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Legitimisation of power in Poland

1. Introduction

The legitimacy of power as a multidimensional issue is taken up by sociologists, political scientists, legal philosophers, and political philosophers or constitutionalists. Undoubtedly, this is a topic that is part (subject) of a much broader discussion in search of answers to questions about the legitimacy of the political system and processes related to the delegitimisation of political actors (participants). Just as each edifice must stand on its own foundation, the organs of authority are based on a multifaceted foundation, including the systemic, political, economic and socio-cultural dimensions. The concept of juridical legitimacy refers to „making something legal and validating it". On the other hand, from a sociological perspective, it includes „the recognition of the right to rule by a specific authority, based on the acceptance of the rules of a given political system"[1]. Legitimisation is defined as legitimacy or as a certain state of social order. It does not only cover the issues of stability of power or acceptance of power in a given political system[2]. Legitimation focuses on the process of creating support for the political system, which emphasizes the dynamic dimension, and on the other hand, it refers to the statics, the state of the political system, which is legitimised until the alternative appears.

[1] *Wielki...*, p. 734.
[2] W. Sokół, *Legitymizacja...*, p. 16.

A number of factors determine the conviction of the rulers and the ruled about the legitimacy of power (and thus not only limited to legitimacy, but also emphasizing its legal dimension). Legitimisation is important both in terms of philosophy and pragmatics of exercising power, because on the one hand it gives power the attribute of authority, and on the other hand it emphasizes the moral dimension of leadership. It is a factor that ennobles power and gives the ruler a sense of certainty[3]. Henryk Domański and Andrzej Rychard define legitimacy as „a state in which submission to the rules and institutions of the state results from the society's belief that they are worthy of subjugation. Society recognises that the rules and the social (political) order are «good and acceptable»"[4]. Jan Garlicki points to a more adequate formulation than describing legitimacy as a certain „condition", stressing that it is „rather a process (...). We can also talk about intertwining processes, going in different directions, of legitimisation and delegitimization"[5].

Hence, the legitimacy of power is related to the sense of the legitimacy of power, irreducible only to what is legal. The denotation of the concept of legitimacy is closely related to the concept of „legality", and thus to the belief that a given authority is perceived as an authority. The legitimation of power – in line with David Easton's classic approach – can be summarised in three dimensions: ideological, structural and personal. The ideological dimension refers to the principles and values that are the basis of the legal and political order. On a structural level, it covers the issues of accepting the rules and procedures of the legal system. On the other hand, from the personal point of view, it concerns the way of relating to the elite and the related or lack of respect[6] .

The assessment of the legitimacy of power in Poland requires recognition of its multifaceted nature. We can talk about the legitimisation of power as long as: 1) it complies with the established rules; 2) the established rules are justified by the beliefs not only exercising power, but also those subordinated to this power; 3) there are real manifestations of acceptance of certain power relations on the subordinate side. So there are three levels of legitimacy: rules, beliefs and behaviour[7]. The presented aspects (dimensions) of the legitimation complement each other and co-create the legitimacy of

[3] J. Garlicki, *Legitymizacja...*, p. 18.
[4] H. Domański, A. Rychard, *Wstęp...*, p. 7.
[5] J. Garlicki, *Legitymizacja...*, p. 18.
[6] D. Easton, *A Systems...*, p. 287.
[7] D. Beetham, *The Legitimation...*, p. 15–16.

specific dependency relationships. They also provide the moral foundations for submission to authority. However, each of these elements may take the characteristic form of an legitimacy deficit (non-legitimacy).

Summing up, the evaluation of the legitimacy of power requires evaluation through the prism of rules, beliefs and behaviours. The rule level includes assessing when power is gained and exercised in accordance with established rules. The opposite of legitimacy from the rule perspective is the illegality of power (illegitimacy). Thus, power is generally illegal when it is acquired in violation of the rules or is exercised in contradiction to them. However, compliance with the law does not constitute a sufficient basis for legitimation, as the rules of acquiring and exercising power require justification. From the perspective of the second level of legitimation, it should be stated that power is legitimated when the rules of power are based on the beliefs of entities related to imperial relations. In conclusion, first: power must come from a recognised authority; second, rules must guard the appropriate qualifications of those in power, and the power structure should serve the general interest. Third, the legitimacy dimension assumes the consent of the subordinate to the ruling dependencies. It is therefore about the power to create subjective identification with a system of imperative dependencies, about behaviour expressing consent, and thus introducing a moral component to imperative relations[8].

The starting point for the analysis of the legitimacy of power in this article is the adoption of the perspective of the Polish political system in multi-level categories, which makes it possible to present elements that dynamize it, first of all related to the representation of citizens' interests, and thus focused on the legitimisation of individual institutions. The correlate of legitimacy is the accountability of the rulers. The following considerations will focus on how to legitimise the three segments of divided power, as well as the legitimising entity. They will cover the formal legitimacy of governance in accordance with the legal order and the substantive legitimacy of the compliance of the legal order with the values professed by citizens. Thus, the legitimacy of power combines various elements: normative justification (legality) and manifestations of the form of acceptance of power[9]. Legitimisation can be recognised on three levels: ethical, sociological and legal, which

[8] D. Beetham, *The Legitimation...*, p. 17–18.

[9] T. Biernat, *Legitymizacja...*, p. 5.

corresponds to the legitimacy of power flowing from axiological, purposeful and institutional sources[10].

Both the legitimacy of the legislature related to democracy and the legitimacy of the judicature related to the rule of law are expected features of a political system. However, they reflect separate institutional systems. In essence, democracy is based on electoral institutions, governments and parliaments. The law works through the administration of justice. However, where the parliament claims sovereign power in the legislative process, the actual systemic position of the judiciary is marginalised as agents of the legislative power[11].

In the context of legitimising power, the Janus face of constitutionalism – the democratic element and the rule of law – cannot be separated from each other without diminishing the achievements of contemporary constitutionalism[12]. Thus, the constitution is a guard against subordinating law to politics. Ryszard Piotrowski rightly points to the paradox of constitutionalism, which consists in the fact that „the self-proclamation of sovereignty that takes place in the establishment of the constitution is essentially identical to its self-reduction, if by the constitution we understand an act subordinating politics to law, and not the other way round"[13].

2. The legitimacy of power and the crisis of Polish democracy

After 2015, in the assessment of the social and political reality in Poland, claims about the crisis of democracy began to appear very often. It is probably more about the right-wing party in power negating the order of liberal (constitutional) democracy and emphasizing the efforts to shape an illiberal democratic order. Undermining the order of constitutional democracy may lead to the formation of alternative, variously defined forms of democracy. For example, the concept of a hybrid regime appears, „in which the elements of democracy and authoritarianism coexist, albeit in different configurations"[14]. There may be some dispute as to whether the hybrid regime is a more flawed form of democracy or authoritarianism[15]. There is currently

[10] R. Fallon Jr., *Legitimacy...*, p. 1794 et seq.; R.M. Małajny, *Podział...*, p. 10–11.
[11] J. Foreyjohn, P. Pasquino, *Demokracja...*, p. 235–236.
[12] D. Grimm, *Constitutionalism...*, p. 364.
[13] R. Piotrowski, *Konstytucja...*, p. 710.
[14] A. Antoszewski, *Współczesne...*, p. 139.
[15] A. Antoszewski, *Współczesne...*, p. 140.

no deeper sense in making this type of demarcation. These systems meet at a certain stage of their operation: sometimes through a democratic transformation (from absolutism to democracy), and in other cases through the removal (elimination) of the standards of constitutional democracy (from democracy to autocracy). The model of totalitarian democracy can be considered a particularly interesting case of the hybrid system. He described this model already in the 1950s. In the twentieth century, the outstanding Israeli historian Jacob L. Talmon. Characterising liberal democracy, he emphasized not only the affirmation of the value of freedom, but also treating the political system as a pragmatic invention of human spontaneity and creativity, containing a variety and multiplicity of individual and collective levels. Therefore, it has an extraordinary legitimising potential, as we are dealing with a constant dialogue between society and the authorities – a dialogue based on both dispute and consensus, but it should be emphasized that the authority and the man listen to each other's arguments. Hence, it is a thoroughly pluralistic system. Totalitarian democracy, on the other hand, assumes the existence of one, exclusive truth in politics. It can be called political messianism in the sense that it postulates a predetermined, harmonious and perfect system of affairs which people are irresistibly moving towards and which they will surely reach. Ultimately, it only takes into account one political plane of existence. It extends the scope of politics to embrace the fullness of "human existence"[16]. The model of totalitarian democracy assumes that the political camp that won the election claims the right to have a monopoly on the representation of a sovereign, while the sovereign is defined and presented not as a real entity, but as an entity created on the basis of **pattern and similarity** the governing ideological assumptions. The opposition, as a parliamentary minority, despite all formal signs of its freedom of operation, is marginalised and its political program and ideological face are depreciated. Thus, it becomes a specific opposition **second-class political class**. The process of delegitimisation and delegitimisation of the electoral act of citizens supporting the opposition follows. The same is done with regard to other minorities: national, sexual, specific professional groups, etc. They are treated as unacceptable deviations from generally accepted norms (e.g., the heteronormative family model). This often leads to attempts to marginalise institutions that protect rights and freedoms (e.g., ombudsmen). A particularly dangerous phenomenon in this model, however, is the

[16] J.L. Talmon, *Źródła...*, p. 9.

arbitrary treatment of law. The law, and therefore the constitution, should be at the service of the will of the nation understood as a community supporting power. The ruling camp becomes omnipotent because this is what the sovereign would want. Thus, a myth of „over-legitimisation" is created. However, the constitution can no longer be an effective barrier to the actions of the authorities; its role as guardian of the rule of law is eroding and ultimately depreciating. She is **circled** by lower-level legal acts (the ruling camp does not always have a parliamentary majority that would allow for a formal change of the constitution), which in fact creates the state of **alternative** – **real** a constitution based on the will and power of the rulers and the voters behind them. Analysing contemporary cases, it can be assumed that countries that do not have an established tradition of democratic constitutionalism (e.g. in the region of Central and Eastern Europe) are susceptible to the above-mentioned tendencies. Hypothetically, the emergence of mechanisms of totalising democracy is therefore influenced, inter alia, by weakness of newly formed democratic institutions, deficit of civic political culture, knowledge and the ability to use solutions aimed at real protection of human and civil rights and freedoms, and therefore a whole complex of issues weakening the real influence of a human (citizen) society on the processes of exercising power. Therefore, often in social circles, aware of the importance of the democratic legitimacy of political power, there appears a concept of alternative actions aimed at restraining the authoritarian actions of the rulers: civic resistance (civic disobedience). Civic resistance is born on the basis of such processes of totalising democracy as deepening violations of rights and freedoms, weakening of institutions protecting them, and closing the authorities to political dialogue with representatives of the entire society.

> Illiberal populism is impatient with human rights. This is probably best seen when populists express their hostility toward the rights of defendants in the criminal process, claiming that these rights constitute a charter for criminals and are insensitive to the claims of the victims. Expressions of rage against human rights are also well reflected in populists' use of measures against terrorism[17].

The populists in power show a deep aversion to social organisations, especially those dealing with human rights, including women's rights, domestic violence, the rights of children, refugees, and ethnic minorities. This is in line

[17] W. Sadurski, *Poland's...*, p. 150.

with a world view that is nationalistic, xenophobic, misogynistic and hostile to most human rights goals[18]. Dominating public discourse by one force and imposing by force most decisions that are not subject to any actual public consultation, taking into account the criticism presented in them, creates a real basis for social behaviour that violates the norms created by the ruling authorities and openly opposes their decisions. By resorting to these actions, citizens emphasize the need to protect higher values, creating the axiological framework of just socio-political relations, based on the constitution understood as **social contract**. After 2015, the slogan „Constitution" and the whole spectrum of symbols associated with it appeared on the streets of Polish cities very often. A question of another analysis remains the problem of how broad and profound is the knowledge of the values, principles and constitutional rules among the protesters, to put it bluntly – whether they are able to indicate exactly what solutions they want to defend and what results for the process of legitimising power. Nevertheless, the awareness of the importance of the supreme legal act increased significantly and it was caused – paradoxically – only by a systemic crisis. However, civil disobedience must rely on a thorough knowledge of the Basic Law to fulfil its role. This is important for at least several reasons. First of all, disobedient citizens should indicate exactly which circle of constitutional values and norms has been violated, because it is not about manifesting the aversion to authority itself, some controversial decisions, about its ideological face or the circle of officials, but about fundamental abuses and torts that are committed against the authorities. she allows. In other words, civic resistance must be deep **substantive** the expression, not the character of pure political demonstration. Most often, these arguments relate to the catalogue of human and civil rights, freedoms and obligations as well as violations related to the institutions guarding them. Secondly, disobedient citizens must know the limits for the operation of not only the authorities but also the human (citizen) in the conditions of the functioning of a democratic state ruled by law. The constitution excludes the use of force mechanisms – measures applied against the authorities must be peaceful, political and democratic. They should be based on the principle of proportionality: citizens should use all possible means of protest that are within the limits of legalism (i.e. associate in parties and other organisations and use their potential to influence the system, petitions, strikes and demonstrations organised on the basis of existing norms, etc.).

[18] W. Sadurski, *Poland's...*, p. 150.

However, even when the possibilities of dialogue with the authorities within these limits are exhausted, the use of means of civil resistance must be graded, just as one should not resort to the most severe forms immediately, when power may yield to the use of milder forms. Therefore, the knowledge of the constitution favours the proper use of institutions and mechanisms of pressure on the authorities, counteracting uncontrolled forms of action with the use of violence. All the comments made lead to a fairly obvious conclusion: constitutional education (from the school system, through non-governmental organisations, to the media) plays a fundamental role in a democratic state, which increases the knowledge, skills and competences of society in various spheres of life in the state – but it can play a fundamental role in the event of crises and threats to the political system, marking the field of conscious and responsible behaviour of citizens.

Questions also arise as to whether, in the event of symptoms of totalitarian democracy, citizens should allow themselves to be passive, and therefore to refrain from reacting to the actions of the authorities that violate the constitutional order? By omission, should people in some way legitimise the actions of the authorities that are inconsistent with the constitution? Passivity, especially at the stage of using legal forms of influence by citizens, may convince the authorities to make an attempt to constantly shift the boundaries of the proceedings and finally open the way to the destruction of constitutional democracy.

> As soon as we start talking about civil disobedience, we hear that this is a serious problem. It's not a problem. Our problem is civic obedience! (...) Our problem is that people obey when prisons are full of petty thieves and the greatest criminals rule the country. This is our problem[19].

This quote should be treated with due proportion and read it not as a call to civic resistance as something indispensable in the everyday realities of political life, but as making citizens aware of various possibilities, which have already been mentioned in the writings of St. Thomas Aquinas (the possibility of resistance to tyrannical power), the American „Declaration of Independence" of 1776 („the right of the nation will be to change or overthrow the government and establish a new one" when it stands in the way of the fundamental values of life, freedom and the pursuit of the happiness

[19] F. Gros, *Nieposłuszeństwo*, p. 7.

of citizens") or of the current Basic Law of the Federal Republic of Germany[20]. The possibility of attempting to destabilise the state under the guise of defending constitutional values may also speak in favour of the cautious use of civil disobedience. Hence, the need to root the knowledge about the constitution and its values in the society should be repeated and emphasized. Properly understood civic resistance can only occur under conditions of the domination of civic constitutional culture. It can also be treated as setting clear limits of social legitimacy for specific actions of the authorities.

3. Legitimisation of the legislature and the executive

The issue of the legitimacy of the first and second authorities leads to the recognition that two basic principles must be adopted: the functioning of the parliament, the president and the government based on the applicable legal provisions, with particular emphasis on the decisions of the constitution and the cyclical renewal of the social mandate to shape and conduct politics countries.

In Poland, as an example of a state in which a process of profound systemic transformation (democratisation) took place, a very important problem was securing in the constitution the actual ability of state authorities to exercise their functions and competences. This was a response to the political and political assumptions of the countries of real socialism, in which there was a desire to maximally unite and unify the policy of the state and the Marxist-Leninist party. In practice, this meant that the constitutional organs of the state were obliged to implement the policy set by the party organs (the first secretary, the Central Committee, the Politburo). The constitutional regulations of democratic and legal states are to guarantee that the parliament, the head of state and the government will implement the policy resulting from the results of free elections, and the provisions of, inter alia, art. 1 (the Republic of Poland as the common good of all citizens), art. 4 (the principle of national sovereignty), art. 7 (the principle of legalism), art. 10 in conjunction with the preamble (the principle of division, balance and cooperation between authorities), Art. 11 (position and role of political parties in a democratic state ruled by law), art. 96 and 97 (guiding principles

[20] Article 20 (1) 4 of the German Constitution provides: „The right to resist anyone who attempts to overthrow this order [systemic – ed. T.S.], are available to all German citizens – if the application of other measures is not possible".

of the right to vote to the parliament), art. 104 – in accordance with art. 108 (free representative mandate of a deputy and senator).

The constitutional decision that individual authorities operate within the functions and competences assigned to them, perform their assigned roles (legislative and executive), but they are to control and balance each other and cooperate with each other so that the system of state power does not dominate seems to be extremely important. by only one organ or group of organs gathered within a given authority. It is also a firm rejection of the principle of the uniformity of state power, known to the Polish constitutions of 1935 and 1952[21]. From the constitutional point of view, the Sejm and the Senate were assigned the functions of establishing the basic sources of universally binding law (amendment to the constitution, statutes), government control (the Sejm) and the creation of other state organs (the Sejm or the Sejm with the consent of the Senate). The President of the Republic of Poland is its supreme representative in internal and external relations and a political arbiter, while the Council of Ministers (government) is responsible for conducting internal and foreign policy.

The way of adopting the Basic Law played an important role in the legitimacy of the system of authorities. It was passed by the National Assembly (the Sejm and the Senate meeting together) by a qualified majority of 2/3 votes and approved by the nation through a nationwide referendum. In particular, this last element of the constitutional procedure may testify to the **proper legitimacy** of the Fundamental Law and the solutions contained therein.

The Constitution of the Republic of Poland[22], like other modern constitutions of democratic states, contains a clearly formulated principle of national sovereignty. Nation – the sovereign is a legal and political entity, all citizens of the state (*vide* first sentence of the constitutional preamble). The nation has sovereign power through its representatives (deputies, senators) sitting in parliament, equipped by cyclical elections with appropriate powers of attorney to act. In many modern states, the institutions of direct democracy are also used, by means of which the sovereign participates in the resolution of important state matters without the participation (mediation) of his representatives, or initiates the actions of his representatives in

[21] However, Jerzy Jaskiernia points out that in the constitutional practice after 2015 „it is impossible not to notice the imbalance, as well as mutual respect for competences between the legislative, executive and judiciary authorities". J. Jaskiernia, *Funkcje...*, p. 632.

[22] The Constitution of the Republic of Poland of 2 April 1997, Dz.U. 1997, no. 78, item 483 as amended.

specific matters (see art. 4 subsection 2 of the Constitution of Poland). This significantly influences the legitimacy of the process of making fundamental decisions in the state.

A key element in the legitimacy of the legislative and executive bodies is the process of free elections. This also applies to the government, although – unlike the Sejm, the Senate and the President – it does not come from direct election. The key assumption here is that only a government appointed by the head of state and which enjoys the trust of the majority of the Sejm formed in the act of popular vote can function. For items that constitute certain *minimum minimorum* the principles of free elections, including: 1) ensuring the fully competitive nature of the elections; 2) shaping the composition of representative bodies only on the basis of the will of voters expressed in the act of voting; 3) providing voters with complete freedom as to the content of voting. The emphasis is therefore on the principle of political pluralism, with particular emphasis on two issues. *Primo*, it is the freedom to create and operate political parties. Political parties – says art. 11 sec. 1 of the Constitution – associate Polish citizens on the basis of voluntariness and equality in order to influence the shaping of state policy by democratic methods. It is political parties – as in any other democratic state – that are the basic subject of political competition in free elections. Restricting the freedom of their creation and activity (apart from the provisions of art. 13 of the Fundamental Law, which are absolutely right, but sometimes difficult to enforce), would be at the same time a restriction of the freedom to vote. *Secundo*, in order to understand the full meaning of the principle of pluralism, it is necessary to emphasize the importance of the provision of art. 14 of the Constitution – the Republic of Poland ensures the freedom of the press and other means of social communication. There are no free, informal elections where there are no free social (mass) media, which provide both the possibility of presenting electoral programmes by political parties and other electoral committees, but also allow for free, democratic electoral discussion of public opinion.

4. The legitimisation of judiciary

The legitimacy of the judiciary can be presented in three dimensions: institutional (formal, legal), moral and social. The first includes not only the sources of the judicature power and its horizontal relations with the executive and the legislature, but also the vertical dimension: the judiciary – the sovereign. The moral (ethical) dimension of the legitimacy of the bench includes the

issue of judicial deontology and the ethos of a judge. The social approach to the legitimacy of the judiciary focuses on social and professional institutions supporting the court, as well as issues related to the development of mediation or the direct involvement of citizens in the justice system (lay judges).

In a democratic state ruled by law, where the power of the majority is limited by the rights of minorities, the source of the legitimacy of the judiciary is not election, but the ability to rule independently of the interests of political parties[23]. Courts control not only the executive but also the legislature. Only independent courts and independent judges are able to defend citizens' rights. The systemic position of the judiciary is balanced by the powers of the executive in the field of appointment to the office of judge. It is the appointment to the office of a judge by the President of the Republic of Poland elected in general elections that determines the legitimacy of the judiciary in Poland. The division of powers, which in relation to the judiciary takes the form of separation, is a specific „errata" or „correction" of the systemic principle of sovereignty and representation. Despite the deficit of direct electoral legitimisation of judges, the courts, as one of the authorities, issue sentences on behalf of the Republic of Poland. This perspective of a democratic state ruled by law (constitutional democracy) requires judicial independence and impartiality, necessary for the coexistence of the principle of national sovereignty with the constitutionally defined human rights resulting from the inherent and inalienable dignity of the human person.

The contemporary interest in the legitimacy of the judiciary stems from judicial activism and the reversal of the minimisation or even depreciation of the role of the judiciary in the system of separation of powers. This tendency was reflected in legal illumination, according to which the view „judges are to speak when the laws speak and remain silent when they are silent, or do not speak clearly, because the interpretation of the law is forbidden, and for legal authorities there is no place in the court"[24]. Wolter's desire to avoid judicial discrepancies was to be fostered by a linguistic interpretation. However, the beginning of the 19th century with the ruling of the US Supreme Court – Marbury v. Madison – from 1803 changed the optics of looking at the power of judgment. Judges' assessment of statutes from the point of view of their compliance with the constitution has become a turning point, which is related to the commencement of the actual performance by the constitution of the system of supremacy.

[23] R. Piotrowski, *Zagadnienie...*, p. 11.

[24] R. Piotrowski, *Zagadnienie...*, p. 13.

The growing importance of the role of judges is a derivative not only of the interpenetration of the culture of statutory law and judicial law in Europe, but also of European integration and the transformation of the concept of sovereignty[25]. The functions of the judiciary boil down to playing the role of „a guard" and a guarantor of civil rights and freedoms in the flash of the constitutional right to a fair trial (e.g. the judgment of the Constitutional Tribunal 9 November 1993, K 11/93). The question of the legitimacy of the judiciary is related to the question of the limits of the power of the democratic majority and the way of protecting minorities in the context of majority domination. In this respect, the separation of powers determines the identity of constitutionalism based on guarantees of human rights, which is considered a component of normative universalism consisting of „values that shape the mechanisms of the functioning of power"[26].

The importance with which the Polish legislator relates to the judiciary is evidenced by its constitutional placement in a separate chapter. It is precisely the guarantee of human freedom and dignity that requires the division and balance of powers, separating the judiciary from the executive and the legislature, which have a tendency to extend power inherent in „nature". It becomes a guarantor to prevent abuse of power, an emblem of „the rule of law" as a component of constitutional democracy. The Constitution of the Republic of Poland in art. 173 created the principle of a separate and independent judiciary and the resulting independence of judges, expressed in the judicial sphere. At the same time, the separate nature of the judiciary should not only refer to the judicial sphere. The actual influence of the Minister of Justice (resulting from statutory powers) on the common judiciary, manifested in the implementation of the so-called administrative supervision, may give rise to the recognition that the organisational and order activities performed fall within the sphere of judicial independence (deciding on the delegation of a judge and its extension to the court of higher level, access to the files of pending proceedings, creation powers of court organs, powers related to disciplinary proceedings).

In the context of the legitimacy of the judiciary, it is indispensable to pay attention to **auctoritas** court, which is manifested in shaping the image of the court in the public opinion. It is about the belief that the court is impartial. Performing the function of an arbitrator requires social acceptance and public trust. Acceptance of a court decision legitimises the adjudicating

[25] R. Piotrowski, *O znaczeniu...*

[26] R. Piotrowski, *Zasada...*, p. 113.

body. In accordance with the established jurisprudence of the Constitutional Tribunal, the right to a court includes in particular: 1) the right to initiate court proceedings, 2) the right to an appropriately structured court procedure, in accordance with the principles of fairness, openness and two-stage proceedings, 3) the right to obtain a binding decision (court judgment) and 4) the right to properly shape the systemic position of the organs examining the case (such as judgment of the Constitutional Tribunal of 24 October 2007, SK 7/06).

Historically, the role of the judiciary in the political system in democratic countries was varied. In European countries, in the culture of statutory law, the role of judges is not as significant as in the United States, where the judicial review of the constitutionality of law and the position of the judiciary have become a real equivalent within the constitutional system **checks and balances**. It was a real barrier against „the tyranny" of the representative body or – as Alexis de Tocqueville put it – against „the absolute power of the majority"[27].

The legitimisation of the legal order presupposes its dynamism, i.e. an interpretative obligation in the process of applying the law in line with the preferences of the current axiological context, rejecting the historical interpretation or the assumptions of the statics of the legal order. The growing importance of the systemic and functional interpretation is conducive to judicial activism, which also results from the change in the environment, in particular the multicentricity of the sources of law in the context of Poland's membership in the European Union (the principle of **effet utile**, priority of conflict resolution in accordance with European law). As a consequence, the internationalisation of the content of the provisions of domestic law increases, but also complicates the legitimation, in particular in terms of reconciling the interests of individual social groups.

Judicial activism

The principle of the separation of powers and the place of the courts in this division constitute a particularly interesting problem in the period of systemic, economic and political transformation. The growing position of constitutional courts in Central and Eastern Europe manifested in judicial activism understood as „going beyond the resolution of specific cases and

[27] A. de Tocqueville, *O demokracji*...

participation in the broadly understood solving of social problems"[28], goes beyond the role assigned to the „negative legislator". Thus, judicial activism manifests itself in making politically relevant choices, which are not the choices of the lawmaker (legislator). Activism is such a state of affairs in which „the judge begins to replace the legislator"[29], The vagueness of legal texts contributes to judicial activism, which is inevitable in the case of constitutional provisions. The ambiguity of the constitutional provisions (rules) results in the necessity to interpret the basic law of the court, which, according to Wojciech Sadurski, leads to a view that recognises the objective significance of the constitution and is a standard argument used by constitutional courts in terms of self-empowerment rhetoric[30]. Nowadays, the role of the constitutional court goes beyond the framework related to the concept of hierarchical control of the constitutionality of law and the role of the constitutional court in guaranteeing the hierarchical compliance of norms. Along with the change of the systemic position of the constitutional judiciary, its role has changed, evolving from the role of „a negative legislator" to the guardian of the constitution, and even creating in the basic law the „axiological basis of the legal system"[31].

During the provisional system, the activism of the Constitutional Tribunal was manifested in the adoption of the democratic rule of law clause as the basis for its decisions, because until the Constitution came into force, the activism of the Constitutional Tribunal also consisted in establishing a universally binding interpretation of statutes. The Constitutional Tribunal exemplifies activism from the principle of a democratic state ruled by law specified in art. 2 of the Constitution of many related, detailed rules. Even principles such as the prohibition of the retroactive effect of the law (*lex retro non agit*), an injunction to keep the appropriate *vacatio legis*, the principle of proportionality, the principle of protection of legitimately acquired rights or the prohibition of introducing changes during the tax year. It is also necessary to mention that already after the entry into force of the Constitution of 1997, the Constitutional Tribunal decided in its judgment of 25 November 1997 (K 26/97) that the legal principles specified in the newly adopted constitution are not of a closed nature, and the Constitutional Tribunal has granted itself the right to establish still other principles resulting from the

[28] B. Banaszak, *Aktywizm...*, p. 78.
[29] L. Morawski, *Zasada...*, p. 65.
[30] W. Sadurski, *Prawo...*, p. 59–60.
[31] P. Tuleja, *Trybunał...*, p. 575.

principle of a democratic state ruled by law. It follows from the content of the above judgment that:

> at present certain principles and rules are expressed both in the general clause of art. 2 of the Constitution, as well as – sometimes in a much more specific way – in further detailed provisions of this act. Other principles and rules, which have not been repeated in the rest of the constitution, result – as before – from the general content of the democratic state ruled by law clause and art. 2 of the Constitution became their only and independent legal basis. Article 2 of the Constitution must therefore be understood in close connection with the specific provisions concretising it, but the provision of these arrangements in the text of the Constitution should be treated only as a confirmation of the content generally resulting from the clause of a democratic state governed by the rule of law. In any event, this cannot give rise to an *a contrario* interpretation and the thesis that if a principle or rule is not expressly enshrined in specific constitutional provisions, this precludes its derivation from the general clause of a democratic state governed by the rule of law.

It should also be noted the position of the Constitutional Tribunal assessing legal provisions also from the point of view of criteria of economic rationality (for example the judgment of the Constitutional Tribunal of 15 February 2005 (K 48/04). In a way, the basic law itself, by formulating a large catalogue of program-related standards, forces the assessment of the provisions from the point of view of achieving goals.

Today, therefore, it is the power of the Constitutional Tribunal that remains beyond the real control of the legislative and executive powers. The practise of some political systems gives rise to the claim that they are based on the principle of the supremacy of the judiciary rather than the supremacy of the judiciary[32]. The function of the constitutional judiciary was to restrain excessive legislative power. Originally, there was no question of institutional pressures. Judicial activism is an inevitable phenomenon, and such social issues as the right to abortion, euthanasia, and lustration contribute to the political activity of the constitutional court. Contemporary judicial activism is based on the principle of the necessity to correct legislative omissions, with the assessment of what this omission is made by the constitutional court. The limitation of judicial activism may only take place through control

[32] L. Morawski, *Zasada...*, p. 64.

of a non-institutional nature, e.g. doctrine or public opinion. However, the currently adjudicating Constitutional Tribunal in its actual activity performs more the function of an organ justifying the actions of the parliamentary majority (as Jerzy Zajadło aptly puts it), implementing a hostile interpretation of the constitution – *interpetatio constitutionis hostilis* than the function of the guardian of the constitution, as well as issuing decisions based on the political preferences of the adjudicating judges (politically expressive, former parliamentarians of the ruling party).

Polish constitutional crisis and the judiciary

The basis and source of the Polish constitutional crisis that has been taking place since autumn 2015 is the split between constitutional axiology and practise implemented through ordinary legislation with the mentality inherent in the statutory state. Despite the unchanged constitution, „the attractive" practise of presenting the will of the parliamentary majority, equated with the will of the Nation („sovereign"), was used. Its origins were the rejection of the principles of liberal democracy and constitutionalism. Institutional changes have become symptoms of „the populist syndrome" with the catastrophic collapse of social debate. Wojciech Sadurski describes the development of events in Poland after the 2015 elections as „anti-constitutional populist backsliding"[33]. The announcement of the depreciation of the legitimacy of the law based on constitutional principles was expressed by Kornel Morawiecki during the session of the Sejm on 25 November 2015:

> The law is an important thing, but the law is not sanctity. The good of the nation is above the law. If the law disturbs this good, then we must not consider it something that we cannot violate, that we cannot change. I say this. The law is there to serve us. A law that does not serve the nation is lawlessness.

It reduced the will of the sovereign to the current will of voters, regardless of the voter turnout, while the ruling majority represented less than 19% of voters (5,711,687 votes out of 30,629,150 entitled to vote). The Polish erosion of democracy results from the aggregation of many processes, and these are not frontal attacks on the institutional features that distinguish liberal constitutional democracy, which are usually associated with an excessively

[33] W. Sadurski, *Poland's* ..., p. 8, 14.

totalitarian regime. „The patina of legality is misleading"[34]. These predicates include functionally related elements: 1) democratic electoral system with periodic, free and fair elections; 2) the right to freedom of expression and association; 3) rule of law[35]. The term „Delegative Democracy", where the winner of parliamentary elections has the legitimacy (as in the case of post-authoritarian presidential regimes in Latin America) to rule as he pleases, limited in terms of term and real power relations[36]. Such an approach strongly emphasizes the legitimacy of the majority, while eliminating horizontal accountability, almost „vassalage" the institutions that make up the system of brakes and the balance of power, and consequently obscuring the constitutionally defined rules of „the democratic game". The way necessary for the survival of a democratic state ruled by law is institutional „restraint", i.e., the abandonment of actions that violate its essence, which could literally be considered consistent with its letter[37]. In Poland, there has even been „a game for survival", the aim of which is to conduct a political struggle in such a way as to defeat party rivals once and for all, going even beyond the phenomenon called by Mark Tushnet „a fierce constitutional game" (**constitutional hardball**)[38].

One of the consequences of the political and legal dispute over the foundations of the functioning and, above all, the personnel composition of the judicial authorities (personnel exchange), which has been going on since the end of 2015[39] is the social delegitimization of the Constitutional Tribunal and parts of the Supreme Court in the scope of the implementation of judicial functions.

The boundaries of the judicial activity of courts (and judges) are set out in art. 7 and 8 of the Constitution (the principle of legalism and constitutional supremacy), which are supplemented by art. 173 which determines that courts and tribunals are an authority that is separate and independent from other authorities, and art. 178 § 1, within the exercise of their office, shall be independent and subject only to the Constitution and statutes. In a democratic state ruled by law, binding a judge by law is the constitutional basis for his actions. It is a guarantee of impartiality. In the context of the Polish constitutional crisis and the actually progressing process of social and

[34] T. Ginsburg, A.A. Huq, *How to Save...*, p. 91.
[35] T. Ginsburg, A.A. Huq, *How to Save...*, p. 19–24, 90–91.
[36] G.A. O'Donell, *Delegative...*
[37] S. Levitsky, D. Ziblatt, *Tak umierają...*, p. 124–125; A.C. Holland, *Forbearance*.
[38] M. Tushnet, *Constitutional...*, p. 523–553.
[39] W. Sadurski, *Poland's...*, p. 58–95.

systemic delegitimization of the Constitutional Tribunal, binding a judge by law leads to more frequent use by common courts of dispersed constitutional control of statutes and direct application of the provisions of the Constitution. The actual discontinuation of the courts' use of the possibility of referring legal questions to the Constitutional Tribunal (a torrent reduction from 135 legal questions in 2015 to 15 in 2019) results primarily from doubts as to the legal status of its individual members, politicisation and direct personal relationships of individual between judges and politicians from the ruling party, the consequence of which is the actual disruption of his political role. The affirmation of the direct, judicial application of the provisions of the Constitution also results from the jurisprudence of the Supreme Court (e.g. the judgment of the Supreme Court of 7 April 1998, I PKN 90/98). In the resolution of 23 March 2016 (III CZP 102/15), the Supreme Court (Civil Chamber), on the basis of the constitutional crisis related to the appointment of the Constitutional Tribunal, indicated that: „the division of functions between the Constitutional Tribunal and the Supreme Court and common courts is expressed in the fact that the assessment of compliance with the Constitution of legal norms is performed by the Tribunal. They do not do it – in fact – *ad casum* the Supreme Court or common courts", the Supreme Court made a reservation that „this assumption applies as long as the Constitutional Tribunal is empowered – in the existing normative order – to perform its system functions". The stance justifying the court's refusal to apply the provisions of the Act to the extent contrary to the constitution results not only from the ineffectiveness of the Constitutional Tribunal, but also eliminates the risk of the courts adjudicating on the basis of the provisions of the Act which are inconsistent with the Constitution[40]. This position is justified by the lack of internal instruments securing the validity of constitutional provisions due to the deprivation of the primacy of the Constitution over other normative acts.

An unexpected, though anticipated consequence and response to the legitimation crisis and the actual systemic and substantive atrophy of the Polish constitutional court is the observed development of the mechanism of dispersed constitutional control of statutes by common and administrative courts. This circumstance became a turning point in the process of legitimising the previously unused methods of interpretation, justified by the defence of constitutional democracy. The constitutional crisis, which

[40] M. Gutowski, P. Kardas, *Sądowa...*, p. 26; A. Rakowska-Trela, *Niezależność...*, p. 48–49.

is a political and legal fact, has led to the initiation of systemic changes in this area[41]. The practise of direct application of the constitutional law, manifested in the dispersed constitutional control of the statutory provisions, is a response to the unconstitutional, deprived of legitimacy activities of other authorities. In particular, there is a noticeable lack of external manifestations of the impartiality of the Constitutional Tribunal (ostentatious demonstration of acquaintance between the President of the Constitutional Tribunal, Julia Przyłębska, and the President of Law and Justice, Jarosław Kaczyński, the election of clear and politically active members of the ruling party as judges of the Constitutional Tribunal) and the actual loss of judicial authority. The Constitutional Tribunal has become a legitimising screen for the ruling majority, being the constitutional court, involved in the legitimacy of legislative processes (e.g., changes to public assemblies related to the introduction of cyclical assemblies; challenging the so-called abortion compromise) and legitimising the positions of the ruling party (e.g., recognising apparent disputes competence – which even realises the hallmarks *détournement pouvoir*). The role assigned to the Constitutional Tribunal in this way results in the falsification of its systemic position, making the control of the constitutionality of the law fictitious.

The application of dispersed constitutional control of provisions by courts allows for the implementation of effective judicial measures to protect rights and to ensure that the constitutional law maintains its supremacy. Although the problem of constitutional control of provisions in the process of applying the law (interpretative dimension), i.e., the application of conflict-of-law rules in terms of the interpretation of provisions, was not a new problem, since 2016 the model of dispersed control of the constitutionality of law has been shifted to the level of validation issues, i.e., decisions on hierarchical compliance with standards[42]. The judicial activity of the judiciary in the field of consolidating the dispersed control of the constitutionality of statutes is justified by the social and institutional context, the inadequacy between the constitutionally defined normative order and the political and political reality. It is justified not only by a constitutional necessity, but it results mainly from the necessity to behave *equilibrium* the constitutional system of the state and the obsolescence of the principle *iudex est lex loquens*. Moreover, it refers to the legitimate scope of constitutionally defined competences (the issue of neutrality).

[41] P. Radziewicz, *Kryzys...*, p. 7.
[42] P. Radziewicz, *Kryzys...*, p. 9.

In the context of legitimation processes in the Polish area of justice, attention should be paid primarily to the explanatory role of justifying court decisions in the context of social changes, because „bureaucratic legalism" does not have the power to convince[43]. An efficient information policy also helps to reduce the populist threats in the justice system, which in relation to criminal law are manifested in adopting punitive social attitudes. The legitimacy of the judiciary does not come from the mere fact of having power, but primarily through actions *imperio rationis* and not just *by ratione imperii*.

5. Summary

The legitimacy of power as a process leads to the recognition of power as legitimate. However, it is not a one-way or unchanging phenomenon. Fluctuations in the beliefs of citizens about the legitimacy of the authorities are mixed with actions of a delegitimising nature. The legitimation of the Polish political system is a phenomenon qualitatively different from the processes of this type recorded in countries with long-standing democratic traditions. The legitimation of power in Poland is part of the systemic changes related to the political, political and economic transformation. The legitimacy is also influenced by acceptance in the international dimension, which affects institutional and political solutions and leads to a redefinition of the concept of state sovereignty. The judicial activism of common courts in the times of the Polish constitutional crisis is a response to the atrophy of the Constitutional Tribunal. The inability of the courts to assess legal acts (executive acts or statutes) that are inconsistent with the constitution would mean that the basic law of the state would mean little more than a non-binding wish. „Circumventing the constitution", in the absence of formal changes (amendments), by means of statutes, leads to a reinterpretation of the systemic order and creates „a real constitution"[44]. Activities bearing the appearance of constitutional legalism, settled by a parliamentary majority, were transformed into nominal legitimacy. Bojan Bugarič aptly points out that there has been an institutionalisation, through changes in the law, of a new variant of a semi-authoritarian regime that lies halfway between „diminished democracy" and „competitive authoritarianism"[45].

[43] E. Łętowska, *Pozaprocesowe...*

[44] T. Słomka, *Stan...*, p. 36.

[45] B. Bugarič, *Central...*, p. 599.

The now anachronistic role of the judge needs to be redefined and perceived as a passive literal interpreter of the legislator's will, petrifying the belief that the judge is only *la bouche de la loi* and therefore whose power was to be – as Montesquieu put it – no power. In democracies, written rules (constitutions) have their arbitrators (courts). And they work best when written constitutions are reinforced by unwritten rules of the game. These rules act as „subtle" guards for democracy that limit the politics of everyday life before turning into a conflict[46].

The personnel revolution made after 2015 in the Supreme Court and the Constitutional Tribunal is an expression of the repeating of the French history of the Enlightenment and Jacobinism era. Opposition to non-elected judges and depreciating the role of the judiciary is manifested by granting them the right to mechanically apply the law understood as the will of a sovereign parliament. The judges remain between the Scylla of activism and a certain dose of arbitrariness and the Charybdis of passivism, formalism and heartlessness. The attempt to look for a golden mean in the era of a systemic crisis, in which there was a real threat of shaping the judicial mentality of an auxiliary nature to the executive, is a vector for liberal constitutional democracy in Poland. Without achieving the institutional balance within the principle of the separation of powers between politicians and judges, the system described in the Constitution of 1997 in the direction – to refer to Ernest Fraenkel – *Doppelstaat*, that is, the coexistence of two orders: political and juridical. The misunderstanding of the role of the judiciary as not only a brake of political power, but also a participant in exercising power, from misunderstanding the differences between judicial interpretation and legislation, misunderstanding of the existence of the principle of legalism, supremacy of the constitution, the need to justify facts and applicable legal norms in the context of the principle of impartiality[47]. Although public opinion has an impact on the shaped jurisprudence, the words of Judge Felix Frankfurter should be recalled that „The Court's authority – possessed of neither the purse nor the sword – ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements (...)"[48].

Although juridical-rational arguments give formal entitlement to exercise power, such an approach is less and less sufficient to recognise that power

[46] S. Levitsky, D. Ziblatt, *Tak umierają...*, p. 120.
[47] J.M. Maravall, *Rządy...*, p. 258–259.
[48] *Baker v. Carr*, 369 US 186 (1962).

is legitimized. Today, the expectations of public opinion concern access to information, transparency, procedural fairness, as well as participation and democratisation processes. The legitimacy of the judicature should also be viewed through the prism of internal control mechanisms, which include the manner of recruitment, training, disciplinary liability and the professional ethos. They constitute the legitimisation of the judiciary, which is essentially meritocratic. They should be supplemented by the personalization of responsibility related to adjudication on behalf of the state by a judge by name and surname. This approach limits the dispersion of responsibility of the „depersonalised" authority. Legitimisation of public institutions *sensu largo* it also requires that their representatives respect procedural fairness. It is the legitimacy of entities in relation to which we are dealing with deficits in democratic legitimacy (e.g., courts, prosecutor's office), and procedural fairness should not be considered as *decorum*, and the mere establishment of fair procedures cannot be treated as a sufficient condition for legitimation, a kind of „legitimation through procedures"[49].

Legitimisation, as an objective state related to the fulfilment of certain conditions by the authorities, primarily assumes the constitutional and political dimensions. Fulfilling them does not result in recognition of the authority as legally valid, because legitimation is related to the subjective (instinctive) feeling of being subordinated to the authority that such decisions should be subordinated to. Limiting the legitimacy of power to the legal dimension would simplify this issue. Without acceptance of the legal order, it is difficult to expect voluntary obedience to the legal order. Essentially, legitimacy is characterised by dynamics related to the social capital of political institutions. Thus, it complements the static dimension of the legal order perceived as legally valid. The legitimacy of power in a democratic state ruled by law is more than just obedience. It is respect and trust in the law. In an authoritarian state, the law is obeyed, but not necessarily respected, as Lucius Accius succinctly expressed (*Oderint dum metuant*). The sovereign status results not only from political legitimacy, but also, and perhaps above all, from the constitution related to subordination, limiting the power of the sovereign on the basis of values and preventing the culture of compromise from being undermined. In a democratic state ruled by law, the observance of human rights is of primary importance for the legitimacy of the sovereign's power, which is related to the fact that the judiciary „has

[49] S. Burdziej, *Sprawiedliwość...*, p. 9, 33.

become the guardian of the limits of the nation's sovereignty, understood as the exercise of power based on the strength of values, as stated in the preamble to the Constitution of the Republic of Poland, and at the same time by these limited values"[50]. Only in this way can it be possible to prevent the allegiance of democracy and the loss of the identity of the Polish Basic Law, the limits of which are determined by the content of the preamble indicating the inviolable values. Without the political morality of the participants in the democratic regime, the constitution itself will not provide a sufficient guarantee capable of securing it.

Abstract

The article concerns the dilemmas of legitimising power in Poland, based both on the contemporary achievements of theoreticians and on a discussion of the realities of the political system in Poland. The analysis focuses on the assumption that, on the one hand, the legitimation of power is its recognition as legal, operating on the basis of applicable legal norms, and on the other, the recognition that a specific power has social grounds for having the rule. The legitimacy of power in Poland is based on the authoritarian experiences before 1989, the democratic transformation, and the crisis of constitutional democracy after 2015. The discussion is based on a reference to Montesquieu's division of powers and an analysis of the legitimacy of the legislature, the executive, and the judiciary.

Keywords: power, legitimacy of power, constitution, crisis of democracy, legislative power, executive power, judicial power

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[50] R. Piotrowski, *Konstytucja...*, p. 720.

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