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DUAL NORMATIVE AND PREROGATIVE STATE: HUMAN RIGHTS AFTER 1989 IN POLAND

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Abstract: The changes that have taken place in Poland since 1989 reveal real problems whose solution depends on civic awareness, i.e. on understanding what a democratic legal state is and what role human rights play in it. Given the threats posed by various populisms, also the manipulation of the concepts of: nation, homeland, citizen, patriot, common good, etc., society may not notice how the normative state is turning into a prerogative state. An important role is played by knowledge and understanding of the provisions of the Constitution of the Republic of Poland of 2 April 1997, not only by lawyers, but by the whole of society and, perhaps above all, by the various levels of power, both legislative, executive and judicial. This also applies to local authorities, economic and social entities. Universal civic education and the everyday practice of democracy and human rights are essential. Over the past thirty-five years, there has been a slow change in the mentality of Poles, especially among the younger generation. People born in European Poland support a civil state in which human rights are respected. Paradoxically, the last eight years of PiS rule have contributed to an awareness of the role of law, including human rights, and a willingness to learn about the Constitution of the Republic of Poland. It is also important that the language of a democratic rule of law is back on track.

INTRODUCTION

From the very beginning, the construction of a democratic, constitutional Polish state was fraught with problems. While the legacy of the Polish

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People's Republic was inherited relatively peacefully, its heirs (the Solidarity camp) did not deal with it very well. It turned out that the vision of a Western-style welfare state was very attractive, but the rule of law was not.

The statements of the politicians of the time show extreme visions of the future democratic Polish state: from socialists to liberals to the right wing, closely linked to the Catholic Church and some unspecified tradition. Activists from the former Polish People's Republic also had a lot to say, especially as they had political and financial support and knowledge of the mechanisms of power.

On the basis of these problems, a new reality began to emerge. It was difficult, because it lacked experience and was based on hope and the rapid satisfaction of demands. There were a lot of them, because in 1989 Polish society believed that there would be immediate changes and improvements in their quality of life, following the example of citizens of Western countries. But that didn't happen.

After thirty-five years of changes initiated by the Round Table talks, when the systemic transformation took place in Poland, it is clear that changes take place slowly, especially in people's consciousness.

Even today, many politicians, but also a large part of society, say that a democratic constitutional state means rule by the majority, forgetting that there is another inseparable part of it – respect for minority rights, i.e. human rights.

UNPREPARED FOR A DEMOCRATIC CONSTITUTIONAL STATE

Two concepts are inextricably linked with the changes that took place in Poland after 1989 – transformation and anomie.

The first of these concepts, transformation, is used to describe comprehensive changes in political, economic and social life.

1. International transformation brought about changes caused by the collapse of the Union of Soviet Socialist Republics (USSR) and the transition from the Warsaw Pact to NATO, from the Council for

Mutual Economic Assistance to the European Union. Alliances with Western European countries guaranteed the rule of law and economic development.

2. Political transformation means moving away from the structure of an authoritarian state towards a democratic rule of law. Over the course of thirty-five years, Polish democracy has changed its face. Designed as a liberal, constitutional democracy in the sense of majority rule with respect for minority rights, in the period 2015–2023 it oscillated towards a populist, authoritarian democracy with the slogan of majority rule. The institution of the Catholic Church actively participates in shaping Polish democracy, not always in a positive way.
3. From the law of power to the power of law. A characteristic feature of communist governments was the creation of laws that helped the authorities to maintain the social, economic and political order they imposed. In a democratic order, power is limited by law. It can only do what the law allows, while a person can do what the law does not forbid. Decentralisation also serves to limit power.
4. The economic transformation introduced a free market economy instead of a planned economy. To this day, the economy is a serious problem for society and the state, because it causes entrepreneurs, producers and consumers to worry about stabilising prices and taxes through changing regulations.
5. Social transformation – from the collective to the individual. Human rights and freedoms are the basis for the functioning of a democratic constitutional state. A serious problem is the lack of individual awareness of one's rights and responsibility for oneself, one's words and one's actions.
6. Mental transformation takes the longest because social consciousness changes very slowly. In the experience of Western countries, this period is over a hundred years. It is characterised by conflicts over the values and character of the state.
7. Technological and information transformation has brought Polish society into the circle of McLuhan's "global village". It brings with it

problems related to new technologies and their skilful use for the common good (Koba, 2020, p. 27–99).

Anomie is a "social phenomenon involving the breakdown of commonly accepted norms and social bonds that occurs during major crises". The definition can also be extended to include a second aspect "as a state of alienation and disorientation of the individual in the above situation" (SJP, doc.celectr.).

In the transformation taking place in the countries of Central and Eastern Europe, Helmut Thome identifies four possibilities of social anomie:

1. The absence of rules from which new systems of rules can emerge. The author refers to the reflections of Vaclav Havel, who admitted that the Czechoslovak opposition knew that it wanted freedom, but was less sure how to use it once it had been achieved. In Poland, various options for action appear, including the need to act to solve problems, who should do it and on what basis, which naturally favours various types of action oriented towards one's own interests.
2. Lack of competence to act when existing norms cannot be respected by a large part of society and those in power due to lack of experience with democracy and market economy. There are inequalities and a desire to return to the previous power structure.
3. Difficulties for citizens to understand what is really going on. The problem is the inconsistency of the law, contradictory and incomprehensible provisions that make it impossible for citizens to understand the dualistic law that favours abuse, corruption and lack of control over the work of officials and civil servants.
4. The discrepancy between norms and values, when the binding of law and norms to certain values, which are more important in democracies than in dictatorships, results from the "demoralisation" of the principle of a free market economy (Thome, 2000, p. 11–14). This was evident in the privatisation of state assets. Also in the violation of workers' rights in small towns where the local entrepreneur had no competition.

The Poles learned democracy from the best. They travelled to the USA, Canada and Western European countries and acquired knowledge about

democracy, which was the experience of these countries. Many scientists and officials from various international organisations also came to Poland to teach us about the democratic rule of law and the free market economy. However, none of these people knew Poland, its history, everyday reality or the Polish mentality. It is impossible to transplant the experience of one country to another. Each society has to work through its own democracy. And that takes time and the involvement of the whole society, the authorities and their officials. Ewa Łętowska drew attention to this aspect in her book "Why do people need a constitution? The author wrote that "when in 1989 (in December) the provision was introduced that Poland was a state under the rule of law, some people believed that thanks to this provision, or rather its introduction, it really became a state" (Łętowska, 1995, p. 110). Many people think that the provisions of national law and Poland's international obligations are enough for them to exist in our country. Nothing could be further from the truth, because – as Ewa Łętowska also wrote – "the mere change of regulations has never led to a change in the real world" (Łętowska, 1995, p. 110). And that meant changing the mentality of Poles, teaching them respect for the law and a sense of responsibility for themselves and their country.

THE DUAL STATE

A democratic state of law is therefore not an entity that comes into being simply because of its name. Citizens and authorities are obliged to abide by the clear rules and regulations that apply in such a country. However, in order to promote common interests and strengthen the position of the state, those in power try to expand the scope of their competences, leading to a separation of theory and practice.

Ernst Freankel characterised this phenomenon by calling it a dual state, a state in which there are two legal systems. The first is based on the theory of a democratic rule of law, which is reflected in the constitution and the entire legal system derived from it, as well as the legitimate authority adopted and accepted by the citizens in elections. It is a normative state. And the second, which is theoretically called a democratic state of law, but

in which "there is no objective or subjective law, no legal guarantees, no judicial qualifications. There are no legal rules governing the political sphere. It is regulated by arbitrary means (measures) in which dominant officials exercise their discretionary prerogatives. Hence the term 'prerogative state'" (Freankel, 2017, p. 3).

This negative phenomenon is characteristic not only of totalitarian states, but also of democratic states in which the rule of law has not yet been stabilised and tendencies towards authoritarian rule are visible. In a democratic state, two visions come together: first, when the authorities act on the basis of the law and within the limits of the law; and second, when the authorities assume the right to change the law in the name of the nation for its good. We are dealing with numerous pathologies and defects typical of unstable states (Sebaldt, 2015, p. 11–12).

In the 2005–2007 and 2015–2023 periods, the vision of a state free of all abuses and corruption associated with political opponents became strongly entrenched in Poland. This became the mission of the ruling PiS party. To this end, the state became partisan and, together with the Catholic Church, which provided moral arguments, was supposed to justify various kinds of abuse and illegal activities. After all, it was about the highest common good, and in accordance with Montesquieu's principle – the end justifies the means – every possible means was used to achieve it.

One such means was described by Imre Kertész in his essay "The Right to Self-Determination", when he wrote that politics had become the enemy of culture. Separated from it, it causes great destruction in the human soul. The instrument of this destruction is ideology. In the twentieth century, in this terrible age of the debasement of all values, everything that was once a value has become an ideology. Ideology has included religion. For them, the most important elements of patriotic education were hatred and lies. The big problem is that the modern masses, who have never participated in culture, are adopting ideology as culture" (Kertész, 2004, p. 190).

Then there is the demanding attitude of people whom Alexander Zinoviev, and after him Józef Tischner, called homo sovieticus. This is how Jerzy Turowicz described this phenomenon: "Homo sovieticus is an enslaved, incapacitated man, deprived of the spirit of initiative, incapable

of critical thinking. (...). Today, homo sovieticus is a man who expects and demands everything from the state, who is unwilling and unable to take his destiny into his own hands" (Turowicz, 1993).

The above-mentioned attitudes are the fuel for various types of populism, which are the models for the government's actions in the fight against those who see the above-mentioned attitudes as a threat to the democratic rule of law.

Such a state also produces what Gustav Radbruch called "statutory lawlessness" and "supra-statutory law" (Radbruch, 2012, p. 244–254) i.e. law that is incompatible with constitutional and international provisions.

The above actions were opposed by a part of society that builds its future on human rights, joint action for the common good (Article 1 of the Constitution of the Republic of Poland) and cooperation with other people in McLuhan's "global village".

HUMAN RIGHTS

Building social awareness of the role of human rights as regulators of community life is a long-term process. It is not enough to ratify international documents guaranteeing their protection or to include them in the constitution for them to work in a given country (see: Republic of Belarus, Democratic People's Republic of Korea).

According to Wiktor Osiatyński "the idea of human rights is of moral rather than legal nature. (…) They proclaim widely accepted standards for freedom, for limitations on state power, and for services that can be expected from a society as represented by the state in accordance to an underlying set of moral values" (Osiatyński, 2009, p. 1).

Human rights are therefore universal moral rights and "they belong to every person in his or her relations with the state and with any other authority in a position to use coercive power against the individual. (…) Although some moral rights can be acquired (inherited, earned, bought, received, or exchanged for something else), human rights are inherent and belong to the human being as such. It is believed that every person comes to existence endowed with these rights" (Osiatyński, 2009, p. 1).

Thirty-five years after the Magdalenka Round Table talks between the Polish People's Republic government and the Solidarity opposition, human rights are still often used more as a propaganda slogan than as binding law.

During the period in question, the ignorance of society and the authorities about the fundamental principle of a democratic state of law, namely human rights, was repeatedly confirmed.

During the rule of President Lech Wałęsa, the concept of "falandisation of the law" was born, i.e. balancing on the edge of the law and its arbitrary interpretation, which led to abuses and violations of the rights in question. The second such example of the use of synonymous terms is "refusal to resume", i.e. questioning the correct vote of MPs because it was inconvenient for the ruling PiS (Dubisz, 2021, doc. etectr.).

Very often, the actions of those in power reflected a patriarchal vision that reinforced the belief that the authorities knew better what society and individuals needed for a 'happy life'. The biggest problem turned out to be ignorance of human rights or disregard for them by the authorities.

1. VIOLATION OF THE PERSONAL RIGHTS OF A PERSON BELONGING TO A SELECTED GROUP

Various expressions are allowed in public debate as long as they do not violate the personal rights of individuals. One of the first examples of political ostracism was Donald Tusk's (10 November 2005) use of the term "mohair coalition" in reference to the coalition of PiS, LPR and Samoobrona during the debate on the exposé of Prime Minister Kazimierz Marcinkiewicz. The speaker indirectly referred to the pejorative term for the elderly (mohair berets) who gathered around Radio Maryja and supported the winning coalition (Tusk 2005, electr. doc.). And although Donald Tusk was only referring to a concept that already existed in the public sphere, it was not appropriate in the Sejm hall. On the basis of this event, others were created to prevent older people from participating in the next elections. In 2007, Prime Minister Jarosław Kaczyński criticised the idea of "taking grandma's ID card", saying it was "raising a hand against the Polish nation". This would be an obvious exaggeration, but it should make society,

especially young people, aware that their participation in elections is more important than restricting the rights of other people. However, the outrage at the time did not prevent the PiS president from calling some Poles inferior eight years later because they did not agree with his policies. This was the case when he blamed Poland's low fertility rate on the behaviour of young women: "but if women under 25 drink, I'm joking, but it's not a good prognosis in this matter" (A lawsuit is being prepared against Kaczyński for saying "women drink", 2023, electr. doc.).

Even more disgraceful was the attitude of the President of the Republic of Poland, Andrzej Duda, when he called LGBT people an ideology "they are trying to convince us that they are people. It's an ideology" or "an MP was thrown out of television for simply calling it an ideology" (Duda, 2020, electr. doc.). Similar statements were repeated many times by other state officials, including Minister of Education and Science, Przemysław Czarnek.

2. VIOLATION OF THE PRINCIPLE OF LIMITED GOVERNMENT

Article 7 of the Constitution of the Republic of Poland clearly states that "the authorities shall act on the basis of the law and within the limits of the law" (Constitution of the Republic of Poland, 1997).

In 1998 (one year after the adoption of the Constitution of the Republic of Poland of 2 April 1997), the so-called "Małolat" action was introduced by a decree of the Voivode of Warsaw, Maciej Gielecki, of 8 April 1998. In order to protect children and adolescents from abuse and demoralisation, he banned them from being on the streets of Warsaw without adult supervision between 11 p.m. to 5 a.m. A noble aim, but its implementation is illegal because, in accordance with Art. 31(3) of the Constitution of the Republic of Poland,

> restrictions on the exercise of constitutional freedoms and rights may be imposed only by law and only if they are necessary in a democratic state for its security or public order, for the protection of the environment, public health or morals, or for the protection of the freedoms and rights of others. These restrictions may not affect the substance of freedoms and rights.

The decision of the Supreme Administrative Court abolished the Małolat action (I SA 781/98 – ruling of the Supreme Administrative Court of 07.08.1998).

In 2020, following the announcement of the COVID-19 pandemic in Poland, the Prime Minister, Mateusz Morawiecki, introduced a regulation restricting freedom of movement in Poland. The Ombudsman, Adam Bodnar, found that this was incompatible with Art. 31(3) of the Constitution of the Republic of Poland (Analysis of the public defender of rights for the Prime Minister on the creation of law during the 2020 epidemic, electr. doc.).

An additional problem in this case is that the action was taken several years after the Constitution came into force, which is sufficient time for the authorities to become familiar with the document on which they took the parliamentary oath.

3. THE RIGHT TO A FAIR TRIAL

The next example is the operation of Polish courts, which are obliged to rule in accordance with the Constitution of the Republic of Poland. In art. 45(1) of the Constitution of the Republic of Poland states: "Everyone has the right to a fair and public hearing without undue delay by a competent, impartial and independent court". In the 1940s, Gustaw Radbruch wrote: "The tasks of the judiciary include: rendering judgments in accordance with the law, striving for justice and ensuring legal security" (Radbruch, 2012, p. 245). He went on to say that: "No judge is allowed to invoke a law or to base the justification of judgments on a law that is contrary to the principles of justice... We invoke human rights, which are above any written law..." (Radbruch, 2012, p. 246).

The result of a bad law introduced contrary to the Constitution of the Republic of Poland. We are dealing with such a case in connection with the Deubekization Act of 18 February 1994 (amended on 1 January 2017), which reduced the pensions of almost 40,000 people (24,000 of whom appealed to the court). (Deubekisation Act 1994/2017, Journal of Laws of 2020, item 723, as amended) The District Court in Warsaw suspended the court proceedings and asked the Supreme Court and the Constitutional

Tribunal to interpret the provisions of the Act. The Supreme Court issued its first opinion in September 2020, stating that the criterion of "serving a totalitarian state" should be assessed, inter alia, on the basis of individual acts and their assessment in terms of violation of human rights and freedoms. It was not until 16 June 2021 that the Constitutional Tribunal issued a decision declaring that the provision on the basis of which the disability pensions of former officers of the security services of the Polish People's Republic were reduced was in conformity with the Constitution. He also stated that the legislator was authorised to take such measures.

On July 21, 2022, the European Court of Rights published its judgment in the case of Bieliński v. Poland, stating that there was a violation of Art. 6 section 1 of the Convention due to unjustified length of proceedings and Art. 13 of the Convention due to the lack of effective remedy in domestic law (Beliński v. Poland, 2022, electr. doc.).

Elderly people do not have time to wait for court decisions. Since its entry into force The Act in 2017, it has raised many emotions and legal doubts due to the group liability assumed by its provisions.

On 21 July 2022, the European Court of Rights published its judgment in the case of Bieliński v. Poland, finding a violation of Art. 6 § 1 of the Convention due to the unjustified length of the proceedings and Art. 13 of the Convention due to the lack of an effective remedy under domestic law (Beliński v. Poland, 2022, electr. doc.).

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4. LEGAL BUT NOT FULLY ENFORCEABLE

Art. 63 of the Constitution of the Republic of Poland states, inter alia: "Everyone has the right to petition...". For several years it was not possible to exercise this right because there was no law regulating the rules for submitting and considering petitions and the way in which the authorities act on petitions. Such an act came into force only on 11 July 2014 (Act of 11 July 2014 on petitions, Dz.U. 2014 poz. 1195).

The case of Alicja Tysiąc was different. Due to the risk of losing her eyesight, the woman was advised by her doctor to have an abortion. However, she was unable to do so because it turned out that the law allowed her to do so, as the state had not created any implementing tools for the law, i.e. regulations. It was only in the judgment of the European Court of Human Rights of 24 September 2007 that the judges found that the Polish state had failed to ensure the proper functioning of appropriate medical procedures and had therefore violated the complainant's right to respect for her private life (Case of Tysiąc v. Poland 2007, electr. doc.). A year after the judgment, the Ombudsman asked the Prime Minister to adopt regulations allowing for an appeal against a medical decision in the case of the right to legal abortion (RPO 2008, electr. doc.).

In 2020, the Constitutional Court introduced a restrictive abortion law, thereby limiting women's right to choose.

5. LGBT-FREE ZONES

In the case of councillors' actions, many PiS-affiliated counties adopted a resolution discriminating against LGBT people by prohibiting any expression of sexual difference. In doing so, the councillors violated Art. 32(2) of the Constitution of the Republic of Poland, which states that no one may be discriminated against on any grounds in political, social or economic life. The Supreme Administrative Court confirmed that the "anti-LGBT" resolutions of the local authorities were adopted without a legal basis and were invalid due to a gross violation of the law (RPO 2023, electr. doc.).

6. EQUAL AND MORE EQUAL

Representatives of public authorities at various levels often claim that their human rights, especially the right to privacy, are being violated by the media. The basic assumption of human rights is that they are the individual's shield against the authorities, which are equipped with various means of coercion and sometimes use them illegally. The actions of the authorities are under the control of society (Article 61 of the Constitution

of the Republic of Poland – the right to information about the actions of the authorities) in order to prevent corruption, nepotism and other criminal activities. This means that their privacy may be restricted. However, they may benefit from the protection of their human rights, as illustrated by the case of Jacek Kurski before the ECtHR. A PiS MP filed a complaint for violation of his freedom of expression, accusing Gazeta Wyborcza of "financing mass propaganda against PiS". Convicted of defamation by the Polish courts, he appealed to Strasbourg, where in 2016 the ECtHR upheld his claim for violation of Art. 10 ECHR (freedom of expression) (Jacek Kurski won in Strasbourg in the case of allegations against "Gazeta Wyborcza" 2016, electr. doc.). Jacek Kurski's cynicism consisted in the fact that, as President of the Management Board of Telewizja Polska, he did not allow opposition views to be expressed freely on public television. Moreover, according to the Polish Language Council at the Polish Academy of Sciences, the information placed on the strips during the news broadcast was manipulated and constituted a propaganda message (Polish Language Council 2019, electr. doc.).

The above cases show the diversity of areas and activities of public authorities that violate human rights. These examples demonstrate the lack of civic education and, as a result, ignorance of one's rights. Society still lacks basic knowledge about the Constitution of the Republic of Poland, what a democratic state of law is and what human rights are and what they mean. However, if we compare 1989 with today, we can see a huge social change. Awareness of one's rights, but also of civic activity, is slowly emerging.

CONCLUSION

There are no shortcuts when it comes to writing history. This is demonstrated by the period after 1989, when the Polish People's Republic was transformed overnight into the Republic of Poland, a democratic state governed by the rule of law and committed to respecting human rights. The experience of Western countries shows that this is a long-term process, lasting hundreds of years. In Poland, there are slow changes in social

consciousness, which have recently accelerated. This is due to the fact that we are facing a generational change and people born in the new European Poland are gaining their voice. The result of their decisions was the last parliamentary elections on 15 October 2015. Young people want to live in a peaceful Poland, without fear for their own safety and that of their country. Perhaps they will be able to unite the divided Polish society and actively participate in the life of a "global village", full of diversity and common problems to solve.

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