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THE COMMON GOOD*

The common good is one of the foundations of the Polish Republic, and is thus expressed in the Polish Constitution. The Constitution of May 3 [1791] already declared its enactment 'for the general welfare', alongside the 'establishment of liberty' and 'preservation of our country and its borders', and as such it was an important, third goal to the enacting of the constitution itself;[1] the state is not given here as a concept supreme to all others. It also specifies the concept of the common good, concepts of the state and the servient character of the latter's authorities towards the community. In this understanding the state is not an abstract to which citizens are to be subjugated, a kind of idol before which rituals have to be celebrated and sacrifices laid. This is because such 'idolising' of the state allows the position of the citizen to be considered almost exclusively in the category of obligations towards the state, while rights become marginal, and it is by this that we best identify upset relations. The state–citizen relationship then becomes a caricature of a religious relationship, and the state began occupying just such a place in the ideological void of the 1920s and 1930s following the great social revolutions. Many citizens were convinced that only an 'idolised' abstract state could occupy the space left empty by the tsar and emperor, to be followed shortly afterwards by its 'great leader', who was meant to personify it, and who plunged the country into Russian or German totalitarianism. Of the many complex sources of totalitarianism described in literature, those most significant for the science of administrative law are precisely the consequences of the state's apotheosis, its unity, and it absolute dominance.[2]

The March Constitution of Poland [1921] did not anticipate such idolisation. Its sober approach to the state as an imperfect human work, the concept of a state community of diverse peoples relating to the First Polish Republic, the rule of law, the broad grasp of electoral rights, and the authorities as service to the 'majesty of the Republic'—all this facilitated the cementing of the three former partitions, despite all the ethnic and regional tensions. It was also facilitated by the personal modesty of Piłsudski, to whom in 1918 the idea of growing wealthy at the cost of public offices and corruption were as alien as they could possibly be. The April Constitution [1935] was different; in

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[1] J. Boć (ed.), Introduction, in: *Konstytucje Rzeczypospolitej oraz komentarz do Konstytucji RP z 1997 roku*, Wroclaw, 1998.

[2] F. Longchamps, *Współczesne kierunki w nauce prawa administracyjnego na Zachodzie Europy*, Wrocław 2001: 126–127; cf. also the classic work by H. Arendt, *Korzenie totalitaryzmu [The Origins of Totalitarianism]*, Warsaw, 2014; cf. eadem, *Ideologia i terror: Nowatorska forma rządów [Ideology and Terror: A Novel Form of Government]*, Warsaw, 2013: 7f. and 231–234.

this case the state was supposed to subjugate its citizens, while they mainly had numerous obligations towards the state; both local government and civil rights were restricted and depreciated.[3] One must bear in mind, of course, that compared to the ideologies of neighbouring states, fascist and communist, the scale of this 'idolisation' as a successful ideology in the Europe of the day (that brought the catastrophe of totalitarianism) was quite modest. Nevertheless, the understanding of the common good was significantly narrowed, weakening the mutual understanding of the numerous nations within the Republic of Poland. Paradoxically, the authoritarian governments weakened the state and its cohesiveness on the eve of Second World War.

During the Second World War, the Polish Underground State and its armed forces—the Home Army, who fought the occupying forces in the name of freedom and democracy—managed to define the common good in extremely difficult historical conditions, respecting the empowerment of citizens and creating the framework for various forms of resistance, frequently transcending the earlier acute political divisions. The Underground State had well-developed administration and a highly qualified civil service serving the common good.[4]

The Polish People's Republic totally abandoned the common good in favour of servitude towards only certain social classes and treatment of the law as a tool for wielding power in a fully instrumental manner.[5] The teaching of administrative law in Poland by its outstanding representatives (Franciszek Longchamps, Teresa Rabska,[6] Karol Podgórski and Wacław Dawidowicz) fought for many a year—frequently in hiding, but consistently—with the instrumental treatment of law, with its perception as an ordinary tool in the hands of the current authorities. This was served above all by the demand for the restoration of administrative judiciary as a symbol of control over the state's uniform authorities, rejecting the demand for the separation of powers, but also by showing in a good light the rights of the individual in relation to the authorities in Western Europe. It was precisely this restitution of the Supreme Administrative Court that was the first signal of a return to the idea of a democratic state of law. This was a very long road, and one comprising numerous minor victories but also many defeats—especially in the period of Martial Law. Most authors of importance supported the expansion of the area of individual rights and freedoms, and a curtailing of the authorities' arbitrariness. One must bear in mind that it

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[3] Cf. an excellent defence of self-government in: T. Bigo, *Samorząd terytorialny w świetle nowej konstytucji*, Lvov, 1933; cf. J. Babiak, A. Ptak, *Samorząd terytorialny w II RP*, Poznań, 2010: 29f.

[4] S. Korboński, *Polskie państwo podziemne*, Warsaw, 2008: 5; W. Bartoszewski, *O Żegocie, relacja poufna przed pół wieku*, Warsaw, 2013: 17–19; cf. for example T. Rabska, Podstawowe pojęcia organizacji administracji, in: *System prawa administracyjnego*, vol. 1, Wrocław, 1977; eadem, *Prawny mechanizm kierowania gospodarką. Działalność prawodawcza administracji i jej uwarunkowania*, Wrocław, 1990: 70–89 and 134–136.

[5] Cf. as examples constituting a warning: Z. Rybicki, S. Piątek, *Zarys prawa administracyjnego i nauki administracji*, Warsaw, 1984; S. Rozmaryn, *Prawo i państwo*, Warsaw, 1949; idem, *Polskie prawo państwowe*, Warsaw, 1951; J. Starościak, *Instytucje prawa administracyjnego europejskich państw socjalistycznych*, Wrocław, 1973: 9–18.

[6] Cf. T. Rabska, Podstawowe pojęcia organizacji administracji, in: *System prawa administracyjnego*, Warsaw, 1967; F. Longchamps, *Współczesne kierunki w nauce prawa administracyjnego na Zachodzie Europy*, Wrocław, 2001: 110–114, 138–139, 147–148, 170–177, 206–209; K. Podgórski, Wymogi ochrony *środowiska* w organizacji i procedurze planowania przestrzennego, in: idem (ed.), *Zagadnienia proceduralne w administracji*, Katowice, 1984: 118–130.

was precisely the political and economic voluntarism unrestricted by the sharing of powers that led Poland to its economic catastrophe of 1980.

There is therefore a research requirement for greater depth in academic analyses but also in social reflection regarding concepts that, for years, seemed obvious. They have become established in the consensus of the generation of the 'Solidarity' period, a generation which in 1980 was unanimous regarding fundamental values. Despite all the differences, the common good, human dignity, freedom and solidarity were—it seemed—obvious.[7] Following the change in the political system what we needed things more concrete: a certain 'technology of power', effective mechanisms for the functioning of the state apparatus, a functional separation of powers, a well-working state apparatus, and reform in local government, education and the health service. This is what the legislature and case law were to focus on. Grand notions and ideas seemed reserved for the turbulent times that had passed, and—ultimately—for the Constitution as a solemn act by the legislator.

What, according to the preamble to the Polish Constitution, are the 'unshakeable principles of the Republic of Poland'? They are respecting a person's inherent dignity, their right to freedom, and the obligation of solidarity. According to the legislator, these principles must be respected if the Polish Republic is to endure. Creating the common good as the condition for society to live in dignity and freedom is the opposite of the idolisation of the state. Concretisation of the concept of the common good is given in numerous rulings by the Constitutional Tribunal (CT).[8] It comprises the following: the State, its existence and security, the dedication of public officials, the independence of the courts, the natural environment as a common good and the state free of corruption. However, all of this is insufficient if we weigh the position of the common good in the Constitution.[9] It is an incredible paradox that analysis of contemporary CT case law reveals that, despite achievements in regard to detailed issues of the common good (though not the concept itself), it seems—as has been shown in literature—to automatically continue the concept of the state given in the April Constitution rather than the March Constitution. As such it would be worth returning to the foundations of our modern statehood and expounding the concept of the common good in all branches of the law.[10] The state is a man-made, imperfect creation, and is supposed to serve society as such. Public service also obviously means the application of authoritative forms of action, and the entitlement to apply state coercion deriving from its democratic legitimacy. Yet this should not cause this useful construct, essentially abstract in character, to be granted any 'mystical' attributes whatsoever. An attachment to one's own state, its symbols, organs and structures is quite natural, and is legitimately protected by the law forbidding disrespect of these symbols. It is also particularly justified in the case of Poland and the Poles, for 123 years painfully experiencing the absence of their own state, but

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[7] T. Szawiel, Wartości, a transformacja, in: J. Schomburg, *System wartości i norm społecznych podstawą rozwoju Polski*, Gdansk, 2005: 35 and 36f.

[8] Cf. for example CT rulings: K26/98, K26/100, K 44/07; A. Choduń, S. Czepita, *W poszukiwaniu dobra wspólnego. Księga jubileuszowa Profesora Macieja Zielińskiego*, Szczecin 2010.

[9] J. Kuciński, W.J. Wołpiuk (eds.), *Zasady ustroju politycznego państwa w Konstytucji Rzeczypospolitej Polskiej z 1997*, Warsaw, 2012: 87–91 and 133f.

[10] W. Brzozowski, Konstytucyjna zasada dobra wspólnego, *Państwo i Prawo* 61(11) 2006: 17–28.

could also become a trap if the 'state' construct begins ruling over society and Nation (in the constitutional sense) embracing all citizens.

If we are to acknowledge that the state is a common good, then it serves the development of man, and nurtures his respect for inherent dignity. In such a concept—and I am taking Marek Piechowiak's lead here—the Constitution places man, living in community with its laws, at the foundations of the state.[11] A democratic state of law is essential, but does not automatically ensure—as is indicated in doctrine—that the common good is achieved. Implementing the principle of the state's servitude also requires that the principle of subsidiarity and the principle of solidarity are taken into account, and that man's personal freedom is respected. Subsidiarity, indicates the author, requires the respecting of the rights of self-government communities, and the abandoning of centralisation that destroys the self-reliance and initiative of citizens and families. One could add that subsidiarity provides sound foundations for the 'pyramid of power', while its violation reverses it, dangerously accumulating too many powers in the supreme and central bodies, to the detriment of the correct spread of managing.

Solidarity lends direction to common action, teaches one to bear 'others' burdens', and to step beyond the egoistic interests of the individual and nation. However, it pays off for the state community as a whole in the long run. The following must be emphasised: the Third Polish Republic was based on three pillars: on respect for the Underground State and the Home Army, on the heritage of Solidarity, and on the teachings of John Paul II—a historical figure of authority for an overwhelming majority of Poles, irrespective of their faith. Each of these pillars is being called into question today, as discussed below.

Few authors have written monographs focusing on the common good; among those who have are Marek Piechowiak and Janusz Trzciński.[12] The latter understood the need for specifying the common good via three areas of regulations:

1) The area of freedom, rights and obligations in relations between the authorities and individual;

2) The area of the functioning of public institutions (the optimum state model from the point of view of constitutional order);

3) The area of law-making.

Let us attempt to present in brief today's dilemmas in all three of the above areas. What serves the common good in the 'area of freedom' and other rights and obligations, if we adopt the principle of autonomous content of the principle of the common good?

In the first area: the law is the basis of government–individual relations, but not a tool arbitrarily used by the rulers. The legitimisation of the wielding of power comprises two parts: democratic elections, and the rational capability to perform authoritative actions, meaning professionalism. Not only the stance of service, but also qualifications of merit. Freedom is subject to special protection.[13]

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[11] M. Piechowiak, *Dobro wspólne jako fundament polskiego porządku konstytucyjnego*, Warsaw, 2012: 28.

[12] M. Piechowiak, op. cit.; J. Trzciński, Rzeczpospolita Polska dobrem wspólnym wszystkich obywateli, in: J. Góral, R. Hauser, J. Trzciński (eds.), *Sądownictwo administracyjne gwarantem wolności i praw obywatelskich 1980–2005*, Warsaw, 2005.

[13] On rationality in this meaning—cf. D. Kijowski, A. Mirući, A. Budnik (eds.), *Księga Pamiątkowa ku czci A. Smoktunowicza. Racjonalny ustawodawca, racjonalna administracja*, Bialystok, 2016, in particular A. Panasiuk, Racjonalny prawodawca, racjonalna administracja—uwag kilka, ibidem: 82–85.

A deficit of rationality in the action of those governing is easier to expose in times of digitalisation, and following an understandable period of democratic euphoria among the electorate it challenges the very legitimacy of wielding power, ruins trust. Apart from formal legitimisation (the undisputed result of the elections) there is also the appearance of material legitimisation: real capability of wielding power based on professional preparation and the skill of anticipating consequences. However, this is not a demand for a 'meritocracy', where power is held by technical experts and not politicians, but acknowledgment of their value for a fully rational decision process. The Polish teaching of public law has hitherto not given sufficient attention to this aspect of legitimisation.

Judicious administrative policy requires legitimisation through elections, and differentiation of 'social choices' from 'technical choices'. It also obviously requires political charisma, emotions and bonds. The excessive lean towards a meritocracy in the European Commission and its administration is precisely what seems to be one of the causes of the crisis in the EU's democratic legitimisation, one even stronger—as Dieter Grimm posits—than the specific and not very strong position of the European Parliament. Hence the need for drawing up a new equilibrium, not only EU-wide, but also in its member states. But emotions will not take the place of a rational calculation of causes and effects in the actions taken by bodies in member states and in the European Union as a whole.[14]

In the second area, the common good is the state understood as a good for the 'democratically organised community of empowered citizens'. As thus expressed, public service—organised along professional criteria and accessible via honest, impartial competitions, and connecting selfless people and ensuring continuity in the administering of the state—is for the good of all citizens. The governing parties have the right to give direction to this body, but they should not 'demolish' it with arbitrary changes, even legislative, on a mass scale. Every Polish citizen has the right, according to the Constitution, to compete according to clear criteria for a position in the civil service (government or local government), excluding persons stripped of their public rights or the right to hold managerial positions as ruled by a court.[15]

In Jan Zimmerman's classic definition, the 'public interest as the interest of the whole of society' is 'such a state of things in which the interests of the whole are achieved while respecting the interests of the individual'.[16] Mirosław Wyrzykowski, on the other hand, emphasises that in the concept of the public interest we have an equilibrium of different values important for society at a specific time and place.[17]

Source literature provides other analyses of the relations between the concepts of 'common good' and 'public interest'. To cite Małgorzata Stahl, an assumption widely accepted in literature is that the public interest is a narrower concept than the common good. Ewa Olejniczak-Szałowska rightly stresses

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[14] D. Grimm, cf. por. *Über europäisches Parlament* [*On the European Parliament*], in: *Nachdenken über unseren Kontinent*, *Zur Debatte*, Heft 6, 2014/46, Europa.

[15] M. Kasiński, Dobro wspólne, a lojalność pracowników i funkcjonariuszy pełniących służbę publiczną w administracji, in: Z. Duniewska et al. (eds.), *O prawie administracyjnym i Administracji. Refleksje. Księga jubileuszowa dedykowana Profesor Małgorzacie Stahl*, Lodz, 2017: 297f.

[16] J. Zimerman (ed.), *Koncepcja systemu prawa administracyjnego*, Warsaw, 2007: 133.

[17] M. Wyrzykowski, *Pojęcie interesu społecznego w prawie administracyjnym*, Warsaw, 1986: 45; J. Zimerman, *Ordynacja podatkowa komentarz. Postępowanie podatkowe*, Torun, 1998: 133.

that both the concept of the common good and that of the public interest are of key importance for considering the actions taken by contemporary administration, and—as she writes—for determining the scope of admissible action by public administration and admissible legislative interference in social and economic relations as well as in the private life of the individual. We could say that, in this respect, the most important representatives of administrative law doctrine are exceptionally concordant despite a somewhat different research perspective, difference that is natural in such conditions.

It long seemed that the concept of public interest, as the more objectivised and pragmatic, was more worthy of academic reflection in regard to the teaching of administrative law than the concept of the common good, since the latter is excessively variable historically and is saturated with axiological problems, even of an ideological tone. The potential of the concept of the common good is gradually revealing itself. It would seem that the consistent adoption of the character of the common good as broader than the public interest should be but the beginning of this road for its broader application.

The body of public service should be the essential formalising of the civil service of a free society. Honest and public exams open to all interested would be the condition for gaining employment in a public office, with the exception of the lowest auxiliary positions. The civil service, impartial and apolitical, needs to be expanded and not eliminated. The integrity and legality of the examinations should be verified through inspection by Najwyższa Izba Kontroli (Poland's Supreme Audit Office) and judicial review.

This is because the electorate's decision is also based on the silent assumption that a person applying for a position in public service stands out—that he or she has the political skills, knowledge and experience in life allowing him or her to take decisions affecting others' lives, although little experience in life (for example due to young age) may obviously be made up for by a documented high level of specialist knowledge or this person's social innovativeness. A new development of recent years is the ostentatious display of ignorance, for example in regard to an area of activity chosen in parliament. Beforehand such ignorance tended to be hidden behind shame; now the mandate granted by the electorate is supposed to counterbalance everything. In regard to legislating this is frequently an insufficient qualification, especially if accompanied by lack of respect not only for parliament's legislative services but even for the Legislative Council and its position. There is a lack of systematic training for parliamentarians, as an obligatory part of carrying out one's mandate. In the area of application of the law, the appointing of people to positions entails responsibility for the recruitment, for the 'planned selection of administrators'. An aspect of Western civilisation, the adoption of which we have declared, is the conducting of such recruitment without clientelism or political corruption. This criterion is indicated very powerfully by Francis Fukuyama, as a historical criterion behind the shaping of modern administration in western civilisation.[18]

One of the coryphaei of Polish and then French administrative law, Jerzy Langrod, focused his attention on the entire system of public power. Langrod believed that 'the rule of law in administration does not mean a quantitative

[18] F. Fukuyama, *Ład polityczny i polityczny regres. Od rewolucji przemysłowej do globalizacji demokracji [Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy]*, Poznań, 2015: 10f.

proliferation of regulation, the rule of law is achieved equally by a number of centres'.[19] He emphasised that an offence against the principles of administrative law causes disorder—as he called it—in the administrating 'apparatus'. Here is a characteristic citation from Langrod's writings:

> moderation, unaffectedness, patience and farsightedness of the legislator [...] only together may ensure harmony between the rule of applicable law and the iron necessities of life. Essentially, it is a problem of trust and the distribution of tasks; the planned selection of administrators; their degree of theoretical and practical preparation in general law and professional administration; their character; their cultivation; and their intellectual qualifications. All taken together commands one to place the emphasis on nothing other than their creative activeness within the boundaries of the legal order and under impartial supervision.[20]

All these remarks remain fully valid, particularly realising that one has limited means and awareness of the goals of these tasks, but above all—understanding the issue of respecting the trust of 'those who are administrated'. A new version of analysis of the meaning of social trust is given today by Ivan Krastev.[21] Langrod wrote much about 'fully successful administrating' remaining within the boundaries of the law, yet at the same time innovative and creative. He understood better than others the importance of respecting the law, as well as the trust and general-law preparation of officials at the lowest rungs of administration. One should of course aim for such a form of administration taking into account the challenges of the modern day, and especially its digitalisation. Its most difficult challenges may also, I feel certain, be overcome by applying the universal methods of the teaching of administrative law. This is demonstrated by works dealing with the issues of Big Data and cloud management, as well as the so-called new science of administrative law which, as an academic achievement of Europe, is proving highly successful in Asia and South America.[22]

I share the view that such a shape of the state, one that realises the principle of democratic state of law, is an important element of the common good, but not its foundation. The foundation is man, with his dignity and his rights, living in community. This community, which the state should serve, has the right to govern itself independently at the lowest levels to the greatest possible extent. This in turn is expressed by the principle of subsidiarity, which derives after all from Catholic social teaching. Democracy therefore means the power of the people, but in terms of service, of obligations to care for the entrusted deposit of the state in a specific generational contract. The common good is an inter-generational good.

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[19] J. Langrod, *Instytucje prawa administracyjnego. Zarys części ogólnej. Reprint*, Cracow, 1997.

[20] Ibidem; cf. J. Niczyporuk (ed.), *Teoria instytucji prawa administracyjnego. Księga pamiątkowa Profesora Jerzego Stefana Langroda*, Paris, 2011: 35f.

[21] I. Krastew, *Demokracja nieufnych. Eseje polityczne*, Warsaw, 2013: 14–17 and 97–119; Sprawiedliwości i zaufanie do władz publicznych – zagadnienia ogólne, in: M. Stahl, M. Kasiński, K. Wlaźlak (eds.), *Sprawiedliwości i zaufanie do władz publicznych w prawie administracyjnym*, Warsaw, 2015: 29f.

[22] G. Szpor (ed.), *Internet publiczne bazy danych i Big Data*, Warsaw, 2014; cf. also K. Dobrzeniecki, Konflikty wartości konstytucyjnych związane z funkcjonowaniem internetu. Kazus przetwarzania danych w chmurze, in: G. Szpor (ed.), *Internet Cloud Computing, przetwarzanie w chmurach*, Warsaw, 2013: 37f.

Its opposite is 'consumption' democracy: I'm a consumer, a client, while the state—the democratic authorities—is supposed to serve me, just like the hypermarkets. My consideration in return is my (contingent) participation in the elections. People look through what the political parties have to offer, searching for and finding a 'bonus', and by casting their votes, they 'validate' the offer. They are no longer party members. Those old, mass-membership parties of Western Europe, such as the CDU or SPD, are losing members in their droves, and the long-term loyalty of a group of people wanting to change something is dying out. There is room for new 'clients' of the administration. Then a switch in political preferences is natural; somebody at the last minute offers us more, so we vote differently than to date.

The directions of development in administrational theory of the past 20 years, for example *New Public Management*, have—in a manner almost 'suicidal' for a democratic state of law—reinforced these tendencies in the pursuit for a constant lowering of costs and rationalisation of the administrating. The concepts of economisation and client of the administration were useful for a short time, but their dominance is very dangerous for the foundations of the state, for the chief mission of the public authorities, and especially for local self-government as an entity of service-providing administration. Thus reconstruction of the democratic state of law requires a return to its fundamentals, recognition for the public mission as the most important in the administration's activity.

The results of elections do not entitle any group to appropriate the state. The common good assumes elementary unity in the state in regard to fundamental issues, despite all of the political differences. Citizens should have a feeling of certainty of the rights of every citizen and community above all divisions. That builds up political trust, but also economic and financial trust, and is partially reflected in economic growth. Polarisation as a method of governing ruins such social trust—and the economic consequences are inevitable, though sometimes offset in time.

An interesting thing is that proponents of the new 'idolisation' of the state active in Poland frequently refer groundlessly to Catholic doctrine. In the meantime, according to Catholic social teaching the common good signifies a totally different vision of the state: the common good is always oriented towards people's development, their prosperity, the respect of dignity and that 'the order of things must be subordinate to the order of persons' (Second Vatican Council). The state's job is solely to support and protect the common good, which is the work of the civil society. The state—according to Catholic social teaching—always exists for the good of the individual, and is obliged to protect people (for example a former prisoner or homeless person), even contrary to the will of the whole.[23] Therefore it is not automatically the same as the demand for 'fusion with the state', the negating of the state's servitude towards the people, the emotional adoration of what is after all a historically variable state structure, and the conviction of the absolute primacy of the good of the state over the individual; on the contrary, the state is supposed to create the legal framework for the activity of free citizens.

Informational equilibrium is very important. John Paul II rightly demanded that the governing and the governed learn to live in peace. This is a process

[23] *Kompendium nauki społecznej Kościoła*, Kielce, 2005: 3f.; W. Bonowicz, K. Michalski (eds.), *Tożsamość w czasach zmiany. Rozmowy w Castel Gandolfo*, Cracow, 2010.

of education for both parties. Shutting the door to unconstrained public debate is also harmful for the rulers, since they do not notice the numerous warning signs in time, and see only a positive reception reinforced by their own supporters. As a result, the essential change in course is not made on time, and rationality in decision-taking suffers, right up until the moment when the previously hidden crisis escalates. By then it is too late for level-headed rationality of choice, and all that remains is improvised reaction, which is usually chaotic or even panicky. The desire to muffle recurring negative feedback from society, and foregoing real consultation just to avoid hearing criticism, indicates an advancing and destructive 'closure' of the decision process. We already experienced this during the Polish People's Republic, and it led to the state's economic and moral collapse. Such closure ends in social explosion.

The optimal model clearly chosen by our Constitution is the democratic state of law, in which the doctrine of putting a check on government, and the sharing of powers, applies. What disrupts this division to the detriment of the common good? Where legislating is concerned, it is the inflation of law; this is usually an expression of normative helplessness—of both the legislator and of administration as the secondary legislator. Regulations multiply for various reasons, but the initial one is usually a sense of the hitherto regulations being ineffective or incomplete, or a clearly existing normative loophole. The violation or acceleration of parliamentary procedures does not allow for verification of this feeling, frequently groundless and subjective, and generates superfluous and chaotic law. 'Acts for single cases', a form of sidestepping the law, recur.[24]

Every initiative generating social trust in the state (going beyond the family, for which after all there is much trust in Poland), and trust between NGOs and businesses, increases social capital—just as this capital is diminished by any action towards deliberate polarisation. Social trust was affected by erosion long before the political crisis arrived; it was a harbinger of the approaching change, and is a powerful factor behind it.

Trust continues to be fundamental in social and economic life. The ultimate exhaustion of trust, or one could say empty coffers of the 'common good', sometimes—as in Argentina—also means a collective attack on cash dispensers, grabbing what is 'mine' while there is still time. It kills not only expansion, but economic life in general and the essential element of cooperation. In addition a very long time elapses without any major warning signals, because political and administrative systems feature a high level of inertia, while 'turning off' the safety valves typical of the sharing of powers means that the consequences may be felt very late on.[25]

A good barometer for a crisis in trust is that of outstanding payments—as long as one is not dealing with a worldwide financial crisis at the time—and the scale of fraud between businesses; this is a useful indicator (although not the only one) of whether a state is functioning effectively. In this respect we have neither the best results not the best prognoses. Which means that working together, that a consensus in regard to systemic fundamentals, is all the more important.

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[24] J. Blicharz, *Administracja publiczna i społeczeństwo obywatelskie w państwie prawa*, Wrocław 2012: 51f.

[25] D. Stola, *„Kraj bez wyjścia?"*, Warsaw, 2010: 24f.; A. Wierciński, *Prawo do wolności i bezpieczeństwa osobistego*, in: R. Wieruszewski, *Prawa człowieka. Model prawny*, Wrocław, 1991.

There are three pillars on which the Third Republic of Poland stands. They are:

1. The legacy of the Polish Underground State and its government, administration and judiciary, as well as its armed forces—the Home Army (Armia Krajowa [AK]). After the war, it was the AK that gave the order to cease fighting until change in the political constellations and reconstruction of the nation's biological strength. The legacy of the memory of the 'cursed soldiers', who on their own initiative opposed the order to cease armed fighting, is currently being set against the above. The Home Army is even slowly being moved into the shadows in public discourse. In the meantime the entire Underground State is an example of rational concern for the common good, stepping beyond the summary interests of selected groups of citizens, and caring also for the weakest.

2. Solidarity. There is no need to justify how very much this movement, with its ethos, became a foundation of the Third Polish Republic, even if it has become somewhat forgotten more recently. All three aspects of this ethos, that is 'carry each other's burden', 'come with us' and 'overcome evil with good', are currently being questioned; 'healthy national egoism' is being set against solidarity; the role of forgiveness in social life is being renounced as opposed to the inclusiveness of 1980; and the principle that brought about a bloodless victory is being accused of naivety towards the opponents and leniency towards the past of the Polish People's Republic. The Solidarity movement itself is being overshadowed by a Fighting Solidarity, and regret for there having been no 'bloody beginning' to our independence. We find solidarity as a principle in the Constitution, of which there are consequences for its concretisation in administrative law.

3. The third pillar on which we essentially propped not only our transformation but also our accession to the EU comprised the teachings of John Paul II, an unquestioned figure of authority among Poles. The words 'From the Lublin Union to the European Union' and other teachings regarding Europe facilitated many people's decision during the European referendum.[26] As such, this is another contribution to the defining of the Polish common good. Respecting a person's dignity—that of any person—is always fundamental. In this case there is no open negation, but there is a slow departure from the content of these teachings, full of courage, bearing the mottos 'step out fearlessly', 'do not be afraid' or social love; from teachings receptive towards the world and Europe, offensive in understanding service for the people, the dedication of public service, and subsidiarity. This is being countered today by fear, closure, national egoism, and perceiving Europe and changes around the world in terms of threats rather than challenges, particularly for young people. Numerous justifications are found for not helping refugees about whom the whole of Europe is concerned.

The topic of the common good in Polish administrative law doctrine has recently experienced fundamental intensification. Our times of social polarisation make it exceptionally important to achieve a reasonably uniform view of the teaching of administrative law in such a fundamental matter, with understandable individual differences in approach. From an article by Małgorzata

[26] Przemówienie Jana Pawła II z 11 czerwca 1989, in: S. Sowiński, R. Zenderowski, *Europa drogą Kościoła. Jan Paweł II o Europie i europejskości*, Wroclaw, 2003: 195–200.

Stahl,[27] and papers by Zofia Duniewska,[28] Jan Boć and Michał Kasiński, we may talk of a transition in deliberations regarding the common good from the sphere of philosophy and constitutional law to administrative law. Let us recall Stahl's key conclusions:

> The scope of the common good embraces not only individuals granted inalienable dignity, with both rights and duties in relation to the state, but also smaller and larger communities, the state's systemic and organisational structure based on democratic standards, constitutional principles of the system of government (the principle of a democratic state of law, decentralisation, social justice and solidarity), and public tasks and forms of their implementation.[29]

As Duniewska emphasises, the common good is 'the good of all citizens, equal in their rights and duties'.[30] As such the author legitimately indicates in this statement that it is an additional strengthening of the principle of equality counteracting the worse treatment of individual citizens or entire social groups. At the same time one should bear in mind Mirosław Granat's warning, that the common good 'does not have to be with the majority and community'[31]—and in this sense it is indeed close to human dignity. Administrative law, in its function of concretising constitutional law, must constantly expand upon the consequences of the fact that we are dealing here with the 'principle of principles' in Piechowiak's well-known definition.[32]

So when can an act constituting a part of administrative law violate the common good? At a time, for example, when it contravenes citizens' equality in their 'rights and duties', creating privileges for certain citizens or groups thereof in such a manner that this does not constitute the re-establishment of equal opportunities.

The author conceives legislating as a part of the realisation of these tasks. Whereas during the Polish People's Republic the law was perceived as a tool of state politics, while treating specified groups or persons worse despite the contrary provisions of the superficial constitution was ingrained in the principles of practical politics, a democratic state of law makes law something that restricts power.

Administrative law, including the section of it set by public administration, cannot exclude individuals or social groups. On the contrary, it is obliged to prevent social exclusion. The principles of decent legislation exclude 'acts for a single case'—and therefore the modification of an act or regulation for surreptitiously sorting out an individual matter within the scope of public administration. In such a case we are dealing with the abuse of law, with ostensible action. A normative act has general and abstract features. An individual and doubly specific administrative act essentially fits within an 'act for a single case'. For example, historical exceptions were acts ceremoniously proclaiming the estab-

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[27] M. Zdyb, Dobro wspólne w perspektywie art. 1 Konstytucji RP, in: F. Rymarz, A. Jankiewicz (eds.), *Trybunał Konstytucyjny Księga XV-lecia*, Warsaw 2001: 190f.

[28] M. Stahl, Dobro wspólne w prawie administracyjnym, in: J. Boć, A. Chajbowicz (eds.), *Nowe problemy badawcze w teorii prawa administracyjnego*, Wrocław, 2009: 47–59; also J. Boć, Z refleksji nad dobrem wspólnym, in: ibidem: 151–153.

[29] M. Stahl, Cel publiczny, interes publiczny i dobro wspólne, in: eadem (ed.), *Prawo administracyjne: pojęcia, instytucje, zasady w teorii i orzecznictwie*, Warsaw, 2013: 76–80.

[30] Z. Duniewska, Dobro wspólne, wielość w swoistej jedności, in: eadem et al. (eds.), op. cit.: 179.

[31] M. Granat, op. cit.: 137.

[32] M. Piechowiak, op. cit.: 42.

lishment of a university, although this concerned a large collectivity, an administrative facility. The principle of the common good is also violated by the 'rule of the spectacle'—meaning the treating of normative acts in the category of a manifestation addressed solely to one's own supporters and taking advantage of social response to a situation obtaining much media publicity, without introducing important normative change preceded by deep analysis.

One has to remember that the common good constitutes an important interpretational directive in the event of a collision of goods, including in administrative law. The legislator may, of course, claim that other important considerations command, for example, that an entire social group be excluded from access to public service. However, such an intention remains in collision with specific regulations, and in particular with the principle of the common good. Although the vetting act proved an exception, it too was subject to constitutional control in regard to abiding—among other things—by the principle of the common good. Nevertheless, the vetting act applied to a one-off situation of modification to the system of government to a different system of a democratic state of law. It was approved of with numerous restrictions.

Legislative changes in recent years incompatible with the 'principle of principles', meaning the principle of the common good, require in-depth analysis. According to the method proposed by Stahl and Duniewska, investigating compatibility with the principle of a democratic state of law—decentralisation—is insufficient. Attention should be paid to the principle of social justice, not only in the traditional understanding of supporting those weakest economically, but also in the unequal spread of burdens by regions, social groups and individuals, which is reflected in the allocation of resources. Therefore, should the terrible state of the environment in one region (Upper Silesia) mean that the average length of life among the region's inhabitants is shorter than in the rest of the country—caused among other things by the exceptional intensity of neoplastic, respiratory and circulatory diseases—then it is the state's duty to make appropriate changes to the budget.

If instead of these there is a reduction in the autonomy of and financial resources for important entities, for example the Cancer Center and Institute of Oncology in Gliwice, while state administration continues to develop a branch of industry that is dangerous for the health and life of the inhabitants of the region, where all norms for soil and air pollution have already been exceeded many times over, then here as well the normative measures and respective administrative policy are contradicting the principle of the common good, even if we are to find legislative tasks and programmes citing the Constitution. After all, it means consciously treating a part of the country's population worse, which is also evident in the state of the infrastructure, quality of living, and allocation of public funds for education, culture and health.[33] This old 'harm to the regions' has long been mitigated by the presence of EU funds, which will lessen post 2020—when the problem will emerge in its full severity. Reaction by the legislator is required today.

Unlike in the USA, the problem of long-standing wronging of local communities or social groups as a result of measures being carried out that violate the

[33] J. Tischner, Naród i jego prawa: komentarz do przemówienia Jana Pawła II na forum ONZ w październiku 1995 roku, *Znak* 1997, no. 4.

principle of the common good does not yet account for a significant portion of case law, although we seem to be entering such a period. Ignoring similar lawsuits or their routine rejection may result in social unrest and people striving to settle wrongdoings via extralegal means. An example—staying with Upper Silesia here—could be the commune of Jastrzębie. Tax was legally collected there from mining excavations, making it possible to compensate for severe mining damage to the town. A change in ruling practice, followed by a modification in the law, resulted in the necessity for this town—badly affected by unemployment—to repay approximately 50 million zlotys to the state budget; that, alongside problems experienced by the local coal mining company, provided fertile ground for violent rioting.[34] One can currently see a similar escalation in tensions in Bytom and other cities in the Upper Silesian Industrial Region.

Similar legal problems can be expected in the case of mass redundancies made in the public sector through legislation, resulting frequently from the legally questionable reorganisation of a particular public administration body, state agency or public facility. Because this means job losses for large groups of highly qualified people, for example customs officials or teachers, the issue of a collision with the common good is likely to be raised if their place is taken by persons less well educated or with inferior training. One could also expect the accusation of the changes having been made for show, thereby meaning legislating as a legal action intended to conceal, for example, the incompatibility of lockout with labour law, and in particular with pre-retirement employee protection. The mass-scale and economically essential layoffs of miners or teachers were accompanied by numerous compensatory payments and support measures, although these too were imperfect; however, the total absence of such measures in mass-scale redundancies among employees in public administration violates the principle of equality.

The government and administration are only the guardian of power and temporarily manage the state's resources on the basis of democratic legitimation; they do not become the owners of these resources. As Wojciech Góralczyk indicates, those governing should pass them on in a condition that at least shows no deterioration, unless there have been natural or historical catastrophes.

Changes resulting from administrational, economic or educational reform mean that the state is taking responsibility for facilitating reintroduction on the job market for 'wronged' persons, for adjustment programmes and for training. They must have the good of the citizens as their goal as well, and not the particular interests of, for example, political parties, and must be honest (meaning that the purpose declared in the act must be its real purpose, one that can be decoded in the course of the legislative process and in available programme documents). Otherwise this would be action incompatible with the principle of the common good.

Pursuant to the resolution of the Sejm of the Republic of Poland dated 17 July 1998, on the principles of ethics among Deputies, by virtue of the oath made in accordance with Article 104 of the Constitution, a Deputy of the Sejm is guided in his public service by the applicable legal order, generally accepted ethical principles, and supportive concern for the common good, while article 3 highlights separately the issue of being guided by the public interest, speci-

[34] See <www.jastrzebie.pl>; cf. speech by the Polish Ombudsman on this matter.

fying that this does not mean taking advantage of one's function in order to obtains benefits for oneself or somebody close, or benefits that might affect their conduct as a Deputy. However, pursuant to Article 1, supportive concern for the common good becomes the limit of action. The Sejm's resolution defines the principles of impartiality, clarity, honesty and attention to its good name. This is an example of the concretising of the 'principle of principles', which—as we should recall—is to be found in the Constitution, and not in its preamble but in the wording of the normative text itself. Article 1 of resolution no. 338 of 17 July 1998 is particularly interesting, since it shows with the effect of an internal normative act of the Sejm the obligatory 'being guided by' concern for the common good, and as such together with others, one with another, and not one against another.

'Ostensible' Deputies' bills, essentially governmental bills only dressed in the 'garments' of a Deputies' bill in order for the government to bypass the opinions of the Legislative Council and its own inter-ministerial negotiations. This means the attestation of an untruth by Deputies, who in signing beneath Deputies' bills are declaring, with their signature, that the bill was drawn up independently of governmental structures. Otherwise it loses the justification for the privilege of being exempt from inter-ministerial consultations. This does not rule out a group of Deputies using the assistance of the Legislative Office and the expert advice of experts whose work was coordinated by the Bureau of Research of the Chancellery of the Sejm. The main reason behind its formation and its successes was precisely to ensure an independent database of information and expertise for Deputies' initiatives. This was something for the Polish Sejm's administration to be proud of, as it maintained the empowerment of the parliamentarians, who were not confined solely to governmental bills. As such, the degeneration and superficiality of the institution of Deputies' bills is also threatening the empowerment and independence of the Deputies and Senators of the Republic of Poland.

In such a case the Deputies are breaking the oath they made (for supportive concern for the common good) and the Sejm's resolution regarding Deputies' ethics of 17 July 1998[35] (clarity and honesty). If organs of governmental administration draw up a bill in secret which is then labelled with the clause 'Deputies' bill', despite it being a bill fully prepared in the Chancellery of the Prime Minister or in the ministries, they too are attesting an untruth, and in addition they are violating the provisions of applicable law in regard to 'one's own' legislative procedure, bypassing the regulatory impact assessment (RIA).[36] Another aspect is that a minister in whose ministry such a bill is drawn up is conducting ostensible actions, and by then passing it on to a group of Deputies is not only attesting an untruth, but also violating his or her powers (the preparation of draft legislation) and subordination to the Prime Minister. The toleration of such conduct in the past in various coalitions led to a deepening of the 'silo mentality' of Polish administration and enabled a hidden 'hit-and-run war of bills' between various ministries. A minister legitimately afraid of the results of inter-ministerial consultations revealing mistakes in the bill—which serves the common good after all,

[35] Resolution of the Polish Sejm, 17 July 1998, Monitor Polski 1998, no. 24, item 338.

[36] Regulation of the President of the Council of Ministers of 20 June 2002, on the „Principles of Legislative Technique", Journal of Laws of the Republic of Poland 2016, item 283.

since it prevents social harms—would often catch a colleague at the Council of Ministers by surprise with a bill already submitted. This is, I firmly believe, one of the sources of the poor quality of legislation and an evident violation of the law.[37]

Politics is the prudent concern for the common good, yet it demands the taking into account of a very significant factor; prudence means taking various aspects of a matter into consideration.[38] And taking various aspects into consideration requires in turn what is also a very important factor: time. Therefore the principle of the common good and prudent concern for the common good can be violated if this factor is eliminated in advance, not allowing for specific aspects to be considered calmly, for consultation, or for listening to social opinions. Even if all legislative procedures are formally taken into account, a very important condition is not fulfilled materially: that of the decision process being placed properly in time.

Great constitutional principles show their usefulness at times of crisis. Then one sees clearly, for example, their close link with specific tasks of public administration and its forms of operation. The current crisis of the state of law was long ago forecast by the teachings of administrative law. It will undoubtedly constitute a powerful (though unexpected and not particularly fortunate) impulse for new theoretical pursuits of great momentousness, the fruit of which we shall only see in the future. The fundamental function of administrative law is to protect those who are weaker and their rights—and this should be returned to with full force, since the future renewal of the state of law also fits within it.

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THE COMMON GOOD

Summary

The concept of the common good is a wider concept than the concept of public interest, which has for years been the focus of interest of the doctrine and judicial decisions. At the time of the current State crisis, the fundamental elements of which are discussed in the paper, a reflexion on the common good seems to be of particular importance for the protection of the fundamentals of the idea and the realisation of the rule of law. Both are anchored in the Constitution but have significant consequences for the evaluation of actions taken by public administration. Furthermore, as the doctrine shows, while public interest concerns a collective action, the common good requires the protection of an individual, their dignity and legal position. It has also been shown that the common good may be put in jeopardy as a result of the infringement of the principles according to which public administration functions. Possible concretisations of the concept of the common good in administrative law and consequently in the sphere of the performance of tasks or management in administration have been proposed and relevant directions of research programmes recommended.

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[37] I write further on this matter in: Uwagi o polskim systemie stanowienia prawa, *Państwo i Prawo* 67(7), 2012: 5–19.

[38] Przemówienie Jana Pawła II z 11 czerwca 1989.