Report

The lecture of Professor Sławomira Wronkowska-Jaśkiewicz titled *Instrumentalisation of law*, delivered on 29th May 2017 at the Faculty of Law and Administration of the University of Szczecin

On 29th May 2017 at the Faculty of Law and Administration of the University of Szczecin (Poland) a lecture of prof. Sławomira Wronkowska-Jaśkiewicz¹ took place. It was dedicated to the issue of the instrumentalisation of law. The event was attended by representatives of Szczecin academia. The guests were welcomed and the meeting (combined with a discussion) was opened by the Dean of the local Faculty prof. Zbigniew Kuniewicz.

According to the lecturer, in treating law as an institution shaped by culture and used in certain circumstances, one clear and obvious property is attributable to it: the ability to achieve a certain state of affairs. Law has thus a potency, which is used in creating specific legal norms, or their whole systems. This ability is called the instrumentalisation of law. If one looks a law as a man-made product used in certain situations in order to pursue specific public strategies, then it is said that people instrumentalise law. Therefore each of us use law so as to – by taking advantage of its potency – achieve certain states in public life.

This feature of law is specific not only to legal positivism, since in each of the concepts of law it is emphasised that law has the ability to achieve a cer-

¹ Born in 1943, Polish professor of legal theory and philosophy at the Adam Mickiewicz University in Poznań (Poland), Faculty of Law and Administration, a judge of the Constitutional Tribunal of Poland since 2010.

tain state of affairs. Among positivists, the legislator provides the norm with its content and therefore, by using it, controls society. According to their point of view – law is the only mechanism for controlling society. Also, in the concepts of natural law, it is discerned that besides this law there is a second system of ‘legal-human’ norms that either supplement the natural law, because it is too general, or provide sanctions for infringements of its rules. Even in the time of Saint Thomas, he was able to point out that a man who was appropriately raised respected the natural law (even without realising it), whereas highwaymen needed to be compelled to follow it by means of sanctions and their enforcement. He, therefore, saw the need for the instrumentalisation of human law. Similarly, this can be inferred from the concepts of law as a conversation.

Therefore, if law has the ability to achieve certain objectives, and an entity uses it to implement certain strategies in public life, the question arises as to how to be able to do this. Often, when we talk about the instrumentalisation of law (i.e. making use of it), we mean the reprehensible instrumentalisation, although anyone who uses law, even in the best, lofty aim (the one that we are willing to accept), instrumentalises it. Generally this phenomenon is not seen in public life. If we assume a situation in which a set of values on which we all agree is provided and a legislator – by respecting the rules of creation of law – complies with the rules of its application, then we will say that the law is instrumentalised in the way we accept. In these circumstances the phenomenon of instrumentalisation of law will not displease others, and then the consideration will concern the matter whether the goal has been reached or not, since one could wrongly discern a situation in which the norms were created or make an incorrect assessment whether addressees of the norms would submit to them. Consequently, the legislation will be assessed as less or more effective (from the point of view of improperly applied legal policy), but will not be assessed from the point of view of moral evaluation.

However, the lecturer was focused mainly on a different situation – when a set of values to be carried out by the legal order is more or less accurately expressed in the Constitution and someone calls this set of values into question or – in spite of not contesting it – violates the rules of creation or application of the law, that is, instrumentalises the law for some political reasons. Taking as a reference point a situation in which: a) a certain set of values have

been enshrined in the Constitution, b) there was an entity that made use of law and c) this entity did so in a way in which the constitutional values were contested more or less explicitly, the lecturer proved that law could be instrumentalised from the point of view of the entity, which was a member of the political community (in which the Constitution was in force), and at the same time did not accept this Constitution and fought with it. It would not be a fight for constitutional amendments, but a fight aimed at instrumentalising the certain acts of creation of the law.

In order to prove the thesis mentioned above, the lecturer referred to Zygmunt Ziemiński's² expanded concept of the sources of law which answers the question whether a norm with specified content is valid or not in the legal order. To answer this question it is necessary to know 2 types of directives – validation rules (determining what facts are legislative) and the rules of exegesis of a legal text (its interpretation, legal deductions and rules on conflict of laws). This means that law arises in an extremely complex and intricate procedure. Law is neither a collection of normative act nor a set of rules that comes from the legislator. Although we receive from the legislator extremely important material, it is a subject of further studies, in which other entities are involved, for example: those interpreting the law, determining collisions *etc.* Therefore, if the law arises in a complex process, in which the creation of a legal regulation by the legislator is the first step (restricting consideration to the law of the State), then an exegesis of the legal text is the next stage. Even though our attention on the instrumentalisation of law shall be addressed mainly to the legislator, it is not that the legislator is the only entity that can instrumentalise law. It is obvious that the legislator has the greatest potential (political power), because he provides the norms with specified content and decides in which point they are set and when they enter into force. Nevertheless, the legal text is then subjected to interpretation. Thus, law can be instrumentalised by both the legislator and the interpreter, applying law under recognized clearance decisions, and finally, by legal doctrine. Ideally, if everybody instrumentalised law in the name of the same values, the legal

² Zygmunt Ziemiński (1920–1996) – a Polish lawyer, profesor of law, philosopher, law theorist, logician. An author of the Poznań–Szczecin's legal theory school, on the grounds of which Zygmunt Ziemiński's and Maciej Zieliński's derivative concept of legal interpretation arose. Currently it is the most common Polish concept of interpretation of the law.

order would be consistent (coherent). If one performed this in the name of other values, which are from the point of view of the other, counter-values, and the other – by using the interpretation – remedied the effects of the instrumentalisation of the first, then we would encounter a situation of remedial, corrective actions. But it is also possible to instrumentalise law according to different systems of values, and then we deal with the dysfunctionality of the legal system. As an example of such different situations, the lecturer referred to the process of the formation of the administrative judiciary in Poland.

Accepting the thesis that various entities may instrumentalise law, the answer shall be given to a further question: in what way and by which means are they able to do so? In the first place, the possibilities of the legislator were considered.

First, the legislator can instrumentalise law by creating legal norms:

- which violate the accepted system of values;
- which constitute a reaction to errors that were made in the past;
- for the regulation of a particular legal situation which he wants to create at a given moment of time.

Works on the Act on Constitutional Tribunal from 2015³ were a good example of such legislator's actions. This act – despite the fact that the works on it had lasted for 2 years – was hurriedly enacted by the Sejm⁴ at the end of its 7th term of office. The Act provided for a 3-month time limit for proposing a person as a candidate for judge of the Constitutional Tribunal (Art. 19 section 2). The length of this term was this long thus to allow the assessment of candidates and hold a public debate about their choice. One of the basic (main) premises was that the candidates for judges of the Constitutional Tribunal would be appointed by various bodies, including academic centres. This regulation was, however, one of the first to be eliminated at the stage of parliamentary work. The cause of the above was that the office of the Constitutional Tribunal judge was the subject of interest of each political persuasion. In June 2015, it proved that there was no room for a longer debate on, by the way, a very simple act, as the end of the term of office of some judges was im-

³ We mean works on Act on Constitutional Tribunal from 25th June 2015 (The Journal of Law from 2015, position 1064).

⁴ The Polish Parliament is bicameral and consists of a 460-member lower house (Sejm) and a 100-member Senate.

minent and there was a high risk that new ones would not be selected by the Sejm before the end of its 7th term of office. At this time the legislator passed a transitional provision (although in fact it was not transitional in nature, but was an example of incidental regulation), which, in this particular situation, reduced the above-mentioned period to 30 days (Art. 137). This was, therefore, an example of the instrumentalisation of law by creating legal norms which were a response to the legislator's errors that had been committed before, as well as aimed at the regulation of a particular legal situation which the legislator would like to establish at a given moment of time. In response to this instrumentalisation, the majority of the Polish MPs of the 8th term of office introduced immediate amendments. It was found that the deadline for submitting candidates for judges of the Constitutional Tribunal was not a legal, statutory issue but a matter of procedure before the Sejm and thus the rules of the Parliament, in which relevant terms, negative from this point of view, had been provided, were changed. As a consequence of the amendments to the rules of the Parliament, the candidates were immediately notified (1st December 2015), chosen (2nd December 2015) and sworn in by the President (3rd December 2015). This was an example of the instrumentalisation of law that was made in response to the earlier instrumentalisation.

Secondly, a revision of constitutional values is another typical form of the instrumentalisation of law by the legislator. This is an issue and a situation much more difficult from the first form, since the legislator challenges the system of values that has been clearly formulated in the Constitution. Citing the views of doctrine, the lecturer pointed out that so far an opinion had developed according to which combining the terms 'legal' and 'democratic' in one political and legal doctrine meant an important change in modern ideas of democracy. In Western European culture it seems that there is a widespread agreement that democracy does not mean the omnipotence of a nation, but must be limited by the Constitution, and therefore understood as a constitutional democracy. By contrast – by denying constitutional values – it is now shown that a liberal interpretation of the Constitution is incompatible with the traditional, Polish constitutional identity up to the Constitution of 3rd May 1791, which underscored republican values – that is, the state as defender of the common good, the guardian of rights and freedoms, as well as patriotism, adherence to tradition and the Catholic religion, as the factor that

connects the community. A comparison of these views can be seen, according to lecturer's estimation, that what we have to deal with now is not a reinterpretation of the clause of the democratic rule of law, but a total revision of the state perceived as a state of constitutional democracy.

Thirdly, the legislator may instrumentalise law by replacing acts of Parliament, that is, through drafting acts which settle a specific case, for example: by providing such a procedure or indicating such a subject, which, according to this procedure, is to be marked that there is no option possible other than this certain one.

Fourthly, transfer of the burden of initialization of the bills from the government to the members of the representative body is the next distinctive indication of the instrumentalisation of law in the legislative process. According to the statistical data adduced by the lecturer, it can be noticed that as from the Contract Sejm⁵ up to the current state, in periods of transformation the intense activity of members and senators is absolutely clear. The reason for this, on the one hand, is to show the democratic performance of social functions, and on the other it is the fact that as far as members' projects are concerned, the legislative procedure is less formulaic and more flexible. As far as this is in accordance with law, because it provided for a special, separate procedure for members' projects, there shall be an expectation that the legislative process would be democratized by a wide range of consultations, which at present is basically illusory.

Finally, creating law according to a so-called billiard strategy is a subsequent form of instrumentalisation of law by the legislator. The billiard strategy is based on the assumption that one ball is hit with the intention of moving another one. This means that although the legislator declares some aims, the declared aims are not going to be achieved by a certain legal regulation, but other ones that are inexpressible. The so-called acts on the Constitutional Tribunal's repair⁶ are a clear, representative ex-

⁵ Contract Sejm (Polish: *Sejm kontraktowy*) is a term commonly applied to the "Sejm" (parliament) elected in the Polish parliamentary elections of 1989. The *contract* refers to an agreement reached by the Polish United Workers' Party and the Solidarity (NSZZ Solidarność in Polish) movement during the Polish Round Table Agreement. For more details, see: <http://opis.sejm.gov.pl/en/historiasejmu.php> (10.10.2017).

⁶ We mean the following acts: Act on a change of the Act on Constitutional Tribunal from 19th November 2015 (Dz.U. 2015, item 1928), Act on a change of the Act on Constitutional Tribunal from 22nd December 2015 (Dz.U. 2015, item 2217), Act on Constitutional

ample of such a situation. These acts incorporated a number of elements which could be discussed, for example, the 'advantages' of the composition of 7 judges over 5, but also included a provision about the adoption of the composition of the 13 members with the qualified majority 2/3. Its aim was not to provide judgements with greater legitimacy, but to result in the 3 judges – sworn, but not authorised to give judgements – eventually being able to adjudicate; in other words – to order the supplement of the composition of the Constitutional Tribunal contrary to its prior, unambiguous (unequivocal) ruling.

The activity of the interpreter is also a form of the instrumentalisation of law. Irrespective of the precise concepts of interpretation of the law used by the interpreter, the interpreter has always possessed a wide range of interpretative freedom. A particularly broad scope of such freedom exists in the case of the interpretation of the Constitution. By preferring some rules of interpretation over the others – there is the possibility of performing acts of interpretation, which could be called instrumentalisation of law. An example of such a situation can be illustrated by the statement that since the Sejm is the representative of a higher authority, all its normative acts (statutes and resolutions) have a special position in the course of control systems of the constitutionality of law, because it is the Constitutional Tribunal's responsibility to construe the acts of the Parliament in accordance with its will. This is a clear signal that compatibility not with the Constitution Act, but with the will of Parliament should be determining and of essence for the interpreter. This is a special kind of subjective interpretation, which is a clear challenge to the traditional paradigm of interpretation of law.

Furthermore, doctrine can instrumentalise law. It creates certain normative concepts of interpretation of law, promotes some of its rules arising from judicial decisions or casts doubts on them by questioning their content or importance. It is also the role of doctrine to educate students, which is a powerful possibility to affect their future understanding and ways of interpretation of legal texts. In the end, doctrine determines what the rules for taking con-

Tribunal from 22nd July 2016 (Dz.U. 2016, item 1152), Act on an organisation and course of action before the Constitutional Tribunal from 30th November 2016 (Dz.U. 2016, item 2072) and Act on the status of the judges of the Constitutional Tribunal from 30th November 2016 (Dz.U. 2016, item 2073).

ventional steps are, what errors occur in their performance and what sanctions they involve.

The conclusion that can be drawn from the above is that there are various possibilities of instrumentalising law. The question is whether it is possible to defend against them. Unfortunately, there are not so many ways. These include:

First of all, the existence of a culturally – shaped concept of law as a set of general and abstract standards which enforces the equal treatment of their recipients, is considered to be an elementary requirement of justice in our legal culture. This is an evaluative component of the accepted definition. Moreover, legal norms are always directed to a specific addressee who can behave according to them or not. It is a democratic element, because an entity can, but is not necessarily obliged to, act in a certain way; in other words the decision they make results from their own accord.

Secondly, law is constructed with primary and secondary rules, which means it has, *per se*, mechanisms for its defence. One can expect from law that it provides the rules of its creation, modification and control. Naturally, these rules can differ: they can be unclear; as happens in an authoritarian state, but the requirement of the rule of law is that they are extremely transparent and clearly expressed. In relation to policy, law retains its autonomy, which means that policy is to be bound by legal rules.

Thirdly, the whole political doctrine is a set of cultural requirements that determine the character of law. In a material understanding, it must correspond to the minimum standards of protection of human freedoms and rights, and this is a reason for more and more numerous security mechanisms against legislative arbitrariness to be created.

To summarize, the lecturer concluded that human law would not be better and fully depends on how much the entities that were subject to it could give it. There were no. additional security precautions. Even the law of nature is not such a measure, because there is no. mechanism that would allow the repair of human law in a way other than dramatic and revolutionary. It can only be a model for statute law.

If the rule of law is violated, there is still a vast array (catalogue) of human rights – freedom of the media, freedom of association, freedom of thought, freedom of assembly, etc. These are the most important ways of responding to breaches of the rule of law.

Pointing out that there is no concept of law that has the ability to protect against errors committed by the entities instrumentalising law, the speaker recalled the story, when during one of his post-war seminars, Hans Kelsen was asked by his student whether or not his concepts had contributed to the events of the Second World War. Kelsen replied that no concept of the law could prevent such situations from happening and if they happened again, it would depend on whether the people of the generation of the student asking the question reacted fast and said “that’s enough!” in the proper time. One can wish that every entity would have the ability to say “enough!”, but also that it will never be necessary to take advantage of it.

After the lecture, there was a discussion concerning, in particular, the constitutional crisis surrounding the Constitutional Tribunal in Poland caused by both the representatives of the executive and legislature.

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