

CHALLENGING THE LEGITIMACY OF THE LAW

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Summary. This article is about the behaviour patterns that challenge the legitimacy of the law. The analysis focuses on the basic forms of questioning the legitimacy of such rights namely the right to resistance, civil disobedience and revolution. The considerations made in this article are designed to synthetic analysis of the issues related to the questioning of state power by the citizens.

Key words: right to resistance, civil disobedience, revolution

INTRODUCTION

The questions which are the subject of the following scientific reflection of an academic nature can be examined from the point of view of different branches of science. They are intensely analysed on the ground of philosophy of history, political and economic history, political science, and many others. What seems obvious, in this paper emphasis is put on the subject of study of the law. The rights to resistance, civil disobedience and revolution as forms of challenging the legitimacy of the law are insufficiently elaborated on in the science of the law and constitute a research area which few representatives of jurisprudence have the courage to step into. Typically, the aforementioned issues are raised in the science of the constitutional law however in a clearly insufficient way. For centuries, problems related to challenging the legitimacy of the law have been the subject of interest of the philosophy of the law and it is mainly there where we can find both questions and answers related to the binding force of the law as a system of norms of behaviour of particular importance¹.

The following considerations are aimed at indicating basic theses to be coped with by a modern researcher focused on these socio-legal phenomena. Secondly, the following scientific reflections onto the forms of challenging the legitimacy of the law stimulate further research onto the area which should definitely be carried out due to its importance and nature, as well as meaning in the context of problems we face in modern times.

¹ A. Kość, *Podstawy filozofii prawa*, Lublin 1998, 232–241; M. Sawczuk, M. Konarski, B. Nowaczyński, *W poszukiwaniu mocy wiążącej prawa*, in: *Abiit non obiit. Księga poświęcona pamięci Księdza Profesora Antoniego Kościa*, ed. A. Dębiński, *et al.*, Lublin 2013, 317–354.

RIGHT TO RESISTANCE

Certainly, the term *right to resistance* as one of the forms of challenging the legitimacy of the law conceals different political situations.

As emphasised by Jan Baszkiewicz, if the authority violates legal order with its despotic and arbitrary acts, resistance to it is the defence of the violated law and can be included in the positive legal criteria². If, however, the authority degenerated the entire legal order or at least a part of it by changing it into a system of lawlessness, such resistance to oppression challenges the legal order and falls outside the positive legal criteria, therefore its foundations have to be searched for in the law of God or the natural law, principles of justice and social equity³.

The right to resistance may have different natures. It may have a repressive nature (for example, punishment for poor governance) as well as a defensive one (as a defence of community against poor government). Moreover, the right to resistance against the broadly defined oppression can be implemented either through collective actions (e.g. a revolution) or may be expressed in individual resistance⁴.

The right to resistance was sometimes recognized as a thesis which assumed that obedience should be only given to such authority which provided protection against violence on the part of those who violated the legal order established in the social agreement. If there was no such protection, subjects could defend their rights and refuse to obey the impotent authority themselves, which was most clearly expressed by *Thomas Hobbes* who believes that the purpose and the end of subjects' obedience is the effectiveness of state protection. Although *Hobbes* is considered a strong opponent of the authority's sovereign power, he sometimes allowed such active resistance, especially in the defence of life, health and personal freedom of individuals. What is more, *Thomas Hobbes* believed in collective self-defence and even self-defence reserved for criminals. Thus, the subject of interest is the opposition of the rights of an individual and the rights of the government because, ultimately, the right to collective self-

² J. Baszkiewicz, *Z zagadnień nowożytnej koncepcji prawa do oporu*, in: J. Baszkiewicz, *Państwo. Rewolucja. Kultura polityczna*, Poznań 2009, 621. According to Herbert L.A. Hart, the term „positivism” in relation to legal criteria is used to denote one or more of the following ideas: 1) rights are people's commands; 2) there is no necessary connection between the law and morality or the law as it is and the law as it should be; 3) analysis or examination of meanings of legal terms is extremely important and must be distinguished from historical and sociological research and the critical evaluation of the law from the point of view of morality, social objectives, functions, etc.; 4) the legal system is a „closed logical system” and proper decisions as part of it can be deduced from the previously established legal rules by sole reference to logic; 5) moral beliefs cannot be proven the same way statements of facts are, i.e. through rational argumentation, experience or evidence, H.L.A Hart, *Pojęcie prawa*, Warszawa 1998, 399.

³ J. Baszkiewicz, *op. cit.*, 621–622.

⁴ *Ibidem*, 622.

-defence paves the way for legalization of a rebellion⁵, as „opposionists can always cite the right to collective self-defence if the head of state wants to punish their actions undertaken against the government”⁶.

The history of resistance against the law has its centuries-old origin, and apart from the already mentioned *Hobbes*, many thinkers before and after the author put special attention to the problem⁷. At this point, of course, it is impossible to refer to all of these concepts, therefore we highly recommend the article by *Jerzy Oniszczyk* in which he examined the issues to a broad extent⁸. In the next part of our deliberations, the focus will be on the right to resistance as it was formulated in the time of the French Revolution, referring to the provisions of the Declaration of the Rights of Man and of the Citizen of 1791 (Article II stated that the main aim of every political association is to maintain natural and not outdated human rights, listing the resistance to oppression next to liberty, property and safety), then the Declaration of the Rights of Man and of the Citizen preceding the constitutional law of 1793 (the so-called Constitution of the Year I or the Montagnard Constitution). This was because it was probably the first time in the history of a modern state when the concept of the right to resistance was established in the highest ranking normative act in the country⁹.

⁵ *Ibidem*, 624.

⁶ *Ibidem*, 624.

⁷ Years ago, Konstanty Grzybowski wrote that „the right to resistance has its origins in the medieval system, its theoretical development in the doctrines of monarchs of the 16th century, its renaissance in the American Revolution, but in each of these periods the right to resistance against the rulers is of prime importance, in each of these periods this law remains primarily in relation to the dualistic structure of the state (ruler – states, rulers – subordinates represented by their bodies). It was only in French declarations where it was completely separated from both the dualistic structure of the state and the theoretical perspective as the society’s law (i.e. states) and the technical recognition in certain forms; it became a saint, unalienable right of every individual not included in any form. [...] it becomes a dogma standing above all the positive law”, K. Grzybowski, *Demokracja francuska*, Kraków 1947, 24–25.

⁸ J. Oniszczyk, *Prawo do oporu i Radbrucha wizja nieposłuszeństwa obywateli. Opór jako odtworzenie nowoczesnej polis*, in: *Nieprzećiętność. Dylemat wolności*, ed. M. Szyszkowska, A. Rossmannith, Warszawa 2013, 21–33. Although the author analyses the right to resistance mainly from the point of view of G. Radbruch’s concept, he also points to the concepts of the following authors: Thomas Aquinas, Ockham, Bodin, Calvin, Brutus, Grotius, Locke, Fichte, Mill.

⁹ Stanisław Ehrlich was of the opinion, as previously cited K. Grzybowski, that the issue of the right to resistance dates back to the Middle Ages, citing the reasons for the adoption of the Magna Carta, as an expression of a political compromise with the resisting state of nobility led by aristocracy, in England as an example. The author considers that historical moment as the beginning of a process that led to the formation of a law-abiding state, see S. Ehrlich, *Wiążące wzory zachowania. Rzecz o wielości systemów norm*, Warszawa 1995, 197. In turn, Iwo Jaworski wrote that in order to comply with the provisions of the Magna Carta, far-reaching sanctions were provided for because barons could observe whether the king respects his commitments through 25 representatives chosen among them. In case of a breach thereof, they had the right to call for active resistance against the king, however, the resistance was to be conducted while maintaining inviolability of the person of the king and his family and stopped after the king’s remedy of his abuses, I. Jaworski, *Zarys powszechnej historii państwa i prawa*, Warszawa 1996, 157–158. According to

Resistance to oppression results from other human rights and when the authority violates the rights of people, rebellion is people's, and each part of their communion, most sacred law and at the same time most urgent duty¹⁰. The final formulation of the regulation of the Montagnard Declaration of the Rights of Man and of the Citizen was born out of a profound debate that took place among the leaders of the revolution. Firstly, the right to resistance to oppression, therefore against violence, cannot be subordinated to any legal forms which, in turn, are placed in the context of legality, because as *Maximilian Robespierre* said himself, when oppressive rights are at stake, people cannot wait for legal procedures to be implemented¹¹. As *J. Baszkiewicz* states, such an approach questioned Article VII of the Declaration of Rights of 1789, where it was mentioned that enforcement of Act cannot be resisted, because if the Act is an expression of *volonte generale*, it cannot be repressive¹². Another problem was the distinction between the right to resistance to repressive laws (also ones that assumed the use of violence against population) and the right to petition (complaint) against unfavourable laws. The solution to this issue was ultimately based on the fact that people have the right to criticize bad laws and form against oppressive ones, if the criticism does not bring the expected effect¹³.

The Declaration of Rights draft, in a version prepared by *M. Robespierre*, brought the most comprehensive and far-reaching development of the idea of the right to resistance, strengthened by the Montagnard Declaration of the Rights of June 24, 1793, according to which: 1) resistance to oppression is a result of other rights of man (Art. 33); 2) the whole of society is oppressed, when one of its members is oppressed, and each member of society is oppressed when it extends to the whole of the society (Art. 34); 3) when the authority violates the rights of people, a rebellion is people's, and each part of their communion, most sacred law and at the same time most urgent duty (Article 35)¹⁴. Therefore, emphasis is put here on resistance to acts of authority that violate the content of the law or its forms, whereas the respect for the law itself prohibits undertaking such arbitrary acts, and if the authority applies power in this case, people can respond with power as well what is referred to as „resistance for the protection of human

Benedykt Zientara, the council of barons never assembled, B. Zientara, *Historia powszechna średniowiecza*, Warszawa 1994, 205.

¹⁰ M. Szaniecki, *Wybór źródeł do historii państwa i prawa w dobie nowożytnej*, Warszawa 1996, 147–148.

¹¹ At the meeting of the Jacobins dated July 29, 1792, Robespierre said that „the state must be saved in every possible way; only what brings it to ruin is unconstitutional”, J. Baszkiewicz, *Maksymilian Robespierre*, Wrocław 1989, 139. A. Manfred, a historian who studied the history of France, wrote that in those days of July, Robespierre „draws a program of a courageous and resolute destruction of the whole of the state-political organism”, J. Baszkiewicz, *Rousseau, Mirabeau, Robespierre. Trzy portrety z epoki Wielkiej Rewolucji Francuskiej*, Warszawa 1988, 339.

¹² J. Baszkiewicz, *Z zagadnień nowożytnej...*, 631.

¹³ *Ibidem*, 631.

¹⁴ M. Szaniecki, *op. cit.*, 147–148.

rights”¹⁵. In turn, the provision of Art. 35 speaks more of „resistance to the laws” that is the degenerated, oppressive legal system. For such oppressive laws, people’s resistance refers to fundamental natural rights¹⁶. Although the later Thermidorian coup thwarted the Jacobins’ work and ignored the problem of the right to resistance, surely the idea of trust in people (to their patience, gentleness and the belief that they arise against the laws only in a just cause) presented by the Jacobins got a lot of publicity throughout Europe and had a great influence on the development of human rights in recent times.

What seems important for the discussion is Gustav Radbruch’s reflection (his views are more widely presented later in the paperwork) who wrote that a nation is not obliged to serve and lawyers must find the courage to deprive acts that are against the natural law of their legal nature as the criterion that directs people to a right decision, what allows easing a specific tension between the duty of obedience to authority and the legal and natural principle (justice) is man’s conscience¹⁷.

CIVIL DISOBEDIENCE

Another form of the right to resistance (as it was historically conditioned in a different way), which has specific distinguishing features, is civil disobedience, also known as the non-violence conflict. As was emphasized by *Stanisław Ehrlich*, „civil disobedience was formed and developed outside the European cultural circle. It was only after many years when the work and practice of *Mahatma Gandhi* became known and penetrated into Europe and America (especially the United States where *Martin Luther King* continued the idea by adapting it to the needs of the fight against discrimination of African Americans)”¹⁸.

Civil disobedience can be defined as „a public, free of constraint, conscious and political act that is contrary to law, usually undertaken to induce changes to the law or the government policy”¹⁹, whereas three criteria that allow distinguishing civil disobedience from other forms of opposition can be proposed: 1) it is neither a protest nor a council; 2) it is not a revolution as a revolution is aimed at overthrowing constitutional foundations of society with violence; 3) a citizen who refuses obedience should not be treated as a criminal because a personal benefit is not the motive for his behaviour²⁰.

¹⁵ J. Baszkiewicz, *Z zagadnień nowożytnej...*, 632.

¹⁶ *Ibidem*, 632.

¹⁷ J. Oniszczyk, *op. cit.*, 34.

¹⁸ S. Ehrlich, *Norma, grupa, organizacja*, Warszawa 1998, 180; see also: V. Haksar, *The Right To Civil Disobedience*, „Osgoode Hall Journal” 2003, vol. 41, 407, where the author referred to M. Gandhi defines civil disobedience as the purest type of a constitutional campaign.

¹⁹ S. Ehrlich, *Norma...*, 180.

²⁰ *Ibidem*, 180; see also: S. R. Schlesinger, *Civil Disobedience: The Problem of Selective Obedience to Law*, „Hastings Constitutional Law Quarterly” 1976, vol. 3, 947, where the author

In turn, *Robert Alexy* by analysing the assessment of the civil disobedience act, i.e. whether it has a civil disobedience nature, made it dependent on: 1) the oppositionist's unselfish motives (public interest matter); 2) targeting actions against a law that is grossly at variance with basic rules of morality or rationality; 3) the public nature and non-violent actions; 4) exhausting all legal means; 5) approval for punishment; 6) complying with the rule of the „lesser evil”²¹. Whereas, in the case of the institution of an official derogation from the law, the procedure: 1) must take place due to the gross variance with morality or rationality; 2) was made in the public interest in accordance with the principle of „lesser evil”; 3) had approval of the public opinion.

Therefore, civil disobedience is nothing else but a form of a protest (opposition)²² in which those staging the protest are aware of the violation of the law²³. It is different to revolution²⁴. As emphasised by *J. Oniszczyk*, „in general, those in charge of a civil resistance do not conduct the process in the form of social disturbances and accept their subjection to legal responsibility as well. The goal of this disobedience is the essence as it is all about making knowledge of the unjust law public, appealing to social consciousness [...] Therefore, the motivation of this resistance, its justification, is of great importance. It is believed that the motive cannot have a personal background (individual) but should reach common good (public)”²⁵.

Among many examples of civil disobedience as a form of protest, attention should be paid to those that took place in the days of the communist ruling in

wrote: „civil disobedience is illegal activity undertaken to protest laws that are regarded as unjust. It is characterized by open, nonclandestine, violation of the law being protested or of other laws”, *ibidem*, 947; A. Sabl, *Looking Forward to Justice: Rawlsian Civil Disobedience and its Non-Rawlsian Lessons*, „The Journal of Political Philosophy” 2001, vol. 9, 307; L. M. Sidman, *On Constitutional Disobedience*, „Georgetown Public Law and Legal Research Paper” 2012, no. 12, 1–32.

²¹ J. Oniszczyk, *op. cit.*, 33–34.

²² A protest as a basic form of counteraction (next to pressure) is implemented as counter-mobilization to an existing domination structure. A protest becomes the most effective solution in achieving objectives, if the State at which it aims is already weak itself. If pressure exerted on the state assumes an attempt to influence and lobby in order to achieve the expected result derived from within the political system, a protest results in starting a competition or bringing about a test of strength which undermines the existing domination structure and seeks its reformation in a way. A protest finds its most effective expression in the form of collective actions of organizations and social movements, J. Scott, *Władza*, Warszawa 2006, 38–39 and 139.

²³ J. Oniszczyk, *op. cit.*, 34.

²⁴ C. Cohen, *Civil Disobedience and The Law*, „Rutgers Law Review” 1966, vol. 21, 3. As the author emphasizes: „revolution seeks the overthrow of constituted authority, or at least repudiates that authority in some sphere; civil disobedience does neither. The civil disobedient accepts, while the revolutionary rejects, the frame of established authority and the general legitimacy of the system of laws”, *ibidem*, 3.

²⁵ J. Oniszczyk, *op. cit.*, 35. In his reflections, J. Oniszczyk refers to Henry D. Thoreau's views who contained his main theses in his most famous work: *On The Duty Of Civil Disobedience*, www.ibiblio.org/ebooks/Thoreau/Civil%20Disobedience.pdf

Poland after World War II. Typical examples are workers' protests that started in June 1956 and lasted until the fall of the Polish People's Republic. They were an integral part of formation of socio-opposing movements aimed at introducing political changes in Poland. However, apart from strictly political protests, there were social protests directed primarily against particular initiatives of communist authorities, such as e.g. the construction of the Żarnowiec Nuclear Power Plant, which seem noteworthy²⁶. In the latter example, the protests were effective enough to result in closure of the construction.

REVOLUTION

Revolutionary behaviours as forms of challenging the legitimacy of the law have a different dimension the aforementioned ones as they call into question the functioning of the entire political system. Their final result is aimed at taking control of the political decision centre in the country²⁷. The concept of revolution derives from the Latin term „revolution” which means „turn” or „revolution” and it was originally used in natural sciences. In social sciences, the term is ambiguous. For the needs of our research, we will assume that it means a fast and armed capture of the political decision making centre in the country by organized groups or political parties, which had fought the centre explicitly or conspiratorially, with strong support of materially underprivileged masses²⁸. In contrast to revolution, such socio-political situations as coup, rebellion, etc. do not give beginning to a new socio-political system but lead only to individual changes in the political decision making centre or, alternatively, to limited reforms within the existing system²⁹.

As *Harold J. Berman* wrote years ago, every revolution is a testament to the fall of the old legal system. Moreover, „in each of the great revolutions, a transition period can be seen during which some laws were quickly replaced with new ones and the new ones were quickly abolished or replaced with another. Ultimately, however, in its course, each revolution restored pre-revolutionary laws, reactivated many of their elements, including them in a new system that reflected goals, values and beliefs in the name of which the revolution had been started in the first place”³⁰.

²⁶ J. Waluszko, *Protesty przeciwko budowie Elektrowni Jądrowej Żarnowiec w latach 1985–1990*, Gdańsk 2013, 36–63.

²⁷ S. Ehrlich, *Wiążące...*, 203.

²⁸ *Ibidem*, 204.

²⁹ *Ibidem*, 205. Bertrand de Jouvenel wrote that „the true historical function of a revolution is the renewal and strengthening of authority”, B. de Jouvenel, *Traktat o władzy*, Warszawa 2013, 246.

³⁰ H.J. Berman, *Prawo i rewolucja. Kształtowanie się zachodniej tradycji prawnej*, Warszawa 1995, 43.

For centuries, challenging the legitimacy of the political decision making centre while challenging the legitimacy of normative decisions established by the centre was hand in hand with revolutionaries' presentation of their own system of values which underlied a positive law system³¹.

As it is assumed in literature on the subject, periods of violent coups or revolutions, although often different in nature, are characterized by certain regularities. The meaning of the „violent nature” does not mean power of legal compulsion applied by governments through the police or the army, but extra-legal power used by individuals or groups against existing authority³². Those who reached authority as a result of such activities created a new legal system³³.

The said revolution-oriented regularities made each revolution an essential, quick, rapid and lasting change to the social system as a whole. What is more, each one sought legitimacy in the fundamental law, distant past and the apocalyptic vision of future. Moreover, each revolution resulted in a new legal system embodying the main goals of the revolution and modifying the western legal tradition. Ultimately, none of the new systems went beyond this tradition³⁴.

It should be remembered that the typology of a revolution can determine it through different criteria such as historical significance (Hussite, Puritan, independence, national, communist), purpose (personal, constitutional, social, religious, economic), nature of forces behind the revolution (military, parliamentary, and mass revolutions), paradigm that characterizes a given type of revolution (jacqueries, rebellions, armed insurgencies – uprising), and, finally, criterion of class (revolutions of slaves, anti-feudal or proletarian revolutions)³⁵. Ultimately, however, regardless of the adopted classification type, a revolution involves a change to the political system that brings a number of legal-institutional modifications, which undermine an existing legal order and legitimacy of norms of behaviour with characteristics that are generally applicable on the territory of a given state community. Jan Baszkiewicz wrote that each revolution is a process of demolition and adaptation, every revolution transforms something and continues something from the existing social matter³⁶.

³¹ The day before the completion of work of the Constituent Assembly, Robespierre said that „a revolution is nothing else but a sum of the Nation's efforts aimed at preserving or winning Freedom”, J. Baszkiewicz, *Francuzi 1789–1794. Studium świadomości rewolucyjnej*, Warszawa 1989, 280.

³² H.J. Berman, *op. cit.*, 34.

³³ As H.J. Berman stated, „the system of authority and the right of every country of the West is derived from such a revolution”, H.J. Berman, *op. cit.*, 34.

³⁴ H.J. Berman, *op. cit.*, 33.

³⁵ M. Chmaj, M. Żmigrodzki, *Wprowadzenie do teorii polityki*, Lublin 1996, 213–215.

³⁶ J. Baszkiewicz, *Ciągłość i zmiana w kulturze politycznej okresu rewolucji: przykład rewolucji francuskiej*, in: J. Baszkiewicz, *Państwo. Rewolucja. Kultura...*, *op. cit.*, 683.

CONCLUSION

The analysis made above refers only to a few forms of challenging the legitimacy of the law chosen by the author. The reason for the fact was the narrow scope of expression as well as the enormity of research material the amount of which exceeds the capabilities of this analysis.

The issue of the legitimacy of the law and challenging it is perhaps the oldest one which many philosophers and jurists have tried to measure over many centuries. As long as humanity will last, the problem will remain unsolved which, of course, does not exempt a reliable researcher from the obligation to investigate the subject.

Years ago, *Antoni Kość* – a great Polish philosopher of law – asked a question about the immediate cause of the motivating force of law which reliably motivates the widespread compliance with the law and provides an opportunity to force it through³⁷. The answer to this question can be found in the theory of recognition – the reason here is the recognition of the law which is not understood as a single mental act but a long-lasting, habitual behaviour in following and respecting the law³⁸. Therefore, it can be concluded that the validity of the law is consisted in a positive attitude towards the law that prevails in a legal community, making the whole of the community approve and recognize the law as its own³⁹. If so such approval and recognition is present, the community may have a negative attitude towards the law and challenge its validity through the aforementioned forms.

It usually happens that groups or organizations that challenge the legitimacy of both the decision making centre and its system of adopted standards, take actions at variance with these standards being convinced of superiority of their own standards that are based on different core values. This usually results in a conflict of values the solution of which is often found through force and violence⁴⁰, and the winner of such a rivalry sets a new or altered system of generally applicable legal norms.

Ascertaining the aforementioned deliberations, the words of *Jean-Jacques Rousseau*, the symbol of democracy, separation of authority and the idea of sovereignty of people, can be cited. Already in 1767, *Jean-Jacques Rousseau* wrote that it is crucial to find a form of authority that would put the law above man. If such a form can be found, it must be searched for. If, however, it cannot be found, the opposite extreme solution must be implemented to put a man above the law⁴¹.

³⁷ A. Kość, *op. cit.*, 234.

³⁸ *Ibidem*, 234.

³⁹ *Ibidem*, 234.

⁴⁰ On strength and violence as attributes of state authority, see also: M. Konarski, M. Woch, *Siła i przemoc jako atrybut władzy państwowej*, in: M. Konarski, M. Wielec, M. Woch, *Prawa człowieka w państwie*, Warszawa 2014, 93–122.

⁴¹ A. Burda, *Demokracja i praworządność*, Wrocław 1965, 184.

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KWESTIONOWANIE LEGITYMACJI PRAWA

Streszczenie. Niniejszy artykuł dotyczy zachowań, które kwestionują legitymację prawa. Analiza koncentruje się na podstawowych formach kwestionowania legitymacji prawa, a mianowicie prawie do oporu, cywilnym nieposłuszeństwie i rewolucji. Rozważania zawarte w tym artykule stanowią syntetyczną analizę zagadnień związanych z kwestionowaniem władzy publicznej przez obywateli.

Słowa kluczowe: prawo do oporu, obywatelskie nieposłuszeństwo, rewolucja