

## PREFACE

The issue of the state under the rule of law has frequently been analyzed and presented in the Polish specialist literature. A growing interest in the concepts, models or a constitutional principle of the state under the rule of law was closely connected with a fundamental change of the political system in Poland by the law of December 29, 1989 regarding the change of the Constitution of the Republic of Poland. A previous art. 1 of the Constitution of the Republic of Poland of July 22, 1952 stating that “The Polish People’s Republic shall be a socialist state” was changed into “The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice”. The content of the principle of the democratic state under the rule of law has become the subject of interest for the doctrine of the Constitutional law, the theory of law as well as the jurisdiction of the Constitutional Tribunal.<sup>1</sup> In the Constitution of the Republic of Poland dated 2 April, 1997 a verbal form of the above-mentioned principle was preserved; what was changed was its place in the inner systematics of the Constitution (now it is art. 2). Among many works regarding the issue of the state under the rule of law which have been published since 1997 one may find both theoretical-legal (or even philosophical-legal) works,<sup>2</sup> as well as those which analyze the content of the principle of the state under the

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<sup>1</sup> The principle of the democratic state under the rule of law has been described by: K. Działocha, W. Gromski, A. Kubiak, J. Nowacki, J. Oniszczyk, W. Sokolewicz, J. Wróblewski, J. Zakrzewska. Also M. Wyrzykowski discusses it in details in the commentary to art. 1 of the laws obliging by the art. 77 of the Constitutional Law dated 17 October, 1992 (in:) L. Garlicki (scientific ed.), *Commentary to the Constitution of the Republic of Poland*, T. I, Warszawa 1995. It is necessary to mention a collective work ed. S. Wrótkowska, *Polskie dyskusje o państwie prawa*, Warszawa 1995.

<sup>2</sup> Among all, L. Morawski, *Państwo prawa w toku przemian*, (in:) L. Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian*, Warszawa 1999; R. Woniński, *Spór o demokratyczne państwo prawa. Teoria J. Habermasa wobec liberalnej, republikańskiej i socjalnej wizji państwa*, Warszawa 2007.

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rule of law in the light of the Constitution of the Republic of Poland and jurisdiction of the Constitutional Tribunal.<sup>3</sup>

September 11, 2001 changed our contemporary world. The truism of this statement seems to be obvious but it does not refer to the fact itself as much as it does when one considers its consequences. Fukuyama's thesis regarding the "end of the history" and the inevitable victory of liberal democracy expressed in the 90s of the XX Century has lost its meaning. A contemporary world has become dominated by the following words: terrorism, war against terrorism, collision of civilizations. A traditional dictionary of social sciences and philosophy of politics, where the notions "democracy", "state under law", "human rights" had a fixed meaning, requires a new defining. In the name of the fight against terrorism and the need of protection of public safety, modern states or rather western states have reached new techniques and technologies of control over an individual and his life. Once again, a border between what is private and public/political should be re-defined. Once again, there appears a necessity to answer the following questions: what does privacy mean today?, how significant is the principle of human rights' respect and protection? Is it still a guarantee against an arbitrary action of the state? And perhaps the most significant question appears: what do we mean today by the state under the rule of law? It is impossible to give answers to all these questions within one study.

Human dignity has remained one of the most essential values of the state under the rule of law. Being natural, nontransferable, and unsubjected to any limits, human dignity constitutes the basis of human rights. By not negating a need for democracy and rules of law, a contemporary state has greatly changed the perception of a political character. Politics has reached its limits; there has appeared soft totalitarianism, whose totality has acquired a form of diffuse microphysics of power or biopolitics.

Papers comprised in this volume deal with different aspects of axiology of the modern state under the rule of law. Some of them give a special consideration to human dignity in the context of the contemporary world's phenomena and questions which they pose. Such problems are presented from a philosophical and legal perspective (K. Kuźmicz, S. Oliwniak, A. Breczko), a theoretical and legal perspective (A. Jamróz, B. Kornelius, P. J. Suwaj,

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<sup>3</sup> W. Sokolewicz, *Commentary to art. 2*, (in:) L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, T. V, Warszawa 2007; S. Wronkowska (ed.), *Zasada demokratycznego państwa prawnego w Konstytucji RP*, Warszawa 2006, E. Morawska, *Klauzula państwa prawnego w Konstytucji RP na tle orzecznictwa Trybunału Konstytucyjnego*, Toruń 2003.

K. Doliwa) and a constitutional perspective (M. Aleksandrowicz, A. Czarnota, A. R. Bartnicki i E. Kuźlewska).

K. Kuźmicz analyzes relations of philosophy of politics which constitute an integral part of the Kantian practical philosophy and politics of law comprising the content of the proclaimed law. A proper politics of law treats human rights as a sanctity that should be protected by public authority. The progress of mankind is identical with the progress of law which is to guarantee a moral development of an individual and the society. In this way, a “kingdom of ends” is created, where an individual becomes an end in himself. In this context, the aim of the human actions is to realize a perfect model of the collective life, a “civil state”, which is in accordance with a moral law and where no individual is treated in an instrumental way. Therefore, Kant’s concept of the “kingdom of ends”, based on the respect for human rights and liberties, constitutes an archetype of the modern state under the rule of law.

S. Oliwniak and A. Breczko highlight contemporary threats that individual freedoms may be subjected to by the state. At the age of biopolitics and biopower an individual is no longer “an end in himself” but an object, a subject of normalizing measures of power. Sometimes dignity and human autonomy may seem to be “empty” notions which “exist rather than mean”. A contemporary paradigm of the western world is presented neither by the Kantian “kingdom of ends” nor by the state under the rule of law but by the state of exception and territory where it is most visible in a camp. A camp is a territory which, by the decision regarding the state of exception, becomes extracted from the range of the obligatory norms of the legal order. These are the places filled by the contemporary *homines sacri* (refugees, prisoners of Abu Grhaib and Guantanamo). These are also the places where we are constantly controlled by the authority (airports, railway stations, public urban space fixed with industrial cameras). S. Oliwniak, analyzing categories such as biopolitics, biopower, and “bare life” as presented in the concepts of Michel Foucault and Giorgio Agamben, arrives at the conclusion that we are subjected to a permanent, hidden and growing control of our life conducted by the impersonal Power and State.

A threat of the traditionally understood human subjectivity can also appear as a consequence of the legally unregulated development of genetic research and biotechnological progress. Borders between the nature of humanity and the available (from the point of view of technology) possibilities of manipulation of human subjectivity by a man are being washed away. It is inevitably and closely connected with the threat of entering the sphere of dignity, integrality, identity and individual autonomy. A. Breczko high-

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lights a clear need of a fundamental settlement regarding the social, legal and political consequences resulting from the application of biotechnology.

A. Jamróz proves that jurisdiction of the idea of human dignity results in the ambiguity of a normative content, at least regarding a normative meaning of this idea. A settlement of the normative content of the notion of human dignity demands a philosophical (doctrinal) account of the notion. At the same time, in the light of the positivization of the human dignity clause in the Constitution, there appears a clear necessity for the analysis of the jurisdiction of the Constitutional Courts in this respect. The author's considerations are referred to the content of art. 30 of the Constitution of the Republic of Poland.

Describing relations of law with the phenomena of a linguistic character, K. Doliwa pays attention to a performative character of the language of the legal norms of the "statements of the will", whose function does not depend on the description but on the creation of a new social reality. The author highlights the role of conventional actions in the process of the creation of law, that is, the sphere of value. The author also emphasizes the fact that J. L. Austin's theory of performatives, adopted by the contemporary theory of law, was already revealed by some legal ideas as presented by Thomas Hobbes, a seventeenth-century writer.

B. Kornelius considers the fact that a clause of the democratic state as comprised by art. 2 of the Constitution of the Republic of Poland orders to consider axiology of the state under the rule of law in the process of law application. Referring to the theoretical and legal settlement connected with the construction of general clauses, the author presents their role in the process of law interpretation as conducted by organs applying law.

P. J. Suwaj highlights the necessity of practical realization of the principles protecting law and civil freedoms against the excessive interference of public administration. The author presents the evolution and content of the principle of publicity of actions taken by public administration in the European and Polish laws. The author considers a possible conflict of the constitutional right to privacy as contrasted to the duty to reveal financial statements by public officials. The author concludes that this duty is justified and remains in accordance with the requirements of the modern state under the rule of law.

This volume is closed by the papers devoted to the realization of the model of the state under the rule of law in the system of Switzerland, some Central European states, as well as chosen post-Soviet republics. M. Aleksandrowicz focuses on both the material and formal character of the concept of the state under the rule of law in the Constitution adopted in Switzer-

land in 1999. A formal aspect is revealed by the certainty of law and basing the activities of public authority on the foundation and limits of law, in the first place, the proclaimed law. A material aspect is revealed by human dignity and freedom, which are leading values in democracy both in the sphere of the positive law and norm-creating activities of the jurisdiction of the Federal Court.

There is a fixed tradition of Rechtsstaat Rule of Law in western states. In the Central and Eastern European states there still exist problems with adaptation or a practical realization of the principles of the state under the rule of law. Controversy appears when faced with a necessity to solve problems connected with the non-democratic past of these states or rather its consequences such as, “de-communization” or inspection. In what way is it to be done in the conditions of the state under the rule of law and respect for the certainty of law? How can possible conflicts between the principles of the state under the rule of law and the principle of social justice be solved? – this is the question A. Czarnota aims at answering in his paper.

The authors of the last but not least paper in this volume – A. R. Bartnicki and E. Kuźelewska – represent a perspective of political sciences. They consider the possibility of the perception of the model of the state under the rule of law in post-Soviet republics and arrive at a pessimistic (though true) conclusion that, when faced with the concepts of the state under the rule of law, it is authoritarianism that wins. In the first place, this is conditioned by the lack of a democratic tradition in these states. Undoubtedly, Islam, with its different hierarchy of values, has a great role there. Specific economical and political connections with Russia are also of a great significance in this process.

Hopefully, the articles presented in this volume will enrich a discussion regarding the issue of axiology of the modern state under the rule of law.

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