

**Andrzej ZOLL**

## **THE STATE AND THE RULE OF LAW**

*Text of the Inauguration Lecture delivered in Polish by Professor Andrzej Zoll, President of the Constitutional Tribunal of the Republic of Poland, at the Inauguration Ceremony for the 1996/7 Academic Year in the Jesuit Faculty of Philosophy, Cracow, 4th October, 1996.*

The changes brought about in Poland and elsewhere in Europe by the fall of Communism have given rise to hopes for the establishment of a political system differing from the one which had been the fate of these countries. In place of totalitarianism a new political system is to be created based on the democratic principles of a state under the rule of law. The transformation from totalitarianism to democracy is a process which has not yet been completed in Poland and still requires many efforts to be made before this goal may be achieved. One may also enumerate various pitfalls jeopardising this process even now. The dangers cannot be avoided if their sources and nature are not identified. Attempts to pervert the law and the political system may only be counteracted by legal means if the system based on the abuse of the law has not yet succeeded in establishing itself. Resistance by means of the law only has any real chance of success provided it is directed against attempts to set up a totalitarian system. Once the powers which are hostile to the state bound by the rule of law take over the institutions of the state, such resistance is doomed to failure.

In Poland it was not long after the collapse of Communism, already in December 1989, that an amendment to the Constitution declared that country to be a democratic state ruled by the law, in which the principles of social justice were applied. We should consider what these words mean when used in the provisions of a constitution, whether they

are just a declaration used merely as propaganda, or whether they comprise a legal prescription which gives rise to a particular set of rights and duties for citizens and state.

Let us first look at the role of the state in a totalitarian system, and in particular at the relationship between the state and the individual.

The characteristic feature of a totalitarian state is absolute control of all the aspects of public life by the ruling group. The name itself is derived from a term coined by an Italian journalist to describe Mussolini's manifesto and political programme. In a totalitarian system the state is the source of all order, and in particular of all the rights which the individual may enjoy. The state itself is the supreme good. The individual's life is to be fully subordinated to the interests and good of the state. An honest and apposite, if somewhat terse description of this was the Nazi slogan, which may also be encountered in Communism, that the state (class or group - depending on the particular brand of totalitarian ideology applied) was supposed to be everything, while the individual was nothing.

Since in totalitarianism the state is to be the supreme good and the whole of public affairs is to concentrate on the achievement of the state's interests, nothing can restrict such a state in the pursuit of its aims. In particular that state cannot be limited by any laws, which are only passed in order to help, not hinder or restrict the pursuit of those aims. In totalitarianism the state, which is the source of all laws and rights, itself stands above the law. It is an entity whose authority is the outcome of its power, not of a legal order established by the given society.

In the theory of the state governed by the rule of law it is assumed that just like other legal persons, the state is the subject of rights and obligations. The power of such a state is to be determined by what is laid down by the law. No state institution may operate outside the regulations of the law. The state is not the source of the fundamental human rights and liberties. The legislative power merely discovers these rights, endowing them with a legislative substance. Man is by nature entitled to the fundamental rights and liberties. The state is necessary to ensure every individual of the opportunity to develop, to keep public order, and to maintain internal and external security. In order to accomplish these tasks the state governed by the law has to be endowed by its citizens with particular rights, including rights which may for this purpose limit the individual's rights and liberties.

I stress once again this fundamental difference between the totalitarian state and the state under the rule of law. In the totalitarian concept the state determines all rights and laws, including the rights of the individual. The totalitarian state is the source of the rights and

laws in it, but it is not itself subject to any laws or duties, since it is above the legal order. In the democratic state the individual entrusts the state with that part of his rights and freedoms which is necessary for the state to apply in order to fulfil its tasks. The state enjoys certain rights, but it is also bound by certain duties.

This absolutely different philosophy of the state and of the law has patent practical consequences. Since the totalitarian state is the source of the law in it, the individual subject to its authority may do only those things which are allowed by that authority. On the other hand the basic principle in the democratic state regulated by the law is the individual's freedom to do whatever he pleases providing it is not expressly forbidden by the law. Of course this does not mean that whatever is not prohibited by the law is permissible in the moral sense, but here I am talking only about the legal aspect. But the democratic state itself may act only within the bounds determined by the law.

Since in the totalitarian system the state is above the law and no limits to the state's power can be defined - there are numerous examples which may be cited, even from the most recent times, when millions of human lives were sacrificed for the sake of a medley of mad ideas held by those who have wielded power in totalitarian states - there are no possibilities for the introduction of any control mechanisms whatsoever to check totalitarian power. By its very nature totalitarian power is beyond all moderation or restraint. Totalitarian power is uniform in the sense that all the functions of the state's power and authority are vested in the hands of one central entity. The Führer in Nazi Germany, and the First Secretary of the Communist Party, wielded both the legislative power (even if, as for example, in People's Poland, officially there was a parliament ostensibly convened for the purpose of laying down the law); and it also held the executive power and the judicial power, regarding which there could of course be no question as to its independence of the political power. The Prime Minister, formally head of the government, was always a member of the Politburo, and in his political decisions was subject to the First Secretary of the Communist Party. The same applied to the First President of the Supreme Court [the name of the supreme office in the Polish judiciary]; appointments to this office could not be made without the approval of the Politburo, and the person appointed would become a member of the Central Committee of the Party. The totalitarian state is based on the doctrine of uniform state power.

The situation differs fundamentally in a state which is ruled by law, especially in a democratic one. In such a country the power of the state is always divided into three distinct centres of power which are mutually independent of each other: the legislative power, the executive

power, and the judicial power. These three centres of power supplement each other in the carrying out of the state's functions, and they mutually exercise control over each other. No authority within the state bears the nature of omnipotent power. The legislative authority in a modern state under the rule of law, that is its parliament, is subject to control by an institution which is independent of the parliament, that is the constitutional court. Parliament is bound by the provisions of the Constitution. It may only legislate laws which are in compliance with the principles and provisions of the Constitution, and in the manner laid down by the Constitution. The constitutional court supervises parliament to ensure that it keeps within the principles and provisions of the Constitution. If the constitutional court finds that a given act of parliament is not in agreement with the Constitution it will have such an act or a constituent part of such an act removed from the statute book and legal system.

The executive power is supervised by parliament, which has the possibility of passing a vote of no confidence in the government; but the executive power itself also controls parliament through the presidential prerogative to dissolve parliament. The executive authority is also monitored by the courts, for example through the administrative courts' power to check the legality of administrative decisions. Naturally, the degree to which any particular unit or institution may limit the power of another unit will vary depending on the specific type of political system involved, for instance we can distinguish a parliamentary and cabinet system of government, in which the parliament's power is relatively strong, from a presidential system, in which the executive power is strong in relation to a weaker parliamentary power.

The fundamental control over the legislative authority, but indirectly also over the executive authority, is exercised by the people. This control is made manifest in the form of free and democratic elections, which may influence the composition of parliament and hence the policies pursued by parliament and the government. In a totalitarian system the ruling power cannot make itself subject to free elections. The fundamental principle on which a totalitarian state is based is the permanence of power grounded on the ideology which in that state is held to be the only legitimate doctrine, upheld in exclusive preference over all others whatsoever. Any person who fails to adhere to the uniquely acceptable ideology is an enemy who must be deprived of his rights, and in particular he must be deprived of any opportunity to resist and counteract, or even question the validity of the prevailing ideology. Nazism, Communism, or Fascism in Italy, was to be that prevailing ideology. By its very definition therefore in such a state there was never a chance for the domination of its totalitarian ideology to be submitted

to voting. Any contention as to who should wield power could only take place within the ruling party structures.

I have already said that the key issue distinguishing a totalitarian state from a democratic state regulated by the law is the position of the individual within the state. A state under the rule of law treats the individual as an absolute subject with respect to the law, a carrier of rights. In a totalitarian state the individual is an object under the influence of totalitarian power. This has some very far-reaching consequences not only as regards the legal dimension and the definition of the extent of human rights and freedoms, but it is also very important in the shaping of human attitudes. The totalitarian system deprives people of responsibility for their actions. The individual person has no say in matters concerning his or her own life in that his or her entire future has been planned out for that individual, from nursery school through education in a preselected school, to employment prescription - or proscription - in a predetermined workplace. In totalitarian systems, such as for example modern China, the individual may not make decisions even in the most personal matters, such as those concerning the setting up of a family and how big it should be. An individual who ceases to feel responsible for his own life is inclined to treat himself as an object. He is passive and expects to have the essentials of life apportioned and allocated to him by the authorities. This is understandable.

Now responsibility always implies the assumption of a certain range of freedom. Life under the influence of a totalitarian authority for any substantial length of time, and the subjection of people to being treated as objects for several consecutive generations always leaves permanent marks which are hard to remove. This kind of life may be easy. You don't have to worry about anything; it will all be sorted out by the authorities anyway. It's convenient not to feel responsible for anything; it absolves you of the need to make choices and it calms your conscience. A person living in a totalitarian system becomes enslaved. In a state under the rule of law you run your own life. You are free, so therefore you have to make decisions for yourself. Thus it's obvious that in a state bound by the law life is harder, but it may (this again is a matter of choice) be more fitting for a human being.

What we are observing today in all the countries which have discarded totalitarianism is a conflict between two attitudes. The first is the attitude imposed by the totalitarian order, of a person who has become accustomed to a system of state allocation and apportionment and expects to be given his share; the second is the attitude of the active person who thinks of himself as a free individual determined to surmount difficulties by taking his life into his own hands. As we know,

the former attitude is much more widespread, as confirmed by election results, not just in Poland.

To close it would be worth-while asking the question whether today's Poland is a democratic state ruled by the law. In my opinion there can be no clearcut answer. This is because what is at issue in this question is not what is laid down constitutionally, but what the legal and social realities are in modern Poland. There is no easy answer also for the reason that both „the totalitarian state” and „the state ruled by law” are ideal constructs, models set up to classify the particular existing states. Actual states are always only closer to, or further away from, a particular prototype model. It would be hard to name an ideal state ruled by the law; and even in the systems operating in Nazi Germany and under Stalin's Soviet Union there were component parts which were not typical of totalitarianism. Transformation from a totalitarian system to a democracy in which the law is supreme is a long process, and will necessarily be longer the longer the time for which the given nation was subjected to the bonds of totalitarianism. Poland is still undergoing this process, which has by no means been accomplished yet. But I have to admit that very much has been done since 1989. All the time we are getting closer and closer to the reality of the rule of law.

But there is still one more, extremely important issue, concerning the roots of the law. The supremacy of the law attesting to a law-regulated democracy means more than just government through legislation passed by a parliamentary majority; and it means more than just government in accordance with the principles of a Constitution which the majority has approved of, even in a general election. Democracy, too, can be totalitarian, in the sense that a majority may enthrall a minority if it fails to respect the minority's natural rights. There is something that goes beyond, or perhaps it would be better to say transcends the legal order established by man. We Catholics will say that this is of course the Divine Law, with which the law created by man is to comply. Not everyone concurs in believing in God, and this has to be respected in a state founded on the law, too. But there are values which are common both to believers and non-believers alike, which have been shaped by the European, that is the Christian civilisation. The rule of law may not stand in opposition to these values. Here we have to apply a simple rule: if something is not prohibited by the law, that does not mean that that kind of conduct may be said to be morally right. The law does not regulate all matters, and not all amoral acts may be checked by means of legal prohibitions. There is also another rule we will find necessary, namely that the law may not force anyone to behave in any way which is regarded by anyone, be it only a civilised minority, as immoral.

It seems to me that where the people of Poland still have the greatest distance to cover on their road to establishing a state ruled by law is in contending with themselves. We have to overcome the enthrallment which has been imposed on us from outside but to which so very many of us have grown accustomed. If we think of ourselves as free, and if by virtue of that freedom we hold ourselves responsible for our own future, we shall have come very close to our goal.

Translated from Polish by Teresa Bałuk-Ulewiczowa