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Criticism Towards the Ruler: Illustrations From the Letter of the Law and the Practice of the Polish Constitutional State

1. Introduction

In this text with a somewhat essayistic fervour, we would like to ask whether a historical analysis, limited as it may be, could indicate specific points: of construction and of "test" when it comes to the transformation of the limits of criticism towards the ruler/authority[1] and the legal-normative legitimation of this criticism, as well as the penalisation of a possible transgression of its limits. We intend, therefore, to look at the aspect of the permissibility of criticism, its certain forms and, finally, the reaction of the authorities at selected moments in Polish history, in search of notable moments in the history of criticism and their distinctive features.

Is it even possible to identify such points, which perhaps even go beyond Polish history? Certainly, to some extent, yes, and the separation in the critical stance between the person of the ruler and the state as such can be

[1] For the purposes of the text, we understand the term "the ruler" broadly, referring to the 19th century monarch and the person exercising actual power after 1926, as well as to the head of state and the executive or even the entire ruling camp in the present day. "Critique of power" would be also relevant a certain extent, this notion, however, seems to function more on the ground of social philosophy. See: M. Saar, *Power*..., pp. 7–20.

regarded as one of them. As long as the ruler is one entity with the state ("L'etat c'est moi", the Bourbons would say) it is impossible to criticise power openly. The person of the monarch symbolised – and in some political-legal cultures still symbolises – the state as a whole, hence the *crimen laese maiestatis* was universally taken seriously. Similarly, in the nation-state building, in the monarchies of the nineteenth century as well in the new interwar republics, criticism of authority still had to be equated with criticism of one's own state, and one's own community. But is it possible to grasp the moment of change? Certainly, the change can be linked to the formation of the liberal currents in the first decades of the nineteenth century and the opening to criticism of the executive (even if not personally of the monarch) and its abuses in the interest of the general[2]. This occurs in parallel with the growing popularity of the tool of the constitution itself, whether it is an octroyed constitution, a constitution established in agreement with a quasi-representation (sometimes still of a state character) or finally – very rarely at that time – adopted by the will of the people. The establishment of a constitution is inextricably linked to a limitation of power, even if it is gradual. The very fact that the ruler accepts the necessity of acquiring legitimacy of a new type and consequently verbalises his powers in a constitutional act is already an expression of this limitation.

The first decades of the nineteenth century saw the emergence of the first formalised tools, such as petitions on abuses of power, constitutional complaints in the countries of the German south[3], and eventually in the later period administrative judiciary in all its glory, i.e. independent control over the legality of the decisions of the executive and the administrative apparatus. However, on the European continent, particularly in the German countries and Austria, this direction with the revolutionary apogee of 1848 was blocked – in some countries for several decades – by an anti-liberal reaction. It took the view that criticism directed against the executive strikes at the authority of the state as such and thus, is a socially harmful phenomenon. The criminal codes of the era commonly criminalised offences of insulting the ruler and, separately, officials; the possible relationship between the nature of the guarantee of constitutional rights and the regulation of criminal law remains an open, particularly interesting research question. Philosophers of the liberal current, on the other hand, assumed that the identification of

[2] As representatives, one can point to philosophers of the German south, such as Carl von Rotteck (assumptions expounded in his *Staats-Lexikon...*, pp. 761–794).

[3] A. Tarnowska, *O wczesnym...*, pp. 103–113.

abuses, as a consequence of the right to criticise, was the tool that best served the society. The period of conservative reaction lasted about a decade in the Austrian monarchy, much longer in Prussia, for example.

Is the next turning point linked to the democratic turn towards liberal-individualist models, which were adopted quite widely on the European continent in the early years of the interwar period?[4] If already, it must be perceived that this shift did not occur permanently if we consider the retreat from democracy of the mid-1920s or later in the 1930s in many European countries. Suffice it to say that in Central and Eastern Europe, Czechoslovakia was essentially the only country to remain with a strictly democratic system. The region only restored democratic models in the era of the collapse of the communist system in 1989–1990, with widespread freedom of speech, opinion, and print; in principle both in the letter of the law and practice.

We would like to refer to three historical moments in these reflections. First one is the first decade of the Polish Kingdom, a specific political entity created in 1815 by the Congress of Vienna, the so-called Concert of the Powers[5] . We will also refer to the inter-war period, and more precisely: to the period after the *coup d'*état staged in 1926 in the young Polish republic by its recent founding father, the hero of the First World War national campaigns, Józef Piłsudski, and the events following his death. Finally, we will refer to certain aspects of the practice of criticism of power in the public space in recent times, also recalling the high-profile criminal trial that reached the highest instance in 2023, after the prosecution filed a cassation to the Supreme Court.

2. Criticism of the Ruler in the Congress Kingdom of Poland

The first of the selected illustrative moments is the moment of stabilisation that followed the Napoleonic Wars. It is worth recalling that in the 1790s the Polish state was finally conquered by its superpower neighbours Prussia, Austria and Russia, and after a temporary episode with the Grand Duchy of Warsaw during Napoleon's domination of Europe, a sizeable part of the

4 A. Di Gregorio, *European...*

5 Research and its results on this period conducted under the National Science Centre grant Opus 15: 2018/29/B/HS5/01165, "Spór o wykładnię konstytucji Królestwa Polskiego jako formative of Polish political liberalism [The dispute over the interpretation of the constitution of the Kingdom of Poland as formative of Polish political liberalism]", headed by Prof. Michał Galędek of the University of Gdańsk, became the inspiration for the entire essay.

former Polish territories were ceded by the decision of the superpowers at the Congress of Vienna to Russia, with which it created a hybrid form of polity – a personal union. Tsar Alexander I was an absolute ruler in Russia and at the same time a constitutional limited monarch in the so-called Congress Kingdom of Poland. The constitution granted in 1815[6] to the Polish lands was a relatively liberal and modern instrument as for European relations at the time, with a significant range of parliamentary powers and civil rights, in particular guarantees of freedom of religion, property, and procedural rights. Freedom of the press was also articulated in Article 16, but the law was to provide for measures against abuse.

We would like to refer to the promising first decade of the constitution and the parliamentary sessions of the time, which became a special arena for quite sophisticated criticism of the authorities. In the course of passionate discussion, the proto-opposition faction often succeeded in gaining the support of the members of the parliament of the time and in rejecting legislative proposals backed by a political option loyal to the Tsar (the caveat here is that there is no question of the existence of early forms of modern parties; at most, one can discern the existence of certain political groups, sometimes quite fluid[7]). It was a special moment in history when some of the Polish MPs, even patriotically oriented, however, experienced by the upheavals of partition and the Napoleonic period, called for gratitude to the Tsar and submission, which could bring stability and allow the shaky *status quo* to be maintained with limited independence. The question of the free public debate and how to express an assessment of power was a lively one.

The draft constitution of the Kingdom of Poland was developed by Poles. Its drafters stood on the classical concept of the separation of executive and legislative powers, that "in every good national organisation" there must be "two distinct kinds" of power: "the power that makes laws and the one that executes them"[8]. In a popular pamphlet entitled *O Sejmie Królestwa*

6 There is, for example, a version available in Anna Tarnowska's edition, *Polish Constitutional...*, p. 71 – the original French version published parallel to the Polish one.

7 When the leaders of the political group known as the Kaliszanie (Kaliszans, after the voivodship, region they represented) proposed that MPs should take their seats in the Sejm according to their political beliefs, this idea was rejected; according to well-established Polish tradition, MPs sat according to the lands from which they were delegated, the 'electoral districts' of the time, and nothing prevented them from proclaiming any views from their seats.

8 *Uwagi komisji Senatu...*, p. 40. In this period there was not necessarily a consensus for this seemingly obvious assumption. For example, in liberal German thought (some participants in public debates in the Kingdom of Poland were influenced by), there were voices in favour of maintaining the "indivisibility of the authorities". See: *Pamiętniki Fryderyka...*, p. 157.

Polskiego (On the Seym of the Polish Kingdom), published in 1818, a young civil servant Aleksander Kożuchowski pointed out that the representatives of Polish political liberalism were guided by an assumption characteristic of this thought, "derived from the experience of the ages", that between the legislative and the executive ("composed of ministers and a whole collection of officials shielded deftly by the monarch's solemnity"), there was an "eternal struggle (...) in the shape of two peoples breathing envy who are constantly experiencing each other's strength. The victorious side [Kożuchowski described] takes away the strength of the defeated one, while the latter usually accepts with humiliation the conditions given to it". He was echoed by the MP Bonawentura Niemojowski, who openly declared during the Sejm of 1820 that "representative government in all countries" should be seen in terms not of a power remaining in symbiosis with national representation, but as "a government of struggle between ministers trying to spread the limits of their power, and the nation wishing to keep ministers within constitutional limits"[9].

What form, then, did the age-old struggle between the executive and legislative powers take in the political conditions of the Kingdom of Poland? Unlike Kożuchowski, future problems were anticipated as early as 1816 by the anonymous author of a formative article for Polish liberalism entitled "Co znaczą wyobrażenia liberalne?" (*What Do Liberal Imaginations Mean*?), which appeared in the pages of "Pamiętnik Warszawski". This perceptive observer of political life focused his attention on the benefit of the freedom of public debate, which implied the possibility of criticising the actions of the government. He took the view that "one of the first marks of a liberal government is the freedom to demand public deliberation on matters about the state and the nation". The government may not prohibit public criticism of its actions. "Having allowed deliberation, opposition must also be allowed". Even "constant resistance in political matters" must be tolerated, as an attribute and virtue of the "opposition" to the government. As an anonymous columnist pointed out: (1) "only open resistance convinces of political freedom"; (2) "the disputes between ministers and the opposition reveal the errors of the former, and give the government an idea of the state and spirit of the public; they provide an opportunity to direct and control opinion, that unrefined moral force from which despotism voluntarily robs itself". So even if "the opposition (...) makes a mockery of the noblest qualities, (...) all this

[9] *Dziennik posiedzeń...*, p. 315.

does not outweigh its advantages". The moral strength of a nation is thus based on the freedom of public debate in speech and writing. Even unjustified criticism should be allowed in the name of higher reasons. On the other hand, however – as the author of the 1816 article argued – "the opposition acts liberally when, while defending constitutional liberties, it respects and sanctifies the affairs of state; when, while reprimanding errors and misconduct, and even holding wicked or imprudent persons to answer, it does not suspect the whole class of such persons of a partisan spirit, of rebellious intentions, of unrighteous designs (...)"[10]. If, therefore, the political opposition destroys the image of the government without inhibition and unreflectively undermines confidence in it, this is a visible sign that "the state of the nation's civilisation does not yet allow" a higher degree of political freedom to be granted to the nation. The political immaturity of the nation provided a ready template for arguments in favour of limiting political freedoms in the Kingdom of Poland.

The key instruments for safeguarding against executive abuse were the constitutional powers of control of the Sejm towards the government, intricately linked to an effective mechanism for holding the executive to account by representative institutions for its lawful activities (constitutional accountability). The constitutional project drafted by the Poles, the part devoted to national representation, which was personally prepared by Prince Adam Jerzy Czartoryski, the liberal guide of this work, contained two articles of fundamental importance: Articles 106 and 107[11]. According to their content, the basis of parliamentary control was to be "a general report on the situation of the country, arranged in the Council of State and sent to the Senate". It was stipulated that it would first "be [read] in both chambers combined", and then "each chamber separately" would be empowered to "deliberate" on the report "by the competent committees" of the parliament and to "declare [its] opinion on the report to the king". Thus, the constitution empowered both houses of parliament to examine the government report in its entirety. The constitution suggested that, in exercising these functions, the Sejm should only act as a consultative body to the monarch, as it was exclusively up to the monarch to decide how to use the comments made. Direct interference

[10] *Co znaczą...*, pp. 37–39.

[11] "Article 106. A general report on the state of the country, drawn up in the council of state and sent to the senate, will be read in both chambers combined. Article 107. Each chamber will examine the report in its own right and will submit its own opinion to the King. The said report may be published in print", Journal of Laws of the Kingdom of Poland, vol. 1, no. 1, p. 64.

by the Sejm in the activities conducted by the government was excluded in this field.

The extent of the Sejm's control powers became the main subject of the dispute between the parliamentary opposition and Alexander I, who, having commissioned Czartoryski to prepare a constitutional draft, removed him from power and departed from his original liberal vision of the political system. In this field, the Tsar's different understanding of the provisions of the constitution was particularly vivid than that of the "national representation" supported by the liberal public opinion circles of the Kingdom[12]. Following Czartoryski's move to the oppositional fraction, the new ruling camp in the Kingdom of Poland, headed by Governor Józef Zajączek, a servile autocrat, was also particularly reluctant to see any attempts by the Sejm to interfere in its activities. On the other hand, both the older liberals co-drafting the constitutional project with Czartoryski in 1815, and the younger representatives of the liberal opposition in the Kingdom of Poland, could not imagine the possibility of a liberal state functioning without the effective exercise of the powers of control by the National Representation. They followed in the footsteps of European liberals led by Benjamin Constant and focused primarily on the problem of creating the most effective mechanism to safeguard against executive arbitrariness. This was a central issue not only in Polish but also in European political liberalism of the era closing between 1815 and 1848.

The question arose as to whether, in a system of holding the executive accountable for conducting lawful activities, the role of the National Representation should indeed be merely servile to the monarch. Was the Sejm supposed to serve the King only as an aid to the sovereign in exercising supremacy over the executive? Already at the first Sejm of the Kingdom of Poland in 1818, the authors of the Remarks of the Senate Committee, read out by its most prominent member, Prince Adam Jerzy Czartoryski, decided to question this. They argued: "The 'thing of general concern' is not only the enactment of future laws but also the analysis of 'the execution of those laws', which, according to the Constitution, 'not otherwise than after discussion and according to the opinion of both chambers' should be carried out for the use of the monarch". In other words, the actions taken by the government should be subject to the assessment of the National Representation, since they amount to the execution of laws, for which the government must be

[12] J. Leskiewiczowa, F. Ramotowska, *Przedmowa...*, p. 8.

scrupulously accountable to both the King and the people. Admittedly, it was perceived that the constitution, while ordering "the annual opinion of the government to be presented to the Sejm", "entrusts both chambers of the Sejm" only to draw up "their opinion of its actions to the Throne". However, it appealed that "in making laws and equally in judging their execution (...) the three branches of the supreme legislative power [i.e. the monarch, the Chamber of Deputies and the Senate] should agree and give a joint judgment"[13]. In assessing how the law should be implemented, the monarch should therefore not decide individually. According to Czartoryski and the other authors of the *Uwagi Komisji Senatu* (Remarks of the Senate Committee), he was obliged to treat the Chamber of Deputies and the Senate as equal partners ("branches" of one "supreme legislative power") in the debate on the assessment of the legality of the government's work. In this respect, the monarch should not only reckon with the opinion of the Sejm but, it was suggested, even take it into account, seeking to reach a mutual consensus on the matter. Moreover, it was pointed out that it is the representatives of the people who are incomparably better informed about the relations prevailing in the country and can correctly assess the government's conduct on this basis. The monarch residing permanently in Sankt Petersburg should therefore trust them. Otherwise, he is at risk of misjudging the situation.

However, this was an interpretation inconsistent with the letter of the Constitution of the Kingdom of Poland. None of its provisions guaranteed the Sejm the possibility of direct interference in the activities conducted by the government. The Senators of 1818 questioned the monarch's right to make a sovereign assessment of the work carried out by the government and administration, whereas the Constitution implied that this was his exclusive prerogative.

As a result of this and other events occurring not only during the 1818 Sejm but especially the next one convened in 1820, the granting of extensive powers to the Sejm was considered "dangerous" not only by governmental spheres but also by some moderate liberals. At the dawn of the new decade, there was a growing revolutionary turmoil in Europe fuelled by orthodox liberals, and in this climate, the future fate of the constitutional Kingdom of Poland became uncertain in the face of the radicalisation of local liberal opposition. Among the group of concerned moderate liberals was the author Fryderyk Skarbek, then a young professor of administrative sciences at

[13] *Uwagi komisji Senatu...*, p. 40.

Warsaw University. Several decades later, at the end of his life writing down the history of the Kingdom of Poland, he assessed the political situation as follows: The political order in the Kingdom of Poland was shattered by two new [concerning the earlier system of the Duchy of Warsaw] competences assigned to the Sejm, the first of which was "the right to make remarks on the report of the Council of State, i.e. to criticise governmental actions". The second was the ability to make requests to the throne, i.e. the right of petition. In his opinion, these were competences that "could only serve an independent and self-governing nation", and were therefore definitely at odds "with the position from the grace of the conqueror of a dependent people", as the Polish nation had become subjected to the power of the Russian Emperor after his victory over Napoleon. For this reason – according to Skarbek – the earlier Polish Constitution of 1807, granted to the Duchy of Warsaw by Napoleon, was more suited to the circumstances of place and time. This was because it allowed only members of the Council of State and the parliamentary committee to speak in the Chamber of Deputies (Article 46), and not random or politically indoctrinated deputies[14]. In this way, it suppressed manifestations of political struggle in the parliamentary forum, the political struggle referred to by the anonymous author of the mentioned above article *What Do Liberal Imaginations Mean?*, who asked for it to be recognised and accepted as an immanent feature of the liberal system even before later political events in the Kingdom of Poland confirmed that therein lay the key problem of political liberalism of the era.

A different optic was presented by Czartoryski in 1818 in his remarks in the name of the Senate committees during the First Sejm. Their leitmotif was the observation that: "the truth (...) usually so rarely reaches thrones", while its "concealment causes all their misfortunes". It was for this reason – as Prince Adam argued – that the control over the government exercised by the Sejm, as a body performing this function for and in the interests of the ruler, was an indispensable condition for the proper functioning of the entire system. It determined whether the state system was liberal in character. Czartoryski stressed that it was necessary to know the "spirit" of this institution in order to "respond with dignity to the will of the Constitution and the expectations of our legislature". In the light of the Senate's Committees' Remarks, "a thorough and noisy dissection of every thing pertaining to the public" is the "spring of representative institutions", for only in this way is it

[14] F. Skarbek, *Dzieje...*, pp. 61–62; see also: P. Szymaniec, *Fryderyk Skarbek...*, p. 288.

possible "to derive the greatest light about it, and judgments and conclusions, so far as one can be certain, that are not mistaken". It was emphasised that, especially under Polish conditions, the external control functions exercised by the Sejm were a necessary safeguard due to the monarch's absence from the country. For if "we are doomed to have only a rare and brief possession of our King", "how indeed [he], staying so far from us (...) would be able to gain a true idea of the progress and performance of the government, the degree of happiness of the citizens and the state of the country, if he could learn about it in no other way than through the government itself or its constituents", as was the case in the Duchy of Warsaw, where, due to the political order in force, "he did not go to the Sejm chambers and did not seek to obtain from them the full truth, trustworthy testimonies and reports"[15].

Such a far-reaching interpretation of the constitutional provisions met with a strong reaction from Alexander communicated to the Polish side through a proclamation by the Minister Secretary of State on 4 September 1818. The Tsar made it clear that the constitution "does not authorise the [Senate?] Chamber to reprove the conduct of the government, does not authorise it to reproach it, but only to express its opinion because of the instructions made to the Sejm". Alexander did not wish to formulate any "general reproaches made to the government" concerning its policies. Thus, the assessment could not concern, for example, excessive haste in the undertakings undertaken, poor selection of priorities, or overly broad or petty handling of public affairs[16]. From this point onwards, attempts to interpret constitutional provisions differently could be interpreted as a desire to engage in polemics with the Emperor.

Similarly, the Emperor's plenipotentiary and his closest advisor in the affairs of the Kingdom of Poland, Nikolai Novosilcov, left no illusions about the monarch's and the government's side's understanding of the Sejm's participation in evaluating government activity. When MPs undertook to evaluate the work of one of the Kingdom's government committees, Religious Denominations and Public Enlightenment, he responded as follows: "the committees of the Chamber of Deputies (...) lost sight of the true purpose of the law and went beyond their competence. Instead of seeking whether the report of the Council of State presented an accurate and faithful picture of the activities of the Confessions Commission and the results of its work,

[15] *Uwagi Komisji Senatu...*, pp. 39–40.

[16] Printed in: S. Barzykowski, *Historya...*, p. 134; see also: H. Izdebski, *Ustawa Konstytucyjna...*, p. 211.

they have been preoccupied with criticising the decisions of the monarch and the decisions of the government, as well as the entire system of functioning of the Commission, which no law authorises and which is in complete contradiction with the principles of the monarchical order. If the legislative power and the judicial power are exempted from the kind of attacks made periodically in every Diet, why should the executive power, which is concentrated in the very person of the Sovereign [i.e. the monarch], be subject to them?"[17]. This way of interpreting the constitutional powers of the Sejm was supported in the government by the governor and a group of reactionary clerics associated with Novosilcov, led by Jozef Kalasanty Szaniawski and the Minister of Enlightenment Stanislav Grabowski. It was under the inspiration of the latter that Novosilcov came out with his criticism[18].

Novosilcov's intervention took place in response to the initiative of the Chamber of Deputies at the 1825 Sejm. It was taken although its composition and course differed from previous Sejms due to the pacification of the liberal opposition. For these government circles, the political ideal was generally the aforementioned consultative monarchy, in which "national representation" would have a real opportunity to express the interests of the people but would not have the means to obstruct the sovereign and the government[19]. These views were close to, for example, Franciszek Ksawery Drucki-Lubecki. This most influential of ministers of the period (from 1822 onwards Minister of the Treasury) held the view that the advantage of the "constitutional system and its public forms" was "to enlighten the course of administration (...). Both the King and the people are interested in ensuring that this course is correct (...). The government, i.e. the delegates of power who put into practice the views of the sovereign and the wishes of the subjects, act as intermediaries between them". In this configuration, the role of the Sejm should be subservient, but not so much to the nation, but to the king. The assessment of the government's work should therefore be made for the monarch's use and not necessarily exposed to the public. A nation with representation has guarantees that its "voice will reach the throne, the administration will properly calculate its acts and fear abuse of power, and discussions will be calmer and more substantive"[20].

17 Quoted in: H. Izdebski, *Ustawa Konstytucyjna...*, p. 212.

18 See: M. Manteufflowa, *J.K. Szaniawski...*, pp. 10 ff.

19 H. Izdebski, *Ustawa Konstytucyjna...*, pp. 214–215.

20 The statement was contained in a letter from F.K. Drucki-Lubecki to the Minister Secretary of State of 4 March 1825, quoted (translated from the French) after: H. Izdebski, *Ustawa Konstytucyjna...*, pp. 214–215.

By contrast, for the proponents of "representative government" – i.e. among the liberals dominating the parliamentary benches in opposition to the government authorities – it was obvious that the role of the people's representatives was to exert the broadest possible control over the executive. This was argued, among others, by Dominik Krysiński during the Sejm of 1820 concerning the drafts of normative acts brought before the Sejm. He pointed out that the representatives of the nation could not be regarded as undermining the authority, bringing disrepute or "offending the light" of the Council of State when they "point out [its] shortcomings, errors and mistakes which the members of the Chamber perceive in the work submitted by the Council of State". In his opinion, this struggle between Parliament and the Council of State is a "beneficial and constitutional struggle". He pointed out that Polish political habits stand out on the plus side compared to other countries. He argued that this struggle "in other governments is more severe because it goes as far as the personalities of ministers" (personal attacks), while "in our country, it is merely expounding", i.e. it boils down to constructive substantive criticism. The Sejm should therefore be guaranteed the free exercise of its right to make observations on the activities conducted by the government authorities, including the drafts of legislation prepared by them. It is always possible for the government to provide an effective rebuttal to unfounded allegations. He argued: "if [only] the Council of State finds something erroneous [in them], after every observation to that effect, after every rising voice of an unjust accusation against a bill, it is strong to reflect immediately on the impropriety of the motion, then every accusation, if it were weak, would fall under the thoroughness of the evidence against it"[21].

At the 1820 Sejm, however, both sides were already aware that the problem had deeper roots in a growing political conflict. The response from the government, delivered by the State Secretary (Registrar) Ignacy Zieliński, should be interpreted in this context. He did not directly argue with Krysinski's argument that it was the right of the National Representation to (in accordance with the Constitution) and should be (due to the general theory of representative government) to make observations on the government's activities and the projects it presented, but because of the thickening political atmosphere in the Kingdom, he noted that the general attitude of the Sejm chambers should change, as it was their constitutional duty to bestow confidence on those in power. He argued that there could be no "insult to

[21] *Dziennik posiedzeń Izby Poselskiéy...*, p. 134.

the confidence in the work done by the composition of the Council of State, which cannot be exempted from influence for the general interest from one country of inhabitants, from fellow citizens devoting their time and years to public service"[22]. In other words, in Zieliński's view, it should be presumed that the government authorities are guided by good intentions, which is guaranteed by the national character of a government composed of persons of merit to the fatherland.

Open criticism of the Tsar would have been dangerous and irresponsible. The opposition group therefore resorted to more sophisticated means, a kind of *in-proxy* criticism. During the indicated first period of relative liberalism in parliament, assessments of unconstitutionality were formulated, both of government actions and projects submitted by the loyalist option. It should be noted that the question of the constitutionality or possible unconstitutionality of acts at this moment in history is a great theoretical novelty – hardly had the *Marbury v Madison* verdict been handed down in the distant United States, on European soil the question had not yet received wide embedding even in the doctrine itself, into the practice of constitutional states it would sometimes take many decades to break through[23]. In the meantime, such a precursor argumentation, applied by the opposition in the parliament of the Kingdom around 1818, proved effective and convincing during parliamentary deliberations. Paradoxically, at the opening of the first parliament, Tsar Alexander himself referred to the deputies as "interpreters of rights, constitutional guardians of national liberties"[24].

Arguments alluding to unconstitutionality arose at an early stage of the work, already during the discussion of the land demarcation project. One member of parliament saw in the draft a violation of the individual's freedom to dispose of property as well a violation of the legislative procedure. Statements in the second stream accepted the irregularities in the name of adopting a modernising regulation, which was important for sorting out the legal status of a property. Count Ignacy Komorowski also regarded the Constitution as "the cornerstone, this essential Shield of real national liberties". At the same time, in his opinion, the Constitution set limits on the

22 Ibidem, p. 135.

23 Of course, the very concept of constitutional supremacy is also subject to reinterpretation and today's understanding of it focuses on slightly different elements than when the constitution was fixed in legal orders. See also: A. Kustra, *Współczesny...*, pp. 105–127, whereby even so the considerations of Aleksandra Kustra refer to the time before the latest challenges by populist governments around the world to test liberal constitutions.

24 Universal of 5 (17) February 1818, *Dyariusz Seymu* 1818, vol. 1, p. 3.

activities of the representatives. The response to the Tsar's graciousness in restoring the National Representation within the liberal regulations of the Constitution, and to the Sejm itself the power to legislate and the power to tax, had to be to work around the laws in unity and fraternal harmony, with the utmost zeal[25].

Later in the session, deputy Wincenty Niemojowski openly criticised the lack of countersignature of imperial acts by ministers. In an emphatic speech on the issue, he announced that MPs would not tolerate the anti-constitutional activities of ministers and would use their constitutional powers. This speech was regarded as a kind of programme manifesto[26]. This was recognised by the Tsar as well, who, although announcing the "development of constitutional forms", nevertheless issued a rescript to the Administrative Council at the close of Sejm with a recommendation for the future that the chamber should not reprove the government but should present its wishes and "national needs". The Sejm convened in 1820 was already an arena of sharp disagreements. In particular, the debate around the draft Organic Statute for the Senate, which introduced the mediation of the Council of State in the process of holding ministers accountable, stands out here. The Senate could no longer do so directly, and such a solution was contrary to Article 116 of the Constitution. On the Governor's orders, rumours were spread against the Niemojowski brothers, and MPs were intimidated by the vision of the Tsar withdrawing the constitution. Wincenty Niemojowski was deprived of the floor during his speech, but it was perhaps these actions that helped convince the MPs, who rejected the draft. Although the Niemojowskis emphasised that they were defending the constitution, public opinion equated their speeches with ruthless criticism of the government. Some loyalist and cautious MPs, however, considered this type of argumentation dangerous, moreover, populist and dictated by the desire of critical MPs to gain their own popularity[27]. The next Sejm was held late in 1825, and despite being elected to the Sejm, the authorities prevented the Nemojowskis from exercising their mandate by various means. Provisions were also made to keep

[25] *Dyariusz Seymu* 1818, vol. 1, p. 115.

[26] W. Bortnowski, *Kaliszanie...*, p. 67.

[27] Władysław Bortnowski, a researcher of the opposition environment of Kaliszans, also formulated harsh assessments of the Niemojowski brothers' opposition activities, particularly around the issue of newspaper censorship. He attributed to the Niemojowskis "doctrinaireism, disregard for the existing situation, and even a lack of reason, which makes one choose the lesser evil". At the same time, he emphasised how carefully they prepared their parliamentary speeches, thanks to which they gained support; see: W. Bortnowski, *Kaliszanie...*, pp. 122–124.

the Sejm proceedings secret and journals were censored. Thus, the dark visions were realised – a troublesome opposition, even if not with extensive powers, annoyed the Tsar. The liberal experiment was over.

The described debates involving the "noisy opposition"[28] are particularly interesting since in the new system it was not possible to turn against the person of the ruler himself. This was contrary to Polish custom – after all, in formerly noble Poland, it was the nobility who chose the King (the elected monarch), and it even happened that he did not necessarily come from a foreign royal or princely family, but from a Polish noble family (such as Michał Korybut Wiśniowiecki or Jan III Sobieski). The boundaries of criticism of a person elevated to the throne by a decision of the noble community, perhaps a recent neighbour and cup companion, must have been fluid. Meanwhile, the Tsar of Russia as King of Poland is a different category of ruler; his criticism is a kind of playing with a bear. For this illustration, however, we referred to the first period of the political experiment, which for many observers, including those from abroad, was surprisingly liberal. Criticism of the authorities therefore emerged but took a veiled form – the dispute over unconstitutionality. Using this litmus test, legislative proposals were examined, as well as the actions of state bodies, in particular ministers. It is noteworthy that in the first decade of the Kingdom's existence, parliamentary debate was of a public nature, open to the public and reported in the press; disputes in parliament were on the lips of public opinion. The press of the time also experienced an intense, if short-lived, boom – even if liberal newspapers did not criticise the ruler directly, they did, for example, include reports on non-coincidentally selected foreign events, wars of independence, and quoted liberal speeches by foreign politicians. This state of relative freedom ended, as mentioned, around 1825. The Tsar, due to both the rigid stance of other monarchs and his Russian subjects, could not afford to play the liberal king in Poland.

3. Criticism of power in the reborn Polish Republic: the good name of Józef Piłsudski

The second of the selected moments is related to the aftermath of the death of the Father of the Nation, or at least the Father of Poland's Independence

[28] W. Bortnowski, *Kaliszanie...*, p. 94.

during the inter-war period, i.e. the Chief of State (Naczelnik Państwa, between 1918 and 1922), Prime Minister, Minister of Military Affairs and Marshal of the Army Józef Piłsudski. The father of independence was, as already mentioned, both the author and leader of the 1926 coup, after which the former democratic system based on the tripartite division of power first degenerated through changes introduced to the existing Constitution of 1921 by the so-called August Amendment and then basically collapsed with the enactment of the authoritarian April Constitution of 1935. Piłsudski's orphaned, decomposing political camp had to create a new, specific legitimacy. It developed an institutionalised cult of the deceased leader.

Let us assume, following Benedict Anderson, that a cult consists of myth, ritual, and symbol[29]. In the case of Piłsudski, it was initially created quite naturally, before his death in connection with name-day celebrations and later funeral ceremonies. Then it began to take on a formalised form as determined by a separate body set up, the Supreme Committee of Remembrance under the leadership of the incumbent President of the State, Ignacy Mościcki[30]. Since Piłsudski was to be commemorated all over Poland, an extensive structure of local branches of the Committee was created. The anniversary of his death, 12 May, was to be annually the culminating day on which all commemorations of Piłsudski's name were concentrated. These elements were to cement the conviction that Piłsudski was "a living symbol of Poland reborn and its national conscience", "a symbol of statehood and a symbol of love and work for the state", the Marshal's name being "the second name of the fatherland"[31].

The first trials against those who insulted the person of the Marshal were taking place under the March Constitution. The Constitution itself contained a broad catalogue of rights and freedoms in Chapter V. However, as in other constitutions of the epoch, the legislator placed duties in the foreground of such a catalogue, among them the duty of all citizens, expressed in Article 93, to "respect lawful authority and facilitate the fulfilment of its tasks (...)". At the same time, freedom of the press was guaranteed in a further broad

[29] B. Anderson, *Imagined...*

[30] The latter, moreover, refused to relinquish power after Piłsudski's death. While he could have made way for the Marshal himself, he felt that, with his second term of office started 1933, he would not hand over the function to another trusted person, even if that was the leader's will. Thus, a situation arose in which several competing centres of power (the President, the post-Piłsudski government, and the army command) existed side by side, and in the face of this rivalry the provisions of the April Constitution were peculiarly neutralised.

[31] H. Hein-Kircher, *Kult Piłsudskiego...*, pp. 231–245.

catalogue (Article 105), with responsibility for the abuse of this freedom defined in a separate law. Article 108 guaranteed the freedom of coalition, assembly and the formation of associations and unions. These provisions may be relevant for examining the constitutional basis for criticism of the authorities. The successor, the April Constitution, enacted in a highly controversial procedure, addressed the issue of constitutional freedoms in a completely different way. It was an act based on the concept of solidarity and unity of power entrusted to the person of the President. According to its assumptions, the life of society was to be shaped within and based on the state. "The state shall ensure that citizens have the opportunity to develop their values, and freedom of conscience, speech and association", proclaimed Article 5, in which a specific fusion of freedoms was made. No separate chapter was devoted to freedoms, moreover, not even a separate section, apart from the indication in the final provisions that the March Constitution was being repealed except Articles 99 (protection of property), 109–118 and 120 (relating to minority rights, religious freedoms, freedom of scientific research, compulsory education and compulsory religious lessons; Article 119 relating to free education and state scholarships was omitted). The overly laconically formulated personal liberty, inviolability of dwelling and correspondence and key procedural rights are placed in §§ 2 and 4 of Article 68, relating to the administration of the judiciary. As can be seen, the issue of rights and freedoms was not among the priorities of the new constitution-maker, and they did not seek to create a precise catalogue.

The criminal law foundations show a slightly different chronology. The situation was different under the three criminal legal systems of the former partitioned states (German, Russian, and Austrian), which remained in force until the early 1930s. For example, the Tagancev Code of 1903, which was in force in the former Russian partition, provided in Article 128 for liability for "showing insolent disrespect to the Superior Authority or disdain for the form of government established by the Fundamental Laws (in the original version also: the order of succession to the Throne) by making or reading a speech or literary piece in public, or by disseminating or publicly displaying a piece or image"[32], and this provision served as the legal basis for initiating proceedings for liability for insulting an authority[33]. In the case

[32] Text according to *Kodeks karny z r. 1903...*

[33] K. Siemaszko, *Ochrona...*, p. 300. The author cites the case of Andrzej Niemojowski and the charge of "audacious insult" (Niemojowski was alleged to have called the Chief of State "a political bandit and a madman"). In the existing practice, however, it was the offended superior

of the lands formerly belonging to the German Reich, one can point to the Code's criminalisation of the offence of insulting the ruler (more precisely "the Emperor, the ruler of His country", "a member of the ruling family", "the regent", "the prince of the union, respectively §§ 95–101")[34] or insult in general (§§ 185–195, including § 189 dealing with insulting a deceased person). The German Criminal Code specified liability for insulting an authority, an official, a clergyman or a member of the armed forces, in whose case, in addition to the persons concerned, their official superiors could apply for punishment (§ 196). In response to a press insult, the publication of a conviction in the press could be ordered. The Austrian Criminal Act as late as 1852 provided for liability for violation of the honour owed to the monarch or members of the imperial house – by personal insult, publicly uttered insults, name-calling, taunts, print, engravings, writings (§§ 63–64)[35]. On the other hand, incitement "to contempt or hatred against the person of the Emperor, against the whole state, against the form of government, or the administration of the state" was considered a crime of disturbing the public peace (§ 65). These provisions were to find provisional applications in the Polish Republic. One may also recall an episode from 1920, when, in the conditions of the ongoing Polish-Bolshevik war, special provisions were enacted to criminalise insulting the Head of State "by derogatory speech, shouting, threats or behaviour in offices, places or public meetings, or by derogatory writings, prints, posters, pictures, drawings, images or works, circulated, distributed or displayed in public"[36]. This act was repealed after three months, and its provisions did not live to see significant practice[37].

Finally, in 1932, criminal law was unified in Poland and codified in the form of the Criminal Code[38]. The so-called Makarewicz Code criminalised the offence of insulting the honour or solemnity of the President of the Republic of Poland (Article 125 § 1). On the question of criticism against authority, the provisions concerning defamation and insult, respectively, of

authority that decided whether to initiate proceedings, and the Chief of State Piłsudski refused to do so on several occasions.

34 *Kodeks karny Rzeszy Niemieckiej...*

35 *Ustawa karna austrjacka...*

36 Rozporządzenie Rady Obrony Państwa z dnia 17 września 1920 r. w przedmiocie kar za obrazę Naczelnika Państwa [Regulation of the Council of State Defence of 17 September 1920 on penalties for insulting the Head of State], Journal of Laws 1920, no. 91, item 598.

37 K. Siemaszko, *Ochrona...*, p. 301.

38 Rozporządzenie Prezydenta Rzeczypospolitej z dnia 11 lipca 1932 r. Kodeks karny [Decree of the President of the Republic of 11 July 1932 Criminal Code], Journal of Laws 1932, no. 60, item 571.

"authority, office, army or navy or their units" in a place or during official activities or in public (Article 127), or of a person (institution or association) on the grounds of Article 255 § 1 and Article 256 § 1, while concerning an official on the grounds of Article 255 § 5 and in the course of his duties – on the grounds of Article 132 § 1. The disposition of the provisions referred to slander "of such conduct or qualities which may bring them into disrepute in public opinion or expose them to the loss of confidence necessary for a given position, profession or type of activity" (Article 255 § 1) and "insulting the personal dignity of another person in his or her presence, or even in his or her absence, but in public or with the intention that the insult should reach that person" (Article 256 § 1). In turn, the Code of Offences, also from 1932[39], provided for arrest or a fine for the offence of demonstrating in a public place dislike or disregard for the Polish State or public institutions (Article 18). The universal criminal law thus protected the good name of specific officials or institutions in a rather general way.

Several criminal cases against persons alleged to have insulted Marshal Piłsudski are cited in the literature. As mentioned, such cases appeared immediately after the May coup. These included two people who had torn up a portrait of Piłsudski during the campaign and were sentenced to two months' imprisonment[40]. A journalist who called Piłsudski's Legions a "fanatical military group" was sentenced to a month's imprisonment and a 320 zloty fine; a priest from Chorzów was convicted of insulting the government and the Marshal in 1929[41]. Antoni Bojańczyk, on the other hand, identified a Supreme Court judgement from 1934, in which the court referred to charges of showing dislike/disregard for the state or an institution. The charge concerned the holding of a "funeral service" in an orthodox church on the Marshal's Name day (18 March 1933), and the Supreme Court held that the celebrations on this occasion were of a state character and that the orthodox clergyman, by its demonstrative action, had committed an offence under Article 18 of the Code of Offences[42]. Another of the controversial Supreme

[39] Rozporządzenie Prezydenta Rzeczypospolitej z dnia 11 lipca 1932 r. Prawo o wykroczeniach [Decree of the President of the Republic of 11 July 1932 Code of Offences], Journal of Laws 1932, no. 60, item 572.

[40] This was reported by the "Głos Prawdy", 1 February 1929, cited by H. Hein-Kircher, *Kult Piłsudskiego...*, p. 245.

[41] "Gazeta Warszawska", 25 January 1927; "Gazeta Warszawska", 13 December 1929, cited after H. Hein-Kircher, *Kult Piłsudskiego...*, p. 245, note 1116.

[42] The Supreme Court also ruled in 1934 based on the same legislation in the case of a Greek Catholic priest from the parish in Zarubnice who held a service in a mourning chasuble on

Court's rulings of 1934, on the other hand, concerned the offence under Article 128 of the Criminal Code, i.e. insulting the army, which was to be done by insulting the Marshal of Poland. The legal issue remained complicated, as on another occasion the Supreme Court ruled that "insulting individual officials is not an insult to authority". Meanwhile, there was only one person in Poland who bore the highest rank in the corps of generals, Marshal Piłsudski, and in essence, his criminal protection was decided by the court. According to the ruling, "an insult to the Marshal of Poland Józef Piłsudski, apart from the inherent insult to the moral authority he holds in the Nation and the State, may include an insult to the authority and office he holds, such as Minister of Military Affairs, General Inspector of the Armed Forces"[43].

In 1936, issue of the local newspaper that had reported on a trial concerning an insult to Piłsudski's name was confiscated[44] – not only criticism but even reporting on it was therefore forbidden. There were, however, cases of acquittal, including that of the defendant who allegedly called Piłsudski a bandit. Because of Piłsudski's death, however, the criminal situation changed, with the 1932 Criminal Code possibly providing for the possibility of relatives pursuing liability for insulting the deceased (as private prosecution, Article 256 § 3), the Supreme Court remaining rather sceptical about such an option[45].

The legal void was finally filled in 1938 with the Act on the Protection of Józef Piłsudski's Name[46]. This noticeably short act stated explicitly that "the memory of the deeds and merits of Józef Piłsudski – the Resurrector of the Homeland's Independence and the Educator of the Nation – for all time belongs to the treasury of the national spirit and remains under the special protection of the law". Violation of this memory was punishable by imprisonment of up to 5 years. The immediate impulse for the law to be passed was a statement made by a professor at Vilnius University (then in Poland), Stanisław Cywiński, who – without mentioning Piłsudski's name,

11 November 1933, i.e. on a national holiday. Here, too, the Supreme Court found disregard. However, the case of Piłsudski's name-day celebrations is more controversial, in view of the recognition that the extraordinarily solemn celebrations of 1933 "were indeed state celebrations". See: A. Bojańczyk, *Karnoprawna...*, part 1, pp. 158–163.

43 Judgment of the Supreme Court of 12 October 1934, 2 K. 1083/34, Zbiór Orzeczeń Sądu Najwyższego IV/1935, item 160, pp. 251–254; A. Bojańczyk, *Karnoprawna...*, part 2, pp. 226–227.

44 As reported by "Warszawski Dziennik Narodowy", 26 July 1937.

45 In the judgment of 2 December 1932, II 4K593/32, Supreme Court Reports II/1933, pp. 54–55.

46 Ustawa z dnia 7 kwietnia 1938 r. o ochronie imienia Józefa Piłsudskiego, Pierwszego Marszałka Polski [Act of 7 April 1938 on the protection of the name of Józef Piłsudski, First Marshal of Poland], Journal of Laws 1938, no. 25, item 219.

but referring to him as "a certain cabotine" – criticised Piłsudski's comparison, dating back to 1920, of Poland to a pretzel, i.e. Poland is valuable near the borders, but empty inside[47]. The professor published his critical text in the opposition newspaper "Dziennik Wileński". In response, a group of military officers from the Vilnius garrison assaulted and beat Cywiński and other journalists of the "Dziennik"[48]. In a dramatic narrative, the government saw this as an insult to Piłsudski's "last will" and drafted the above-mentioned law.

The case of Cywiński and the editor-in-chief of the "Dziennik", Aleksander Zwierzyński, was considered by the District Court in Warsaw, which sentenced Cywiński to 3 years in prison, acquitting his superior. The Appeal Court mitigated the sentence to 1,5 years in prison. In the first instance, the court based the sentence on Article 152 of the Criminal Code, which stated that "whoever publicly insults or mocks the Polish Nation, or the Polish State" is liable to imprisonment or arrest for up to 3 years. It therefore considered the insult to Piłsudski to be an insult to the nation. The Court of Appeal recognised this acrobatic legal construction and at the same time upheld it with the reasoning that Józef Piłsudski had become part of the nation's collective memory: "an insult to the nation is also committed by one who offends the deepest feelings of the nation and painfully affects them. Whoever offends the nation's most sacred feelings thereby offends the nation as well"[49]. This argumentation was attempted to be undermined by Cywiński's defence lawyers in a cassation appeal to the Supreme Court, but the latter upheld the verdict. This ruling was later pointed out in criminal doctrine as an example of the use of analogy under the guise of an extensional interpretation[50]. This dilemma disappeared with the passing of the Act on the Protection of Piłsudski's Name – the legislative process itself proceeded rapidly, and many tribute speeches were made in the Sejm on the occasion[51]. Although the law had only been in force for a short time before the outbreak of World War II, a few cases of its application were identified, e.g. against the editor-in-chief of "Obrona Ludu" and its cartoonist, who were to answer for

47 S. Cywiński, *C.O.P. ...*, p. 3.

48 K. Siemaszko, *Ochrona...*, pp. 302–303.

49 Ibidem, p. 304.

50 A. Bojańczyk, *Karnoprawna...*, part 2, pp. 230–231.

51 Stenographic report of the 78th Meeting of the Sejm on 15 March 1938, benches 5–8, excerpts quoted by A. Bojańczyk, *Karnoprawna...*, part 2, p. 232.

publishing a caricature insulting the Marshal's honour (the court of second instance acquitted both)[52].

In the case of editor Cywiński, there were calls for the right of clemency to be exercised: writer Studnicki appealed to the Marshal's widow, Aleksandra Piłsudska, to make such a request, arguing that Piłsudski himself would not have allowed the prosecution: "he felt too great to be offended by [Cywiński's words]"[53]. As indicated earlier, Piłsudski himself was opposed to prosecuting the authors of the insults directed at them even during his time as Head of State (till 1922). At the same time, Piłsudski himself created later and disseminated a certain image of himself, in particular by post-rationalizing his controversial decisions. However, Heidi Hein-Kircher proved convincingly that the Piłsudski camp instrumentalised this cult after the leader's death to legitimise power and build a specific civic identity[54]. The criminal law aspect of the "defence of the good name" became an essential component of this cult, and loopholes in the law could not stand in the way of its enforcement.

4. Criticism of authority under Law and Justice party: selected images

Quite surprisingly, certain elements of the construction of the Pilsudski cult can be associated with the commemoration of the victims of the presidential plane crash in Smolensk in 2010, particularly when it comes to the person of Lech Kaczynski, then president seeking re-election and twin brother of the recent Polish deputy prime minister, and head of the ruling party, Jaroslaw Kaczynski. Monthly acts of commemoration of the victims of the catastrophe have continued to this day, in the meantime taking the form of cyclical assemblies and then official state ceremonies on the 10th of each month, when leading figures of the Law and Justice party lay flowers in front of the victims' monuments and attend memorial masses in Warsaw, and then on the monthly commemoration of Lech Kaczyński's funeral also in Krakow. This formula has met with political protests, both from opposition representatives and critics of this monthly form, secured by the participation of a number of police officers and costly for the budget.

[52] In addition to this case, several more were identified by K. Siemaszko, *Ochrona...*, pp. 308–309.

[53] Studnicki's letter to Aleksandra Piłsudska of 14 April 1938 was found in Archiwum Akt Nowych [the Archives of New Files] under ref. 2/1238/0/4/22, k. 5, by K. Siemaszko, *Ochrona...*, pp. 304–305.

[54] H. Hein-Kircher, *Kult Piłsudskiego...*, pp. 249, 261.

Current constitutional guarantees and the law on assemblies seem to adequately protect the rights of participants in these protests. Moreover, the extensive case law developed based on Articles 31, 32, 54, 57 of the 1997 Constitution of the Republic of Poland seems to be an effective barrier against the sometimes censorious decisions of the authorities (for example, numerous judgements overturning decisions of city mayors prohibiting the organisation of assemblies may serve as an example). The time of the COVID-19 restrictions, with the total ban on assemblies introduced in Poland, can obviously be considered a testing moment, while the authorities of other countries (whose decisions were sometimes also corrected by the courts) did not decide to limit this freedom so drastically. The universality of the threat (pandemic state) made it possible, in retrospect, to undertake remarkably interesting comparative research on the decisions taken by the governments[55].

However, we would like to draw attention to a different phenomenon that has often occurred in recent years: the use of security forces for unauthorised control or even a kind of harassment of specific individuals/forms of protest. In this context, we would like to note the activity of the so-called Lotna Brygada Opozycji (Opposition Flight Brigade), which, drawing on the satirical tradition of the opposition against communist rule (such as the so-called Orange Alternative), also dresses up and prepares ridiculous gadgets, demonstrating during the monthly commemorations or organising other happenings. It then remained under the close supervision of police officers, so much so that when, in January 2023, the police learned that this opposition group had rented a flat before the next monthly commemoration and it was feared that they might be spread a word through a megaphone, the police hired a boom and looked into the premises through the window[56]. Pictures of this grotesque police action have become the subject of many internet memes. It was less amusing for the participants in these protests: the most active of them were repeatedly legitimised while they did not take any unlawful action, prevented from entering the planned place of assembly or held without a legal title until the end of the celebrations, against which they counter-demonstrated, and finally detained by the police, who directed requests for punishment to the court. These, however, generally did not hold the demonstrators responsible[57]. Activists' luggage was also searched

[55] B. Huszka, T. Lessenska, *Viral...*

[56] *Policjanci na wysięgniku...*

[57] Among others, the District Court for Warsaw-Centre in Warsaw, in its decision of 7 September 2022, upheld the citizen's complaint against her detention on 10 June 2022, pointing out

by the police, and sound equipment was confiscated. The Lotna Brygada submitted a request to the Ombudsman regarding the notorious restriction of the freedom of public assembly regards counter-demonstrations to the official monthly gatherings. The group stressed that its gatherings always take place based on the notification provided for by the current law on assemblies. The Ombudsman addressed the Commander of the Capital City Police indicating that the peaceful manifestation of views of the participants of the counter-manifestation should not be the basis for police intervention[58]. It is reasonable to assess that, in the face of a satisfactory legal situation, the problem rested on arbitrary and disproportionate enforcement.

Finally, we would like to recall the criminal case brought against one of the Polish writers, Jakub Żulczyk, which echoes the accusations made to the courts in the interwar period. Żulczyk commented critically on a post by President Andrzej Duda on social media. President Duda wrote about Joe Biden's "waiting for the nomination of the Electoral College", while Żulczyk responded that "no one has ever heard of the nomination of the College in the American electoral process", and that there is no office that makes a confirmation of the election of a President who has received a certain number of electoral votes. All the elements after the electoral act are matters of form. "Andrzej Duda is a moron"[59], with these strong words the writer's comment ended, and these words triggered a reaction from an individual who notified the public prosecutor's office. The prosecutor's office decided to file a formal accusation, alleging an offence under Article 135 § 2 of the current Criminal Code[60] (insulting the Head of State). This act is punishable by three years in prison. Żulczyk did not admit to the charge against him, explaining that the comment was meant to be an expression of criticism and concern about the actions of President Andrzej Duda – they were to jeopardise the "international reputation of Poland". The writer's defence moved for acquittal, while the prosecution demanded a five-month restriction of liberty in the form of community service and a public apology on Facebook.

emphatically that the police had acted with the intention of preventing the applicant from participating in the assembly at the notified place and time, thus *de facto* depriving the applicant and other people of the possibility of exercising the rights guaranteed by the Constitution. See: *Wolność zgromadzeń...*

58 Ibidem.

59 Pol. *debil*.

60 Ustawa z dnia 6 czerwca 1997 r. Kodeks karny [Act of 6 June 1997 Criminal Code], Journal of Laws 2024, item 17, consolidated text.

The first of the courts hearing the case discontinued it, finding that Żulczyk had not committed an offence. According to the court, the provision on insulting the head of state should not exclude the right to formulate critical, even very harsh assessments, as long as they serve public debate[61]. The prosecution appealed to the court of second instance. The Warsaw Court of Appeal in September 2022 upheld the judgment of the court of first instance. The appellate court emphasised that the term used by Żulczyk had a marginal function and that the entire comment and its context should be taken into account when considering the case[62]. The prosecution filed a cassation appeal against this judgment with the Supreme Court, which upheld the lower instance judgment in May 2023. The Supreme Court emphasised that the Court of Appeal – contrary to the prosecution's claims – had addressed all the pleas in the appeal and had correctly reviewed the earlier ruling, "just not as the prosecutor wanted". The Supreme Court noted that the courts recognised the insulting meaning of the word "moron", although "at the same time, the courts assumed that in these particular circumstances, in this particular case, the social harm of this behaviour is negligible"[63]. However, the consistency with which the Polish prosecutor's office (completely dependent on the then Minister of Justice[64]) acted, indicated that it was given priority by the ruling camp. The whole affair seems to have remained in the spirit of the overzealous pursuit of responsibility that also characterised the prosecution of perpetrators of violations of Piłsudski's good name. The prosecution's attention was probably attracted by the popularity of the perpetrator; one fears that an ordinary citizen would have been less fortunate than a well-known writer, whose accusation was widely publicised, and the public opinion followed the course of the court case[65].

The provision in question has remained the subject of attention from the doctrine and the courts for years. The Polish doctrine and the European

61 Judgment of the District Court of Warsaw of 10 January 2022, VIII K 51/21.

62 Judgment of the Court of Appeal in Warsaw of 30 September 2022, II AKa 110/22. A dissenting opinion has been submitted to this judgment.

63 *Zapadł wyrok SN...*

64 One of the significant first moves of the Law and Justice party after its election victory in 2015 was to link the post of Minister of Justice to that of Prosecutor General, previously two separate bodies.

65 This trial, too, has given rise to numerous memes circulating in the online community; one internet user commented in the media space: "I hope this trial comes to fruition; imagine how, for several trials, Żulczyk will prove that the president is a moron and the prosecution will argue that he is not at all", and this quote was used in the memes.

judicature[66] seem to agree on the issue of lowering the standard of protection of persons performing public functions. There are voices in favour of directly decriminalising insulting the President[67]. Also present in the discussion are calls for making prosecution conditional on the consent of the Head of State, as in German law or in the practice of Japanese law, where in turn it is customary not to give this consent[68]. As indicated earlier, such a formula functioned in practice in the first years of the interwar Polish Republic, and Piłsudski, while still Head of State, did not grant such consent.

However, it is impossible to omit in this discussion the verdict of the Constitutional Tribunal of 2011[69], in which the Tribunal ruled on the compliance of Article 135 § 2 of the Penal Code with Article 54 sec. 1 in conjunction with Article 31 sec. 3 of the Constitution of the Republic of Poland and Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Constitutional Tribunal found the provision to be constitutional, arguing that "the momentous nature of presidential functions under the Basic Law means that the President of the Republic of Poland deserves special respect. This is also since the commission of the act defined in Article 135 § 2 of the Penal Code is at the same time an insult to the Republic of Poland itself, which is already suggested by the title of Chapter XVII of the Penal Code, in which the provision in question in this case is placed, 'Offences against the Republic of Poland' (...). The commission of the act defined in Article 135 § 2 of the Penal Code, and thus an act against an entity which is a constitutional emanation of the 'common good', harms the Republic of Poland as the common good of all citizens by, for example, lowering the prestige of state organs, eroding citizens' trust in the Republic, and may lead to states of declining identification of citizens with the state". Thus, an equality mark was placed between the Head of State and the state as such[70]. However, the European Court of Human Rights itself upholds an

[66] In particular, the judgment of the European Court of Human Rights of 1 July 1997, *Oberschlick v Austria*, application no. 20834/92, allowing the use of an offensive term precisely in the context of a specific discussion triggered by a politician's statement.

[67] W. Mojski, *Prawnokarne...*, pp. 185–186; A. Krzywoń, *Prawnokarna ochrona...*, p. 25; K. Kluza, *Przestępstwo...*, p. 44.

[68] P. Gadzinowski, *Czy karać...*

[69] Judgment of the Constitutional Tribunal of 6 July 2011, P 12/09, OTK-A 2011, no. 6, item 51.

[70] This may not be as wobbly a construction as that of the Supreme Court, equating insulting Piłsudski with insulting the Nation, but it is also debatable. It was negated by two judges in dissenting sentences, as were some glossators. See: dissenting opinions of Constitutional Tribunal judges S. Biernat and P. Tuleja to the justification of the judgment of the Constitutional Tribunal of 6 July 2011; see also: A. Wilk, *Glosa...*

earlier interpretation of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as it expressed recently in its ruling in *Vedat Şorli v Turkey*[71]. It considered the sanction, which is criminal in nature, imposed on the applicant as a result of the application of a specific statutory provision providing for the special protection of the President of the Republics, to be contrary to the Convention.

Paradoxically, despite political declarations and even submitted projects to repeal the controversial provision of the Penal Code, the main political forces in Poland have maintained it for decades. Moreover, the echoes of the past are not silent: in a critical opinion on one of the drafts, the Prosecutor General even stated: "The special criminal law protection of the honour due to the President of the Republic of Poland is firmly rooted in the tradition of Polish penal thought"[72]. Damian Szczepaniak, however, challenged the assumption that the Polish legal thought from the time of the codification of the Criminal Code in 1932 would order to see insulting the President as an offence against the state, at the same time reasonably pointing out that, reaching for historical arguments, this cannot be done selectively[73]. This position can only be applauded.

In practice, opposition MPs who criticise the President even with harsh words are protected by immunity, so the prosecutor's office prosecutes, for example, drunk citizens shouting offensive slogans and, as a rule, such cases are discontinued by the courts. Once it reaches the stage of court proceedings, the courts lately recognise the problem of the brutalisation of the language of political debate and, consequently, the lower sensitivity of society to insulting content[74]. Thus, the question can be asked: what is the cost of the President of the Republic defence of the name of authority and

[71] Judgment of 19 October 2021, application no. 42048/19; see also: K. Warecka, *Strasburg: Sankcja...*

[72] See: Position of the Attorney General of 1 March 2016, PG VII G 025.50.2016.

[73] D. Szczepaniak, *Odpowiedzialność...*, pp. 63–82.

[74] Judgment of the Court of Appeal in Szczecin of 19 September 2019, II AKa 184/1; see also: M. Grudecki, *O występku...*, pp. 16–33. The author emphasises in his argument that a malicious personal attack does not fall within the limits of acceptable criticism. However, the thesis that "the protection of his [the President's] self-confidence and authority is in a way the protection of our country and nation – ourselves, i.e. goods standing much higher in the hierarchy than the freedom of speech" (pp. 30–31) seems too far-fetched: the scope of protection of the country and the nation would be conditioned to some extent by the individualised sense/lack of self-esteem of the incumbent?

should it, by its very nature, be particularly resistant to criticism sometimes expressed in primitive forms? Is the very presence of the provision not a relic of the pre-democratic tradition of special treatment of the ruler and is it legitimate in a pluralistic society respecting freedom of expression? Do the objectives historically served by the special protection of the ruler's good name remain valid?

5. Conclusions

Following the elections in the autumn of 2023, the new authority of the Sejm decided to remove the barriers that had surrounded the Polish parliament for the past few years and thus moved the space of protest away from where the criticised decisions were made. May this be a symptomatic action: the new government should be wished a great deal of self-restraint, translating into full respect for the constitutional rights and freedoms of the individual, which are reflected in criticism in word and writing.

It is a freedom both as old as the world and relatively new in its legal channelling. We have traced several turning points above: from the early history of the constitutional state and camouflaged criticism of power in the Kingdom of Poland, through the inter-war liberal model of protection of freedom of speech/press, which was particularly damaged by the intention to protect the good name of one particular man; after Piłsudski's death, the lack of adequate legal protection *post mortem* was finally "remedied" by a particular, curiously punitive law. The concluding section refers to the contemporary Polish state of law, focusing on the two faces of criticism and its suppression. The problem of the extensive use of the means available to the police against criticism that was particularly unpleasant for the power camp (right up to the ridiculous action with the boom) and the issue of maintaining specific protection of the Head of State against defamation in the Criminal Code, were pointed out. Thus, we have traced the issue of the critics in certain areas of political thought and debate, directly in the law and where it applies. As it turns out, protection from criticism as well as its *alter ego*, the protection of criticism, did not develop linearly. The evolution towards a high standard of constitutional freedoms still seems to face doctrinal dilemmas and unexpected obstacles.

Abstract

The publication is devoted to several examples of the practice of criticism of the Head of State and executive power in Polish history. The authors have chosen three moments of interest: the first one is the first decade of the "Congress" Polish Kingdom established in 1815, and the second refers to the Second Polish Republic in the period after the *coup d'État* by Józef Piłsudski in 1926. Finally, the authors refer to some practical aspects of criticism of the authority in the public space in recent times, also recalling the high-profile criminal trial that reached the highest instance – the Supreme Court in 2023. In these examples, the authors focus on aspects of the permissibility of criticism, its specific forms and the reaction of the executive in the early history of the constitutional state and camouflaged criticism of power respectively, through the interwar liberal model of protection of freedom of speech and of the press, which failed in the face of authoritarian changes and the political will to protect the good name of one particular individual; after the death of Piłsudski, the lack of adequate legal protection *post mortem* was finally "remedied" by a particular repressive law. The last section of the discussion refers to the contemporary Polish state of law, and here the focus is on the faces of criticism and the forms of its suppression. In particular, attention was paid to the problem of the extensive use of means used by the police against criticism particularly unpleasant to the power camp (up to the bizarre action with the hiring of a jib) and the question of maintaining specific protection of the Head of State against defamation in the Criminal Code.

Keywords: criticism of the ruler, insult, insult to the President, responsibility for insult, forms of criticism, assemblies

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