



THE LEGITIMATION OF JUDICIAL POWER



EDITED BY ANNA MACHNIKOWSKA

GDAŃSK UNIVERSITY PRESS



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INTRODUCTION

This book has been prepared under the Project of the National Science Centre entitled “The third power of courts and judges in Poland from the perspective of theory and philosophy of law” (2013/11/B/HS5/04156). The aim of the project is to analyze the relations between the standard of institutional guarantees of judicial power, the status of common courts and judges, judicial ethics, the principles of judicial proceedings and those systemic factors in the judiciary area which materially affect the nature of power exercised by the courts. The concept of “independence of judges and courts” is essential in that respect. The changes in functioning of the judiciary model and their social perception cause that a connotation which is given to both terms by the legitimation of judicial power is more and more important again. The latter one is also subject to transformations, accompanied by discussions, along with the legal and political disputes. Some of them relate to issues that have been known for a long time, however a few of them are redefined, and others are exposed due to unused potential. At the same time, new points of reference for the judiciary appear. One of them is the negative assessment by the citizens.

It is worth to take a closer look at that, especially that these are not the issues fully recognized, but they are often described in a fragmentary way or in a short term perspective. These considerations have determined the selection of the main plot and also the subject matter of individual parts of this study. The legitimation of judicial power has been presented on three levels: institutional, ethical and social one. This order has been determined by the legal nature of the study. The papers commencing thereof cover the institutional dimension. The study entitled *The issue of the legitimation of the judicial power in a democratic state ruled by law* indicates the sources of that power, along

with positioning of the courts in relation to other powers. This is relevant for arranging, more and more frequent deliberations on the relationship between the Sovereign and the judges. They attract attention also to the concept of judicial independence, including the question of whether it requires legal clarification. That is signaled by the paper *The side notes to the petition on judicial independence submitted to the Sejm*. Power is inherently also responsibility, thus the next study refers to dependence of a judge and is entitled: *Independence, discretion and arbitrariness. The limits of administering justice*. This element, essential for a coherent interpretation of the legitimation of judicial power, does not always receive due attention in the theory and philosophy of law.

The legitimation of judicial power is also situated in the judicial deontology, which is accentuated in another part of the book. It relates to virtue ethics of a judge the universal basis of duties, helpful also in resolving the judge's dilemmas – *A good judge as a milestone of the judiciary*. The attitude which respects these values becomes essential in times of political and social crises, when many principles and the arguments referenced to them are subject to revaluation, or at least such attempts are made. This is referred to also in the paper *Judicial ethics in the time of the systemic transformation*. The next one, *Attitudes of judges in the light of reflective sociology*, at the historical background, but in the contemporary terms, analyses the circumstances of issuing, by the judges, under the similar factual and legal circumstances, opposing judgments. The context of such situations is extensive, ranging from the criteria for independence of a judge, through juxtaposition thereof with the values identified with the uniformity of case-law, including the certainty of law application, ending with the factors developing law and jurisprudence. The challenges faced by the judges are referred to also in the text *Judicial authority as ultima ratio*. For some reasons the deliberations on torture, upon the consent of the court, may seem quite distant and associated with the extreme cases, however the essence of the problem in question appears in each State, among others, in relation to long-lasting detention or isolation, applied after serving the sentence, when high risk of committing another serious crime by a particular person is predicted. In such cases, deciding on the fundamental human rights, confronted with other values, requires the judges to have the highest ethical qualifications.

The third part of the book presents the social legitimization of judicial power. In the judiciary's surrounding numerous institutions as well as social or professional communities supporting it and cooperating therewith operate. Their activity opens the legal proceedings to, among others, information and opinions requiring specialized knowledge or provides an actual adversarial nature to the disputes before the court. However, it requires from the judges the ability to maintain self-reliance against the phenomena usually not associated with impermissible impact on judicial power. The paper entitled *A Wolf in Sheep's clothing. On strategic litigation and amicus curiae as the forms of lobbying activity* draws attention to that aspect. An increasing challenge for the courts and judges is also a critical opinion on their activities issued by the citizens. The consequences thereof are numerous and complex, some of them, in accordance with the rule of communicating vessels, may determine the substantial change of the judicial power's status, leading to a paradox when the society members demanding more solid guarantees of their rights' protection will allow for the reforms actually depriving them even of those rights that were previously considered insufficient by them. The paper *A distorting mirror? – a few observations on the relationships between the courts and the citizens* has been developed for that reason. It is hard to rebuild lost trust. The last article *Why do people need courts? Adjudicating in the times of the trust crisis* refers to that. One of the components of "work at the grass roots" is a proposal to increase the role of the representatives in the judicial proceedings and commitment to the development of mediation. Perhaps, their direct participation in administering justice could bring a reliable answer to the question raised.

The analyses and views presented may become subject to debate. Some of them refer also to the domestic area, where the growing tension between the judicial power and the legislative, as well as executive powers, may be observed. That is why a substantive discussion with the participation of multiple parties is required. It is supported by the observation, shared by all the papers presented, that the issues referred to have universal characteristics, present also in the legal systems of other countries. The legitimization is needed for each judicial power.

Anna Machnikowska

Ryszard Piotrowski*

THE ISSUE OF THE LEGITIMATION OF THE JUDICIAL POWER IN A DEMOCRATIC STATE RULED BY LAW

1. The thesis according to which “there is no State without law and no law without the State”¹, nowadays challenged as a manifestation of legal statism², is coessential with the belief, that – both in the democratic system in its diverse forms and in the authoritarian regimes³ the State cannot exist without the courts and judges playing a special role in the process of legitimization of power.

In a democratic State ruled by law, where the power of the majority is limited by the rights of the minorities, which is reflected in the formula of constitutional democracy, the source of the legitimation of the judicial power is not the result of the elections, in particular parliamentary election, but the ability to adjudicate independently of the will and interests of the political parties. They control the legislative power but sometimes also the constitutional courts dependent on the parliamentary majority. They also control the executive power. Therefore, citizens are essentially dependant on the politicians, even if they do not provide them with their electoral support. Only the judicial power may defend against that dependency, if judges and courts are independent. Thus, this ability resulting from the systemic

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¹ Thus: S. Ehrlich, *Wstęp do nauki o państwie i prawie*, Warszawa 1971, p. 52.

² Cf. A. Kociołek-Pęksa, M. Stępień, *Leksykon socjologii prawa*, Warszawa 2013, p. 435.

³ Cf. *Rule by Law: The Politics of Courts in Authoritarian Regimes*, eds. T. Ginsburg, T. Moustafa, Cambridge 2008.

position of the judicial power, intrinsically related to balancing the role of politicians and judges in the process of judges' appointment, is the factor determining the legitimization of the judicial power in the State, whose Basic Law reflects the rules referred to as liberal constitutionalism⁴.

2. Independence and impartiality of the judiciary are the foundations of a democratic State ruled by law and a keystone of contemporary constitutional democracies. They refer to the principle of separation of powers in a significant way correcting the traditional concept of national sovereignty and the principle of representation – coessential with it. Although judges are not elected as a result of elections such as the parliamentary or presidential ones, they issue judgments on behalf of the Republic of Poland, which – according to the Constitution – is the common good of all citizens. From this perspective, they are also the representatives of the sovereign, especially if we recognise, that in a democratic State ruled by law, in fact, they are the rights reflecting the sovereign values limiting the power of the Nation, due to the human rights, that are the sovereign, as a result of the change involving “the notion of sovereignty as the supreme and unlimited power, both in the internal relations of the State and its external relations”⁵. According to the Constitutional Tribunal in a democratic State ruled by law “the principle of a monarch’s sovereignty is replaced with the principle of the Nation’s sovereignty limited by the human rights having their origin in inviolable human dignity”⁶. Therefore, the values reflected in law are the sovereign. The “basic and necessary [values] certainly include dignity of every human being, respect for the inviolable and inalienable rights thereof, as well as recognising that the “common good” is the goal and criterion governing political life”⁷.

⁴ Cf. M. Tushnet, *Advanced Introduction to Comparative Constitutional Law*, Cheltenham–Northampton 2014, p. 114 ff.

⁵ Thus: The Constitutional Tribunal in the grounds for the judgment in the case with the files No. K 32/09.

⁶ *Ibidem*.

⁷ Thus: Jan Paweł II, *Encyklika Evangelium Vitae*, Watykan 1995, p. 132.

3. The increase of the judicial power's importance is a manifestation of the phenomenon that has been present in democratic States since the middle of the previous century⁸, when there was a reversal of the 18th-century trend to minimize the importance of the judicial power in the system of separation of powers, reflected in the ideas of legal Illuminism, according to which judges were supposed to be the mouth of the law only, or – as it was put – the judges were to speak, when the law was speaking, and remain silent when it was silent, or did not speak clearly, because the interpretation of law was prohibited, and there was no room for the legal scholarship in the court. Thus, the intention was to avoid the divergences in case-law, so criticized by Voltaire⁹. It seemed that law could be reasonable and, thus, clear and concise. In order to reduce the significance of judges in the 19th century in Europe any other interpretation than linguistic was prohibited and even publishing comments on the criminal code was banned¹⁰. On the other side of the Ocean, in 1803 the well known thesis was developed by Chief Justice Marshall, according to which the judicial power over the laws, subject to constitutionality review, was necessary for playing by the Constitution its systemic role. This view is coessential with the legal culture of judicial law.

The increase in the role of judges is a consequence of intermingling, in Europe, of the legal culture of civil law and the legal culture of law developed by judges¹¹. This phenomenon accompanies a process of the European integration¹² resulting in the changes to the system of sources of law and the transformation of the notion of sovereignty placing a judge before the legislature. The judicial power is also an indispensable prerequisite of

⁸ Thus: *The Global Expansion of Judicial Power*, eds. C.N. Tate, T. Vallinder, New York 1995, p. 5; cf. also: R. Piotrowski, *O znaczeniu prawa sędziowskiego w polskim ustroju państwowym* [in:] *Rola orzecznictwa w systemie prawa*, ed. T. Giaro, Warszawa 2016, p. 39 ff.

⁹ Cf. M. Ainis, *La legge oscura*, Bari 1997, p. 28 ff.; also: L. Garlicki, *Sądownictwo konstytucyjne w Europie Zachodniej*, Warszawa 1987, p. 31 ff.

¹⁰ Cf. M. Ainis, *La legge...*, p. 29.

¹¹ Cf. R.A. Tokarczyk, *Komparatystyka prawnicza*, Kraków–Lublin 1997, p. 143; also: R. Piotrowski, *O znaczeniu prawa sędziowskiego...*

¹² Cf. M. Safjan, *Bez sędziów nie byłoby Unii Europejskiej*, "Rzeczpospolita", 25 February 2009.

constitutional democracy assuming no supreme power organ in the State and its limitation by human rights¹³. Therefore, constitutional democracy in this regard is the system of iurisdiction of everyday life¹⁴ and iurisdiction of politics¹⁵ shaped by the need for the effective control of the lawfulness of the activities of the political power and [is] related to the operation of the judicial review, leading to the transfer of political decisions to judicial organs, whose role is increasing, since the human rights and the rule of law, and therefore respecting the rights of the minorities and the rights of the opposition, are becoming the foundation of sovereignty¹⁶. Almost every significant problem may need deciding by the court or the Constitutional Tribunal, which is required [to express] its view even when it has no *locus standi* in a particular case¹⁷.

4. The prerequisite of solving the dilemma of the legitimation of the judicial power in a democratic State is an interpretation of the Basic Law, taking into account the mutual axiological relationships of the fundamental systemic principles: inherent dignity of a person, sovereignty of the Nation and the separation of powers. They are those principles that assign to the judicial power the role of a guardian of human rights, especially legitimated to protect thereof due to the guarantee meaning of the right to a fair hearing in a democratic State ruled by law.

The judicial power, which in accordance with the Constitution, is exercised by the courts and tribunals safeguards the values underlying the Basic Law and the regime of the State, it is also the guardian of the principle of the Nation's sovereignty. This principle is sometimes a condition for claiming that the Parliament and the Government, as an emanation of the will of the sovereign, are the authorities prevailing over the courts and tribunals. How-

¹³ Thus in the grounds for the judgment in the case with the files No. U 4/04.

¹⁴ Cf. A. Garapon: *La question du juge*, "Pouvoirs" 1995, No. 74, p. 16 ff.

¹⁵ *The Global Expansion...*, p. 5 ff.

¹⁶ Cf. R. Piotrowski, *O znaczeniu prawa sędziowskiego...*, p. 39 ff.

¹⁷ Cf. R. Piotrowski, *Wpływ orzecznictwa Trybunału Konstytucyjnego na tworzenie prawa* [in:] *Prawo i ład społeczny. Księga Jubileuszowa dedykowana Profesor Annie Turskiej*, ed. G. Polkowska, Warszawa 2000, p. 174 ff.

ever, in my opinion, this idea has no sufficient support in the applicable Basic Law, which – by creating a system of constitutional democracy – does not allow for the interpretation based on contrasting democracy and the rule of law, the Nation's sovereignty and the Constitution. In that system, the Constitution is inextricably linked to the Nation and its sovereignty, since in matters relating to power “Let no man be trusted with power but tie him down (...) by the chains of the Constitution”¹⁸.

The right to have rights becomes the paradigm of the democratic system¹⁹ – ineffective, however, without the participation of judges. The importance of the judicial power increases also because of its role in the protection of the rights threatened by the development of new information technologies including, in particular, the right to privacy²⁰.

Case-law of the courts – both the Polish and, in a relevant respect, the European ones – is, regardless of the controversies related to the particular decisions, essential for the operation of a democratic State ruled by law and, in particular, for securing the human rights and stability of constitutional democracy. The basis for the legitimation of the judicial power is its role in the implementation, in the Polish legal order, established case-law of the European Court of Human Rights²¹. Understanding the rights of an individual from the perspective of the Convention on Human Rights could justify the thesis, according to which in contemporary Europe it is not possible to trace one sovereignty centre. On the contrary, they should be located there, where the human rights are better protected. However, from the perspective of case-law of the European Court of Human Rights this thesis is subject to a substantial limitation due to the doctrine of the

¹⁸ T. Jefferson [in:] *The Writings of Thomas Jefferson*, ed. A.A. Lipscomb, Vol. 2, Washington 1903, p. 163.

¹⁹ Cf. S. Rodota, *Il diritto di avere diritti*, Roma – Bari 2012, p. 41 ff.; R. Piotrowski, *O znaczeniu prawa sędziowskiego...*, p. 44.

²⁰ Cf. M. Zubik, *Nowe technologie jako wyzwanie i zagrożenie dla prawa, statusu jednostki i państwa* [in:] *Prawo wobec nowoczesnych technologii*, ed. P. Girdwoyń, Warszawa 2008, p. 37 ff.; R. Piotrowski, *Prawa człowieka wobec globalizacji* [in:] *XV lat obowiązywania Konstytucji z 1997 r.*, ed. M. Zubik, Warszawa 2012, p. 69 ff.

²¹ Cf. L. Garlicki, *Polskie prawo konstytucyjne*, Warszawa 2015, p. 106.

cultural margin of appreciation²² that confirms the importance of a local context in understanding human rights and makes them dependant on the standpoint of the majority. It seems, however, that there are the limits to the application of the cultural margin of appreciation, set by the provisions of the Charter of the United Nations or the norms of international law, which are considered by the Vienna Convention on the Law of Treaties the peremptory norms of international law²³.

As the advocates of the European values in the Polish political system, within the limits set by the applicable Basic Law, not only the Constitutional Tribunal, but also common courts, by their case-law, may promote the transformation of traditional understanding of the State sovereignty into the sovereignty of human rights legitimating the judicial power.

5. From the point of view of the doctrine of contemporary constitutionalism, without the principle of judicial independence it is not possible to talk about the existence of a democratic State ruled by law²⁴. What is more, it is not possible to implement the principle of separation of powers, and guarantee the rights and freedoms of an individual, without it²⁵.

The judicial power has been given in the Constitution of the Republic of Poland – contrary to the constitutions of many democratic States – a separate chapter, not to mention, the provisions relating to that power included in other chapters of the Basic Law and the preamble thereto²⁶.

In the light of the views of legal scholars and commentators the systemic position of the judiciary “to a large extent is based on the principle of sepa-

²² Cf. L. Garlicki, *Wartości lokalne a orzecznictwo ponadnarodowe – “kulturowy margines oceny” w orzecznictwie strasburskim?*, “Europejski Przegląd Sądowy” 2008, No. 4, p. 4 ff.

²³ Cf. Article 53 of the Vienna Convention on the Law of Treaties, pursuant to which a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole.

²⁴ Cf. e.g. W.F. Murphy, *Constitutional Democracy*, Baltimore 2007, p. 241 ff.

²⁵ Cf. in particular: E. Łętowska, *Władza sądownicza a pozostałe władze – stan równowagi czy jej zachwiania?* [in:] *Pozycja ustrojowa sędziego*, ed. R. Piotrowski, Warszawa 2015, p. 154 ff.

²⁶ Cf. R. Piotrowski, *Władza sądownicza w Konstytucji RP*, “Krajowa Rada Sądownictwa” 2010, No. 1, p. 17 ff.

ration or even isolation of the judicial power”²⁷, however any derogation “from the principle of separation of powers that would entitle the legislative power or the executive power to decide individual cases of the judicial type”²⁸ should be excluded.

The separation of the judicial power, as independent from other powers, is coessential with the principle of the democratic State ruled by law and the principle of separation of powers and their role in the area of securing the rights of an individual “by preventing abuse of power by any of the organs exercising thereof”²⁹. The primary goal of the constitutional regulation, i.e. to ensure the freedom and dignity of an individual, requires the separation and balance of powers, which are required, by the preamble to the Constitution to “respect the inherent dignity of the person, his or her right to freedom, the obligation of solidarity with others”. Similarly to the remaining powers, the preamble requires the judicial power to make human dignity the “unshakeable foundation” of the State’s regime. Therefore, the laws of the Republic of Poland should be – in the light of the preamble to the Constitution – interpreted and applied in accordance with the principle *in dubio pro dignitate*. Thus, the systemic sense of the judicial power is that it is the guardian of human dignity, the guardian of the universal, timeless values. It happens, that the parliamentary majority forget those values or do not want to remember them, because they are not prized and do not improve the surveys and in such a case the judicial power is able to make adjustments because of the values which are considered, by the human rights culture, independent of any power³⁰.

In the light of case-law of the Constitutional Tribunal the principle of separation of powers assumes that the system of state authorities should contain internal mechanisms preventing concentration and abuse of the State power [and] ensuring exercise thereof in accordance with the will of the Nation with respect for the freedoms and rights of an individual. The requirement of “separation” of powers means, among others, that each of the three powers should have substantive competences corresponding to

²⁷ Thus: L. Garlicki, *Polskie prawo...*, p. 79.

²⁸ *Ibidem*.

²⁹ Thus: the Constitutional Tribunal in the grounds for the judgment in the case K 11/93.

³⁰ Cf. R. Piotrowski, *Władza sądownicza...*

their essence, and what is more – each of these powers should maintain some minimum competence that determines the maintenance of that essence. Whereas, the legislature – shaping competences of individual State authorities – cannot violate this “significant scope” of a particular power³¹.

6. The significant systemic role of the judicial power causes that the executive power has been striving for many years to maintain and increase its impact on the judicial power, what destabilizes that power, threatens the constitutional status of the judges, and thus, also the rights and freedoms of individuals.

Therefore, the guarantee sense of the Basic Law opposes to an interpretation of Article 173 of the Constitution, which would allow for narrowing the scope of that independence and the separation of the judicial power to the area of adjudicating. Noticing, in the provisions of the Constitution, the grounds for recognising the competence of the Minister of Justice to exercise supervision over the activities of the courts seems especially doubtful.

An interpretation arguing that Article 173 of the Constitution limits the principle of separation and independence of the judicial power to the sphere of judicial independence exclusively, understood as relating to adjudicating only, is supported – in the opinion of the Constitutional Tribunal – by the principle of separation and balance of powers. However, understanding this principle cannot be separated from its systemic purpose, which has been identified by the Constitutional Tribunal as securing the rights of an individual by preventing abuse of power by any of the organs exercising thereof³². Thus, experience acquired – both previously and recently – indicates threats to the rights of an individual relating to the narrowed understanding of the separation of the judicial power from other powers. In addition, against the narrowed understanding of the separation and independence of the courts and tribunals, speaks one of the fundamental values of constitutional democracy, that is, the right to a fair hearing [before] the court separate and independent of the Minister of Justice and other members of the government elected by the majority, which had won the election.

³¹ Thus in the grounds for the judgment in the case with the files No. P 16/04.

³² Thus: the Constitutional Tribunal in the grounds for the case with the files No. K 11/93.

From this point of view, the separation and independence of the judicial power have an important systemic significance – after all, it is about holding an important, in the democratic system, function of an arbiter in the disputes between the winning majority and minorities, protection of the minorities' rights and establishing limits which should not be exceeded by minorities to maintain their identity and [not] contradict in this way the majority sense of equity. Exercising this function requires a court separated from the power of the majority, effectively enough, to oppose thereto, especially when issuing judgments hard to accept by the voters, since the government's future depends on their will. This kind of separation may be particularly important, especially when the majority is not in support of the rights of minorities or human rights, what even might be convenient for those exercising the executive power³³.

Frequent reforms destabilise the judicial power, impair its effectiveness, cause social discontent, shape the negative attitudes of the public opinion towards the judiciary³⁴ and justify the need for subsequent changes, which results in the self-arousing permanent reform of the judiciary. However, those changes are not assessed as "comprehensive and in-depth"³⁵. A situation in which the judicial power is subject to, the usually arbitrary, impact on the part of the legislature and the executive, seems to be difficult to reconcile with the separation and independence of the judiciary. Practice in this area demonstrates destabilising the balance between the judicial and legislative powers, what undermines the legitimation of the judiciary.

The Constitutional Tribunal held that the principle of separation of powers assumed a special manner of determining relations between the judicial power and other powers. In the relations between the legislative power and the executive power different forms of interaction and cooperation are possible, and what is more, an area in which the powers of the organs belonging to both powers "intersect" or "overlap" is also allowable, while the relations between the judicial power and other powers must be based on the principle

³³ Cf. R. Piotrowski, *Władza sędziowska...*, p. 22.

³⁴ Cf. e.g. M. Bernatt, A. Bodnar, *Wymiar sprawiedliwości w Polsce* [in:] *Demokracja w Polsce 2007–2009*, ed. L. Kolarska-Bobińska, J. Kucharczyk, Warszawa 2009, pp. 92 ff.

³⁵ Cf. on that subject *ibidem*, p. 89 ff.

of “separation”. A necessary element of the principle of separation of powers is independence of the courts and judges³⁶.

7. The Constitution makes judges the guardians of values independent of the *ad hoc* political trends and variable parliamentary majorities. The judges of the Constitutional Tribunal may perform this function by their rulings and the remaining judges may submit legal questions to the Constitutional Tribunal. The performance of this function requires independence of the judges and courts, what is not possible without an apolitical nature of the judicial power. Perhaps due to this apolitical nature, according to the public opinion, the judges “do not govern” in Poland³⁷. However – contrary to this opinion – the political significance of the judicial power is equal to both the legislative power and the executive power.

It should be emphasized that the Constitution of the Republic of Poland does not provide for any supervisory impact on the judicial power, on the part of the government, and particularly the Minister of Justice³⁸. Admissibility of this kind of impact results neither from the responsibilities of the Council of Ministers (Article 146 of the Constitution of the Republic of Poland) or the Prime Minister (Article 148 of the Constitution of the Republic of Poland), nor the provisions of the Constitution relating to the Minister of Justice (Article 187 of the Constitution of the Republic of Poland providing that the Minister of Justice is a member of the National Council of the Judiciary). On the contrary, from the perspective of Article 173 of the Constitution such an interpretation of the Basic Law, which would provide the government with the competence ground for violation of the separation and independence of the judicial power should be considered unacceptable.

Therefore, the guarantee sense of the Basic Law is unfavourable for such interpretation of Article 173 of the Constitution that would allow for narrowing the scope of independence and separation of the judicial power to the adjudicating area. Particularly doubtful seems to be noticing, in the provi-

³⁶ Thus in the grounds for the judgment in the case with the files No. K 8/99.

³⁷ Cf. e.g. CBOS [Public Opinion Research Centre Survey Report], *Kto naprawdę rządzi w Polsce? Komunikat z badań*, Warszawa 2003.

³⁸ Cf. R. Piotrowski, *Władza sądownicza...*, p. 20.

sions of the Constitution, the grounds for recognition of the competence of the Minister of Justice to exercise supervision over the courts' operation. According to the Constitutional Tribunal, having regard to the principle of separation and balance of powers (Article 10 of the Constitution) "it cannot be claimed that administrative activity of the courts could not be under supervision of the Minister of Justice. However, the condition of administrative supervision in accordance with that principle is that the activities carried out within it did not enter the area, in which the judges are independent"³⁹. Such an interpretation limits the guarantee function of Article 173 of the Constitution by giving it the meaning reducing independence and separation of the courts and tribunals to the area of judicial independence. The principle of separation of the judicial power from other powers results from the Basic Law with the exceptions provided for in the text of the Constitution. These constitutionally allowable exceptions do not cover any supervision over the courts and tribunals on the part of the government.

Case-law of the Constitutional Tribunal introduces an important modification to Article 173 of the Constitution of the Republic of Poland consisting in supplementing the content of that Article with the words "in the scope of adjudicating"⁴⁰, which are not included in the Basic Law. The Constitution does not provide that the courts and tribunals are the power separate and independent from other powers in the scope of adjudicating but establishes the principle of separation and independence of power of the courts and tribunals and provides for the exceptions in that respect.

The solution which is not in conformity with the concept of court, understood in that way, poses a risk of limitation to the constitutional right to a fair hearing⁴¹ which could be the case, in particular, in a situation when the political interests encouraged the Minister of Justice to abuse his supervisory powers. This could lead to depriving the citizens of the right to a fair hearing referred to in Article 45 paragraph 1 of the Constitution, when that

³⁹ Thus: the Constitutional Tribunal in the grounds for the judgment with the files No. K 45/07.

⁴⁰ *Ibidem*.

⁴¹ Cf. A. Kubiak, *Konstytucyjna zasada prawa do sądu w świetle orzecznictwa Trybunału Konstytucyjnego*, Łódź 2006, p. 145 ff.

right was particularly needed by them. The statutory arrangements relating to the judiciary must be constructed in such a way as to minimize the risk of political abuse threatening civil rights⁴². The right to a fair hearing can be effectively implemented only before an organ separated from other organs of public authority and separate from them functionally and organizationally⁴³. This kind of assessment is supported by the position of the Constitutional Tribunal which held that “the essence of the judiciary includes that it should be exercised by the courts only, and other authorities could not interfere with these activities, or participate therein. This is due to the specific association of the judicial power with the protection of the rights and freedoms of an individual and is confirmed both in the detailed norms of the Constitution and in the international conventions”⁴⁴. According to the Constitutional Tribunal (in the case with the files No. K 11/93), judicial independence “is also a guarantee of civil rights and freedoms”.

After all, judicial independence is independence from the only right majority opinion, one point of view. The culture of “the only viewpoint” can pose a serious threat to that independence. The separation and independence of the courts and tribunals may pose a challenge for implementation of the assumption, according to which the result of the parliamentary election gives to the majority elected as a result thereof, the right to implement, without limits, the projects developed by its leaders. Constitutional democracy means limiting the power of the majority according to the principles contained in the applicable Basic Law, including the principle of separation and independence of the courts and tribunals, and not assuming that it is only the will of the parliamentary majority that legitimizes the judiciary.

The independent judiciary reinforces the State and thus influences its position among other States. The courts controlled by the government, what undermines their credibility, lose their ability to sustain legitimacy of

⁴² Cf. R. Piotrowski, *Sędziowie a władza wykonawcza. Wybrane problemy konstytucyjne*, “Studia Iuridica” 2008, Vol. 48, p. 204.

⁴³ Thus in particular: A. Kubiak, *Konstytucyjna zasada...*, p. 135; cf. also: K. Działocha, *Prawo do sądu w poglądach Trybunału Konstytucyjnego* [in:] *Polskie zmiany ustrojowe w literaturze prawniczej*, eds. R. Balicki, B. Banaszak, M. Jabłoński, Wrocław 1997.

⁴⁴ Thus in the grounds for the ruling in the case with the files No. K 6/94.

the existing order relating to the ability to administer justice independently of the politicians. Subjecting the common judiciary to control of the parliamentary majority falling outside the scope of subordination of the judges to the Constitution and statutes would amount to limiting the ability of the sovereign to exercise sovereignty regardless of the political parties successful in the elections. Accordingly, the erosion of the boundaries separating the political parties exercising public power from the State would take place, and instead of the common good, the aim of the political activity would be, increasingly, to get power by the rival parties. Independence of the judicial power from the politicians is essential to prevent the transformation of constitutional democracy into a sort of the majority domination, leading to the effective transformation of the Nation's sovereignty into electoral dictatorship⁴⁵.

The Constitutional Tribunal in its case-law held that "the judiciary is integrally linked to the constitutionally guaranteed right to a fair hearing"⁴⁶. Independence of the court is the result of the separation from the executive power, which should avoid the impact on judicial case-law⁴⁷. The result of the principle of the courts' independence, constitutive to the notion of court, covers the organisational consequences expressed in their independence and separation from other State authorities⁴⁸.

Pursuant to Article 45 paragraph 1 of the Constitution of the Republic of Poland everyone shall have the right to a fair and public hearing of his case, without undue delay, before an impartial and independent court. The Court, which allows for the implementation of that right, derives its legitimacy directly from the Constitution⁴⁹, that entrusts to the judiciary

⁴⁵ Cf. F.P. Miller, A.F. Vandome, J. McBrewster, (ed.) Q. Hogg, *Elective Dictatorship*, Beau Bassin 2010, p. 1 ff.

⁴⁶ Thus in the grounds for the judgment in the case with the files No. K 34/98.

⁴⁷ Cf. A. Murzynowski, A. Zieliński, *Ustrój wymiaru sprawiedliwości w przyszłej konstytucji*, "Państwo i Prawo" 1992, Issue 9; Z. Czeszejko-Sochacki, *Prawo do sądu w świetle Konstytucji Rzeczypospolitej Polskiej*, "Państwo i Prawo" 1997, Issue 11–12.

⁴⁸ Thus: B. Naleziński: *Organy władzy sądowniczej* [in:] *Prawo konstytucyjne RP*, ed. P. Sarnecki, Warszawa 2004, p. 333.

⁴⁹ Cf. K.C. Wheare, *Modern Constitutions*, London 1966, p. 56 ff.

the role of the guardian of the provisions of the Basic Law and at the same time assigns the specific tasks in this respect to the Constitutional Tribunal.

As the Constitutional Tribunal held, “there is a public interest (common good), consisting in shaping an external image of the judiciary generating the belief, in the society, that the court is impartial”⁵⁰. According to the Tribunal, “work of a judge is of a special nature. In addition to great discretionary power, for the exercise of which internal independence and impartiality are necessary, the judge holds a specific social function as an arbiter in social conflicts. This function cannot be identified with the correctness and actual impartiality of case-law only. Serving as an arbiter requires public trust. The judge deprived of that trust could not resolve conflicts properly and serve maintaining the public peace. The rulings issued by such a judge, in spite of their objective correctness, would not be accepted by the parties to the conflict or the public opinion”⁵¹.

The implementation of the right to a fair hearing is the basis for legitimation of the judicial power, since that right is one of the “fundamental rights of an individual, making also a fundamental guarantee of the rule of law”⁵². In accordance with the established case-law⁵³ of the Tribunal the constitutional right to a fair hearing consists, in particular, of: (a) the right of access to a court, i.e. the right to initiate procedure before the (independent and impartial) court; b) the right to an appropriately shaped judicial procedure complying with the requirements of fairness and transparency; c) the right to a court judgement, i.e. the right to obtain a binding determination of the case [issued] by the court and d) the right to the appropriately shaped organisation and position of the organs hearing the cases. Thus, the right to a fair hearing, understood in such a way, is linked to the pre-existing constitutional notion of “case” which is of an autonomous nature.

In the light of case-law of the Constitutional Tribunal and the views of the legal scholars and commentators the Constitution, not specifying

⁵⁰ Thus in the grounds for the judgment in the case with the files No. K 1/98.

⁵¹ Thus in the grounds for the ruling in the case with the files No. K 11/93.

⁵² Thus in the grounds for the judgment in the case with the files No. K 21/99.

⁵³ Thus in particular in the grounds for the judgment in the case with the files No. SK 7/06.

the meaning of many concepts applied therein, refers to their hitherto understanding, which – depending on the views of scholars and the shape of practice – results “from tradition, views of the legal scholars and commentators and case-law, as well as the way of understanding (...) in the law applicable so far”⁵⁴. Therefore, it is about such a meaning which “has long been established in Poland on the background of the views of the legal scholars and commentators and case-law”⁵⁵. In addition to the concept of the pre-existing notions, in the process of the Basic Law’s interpretation, the principle – according to which the constitutional notions are of the autonomous nature⁵⁶ and understanding a specific term by the legislator cannot bind upon the State authorities in interpreting the Constitution – is applicable.

According to the Constitutional Tribunal, the constitutional normative content of a legal notion of «hearing the case» provided for in Article 45 paragraph 1 of the Constitution includes deciding on the rights or obligations of an individual on the basis of the legal norms «resulting» from the legal regulations. The essence of «hearing the case» is the legal qualification of particular facts of the case included in the particular and individual norm issued, addressed to a specified entity, from which specified legal effects, i.e. the rights or obligations are derived. It results from Article 45 paragraph 1 of the Constitution that fair and public «hearing the case» without undue delay shall be made by an impartial and independent court. According to the Tribunal, it is important for the qualification of a given situation as a “case” in the constitutional sense, above all, that there is a need for powerful deciding, under the conditions of independence, on the rights and freedoms of a specified individual, in a situation that excludes arbitrariness of the decision and the possibility of deciding by the other party⁵⁷.

It is this ability to make decisions, understood in this way, regardless of any impact in breach of independence of judges and courts, including any

⁵⁴ Thus in the grounds for the judgment of the Constitutional Tribunal in the case K 24/04.

⁵⁵ Thus: L. Garlicki, *Polskie prawo...*, p. 131.

⁵⁶ Thus in the grounds for the judgment in the case with the files No. P 1/05.

⁵⁷ Thus in the grounds for the judgment in the case with the files No. SK 34/08.

influence of political parties, that legitimises the judicial power in a democratic State ruled by law, which is the foundation of liberal democracy reflecting the belief that neither the will of the majority, nor its leaders is the source of human rights. However, the condition of this legitimisation is the manner of appointing judges and such a judiciary organisation, which minimizes the risk of making the judicial power dependant on the politicians, since the larger this dependency [and] the more inevitable risk of its occurrence, the bigger the distance separating practice of the democratic system from the constitutional rules of its operation.

8. The judicial power is subject to many critical reviews; some of them are in the form of substantive polemics with legal views of judges that are reflected in case-law. However, the main criticisms reflects non-acceptance for both individual judgments and the way of adjudicating. Successive governments, after 1989, assessed the judiciary critically and claimed that in spite of relatively high financial outlays, it did not meet the expectations of the citizens and the contemporary challenges⁵⁸ and that slowed down the developmental processes and supported the de-legitimation of public authority.

As far as the social perception of the judiciary is concerned, it is negatively perceived by 44% of respondents; they pointed out to such causes of negative reviews, as: unjust rulings (70.9%), unreliability (69.3%), partiality and a lack of independence (65%), low level of effectiveness of the judiciary and too high costs of its operation (63%), corruption (50%), staff shortages and bureaucracy (33%)⁵⁹. However, it should be noted that judges are not the authors of the laws they apply. The negative reviews on the judiciary should be extended and include also the legislator implementing the government policy, and thus, the parliamentary majority appointed for lawmaking by those citizens who put into question the results of that majority's actions applied to them by the judicial power⁶⁰.

⁵⁸ Cf. e.g. *Polska 2030. Wyzwania rozwojowe*, ed. M. Boni, Warszawa 2009, p. 299.

⁵⁹ Cf. e.g. M. Bernatt, A. Bodnar, *Wymiar sprawiedliwości...*, p. 89 ff.

⁶⁰ Cf. R. Piotrowski: *Efektywność stanowienia prawa, systemu wymiaru sprawiedliwości i praw konsumenta warunkiem sprawnego państwa. Ekspertyza dla Ministerstwa Rozwoju Regionalnego*, Warszawa 2011.

Social inequalities contribute to de-legitimation of the judicial power. The law – also that which does not correspond to the social sense of justice as “its force is perceived as a completely unjustified violence”⁶¹ – speaks through the judges. They are for many citizens the actual personification of the State, even when it does not solve real problems, legitimises lawlessness and social injustice, tolerates exploitation and law abuse, accepts the power of corporations and banks and supranational bureaucratic structures⁶².

As a rule, decisions of the courts on the disputes are not approved by both a successful party, that expected more impressive success, as well as – what seems natural – the losing party. In this way, the judiciary is shaping – contrary to its mission – the social sense of injustice and harm. Thus, we face the mechanism of the constant, in fact, systemic, de-legitimation of the judicial power undermining the constitutional principle of the democratic state ruled by law.

The judiciary operation has been raising doubts and objections for many years. They focus on such phenomena as excessive lengthiness of the judicial proceedings hindering to assert the rights effectively, as well as the problems in exercising the right to a fair hearing due to the high costs of legal aid. Applying detention as a means of pressure on suspects in the preparatory proceedings is also subject to criticism. What is more, criticism relates to initiating criminal proceedings on the basis of the conditions insufficient to prove guilt and the attempts to use the judiciary for political purposes and undermining judicial independence. The doubts relate also to excessively frequent imprisonment penalties causing overcrowding in prisons and the need to wait for serving the sentence.

Social criticism of the judiciary happens to be used by the politicians to get support of the public opinion, and above all, their electoral support. The shortcomings of the judiciary may justify the difficulties related to the implementation of the political programmes of the parties exercising legislative and executive powers.

⁶¹ Thus: B. Skarga, *Człowiek to nie jest piękne zwierzę*, Kraków 2007, p. 88.

⁶² Cf. R. Piotrowski, S. Waltoś, *Wymiary równości a wymiar sprawiedliwości. Debaty “Państwa i Prawa”*, “Państwo i Prawo” 2015, Issue 12, p. 108 ff.

The actual prevention of the dysfunctional phenomena in the functioning of the judiciary requires on the one hand, organizational improvements in the courts operation⁶³, and on the other hand, essential changes to the present location of the judiciary in the State, aiming at the separation thereof from political power, increasing independence of the courts and enhancing independence of judges. What is more, action is necessary to develop the legal culture and shape the civil society, to reinforce the constitutional and statutory guarantees of civil rights, to clarify the arrangements relating to liability of those involved in administering justice, to increase the access to information on law and legal aid, since the dysfunctional phenomena in the area of the judiciary are also caused by the low level of legal and civil culture of the society, in which a lack of the ability to understand another man⁶⁴, a lack of the ability to cooperate and ignoring the importance of such values as solidarity and such an attitude as empathy (except for emergency situations) prevail, which leads to the eagerness to start court proceedings and lacking a tendency to refer [cases] to mediation or arbitration. If collecting assets was perceived as a reason for existence and a measure of success under the market economy conditions, it could be necessary to use judicial remedies to fight for property. One of the reasons for the negative reviews on the judicial power is the poor condition of the law, including both its poor quality and the phenomenon of the legal regulations inflation. Legislation, reflecting the practice of ruling by reforming⁶⁵, characteristic of the contemporary democratic States, happens to be a denial of legislative rationality and – regardless of the intentions of the participants to the specific legislative marathon, which takes place in the Parliament – leads to de-legitimation of the legal system, and thus also the judicial power.

Overregulation of social life and economy, consolidation, in the legal regulations, of the mistrust culture in relations between the citizens and the public authority, the poor quality of the law and conflicts among, often vague and ambiguous, regulations requires a special activity of the judicial power in the State and focuses that activity on the problems generated by the legislature.

⁶³ Cf. R. Piotrowski, *Efektywność stanowienia prawa...*

⁶⁴ Cf. *Diagnoza społeczna 2009*, eds. J. Czapieński, T. Panek, Warszawa 2009, p. 345.

⁶⁵ Cf. G. Sartori, *Democrazia*, Milano 1993, p. 150 ff.

It is hard to claim that the current condition of lawmaking meets the contemporary requirements⁶⁶. The legislative process favours dysfunctional phenomena in the State and causes de-legitimation of a legal order, which often is not shaped as a result of applying the consultation procedures, enabling to negotiate solutions, but results from the actions based, in social perception, on arbitrary decisions.

The doctrine of democratic constitutionalism and the provisions of the Basic Law, and improvement of the quality of law and legislation as well as the organisation and operation of the courts, will not provide the legitimation of the judicial power, if the basis for that legitimation is not the social acceptance of that power as the foundation of the State serving the common good of all its citizens.

⁶⁶ Cf. R. Piotrowski, *Ustrojowe konsekwencje inflacji prawa* [in:] *Leges ab omnibus intellegi debent. Księga XV-lecia Rządowego Centrum Legislacji*, eds. W. Brzozowski, A. Krzywoń, Warszawa 2015, p. 384 ff.

Andrzej Szmyt*

THE SIDE NOTES TO THE PETITION ON JUDICIAL INDEPENDENCE SUBMITTED TO THE SEJM¹

On 5 August 2016 a petition by Roman Jacek Arseniuk – addressed to Marek Kuchciński, the Marshal of the Sejm submitted “in the public interest”² was received by the Sejm of the Republic of Poland, in which a petitioner requested for taking the legislative initiative to supplement the Law on the Common Courts Organisation (Act of 27 July 2001 – Law on Common Courts Organisation, uniform text – Dz. U. [Journal of Laws] of 2013 item 427, as amended) with a provision including a definition of the term ‘independent judge’. According to the petitioner, such supplementing “will allow to change the interpretation of the important provisions of the Constitution of the Republic of Poland, and thus a lot of constitutional ambiguity will be removed; as well as the aspect of the judiciary will be enhanced, and therefore its improvement will be facilitated, as expected by most of the citizens of the Republic of Poland”. The petition itself is in the form of – the above mentioned – request including two sentences. However, the petitioner attached,

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¹ In some parts of this paper the study for the Sejm’s Office of Analyses of the Chancellery of the Sejm of 2 November 2016 entitled “Opinia prawna o petycji Romana Jacka Arseniuka w sprawie podjęcia inicjatywy ustawodawczej” [“The legal opinion on the petition by Roman Jacek Arseniuk on taking the legislative initiative”] (BAS – WAUPiP – 1962/16) has been used with changes.

² Correspondence at the Social Communication Office of the Chancellery of the Sejm files No. BKSP – 5537/02/16/AMM; the petition dated 4 August 2016.

as “the grounds” thereto, the typescript of his authorship entitled: “The definition of the term ‘independent judge’; A new interpretation of Article 178 paragraph 1 and Article 195 paragraph 1 of the Constitution of the Republic of Poland³”, treated as an integral part of the petition⁴.

The above issue is clearly of the constitutional law character and at the same time – regardless of its *in concreto* nature – has a general dimension, since the issue of judicial independence has deep historical roots, both in Polish constitutionalism and in the meaning of comparative law, within the States (in their constitutions), as well as in international and European law. The issue of judicial independence is seen as an axiological essence of the European systems. In the European legal culture some systemic “general standards” of democratic States have developed quite clearly, in multidimensional terms, arising throughout the long development of international law, constitutional law of individual States and EU law. In some areas that is accompanied by unquestionable case law. The strength and stability of this trend of legal solutions is essential for thinking about the inadmissibility of derogations from those standards, even in constitutions. These general standards do not determine the secondary matters, especially in the area of the State apparatus and the relationships among its parts, but it is beyond doubt that the judiciary independence, together with the judges’ independence, should be seen as one of the two “necessary elements”⁵.

Article 178 of the Polish Constitution, referred to in the petition, provides that “[j]udges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes” (paragraph 1),

³ The Constitution of the Republic of Poland of 2 April 1997 (Dz. U. [Journal of Laws] No. 78, item 483, as amended).

⁴ Moreover, the petitioner submitted his “statement”, in which he had expressed his consent to disclosing on the website of the Sejm of the Republic of Poland, his first name, middle name, surname and e-mail address, as well as to including on that page the study of his authorship. He has also included, in the letter, information on himself as the author (LLM, not employed at any research institution) and declaration of his own authorship – without any influence of other people or institutions – of the enclosed text of the study.

⁵ Another issue of that type is the existence of the parliament with the regular elections – more on that subject: A. Szmyt, *W sprawie poselskiego projektu ustawy o zmianie Konstytucji Rzeczypospolitej Polskiej*, “Przegląd Sejmowy” 2016, No. 4, pp. 135–136.

that “[j]udges shall be provided with appropriate conditions for work and granted remuneration consistent with the dignity of their office and the scope of their duties” (paragraph 2) and finally that “[a] judge shall not belong to a political party, a trade union or perform public activities incompatible with the principles of independence of the courts and judges” (paragraph 3). Therefore, the content of this constitutional provision is, at first, the wording of the principle of judicial independence itself, followed by the specification of two guarantees thereof – as to work conditions and remuneration, as well as the political neutrality of judges. By the way, it should be added, that further guarantees of judicial independence have been indicated also in Articles 179–181 of the Constitution, but they are of the complementary nature and provide more detail to the general principle of Article 178 paragraph 1 of the Constitution. However, it should be also added that the petitioner, in the relevant terms of the petition, has referred to paragraph 1 of Article 178 only. In his study he has also indicated Article 195 paragraph 1 of the Constitution, which – in essence – is equivalent to the general principle of Article 178 paragraph 1 itself, but in the detailed reference, since it relates to the judges of the Constitutional Tribunal⁶. In the literature of the subject there is no doubt that the principle of judicial independence “is one of the most fundamental, and at the same time, the most specific features of the judiciary system: whereas in the more general perspective, it is a necessary element of a law-abiding State, therefore – using a more contemporary terminology – a democratic state ruled by law”⁷.

In historic Poland the first Constitution – of the 3rd May 1791 – by adopting the principle of separation of powers – provided a solid ground for

⁶ The provision of Article 195 of the Constitution also includes paragraphs 2 and 3, analogous to Article 178 paragraphs 2 and 3 in the scope of guarantees listed therein. Let us add, by the way – [that] the relevant constitutional contexts of the provisions of Article 178 and Article 195 of the Constitution are the provisions of Article 10 of the Constitution (tri-partition of power), Article 45 of the Constitution (right to a fair trial) and Article 173 of the Constitution (the separateness and independence of Courts and Tribunals as the third power).

⁷ L. Garlicki, *Teza 3* [The 3rd Thesis] [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. L. Garlicki, Vol. 4, Warszawa 2005, p. 1, of the theses to Article 178 of the Constitution and the literature referred to there.

the judiciary, although it has not, itself, contained any provision referring directly to the judicial independence. However, the Constitution of the Duchy of Warsaw of 1807 in its Article 74 stated that “the judicial system is independent”, and the Constitution of the Kingdom of Poland of 1815, provided that “the judiciary is constitutionally independent” (Article 138) and defined the same more precisely (Article 139) in a statement, that “independence of a judge is understood as his freedom of expressing his own opinions in adjudicating, without being influenced by the highest and ministerial authorities or any other concern. Any other term or explanation of independence of a judge shall be considered abuse”. The March Constitution of 1921⁸ established the principle of judicial independence in its Article 77 paragraph 1 (“[j]udges are independent within the exercise of their judicial office and shall be subject only to the statutes”), and the Constitution of April 1935⁹, in its Article 64 paragraph 3 (“[j]udges are independent within the exercise of their judicial office”). After the Second World War, the provision of Article 25 paragraph 2 of the so called Small Constitution of 1947¹⁰ returned to the wording of the provision of the Constitution of March, whereas the Constitution of July 1952¹¹ in (then) Article 52 provided more briefly, that “judges are independent and shall be subject only to the statutes”¹².

Therefore, the constitutional concept of ‘judicial independence’ is well established in our legal and judiciary culture and has become surrounded

⁸ The Act of 17 March 1921 – Constitution of the Republic of Poland (Dz. U. [Journal of Laws] No.44, item 267).

⁹ The Constitutional Act of 23 April 1935 (Dz. U. [Journal of Laws] No. 30, item 227).

¹⁰ The Constitutional Act of 19 February 1947 on the Political System and the Scope of Activity of Supreme Authorities of the Republic of Poland (Dz. U. [Journal of Laws] No. 18, item 71).

¹¹ The Constitution of the Polish People’s Republic adopted by the Legislative Sejm on 22 July 1952 (uniform text: Dz. U. [Journal of Laws] of 1976 No. 7, item 36, as amended).

¹² More on that subject: P. Wiliński, P. Karlak, *Objaśnienia do art. 178* [Explanation to Article 178] [in:] *Konstytucja RP. Komentarz do art. 87–243*, eds. M. Safjan, L. Bosek, Vol. II, Warszawa 2016, pp. 1009–1010 (item II. Niezawisłość sędziowska w ujęciu historycznym); the collection of the constitutional texts: T. Mołdawa, *Konstytucje polskie 1918–2008*, Warszawa 2008.

by the theoretical analyses and practice experiences, undoubtedly, operating nowadays as a so called “pre-existing concept”. Leaving out the nuances, it can be incontestably accepted, that the principle is classically defined as providing judges with such a situation, that in the exercise of their activities they can make impartial decisions consistent with their own conscience and protected against the possibility of any direct or indirect external pressure¹³. B. Banaszak, applying the more recent definition approach, claims that the principle of independence in the constitutional approach refers to adjudicating and means interpreting the law, by a judge on her/his own, as well as assessing the facts [and] evidence when performing the judiciary activities and further – “therefore, the judicial independence is understood as the unacceptability of any outside interference or exerting pressure on a judge to make him/her decide a case in a specific way”¹⁴.

The position adopted by the Constitutional Tribunal in its case-law covers five elements of judicial independence¹⁵: 1) impartiality in relation to the participants to the proceedings, 2) independence in relation to the non-judicial organs, 3) self-sufficiency of a judge in relation to the authorities and other judicial bodies, 4) independence of the influence of any political factors, in particular political parties, 5) inner independence of a judge.

The principle of judicial independence is commonly declared in international and European law as well as the domestic constitutions of the States. They include, among others, in particular Article 6 (1) of the European Convention on Human Rights, Article 14 of the International Covenant on Civil and Political Rights, Article 47 (2) of the Charter of Fundamental Rights of the European Union, and the recommendation documents which cover, among others, “The Basic Principles of the Independence of Judiciary” (adopted within the framework of the United Nations in 1985), “The

¹³ L. Garlicki, *Teza 5* [The 5th Thesis] [in:] *Konstytucja Rzeczypospolitej Polskiej...*, p. 3, of the theses to Article 178 and the literature referred to there.

¹⁴ B. Banaszak, *Konstytucyjne i ustawowe uwarunkowania niezawisłości sędziowskiej*, “Iustitia” 2014, No. 1, p. 2, online: www.coe.int/ccje (accessed: 10.11.2016).

¹⁵ Judgments of the Constitutional Tribunal of 24 June 1999 in the case K 3/98 (OTK 1998, No. 4, item 52), of 14 April 1999 in the case K 8/99 (OTK 1999, No. 3, item 41), of 9 March 2016 in the case K 47/15 (OTK-A 2016, item 2).

Recommendation” of the Committee of Ministers of the Council of Europe of 13 October 1994 No. R (94) 12 (in particular item I) and “European Charter on the Statute for Judges” (adopted in the framework of the Council of Europe 8–10 July 1998 in particular part I – “General Principles”), and most recently, among others, – “Magna Carta of Judges” (adopted at the 11th plenary meeting of the Consultative Council of European Judges – Strasbourg, 17–19 November 2010 – and submitted for consideration, together with detailed opinions attached thereto, to the Committee of Ministers of the Council of Europe¹⁶.

The constitutions of the contemporary democratic States provide for the principle of judicial independence in their texts, although various wordings are applied therein. Sometimes there is no “general principle” but the guarantees thereof are indicated (for example USA, Norway, Belgium, the Netherlands, Canada), judicial independence is concluded from independence of the judicial power (Denmark, France, Croatia, Estonia, Bulgaria), it is also indicated as a characteristic feature of the court (Greece, Spain, the Czech Republic, Ukraine, Switzerland, as well as Article 45 paragraph 1 of the Constitution of the Republic of Poland). The wording of Article 178 paragraph 1 of the Constitution of the Republic of Poland refers directly to the Austrian Constitution of 1920 (Article 87, paragraph 1) and the Constitution of Germany of 1949 (Article 97, paragraph 1). These trends are referred to by more recent constitutions, for example those of Hungary and Latvia¹⁷.

The diversity of formal approaches does not change the way of understanding the essence of the principle of judicial independence. Independence is not seen as a right or privilege of a judge, but as a subjective public right of a citizen, without which, the State would not guarantee its citizens a minimum standard of legal protection. In particular, it is worth to recall one more significant view in that respect, expressed by the Polish Constitutional Tribunal (Ruling of 24 October 2007 in the case SK 7/06, OTK-ZU No. 9/A/2007, item 108), namely: “[t]he principle of judicial independence is so important that it cannot be limited to the formal-dogmatic aspect, but

¹⁶ L. Garlicki, *Teza 3...*; B. Banaszak, *Konstytucyjne i ustawowe...*, p. 1.

¹⁷ The Compilation of Constitutions’ Texts in: *Konstytucje państw Unii Europejskiej*, ed. W. Staśkiewicz, Warszawa 2011, p. 982.

an important role here is played by the need to ensure the conviction that it is complied with. Therefore, caution should be maintained, when approaching any regulations that modify the standards of independence and attention should be paid, as to whether they lead to [any] changes in the social assessment of the court as an independent institution”.

However, in the context of the petition on judicial independence, filed by Roman Jacek Arseniuk, it should be noted, that the provision of Article 63 of the Constitution of the Republic of Poland provides that “[e]veryone shall have the right to submit petitions, proposals and complaints in the public interest, in his own interest or in the interests of another person – with his consent – to organs of public authority, as well as to organizations and social institutions in connection with the performance of their prescribed duties within the field of public administration. The procedures for considering petitions, proposals and complaints shall be specified by statute”.

In this regard, the Petitions Act of 11 July 2014 is in force (Dz. U. [Journal of Laws] of 2014, item 1195). In accordance with the Act referred to (Article 2, paragraphs 1–2), a petition may be submitted by a natural person, a legal person, an organizational unit that is not a legal person or by a group of those entities, hereinafter referred to in the Act as a “petitioner”, to an organ of public authority, as well as to any other entity indicated – within the specified range – in the provision of the Constitution referred to. A petition – in accordance with the Act – may be submitted in the public interest, the petitioner’s interest or the interest of a third party (upon its consent).

The subject matter of a petition may cover a request, in particular, for amending legislation, for making a decision or any other action on issues relating to the petitioner, collective life or values that require special protection for the sake of common good, falling within the scope of the responsibilities and competences of the addressee of the petition (Article 2 paragraph 3 of the Act). Whether a letter is a petition or not, is determined by the content of the request, and not its external form (Article 3 of the Act). It results from the wording of the provision that the Act has defined the subject matter of the petition quite broadly.

The Petitions Act provides explicitly that a petition submitted to the Sejm (or the Senate) is examined by those organs, unless the Rules of the Sejm

(the Senate) indicate an internal organ competent in that regard (Article 9 paragraph 1). With respect to the proceedings in the petition cases, the provisions of the Rules of the Sejm¹⁸ (Article 126b–126g) provide that a petition submitted to the Sejm is referred, by the Marshal of the Sejm, to the Petitions Commission for examination. Once the petition concerned had been referred to the Petitions Commission by the Marshal of the Sejm, the Chairman of the Commission, Stanisław Piechota, MP, asked on 20 September 2016 the Sejm's Office of Analyses of the Chancellery of the Sejm to draw up an opinion on the petition in question¹⁹. Therefore, in the course of the systemic practice, the general issue of judicial independence has taken the form of an individual case.

The content of the petition submitted is the request, clearly formulated by Roman Jacek Arseniuk, for amending the “Law on the Common Courts Organisation”. Thus, it falls within the statutory assumption (Article 2, paragraph 3) that the subject matter of the petition may be, among others, a request for amendments to the legislation.

The idea of amendment suggested, assumes introducing to the “Law on the Common Courts Organisation” a legal definition of the concept of judicial independence (an independent judge). A legal definition is required, in the petitioner's opinion, due to the requirements of the “Rules of Legislative Drafting”²⁰, according to which, there is an obligation to define a particular term, when it is ambiguous, unclear, its meaning is not widely understood or there is a need to establish a new meaning of a particular term. In addition, according to the petitioner, that would enable to change the previously widely accepted interpretation of the provisions of the Constitution of the Republic of Poland (Article 178 paragraph 1 and Article 195 paragraph 1).

¹⁸ Resolution of the Sejm of the Republic of Poland of 30 July 1992 – Rules of the Sejm of the Republic of Poland (uniform text – Monitor Polski of 2012, item 32, as amended).

¹⁹ In the Sejm's Office of Analyses of the Chancellery of the Sejm, files No. 1962/16.

²⁰ The petitioner refers to paragraph 43 subparagraph 1 of the “Rules of Legislative Drafting” of 1991 (Monitor Polski No. 44, item 310); however in that respect the regulation of the Prime Minister of 20 June 2002 as amended on 5 November 2015 (uniform text – Dz. U. [Journal of Laws] of 7 March 2016 item 283) is currently binding; paragraph 146 subparagraph 1 of the “Rules of Legislative Drafting” is currently relevant.

The petition in question contains a request for amending a normative act in the form of a statute. In accordance with the Constitution of the Republic of Poland, passing bills is the responsibility of the Sejm (Article 120), so there is no doubt that the petition falls within the range of responsibilities and competences of the Sejm as the addressee of the petition (Article 2 paragraph 3 of the Act). In particular, deputies are entitled to, among others, the legislative initiative, which would allow to launch the legislative procedure in the Sejm. In terms of the legislative initiative the Rules of the Sejm, also in Article 126c paragraph 3 item 1, provide that one of the ways of handling petitions may be submitting a draft law by the Petitions Commission.

In accordance with the above mentioned provisions of the Act (Article 4 paragraphs 1–2 and Article 5 paragraph 1 of the Petitions Act), a petition may be submitted in writing. The petition should indicate a petitioner, his address, include the indication of the addressee of the petition and the subject matter thereof. It may also contain a consent to disclosing personal details of the petitioner on the website (in this case – on the website of the Sejm). A petition submitted in writing, by an individual acting as a petitioner, should be signed by him. As it has been mentioned before, the petition by Roman Jacek Arseniuk meets all formal requirements, however, there is a number of substantive issues that should be considered relevant in relation to that petition.

The petitioner has not submitted a specific draft amendment to the “Law on the Common Courts Organisation”, within his proposal of the statutory introduction of an ‘independent judge’ definition, but only a general request, supported by the text, which is a sort of analysis of the issue concerned. Such an approach is legally possible because there is no obligation – in the framework of exercising the right to petition – to submit to the Sejm a draft law “articulated” in the legislative and technical terms. However, this means imposing the burden of preparing a prospective draft law on the Petitions Commission, which would require separate study work as well as preparation and editorial work.

In the attached text – as a kind of justification – the petitioner has referred to a number of various legal provisions, in his opinion, relative to understanding judicial independence. However, this is a pretty loose “collection” of

referrals – from different States, covering a period of two centuries – to normative acts of various status of the different branches of law. It also includes partly random references to different views of legal scholars. The complete text does not provide a systematic or in-depth substantive approach to the issues concerned. As such, it does not provide sufficient grounds for making decisions on the need and direction of the statutory definition of an independent judge concept. The petitioner, in his text, shows some definition related approximation, but it is hard to talk about being sure as to the final definition of the concept, especially in the legal language.

In the text submitted by the petitioner, also signalling the conception definitely deviating from the established tradition – in Poland starting with the Constitutions of March and April, respectively – of understanding the concept of judicial independence and the normative terms, underlying the established doctrine, should be emphasized. The reasons for the departure from the existing regulation and doctrine, indicated in the text, are shallow and totally unconvincing. However, the petitioner approaches the remarks presented by himself with quite high level of fluency.

The petitioner – in view of all the foregoing considerations – does not pay sufficient attention to the fact that the concept of judicial independence is primarily a concept of the constitutional sphere, and not of the ordinary legislation area. The assumption that the amendment to the ordinary legislation will produce a different interpretation of the provisions of the Constitution is incorrect. Such assumption contradicts the foundations of the law interpretation principles, according to which ordinary statutes must be interpreted in the light of the Constitution, [and] that it is not possible to give the meaning to the provisions of the Constitution “by” the wording of an ordinary statute. The shapes of the institutions specified in an ordinary statute are only the “manifestation” of the constitutional provisions. This reversal of the rules of legal interpretation can be observed. This involves the particularity of the relationship between the concepts within “constitutional” and “statutory” areas. The provisions of the Constitution must have a much higher level of generality and a much wider range of application.

The concept of judicial independence is therefore a prime example, involving a whole range of different aspects, conditions and references. The

legislative “development” of the constitutional concept cannot be closed in a single definition in this place. Various aspects of judicial independence are expressed in many statutes, relatively narrowly (“contextually”) regulating various, more detailed issues. None of them, individually, will exhaust a “comprehensive” understanding of the concept of independence of a judge. These are not the terminology based “discrepancies” requiring a “homogenous” approach – it is a conglomerate of “interdependent” approaches. Their contents in specific contexts can overlap, however, they can also be relatively autonomous. Therefore, the assumption itself, that the multifaceted constitutional concept could be closed in one statutory definition, is incorrect. The petitioner clearly underestimates the importance of the multidimensional nature of the judge’s independence concept.

The current manifestations of the diversity of aspects focusing on the constitutional concept of judicial independence are the discussions on the secondary legislation, relating to such specific issues as, for example, the issue of administrative supervision, assessments of judges, the internal rules of the courts operation, remuneration for judges, irremovability and non-transferability of judges, the competences of the National Council of the Judiciary²¹. If it was “necessary” to look for a legislative manner for the definition-related bringing the essence of that concept closer, the right way should be to extend the content – in that respect – of the provisions of the Constitution. However, it would certainly still be a sort of “bringing closer” only, and not finally “closing” the concept in a single formula.

The substantive conclusions in the case in question seem clear. The reservations, presented above, with regard to the petition filed, require to doubt its relevance (purposefulness) indeed. I would opt for disregarding, by the Sejm’s Petitions Commission, the request which is the subject matter of the petition. Moreover, the considerations of the time economics do not support continuing substantive work of the Commission on the petition submitted. However, if despite the doubts indicated, the petition in question was to become subject to further proceedings of the Sejm it should, at first, amount to extremely thorough preparatory work on drawing up, by the Petitions Commission, a draft amendment to the Law.

²¹ B. Banaszak, *Konstytucyjne i ustawowe...*, p. 1.

Anna Rakowska-Trela*

INDEPENDENCE, DISCRETION AND ARBITRARINESS THE LIMITS OF ADMINISTERING JUSTICE

Introductory remarks

The principle of the separation of powers provided for in Article 10 of the Constitution of the Republic of Poland – as emphasized by both the Constitutional Tribunal in its rulings, as well as legal scholars and commentators – has not a purely organisational meaning only¹. Its purpose is to prevent an infringement of human rights and freedoms by any of the organs exercising power due to excessive extension of its competence. A special place in the separation of powers is taken by the judicial power: the courts and tribunals which constitute the separate power are independent of other branches of power (Article 173 of the Constitution) and the judges are independent (Article 178). As it is rightly argued by Bartosz Wojciechowski, the judicial application of law is based on a special kind of discretion which relates to the selection of a legal provision, interpretative, evidential discretion and [discretion] as to the choice of a legal consequence. Issuing a decision within such discretion is an act, to some extent, independent and is linked to the exercise of a particular power over the addressees of the applied norms. That power is referred to as discretion-

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¹ Ruling of 9 November 1993, K 11/93; P. Sarnecki, *Nota do art. 10* [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. L. Garlicki, Vol. 5, Warszawa 2007, remark No. 1.

ary power and it is considered an inherent feature of each legal system². Therefore, undoubtedly, the principle of independence is one of “the most fundamental, and at the same time, specific characteristics of the judiciary system” and is “a necessary element of a rule of law state, (...) a democratic state ruled by law”³. Thus, “without the actual existence of the principle of independence we cannot talk about an independent and impartial judicial power”⁴. As the Constitutional Tribunal held in the decision of 9 November 1993 (K 11/93), “the notion of judicial independence has unambiguous and well established content which provides a fundamental guarantee of impartial decision making. It means independence of a judge from both, the parties to the dispute and the organs of the State. On the part of a judge, the correlate of the principle of independence is a duty of impartiality, in accordance with the contents of a solemn affirmation made by a judge: »I affirm (...) to administer justice impartially according to my conscience«”. Importantly, impartiality may sometimes induce duties for judges further reaching than the scope of the judicial independence protection. While independence refers to the impact of external entities, the duty of impartiality imposes on a judge the duty to oppose, at times, to his or her own assessments resulting from the experience gained so far, worldview held, stereotypes and prejudices. Thus, independence is a source, not only of rights but also specific obligations on the part of the judges, limitations in the exercise of the function of judge.

Therefore, independence of judges and courts is not unlimited, and on the contrary, it has limits which sometimes, awkwardly, result from these principles themselves. The limits of independence of the judges and courts may be found in the Constitution of the Republic of Poland including, in the first place, the democratic state ruled by law clause provided for by Article 2 which not only “determines the State model”, but also “provides axiological and praxeological consistency of the entire legal system in the

² B. Wojciechowski, *Dyskrecjonalność sędziowska. Studium teoretycznoprawne*, Toruń 2004, p. 16.

³ L. Garlicki, *Nota do art. 178* [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. L. Garlicki, Vol. 4, Warszawa 2005, remark No. 3.

⁴ *Ibidem*.

State”⁵. This “triune principle of principles” is based on the “hard body” of the rule of law prohibiting the arbitrary activity of the State against its own citizens and other individuals, which – obviously – is also addressed to the organs of the judicial power. This means that the courts, acting upon the principle of independence must, however, as the organs of a State, take into account the principle of legalism which is an essence of a democratic state ruled by law (Article 7 of the Constitution), supplemented with the constitutional (Article 8) and international legalism (Article 9)⁶. The democratic State ruled by law clause, outlined in this way, remains also inextricably linked with the right to a fair hearing guaranteed under the Constitution (Article 45) and with other fundamental principles of organization of the judiciary and the judicial proceedings provided for in the Constitution. Although, the principle of independence of the judges and courts results from these rules directly, at the same time, it provides the grounds for the clarification of their limits. Independence does not amount to arbitrariness. The limit authorized under the Constitution is certainly the principle of legalism, with particular reference to the constitutional legalism and international legalism.

The limits of independence are also expressed in statutes, including in the first place, the statutes governing adjudicating by the courts in certain types of cases including the Code of Civil Procedure (Dz. U. [Journal of Laws] of 1964 No. 43 item 296, as amended), the Code of Criminal Procedure (Dz. U. [Journal of Laws] of 1997 No. 89 item 555, as amended), the Code of Procedure in Cases of Misconduct (Dz. U. [Journal of Laws] of 2001 No. 106 item 1148, as amended), in the statute – Law on Proceedings before Administrative Courts (Dz. U. [Journal of Laws] of 2002 No. 153 item 1270, as amended) but also in the organizational statutes relating to the judiciary, since those statutes set limits to the discretion of judges and courts in their judicial operation, establish supervision of the Supreme Court over the courts operation, as well as administrative supervision

⁵ W. Sokolewicz, *Nota do art. 2* [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. 5, remark No. 5; S. Wronkowska, *Od Redaktora* [in:] *Zasada demokratycznego państwa prawnego w Konstytucji RP*, ed. S. Wronkowska, Warszawa 2006, p. 8.

⁶ W. Sokolewicz, *Nota do art. 2*, remark No. 12.

over the courts⁷. All those regulations certainly limit the courts and judges but, perversely, they are also necessary in a democratic State ruled by law to guarantee independence. In this study, in view of its volume, the limits imposed on the courts and judges by the said statutory regulations will be signalled and discussed on the example of the selected applicable solutions.

Subordination of judges to law

As I have indicated, in the first place, the limits of the judicial operation of the courts and judges are contained in the Constitution of the Republic of Poland, in particular its Article 2 in conjunction with Article 7, Article 8 (the principle of the primacy of the Constitution), supplemented in relation to the courts with the disposals of Articles 173 and 178 paragraph 1, from which the need to maintain the principle of legalism, and in particular the constitutional legalism, when administering justice, results. Being bound by the applicable law, that is in the first place, by the Constitution but also the statutes, is the most important duty for the courts and judges in a democratic state ruled by law. However, this duty is not – as might appear at the first glance – a contradiction of independence or a directive limiting thereof. On the contrary, it is inextricably linked to the principle of independence and the duty of impartiality resulting from it and it is the consequence and guarantee thereof, since the principle of independence not only does not preclude the subordination of a judge to law⁸ but even determinates and coerces the same.

When analyzing the issue of judges' subordination to law it is not possible to ignore, the issue, highly topical at present and currently more and

⁷ Act of 27 July 2001 – the Law on Common Courts Organisation, Dz. U. [Journal of Laws] of 2001 No. 98 item 1070 as amended; Act of 21 August 1997 – the Law on Military Courts Organisation, Dz. U. [Journal of Laws] of 1997 No. 117 item 753 as amended; Act of 25 July 2002, the Law on Administrative Courts Organisation, Dz. U. [Journal of Laws] of 2002 No. 153 item 1269 as amended; Act of 23 November 2002 r. the Law on the Supreme Court, Dz. U. [Journal of Laws] of 2002 No. 240 item 2052 as amended.

⁸ L. Garlicki, *Nota do art. 178*, remark No. 13.

more analyzed, of the direct applicability of the Constitution by the courts and the possibility of reviewing, within their judicial operation consisting in administering justice, the constitutionality of the provisions of statutes to be applied in individual cases and any possible disapplication, by the courts, of the unconstitutional statutory provisions. The Supreme Court supported such an option in the period immediately following the adoption of the Constitution of the Republic of Poland of 2 April 1997⁹. In its judgment of 7 April 1998 (files reference number I PKN 90/98), the Supreme Court stated explicitly that “a common court may review the constitutionality of the provisions to be applied in a case because that does not lead to violation of the constitutionally established separation of competences between the courts and the Constitutional Tribunal. (...) The issue of the conformity of a normative act’s provision with the Constitution is the core issue for the Constitutional Tribunal, on which the Tribunal shall decide in the form of a ruling with the effects provided for in the statute, whereas, a common court does not rule on the conformity of a legal provision with the Constitution but only refuses to apply the legal provision which, in its opinion, is unconstitutional. Assuming (...) that the common courts are not entitled to review the conformity of the statutes with the Constitution (...) is clearly contrary to the provision of Article 8 paragraph 1 of the Constitution which requires the direct application of its provisions, and the term »application« should be understood, in the first place, as the judicial application of law”.

This case-law trend, subsequently, under the rule of the Constitution of the Republic of Poland of 1997, due to the correct and effective operation of the Constitutional Tribunal, has lost its importance and undergone the evolution towards a more restrained approach to the competences of the courts relating to deciding, on the constitutionality of statutes, by themselves¹⁰. However, this issue had recently become subject to interest of the Supreme Court due to the crisis concerning the Constitutional Tribunal

⁹ See e.g. the judgment of the Supreme Court and a resolution of the formation of seven judges of the Supreme Administrative Court (NSA) of 12 October 1998, files No. OPS 5/98 as well as the judgment of the Administrative Supreme Court (NSA) of 9 October 1998, files No. SA 1246/98.

¹⁰ See the judgment of the Supreme Court of 24 November 2015, II CSK 517/14.

which, in effect, led to undermining its position and operation. The latest rulings by the Supreme Court indicate clearly its favour towards the existence on the part of the common courts, in the situation of the dysfunction of the Constitutional Tribunal, not only a right but also an obligation to refuse applying the statutory provisions which are contrary to the Constitution¹¹. The Supreme Court recently faced deciding such an issue in the case V CSK 377/15 (Judgment of 17 March 2016). When issuing that ruling, the Supreme Court had to assess the admissibility of the application of Article 70 paragraph 8 of the Tax Law (Act of 29 August 1997 – Tax Law, Dz. U. [Journal of Laws] of 1997 No. 137 item 926); the provision concerned had the same wording as the previously applicable Article 70 paragraph 6 of the Tax Law which had been formerly held unconstitutional by the Constitutional Tribunal. As the Supreme Court reported in the grounds for the judgment, both of those provisions had “the same wording” and “other numbering in the statute arises only from the extension of the content of Article 70 of the Tax Law and moving the provision by two editorial units within the same article being, in essence, of the same content” (page 5 of the grounds for the judgment). Accordingly, the Supreme Court held strongly in the grounds that the “obvious non-conformity of the provision with the Constitution resulting from the prior ruling of the Constitutional Tribunal is, by itself, a sufficient ground for refusing, by the court, to apply the provisions of the statute because, as it is emphasized in such obvious cases, it is difficult to expect from the courts to launch the procedure of legal questions”. When justifying its position the Supreme Court raised, that “the issue cannot be reduced to the pure formalism which cannot be given priority over rational understanding of law in the entire system thereof and it results from this, that when ruling on non-conformity of a specific provision with the Constitution it is about eliminating it from the legal system, which was the case in the situation under concern relating directly to Article 70 paragraph 6 of the Tax Law. Therefore, it cannot be claimed that the successor of that provision, still present in the statute under the altered number (Article 70 paragraph 8

¹¹ M. Gutowski, P. Kardas, *Sądowa kontrola konstytucyjności prawa. Kilka uwag o kompetencjach sądów powszechnych do bezpośredniego stosowania Konstytucji*, “Palestra” 2016, Issue 4, p. 9.

of the Tax Law), is applicable as if the judgment on the unconstitutionality of its predecessor did not refer thereto at all. Non-conformity with the Constitution relates to a specific legal norm, reflected by the provision, and not to the editorial units playing an exclusively organizing role inside a legal act, in which it is located. The duty of the legislator is to remove that provision from the statute upon the announcement of the judgment of the Tribunal, as otherwise the reckless conclusion could be drawn that there is a possibility of introducing freely any changes in numbering of the provisions to the statutes, e.g. in case of drawing up the uniform text and avoiding (not executing) in this way the judgments of the Constitutional Tribunal. The need for re-examination by the Tribunal the conformity of, this time Article 70 paragraph 8 of the Tax Law, with the Constitution should be held unnecessary, since that provision did not change with respect to the issue due to which its unconstitutionality had been held” (the grounds for the judgment, p. 6).

In the judgment referred to, the Supreme Court has recognized the competence of the common courts and the Supreme Court to refuse the application of the unconstitutional statutory provision, when that non-conformity is “certain”. This “certainty” would occur when the basis for adjudicating was to be the statutory provision of the same wording as the previous one which had been reviewed by the Constitutional Tribunal for conformity with the Basic Law and found unconstitutional. In such a situation, according to the Supreme Court, non-conformity with the Constitution is “certain” and has an “additional support in the judgment of the Constitutional Tribunal” which justifies not applying that provision in the case examined by the Court.

In relation to the issue under discussion, the question arises as to whether “certainty” of unconstitutionality of the provision of the Act, to be applied in a particular case and making the potential basis for the court settlement, should be limited only to a situation where the reviewed provision is the same as another one which previously had been found unconstitutional by the Constitutional Tribunal or whether other situations should be considered. Having regard to the specific conditions in which the Polish Constitutional Tribunal is nowadays, and which start to apply also to the courts, that question is not rhetorical only. Commenting on that issue in another ruling,

i.e. in the resolution of the Civil Chamber of 23 March 2016 (files No. III CZP 102/15) the Supreme Court held that “the distribution of functions between the Constitutional Tribunal and the Supreme Court and the common courts is manifested in the fact that it is the Tribunal that reviews the conformity of the legal norms with the Constitution. It is not performed – in principle *ad casum* by the Supreme Court and the common courts”. However, the Supreme Court added, most strongly, that “this assumption is valid as long as the Constitutional Tribunal is capable – in the existing normative surrounding – to perform its systemic functions”.

In a current situation of the Polish Constitutional Tribunal, in particular after 21 December 2016, the opinions raised by the leading representatives of constitutional law, are more frequent and stronger and it is raised that the Constitutional Tribunal has lost the ability to discharge its systemic function, i.e. that the premise arose, upon which the Supreme Court, in its resolution of 23 March 2016, had made conditional the possibility of reviewing the conformity of the statutory norms with the Constitution *ad casum* by the courts. Fryderyk Zoll even pointed out that “there is no Constitutional Tribunal in the shape referred to in the Polish Constitution”¹². At the same time, he added that “today a very important role rests with the courts, since that Constitutional Tribunal, which had independently reviewed the conformity of legal norms with the Constitution and the acts of the higher rank was virtually liquidated, this role has to be taken over by the courts” and that, in his view, “the Polish Constitution allows for that. Article 8 of the Constitution provides for the ability to [perform] control, no longer abstract, i.e. in isolation from the case, but when ruling on specific cases, the courts will be able to control the conformity of the legal norms with the Constitution”¹³. In addition, it is worth to refer to the opinion by Maciej Gutowski and Piotr Kardas, who rightly indicate that “the recent events related to the position and the way of the Constitutional Tribunal’s operation once again have placed, in the spotlight of lawyers, the issue of competence of the common courts and administrative

¹² An interview broadcasted on the TV program “Kropka nad i” of 21 December 2016, <http://www.tvn24.pl/kropka-nad-i,3,m/andrzej-zoll-w-kropce-nad-i,701618.html>, min. 3:40–3:48 (accessed: 22.12.2016).

¹³ *Ibidem*, min. 4:29–4:55.

courts to apply the Constitution directly in the context of the authorization including not only making, the so called, pro-constitutional interpretation of the provisions underlying a particular decision (...) but also the possibility to use a sort of a specific derogatory competence enabling to refuse the application of a particular provision in the scope contrary to the Constitution”¹⁴.

The issue, signalled by F. Zoll, M. Gutowski and P. Kardas, of carrying out, by the common courts, administrative courts or the Supreme Court a particular control of constitutionality of norms, certainly is not an issue that raises no controversies. It certainly relates to the aforementioned principle of direct applicability of the Constitution, resulting from its Article 8. As M. Gutowski and P. Kardas rightly argue, the resignation by a court of disapplying an unconstitutional statute and [of] the direct application of the provision of the Constitution would bring about, in the situation of the Constitutional Tribunal’s inefficiency, “a risk of adjudicating by the courts on the basis of the statutes contrary to the Constitution. This would amount to an infringement of the Constitution by the courts”¹⁵ which would be an unacceptable phenomenon. Therefore, according to the authors, in the event of the unconstitutionality of the provisions of a statute, the courts have not only a possibility, but an obligation, to refuse the application of the provisions which are contrary to the Constitution¹⁶.

The legislator of the constitutional system itself, providing in Article 178 paragraph 1 that judges are subject not only to the statutes but also – and even primarily – to the Constitution, has imposed on the courts not only possibility, but even the duty, of applying the Constitution¹⁷. Bogusław Banaszak, referring to the systemic interpretation, indicates that “the inclusion of a provision (namely Article 8) in the general part of the Basic Law results in the inability to undermine the principle expressed therein by the interpretation of the provisions included in its detailed part (i.e. Article 178 paragraph 1, Article 188 paragraph 1, Article 193). It is worth emphasizing that the legislator of the constitutional system itself added in Article 178

¹⁴ M. Gutowski, P. Kardas, *Sądowa kontrola konstytucyjności...*, p. 9.

¹⁵ *Ibidem*, p. 26.

¹⁶ *Ibidem*, p. 29.

¹⁷ *Ibidem*, p. 24.

paragraph 1, that judges are subject not only to the statutes, as it was the case in the previous legal order, but also to the Constitution. Thus, they not only may, but should, apply the Constitution of the Republic of Poland. In the event of any doubts as to the constitutionality of the act, pursuant to Article 193, a legal question »may be referred« to the Constitutional Tribunal but the Constitution does not impose on them such an obligation, and therefore it could be concluded that if they do not use that opportunity, they will decide the doubts themselves”¹⁸. Thus, “an indication that judges, within the exercise of their office, are independent and subject to the Constitution and statutes only provides that they can apply the statutes only when there are no doubts as to their conformity with the Constitution. Continuing on this point, it should be held that, in the absence of the possibility to carry out an immediate and effective control of the constitutionality by the Constitutional Tribunal, the court will have to decide itself whether a doubtful statute violates the Constitution or not. In the situation, when it is not possible to interpret a statute in a manner in conformity with the Constitution, the court will be obliged to apply the Constitution directly and not apply the statute that is contrary to [the Constitution], when deciding a case”¹⁹.

To sum up this part of the foregoing considerations, it should be noted that the courts and judges are bound by law in their judicial operation which means that in accordance with Article 178 paragraph 1 of the Constitution they are subject to the Constitution and to the statutes. However, it seems that this constitutional disposal is not so much a limitation to the principle of independence but its systemic supplement. At the same time, according to the position of legal commentators, including the leading representatives of legal scholars, as well as the case-law of the Supreme Court, the limit of binding the courts with the provisions of the statutes is their

¹⁸ B. Banaszak, *Nota do art. 8 [in:] idem, Konstytucja Rzeczypospolitej Polskiej. Komentarz*, 2nd ed., Warszawa 2012, remark No. 7.

¹⁹ M. Gutowski, P. Kardas, *Sądowa kontrola konstytucyjności...*, p. 25–26; similarly: B. Banaszak, *Nota do art. 8*, remark No. 7; W. Sanetra, *Sąd Najwyższy w systemie wymiaru sprawiedliwości*, “Przegląd Sądowy” 1999, Issue 7–8, p. 13; R. Hauser, J. Trzciński, *O formach kontroli konstytucyjności prawa przez sądy*, “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2008, Issue 2, p. 10 ff.

conformity with the Constitution. The courts cannot apply the statutes that are contrary to the Constitution, as such action would be an infringement of the principle of constitutional legalism. In a situation, where both the position and operation of the Constitutional Tribunal have been destabilised, and even – as admitted by F. Zoll – “there is no Constitutional Tribunal in the shape referred to in the Polish Constitution”, the burden of deciding on the constitutionality of the statutory provisions has been transferred to the common and administrative courts as well as the Supreme Court. If the courts avoided discharging this duty, this would constitute an infringement of Article 8 paragraphs 1 and 2 and Article 178 paragraph 1 of the Constitution. Jerzy Zajadło approached that issue quite interestingly, claiming that the ‘judicial disobedience’²⁰, induced by the current events, will be – in contrast to the civil disobedience – a legalistic attitude. Although the judges may refer to it in very rare, ‘extreme’ cases, the Author emphasizes that the constitutional crisis, consisting in unconstitutional interference of the legislative and executive powers with independence of the judiciary in breach of the principle of separation of powers, when a certain level of intensity is reached, is actually such a special ‘extreme’ situation²¹. It is necessary for the courts, in such a situation, to refer directly to the Constitution, somewhat, in the defence thereof. Therefore, it should be assessed that the *ad casum* review of the constitutionality of the statutory provisions, carried out by the courts, supported by the case-law of the Supreme Court, in the present situation, is the choice of ‘the lesser evil’. Undoubtedly, the courts are ‘more’ bound by the Constitution than by the unconstitutional statutes.

²⁰ It should be discussed, taking into account for example the words by the Minister of Justice, Zbigniew Ziobro, who indicated that on the judges who would not apply, when adjudicating, the judgments of the Constitutional Tribunal, issued in the composition contrary to the Basic Law and the up to date case-law of the Constitutional Tribunal, disciplinary responsibility and the consequences related to the non-observance of the legal regulations which provided clearly that courts and individual judges were obliged to comply with the law in force in Poland would be imposed, see: “Rzeczpospolita”, 22 December 2016, <http://www.rp.pl/Sedziowie-i-sady/312229963-Ziobro-za-nieprzestrzeganie-przez-sady-wyrokow-TK---odpowiedzialnosc-dyscyplinarna.html#ap-1> (accessed: 31.12.2016).

²¹ J. Zajadło, *Nieposłuszeństwo sędziowskie*, “Państwo i Prawo” 2016, Issue 1, pp. 36–37.

Principles of evidence appraisal

In addition, to the discussed limits resulting from binding the judges and courts with law, i.e. the Constitution and the statutes, other, more detailed limits for the judicial operation can be found, resulting from the provisions of the statutes in force, primarily governing the judicial proceedings and the rules of judicial reasoning. It is a truism to state that the courts, when administering justice, must proceed in accordance with the procedures laid down for particular types of cases. In the foreground, among the rules provided for in these procedures, the principle of free appraisal of evidence is located, which not only provides the judges with discretion, but also prevents them from arbitrariness, and thus limits their judicial operation. It should be noted, that it does not relate to the whole judicial proceedings, but to the stage of the judicial appraisal of the evidence collected. In this regard, Article 7 of the Code of Criminal Procedure introduces the principle that the judicial bodies shape their conviction upon the [entirety of] evidence taken which has been appraised at their own discretion, based on the principles of sound reasoning as well as indications of knowledge and personal experience. Thus, it formulates for the judicial bodies, including the courts, the guidelines which have to be followed by them when issuing the rulings in the cases under examination. Therefore, the principle of free appraisal of evidence, resulting from independence of judges and courts, does not mean arbitrariness, since that appraisal – what results directly from the provision under discussion – has to take into account the objective criteria, such as logic, knowledge and personal experience²². Although the principle of free appraisal of evidence means “freedom from schematic limitations”²³ in appraising evidence, nevertheless it cannot be arbitrary, as it has to remain within the requirements of knowledge and personal experience, take into consideration the entirety of circumstances revealed at the

²² T. Grzegorzczuk, *Nota do art. 7 [in:] idem, Kodeks postępowania karnego*, Vol. 1, *Artykuły 1–467. Komentarz*, 6th ed., Warszawa 2014, remark No. 2.

²³ L. Paprzycki, *Nota do art. 7 [in:] Komentarz aktualizowany do art. 1–424 kodeksu postępowania karnego*, LEX/el. 2015, remark No. 2.

hearing, respect the principle of sound reasoning. The principle of free appraisal of evidence in the criminal proceedings requires to take into account all evidence taken²⁴ whereas, the prerequisites included in the provision are the objectified criteria for their appraisal. The principle of free appraisal of evidence means that it is not the number or type of evidence that matters, but its value in the light of the whole body of evidence²⁵. The grounds for the ruling are the control instruments for the court's compliance with the principle of free appraisal of evidence.

The principle of free appraisal of evidence is formulated in a slightly different way by the legislator in the Code of Civil Procedure. Article 233 thereof provides that "a court shall assess the credibility and force of evidence according to its own conviction, based on a comprehensive consideration of evidence collected" (paragraph 1) and that "the court shall assess on the same basis what significance should be given to the refusal of producing evidence by a party or to the obstacles posed by it in taking thereof contrary to the court's order". As it is emphasized in case-law and the legal scholars' writings "assessment of the credibility and force of evidence is the main task of the court formation, embodying the essence of adjudicating, that is deciding the issues at dispute under the conditions of independence, based on a judge's own conviction, taking into consideration the entirety of evidence collected"²⁶.

Similarly to the criminal proceedings, it is emphasized that the principle of free appraisal of evidence is understood as an "antithesis of arbitrariness"²⁷ and "the limits of free appraisal of evidence are designated by three factors: logical, statutory, and ideological"²⁸. A logical factor means that the court is obliged to draw logically correct conclusions from evidence collected in the case. Thus, a judge is limited by the formal logic rules for a specific type of

²⁴ D. Świecki, *Nota do art. 7 [in:] Kodeks postępowania karnego. Komentarz*, Vol. 1, Warszawa 2015, remark No. 5.

²⁵ *Ibidem*, remark No. 11.

²⁶ T. Ereciński, *Nota do art. 233 [in:] Kodeks postępowania cywilnego. Komentarz*, Vol. 1, *Postępowanie rozpoznawcze*, ed. T. Ereciński, Warszawa 2012, remark No. 1.

²⁷ J. Bodio, *Nota do art. 233 [in:] Komentarz aktualizowany do Kodeksu postępowania cywilnego*, LEX 2016.

²⁸ T. Ereciński, *Nota do art. 233*, remark No. 3.

reasoning. Therefore, there may be no contradiction among the conclusions of the court, drawn up when appraising particular pieces of evidence. All conclusions must constitute the logical entirety and this rule takes precedence over the judge's own conviction. The procedural factor means that the court may base its decision only on the evidence properly taken, on the basis of comprehensive consideration of the evidence, and the ideological factor means that the limits of free appraisal of evidence are also designated by the level of legal awareness of a judge, shaped by information on the facts of social life, the general legal culture, as well as the system of non-legal rules and social assessments²⁹. It belongs to the intellectual factors, it is of subjective nature, and it is associated with the personality of the judge³⁰.

According to these guidelines, the court in an impartial, reasonable and comprehensive way considers evidence as a whole³¹. However, in the civil proceedings, the cases in which the legislator binds the court in its reasoning, by specifying the force of particular evidence measures, can be indicated. Thus, for example, in Article 11 of the Code of Civil Procedure the rule of binding the civil court with a final judgment by the criminal court as to committing an offence is expressed and in Articles 244 and 245 – the force of private and official documents' evidence is determined. Therefore, it should be assumed that the appraisal of evidence made by the court is conditional upon the rules resulting from the principle of free appraisal thereof (and therefore cannot be arbitrary), and sometimes the legislator introduces further reaching limitations.

A special type of such restrictions are the presumptions of law, as provided for in Article 234 of the Code of Civil Procedure, whereby proving the fact specified in a legal norm replaces evidence of another fact from which a participant to the proceedings derives legal results, i.e. ordering the court to recognize a specific fact as real, when the occurrence of another fact

²⁹ *Ibidem*, notes No. 3–6; see also: H. Dolecki, *Nota do art. 233* [in:] *Kodeks postępowania cywilnego. Komentarz*, Vol. 1, *Artykuły 1–366*, red. H. Dolecki, T. Wiśniewski, Warszawa 2013, remark No. 4.

³⁰ H. Dolecki, *Nota do art. 233*, remark No. 4.

³¹ T. Demendecki, *Nota do art. 233* [in:] *Kodeks postępowania cywilnego. Komentarz*, ed. A. Jakubecki, Warszawa 2015.

has been found. The presumptions of law are introduced by the provisions of substantive civil law, and also procedural law on the exceptional basis. They are divided into substantive and formal presumptions. A substantive presumption means that in the case of the situation described in the foundation of the presumption a legal obligation to recognize the results described in the conclusion of the presumption, is imposed on the court. The formal presumptions are the so called presumptions without a predecessor³².

The presumptions are divided into rebuttable and irrebuttable ones, i.e. such that the conclusions drawn from those presumptions can be challenged by taking evidence to the contrary or may not be challenged in any way, respectively. In Polish law there are no absolutely irrebuttable presumptions³³.

The presumptions of law in Polish civil law which are, in principle, rebuttable certainly constitute the important limitation to the free appraisal of evidence and thus, the discretion of the judge and the court administering justice, since the judge cannot, without effective taking evidence to the contrary, adopt an inverse thesis than that resulting from the presumption of law.

It should be also mentioned that in the criminal proceedings the presumption of innocence is of particular importance and rises to the rank of the fundamental principle of criminal law, resulting not only from Article 5 of the Code of Criminal Procedure but also from Article 42 paragraph 3 of the Constitution of the Republic of Poland, as well as from Article 6 paragraph 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Dz. U. [Journal of Laws] 1993 No. 61 item 284).

³² H. Dolecki, *Nota do art. 234* [in:] *Kodeks postępowania cywilnego...*, Vol. 1, *Artykuły 1–366...*, remarks No. 3 and 4. An example of that type of presumption could be a norm of Article 7 of the Code of Civil Procedure providing that if a statute makes the legal effects dependant on the good or bad faith, the good faith is presumed. On the other hand, substantive presumptions include, for example, the rule provided for in Article 9 of the Civil Code, that when a child has been born it shall be presumed to have been born alive, in Article 32 of the Civil Code that if several people lost their lives as a result of a common danger to them, they shall be presumed to had died simultaneously, or in Article 62 paragraph 1 of the Family and Guardianship Code that if a child was born during the marriage or before three hundred days from its end or annulment, it is presumed that he or she is the baby of the mother's husband.

³³ H. Dolecki, *Nota do art. 234*.

However, it has a slightly different meaning than presumptions in the civil proceedings, it is associated with duties relating to the treatment of the accused and that means that he must be treated as innocent until the final completion of the case, irrespective of any personal opinion of the judicial body. At the same time, the presumption of innocence is a rebuttable presumption and the burden of proving guilt rests with the prosecution.

Instances in the judicial proceedings

When discussing the statutory limitations of courts and judges in the scope of their judicial operation, it is impossible to ignore the regulations resulting from the instances of the proceedings and the possibility of setting aside rulings by an appellate court and referring the case for re-examination, since pursuant to Article 386 paragraph 6 of the Code of Civil Procedure “the legal assessment and indications relating to further proceedings expressed in the grounds for the judgment of the second instance court are binding both on the court to which the case has been referred and the court of the second instance at the re-examination of the case”. Similarly, in the criminal proceedings, pursuant to Article 442 paragraph 3 of the Code of Criminal Procedure “legal views and indications of an appellate court relating to further proceedings are binding on the court to which the case has been referred for re-examination”.

Although those indications are only supposed to set an appropriate direction for the court operation and cannot impose, in advance, the manner of solving the problems relating to the content of a ruling to be issued by a lower court³⁴ nevertheless, they limit the discretion of the court re-examining the case. It is assumed, that the discussed binding does not prejudice the principle, according to which judges adjudicate in line with their own conviction based on the free appraisal of evidence (...) As a result of that binding, a court of the first instance is only obliged to follow all the guidelines included in the written reasons relating to supplementing eviden-

³⁴ T. Ereciński, *Nota do art. 386 [in:] Kodeks postępowania cywilnego...*, Vol. 1, *Postępowanie rozpoznawcze...*, remark No. 26.

tial proceedings and verifying the questioned facts of the case or reconsidering those circumstances which, in the assessment of the court of the second instance, influence the final settlement of the case. (...) The indications are to guide the restarted proceedings before the court of the first instance, nevertheless, the court of the second instance may not, at any rate, determine, in advance, how to resolve the issues related to the future settlement of the case, and the more, the settlement itself³⁵. Similarly, in the criminal proceedings it is raised that a court of the first instance, re-examining the case, assesses evidence on the basis of its own conviction, and not on the basis of suggestions as to the facts of the case and appraisals presented in the grounds of the appellate court. The suggestions and appraisals of that court are not binding on the court, to which the case has been referred for re-examination, which results *a contrario* from Article 442 paragraph 3 limiting binding the court of the first instance only as to the legal views and indications of the appellate court on further proceedings³⁶.

The Supreme Court Supervision

In the context of the limits for the courts and judges administering justice also the competences of the Supreme Court should be mentioned, which pursuant to Article 1 of the Law on Supreme Court is an organ appointed to administer justice, *inter alia*, by providing, in the framework of supervision, the uniformity of the case-law of the common and military courts by recognizing the cassations and other remedies. What is more, pursuant to Article 60 of the Law, the Supreme Court is competent to resolve doubts, revealed in the law interpretation in the case-law of the common and military courts or the Supreme Court. Pursuant to Article 61 paragraph 6 the resolutions of the full formation of the Supreme Court, the formation of the combined Chambers and the formation of the entire Chamber upon the adoption

³⁵ T. Wiśniewski, *Nota do art. 386* [in:] *Kodeks postępowania cywilnego...*, Vol. 1, *Artykuły 1–366...*, remark No. 21.

³⁶ J. Grajewski, S. Steinborn, *Nota do art. 442* [in:] *Komentarz aktualizowany do art. 1–424 kodeksu postępowania karnego...*, remark No. 17.

thereof get the power of legal principles. The formation of seven judges may decide on giving to a resolution the power of a legal principle. Supervision over judgments of common courts, exercised by the Supreme Court under Article 183 paragraph 1 of the Constitution and Article 1 item 1a of the act of 2002 – the Law on the Supreme Court, is of the judicative supervision nature, the exercise of which is a systemic function of the Supreme Court³⁷. Such regulation of the Supreme Court's competences limits the discretion of individual judges and courts in administering justice. However, this limitation is justified by the need, resulting from the principle of the rule of law, to ensure uniformity of case-law and the judicial interpretation of law. However, that is not absolute, as the judge examining a particular case may base his decision on the interpretation different from that adopted by the Supreme Court, but should this be the case [the judge] poses himself at risk of setting aside or changing his ruling in the progress of the instance control.

Administrative Supervision

In addition to the limits of the judicial discretion, arising from the regulations of substantive and procedural law, governing the types of cases, other limitations result also from organizational provisions, relating to the operation of the courts. The act of 27 July 2001 – the Law on the Common Courts Organisation in its Article 37f provides that external administrative supervision over the administrative activity of the courts is exercised by the Minister of Justice through the supervising service composed of the judges posted to the Ministry of Justice (Article 9a paragraph 2).

Pursuant to Article 37g, an external administrative supervision, exercised over the courts by the Minister of Justice covers analysis of annual information on the courts operation, setting the general directions of internal administrative supervision, exercised by the presidents of the appellate courts and control over discharging the supervisory duties by the presidents of the

³⁷ The order of the Supreme Court of 13 November 2009, III SPP 24/09 and the judgment of the Supreme Court of 3 June 2008, I UK 323/07.

appellate courts. Should material irregularities in the administrative activity of a court or failure by a president of an appellate court to implement orders, be found, the Minister of Justice may order vetting a court or a court department or vetting the supervisory activity of the court's president.

It is clear that the legislator, when specifying the framework and limits of administrative supervision over the courts and judges must take into account the principle of separation of powers referred to in Article 10 paragraph 1 of the Constitution of the Republic of Poland, the principle of independence and separation of the judicial power laid down in Article 173 of the Constitution, as well as the principle of judicial independence resulting from Article 178 paragraph 1 of the Constitution. An important limit here is the principle of the competence monopoly of the judiciary, which means that the allowable competences of the supervisory organs are decided by the division into actions consisting in administering justice and legal protection and those which are not directly related thereto.

It should be emphasized that the model of supervision over the courts, adopted by the legislator, is criticized as posing a potential risk of unauthorized entrance of the executive power into the judicial operation of the courts. The introduction of that type of restrictions for the judges and courts would be unacceptable from the point of view of the principle of legalism, including the constitutional legalism and the principle of separation of powers. During the debate organized in June 2016 at the Supreme Court by the National Council of the Judiciary and the First President of the Supreme Court "The situation of the Judiciary in Poland and Europe" the First President of the Supreme Court, Małgorzata Gersdorf, proposed the introduction – in lieu of supervision over the courts by the Minister of Justice – supervision by the Supreme Court, as an impartial institution not intervening in the separation of powers³⁸. What is more, on 31 May 2016 the National Council of the Judiciary passed a resolution on referring to the Constitutional Tribunal a request for reviewing the compliance with the Constitution of the Republic of Poland of the act – the Law on Common

³⁸ <http://www.kwartalnikiustitia.pl/prof-malgorzata-gersdorf-proponuje-nadzor-snad-sadami,8396> (accessed: 15.12.2016).

Courts Organisation and the act – the Law on Military Courts Organisation as to supervision exercised by the Minister of Justice over the courts and its competences relating to the courts and judges (files No. K 32/16). The case has not been reviewed by the Constitutional Tribunal, yet³⁹.

The issue of applicability and allowable limits of the Minister of Justice's supervision over the courts is relevant and topical also because currently the trends to expand the supervisory powers of the Minister of Justice towards the courts are noticeable, which poses a danger of interference of an executive power organ with the judicial operation i.e. administering justice by the courts and [exercising] the legal protection function and thus, an infringement of Article 10, Article 173 and Article 178 paragraph 1 of the Constitution⁴⁰. The concerns, reported broadly in journalism, are reflected in the response of the judicial organs to the draft act on amending – the Law on Common Courts Organisation⁴¹ submitted to the Marshal of the Sejm by the Council of Ministers on 21 December 2016. This draft assumes, first of all, that an official superior of a court's director shall be the Minister of Justice, and not – as so far – the president of the court, and also provides for the appointment of the courts' directors without the competition. The critical remarks to the draft have been reported, as early as at the stage of work at the Council of Ministers, by many presidents of the courts, including the Court of Appeal in Łódź⁴², the Court of Appeal in Kraków, where it

³⁹ Status as for 18 December 2016.

⁴⁰ See for example: *Minister-prokurator Zbigniew Ziobro będzie wyznaczał sędziów?*, "Gazeta Wyborcza", 6 May 2016, <http://wyborcza.pl/1,75398,20026518,minister-prokurator-zbigniew-ziobro-bedzie-wyznaczal-sedziow.html> (accessed: 10.09.2016); *Sędziowie pod presją Ziobry – minister zwiększa nadzór nad sądami*, "Rzeczpospolita", 14 October 2016, <http://www.rp.pl/Sedziowie-i-sady/310149998-Sedziowie-pod-presja-Ziobry---minister-zwieksza-nadzor-nad-sadami.html#ap-1> (accessed: 12.11.2016); *Nadzór nad sędziami: minister sprawiedliwości przejmie władzę*, "Rzeczpospolita", 6 October 2016, <http://www.rp.pl/Sedziowie-i-sady/310069859-Nadzor-nad-sedziami-minister-sprawiedliwosci-przejmie-wladze.html> (accessed: 9.11.2016).

⁴¹ Form No. 1181; [http://orka.sejm.gov.pl/Druki8ka.nsf/Projekty/8-020-443-2016/\\$file/8-020-443-2016.pdf](http://orka.sejm.gov.pl/Druki8ka.nsf/Projekty/8-020-443-2016/$file/8-020-443-2016.pdf) (accessed: 30.12.2016).

⁴² <http://legislacja.rcl.gov.pl/docs//2/12291000/12384608/12384611/dokument253801.pdf> (accessed: 15.12.2016).

has been explicitly stated that “this draft is another manifestation of the interference of the executive power with independence of the judicial power”, in Wrocław⁴³, in Szczecin⁴⁴, or in Warsaw, where it was expressly indicated that the proposed solutions infringed Article 60 of the Constitution, as well as affected competence and authority of the courts’ presidents, and the real purpose of the changes was questionable⁴⁵. Similarly, the project has been criticized by the presidents and judges of the appellate courts in: Rzeszów, Poznań, Lublin, Katowice and Gdańsk⁴⁶. However, so many critical opinions had influenced neither the Ministry of Justice nor the Council of Ministers and the draft, referred to the Sejm, maintained its solutions unaltered.

* * *

The analysis carried out, leads to the conclusion that the judicial operation of the courts and judges is subject to numerous limitations arising both from the Constitution and the acts of the statutory rank, including the statutes governing the judicial procedures in different types of cases and the statutes on the judiciary organization. However, awkwardly, these limits are not denial of the principle of independence, and on the contrary, they protect that principle, providing the guarantees thereof. The judge, complying with the principle of legalism, including first of all, the constitutional legalism, who conducts the proceedings in accordance with the procedures, appraises evidence freely, but not arbitrarily – acts in accordance with the principle of judicial independence, guaranteeing the existence and operation of the independent judicial power.

⁴³ <https://legislacja.rcl.gov.pl/docs//2/12291000/12384608/12384611/dokument253288.pdf> (accessed: 15.12.2016).

⁴⁴ <https://legislacja.rcl.gov.pl/docs//2/12291000/12384608/12384611/dokument253285.pdf> (accessed: 15.12.2016).

⁴⁵ <https://legislacja.rcl.gov.pl/docs//2/12291000/12384608/12384611/dokument253287.pdf> (accessed: 15.12.2016).

⁴⁶ Texts of the opinions available at the website of Rządowe Centrum Legislacji: <https://legislacja.rcl.gov.pl/projekt/12291000/katalog/12384608#12384608> (accessed: 15.12.2016).

The requirement of maintaining by the judges such an attitude imposes on them a number of limitations, including imposing a duty to oppose occasionally to their own opinions resulting from their personal experience, worldview held, stereotypes or prejudices. Sometimes, it also determines the need to protect law, constitutional values, including mainly independence of the judicial power, the right to a fair hearing, freedoms and constitutional rights, since the highest duty of the judge is being bound by the law, including in particular the Constitution.

Oktawian Nawrot*

A GOOD JUDGE AS A MILESTONE OF THE JUDICIARY

When it comes to considering the question of Justice, written deliberately with a capital letter “J”, including the issue of good judge, the first image that is suggested by our imagination – at least to those growing up in the circle of the Judeo-Christian civilization – is often the biblical King Solomon and his famous judgment in the case which, with a pinch of salt, could be called “baby vs. the heartless mother”. As described in the First Book of Kings, when Salomon went to Jerusalem to sacrifice to the Lord, two women, who were harlots, came to the King and stood before him, each of them claiming that she was a mother of one and the same baby. Then the King commanded: “[d]ivide the living child in two, and give half to the one and half to the other!”. Upon hearing this, the actual mother of the baby asked the King for mercy, and then added: “My lord, give her the living child, and by no means kill him!” Salomon had no more doubts which woman was the mother, and “all Israel, feared the King for they saw that the wisdom of God was in him to administer justice” (1 Kings 3:16–28).

What impresses us in this story is beyond doubt the wisdom of the king-judge, who, without referring to any written sources of law and complicated methods of law interpretation, has settled the dispute in the way enabling the triumph of justice and what is more – there are no doubts in that respect. At the same time, the truth has been revealed, damage compensated, and the social sense of justice has been satisfied. And all of these not due to the legal system, that had been duly constructed – since there is no reference

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in the Bible in that respect – but wisdom, which is the attribute of the person administering justice. Moreover, this aspect is emphasized by the author of the First King Book himself. The purpose of the case quoted is, in fact, to illustrate the gift that Salomon received from the Almighty. When, in fact, Salomon stayed in Gibeon the Lord appeared to Solomon in a dream at night and God said, “[a]sk what you wish Me to give you”. The King asked for “an understanding heart to judge (...) people to discern between good and evil”. It was pleasing in the sight of the Lord that Solomon had asked this thing and He fulfilled his wish.

In today’s debates on the judiciary, especially relating to the possibilities of improving it, the central figure thereof – a judge, seems quite elusive. It is treated in terms of the necessary, but typically, service-like element of the judiciary. Its role is therefore reduced to a guarantor of the system efficiency and not an executor of a main goal, embedded in the very essence of the system, specifying its fundamental nature, namely justice. Indeed, justice is supposed to be a feature of the system understood as a set of legal norms. There is no more room for a judge within justice, understood in this way, thus he loses meaning at least until the moment of the “just” system operation. Therefore, the legislator that creates the legal system, remains Demiurge of so understood justice. Naturally, in a democratic state ruled by law there are numerous instruments enabling to assess whether the developed legal regulations are just or not. Also philosophers of law have developed many interesting models for the creation and evaluation of justice of legal regulations. It is worth to mention, at this point, the veil of ignorance developed J. Rawls or the king named Rex created by L.L. Fuller.

The absence of the figure of judge in creating a just system causes that basically the sense of what kind of person he or she is – moral or immoral, honest, guided by the highly regarded system of values, or not, seems to be lost. Paradoxically, with the application of a too-thick pencil when making a sketch of a just legal system, you can go so far as to say that even accepting bribes by a judge, if he or she adjudicates in accordance with the letter of the law, is of no importance from the point of view of correctness and fairness of the judiciary operation. In other words, from the perspective of that kind, perhaps even the worst villain may turn out to be

the best judge, that is, the one who embodies the values encoded by the legislator in the legal system.

The above paradox results from the simple relationship: the recognition that justice is primarily a feature of the legal system, and not of a judge, leads to the conclusion that it is not the judge, as a person, but only the consequences of his or her actions (and not the actions themselves since, in fact, *the end justifies the means*) which may be subject to assessment. Therefore, if the consequences are consistent with the content of the legal norms, and possibly their objectives, then a judge must be regarded as 'good'. When developing this idea, it should be stated that in a situation where the judge opposed to an 'unjust' legal regulation, in the name of the most noble values, but which were contrary to the letter of the law, he or she would have to be considered a 'defective' element of the system that requires the elimination for the sake of maintaining 'justice' of the system. This leads inevitably to strengthening the servile attitudes towards the legal norms understood in accordance with the will of the legislator. Immediately, the issue of Radbruch's 'vulnerable jurists' – absolute servants of the laws appears. As Gustaw Radbruch wrote: "Positivism with its credo «a law is a law» actually rendered the German legal profession defenseless against laws of arbitrary and criminal content". What is more, positivism cannot justify the enforcement of laws with their own force. "It believes that the validity of a law is established by the fact that this law is in a position to be enforced"¹.

Perhaps, the aforementioned danger is even more highlighted by the "wisdom" of Communists, referred to in the text of the *Manifesto of the Communist Party*. In accordance with the said document communism aimed, among others, at abolishing eternal truths, abolishing all religion, and morality² because of their allegedly destructive nature for human freedom. In this way the Communists negated *de facto* the most basic human

¹ Quoted after: J. Zajadło, *Dziedzictwo przeszłości. Gustaw Radbruch: portret filozofia, prawnika, polityka i humanisty*, Gdańsk 2007, p. 211.

² K. Marks, F. Engels, *Manifest Partii Komunistycznej*, Warszawa 2007, p. 13; e-version available at the website of Studenckie Koło Filozofii Marksistowskiej [the Student Group of Marxist Philosophy] (Warsaw University): <http://www.filozofia.uw.edu.pl/skfm/publikacje/marks-engels01.pdf> (accessed: 12.10.2016).

freedom – freedom of thought/conscience, as well as human dignity which is a source thereof. Taking away those freedoms from individuals, coupled with transferring the competence to determine what is “good and what is wrong” to the legislator, must have led to the enslavement and consequently, making the individuals mindless and passive tools in the hands of the authorities³. In the progress of developing this reasoning it should be noted that an individual has been *de facto* deprived, in this way, of an element embedded in its nature, which is its immanent feature, since according to the classic definition formulated in the 6th century AD by Boethius *persona est naturae rationalis individua substantia*, thus rationality is the essence of a human being⁴ and it is not possible when an individual loses the ability to think, and consequently act, autonomously. In a situation where the state authorities acquire the monopoly in the field of axiology, and consequently reduce the entirety of human behaviours to the sphere that is subject to regulation by means of the legal norms’ system, an individual loses the ability to make even basic judgments based on any non-legislative systems of values. Any points of reference, external perspectives for making these judgments, cease to exist, and any possible moral judgment boils down to the determination whether a particular behavior is compatible with the legal norms’ system, and therefore the legislator’s intention, or not⁵.

As mentioned before, a democratic state ruled by law has a number of “safety devices” against the development of a criminal legal system, and thus it can be concluded, in simple terms, that we may rest easy. A judge in a democratic state ruled by law seems to be free from such dangers. However, if a naive vision that the democratic state ruled by law is a monolithic land of eternal bliss that once captured, remains forever in our hands in the same shape – is rejected, it will become apparent that creating a servile attitude of a judge towards the legal norms’ system should be consid-

³ Z.J. Zdybicka, *Wolność religijna fundamentem ludzkiej wolności*, “Człowiek w Kultu-rze” 1998, No. 11, p. 128.

⁴ On the concept of a person see e.g. J. Grzybowski, *Człowiek jako osoba w metafizyce św. Tomasza z Akwinu*, “Warszawskie Studia Teologiczne” 2003, Vol. 16, pp. 201–229.

⁵ Cf. A. Zoll, *Klauzula sumienia* [in:] *Sprzeciw sumienia w praktyce medycznej – aspekty etyczne i prawne*, eds. P. Stanisławski, J. Pawlikowski, M. Ordon, Lublin 2014, pp. 77–78.

ered a highly disturbing and unwelcome phenomenon. Thus, approaching a judge as a person – who he or she is/should be, seems relevant.

The aforesaid focus on an agent was characteristic of Aristotle's ideas⁶. It should be recalled in this place that for Aristotle, as well as for the majority of Greeks, it was certain that the goal of human life is to achieve *eudaimonia* (εὐδαιμονία)⁷, that is simply happiness⁸. Naturally, happiness is a typically protean term, showing one of its numerous faces almost to everyone. What is more, at various stages of life, and even in different circumstances, a particular individual may assign a different meaning to it. Therefore, for some, happiness is synonymous with pleasure (as, among others, Aristippus of Cyrene claimed), for others acquiring wealth, the achievement of honors, the implementation of a specific idea, life compatible with some abstract standards, etc. However, Aristotle has noticed that all of these goods are not the ultimate goal of the rational human's activities, but only the means to achieve happiness. The Life of Enjoyment could not be, according to Aristotle, what should be characteristic of a man since it is, in fact, reducing an individual to the slavish level and, actually, it is a life for cattle⁹. "The Life of Money making is a constrained kind of life, and clearly wealth is not

⁶ The section of this paper relating to the Aristotle's ideas on the issues of ethics has been based on the previously published texts, in particular, the subsection of the study: O. Nawrot, *Ludzka biogeneza w standardach bioetycznych Rady Europy*, Warszawa 2011, pp. 44–47; more broadly on virtue ethics in ancient times see: R. Kamtekar, *Ancient virtue ethics: an overview with an emphasis on practical wisdom* [in:] *The Cambridge Companion to Virtue Ethics*, ed. D.C. Russell, Cambridge 2013, pp. 7–28.

⁷ On the concept of *eudaimonia* see e.g. Ch. Rowe, *Etyka w starożytnej Grecji* [in:] *Przewodnik po etyce*, ed. P. Singer, Warszawa 2009, pp. 158–160.

⁸ In the *Etyka Nikomachejska* [*The Nicomachean Ethics*] (trans. D. Gromska, Warszawa 2007, Book I, 1095a) Aristotle provides explicitly: "As far as the name goes, we may almost say that the great majority of mankind are agreed about this; for both the multitude and persons of refinement speak of it as Happiness, and conceive, »the good life« or »doing well« to be the same thing. But what constitutes happiness is a matter of dispute; and the popular account of it is not the same as that given by philosophers". On Aristotelian ethics, see e.g. F. Copleston, *Historia filozofii*, Vol. 1, *Grecja i Rzym*, trans. H. Bednarek, Warszawa 1998, pp. 301–317; G. Reale, *Historia filozofii starożytnej*, Vol. II, *Platon i Arystoteles*, trans. E.I. Zieliński, Lublin 1997, pp. 475–507.

⁹ *The Nicomachean Ethics*, Book I, 1095b.

the Good we are in search of; for it is only good as being useful, a means to something else”¹⁰. Similarly, honor could not be the Supreme Good, as “honor after all seems too superficial to be the Good for which we are seeking since it appears to depend on those who confer it more than on him upon whom it is conferred, whereas we instinctively feel that the Good must be something proper to its possessor and not easy to be taken away from him”¹¹. Moreover, any honor in fact plays purely instrumental functions, it serves the public assurance of men’s merit, but it does not create that merit. The ultimate goal may not be, against the Plato’s suggestions, achieving the good transcendent towards an individual – the Ideal Good¹² – “for even if the goodness predicated of various in common really is a unity or something existing separately and absolute [just like the Ideal Good], it clearly will not be practicable or attainable by man”¹³.

Therefore, how has the Supreme Good – happiness been defined by Aristotle himself? First of all, as it has been mentioned above, but should be firmly emphasized, happiness is a specific human activity, since it should be noted that happiness is the goal of human life, of all activities taken by a man. So when specifying what this Supreme Good is, Aristotle considered what the specific human activities are. For Aristotle, it remained clear that there is an action, peculiar to a man, which distinguishes him from the rest of the world. The same refers, for example, to a sculptor, a craftsman of any sort, and in general anybody who has some function or business to perform – each one has a specific function, performs a specific action that, on the one hand, allows to assign him to an individual profession, and on the other hand, the excellent performance thereof increases his merit. In this context, Aristotle asks the rhetorical questions: “Are we then to suppose that, while the carpenter and the shoemaker have definite functions or businesses belonging to them, man as such has none, and is not designed by nature

¹⁰ *Ibidem*, 1096a.

¹¹ *Ibidem*, 1095b.

¹² On the Plato’s theory of ideas and in particular the idea of good itself see e.g. G. Reale, *Historia filozofii...*, pp. 88–112, 268–276; W. Tatarkiewicz, *Historia filozofii*, Vol. 1, *Filozofia starożytna i średniowieczna*, Warszawa 2001, pp. 98–100.

¹³ *The Nicomachean Ethics*, Book I, 1096b.

to fulfill any function? Must we not rather assume that, just as the eye, the hand, the foot and each of the various members of the body manifestly has a certain function of its own, so a human being also has a certain function over the above all the functions of his particular members?”¹⁴ and providing an answer thereto he emphasized that the mere fact of biological existence, the realization of vital functions, could not be that function, since this appeared to be shared by the whole living nature. A specific human feature could not be sentient life either, as that is shared by both men and other living creatures. Therefore, what distinguishes a man is reason, and specifically human activity, is the rational activity¹⁵.

Aristotle argued, having already the foundation for his ethical theory, that the specific function of a man as such and the specific function of a man superior in excellence is the same, in terms of ethics, and so is a function of an average doctor and a good doctor. The difference between the particular categories refers to the manner of performing specific responsibilities, their duties. What is more, Aristotle stressed that it was not a one-time procedure “[f]or one swallow does not make spring, nor does one fine day; and similarly one day or a brief period of happiness”¹⁶. Therefore, a virtuous man is an individual who discharges, in the best possible way, his duties or even more – his nature, his humanity, since in the above context virtue is “a settled disposition enabling a man to be good and to perform his functions well”¹⁷. When solving a particular moral dilemma, a virtuous man would not ask questions like: what is the most beneficial in a given situation? What is dictated by specific norms? What will contribute to the increase of universal happiness? How to attain eternal life? Focusing on his own nature he would raise the following question: “What kind of man will I be if I make such a choice?”

Virtue ethics, outlined by Aristotle, induces to return to an agent itself – a performer of a specific action subject to valuation. In other words,

¹⁴ *Ibidem*, 1097b.

¹⁵ *Ibidem*, 1098a.

¹⁶ *Ibidem*.

¹⁷ Arystoteles, *Etyka wielka* [in:] *idem, Dzieła wszystkie*, Vol. 5, trans. W. Wróblewski, Warszawa 2000, 1182a.

it becomes impossible to make an assessment of a specific conduct without taking into account its core element – an acting man. Only if the nature of an actor is known, his performance may be assessed, that is, whether such an action is in accordance with the nature of that actor or not. From this perspective, an activity that contributes to an overall increase of happiness, but at the same time leads to the moral degeneration of an acting individual – makes him a worse man, cannot be called a moral action.

The renaissance of virtue ethics came at the end of the 1950s thanks to the British philosopher Gertrude Elizabeth Margaret Anscombe, *aka* Elizabeth Anscombe. In 1958, in the January issue of the British research magazine *Philosophy* her article entitled “Modern Moral Philosophy”¹⁸ was published, wherein a critical analysis and assessment of the condition of contemporary ethics ‘enslaved’, on the one hand, by the Neo-Kantian formalism¹⁹ and on the other hand, by the utilitarian utility, was made. A suggested answer to the crisis of ethics was the return to virtue ethics, re-focus on the agent, in particular its moral dispositions²⁰.

The issue of an agent became particularly present in the 1990s. Alasdair MacIntyre contributed to that significantly by publishing in 1981 his flagship work “After virtue”. Some of the characteristics of contemporary ethical disputes, according to MacIntyre were, in fact, their alleged rationality, objectivity and impersonality. The adoption of this type of perspective has

¹⁸ G.E.M. Anscombe, *Modern moral philosophy*, “Philosophy. The Journal of Royal Institute of Philosophy” 1958, Vol. 33, No. 124, pp. 1–19; the text was repeatedly reprinted e.g. in: *Collected Philosophical Papers of G.E.M. Anscombe*, Vol. 3, *Ethics, Religion and Politics*, Minneapolis 1981, pp. 26–42; *Human Life, Action, and Ethics: Essays by G.E.M. Anscombe*, eds. M. Geach, L. Gormally, Exeter 2005, pp. 169–194; moreover the essay is available on a website <http://www.philosophy.uncc.edu/mleldrid/cmt/mmp.html> (accessed: 15.10.2016).

¹⁹ Literally speaking, in the said article G.E.M. Anscombe raises criticism of the traditional Kantianism. However, the way of understanding thereof indicates that, in fact, she means Neo-Kantian moral philosophy, since the form of Kantianism, attacked by Anscombe rejects the noumenon nature of moral judgments, and particularly, their funding on the axiom of the existence of God and immortality of soul and puts the emphasis on the practical aspects of the formalism of Kant.

²⁰ Broadly on the Anscombe’s contribution to the development of virtue ethics: J.J. Sanford, *Before Virtue. Assessing Contemporary Virtue Ethics*, Washington 2015, pp. 51–113.

led to the rejection of the possibility of existence of [any] supra-historical and supra-community, and therefore impersonal and non-subjective, resistant to the impact of non-cognitive interests, universally applicable criteria which can be referred to, in order to determine, beyond doubts, which party to such disputes is actually right²¹. In the light of the fundamental issues raised in this essay it means that taking over, by an abstractly understood legal system, the monopoly for “justice” leads to the situation in which any discussion on equity/relevance/justice of a legal norm, leaving out the system’s paradigms, becomes impossible, or possibly, is an element of the discourse held beyond the paradigm of a democratic state ruled by law. Accordingly, a good judge turns out to be an element and a faithful servant to the justice system distinguished by the legislator.

MacIntyre, criticizing the Enlightenment morality model, drew attention to the fact that Aristotelian ethics had been built on a fundamental distinction between an act and potency (possibility) taking into account the current status as well as the purpose of existence. In the case of a human being an initial act is the existence of an unformed individual, both as to the nature as well as morality, its derivative, and potency is what may be achieved by an individual if it fulfills its nature, the purpose of its existence, whereas enlightenment moral philosophy has rejected all teleology and the concept of nature. Accordingly, an individual has been boiled down to being of an unformed nature and with an unspecified purpose of existence. Only a system of norms of conduct, more or less arbitrarily adopted/imposed, could fill in the unknown. However, this system devoid of the teleological context tied to the nature of an individual has lost, in principle, all arguments of being in effect, certainly beyond the legislature’s intention. By analogy, the will of the legislator often becomes that, what assigns the ethos of a judge as well as of all the legal professions. As a result, the process of applying law is boiled down to decoding, from legal provisions, the legislator’s intentions, and thus develops on the part of a judge, above all, the specific skills of a legal text interpretation. It is worth noting in this place that, in fact, it does not matter whether the judge behaves like a typical positivist

²¹ A. Chmielewski, *MacIntyre a współczesna filozofia polityczna* [in:] A. MacIntyre, *Czyja sprawiedliwość? Jaka racjonalność?*, ed. A. Chmielewski, Warszawa 2007, p. 19.

and reduces his reasoning to the semantic interpretation of the text or as a pragmatist, drawing attention to the purpose of the regulation or functions of the individual legal institutions, or even as an 'axiologist' looking for the values to be protected by the legal system, since in each case, the judge accepts *a priori* the fact that justice is hidden mainly in the legal text – its wording, objectives set or values protected. The reasoning of the judge will also end upon the reconstruction of a legal norm, which – to the best of his belief – is encoded in the legal text. Once this process is finished, the judge undoubtedly will acquire new skills in the technical aspect of his 'craft', but will he be a better judge, a better man? As mentioned above, virtue ethics requires raising such a question. Has a judge, as a result of the law application, become a better person, acquired certain moral dispositions, which lead him to becoming an ideal judge? Not an ideal, that has been assumed by the legislator, but the ideal that results from the essence of the judicial profession shaped within a specific civilization including its history, culture and system of values.

According to the above "[v]irtue theories focus on the agent – on his or her intentions, dispositions, and motives – and on the kind of person the moral agent becomes, wishes to become, or ought to become as a result of his or her habitual disposition to act in certain ways"²². Such distribution of accents, obviously leads to the conclusion that the ultimate "normativity criterion is a good person; a person of character is one who can predictably be trusted to act well in most circumstances"²³.

So what characteristics should a contemporary Salomon have? As Lawrence B. Solum, one of the pioneers of so-called virtue jurisprudence argues, it is extremely difficult to achieve a universal agreement on what personality traits should be represented by an excellent judge. It is difficult to reach such an agreement in practice, as may be observed, for example, in the United States when appointing the judges of the Supreme Court and in Poland, the judges of the Constitutional Tribunal, and what is more, it is also difficult in theory. Philosophers of law have not recorded any significant successes in

²² E.D. Pellegrino, *Toward a Virtue-Based Normative Ethics for the Health Professions*, "Kennedy Institute of Ethics Journal" 1995, Vol. 5, No. 3, p. 254.

²³ *Ibidem*.

this area yet, which is reflected in their legal and political likes and dislikes. However, according to Solum there are certain beliefs as to the rightness of conduct, founded on the human nature and social reality, and especially, the roles played by the particular individuals therein. Similarly, there seems to be consensus as to the features commonly stigmatized also in the framework of the judiciary²⁴. One of those flaws is corruption. Corruption in the judiciary is like illiteracy in the literature, barbarism in culture, chaos in the space. It is an oxymoron, a self-contradictory term, and in the non-linguistic sphere, an impossible being in an ontic sense. It is the total denial of justice because of its nature and the nature of justice. According to Solum corruption is incompatible with the essence of the judiciary because it destroys the material objectives of law. A corrupt judge, even if he or she issues a judgment compatible with the wording and spirit of law, that embodies the objectives of the legal regulation, will not be guided by the implementation of justice but someone's interest. In addition, his or her decision will undermine respect for law as such and will adversely affect the public acceptance of the judiciary²⁵. This argument, in principle, must be supported by any rational observer and reviewer of the judiciary. Even the most eager supporter of the judicial activism and the political commitment of judges, has to admit that corruption means the end of justice.

If corruption is something definitely incompatible with the ethos of judge, what virtues should be characteristic of a judge? It seems that integrity is opposite thereto – both in moral and intellectual terms. As far as the former seems not to require explanation, since it is intuitive, undoubtedly, a few words should be dedicated to intellectual integrity. The latter, in addition to the moral [integrity], seems to be the best response to the phenomenon of corruption. If corruption, in the greatest simplification, is taking a specific position in view of a specific benefit (current or expected), intellectual integrity requires the adoption of the same standards against various adversaries, positions, points of view, including the own one. As a result, the same

²⁴ L.B. Solum, *Virtue Jurisprudence: Towards an Aretaic Theory of Law* [in:] L. Huppes-Cluysenaer, N.M.M.S. Coelho, *Aristotle and The Philosophy of Law: Theory, Practice and Justice*, Dordrecht–Heidelberg–New York 2013, p. 12.

²⁵ *Ibidem*.

degree of severity is required for the positions contrary to our point of view or interests and the ones in support of them. Achieving such a situation is extremely difficult due to the somewhat natural self-centeredness, self-focus in thinking. The standards to which we refer when judging others are not always referred to us by ourselves. What justifies our actions, in our eyes, is not sufficient to justify the actions taken by others and *vice versa*, what clearly charges others, often remains irrelative in the assessment of our own conduct. So when considering intellectual integrity it is worth to refer to the meaning of the word ‘integrity’. That word is used in relation to honesty, sincerity, impeccability, purity, but also integrality, wholeness. As a result, intellectual integrity requires consistency in thinking – and subsequently – in action²⁶.

Another judicial virtue, referred to by Solum, is courage. Referring to the legacy of Aristotle, and in particular his concept of mean, Solum recalls that courage is a feature located between recklessness/bed-temper/carelessness and cowardice. Then, quite interestingly, he distinguishes “physical courage” and “civil courage” claiming that both of them should be characteristic of a judge. The first one is to protect a judge against any physical intimidation, since it is obvious that the person who can be threatened with physical violence does not provide due guarantees of impartiality, whereas civil courage relates to the approval of the consequences of actions taken by the judge which can translate into the social acceptance thereof, also in the judicial circles, and consequently, translate into his or her position, since safeguarding the law, discharging duties conscientiously, administering justice in accordance with the laws, impartially in accordance with his or her own conscience, and following the rules of dignity and integrity (Article 66 of the Act – Law on Common Courts Organisation, Journal of Laws 2001 No. 98, item 1070 as amended) may require to issue an unpopular decision which could result even in the social ostracism. The maintenance of this kind of attitude in a situation of any possible conflict with those responsible for supervision may require special courage.

The judge must therefore realize the simple fact that the public acceptance not always equals justice. What is more, what is socially acceptable,

²⁶ Broadly on judicial impartiality, also in the context of virtue jurisprudence, see: J. Soeharno, *The Integrity of the Judge. A Philosophical Inquiry*, Surrey–Burlington 2009.

may be in conflict with the content of a legal norm, the objectives of law or the values underlying thereof, as well as the judge's conscience. In particular, this issue arises in the context of the 'socially vulnerable' institutions, such as the conscience clause, the rights of sexual minorities, abortion, euthanasia, etc., when the judge 'restoring' a legal norm goes across social expectations, and often also – the related pressure. As it is emphasized by Solum, the judge having a virtue of courage will not be willing to sacrifice justice on the altar of public opinion, since such judge understands that the good reputation of a judge is something valuable only if it is formulated in the context of the judicial ethos or the duties thereof²⁷.

The opposite of fear, on which the virtue of 'courage' is raised, seems to be anger, leading to an excessively emotional conduct. Similarly to fear, anger, or more precisely, a hot temper – may lead to decision making whose roots are distant from what should be the essence of a legal norm. The answer to this imperfection is a virtue called by Solum a "good temper" or "the judicial temperament". To illustrate this virtue Solum uses quite an intriguing comparison, namely he refers to the three characters of the television series "Star Trek": Captain Kirk, Dr. McCoy and Mr. Spock. Spock symbolizes the Stoic wisdom. Distancing himself from anger, and generally most of the emotions, Spock follows in his conduct, above all, the rules of logic. Doctor McCoy is at the opposite extreme, he is hot blooded and gets angry easily. Any unprofessional behavior in the courtroom would lead to the outburst of his anger. Captain Kirk represents a character standing half way between Spock and McCoy – he is outraged at injustice and incorrect conduct of the legal representatives, but at the same time he is able to control his anger, so that his reactions are justified, and maintain temperance. As a result, "judicial temperament" allows, on the one hand, to keep professional distance, and at the same time, guarantees a sufficient degree of emotional involvement of a judge in his duties²⁸.

The emotions exceeding the scope of "judicial temperament" may lead to bias, thus another judicial virtue, highlighted by Solum, referring closely to the previous ones, is impartiality. The substance of the judiciary

²⁷ L.B. Solum, *Virtue Jurisprudence...*, pp. 14–15.

²⁸ *Ibidem*, pp. 15–16.

mission, which is currently symbolized by Themis with a bandage over her eyes, includes being a neutral arbiter. Legal norms and evidence, and not the parties or their representatives, are the major companions of the judge. According to the maxim, well known to most lawyers: *de maiore et minore non variant iura*, it should be recalled that the virtue of impartiality is also the judicial duty, since in accordance with Article 32 paragraph 1 of the Constitution of the Republic of Poland, all have the right to be treated equally by public authorities (Dz. U. [Journal of Laws] 1997 No. 78, item 483 as amended).

When considering the virtue of impartiality it has to be emphasized that it is not limited only to the relation of the judge to the parties to the proceedings, their representatives or other people who may affect the course of the proceedings and reasoning of the judge, but it should also refer to their motives, interests, worldviews, values systems, etc. The judge entering the court should leave his or her own socio-political views, likes and dislikes in the locker room, together with his/her coat. However, this does not mean that impartiality should be understood as a synonym of indifference and that a conclusion should be drawn that a judge cannot value various phenomena or even emphasize some of them. After all, it belongs to his duties. However, it is essential that the judge follows two fundamental principles coined in the ancient times, namely: 1^o *A verbis legis non est recedendum* (from the words of the law there must be no departure) and 2^o *Benignius leges interpretandae sunt, quo voluntas earum conservetur* (laws are to be benignly interpreted to preserve their intent). Accordingly, the values which should be respected by the judge in the courtroom, must be the values embedded in the legal system, and even more, in the essence of law. Therefore, a good judge should not be a passive ‘mouth of the law’, he or she not so much reads the statute as decrypts it – when decoding a legal norm from legislation he or she takes into account “the spirit of the laws”. At the same time he/she remains an individual with his/her sensitivity, wisdom and conscience. In addition, as mentioned above, the judge should, to some extent, be emotionally involved in the case. People who appear before him or her and look for justice should never be indifferent to him or her. Impartiality is not, after

all, the distance preventing from seeing a man, on the contrary, it covers compassion and empathy that create the framework for proper weighting and assessing the interests of the parties²⁹.

The vice that is universal, and which supposedly threatens in particular smart people, is sloth. In the case of the judge, sloth may manifest in focusing an intellectual effort on considering himself or herself not competent, transferring own duties to the others, reducing himself or herself to the absolutely necessary minimum or simply lacking intellectual involvement in the case. The virtue, which in this case according to Solum can, and should, be revealed, is diligence. A diligent judge will not look for solutions that seem only formally correct but will search for the achievement of justice in its substantive terms. As a result, such a judge will be eager to bear additional sacrifices in order to resolve the problem faced by him or her rather than to choose a solution that will quickly “leave him or her alone”³⁰. That reminds me of the famous hermeneutical circle, especially in terms of the game between pre-understanding and a legal text. Let us recall, that according to the supporters of the hermeneutics, any understanding is preceded by pre-understanding. Pre-understanding covers our beliefs, experience, previous education, in other words, everything that has shaped us, as we are, at the moment of encountering an object of cognition, in the case of our interest – a legal text. The process of understanding covers, in essence, the interaction between the pre-understanding and the legal text encountered. The result of understanding shall be therefore called a sort of compromise between us (our subjectivity) and the world transcendent to us, in this case, the legal text. However, this process leaves some trace in us. The more difficult it was to develop a ‘compromise’, the greater is the stigma. Accordingly, our experience, our baggage of pre-understanding, is changed. Following this, any subsequent contact with the legal text will be slightly different than the previous one. As Tomasz Spyra rightly indicates, the hermeneutical circle in such a version requires activity on the part of an interpreter³¹. It

²⁹ *Ibidem*, p. 16.

³⁰ *Ibidem*, p. 17.

³¹ T. Spyra, *Granice wykładni prawa. Znaczenie językowe tekstu prawnego jako granica wykładni*, Kraków 2006, p. 114.

seems that in this way the virtue of diligence can be approached – climbing to higher and higher levels of law understanding.

An obvious judicial virtue is intelligence. Without intelligence, it is hard to talk about actual discharging of judicial duties that does not mean, however, that it is impossible to be a judge without it. However, as a rule, exploring the essence of the factual and legal status requires above-average intelligence.

All the above virtues boil down, in essence, to the qualities of mind and character. They are not virtues reserved to ‘the children of Themis’ only. In fact, most of them can be expected from any decent man. However, the thing is that a judge, in particular, should be a decent man and even more – the judge should be a good person. To paraphrase the words by Władysław Biegański, a great Polish physician, philosopher, and social activist, *who is not a good man will not be a good judge*³². It should be also recalled that – according to Celus – law is the art of the good and the equitable (*ius est art boni et aequi*).

In addition to the virtues relating to intellect and character, a series of virtues related directly to the specificity of the law application and, in particular, to the judicial application of law, are expected of a good judge. As an Aristotelian shoemaker or carpenter will not be a good craftsman, if he does not know the secrets of his craft, so the judge will not be a good judge without the aforementioned skills. The most basic virtue in this respect seems to be excellent knowledge of the law. It is obvious that it is not just about knowledge of the legislation directly governing a specific section of social life, which is a subject of adjudicating by an individual judge. It should be remembered that when interpreting a legal text the judge should take into account, among others, the constitutional and international law context, as well as EU law norms. The judge, who in fact still learns the law (although it is a never-ending process) cannot be called a good judge, similarly to a child taking the first steps, who cannot be called an excellent runner. As it is emphasized by Solum, intelligence in conjunction with learnedness, are the essential characteristics of a good judge³³.

Knowledge of the law, certainly, cannot be reduced to literal knowledge of the texts of normative acts. Equally important is knowledge of the judicial

³² Cf. W. Biegański, *Myśli i aforyzmy o etyce lekarskiej*, Warszawa 1899, p. 41.

³³ L.B. Solum, *Virtue Jurisprudence...*, p. 17.

practice of the law application, and also the reasons underlying individual regulations, their goals and the values protect thereby. Using terminology of this study, it can be said that a good judge should also know – and it shall not be misuse – ‘feel’ virtues underlying the law. Those virtues, obviously, are not merely the product or result of the selection made by the current legislator, they are shaped by the judiciary and, to a large extent, the legal culture including its historical dimension. After all, the legal system is the result of the above phenomena; even more – if it had not been for social life it would have never occurred.

Speaking of the virtues associated with the ‘judicial craft’ also proficiency in the law application and, in particular, its interpretation should be emphasized. In the first place, the judge is obliged to have excellent knowledge of the natural language in which the legislation is formulated. Indeed, as it was held by the Supreme Court in its judgment of 8 May 1998 (I CKN 664/97, OSNC 1999/1/7), “when explaining the meaning of a norm it should be assigned such a meaning, as it has in everyday language, unless important concerns argue in favor of a derogation from that meaning”.

Knowledge of the legal and juristic language should be equally important for the judge. For this reason, it is sufficient at this point, to raise that the legal definitions are, in fact, the legal norms imposing on the interpreter the duty to adopt a specific meaning of a word or term being defined by the legislator. Therefore, as it was so rightly stressed by the Supreme Administrative Court (SA/Ka 1760/92, POP 1994/3/52) “a recognized rule of interpretation is to derogate from the colloquial meaning of words and terms when the legislator defines them in the legal language, developing a so called normative definition”. By analogy, if there is no legal definition of a particular term, but it has a given meaning in the juristic language, it should be assumed that this meaning shall take precedence over the meaning of everyday or specialized language³⁴, since, as the Supreme Administrative Court emphasized in its resolution of 29 November 1999 (FPK 3/99, ONSA 2000/2/59): “in the absence of a legal definition actions should be taken to determine whether an ambiguous phrase has its meaning commonly established in the juristic

³⁴ See more broadly: L. Morawski, *Zasady wykładni prawa*, Toruń 2014, pp. 112–115.

language (the language of the legal literature and the language of judicial case law) of a particular branch of law”.

The need to know the language, in the case of the judge's work, also includes expressions from the scope of the relevant specialist language. It is difficult to expect success and even talk about the correctness of the law application by a judge who, specializing, e.g., in medical law, does not understand the basic terminology of the medical sciences.

When speaking of the 'judicial craft' it remains clear that the judge should know the directives of a legal text interpretation, know the order in which they should be applied, and he or she should do that consciously. The proficiency in the application of the interpretation directives is overlapped by the issue of using legal deductions, conflict-of-law rules and a number of other specific issues without which the sound application of law is not possible. However discussing, or even mentioning, thereof goes beyond the framework of this study.

Linguistic competence of the judge clearly translates into his or her communicative skills. Due to them, among others, the need for the public sense of justice can be satisfied, since a good judge should not only well/justly apply the law, he or she should also be able to present it to all its addressees. Accordingly, he or she should be able to adapt his or her language to the possibilities of the addressees. Therefore, the good judge talking about law should be able to leave aside his/her professional language for the benefit of good communication³⁵. As a result, even an unsuccessful party to the dispute, despite its subjective defeat, should be able to understand the reasons followed by the judge when making a decision and leave the courtroom with the feeling that it leaves the Temple of Justice.

In summary, from the point of view of virtue jurisprudence, the essence of the judicial profession, and in this context it should be rather said, the essence of the judicial mission, cannot be reduced to the implementation of the specific norms' dispositions, whether legal or deontological ones. The judicial ethos cannot be brought 'to the ground', to the text of laws and codes of ethics. Paraphrasing prof. Biegański again, it should be stated that

³⁵ O. Nawrot, *Wprowadzenie do logiki dla prawników*, Warszawa 2014, p. 33.

the legal and deontological norms will remain forever the ‘lifeless letter’ if they are not derived from the own sense of judges, from the ideals that should guide them in their activities, from the virtues that they should like to implement, put in practice³⁶. At the same time, virtue jurisprudence emphasizes that these ideals and virtues are not only baroque figures, in essence, bringing little to the judicial profession. On the contrary, without them, we cannot talk about a judge. A formal act of nomination itself should not be the essence of being a judge. Let us recall, in this place, that one of the most famous monuments of law, namely the Code of Hammurabi, according to its “preamble”, was established so “[t]hat the strong might not injure the weak, in order to protect the widows and orphans, (...) in order to bespeak justice in the land, to settle (rightly) disputes, and heal all injuries”³⁷. In the light of the above wording, law arises out of the opposition to harm, injustice. Without this disagreement, and even somewhat crazy faith that justice, even if it cannot be fully implemented, is something that should be aimed at, there will never be a good judge. After all, as it was put by Celsus: “[l]aw is the art of the good and the equitable”.

Finally, it is worth to recall the words, engraved centuries ago, on the pronaos of the Temple of Apollo in Delphi: *gnothi seauton*, that is “know thyself” and repeat once again, that without realizing the essence of the judicial mission, including the values and objectives related thereto, without an in-depth autoreflection, there is no possibility of its implementation. Certainly, an objection could be raised in this place that a good judge characterized briefly in this paper, in fact, is an unreachable ideal, a typical literary protagonist, a product of imagination. Even if it was so, which I strongly disagree with, this ideal, itself, would have to be considered valuable. What is an ideal? It is a thought that not only we are able to understand, but which affects us, which – if we identify ourselves with – will be able to play an important role in our lives. It is something what we compare to, and when doing so, we are becoming better and better and, as a consequence, we reach further than we would have reached if it had not existed.

³⁶ *Ibidem*, p. 43.

³⁷ *Kodeks Hammurabiego*, trans. M. Stępień, Warszawa 1996, online: <http://www.pistis.pl/biblioteka/Hammurabiego%20kodeks.pdf> (accessed: 15.11.2016).

Grzegorz Ławnikowicz*

JUDICIAL ETHICS IN THE TIME OF THE SYSTEMIC TRANSFORMATION

The issue of the systemic transformation

The belief in the stability of the then axiopolitical system – its timelessness and the universality of norms that it is composed of, which had accompanied us even a few years ago, turned out, not for the first time, to be a predictor of dominance of the new rules and values. It seems, that currently they are becoming reality. Democracy, and in any case, democracy in the form known to us, goes to the past.

We live in the time of transformation. Certainly, what we experience, is the response recorded in history of doctrines, something that Polybius included in his description of the transition process among the elements of the political cycles (*anacyclosis*) or, nowadays, Stanisław Kutrzeba referred to as an element of the pendulum movement accompanying our social existence¹.

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¹ Polybius, *Dzieje*, Warszawa 1957, Vol. 1, p. 312 ff. Stanisław Kutrzeba wrote: “[t]he directions of that pendulum movement are – on the one hand, systems with a predominance of an authority factor in the state, and on the other hand – the systems guaranteeing freedom to a social, i.e. governed, factor and participation in the governance. The first type includes those types of regimes, where power rests in hands of an individual (whether it be a monarch or a dictator or whatever this individual is called) or smaller or larger groups of people, but making a significant minority in the society. The contrary type includes the regimes usually referred to as democratic. Direct democracies are the furthest reaching for that extreme, this type is less brightly manifested in all sorts of direct democracies (...)”. S. Kutrzeba, *Idea wolności w ustroju dawnej Rzeczypospolitej*, “Themis Polska” 1930, pp. 29–30.

In public debate the attempts to adjust conceptually to the new reality, to find suitable emblems and labels thereto, emerge. These searches are as clear, as uncertain are their results. In fact, within their framework, we naturally trust our intuition and experience derived from history. It seems quite easy to apply, in this place, the simplifications based on the mechanical application of the patterns described a long time ago. Probably, in particular, due to the distinctiveness of the social and political considerations – inter-war fascism, Nazism or authoritarianism will not appear again anywhere. However, this does not mean that we should not be afraid, *toutes proportion garde*, of any new form thereof, a new – contemporary incarnation that has not been named, yet.

Realizing that we have entered a new territory, only partially known to us, seems quite important to me. The fact that we see the direction and outlines only, while precise decoding of the new structure's elements is not possible, requires applying knowledge of history (including history of law and history of political and legal doctrines) to recognize threats and forecast the evolution of the (social, political, legal) systems, both in Poland and abroad.

As for the historical labels, one seems to me particularly relevant. Is it a proposal by A. Peretiatkowicz, an unfairly forgotten nowadays interwar constitutional jurist, philosopher of law and historian of ideas. What lies at the roots of his diagnosis, bringing him close to our position, is the assessment, supported by historical knowledge, of the pre-existing and dynamic reality, a manifestation of a sort of participatory observation.

A. Peretiatkowicz, in his description, used the term *democracy Caesarism*. The *caesarian* regime is a universal image of a specific type of dictatorship, a system, in which democracy and democratic institutions are formally maintained – based, however, on “the actual power of one person, but with the maintenance of the forms, sometimes appearances, of democracy, since actual dictatorship of one person always tries to obtain somehow the authorisation of the nation's will”². A. Peretiatkowicz distinguished two elements in that regime: the tension of political power and using that power for imple-

² A. Peretiatkowicz, *Nowa Konstytucja Polska*, “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 1935, Issue 1, p. 53*.

menting sustainable reforms. The aims covered by the latter element are for him a *sui generis* 'caesarian' alibi for violations of the rule of law³.

However, from the point of view of this paper, the answer to the two related questions is the most important. The first and general one, is the question about what the evolution in progress means, and in fact, what it may mean for the courts and judges, and the subject matter of the second, more detailed one, covers the consequences of these hypothetical changes for the professional ethics system, in particular, the nominal catalogue of norms, the manner of their interpretation and attitudes taken by judges. Achieving these objectives certainly requires, at least, a brief presentation of the principles of professional ethics of judges.

Status of the courts and judges

In a democratic system we can talk about a specific heteronomy of the third power⁴. Political correctness requires recognizing, as optimal, the situation which is close to the separation between the political powers (legislature and executive) and the third, non political and independent judiciary. The essence of such an optimum was described in the interwar period by the Supreme Court's judge I. Kondratowicz who wrote: "The courts, as the authority of the sovereign nation, according to the Constitution, are completely independent and the judges, as well as each of them individually, shall be independent only in the exercise of their judicial office, but inherently shall remain in the administrative and instances related dependence on the completely independent collective (the court), of which they are the members". The courts are independent "(...) without reservations and thus, also administratively, and not as individual judges – independent only in adjudicating"⁵.

³ *Ibidem*, p. 54*.

⁴ More on this subject: G. Ławnikowicz, *Idea niezawisłości sędziowskiej w porządku prawnym i myśli prawniczej II Rzeczypospolitej*, Toruń 2009, pp. 94–97.

⁵ I. Kondratowicz, *Zawieszenie nieusuwalności sędziów*, "Gazeta Sądowa Warszawska" 1929, No. 19, p. 286.

Let us note that the situation indicated by Kondratowicz creates dependence of the judges on the structure they belong to (the judiciary)⁶. It demonstrates exclusivity, since it is their exclusive dependence on independent courts and independence from the bodies of other powers. This situation may certainly generate threats also to the implementation of the ethical standards, but this will be referred to, generally, in the last part of this paper.

In a democratic regime based on the principle of separation of powers, the balance between political powers is of the paramount importance, in any way, unless any clear advantage of the executive takes place, even the precarious (unstable) balance creates a protective armour for the courts, it becomes a relatively tight veil against political pressure⁷.

However, we do not know how the evolution of the system will go. The most serious, but as indicated by the current events – real threat is departing from the principle of separation of powers. It is not about the wording of the Constitution (especially in view of at least partial incapacitation of the Constitutional Tribunal) but the actual system of the State – namely, its possible, further and gradual evolution, shifting the burden of power towards an individual, or within the scope indicated by it, towards other entities. This pattern is classic for pragmatic authoritarianism, in which prudent Caesar by virtue of his own, sovereign decision, determines how much power should be held by him (the directive sphere), and how much of it, and under what conditions, should be passed to others (the non-directive sphere)⁸ and that

⁶ The notion dependence, and more precisely “depending independence” was used in the interwar period by judge J. Jamontt. Paying attention to the disastrous consequences of dependence on an administrative factor he wrote, *inter alia*: “[t]hat logic absurd was constructed in such a way that in the field of ruling and adjudicating the judges »de iure« are provided with independence but outside this area, their independence from administration ceases even *de iure*. (...) Therefore, there is nowhere total independence of judges and in all the states of the European continent the principle of depending independence, which boils down to this that a judge, independent *de iure*, is dependant *de facto*, has persisted so far”. J. Jamontt, *Historia i krytyka rozporządzenia o ustroju sądów powszechnych*, Warszawa 1928, pp. 6–7.

⁷ G. Ławnikowicz, *Idea niezawisłości...*, pp. 95–97.

⁸ More on this subject: W. Paruch, *Miedzy dziedzictwem a współczesnością, czyli o podstawach ideologicznych myśli politycznej obozu piłsudczykowskiego (1926–1939)*, “Annales UMCS, sectio K” 1998, pp. 100–103.

has nothing to do with the scope of competences provided for by the Constitution and the secondary legislation issued on the basis thereof. Should this be the case, the situation to be prevented by the effective system of the systemic constraints, designed by Montesquieu, will take place. He wrote: "Political liberty is to be found only in moderate governments (...). It is there only when there is no abuse of Power. But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. Is it not strange, though true, to say that virtue itself has need of limits. To prevent this abuse, it is necessary from the very nature of things that power should be a check to power"⁹.

The more we approach the situation of domination of the executive over the legislature, the closer we are to its dominance over the courts. In practice – irrespective of the labels – the situation close to the uniformity of the State power appears. Reducing the status of the courts takes place. They pass from the remote, but still subject based positions, to the object based ones; they cease to be the authorities of the power to become the State's authorities subordinated to the unitary power.

When it comes to specific threats to the judicial status a persuasive warning should be the practice of the authoritarian Second Republic of Poland. Upon the entry into force of the Decree of 6 February 1928, the Law on the Common Courts Organization (Regulation of the President of the Republic of Poland of 6 February 1928 the Law on Common Courts Organisation, Dz. U. [Journal of Laws], No. 12, item 93), the irremovability of judges was suspended and what is more, the comprehensively understood certainty of their tenure was undermined. Subsequently, as a result of the Regulation of 23 August 1932 amending that Law (Regulation of the President of the Republic of Poland of 23 August 1932 amending certain provisions of the Law on Common Courts Organisation, Dz. U. [Journal of Laws], No. 73, item 661), irrespective of the re-suspension of the judicial irremovability, actually all competences of the judicial assemblies were passed on administrative boards subordinated to the president appointed by the Minister of Justice. Then also "kangaroo courts" were introduced, operating additionally to the disciplinary courts dependent on the president

⁹ Montesquieu, *O duchu praw*, trans. T. Boy-Żeleński, Vol. 1, Warszawa 1957, p. 232.

which were empowered to grant the judges retirement or transfer them to another post. The grounds were the conditions in the form of “the best interests of the judiciary” and the “solemnity of the post of judge”. That image is supplemented by the provisions of the regulations of the first half of the 1930s. – those which entitled the Minister of Justice to intervene in the amount of the judges’ salaries and the practice of the permanent and temporary posting of judges to the financially lucrative positions of notaries and mortgage writers¹⁰.

Reconstruction of the ethical system

Professional ethics of judges cannot be perceived as a self-sufficient value but rather as a means of securing certain rudimentary, social purposes. What they are, determines the actual substance of the system – the nominal content of the norms (their wording) and the revealed, or dominant, interpretative trends. In a democratic regime it will be rather the implementation of the individual rights of a citizen, in particular the right to a fair trial, in the authoritarian regime – the collective interest usually identified, when it comes to the arguments associated therewith, with the beliefs expressed by the leader and a group surrounding him.

Whether a term ‘ethical’ is the most accurate for determining the system under analysis may raise some doubts. Normative ethics, and more precisely, professional deontology, contains various norms, sometimes only indirectly valuated on moral grounds¹¹. In practice, judicial behaviours are often simultaneously evaluated on the basis of various normative systems.

¹⁰ More on this subject, see: G. Ławnikowicz, *Sędziowie w autorytarnej Polsce*, “Krajowa Rada Sądownictwa. Kwartalnik” 2016, No. 2, pp. 9–17.

¹¹ Perhaps providing the requirements of courtesy and patience by the Code of the Judges’ Professional Ethics may serve as an example. Pursuant to paragraph 12 subparagraph 2 of that Code: “In relation to the parties to the proceedings and other individuals participating therein a judge should keep an attitude of dignity, patience, courtesy and require appropriate behaviour also from those people”. Resolution No. 16/2003 of the National Council of the Judiciary of 19 February 2003 on adopting a collection of principles of judges’ professional ethics, www.krs.pl.

Therefore, the basis of their appraisal may be concurrently morality, professional deontology and the norms of the generally applicable law.

The specificity of the judicial ethics (judicial deontology), as any deontology of public confidence profession, is to secure compliance with its principles by a system of disciplinary sanctions administered in the disciplinary proceedings and to give the formalized nature to the ethical principles, through their inclusion in the code of professional ethics. The judicial code of professional ethics (*The Collection of the Principles of the Judges' Professional Ethics*) has been adopted on the basis of an explicit statutory authorisation by the National Council of the Judiciary (Resolution No. 16/2003 of the National Council of the Judiciary of 19 February 2003 on adopting a collection of principles of judges' professional ethics). However, it is not and cannot be, an act exhaustively defining the principles of the judicial profession's ethics, due to the specificity of the subject matter of the regulation¹². Its norms are an attempt to clarify and specify, and to some extent, even supplement, the principles of professional deontology included in the Law on Common Courts Organization (Act of 27 July 2001 Law on Common Courts Organisation, Dz. U. [Journal of Laws] 2016, item 2062). However, they are not of an autonomous nature and may not compete with the statutory norms. In the situation when the codes are adopted on the basis of an explicit statutory authorization granted as proof of the confidence and a reminder of responsibility imposed on the self-governments of the public confidence professions¹³ it seems enough to maintain the consistency relation between them and the

¹² Undoubtedly, the Supreme Court was right stating that: “[t]he requirement of the judge’s conduct in a manner consistent with the principles of professional ethics, and hence the ability to assign to a judge behaviour contrary to that, in breach of the authority of the profession, is independent on [the circumstance] whether those principles have been catalogued and included in the form of a collection or not (which, moreover, is not closed) (...)” Judgment of the Supreme Court – the Disciplinary Court of 13 October 2005, SNO 47/05, www.sn.pl/sites/orzecznictwo/orzeczenia1/sno%2047-05.pdf (accessed: 10.09.2016).

¹³ Article 17 paragraph 1 of the Constitution provides: “[b]y means of a statute, self-governments may be created within a profession in which the public repose confidence, and such self-governments shall concern themselves with the proper practice of such professions in accordance with, and for the purpose of protecting, the public interest”.

norms of the generally applicable law. In other words, it should be considered that this norm is applicable, which is not in conflict with the statute and develops (clarifies, specifies, provides details or supplements) its deontological norms. The Constitutional Tribunal in its resolution of 17 March 1993 rightly stated that the provisions providing the professional disciplinary responsibility of a physician were not “applicable to the extent in which the behaviour of a doctor is in compliance with a requirement or prohibition or an authorization of the applicable statute”¹⁴.

The essential question is which of the statutory deontological norms are of the primary nature. This is at the same time the question about the hierarchy within the system. For various reasons, the precedence should be given to independence, integrity and authority of the office. They hold functions of meta norms, which are the predictors and justification for the specific status of judge. The first two of them are also, and perhaps above all, useful fiction – “vital fiction”¹⁵.

The integrity requirement has been expressed in Article 61 paragraph 1 item 2 of the Law on Common Courts Organisation. Pursuant to that provision a person applying for the position of judge must be a person of integrity¹⁶.

¹⁴ Resolution of the Constitutional Tribunal of 17 March 1993 r., files No. W 16/92 (Dz. U. [Journal of Laws] of 1993, No. 23, item 103).

¹⁵ By using this term I refer to the considerations by W. Maliniak, who when analyzing the legal “fictionality” assumed that fiction is not equal to [another] fiction, and the trick is to distinguish between “historically creative and vibrant fiction” and “idle” and “lifeless” one. The former, “works normatively, legislatively as long as the legal awareness of the broad social spheres considers fiction a due norm, i.e. as long as this awareness is unaware of the fictionality of fiction” and it ceases to perform its function when “an opinion realizes (...) its fictionality”. Then, in fact, “fiction becomes fiction, an explicit imagination and nothing more, and therefore must cease to act normatively”, W. Maliniak: *Zagadnienie podziału władz w prawie państwowym nowoczesnym*, Warszawa 1936, pp. 20–23.

¹⁶ Article 61 paragraph 1 item 2 provides: “A district court judge may be a person who: (...) 2) is a person of integrity; (...)” This requirement should refer to the candidates applying for each judicial position (common courts, administrative courts, military courts, the Supreme Court), as well as for the posts of referendaries, apprentices and lay judges. See Article 149 paragraph 1 item 2, Article 155 paragraph 1 item 2, Article 158 paragraph 1 item 2 of the Act of 27 July 2001 Law on Common Court Organisation (Dz. U.

Concluding *a fortiori* we will reach the conclusion that also (and even more) a person who holds the post of judge should be a person of integrity.

Only the judge who is actually a person of integrity (internally, materially impeccable) may demonstrate independence in administering justice (administer thereof in accordance with the law and conscience). Both conditions – integrity as well as independence, which is the consequence thereof, generate a type of a perfect judge, unachievable in practice, by its very nature, in view of the disabilities of human character. In short, there are no impeccable and independent judges, since – there are simply no such people¹⁷.

However, if integrity and independence are concerned, it should be considered what meaning those duties have been given. Integrity received, by the legislature's will, a formal and relative dimension. Not any, and in general, only a drastic violation of the rules disqualifies an individual from its capability to perform the judicial service. The rightness of this thesis is supported by the very existence of the disciplinary penalties catalogue, since if the legislature treated the requirement of integrity literally, in view of finding a breach of any ethical principle and regardless of the scope (degree) of that breach, it would have to recognise, that integrity has been eliminated and then accept the need to remove a person from performing service at the post of judge (to prevent the performance thereof). Therefore, actually, the presumption of integrity applies until it is formally abol-

[Journal of Laws] of 2001, No. 98, item 1070 as amended), Article 22 paragraph 1 item 2 of the Act of 23 November 2002 on the Supreme Court, i.e. (Dz. U. [Journal of Laws] of 2013 item 499), Article 6 paragraph 1 item 2 of the Act of 25 July 2002 Law on Administrative Courts Organisation, i.e. (Dz. U. [Journal of Laws] of 2014 item 1647), Article 22 paragraph 1 item 2 and Article 55 paragraph 1 of the Act of 21 August 1997 Law on Military Courts Organisation (Dz. U. [Journal of Laws] of 2015 item 1198).

¹⁷ There are attempts in the literature to catalogue the characteristics of integrity. They include: "honesty, diligence, balance, accountability, courage, patience, good manners, cleverness, kindness, self criticisms, intellectual openness, internal sense of independence, the ability to clearly express own thoughts and discursive reasoning. [A judge] should also be sensitive, have a sense of justice and fairness but at the same time should be ready for a reasonable compromise; display severity and rigour in the application of the procedural regulations". S. Dąbrowski, A. Łazarska, *Dział II Sędziowie* [in:] *Prawo o ustroju sądów powszechnych. Komentarz LEX*, ed. A. Górski, Warszawa 2013, p. 281.

ished i.e. once the ruling which results in removing a judge from the office becomes final¹⁸. It is not accidental, that the Supreme Court – the Disciplinary Court when administering a disciplinary penalty, other than removing from the office, in order to describe the behaviour of the accused, uses the expressions such as: “calls integrity into question”, or “undermines trust in integrity”¹⁹. The practice of applying the quotation marks to the term “integrity” is also fully understandable²⁰. It is case law that establishes the standards of integrity specifying the degree of reprehensibility of different, generally typical, behaviours and recognizes them as more or less significant manifestations of undermining or even eliminating formally understood integrity. Case law of the Supreme Court – the Disciplinary Court is the basis for decoding a few, clearly outlined, standards. They consist in recognising an incriminating nature of the commonness of the reprehensible behaviours when on and off service²¹, accepting that, in principle, a final conviction for a criminal offence amounts to losing an integrity quality²² and, what undermines the peremptoriness of

¹⁸ More on integrity and the standards of integrity in case law of the disciplinary courts, see: G. Ławnikowicz, S. Pilipiec, *Nieskazitelnosc charakteru i nieposzlakowana opinia w prawie prawniczych samorządów zawodowych*, “Annales UMCS, Sectio G” 2016, Vol. 43/2, pp. 234–244.

¹⁹ Thus among others, in the rulings of the Supreme Court of 20 September 2007, SNO 60/07, LEX No. 471853 and of 20 June 2013, SNO 8/13, http://www.sn.pl/orzecznictwo/SitePages/Baza_orzeczen.aspx?Sygnatura=sno%208/13 (accessed: 13.09.2016).

²⁰ Thus in the resolution of 7 July 2009, SNO 17/09, http://www.sn.pl/orzecznictwo/SitePages/Baza_orzeczen.aspx?Sygnatura=sno%2017/09 (accessed: 13.09.2016); the resolution of 17 April 2007, SNO 20/07, http://www.sn.pl/orzecznictwo/SitePages/Baza_orzeczen.aspx?Sygnatura=sno%2020/07 (accessed: 13.09.2016); the order of 12 June 2003, SNO 29/03 and the judgment of 9 June 2005, SNO 28/05, LEX No. 471989.

²¹ The Supreme Court – the Disciplinary Court held that: “The judge repeatedly committing gross violations of his professional duties, the proper exercise of which, is essential to maintain the best interest and solemnity of the judiciary, loses the quality of »integrity« and must assume – taking into account, in particular, the degree of culpability and the social harmfulness of the acts committed – the most severe punishment of removing from the office”. Judgment of 9 June 2005, SNO 28/05, LEX nr 471989.

²² The Supreme Court – the Disciplinary Court in its judgment of 21 October 2008, SNO 78/08 SN held: “(...) for a disciplinary misconduct, whose description cor-

the principle referred to, behaviours that satisfy the criteria of the so called civilization offences should be assessed more leniently²³.

The diversity of standards resulting in treating differently the judges and the lay judges²⁴, the candidates [applying] for the posts, the judges holding offices and the retired judges (prior and follow-up integrity)²⁵ should also be emphasised. On the other hand, the requirements for judges are undoubt-

responds to the statutory conditions of a prohibited act classified as an intentional offence, an appropriate penalty should be, as a rule, removing a judge from the office. **This kind of offence not only disqualifies a judge required to be a person of integrity** [emphasis added by G.L.], but it also undermines the citizens' trust in the judiciary. Consequently, justice should not be administered by a judge, who himself commits an act, the description of which corresponds to the conditions of an intentional offence". The analogous arguments can be found in other rulings of that Court. http://www.sn.pl/orzecznictwo/SitePages/Baza_orzeczen.aspx?Sygnatura=sno%2078/08 (accessed: 13.09.2016).

²³ In the resolution of 15 September 2004 (SNO 34/04), it was held: "The criminal proceedings against a judge are his stigma and impede the operation in the judiciary structure although it is clear that in many cases, committing an unintentional misconduct of the so called civilization nature does not disqualify a judge in the light of integrity (Article 61 paragraph 1 item 2 the Law on Common Courts Organisation). Since it is also a professional misconduct, in the event of a very small degree of social harmfulness of a deed the Disciplinary Court may consider whether the disciplinary penalty of severity comparable with measures applied in similar cases, in criminal proceedings (e.g. in the case of conditional discontinuation of the proceedings) meets the principle of fair consideration and general prevention", http://www.sn.pl/orzecznictwo/SitePages/Baza_orzeczen.aspx?Sygnatura=sno%2034/04 (accessed: 13.09.2016).

²⁴ It is hard to imagine the removal from the office of a judge in connection with committing an act constituting a petty offence and Article 166 paragraph 1 of the Law on Common Courts Organisation provides: "The mandate of a lay judge expires if the lay judge is validly convicted of an offence or a petty offence, including a fiscal offence or a fiscal petty offence. The council of the municipality/commune which selected the lay judge ascertains the expiry of the mandate for the aforementioned reason and informs the president of a competent court about that fact".

²⁵ G. Borkowski, *Nieskazitelność charakteru a powołanie do wykonywania zawodów prawniczych* [in:] *Etyka zawodów prawniczych w praktyce. Wzajemne relacje i oczekiwania*, ed. G. Borkowski, Lublin 2012, pp. 209–210; see also: G. Ławnikowicz, S. Pilipiec, *Nieskazitelność charakteru...*, pp. 234–244.

edly higher in terms of ethics than for the representatives of any other public confidence profession²⁶.

The requirement of integrity, although formal and relative, has a kind of a double meaning, that shows to a judge the direction which should be followed by him/her and additionally, enhances among lay people, a positive image of judges, that is so desirable.

Any breach of ethics rules at least undermines integrity, in general, but not always, it is also the basis for the disciplinary responsibility when authority of the office is in breach.

When administering disciplinary justice, the disciplinary court indicates (should indicate), as the grounds for the penalty imposed, not a provision of the code of professional ethics, but Article 107 paragraph 1 of the Law on Common Courts Organisation, and possibly when clarifying that basis, the provision (provisions) specifying thereof, included in the code of professional ethics. Article 107 paragraph 1 of the Law on Common Courts Organisation has the following wording: “A judge takes disciplinary responsibility for misconduct in service including a gross violation of the provisions of law and for breach of the authority of the office of judge (disciplinary misconduct)”.

From the provision referred to above the general and basic duty results, which can be defined as a deontological minimum formula. It reads: “Behave at least in such a way that your behaviour is not in breach of the

²⁶ Aside from the comparative analysis of disciplinary case law we can limit ourselves in this place to a symptomatic listing. Namely, the organisational-pragmatic statutes on notaries, attorneys at law and legal counsels provide for the fiction of the integrity novation (just as it happens in the case of good reputation required from the bailiffs). In accordance therewith after the expiration of 10 years from the date when a decision on the punishment in the form of deprivation of the right to run a Notary Office (notaries), expulsion from the bar, deprivation of the right to practice as a legal counsel, becomes final, it is possible to apply for the re-appointment at the post of notary, as well as an entry into the list of attorneys at law and legal counsels (Article 51 paragraph 4 of the Notary Law, Article 82 paragraph 2 of the Attorney Law, Article 65 paragraph 2c of the Act on Legal Counsels, respectively. However pursuant to Article 109 paragraph 4 of the Law on Common Courts Organisation “The disciplinary penalty referred to in paragraph 1 item 5 [i.e. the penalty of removing a judge from the office – the note added by G.Ł.] excludes the reinstatement of the person subject to it in the judicial post”.

authority of the office”. The implementation of that formula is based on meeting the dispositions covered by the content of the more specific ethical norms of the statutes and codes. In other words – we recognize that violation thereof will be in breach of the authority of the office, undermining or even eliminating integrity of a particular judge.

The role of a sort of deontological centre – the set of norms, and at the same time, the source of knowledge on the detailed deontological obligations is played by Article 66 of the Law on Common Courts Organisation. This provision includes information on the following duties: serving faithfully to the State (fidelity to the Republic of Poland), guarding the law, performing scrupulously the duties of judge, adjudicating in accordance with the rules of law, impartiality in administering justice, following own conscience in administering justice, keeping legally protected secrets, being guided by the principles of dignity and integrity²⁷. In addition to the solemn affirmation, there are some other duties. Particularly noteworthy are the following ones: constant improvement of professional qualifications²⁸ and *sui generis* social engineering duty in the form of an obligation to guard solemnity of the office²⁹. The latter is clarified by a number of provisions of the code of ethics. An example might be the principle resulting from Article 5 paragraph 3 of

²⁷ The provision specifying the text of the solemn affirmation has the following wording: “I affirm solemnly, holding the post of common court judge entrusted to me, to serve faithfully to the Republic of Poland, to guard the law, to perform scrupulously the duties arising from my position, to administer justice, without any bias, according to my conscience and to the rules of law, to keep the State and professional secrets, and to be guided by the principles of dignity and honesty”; the person making this affirmation may finish it by saying the words «So help me God».

²⁸ Article 82a paragraph 1 of the Law on Common Courts Organisation provides: “A judge shall constantly improve his/her professional qualifications”.

²⁹ Pursuant to Article 82 paragraph 2 of the aforementioned statute: “A judge should, when on and off service, guard the authority of the post of judge and avoid everything that could bring discredit to the authority of a judge or weaken confidence in his/her impartiality”. Juxtaposing this responsibility with a duty of following the principles of dignity and integrity leads to the conclusion that a judge should not only behave decently and honestly, but also be perceived as a person of dignity and honesty. Those responsibilities are developed in detail by the judicial codes of ethics (see in particular paragraphs 3, 5, 12, 16 of the collection adopted by the National Council of the Judiciary).

the collection adopted by the National Council of the Judiciary. According to it, a specific ‘judicial active regret’ is a promoted model of behaviour. The referenced provision states: “A judge who violated ethical principles, should take immediate action to remove the effects of the infringement or otherwise compensate a person affected by such proceedings”.

Noteworthy is the marginal role of norms specifying the standards of interpersonal (generally intra-judicial) behaviours within the group. It is understandable, especially in the context of the goals of the judicial service and the “official” status of judge, [as well as] the belief that this service is performed by individual sacrifice. In those circumstances, the standards of loyalty (professional solidarity) and fair competition strongly emphasised with attorneys at law, legal counsels, notaries and bailiffs virtually have no *raison d’être*. The prosecutors are in a similar position. This state of affairs, although as indicated, understandable, may be a source of pathology.

Ethical standards in the transformation period – practical considerations

Most of the ethical threats are of a universal nature, irrespective of the type of the political regime. Their source is the imperfection of human (and therefore also judicial) nature. The type of regime reinforces or (relatively) weakens the threats. The thesis that the less democracy, the greater the level of threat is quite obvious.

The observations outlined so far, lead to the conclusion that judges are always dependant. Firstly, on themselves by approaching or moving away from the ideals of integrity and independence which, after all, are objectively unachievable due to the personality defects; secondly, to a lesser or greater extent, on one of the two structures or on both of them at the same time – the judiciary and the executive. The first of the dependencies limits the judge *per se* in the possibility of the full implementation of the ethical standards assumed. The latter, reinforces the operation of limitations resulting from the first one. This reinforcement is presented differently in the case of dependency within the judiciary and differently in the case of

dependency on the executive. Probably, the combination of those two external dependencies, impossible in the authoritarian system and difficult in the democratic regime, would be optimal. It would have to be based on the reasonably constructed balance.

Let us remind, that dependency within the judiciary structure is typical for the democratic regime. It is the justification for the existence of a separate “power in the power” with its own, internal administration and management. Thus, the danger of nepotism is generated – the development of the court aristocracy and the hereditary elites. The problem is, that the latter are legitimated by the democratic structures (selection of the assembly and a system similar to co-optation) but they are not subject to comprehensive and democratic, and therefore, also external control. Eugeniusz Waśkowski emphasized, a long time ago: “The election of new judges will cause fight of fractions in the judicial assemblies, there will be intrigues, the choice of the judges will be influenced by the political views of the majority of the members of the assembly. Co-optation may lead, as a result of choosing people of a certain worldview and even mostly relatives, to nepotism and creating a closed caste, full of superstition, held back, not capable of progress, remaining behind to life. It is possible that (...) the judges, mostly mediocre people, will give priority to the similar candidates and remove, by jealousy, outstanding people, or will follow the service seniority”³⁰.

Also “practically” understandable is the gentler treatment of the judges (retired judges) than candidates for the posts of judges (different standards of integrity indicated above). However, it has no justification in the objectives of the judicial service. The disadvantage is also the “personal” distance of the disciplinary judiciary from the “judicial nation”. It can be assumed in advance that the judges of the disciplinary courts (judges of the courts of appeal and the Supreme Court) do not know sufficiently the conditions of work in lower courts; thereby it is easy to [apply] excessive strictness in assessment of the misconduct directly related to the service and the conditions thereof (in particular the delay in drawing up the grounds, reprehensible behaviours on the line: a judge – parties and other entities to the proceedings).

³⁰ E. Waśkowski, *Podręcznik procesu cywilnego*, Wilno 1932, pp. 32–33.

As a marginal note, although this is not a marginal question – objectively, it is the lack of appropriate system solutions, in particular, organized psychological care, which could be reasonably used by the judges overloaded with duties, that is blameworthy.

What destructively affects the judges' characters is fighting for promotion within a closed environment, and basically, in small environments limited to judicial (appeal) circuits. The limitation of opportunities for promotion may occur a remedy thereto – since the less positions involving perquisites (higher salary, less work, more power) the less competition, undesirable for the ethical level of the [judicial] environment.

Unfortunately, in a system moving away from the democratic regime all those threats do not disappear; on the contrary, they are even reinforced – judicial dependency does not disappear (now these are the structures closely or directly related to the executive) and political dependency is added thereto, both autonomous and implemented through the political pressure on the management of the courts. This pressure, differentiated as to the content and source, leads to the development and establishment of the belief that *condition sine qua non* of the judicial existence and career is not only subordination to that pressure, but also sound reading of the intentions of those who have political power and decide directly on promotions, maintaining the position, the place of service. This enables the omnipotent political power to implement, in addition to the policy of law, also the policy of case law. The base of the latter is to develop a situation of uncertainty and belief in the temporary status of judge. This is a situation, which in its extreme form, leads to the suspension of professional ethics, as the permanent foundation of the judge's behaviour, as well as the destruction of independent judges and the independent judiciary.

Perhaps soon the reconciliation of law and conscience will become heroism. Potentially, the application of the law itself, and more specifically, that, what in the assessment of a judge, is the law (an issue of an individual assessment of the binding force of the rulings issued by the Constitutional Tribunal, the possible direct application of the Constitution in view of finding unconstitutionality of the secondary legal provisions) may be also heroic.

The nature of the principles of professional ethics is an objective problem, as the fact, that they take the form of general clauses is both their disadvantage and advantage. The disadvantage, because in uncertain times their capacious formula open to new contents – and so, quite real seems to be the change in the meaning of the principle of faithfulness, or an internal hierarchy of the principles. There is also the danger associated with the introduction of new clauses to the system which, in practice, may annihilate judicial deontology. This undesirable direction has been already set by the norm covered by the content of Article 137 paragraph 2 of the Law on the Public Prosecutor's Office (Act of 28 January 2016 Law on the Public Prosecutor's Office i.e., Dz. U. [Journal of Laws] 2016, item 177), that has supplemented the system of professional deontology of prosecutors with a new dangerous disciplinary exemption. In accordance with it: "An act or omission by a prosecutor taken solely in the public interest does not constitute a disciplinary misconduct".

A detailed direction which will be taken by the system of professional ethics of judges, nowadays still seems an open question.

Jerzy Zajadło*

ATTITUDES OF JUDGES IN THE LIGHT OF REFLECTIVE SOCIOLOGY

Thomas Ruffin and William Gaston

History is for us, above all, the source of knowledge about what and why happened in the past. However, we can approach it in a different way and treat it as an exemplification helping to formulate and review the paradigms. It also relates to the general reflection on law made within three fundamental fields – philosophy, theory and sociology of law. As an example for analysis, I have chosen case-law of U.S. courts in slavery cases in the first half of the 19th century, since it provides, in my opinion, fantastic substance for deliberations on judicial approaches. Below an example is provided of two judges who adjudicated at the same court, at the same time and under the same law, and yet had different views on the same institution, i.e. slavery. If it was treated not purely historically, but indeed paradigmatically, the question would arise about the universal reasons for which judges may, in the same case or group of cases, take different attitudes.

Many slavery cases were so complicated in the legal sense that they ended up at the Federal Supreme Court and those are best known because some of them have been referred to in U.S. jurisprudence until today¹. Certainly, the most famous one and considered the catalyst of the civil war is the case *Dred Scott v. Sandford* of 1857. However, actually, most of them had taken

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¹ The most important ones are discussed by E.M. Maltz, *Slavery and the Supreme Court, 1825–1861*, Lawrence 2009.

place before the courts of the states and never exceeded the boundaries of those states. What is more, in the majority of numerous cases, they related not to the great constitutional disputes, but to apparently uncomplicated ones associated with the day-to-day legal relations – both in the civil law and criminal law areas. Slaves used to work, had families, were subject to rental, caused damage to third parties, they were bequeathed by the will but sometimes they also used to run away, steal, rob, kill intentionally or unintentionally. That brought some legal issues – after all, slaves were, in principle, property, but specific property, nevertheless equipped with some external and internal attributes of humanity. At the same time they were worth quite a lot, in terms of assets, and therefore had to be operated and deprived of any rights, but concurrently there was a need to place them in the society somehow and, for example, protect them against the attacks by other people who could cause their disability or death².

However, sometimes those cases, that had appeared trivial and mundane at the beginning, took a permanent place in history because of their nature and unconventional decisions taken thereon as well as their effects. I will try to show that, using the example of the decisions taken by two judges of the Supreme Court of North Carolina, namely Thomas Ruffin and William Gaston. They both adjudicated at the same time, at the same court and under the same law, nevertheless some significant differences in their approaches to slavery can be observed. Some piquancy is added by the fact that each of them, as a respected affluent southerner, owned quite a vast number of more than one hundred slaves working on lucrative plantations. Therefore, in principle, they were not opponents of slavery, though, they had different approaches to the issue of legal subjectivity of slaves. It is indeed, a phenomenon worth a paradigmatic approach to the problem that to this day has generated a lot of interest in the literature of the subject³,

² More broadly on that subject: A. Fede, *People without Rights. An Interpretation of the Fundamentals of the Law of Slavery in the U.S. South*, New York–London 1992 (reprint: New York 2011).

³ Cf. e.g. J. Oakes, *Slavery and Freedom. An Interpretation of the Old South*, New York–London 1990, pp. 160–166; T.C. Meyer, *Slavery Jurisprudence on the Supreme Court of North Carolina, 1828–1858: William Gaston and Thomas Ruffin*, “Campbell Law Re-

since a question arises what factors had determined the fact that the two judges adjudicated so differently under the same conditions. At the end of this paper, I will try to answer this question by applying the methodology of contemporary reflective sociology by Pierre Bourdieu. For now, however, we will hear from the voice of history.

It is worth doing, especially in relation to judge Thomas Ruffin, an author of the ruling in the case *State v. Mann* of 1829, as that case has been recorded in history for several reasons and the contemporary research papers dealing with certain legal aspects of slavery, completely ignoring that case or quite apart from it, are hardly ever met.

Firstly, it focused on the very essence of slavery as an economic, cultural, legal and social system – in other words, as the famous American historian Eugene Genovese put it “the logic of slavery”⁴. The owner – slave relationship was autonomous and it was difficult to subject it to any internal interference by legal regulations and the legal system safeguarded this autonomy rather from the outside. At the same time, slavery was the basis for economy, arranged the social structure and was the source of a certain specific cultural model, while law (both statutory law and common law) as well as the judges applying thereof were only supposed to preserve and petrify that arrangement.

Secondly, starting with a study by another well-known historian Kenneth M. Stampp *Peculiar Institution. Slavery in the Ante-Bellum South* of 1956⁵ the in-depth analyses of that ambiguous legal situation of slaves began – in certain circumstances, they were considered property, however in others, they were treated as minded human beings having free will. Although this complicated legal status of slaves was realized as early as in the

view” 2011, Vol. 33, pp. 313–339. It is worth noting that in November 2007 a special symposium on that case was held entitled: *The Perils of Public Homage: State v. Mann and Thomas Ruffin in History and Memory* – the papers by S. Levinson, S. Greene, E.L. Muller, A.L. Brophy, L.F. Edwards, D. Lowenthal, M. Tushnet, J.V. Orth, J.A. Wynn were published in “North Carolina Law Review” 2009, Vol. 87.

⁴ E. Genovese, *Roll Jordan, Roll. The World the Slaves Made*, New York 1976, p. 35.

⁵ Provided according to the edition: K.M. Stampp, *Peculiar Institution. Slavery in the Ante-Bellum South*, New York 1989.

mid-19th century and this is evidenced by numerous papers of that time, it was Stampp who probably, as the first one, raised the problem of the imminent contradiction inherent in the institution of slavery and laws governing it. The judges of that time tried to solve this conflict more or less effectively. What is more, the contemporary scholars also try to explain that in a more or less convincing way. According to some, nothing else reflects this ambivalence better than the paradigmatic dimension of the *State v. Mann* case⁶.

Finally, the case concerned survived in human memory, since it had been largely the inspiration for Harriet Beecher Stowe when writing her famous *Uncle Tom's Cabin*. This can be seen even more clearly in another novel, by the same author, slightly less known in Poland *Dred. A Tale of the Great Dismal Swamp*, as the plot and the characters of that book had been based on the real events that were subsequently the subject of a trial in the case *State v. Mann*, before Judge Thomas Ruffin⁷. Judge Clayton of the novel is Thomas Ruffin himself – he also personally has doubts about the cruelty of the slavery system, but as the judge, dressed in a gown, leaves his moral dilemmas outside the door of the courtroom.

Thomas Ruffin was not an ordinary, provincial judge. On the contrary, as Chief Justice of the Supreme Court of North Carolina he is regarded, in the contemporary literature, one of the most important jurists in the history of the U.S. judiciary and his judicial work covers approximately 1500 opinions drawn up for the decisions relating to various areas of law⁸. The case of *State v. Mann* was one of the first cases that judge Ruffin had

⁶ M.V. Tushnet, *Slave Law in the American South. State v. Mann in History and Literature*, University Press of Kansas, Lawrence 2003; cf. also earlier work by the same author *The American Law of Slavery 1810–1860. Considerations of Humanity and Interest*, Princeton 1981 and a critical review by A. Fede, *Toward a Solution of the Slave Law Dilemma: a Critique of Tushnet's 'The Law of American Slavery'*, "Law and History Review" 1984, Vol. 2, No. 2, pp. 301–320.

⁷ Of vast literature cf. recently: A.L. Brophy, *University, Court, and Slave. Pro-Slavery Thought in Southern Colleges and Courts and the Coming Civil War*, New York 2016, pp. 182–196.

⁸ Thus e.g. J.R. Vile, *Great American Judges. An Encyclopedia*, Vol. 2, Santa Barbara–Denver–Oxford 2003, pp. 662–667; the characteristics of Thomas Ruffin as a symbol of judicial pragmatism and southern constitutionalism has been presented in detail by

decided as a member of the North Carolina Supreme Court since 1829, but it should be also added that there were more slavery cases throughout his career, namely over 425⁹.

Since, further in this paper, his profile shall be compared to that of Judge William Gaston, let us first introduce some similarities and differences in their biographies because this will be of some significance for the assessment of their attitudes towards slavery. Certain factors, which normally are not taken into account in the analysis of case-law of the court, here may prove to be very helpful in understanding the judicial interpretation of law and the contexts in which that interpretation is involved. It is not only about the context of a specific case's circumstances, but also about the ethical, moral, social, political or economic contexts of a particular legal institution's operation, in this case the institution of slavery, against the background of a specific cultural landscape of the American South in the mid-19th century.

Both judges were actually almost the same age – Ruffin was born in 1787 in King and Queen County in Virginia, while Gaston was born in 1778 in New Bern in North Carolina. The former was a member of the protestant family belonging to the Episcopal Church, while the later one was quite early, at the age of two, orphaned by his father and brought up by his ultra-catholic mother. Both of them had studied at the College of New Jersey (nowadays Princeton University) but later their political and professional careers turned out to be partly similar, but in part quite different. Both Ruffin and Gaston preceded their high judicial offices with quite active participation in public life, but with one important difference – the former focused mainly on the local level of North Carolina, and the later one, over time, launched upon the high federal seas. Ruffin's political views are determined in the contemporary literature as Republican in the Thomas Jefferson's style¹⁰. In the years 1813–1817 the judge to be was a member of the State General Assembly and for three years he held an office of Speaker. Twice he was also an elector in

T.S. Hubner, *The Southern Judicial Tradition. State Judges and Sectional Distinctiveness, 1790–1890*, Athens–London 1999, pp. 130–159.

⁹ A.L. Brophy, *University, Court...*, p. 197.

¹⁰ T.C. Meyer, *Slavery Jurisprudence...*, p. 314; T.S. Hubner, *The Southern Judicial Tradition...*, p. 132.

the presidential elections – the first time for James Monroe and subsequently for William Crawford. He launched upon the high federal seas in 1861 – when he participated in the peace conference held in Washington, which was probably the last attempt to prevent the civil war. In the local community he enjoyed great authority. He enjoyed the opinion of a busy, warm, full of empathy and religious person¹¹ and after finishing his judicial career in the years 1854–1860 he was a chairman of the state association of planters. However, in history, he is known mainly as a long-time Chief Justice of the Supreme Court of North Carolina (1833–1852) and (perhaps in particular) the author of the opinion in the case *State v. Mann* of 1829 referred to in this paper.

On the other hand, William Gaston had completely different political views. He had been involved in the federalist fraction, and subsequently became a member of the Whig Party. Initially, his career had been mainly developed at the local level in the State Parliament, next it moved to the federal level of the Union and in the years 1813–1817 he was a member of the House of Commons. Later, when he was a judge of the Supreme Court of North Carolina, in 1840 he was offered a place in the Senate, and in 1841 the position of Attorney General, but he refused that twice. William Gaston was a judge from 1833 until his death in 1844. As a lawyer, he was not as highly valued as Thomas Ruffin¹², but in the contemporary literature some of his decisions are quoted, in particular, his opinion on the *State v. Will* case of 1834 referred to herein.

It seems that the differences in attitudes to slavery represented by both judges, in a wider perspective, were primarily influenced by different courses of their political careers, although other factors, such as their religious, educational or family backgrounds cannot be disregarded. Gaston as a federalist, could see in it some risk for the future of the Union, because the conflict of the North and the South was increasing from year to year; in turn, Ruffin as a state Republican was, first and foremost, focused on the importance of slavery for economy, culture and the social structure of North Carolina.

¹¹ J. Yanuck, *Thomas Ruffin and North Carolina Slave Law*, “The Journal of Southern History” 1955, Vol. 21, No. 4, p. 460.

¹² However, he is considered such a remarkable figure in American history that a biography has been dedicated to him – J.H. Schauinger, *William Gaston: Carolinian*, Milwaukee 1949.

State v. Mann and State v. Will

The facts of both cases were quite reverse – in the former a white man killed the slave he had power over; in the latter one it was the slave who killed a white foreman, whose commands he had to listen to. For our considerations, the course of action, and even the operative parts of the judgments issued are of the secondary importance, nevertheless different arguments covered by the opinions of judges, Thomas Ruffin and William Gaston respectively, seem much more important. Although the files of both cases have been destroyed during the civil war, there are enough other sources enabling to reconstruct, quite precisely, the standpoints of both judges.

The facts of the *State v. Mann* case were as follows: in 1828 in Chowan County, North Carolina, John Mann rented a slave named Lydia from his neighbour, Elisabeth Jones. He decided to chastise her for certain minor offences committed by her, the details of which unfortunately are not known to us, by whipping her, which was a typical practice to discipline slaves. However, during the whipping Lydia had wrenched her tormentors and attempted to escape, but since she did not stop at the call, John Mann shot a runaway woman in the back and wounded her. Taking into account the legal status of slaves treated as objects (so called ‘chattel slavery’), mentioned above, we should in general, probably, deal exclusively with the classic civil liability for damage to the rental object. However, in this case something unusual happened – in spring of 1829 John Mann was charged with assault and battery and taken to the court. In the course of the trial held in autumn of the same year the judge instructed the jury that if they considered the deed committed by Mann cruel and disproportionate in comparison with the offences committed by the slave herself, he should be found guilty of committing the alleged offence. As a result, the offender has been sentenced to a fine amounting to five dollars¹³.

Although the penalty was actually symbolic, John Mann had never given up, “on principle” and therefore he appealed to the Supreme Court of North

¹³ M.V. Tushnet, *Slave Law...*, p. 20 ff.

Carolina and the case went before Judge Thomas Ruffin. Although, the final judgment was eventually unambiguous in its operative part and beneficial for Mann yet supported by an extensive argument of a precedential nature. However, we know from multiple sources that Judge Ruffin hesitated and was not sure of his judgment – he had prepared a couple of different drafts of the grounds for the opinion and changed them several times looking for different solutions and the best arguments for his final decision¹⁴. At this level, the case of *State v. Mann*, which seemingly had appeared uncomplicated, turned out to be quite complex in terms of its structure. However, it seems that due to that specific way of reasoning, presented by Judge Ruffin in his opinion, it has been permanently entered into the records of history of the U.S. courts' case-law in slavery cases, and that is why it is so often referred to in the contemporary literature of the subject. Moreover, Ruffin had doubts not only at the stage of adjudicating as a judge, in fact, he had felt them right from the very beginning as a man – he wrote subsequently in the first draft of his opinion that it was one of those cases which the court did not want to adjudicate upon – one of those where the rules of politics made a judge decide contrary to his feelings as a human being¹⁵. This is referred to, in slightly different words, in the very first sentence of the final version of his opinion: "A Judge cannot but lament, when such cases as the present are brought into judgment"¹⁶. Therefore, Ruffin's personal sympathies had seemed, at least partly, to be on the side of the wounded black slave but the final decision was *in favorem* of the white man hiring a slave. Why? The opinions of the contemporary commentators are divided and diverse – starting with the classic judicial dilemma formalism – moralism, from which a judge usually escapes into the former one, ending with

¹⁴ S. Hadden, *Judging Slavery. Thomas Ruffin and State v. Mann. Race, Crime, and Justice in the Nineteenth-Century* [in:] *In Local Matters. Race, Crime, and Justice in the Nineteenth-Century South*, eds. D. Nieman, C. Waldrep, Athens 2011, pp. 1–28; cf. also: M. Tushnet, *Slave Law...*, pp. 26–30.

¹⁵ Quoted after: W.E. Wiethoff, *A Peculiar Humanism. The Judicial Advocacy of Slavery in High Courts of the Old South, 1820–1850*, Athens–London 2010, p. 90; cf. also: M.V. Tushnet, *Slave Law...*, p. 26.

¹⁶ *State v. John Mann*, 13 N.C. 264 (1829).

indicating the external political, economic, social and cultural context of an individual final decision.

The analysis of all draft opinions by Ruffin and their subsequent changes would exceed the scope of this paper more than necessary. Thus, let us take as the basis for the analysis, only the final decision and its grounds – since that final decision had changed the judgment of the court of first instance and released Mann from criminal liability. However, it is particularly interesting what legal and non-legal arguments induced Ruffin to draw that conclusion because in the contemporary literature the assessment of that decision is subject to heated debate and controversy¹⁷. The starting point for the deliberations by the judge was the following problem: if the torturer of the slave Lydia had been a total bystander, he probably would have incurred criminal liability for his act, because in such a case, the aforementioned ambivalent legal status of a slave would have been manifested – she would not have been an object but a human being though, let us call it, quite “specific”. In other words, health and life of the slave would have been subject to the protection not only under civil law but also in the criminal law sphere. However, John Mill was not a bystander to the case, since he was in the rental relation with the slave’s owner. Although that still does not explain why John Mann’s criminal liability should be excluded, but just in this place, we are reaching the essence of the line of argument by Judge Ruffin – the rental relationship caused that some of the owner’s rights and obligations, including the right and obligation to maintain a slave in the relevant disciplinary regime, passed on the lessee. Therefore, according to Ruffin “our laws uniformly treat the master or other person having the possession and command of the slave, as entitled to the same extent of authority”, since “the object is the same – the services of the slave”¹⁸. Certainly, the question arises about the scope of that authority – here Ruffin had no doubts and included in his opinion the most frequently quoted sentence: “[t]he power of the master must be absolute, to render the submission of the slave perfect”¹⁹. Ruffin wrote that this might raise our moral

¹⁷ It is particularly apparent in the post-conference papers published in 2009 in “North Carolina Law Review” 2009, Vol. 87.

¹⁸ *State v. John Mann*, 13 N.C. 265 (1829).

¹⁹ *Ibidem*.

considerations but at the same time he immediately added: “in the actual condition of things, it must be so. There is no remedy. This discipline belongs to the state of slavery”²⁰. Therefore, Eugene Genovese quoted above, was right – in the Ruffin’s opinion on the case of *State v. Mann* the very essence of slavery logic had been formulated: the aim [of slavery] “is the profit of the master, his security and the public safety”²¹. Therefore, in the Judge Ruffin’s view John Mann’s behaviour fell within that logic and did not exceed its limits – since, against all moral appearances, when disciplining the unruly slave he had acted in his interest as the owner but, above all, in the public interest. Ruffin had not escaped, as the majority of other judges having moral dilemmas in slavery cases, into formalism but he rather relied on broad contextual arguments.

Judge William Gaston in 1834 took a slightly different approach in the case of *State v. Will* – as he focused rather on a particular case being decided. Although, he had referred in his opinion to the judgment in the case of *State v. Mann* on several occasions, he confirmed the absolute nature of the power of the master over the slave. However, he raised a question about the limits of that power, since the limit thereof could be, in certain circumstances, the deprivation of the slave’s life. Perhaps the term ‘limit’ in this context is not relevant enough, as it was more about, if at the same time certain criminal law nuances are taken into account, the purpose of applying even cruel measures to discipline slaves – that could not be accompanied by the desire, or in certain circumstances, even the effect of depriving [the slave] of life. It seems that it was probably understood also by Judge Thomas Ruffin and there are at least two proofs evidencing that. Firstly, even though he had been in the court formation in the case of *State v. Will* (with the judges William Gaston and Joseph J. Daniel), he did not raise a dissenting opinion, but he only formulated a concurring opinion relating to some items of the grounds. Secondly, a few years later in 1839, when drawing up an opinion on the *State v. Hoover* case, he essentially shared the view of Judge Gaston – the purpose of exercising the power over the slave might not be depriving him of life. If this happened, the owner should, in certain circumstances,

²⁰ *Ibidem.*

²¹ *Ibidem.*

incur criminal liability²². However, also these arguments fall within Ruffin's logic of slavery – a sadistic owner focused not on the basic purposes of enforcing obedience of slaves, but on plain cruelty, infringing a certain order and was unworthy of living in the white southern society²³.

Relatively much is known about the case *State v. Will* – since not only the judgment and the opinion by Judge William Gaston, but also the minutes of the statements by J.R.J. Daniel, the attorney general and B.F. Moore, the defence counsel, have survived. In 1920 the article presenting and analysing in detail those materials was published in *Virginia Law Review*²⁴. The author of that text, George Gordon Battle, is an interesting person because he was in a special way related to that litigation – as the owner of the accused slave Will, James S. Battle was his paternal grandfather, Judge Joseph S. Daniel was his maternal grandfather and the attorney general J.R.J. Daniel was his uncle. So we have to deal with the research text, but containing elements of personal memories, since events that had happened years ago craved permanently in the Battle family's history.

The day of 22 January 1834 began totally normally at the Cool Spring cotton plantation in Edgecombe County, North Carolina, as each working day, and nothing predicted subsequent dramatic events. With one exception – a small argument relating to a working tool occurred. The slave Will had his favourite hoe, but that day the foreman Allen, also a slave, assigned it to someone else. In view of the fact that Will had protested against that, Allen complained about him to Richard Baxter, a white slaves overseer. The latter took a shotgun from home and headed to that part of plantation where Will was working that day. Some circumstantial evidence shows that he wanted to teach a lesson, that he had planned for a long time, to the quarrelsome slave. Subsequently, the events took an uncontrolled direction – Baxter shot Will and the injured slave rushed to escape. However, soon he was caught by the overseer and a few slaves accompanying him and in the

²² Quoted after: T.C. Meyer, *Slavery Jurisprudence...*, p. 321.

²³ *Ibidem*.

²⁴ G.G. Battle, *The State of North Carolina v. Negro Will, a Slave of James S. Battle. A Cause Celebre of Ante-Bellum Times*, "Virginia Law Review" 1920, Vol. 6, No. 7, pp. 515–530.

course of the struggle he stabbed the white overseer with a knife. Richard Baxter, as a result of the wound, died at his home that night.

Will had been detained and was taken to the court on a charge of murder. He had been found guilty and sentenced to death by Judge Donnel. However, the judgment, was not exercised, because the appeal had been brought to the Supreme Court of North Carolina. Interestingly – it was brought by a renowned attorney Bartholomew F. Moore hired by the slave's owner. James S. Battle had to be actually very determined and convinced of the need to defend his Will, since he paid the defence counsellor an exceptionally generous fee amounting to one thousand dollars.

As it was mentioned before, the case was recognized by the court formation consisting of three judges and Judge William Gaston was the reporting judge. The opinion, drawn up by him, is long and detailed, so let us focus only on what is important from the perspective of confrontation of the *State v. Will* case with the *State v. Mann* case – the issue of limits of discipline in the context of the undisputed viewpoint of the absolute nature of the power of the master over the slave. The basic issue boils down to answering the question about the legal classification – has Will committed a murder or, given the circumstances of this particular case, should his deed have been regarded as manslaughter? However, one more issue, much further reaching and more general, that related not only to Will could arise – whether it is possible to recognize that a slave resisting his owner or overseer, in certain circumstances saving his life, acts under the conditions of the necessary self-defence justification. If so, the problem of legal subjectivity of a slave had looked slightly different than it could have resulted from the categorical statements made by Judge Ruffin in the case *State v. Mann*. And it is the position taken by Judge William Gaston in the case *State v. Will* taking into account, on the one hand, the legal regulations and circumstances of an individual case and, on the other hand, guidance of universal humanism. Let us quote only one but very distinctive piece of his opinion: “[u]nconditional submission is the general duty of the slave; unlimited power, is in general, the *legal* right of the master. Unquestionably there are exceptions to this rule. It is certain that the master has not the right to slay his slave, and I hold it to be equally certain that the slave

has a right to defend himself against the unlawful attempt of his master to deprive him of life”²⁵.

The case *State v. Hoover*, referred to above, could suggest that the viewpoints of the judges, Ruffin and Gaston, were not so much different as if it could have seemed, and that they were of different opinions only in details. However, such a conclusion could be probably unauthorized because the difference between them was essential and reached the very essence of philosophy of adjudicating in slavery cases. It can be clearly seen in other rulings not only in the area of criminal law but also civil law, for example, with regard to the institution of liberation or the issues of inheritance of slaves and by slaves²⁶. However, let us remain, perhaps, in the sphere of criminal law and indicate, for example, two cases. The case *State v. Jarrott* of 1840 related to the fight during the card game – the slave killed a white man. Judge Gaston held that he had been provoked and it was necessary to take it into consideration at the legal classification of his deed. The case *State v. Caesar* of 1849 related to a slightly different problem – a slave had been attacked by two drunken white men and another slave started helping him by killing one of the attackers. In the dissenting opinion from the majority opinion by Judge Pearson, Ruffin wrote that the obligation of absolute obedience of the slave had not allowed him for such response and therefore there was no reason to accept that his deed had not been a murder. Comparing these two cases allows to claim that attitudes of Gaston and Ruffin towards slavery had been indeed different and that translated into certain essential details taken subsequently into consideration in the courtroom.

The *State v. Mann* and *State v. Will* cases show certainly some legal loop resulting from the above mentioned ambivalence of a slave status. Let us summarize that, slightly ironically, by referring to the further story of Will’s life. George Gordon Battle, quoted above, a descendant of Will’s owner, wrote that his grandfather, after the trial, had moved to a different plantation in the state of Mississippi. The slave probably had a difficult character indeed, since he had killed another slave there, and was sentenced and hanged. Will’s

²⁵ *Ibidem*, p. 525.

²⁶ They are discussed extensively by T.C. Meyer, *Slavery Jurisprudence...*, pp. 323–331.

wife, whom George Gordon Battle remembered from his childhood as Aunt Rose, kept saying that Will had hard life. He had killed a white man in North Carolina and came out with this and later he was hanged for killing a nigger in Mississippi²⁷. Isn't it ironic? In the individual scale – certainly; in the social dimension – it is rather a bizarre logic of slavery, hardly understandable for us today, and its legal, political, moral, social, economic and cultural context.

The light of the reflective sociology by Pierre Bourdieu

The legendary American judge Oliver W. Holmes wrote in 1881 at the very beginning of his work *The Common Law* the following sentence: “[t]he life of the law has not been logic; it has been experience”²⁸. This opinion, until today, has been subject to very different interpretations. For the purposes of this paper, I assume that Holmes was wrong – the life of the law is both logic and experience. However, this does not change the fact that if the primary emphasis is put on experience (sociology of law) and not on the language (analytical philosophy of law), the professional lawyers may find reflective sociology by Pierre Bourdieu incredibly [interesting]²⁹, since Holmesian experience should be understood very broadly and in this sense it is a synonym of practice as the primary category of reflective sociology. What is more, all intellectual work by Pierre Bourdieu is, in fact, an attempt to develop the theory of practice in different areas of social life – economics, culture, politics, religion etc.³⁰ The aim of this study is, first of all, an attempt to reconstruct briefly the possibility to apply, in the area of jurisprudence, the fundamental categories of knowledge sociology by Pierre Bourdieu on the selected example. It should be admitted that for lawyers that author should be particularly interesting for several reasons.

²⁷ G.G. Battle, *The State of North Carolina v. Negro Will...*, p. 530.

²⁸ O.W. Holmes, *The Common Law*, Boston 1881, p. 1.

²⁹ P. Bourdieu, L.J.D. Wacquant, *Zaproszenie do socjologii refleksyjnej*, trans. A. Sawisz, Warszawa 2001.

³⁰ P. Bourdieu, *Zmysł praktyczny*, Kraków 2008; *idem*, *Rozum praktyczny. O teorii działania*, trans. J. Stryczyk, Kraków 2009.

Firstly, Bourdieu himself devoted in his research relatively much attention to law and lawyers, but his interest in those issues was not of the primary nature, but it was rather exemplificative. However, that should not be surprising. Although law and lawyers make, admittedly, a quite specific cultural phenomenon, yet perfectly suited for the subject of research on applying such basic categories of reflective sociology as, for example, “field”, “capital”, “habitus” or “symbolic violence”. In that respect, two studies by Bourdieu of that area are entitled very characteristically, namely – *The Force of Law: Towards a Sociology of the Juridical Field*³¹ and *Les juristes, gardiens de l'hypocrisie collective*³².

Secondly, if it is assumed that the phenomenon of law is covered by five key dimensions (lawmaking, its application, interpretation, validity and observance) then in each of them practice is essential (it should be read: experience in the understanding of Holmes). At the same time, that practice in the social sense, is so important and extensive that it includes not only the operation of the institutions (the legislature, courts, the prosecutor's office, the government and local administration authorities etc.) and conduct by professional lawyers (judges, prosecutors, attorneys at law, legal counsels, notaries, bailiffs etc.) but also affects with its results virtually all citizens. Therefore, nothing is more suitable for the comprehensive analysis of that practice, than the theory thereof developed by Bourdieu with the universal research methods.

Thirdly, in recent years, a rapid growth of interest by the jurists, both scholars and practitioners, in reflective sociology, and especially its juridical issues, has been observed. That applies perhaps not so much to the United States, where sociological jurisprudence, developed by Roscoe Pound, has always dominated³³ but rather to the continental European legal culture with its traditional attachment to formal legal positivism. In other words,

³¹ P. Bourdieu, *The Force of Law: Towards Sociology of the Juridical Field*, “The Hastings Law Journal” 1987, Vol. 38, pp. 805–853.

³² P. Bourdieu, *Les juristes, gardiens de l'hypocrisie collective* [in:] *Normes juridiques et régulation sociale*, eds. P. Bourdieu, L. Chazel, J. Commaille, Paris 1991; quoted after: H. Dębska, *Refleksyjna socjologia Pierre'a Bourdieu* [in:] *Leksykon socjologii prawa*, eds. A. Kociolek-Pęksa, M. Stępień, Warszawa 2013, pp. 311–319.

³³ A. Pieniążek, *Socjologiczna jurysprudencja* [in:] *Leksykon socjologii prawa...*, pp. 352–357.

using Pound's language, American functionalists (similarly to Bourdieu) were interested in "law in action", while the European positivists focused on "law in books". However, in recent years there have been more and more references to the article by Bourdieu of 1987, quoted above, on the force of law considering it quite a paradigmatic study³⁴. This also applies to Polish sociology of law – although in the latest comprehensive study on this subject only one item of that author's achievements has been cited³⁵ but in another, equally current one, even 'reflective sociology of law by Pierre Bourdieu' is referred to³⁶.

This specific renaissance of interests in the juridical concepts by Bourdieu results partly from the change of the methodological status of jurisprudence as science. Although recently a positivist paradigm of the methodological autonomy of legal sciences was common, modern jurisprudence opens more and more often, not only to other social and humanistic sciences, but even to natural sciences³⁷. The advantage of opening to reflective sociology is primarily the fact, that it provides us with realistic methods of assessing the operation of law and behaviours of the authorities of the State and professional lawyers, but without depriving them of their autonomous nature. On the contrary, Bourdieu claimed repeatedly that he was fascinated about that *sui generis* nature of law and lawyers manifested in the specific forms of symbolic violence and the intentional, although sometimes artificial, dissociation from the other aspects of social reality by creating appearances of universality, objectivity, impartiality, neutrality, justice, etc. At the same time, however, the application of the Bourdieu's concepts changes importantly the methodological overview of law – it is no longer a formal, hier-

³⁴ R. Lenoir, *Pierre Bourdieu and the Law: An Intellectual and Personal Encounter*, "Retfærd Årgang" 2006, Vol. 29, No. 3/114, p. 7–22; M.R. Madès, Y. Dezaley, *The Force of Law and Laweyers: Pierre Bourdieu and the Reflective Sociology of Law*, "Annual Review of Law and Social Sciences" 2012, Vol. 8, pp. 443–452; M.G. Villegas, *On Pierre Bourdieu's Legal Thought*, "Droit et Société" 2004, No. 56–57, pp. 57–71.

³⁵ *Socjologia prawa. Główne problemy i postacie*, eds. A. Kojder, Z. Cywiński, Warszawa 2014.

³⁶ H. Dębska, *Refleksyjna socjologia...*, pp. 311–319.

³⁷ J. Stelmach, B. Brożek, *Metody prawnicze*, Kraków 2004.

archical and ordered “system” with the pyramid structure, but it becomes a large “field”, where a complex game is played by the participants to the legal relations (State authorities, professional lawyers and legal entities). The legal norms are the most important, yet not the only part of this “field”, even if it sometimes seems to lawyers that their game in “the field” is limited only to making, applying and interpreting those norms.

An attempt to present the applicability of the basic categories of reflective sociology for all dimensions of the law phenomenon would certainly exceed considerably the scope of this study. Therefore, let us focus on the selected, but perhaps the most spectacular example from the point of view of sociology of knowledge – namely, the application of law by the courts. It is quite important, since in the contemporary theory of law, in this context, the notion of “ideology of a judicial decision” is used³⁸. Therefore, another category (in addition to “field”, “capital”, “habitus” and “symbolic violence”) characteristic of reflective sociology – namely, “ideology” is found. Although “ideology” appears relatively rarely in the texts by Bourdieu³⁹ *explicitly*, on the other hand, it is embedded in his concepts *implicitly*. At the same time, this is not negative ideology in the meaning of “false consciousness” by Karl Mannheim⁴⁰ related to the problem of dominance. On the contrary, for Bourdieu, ideology occurs intentionally within each “field” – in that sense ideology is everywhere and everything is ideology. However, the example of the judicial application of law is relevant from the point of view of the practical dimension of reflective sociology, in view of the fact that if people (both professional lawyers and laymen) talk about practice of law, they usually mean the judiciary. Average people associate law simply with the courts and “symbolic violence” hidden behind their facade.

³⁸ Thus in particular: J. Wróblewski, *Wartości a decyzja sądowa*, Wrocław–Warszawa–Kraków 1973, pp. 18–26; *idem*, *Sądowe stosowanie prawa*, 2nd ed., Warszawa 1988, pp. 334–396.

³⁹ The equivalent of the ideology would be *doxa*, in particular, this part thereof, that is or may be verbalized – I owe the need for making this remark and revising a few other issues to Piotr Pawliszak, PhD of the Faculty of Social Sciences of the University of Gdańsk, whom, on this occasion, I would like to thank very much.

⁴⁰ K. Mannheim, *Ideologia i utopia*, trans. J. Miziński, Warszawa 2008.

In addition, the explanation of the meaning of the basic categories of the Bourdieu's conception is required. A "field" is each section of the social structure, which is characterized by the fact that brings together individuals and groups focused on similar efforts and competing for position within it, and indirectly, in the whole society, according to the criteria applicable in that field, around the central assumptions and goals therein that are considered particularly important. Those objectives are sometimes called by Bourdieu '*stakes in the game*' played in the field and the acknowledgement of the priority nature of the stakes is termed "*illusio*" of that field⁴¹. In this sense, in social reality there is, in fact, an unlimited number of "fields" – "the field" is economy, culture, politics, religion, and also law, whereas "capital" means a collection of actual and potential resources related to the possession of a stable network of more or less institutionalised relations supported by mutual knowledge and recognition – or in other words, the membership in a group that provides each of its members with support in the form of capital held by the collective, reliability, which gives them access to credit in the broadest sense of the word⁴². In this meaning, the (social and cultural) "capital" means both the network of links as well as, the socially valuable source of individual and group forces and resources necessary for meeting certain goals. Finally, "habitus" is associated with the fact that in the field the individuals and groups of related habituses (with the socio-cultural dispositions embedded in their way of thinking) usually compete, though of course there are always individuals that have a high level of '*subversive potential*' (the desire to change their social position). Those individuals enter a field, from which they do not come from (so they have different habitus) and enter competition in progress in that field. "Habitus" is therefore a collection of mental schemes and dispositions for activities internalized by an individual and used within the "field"⁴³. Thus, it may be, as suggested by Bourdieu, stable and structured but it can also be more flexible, as it will be presented below. Those three categories, namely, "field", "capital" and "habitus" form the structure of the Bourdieu's concept which rotates around

⁴¹ Quoted after: wikipedia.org; see also: H. Dębska, *Refleksyjna socjologia...*, p. 312.

⁴² Quoted after: wikipedia.org; see also: H. Dębska, *Refleksyjna socjologia...*, p. 312.

⁴³ Quoted after: wikipedia.org; see also: H. Dębska, *Refleksyjna socjologia...*, p. 312.

an axis defined by the notion of “symbolic violence”. It means a soft form of violence that does not give a feeling that it is violence. It covers obtaining, by various methods, such influence of the dominant or privileged classes on the whole society and subordinated groups, so that the subordinated perceive reality, including the dominance relation they are subject to, in terms of the perception and assessment categories which express the dominant classes’ interest. In this way, the subordinated perceive their situation as natural or even beneficial or desirable for them, because they see social reality in categories developed by the dominant classes in order to legitimize their dominant position”⁴⁴.

Let us return to the issue of the judicial application of law. The aforementioned Jerzy Wróblewski has distinguished in this regard three basic models associated with ideology of a judicial decision: an ideology of a bound judicial decision, an ideology of a free judicial decision and an ideology of a law-abiding and rational judicial decision. The term “ideology of a judicial decision” is understood by the author as the views on how a judge should make decisions, including the possible grounds for the proposals developed and it is added that the views on how a judge should decide, what is the purpose of law, its application or a particular decision can be arranged, in a model form, in certain groups⁴⁵. In respect of each of those ideologies of a judicial decision “symbolic violence” operates similarly, while some differences may occur in respect of “field”, “capital” and “habitus”. However, this just confirms how universally important for jurisprudence the application of reflective sociology research instruments can be. No matter what “ideology of a judicial decision” is dealt with, the “symbolism of violence” is the same everywhere – a spacious and austere courthouse, the design of a courtroom with the places strictly assigned to the participants to the proceeding, the judge dressed in the gown with an opulent chain around his neck, the files on the judicial bench as well as a gavel for bringing order, the formal official language and professional jargon introducing a specific atmosphere, etc.

⁴⁴ Quoted after: wikipedia.org; see also: P. Bourdieu, *Przemoc symboliczna* [in:] *Socjologia. Lektury*, eds. P. Sztompka, M. Kucia, Kraków 2005, pp. 503–508.

⁴⁵ J. Wróblewski, *Wartości i decyzja sądowa...*, p. 19.

The characteristics of the particular “ideologies of a judicial decision” presented, is certainly, a far-reaching simplification, but this is due to the main subject and nature of this study.

The “ideology of a bound judicial decision” is characteristic of the European continental system and it is related to the canons of traditional legal positivism. In this model, a judge does not have too much freedom and broad discretionary powers because it is bound by a duty of rigorous application of the legal regulations. The “field” is limited to the provisions of applicable law and the principles laid down in prior case-law. In fact, the role of the judge boils down to a sort of mechanical action based on simple syllogistic reasoning and its fulfilment means the conduct according to the following sequence: to establish facts → to establish an applicable norm → to assess the facts of the case from the point of view of that norm → to issue a decision. Even if *de facto* much larger “capital” is available to a judge resulting from his/her legal knowledge and practical experience, nevertheless *de nomine* in practice, only minimum capital in the form of knowledge of applicable law and prior case-law will be used by him/her. The same refers to “habitués” – even if a judge sees the prospect of other behaviours, he/she will reject that and return to the role of the mechanical subsumption of the facts of the case and a legal norm.

“The ideology of a free judicial decision” can be, in turn, associated with the Anglo-Saxon common law legal culture. While in the “ideology of a bound judicial decision” there is a supreme value in the form of legal certainty and uniformity of case-law, here there is no such unambiguous axiology – since the decision taken is to some degree an expression of subjective beliefs of a judge as to the nature and content of the idea of justice, both substantive and procedural. Certainly, this poses a threat of arbitrariness, but at the same time, it can be overcome by the level of moral and professional qualifications of a judge. Therefore, it is no wonder that in the Anglo-Saxon system, the post of the judge is the culmination, and not the beginning of the legal career. The “field” is much broader here, than in the case of a bound decision, because the judge takes into account not only applicable law and established case-law but also other factors and thus, operates in the area designated by both, the legal norms, as well as other social norms. He also uses

much broader “capital” in Bourdieu’s understanding, because the systemic position provides for such opportunities. The judge indeed is no longer, using the Montesquieu’s language, “the mouth of the law”, but becomes a partner of the legislature, since he/she develops positive law by making judicial law. The spectrum of “habitus” is also wider – since a judge adjusts his behaviour to the requirements of a particular case and tries to avoid actions based only on a simple subsumption of a norm to the facts of the case. You can see it often in American court drama movies – a judge suddenly interrupts the public hearing and asks the representatives of the parties to his office to discuss a particular issue. That “habitus” is completely excluded in the continental model.

Finally, the “ideology of a law-abiding and rational decision” – is a sort of trying to find a third way, where the dangers related to both an excessive formalism, the “ideology of a bound decision”, and the excessive arbitrariness, the “ideology of a free decision”, will be avoided. Although also here a “field” is limited to applicable law and established case-law, the possibilities of the extension thereof arise by the way of the interpretative processes. Therefore, the judge in this model is much more eager to apply the functional and teleological interpretation and is not limited exclusively to a linguistic-logical interpretation. [The judge] also pays attention to axiology underlying the Constitution – in case of doubts, asks the constitutional court for reviewing the constitutionality of a legal act, on the basis of which he/she is to adjudicate. The “ideology of a law-abiding and rational judicial decision” means, in fact, a departure from the syllogistic model of the law application towards the argumentative model. The judge, taking up the discourse with the parties to the proceedings, reduces slightly the dimension of “symbolic violence” but for this purpose, he/she must have an appropriate “capital” of knowledge, experience and rhetorical competence. Therefore, the judge must also produce “habitus” that will enable the argumentative discourse on the line the court – the parties to the proceedings. The result of his/her activity is achieving, not only a lawful, but also a rational, decision, that is, the one that successfully justifies its own effects.

Bourdieu’s sociology of knowledge is in a way convenient and inconvenient both for the State as well as professional lawyers, since it reveals an

actual image of law and mechanisms of law making, its application, interpretation, observance and validity. Thus, at least to a certain extent, it may stop the process of developing unnecessary mythology used by the State and lawyers towards common people. Thus, let us try to apply the methodology of Bourdieu at an even higher level of detail in relation to the individual cases. Although it is not so difficult to find selectively the examples of particular judicial rulings, that could be examined in terms of “field”, “capital”, “habitus” and “symbolic violence”, it is not known what general-theoretical advantages such analysis could have. They certainly would be bigger if we applied for this purpose a number of rulings reflecting a certain coherent phenomenon not only of the legal but also economic, moral, political or social nature. It seems that case-law of the U.S. courts in slavery cases, though treated not that much historically, but rather paradigmatically, as an example of conflict of the judicial conscience involved in the rivalry in the “field” of different interests, is perfectly suited for that role. “Symbolic violence” here was taken to its limits because an actual or alleged slave, whose destiny was decided by the court, did not participate in the proceeding at all. His or her vague, ambiguous nature of a person/an object⁴⁶ caused that he/she actually had no right to speak. Thus, his/her final status and future were decided in the final instance, on the one hand, by “capital” and on the other, the judge’s “habitués” applied in the “field”.

At the same time, it is hard to say what “ideology of judicial application” of law is applied here. Apparently, it may seem that it is the “ideology of a free judicial decision”, since we are in the area of the *common law* culture. In fact, case-law of the U.S. courts in slavery cases provides, paradoxically, actual and apparent, as well as overt and covert examples for each of the “ideologies of the judicial application of law” referred to above. Sometimes the judges used to escape into formalism (a bound decision), other times they used to establish lawmaking precedents (a free decision) and, finally, in other cases, they were supported in their assessments of applicable law by the interpretation of the Constitution and tried to predict not only the

⁴⁶ P. Finkelman, *Slavery in the United States. Persons or Property?* [in:] *The Legal Understanding of Slavery: From the Historical to the Contemporary*, ed. J. Allain, Oxford 2012, pp. 105–134.

individual, but also collective, effects of their decisions (a law abiding and rational decision). The “field” was extremely broad, since the state-level regulations in the form of so called ‘slave codes’ sometimes were of the legal nature but more often they were only the collections of certain established and universally accepted practices, because slavery, in fact, was considered a “peculiar institution”⁴⁷. These practices reflected the game of vastly different economic, ideological, political, religious or social factors, and law, paradoxically, was pushed into the background.

Certainly, the dilemmas of ‘judicial conscience’ related mainly to the judges representing the anti-slavery views. However, the possibility that they could occur, for a variety of reasons, also in the case of judges representing the pro-slavery views cannot be ruled out, either. It seems that such a situation is faced when discussing the case referred to in this paper – the diversity of case-law due to the different “capitals” and “habitus” in the seemingly homogeneous group of pro-slavery judges from the South (*vide* Thomas Ruffin and William Gaston). As we could see, the former was much more restrictive in his case-law and recognised the complete and unrestricted power of the owner over the slaves, inclusive of the possibility of deprivation of life, in certain circumstances (*State v. Mann*); the later one was much more liberal and accepted at least partial moral, legal and social subjectivity of the slaves, including the right to self-defence against an excessively brutal owner (*State v. Will*). However, we are faced with a sort of paradox. Judge Ruffin, contrary to appearances, was not guided by a formal interpretation of the legal regulations, but rather referred to the broader political, economic, social and cultural context of the slavery institution in the conditions of North Carolina in the 1820s. and 1830s. On the other hand,

⁴⁷ Such term of slavery had been introduced to the American historiography by Kenneth M. Stampp (see *idem*, *Peculiar Institution...*). Subsequently, it was questioned by Orlando Paterson, the sociologist (*Slavery and Social Death*, Cambridge (Mass.) 1982) according to whom slavery was nothing special in the United States, since it was common in various historical ages and in various geographical locations. Paul Finkelman, the historian of law and constitutional jurist, tried to reconcile those both attitudes on the ground of jurisprudence (*The Centrality of Slavery In American Legal Development* [in:] *Slavery and the Law*, ed. P. Finkelman, Lanham–Boulder–New York 2002, pp. 3–26).

judge Gaston, somewhat conversely – also contrary to appearances, focused more on applicable law, although he supported his arguments also with humanism referring to a broader context. But what has caused such different attitudes of the two judges operating at the same time within the same court (and therefore, using the Bourdieu's language, operating within the same "field") and, in principle, taking the same position on the admissibility of slavery (both owned quite a large group of approximately 100–200 slaves)? The contemporary U.S. authors analysing that issue provide several factors that are elements of the broader "capital" and affect different "habitus" – the social background, education, religion, moral system, political career, judicial philosophy etc. The application of the Bourdieu's methodology to assess the behaviour of the judges, Ruffin and Gaston, of course, is not panacea for all methodological and axiological problems of jurisprudence, but it allows, perhaps at least partly, for fuller understanding of the origins and essence of certain phenomena.

Sebastian Sykuna*

JUDICIAL AUTHORITY AS *ULTIMA RATIO*

For philosophers and legal theorists the judiciary issues have always been extremely important and interesting. In jurisprudence of civil law jurisdictions, including Poland, the issues such as: discretion of the judicial power, the judicial ethics issues, independence of the judicial authority or the status of judge itself belong to the leading and most often discussed topics in the literature of the subject¹. Certainly, even higher level of attention is attached to the position of judge in the common law culture. Just to remind, one of the greatest philosophers of the 20th century, Ronald Dworkin, called the courts explicitly, the capitals of law's empire, and the judges its princes ("the courts are the capitals of law's empire, and the judges are its princes")².

It is not necessary to remind, that due to the system solutions, especially in the common law culture, where judges have obtained legislative powers, the burden of responsibility imposed on them is definitely higher than that which relates, for example, to defense lawyers or attorneys representing [the parties] in the judicial proceedings. Therefore, the judges

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¹ See e.g. B. Wojciechowski, *Dyskrecjonalność sędziowska. Studium teoretycznoprawne*, Wydawnictwo Adam Marszałek 2004; M. Safjan, *Etyka zawodu sędziowskiego* [in:] *Etyka prawnika, etyka nauczyciela zawodu prawniczego*, ed. E. Łojko, Warszawa 2006, pp. 40–56; P. Skuczyński, M. Zirk-Sadowski, *Etyka sędziowska* [in:] *Leksykon etyki prawniczej. 100 podstawowych pojęć*, eds. P. Skuczyński, S. Sykuna, Warszawa 2013, pp. 126–140; A. Machnikowska, *Zasada niezawisłości sędziów a wykładnia prawa* [in:] *Wykładnia prawa. Tradycja i perspektywy*, eds. M. Hermann, S. Sykuna, Warszawa 2016, pp. 237–274.

² R. Dworkin, *Law's empire*, Oxford 1998, p. 407.

should be equipped with certain personality qualities which predetermine them to the specific competences. Ronald Dworkin, when considering issues relating to the application of law, has even developed a kind of an ideal judge. In his publications he called him Hercules indicating that he is a jurist “of superhuman intellectual power and patience”³. For the purpose of this paper it is not necessary to consider the whole complexity of the description of the Dworkinian Hercules⁴, since he is only to serve as a sort of example of an ideal judge developed in jurisprudence. Although Dworkin himself admitted that although judges are princes of law “(...) but not its seers and prophets”⁵, nevertheless – because of the virtues represented by them – particularly in the great debates on changes in law or when formulating various controversial proposals, that professional group is especially referred to.

It was also the case in relation to the proposals raised during the American heated debate on applying torture, which started, *inter alia*, in the legal community after the events of 11 September 2001. In “*Los Angeles Times*” Alan M. Dershowitz, Professor of Law at Harvard University, published an article, under a quite suggestive title, namely, *Is There Torturous Road to Justice?*⁶ As it turned out, this had been only a provocative introduction to the storm, which was caused by the theses included in the article, subsequently developed by the author in his later publications. Among them, from the point of view of this study, the proposal of a so called ‘torture warrant’ to be issued by the court was the most important aspect.

Alan Dershowitz was aware that after 11 September 2001 there was a sort of social expectation that the State authorities acquired more information on any possible future terrorist attacks. The author in the very first paragraph of his text asked directly: “When, if ever, is it justified to resort to unconventional techniques such as truth serum, moderate phys-

³ R. Dworkin, *Biorąc prawa poważnie*, trans. T. Kowalski, Warszawa 1998, p. 198.

⁴ S. Sykuna, J. Zajadło, “*Sprawy konstytucyjne*” w integralnej filozofii prawa Ronalda Dworkina, “Gdańskie Studia Prawnicze” 2004, Vol. 12, pp. 279–294.

⁵ R. Dworkin, *Law’s empire...*, p. 407.

⁶ A.M. Dershowitz, *Is There Road to Justice?*, “Los Angeles Times”, 8 November 2001, online: <http://articles.latimes.com/2001/nov/08/local/me-1494> (accessed: 12.09.2015).

ical pressure and outright torture?⁷ Interestingly, referring to case-law of the U.S. Supreme Court on the provisions of the U.S. Constitution, in particular, its Fifth Amendment – in Dershowitz’s opinion – both the use of truth serum as well as torture is not expressly prohibited on that basis⁸. However, it is different only in relation to evidence collected in this way used in the criminal proceedings⁹. When analyzing the possibility of administering truth serum to an interrogated suspect, it would be useful to reflect on the issue of the right to preserve physical integrity of a suspect. However, how does this relate to the situation, when blood is taken from a drunk driver? Though in this case, nothing is injected into the body of a suspect but also in this case punctures are made. Thus, if particular substance was secure enough not to pose any health risk to an interrogated suspect, it could be regarded acceptable. What is more, according to Dershowitz, serum forces a suspect to do, what in accordance with the law he should do, namely, to give truthful answers to the questions asked. However, the problem arises when truth serum does not work. Therefore, Dershowitz suggested granting the court the power to issue a so-called ‘torture warrant’. It would take the form of ‘specified forms of non-lethal physical pressure’ forcing the interrogated suspect to speak¹⁰. Dershowitz was certainly aware that torturing people is shocking, especially for civilized nations. In addition, he knew that there had always been a risk of exceeding authorization by the relevant services in the case of authorizing them to apply torture. However, in a situation of the United States after 11 September 2001 it was necessary to start a discussion on allowing for emergency interrogation measures but only in the situations referred to as ‘ticking bomb cases’. However, it is important that Dershowitz considered the court the only competent authority which could settle so delicate, yet dramatic, cases. It is hard to discover the reasons followed by

⁷ *Ibidem*.

⁸ More on the relation of the Fifth Amendment to torture, see: J.A. Cohan, *Torture and the Necessity Doctrine*, “Valparaiso University Law Review” 2007, Vol. 41, pp. 1603–1607.

⁹ A.M. Dershowitz, *Is There Torturous...*

¹⁰ *Ibidem*.

the author precisely. However, it seems they are exactly the qualities such as independence and the thorough substantial preparation, as well as the personality characteristics of judges that predetermine them to play such a difficult role.

The above mentioned proposals were repeated by Dershowitz in his subsequent publications. Thus, for example, in January 2002 in “*San Francisco Chronicle*”, he raised again the need to apply torture under a court warrant issued only in the ticking bomb cases¹¹. In the same year, he published two books: *Shouting Fire: Civil Liberties in a Turbulent Age* and *Why Terrorism Works. Understanding the Threat, Responding to Challenge*¹². The latter, in particular its fourth chapter, have had an echo in literature¹³. Even the title of the chapter mentioned was extremely suggestive, because the author asked in it directly whether a terrorist in a ticking bomb case may be tortured¹⁴. Certainly, also in that publication Dershowitz, repeated his previous proposals. However, enhanced arguments developed by the author have caused that most of the authors participating in the American discussion, referred to that book. It is not surprising, if it is taken into account that Dershowitz in support of a solution to the problem of terrorism, offered by him, referred even to the Jeremy Bentham’s utilitarian views. In addition, he made reference to work by Michael Walzer, Jean Paul Sartre or even to literary work by Fyodor Dostoyevsky. At the same time, which was subsequently followed

¹¹ A.M. Dershowitz, *Want to torture? Get a warrant*, “San Francisco Chronicle”, 22 January 2002, p. A19-A20.

¹² A.M. Dershowitz, *Shouting Fire*, New York 2002; *idem*, *Why Terrorism Works. Understanding the Threat, Responding to Challenge*, New Haven 2002.

¹³ M. Wagner, *The justification of torture. Some Remarks on Alan. M. Dershowitz’s Why Terrorism Works*, “German Law Journal” 2003, Vol. 4, No. 5, pp. 515–526.

¹⁴ The English title of the chapter has the following wording: *Should the Ticking Bomb Terrorist Be Tortured? A Case Study in How a Democracy Should Make Tragic Choices*. See: A.M. Dershowitz, *Why Terrorism Works...*, pp. 131–163. Stephen Levinson even calls the fourth chapter of the book by Dershowitz in question the most sensational one. See: S. Levinson, “Precommitment” and “Postcommitment”: *The Ban On Torture In The Wake of September 11*, “Texas Law Review” 2003, Vol. 81, p. 2024.

also by other authors¹⁵, Dershowitz had been referring to the experiences of other countries, in particular Israel¹⁶.

Certainly, the contemporary American debate, even the proposal of the court warrant, should not be associated with the name Dershowitz only. However, adopting some methodological assumptions indicating that attacks of 11 September 2001 were the breakthrough in this regard, it may be considered that they were the publications by Dershowitz, that raised again the issue of torture and the court warrant relating to their application. However, for the record, it is worth to mention that the model of warrant in question was referred to by Leon S. Sheleff as early as at the end of the 1980s¹⁷. Also according to that author, it was the court that was supposed to be the most relevant and independent authority which could, in extreme situations, issue its consent to use torture. What is more, Dershowitz himself, made reference to history of Anglo-Saxon law, where in the 16th and 17th centuries there was a sort of torture warrant. Dershowitz, relying on work by John Langbein, provided that according to research by that historian in the period from 1540 to 1640 torture under warrant was used to acquire some knowledge rather than evidence. In addition, mostly, the aim of torture used to be detecting any possible conspiracies and not punishing itself¹⁸.

¹⁵ See e.g. A.J. Bellamy, *No pain, no gain? Torture and ethics in the war on terror*, "International Affairs" 2006, Vol. 82, No. 1, pp. 133-137; *idem*, *Torture, terrorism, and the moral prohibition on killing non-combatants* [in:] *Terrorism and Torture. An Interdisciplinary Perspective*, eds. W.G.K. Stritzke, S. Lewandowsky, D. Denemark, J. Clare, F. Morgan, Cambridge 2009, pp. 21-26; J.T. Parry, *Understanding Torture. Law, Violence, and Political Identity*, The University of Michigan Press 2010, pp. 120-126; T. Lyne, *Lesson on Lesser Evils: Israel and the Prohibition against Torture*, "Irish Student Law Review" 2006, Vol. 14, pp. 207-244.

¹⁶ A.M. Dershowitz, *Why Terrorism Works...*, p. 150.

¹⁷ L.S. Sheleff, *Ultimate Penalties: Capital Punishment, Life Imprisonment, Physical Torture*, Columbus 1989, quoted after: Y. Ginbar, *Why Not Torture Terrorists? Moral, practical, and legal aspects of the "ticking bomb" justification for torture*, Oxford 2008, p. 183.

¹⁸ Cf. J. Langbein, *Torture and the Law of Proof*, Chicago 1977, quoted after: A.M. Dershowitz, *Why Terrorism Works...*, pp. 156-158. See also: D. Hope, *Torture*, "International and Comparative Law Quarterly" 2004, Vol. 53, pp. 809-812.

However, irrespective of the foregoing considerations, it is understood that today it is Alan M. Dershowitz that should be considered the one who has introduced an issue of the judicial torture warrant to the public debate. What is important, though, it cannot be forgotten that the author associates it only with a situation referred to in the literature as a 'ticking bomb scenario'. Therefore, the key issue was to determine the conditions of that extreme situation, which in the literature was also called the '*Ticking Bomb Example*'¹⁹ or '*the ticking time bomb*'²⁰. The substance of the scenario, in principle, is based on several elements. Firstly, a threat of a disaster (most often a bomb explosion) in which innocent people could be killed is assumed. Secondly, it is indicated that the police or other services, do not know where the explosives had been placed but they caught the suspect having that information. Thirdly and finally, it is assumed that there is no other possibility to rescue any prospective victims (for example, by their evacuation) as only by obtaining information from an interrogated suspect immediately and controlled bomb disarming. With such basic assumptions, most often at the end of the description, the question is raised whether in such a situation it is acceptable to torture a suspect to obtain that information.

We have already known that in the contemporary debate on torture Dershowitz suggested one more condition necessary to be met, namely a warrant, under consideration in this study, which upon the request of the relevant services in the case of the ticking bomb scenario, could be issued by a court *a priori* before using torture²¹. Dershowitz himself, as well as other authors commenting on his view, noticed in this respect some kind of similarity with a search warrant²². Moreover, the ruling by the Supreme

¹⁹ K.E. Himma, *Assessing the prohibition against torture* [in:] *Intervention, Terrorism, and Torture. Contemporary Challenges to Just War Theory*, ed. S.P. Lee, Dordrecht 2007, p. 237.

²⁰ D. Luban, *Liberalism, Torture, and the Ticking Bomb*, "Virginia Law Review" 2005, Vol. 91, p. 1440.

²¹ *Ibidem*; A.M. Dershowitz, *Tortured Reasoning* [in:] *Torture. A Collection*, ed. S. Levinson, Oxford 2004, *passim*.

²² A.M. Dershowitz, *Why Terrorism Works...*, pp. 159–161; Y. Ginbar, *Why Not Torture Terrorists?...*, pp. 185–195.

Court of the United States of America on the necessity of subjecting the police search decisions to the judicial supervision was also an argument for Dershowitz in support of his proposal of a torture warrant. He even quoted a section of the grounds to the case of 1932, in which the Supreme Court held that thoughtful and prudent decisions by the courts should have priority over the hasty actions by officers²³. In addition, Dershowitz has clearly pointed out that although torture is very different from search, the reasons justifying the establishment of a search warrant are relevant in the context of a question about whether it is more likely that there is less torture when the decision on application thereof belongs to law enforcement officers only, or when that decision must be approved by the court. As Abraham Maslow has claimed, if a guy has a hammer he tends to see every problem as a nail. If the guy with the hammer had to get permission of the court for using it, he would probably use it less often and with greater attention²⁴.

In many countries, including the United States, the police in order to search an apartment or other property effectively must previously obtain permission of the court – a so called court warrant²⁵. Although, even intuitively, it seems quite distant, in accordance with the proposal by Dershowitz a similar situation could occur under the ticking bomb scenarios. According to that author, extensive case law of the U.S. Supreme Court on search warrants could be helpful in matters relating to torture warrants. It would seem even more possible, if it was taken into account, that in relation to the search warrant its individual nature and a legitimate reason of issuing thereof were indicated. Therefore, nothing would preclude applying similar or even the same conditions of issuing torture warrants. The police or other authorities would have to demonstrate some specific grounds and then they could obtain a relevant warrant. Only after applying such

²³ A.M. Dershowitz, *Why Terrorism Works...*, p. 160; *idem*, *Czy powinno się torturować terrorystę, gdy bomba tyka?*, przeł. M. Szczubiałka [in:] *Etyka wojny. Antologia tekstów*, eds. T. Żuradzki, T. Kuniński, Warszawa 2009, pp. 401–402.

²⁴ A.M. Dershowitz, *Czy powinno się torturować...*, p. 402.

²⁵ With reference to the United States the need to obtain a search warrant results, among others, from the amendment to the Constitution adopted by the Congress in 1789.

a procedure they could legally apply the so called alternative interrogation methods, i.e. torture.

For the purposes of this paper, it is not necessary to raise all arguments against the legalization of the exception in the form of a ticking bomb scenario. However, it should be noted, that most of the authors participating in the American discussion commented critically on the warrant itself. For example, Elizabeth S. Silker claimed that the proposal in question lacked any practical advantages²⁶. In her opinion, first of all, it should be taken into account that in the ticking bomb scenario time is of essence and the relevant services or the police simply may not have enough time to prepare a formally correct application and submit it to the court. Then a quick review of the case by the court, and issuing a relevant warrant, would be difficult, if not impossible. Another problem relates to the peculiarities of the American legal system – it might be quite difficult to find a judge who, generally approving of the torture warrant requirement itself, would agree to consider the issuance thereof²⁷. Similar, critical objections, were raised by Elaine Scarry who claimed that in such dramatic circumstances, which were provided under the ticking bomb scenarios when, in fact, time was the greatest enemy, a judge, or any other officer, would not be able to rationally consider whether there were indeed grounds to issue a torture warrant²⁸.

However, for Dershowitz the court warrant seems to be crucial. Contrary to many opponents, he claimed that due to the institutionalization of non-lethal torture, the torture warrant would *de facto* reduce the amount of abuse and violence that had been directed so far by intelligence services against the interrogated subjects²⁹. On the other hand, the guarantees of the suspects' rights would increase. Their situation would be more clear, since

²⁶ E.S. Silker, *Terrorists, interrogation, and the torture: Where do we draw the line?*, "Journal of Legislation" 2004, No. 31, p. 206. On other problems arising from 'torture warrant' see also: R.S. Brown, *Torture, Terrorism, and The Ticking Bomb: A Principled Response*, "Journal of International Law & Policy" 2007, Vol. 4, No. 1, pp. 15–19.

²⁷ E.S. Silker, *Terrorists, interrogation...*, p. 206.

²⁸ E. Scarry, *Five errors in the reasoning of Alan Dershowitz* [in:] *Torture. A Collection...*, p. 286.

²⁹ On the contrary J. Kleinig, *Ticking Bombs and Torture Warrants*, "Deakin Law Review" 2006, Vol. 10, No. 2, pp. 614–627; U. Steinoff, *Torture – The Case for Dirty Hands*

any possible torture could be, in fact, used only after the refusal of cooperation on the part of an interrogated suspect, and completed upon disclosing by him the information expected³⁰. Thus, the suspect himself would decide on his situation. In addition, as noted by Fritz Allhoff, criticism of the torture warrant developed in the literature was not free from defects. In his opinion, some of the objections raised, related more to the issue of torture in general than to the warrant itself³¹, since according to Allhoff it is hard to agree with charging the judicial torture warrant with the potential increase in application thereof, or as it was claimed – in his opinion – for example by David Luban³², with the decrease in the value of liberal democracy in the State³³. The main problem in the analysis of the proposals offered by Dershowitz related to the fact that his main message has been ignored. In most cases, he was considered not only the main supporter of torture, but also of its legalization. In fact, his proposal related to an extreme situation only, namely the ticking bomb scenario. What is more, Dershowitz himself repeatedly stressed that, in principle, he was not in support of torture in general³⁴. Therefore, he defended himself against allegations indicating that he wanted to take back our civilization to the medieval ages somehow³⁵, since he had always emphasized that it was necessary to distinguish torture applied in the past as a sort of punishment from the mentioned alternative interrogation methods, the objective of which was solely to save innocent people. Therefore, for Dershowitz and other supporters of torture legalization the central issue in the discussion was to determine precisely an extreme situation exemplified by the ticking bomb scenario.

and against Alan Dershowitz, "Journal of Applied Philosophy" 2006, Vol. 23, No. 3, pp. 337–353.

³⁰ A.M. Dershowitz, *Why Terrorism Works...*, pp. 158–159.

³¹ F. Allhoff, *Torture Warrants, Self-Defense, and Necessity*, "Public Affairs Quarterly" 2011, Vol. 25, No. 3, p. 224.

³² D. Luban, *The Torture Lawyers of Washington* [in:] *Legal Ethics and Human Dignity*, ed. D. Luban, Cambridge 2007, pp. 162–205.

³³ F. Allhoff, *Torture Warrants...* Such an objection was made for example by J. Klein-ing or U. Steinoff.

³⁴ A.M. Dershowitz, *Tortured Reasoning...*, p. 266.

³⁵ A.M. Dershowitz, *Why Terrorism Works...*, p. 148.

Irrespective of the criticism of a warrant requirement itself, presented above only in brief, it is worth noting that even in such dramatic proposals, their authors refer to the authority of the court. Dershowitz, not assessing the essence of the warrant itself, claimed *explicite*, that the court's supervision in that respect would not only secure the rights of an interrogated suspect but also – paradoxically – might become an instrument limiting the application of torture. In *Why Terrorism Works. Understanding the Threat, Responding to Challenge*, he claimed explicitly: "I believe, though I certainly cannot prove, that a formal requirement of a court warrant as a prerequisite to nonlethal torture would decrease the amount of physical violence directed against suspects. At the most obvious level, a double check is always more protective than a single check. In every instance in which a warrant is requested, a field officer has already decided that torture is justified and, in the absence of a warrant requirement, would simply proceed with the torture. Requiring that decision to be approved by a judicial officer will result in fewer instances of torture even if the judge rarely turns down a request. Moreover, I believe that most judges would require compelling evidence before they would authorize so extraordinary a departure from our constitutional norms, and law enforcement officials would be reluctant to seek a warrant unless they had compelling evidence that the suspect had information needed to prevent an imminent terrorist attack. A record would be kept of every warrant granted, and although it is certainly possible that some individual agents might torture without a warrant, they would have no excuse, since a warrant procedure would be available. They could not claim «necessity» because the decision as to whether the torture is indeed necessary has been taken out of their hands and placed in the hands of a judge (...). I also believe that the rights of the suspect would be better protected with a warrant requirement. He would be granted immunity, told that he was now compelled to testify, threatened with imprisonment if he refused to do so, and given the option of providing the requested information. Only if he refused to do what he was legally compelled to do – provide necessary information, which could not incriminate him because of the immunity – would he be threatened with torture. Knowing that such a threat was authorized by the law, he might well provide the information. If he still

refused to, he would be subjected to judicially monitored physical measures designed to cause excruciating pain without leaving any lasting damage”³⁶.

Having certainly no doubts as to the essence of assigning *prima facie* to any court and judge the qualities of independence, it is nevertheless noteworthy that in the case of the American system even the above mentioned arguments by Dershowitz have been, at least partly, questioned. For example D. Luban indicated that in the United States “politicians pick [judges], and if the politicians accept, the judges will as well. Once we create a torture culture, only the naive would suppose that judges will provide a safeguard. Judges do not fight their culture – they reflect it”³⁷. Moreover, in the opinion of those criticizing Dershowitz, it is not possible to forget about mistakes made by judges when adjudicating. It is particularly apparent on the example of mistakenly administered capital punishment, that is still in force in some American states.

However, the criticism of the Dershowitz conception – from the point of view of this paper – is of the secondary nature to its very message, as it seems that the author concerned, not without a reason, has put in the hands of the court such a difficult decision, namely giving permission for applying torture against a terrorism suspect. Leaving out the entire dramaturgy of the example and proposal by Dershowitz, it is worth to pay attention to the fact that the judicial power remains specific *ultima ratio* for all choices under tragic conditions. Our confidence in this profession enables to believe that only a judge will be able, independently and fully objectively, to take even the most difficult decisions.

A reader who will reach for this book, *prima facie*, may have a feeling that an article on torture legitimization does not fit much the remaining papers included therein. However, due to the increase in the significance of a sort of national isolationism in international politics, observed nowadays, that conclusion may be quickly revised. Additionally, it should be remembered that at the beginning of the 21st century nobody could imagine that the issue of torture that had been considered solved a long time ago, for example due to an absolute prohibition of applying thereof (recognizing

³⁶ A.M. Dershowitz, *Czy powinno się torturować...*, pp. 400–401.

³⁷ D. Luban, *Liberalism, Torture...*, p. 1452.

freedom from torture as a *ius cogens* norm), would return as one of the crucial topics in the debate on the war on terrorism. Joining the discussion on the courts competence to decide on torture warrants in extraordinary situations seems even more important. All those circumstances allow for adopting at least two conclusions. Firstly, it is never possible to be sure that even the issues that seemed the most obvious and determined, will not return as proposals for the introduction, as binding, to the democratic legal systems. Secondly, it is not possible to rule out that, as in the case of torture, also in the future, the courts will face the challenge of deciding on unusually dramatic matters, in which a lack of consensus relates not only to issues of a political or ethical character but also of a legal nature.

Marcin Michał Wiszowaty*

A WOLF IN SHEEP'S CLOTHING. ON STRATEGIC LITIGATION AND *AMICUS CURIAE* AS THE FORMS OF LOBBYING ACTIVITY

1. In recent years the noticeable increase in the number of publications relating to the so-called strategic litigation issues and one of the main devices thereof i.e. an *amicus curiae* brief (from Latin 'the friend of the court') can be observed. Without a hint of criticism, it should be noted that the vast majority of these publications are of the popularizing and even promoting the *amicus curiae* institution nature. Such an approach is justified to a certain degree by a still pioneering nature of the institution concerned in Poland. Its numerous advantages and a potentially positive effect on a lot of values essential for democracy, including human rights and the rights of the citizens, justify both an interest of jurisprudence therein as well as its propagation by researches.

Neither the *amicus curiae* status nor the form of its brief (opinion) have been defined in Polish law, yet. According to the universally adopted view of jurisprudence, referred to also in case law of the courts and the Constitutional Tribunal, the institution in question is a form of expressing opinions in the court proceedings, in cases where in relation to the objectives of an individual organization's operation, there is such a need¹ and the regulations on judicial proceedings or practice resulting from that allow for presenting

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¹ K. Wilamowski, *Opinia prawna typu amicus curiae w sprawie zasadności umorzenia przez Prokuraturę Rejonową w X postępowania w sprawie o przekroczenie uprawnień i nieumyślne spowodowanie śmierci Z* [in:] Helsińska Fundacja Praw Człowieka, "Raporty,

such an opinion. It is usually a legal opinion but it can also present statistics relating to the operation of a given institution or research results².

An *amicus curiae* brief can take various detailed forms. For example, it may take the form of responding to charges, motions or replies to charges (lawsuit) of a party or the parties to the judicial proceedings. An opinion may reinforce the statements by the party or provide new arguments in the form of outcomes of analyses, expert appraisals, vetting or site visits, compilations and analyses of case law³.

The institution of an *amicus curiae* brief is one of the essential instruments applied within so called strategic litigation, that is “a specific type of legal proceedings [taken] in the public interest, (...) with the intention of getting as great publicity as possible, the *erga omnes* effect on deciding an important social issue”⁴. The typical methods and main purposes of strategic litigation include, in general, initiating the proceedings or joining the proceedings in progress (usually before the court) as a party, to shape the legal system by getting a precedential decision of the court, but also in order to assert influence on political decisions⁵. In the case of strategic litigation in the form of participation in the litigation as a party, all litigation actions available to a party to the proceedings are applied, in particular: a complaint about the excessive length, a complaint about unlawfulness, the application for excluding a judge, as well as submitting a request, to the president of the

ekspertyzy i opinie”, No. 34: *Zapobieganie torturom w instytucjach izolacyjnych Europy Centralnej i Wschodniej. Wybrane zagadnienia*, Warszawa 2006, p. 226.

² A. Bodnar, B. Grabowska, P. Osik, “Opinie przyjaciela sądu” (*amicus curiae*) w postępowaniu przed Trybunałem Konstytucyjnym w praktyce Helsińskiej Fundacji Praw Człowieka [in:] *Księga XXXV-lecia Trybunału Konstytucyjnego. Ewolucja funkcji i zadań Trybunału Konstytucyjnego – założenia a ich praktyczna realizacja*, Warszawa 2010, p. 145.

³ See e.g. B. Kawecka-Stańdo, K. Wilamowski, *Opinia typu amicus curiae w sprawie warunków przebywania osób pozbawionych wolności w Zakładzie Karnym w Tarnowie Mościcach w świetle standardu orzecznictwa Europejskiego Trybunału Praw Człowieka w zakresie art. 3 Konwencji o ochronie praw człowieka i podstawowych wolności* [in:] Helsińska Fundacja Praw Człowieka, “Raporty, ekspertyzy i opinie”, No. 34..., p. 138 ff.

⁴ J. Babel, *Litygacja strategiczna*, <http://www.babel.com.pl/index.php?wiad=9899> (accessed: 23.11.2016).

⁵ *Ibidem*.

court or the Minister of Justice, for carrying out examination of the course and efficiency of proceedings or – after the remedies exhaustion – a constitutional complaint⁶. The *erga omnes* effect of the ruling issued in the given case may result in changing legislation or at least changing the negatively assessed practice of its application⁷. The preparation and presentation of an *amicus curiae* brief is the form of intervention in the case of any threat to specific interests or values, like e.g. human rights⁸. Litigation aiming at repealing a legal act or amendment of its provisions shall consist in proving that a provision does not comply with the legal acts situated higher in the hierarchy (generally with the Constitution or international treaties binding the Republic of Poland). As it is emphasized in the literature of the subject, when clarifying the characterization of strategic litigation (*litygacja strategiczna*) (some researchers criticize its very name as the literal transplantation from the English language⁹), it can be undertaken by various social groups – “formed only for achieving a specific purpose, representing the residents’ community in a housing cooperative, in the area of the commune (*gmina*), the voivodship (*województwo*) or the region of the country. However, the greatest role can be played by non-governmental organizations (associations and foundations) which, when accomplishing their statutory objectives, acquire experience in conducting difficult cases and therefore have greater chances of forcing their way through the maze of complicated issues relating to law interpretation, and consequently fulfil the objective set”¹⁰.

Emphasizing, in the Polish literature, the socially useful, not to say, serving the general interest, purpose of strategic litigation is decisive for perceiving

⁶ K. Gonera, *Udział organizacji społecznych w postępowaniu sądowym jako gwarancja prawa do rzetelnego procesu* [in:] *Sprawny sąd. Zbiór dobrych praktyk*, part 2, ed. Ł. Bojarski, Warszawa 2008, pp. 168–169.

⁷ A. Gronkiewicz, *Opinia przyjaciela sądu (amicus curiae brief) jako forma ochrony praw człowieka w postępowaniach sądowych i administracyjnych* [in:] *Problemy z sądową ochroną praw człowieka*, Olsztyn 2012, p. 653.

⁸ See: K. Wilamowski, *Opinia prawna...*, p. 226.

⁹ A. Bodnar, *Litygacja strategiczna – pojęcie, zastosowanie, praktyka* [in:] *Sprawny sąd...*, p. 177.

¹⁰ J. Babel, *Litygacja...*

it unambiguously positively¹¹. Stressing such positive functions of strategic litigation, as: raising social awareness, educating judges, prosecutors, legal counsellors and attorneys at law, the introduction into the domestic area the comparative law arguments¹², mitigates its image and hides the real effect of that practice as aiming at the change of law or the adjudicating practice in the specific interest. The institution of *amicus curiae*, i.e. the friend of the court, is even called “the friend of the human rights” which is transposing the similar device known of the practice of the European Court of Human Rights operation¹³. Associating strategic litigation mainly with the operation of non-governmental organizations, active in the field of the human rights protection, causes that in Poland, it is not associated with the pressure groups, [exerting] influence on decision-makers or the game of interests. The opinions, presented in the legal writings, that the purpose of non-governmental organizations’ operation, also as *amicus curiae*, is to support and protect human rights, whose presence “limits the freedom of the legislator and protects minorities against the dictate of the majority”, whereas the organisations concerned “are (...) interested in the introduction to the public debate some specific universal values significant for the common good”¹⁴ or at least “taking initiatives in the public interest”¹⁵, with a great deal of rightness, can favour the development of an unilaterally positive image of the institution in question, as they do not take into consideration such prospective, yet probable, phenomena as a conflict against the above mentioned background, resulting from the worldview-based differences among various minority groups, pressure of the influential minorities on the majority or various conflicts between individual human rights and the values referred to them.

¹¹ Wiktor Osiatyński even called it “an essential element of constitutional democracy”. P. Brzuszcak, K. Ferenc, *Udział organizacji pozarządowych w postępowaniu przed Trybunałem Konstytucyjnym*, “Studenckie Zeszyty Naukowe” (Uniwersytet Marii Curie-Skłodowskiej w Lublinie), 2014, Vol. 24, p. 67.

¹² A. Bodnar, *Litygacja strategiczna...*, pp. 177–178

¹³ See: D. Pyć, P. Zajadło-Węglarz, *Organizacja pozarządowa jako amicus curiae przed Europejskim Trybunałem Praw Człowieka*, “Przegląd Naukowy Disputatio” 2014, No. 18, p. 92.

¹⁴ A. Gronkiewicz, *Opinia przyjaciela sądu...*, p. 652.

¹⁵ P. Brzuszcak, K. Ferenc, *Udział organizacji...*, p. 65.

A positive opinion on the *amicus curiae* institution has been even additionally reinforced by the Constitutional Tribunal emphasizing in the grounds to its judgment of 2006 (judgment of the Constitutional Tribunal of 16 January 2006, files No. SK 30/05), often referred to and quoted in the literature, the importance of the “dialogue, openness and social communication in the constitutional disputes resolution” and stating that presenting, by social organizations, their views on a case pending before the Tribunal, promotes “dissemination of constitutional values and shaping attitudes suitable for a civil society”. In addition, the Tribunal has appreciated a positive influence of an *amicus curiae* brief on its more comprehensive assessment of the issues, and also the increase in the social acceptance for its decisions, and finally, on reinforcing “social trust in the State and the judicial power”.

The clearly positive description of the strategic litigation mentioned above, on the one hand, overrides its other characteristics, manifestations and consequences which are not, or need not to be, positive and, on the other hand, often favours assigning to *amicus curiae* briefs too important role in the judicial decision-making process. The view, that the opinion of the friend of the court should be ‘relevant’ (contain a significant view) for the ongoing proceedings, as helpful in the comprehensive recognition of the case¹⁶, does not raise any objections, which results also from the contents of the provisions considered the legal basis for the presentation of such opinions (in particular Article 63 of the Code of Civil Procedure). However, the claim that *amicus curiae* is to assist the court in the case settlement¹⁷ is going too far. Certainly, the view of the friend of the court is never binding on the court. However, the mere fact that, according to the consistent opinion of the legal scholars, it should be taken into account when issuing judgments, and the court referring thereto should include this in the grounds of its ruling¹⁸, provides to the friends of the court – under the conditions of still low level of popularity of that practice (and therefore little competition between the “friends”) and assuming a high substantive quality of their

¹⁶ Thus: M. Bernatt, *Opinia przyjaciela sądu (amicus curiae) jako pomocnicza instytucja prawna w orzecznictwie sądów polskich* [in:] *Sprawny sąd...*, p. 184.

¹⁷ Thus: K. Goner, *Udział organizacji...*, p. 170.

¹⁸ See: M. Bernatt, *Opinia przyjaciela...*, p. 186 (and the literature referred to therein).

opinions – a strong position and an actual impact on the decisions of the courts. Even though the effectiveness of strategic litigation is much more higher in the *common law* jurisdictions, where each judgment of the court may be relevant to the change of law, that litigation is also important in the civil law jurisdictions¹⁹. That influence on the rulings issued by the Supreme Court and the Supreme Administrative Court, can subsequently translate into the changes in the direction of the statutory provisions' interpretation, in view of the fact that those judgments are indirectly binding on lower courts. The adjudicating activity of common courts may also affect judgments of other courts – whether by applying an expression developed by A. Bodnar “psychological support”²⁰ or as a substantive guideline, by virtue of authority, to resolve a similar, complex case, for which another court has found a solution.

The unambiguously lobbying effect of successful strategic litigation is the change of law resulting from repealing certain provisions by the Constitutional Tribunal and, even more,[as] a consequence of the enactment, in lieu thereof, of the new ones by the Sejm and the Senate or other authorities having relevant competences. Although those facts and the consequences thereof, are referred to in the most recent Polish studies, common identifying an institution of the friend of the court almost exclusively with the activities, positive for the general public, taken by the social organisations, prevents any associations thereof with the particularistic interests and lobbying. In the literature, it is also possible to find calming accounts, that in the opinions of the friend of the court neither any statements on the views expressed by the parties to the proceedings are formulated, nor do they contain any assessments of the facts of the case, since it is an exclusive competence of the court²¹. However, this is only an expression of beliefs, or the wishes of the author rather, and not the effect of analysing the content of *amicus curiae* briefs and their actual impact on the final decision of the court. The comments that strategic litigation may serve “to protect the

¹⁹ A. Bodnar, *Litygacja strategiczna...*, pp. 177–178.

²⁰ *Ibidem*, p. 178.

²¹ See e.g. M. Bernatt, *Opinia...*, p. 189.

property interests of specific groups”²², and therefore has a classically lobbying nature, appear in the Polish literature only occasionally and are of the marginal nature.

Whereas, in the foreign literature, especially relating to the U.S. system, where strategic litigation activities are the most developed and comprehensive, they are characterized in a totally different way. They have long been²³ commonly considered the main (due to the popularity and effectiveness thereof) impact instruments applied by the lobbyists addressing their actions to the judicial power²⁴. *Amicus curiae*, as an element of strategic litigation, for the Western researchers, is simply a device that can be used both in the public interest, and in the particularistic one, in the matters serving the public good or only a specific influence group. Depending on the purpose and nature of an entity reaching for that device the effects thereof may be different and therefore its assessment from the point of view of the public interest should be different. American researches emphasize in that respect, that the name, which seemingly implies neutrality, is in fact, an intentional conduct aiming at hiding the real intentions of many “friends” who articulate particularistic interests of their clients urging the courts to support particular policies or views²⁵.

There are a few reasons for the described difference in perceiving *amicus curiae* and strategic litigation in the Polish and Western literature. Apart from the aforementioned ones, relating to identifying that type of activity with the activity of social organisations acting *pro publico bono*, the still low level of knowledge on Polish lobbying and consequently – the low level of its regulation – should be mentioned in the first place.

²² See: A. Bodnar, *Litygacja strategiczna...*, p. 178.

²³ One of the first publications, whose authors explicitly defined *amicus curiae* briefs as lobbying instruments addressed to the court, is of the 50s. of the 20th century; see: F.V. Harper, E.D. Etherington, *Lobbyist Before the Court*, “Pennsylvania Law Review” 1953, Vol. 101, p. 1172 ff.

²⁴ See: P.M. Collins Jr., *Lobbyists before the U.S. Supreme Court. Investigating the Influence of Amicus Curiae Briefs*, “Political Research Quarterly” 2007, Vol. 60, No. 1, p. 55 and bibliographical references included therein.

²⁵ *Ibidem*, p. 55.

Only for a few years a fact that the activity of lobbyists is not limited to the legislative power only, but it is also addressed to the executive (both to the Council of Ministers and its members as well as to the President²⁶) or to the authorities of the local governments²⁷ has been noticeable in a broader scientific discussion in Poland and in the awareness of the political observers. Lobbying addressed to the judiciary is still a taboo, since it requires making an assumption that judges can be, and are, subject to any external influences and what is more, they submit themselves thereto, what under the conditions of a lack of openness and in the situation of the shortage of universal knowledge on that topic, may present them in an unfavourable light.

Research on the Polish specificity and entirety of the institution of the friend of the court is fragmentary and still at the initial stage and what is more, the literature on the subject concerned, is still relatively limited. It can be partially explained by the fact that the Polish *amicus curiae* history is very short in comparison with the origins of that institution dating back to ancient Rome, and in the modern era – medieval England²⁸. As it results from the developments that have been made by researchers so far, that institution was not known to the law of civil procedure before the Second World War. Its debut in Poland is dated back to the 90s. of the 20th century. It was related to the cases pending before foreign courts, that Poland had not been the party to, but whose results affected the legal situation of the Polish citizens or indirectly affected the image of the Polish State²⁹. The activity of the international judicial authorities safeguarding

²⁶ See: M.M. Wiszowaty, *Lobbing Prezydenta. Regulacja prawna działalności lobbingowej w odniesieniu do Prezydenta RP. Teoria i praktyka*, “Białostockie Studia Prawnicze” 2016, Vol. 20/B, pp. 183–201.

²⁷ Cf. M. Karciarz, *Lobbing a obowiązki organów samorządu terytorialnego*, “Serwis Administracyjno-Samorządowy” 2015, No. 11, pp. 27–29; M.M. Wiszowaty, *Działalność lobbingowa w procesie stanowienia prawa. Ustawa z dnia 7 lipca 2005 r. z komentarzem*, Warszawa 2010, p. 102.

²⁸ On *amicus curiae* history see: D. Pyć, P. Zajadło-Węglarz, *Organizacja pozarządowa...*, pp. 90–91 and the foreign literature referred to there.

²⁹ Przemysław Mijał indicates that the first, or at least the first so significant – *amicus curiae* brief was submitted by the Government of Jerzy Buzek in the case

compliance with the conventions protecting human rights had the greatest influence on transplanting this institution to the practice of the Polish judiciary. Poland, as a party to those conventions, has been sued many times in the international courts including, first and foremost, the European Court of Human Rights. Polish non-governmental organizations, aiming at disseminating knowledge on human rights and preventing violations thereof started to join the proceedings in progress more and more actively. Having learned that practice, widespread in the operation of the international judicial authorities, they started to transfer it to the domestic courts. The influence of international law and specific "over-activity" of non-governmental organizations dealing with the promotion and protection of human rights, which started submitting *amicus curiae* briefs to the domestic courts, despite a lack of relevant legal regulations, are the two main causative factors, which are regarded as having a decisive influence on the occurrence and development of the institution of the friend of the court, that can be observed at present in the civil law jurisdictions, in which it has not been known before³⁰.

Knowledge of this type of activity of the friends of the court, serving the human rights protection and initiated by the *pro publico bono* organisations, is the type most widely known in Poland, and the stage of research is the most advanced [in that respect]. On the ground of the judicial practice of the courts and tribunals even the first rulings, in which the judiciary authorities referred generally, indirectly or directly, to the *amicus curiae* institution (*vide supra*: the judgment of the Constitutional Tribunal in the SK 30/05 case) can be observed. At the same time, so far, almost none of the

on the claims for compensation of forced laborers employed in the Third Reich, pending before the Court in Newark near New York against the Degus group in 1999. Also the Polish media informed on the case specifying it as the first one in which Poland has applied the *amicus curiae* brief; P. Mijał, *Opinia amicus curiae jako forma wsparcia sądu konstytucyjnego przy rozstrzyganiu sprawy* [in:] *Księga jubileuszowa Andrzeja Bałabana* (typescript accepted for printing, planned publication: September 2017), p. 3.

³⁰ S. Kochevar, *Comment: Amicus curiae in Civil Law Jurisdictions*, "The Yale Law Journal" 2013, Vol. 122, pp. 1664–1667.

Polish researchers has paid attention to the lobbying nature of an *amicus curiae* brief and has devoted research thereto³¹.

In the Polish literature, the opinions that the *amicus curie* institution “embedded in the common law system” is “specific for American litigation”, and what is more, it can “only in exceptional cases play a constructive role in the proceedings”³² are popular, what can moderate the enthusiasm of its supporters wishing to submit that institution to the closer analysis. In relation to the statement quoted, an opinion expressed in the most recent American literature, seems quite interesting. It is not only mentioned there, that recently there has been a considerable increase in the number of cases applying the *amicus curiae* brief institution in the civil law jurisdictions, even though such a possibility, generally speaking, is not provided for by their applicable legislation at all, but also attention is paid to the fact that perhaps the thesis on genetic connections of *amicus curiae* with the common law system is not entirely true and should be revised. One of arguments supporting this thesis is the fact, that in spite of a long tradition of *amicus curiae* in the U.S. and the common law jurisdictions, in the unanimous opinion of the legal scholars, its origin dates back to ancient Rome i.e. it has the civil jurisdiction roots. A peculiar position of a judge and its powers, in the civil law system, stemming from an inquisition process, allows for considering the *amicus curiae* institution well embedded also in that type of a legal system. However, there are also views to the contrary, claiming that, since the judges have suitable measures aiming at establishing the substantial truth, also in the form of possibility to commission external opinions, any intervention by third parties taken out of their own initiative, as for example an *amicus curiae* brief, should be ruled out as a potentially dangerous interference with the course of the proceedings, determined by various interests, which should be pursued by

³¹ The lobbying characteristics of “the friend of the court” are mentioned by J. Graniżewski (*Procedury sądowe jako metody działania grup interesu* [in:] *Grupy interesu i lobbying. Polskie doświadczenia w unijnym kontekście*, Warszawa 2011, pp. 150–153), but only in the form of a longer note.

³² Thus: M. Swora, A. Trela, *Amicus curiae w postępowaniu monopolowym*, “Administracja. Teoria – Dydaktyka – Praktyka” 2006, No. 1, p. 83.

other procedural institutions – for example, by taking action or joining the proceedings in progress³³.

2. The main research purpose of this paper is to answer the question whether also in Poland the institution of the friend of the court, as a strategic litigation element, could, or even should, be perceived as a lobbying device addressed to the judiciary. If so – what the consequences of this fact are in the light of the lobbying legislation in force – both for lobbyists as well as the addressees of their litigation actions – i.e. the judicial power. Should *amicus curiae* briefs, as the lobbying device, be subject to a thorough control on the part of the State and to the general rules relating to the openness of the lobbying activity?

Due to the limited volume framework of an academic paper and still an initial stage of research (I see this article as a signal of this new research issue in Poland) – I will focus on an analysis of the friend of the court institution before the Constitutional Tribunal. Especially in the case of the Tribunal, through its power to repeal the provisions found unconstitutional, and therefore to make amendments to the law in force, the lobbying nature of the actions by “the friend of the court” can be captured and presented.

It is worthwhile to begin a reflection on the lobbying nature of the *amicus curiae* institution with presenting the practice of its operation in the United States. American studies bring very interesting observations – also for the assessment of the situation of that institution in Poland, currently and in the future. In the American literature the difficulty with determining the actual impact of the “friends” on the substantive decisions of the courts is emphasized. The following reasons are mentioned, among others, firstly – the fragmentary nature of analyses conducted, limited to the selected groups of interests or subject areas (e.g. relating to environmental law), secondly – relatively short period of time since the effectiveness of an *amicus curiae* operation has become the subject of research, and thirdly – imprecise or incomplete research apparatus and methodology. As the cases, in which there has been an influence by lobbying friends of the court, are commonly

³³ S. Kochevar, *Comment: Amici curiae*..., pp. 1653–1655, 1667–1668.

considered the ones, in which a party supported by them, has succeeded, i.e. it has won. In view of the fact, that the courts (including the Supreme Court) not always make reference to an *amicus curiae* brief in the grounds, it is hard to determine to what extent that brief has indeed influenced and changed the opinion of the court, and to what extent their views have been similar, independently of each other. Any influence, exerted on the decision of the court, may be considered a success of the friend of the court, not only that which has brought a total victory, but also taking into account the arguments of 'amicus' partly, also [in relation to] the losing party, which it provided support to³⁴.

American studies also provide interesting information on the tactics applied by the lobbyist-friends of the court. It is based primarily on presenting a particular issue relevant to their clients as a wider, universal problem. In the common law legal system it is very important, since the decision taken in a case involving a more general problem, can become a source of a legal precedent. Similar arguments, which refer to the universal nature of the problem, which is the subject matter of an *amicus curiae* brief, may prove to be useful in the civil law jurisdictions. Firstly – they can overshadow, in fact, the particularistic interest of amicus or mitigate its view, secondly – convince a court (especially the tribunal) of the relevance of its intervention, presenting, as its aim, the protection of certain constitutional values or human rights, and not the particularistic interest. A good example of applying this tactic is the case *Texas vs. Johnson* of 1989, referred to in the American literature, relating to the conformity with the Constitution of the provisions of the statute of Texas declaring desecration of the flag of the United States a crime against the U.S. Constitution. In the *amicus curiae* brief, submitted on behalf of an organization associating artists and in support of finding the incriminated provision unconstitutional, no reference to artistic creation freedom has been made, which could have been regarded as the implementation of the particularistic interests of a specific professional group, but the reference has been made to the freedom of speech [expression] covered by the First Amendment to the Constitution. American researchers also point

³⁴ P.M. Collins Jr., *Lobbyists before...*, p. 56.

out to another important objective of submitting the *amicus curiae* briefs. It is to make the constitutional court determine a specific interpretation of the legal norms of the Constitution or statutes. Even though, in a particular case, it has not led to a successful settlement, it may be useful in the future. Due to its formulation in the content of the ruling (grounds) it will be possible to refer to it³⁵. It is the second, important, but often ignored, goal and effect of the *amicus curiae* brief.

In American studies the transformation of the “friend of the court” into “the friend of the party”, i.e. a lobbyist, and at least an ombudsman of public interest or rights of certain minorities is attributable, first of all, to the increase in the number of various interest groups and their representations and, as a result, the development of competition among them. The original meaning of the term “the friend of the court”, which had meant a lawyer assisting a judge, changed as early as in the 30s. of the 20th century. The social and industrial organisations representing specific interest groups, ideas or values started to promote the briefs. Over time, *amicus curiae* briefs have become a weapon of social activists fighting for extending the sphere of freedoms and rights to the subsequent areas of life and social groups³⁶. This has given rise to consider, by the researches, an *amicus curiae* brief, a device typical for lobbying and at the same time to discover that lobbying can be addressed also to the judiciary authorities and just in the scope of their judicial activity.

A feature of *amicus curie* briefs, that promotes their development, is that they are the perfect answer to the growing demand for expertise among contemporary judges. The significant growth of the amount of the legislation enacted, increasingly complex legal structures, as well as the increase in the number of initiated legal proceedings, significantly impede contemporary judges in discharging their professional duties. The “friends of the court” start to play, with respect to the judges, a role analogous to that of the parliamentary lobbyists providing expertise to the Members of

³⁵ *Ibidem*, pp. 57, 65.

³⁶ A. Orr Larsen, N.E. Devins, *The Amicus Machine*, “Virginia Law Review” 2016, Vol. 102, pp. 109–111; see also: L. Re, *The Amicus Curiae Brief: Access to the Courts for Public Interest Associations*, “Melbourne University Law Review” 1984, Vol. 14, p. 526.

Parliament³⁷. This problem applies particularly to judges adjudicating in the framework of precedent law, however it is not unknown to the judges in the civil law jurisdictions, which has been noticed in the Polish literature by Ewa Łętowska, who stated that “in the existing, difficult-to-read legal system the role of a professional factor as an interpreter and assistant of a person who wants to apply law is increasing. The current complicated system of law, a complex system of protection of an individual, the complicated constitutional mechanism that guarantees the position of an individual, reinforces the role of an expert-lawyer”³⁸. The openness of the judges to such opinions and the increase of trust in them, reinforced by authority of the organisations promoting them or their seemingly altruistic nature, pose a threat to the judicial objectivity and independence.

Finally, the *amicis curiae* briefs provide feedback to judges on the social reception of their judgments. Such information may also affect their decisions³⁹.

Researchers record a clear increase in the number of *amicis curiae* briefs reported in the proceedings before the U.S. Supreme Court. And so, although in the years 1946–1955 such briefs were reported in approximately 23% of the cases, in the years 1990–1995, in as many as 90% of the cases at least one such brief was reported⁴⁰. The percentage of cases in which the briefs have been reported continues to grow. In the years 2013–2014 it amounted

³⁷ L. Epstein, J. Knight, *Mapping the strategic terrain: The informational role of amici curiae* [in:] *Supreme Court decision making: New institutional approaches*, Chicago 1999, p. 215, quoted after: P.M. Collins Jr., *Lobbyists before...*, p. 58.

³⁸ E. Łętowska, “Właśnie po to ludziom konstytucja” – rola organizacji pozarządowych w kształtowaniu standardów ochrony praw człowieka w Polsce [in:] *Materiały z konferencji Helsińskiej Fundacji Praw Człowieka pt. Wzmacnianie rządów prawa i ochrony praw człowieka w Polsce poprzez zaangażowanie podmiotów gospodarczych i społeczeństwa obywatelskiego w działania prawne na rzecz interesu publicznego*, Warszawa, 18 June 2007, pp. 39–46, quoted after: A. Bodnar, B. Grabowska, P. Osik, “Opinie przyjaciela sądu”..., p. 172.

³⁹ P.M. Collins Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, “Law & Society Review” 2004, Vol. 38, No. 4, p. 816.

⁴⁰ P.M. Collins Jr., *Lobbyists before...*, p. 61.

to 96%, in the years 2014–2015 already to 98%. What is more, subsequent records in the amount of briefs made on the occasion of the examination of one case have been won. The greatest interest of the friends of the court is received by the precedent cases which get publicity in the media or provide an opportunity to develop a new interpretation or exert significant influence on a given policy of the authorities (this trend has been noticed by researchers also at the level of the courts of appeal⁴¹). By the way, it should be mentioned that the increase in the briefs by “the friends of the court” was also associated with finding, by American lawyers, a large promotional or even advertising potential of that institution. Therefore, in the prominent cases, a significant increase in the number of submitted “friendly” briefs, also motivated by that particularistic goal, can always be expected⁴². A similar motivation (with a similar effect) is demonstrated by numerous law professors who are willing to engage in renowned, political proceedings as the friends of the court⁴³. In the same-sex marriages cases recognized by the Supreme Court of the United States in the years 2014–2015 as many as 148 briefs of the friends of the court were reported. The previous record belonged to the case *NFIB vs. Sebelius*, in which 136 *amicus curiae* briefs have been reported⁴⁴. There are a few significant results of this situation. In the first place, competition phenomenon between lobbyists-friends of the court, known of the parliamentary lobbying area, should be mentioned. It promotes the development of various operation strategies aiming at eliminating competition and reaching the decision maker with the arguments, to affect its decision. The latest analyses raise the question of the so called ‘counteractive lobbying’ in the U.S. Supreme Court – invalidating, by the entities acting as the friends of the court and supporting arguments of one of the parties, the arguments of the other party (parties) to the proceedings. Whether the parties to the proceedings are the natural (individual) persons, or the governmental insti-

⁴¹ See: W.L. Martinek, *Amici Curiae in the U.S. Courts of Appeals*, “American Politics Research” 2006, Vol. 34, No. 6, p. 803 ff.

⁴² L. Re, *The Amicus Curiae Brief*..., p. 528.

⁴³ H.A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae*, “University of Richmond Law Review” 2015, Vol. 49, p. 361.

⁴⁴ A. Orr Larsen, N.E. Devins, *The Amicus Machine*..., pp. 111–112.

tutions, is of the secondary importance. In the latter case, the competitive interests can also be mentioned, for example, in the implementation of certain policies. An *amicus curiae* brief may serve the purpose of ‘counteractive lobbying’ also by *strict* legal arguments, for example, by undermining the interpretation of the legal provisions submitted by the “opposite” party⁴⁵. The recent studies of the American *amicus curiae* practice also show phenomena which in Poland – should they be the case – belong to the future. One of them is called an ‘amicus machine’ – an emergence of a new influential interest group of lawyers entitled to practice before the Supreme Court. The Rules of the U.S. Supreme Court define the formal requirements, which must be met by a lawyer, to be able to appear before it⁴⁶. The legal scholars speak directly of the monopolization, by those lawyers, not only of the legal service to the parties appearing before the Supreme Court or applying for initiating the proceedings before that Court, but also of *amicis curiae* briefs⁴⁷.

Any attempts to reverse the trends described, have brought no serious results. Any efforts to cover the operation of “the friends of the court” with some legal regulations, and even to cover them with the lobbying regulation, have produced rather bleak results.

The views of American jurisprudence and political sciences on the presence of a specialized type of lobbying addressed to the judicial power have not affected the American legislature – either at the federal level or at the state level. Despite numerous and detailed studies on this subject, additionally supported by the examples of specific activities of the lobbying nature addressed to the courts – in the form of *amicus curiae*, legislation is virtually silent on that subject.

The basic American legal act regulating lobbying at the federal level, i.e. the *Lobbying Disclosure Act 1995* does not make reference to the court

⁴⁵ See: L. Solowiej, P.M. Collins Jr., *Counteractive Lobbying in the U.S. Supreme Court*, Conference Papers – Southern Political Science Association 2008 Annual Meeting, pp. 1–3, 28.

⁴⁶ Rules of the Supreme Court of the United States (Adopted 19 April 2013, Effective 1 July 2013), Part II: Attorneys and Counsellors, Rule 5: Admission to the Bar, <https://www.supremecourt.gov/ctrules/2013RulesoftheCourt.pdf> (accessed: 20.11.2016).

⁴⁷ See: A. Orr Larsen, N.E. Devins, *The Amicus Machine...*, pp. 102–109, 115 ff.

lobbying, and even lays down a relevant subjective exception. The Act provides that contacts with an official (a public authority officer) regarding the judicial proceedings, established in a situation where the government agency, in which the official concerned is employed, is charged with responsibility for those proceedings, are not of the “lobbying contact” nature⁴⁸. At the state level – after changing the laws in the state of Oklahoma, only the laws of the state of Missouri provide for lobbying aimed at the judiciary and cover this type of action with the registration and reporting duty. Importantly, law defines the judicial lobbying as influencing the courts’ operation, other than adjudicating activity (in the State of Missouri-purchasing decisions)⁴⁹.

The Rules of the Supreme Court of the United States dedicate to the *amicus curiae* institution one of their 48 Rules – namely, Rule No. 37. The majority of the provisions contained in that Rule refer to the formal requirements which must be complied with by an *amicus curiae* brief and the procedure for obtaining permission (of the parties or the court) for submitting it. The last, sixth paragraph is of the para-lobbying regulation nature. It refers to the practice of applying the briefs of the friend of the court to support the arguments of a party to the proceedings. This is the result of the findings by the American scholars who expressed objections at the parties and, in particular, their legal representatives, who deliberately inspired, supported and commissioned drawing up the *amicus curiae* briefs, and even drew them up themselves, to reinforce their arguments and litigation position. Interestingly, the provision in question does not prohibit such practices, and only requires to disclose relevant facts in the initial part of the brief (in the first footnote on the first page of the brief). The duty applies to the cases where a counsel for one of the parties to the proceedings has authored the *amicus curiae* brief in whole or in part or the counsel or a party has made a monetary contribution intended to fund the preparation or submission of the brief. What is more, information on every person, other than the friend of the court, its members, or its counsel, who has made such a monetary contribution to the preparation of the brief, is subject to the mandatory disclosure. That provision was added in 2007. The

⁴⁸ U.S. Code, Title 2, Chapter 26, paragraph 1602, Article (8) (B) (xii).

⁴⁹ Missouri Revised Statutes, Chapter 105 (*Public Officers and Employees. Miscellaneous Provisions*), Sec. 105.470.4 (28 August 2016).

analysis of case law issued under that new rule leads to the conclusion that its purpose was not to prevent drawing up *amicus curiae* briefs in the interest of the party, or even commissioning thereof by the party's counsel as a tactical measure, but rather – discouraging the counsel from the preparation of such a brief by itself. In addition, as it is apparent from the official explanation to the Rule 37 (6), the Supreme Court takes into account the authorship of the friends' of the court opinions and favours less those, whose preparation has been inspired by the party⁵⁰.

The regulations relating to the submission of the briefs at the level of federal courts of appeal are slightly differently worded, and therefore are even more restrictive. If a corporate entity acts as a friend of the court, it is obliged to provide, in addition to its identity details – also additional information on the ownership relations – whether it is a part of a larger corporate structure, as well as [notify] who has the interest therein amounting to at least 10%. In addition, at the beginning of an *amicus curiae* brief, information on the interests joining the friend of the court with the case in which the brief is presented and an indication of the reasons justifying the submission of the brief to the court, should be disclosed⁵¹. What is more, it is worthy to note the famous statement, often quoted in the literature, by Richard Posner, the President of the Court of Appeal of the Seventh Circuit, who in the grounds to the decision dismissing the request for filing an *amicus curiae* brief in the case *Ryan vs. Commodity Futures Trading Commission* of 1997 criticized the practice of that institution's operation at that time. He has made numerous allegations, including the main one, that the friend of the court has become a “friend of the party” and that submitting the relevant brief should be limited to situations where a party [to a case] is inadequately represented, when access to information is limited or when the voice of the community, which will be affected by the consequences of the judgment in a particular case, is not

⁵⁰ A. Orr Larsen, N.E. Devins, *The Amicus Machine...*, pp. 112–114.

⁵¹ Federal Rules of Appellate Procedure, Title VII: General Provisions, Rule 26.1 (Corporate Disclosure Statement), Rule 29 (Brief of an Amicus Curiae).

heard enough⁵². The position of Judge Posner has got a lot of publicity in the scientific literature and has influenced the judicial practice of the proceedings in *amicis curiae* cases, also at the Supreme Court level. It is believed that it has influenced the greater openness of the judges to the briefs of the friends of court filed under the conditions of a lack of consent of both parties to their submission (which in accordance with the legal provisions may be the reason for dismissing the brief, but also for appealing to the court and getting a positive decision)⁵³. However, the critical opinions have also been raised, according to which the arguments by Judge Posner have become for many judges, particularly those, who are overloaded with incoming cases and for that reason are in serious delays – a perfect excuse to reject most of the *amicis curiae* briefs⁵⁴.

Moving onto the analysis of the Polish legislation and practice relating to the *amicus curiae* institution, in terms of its lobbying nature and potential, a few initial remarks should be made. Firstly, the development of that institution in Poland is at the initial stage and therefore numerous phenomena known, almost completely, of the U.S. practice, have not been the case in Poland, yet. However, with a sufficient degree of probability it can be expected that the situation will be changed and will be closer to the U.S. reality. I mean, especially the increase in the *amicis curiae* briefs number and the consequences thereof. They should include: the emergence of competition between individual “friends” representing different views, difficulties with the access to the court, which due to the reasons known of the U.S. practice may treat the numerous, extensive opinions drawn up in the form of the *amicis curiae* briefs with some reserve, under the conditions of the arithmetic increase in the amount of cases initiated before the Polish

⁵² *Ryan vs. Commodity Futures Trading Commission*, 125 F.3d, (7th Cir. 1997), 1062–1063.

⁵³ See: K. Shaw, *Essay: Friends of the Court: Evaluating the Supreme Court's Amicus Invitations*, “Cornell Law Review” 2016, Vol. 101, Issue 6, p. 1533 ff; B.P. Goldman, *Note: Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?*, “Stanford Law Review” 2011, Vol. 63, Issue 4, pp. 907, 909–910.

⁵⁴ See: L.T. Munford, *When Does the Curiae Need an Amicus?*, “The Journal of Appellate Practice and Process” 1999, Vol. 1, Issue 2, p. 279 ff.

courts and enormous delays in recognizing them. Those phenomena may also be the case in the practice of the Constitutional Tribunal's operation, which also experiences serious delays in the recognition of the constitutional requests and complaints. The competition among "the friends of the court" does not need to result from representing their *stricte* substance-related interests but also those of the world-view or environmental nature. Despite the aforementioned domination of the scope of the subjects of the *amicus curiae* briefs presented before the Constitutional Tribunal with the human rights issues, also in that area competition may occur, for example, among the minorities or between the minorities and the majority. It has been proven by numerous cases pending before the U.S. Supreme Court relating to the controversial issues – as recently – an affirmative campaign at colleges concerning the access to firearms or the same sex marriages. The opinions by the friends of the court were submitted on behalf of various environments and groups, whose vital interests could be affected by a particular ruling of the court. As it has already been claimed by the Western researches for a few decades – the rights of various minorities have currently become as important issue, subject to a wide variety of activities and even struggle – as property right used to be in the past⁵⁵.

The predictions presented, relating to the development of the *amicus curiae* institution in Poland, are based also on the observation of that institution's development in other civil law jurisdictions, against the beliefs of some researchers, indicated above, that the institution concerned is specific for the common law system. The examples include: France, where that institution has been established since 1988, at first on the basis of the practice of the courts of lower instances and since 1991 before *Cour de cassation* for the first time, and since 2010 officially under the amended legislation before *Conseild'Etat* (the State Council), the supreme administrative court of France⁵⁶. Moreover, in Europe such possibility occurs, with the limitation to the constitutional courts – in Albania, Bosnia and Herzegovina, the Czech Republic, Georgia, Kazakhstan and Moldavia⁵⁷. It can be also met

⁵⁵ L. Re, *The Amicus Curiae Brief*..., p. 522.

⁵⁶ S. Kochevar, *Comment: Amici Curiae*..., p. 1661.

⁵⁷ A. Bodnar, B. Grabowska, P. Osik, "Opinie przyjaciele sądu"..., pp. 170–171.

in the operation practice, as well as in the procedural regulations, of the constitutional courts of the South America: Argentina, Brazil, Colombia, Mexico, Paraguay and Peru⁵⁸.

Polish law is not prepared for that increase, in terms of the number and importance of the *amicus curiae* institution [cases], expected in the future. As it is emphasized by all the authors – there is no detailed legislation relating to *amicis curiae* briefs – first of all, of the formal (procedural) nature, clearly specifying the rules of drawing them up and submitting them (including the appointment of the entities authorized) and allowing them by the court as well as their impact on the contents of the ruling.

Among the legal bases for the *amicis curiae* operation in Poland referred to, in the first place, the constitutional norms are listed, primarily those included in Article 2 providing for the principle of a democratic state ruled by law⁵⁹. The provisions enabling to present, by the social organizations, their views in the ongoing proceedings of other parties, are considered the basis for presenting *amicis curiae* briefs. Such possibility is provided explicitly by the provisions governing the civil proceedings (Article 63 of the Code of Civil Procedure) and the administrative proceedings (Article 31 paragraph 5 of the Code of Administration Procedure). In the case of the criminal proceedings there is no similar regulation laying down the rules for the expression of views by social organizations. However, Article 91 of the Code of Criminal Procedure is indicated, as introducing a social representative, who may speak and make written representations⁶⁰. The bases for submitting the *amicus curiae* briefs to the Constitutional Tribunal are the provisions relating to the two principles of that proceedings. Firstly – the principle of comprehensive clarification of each case under recognition, secondly – the right to summon, by the chairman of the adjudicating panel, any other authorities or organizations whose participation therein is considered by him relevant for the due clarification of the case, to take part in the proceedings. In spite

⁵⁸ S. Kochevar, *Comment: Amici Curiae*..., pp. 1659–1660; A. Bodnar, B. Grabowska, P. Osik, “*Opinie przyjaciela sądu*”..., p. 170.

⁵⁹ M. Flis-Świeczkowska, *Udział organizacji pozarządowych w postępowaniu przed sądami karnymi*, “Przegląd Naukowy Disputatio” 2014, Vol. 18, p. 32.

⁶⁰ A. Gronkiewicz, *Opinia przyjaciela sądu*..., p. 655.

of subsequent, numerous amendments to legislation specifying the rules of proceedings before the Constitutional Tribunal, the rules mentioned have been maintained in subsequent statutes on that issue enacted by the Sejm and the Senate of the seventh and eighth tenures⁶¹.

The statutory regulations have been clarified by the provisions of the Rules of the Constitutional Tribunal (currently still of 2015⁶²) which in paragraph 33 provide for the possibility of asking, by the adjudicating panel, upon the request of the chairman of the panel or a reporting judge, among others, the organizations or educational units, for an opinion in matters indicated, relevant for a case under recognition. What is more, paragraph 30 subparagraph 3 of the Rules of the Constitutional Tribunal provides that the President of the Tribunal, at each stage of the proceedings, may ask other authorities or entities to take a position in matters that could be relevant for the settlement of the case appointing a suitable deadline for that purpose. Paragraph 4 of that article relates to a situation where an interested authority or entity itself requests the President of the Tribunal to enable it to present its position on the case under the Tribunal's recognition. Should this be the case the President of the Tribunal shall be obliged to refer the request to the chairman of the adjudicating panel.

The practice of appearing before the Constitutional Tribunal by “the friends of the court” has developed on the basis of the above mentioned provisions. At first, the form of an invitation issued by the Tribunal itself (most

⁶¹ Cf. Article 20 paragraph 1 of the Act of 22 July 2016 on the Constitutional Tribunal (Dz. U. [Journal of Laws], item 1157) and an analogous Article 69 paragraph 1 of the Law on the Organisation and Mode of the Proceedings before the Constitutional Tribunal (form No. 963, the Sejm of the 8th tenure), and respectively – Article 39 item 4 of the Act of 2015, and of the same wording, the provision of Article 72 item 4 of the above mentioned Act of 2016 enacted by the Sejm on 30 November 2016 and passed on to the Marshal of the Senate). Previously, they were, respectively: Article 19 paragraph 1 and Article 38 paragraph 4 of the Act of 1 August 1997 on the Constitutional Tribunal (Dz. U. [Journal of Laws], No. 102, item. 643, as amended).

⁶² Resolution of the General Assembly of the Judges of the Constitutional Tribunal of 15 September 2015 on the Rules of Procedure of the Constitutional Tribunal, <http://trybunal.gov.pl/o-trybunale/akty-normatywne/regulamin-trybunalu-konstytucyjnego> (accessed: 30.11.2016).

often by its President) to submit a brief had dominated, often preceded by a relevant request issued by an organization itself, declaring its willingness in that respect. Over time, the practice developed, according to which requests for allowing for presentation of the views were submitted directly to the Tribunal and the Tribunal usually, generally by the chairman of the panel, responded by giving its consent (less often by an invitation) and possibly by appointing a deadline – usually 60-day – for presenting an opinion. Recently, a new practice emerged – a letter by the Secretary of the Tribunal acting upon the authorization of the President of the Constitutional Tribunal, whereby a “friend of the court” was notified, that the Constitutional Tribunal “sees no obstacles against presenting an *amicus curiae* brief”. At the same time, an applicant was notified, that an invitation or consent to drawing up and sending its opinion, does not amount to granting to “the friend of the court” any rights of the party to the proceedings. However, it happened that the Tribunal, on the exceptional basis, invited *amici* to take part in the hearing and to present their views personally⁶³. The approach of the Tribunal towards the opinions of the friends of the court in the course of the proceedings and in the contents of the rulings used to be differentiated – starting with ignoring that fact completely, through noting its occurrence but without any direct reference to the contents of the brief, ending with detailed reporting and discussing the brief and even inviting a representative of the friend of the court to the hearing and asking questions to the parties or the “friend” – relating to the details of the opinion presented⁶⁴.

Considering a provision covering the principle of the comprehensive clarification of each case under recognition, one of the sources of the Constitutional Tribunal's entitlement to request or accept *amicis curie* briefs, grants to judges a substantial degree of discretion in determining who is entitled to submit such an opinion or from whom it can be taken. That means that it could be not only an authority or an organization, but also a natural person – for example a prominent lawyer – an expert or a researcher in a specific area of law or another natural or legal person. In the American literature on

⁶³ A. Bodnar, B. Grabowska, P. Osik, “*Opinie przyjaciela sądu*”..., pp. 166–167.

⁶⁴ *Ibidem*, p. 168.

the basis of the developed practice, there have been several different categories of “friends of the court” – starting with a “Court’s Lawyer” – a neutral, external lawyer serving the court, who is the most similar to the classic form of an ‘*amicus curiae*’, through an “Independent Friend” category, i.e. an amicus, who presents an opinion not supporting the statements by any of the parties, not to say, undesirable to the parties (the parties, most often, try to block submitting such opinions but generally the court allows for them under its decision), ending with a “Friend of [a] Party” – that is a friend supporting clearly one of the parties, frequently upon its inspiration, and even for remuneration. In addition to these categories, there are other variations of the “friends of the court”, some of a clearly lobbying nature⁶⁵.

The Polish, relatively short history of the *amicus curiae* activity before the judiciary authorities, does not provide such a complex image of the institution in question. Without any doubt, the most cases of submitting a friendly opinion have been reported in the practice of the Constitutional Tribunal’s operation. As it is apparent from the data contained in the On-line Portal of Rulings of the Constitutional Tribunal⁶⁶, the opinions have been presented in approximately 30 cases. Importantly, it is not a complete source of information, because it allows to establish only those cases in which one or more opinions had been submitted to the Tribunal and what is more, the grounds included relevant reference in that respect. However, the cases are known, where an *amicus curiae* brief had been reported, but in the grounds there was no reference thereto, even of an informative nature, not to mention, any response to the claims contained in that opinion⁶⁷. As the first case, in which the opinion of “the friend of the court” has been submitted, is considered the case with the reference number SK 21/04 (the brief was received by the Tribunal in July 2005)⁶⁸. An entity, which most often in the short [domestic] history has submitted such briefs, is the Hel-

⁶⁵ See: H.A. Anderson, *Frenemies of the Court...*, p. 363 ff.

⁶⁶ <http://ipo.trybunal.gov.pl/ipo> (accessed: 1.12.2016).

⁶⁷ An *amicus curiae* brief had been reported, for example, in the case with the files reference No. K 6/09, which was completely ignored in the content of the grounds; see: P. Brzuszczyk, K. Ferenc, *Udział organizacji...*, pp. 66–67.

⁶⁸ D. Pyć, P. Zajadło-Węglarz, *Organizacja pozarządowa...*, p. 96.

sinski Foundation for Human Rights – an organization whose intentions related to the promotion of human rights are unambiguous. However, among the “friends of the court” there are also those entities whose, if not lobbying purpose, but at least lobbying potential, cannot be completely ruled out, such as: Stefan Batory Foundation (Fundacja im. Stefana Batoryego) (including the opinions of the Civil Legislation Forum), the Polish Bar Council (Naczelna Rada Adwokacka), the National Chamber of Statutory Auditors (Krajowa Rada Biegłych Rewidentów), the National Council of Legal Advisors (Krajowa Rada Radców Prawnych), the Polish Judges Association “Iustitia” (Stowarzyszenie Sędziów Orzekających “Iustitia”), the Polish Chamber of Press Publishers (Izba Wydawców Prasy), the Board of Association of Polish Lawyers (Zarząd Główny Zrzeszenia Prawników Polskich), the Board of the Polish Catholic Lawyers Association (Zarząd Główny Stowarzyszenia Polskich Prawników Katolickich), the Polish Society of Ethics (Polskie Towarzystwo Etyczne). Among the authors, whose friendly opinions have been allowed by the Tribunal, there are also foreign entities – the World Press Freedom Committee, the Open Society Justice Initiative (files No. K 19/11) and the World Jewish Restitution Organization. An interesting fact related to the first of the opinions mentioned is, that although it was not taken into account in the case for which it had been submitted (files ref No. SK Act 43/05) it was taken into account by the Tribunal in another, subjectively the same, case (files ref. No. P Act 10/06)⁶⁹. This shows the relevance of looking for similarities between the developing Polish practice of “friendly” briefs, and the U.S practice in that respect and therefore setting similar goals to those briefs – not only, or not necessarily, winning the case, but also convincing the Tribunal of the view, which may determine a successful decision for a given environment or party to the future proceedings.

Against the background of the above comments and trends, a lack of suitable regulation relating to the lobbying nature of the *amicus curiae* institution, referred to in the title of this paper, rises to the rank of a significant problem, especially on the basis of the judicial practice of the Constitutional

⁶⁹ A. Bodnar, B. Grabowska, P. Osik, “Opinie przyjaciela sądu”..., p. 148.

Tribunal, which is empowered to repeal laws and legal acts, and to a certain degree – which results from its up to date practice – to determine the interpretation of the legislation referred to in the so-called interpretative judgments. However, it cannot be concluded that the Polish legislation does not refer to this type of lobbying activities at all. The Act of 7 July 2005 on Lobbying Activities in the Process of Law-making (Dz. U. [Journal of Laws] of 2005, No. 169 item 1414; hereinafter: the Lobbying Act), in paragraphs 1 and 2 provides that “lobbying activity is any action carried out by the legally permitted methods aiming at influencing the public authorities in the process of law-making”. There is no doubt that the actions of the friend of the court presenting its view before the Constitutional Tribunal correspond to the overall characteristics of the lobbying activity covered by the provision quoted. At the same time, it is not relevant whether it is an opinion reinforcing (or weakening) the arguments of the party who is demonstrating that the norm which is subject to control, should be found compatible or incompatible with the Constitution. It is also irrelevant whether the submitted opinion of the friend of the court will be taken into account or not. What is more, it does not matter whether, as a result, an unconstitutional provision will be repealed [or] maintained in force as a result of finding its conformity with the Constitution, since in all those cases, we will have to deal with the activities “aiming at influencing the public authorities in the process of law-making” which can be understood as both the legislative authorities on which that opinion may have an indirect impact, as well as the Tribunal itself, which by virtue of its decisions of the derogatory nature, is involved in the *sensu largo* process of law-making. Lobbying activity can be active and aim at enacting, amending or repealing a legal act or any part thereof, or passive, i.e. aiming at preventing those activities (i.e. amendment, repeal, enactment).

In order to recognise that the duties imposed on both, the lobbyists and the addressees of the lobbying activities, apply also to the “friends of the court” and the head of the office servicing the Constitutional Tribunal (and thus the Head of the Tribunal Office) – the question whether the activities of *amicus curiae* meet the conditions of the so called professional lobbying activity, referred to in Article 2 paragraphs 2 and 3 of the Lobbying Act,

should be answered. It should be noted, whether in addition to the general prerequisites of the classification of a given activity as the lobbying activity, the actions by the “friend of the court” presenting its view, can also meet additional requirements cumulatively. i.e.: to be a gainful activity, carried out for third parties, in order to take account of the interests of those people in the law-making process, and also to be performed on the basis of a civil law contract by a trader or an individual who is not a trader. Aside from the fact that the statutory requirements for acting “for a third party” and “on the basis of a civil law contract” have given rise to many doubts, since the enactment of the Polish lobbying legislation (it is subject to severe but fair criticism as a facade regulation also due to the vague terms and a very limited definition of the lobbying activity applied therein)⁷⁰ – the above question can be answered positively. In the case of the social and professional organisations, employing or affiliating lawyers, *amicus curiae* briefs are drawn up (and possibly presented) by them within their professional responsibilities and in the interest of their own members or in the exercise of [their] statutory activity. An open, but arguable, question is the classification of the activities of the organizations promoting human rights which act, due to this fact, not only in their own interest and are financed from private resources. The classification of certain actions as professional-lobbying depends on the provisions of the financing agreements, as well as on the legal status of an organization as a trader. The above presented characteristics of the practice of submitting the opinions of “the friend of the court” to the Constitutional Tribunal – upon the invitation of the President of the Tribunal or the chairman of the adjudicating panel or upon an entity’s own initiative – proves that the cases of “the friends of the court”, acting as lobbyists, even within the meaning of the definition so limited in terms of the material scope as the one contained in the Lobbying Act, are possible. This would mean, on the one hand, that submitting the opinions by “the friend of the court” corresponding to the above characteristics should be preceded by entering an “amicus” into the register of entities conducting professional lobbying

⁷⁰ See e.g. M.M. Wiszowaty, *Ustawa o działalności lobbingsowej w procesie stanowienia prawa*, “Przegląd Sejmowy” 2006, No. 5(76), pp. 68–71; *Ustawa o działalności lobbingsowej w procesie stanowienia prawa. Komentarz*, ed. P. Kuczma, Toruń 2013, pp. 9–10.

activity, and on the other hand, submitting opinions entails the duties, provided for in the Lobbying Act, of “the Head of the Office, servicing a public authority”, so in the case of the Constitutional Tribunal – the Head of the Tribunal Office. First of all, these are the reporting duties (an annual report on the lobbying measures taken towards an authority published on the website of the Public Information Bulletin) but also the duty to establish the rules of dealing with the lobbyists by the office staff and the rules relating to the access of the lobbyists to the Tribunal Office and to obtaining assistance in the performance of their activities.

3. There is no doubt that the institution of “the friend of the court” has a lot of lobbying potential and can become a useful lobbying device soon. This is not the only feature of that institution, which is widely underestimated, and even neglected, in the Polish literature. At the same time, it should be noticed, that the process of the development of the friend of the court institution in Poland is far from the mature stage. In this situation, the positive feedback thereon, for example relating to its positive impact on the practice of the Constitutional Tribunal, and even the development of the civil society, should be reviewed. The enthusiasm of the authors expressing their views on *amicis curie* briefs submitted in Poland, who are of the opinion that “more and more non-governmental organizations will take that option, which will undoubtedly positively influence the quality of case-law of the Constitutional Tribunal” should be slightly moderated. It is worth noting that even if some phenomena known from the U.S. have not been introduced in Poland yet (like previously *amicus curiae* itself) they will appear here sooner or later. The catalyst for changes will be primarily the rise in the popularity, and consequently – the number of the opinions submitted. The result, that may be expected, will be the emergence of competition within the *amici* group. An opportunity to listen to opinions of different parties may seem beneficial for a court following the principle of a comprehensive overview of the case. However, any potential hazards, caused by a lack of relevant regulations protecting the court against the lobbying pressure and techniques, or even manipulation, but also failure to establish or safeguard an equal access to the court or tribunal for all “*amici*” concerned, cannot be

ignored. Should this be the case, the lobbyists having more funds and better experts will always prevail. This is a particularly dangerous threat in view of the unique systemic position of the Constitutional Tribunal that makes decisions on repealing legal provisions in the one-instance proceedings and taking into account that its judgments are final. The need to take a decision under conditions of strong competition among the “friends of the court”, in the light of the significant differences resulting from the different interests and views expressed in the content of their briefs may be a significant impediment for the Tribunal in discharging its duties. No clear specification of the rules on access to the Tribunal by its “friends”, and similarly, not specifying in detail the criteria of taking the opinions into account and referring to them – could put the Tribunal on the accusation of bias. The clear criteria could help avoiding the negative consequences of hyperactivity of *amici*, complained about by some judges of the U.S. courts, that may significantly extend time of recognizing cases pending before the tribunal and increase the delays thereof⁷¹. Under unfavourable circumstances that hyperactivity could take the form of an obstruction.

The simplest summary of an academic paper is to present the *de lege ferenda* proposal. The scale of discretion which has been granted to the entities deciding on the acceptance of an *amicus curiae* opinion and on the manner of recording it, as well as the degree of freedom of the parties submitting those opinions, should be subject to criticism and justify making necessary, relevant amendments to the legislation. What is more, in Polish law, there are no regulations that specify the acceptable material scope of friendly opinions, which further facilitates to consider a “friend to a party” as “the friend of the court”. Such proposals, in terms of both, the *amicus curiae* legal regulations, as well as the lobbying regulations, have already been presented in the literature⁷² and there is no reason to repeat them in this place.

⁷¹ See: H.A. Anderson, *Frenemies of the Court*..., p. 365.

⁷² As to the amendments in the regulation on the *amicus curiae* before the Constitutional Tribunal – see e.g. A. Bodnar, B. Grabowska, P. Osik, “Opinie przyjaciela sądu”..., p. 173; A. Rytel-Warzocho, *Udział organizacji społecznych w postępowaniu przed Trybunałem Konstytucyjnym*, “Przegląd Naukowy Disputatio” 2014, Vol. 18, p. 117; P. Mijał, *Opinia amicus curiae*..., pp. 7–8 (typescript).

However, the stage of the *amicus curiae* institution development is mature enough to raise also the *de lege lata* claims. On the one hand, they refer to discharging the duties imposed on the parties to the lobbying relationship – a lobbyist and a lobbying addressee – by the legislator. On the other hand, they refer to a much more serious issue of the very admissibility of an *amicus curiae* brief before the Constitutional Tribunal. This question has been asked in the Western literature as well. Should an *amicus curiae* institution be prohibited at all in view of the existence of various and numerous, yet indirect, forms of supplementing the image of the case in the eyes of the court (through scientific and media publications, social campaigns, ordering expert appraisals, etc.) or – the forms of supporting the party to the proceedings? Should such lobbying against the judicial authority, especially against the Constitutional Tribunal be allowed at all? While being inclined to a positive answer, justified by to date achievements of non-governmental organizations promoting human rights, including in the first place, the Helsinki Foundation for Human Rights, nevertheless an important reservation should be made in this place. It is necessary to ensure, strictly and promptly, that relevant guarantees of openness of *amicis curiae* activity and the clear rules on the operation of the institution itself in the framework of the proceedings before different types of courts, and especially the Constitutional Tribunal, are established. In the current under-regulated situation, we can only expect a repetition of the scenario known from the U.S. practice and the development of negative trends which, without the relevant *de lege lata* and *de lege ferenda* amendments will be hard to stop or control in Poland.

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A DISTORTING MIRROR? A FEW OBSERVATIONS ON THE RELATIONSHIPS BETWEEN THE COURTS AND THE CITIZENS¹

Introduction

The relations between the courts and judges, and the citizens cover a variety of systemic links. Among them, the mutual perception of those entities deserves a special attention. It is currently subject to a number of changes but at the same time it is more and more difficult to subject them to the unambiguous identification, and especially, interpretation. Their main source is the cultural-communication dynamics of social relations. The subject in question does not relate to trust and authority of the judiciary only. Knowledge of information and opinions held by both environments, the substance of differences found therein and the fact that some of these views are not justified by the facts, make an essential element of analysis of most of the judiciary issues. This relates, among others, to: the development and implementation of the legal policy strategy, the direction of the systemic changes with the involvement of the courts, the judicial interpretation of law, the treatment of values such as judicial independence and, above all, the condition of the legal awareness of citizens, more and more strongly translating into their socioeconomic and political decisions. This includes

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the broad area of data requiring a careful diagnosis and a new type of management. What is more, it covers the professionalization of the communication sphere involving not only the effective acquisition of information and responsiveness, but also an independent, though with the participation of highly qualified specialists, development of individual institutions' image, what for a long time has been the case in relation to, among others, economic and political entities. Whereas, a similar commitment for the benefit of the judiciary remains much weaker, what is supported by the belief that the social status of the courts requires more constructive activities than the public relations sphere, as well as by inefficiency, in relation to the courts, of reproducing some solutions successfully applied by other participants to the public sphere.

In this context, communication and the relationships associated therewith between judges and citizens in Poland should be emphasised. The first reason for this indication is using, by the political class, the negative manifestations of these relations to gradually limit the scope of the power of judges and courts, what had not only increased the tension among the powers but also led to articulating the unusual arguments relating to the evaluation of the social perception of the judiciary. Their symptomatic motif was putting in question, equal to other powers, the presence of judges in the media, including their right to express opinions on public affairs, except for the statements in the procedural form. As explanation, the executive power referred to the public opinion refusing confidence in the courts. This, in turn, deprives of the credibility and neutrality these statements by judges that relate to the contemporary standards of managing the State and citizens' affairs and also de-legitimizes a wide range of power, held so far, by the judicial corporation, in matters not relating directly to adjudicating. The derivative of such a position is, among others, relativisation of the concept of non-adjective independence and the role of the courts in shaping the legal culture. What also speaks for the presentation of the Polish example is increasing disparity of the opinions by the citizens and judges on the problems of the judiciary despite the fact that many aspects of the daily operation of a substantial part of both communities remain common (social origins, the standard of living, age, political views, using new technologies).

The third argument relates to existing sociological research. Much is known about the surveys confirming the critical assessment of the courts and related multi-annual trends, and less about the reasons thereof². Even more rarely, information on the opinions of the judges themselves, including how they are perceived by the citizens, appears. This disproportion causes that the public opinion on the courts is treated not only as *opinio communis*, but also as the only one. Finally, the low effectiveness of undertakings supposed to improve the effectiveness of the relations of the courts with external stakeholders should be noted. Information derived from that fact is also subject to an inconsistent interpretation of what citizens should know about the courts, how to make them interested in this knowledge and who, and under what conditions, should participate therein. The lack of agreement in such an elementary issue has become the additional motif in the dispute between some [parts] of the judicial community and the political class as well as the representatives of the media. Therefore, the needs of information policy, which would be at the same time an educational campaign for the judiciary, are much discussed but much less is being done.

The aforementioned circumstances confirm the observation that the status of the courts in a democratic State ruled by law may, in certain circumstances, be strongly determined by its social communication. If it itself works in the conditions of crisis of confidence not only in the ju-

² Research on this subject has been done in Poland for a long time see among others *Sądy w opinii społeczeństwa polskiego*, eds. M. Borucka-Arctowa, K. Pałeczki, Kraków 2003; K. Daniel, *Kryzys społecznego zaufania do sądów*, "Studia Socjologiczne" 2007, No. 2, p. 62; G. Skąpska, G. Bryda, *Apolityczność czy sprawiedliwość proceduralna? Zaufanie do sądowego wymiaru sprawiedliwości na tle innych instytucji publicznych w Polsce*, "Studia Socjologiczne" 2013, No. 1, p. 83 ff.; reports of the Polish Opinion Research Center (CBOS), published every few years, the last one of 2013, www.cbos.pl/SPISKOM.POL/2013/K_005_13.PDF (accessed: 17.11.2016). Some information is derived from research done upon request of the Association of Judges Iustitia, see: *Diagnoza świadomości prawnej Polaków 2016*, www.di.com.pl/diagnoza-swiadomosci-prawnej-polakow-2016-54682 (accessed: 16.11.2016). Surveys, but without the application of scientific sampling methods, are also carried out by some courts, including the Regional Court in Warsaw – the questionnaire *Polskie sądy w ocenie obywateli*, ed. P. Protasiewicz, Warszawa 2016.

diciary, but also the civil society in itself, both the courts and the society will [have to] face a new and difficult challenge. It boils down to the fact that although citizens, including judges, have access to the unprecedented diversity of communication channels, it is increasingly difficult for them to interpret, on their own, compare, and verify information and opinions received by them. They are, in that case, more willing, than they used to be, to accept and repeat the ready-made argumentative schemes of the adjacent surrounding. Whereas, it more and more often closes gradually and the manifestation thereof is the selective way of information reception, and replacing missing messages – with presumptions and emotions. With reference to the courts, such a separation may be the case, simultaneously, in relation to several categories of entities: citizens, who have direct experience of the contact with judges, people acquiring knowledge from intermediaries, most often the media, judges, some of whom contribute to the community, and some focus on adjudicating only, also exercised in the heterogeneous circumstances. Separate space is shaped by the experience of the representatives of the political class, focused on administrating the day-to-day affairs of the judiciary. This imposes, not only on the executive branch, a short-term prospect of acquiring and processing information, assessed according to the marketing criteria and generates a serious risk of using public opinion for support or tacit consent to the systemic changes treating the judiciary issues in terms of a measure subordinated to achieving indefinite goals.

The fragmentary perception of the judiciary is one of those facts that form, and at the same time, distort the social relations of the courts. These dependencies are an important element of the state of awareness of the civil society and the processes of governing [by] the authority still invoking the idea of democracy. Therefore, it is reasonable to argue that communication between the courts and citizens often takes place on the basis of watching the judiciary in the distorting mirror, but more often provides, also to the courts, valuable messages about under what circumstances a contemporary judge discharges his/her duties and what results thereupon.

Citizens on the judiciary – on formalism and arrogance

The issue of perception of the judiciary by the citizens requires a short reference to obtaining, by the society, information on the public institutions, such as the court, as well as to the criteria for assessments and opinions formulated in that respect. What is more, information on fundamental problems encountered currently by the courts and judges is essential, since they, in fact, determine, as strongly as the form of information, why and how the courts are treated by the citizens.

In this case it is useful to bear in mind a number of factors. The first group thereof is related to the general trends in creating and processing information. Today it is primarily a simplified vision of the world in the most common sources of knowledge which include: Web sites, social media³, TV, tabloids, advertisements, also in the countries with the enhanced system of education and professional development⁴. Equally symptomatic is a shortened form of public expression supplemented or replaced with visualization (memes, graphics schemas, titles). Entering information into circulation, and dissemination thereof, takes place quickly, however, this does not include the stage of the messages correction, while some part thereof is false or contains significant errors⁵, but they attract most of the audience, what

³ Traditional sources of information: television and newspapers, still occupy a high position among the media, however, the participation therein of the websites and social media, indicated as a primary source of knowledge, is steadily increasing, which (for both together) is already comparable with television, see: *Polskie sądy w ocenie obywateli...*

⁴ In the CBOS survey of 2013 the media, as a primary source of knowledge and views on the judiciary, were indicated by 61% of respondents, www.cbos.pl/SPISKOM.POL/2013/K_005_13.PDF (accessed: 17.11.2016).

⁵ Two examples of 2016 are representative, one relates to the local press, where the names of the judges not related to the case were provided, and the other one – a nationwide press commenting on actions by the First President of the Supreme Court in a way indicating that the author confuses the legal institutions, and uses his mistake to present an unfounded thesis. In the former article when negatively assessing a few rulings at the same time bias of judges was suggested and their statements were referred to. In fact, one of these named judges did not rule on the case at all, and in the case of the latter of the judges referred to, the courts, the number of the composition of the court formation, as

is treated as confirmation of the credibility and social importance thereof. The process of assimilation of information, taking place to the rhythm of performing many other tasks, some of which also contain information (multitasking) is also subject to modification. Subsequently, current textual or picture comments, arise thereupon in the interaction manner. Much of information is obtained by using smart phones, where on the screen several sites are open at the same time, and each of them usually contains only a short text next to an announcement of other information and an advertisement. In such circumstances, the messages are received slightly differently than in the case of paper medium which is short of additional references and that should be kept in mind⁶.

Another feature of modern communication is more and more frequent meeting, by the users of digital media, the views and attitudes of other users, similar to their own ones, and similar information, in which algorithms are applied by the administrators and owners of individual sites, domains and search engines. They use for this purpose the 'filter bubbles'. Those socio-technological determinants favour interpreting information and assessments in such a way as to confirm the beliefs already held, with a lack of their recipients' awareness of their situation. Moreover, the new patterns of be-

well as an instance in which they adjudicated were confused which was also important for that information. The correction sent by the spokesperson of the Regional Court in Gdansk, has not been published, see: M. Formela, *Konsumenci sprawiedliwości*, "Gazeta Gdańska", 4 November 2016 correction of 14 November 2016. The second example relates to the request by the First President of the Supreme Court for resolving discrepancies in interpretation of one of the legal notions. The request was described not in accordance with its function and subject, and what is more, views of other entities were assigned to the First President of the Supreme Court and the text was entitled inappropriately to the facts, see: G. Strzemecki, *Nowe narzędzie rewolucji gender-queer*, "Gazeta Polska Codziennie", 5 March 2016. In response of 30 March 2016 a spokesperson of the Supreme Court referred to the substantive errors of the text and explained the essence of the institution of the legal issues examination, however, this information has not been provided to the readers of the newspaper, either, see: www.sn.pl/aktualnosci (accessed: 13.04.2016).

⁶ On this subject, among others, M. Spitzer, *Risk and side effects of digital information technology*, the conference *Mobilność w sieci. Relacje – Bezpieczeństwo – Rozwój*, Gdynia, 1–3 December 2016.

haviour and decisions are connected therewith⁷. One of them is to search on the Internet for the relevant information, including: health, educational and legal information, but not in the form of contacting an expert or his direct statement, but in the form of advice from another user of the website or other material made available by him. They are often more important to a recipient than other certified sources of knowledge⁸, sometimes replacing them completely. This justifies, according to the social behaviour researchers, the thesis that many people use new technologies without knowing, and thus, not using their actual potential and their choice of information sources (Web sites, applications, www pages) is primarily determined by the trends and advertising⁹.

The phenomenon of articulating publically, though as a rule anonymously, the critical views on existing institutions and environments representing them should also be mentioned. They are raised by both the attentive observers of that sphere of reality, as well as individuals whose online activity is more than average and is manifested, among others, by the comments on the largest pieces of information possible, regardless of the content thereof. This is also related to the denial of the status of the current elites – including judges and getting more easily (via the Internet) the feeling of belonging to the counter-system community, whose consistency is much stronger than

⁷ More on this subject: M. Kamińska, *Bańki, puśćcie nas! Kulturowe i społeczne zagrożenia związane z rosnącą rolą tzw. baniek filtrujących w komunikacji komputerowo zapośredniczonej*, conference *Mobilność w sieci. Relacje – Bezpieczeństwo – Rozwój*, Gdynia, 1–3 December 2016.

⁸ This kind of experience is increasingly involving qualified lawyers trusted less than information obtained from the Internet, often in the form of a blog, comment on other information or free legal advice, which in turn, affects the relationships, among others, between a professional legal representative and his client, and the manner of handling some cases.

⁹ “Cyfrowi tubylcy wbrew pozorom nie wiedzą wszystkiego o sieci (...) często nie wykorzystują nowych technologii w twórczy sposób” [“Digital natives, despite appearances, do not know everything about the network (...) they often do not make use of new technologies in a creative way”]; see: G. Stunża, *Pokolenia interaktywnych ekranów – kompetencje do uczestnictwa w (cyfrowej) kulturze*, the conference *Mobilność w sieci. Relacje – Bezpieczeństwo – Rozwój*, Gdynia, 1–3 December 2016.

the others, and thus, more attractive. The mechanism, referred to as the principle of the minority, which is believed to be the majority, and the level of self-esteem of the members of such a group, are also decisive.

In the media space, functioning in this way, there are also opinions and information on the courts. In addition to the already mentioned features, they are characterized by several specific elements, even more limiting access to multilateral, substantive news and assessments. The most important of them is the fact that this institution is not a subject, but an object of the message about itself, that can be described as follows: “it is not present but it is talked about”. It is hardly ever met to hear an excerpt of the grounds for a judgment presented directly by a judge, and the majority of cases relating to a particular court or ruling are not commented on at all by the representatives of the judicial power or it happens with a delay. A small number of such statements is caused, among others, by the fact that judges do not have their national representation, and thus, also a spokesperson, while only a few spokespeople of particular courts contact media. Recently, they have been joined by a spokesperson for the National Council of the Judiciary, but this body discharges, in the first place, completely different responsibilities.

It is important not only who and when speaks on behalf of the courts, but also what is talked about. Also in this place a gap appears – most of information does not include knowledge on the law, considerations of the courts operation, their problems and achievements. Although in two national newspapers the judiciary issues are discussed, they do not have the mass readers, even among the lawyers¹⁰, while the websites kept by the judicial associations and the National Council of the Judiciary, devoted to those issues, including the social relations of the courts, still remain of concern to the judges only¹¹ and greater attention of citizens is focused on the website informing on the ranking of judges, developed by the opinions of the citizens about individual lawyers. A clear aim of that project is announced by the portal’s name itself suggesting corruption of judges¹².

¹⁰ Two national newspapers “Rzeczpospolita” and “Dziennik Gazeta Prawna”.

¹¹ Among others www.iustitia.pl, www.themis-sedziowie.eu, www.ssrwp.pl, www.sedziowierodzinni.pl, www.krs.pl.

¹² Website www.dajwlape.pl (the website address suggests corruption).

Information regarding courts and judges that has universal coverage, originates from non-judicial entities and is mostly critical. Sometimes it relates to the process preceded by, in a show convention, narrative outlining the emotional plots of the case. Then the court is presented as power exercised on behalf of the citizens, that depending on the earlier presentation of the case, should severely punish the accused or acquit him. However, a frequent motif is also information on the ruling, presented without the context of the whole case, to which an objection of lacking justice and common sense is addressed, because the court has decided the case following the formal issues only¹³. Some of the cases of that type are also the subject of the intervention TV programs with the participation of the audience and the interested parties. The statement by the representative of the court happens to be recorded in advance and then commented on by the others. Each of such cases is accompanied by numerous Internet posts containing general assessment of judges, described as lawyers, who abuse power, are arrogant and indifferent to lives of ordinary citizens. Some of these reviews are characterized by aggressive vocabulary. They are noteworthy also because, they more and more often argue that the attitude assigned to the judges is a result of their exclusion from social control, and at the same time, granting them numerous privileges, including the co-optation system, which are not available to other professional groups.

The third type of the media communication focuses its attention on the results of public opinion surveys, which are adverse to the courts. They inform on a low level of confidence in the judiciary, in 2016 it was at the level not exceeding 50%¹⁴. In the accompanying comments very pejorative

¹³ The examples include the cases, exposed in the media, of rulings on limiting or depriving of parental authority, described as the decisions on taking the children from their parents only because of poverty. This information was repeated by the Minister of Justice at a special conference held, where amendments to the legal regulations to prevent judges from such actions were announced. The facts are different, but they are learned about only by the readers of specialist press – in 2015 no ruling was issued under which the parents were deprived of or limited in their parental authority because of poverty only, but other conditions, including the parents' alcoholism, were decisive.

¹⁴ According to CBOS in 2013, 61% of respondents assessed the judiciary negatively, including 13% – definitely negatively and only 28% – positively, including 1% defi-

terms appear, namely: corruption, bias, succumbing to political pressure, slowness, bureaucracy, arrogance¹⁵. That is accompanied by the suggestion that these categories are not only part of the social image of the courts, but also their actual feature, and that knowledge on this subject was derived from those individuals who had personal contact with the judiciary while, in fact, their share among the respondents is below 20%¹⁶, and the others reproduce views acquired from the media, including the previously published surveys. Such a method of conducting, and then analysing the survey's results illustrates the challenges that, in this era of rapid and low-cost information, are faced by the public opinion research centres. They apply to the temptation to acquire not necessarily representative data, because it is a mundane process that requires relevant infrastructure and the transmission of results in a way apart from their interpretation by the public not having knowledge of the statistics' rules¹⁷.

It should also be noted that the media identify the court only with the professional judges, while in some cases the court formation includes lay judges, who are then the majority thereof. Also that fact is not recorded in the reports on particular judicial rulings and when commenting on the results of the public opinion surveys on the judiciary.

In practice, the message dominant in the mass media relating to the courts, separates them from the public. It fixes the view of law as a formal-

nately positively; www.cbos.pl/SPISKOM.POL/2013/K_005_13.PDF, p. 15 (accessed: 22.10.2016). *Diagnoza świadomości prawnej Polaków 2016*, p. 5, www.di.com.pl/diagnoza-swiadomosci-prawnej-polakow-2016-54682 (accessed: 22.10.2016).

¹⁵ K. Baran, *Diagnoza świadomości prawnej Polaków 2016*; conference (*Nie*)świadomość prawna Polaków, Warszawa, the Supreme Court, 7 March 2016.

¹⁶ The representatives of the judicial community hold the substantive debate with such practices, pointing out to their devastating effect on the legal awareness of citizens, see a statement by a spokesperson of the National Council of the Judiciary relating to the article *Kiepskie sądy i prokuratury* ("Rzeczpospolita", 23 March 2009) commenting on the public opinion survey on the judiciary image, where it was reported, *inter alia*, that 99% of respondents had been in contact with the judiciary while actually only 16.3% had any contact with a court, www.krs.pl/admin/files/100860.pdf (accessed: 17.11.2016).

¹⁷ This problem is raised, among others, M. Szreder, *O niektórych nowych wyzwaniach i oczekiwaniach wobec statystyki*, "Wiadomości Statystyczne" 2016, No. 6, pp. 1–9.

ised issue, hard to understand, sometimes oppressive for ordinary citizens, which is applied by the courts. In the news and opinions there is no information, or that information appears to a small extent, on the day-to-day operation of the courts, the rights and obligations of citizens before the court and on that which of the substantive law regulations may be helpful to them in meeting their aspirations, and which should be known well to them to avoid problems and sanctions.

A negative image of the courts is also perpetuated, as a contrast, by the media presentation of the two other institutions typically attributable to law enforcement. The first of them is the police, that keeps notifying of their successes, portraying them with the spectacular pictures of catching the perpetrators of serious crimes or preventive actions, for example, relating to road safety. The Minister of Justice is also often presented in a short and attractive form. He communicates, adopting the attitude of a sheriff or a moderniser, on introducing, upon his own initiative, more severe penalties for crimes perceived by the society as particularly dangerous¹⁸, announces the procedural intervention in cases in which citizens suffer harm or announces improvement of the judiciary, which is always required by the public opinion.

However, the assessments and social beliefs on the courts and mutual relations of both entities are not derived from the media and social networks only. An equally important source thereof are the personal contacts with a court (not only as a party), and information on this subject provided by people of the close surrounding. The last years' research confirms the increasing impact of this experience on shaping the image of the courts¹⁹.

¹⁸ The majority of the public opinion are in favour of more severe penalties – see: CBOS survey of 2013; www.cbos.pl/SPSKOM.POL/2013/K_005_13.PDF (accessed: 17.11.2016).

¹⁹ The growing number of personal experiences of the citizens in courts is supported by, *inter alia*, 61% respondents answering positively that question in 2016 in one of the surveys, see: www.di.com.pl/diagnoza-swiadomosci-prawnej-polakow-2016-54682 (accessed: 17.11.2016). In the CBOS survey of 2013 such contact, personal or of a close person, in the last five years was declared by 40% of respondents, www.cbos.pl/SPSKOM.POL/2013/K_005_13.PDF, p. 5 (accessed: 17.11.2016). In the questionnaire *Polskie sądy w ocenie obywateli*, disseminated through social organizations, including

However, it remains linked to the media transmission. In the courtroom the confrontation of ideas and schemes present in the media with the individual, substantive expectations of the citizens towards particular cases involving them, subsequently compared to the actual attitude of judges²⁰, takes place. A citizen hopes that he/she will be treated impartially and with dignity²¹, although when asked for an opinion on judges he/she answers that they conduct the cases entrusted to them unreliably, not carefully and too slowly, they are corrupt, and at the same time, claim to be better than other members of the society²².

These expectations are derived from the traditional values typically attributable to the judiciary, starting with independence, impartiality, conscientiousness and justice²³. They are also derived from social aspirations strongly aroused in recent years. In addition to the procedural justice²⁴ and treating the citizens with respect, an important place therein is taken by the

employers, law corporations and the media, as many as 81% respondents referred to their own experience in the court, see: *Polskie sądy w ocenie obywateli...*, p. 5.

²⁰ See: K. Daniel, *Normatywny i społeczny obraz sędziego* [in:] *Sądy w opinii społeczeństwa...*, p. 117 ff; and the citizens' monitoring of the courts, in the 2015/2016 edition, covered observation of 5124 court sessions in 137 courts throughout the country, see: *Obywatelski monitoring sądów 2015/2016*, eds. B. Pilatowski, S. Burdziej, Toruń 2016, pp. 21–23.

²¹ More on perceiving by the citizens the values they identify with impartiality of judges, see: J. Neimanis, R. Matjusina, *Judge impartiality in comprehensive judicial development*, "European Integration Studies" 2011, No. 5, p. 89 ff.

²² A significant number of respondents indicate treating citizens as objects by judges, they also raise the cases of inappropriate behaviour of judges towards them – in a survey carried out by the Regional Court in Warsaw, that response was selected by 24% and 13.5% respondents, respectively see: *Polskie sądy w ocenie obywateli...*, pp. 7–8, 10.

²³ Among the judges' attributes considered, by the citizens, most important, the first place is occupied by independence and impartiality and then insightful and thorough handling of the case is placed, what is confirmed not only by the responses to survey questions, but also additional comments made by them in the questionnaires see: *Polskie sądy w ocenie obywateli...*, pp. 12–19.

²⁴ More: T.R. Tyler, *What Is a Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, "Law & Society Review" 1988, Vol. 22, No. 1, pp. 103–36; T. Pietrzykowski, B. Wojciechowski, *Równość, prawda i sprawiedliwość w procesie cywilnym. Rozważania na tle kodeksu postępowania cywilnego*, "Palestra" 2004, Issue 9, p. 11 ff;

efficiency of the judicial proceedings, understood as: economical and technological availability of the judicial proceedings, the speed of the judicial operation, as well as specialized and interdisciplinary knowledge and skills of the judge, determining the proper preparation for the case and conducting thereof, finally-enforceability of the rulings. These factors are equally, and sometimes more, important than the content of the ruling, even for the losing party²⁵ which is influenced, among others, by the fact that many cases brought to the court by the citizens relate to property issues.

Communication is crucial during the direct contact between the court and a citizen, not only for the image of the judiciary but also for socialization which is shared by this institution. In the public opinion surveys, the assessments of the judiciary made by those people who had contact with the court are a few percentage points higher than those by people who had no experience of that type. However, these differences, are not due to the positive consequences of the way of the court's communication with a citizen, as could be expected, but result from other information obtained by the citizen in the course of the judicial proceedings²⁶. This leads to the conclusion, that the direct contact of the court with the citizen, although in this case the judges themselves are responsible for the nature of those relations, also requires more attention. Especially, that the main criteria which in these situations are guiding the citizen are: to obtain from the court an explanation and justification for the procedural acts taken in the case and an impartial attitude of the judge towards each event and participant related to the proceedings in progress. If the judge's behaviour does not articulate these values clearly, it is more likely that even those actions by the judge which are neutral or indifferent to the content of the ruling will be interpreted negatively. Should this be the case, a place of a lacking message by the judge

T.T. Koncewicz, *Poszukując modelu sprawiedliwości proceduralnej. Mit czy rzeczywistość?*, Warszawa 2009.

²⁵ See an announcement of the publication of the results of survey involving 228 people to whom judgments in criminal cases related, *Obywatelski monitoring sądów...*, pp. 9–10.

²⁶ CBOS survey of 2013, www.cbos.pl/SPISKOM.POL/2013/K_005_13.PDF, pp. 17, 20 (accessed: 17.11.2016).

will be taken by the image of judges obtained from the media. Therefore, the attention to every message received by a citizen during the contact with the court becomes even more essential.

The judicial grounds remain the paramount element of this contact. Their content should confirm the equity of the decision and confirm the argumentative diligence and thoroughness of the judge, who had comprehensively considered the claims and evidence of both parties, and presented the course of his/her reasoning and the consequences thereof²⁷. These requirements are not limited to oral reasons for the ruling, on which the judge's work methodology is focused, but also include a written form of expression. However, in practice, some citizens do not receive that information. It is replaced by the reasoning in the legal language, where the arguments are derived from the authority of the court of the higher instance, which makes those grounds even more communicatively hermetic²⁸. For the majority of citizens the message from the court is incomprehensible and brief. In certain situations it is felt as an infringement of the fundamental procedural rights and the right to be treated with dignity²⁹. It also creates a presumption that the court, not using the language of ordinary people, is not in a position to

²⁷ On evolution of the model of providing grounds for judicial decisions, from the syllogistic to argumentative, see: D.N. MacCormick, R. Summers, *Interpreting Statutes. A Comparative Study*, Dartmouth 1991; K. Pleszka, *Uzasadnienie decyzji interpretacyjnych przez ich konsekwencje*, Kraków 1996; E. Łętowska, *Pozaprosesowe znaczenie uzasadnienia sądowego*, "Państwo i Prawo" 1997, Issue 5, p. 4 ff; also: *Kilka uwag o praktyce wykładni*, "Kwartalnik Prawa Prywatnego" 2002, R. XI, No. 1, pp. 54–55; L. Morawski, *Zasady wykładni prawa*, Toruń 2010, p. 66, 77; *Uzasadnienia decyzji stosowania prawa*, eds. I. Rzucidło-Grochowska, M. Grochowski, Warszawa 2015.

²⁸ See: A. Machnikowska, *Zasada niezawisłości sędziów a wykładnia prawa* [in:] *Wykładnia prawa. Tradycja i perspektywy*, eds. M. Hermann, S. Sykuna, Warszawa 2016; M. Romanowicz, *Argument z autorytetu w dyskursie sądowym – próba wyjaśnienia* [in:] *Wykładnia konstytucji. Inspiracje, teorie, argumenty*, eds. T. Stawecki, J. Winczorek, Warszawa 2014, pp. 511–515; M. Romanowicz, *Utrwalona linia orzecznicza jako argument z (własnego) autorytetu sądowego* [in:] *Rola orzecznictwa w polskim systemie prawnym*, ed. T. Giaro, Warszawa 2016, pp. 39, 194, 198–200.

²⁹ A Judge "had not responded to his repetitive questions but only read the judgment several times. She did not explain (...) Her confusion was evident"; "(...) the plaintiff had asked for a 'common sense' explanation of the judgment. The Judge did not accede

understand their reasons and therefore decides solely at its own discretion. Whereas, the actual reason for giving a very formal wording to the grounds is treating them, by the courts, as a form of communication, above all, with the court of the higher instance, which is thus persuaded that keeping in force the appealed ruling is justified³⁰. Referring to this issue, the representatives of jurisprudence argue that the problem of communication of the courts in this area is not only the wrong identification of the grounds' addressee but also not using, by the judges, legal research achievements, which in the recent decades recorded the "qualitative leap" in the interpretation theory³¹.

More clear information and a pro-social attitude on the part of the court are also required by several other situations including the participation thereof. The first one, is revoking the court sessions or starting them with delay. In a situation when a lot of cases have been carried out for a very long time, and there are a few-month breaks between the sessions, the evaluation of such cases may be very negative. It is also the case in relation to the delays in times of starting sessions, which in some courts happens quite often³². In both situations, any clarification and in case of the delay, an apology, by the court is missing. Then, due to the stress and uncertainty suffered, additional emotions arise, mainly identifying such an event with the manifestation of arrogance and insufficient involvement of judges in discharging their official duties. On the other hand, when the court provides full information and an apology, the image of the court is positively affected and consequently, it is attributed with respect for the citizens and their cases³³. Also the events of postponing the announcement of judgments, although justified, may con-

to his request, as it has never been asked", two of the numerous reports of the court sessions' observers, see: *Obywatelski monitoring sądów...*, pp. 46–49.

³⁰ That is confirmed by judges, *inter alia*, in the progress of the collective interviews conducted under the project "The third power of courts and judges in Poland from the perspective of theory and philosophy of law", NCN No. 2013/11/B/HS5/04156.

³¹ This fact is indicated, *inter alia*, by Z. Tobor, conference (*Nieświadomość prawna Polaków*, Warszawa, 7 March 2016; Z. Tobor, *W poszukiwaniu intencji prawodawcy*, Warszawa 2013).

³² "It can be said that delays are a regular element of the organisational culture of Polish courts"; see: *Obywatelski monitoring sądów...*, pp. 27–30.

³³ See: *ibidem*, p. 32.

tribute to the negative evaluation of the court, taking into account that the parties do not always have an opportunity to appear at court at a later date, and thus will not become familiar with the reasons for the ruling.

The other, carefully observed form of the court's communication with citizens is treating the procedural acts by judges. From the citizens' point of view, most important is to be heard by the court. If it comes to intervene in this activity, in the manner incomprehensible or biased to the person heard, for example, by shortening, interrupting, commenting on the statements or allowing the other party for such behaviour, the assessment of the judge's attitude is very critical, shaped by the belief in avoiding, by the judge, the duty to examine the merits of the case, infringing dignity of the parties to the proceedings and, above all, not respecting guarantees of the parties' equality. Much information is also obtained from other, also non-verbal, behaviours of the judge, to which specific emotions and views may be assigned³⁴. They also form an opinion on impartiality of the judge, although some of such cases are, first of all, the manifestations of a lack of manners of a judge. They are not numerous³⁵, nevertheless information thereon spreads quickly.

On the other hand, when a judge shows control over a difficult situation that may happen in the course of the proceedings, the assessment of his/her conduct will increase rapidly³⁶. That confirms, the aforementioned, appreciating by the citizens the judicial management of the proceedings, that shows [the judge's] power as balance between such characteristics as: decisiveness, knowledge and speed, and the servicing elements, such as: courtesy, patience, empathy, explanation. Especially, that most of the citizens' contacts with the court relate to their presence [at court] as witnesses. The procedural acts with the participation of the judge are also evaluated in the context of his/her preparation to decide the case. The opinions on that subject, obtained from the public opinion surveys, lead to several conclusions. The first, relates to the clear differentiation, by citizens, of the judges' legal knowledge and knowledge of the particular cases at the moment of entering the courtroom

³⁴ See: *ibidem*, pp. 52–53.

³⁵ In the edition of the civil monitoring 2015/2016 such cases were reported in 3% observations of the hearing, see: *ibidem*, p. 59.

³⁶ See: *ibidem*, pp. 68–71.

by judges. The comparison of both categories, according to the citizens, indicates that the judges do not prepare for each case individually, which decreases the efficiency of individual court sessions, and is also felt as disregard to the parties and other participants. The assessment of that preparation is the most critical and coherent – not only does it take the last place among the characteristics assigned to judges, but also the first place, respectively, when indicating, by the citizens, which attributes judges are lacking³⁷.

An aspect that is worth mentioning, when discussing the issue of social evaluation of courts, is also the access to typically organizational information, starting with the websites of particular courts, through information notices inside the court houses and acquiring information from administrative staff, ending with the conditions of access to the court files³⁸. Improper management of that sphere of the court's communication with its surrounding enhances the critical evaluation. No such information, its illegibility or dispersion confuse and frustrate the users of public spaces of the courts. The marginalisation of that issue deprives the courts, when dealing with the public, of one more significant value which is the message on their transparent operation. It includes public access of the citizens to knowledge how and by whom the public tasks are performed. Nowadays, the carrier of such a message is, among others, a website which, depending on the information policy of the court, provides a lot of information useful in practice, enables to become acquainted with the members of the court³⁹ and the declaration of values served by the judges or just to look for a phone number or an e-mail to the secretariat of the department.

In addition to the public image of the court, developed in the media and judicial practice of direct communication with the citizens, the assessment of the courts and judges is affected by the organizational-systemic problems of

³⁷ See: *Polskie sądy w ocenie obywateli...*, p. 8.

³⁸ *Obywatelski monitoring sądów...*, pp. 95–117.

³⁹ Creating, for the purposes of sociological research under the Project NCN No. 2013/11/B/HS5/04156, the collection of personal data of all the judges adjudicating in the common courts in Poland, *inter alia*, the review has been made of all websites of the majority of courts in Poland, some of them do not contain first names and surnames of judges and the scope of other information is also very diverse.

the judiciary as well. Also here the crucial role is played by the level of knowledge. An example of such a causal link is the defective legislative policy and two kinds of effects negative for the courts. The first one, is inefficiency of the judiciary, that self-sufficiently generates critical opinions thereon, whereas one of the main sources of difficulties is the wording of certain provisions governing the organization and conduct of the judicial proceedings. The second consequence of the poor quality of legal solutions is transferring responsibility for their wording to judges themselves, which is enhanced by not distinguishing, by part of the society, between law making and law application and identifying that law, due to the direct contact, with a judge only, perceived then as a subject of power over law, including political power⁴⁰.

Such a systemic, multi-level interaction, in case of Poland is of the primary importance, because the domestic legal order is characterized by: a permanent variation of legal regulations, their complicated wording resulting in the confusing and incoherent content⁴¹, as well as responding with a significant delay to new types of social and economic relations. In addition, their effective application is decreased by lacking legal education of the majority of the society⁴². The associated consequences of weakening

⁴⁰ It results from the survey that 51% respondents claim that judges are the members of political parties and only 39% know that in this respect the absolute prohibition applies, see: www.di.com.pl/diagnoza-swiadomosci-prawnej-polakow-2016-54682, pp. 15–16 (accessed: 17.11.2016).

⁴¹ The condition of currently applicable legislation entitles, according to some commentators, to ask a question whether at present “we can allege ignorance of law at all”, since “are we able to know it?” – the statement by the participant to the Conference (*Nie*)świadomość prawna Polaków, Warszawa, 7 March 2016.

⁴² The issue is worth attention for many reasons, starting with the questions, why in spite of numerous education reforms, the citizens, including the young generation, often do not have elementary knowledge of law. An example is *Diagnoza świadomości prawnej Polaków 2016*, carried out upon the initiative of the Iustitia Association by a specialist research agency, from which it results that, *inter alia*, only 36% of respondents know that a letter from the Court which had not been collected but missed delivery took place shall be deemed, after the expiry of the statutory time limits, served, and 34% of people are aware of impossibility of an effective appeal submission lodged after the deadline; see: www.di.com.pl/diagnoza-swiadomosci-prawnej-polakow-2016-54682 (accessed: 17.11.2016).

legal protection at the pre-trial stage, are usually revealed as late as when the case is referred to the court. Then, in turn, an expectation occurs, especially when a party appears without a professional legal representative, towards a judge to conduct an inquisition process and apply the lawmaking interpretation. When he/she does not do so, the passivity, compromising justice and the object-like treatment of the case are alleged to him/her. This opinion is reinforced by the formalism typical for the procedural provisions.

The state of the legislative policy also favours the opinion that the courts act in the interests of the elite, which is understood as including the wealthy people or otherwise socially and institutionally privileged entities, since the courts apply the law considered as gentle (criminal cases) and helpful (civil, economic ones) for the elites, but not taking into account the needs and the situation of ordinary citizens. Again, the source of that approach is the interpretation of the course of the judicial proceedings without an analysis of the provisions available to the judge. However, they include the regulations characterized by the delayed or defective response to changes in legal relations. Deciding on the claims resulting from them is difficult, time consuming and costly, and is related to the probability of failure to provide legal protection to the people actually affected. The judiciary has long been struggling with this type of issues. The typical examples are the proceedings relating to the financial pyramids, junk bonds, fraud via the Internet or the issues of payment for construction work, where the chain of contractors and subcontractors includes dozens of entities.

Another condition for the evaluation of the judicial power, which to a large extent is affected by the non-judicial factors is, the aforementioned, organizational inefficiency. In the times of the culture of speed, in which the majority of the society operate, it is a very serious image related problem. The most important manifestation thereof remains the excessive lengthiness of the judicial proceedings⁴³. Not only does it destroy the effectiveness of

⁴³ See: A. Machnikowska, *Prawo do sądu a szybkość postępowania cywilnego*, "Gdańskie Studia Prawnicze" 2016, Vol. 35, pp. 281–294; Ministry of Justice, *Raport z działalności sądów powszechnych w latach 2010–2014*, Warszawa 2015; Informator statystyczny wymiaru sprawiedliwości 2015 (The 2015 Statistical Handbook of the Judiciary), <https://isws.ms.gov.pl/porownania-krajowe/> (accessed: 15.11.2016).

some of the rulings but it also distorts the model of the judicial proceedings, starting with the concentration of procedural material and the judicial management of the proceedings, through the system of evidence preclusion and acquiring expertise knowledge ending with the right to examine the case by two substantive instances. Also that state of affairs is assigned, by the public opinion, to the judges, who according to it, examine the cases too long, since they are not sufficiently substantively prepared for the legal appraisal thereof, and they lack the relevant management competence.

In practice, long-lasting waiting for a final court ruling stems from multiple causes, partially on the rights of paradox, if the content of the critical opinions on the courts, expressed by the citizens and representatives of the organs of the executive power is taken into account, since for a few years more and more cases have been received by the courts, which causes that some judges statistically should recognize approximately 2200 cases a year. This is the derivative of a wide cognition of the courts and greater confidence in the judges than in the institution of mediation, which is still only occasionally used by the citizens. At the same time the proposals to reduce the number of the court cases through, among others, establishing for some of them the jurisdiction of the court only on the rights of the second instance, as well as limiting the possibilities of appealing against rulings relating to selected types of cases raise objections, as affecting the right of the citizens [to access] to court.

While, not only do the courts adjudicate in too many cases, but they also lack, due to the omission by the executive authorities, many instruments necessary for the professional organization of their work, which have long been enjoyed by other institutions and citizens. The scale of the problem is illustrated by both a lack of a comprehensive IT system, including the court correspondence, as well as the mechanisms of flexible management of the number of cast of judges and support staff, taking into account their additional specialist qualifications, with regard to the size and type of cases received by individual courts and departments. This list should also include charging judges with numerous bureaucratic activities, while reducing administrative power of the courts' presidents, as well as the ineffective model of free legal aid. Under such conditions, long waiting for the appointment

of the first trial date is for some cases inevitable, similarly to the inability of their completion at the one and the same session.

The evaluation of the Polish courts from the perspective of the excessive lengthiness of the proceedings conducted requires an additional comment. A long period of waiting for the final judgment is mentioned by the citizens in the first place of the Polish judiciary disabilities list, and the speed has become, in the popular reception, a synonym for efficiency of the courts. However, the summary of the responses given in each category of opinions on courts leads to the conclusion that most citizens expect from judges, primarily, a fair, impartial and committed treatment of their cases. When it is believed that [the judges] follow the rules referred to, the speed of the proceedings is no longer decisive for the overall assessment of the courts⁴⁴. When the attitude of the judge does not communicate his/her independence combined with diligence and thoroughness in action, all organizational shortcomings and weaknesses are assessed more critically. The excessive lengthiness commences to be identified not only with examining the case for a few years, but also with time of expecting information and the need to implement additional, formalized obligations. It also supports the interpretation of technical inefficiency as the manifestation of arrogance towards the citizens, and sometimes even the deliberate disorganization increasing freedom of unethical actions.

The importance of this issue in the relations of the courts with the citizens is treated passively. They are not informed, for example through the websites of the courts, among others, on the number of cases held by the judges in their respective divisions, and at least in their departments, and on the number [of cases] received, as well as the forecasted date for appointing the first court session and on average time of the whole proceedings, while such an "advance" message could order and neutralize some misconceptions about work of the courts, reduce negative emotions and submit the courts to one of the forms of social control, using public information for that purpose.

⁴⁴ In opinions on the characteristics of the courts considered the most important, examination of cases without undue delay takes lower positions, and when the question relates to the most serious problems of the courts operation this factor is listed as the first one, *Polskie sądy w ocenie obywateli...*, p. 6.

The image of the courts is also affected by practice of their contacts with journalists. This is a special group of citizens, who form opinions on the Court, at the same time being their part. Their experience, transferred to the presentation of the judiciary, identifies some causes of media transmission adverse to the courts. The spokespeople do not work in each court and are not always available due to discharging also the adjudicating duties, they do not benefit from assistance of other people working for the judiciary, which in turn, causes that journalists receive information with a delay. Spokespeople's statements tend to be too specialized, not accompanied by additional explanations necessary for journalists with no legal education, and their form does not take into account the time unit used in the media known as a "hundred". The media representatives also argue that the courts do not conduct an active information policy with their participation. It involves not only, responding to the events that have occurred, and the polemics with the statements by other entities, which is done by the spokespeople, but above all, an introduction to the media, by themselves, information desirable from the point of view of the interests of the judiciary, and interesting to the public. In such a case the actions carried out in advance make the point of reference for the statements and reviews of other entities, repositioning the courts⁴⁵.

In the perception and evaluation of the courts by the society an important role is played also by the representatives of the political class. Their statements about the judiciary are featured prominently in the media, and at the same time, in support of their actions towards the courts they rely on the viewpoint of the public. The change that should be recorded in this

⁴⁵ The journalists' opinion survey on their contacts with the media indicate that they assess best courtesy of spokespeople of the courts and most critically-time of their response and the bureaucratically determined conditions see: *Opinia 163 dziennikarzy ankietowanych w dniach 9–15.03.2015 r.* [The opinion of 163 journalists surveyed on 9–15 March 2015]; www.proto.pl/artykuly/wizerunek-polskich-sadow-czesc-1 (accessed: 16.11.2016). The same problems were indicated by the media representatives, among others, T. Pietryga, Head of the Legal Department of the newspaper "Rzeczpospolita", at the conference on the survey results *Polskie sądy w ocenie obywateli*, Warszawa, 12 December 2016 held, *inter alia*, in cooperation with the Regional Court in Warsaw.

case, is the more critical content of those reviews and giving them a form which, in the intention of the representatives of the political parties, should additionally depreciate the courts. Those statements relate to the individual court rulings, however even more often, they formulate a general, negative assessment of the judicial environment. In addition to the legal and organizational charges addressed to the courts, their systemic status and the traits of character of some judges are made relative. The same politicians declare a constructive approach to the judiciary, stressing their commitment in the reform to restore public trust in courts, founded on the efficiency of judicial proceedings and the ethical attitudes of judges. One of its elements is to improve the condition of communication between the courts and the public, described as modernization using modern technologies and developments of social sciences.

The political class on the judiciary – a few observations on the mission, vision and strategy

The critical opinions of the society on judiciary bodies, their content and the way of treatment by the citizens, media and authorities, are not only a manifestation of the problems that must be solved by the judges. They are also embedded, currently outside Poland as well, in the transformation of the legal system and a model of democratic governments and decision-making processes related thereto. Their institutional and social dimension is being limited, coming close to the level of “media democracy”. It is characterized by, among others, monism of the legislative and executive power, limited political activity of the society, greater social activity which is carried out mainly via the Internet, change of the economic rules concentrating capital and increasing rapidly the wealth differences between the richest and the rest of the citizens, as well as new forms of social communication and the related mechanisms of formation and solving some of the conflicts. In such a case the courts are positioned in the system, in which one of the parts has cumulated a variety of, previously separate, instruments of power exercise and control.

The circumstances referred to determine the political practice, including information policy. In addition to attention focused by some entities of the public sphere on their own image, the public opinion argument is used for variety of purposes, sometimes quite distant from the wording thereof. It is also experienced by communication between the courts and the public, in which also the executive power is involved, assigning to itself the following three roles for this purpose. The first one is to [act] on behalf of the citizens (mission), the second one consists in defining the problems associated with communication and social trust (vision), the third one boils down to determining the methods of solving thereof (strategy)⁴⁶. However, the problem is a situation in which those activities are sometimes embedded in a “vicious circle” mechanism, since sometimes the political class contributes to the negative image of the courts criticising strongly the judges and exposing them to criticism of citizens due to legislative omissions decreasing the courts’ efficiency, and then, the politicians themselves blame the courts for negative evaluation of their operation by the citizens, what even more stigmatizes the courts and increases the tension among the powers. Subsequently, they announce reforms, suggesting that in this way they partly assist, and partly discipline, the judges in the due discharge of their duties, and when the legal and organisational changes do not bring the expected results and the crisis is even deeper, the executive power considers the latter fact an argument in support of criticizing the courts again and repeating the familiar sequence of decisions.

In the media transmission on the activity of the executive power towards the courts, it is presented as a neutral entity, whereas like any other one, it is also a group of interests, equipped with strong contributing instruments. The denial of this premise aims at both, developing a positive image of the

⁴⁶ An example is the statement by the Prime Ministers, B. Szydło, announcing the judicial reform with the following words “service to the public it is the priority of the government” therefore “we shall focus on the reform of the judiciary expected by all” whereas “Poles complain about the work of the courts, but must trust the courts (...) They need to know that they go to the courts for justice and need to know that whenever they need protection the State is on their side”, the press conference of the Prime Minister, Warszawa, 20 January 2017, www.onet.pl (accessed: 21.01.2017).

executive power among citizens and the instrumentalisation of information on conflicts, in which it is involved. One of these is the conflict of interests of the executive and judicial powers. The politicians present citizens with such cases in a different way, defining the judges as members of one of many corporations operating in the State (that term itself has usually negative connotations), and their statements are boiled down to the allegation of unauthorized polemics of judges with the public opinion, which is, in such a case, represented by the government and the parliament. This scheme, adverse to the courts, also includes the practice of questioning the rights of judges to talk about the State affairs. The representatives of the executive power argue that any statement by the judges, outside the form of procedural acts, has political signs, because public space has such a nature, and thus remains in conflict with independence and impartiality of a judge. They also refuse to them the social legitimation to participate in the public debate, relying in that respect on the lack of confidence of citizens in the courts. However, public opinion is not so unambiguous, as claimed by the governing politicians, since only some aspects of public activity of the judges are criticized, whereas others are perceived positively⁴⁷.

However, the above mentioned activities, embedded in the classic political manners, reduce the potential of many valuable projects for the benefit of the efficiency of the judiciary, including its communication with the surrounding. A new, serious problem in this regard is the introduction, among the solutions marked as restoring the citizens' trust in the courts, those which are not authorized by the Constitution of the Republic of Poland, but change the scope of the rights and obligations of the authorities to the detriment of the judicial power. Not only the applicable legal regulations are of key importance here (such as, e.g., the establishment of a separate de-

⁴⁷ Negatively evaluated are commenting on the media by judges on the cases conducted by them (42% choices), participating in marches against the government organized by a political party (35%), providing likes to the profiles or statements by politicians on social media (34%). A positive review applies to the participation in the pilgrimage or the march protesting against violence, see Nationwide survey commissioned by the Association of Polish Judges "Iustitia", M. Kryszkiewicz, *Sędzia może pielgrzymkować ale nie powinien politykować*, "Dziennik. Gazeta Prawna", 28 September 2016.

partment of the Public Prosecutor's Office for crimes committed by judges and prosecutors, increasing penalties for judges for corruption, publication of the declarations of financial interests of the judges, financial liability of judges for excessive lengthiness of the proceedings) but also those regulations that have not been eventually introduced into the legal system due to the rulings of the Constitutional Tribunal unfavourable for them (free access of the Minister of Justice to the court files⁴⁸) or common criticism of the legal community and some media (the amendment to the Code of the Criminal Procedure providing for the request, binding also on the court of the second instance, by the prosecutor, to refer the case back to the preparatory proceedings) as they together set the direction for further changes, and introduce to the public debate new conceptions of the status of the courts and standards of cooperation between them and other public institutions.

Each of such issues, raising the doctrinal disputes, is accompanied by an argument of increasing social control. However, in response to the allegation that, in practice, it is exercised by the executive power, the slogan is raised that it indeed acts on behalf of the citizens and the protests of the judges in this case are nothing else but an unsuccessful attempt to avoid a requirement of transparent performance of their statutory obligations. This message is met with much more interest of the citizens and their acceptance or tacit approval, than the legal arguments, undermining that thesis, arguing that those solutions, presented as communicative, in fact transform the legal relations of individual powers. However, for the reasons referred to in the previous section, the latter information and its documented justification, does not reach the majority of citizens or is not convincing for them.

The circumstances referred to are not favourable for the projects aimed actually at supporting the courts and judges in the development of their relationships with the social environment. First, because their completion fades into the background and is inconsistent. Some of such projects are abandoned upon the change of the governing party, and what happens more

⁴⁸ Judgment of the Constitutional Tribunal of 15 October 2015, files No. Kp 1/15 holding unconstitutional a part of the Act of 20 February 2015 amending the Law on Common Courts Organisation, relating to the issue of the competence of Minister of Justice for requesting the court files.

often in Poland, upon appointment of a new person to the post of the Minister of Justice. The other manifestation of this dependency is a manner of preparing the government strategies relating to the judiciary institutions. Their authors do not cooperate with other entities, but only announce consultations followed, more and more often, by a facade, very brief discussion, resulting in the decisions, not taking into account other proposals or objections, except for the own ones, relating to the errors obvious for a lawyer. This contributes to the reduction of the substantive value of such projects – the government, similar to the representatives of any other power, is not omnipotent, and deprives them, at the very beginning, of the allies necessary for their further success, as it happens in the case of the judges who are ignored, treated condescendingly or criticised.

Such an experience discourages them and other social groups from getting involved in the following actions, starting with the participation in surveys to which importance is attached by the authors of the assumptions of the projects to improve communication of the courts with the citizens. The respondents to such projects do not receive any feedback on the use of their opinions, on the contrary, they are often sure that things are getting worse⁴⁹. Under these conditions, much conceptual work is perceived only in terms of marketing, which generates additional problems both of the relation and structural nature.

This is confirmed by the analysis of the history of several projects. One of them is *Strategia modernizacji przestrzeni sprawiedliwości w Polsce na lata 2014–2020* [The Strategy of Modernisation of the Area of Justice in Poland for the Years 2014–2020]⁵⁰. In this document, the change in the

⁴⁹ In this manner many judges perceive the significance of their opinions in the contacts with the executive power, which is referred to, *inter alia*, in individual discussions, collective interviews, as well as relating to the questionnaires addressed to them, what seriously makes more difficult, though not impossible, to acquire a representative sample. It was the case, among others, in relation to a survey carried out in a situation when the whole population of active judges of the common courts amounts to approximately 10 000 of active judges (NCN No. 2013/11/B/HS5/04156).

⁵⁰ *Strategia modernizacji przestrzeni sprawiedliwości w Polsce na lata 2014–2020* [The Strategy of Modernisation of the Area of Justice in Poland for the Years 2014–2020], Warszawa 2013, p. 2 (hereinafter: *Strategia*) developed by representatives of the Na-

way of thinking, covering the introduction of the rules and mechanisms whose essence is to achieve a real effect and the departure from the practice of “procedure in itself”, has been declared⁵¹. It has been inspired by the New Public Management, a managerial style oriented model, where the aim is to make changes and the measure are the economic and social effects (citizen-client)⁵². The participants to the “area of justice” were to be joined by “the mutual goals” identified not only in the professional sphere, but also in private life. Thus, the rights of citizens were supposed to be in “the centre of the judiciary’s attention”, and the institutions associated therewith, serving and friendly to citizens, enjoying public trust. At the same time, reinforcing the authority of the courts should lead to a reduction in the number of cases under examination [and] raising the efficiency of other proceedings (the smaller number of appeal remedies filed, more cases decided out of court, sanctioned with the amicable settlement).

The declaration of ambitious aims did not provide detailed information on the related activities. Only the slogans of improvement were raised [relating to]: customer service, efficiency and quality of case-law and the image of a judge by increasing the availability and openness of the judiciary. The Ministry of Justice has been assigned with the tasks of education of citizens, and the development of the organizational culture “focused on the attainment of the objectives”. When referring to the sphere of communication several indications have been formulated. One of them related to the comprehensive inclusion of the courts into the IT systems⁵³. Their elements

tional School of the Judiciary and Public Prosecution of the Ministry of Justice and the General Prosecutor’s Office.

⁵¹ Strategia, pp. 17–18.

⁵² See: *Principles of Problem-Solving Justice*, Center for Court Innovation, New York 2007. It is worth noting that in addition to this model the concept of “good governance” also operates, where the goal is to build a social agreement, and the direction thereof is set by the needs of the civil society, see: J. Hausner, *Podstawy rządzenia interaktywnego* [in:] *Studia z zakresu zarządzania publicznego*, eds. J. Hausner, M. Kukielka, Kraków 2002, p. 11 ff.

⁵³ “So that a citizen could find out easily, by using the website, what actions should be taken by him/her to handle his/her case” and exchange data before the court in the e-form, Strategia, pp. 18, 27, 29.

were the portals of judgments and the general statistical data, whereas the needs were far more higher, as the citizens, in the first place, searched for information on the situation of their court cases and the devices needed for conducting them, including the possibility of making certain procedural acts via the Internet. The remaining items referred to the attitude of judges, which should be characterized by courage to accept public, also critical, assessments and the care for openness and transparency of their own actions, as well as activity of judges in favour of local communities, primarily in the sphere of education, helpful for confidence-building⁵⁴.

The vagueness of the *Strategy*, also in the context of research and practical developments⁵⁵, has been highlighted by the entities providing opinions on that project, including the judges involved in shaping the social relations⁵⁶. It has not stated clearly both the standard of services provided by the courts (the subject matter and the order of the performances) and the manner of providing them. Perhaps, this was due to failure to decide some basic issues, including the content of the most important needs of the citizens, classified, among others, according to the procedural criteria (the speed of the proceedings, the stability of the first instance rulings, proceedings costs, the access to legal aid) or the substantive ones (the type of cases requiring, in the first place, the proceedings improvements), whereas such initial decisions could organize and focus the actions on the strategic elements of the system⁵⁷.

⁵⁴ As a positive example, an educational program for preschoolers had been provided, what raised questions about the government's knowledge on actual and urgent needs in this area.

⁵⁵ See: P. Banasik, *Nowe kierunki w zarządzaniu wymiarem sprawiedliwości*, Warszawa 2015, pp. 71–92.

⁵⁶ Uwagi Helsińskiej Fundacji Praw Człowieka do Strategii systemu wymiaru sprawiedliwości [The Comments of the Helsinki Foundation for Human Rights on the Judiciary System's Strategy], Warsaw, Poland 17 February 2014, the document's title has been changed several times. The similar opinions were forwarded to the representatives of the Ministry of Justice, presenting the strategy at the University of Gdańsk at the meeting with the participation of judges and scholars in 2014.

⁵⁷ See: L. Balcerowicz, *Polski wymiar sprawiedliwości z punktu widzenia ekonomii instytucjonalnej*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2014, Issue 2.

It was also symptomatic that data, on the basis of which the problems relating to social communication of the courts were identified, had been partly out of date; in a document of 2014, information on public opinion of 2009 was referred to, although just then there was a permanent change in trends. New data was to be taken from questionnaires distributed by the judicial public service bureaus, while the increase in positive ratings was predicted. The same measure had been adopted by particular courts. They also did not inform how they would accomplish that goal⁵⁸.

After three years from announcing the *Strategy*, many of the assumptions thereof still awaited completion and some of the attributed indicators decreased, including: the average time of the judicial proceedings, a positive image of the courts and the coherence of the mutual goals of all the people interested in the judiciary. The strategic importance of IT infrastructure of the courts, that had been so emphasized in that document, was not respected. The schedule for upgrading, involving IT systems, was modified several times, as initially the need to ensure consistency with the system of the public administration service, developed at the same time, had not been taken into account. In 2017, in some of the courts the e-protocol system, introduced in 2010 in civil cases and in 2014 in criminal cases, is [still] not in operation and the dissemination thereof is currently planned for the end of 2018. The electronic registry office is supposed to work in all the courts as late as in 2019. The slow pace is also related to the adaptation of the procedural regulations to the standards of out of court communication, including those relating to taking evidence with the use of e-mails and sms.

Other activities by the authorities are also fragmented. For example, IT and organizational tools available on the market are not used, for the purposes of the courts, to manage professionally uneven receiving the cases resulting in the differences in workload of the courts, departments and individual judges. In the developed reporting model output data, required for that purpose, is missing. What is more, a system of weighting cases, where

⁵⁸ E.g. the increase in 2016, up to 80% of good and very good ratings in the interested parties' satisfaction surveys of the Public Service Bureaus of the district of the Regional Court in Wrocław, see: Action Plan for the courts of the Regional Court's in Wrocław district, Wrocław, 28 December 2015.

the relevant algorithms identify, among others, time required for particular types of cases, taking into account many variables, is not applied. The command and control model is preferred with the centralisation of powers on the part of the Minister of Justice, for whom the Rules concerning the operation of the common courts remain the operating instruments. However, this is not effective, as evidenced by practice. The legal proceedings in some of the cases last longer, contrary to the expectations of both the citizens and the authors of the projects, such as the *Strategy* referred to. In addition, some modifications introduced in this form, move the limits of competence of the executive power in relation to the judicial power. As a result, the solutions important for one of the essential, legal and reputational, judiciary problems are not fully stable, and some of them raise systemic doubts which are subsequently decided by the Constitutional Tribunal⁵⁹.

In search for the solutions designed to accelerate deciding the citizens' cases, it is worth to note that since 2015 the rulings of the administrative courts may be not only of the cassation nature. In some cases, it is possible to oblige an administrative organ, by the court, to issue, within a specified period of time, a decision or an order, indicating at the same time the manner of handling the case or deciding it, unless deciding thereon has been [left] to the discretion of an organ⁶⁰. In accordance with the grounds for that draft amendment, the change corresponds to the need to increase the effectiveness and efficiency of the proceedings and the need to enable the petitioner to obtain a substantive decision on the case more quickly. The amendment introduces a special competence of the court, surrounded by many requirements⁶¹, and the ruling itself is not equal to replacing the decision or the

⁵⁹ The new Rules concerning the operation of the common courts, appealed to the Constitutional Tribunal by the National Council of the Judiciary see: A. Łukaszewicz, *Wątpliwy porządek w sądach*, "Rzeczpospolita", 30 September 2016.

⁶⁰ Article 145a of the Act of 30 August 2002 – Law on Procedure before Administrative Courts (uniform text Dz. U. [Journal of Laws] of 2016, item 718 as amended), added under the Act of 9 April 2015 on amending the Act – Law on Procedure before Administrative Courts (Dz. U. [Journal of Laws] of 2015, item 658).

⁶¹ I.e.: 1) adjudicating in the case of repealing a decision or an order, in the whole or in part, in the case of finding infringement of substantive law, that affected the result of the case or declaration of invalidity of a decision or an order, in the whole or in part,

order, by an organ, with it. It is worth to bear this in mind when referring to any possible doubts whether the provision introduced affects the principle of separation of the judicial power from the executive power or not. From the perspective of an individual waiting for deciding its administration case and shaping its administrative-legal situation, it is indifferent in what manner the case will be handled, if the standard of due protection of the individual's rights is maintained, and this condition is secured by the court's activity. What matters is also the fact, that the solution introduced is favourable for the fulfilment of the principle of legal certainty, since it limits the situations which occurred in the past when despite the annulment of the contested decision, or determining by the administrative court the inactivity of the organ, the latter one issued a faulty decision again or continued to avoid the conclusion of the proceedings.

Another noteworthy project was an institutional support for the media coverage of the courts. In 2015 at the Ministry of Justice a team for the communications standards at courts was appointed, which in addition to surveying the judges, citizens and journalists was to develop the principles of functioning of the two-tier structure for work organisation of the courts' spokespeople. At the national level it was planned to conduct information policy and coordinate substantive and technical support for spokespeople of individual courts, as well as [to introduce] the statements by a spokesperson acting at the central level in matters relating to the whole judicial community and the judicial proceedings of the highest public interest. At the local level, it was assumed to increase the number of spokespeople, their team work (several spokespeople, support staff) in case of larger courts, as well as to increase their media qualifications.

One element of that project has been completed – more frequent and specialized trainings not only for spokespeople, but also other judges. Also this area of cooperation has proved to be difficult, among others, due to the difference in opinions who and under what rules should prepare the

when the reasons specified in Article 156 of the Code of Administrative Procedure or other regulations take place, 2) justification by the facts of the case, 3) not ruling by an organ under the conditions of an administrative discretion – Article 145a paragraph 1 Law on Procedure before Administrative Courts.

judges to contact the media and develop their general communication competence. However, at the same time the adjudication duties of the spokespeople of the courts have been increased by including them in a new system of allocating cases at courts. The purpose of this change was, which should be appreciated, an even workload for judges, including a large group of functional judges, however it was treated too mechanically. Due to a small number of the spokespeople, this has not improved significantly the countrywide speed of the judicial proceedings and definitely has not facilitated the regular contact of spokespeople with the media, including the capacity for immediate responding to false information on courts and has provoked questions about the consistency of the government's activity in the information policy. The subsequent, partial adjustment of the new regulations, that had been caused not only by the protests of the judges⁶², but also reflection on the principles of proportionality and necessity, did not significantly improve the situation of the spokespeople, with the exception of those working in the largest courts; the workload of the others was maintained at the level of 90% of the cases received falling on other judges⁶³.

In summary of the status of implementation of the activities dedicated to improving the relationship between the courts and the citizens, a lack of a determined, structured commitment to legal education of the society should be noted. It is covered neither by the syllabuses in the education system or the solutions applied in the system of social aid nor the projects enhancing the social activity, although the management of these areas is subjected to successive reforms, and this failure destroys many projects with the participation of the executive power, courts and non-governmental organisations, which aim to improve both the efficiency of the judicial proceedings and the

⁶² New principles relating to the volume of workload for functional judges, not only the spokespeople, were introduced on 1 January 2016 (section 48 of Rules concerning the operation of the common courts), the amendment – on 1 July 2016, taking into consideration the differences in the scope of the media duties of the spokespeople of the largest courts, previously also their case allocation rate amounted to the 90%.

⁶³ At present, cases are directed to the spokesperson's division of the court of appeal and the large regional court (200 or more judges) in the number amounting to 75% of the cases received falling on different judges.

image of the courts⁶⁴. The low level of legal knowledge was indicated in the SWOT analysis for the judiciary as the first item in the list of threats to the improvement of the situation of a citizen in the judiciary system. The risk of lacking integrity of the introduced solutions has also been indicated there⁶⁵.

In this situation the universal observation on blocking changes by the own organizational culture, including communication with the surrounding, seems reasonable. Contrary to the *Strategy* of 2014 and other documents of the similar content the basis for the reforms taken so far was not the redefinition of the selected goals of the judiciary and the methods as well as the devices applied for them. Social experience associated with that shapes various emotions. In addition to the routine and perpetuation of the negative assessments of the constantly “modernised” institution, that can be, at an undefined moment, expectation or consent of the citizens to the radical solutions irrespective of risk related thereto.

Judges on the judiciary – a few remarks on populism and media

In recent years, the attitude of judges in their relations with the judiciary stakeholders has changed, including their attitude to that how they are assessed by the citizens, as well as the use of the public opinion, by the executive power, in its relations with the judicial power. In the year 2016 many judges expressed their views on that subject, often in the unprecedented circumstances. At the same time, the public sphere was more broadly entered by the critical opinions and theories on the courts. Consequently, the confrontation, partially reported by the media, of practice and views about that – by whom, how and what – can be communicated in the judiciary issues, takes place. The redefinition of the attitudes in the

⁶⁴ The examples of such an action are so called good practices in the scope of support for image and information oriented activity of the court, see: <https://isws.ms.gov.pl/pl/dobre-praktyki/> (accessed: 15.11.2016).

⁶⁵ SWOT analysis, see: *Strategia*, pp. 52–53.

relations among the public institutions and between them and the society was evidenced, among others, by the executive power's refusal to conduct the direct discussion with judges, despite the announcement of carrying out a fundamental reform of the judiciary, preceded by quick, numerous and fragmentary amendments to the legal regulations on the status of judges, described as a response of the executive power to the faulty discharge of their duties, starting with the procedural, through administrative and corporate, and finishing with the ethical ones. Also the rules of the Constitutional Tribunal's operation together with the change in the composition of the court formation and practice of contacting the political and social environment have been transformed. At the same time, some judges, including the retired ones, when arguing against the executive power, also addressed its representatives with very critical words and serious accusations using the mass media for that purpose.

Among the events, representative for those processes, it is worth to mention, for example, holding for the first time the Extraordinary Congress of the Judges, where one of the leading issues was a catastrophic condition of the legal and non-law related relationships between the courts and the political class, and the message by the judges addressed to the citizens⁶⁶. Another precedent related to the statements by the judges, including the First President of the Supreme Court, requesting the executive power to play "an open game"⁶⁷ with the judges, in relation to the systemic change in the area of the judiciary prepared without their participation. The accompanying brief arguments relied on the status of the judicial power, equal to other [powers] and on the fact that the primary relationship in which [the judges] remain is the one with the citizens, what is also a guarantee of the civil rights. Thus, the judiciary is not subject to the autonomous management by the executive power, and what is more, the latter one has no monopoly to speak on behalf of the public opinion.

⁶⁶ Treść uchwał Nadzwyczajnego Kongresu Sędziów Polskich [The content of the resolutions by the Extraordinary Congress of the Polish Judges], <http://www.krs.pl/pl/aktualnosci/d,2016,9/4325,uchwala-nadzwyczajnego-kongresu-sedziow-polskich-nr-1> (accessed: 11.11.2016).

⁶⁷ Statement of the First President of the Supreme Court at the Extraordinary Congress of the Judges, Warsaw, 3 September 2016, own report.

Equally firm, and first of all, common was the response of the judicial community to the refusal of the executive power to publish the rulings [issued] by the Constitutional Tribunal. Also in this case, public communication has gained importance. Firstly, because the General Assembly of the Supreme Court adopted an unprecedented resolution, in which it stated that the mere fact of issuing a ruling, even before its publication, in which the Constitutional Tribunal ruled on unconstitutionality of a legal provision or a statute under review, deprived such a norm of the presumption of conformity with the Constitution, which was not indifferent to a common court judge⁶⁸. However, the content of this position, interesting in legal terms, was faulty interpreted by some media, which suggested that the Supreme Court, contrary to the applicable principles, had undermined the legal significance of publication. This, in turn, became an excuse for accusing the judges of the Supreme Court of “spreading anarchy in the State”. An additional element of this issue is its technological background – the rulings by the Constitutional Tribunal are available on the website of that institution, which causes that the information criterion is no longer that important for the publication of the rulings in the official journal. Another important motif of this issue was related to the attitude of the general assemblies of many courts protesting against the use of the current model of publication of the rulings [issued] by the Constitutional Tribunal, to make changes to the systemic relations. At the same time, they declared that if this situation lasted, the judges of the common and administrative courts would apply the Constitution of the Republic of Poland directly. It has been treated as a public renewal of the existing, yet not declared in that form so far, submission of the judges to the Constitution. This case has been also used to initiate a discussion on the function of the Basic Law under the conditions of the contemporary systemic and political disputes, and thus to accelerate legal education of the citizens, even if it was only the role of the observers to those disputes.

Repeatedly and clearly, the judges responded also to negative opinions and assessments expressed about them and addressed to them, by the repre-

⁶⁸ The resolution of the General Assembly of the Supreme Court, the standpoint of 26 April 2016, www.sn.pl/aktualnosci/SitePages/wydarzenia.aspx?ItemID=193&ListName=Wydarzenia (accessed: 16.11.2016).

sentatives of the political class. The content of some of these statements has been considered a violation of the standards of a democratic state ruled by law⁶⁹, in a situation when the representatives of the legislative and executive powers, by using the pejorative, media catchy expressions, questioned the legal status of some of the rulings and resolutions of the courts and the Tribunal (for example, the statement on the General Assembly of the Supreme Court as a “team guys who defend *status quo* of the previous authorities”⁷⁰). The judges started to consider this and other statements, deliberate undermining the authority of the judiciary, manipulation of public opinion and an important reason for a lack of confidence of the citizens in the courts.

At the academic conferences, in the newspaper articles and in the form of resolutions, judges identify the negative results of the public opinion surveys on the courts, primarily, as a result of the information policy on the courts. In their opinion, the above, combined with the legal unawareness of citizens, not only brings the results in the form of a false image of the judges, but also may become the basis for the approval of the demand to change fundamentally the status of judges and courts. It will be carried out under the slogans of combating the excessive lengthiness of judicial proceedings and corruption of judges, in fact, leading, besides the partial modernization of some aspects of the judiciary, to undermining the guarantee of independence of judges and courts. The forecast is noteworthy, since the majority of citizens when assessing the organization of the courts operation, accuse them of slowness and adhering to bureaucracy (80% positive responses), and when it comes to the ethical dimension of their rulings, many judges are accused of corruption and caring mostly about their own interests (57% and 15% respectively)⁷¹. Whereas, at it is more and more often emphasized by the judges, most of them work very diligently and

⁶⁹ The common standpoint of the management board of all associations of judges on the statement by the spokesperson of the PiS parliamentary club, B. Mazurek on 26 April 2016, <http://www.krs.pl/pl/rzecznik-prasowy/komunikaty/p,1/4096,uchwala-stowarzyszen-sedziowskich-w-sprawie-wypowiedzi-rzecznika-prasowego-klubu-parlamentarnego-prawo-i-sprawiedliwosc> (accessed: 16.11.2016).

⁷⁰ The statement by the spokesperson B. Mazurek on 26 April 2016.

⁷¹ The summary of replies: “I definitely agree”, “I agree” and “rather yes”.

with great commitment, and the source of the excessive lengthiness of the judicial proceedings is beyond them. In addition to the examples provided above, they point further to suspending the recruitment (at present already a few hundred judicial posts are vacant) which results in even more workload for other judges, the consequence of which is that a number of cases awaiting for examination keeps rising. The response of the Ministry of Justice diminishes the scale of this phenomenon and explains that the slowdown in the procedure of appointing new judges results from the plan to entrust the vacancies to the graduates from the judicial apprenticeship in the assistant judge training system, which requires additional actions. This situation has lasted for a year, which in the case of the districts of the largest regional courts results in not filling approximately 20% of the judicial posts at the end of 2016⁷².

On the other hand, referring to accusations of compromising the principle of independence, judges claim that the number of such cases is small and the executive power, for reasons obvious for itself, disseminates false suggestions in that respect, the credibility of which is built on the following mechanism: announcement of more severe penalties for corruption of judges, while maintaining the existing dimension thereof for representatives of other authorities, justifying the departure from the principle of criminal law prohibiting “the poisonous tree” evidence with the case of alleged corruption in the Supreme Court, which has been discontinued for lack of evidence, as well as the establishment of the department at the public prosecutor’s office, only for the offences committed by judges, and the plans to establish an additional Chamber of the Supreme Court ruling in the composition of lay judges (the social community board) in those and disciplinary cases relating to judges. The judges, highlighting the negative consequences of this type of message, for the whole judiciary system, indicate that they are not able to oppose effectively to the related public opinion.

They put in question, among others, the ability to improve their image quickly, using the methods that have been used by some other public

⁷² Information obtained from the presidents of the Regional Court in Warsaw, Regional Court Katowice, Regional Court Gdańsk.

institutions, for example, the police⁷³. In their opinion, simple and quick communicating, first of all, the successes and positive aspects of the courts' operation in their case is technically, but also substantively, unenforceable. In cases involving the police it is easy to identify good and evil and describe the subject with the language understandable for everyone. In the criminal proceedings the accused enjoys the presumption of innocence, and the speed of the proceedings is determined, which seems to be forgotten by the executive power and the media, by the problems of some prosecutors in drawing up a complete indictment, and subsequently, prove it before the court. In civil cases many disputes are complex and, at least, they can be presented in this way by the parties to the proceedings. Their communicative presentation can be difficult which is increased by the fact that still there are not enough spokespeople, and they are still not assisted by the professional support staff, and what is more, recently, the scope of their adjudicating duties has been extended.

In the awareness and attitude of judges, related to perceiving them by the public opinion, which is dominated with the critical assessments of the judiciary institutions, an important place is occupied by two beliefs. The first one boils down to recognizing the irregularities of those relations, provided that most of the reasons for that situation are beyond the judges community. The second one, identifies this assessment with the image of the courts presented in the media and with politics, including the sphere of communication, which is conducted by the legislative and executive powers in relation to the courts and judges. The surveys of the judges' opinion show that they perceive the degree of their independence and non-dependence and those of other judges at the high level (70%: very high, high ratings), treating both attributes as duties and not privileges (more than 96% responses), whereas they evaluate independence of the courts, as institutions, at the lower level (33%: very high, high)⁷⁴.

⁷³ The judges' opinion surveys in the form of collective and individual interviews conducted in the years 2015–2016 under the NCN Project No. 2013/11/B/HS5/04156.

⁷⁴ The results relating to the opinions of the judges are derived from the representative national survey conducted with the application of research methods in the years 2015–2016, completed under the NCN Project No. 2013/11/B/HS5/04156. In the

However, being an independent judge and discharging his/her duties is perceived by half of the judges surveyed as a difficult task, whereas the majority of them are the judges of the district courts, statistically deciding on the largest group of cases, which is also related to the pressure of time. It is the excessive case load, in addition to the activities of the Ministry of Justice, that is indicated by them as limiting their sense of independence (this is not equivalent to the statement that they are not independent). The first of these factors has been mentioned by more than 62% of the respondents, the second one – 56%. The judges equally negatively identify the media message about them, more than half of them (53.4%) consider it a factor unfavourable for independence, even more (62.9%) the condition that can limit their independence. It is worth noting that the image of the courts in the media took the first, and the category of “social position of the courts” related thereto (40.3%), the second place, among the judges’ opinions on what is unfavourable for their independence. A much less serious problem for contemporary judges is the impact on their independence of such conditions as: the pressure of the superior (1.5% indications), expectations of the parties (14.2%) and the public opinion (18.4%). Influencing independence of the courts as an institution, by the latter one is rated even less (13%), whereas the scale of the problem in the opinion increases in relation to independence of the judges themselves (24.7%)⁷⁵.

In practice, the impact of public opinion on judges is more complex, especially when a particular case is of interest for the media and therefore also for the citizens. Then the relation between that how the public opinion,

surveys the categories of the judges’ independence, judges’ non-dependence and courts’ independence have been identified, assuming, on the basis of other analyses of the situation in which the Polish judges operate, that it is justified, since there are cases where a judge is adjudicating in the independent way but at the same time e.g. due the pressure of the time, financial obligations, the organization of his/her work or other conditions he/she is not a non-dependant person. The situation of the judge who is sure that he/she adjudicates independently on the basis of the statutes and the Constitution, whereas due to inexperience or a lack of expert knowledge, when conducting a particular case, that judge is unaware that he/she is dependent on the legal representatives or experts, is similar.

⁷⁵ Result of the surveys completed under the NCN Project No. 2013/11/B/HS5/04156.

developed by the media, determines the attitudes of judges and [the fact] that some of them, more or less consciously, are embedded in that message, although they consider it fake and harmful to the citizens, becomes apparent. One of the manifestations of such dependencies is the interpretation of the notion of “impartiality of a judge”⁷⁶ which is revealed, among others, together with doubts, due to the circumstances of a given case, [as to] when the request for excluding the judge from the case or referring the case to another court should be submitted. This issue can be looked at from several perspectives, when a request is lodged as a preventive measure to defend against a possible opinion of the citizens on the judge’s partiality due to any relationship of [the judge] with the case. However, in some cases, the main motive of the judge, is not the uncertainty of personal independence, but avoiding the pressure of the public opinion, including the need to resist their unjustified critical allegations⁷⁷. Also another perspective is possible, where such cases are the best opportunity to promote the belief in impartiality of judges⁷⁸.

The level of citizens’ trust in the courts is shaped not only by the media and the executive and legislative powers. What is more, the judges themselves have contributed to that seriously, also due to the attitude presented

⁷⁶ Functioning of the principle of an independent judge entails not only the problems of its interpretation by the citizens but also by the judges themselves, see: Z. Tobor, *Bezstronność sędziego*, “Przegląd Sądowy” 2005, No. 6.

⁷⁷ Unfounded requests for excluding a judge or referring the case by the Supreme Court to another court submitted in the cases with the participation of other judges or workers of the courts, in cases of financial pyramids and in the criminal cases involving the political elements, like in the case of the request of the Regional Court in Katowice regarding the death of miners at pacifying the mine during the martial law period. See: I. Kacprzak, G. Zawadka, *Sąd nie może obawiać się krytyki*, “Rzeczpospolita”, 17 August 2015; M. Kryszkiewicz, *Nikt nie chce sądzić prezesa*, “Dziennik. Gazeta Prawna”, 4–6 September 2015.

⁷⁸ The Supreme Court when deciding negatively on that type of requests – emphasised, *inter alia*, “for the critical opinions the counterbalance must be the efficiency of the proceedings and reliability of adjudicating and not transferring, among the courts, the cases which are subject to public debate” “it should be strictly emphasised that hypothetical anxiety relating to the future disadvantageous public opinions, having no realistic bases, should not justify avoiding by the court of the competent jurisdiction examining the case”.

by them in the direct contact with the social environment. The current systemic crisis and the persistent trend of the public opinion, negative for the courts, make some judges accept the need to change the criteria of their own attitude's assessment, and to apply, not used so far, though often well known, activities for the development, on the basis of substantive and communicative premises, of the positive image of judges, and consequently, the institutional authority of the judiciary.

In this aspect judges refer to good, national and international, practices⁷⁹ and, above all, their own experience from the courtroom and the activities that they take, among others, in the field of legal education. In addition, in many [judicial] community's recommendations, the need to relate to the general principles of law in the oral and written grounds, which was mentioned in the first subsection [of this paper] (*ius* before *lex*), as well as to present them in such a way as to convince, the parties and other participants to the proceeding, of the equity and fairness of a particular decision, is referred to. Equally important is emphasising, by a judge, the attitude embodying care, insight, commitment and empathy⁸⁰. The implementation of those, and many other responsibilities and communication standards, does not require the amendment to the procedural regulations and further financial expenses. The latter could be allocated to the projects supporting these attitudes, including training with the application of *case study*, during which some judges could practice, among others, the expression, in an appropriate form, of emotions, accompanying them when conducting the legal proceedings, but not disclosed in public.

At the same time, the judges emphasize the length of the process of such changes to which both, the previously preferred patterns of judicial restraint associated with the interpretation of the notion of impartiality, as well as the routine and mentality of some of the judges, contribute. Therefore, a variety

⁷⁹ *Inter alia*, the collection of good practices *Sprawny sąd*, and ENCJI recommendations, www.encj.eu (accessed: 15.10.2016).

⁸⁰ Such an attitude is summarized by the statement by SSR O. Barańska-Małoszek [Judge of the District Court Gorzów Wielkopolski]: "the parties should be assured that we do our best" see conference *Jak sądy powinny służyć obywatelom*, Warszawa, 12 December 2016.

of forms and methods of communication⁸¹ should be searched for, and above all, applied to convince the citizens of the arguments presented in the judicial rulings and that they are consistent with the system of values and behaviours of the judge issuing those rulings. This sometimes requires civil courage, especially when the parties to the proceedings are not only notified of the legal regulations governing each section of the procedural acts (impersonal message), but it is needed to justify them with own words and, above all, provide the reasoning (in the first person).

Equally effective can be the review, by the judges themselves, of the judicial documents sent to the parties, for their legibility, and then the standard of other repetitive actions in the citizens' contacts with the court. Experience shows that what for judges, referendaries and legal secretaries is obvious, often has not such a value for the citizens. Reading the letters notifying the witnesses of the court session provides much thought on this topic and partly explains why some of those people arrive at the court and do not know what the case refers to, while the others are stressed or irritated. This state of affairs leads some judges to the reformulation of the wording of the court forms⁸², and on that occasion, to verification of other elements of informing on the courts' activities.

Some judges also stress the need for a two-level activity of judges, where in addition to the statutory obligations, the social duties appear. Among them, as the essential ones, the pro-educational system activities are listed, as for example, the regular meetings with young people carried out at the district of the Regional Court in Katowice combined with discussing the *Apteczka prawna. Lex bez łez* manual, developed by the judges themselves, including information on law necessary in everyday life of teenagers⁸³. Two facts are symptomatic for contemporary communication, namely that the

⁸¹ *Inter alia*, the conference *Jak sądy powinny służyć obywatelom*, Warszawa, 12 December 2016.

⁸² An example is the review of the judicial documents carried out in the District Court Katowice-Zachód, in cooperation with Pracownia Prostej Polszczyzny, operating at the University of Wrocław, see: P. Szymaniak, *Sąd przemówi ludzkim głosem. Najpierw do świadków*, "Dziennik. Gazeta Prawna", 13 December 2016.

⁸³ *Apteczka prawna. Lex bez łez*, eds. K. Markiewicz, M. Szczocarz-Krysiak, Warszawa 2015.

book has been out of print rapidly, and its availability by the Internet portals, popular among students, not respecting copyright. Another manifestation of the intentional operation are the activities by some of the judges in the district of the Regional Court in Gdańsk, where in addition to education, many projects are initiated together with other law corporations, and non-governmental organisations, including open days of the Court.

The practices referred to as well as the related discussions, and sometimes disputes, show that the subject of the relationship between the courts and citizens, can be also seen in the perspective nearest to them. Although often it is not as exciting as the monologues and dialogues with the public opinion, the media and other authorities, it is usually easiest to understand and operate efficiently.

Conclusion

Administering justice is founded on communication of the courts with the citizens, but also among the judges themselves. The observations that have been made so far, justify the thesis that in this case the full initiative must be taken by the representatives of the judiciary, regardless of the duties of the other entities, their inadequate behaviour towards the courts, and a list of the current priorities of the judiciary. The legislative and executive powers and a variety of other institutions, in the foreseeable future, will not be interested in the change of information policy related to the courts and on the courts. Also the citizens will not acquire, by themselves, necessary knowledge on law, the principles of the judiciary operation and their own duties in the legal system, whereas the current situation not only seriously impedes the exercise of the office of judge, but can also be used to de-legitimate doctrinally certain attributes of power of the judges and the courts. It should be taken into account when the citizens learn from the media and from other entities, that most of other citizens see the judges as indifferent to the problems of the society, corrupt and arrogant, especially, when this information encounters the theory of the elites, which have betrayed the ideals of democracy proclaimed by them, and they should be changed.

Wojciech Zalewski*

WHY DO PEOPLE NEED COURTS? ADJUDICATING IN THE TIMES OF THE TRUST CRISIS

Sometimes fundamental questions are worth asking and they include the following ones: “why do people need courts?” and in the same vein: “why do people need the Constitution?”¹. In Poland and in Europe the period of decline of trust in the courts is experienced and although it seems that the courts in Poland have gone through the worst times², rebuilding trust takes years, and its result is not certain at all. Raising questions about the sense of the judiciary operation, the structure of the courts and their functioning is necessary.

Nevertheless, one thing is beyond doubt; we need efficient courts³. It is not possible to maintain social order without their participation. However, we will not understand how to rebuild trust, if we do not recognise the reasons for the crisis of trust in the judiciary institutions.

It comes to the paradox that the judiciary in the People’s Republic of Poland had enjoyed greater social trust, than it did after the political transformation. While from research published in 1978⁴ an image of a high level, i.e. almost 80%, of trust in the courts came out, after 20 years, in 1998, thus

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¹ Cf. E. Łętowska, *Po co ludziom Konstytucja?*, Warszawa 1995.

² The years from 1998 to 2006 were the worst rated by the respondents, see below.

³ As briefly said E. Łętowska, it is about the right to a “a good court”; E. Łętowska, *Rzeźbienie państwa prawa. 20 lat później*, Warszawa 2012, p. 141 ff.

⁴ Cf. *Poglądy społeczeństwa polskiego na stosowanie prawa*, ed. M. Borucka-Arctowa, Wrocław–Warszawa–Kraków 1978, p. 35 ff.

after the political transformation, the percentage of respondents trusting the courts declined to about 30%.

In the mid-1970s – the vast majority (77%) of the Poles surveyed assessed the judgments issued by the courts positively, of that amount 25% of the people surveyed claimed that the judgments were always right, and as many as 52% that they were right in numerous cases. At that time only 14.1% assessed the judicial decisions as wrong⁵.

The image of courts after the so called ‘carnival of Solidarity’ and the martial law period has changed rapidly. The CBOS survey of 1986⁶ revealed that the courts at the end of the Polish People’s Republic were perceived as biased by almost half of Poles. According to the respondents, the courts, first of all, protected the interests of the State and not those of the citizens. In the first half of the 1990s, the positive social evaluation of the judiciary performance still prevailed over the negative ratings. Respectively, in 1993 there were 45% answers affirming the judiciary performance and 26% opposing ones, in 1994, 52% positive ratings and 21% negative ones. A gradual change started in 1995. In May 1995 the proportion of affirmative ratings decreased to 49% and the negative ones increased to 30%⁷. The end of the 1990s shows a clear negative trend.

In the period of the People’s Republic of Poland the level of prestige of the legal profession was low. The reasons for that situation should be looked for in the then binding doctrine of law, in the politics of the State, in the judiciary system, in the attitudes and conduct of judges and prosecutors. Depreciation and instrumentalization of law took place. Law was to be applied to implement a specific, Marxist vision of the State and its

⁵ See: M. Sojka, *Kontakty obywateli z instytucjami wymiaru sprawiedliwości a ocena decyzji wydawanych przez te instytucje* [in:] *Poglądy społeczeństwa polskiego...*, pp. 35–48.

⁶ CBOS – Opinie o wymiarze sprawiedliwości: wrzesień 1986 [The Public Opinion Research Center – Opinions on the judiciary: September, 1986].

⁷ CBOS – Instytucje publiczne w opinii społeczeństwa, listopad 1994 r., CBOS – Instytucje publiczne w maju 1995, czerwiec 1995 r. Komunikat z badań CBOS dostępny na www.cbos.pl (accessed: 15.12.2016) [CBOS – Public institutions in the public opinion, November 1994, CBOS – Public institutions in May 1995, June 1995, the CBOS survey report available at www.cbos.pl].

society. It was not possible indeed to reconcile it with the notion of judicial independence. Law as an autotelic value, in principle, did not exist. Law was supposed to serve not as much justice as “historical justice”. Law has been placed at the disposal of social engineering, whose task was to create a new society. It was an instrument of political action⁸. The axiological value of law decreased dramatically due to the relaxation of the natural connection between law and morality and justice. A sense of fairness and justice, generally, did not result from statutory law, but existed, in a sense, next to it. A repressive function of law was dominating. The law – citizens relationship was of a wrong nature. Social experience in contacts with the law and its representatives was, in general, negative. Law was unlikely to protect citizens, especially against the arbitrariness of the State. Generally, law used to punish. The regulatory functions of law used to lose to its repressive functions. The citizens used to be punished, while the public officials enjoyed relative impunity⁹. Most often, they were not the official actions, which posed a threat to independence, but the actions stemming from the Executive through the judicial hierarchy itself – the presidents of the courts and other superiors within the judicial administration. Appointing relevant court formations and selection of the cases, as well as the individual pressure enabled to influence the course of the proceedings¹⁰.

Judges are only human beings and the citizens realise that. The CBOS survey of 1994 revealed that the public opinion does not consider judges as people “less inclined to dishonesty and the law violation” (62%, including

⁸ The concept of the unity of the State power and the principle of an “active cooperation” excluded independence of the judiciary in the People’s Republic of Poland. The principle of judges “warranty” was in force (Article 53 of the Law on Common Courts Organisation). The judiciary was included in the political plan (Article 53 of the Constitution of 1952, Article 3 of the Law on Common Courts Organisation). In the years 1945–1990 all First Presidents of the Supreme Court were political parties’ activists of a high level – five representing the PZPR party, one SD etc.

⁹ G. Rejman, *Prawo karne w latach 1944–1956*, “Studia Iuridica” 1992, Vol. 22, p. 53.

¹⁰ Discussion of the analyses’ results, (quoting) A. Bielewicz, *Prestiż zawodu sędziego i społeczny wizerunek instytucji wymiaru sprawiedliwości*, “Archiwum Kryminologii” 1995, Vol. 21, p. 105 ff., p. 116 ff.

54% neither less, nor more inclined, and as many as 8%, more inclined to violate the law than other members of the society). Only 21% of respondents felt that judges and prosecutors were less inclined to dishonesty than the others¹¹. However, expectations towards judges are greater. The survey covering a group of 1000 respondents published in 1998 in “Rzeczpospolita” revealed a very critical attitude of the Polish society towards the courts and a decline in trust by nearly 40%. That survey showed that as many as 59% of Poles assessed the judgments of the common courts negatively. Within the above mentioned number 36% of those questioned, indicated that the rulings issued were “rather unfair” and 23% that “definitely unfair”. Positive opinions on the judgments were expressed by 29% of respondents, including as little as 2% of those who were convinced that the courts always adjudicated fairly and 27% selected an answer “rather fairly”. The survey also revealed unequal treatment due to the social position and wealth, 84% of Poles believed that wealthy people were treated differently at courts than the poor. Moreover, 10% of the people taking part in the survey indicated corruption in the courts¹². K. Daniel summarized that survey very pessimistically, [claiming] that way of perceiving the courts indicated clearly that the society had lost its trust in the judiciary operating efficiently, and above all, in its impartiality and integrity¹³.

At the same time, since 1989 social apathy and withdrawal of Poles from the political sphere has been observed. In the elections of 4 June 1989 more than 62% of Poles participated. Subsequently, the level of voter turnout was only lower, and has not come close to the level of 60%. An average turnout in the parliamentary election in Poland has been reaching, for years, the lowest rate among the EU countries, and typically is approxi-

¹¹ CBOS – Nieuczciwość i korupcja w instytucjach wymiaru sprawiedliwości, czerwiec 1994 r. Komunikat z badań CBOS dostępny na www.cbos.pl (accessed: 15.12.2016) [CBOS – Dishonesty and corruption in the judiciary institutions, June 1994 the CBOS survey report available at www.cbos.pl].

¹² R. Wróbel, *Ile wiary w sądy. Sondaż “Rzeczpospolitej”*, “Rzeczpospolita”, 13 February 1998, p. I, VIII.

¹³ K. Daniel, *Kryzys społecznego zaufania do sądów*, “Studia Socjologiczne” 2007, No. 2, p. 62.

mately by 20% lower than the European average. Only 3% of members of the Polish society declare any political activity, either in political parties or associations of that type. The reasons for that low level of activity are attributed to Polish history and the legacy of the People's Republic of Poland. The legacy of the previous era covers especially: 1) a high level of distrust, 2) perceiving the State as a force hostile towards the society, 3) eradicating the civic traditions and models, 4) implementing a demanding attitude towards the State and other citizens, 5) discrediting the concept of social work¹⁴. The constraint for the development was the post-soviet mentality, a so called, by J. Tischner, *homo sovieticus*¹⁵. *Homo sovieticus* was an enslaved man, deprived of the spirit of initiative, not able to think critically, a man who expects and demands everything from the State, who does not want to take his fate into his own hands and does not know how to do it, a will-less member of the collective society¹⁶.

The image of the courts and the evaluation of their operation results from the assessments made by the citizens on all institutions of the State. If the citizens evaluate critically the performance of the State, as a whole, they transfer, which is somehow natural, their negative ratings to the judiciary, as one of the three powers of the State. The intensity of critical assessments and the lack of acceptance for ongoing changes – noted at the end of the 1990s – finally had to transfer to the judiciary. Although that extrapolation is certainly only one of the reasons for the crisis of trust in the courts, it indicates that after the initial period, in which the citizens had been willing to forgive a lot, put up with any inconvenience and sacrifice associated with the political, economic and social reconstruction of the State, the time of evaluation came. It turned out, that in the public opinion numerous negative phenomena had not been limited and the new threats developed¹⁷.

¹⁴ Z. Kinowska, *Kondycja społeczeństwa obywatelskiego w Polsce*, "Infos. Zagadnienia Społeczno-Gospodarcze" 2012, No. 22, pp. 1–4, and previously e.g. A. Paczeński, *Barieiry obywatelskości w polskim społeczeństwie po 1989 roku* [in:] *Europa obywateli. Polskie społeczeństwo obywatelskie in actu*, eds. W. Bokajło, A. Wiktorska-Święcicka, Wrocław 2007.

¹⁵ See: J. Tischner, *Etyka solidarności i Homo sovieticus*, Kraków 1992.

¹⁶ See: J. Turowicz, *Pamięć i rodowód*, "Tygodnik Powszechny" 1993, No. 45.

¹⁷ K. Daniel, *Kryzys społecznego zaufania...*, p. 78.

Significantly, at that time, the negative opinions on the judiciary were typical of Poland throughout the region. In 2001 an interesting comparison of trust in the public institutions in the three democracies of the former Eastern bloc, namely: the Czech Republic, Poland and Hungary, was made. The survey revealed that the level of trust in the courts is the lowest in Poland, where trust was declared only by 22% of respondents¹⁸.

It is widely accepted that the decrease in trust reached its climax just at the beginning of the 21st century¹⁹. In the years 1999–2002 the judiciary was assessed by the Polish society at the extremely low level. Only the Sejm of the Republic of Poland was assessed, at that time, at a lower level than the courts, which means that the courts occupied then a penultimate place in the list of the assessed public authorities, after the army, the President, the Constitutional Tribunal, the Ombudsman, the Supreme Audit Office, the National Bank of Poland, the local authorities, the Police, the Monetary Policy Council, the Senate, the Public Prosecutor's Office and the government²⁰.

The courts have been criticized for many, endogenous and exogenous reasons. The exogenous factors, beyond the control of the courts, in the first place, include the impact of the media that transmit information from the courts dockets selectively and focus on sensational information²¹. The transformational context has been already mentioned above. However, also depreciating the importance and role of the courts by the executive power

¹⁸ See: CBOS, *Zaufanie do instytucji publicznych w Polsce, Czechach i na Węgrzech*, komunikat z badań, Warszawa, styczeń 2001, dostępny na www.cbos.pl (accessed: 10.10.2016) [CBOS, *Trust in public institutions in Poland, the Czech Republic and Hungary*, the survey report, Warsaw, January 2001, available at www.cbos.pl].

¹⁹ J. Czapska, *Wizerunek sądu w opinii społecznej* [in:] *Sądy w opinii społeczeństwa polskiego*, eds. M. Borucka-Arctowa, K. Pałeczki, Kraków 2003, pp. 13–70; J. Kurczewski, *Polskie spory i sądy – podsumowanie* [in:] *Polskie spory i sądy*, eds. J. Kurczewski, M. Fuszara, Warszawa 2004, p. 247; K. Daniel, *Kryzys społecznego zaufania...*; G. Skąpska, G. Bryda, *Apolityczność czy sprawiedliwość proceduralna? Zaufanie do sądowego wymiaru sprawiedliwości na tle innych instytucji publicznych w Polsce*, “*Studia Socjologiczne*” 2013, No. 1, p. 83 ff.

²⁰ J. Kurczewski, *Polskie spory i sądy...*, p. 246; G. Skąpska, G. Bryda, *Apolityczność czy sprawiedliwość...*, p. 83.

²¹ K. Daniel, *Kryzys społecznego zaufania...*, p. 71.

and more broadly – the politicians²², involved in populist actions for the sake of subsequent election campaigns have been indicated. Additionally, spoiling law by adopting inconsistent and unclear regulations, “indulging in trends, political fads and programmes of changing political parties” have been indicated for a long time²³. Those who govern the State often lack knowledge and vision of the legal consequences of the reforms taken²⁴. Finally, the Poles’ punitive approach is worth noting, therefore their attitude manifested in their demands for severe punishments, through which the courts are seen, and subsequently criticized, usually for too mild penalties, in comparison with the social expectations.

The endogenous factors, in the first place, cover the bureaucracy, followed immediately by the excessive lengthiness of legal proceedings. These two factors are, according to researchers and the public opinion, the main disadvantages of the judiciary. These defects are long-lasting and difficult to remedy. The in-depth survey of case law, carried out from 2003 to 2007 shows that it is not enough to amend the law to accelerate and improve the performance of the courts. Despite the large reform of the criminal procedure in 2003, S. Waltoś had to conclude, in 2007, that it turned out that although in 2002 the preparatory and judicial proceedings before the court of the first instance took, on average, 17.7 months in total, in 2004, already 19.9 months. This means that it is not enough to develop legal mechanisms, [but also] the people to launch those mechanisms are needed²⁵.

²² *Ibidem*, p. 76 ff.

²³ J. Królikowska, *Kara kryminalna w badaniach socjologicznych* [in:] *Kulturowe uwarunkowania polityki kryminalnej*, eds. M. Filar, J. Utrat-Milecki, Warszawa 2014, p. 228.

²⁴ In the questionnaire carried out by J. Królikowska one of the judges stated firmly that the codes were inconsistent and incoherent, since codifications as something written from the very beginning to the end had their own logic and consequence. For example, amending Article 178 has its consequences in Articles 25, 75 and 285 respectively. However, that is known or analysed neither by the politicians nor their parties (...) and in this way the generally applicable law, also very severe criminal law, is developed, completely accidentally, in chaos. (...) Also lobbying, which is nowhere held by the courts, while everywhere held by the legal counsels and attorneys, is not without significance. *Ibidem*.

²⁵ S. Waltoś, *Podsumowanie* [in:] *Zagubiona szybkość procesu karnego. Światło w tunelu*, eds. S. Waltoś, J. Czapska, Kraków 2008, pp. 268–269.

In the survey of 2002, as many as 60% of respondents said that the Polish judges compromised the principle of judicial independence, and 21% of respondents indicated that such violations were “frequent”. Only 7.3% of the people surveyed revealed a definite, positive opinion on judges. The threats to judicial independence included, in the first place: corruption (indicated by 57.5% respondents), political beliefs and sympathies of judges (51.6%) and all sorts of pressure from superiors (38.0%). Further places were taken by opportunistic attitudes of judges, ready for different kinds of “compromise” in exchange of getting a promotion to a higher position (20.3%), pressure and influence of the judicial community (18.0%), and pressure of the public opinion (17.0%)²⁶.

As indicated above, the change in the statistical trends, could be noted in 2006. The positive assessment of the courts increased then by 10% in comparison with the year 2005. The year 2007 was groundbreaking, because for the first time in 10 years, and thus since 1996, in the surveys of the common courts’ performance, positive ratings outweighed the negative ones. After the following three years the trends returned to the old patterns. It is true that the results of the surveys carried out in 2009 on behalf of the National Council of the Judiciary revealed that only 3% of the Poles surveyed stated that they had no trust in the courts at all. On the other hand, 3.5% declared their full trust. More than one-third of Poles showed some ambivalence in their assessments, over 40% of them rated their level of trust in the courts as positive and above average positive. The above data indicates some growth of trust in the courts, noticeable in the surveys carried out in subsequent years²⁷.

However, in the period from 2008 to 2016 a downward trend was revealed again. Negative ratings began to outweigh the positive ones again. According to the CBOS data the indicated changes are as shown in chart 1.

It is time to raise an essential question. What are the reasons for recurrence of the decline in trust and how to reverse the trends under discussion?

²⁶ K. Daniel, *Normatywny i społeczny obraz sędziego* [in:] *Sądy w opinii społeczeństwa...*, pp. 117–118.

²⁷ G. Skąpska, G. Bryda, *Apolityczność czy sprawiedliwość...*, p. 86 ff.

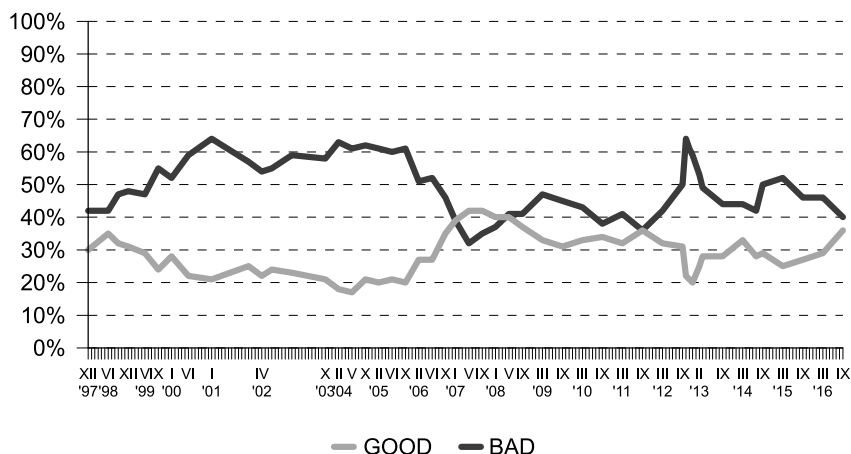


Chart 1. The changes to the opinions on courts in the Polish society in the years 1997–2016

Źródło: CBOS, Ocena instytucji publicznych, Komunikat z badań 2016, nr 133

[CBOS, The assessment of the public institutions, The survey report 2016, No. 133],

online: http://cbos.pl/SPISKOM.POL/2016/K_133_16.PDF, p. 13 (accessed: 20.12.2016).

Certainly, still, namely after 2009 until 2016, in the Polish society there were, and still are, re-sentiments that had been recorded by the researchers previously, and that were referred to above. Suspicions of partiality, corruption, nepotism, not clearing the past events in the form of verification of the judicial community, excessive lengthiness of the proceedings, etc. The condition of the courts, in the public opinion, is influenced by the image of the State operation as a whole, including revealed scandal cases and so on. That community is exposed to attacks by the media and to a large extent it is vulnerable in that respect. Journalists focus on individual, negative cases and draw generalized, often unauthorized, conclusions.

It cannot be excluded that the deterioration of the image of the courts is also influenced by the limitation of lay judges' participation in the court formations²⁸, especially in civil cases, as well as a limited and conservative reaching for mediation by the courts. Apart from a few positive exceptions

²⁸ See more on that subject: W. Zalewski, *Demokratyzacja prawa karnego a sprawiedliwość naprawcza* [in:] *Mediacja*, ed. L. Mazowiecka, Warszawa 2009, p. 25 ff.

(Białystok), mediation is used relatively rarely in Poland²⁹. For example, in 2015 in criminal matters, the cases were referred to mediation in 4046 proceedings, of which 2530 cases ended with an amicable settlement. This creates an image of the courts unwilling the social participation in administering justice. Of course, not always the judges themselves are responsible for that situation, often unclear regulations are to blame.

In the public opinion the negative ratings of the quality of the legislation enacted are transferred to the negative evaluation of the courts. This relationship seems to work also on the reverse side. Once, A. Podgórecki wrote rightly that the operation of law could not be isolated from the performance of the institutions, which applied that law. (...) The lack of satisfactorily efficient performance of the institutions, namely factors, such as, lengthy handling of the cases, procedural defaults and complexities, not specified delimitation of competences, a lack of relevant technical conditions, difficulty in acquiring experts, inclination towards biased (in the extreme situations dependable on any specific profit) settlement of the cases, caused the failure to achieve the results intended by the norm-giver³⁰. If we agree with A. Podgórecki, do not the above mentioned particulars indicate the current lack of “satisfactorily efficient performance of the institutions?”

The profound praxeological impairment of the judiciary system certainly has a variety of sources. They are finance, human resources, but also the crisis of values and trust in law as a means of conflicts resolution. Undoubtedly, the crisis is deep. Nevertheless, in Poland, we have a great potential of public activity and we should use it properly also in the context of restorative justice or community justice³¹. Law should create frameworks for its creative application in order to revitalize law as a social autotelic value.

There is no simple remedy to improve the situation. As indicated above, one of the factors of the efficient operation of law is trust in the law ap-

²⁹ Compare mediation statistics: <https://www.ms.gov.pl/pl/dzialalnosc/mediacje/publikacje-akty-prawne-statystyki/> (accessed: 17.11.2016).

³⁰ A. Podgórecki, *Socjologia prawa*, Warszawa 1962, p. 176.

³¹ A. Crawford, T.R. Clear, *Community Justice: Transforming Communities through Restorative Justice?* [in:] *Restorative Justice. Critical Issues*, eds. E. McLaughlin, R. Ferguson, G. Hughes, L. Westermarland, London 2003, p. 215.

plying institutions, but also the prestige enjoyed by the representatives of individual legal professions³². CBOS surveys show that the years after the transformation have not contributed to a significant change in the perception of the courts. Data presented recently is the reflection of the permanent trends in the social assessments. The above overview seems to contradict the thesis that a constant process of building a positive image of the judiciary has commenced. It seems that the image of the courts and prosecution offices cannot be improved by the propaganda activities associated with developing a positive media image. What is good for politicians, is not good for the judiciary institutions. Rebuilding trust may be carried out only by a mundane and long lasting process in which the values and the sense of community will be rebuilt. Changing mentalities and reorganization are also required. A. Rzepliński wrote once, rightly, on the necessary obrogation of the old system³³.

There is a need to rebuild social trust capital³⁴, as well as trust in the State and the judiciary. Social capital is generally understood as the capability of interpersonal cooperation within the groups and organizations in order to implement common interests³⁵. The judiciary has a huge role to play in this area. Surveys show the increasing preoccupation with professional life, working hard. Adverse changes in the attitudes and personalities of Poles belong to the most frequently mentioned forms of deterioration in human relationships. Despite those adverse trends in human relationships, Poles still

³² Cf. A. Bielewicz, *Prestiż zawodu sędziego...*, p. 105 ff.

³³ A. Rzepliński, *Sądownictwo w PRL*, Londyn 1990.

³⁴ F. Fukuyama, *Zaufanie. Kapitał społeczny a droga do dobrobytu*, trans. A. Śliwa, L. Śliwa, Warszawa–Wrocław 1997; as well as, e.g. P. Romaniuk, *Kapitał społeczny – podejścia definicyjne oraz ich miejsce w naukach społecznych*, “Politeja. Pismo Wydziału Studiów Międzynarodowych i Politycznych Uniwersytetu Jagiellońskiego” 2010, No. 14, pp. 459–481. Significantly, the original title of the book by Fukuyama in the literal translation [into Polish] reads: “Zaufanie. Cnoty obywatelskie a osiągnięcie dobrobytu” [Trust. The Social Virtues and the Creation of Prosperity]. Compare valuable notes by a reviewer; M. Ratajczak, *Recenzja książki Francisa Fukuyamy, Zaufanie. Kapitał społeczny a droga do dobrobytu*, PWN, Warszawa–Wrocław 1997, “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 1998, Issue 2, pp. 194–196.

³⁵ Cf. Fukuyama, *Zaufanie...*, p. 20.

have strong family and social ties and are willing to help. It is worth noting that almost every third person surveyed provides assistance both to someone in the family and outside it (32%) and almost the same number of people did not help to anyone in that time. In the CBOS survey – “Civic society, between the social activity and a passive attitude”³⁶ the image of two contradicting, but very characteristic trends, can be found. Although the vast majority of Poles do not work in any organization, however, every fourth adult devoted his/her free time to the activities of a group (of which 13% work in one organization and 11% in two or more ones). In recent years, the level of the group activity of Poles in general is stable. The Polish people try to work for the benefit of their community. More than one-fifth of the respondents admits that. The surveys of 2006 confirmed that the majority (61%) agree with an opinion that we should be more sensitive and willing to help other people. In the years 2002–2006 the number of people who, in the year preceding the survey, voluntarily and free of charge had worked for their local community or those in need, slightly increased³⁷.

There are also threats to the process of reconstruction of social trust capital and trust in the institutions. More than half of those surveyed do not believe in the effectiveness of civic activity undertaken through social organizations. The sources of the Poles' social passivity are usually³⁸ looked for in the cultural factors inherited from real socialism covering, among others, the eradication of civic and democratic traditions, discrediting the social work concept, deprivation of organizational and managerial skills necessary in social activity. The blockade of the activity on the part of such awareness factors as: low level of civic awareness, lacking a sense of impact on the State's affairs and those of one's environment, a lack of trust in the effective-

³⁶ <http://www.cbos.com.pl/1999/KOM> (accessed: 13.11.2016).

³⁷ CBOS, Stan społeczeństwa obywatelskiego w latach 1998–2006. Komunikat z badań. Warszawa, styczeń 2006 r., www.cbos.pl (accessed: 20.11.2016) [CBOS, The condition of the civil society in the years 1998–2006. The survey report. Warsaw, January 2006, www.cbos.pl].

³⁸ Cf. W. Zalewski, *Sprawiedliwość naprawcza. Początek ewolucji polskiego prawa karnego?*, Gdańsk 2006, particularly chapter V, and the literature referred to therein as well as CBOS data discussed by B. Wciórka.

ness of civic activity, additionally reinforced by the negative social evaluation of the Polish political scene, is also indicated. The macrostructure factors, unfavourable for civic activity, cover a lack of a well developed “new middle class” in Poland, which in the mature democracies, provides a social and financial foundation for non-governmental organizations. What is more, insufficient legal, financial and organisational support for these organisations by the State administration is emphasized. This can be seen especially in the tax system, which is not encouraging to support associations and foundations by the institutions and the citizens. The development of social participation is also hindered by introducing, too late, the administrative reform intended to support the development of self-government, and the education reform covering, *inter alia*, the civic education program, as well as by the underinvestment in science. The blame for the passivity of the society is also put on mass media indicating that civic activity, associated generally with the idea of organic work and work at the grass roots is, by its nature, not attractive enough to reach the media, capture the mass imagination and become part of the mass culture.

It turns out, that even in view of the deep penal indoctrination of the Polish society, there is a social agreement, social tolerance, for resignation from punishing an offender if previously he had reached an agreement with a victim on compensation³⁹. It is the capital to be used.

It could be asked whether the degree of civic engagement in the social and political life of the citizens has anything to do with the condition of the courts and adjudicating. Well, it has, indeed. Aristotle has written about it⁴⁰. The Aristotelian concept of a man as a political animal (*zoon politikon*) until today captures perfectly the human “nature”. A man, only leading an active life in the political community reaches the fullness of his humanity. The frequently quoted statement by Aristotle is that “anyone who either cannot lead the common life or is so self-sufficient as not to need to, (...)”,

³⁹ Cf. A. Szymanowska, T. Szymanowski, *Opinia społeczna w Polsce o niektórych zachowaniach patologicznych, kontrowersyjnych, przestępstwach i środkach kontroli prawnokarnej*, Warszawa 1996, p. 120 ff.

⁴⁰ See: M. Gajek, *Człowiek jako obywatel w myśli Arystotelesa*, “Zoon Politikon” 2010, No. 1, p. 39 ff.

is either a beast or a god”⁴¹. Citizens should be active also in the sphere of administering justice.

Researchers have established that a citizen’s perspective is the perspective based on procedural justice. Sometimes, in the perspective of addressees of norms, the way in which the authority is exercised is more important than the result of the actions itself. It is indicated that this imposes focus on subjective feelings of the citizens and, at the same time, gives room to informal practice as a means of developing legitimacy of the institutions and thus, the belief in the lawfulness of their actions⁴².

I think that the judiciary has the potential and should contribute to building social trust capital⁴³. This can be done also by including alternative methods of disputes resolution, involving citizens. Alexis de Toqueville rightly has noted that the most effective, and may be the only way, to make people take a personal interest in their country’s fate is giving them a share in government⁴⁴. Starting with this idea, it may be argued, that the presence of the people’s factor in administering criminal justice is essential, after all, the judiciary is the third power. Charles Louis de Montesquieu provided the equal status to the principle of tri-partition of power and the necessity of the people’s participation in adjudicating: “[t]he judiciary power ought not to be given to a standing senate; it should be exercised by persons taken from the body of the people (...). In accusations of a deep and criminal nature, it is proper the person accused should have the privilege of choosing, in some measure, his judges, in concurrence with the law or at least he should have a right to except against so great a number that the remaining part may be deemed his own choice”⁴⁵. The painful experience of the 20th century shows

⁴¹ Arystoteles, *Polityka*, trans. L. Piotrowicz, Warszawa 2004, 1253a; M. Gajek, *Człowiek jako obywatel...*

⁴² Cf. S. Burdziej, *Efektywność nieformalnej kontroli społecznej – próba pomiaru na przykładzie badań praktyki sądowej*, “Profilaktyka Społeczna i Resocjalizacja” 2014, No. 23, p. 123

⁴³ See more on that subject: W. Zalewski, *Sprawiedliwość naprawcza formą demokracji deliberatywnej*, “Białostockie Studia Prawnicze” (in progress of publishing).

⁴⁴ A. de Toqueville, *O demokracji w Ameryce*, trans. M. Król, B. Janicka, Warszawa 2005, p. 212.

⁴⁵ Montesquieu, *O duchu praw*, trans. T. Boy-Żeleński, Kraków 2003, p. 150.

that there is no law and a democratic State without the community which believes in it and defends it. According to Hannah Arendt: “[n]ot the loss of specific rights, then, but of a community willing and able to guarantee any rights whatsoever, has been the calamity”⁴⁶. People have to be willing to defend law, and they will do so, only if they are treated subjectively. A lack of involvement of citizens in democratic processes poses a threat to democracy.

Today, citizens, not only in Poland, feel alienated and ignored⁴⁷ because their votes are important only during elections. It is a major threat. Democracy is not a system given once forever. It has to be strived for and social capital has to be built with effort. As John Braithwaite rightly put it, people “are not born democratic”⁴⁸ but learn various forms of democratic participation. History knows many forms of legitimacy but in today’s world democracy is the only serious source thereof⁴⁹. Also Francis Fukuyama postulates the obvious truth, that there is no democracy without democrats⁵⁰. The way out of the stagnation, in the contemporary model of a democratic State, is a more serious share of the citizens themselves in governing, through the deliberative participation. There is a need of “democracy as cooperation”⁵¹, “partnership democracy”⁵². Citizens should have their share not only in the legislative and executive powers but also in the judicial power, in adjudicating, in applying law by the courts. The share of the people’s factor increases

⁴⁶ H. Arendt, *Korzenie totalitaryzmu*, Vol. 1, Warszawa 1993, p. 325.

⁴⁷ See in particular: R.D. Putnam, *Samotna gra w kręgle. Upadek i odrodzenie wspólnot lokalnych w Stanach Zjednoczonych*, Warszawa 2008.

⁴⁸ J. Braithwaite, *Deliberative Republican Hybridity Trough Restorative Justice, Raisons politiques*, “Etudes de pensée politique” 2015, No. 3, p. 42.

⁴⁹ F. Fukuyama, *Budowanie państwa. Władza i ład międzynarodowy w XXI wieku*, trans. J. Serwański, Poznań 2005, p. 42.

⁵⁰ F. Fukuyama, *Koniec historii*, trans. T. Bieroń, Kraków 2009, p. 201 ff. Contemporary democracy has many heated opponents, cf. e.g. H.H. Hoppe, *Demokracja – bóg, który zawiódł. Ekonomia i polityka demokracji, monarchii i ładu naturalnego*, trans. M. Miąsik, Warszawa 2006.

⁵¹ Cf. J. Dewey, *The Public and Its Problems. An Essay in Political Inquiry*, Pennsylvania 2012.

⁵² Cf. R. Dworkin, *Is democracy possible here? Principles for a New Political Debate*, Princeton University Press 2006, p. 131 ff.

the citizens' trust in the judiciary authorities⁵³. It seems, that without increasing trust in the judiciary authorities, trust in law, in general, will not be able to increase and without that, it will not be possible to expect strict compliance therewith, whereas fast [judicial] proceedings, so desired nowadays, depend on the citizens' readiness to submit themselves to the force of law. The citizens participating in the process of administering justice win trust in law. As it is apparent from a comparison of Polish and German law, the secret of fast proceedings is not the shape of legal norms but the citizens' readiness to comply with the law. A higher level of trust in law translates into greater readiness to comply with the norms of conduct (for example a duty to appear before the court upon summons) which, in turn, may translate into faster handling of cases⁵⁴.

In [legal] writings it has been apparent for a long time that there are at least three reasons for which the social factor in the judiciary and, in particular, in administering punishments, is necessary⁵⁵. Firstly, judges who are officials of the State, are always inclined to a sort of servility towards the government, which in many cases, may distort their sense of justice. Secondly, judges constantly holding posts involving settlement of cases, develop as a result of their long lasting practice, a certain number of readymade formulae of adjudicating, and put the cases, that are subject to their recognition, into them, regardless of their specific individual nature. Finally and thirdly, judges appointed by the government provide to the judiciary far less solemnity in the opinion of both, a defendant and the society as a whole, than it could be the case in relation to the people's judges. As this phenomenon has been explained by prof. E. Krzymuski; the people's judges belonging to dif-

⁵³ Cf. e.g. R.A. Stefański, *Składy sądu w postępowaniu karnym* [in:] *Reforma prawa karnego, propozycje i komentarze. Księga pamiątkowa Profesor Barbary Kunickiej-Michalskiej*, eds. J. Jakubowska-Hara, C. Nowak, J. Skupiński, Warszawa 2008, p. 435.

⁵⁴ Cf. G. Kielbasa, T. Heymann, *Organizacja orzekania a czas trwania postępowania w sprawach karnych. Dwugłos sędziów – polskiego i niemieckiego* [in:] *Zagubiona szybkość procesu karnego...*, p. 246.

⁵⁵ See more on that subject: W. Zalewski, *Demokratyzacja prawa karnego...*, p. 25 ff.; *idem*, *Wymiar sprawiedliwości, sprawiedliwość naprawcza, demokracja* [in:] *Mediacja dla każdego*, ed. L. Mazowiecka, Warszawa 2010, p. 11 ff.

ferent spheres of the nation, reflect more accurately its conscience than the judges who are only lawyers and officials of the State⁵⁶. The subject-matter of the dispute was solely – what form of the people's participation should be adopted. One of the following two variants could be suggested: either a) the jury court (*Geschwornengericht*), or b) the lay judge court (*Schoffengericht*)⁵⁷.

Today we know that one more solution is possible and desirable. In philosophy of law it has been indicated for a long time that the postclassical trail model requires supplementing it with the proposal to develop the forms of the judiciary, alternative to the judicial proceeding, as tools for improvement and democratisation of dispute resolution forms (ADR) in the contemporary societies. The contemporary courts cease to be, the Dworkinian “capitals of law's [empire]”⁵⁸. The various forms of meeting the requirements of restorative justice, namely, mediation, conferences and circles⁵⁹ are becoming important alternatives for a criminal court. Due to the fact, that the judiciary includes and involves the citizens, it becomes more inclusive.

Mediation has, of course, a number of advantages that are well known: it is a natural form of dispute resolution, empowers the parties thereto, who recover control over their cases⁶⁰. The problem is, that mediation does not involve, in the process, other interested parties, e.g. witnesses of an event, who have survived the trauma, or any potential victims. What is more, a lack of transparent mechanisms of control and supervision of the mediation proceedings is not without significance⁶¹.

⁵⁶ E. Krzymuski, *Wykład procesu karnego ze stanowiska nauki i prawa obowiązującego w b. dzielnicy austriackiej oraz z uwzględnieniem ważniejszych różnic na innych ziemiach Polski*, Kraków 1922, p. 16.

⁵⁷ See more on that subject: *ibidem*, p. 17.

⁵⁸ See: L. Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian*, Warszawa 1999, p. 182 ff.

⁵⁹ See more: W. Zalewski, *Sprawiedliwość naprawcza. Początek...*, p. 183 ff.

⁶⁰ N. Christie, *Conflicts as property*, “The British Journal of Criminology” 1977, No. 17, pp. 1–15; J. Consedine, *Sprawiedliwość naprawcza. Przywracanie ładu społecznego*, trans. M. Wołodźko, K. Gradoń, Warszawa 2004.

⁶¹ M. Fajst, M. Nielączna, *System mediacji w Polsce – słabość prawa czy organizacji?*, “Zasopismo Prawa Karnego i Nauk Penalnych” 2005, No. 2. The authors aptly indicate that forgiving, amicable settlement [and] compensation do not mean the same

On the other hand, wide opportunities for the performance of the civic participation factor and, therefore, not only the public interest in the legal-criminal understanding, are provided by conferences. Conferencing is one of the basic forms of implementation of restorative justice⁶². It should be remembered that conferences are as old as mediation, if not older⁶³. The disputes at the workplace, at school, as well as the ones resulting from crimes and other [occurrences] are effectively resolved by conferences. Their participants are the groups of people somehow related to or affected by any past event who meet to discuss and sort out all issues resulting from that event⁶⁴. Conferencing is of great importance in terms of implementation of the standards of conduct relating to a given situation. The conferences, due to the fact that there are supporters on each part, balance any possible irregularities. In addition, in conferences a great importance is attached to affecting the whole community. Therefore, its representatives participate therein. All that, leads to an increase in the civic participation.

As Jean Jacques Rousseau indicated; legitimate authority means something more than strength or constraint only: “[t]he strongest is never strong enough to be always the master, unless he transforms strength into right, and obedience into duty” and further [as he puts it], since no man has a natural authority over his fellow men, and since force is not the source of right, conventions remain as the basis of all lawful authority among men⁶⁵.

The lack of trust in the courts needs to be changed. It has been known for a long time that great expectations relate to judges, because any judge,

everywhere. What is more, the standards provided for in the law do not determine their detailed meaning, since the scope of the mediation application depends on the particular society’s agreement and its law.

⁶² See: W. Zalewski, *Sprawiedliwość naprawcza. Początek...*

⁶³ See: E. Admason Hoebel, *The Law of Primitive Man*, New York 1974.

⁶⁴ More on that subject: J. Pennell, *Mainstreaming Family Group Conferencing: Building and Sustaining Partnership*, North Carolina State University, the conference materials “Conferencing: A New Response to Wrongdoing. Proceedings of the First North American Conference on Conferencing”. Bethlehem PA: Real Justice, p. 4 ff., http://www.realjustice.org/Pages/vt/99papers/vt_pennell.html (accessed: 15.11.2016).

⁶⁵ Cf. J.J. Rousseau, *Umowa społeczna*, translated and explained by A. Peratiakowicz, 2nd ed., Poznań 1920, pp. 14–15.

outside expertise, 'must be high in the mind and moral terms'⁶⁶. He/she must also enjoy social trust. This may be accomplished by the inclusion of the citizens in administering justice, but it should be taken into account that nowadays justice has been already differently comprehended. Nils Christie suggested justice based on participation⁶⁷, which has received an overwhelming response. This model of justice sees a crime, above all, as questioning social values which requires restoring infringed norms and value restoration. This process can take place through the renewal of the public agreement in respect of the principles and values. It is about the Durkheimian revalidation of values through public agreement⁶⁸. In this approach, justice means restoring values and shaping social attitudes. As research indicates, both prosecutors and judges, do not need any strict statutory guidance as to when the case may be referred to mediation, they rather see the need to identify clearly which cases may be resolved in this manner⁶⁹.

When answering the question asked in the title of this paper it should be emphasized that the courts are essential for maintaining the social order. However, it is possible to adjudicate, especially in the times of crisis, only with the participation of the citizens. It seems that judges in Poland have matured to change the judiciary, to open constructively to the members of the local communities. It happens in a variety of ways including, for example, referring the cases to mediation more frequently. This brings hope to restoration of trust in the judiciary and the State as a set of institutions. In the society emphasising the value of civic engagement in the State's affairs, the increase of the civic participation does not require further excuses⁷⁰. In-

⁶⁶ B. Wróblewski, *Sprawność i kultura umysłowa sędziów karnych*, Wilno 1939, p. 3.

⁶⁷ Cf. N. Christie, *Granice cierpienia*, trans. L. Falandysz, Warszawa 1991, p. 112 ff.

⁶⁸ Cf. M. Wenzel, I. Thielmann, *Why We Punish in the Name of Justice: Just Desert versus Value Restoration and the Role of Social Identity*, "Social Justice Research" 2006, Vol. 19, No. 4, p. 450 ff.

⁶⁹ Cf. D. Kuźelewski, *Mediacja w procesie karnym w opinii sędziów i prokuratorów – wybrane zagadnienia* [in:] *Ocena funkcjonowania porozumień procesowych w praktyce wymiaru sprawiedliwości*, ed. C. Kulesza, Warszawa 2009, p. 257.

⁷⁰ B. Galaway, *Informal justice: Mediation between offenders and victims* [in:] *Crime Prevention and Intervention: Legal and Ethical Problems*, eds. P. Albrecht, O. Backes, New York 1989, p. 112.

clusive, restoring justice irrigates drying democracy through waking up the participatory involvement of the citizens who take responsibility for searching for constructive proposals⁷¹. Without it, it is not possible to build the civil society sensibly i.e. such a situation in the State and social life, where the citizens control the authority, have an impact on it, organize themselves in the desirable manner and take initiatives⁷². The civil activity is presented as a natural way of functioning by a man, as a social individual, in an organised society. This activity will be carried out by the citizens, when the authority and media support them and create the friendly context for their actions⁷³. In this way, public trust capital is built⁷⁴.

⁷¹ L. Walgrave, *Restorative justice, Self-interest and Responsible Citizenship*, Portland 2008, p. 196.

⁷² See more broadly: Z. Krzeziński, *Spoleczeństwo obywatelskie i symbole wspólnoty* [in:] *Jak Polacy przegrywają? Jak Polacy wygrywają?*, ed. M. Drogoz, Gdańsk 2005, pp. 93–114.

⁷³ Cf. R. Klamut, *Aktywność obywatelska jako rodzaj aktywności społecznej – perspektywa psychologiczna*, "Studia Socjologiczne" 2013, No. 1, pp. 187–203.

⁷⁴ Cf. R. Putnam, *Samotna gra w kregle*, p. 36 ff.; broader reference to the literature in: M.D. Adamczyk, *Kapitał społeczny czynnikiem konstytutywnym współczesnego ładu społeczno-moralnego*, "Roczniki Nauk Społecznych" 2015, No. 2, pp. 201–219.

LEGAL ACTS*

National law

The Constitution of 3 May 1791.

The Constitution of the Duchy of Warsaw promulgated in Dresden on 22 July 1807.

The Constitution of the Kingdom of Poland of 27 November 1815.

The Act of 17 March 1921 – Constitution of the Republic of Poland (Dz. U. [Journal of Laws] No. 44, item 267).

The Regulation of the President of the Republic of Poland of 6 February 1928 – the Law on Common Courts Organisation (Dz. U. [Journal of Laws] No. 12, item 93).

The Regulation of the President of the Republic of Poland of 23 August 1932, amending certain provisions of the Law on Common Courts Organisation (Dz. U. [Journal of Laws] No. 73, item 661).

The Constitutional Act of 23 April 1935 (Dz. U. [Journal of Laws] No. 30, item 227).

The Constitutional Act of 19 February 1947 on the Political System and the Scope of Activity of Supreme Authorities of the Republic of Poland (Dz. U. [Journal of Laws] No. 18, item 71).

The Constitution of the Polish People's Republic adopted by the Legislative Sejm on 22 July 1952 (uniform text: Dz. U. [Journal of Laws] of 1976 No. 7, item 36, as amended).

* Italics applied to non-binding pieces of legislation.

The Act of 14 June 1960 – the Code of Administrative Procedure (uniform text: Dz. U. [Journal of Laws] of 2016, item 23, as amended).

The Act of 25 February 1964 – the Family and Guardianship Code (uniform text: Dz. U. [Journal of Laws] of 2015, item 2082, as amended).

The Act of 23 April 1964 – the Civil Code (uniform text: Dz. U. [Journal of Laws] of 2016, item 380, as amended).

The Act of 17 November 1964 – the Code of Civil Procedure (uniform text: Dz. U. [Journal of Laws] of 2016, item 1822, as amended).

The Act of 26 May 1982 – Attorney Law (uniform text: Dz. U. [Journal of Laws] of 2016, item 1999, as amended).

The Act of 6 July 1982 on Legal Counsels (uniform text: Dz. U. [Journal of Laws] of 2016, item 233, as amended).

The Act of 14 February 1991 – Notary Law (uniform text: Dz. U. [Journal of Laws] of 2016, item 1796, as amended).

The Resolution No. 147 of the Council of Ministers of 5 November 1991 on the Rules of Legislative Drafting (Monitor Polski, No. 44, item 310).

The Constitution of the Republic of Poland of 2 April 1997 (Dz. U. [Journal of Laws] No. 78, item 483, as amended).

The Act of 6 June 1997 – the Code of Criminal Procedure (uniform text: Dz. U. [Journal of Laws] of 2016, item 1749, as amended).

The Act of 1 August 1997 on the Constitutional Tribunal (Dz. U. [Journal of Laws] No. 102, item 643, as amended).

The Act of 21 August 1997 – the Law on Military Courts Organisation (uniform text: Dz. U. [Journal of Laws] of 2016 item 358, as amended).

The Act of 29 August 1997 – Tax Law (uniform text: Dz. U. [Journal of Laws] of 2015, item 613, as amended).

The Act of 27 July 2001 – the Law on the Common Courts Organisation (uniform text: Dz. U. [Journal of Laws] of 2016, item 2062, as amended).

The Act of 24 August 2001 – the Code of Procedure in Cases of Misconduct (uniform text: Dz. U. [Journal of Laws] of 2016, item 1713 as amended).

The Regulation of the Prime Minister of 20 June 2002 on the “Rules of Legislative Drafting” (uniform text: Dz. U. [Journal of Laws] of 2016, item 283).

The Act of 25 July 2002 – the Law on Administrative Courts Organisation (uniform text: Dz. U. [Journal of Laws] of 2016 item 1066 as amended).

The Act of 30 August 2002 – Law on Procedure before Administrative Courts (uniform text: Dz. U. [Journal of Laws] of 2016, item 718, as amended).

The Act of 23 November 2002 on the Supreme Court (uniform text: Dz. U. [Journal of Laws] of 2016, item 1254, as amended).

The Act of 7 July 2005 on Lobbying Activities in the Process of Law-making (Dz. U. [Journal of Laws] No. 169, item 1414, as amended).

The Petitions Act of 11 July 2014 (Dz. U. [Journal of Laws], item 1195, as amended).

The Regulation of the Minister of Justice of 23 December 2015 the Rules concerning the operation of the common courts (Dz. U. [Journal of Laws], item 2316, as amended).

The Act of 28 January 2016 – Law on the Public Prosecutor's Office (Dz. U. [Journal of Laws], item 177).

The Act of 22 July 2016 on the Constitutional Tribunal (Dz. U. [Journal of Laws], item 1157).

International law

The Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 amended by Protocols Nos. 3, 5 and 8 as well as supplemented by Protocol No.2 (Dz. U. [Journal of Laws] of 1993, No. 61, item 284).

The Charter of the United Nations signed on 26 June 1945 in San Francisco (Dz. U. [Journal of Laws] of 1947, No.23, item 90).

Vienna Convention on the Law of Treaties concluded at Vienna on 23 May 1969 (Dz. U. [Journal of Laws] of 1990, No.74, item 439).

The International Covenant on Civil and Political Rights opened for signature at New York on 19 December 1966 (Dz. U. [Journal of Laws] of 1977, No. 38, item 167).

European law

The Charter of Fundamental Rights of the European Union (30 March 2010, C83/02).

Other documents

The Basic Principles on the Independence of the Judiciary adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by the General Assembly in the resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

The Resolution of the Sejm of the Republic of Poland of 30 July 1992 – the Rules of the Sejm of the Republic of Poland (uniform text “Monitor Polski” of 2012, item 32, as amended).

Recommendation of the Committee of Ministers of the Council of Europe of 13 October 1994, No. R (94) 12.

European Charter on the Statute for Judges adopted in the framework of the Council of Europe 8–10 July 1998.

Resolution No. 16/2003 of the National Council of the Judiciary of 19 February 2003 on adopting a collection of principles of judges’ professional ethics.

“Magna Carta of Judges” adopted at the 11th plenary meeting of the Consultative Council of European Judges in Strasbourg 17–19 November 2010.

The Resolution of the General Assembly of the Judges of the Constitutional Tribunal of 15 September 2015 on the Rules of Procedure of the Constitutional Tribunal, <http://trybunal.gov.pl/o-trybunale/akty-normatywne/regulamin-trybunalu-konstytucyjnego>.

CASES

- The ruling of the Constitutional Tribunal (TK) of 9 November 1993, K 11/93.
- The resolution of the Constitutional Tribunal (TK) of 17 March 1993, W 16/92, Dz. U. [Journal of Laws] No. 23, item 103.
- The judgment of the Supreme Administrative Court (NSA) in Katowice of 3 March 1993, SA/Ka 1760/92, POP 1994, no. 3, item 52.
- The ruling of the Constitutional Tribunal (TK) of 9 November 1994, K 11/93, OTK-A 1994, item 45.
- The ruling of the Constitutional Tribunal (TK) of 21 November 1994, K 6/94, OTK-A 1994, item 43.
- Ryan vs. Commodity Futures Trading Commission*, 125 F.3d, (7th Cir. 1997), 1062–1063.
- The judgment of the Supreme Court (SN) of 7 April 1998, I PKN 90/98, OSNP 2000, no. 1, item 6.
- The judgment of the Supreme Court (SN) of 8 May 1998, I CKN 664/97, OSNC 1999, no. 1, item 7.
- The judgment of the Supreme Administrative Court (NSA) of 9 October 1998, SA 1246/98, “Glosa” 1999, no. 3, p. 29.
- The resolution of the formation of seven judges of the Supreme Administrative Court (NSA) of 12 October 1998, OPS 5/98.
- The judgment of the Constitutional Tribunal (TK) of 27 January 1999, K 1/98, ipo.trybunal.gov.pl.
- The judgment of the Constitutional Tribunal (TK) of 14 April 1999, K 8/99, OTK 1999, no. 3, item 41.

The judgment of the Constitutional Tribunal (TK) of 2 June 1999, K 34/98, ipo.trybunal.gov.pl.

The judgment of the Constitutional Tribunal (TK) of 24 June 1999, K 3/98, OTK 1998, no. 4, item 52.

The resolution of the Supreme Administrative Court (NSA) of 29 November 1999, FPK 3/99, ONSA 2000, no. 2, item 59.

The judgment of the Constitutional Tribunal (TK) of 10 May 2000, K 21/99, ipo.trybunal.gov.pl.

The order of the Supreme Court (SN) of 12 June 2003, SNO 29/03.

The resolution of the Supreme Court (SN) of 15 September 2004, SNO 34/04.

The judgment of the Constitutional Tribunal (TK) of 24 January 2005, K24/04, ipo.trybunal.gov.pl.

The judgment of the Constitutional Tribunal (TK) of 27 April 2005, P 1/05, ipo.trybunal.gov.pl.

The judgment of the Supreme Court (SN) of 9 June 2005, SNO 28/05, LEX no. 471989.

The judgment of the Supreme Court (SN) – the Disciplinary Court of 13 October 2005, SNO 47/05.

The judgment of the Constitutional Tribunal (TK) of 29 November 2005, P 16/04, Dz. U. [Journal of Laws] No. 241, item 2037.

The judgment of the Constitutional Tribunal (TK) of 16 January 2006, SK 30/05.

The judgment of the Constitutional Tribunal (TK) of 22 September 2006, U 4/06, ipo.trybunal.gov.pl.

The resolution of the Supreme Court (SN) of 17 April 2007, SNO 20/07.

The judgment of the Supreme Court (SN) of 20 September 2007, SNO 60/07, LEX no. 471853.

The judgment of the Constitutional Tribunal (TK) of 24 October 2007, SK 7/06, OTK-ZU 2007, no. 9/A, item 108.

The judgment of the Supreme Court (SN) of 3 June 2008, I UK 323/07, OSNP 2009, no. 19–20, item 267.

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- The judgment of the Constitutional Tribunal (TK) of 15 January 2009, K 45/07, Dz. U. [Journal of Laws] No. 9, item 57.
- The resolution of the Supreme Court (SN) of 7 July 2009, SNO 17/09.
- The order of the Supreme Court (SN) of 13 November 2009, III SPP 24/09.
- The judgment of the Constitutional Tribunal (TK) of 8 December 2009, SK 34/08, ipo.trybunal.gov.pl.
- The judgment of the Constitutional Tribunal (TK) of 24 February 2010, K 6/09.
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- The judgment of the Supreme Court (SN) – the Disciplinary Court of 20 June 2013, SNO 8/13.
- The judgment of the Constitutional Tribunal (TK) of 15 October 2015, Kp 1/15.
- The judgment of the Supreme Court (SN) of 24 November 2015, II CSK 517/14.
- The judgment of the Constitutional Tribunal (TK) of 9 March 2016, K 47/15, OTK-A 2016, item 2.
- The judgment of the Supreme Court (SN) of 17 March 2016, V CSK 377/15.
- The resolution of the Supreme Court (SN) – the Civil Chamber of 23 March 2016, III CZP 102/15.

The changes in the functioning of the judiciary model as well as the social, often negative, reception of the courts cause that the connotation provided to the term – independence by the legitimation of the judicial power is becoming significant again. The latter is also subject to transformations, accompanied by discussions, together with the legal and political disputes, for example, relating to the current status of the Constitutional Tribunal. For this reason, this publication focuses exactly on the legitimation of the judicial power on its three levels: institutional, ethical and social. To this end, ten analyses by legal scholars of several academic centres in Poland are presented – in addition to the University of Gdańsk, where the research project of the National Science Centre, entitled “The third power of courts and judges in Poland from the perspective of theory and philosophy of law” has been implemented, including the University of Warsaw, the University of Łódź and Maria Curie-Skłodowska University. These texts may be the subject of debate, because some of them relate also to the domestic reality presenting the growing tension between the judicial power and the legislative as well as executive powers.

