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RECOLLECTION OF MEMORIES: ANDRZEJ WASILKOWSKI 1932-2020

Abstract: *On 1 March 2020, Professor Andrzej Wasilkowski died. In his research, Professor Wasilkowski undertook issues which were co-creating the mainstreams of legal debates all over the world. He was an author of valuable publications on the relationship between international law and Polish domestic law. Professor Wasilkowski was also a director of the Institute of Law Studies of the Polish Academy of Sciences and the head of the Legal Advisory Committee of the Minister of Foreign Affairs.*

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INTRODUCTION

On 1 March 2020, Professor Andrzej Wasilkowski passed away. Andrzej Wasilkowski studied at the Faculty of Law of Warsaw University, where in 1960 he received the title of Master's in law. Quickly, already in 1963, the same University awarded him a doctoral degree. The supervisor of the doctoral dissertation, entitled "State's membership in international organizations. Shaping of modern community and international organizations", was Judge Manfred Lachs. Both the supervisor and the doctoral thesis exerted a substantial impact on Wasilkowski's professional life.

Professor Waskilkowski combined scientific research with legal practice. He remained faithful to the chosen issues throughout his entire professional life. He earned his habilitation in 1969, following the awarded habilitation thesis ("Recommendations from the Council for Mutual Economic Aid"). In 1975, he was granted the academic title of an associate professor.

What connected the method of a legal argument between the Student – Andrzej Wasilkowski – and the Mentor – Manfred Lachs – was the conciseness of their arguments. In fact, their publications consist only of conclusions, which distinguishes them from the majority of others. The message to the reader remains unstated: you know

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what I know, so let's compare our conclusions; let's exchange them. Most of scientific publications from the field of international law (and not only) are addressed to potentially broad audiences. This type of reader, unfortunately, was not Wasilkowski's target group. I say "unfortunately" because the knowledge – foundations, on which his arguments were based, were worth publishing. They might serve as Ariadne's thread, which would lead many people to valuable knowledge. An excellent Polish writer, Antoni Słonimski, used to say: "I do not like exchanging views. I always lose." I suppose that Andrzej Wasilkowski would reply, silently, that there are no free lunches. He demanded knowledge from the reader, which was the Charon's obol for reading; unfortunately many people had no obol, which limited the reception of his works.

Professor Wasilkowski, in his research, undertook issues which were co-creating the mainstreams of legal debates all over the world. He extended the studies on international organizations aimed at economic integration. He was an author of valuable publications on the relations of international law with Polish domestic law. He also made a contribution to the creation of space law.

After receiving his doctoral degree, he found employment in the Institute of Law Studies of the Polish Academy of Sciences, where he worked until his retirement. In 1991-1996 he served as a director of the Institute. For many years he was also the head of the Legal Advisory Committee of the Minister of Foreign Affairs, and a member of the Legislative Council (the government's consultation body). In addition, he was a member of the editorial staff of various legal periodicals, scientific councils, and academic bodies.

The second stream of Andrzej Wasilkowski's professional activity was journalism. When he was seventeen, he started to write in a biweekly entitled *Pokolenie.* He publicized successively in the weekly *Dookoła Świata* and the daily *Życie Warszawy* (in which he was, among others, a deputy editor). Each of these titles was important in the social and intellectual life in Poland; *Życie Warszawy* was a daily not affiliated with by the Polish United Worker's Party (PZPR) – the ruling party; the other two took their readers to life spaces different than those determined by politics.

While Andrzej Wasilkowski separated these streams of activities, at the same time in his style of writing reactions to the expectations of newspapers' readers can be noticed. He presented his legal arguments linearly – consequently pursuing the objective and avoiding digressions and empty words. Curiosity about the world and its people prompted him to sail as a seaman.

Andrzej Wasilkowski was one of the last professors of international law in Poland born before 1945. He was, on the one hand, a representative of a group of specialists in the field of international law joined by a common space/time of life and work in Poland – then being a part of the Eastern bloc. On the other hand, he was different from the members of this group. What decided about the coherence of the "group", and at the same time decided about what was happening in Poland in the period 1945-1990, was that there was no established school of international law declaring its identity (either distinct from "schools" in the world, or indicating an affiliation to some

other one) with regard to the method of researching international law. Polish lawyers specializing in international law (meaning those who did not emigrate from Poland) neither described the method which they used, nor expressed their opinion on the appropriate method in international law.[1] Lawyers in Poland co-creating the doctrine of international law were the "great silent" ones in a rich and multi-threaded debate ongoing all over the world, in which all the foremost scholars spoke and took part. Such a debate, a conscious and articulated methodological reflection was a factor enabling the creation of schools and the development of doctrine in the world. Lack of such debate – lack of a conscious and articulated methodological reflection was a factor preventing the creation of schools in Poland. And this was a conscious choice. The authority of the communist party in the sphere of ideology decided that the only accepted method of researching international law was the Marxist method. However, this method, in the only version approved by the states of the Eastern bloc, namely the version of Wyszyński,[2] was unusable for scientific research, since it was not a scientific method. Owing to the scientific honesty of the group members, the door to the science of international law in Poland was closed for the followers of "Lysenko's science" in international law. Going down this road would be deadly for the study of international law in Poland. This is demonstrated by the destructive influence that Józef Kukułka publication, entitled *Współpraca polityczna państw wspólnoty socjalistycznej* [The Political Cooperation of the Socialist Community Countries] (Warsaw 1976) and the research method promoted in it, had on the environment of those involved in political science. However, silence about the legal method also had its drawbacks. With regard to the applied research method of international law in Poland, dogmatism prevailed. The only accepted method was positivism in its extreme version of Hans Kelsen's normativism.[3] This dogmatism, because it was undeclared, did not allow for any exceptions. This is illustrated by the case of an allegation raised in 1988 against the doctoral dissertation on responsibility and liability for ecological damages; where the reviewer claimed that within the framework of international law, norms which are not law (yet) cannot be examined. Another common feature of the group members was avoiding, in research, the issue of plurilateral relations of the states of the Eastern bloc. Professor Wasilkowski, as the rest in this group, did not speak about the legal method. However, he was different from the majority of the members since in his research, he often used methods other than positivism.

There was concluded and executed an "unwritten agreement" between the authority and lawyers – specialists in international law. Lawyers "committed themselves" – to not comment on the philosophy and methods of international law; to not formulate negative

[1] In works published before 1956, only papers of communist creators and leaders were quoted (because it was obligatory).

[2] Soviet General Prosecutor, public prosecutor in the Stalinist trials, after Stalin's death – USSR ambassador to the United Nations. For the presentation of this method, *see* A.J. Wyszyński, *Zagadnienia prawa i polityki międzynarodowej* [Issues of international law and politics], Książka i Wiedza, Warszawa: 1951.

[3] Obviously, Hans Kelsen was not quoted, since his method was regarded as a "bourgeois method."

conclusions resulting from the international law analysis of the practice of the Eastern bloc; to not to express positive opinions on the relations within the Western hemisphere and the activities of the West in the world; and to not criticize the publications of scholars from the Eastern bloc and Polish lawyers who were under the umbrella of the authorities. These were taboo subjects.

The authorities, in exchange for the adherence to these rules, allowed international law to be researched in accordance with the "rules of art" and to publish the results of research (this freedom to publish was only partial in relation to textbooks). Lawyers in Poland had unlimited administrative access to foreign scientific publications (in other countries of the Eastern bloc, this access was strictly limited); it was possible to refer to world literature in footnotes; and there was no obligation to recall Marx, Engels, Lenin and the secretaries general of the ruling party, etc. The authorities did not demand: that certain contents (stupidity) must be written; to declare support for "socialist practice and law"; to attack those considered "enemies"; and last but not least to defend the Polish western border (Polish *raison d'être* seen as being threatened by Germany). Under the dictates of the authorities, the ordered content was written by volunteers (in exchange for privileges distributed by the authorities).

As a result, in Poland in 1949-1990 there was no established "socialist-class international law" (but there was established "socialist-class criminal law and procedure"). In the Polish doctrine of international law there are no very visible spots, i.e. publications about which one wishes to forget. However, the price paid by lawyers was not only the resignation from methodological reflection. It was also an absolute pro-state attitude towards the research in the field of international law. Starting as early as from 1918, in the reflections on Poland's statehood, relations with neighbours, internal relations etc., there prevailed the principle of speaking with a single voice. This principle, created in the interwar period, was maintained by the participants in the transactions after World War II.[4] Lawyers quoted the norm "ius postliminii" as the basis of recognizing Poland's continuity – beyond the partitions.[5] Lawyers unambiguously supported the position of the Polish government in disputes with Germany before the Permanent Court of International Justice (PCIJ) and demonstrated reluctance toward "minority treaties." Generally, in the legal environment there prevailed the perception of Germany

[4] This is illustrated by the case of a judge of the Permanent Court of International Justice – Michał Rostworowski. He was not reported in 1935 by the Polish government in the composition of the Polish national group in the Permanent Court of Arbitration. In his case a "black legend" was created of someone not eager enough represent Poland's interests. For more details on the consequences of such an attitude; *see* S.E. Nahlik, *Rostworowski Michał Jan (1864-1940),* in: *Polski słownik biograficzny* [Polish bibliographical dictionary], vol. XXXII, Wydawnictwo Ossolineum, Wrocław: 1989-1991, p. 224.

[5] S. Hubert, *Odbudowa państwa polskiego jako problem prawa narodów* [Rebuilding the Polish State as a problem of the law of nations], Drukarnia Artystyczna K. Kopytowski, Warszawa: 1934, and S. Hubert, *Przywrócenie władzy państwowej (ius postliminii). Rozwój doktryny w teorii i praktyce prawa narodów do początków wieku XIX* [Restoration of state authority (ius postliminii). Development of the doctrine in the theory and practice of the law of nations until beginning of the 19th century], Zakład Prawa Politycznego i Prawa Narodów Uniwersytetu Jana Kazimierza, Lwów: 1936.

as a threat to Poland's statehood, an attitude determined by the political programme of national democracy from the 1920s and 1930s[6] and with regard to Germany, and transformed into reality after 1945. In scientific publications legal heresies emerged – which defended themselves by referring to the Polish national interest.[7]

Wasilkowski was different from other members of this group. Professor Wasilkowski did not participate in the above-mentioned *concertatio*. Can conclusions be drawn from this silence? Even if so, definitely not in the framework set by the rules of researching the history of science. Nevertheless, it seems to me as a person knowing Andrzej Wasilkowski that this silence was decided by "the gene of discreteness", and a critical – from the socialist position – attitude to the governing practice in Poland.

Another difference concerned the subjects of his research. Professor Wasilkowski distinguished himself both by the subjects that he addressed, as well as those he did not. For many years he conducted studies on "socialist integration", on the Mutual Economic Assistance Council (MEAC). In Poland, the specialists in the field of international law got swiftly interested in organizations of integration. In discussions accompanying the beginnings of the European Coal and Steel Community (ECSC) in Poland, Judge Lachs and Professor Berezowski swiftly indicated the novelty and essence of the European integration project. A group of lawyers was shaped examining the (Western) European integration. Simultaneously, research on the MEAC was undertaken. However, the specificity of MEAC – an institution which was firstly a response to the Marshall Plan, and then to the ECSC and CEE as well as Euratom – was the decisive factor in concluding that European integration project was incomparable with the socialist integration. MEAC – the socialist integration – corresponded to the CEE integration as the socialist democracy corresponded to democracy.[8] And this difference laid at the very essence of the incomparable institutions. However, MEAC was an element of relations between Eastern bloc countries. Therefore it needed to be researched. However, with regard to its essence, namely the fact that it was a something like a unicorn, it could be researched using instruments of magic and described in the language of magic, namely *newspeak*[9] practiced in the Eastern bloc countries, or using the language and methods of international law. In the latter case, a lawyer would claim that if states declared – with the use of an instrument of international law, which is an international agreement – creation of an international organization and equipped it with competences to realize its designated functions, then one should say: "call it what it is." And Professor Wasilkowski used to do that. Wasilkowski believed that MEAC was

[6] A party operating in the interwar period.

[7] Therefore I allow for the possibility to defend the "scientific" view of Klafkowski, who in 1979 (sic!) authoritatively claimed that international organizations are not the subject of international law; A. Klafkowski, *Prawo międzynarodowe publiczne* [Public international law], PWN, Warszawa: 1979, pp. 133-137. The problem was not Klafkowski's preposterous views, but the fact that the state's authority granted the book the status of a quasi-official coursebook, thus contributing to the spread of the author's views.

[8] Or currently the illiberal democracy.

[9] The term coined by Orwell; G. Orwell, *Nineteen eighty-four*, Plume, New York: 2003. I do not quote any specific publications, since they had no scientific value (from the perspective of international law).

not an international organization since – according to him – "creating (an international organization – note of J.M.) requires a certain minimum of voluntarism of entities of international law joining their forces."[10] In historical and comparative studies on the ways of organizing larger communities, Wasilkowski differentiated (as fundamental) between two methods: subordination (imperial) and cooperation (coordinating). He indicated the functioning of organizations – tracing the forerunners of the modern ones back to ancient Greece, and their lack in ancient Rome. In the first case, it was possible due to ensuring a minimum of (formal) equality; while in the latter, i.e. for Rome, the imperial method was sufficient. Professor Wasilkowski's monograph, entitled *Socjalistyczna integracja gospodarcza. Zarys problematyki prawnej* [Socialist economic integration. Outline of the legal issues] (Warszawa: 1975) outlived MEAC, it defends itself in scientific workshops and methods. In this work Professor Wasilkowski indicated how a specialist in international law researches organizations of economic integration – which criteria an institution has to meet in order to become an international organization of integration. The unspoken conclusions of the legal research of MEAC is that MEAC and the rest do not constitute a homogenous model of an international organization of integration.

Research dedicated to international organizations was generalized by Andrzej Wasilkowski in a co-written coursebook. This publication was the result of multi-year studies and discussions, it was a real opus magnum of Professor Wasilkowski's. He included in it the effects of his reflections and many new views. At the same time, he revealed an essential trait of his scientific personality; Andrzej Wasilkowski perceived the world from the perspective of political realism, but at the same time he was a believing idealist and this is reflected in his publications, i.e. that what the world is like does not mean that it must remain like this. This hope was fully expressed in his remarks *International Law: how far is it changing?* published in the Festschrift honouring his Teacher – Judge Lachs.[11] Despite the title, in the text he did not focus on law and its changes, but on the international community making the international law, changing the international law, and changing itself under the international law. The starting point was a precise description of the generation and evolution of the international community. The key to the choice of challenges, which he indicated the community faced, was the desire of compensatory justice – Andrzej Wasilkowski perceived evil in inequalities. He closed his remarks with a declaration of belief in the international community's ability to change the law, so that this law could change the international community. Simultaneously, this interesting text confirms the said truth: "there are no free lunches." Combining the conciseness of his arguments with his resignation from declaring the method, as well as not using legal positivism (either in Hart's or Kelsen's version), led to a text in which the reader could easily get lost. Hardly anyone

[10] *See* J. Menkes, A. Wasilkowski, *Organizacje międzynarodowe. Prawo instytucjonalne* [International organizations. Institutional law], PWN, Warszawa: 2017, p. 89.

[11] J. Makarczyk (ed.), *Essays in International Law in Honour of Judge Manfred Lachs*, Martinus Nijhoff Publishers, The Hague: 1984, pp. 307-311.

knows whether Wasilkowski presents conclusions derived from his research of the law or "dreams." I am convinced that, on one hand, researching the law limited to legal positivism leaves many questions (which cannot be avoided while perceiving the "law in action"), while on the other hand researching the law without legal positivism deprives this research of the character of legal research – it takes us into a stream of reflections around moral postulates.

At the meeting point of his functional analysis of international institutions and the normative content of UN provisions regulating the use of force, there is an article by Wasilkowski entitled *Kilka uwag o kwestii użycia siły we współczesnym prawie międzynarodowym* [Several remarks about the issue of the use of force in contemporary international law].[12] Also in this case the starting point of Professor Wasilkowski's considerations is the international reality of using force. He accepts the formal rationalization of its use in international relations and is aware of the fact that force is often (the only) tool for managing a conflict. Wasilkowski makes a difficult choice; aware of the contemporary alternative: force as one of the instruments of conflict management or its rejection as an evidence of weakness – an inability to manage a conflict without using this instrument, and he has the courage to speak against the rejection of force. His argument – embedded in the stream of realism – seems even cynical. I cannot accept the perspective through which Andrzej Wasilkowski perceives the international relations and law regulating them; a closer (or maybe close) perspective for me is that of Theodor Meron.[13] I often have an impression that Dostoyevsky, rejecting the sacrifice of a child's tear in favour of the idea, defended both the child and the idea, as well as that his opponents are effective as the perpetrators of the child's tears, but less effective as defenders of the idea – value. In Wasilkowski's argument faithfully reflecting the reality, I miss, on one hand, an explicit axiological reflection, while on the other hand it is present there. Professor Wasilkowski clearly opts for using (or returning to use) the term "reprisal" against the neologism "countermeasure." He recognizes the new term as rebranding and disapproves of it. The foundation of Wasilkowski's axiology is, thus, demanding the truth and disapproval of *newspeak*.

Professor Wasilkowski many times carried out considerations on *sovereignty*, but from a different perspective. In the article entitled *Suwerenność w prawie międzynarodowym i w prawie europejskim* [Sovereignty in international law and in European law][14] the starting point of his reflection is recognition of the cognitive dissonance between *sovereignty* in action and *sovereignty* in "common thinking" (p. 11). And again Wasilkowski,

[12] J. Menkes (ed.), *Prawo międzynarodowe – problemy i wyzwania. Księga pamiątkowa Profesor Renaty Sonnenfeld-Tomporek* [International law – problems and challanges. Commemorative book of Professor Renata Sonnenfeld-Tomporek], Wydawnictwo WSHiP, Warszawa: 2006, pp. 528-539.

[13] T. Meron, *The Humanization of International Law*, Brill, Leiden-Boston: 2006.

[14] J. Kolasa, A. Kozłowski (eds.), *Prawo międzynarodowe publiczne a prawo europejskie. Konferencja Katedr prawa międzynarodowego Karpacz, 15-18 maja 2002* [Public international law and European law. The conference of the chairs of international law. Karpacz, 15-18 May 2002], Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław: 2003, pp. 11-24.

while declaring himself as a defender of the states' right to *sovereignty*, researches the reality which they determine: extending the range of the regulation of international law to the fields covered (in the past) by the state's authority in connection with the process of institutionalization of the international community. Neither advocating nor (maintaining) *sovereignty*, nor giving primacy to other values, he claims that recognizing sovereignty as a foundation of the international order is incompatible with the concept of the primacy of human rights. And as in his other works, Professor Wasilkowski rejects "only" the lack of logic of arguments, and demands coherence of thinking.

The common sense (sense based on knowledge) of Andrzej Wasilkowski's legal perception of the new reality will be sorely missed.