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Jacek Srokosz
University of Opole, Poland
ORCID: 0000-0002-7587-6483
jsrokosz@uni.opole.pl

Lawyers in Post-Transformational Society in Times of Populism: Guardians of the Hegemonic Status Quo or Agents of Social Change?

Prawnicy w potransformacyjnym społeczeństwie w czasach populizmu. Strażnicy hegemonicznego status quo czy rzecznicy zmian społecznych?

ABSTRACT

The article discusses the functioning of lawyers in a Central European, post-transformational society. It presents both the narrative created and spread by legal milieu concerning their social role, as well as how legal professions function and are perceived within society. Lawyers often describe themselves as agents of social change and as being actively involved defenders of individual rights. Meanwhile, they are more often perceived as guardians of the status quo, who serve the interests of the hegemonic class. This is illustrated by the situation in Poland after 1989, where such a narrative has prevailed since the very beginning of the transformation, and where problems connected with the actual functioning of legal professions have been accumulating. The gradually growing discrepancy between the narrative of the legal milieu and the social evaluation of their activities made lawyers an easy target for attack from politicians described as populist. The author suggests perceiving lawyers as agents of social change, who follow social expectations, rather than as guardians of post-transformational status quo.

Keywords: lawyers; post-transformational society; populism; hegemonic status quo; agents of social changes

CORRESPONDENCE ADDRESS: Jacek Srokosz, PhD, Assistant Professor, University of Opole, Faculty of Law and Administration, Institute of Law, Katowicka 87a, 45-060 Opole, Poland.

INTRODUCTION

It is strongly emphasized in contemporary Western societies that the legal professions (especially judges) play a special and important role in upholding liberal democracy and protecting individual rights vis-à-vis government. This standpoint, advocated mainly by the legal milieu, has been present in the public debate in Western countries, especially in the United States, and after the Second World War also in the countries of Western Europe.[1] According to the late Justice of US Supreme Court A. Scalia, this way of perceiving the role of lawyers resulted from a certain kind of colonisation of Western Europe by the American way of thinking about law, and through the adoption of American Supreme Court judiciary standards by the national constitutional courts of European countries, as well as the two European supranational courts (the European Court of Justice and the European Court of Human Rights).[2] According to A. Scalia, this process was a gradual one, and the adoption of American models went rather smoothly, including an adaptation to the local conditions of different European countries.

After the political transformations that took place in the authoritarian countries of Europe and South America (from the 1970s to the 1990s), the Western model of liberal democracy, together with all the philosophical reasoning and views emphasizing the importance of legal professions, was accepted and implemented in particular legal systems.[3] The special role of lawyers and their importance for democratisation and the implementation of social changes, which was to ensure a more comprehensive protection of civil rights, was accepted as something obvious and did not require broader justification. Nevertheless, that approach was gradually subjected to critique. Lawyers were claimed to be in fact guardians of the status quo, that is, the system in which they had a strong position.[4] Hence the

[1] For example, see A. Barak, *The Judge in Democracy*, Princeton 2006; J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review*, Cambridge 1980.

[2] A. Scalia, *Mullahs of the West: Judges as Moral Arbiters*, Warszawa 2009.

[3] S. Huntington called this phenomenon the "third wave of democratisation". See S. Huntington, *Democracy's Third Wave*, "Journal of Democracy" 1991, vol. 2(2); idem, *The Third Wave: Democratization in the Late Twentieth Century*, Norman 1993. Huntington's concept of the waves of democratisation was also criticised. See A. Przeworski, M.E. Alvarez, J.A. Cheibub, F. Limongi, *Democracy and Development: Political Institutions and Well-Being in the World, 1950–1990*, New York 2000; R. Doorenspleet, *Reassessing the Three Waves of Democratisation*, "World Politics" 2000, vol. 52(3).

[4] The strong position of judges is especially criticised – some authors even refer to it as "juristocracy", as a system where judges are holder of power. See R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Cambridge 2007; L.F. Goldstein, *From Democracy to Juristocracy*, "Law & Society Review" 2004, vol. 38(3); S.A. Sheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Changes*, Ann Arbor 2004.

official standpoint that the strong social position of lawyers was justified was only to mask the real structure of power.

This paper aims to analyse the functioning of the legal professions in post-transformation societies against the official standpoint of legal milieus. The analysis is based on the situation in Poland after 1989, a country which, following 45 years of actually existing socialism, embarked upon an accelerated transformation through a "shock therapy" imposition of capitalism and, in parallel, the introduction of Western-style liberal democracy and the rule of law. The paper focuses on the role of all legal professions, and the term "lawyer" used herein refers to all individuals with a legal education, not only practising attorneys, but also judges, notaries, prosecutors, as well as academic lawyers. The paper focuses on the role of the legal professions in contemporary Polish society, as well as their impact on the processes of social change and the average citizen's level of awareness of the law. For the purposes of this paper, it is necessary to discuss the roles of judges, barristers and solicitors, as these are the legal professions which can have the greatest impact on the social perception of the legal system, therefore other legal professions are less important in this context and so will not be discussed.

I discuss the narrative created and spread by lawyers about themselves as crucial entities in contemporary societies, depict situations involving law and lawyers in the People's Republic of Poland, and present the functioning of the legal professions after the transformation of 1989 and the dark clouds gathering over them. Finally, I present an outline of the Polish constitutional crisis after 2015.

The main claim advanced in the paper is that the legal professions in post-transformational societies should be more engaged in social changes and more responsive to social needs.

THE SIGNIFICANCE OF LAW AND LAWYERS IN CONTEMPORARY SOCIETIES

According to a narrative of the legal milieu in contemporary Western societies, law plays a crucial role and has become probably the most important factor which unites individuals into a body politic, due to several processes which are currently occurring.[5] Primarily, an ongoing process of deepening cultural differentiation in Western societies can be observed, which is closely connected with the disintegration of the moral system, that used to provide a uniform and unequivocal value system for all members of society. The disintegration of a commonly shared

[5] On the problem of law as the factor unifying modern multicultural societies, see D. Barek-Erez, *Law in Society: A Unifying Power or a Source of Conflict*, [in:] *Law and Sociology*, ed. M. Freeman, Oxford 2006.

value system results in cultural pluralism and the loss of traditional social bonds between individuals. In culturally uniform societies in Western Europe law was not the only normative system which shaped citizens' attitudes to each other. Of the numerous other normative systems, the most important was morality, which could exist and properly play its role only when commonly accepted. Therefore, when morality disintegrated it could no longer maintain its social significance and had to be replaced by other rules which could be accepted by every member of society, despite of his/her worldview.[6]

This need was met by legal rules which could be considered objective, neutral and not connected to any particular value system, and which could therefore be commonly accepted by all sectors of society. For this reason, law is treated as the only factor uniting culturally varied groups into a body politic. It is claimed that despite the fact that law in democratic states is created by the majority, in contrast to the moral system, legal rules can also include the interests of minorities. In the contemporary world, the language of public discourse has become mainly the language of law,[7] displacing other normative systems such as morality, common customs or standards of good behaviour. The role of legal language in democratic discourse can be compared to the significance of religious language in medieval times, as without knowing its meaning nobody could function in society or take part in public debate.[8] In the current public debate, we more frequently hear about somebody's right to do or to obtain something than we hear language based on moral evaluation. The domination of law in public discourse is certainly connected with the concept of human rights and the conviction that legal rules clearly describe the rights and duties of the individual and also constrain the power of the state, and are the most beneficial way to guarantee freedom and security for every human. Moreover, it can be seen that overreliance on law and the strong belief that every social problem can easily be solved with legal rules provide very fertile ground for the process of juridification.[9]

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[6] J. Habermas claimed that law provides plain and efficient problem-solving mechanisms which displace previous social processes that turned out to be ineffective. See J. Habermas, *Between Facts and Norms – Contributions to a Discursive Theory of Law and Democracy*, Cambridge 1996, p. 318.

[7] One aspect of the juridification public discourse is the displacement of politics by law. On that matter, see L. Trägårdh, M.X. Delli-Carpini, *The Juridification of Politics in the United States and Europe: Historical Roots, Contemporary Debates and Future Prospects*, [in:] *After National Democracy Rights, Law and Power in America and the New Europe*, ed. L. Trägårdh, Portland 2004; G. Silverstein, *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics*, New York 2009; A.M. Magnussen, A. Banasiak, *Juridification: Disrupting the Relationship between Law and Politics*, "European Law Journal" 2013, vol. 19(3); M. Croce, *The Politics of Juridification*, London 2018.

[8] A. Turska (ed.), *Humanizacja zawodów prawniczych a nauczanie akademickie*, Warszawa 2002.

[9] For a critical account of overreliance on law in contemporary society and process of juridification, see C. Staughton, *Za dużo prawa*, "Ius et Lex" 2002, no. 1; J. Kochanowski, *Jurydyzacja życia*, "Palestra" 2002, no. 7–8.

Juridification has many meanings. According to L.C. Blichner and A. Molander, we can distinguish at least five different definitions of this term in legal discourse.[10] For the purposes of this paper, it is not necessary to give a detailed definition of this term, since it suffices to state that in this context juridification is defined as the process whereby legal rules come to encompass all the spheres of social life, even those which were traditionally regulated by other normative systems, e.g. relations between family members.[11] The effects of this juridification are visible and strong in Europe, especially EU legislation which is based on detailed regulations of almost every aspect of social life that are believed to be enforceable and beneficial.[12]

The aforementioned facts cause lawyers to be among the leading figures in modern society. From the point of view of the free market, the legal professions can be treated just like any other service provider, but in fact their role is much more significant and this places legal professionals much higher in the hierarchies of power and society.[13] Primarily, their special status derives from their special knowledge of the meaning of the most important language in public discourse, as well as their ability to interpret and disclose this meaning and apply legal rules.[14] According to R. Pound, if the law is treated as a device for bringing about social change, then lawyers should become social engineers who initiate and conduct social change through the use of legal rules.[15]

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[10] L.C. Blichner and A. Molander (*Mapping Juridification*, "European Law Journal" 2008, vol. 14(1), pp. 36–54) distinguished the meaning of juridfication as: 1) "the process where constitutive rules and principles relating to a political system are established or changed to the effect of adding to the competences of the legal system"; 2) "a process through which law comes to regulate an increasing number of different activities"; 3) "a process whereby problems and conflicts increasingly are being solved by or with reference to law"; 4) "a process by which the legal system and the legal profession get more power as contrasted with formal authority"; 5) "the process by which people increasingly tend to think of themselves and others as legal subjects and as bearers of rights".

[11] G. Teubner, *Juridification – Concepts, Aspects, Limits, Solution*s, [in:] *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labour, Corporate Antitrust and Social Welfare Law*, ed. G. Teubner, Berlin–Boston 1987. The process of juridification is connecting with the cult of experts and meritocracy. See A. Sulikowski, *Posthumanizm a prawoznawstwo*, Opole 2013, p. 65; R. Mańko, *W stronę krytycznej filozofii orzekania. Polityczność, etyka, legitymizacja*, Łódź 2018, pp. 84–85, 124–125.

[12] See C. Maas (ed.), *Juridification in Europe: The Balance of Powers under Pressure?*, The Hague 2012.

[13] Cf. J. Srokosz, *Arguments for Separate Identity and Particular Importance of Lawyers in Contemporary Society in Narrative of Legal Professions*, [in:] *Law, Space, and the Political: An East-West Perspective*, eds. P. Bieś-Srokosz, R. Mańko, J. Srokosz, Częstochowa 2019; idem, *A Technicistic Perspective and Contemporary Perception of the Role of the Lawyers in Society in Poland*, [in:] *Law and Critique in Central Europe: Questioning the Past, Resisting the Present*, eds. R. Mańko, C. Cercel, A. Sulikowski, London 2016.

[14] B.A. Green, *The Lawyers Role in Contemporary Democracy*, "Fordham Law Review" 2009, vol. 77(4).

[15] R. Pound, *The Lawyer as a Social Engineer*, "Journal of Public Law" 1954, vol. 3, p. 292; L.J. McManaman, *Social Engineering: The Legal Philosophy of Roscoe Pound*, "St. John's Law

As social engineers, lawyers can have a great impact on the outcome of political discourse, especially when it concerns law and the democratic order.[16] According to the literature from Western countries, especially the US, lawyers have a great influence on the liberalisation of law and the functioning of the state, on three levels.[17] The first level is legal, meaning lawyers can improve the legal culture by educating individuals within society on legal issues in order to develop their legal awareness and, more generally, by building a legal culture within society. Also, an important role of the legal professions on this level is to limit the power of the authorities by enforcing legal constraints and ensuring that their activity is legal.[18] The second level is political, meaning lawyers can be very active in fighting for civil rights, counteracting discrimination and protecting minorities and those most exposed to the threat of social exclusion.[19] Finally, on the third and economic level, according to M. Weber, lawyers can play an important role in making the free market more predictable, rationalised, regular and transparent, thus meeting the requirements of both consumers and entrepreneurs.[20]

While performing their role in society, lawyers in general are active on the first and third level because these are closely connected with legal practice and this positive impact on society occurs as a side effect of professional activity. The second field of activity is different because the social role of lawyers on this level not only makes demands on them in the field of their professional work, but also requires deep political and social engagement, and very often opposition to the authorities. In many cases, lawyers are regarded as incapable of this because their priority is to serve the legal system. This point of view can be found especially in legal systems based on hard legal positivism.[21] In the positivistic concept of law,

Review" 1958, vol. 33(1); D. Howarth, *Law as Engineering: Thinking about What Lawyers Do*, Cheltenham 2013.

[16] According to A. Sulikowski, the role of social engineers in Poland was played by the judges of the Constitutional Tribunal. See A. Sulikowski, *Government of Judges and Neoliberal Ideology: The Polish Case*, [in:] *Law and Critique in Central Europe…*

[17] R.W. Gordon, *The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, "Theoretical Inquiries in Law" 2010, vol. 11(1).

[18] F.C. Zacharias, *The Lawyer's Role in Contemporary Democracy, Promoting Social Changes and Political Values: True Confessions about the Role of The Lawyers in a Democracy*, "Fordham Law Review" 2009, vol. 77(4).

[19] On the engagement and significance of lawyers in the field of fighting for citizen's right, see S. Sheingold, *op. cit.*; D. Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought*, "Law and Critique" 2015, vol. 25(1).

[20] M. Weber, *Economy and Society*, Berkeley–Los Angeles 1968, pp. 784–808. See also D. Trubek, *Max Weber on Law and the Rise of Capitalism*, "Wisconsin Law Review" 1972, vol. 3; D. Kennedy, *The Disenchantment of Logically Formal Legal Rationality: Or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, [in:] *Max Weber's Economy and Society: A Critical Companion*, eds. C. Camic, P. Gorski, D. Trubek, Stanford 2005.

[21] M. Zirk-Sadowski, *Prawo a uczestniczenie w kulturze*, Łódź 1998.

which is perceived as a well-ordered and hierarchical system of legal rules, the only role of lawyers is to be servants and guardians of the system, so for this reason legal professionals are very often regarded as natural allies of the authorities, or even worse, as simple executors of state orders.[22]

This seems to be rooted in the attitude adopted by lawyers who see themselves, in P. Kaczmarek's words, as the "executors of orders" received from the legislator, whose only task is to explain and apply the will expressed in statutory provisions.[23] This attitude has persisted among the participants of legal discourse, particularly in civil law countries, including Poland. This is to a considerable extent reflected in everyday legal practice and is present in legal thought, where it is the legal text itself or its author that are more important than its interpreter.[24] This attitude is also enhanced by the vision of the lawyer's identity, a model which is rooted in the institutional ethics of the legal professions.[25]

The necessity of changing the attitudes of lawyers to their social role is strongly advocated in the critical philosophy of law, where it is recommended that they (especially judges) engage more in implementing justice, even if this entails a departure from formal legal rules. In their critical approach to judicial decisions, C. Douzinas and A. Gearey propose restoring the ethical dimension of law, which may be achieved

[22] R. Shamir, *Managing Legal Uncertainty: Elite Lawyers in New Deal*, Durham–London 1995, p. 7. Legal education plays a very important role in preparing lawyers to serve to authority. See L. Jewel, *Bourdieu and American Legal Education: How Law School Reproduces Social Stratification and Class Hierarchy*, "Buffalo Law Review" 2008, vol. 56(4); Y. Dezalay, M.R. Madsen, *The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law*, "Annual Review of Law and Social Science" 2012, vol. 8. According to D. Kennedy, the essence of legal education and law schools is to prepare lawyers for thinking based on subordination and hierarchy. See D. Kennedy, *Legal Education and the Reproduction of Hierarchy*, "Journal of Legal Education" 1982, vol. 32(4).

[23] This issue is broadly discussed in P. Kaczmarek, *Tożsamość prawnika jako wykonawcy roli zawodowej*, Warszawa 2014, p. 124 ff.

[24] R. Sarkowicz, *Poziomowa interpretacja tekstu prawnego*, Kraków 1995, p. 43.

[25] Despite the fact the traditional positivist model of legal ethics dominates in Poland, with the lawyer perceived as an executor of orders, other visions of identity appear in the legal discourse and, consequently, other models of the social engagement of lawyers, which aim at breaking the positivist paradigm. Among these concepts, the following are particularly worth mentioning: 1) the juriscentrism of A. Kozak (*Granice prawniczej władzy dyskrecjonalnej*, Wrocław 2002), which posits the key role of lawyers as persons responsible for maintaining and developing legal culture and creating mechanisms for reaching compromises between the representatives of various social groups; 2) the interpretive holism of M. Matczak (*Summa iniuria. O błędzie formalizmu w stosowaniu prawa*, Warszawa 2007), which sees the lawyer as a co-creator of legal norms, in the construction of which the legal text is only one of the factors to be taken into account by the interpreter; 3) the multi-faceted model of legal ethics presented by P. Skuczyński (*Status etyki prawniczej*, Warszawa 2010), which argues that ethics is not only to solve the moral dilemmas inherent in the lawyer's profession, but it also has a social and moral dimension; 4) the dialogical model of legal ethics by P. Kaczmarek (*op. cit.*), where the author suggests the necessity of reconciling the professional role of the lawyer with their personal moral convictions and social considerations.

through including politics in legal discourse and shifting the judicial focus from the formally established abstract situations described by legal regulations to the individual establishment of justice, i.e. casuistry. The lawyer should therefore no longer guard that abstract order, but should rather implement the principle of individual justice.[26] The views of C. Douzinas and A. Geary correspond to D. Kennedy's project of lawyers' engagement. According to D. Kennedy, lawyers (judges) should modify social reality, which requires a departure from camouflaged objectivity and ideological indifference towards implementing certain ideological projects within the limits set by legal rules.[27] According to R. Mańko, Kennedy's project comes down to a transition from a judge-Hercules striving to find an objective solution (which in fact serves the interests of the establishment) in a given case, to a judge-Prometheus, whose task is not only to adjudicate but to adjudicate to the benefit of the weakest.[28]

All these proposals unequivocally lead to a departure from the conception of the lawyer as "executor of orders" towards the lawyer as an engaged agent of social changes. In my opinion, these proposals are fully justified and, contrary to the opinions frequently expressed by representatives of the liberal legal mainstream, their implementation is not only feasible, but also desirable. Above all, if lawyers act as agents of social changes, their prestige and position within the system of power are higher, which also makes them less vulnerable to populist attacks. Although throughout history there have been countless examples of legal professionals acting as supporters of the authorities, it should be emphasised that there have also been many instances in which legal professionals have been agents of revolutionary social change. Excellent examples of socially engaged legal activity can be found in the American Revolution, the French Revolution of 1789 and in the American Civil Rights Movement in the 1970s.[29] In all these situations, lawyers were very active and played crucial roles in social change, which allowed them to build their success and professional prestige.

THE ROLE OF LAWYERS IN THE POLISH PEOPLE'S REPUBLIC

During the period of the Polish People's Republic, the Communist Party treated law in two ways. Firstly, Marxist philosophy regarded law as a tool of the ruling class for controlling and dominating the subordinated social classes, therefore it

[26] C. Douzinas, A. Gearey, *Critical Jurisprudence: The Political Philosophy of Justice*, Oxford–Portland 2005.

[27] D. Kennedy, *A Critique of Adjudication (fin de siécle)*, Cambridge 1997.

[28] R. Mańko, *W stronę krytycznej filozofii orzekania…*, Łódź 2018, p. 197.

[29] See more Y. Roznai, *Revolutionary Lawyering? On Lawyers' Social Responsibilities and Roles During a Democratic Revolution*, "Southern California Interdisciplinary Law Journal" 2013, vol. 22(2).

could not be considered independent and neutral with regard to policy.[30] Secondly, the law was viewed as deeply engaged in a political context, meaning it should be applied in accordance with the interests of the Polish United Workers' Party (PZPR) and the socialist revolution.[31] For these reasons, legal professionals were treated not just as guardians applying the rules of the legal system, but also as agents of the Communist Party who were fully engaged in implementing socialism and were obliged to enforce the law in harmony with the interests and needs of the working class.[32] This was true of not only judges and prosecutors, who were expected to be totally compliant with the orders from the PZPR, but also other legal professions. In sum, lawyers under state socialism were treated as agents of the interests of the Communist Party and in many cases, especially during the Stalinist period in Poland, from 1944 till 1956, many judges and prosecutors were absolutely compliant with and subordinated to orders coming from the authorities.[33]

This does not mean that all legal professionals were simply the minions of communist authority. Many of them, especially after 1956, opposed treating the law as a simple instrument for fighting the real and imaginary enemies of the Polish People's Republic. They did not want to apply the rules according to the interests of the authorities and consequently took to practising a highly-developed hard positivism ("hyperpositivism") when applying the law.[34] This "hyperpositivism" was based on strictly and precisely enforcing the rules of law on the basis of its literal meaning, which allowed lawyers to avoid the Communist Party's expectations and requirements that the law should be applied in accordance with their interests. This tactic, based on strictly observing the law and used mainly by judges and prosecutors, many of whom were opposed to communist rule, was the only way to defy the official ideology and guarantee freedom from the politically imposed obligation to engage in communist policy.[35] In many cases, they choose this pro-

[30] For a broader discussion on the Marxist theory of law as politically engaged, see A. Hunt, *Marxist Theory of Law*, [in:] *A Companion to Philosophy of Law and Legal Theory*, ed. D. Patterson, Chichester 2010, p. 22. See also M. Cain, A. Hunt, *Marx and Engels on Law*, London 1989; H. Collins, *Marxism and Law*, Oxford 1982; A. Hunt, *Marxism, Law, Legal Theory and Jurisprudence*, [in:] *Dangerous Supplements: Resistance and Renewal in Jurisprudence*, ed. P. Fitzpatrick, London 1991.

[31] T. Stawecki, *Niezależność zawodów prawniczych i rządy prawa w społeczeństwie postkomunistycznym*, [in:] *Niezależność sądownictwa i zawodów prawniczych jako fundamenty państwa prawa. Wyzwania współczesności*, eds. T. Wardyński, M. Niziołek, Warszawa 2009, p. 53.

[32] See C. Cercel, *Towards Jurisprudence of State Communism: Law and the Failure of Revolution*, Abington 2018.

[33] A. Lityński, *Historia prawa Polski Ludowej*, Warszawa 2013.

[34] T. Milej, *Europejska kultura prawna a kraje Europy Środkowej i Wschodniej*, "Przegląd Legislacyjny" 2008, vol. 5(1); R. Mańko, *Weeds in the Gardens of Justice? The Survival of Hyperpositivism in Polish Legal Culture as a Symptom/Sinthome*, "Pólemos" 2013, vol. 7(2).

[35] Z. Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?*, Leiden–Boston 2011, pp. 158–159. See also Z. Fleck, *Judicial Independence and Its*

fession because it provided the best opportunity to avoid political pressure from the authorities and made them less of a target for communist ideology. During the communist period in Poland, many attorneys (Pol. *adwokaci*) actively opposed the Communist Party, especially as they defended workers in political trials who were accused of anti-state activities (taking part in workers' strikes and riots in the 1970s and 1980s).[36] Therefore, the communist authorities did not trust attorneys and treated them as a necessary relic from bourgeois times. It should also be mentioned that for ideological reasons all legal professions were generally underpaid, since the communist authorities preferred to reward the working class.[37] Many social groups were treated much better by the authorities than lawyers, especially workers in heavy industry, hence there were no incentives in society to become a lawyer or even enter higher education.

The situation of lawyers in communist times had a great impact on their conduct after the democratic transition of 1989–1991,[38] which presented a considerable opportunity for lawyers to play a much more important role in society than was possible during the communist period.[39] Subsequently, legal professionals were reluctant to engage in policy and desired rather to improve their standard of living. The outcome of these attitudes is evident in the practice of law in the Republic of Poland.

POLISH LEGAL PROFESSIONS AFTER THE TRANSFORMATION OF 1989

After the political transformation in Poland, the legal professions found themselves in a completely different situation, as their social significance grew rapidly due to two different factors.[40] Firstly, the free market needed legal services and an

Environment in Hungary, [in:] *Systems of Justice in Transformation*, eds. J. Přibáň, P. Roberts, J. Young, Dartmouth 2003, p. 133.

[36] A. Redzik, T. Kotliński, *Historia adwokatury*, Warszawa 2018.

[37] Z. Kühn, *op. cit.*, pp. 52–57.

[38] On the transformation of the Polish system in the 1990s, see J. Hardy, *Poland's New Capitalism*, London–New York 2009; T. Kowalik, *From Solidarity to Sellout: The Restoration of Capitalism in Poland*, New York 2012.

[39] M. Safjan, *Wyzwania dla państwa prawa*, Warszawa 2007; R. Piotrowski, *Sędziowie i granice władzy demokratycznej w świetle Konstytucji RP*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2018, vol. 80(1).

[40] On the issue of law in Poland during the transformation, see R. Mańko, *Law, Politics and the Economy in Poland's Post-Socialist Transformation: Preliminary Notes Towards an Investigation*, [in:] *Central and Eastern European Socio-Political and Legal Transition Revisited*, eds. B. Fekete, F. Gárdos-Orosz, Bern 2017.

appropriate legal system. Secondly, the rule of law had to be applied.[41] After the transformation, the market-oriented legal professions had to face different problems than those faced by judges, so it is necessary to consider each situation separately.

1. The market-oriented legal professions

In this section, I focus on two specific legal professions in the context of the developing legal market at that time: advocates (Pol. *adwokaci*) and legal advisors (Pol. *radcowie prawni*). Whereas advocates were the traditional legal profession, combining the powers and tasks of English barristers and solicitors in one, legal advisors emerged in the 1950s as in-house lawyers of the state enterprises and public administration, to become formally an independent legal profession only in the 1980s. Initially, they could only represent institutional clients and could not act as defence lawyers or family lawyers, but today both professions have the same duties and powers; the only outstanding difference being that advocates cannot be employed under an employment contract, while legal advisors may.[42]

These two professions were amongst those which benefited most from the Polish transformation of 1989, as the emerging market economy of the early 1990s generated a high demand for legal services and significant opportunities for those professions to benefit from these social changes. The majority of lawyers were only interested in earning money, which resulted in them being less interested in public service and reduced the significance of their role in creating and shaping legal culture.[43] This attitude was in line with the classic slogan of capitalism formulated by French historian and Prime Minister L.P.F. Guizot, who advised "enrich yourselves", and this is what most legal professionals did. Consequently, the increased demand for legal services made them very profitable, which in turn led to increased interest in studying law.

Lawyers who started their careers in the 1990s rapidly formed a closed elite which resisted the influx of practicing lawyers, especially from outside legal en-

[41] For a discussion on the rule of law in post-communist societies, see A. Czarnota, M. Krygier, W. Sadurski, *Rethinking the Rule of Law after Communism*, Budapest–New York 2005; C. Kuti, *Post-Communist Restitution and Rule of Law*, Budapest–New York 2009. The significance of the lawyers in shaping of the rule of law was discussed in A. Dieng, *Role of Judges and the Lawyers in Defending the Rule of Law*, "Fordham International Law Journal" 1997, vol. 21(2).

[42] The legal framework for both professions, laid down in their respective acts, is very similar. See Act of 26 May 1982 – Law on the Bar (consolidated text, Journal of Laws 2022, item 1184, as amended); Act of 6 July 1982 on legal advisors (consolidated text, Journal of Laws 2022, item 1166, as amended).

[43] M. Safjan, *Rola prawnika w społeczeństwie*, Lublin 2003, p. 34.

vironments.[44] After 15 years of attempting to keep access to the legal professions tightly shut, their resistance was broken by changes in the law which transferred responsibility to the Ministry of Justice for organising the initial exam, which allows access to the 3-year professional bar training (Pol. *aplikacja*) culminating in the final law exam.[45] Subsequently, access to the legal professions in Poland became much more open, which resulted in a huge number of new lawyers flooding the legal services market each year.[46] This led to a very clear split in the legal professions. Older advocates and legal advisors held their positions, while their younger counterparts were too numerous and had to fight for their position in the market. This created situations in the legal market which did not motivate lawyers to become more socially engaged, as the older generation was not interested in social change and the younger had neither the time nor the will to engage in public discourse.[47]

In general, market-oriented legal professions are not deeply engaged in public discourse and do not involve themselves in public debate on most issues, even those concerning typical legal problems. This lack of interest is replaced with brisk activity when it comes to issues concerning changes in law which affect them. For example, they were very vociferous and active in the public debate concerning the deregulation of these professions and the opening of access to them.[48] Another problem is excessive professional solidarity. In the 1990s, it was almost impossible to expel a lawyer from the profession, even if he/she flagrantly breached the rules of law or ethical codes.[49] The increasing rivalry amongst professional lawyers is stimulating change in this area, but progress is still very slow and the legal industry still prefers to cover up rather than expose this kind of problem.

[44] B. Sitek, *Rynek pracy prawników w Polsce po deregulacji zawodów prawniczych (adwokata i radcy prawnego)*, "Studia Prawnoustrojowe" 2016, no. 32, pp. 171–172.

[45] See M. Wenclik (ed.), *Deregulacja zawodów w Polsce*, Łomża 2015, pp. 42–66.

[46] In 2005 in Poland there were 6,191 attorneys and 17,501 legal advisors, and in 2016 respectively 16,904 and 30,938. The growth of attorneys was 160% and legal advisors 77% in 11 years. See K. Gadowska, *Otwarcie zawodów adwokata i radcy prawnego w Polsce po 1989 roku*, "Prakseologia" 2018, no. 160, p. 269.

[47] The situation of the legal service market after access to the legal professions was opened in Poland is discussed in: K. Nizioł, *Deregulacja zawodów prawniczych i jej wpływ na konkurencję na rynku usług prawniczych*, "Acta Iuridica Stetinensis" 2018, no. 3. The situation of the youngest trainee lawyers (legal applicants) in Poland was presented in a report issued by the Center for Legal Education and Social Theory at Wroclaw University. See M. Stambulski, W. Zomerski, *Nużący rytuał. Aplikacja adwokacka i radcowska w Polsce*, Wrocław 2019, http://www.bibliotekacyfrowa.pl/dlibra/publication/101947/edition/94782/content?ref=desc (access: 27.3.2025).

[48] See J. Agacka-Indecka, *W Sejmie i Senacie. Sprawozdanie z zakończenia prac parlamentarnych nad zmianą ustawy – Prawo o adwokaturze*, "Palestra" 2005, no. 9–10.

[49] M. Zirk-Sadowski, *Uczestniczenie prawników w kulturze*, "Państwo i Prawo" 2002, no. 9, pp. 6–7.

2. Judges

In many countries, judges are primarily the agents of social change as they have the greatest influence on law making, with the United States being the archetypical case. In Poland, which is typical for a country with a civil law system, judges cannot officially create new legal rules, but only interpret and apply those which have been duly enacted by the legislature, but unofficially they have a strong influence on the legal system by way of more or less creative interpretation. After 1989, Polish judges (except those from the Constitutional Tribunal in some cases) did not become active agents of social change and were very reluctant to base their judgments on any values other than the literal meaning of the written legal provisions.[50] This hyper-positivistic approach of the judiciary also continued after the political system changed, due to fears of being accused of political engagement and lack of neutrality during legal proceedings.[51] The reluctance of judges to make independent decisions on unusual or socially-sensitive situations is especially evident in controversial cases concerning free-speech and hate crimes.[52] This fear of accusations of political engagement is, in some way, justified because it is reminiscent of the politically involved judiciary of the former political system. However, this situation leads to a very formal application of the law in situations in which the demands of society are completely different.[53]

Another problem with Polish judges, which is described in the literature, is the "besieged stronghold syndrome".[54] This syndrome relates to the tendency of judges to think of themselves as the only and ultimate stronghold, maintaining and guarding the rule of law and democracy in Poland. Moreover, this stronghold is regarded as if it were under permanent attack from politicians and populists, meaning the judiciary has to defend democracy and the rule of law to prevent the democratic system being

[50] E. Łętowska, *Kilka uwag o praktyce wykładni*, "Kwartalnik Prawa Prywatnego" 2002, vol. 11(1).

[51] The relations between law and politics are discussed in A. Sulikowski, R. Mańko, J. Łakomy, *Polityczność prawa i ogólnej refleksji nad prawem: zagadnienia ogólne*, "Archiwum Filozofii Prawa i Filozofii Społecznej" 2018, vol. 3, pp. 5–9. The problem of the connection between judges and the political is discussed in R. Mańko, *Orzekanie w polu polityczności*, "Filozofia Publiczna i Edukacja Demokratyczna" 2018, vol. 7(1).

[52] For instance, the Nieznalska case – concerning a Polish artist accused of blasphemy – the Supreme Court's final decision was made on the basis of formal academic issues in order to avoid a merit decision about the limits of artistic free speech. On this case, see broadly D. Gozdecka, *Europe Changing Approach Towards Blasphemy: The Right Not to Be Offended, Sensitive Identities and Relativism*, [in:] *Law and Outsiders: Norms, Processes and "Othering" in 21st Century*, eds. C. Murphy, P. Green, Oxford–Portland 2011, p. 240.

[53] E. Łojko, *Role i zadania prawników w zmieniającym się społeczeństwie*, Warszawa 2005, pp. 200–201.

[54] J. Ignaczewski, *Wymiar sprawiedliwości – teraźniejszość i przyszłość*, Warszawa 2008, p. 57 ff.

replaced by a more or less authoritarian dictatorship.[55] This syndrome is highlighted here as it is typically found in the mentality of the elites of post-colonial societies, leading to sensitivity on the part of judges over the independence of their judgments. Judicial independence is defined very broadly and includes freedom from the social criticism of judgments, very often meaning that criticism is treated as an attack and a threat to judicial independence.[56] Associated with this is a reluctance to give more elaborate reasons for judicial decisions and many representatives of the judiciary require society to just accept their judgments without question.[57] This kind of attitude makes it difficult for judges to be active agents of social change, as this would require not only simply applying the literal meaning of the law, but also a willingness to educate society on legal matters. In this context, it is very important for judges not to put themselves in an "ivory tower", but instead to be very active in shaping the social sense of law, which can be achieved by explaining to society the reasons and values which induce them to issue any given judicial decision.[58]

TOWARDS CRISIS – LAWYERS UNDER ATTACK FROM POLITICIANS

The activity and engagement of the legal professions in shaping social attitudes to law is one of the most important problems in contemporary Poland. The level of acceptance and understanding of law amongst ordinary Poles is very low, and trust in the judiciary is falling proportionally each year.[59] This situation can only be partially explained by the Poles' general tendency not to identify with the state and its law, for historical reasons. During the last three centuries, a truly independent

[55] See A. Sulikowski, *Współczesny paradygmat sądownictwa konstytucyjnego wobec kryzysu nowoczesności*, Wrocław 2008; idem, *Konstytucjonalizm a nowoczesność. Dyskurs konstytucyjny wobec tryumfu i kryzysu moderny*, Wrocław 2012.

[56] A. Kojder, *Prawo w impasie*, [in:] *Polska, ale jaka?*, ed. M. Jarosz, Warszawa 2005, p. 142. Similar problems also exist in other post-communist Central European countries. See M. Bobek, *The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries*, "European Public Law" 2008, vol. 14(1).

[57] E. Łętowska, *Prof. Ewa Łętowska punktuje sędziów, którzy sądzą bez zrozumienia*, 29.8.2014, https://prawo.gazetaprawna.pl/artykuly/818520,prof-ewa-letowska-punktuje-sedziow-ktorzy--sadza-bez-zrozumienia.html (access: 27.3.2025).

[58] A. Sulikowski, *Trybunał Konstytucyjny a polityczność. O konsekwencjach upadku pewnego mitu*, "Państwo i Prawo" 2016, no. 4. See also K. Lenaerts, *The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice*, [in:] *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice*, eds. M. Adams, H. de Waele, J. Meeusen, G. Straetmans, Oxford–Portland 2013, p. 13.

[59] See Centrum Badania Opinii Społecznej, *Społeczne oceny wymiaru sprawiedliwości*, 2017, https://www.cbos.pl/SPISKOM.POL/2017/K_031_17.PDF (access: 27.3.2025).

Polish state has only existed for 50 years,[60] the rest of the time the territories of today's Poland were either part of other states[61] or the Polish state was completely dependent on neighbouring states.[62] In those times, the state was treated as something hostile to citizens, and the law was viewed as simply an instrument designed to control and subordinate individuals to foreign authorities, therefore there was no expectation that citizens should know and understand the law, only that they observe it. This situation created an acute split in Polish society, with the attitude towards the state being "us" against "them", and the law always viewed as the instrument of oppression used by "them". This situation was not only limited to Poland, but in general seems to be characteristic for Central Europe – a territory ruled by other empires (German, Russian, Austrian, Ottoman) during the entire 19th century, and often for a much longer period, contributing to its peripheral status.[63]

The split between foreign law and the domestic society can be exacerbated by the attitude of lawyers, whose priority is to preserve the rule of law in a strict and literal fashion. As I mentioned previously, law during the communist period was an instrument for fighting class-enemies and was interpreted in accordance with the needs of communists, so in legal environments the priority was only to prevent this situation and guarantee equality and justice by means of the strict application of the law. Since the transformation, it has been naively assumed that the same approach ought to solve every problem, leading to a system based on clarity and security, in which law, not man, is the ruler. This attitude could explain the passivity of the legal professions in the field of social change, as this is not a priority for them. Instead, it is treated like a side effect of unifying and ordering the legal system, which justifies their social passivity. If this is the case, lawyers should try to meet the social expectations of justice rather than try to maintain the purity and clarity of the formal legal system.[64]

In general, lawyers in Poland are not interested in participating in the processes of social change. Judges and market-oriented legal professionals alike perceive their roles as passive defenders of a static legal system.[65] The latter are more interested in the benefits of a free market economy and so perceive the role of the lawyer in society as simply a provider of special services, not as an agent of social change.

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[60] 1918–1939 (Second Republic) and 1989 – today (Third Republic).

[61] As was the case between 1795 and 1807, and later – between 1864 and 1918.

[62] From the "Silent Sejm" (1717) until the third partition (1795) the Polish-Lithuanian Commonwealth fell under the dominance of Russia, the Duchy of Warsaw (1807–1814) was dependent on France, the Kingdom of Poland (1815–1864) was in personal union with Russia, and the People's Republic of Poland (1944–1989) was de facto dependent on the USSR.

[63] R. Mańko, M. Škop, M. Štěpáníková, *Carving out Central Europe as a Space of Legal Culture: A Way Out of Peripherality?*, "Wroclaw Review of Law, Administration and Economics" 2016, vol. 6(2), p. 10.

[64] M. Zirk-Sadowski, *Uczestniczenie prawników…*

[65] T. Raburski, *Profesjonalizm i ekskluzywizm prawników w społeczeństwach liberalno-demokratycznych*, "Filo-Sofija" 2017, no. 37, p. 35.

The social dimension of the legal professions and their impact on the legal culture of society is underrated by legal milieu. This attitude is contributing to increasing the previously mentioned isolation of lawyers from society and their reluctance to engage in public affairs, which resulted in a divergence between the official standpoint of the legal milieu from the opinion of the society.

The isolation of lawyers from society makes them more prone to the attacks of politicians – in 2015, just after the election and their becoming the ruling party, Prawo i Sprawiedliwość (Law and Justice) began a war against the judiciary and its key institutions: the Constitutional Tribunal, the Supreme Court and the hitherto independent National Council of the Judiciary.[66] Characteristically, the government's attacks against the judiciary were accompanied by the indifference of the majority of Poles. When speaking about the crisis, the lawyers were trying to convey to the public why the judiciary is so important and crucial for the protection of citizens' rights.[67] However, the list of examples of judges who had stood up for these rights and broadened their scope was not usually very long. The Constitutional Tribunal, which actively upheld and even expanded neoliberal policies during the 25 years after the transformation, is a case in point. While it contributed to the dismantling of various legal institutions and rules which it deemed to violate freedom of economic activity and other neoliberal principles, it did virtually nothing to defend social rights, despite the clear mandate in Article 2 of the Polish Constitution[68] which provides that the Republic of a Poland is a democratic state of law applying the principles of social justice. This can explain why the citizens did not engage in defending the judges from attacks by the politicians. Despite what the judges were saying, they were not considered to be defenders of the people, but just another element of power, often corrupt and by no means independent of political influence.[69] They could not therefore be perceived as

[66] On the Polish constitutional crisis, see W. Sadurski, *Poland's Constitutional Breakdown*, Oxford 2019; A. Kustra, *Poland's Constitutional Crisis: From Court-Packing Agenda To Denial of Constitutional Court's Judgments*, "Toruńskie Studia Polsko-Włoskie / Studi Polacco-Italiani Di Toruń" 2016, vol. 12; T. Koncewicz, *The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux*, "Review of Central and East European Law" 2018, vol. 43(2); K. Kobyliński, *The Polish Constitutional Court from an Attitudinal and Institutional Perspective Before and After the Constitutional Crisis of 2015–2016*, "Wroclaw Review of Law, Administration & Economics" 2016, vol. 6(2).

[67] For example, see Rzecznik Praw Obywatelskich, *Wyroki Trybunału Konstytucyjnego, które wpłynęły na życie obywateli*, 16.12.2015, https://www.rpo.gov.pl/pl/content/wyroki-trybunalu-konstytucyjnego-ktore-wplynely-na-zycie-obywateli (access: 27.3.2025).

[68] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, no. 78, item 483, as amended). English translation of the Constitution is available at https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (access: 26.3.2025).

[69] See B. Kociołowicz-Wiśniewska, B. Pilitowski, *Ocena polskiego sądownictwa w świetle badań*, 2017, https://courtwatch.pl/wp-content/uploads/2017/05/Raport-Fundacji-Court-Watch-Polska-Ocena-polskich-sądów-w-świetle-badań-maj-2017.pdf (access: 27.3.2025).

the defenders of the citizen against state power. This criticism fuelled the so-called populist trends aiming to reject the existing social order and deprive the lawyers of their special role in the democratic state.

CONCLUSIONS

The perception of lawyers in the post-transformational society has gone through a number of stages. During the first years of the transformation, they were actually perceived as agents of some social changes, which was made credible by the oppositionists who had struggled to protect the rights of persecuted individuals during the authoritarian rule. This explains why the society was initially enthusiastic about accepting the rule of law and why the opinions of the legal milieu were considered credible. With time, however, the lawyers' role was increasingly often reduced to maintaining the status quo or strengthening the mechanisms of the rule of law. According to a former judge of the Constitutional Tribunal in Poland, E. Łętowska, after the period of heroic struggles to establish the rule of law, the role of lawyers is "to sculpt" it.[70] Thus, great changes or social transformations are no longer necessary. The lawyers' task is therefore to maintain the status quo and, if needed, alter the social order so that it can be more just. This can be achieved by developing the mechanisms designed to maintain such a status quo, but without radical changes in reality.

The way in which I have depicted the functioning of legal professions in this paper is not in line with the officially proclaimed standpoint or with the social assessments in post-transitional countries, especially in Central Europe. This discrepancy forms the basis for questioning the status of lawyers in the social structure. According to their own vision, they should play a paternalistic role in society, protecting it from state power through preserving and consolidating the status quo and not introducing further changes. In a situation where social expectations are clearly oriented towards profound changes and the rejection of the existing social and economic model, lawyers are beginning to be seen as obstructers of change, and the law is viewed as an unfair system that prevents the implementation of justice. The term "legal impossibilism" is often used in Poland to present law and administration of justice as structures shaped in such a way so as to make it impossible to carry out any reforms, including socially expected ones.[71] It is used by the parties described as populist to channel social discontent and blame the lawyers, the guardians of the status quo. It is no surprise therefore that, having assumed power, the first target of their attacks was the legal community, in particular the

[70] E. Łętowska, K. Sobczak, *Rzeźbienie państwa prawa 20 lat później*, Warszawa 2012.

[71] J. Zajadło, *Pojęcie „imposybilizm prawny" a polityczność prawa i prawoznawstwa*, "Państwo i Prawo" 2017, no. 3.

judiciary, which led to constitutional crises such as the one in Hungary after 2010 or the one in Poland after 2015.

The post-transformational societies have been going through a crisis of faith in the social role played by lawyers, which resulted in a gradual rejection of the existing vision of the rule of law and the role of lawyers as defenders of individual rights. It seems that maintaining the previous and current status of lawyers in society will only be possible if they cease to be isolated from others, become more strongly involved in social life and convince society that they actually act as defenders of individual rights. Optimistically, however, due to the crisis, lawyers have actually started noticing that it is necessary to become more engaged in social life and to provide legal education to society.

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ABSTRAKT

W artykule omówiono funkcjonowanie prawników w środkowoeuropejskim społeczeństwie potransformacyjnym – z jednej strony przedstawiono narrację środowisk prawniczych na temat ich roli społecznej, a z drugiej pokazano, w jaki sposób zawody te funkcjonują w rzeczywistości oraz jak są postrzegane przez społeczeństwo. Prawnicy w prowadzonej narracji chętnie przedstawiają siebie jako agentów zmian społecznych, czynnie zaangażowanych obrońców praw jednostek. Tymczasem częściej są postrzegani jako strażnicy status quo służący interesom szeroko rozumianej klasy hegemonicznej. Jako przykład dla omówienia tego tematu posłużyła Polska po 1989 r. Od samego początku transformacji zaznaczyła się tu dominacja takiej narracji prawników, a równocześnie nawarstwiały się problemy związane z rzeczywistym funkcjonowaniem zawodów prawniczych. Stopniowo narastający rozdźwięk pomiędzy narracją środowisk prawniczych a społeczną oceną ich działalności uczynił z prawników łatwy cel ataku ze strony polityków określanych mianem populistów. Autor postuluje rzeczywiste wdrażanie postulatu prawników jako rzeczników zmian społecznych, porzucenie roli strażników dotychczasowego potransformacyjnego porządku oraz podążanie za kierunkiem oczekiwań społecznych.

Słowa kluczowe: prawnicy; społeczeństwo potransformacyjne; populizm; hegemoniczne status quo; rzecznicy zmian społecznych