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Articles

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The State National Council and the Polish Committee of National Liberation in a State Governed by the Rule of Law: Positions of Legal Scholarly Opinion

Krajowa Rada Narodowa i Polski Komitet Wyzwolenia Narodowego w państwie prawa. Stanowiska doktryny

ABSTRACT

The establishment of the communist regime in Poland in 1944 is a current subject of reflection in the doctrine and practice of legislation and judiciary. There has been no uniform position on these events, which means that the then sanctioned political and normative order continues to produce controversial assessments and, above all, certain legal effects. This results from the fact that the new people's power, empowered by force, and not by legal or social basis, has given itself the competence to establish a normative order. The lack of legitimacy for the rightful rule and legislative activity, in principle – from the point of view of the idea of the rule of law – undermines the political and legal status of the people's authorities. This is all the more so because the system of unified power and sources of law created at that time was evidence of building a totalitarian state modelled on the Soviet

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Union. The events and legal behaviours of that time led to numerous, often radical changes in many areas of private and public life. They caused certain social and material effects, difficult to reverse today, which Polish society still faces. Therefore, modern standards of the rule of law require that public authorities undertake comprehensive and effective activity. They require that the principles of just and fair compensation for material damage and compensation for moral losses resulting from the rule of this system be implemented. This seems all the more important because some regulations of the people's power, especially those concerning changes in the ownership structure, are still in force and form the basis of court and Constitutional Tribunal decisions.

Keywords: State National Council; Polish Committee of National Liberation; Poland; communist regime; Poland

INTRODUCTION

The liberal concept of *Rechtstaat* (similar to the Anglo-Saxon idea of the rule of law), originally proposed at the turn of the 19th century in continental Europe, gave the subsequent decades the feature of generally accepted standards of lawfulness of state's activity. The approach to legitimacy of public bodies and the legality of legal acts in force, defined in more detail by scholars and practitioners of legal positivism, began to be treated as a *conditio sine qua non* of the political organisation of the state and a guarantee of civil freedom rights. This kind of a new juristic culture, recognizing the supremacy of law over political decisions and actions, was, however, brutally confronted in the 20th century with a diametrically different approach pursued in totalitarian systems. These countries' ruling elites had caused that the legitimacy of the rule of law mechanisms of state governance was questioned, including the collapse of the authority of law, allowing for the monopolization of power, the dictate of violence, and finally the use of *fait accompli* methods. The societies of Central and Eastern Europe, which pursuant to the agreements made by the Big Three (undertaken without respecting the will of the majority of citizens of the countries of this region) were subordinated to the omnipotent and unlimited influence of the Soviet Union, suffered particularly severe and long-lasting effects of arbitrary behaviour by public authorities. The situation of the Republic of Poland is a clear example here: its inhabitants felt the totalitarian, German and Soviet way of exercising power as early as in September 1939, and then from mid-1944, in the areas west of the Bug and San, were subjected to the actions of the self-proclaimed communist centre of power. These people, with the planned and active participation of Soviet Russia, which had a negative attitude towards sovereignty of the Polish state, led to the negation of the legality of the London government (the Polish government in exile) and to a rapid, multifaceted transformation of the political system of our state.

The importance of these events, especially those that took place in 1944 due to the method of appointing (by Stalin's arbitrary decision) the State National

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Council (Krajowa Rada Narodowa, hereinafter: KRN) and the Polish Committee for National Liberation (Polski Komitet Wyzwolenia Narodowego, hereinafter: PKWN), and due to the arbitrary granting them certain sovereign powers, from the very beginning occupied a significant place in the research of Polish scientific community, and the interest in the subject matter has been still fervent to this day. At the same time, diversified and temporally varying interpretations of these events and their legal consequences appear. As it seems, the exploration of this issue has been dictated not only by the need to document this important episode in the history of Poland, but also by the need to pursue a specific historical narrative (especially in the times of the People's Republic of Poland), allowing for making credible the genesis of the people's character of the state after World War II. However, while scholars in the field are rather unanimous about the ground-breaking significance of the fact of political transformations in Poland in 1944, numerous doubts arise and there is no unanimity among them regarding whether the systemic and legal continuity between the Second Polish Republic and the People's Republic of Poland was maintained or broken, and, consequently, about the recognition or rejection of the legacy of the Polish People's Republic by the Third Polish Republic. In this context, it seems particularly noteworthy to reflect on the legality[1] of the communist state bodies and, consequently, on the legitimacy of their normative actions. This research area, of course, used to be discussed in numerous publications from the

[1] We refer to the classic understanding of the legal, "legitimate" authority, distinguished (alongside the charismatic and traditional types) by the eminent sociologist and political theorist Max Weber. He put them in terms of legal and procedural categories, which were intended to be a *conditio sine qua non* for the legitimacy and the reasonableness of authority. However, based on this rather idealistic classification, numerous (over)interpretations of the legitimacy of authority have appeared in the literature on the subject, especially those referring to the socio-ideological or moral form of it. They point to the possibility of applying non-legal or even non-evaluative arguments and techniques of legitimisation of power (related, *inter alia*, to the institutionalisation of social life, the variability of forms of political participation, the so-called "social legitimisation situation" or, finally, to the sanctioning of initially usurpatory power of the sovereign). Their proper selection by an entity aspiring to gain (and maintain) power was to encourage citizens to adopt an attitude of obedience towards this entity. Among these arguments, particular attention is paid to the effectiveness or efficiency of the authority, which are supposed to justify a claim to power of even an illegal, revolutionary regime, or allow granting a sanction to a mass system of rituals taking place between the ruling group and the rest of society (e.g. in socialist states, the admission of members to collectives or participation in political feasts). See J. Rotschild, *Legitymizacja polityczna we współczesnej Europie*, [in:] *Władza i polityka. Wybór tekstów ze współczesnej politologii zachodniej*, ed. A. Ankwicz, Warszawa 1986, pp. 62–64; Ch. Lane, *Socjalistyczny rytuał a legitymacja władzy*, [in:] *Władza i polityka…*, p. 91, reported after T. Biernat, *Legitymizacja władzy politycznej. Elementy teorii*, Toruń 1999, pp. 90–96. Cf. P. Winczorek, *Legitymizacja władzy politycznej*, „Państwo i Prawo" 1985, no. 11–12, pp. 65–76. These studies inspired by the Weberian theory may have been an attempt to explain the undoubtedly illegal takeover of power by the Bolsheviks in Russia, as well as the establishment of the communist regime in Poland and other regions of the world.

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period of the People's Republic of Poland[2] and still is a fascinating object of study for the humanities and social sciences. Nonetheless, in our opinion, it does not lose its relevance, since the ambiguous attitude about continuation or discontinuation of the system in transition from the Second Republic to the Third Republic,[3] seen in legal science and legislative and judicial practice, still has serious consequences in the institutional and normative functioning of the Polish state. In particular, it is measurably reflected in the shaping of the political systemic identity, as well as in the legal tradition. Moreover, it is worth noting that shortcomings in this area substantially complicate, and sometimes even prevent, the definition of the status of an individual and the guarantees of their rights (particularly in terms of the legitimate acquisition of subjective rights), which, in turn, determine the content of powers and the scope of the mobilisation of State bodies. As it seems, the lack of a clearly unambiguous will to interpret the legitimacy of the communist government in 1944 for its legislative activity results in the polarisation of the positions of various sectors of the governing bodies of the state. This is a serious problem, due to still numerous formal and legal claims of citizens and legal persons who are expecting a certain form of compensation for the damage suffered by them. This heterogeneity in the activity of representatives of the public authority also strongly limits the creation of an effective conviction, both in the public and at the level of formulating the rudimentary foundations of the state, that the political community implements both the substantive and formal requirements of the rule of law in a balanced manner.

Below, the statements of legal scholars who were renowned figures at a given time (including representatives of constitutional law and history of the Polish political system and law) and historians are presented, which will allow us to indicate the dominant tendencies in the analysis of the significance of the events of 1944 and their possible impact on the current discourse about them.

POSITIONS OF THE POST-WAR LEGAL SCHOLARLY OPINION

Let us note here that with the advent and consolidation of the so-called people's rule, the propaganda and legal practice implemented by the regime expressed the thesis that there was an absolute need to consider the existing radical systemic changes as an expression of "historical necessity", in which the class-conscious

[2] The name "People's Poland" used herein is an established convention for referring to the political-system situation in which the current Polish lands found themselves in the period 1944–1989.

[3] For more detail, see E. Kozerska, T. Scheffler, *Retoryka ciągłości: o dziedzictwie prawnym II Rzeczypospolitej i rządów komunistycznych*, „Studia nad Autorytaryzmem i Totalitaryzmem" 2017, vol. 39(2), pp. 53–79.

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working part of society (working class) allegedly had a key role to play.[4] The need to create an effectively credible narrative required that the legitimisation of both government bodies (especially the State National Council) be sought simultaneously (as Zbigniew Wawak rightly stated) on the ideological level and based on the domestic and, to a lesser extent, international legal system.[5] This apt thesis is well reflected in the statements of Stefan Rozmaryn, a professor of law at the University of Warsaw and the main author of the Constitution of 1952. This leading Polish constitutionalist of Marxist provenance derived the powers of the State National Council from a purely declarative (and not constitutive) act announced in December 1943 by several groups of leftist and military character in the form of the "Manifesto of democratic socio-political and military organizations in Poland". The provisions of this document stated that this body, established on the initiative of Władysław Gomułka and completely subordinated to the Polish Workers' Party (Polska Partia Robotnicza, PPR), had a real political delegacy from the Polish nation, as it was "a representation of the nation's most progressive forces and the ruthless struggle against the reactionary camp".[6] Thus, it was considered to embody a wide spectrum of Polish anti-fascist democratic circles, excluding the possibility of representatives of the Sanation movement (Sanacja) or the National Democratic Party from participating in power. As S. Rozmaryn stressed, in the "period of restitution of state organs" the KRN was therefore authorized to act on behalf of the Polish nation and to guide its fate. Its position was to be additionally strengthened by the prerogative to manage the communist armed forces. In addition, the supreme authority granted to the KRN (due to allegedly being an authentic representation of the nation) was to gain additional confirmation in the so-called July Manifesto (dated 22 July 1944), in which the KRN was recognized as the only source of legal power in the country and defined as a temporary parliament supported by the broad masses. In S. Rozmaryn's opinion, the legitimisation of this body resulted at the same time in an absolute breach of continuity with the authority of the "landowners and capitalists" established in the Second Republic of Poland. This author was convinced that KRN embodied the class opposite of the pejoratively defined administrators of the pre-war Polish state. What is also significant, a meaningful statement appeared in the findings of this communist researcher that the KRN's legitimacy had not stemmed from the formal regulations of the constitutions in force during the Second Republic of Poland, but from the will of the working class, most notably by

[4] Cf. W. Dworakowski, *Klasa robotnicza-awangarda narodu*, [in:] *O Konstytucji Polskiej Rzeczypospolitej Ludowej. Zbiór materiałów*, Warszawa 1953, p. 31.

[5] Z. Wawak, *Legitymacja prawna KRN*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1993, no. 4, p. 51.

[6] Manifest demokratycznych organizacji społeczno-politycznych i wojskowych w Polsce, https://jbc.bj.uj.edu.pl/dlibra/publication/410102/edition/420906/content [access: 12.10.2019]; S. Rozmaryn, *Polskie prawo państwowe*, Warszawa 1951, p. 244.

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workers.[7] He, therefore, stressed that the proletariat, by leading the popular masses and in alliance with the USSR, had carried out a national liberation revolution on Polish soil.[8] He argued further that, as the highest authority in the state, KRN was a body empowered to enact both ordinary and constitutional legislation. Thus, it could "amend and repeal the provisions of the March Constitution without special formalities" (while simultaneously and unequivocally questioning the binding force of the Constitution of 1935), the partial restoration of which could also only take place at its will.[9] At the same time, he used to explain the establishment of com-

[7] S. Rozmaryn, *op. cit.*, p. 253. It is worth noting here that two Polish well-known specialists in constitutional law – Zdzisław Jarosz and Janina Zakrzewska (*Krajowa Rada Narodowa. Z dziejów kształtowania się ludowego parlamentu*, „Czasopismo Prawno-Historyczne" 1964, vol. 16(1), pp. 55–56) – reduced the problem of legality of the KRN and its powers to two aspects, which were to give credibility to the status of this body: on the one hand, to the actual formation of this entity as the supreme state authority and, on the other, to its formal and legal aspect, recognizing the Statutes of the Provisional National Councils of 1 January 1944 and the principle of the Manifesto of PKWN (of not statutory but political agenda character) as a normative source of its authority. Another Polish professor of constitutional law and a member of the Presidium Bureau of the KRN (1946–1947) – Kazimierz Biskupski (*Rady narodowe. Wykład o ustroju i komentarz do ustawy*, compiled by K. Biskupski, J. Starościak, Warszawa 1948, p. 9) – tried to convince that the KRN was established by agreement of the so-called Polish democratic camp and established a link with the broad masses as early as in the wartime conspiratorial conditions. Unlike the reactionary camp, it allegedly gained public support through national councils emerging at all levels of administration.

[8] S. Rozmaryn, *op. cit.*, p. 253. A similar argument was expressed by constitutionalist Wiesław Skrzydło (*Kształtowanie się aparatu państwowego w okresie PKWN*, „Roczniki Lubelskie" 1964, vol. 7, p. 26, 30) who stated that so-called people's authority emerged from the social revolution against the bourgeoisie and did not need to be authorised under the legal norms of the Second Republic. He considered that the new authority was not bound by them and it could, at its own discretion, sanction them to a certain extent and limits. Accordingly, there was no restitution of the former state apparatus, because the current power emerged in the course of revolutionary changes, and its legitimacy was supposed to be based on, vaguely defined, the will of the nation at war.

[9] In this context, interesting considerations come from an eminent law theorist, Professor Antoni Peretiatkowicz (*Konstytucja Marcowa a Konstytucja Lutowa*, „Państwo i Prawo" 1947, no. 11, pp. 56–60), who stated that even the validity of the March Constitution in the first two years after World War II was a contentious issue. However, this problem has only led to deliberations as to whether the binding effect results from the content of the whole act or only its political guidelines. In contrast to the view of Professor Andrzej Mycielski (*Polskie prawo polityczne*, Kraków 1947), a renowned specialist in state law, he argued that post-war legislation and constitutional practice did not refer to the literal and comprehensive validity of the Constitution of 1921. If that had been the case, it could have been considered illegal for formal reasons. Therefore, A. Peretiatkowicz demonstrated that binding effect could only be attributed to the basic assumptions of this constitution, which were not expressly formulated and therefore did not constitute legal norms. They should be treated as directives, guidelines for the legislature. On the basis of this argument, he concluded that the legal authority of the KRN did not come from the Constitution of 1921. At the same time, he considered that the basic principles of this Constitution were in force under the "revolutionary, sovereign" decision of the KRN and the July Manifesto. This intellectual construct allowed the professor to provide on the basis of positive law, as he himself pointed out, credibility to the sovereignty of the KRN and its powers

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munist rule by the need to unmask the false policy of the government-in-exile and its delegation in Poland, which could not legitimise itself by the will of the people, as "their so-called legality" resulted from the fascist and illegally imposed April Constitution of 1935. Therefore, in S. Rozmaryn's view, KRN was a representative body, even though – due to the post-war conditions – established in a non-election process, but one whose essence of legitimacy was to result from "the identical aspirations of the representatives and the represented".[10]

Additional arguments in the context of providing credibility for the KRN were proposed by another Polish communist constitutionalist, Feliks Siemieński, who analysed the genesis of people's authority in Poland on the basis of the theory of the creator of state socialism, Ferdinand Lassalle. Directly referring to the quite significant Lassalle's (materialistically approached) dualistic concept of the constitution, he argued that it is a so-called actual constitution expressed in the current system of social forces, not a written one (equated with the comprehensive regulation of the state system), that determines the political-legal order in a given state. He argued that only current circumstances made it possible to give significance to the constitution in the system of law.[11] This system has never remained unchangeable, since in F. Siemieński's view it was evolving towards the empowerment of the working masses. In his opinion, this caused that the formal constitution ("written constitution") "can undergo and certainly undergoes almost deterministic changes". Hence, the communist authorities did not invoke the law in force, but the will of the people, seeking the normative authorisation in it. He stated that the Manifesto and the normative acts adopted by the KRN and the PKWN clearly indicated the revolutionary nature of establishment of these bodies, which were the result of the then current arrangement of social forces.[12] In this context, it is also worth mentioning the important statement by a prominent jurist of Kraków, Professor Konstanty Grzybowski. He wrote, without deluding himself, that in the post-war circumstances, "we are dealing with the original emergence of a new power, not its derivative establishment based on an existing and formally binding (although brought down by force) legal order. We are dealing with a revolution, not a formally

to arbitrarily interpret and recognize the assumptions of the Act of 1921. It also made it possible to attest the legality of post-war legislation, including specific institutional and legal changes. Cf. J. Trzciński, *Zagadnienie obowiązywania konstytucji z 17 marca 1921 w latach 1944–52*, „Przegląd Prawa i Administracji" 1974, no. 5, p. 14 ff. Like most post-war Polish constitutionalists, J. Trzciński considered the norms of the March Constitution still in force during the Period of People's Republic of Poland as long as they were recognized as binding in the then applicable legislation.

[10] Cf. Z. Jarosz, J. Zakrzewska, *op. cit.*, pp. 9–22; K. Biskupski, *op. cit.*, p. 16.

[11] In a broader perspective: F. Lassalle, *O istocie konstytucji*, Warszawa 1907.

[12] F. Siemieński, *Prawo konstytucyjne*, Warszawa–Poznań 1976, pp. 20–21, 40–45.

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legal genesis of a new authority".[13] Let us add that he considered it reasonable to look at the problem of operation of the KRN and the PKWN in the Schmittian perspective, even though no one would have dared at that time to formally refer to Carl Schmitt's theses to support the legitimisation of communist rule.

These views of state law specialists were intended to sanction the actual and quasi-legal status of the KRN.[14] In line with the postulates of the Polish Workers' Party, they treated it as the current state authority, necessary for the working people to gain power and adopt new, revolutionary laws. Moreover, S. Rozmaryn also noted that the PKWN was established by the authorized will of this legislative entity.[15] Its position within the political system was not to be that of the government (within the meaning of the March Constitution), but, following the example of Soviet systemic transformations, it was given the character of an executive committee, which was later replaced with the Provisional Government. Interestingly, S. Rozmaryn stated that the famous Manifesto issued by this committee had no statutory character, as it was not passed by the KRN, which at that time had the exclusive right to adopt acts of this level.[16] The legal nature of the July Manifesto was basically reduced to

[13] K. Grzybowski, *Ustrój Polski współczesnej 1944–1948*, Kraków 1948, p. 13, as cited in R. Jastrzębski, *Powstanie i działalność Prezydium Krajowej Rady Narodowej (1944–1947)*, [in:] *Z historii ustroju i konstytucjonalizmu Polski. Księga jubileuszowa dedykowana w osiemdziesiątą rocznicę urodzin Profesora Mariana Kallasa*, ed. D. Makiłła, collaboration M. Wilczek-Karczewska, Warszawa 1918, p. 363. K. Grzybowski (*ibidem*) also argued that the reintroduction of the March Constitution by the new rulers had, of course, a political rationale related to obligations towards the people, but the sanctioning (to a certain extent) of this act primarily resulted from such their will.

[14] It is worth mentioning here an interesting (and unusual for the political narrative of that time) statement by another Polish researcher – Adam Wendel (*KRN i PKWN – pierwsze władze Polski Ludowej*, „Rocznik Lubelski" 1959, vol. 2, p. 18, 20), who treated the KRN as an "illegal" underground political entity, effectively seeking to take over the role of "the rule of souls" from the still "legal" London-based centre of power. At the same time, when pointing to the importance of the KRN, he quite freely assumed that the KRN had slurred over "the existence of the "legitimate" government-in-exile in London and spoke above its head, not from London, but […] from Warsaw, to the nation" and the whole world as the actual political representation of the nation. Moreover, according to that thinker, the legalisation of the KRN was legitimised not only by the will of the people, but also in the recognition of it by the authorities of the Soviet Union.

[15] To be more specific, it is worth recalling here a now obvious thing that both the PKWN and the aforementioned Manifesto had been convened and written in Moscow at the order of Stalin. See, e.g., T. Żenczykowski, *Polska Lubelska 1944*, Warszawa 1990, p. 19.

[16] S. Rozmaryn, *op. cit.*, pp. 244–253. A Polish lawyer and author of pre-war comments on labour law and the Commercial Code, Doctor Zygmunt Fenichel, already explained in 1947 that the name "manifesto" referred to its form and content. This, as he stated, systemically significant document did not have the form of a statute to which he was accustomed. At the same time, he justified the use of such a form of the act (a form of political programme) by extraordinary times in which it was issued. He also stated when discussing the content of the Manifesto that the dispute between the London and Lublin Governments over the validity of pre-war constitutions was more political than legal. Importantly, he considered in this context that the establishment of the Government of National Unity after the negotiations in Moscow was ultimately intended to dispel doubts and give effect only to the

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the level of "the programme of the people's rule and the manifestation of the will of the organs representing this rule".[17] It did not matter much, as the Polish jurist expressed in the cited textbook the view that the ultimate factor determining the content of both legal norms and judicial decisions is the economic and social system, which in the case of the People's Republic of Poland is an expression of the will of the working people. In this context, he pointed to a rather selective catalogue of the sources of state law in force in Poland at that time, under which, apart from the Constitutional Act of 19 February 1947 (along with the articles of the March Constitution explicitly referred to therein),[18] he listed ordinary legislation, including the acts of the KRN, decrees of the PKWN and the Provisional Government, statutory acts and other acts of equal force adopted under delegation of the April Constitution (despite the April Constitution having been declared unlawful and invalid) and some resolutions of the KRN adopted during the so-called conspiracy period, i.e. until 21 July 1944, which were to be the obvious source of later PKWN decrees.[19] Although when presenting the sources of law, S. Rozmaryn confirmed the correctness of the principle of the hierarchy of normative acts established in constitutionalism, according to which the primacy was granted to the constitution and the compliance with it of other acts defining its essence, he mentioned at the same time that the content of the binding legal order (including the character of the Constitution of 1947) is more important than the types of forms in which it was expressed. He considered that as a rule there should be a dialectic link between them, but that there could be a dissonance during the transition period, especially when the legal form was not immediately adapted to the new socio-economic content arising from the needs of the working people.[20] However, the freedom with which that professor pointed out a catalogue of existing sources of state law, especially in the conditions of the then incomplete regulation of the Constitution in terms of the political, social and economic system, unveiled a deliberate weakening of the authority of law. It has not only highlighted the arbitrary treatment of the formal conditions for the finality of legislative acts (including regarding the legitimacy

March Constitution. In his article published in a specialist journal on legal practice, interpretation and administration of justice, he did not notice, as an experienced lawyer, a serious problem in violating formal procedures in terms of the validity or derogation of normative acts (including the constitution) and unreservedly accepted the need for changes in the political system. All the more so, the fact that the reorganisation of the State was carried out under a political decision of an entity that had not been constitutionally authorised and, in addition, undertaken in agreement with the authority of another State, did not raise his doubts whatsoever. See Z. Fenichel, *Próba charakterystyki ustawodawstwa polskiego za okres 1944–1946*, „Demokratyczny Przegląd Prawniczy" 1947, no. 1–2, pp. 69–70.

[17] S. Rozmaryn, *op. cit.*, p. 253.

[18] Constitutional Act of 19 February 1947 on the organization and scope of activities of the highest organs of the Republic of Poland (Journal of Laws 1947, no. 18, item 71).

[19] S. Rozmaryn, *op. cit.*, pp. 248, 283–313.

[20] *Ibidem*, pp. 297–308.

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of the legislative entity, the derivative character of powers of the authorities to adopt and repeal certain legal norms, the clear separation of the scope of matters reserved for regulation by the Constitution from those governed by ordinary legislation or decrees), but also allowed granting the self-proclaimed legal authority the exclusive rights to interpret and test the compliance of a particular norm with the applicable legal order. S. Rozmaryn justified and thus sanctioned both the method of enactment and the substantive scope of the normative acts adopted by the new communist regime, considering that this was a necessary stage in the development of socio-economic relations of the Polish working class.[21]

A similar character had the explanations of another leading constitutionalist and judge of the State Tribunal in the period 1982–1985, Andrzej Burda. In his opinion, the KRN was established and acted as an actual and true political representation of the nation. As he argued, the establishment of this body was not based on the existing legal order, but resulted from a revolutionary act. What is significant in the narrative of this professor of constitutional law is that even though the KRN had no normative authorisation, it was itself a constitutional institution empowered to establish and define the functions of local national councils (considered as the "moral and legal" basis for the future state apparatus). At their inception, these bodies were to take on an institutional character through the causative power of KRN and thus constitute the political foundation for the revolutionary people's power. He even stressed that the KRN was the only legal source of authority, whose sole and sufficient legitimacy was the fact that it had been appointed by a warring nation. Thus, in A. Burda's view, it was considered a self-creating revolutionary body with supreme legislative authority, implementing the political programme of conscious working masses. To that end, the KRN undertook the struggle for its implementation, formulating new political principles and legal norms. In this context, he also justified the possibility of treating, by way of an exception, the will of the state expressed in a voluntary form (in other words, the will of a relevant state organ) as a direct source of law. A plausible reason for this special situation was to be the (temporary) revolutionary period of the emergence of new power.[22]

[21] The open aversion of committed lawyers of the period of communist rule in Poland to both pre-war constitutions (especially to the Constitution of 1935) was supposed to perpetuate the conviction of the need to breach the systemic continuity between the new regime and the pre-war Republic of Poland whose systemic solutions were not in line with the post-war revolutionary changes. See *ibidem*, p. 299.

[22] A. Burda, *Polskie prawo państwowe*, Warszawa 1969, pp. 39–40, 116–118. Cf. K. Działocha, *Rola konstytucji marcowej w prawie państwowym Polski Ludowej*, „Przegląd Prawa i Administracji" 1976, vol. 8, [in:] *Prawo konstytucyjne na przestrzeni lat. Wybór publikacji profesora Kazimierza Działochy z okazji jubileuszu 85 urodzin i 60-lecia pracy naukowej*, ed. A. Łukaszczuk, Warszawa 2018, pp. 35–53.

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As we can see also in the case of A. Burda, the legitimisation of the authority of the KRN (and the PKWN) was supposed to result from the fictitious will of the "nation at war", and more specifically from the need and force of the decisions of the "conscious working masses". However, it is difficult to suppose that both A. Burda and the previously mentioned jurists actually believed that such a will of the nation actually existed. It is more likely that they derived their theses from post-Leninist categories which made it easier to reduce and equate the actions of the "conscious working masses" with the will of the communist party leadership, and in the Stalinist perspective, with the will of Stalin himself. The presented views of constitutionalists allow us to notice the implicit references to Machiavellian methods of gaining and maintaining power, as well as the Hobbesian (explicitly in the case of S. Rozmaryn) or Schmittian justification for the legitimacy of the authority by the circumstances of actual state of affairs (including with the use of violence).[23] It is worth noting that both the communist lawyers, such as Andrzej Burda or Stanisław Rozmaryn, and those not directly associated with the Marxist ideology, such as Antoni Peretiatkowicz or Konstanty Grzybowski, concluded, in line with the thought of Thomas Hobbes, that the validity of law should be directly linked to the actual supreme political power, indirectly justified by the currently prevailing socio-economic conditions.[24]

The last of the scholarly statements about the legitimacy of the communist regime we would like to discuss here comes from the basic textbook on the history of the state and Polish law for many years of law students of the communist period.[25] One of its authors, Michał Pietrzak, noted that the "revolutionary KRN" was established independently and in opposition to the Polish authorities existing both home and in exile. Importantly, this body (along with local national councils) was a political representation of "part of the nation" and constituted provisional underground bodies of the people's democratic state authority. The gradual process of liberating the Polish lands was allegedly supposed to be conducive to the establishment by the KRN of a committee known as PKWN, which actually performed all the functions of the government. Due to the fact that it exercised power in the liberated part of the country and enjoyed the support of the USSR, its situation was more favourable than that of

[23] See N. Machiavelli, *Książę*, Warszawa 1969, pp. 39–131; T. Hobbes, *Lewiatan, czyli materia, forma i władza państwa kościelnego i świeckiego*, Warszawa 2005, p. 253 ff. Cf. E. Kozerska, T. Scheffler, *op. cit.*, pp. 65–70.

[24] In this context, A. Peretiatkowicz (*op. cit.*, pp. 57–58), an excellent specialist in Hans Kelsen's work, accused the author of the normative theory of failing to notice the dependence between the state and the law or that he had not taken into account the possibility of social interpretation of law. It seems, however, that this accusation resulted from improper understanding of Kelsen's theory. Cf. T. Scheffler, *Recepcja doktryny prawnej Hansa Kelsena w Niemczech*, [in:] *Normatywizm Hansa Kelsena a współczesna nauka prawa*, ed. A. Bosiacki, Warszawa 2017, pp. 145–146, 156–158.

[25] J. Bardach, B. Leśnodorski, M. Pietrzak, *Historia państwa i prawa polskiego*, Warszawa 1979.

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the London government. This is so because M. Pietrzak stated that the assumption of power in Poland depended not only on the popular support in Poland, but also on the position of the great powers (which, except for the USSR, initially recognized the Polish London government). The author also emphasized that the PKWN, striving to ensure the public order necessary under the conditions of the time, proceeded to effectively create the state apparatus in the liberated territories (organisation of local administration, public security authorities, development of the Polish army, economic reforms). As he emphasized, despite a difficult situation, especially in the face of resistance from "far-right" organizations, both bodies gained social support, mainly from "politically conscious workers and some peasants". Hence, the legal acts issued by the KRN and the PKWN embodied the people's democratic revolution, which allowed for the extensive economic, social and political transformations announced in the manifesto.[26] Once again, we are dealing with a subtle narrative, but still only a narrative, pointing to the alleged real necessity of socio-political transformations and the alleged social support as sources of the legality of the state power and its legislation. In this case, however, there was at least a realistic remark referring to international conditions. With a certain amount of good will, this can be interpreted as an expression of the awareness that the sources of the legality of the new government may be sought in the will of the Soviet regime.

We have mentioned above that S. Rozmaryn strengthened the questions of the legitimacy of post-war legislation with arguments borrowed from T. Hobbes, a thinker regarded at that time as "bourgeois". It is worth noting here that a similar approach was presented at the time by Józef Litwin, a professor of administrative law. Both these jurists, in line with the view of the 17th-century English philosopher, referred to above, argued that the legislature (equated with the sovereign) *non is cuius autoritate leges ab initio institutae sunt sed is cuius autoritate retinentur*, and that it was that entity's will (and not the provisions of some "legal" law or an authorised original lawmaker) that decided on the sustaining, amendment or repeal of a hitherto binding law. Therefore, important for them was not who made the law, but who sanctioned it.[27] This thesis was also reflected in the judgement of the Supreme Court of 5 December 1950 (C 323/50) stating that the norms applicable in pre-war Poland lost their validity with the victory of the revolution, and only some of them were re-enacted in the post-war period. From that moment on, only selected legal acts sanctioned by the current authorities could serve the people's rule and fulfilment of its tasks.[28] Once again, we can see that the theory and practice of the post-war period pointed to the need to abandon the idea of succession of the

[26] *Ibidem*, pp. 622–627, 633–634. Cf. A. Burda, *op. cit.*, pp. 109–113.

[27] T. Hobbes, *op. cit.*, p. 354. Cf. A. Peretiatkowicz, *op. cit.*, p. 56.

[28] J. Litwin, *W sprawie mocy obowiązującej niektórych ustaw przedwojennych*, „Palestra" 1957, no. 1/3, p. 16.

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legal system and promoted the concept of political and legal independence of the new revolutionary authority from the legacy of the Second Republic. Thus, from these views emerges a very quasi-positivist (in the Hobbesian meaning), or rather Schmittian approach to law, treated in categories of relativity and dependence on the authority of the current and actual (and not formal-legal) power.

In this context, one should briefly note the view expressed by well-known pre-war commentator Zygmunt Fenichel, that the political and legal changes which took place in Poland between 1944 and 1947 had the character of a "peaceful social revolution". As he explained, in the normative sphere, they were in line with "European tendencies to nationalise major branches of economy". Thus, the author justified the post-war changes (in a rather simplified way, though) by trying to convince that it was not only in Poland that the legislature intervened, even at the expense of acquired rights, in those areas of life where it was allegedly required by the public interest. He argued, in line with the usual practice of the communist regime, that individual interests (e.g. the previously applicable principles of ownership right, freedom of contract) had to give way to collective needs in order to implement a "broad social agenda".[29] He thus confirmed F. Lassalle's thesis that the legal order, including personal lawfully acquired rights, remained binding as long as the current balance of political power did not change or invalidate them. For the purposes of the realities of the time, he supported the thesis on the relative (unstable and uncertain) character of positive law, a law that was always dependent not so much on formal and legal conditions, but only on the discretionary will of those actually in power.

STATEMENTS BY SCHOLARS IN THE FIELD AFTER 1989

For several decades of the Polish People's Republic, the above-presented manners of proving the legality of the communist regime were in fact repeatedly used and established by renowned legal scholars recognized by the political authorities. Only after the changes of 1989, the gradual abolition of censorship and the introduction of freedom of research allowed opinions that went beyond the communist schemes to emerge in Polish legal sciences. However, the formal collapse of the regime has not resulted in a significant intellectual ferment. For example, some constitutional law textbooks do not address these issues even marginally.[30] Among the valuable statements on constitutional issues in this area, worth mentioning is the position of Professor Leszek Garlicki. His textbook points out that after World War II, a system of factual power developed on Polish lands, which, despite the

[29] Z. Fenichel, *op. cit.*, pp. 72–73.

[30] For example, see the textbook by B. Banaszak, *Prawo konstytucyjne*, Warszawa 2017.

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lack of constitutional or political legitimacy, established a new political order.[31] At the same time, he pointed out that the moment of proclamation of the KRN as a provisional parliament had been in a period of provisional solutions and following the recognition of the new authority by the Western powers and after the elections which were doubtful as to their fairness, the Constituent Assembly which adopted the so-called Small Constitution was convened. The constitutional provisions were in fact a façade that concealed the true governance system based on the principle of primacy of the communist party.[32] Thus, although L. Garlicki referred to the actual and not legal origin of the new authority, he did not address the question of validity of the legislation adopted by that unlawful body at that time. Moreover, by remaining silent on this matter, he seems to accept the practice that has been in place since 1944. This is an attitude that is paradigmatic for current legal deliberations on the legacy of the communist regime.

A similar, but not entirely identical narrative can be found in the statements of another person important for contemporary constitutional studies in Poland, Wiesław Skrzydło. In the study entitled *Polskie prawo konstytucyjne* (*The Polish Constitutional Law*),[33] he noted, similarly to M. Pietrzak, that the establishment of two various administrative and military centres in the country was not accompanied by the same social support. The vast majority of the society supported the legalism of the government-in-exile with subordinated centres of power in Poland, recognizing their continuity. Left-wing milieux enjoyed support in narrower circles, but they gained power in the country owing to the international relations within the anti-Nazi coalition in its shape formed at the end of the war and to a lesser extent owing to internal socio-political relations.[34] This view was a continuation of the earlier description of the events of 1944–1952 presented by W. Skrzydło.[35] This author admitted that the systemic transformations in Poland at the end of World War II resulted from external intervention, and even that the tendencies to cultivate the Polish political and legal traditions were effectively eliminated by

[31] Cf. K. Kersten, *Narodziny systemu władzy. Polska 1944–1948*, Paryż 1986, p. 70 ff. The author demonstrates that effective actions of the new authorities performed by force and *fait accompli*, led to abandoning the principle of legitimism by recognizing the KRN as the representative of the nation and to the appointment of a government dominated by the communists. According to historian of law M. Lipska (*Aparat administracyjny PKWN*, „Czasy Nowożytne" 2005, vol. 18–19, pp. 27–28, 34), from a purely legal perspective, the establishment of the KRN and the PKWN constituted a breach of the existing political system rules.

[32] L. Garlicki, *Polskie prawo konstytucyjne*, Warszawa 2016, p. 26.

[33] *Polskie prawo konstytucyjne*, ed. W. Skrzydło, Lublin 2005.

[34] *Ibidem*, pp. 45–48. As a side note, it can be stated that in W. Skrzydło's opinion, the PKWN was established formally by the KRN, which resulted from the decision taken in agreement with Stalin. As we know, it was not quite true, as the PKWN was established under a decision made by Stalin without any arrangements with the KRN. The KRN just "legalised" *post factum* the earlier event.

[35] W. Skrzydło, *Ustrój polityczny RP w świetle Konstytucji z 1997 roku*, Kraków 2000, pp. 20–25.

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"the second current, completely foreign, influenced from outside […] and based on the Soviet model",[36] but he failed to juridically comment this statement. It is striking that W. Skrzydło's study lacks any considerations regarding the legality or doubts as to the validity of normative acts issued by the KRN, the PKWN, the Provisional Government or the Sejm elected in 1947. Despite mentioning that the regime did not follow the theoretically accepted rules of the March Constitution, and that "completely foreign" models were introduced on which the Constitution of 1952 was based, the author does not question the validity and legality of the rules enacted by communists. Interestingly, the description of normative changes in the field of constitutional provisions was shaped by W. Skrzydło in such a way as to convince the reader that the Constitution of 1997 is normatively rooted in the systemic changes that took place in Poland after 1943. The only difference between the situation before 1997 and the new one was that the previous state "created a patchy picture", because – especially in the recent period – it consisted of the so-called Small Constitution (the one adopted in 1992) and the provisions of the Constitution of 1952 retained in force, while the new Constitution of 1997, on the other hand, introduced an allegedly coherent state.[37] Also in this case, the idea of rule of law, so widely and affirmatively discussed in further parts of both cited W. Skrzydło's works, is suspended or forgotten when the communist heritage is concerned.

The issue of administrative structures in Polish lands west of Bug and San was also addressed by Robert Jastrzębowski. This author claimed that the creators of the communist regime wanted to develop a system different from that of the Second Republic of Poland. The KRN, which was established by a statute (without the prior consent of Stalin), from the very beginning denied the London government-in-exile the right to represent the Polish people. Its activities, including the establishment of the PKWN, depended heavily on the Soviet approval and the military-political situation. In this context, the July Manifesto was considered by R. Jastrzębowski as a political document whose declaration on invoking the basic principles of the March Constitution allowed selective reference to the provisions of this constitution in later practice. At the same time, the laws adopted in July and August 1944, finally built the model of political system for the period 1944–1947 contradicting the parliamentary system declared in the manifesto of 1944, and proclaimed the principle of unity of state power adopted in the 1952 Constitution. As he noted, the legal issues, especially the issue of binding force of the Constitution of 1921, virtually lost its importance with the entry into force of the Act on the system and the scope of operation of the supreme bodies of the Republic of Poland dated

[36] *Ibidem*, p. 21.
[37] *Ibidem*.

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19 February 1947.[38] Despite mentioning the arguments which, from the point of view of legality, discredited the KRN and the PKWN, also this author did not draw any broader conclusions as to the binding force of the legislative acts adopted by those bodies, nor did he attempt to confront his own observations with the concept of the rule of law and consequently to put forward postulates concerning the correct conduct of current judicial bodies towards the KRN and the PKWN functioning, after all, in the current normative order.

An interesting, but ultimately – as will be demonstrated – similar opinion on the activities of the KRN and PKWN was presented by historian of law Adam Lityński. He pointed out that the determination of the legal status of the "old--and-new" Polish state (in the territories west of the Curzon Line, grabbed by the USSR but not incorporated into the USSR as a Soviet republic) is characterised by hesitation, discrepancies, as well as inconsistent behaviour aimed at giving it external appearances of a sovereign political entity.[39] He assumed, in line with the proposal put forward by another well-known law historian, Marian Kallas, that Poland since 1944 had been under an illegal "special occupation" (a specific form of military occupation), characterised by the fact that, although its territory was not declared by the USSR to be annexed, there was full dependence on Moscow both informally in the factual acts of the "red army" and in the decision-making activities of the newly created power structures.[40] At the same time, according to A. Lityński, the new authorities under Soviet supervision wanted to keep up the appearances of legality of power gained. As he stated, the takeover of power was not supposed to look like a revolution, but rather an evolution. According to him, this appearance resulted from the war conditions and the international situation, then favourable to the government-in-exile.[41] A. Lityński admitted unequivocally

[38] R. Jastrzębski, *op. cit.*, pp. 360–363, 370–371. Cf. M. Szulc, *Prezydium Krajowej Rady Narodowej w systemie ustrojowym państwa polskiego (1944–1947)*, https://depotuw.ceon.pl/bitstream/handle/item/1681/2200-DR-PR-30809.pdf?sequence=1 [access: 22.11.2019], pp. 40–42, 235.

[39] A. Lityński, *Początki resortu sprawiedliwości PKWN. W 70. rocznicę*, „Roczniki Administracji i Prawa" 2014, vol. 14(1), pp. 85–86.

[40] M. Kallas, A. Lityński, *Historia ustroju i prawa Polski Ludowej*, Warszawa 2003, p. 29.

[41] Cf. a similar view of a renowned historian, Professor Andrzej Friszke (*PKWN – próba oceny*, „Pamięć i Sprawiedliwość" 2005, no. 2, pp. 19–21). In addition, Professor Janusz Wrona (*System polityczny w Polsce w latach 1944–1948*, „Pamięć i Sprawiedliwość" 2005, no. 2, pp. 52–56, 67), a historian, stated that the year 1944 had been the start of the process of establishing a totalitarian state in Poland. As it seems, it is difficult to consider this new state a successor of the solutions from the Second Republic, especially from the period governed by the March Constitution. On the other hand, Professor Andrzej Paczkowski (*PKWN – próba oceny*, „Pamięć i Sprawiedliwość" 2005, no. 2, pp. 18–19) shared a controversial view that there had been a legal, symbolic and institutional continuity between the PKWN and the Second Polish Republic. Although he admitted that the pre-war regulations had been treated selectively and instrumentally but he argued that they played a significant persuasive role in the original period of the new authorities. He also argued that the real "breakaway" in formal and legal terms took place in the years 1949–1950, and ultimately in 1952, not in 1944.

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that the appointment of the PKWN had been an illegal act and the issuance of the manifesto was deprived of legal sanction, and that these methods indicated a lack of restraint in achieving the intended goal. This was also the purpose of the Manifesto, the political and systemically significant formula of which, deliberately ambiguous and poorly fit for legal use,[42] built the justification for the validity of the Constitution of 1921. In fact, its unclear and vague message regarding the legal continuity of the old system was to be a camouflage for the legitimacy of the new authority and provided it with a normative basis for the legality of its actions. The more so because the Manifesto – as A. Lityński argued – was treated by the communists as an act of constitutional nature. Thus, according to the author, the legalistic concept of the continuity of the legal order was a general rule devised for the needs of the political game (exceptions were military criminal law and military judicial institutions, illegally established in 1943 in the USSR and modelled on Soviet solutions).[43] This strategic idea made it possible to undertake actions which only partially and selectively upheld the pre-war laws and institutions. It was only after the elections of 1947 when this narrative was abandoned, as there was no need to worry about the position of the former allies and the international opinion. Thus, no illusions left as to the continuity of the system in any normative and practical space.[44] Also in this case, however, in A. Lityński's opinion, there was no statement what are the legal consequences of such unambiguous arrangements as to the unlawfulness of structures established by the communists.

Another important publication addressing the legislative activities of the post-war regime in Poland is a study by Marcin Wiącek. In this interesting dissertation, however, the author stipulated that he "does not undertake to carry out a multifaceted assessment of the events related to the assumption of power by the communists", but he only refers to the positions of post-war recognized lawyers for the purposes of the study. His intention was to draw attention to the selective approach of the Polish communist authorities to the application of the March Constitution with simultaneous rejection of the possibility of sanctioning the Constitution of 1935. In this context, M. Wiącek, at the level of declarations, put aside the question of determining the status of the KRN and the PKWN and examining their legality, focusing rather on discussing the system of sources of law created by those authorities. Although he stated in a definitely negative tone that the powers of those bodies had not resulted from applicable pre-war constitutional

[42] Cf. K. Działocha, J. Trzciński, *Zagadnienie obowiązywania konstytucji marcowej w Polsce Ludowej. 1944–1952*, Wrocław 1977, p. 16.

[43] A. Lityński, *op. cit.*, p. 86 ff.

[44] A detailed analysis, especially from the perspective of judicial law, is provided in: A. Stawarska-Rippel, *Prawo sądowe Polski Ludowej 1944–1950 a prawo Drugiej Rzeczypospolitej*, Katowice 2006, p. 21 ff.

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norms (and in the initial period of the KRN's activity there were loopholes in the detailed rules of legislative procedure), since they used to invoke in their revolutionary slogans mainly the will of the masses, he failed to draw legal conclusions from this. M. Wiącek just accepted as a relevant fact that those authorities had considered themselves (as he mentioned: rather on their own) to be empowered to take decisions in the field of public authority and that they had granted themselves the right to make such acts. Thus, despite the apt thesis on the unconstitutionality (and probably also illegality, but M. Wiącek is not quite unequivocal here) of these people's sovereign entities, but this author did not see reasons to challenge the binding force of their legislative activities. Starting from a seemingly formal and positivist position, he accepted that the current constitution-makers of the Third Republic did not equip the judicial authorities with instruments that prevent challenging the legislative legitimacy of the KRN and the PKWN only because of the circumstances in which they had assumed power and their lack of legitimacy in the pre-war constitutions. This is a rather controversial thesis in the context of the rule of law.

As we mentioned, M. Wiącek considered it a fact that if a given act is issued by an entity authorised in the period of the People's Republic of Poland to do so, then such a document should be accepted as binding, regardless of the fact that these bodies have independently granted themselves legislative powers. At the same time, he noticed that both the legislature and the case law of the then regime were equivocal about the validity of pre-war law and seemingly applied the Hobbesian principle that the force of this law did not result from respect for the continuity of law, but from the will of the current legislature. An attitude was even taken at that time, according to which the authorities, mainly courts, decided not to apply a specific regulation (except in situations of a clear derogation) on the basis of alleged objective axiological conditions. Thus, in his opinion, it is impossible to precisely determine which pre-war legal acts were binding. Regarding acts that were newly adopted by the communist government, M. Wiącek's reservations mainly concerned the July Manifesto. He took a position to negate its normative character, which he justified by the fact that before 22 July 1944, the new authority had only granted legislative powers to the KRN and established a specific form of issuing binding legal acts. Moreover, he admitted that the content of that act was too general and ambiguous. The Manifesto was only a propaganda declaration to provide arguments for the illegality of the London government and its ostensible basis in the international constitutional tradition. However, as the author argued, it did not establish legal norms, but confirmed the existing factual state, and also contained an announcement of a specific manner of action of emerging state organs. Moreover, he stated that the provisions of the Manifesto on the validity (or invalidity) of the pre-war constitutions should not be treated as legal norms. The more so as the later practice freely recognized individual institutions regulated by the Consti-

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tution of 1921 according to the assumed political goals.[45] According to M. Wiącek, it is also worth noting that the constitution-makers of the Third Polish Republic clearly distanced themselves from the axiology of the system from before 1989, while having an attitude that the effectiveness of the legal order originating from the KRN and the PKWN (including that derogating the April Constitution) cannot be challenged. These systemic changes were introduced through an amendment, and not a rejection or declaration of invalidity of the constitutional norms of the People's Republic of Poland. Thus, he stated that it is not admissible for the current law-applying authorities to derive legal effects from the lack of the constitutional legitimacy of the bodies of the People's Republic of Poland, and thus they should be allowed to settle cases in which it is necessary to refer to the constitutional model "applicable" at that time. He also argued that in order to assess the events of the period of 1944–1952 (on the basis of the constitution in force), a compromise position should be adopted, in line with the case law of the Constitutional Tribunal,[46] sanctioning the legal norms that have formally been expressed in the acts issued by the then authorities (including those referring to regulations of the Constitution of 1921) and forming the legal system of the People's Republic of Poland. However, he rightly notices that the legal scholarly literature and case law did not develop a coherent concept that would enable the determination of specific normative (constitutional) model rules that would allow legal practitioners to assess legal events and behaviours that occurred in the first years of communist Poland. Adopting such a method, especially through inter-temporal and validation decisions or constitutional regulations, would serve to systematise and thus avoid divergences in the constitutional argumentation used in cases before the Constitutional Tribunal and common courts.[47] It can be easily noticed that the opinions expressed by M. Wiącek assume the necessity in a state governed by the rule of law to suspend its principles regarding the heritage of communist Poland.

An interesting assessment of the legality of the KRN and the validity of its legislative activities was provided by the above-cited Z. Wawak. In his opinion, the system which emerged in the period 1944–1952 did not have revolutionary origins: neither under the traditional approach, i.e. resulting from the will of the masses or the nation (or part of it), nor under the Marxist approach associated with the conscious, necessary stage of development of the socio-economic formation. These violent, revolutionary transformations were, in fact, a coup forcibly carried out against the legal authorities. Such an attitude does not, however, grant legitimacy to exercise power, since it would be a method for justifying any violence.

[45] M. Wiącek, *Znaczenie zastosowania konstytucji marcowej w Polsce Ludowej dla orzecznictwa sądów i Trybunału Konstytucyjnej III RP*, Warszawa 2012, pp. 88–112.

[46] Cf. decision of the Constitutional Tribunal of 13 March 2013, SK 38/12.

[47] M. Wiącek, *op. cit.*, pp. 255–260.

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What is also important, it was only the need to win social support that encouraged the new government to make fictitious references to the legal continuity with the Second Polish Republic (excluding the binding force of the Constitution of 1935). He stressed that the KRN did not had the power to adopt a new constitution and to reject the previous constitution. The Polish lawyer also disagreed with the position that an agreement made by foreign countries (especially the Yalta conference agreements) or the international recognition (especially by *fait accompli*) of the new authority guaranteed its constitutional continuity of the normative internal order. Moreover, he argued that the pre-war legal order had ceased to be binding by facts (and by the law of the jungle) created by the communist power "installed" and supported by the Soviets. Thus, he unequivocally proved that the lack of legal legitimacy of the KRN undermined the foundations of all the legislation adopted by this authority. Subsequent constitutions (from 1947 and 1952) could not rectify this defect, as they derived their legitimacy from the order established by the Manifesto and the decisions of the KRN. This system is defective in constitutional terms (in the substantive aspect, the sovereign's consent is missing, and in the formal aspect, the system lacks constitutional legitimism) and in international-law terms (a *post factum* recognition of the state *de iure*). Due to the fact that the system in force at that time was deprived of legal legitimacy and thus violated the substantive and formal principles of the rule of law, it became necessary in the state governed by the rule of law, according to Z. Wawak, to make a fundamental decision about its application. However, the finding of its illegality could not be accompanied by questioning the irreversibility of its legal consequences. It was necessary, as Z. Wawak argued, to analyse the provisions of that period in view of their compliance with the assumptions of law of the Republic of Poland. Hence, some legal acts of the People's Republic of Poland, even those that are not binding, should be considered null and void *ex tunc* (by applying the institution of annulment without challenging the irreversible legal effects resulting from a ruling or decision), as well as making a substantive reconciliation of the applicable legislation with the current Constitution, and finding a systemic solution of compensation to victims of the communist system, combined with moral redress.[48] Rational Z. Wawak's opinions, which allowed approaching to the idea of the rule of law in a serious way (and not as a kind of juridical ornament), did not receive due attention of the scholars in the field. The "rhetoric of continuity" made it rather impossible to undertake an in-depth debate on the intellectual and normative heritage left behind by the Soviet-established communist regime.

[48] Z. Wawak, *op. cit.*, pp. 53–62.

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CONCLUSIONS

It should be noted that after 1944 Poland was turned into a Soviet vassal, disregarding the formal principles of the rule of law, which were displaced by the coercive force of the Schmittian "concrete order". The established political and normative system had no constitutional legitimacy and did not even aspire to maintain continuity with the pre-war system. The new communist power, authorised by force and not by a legal or social basis, gave itself the competence to establish a normative order. From the point of view of the idea of rule of law, the lack of legitimacy for lawful governance and legislative activity undermined, in principle, the systemic and legal status of the bodies of communist authority. This was all the more so because the system of unitary power created at that time, restrictions on personal and civil rights, as well as the use of terror, showed that a totalitarian state modelled on the Soviet Union was under construction. The events and legal developments of the time led to numerous, often radical changes in many areas of private and public life. They caused specific social and material consequences, which are difficult to reverse today and still affect Polish society. Its many members expect restitution of property and fair treatment as a condition *sine qua non* for the rule of law. In this aspect, especially on the part of intellectual elites, including political and legal communities, a need arises to reflect on every usurpatory and arbitrary action of the entities which illegally took over power in Poland in 1944. The consequences of their systemic legal, social and economic solutions are in many cases the still unsettled aftermath of that regime. Therefore, the currently cherished ideal of a state governed by the rule of law requires that the public authorities undertake comprehensive and effective measures for the just and equitable redress of material and moral damage undoubtedly inflicted by the communist regime. The more so, because – as we have shown in the article – the established scholarly opinion (and the case law[49]) has not managed to develop a position coherently linking the People's Republic of Poland with the present legislation, even if only by referring to the "Radbruch's formula". This seems even more important that some regulations of the communist government, especially those concerning changes in the ownership structure, are still in force and form the basis for judicial decisions of common courts and the Constitutional Tribunal.

[49] See E. Kozerska, T. Scheffler, *op. cit.*, pp. 65–70.

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ABSTRAKT

Ustanowienie reżimu komunistycznego w 1944 r. w Polsce stanowi w doktrynie oraz w praktyce legislacyjnej i orzeczniczej aktualny przedmiot refleksji. Nie wypracowano bowiem jednolitego stanowiska wobec tych wydarzeń, co powoduje, że usankcjonowany wówczas porządek polityczno-normatywny nadal skłania do kontrowersyjnych ocen i przede wszystkim wywołuje określone skutki

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prawne. Wynika to z faktu, że nowa ludowa władza, umocowana siłową, a nie prawną czy społeczną podstawą działania, sama nadała sobie kompetencje do stanowienia porządku normatywnego. Brak legitymacji do prawowitego panowania i działalności legislacyjnej w zasadzie – z punktu widzenia idei państwa prawa – podważa status ustrojowo-prawny organów władzy ludowej, tym bardziej że stworzony wówczas system jednolitej władzy i źródeł prawa świadczyły o budowaniu wzorowanego na Związku Radzieckim państwa totalitarnego. Ówczesne zdarzenia i zachowania prawne doprowadziły do licznych, często radykalnych zmian w wielu płaszczyznach życia prywatnego i publicznego. Ponadto wywołały określone, trudne dziś do odwrócenia skutki społeczne i materialne, z którymi wciąż mierzy się polskie społeczeństwo. Współczesne standardy państwa prawa stawiają zatem wymóg podjęcia kompleksowej i skutecznej aktywności przez władzę publiczną w zakresie słusznego i sprawiedliwego naprawienia szkód materialnych oraz zadośćuczynienia strat moralnych powstałych w wyniku panowania tego ustroju. Wydaje się to tym bardziej istotne, że niektóre regulacje władzy ludowej, zwłaszcza dotyczące zmian struktury własnościowej, nadal obowiązują oraz stanowią podstawę orzeczeń sądowych i Trybunału Konstytucyjnego.

Słowa kluczowe: Krajowa Rada Narodowa; Polski Komitet Wyzwolenia Narodowego; Polska; reżim komunistyczny

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