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THE POLISH CONSTITUTION OF 1997 AS PART OF THE EUROPEAN CONSTITUTIONAL HERITAGE*

In the context of ongoing disputes about the Constitution, when its role is being questioned, when it is attributed a communist provenance and is thereby denied any intrinsic value, we find ourselves in the situation where certain facts concerning the not so distant history of the drafting of the Constitution, its origins and content, ought to be continually remembered or even repeated, even if they seem obvious.

The dynamics of changes of social and political reality in the early years of the transformation forced the authorities to take specific constitutional 'steps', with the intellectual debate over such steps being only secondary so to speak. The new situation evolving at that time posed many question marks. Taboo issues, hitherto restricting the constitutional debate were gone—every question was allowed and justified. No questions were barred; nor were there any ready-made, planned beforehand, 'only right' answers. Instead, disputes arose over the very nature of specific constitutional solutions. The new constitution was drafted and evolved in a certain continuous process on the ruins of the shattered constitutional monolith left behind by the period of Real Socialism, while answers as to its nature, what values it is to protect and what form of a political system it should take on were many.[1] It was absolutely necessary to find a clear reference point.

One of such questions concerned references to the Polish constitutional tradition. There was no doubt that the tradition was long as it went back to the Constitution of 3 May 1791—Europe's first. However, apart from this bipartisan general agreement, recognising the significance of this Constitution, there was little agreement and few clear answers as to what specific political system solutions from our constitutional tradition were desired. Some political factions advocated the adoption of solutions from the March Constitution of 1921, while others, which could be clearly seen in the proceedings of the Senate Constitutional Commission, harked back to the traditions of the April Constitution of 1935. These references were not merely historical. What they entailed was different outlooks on the political system of the country. Consequently, it was difficult to arrive at a common position on

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[1] Cf. R. Chruściak, W. Osiatyński, *Tworzeniekonstytucji w Polsce w latach 1989–1997*, Warsaw 2001.

specific political system solutions especially in the early times of the so-called Round Table Sejm. This was one of the reasons behind the delay in the drafting of the Constitution. An opinion could be even heard then that we had missed 'our constitutional moment'.

In a sense, a similar situation prevailed in other countries of our region, hence an opinion can be found in the literature that Central European countries 'have embarked on a process of trial and error in the making of new constitutions'.[2] In Poland, the debate concentrated more on stressing differences than highlighting what we had in common in terms of political system traditions. This way of thinking sets also the tone for our current constitutional debate, which takes on clear confrontational overtones.

At this juncture, it is worth citing the opinion of the Italian jurist Giovanni M. Flick, who presented an entirely different attitude in his approach to the Italian Constitution. He looked in the European tradition for that which had joined, not separated; one that did not counterpose Christianity to the secular state, observing:

> It is true that between Christian and secular roots of Europe a certain conflict or confrontation takes place, nevertheless, what above all takes place is the mutual supplementation of values following from them, which helps overcome a number of problems caused by the confrontation.[3]

A major debate at the initial stage of Constitution drafting concerned axiology, more than once taking the form of an argument about values,[4] with one of its elements being the problem of the relationship between *ius* and *lex*. Arguably, the countries coming out of totalitarianism witnessed a peculiar 'revival' of natural law. This could be seen in both the post-fascist and post-communist periods. It had become obvious that an approach grounded solely in legal positivism did not suffice. A common tendency could be observed to search for references to values existing outside positive law, but underpinning written law. The search, in its juridical aspect, in essence was one of determining the relationship between *ius* and *lex*.[5]

Moreover, this way of thinking entails a distinction between strictly formal legality and the rule of law, appealing to values beyond written law. It was in this context that European legal heritage was looked for and referred to. There was no doubt that law was an integral part of such concepts as European identity, common European heritage, European Christian roots or European community.

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[2] A.E. Dick Howard, Constitutional reform, in: R.F. Staar (ed.), *Transition to Democracy in Poland*, New York 1993: 107

[3] G.M. Flick, *Elogiodella Costituzione*, Milano 2017.

[4] H. Suchocka, Spór o wartości w polskiej rzeczywistości ostatniej dekady, in: J. Barcz (ed.), *Prawda i pojednanie, w 80 rocznicę urodzin W. Bartoszewskiego*, Warsaw 2002: 227–237.

[5] P. Haberle, Ius et lexals Problem des Verfassungsstaates – das Beispiel der Verfassunggebung in Polen, in: M. Piechowiak, R. Hliwa (eds.), *The Draft Polish Constitution in the Light of Comparative Law*, Poznań 1993: 58–63; and also: W. Łączkowski, Konstytucja a transformacja ustrojowa, in: *Konstytucja i transformacja*, Warsaw 1995: 9–10.

The main challenge, therefore, that faced all post-socialist countries was the need to 'decode' or explain the concept of 'common legal heritage'. Efforts to this end, however, have encountered numerous obstacles created by the vagueness as to what elements this heritage constituted.[6] There is no doubt, nonetheless, that a major source for 'decoding' the fabric of European legal heritage was papal documents on Christian social teaching, beginning with Leo XIII's encyclical *Rerum novarum* of 1891.[7]

These efforts undertaken at that time as part of Poland's constitutional process, but also of that of other countries, were noticed by John Paul II. It is for this reason that his encyclical *Centesimus annus* was so hugely important when it came out in 1991 on the centennial of *Rerum novarum* that coincided with the launch of the transformation. John Paul II's words were to be also a guidance, or a reference of a sort to values constituting the common constitutional heritage. Referring to the encyclical *Rerum novarum*, John Paul II reminds us that already Leo XIII wrote about the organisation of society based on three powers: legislative, executive and judicial. He adds:

> Such an ordering reflects a realistic vision of man's social nature, which calls for legislation capable of protecting the freedom of all. To that end, it is preferable that each power be balanced by other powers and by other spheres of responsibility which keep it within proper bounds. This is the principle of the 'rule of law', in which the law is sovereign, and not the arbitrary will of individuals.[8]

The discovery of elements making up the concept of common constitutional heritage was a founding myth, so to speak, in the new democracies of Central Europe. In this task, they were greatly helped by the Venice Commission, founded in 1990. They discovered what common European legal traditions were becoming a European standard, that is, a model for specific legal solutions being adopted. With respect to general matters, therefore, the so-called European standard was seen as a central value. Hence, references to it were an important gauge of amendments to internal legal systems and, above all, constitutions.

While on the question of references to the European legal heritage, a speech delivered by Pope Benedict XVI in the Bundestag in September 2011 is worth quoting. Although made much later, it was characteristically devoted in its entirety to law, being entitled *Reflections on the foundations of law*. The pope said:

> Christian theologians thereby aligned themselves with a philosophical and juridical movement that began to take shape in the second century B.C. In the first half of that century, the social natural law developed by the Stoic philosophers came into contact with leading teachers of Roman Law. Through this encounter, the juridical culture of the West

[6] A. Pizzorusso, *Europejskie dziedzictwo konstytucyjne*, Warsaw 2013.

[7] Encyclical *Rerum Novarum*, <http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html>.

[8] Encyclical *Centesimus annus* (44), <http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus.html>.

> was born, which was and is of key significance for the juridical culture of mankind. This pre-Christian marriage between law and philosophy opened up the path that led via the Christian Middle Ages and the juridical developments of the Age of Enlightenment all the way to the Declaration of Human Rights [...].[9]

Aware of the pope's responsibility in matters of society and law across the globe, Benedict XVI shares his thoughts on, in his own words, 'foundations of a free state of law'. Representing a subject of international law, that the Holy See is, he does not limit his reflections to the context of one state, in spite of the fact that he articulates them in a specific state and a specific parliament. He makes his speech a much broader reflection, going beyond the internal law of the state, and sets it firmly in the European context.

In his reflections, he refers to the law that took shape in Europe and that shaped Europe, developed along with Europe and that, *ipso facto*, is Europe's capstone of identity. According to Benedict XVI, this has three key elements:

(1) The triad of faith, reason and law

(2) Recognition of the inviolable dignity of every single human person, being the foundation of human rights and freedoms

(3) Defence of the law so understood by all of us—inhabitants of Europe.

Despite the fact that the words of Benedict XVI postdate the commencement of the work on our Constitution, there is no doubt that it was this thinking about the European roots of a new Polish Constitution that its drafters shared. They made reference to the European heritage that at the same time was the common heritage of Polish constitutional tradition; one that did not develop in a vacuum. On the contrary, it stemmed from Poland belonging to Europe and sharing a common set of values.

One of the first steps taken to return to these common values was the break from the dualistic conception of law in its socialist version, which was a major barrier that separated Poland from the European heritage. A very clear manifestation of the conception was the decision of the Supreme Court of People's Poland of 1987.[10] In this decision, the Supreme Court made it absolutely clear that international law was not enforceable in the domestic legal order *ex proprio vigore*. Until such time as norms of international law are incorporated into domestic law in the manner prescribed in that law, they will not become that law and, consequently, they will not bind the courts.

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[9] <http://w2.vatican.va/content/benedict-xvi/en/speeches/ 2011/september/documents/hf_ben-xvi_spe_20110922_reichstag-berlin.html>.

[10] The Supreme Court (specifically, Labour Law and Social Insurance Division) in the decision of 25 August 1987 held that 'in the light of the provisions of our Constitution [of the Polish People's Republic], there are no grounds to believe that upon ratification, international law norms are transposed to domestic law [...]. This is only an obligation of the state to incorporate the ratified norms of international law into domestic law'. For a broader discussion see: L. Kański, Konstytucyjna regulacja statusu jednostki a międzynarodowa ochrona praw człowieka, in: Z. Kędzia (ed.), *Prawa, wolności i obowiązki człowieka i obywatela w nowej polskiej konstytucji*, Poznań 1990: 85; H. Suchocka, The constitutional trends in Central and Eastern Europe, *Polish Western Affairs* 1992, no. 1: 24–43.

The purpose of this construction, under conditions prevailing at that time, was quite obvious. For only this, strictly dualistic conception made it possible to block the right to freedom of association with others, including the right to form and join trade unions, following from international agreements signed and ratified by Poland, such as the Human Rights Treaties.

Furthermore, the conception left it to the discretion of the authorities which rights will be guaranteed by domestic law and which will not, despite ratified treaties. Naturally, under such conditions, there was no space whatsoever for a discussion on the European legal standard, as long as the European legal heritage could not be a reference point.

Hence, one of the objectives, not only in Poland, but in all the countries that aspired to 'return to Europe'—regardless of how broadly and variously this concept of return was understood—was to overcome the rigorous dualism of two legal orders: international and domestic.

Abandoning the dualism and adopting a new approach to the relationship between international and domestic law had several reasons:

(1) Political – each of these countries intended to stress its openness and readiness to break the isolation of the hitherto existing political and legal systems, with the change of attitude to international law offering an undeniable proof for this.

(2) Ideological – all these countries aspired to membership in an organised European structure, namely the Council of Europe, which was seen as a carrier of universal values related to the rule of law and guarantees of human rights and freedoms based on a central value, namely the dignity of a human person.

(3) Pragmatic – integrally bound with the previous and consisting in the fact that all these countries intended to accede to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). To this end, it was necessary to guarantee the citizens of particular countries the possibility to cross the borders of their own country in order to enforce their rights before an international organ, namely the European Court of Human Rights (ECtHR). Whereas, the principle of dualism prevented this completely and separated Poland from the legal heritage of Europe.

The adoption of the monistic conception instead allowed the countries to change the situation and open a possibility to refer to a standard existing in supranational law and derived from the European tradition. The aim was to create homogeneity, so to speak, of solutions adopted in domestic law and those of the European system in which the principle of human dignity, as embedded in natural law, was considered the principal point of reference.

All these ties, so important for the common European heritage, had been severed in the communist period. The countries of Central and Eastern Europe, including Poland, were subjected to a different legal experiment, a strong centralism founded on the restriction of personal freedom that was rationed by the state authorities.

Furthermore, it was necessary to restore proper meanings to concepts distorted under the previous system when the same expressions hid entirely different meanings, for instance, the principles of democracy, rule of law and independence of courts and judges. In this respect, also, referring to existing concepts belonging to the European heritage was of paramount importance.[11]

The political system principles of the new constitution were, therefore, meant as an antithesis of the principles that had been adhered to under the previous system. To this, there was across-the-board agreement in the Constitutional Commission. Thus pluralism instead of the leading role of the party, separation of powers instead of unity of power, autonomy of the judiciary instead of ties to the executive and the dominant role of the Minister of Justice within the judiciary. There was agreement that principles invoking that former 'axiology' could not aspire to be an element of the European legal heritage.

At this juncture, a comment is in order which is often made in the ongoing dispute about the Constitution and respect for the rule of law. In the context of appeals to the European heritage, a question arises as to the scope of State sovereignty and related discretion enjoyed by particular states in making relevant decisions. It can be noticed that appeals to the European legal heritage in connection with very general ideas and slogans are acceptable to a degree. A problem arises when specific principles underpinning the rule of law are invoked and their observance is insisted on. After all, they follow from international treaties that are also part of that common heritage. An argument is being raised then about the sovereign power of the state and its discretion in making decisions about legal solutions to be adopted. An apparently obvious view is being challenged that if a sovereign state binds itself by treaties, it does not lose its sovereignty but rather exercises it and performs its obligations under the treaties. However, this well-founded view does not seem to convince all.[12]

In this context, it seems justified to distinguish sharply between two matters, reflecting actually two tendencies revealed by the drafting of a new constitution, especially its part on the protection of human rights founded on the inherent dignity of man. The first, appearing to be dominant, aimed at creating and protecting standards stemming from the common heritage in the

[11] The significance of this problem is attested to by a special conference held in Montpellier in 1996 and devoted to the European constitutional heritage. See *Le patrimoine constitutionnel europeen*, Editions du Conseil de l'Europe, Strasbourg 1997.

[12] In this context, therefore, it is worth appealing to another authority, namely Edith Stein, proclaimed co-patroness of Europe by John Paul II in 1999. Her thoughts on the creation of supranational structures are particularly interesting. Already in her letters to Ingarden, she mentioned the creation of a cultural community across state borders. In this sense she was a European. I think that her vision was aptly expressed in John Paul II's *motu proprio*: 'to raise on this Continent a banner of respect, tolerance and acceptance which invites all men and women to understand and appreciate each other, transcending their ethnic, cultural and religious differences' (John Paul II, Apostolic Letter issued in the form of a *Motu Proprio* proclaiming Saint Bridget of Sweden, Saint Catherine of Siena and Saint Teresa Benedicta of the Cross Co-Patronesses of Europe (9), <http://w2.vatican.va/content/john-paul-ii/en/motu_proprio/documents/hf_jp-ii_motu-proprio_01101999_co-patronesses-europe.html>.

European domain. The second probed to what extent, within the above general tendency, it was possible to preserve certain national differences.[13]

Independently of the search for common solutions consistent with the European standards, an important tendency in the new constitutional process involved, as mentioned elsewhere, references to the country's own tradition wherever possible. A good example is offered by the words from the Preamble to the Polish Constitution: 'Beholden to our ancestors for their labours […] for our culture rooted in the Christian heritage of the Nation and universal human values, recalling the best traditions of the First and the Second Republic'.[14] As it is stressed in the relevant literature, with regard to the drafting of the Constitution, the term 'tradition' ought to be associated with political system issues, hence, the political system traditions of Poland.[15]

For the purpose of finding an answer to the question if it is possible to preserve certain national differences, it is thus necessary to distinguish clearly between the two domains, namely:

(1) that which is the foundation of the European democratic tradition and the European legal heritage and must be absolutely respected by Member States

(2) that which belongs to the regulatory free way of particular countries, following from their rich and varied political system tradition.[16]

It would seem that these two domains oppose each other, but these are only appearances. In fact, the domains supplement each other. In the most general terms, it can be said that the first is about principles, while the second is about specific manners of their implementation.

Indubitably, the European system (in particular that of the Council of Europe) admits co-existence of common fundamental standards and national peculiarities. A key role in this respect is played by the principle of subsidiarity. In fact, it was relied on by the ECtHR to develop specific tools to ensure such co-existence already before the major EU enlargement. Important but controversial, the conception of the margin of appreciation, in turn, provides a certain flexibility necessary to avoid a destructive confrontation between the ECtHR and Member States, and helps the Court strike a balance between the sovereignty of Member States and their obligations under the ECHR.[17] This is supposed to leave countries some room for legal manoeuvre not without the ECHR but within. In addition, the Treaty on European Union, Article 6(3), invokes 'constitutional traditions common to the Member States'

[13] H. Suchocka, Potransformacyjny proces zmian konstytucji w państwach Europy Środkowej i Wschodniej w świetle doświadczeń Komisji Weneckiej, in: J. Ciapała, P. Mijal (eds.), *Wokół wybranych problemów konstytucjonalizmu, Księga Jubileuszowa profesora Andrzeja Bałabana*, Warsaw 2017: 311–313.

[14] *The Constitution of the Republic of Poland*, Sejm Publishing Office, Warsaw 2010 (trans. Albert Pol and Andrew Caldwell).

[15] M. Piechowiak, Komentarz do Preambuły Konstytucji RP, in: M. Safjan, L. Bosek (eds.), *Konstytucja RP*, vol. 1, Warsaw 2016: 141.

[16] This distinction is always stressed in the opinions of the Venice Commission, see for instance *Opinion on the New Hungarian Constitution*, CDL(2011)016.

[17] For a broader treatment see *Koncepcja marginesu oceny w orzecznictwie Europejskiego Trybunału Praw Człowieka*, Gdańsk 2008.

('Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law').

In this context, it is crucial to specify in greater detail what these general principles are. Rule of law is no doubt one of them. Its vital elements are separation of powers, autonomy of the judiciary and independence of judges. Any pressure on the courts exerted by the executive branch has always been considered an abuse in European sensibilities.

Now, another important question arises whether the judicial review is one of these general principles and whether it is part of the common constitutional heritage.

Certainly, there might arise doubts as to how long an institution has to exist to be considered part of a legal heritage. However, the issue may be decided by other characteristics than time, such as the importance of the institution in question for ensuring the observance of the crucial principle of rule of law. From this perspective, judicial review, in spite of the fact that it is a relatively new institution in the European constitutional tradition, is a vital element of the European legal heritage.[18]

Western European experience shows that the success of democracy pivots on judicial review. It ensures the supremacy of law over politics[19] and creates a new ground where powers are balanced. There, even parliament as the legislator may be subjected to review with respect to the laws it enacts.[20] It does not matter much what model of judicial review is followed. What does matter, however, is the autonomy and independence of the reviewing institution.[21]

The Constitutional Tribunal has been an important instrument of the dynamic interpretation of the Constitution on many occasions (for instance, with respect to the right to have one's case heard at the court of law in Poland). In 1994, when the Constitution was being drafted, the Polish Constitutional Tribunal gave an opinion on the clauses referring to Christian values in legislation. It viewed such clauses not in religious terms, but rather as an expression of the universal ethical categories of the Mediterranean culture, which should not be disavowed. With many areas of public life still being nebulous, the decisions of the Constitutional Tribunal were vital, because they contributed towards the growth of legal and political culture in a country that was only beginning to design its democratic government and still mired in the legacy of a mono-ideological system.

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[18] CDL-AD (2013)014, Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges (including an explanatory note and a comparative table) and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, para. 76.

[19] S. Ruelke, *Venedig-Kommission und Verfassungsgerichtsbarkeit*, Georg-August-Universität Göttingen, Institut für Völkerrecht, Dissertation: 104–107.

[20] J. Zakrzewska, *Spór o konstytucję*, Warsaw 1993.

[21] H. Suchocka, Stanowisko Komisji Weneckiej dotyczące pozycji ustrojowej sądownictwa konstytucyjnego w demokratycznym państwie prawa, *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 78(1), 2016: 5–18.

The question may be repeated where lies the limit of discretion of the states, where is the hard barrier of the immutable, which is the unquestionable European standard. Agreeing to the margin of appreciation for the states in which to regulate differently certain matters in their domestic law, one needs to admit that there are principles having the nature of axioms rooted in the European legal tradition. The latter must be absolutely observed. For it is they that form the skeleton, or rather the load-bearing wall of the entire legal construction. Only on this uniform stable 'scaffolding' can varied solutions of detail be built, allowing for various cultural traditions, and guaranteed protection. Irrespective of the differences lying at the root of the two legal traditions (orders) that Europe knows, that is, those of civil law and common law, a common backbone could be found or a common foundation embedded in the European legal values that have helped develop the concept of the European legal standard.

The search for various solutions is thus limited by the axiom following from the common understanding of the constitutional heritage–one very clearly worded by Karl Loewenstein. According to the scholar, the history of constitutionalism was nothing but a search by man, in his political guise, for the limits to absolute power by its holders. Moreover, it was an effort to replace blind obedience to the absolutism of the powers that be with an authority, one firmly based on a spiritual, moral and ethical bedrock.[22]

A similar thought was expressed in a speech by the British Prime Minister on the occasion of the 800th anniversary of the Magna Carta. David Cameron said:

> 800 years ago, on this day, King John put his seal to a document that would change the world. [...] The limits of executive power, guaranteed access to justice, the belief that there should be something called the rule of law [...] That might sound like a small thing to us today. But back then it was revolutionary, altering forever the balance of power between the governed and the government.[23]

The concept of the rule of law was adopted as one of the basic principles underpinning our 1997 Constitution. It was given expression in its Article 2: 'The Republic of Poland shall be a democratic state ruled by law [...].' A constitution founded on this principle should be conducive to the fostering of attitudes based on the sense of constitutionalism—following from its stability—among members of the general public. It should not be treated as a mere political instrument, following Carl Schmitt's thesis, in a dispute between political forces:

> The rhetoric of political struggle makes every party participating in it consider as true only this constitution that suits its political demands. If fundamental political and social conflicts are very bitter, it may easily come to pass that some party may deny the name

[22] K. Loewenstein, *Die Verfassungslehre*, Tübingen 1975.

[23] <https://www.gov.uk/government/speeches/magna-carta-800th-anniversary-pms-speech>

of constitution altogether to every constitution that does not satisfy the party's demands.[24]

It can be seen that such a thesis is very dangerous and may lead in a direction that is opposite to the European legal heritage. We may only hope that our current constitutional 'debate' will not move in that direction.

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THE POLISH CONSTITUTION OF 1997 AS PART OF THE EUROPEAN CONSTITUTIONAL HERITAGE

S u m m a r y

The aim of this paper is to present axiological researches that were going on during the work on the Polish Constitution in the early years of transformation. One of the fundamental discussions at the initial stage of the work on the Constitution was a discussion that often took the form of a dispute about values. One of the elements of the dispute was the problem of dependence between *ius* and *lex*. In this context, references were made to the European legal heritage and concepts such as European identity or the common European legal heritage. The main challenge for all post-socialist countries was the need to 'decode', or explain the concept of 'common legal heritage'. This concept became a peculiar founding myth in the new democracies of Central Europe. In this context, the Venice Commission (formed in 1990) played an extremely important role by helping countries to discover what evolved from the common European legal tradition to become a European standard, and consequently, a model for concrete legal solutions. In the general category, therefore, the so-called European standard was perceived as a central value and a reference to it was an important verifier in the process of reviewing the internal legal system and, particularly, in the process of constitutional changes, especially on issues such as the rule of law, separation of powers, or the independence of the judiciary and judicial control over the constitutionality of the law. Despite disputes concerning specific political regulations, the consensus that prevailed was that the rules which referred to the 'axiology' of the previous system could not pretend to constitute an element of the European legal heritage and thus could not serve as a basis for the drafting of a new Polish Constitution.

[24] C. Schmitt, *Nauka o konstytucji. Teologia polityczna*, Warsaw 2013: 77.