for praxeological reasons. The principles of transitional justice are often embodied in practice and take the form of settling the past by enforcing legal responsibility. Criminal processes are then based on a visible narrative of retribution, which is based on the idea of "settlement"[9]. Another way the principles of transitional justice are embodied is through the use of certain measures to smooth the transition from an authoritarian system to a democracy. In this respect, various "truth commissions" promoting ideas of reconstruction and reconciliation can operate[10].

IV.

The primary objective of the Law and Justice party (PiS), which won the 2015 election and the following one in 2019, was to restrict the operation of independent institutions, including, above all, the judiciary. Thus, any political plans related to the possible electoral defeat of the PiS in the future have to do with fixing the situation in the judiciary. I will therefore limit the paper

[7] D. Preysing, *Transitional Justice in Post-Revolutionary Tunisia (2011–2013): How the Past Shapes the Future,* Wiesbaden 2016, p. 24.

[8] M. Krotoszyński, *Modele sprawiedliwości tranzycyjnej*, Poznań 2018, pp. 170 ff.

[9] A. Schaap, *Political Reconciliation,* Routledge. 2005, p. 18; C. Moon, *Narrating Political Reconciliation*, London 2008, p. 19.

[10] C. Moon, *ibidem.*

to these issues. As a reminder, the attacks of the populist government in Poland on the independent judiciary in terms of legal changes took two forms. The first was the takeover and complete subordination of the Constitutional Tribunal (CT) to politicians[11]. In the beginning, this consisted of striking down laws restricting the activities of the CT and the unlawful election of three persons (they are often referred to as fake judges) to sit on the Court to seats that were already occupied[12]. Further steps were aimed at electing people directly linked to the ruling party to seats on the CT. The second form involved attempts to subordinate the ordinary judiciary and the Supreme Court. The main tool was the complete control of judicial appointments. The previously functioning National Council of the Judiciary, which prepares nomination proposals to the President for judicial appointments, was dissolved on the basis of the Act passed by the parliament in December 2017[13]. In its place – contrary to the Constitution – a new National Council of the Judiciary (NCJ) was created, with members of the judiciary elected by parliament. However, under the Constitution the judges of the NCJ were to be elected by the judges themselves through the appointment decisions of the judiciary's self-governing bodies[14]. A further step in the plan to destroy the independent judiciary was the creation of the Disciplinary Chamber within the Supreme Court, composed entirely of appointees with input from the new National Council of the Judiciary, often colloquially referred to as neo-judges.

V.

In this part of the text, I will give examples of proposals to restore the rule of law concerning the judiciary, and the Constitutional Tribunal contained in 3 groups of projects. These projects can be said to be the result of civil society ac-

[11] T.T. Koncewicz, *From Constitutional to Political Justice: The Tragic Trajectories of the Polish Constitutional Court*, VerfBlog, February 27, https://verfassungsblog.de/from-constitutional-to-political-justice-the-tragic-trajectories-of-the-polish-constitutional-court (1.11.2022).

[12] I.e. to replace judges elected by the parliament before the 2015 elections.

[13] Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts.

[14] See Art. 187 and 186 of the Constitution, in conjunction with Art. 173 and Art. 10 due to the principle of independence of the judiciary from other authorities expressed therein.

tion. The proposals presented contain mechanisms that could be described as standard and not referring to the principles of transitional justice. The first one is developed within the framework of the Senate, the second one has been presented by the Polish Judges Association 'Iustitia' as a package of two bills, and the third one has been developed within the framework of the Batory Foundation team, bringing together experts who analyse violations of the rule of law in Poland on an ongoing basis. The drafts are designed to remove the unconstitutionality of disrupting the independence of the judiciary in Poland. The premise of the drafts was to recognise that the actions taken by the government and the PiS parliamentary majority to strike at the independence of the judiciary were in direct breach of the Constitution and international obligations of the Polish state. These violations of law have been established by state institutions that retained their independence (the courts) and international institutions that have the legitimacy to do so based on the obligations of the Polish state, which is recognised by the politically uncaptured part of the institutions (one of the two states; i.e. democratic and based on the rule of law). Therefore, the restoration of the rules enabling the independent courts to function does not require any extra-coordinated action and can be carried out by an ordinary statute.

The bill drafted within the Senate (the opposition has a majority in this Chamber as of 2019)[15] dealt with the situation in the courts of general jurisdiction and did not concern the CT. In terms of eliminating neo-judges from the judicial system, there were subjected to a mandatory evaluation by a disciplinary court, which was obliged to rule that neo-judges should be deprived of their office. The drawback of this project was the seemingly inconsistent approach to those elected to judicial positions by the new NCJ (neo – judes). On the one hand, they were recognised as judges; on the other hand, they were subjected to compulsory disciplinary responsibility with an obligatory penalty of removal, thus eliminating the discretion of the disciplinary court to assess a particular case.

The project of the 'Iustitia', drafted in 2021[16], refers to the ordinary judiciary and envisages, from the perspective of this paper, four essential solu-

[15] Bill on amending the Act on the National Council of the Judiciary and certain other acts, Druk (Senate Document) No. 50.

[16] Bill on amending the Act on the National Council of the Judiciary, the Act on the Supreme Court and certain other acts, see <https://www.iustitia.pl/images/A/projekt_IUS-

tions. First, the draft annuls all decisions of the NCJ in the composition shaped by the 2017 Act[17]. Second, in principle, it cancels the service relationship of the judge in the case of all judicial appointments that came into effect due to appointment decisions involving the unconstitutionally shaped NCJ. The only exception is the judicial appointments to the lowest level courts of so-called judicial assessors, that is, persons who, after studying law, have chosen to prepare for the profession of judge. This exception is related to the slightly different nature of the decision of the NCJ converting the position of a court assessor into the service relationship of a judge (in special cases, however, the newly appointed NCJ would have the possibility to remove a judge from the office). Third, the draft assumes nullification of all rulings of the Disciplinary Chamber and rulings of other chambers of the Supreme Court made after 23 January 2020, in the case where a person appointed by the neo-NCJ was a member of the bench, can, according to the draft, be overturned since, in principle, the proceedings are invalid. On the date listed above, a resolution of the three combined chambers of the Supreme Court was passed, allowing a judgement to be challenged if there is an unauthorised person in a court's bench. Fourth, the draft does not deprive of a legal force a judgement issued in criminal, administrative and civil proceedings with the participation of neo-judges. The authors of the draft addressed this as follows: "Such decisions should be taken independently by Polish courts, taking into account circumstances such as the degree of defectiveness of the appointment, the finality of the judgments, considering both the current state of the law, the factual and legal possibility of "taking advantage of the provisions guaranteeing everyone the right to have a case heard by an independent court established by law, and future decisions of the European courts and tribunals".

In turn, in 2022, the Batory Foundation presented a draft of a new law on the CT and a draft of a law concerning its implementation[18]. The following key solutions were applied in these drafts:

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[17] I.e. with the participation of judges elected by the parliament.

[18] See: https://www.batory.org.pl/publikacja/projekt-ustawy-o-trybunale-konstytucyjnym-przygotowany-przez-zespol-ekspertow-prawnych-fundacji-im-stefana-batorego/ (1.11.2022).

Withdrawal of persons not entitled to sit on the CT from adjudication in the CT, although the final formal removal of a judge of the CT should be a result of a resolution of the Sejm declaring the invalidity of the judge's election due to its contradiction with the Constitution.

Statutory nullification of decisions of the CT made with the participation of persons not entitled to adjudicate (fake judges), whereby if the decisions of the CT, triggered by a legal question or constitutional complaint (incidental constitutionality review), formed the basis for the resumption of proceedings in an individual case, the nullification of the decisions of the CT does not affect the validity of the decision in the individual case.

Allowing all judges elected under the PiS government (except for fake judges) to retire due to the law's entry into force, rectifying the situation in the CT.

VI.

To sum up the deliberations on the projects in question, it is important to again emphasise their scant reference to the principles of transitional justice. The drafts also differ because they were prepared at different times. With the development of the case law of both national and European courts, the legal approach toward fake judges in the CT and the so-called neo-judges in the Supreme Court and other courts may be distinctive. During the preparation of the Senate draft, the predominant attitude was in favour of a case-by-case assessment of whether, in the particular circumstances, the person serving as a judge did not lose his or her independence. This was dictated, among other things, by the content of the resolution mentioned above of the three chambers of the Supreme Court of January 2020, according to which an improper nomination could but did not have to be the basis for a finding of an undue appointment of a judge, and thus a judicial assessment of the specific case would follow.

Attention should be drawn to the judgments of the CJEU relating to the Disciplinary Chamber whose composition has been challenged[19], as well as judgments of the ECtHR relating to the status of both judicial and constitutional judges.

[19] I.e., inter alia, the CJEU judgment of 19 November 2019. C-585/18, C-624/18, C-625/18 and the judgment of 15 July 2021, C-791/19.

In the 2019 judgment, the CJEU clearly emphasised the need to pay attention to the nomination procedures in order to ensure the construction of a judicial body that meets the requirements of EU law: The degree of independence enjoyed by the NCJ in respect of the legislature and the executive in exercising the responsibilities attributed to it under national legislation, as the body empowered, under Art. 186 of the Constitution, to ensure the independence of the courts and of the judiciary, may become relevant when ascertaining whether the judges which it selects will be capable of meeting the requirements of independence and impartiality arising from Article 47 of the Charter.

In turn, in its judgement of 15 July 2021, the CJEU indicated that the independence of the Disciplinary Chamber was also in question because the appointment process of the new NCJ raised doubts due to the changes made by PiS in the way this body was created. As a result of the implementation of the law of December 2017, the NCJ was to be composed, inter alia, of judges elected not by judges according to the procedure and rules set out in the Constitution and the law but rather by the first Chamber of parliament[20]. This made the previously independent council dependent on political factors.

Regarding the ECtHR judgements, it is necessary to point out, inter alia, the judgement Reczkowicz v. Poland[21], in which the ECtHR ruled that the manner of electing judges to the Disciplinary Chamber of the Supreme Court was blatantly contrary to both Polish law and the elementary principle of the rule of law, which is the independence of the judiciary. Furthermore, the ECtHR, in its judgement of 8 November 2021 in the case of Dolińska-Ficek and Ozimek v. Poland[22], ruled that following the statutory changes concerning the NCJ made in 2017, the judicial power in Poland was deprived of real influence on the functioning of the NCJ. Specifically, the ECtHR held that the NCJ in its current form did not provide a guarantee of independence from the legislature and executive power. The ECtHR also questioned the legitimacy of the new Chamber created by the 2017 Act and the Chamber of Control and Public Affairs. Judges Dolińska-Ficek and Ozimek challenged the status and legitimacy of the new Chamber, which was considering their ap-

[20] I.e. the Sejm.

[21] Case no. 43447/19.

[22] Case no. 49868/19 and 57511/19.

peal against the decision to refuse to present their candidatures for judicial posts to the President of the Republic of Poland. They argued, and the Court agreed, that the Chamber was not independent and autonomous, and therefore there was a violation of Article 6 of the Convention because the chamber was composed of judges recommended by the new NCJ. With regard to the judges of the CT, the judgement in Xero Flor v. Poland (ref. 4907/18) is relevant. In that judgement, the ECtHR stated that Poland had violated Article 6 of the European Convention and that the CT with the participation of a person elected to a seat already occupied in the CT cannot be deemed as an independent and impartial tribunal established by law

In addition to the aforementioned three-chamber resolution of January 2020, the Supreme Court, inter alia, in its order of 29 September 2021 (issued in the correct composition), pointed out the validity of the three-chamber resolution, emphasising that inadequate composition of the bench of a court within the meaning of the law also occurs when the Court includes a person appointed to the office of a judge of the Supreme Court at the request of the National Council of the Judiciary formed in accordance with the procedure set out in the 2017 Act amending the Act on the National Council of the Judiciary and certain other acts.' On this basis, it annulled an earlier decision made by such persons. At the same time, the Supreme Court indicated that the ruling made by the CT on 20 April 2020[23] on the unconstitutionality of the resolution of the three chambers could not be considered binding due to the participation of non-judges of the Court (doubler judges) and a judge designated by the PiS, who had previously been an active politician of that party, in the ruling.

VII.

Relying on all these judgements, and not only on the interpretation of the Constitution based on constitutional law scholarship, provides a basis for introducing changes concerning the ordering of cases in the Polish judiciary in line with the rule of law. This, therefore, confirms my thesis that the phenomenon of the dual state has made it unnecessary, at least at this point, to seek

[23] File ref. no. U 2/20.

arguments to justify changes based on the principles of transitional justice. I am referring here only to issues concerning the judiciary, not to the entirety of the actions and deeds associated with the activities of the PiS governments. Perhaps in this broader scope the principles of transitional justice will be relevant. Does this mean that – referring to the judiciary – it is not possible to identify certain solutions that can considered as an expression of this principle? Manifestations of this may be the provision that some judgements of the CT made in an illegal composition may have legal effects (the Batory Foundation's project) and the acknowledgement that young people who have received their first judicial nomination may not be deprived of their judicial posts. The reference to transitional justice may lie in the special treatment of these two circumstances. Nevertheless, it can also be argued that exceptions may be justified simply by constitutional principles and principles of equity without the need for any reference to the concept of transitional justice. For example, this case is presented in the explanatory memorandum to the draft law implementing the law on the CT prepared by the Batory Foundation.

VIII.

With regard to the future, it should be stated that the nature of the transformation in Poland after the fall of the PiS governments will also depend on when such a turning point in history occurs in Poland. Justifications based on the dual state phenomenon[24] will be possible relatively quickly. After many years, the number of transformations introduced by the PiS party will petrified. Those in power intend this; by taking over the system of judicial appointments, they sought to bring into the judiciary, over time, suitable, non-damaging people who, as some practical experience has already shown, can count on promotion if they maintain appropriate loyalty. Once petrified, the concept of the dual state will not be helpful in the sense of bringing about specific changes that democratise the system. It follows that the time factor must be taken into account in these cases. Then, it is precisely the doctrine of transitional justice that will remain, according to which it will be possible to de-

[24] I.e. referring to the legacy of institutions not captured by the autocrats and the legacy of the European case-law.

part from the principle of the non-removability of judges, not based on the previous findings of certain bodies but rather on a certain package of necessary solutions that are introduced during the transition. There would then be room for the typical settling of accounts with the past authoritarian state, as we have seen historically when there have been political changes due to revolution or evolution.

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