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Challenges for Legislation Related to Political Transformation and European Integration

ABSTRACT

The aim of the article is to identify the reasons for the declining quality of legislation in Poland since 1989. The focus is not on the substance of regulations, which reflect the political choices of lawmakers, but rather on an assessment of law from the perspective of its formulation and legislative correctness. The current state of Polish law is found to be unsatisfactory, even when compared to legislation enacted during the period of so-called real socialism, that is, under a non-democratic regime. How can this paradox be explained?

According to the author, it is partly a consequence of the inherent characteristics of democratic systems, in which law assumes a far greater role as a regulator of social relations than it does in autocratic systems. The principle of legalism precludes governance through arbitrary or discretionary acts, while the logic of the post-1989 political system frequently necessitates rapid and often imperfect changes to legal regulations. Although law embodies certain autonomous values, its instrumental use has not been entirely avoidable.

These circumstances, of course, do not excuse legislators from enacting poor-quality law; however, they undeniably create challenges that did not exist under the previous system. The flawed model for implementing secondary European Union law is also worth noting, as it contributes to further inconsistencies within the national legal system.

Keywords: Legislation, political transformation, principles of lawmaking, implementation of European Union law, repressive law, autonomous law.

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I. The Political and Legal Context of Systemic Transformation in Poland

The collapse of the communist system in Central and Eastern Europe initiated a years-long process of systemic transformation, encompassing both political and socio-economic changes. The political consensus reached by the communist authorities in Poland at the Round Table in April 1989, with the opposition representatives gathered around the Solidarity trade union, (founded in August 1980), assumed an evolutionary shift away from authoritarian rule, and the gradual implementation of free market principles. Looking back, we know that the government's intention was to share power in the face of the impending economic catastrophe, while maintaining a number of economic privileges and guarantees of security for high-ranking officials of the former regime, and of impunity for members of the state's repressive apparatus. For this reason, the process of democratization was initially planned to take several years, with the ruling party retaining a dominant share of power. Accordingly, the first parliamentary elections following the Round Table talks in June 1989 were only partially free. Communist-leaning parties were guaranteed 65% of the seats in the Sejm (the lower house of Parliament), whereas elections to the Senate (the upper house) were fully competitive. The last communist dictator was initially slated to become the first president. Although this plan was partially implemented, significant changes occured relatively quickly. The new government was headed by the first non-communist prime minister, Tadeusz Mazowiecki, while key ministries remained in the hands of communist party representatives. After a dozen or so months, the presidency changed hands, with Lech Wałęsa, chairman of the Solidarity trade union, assuming office in late 1990. Finally, in the autumn of 1991, Poland held its first fully free parliamentary elections.

Economic reforms aimed at implementing free market principles began earlier, albeit still within the framework of the socialist system. As early as 1988, citizens were allowed to establish businesses of their own, a reform of which they readily took advantage. However, the shift away from the centralized planned economy only occurred after the political collapse. From the end of 1989, the economy began, at least theoretically, to be gradually freed of direct state influence, accompanied by the large-scale (and not always transparent) privatisation of state-owned enterprises.

It is obvious that the phenomena described above required an appropriate legal framework. However, the state did not opt for a radical departure from the existing

principles: laws enacted during the period of real socialism remained in force until appropriate amendments were made. Therefore, the first years of the systemic transformation were characterised by intensive legislative activity. Constitutional changes were undoubtedly crucial – at the end of 1989, the state was given a new name (the Polish People's Republic became the Republic of Poland), and a number of regulations at the foundation of the socialist system of government were removed from the Constitution. Then, in 1992, mutual relations between state authorities were redefined, and finally, in 1997, a new Constitution was adopted. However, the author's intention is not to provide a detailed analysis of the evolution of Poland's law and political system after 1989. Rather, the aim is to examine a troubling phenomenon that has persisted since the restoration of the democratic system. According to a widely held belief, the quality of law has significantly deteriorated over the last 35 years. While this claim may seem surprising, it is confirmed by the author's personal experience.[1] The following discussion therefore seeks to explore the causes of a phenomenon that can be described as "poor" or "bad" legislation.

The article discusses the impact of systemic transformation on the state of legislation in Poland. However, the considerations contained in it may also interest readers from other countries that, almost 40 years ago, were directly or indirectly dependent on the Soviet Union and who share experiences of authoritarianism followed by the building of a democratic system.

II. Legislation at the Beginning of Systemic Transformation in Poland

The term "legislation" typically has a double meaning: first, as the lawmaking activity of competent public bodies, and second, as the result of that activity. Legislation is therefore a process or product of intentional lawmaking, meaning it is a younger phenomenon than law itself. F. A. Hayek rightly noted this apparent paradox when he wrote that "law had existed for centuries before it occurred to man that he could create or change it."[2] Legislation should thus be associated with statutory law, which is formalised using the concepts of the legal language. In legal discourse, legislation is often viewed more narrowly, being equated simply with the "legislative technique", i.e., the rules for formulating legal texts.[3] The way in which law is "expressed", that

[1] Stelina, 2022, 25 et seq.

[2] Hayek, 2020, 118.

[3] Wróblewski, 1989, 134.

is, given the form of a statement of specific formal features and meaning, is crucial to the functioning of law, as it fundamentally influences the legislator's achievement of its intended goal. It is in that very sense, i.e., as a "legislative technique", that the term "legislation" will be used in the present study.

For many decades, the principles of legislative technique were being formalised, initially in the form of written directives contained in provisions of a guidance nature,[4] and recently also in normative acts.[5] They have additionally attracted significant attention from legal scholars, and the preparation of draft legislation is now the responsibility of a large group of specialized legislators, effectively constituting a distinct legal profession. Present-day legislators have modern tools at their disposal, including word processors and electronic databases of legal acts, to help enhance the coherence of the legal system. All this suggests that the quality of law – at least technically – should be higher than before. However, as mentioned above, there is a widespread belief that the quality of legislation is steadily declining, as evidenced by the daily experience of practicing lawyers. The law is increasingly unstable; a situation that burdens politicians more than it does legislators. At the same time it is becoming progressively more difficult to understand. Errors in legal texts are sometimes corrected even before the provisions enter into force, while subsequent amendments often further complicate the legal landscape. It is hardly surprising, then, that the pre-WWII acts, and even the legislation from the era of real socialism, are often cited as a counterpoint to the currently developed legal regulations, and are held up as models for contemporary legislators. But can legal acts of a good quality really be created in a non-democratic state? *Prima facie*, a question like that may seem shocking. After all, the main characteristic of the lawmaking process of that period was its complete voluntarism and strong entanglement with ideological and political contexts. However, there were also regulations that can be, to a greater or lesser extent, viewed as neutral from this perspective. Should we distinguish between legislative technique and the values (or anti-values) expressed by the law enacted at the time, then the above observation may be justified with respect to a number of legal acts.

In my opinion, the political transformation and the principles of functioning of a democratic state have played a significant role in the phenomena described here,

[4] See: Regulation No. 55-63/4 of the Prime Minister of Poland of 13 May 1939, Regulation No. 238 of the Prime Minister of Poland of 9 December 1961, Resolution No. 147 of the Council of Ministers of Poland of 5 November 1991. In

[5] Ordinance of the Prime Minister of 20 June 2002 "Provisions on legislative technique".

related to the deterioration of the quality of law. Certainly, the enactment of poor--quality legislation is not the intention of state bodies, nor do they deliberately seek to undermine the legislative process. Rather, attention should be drawn to certain phenomena that naturally occur within democratic systems and that, in a sense, incidentally affect the quality of legislation. It is therefore worth taking a closer look at the impact of the transformation processes of the late 1980s and early 1990s on legislation, to see if the Polish experience overlaps with that of other countries which, until the late 1980s, were part of the so-called Eastern Bloc.

The period of systemic transformation, initiated by the political consensus reached at the abovementioned Round Table, symbolically ended with the Constitution of 1997 entering into force.[6] Without a doubt, it resulted in fundamental changes in all areas of public life. Building a new political, economic, and social order required designing targeted solutions, convincing society to accept them, and then consistently implementing the goals. It also entailed making appropriate amendments to the law. While, theoretically, these actions should have taken place in parallel, the dynamics of social processes did not always allow for it. Particularly at the beginning of the transformation, legal changes lagged behind institutional developments: the erosion of the political system outpaced legal changes, and the formal legal system diverged significantly from the actual political reality. This was especially evident in the second half of 1989, when, at the height of the political crisis, the Constitution of 1952, providing among other things for the leading role of the Communist Party and the state's alliance with the USSR, remained formally in force. However, following the elections of June 1989 and the appointment of a new government in September of that year, headed by the first non-communist prime minister, these constitutional provisions became, in practice, devoid of real effect.

The legal and institutional instability at the beginning of the political transformation (that is, the divergence between the political system and the formal legal order), was more an expression of political realism among opposition circles, who aspired not only to seize power but, above all, to implement fundamental changes in the state, than an acceptance of the existing systemic practice known from the previous system, when law was purely instrumental to politics. The negation of this state of affairs, and thus the departure from complete political and legal voluntarism, was intended – at

[6] S. Wronkowska refers to the period as an "interim constitution era" (*Na czym polega dobra legislacja?* [What Does Good Legislation Consist of?], Przegląd Legislacyjny, 1/2002, 112).

least at the declarative level – to be the beginning of a new constitutional order. Its main pillar was the principle of a democratic state of law, introduced into the Constitution of the Polish People's Republic by an amendment made in December 1989, and later consolidated in the new constitution.[7]

What was the impact of the changes on the rules of lawmaking? Primarily, we should point to more transparent lawmaking procedures and a streamlined system of legal sources, as well as a new axiology of the state's political system and the different perception of the role and importance of law resulting therefrom. The break with totalitarianism meant a gradual shift from the repressive legal system typical of non-democratic states. In such systems, the focus is primarily on ensuring order: the authorities expect obedience from citizens (disobedience *per se* being punished as a crime), and coercion is extensive. Repressive law is subordinated to politics and treated instrumentally. Of course, law is always a tool of governance, as it serves to achieve specific goals set by politicians. However, in a repressive system, it is devoid of certain autonomous values, and binds those in power only to a limited extent,[8] with its creation being arbitrary in nature.[9] According to Polish legal doctrine, arbitrary legislation can take many forms, its most extreme form being despotic law, in which the lawmaker acts in an ostentatiously arbitrary manner and enforces obedience to established norms by force. A milder form of arbitrary legislation is the paternalistic law. It is clear that Polish legislation in the final years of real socialism was of precisely such a nature. The lawmaker was often willing to make concessions and compromises, although it was he who set the limits.[10] Of course, even this milder form of arbitrary legislation did not fit with the axiology of a democratic state governed by the rule of law.

Although towards the end of the period of real socialism, certain institutions alien to repressive law were introduced (administrative and constitutional courts and the Commissioner for Human Rights - the ombudsman), they were, nevertheless, largely superficial; only initiating what was later called by legal scholars a *sui generis*: "reinstatement of the legal culture."[11]

[7] "The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice" - the Constitution of the Republic of Poland, 2 April 1997, Art. 2.

[8] Nonet and Selznick, 2017, 16.

[9] Kustra, 1994, 38.

[10] Wronkowska, 2009, 113.

[11] Ibid.

III. Legislative Conditions in Democratic Systems

The systemic transformation in Poland, as in most other countries of real socialism, led to the replacement of repressive law with a system of autonomous law, which, according to the scheme proposed by Philip Selznick and Philip Nonet, represents the next, more advanced stage of legal development, characteristic of democratic systems. Autonomous law arises as a result of political consensus. To enact legislation, political actors must first win elections, and thus persuade the electorate to support their proposed programmes and policies.

As a result, law is more independent of politics, coercion is subject to institutional control, and legal norms assume a general character, binding the rulers and the governed equally, and the justification of legal decisions favours compliance with the law[12] itself.

The role of the courts is also crucial. In the autonomous legal system, lawmaking is based on a legalistic model.[13] One of its fundamental constitutional assumptions is the principle of legalism, according to which all state bodies require a legal basis for decision-making. The principle that "everything that is not prohibited by law is permitted" applies in the private sphere, while a different principle applies to state authorities: "only what is permitted by law is permissible; only what is required by law is required."

The changes in the axiological foundations of lawmaking that occurred as a result of the systemic transformation initiated in 1989 consisted primarily of the recognition of personal rights and freedoms, as well as numerous principles of the rule of law, which set the limits to legislative discretion. The lawmaking system thereafter clearly took on the characteristics of a legalistic model.[14]

It is worth considering what these changes meant for legislation. Primarily, law gained importance as a genuine tool for regulating social and political relations, rather than serving merely as a façade, as had previously been the case. It became more enforceable, as the role of legal protection agencies, established to safeguard the legal order (e.g., courts, the Commissioner for Human Rights, etc.), was expand-

[12] Nonet and Selznick, 2017, 16. The highest phase of legal development, according to these authors, is the so-called responsive legal system, in which law is "open" to social needs and aspirations, coercion is replaced by self-limiting obligations, the justification of legal decisions is teleological in nature, and law-making assumes citizen involvement.

[13] Kustra, 1994, 40.

[14] Wronkowska, 2009, 114.

ed. Although some of those bodies had existed earlier, it was only with the beginning of the systemic transformation that they gained real significance in carrying out their assigned tasks.

In a totalitarian state, all state institutions inevitably reflect, to a greater or lesser extent, the totalitarian character of the system. Until December 28, 1989, only a person who guaranteed the proper performance of judicial duties in the Polish People's Republic could become a judge. Upon assuming office, a judge swore, among other things, to uphold the political, social, and economic system of the Polish People's Republic, and to protect the achievements of the working people and public property. Moreover, the political authorities retained the power to dismiss judges if they were deemed as having failed to provide such a guarantee. Judges, as guardians of the system, were therefore expected to make certain that in a dispute between citizens and the political authorities, they would side, if necessary, with the latter (assuming that such disputes were heard by the courts at all, which was itself rather unlikely).

Only the systemic transformation initiated in 1989 enabled the formal ties between the political authorities and legal protection bodies to be severed, and, at least declaratively, for there to be a shift away from the primacy of politics over law. The sole remaining link between these spheres became law itself, which, in a democratic state governed by the law, derives its legitimacy from the nation and should conform to specific standards and values, while also providing clear and precise guidelines of conduct.

Deprived of influence over the judiciary, the political authorities strive to strictly enunciate provisions so as to preclude diversion of court rulings from the lawmaker's intentions. The role of general terms is therefore limited, and regulations become increasingly detailed, often casuistic. This, in turn, contributes to what may be described as a legislative spiral, i.e. changes in law made in response to court activity. However, casuistry rarely produces good results: more often, it leads to the disintegration of regulations, thus corrupting a legal system, which – by the very nature of things – should be based on general and abstract norms.

As previously mentioned, in the autonomous legal system, legal rules bind both those who rule and those who are governed to the same extent. As a result, in accordance with the principle of legalism, each state body may act only on the basis of and within the limits of law. Such conduct behaviour is subject to judicial review and, through democratic mechanisms, also to social control. Acting outside the law entails specific consequences, both political and legal. If no legal basis exists for a particular action, the legal basis must be created. Importantly, this basis must take the form of

a specific legal provision rather than general guidelines or broadly defined competences. Consequently, the Constitution of 1997 reorganized the system of sources of universally binding law.

Ipso facto, the legal component, in the form of an appropriate legal basis, has become inherently linked to the quality of the power exercised by state authorities. Poorly drafted legislation undermines the effective performance of public tasks to a similar extent as incompetent officials or inept political leadership. It should be noted, however, that the growing prominence of legal issues has contributed to a certain fetishisation of law, understood as the tendency to treat legislation as the primary, or, even worse, the sole, means of addressing social problems.

Such a fetishisation of law is largely possible only in democratic systems, as it is precisely within them that law is taken so seriously. The difficulty arises when the enactment of a law marks the end, rather than the beginning, of a process of resolving a given problem. Political actors have successfully persuaded society that a change in the law constitutes a sufficient response to many public issues, which in turn encourages the continual adoption of regulations. The belief that the mere enactment of legislation is tantamount to solving a problem has something of a "magical" quality, and significantly influences the legislative process. First, it promotes the proliferation of regulations: while it is relatively easy to amend the law, it is far more difficult to address the underlying issue. It also creates a temptation to resort to the simplest measures, particularly since the executive power can quickly proclaim a "success".

Such a pattern of action, however, seldom aligns with the quality of law itself, as the expectation is for the law to be adopted quickly, without lengthy and in-depth analyses of its consequences.[15] Laws are thus passed frequently and, when necessary, quickly. At times, legislation is adopted merely to provide the executive branch with a form of political alibi should it later be called upon to account for its actions. In such circumstances, responsibility can easily be diffused, or even shifted, since the legislature that enacted the defective law can also be said to have contributed to the eventual failure.

IV. Legislation and European Integration

Another factor that has had a significant impact on Polish legislation deserves mention: the challenges brought about by European integration. One of the condi-

[15] Łętowscy, 1996, 22.

tions for Poland's accession to the European Union, which ultimately occurred on May 1, 2004, was the harmonisation of national law with EU legislation. This constituted a massive undertaking that required finding an effective implementation method. Unfortunately, such a method has never been fully developed, and this continues to negatively affect the situation even after Poland's accession to the European Union, as the ongoing implementation of EU law must be ensured on a continuous basis.

It should be emphasised that the author does not address substantive questions here, such as the justification for or necessity of adopting ever more regulations. Addressing such matters would require a separate study. Therefore, at this point, the author will limit himself to expressing the view that the method of implementing EU law adopted by the Polish lawmaker is fundamentally flawed. Without going into a detailed analysis, it is sufficient to note that, all too often, the implementation of European Union directives involves enacting laws that are literal translations of the directives themselves. In this way, provisions "implanted" into the Polish national legal order often remain incompatible with it terms of their nature, the identification of the law's addressees, and/or their operational mechanisms.

EU directives are intended to set out general objectives that should be achieved through appropriate amendments to national law. They use specific terminology that often deviates from the frameworks developed in individual countries, and which is not always consistent with their established legal traditions. Consequently, the literal translation of a directive and its direct incorporation into the domestic legal system, without adequate adaptation, is difficult to justify. And yet it happens. It goes without saying that such practices significantly undermine the coherence of the national legal system.

V. Final Conclusions

To summarise the current legal landscape in terms of legislative correctness, it may be observed that it is characterised by an excess of regulations, many of which are of questionable quality. As the preceding discussion suggests, this paradox is, at least to some extent, a consequence of the growing importance of law as a regulator of social relations. The principle of legalism excludes governance through arbitrary acts, while the logic of the political system that emerged after 1989 often compels rapid and, unfortunately, not always carefully developed legislative changes. Although the law reflects certain autonomous values, its instrumental use has not been effectively

avoided on a broad scale. Despite its proclaimed independence from politics, law remains closely tied to political processes, not only because it is one of the instruments of governance, but also because legislative bodies are deeply entangled in political struggles, in which the quality of law is sometimes sacrificed.

Naturally, these circumstances do not justify the enactment of poorly drafted legislation. Nevertheless, they present legislators with challenges that were largely absent in earlier periods. Any accurate account of contemporary lawmaking must also take into consideration the often flawed model of implementing secondary European Union law, which further contributes to inconsistencies within national legal systems.

Consequently, what is frequently described as "bad" law is simply the result of a dysfunction in the democratic system, rather than the quality of the legislators. In fact, the legislators serve a subservient role to politicians who, in pursuit of their own political goals, may be willing to sacrifice legislative quality in favour of effectiveness or political success.

As renowned German physicist Werner Heisenberg once said, "Everyone has the right to happiness, but not everyone has the right to happiness at the expense of others." Nonetheless, the continuous improvement of the art of legislation remains a worthwhile endeavour. The first step toward this goal is an accurate diagnosis of the current state of affairs. The present study seeks to contribute to that task.

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