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MINI-CONFERENCE ON "THE RULE OF LAW"

REPORT

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Short Outline:

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    b) The 1989 amendment of Article 1.
    c) The current Constitution of 1997, Article 2.
    d)
2. The Rule of Law in jurisprudence prior to 1997.

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In Polonia lex est rex. *Lex est anima reipublicæ*. *In respublica bene constituta vis absit*. Those XVIth century Polish proverbs are the best testimony of the long dating tradition of the principle of Rule of Law in Poland.

Certain compounds of the principle of Rule of Law were present in various Polish constitutional texts across the centuries (1505 (Radom Constitution): separation of powers, obligatory promulgation of laws; 1573 (*Confœderatio Generalis Varsoviæ*): first written constitutional guarantee of freedom of confession in Europe, enacted right after the events of the night of st. Bartholomew in France, as at that time protestants were in majority among the Polish aristocracy; 3 V 1791 (first of its kind written Constitution in Europe): right to court, right to appeal, equal rights for the *bourgeoisie*; 1807 (Constitution of the *Grand Duché de Varsovie*): equality before the law for everyone, 1921 (the March Constitution): right to damages for loss caused by unlawful action of state authorities, prohibition of discrimination on racial or religious grounds). Nevertheless it was only in 1989 that a norm more or less equivalent[1] to Article 20 I of the Basic Law of the Federal Republic of Germany appeared in the Polish legal order.

We probably all know the content of Article 20 I GG, which reads: *The Federal Republic of Germany is a democratic and social federal state*[2]. At the time this provision was enacted in 1949, the fate of Poland and other states of Central Europe was still unclear. Everything became perfectly clear only several years later. The constitution of 1952, based in its essential content on the 1936 soviet Constitution, in its Articles 39, 48 and 54 did contain the notion of "popular legitimacy", but since the very same Constitution expressly repealed the principle of separation of powers and was treated by practically everyone, including judges, as a merely declaratory *façade*, and since at that time in Poland there was no constitutional review at all, it is hard to say whether this notion had any real meaning at all. Jacques Chevallier put it this way:

Cet « État de droit » était évidemment, n'en déplaise aux kelséniens, en trompe l'œil, compte tenu de l'emprise de la logique totalitaire. *La dérive était identique dans les autres pays socialistes ; et, en ce qui concerne les pays en développement, l'État de droit prenait l'aspect d'un mimétisme de pure forme, faute des conditions indispensables à son épanouissement*. (J. Chevallier : *L'État de droit*. Clefs Politique, Montchrestien, Paris 1992, p. 138).

Article 33a subsection 1 was added to the Constitution of the People's Republic of Poland in 1982, it established the Constitutional Court. The Court was *de facto* established only three years later; what is important though is that it began adjudicating in 1986, i.e. still under socialism[3].

On 29 December 1989, Article 1 of the Constitution was amended as follows: "*The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice".* It is worth mentioning that Article 2 of the currently binding Constitution of 1997 has exactly the same wording. Nevertheless, constitutional case-law under both provisions is quite different.

[1] According to Professor Sławomira Wronkowska, at the time the general clause of Article 1 was introduced to the Polish Constitution in 1989, there was no theory explaining in depth the meaning and legal significance of the said clause. The general approach was to mark a discontinuity with the notion of popular or socialist legitimacy. However, a lecture of the first commentary to the 1992 Constitution clearly shows that the German Basic Law, the German legal doctrine and the jurisprudence of the Karlsruhe Court were an important point of reference for Poland at that time.

[2] www.gesetze-im-internet.de.

[3] Within the so called eastern block only Yugoslavia enjoyed constitutional review at that time, but the status of Yugoslavia was rather unique (e.g. it was not a member of the COMECON). The International Covenant on Civil and Political Rights was theoretically binding in Poland since 1977, but according to the Supreme Court of the People's Republic of Poland, international agreements were applicable "*ex proprio vigore"* – in certain cases the Supreme Court would even refuse to apply conventions of the ILO...

Although until some time after 1997 the Court did not enjoy full jurisdictional freedom as its rulings concerning statutory normative acts could be "quashed" by the Parliament, it did adopt a rather activist approach already in the 1980s, especially in relation to substatutory acts, since rulings of this kind were final and universally binding: the Court defined the principle of equality (U 7/87), stated that a regulation limiting a citizen's legal position may not be introduced in a ministerial ordinance (P 2/87), that rights and duties of citizens are to be enacted only in statute (K 1/88), that tax issues are to be enacted only in statute (Uw 4/88), that the principle of "material legitimacy" includes the principle of confidence of the citizen in the state (K 1/88), that the protection of acquired rights including the prohibition of limiting rights and expectations to the extent where the essence of the right is infringed, without full compensation (K 3/88), and defined the prohibition of retroactivity widely, including an obligation of the legislator to enact proper intertemporal regulations (K 1/88). Those ruling were issued before the introduction of the general clause of the Rule of Law to the Polish legal order.

After 1989 the Constitutional Court would "extract" traditional compounds of the principle of rule of law from the general clause of Article 1: the separation of powers (although in 1992 Article 1 of the Small Constitution officially reintroduced the principle of separation of powers, which "disappeared" from the legal order in 1952); the impartiality of a judge as one of the fundaments of the principle of rule of law (K 11/93); the right to a court as a guarantee of observance of the law by everyone, including state authorities (K 8/91). In 1993 Poland ratified the European Convention on Human Rights and Fundamental Freedoms. At that time the Constitutional Court had no competence to use norms of the Convention as higher-level norms for the constitutional review of statutes which it enjoys today. Nevertheless, from the very beginning the Constitutional Court was an important actor in the process of implementing the Rule of Law from the point of view of the Convention, as observed by Sir Nicholas Bratza who attended the 20th Meeting of the Polish Section of the International Commission of Jurists which took place in the Constitutional Court last week.

After the entry into force of the current Constitution of 1997, the current constitutional text expressly provides for the separation of powers (Article 10), right to a court (Article 45), prohibition of retroactivity in penal matters (Article 42), it includes a closed catalogue of universally binding sources of law (Article 87 and following). It also includes a wide catalogue of human rights.

According to well-established constitutional case-law, Article 2 is not in itself a source of constitutional rights and freedoms of the individual (SK 21/99). A constitutional complaint based solely on an alleged infringement of Article 2 will be unsuccessful (SK 16/01). This provision may be indicated as the sole basis of a constitutional complaint only when the applicant precisely specified the infringement of a right of the individual (SK 26/01 – *skonkretyzował naruszenie prawa podmiotowego*). In case of constitutional rights and freedoms of the individual, Article 2 should be indicated in conjunction with the existing, more specific constitutional provisions (e.g. Article 45 – right to a court) which obviously does not mean that the principle of rule of law ceased to encompass those rights or principles (K 26/97). Consequently, an alleged infringement of the principle of proportionality in the context of rights and freedoms of the individual will not be tested under Article 2, but Article 31 subsection 3 of the Constitution, which is devoted to limitations of constitutional rights and freedoms (P 110/08).

Nevertheless, whenever constitutional rights and freedoms of public entities are concerned, the infringement of the principle of equality may be reviewed under Article 2, and not Article 32 (K 13/99). Analogically, the infringement of the principle of proportionality, in the context of constitutional rights and freedoms of public entities, is also tested under Article 2, and not Article 31 subsection 3 (K 37/02), as both Articles 31 and 32 refer to individuals and there is no special provision regulating the principles of equality and proportionality of other subjects of constitutional rights and freedoms. Institutional and procedural guarantees of the right to a court may be found in Article 45, but the conformity of legal acts regulating access to a court in the

remainder should be reviewed with Article 2 (P 13/01). The infringement of a conjunction of specific provisions of the Constitution – such as Article 31 subsection 3 and Article 64 subsection 3, may be found equivalent to an infringement of the principle of rule of law (P 11/98). Transgressing a certain level of unclarity of legal provisions may substantiate infringement of the principle of rule of law (K 6/02).

On the one hand, Article 2 may be used in conjunction with norms of international law, such as Article 15 of the ICCPR (P 9/04). On the other hand, Article 2 is not an adequate higher-level norm for the review of primary EU law on enactment of secondary EU law (K 18/04).

Quite often, especially in abstract review, it is not directly Article 2 which serves as a higher-level norm for the review, but one of the so called derivative principles extracted from it by the Court (e.g. principle of protection of acquired rights, principle of proper legislation, etc.). The catalogue of these principles is open, which gives the Court significant power and makes the Constitution relatively flexible.

In 2011, many “derivative” principles were used, for example: the principle of confidence in the state (e.g. unconstitutionality of the abolition of building permits (Kp 7/09)), the principle of protection of rightfully acquired rights (the necessity to maintain budgetary equilibrium may substantiate modifications to conditions of work and payment of civil servants (Kp 1/11)), the principle of proper legislation (repeating normative content previously declared unconstitutional by the legislator is contrary to the said principle (K 19/08)), the prohibition of retroactivity (constitutionality of a norm referring to a norm previously declared in disharmony with the principle of retroactivity if the reference is made to the extent in which the former norm was declared constitutional (K 8/09)), the principle of proportionality (it is not excessively repressive to apply provisions of the tax criminal code to a taxpayer with regard to whom the 75% rate of PIT was applied because he did not reveal taxable income (P 90/08)).

Article 2 is undoubtedly one of the higher-level norms for the review most frequently quoted by those initiating proceedings before the Constitutional Court. Cases where the Court quashes a norm due to its inconsistency with Article 2 taken alone are not very frequent, but this provision is very often indicated in conjunction with some other, more specific higher-level norm for the review.

If one may speak of the Constitution of the third Republic of Poland as a living instrument, it is also because of the principle of Rule of Law, which opens the legal system to new derivative principles, serving as higher-level norms for the constitutional review of legal norms, and sometimes entire statutes.

Nevertheless, it is more and more difficult for the Court to “act as guarantor” of the Rule of Law. The Rule of Law emerged in the XIXth and XXth centuries as a guarantee for the individual against the executive power, and later on – against the legislative and judicial powers as well. Today, the machinery, aiming at securing the Rule of Law *vis-à-vis* the State or public-private partnerships does not work in a situation, where a particular competence has been handed over exclusively to private actors.

At the 20th Meeting of the Polish Section of the ICJ last week, Former Judge of the Polish Constitutional Court, Professor Ewa Łętowska, indirectly made reference to item 66 of the Report. Theoretically, in private law, parties are autonomous, may refuse to contract whenever they wish; unequal bargaining power of the parties is supposed to be brought to balance to a certain extent by consumer protection regulations. However, in a situation where the real centre of power shifts from national Parliaments to powerful private entities, the Rule of Law must be applied especially with regard to contracts concluded by private parties, such as bank netting agreements in the context of the global financial crisis, agreements made with a

certain European football association in the context of a major football event which is about to take place this month, or with regard to a certain agreement on counterfeiting trade.

Effectiveness of the enforcement of Rule of Law must be a priority for every Constitutional Court. It is sometimes said in European constitutional case-law that pushing European integration any further may result in a pure ritualisation of the activity of Constitutional Courts. I personally agree with Professor Łętowska and consider the inadequacy of remedies at the disposal of Constitutional Courts caused by relatively recent, profound changes in the economic environment a significant threat to the Rule of Law. It is an uneasy task to find a solution to this problem, but if I understand well the intention of the authors of the Report, the expression “governmental actors at the national level to act as guarantors (…)” does include in particular Constitutional Courts and equivalent bodies. The problem is that Constitutional Courts are themselves subject to the Rule of Law, and an activist approach aiming at protecting the Rule of Law might be considered a breach of the said rule.

Thank you for your attention.