

*Wszelkie prawo
stanowione
jest dla ludzi*

KSIĘGA JUBILEUSZOWA

SĘDZIEGO DOKTORA ZBIGNIEWA SZCZURKA

KOWALEWSKI & WOLFF

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JUDGING IN THE EUROPEAN LEGAL SPACE.

BUILDING BLOCKS FOR THE DEBATE

ON THE STATE OF POLISH JUDICIARY

I do not know how to reform Polish judiciary. I see potential for change in reasonable, calm, decisive, steady, rather than playing-to-the-gallery, building of the authority of courts by courts themselves... What is most disturbing in the practice of Polish courts is the acceptance of methodological nihilism and interpretative reductionism together with denying the right to a court on the pretense of allegedly commendable judicial restraint. While judicial restraint is one thing, interpretive deficit is quite the other².

It is with great pleasure that I dedicate this short piece in honour of work and life of Dr Zbigniew Szczurek. His scholarly work and research set the highest standards to emulate, with the to-the-point and precise language and crisp analyses. This praise comes from personal experience. I keep vivid memories of my preparations for state judicial exam and Dr Szczurek's publications, in particular on the civil procedure and enforcement, served as authoritative sources of knowledge and expertise.

The choice of the present analysis is not accidental either. Polish judicial system, state of the mind of Polish judges and judicial craft figured prominently

¹ University of Gdańsk; Director of the Chair of European and Comparative Law, Faculty of Law and Administration, University of Gdansk. This paper builds on my intervention Polish Judge and Judging in the European Legal Space. Maintaining status quo or rethinking judicial ethos? during the Conference "The Transformative Power of Europe Revisited on the 10th Anniversary of the Enlargement", organized by the Centre for Judicial Cooperation European University Institute in Florence on 12-13th of May 2014. All comments are welcome at www.tomasz-konczewicz.eu.

² E. Łętowska, *Rzeźbienie państwa prawa. 20 lat później*, (*Sculpting the state governed by the rule of law. 20 years later*), Warsaw, 2012, p. 149, 165. It is a must-read for anyone interested in finding out what and why went wrong with Polish courts and how to move forward (my own translation).

both in his academic work and professional career as a judge and former President of the Regional Court in Gdańsk. Below I present few remarks as an *amicus curiae* to help move the debate forward and focus it on issues that really matter.

SETTING THE SCENE. WHAT CHANGE?

Revolt against formalism, revolt against mechanical jurisprudence and revolt against routine justice. These three processes explain why people go to courts today³. The law and people's expectations at the court-room have changed significantly. Law is becoming more responsive and courts act, to a greater extent than was the case in the past, as catalysts for change and protectors of an equilibrium between statistical democracy (rule of the majority) and substantive democracy (rule of the values). Judge has his own promises to fulfill as *gardien des promesses*⁴ and the courtroom becomes forum of principle as opposed to parliaments as forum of opportunism ("judges argue, politicians bargain"). Judges are no longer seen as listless machines devoid of will and critical mind but ready to approach the normative material in a constructive (not equaling creative though) manner which takes into account all relevant factors and circumstances of each case and balances competing claims and pretensions⁵. It does not mean though that everyone should have an access to a courtroom. The courts are not and should not be seen as a surrogate for political process. Their contribution to the democratic process is not and can not be identical as that of representative government. Changing nature of interpretation from literal to more teleological and systemic is a powerful tool for building the legitimacy of the courts in 21st century⁶. The question then is this: did the Polish judges change their habits and attitudes to keep abreast of this change?

3 See ground-breaking analysis by M. Cappelletti, *The Judicial Process in a Comparative Perspective*, Clarendon Press, Oxford, 1989.

4 A. Garapon, *Le Gardien des promess. Justice et Démocratie*, Odile, 1997.

5 M. Kirby, *To judge is to learn*, (2007) Harvard International Law Journal Vol. 48, at p. 36.

6 A. Barak, *Purposive interpretation in law*, Princeton University Press, 2005.

RECALIBRATING THE SCENE AND THE CHARACTERS

The working assumption is that lots of mental catching-up still awaits Polish judges. They firmly belong to the world-past inhabited by Montesquieu, formalism and unflinching faith in the rationality of the law-maker. Challenges are indeed of fundamental nature but they are not only normative in nature but also concern the mental side of the judges, their readiness to open up, change and learn⁷. Average Polish judge still believes in the legal fairy-tale in which legal provisions come neatly wrapped up and ready to use. Bad decisions will be given, when judges muddle the password, and as a rule simply uttering “Sesame open up” will do the trick⁸. Such naiveté is striking considering fundamental changes to, and recalibrations of, law, society and people’s understanding of the court room⁹, juridification (understood as a proliferation of law, the Constitution and expansion of judicial power¹⁰) and proceduralisation (move away from “*what you are entitled to?*” to “*how you enforce your rights and entitlements?*”).

There is a dramatic shift today from law acting as a sword to punish (post-communist heritage) towards law as a shield (new paradigm dictated by the rule of law approach) to protect individual against the state. Unfortunately “*law as a sword*” still reigns in Polish courts and “*the law as a shield*” is seen as an aberration. As a result one finds in Polish courts dramatic gap between on the one hand people’s expectations (new rights, new procedures) and the quality of performance by the courts in providing effective and adequate legal protection on the other¹¹. Citizens are still in the shadow of the state and the aspiration of “*living on the frontier*” is painfully verified by a Polish judge who is not up to the

7 In similar vein M. Bobek, *The Fortress of judicial independence and the mental transitions of the Central European Judiciaries*, (2008) 14 *European Public Law* 99.

8 Lord Reid, *The Judge as Law-maker*, (1972) 12 *Legal Studies* 22.

9 See illuminating analysis L. Claus, *Montesquieu’s Mistakes and the true meaning of Separation*, *Oxford Journal of Legal Studies* 2005 vol. 25, No. 3.

10 For definitions and more in-depth analysis consult L. Chr. Blichner, A. Molander, *What is juridification?*, Centre for European Studies University of Oslo Working Paper 14/2005.

11 This discrepancy is at the heart of my argument and was presented forcefully in the series of publications on the state of Polish judiciary. See *Prawo i niesprawiedliwość*, (*Law and Injustice*) *Gazeta Wyborcza* 11th of September 2012, *Sądzie sądzi*, *POLITYKA* no 50, 12th of December 2012, *Jaka interpretacja w polskim sądzie* (*What kind of interpretation in the Polish court?*), *Rzeczpospolita* 8th of November 2013, *Sędziów polskich trzeba uczyć*, (*Polish judges must be taught*), IN *GREMIO* 3/2013, *Nie(ludzki) polski sąd*, (*(In)human Polish Court*), IN *GREMIO* 4/2013.

challenge of catching up in the spirit of “*adjudicating on the frontier*”. People are relegated to mere case numbers. The courts do not see people with flesh and blood. It is all formally correct but was justice really done in the end? Not necessarily, but justice (as shocking as it might sound!) does not occupy the central place in the vernacular of Polish judges. It is still seen as more or less nebulous concept, good for philosophical considerations rather than an objective tool for managing the dispute in the court-room. All this takes on special importance today, at times where Polish judges are faced with systemic challenges and pressure for change coming from the outside. The europeization is a powerful learning process which transforms CCE judicial methods and mentalities. Supranational adjudication and piercing the veil of the state, plurality of sources, venues and legal forums, all bring to the fore questions which in the past were unthinkable like where is my judge?, who is my judge?, how my judge reasons?.

HOW TO CAPTURE THE NORMATIVE CHANGE?

For Polish judge to capture the change and challenges ahead it is crucial to make a clear break with the past and reconsider judicial craft. Judges in Poland need a new model for dispensing justice and new language for understanding their role in a democratic state governed by the rule of law which would help take them out of their comfort zone. There are certain building blocks of the new judicial philosophy which should in turn inform our discussion about Polish judges and challenges ahead. Below I put forward a list of tentative and by no means exhaustive proposals to move forward our discourse on the current condition of Polish courts and the challenges they face.

First, right to a court (aspect of an *access*) must be complemented by right to a good judge (aspect of the *procedural quality* of the right)¹². *Second*, we must move beyond independence and impartiality paradigm and towards aspect of good judging that is much more than these two basic features. We need a new “turn to judicial virtues” like discursiveness, openness, rationality, criticism, responsiveness, art of listening, wisdom of deferral, acceptance of my limits as

12 See also terminology in S. Guinchard, *Droit processuel*, Dalloz, 2011, at p. 415.

a judge, courage to reject opportunism and pressure to fall in line with judicial mainstream. "Just right" is no longer an option. They make up our right to a good judge today and determine methodology of deciding cases, and yet they are completely absent from Polish discourse on the state of Polish judiciary. *Thirdly*, moving beyond infrastructure issue. "New public management" puts emphasis on presenting courts as user-friendly institutions with know-how necessary to balance arguments and wielding power of choice within judicial zone of discretion. Participatory justice underlines that courts can as well claim democratic legitimacy based not on the representativeness, but accessibility and participation. Judicial proceedings need to be transparent, speedy and well managed, user-friendly, ensuring full and fair participation for all interested (proverbial "have one's day at court"). *Fourthly*, judicial temperament¹³ needs drastic reconsideration. Polish judge must be ready to make justice and not simply decide cases. *Fifthly*, moving beyond result-based justice, towards procedural thinking and satisfaction: correct question is not *why* people go to courts in the first place but rather *why people are ready to go back to courts?*¹⁴ *Sixthly*, move away from formalism and new understanding of division of powers. Courts should be seen as actors with their own promises and expectations. They are courts of law, not only "courts of statutes". *Seventhly*, building culture of justification where what counts is the power of arguments, not arguments of power¹⁵. Legitimacy is derived from transparency and from weight of arguments, not from "who says", (dominant approach "I, Supreme Court rule hereby ...") but "how". *Last but not least*, constructive interpretation must take place of the reigning infatuation with the literal interpretation which treats mere attempts to consider the text in the light of the general scheme or the law's *ratio legis* as

¹³ Term borrowed from A. Barak, *Judge in a democracy*, Princeton University Press, 2006.

¹⁴ It is to be noted here that this lack of appreciation for the procedural dimension of rights is more general phenomenon characterizing "Polish mind" which approaches procedures from two extremes as either having to be "followed to a T" irrespective of consequences or being neglected completely as limiting judges' "freedom" and discretion. For a plea to abandon this procedural misconception see my paper *Po co ludziom procedury? Powściągnąć nasze ukochanie "ulańskiej Somosierry"*, (*What people need procedures for? Harnessing our affection for Somosierra-style brinkmanship*, *Gazeta Wyborcza* 23rd of August 2014, p. 7.

¹⁵ See powerful plea in this vein by E. Łętowska, *Transformations In Law Interpretation: Towards a Universal Approach - The Phenomenon, Causes and Symptoms* in J. Jemielniak, P. Mikłaszewicz, (eds.), *Interpretation of Law in the Global World: From Particularism to a Universal Approach*, Heidelberg, Dordrecht, New York, 2010, p. 39.

inadmissible judicial activism. It is good legal interpretation that builds discursive legitimacy of the courts today.

The image of Polish courts in the public mind is disastrous but the problem runs much deeper than occasional gaffes by the judges or random decisions making headlines for all the wrong reasons (formalistic reading of the text with no regard to its consequences and the system). Neither is the source of the problems, as suggested by the judges themselves, accurate: "everyone is guilty but me" logic is all we get from the judges on a daily basis!

Bad management by the Ministry of Justice of the day, poor infrastructure etc. are all important issues to tackle but they are only part of the problem. Issues facing Polish judges are more existential and systemic in nature. They call for radical actions and new language which would remind Polish judges the wisdom of old adage "*as you sit on trial, you stand on trial*". Rejoining Europe by Poland necessitated normative openness of the system but of equal importance was the mental openness which never really happened. This was, and still is, as much challenge for law as for mind's changing. There is no doubt thus, that we are faced with the challenge of reconsidering judicial ethos and ideology and not merely maintenance of *status quo*. This challenge is not only here to stay with us, but will define public image of Polish judiciary in the foreseeable future. We either face it squarely or, as was the case so many times in the past, be doomed to repeat "*wise after the event*". Should it be the latter, it would be nothing short of catastrophe for individuals who rely more and more on courts to come up with good and workable interpretation when others failed. After all this is exactly what we should have courts for today in a democratic state governed by the rule of law.

It is time to accept that with great power comes great responsibility and expectations, that constructive criticism must not be equated with the attack. Courts of today are much more than "*la bouche qui prononce les paroles de la loi*". They are ambassadors of their legal orders, bearers of ever-growing expectations of those who come to the courts seen as institutions required to act as just mediators of divergent claims. Judges who deny it are liars¹⁶.

16 M. Shapiro, "Judges as liars", (1994) 17 Harvard Journal of Law and Public Policy 155.

As opening quotation by Professor Ewa Łętowska shows reforming Polish judiciary is nothing short of a Herculean task. Yet the challenge of change must be confronted head-on and it must happen now. First signs of the revolt against the rule of formalism in Polish courts and growing critique of the methodology of Polish judges show forcefully that maintaining *status quo* and “business as usual” approach are no longer a tenable alternative¹⁷. Unfortunately this call for change still waits to be received by Polish judges who, despite all the mutations in law and society around, love to keep on lying about their true function and vocation and still believe fervently in the myth of “*la bouche*”.

Let me sum up with the often-quoted quip by Lord Reid as it captures perfectly state of the mind of an average Polish judge: “There was a time when it was thought almost indecent to suggest that Judges make law – they only declare it. Those with a *taste for fairy tales* deem to have thought that in some Alladin’s cave, there is hidden the Common Law in all its splendor and that on a judge’s appointment there descends on him the knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the password and the wrong door opens. *But we (judges - T.T.K.) do not believe in fairy tales any more ...*”¹⁸ (my emphasis).

This excerpt is applicable with equal force to Polish judges as they continue to live in a world of fairy-tales, unaware of the legal change(s) around them. However this persistent and unapologetic belief in the “Open Sesame” will soon degenerate (many would argue though that it has already happened!) into a horror movie. Hence new narratives, plots and characters are desperately needed. For Polish courts stakes of such institutional recalibration and rediscovery of the ethos of judging could not be higher: change, adapt and open up or fall into intellectual oblivion and societal irrelevance. Clock has been already ticking for much too long. The time for difficult debate on the state of Polish courts has finally arrived.

17 See most notably M. Matczak, *Summa iniuria. O błędzie formalizmu w stosowaniu prawa*, (*Summa iniuria. On the formalism vice in the application of law*), Warsaw 2007; E. Łętowska, *Rzeźbienie państwa prawa. 20 lat później*, (*Sculpting the state governed by the rule of law. 20 years later*), Warsaw, 2012 and more recently “*Orzekł jak orzekł a nikomu nic do tego*” (*The judge decided and it is nobody’s business*) *Dziennik Gazeta Prawna Prawnik* 29-31 of August 2014.

18 *The Judge as a law-maker, op. cit.*