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Value of Law in Political Thinking

Wartość prawa w myśleniu politycznym

SUMMARY

The article analyzes the process of displacing law and its values from political thinking. There are many indications that law and its values are not a point of reference for contemporary politics, which results from the ongoing process of democratization. The coherence of virtues, law and politics, variously approached and variable over time, lasted in European culture for more than a thousand years. The Greek models have been adopted and consolidated by the Romans and Medieval thinkers. The breakthrough is brought by Machiavelli's writings, which radically changed the view of politics, free will, power. The nature of the state ceases to mean providing citizens with a happy life, and it begins to concern security. As a result, law becomes a tool to protect this security effectively.

Keywords: value of law; political thinking; justice

The relationship between law and the world of values in the broad sense has been the subject of a number of analysis, the origins of which disappear in the darkness of history. At such moments, historians of ideas used to draw a dividing line by specifying the author or authors in antiquity who were the first to pay attention to the problem, while being aware that such a line has only a systematising nature and do not discover the sources of anything. This is so because having written a formula, we are not condemned to conjectures that tell us that when a group of people decided to regulate some part of their behaviour by the norms having germs of the later law, we began to discover or create the world of values.

As it can be noticed, I tacitly assumed in the above paragraph, that law must, in its essence, contain some values, be their carrier. I will devote more space to this problem further on in this article, but at this point I will only signal that this assumed relationship of law and values is not as obvious as it might seem. Moreover,

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the pluralism of the values of the modern world makes them competitive and not always can be made mutually matching. While we can try to use existing formulas aimed at peaceful coexistence of axiologically different communities, their actual implementation is often impossible or significantly difficult. For illustration, let us look at the attempt to agree on values between Islam and the culture of the Western world, being aware of the significant diversity of the two categories. Turkish Islam significantly differs from its counterpart in Saudi Arabia, and the latter is incomparable to that professed by Caucasian highlanders. Similarly, the liberal democracy of the United States is different from the Swedish or Canadian models. With this observation in mind, let us not go into much detail and let us return to the general categories mentioned, by attempting to use the J. Rawls' theory of justice as a formula for coexistence[1]. We will notice that all the sophistication of the system devised by the American philosopher crumbles under the weight of the real world, as we are not able to talk about "free and equal individuals" in Islam[2]. If we cannot agree on equality in the legal status of men and women, we are also unable to take the next steps. And this is only the tip of the iceberg.

The above introduction leads me to a statement around which the whole paper is to be built and which will be the subject of analysis. Well, one can see the phenomenon that the law and values are a conjunction for a lawyer, they are a certainty around which the whole cosmos of the legal system is created. The above sentence may be striking from the point of view of formal logic, but it makes sense for the adopted narrative, because I mean a certain foundation on which both the legal dogma and theory are built. At this point, I should once again show a certain erudition and reassure the inquisitive and critical reader that I am familiar with legal normativism in both radical and softened versions[3]. I am writing this because I believe that although H. Kelsen left the lawyers with the dilemmas of his theory, this did not lead to any legal nihilism, looking at his achievements more broadly. I consider the main part of the discussion by the author of *Reine Rechtslehre* to be methodological issues that were often unnecessarily extrapolated to the legal reality as a whole. The Kelsen's intention was that pure law theory was the theory of positive law. By equating the state and law in this concept, as well as adding constitutional considerations, the claims of the Viennese Professor become more refined than those of his opponents. Without getting into a dispute over the essence of the grundnorm (basic norm), being and duty, I will agree with Z. Ziembiński, who wrote: "Constitutional norms are a manifestation of the sovereign power of a political group forming a constituent assembly […]"[4]. Positivism itself, on the

[1] J. Rawls, *Teoria sprawiedliwości*, Warszawa 1994.
[2] *Ibidem*, p. 414 ff.
[3] H. Kelsen, *Czysta teoria prawa*, Warszawa 2014.
[4] Z. Ziembiński, *Problemy podstawowe prawoznawstwa*, Warszawa 1980, p. 211.

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other hand, concerns formal issues of law rather than substantive ones. In other words, Kelsen saw and perhaps even valued morality, but not in the area of legal sciences[5].

Getting back to the main thesis and referring it to the title of this article, what is obvious to a lawyer becomes an abstraction for a politician. Of course, I think here more of a practising politician than a political theorist. I am also aware that the claim is categorical and needs to be justified. Before that, one more remark is needed that the categories of law and politics are often fluid and intertwined, since the well-established tradition of using a cluster of notions "political and legal doctrines" has not come from nowhere. The phenomenon itself is quite interesting and deserves a separate article, but at this point I will only signal some problems directly related to my paper. If I am aware of the fluidity of the terms, their mutual permeation, why do I decide to introduce a risky dividing line? The answer is simple: this border exists and can sometimes be caught. It does require further clarification and additional definitions, but it also helps us change the optics, to see things and phenomena in a new light.

What is political thinking then? Why does it differ from thinking about law? Intuitively, we will answer that the difference lies in the subject of research, but it is not the complete answer. For we will soon realize that some problems are common: the state, justice, power, democracy, etc. Is there an empirical equivalent of the political? Do coercion in political thinking about power and sanction in thinking about law have more similarities or more differences? I multiply these questions so that the reader can follow my line of reasoning, because, as I have mentioned, it is difficult to cover this matter by a solid, universally accepted terminological framework[6]. The names of J. Schumpeter, J. Rawls, G. Sartori and R. Dahl will be assigned to contemporary political theory, and the names of H.L.A. Hart, L.L. Fuller and J. Finnis to the theory of law. At the same time, Finnis's work has chapters on community and the common good, power or practical rationality, while Rawls's work addresses the theory of justice[7]. This justice, and thus a category seemingly closely and inextricably linked with the law, may be the subject of strictly political thinking[8].

In the optics of my argument, certain breakthrough moments are crucial, as they have all the drawbacks of simplification, but allow you to focus on the essence of the problem. The first is the Renaissance and N. Machiavelli, the second is the

[5] More in: H. Kelsen, *O istocie i wartości demokracji*, Warszawa 1936.

[6] Cf. A.W. Jabłoński, *Polityka. Teoretyczna ewolucja pojęcia*, [in:] *Polityka i polityczność. Problemy teoretyczne i metodologiczne*, eds. A. Czajkowski, L. Sobkowiak, Wrocław 2012, pp. 11–40.

[7] J. Finnis, *Prawo naturalne i uprawnienia naturalne*, Warszawa 2001.

[8] See M. Foucault, *Zło czynić, mówić prawdę. Funkcja wyznania w sprawiedliwości. Wykłady z Louvain 1981*, Kraków 2018; A. MacIntyre, *Czyja sprawiedliwość? Jaka racjonalność?*, Warszawa 1996.

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turn of the 18th century and the person of J. Locke, the third is our present day and the phenomenon of media democracy.

To be more communicative, I'll start from the end. Probably every person who professionally deals with the world of ideas and is a lawyer is sensitive to related problems. Thus, when certain "keywords" are heard, one naturally pays attention to them, whether the incident occurs on a train, at an election rally, or while mindlessly watching a television programme. At the same time, this sensitivity is accompanied by a kind of criticism resulting from professional background: the knowledge of the relevant definitions of terms, along with their etymology and evolution, social theories, historical background, etc. We are also aware that Plato, Grotius or Rawls are not must-read, therefore colloquial judgements will bear marks of superficiality. The problem is also that our profession prompts us to be dangerously over-intellectual. Although we know that our world image does not correspond to the "statistical average", we probably unconsciously idealize the state, society, and the citizen.

The above paragraph has led us to the contemporary absence of law in the political sphere. By this, I mean the state of the lack of substantive deliberation on law[9]. I would add that, of course, I notice the one-sided political messages, often made in a heated atmosphere. It would now be difficult to point out the classic principle that speech (*lexis*) together with action (*praxis*) make up an informed citizen operating in the public sphere. Law has always been a tool of policy, but in the present era it has become a tool willingly concealed, not arousing the right emotions. A few decades ago, H. Arendt, when writing the essay *Introduction into Politics*, stated, "The danger is that politics may vanish entirely from the world"[10]. The analogy with law seems legitimate here. Contemporary law is more of a "legislative technique" than an in-depth philosophical reflection. This crisis of the present is, of course, a multifaceted phenomenon, and to describe it we could apply many theories relating to the so-called postmodernism. The mass man "detached himself from the world" he had created and some well-established concepts have gained a new dimension[11]. For example, law began to be assessed based on its effectiveness and therefore something completely different from equity, fairness, goodness or beauty. We can therefore look at this through the prism of the "end of great narratives" and mythologisation of law[12]. Referring to J.-F. Lyotard can seem risky, as law by itself plays a unifying function and should effectively resist particular narratives. A sanction secured by the state's use of coercion seems to counteract any individualisation of this sphere of life. However, this is only seemingly, since the process

[9] See the political programme documents of randomly selected parties: www.democrats.org; www.cdu.de; www.conservatives.com; http://pis.org.pl [access: 23.08.2019].

[10] H. Arendt, *The Promise of Politics*, New York 2005, p. 96.

[11] Cf. O. Marquard, *Apologia przypadkowości*, Warszawa 1994, p. 78 ff.

[12] J.-F. Lyotard, *The Postmodern Condition: A Report on Knowledge*, Manchester 1986.

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of multiplying the justifications for law, the values it is to protect, its sources and objectives began long ago. Lyotard describes it as a kind of loop:

> It is assumed that the laws it makes for itself are just, not because they conform to some outside nature, but because the legislators are, constitutionally, the very citizens who are subject to the laws. As a result, the legislator's will – the desire that the laws be just – will always coincide with the will of the citizen, who desires the law and will therefore obey it[13].

I do not wish to claim that the theories of the "Pope of postmodernism" are correct. However, I believe that the paradox of "small narratives" in the sphere of law is noticed in a profound manner and capable of explaining at least in part the situation in which we find ourselves. If each narrative is equivalent, which implies the inability to assess them, then legal issues become politically inconvenient. Imposing a "state's narrative", as legislative activity can be perceived, is unreasonable favouritism for one of many options, it is the use of a temporary monopoly of the authority.

By mythologisation of law I mean a situation when it ceased to perform its original function related to either a virtue, guarantee of freedom, conservative order or citizenship. Today, law has become an element of the watered-down story of rights, so numerous that no one takes them seriously. The right to a dignified death is accompanied by the right to life and between them we find the right to different lifestyles, the right to privacy or the right to a dignified life[14]. Politicians are free to pick parts of these stories that are of interest to them, without any particular care for the coherence of both their party's program and their overall vision of law.

The above paragraph forces to make an important remark, having all the characteristics of a paradox. While maintaining the claim about the lack of value of law in political thinking, I see a phenomenon of growing use of legal solutions in public life. Increasingly large areas of social life are subject to legal regulations, and the rate of "production" of laws has exceeded reasonable limits[15]. As it can be easily guessed, it is difficult to see values in something that is not only common, but even overwhelming. This empire of law, however, is ostensible because mass is not a value but only an instrumentalisation designed to mask the aridity of the political world. The responsibility for reality ceased to burden anyone because it is difficult to argue with the heartless and in fact impersonal letter of the law. The legislator,

[13] *Ibidem*, p. 35.

[14] The right to a dignified life may also be expressed by its opposite: a *wrongful life* action, though various opinions may be found in the literature on the subject. In more detail, see T. Juszyński, *Poczęcie i urodzenie się dziecka jako źródło odpowiedzialności cywilnej*, Kraków 2003.

[15] According to a study by the auditing and consulting company Grant Thornton, in the first half-year of 2019, a total of 11.8 thousand pages of high-level legal acts (laws, regulations and international agreements) were adopted in Poland. Since 2012, this number has not fallen below 20 thousand pages per year. The data published at www.barometrprawa.pl [access: 10.09.2019].

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contrary to falsely suggesting a single number of its name, is a multi-headed hydra, and additionally changes in time. A similar thesis was put forward by H. Arendt, who wrote: "Bureaucratic rule, the anonymous rule of the bureaucrat, is no less despotic because nobody exercises it. On the contrary, it is more fearsome still, because no one can speak with or petition this nobody"[16].

To conclude the reflections on the present day, I will touch upon another aspect which is tacitly and constantly present in my narrative. I will add that this issue can be expressed in various ways and my perspective is neither innovative nor the only one. It is about choosing a certain model: the primacy of law or the primacy of democracy. Of course, this dichotomy is never clear-cut, since as a rule one model consumes certain elements of the other, which makes it surprising for an average citizen to realize the existence of such two traditions[17]. Through over 200 years, these models have come closer and further away, drawing on various sources, ideas, concepts (national sovereignty, legal and natural concepts, republican tradition, constitutionalism, universal will, legitimacy of power, human rights, etc.). They were competitive one to another but not hostile. The competition itself was of a special kind, because there is a feedback and mutual conditioning in the relation between these models. It may turn out that when I write about a certain displacement of law from political thinking, I unconsciously describe the temporary crisis of the democratic model where the "universal will" of the sovereign wants to break free from the fetters of law, which it does not understand, treating law as a yoke imposed by undefined external entities, because the theoretical unity of the rulers and the ruled was broken. When we listen carefully to the arguments present in contemporary discourse, we will hear that the general public have no sense of exercising power, no sense of equality, that they consider their own representatives as an enemy. Power elites are not the personification of the people on a small scale, but an external entity. A. Lincoln's words in the Gettysburg Address: "[…] government of the people, by the people, for the people", become meaningless. Presenting the democratic paradigm, I could use fragments of the pamphlet by E.-J. Sieyès in which he perfectly captured the needs, frustrations and hopes of the French, but I am rather going to reach for an author who is geographically and temporally closer to us[18]. In the speech of the President of the Republic of Poland, A. Duda, to the inhabitants of Sosnowiec, the following words were said:

> […] those who did not choose and did not decide have no right to complain and expect. That's the truth. First of all, this shows to those in power and to those in opposition what is important to the people. And this is extremely important. I am deeply convinced that democracy is of such a nature

[16] H. Arendt, *op. cit.*, p. 97.

[17] I mean here rather Poland and Central and Eastern Europe, as for the informed US voter the existence of the Republicans and Democrats and related divisions is nothing new.

[18] E.-J. Sieyès, *Czym jest stan trzeci? Esej o przywilejach*, Warszawa 2016.

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that it is not supposed to be the rule of some elite, it is not supposed to be the rule of some top caste. This is supposed to be the rule exercised for the people. People choose and what people want is to be done. […] Plus, of course, the tripartite division of power. The old Montesquieu's principle is extremely important, as only the separation of the three powers means the balancing of them, not that a certain power chooses its members by co-optation and will impose the terms on everyone else. In fact, people don't really know where it comes from. In addition, this power goes completely unpunished and believes that it has the right to all of this. Well, this is not, ladies and gentlemen, in line with the principles of democracy. We want real democracy in Poland. One that is real, that means the rule of the people, society. And this is how our democracy will look like[19].

At this point, I will return to the beginnings of European democratic traditions, which, I suppose, will help to trace certain processes and identify the reasons that caused these phenomena. However, I must note that the quotation cited is not intended to stigmatize Poland in any way. I believe that the problems we are dealing with are not only the domain of our country or our part of Europe (vide Hungary). The United States, France, Great Britain and Germany are also struggling with phenomena which point to the disappointment of the sovereign, the imbalance between democratism and law.

The ancient Greeks, laying the foundations for our culture, have at the same time marked it with a kind of original sin – it all begins with Plato and Aristotle, but often these basic categories become untranslatable into our present day. Ancient basic concepts such as democracy, law, politics, ethics have their origins in the *polis*, but simple analogies are no longer possible. Socrates lays the foundations of political participation, rule of law, raises ethics to the status of knowledge, but the ancient city-state and its inhabitants often differed from us in a fundamental way. Antiquity left us convinced of the existence of an inseparable relationship between values and virtues and the state. Aristotle states in the first sentences of *Politics*: "Every state is a community of some kind, and every community is established with a view to some good"[20]. At the same time, man, having the opportunity to distinguish between good and evil, justice and injustice and as a reasonable being, must assume the burden of conscious participation in politics[21]. This civic activism is something obvious for the Greeks, not requiring any proof, but for us it becomes merely an option. For Aristotle, the state must be just by its very nature: "But justice is the bond of men in states, for the administration of justice, which is the

[19] *Wystąpienie Prezydenta podczas spotkania z mieszkańcami Sosnowca*, 8.07.2019, www.prezydent.pl/aktualnosci/wypowiedzi-prezydenta-rp/wystapienia/art,773,wystapienie-prezydenta-podczas-spotkania-z-mieszkancami-sosnowca.html [access: 12.09.2019].

[20] Aristotle, *Politics*, Kitchener 1999, p. 25. It should also be added that Book 3 is more precise and refers to the body of citizens.

[21] The citizen is a person who "shares in the administration of justice, and in offices" (*ibidem*, p. 101).

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determination of what is just, is the principle of order in political society"[22]. It is therefore difficult to talk about neutrality of the state in relation to values.

Plato had a deep conviction in the natural structure of man based on reason, mind-based healthy attitude of the soul, justice and fortitude[23]. This characteristics given by the gods must be developed by the citizen, and the state should support him in this. In the dialogue between Cleinias and Athenian on education, the following is said: "For we are not speaking of education in this narrower sense, but of that other education in virtue from youth upwards, which makes a man eagerly pursue the ideal perfection of citizenship, and teaches him how rightly to rule and how to obey"[24].

This indisputable coherence of virtues, law and politics, variously approached and variable over time, lasted in European culture for more than a thousand years. The Greek models have been adopted and consolidated by the Romans and Medieval thinkers. The breakthrough is brought by Machiavelli's writings, which radically changes the view of politics, free will, power. The nature of the state ceases to mean providing citizens with a happy life, and it begins to concern security. As a result, law becomes a tool to protect this security effectively. It is deprived of its philosophical-mystical encasement, it does not have to be the implementation of the divine plan, nor does it have to derive from the law of nature, its creator is a man who is supposed to effectively protect fellow citizens[25].

Therefore, we see that the long process of treating law as an ethical virtue: *Ius est a iustitia appellatum* has been broken by a new narrative. It is taken up and developed by various thinkers, not always aiming at the same thing, but there is a significant change, shifting the emphasis to law as the guarantee of human freedom[26]. This breakthrough did not invalidate the old tradition, but added a new perspective, which we can provisionally define as a subjective legal perspective, and importantly, made it possible to use a new narrative, which we can provisionally define as political.

As a matter of convention, we can choose J. Locke the father of this political narrative, who, in a manner as close as possible to our present day, began the tradition of providing reasons for law as a guarantee of natural human freedom[27]. As the subsequent history has shown, this liberal perspective has become extremely tempting and innovative, although the elements of the jigsaw puzzle remained constant and unchanging: the individual, the state, law, property, power. The fact is

[22] *Ibidem*, p. 30.

[23] Plato, *Laws*, http://classics.mit.edu/Plato/laws.1.i.html [access: 10.08.2020].

[24] *Ibidem*.

[25] See N. Machiavelli, *Książę*, [in:] idem, *Książę. Rozważania nad pierwszym dziesięcioksięgiem Historii Rzymu Liwiusza*, Warszawa 2008, p. 80 ff.

[26] Cf. T. Hobbes, *Lewiatan*, Warszawa 1954, p. 113 ff.

[27] In more detail, see J. Locke, *Dwa traktaty o rządzie*, Warszawa 1992, p. 250 ff.

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that Locke's ideas were enhanced to the extent which the author probably did not dream of, thanks to two phenomena. The first one was not innovative, as it concerns the reception and development of some subjects by later thinkers – D. Hume, J.S. Mill and others. The second enhancement had never happened before and related to the inscription of Locke's idea into the American constitution.

One could risk proposing a thesis that it is constitutionalism and democratization that are responsible for this shift of emphasis, which made political thinking primary, before legal thinking. Moreover, these spheres have been separated, the separation being not radical but nonetheless existing. The ancient coherence of the individual-citizen, his relationship with the state understood as a community, has been displaced by the vision of autonomous individuals in opposition to society and the state[28]. In contemporary political thinking, at the theoretical level, justice becomes the key word. The question of what is the relationship between the right to justice would go significantly beyond the scope of this article.

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[28] To prevent opening the Pandoras's box, I skipped the deliberations on liberal tradition and its significance for the processes under analysis. Cf. J. Szacki, *Liberalizm po komunizmie*, Warszawa 1994, p. 24 ff.

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STRESZCZENIE

Artykuł jest analizą procesu wyparcia prawa i jego wartości z myślenia politycznego. Wiele wskazuje na to, że dla współczesnej polityki prawo i jego wartości nie stanowią punktu odniesienia, za co odpowiada trwający proces demokratyzacji. Koherencja cnót, prawa i polityki, różnie ujmowanych i zmiennych w czasie, trwała w europejskiej kulturze przez ponad tysiąc lat. Greckie wzorce zostały przejęte i ugruntowane przez Rzymian i myślicieli średniowiecznych. Przełomem stało się dopiero pisarstwo Machiavellego, który radykalnie odmienił spojrzenie na politykę, wolną wolę, władzę. Istota państwa przestaje sprowadzać się do zapewnienia obywatelom szczęśliwego życia, a zaczyna dotyczyć bezpieczeństwa. Co za tym idzie prawo staje się narzędziem służącym do tego, by owo bezpieczeństwo skutecznie zabezpieczyć.

Słowa kluczowe: wartość prawa; myślenie polityczne; sprawiedliwość

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