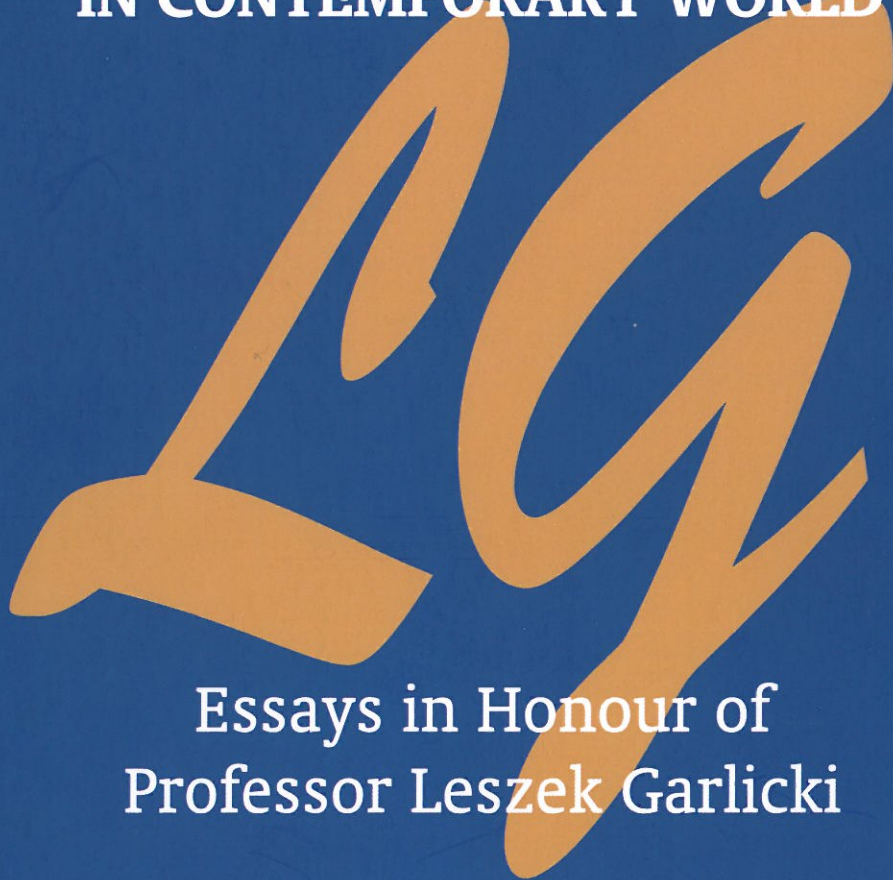


**HUMAN RIGHTS  
IN CONTEMPORARY WORLD**



Essays in Honour of  
Professor Leszek Garlicki

Wydawnictwo Sejmowe



# HUMAN RIGHTS IN CONTEMPORARY WORLD

*Essays in Honour of  
Professor Leszek Garlicki*

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**Professor Leszek Garlicki.**  
**Curriculum Vitae et Studiorum.**  
**Summa cum laude**

Professor Leszek Garlicki, distinguished scholar and judge, is one of the most learned representatives of the Polish legal world. He is a jurist of international renown, with numerous research specialisms. It would be difficult to overstate Professor Garlicki's role in the formation of contemporary Polish constitutional thought. His ideas have had a substantial influence on the theory and practice of constitutional law in Poland, and have frequently been of fundamental significance. The occasion of his 70<sup>th</sup> birthday in 2016 provides us with an excellent opportunity to present a profile of Professor Garlicki.

Professor Garlicki's route to the Olympian heights of law has led, amongst other things, through the lecture halls of the leading universities of Europe, Asia, and both Americas; the chambers of Polish courts, specialist offices in the Polish Parliament; via the Round Table subcommittee on Reform of Legal System and Judiciary; then the office of the vice-president of the Legislative Council at the Prime Minister Office; Polish constitutional court and from there to the European Court of Human Rights where he eventually served as the President of its Fourth Section. Professor Garlicki's professional history – eventful, rich in experience and achievement – can be divided into three fundamental periods. The first of them can be defined as the academic period, a time of progress through successive levels in a university career; the second – the tribunal phase; the third – the Strasbourg period.



Leszek Garlicki was born on the 23 August 1946 in Żoliborz, in Warsaw, to Stanisław Wojciech Garlicki and Janina, nee Łaskiewicz. In 1963 he took his final school examinations at the B. Limanowski Comprehensive School 1 in Warsaw, and then – following in the footsteps of his father, himself a lawyer – he began his studies in the Faculty of Law and Administration at the University of Warsaw. It should be mentioned at this point that for over half a century the Professor's professional career has been linked with the oldest academy in the capital, one which celebrated its 200<sup>th</sup> Anniversary in 2016. Over a quarter of the 200-year history of the University of Warsaw has moved a parallel with the history of Professor's professional path.

## **"Mechanical jurisprudence" under strain? Eastern Europe judiciary under the European influence<sup>1</sup>**

A constitution is no longer something that functions exclusively within the sphere of politics; rather it is regarded as the *Grundnorm*, determining the legal system as a whole and, in particular, the status of the individual.

L. Garlicki, "Cooperation of Courts: The Role of Supranational jurisdictions in Europe", *International Journal of Constitutional Law* 2008, vol. 6, p. 509

### **1. Setting the scene. WHAT change?**

One should realize how the world we live in is getting smaller and smaller. This observation holds also true for the legal world, where the word best describing the current state of art is "legal interrelationship".<sup>2</sup> There are more and more laws, courts and case-law is getting more nuanced and complicated,<sup>3</sup> blurry and less straightforward.

<sup>1</sup> This text builds on my presentation in October 2015 at the Visiting Scholars Series at the Centre for the Study of Law and Society of the Berkeley Law School, University of California, Berkeley. All comments are welcome at [www.tomasz-koncewicz.eu](http://www.tomasz-koncewicz.eu).

<sup>2</sup> For a full exposition of the argument see incisive analysis by S. Douglas-Scott, *Law after modernity*, 2013.

<sup>3</sup> On the phenomenon of proliferation of the courts see generally R. Higgins, "A Babel of Judicial Voices? Ruminations from the Bench", *International Comparative Law Quarterly* 2006, vol. 55, p. 791; N. Lavranos, "Concurrence of Jurisdiction between the ECJ and other International Courts and Tribunals. Part I", *European Environmental Law Review* 2005, p. 213; "Concurrence of Jurisdiction between the ECJ and other International Courts and Tribunals. Part II", *European Environmental Law Review* 2005, p. 240; "The MOX Plant Judgment of the ECJ: How exclusive is the jurisdiction of the ECJ?", *European Environmental Law Review* 2006, p. 291; "Protecting Its exclusive Jurisdiction: The Mox Plant-judgment of the ECJ", *Law and Practice of International Tribunals* 2006, vol. 5, p. 479.

The claimants, disillusioned by the constant bickering of petty politics, assume that judicial forum will furnish them an alternative for the solution of the legal disputes, and that their problems will be solved by not only independent and neutral, but also competent, reasonable and predictable judges. The result of these shifts is "judicialization"<sup>4</sup> and "juridification",<sup>5</sup> which mean that courts interpret more and more laws to meet growing expectations of the involved parties. In a globalized and complex world people expect more and more of the judges. When politicians fail and disappoint, individuals turn to impartial, objective and effective procedures and to open-minded and creative judges ensuring that justice is indeed done.<sup>6</sup> Nowadays not only politicians, but also judges have their own promises to fulfil: make sure that the aggrieved party finds equitable solution in the court of law and even more, namely convince a party losing the case that it was heard with due diligence, that parties' rights to present all the arguments were respected and considered. This symbolic act of entrusting and belief make judges "*gardienne de promesses*".<sup>7</sup> In this way our understanding of the role of the courts, law and procedures must evolve accordingly and search for a common denominator linking various judicial *fora*, multiple remedies and judicial approaches to the interpretation.

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). Judges have their own promises to fulfill and they become *gardien des promesses*. The court-room 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 pretensions.<sup>8</sup> 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 cannot be identical as that of repre-

<sup>4</sup> See generally T. Vallinder, "The Judicialization of Politics – A World-View Phenomenon: Introduction", 15 *International Political Science Review* 1994, vol. 15, p. 91.

<sup>5</sup> A. M. Magnussen, A. Banasiak, "Juridification: Disrupting the Relationship between Law and Politics?", 19 *European Law Journal* 2013, vol. 19, p. 325.

<sup>6</sup> For various approaches and perspectives consult P. P. Wiener, *Dictionary of Selected Pivotal Ideas. Volume I Despotism to Common Law and Volume III Concept of Law to Protest Movements*, 1974; W. Sadurski, *Giving Desert its Due: Social Justice and Legal Theory*, 1985; O. Höffe, *Political Justice. Foundations for a Critical Philosophy of Law and the State*, 1995; P. Ricœur, *Le Juste*, 1995; N. MacCormick, O. Weinberger, *An Institutional Theory of Law. New Approaches to Legal Positivism*, 1986; J. N. Shklar, *The Faces of Injustice*, 1990.

<sup>7</sup> This expression comes from A. Garapon's, *Le Gardien de promesses-justice et démocratie*, 1996.

<sup>8</sup> M. Kirby, "To judge is to learn", *Harvard International Law Journal* 2007, vol. 48, p. 36.