
Illiberal democracy in action: Polish kind of symbolic legislation*

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Summary: The author explores symbolic legislation in Poland. Three instances of such legislation enacted since the 2015 general election are analysed in this essay. The author recognizes symbolic legislation of the negative type and provides specific features. She asks about the causes for such activity of the Parliament. The author has outlined the conclusion, that possible reasons may be: a deficient process of the transition to democracy, and past negative time perspective. Both reasons disturb the sustainable development of Polish society. As a possible solution, the author considers a properly functioning education system. However, this would be regulated by an act of Parliament that may be entirely symbolic as well.

Keyword: act of parliament – symbolism – symbolic legislation

1. Introduction

One of the fundamental requirements of the rule of law is that legal provisions should refer to the future and not to past situations. The aim of the law-making is to shape the legal sphere through the representatives of all members of the state community. This way, the legislator solves (consensus) or ends (closes disagreement) conflicts that appear in the social space. The basic form of action should be here, a statute adopted by deputies in an open and transparent legislative process. Nevertheless, since the 2015 election, we can notice the specific activity of the Polish legislator, which is not focused on the regulation of future behaviour. The purpose of such legislation is to provide a certain symbolic value, to emphasise its importance for the majority in the Parliament. The symbolism comes to the fore in

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this legislation, as if at the expense of the other functions of the act. The form of the statute has been chosen because of its importance within the system of sources of law and its feature of regulating the behaviour of individuals. Nevertheless, the statute's normativity is not taken into consideration, and it is even neglected. We can sometimes notice a magical effect attributed to a statute. Adoption of a piece of legislation is treated as tantamount to the implementation of the symbolism associated with it, i.e. confirmation of a specific value or sense expressed by a statute. This means that the legislator is not interested in generating effects in the legal sphere. What's more, by emphasizing the symbolism, the Parliament has weakened the basic aim of law-making that is relied upon in solving social conflict. By invoking symbolism, the legislator admits the uniformity of its understanding and acceptance in the human community, but disregards that such a community is not homogeneous¹. As a consequence, the Parliament has generated a social conflict, which seemed to be unexpected for the current majority in power. In this context, the question remains open as to why the parliamentary majority in Poland chooses a statute to emphasise symbolism, having at their disposal a whole range of means of expressing values associated with symbolism (e.g. appeal, resolution, declaration). The answer touches not only on the features of statutes as a source of law, but also on the motivations of the parliamentary majority.

The paper is structured as follows: firstly, the problem of symbolic function of a statute is discussed (2.), then examples of such a symbolic legislation are analysed (3.) and finally the possible reasons of such a systemic practice are provided (4.).

2. The symbolic function of a statute

The rudimentary function of the law is undoubtedly the regulation of social relations. In this manner, the legislator sets out the rules of behaviour in a specific social area. The regulatory function influences human actions by establishing specific patterns of behaviour and their legal effects. If this area is covered by constitutional regulation, the legislator has the task of implementing the standards outlined in the constitution. In this respect, every statute should implement and develop constitutional provisions. Obviously, statutory norms ought to refer to reality.

Sometimes, however, the legislator goes beyond purely regulatory and normative functions. The effect in the legal sphere is not the primary but secondary objective of the law. The expression of a specific value, meaning, belief or

¹ WŁOCH, W. *Demokracja zaczarowana* (Enchanted democracy) [online]. Available at: <https://www.gazetaprawna.pl/artykuly/988374,wloch-demokracja-zaczarowana.html> [23. 1. 2020].

attitude becomes a priority. Moreover, they are symbolically linked to an act, which therefore becomes a visible sign of something invisible (the symbolic legislation).

The phenomenon of symbolic legislation is known within the realms of legal sociology and has already been scholarly described². The two concepts of symbolic legislation which were highlighted: are both negative and positive. The first is when the stated purpose of the law does not coincide with a political objective that has not been publicly disclosed. The origin of this function is found in the Norwegian Law on Housemaids (1948). This regulation served only to create an illusion of social reforms, because of the lack of an adequate legal means to ensure effectiveness³. In theory, symbolic legislation is linked to the non-effective legislation⁴. Indeed, the legislator seeks to maintain *the status quo* by introducing ineffective legal measures.

Symbolic laws are not intended to implement legal norms, especially through sanctions (direct effect of the law). Nor are intended to achieve more fundamental objectives or values (indirect effects of the law)⁵. The legislator seeks to: (1) confirm a system of values of a particular social group, (2) demonstrate its power, or (3) resolve a conflict between two or more social groups or political parties. Important to note is that the symbolic function is rarely pure. It is combined with other functions (mainly regulatory or normative). It may also be combined with the instrumental use of law to achieve *ad hoc* political objectives. However, the instrumentalization of law differs from the symbolic legislation. For example, the Act of 28 December 2018 concerning excise duty could be seen as an instance of instrumentalization⁶. The statute has been used as an instrument to stabilize electricity prices despite the economic need for an increase. The purpose of the act is clear and oriented toward creating effects in the legal sphere that are in line with the political agenda of the parliamentary majority. The effectiveness and efficiency of the power exercised by the current majority and the fulfilment of electoral promises serves as the symbolic ground of instrumentalization.

² KLINK van, B., BEERS van, B., POORT, L. (eds.). *Symbolic Legislation Theory and Developments in Biolaw*. Springer International Publishing Switzerland, 2016, pp. 1–2.

³ AUBERT, V. *Some Social Functions of Legislation*, *Acta Sociologica* 1967, vol. 10, issue 1–2, pp. 97–120.

⁴ LEMBCKE, O. Symbolic Legislation and Authority. In: KLINK van, B., BEERS van, B., POORT, L. (eds.). *Symbolic Legislation Theory and Developments in Biolaw*. Springer International Publishing Switzerland, 2016, pp. 87.

⁵ KLINK van, B. Symbolic Legislation: An Essentially Political Concept. In: KLINK van, B., BEERS van, B., POORT, L. (eds.). *Symbolic Legislation Theory and Developments in Biolaw*. Springer International Publishing, Switzerland: 2016, pp. 22–23.

⁶ Dz. U. z 2018 poz. 2538. Hasty legislative process. [online]. Available at: <http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?id=965859E2E30B5FACC125836A005EB34C>

The symbolic concept in the positive sense can be identified when the legislator clearly indicates the purpose of the act and refers to values or attitudes in order to create legal effects, by using non-legal methods of communication and social interaction. The legislator identifies the preferred values of the society and introduces mechanisms for their implementation. Moreover, it seeks to shape specific attitudes and approaches of the individual. The symbolic legislation in the positive sense is widely used in biomedical law⁷. However, it can be found also in regulation of other societal spheres especially when the legislator formulates a preamble⁸. In a sense, the constitutional accountability could be considered an example of symbolic legislation in the positive sense. According to the Polish Constitution and the statute of the Tribunal of State⁹ the preferred situation is to prevent breaching of the law by state officials. Obviously, sanctions are also provided¹⁰. However, following the logic of the preventive effect, we trust that the sanction itself will affect the attitude of state officials so that they will not breach the law. The preference is thus revealed for a positive image of the officials as honest and trustworthy people. Unfortunately, this positive symbol of fair and law-abiding officials is undermined by some politicians disregarding constitutional accountability and procedures against them¹¹. Such a disregard may, in some sense, indicate the failure of symbolic function in the positive sense¹².

In the post-2015 election legislative practice in Poland, at least a few laws can be identified, whose intention is not an effect in the legal sphere, but to highlight certain values, attitudes or symbolic meaning. These statutes refer to certain values and those values are symbolically linked to the immanent characteristic of the law, which is effectiveness. As a consequence, the statute has been attached to a value in such a way that the value has been embodied¹³. The

⁷ KLINK van, B. Op.cit., pp. 19–20.

⁸ For example, the Act on Family Planning, Human Fetus Protection and pregnancy termination conditions of 7 January 1993 (Dz.U. Nr 17, poz. 78 ze zm.) or the Act on Disclosure of documents of the Security Service of 1944–1990, and the contents of these documents of 18 October 2006 (Dz. U. Nr 218, poz. 1592).

⁹ The Act of Tribunal of State of 26 March 1982 (Dz. U. 1982 r. Nr 11, poz. 84 ze zm.).

¹⁰ More on constitutional accountability BIEŃ-KACAŁA, A. Trybunał Stanu (The Tribunal of State). In: WITKOWSKI, Z., BIEŃ-KACAŁA, A. (eds.). *Prawo konstytucyjne* (Constitutional Law). Toruń: TNOiK 2015.

¹¹ [online]. Available at: <https://www.gazetaprawna.pl/artykuly/663974,ziobro-o-wniosku-o-post7awienie-go-przed-ts-premier-i-po-sie-osmieszaja.html> [3. 1. 2020].

¹² PŘIBÁŇ, J. On Legal Symbolism in Symbolic Legislation: A Systems Theoretical Perspective. In: KLINK van, B., BEERS van, B., POORT, L. (eds.). *Symbolic Legislation Theory and Developments in Biolaw*. Springer International Publishing Switzerland, 2016, pp. 105–119.

¹³ PŘIBÁŇ, J. Op.cit., pp. 108–109 and more RICOEUR, P. *Egzystencja i hermeneutyka. Rozprawy o metodzie* (Existence and hermeneutics. Essays on method). Warszawa: Pax, 1985, pp. 58–146.

normative function of the law was used for this purpose. Thus, the symbol is perceived as realized – “the word became flesh” in a sense. In such a situation, the legal effects of the legislation are irrelevant, as the law becomes the primary means of expressing a particular view of the world.

This phenomenon can be identified in the case of: the demotion Act¹⁴ and the amendments to the Institute of National Remembrance Act¹⁵ and the Supreme Court Act¹⁶. In the first two examples, the values represented were clearly indicated and separated from the legal effects of the Acts¹⁷. The values addressed were a settlement with the past and the protection of the image of a homogeneous Polish Nation were obvious. In the case of the amendment to the Supreme Court Act, the sovereignty of the Republic of Poland as a symbol was associated to the Act. The cases study will confirm the observations.

3. Examples of such a symbolic legislation

The subject matter literature identifies criteria that are helpful in identification of symbolic legislation. They concern the textual qualities of the law at hand (semantic criteria) and the context of the adoption of the law (pragmatic criteria)¹⁸.

The semantic criteria are as follows: “the substantive provisions are not backed up with provisions to enforce them and this discrepancy cannot be justified on rational grounds (*criterion of discrepancy*); the text of the law is incomprehensible for the citizens who have to comply with it as well as for the legal and political actors who have to apply it (*criterion of obscurity*); and the rules of which the law consist can be interpreted in various ways (*criterion of vagueness*). Pragmatic criteria are: in the legislative process two or more groups with conflicting or incompatible interests are fighting each other (*criterion of*

¹⁴ The Act of 6 March 2018 on the deprivation of the military rank of persons and soldiers in the reserve, who, in the years 1943–1990, had betrayed the Polish reason of state [online]. Available at: <http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=2319> [3. 1. 2020]. The Act was vetoed by the President of Poland on 30 March 2018.

¹⁵ The Act of 26 January 2018 amending the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (Dz. U. 2018 poz. 369). The repeal of the controversial provision occurred by the Act on 27 June 2018 (Dz. U. 2018 poz. 1277).

¹⁶ The Act of 21 November 2018 amending the Act of Supreme Court (Dz. U. 2018 poz. 2507).

¹⁷ [online]. Available at: <https://dzieje.pl/aktualnosci/z-romaszewska-ustawa-degradacja-na-jest-w-ogole-niepotrzebna> [3.01.2020]. Ustawa o IPN nie będzie działać [online]. Available at: <https://www.tvn24.pl/wiadomosci-z-kraju,3/instytut-pamieci-narodowej-o-stosowaniu-znowz-elizowanej-ustawy-o-ipn,817494.html> [3. 1. 2020].

¹⁸ KLINK van, B. Op.cit., pp. 22.

conflict of interest); one of the groups involved considers the enactment of the law as a moral victory over the other group (or groups) and a confirmation of its values (*criterion of politisation*); and society is in a state of emergency that calls for immediate governmental action (*crisis criterion*)¹⁹”.

According to the literature, the symbolic legislation can be identified if at least two of the criteria are met. In this respect, examples of the Acts pre-classified as symbolic legislation will be evaluated.

The symbolic function is the most obvious as far as the so-called Demotion Act is concerned. In the preamble of the Law of 6 March 2018 on the deprivation of the military rank of persons and soldiers in the reserve, who, in the years 1943–1990, had betrayed the Polish reason of state, we can find a simple reference to the symbolism²⁰. Among the semantic criteria, the criterion of discrepancy was directly identified. The President of the Republic of Poland pointed to it as a motive for vetoing of the Act²¹. The main issue was the lack of legal remedies against the effects of the implementation of the legislation in question. Still, it seems that the text of the Act is sufficiently understandable and clear to the addressees of the standards of conduct contained therein. The legal effects have been clearly defined and are virtually automatic in relation to a predefined group of people (especially the members of WRON²²). More importantly, deceased people are affected. The explanatory memorandum directly indicated the name of Gen. W. Jaruzelski²³. However, this end seems to be difficult to complete in a logical sense. In the context of pragmatic criteria, it should be noted that the conflict of interest has been logged by the President as existing in the social area. Moreover, the veto procedure revealed a conflict within the governing party. The President acted against “his” majority that passed the Act. The politicisation criterion was in principle included in the explanatory memorandum and was revealed in the discussions that took place at the time the law was adopted. The Act was undoubtedly aimed at confirming certain moral values. While the situation did not require immediate action, the ruling majority passed the Act promptly.

¹⁹ KLINK van, B. Op.cit., pp. 22.

²⁰ „... it is necessary to introduce a legal solution which will serve to clean up the Armed Forces of the Republic of Poland in the symbolic sphere”, translation by author.

²¹ [online]. Available at: <http://www.prezydent.pl/aktualnosci/wypowiedzi-prezydenta-rp/wystapienia/art,396,wystapienie-prezydenta-dotyczace-weta-do-tzw-ustawy-degradacyjnej.html> [3. 1. 2020].

²² The Military Council of National Salvation – a body responsible for state administration during martial law of 1981.

²³ “The bill will allow the Polish society to be compensated and will constitute a symbolic settlement of the epoch of the People’s Republic of Poland, in which the symptomatic was a career of Wojciech Jaruzelski, a collaborator of the Military Information Service during the Stalinist period”, translation by author.

In the context of the amendment to the Law on the Institute of National Remembrance²⁴, it should be stressed that the controversy was mainly raised at a level of international relations and concerned two issues. The first, covered by the original draft law, concerned the crimes of Ukrainian nationalists and Ukrainian formations collaborating with the Third Reich. The second, introduced in the draft law during the Sejm's hearings, concerned the crime of 'defamation of the Polish Nation'. Both provisions caused massive reactions from both Ukraine and Israel respectively, as well as in wider public discourse. It should be stressed that the symbolism was not disclosed in the explanatory memorandum to the amendment but can be identified on the basis of the circumstances surrounding the adoption and implementation of the Act. As a result, with regard to the semantic criteria of legislation, the first criterion of discrepancy was revealed by issues relating to the prosecution of foreign nationals abroad by Polish authorities. In addition, following a motion on constitutional review²⁵, the Marshal of the Sejm has explicitly stated that he does not imagine that the Act would be applicable until the Tribunal had dealt with the case²⁶. Thus, despite some implementation mechanisms, there was no political will to implement the Act. However, the provisions of the Act seem to be understandable to the addressees, although some vagueness has been highlighted in relation to the potential prosecution of researchers dealing with crimes committed during the occupation of Poland by the Third Reich. The lack of clarity of the regulations was alleged by the President in his motion to the Constitutional Tribunal. Pragmatic criteria focus not so much on conflict as on two differing visions of the Polish Nation. The first one assumes the existence of a homogeneous community which acts morally only, while the second vision assumes the heterogeneity of the Nation and the individualization of moral attitudes. These visions are based on a psychological mechanism to deal with the assessment of the ingroup²⁷. The conflict is permanent and has already been highlighted in the past. For some time, it has been obvious that the moral values are confirmed by the ruling majority in the legislative practice. Therefore, there is no need for a state of emergency. In a sense, however, we can find a need

²⁴ The Act of 26 January 2018 amending the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (Dz. U. 2018 poz. 369).

²⁵ Motion of 14 February 2018 (K 1/18). Mirosław Wyrzykowski presented his constitutional arguments in this regard in the paper: WYRZYKOWSKI, M. Law on The Institute of National Remembrance before The Constitutional Court. *Gdańskie Studia Prawnicze*, 2018, vol. XL, pp. 355–369.

²⁶ [online]. Available at: <https://www.tvn24.pl/wiadomosci-z-kraju,3/karczewski-w-jeden-na-jeden-ustawa-o-ipn-nie-bedzie-dzialac,816548.html> [3. 1. 2019].

²⁷ BILEWICZ, M. *Między idealizacją a hiperkrytycyzmem. Polska niepamięć historyczna i jej źródła* [Between idealization and hypercritical. Poland's historical oblivion and its sources], Instytut Studiów Zaawansowanych, Warszawa, Seria ANALIZY, Wrzesień 2018, pp. 1–8.

for immediate action in the following amendment to the Act which repealed the crime of defamation of the Polish Nation²⁸. The instant legislative repeal was driven by a severe political reaction from Israel and the USA. This immediate legislative change highlighted the moral base of the need to criminalize a specific assessment of the behaviour of Poles during the Second World War.

The third example of symbolic legislation is the Act of the Supreme Court which was amended in a hasty legislative procedure on 21 November 2018²⁹. In particular, the Act fulfils the criterion of discrepancy. Semantically, it provides clear and understandable legal provisions and mechanisms for their implementation. However, the Act itself is not able to raise legal effects, as the effects have already come into force based on the decision of the TSEU (especially interim measures)³⁰. What we can clearly see here is the pretence of law-making. The reasons are not clear, however. The explanatory memorandum of the Act states that the implementation of the interim measures of the Vice-President of the Court of Justice of the European Union (CJEU) requires the Member State's legislative procedure. The relationship between the EU legal system and the Polish legal system was therefore symbolically highlighted, giving supremacy to the Polish legal system. In a sense, there can be identified a conflict of interest between Poland and the European Union, where the value of the sovereignty of Poland has been emphasized in the expanse of the common European values. The crisis and the need for immediate legislative reaction was expressed in the explanatory memorandum of the Act. In the opinion of the ruling majority, passing the Act within three and a half hours and the failure to provide ample *vacato legis*, was justified thus.

The analysis shows that the symbolic legislation is connected to the protection and implementation of certain values that are important for the ruling majority (settlement with the past, the homogeneity of the Nation, the sovereignty of the Republic of Poland). These values are implemented in expanse of values so far recognized as important (right to defence, freedom of research, primacy of the EU law). The aim of the Acts is often clearly expressed in the explanatory memorandums, or is easily identified in the political declarations uttered in the context of the legislative process. This can be seen as a specific characteristic of Polish symbolic legislation. Obviously, such a legislation allows the political objectives of the ruling majority to be achieved³¹. The symbolic values are equated with the political aims. The law-making power thus confirms a certain view of the world

²⁸ The Act of 27 June 2018 amending the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (Dz. U. 2018 poz. 1277).

²⁹ Dz. U. 2018 poz. 2507.

³⁰ Case C-619/18 Commission v Poland, ECLI:EU:C:2018:852.

³¹ KLINK van, B. Op.cit., pp. 19.

while demonstrating its power in a hasty legislative process. Consequently, the hyperextension of the symbolic function can be noted. The main objective of the law-making seems to be the achievement of partisan goals rather than legal goals. The lack of the intent of regulating the legal sphere is shifting the law into a mystical phenomenon. The law becomes an instrument for the magical transformation of reality. It makes it possible to demote posthumously, recognize the homogeneity of the Polish Nation, or acknowledge supremacy of the Polish legal system over the EU law. The adoption of a symbolic statute does not, however, alter the fact that the actions of majority in power remain mainly on the level of “moral victory”. Thus, the Parliament does not solve or end the conflict, but rather generates it by the attempt to impose the specific world’s view on the whole society.

4. Conclusions

In conclusion, the Polish Parliament passes symbolic legislation to achieve political goals. Since the 2015 election, the ruling majority has promoted certain attitudes and emphasised certain symbolic values. The situation extrapolated on the new term of office that started after the 2019 election. The first and most spectacular example of symbolic legislation is the amendment to Acts of ordinary courts and of the Supreme Court³². The symbolic aim of the amendment is respect for independence of courts and the impartiality of judges explicitly shown in the preamble, while the political goal seems to be “cleansing of the judiciary” as was explicitly expressed by the Polish President³³. Obviously, there is no need for an immediate reaction to achieve this political goal but the will to impose certain values is primary among ruling politicians. Such a situation does not create a favourable milieu for sustainable development of civil society that respect pluralism and equality. the causes of the increase of symbolic legislation requires to be identified to resolve the situation. However, this is not an easy mission, as there might be many reasons rooted in historical development of the Polish society³⁴. Possible origin could be the loss of sovereignty as a result of the Partitions, the Second World War and the Soviet domination. Additionally, it seems that the Polish society has not settled with the past as there was not

³² The ongoing legislative process [online]. Available at: <https://www.sejm.gov.pl/Sejm9.nsf/proces.xsp>

³³ [online]. Available at: <https://oko.press/duda-o-sedziach-oczyszc-do-konca-nasz-polski-dom-iustitia-to-mowa-nienawisci/> [20. 1. 2020].

³⁴ DRINÓCZI, T., BIEN-KACAŁA, A. Extra-legal particularities and illiberal constitutionalism: the case of Hungary and Poland. *Hungarian Journal of Legal Studies*, 2018, vol. 59, no. 4, pp. 338–354.

a proper “transition ritual” that could bring a kind of relief³⁵. Thus, even after 30 years since the transformation to democracy, calls for such a settlement are still alive (eg the Demotion Act). The frustration increases in a sense, as the time perspective of Poles could be associated with past negative attitudes (eg protection of the positive image of the Polish Nation in the context of the Second World War)³⁶. The time negative past perspective makes it difficult to aim in the future and develop in a way that is free from the burden of loss of sovereignty (eg in relations with the European Union). In this context, it is somehow obvious that a symbolic legislation ceases to be a source of law. It has become a political and moral manifestation rather than a conflict solution. As a kind of truism could be perceived a postulate of appropriate education aiming at shaping a free, independent, aware society and responsible individuals. However, the education system remains in the hands of the ruling majority and the Parliament. Consequently, the demand for proper education can only be of symbolic importance.

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³⁵ MŁYNARSKA-SOBACZEWSKA, A. *Autorytet państwa. Legitymizacyjne znaczenie prawa w państwie transformacji ustrojowej* [Authority of a State. The Legitimization through law in the state of systemic transformation], Toruń: TNOIK, 2010, pp. 253–447 and 454–455.

³⁶ STOLARSKI, M., ZIMBARDO, P. Czas na Polskę! O perspektywie czasowej Polski i Polaków [It’s time for Poland! About the time perspective of Poland and Poles]. In: ZAJENKOWSKA, A. (ed.). *Polska na kozetce. Siła obywatelskiej refleksyjności* [Poland on a coach. The power of civic reflectivity], Sopot: Smak Słowa, 2016, pp. 227–237.

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